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IS PORNOGRAPHY "SPEECH"?

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Is pornography within the coverage of the First Amendment? A familiar argument claims that it is not. This argument reasons that (1) the free speech principle protects the communication of ideas, which appeal to the reason (the major premise); (2) pornography communicates no ideas and appeals to the passions rather than the reason (the minor premise); (3) therefore pornography is not protected by the free speech principle. This argument has been specified in different ways by different writers. The most prominent and careful of these are Frederick Schauer and John Finnis. Both founder on the attempt to distinguish pornography from art, which both would protect. If art, film, and literature should be protected, then this protection should extend to the pornographic subsets of these genres.

Is pornography within the coverage of the First Amendment?[1] A familiar argument claims that it is not. This argument reasons that (1) the free speech principle protects the communication of ideas (the major premise); (2) pornography communicates no ideas (the minor premise); (3) therefore pornography is not protected by the free speech principle.

This argument has been endorsed several times by the Supreme Court. The germinal case of Chaplinsky v. New Hampshire[2] declared that "certain well-defined and narrowly limited classes of speech," among them "the lewd and obscene," were outside the protection of the First Amendment because "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step toward truth that any benefit that may

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1. This essay was provoked by an exchange with Professor James Weinstein, the most recent exponent of this argument, who correctly points out that, although I have questioned the constitutional nonprotection of obscenity, I have not explained why obscenity should be thought to raise any free speech issue in the first place. James Weinstein, *Democracy, Sex and the First Amendment*, 31 N.Y.U. REV. L. & SOC. CHANGE 865, 875 n. 44 (2007), citing Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635 (2005). For a response to Weinstein's specific formulation of the argument, *see* Andrew Koppelman, *Free Speech and Pornography: A Response to James Weinstein*, 31 N.Y.U. REV. L. & SOC. CHANGE 899 (2007).

2. 315 U.S. 568 (1942).

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be derived from them is clearly outweighed by the social interest in order and morality."[3] When the Court announced the present constitutional test for unprotected obscenity, it declared that "[p]reventing unlimited display or distribution of obscene material, which by definition lacks any serious literary, artistic, political, or scientific value as communication, is distinct from a control of reason and the intellect."[4]

I have deliberately stated both the major and minor premises vaguely. The argument has been cashed out in various ways. The most prominent and careful of these treatments are those of Frederick Schauer and John Finnis, and here I will confine my attention to them.[5] Each has offered a somewhat different statement of both the major and minor premises. A response to them must take up each of their formulations in turn. I conclude that the categorical distinction that they attempt is unsustainable. If art, film, and literature should be protected, then this protection should extend to the pornographic subsets of these genres.

I. SCHAUER

The most elegant statement of the argument is that offered by Frederick Schauer. Schauer writes that "a refusal to treat hard core pornography as speech in the technical sense at issue is grounded in the belief that the prototypical pornographic item shares more of the characteristics of sexual activity than of communication."[6] He illustrates the point with a hypothetical extreme example:

> Imagine a motion picture of ten minutes' duration whose entire content consists of a close-up colour depiction of the sexual organs of a male and a female who are engaged in sexual intercourse. The film contains no variety, no dialogue, no music, no attempt at artistic depiction, and not even any view

3. Id. at 572.

4. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973), citing John M. Finnis, *"Reason and Passion": The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222 (1967); *see also* Miller v. California, 413 U.S. 15, 34–35 (1973); Roth v. United States, 354 U.S. 476, 484 (1957).

5. The argument has been made more briefly by others. *See, e.g.,* CATHARINE MACKINNON, ONLY WORDS (1993), at 16–17; HARRY M. CLOR, PUBLIC MORALITY AND LIBERAL SOCIETY (1996), at 213–227; Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 606; CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993), at 215; Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159 (1997); Jennifer Hornsby, *Speech Acts and Pornography*, *in* THE PROBLEM OF PORNOGRAPHY (Susan Dwyer ed. 1995), at 220.

6. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982), at 181. Schauer earlier published substantially the same argument in Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. (1979), at 899. The same argument is adopted by ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY: FINAL REPORT (1986), at 260–269, written in large part by Schauer, who was a member of the commission. *See* Frederick Schauer, *Causation Theory and the Causes of Sexual Violence*, 1987 AM. B. FOUND. RES. J. 737, 737–738 n. 5.

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> of the faces of the participants. The film is shown to paying customers who, observing the film, either reach orgasm instantly or are led to masturbate while the film is being shown.[7]

This film is a sexual surrogate, like a plastic or vibrating sex aid. It takes pictorial form only because that is another way of helping individuals achieve sexual gratification. "The mere fact that in pornography the stimulating experience is initiated by visual rather than tactile means is irrelevant if every other aspect of the experience is the same."[8] It is true that some serious literature can also produce sexual arousal, but that literature has other elements that entitle it to protection. The reason why such protection is not appropriately extended to hard-core pornography "is not that it has a physical effect, *but that it has nothing else.*"[9]

Pornography that meets this description, Schauer argues, is not protected by the free speech principle.

A. Schauer's Major Premise

To assess Schauer's argument, we must begin with his major premise—the reasons, in his view, speech is protected.[10] His book, *Free Speech: A*

7. SCHAUER, FREE SPEECH, *supra* note 6, at 181.
8. Id. at 182.
9. Id.
10. With both Schauer and Finnis, I will take their major premises as given. My claim is that even if those premises are accepted, the conclusions do not follow. I take no position here as to whether those premises are correct. Doing that would require me to state and defend the correct foundational theory of free speech, and even if I could do that, it is beyond the scope of a short paper such as this.

A different argument has been offered by Ishani Maitra and Mary Kate McGowan to show that pornography is outside the coverage of the free speech principle. Maitra and McGowan say little about the rationale for free speech protection, but they claim that "significantly obligation-enacting utterances," verbal acts that actually change the relationships of obligation that exist between persons in a significant way, are outside its scope. Pornography is significantly obligation-enacting if, as feminist critics such as Catharine MacKinnon contend, it "ranks women as inferior (e.g., as socially subordinate to men); it deprives women of important powers (e.g., the ability to fully participate in the democratic process); and it legitimates discriminatory behavior against women (e.g., by making it socially acceptable to treat women as mere sexual objects)." Ishani Maitra & Mary Kate McGowan, *The Limits of Free Speech: Pornography and the Question of Coverage*, 13 LEGAL THEORY 41, 64 (2007).

The proposed principle proves too much. It would justify, for example, the Sedition Act of 1798, which made it a crime to write about Congress or the president "with intent to defame" or "to excite against them . . . the hatred of the good people of the United States." 1 Stat. 596. If pornography is significantly obligation-enacting, then so was speech critical of President Adams; it ranked the president as an abuser of his powers, tended to deprive him of important powers by making it likely that he would lose the election of 1800 (as in fact he did), and legitimated voting against him. If, however, speech critical of incumbent officeholders is unprotected, then it is hard to see what is left of free speech.

Other speech act theorists have suggested a different and more theoretically (though perhaps not empirically) sound approach, conceding that pornography is speech but claiming that its illocutionary effect is to disable women from being able to engage in speech acts of their own, such as communicating unwillingness to engage in sex. "Faced with a conflict

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Philosophical Enquiry, surveys the major justifications for free speech and concludes that many of them are weak. The two that are strongest and provide the best reasons for the distinctive protection of free speech are the idea that the individual has a right to control his thoughts and the judgment, based on experience, that powers of censorship are unusually likely to be abused by governments.

The right to control one's own thoughts, Schauer thinks, entails "a right to receive information and, more importantly, a right to be free from governmental intrusion into the ultimate process of individual choice."[11] The dignity of the individual entails that he has a right to decide what to think.

Schauer's major premise is attractive and has been endorsed by many other First Amendment theorists.[12] A particularly careful development of the argument is that of David Strauss, who has argued that as a general rule, "government may not justify a measure restricting speech by invoking harmful consequences that are caused by the persuasiveness of the speech."[13] Violations of this principle are wrong for the same reason that lies are wrong: both "interfere with a person's control over her own reasoning processes."[14] This is different in kind from restrictions on conduct: "outright coercion affects what people do, but restrictions on information affect what people are. For government to frustrate the desire to gamble, for example, is different from the government manipulating the flow of information so that some people who would otherwise have developed that desire never do so." In the former case, people at least know what is being done to them. "There is a value in being able to hold a belief or desire even if one cannot act on it. That is why 'thought control' is such an odious notion."[15]

between freedoms to speak—faced, for example, with a conflict between subordinating with words and refusing with words—perhaps one should judge that refusal matters more." Jennifer Hornsby & Rae Langton, *Free Speech and Illocution*, 4 LEGAL THEORY 21, 33 (1998). That claim is beyond the scope of this paper, which considers only whether the suppression of pornography implicates free speech at all. On the empirical issue, *compare* Leslie Green, *Pornographizing, Subordinating, and Silencing*, *in* CENSORSHIP AND SILENCING (Robert Post ed. 1998), at 285; *with* Rae Langton, *Subordination, Silence, and Pornography's Authority*, *in* CENSORSHIP AND SILENCING (Robert Post ed. 1998), at 261.

Thanks to Profs. Maitra and McGowan for helpful and generous correspondence.

11. SCHAUER, FREE SPEECH, *supra* note 6, at 69.

12. CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT (2004), at 78–142; MARTIN REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS (1984); C. Edwin Baker, *The Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964 (1978); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974); T.M. Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972).

13. David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 334 (1991).

14. Id. at 354.

15. Id. at 360. Strauss thinks that this principle bars regulation of pornography unless pornography is peculiarly likely to elicit a nonrational response. Id. at 345–346 n. 35. Such a position, he notes, would require "substantial argument." Id. at 345.

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The second reason for protecting speech, and the one that Schauer thinks most persuasive, is "the argument from governmental incompetence."[16] This argument does not depend on there being anything especially good about speech compared to other conduct. Rather, it is an argument from experience, "that governments are particularly bad at censorship, that they are less capable of regulating speech than they are of regulating other forms of conduct."[17] An example is "the banning of numerous admittedly great works of art because someone thought them obscene."[18]

Neither of these understandings of the major premise about the First Amendment's coverage settles the question of whether any particular speech is protected.[19] There is a well-established but unfortunate convention

Larry Alexander has objected that Strauss's argument will not generate the general rule he proposes, because "autonomy is on both sides of the equation." LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? (2005), at 176. The government, when it interferes with speech that it thinks will mislead its audience, may seem to be wrongly paternalizing that audience. But if it does not intervene and the audience is in fact misled, then this will signify "some defect in the audience's ability to deliberate rationally about the message, a defect that impairs the audience's autonomy." Id. Suppression of messages that do this will enhance rather than violate the audience's autonomy. Alexander challenges Strauss at a more fundamental level, arguing that, if (as Strauss concedes) Strauss's principle does not bar the government from censoring false statements of fact, then nothing is left of the principle: any opinion that the government wants to suppress will be dangerous only because it contains implicit assertions of facts that in the government's view the audience should not believe. Id. at 68–71.

Alexander's objection makes autonomy too easily disappear from the anticensorship side of the equation: if the state disagrees with anything the speaker is saying, then it is entitled (Always? Under some circumstances? What circumstances?) to conclude that the speaker must be manipulating or misleading the audience somehow, and so the audience's autonomy will be promoted if the speaker is silenced. The objection to thought control has vanished, because whenever thought control is exercised, the presumedly benign control enhances rather than invades the patient's autonomy. This goes too far. If human beings are going to live in respectful relations with one another, they must, as a general matter, regard one another as free and rational. *See* STEPHEN DARWALL, THE SECOND PERSON STANDPOINT (2006), at 269–276. There may be exceptions, and Alexander is right that they cannot be ruled out, but the presumption must run strongly the other way.

16. SCHAUER, FREE SPEECH, *supra* note 6, at 86.

17. Id. at 81.

18. Id.

19. Another complication, which I will not explore further here, is that the two reasons for protecting speech that I have described here might imply different ranges of coverage; the area of autonomy of the mind might differ from the area of governmental incompetence. Schauer thus suggests that freedom of speech might not have any essential core but rather be a cluster of interrelated principles. Id. at 14; Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 277 (1981); Schauer, *Must Speech Be Special?* 78 NW. U. L. REV. 1284 (1983); Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 SUP. CT. REV. 285, 313. In his latest work, this has led him to an extreme skepticism: "if all of the judicially recognized and historically available theories are available—self-expression, individual autonomy, dissent, democratic deliberation, the search for truth, tolerance, checking government abuse, and others—then their collective coverage is so great as to be of little help in explaining the existing state of First Amendment terrain." Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1786 (2004). But this gives up too quickly. Some of these theories are more salient than others, and together the most persuasive of them still protect only a subset of speech. Robert Post addresses the salience question by noting that "any function attributed to the First Amendment will require a form of social organization in order to accomplish its ends." Robert Post, *Reconciling Theory and Doctrine*

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(in which this article's title participates) of describing the scope of the First Amendment's operation by distinguishing between "speech" and "conduct." This is a useful shorthand phrase (that is why it is in the title), but it produces the confusing result that the burning of an American flag is "speech," while a bank robber's threat to a teller is not.[20] Schauer offers a better formulation, distinguishing between the First Amendment's *coverage* and its *protection*. Rights:

> may cover certain conduct, by requiring greater persuasive force in order to restrict that conduct. If a particular act is covered by a right to engage in acts of that general type, it takes a better reason to restrict that act than would be the case if the act were not covered by a right. But some reasons may be sufficiently powerful to penetrate the right, just as artillery fire may be sufficiently powerful to penetrate the coverage of . . . armour.[21]

Thus even if pornography were covered by Schauer's free speech principle, it might still be regulable if it could be shown that it is sufficiently harmful. But that is not Schauer's position.[22] He claims that pornography is not even within the First Amendment's coverage. Regulation of pornography does not involve thought control, because pornography contains no thoughts.

B. Schauer's Minor Premise

Schauer's minor premise, that pornography is not among the communications that the free speech principle protects, is unpersuasive, for three reasons.

First, it is uncertain whether there is any actual pornography that fits Schauer's description. Most does not.[23] As Schauer's critics have observed,

in First Amendment Jurisprudence, *in* ETERNALLY VIGILANT (Lee Bollinger & Geoffrey Stone eds. 2002), at 164 n. 47. Thus, for example, the truth-seeking rationale for free speech "requires the protection only of speech that communicates ideas and that is embedded in the kinds of social practices that produce truth." Id. at 164. Two free speech principles Schauer endorses in his early work—autonomy of the mind and governmental incompetence—provide ample reason to protect pornography, and these principles happen to produce the same range of coverage for pornography. Thanks to Fred Schauer for pressing me to engage with his recent work.

20. The confusion is clarified in LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988), at 825–832.

21. SCHAUER, FREE SPEECH, *supra* note 6, at 89.

22. I take no position on that question here. I discuss the harm question in Koppelman, *Does Obscenity Cause Moral Harm? supra* note 1; and Koppelman, *Reading Lolita at Guantanamo*, 53 DISSENT 64 (Spring 2006).

23. In another article, Schauer notes that prurient material may be "inextricably coupled" with intellectual or scientific value, and he rejects *Miller*'s limitation of protection to material with "serious" value. "In order for the test to function, we must be able to say that only material that is completely non-intellectual is excluded from the definition of 'speech.'" Frederick Schauer, *Response: Pornography and the First Amendment*, 40 U. PITT. L. REV. 605, 609 (1979). He

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any physical response elicited by pornography depends on the viewer's mental processes.[24] Human sexuality, it appears, is always mediated by thought.

I have been told several times by people who were in a position to know that the typical hotel patron who rents an adult movie in his room stays tuned to that movie for about eight minutes. After that time, he changes the channel or turns the TV off. Suppose that this is true. One might take this datum to confirm the view that pornography is, at least here, merely a masturbatory aid: if those viewers are watching the film only until they orgasm, then their interest in the film is merely physical and has little to do with the film's content.[25]

The intentions of these viewers seem clear enough. Orgasms are what they are after. Nonetheless, it is plainly mistaken to say that those intentions are merely intentions to masturbate. It can safely be assumed that they already know how to do that, even in hotel rooms without television sets. Why would they pay to rent these movies in order to do something they can already do for free? What are they paying for during those eight minutes?

They are paying for a fantasy—a kind of fantasy that is appealing to them only in a state of preorgasmic arousal, but a fantasy nonetheless. Moreover, not all uses of pornography are as a prelude to orgasm. (Porn magazines are sold in airports, and the men who purchase them very much want *not* to have an orgasm, since their other pants are in the luggage. What they want is to pass their time imagining certain things.) The common denominator is not any particular physical effect but the presence of fantasy. The real First Amendment issue here is whether the amendment is implicated when government deliberately interferes with efforts to imagine and describe other worlds.

Any regulation of pornography directly implicates the right to control one's own thoughts. This is not true of, say, a law that prohibits prostitution: such a law does not prevent people from thinking about having sex with prostitutes, or from telling one another that this is what they are thinking about, or from inducing one another to think about that. Once more, control

thus makes clear that the set of material he means to deny protection is very narrow. He does not pause to wonder whether it is an empty set.

24. Robert C. Post, Constitutional Domains (1995), at 111–112; Martin Redish, Freedom of Expression (1984), at 75; David Cole, *Playing By Pornography's Rules: The Regulation of Sexual Expression*, 143 U. Pa. L. Rev. 111, 124–131 (1994); Simon Roberts, *The Obscenity Exception: Abusing the First Amendment*, 10 Cardozo L. Rev. 677, 711–713 (1989); Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 Mich. L. Rev. 1564, 1594 (1988). Steven Gey is on weaker ground when he challenges Schauer's claim that the Court does not protect all "speech" as the word is generally used. Gey acknowledges that conspiracy and perjury are unprotected, but in those cases, he claims, "speech is simply one instrumentality by which a crime unrelated to expression is committed." Id. at 1591. The distinction is unpersuasive. How can one commit perjury without using language to state a proposition? *See generally* Schauer, *Categories and the First Amendment, supra* note 19.

25. This argument was made in conversation by Geoffrey Stone, who however did not say that he endorsed it.

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of the body is not the same as control of the mind. In order for Schauer's argument to work, he would have to offer some reason for distinguishing sexual thoughts from other thoughts, and he does not even attempt to do that. Schauer never confronts the tension between his rejection of thought control and his conclusion about pornography.

The second difficulty with Schauer's minor premise is related. It is precisely the ideational element that is the basis of any concern of the state that is articulated today. The state is only indirectly attempting to prevent a physical effect from occurring. What it is directly aiming at is a thought elicited in the viewer: "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex."[26] The physical effect once mattered to regulators much more than it does now. The antipornography crusaders of the nineteenth century thought that if sexual material came into the possession of teenage boys, it would induce them to masturbate, and this in turn would lead to lassitude, weakness, crime, insanity, and early death.[27] Even then, though, much of the suppression was frankly viewpoint-based, targeting as "obscene" writings that were not at all sexually explicit but that advocated sexual liberation or birth control.[28]

I am aware of no jurisdiction today that regulates pornography without attention to the ideas that it conveys. A few illustrations must suffice. Canada is only concerned about pornography that depicts women in a degrading and dehumanizing way.[29] Germany is only concerned about pornography that offends against human dignity.[30] Japan is only concerned about salacious materials that reflect an "un-Japanese" view of the world.[31] None of these regimes ban all sexually arousing material without regard to the way in which it is presented.

Third and finally, to the extent that Schauer's position rests on distrust of the state, the nonprotection of noncognitive speech is inconsistent with his skepticism about the abuse of state power. That abuse, David Richards observes, "occurs equally on both sides of the line that Schauer draws between cognitive and noncognitive communication."[32]

26. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973) (citations omitted).

27. *See* WALTER KENDRICK, THE SECRET MUSEUM: PORNOGRAPHY IN MODERN CULTURE (1988), at 138–143; HELEN LEFKOWITZ HOROWITZ, REREADING SEX: BATTLES OVER SEXUAL KNOWLEDGE AND SUPPRESSION IN NINETEENTH CENTURY AMERICA (2003), at 92–93, 97–107, 394–403.

28. HOROWITZ, *supra* note 28, *passim.*

29. *See* RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE (2006), at 69–82.

30. Mathias Reimann, *Prurient Interest and Human Dignity: Pornography Regulation in West Germany and the United States*, 21 U. MICH. J.L. REFORM 201 (1987–1988).

31. KROTOSZYNSKI, *supra* note 29, at 164–171.

32. David A.J. Richards, *Pornography Commissions and the First Amendment: On Constitutional Values and Constitutional Facts*, 39 ME. L. REV. 275, 282 (1987).

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II. FINNIS

The weaknesses of Schauer's position are avoided by John Finnis, on whose theory the Supreme Court has expressly relied.[33] Unlike Schauer, Finnis does not deny that pornography contains thoughts. Rather, Finnis tries to show that the thoughts contained in pornography are not of the kind that the First Amendment seeks to protect. This raises difficulties that Schauer understandably sought to avoid.[34]

A. Finnis's Major Premise

Finnis begins by noting that the Court has described the reader of obscenity as looking "for titillation, not for saving intellectual content."[35] The Court is thus relying on "a distinction between two often competing aspects of the human mind: the intellect or reason and the emotions or passions."[36] This distinction was also deployed by framers such as James Madison, who thought that government should aim at control over men's passions.[37]

Free speech was valued "because it supplied the community with independent (rational) critics of the government."[38] It follows that, "to the extent that expressions derive from the passion end of the reason-passion continuum, the rationale for that freedom disappears."[39] Only rational expression is within the First Amendment's coverage.

The reliance on Madison's democratic justification gives rise to a problem: How can free speech thus understood protect art and literature? In the United States and Great Britain throughout the early twentieth century, the suppression of major literary works of undoubted value, such as James Joyce's *Ulysses* and D.H. Lawrence's *Lady Chatterley's Lover*, produced a growing consensus that the law in this area was ridiculous. It is now almost universally agreed that artistic works must be within the protection of the First Amendment.[40] Yet if one understands the First Amendment to protect only expressly political speech, then as Robert Bork argued in a well-known 1971 article, there is no basis for protecting any art or literature (or, for

33. *See* Paris Adult Theatre I v. Slaton, *supra* note 4.

34. Schauer wrote after Finnis and was familiar with Finnis's work. *See* SCHAUER, FREE SPEECH, *supra* note 6, at 188, *citing* Finnis, *supra* note 4.

35. Finnis, *supra* note 4, at 223, *quoting* Ginzburg v. United States, 383 U.S. 463, 479 (1966).

36. Id.

37. Id. at 229–30. This exaggerates Madison's hostility to the passions. In the Virginia Report, attacking the Sedition Act of 1798, see *supra* note 10, he argued that democracy required that the press be free to discuss whether incumbent office holders "should be brought into contempt or disrepute, and incur the hatred of the people." James Madison, *Virginia Report*, *in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON (Marvin Meyers ed., rev. ed. 1981), at 263.

38. Id. at 230.

39. Id.

40. On developments in the United States, *see generally* EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS (1992); for a comparative overview of America and Europe, *see* KENDRICK, *supra* note 27.

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that matter, any other speech) that is not explicitly political.[41] Finnis does not want to adopt such a restrictive major premise, which would "make nonsense of the Court's recognition of the redeeming value of art" and "amount to the constitutional canonization of sheer philistinism."[42] Finnis must therefore explain why free speech protects the arts.

Finnis argues that "art expresses *ideas* of feeling, and it does this by embodying these ideas in the more or less conventional symbolic forms of music, painting, sculpture, architecture, poetry, drama and prose."[43] Art provides, "to those who attend to it aesthetically, an insight into the life of feeling, vitality and emotion."[44] An indispensable part of the experience of any kind of art is the aesthetic attitude of contemplation, from which all practical interest is absent. When dealing with sexual matters special precautions are necessary in order to maintain the necessary psychic distance. The pornographer is precisely "the man who sets out to defy" these precautions.[45] By doing so, he deprives the material he purveys of intellectual content: "expression that threatens psychic distance does so by shifting its appeal towards the emotion end of the intellect-emotion continuum, and by suppressing the intellectual component in the aesthetic attitude."[46]

Finnis relies heavily on the aesthetic theory of Susanne K. Langer. Langer's work is in part a reaction to certain positivist theories of knowledge that were prevalent in the early twentieth century, which posited that only scientific language had truth value and that all other types of meaning were mere expressions of subjective preference.[47] Langer argues that there is

41. Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). Bork substantially retreated from this position during the hearings on his failed Supreme Court nomination. NORMAN VIEIRA AND LEONARD GROSS, SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS (1998), at 99–105; ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989), at 242–251. More recently, he has indicated that he would protect all ideas but has embraced something like Schauer's view that pornography contains no ideas. His claim that "stories depicting the kidnapping, mutilation, raping, and murder of children do not, to anyone with a degree of common sense, qualify as ideas" leaves continuing doubt about what he would protect. ROBERT BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE (1996), at 148. Most recently, he has denounced "the Court's reckless expansion of the 'speech' protected by the First Amendment to encompass . . . a sickening variety of obscenities." Robert H. Bork, *The Judge's Role in Law and Culture*, 1 AVE MARIA L. REV. 19, 21 (2003). Appended to this sentence is a citation to, inter alia, Butler v. Michigan, 352 U.S. 380 (1957), which he accurately summarizes as "holding unconstitutional a ban on the sale to adults of books deemed harmful to children." Id. at 21 n. 7. Evidently Bork now thinks that it is permissible for a state to "reduce the adult population . . . to reading only what is fit for children." *Butler*, 352 U.S. at 383. This may be an even narrower interpretation of the First Amendment than his original view, since some core political speech may be unfit for consumption by children. It is doubtful whether, on this view, the Amendment would protect publication of Independent Counsel Kenneth Starr's report on the Clinton-Lewinsky scandal, for example.

42. Finnis, *supra* note 4, at 231.

43. Id. at 233.

44. Id.

45. Id. at 235.

46. Id. at 236.

47. *See* SUSANNE K. LANGER, PHILOSOPHY IN A NEW KEY: A STUDY IN THE SYMBOLISM OF REASON, RITE, AND ART (3d ed. 1957), at 79–102.

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another mode of thinking, symbolic thinking, that has a different kind of objectivity and which can address matters with respect to which science is silent. Notably, the arts communicate symbolically by expressing not factual information but feelings, which are shown rather than stated. The feeling thus expressed is not necessarily the personal feeling of the artist nor the feelings aroused in the audience; it is detached from both. What is shown is the form of feelings, the dynamic patterns that feelings follow. Musical works, for example, convey not emotions but conceptions of emotions in terms that could not be communicated by means of discursive language.

The problem presented by the positivists, to whom Langer was responding, is analogous to the problem in First Amendment theory about the intellectual content of art and literature. Langer's account of symbolic thinking thus gives Finnis the tools to address the free speech problem and to show why art should be protected.

B. Finnis's Minor Premise

Finnis's next task is to show why this protection does not extend to pornography. His central claim is that pornography, by collapsing the necessary detachment, disables itself from symbolically expressing the thought of a feeling in the way that Langer describes.[48]

What distinguishes the pornographer, Finnis writes, is that he deliberately destroys the aesthetic attitude, notably through "the arousing of identification with, and the compelling of envy for, the fictional characters in their sexual opportunities and exploits."[49] A principle of free speech that is concerned with protecting ideas is not implicated by the suppression of entertainments that "appeal to the sensual emotions in order to achieve a calculated effect of obfuscating understanding with titillation, stimulation and gratification."[50]

Langer's theory of aesthetics is controversial, but set that aside.[51] The symbolic communication she is describing does not cease if the audience

48. Stephen Gey is Finnis's most prominent critic, but he makes little effort to explicate or understand this admittedly somewhat obscure argument. Gey's principal objection is that Finnis "does not cite any empirical studies supporting" the distinction between reason and passion, and Gey concludes that the distinction is unpersuasive because it rests on "no scientific analysis." Gey, *supra* note 24, at 1587, 1588. Gey's claim that Finnis lacks a scientific basis reveals exactly the kind of positivism that Langer was seeking to refute. Gey further argues that Finnis's defense of artistic expression works "only by ignoring the art and concentrating on the ideas that art is intended to communicate." Id. at 1593 n. 134. This allegation attributes to Finnis the opposite of his actual view by ignoring Langer's claim, adopted by Finnis, that art is not reducible to propositions: "A symbol is a sensuous object which by virtue of its highly articulated structure can express the forms of vital experience—feeling, life, motion and emotion—which purely intellectual discourse cannot convey." Finnis, *supra* note 4, at 232. Gey, *supra* note 24, at 1592–1593, pounces on Schauer's concession that emotive speech is protected, which he thinks is a major departure from Finnis. As we have seen, however, Finnis must make a similar concession to the emotions in order to protect the arts.

49. Finnis, *supra* note 4, at 235.

50. Id. at 239.

51. In fact, according to the most recent edition of the ENCYCLOPEDIA OF PHILOSOPHY, it is "now relatively neglected." John Dilworth, *Langer, Susanne K.*, *in* ENCYCLOPEDIA OF PHILOSOPHY

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becomes emotionally involved with the narrative and begins to experience directly the feelings that are depicted—a phenomenon that is familiar but which her theory cannot explain.[52] Even if the reader's passions are overwhelmed by the material, this does not mean that symbolic communication is not occurring.

Much art mixes detachment with engagement. The pornography of violence, in which the viewer is invited to envy the hero and imagine himself doing the bloody things that the hero is doing, is as old as Homer. The collapse of detachment, Roger Scruton observes, is in part the way in which music accomplishes its effects: "Jazz frequently takes an off-beat, divides it into quarter-notes, and places the accent on the fourth of those quarter-notes—an effect which impacts so violently against the measure, that we cling more firmly to the underlying rhythm, and throw ourselves into the movement."[53] The compelling character of much of Beethoven's music depends on similar techniques.

Form is emphatically not absent from pornography. On the contrary, pornography symbolizes sexual arousal through a range of intensely conventional and ritualized tropes, which are followed with such determined regularity as to invite comparison with that similarly ritualized form, the Hollywood musical.[54]

Langer's discussion of symbolic communication is useful, but it cannot produce fertile offspring when mated to the reason-passion distinction on which Finnis places so much weight. Any emotion has cognitive content. All emotions involve appraisals of their object, which is judged to be in some way significantly related to the agent's well-being or that of some entity to which the agent is in some way attached.[55] For this reason, emotions are always sensitive to changing beliefs in factual propositions. My anger against you ceases as soon as it is explained to me that you did not do what I think you did.[56]

Sexual emotions have cognitive content and so are subject to this kind of fact sensitivity.[57] People get aroused by thinking certain thoughts, and evidence that those thoughts are mistaken can end the arousal, as when I discover that I was misinformed about whose hand was on my genitals. Even pornographic photographs have implied factual content. Many avid

187–188 (Donald M. Borchert ed., 2d ed. 2006). Difficulties are reviewed in STEPHEN DAVIES, MUSICAL MEANING AND EXPRESSION (1994), at 123–134.

52. "Langer's theory removes emotion from art, replacing it with conceptions of emotions. In so doing, her theory undermines the basis for emotional responses to musical works and makes mysterious the power of art to evoke such responses." DAVIES, *supra* note 51, at 134.

53. ROGER SCRUTON, THE AESTHETICS OF MUSIC (1997), at 26; *see also* id. at 47–49.

54. *See* LINDA WILLIAMS, HARD CORE: POWER, PLEASURE, AND THE "FRENZY OF THE VISIBLE" (rev. ed. 1999), at 123–124, 132–133, 151–152.

55. *See* MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS (2001) (setting forth this argument); and MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW (2004) (applying this framework to legal problems).

56. Nussbaum argues that Langer's account of emotions cannot adequately account for this. NUSSBAUM, UPHEAVALS OF THOUGHT, *supra* note 55, at 261–62.

57. The cognitive content of sexual emotion is explored in detail in ROGER SCRUTON, SEXUAL DESIRE: A MORAL PHILOSOPHY OF THE EROTIC (1986).

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consumers of the photographs in *Playboy* would lose interest in the magazine, or at least be considerably more conflicted in their erotic reactions, if they were told that the nude woman they were admiring was originally a man who had had a sex change operation.

Any work of art implicitly includes value claims, if only about its own value as art. Pornography obviously contains value claims about the world, most obviously about what is appropriately arousing, that have ethical and even political implications. Thus, for example, gay male pornography, which gave many gay men an early window into their own sexuality, has played a significant role in the emergence of the gay rights movement, which in turn gave rise to one of the most pressing and divisive questions in contemporary American politics.[58]

A work of art can deliberately elicit its audience's erotic interest in order to make that interest itself the object of aesthetic and intellectual contemplation. Peter Shaffer's play *Equus* depicts a psychiatrist's dilemma as he attempts to treat an adolescent boy who has committed a horrible crime. The boy worships a god, Equus, who takes the form of a horse and is manifest in actual horses. Equus torments him, but it is also the sole element of transcendence in his otherwise meaningless existence. The play culminates in the reenactment of the failed sexual encounter that led the boy to blind a stable of horses. In that scene, the boy and a young woman both undress, and the woman lies naked on the stage in a sexually inviting position. This is alarming and therefore artistically effective precisely because it is voyeuristic and arousing, and requires audience members to confront their own arousal. The tension between that voyeurism and the civilized ritual of an evening at the theatre mirrors the tension between civilization and Dionysian release which is the play's central concern.[59]

The contemporary law of obscenity implicitly acknowledges that a work of art can combine prurient interest with artistic value. The present test for determining whether a publication is obscene, laid down in Miller v. California, is:

> [a] whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient

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

59. I saw the play twice in its original Broadway run in the 1970s. The woman was played by a different actress each time. Both actresses looked attractive without their clothes and doubtless were cast with this in mind.

A majority of the Court has agreed that any effort to enforce a ban on public nudity against a performance of a serious play containing nudity, such as *Equus,* would violate the First Amendment. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 585 n.2 (1991) (Souter, J., concurring); id. at 587 (White, J., joined by Marshall, Blackmun, & Stevens, JJ., dissenting). The judges also argued about the significance of the nonenforcement of a nudity ordinance against *Equus* in City of Erie v. Pap's A.M., 529 U.S. 277 (2000). *See also* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 550, 557 (1975) (holding that *Hair,* including the "group nudity and simulated sex" involved in the production, is protected speech, and rejecting the view "that live drama is unprotected by the First Amendment—or subject to a totally different standard from that applied to other forms of expression").

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> 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.[60]

All three prongs must be satisfied before a work can be deemed constitutionally unprotected. But this means that a work can explicitly describe sexual conduct in a way that appeals to the prurient interest—it can be obscene under prongs [a] and [b]—and nonetheless be protected under prong [c] because it has "serious literary, artistic, political, or scientific value."[61] Perhaps *Equus* is an example.[62]

Finnis does not deny that erotic feeling is capable of being symbolized. What happens in pornography, he thinks, is that the thought of the emotion is overwhelmed by the emotion itself. The reader is not aiming at any kind of understanding. Thought is present—thus Finnis avoids Schauer's error—but it is a mere means to what is actually sought, which is a purely physical gratification. The aim of the pornographer's techniques is "the replacement of aesthetic attention to the material with an attitude in which the practical concerns of the reader or viewer (in this case, a concern to achieve the emotionally aroused states which he desires for himself) intrude upon and suppress an understanding contemplation of the created symbol."[63]

Let us call the viewer Finnis hypothesizes the Grimly Purposive Masturbator, or GPM for short. The situation of the GPM is precisely that contemplated by Schauer: he wants his orgasm and does not care how he gets it. Pornography is "viewed merely as a type of aid to sexual satisfaction."[64]

The difficulty for both Finnis and Schauer is that the "failure" of the aesthetic attitude (which of course the viewer will probably regard as no failure at all) lies not in the material itself but in the reactions of the GPM. The GPM may achieve exactly the same result by contemplating a reproduction of a Rubens nude. He may even want to attend a performance of *Equus*. On the other hand, the GPM is not the only consumer even of the most salacious pornography. Material originally constructed for purely

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

61. This is a long-standing instability in obscenity law that has been present ever since the courts began to notice that aesthetic value could justify otherwise obscene publications. *See* IAN HUNTER, DAVID SAUNDERS, & DUGALD WILLIAMSON, ON PORNOGRAPHY: LITERATURE, SEXUALITY AND OBSCENITY LAW (1993), at 142–145.

62. The alternative is to grasp the aesthetic nettle and argue that works of art with prurient appeal or sexual themes cannot have literary merit. *See, e.g.,* United States v. One Book Called Ulysses by James Joyce, 72 F.2d 705, 709–11 (2d Cir. 1934) (Manton, J., dissenting); for a similar view, *see* BORK, SLOUCHING TOWARDS GOMORRAH, *supra* note 41, at 147, 148–149. Finnis is perhaps making an argument of this kind when he writes that "to the extent that an appeal is made to prurient interest, the psychical distance essential to an aesthetic attitude is liable to be destroyed." Finnis, *supra* note 4, at 237. It is fair to tell Shaffer that he is playing with fire, but this is a decision for which the playwright or the audience is better suited than the censor.

63. Finnis, *supra* note 4, at 235.

64. SCHAUER, FREE SPEECH, *supra* note 6, at 182.

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pornographic purposes has ended up in museums. One cannot infer the audience from the material. Chief Justice Earl Warren observed in 1957 that "the same object may have a different impact, varying according to the part of the community it reached."[65]

The positions taken by Finnis and Schauer might, then, be understood to point to a rule of "variable obscenity," in which the issue is not the content of the material but the pornographer's intent, which is that of inducing a certain kind of reaction from the readers. But as Schauer notes, the idea of variable obscenity had a pretty short run of success in the Supreme Court, because its flexibility gives sellers inadequate notice of just what conduct is prohibited.[66] And this approach still does not explain why salacious appeal, even deliberately salacious appeal, does not convey ideas.

Ian Hunter and his colleagues observe that all of the most prominent discussions of pornography reform in the 1960s, when Finnis was writing, struggled to distinguish art from pornography, and all implicitly relied on a romantic aesthetic ideal. The appropriate consumer of art manages to balance sensual experience with moral reflection, engaging with both without being overwhelmed by either. The consumer of pornography fails to achieve this aesthetic balance. The classic statement of this ideal is Friedrich von Schiller's 1795 *Aesthetic Education of Man*, which calls for a strenuous striving for the dialectical reconciliation of feeling and form, which would resolve the division of the human self that was the most problematic aspect of Kant's philosophy.[67] "All other forms of perception divide man, because they are founded exclusively either upon the sensuous or upon the spiritual part of his being; only the aesthetic mode of perception makes of him a whole, because both his natures must be in harmony if he is to achieve it."[68] Finnis evidently subscribes to this ideal; he thinks that "the peculiar triumph of art" is to weld together reason and passion so that "sentience is liberated from the drag of biological relevance, while intelligence is liberated from the constraints of discursive reasoning."[69]

Even if Schiller's romantic ideal is accepted as a criterion of valuable aesthetic experience, the reconciliation he aims for is not made impossible

65. Roth v. United States, 354 U.S. 476, 495 (1957) (Warren, C.J., concurring in the result). One may perhaps try to distinguish the pornographic based on which type of reception an image centrally aims at; that is what Warren had in mind. Jerrold Levinson offers a more recent formulation of this idea, arguing that aesthetic attention focuses on the form or manner in which an image is presented while pornographic attention sees through or past the medium to its object. Jerrold Levinson, *Erotic Art and Pornographic Pictures*, 29 PHIL. & LITERATURE 228 (2005).

66. FREDERICK SCHAUER, THE LAW OF OBSCENITY (1975), at 92–95.

67. HUNTER ET AL., *supra* note 61, at 22, 183–184; David Saunders, *Obscenity: Aesthetics in Obscenity Law*, *in* ENCYCLOPEDIA OF AESTHETICS 383 (Michael Kelly ed. 1998). It must be acknowledged that Hunter and his coauthors are persuaded by Schauer's argument, which they quote with approval as presented in ATTORNEY GENERAL'S COMMISSION, *supra* note 6. HUNTER ET AL., *supra* note 61, at 227–228.

68. FRIEDRICH SCHILLER, THE AESTHETIC EDUCATION OF MAN IN A SERIES OF LETTERS (E. Wilkinson & L.A. Willoughby trans., Oxford 1967) (1795), at 215.

69. Finnis, *supra* note 4, at 233–234.

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by erotic interest, any more than it is by sentimental interest. If Schiller could balance his sensuous and his intellectual interests in a Greek statue of a goddess, then so can we.[70] The problem arises only if the intellectual interest is overwhelmed by the sensuous one.[71] And even then, it is hardly clear that the work in question is not art, albeit art of a low kind.

The tendency of treatments of sex to elicit this kind of purportedly inappropriate reaction is what the 1960s reformers thought placed a work beyond protection. Eberhard and Phyllis Kronhausen, in "what was perhaps the single most influential account of pornography in the 1960s,"[72] hold that the appropriate aim of erotic literature was "satisfy[ying] the natural and desirable interest in sex, without turning it into morbid channels, confusing and linking it with violence, or keeping it antiseptically detached from the physical sensations which should accompany it, and by connecting the sexual impulse with those love-feelings which are its highest perfection."[73] As William Lockhart and Robert McClure, whose studies of obscenity law were cited nearly two dozen times in Supreme Court opinions,[74] explain, "hard-core pornography appeals to the sexually immature because it feeds their craving for erotic fantasy; to the normal, sexually mature person it is repulsive, not attractive."[75] Pornography is worthless and harmful when it is "daydream material, divorced from reality, whose main or sole purpose is to nourish erotic fantasies or, as the psychiatrists say, psychic autoeroticism."[76]

70. SCHILLER, *supra* note 68, at 109; *see also* id. at 213–215.

71. Id. at 199. Schiller did not think that material with sensuous interest should be excluded from art; the synthesis he sought "does not reside in the exclusion of certain realities, but in the absolute inclusion of all realities." Id. at 125. *Compare* E.M. Forster: "Nothing is more obdurate to artistic treatment than the carnal, but it has to be got in I'm sure: everything has got to be got in." FORSTER, *Letter to Siegfried Sassoon, in* I SELECTED LETTERS OF E.M. FORSTER 316 (Mary Lago & P.N. Furbank eds., 1983).

72. HUNTER ET AL., *supra* note 61, at 20.

73. EBERHARD KRONHAUSEN & PHYLLIS KRONHAUSEN, PORNOGRAPHY AND THE LAW (1959), at 260, *quoted in* HUNTER ET AL., *supra* note 61, at 20.

74. Ginsberg v. State of New York, 390 U.S. 629, 636, 642 n.10 (1968); Memoirs v. Att'y General, 383 U.S. 413, 431 nn. 8, 10 (1966) (Douglas, J., concurring); id. at 442 n. 1 (Clark, J., dissenting); Ginzburg v. United States, 383 U.S. 463, 490 (1966) (Douglas, J, dissenting); id. at 500 (Stewart, J., dissenting); Mishkin v. State of New York, 383 U.S. 502, 506 n.4, 508 n.7 (1966); Jacobellis v. Ohio, 378 U.S. 184, 188 n.3, 195 n.10 (1964) (opinion of Brennan, J.); Bantam Books v. Sullivan, 372 U.S. 58, 67 n.7 (1963); Manual Enterprises v. Day, 370 U.S. 478, 488, 489 (1962); Times Film Corp. v. City of Chicago, 365 U.S. 43, 74 n.12 (1961) (Warren, C.J., dissenting); Smith v. California, 361 U.S. 147, 168, 169 n.* (1959) (Douglas, J., concurring); Kingsley v. Regents, 360 U.S. 684, 699 (1959) (Douglas, J., concurring); Roth v. United States, 354 U.S. 476, 486 n.19 (1957); id. at 510, 511, 512, 514 (Douglas, J., dissenting).

75. William B. Lockhart & Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 72–73 (1960), *quoted in* HUNTER ET AL., *supra* note 61, at 174.

76. Lockhart & McClure, *supra* note 75, at 65, *quoted in* HUNTER ET AL. *supra* note 61, at 26. The drafters of the Model Penal Code, too, were concerned about a kind of bad psychic stimulation: "Society may legitimately seek to deter the deliberate stimulation and exploitation of emotional tensions arising from the conflict between social convention and the individual's sex drive." American Law Institute, Model Penal Code, Tentative Draft No. 6 (May 6, 1957), at 30. The drafters further explained that "the guilt-pleasure concept which is central to our definition of prurient interest" is the idea that pornography "'encourages people to luxuriate

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The aesthetic failure that concerned Schiller was not peculiar to erotic works, however. If a reader

> is used to apprehending either exclusively with the intellect or exclusively with the senses, he will, even in the case of the most successfully realized whole, attend only to the parts, and in the presence of the most beauteous form respond only to the matter. . . . Such readers will enjoy a serious and moving poem as though it were a sermon, a naïve and humorous one as though it were an intoxicating drink.[77]

But Schiller does not claim that if feeling or form is allowed to dominate unduly, the work communicates nothing. His concerns are very different from Langer's. Bad works of art that Schiller would despise are unquestionably symbolic communications of feeling, in Langer's sense. The balance Schiller idealizes is never realized perfectly; there is no clear line dividing good from bad works of art.[78]

Many artistic works disrupt the Schillerian balance, often deliberately. In this respect, the GPM is no different from the weary traveler staving off boredom with an ephemeral paperback or the sentimental consumer of drawings of kittens with big eyes. These, for Schiller, might simply be among the huge manifold of events in a life that fall short of perfect aesthetic harmony. Some explanation is needed for why the breakdown of aesthetic distance is especially worrisome when it takes a sexual form.

The basic problem is that the aesthetic theories upon which Finnis is drawing are trying to answer the question: What is great about great art? But for free speech purposes, the question is different. It is: Which actions are covered by the free speech principle?[79] That standard is defined not by criteria of artistic worth but by ideals of self-governance and distrust of government censorship. If I have a right to control my own thoughts, then I have a right to entertain myself with worthless junk.

The impulse to protect high art is related to the tendency in modern times, noted by Charles Taylor, to treat art as a moral source that can substitute for the decline of religious faith by investing ordinary life with meaning.[80] Taylor focuses on high art with serious aspirations, such as the poetry of Pound and Rilke, but the tendency he describes has continued to transform modern aesthetics, which increasingly challenges the stability of the distinction between high and low art.

Miller requires courts to be arbiters of a standard of artistic worth, one that must be uniform across the United States and that, as Justice Stevens

in morbid, regressive, sexual-sadistic fantasy and cultivates this morbidity in them, tending to arrest their development."' Id. at 32, quoting D.W. Abse, *Psychodynamic Aspects of the Problem of Definition of Obscenity*, 20 L. & CONTEMP. PROBS. 572, 586 (1955).

77. Schiller, *supra* note 68, at 157–159.

78. Id. at 153–157.

79. This way of stating the problem was suggested in conversation by Charles Taylor.

80. CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY (1989).

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has noted, "assumes that all reasonable persons would resolve the value inquiry in the same way."[81] But even the specialists, artists and critics alike, are deeply divided about what constitutes artistic worth, both in general and in particular cases.[82] With respect to both the production and the critical appreciation of art, the Schillerian ideal competes today with a formidable array of rivals, some of whom reject *Miller*'s criterion of seriousness altogether.[83] This is why in any obscenity trial there will be literary experts who will come forth to testify in all sincerity about the value of the work on trial.

The adjudicating of questions of high aesthetic theory is a strange task to assign to courts. The trouble is similar to that raised by Larry Alexander's objection to the idea that religion is accommodated by the law because it is a good thing. It follows from this rationale, Alexander points out, that one should accommodate only the true religion. If duties to God have priority over duties to the state, this priority holds only with respect to real rather than imagined duties to God. In order to apply this rationale, the state would have to decide what the true religion is and exempt only that religion's believers from generally applicable laws.[84] This task is obviously one that the state is incompetent to undertake;[85] so is resolving the question of the aesthetic value of any particular work.[86]

III. CONCLUSION

Freedom of the mind should be understood to forbid the government from extending protection only to those uses of the mind that it regards as sufficiently dignified. Finnis, in his magisterial treatise, *Natural Law and Natural Rights*, offers a list of basic aspects of human well-being that the state is obligated to respect and promote. Among these is play, "performances which have no point beyond the performance itself, enjoyed for its own sake."[87] Play, he says, "has and is its own value."[88] He is right about this,

81. Pope v. Illinois, 481 U.S. 497, 511 (Stevens, J., dissenting).

82. This is not new, of course; the Western tradition has been divided about the value of art, in general and in particular cases, ever since Plato proposed to banish the poets. *See* MONROE BEARDSLEY, AESTHETICS FROM CLASSICAL GREECE TO THE PRESENT: A SHORT HISTORY (1966).

83. This has been a persistent theme in the scholarship of Amy Adler. *See* Amy Adler, *All Porn All the Time*, 31 N.Y.U. REV. L. & SOC. CHANGE 695 (2007); Amy Adler, *The Art of Censorship*, 103 W. VA. L. REV. 205 (2000); Amy Adler, *What's Left? Hate Speech, Pornography, and the Problem of Artistic Expression*, 84 CAL. L. REV. 1499 (1996); Amy Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359 (1990).

84. *See* Larry Alexander, *Good God, Garvey! The Inevitability and Impossibility of a Religious Justification of Free Exercise Exemptions*, 47 DRAKE L. REV. 35 (1998).

85. For an answer to Alexander's claim with respect to the protection of religion, *see* Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571; Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87 (2002).

86. The boundary between art and religion is hardly a sharp one. As Beardsley notes, the value of art reaches quasi-religious importance in Schiller; it is not only a step toward the highest human state, but is a constituent of it. BEARDSLEY, *supra* note 82, at 229–230. Schiller is hardly the only writer of whom this is true.

87. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980), at 87.

88. Id.

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but the thought has implications for pornography that he resists. Freedom of thought should include the freedom to be playful and to toy even with dangerous thoughts. Playing with thoughts is precisely what the arts do.

The effort to separate pornography from the arts, we have seen, is the rock on which each of the arguments that has been considered here has come to wreck. Finnis is correct that thought is contained in every work of art, but the point applies equally to every fantasy constructed by human beings, sexual or otherwise. Freedom of the mind means the right to imagine other worlds and to tell one another what we have imagined.

I have not addressed the question of the state's interest. Perhaps the freedom to publish pornography is so damaging that the presumption against thought control is here overcome. But we should not pretend that when we suppress pornography we are not infringing values that lie at the heart of free speech.

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