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OBSCENITY, PORNOGRAPHY, AND FIRST AMENDMENT THEORY

Arnold H. Loewy*

The urge to punish those who disseminate sexually explicit material is overwhelming. To illustrate, in the *Sable Communications* case,¹ the Supreme Court was faced with a congressional statute forbidding the interstate telephonic communication of any indecent or obscene message to any person, regardless of age.² In this essay, I shall examine the rationale for this urge to punish and the extent to which such urge can be implemented consistent with sound First Amendment theory.

There are at least three different concerns motivating those who would limit the dissemination of sexually explicit material: the antisocial behavior engendered by exposure to the material, the exploitation of those who participate in production of the material, and the quality of community life in and around commercial outlets which disseminate such material. My conclusions, which will be developed in this essay, are: (1) if obscenity is speech, any antisocial behavior engendered from reading or watching it should not count as a harm to be balanced against the First Amendment; (2) obscenity should be treated as speech; (3) exploitation of participants should be punishable, but, except in the case of minors, should not be presumed; and (4) a law that channels sexually explicit speech without significantly impairing its availability should be constitutional.

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¹ *Sable Communications v. FCC*, 492 U.S. 115 (1989).

² 47 U.S.C. § 223(b)(2) (1988) provides:

Whoever knowingly—

(A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or

(B) permits any telephone facility under such person's control to be used for an activity prohibited by clause (i), shall be fined not more than \$50,000 or imprisoned not more than six months, or both.

I. ANTISOCIAL BEHAVIOR

There is substantial, but not overwhelming, evidence that exposure to obscenity causes antisocial or criminal behavior.³ If obscenity is not speech, there is no question that this evidence warrants its suppression.⁴ That indeed is the current law of the land.⁵

If, however, obscenity *is* speech, the law seems quite clear that proof of antisocial behavior emanating from it would not justify its suppression. According to *Brandenburg v. Ohio*,⁶ even advocacy to commit crimes cannot be punished unless it reaches the level of incitement to imminent illegality.⁷ Although obscenity does, however obliquely, advocate sexual and sometimes violent crimes, it does not approach the level of incitement to imminent criminality required by *Brandenburg*.

The Supreme Court has never questioned this analysis. Rather, it has held that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."⁸ Proceeding from that premise, the Court reached the logically impeccable conclusion that obscenity is subject to legislative prohibition. If, however, obscenity is speech, such a conclusion is incorrect. In examining the Court's conclusion that obscenity is not speech, I shall analyze written obscenity and pictorial obscenity separately because they involve potentially different considerations.

II. WRITTEN OBSCENITY

In *Kaplan v. California*,⁹ the Supreme Court explicitly held that "expression by words alone can be legally 'obscene.'"¹⁰ Statutes that punish the dissemination of written obscenity are designed to deprive the citizenry of access to ideas deemed offensive by the government. They

³ See generally, ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, FINAL REPORT (1986); cf. Edward I. Donnerstein, *Aggressive Pornography: Can It Influence Aggression Against Women*, in PROMOTING SEXUAL RESPONSIBILITY AND PREVENTING SEXUAL PROBLEMS (George W. Albee et al. eds., 1983). But see U. S. COMM'N ON OBSCENITY AND PORNOGRAPHY, THE REPORT (1970); EBERHARD KRONHAUSEN & PHYLLIS KRONHAUSEN, PORNOGRAPHY AND THE LAW (1959); Steven Alan Childress, *Reel "Rape Speech": Violent Pornography and the Politics of Harm*, 25 LAW AND SOC. REV. 177 (1991).

⁴ See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁵ See, e.g., *Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973).

⁶ 395 U.S. 444 (1969).

⁷ *Id.* at 449.

⁸ *Roth v. United States*, 354 U.S. 476, 484 (1957).

⁹ 413 U.S. 115 (1973).

¹⁰ *Id.* at 118.

may not totally preclude the advocacy of licentious or perverted sex, but they preclude a form of advocacy which, from an emotive perspective, might be quite effective. Even if obscenity laws could be viewed as ideologically neutral, they still limit the manner in which appeal can be made to individual emotions.¹¹

Outside of obscenity cases, legislation that attempts to limit appeals to emotion has fared little better than legislation attempting to limit appeals to the intellect.¹² For example, in *Cohen v. California*,¹³ the Supreme Court reversed the conviction of a man for wearing a jacket with the words "Fuck the Draft" emblazoned thereon.¹⁴ In the course of its opinion, the Court emphasized: "We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for the emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated."¹⁵ The Court has adhered consistently to this approach, most recently affirming the right to burn the American flag as a form of political protest¹⁶ and the right to burn a cross as a form of racial insult.¹⁷

Although the Supreme Court has not protected the emotive aspect of sexually explicit speech, it has held that advocacy of sexually perverse ideology cannot be proscribed. In *Kingsley International Pictures Corp. v. Regents*,¹⁸ it invalidated an overtly ideological New York statute which forbade the presentation of a movie because it portrayed adultery as desirable social behavior.¹⁹ In ringing terms, the Court held that the First Amendment "protects advocacy of the opinion that adultery may

¹¹ See Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime, and the First Amendment*, 1987 WIS. L. REV. 221; see also Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564 (1988).

¹² Except in schools. See *Bethel School District v. Fraser*, 478 U.S. 675 (1986); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

¹³ 403 U.S. 15 (1971).

¹⁴ *Id.* at 16.

¹⁵ *Id.* at 26.

¹⁶ *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990). See Arnold H. Loewy, *The Flag-Burning Case: Freedom of Speech When We Need It Most*, 68 N.C. L. REV. 165 (1989).

¹⁷ *R.A.V. v. St. Paul*, 112 S. Ct. 2538 (1992). Cf. *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993). See generally, Frederick M. Lawrence, *Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 NOTRE DAME L. REV. 673 (1993).

¹⁸ 360 U.S. 684 (1959).

¹⁹ Although *Kingsley* involved a movie, no claim was made that any pictorial representation was unlawful. Therefore, the case can be appropriately analyzed under written obscenity.

sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing."²⁰ Indeed, in finding obscenity to be outside the scope of the First Amendment, the Court, in *Roth v. United States*,²¹ clearly held that obscenity is unprotected, principally because it is nonideological:

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . . "It has been well observed that such [lewd and obscene] utterances are no essential part of any exposition of ideas"²²

Even if the Court were correct in its assessment of the nonideological character of obscenity, the Court, in *Winters v. New York*,²³ had previously granted constitutional protection to stories of violence that were so massed "as to become vehicles for inciting violent and depraved crimes against the person."²⁴ The Court, which could see no possible value in these stories, nevertheless protected them, holding that "the line between the informing and the entertaining is too elusive for the protection of [freedom of speech]."²⁵ Although *Winters* explicitly excluded obscenity from its libertarian sentiments,²⁶ it did so by *ipse dixit* rather than by analysis. Sexually explicit magazines are at least as likely to advocate an idea—the joy of promiscuous sex, for example—as were the violent magazines in *Winters*.²⁷ Indeed, it is precisely because of such advocacy that many obscenity laws are enacted.²⁸

²⁰ *Kingsley*, 360 U.S. at 689.

²¹ 354 U.S. 476 (1957).

²² *Id.* at 484-85 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

²³ 333 U.S. 507 (1948).

²⁴ *Id.* at 513.

²⁵ *Id.* at 510. See Arnold H. Loewy, *Freedom of Speech As a Product of Democracy* 27 U. RICH. L. REV. 427 (1993).

²⁶ *Winters*, 333 U.S. at 510.

²⁷ See David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

²⁸ See Arnold H. Loewy, *Why the 1985 North Carolina Obscenity Law is Fundamentally Wrong*, 65 N.C. L. REV. 793, 795 (1987).

Frederick Schauer has argued that obscenity is outside the First Amendment because it appeals to one's physical rather than mental processes.²⁹ In Professor Schauer's view, an obscene book is more like a sex aid than an item of literature. Consequently, he would argue that whether or not sex aids are useful, they should not be protected under the freedom of speech principle. The difficulty with Schauer's analysis is that much literature is read for the physical reaction—laughter, euphoria, or whatever—that one derives from it. Speech, obscene or otherwise, allows one to have such physical feelings only after mental digestion of the material. Martin Redish has astutely observed that “viewing pornography is clearly distinguishable, for First Amendment purposes, from a vibrator, just as the whoopee cushion is distinguishable from the Marx Brothers movie.”³⁰ Neither the vibrator nor the cushion is protected because each bypasses the mental processes in achieving a physical reaction, whereas both the obscenity and Marx Brothers movie achieve the physical reaction via mental processes. Because neither Schauer nor anyone else³¹ has adequately explained why the most sexually explicit literature should not be treated as speech, the libertarian sentiments expressed in *Winters* ought to apply to obscenity.

To justify prosecutions for written obscenity, the Court is forced to make highly artificial distinctions based on prurient appeal. *Kingsley Pictures*³² protected advocacy of adultery, but not if done in a prurient manner; *Cohen*³³ protected offensive but not prurient speech; and *Winters*³⁴ protected violent but not prurient magazines. *Kingsley* and *Cohen* largely cancel each other's limitations: If sexual misconduct can be advocated, as in *Kingsley*, and advocacy can be offensive, as in *Cohen*, why can sexual misconduct not be advocated in an offensive—that is, prurient—manner? The *Winters* violence/obscenity distinction is even more perverse in that most studies have shown explicit violence to be more harmful than explicit sex.³⁵

²⁹ See Frederick Schauer, *Speech and “Speech”—Obscenity and “Obscenity”: An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979); FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY*, 181-84 (1982).

³⁰ MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 75 (1984).

³¹ For a similar attempt, see John M. Finnis, “Reason and Passion”: *The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222 (1967).

³² *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684 (1959).

³³ *Cohen v. California*, 403 U.S. 15 (1971).

³⁴ *Winters v. New York*, 333 U.S. 507 (1948).

³⁵ See ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, *supra* note 3, at 977-1007. For example, one study showed that males who were exposed to a large number of films depicting violent acts against women came to feel less sympathetic toward women, tended to underestimate the violent nature of the males' acts, and began to evaluate such acts as significantly less degrading to women. Subjects shown films that had received an “X”

III. LIVE OR PHOTOGRAPHIC OBSCENITY

The potentially relevant distinction between written obscenity and that which is live or photographic is that the latter injects an element of conduct. Freedom to advocate sexual promiscuity does not necessarily imply freedom to engage in sexual promiscuity.³⁶ It is important to emphasize that it is only the actual conduct that arguably justifies a different approach. Sexually explicit cartoons, drawings, or other lithographs are not themselves violations of the law. Therefore, they should be fully protected even when they depict such violations. Similarly, moving or still photography of lawful activity should be fully protected.

It seems clear that the First Amendment does not protect the movie producer's right to photograph everything. The law against murder obviously reaches the production of a "snuff" film.³⁷ Although it is less clear, I assume that some form of government regulation on dangerous stunts would be permissible on the theory that at some point lives are worth more than realism. Similarly, sexually explicit performances, films, or photographs might be controlled by indecent exposure, prostitution, or sexual misconduct charges.³⁸

Live performances would seem easiest to control because they involve only the jurisdiction in which the performance is presented. Indecent exposure statutes have occasionally been employed to convict nude dancers and their sponsors.³⁹ Whether such efforts will succeed is problematic. The Supreme Court has not looked kindly upon efforts to ban all nude dancing,⁴⁰ and that is precisely what such a statutory application does.

rating for sexual content only, however, experienced no such change in objectification of women, acceptance of conservative sex roles, or rape myth acceptance. *Id.* (citing D. Linz, *Sexual Violence in the Mass Media: Effects on Male Viewers and Implications for Society* (1985) (unpublished Ph.D. dissertation, University of Wisconsin)); *see also* Childress, *supra* note 3; *cf.* Donnerstein, *supra* note 3.

³⁶ See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 182-83 (1982).

³⁷ A film in which an actress is tortured and killed for the enjoyment of the audience.

³⁸ It is unclear how much consensual activity is protected by the progeny of *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating statute restricting use of contraceptives by married persons).

Compare *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (invalidating statute prohibiting distribution of contraceptives to unmarried persons) *with* *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding statute prohibiting sodomy between consenting adults). It is doubtful that any of these decisions protect the public display of sexuality.

³⁹ *E.g.*, *Erhardt v. State*, 468 N.E.2d 224 (Ind. 1984); *State v. King*, 201 S.E.2d 724 (N.C. Ct. App. 1974), *modified on other grounds*, 204 S.E.2d 667 (N.C. 1974). *But see* *Morris v. Municipal Court*, 652 P.2d 51 (Cal. 1982), *overruling* *Crownover v. Musick*, 509 P.2d 497 (Cal. 1973), *cert. denied*, 415 U.S. 931 (1974).

⁴⁰ *See* *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *cf.* *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (showing films containing nudity at a drive-in

Furthermore, the government interest in preventing indecent exposure is surely at its nadir when the "victim" of the exposure wishes to witness it. Consequently, one would think that the First Amendment would preclude application of such a statute to nude entertainment, at least where exposure to children and nonconsenting adults is avoided. Nevertheless, in a strangely convoluted opinion, *Barnes v. Glen Theatres*,⁴¹ the Court upheld an indecent exposure statute as applied to barroom dancing and other adult entertainment.

Because of the breakdown of the Court, however, it is difficult to extrapolate much precedential value from the case. Justice Scalia, one of the five votes necessary to uphold the statute, was prepared to do so only because of the statute's generality. In his view, the statute applied to *all* forms of public nudity.⁴² Consequently, he viewed the statutory prohibition as unvarying regardless of the whether the nude was conveying an idea or not. He voted to uphold the statute because of the perceived immorality of public nudity.⁴³

Justice Souter, another of the five votes required for a majority, was prepared to uphold the statute only because of its *nongenerality*. In his view, the statute only applied to nudity where harmful secondary effects were likely to transpire.⁴⁴ In other words, he perceived this regulation to effect nude dancing *establishments* rather than nudity itself. Consequently, he analyzed this case as one channeling public nudity rather than forbidding it.⁴⁵ Only on that basis was he willing to concur.⁴⁶

The upshot of *Barnes* is that five of the justices—Scalia and the four dissenters—were unwilling to sustain a statute that made the legality of public nudity depend on the character of the entertainment.⁴⁷ But a different five justices—Souter and the four dissenters—were unwilling to sustain a statute that did *not* allow expressive nudity outside of the unwholesome environs at issue in *Barnes*. Because of the uncertainty of its application as well as the insubstantiality of its doctrinal underpinnings, one can only hope that the viability of *Barnes* will be exceedingly short-lived.

theater, thereby creating the chance for passers-by to have unwilling glances at nudity, did not constitute an offense as long as the nudity was not obscene, at least as to minors). See *infra* text accompanying notes 101-108.

⁴¹ 111 S. Ct. 2456 (1991).

⁴² *Id.* at 2463.

⁴³ *Id.* at 2468.

⁴⁴ *Id.* at 2469-70. Here he was relying on *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). See *infra* text accompanying notes 124-30.

⁴⁵ See *infra* text accompanying notes 90-130.

⁴⁶ *Barnes*, 111 S. Ct. at 2468-69.

⁴⁷ At least assuming that it was not obscene.

The case for prostitution prosecutions is more arguable. Compensating an actor or actress for sexual intercourse probably comes within the literal definition of prostitution. On the other hand, this type of prostitution is nowhere near so great a state concern as murder or even safe stunts. Nevertheless, it is arguable that a state in which specific sexual activity is either performed live or photographed could punish that activity as prostitution.⁴⁸ Should the Court so hold, it is conceivable that Congress would enact federal prostitution statutes aimed at preventing such performances nationwide.⁴⁹ Any such statute, however, would have so great an impact on speech relative to the attenuated federal interest that its constitutionality would be extremely doubtful.⁵⁰

A state in which photographed sexual activity is marketed may seek to prevent its dissemination on the grounds that it was produced in violation of local prostitution laws. This argument should fail. Not all jurisdictions prohibit prostitution,⁵¹ and of those that do, it is likely that not all would adopt the argument that such prohibition should apply to moving and still photography. Even if the market state could positively identify the producing state as one that deems this type of photography to constitute prostitution, its argument would be limited to a "good neighbor" policy justification; that is, it would contend that as a good neighbor, it should

⁴⁸ See E. Edward Bruce, Comment, *Prostitution and Obscenity: A Comment Upon the Attorney General's Report on Pornography*, 1987 DUKE L.J. 123; Lori D. Hutchins, Note, *Pornography: The Prosecution of Pornographers Under Prostitution Statutes—A New Approach*, 37 SYRACUSE L. REV. 977 (1986).

⁴⁹ Conceivably, the Mann Act could be applied to one who transported an actress across state lines for such purposes. Mann Act, 18 U.S.C. § 2421 (1988). Under the same reasoning, an amendment to the Mann Act could presumably prevent the transportation across state lines of photographed sexual activities.

It is already possible to prosecute those who transport obscene materials across state lines, even for private purposes. See *United States v. Orito*, 413 U.S. 139, 143 (1973). Similarly, 19 U.S.C. § 1305(a) (1982) has been held to preclude importation of obscene materials by private carriage. See *United States v. 12 200-ft. Reels of Film*, 413 U.S. 123, 128 (1973).

⁵⁰ See *Roth v. United States*, 354 U.S. 476, 505-08 (1957) (Harlan, J., dissenting). Whether the Court would consider any speech-suppressing animus on behalf of the government to be relevant evidence would depend upon its choice of precedents. Compare *United States v. O'Brien*, 391 U.S. 367 (1968) (declining to find congressional motive to punish speech in enactment of statute requiring men to carry draft cards) with *Edwards v. Aguillard*, 482 U.S. 578 (1987) (invalidating Louisiana statute requiring schools to give equal treatment to so-called "creation science" theories because legislative history showed purpose of the statute was to further a specific religious viewpoint). See generally John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

⁵¹ Nevada allows prostitution under some circumstances. NEV. REV. STAT. § 269.175 (1979).

not provide economic encouragement for prostitution in a sister state. In view of the marginal interest of the producing state, this argument should fail. Obviously, the result would be otherwise if the market state prevented—as it should—dissemination of a “snuff” film.

A market state might also argue that sexually explicit photographs, unlike words, are unprotected conduct rather than speech. Professor Schauer argues that since the First Amendment would not protect a person’s right to hire two prostitutes to have sex with each other for his personal gratification, it should not protect his right to achieve the same result through use of film.⁵² To illustrate his point Schauer suggests:

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 of the faces of the participants.⁵³

The reason we should protect such a film is the *Winters* observation about the difficulty of distinguishing that which entertains from that which informs.⁵⁴ Undoubtedly this film can be, and in Schauer’s illustration is, employed to achieve orgasm.⁵⁵ It also can be perceived as an illustrated argument in favor of casual sex, wherein the producer emphasizes the anonymity of the parties by focusing on their genitals to the exclusion of their faces. While some might describe this construction of the movie as absurd,⁵⁶ the whole point of *Winters* is to prevent the judiciary from making this kind of value judgment at all. Consequently, the likelihood that much of the audience will use this movie as a masturbatory device should not deprive it of First Amendment protection any more than the magazines in *Winters*, which were protected despite the Court’s inability to “see [anything] of any possible value to society in [them]. . . .”⁵⁷

⁵² SCHAUER, *supra* note 36, at 181.

⁵³ *Id.*

⁵⁴ See *supra* note 26 and accompanying text.

⁵⁵ SCHAUER, *supra* note 36.

⁵⁶ If I were wont to express myself in a manner similar to Paul Cohen or George Carlin, I might have chosen a term other than “absurd.” See *Cohen v. California*, 403 U.S. 15 (1971), *supra* notes 13-15 and accompanying text; *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), *infra* notes 113-23 and accompanying text.

⁵⁷ *Winters v. New York*, 333 U.S. 507, 510 (1948).

IV. CHILD PORNOGRAPHY

Analysis of child pornography can differ from obscenity analysis only insofar as live or photographic displays are concerned. As far as written or illustrated accounts of sex and the six-year-old are concerned, the Constitution should permit no limitation.⁵⁸ Although the subject is almost too revolting to discuss, it is no more revolting than the hate-filled ideas of Nazi and Klan devotees, whose right to advocate genocide is constitutionally protected.⁵⁹ The actual employment of children in such material, however, is an altogether different issue. It should be clear beyond peradventure that a state can preclude children from performing sexually for a live audience or a camera. Although the state's interest may not approach that of preventing the producer of a "snuff" film from orchestrating a murder, it is infinitely superior to the need to control consenting adults from receiving money for similar performances. Contrary to Justice Brennan's analysis in *New York v. Ferber*,⁶⁰ a finished product that has "serious literary, artistic, scientific, or medical value"⁶¹ should not justify the employment of children to perform sexually any more than the need to build a better building could justify a construction company's violation of a child labor law. A movie or play could satisfy its artistic needs either by simulation, an adult double for the sexually explicit scene,⁶² or a young-looking adult portraying a child.⁶³

The constitutional power of a market state to prevent dissemination is more difficult. The good neighbor argument is much more powerful than it was in obscenity. Each of the states forbids the production of child pornography, and the state interest in doing so is substantial. Furthermore, it is frequently difficult to determine where a particular piece of child pornography was produced. Consequently, by outlawing it everywhere, the in-

⁵⁸ A limitation on its dissemination to minors is, of course, a different issue. Compare *Ginsberg v. New York*, 390 U.S. 629 (1968) (affirming conviction of shop owner for selling "girlie" magazine to sixteen-year-old) with *Butler v. Michigan*, 352 U.S. 380 (1957) (reversing conviction for selling a book containing obscene language "tending to the corruption of the morals of youth" to adult police officers).

⁵⁹ See *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), cert. denied, 439 U.S. 916 (1978). Although not more revolting than genocide, child abuse is a more realistic concern. Even so, the First Amendment cannot be compromised. See *supra* text accompanying notes 3-8; cf. *infra* text accompanying notes 80-88.

⁶⁰ 458 U.S. 747 (1982).

⁶¹ *Id.* at 776 (Brennan, J., concurring). Arguably, Justice Brennan is referring merely to dissemination of already produced material and not to production, but that is not clear from his opinion. Compare Frederick Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 SUP. CT. REV. 285, 298 n.71, where the distinction is emphasized.

⁶² Stunt people typically double for stars in unduly risky scenes.

⁶³ See Brief for Petitioner at 25, *Ferber* (No. 81-55).

centive to produce it anywhere will be significantly reduced. For these reasons, the Court in *Ferber* correctly upheld a statute forbidding the knowing distribution of material depicting sexual performances by children.⁶⁴

In his concurring opinion in *Ferber*, Justice Stevens raised the question of a foreign movie which was a serious work of art, but which contained a sexually explicit scene featuring a child actor who resided abroad. Justice Stevens suggested that in such a case, "New York's interest in protecting its young from sexual exploitation would be far less compelling than in the case before us. The federal interest in free expression would, however, be just as strong as if an adult actor had been used."⁶⁵ Stevens does seem to have a point, at least if the child's performance was lawful in the country of its origin. Perhaps the best solution would be to allow the disseminator of such material to prove that the material was lawfully produced in its place of origin.⁶⁶ Because I take seriously the *Winters* admonition that a judge should not condition constitutional protection on her own perception of value, I would require only that the defendant prove that the material was produced lawfully, and not that it was a serious work of art.

What about private possession of child pornography? *Stanley v. Georgia*⁶⁷ clearly holds that private possession of obscenity is constitutionally protected.⁶⁸ Child pornography, however, is forbidden—not because it is inherently unworthy of protection, but to protect the children who are exploited in producing the material. At one level, it might seem

⁶⁴ The Court "adjusted" the *Miller* test, see *infra* note 92, for child pornography cases as follows: "A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole." *Ferber*, 458 U.S. at 764.

⁶⁵ *Id.* at 779 (Stevens, J., concurring).

⁶⁶ The burden would be allowed to be shifted because of the few places where such performances would be lawful and the desire not to infringe upon areas of protected expression. See generally Arnold H. Loewy, *Culpability, Dangerousness and Harm: Balancing the Factors On Which Our Criminal Law Is Predicated*, 66 N.C. L. REV. 283 (1987); cf. Schauer, *supra* note 61, at 298-99 (suggesting an approach of shifting the burden to the defendant to prove the serious merit of the materials). Of course, one could argue that the interest in preventing child exploitation is so great that the state should proscribe the materials in any event, in order to discourage the country of production from continuing the exploitation of children.

⁶⁷ 394 U.S. 557 (1969).

⁶⁸ One could argue that the Court has not faithfully adhered to *Stanley* over the years. See *United States v. Reidel*, 402 U.S. 351 (1971) (upholding prohibition on receiving obscene materials through the mails); *United States v. 12 200 Ft. Reels of Film*, 413 U.S. 123 (1973) (upholding prohibition on importing obscene materials from foreign countries); *United States v. Orito*, 413 U.S. 139 (1973) (upholding prohibition on transportation of obscene material even for private use). Nevertheless, the core holding has not been questioned.

perverse to constitutionalize the right to possess unqualifiedly worthless (according to the Court) material, but punish possession of material that is not unqualifiedly worthless. There is, however, no good reason to punish private possession of obscenity. Contrariwise, criminalizing possession of child pornography can help dry up the market, thereby reducing the demand for, and hopefully the supply of, exploited children. On balance, therefore, the Supreme Court's opinion in *Osborne v. Ohio*⁶⁹ permitting such prosecutions was correctly decided.

There is a scienter problem, however: How is a consumer of such material supposed to know whether the photographs are really of children, or whether, as the Court suggested in *Ferber*, they are adults pretending to be children? Given the *Ferber* suggestion, we cannot just say: "If they look like children, then, for purposes of prosecution, we will assume that they are children." Perhaps proof that the defendant specifically asked for or ordered photographs of children engaged in particular sexual activity should suffice. Those statutes that make scienter irrelevant, however, should be invalidated.⁷⁰

V. FEMINIST-DENOMINATED PORNOGRAPHY

In recent years, some feminists have sought to control the proliferation of what they define as pornography. Feminist-denominated pornography differs from obscenity in that its focus is upon sexually explicit subordination of women rather than prurience. Such a statute is both more and less justifiable than an obscenity statute. It is more justifiable in that it aims at redressing a serious harm, subordination of women, rather than the much more trivial concern of pandering to the prurient interest. On the other hand, it is more clearly and explicitly aimed at silencing a particular viewpoint—the desirability of sexually subordinating women.⁷¹ One version of such a statute was enacted in Indianapolis and invalidated by the Seventh Circuit.⁷²

⁶⁹ 495 U.S. 103 (1990).

⁷⁰ "As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant." *Ferber*, 458 U.S. at 765. A conviction can, however, be predicated on recklessness, defined as a subjective awareness of the risk that the photographs were of children. See *Osborne*, 495 U.S. at 104; cf. *Hamling v. United States*, 418 U.S. 87, 123-24 (1974) (holding that statutory language "'knowledge' of, or 'reason to know'" satisfies scienter requirement for distribution of obscene materials through the mails).

⁷¹ See Geoffrey R. Stone, *Comment: Anti-Pornography Legislation as Viewpoint-Discrimination*, 9 HARV. J.L. & PUB. POL'Y 461, 461-62 (1986).

⁷² *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd.*, 475 U.S. 1001 (1986).

Among other things, the Indianapolis ordinance sought to protect actresses from being compelled to perform in sexually degrading movies. Insofar as a law protects against actual kidnapping, rape, or extortion, the statute seems unassailable, although unnecessary. For example, if an actress could establish that she was subject to the kind of abuse described by Linda Lovelace,⁷³ her tormentor ought to be imprisoned for a very long time under our present laws. If she cannot—or is afraid to—establish her claim, a new law forbidding the same conduct is not likely to do much good. Although it is a closer question, a law precluding the knowing dissemination of material produced by criminal threats against one or more of the performers ought to pass constitutional muster under *Ferber*.⁷⁴

Much more problematic is the statute's conclusive presumption that all women who perform in pornographic films do so involuntarily.⁷⁵ At bottom, this can represent no more than the views of the most zealous proponents of the pornography approach, who simply cannot believe that any woman would voluntarily consent to this sort of thing.⁷⁶ One could, of course, establish a juridical incapacity of any woman to consent, thereby analogizing adult pornography to the child pornography condemned in *Ferber*. Such an approach is rejected even by some of the proponents of pornography legislation. For example, Cass Sunstein, a moderate proponent of such legislation, rejects the *Ferber* analogy, contending that "[b]ecause the people to be protected are women rather than children, . . . the claim of universal legal involuntariness is untenable."⁷⁷ Indeed, it was not so long ago that the law's tender mercies conclusively presumed that women were unable to serve as barmaids, unless, of course, their fathers or husbands were around to protect them.⁷⁸ Let us hope that civil rights for

⁷³ LINDA LOVELACE, *ORDEAL* (1980).

⁷⁴ Ideally, such a law should apply to all actors and actresses, not just those in pornographic films. See Stone, *supra* note 71, at 471-72. There might be a special problem if the movie producers did not apply coercion, but unbeknownst to them, an outsider did. Whether a disseminator who subsequently learns of this third party coercion could be precluded from disseminating the material is a more difficult question.

⁷⁵ The Indianapolis ordinance made it no defense that no force or threats were used to coerce the performance, or that the person photographed had previously posed for pornography, or that the person was under contract and was paid for the performance, or that the person had consented to the pornographic usage of the materials or knew that they would be so used. *American Booksellers Ass'n*, 771 F.2d at 325-26.

⁷⁶ See Catherine A. MacKinnon, *Pornography, Civil Rights and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

⁷⁷ Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 596.

⁷⁸ *Goesaert v. Cleary*, 335 U.S. 464 (1948), *overruled by* *Craig v. Boren*, 429 U.S. 190 (1976).

women have reached the point where a legislature cannot conclusively determine how each and every woman wants to earn her livelihood.⁷⁹

The other major purpose of pornography legislation is to prevent the citizenry from acting upon the abhorrent message of the pornographers. The short answer to this argument is that the First Amendment requires that we take the risk.⁸⁰ One could argue that it is not the idea—male sexual dominance—but the offensive manner of presentation that the law seeks to prevent. Even in the context of viewpoint-neutral legislation, *Cohen* would appear to reject this mode of analysis.⁸¹ But pornography is not viewpoint-neutral; identical explicitness that sought to establish sexual equality would not contravene the statute.⁸²

According to Professor Sunstein's argument, however, because anti-pornography legislation aims to prevent the harm that emanates from viewing pornography, the legislation is harm-based rather than viewpoint-based.⁸³ Inasmuch as there is no motive for a government to suppress a viewpoint unless that government believes that the expression is likely to cause harm, Sunstein's argument would condemn all viewpoint-based discrimination as harm-based. This argument proves too much. Most of his examples, moreover, are channeling cases—for example, an ordinance precluding sexually explicit entertainment in a residential neighborhood.⁸⁴ His only examples of total prohibitions are in the area of commercial speech, which is not entitled to full First Amendment protection.⁸⁵

Because anti-pornography legislation is clearly a total prohibition on a type of speech, it can be sustained only if we can justify an exception to the First Amendment. In terms of repulsiveness, it is hard to make a special case for pornography. As repulsive as the message is, it is not worse than some of the stuff put out by the Nazis and Klan.⁸⁶ Yet the case can be made that Nazi and Klan literature appeals primarily to the lunatic fringe,

⁷⁹ In light of some decisions of the past 15 years or so, I am not sure that point has been reached. See, e.g., Arnold H. Loewy, *Returned to the Pedestal—The Supreme Court and Gender Classification Cases: 1980 Term*, 60 N.C. L. REV. 87 (1981). The applicability of equal protection to this aspect of the pornography statute was suggested to me by Professor Sylvia Law.

⁸⁰ See *supra* notes 3-8 and accompanying text.

⁸¹ *Cohen v. California*, 403 U.S. 15 (1971). See *supra* notes 13-15 and accompanying text.

⁸² See *Stone*, *supra* note 71, at 469; cf. *Schacht v. United States*, 398 U.S. 58 (1970).

⁸³ Sunstein, *supra* note 77, at 612 *et seq.*

⁸⁴ E.g., *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986). See *infra* notes 124-30 and accompanying text.

⁸⁵ E.g., *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328 (1986).

⁸⁶ For example, the news program 20/20 once presented a KKK publication containing a cartoon advocating the moral propriety of killing Negroes. (ABC television broadcast, July 9, 1986).

whereas male sexual dominance is more acceptable to the rank and file citizen. Consequently, more people are likely to identify with and accept the message of pornography, rendering its dissemination more dangerous.

The difficulty with this argument is that it permits suppression of repulsive speech precisely because its repulsiveness is not apparent to enough people. This is not the theory behind the First Amendment. Rather its theory is to make the repulsiveness apparent by more speech. Some contend that more speech is impossible because pornography has made women unbelievable.⁸⁷ The same argument could have been made about the civil rights revolution. Blacks who had been demeaned, attacked by dogs, and otherwise presented as sub-human, overcame their oppression largely by speech. Because of that speech, groups such as the Klan are now publicly scorned. Undoubtedly, those who would "take back the night"⁸⁸ have a similar capacity to educate the public.

The need for those committed to this important project is to reach more people, not to silence their opposition. Although freedom of speech cannot totally eliminate the sexist mentality, it can ensure that those who display it become as ostracized as those who display racism are ostracized today.⁸⁹

VI. CHANNELING

In *Paris Adult Theatre I v. Slaton*,⁹⁰ the Court, in one of its rare efforts to rationalize suppression of obscenity, focused on reasons relating to the quality of life around the commercial distribution center: "These 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."⁹¹ Because the definition of obscenity bears so little relationship to the problem,⁹² some communities have preferred to

⁸⁷ See, e.g., MacKinnon, *supra* note 76; Sunstein, *supra* note 77.

⁸⁸ The title of a book compiled by several authors detailing the harm to women from pornography. TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY (Laura Lederer ed., Morrow Quill Paperbacks 1980).

⁸⁹ See Stone, *supra* note 71, at 480.

⁹⁰ 413 U.S. 49 (1973).

⁹¹ *Id.* at 58. Arguably the public safety interest could refer to violence inspired by reading obscenity. In context, however, the Court appeared to be concerned about the safety of a neighborhood that is overrun by the seedy characters that frequent "adult" book stores.

⁹² In *Miller v. California*, the companion case to *Paris Adult Theatre*, the Court announced:

The basic guidelines for the trier of fact must be: (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

focus on channeling sexually explicit material in lieu of, or in addition to, prosecuting the dissemination of obscenity.

Channeling sexually explicit material is beset with some problems that are irrelevant to the suppression of obscenity. If obscenity fails to achieve constitutionally-protected status, as the Court (contrary to my good advice) says it does, suppression presents no problem. Much sexually explicit speech, despite its equal capacity to deteriorate a neighborhood, is constitutionally protected. The core of much modern First Amendment theory is that content-based discrimination among different types of constitutionally-protected speech is anathema to the First Amendment.⁹³ Consequently, it is argued that communities ought not be permitted to channel sexually explicit speech from places in which other types of speech are permitted.⁹⁴

One argument in favor of channeling is that sexually explicit speech should be deemed lesser value speech and consequently amenable to channeling. Although some Supreme Court Justices⁹⁵ and some fairly diverse commentators⁹⁶ have endorsed this approach, it has failed to obtain majority support. The better rationale for channeling only sexually explicit speech is that it has a greater capacity to invade privacy or destroy

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

413 U.S. 15, 24 (1973). Whether the sexually explicit material appeals to the prurient interest in whole or in part, whether it is patently offensive or just offensive, or whether it has some literary or artistic value (which was not what the viewer came to see anyway) has very little to do with the tone of commerce concerns expressed in *Paris Adult Theatre*.

The silliness of the obscenity standards was never more apparent than in the "dial-a-porn" case. Indecent messages were held to be protected, but obscene ones were not. *Sable Communications v. FCC*, 492 U.S. 115 (1989). The specter of overcrowded courts deciding whether a particular dial-a-porn message is "patently" offensive or just offensive is mind-boggling. I assume that "prurient" appeal would be less of an issue here because if the messages were not "prurient," the customer would want his money back.

⁹³ See *Police Dep't v. Mosley*, 408 U.S. 92 (1972); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

⁹⁴ See Frederick F. Schauer, *The Return of Variable Obscenity?*, 28 HASTINGS L.J. 1275, 1288-91 (1977); Karst, *supra* note 93.

⁹⁵ In *Young v. American Mini Theatres*, 427 U.S. 50, 70-71 (1976), Justice Stevens, joined by Justices White and Rehnquist and Chief Justice Burger, considered sexually explicit films to be lesser value speech and therefore more subject to channeling than other types of speech. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), only three Justices (Stevens, Burger, and Rehnquist, JJ.) endorsed the lesser value theory.

⁹⁶ See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26-29 (1971); Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 255. Although I once endorsed this approach, see Arnold H. Loewy, *A Better Test For Obscenity: Better for the States—Better for Libertarians*, 28 HASTINGS L.J. 1315 (1977), I prefer not to rely on it because it is not necessary to establish the thesis that I am advancing and is fraught with difficulty.

neighborhoods than most other types of speech; therefore, it may be subject to greater regulation.⁹⁷

Another powerful argument in favor of channeling is that the book stores and movie theatres that are channeled are seldom seeking to convey any particular message. Rather, they are commercial conduits, whose *raison d'être* is to make money from disseminating whatever books and movies will be most profitable. These conduits, of course, are entitled to First Amendment protection because failure to provide such protection would effectively prevent the dissemination of much constitutionally protected material. The measure of such protection, however, ought to be that which is necessary to ensure that book publishers and movie producers have ample opportunity to reach their audiences.⁹⁸ From a free speech perspective, this emphasis seems sound. At least so long as a conduit is not personally interested in spreading a message, the constitutionality of a law limiting its freedom ought to be measured by the impact of the law upon dissemination of the material. *Bantam Books, Inc. v. Sullivan*,⁹⁹ which allowed a publisher to challenge a prior restraint of book stores, supports this proposition. That case recognized that although the statute nominally burdened book stores, the real party in interest was the publisher who stood to have its book removed by the compliant book store.¹⁰⁰ Consequently, it does not seem unreasonable to view a conduit as an incidental beneficiary of a publisher's or producer's First Amendment rights and to measure the conduit's rights accordingly.

The Supreme Court has been less than uniform in its treatment of the relevant cases. In *Erznoznik v. City of Jacksonville*,¹⁰¹ the Court invalidated a Jacksonville ordinance that forbade projection of nude images that could be seen from a public place outside of the theatre. Inasmuch as the state can forbid indecent exposure to an unwilling viewer in a public place, one could argue that such a person should be protected from exposure to the much larger representation on the screen. Although this interest is not overwhelming, neither is the interference with free speech. To be sure, *Erznoznik* cannot show films containing nudity at his drive-in, but these

⁹⁷ Cf. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (holding—at least by plurality—that commercial posters could be *avored* over political posters on a municipal transit system in part because only the latter run the risk of apparent government endorsement).

⁹⁸ See *Young*, 427 U.S. at 78-79 (Powell, J., concurring).

⁹⁹ 372 U.S. 58 (1963).

¹⁰⁰ *Id.* at 64-65 n.6. Cf. William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 263-65 (1982) (discussing *Bantam Books* in the context of administrative licensing and subsequent punishment).

¹⁰¹ 422 U.S. 205 (1975).

films could still be shown at all indoor theatres and all drive-ins that are not visible to passersby. Nevertheless, the Court balanced the First Amendment and privacy interests by requiring the offended passerby to look the other way.¹⁰² It also held that the ordinance could not be justified as a traffic safety regulation. The Court indicated that even if the ordinance had been limited to movies that were visible from the highway—which this ordinance was not: “There is no reason to think that a wide variety of other scenes in the customary screen diet, ranging from soap opera to violence, would be any less distracting to the passing motorist.”¹⁰³ Therefore, although suggesting that an ordinance requiring all movie screens to be shielded from the highway would pass constitutional muster,¹⁰⁴ the Court refused to uphold this nudity-channeling ordinance.

Jacksonville, however, might be unwilling to require all theatres to shield their screens from the highway because, contrary to the Court, the city might conclude that soap opera and violence are not so distracting as nudity, and therefore not worth the additional expense to the theatre.¹⁰⁵ After all, there are no indecent soap opera statutes.¹⁰⁶ Although equality purists have hailed *Erznoznik* for its refusal to accept a content-based classification,¹⁰⁷ I repeat what I wrote sixteen years ago:

[A]s a passenger in a car, I would feel safer knowing that the driver was not seeing a nude scene while driving. To be sure, I would rather that he or she not be distracted at all, but if there were to be a distraction, I would feel safer knowing that it was a fully clothed one.¹⁰⁸

The Court was more receptive to channeling in *Young v. American Mini Theatres*,¹⁰⁹ in which it upheld a Detroit ordinance forbidding the establishment of an adult book store, adult movie theatre, or any one of

¹⁰² Part of the Court’s concern was the overbreadth of the statute in forbidding such nudity as a baby’s buttocks. The opinion was not so limited, however. Indeed, it clearly held that the state was powerless to prevent the projection of nude images to unwilling viewers unless the movie taken as a whole was obscene at least as to minors. *Id.* at 213-14.

¹⁰³ *Id.* at 214-15.

¹⁰⁴ *Id.* at 215 n.13.

¹⁰⁵ See *id.* at 211-12 n.8 (citing *Olympic Drive-In Theatre, Inc. v. Pagedale*, 441 S.W.2d 5, 8 (Mo. 1969) for the proposition that, at least in one case, the cost of shielding the screen from public view was estimated at \$250,000).

¹⁰⁶ Although aesthetically it might not be a bad idea to adopt such a statute, I doubt that it would pass constitutional muster.

¹⁰⁷ See *Karst*, *supra* note 93, at 65-66; *Schauer*, *supra* note 94, at 1285.

¹⁰⁸ *Loewy*, *supra* note 96, at 1319.

¹⁰⁹ 427 U.S. 50 (1976).

several other establishments, such as a pool hall, within 1000 feet of two other such establishments. The statute was inspired by a study that had determined that the concentration of such businesses within a single area tended to foster urban decay. Four of the Justices—Justices Stevens, White, Rehnquist, and Chief Justice Burger—relied in part on what they perceived to be the lesser value accorded sexually explicit speech.¹¹⁰ Justice Powell, the fifth vote for upholding the statute, made no such assumption. Rather, he upheld this channeling on the ground that no other type of speech contributed to the problem of urban decay.¹¹¹

In some ways, channeling was more justified in *Young* than it was in *Erznoznik*. Privacy and highway safety, though serious concerns, do not approach Detroit's interest in fighting urban decay. Furthermore, a more encompassing ordinance—for example, one that would prohibit *any* drive-in movie from being seen outside the theatre—would have better protected the privacy and safety of the Jacksonville citizenry, even if on a cost/benefit analysis such a sweeping statute would have been imprudent. On the other hand, movies that were not sexually explicit did not threaten Detroit's urban security at all. Consequently, limiting these films would have been an arbitrary and useless act. Therefore, if Detroit was entitled to enact any legislation limiting the dissemination of books and movies, its only sensible option was the channeling ordinance that it adopted.

This is not to say that *Young* was an easy case. Because sexually explicit books and movies tend to advocate promiscuity, whereas movies containing nudity might advocate just about anything, *Young* approximates viewpoint discrimination more closely than *Erznoznik* does.¹¹² Furthermore, the argument that Detroit was concerned with secondary effects has to be tightly cabined. I assume that a predominantly Republican town could not justify a refusal to allow Democrats to operate a downtown office on the ground that such an office would tend to attract "riffraff" who would spoil the town's genteel image.

Notwithstanding these concerns, the *Young* result was correct. Though more viewpoint-specific than the Jacksonville ordinance, the Detroit ordinance was nowhere near so viewpoint-specific as that of the hypothetical Republican town. Furthermore, *Young* was explicitly premised on minimal interference with the dissemination of books and movies. The Democratic party—unlike American Mini Theatres, which is merely a commercial conduit—has a direct First Amendment right to choose its locus of operations. Given the documentation of harm, the disutility of an across-

¹¹⁰ See *supra* note 95 and accompanying text.

¹¹¹ *Young*, 427 U.S. at 82.

¹¹² See Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 111-12 (1978).

the-board limitation, and the assurance of adequate outlets for adult books and movies, the channeling of sexually explicit entertainment was properly sustained in *Young*.

The next case, *FCC v. Pacifica Foundation*,¹¹³ which upheld an FCC warning to a radio station not to rebroadcast a twelve minute monologue by George Carlin entitled "Filthy Words" during daytime hours, was far more questionable. In two separate opinions, garnering a total of five votes,¹¹⁴ the Court concluded that in the context of a radio broadcast during the daytime, the government's concern with invasions of privacy and protecting children warranted this special channeling. Because indecent speech was the only source of the problem, it was clear that if there was to be a regulation at all, it would have to be limited to indecent speech.

The case for any regulation, however, was not powerful. Any home owner could remove the offending broadcast with a flick of the switch. The Court concluded that this "is like saying that the remedy for an assault is to run away after the first blow."¹¹⁵ The Court analogized the limitation to a law proscribing obscene phone calls, and distinguished *Erznoznik* on the greater expectation of privacy one has in his home.¹¹⁶ Because obscene phone calls can represent a direct threat to the homeowner, they are hardly analogous. Furthermore, it could be argued that a brief exposure to dirty words while flipping the dial is hardly more of an assault to a person of genteel sensibilities than a similar exposure to aesthetically unpalatable music. Finally, because the only complaint that the FCC received about this broadcast came from a man listening to the broadcast on his car radio, the special sanctity of the home seems peculiarly irrelevant.

The protection of children rationale fares little better. Apart from the absence of a determination that the Carlin monologue was obscene for children, a *sine qua non* in *Erznoznik*,¹¹⁷ there was neither evidence nor reason to believe that very many children would be listening to the broadcast at two o'clock on a Tuesday afternoon.¹¹⁸ In fact, the only child who was known to have heard the broadcast was the child of the man who

¹¹³ 438 U.S. 726 (1978).

¹¹⁴ Justice Stevens, joined by Chief Justice Burger and Justice Rehnquist, justified the FCC's order in the context of a radio broadcast by reference to the low value of the "patently offensive" speech which "lies at the periphery of First Amendment concern." *Id.* at 743. Justice Powell, joined by Justice Blackmun, specifically denied the Court's power to decide the relative value of speech protected by the First Amendment, *id.* at 761 (Powell, J., concurring in part and concurring in the judgment); rather, he adopted the "special harm" approach to justify the order. *Id.* at 762.

¹¹⁵ *Id.* at 749.

¹¹⁶ *Id.* at 749 n.27.

¹¹⁷ See *supra* note 101 and accompanying text.

¹¹⁸ See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 937-38 (2d ed. 1988).

was offended by listening to it on his car radio. Evidently, this man was sufficiently concerned about the impact of the broadcast on his child to complain to the FCC, but not sufficiently concerned to turn it off. One has to think that the complainant's real concern was the failure of the government to protect us from offensive speech—surely an illegitimate concern¹¹⁹—rather than the more legitimate-sounding protection of children or privacy. This is not to say that a more carefully tailored effort at channeling, such as a prohibition of scatological speech on Saturday morning television, might not be appropriate.

The Court's opinion was not totally insensitive to free speech. It did emphasize the alternative places that a willing listener could hear the monologue. Nevertheless, *Pacifica* sanctions a rather broad content-channeling regulation for reasons that cannot withstand analysis. The plurality may have been influenced by its view that "[a] requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language."¹²⁰ If one ignores the Court's prior¹²¹ and subsequent¹²² emphasis on the emotive aspects of speech, the plurality's general proposition is basically correct. The ultimate irony in this case, however, is that one of the few serious ideas that cannot be expressed without offensive language is the silliness of prohibiting offensive language. Justice Brennan characterized the Court's opinion as "confirming Carlin's prescience as a social commentator. . . ." ¹²³ He has a good point.

The most recent case in this series, *City of Renton v. Playtime Theatres, Inc.*,¹²⁴ bears a surface resemblance to *Young* in that both cases involved efforts to prevent neighborhood blight that the city believed would be caused by the location of an adult theatre. Unlike Detroit, however, which precluded only the clustering of adult theatres, Renton, Washington, precluded any adult theatre from locating within 1000 feet of a residential neighborhood, church, park, or school. Under this ordinance, only 520 acres, or slightly over five percent,¹²⁵ of the entire city was theoretically available for an adult theatre. The Ninth Circuit had

¹¹⁹ See Loewy, *supra* note 25.

¹²⁰ FCC v. *Pacifica Foundation*, 438 U.S. 726, 743 n.18 (1978).

¹²¹ *Cohen v. California*, 403 U.S. 15, 26 (1971). See *supra* text accompanying notes 12-15.

¹²² *Texas v. Johnson*, 491 U.S. 397 (1989). See *supra* text accompanying note 16.

¹²³ *Pacifica*, 438 U.S. at 777 (Brennan, J., dissenting).

¹²⁴ 475 U.S. 41 (1986).

¹²⁵ In justifying the regulation, Justice Rehnquist described the 520 acres as "more than five percent of the entire land area of Renton." *Id.* at 43. I assume that if it were very much more, such as 10 percent, he would have said so.

previously noted that “[a] substantial part of the 520 acres is occupied by: (1) a sewage disposal site and treatment plant; (2) a horse-racing track and environs; (3) a business park containing buildings suitable only for industrial use; (4) a warehouse and manufacturing facilities; (5) a Mobil Oil tank farm; and, (6) a fully-developed shopping center.”¹²⁶ Not surprisingly, that court held that “[l]imiting adult theater uses to these areas is a substantial restriction on speech.”¹²⁷

In an incredibly cavalier opinion, the Supreme Court, per Justice Rehnquist, reversed the Ninth Circuit:

We disagree with both the reasoning and the conclusion of the Court of Appeals. That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have “the effect of suppressing, or greatly restricting access to, lawful speech,” we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. (“The inquiry for First Amendment purposes is not concerned with economic impact”). In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement.¹²⁸

Adjudication of cases involving channeling of sexually explicit speech requires much greater sensitivity. *Young* drew a sharp distinction between the availability of adult entertainment, which is protected, and the opportunity of a particular theatre to disseminate the movies, which in itself is not protected. Out of ignorance or sophistry, the *Renton* opinion melds these concepts. The problem with the Renton ordinance is not that Playtime Theaters may be foreclosed from the adult movie business; it is the impossibility or extreme difficulty of *any* adult theatre’s doing business in Renton. Had Renton enacted an ordinance barring adult theatres from

¹²⁶ *Playtime Theatres, Inc. v. City of Renton*, 748 F.2d 527, 534 (9th Cir. 1984), *rev’d*, 475 U.S. 41 (1985).

¹²⁷ *Id.* at 534.

¹²⁸ *Renton*, 475 U.S. at 54 (quoting *Young v. American Mini Theatres*, 427 U.S. 50, 71 n.35 (1976) (plurality opinion), 78 (Powell, J., concurring)).

its community, I assume that such a statute would have been unconstitutional.¹²⁹ The Court should not allow the same result by subterfuge.¹³⁰

The Supreme Court's vacillation in this area is disquieting. From its refusal to take government arguments seriously in *Erznoznik* to its refusal to take free speech interests seriously in *Renton*, the Court has come full circle. Part of the inconsistency may be attributable to changes in Court personnel. Justice Powell, however, was in the majority in all four cases—*Erznoznik*, *Young*, *Pacifica*, and *Renton*. Powell's concurrence in *Young* was the single outstanding opinion rendered in any of the four cases. If the Court were to take that opinion with its carefully crafted limitations seriously, Justice Powell could be remembered more for contributing to the solution than for adding to the problem.

VII. CONCLUSION

Obscenity law, as the Supreme Court currently construes it, does not comport with sound First Amendment theory. Nothing short of a complete overhaul of the doctrine can correct the problem. Shortly after joining the Court, Justice Scalia suggested as much.¹³¹ Neither he nor any of his colleagues, however, seem committed to such a task. Perhaps some day the doctrinal bankruptcy of the Court's obscenity jurisprudence will become apparent to a majority of the Court, but I see little reason to expect it.

¹²⁹ Cf. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), in which the Court invalidated a municipal ordinance banning all live entertainment in the community. *But cf. Barnes v. Glen Theatre*, 111 S. Ct. 2456 (1991), discussed *supra* text accompanying notes 41-47.

¹³⁰ Conceivably, the Court could have believed that the X-rated video-cassette business was an effective substitute. Nothing in the opinion, however, suggests that this is the case. The argument that *Renton* residents could have gone to nearby Seattle to see adult films is foreclosed by *Schad v. Borough of Mt. Ephraim*, where the Court stated: "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schad*, 452 U.S. at 76-77 (quoting *Scheider v. State*, 308 U.S. 147, 163 (1939)).

¹³¹ *Pope v. Illinois*, 481 U.S. 497, 504 (1987) (Scalia, J., concurring).