# Article

# Obscenity and Community Standards

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## I. INTRODUCTION

In the constitutional law of freedom of expression, the treatment of "obscenity"[1] is an anomaly. It is a cardinal constitutional principle that speech may not be suppressed merely because it is unpopular or offensive to the community.[2] Indeed, it is precisely where speech gives offense that constitutional protection is most important. As the U.S. Supreme Court has put it, "the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."[3] Yet offensiveness is precisely the reason (and the constitutional standard) adopted for the suppression of obscenity: "Obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards."[4] In general, offensiveness is said to be a reason for according constitutional protection; in the case of "obscenity," offensiveness is said to be a constitutional reason for suppression.

Denial of First Amendment protection to matter deemed "obscene" is also anomalous because the Supreme Court has recognized that the criminalization of mere possession of such matter infringes the freedom of conscience. In *Stanley v. Georgia*,[5] the Court struck down a state statute criminalizing the possession of obscene matter, rejecting "the assertion that the State has the right to control the moral content of a person's thoughts."[6] According to the Court, "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds."[7] The Court emphasized that moral coercion was the underlying purpose of the statute, and that there was little empirical basis to support the state's claim that suppressing obscenity would prevent crimes.[8] In any case, the Court stressed, "in the context of private consumption of ideas and information . . . [']the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law.'"[9] Yet if private possession and

1. Though notoriously difficult to define, the term "obscenity" is typically applied to legally proscribed descriptions or depictions of sexual (and sometimes excretory) activities.

2. *E.g.*, Texas v. Johnson, 491 U.S. 397, 408-09 (1989); Cox v. Louisiana, 379 U.S. 536, 551 (1965); Terminiello v. Chicago, 337 U.S. 1, 4 (1949); *cf., e.g.*, R. v. Zundel, [1992] 2 S.C.R. 731, 753 ("[I]t is often the unpopular statement which is most in need of protection under the guarantee of free speech.").

3. FCC v. Pacifica Found., 438 U.S. 726, 745 (1978).

4. *Id.*

5. 394 U.S. 557 (1969).

6. *Id.* at 565.

7. *Id.*

8. *Id.* at 566.

9. *Id.* at 566-67 (quoting Whitney v. California, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring)).

consumption of obscene matter cannot be criminalized, it is hard to see why obscene expression can.

It is hard not to hear in *Stanley* echoes of John Stuart Mill. For Mill, the cornerstone of human liberty is "liberty of conscience, in the most comprehensive sense"; and this liberty is "practically inseparable" from the liberty of expression, and requires as well the "liberty of tastes and pursuits" and "of framing our plan of life to suit our own character."[10] In his view, society has no business punishing on moral grounds private conduct that causes no harm to others. To prevent such conduct it may use its powers of education (in the case of children) and its resources of compassionate advice and persuasion (in the case of adults), but should punish only actual infliction or serious threat of harm to others.[11]

Nevertheless, for more than half a century the Court has permitted the government to suppress as obscene material deemed offensive under community standards. In so doing, the Court has rejected Mill's argument that adults should be free to order their private lives as they see fit.[12] Yet paradoxically, the Court has been careful to disclaim (however unconvincingly) any intention to impose the morality of the majority on the minority.[13] Recent constitutional developments have only sharpened this paradox, insisting strongly on individual autonomy, particularly in private sexual matters.[14] In *Lawrence v. Texas*, the Court proclaimed that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[15] After *Lawrence*, obscenity doctrine is even more anomalous: if sexual activity between consenting adults can no longer be criminalized, how can descriptions or depictions of such activity be criminalized? If the Court's statement is to be taken seriously, obscenity law can no longer be legitimized as a means of imposing community standards of morality.

The Supreme Court of Canada has sought to avoid this paradox by adopting an approach to obscenity that focuses on harm rather than on morality. At least until recently, in Canada, as in the United States, the question of obscenity was evaluated under a community standards test. But in *Regina v. Butler*, the Canadian Court expressly rejected the claim that the state may "impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community."[16] Drawing on certain feminist critiques, the Court held that pornography may cause harm to society because "it predisposes persons to act in an antisocial manner, as for example,

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10. JOHN STUART MILL, ON LIBERTY 26 (Legal Classics Library ed., 1992) (1859).

11. *Id.* at 134-51, 168-69.

12. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 (1973) ("[F]or us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation, is a step we are unable to take.").

13. *Id.* at 69 ("The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as 'wrong' or 'sinful.'").

14. *See* Lawrence v. Texas, 539 U.S. 558, 571-74 (2003).

15. *Id.* at 577 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)); *see also id.* at 578 ("Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here.").

16. [1992] 1 S.C.R. 452, 492.

the physical or mental mistreatment of women by men."[17] Material that violates community standards does so, in the *Butler* Court's view, because the community judges it to be harmful rather than immoral.[18] But the *Butler* Court's conflation of a test based on community standards with one based on harm is difficult to defend, and the *Butler* standard has proved repressive in practice.[19]

More recently, in an indecency case involving a sex club, *Regina v. Labaye*,[20] the Court, while purporting to follow *Butler*, appeared to discard the community standards test altogether in favor of a test based solely on harm. The *Labaye* Court recognized that an obscenity doctrine based on community standards is impossibly subjective and unworkable, and insisted that harm must be proved beyond a reasonable doubt, not just assumed on the basis of community opinion.[21] Although *Labaye* did not expressly overrule *Butler*, the principles it enunciates, if applied consistently, ought to spell the end of the criminalization of sexual expression produced by and for consenting adults.

Comparison of the U.S. and Canadian approaches to prohibitions on obscenity can provide us with a very valuable constitutional perspective.[22] Our two societies are closer to each other than to any other on earth, and share many legal and cultural features that promise to make comparison fruitful (such as pluralism, secularism, federalism, and our common law heritage). Unlike many other common law systems, we also share a system of constitutional judicial review, under which ordinary legislation may be struck down when it conflicts with an entrenched bill of rights in which the protection of freedom of expression occupies a prominent position.[23] In both countries, the law of obscenity was historically rooted in Victorian prudery, to which the doctrine of community standards emerged as a liberalizing reaction. Subsequent legal evolution has diverged on various issues, including not just harm versus morality, but also national versus local standards, taste versus

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17. *Id* at 485.
18. *See id.* at 479, 485.
19. *See infra* Section IV.C.
20. [2005] 3 S.C.R. 728.
21 *See id.* at 738-41, 743, 749-50.
22. For discussion of approaches to the constitutionality of prohibitions on obscenity in various legal systems, see ERIC BARENDT, FREEDOM OF SPEECH 352-91 (2d ed. 2005) and LAURENT PECH, LA LIBERTÉ D'EXPRESSION ET SA LIMITATION 306-23 (2003). According to Pech, Germany has adopted a dignity-based Kantian approach to this question, while France has generally eschewed attempts to regulate obscenity so long as the material is not susceptible to being seen by minors. *See* PECH, *supra* at 310-11.
23. *See* U S. CONST. amend. I ("Congress shall make no law . . abridging the freedom of speech, or of the press . . . ."); Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 2 (U.K.) ("Everyone has the following fundamental freedoms: . . . (b) freedom of thought, belief, opinion and expression, including the freedom of the press and other media of communication . . . ."). Other common law countries (for example Ireland and India) have also adopted judicial review based on a written constitution that includes a bill of rights, but lack the close cultural similarities that exist between the United States and Canada. Some, such as Australia, have an entrenched constitution and judicial review but lack a bill of rights. *See* Australian Capital Television v. Australia (1992) 177 C.L.R. 106 (recognizing limits to the constitutional protection of free speech despite an explicit textual constitutional guarantee). Still others, such as the United Kingdom and New Zealand, have adopted bills of rights in recent decades that are not constitutionally entrenched and do not have the status of supreme law enforced by courts enjoying the power of judicial review. *See* Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001).

tolerance, and artistic merit. In each system, the obscenity doctrine confronts the constitutional rights to moral autonomy and freedom of expression.

This Article argues that the invocation of community standards to suppress obscenity cannot be reconciled with those fundamental individual rights, and that the substitution of a harm-based standard has not resolved this problem. The legal concept of obscenity cannot be reformed and therefore must be scrapped. In both the United States and Canada, obscenity doctrine rests on the barely concealed and unjustified assumption that sexual expression is, by its very nature, scarcely worthy of protection. Regardless of whether harm or morality is proffered as the underlying concern, "community standards" and the claim that obscenity causes "harm to society" are consistently deployed to enforce majoritarian prejudices and to suppress dissentient or "deviant" art, literature, cultures, and sexualities.

It might be thought desirable to begin with a definition of such terms as "obscenity" and "pornography." In fact, however, to do so in the abstract would be, as Potter Stewart said, "trying to define what may be undefinable," and we might "never succeed in intelligibly doing so."[24] Justice Stewart's own approach to the question was notoriously opaque and subjective ("I know it when I see it")[25] and left little scope for principled discussion or analysis. The usage of the terms "obscenity" and "pornography" has not been stable historically. As recently as the 1960s, "pornography" was seen as the most extreme form of "obscenity."[26] In current U.S. constitutional discourse, however, the terms are almost reversed, and "obscenity" is treated as more extreme than "pornography." While "obscenity" refers to constitutionally proscribable material, the term "pornography" is often used for constitutionally protected erotic material.[27] Pro-censorship feminists such as Catherine MacKinnon and Andrea Dworkin sought to reverse the usage once again and to replace laws suppressing "obscenity" with laws suppressing "pornography," which they define as "graphic sexually explicit materials that subordinate women through pictures or words";[28] however, many other feminists firmly reject censorship.[29] In Canada, the federal statute regulating sexual expression proscribes "obscene" matter;[30] but in construing it, the Canadian Supreme Court, evidently influenced by the arguments of pro-censorship feminists, frequently uses the term "pornography" to describe the matter suppressed.[31] In view of the shifting nature of these terms, it is perhaps

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24. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

25. *Id.*

26. For example, one article from that period treated "pornography" or "hard-core pornography" as obscene material "so foul and revolting" that "the absence of laws against it . . . would be unthinkable." William B. Lockhart & Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 26 (1960); *cf.* EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS 298 n.† (1992) (noting "a partial reversal in the usage of these terms").

27. *See, e.g.*, FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 252 (1990) (Scalia, J., concurring in part and dissenting in part) (stating that "pornography . . . so long as it does not cross the distant line of obscenity, is protected").

28. CATHERINE MACKINNON, ONLY WORDS 22 (1993).

29. *See* NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS 59-60 (2d ed. 2000).

30. Offences Tending to Corrupt Morals, R.S.C., ch. C 46, § 163 (1985).

31. *See, e.g.*, R. v. Butler, [1992] 1 S.C.R. 452, 484-85, 498-500, 504.

best simply to treat them, as Amy Adler has suggested, as "placeholders for contested meaning" that should always be regarded "as if there were quotation marks around them."[32] The meanings of obscenity and pornography are contested and historically contingent.

Accordingly, this Article begins in Part II by reviewing the historical emergence of obscenity and pornography as legal and regulatory categories. The societies of classical antiquity were not concerned with regulating obscenity, and even the Christian Church, with its much greater suspicion of sexuality, did not do so systematically until the Counter-Reformation. Even the so-called "common law of obscenity," unlike modern obscenity law, was not concerned to regulate sexual expression as such. The modern approach, aimed specifically at suppressing sexual expression, is a product of the Victorian era. Part III traces the development of the constitutional law of obscenity in the United States, explaining how the "community standards" test originally emerged as a kind of democratization of the more repressive Victorian standard, but now itself appears increasingly problematic in light of modern constitutional developments. Part IV discusses Canadian constitutional jurisprudence, focusing on the shift in rationale under *Butler* from morality to harm, examining the repressive way that that decision has been applied in actual practice, and discussing the recent apparent abandonment of the community standards test in *Labaye*. Part V examines in greater depth various problems raised by the community standards approach, including the assumption that sexual expression is unworthy of protection, the problems of ascertaining and applying community standards, and the infringement of individual rights and minority rights that results from their enforcement. The Article concludes that the imposition of community standards under the legal rubric of "obscenity" cannot be squared with constitutional freedoms of conscience and expression.[33]

## II. THE BIRTH OF OBSCENITY

As legal categories, pornography and obscenity are modern inventions that emerged only in the Victorian era. The legal regulation of obscenity has not been a constant in human society, or even more narrowly in western society or in the common law tradition. A brief survey of classical, Christian, and common law approaches to this issue is worth undertaking because of their unique formative influence on U.S. and Canadian cultures and legal traditions. Classical society was generally not concerned to regulate sexual

32. Amy Adler, *What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499, 1506, 1508 (1996).

33. This Article is concerned only with obscenity and pornography involving consenting adults, not with child pornography. At least in U.S. constitutional law, child pornography is a completely separate category from obscenity. Material produced by the sexual abuse of children may be constitutionally prohibited for that reason alone, without any consideration of whether it violates community standards. *See* New York v. Ferber, 458 U.S. 747, 761 (1982). However, the extension of prohibitions on child pornography to include material in the production of which no children are actually harmed (for example, so-called "virtual" child pornography) is constitutionally more problematic. *Compare* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002) (striking down ban on virtual child pornography), *with* R. v. Sharpe, [2001] 1 S.C.R. 45 (upholding ban on virtual child pornography). However, a discussion of those issues is beyond the scope of this Article.

expression through the legal system, while the Christian and common law tradition did so only incidentally to the regulation of some other offense (especially blasphemy) and never as an end in itself. Viewed in a broad historical perspective, obscenity law appears to be a relatively artificial and recent experiment that society need not fear discarding.

### A. *The Ancient World*

In classical antiquity, obscenity as a regulatory category did not exist. Erotic subject matter was treated freely and with great frankness in both the visual arts (for example in Greek sculpture and vase painting, or the Roman frescoes recovered at Pompeii) and in literature (as the slightest perusal of Aristophanes, Catullus, Petronius, or Martial will reveal). Much ancient art and literature might today be termed "pornographic," but "pornography" or "erotica" did not constitute a separate literary genre.[34]

The term "pornography," though built on ancient Greek roots (*pornographia* would mean "depiction of prostitutes"),[35] does not occur in extant ancient Greek literature. The term *pornographos* ("pornographer," i.e., depicter of prostitutes) apparently occurs only once, in the late rhetorician Athenaeus (late second or early third century A.D.).[36] For Athenaeus, as for other ancient writers, the depiction of sex is not so different from the depiction of food—indeed he frequently draws an analogy between the two.[37] Like food, sex was not regarded as immoral or dangerous in itself—the principal danger is failure to enjoy it in moderation.[38]

The modern usage of the term "pornography" (in the sense of erotic or "obscene" writings or images) dates only from the nineteenth century.[39] Walter Kendrick has connected the emergence of the modern usage to the rediscovery of the ruins of ancient Pompeii and Herculaneum.[40] As these sites were excavated, Europeans who had idealized classical antiquity were suddenly confronted with an unmediated glimpse of the everyday life of ancient cities and were shocked by what they found. As the excavators turned up more and more erotic paintings, priapic sculptures, and a profusion of obscenely shaped everyday objects such as vases and lamps, they could

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34. There was a genre of sex manuals, of which only a list of putative authors and a few sentence fragments of one papyrus text survive. *See* Holt N. Parker, *Love's Body Anatomized: The Ancient Erotic Handbooks and the Rhetoric of Sexuality*, *in* PORNOGRAPHY AND REPRESENTATION IN GREECE AND ROME 90, 91, 94 (Amy Richlin ed., 1992) [hereinafter PORNOGRAPHY AND REPRESENTATION]. These erotic manuals were almost all attributed to women, but Parker and others have speculated that such an attribution is a "male-created mask." *Id.* at 92.

35. The Greek verb *graphein* can mean both to write and to draw or paint.

36. ATHENAEUS, DEIPNOSOPHISTAE [THE LEARNED BANQUETERS] § 13.567b (Charles Burton Gulick trans., Harvard Univ. Press 1937) (c. 200 A.D.).

37. *See* Madeleine M. Henry, *The Edible Woman: Athenaeus's Concept of the Pornographic*, *in* PORNOGRAPHY AND REPRESENTATION, *supra* note 34, at 250, 255-58

38. *Id.* at 257-59.

39. The word first appears in French in the early nineteenth century and in English by mid-century. *See* Lynn Hunt, *Introduction*, *in* THE INVENTION OF PORNOGRAPHY: OBSCENITY AND THE ORIGINS OF MODERNITY, 1500-1800, at 9, 13-14 (Lynn Hunt ed., 1993) [hereinafter INVENTION OF PORNOGRAPHY].

40. WALTER KENDRICK, THE SECRET MUSEUM: PORNOGRAPHY IN MODERN CULTURE 1-32 (1987).

scarcely bring themselves "to believe that the Romans spent their days amid a forest of phalluses."[41] Anxious that access to such objects should be restricted to gentlemen of discernment who would not be corrupted by them, their curators locked them away in a "Secret Museum" from which "women, children, and the poor of both sexes and all ages were excluded."[42] It is in this archaeological context, amid general anxiety about the erosion of gender and class hierarchies, that the word "pornography" made its first appearance in English.[43]

In general, the ancient Greeks and Romans accepted graphic depictions of sexuality and were not concerned to suppress or control them through the legal system. Pericles's famous defense of libertarianism (as reported by Thucydides) is an accurate reflection of Athenian attitudes, both in general and as related to erotic expression:

> The freedom which we enjoy in our government extends also to our ordinary life. There, far from exercising a jealous surveillance over each other, we do not feel called upon to be angry with our neighbor for doing what he likes, or even to indulge in those injurious looks which cannot fail to be offensive, although they inflict no real harm.[44]

Not only were the ancients remarkably open-minded in sexual matters, but in Athens, as a matter of democratic ideology, the private sexual life of citizens was generally not subject to legal regulation.[45]

### B. *Christianity and Censorship*

Christian attitudes toward sexuality could not have been more different. From early times Christianity viewed sexuality in general with great suspicion,[46] but this change in attitude did not result in systematic legal suppression. As the Church soon came to enjoy a near monopoly on the production of literary and artistic works, formal legal sanctions were at first largely unnecessary to enforce orthodoxy. But with the revival of learning in the late Middle Ages and the Renaissance, heterodox materials began to proliferate.

The Protestant Reformation, the rise of the nation state, and above all, the invention of printing, posed unprecedented new threats to the maintenance of orthodoxy. During the Counter-Reformation of the sixteenth century, at the Council of Trent, the Catholic Church responded to these developments with new doctrinal and legal measures. In the mid-1500s, with the creation of the *Index Librorum Prohibitorum*, the Church instituted formal legal machinery

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41. *Id.* at 9.

42. *Id.* at 6.

43. The word appeared in a translation of a German treatise on archaeology. *Id.* at 11.

44. THUCYDIDES, THE PELOPONNESIAN WAR § 2.37 2 (Richard Crawley trans., 1874), *reprinted in* THE LANDMARK THUCYDIDES: A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR 112 (Robert B. Strassler ed., The Free Press 1996).

45. *See* DAVID COHEN, LAW, SEXUALITY AND SOCIETY: THE ENFORCEMENT OF MORALS IN CLASSICAL ATHENS 218-31 (1991).

46. *See* PETER BROWN, THE BODY AND SOCIETY: MEN, WOMEN, AND SEXUAL RENUNCIATION IN EARLY CHRISTIANITY (1988).

for suppressing heresy, which at least incidentally was deployed as well against obscenity.[47]

In Protestant countries, the censorial role was taken over by the civil authorities or by the reformed churches under their control. Henry VIII gave the Court of Star Chamber jurisdiction over censorship cases. Elizabeth I supplemented this with a system of monopolies and licenses—a system that grew more repressive under their Stuart successors.[48] But the Star Chamber was abolished under the Commonwealth, and by the end of the seventeenth century, in the aftermath of the Glorious Revolution, the system of prior restraints had been dismantled in England.

### C. *Obscenity in the English Common Law*

The common law of libel developed to take the place of the prior restraints system. The common law recognized four species of criminal libel: defamation, sedition, blasphemy, and obscenity. Of these four, "[o]bscene libel was a last and late comer to the category of libels."[49] In fact, early common law involving so-called obscenity was not really about obscenity, but rather sedition, blasphemy, or breach of the peace. In the earliest reported case, Sir Charles Sedley was convicted for preaching blasphemy while "shewing himself naked in a balkony, and throwing down bottles (pist in) vi & armis among the people in Convent Garden."[50] As late as 1708, in *Read's Case* the court rejected the notion that obscenity was a common law crime unless it was also blasphemous.[51]

The turning point came in 1727 with *Curll's Case*,[52] which is the foundation of the so-called common law of obscenity. Curll, a Grub-Street publisher who had lampooned leading aristocrats and savants such as Alexander Pope, was indicted for publishing a work depicting the promiscuity of the clergy, *Venus in the Cloister, or the Nun in Her Smock*. Relying upon *Read*, Curll argued that obscenity was not indictable at common law. The Attorney General, however, insisted that there were three ways that a libel could be a criminal breach of the peace: "1. If it be an act against the constitution or civil Government; 2. If it be against religion; and, 3. If against morality."[53] A libel against religion was "both a spiritual and temporal

47. *See, e.g.*, ALEC CRAIG, SUPPRESSED BOOKS: A HISTORY OF THE CONCEPTION OF LITERARY OBSCENITY 18-19 (1963); Paula Findlen, *Humanism, Politics and Pornography in Renaissance Italy*, *in* INVENTION OF PORNOGRAPHY, *supra* note 39, at 49, 55.

48. *See* CRAIG, *supra* note 47, at 20-22.

49. *Id.* at 23

50. Sir Charles Sydlyes Case, (1663) 83 Eng. Rep. 1146 (K.B.). According to Anthony à Wood, in addition to exposing himself, Sir Charles "excrementiz'd in the street" and "with eloquence preached blasphemy to the people." CRAIG, *supra* note 47, at 23 (quoting 4 ANTHONY À WOOD, ATHENAE OXONIENSES 731 (Philip Bliss ed., 3d ed., London, Thomas Davison, 1820) (1691-92)).

51. "A crime that shakes religion, as profaneness on the stage, &c. is indictable; but writing an obscene book, as that entitled 'The Fifteen Plagues of a Maidenhead,' is not indictable, but punishable only in the Spiritual Court." The Queen v. Read, (1708) 88 Eng. Rep. 953, 11 Mod. 142 (Q.B.) (This case is also reported at 92 Eng. Rep. 77, Fort. 98.).

52. Rex v. Curl, (1727) 93 Eng. Rep. 849, 2 Strange 788 (K.B.).

53. *Id.* at 850, 2 Strange at 789.

offence" because religion is the "great basis of civil Government and society."[54] As for a libel against morality,

> Destroying that is destroying the peace of the Government, for government is no more than publick order, which is morality. My Lord Chief Justice Hale used to say, Christianity is part of the law, and why not morality too? I do not insist that every immoral act is indictable, such as telling a lie, or the like; but if it is destructive of morality in general, if it does, or may, affect all the King's subjects, it then is an offence of a publick nature. And upon this distinction it is, that particular acts of fornication are not punishable in the Temporal Courts, and bawdy-houses are.[55]

Initially this argument did not fully convince the court. Justice Fortescue was troubled by the lack of precedent supporting the prosecution, noting that *Read's Case* held that merely immoral speech was not criminal, while *Sedley's Case*, which involved an actual assault, was clearly distinguishable.[56] The court was divided and ordered the case held over for further argument. But the following term, Justice Fortescue had retired, and the court unanimously ruled that obscenity was a temporal offense.[57] Curll was "set in the pillory, as he well deserved."[58] From at least one report it appears that the court adopted the Attorney General's argument that an offense against morality is an offense against the common law.[59]

Thus was born the common law of obscenity. But what is remarkable about successful early obscenity prosecutions, including even *Curll's Case*, is that they all involved more than merely sexually explicit expression that offended community values. Rather, the gravamen of the offense was political or religious in nature. Sedley preached blasphemy and incited a riot; Curll published a book that brought the clergy into disrepute. As Theodore Schroeder put it, the common law did not "penalize obscenity in literature *as obscenity*, and when it did not discredit the established religion or its servants, nor was of a seditious nature, nor concerning an individual so as to prove a breach of the peace."[60] In other words, obscenity as such did not really exist independently of blasphemy, sedition, and defamation as a separate "fourth branch" of the common law of criminal libel.

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54. *Id.*

55. *Id.* at 850, 2 Strange at 790

56. *Id.* at 850-51, 2 Strange at 791.

57. *Id.* at 851, 2 Strange at 792.

58. *Id.*

59. Strange's report of the case adduces little reasoning to support the court's decision, other than the assertion that *Sedley* was on point and that *Read* was wrongly decided. *Id.* But Barnardiston's report indicates that the court embraced the Attorney General's argument:

> [A]fter solemn deliberation, the Court held it to be an offence properly within its jurisdiction; for they said, that religion was part of the common law; and therefore whatever is an offence against that, is evidently an offence against the common law. Now morality is the fundamental part of religion, and therefore whatever strikes against that, must for the same reason be an offence against the common law.

King v. Curl, (1727) 93 Eng. Rep. 849, 1 Barn. 29 (K.B.).

60. Theodore Schroeder, *Obscene Literature at Common Law*, 69 ALB. L.J. 146, 147 (1907). As Schroeder notes, even after *Curll* was decided, English courts continued to reject obscenity indictments where the gravamen of the charge was merely sexual indecency. *See id.* at 148 (citing King v. Gallard, (1733) 25 Eng. Rep. 547 (Ch.) (quashing indictments of a woman for exposing her breasts in the street and of a person who printed the bawdy poems of Rochester)).

The final reported English obscenity decision before the American Revolution, the case of John Wilkes, again suggests that prosecutions in this area were focused more on enforcing religious and political, rather than sexual, orthodoxy. Wilkes was indicted in 1764 for printing a series of parodies of Alexander Pope, including *An Essay on Woman*, a parody of Pope's philosophic *Essay on Man*, which has been called "the dirtiest poem in the English language."[61] The parody was printed facing a reproduction of William Warburton's edition of Pope, and was equipped with pseudo-scholarly notes mocking William Warburton's pedantic commentary on Pope. Warburton was the bishop of Gloucester and brought proceedings against Wilkes in the House of Lords for libel and violation of his privilege.[62] Wilkes fled to France, was tried in absentia, convicted in the Court of King's Bench before Lord Chief Justice Mansfield, and was subsequently outlawed.

The record of Wilkes's case is incomplete, and the case report focuses exclusively on procedural issues. The motivation of the prosecution was clearly political, as Wilkes was a radical opponent of the government and an outspoken champion of democratic ideals. Moreover, the proceeding was marred by numerous irregularities.[63] We know little of the substantive issues involved, but the very charge of "printing and publishing an obscene and impious libel, intitled An Essay on Woman, and other impious libels"[64] again demonstrates that the common law offense of obscenity was still invariably coupled with blasphemy.

At least from an American perspective, Wilkes's case is a doubtful precedent on obscenity. The American revolutionaries lionized Wilkes. Their rallying cry was "Wilkes and Liberty." After Wilkes's conviction, the Sons of Liberty sent him (in addition to several large turtles) a letter eulogizing him as "one of those incorruptibly honest men destined by heaven to bless and perhaps save a tottering empire."[65] The Commons House of South Carolina sent him a gift of fifteen hundred pounds and shut down the provincial government for five years rather than yield to the colonial governor's demands that it rescind the gift.[66] Although the U.S. Supreme Court has pointed to colonial and early republican legislation against blasphemy and profanity as evidence that the framers understood obscenity to be constitutionally unprotected,[67] the adulation of Wilkes suggests caution. Whether or not they approved of his licentious poems, many Americans surely

61. ARTHUR H. CASH, JOHN WILKES: THE SCANDALOUS FATHER OF CIVIL LIBERTY 31 (2006). These parodies were to be printed in a luxury edition of only thirteen copies for private distribution to the members of a libertine society. The frontispiece was an engraving of an enormous phallus, which according to a verse in the poem was thirteen inches long. A Latin inscription identified it as belonging to the Most Reverend Archbishop George Stone, Primate of Ireland, although it was to be found "more frequently in the anus of the intrepid hero George Sackville," a younger son of the lord lieutenant of Ireland. *Id.* at 63; *see also* LEONARD W. LEVY, BLASPHEMY 323 (1993).

62. CASH, *supra* note 61, at 151-53.

63. *See id.* at 121-48. As Cash explains, the government seized the manuscript pursuant to a warrant that was later ruled illegal, obtained printers' proofs from the printers through bribery and extortion, and altered those proofs by adding forged incriminating matter. *Id.* at 172.

64. Rex v. Wilkes, (1770) 98 Eng. Rep. 327 (K.B.).

65. CASH, *supra* note 61, at 231-32. The letter was signed by John and Samuel Adams and John Hancock, among others.

66. *Id.* at 259-60.

67. Roth v. United States, 354 U.S. 476, 481, 483 (1956).

disapproved of the Crown's highly politicized and abusive obscenity prosecution.

### D. *Victorian England and the Birth of the Modern Conception of Obscenity*

Modern conceptions of obscenity and pornography arose amid nineteenth-century social upheavals: wider literacy and political activity among the lower classes, and attacks on the power of aristocracies and established churches. Before the American and French Revolutions, "obscenity" was viewed as a threat only when coupled with attacks on political and religious authority. Erotic writings and pictures went unpunished so long as they were circulated privately among the elite. The prospect that such materials could fall into the hands of the lower classes gave rise to the need to control them: as Lynn Hunt has written, "pornography as a regulatory category was invented in response to the perceived menace of the democratization of culture."[68]

The same democratic convulsions that triggered the invention of "pornography" as a conceptual and regulatory category also ultimately changed the nature of pornographic materials produced. Up to the late eighteenth century, obscenity and its regulation were concerned with dissident political, religious, and philosophic messages.[69] Political pornography continued to play a vital role right through the French Revolution.[70] Paradoxically, however, as press restrictions were lifted, literacy widened, and democratic politics developed, pornography, as Lynn Hunt has shown, largely ceased to be explicitly political or anticlerical, even though it has never ceased to have "political and social meanings."[71]

Victorian England responded with a new repressiveness to the threat of ever wider dissemination of erotic material. In 1857 Parliament enacted the Obscene Publications Act,[72] designed to remedy the perceived inadequacies of the common law. A prosecution under this Act gave rise to the decision in *Queen v. Hicklin*,[73] which was to dominate obscenity law in the English-speaking world for nearly a century.

A zealous Protestant named Henry Scott had purchased and distributed at cost copies of a tract entitled *The Confessional Unmasked; Shewing the Depravity of the Romish Priesthood, the Iniquity of the Confessional, and the*

68. Hunt, *supra* note 39, at 12-13.

69. *See, e.g*, Findlen, *supra* note 47, at 86-102 (describing Antonio Vignali's pornographic satires of the sixteenth-century government of Siena and Pietro Aretino's pornographic attacks on the clergy); Wijnand W. Mijnhardt, *Politics and Pornography in the Seventeenth- and Eighteenth-Century Dutch Republic*, *in* INVENTION OF PORNOGRAPHY, *supra* note 39, at 283; Rachel Weil, *Sometimes a Scepter Is Only a Scepter: Pornography and Politics in Restoration England*, *in* INVENTION OF PORNOGRAPHY, *supra* note 39, at 125.

70. Lynn Hunt, *Pornography and the French Revolution*, *in* INVENTION OF PORNOGRAPHY, *supra* note 39, at 301; SIMON SCHAMA, CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION 210-11, 221-26 (1989).

71. Hunt, *supra* note 70, at 339.

72. Obscene Publications Act, 1857, 20 & 21 Vict., c. 83 (repealed by Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66, § 3(8)).

73. Queen v. Hicklin, (1868) 3 L.R.Q.B. 360.

*Questions Put to Females in Confession*. The pamphlet consisted of extracts from Catholic theological tracts in the original Latin, with facing translations in English. About half of the pamphlet consisted of turgid theological disquisitions, but the other half described the "impure and filthy acts, words, and ideas" discussed by Catholic ladies and their confessors.[74] When the government seized this tract, Scott argued that it was not obscene, because its proper purpose was to expose the errors and immorality of the Catholic Church. Apparently accepting this argument, the recorder Hicklin quashed the order to confiscate the pamphlets.

However, the Court of Queen's Bench, per Lord Chief Justice Cockburn, reversed. However laudable Scott's goal of extirpating Roman Catholicism might have been, the court held he could not seek to accomplish it by distributing obscene materials. But the most influential part of the decision was Cockburn's definition of obscenity:

> I think the 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. Now, with regard to this work, it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character. . . . [I]t manifestly must . . . be so when the whole is put into the shape of a series of paragraphs, one following upon another, each involving some impure practices, some of them the most filthy and disgusting and unnatural description it is possible to imagine.[75]

All of this was dicta, because the court below had accepted that the pamphlet was legally obscene. Nevertheless, the *Hicklin* definition, which focuses on the corrupting influence that "obscene" matter is said to have on particularly sensitive individuals, was treated by common law courts as authoritative for nearly a century.

As Alec Craig has written, the *Hicklin* test, "if consistently applied . . . would have reduced literature to the level of the nursery."[76] It was indeed applied arbitrarily throughout the common law world as a tool of social, political, and literary oppression. In England it was invoked to suppress the novels of Flaubert, Zola, and Maupassant; treatises on contraception; the writings of Havelock Ellis on human sexuality in the nineteenth century;[77] and the works of James Joyce and D.H. Lawrence in the twentieth.[78]

## III. OBSCENITY LAW IN THE UNITED STATES

In the United States, obscenity prosecutions were relatively rare in the first century after the Revolution, but in the late nineteenth and early twentieth centuries new federal regulation and the importation of the *Hicklin* approach led to a dramatic upsurge in efforts to control sexual speech and advocacy of sexual liberation. By the mid-twentieth century, however, courts began to reject the repressive *Hicklin* test in favor of a relatively more liberal

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74. *Id.* at 362-63.
75. *Id.* at 371.
76. CRAIG, *supra* note 47, at 44.
77. *See id* at 44-70; DE GRAZIA, *supra* note 26, at 48.
78. *See* CRAIG, *supra* note 47, at 75-82.

alternative: the community standards test. Nevertheless, the community standards test soon raised significant new constitutional problems.

### A. *The Early Republic*

During the nineteenth century, in America even more than in Britain, obscenity began to be decoupled from the offenses with which it had historically been closely intertwined: sedition and blasphemy. Although the common law doctrines of seditious and blasphemous libel were at odds with the First Amendment's commitment to freedom of conscience, these doctrines did not simply vanish overnight: their death was long and painful. The passage of the Sedition Act in 1798 showed that many in the Framers' generation had few constitutional qualms about muzzling political dissent, and a consensus that such legislation was unconstitutional emerged only gradually.[79] The death throes of the law of blasphemy were even more prolonged. Despite state and federal constitutional guarantees of freedom of religion, state courts continued to approve of blasphemy prosecutions well into the middle of the nineteenth century.[80] Chancellor Kent set the tone for this line of cases in finding no conflict between a constitutional guarantee of religious freedom and a blasphemy law that criminalized only attacks on Christianity. Attacks on other religions, such as that "of *Mahomet* or of the grand *Lama*," according to Kent, were of course not blasphemous, for "we are a christian people, and the morality of the country is deeply ingrafted upon christianity, and not upon the doctrines or worship of those impostors."[81] Yet despite such embarrassing judicial pronouncements, blasphemy prosecutions in the United States were in fact quite rare.[82] When the Supreme Court finally declared in the twentieth century that the criminalization of sedition and blasphemy was incompatible with the First Amendment,[83] it was merely formally burying doctrines that had long since passed away.

The First Amendment and analogous provisions of state constitutional law did not put an end to regulation of obscenity any more than sedition or blasphemy, but early prosecutions were infrequent. In the first reported obscenity decisions in the United States, state courts, led by Pennsylvania in 1815[84] and Massachusetts in 1822,[85] imported the English common law doctrine of obscene libel. The first federal legislation regulating obscenity was

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79. LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 269 (1985). Moreover, while the Jeffersonians repudiated such restrictions on political speech as beyond the power of the national government, they had no such objections to similar restrictions imposed by the states. *See id.* at 307-08.

80. *See, e.g.*, Commonwealth v. Kneeland, 37 Mass. 206 (1838) (Shaw, J.); Updegraph v. Commonwealth, 11 Serg. & Rawle 394 (Pa. 1824); People v. Ruggles, 8 Johns. 290 (N.Y. 1811) (Kent, J.).

81. *Ruggles*, 8 Johns. at 294.

82. *See* LEVY, *supra* note 61, at 506.

83. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) ("Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. . . . [There is] a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment."); Burstyn v. Wilson, 343 U.S. 495, 505 (1952) ("[F]rom the standpoint of freedom of speech and the press, . . . the state has no legitimate interest in protecting any or all religions from views distasteful to them.").

84. Commonwealth v. Sharpless, 2 Serg. & Rawle 91 (Pa. 1815).

85. Commonwealth v. Holmes, 17 Mass. 335 (1821).

enacted in 1842 and was aimed at the importation of pictorial matter ("fancy" French postcards).[86] At the end of the Civil War, new legislation targeted the sending of obscene materials through the mail.[87] But few federal prosecutions resulted. State prosecutions typically targeted works describing "female sexual desire or sexual pleasure, usually narrated by women in the first person," in violation of nineteenth-century conventions about female chastity and women's supposed lack of interest in sex.[88] Recently Donna Dennis has argued that such repressive measures actually promoted the proliferation of erotic literature by providing publicity that whetted the public appetite for taboo materials, spurring publishers to seek new markets and to develop new genres of pornographic and semi-pornographic materials.[89]

### B. *The Comstock Act and the* Hicklin *Doctrine*

Repression of sexual speech intensified in the United States after the passage of new federal obscenity legislation championed by Anthony Comstock.[90] Comstock was bitterly disappointed that the obscenity prosecution in 1873 of the feminist Victoria Claflin Woodhull failed to secure a conviction (although it did succeed in ruining her career) because existing obscenity law did not cover material published in newspapers. The Comstock Act,[91] passed in the very same year with little debate, remedied that defect, and also prescribed harsher penalties as well as specific prohibitions on distributing family planning information. The Act also created a new special agent office in the Postal Service to oversee its implementation, an office that Comstock himself was to fill from 1873 until his death in 1915.

Comstock directed his harshest attacks against advocates of sexual liberation, birth control, and abortion. His targets included the free love advocate Ezra Heywood, the radical D.M. Bennett, the freethinker Moses Harman, the anarchist Emma Goldman, and the feminist Margaret Sanger.[92] Near the end of his career Comstock claimed credit for the destruction of almost 160 tons of obscene literature and the conviction of thousands of

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86. Act of Aug. 30, 1842, ch. 270, 5 Stat. 548, 566 (banning importation of "all indecent and obscene prints, paintings, lithographs, engravings, and transparencies"). The scope of this prohibition was extended in 1857 to cover "photographs," "images," and all other "obscene articles." Act of Mar. 2, 1857, ch. 62, 11 Stat. 168. "Fancy" in nineteenth-century parlance meant salacious, although many of these postcards merely depicted scantily clad women and would scarcely raise an eyebrow today.

87. Act of Mar. 3, 1865, ch. 88, 13 Stat. 504, 507.

88. Donna I. Dennis, *Obscenity Law and Its Consequences in Mid-Nineteenth-Century America*, 16 COLUM. J. GENDER & L. 43, 55 (2007).

89. *Id.* at 71-93.

90. *See* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 23-44, 57-69 (1997); Margaret A. Blanchard & John E. Semonche, *Anthony Comstock and His Adversaries: The Mixed Legacy of this Battle for Free Speech*, 11 COMM. L. & POL'Y 317 (2006).

91. Act of March 3, 1873, ch. 258, 17 Stat 598, *amended by* Act of July 12, 1876, ch. 186, 19 Stat. 90 (codified as amended in 18 U.S.C. § 1461 (2000)). The most important provision of this act prohibited the use of the mail to send "obscene, lewd, or lascivious" matter or information on abortion or contraception. These provisions are still on the books in barely modified form, although the provisions on contraception have been removed, and the provision on abortion information, which remains, is presumably unconstitutional.

92. *See* RABBAN, *supra* note 90, at 23-44, 57-69.

people, enough to fill a passenger train more than sixty cars long.[93] He boasted that he had driven at least fifteen persons to suicide.[94]

Although the Comstock Act covered a wider range of materials than previous legislation and provided for harsher and more vigorous enforcement, it did nothing to define obscenity. Accordingly, the federal courts embraced the *Hicklin* definition, as did the state courts in construing state obscenity legislation.[95] Right through the middle of the twentieth century, American courts deployed this test to suppress major works of literature.[96] Even Learned Hand, sitting as a trial judge in *United States v. Kennerly*,[97] felt bound to apply it, although he strongly disagreed with it, because it had "been accepted by the lower federal courts until it would be no longer proper . . . to disregard it."[98]

Nevertheless, Judge Hand harshly criticized the *Hicklin* test as an anachronism, which tended to "embalm" forever the standard of mid-Victorian morality, limiting important discussions of sex out of a feeling of shame and reducing them "to the standard of a child's library in the supposed interest of a salacious few."[99] He suggested that honest treatments of sexual themes ought not to be proscribed, but realizing that society was perhaps not yet ready for complete honesty in such matters, he suggested, as a second-best alternative, that "the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now."[100] In place of the *Hicklin* standard, which focused on the effect of "obscene" matter on the most impressionable minds, Hand suggested that it might be more appropriate to focus on "the average conscience of the time."[101]

By the 1930s, serious cracks in the *Hicklin* doctrine began to appear, most notably in the decisions in the prosecution of Joyce's *Ulysses*.[102] John Woolsey, the trial judge, noted that *Ulysses* contains what are "generally considered dirty words," but observed that those words were "known to almost all men and, I venture, to many women."[103] More importantly, the

93. *See* Blanchard & Semonche, *supra* note 90, at 361.

94. *See id.* at 363.

95. *See, e.g.*, United States v. Smith, 45 F. 476, 477 (E.D. Wis. 1891); United States v. Clarke, 38 F. 732, 733 (E.D. Mo. 1889); United States v. Bennett, 24 F. Cas. 1093, 1104 (C.C.S.D.N.Y. 1879) (No. 14,571); Commonwealth v. Allison, 116 N.E. 265, 266 (Mass. 1917); People v. Muller, 96 N.Y. 408, 411, 413 (1884).

96. *See, e.g.*, Doubleday & Co. v. New York, 335 U.S. 848 (1948) (upholding obscenity conviction of Edmund Wilson's *Memoirs of Hecate County*); Commonwealth v. Delacey, 171 N.E. 455 (Mass. 1930) (D.H. Lawrence's *Lady Chatterley's Lover*); Commonwealth v. Friede, 171 N.E. 472 (Mass. 1930) (Theodore Dreiser's *An American Tragedy*).

97. 209 F. 119 (S.D.N.Y. 1913).

98. *Id.* at 120.

99. *Id.* at 121.

100. *Id*

101. *Id*

102. United States v. One Book Called "Ulysses," 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd sub nom.* United States v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705 (2d Cir. 1934). For discussion of the background of these decisions, see Stephen Gillers, *A Tendency to Deprave and Corrupt: The Transformation of American Obscenity Law from* Hicklin *to* Ulysses II, 85 WASH. U. L. REV. 215 (2007).

103. *One Book Called "Ulysses,"* 5 F. Supp. at 183-84. Furthermore, he insisted, "it must always be remembered that [Joyce's] locale was Celtic and his season spring." *Id.* at 184.

allegedly "dirty" material was an integral part of a serious literary experiment in stream-of-consciousness writing—it was not "dirt for dirt's sake,"[104] nor could Woolsey detect "the leer of the sensualist."[105] Accordingly it was not written with pornographic intent. But the question remained: was it obscene, that is, did it tend to excite "sexually impure and lustful thoughts"?[106] In a decisive break with *Hicklin*, the court ruled that obscenity must be judged not in regard to its effect on the youngest or most impressionable readers, but rather in regard to "its effect on a person with average sex instincts—what the French would call *l'homme moyen sensuel*—who plays, in this branch of legal inquiry, the same role of hypothetical reagent as does the 'reasonable man' in the law of torts."[107] The danger of such a test, the court admitted, was that the trier of fact will tend inherently to substitute his own reactions for those of the hypothetical average person. But after checking with two friends of his who appeared to him to have normal sexual impulses and thus could serve as "literary assessors,"[108] the trial judge was convinced that the book was not obscene: "whilst in many places the effect of 'Ulysses' on the reader undoubtedly is somewhat emetic, nowhere does it tend to be an aphrodisiac."[109]

The Second Circuit affirmed Woolsey's judgment in an opinion written by Augustus Hand with the concurrence of his cousin Learned (by then sitting on the court of appeals). The court "reject[ed] the view that [*Ulysses*] will permanently stand among the great works of literature,"[110] and noted that "[p]age after page of the book is . . . incomprehensible," but conceded that it was a work of some artistry.[111] Unfortunately, numerous long passages contained material that was "obscene under any fair definition of the word."[112] Nevertheless, the court ruled, literary and scientific works may not be judged obscene based on an isolated passage—Aristophanes, Chaucer, and even the Bible might fail such a test.[113] Instead, the proper test is "whether a publication taken as a whole has a libidinous effect."[114] Because the "dominant effect"[115] of *Ulysses* was not libidinous, it could not be judged obscene, "even though it justly may offend many."[116] Taken together, then, the trial and appellate opinions in this case decisively rejected *Hicklin*'s emphasis on the corrupting effect of isolated passages on particularly sensitive

104. *Id* at 184.
105. *Id* at 183.
106. *Id.* at 184.
107. *Id.*
108. *Id.*
109. *Id.* at 185. One scholar characterized four of Woolsey's conclusions as "well-intentioned lies": that judges should consult the work of critics, that Joyce wrote without pornographic intent, that literature and pornography are clearly distinguishable, and that *Ulysses* is in no part an "aphrodisiac." PAUL VANDERHAM, JAMES JOYCE AND CENSORSHIP 115-31 (1998).
110. United States v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705, 706 (2d Cir. 1934).
111. *Id.* at 707.
112. *Id* at 706-07.
113. *Id.* at 707.
114. *Id.*
115. *Id.* at 708.
116. *Id.* at 709.

readers, and focused instead on the effect of the work as a whole on the average person.

### C. *Roth and the Emergence of Community Standards*

In 1957, in its decision in *Roth v. United States*,[117] the Supreme Court decisively endorsed the lower courts' repudiation of the *Hicklin* test. Writing for the Court, Justice Brennan opined that "obscenity is not protected by the freedoms of speech and press"[118] because it is "utterly without redeeming social importance."[119] Constitutional freedom of speech, as Brennan conceived it in *Roth*, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[120] The *Roth* Court thus viewed freedom of speech purely as an instrument of democratic self-government, rather than as an aspect of individual autonomy intrinsically valuable in itself. But the Court endorsed the trend among the lower courts in rejecting the *Hicklin* standard, which "allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons."[121] Instead the Court adopted a new standard, which it claimed the lower courts had adopted. The new test of obscenity was this: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."[122]

Despite the Court's string of citations, no lower court had actually adopted this standard precisely as the Court formulated it in *Roth*. But the genealogy of *Roth*'s "contemporary community standards" may be traced at least as far back as Learned Hand's 1913 reference in *Kennerly* to "the average conscience of the time"[123] or Judge Woolsey's 1933 reference in *Ulysses* to the "person with average sex instincts."[124] Similarly, *Roth*'s reference to "the dominant theme of the material taken as a whole" clearly echoed Augustus Hand's insistence in *Ulysses* that the material in question must be "taken as a whole" in order to determine its "dominant effect."[125] *Roth*'s "prurient interest" language drew on still other cases, as well as the American Law Institute's Model Penal Code.[126] Thus the *Roth* "contemporary community standards" test was a synthesis of various standards that courts and commentators had articulated in their attempts to craft more liberal alternatives to the *Hicklin* rule.[127]

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117. 354 U.S. 476 (1957) (upholding federal obscenity conviction for advertisement and distribution of an issue of a literary magazine containing Aubrey Beardsley's unfinished prose romance, *Venus and Tannhäuser*).

118. *Id.* at 481.

119. *Id.* at 484.

120. *Id.*

121 *Id.* at 488-89.

122. *Id.* at 489.

123. United States v. Kennerly, 209 F. 119, 121 (S.D.N.Y. 1913).

124. United States v. One Book Called "Ulysses," 5 F. Supp. 182, 184 (S.D.N.Y. 1933), *aff'd sub nom.* United States v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705 (2d Cir. 1934).

125. *One Book Entitled Ulysses by James Joyce*, 72 F.2d at 707, 708.

126. *See Roth*, 354 U.S. at 487.

127. According to Justice Harlan, the *Roth* test "merely assimilates the various tests into one indiscriminate potpourri." *Id.* at 500 (Harlan, J., dissenting) He chastised the Court for assuming that

Justice Douglas, joined in dissent by Justice Black, sharply attacked the Court's new standard, which made "the legality of a publication turn on the purity of thought which a book or a tract instills in the mind of the reader."[128] It inflicted punishment "for thoughts provoked, not for overt acts nor antisocial conduct."[129] Even more inimical to freedom of expression was the "community standards" test adopted by the Court, which "creates a regime where in the battle between the literati and the Philistines, the Philistines are certain to win."[130] The standard of offensiveness to community standards, as Justice Douglas observed, "would not be an acceptable one if religion, economics, politics or philosophy were involved."[131] Why then should it be acceptable where the subject is sex?

Whatever its flaws, *Roth* was a momentous step toward the liberalization of the law of obscenity. However objectionable, the community standards test, which focused on the effect of the work as a whole on the average reader, was a marked improvement on *Hicklin*, which focused on the effect of isolated passages on a particularly susceptible reader. Moreover, for the first time the Court had placed constitutional limits on the criminalization of sexual speech.

Almost a decade later, the *Roth* Court's dictum about obscenity's lack of "redeeming social importance" was transformed into another potentially significant restraint on censorship, when in *Memoirs of a Woman of Pleasure v. Massachusetts*[132] Justice Brennan, writing for a plurality, set out three elements that must coalesce for a constitutionally sustainable finding of obscenity: "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."[133] In *Memoirs*, the lower court's finding that the eighteenth-century erotic novel *Fanny Hill* possessed even a "modicum of social value," however "minimal," was enough for the Court to reverse the lower court's finding of obscenity.[134] However, the *Memoirs* standard never commanded support of more than three of the Justices. As Justice Harlan wrote in that case, "no stable approach to the obscenity problem" had yet emerged in the Court.[135] Justices Black and Douglas rejected any restrictions on obscenity and thus tended to vote with the Brennan group in striking them down; the remaining Justices advocated rather more restrictive standards and often found themselves dissenting.[136]

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certain speech could be stripped of constitutional protection simply because a fact-finder had pigeonholed it as "obscenity": "The Court seems to assume that 'obscenity' is a particular *genus* of 'speech and press,' which is as distinct, recognizable, and classifiable as poison ivy is among other plants." *Id.* at 497.

128. *Id.* at 508 (Douglas, J., dissenting).

129. *Id.* at 509.

130. *Id.* at 512.

131. *Id.*

132. Memoirs of a Woman of Pleasure v. Massachusetts, 383 U.S. 413 (1966).

133. *Id.* at 418.

134. *Id.* at 419, 420.

135. *Id.* at 455 (Harlan, J., dissenting).

136. *See, e.g.*, Jacobellis v. Ohio, 378 U.S. 184 (1964); Grove Press v. Gerstein, 378 U.S. 577 (1964).

The year after *Memoirs*, in *Redrup v. New York*,[137] the Court essentially gave up trying to devise a test that a majority could support. In *Redrup*, the seven-Justice majority simply issued a laconic per curiam opinion that reversed, with little analysis, the defendant's conviction for selling pulp pornographic fiction.[138] During the next six years, the Court "systematically Redrupped—reviewed and reversed summarily, without further opinion—scores of obscenity rulings by lower state and federal courts."[139]

### D. Miller *and the Modern Test*

In 1973, in *Miller v. California*,[140] the Burger Court put a stop to this trend. The political backlash against the Court's obscenity jurisprudence was a crucial factor in this reversal. In 1968, when President Johnson nominated Justice Abe Fortas to replace retiring Chief Justice Earl Warren, Senator Strom Thurmond of South Carolina led a group of conservative colleagues to block the nomination. They shrewdly chose to highlight not their hostility to the Court's rulings on civil rights, but rather the more sensational issue of obscenity.[141] Thurmond organized hearings and invited politicians and the press to a "Fortas Obscene Film Festival" held in the Capitol featuring cavorting transvestites and other horrors.[142] Fortas's withdrawal and subsequent resignation (for unrelated reasons) from the bench gave the incoming President, Richard Nixon, the opportunity to make two new nominations to the Court, including its new Chief Justice, Warren Burger.

In *Miller*, Chief Justice Burger was finally able to cobble together a majority to rally behind a new constitutional test for obscenity, which remains the governing standard today. The three criteria of this test are as follows:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[143]

Obviously, this test is modeled after the three-prong test of the *Memoirs* plurality, with the crucial difference that *Miller* repudiated the "utterly without redeeming social value" standard in favor of the markedly less liberal "lacks *serious* literary, artistic, political, or scientific value."[144] The *Miller* Court seemed to regard this third prong as almost unnecessary. With stunning ignorance, the Court proclaimed: "There is no evidence, empirical or

137. 386 U.S. 767 (1967).

138. The opinion simply noted that the majority was hopelessly divided among four different proposed standards, and stated: "Whichever of these constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand." *Id.* at 771.

139. DE GRAZIA, *supra* note 26, at 515.

140. 413 U.S. 15 (1973).

141. *See* DE GRAZIA, *supra* note 26, at 526-30.

142. *Id.* at 544.

143. Miller v. California, 413 U.S. 15, 24 (1973) (citations omitted).

144. *Id.* (emphasis added). As the Court explained: "'A quotation from Voltaire in the flyleaf of a book will not redeem an otherwise obscene publication.'" *Id.* at 25 n.7 (quoting Kois v. Wisconsin, 408 U.S. 413, 461 (1966) (White, J., dissenting)).

historical, that the stern 19th century American censorship of public distribution and display of material relating to sex . . . in any way limited or affected expression of serious literary, artistic, political, or scientific ideas."[145] The *Miller* test also appeared to shift the focus of the "community standards" test: while in *Memoirs* this formulation related to prong (b), whether the work is "patently offensive," in *Miller* it relates to prong (a), whether it appeals to "prurient interest." That shift was only apparent, however, and not substantive. As subsequent decisions made clear, appeal to the prurient interest and patent offensiveness are *both* to be judged with reference to contemporary community standards.[146] *Miller*'s prong (c) ("serious . . . value"), in contrast, is not to be judged by community or majoritarian standards but by those of a "reasonable person."[147]

In *Miller* and a companion case, Justice Brennan strongly dissented. Belatedly realizing the repressive potential of a standard he had done so much to develop, he repudiated his prior decisions in *Roth* and *Memoirs*.[148] After sixteen years of experimentation with various standards, Brennan was forced to conclude that "the outright suppression of obscenity cannot be reconciled with the fundamental principles of the First and Fourteenth Amendments."[149] The problem of vagueness, which Brennan had so breezily dismissed in *Roth*, turned out to be a fundamental stumbling block. No definition of obscenity could ever be formulated with sufficient clarity that it would target only constitutionally unprotected speech. Experience had demonstrated that "almost every [obscenity] case is 'marginal'" and "presents a constitutional question of exceptional difficulty."[150] No one could ever "say with certainty that material is obscene until at least five members of [the Supreme] Court, applying inevitably obscure standards, have pronounced it so."[151] The vagueness of the constitutional definition of obscenity gives rise to three fundamental problems. It does not give fair notice to the public and to law enforcement officials as to what conduct is criminal, thereby violating due process;[152] it has a chilling effect on protected speech;[153] and it places great stress on the judicial system, as judges are tied to the "'absurd business of perusing and viewing the miserable stuff that pours into the Court.'"[154] For these reasons, Justice Brennan was forced to conclude that the distribution of sexually explicit materials to consenting adults could not constitutionally be prohibited as obscenity.[155]

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145. *Id.* at 35.

146. *See, e.g.*, Ashcroft v. ACLU, 535 U.S. 563, 576 n.7 (2002); Pope v. Illinois, 481 U.S. 497, 500 (1987).

147. *Pope*, 481 U.S. at 500-01. As the Court explained, "the mere fact that only a minority of a population may believe a work has serious value does not mean that the 'reasonable person' standard would not be met." *Id.* at 501 n.3.

148. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73-114 (1973) (Brennan, J., dissenting). *Slaton* was a companion case to *Miller*, and Brennan's dissent was joined by Justices Stewart and Marshall.

149. *Id.* at 83.

150. *Id.* at 91.

151. *Id.* at 92.

152. *See id.* at 86-88.

153. *See id.* at 88.

154. *Id* at 92 (quoting Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 707 (1968)).

155. *Id* at 113.

E. *Aspects of the Community Standards Test*

The *Miller* test has survived for a generation. Much of the constitutional case law on obscenity both before and since *Miller* has focused on the scope of the community standards test. The notion of "community standards" raises obvious questions: Which community? Can a community have standards that are independent of the standards of its members? If so, how are these standards to be ascertained? Courts have suggested answers to some of these questions, although these answers may raise even more questions. Courts have held, for example, that "community standards" may be ascertained by jurors without the benefit of expert evidence.[156] In the case of material designed to appeal to a "deviant" sexual group, the prurient appeal requirement (but not the patent offensiveness requirement) "'is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.'"[157] But even in such cases, expert evidence regarding the "deviant" group's taste has not been required.

One of the most hotly debated aspects of community standards is the issue of geographic scope. From the outset, the *Miller* Court strongly suggested that the nation as a whole was not the relevant community. But if it is not, then "community standards," and hence First Amendment protections, will undoubtedly vary from one community to another. The notion that federal constitutional protections should vary from place to place throughout the nation is of course anomalous. The Court, however, could see no contradiction:

> Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive." These are essentially questions of fact, and our Nation is simply too big and diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists.[158]

The Court explained: "It is neither realistic nor constitutionally sound to read the First Amendment as requiring the people of Maine or Mississippi to accept public depiction of conduct found tolerable in Las Vegas, or New York City."[159] The Court rejected the argument that a local standard would have the repressive effect of subjecting material aimed at a national market to the mores of the most conservative hamlets in the country. It suggested that "the potential for suppression seems at least as great in the application of a single nationwide standard as in allowing distribution in accordance with local tastes."[160]

Subsequent decisions clarified that although the trier of fact is not constitutionally required to apply a national standard, neither is it

156. *See* Hamling v. United States, 418 U.S. 87, 105 (1973); *Slaton*, 413 U.S. at 56 & n.6; United States v. Ragsdale, 426 F.3d 765, 772-73 (5th Cir. 2005); *see also* Smith v. California, 361 U.S. 147, 159 n.3 (1959) (Black, J., concurring).

157. *Hamling*, 418 U.S. at 129 (quoting Mishkin v. New York, 383 U.S. 502, 508-09 (1966)).

158. Miller v. California, 413 U.S. 15, 30 (1973).

159. *Id.* at 32.

160. *Id.* at 32 n.13.

constitutionally prohibited from doing so.[161] But it is perfectly permissible to apply a local standard, even in a federal obscenity prosecution.[162] Indeed, the Court held, it is perfectly proper for a court to instruct a jury to apply community standards without ever specifying *which* community.[163]

Several Justices have sharply criticized the Court's approach to the issue of national standards. Even prior to *Miller*, Justice Brennan had argued that a federal constitutional right must be defined by a national standard:

> It is true that local communities throughout the land are in fact diverse, and that in cases such as this one the Court is confronted with the task of reconciling the rights of such communities with the rights of individuals. Communities vary, however, in many respects other than their toleration of alleged obscenity, and such variances have never been considered to require or justify a varying standard for application of the Federal Constitution.[164]

In the case of a federal obscenity prosecution, Brennan argued, the case for a national standard is even more compelling. Not only the Federal Constitution, but also federal statutes ought to receive a uniform interpretation.[165]

Justice Stevens was equally critical of the concept of community standards, arguing that the absence of an ascertainable national standard ought to suggest not that local standards should apply, but rather that criminal prosecution is an unsuitable "mechanism for regulating the distribution of erotic material."[166] Moreover, Justice Stevens argued, state and local standards can be just as elusive as national standards.[167] The use of local standards also impedes the development of a uniform body of decisional law, and permits "the guilt or innocence of a criminal defendant" to be "determined primarily by individual jurors' subjective reactions . . . rather than by the predictable application of rules of law."[168]

Most recently, the issue of local community standards has resurfaced in the context of Internet regulation. In *Ashcroft v. American Civil Liberties Union*,[169] the Court considered a constitutional challenge to the federal Child Online Protection Act (COPA) of 1998.[170] COPA prohibits under certain conditions the online display for commercial purposes of "material that is harmful to minors," which the Act defines in language that largely tracks the three-pronged *Miller* test for obscenity, except that Congress added to each of the prongs the words "for minors" or "with respect to minors."[171] The district court granted a preliminary injunction against enforcement of the Act, ruling that it was unlikely to survive strict scrutiny because it was not the least restrictive means of preventing minors' access to such material. The Third Circuit affirmed on different grounds, ruling that the Act was facially

161. *See, e.g.*, *Hamling*, 418 U.S. at 104-05.
162. *See id*
163. *See* Jenkins v. Georgia, 418 U.S. 153, 157 (1974).
164 Jacobellis v. Ohio, 378 U.S. 184, 194 (1964).
165. *See Hamling*, 418 U.S. at 142-45 (Brennan, J., dissenting).
166. Smith v. United States, 431 U.S. 291, 313 (1977) (Stevens, J., dissenting).
167. *See id* at 314.
168. *Id.* at 316.
169 535 U.S. 564 (2002).
170. Pub. L. No. 105-277, § 1401, 112 Stat. 2681-2736 (codified at 47 U.S.C. § 231(1998)).
171. 47 U S.C. § 231(e)(6).

overbroad, because in relying on community standards, it potentially criminalized the display on the Internet of "'any material that might be deemed harmful by the most puritan of communities in any state.'"[172] In an opinion written by Justice Thomas, the Supreme Court vacated the judgment of the Third Circuit, holding that the Act's reliance on community standards did "not *by itself* render the statute substantially overbroad."[173] However, the various opinions suggest that a majority of Justices on the Court view the community standards test, at least in the context of the Internet, as highly problematic.

The Court was fragmented as to the rationale of the judgment. Only Chief Justice Rehnquist and Justice Scalia joined Justice Thomas's opinion in full. Speaking for himself and those two colleagues, Justice Thomas observed that the Court had "rejected Justice Brennan's argument that [the application of local community standards in the context of the Comstock Act] unconstitutionally compelled speakers choosing to distribute materials on a national basis to tailor their messages to the least tolerant community."[174] Justice Thomas rejected the claim that the Internet requires a different approach because (unlike the mail or the telephone) it does not readily permit the speaker to target specific communities: "The publisher's burden does not change simply because it decides to distribute its material to every community in the nation."[175]

Justice O'Connor agreed that the use of community standards did not render COPA unconstitutionally overbroad for the purposes of the facial challenge before the Court, but left open the possibility that it might be sufficient in an as-applied challenge or even a future facial challenge.[176] Furthermore, she stated, "adoption of a national standard is necessary . . . for any reasonable regulation of Internet obscenity." Indeed, she suggested that the *Miller* Court was wrong to insist that a national standard might be unascertainable.[177] Justice Breyer likewise rejected the idea of local standards in this context, stating that the adoption of local standards "would provide the most puritan of communities with a heckler's Internet veto affecting the rest of the Nation."[178]

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172 535 U.S. at 573 (quoting ACLU v. Reno, 217 F.3d 162, 175 (3d Cir. 2000)).

173. *Id.* at 585. However, the Supreme Court did not dissolve the preliminary injunction. Upon remand, the Third Circuit again affirmed the district court's grant of a preliminary injunction on broader grounds, and this time the Supreme Court affirmed. Ashcroft v. ACLU, 542 U.S. 656 (2004). After a trial on the merits, the district court, holding that the statute was unconstitutional, entered a permanent injunction. ACLU v. Gonzales, 478 F. Supp. 2d 775 (E.D. Pa. 2007).

174. Ashcroft v. ACLU, 535 U.S. at 580-81.

175. *Id.* at 583. According to Justice Thomas, if publishing material on the Internet might subject the publisher to criminal sanctions in some communities, then the publisher "need only take the simple step of utilizing a [different] medium." *Id.*

176. *See id.* at 586-87 (O'Connor, J., concurring in part).

177. *Id.* at 589 (arguing that if a California standard was ascertainable, then "it is difficult to believe" that a national standard was not).

178. *Id.* at 590 (Breyer, J., concurring in part). Justice Breyer also argued that in enacting COPA, Congress expressly rejected the use of local standards. *See id.* ("'The Committee recognizes that the applicability of community standards in the context of the Web is controversial, *but understands it as an 'adult' standard, rather than a 'geographic' standard, and one that is reasonably constant among adults in America with respect to what is suitable for minors.*'" (quoting H.R. REP. NO. 105-775, at 28 (1998))) (emphasis added in the opinion).

Justice Kennedy, joined by Justices Souter and Ginsburg, did not agree with Justice Thomas that precedents relating to speech disseminated by mail or telephone could simply be mechanically applied to the Internet.[179] Each medium requires a different constitutional analysis, and it was no answer to say, as Justice Thomas had, that if COPA foreclosed Internet speech the speaker had only to utilize a different medium; laws that foreclose an entire medium of expression are particularly suspect.[180] According to Justice Kennedy, "variation in [local] community standards constitutes a particular burden on Internet speech."[181]

Finally, Justice Stevens dissented. He observed that in the context of the Internet, the community standards test, which originated as a shield to protect "communications that are offensive only to the least tolerant members of society," had become a sword criminalizing material simply because it might be found "offensive in a puritan village."[182] Like the court of appeals, he would have held that this fact alone rendered the statute substantially overbroad and thus unconstitutional.[183]

What is most striking about U.S. obscenity jurisprudence is that the Court has made little effort to supply a rationale for the community standards test. In *Roth*, the test was initially justified on the grounds that it was less repressive than the *Hicklin* test. But why should community standards be the appropriate test? We would not permit the government to criminalize political, scientific, or artistic expression that offends community standards. Why should sexual expression be treated differently?

The decision in *Paris Adult Theatre I v. Slaton*[184] was perhaps the closest the Court has ever come to offering an explanation or rationale. According to the Court, the government interests in regulating obscenity include "the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself."[185] The Court quoted approvingly from an article by Alexander Bickel:

> "A man may be entitled to read an obscene book in his room, or expose himself indecently there . . . . We should protect his privacy. But if he demands a right to obtain the books and pictures he wants in the market, and to foregather in public places—discreet, if you will, but accessible to all—with others who share his tastes, then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies. Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it or not."[186]

The Court concluded:

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179. *See id.* at 594-96 (Kennedy, J., concurring in the judgment).

180. *Id.* at 596.

181. *Id.* at 597. Nevertheless, Justice Kennedy agreed that the court of appeals's decision should be vacated to allow for development of the factual record on this point. *Id.* at 597-602.

182. *Id.* at 602-03 (Stevens, J., dissenting).

183. *Id.* at 610.

184. 413 U.S. 49 (1973).

185. *Id.* at 58

186. *Id.* at 59 (quoting Alexander Bickel, *On Pornography. Concurring and Dissenting Opinions*, PUB. INT., Winter 1971, at 25, 26).

> The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.[187]

The Court expressly rejected the notion championed by John Stuart Mill that the state may not regulate private conduct by consenting adults.[188] Nevertheless, it denied at the same time that it was simply permitting the states to enforce majoritarian moral judgments:

> The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as "wrong" or "sinful." The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize in Mr. Chief Justice Warren's words, the States' "right . . . to maintain a decent society."[189]

Thus, although the Court does allude to the (empirically unproven) possibility that obscenity might incite physical harm, the primary state interest that the Court invokes is the possibility of moral harm: damage to the "quality of life"; injury to "the development of the human personality," "family life," and "the community as a whole"; and the corruption of "a decent society."

### F. *Current Implementation*

In the United States today, federal obscenity prosecutions are sporadic, but arbitrary and highly politicized. During the administration of President George H.W. Bush, there were some significant prosecutions of obscenity involving willing adults, but under the Clinton administration, such prosecutions virtually came to a halt.[190] President George W. Bush pledged a renewed effort against such materials, but only a handful of cases were filed, and the rationale for focusing on the ones that were brought is difficult to discern.[191] For example, the government brought an action against a nonviolent scatological website featuring only adults, girlspooping.com.[192] As a result of this prosecution, the defendants (one of whom was a featured actress in the videos) were convicted and sent to prison, and the website became the property of the United States. Without citing any evidence, the Justice Department official overseeing the operation incongruously explained

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187. *Id.* at 63.

188. *See id.* at 68 & n.15.

189. *Id.* at 69 (quoting Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting)).

190. *See, e.g.*, Clay Calvert & Robert D. Richards, *Pointless Prosecution*, NAT'L L.J., Aug. 7, 2006, at 27; *Is It Legal?*, 54 NEWSL. ON INTELL. FREEDOM 305 (2005); Jason Krause, *The End of the Net Porn Wars*, A.B.A. J., Feb. 2008, at 52, 53.

191. *See* Charles Hurt, *Porn Foes Lament Ashcroft Record on Prosecutions*, WASH. TIMES, Dec. 20, 2004, at A1.

192 *See* Greg Beato, *Xtreme Measures: Washington's New Crackdown on Pornography*, REASON MAG, May 2004, http://www.reason.com/news/printer/29138.html; Toby Coleman, *Obscenity Question Revisited: W. Va. Pair Named in Federal Case over Internet Porn*, CHARLESTON DAILY MAIL, Apr. 24, 2003, at 1A. For a copy of the affidavit describing the materials, some of which involved the use of a "bowl cam," see Affidavit of Thomas W. Svitek, Mar. 25, 2003, *available at* http://www.thesmokinggun.com/archive/poopvid1.html.

that the devotion of federal resources to such prosecutions served to prevent "degrading, and sometimes violent, sexual offenses against others."[193]

The recent increased focus on such issues reflected pressure from the religious right. Disturbingly, beginning in 2004, the government began outsourcing the investigation of obscenity claims to a private right-wing religious group, Morality in Media (MIM). Members of the public who wish to file a complaint about obscenity are referred from the Justice Department website to ObscenityCrimes.org, operated by MIM under a congressional grant.[194] It does not appear, however, that the tens of thousands of tips filed with this organization have resulted in a single prosecution.[195]

Furthermore, in recent years, federal prosecutors and law enforcement professionals have shown little appetite for such cases. Shortly after taking office, Attorney General Alberto Gonzales announced that the prosecution of obscenity depicting and marketed to consenting adults would be one of his top priorities.[196] However, federal prosecutors and professional law enforcement officials were less than enthusiastic about the diversion of resources to such cases.[197] U.S. Attorneys in Nevada and Arizona balked at a Justice Department directive ordering them to commit resources to adult obscenity cases, noting that they faced serious shortages of manpower, and therefore would have to divert resources from serious investigations of gang violence, racketeering, healthcare fraud, corruption, and child exploitation.[198] Gonzales's decision to fire these attorneys contributed to the scandal that eventually forced him to resign.

The reluctance of professional prosecutors to pursue such cases merely to placate a political constituency is understandable. U.S. obscenity doctrine is vague: it is impossible to tell in advance what a particular jury will find offensive to community standards. The rationale underlying the doctrine has never been clearly articulated. Increasingly, Justice Department professionals prefer to focus on child pornography cases, in which the harms involved are clear, and tend to reject obscenity cases. But in the hands of a government willing to use it, obscenity law remains a potentially potent tool of repression.

## IV. OBSCENITY LAW IN CANADA

In Canada a community standards test first emerged in the 1960s, and acquired a constitutional dimension only in the 1980s. The enactment of the Canadian Charter in 1982 vastly expanded the scope of constitutional judicial review to protect fundamental rights. Since then, the Supreme Court of

193. Beato, *supra* note 192 (quoting John G. Malcolm, head of the Department of Justice's Child Exploitation and Obscenity Section).

194. *See* Stephen Bates, *Outsourcing Justice? That's Obscene*, WASH. POST, July 15, 2007, at B3, Neil A. Lewis, *Federal Effort on Web Obscenity Shows Few Results*, N.Y. TIMES, Aug. 10, 2007, at A13.

195 *See* Krause, *supra* note 190, at 56.

196. *See* Barton Gellman, *Recruits Sought for Porn Squad*, WASH. POST, Sept. 20, 2005, at A21.

197. As one exasperated FBI agent quipped, "'I guess this means we've won the war on terror.'" *Id*

198. Mark Follman, *The U.S. Attorneys Scandal Gets Dirty*, SALON.COM, Apr 19, 2007, http://www.salon.com/news/feature/2007/04/19/DOJ_obscenity.

Canada has developed an extensive jurisprudence of constitutional rights. While giving wide scope to the freedom of expression, the Canadian Court has nevertheless approved some restrictions on that freedom which would be impermissible in the United States. Notably, the Canadian Court has upheld restrictions on hate speech in a decision that later had important ramifications for the development of its constitutional doctrine of obscenity.[199] In its first elaboration, that doctrine embraced the community standards test, but linked it to a harm-based test. The Court's most recent pronouncement, however, appears to jettison community standards in favor of a pure harm-based test.

### A. *"Undue Exploitation" and Community Standards*

In Canada, the *Hicklin* test was the governing standard for obscenity prosecutions for nearly a century, first under the common law of obscene libel, and later under an 1892 criminal statute that left obscenity undefined. The turning point came in 1959, when Parliament amended the statute and for the first time provided a definition of obscenity: "For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene."[200] The government's intention in amending the statute was that the new definition should apply to "pulp" materials only, while serious literature and art would continue to be judged by the *Hicklin* test.[201] However, the Supreme Court of Canada ultimately ruled that the new "undue exploitation" test was the exclusive standard of obscenity, displacing the old *Hicklin* test.[202]

In the first obscenity case to reach the Court, *Brodie v. The Queen*,[203] a prosecution involving D.H. Lawrence's *Lady Chatterly's Lover*, the Justices were sharply split over both the proper test and the outcome. Ultimately, the opinion of Justice Judson had the greatest influence on the future course of Canadian obscenity jurisprudence. Justice Judson held that the statutory definition of obscenity was exclusive: if Parliament had intended for the *Hicklin* test to survive alongside the new definition, it should have explicitly stated so.[204] Moreover, according to Justice Judson, in contrast to the "vague, difficult and unsatisfactory" *Hicklin* test, the new statutory tests "have some certainty of meaning and are capable of objective application and . . . do not so much depend as before upon the idiosyncrasies and sensitivities of the tribunal of fact, whether judge or jury."[205] Whereas under the *Hicklin* test, evidence of artistic value had been excluded as irrelevant, the new "undue

199. *See* R. v. Keegstra, [1990] 3 S.C R. 697. The Court has also declined to limit the common law of defamation to protect criticism of public figures. *See* Hill v. Church of Scientology, [1995] 2 S.C.R. 1130.

200. Offences Tending to Corrupt Morals, R.S.C., ch. C 46, § 163(8) (1985)

201. *See* L.W. SUMNER, THE HATEFUL AND THE OBSCENE: STUDIES IN THE LIMITS OF FREE EXPRESSION 89-90, 219 n.8 (2004) (discussing statements made in Parliament by the Minister of Justice indicating that the new statutory prohibition was aimed at cheap mass-market materials sold on newsstands rather than material of "genuine literary, artistic or scientific merit").

202. Dechow v. The Queen, [1977] 76 D.L.R.3d 1 (Can).

203. [1962] S.C.R. 681.

204. *See id.* at 701-02 (Judson, J.).

205. *Id.* at 702.

exploitation" test permitted the factfinder to consider whether the exploration of sexual themes served a genuine literary or artistic purpose. All of the expert evidence submitted in the case suggested that the sexual material in Lawrence's work did serve such a purpose, and hence did not constitute "undue exploitation."[206]

Justice Judson also held that "undue exploitation" should be measured by the "standards of acceptance prevailing in the community."[207] He drew this standard not from U.S. case law, but from an Australian decision that was subsequently widely influential both in Australia and New Zealand, in which the court ruled that a jury ought to apply the "standards of decency which prevail in the community."[208] Although the adoption of the community standards test had been criticized as "judicial legislation," in Justice Judson's view, it was far preferable to the alternative:

> Surely the choice of courses is clear-cut. Either the judge instructs himself or the jury that undueness is to be measured by his or their personal opinion—and even that must be subject to some influence from contemporary standards—or the instruction must be that the tribunal of fact should consciously attempt to apply these standards. Of the two, I think that the second is the better choice.[209]

Only two years later, in *Dominion News & Gifts Ltd. v. The Queen*,[210] the Supreme Court of Canada, in effect, unanimously endorsed the community standards test. Reversing the judgment below upholding forfeiture orders against two magazines (*Escapade* and *Dude*), the Court adopted in its entirety the dissenting opinion of Justice Freedman on the Manitoba Court of Appeal. Justice Freedman had held that the "standards of the community" ought to be the proper test of "undue exploitation," and further specified that community standards must be both "contemporary" and "Canadian."[211]

Two decades later, in *Towne Cinema Theatres Ltd. v. The Queen*,[212] the Supreme Court of Canada expressly held that the relevant community standard is both national and contemporary. It further specified that although expert evidence is admissible to establish the standard, such evidence is not mandatory.[213] Most importantly, the Court indicated that the relevant standard is a standard of tolerance:

> The cases all emphasize that it is a standard of *tolerance*, not taste, that is relevant. What matters is not what Canadians think is right for themselves to see. What matters is what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it.[214]

In explaining his judgment that the film at issue in this case (*Dracula Sucks*) was obscene, the trial judge had stated that he was confident that the majority

206. *Id.* at 702-05.
207. *Id.* at 705.
208. *Id.* at 706 (quoting R. v. Close (1948) V.L.R. 445, 465 (Fullagar, J.) (Austl.)).
209. *Id.* at 706.
210. [1964] S.C.R. 251.
211. R. v. Dominion News & Gifts Ltd., [1963] 42 W.W.R. 65, 80 (Man.) (Freedman, J., dissenting).
212. [1985] 1 S C.R. 494.
213. *See id.* at 513-14 (Dickson, C.J.C.); *see also id.* at 518 (Beetz, J.).
214. *Id.* at 508 (Dickson, C.J.C.).

of the community would feel the same "revulsion" he felt after viewing it and that "somebody" needed to "draw the line on the type of garbage I saw this morning."[215] But the Supreme Court ordered a new trial, ruling that the trial judge's statements indicated that he had applied a standard of taste (what the majority—or the trial judge—would find personally offensive)[216] rather than of tolerance (what the majority would prohibit others from seeing).

### B. Butler: *Community Standards, Harm, and the Charter*

The decisions discussed up to this point dealt only with the scope of Canadian obscenity law as a matter of statutory interpretation. The enactment of the Canadian Charter of Rights and Freedoms in 1982 dramatically altered the legal landscape in Canada, creating for the first time an entrenched bill of rights and vastly expanding the scope of constitutional judicial review. Section 2(b) of the Charter guarantees to everyone in Canada the fundamental "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."[217] But in contrast to the U.S. approach, in Canada, a finding that the government has violated the guarantee of freedom of expression does not terminate the inquiry. Rather, the freedom of expression, like the other Charter rights and freedoms, is guaranteed under Section 1 "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[218] Thus, to determine whether an infringement of the violation of the freedom of expression guaranteed in Section 2(b) is justified, a proportionality test applies. Courts must examine whether the government's objective is sufficiently "pressing and substantial" to override a fundamental right, and whether the measures chosen are rationally connected to the objective, impair the right no more than necessary, and do not have a disproportionately severe effect on those whose rights are infringed.[219]

The issue of the constitutional validity of the statutory definition of obscenity first came before the Supreme Court of Canada in the landmark case of *Regina v. Butler.*[220] Before discussing the constitutional issue, Justice Sopinka, writing for the majority, began by reviewing and refining the judicial interpretation of the statutory definition of obscenity ("undue exploitation of sex"). He observed that courts had employed three different tests to determine when exploitation was "undue," but had "fail[ed] to specify the relationship of the tests one to another."[221] These were the "community standard of tolerance test," the "degradation or dehumanization" test, and the "internal necessities test" or "artistic defence." Of these tests, the elaboration of the second was the

215. *Id.* at 510 (quoting the trial judge).

216. Chief Justice Dickson stated that the trial judge "applied his own subjective standards of taste" but also that the judge's statement "can only be interpreted as saying that most people would be personally offended." *Id.* at 510-11.

217. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 2(b) (U.K.).

218. *Id.* § 1.

219. R. v. Oakes, [1986] 1 S.C.R. 103, 138-39. *See generally* 2 PETER HOGG, CONSTITUTIONAL LAW OF CANADA ch. 38 (5th ed. 2007) (discussing Section 1 analysis).

220. [1992] 1 S.C.R. 452.

221. *Id.* at 483.

most innovative aspect of the *Butler* decision. The community standards test, as we have seen, had already been extensively elaborated in prior cases, and the internal necessities test, which examined whether sexual depictions served genuine artistic purposes, was of subsidiary importance.

The Canadian Court made clear that the "degradation or dehumanization" test was an elaboration of the "undue exploitation" standard, and was not limited to depictions of explicit violence and cruelty, which were already expressly mentioned elsewhere in the statute. It was aimed at any materials that exploit sex in a way that tends "to reinforce male-female stereotypes to the detriment of both sexes" or "to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable."[222] The Court furnished some graphic illustrative examples of such "degrading" material: films portraying women "as pining away their lives waiting for a huge male penis to come along, on the person of a so-called sex therapist, or window washer" or depicting women as beings whose "'raison d'être is to savour semen as a life elixir.'"[223] The Court cautioned that in such materials "the appearance of consent is not necessarily determinative. Consent cannot save materials that otherwise contain degrading or dehumanizing scenes. Sometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing."[224]

The Court expressed confidence that the "degradation or humiliation" standard would not suppress what civil liberties advocates had described as "good pornography," that is, pornography that "'has value because it validates women's will to pleasure[,] celebrates female nature[, and] validates a range of female sexuality that is wider and truer than that legitimated by the non-pornographic culture.'"[225] Instead, properly applied, it would suppress only "bad" pornography, in which women "are depicted as sexual playthings . . . . [who] worship male genitals and [whose] own value depends upon the quality of their genitals and breasts."[226] The Court did not express any concern that police, prosecutors, and judges might have difficulty distinguishing the "good" from the "bad."

In adopting the "degradation or humiliation" test, the Court signaled its sympathy with the efforts of some pro-censorship conservatives and feminists to supplement or replace the old moralistic rationale for pornography regulation with a harm-based rationale. At the same time, the Court attempted to harmonize this test with the community standards test, stating:

> This type of material would, apparently, fail the community standards test not because it offends against morals but because it is perceived by public opinion to be harmful to society, particularly to women. While the accuracy of this perception is not susceptible of exact proof, there is a substantial body of opinion that holds that the portrayal of persons

222. *Id.* at 493 (quoting STANDING COMM. ON JUSTICE AND LEGAL AFFAIRS, REPORT ON PORNOGRAPHY, § 18:4 (1978) [hereinafter MACGUIGAN REPORT]).

223. *Id.* at 479 (quoting R. v. Ramsingh [1984] 14 C.C.C. (3d) 230, 239 (Man. Q.B.)).

224. *Id.* at 479.

225. *Id.* at 500 (quoting Brief of B.C. Civil Liberties Ass'n, R. v Butler, [1992] 1 S.C.R. 452 (quoting Robin West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report*, 4 AM. BAR FOUND. RES. J. 681, 696 (1987))).

226. *Id.* at 452 (quoting R v. Wagner, [1985] 43 C.R.3d 318, 331 (Alta. Q.B.) (Shannon, J.), *aff'd*, [1986] 50 C.R.3d 175 (Alta.))

> being subjected to degrading or dehumanizing sexual treatment results in harm, particularly to women and therefore to society as a whole. It would be reasonable to conclude that there is an appreciable risk of harm to society in the portrayal of such material.[227]

Logically, however, there is no necessary connection between "community standards of tolerance" and the harm-based "degradation or dehumanization" approaches. As Chief Justice Dickson once observed, the community might well tolerate material that is degrading or dehumanizing.[228] One might add that the converse is also true: the community might refuse to tolerate material even though it is not degrading or dehumanizing. Nevertheless, the Court simply conflated the two approaches.[229] Likewise, the third test (the "internal necessities test" or "artistic defence") was also to be judged by community standards.[230]

To assist in applying these standards, the *Butler* Court set out a tripartite taxonomy of pornography: "(1) explicit sex with violence, (2) explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing, and (3) explicit sex without violence that is neither degrading nor dehumanizing."[231] The first will "almost always constitute undue exploitation of sex."[232] The second "may be undue if the risk of harm is substantial," while the third will not be undue "unless it employs children in its production."[233]

Turning to the constitutional question, the Court ruled that the application of the obscenity statute did infringe the freedom of expression guaranteed in Section 2(b) of the Charter.[234] The appellate court had reached the contrary conclusion on the grounds that the sexually explicit materials at issue in the case were devoid of meaning.[235] But the Supreme Court of Canada ruled that a film always has some meaning. By "consciously choosing the particular images" that constitute the film, the filmmaker "is attempting to create some meaning" which can be measured by the audience's reaction, even if that reaction "may amount to no more than physical arousal or shock."[236]

But, as is often the case in constitutional challenges under the Canadian Charter, the determination that a fundamental right had been infringed was only the beginning of the Court's inquiry, not the end. The heart of the issue

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227. *Id.* at 479-80 (citation omitted).

228. *See id.* at 480 (citing Towne Cinema Theatres Ltd. v. The Queen, [1985] 1 S.C.R. 494, 505 (Dickson, C.J.C.)).

229. The Court simply stated that because the alleged harm that flows from pornography

> is not a matter that is susceptible of proof in the traditional way and because we do not wish to leave it to the individual tastes of judges, we must have a norm that will serve as an arbiter in determining what amounts to an undue exploitation of sex. That arbiter is the community as a whole.

*Id.* at 484.

230. *See id.* at 486 ("The court must determine whether the sexually explicit material when viewed in the context of the whole work would be tolerated by the community as a whole.").

231. *Id* at 484.

232. *Id.* at 485.

233. *Id*

234. *See id.* at 490.

235. *See id* at 486-87.

236. *Id.* at 490.

was the analysis under Section 1: was the infringement a "reasonable" limit, "prescribed by law," that was "demonstrably justified in a free and democratic society"? The Canadian Court ruled that as judicially interpreted, the statutory "undue exploitation" test was not so vague that it could not qualify as a reasonable limit prescribed by law.[237] The Court then examined the objectives of the statute, which, in order to override a fundamental right under Canadian constitutional doctrine, must be shown to be "pressing and substantial." The Court observed that under the old *Hicklin* approach, the dominant purpose of obscenity regulation was "to advance a particular standard of morality."[238] Under the Charter, according to the Court, that "particular objective is no longer defensible": "To impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract."[239] The Court did not assert that Parliament had no power whatsoever to legislate based on fundamental conceptions of morality. It suggested that legislation may seek to advance constitutional moral values enshrined in the Charter itself, but not values that are grounded merely in conventional majoritarian morality.[240]

Nevertheless, in the Court's view, the overriding purpose of the Canadian obscenity statute was "not moral disapprobation but the avoidance of harm to society."[241] It quoted approvingly from language in the MacGuigan Report on pornography suggesting that the government has sweeping powers to prohibit *any* speech that violates egalitarian principles: "'A society which holds that egalitarianism, non-violence, consensualism, and mutuality are basic to any human interaction, whether sexual or other, is clearly justified in controlling and prohibiting any medium of depiction, description or advocacy which violates these principles.'"[242] Here the Court drew on its recent decision in *Regina v. Keegstra*, where it upheld a statute criminalizing "hate propaganda" by invoking both the harm of propagating messages of prejudice among the general population as well as the harm of psychological and perhaps even physical injury to targeted groups.[243] Materials portraying the sexual degradation and dehumanization of women, the *Butler* Court held, pose the risk of similar harms.[244]

Having satisfied itself that the obscenity statute served a legitimate, pressing, and substantial government purpose, the Court turned next to the question whether the means chosen were proportional to that purpose. There are three aspects to such an inquiry: Were the measures chosen rationally connected to the objective? Did they impair the freedom of expression only minimally? And finally, did the infringement on freedom of expression outweigh the objectives sought?

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237. *Id* at 467, 490-91.
238. *Id* at 492.
239. *Id.*
240. *Id.* at 493.
241 *Id.*
242. *Id* at 493-94 (quoting MACGUIGAN REPORT, *supra* note 222, § 18:4).
243. *Id.* at 496; *see* R. v. Keegstra, [1990] 3 S.C.R. 697, 747-48.
244. *See Butler*, [1992] 1 S.C.R. at 496-97.

In a series of cursory general remarks, the Court signaled in advance the outcome, stating that obscene material is of little value: "[T]he kind of expression which is sought to be advanced does not stand on equal footing with other kinds of expression which directly engage the 'core' of the freedom of expression values."[245] This was not a view shared by all the parties. While the Attorney General for Ontario had argued that pornography implicates only the value of "'individual self-fulfilment,' and only in its most base aspect, that of physical arousal," civil liberties groups had argued that "pornography forces us to question conventional notions of sexuality and thereby launches us into an inherently political discourse."[246] With little analysis, the Court simply opined that the standard it had elucidated, properly applied, would affect only "base" material of little value,[247] and would not "inhibit the celebration of human sexuality" or other core values at the heart of free expression.[248] According to the Court, this conclusion is "further buttressed by the fact that the targeted material is expression which is motivated, in the overwhelming majority of cases, by economic profit."[249] The Court did not explain how obscenity differs from fully protected expression such as political journalism in this respect.

After these preliminaries, the Court had little trouble concluding that the legislative measure was proportional to the objectives sought. Although "a direct link between obscenity and harm to society may be difficult, if not impossible, to establish," the Court said that it was "reasonable to presume" that such a causal relationship existed.[250] It observed that in the United States, the Meese Commission had argued that such a link exists, and in *Slaton*, Chief Justice Burger had held that such a link might reasonably be presumed absent conclusive proof.[251] It also held that the legislation satisfied the "minimal impairment" prong, stating: "This Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups."[252] Finally, the Court ruled that the legislative objective was not outweighed by the infringement, which, the Court repeated, affected speech that "lies far from the core of the guarantee of freedom of expression[,] . . . appeals only to the most base aspect of individual fulfilment, and . . . is primarily economically motivated."[253] Accordingly, the Court concluded that the legislative infringement on freedom of expression was justified under the Charter.

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245. *Id.* at 500.
246. *Id.* at 499-500.
247. *Id.* at 509.
248. *Id.* at 500.
249. *Id.* at 501.
250. *Id.* at 502.
251. *Id.* at 502-04 (quoting with approval from 1 ATTORNEY GEN.'S COMM'N ON PORNOGRAPHY, FINAL REPORT 326 (1986) [hereinafter MEESE COMMISSION REPORT] and Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60-61 (1973)).
252. *Id.* at 505 (quoting with approval Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R 927, 999)
253. *Id.* at 509.

### C. *The Implementation of* Butler: *Big Brother and* Little Sisters

Despite *Butler*'s egalitarian rhetoric, the implementation of the new standard has been repressive and discriminatory. Canadian government authorities continued to use obscenity law overwhelmingly to target and harass sexual minorities, as they had done for many years before the decision. Up to seventy-five percent of the material detained and examined by Canadian Customs was directed to gay and lesbian audiences.[254] Gay and lesbian bookstores carrying a broad range of titles (i.e., not predominantly erotica) routinely had their entire shipments impounded.[255] Customs officials detained material for months at a time, and returned shipments to the sender with some items missing and the remainder so damaged as to be unsalable, leading at least one supplier to cease shipments to Canada altogether.[256] In several cases, bookstores appeared to be targeted merely for engaging in political criticism of the government.[257] General interest bookstores and even adult bookstores selling exclusively pornographic materials catering to a heterosexual clientele experienced no comparable harassment.[258]

Among the titles confiscated were novels by internationally acclaimed authors such as Jean Genet and Marguerite Duras.[259] Often mainstream booksellers were able to import the same books without any problems,[260] although shipments of serious literature to mainstream and even university destinations were periodically targeted as well.[261] Other authors whose works were seized as obscene include Langston Hughes, Audre Lorde, Anne Rice, and Oscar Wilde.[262] Despite the ostensibly feminist rationale underlying the *Butler* decision, well over half the feminist bookstores in Canada were also targeted.[263] Among the feminist materials seized were the lesbian magazine *Hothead Paisan*, which portrays no sexual activity, and ironically, even two works (*Pornography: Men Possessing Women* and *Woman Hating*) by Andrea Dworkin, a pro-censorship feminist whose work was an important inspiration for the approach to obscenity regulation championed in *Butler*.[264] Meanwhile, mainstream works that seemingly would fall afoul of the legal definition of obscenity were untouched. Madonna's *Sex*, which "contains an account of a sexual encounter with a pubescent boy," and Bret Easton Ellis's *American Psycho*, which contains explicitly sexual depictions of torture, rape, and murder, were freely imported.[265]

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254. *See* Little Sisters Book & Art Emporium v. Canada, [2000] 2 S.C.R. 1120, 1184.

255. *See id.* at 1137-39.

256. *See id.* at 1218-19 (Iacobucci, J., dissenting in part).

257. *See* STROSSEN, *supra* note 29, at 236 (describing harassment of Le Dernier Mot bookstore after it published transcripts embarrassing to the government and of Pages Bookstore after it installed an anticensorship display).

258. *See Little Sisters*, [2000] 2 S.C.R. at 1138-39 (majority opinion).

259. *See id.* at 1139.

260. *Id.*

261. *See, e.g.*, STROSSEN, *supra* note 29, at 238 (describing seizure of copies of Duras's novella *The Man Sitting in the Corridor* ordered by Trent University, because the novella depicts violence against a female character).

262. *See id.* at 238-39.

263. *See id.* at 231.

264. *See id.* at 236-37.

265. *See Little Sisters*, [2000] 2 S.C.R. at 1219 (Iacobucci, J., dissenting in part).

These abuses did not lead the courts to reconsider the wisdom of the *Butler* doctrine. In the immediate aftermath of *Butler*, a number of lower courts upheld highly questionable obscenity determinations against gay and lesbian material with only the most cursory analysis.[266] When the issue finally came before the Supreme Court in *Little Sisters Book & Art Emporium v. Canada*, the Court unanimously rejected the plaintiffs' arguments that the *Butler* community standard of tolerance approach suppresses minority speech, that it tends to subject sexual minorities to prejudicial treatment, and that its purportedly harm-based test was merely a new form of moral regulation in disguise.[267] The problem, in the Court's view, lay merely in the failure to implement the *Butler* standard correctly.[268]

In denying the *Little Sisters* plaintiffs' request for injunctive relief, the Court relied on the government's assurances that it had "addressed the institutional and administrative problems" at issue during the six-year period since the litigation began.[269] The Court expressed confidence that, should further legal action be necessary, its decision provided the plaintiffs "with a solid platform from which to launch" such action.[270] According to the plaintiffs, however, Customs merely stopped disrupting shipments while the litigation was active, and within two weeks of the Supreme Court's *Little Sisters* decision in 2000, shipments to the store began disappearing again.[271]

### D. Labaye: *The Death of Community Standards?*

Meanwhile, in 2005, in *Regina v. Labaye*,[272] the Supreme Court, without formally overruling *Butler*, appeared to discard some of its least defensible aspects, including most notably the community standards test itself. Jean-Paul Labaye, who operated a Montreal sex club, was convicted of the criminal offense of keeping a "common bawdy-house."[273] The case thus involved indecency rather than obscenity, but the Court largely analyzed the case under Canadian obscenity doctrine as it had evolved from *Hicklin* through *Dominion*

266. *See* Glad Day Bookshop v. Canada, [1992] O.J. 1466 QUICKLAW (Ontario Ct. Gen. Div. July 14, 1992); R. v. Scythes [1993] O.J. 537 QUICKLAW (Ontario Ct Provincial Div. Jan. 16, 1993). A discussion of these cases can be found in Brenda Cossman, *Feminist Fashion or Morality in Drag? The Sexual Subtext of the* Butler *Decision*, *in* BAD ATTITUDES ON TRIAL: PORNOGRAPHY, FEMINISM, AND THE *BUTLER* DECISION 107, 130-38 (Brenda Cossman et al. eds., 1997).

267. *See Little Sisters*, [2000] 2 S.C R. at 1159-64 (majority opinion). *Accord id.* at 1221-23 (Iacobucci, J., dissenting in part).

268 Accordingly, the Court restricted its award of relief to a declaration that Customs had acted improperly and the invalidation of a provision of the Customs Act that shifted the burden of proving obscenity *vel non* from the Crown to the importer. *See id.* at 1201, 1205 (majority opinion).

269. *Id.* at 1203

270. *Id.* at 1204.

271. *See* Patrick Brethour, *Little Sisters Closing Book on Legal Battle*, GLOBE & MAIL (Toronto), Jan. 23, 2007, at S1 The Little Sisters bookstore subsequently filed a new challenge to the continuing systemic discrimination and requested an advance of costs The trial court granted that request, but the British Columbia Court of Appeal reversed and the Supreme Court of Canada affirmed the appellate decision, holding that the fact that Customs was continuing to detain a high percentage of gay and lesbian material was not prima facie evidence of targeting, and that the issues at stake were not of public importance. *See* Little Sisters Book & Art Emporium v. Canada, [2007] 1 S.C.R. 38, 68, 73-74 Financially exhausted after two decades of litigation, Little Sisters abandoned its legal struggle, leaving it to the government to decide which books it could import and sell. *See* Brethour, *supra*.

272. [2005] 3 S.C.R. 728.

273. *Id* at 733.

*News*, *Towne Cinema*, *Butler*, and *Little Sisters I*.[274] In *Labaye*, however, the Court departed dramatically from key doctrines developed in those cases.

In *Butler*, the Court had stated that "the most important . . . [test of obscenity] is the 'community standard of tolerance' test,"[275] and then simply equated it with the harm test, stating that "degrading or dehumanizing . . . . material would, apparently, fail the community standards test . . . because it is perceived by public opinion to be harmful to society."[276] It insisted that the question whether pornography causes harm "is not susceptible to proof in the traditional way" and therefore in this matter the "arbiter is the community as a whole."[277] The role of the Court was to determine "what the community would tolerate others being exposed to on the basis of the degree of harm that would follow from such exposure";[278] likewise, in evaluating a claim of artistic necessity, "[t]he court must determine whether the sexually explicit material when viewed in the context of the whole work would be tolerated by the community as a whole."[279]

In *Labaye*, the lower court had convicted the defendant, finding that "Canadian society does not tolerate orgies."[280] But the Supreme Court quashed the conviction, rebuking the lower court for its reasoning, which "erroneously harks back to the community standard of tolerance test," which it claimed "has been replaced . . . by the harm-based test developed in *Butler*."[281] Application of the community standard of tolerance test, which under *Butler* was the most important test of obscenity, was now treated as reversible error.

Thus, while claiming simply to follow *Butler*, the *Labaye* Court rejected the concept of community standards that had formerly been the foundation of Canadian obscenity doctrine. The Court suggested that community standards are impossible to ascertain or to apply objectively:

> In a diverse, pluralistic society whose members hold divergent views, who is the "community"? And how can one objectively determine what the community, if one could define it, would tolerate, in the absence of evidence that [the] community knew of and considered the conduct at issue? In practice, once again, the test tended to function as a proxy for the personal views of expert witnesses, judges and jurors. . . . The result was that despite its superficial objectivity, the community standard of tolerance test remained highly subjective in application.[282]

The replacement of community standards test with a harm test, the Court argued, was a distinct advance in the law. The criminal law generally is grounded in objective criteria, based on harm, and criminal indecency should

274. *Id.* at 737-40.
275. R. v. Butler, [1992] 1 S.C.R. 452, 476.
276. *Id* at 479.
277. *Id.* at 484.
278. *Id.* at 485.
279. *Id.* at 486.
280. R. v. Labaye, [2005] 3 S.C.R. 728, 756.
281. *Id*
282. *Id.* at 738-39.

be no exception to this rule.[283] Moreover, the Court asserted, "[h]arm or significant risk of harm is easier to prove than a community standard."[284]

The *Labaye* Court also radically departed (albeit *sub silentio*) from the approach of *Butler* on the issue of the standard of proof required to show that alleged indecent conduct or obscene material causes harm. The *Butler* Court upheld the suppression of "degrading and dehumanizing" pornography, although it admitted that the claim that such material causes harm "is not susceptible of exact proof,"[285] and suggested that "[t]he most that can be said . . . is that the public has concluded that exposure to [such] material . . . must be harmful in some way."[286] According to the *Labaye* Court, however, the threshold for proof of harm is very high. The harm must be so great as "to interfere with the proper functioning of society"; moreover, such harm must be "objectively shown beyond a reasonable doubt."[287] In particular, "[t]he causal link between images of sexuality and anti-social behaviour cannot be assumed"; it "must be proved."[288] While the earlier cases insisted that expert evidence was not required (and may even be inappropriate) in obscenity cases, in *Labaye* the Court stated that "in most cases, expert evidence will be required to establish that the nature and degree of the harm makes it incompatible with the proper functioning of society."[289]

In short, the *Labaye* Court appeared to completely jettison reliance on community standards of tolerance in favor of a harm-based test. The Court elaborated on the requirements of the test, which it summarized as consisting (in the case of indecency) of two elements:

> 1. That, by its *nature*, the conduct at issue causes harm or presents a significant risk of harm to individuals or society in a way that undermines or threatens to undermine a value reflected in and thus formally endorsed through the Constitution or similar fundamental laws by, for example:
>
> (a) confronting members of the public with conduct that significantly interferes with their autonomy and liberty; or
>
> (b) predisposing others to anti-social behaviour; or
>
> (c) physically or psychologically harming persons involved in the conduct, and
>
> 2. That the harm or risk of harm is of a *degree* that is incompatible with the proper functioning of society.[290]

It is difficult to see what is left of earlier Canadian obscenity doctrine after this decision. *Labaye* clearly represents a profound, if unacknowledged, departure from *Butler*. But because *Labaye* dealt with indecency rather than obscenity, the extent of that departure is difficult to gauge. The harm at issue in *Butler* (perpetuation of negative and demeaning images, predisposition

283. *See id.* at 733-34, 741.
284. *Id.* at 741.
285. R. v. Butler, [1992] 1 S.C.R. 452, 479.
286. *Id.* at 480, 481 (twice quoting this same passage from Towne Cinema Theatres Ltd. v. The Queen, [1985] 1 S.C.R. 494, 524 (Wilson, J., concurring)).
287. *Labaye*, [2005] 3 S.C.R. at 750.
288. *Id.* at 751-52.
289. *Id.* at 752.
290 *Id.* at 753-54.

towards antisocial conduct) was that identified in part 1(b) of the test set out in *Labaye*. But curiously, the *Labaye* Court insisted that in considering this type of harm, "it is relevant to inquire whether the conduct is public or private," because the "harm can arise only if members of the public may be exposed to the conduct or material in question."[291] It is not entirely clear why this should be so. Under *Butler*, if exposure to conduct or expression predisposes people to harm, it would not seem to matter that the exposure takes place in private.

Indeed, the Court's attempt to distinguish *Butler* in applying this subprong of the test was less than convincing. The Court stated that the fact that the sex club was a "commercial establishment does not in itself render the sexual activities taking place there commercial in nature."[292] But the same could be said of obscenity—the fact that it is commercially available does not render the expression itself commercial. Furthermore, the Court said, in Labaye's sex club, unlike in the pornography distributed by Butler, "[n]o one was . . . treated as a mere sexual object for the gratification of others."[293] Considering that the Court was discussing anonymous group sex, that proposition is open to question.

### E. *Community Standards in U.S. and Canadian Law*

At least until recently, obscenity doctrines in the United States and Canada have shared significant similarities. Both relied on community standards to define the statutory and constitutional parameters of obscenity. In both legal systems, the introduction of community standards was justified on the grounds that it was substantially more objective, definite, and liberal than the earlier *Hicklin* standard. However, expert evidence was not required (and may sometimes even be inappropriate) in order to establish community standards in this area. Instead, the factfinding judge or jurors are entitled to rely on their own personal knowledge of community opinion to establish the relevant community standards.

But while U.S. obscenity doctrine has remained largely stagnant since 1973, when *Miller* was decided, Canadian doctrine has evolved rapidly, and salient differences between the two approaches have emerged. In the United States, community standards (even in federal prosecutions) are typically drawn from the state or local rather than the national community, and some older opinions sometimes seem to suggest that a national standard is an impossibility. But dissenting Justices have continued to criticize the use of local standards, and in the era of the Internet it appears to be under particular strain. In Canada, on the other hand, the community standard was a national standard. The questions to be decided according to community standards also differed. In the United States, under the *Miller* test, both prurient appeal and patent offensiveness are evaluated according to community standards, but serious literary, artistic, political, or scientific value is not. The "serious value" prong of the test thus provides a significant check on the ability of the community to impose its standards on others. In Canada, on the other hand,

291. *Id.* at 748.
292. *Id* at 755.
293. *Id.*

community standards were applied not only in evaluating the community's tolerance for the material in question (roughly analogous to the patent offensiveness prong of *Miller*, although the Canadian standard was expressly a standard of tolerance, not taste), but also in evaluating the "internal necessities test" or "artistic defence" (analogous to the serious value prong of *Miller*).

The greatest difference, however, relates to the underlying philosophical rationale for the constitutionality of prohibiting obscenity. In the United States, the Supreme Court has said little about the underlying reasons for permitting obscenity to be proscribed, and its one major pronouncement on the subject (in *Slaton*)[294] was far from clear. But at the forefront of the Court's concern seems to be the notion of moral corruption of the consumers of pornography and resultant moral harm to the community as a whole, even if the Court cryptically claimed that it was not simply deferring to majoritarian morality. Concerns that pornography might incite its users to inflict harm on others are deemphasized, perhaps for lack of empirical evidence. In Canada, on the other hand, the rationale was almost reversed. In *Butler*, the Supreme Court expressly rejected the notion that conventional majoritarian morality could justify violation of the freedom of expression, and instead justified the obscenity law on the grounds that it serves to prevent harm. This harm was understood not in terms of the moral corruption of the consumers of pornography (understood to be typically men), but rather in terms of damage to society (particularly through the degradation and dehumanization of women). This harm-based rationale was ultimately inconsistent with the community standards approach, and *Butler*'s tortured attempt to reconcile the two was unconvincing. Recognizing this, in *Labaye* the Court finally abandoned the community standards test, which it criticized as both practically unworkable and theoretically indefensible.

## V. PROBLEMS WITH COMMUNITY STANDARDS

The suppression of material that does not conform to community standards raises a host of constitutional problems. It has been claimed that obscenity is constitutionally unprotected because it does not convey significant ideas or because it is undertaken purely for profit. Upon examination, these claims are difficult to sustain, which suggests that the special treatment of obscenity reflects simple disapproval or prejudice against sexual speech. The very notion that community standards are ascertainable is itself highly problematic. The idea of a national standard is especially problematic; yet the idea that constitutional protection should vary in accordance with local standards is inconsistent with a national constitutional right. Finally, even assuming that community standards can be ascertained, enforcing them as moral standards would violate the basic freedoms of speech and conscience, while enforcing them to prevent harm to society is difficult to defend both logically and empirically.

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294. *See supra* notes 184-189 and accompanying text.

### A. *Is Sexual Expression Constitutionally Unprotected?*

#### 1. *Sexual Expression as Speech*

A threshold question in the constitutional analysis of obscenity is whether it (or sexually explicit material generally) is "speech" or expression entitled to constitutional protection. In U.S. constitutional doctrine, obscenity is considered to be "categorically . . . unprotected by the First Amendment."[295] This is said to be so because in obscene materials "communication of ideas, protected by the First Amendment, is not involved."[296] Moreover, some Justices on the Supreme Court (but never a clear majority) have suggested that even nonobscene sexual expression may be entitled to lesser constitutional protection than other forms of expression. For example, in upholding zoning restrictions on adult businesses engaged in the sale of nonobscene material, four Justices agreed that although "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."[297] Similarly, in upholding restrictions on the broadcasting of nonobscene but "indecent" references to "excretory and sexual organs and activities," three Justices were of the opinion that "[w]hile some of these references may be protected, they surely lie at the periphery of First Amendment concern."[298] Three Justices subscribed to a similar view in upholding a ban on nude dancing.[299]

The Canadian Supreme Court has taken a rather similar approach. While conceding that obscenity is constitutionally protected expression for the purposes of Section 2(b) of the Charter, the *Butler* Court clearly viewed it as entitled to a lower level of constitutional protection than other types of expression for purposes of the proportionality analysis under Section 1. Of the values that "underlie the protection of freedom of expression," namely, "the search for truth, participation in the political process, and individual self-fulfillment,"[300] the Court ruled that pornography appeals "only to the most base aspect of individual fulfillment,"[301] which the Attorney General argued is "that of physical arousal."[302] Accordingly, the Court concluded that pornographic or obscene expression "does not stand on an equal footing with other kinds of expression which directly engage the 'core' of freedom of

295. Miller v. California, 413 U.S. 15, 23 (1973).

296. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973).

297. Young v Am. Mini Theatres, 427 U.S. 50, 70 (1976) (plurality opinion) (Stevens, J.).

298. FCC v. Pacifica Found., 438 U.S. 726, 743 & n.18 (1978) (plurality opinion) (Stevens, J.).

299. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (plurality opinion) (Rehnquist, C.J.) ("[N]ude dancing . . . is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so."). *But cf.* City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (repudiating the rationale but not the result of *Barnes*). *See generally* Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108, 1108 (2005) (arguing that the Court's nude dancing decisions "are built on a foundation of sexual panic, driven by dread of the female body").

300. R. v. Butler, [1992] S.C.R. 452, 499.

301. *Id.* at 509.

302. *Id.* at 500.

expression values."[303] Thus the Court had little trouble concluding that such expression could constitutionally be suppressed.

The argument that obscenity is unprotected because it conveys no ideas (or no ideas worth protecting) is in considerable tension with the free speech jurisprudence of the U.S. and Canadian Supreme Courts in other areas. The cases do not support the claim that the constitutional guarantee of free expression extends only to the expression of ideas, at least in the narrow sense of logical propositions that must either be true or false, much less that it can be limited to political debate. Art and music, for example, which often cannot be reduced to "ideas" or logical propositions, are nonetheless fully protected, as exemplified by the presence of an exception for artistic speech in U.S. and Canadian obscenity doctrine. The U.S. Supreme Court has recognized that First Amendment protection is not limited to the purely cognitive communication of ideas—it covers "not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well": indeed, emotion, rather than any "idea," "may often be the more important element of the message sought to be communicated."[304]

Indeed, if obscenity is unprotected under the guarantee of freedom of expression, whether on the ground that it promotes immorality or harm to society, the existence of an artistic exception seems puzzling.[305] Surely an artistically compelling presentation poses a greater danger of promoting immorality or harm than a presentation that is inept and pedestrian. As Judge Jerome Frank has written, obscene writings that have literary or artistic value, "just because of their greater artistry and charm, will presumably have far greater influence on readers than dull inartistic writings."[306] The same is true of visual depictions. If one believes that Jacques-Louis David's painting the *Death of Marat* is a glorification of revolutionary fanaticism and violent terror, then it is all the more heinous because it is so artistically compelling.[307] And of course, the existence of an artistic exception places judges in the position of having to decide issues of "literary merit and historical significance,"[308] questions upon which professional literary and art critics disagree. Moreover, as the history of judicial condemnation of widely acknowledged masterpieces has repeatedly demonstrated, judges have no special qualification to give meaningful opinions on such matters.[309]

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303. *Id.*

304. Cohen v. California, 403 U.S. 15, 26 (1971) (overturning the conviction of a defendant for wearing in court a jacket bearing the words "Fuck the Draft").

305. Indeed, the MacKinnon-Dworkin model antipornography ordinance makes no exception for works of literary or artistic value, and MacKinnon has suggested that such value should be legally irrelevant. "[I]f a woman is subjected, why should it matter that the work has other value? . . . Existing standards of literature, art, science, and politics are, in feminist light, remarkably consistent with pornography's mode, meaning, and message." CATHERINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 202 (1989).

306. United States v. Roth, 237 F.2d 796, 820 (2d Cir. 1956) (Frank, J., concurring), *aff'd*, 354 U.S. 476 (1957).

307. *Cf.* SIMON SCHAMA, THE POWER OF ART 221-24 (2006) (discussing David's *Death of Marat* and its political context).

308. Memoirs v. Massachusetts, 383 U.S. 413, 427 (1966) (Douglas, J., concurring).

309. *See id.*

If freedom of expression extended only to the communication of ideas, then vast swaths of expression in our society would be unprotected. Depictions of food appeal primarily to the senses rather than to the intellect, stimulating gluttony in the same way that erotic depictions may stimulate lust. The analogy is sufficiently close that it has been noted that the term "food porn" is "only slightly metaphorical."[310] And certainly gluttony can cause harm, at least to gluttons (as our current epidemic of obesity and attendant ills such as diabetes and heart disease amply demonstrates), and imposes additional costs on society by raising expenditures on healthcare. Can we therefore ban depictions or descriptions of unhealthy foods? Similarly, although it would be difficult to argue that sports events contribute to political debate, the search for truth, or the general exchange of ideas, it might be argued that sports too are harmful, on the grounds that participants can suffer serious injuries, and that athletics may stimulate unhealthy forms of male bonding, possibly leading to aggression or other forms of antisocial behavior. Yet it has been rightly observed that no one would claim that sports events "are outside of the First Amendment unless they can be proved to have redeeming social value."[311]

2. *Feminist Approaches*

Some feminist censorship advocates have advanced a very different argument. They claim that pornography does in fact advance an idea, namely the subordination of women. But these advocates argue that pornographic speech is also conduct, namely a practice of discrimination or subordination. For legal purposes, they urge, pornography should be suppressed as conduct rather than as speech, just like abusive language in the employment context or discriminatory advertisements in the housing context. For example, in their model antipornography ordinance, Catherine MacKinnon and Andrea Dworkin define pornography as a form of conduct—"the graphic sexually explicit subordination of women."[312] MacKinnon purports to be puzzled by the distinction between speech and conduct that underlies First Amendment jurisprudence. If pornography is protected as expression, she asks, why not rape and murder?[313] If pornography is construed as speech rather than conduct, MacKinnon argues, then the subordination of women receives constitutional protection.[314] Pornography deserves no such protection, because it conveys no ideas worth protecting. What is the First Amendment value, MacKinnon asks, of the "idea of a penis ramming into a vagina?"[315]

Similarly, the Canadian feminist censorship advocate Kathleen Mahoney has argued that pornography is "a practice of sex discrimination" and therefore is not protected by the freedom of expression.[316] Like MacKinnon,

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310. SUMNER, *supra* note 201, at 14 (2004).

311. DANIEL A. FARBER, THE FIRST AMENDMENT 131 (2d ed. 2003)

312. MACKINNON, *supra* note 28, at 121 n.32 (quoting model pornography ordinance).

313. *See id.* at 29-30.

314. *See id.* at 29.

315. *Id.* at 24.

316 Kathleen Mahoney, *The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography*, 55 LAW & CONTEMP. PROBS. 77, 94 (1992).

Mahoney appears to reject the basic distinction between speech and conduct that underlies constitutional free expression jurisprudence. The Supreme Court of Canada, she argues, "says violence in the form of murder or rape would not be protected" under the constitutional freedom of expression, "but it fails to tell us why."[317] According to Mahoney, pornography, like "hate speech" is constitutionally unprotected when directed against historically subordinate groups; only "hate propaganda . . . directed against historically dominant group members" deserves constitutional protection.[318] She praises the Canadian approach for considering the "social reality"[319] that she claims the U.S. First Amendment ignores and suggests that true "[h]uman rights start where civil liberties end."[320]

Many other feminists, of course, have rejected this position. They note that obscenity law has been used to suppress feminist speech from Margaret Sanger and Emma Goldman to Karen Finley, and the feminist-inspired antipornography approach adopted in Canada has similarly been deployed to suppress the work of Andrea Dworkin herself.[321] They argue that such suppression is inevitable—there is an inherent contradiction in any attempt to enlist patriarchal state power to suppress patriarchal discourse.[322] While anticensorship feminists agree that much pornographic (as well as nonpornographic) expression conveys misogynistic messages, they prefer to rely on their own speech to expose and denounce than to trust the state with the awesome power to suppress them.[323] And they argue that there is also much pornography that conveys positive images of women.[324] According to these feminists, far from being "radical," the approach advocated by MacKinnon is "deeply reactionary"[325] and paternalistic, and the similarity between her views and those of right-wing fundamentalists is no accident.[326] MacKinnon has contemptuously dismissed feminist opponents of censorship as "Uncle Toms," "Oreo cookies," and "house niggers," implying that they are unworthy to be called feminists at all.[327] But they include many leaders of the feminist movement, including Betty Friedan, Kate Millett, and innumerable others.[328]

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317. *Id.* at 83.

318. *Id.* at 88.

319. *Id.* at 89.

320. *Id.* at 102.

321. *See* STROSSEN, *supra* note 29, at 11, 31-32, 206, 228.

322. *See id.* at 31-32.

323. *Id.* at 48.

324. *See id.* at 161-78.

325. Jeanne L. Schroeder, *Catharine's Wheel: MacKinnon's Pornography Analysis as a Return to Traditional Christian Sexual Theory*, 38 N.Y.L. SCH. L. REV. 225, 225 (1993); *see also* Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1609 (1988) (characterizing MacKinnon's theory as "pre-liberal" and "in essence . . . religious"). MacKinnon's argument that pornography is undeserving of constitutional protection because it appeals primarily to the senses rather than to reason is in fact strikingly similar to arguments earlier advanced by religious conservatives. *See, e.g.*, John M. Finnis, *"Reason and Passion": The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222, 227 (1967).

326. *See, e.g.*, West, *supra* note 225, at 684-93.

327. *See* STROSSEN, *supra* note 29, at 32 (citing Pete Hamill, *Women on the Verge of a Legal Breakdown*, PLAYBOY, Jan. 1993, at 186 (quoting MacKinnon)).

328. *Id.* at 34.

### 3. *The Speech-Conduct Distinction in the Courts*

The extreme, if not radical, claim that obscenity (or "pornography") may be legally suppressed simply as conduct rather than speech has never been accepted even by courts (such as the Supreme Court of Canada) most sympathetic to MacKinnon's and Mahoney's arguments, and for good reason. The distinction between speech and conduct, even if it sometimes requires difficult line drawing, is fundamental to constitutional free expression. Speech is regarded as worthy of special protection both because it is so central to individual identity and autonomy of conscience and because any harms it causes are generally of a lesser order than those caused by conduct.[329] The distinction between pornography and rape is clear enough to most people, even though it is not acknowledged by Catherine MacKinnon. If speech could be stripped of constitutional protection and regulated as mere conduct simply because it offends important (and even constitutionally protected) values like equality, the constitutional freedom of expression would be eviscerated. The government would be free to suppress any speech that conflicted with its own moral or constitutional vision.

### 4. *Obscenity as "Commercial Speech"*

Another, and even less convincing, rationale sometimes offered for the disparate treatment of sexual material is that it is merely a form of commercial speech. The U.S. Supreme Court has never explicitly endorsed this rationale, but it seems largely to underlie the doctrine of "pandering" (that is, the notion that material not in itself obscene may become so if marketed in a way that appeals to the prurient interest).[330] It appears even more explicitly in some individual opinions, for example in Chief Justice Warren's concurrence in *Roth*, which emphasized that the defendants "were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect."[331] The Supreme Court of Canada has gone even further and explicitly endorsed this rationale (although not expressly under the rubric of "commercial speech").[332]

But obscenity cannot be treated for constitutional purposes as commercial speech. The mere fact that material is sold for profit is irrelevant to the question whether it is constitutionally protected. Otherwise, not only "pornography" but also newspapers and novels would be unprotected. The U.S. cases make clear that "commercial speech" (which in any case is constitutionally protected) means advertising.[333] Advertising may be regulated to protect the integrity of the marketplace for the same sorts of reasons that

329. *See* Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 974 n.238 (2001).

330. *See, e.g.*, Ginzburg v. United States, 383 U.S. 463, 467-75 (1965).

331. Roth v. United States, 354 U.S. 476, 496 (1957) (Warren, C.J., concurring).

332 *See* R. v Butler, [1992] 1 S C R 452, 501 (stating that the Court's conclusion that obscenity may be treated differently from other forms of expression was "further buttressed by the fact that the targeted material is expression which is motivated, in the overwhelming majority of cases, by economic profit").

333 *See, e.g.*, Bolger v. Youngs Drug Prods. Corp , 463 U.S. 60, 67-68 (1983); Va State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976).

consumer safety laws may be enforced; but all speech for profit cannot be regulated for the same reason. Likewise, although the Canadian cases do not formally treat "commercial speech" as a separate category for the purposes of freedom of expression claims,[334] the cases in which the courts have held that a profit motive might justify infringement on expression have similarly involved advertising.[335] Moreover, the very case on which the *Butler* Court relied to support its "profit motive" argument actually *struck down* the challenged regulation on expression, stressing that adults had a right to receive the expression in question.[336] Thus, the fact that "obscene" materials are sold for profit cannot justify diminished constitutional protection.

### 5. *The Social Value of Sexual Expression*

If the grounds cited by the courts ("it does not convey ideas," "it is conducted for profit") do not in fact justify the disparate treatment of sexual speech, we must ask, what is the real reason for such disparate treatment? It is hard not to conclude that the courts are operating on the unexpressed assumption that sexual expression is especially dangerous, shameful, or immoral, and therefore subject to suppression on the same grounds as shameful or immoral sexual conduct.[337] Yet to the extent that private consensual sexual conduct is no longer considered constitutionally punishable, it is hard to see why private sexual expression should be.

Moreover, the assumption that material stigmatized as pornography is utterly lacking in social value is defensible only within the context of certain narrowly limited moral world views. "Obscenity" and "pornography" can be, but need not be, degrading or dehumanizing; they can also be liberating and empowering. Many feminists reject the notion of censorship and celebrate pornography's potential to enhance the pleasure of both women and men and to break down repressive sexual conventions.[338] For sexual minorities, such as gay people, pornography may provide rare positive images that affirm their own sexuality.[339] It can be an important weapon in the fight against AIDS and other sexually transmitted diseases, by eroticizing safer sex practices.[340] And it may transmit important artistic, social, and political messages, which the artistic exception cannot be relied upon to protect adequately.[341] As Amy

334. *See* Ford v. Quebec, [1988] 2 S.C.R. 712, 755 (rejecting the U.S. approach that treats commercial speech "as a particular category of speech entitled to First Amendment protection of a more limited character than that enjoyed by other types of speech").

335. *See, e.g.*, Rocket v. Royal Coll. of Dental Surgeons of Ont., [1990] 2 S.C.R. 232; Irwin Toy Ltd. v. Quebec, [1989] 1 S.C.R. 927.

336. *See Rocket*, [1990] 2 S.C.R. at 247-48, 250-51.

337. *Cf.* FARBER, *supra* note 311, at 131-32 (arguing that U.S. obscenity jurisprudence appears to presuppose that sexual urges are uniquely dangerous).

338. *See, e.g.*, STROSSEN, *supra* note 29, at 161-78.

339. *See* Jeffrey G. Sherman, *Love Speech: The Social Utility of Pornography*, 47 STAN. L. REV. 661 (1995).

340. *See* Adler, *supra* note 32, at 1532.

341. As Justice Scalia has pointed out,

> it is quite impossible to come to an objective assessment of (at least) literary or artistic value, there being many accomplished people who have found literature in Dada, and art in the replication of a soup can. . . . Just as there is no use arguing about taste, there is no use litigating about it. For the law courts to decide "What is Beauty" is a novelty even by

Adler has shown, much modern or postmodern artistic expression, including the work of the performance artist Karen Finley or the photographer Robert Mapplethorpe, might easily fall within the legal definition of obscenity or pornography.[342] The existence of an "artistic exception" has not always protected even acknowledged works of classic art and literature from the depredations of policemen, customs officials, judges, and juries. It would be foolish to expect it to protect the avant-garde.

### B. *How Are Community Standards to Be Ascertained?*

#### 1. *Community and Geography*

The notion of community normally implies a group united by common social or cultural characteristics. Even such relatively cohesive and well-defined communities are in themselves diverse, and their individual members can be expected to have a wide range of attitudes with respect to controversial subjects such as obscenity or pornography. The same is true *a fortiori* of "communities" that are defined only by political geography. Geographically defined communities do not necessarily share a wide range of common values, and in particular, common values regarding sexual expression. Yet it is precisely from such "communities" that "community standards" are supposed to be derived.

One of the clearest points of divergence between U.S. and Canadian law, prior to the latter's abandonment of the community standards test, concerned the geographic scope of the relevant community for purposes of determining community standards. In the United States, the relevant community is left undefined, but the cases suggest that a national standard is nonexistent, and that therefore a state or local standard should apply. In Canada, on the other hand, the relevant community was the nation, and the cases made clear that community standards for purposes of obscenity law did not vary from one part of the country to the other. Each of these approaches is highly problematic for different reasons.

#### 2. *Problems with a National Standard*

The difficulty with a national standard is that a national community of values regarding obscenity scarcely exists. The problems of aggregating individual standards become more intractable the wider we cast our net. The U.S. Supreme Court has not actually held that application of a national standard is impermissible, and has upheld obscenity convictions where national standards were purportedly applied.[343] But the *Miller* Court recognized the difficulty of applying such a standard when it insisted that the

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today's standards.

Pope v. Illinois, 481 U.S. 497, 504-05 (1987) (Scalia, J., concurring).

342. *See* Adler, *supra* note 32, at 1526-27, 1535-38, 1542-44.

343. *See, e.g.*, Hamling v. United States, 418 U.S. 87 (1974), *see also id.* at 145-46 (criticizing the majority's characterization of trial court's references to national standards as "isolated" when jury instructions referred to them eighteen times); *cf id.* at 109 (referring to "confusing and often gossamer distinctions between 'national' standards and other types of standards").

United States "is simply too big and too diverse" for a single national standard to be articulated.[344] Because Canada is hardly less diverse than the United States, the difficulty of articulating a national standard was a weakness of the Canadian approach. As one Canadian judge has written,

> in countries as large and as regionally diverse as Canada and the United States it may be fanciful to believe that a literal country-wide measure can be applied. . . . These considerations may suggest that a community standard is a will-o'-the-wisp, an unknown, and perhaps even an unknowable quantity despite all the expert evidence that can be adduced.[345]

To the extent that *Labaye* signals the abandonment of community standards, this difficulty has been eliminated.

### 3. *Problems with Local Standards*

Local standards raise many of the same practical problems as national standards, and also raise serious constitutional problems of lack of uniformity. The substitution of state or local standards for national ones under the U.S. approach hardly solves the difficulty of articulating such standards. In *Miller*, for example, the community standards applied were those of the State of California.[346] The irony, Justice Stevens has pointed out, is that "[a] more culturally diverse State of the Union hardly can exist, and yet its standard for judging obscenity was assumed to be more readily ascertainable than a national standard."[347] Even local standards will reflect a genuine consensus only in very small or unusually homogeneous communities.[348]

The most serious objection to the U.S. approach, however, is one of principle rather than practicability. The *Miller* Court admitted that First Amendment protections "do not vary from community to community,"[349] but under the *Miller* test, they do precisely that. As Justice Brennan pointed out, in no other area of the law do we permit a federal constitutional protection to diminish in proportion to local intolerance for the protected activity.[350] It is no answer to say, as the *Miller* Court did, that issues of community standards are simply "questions of fact."[351] Community standards are the basis of the legal test for obscenity, and if varying local standards are applied, then the protection of the First Amendment will necessarily vary from one community to the next.[352]

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344 Miller v. California, 413 U.S. 15, 30 (1973); *cf. id.* at 32 ("[T]here is no provable 'national standard.'" (quoting with approval Jacobellis v. Ohio, 378 U.S. 184, 200 (1964) (Warren, C.J., dissenting))).

345. R. v. Cameron, [1966] 2 O.R. 777, 804-05 (Laskin, J., dissenting). For discussion of other decisions expressing similar views, see SUMNER, *supra* note 201, at 105, 224 & nn.55-56.

346. *Miller*, 413 U.S. at 31.

347. Smith v. United States, 431 U.S. 291, 314 (1977) (Stevens, J., dissenting).

348. *See id.* at 304 n 10.

349. *Miller*, 413 U.S. at 30.

350. *See* Jacobellis v. Ohio, 378 U.S. 184, 194 (1964).

351. *Miller*, 413 U.S. at 30.

352. The application of local standards is doubly incongruous in federal obscenity prosecutions. Because the statutory definition of obscenity under federal law has been held to track the constitutional definition, *see, e.g.*, Hamling v. United States, 418 U.S. 87, 105 (1974), the federal statutory standard is likewise not uniform throughout the nation. Such a variable constitutional and

### 4. *Community Standards in the Internet Age*

The anomaly of permitting federal constitutional protection to vary according to local standards of tolerance has become especially egregious in the Internet age. The Supreme Court has recognized that "the 'community standards' criterion as applied to the Internet means that any communication available to a nation-wide audience will be judged by the standards of the community most likely to be offended by the message."[353] Despite some recent progress in geolocation technology, it is still not possible for a website operator to restrict access only to certain jurisdictions, and the imperfect technology that does exist can be prohibitively expensive.[354] Although when it addressed this issue in 2002 the Supreme Court stopped short of holding that reference to contemporary community standards alone did not render Internet regulation overbroad in the context of one particular purely facial challenge,[355] a majority of the Justices recognized that the application of local community standards could present serious constitutional problems in future challenges, whether on a facial or as-applied basis.[356]

### 5. *Community Standards and Individual Standards*

In a democracy, community standards cannot be determined except by reference to the subjective standards of the individuals who comprise the community. That statement might seem almost tautological, but some have denied it. Patrick Devlin, for example, argued that in ascertaining "the moral judgments of society," it is "not enough that they should be reached by the opinion of the majority."[357] Instead, reference must be made to "the man in the street" or "reasonable man," who "is not to be confused with the rational man" because "[h]e is not expected to reason about anything and his judgment may be largely a matter of feeling."[358] How do we ascertain the values of the reasonable man? Lord Devlin gave at least two answers, which he apparently did not think inconsistent. His first answer is that the reasonable man is the "right-minded man," "the man in the jury box,"[359] and the touchstones of his moral values are "intolerance, indignation and disgust," which are "the forces behind the moral law."[360] It is not at all clear under this first formulation that the morality of the reasonable man differs meaningfully from the morality of the majority. Lord Devlin does not explain why, if it is illegitimate to rely on the latter, it is nonetheless proper to enforce the moral judgment of a jury moved by "intolerance, indignation and disgust." Such a judgment seems inherently subjective.

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statutory standard is inconsistent with normal First Amendment principles. *See Smith*, 431 U.S. at 312-16 (Stevens, J., dissenting).

353. Reno v. ACLU, 521 U.S. 844, 877-78 (1997).

354. *See* ACLU v. Gonzales, 478 F. Supp. 2d 775, 807, 820 n.13 (E.D. Pa. 2007).

355 *See* Ashcroft v. ACLU, 535 U.S. 564, 584-85 (2002).

356. *See supra* notes 176-183 and accompanying text.

357. PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 15 (1959).

358. *Id.*

359. *Id*

360. *Id* at 17

But a few pages later, Lord Devlin suggests a second answer that offers an escape from individual subjectivity. At least for the purposes of the legal enforcement of morality, he argues, "no practical difference" exists "between Christian morals and those which every right-minded member of society is expected to hold."[361] In his view, "the law must base itself on Christian morals."[362] In fact, however, there is widespread disagreement among Christians both about what Christian moral principles require in specific situations and about the extent to which such principles may be made binding as law. But even assuming such agreement existed, a uniquely privileged position for Christian morality in the law cannot be defended in a society committed to pluralism of faith and conscience.

More recently, Harry Clor has similarly rejected the notion that "public morality is nothing more than an aggregate of opinions that happen to be held by a majority of individuals or social groups at the moment."[363] Instead, he argues, "public morality" is "rooted in long-range civic interests and is generally recognized as such"; it is "periodically acknowledged in civic discourse by institutional or opinion leaders and sanctioned, more or less, by the legal order."[364] As Clor admits with considerable understatement, his criterion for ascertaining what constitutes public morality is "not unproblematic."[365] But Clor never articulates or defends the rule of recognition on which his whole theory would seem to depend. He never explains which statements by which "institutional or opinion leaders" are to be regarded as authoritative and why. In authoritarian or aristocratic societies, public morality has been equated with the morality professed by ruling elites. In seventeenth- and eighteenth-century England, for example, moral standards were set by the established church, by the monarchy, or by a parliament which at that time represented a relatively narrow segment of society. Under such circumstances, as we have seen, obscenity was little more than a species of blasphemy (an offense against established religion) or sedition (an offense against the government in power). But with the rise of democracy and political and religious pluralism, it was no longer acceptable for the church or the government to dictate moral standards. Clor's claim that the principles of public morality are to be found in the utterances of unspecified "opinion leaders" is both arbitrary and antidemocratic.

Perhaps, as Clor's reference to the "legal order" suggests, in a democracy the community's standards are to be sought in the law itself. But this hardly establishes that the community's morality exists independently of the moral views of individuals—in fact quite the opposite. The law itself is a reflection of the will of individuals, as manifested through their representatives in the democratic legislative process. If societal morality can be said to exist independent of that process as some sort of Platonic idea or Rousseauian *volonté générale*, then we could not with any confidence find it

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361. *Id.* at 23.

362. *Id.* at 25.

363. HARRY M. CLOR, PUBLIC MORALITY AND LIBERAL SOCIETY: ESSAYS ON DECENCY, LAW, AND PORNOGRAPHY 13 (1996).

364. *Id.*

365. *Id*

in the statute books. Furthermore, the notion that community standards of morality are to be found in the law itself does not get us very far, particularly when the law does not define those standards in any detail. In an obscenity prosecution, the question whether material violates community standards is said to be a question of fact. It would be odd if the factfinder were expected to look to the law to resolve that question, and it is hard to see how the law could offer any specific guidance.

### 6. *Aggregation of Standards*

Community standards, then, must in some sense be an aggregate of the standards of the individuals who comprise the community. But how are we to determine the community's standards when those individuals do not all share the same common standards? We might posit that the community standard is the standard adhered to by the majority of members of the community, but what if no single majority standard exists? Perhaps we might argue that the standard is a kind of average standard—this seems to be what the trial court in the *Ulysses* decision was getting at when it spoke of the "person with average sex instincts—what the French would call *l'homme moyen sensuel*."[366] But the notion of an average standard is also problematic, and the problem, as Sumner has pointed out,

> extends well beyond the fact that these opinions resist quantification. Suppose that the opinions of the members of some community are sought on the question of whether the sale or rental of hard-core sex videos ought to be permitted and that 55 per cent respond "yes", 35 per cent respond "no", and the remaining 10 per cent are undecided or have no opinion. What is the average opinion in this case? We can readily identify a level of tolerance supported by a majority in the community, but the notion of an average level seems to have no clear sense.[367]

The problem here seems to be that "yes" and "no" do not lie along a continuous spectrum of possible answers. The problem is even more acute if the numbers were, say, forty percent "yes," forty-five percent "no," and fifteen percent undecided. In such a case we have neither a clear average nor a clear majority. Based on the exact same data, one could argue either that the material should be proscribed because a majority of those expressing an opinion thought it should, or that it should not be proscribed, because a majority of all those polled did not think it should.

Perhaps instead, as Sumner suggests, those judges who have spoken of an average have conceived of it as "a kind of midpoint between extremes."[368] In other words, perhaps they meant a median rather than an arithmetical mean. This might seem to solve the problem of discontinuity. But the notion of an average standard still implies the existence of a spectrum of tolerance that can be ranked along a single dimension, from least intolerant to most intolerant. The problem with this approach is that a single dimension of tolerance does not exist. Some people might find intolerable material that depicts sexual

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366. United States v. One Book Called "Ulysses," 5 F. Supp. 182, 184 (S.D.N.Y. 1933), *aff'd sub nom.* United States v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705 (2d Cir. 1934).

367. SUMNER, *supra* note 201, at 106.

368. *Id*

activity that takes place outside of marriage; others, material that depicts certain sexual activities, regardless of the legal relationship between the parties involved; still others, materials that in their view degrade and dehumanize. A determination that material is unacceptable under one of these standards does not necessarily imply that it is unacceptable under any of the others. As long as multiple dimensions or standards of tolerance exist, it is impossible to rank members of a given community from least to most tolerant in a manner that is simultaneously valid under each standard. So the notion of a median standard is also chimerical.

In most cases, of course, the finder of fact does not have any reliable evidence of what the community standard actually is, whether it is understood as a majority standard, a mean, or a median. Typically, empirical evidence on this question is not introduced, and it may be impracticable to develop reliable empirical evidence on the precise material involved in each prosecution. But the U.S. Supreme Court has gone even further and suggested that the use of expert evidence may be inappropriate:

> This is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. No such assistance is needed by jurors in obscenity cases; indeed the "expert witness" practices employed in those cases have often made a mockery out of the otherwise sound concept of expert testimony.[369]

Not only is empirical evidence not required, but the Court has upheld obscenity convictions where the trial judge refused to admit such evidence, reasoning that the trial court has wide discretion in such matters and that, even if the exclusion were erroneous, such error is harmless.[370] Earlier Canadian decisions, relying on such U.S. cases, likewise held that triers of fact can rely exclusively on their own personal knowledge to decide issues of community standards.[371] The danger of such an approach was cogently expressed by the trial judge in *Butler*, who complained that it "is difficult . . . to understand" how a judge can be expected to apply community standards "in the absence of evidence, without relying on conclusions that are entirely personal."[372]

Recognizing these problems, the Canadian Supreme Court has repudiated the community standards approach as unworkable. In *Labaye*, the Court criticized as incoherent the very notion that a "diverse, pluralistic society whose members hold divergent views" can constitute a single community with ascertainable standards.[373] And even if such a community could be identified, the Court asked, "how can one objectively determine what [it] would tolerate, in the absence of evidence that [it] knew of and considered" the material in question? [374] Thus, "despite its superficial objectivity . . . the community standard of tolerance test remained highly

369. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 n.6 (1973) (citations omitted).

370. *See* Hamling v. United States, 418 U.S. 87, 104-10 (1974).

371. Towne Cinema Theatres Ltd. v. R, [1985] 1 S.C.R. 494, 514 (quoting *Slaton*, 413 U.S. at 56 n.6).

372. R. v. Butler, [1989] 6 W.W.R 35, 47 (Man. Q.B.).

373. Labaye v. The Queen, [2005] 3 S.C.R. 728, 738.

374. *Id.*

subjective in application."[375] Moreover, while older decisions permitted triers of fact to rely on their own personal knowledge to assess community standards, without expert evidence, the *Labaye* Court insisted that the new harm-based approach will almost require "assistance from expert witnesses."[376]

Thus community standards cannot yield an intelligible rule that would predict and explain which materials are unacceptable. The most we can expect is an ad hoc determination in each case as to whether a majority of members of the community would consider a given item obscene. And because empirical evidence on this question is typically not introduced, it is almost inevitable that the factfinding judge or jurors will substitute their own views for those of the community. Learned Hand once said that each jury verdict in an obscenity case is "really a small bit of legislation ad hoc."[377] Even worse, in the absence of any fixed and intelligible standards, it is legislation *post* hoc. Moreover, the determination of community standards in an obscenity case is far more problematic than the determination of, say, reasonableness in a negligence case. Not only is the standard vaguer and more malleable, but also it is invoked to override a fundamental freedom. Noting that each jury in an obscenity prosecution "constitutes a tiny autonomous legislature," Jerome Frank asked, "was it the purpose of the First Amendment, to authorize hundreds of divers jury-legislatures, with discrepant beliefs, to decide whether or not to enact hundreds of divers statutes interfering with freedom of expression?"[378]

## VI. OBSCENITY AND HARM

The enforcement of community standards has been justified in the United States on moral grounds, and in Canada until recently in order to prevent "harm to society." However, "community standards of morality" may be little more than unreflective prejudices, and even if they reflect considered ethical views, the imposition of such views in the absence of concrete harms merely to stifle contrary viewpoints cannot be justified in a democratic society. On the other hand, the fact that material violates community standards (assuming such standards to be ascertainable) does not prove that they are harmful, as the Supreme Court of Canada has now implicitly recognized. The impact of that Court's substitution of a pure harm-based test for the community standards test remains to be seen. If the relevant harms are construed too broadly (so as to include, in particular, moral harm to oneself, and moral offense to others) and the burden of proof too laxly, the new approach signaled in *Labaye* may make little practical difference. The suppression of speech deemed harmful is unlikely to prevent significant harms, but is likely to impose unacceptable costs, especially on subordinated and marginalized sectors of society. On the other hand, if moral harm and

375. *Id.* at 738-39.
376. *Id* at 752.
377. United States v. Levine, 83 F.2d 156, 157 (2d Cir. 1936).
378. United States v. Roth, 237 F.2d 796, 822-23 (2d Cir. 1956) (Frank, J., concurring), *aff'd*, 354 U.S. 476 (1957).

moral offense are excluded, and the burden of proof is as stringent as *Labaye* suggests it should be, then the suppression of erotic material created by and for consenting adults can no longer be justified.

### A. *Moral Offense and Moral Harm*

#### 1. *Mill and Stephen*

The question of the limits on enforcement of majoritarian morality is as old as democracy. Under democracy, the greatest threat to liberty is the tyranny of the majority. In *On Liberty*, John Stuart Mill focused on this problem. What are the proper limits to use of coercion by the majority against the individual? Mill's famous answer was:

> That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise.[379]

The rationale behind Mill's so-called "harm principle" is that freedom is essential for human progress, and if individual freedom means anything, it must mean that there is a protected private sphere that is free from external control.[380] This sphere must encompass freedom of conscience as well as freedom of expression, which is "practically inseparable" from freedom of conscience; it also "requires liberty of tastes and pursuits."[381] Those who seek to suppress expression that they believe to be wrong assume their own infallibility.[382]

On questions of morality in particular, Mill argues that a distinction must be drawn between conduct that directly affects others and conduct that affects the actor alone. In the case of conduct affecting others, the majority is more often likely to be right than wrong, "because on such questions they are only required to judge of their own interests; of the manner in which some mode of conduct, if allowed to be practised, would affect themselves."[383] But in the case of conduct affecting the actor alone, the majority "is quite as likely to be wrong as right," because the actor is generally the best judge of what is good or bad for himself.[384] As Mill put it,

> there is no parity between the feeling of a person for his own opinion, and the feeling of another who is offended at his holding it; no more than between the desire of a thief to

379. MILL, *supra* note 10, at 22
380. *See id.* at 26-27.
381. *Id.* at 26.
382. *Id.* at 34.
383. *Id.* at 150.
384. *Id.*

take a purse, and the desire of the right owner to keep it. And a person's taste is as much his own concern as his opinion or his purse.[385]

Therefore, in Mill's view, the mere fact that the community finds private activity morally offensive is no grounds for regulating or suppressing it.

Mill's work is the greatest landmark in the theory of free expression. The debate it sparked continues to this day. A few months before Mill's death, Sir James Fitzjames Stephen sharply attacked his view that the law should not regulate purely private conduct on moral grounds. Stephen was himself a utilitarian and a former disciple of Mill, but he came to believe that Mill had deserted the true principles of utilitarianism for a mawkish and sentimental attachment to liberty.[386] Stephen's attack on Mill was entitled *Liberty, Equality, Fraternity*, and it is fair to say that he took a rather dim view of all three.[387] More than a hundred years before the Reverend Falwell, Stephen insisted on the right of an overwhelming "moral majority" to impose its views on the individual.[388] Far from being neutral in matters of religion and private morality, he insisted that "all government has and must of necessity have a moral basis, and that the connection between morals and religion is so intimate that this implies a religious basis as well."[389]

In Stephen's view, "[v]ice is as infectious as disease. . . . Both vice and virtue are transmissible, and, to a considerable extent, hereditary."[390] Vice excites feelings of hatred in "healthily constituted minds," and ought to be punished not merely in order to prevent harm, but "for the sake of gratifying the feeling of hatred."[391] The gratification of such healthy feelings of hatred is the great value and social utility of "morally intolerant legislation."[392] The suppression of obscenity, for example, is indispensable in a moral society, "because if the law of the land did not deal with it, lynch law infallibly would."[393] Even in the absence of any harm to others, moral legislation appropriately "brands gross acts of vice with the deepest mark of infamy which can be impressed upon them," by punishing them "with exemplary severity."[394]

### 2. *Hart and Devlin*

The nineteenth-century debate between Mill and Stephen was carried forward in the twentieth century by the debate between Lord Devlin and H.L.A. Hart over the Wolfenden Report, which urged decriminalization of

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385. *Id.* at 150-51.

386. R.J. White, *Introduction to* JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY 1, 12 (R.J. White ed., Cambridge Univ. Press 1967) (2d ed. 1874).

387. As Stephen put it, "there are a vast number of matters in respect of which men ought not to be free; they are fundamentally unequal, and they are not brothers at all, or only under qualifications which make the assertion of their fraternity unimportant." STEPHEN, *supra* note 386, at 262.

388. *Id.* at 159.

389 *Id* at 90.

390. *Id.* at 146.

391. *Id.* at 152

392. *Id.* at 150; *see also id.* at 154.

393. *Id.* at 135.

394. *Id.* at 162. In reading such statements, one can hardly doubt his editor's claim that Stephen "was inclined to believe that life would be tolerable but for its enjoyments." White, *supra* note 386, at 3.

private consensual homosexual acts. Echoing Stephen, Devlin insisted that "it is not possible to set theoretical limits to the power of the State to legislate against immorality."[395] This is so, according to Devlin, because "[t]here is disintegration when no common morality is observed . . . so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions."[396] Thus there can be no limits to legislation against private sexual immorality any more than there can against treason and sedition.[397] Accordingly, as discussed above, Devlin defended the right of society to impose "its" morality, the morality of the "man in the street," the irrational "reasonable man," which according to Devlin for all practical purposes is identical with "Christian morals."[398]

H.L.A. Hart undertook to defend Mill's basic thesis that the law may not punish conduct merely because it is commonly deemed to be immoral.[399] But Hart did not go as far as Mill in insisting that harm to others is the only justification for legal coercion. He would also have permitted paternalistic legislation to prevent individuals from doing serious physical harm to themselves, as well as public indecency laws to protect unwilling persons from exposure to material that they find deeply offensive.[400] But he insisted with Mill that private acts that do not cause harm cannot justifiably be punished. Moreover, "harm" under this principle must mean more than "the distress occasioned by the bare thought that others are offending in private against morality."[401] For if the distress caused by knowing that others are acting wrongly can count as harm, so can "the distress incident to the belief that others are doing what you do not want them to do."[402] And if society could punish people simply because it objects to what they do, that would be the end of liberty.

Stephen's argument that society may punish immorality merely to gratify its hatred and to denounce immorality is, according to Hart, "uncomfortably close to human sacrifice as an expression of religious worship."[403] If society wishes to denounce actions that do not cause harm but are nonetheless regarded as immoral, then "a solemn public statement of disapproval," rather than the infliction of suffering, would seem the most appropriate course.[404] As for Devlin's argument that the enforcement of morals is necessary for the preservation of society, Hart replies that not every principle of positive morality (the morality actually accepted by society at a given point in its history) is actually necessary or even justifiable in light of critical (that is, rational) morality.[405] Positive morality at various points in history endorsed torture or racial discrimination. One cannot simply maintain

395 DEVLIN, *supra* note 357, at 14.
396. *Id* at 14-15.
397. *See id* at 14.
398. *Id.* at 15, 23.
399. *See* H.L.A. HART, LAW, LIBERTY, AND MORALITY 4-5 (1963).
400. *See id.* at 30-34, 38-45.
401. *Id.* at 46.
402. *Id.* at 47.
403. *Id* at 66.
404. *See id.*
405. *See id.* at 17-19.

that society has a right to enforce its positive morality to preserve itself without first asking whether those positive moral principles are justifiable in the light of critical morality. Moreover, even a critical commitment to certain principles of positive morality does not justify "the use of legal punishment to freeze into immobility the morality dominant at a particular time in a society's existence."[406] Although Hart concedes that morality is important and even indispensable to society, he argues that it is so precisely because individuals choose to embrace it of their own volition: "To use coercion to maintain the moral *status quo* at any point in a society's history would be artificially to arrest the process which gives social institutions their value."[407]

### 3. *Recent Discussions*

In recent years Harry Clor has presented perhaps the most comprehensive defense of the legal enforcement of public morality with regard to obscenity. Clor is remarkably vague, as we have seen, as to how public morality is to be ascertained and how its enforcement can be justified in a democratic and pluralistic society.[408] But he does offer a normative theory as to why pornography should be regarded as immoral and therefore subject to suppression. The essential problem with pornography, in Clor's view, is that it "obliterates the distinction between human and subhuman sexuality."[409] It depicts "wholly loveless, affectionless sex"; "physical intimacies and reactions normally protected from public observation are placed conspicuously on display"; and it objectifies both women and men, portraying them as "*things* to be used for the gratification of the user."[410]

Clor anticipates at least one potential objection to his views. In business transactions people treat each other as sources of profit, but we do not therefore prohibit contracts or refuse to enforce them on the grounds that they degrade or reduce persons to mere objects. Similarly, hunger is an animal instinct, but we do not suppress depictions of food that incite gluttony on the ground that they are dehumanizing. Clor replies that sex is different because it engages the psyche and personality in ways that other human activities do not.[411] And because sex is morally different, the prurient depiction of sex (obscenity, pornography) requires different legal treatment.

Clor's argument is less than fully convincing even on its own terms. Whatever else human beings are, they are also animals, and to depict human sexuality as an animal function is to portray an aspect of reality, even if it is not the whole reality. Even Clor admits that "objectification is an inescapable part of the story, even of the love story."[412] It might be better if people were attracted to each other based purely on their spiritual qualities, and did not

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406. *Id.* at 72.

407. *Id.* at 75.

408. *See supra* notes 347-349 and accompanying text.

409. CLOR, *supra* note 363, at 187; *cf. id.* at 192 ("Ethically speaking, and most briefly, what is wrong with [pornography] is that it dehumanizes in an area of great human importance and some sensitivity.")

410. *Id.* at 190-92.

411. *See id.* at 205

412. *Id* at 212.

objectify one another based on their physical characteristics, but to expect or require this is perhaps too much to ask of most human beings. It could be argued that Clor objects to pornography not so much because it appeals to the subhuman element in our nature as because it fails to conform to a particular superhuman standard of morality. Andrew Koppelman has observed that Clor's argument that pornography reduces people to objects echoes that of Kant, who worried that sex causes one to focus on one's own pleasure to the exclusion of one's partner's.[413] As Koppelman points out, "[t]he huge question that Clor leaves unanswered is whether sexuality is redeemable on his terms, or whether his view, like Kant's, logically must condemn sex as such."[414]

Koppelman in fact accepts Clor's claim that obscenity can cause moral harm. According to Koppelman, morally bad art or literature in general, and obscenity in particular, may promulgate "morally bad fixed norms," that is, normative beliefs implicit in the narrative that are also taken to be applicable in the real world.[415] They have the potential to cause "a person to be mistaken about his fundamental purposes" by clouding his ability to make correct moral value judgments.[416] Sexual objectification, which is seen as the core wrong of pornography, exists in two forms. The first, "self-centeredness," is a contingent moral evil, depending "on whether someone else's valid claims are being neglected."[417] The second, "cruelty," is intrinsically evil—it involves the conscious neglect of another's humanity.[418] The reason that "obscenity induces its consumers to entertain morally bad fixed norms" is that "sexuality has a powerful tendency to distort our powers of perception and judgment."[419]

Koppelman argues that moral harm rather than offense to community standards is the core concern of obscenity law. Ultimately, however, Koppelman concludes that the concern about moral harm cannot justify the suppression of obscenity. "The idea of moral harm appears not to be susceptible to codification in a legal definition."[420] No test can be devised that targets moral harm precisely, and any attempt to do so will necessarily be too vague to give fair notice as to what is prohibited.[421] Moreover, if government could legislate to suppress material that causes moral harm, it could suppress all kinds of expression, not just obscenity.[422] Furthermore, even if we concede that obscenity *may* cause moral harm, it is impossible to show that it *does*, not least because moral harm is internal; "[i]t is hard to find a single *demonstrable* instance of moral harm caused by obscenity."[423] And even if we agree that

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413. *See* Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1649 (2005) (citing IMMANUEL KANT, LECTURES ON ETHICS 162-68 (Louis Infield trans., Methven & Co. Ltd. 1930) (1924)).

414. *Id.* at 1651.

415 *Id.* at 1643-44 (quoting WAYNE C. BOOTH, THE COMPANY WE KEEP: AN ETHICS OF FICTION 141, 142-43 (1988)).

416. *Id.* at 1643.

417. *Id.* at 1650.

418. *Id.* at 1649-50.

419. *Id* at 1652.

420. *Id.* at 1660.

421. *Id.* at 1674.

422. *See id.* at 1674-75.

423. *Id.* at 1675.

moral harm exists, there is unlikely to be broad agreement as to which material causes moral harm, and what that harm consists of.[424] He concludes, therefore, that the doctrine of obscenity is unworkable and should be abandoned.

Koppelman's argument that concerns about moral harm cannot justify obscenity regulation is convincing. But he concludes, perhaps too readily, that the prevention of moral harm is in fact the goal of obscenity law, and that therefore the focus of courts and scholars on the issue of offensiveness to community standards has been misplaced. To suppress material merely because the community finds it offensive would be unjustified, Koppelman argues, so that cannot be the purpose of the law: it *must* be aimed at preventing moral harm.[425] But the legal definitions of obscenity are in fact framed in terms of offense to community standards, not moral harm. As Koppelman observes, material deemed obscene under the U.S. *Miller* test "is not identical to, and only fortuitously overlaps with" morally harmful matter.[426] The Canadian *Butler* standard does purport to focus on harm to society (not exactly the same as moral harm), but, as Koppelman observes, that test is confusing and vague, and has been applied in a repressive and discriminatory manner.[427] An obscenity doctrine based on moral harm is vulnerable to many of the same objections as one based on mere offense to community standards: vagueness, potentially sweeping reach, and imposition by the state of morally contested norms.

Moral norms, especially norms regarding sexual behavior, are inevitably contested. Clor proposes to ban material that objectifies and dehumanizes, but rejects as impossibly unrealistic an alternative feminist proposal condemning material in which each participant does not regard the "desires and experiences" of every other participant as having a "validity and subjective experience equal to" her own.[428] Koppelman condemns a softcore *Playboy* pictorial entitled "Exotic Beauties" featuring women of color with no sex or violence of any kind (because "it constructs women of color as a kind of exotic forest primeval"[429]), but argues that vastly superior fixed norms are embodied in a website entitled "Boiled Alive!," which consists of visual and written fantasies "of boiling naked women alive and eating them"[430] (because unlike the *Playboy* pictorial, the website contains a disclaimer insisting on "a healthy separation of fantasy and reality").[431] Other reasonable people could easily reach diametrically opposite conclusions from those reached by Clor and Koppelman on those respective issues. There is a vast gamut of subjective moral views regarding sexuality and the depiction of sexuality in our society.

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424. *Id.*

425. *Id.* at 1654-55.

426. *Id.* at 1656.

427. *See id* at 1659.

428. CLOR, *supra* note 363, at 194 (quoting Helen E. Longino, *Pornography, Oppression, and Freedom: A Closer Look*, *in* TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY 40, 42 (Laura Lederer ed., 1980)). Clor ridicules such a standard as "strikingly (preposterously?) high-minded. . . . [Y]ou must have an *equal* regard for your and your partner's sexual experience!" *Id.*

429. Koppelman, *supra* note 413, at 1657.

430. *Id.* at 1658.

431. *Id.* (quoting Boiled Alive!, http://daha.best.vwh.net/boiled/main.shtml (last visited Apr. 2, 2008)).

These views yield no clearly ascertainable standard, and imposing them by force violates individual moral autonomy. A libertarian approach avoids both the indeterminacy and the violation of moral autonomy that characterizes the imposition of subjective moral norms for their own sake. Under this approach, unless some demonstrable harm such as coercion, invasion of privacy, or the exploitation of minors is involved, adult individuals should be free to make up their own minds what to write, read, depict, or see.

#### 4. *Moral Reasoning and Irrational Prejudice*

In any case, it is implausible to think that in applying community standards jurors typically engage in sophisticated Kantian ratiocination about moral harm. In deciding what is patently offensive to community standards of decency, they are more likely to resemble Lord Devlin's "man in the jury box," the "reasonable man" who "is not expected to reason about anything," but rather to render judgment based on his personal feelings of "intolerance, indignation and disgust."[432] Perhaps, like Stephen's "moral majority," they are moved by hatred of vice and fear of the threat of contagion that it poses. The philosophy behind the *Miller* test is not animated by a sophisticated rational theory of moral harm. The Court requires no logical or empirical demonstration of moral harms, merely that the proscribed material violates the community's moral standards. But as social intuitionist theorists have argued, moral judgment is often a matter primarily of nonrational feelings of disgust, justified if necessary only after the fact by moral reasoning about harm.[433] *Miller* thus presupposes that the community's moral beliefs, even if those beliefs are grounded in irrational fears and prejudices, are a sufficient warrant for the use of legal coercion.[434] This is a jurisprudential vision that William Eskridge has aptly termed the "Constitution of Disgust and Contagion."[435] Such an approach will naturally fall hardest on those who deviate from the norms of the majority.

U.S. constitutional doctrine not only countenances, but also encourages such a result. Under the *Miller* community standards test, to qualify as obscene, material must both appeal to the prurient interest and be patently offensive. As Kathleen Sullivan has put it, it is obscene if it simultaneously "turns you on" and "grosses you out" (provided of course that it is deemed sufficiently "worthless").[436] But the "you" involved is not really the same person: obscenity "turns on" its producers and consumers, and "grosses out" its censors (the police, prosecutors, and the courts).[437] In the case of "deviant" material, this division of the audience is made explicit in the Court's jurisprudence. Materials that "depict such deviations as sado-masochism, fetishism, and homosexuality"[438] satisfy the "prurient interest" prong if they

432. DEVLIN, *supra* note 357, at 17.

433. *See* William N. Eskridge, Jr., *Body Politics.* Lawrence v. Texas *and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1022-23 (2005).

434. *See id.* at 1036-37 (discussing Miller v. California, 413 U.S. 15 (1973)).

435. *See id.* at 1044.

436. Jeff Rosen, Miller *Time*, THE NEW REPUBLIC, Oct. 1, 1990, at 17.

437. *Id.*

438. Mishkin v. New York, 383 U.S. 502, 505 (1966).

appeal to the prurient interest of members of the "deviant" group.[439] But the "patent offensiveness" of such material is still judged by the standards of the community as a whole. In other words, it is obscene if it "turns on" a "deviant," but "grosses out" a "normal" person. Obviously, such a test is a recipe for the repression of sexual minorities.

Fortunately, since the nineteenth century, the appeal to simple majoritarian morality, without any grounding in demonstrable harms, has gradually faded from our constitutional discourse. As Suzanne Goldberg has demonstrated, since World War II the Supreme Court has rarely invoked a pure morals rationale to sustain government action.[440] The clearest counterexample, *Bowers v. Hardwick*,[441] has now been decisively repudiated. In overruling *Bowers*, the Court in *Lawrence v. Texas* stressed that personal "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[442] The Court held that the importance of personal autonomy should counsel against regulation of sexual conduct "absent injury to a person or abuse of an institution the law protects."[443] In the absence of such concrete harms, the Court suggested that a majority may not "use the power of the State to enforce [ethical and moral] views on the whole society through the operation of the criminal law."[444] Adult individuals have substantial autonomy rights especially in matters pertaining to sex and in making their own moral choices.[445] "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . ."[446]

In the current constitutional context, the regulation of obscenity under the *Miller* community standards test is no longer defensible. In a widely noted recent decision, a district court held federal obscenity statutes unconstitutional, citing *Stanley* for the proposition that the government may not employ coercion to control the moral content of a person's thoughts and *Lawrence* for the proposition that in the absence of concrete harm, mere majoritarian morality cannot justify criminal sanctions, particularly in the private sexual sphere.[447] Invoking stare decisis, the Third Circuit promptly reversed, mechanistically invoking the Supreme Court's earlier decisions,

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439. *Id.* at 508; *see also* Hamling v. United States, 418 U.S. 87, 128-29 (1974); Miller v. California, 413 U.S. 15, 33 (1973).

440. *See* Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233, 1243-1300 (2004).

441. 478 U.S. 186 (1986).

442. 539 U.S. 558, 562 (2003).

443. *Id* at 567.

444. *Id.* at 571.

445. *See id.* at 572 ("[L]iberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."); *see also id* at 574 ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." (quoting Planned Parenthood of Se. Pa. v Casey, 505 U.S. 833, 851 (1992))).

446. *Id.* at 577 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)); *see also id.* at 578 ("Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here.").

447. United States v. Extreme Assocs., Inc., 352 F. Supp 2d 578, 588-92 (W.D. Pa. 2005), *rev'd*, 431 F.3d 150 (3d Cir. 2005), *cert. denied*, 547 U.S. 1143 (2006); *see* Sienna Baskin, *Deviant Dreams:* Extreme Associates *and the Case for Porn*, 10 N.Y. CITY L. REV. 155 (2006).

without addressing the substance of the district court's reasoning.[448] It thus left unresolved the glaring contradiction between the earlier cases endorsing the imposition of mere majoritarian morality and recent decisions rejecting it.

In rejecting mere majoritarian morality as a permissible basis for criminal sanctions, the Court in *Lawrence* did not of course claim that moral concerns may never animate the law. The prevention of harm to others is itself a moral principle, but one rooted not just in the conventional views of an adventitious majority, but also in fundamental rational concerns for the protection of society and its members. The same is true of other fundamental principles embodied in the Constitution, such as equality, individual autonomy, and freedom of conscience and expression. Mere feelings of disgust or hatred not grounded in such rational principles, on the other hand, cannot justify coercive state action to override fundamental constitutional rights. The doctrine of obscenity does not require a rational justification for a jury's verdict that speech is so disgusting that the speaker should be sent to prison. Therefore, it cannot be squared with the constitutional freedom of speech and conscience.

### B. *Community Standards and "Harm to Society"*

The Supreme Court of Canada has rejected reliance on subjective majoritarian standards of morality to invade fundamental rights: "To impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract."[449] Morality grounded in Charter values is a permissible ground for legislation, but not morality grounded merely in subjective preferences of the majority.[450] However, the Court held that the purpose of the Canadian obscenity statute was not to impose moral values but to avoid "harm to society."[451]

The *Butler* Court did not repudiate prior Canadian obscenity jurisprudence, which like its U.S. counterpart, made "contemporary community standards" the test of obscenity. It simply declared (quite implausibly) that the community standards test and the harm test are identical.[452] The *Butler* Court offered no justification for this claim and indeed quoted Chief Justice Dickson's observation that "there is no necessary connection between these two concepts."[453] This observation seems obvious: the community may well tolerate some material that is harmful, and may not tolerate other material that is not simply because it finds it offensive. Nevertheless, the *Butler* Court rejected this observation without explanation. It appears that the Court conflated the community standards and harm tests

448. *See Extreme Assocs.*, 431 F.3d at 155-62.

449. R. v. Butler, [1992] 1 S.C.R. 452, 492.

450. *See id.* at 493.

451. *Id.*

452. *Id.* at 479 (stating that material that is "degrading or dehumanizing" will "fail the community standards test . . . because it is perceived by public opinion to be harmful to society, particularly to women").

453. *Id.* at 480 (quoting Towne Cinema Theatres Ltd. v. The Queen, [1985] 1 S.C.R. 494, 505).

simply because it would be constitutionally impermissible to impose community standards for their own sake.[454]

As many commentators have observed, the *Butler* Court's conflation of the community standards and harm tests is incoherent. Richard Moon has characterized the contradictions inherent in *Butler* as the result of a problematic attempt to reconcile a pro-censorship feminist approach with a fundamentally conservative statute on the one hand and an individualistic and liberal free speech tradition on the other.[455] Moreover, as L.W. Sumner has observed, whether in fact "pornography has the potential for social harm (and, if so, what kind of harm) is a complex empirical question for whose resolution it is appropriate to consult the best available social-scientific evidence. It is not a question to be answered by a public opinion survey."[456]

It might be thought that the *Butler* standard, which was explicitly a standard of tolerance not taste,[457] was potentially more objective than the U.S. approach, which focuses simply on offensiveness. But this approach was hardly much of an improvement. It made intolerance (rather than say, disgust) the reason and the standard for suppression. Furthermore, it is hard to see what a judge would rely on to establish community standards of tolerance, especially in the absence of empirical evidence, which is of course not required. Ultimately, "community standards of tolerance" did not provide a workable objective criterion and judges were left to fall back on their own subjective moral values and tastes.[458]

Even if community standards of tolerance could be objectively ascertained, and even if it were true that those standards were based on concrete harm to society rather than irrational disgust or prejudice, it does not follow that certain texts or images are harmful merely because a majority believes them to be so. The *Butler* Court implicitly recognized this when it stated that the accuracy of social perceptions that certain material is harmful

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454. Unconvincingly, the Court held that this move did not violate the "shifting purpose" doctrine, under which courts may not sustain the constitutionality of legislation by attributing a different purpose than that held by the legislators who enacted it. It did so only by confusing the concepts of morality and harm that it initially insisted ought to be kept separate. *Id.* at 494. The Court characterized Parliament's purpose at such a high level of generality as to be almost meaningless. Although it conceded that the notion of public morality underlying the statute in 1959 might not justify the infringement of a fundamental Charter right, it chose instead to characterize Parliament's purpose quite broadly (even vacuously) as "the protection of society from harms." *Id.* at 495. Furthermore, "[a] permissible shift in emphasis was built into the legislation when, as interpreted by the courts, it adopted the community standards test." *Id* at 496. It was not the legislative purpose that had "changed since 1959," but "community standards as to what is harmful." *Id.* In other words, because *the courts* had *subsequently* interpreted the statute to incorporate shifting community standards (of morality), and then much later *the courts* determined that those standards should refer *not* to majoritarian morality, but to harms, there had been no shift in purpose. The purpose was "the same"; it was merely community standards that had shifted. This argument is as specious as the U.S. Supreme Court's claim that the application of local community standards does not result in variation in constitutional protection. The protection is "the same" everywhere because every locality is still applying community standards.

455. *See* RICHARD MOON, THE CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION 106 (2000).

456. SUMNER, *supra* note 201, at 124.

457. *See Butler*, [1992] 1 S.C.R. at 478.

458. *Cf.* SUMNER, *supra* note 201, at 113-14 (arguing that judgments about community standards "reflect little more than the subjective moral views of judges"); MOON, *supra* note 455, at 111 (arguing that under *Butler*, "[j]udicial subjectivity . . . is simply dressed up in the objective garb of community standards").

"is not susceptible of exact proof"[459] and that "'[t]he most that can be said . . . is that the public has concluded that exposure to [such] material . . . must be harmful in some way.'"[460] But the Court was content to assert that although "a direct link between obscenity and harm to society may be difficult, if not impossible, to establish," it was nonetheless reasonable to conclude that such a link exists.[461]

This is an extraordinarily lax standard of causation, particularly when used to justify the infringement of a fundamental right. Obscenity causes harm because Parliament (or public opinion) might reasonably believe it does. In other contexts, the Supreme Court of Canada has been much more demanding. For example, in striking down a prohibition on brand advertising of tobacco, the Court insisted:

> While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. It is the task of the courts to maintain this bottom line if the rights conferred by our constitution are to have force and meaning. The task is not easily discharged, and may require the courts to confront the tide of popular public opinion.[462]

In *Butler*, on the other hand, rather than confronting the tide of public opinion, the Court simply deferred to it, and indulged the unsupported and unwarranted assumption that whatever the public is unwilling to tolerate *must* be harmful.

### C. *Harm as an Independent Test of Obscenity*

In *Labaye*, however, the Canadian Court implicitly recognized that community standards cannot serve as a meaningful measure of harm. The trial court in that case grounded the defendant's conviction on its finding that the sex club violated community standards of tolerance, yet there was no showing that it harmed anyone.[463] The Supreme Court held that harm, not community standards, is the proper test: "Incompatibility with the proper functioning of society is more than a test of tolerance. The question is not what individuals or the community think . . . ."[464] Moreover, the standard of proof of such harm is quite high. Because suppression implicates fundamental rights, it is not enough to show that the majority thinks the matter suppressed is harmful, or even that it has some reason to think so. Rather, the Court insisted that "as members of a diverse society, we must be prepared to tolerate conduct of

459. *Butler*, [1992] 1 S.C.R. at 479.

460. *Id.* at 481 (quoting Towne Cinema Theatres Ltd. v. The Queen [1985] 1 S.C.R. 494, 524 (Wilson, J.)).

461. *Id.* at 502. It is interesting to note that the Court relied, at least explicitly, far more on conservative U.S. authorities than on feminist sources to buttress what has been mischaracterized as a progressive opinion. *See, e.g.*, *id.* at 479, 502 (relying on the Meese Commission Report for the claim that violent pornography causes sexual violence); *id.* at 503-04 (quoting Chief Justice Burger's opinion in *Paris Adult Theatre I v. Slaton* that the legislature needs no conclusive proof in order reasonably to conclude that obscenity causes antisocial behavior). The Court largely ignored U.S. authorities reaching the opposite conclusion.

462. RJR-MacDonald, Inc. v. Attorney General, [1995] 3 S.C.R. 199, 329 (McLachlin, J.).

463. *See* R. v. Labaye, [2005] 3 S.C.R. 728, 756.

464. *Id.* at 751.

which we disapprove, short of conduct that can be objectively shown beyond a reasonable doubt to interfere with the proper functioning of society."[465] Because *Labaye* involved indecency rather than obscenity, the Court spoke of conduct rather than expression, but there is no reason to think that a lower standard should apply to the suppression of expression. *Labaye* required "proof beyond a reasonable doubt," but the *Butler* Court conceded that the perception that obscenity is harmful "is not susceptible of exact proof."[466] It is therefore difficult to see how a ban on obscenity can survive the rigorous standard propounded in *Labaye*.

The *Labaye* Court discussed three categories of harm: public confrontation with unpalatable material, predisposition to antisocial acts or attitudes, and harm to participating individuals.[467] Regarding the first, the Court suggested that in the context of obscenity (as opposed to indecency) "an element of public exposure is presumed."[468] In fact, nearly the opposite is true. "Confrontation" of an unwilling audience is not a required element of obscenity. Confrontation of unwilling viewers with sexually explicit materials may be dealt with through time, place, and manner restrictions, such as zoning and broadcast regulations, or through tort law doctrines such as invasion of privacy. But it has never been the focus of obscenity law as such. The questions of predisposition to antisocial attitudes and acts and of harm to participants must be examined more closely.[469]

### 1. *Predisposition to Antisocial Acts and Attitudes*

The notion that obscenity may be suppressed merely because it predisposes its audience to antisocial *attitudes* is problematic. Much expression, including political, religious, and literary expression, arguably promotes hierarchy, propagates negative stereotypes, and glorifies domination and even violence. It is not subject to suppression on those grounds, absent more specific harms. But it is often claimed that "degrading or dehumanizing" sexual depictions deserve special treatment because they predispose their audience to antisocial *acts*, and in particular because they increase the propensity of men to abuse women. There is a huge literature on this topic, which can only be briefly summarized here. But the short answer is that empirical support for such a claim is weak and inconclusive.

The Report of the U.S. Commission on Obscenity and Pornography, issued in 1970, determined that "[o]n the basis of the available data . . . it is not possible to conclude that erotic material is a significant cause of sex crime."[470] The 1970 Commission therefore recommended that all statutes criminalizing the sale or distribution of sexual materials to consenting adults

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465. *Id.* at 749-50.

466. *Butler*, [1992] 1 S.C.R. at 479

467. *Labaye*, [2005] 3 S.C.R. at 745-49.

468. *Id* at 746.

469. For a general discussion of these issues, in addition to the sources cited below, see JAMES WEINSTEIN, HATE SPEECH, PORNOGRAPHY, AND THE RADICAL ATTACK ON FREE SPEECH DOCTRINE 130-35, 191-217 (1999).

470. THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 243 (1970).

be repealed.[471] To refute this and other reports, President Reagan instructed his Attorney General Edwin Meese to appoint a new commission, which was dominated by opponents of pornography and charged with finding more effective ways to curb pornography.[472] As expected, the Meese Commission duly contradicted the earlier report and found that a causal connection between sexually violent pornography and crime did in fact exist (there was no similar claim for nonviolent pornography).[473] But the claimed effect appeared to depend on the degree of violence of the material, not the degree of sexual explicitness, "[o]nce a threshold is passed at which sex and violence are plainly linked."[474] The Commission stated that "it is unclear whether sexually violent material makes a substantially greater causal contribution to sexual violence itself than material containing violence alone."[475] Indeed, it concluded that "the so-called 'slasher' films, which depict a great deal of violence connected with an undeniably sexual theme but less sexual explicitness than materials that are truly pornographic, are likely to produce the consequences discussed here to a greater extent than most of the materials available in 'adults only' pornographic outlets."[476] In other words, the Commission found a greater causal link to violence from nonpornographic violent material than from pornographic material.

The principal empirical studies on which the Meese Commission and others who have reached similar conclusions have relied consist of laboratory experiments in which subjects were exposed to violent pornography and then questioned regarding their attitudes. Although some such studies found that exposure of men to such material led to some temporary increase in negative attitudes toward women, they do not support the claim of a causal connection to violence.[477] Indeed, several of the most prominent researchers on whose work the Commission relied repudiated its claim of a causal connection.[478] And significantly, such studies showed that men exposed to both misogynistic and feminist materials had more positive and less discriminatory attitudes than men exposed to feminist materials alone, providing some empirical

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471. *Id.* at 51.

472. *See* BARRY W. LYNN, POLLUTING THE CENSORSHIP DEBATE: A SUMMARY AND CRITIQUE OF THE FINAL REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY 5-6, 14 (1986).

473. *See* 1 MEESE COMMISSION REPORT, *supra* note 251, at 326 ("[T]he available evidence strongly supports the hypothesis that substantial exposure to sexually violent materials . . . bears a causal relationship to antisocial acts of sexual violence and, for some subgroups, possibly to unlawful acts of sexual violence."). The Report characterized this conclusion as "unanimous," but at least two members of the Commission subsequently denied that the social science research has proven a causal link between exposure to pornography and the commission of sexual crimes. *See* STROSSEN, *supra* note 29, at 252. As for nonviolent pornography, which constitutes the vast bulk of commercially available material, some studies have shown that it "actually *reduces* aggression in laboratory settings." Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1182 (1993).

474. 1 MEESE COMMISSION REPORT, *supra* note 251, at 328.

475. *Id.* at 328.

476. *Id.* at 329.

477. *See* STROSSEN, *supra* note 29, at 252.

478. *See* Daniel Linz, Steven D. Penrod & Edward Donnerstein, *The Attorney General's Commission on Pornography. The Gap Between "Findings" and Facts*, 4 AM. B. FOUND. RES. J. 713, 723 (1987).

confirmation, as Nadine Strossen has argued, for the view that the best remedy for negative speech is refutation, not suppression.[479]

It is very difficult to translate laboratory findings to the real world. As Gore Vidal once said, the only thing pornography is known to cause directly is the "solitary act of masturbation."[480] Only a fraction of available sexually explicit material depicts violence.[481] Arguably, even violent pornography may provide a harmless outlet for those who might otherwise engage in actual sexual violence.[482] Surveys in which men were asked to report their own consumption of pornography as well as their level of sexual aggression, found a significant correlation in only "0.84% of the population as a whole."[483] In short, the experimental and survey evidence for the claim that pornography causes violence is exceedingly weak.

Longitudinal and comparative studies utilizing crime statistics furnish even less support for that claim. In Northern Europe and the United States, when restrictions on sexual material were liberalized, rape rates either remained constant or increased more slowly than the overall rate of violent crime; the rates of other sexual offenses actually decreased.[484] Rape rates have historically been much lower in Japan than in the United States although violent pornography is much more prevalent there.[485] A study of the United States found that gender equality was highest in those states where pornography circulated most widely.[486] Of course, it would be rash to conclude from such studies that pornography *causes* a decline in rape or an increase in gender equality. Many cultural factors no doubt affect rates of violence and attitudes toward women. But these studies at least cast doubt on the opposite claim that pornography causes violence or inequality.

2. *Harm to Participants*

The participants in "obscenity" are its producers and consumers. The question of harm to consumers has been examined above in the discussion of moral harm and predisposition to antisocial attitudes. But it is also worth examining the extent to which obscenity harms its producers, discussion of which has focused on those who act in pornographic films. Certainly the use of coercion to produce such materials is a heinous crime. But coercive acts and materials produced thereby may be suppressed without resort to the doctrine of obscenity.

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479. *See* STROSSEN, supra note 29, at 273.

480. *See* David Futrelle, *The Politics of Porn, Shameful Pleasures*, IN THESE TIMES, Mar. 7, 1994, at 14, 17. Vidal continued: "As for corruption, the only immediate victim is English prose." *Id.*

481. *See* STROSSEN, *supra* note 29, at 143; WEINSTEIN, *supra* note 469, at 205-08.

482. *See* RICHARD POSNER, SEX AND REASON 366 (1992).

483. *See* Koppelman, *supra* note 413, at 1667. As Koppelman observes, this is a very small percentage, and even for this small group, correlation is not the same as causation, much less does it indicate the direction of the causal relationship.

484. POSNER, *supra* note 482, at 368-69 (discussing research of Berl Kutschinsky); STROSSEN, *supra* note 29, at 256 (same); SUMNER, *supra* note 201, at 134.

485. POSNER, *supra* note 482, at 369-70; STROSSEN, *supra* note 29, at 256.

486. POSNER, *supra* note 482, at 368-69 (discussing research of Larry Baron and Murray Straus); STROSSEN, *supra* note 29, at 255 (same).

However, it has been claimed that such sexually explicit materials may be suppressed on the grounds that they harm their participants even when the participants deny that this is the case. Chillingly, the *Butler* Court treated the subjective response of such participants as almost irrelevant: "In the appreciation of whether material is degrading or dehumanizing, the appearance of consent is not necessarily determinative. . . . Sometimes the very appearance of consent makes the depicted acts even more degrading and dehumanizing."[487] On this view, consensual sex is more degrading than rape. Similarly, under the Indianapolis antipornography law drafted by Catherine MacKinnon and Andrea Dworkin, the fact "[t]hat the person actually consented" "shall not constitute a defense" to a claim that a person was coerced into performing in pornography.[488] MacKinnon has written that the pleasure taken by the "victim" in sex that MacKinnon deems degrading is "at times tragically real."[489] The notion of harm that emerges from the *Butler* opinion is almost metaphysical. If some poor deluded women take pleasure in acts axiomatically deemed "degrading," their pleasure can only be a tragic form of false consciousness. MacKinnon was of course delighted with *Butler*, and when confronted with the reality that *Butler* was being used to suppress the speech of comparatively powerless groups, including feminists, lesbians, and gays, her response was: "Big surprise."[490]

If harm must be proven beyond a reasonable doubt, as the *Labaye* Court insisted, then neither the public perceptions deemed sufficient in *Butler* nor the impressionistic and metaphysical approach taken by MacKinnon can justify the suppression of sexual expression as obscene. As the *Butler* Court itself recognized, the evidence that pornography causes harm to society is inconclusive, leaving ample room for doubt. A proper application of the *Labaye* standard would leave no room for the suppression of erotica produced by and for willing adults.

Nevertheless, *Labaye* purported simply to follow, not to overrule *Butler*, and its effect on Canadian obscenity law is therefore difficult to predict. Formally, *Labaye* rests on statutory interpretation rather than direct application of the Charter; but because that statutory interpretation is grounded in fundamental constitutional values, and purports to follow *Butler*, it would seem to have unavoidable ramifications for the constitutional treatment of obscenity. The dissenters in *Labaye* complained that the Court had embraced John Stuart Mill's harm principle.[491] That is perhaps an exaggeration. In order for the harm principle to provide any real limit to society's power of coercion, Mill insisted that the class of cognizable harms

487. R. v Butler, [1992] 1 S.C.R. 452, 479.

488. Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 325 (7th Cir. 1985).

489. MACKINNON, *supra* note 28, at 60.

490. STROSSEN, *supra* note 29, at 239. MacKinnon devoted a ten-page paean at the end of *Only Words* to the *Butler* decision, lauding it as the harbinger of a glorious future "in which equality is a fact, not merely a word." MACKINNON, *supra* note 28, at 109. In Canada, she suggested, unlike the United States, perhaps "people talk to each other, rather than buy and sell each other as ideas." *Id.* at 102. Her description of the purpose of the 1959 Canadian obscenity statute is pure fantasy. *See id.* at 103 (stating that it is "a law passed to stand behind a comparatively powerless group in its social fight for equality against socially powerful and exploitative groups").

491. *See* R. v. Labaye, [2005] 3 S.C.R. 728, 769-70 (Bastarache & LeBel, JJ., dissenting).

must be strictly limited. The *Labaye* Court, on the other hand, insisted that the relevant "categories of harm . . . are not closed."[492] But the Court was careful to place significant limits on the types of cognizable harm that are broadly consistent with respect for autonomy and freedom of expression.

Mill rejected paternalism, insisting that only harm to others could justify state coercion. The *Labaye* Court at least tepidly endorsed paternalism by identifying harm to the participants as a relevant source of harm. But it suggested that there are limits to paternalism, and that "[t]he consent of the participant will generally be significant."[493] The Court observed that "consent may be more apparent than real,"[494] and of course courts must properly seek to determine whether consent was genuine. But the Court also stated that "[w]here other aspects of debased treatment are clear, harm to participating individuals may be established despite apparent consent."[495] That statement deserves qualification. Courts should not assume that consensual activity is harmful merely because by the court's or the community's lights it appears "debased" or degrading. To do so would merely reintroduce through the back door, in the guise of "harm," the community standards test that the Supreme Court has now explicitly rejected.

Mill's approach would also seemingly reject the notions of moral distress and moral offense as cognizable harms: if the mere fact that others are distressed at what one says or does is a "harm" justifying social coercion, then the harm principle is vacuous.[496] The *Labaye* Court, however, insisted that the public has a right "to live within a zone that is free from conduct that deeply offends them," although it again suggested that this principle is limited, and that "only serious and deeply offensive moral assaults can be kept from public view."[497] Even with regard to public offenses, courts need to be cautious in applying this principle. In a pluralistic society, we are all confronted with conduct or expression we may find offensive, and generally the appropriate response is to avert one's gaze. In some communities the public might be deeply offended at the sight of a same-sex couple, but not an opposite-sex couple, holding hands.[498] But to criminalize one and not the other would be a gross violation of the right to equal treatment and moral autonomy. However, the state's regulatory powers to curtail offensive displays in the public sphere are much greater than in the private sphere. One may argue, just as the state has the power to curtail other kinds of nuisances, it may regulate public sexual activity or displays that intrude on the privacy and autonomy of others.[499] In the case of expression directed at a willing audience, the nuisance rationale does not apply.[500]

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492. *Id.* at 754 (majority opinion).

493. *Id.* at 748.

494. *Id.*

495. *Id.*

496. *See* SUMNER, *supra* note 201, at 45-46.

497 *Labaye*, [2005] 3 S.C.R. at 745.

498. *Cf.* SUMNER, *supra* note 201, at 45 (referring to same-sex couples). But as Sumner points out, "they may be equally offended by the very thought of what the couple might be getting up to in private." *Id*

499. *Cf.* JOEL FEINBERG, OFFENSE TO OTHERS 22-24, 97-126 (1985) (discussing various offenses against privacy in the public sphere and the idea of obscenity).

500. *Cf. id.* at 188-89 (arguing that the goal of "prevention of offensive nuisances" cannot

## VII. CONCLUSION

Modern obscenity law still reflects its origins in the Victorian anxiety over sex. The community standards doctrine that prevails today in the United States, and that prevailed until recently in Canada, no doubt mitigated some of the harshness of the Victorian *Hicklin* standard. It replaced an elitist test that asked whether impugned matter tended to corrupt and deprave the weakest and most susceptible members of society (whom the Victorians identified as women, children, and the lower classes) with an ostensibly more democratic test that focused on the reaction of the average member of the community. But in so doing it merely replaced the tyranny of an elite with the tyranny of the majority. In contrast, under the new approach adopted by the Canadian Supreme Court, which rejects the community standards test as unjust and unworkable and insists that the alleged harms caused by obscenity be demonstrated beyond a reasonable doubt, consensual erotic expression can no longer justifiably be criminalized.

The manifestly arbitrary and political character of current obscenity enforcement in the United States, in which a handful of defendants are selectively prosecuted, while the major players in the multi-billion dollar pornography industry[501] go unscathed, can only undermine respect for the rule of law. The vague and malleable community standards test, which varies from locality to locality (and from jury to jury), is a potentially powerful weapon of repression in the government's arsenal. Yet, as the Canadian experience demonstrates, any attempt to rationalize and regularize the community standards test, by linking it to harm, or attempting to apply a uniform national standard, will likely result in only greater suppression, not only of "pure pornography" (if such a term has meaning), but of important political, literary, and artistic expression, especially for dissident and subordinated groups, such as feminists and sexual minorities. Concrete harms, such as coercion or the exploitation of children, may be punished under legal doctrines prohibiting such conduct without resort to the concept of obscenity. But alleged moral harm to consenting adults is not a proper concern of the criminal law. The doctrine exempting "obscene" expression from constitutional protection cannot be justified or salvaged and should be scrapped. If freedom of expression means anything, it means this: in the absence of concrete harm to others, the right to decide what to read, to watch, to say, and to think belongs not to the community but to the individual.

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justify government control of "the unobtrusive and willing enjoyment of pornographic materials").

501. Estimates vary, but many reports estimate that the domestic U.S. industry is worth about $12 billion. *See, e.g.*, Beth Barrett, *Porn Is a $12 Billion Industry, But Profits Leave the Valley*, L.A. DAILY NEWS, June 5, 2007, at N1, *available at* http://www.dailynews.com/search/ci_6059391, *see also* Brent Hopkins, *Porn in the Mainstream*, L.A. DAILY NEWS, June 6, 2007, at N1, *available at* http://www.dailynews.com/search/ci_6067497.