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TO 'DEPRAVE AND CORRUPT'

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BOOK REVIEW

TO 'DEPRAVE AND CORRUPT'*

GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS. By Edward de Grazia. New York, Random House, 1992. Pp. 814. $30.

*Reviewed by Henry Louis Gates, Jr.***

That the appearance in 1992 of Edward de Grazia's book on obscenity law should prove so very timely is cause for considerable regret. A powerful anti-obscenity measure had been gathering support in the Senate Judiciary Committee,[1] while similar bills were being considered in various state and municipal legislatures.[2] Also in 1992, the Supreme

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1. Pornography Victims' Compensation Act of 1992, S. 1521, 102d Cong., 2d Sess. (1992). The bill first was introduced in the Senate in 1991 by Senator Mitch McConnell of Kentucky. S. 1521, 102d Cong., 1st Sess. (1991). It died in 1992 when Congress adjourned without enacting it. For the history of the legislation, see Morrison Torrey, The Resurrection of the Anti-Pornography Ordinance, 2 TEX. J. WOMEN & L. 113, 116. *See also infra* notes 200-08 and accompanying text.

2. An anti-pornography ordinance was passed in Indianapolis, Indiana. *See* INDIANAPOLIS & MARION COUNTY, IND., CODE §§ 16-1 to -28 (1993) (found unconstitutional in Hudnut v. American Booksellers Ass'n, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986)). In Minneapolis, Minnesota, the city council twice passed anti-pornography ordinances which were vetoed by the mayor. *See* Minneapolis, Minn., Ordinance (Dec. 30, 1983; July 13, 1984) (amending MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, ch. 139); Minneapolis, Minn., Ordinance (Dec. 30, 1983; July 13, 1984) (amending MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, ch. 141); *Indiana Porn*, WASH. POST, May 12, 1984, at A14 (editorial) (noting that Minneapolis Mayor Don Fraser vetoed the bill that would have made pornography a civil rights violation, despite the fact that women's groups had strongly backed the measure). *See also Anti-porn Law Axed in Federal Ruling*, SEATTLE TIMES, Feb. 10, 1989, § NW, at 3 (reporting that a Bellingham, Washington anti-pornography ordinance was ruled unconstitutional by a federal judge; the city council later refused to validate the results of the referendum enacting the ordinance).

An anti-pornography ordinance was rejected by voters in Cambridge, Massachusetts. *See Anti-Pornography Law Defeated in Cambridge*, N.Y. TIMES, Nov. 12, 1985, at A16 (reporting that the ordinance, which would have made it a civil rights violation to "traffic" in pornography and would have permitted civil lawsuits against "traffickers" was rejected in a referendum by a vote of 13,031 to 9,419). The Board of Supervisors

Court of Canada embraced the controversial MacKinnon-Dworkin definition of obscenity as the law of the land north of our border.[3] Combining the political muscle of the Right with the high-powered social theories of the Left, a new anti-obscenity alliance has galvanized the once depleted arena of obscenity law and recast its very terms of argument. What de Grazia's history makes clear is how very much we have come full circle.

Given the present-day debate, de Grazia's historical survey performs the additional service of helping us to view the contemporary terms-of-art in historical perspective. One of the things we learn is that the new vocabulary is, in some respects, a revival of a much older, and long superseded, tradition in obscenity law. But first things first: For the interest of de Grazia's research goes well beyond the immediate concerns we may have on the topic.

At 814 pages, the work might be called a tome—but it's not, I promise, the doorstop it may seem. I've read enough dull books on fascinating topics to realize that the phenomenon is usually deliberate: The author, distrustful of our motives, wants us to know that this is work, damn it, not pleasure. Anyway, what does not destroy us makes us stronger. It's the scholar's credo: No pain, no gain.

Fortunately, de Grazia took no vows of self-denial in writing this book. Organized into chapters that detail celebrated or otherwise significant obscenity cases, *Girls Lean Back Everywhere*[4] is capacious but not dense. Both casebook and chronicle, it brims with anecdotes and tidbits unrelated, strictly speaking, to the legal issues at stake—but why be a spoilsport? De Grazia isn't just a legal scholar, he's a litterateur, with a leisurely and expansive sense of relevance.

This is, in short, a loose, baggy monster, the book of someone liable to put in pretty much whatever interests him. In a chapter about the legal

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in Los Angeles also rejected an anti-pornography ordinance. *See* Cathleen Decker, *Coalition Sees Plan as Threat to Free Speech; Feminists Resist Pornography Law*, L.A. TIMES, Mar. 16, 1985, Metro, at 1 (reporting that an anti-pornography ordinance in Los Angeles would have allowed women who alleged injuries caused by pornography to seek relief through litigation; the proposal was never enacted by the local Board of Supervisors).

3. *See* R. v. Butler, [1992] 1 S.C.R. 452, 454 (Can.). The court pronounced that the standard of review for what constitutes obscenity must include "material that creates a risk of harm to society . . . which Parliament has reasonably concluded will be caused directly or indirectly to . . . groups such as women and children . . . by the distribution of these materials." The Court stated that "if true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material." *Id.* at 497.

4. EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS (1992).

difficulties of William Burroughs' *Naked Lunch*,[5] we get four pages on the conflicting accounts of how he came to shoot his wife.[6] A section on Dreiser tells us plenty about his complicated love life.[7] And so on. Most of his chapters on major literary figures (Joyce, Dreiser, Lawrence, Radclyffe Hall, Burroughs, Miller) deal with the vicissitudes of their critical reputations—and the irregularities of their private lives—as well as with their encounters with the law of obscenity. Generically speaking, the book owes more to Lytton Strachey than to Ronald Dworkin.

(An editorial cavil: De Grazia says that he wanted to represent the reactions of authors and publishers, "the persons who were most immediately affected by literary censorship . . . as much as possible in words of their own."[8] So the book is interlaced throughout with long quotations from the various players involved. It's a device that can be effective, but it's overused. At times the book looks like the screenplay of a documentary, or, worse, a do-it-yourself kit for home assembly. More than a few of the quoted passages could usefully have been paraphrased or otherwise integrated into the main text.)

Still, one invaluable service the book performs is reprinting verbatim the "obscene" passages—the "good bits"—of the prosecuted texts under discussion. People sometimes forget that there *are* any good bits in Zola or Dreiser, and it's helpful to have them before us in tracing the shifting standards of obscenity. (In the acknowledgements, he thanks the people who typed his manuscript "almost always without blinking" at these passages.)

Because the book—eight years in the making—does so many things, it is important to be clear what this book is *not*. Caveat emptor. It is *not* a work of legal theory. While it refers to (and rebuts) some positions in the literature, it doesn't engage at much length with the sort of arguments advanced by, e.g., Eric Barendt, Ronald Dworkin, Joel Feinberg, Catharine MacKinnon, or Frederick Schauer. Nor is it really a social history of obscenity law. Although, as I say, it contains a great deal of literary, historical, and biographical detail surrounding many of the cases he discusses, it doesn't try to coordinate jurisprudential trends with larger social or political ones. Finally, it is not a generic history of pornography, paying scant attention, as it does, to the history of the production and distribution of obscene material.

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5. WILLIAM S. BURROUGHS, NAKED LUNCH (1966); DE GRAZIA, *supra* note 4, at 480-95.

6. DE GRAZIA, *supra* note 4, at 480-84.

7. *Id.* at 109-27.

8. *Id.* at xiv.

Few will mind that this is a frankly partisan account; the author himself, long associated with the American Civil Liberties Union, was involved in a number of the landmark cases he describes.[9] Surely the posture of impartiality would have been a tedious fiction: For most of us, the choice between Anthony Comstock and Honoré de Balzac (whose American publisher Comstock sent to prison) is *not* a finely balanced matter of judgment. Despite de Grazia's own generally "absolutist" tendencies in First Amendment law, however, the book's hero and dedicatee isn't one of the two Warren Court Justices, William O. Douglas and Hugo L. Black, who shared his views, but William J. Brennan, Jr., a moderate who—having been assigned most of the important decisions on the subject—incrementally moved to the left, taking the rest of the Court with him.[10]

De Grazia's real forte may be the step-by-step, motion-by-motion analysis of modern case law, especially the evolution of obscenity law as interpreted by the Warren Court.[11] That shouldn't come as a surprise. For de Grazia himself comes in for a few star turns in these crucial years, having defended a number of high profile obscenity cases.[12] (In his *Armies of the Night*,[13] Norman Mailer—who took the stand as an expert witness to defend the artistic merit of Burroughs' *Naked*

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9. During his career, de Grazia defended against obscenity charges Henry Miller's *Tropic of Cancer*, William S. Burroughs' *Naked Lunch*, and the Swedish film *Jag Ar Nyfiken—Gul (I am Curious—Yellow)*, and testified for the defense in the obscenity prosecution of Luther Campbell and 2 Live Crew. *See, e.g.*, DE GRAZIA, *supra* note 4, at 417-32 (discussing the author's involvement in the *Tropic of Cancer* cases).

10. *See* Roth v. United States, 354 U.S. 476, 489 (1957) (rejecting the *Hicklin* test and holding that the standard for judging obscenity is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest"). De Grazia writes that the application of this standard was instrumental in freeing a number of works from suppression. *See* DE GRAZIA, *supra* note 4, at 323; Jacobellis v. Ohio, 378 U.S. 184 (1964) (holding that the film *The Lovers* was not obscene under the *Roth* test); Grove Press, Inc. v. Gerstein, 378 U.S. 577, 577 (1964) (reversing an injunction restraining a publisher from selling and distributing a book including a "narration of a procession of sexual episodes" because it did not meet the *Roth* obscenity test). *See also* Edward de Grazia, *Freeing Literary and Artistic Expression During the Sixties: The Role of Justice William Brennan, Jr.*, 13 CARDOZO L. REV. 103 (1991) (highlighting Justice Brennan's migration toward a more liberal approach to obscenity issues).

11. *See, e.g.*, DE GRAZIA, *supra* note 4, at 236, 274-75, 513, 546 (discussing the progression of the Warren Court's obscenity decisions).

12. *See id.* at 486-87.

13. NORMAN MAILER, THE ARMIES OF THE NIGHT (1968); DE GRAZIA, *supra* note 4, at 520.

Lunch[14]—described defense attorney de Grazia as "a slim elegant Sicilian" bearing a "pleasant resemblance" to the young Frank Sinatra.)[15] Henry Miller's *Tropic of Cancer*[16] also benefitted from de Grazia's legal services;[17] for technical reasons, another client, Lenny Bruce, was evidently past saving.[18]

De Grazia's hands-on experience in obscenity litigation has other advantages. For it's just the sort of gossipy details that de Grazia provides—and that standard legal histories studiously omit—that shed unaccustomed light on the actual vagaries of legal decision-making. For example, Judge Samuel Epstein of Chicago established a legal landmark in 1964 when he decided, against much political pressure, to free the Grove Press edition of Henry Miller's *Tropic of Cancer*.[19] But was it irrelevant to his deliberations that the father of Barney Rosset, publisher at Grove, was a friend of his? Or that Epstein's two sons (one a lawyer himself) let him know they'd never speak to him again if he ruled against Miller? (Judge Epstein's predicament brings to mind Ambrose Bierce's

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14. DE GRAZIA, *supra* note 4, at 486-87.

15. *Id.* at 392.

16. HENRY MILLER, TROPIC OF CANCER (1961); *see also* DE GRAZIA, *supra* note 4, at 366-97.

17. *See* DE GRAZIA, *supra* note 4, at 122 n.* (stating that the author wrote and filed an amicus brief on behalf of members of the literary community in the U.S. Supreme Court, urging the Court to allow the distribution of *Tropic of Cancer*). *See also id.* at 229 n.*, 312 n.* (describing the arguments de Grazia made in the Supreme Court brief).

18. *See id.* at 447-48. Bruce was convicted under criminal obscenity laws in Chicago for using the words "asshole," "bastard," and "goddamn" in his comedic monologues. *Id.* at 446. Before his appeal, he fired his lawyers and was unable to hire new counsel, a circumstance that cost Bruce "the only real chance" to appeal his conviction and vindicate his comedic art. *Id.* at 447. For letters from Bruce to the author concerning his legal representation, see *id.* at 448-50.

19. *See* Elmer Gertz, *"Tropic of Cancer" Litigation in Illinois*, 51 KY. L.J. 591 (1963) (detailing the successful trial strategy and outlining the evidence presented to win the case by the attorney who represented both the publisher, Grove Press, Inc., and the author, Henry Miller). For comments about the case by Epstein and an excerpt from his opinion, see DE GRAZIA, *supra* note 4, at 370-82.

The Illinois Supreme Court initially reversed Epstein's ruling that *Tropic of Cancer* was neither obscene nor pornographic. Haiman v. Morris, No. 37276 (Ill. June 18, 1964). However, four days later, the U.S. Supreme Court reversed a Florida appellate court's ruling that the book was obscene. Grove Press, Inc. v. Gerstein, 378 U.S. 577 (1964), *reversing* 156 So.2d 537 (Fla. Dist. Ct. App. 1963). The Illinois Supreme Court reversed itself to follow *Gerstein*. Haiman v. Morris, No. 37276 (Ill. July 7, 1964).

For *Tropic of Cancer* author Henry Miller's view on obscenity, see Henry Miller, *Obscenity and the Law of Reflection*, 51 KY. L.J. 577 (1963).

definition of a statesman: A politician who, subject to equal pressure from all sides, remains upright.)

Or consider Lenny Bruce's conviction by the Criminal Court of the County of New York in 1964.[20] Judge John Murtaugh led a three-judge bench, but his two colleagues evidently did not share his outrage at Bruce's nightclub act. To secure the conviction, therefore, Murtaugh threatened his most vulnerable junior colleague, a black judge named Kenneth M. Phipps: Phipps could vote to convict, or he could spend the rest of his term in traffic court.[21] Ah, sweet justice.

Just as worrying, consider the judicial hostility that Ralph Ginzburg, a publisher of arty erotica, encountered.[22] Given the prevailing court doctrine in 1966,[23] Ginzburg's conviction should easily have been reversed: Even the government conceded his publications had at least some social value.[24] De Grazia's account shows us that the conviction of Ralph Ginzburg was affirmed, in no small part, because of the man's singularly obnoxious personality; he was a lewd, obstreperous, and insufferable man who dressed and behaved badly in court.[25] And what was fatal was that his advertisements boasted to readers that his magazine was "enabled by recent court decisions" which protected sexually explicit literature with artistic merit.[26] On the merits, his publication *was* so

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20. People v. Bruce (N.Y. Crim. Ct. 1964); *see* DE GRAZIA, *supra* note 4, at 452-79. Bruce was arrested under obscenity laws for using hundreds of obscene words in his performances at local nightclubs. *See* Jack Roth, *Lenny Bruce Act Is Ruled Obscene*, N.Y. TIMES, Nov. 5, 1964, at 47 (reporting that Bruce was convicted of giving obscene performances and that the court ordered Bruce to undergo psychiatric evaluation by the city's Probation Department).

21. *See* DE GRAZIA, *supra* note 4, at 479.

22. *See id.* at 500-15; Ginzburg v. United States, 383 U.S. 463 (1966). Ginzburg was convicted of violating the federal obscenity statute by mailing *Eros*, a hardcover magazine dealing with sex, *Liaison*, a sexual newsletter, and *The Housewife's Handbook on Selective Promiscuity*, a short book purporting to be an account of the author's sexual experiences. *Id.* at 466-67. The Supreme Court upheld Ginzburg's conviction, holding all three publications to be unprotected by the U.S. Constitution because of the purpose for which the material was created and offered for sale. *Id.* at 473-76.

23. *See supra* note 10 and accompanying text.

24. *See Ginzburg*, 383 U.S. at 472 ("[t]he Government does not seriously contest the claim that [*The Housewife's Handbook on Selective Promiscuity*] has worth" in the context of medical and psychiatric practice); DE GRAZIA, *supra* note 4, at 505.

25. DE GRAZIA, *supra* note 4, at 502.

26. *See id.* at 502 ("Ginzburg had made the mistake . . . of exuberantly promoting his publications . . . by stressing the interest they held for persons wanting to see sex in print, and claiming that he had 'taken advantage' of the American judiciary's 'permissive' obscenity decisions to go as far as he could without falling afoul of the

enabled. But a vengeful court would make him suffer for rubbing their face in it. The result was Brennan's worst and least coherent opinion.[27]

De Grazia's narrative begins with what was dubbed the "judicial murder" of a publisher named Henry Vizetelly, who was sentenced to prison for the crime of publishing Emile Zola's *La Terre*.[28] Henry Vizetelly should probably have known it was a bad omen that he was assigned a barrister named Mr. Cock Q.C. ("a fat unwieldy man with a startling red face," Vizetelly's son recalled) to represent him.[29] Cock told Vizetelly flatly that "there could be no defense" to publishing the book, and instructed the elderly publisher to throw himself "on the mercy of the court."[30] It had none; the outrage was unforgivable. Earlier, in fact, the solicitor-general warned the newspapermen covering the trial that they, too, would be prosecuted if they dared to report the filthy passages in question.[31] Vizetelly would die in prison in 1894, one of the first martyrs to great literature in the history of obscenity law.

What doomed the likes of Vizetelly, and so many others in the succeeding half-century on both sides of the Atlantic, was a rule first enunciated in 1868 by an English court in *Regina v. Hicklin*.[32] This case defined obscenity by its tendency "to deprave and corrupt those whose minds are open to such immoral influences."[33] For most judges who applied the *Hicklin* test, girls were considered most susceptible to wayward influences; literature unfit for them was unfit for all.[34] Passing judgment on the 1928 Jonathan Cape edition of Radclyffe Hall's *The Well of Loneliness*,[35] the presiding magistrate allowed, "[t]here are plenty of people who would be neither depraved nor corrupted by reading a book

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Supreme Court's definition of what was obscene."). *See also Ginzburg*, 383 U.S. at 468 (characterizing Ginzburg as "openly boast[ing] that the publishers would take full advantage of what they regarded as an unrestricted license allowed by law in the expression of sex and sexual matters") (footnote omitted).

27. *See* DE GRAZIA, *supra* note 4, at 503 (stating that "Brennan's decision . . . was later conceded by him to be 'the worst mistake' he ever made").

28. EMILE ZOLA, LA TERRE (1888); *see also* DE GRAZIA, *supra* note 4, at 40-53.

29. DE GRAZIA, *supra* note 4, at 49.

30. *Id.*

31. *See id.* at 45.

32. 3 L.R.-Q.B. 360 (1868). *Hicklin* involved a book titled *The Confessional Unmasked*, which contained obscene depictions of events which allegedly had occurred in the confessional. The purpose of the book was to discredit the Catholic Church and elect more Protestants to Parliament. *Id.*

33. *Id.* at 371; *see also* DE GRAZIA, *supra* note 4, at 12.

34. *See* DE GRAZIA, *supra* note 4, at xi.

35. RADCLYFFE HALL, THE WELL OF LONELINESS (1928).

like this, but it is to those whose minds are open to such immoral influence that I must refer."[36]

De Grazia's account bristles with the views of bravely indignant authors and editors who ran afoul of the obscenity laws of their day, some of whom had little patience for *Hicklin*'s infinitely corruptible girl.[37] When Jane Heap, editor of the *Little Review*, dared to publish the Nausicaa episode of Joyce's *Ulysses* in 1920, prosecution was instigated by John Sumner, Comstock's successor at the New York Society for the Suppression of Vice.[38] Heap was not cowed. "What man not a nincompoop has ever been heard by a jury of his peers?" she wondered. "The society for which Mr. Sumner is agent, I am told, was founded to protect the public from corruption. When asked 'what public?,' its defenders spring to the rock on which America was founded: the cream-puff of sentimentality, and answer chivalrously: 'Our young girls!' So the mind of the young girl rules this country . . . ? If there is anything really to be feared it is the mind of a young girl."[39] Needless to say, she was found guilty.[40]

A peculiarity of early obscenity law was that the state conferred on ostensibly private associations sweeping powers of law enforcement.[41] The Society for the Suppression of Vice, for example, was granted powers of search and seizure and allowed to split whatever punitive fines that might be levied on the purveyors of vice, an arrangement that provided it a financial incentive to root out evil.[42] And what was then standard legal protocol made the prosecutor's task absurdly easy.[43]

A defendant in an obscenity case faced two main obstacles in those days. First, there was no requirement that a work be considered as a whole.[44] Prosecutors could, and usually did, enter *only* the naughty parts

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36. DE GRAZIA, *supra* note 4, at 194.

37. *See, e.g., id.* at 11 (stating that John Cowper Powys, a famed English poet, novelist and critic, declared James Joyce's *Ulysses* to be "a beautiful piece of work in no way capable of corrupting a young girl").

38. *See id.* at 8-13, 118-19 n.†.

39. *Id.* at 11 (footnote omitted).

40. *Id.* at 13.

41. *See id.* at 118-19 n.† (describing the semi-governmental status of the New York Society for the Suppression of Vice).

42. *Id.*

43. *Id.*

44. Commonwealth v. Buckley, 86 N.E. 910, 910 (Mass. 1909) (wherein the court stated to the jury that it "makes no difference what the object in writing [the] book was, or what its whole tone is, if these pages that are complained of . . . [are] in your mind obscene, impure, indecent, and manifestly tending to the corruption of youth . . . .").

as evidence.[45] At the 1928 trial of Radclyffe Hall's *The Well of Loneliness*,[46] the attorney general said that "even were the whole book as to ninety-nine one-hundredths of it beyond criticism, yet one passage might make it a work which would have to be destroyed as obscene."[47] (In this case, it was one sentence that truly offended, to wit: "And that night they were not divided."[48] It was the only line in the book that specifically implied sexual intimacy.)[49]

Second, the issue of artistic merit was deemed wholly irrelevant.[50] At the Old Bailey trial of *The Well of Loneliness*, forty prominent authors and critics were assembled as witnesses for the defense, among them Rudyard Kipling, Hugh Walpole, Rose Macaulay, Julian Huxley, E.M. Forster, Virginia and Leonard Woolf, and Vita Sackville-West—a veritable Norton Anthology of Edwardian Literature.[51] The presiding magistrate was unimpressed, declaring their testimony inadmissible. "I reject them all," he pronounced.[52] "It does not follow that because a book is a work of art it is not obscene."[53]

In the States, John Sumner was equally emphatic on this point. Artists may be good judges of literary merit, he allowed, "but on the question of the tendency of that writing on the manner and morals of the people at large they are no more qualified than are an equal number of

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See also DE GRAZIA, *supra* note 4, at 194-95.

45. *See* DE GRAZIA, *supra* note 4, at 138 (noting that in the Massachusetts obscenity trial of *An American Tragedy*, the court considered only the portions deemed "indecent, obscene, and manifestly tending to corrupt the morals of youth").

46. People v. Friede, 233 N.Y.S. 565, 566 (N.Y. Magis. Ct. 1929) (rejecting the contention that *The Well of Loneliness*, as a matter of law, was not obscene under the penal law provision declaring it a misdemeanor for the sale of "any obscene, lewd, lascivious, filthy, indecent or disgusting book"); *see also supra* notes 35-36 and accompanying text.

47. *See* DE GRAZIA, *supra* note 4, at 193-94.

48. *Id.* at 194.

49. *Id.*

50. *See Friede*, 233 N.Y.S. at 567. The court stated:

> [N]or is it disputed that the book has literary merit . . . . [Y]et the unnatural and depraved relationships portrayed are sought to be idealized and extolled. The characters in the book who indulge in these vices are described in attractive terms, and it is maintained throughout that they be accepted on the same plane as persons normally constituted, and that their perverse and inverted love is as worthy as the affection between normal beings and should be considered just as sacred by society.

51. DE GRAZIA, *supra* note 4, at 187.

52. *Id.* at 189.

53. *Id.* at 188.

mechanics of ordinary education."[54] Invoking a principle dear to the administration of the National Endowment for the Arts, he continued, "[i]t is not for any limited group of individuals to attempt to force upon the people in general their own particular ideas of what is decent or indecent."[55]

What was at issue, after all, was real harm. "I would rather give a healthy boy or a healthy girl a phial of prussic acid than this novel. Poison kills the body, but moral poison kills the soul."[56] So proclaimed James Douglas in the *Sunday Express* on the publication of *The Well of Loneliness* in 1928.[57] For many concerned by obscenity, this was scarcely hyperbole. Damned by one unspeakable sentence, Hall's novel would not be reprinted legally in England until 1959.[58]

If de Grazia's narrative has its victims and its villains, it has just as many literary temporizers and appeasers. Certainly, the suppression of Hall's novel was equally a record of indifference and obliviousness. John Galsworthy, then president of "PEN" (the International Association of Poets, Playwrights, Editors, Essayists, and Novelists) refused to intercede on behalf of Radclyffe Hall when her book was banned; "he was too busy, and, in any event, did not see that any principle of literary freedom was involved."[59] Bizarrely enough, PEN's general secretary did not see that censorship was involved either.[60] This despite the fact that her book was banned, confiscated, burned, and its sale prohibited.[61] And Alfred and Constance Knopf, who had contracted for North American rights, tried to wriggle out of the deal.[62] As de Grazia observes, Knopf, a true survivor, "had always thought it best to avoid confrontations with the censors when possible and to withdraw from any he could not forestall."[63]

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54. *Id.* at 122.
55. *Id.* at 123.
56. *Id.* at 173.
57. *Id.*
58. *Id.* at 269.
59. *Id.* at 181.
60. *See id.*
61. *See id.* at 177.
62. *Id.* at 182.
63. *Id.*

The 1930 Boston trial of Dreiser's *American Tragedy*,[64] initiated by Boston's Watch and Ward Society,[65] recapitulated the standard procedure in an obscenity prosecution.[66] Significantly, the defense insisted on protesting each premise.[67] True to form, the prosecutor read aloud various passages held to be salacious or immoral, while the judge refused to allow the jury to consider anything other than the selected paragraphs.[68] When the defense pleaded on appeal that the book be considered as a whole, the Supreme Judicial Court of Massachusetts made short work of their request, making the logic of its position explicit: "[T]he seller of a book which contains passages offensive to the statute has no right to assume that children to whom the book might come would not read the obnoxious passages or that if they should read them would continue to read on until the evil effects of the obscene passages were weakened or dissipated with the tragic denouement of a tale."[69]

Having read the naughty parts into the record, the prosecutor invoked the *Hicklin* rule.[70] "How, sirs, would you like to have your fifteen-year-old daughters read that?" he asked the jury.[71] The defense responded by taking on *Hicklin* directly. Clarence Darrow appeared in court, arguing that it was an adult book which was intended to be read by adults.[72] "You can't make all literature in this world for the benefit of three-year-old children, or ten-year-old children, or fifteen-year-old children. It is utterly absurd. We cannot print all our literature for the weak-minded and the very immature."[73] Naturally, the judge had no patience for such sophistry. (The Supreme Court would not come around to Darrow's view

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64. THEODORE DREISER, AN AMERICAN TRAGEDY (1925); *see also* DE GRAZIA, *supra* note 4, at 135-39.

65. *See* DE GRAZIA, *supra* note 4, at 135.

66. Commonwealth v. Friede, 171 N.E. 472, 473 (Mass. 1930) (holding that a book may be found obscene by the submission into evidence of certain passages, and that excluding the book in its entirety from evidence is left to the discretion of the trial judge).

67. *See id.* at 473 (noting the defendant's exceptions to both the readings of passages from *An American Tragedy* and the admission into evidence of those passages); *see also* DE GRAZIA, *supra* note 4, at 137.

68. *Friede*, 171 N.E. at 473.

69. *Id.* at 474.

70. DE GRAZIA, *supra* note 4, at 138.

71. *Id.*

72. *See id.* at 137.

73. *Id.* (quoting Darrow responding to the Justice's question, "[b]ut supposing it did fall into the hands of someone seventeen, eighteen or nineteen years of age?").

until *Butler v. Michigan*[74] in 1957. The deprave-and-corrupt test is still the law of the land in Britain, but after passage of the 1959 British Obscene Publications Act,[75] it was the "effect upon a significant portion" of likely readers, rather than those most susceptible, that was to be considered.[76])

Most peculiarly, the defense actually thought to raise the issue of the freedom of the press vouchsafed by the First and Fourteenth Amendments.[77] The court wasted no time on what was then a "novel" and anomalous argument: "The contention that a decree adjudicating the book as obscene, indecent, or impure would be an abridgement of the rights of freedom of the press guaranteed by the First and Fourteenth Amendments to the Constitution of the United States requires no discussion," it declared.[78] Startling as it seems today, it was not until the late 1950s that First Amendment considerations would be deemed relevant to obscenity law.[79]

The tendrils of *Hicklin* extend surprisingly far. When, in a 1957 obscenity case involving the publisher Samuel Roth,[80] Justice

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74. 352 U.S. 380 (1957) (striking down as unconstitutional a Michigan law making criminal the sale, to adults, of books that might have a deleterious effect on youth).

75. Obscene Publications Act, 1959, 7 & 8 Eliz. 2, ch. 66 (Eng.).

76. *See id.* The Act provides that "an article shall be deemed to be obscene if its effect or . . . the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it." *Id.* § 1. *See generally* DE GRAZIA, *supra* note 4, at 268 (stating that the Act allows the presentation of a "formidable array of literary personalities" to testify concerning the literary merit of a particular work).

77. DE GRAZIA, *supra* note 4, at 139.

78. *Id.*

79. *See, e.g.*, Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 688 (1959) (holding unconstitutional New York's denial of a license to show the movie *Lady Chatterley's Lover* "because that picture advocates an idea—that adultery under certain circumstances may be proper behavior. Yet the First Amendment's basic guarantee is the freedom to advocate ideas."); Roth v. United States, 354 U.S. 476, 488-89 (1957) (holding that although consideration of First Amendment gaurantees was necessary in the case, obscenity, as defined by the average person applying contemporary community standards, is not protected by First Amendment guarantees if the dominant theme of the work taken as a whole appeals to the prurient interest); *see also* DE GRAZIA, *supra* note 4, at 139.

80. *See* DE GRAZIA, *supra* note 4, at 289.

Frankfurter[81] worried about the effect that such material (in this instance, Aubrey Beardsley's *Venus and Tannhäuser*[82]) might have upon the "feeble-minded," he was carrying on the *Hicklin* tradition, wherein the possible effect upon the most susceptible member of a community would limit what was permissible for the rest.[83] Understandably, Felix Frankfurter is something of a villain in de Grazia's story. As a friend of Edmund Wilson, he recused himself from the review of the obscenity ruling on Wilson's *Memoirs of Hecate County*,[84] much to Wilson's disappointment; yet Wilson speculates that had he voted, he might have joined the majority in voting against Wilson.[85]

But the most revealing story about Frankfurter in this connection comes from the legal scholar Paul Bender, who served as Frankfurter's law clerk.[86] The Court was reviewing a case involving what Bender considered a "highly innocuous book," a steamy but not very explicit romance novel with a prominent lesbian theme.[87] Bender urged his boss to let the book go. After all, he pointed out, you could find books just like it at the local drug store. "If you don't believe me," Bender added, "ask Margy, my wife. She'll tell you."[88] "Where did she get it?" demanded the outraged justice. Bender explained that he'd shown it to her. "You showed it to her?" Frankfurter was apoplectic. "You did *what?*"[89]

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81. Although Brennan wrote for the Court in *Roth*, de Grazia describes the Court at that time as being "under the sway of Frankfurter's policy of judicial restraint," DE GRAZIA, *supra* note 4, at 305, and states that Brennan "tracked" Frankfurter's approach to the case. *See id.* at 319.

82. AUBREY VINCENT BEARDSLEY, THE STORY OF VENUS AND TANNHÄUSER (1907).

83. *See supra* notes 32-36 and accompanying text for a discussion of the *Hicklin* test. *See also Roth*, 354 U.S. at 489 (recognizing that the *Hicklin* test could "encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press").

84. *See* Doubleday & Co., Inc. v. New York, 77 N.E.2d 6, 8 (N.Y. 1947) (holding that Edmund Wilson's *Memoirs of Hecate County* was obscene because a story within the collection, *The Princess with the Golden Hair*, was found to be obscene under New York obscenity laws), *aff'd*, 335 U.S. 848 (1948) (per curiam) (in which Justice Frankfurter took no part in the consideration or decision of the case). *See also* DE GRAZIA, *supra* note 4, at 230.

85. *See* DE GRAZIA, *supra* note 4, at 232.

86. *See id.* at 292.

87. *Id.* (referring to Mark Tryon's *Sweeter than Life*).

88. *Id.*

89. *Id.*

Hicklin was dealt its first serious blow in *Roth.*[90] This was also the first major obscenity case in which the First Amendment was invoked as an inhibiting consideration.[91] When Roger Fisher, rather genteelly prosecuting Roth, tried to assuage those First Amendment concerns by invoking the Holmesian clear-and-present-danger exemption, he aroused William O. Douglas's skepticism. "Clear and present danger of *what?*" the justice demanded.[92] Fisher tried to explain:

> The person can see photographs of sexual perversion, moving pictures of perverted conduct taking place, or booklets, and think: Let me experiment myself. We think there's a serious risk of that, one which the legislature could properly act upon.
>
> Second: long-range conduct induced by a breaking down of morals. You read these books—it's not that you're immediately aroused to do something, but they gradually fill your mind with the thought that everyone seems to be doing it, let's have some fun, illicit sex life—various kinds of activity—because your moral standards are broken down by being hit.[93]

To Douglas, it sounded like Comstockery.[94] But to Frankfurter, this was nothing to be frightened of. "How do we know it doesn't affect conduct in the future?" Frankfurter asked.[95] "Does anybody know? Has psychology reached that wonderful stage where we can be assured that if boys or grown-ups who are feeble-minded, or general weak-kneed human beings have certain things said to them, that it doesn't do anything to them? Has psychology reached that certainty of determination?"[96] He implicitly invoked the *Hicklin* test—where the impact upon the most

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90. 354 U.S. 476, 489 (1957) (rejecting the *Hicklin* test in favor of a new standard: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest") (footnotes omitted); *see also* DE GRAZIA, *supra* note 4, at 325.

91. *Roth*, 354 U.S. at 489; *see also supra* notes 77-79 and accompanying text.

92. *See* Roger D. Fisher, Oral Argument on Behalf of the United States, *in* 53 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 489, 497 (Philip B. Kurland & Gerhard Casper eds., 1975); DE GRAZIA, *supra* note 4, at 309.

93. *See* DE GRAZIA, *supra* note 4, at 309.

94. *See id.* The "Comstock law" allowed "the United States government, acting through the Post Office Department and the Justice Department's Criminal Division, to superintend the sexual content of materials sent through the mails." *Id.* at 296.

95. *Id.* at 310.

96. *Id.*

susceptible is paramount.[97] But missing, now, is the preemptory certainty of an older generation of censors. Perhaps it will seem strange to place the burden on the defendant to prove that alleged obscenity doesn't harm, rather than on the lawgivers to prove that it does; but Burger would later explicitly uphold this very principle, stipulating that the state may have a *Hicklin*-type interest in controlling obscenity even in the absence of any evidence that it does harm.[98] (Increasingly called upon to pass judgment on hardcore material, the Court's own interest in obscenity was perhaps not exclusively jurisprudential. As Justice Brennan noticed, pornography exhibits had a funny habit of disappearing from chambers.)[99]

Affirming the conviction, Brennan's opinion nevertheless introduced a new test for obscenity.[100] The opinion recognized the relevance of the First Amendment in the act of ruling obscene material beyond its purview.[101] Obscene material, for Brennan, appealed to prurient interest and was utterly without redeeming social importance.[102] Unpromising as it sounded, the opinion actually sponsored the post-*Roth* glasnost in obscenity law.[103] For if obscenity were utterly devoid of social value, it stood to reason that anything that was *not* utterly devoid of social value, no matter how salacious, was ipso facto not obscene. (This was explicitly

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97. *See id.*; *see also supra* notes 32-36 and accompanying text.

98. *See* Miller v. California, 413 U.S. 15, 18-19 (1973) (stating that the states "have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles") (footnote and citations omitted); *see also* DE GRAZIA, *supra* note 4, at 568-69.

99. *See* DE GRAZIA, *supra* note 4, at 303 n.*.

100. *Roth*, 354 U.S. at 484-85, 489. *See also* DE GRAZIA, *supra* note 4, at 320.

101. *Roth*, 354 U.S. at 484-85 (stating that obscenity is outside the area of constitutionally protected speech or press, and that the prevention and punishment of obscenity has "'never been thought to raise any constitutional problem'") (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)). *See also* DE GRAZIA, *supra* note 4, at 320.

102. *See Roth*, 354 U.S. at 484 (stating that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance"); *see also* DE GRAZIA, *supra* note 4, at 320-21.

103. *See Roth*, 354 U.S. at 484-85 (stating that "[a]ll 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") (footnote omitted); *see also* DE GRAZIA, *supra* note 4, at 321.

set forth in Brennan's opinion in *Jacobellis v. Ohio*,[104] involving a theater manager prosecuted for showing Louis Malles' film *The Lovers*.)[105] Summary reversals of lower-court obscenity convictions soon became routine, in a process known as "Redrupping" (after a decision exonerating a Times Square newsstand clerk named Robert Redrup).[106]

With Brennan assigned a shaping role[107] (Warren himself was a prude),[108] the Warren Court incrementally moved toward a position of greater permissiveness.[109] Oddly enough, Douglas and Black, who were more or less First Amendment absolutists, failed to exert much influence on their brethren because of the very "extremism" of their views.[110] It was Brennan who was able to eke out compromise positions acceptable to his less liberal colleagues.[111] Thurgood Marshall also pulled his weight with the landmark decision in *Stanley v. Georgia*, which held that an individual had the right to view concededly obscene material in the

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104. 378 U.S. 184 (1964) (reversing the lower court's conviction of a theatre manager under an Ohio obscenity law, and stating that "'the portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press'") (citing *Roth*, 354 U.S. at 487) (footnote omitted).

105. THE LOVERS (Nouvelles Editions de Films 1958) (wherein the bored bourgeois wife of a wealthy man runs away with a student, leaving behind a husband, a daughter, and another lover; the sensual abandon and frankness of the love scenes sparked the censorship battle).

106. Redrup v. New York, 386 U.S. 767, 770 (1967) (per curiam) (holding that "the distribution of the publications . . . is protected by the First and Fourteenth Amendments from governmental suppression"); *see also* DE GRAZIA, *supra* note 4, at 512-19.

107. *See supra* note 10 and accompanying text.

108. *See* DE GRAZIA, *supra* note 4, at 274 ("If Warren was revolted by something, it was obscene. He would not read any of the books. Or watch the movies. I'd read the book or see the movie and he'd go along with my views.") (quoting Justice William J. Brennan).

109. *See id.* at 274-75 (noting that Warren gave Brennan "doctrinal leadership of the Court in cases where individual liberties were at stake").

110. *See id.* at 401 n.§ (noting that "Brennan found a middle ground between the polarized doctrinal approaches advocated by Justices Black and Douglas . . . on the liberal left, and Justice Frankfurter . . . on the conservative right").

111. *See id.* at 401.

privacy of his own home.[112] Indeed, de Grazia's narrative of the Warren Court years are, in general, triumphalist in tone, and justly so.

There were adjustments to be made, of course. For example, the notion of "prurient appeal" was a vexed one.[113] Appeal to whom? *L'homme moyen sensuel?* In 1966, the Court ruled that prurient appeal to "deviant" interests would be counted as well,[114] but (though de Grazia doesn't go into this) they had a strictly delimited subset of "deviant" tastes in mind.[115] *Dumbo* would not be banned out of a concern for ear fetishists.

De Grazia may be stout of heart, but his triumphalist spirit flags after the Warren era. President Johnson's nomination of Abe Fortas to replace Warren as Chief Justice inspired a vicious Republican smear campaign—largely focusing on, and sensationalizing, the justice's permissive pattern of voting in obscenity cases[116]—that made the Bork hearings look like a royal coronation. This was only a taste of things to come.

Since the appointments of the Nixon administration, the Court presided over a slow retrenchment in obscenity law.[117] Thus Brennan's *Jacobellis* doctrine—where obscenity had to be "utterly without" social value[118]—gave way to the test, still regnant, expressed in Warren

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112. 394 U.S. 557, 565 (1969) (striking down as unconstitutional under the First Amendment a Georgia law that made mere private possession of obscene material a crime); *see also* DE GRAZIA, *supra* note 4, at 450 n.†.

113. *See, e.g.*, Miller v. California, 412 U.S. 15, 30 (1973) (stating that it would be "unrealistic to require that the answer [to what is prurient] be based on some abstract formulation").

114. *See* Mishkin v. New York, 383 U.S. 502, 508 (1966) ("Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.").

115. *See id.* The Court referred to some of the books involved in the case as depicting "various deviant sexual practices, such as flagellation, fetishism, and lesbianism." The Court also said depictions of sado-masochism and homosexuality were "deviations." *Id.* at 505.

116. *See* DE GRAZIA, *supra* note 4, at 526 n.† (noting that Republicans had interpreted a year of assassination, urban rioting, and violent anti-war demonstrations as being "the predictable consequence[] of Warren Court 'permissiveness' of the sort Fortas was taken to exemplify").

117. *See* DE GRAZIA, *supra* note 4, at 424.

118. *See* Jacobellis v. Ohio, 378 U.S. 185 (1964). Applying this standard to a film with one explicit love scene, the Court found that the film was not obscene and thus was protected by the Constitution. *Id.* at 196. The Court reiterated that "obscenity is excluded

Burger's opinion in *Miller v. California*,[119] where such value had to be *significant* before earning First Amendment protection.[120] (How many books are published that can really claim to have *serious* artistic, political, or scientific value?)

Worse still, the invocation of the community standards in *Roth* (by which Brennan avowedly meant the *national* community) was redefined so as to confer on local communities the right to determine what was, to their tastes, "patently offensive" and may "appeal to the prurient interest in sex."[121] At the time, it seemed a recipe for disaster. In a worst case scenario, de Grazia notes, federal prosecution for violating federal obscenity codes might be brought against a New York magazine received in a Bible Belt community and adjudged in that community; found obscene by local standards, the publication could then legally be repressed nation wide.[122] Consternation was widespread. And so in the preface to his novel *Myron*,[123] published shortly after the *Miller v. California* decision, Gore Vidal announced that he had decided to change all the "bad" words in his book to "some very good words indeed": the names of the Supreme Court Justices who concurred in the decision.[124]

If, in the *Redrup* era, the Supreme Court seemed in advance of the community conventions, the reverse may have been true in the post-*Miller*

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from constitutional protection only because it is 'utterly without redeeming social importance,'" (quoting *Roth*, 354 U.S. at 484), and concluded that "material dealing with sex in a manner that advocates ideas, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection." *Id.* at 191 (footnote and citation omitted). *See also* DE GRAZIA, *supra* note 4, at 429 (explaining that the *Roth* Court recognized that "[t]he portrayal of sex . . . is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press").

119. 413 U.S. 15 (1973) (holding that obscene material is not protected under the First Amendment). In determining what is obscene, the court stated:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted).

120. *See id.*; *see also* DE GRAZIA, *supra* note 4, at 561-62.

121. *See Miller*, 413 U.S. at 24; *see also* DE GRAZIA, *supra* note 4, at 566-67.

122. *See* DE GRAZIA, *supra* note 4, at 570.

123. GORE VIDAL, MYRON (1974).

124. *Id.* at ix-x.

era.[125] Despite the fact that the *Miller* test is far friendlier to obscenity prosecution—a statistical breakdown by Joseph Kobylka shows the Burger Court was twice as likely to favor the suppressionist than the civil libertarian side[126]—few local prosecutors have been motivated to exploit the revamped protocol.[127] The pundits who predicted a huge upswing in obscenity prosecution in the early seventies were proven wrong. But is the climate set to change yet again? In his decision convicting Luther Campbell and his rap group, 2 Live Crew, for obscenity, Florida's Judge Gonzalez (an illiberal but not unlettered man) pronounced that he was presiding over a dispute between "two ancient enemies: Anything Goes and Enough Already."[128] If "Anything Goes" made inroads in the sixties, the backlash decade of the nineties seems to intimate the return of "Enough Already." There appear to be two main reasons for this.

First, and maybe least important, the very ascent of liberal jurisprudence in the sixties made it less appealing to left and oppositional intellectuals who viewed such formal civil liberties as a subterfuge and rationale for larger social inequities. The sort of intellectual contrarians and vanguardists who would have rallied behind the ideology of freedom of expression in the days before its (at least partial) ascendance are now, understandably enough, more disposed to explore its limits and failings. (I'll return to this.) A handy index of how the pendulum has swung can be found on our college campuses. The rubric of "free speech," in the 1960s an empowering rubric of campus radicals, has today been ceded to their conservative opponents as an ironic instrument of requital.

Second, in a world after the Evil Empire, a new generation on the Right has learned what the older generation always knew: That hot-button issues involving sex have redoubtable leverage in fundraising drives. It's called the politics of distraction, and it works. To the extent that Luther Campbell's perversity is the issue, the economic decay of Liberty City isn't.[129]

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125. *See* DE GRAZIA, *supra* note 4, at 684-85.

126. *See* JOSEPH F. KOBYLKA, THE POLITICS OF OBSCENITY: GROUP LITIGATION IN A TIME OF LEGAL CHANGE 7-8 (1991). Kobylka notes that the Burger Court (1972-87), in 45 obscenity cases, reached a "proscriptionist" outcome 24 times and a "libertarian" result 10 times. *Id.* at 8, table 1.1.

127. *See* DE GRAZIA, *supra* note 4, at 571 (describing the *Miller* revision of the Brennan doctrine as "sort of a paper tiger," and observing the lack of any increase in prosecutorial activity resulting from *Miller*).

128. Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578, 582 (S.D. Fla. 1990).

129. *See* Morton Kondracke, *Hart's Long March: He'd Give Reagan a Run and a Half*, NEW REPUBLIC, Apr. 2, 1984, at 13 (quoting former presidential candidate Gary Hart calling Ronald Reagan's campaign strategy "the politics of distraction—try and get

Nor is this move a peculiarly American phenomenon. In the former Soviet Union, facing mounting public unrest in the wake of stringent economic measures, pornography was officially and energetically denounced as the *fons et origo* of social decay and decadence.[130] The Chinese Communist Party followed the same script in dealing with the crisis following the Tiananmen Square massacre. When the savvy politico Li Ruihuan was given the job of "ideology control" immediately after the massacre, his first move was clamorously to launch a war against pornography, calling upon all leaders to help him stamp out this abomination of bourgeois liberalism.[131] It was a well calculated move. According to the Chinese writer and critic Jianying Zha, other issues sounded abstract or muddled in Li's speeches, becoming obscured by the heated rhetoric of anti-pornography.[132]

The conservative imperatives of coalition building probably animated the sleazy Meese Commission on Obscenity in 1985, as Reaganism sought to consolidate "movement" support.[133] Whereas the members of the 1970 President's Commission on Obscenity and Pornography studied the available social science evidence and surprised even themselves when they

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people to pay attention to abortion, school prayer and other highly polarized social issues and not deficits and the arms race"). *See also In Their Own Words: Excerpts from Speech by Gore at the Convention*, N.Y. TIMES, July 17, 1992, at A15 (quoting vice presidential candidate Al Gore saying that the Bush-Quayle administration had "demeaned our democracy with the politics of distraction, denial and despair").

130. *See, e.g.*, Larisa Lazar, *Belarussian Government to Enhance Anti-Pornography Actions*, TASS, Dec. 29, 1992 (noting that the Republican Council of Ministers banned "the creation, circulation, show and advertisement of publications and movies picturing pornography"); Vladimir Akimov, *Kazakhstan Draws Up Bill on Television and Broadcasting*, TASS, Aug. 24, 1993 (noting that in Kazakhstan a bill to combat pornography is being prepared).

131. *See* Nicholas D. Kristof, *Beijing Condemns Pornography as Subversive*, N.Y. TIMES, Oct. 28, 1990, § 1, at 6 (reporting that the campaign against pornography has included threats of imposing the death penalty against those involved in the pornography business); Nicholas D. Kristof, *A Top Chinese Leader Challenges Hard-Liners*, N.Y. TIMES, July 17, 1990, at A2 (reporting that many intellectuals feared that they would be the target in the campaign against bourgeois liberalism, but that pornography became the primary target instead).

132. Author's conversation with Jianying Zha.

133. *See* DE GRAZIA, *supra* note 4, at 602 (stating that "[t]he Reagan administration [had] been looking for raw meat to satisfy the appetite of the religious right—people vexed at the Reagan administration because the Constitution has not yet been amended to permit school prayers, abolish abortion, outlaw pornography, and balance the budget." (quoting Robert Yoakum)). *See generally* U.S. DEP'T OF JUSTICE, ATTORNEY GEN.'S COMM'N ON PORNOGRAPHY, FINAL REPORT (1986) [hereinafter FINAL REPORT].

concluded that the repeal of most obscenity laws was indicated,[134] the Meese Commission was, from the outset, put together as a stalking horse for the religious right.[135] They scoured the country looking for horror stories, people who would testify to porn's limitless powers of destruction. Typical of their witnesses was the former Playboy Bunny who told them: "There was no help for me until I changed my lifestyle to be a follower of Jesus Christ and obeyed the Biblical truths, including no premarital sex. I implore the Attorney General's commission to see the connection between pornography and sexual promiscuity, venereal disease, abortion, divorce, homosexuality, sexual abuse of children, suicide, drug abuse, rape and prostitution . . . . Come back to God, America, before it's too late."[136]

But it would be several more years on Capitol Hill before the Right was able to put the specter of smut squarely on the political agenda, and it came in an unexpected form—government funding of the arts.[137] De Grazia's final chapter is a useful dossier on the recent controversies involving the National Endowment for the Arts ("NEA"),[138] reminding us, if it were necessary, that the spirit of censorship retains its sway over the American public, or at least many of its representatives.[139] Still, this

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134. *See* COMMISSION ON OBSCENITY AND PORNOGRAPHY, THE REPORT OF THE COMM'N ON OBSCENITY AND PORNOGRAPHY 51-64 (1970) [hereinafter LOCKHART REPORT] (recommending that federal, state, and local legislation should not interfere with an adult's right to read, obtain, or view sexual materials, but that legislation should regulate the sale of sexual materials to young persons and protect persons from having sexual materials thrust upon them through the mail or open public display); DE GRAZIA, *supra* note 4, at 552. De Grazia quotes Paul Bender, General Counsel to the Commission, as saying:

> The recommendation of the commission was for the abolition of all general laws that prohibit distribution of obscene materials of the normal consensual kind to adults, and that obscenity laws should just take the form of specific laws dealing with particular kinds of contexts: public displays, unsolicited mailings, and distribution to children. The commission also recommended that the country get serious about sex education.

Id. (footnote omitted).

135. *See* DE GRAZIA, *supra* note 4, at 584-86.

136. *Id.* at 586-87.

137. *See id.* at 622-88.

138. *See id.*

139. *See id.* at 627-28. "[W]e need to clean up our culture . . . [j]ust as a poisoned land will yield up poisoned fruits, so a polluted culture . . . can destroy a nation's soul. . . . We should not subsidize decadence." *Id.* at 627 (quoting Patrick Buchanan). "This matter does not involve freedom of expression; it does involve the question whether American taxpayers should be forced to support such trash." *Id.* at 627 (quoting Sen. Alphonse D'Amato).

is an issue that can be detached—legally, if not culturally—from the constitutional skirmishes that preceded it.

That the NEA should have become a political football is distressing, and the spirit of Helms' attack has helped rekindle a very public rhetoric of bigotry and intolerance.[140] At the same time, I do not view the failure of the NEA to support artists it finds objectionable as quite commensurate with the criminal or civil prosecution of such artists. De Grazia does view these episodes as continuous with the history of censorship.[141] (Certainly the criminal prosecution of curator Dennis Barrie in the wake of Helms's attack on Mapplethorpe strengthens his case.)[142] If the NEA embroglio has a silver lining, it will be to have helped restore the prestige of freedom of expression among social progressives.

De Grazia, for his part, cites Geoffrey Stone's argument to the effect that the disbursement of government funding to the arts, though not constitutionally required, does involve constitutional questions (to do with

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140. The right wing increased its public rhetoric after Helms began his attack on "obscene" art. *See* C. Carr, *War on Art*, THE VILLAGE VOICE, June 5, 1990, at 25. The article lists examples of the Right's use of metaphors of chaos, dissolution, sewage and engulfment to condemn the art of Robert Mapplethorpe and Andres Serrano as well as the NEA's support of such art. *Id.* at 26 (reporting that U.S. Rep. Dana Rohrabacher called it "the river of swill"; former Presidential candidate Patrick Buchanan labeled it "a polluted culture, left to fester and stink"; and televangelist Pat Robertson referred to it as "tax-supported trash" while his *700 Club* co-host, Sheila Walsh, said that art was "a hellish plot to destroy this nation."); DE GRAZIA, *supra* note 4, at 643 (stating that after the vote on Helms' amendment, "[f]irestorms" on whether the NEA should even exist, would be "lit by the right-wing religious leaders (Donald Wildmon and Pat Robertson among them) in Congress, and by right-wing newspapers like *The Washington Times*"); Carole S. Vance, *War on Culture*, ART IN AM., Sept. 1989, at 39, 41 (stating that "[f]undamentalists and conservatives are now directing mass-based symbolic mobilizations against 'high culture.' Previously, their efforts had focused on popular culture—the attack on rock music led by Tipper Gore, the protests against *The Last Temptation of Christ* and the Meese Commission's war against pornography.").

141. *See* DE GRAZIA, *supra* note 4, at 636 (noting that despite the fact that denial of funds by the NEA is reviewable in federal court, it is still "tantamount to censorship").

142. *See* Cincinnati v. Contemporary Arts Ctr., 566 N.E.2d 214, 219 (Ohio Mun. 1990) (holding that the defendants could be prosecuted under a statute prohibiting the promotion, sale or exhibition of any obscene material for displaying five Mapplethorpe photographs, including photographs depicting one man urinating into the mouth of another and a man with a whip inserted in his anus).

Barrie and the museum were acquitted in the ensuing jury trial. *See* Isabel Wilkerson, *Cincinnati Jury Acquits Museum in Mapplethorpe Obscenity Case*, N.Y. TIMES, Oct. 6, 1990, at 1. For comments from jurors in the case, see DE GRAZIA, *supra* note 4, at 655.

"government neutrality in the field of ideas") once implemented.[143] I admit I find Stone's argument more ingenious than persuasive. At the end of the day, there's a distinction worth preserving between *not supporting* and *suppressing*. And, as many have pointed out, there's something pathetic about the avowed dependence of oppositional art upon subsidy from the executive branch. "My dance exposes your greed, your hypocrisy, your bigotry, your philistinism, your crass vulgarity," says one of Jules Feiffer's cartoon monologists. "Fund me!"[144]

Has the NEA been "politicized?" Of course. But the charge of "politics" isn't one we can fling with good conscience, save in the spirit of *tu quoque*. If art is political, how can judgment not be? The fig leaf of formalism fools no one, and the tidy distinction between the "artistic" and "political" ought to be left for the genteel likes of Frohnmayer. Art that robustly challenges the distinction is poorly served by stealthy recourse to it.

Charles Keating's plea, as a dissenting member of the 1970 Commission, that we "investigate what pornography does to women"[145] would be taken up by a powerful new school of feminist theorists.[146] A decade later both Andrea Dworkin and Catharine MacKinnon were among the Meese Commission's star witnesses.[147] And the alliance they forged was one of the Commission's most lasting legacies.

For free-speech sentimentalists like me, post-*Roth* obscenity law in the Warren era is, on the whole, the heartening narrative of *Hicklin*'s decline and fall. But one problem was replaced by another. It was not that satisfactory replacements were unavailable, but that none secured the approval of a majority of the justices. Obscenity law is, and continues to be, a mess. Even the most liberal test that the Court promulgated in the late sixties (now considered dead letter) required the court to judge whether the contested material contained "social value,"[148] whatever that

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143. *See* DE GRAZIA, *supra* note 4, at 647 (quoting Geoffrey Stone, former Dean of the University of Chicago Law School).

144. *See* Robert Brustein, *The First Amendment and the NEA; On Theater—National Endowment for the Arts*, NEW REPUBLIC, Sept. 11, 1989, at 27 (discussing various political cartoonists' commentaries on the NEA controversy).

145. DE GRAZIA, *supra* note 4, at 555.

146. *See id.* at 555 n.*, 584 (noting that many feminists such as Andrea Dworkin and Catharine A. MacKinnon have argued that pornography causes harm both directly and indirectly to women). *See also infra* notes 185-90 and accompanying text.

147. *See* DE GRAZIA, *supra* note 4, at 584.

148. *See* Redrup v. New York, 386 U.S. 767, 771 (1967) (per curiam) (stating that the prevailing standard is that no material can "'be proscribed unless it is found to be *utterly* without redeeming social value'" (quoting Memoirs v. Massachusetts, 383 U.S. 413, 418-19 (1966))).

meant; and surely such a requirement was hardly more determinative than Potter Stewart's oft-cited "I-know-it-when-I-see-it" proposal.[149]

Now let's unpack the currently prevailing doctrine of *Miller v. California*.[150] By defining obscenity as both pruriently appealing *and* patently offensive, the doctrine paradoxically requires—as constitutional scholar Kathleen Sullivan has aptly put it—that the audience "be turned on and grossed out at the same time."[151] And I've already mentioned that the finding of "prurience" is afflicted by the "different strokes" dilemma. But beyond these perplexities is the question of who the audience is. Whose offense counts? Writing in 1973, Justice Douglas debunked the test with characteristic verve: "One of the most offensive experiences in my life was a visit to a nation where bookstalls were filled only with books on mathematics and books on religion."[152] But his was not the majority view.[153] *Miller*'s answer is the "average person applying contemporary community standards."[154] Curiouser and curiouser. Both the "average person" and the "reasonable person" (formerly man), are staples of legal argument (and, at least since Aristotle, of aesthetic theory as well).[155] But here the requirement is not that the average person be offended; it is that she could imagine herself to be, were she a member of a local community,[156] a community that (if the formulation is not to be a tautology) may have non-average tolerance for such things. No doubt in the spirit of cultural pluralism, then, Burger wishes to respect the varying tastes of varying communities.

How is this community to be delimited? There seems to be no straightforward answer. Should it correspond to the legal bailiwick of the court or prosecutor, or should it be more narrowly gauged to the offending event or transaction? (In finding against Skyywalker Records, U.S. District Court Judge Jose Gonzalez declared that "the relevant

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149. Jacobellis v. Ohio, 378 U.S. 185, 197 (1964) (Stewart, J., concurring).

150. 413 U.S. 15 (1973); *see* DE GRAZIA, *supra* note 4, at 565-72.

151. Kathleen M. Sullivan, *The First Amendment Wars*, NEW REPUBLIC, Sept. 28, 1992, at 35, 38.

152. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 71 (1973) (Douglas, J., dissenting).

153. *See id.* at 69 (holding that "the States have a legitimate interest in regulating commerce in obscene material and in regulating exhibition of obscene material in places of public accommodation, including so-called 'adult' theaters from which minors are excluded."); *see also* DE GRAZIA, *supra* note 4, at 575.

154. *Miller*, 413 U.S. at 24 (quoting Roth v. United States, 354 U.S. 476, 489 (1957)); *see also* DE GRAZIA, *supra* note 4, at 565-74.

155. *See* DE GRAZIA, *supra* note 4, at 685.

156. *See Miller*, 413 U.S. at 24; *see also* DE GRAZIA, *supra* note 4, at 569-70.

community is the area of Palm Beach, Broward, and Dade Counties."[157] It is, of course, unclear how this area—"remarkable for its diversity" and "heterogeneous in terms of religion, class, race and gender," according to the judge[158]—constituted a "community,"[159] and one whose tolerance might be finely calibrated.) More reasonably, one might suppose that the "community" to be considered is that most immediately affected by the suspect material. I mean, of course, those who are (or would be) actually exposed to it—namely its patrons or customers.

Oddly enough, they are the one taste community (self-selected, to be sure) whose preferences carry no evidentiary weight.[160] Courts do not poll the patrons of the X-rated movie house to determine if they have been offended by the material; nor do they survey the men and women who pay to hear Luther Campbell and 2 Live Crew perform to find out if *they* have been offended. Legally, it does not matter if obscene material is made available only to a self-selecting and appreciative audience.[161] For obscenity law does not require that offensive material actually offend anyone, law enforcement officials aside.[162] It doesn't even require that there exist even a serious *possibility* of such offense.[163] (This is precisely where conventional obscenity law departs from the other salient exceptions to First Amendment protection, all of which involve the concrete prospect of significant harm (to wit—speech posing imminent and irreparable threat to public order or the nation;[164] libel and the invasion

157. Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 557, 588 (S.D. Fla. 1990); *see also* DE GRAZIA, *supra* note 4, at 456-60.

158. *Skyywalker Records*, 739 F. Supp. at 588.

159. *Id.*

160. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 (1972) (stating that "for us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation is a step we are unable to take") (footnotes omitted). *See also* DE GRAZIA, *supra* note 4, at 567-68.

161. *Id.*

162. *See Miller*, 413 U.S. at 23-24 (describing the test for obscenity, which does not require harm to an actual person); *see also supra* note 119 for a discussion of the *Miller* test.

163. *See, e.g.*, Kaplan v. California, 413 U.S. 115, 118 (1973) (agreeing with the Supreme Court of California that the sale of a book could be banned statutorily simply because it "appeals to a prurient interest in sex and is beyond the customary limits of candor within the State of California").

164. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that speech advocating violent acts or unlawful activity could be proscribed only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

of privacy;[165] and the regulated domain of "commercial speech," encompassing, for instance, "blue sky" laws governing truth in advertising.))[166] But perhaps the true offense is to be found elsewhere.

What's likely is that the offense that fuels obscenity law comes from the thought that *other people* are enjoying these spectacles. As moral surrogates, we are offended on behalf of those who don't know enough to be. I will call this "third-party offense." Most legal thinkers are skeptical of according it much weight. As the Williams Report observed in 1979, "if one accepted as a basis for coercing one person's actions, the fact that others would be upset even by the thought of his performing those actions, one would be denying any substantive individual liberty at all."[167]

There is, however, another traditional conception of obscenity-related harm, a strong version of which can be found in Alexander M. Bickel's *The Morality of Consent*.[168] And this is the harm incurred by the social "tone" of a community. Bickel grants, *arguendo*, that dirty books do not deprave and corrupt, and that they pose no "clear and present danger,"[169] but nevertheless would deny the "right to obtain obscene books and pictures in the market or to foregather in public places—discrete, but accessible to all—with others who share a taste for the obscene."[170] For "to grant this right is to affect the world about the rest of us . . . what is commonly read and seen and heard and done intrudes upon us all, wanted or not, for it constitutes our environment."[171] Thus, however secluded and discrete, however carefully restricted to its self-selected clientele, obscenity pollutes the social milieu. De Grazia rightly calls the doctrine "specious and

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165. *See, e.g.*, Gertz v. Welch, 418 U.S. 323, 349 (1974) (stating that in a libel suit against a news publication for defamation of a private individual, the plaintiff must prove actual injury).

166. *See, e.g.*, Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557, 563-64 (1980) (stating that the government may ban commercial speech that is likely to deceive consumers or concerns illegal activity).

167. OBSCENITY AND FILM CENSORSHIP: AN ABRIDGEMENT OF THE WILLIAMS REPORT 100 (Bernard Williams ed., 1981).

168. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 70-76 (1975) (asserting the legitimacy of government regulation of certain forms of speech because the "marketplace" will not adequately protect society from the consequences of "noxious doctrines," which "may create a climate, an environment in which conduct and actions that were not possible before become possible").

169. *See id.* at 73; DE GRAZIA, *supra* note 4, at 567.

170. *See* BICKEL, *supra* note 168, at 73-74; DE GRAZIA, *supra* note 4, at 567.

171. *See* BICKEL, *supra* note 168, at 74; DE GRAZIA, *supra* note 4, at 567.

dangerous,"[172] and even the post-Warren Supreme Court has not found the argument compelling.[173]

As I suggested, those offended by pornographic films don't normally pay to attend such films; obscenity law provides judicial solicitude toward the feelings they have about those who do. So it's natural to wonder who's really on trial under the judicial regime of *Miller v. California*:[174] Luther Campbell, say, or his audience? The "smut peddler" or his patrons? Surely someone who fails to be disgusted at that which (by official "community" standards) is disgusting is socially abnormal, and can be counted out of the social polity. If the "average person" test for prurience and offensiveness is mired in confusion, the "reasonable person" test for "serious literary, artistic, political or scientific value" is in no better shape.[175] (Actually, the "reasonable person" test is a refinement and clarification of Burger's "merit" provision found in Justice White's 1987 opinion in *Pope v. Illinois*.[176] Value was not to be linked to community standards, but to the assessment of a "reasonable person.")[177] Justice Stevens, in dissent, noted that reasonable people may well differ about such judgments;[178] how to decide between them? Further, a jury might conclude that while scholars or critics might find value in a work, "the

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172. DE GRAZIA, *supra* note 4, at 567. De Grazia argues that if Bickel's version of freedom of expression is accepted, the "only expression left free would be that privately created and indulged in at home." *Id.* at 567-68.

173. *See, e.g.*, Pope v. Illinois, 481 U.S. 497, 500-01 (1987) (holding that it was error to apply community standards in deciding whether an allegedly obscene work lacked value); Erznoznik v. Jacksonville, 422 U.S. 205, 210 (1975) (invalidating as overbroad a Jacksonville, Florida ordinance banning drive-in theatres from showing films depicting nudity on screens visible from a public place or street, and holding that "the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer"); *see also* DE GRAZIA, *supra* note 4, at 581.

174. 413 U.S. 15 (1973). For the guidelines for obscenity announced by the *Miller* Court, see *supra* note 119.

175. *See, e.g.*, *Pope*, 481 U.S. at 500-01 (1987) (refining the third prong of the *Miller* test by requiring a jury to apply the standards of a "reasonable person," rather than applying those of "an ordinary member of any given community," when judging the value of the work in question); *see also* DE GRAZIA, *supra* note 4, at 685.

176. *See Pope*, 481 U.S. at 497, 501 n.3 (explaining that the "reasonable person" standard prevents jurors from being bound by predominant local views, and allows consideration of whether a reasonable person could make a different value judgment of the work in question).

177. *Id.* at 500-01; *see also* DE GRAZIA, *supra* note 4, at 685.

178. *Pope*, 481 U.S. at 511 n.4 (Stevens, J., dissenting); DE GRAZIA, *supra* note 4, at 686.

ordinary 'reasonable person' would not."[179] And Antonin Scalia doubted that White's "reasonable person" was even of the right species, given that "ratiocination has little to do with esthetics."[180] He would rescind the merit exemption altogether: "Just as there is no use arguing about taste, there is no use litigating about it."[181]

Those interested in the safeguards of obscenity law plainly have reason for concern. The truth is that no coherent doctrine of obscenity has commanded a judicial consensus since *Hicklin* was shunted aside in 1957.[182] But *Hicklin*'s confident corrupt-and-deprave premise had yet another advantage, not to be underestimated, which was to supply a social policy justification for censorship. "Clear and present danger of what?" Justice Douglas barked at the government attorney in *Roth*.[183] The lack of a cogent answer, in the absence of *Hicklin*, lead to the slippery slope conservatives most feared. Detached from the specter of social harm, reduced to a subjective issue of taste and aesthetics, obscenity law lost its moral bite. The thin, unnourishing gruel of third-party offense was now its main sustenance. As early as 1968, it seemed one could refer, as did the title of Charles Rembar's book, to the "end of obscenity."[184] But perhaps no longer.

In the public discourse on obscenity, it is Catharine MacKinnon's extraordinary achievement to have restored the essence of *Hicklin*—the threat of social injury—to its pride of place.[185] Indeed, her proposals avoid all of the pitfalls and failures of post-*Roth* obscenity law. (Even some of the stalwarts of liberal jurisprudence have been impressed. In a

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179. *Pope*, 481 U.S. at 512 n.5 (Stevens, J., dissenting); DE GRAZIA, *supra* note 4, at 686.

180. *Pope*, 481 U.S. at 504-05 (Scalia, J., concurring); DE GRAZIA, *supra* note 4, at 687.

181. *Pope*, 481 U.S. at 505 (Scalia, J., concurring); DE GRAZIA, *supra* note 4, at 687.

182. *See* Roth v. United States, 354 U.S. 476, 489 (1957) (rejecting the *Hicklin* test as "too restrictive" because judging works based "upon the effect of isolated passages upon the most susceptible persons" could lead to the banning of all "material legitimately treating with sex").

183. *See* Fisher, *supra* note 92, at 497; DE GRAZIA, *supra* note 4, at 309.

184. CHARLES REMBAR, THE END OF OBSCENITY: THE TRIALS OF LADY CHATTERLEY, TROPIC OF CANCER AND FANNY HILL (1968) (discussing the obscenity trials of each of the books); DE GRAZIA, *supra* note 4, at 430 n.*.

185. *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 201-02 (1989) (questioning the *Miller* standard of obscenity law that defines obscene material as that "which, taken as a whole, lacks serious literary, artistic, political, or scientific value," because "what redeems a work's value among men enhances its injury to women").

letter to the mayor of Minneapolis, the eminent constitutional scholar and litigator Laurence Tribe once suggested that the Dworkin-MacKinnon proposal "may eventually be found to be the first sensible approach to an area which has vexed some of the best legal minds for decades.")[186] In a legal arena where anomie, ambivalence, and confusion reign supreme, she has launched a movement to resurrect (as we'll see) the sharpest weapons of traditional, pre-Warren era obscenity law. And she has done so in a way that enlists the sympathy of social progressives and reactionaries alike.

MacKinnon is as formidable a tactician as she is a theorist. Well aware that the criminal prosecution of obscenity has reached something of an impasse, she and her allies have shifted the legal terrain to achieve her objectives through the remedies of civil law.[187] Even this, to be sure, is a throw-back. In fact, obscenity has always been most effectively prosecuted through private organizations like Boston's Watch and Ward Society, or the New York Society for the Suppression of Vice, which commanded a level of vigilance and devotion far above what could be expected from mere public servants.[188] (It's also true that the sharp distinction between criminal and civil law is a relatively late development in common law.)[189] Civil remedies are also suggested by the general argument launched by Catharine MacKinnon and Andrea Dworkin that describes obscenity—covering material that represents "the graphic sexually explicit subordination" of women—as a violation of women's civil rights.[190]

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186. DE GRAZIA, *supra* note 4, at 613.

187. *Id.* at 613-14 (discussing ordinances drafted for Indianapolis and Minneapolis by MacKinnon and Dworkin which permit private citizens to initiate civil suits for injuries allegedly caused by pornography). *See also supra* note 2.

188. DE GRAZIA, *supra* note 4, at 118 n.†. *See also* PAUL S. BOYER, PURITY IN PRINT: THE VICE-SOCIETY MOVEMENT AND BOOK CENSORSHIP IN AMERICA 10, 40 (1968) (describing the 90% conviction rates in vice-society actions against "obscene" books in the late nineteenth and early twentieth centuries).

189. For discussions of this concept, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 6 (5th ed. 1984) and A.K.R. KIRALFY, THE ENGLISH LEGAL SYSTEM 5-7 (8th ed. 1990).

190. DE GRAZIA, *supra* note 4, at 595; *see also* CATHARINE A. MACKINNON, *Francis Biddle's Sister: Pornography, Civil Rights, and Speech*, *in* FEMINISM UNMODIFIED 163, 176 (1987) [hereinafter *Francis Biddle's Sister*]. MacKinnon describes pornography as, among other things, the "practice of sex discrimination," and, thus, a violation of women's civil rights. *Id.* at 163. *See also* ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN at xxxii-xxxiii (1989) (explaining that the Minneapolis ordinance provides a civil cause of action for sex discrimination to women who have been "hurt" by pornography).

The Pornography Victims' Compensation Act[191] is both state-of-the-art and deeply atavistic. The bill stipulates that those who produce, distribute, exhibit, or sell obscene material may be liable for damages if this material "was a substantial cause of" the crime.[192]

How much certainty of the link could we ask? Since the "smut peddlers" will be tried under civil law, the court need only weigh the "preponderance" of the evidence, and decide on the basis of what is more probable than not.[193] To collect unlimited damages, including compensation for pain and suffering, the plaintiff would show that it is more likely than not that the material was "obscene," more likely than not that the crime occurred, more likely than not that it was a substantial cause of the crime, and more likely than not that it was reasonably foreseeable that the material created an unreasonable risk of the crime.[194] This last condition, in which smut is foreseeably linked with criminality, shouldn't be a sticking point. Precisely such a link was affirmed by the U.S. Court of Appeals for the Seventh Circuit,[195] and if Judge Frank Easterbrook finds it foreseeable, who is to gainsay him?

In practice, the bill would encourage and reward strategic alliances between victims and victimizers in order to extract large cash settlements from the third party with the deepest pockets. Not unlike the rest of us, criminals usually quite happily attribute their bad behavior to an external agency (mother, Hostess Twinkies, demon rum, *Playboy*), thus diminishing, in some small measure, their own culpability. Gary L. Bauer, President of the Family Research Council, has written that "[t]he bill aims at making a lucrative and illegal industry disgorge some profits to benefit women and children who become the torture toys on which the industry's customers try out what they have learned from its wares."[196] And as so many New York publishers discovered in the age of Comstock and

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191. S. 1521, 102d Cong., 2d Sess. (1992).

192. *Id.* § 4(b) (stating that the material must be "obscene" or "child pornography," and must have been "a substantial cause of the . . . offense"). The crimes under the proposed act include "rape, sexual assault, sexual abuse, sexual murder, child molestation, or any other form of forcible sexual crime under Federal or State law." *Id.* § 3(a)(3).

193. *Id.* § 4(c).

194. *Id.* § 4(c)(5)(B).

195. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 329 (7th Cir. 1985) (striking down the Indianapolis ordinance but asserting, nevertheless: "[W]e accept the premises of this legislation [that] . . . [d]epictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to . . . insult and injury at home, battery and rape on the streets."), *aff'd*, 75 U.S. 1001 (1986); *see also* DE GRAZIA, *supra* note 4, at 614-19.

196. Gary L. Bauer, Letter to the Editor, N.Y. TIMES, May 7, 1992, at A26.

Sumner, the threat of imminent bankruptcy does concentrate the mind wonderfully.

So note how it revives and deploys the three mainstays of *Hicklin*-era obscenity law. Like *Hicklin*, it is predicated on the power of obscenity to "deprave and corrupt" those susceptible to its influence, prompting criminal behavior.[197] Like *Hicklin*, it determines liability not by the effects upon the average "consumer"—not even the Act's sponsors believe that *most* consumers of pornography react violently—but upon those most susceptible to its baleful influence[198] (what I call the "weakest link" provision). And like *Hicklin*, it fosters the organization of watch-and-ward parastatal associations, with actions instituted by private citizens who gain financially as the tortfeasor suffers.[199]

But the McConnell bill is only the tip of the iceberg. For while the ordinance drafted by Catharine MacKinnon and Andrea Dworkin and passed in Indianapolis was invalidated by a federal court of appeals,[200] redesigned versions of the legislation have been considered in various states and municipalities.[201] In the state of Massachusetts, faithful to an old Boston tradition, the MacKinnon-Dworkin bill declares: "It shall be sex discrimination to produce, sell, exhibit, or distribute pornography . . . . Any woman may bring a complaint hereunder as a woman acting against the subordination of women."[202] Any defendant found to have violated this provision may be subject to an injunction and/or damages.[203]

But, under more congenial circumstances, MacKinnonism can take on the mantle of criminal law as well. In a unanimous decision, the Supreme Court of Canada upheld criminal sanctions on pornography, which it

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197. S. 1521 § 2(b) (stating that the purpose of the Act is to make those who produce and distribute obscene material liable for "sexual offenses" caused by "exposure to obscene material or child pornography").

198. *See id.* § 4(a).

199. *See id.* § 4(e)(1) (providing for award of damages "including compensation for pain and suffering and costs of the suit").

200. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 328 (7th Cir. 1985) (holding that the MacKinnon-Dworkin ordinance passed in Indianapolis was an unconstitutional content-based restriction on free speech which amounted to a government attempt at "thought control"), *aff'd*, 75 U.S. 1001 (1986).

201. *See supra* note 2 and accompanying text.

202. An Act to Protect the Civil Rights of Women and Children, H.B. 5194, Mass. 177th Gen. Ct., 1992 Sess., § 2(e).

203. *See id.* § 4.

defined in terms of material that subordinates or degrades women.[204] "If true equality between male and female persons is to be achieved," the opinion held, "we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material. Materials portraying women as a class as objects for sexual exploitation and abuse have a negative impact on the individual's sense of self-worth and acceptance."[205] (Thus was the hoary Victorian formula of "corrupt-and-deprave" updated for an age of self-actualization.)

It was a decision many hailed as a breakthrough, and a harbinger of things to come. "This makes Canada the first place in the world that says what is obscene is what harms women," Catharine A. MacKinnon commented.[206] And yet such a concern for the welfare of women—and young girls in particular—was precisely what buttressed *Hicklin*-era obscenity law.[207] To be sure, "Hicklinism" has important differences as well as similarities with MacKinnonism. *Hicklin*-era courts typically worried about moral injury incurred by the unwary and susceptible female; their reasoning was, in this sense, consequentialist. MacKinnon adduces consequentialist considerations as well, but for her the offending representation *in se* constitutes the actionable tort.[208] As we'll see, it is not merely the source of injury, but the injury itself. Indeed, one of her most original, and misunderstood, moves involves a conception of what we might call *hermeneutic harm.*[209]

It's an idea that has crystallized into the powerful slogan: "pornography is violence against women."[210] The copula is all-important. The claim is not that it *causes* violence against women, nor even that its production *requires* violence against women, but that it *is*,

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204. R. v. Butler, [1992] 1 S.C.R. 452, 479 (Can.) (upholding an anti-pornography statute based on the legitimate purpose of preventing harm to citizens, and to women specifically). *See also supra* note 3.

205. *Id.* at 497 (quoting R. v. Red Hot Video Ltd., 45 C.R. (3d) 36, 59-60 (B.C.C.A. 1985) (Can.)).

206. Tamar Lewin, *Canada Court Says Pornography Harms Women*, N.Y. TIMES, Feb. 28, 1992, at B7.

207. *See* DE GRAZIA, *supra* note 4, at 12. *See also supra* notes 32-36 and accompanying text.

208. *See* MACKINNON, *Francis Biddle's Sister*, *supra* note 190, at 192 ("One can say . . . that pornography is a causal factor in violations of women; one can also say that women will be violated so long as pornography exists; but one can also say simply that pornography violates women.").

209. *See id.* at 172-73 (arguing that pornography "is a sexual reality" that both creates and represents the world in which men dominate and control women).

210. CATHARINE A. MACKINNON, *Sex and Violence: A Perspective*, *in* FEMINISM UNMODIFIED 85, *supra* note 190, at 85.

itself, an act of violence.[211] As MacKinnon's readers know, "is"—startlingly deployed at unwonted junctures—may be the most devastating word in her vocabulary. In *Toward a Feminist Theory of the State*,[212] she writes: "This book is not a moral tract. It is not about right and wrong or what I think is good or bad to think or do. It is about what *is*, the meaning of what is, and the way what is, is enforced."[213]

Most of the news coverage of the MacKinnon-Dworkin measures simply failed to capture what was distinctive about them. Now, anti-pornography arguments often draw effective sustenance from *expressivist* consideration but (with few exceptions) cast their arguments in *consequentialist* terms.[214] That is, a state ban on degrading representations of women *expresses* an attitude that we would like the nation state to adopt; but we argue for the ban by invoking considerations of beneficial effects that will come from it.[215] Expressivists, too, invoke consequentialist support. Thus James Q. Wilson eloquently makes the case when he writes of his belief that human character is, in the long run, affected less by occasional furtive experiences than by whether society does or does not state that there is an important distinction between the loathsome and the decent.[216]

For sure, MacKinnon and Dworkin enlist both of these arguments without hesitation. They say that the passage of their ordinances expresses disapproval of the subjugation of women.[217] And they are quite ready

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211. *Id.* at 90-91.

212. *See* MACKINNON, *supra* note 185, at ix (asserting that the goal of the book is to analyze, from a feminist perspective, "how social power shapes the way we know and how the way we know shapes social power in terms of the social inequality between men and women").

213. *Id.* at xii.

214. *Compare* CATHARINE A. MACKINNON, *On Collaboration*, *in* FEMINISM UNMODIFIED 198, *supra* note 190, at 200 ("Our law says something very simple: a woman is not a thing to be used, any more than to be abused, and her sexuality isn't either.") *with* MACKINNON, *Francis Biddle's Sister*, *supra* note 190, at 178 ("Our law is designed to further the equality of the sexes, to help make sex equality real.").

215. *See* MACKINNON, *Francis Biddle's Sister*, *supra* note 190, at 175 (arguing that enactment of the model pornography ordinance advocated by MacKinnon and Dworkin would benefit society by "further[ing] the equality of the sexes").

216. *See generally* JAMES Q. WILSON, ON CHARACTER (1991).

217. *See, e.g.*, DWORKIN, *supra* note 190, at xxviii (asserting that the purpose of the Indianapolis ordinance was to "*recognize* pornography as a violation of the civil rights of women, as a form of sex discrimination, an abuse of human rights") (emphasis added); MACKINNON, *Francis Biddle's Sister*, *supra* note 190, at 175 (arguing for the passage of anti-pornography laws because "[p]ornography is integral to attitudes and behaviors of violence and discrimination that define the treatment and status of half the

to present the argument that pornography conduces to sex crimes of the conventional, legally cognizable variety.[218] But if their political arguments were predicated (as many of their opponents suppose) solely upon such an *a posteriori* argument, they would be vulnerable to a now familiar body of social science that tends to disconfirm the hypothesis.[219]

After all, as the 1970 Lockhart Report found, the liberalizations in American obscenity law in the 1960s were unaccompanied by any significant increase in the incidence of rape.[220] Anecdotal evidence aside, other countries report similar experiences.[221] After the repeal of Denmark's pornography law in the late 1960s, the incidence of sex crimes diminished overall (though the significance and magnitude of the diminution is contested).[222] In Japan, where violent pornography is freely available and widely consumed, rape is relatively infrequent,[223] as it is in porn-permissive Sweden.[224] What can we conclude? Nothing much. Too many complicating factors enter into such studies to deduce any hard and fast rules. Still, if the regulation of pornography had a major impact on the rate of sex crimes, we might expect it to show up *somewhere*, and it doesn't. At present, the causal claim that pornography fuels sexual crimes against women remains largely conjectural.

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population"); *see also* DE GRAZIA, *supra* note 4, at 614.

218. *See, e.g.*, DWORKIN, *supra* note 190, at xxix-xxx (describing hearings held in Minneapolis in 1983, in which female victims of sexual violence testified that pornography had been the catalyst of the violent actions perpetrated against them); MACKINNON, *Francis Biddle's Sister*, *supra* note 190, at 185 (arguing that a causal relationship exists between pornography and sexual assault).

219. *See, e.g.*, Berl Kutchinsky, *Pornography and Rape: Theory and Practice?*, 14 INT'L J. L. & PSYCHIATRY 47, 62 (1991) (asserting that research reveals no causative link between pornography and violence); LOCKHART REPORT, *supra* note 134, at 27 (reporting that studies conducted in Denmark in the 1960s show no significant correlation between the availability of pornographic materials and the rate of sex crimes); *see also* DE GRAZIA, *supra* note 4, at 554-55.

220. *See* LOCKHART REPORT, *supra* note 134, at 27, 229; DE GRAZIA, *supra* note 4, at 554.

221. *See generally*, Kutchinsky, *supra* note 219 (reporting on research comparing the availability of pornographic materials with sex crimes statistics in Denmark, the Federal Republic of Germany, Sweden, and the United States).

222. *See* LOCKHART REPORT, *supra* note 134, at 27; DE GRAZIA, *supra* note 4, at 555.

223. *See* William A. Fisher & Azy Barak, *Pornography, Erotica, and Behavior: More Questions than Answers*, 14 INT'L J.L. & PSYCHIATRY 65, 75 (1991) (describing how Japan has "an extraordinarily low incidence of reported rape").

224. *See* Kutchinsky, *supra* note 219, at 52 Fig. 1.

But all these empirical considerations are finally beside the point. For MacKinnon's central argument is an *a priori* one, invulnerable to the social scientist's tables and charts. Nor does it, like *Miller*, invoke third-party offense. Rather, it is founded on the bedrock of an *a priori* stipulation which cannot be falsified, a stipulation to which empirical evidence is irrelevant. To repeat, for her, pornography itself is violence, pornography itself is the crime and the injury.

Now, discourse theorists sometimes criticize MacKinnon for having a naively empiricist or ontological notion of "real reality," of how things *really* are, failing to acknowledge the way reality is structured and contested by representation.[225] For them, she's a naive mimeticist: Porn does not *mean*, it does not *represent*; it *is*.[226] In fact, I think she does give representation its full weight: like them she refuses the disjunction between representation and reality. Under patriarchy, therefore, "real" sex—ordinary and unobserved coition, so to speak—is simply 3-D pornography; if the act itself is accorded greater value, that is simply because it provides men the best seats in the house.

As she writes in *Feminism Unmodified*: "Gender is sexual. Pornography constitutes the meaning of that sexuality."[227] The philosopher Judith Butler has unpacked that sentence as follows: "Pornography is not a 'representation' of a violence that happens elsewhere, but is itself that violence."[228] The argument is not, here, that pornography *causes* rape, or *reflects* male violence (or conversely, female subjection). It is that pornography is itself the content of sexuality and so of gender. As Butler glosses MacKinnon's argument: "pornography is the cause and meaning of sexuality, which is the cause and meaning of gender."[229]

At first blush, the claim seems tendentious to say the least. For the juridical category of obscenity appears to be a trivially small portion of the representation against which MacKinnon inveighs. Indeed, studies have shown that there appears to be less violence in hardcore movies than in movies generally.[230] In general, societies highly repressive toward

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225. *See* Susan E. Keller, *Viewing and Doing: Complicating Pornography's Meaning*, 81 GEO. L.J. 2195, 2228 (1993) (citing Judith Butler's criticism of MacKinnon's and Dworkin's failure to deal with the "socially constructed world").

226. DE GRAZIA, *supra* note 4, at 587.

227. CATHARINE A. MACKINNON, *Not a Moral Issue*, *in* FEMINISM UNMODIFIED 146, *supra* note 190, at 148.

228. Judith Butler, *Disorderly Woman*, 53 TRANSITION 86, 92 (1991).

229. *Id.*

230. *See, e.g.*, FINAL REPORT, *supra* note 133, at 328-29 (acknowledging that R-rated "slasher" films contain more violence than many pornographic films).

pornography tend to be highly repressive toward women; Iran, where pornographers are punished severely, is not the flowering of a nonpatriarchal social order.[231] Nor, surely, would Victorian England compare well to permissive Sweden.

And the application of this conception of obscenity to the realm of male gay pornography has not been entirely satisfactory. Radical critics like Dworkin normally assimilate this material to their paradigm case, as a variant in which (as the philosopher Eve Feder Kittay writes) "a male plays the role of the female."[232] If so, Kittay typically concludes, "the male homosexual literature does not require a separate analysis."[233] (Unlike some of her allies, Kittay does admit the possibility that she might be mistaken: "If this is not so, then, not being a member of the male homosexual community, I do not see myself in a position to make pronouncements as to what is erotic and what is pornographic within that community."[234] This is a touching but perplexing act of positional recusal, since it doesn't occur to her to decline to pronounce upon literature produced for the male heterosexual community on similar grounds.)

To see the real force of MacKinnon's argument, we should replace the word "pornography" with the word "representation." Jacques Derrida is widely identified with the maxim that "there is nothing outside the text."[235] For MacKinnon, in a similar sense, there is nothing outside pornography. As Barbara Ehrenreich shrewdly observes: "Defining pornography as 'a form of discrimination against women' hardly narrows the field, for surely the censor's eye would then be drawn to the more familiar examples of cultural sexism that surround us everyday, in romance novels, detergent commercials, and the Bible. Where would one stop?"[236] Certainly not with a novel like Andrea Dworkin's *Ice and Fire*,[237] which—de Grazia has no trouble showing—would qualify as

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231. *See, e.g.*, WILLIAM J. BUTLER & GEORGES LEVASSEUR, HUMAN RIGHTS AND THE LEGAL SYSTEM IN IRAN 16-18 (1976) (citing examples of severe restrictions on civil and political rights, including women's rights and freedom of the press).

232. Eve F. Kittay, *Pornography and the Erotics of Domination*, *in* BEYOND DOMINATION: NEW PERSPECTIVES ON WOMEN AND PHILOSOPHY 171, 173 n.12 (Carol C. Gould ed., 1983).

233. *Id.* at 174 n.12.

234. *Id.*

235. *See* GEOFFREY BENNINGTON & JACQUES DERRIDA, JACQUES DERRIDA 84-85 (G. Bennington trans., 1993).

236. DE GRAZIA, *supra* note 4, at 597.

237. ANDREA DWORKIN, ICE AND FIRE (1987); *see also* DE GRAZIA, *supra* note 4, at 595.

pornographic, and thus a violation of women's civil rights, by Dworkin's own expressed criterion.[238]

To MacKinnon, defending her latest legislative initiatives, civil inequality, not freedom of expression, is really what's at stake. "You're not talking about things about which people are entitled to disagree," Catharine MacKinnon told a reporter for the *Boston Globe*.[239] It is MacKinnon's willingness to follow out the logic of her position while conceding little to the pieties of liberal democracy that makes her such a ready target. And not all of the antagonism directed toward her has been inspired by sweet reason.

For some, the pornography debate has been an instructive and invigorating occasion for political growth and reflection in civil society. But it's clear that the new anti-obscenity movement has also provided an opportunity for men who are hostile to feminism anyway to brand it as anti-sex while they burnish their derision with a civil-libertarian sheen. These moves are transparent: Yes, there is an anti-pornography position within contemporary feminism; there is also a pro-pornography position within contemporary feminism. Those who would conflate feminism with Catharine MacKinnon grossly distort both mainstream feminism, and MacKinnon's troubled relation to it. But the ploy seems irresistible. Just as tabloids like the *New York Post* have used Leonard Jeffries to discredit black scholarship and activism generally, anti-feminist crusaders gleefully wave Andrea Dworkin's less temperate pronouncement to cast aspersions upon a multifarious intellectual movement.[240] Ironically, mainstream feminism could just as easily be attacked for excessive tolerance toward the power of the erotic, an untoward fascination with the pornographic imagination. NEA martyr Holly Hughes's critique of patriarchy is altogether heedless of propriety and "decency."[241] So, are feminists prudes or sluts? The Backlashers cannot have it both ways.

Nor should it escape notice that the most thorough-going and incisive critiques of MacKinnon and her assumptions are those offered by feminist critics, scholars, and intellectuals—including Judith Butler, Christine Stansell, Ann Snitow, Barbara Ehrenreich, Carole Vance, Jennifer Wicke,

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238. DE GRAZIA, *supra* note 4, at 595 (stating that the novel "is reminiscent of Henry Miller's work but it is more violent, and it is homoerotic. To my knowledge no one has attempted to censor Dworkin's novel, even though it seems to fit the definition of pornography essayed by Catharine MacKinnon and the author herself.").

239. Thomas C. Palmer Jr., *A Bill of Divorcement—Women Are Split on Pornography Law*, BOSTON GLOBE, Mar. 29, 1992, at 69.

240. *See* NAOMI WOLF, FIRE WITH FIRE 122 (1993) (stating that the mainstream press construed Dworkin's book, *Intercourse*, as focused on a theory that all heterosexual intercourse is rape, omitting Dworkin's theoretical focus on consent).

241. *See* DE GRAZIA, *supra* note 4, at 681.

Martha Gever, C. Carr, Betty Friedan, Nora Ephron, and many others. The strain of anti-pornologism is hardly what's distinctive about feminism; whereas anti-anti-pornology—the critique of the anti-porn movement on grounds other than constitutional formalism or First Amendment pietism—*is* a distinctive feminist contribution.[242]

The real challenge, for feminists and free-speech sentimentalists alike, is *not* to defend obscenity on the grounds of innocuousness. We could, of course. Certainly I believe that the effect of such material is massively overstated, and, as we saw, there's no good evidence causally linking violence against women to the pornography industry.[243] And yet, and yet, the capacity to "deprave and corrupt," quaint as it sounds, must be taken seriously. I want to believe that culture *matters*, and I cannot refuse to contemplate that texts have effects as well as courses.

In rebutting the recommendations made by the President's Commission on Obscenity and Pornography,[244] the great philosopher Richard Nixon perhaps put it best: "The Commission contends that the proliferation of filthy books and plays has no lasting harmful effect on a man's character. If that were true, it must also be true that great books, great paintings, and great plays have no ennobling effect on a man's conduct."[245] We might reject both propositions, but we should try to be consistent.

The literary critic Anne McClintock deals with this issue head on when she remarks: "I am as unconvinced by the argument that porn inhabits a remote, frenzied land safely beyond the green door of the mind as I am by the argument that porn is practice for rape."[246] Surely, then, a civil liberties agenda must not depend on the neutrality or inertness of any of our expressive practices. "Every idea is an incitement," wrote Justice Holmes in 1925;[247] they were not, therefore, to be stripped of protection.

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242. *See, e.g.*, Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1173-86 (1993) (arguing that the assumptions relied upon by MacKinnon and Dworkin in correlating sexist and violent behavior against women with exposure to pornography and in defending censorship of pornography are flawed).

243. *See, e.g.*, LOCKHART REPORT, *supra* note 134.

244. *See id.*

245. DE GRAZIA, *supra* note 4, at 560.

246. Anne McClintock, *Gonad the Barbarian and the Venus Flytrap: Portraying the Female and Male Orgasm*, *in* SEX EXPOSED: SEXUALITY AND THE PORNOGRAPHY DEBATE 111, 113 (Lynne Segal & Mary McIntosh eds., 1993).

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

It's a view with judicial implications. Susanne Kappeler argues, in *The Pornography of Representation*,[248] that there are "no sanctuaries from political reality, no aesthetic or fantastic enclaves, no islands for the play of desire."[249] Judge Richard Posner of the Seventh Circuit, one of our nimbler libertarians (and a former Brennan clerk), neatly turns the charge on its head.[250] If so, Posner rejoins, "the vilest pornographic trash is protected."[251] After all, "ideological representations are at the center of the expression that the First Amendment protects."[252] (This also highlights the contradiction between modern obscenity law and MacKinnon's new approach: According to liberal jurisprudence, the obscene has, by stipulation, no significant political content; according to MacKinnonite jurisprudence, it's precisely the significant political content of obscenity that *makes* it obscene.)[253]

Jane Heap, it's safe to say, would have patience with neither Kappeler nor MacKinnon. Facing prosecution for publishing Joyce's Nausicaa episode, where Gertie McDowell leans back and allows Bloom to see her unclad thigh, Jane Heap comments: "Girls lean back everywhere, showing lace and silk stockings; wear low-cut sleeveless blouses, breathless bathing suits; men think thoughts and have emotions about these things everywhere—seldom as delicately and imaginatively as Mr. Bloom—and no one is corrupted."[254]

I will not argue with Heap, but even if social benefits would result from censorship of representations (and porn is hardly the place to start the massive project of discursive social engineering), I would not accede it such a regime. And versions of such content-based restrictions abound in other countries.[255] In Britain, it is illegal to foment racial hatred; literature propagating such attitudes is subject to prosecution and

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248. SUSANNE KAPPELER, THE PORNOGRAPHY OF REPRESENTATION 1-4, 55-58 (1986) (arguing for a feminist critique and analysis of representation itself, including literature, art, and pornography, as a cultural and social phenomenon that both creates and reflects the patriarchal objectification of women in society).

249. *Id.* at 147.

250. DE GRAZIA, *supra* note 4, at 421 (stating that "no bona fide work of art or information may be suppressed in the name of obscenity, even if it is deeply repulsive to the current dominant thought . . . .") (quoting Judge Richard Posner).

251. *Id.*

252. *Id.* at 619.

253. *See, e.g.*, MACKINNON, *supra* note 227, at 148.

254. DE GRAZIA, *supra* note 4, at ix.

255. *See, e.g.*, Strossen, *supra* note 242, at 1184 (commenting on countries such as Saudi Arabia, Iran, and China, where no sexually oriented material is permitted, and noting that the sale and distribution of pornography is now a capital offense in China).

suppression.[256] By custom, only egregious examples are subject to scrutiny. In this country, I can buy scores of racist tracts. And, granted the unhappy condition of our society, I wouldn't have it any other way.

Can civil inequality be censored out of existence? Our more powerful "discourse theories"—focusing on the political dimension of the most innocent seeming texts—can encourage this dream. But social critique allies itself with its natural antagonist, the state apparatus of law enforcement, at its own peril. There are states—and Islamic ones are the most obvious in their vigilance—in particular, that do engage in the widespread censorship of public representations, including imagery in advertisement, television, and entertainment.[257] Their task is not to censor misogyny and perpetuate sexual equality, but to cover the elbows and ankles of females and discourage blasphemy, prurience, and other such illicit thoughts.

A reluctance to embark on any such exercise of massive state coercion does not wed one to the *status quo*. To defend the free speech right (or even, as *Miller* requires, the cultural "value")[258] of racist or misogynistic material is not to defend racism or misogyny—nor is it to shun, silence, or downgrade social critique of these things. To insist that expression should be free of state censorship is not to exempt it from critical censure. This is a point that both Kimberlé Crenshaw and I have argued elsewhere in connection with the Broward County prosecution of Luther Campbell and company.[259]

To be sure, the distinction would mean little to MacKinnon. After all, we do not find it sufficient to "critique" rape; we punish it. Inasmuch as pornography *in se* is interconvertible with rape—is, like rape, *itself* an

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256. *See* Public Order Act, 1986, ch. 64 (Eng.).

257. *See, e.g.*, ANN E. MAYER, ISLAM AND HUMAN RIGHTS TRADITION AND POLITICS 81-85 (1991) (reporting that Islamic "rights" provisions allow freedom of publication and the press "except when they are contrary to Islamic principles . . . .").

258. *See* Miller v. California, 413 U.S. 15, 36-37 (1973).

259. *See* Kimberlé Williams Crenshaw, *Beyond Racism and Misogyny: Black Feminism and 2 Live Crew*, *in* WORDS THAT WOUND 111, 130-31 (1993) (agreeing with many commentators that the prosecution of 2 Live Crew for obscenity was motivated by racist attitudes, but arguing for a more critical view of the misogynist message of such groups: "To say that [rap] . . . is rooted in a Black cultural tradition . . . does not settle the question of whether such practices are oppressive to women and others within the community."); Henry Louis Gates, Jr., *2 Live Crew Decoded*, N.Y. TIMES, June 19, 1990, § A, at 23 ("[W]e must not allow ourselves to sentimentalize street culture: the appreciation of verbal virtuosity does not lessen one's obligation to critique bigotry in all of its pernicious forms."). The author testified for the defense in Broward County's prosecution of Luther Campbell and 2 Live Crew for obscenity law violations. *See* Sara Rimer, *In Rap Obscenity Trial, Cultures Failed to Clash*, N.Y. TIMES, Oct. 22, 1990, at A12.

injury and a crime of violence against women—it should be the subject of criminal and civil sanctions aimed, as she avows, at its abolition. She would thus agree with the conservative legal philosopher Alexander Bickel that "To listen to something on the assumption of the speaker's right to say it is to legitimate it . . . . Where nothing is unspeakable, nothing is undoable."[260] If we allow MacKinnon her first premise—that pornography *is* violence—all else follows.

What *would* a sensible approach toward obscenity consist of? To begin with, it ought to be conceded that a test of offensiveness that does not relate to the likelihood of actual offense is hardly workable—why should an offense that only occurs, and is only prone to occur, in the process of a judicial hearing count as a community injury?—and no quarter should be given to the paternalism of third-party offense. On the "serious value" standard, I agree with Kathleen Sullivan, who witheringly observes that it "remains useful for at least one purpose: as a source of employment of academics willing to testify about such matters as the role of personification in 'Dick Almighty.'"[261] The courtroom (here I speak from experience) is no place for literary critics.

This is *not* to allow no weight at all to a community interest in regulating what offends it. The prohibition of public nudity has never been held to be unconstitutional, but exactly what constitutes "public" nudity (central to the Rehnquist 1991 "nude dancing" decision in *Barnes v. Glen Theater, Inc.*)[262] has yet to be adequately theorized by the judiciary.[263] The matter may seem trivial but much hangs on it. Is there nothing intermediate between the privacy of the bedroom and the publicity of the boulevard?

The condition of cloistral but accessible spaces—the condition of the "all volunteer audience," to borrow the terms of the Williams Report[264]—is, surely, central to the sex industry as it is actually

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260. BICKEL, *supra* note 168, at 73; *see also* DE GRAZIA, *supra* note 4, at 567.

261. Sullivan, *supra* note 151, at 38.

262. 111 S. Ct. 2456 (1991) (holding that enforcement of Indiana's public indecency statute requiring dancers at adult entertainment establishments to wear pasties and G-strings did not violate the First Amendment).

263. *See* DE GRAZIA, *supra* note 4, at 621 n.§ (stating that Rehnquist's plurality opinion in *Barnes v. Glen Theatre*, which was based on the constitutionally permissible argument of forbidding public displays of nudity, conveniently ignored the fact that a barroom is not the paradigm example of a "public place").

264. COMMITTEE ON OBSCENITY AND FILM CENSORSHIP, 1979, CMND. SER. 5, No. 7772. *See also* A.W.B. SIMPSON, PORNOGRAPHY & POLITICS: THE WILLIAMS COMMITTEE IN RETROSPECT 1 (1983). "Its terms of reference were 'to review the laws governing obscenity, indecency, and violence in publications, displays and entertainments in England and Wales, except in the field of broadcasting, and to review the

conducted. Pornography is generally sequestered to the sex industry as it is actually conducted. Pornography is generally sequestered to some degree; dirty rappers perform in clubs, not in Central Park; Pee-Wee Herman's fateful matinee unreeled in a darkened theater, not on a public billboard. If we reject Bickel's pollution argument,[265] and refuse to weigh counterfactual offense, it seems right to extend *Stanley v. Georgia*[266] residential privileges to such private-public spaces. Thus the Court is no longer in the position of acting (in Justice Black's acerbic phrase) as a "Supreme Board of Censors."[267] We would recognize a cloistral zone of assembly, that should have the privacy rights extended to homes. (The "nude dancing" case, where Easterbrook and Posner were at loggerheads,[268] would be resolved in Posner's favor).

On the other hand, though, the notion of significant public offense (by which we restrict the use of loudspeakers, obscene billboards, public nudity, etc.) must suppose the incursion (or likelihood) of *actual* offense. Zoning restrictions, if carefully and narrowly circumscribed, would be a permissible instrument of regulation, as would prohibitions of public display.

Courts would then recognize the interest of communities in controlling the public "spillover" of offense, taking care that "third party" offense is assigned no weight. This would affirm the holding that communities may protect "average persons" to whom the material is offensive from involuntary exposure to obscenity as adjudged by local standards. Thus, exposure to offense is minimized.

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arrangements for film censorship in England and Wales . . . and to make recommendations.'" *Id.*

265. *See* BICKEL, *supra* note 168 and accompanying text. *See also* DE GRAZIA, *supra* note 4, at 568 (explaining Bickel's view that "the sins committed by the wrongdoer pollute the community and the pollution threatens to damn not merely the sinner, but all the rest of us, the innocent community").

266. 394 U.S. 557, 559 (1969) (stating that "whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home" and holding "that the mere private possession of obscene matter cannot constitutionally be made a crime").

267. Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 690 (1959) (Black, J., dissenting) (stating that "[i]f despite the Constitution, however, this Nation is to embark on the dangerous road of censorship, my belief is that this Court is about the most inappropriate Supreme Board of Censors that could be found").

268. DE GRAZIA, *supra* note 4, at 618-21.

BOOK REVIEW

SNIPS AND SNAILS AND PUPPY DOGS' TAILS, THAT'S WHAT LITTLE BOYS ARE MADE OF

AMERICAN MANHOOD: TRANSFORMATIONS IN MASCULINITY FROM THE REVOLUTION TO THE MODERN ERA. By E. Anthony Rotundo. New York, BasicBooks, 1993. Pp. 382. $25.00

POWER AT PLAY: SPORTS AND THE PROBLEM OF MASCULINITY. By Michael A. Messner. Boston, Beacon Press Books, 1992. Pp. 240. $23.00

*Reviewed by Carlin Meyer**

Maleness. Masculinity. Macho. We associate these with certain traits, certain behaviors. Competitive aggression. Toughness, bravery, even violence. Camaraderie, command, control. Rationality, dispassion, honor. Domination. Of women, especially.[1]

Where did these associations come from? Have we always made these particular associations? Are they biologically ordained, socially conditioned, or a little of each? Do these associations represent ideological constructs, or actual behaviors? Are most men aggressive and violent? If so, how did they get that way? How hard is it to change these gender-bound associations and behaviors?

Neither E. Anthony Rotundo's *American Manhood: Transformations in Masculinity from the Revolution to the Modern Era*[2] nor Michael A. Messner's *Power at Play: Sports and the Problem of Masculinity*[3] answers all these questions, but together they go a considerable way toward unravelling the web of attitudes and behaviors that have shaped modern American men. Both ought to give pause to those who seek quick-fix ways to alter dominant norms associating masculinity with aggressive, competitive, even violent behavior.

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1. And we distinguish these from other traits and behaviors. Feminine behaviors. Caring and compassion. Gentleness and cooperation. A certain softness, submissiveness, kindness. Victimization. By men, especially.

2. E. ANTHONY ROTUNDO, AMERICAN MANHOOD: TRANSFORMATIONS IN MASCULINITY FROM THE REVOLUTION TO THE MODERN ERA (1993).

3. MICHAEL A. MESSNER, POWER AT PLAY: SPORTS AND THE PROBLEM OF MASCULINITY (1992).

Having read these books, it would be difficult either to imagine that male behavior would be significantly affected by suppressing pornography,[4] or to credit porn, as anti-pornography feminists[5] do, with playing a key role in inculcating men in the behavioral norms of modern "masculinity."[6] Today's anti-pornography feminists seem to believe that

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4. "Although desire, sensuality, eroticism and even the explicit depiction of sexual organs can be found in many, if not all, times and places, pornography as a legal and artistic category seems to be an especially Western idea with a specific chronology and geography." Lynn Hunt, *Introduction* to THE INVENTION OF PORNOGRAPHY: OBSCENITY AND THE ORIGINS OF MODERNITY, 1500-1800, at 10 (Lynn Hunt ed., 1993) (tracing the main lines of the modern pornographic tradition and its censorship to sixteenth-century Italy and seventeenth- and eighteenth-century France and England). For present purposes, I use the term pornography in its current popular sense, as "the explicit depiction of sexual organs and sexual practices with the aim of arousing sexual feelings." *Id.* Modern feminist definitions of pornography have included the requirement that a sexual depiction "subordinate" women. *See, e.g.*, ANDREA DWORKIN & CATHARINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY 36 (1988) (stating that the essence of the MacKinnon-Dworkin definition is that "pornography *is* what pornography *does* . . . [and that w]hat it does is subordinate women, usually through sexually explicit pictures and words"). For feminist critiques of the anti-pornography effort, see Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1173-86 (1993) (arguing that the assumptions relied on by MacKinnon and Dworkin in correlating sexist and violent behavior against women with exposure to pornography and in defending censorship of pornography are flawed and insupportable) and Carlin Meyer, *Sin, Sex and Women's Liberation: Against Suppressing Porn*, 72 TEX. L. REV. 1097 (1994) (describing the inevitable variety and fluidity of pornography definitions).

5. I use the term "anti-porn[ography] feminist" to refer to those who seek to use law to suppress, censor, or eradicate pornography because of its misogynist content. I do not include in the term the many feminists who critically analyze porn for what it reveals about men, about modern sexuality, and about the period we live in, but who do not seek to suppress it.

6. Nor can one easily, after reading Rotundo and Messner, believe that either masculine ideals or masculine behavior are adequately represented by the hyperbolic sexual exploits portrayed in most, or at least much of, pornography. Indeed, the view that men are largely conditioned to be as they are shown in porn—as sexual predators—has much in common with that of the philosophy of late nineteenth-century social purists. To them, men were *biologically* constituted as sexual predators, driven inexorably to immoral and aggressive behavior, whereas to today's anti-porn purists, men are *socially* constituted as such; men's sexually aggressive drives are in both cases inexorable (unless contained and controlled) and universal. See, e.g., Ellen DuBois & Linda Gordon, *Seeking Ecstasy on the Battlefield: Danger and Pleasure in Nineteenth-Century Feminist Sexual Thought*, *in* PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 31, 36-37 (Carole S. Vance ed., 1984) and LYNNE SEGAL, SLOW MOTION: CHANGING MASCULINITIES, CHANGING MEN 207, 208-09 (1990) for the proposition that sexuality as the center of male dominance is not new, but has origins in conservative

pornography not only expresses "how men see the world"[7] and "what men want,"[8] but also has played an important role in convincing men to want it—to want to dominate through physical potency, competitive aggression, sexual conquest, and sexual violence.[9] Rotundo's and Messner's works, by contrast, suggest that men's ideals and behaviors are generated by far more powerful social forces and more deeply institutionalized norms, and that they cannot be reduced simply to aggression against women.

In carefully researched, clearly articulated, and unusually thoughtful analyses, Rotundo and Messner describe the social forces that have shaped Western ideas about masculinity and the real behaviors of American men: Rotundo surveying the economic, political, and social forces that produced what he calls the three "phases" of American manhood,[10] and Messner

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nineteenth-century "sexology." *See also* ROTUNDO, *supra* note 2, at 229-31 (describing the nineteenth-century notion of the "animal nature of the human race").

7. Catharine A. MacKinnon, *Sexuality, Pornography, and Method: "Pleasure Under Patriarchy," in* FEMINISM & POLITICAL THEORY 207, 219 (Cass R. Sunstein ed., 1990). The view that pornography directly expresses our culture's view of what men and women are or ought to be is, as Lynne Segal has noted, "astonishingly misleading." Lynne Segal, *Sweet Sorrows, Painful Pleasures: Pornography and the Perils of Heterosexual Desire, in* SEX EXPOSED: SEXUALITY AND THE PORNOGRAPHY DEBATE 65, 71 (Lynne Segal ed., 1993). Indeed, "[i]deology is precisely what most fantasy does *not* express: hence, the well-known incidence of fantasies of powerlessness from leading patriarchs, fantasies of sexual domination by black men (or women) from white racists, and rape fantasies from feminists." *Id.*

8. "What men want," declares Catharine A. MacKinnon, is "women bound, women battered, women tortured, women humiliated, women degraded and defiled, women killed. Or, . . . women sexually accessible, have-able, there for them, wanting to be taken and used . . . ." MacKinnon, *supra* note 7, at 219-20.

9. "[I]t is not the ideas in pornography that assault women: men do, men who are made, changed, and impelled by it." CATHARINE A. MACKINNON, ONLY WORDS 15 (1993). "Sooner or later, in one way or another, the consumers [of porn] want to live out the pornography further in three dimensions. Sooner or later, in one way or another, they do." *Id.* at 19.

10. *See* ROTUNDO, *supra* note 2, at 2. Rotundo explicitly derives these phases from a study of white middle-class men living in the northern United States, acknowledging that American society has always been "divided inwardly by class, region, race, and ethnicity," but arguing that "[m]iddle-class values have been the dominant values in the United States for two centuries," and that issues concerning "racism, slavery, and the distribution of the non-white population" are so distinct and complex as to demand entirely separate treatment. *Id.* at 295-97. But Rotundo cannot, I think, claim to appraise "American manhood" without more directly confronting class and race issues. For example, it is impossible to understand the specifically *sexual* aspects of white middle-class men's conceptions of masculinity without addressing the sexual stereotyping of black men and women. *See, e.g.*, SANDER L. GILMAN, DIFFERENCE AND PATHOLOGY:

exploring the historic and contemporary role of sports ideology and institutions in developing male beliefs and behaviors.[11] Both men amply demonstrate that modern masculine ideals that champion aggression, competition, desire to dominate, and physical and sexual prowess have their genesis in conditions, forces, and institutions that long predate mass consumption of pornography, and that are institutionalized today in far more potent forms than is represented by porn's generally shallow and vulgar, if ubiquitous, imagery.

"[E]ach culture," writes Rotundo, "constructs its own version of what men and women are—and ought to be."[12] Mining a historical record of diaries, letters, scholarly writings, periodicals, and legal records, Rotundo demonstrates that American conceptions of manhood and masculinity, as well as actual men's goals, beliefs, and behaviors, have been products of broad changes in economic and social conditions and institutions, and have altered dramatically from the eighteenth century to the present. In the colonial period, for example, masculinity was demonstrated not by aggressiveness and selfish competition, but by success in carrying out communal duties.[13] Status was conferred by property and lineage, as well as by reputation for proper management of home and family, intelligent governance, and reliable and successful handling of community and religious affairs.[14] Manhood depended more on mastery of one's role as *pater familias* and pillar of the community than on one's wealth or individual achievement.[15] In this period of what Rotundo calls "communal manhood,"[16] men's duties included both rule and care: ensuring that wives, servants, children, and other dependents were fed, clothed, housed, cared for, inculcated in the appropriate social and

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STEREOTYPES OF SEXUALITY, RACE AND MADNESS 109-29 (1985) (describing black sexuality in the "modern consciousness"). Moreover, seeking to understand gender from a narrowly American frame, especially one centered on middle-class northern white men, is problematic. Global patterns—from the vast immigration from Europe and the Far East to imperialist intervention, frontier genocide, and foreign commerce—surely shaped and continue to shape "American manhood."

11. Messner's own "intensely personal experiences" as a former athlete, coach, and referee of both youth and adult sport led to his choice to write about sports. *See* MESSNER, *supra* note 3, at 2-5. In his book, he explores "the development and changes in masculine identity in the lives of thirty male former athletes," placing their individual experiences within the framework of recent scholarly work on men and masculinity, the history of sport, and feminist critique of sport. *Id.* at 5.

12. ROTUNDO, *supra* note 2, at 1 (endnote omitted).

13. *See id.* at 10-18.

14. *See id.*

15. *See id.* at 12.

16. *Id.* at 2.

religious values, and prevented from becoming burdens to the surrounding community.[17] Men were naturally suited to rule because they alone possessed the rational faculties necessary to moderate and control "natural" passions like "ambition, defiance, and envy."[18] Self-restraint and self-denial were hallmarks of masculinity.[19]

In the early nineteenth century, a new phase of "self-made manhood" eclipsed the earlier communal form.[20] The emergence of republican government and the growth of the market economy and the middle class created "a political life based on the free play of individual interests" rather than communal concerns.[21] Achievement, rather than birth, began to define manliness: status was increasingly a product of a man's work—his market successes and failures—rather than his lineage or performance of household and communal duties.[22]

By the end of the nineteenth century, the third phase, "passionate manhood," a phase strongly echoed in contemporary norms of masculinity, came into being.[23] The most dramatic change in this phase was "in the positive value put on male passions."[24] In the earliest (colonial) phase of American manhood, male aggression, ambition, and rivalry were vices that moral men used reason to control and overcome.[25] By the early nineteenth century these qualities had become transformed into necessary evils—motor forces of industrialization and progress—to be harnessed and channelled for societal good but, with the aid of women,

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17. *See id.* at 2-3 (diary entry of a bankrupt merchant who was shamed because he hurt the community, harming employees and creditors, and describing his distress in failing to control his son, whose "shortcomings . . . were charged directly to the father").

18. *Id.* at 3.

19. *See id.* at 13-14.

20. *See id.* at 18-25.

21. *Id.* at 3.

22. *See id.* Male bonding rituals gained significance in this period. The locus of men's work shifted from land to commerce, and although much "business" was still carried out at or near the home, men's daily lives were increasingly centered away from their "little commonwealths," and spent in the company not of wives, children, and servants, but of other men. *See id.* at 196-205. For instance, Rotundo describes the carnival-like atmosphere when judges rode circuit: after combat in the courtroom, they would play card games, drink, and tell off-color campfire jokes with the entourage of lawyers who travelled with them. *See id.* at 197.

23. *See id.* at 5-6.

24. *Id.* at 5.

25. *See id.* at 13-14.

kept in strict control.[26] Male reason still played a role, but new "virtues," such as independence, defiance of authority, and the "urge for dominance," emerged.[27] In a major shift, women were viewed as possessing superior moral sensibility, and as guardians of virtue entrusted with the moral education of the young and the duty to control and delimit male passions.[28]

By the turn of the nineteenth century, ambition, combativeness, competitiveness, and aggression had become innate "manly" *virtues*, "positive" male instincts.[29] They had become qualities exalted in themselves rather than vices to be harnessed for social gain, and women's moral guardianship became dangerous, threatening to "feminize" men and American society.[30] "With no frontier to conquer, with physical strength

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26. *See id.* at 16-18. Now, "assertiveness, ambition, avarice, lust for power . . . would provide the motive force for political and economic systems." *Id.* at 16. Indeed, "[t]he new federal constitution, instead of suppressing self-interest, assumed its existence." *Id.* Women, superior in virtue and "*moral* reasoning," were to assist by keeping male passions in check. *Id.* at 17-18 (emphasis added).

27. *Id.* at 4.

28. *See id.* Men were no longer the more virtuous sex, but had become superior primarily in possessing qualities necessary to survive and thrive in the public world of work and politics. They now needed women's superior moral will to help contain their selfish, aggressive passions from infecting the home or raging out of control. *See id.*

Marriage, once a civic, procreative, political, and religious union in which women were legally (sub)merged under patriarchal rule, became a romantic union of opposites based on personal preference rather than communal concerns. Women, still subject to the control and rule of husbands, were thought to possess valued qualities, even if they were not always treated that way. *See id.*

In addition, the notion that men and women "naturally" occupied separate "spheres"—women guarding the hearth, men engaging in the public world of work and politics—began to develop, though it did not come into full flower until the latter half of the century. The "gentle sex" guarded the hearth and created for adult males a "safe haven" from, and counterweight to, the heartless and selfish world of capitalist competition, and used their superior moral sensibilities to instill in boys and men the subtleties of conscience and self-control necessary to balance the demands and influences of the "public" world. *See id.* at 22-25.

29. *See id.* at 5-6. Rotundo points to "[a] flood of animal metaphors," emphasizing the innate quality of man's bestial passions that "poured forth in the post-Darwin era." *Id.* at 229 (citing such phrases as "a brave animal," "animal instincts," and "animal energy" as new ways to describe men).

30. *See id.* at 252-55. *See also* MESSNER, *supra* note 3, at 13-15 (discussing the "'crisis of masculinity'" during the late nineteenth and early twentieth centuries).

becoming less relevant in work, and with urban boys being raised and taught by women, it was feared that males were becoming 'soft' . . . ."[31]

Moreover, "[a] new emphasis on the self"—on each person's "unique core of personal identity that lay beneath all the layers of social convention"[32]—meant that women posed a danger to masculinity.[33] If men and women were fundamentally similar and merely expressed "different" aspects of human personality, young boys too much under women's tutelage might become "effeminate" and lose the qualities essential to the nation's industrial and military success.[34] So "passionate manhood" in the era of Teddy Roosevelt stressed the "manly virtues":[35] toughness, ability to withstand discomfort and pain, physical prowess,

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31. MESSNER, *supra* note 3, at 14. See also ROTUNDO, *supra* note 2, at 248-51, for a discussion of the emergence of the industrial economy in the late nineteenth century.

32. ROTUNDO, *supra* note 2, at 6.

33. *See id.* at 104-05.

34. *See id.* at 6, 252-53. Rotundo adds a dimension to debates about gender difference by demonstrating that liberal individualism was "gendered" from the start because men's identities as individuals were linked to rational self-rule, whereas recognition of women's "unique" selves "came not in the public realm, but through romance." *Id.* at 17. This insight may help explain phenomena as varied as women's preference for establishing identity through relationships and partiality to sexually explicit fare that is clothed, as it were, in romance. *See, e.g.*, CAROL THURSTON, THE ROMANCE REVOLUTION: EROTIC NOVELS FOR WOMEN AND THE QUEST FOR A NEW SEXUAL IDENTITY 6-8 (1987) (following an increase in feedback from readers to publishers during the late 1970s, the erotic romance novel came to reflect "existing social norms and values of some women . . . while acting as an agent of change for others, especially those still holding to traditional sex-role definitions"; the heroine evolved into a 'New Heroine' who displayed attributes of "self-determination," "autonomy," "economic self-sufficiency," and "sexual self-awareness," and by the 1980s, the hero came to "aid[] and admire[] her success."); JANICE RADWAY, READING THE ROMANCE: WOMEN, PATRIARCHY AND POPULAR LITERATURE 16 (1987) (explaining that "the romantic tale simultaneously recapitulates a woman's psychosexual development and vicariously satisfies some of the reader's needs created by such development and seldom met by traditional, patriarchal marriage"). *See also* Avis Lewallen, *'Lace': Pornography for Women?*, *in* THE FEMALE GAZE: WOMEN AS VIEWERS OF POPULAR CULTURE 86, 101 (Lorraine Gamman & Margaret Marshment eds., 1989) (describing popular "genre" as "'shopping and fucking,' or more euphemistically 'hoarding and humping'").

35. ROTUNDO, *supra* note 2, at 231. Roosevelt repeatedly "extolled 'the great primal needs and primal passions that are common to all of us,'" *id.*, and thereby convinced men to join the "'splendid little war' with Spain." *Id.* at 235. Men were warriors—"Rough Riders." *Id.* National greatness and masculinity meant (world) dominance. *See id.* at 232-36.

glorification of muscular and hard bodies,[36] and distinguished them from scorned feminine softness, gentleness, and sensitivity.[37]

Victorian men, instead of looking to women to instill moral conscience and teach techniques of self-control, organized sporting activities, fraternal lodges, and organizations, from the Boy Scouts of America and the YMCA to the Boys' Brigade, the Knights of King Arthur, and the Sons of Daniel Boone. These groups deliberately promoted "manliness": aggression, competition, and demanding and highly combative physical performance.[38] In addition, debating clubs and secret societies were formed to encourage intellectual competition by fostering intense verbal and social rivalries.[39] Leisure activity, which eighteenth-century men would have viewed as effeminate, became the central arena in which boys and young men were trained to be "real men"

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36. *See id.* at 233-34. For a discussion of the contemporary analog to the emphasis on bodily strength, hardness, and muscularity, see Marc E. Mishkind et al., *The Embodiment of Masculinity: Cultural, Psychological, and Behavioral Dimensions, in* CHANGING MEN: NEW DIRECTIONS IN RESEARCH ON MEN AND MASCULINITY 37 (Michael S. Kimmel ed., 1987) and Alan M. Klein, *Of Muscles and Men*, SCIENCE, Nov.-Dec. 1993, at 35.

37. *See* ROTUNDO, *supra* note 2, at 185-93, 205-09. Rotundo's fascinating descriptions of male "neurasthenia" and of the professions of doctor and clergyman underscore that fear of feminization limited men in ways that produced odd results. Apparently, men who needed a break from the competitive combativeness of late nineteenth-century capitalism frequently fell victim to a form of what we might today label chronic fatigue syndrome. Its "cure" permitted men such as Theodore Dreiser, Charles Evans Hughes, William James, Louis Sullivan, and Woodrow Wilson to pursue such otherwise "unmanly" activities as reading, writing, relaxing, and hiking. *See id.* at 186, 192. As macho ideals of manliness became increasingly important, however, "neurasthenia" became such a "badge of shame" that by 1910 it had disappeared altogether. *See id.* at 186, 188.

Men who opted for less combative professions—doctors and clergymen—where they "conducted their activities away from concentrations of men and power, and . . . [aimed] as much at nurture as at competition" found themselves stigmatized as pursuing "feminine" callings, the more so because their activities involved significant contact with women. *Id.* at 205.

38. *See id.* at 257-58. Of course, male aggressive behavior did not originate in this period. As Rotundo notes, little boys of early nineteenth-century families were prone to engage in more or less playful dismemberment of small animals, to throw stones at girls as an expression of affection and interest (as well as disdain), and to carry out pranks—sometimes quite vicious—at the expense of those who seemed "different." *See id.* at 35-38, 46-49.

39. *See id.* at 62-67. "Play" became a sphere of achievement rather than fun. *See id.* at 260-62.

rather than "sissies,"[40] and to relearn "frontier" independence, fortitude, and dominion.[41]

While emphasizing the changed social conditions at the end of the twentieth century, Rotundo argues that emphasis on the positive value of male passions remains visible in today's ideals of manhood, and that, indeed, many of the themes of late nineteenth-century "manhood" are echoed today. We continue to perceive men as "more aggressive, more primitive, more lustful, more dominating, and more independent than women."[42] Indeed, modern masculinists who "lament the growing distance between fathers and sons"[43] as producing or reflecting a "disconnection of men from passion, from the spirit, from their fellow men,"[44] parallel earlier concerns about feminization.[45] Other ideals of manhood, such as what Rotundo labels the "team player," like their nineteenth-century predecessors, "take[] competitive athletics as a model for fitting aggression and rivalry into the new bureaucratic work settings

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40. *Id.* at 273. The term "sissy" came into existence during this period, a period in which being charged with hiding behind women's petticoats was especially stigmatizing because, until the turn of the century, most boys were dressed in petticoat-like "feminine" attire until the age of six. *See id.* at 33, 255, 259.

41. *See id.* at 6, 236-37. At the same time, "rampant athleticism" aimed at "making sturdy citizens, and training men in the invaluable qualities of loyalty, self-sacrifice, obedience and temperance." MESSNER, *supra* note 3, at 7 (quoting an editorial in the *Wesleyan U. Bull.*, Nov. 1895); *see also* ROTUNDO, *supra* note 2, at 232-39 (discussing "manliness and the military ideal").

Middle-class men by then worked largely as middle-level bureaucrats in vast organizations rather than as individual entrepreneurs; what was required was therefore not independence and individualism, but subordination of the self to the competitive enterprise effort. *See* ROTUNDO, *supra* note 2, at 232-46. Rotundo explains that an eight-fold increase in the number of "salaried, non-propertied workers"—virtually all white collar—between 1870 and 1910, brought the total percentage of the male work force that was white-collar to 20%. *See id.* at 48-51. Whether the goal was imperialist intervention, monopolistic domination of the market by a firm or trust, or sports and debating victory, competitive aggression was fostered and structured within well-defined hierarchies. *See id.* at 222-46.

42. ROTUNDO, *supra* note 2, at 285-86.

43. *Id.* at 287.

44. *Id.*

45. *See id.* The particular modern ideal of manhood to which Rotundo refers here is one that emphasizes the "naturally male" passions, and is represented by Robert Bly and others. Rotundo aptly labels it the ideal of the "spiritual warrior." *Id.* at 288. Like their earlier counterparts, these "critics urge men to restore their confused or missing sense of manliness through immersion in the mythology and rituals of premodern men." *Id.* at 287. *See also id.* at 227-32 (describing a similar romance with the primitive among nineteenth-century men).

of the twentieth century."[46] Indeed, even today's increasing consumption of pornography has its genesis in the nineteenth-century affirmation of the "idea of a deep, true passionate self," which desires "self-expression" and deserves "self-enjoyment."[47] It is the ideals and the ideas that need challenge and change, Rotundo argues, not their expression in the works of masculinists such as Robert Bly[48] and Sam Keen,[49] or profit-seekers like *Playboy*.[50]

Messner, like Rotundo, sees the origins of the organization and values of modern sport in the late nineteenth century's "'crisis of masculinity.'"[51] He stresses that the need to reassert and reformulate masculine virtue originated not only in changing economic and urban life, but also as a reaction to women's increased emergence from the domestic sphere to challenge male hegemony in the public world of work and politics.[52]

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46. *Id.* at 286 (endnote omitted).

47. *Id.* at 285. Rotundo places consumers of pornography within the masculine ideal of the "pleasure seeker" who seeks outlets in "exciting, dangerous sports," or in becoming a "consumer connoisseur" of "sex and beautiful women" offered explicitly by *Playboy* and its ilk. *Id.* at 287. Because Rotundo spends a scant 10 of his more than 300 pages on modern masculinity, his writing about the twentieth century is suggestive rather than empirically supported. *See id.* at 284-93. His argument concerning the four modern ideals of manhood is therefore slightly superficial, and he fails to explore either their contestation by more "feminine" versions of manhood or their adoption or challenge along lines of class and race.

48. *See id.* at 287-90 (describing the emergence in the late twentieth century of a new ideal of manhood, the "spiritual warrior," who "believes he has lost touch with those passions and lost his ability to connect directly with other men"). *Id.* at 287. Rotundo differs with this movement's basic assumptions about gender in that Bly adheres to an "essentialism" stance where "manhood begins with a timeless, unchanging core of qualities that all men ultimately possess," while Rotundo advocates "'cultural construction': manhood is a mental category created and recreated by cultures as they, and their social and physical environments, change." *Id.* at 363 n.7. *See also supra* note 45 and accompanying text.

49. *See* ROTUNDO, *supra* note 2, at 2, 287-89 (describing Keen as one of the key voices in the mythopoeic men's movement).

50. *See id.* at 287-90.

51. MESSNER, *supra* note 3, at 13 (citing PETER FILENE, HIM/HER/SELF: SEX ROLES IN MODERN AMERICA 120 (1975)).

52. *See id.* at 14-15. Both Rotundo and Messner note that although women had limited success in entering the professions and had struggled to gain the vote, their organization of such political efforts as the temperance movement demonstrated real political power. As a result, their efforts and challenges evoked a strong backlash. *See id.* at 15-16; ROTUNDO, *supra* note 2, at 219-20.

To reaffirm this male-female "difference," and to ensure the preservation of masculine power, sport, like many clubs and organizations, was organized as an exclusively male bastion.[53] Its explicit aim was to help combat the feminization that derived from women's domination of childrearing and schoolteaching, as well as from the increasing political and social power of the "New Woman."[54] Sports, "[i]n promoting dominance and submission, in equating force and aggression with physical strength . . . naturalized the equation of maleness with power, thus legitimizing a challenged and faltering system of

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One of Rotundo's most interesting insights is that the fear of feminization and homophobia of this period resulted in part from a shift in understanding about personality. *See id.* at 279. Previously, maleness and femaleness had been viewed as residing comfortably in separate bodies. *See id.* at 22-25. But as the ideology of separate spheres increasingly specified the different roles and traits of male and female, the phenomenon of men who preferred nurturing to competitive styles, and women who sought to enter the public world of work and politics, needed explaining. *See id.* at 24-25. The essential sameness of the individual offered the possibility of the existence in both sexes of both masculine and feminine sides. This, in turn, increased the dangers associated not only with feminization, but with homosexuality. *See id.* at 279-83.

Whereas homosexual behavior had earlier been viewed largely in terms of discreet, deviant *acts* (there was until the nineteenth century no word for homosexuality, only labels for particular acts), now it was identified by display of feminine *traits*. And since most men at one time or another acted in ways that could be stigmatized as feminine, it was constantly necessary to prove one's masculinity, especially by displays of homophobia. *See id.* at 262-79. *See also* MESSNER, *supra* note 3, at 15, 34-37, 96, 100, 151.

53. *See* MESSNER, *supra* note 3, at 13. Messner notes that the women's sports programs so successfully promoted by feminists at the turn of the nineteenth and in the early twentieth centuries flourished so long as they were marginalized, but were destroyed during a phase of intense concern about masculinity during the 1930s. *See id.* at 16-17.

A similarly notable wave of hostility to women's sports is visible in today's aggressively negative response by institutionalized male athletics to the efforts of women to gain a greater share of sports funding and attention. *See, e.g.*, Chris Cobbs, *Woman Turns up the Heat on Macho Athletic Programs*, PHOENIX GAZETTE, Feb. 20, 1993, at C2 (describing a woman's claim to equal funding as creating a battle that "could be as bloody as Custer's Last Stand"); Beth Sherman, *Talking Sports With Men*, NEWSDAY, Apr. 4, 1992, at 15 (quoting a psychology professor regarding "'rancor directed against female fans [as] part of an overall backlash against feminism,'" describing sexist treatment of female fans, and quoting a New York Mets ballgirl describing men "'drop[ping] their phone numbers on the field or mak[ing] rude comments'").

54. MESSNER, *supra* note 3, at 14. Messner notes that women's efforts to gain greater reproductive and sexual control also contributed to the "crisis." *Id.* at 15.

masculine domination."[55] Sports organization, Messner argues, did not merely "symbolize the masculine structure of power over women," but "constituted and legitimized a heterosexist social organization of sexuality."[56]

In basic organization and ideology and, Messner argues, in its meaning and role in the lives of boys and men, sport has changed little from the late nineteenth century.[57] Whereas games and play have always been important to young boys, sport in its modern incarnation has become a central institutional means by which development of gender identity in

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55. *Id.* at 15. There, "the ambivalences and insecurities of masculine identities *intersect* with the structure and values of the sportsworld" in such a way as to produce and reinforce not only misogyny and homophobia, but aggressive, often violent, expressions of these attitudes. *Id.* at 47 (emphasis added).

56. *Id.* at 16. Yet sports is not, in Messner's view, simply patriarchal: it reflects class and race relations as well, and reaction and challenge to dominant viewpoints. *See id.* at 19, 37-38, 52. But for Messner, sexism in sports has served to unite men across class and race in a united front against "the feminine." *See id.* at 13-23.

57. *See id.* at 10-13. At the same time, "increasing female athleticism" (generated partly by the modern women's movement and supported by legal change, *see, e.g.*, Civil Rights Act, 20 U.S.C. §§ 1681-1688 (1988)) mandated gender equality in the deployment of public funds for athletics. Thus, conditions are changing, and "the gender issue" in sport cannot be ignored. *See* MESSNER, *supra* note 3, at 3-4. "In 1971, only 294,015 girls participated in high school sport, compared with 3,666,917 boys. By the 1989-90 academic year, there were 1,858,659 girls participating in high school sport, compared with 3,398,192 boys." *Id.* at 3.

While Messner applauds this development and notes that it "has caused many boys and men to adjust—and sometimes radically alter—their preconceptions of what women are capable of," he points out that "there is also considerable evidence that women's sport has been institutionally contained, and thus its potential challenge to sport's construction of hegemonic masculinity has been largely defused." *Id.* at 160. Messner also describes the shift of control of women's sports to men, the backslide in enforcement of Title IX, and the gross inequities in scholarships, salaries, and funding, *see id.* at 4, and notes the pitiful media coverage of women's sports: studies showing 5% of television sports coverage devoted to women's sports and a male/female ratio of top-selling news stories at 23-to-1, with women's stories far less frequently on the front page, and typically much shorter. *See id.* at 149-51. *See also* Michael A. Messner & Donald F. Sabo, *Introduction: Toward a Critical Feminist Reappraisal of Sport, Men, and the Gender Order*, *in* SPORT, MEN, AND THE GENDER ORDER: CRITICAL FEMINIST PERSPECTIVES 1, 5 (Michael A. Messner & Donald F. Sabo eds., 1990) (arguing that increased budgets for women's athletics and subsequent changes in sports organization led, in the 1970s and 1980s, to a dramatic *reduction* in the number and proportion of women athletic directors and head coaches).

young males occurs.[58] In early youth, nearly all males engage in individual or team sports and learn from them "the dominant cultural conceptions of what it means to be male."[59] Success in sports typically brings accolades from family and community; failure often brings identity crisis and a sense of failure.[60] Messner stresses that as young boys begin the difficult transition to manhood, sports provide the central locus in which boys forge bonds with one another[61]—an activity in which they can

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58. *See* MESSNER, *supra* note 3, at 20-21. Ruling groups used sport to maintain social power and control. The British, for example, "consciously developed sport in their public schools as a means of preparing boys to one day administer the Empire," and hence "shaped the structure, rules, values, and meanings of sport" in order to "socialize boys to a certain kind of 'manliness' whose raison d'etre [sic] was the administration of domination over (mostly nonwhite) colonized peoples." *Id.* at 10 (citing J.A. MANGAN, THE GAMES ETHIC AND IMPERIALISM: ASPECTS OF THE DIFFUSION OF AN IDEAL 35-36 (1986)). Ultimately, sports socialization was extended to the middle classes of the colonized so that they could help maintain social control. *See* MESSNER, *supra* note 3, at 10.

Similarly, in America, modern sports was initially exclusive to "upper- and middle-class whites who were concerned with 'building character' in an expanding entrepreneurial environment," but was, by the turn of the century, organized into "widespread 'recreation for the masses'" in order to "integrat[e] immigrants and the growing industrial working class into an expanding capitalist order." *Id.* at 11. Messner is careful to point out, however, that "the control and domination of ruling groups is never total," *id.* at 12, so that sport has always been characterized by renegotiation of and resistance to dominant values. *See id.* at 12-13. Still, the near total exclusion or segregation of women, together with male bonding across class and race generated at the expense of women (and gays) in sports, has left traditional male-dominant values largely intact. *See id.* at 17-19, 149-59.

59. MESSNER, *supra* note 3, at 19. Rotundo describes the transformation in "the meaning and . . . importance" of sport during the late nineteenth century from play and exercise to "breeding grounds for the fighting virtues," ROTUNDO, *supra* note 2, at 241, and a "peacetime equivalent to war." *Id.* at 240. This transformation could teach young men morality and self-control outside the feminizing influence of women. *Id.* at 239-44.

60. *See* MESSNER, *supra* note 3, at 46-52. Sport is especially important to those whose class or racial background blocks other opportunities to achieve "public masculine status." *Id.* at 19.

61. *See id.* at 91. But the promise of "affirmation of self and connection with others—is often *undermined*" by actual experience of the competitive and combative reality. *See* Michael A. Messner, *The Life of a Man's Seasons: Male Identity in the Life Course of the Jock*, *in* CHANGING MEN: NEW DIRECTIONS IN RESEARCH ON MEN AND MASCULINITY, *supra* note 36, at 52, 60.

achieve a certain closeness, yet avoid (or at least control) the degree of intimacy and interpersonal give-and-take.[62]

And what does sport teach young men to value? They learn "a masculinity based upon status-seeking through successful athletic competition and through aggressive verbal sparring which is both homophobic and sexist."[63] Denigration of women and gay men is the sine qua non of sports interaction.[64] Masculinity is understood according to what it is not: feminine. "In sport, to be told by coaches, fathers, or peers that one throws 'like a girl' or plays like a 'sissy' or a 'woman' is among the most devastating insults a boy can receive . . . ."[65]

Status, boys learn, is dependent upon success in competition: in the hierarchical world of sport, qualities and capacities are ranked, and winning is the key to high rank, indeed, to everything.[66] And to get to

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62. MESSNER, *supra* note 3, at 91. In sports, rigid rules channel relationships; for example, male-on-male physical contact is permitted and even encouraged, but it is carefully bounded by formal and informal regulation. The formal rules have the effect not only of transposing violence into mere competitive aggression but also of repressing the homoerotic implications of male-to-male contact. *See id.* at 64-71.

Rather than take sides in the debate between Lillian Rubin, who argues that men distance themselves from each other by spending time in "external" activities like sports, and Scott Swain, who claims Rubin unfairly judges men's friendships by women's standards of intimacy (placing a "high value on talk" and "sharing of inner lives"), Messner asks not how "meaningful" or intimate male bonding is, but how masculine modes of bonding "contribute to certain kinds of [sexist and problematic] attitudes toward and relationships with women [and other men]." *Id.* at 91-93. *See also* ROTUNDO, *supra* note 2, at 150-57 (expressing the Victorian view of male *and* female intimacy centered on self-revelation to reveal an individual "core" beneath social convention).

63. MESSNER, *supra* note 3, at 37. "The extent of homophobia in the sportsworld is staggering." *Id.* at 34.

64. *See id.* at 36. *See also* Klein, *supra* note 36, at 35-36 (describing the rampant homophobia associated with bodybuilding although many bodybuilders are either gay or bisexual).

65. MESSNER, *supra* note 3, at 36.

66. *Id.* at 44-45. Messner quotes his interviewees and numerous others to demonstrate the importance, in sports, of winning. Noting that "only about 6 or 7 percent of high school football players ever play in college" and that only "[r]oughly 8 percent of all draft-eligible college football and basketball athletes are drafted by the pros, and only 2 percent ever sign a professional contract," he argues that "the system is rigged to bring about the failure of the vast majority of the participants." *Id.* at 45, 46. The "99 percent who fail to measure up" suffer feelings of "failure, lowered self-images, and problems with interpersonal relationships." *Id.* at 46.

Not only are the chances of attaining professional status minuscule—"about 4 in 100,000 for a white man, 2 in 100,000 for a black man, and 3 in 1,000,000 for a U.S.-born Latino man"—but "the average career span for professional athletes is about 7 years for a major league baseball player, 4 years for those in the National Football League, and

the top, aggression and violence are necessary and acceptable, indeed, "violence becomes normative behavior,"[67] and "aggression is usually not [even] defined by men as 'violent' so long as it is rule-governed, rather than anger-induced."[68] According to Messner, in the dominant ethic of sport, the body is treated as an instrument; physical and emotional pain are nuisances that must be ignored or suppressed; other people become, like one's own body, "objects to be manipulated and defeated" in the quest to win.[69]

Women frequently become "objects of sexual conquest"[70] aimed at "gain[ing] status in the male peer group."[71] They become, as well, prime targets of the "violence expressed toward others"[72] that a sports mentality typically generates.[73] Serving as the butt of sexually aggressive stories and jokes, women become the means by which males "'negotiat[e]' the 'latent tension and aggression they feel toward each other.'"[74] And women often perform this function for sports spectators as well.[75]

3.4 years in the National Basketball Association." *Id.* at 45.

67. *Id.* at 66.

68. *Id.* at 69. Messner cites the work of sociologists Eric Dunning and Lois Bryson in partial explanation for how sports support male dominance. *See id.* at 15. To Messner, Dunning's work suggests that "the balance of power tips more strongly toward men when violence and fighting are endemic parts of social life." *Id.* Bryson argues that sport, especially in its more violent forms, not only promotes male dominance by excluding and marginalizing women, but by "'associat[ing] males and maleness with valued skills and the sanctioned use of aggression[/]force[/]violence.'" *Id.* at 15 (quoting Lois Bryson, *Sport and the Maintenance of Masculine Hegemony*, 10 WOMEN'S STUD. INT'L F. 349, 349 (1987)).

69. MESSNER, *supra* note 3, at 62. Rotundo stresses that this ethic of "struggle and strife, of violence and force" was virtually synonymous with manhood at the end of the nineteenth century. ROTUNDO, *supra* note 2, at 227. *See also id.* at 226-27 (discussing the nineteenth-century belief that "men were prone to view struggle and strife as ends in themselves").

70. MESSNER, *supra* note 3, at 97.

71. *Id.*

72. *Id.* at 62.

73. *Id.* ("A common result of this focus on the body as an instrument is violence expressed toward others, and ultimately toward oneself.").

74. *Id.* at 97 (quoting Peter Lyman, *The Fraternal Bond as a Joking Relationship: A Case Study of Sexist Jokes in Male Group Bonding*, *in* CHANGING MEN: NEW DIRECTIONS IN RESEARCH ON MEN AND MASCULINITY, *supra* note 36, at 151).

75. MESSNER, *supra* note 3, at 168-70. *See also* Mike Capuzzo, *Aggressiveness in Sports Has a Sorry Spinoff: Studies Show a Link to Wife-Beating*, CHI. TRIB., Jan. 27, 1992, at C8 (finding a correlation between male sports viewing and violence against women); Meyer, *supra* note 4.

While Messner suggests that "[t]he sexual objectification of women among male athletes is probably, in most cases, a 'rhetorical performance' that rarely translates into actual aggression against women," he describes sports culture as fostering precisely the "dynamic that is at the heart of what feminists have called 'the rape culture,'"[76] and cites statistics indicating that although the ratio of sports participants to those who abuse women may be small, the numbers are significant.[77]

Messner, like Rotundo, sees masculine values and behaviors as institutionally embedded in deep and complex ways, and as generated by structures within which men daily learn and are reinforced in perspectives that denigrate and devalue women. To combat the misogynist and otherwise harmful aspects of sports ideology and practice will take considerable creativity and cannot be accomplished by such quick-fix strategies as the outright rejection of sports or sports values.[78] Rather, reform will require slow and painstaking efforts to emphasize the costs of "athletic masculinity,"[79] and to offer alternative visions.[80]

Late twentieth-century men seem to be experiencing at least as strong a wave of anxiety about masculinity, with accompanying "femiphobia,"

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76. MESSNER, *supra* note 3, at 101.

77. *See id.* ("Between 1983 and 1986, a U.S. college athlete was reported for sexual assault an average of once every eighteen days.") (citing Rich Hoffman, *Rape and the College Athlete*, PHILA. DAILY NEWS, Mar. 20, 1986, at 106). Indeed, Messner is probably only able to assert that sport-generated abuse is relatively minimal because he apparently includes within the term only abuse that generates formal complaints or physical injuries, not the psychological and verbal abuse of women so common among sports spectators and participants. *See* MESSNER, *supra* note 3, at 64-67.

78. He rejects, for example, the attempt in the late 1960s and 1970s to replace sport altogether with "'New Games' which emphasized universal participation (in place of a star system), a focus upon enjoyment (instead of upon winning), and spontaneity (instead of rigid rules)." MESSNER, *supra* note 3, at 171. The effort to displace competitive sport by play was, in his view, mistaken and unworkable. It would have been better to focus on specific manifestations of sexist, racist, and commercial influence on sport, rather than the entire institution. Messner's critique of this effort seems somewhat odd in light of his wholesale critique of the very aspects of sport that the "radical" effort he describes sought to alter. *See id.*

79. *Id.* at 152-53.

80. *See id.* at 149-72. Messner argues that sports' ability to "construct a single dominant conception of masculinity" is undermined by three factors: first, the "costs" of that masculinity in relations between males and between males and females; second, the differing experiences in sports across race, class, and sexual orientation; and third, the challenge posed by women's sports (and to a lesser extent by the "coming out" of gay athletes) to the "equation of sport and heterosexual masculinity." *Id.* at 151-52. Yet Messner is not overly sanguine, and points to the limitations of each of these areas of resistance. *See id.* at 155-72.

as did their nineteenth-century predecessors.[81] Although social conditions have changed profoundly,[82] like their great-grandfathers, men today seem to feel a powerful need to define and demonstrate their distinctly masculine status, and to do so by separating from and often demonstrating superiority to women.[83] Football has become the number one American sport today, Messner argues elsewhere, precisely because it offers "comforting *clarity* . . . between the polarities of traditional male power, strength, and violence, and the contemporary fears of social feminization."[84]

Pornography—both its popularity among men and its content—surely reflects this reality. Indeed, one significant weakness of *American Manhood* is its failure to address pornography's origins and rising importance in the late nineteenth century, and the ways in which masculine status had begun to focus especially on sexual and specifically phallic prowess and performance.[85] From D.H. Lawrence's "phallic

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81. *See id.* at 7-9, 13-17, 149-50. It appears to be similarly generated by women's increasing penetration into previously male spheres of power and by changes in sexual relations and mores and reproductive practices. *See generally* SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 65 (1991) (arguing that society's "backlash" against feminism is the result of "the feminist drive for economic equality"); BARBARA EHRENREICH ET AL., RE-MAKING LOVE: THE FEMINIZATION OF SEX 162-63 (1986) (arguing that the modern sexual revolution has impacted more on women's attitudes about sex and their own sexual practices than on men's, and that the meaning of sex has changed from that of female passivity and surrender to an interaction between potentially equal persons, and that "men [have] probably felt more insecure than women, since their position of strength [has been] called into question").

82. Chief among the changed conditions is the disappearance of close communities within which men and women could develop identities in favor of "communities of consumption," in which bonding in common taste occurs without personal connection. ROTUNDO, *supra* note 2, at 284-85 (endnote omitted).

83. Describing four contemporary ideals of masculinity—the "team player," the "existential hero," the "pleasure seeker," and the "spiritual warrior"—Rotundo points out that they share in common "a turning away from women." *Id.* at 286-87, 289.

84. Messner, *supra* note 61, at 52, 54.

85. Indeed, the term "pornography" attained widespread use in its modern sense precisely during these periods. *See* Hunt, *supra* note 4, at 10. Hunt notes that the "modern pornographic *tradition* and its censorship can be traced back to 16th-century Italy and 17th- and 18th-century France and England," but it is significant that widespread modern usage of the term dates from the nineteenth century. *Id.* (emphasis added). *See also* ELAINE HOFFMAN BARUCH, WOMEN, LOVE AND POWER: LITERARY AND PSYCHOANALYTIC PERSPECTIVES 29 (1991) (arguing that, paralleling this phallic emphasis, modern men "direct all tenderness inward toward themselves and turn outward only for sensation").

marriages"[86] and Freud's theory of penis envy to the novels of Norman Mailer, Saul Bellow, and Philip Roth,[87] masculinity has been increasingly tied to sexual achievement.[88] As bell hooks puts it, there has been "a shift from emphasis on patriarchal status (determined by one's capacity to assert power over others in a number of spheres based on maleness) to a phallocentric model, where what the male does with his penis becomes a greater and certainly a more accessible way to assert masculine status."[89] While Rotundo acknowledges the importance of sex as a tactic of male bonding and exclusion of women in the middle of the nineteenth century,[90] and as a source of tension and division later in the century when sexual passion came to be viewed as a "positive" masculine virtue,[91] he underemphasizes the role and importance of specifically sexual requirements of the masculinity then developing.[92]

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86. *See* BARUCH, *supra* note 85, at 164 (describing marriage as an institution "in which each man rules a small Kingdom").

87. *Id.* at 170 (arguing that novelists Roth and Mailer glorify "instant and uncommitted sexuality").

88. Messner links this phenomenon in the world of sport to the psycho-social development of male identity in general. *See* MESSNER, *supra* note 3, at 30-33.

89. BELL HOOKS, BLACK LOOKS: RACE AND REPRESENTATION 94 (1992) (interpreting the work of Paul Hock). *See also* PAUL HOCK, WHITE HERO, BLACK BEAST: RACISM, SEXISM AND THE MASK OF MASCULINITY 98 (1979):

> The shrinkage of the concept of *man* into the narrowed and hierarchicalised conceptions of *masculinity* of the various work and consumption ethics also goes hand in hand with an increasing social division of labor, and an increasing shrinkage of the body's erogenous potentials culminating in a narrow genital sexuality. As we move from the simpler food-gathering societies to the agricultural society to the urbanized work and warfare societies, we notice that it is a narrower and narrower range of activities that yields masculine status.

Id.

90. Abraham Lincoln, for example, told stories that were, according to a contemporary, "generally on the smutty order," but to preserve male bonding, he never told them in front of women. ROTUNDO, *supra* note 2, at 198-99.

91. *See id.* at 120-28.

92. *See generally* STEVEN MARCUS, THE OTHER VICTORIANS: A STUDY OF SEXUALITY AND PORNOGRAPHY IN MID-NINETEENTH CENTURY ENGLAND 32 (1985) (describing men as having extensive sexual needs and women as having no desires for personal sexual gratification. Instead, the wife is "regarded as essentially a function of masculine needs, whatever the direction in which those needs may run."). Rotundo's failure may result from his heavy reliance on diaries and public records. Victorian-era writings often avoid direct discussion of sexual subjects (although, as many have shown, "sex talk" was in some circles quite prevalent and quite explicit). Also, since Rotundo's sources are largely written by white middle-class males, they do not express the

Studying pornography's history and content may help us understand how modern conceptions of masculinity have come to focus on the phallus, and may help us understand the specifically sexual aspects of contemporary backlash against women. We may also learn something of the role of phallic symbolism in helping to prop up patriarchal systems.[93] But that pornography may reflect and embody this phallocentric orientation is a far cry from attributing to it a central role in creating norms of masculinity or fomenting male sexual violence.[94]

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increasing importance to those who were less able to prove their manhood via economic or social power.

93. For some excellent sources, see Lucienne Frappier-Mazur, *The Social Body: Disorder and Ritual in Sade's* Story of Juliette, *in* EROTICISM AND THE BODY POLITIC 131, 135-39 (Lynn Hunt ed., 1991) (describing the social symbolism of the rituals of the Sadian orgy and that the hostility manifested by the male agents against the female sex parallels the violent class rivalries that riddle every sector of society. Thus, the sexual symbolism reaffirms the inequality of the social classes and represents order in the face of disorder. The primacy of the phallus unites maximal social power with maximal sexual energy. "Sade's novel . . . forcefully articulates the relationship between . . . the pornographic novel and . . . phallic sovereignty . . . ."); and LINDA WILLIAMS, HARD CORE: POWER, PLEASURE AND THE "FRENZY OF THE VISIBLE" 268 (1989) (concluding that, contrary to the theory of feminists, in filmic hard-core pornography, "it is simply not possible to regard a represented penis per se as a literal instance of male dominance" and thus, censoring pornography offers no real solution to patriarchal violence and abuse). But studying pornography is not the same as suppressing it. Suppressing pornography is no more possible and would be no more effective than suppressing modern sport. *See* MESSNER, *supra* note 3, at 171 (discussing the "foolhardy" nature of radical rejection of sport).

94. Studies "consistently show that sport remains the single most important element of the peer-status system of U.S. adolescent males." MESSNER, *supra* note 3, at 24. Surely the aggression, hierarchy, homophobia, and misogyny that boys daily experience as sports participants and spectators are far more central to constituting women as objects of their sexual aggression than is pornography. Quite apart from statistical correlations between sports and violence against women, Messner shows how sports values and practices *produce* and *foster* male aggression, including sexual aggression, in ways that require resistance on the part of those young males who do not wish to participate in violent encounters or in misogynist locker-room banter. *See id.* at 15-16.

By contrast, for all of their efforts, anti-pornography activists have failed even to establish a correlation between violence against women and pornography, still less to dissect the way in which the fantasy world of pornography is claimed to operate on its consumers to impel them to violence. *See, e.g.*, Strossen, *supra* note 4, at 1173, 1176-85; Meyer, *supra* note 4, at 1097 n.3; Ronald Dworkin, *Women in Pornography*, 60 N.Y. REV. BOOKS, Oct. 21, 1993, at 36, 38, 40-42 (reviewing Catharine A. MacKinnon's *Only Words*). Rather, anti-pornography theorists rely on such assertions as "[p]ornography does not simply express or interpret experience; it substitutes for it[;] it stands in for reality; it is existentially being there." MACKINNON, *supra* note 9, at 25. And, as I have argued elsewhere, within the realm of culture, popular media—from toys

As both these authors make clear, misogyny is woven deep into the warp and woof of American masculinity, and it will take more than pulling out a loose thread (such as pornography) to reweave our gendered selves into a new social fabric. Major overhaul will require slow and incremental change, change which both Rotundo and Messner have helped move along by their detailed and careful analyses of the genesis and problematic nature of masculine ideals and practices.

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to film to rock music and video—play a far more central role than does pornography. *See* Meyer, *supra* note 4.