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PORNOGRAPHY AND THE FIRST AMENDMENT

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The problem of pornography has reappeared on the national agenda. Feminist approaches to the subject, based on novel arguments and rejecting traditional definitions of "obscenity,"[1] have resulted in legislation in Indianapolis[2] and significant efforts in other cities.[3] The Attorney General's Commission on Pornography has recently supported a national attack on pornography, adopting an amalgam of traditional and feminist objections to sexually explicit materials.[4] Particularly in light of the growth of the pornography industry,[5] the issue seems certain to pro-

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1. *See* MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321, 322-24 (1984) (distinguishing "the male morality of liberalism and obscenity law from a feminist political critique of pornography"); *see also* A. DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN 9 (1981) ("Obscenity is not a synonym for pornography.").

2. *See* INDIANAPOLIS, IND., CITY-COUNTY GEN. ORDINANCES ch. 16 (1984), *quoted in* ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, U.S. DEP'T OF JUSTICE, FINAL REPORT 392 (1986) [hereinafter FINAL REPORT].

3. Antipornography legislation has been proposed in Cambridge, Los Angeles, and Minneapolis. *See* FINAL REPORT, *supra* note 2, at 392. The mayor of Minneapolis has twice vetoed antipornography measures passed by the Minneapolis City Council. *See The Proposed Minneapolis Pornography Ordinance: Pornography Regulation Versus Civil Rights or Pornography Regulation as Civil Rights?*, 11 WM. MITCHELL L. REV. 39, 44 & n.6 (1985) (symposium).

4. FINAL REPORT, *supra* note 2. For a critique of the Commission's work, see Fields, *ACLU Issues Critique of Pornography Commission*, PUB. WEEKLY, Mar. 14, 1986, at 11.

5. The Commission concluded that "[t]here can be little doubt that there has within the last ten to twenty years been a dramatic increase in the size of the industry producing the kinds of sexually explicit materials that would generally be conceded to be pornographic." FINAL REPORT, *supra* note 2, at 284.

duce controversy in coming years.[6]

It should not be surprising that discussions of antipornography regulation[7] often refer to Herbert Wechsler's famous essay on neutral principles.[8] Despite the essay's impact on first amendment theory, the notion of neutral principles has never been altogether clear.[9] It is possible, however, to distinguish weak and strong versions of the basic idea.

The weak version requires each judge to undertake an internal Socratic dialogue in order to ensure that a particular decision can be harmonized with other decisions that have been made and that might be made. Thus understood, the notion of neutrality is designed to ensure that judges do not simply implement whatever intuitions they happen to have, but that they order and make coherent those intuitions through reasoning by analogy. Although one might question whether this version of neutral principles imposes sharp constraints on judges, it has in fact been a basis for invalidating recent antipornography legislation.[10]

The strong version of neutral principles is associated, in Wechsler's own formulation, with severe doubt about the correctness of the result in *Brown v. Board of Education*.[11] Under the strong version, judges should not care "whose ox is gored" by a particular result; they should be indifferent to "who the loser is" in an important, substantive sense. Thus understood, the commitment to neutral principles is a commitment to abstraction or formality in the law. This version of neutral principles

6. For examples of the popular debate, see *The Place of Pornography*, HARPER'S, Nov. 1984, at 31; *Pornography: Love or Death?*, FILM COMMENT, Nov.-Dec. 1984, at 29; *The War Against Pornography*, NEWSWEEK, Mar. 18, 1985, at 58.

7. *See, e.g.*, MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 4 n.6 (1985).

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

9. *See* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1977) (noting that requirement of neutral principles has not led the Supreme Court to accept any tenable, consistent theory regarding scope of constitutional protection of free speech); Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 1001-13 (1978) (finding absence of definitive guidance for judges in resolving conflicts between adherence to neutral principles and fulfillment of other judicial responsibilities); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 821-22 (1983) ("Each proposed definition [of neutral principles] left us with judges who could enforce their personal values unconstrained by the suggested version of the neutrality requirement.").

10. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 327-32 (7th Cir. 1985) (pornography analyzed as protected speech through analogy to clearly protected speech such as political ideology), *aff'd*, 106 S. Ct. 1172 (1986); *see also* Stone, *Anti-Pornography Legislation as Viewpoint-Discrimination*, 9 HARV. J.L. & PUB. POL'Y 461, 463 (1986) (noting that Supreme Court applies stringent viewpoint-based standards even to legislation that is only indirectly viewpoint-based).

11. 349 U.S. 294 (1955).

figures quite prominently in modern attacks on affirmative action.[12] It also plays an important role in recent discussions of pornography.[13] One court recently rejected the feminist argument for antipornography legislation on the ground that the legislation was an attempt to suppress a viewpoint on a public issue—a central first amendment evil.[14] This view has a powerful constitutional pedigree.[15]

This article will discuss the problem of pornography with special attention to the nature and desirability of "viewpoint neutrality" in first amendment adjudication. In the process, it will touch on quite general themes associated with the constitutional guarantee of freedom of speech. Part I argues that pornography is a significant social problem that justifies legal concern.[16] Part II contends that pornography is "low-value" speech, entitled to less protection from government control than most forms of speech. This analysis, in conjunction with the analysis in Part I, supports the general position that pornography, narrowly defined, can be regulated consistently with the first amendment.[17] Part III examines and rejects the argument that antipornography regulation is unconstitutional because it regulates on the basis of "content" or "viewpoint."[18] Part IV analyzes the arguments of those who would defend antipornography legislation by attacking first amendment "neutrality" doctrine[19] and by asserting that antipornography regulation actually enhances free speech.[20] Part V explores some possible limitations of the reach of antipornography regulation.[21]

I. PORNOGRAPHY, OBSCENITY, AND HARMS

Defining pornography is notoriously difficult; indeed, the difficulty of definition is a familiar problem in any attempt to design acceptable regulation. I will argue, however, that a definition can be framed so as to

12. *See, e.g.*, Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 802 (1979) (only way to avoid giving Constitution an "accordianlike" quality is to refuse to allow discrimination on basis of race).

13. *See* Note, *Effects of Violent Pornography*, 8 N.Y.U. REV. L. & SOC. CHANGE 225, 236-37 (1979) (arguing that state must remain neutral about content of speech, including pornography, if it is to adhere to moral rationale of first amendment).

14. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 329-31 (7th Cir. 1985) (concluding that even though materials depict subordination of women, first amendment precludes restriction of pornographic "speech"), *aff'd*, 106 S. Ct. 1172 (1986).

15. *See infra* note 116.

16. *See infra* notes 22-79 and accompanying text.

17. *See infra* notes 80-111 and accompanying text.

18. *See infra* notes 112-55 and accompanying text.

19. *See infra* notes 156-87 and accompanying text.

20. *See infra* notes 188-91 and accompanying text.

21. *See infra* notes 191-98 and accompanying text.

include only properly regulable materials. In short, regulable pornography must (a) be sexually explicit, (b) depict women as enjoying or deserving some form of physical abuse, and (c) have the purpose and effect of producing sexual arousal.

This definition draws on feminist approaches to the problem of pornography and represents a departure from current law, which is directed at "obscenity."[22] Though built-in ambiguities are inevitable in light of the limitations of language, the basic concept should not be obscure. The central concern is that pornography both sexualizes violence and defines women as sexually subordinate to men.[23] Pornographic materials feature rape, explicitly or implicitly, as a fundamental theme.[24] This definition differs from the approach urged by the Attorney General's Commission on Pornography, which operated within conventional obscenity law.[25] The definition is somewhat narrower than the one suggested by the Indianapolis ordinance, which created liability for graphic, sexually explicit subordination of women as "sexual objects."[26] The approach proposed here excludes sexually explicit materials that do not sexualize violence against women, and it ties the definition closely to the principal harms caused by pornography.[27] The definition, therefore, excludes the vast range of materials that are not sexually explicit but that do contain implicit rape themes. The requirement of sexual explicitness is thus a

22. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324-27 (7th Cir. 1985), *aff'd*, 106 S. Ct. 1172 (1986). The Supreme Court's obscenity doctrine has drawn heavy criticism from a Justice, *see* Ginzburg v. United States, 383 U.S. 463, 498 (1966) (Stewart, J., dissenting) (first amendment means that people should not be sent to prison "merely for distributing publications which offend a judge's aesthetic sensibilities"), as well as from commentators, *see* Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 395 (1963) (arguing that obscenity is suppressed not for the "protection of others," but merely for the "purity of the community" and the "salvation and welfare of the 'consumer' "); Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 73 (1974) (arguing that an understanding of moral function of first amendment would lead to protection of obscenity).

23. *See* MacKinnon, *Pornography as Sex Discrimination*, 4 LAW & INEQUALITY 38, 41 (1986).

24. Rape includes both sexual intercourse compelled by force and sexual intercourse with impaired, unconscious, or underage females. *See* MODEL PENAL CODE § 213.1 (Proposed Official Draft 1962).

25. FINAL REPORT, *supra* note 2, at 376-77.

26. *See* INDIANAPOLIS, IND., CITY-COUNTY GEN. ORDINANCES ch. 16 (1984), *quoted in* FINAL REPORT, *supra* note 2, at 392.

27. There is empirical support for drawing a distinction between violent and nonviolent sexually explicit materials. Edward Donnerstein, reviewing empirical studies, concludes that although drawing a "straightforward, definitive" conclusion about the relationship between pornography and aggression is "difficult to make," it appears that "the aggressive content of pornography . . . is the main contributor to violence against women." Donnerstein, *Pornography: Its Effect on Violence Against Women*, in PORNOGRAPHY AND SEXUAL AGGRESSION 53, 78-79 (N. Malamuth & E. Donnerstein eds. 1984) [hereinafter PORNOGRAPHY AND SEXUAL AGGRESSION]; *see also* H. EYSENCK & D. NIAS, SEX, VIOLENCE AND THE MEDIA (1978) (concluding that link between violence in media and behavior is better established than link between portrayals of sex in media and behavior).

means of confining the definition.[28] Part of the definition, moreover, requires that the appeal of the materials be noncognitive[29]—hence the requirement that the purpose and effect be to produce sexual arousal.

Examples of pornography as defined here can be found in such magazines as *Hustler* and numerous "adult" movies.[30] It is difficult to capture the nature of genuine pornography without presenting examples. One such example is the "Beaver Hunters" advertisement in *Hustler,* which shows a nude woman strapped to the top of a car; the copy below the photograph states that the woman would be "stuffed and mounted" as soon as the "hunters" got her home.[31] But pornographic materials cannot always be easily characterized as such. There is a continuum from the most violent forms of pornography to materials that to some degree sexualize violence but cause little harm and are not low-value speech.[32] Many popular movies and novels that combine eroticism and domination should be protected under the first amendment.[33] A common plot in both books and films involves a romantic encounter in which a woman initially resists a forcible sexual assault and then submits.[34] Although harmful, such materials do not fall within the definition of pornography used here. Of course, there will be difficult intermediate cases; but as with other forms of expression not entitled to full first amendment protection, the fact that the relevant class is difficult to define is not itself a sufficient reason to proscribe government regulation.[35]

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28. The requirement is justified as a rough and imperfect means of limiting the regulable category to speech that is of low first amendment value, *see infra* notes 80-111 and accompanying text, and that is likely to cause harm. *See infra* notes 41-79 and accompanying text. Furthermore, sexually explicit speech of the sort described here involves a highly distinctive relationship between speaker and user. *See infra* notes 101-04 and accompanying text.

29. *See infra* notes 101-04 and accompanying text.

30. The Final Report of the Attorney General's Commission on Pornography provides a detailed description of one such film, *Forgive Me—I Have Sinned.* FINAL REPORT, *supra* note 2, at 1668-93. *See also* Dietz, *Pornographic Imagery and Prevalence of Paraphilia,* 139 AM. J. PSYCHIATRY 1493, 1495 (1982) (17.2% of the covers of pornographic magazine surveyed in New York City were explicitly devoted to violent themes such as bondage and domination).

31. This advertisement is discussed in A. DWORKIN, *supra* note 1, at 25-30. Consider as well the titles of various pornographic magazines: *Black Tit and Body Torture, Tit Torture Photos, Chair Bondage. See* MacKinnon, *supra* note 23, at 41 n.73.

32. For a readable account of the historical roots of the distinction between violent pornographic feature films and so-called "mainstream" films, see Slade, *Violence in the Hard-Core Pornographic Film: A Historical Survey,* J. COMM., Summer 1984, at 148.

33. Such materials are much harder to classify as "low-value," *see infra* notes 80-111 and accompanying text, and less likely to cause harms. *See infra* notes 41-79 and accompanying text.

34. Such a scene occurred in the movie *Straw Dogs* (Amerbroco 1971). The mainstream actor Dustin Hoffman starred in the movie, though he did not appear in the assault scene.

35. The Supreme Court, for example, has adopted a case-by-case, fact-specific approach in deciding the validity of government regulation of broadcasts involving "indecent speech." *See* FCC v. Pacifica Found., 438 U.S. 726, 750 (1978).

In light of the highly segregated nature of the pornography industry, most pornographic material will in practice be less difficult to identify than it might at first seem.[36] Nonetheless, I deal with possible limitations on the definition below.[37] And in using this definition, I do not mean to endorse the details of any particular form of current antipornography legislation; I do mean, however, to point to the same concerns that have prompted such legislation.

The initial question is whether pornography, as defined here, is a cause for social concern. Until recently, it was common to dismiss the case against pornography as the product of prudishness or inhibition, a kind of aesthetic distaste not grounded in concrete showings of harm.[38] Regulation of sexually explicit material has thus been based on its offensiveness.[39] Under almost any view, regulation of speech merely because it is offensive is problematic under the first amendment.[40]

Only recently has pornography come to be regarded as posing any problem at all in terms of concrete harm—and that approach remains controversial in some circles.[41] Constitutional consideration of the pornography problem has almost always been obscured by the gender-neutral term "obscenity." Mirroring the aesthetic concerns referred to above, the Supreme Court treats "obscenity" as unprotected because it has nothing to do with underlying first amendment purposes and hence is not "speech" within the meaning of that amendment.[42] Under the ap-

36. *See* FINAL REPORT, *supra* note 2, at 284.

37. *See infra* notes 191-96 and accompanying text.

38. *See* Copp, *Pornography and Censorship: An Introductory Essay,* in PORNOGRAPHY AND CENSORSHIP 15 (D. Copp & S. Wendell eds. 1983) [hereinafter PORNOGRAPHY AND CENSORSHIP].

39. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 661 (1977).

40. *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 467, 499-501 (1970) (noting the difficulties inherent in reconciling "full protection" view of first amendment with social interests thought to be fostered by obscenity laws).

41. *See, e.g.,* Hertzberg, *Big Boobs,* THE NEW REPUBLIC, July 14 & 21, 1986, at 21-24 (attacking Final Report of Attorney General's Commission on Pornography for failing to demonstrate that pornography constitutes meaningful threat to public interest). The Supreme Court, of course, has said that the offensiveness of obscenity is a harm that the state may legitimately address in antiobscenity legislation. *Cf.* FCC v. Pacifica Found., 438 U.S. 726, 737-38 (1978) (holding that the FCC could regulate the broadcast of obscene, indecent, or profane language); *see also* Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159, 3164 (1986) (ruling that the Constitution does not bar states from punishing the use of vulgar and offensive words in secondary schools). Furthermore, in New York v. Ferber, 458 U.S. 747, 756-64 (1982), the Court drew a connection between the production of child pornography and violence and held that the state may regulate child pornography.

42. *See, e.g.,* Paris Adult Theater I v. Slaton, 413 U.S. 49, 56 (1973) (holding that "obscene" material not protected by first amendment); Miller v. California, 413 U.S. 15, 23-24 (1973) (same); Roth v. United States, 354 U.S. 476, 481 (1957) (federal statute criminalizing "obscenity" was not violative of first amendment); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (certain classes of speech such as "the lewd and the obscene" not afforded first amendment protection).

proach set forth in *Miller v. California,*[43] materials can be regulated as "obscene" when they: (1) taken as a whole, appeal to the prurient interest, (2) portray sexual conduct in a patently offensive way, measured by "contemporary community standards," and (3) taken as a whole, lack serious social value, whether literary, artistic, political, or scientific.[44] Under the Court's approach to obscenity, sexually explicit materials can be regulated merely because of environmental or aesthetic harms, and considerations of gender are irrelevant.[45]

An approach directed at pornography differs in important respects from one directed at obscenity. The term "obscenity" refers to indecency and filth; the term pornography—derived from the Greek word for "writing about whores"—refers to materials that treat women as prostitutes and that focus on the role of women in providing sexual pleasure to men.[46] The underlying rationale for regulation therefore differs depending on the definition involved, and the coverage of regulation will differ somewhat as well. In contrast to the vague basis of the obscenity doctrine, the reasoning behind antipornography legislation is found in three categories of concrete, gender-related harms: harms to those who participate in the production of pornography, harms to the victims of sex crimes that would not have been committed in the absence of pornography, and harms to society through social conditioning that fosters discrimination and other unlawful activities.[47] Although it is not possible to describe all the available data here, some of the relevant evidence can be outlined.

First, pornography harms those women who are coerced into and brutalized in the process of producing pornography. Evidence of these harms is only beginning to come to light. But in many cases, women, mostly very young and often the victims of sexual abuse as children, are forced into pornography and brutally mistreated thereafter.[48] The participants have been beaten, forced to commit sex acts, imprisoned, bound and gagged, and tortured.[49] Abuses appear widespread.[50]

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43. 413 U.S. 15 (1973).

44. *Id.* at 24.

45. *See* Emerson, *Pornography and the First Amendment: A Reply to Professor MacKinnon,* 3 YALE L. & POL'Y REV. 130, 134 (1984) (aesthetic harms should not be the basis of suppressing acts of expression).

46. *See generally* A. DWORKIN, *supra* note 1, at 199-202; MacKinnon, *supra* note 7, at 20-22.

47. *See* MacKinnon, *supra* note 7, at 32-60 (similarly categorizing the harms caused by pornography).

48. Numerous examples of abuse were reported to the Attorney General's Commission on Pornography. *See* FINAL REPORT, *supra* note 2, at 856-69.

49. *See id.* at 866-69.

50. *See generally id.* at 767-86 (summarizing testimony of women, men, and children concerning the way pornography contributed to their physical and psychological injuries).

The usual remedy in such situations is to regulate the conduct directly—as current law in fact does—rather than to regulate the expression.[51] Thus, for example, the state might enforce civil and criminal remedies against assault, kidnapping, and sexual abuse rather than direct the force of law against the pornographic materials themselves. Banning the unlawful conduct, however, is unlikely to eliminate it in light of the enormous profits to be made from pornography and the difficulty and cost of ferreting out and punishing particular abuses.[52] The case for a ban on these materials depends on a conclusion that abusive practices are widespread and that elimination of financial incentives is the only way to control those practices. The Supreme Court endorsed this view in the context of child pornography in *New York v. Ferber*.[53]

Because the people to be protected are women rather than children, however, the claim of universal legal involuntariness is untenable. Many women participate in the production of pornography "voluntarily" as that term is ordinarily understood in the law. But some of them do not, and others are subject to grotesque abuse thereafter.[54] These considerations support regulation of the materials themselves.

This justification for regulation may point to one of two conclusions. First, one might conclude that the government should be permitted to ban the distribution of those materials that have been produced through unlawful means.[55] Thus, for example, scenes that involve actual rape, or

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51. For example, although under most circumstances the right to advocate the forcible overthrow of the government is protected by the first amendment, *see* Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969) (per curiam), concrete acts designed to carry out such a plan would violate a host of federal and state statutes. Similarly, although the use, possession, and sale of marijuana remains illegal in almost every state, the activities of groups such as the National Organization for Reform of Marijuana Laws are protected, even though the positions they advocate may give an implied endorsement to violation of current law.

52. To be sure, creative use of civil and criminal law might help remedy the problem. The creation of civil causes of action, with large punitive damages and attorney fees, would be an improvement over the current system. But the pornography industry, as noted by the Supreme Court in New York v. Ferber, 458 U.S. 747, 749 n.1 (1982), is a highly profitable enterprise, and it is unlikely that such actions would be sufficient.

53. 458 U.S. 747, 761-62 (1982). The Court stated:

> The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation. "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."

Id. (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949)) (footnote omitted).

54. *See* FINAL REPORT, *supra* note 2, at 866.

55. In Posadas de Puerto Rico Assocs. v. Tourism Co., 106 S. Ct. 2968, 2977-78 (1986), the Court held that states could, as a lesser included power, ban the advertising of activities that could be made unlawful. In the Pentagon Papers case, New York Times v. United States, 403 U.S. 713 (1971) (per curiam), by comparison, the Court permitted publication of material that had been obtained though unlawful means. Potential or actual illegality in the production of information, there-

that are the product of coercion, might be actionable.[56] Second, one might conclude that the distribution of pornography generally should be regulated through civil or criminal sanctions as a less expensive way of eliminating the problem of coercion and mistreatment.[57]

The second harmful effect that pornography produces is a general increase in sexual violence directed against women, violence that would not have occurred but for the massive circulation of pornography. To say that there is such a connection is not to say that pornography lies at the root of most sexual violence. Nor is it to say that most or even a significant percentage of men will perpetrate acts of sexual violence as a result of exposure to pornography. But it is to say that the existence of pornography increases the aggregate level of sexual violence. Pornography is at least as much a symptom as a cause; but it is a cause as well.

The methodological problems in proving causation are considerable. Even if direct causation in fact existed, it would be difficult to demonstrate; undoubtedly there are multiple causes of sexual violence. In these circumstances the burden of proof becomes critical. If legislators may not regulate pornography in the absence of an unimpeachable showing of proof, they simply cannot regulate it; current data are insufficient to sup-

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fore, does not necessarily license regulation of the speech rather than the underlying conduct. *Id.* at 722 (Douglas, J., concurring). But *New York Times* involved a prior restraint on material that lies at the center of first amendment concern. *Id.* at 717 (Black, J., concurring). In contrast, pornography is close to the commercial speech at issue in *Posadas* and even closer to the child pornography at issue in *Ferber*. *But see* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 332-33 (7th Cir. 1985) (declaring ordinance banning distribution of material depicting coerced performances to be unconstitutional on ground that it was based on defective definition of pornography), *aff'd*, 106 S. Ct. 1172 (1986).

56. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 332 (7th Cir. 1985) ("[W]hen a state has a strong interest in forbidding the conduct that makes up a film . . . it may restrict or forbid dissemination of the film in order to reinforce the prohibition of the conduct."), *aff'd*, 106 S. Ct. 1172 (1986).

57. In New York v. Ferber, 458 U.S. 747, 756 (1982), the Supreme Court sanctioned suppression of child pornography as an indirect though effective way to prevent the abuse of children in the production of pornographic materials. Obscenity can be constitutionally regulated through zoning ordinances, *see* City of Renton v. Playtime Theatres, Inc., 106 S. Ct. 925 (1986), and by penal statutes, *see, e.g.*, N.C. GEN. STAT. § 14-190.1 (Supp. 1985). The Indianapolis antipornography ordinance, in contrast, purported to give a civil cause of action to persons injured by pornography. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324 (7th Cir. 1985), *aff'd*, 106 S. Ct. 1172 (1986).

The Attorney General's Commission on Pornography compiled a readily accessible and fairly extensive body of testimony showing a link between the production of pornography and law-breaking. *See* FINAL REPORT, *supra* note 2, at 852-69. This consideration suggests that another alternative might be to regulate or prohibit the production of pornography in the first instance—just as states generally ban prostitution (though that ban is infrequently enforced in practice). A ban on the production of pornography—as opposed to a ban on its distribution—should not raise significant first amendment issues. *But see* Stone, *supra* note 10, at 461 (contending that because the definition of pornography is viewpoint-based, regulation is insupportable).

port such a showing. But if highly suggestive evidence of harm suffices—as it does in most areas of the law[58]—the case for regulation is powerful. The evidence linking pornography and sexual violence falls in three categories: laboratory studies, victim accounts, and reports based on the experience of states and countries that have changed their practices with respect to pornography.

Some laboratory studies show a reduced sensitivity to sexual violence on the part of men who have been exposed to pornography.[59] Men questioned after such exposure seem more prepared to accept rape and other forms of violence against women, to believe that women derive pleasure from violence, and to associate sex with violence; they also report a greater likelihood of committing rape themselves.[60] And after being exposed to violent pornography, some men report having aggressive sexual fantasies.[61] For these reasons, some social psychologists have concluded that men exposed to pornography have a greater predisposition toward rape than men who have not been exposed.[62] In light of the relevant findings, it is highly plausible to believe that the general climate reinforced by pornography contributes to an increased level of sexual violence against women.

Laboratory results, however, do not reflect the real world with certainty. The decreased sensitivity of men may be only temporary; the subjects' reports of the effects of pornography could be inaccurate or overstated; and other causal factors may dwarf exposure to pornography in importance. Though informative, the laboratory evidence alone does not reveal the extent of the connection between pornography and sexual violence.[63]

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58. *See infra* notes 76-79 and accompanying text. The best example may be that of obscenity itself. In Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60-61 (1973), the Supreme Court stated a rule of judicial deference to legislative presumption of harm caused by obscenity, noting that the same deference was applicable to a broad range of legislative regulation of commerce, industry, securities, and the like.

59. *See* Zillman & Bugant, *Pornography, Sexual Callousness, and the Trivialization of Rape,* J. COMM., Autumn 1982, at 10, 16-17.

60. *See* FINAL REPORT, *supra* note 2, at 1005; Donnerstein, *supra* note 27, at 78 (test results show that massive exposure to pornography leads students to recommend significantly shorter prison terms for rapists).

61. *See* FINAL REPORT, *supra* note 2, at 979 (citing Malamuth, *Rape Fantasies as a Function of Exposure to Violent Sexual Stimuli,* 10 ARCHIVES SEXUAL BEHAV. 33 (1981)).

62. *See* FINAL REPORT, *supra* note 2, at 1005.

63. *See* Copp & Wendell, *Preface* to PORNOGRAPHY AND CENSORSHIP, *supra* note 38, at 12 (concluding that relationship beween sex crimes and pornography has not been definitively established); Gray, *Exposure to Pornography and Aggression Toward Women: The Case of the Angry Male,* 29 SOC. PROBS. 387, 394 (1982) (arguing that pornography causes sexual violence only when it validates a preexisting anger toward women).

But other evidence shows an association between the growth of pornography in particular areas with increases in rape and other forms of sexual violence. In the United States, for example, the incidence of reported rape within states is closely correlated with the mass circulation of pornography.[64] The liberalization of pornography laws in the United States, Britain, Australia, and the Scandinavian countries has been accompanied by a rise in reported rape rates.[65] This finding becomes more striking when compared to the experience of other countries. In countries where pornography laws have not been liberalized, there has been a less steep rise in reported rapes.[66] And in countries where restrictions have been adopted, reported rapes have decreased.[67] The increase in reported rapes, where it has occurred, has not been matched by an increase in serious nonsexual offenses.[68] Furthermore, there appears to be a temporal relationship between changes in pornography regulation and changes in the level of reported rapes.[69] Finally, recent studies have found a correlation between pornography and sexual violence even when controls are instituted for possible confounding variables, such as police practices, propensity to report rape, and so forth.[70]

But again, these comparisons alone do not clearly establish the causal link.[71] The simultaneous rise of pornography and sexual violence

64. *See* Baron & Straus, *Sexual Stratification, Pornography and Rape in the United States,* in PORNOGRAPHY AND SEXUAL AGGRESSION, *supra* note 27, at 206.

65. *See* Court, *Sex and Violence: A Ripple Effect,* in PORNOGRAPHY AND SEXUAL AGGRESSION, *supra* note 27, at 157-67.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *See* FINAL REPORT, *supra* note 2, at 944-46.

71. The Attorney General's Commission on Pornography, after reviewing the available studies, concluded that although the reported relationship between pornography and sexual violence seemed "plausible," it could not ignore the possibility that the studies were finding a "spurious" relationship. *Id.* at 952. In fact, some commentators have argned that pornography decreases the aggregate level of sexual violence because it produces a kind of catharsis. *See* Kutchinsky, *The Effect of Easy Availability of Pornography on the Incidence of Sex Crimes: The Danish Experience,* 29 J. SOC. ISSUES 163 (1973), *reprinted in* PORNOGRAPHY AND CENSORSHIP, *supra* note 63, at 309. The prevailing view, however, is that there is "almost no empirical evidence" to support that argument. *See* Baron & Straus, *supra* note 64, at 188 n.1; FINAL REPORT, *supra* note 2, at 940-42 (summarizing criticisms of this argument). The experience of Denmark—which legalized pornography in 1967 and 1969, and thereafter saw a decrease in some types of sexual violence—is sometimes cited as support for the catharsis theory. *See* Kutchinsky, *supra* at 171. But the incidence of rape, as opposed to other sexual crimes, did not decrease in Denmark during the relevant period, *id.* at 166, suggesting that the data do not support the catharsis theory. *See* Giglio, *Pornography in Denmark: A Public Policy Model for the United States?,* 8 COMP. SOC. RES. 281, 297 (1985) (concluding that empirical studies of effect of Danish pornography laws are largely flawed and that cultural differences, social realities, and political factors work against adopting "Danish solution" in United States). *But cf.* Kutchinsky, *Pornography and Its Effect in Denmark and the United States: A Rejoinder and Beyond,* 8 COMP.

may stem from some external factor; it does not demonstrate beyond doubt the existence of a causal connection. Other social factors, including demographic and ethical trends, may account for simultaneous increases in both pornography and violence—though some of the studies try to control for these possible distortions. Objections of these sorts of course do not disprove a connection; they do suggest, however, that the empirical data are imperfect.

A final source of evidence concerning the harm caused by pornography is victim testimony showing that many perpetrators of sexual violence use pornography. Police reports attest to the connection, and there is evidence showing the relationship between pornography and abuse of women.[72] One cannot fully appreciate the grotesque nature of these harms without hearing or reading the testimony itself. Frequently the temporal and spatial connection is extremely close; pornography is sometimes used as a kind of "how-to" manual for sexual assault.[73] Recent hearings on the subject before the Attorney General's Commission on Pornography provided striking evidence to this effect.[74]

There are, of course, dangers in relying on evidence of this sort. Reports from victims tell little about the extent of the problem and the precise nature of the causal links. Much of the reported violence may have occurred without pornography. Most consumers of pornography do not commit acts of sexual violence. In short, we do not know how widespread the phenomenon is.

We are therefore confronted with three kinds of evidence indicating a link between pornography and violence, all of them suggestive, but none of them alone dispositive. For critics of antipornography regulation, the problems of proof suffice to refute the existence of a causal connection between pornography and sexual violence.[75] Uncertainty about

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SOC. RES. 301, 319-21 (1985) (reiterating that empirical research has revealed no positive causal connection between pornography and sex crimes).

72. *See* Champion, *Clinical Perspectives on the Relationship Between Pornography and Sexual Violence*, 4 LAW & INEQUALITY 22, 25 (1986); *see also* Silbert & Pines, *Pornography and Sexual Abuse of Women*, 10 SEX ROLES 857 (1984) (study of street prostitutes suggested relationship between sexual behavior depicted in pornography and sexual abuse of women).

73. *See* Champion, *supra* note 72, at 25 (referring to the use of "pornography as tools or guides in order to initiate . . . family members into sexual behavior," including father-daughter incest; and describing the "rape and torture of a young wife by her husband . . . an avid consumer of sadomasochistic and bondage pornography who created a complete torture chamber in their basement").

74. *See* FINAL REPORT, *supra* note 2, at 773-80.

75. *See* Lynn, *"Civil Rights" Ordinances and the Attorney General's Commission: New Developments in Pornography Regulation*, 21 HARV. C.R.-C.L. L. REV. 27, 92-96 (1986). Critics of antipornography legislation may be put into two broad categories: those who question the link between pornography and concrete harm (not including offensiveness), *see, e.g.*, Hertzberg, *supra* note 41, at 24, and those who take the view that harms are irrelevant and that the proper remedy for "bad" speech is more speech. *See* Dershowitz, *Partners Against Porn*, HARPER'S, May 1985, at 22; Emer-

the nature and extent of the link, however, hardly counsels inaetion.[76] In the context of carcinogens, for example, regulatory action is undertaken in cases in which one cannot be sure of the precise causal connection between a particular substance and cancer—even when the regulation is extraordinarily costly.[77] Pornography may be at least as harmful as many carcinogens currently subject to regulation. The analogy is close: the nature and extent of the link between act and harm are difficult to establish; but suggestive evidence might well, in the face of potentially severe harm, justify immediate governmental action. Other areas of regulation are treated similarly.[78] Inaction pending the accumulation of definitive proof has costs of its own. The question, a familiar one in the regulatory context, is who should bear the burden of uncertainty: the pornography industry or the potential victims of sexual violence.

A third harmful effect of pornography stems from the role it plays as a conditioning factor in the lives of both men and women. Pornography acts as a filter through which men and women perceive gender roles and relationships between the sexes. Of course, pornography is only one of a number of conditioning factors, and others are of greater importance. If pornography were abolished, sexual inequality would hardly disappear. The connection between inequality, unlawful discrimination, and pornography cannot be firmly established. But pornography undeniably reflects inequality, and through its reinforcing power, helps to perpetuate it.

All of these factors support the conclusion that pornography is a significant social problem—producing serious harm, mostly to women—and that substantial benefits would result if the pornography industry

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son, *supra* note 45, at 142. Proof of harm, therefore, might satisfy the former critics, but not the latter. The "more speech" view is discussed below. *See infra* notes 157-90 and accompanying text.

76. *See* FINAL REPORT, *supra* note 2, at 306 (concluding that if sexually explicit material is causally related to "some" harmful behavior, the material is harmful); *see also* Note, *Anti-Pornography Laws and First Amendment Values,* 98 HARV. L. REV. 460, 479 (1984) (fact that empirical evidence is disputed should not undercut legislative determinations of harm as long as some correlation is found).

77. Consider the decision of the Occupational Safety and Health Administration to reduce the level of occupational exposure to benzene from 10 ppm to 1 ppm, discussed in Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980). *See generally* S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 91 (2d ed. 1985) (noting wide regulation of carcinogens despite disagreement over the precise objectives of safety regulation); S. BREYER, REGULATION AND ITS REFORM 135-40 (1982) (noting irony of extensive regulation of carcinogens despite lack of proof of clear causation).

78. A particularly dramatic example is the death penalty. The evidence showing a relationship between the death penalty and deterrence—a prime justification for the penalty—is weaker than the evidence showing a relationship between pornography and sex-related crime. In Kaplan v. California, 413 U.S. 115, 120 (1973), the Court recognized the need for legislatures to be able to act to suppress obscenity even in the absence of any concrete evidence of harm.

were regulated.[79] It is important to recognize that the various different harms point to different avenues for legal regulation. If the harm to women who participate in pornography is emphasized, regulation will depend on whether such harm has occurred. If the causal connection is emphasized, the question will be whether the material at issue is likely to cause sexual violence and subordination. I will return to these issues below.

II. LOW-VALUE AND HIGH-VALUE SPEECH

Although the harms generated by pornography are serious, they are insufficient, standing alone, to justify regulation under the usual standards applied to political speech. After *Brandenburg v. Ohio,*[80] speech—not including obscenity—cannot be regulated because of the harm it produces unless it is shown that the speech is directed to produce harm that is both imminent and extremely likely to occur.[81] Moreover, the Court has rejected the notion that this showing can be made by linking a class of harm with a class of speech; it is necessary to connect particular harms to particular speech.[82] These doctrinal conclusions will not be questioned here, although they do have powerful adverse implications for antipornography legislation. If current standards are applied, a particular pornographic film or magazine might be beyond regulation unless the harms that result from the particular material are imminent, intended, and likely to occur. Demonstrating this, of course, will be hard to do.

But acceptance of these doctrinal conclusions does not resolve the question of the constitutionality of antipornography regulation. The Court has drawn a distinction between speech that may be banned only on the basis of an extremely powerful showing of government interest, and speech that may be regulated on the basis of a far less powerful demonstration of harm. Commercial speech, labor speech, and possibly group libel, for example, fall within the category of "low-value" speech.[83] Whether particular speech falls within the low-value category cannot be determined by a precise test, and under any standards there will be diffi-

79. The utilitarian "gains" from pornography, as defined here, should count little in the balance. *Cf.* Goodin, *Laundering Preferences,* in FOUNDATIONS OF SOCIAL CHOICE THEORY 75 (J. Elster & A. Hylland eds. 1986).

80. 395 U.S. 444 (1969) (per curiam) (overturning conviction of Ku Klux Klan leader for advocating violence at Klan gathering).

81. *Id.* at 447.

82. *See, e.g.,* Hess v. Indiana, 414 U.S. 105, 107-09 (1973) (overturning conviction for disorderly conduct on ground that defendant's speech was neither directed toward a particular person nor intended to incite specific act of violence).

83. *See* G. STONE, R. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 1058-114 (1986).

cult intermediate cases. But in determining whether speech qualifies as low-value, the cases suggest that four factors are relevant.[84]

First, the speech must be far afield from the central concern of the first amendment, which, broadly speaking, is effective popular control of public affairs. Speech that concerns governmental processes is entitled to the highest level of protection;[85] speech that has little or nothing to do with public affairs may be accorded less protection.[86] Second, a distinction is drawn between cognitive and noncognitive aspects of speech.[87] Speech that has purely noncognitive appeal will be entitled to less constitutional protection.[88] Third, the purpose of the speaker is relevant: if the speaker is seeking to communicate a message, he will be treated more

84. Because pornography and obscenity are obviously "speech," through of low-value, the rationale of Roth v. United States, 354 U.S. 476 (1957), and its progeny is highly questionable. The notion of "no value" speech is also questionable when applied to words and pictures. In general, however, the Supreme Court's approach to deciding what constitutes low-value speech is acceptable and is drawn on here.

85. *See* New York Times v. Sullivan, 376 U.S. 254, 269 (1964) ("[The first amendment] was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." (quoting Roth v. United States, 354 U.S. 476, 484 (1957))).

86. *See, e.g.*, Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159, 3166 (1986) (offensive student speech unrelated to public issues not entitled to first amendment protection).

87. The term "cognitive" as used here refers to whether the material is intended to or does in fact impart knowledge in any sense. *See* Finnis, *"Reason and Passion": The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222, 227 (1960) (obscenity regarded as lacking social utility because it appeals to realm of passion rather than to realm of intellect).

88. The Supreme Court has tied the level of constitutional protection afforded certain classes of speech to their ability to transmit ideology or ideas:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (footnotes omitted).

The *Roth* Court's definition of "prurient interest" in obscenity doctrine fits comfortably into the cognitive/noncognitive analytical framework. Justice Brennan, writing for the Court, defined material appealing to the "prurient interest" as "material having a tendency to excite lustful thoughts." Roth v. United States, 354 U.S. 476, 487 n.20 (1957). Professor Schauer has suggested that the cognitive/noncognitive distinction underlies the Supreme Court's obscenity decisions: "[T]he Court's treatment of obscenity is consistent with a vision that emphasizes intellectual (and perhaps public) communication and not self-expression." Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 932 (1979). Schauer ascribes to the Court an intention to formulate a definition of "obscenity" that functionally excludes noncognitive communication (with sexual content) from constitutional protection. *Id.* at 928. *But cf.* Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U.L. REV. 1137, 1182 (1984) (contending that "there is no denying that obscene pornography constitutes a political-moral vision"). Note also that symbolic speech often has a significant cognitive content.

favorably than if he is not.[89] Fourth, the various classes of low-value speech reflect judgments that in certain areas, government is unlikely to be acting for constitutionally impermissible reasons or producing constitutionally troublesome harms. In the cases of commercial speech, private libel, and fighting words, for example, government regulation is particularly likely to be based on legitimate reasons. Judicial scrutiny is therefore more deferential in these areas.[90]

The exclusion of obscene materials from first amendment protection, in contrast, stems largely from an act of definition. Obscene materials, to the Court, do not count as "speech" within the meaning of the first amendment.[91] But this definitional distinction can be viewed as reflecting the same considerations that define the low-value speech category. If the materials are defined narrowly, only nonpolitical and noncognitive material will be prohibited. The limitation of obscenity law to speech not having "serious literary, artistic, political, or scientific value"[92] fits comfortably with this understanding.

This four-factor analysis is, of course, controversial. The distinction between political and nonpolitical speech, for example, is often unclear and may ultimately depend on the political view of the decisionmaker.[93] The difficulty inherent in such line drawing, moreover, may support abandoning any attempt to do so. Perhaps more importantly, distinctions between cognitive and emotive aspects of speech are thin and in some respects pernicious.[94] Furthermore, approaches based on the pur-

89. *See generally* Wright, *A Rationale from J.S. Mill for the Free Speech Clause,* 1985 SUP. CT. REV. 149, 157 ("If one has sent a social message, however, even if none was received, or if an entirely different message was received, one has engaged in speech, even if imperfectly.").

90. The adjustment of standards of review in accordance with the perception of the likelihood of impermissible government ends is a familiar constitutional theme; it underlies, for example, the various "tiers" of equal protection doctrine. *Compare* Korematsu v. United States, 323 U.S. 214, 219 (1944) (applying strict scrutiny in upholding executive order interning Americans of Japanese ancestry) *with* Craig v. Boren, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny to gender classifications) *and* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174-75 (1980) (applying rational basis standard in challenge to social and economic legislation).

91. *See* Roth v. United States, 354 U.S. 476, 481 (1957) ("[T]his Court has always assumed that obscenity is not protected by the freedoms of speech and press."); *see also* Schauer, *supra* note 88, at 926, 928.

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

93. *See infra* notes 150-53 and accompanying text.

94. For example, visceral and symbolic speech can challenge the listener, viewer, or reader by directly confronting basic beliefs and values. Such speech—consider flag burning—may have the purpose and effect of causing an emotional reaction. The confrontation, however, is ultimately intended to have a cognitive impact, and to cause a reexamination of those values and beliefs. When visceral and symbolic speech is directed at public affairs, it falls well within the core of the first amendment and should receive the highest constitutional protection. *See* Cohen v. California, 403 U.S. 15, 26 (1971); *see also* Ely, *Flag Desecration: A Case Study of Categorization and Balancing in First Amendment Analysis,* 88 HARV. L. REV. 1482, 1482-83 (1975) ("At first glance, however, it is

pose of the speaker are troublesome for familiar reasons.[95] Finally, freedom of speech might be thought to promote self-realization and, on that ground, attempts to make distinctions among categories of speech might be questioned.[96]

But it would be difficult to imagine a sensible system of free expression that did not distinguish among categories of speech in accordance with their importance to the underlying purposes of the free speech guarantee. A system that granted absolute protection to speech would be unduly mechanical, treading unjustifiably on important values and goals: consider laws forbidding threats, bribes, misleading commercial speech, and conspiracies.[97] Any system that recognizes the need for some regulation but does not draw lines could be driven to deny full protection to speech that merits it—because the burden of justification imposed on the government would have to be lightened in order to allow regulation of, for example, commercial speech, conspiracies, and private libel. By hypothesis, that lighter burden would have to be extended across-the-board.[98] The alternative would be to apply the standards for political speech to all speech, and thus to require the government to meet a test so stringent as to preclude most forms of regulation that are currently accepted. In these circumstances the most likely outcome would be that judgments about low-value would be made tacitly, and the articulated rationales for decisions would fail to reflect all the factors actually considered relevant by the court.[99]

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hard to see why [the Court finds the issue troubling]. Laws prohibiting flag desecration quite obviously inhibit political expression . . . ."). This view can be associated with feminist attacks on distinctions between reason and emotion. *See* A. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE 367 (1983).

95. *See* Ackerman, *Beyond Carolene Products,* 98 HARV. L. REV. 713 (1985).

96. *See, e.g.,* Redish, *The Value of Free Speech,* 130 U. PA. L. REV. 591, 625 (1982) ("Once one recognizes that the primary value of free speech is as a means of fostering individual development and aiding the making of life-affecting decisions, the inappropriateness of distinguishing between the value of different types of speech becomes clear.").

97. *Cf.* Redish, *supra* note 96; Redish, *The Content Distinction in First Amendment Analysis,* 34 STAN. L. REV. 113, 128-39 (1982). Professor Redish's position is that any speech that furthers a first amendment goal of self-realization—including obseenity and politieal speech—should be protected. This view differs from the well-known "absolutist" position, expressed most forcefully by Justice Black in Konigsberg v. State Bar, 366 U.S. 36, 61 (1961) (Black, J., dissenting). The criticisms of the absolutist position have, of course, carried the day. *See generally* Kalven, *Upon Rereading Mr. Justice Black on the First Amendment,* 14 UCLA L. REV. 428, 441-47 (1967).

98. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (noting that rule requiring same constitutional protection for commercial and noncommercial speech could result in lowering of standards applied to noncommercial speech).

99. *See* Sunstein, *Government Control of Information,* 74 CALIF. L. REV. (1986) (forthcoming); *cf.* Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz,* 17 VAND. L. REV. 479, 481-82 (1964) (determination of what types of speech are to be protected should be result of balancing of interests with the primary question being whether the balancing should be done covertly or openly).

Once it is accepted that distinctions should be drawn among different categories of speech, the question becomes one of identifying an appropriate basis for those distinctions. The issue is complex, and it will be possible only to outline some of the important considerations here. First, the distinction between political and nonpolitical speech is well-established, and properly so. The distinction protects speech that serves a central function of the first amendment and precludes regulation where it is most likely to be based on impermissible or disfavored justifications.[100]

The distinction between cognitive and noncognitive speech is more difficult to defend. This is so not only because of the existence of difficult intermediate cases, but also because the very concept of communication is badly misconceived if it is understood as an appeal to rational capacities alone.[101] But any attempt to distinguish among categories of speech must start with an effort to isolate what is uniquely important about speech in the first place. Speech that is not intended to communicate a substantive message or that is directed solely to noncognitive capacities may be wholly or largely without the properties that give speech its special status.[102] Subliminal advertising and hypnosis, for example, are entitled to less than full first amendment protection. Listeners or observers will frequently draw messages from speech or conduct, whether or not it has a communicative intent; the fact that a message may be drawn does not mean that the speech in question has the usual constitutional value.[103]

Under this approach, or any plausible variation, regulation of pornography need not be justified according to standards applicable to political speech. The effect and intent of pornography, as it is defined here, are to produce sexual arousal, not in any sense to affect the course of self-government. Though comprised of words and pictures, pornography does not have the special properties that single out speech for special protection; it is more akin to a sexual aid than a communicative expression.[104] In terms of the distinctions made among classes of speech, por-

100. *See infra* notes 124-27 and accompanying text.

101. *See, e.g.*, I. BALBUS, MARXISM AND DOMINATION: A NEO-HEGELIAN, FEMINIST, PSYCHOANALYTIC THEORY OF SEXUAL, POLITICAL AND TECHNOLOGY LIBERATION 231 (1982) (criticizing J. HABERMAS, LEGITIMATION CRISIS (1975), for relying on a disembodied conception of reason and failing to account for "what might be called the psychodynamics of human communication").

102. *See* Schauer, *supra* note 88, at 920-28.

103. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) (rejecting contention that "an apparently limitless variety of conduct" intended to convey ideas merits constitutional protection). *But cf.* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985) (stating that failure to protect speech from which messages are drawn would invite government dictation of "which thoughts are good for us"), *aff'd*, 106 S. Ct. 1172 (1986).

104. *See* Schauer, *supra* note 88, at 923.

nography is low-value speech not entitled to the same degree of protection accorded other forms of speech.

In one respect, however, the feminist case for regulation of pornography might seem, quite paradoxically, to weaken the argument for regulation. The feminist argument is that pornography represents an ideology, one that has important consequences for social attitudes.[105] Speech that amounts to an ideology, one might argue, cannot be considered low-value, for such speech lies at the heart of politics. If pornography indeed does amount to an ideology of male supremacy, it might be thought to be entitled to the highest form of constitutional protection.[106]

But an argument along these lines is based on a misconception of what entitles speech to the highest form of protection. Child pornography, for example, may reflect an ideology, but this did not compel the Court to hold in *New York v. Ferber*[107] that child pornography is constitutionally protected. Indeed, most categories of low-value speech—fighting words, commercial speech, obscenity—amount in some respects to an ideology. In commercial speech, for example, there is an implicit ideology in favor of market-ordering, and perhaps some sort of ideology involving the product advertised. But that fact does not justify a conclusion that courts should accord such speech the highest level of constitutional protection.

Whether particular speech is low-value does not turn on whether the materials contain an implicit ideology;[108] if it did, almost all speech would be immunized. The question instead turns more generally on the speaker's purpose and on how the speaker communicates the message. The pornographer's purpose in disseminating pornographic materials—to produce sexual arousal—can be determined by the nature of the material. And any implicit "ideology" is communicated indirectly and noncognitively.[109] A distinction along these lines has become an integral part of the Supreme Court's commercial speech doctrine. Paid speech

105. *See* S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 394 (1975) ("Pornography is the undiluted essence of antifemale propaganda.").

106. *See* Stone, *supra* note 10, at 467 (arguing that legislation prohibiting portrayal of women as enjoying domination is viewpoint-based and thus constitutionally repugnant).

107. 458 U.S. 747, 763-64 (1982).

108. *See* Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973) (although sex-designated employment advertisements may have expressed implicit ideology whether "certain positions ought to be filled by members of one or the other sex," ordinance forbidding such advertisements did not violate newspaper's first amendment rights because advertisements were classic commercial speech).

109. Even Justice Black, a first amendment "absolutist," believed that regulation of conduct that also touched associated speech could, in particular circumstances, be constitutional. *See* Konigsberg v. State Bar, 366 U.S. 36, 69 (1961) (Black, J., dissenting) (conceding that city ordinances intended to prevent unnecessary noise and traffic congestion that "incidentally" touch speech are permissible).

addressed to social issues receives full first amendment protection; paid speech proposing specific commercial transactions receives less protection despite any implicit political statement such speech may contain.[110] A contention that the purpose of the speech is to transmit an ideological message is easily overborne by the nature of the speech itself. Furthermore, the purpose of the speaker is central to the question; someone who burns a draft card for the purpose of protesting a war is in a very different position from someone who burns a draft card as part of a general program of arson, even if the action of the latter is taken to have expressed an ideology to bystanders. There are, moreover, differences between ideological argument in favor of free markets, or of domination of women by men, and commercial and pornographic speech. The differences have to do with both purposes and effects. For pornography in particular, the cognitive element, to the extent that there is one, operates at a subconscious level; the message is communicated indirectly. Hypnosis, whether or not voluntary, does not amount to constitutionally protected speech, or to speech that is entitled to the highest level of first amendment concern; this conclusion holds even if the hypnotist's message has some ideological dimension. The example is extreme, but it suggests that the fact that speech communicates a message is not a sufficient reason to accord it the highest level of constitutional protection.

These considerations suggest a conventional, two-stage argument for the regulation of pornography. First, pornography is entitled to only a lower level of first amendment solicitude. Under any standard, pornography is far afield from the kind of speech conventionally protected by the first amendment. Second, the harms produced by pornographic materials are sufficient to justify regulation. Admittedly, there will be difficult intermediate cases and analogies that test the persuasiveness and reach of the argument. The crucial point, however, is that traditional first amendment doctrine furnishes the basis for an argument in favor of restricting pornography, and that such an argument can be made without running afoul of the weak version of the notion of neutral principles described above.[111]

110. *Compare* New York Times v. Sullivan, 376 U.S. 254, 266 (1964) (paid political advertisment soliciting financial support for "right-to-vote" movement expressed opinion and communicated information on "matters of the highest public interest and concern") *with* Posadas de Puerto Rico Assocs. v. Tourism Co., 106 S. Ct. 2968, 2976-77 (1986) (regulations prohibiting advertising of casino gambling served substantial government interest).

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

III. THE PROBLEM OF VIEWPOINT DISCRIMINATION

The only federal court of appeals that has faced a challenge to antipornography legislation found it unnecessary to examine either the issue of low-value categorization or the issue of harms. In *American Booksellers Association v. Hudnut,*[112] the United States Court of Appeals for the Seventh Circuit invalidated antipornography legislation on the ground that it discriminated on the basis of viewpoint. In the court's view, the Indianapolis ordinance[113] amounted to "thought control," since it "establish[es] an approved view of women, of how they may react to sexual encounters, [and] . . . of how the sexes may relate to each other."[114] Under this decision, which the Supreme Court summarily affirmed,[115] neither the problem of low-value nor the problem of harm is relevant.

This basic approach is familiar in first amendment law.[116] Modern doctrine distinguishes among three categories of restrictions:[117] those that are based on viewpoint, or that single out and suppress particular opinions concerning a particular subject; those that are based on content, or that regulate any speech concerning a subject, regardless of viewpoint; and those that are both content- and viewpoint-neutral. The most intense constitutional hostility is reserved for measures that discriminate

112. 771 F.2d 323, 332 (7th Cir. 1985), *aff'd,* 106 S. Ct. 1172 (1986).

113. The Indianapolis ordinance used a somewhat different definition of pornography from that set out here. *See supra* note 26 and accompanying text. But those differences would not affect the applicability of the *Hudnut* reasoning to regulation using the definition I have proposed.

114. *Hudnut,* 771 F.2d at 328.

115. Chief Justice Burger, Justice Rehnquist, and Justice O'Connor dissented. Hudnut v. American Booksellers Ass'n, 106 S. Ct. 1172 (1986).

116. The Supreme Court, for example, reversed a New York Court of Appeals decision that upheld the prohibition of the showing on state property of a movie based on *Lady Chatterley's Lover. See* Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959). The New York decision was based on the explicit ground that the movie's subject matter—"adultery presented as being right and desirable for certain people"—permitted regulation. *Id.* at 687. In a concise summary of the basis of the presumption of unconstitutionality of viewpoint-based regulation, the Court stated:

> What New York has done, therefore, is to prevent the exhibition of a motion picture because that picture advocates an idea—that adultery under certain circumstances may be proper behavior. Yet the First Amendment's basic guarantee is of freedom to advocate ideas. The State, quite simply, has thus struck at the very heart of constitutionally protected liberty. . . . [The Constitution's] guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax.

Id. at 688-89. *Kingsley* may be said to prohibit antipornography legislation. Yet *Kingsley* deals with state suppression of a particular point of view that was not tightly connected to any demonstrable harm and that applied regardless of the value of the speech in the constitutional hierarchy. *See infra* notes 124-33 and accompanying text. In New York v. Ferber, 458 U.S. 747 (1982), the Court made it clear that narrowly-tailored harm-based regulation of low-value speech is constitutional. *Kingsley* is thus distinguishable from a viewpoint-based challenge to antipornography legislation such as that made in *Hudnut,* 771 F.2d at 325.

117. *See* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 105 S. Ct. 3439, 3453-54 (1985) (distinguishing between content- and viewpoint-based regulation of access to public forums).

on the basis of viewpoint, even though such measures may suppress less speech than do other sorts of restrictions.[118] Thus, for example, a statute that prohibits all speech on billboards stands a far greater chance of constitutional success than a statute that prohibits speech on billboards that is critical of Republicans.[119]

Under a standard view,[120] restrictions based on viewpoint are necessarily content-based, but the converse need not always be true. A statute that prohibits speech critical of the President is directed at both viewpoint and content; the speaker's point of view is critical to the sanction, for speech supportive of the President is lawful. A statute that forbids false commercial advertising is said to be directed at content but not at viewpoint;[121] although the meaning of the words decides the legal question, the statute does not appear to exclude a particular point of view. Finally, a statute that forbids all speech is directed at neither content nor viewpoint. Under current law, viewpoint-based restrictions are the most difficult to justify; indeed, they sometimes encounter a per se rule of unconstitutionality.[122] Content-neutral rules, in contrast, receive the most lenient review. Content-based regulations that are neutral with respect to viewpoint occupy an intermediate category.[123]

The special constitutional hostility toward viewpoint restrictions is not easy to explain,[124] but it is generally sound. One reason for the hostility toward viewpoint discrimination is that the government may have a motive for excising a particular point of view that is unrelated to the public welfare; the government may excise a point of view simply because it disagrees with it. In this respect, viewpoint-based restrictions are likely to embody one or the other of two central constitutional evils. The first evil is factional tyranny, or the usurpation of government power by private groups.[125] Its first amendment manifestation can be found in laws that censor the speech of some private groups in order to promote the

118. *See generally* Stone, *Content Regulation and the First Amendment,* 25 WM. & MARY L. REV. 189 (1983) (discussing use of stricter scrutiny for regulations based on content as compared to regulations not directed at content).

119. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 514-15 (1981).

120. *See* Stone, *supra* note 118, at 199-200.

121. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563-64 (1980) (regulation barring public utility from advertising violated first amendment because regulation was more extensive than necessary to further valid state interest in energy conservation).

122. Such regulation is sometimes upheld, however. *See infra* notes 134-50 and accompanying text.

123. *See generally* Stone, *supra* note 10, at 471 (viewpoint-neutral regulations are not per se unconstitutional and require lesser degree of scrutiny).

124. *See* Redish, *supra* note 97, at 128-42 (discussing theoretical and practical awkwardness of multi-tiered levels of scrutiny based on whether regulation is content-neutral).

125. *See* THE FEDERALIST No. 10, at 62 (J. Madison) (M. Dunn ed. 1901).

welfare of others; a law preventing speech by opponents of court-ordered busing would be an example. The second evil is self-interested representation, or efforts by rulers to insulate themselves and to promote their interests at the expense of the ruled.[126] Its first amendment manifestation can be found in laws designed to insulate government from criticism, such as those that forbid editorializing against a war effort. Restrictions based on viewpoint are particularly likely to be associated with one or the other of these evils; they are thus met with a high degree of skepticism.[127]

Viewpoint restrictions are also inconsistent with a central premise of any system of free expression—that the usual remedy for harmful speech is more speech rather than enforced silence.[128] Thus, for example, when government prohibits people from criticizing a war effort in the presence of soldiers, the concern is that the government has bypassed the ordinary processes for decision, which include persuasion by other citizens, and has attempted to impose a solution on its own. The proper solution in such a case is to allow response through "counterspeech" rather than through regnlation.[129]

The special hostility directed at viewpoint restrictions—which is manifested in a strong presumption of unconstitutionality—is thus designed to "flush out" impermissible bases for government action.[130] If restrictions on speech are to be permitted, it must be because there are significant harms that cannot be dealt with except through direct restriction. Courts impose a heavy burden of justification on government to demonstrate the harm necessary to justify a viewpoint-based regulation.[131]

The United States Court of Appeals for the Seventh Circuit concluded that the Indianapolis antipornography legislation was viewpoint-

126. *See* THE FEDERALIST No. 51, at 384 (J. Madison) (M. Dunn ed. 1901); J. ELY, DEMOCRACY AND DISTRUST 78 (1980).

127. *But cf.* L. BOLLINGER, THE TOLERANT SOCIETY 50-53 (1986) (arguing that some viewpoint-based restrictions on speech are constitutionally legitimate choices of "the people").

128. *See* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

129. *See id.*; Dennis v. United States, 341 U.S. 494, 503 (1951) (plurality opinion) ("[T]he basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies.").

130. Analagous examples include heightened scrutiny under the equal protection clause and the contracts clause. *See generally* Sunstein, *Naked Preferences and the Constitution,* 84 COLUM. L. REV. 1689 (1984).

131. *See* Widmar v. Vincent, 454 U.S. 263, 269-70 (1981) (university that attempts to exclude religious worship and discussion from public forum must show compelling state interest); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite and produce such action.").

based and that its defenders failed to meet that burden of justification.[132] The legislation, in the court's view, singled out for suppression a particular point of view by aiming at the portrait of male-female relations reflected in some sexually graphic material. One portrait is ruled out; the other is permitted.[133] The issue of harm is irrelevant when restrictions based on viewpoint face a per se rule of illegality.

The initial response to a claim that antipornography legislation is viewpoint-based should be straightforward. The legislation aimed at pornography as defined here would be directed at harm rather than at viewpoint. Its purpose would be to prevent sexual violence and discrimination, not to suppress expression of a point of view. Only pornography—not sexist material in general or material that reinforces notions of female subordination—is regulated. Because of its focus on harm, antipornography legislation would not pose the dangers associated with viewpoint-based restrictions. The government, in effect, would have concrete data to back its legitimate purposes.

This approach is supported by a recent decision that was handed down by the Supreme Court in the same week that it summarily affirmed the Indianapolis case. In *City of Renton v. Playtime Theatres, Inc.*,[134] the Court was faced with a statute that prohibited the showing of sexually explicit motion pictures within 1000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. The Court concluded that the statute was content-neutral because it was aimed not at the substantive message of the speech, but at its secondary effects on crime rates, property values, neighborhood quality, and retail trade. The statute's apparent content-based character, according to the Court, was not troubling because the statute could be justified by reference to these secondary effects. It might be said that *Renton* involves regulation on the basis of content rather than viewpoint—a point taken up below[135]—but it is not clear how that conclusion is relevant to the issue of whether harms rescue a statute from skepticism about government motivation. Although the *Renton* decision is questionable on its facts,[136] the Court's

132. *See Hudnut*, 771 F.2d at 332-34.

133. *See id.* at 328.

134. 106 S. Ct. 925 (1986). *Renton* may also represent the continuation of a trend in the Supreme Court to give increased deference to legislative fact-finding and balancing in the first amendment area. Both New York v. Ferber, 458 U.S. 747 (1982), and Kaplan v. California, 413 U.S. 115 (1973), are noteworthy in their deference to the legislature. Whether such deference will be extended outside the realm of low-value speech, *see supra* notes 80-111 and accompanying text, is unclear.

135. *See infra* notes 143-48 and accompanying text.

136. That harms can be invoked as a basis for regulation should not, as discussed below, be sufficient to rescue a statute from content or viewpoint scrutiny; harms can almost always be invoked to support statutes that exclude a point of view. Instead, the inquiry should require consideration of

willingness to look at possible neutral justifications is sound and coexists uneasily with the outcome in *Hudnut*.

A response to this line of reasoning—and to the *Renton* analogy—would be to point out that viewpoint-based restrictions are frequently defended by reference to harm, and that the possibility of such defenses has not been thought to rescue the restrictions from severe constitutional scrutiny. For example, the government's defense of a law prohibiting people from criticizing a war effort in the presence of soldiers is not that it has any hostility toward the speaker's point of view, but that it is seeking to regulate something that could seriously prejudice the war effort. Despite this claim, the restriction is properly subject to the stringent standards applicable to viewpoint-based restrictions. The reason is straightforward: notwithstanding the possible invocation of harm, the government is attempting to bypass deliberative processes of the community. "More speech" and direct regulation of unlawful conduct should be the preferred remedy for harms. The risks of factional tyranny and self-interested representation are sufficient to justify imposing on government a heavy burden of showing that "more speech" and direct regulation of unlawful conduct are inadequate responses to the harm.

Harm-based justifications thus do not foreclose an attack on pornography legislation as viewpoint-based. Yet one may question the very applicability of the notion of "viewpoint discrimination" in this context. First amendment law contains several categories of speech that are subject to ban or regulation even though they are viewpoint-based in the same sense that antipornography legislation is said to be. The most obvious example can be found in labor law.

Courts have held that the first amendment permits the government to prohibit employers from speaking unfavorably about the effects of unionization in the period before a union election if the unfavorable statements might be interpreted as a threat.[137] In the leading case, the employer had suggested that the firm was not financially strong, that any strike would result in a plant closing, and that many employees would have a hard time finding alternative employment.[138] Regulation of such speech is unquestionably viewpoint-based, for employer speech favorable to unionization is not proscribed. Similarly, regulation of bribery turns not only on content but also on point of view; one may not offer $100 to tempt a person to commit murder, although a $100 offer to build a fence

additional factors, such as whether the speech is low-value or high-value. Although it might be possible to distinguish between "primary" and "secondary" effects of regulation, such distinctions seem artificial. *See* Stone, *Content-Neutral Restrictions,* 54 U. CHI. L. REV. (1987) (forthcoming).

137. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 618-19 (1969).

138. *Id.*

is permissible. Prohibitions of "fighting words" might be similarly understood.[139] False or misleading commercial speech, as well as television and radio advertisements for cigarettes and casinos, are regulable,[140] even though all are based on viewpoint.

Moreover, one may doubt whether the courts would invalidate a statute forbidding advocacy of the use of unlawful force to overthrow the government in circumstances in which the standards of *Brandenburg v. Ohio*[141] were met, even if the statute did not also forbid advocacy of the use of unlawful force to perpetuate the existing government. Such a statute is viewpoint-based because the speaker's point of view triggers statutory sanctions. More generally, the existing law of obscenity may readily be regarded as viewpoint-based.[142] The line drawn by statutes implementing *Miller* necessarily distinguishes between messages on the basis of social attitudes toward sexual mores.

These and other apparently viewpoint-based statutes are upheld because they respond, not to point of view, but to harms that the government has power to prevent. In regulating labor speech, the Court indicated that the government was aiming not at viewpoint but at coercion of employees.[143] The existence of genuine and substantial harm allayed concern about impermissible motivation. Significantly, the Court was sensitive to disparities in power that gave employer speech particular authority. The notion that the Labor Management Relations Act[144] interfered with a well-functioning marketplace of ideas thus seemed absurd.[145]

In the area of bribes, threats, and fighting words, the government is

139. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

140. *See* Posadas de Puerto Rico Assocs. v. Tourism Co., 106 S. Ct. 2968, 2976-79 (1986) (holding that state's power to bar gambling includes the lesser power to ban casino advertising, even where state has not banned casino gambling); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-73 & n.24 (1976) (state may suppress prescription drug advertisements that are false and misleading or that propose illegal transactions); Capitol Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 584 (D.D.C. 1971) (upholding statute banning cigarette advertising on any medium subject to FCC jurisdiction), *aff'd sub nom.* Capitol Broadcasting Co. v. Kliendienst, 405 U.S. 1000 (1972).

141. 395 U.S. 444, 448 (1969).

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

143. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969) ("[A] threat of retaliation based on misrepresentation and coercion [is] without the protection of the First Amendment.").

144. 29 U.S.C. §§ 141-187 (1982).

145. This is not to suggest that regulation of labor speech is uncontested. *See* Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression,* 43 MD. L. REV. 4, 16-19 (1984) (describing Court's distinction between economic activity in the labor cases and political activity relating to public issues as "analytically unsound, historically inaccurate, and culturally myopic"); Posner, *The Economics of Free Speech,* 20 SUFFOLK U.L. REV. 1 (1986).

also attempting to combat obvious harms.[146] Analysis of suppression of speech advocating the immediate and violent overthrow of the government would be similar: the government is attempting to eradicate a harm, not attempting to impose a particular point of view. Bans on false or misleading commercial speech, cigarette advertising, or casino gambling are analyzed in substantially the same way.[147] In the obscenity context, the reasoning is more obscure, but the central point remains: in some contexts, statutes that appear to be viewpoint-based are justified and accepted because of the harms involved. The harms are so obvious and immediate that claims that the government is attempting to silence one position in a "debate" do not have time even to register.[148]

One might go further and suggest that the distinction between content-based and viewpoint-based restrictions is at best elusive and more likely nonexistent—and that the distinction itself will depend on viewpoint. Obscenity, commercial speech, fighting words, and perhaps even labor speech are said to involve viewpoint-neutral restrictions because the "viewpoint" of the speaker is deemed irrelevant to regulation. But the line drawn by the regulation does, in all these contexts, depend on point of view. One does not "see" a viewpoint-based restriction when the harms invoked in defense of a regulation are obvious and so widely supported by social consensus that they allay any concern about impermissible government motivation.[149] Whether a classification is viewpoint-based thus ultimately turns on the viewpoint of the decisionmaker.[150]

It is for this reason that obscenity law is regarded as viewpoint-neutral and antipornography law as viewpoint-based. Obscenity law, particularly insofar as it is tied to community standards, is deemed "objective"

146. The modern classification of obscenity as not being speech at all appears to be based at least in part on a kind of judicial notice by the Supreme Court of harms perceived to flow from obscenity. *See* Roth v. United States, 354 U.S. 476, 484-85 (1957) (miniscule speech value of obscenity overcome by interest in preserving social order).

147. Technically, of course, the analysis differs. In the cases of fighting words and false or misleading advertising, the speech is beyond the first amendment if it fits the relevant definition. *Cf.* Posadas de Puerto Rico Assocs. v. Tourism Co., 106 S. Ct. 2968, 2976 (1986) ("[C]ommercial speech receives a limited form of First Amendment protection so long as it concerns a lawful activity and is not misleading or fraudulent."). On the other hand, the government cannot regulate casino advertising unless it shows a "substantial" state interest. *See Posadas,* 106 S. Ct. at 2977. In every case, however, the court is implicitly or explicitly weighing a perceived state interest against the perceived value of the speech involved. In any case, the requisite showing of harm does not appear to be difficult to satisfy. *See id.*

148. *See supra* notes 143-48 and accompanying text.

149. The Court, for example, did not see any viewpoint-discrimination in a ban on casino advertising. *See Posadas,* 106 S. Ct. at 2977-78.

150. This of course points out the connection between epistemology and power. *See generally* MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory,* 7 SIGNS: J. WOMEN IN CULTURE & SOC'Y 515, 535-36 (1981).

because the class of prohibited speech is defined by reference to an existing social consensus. Antipornography legislation is deemed "subjective" because the prohibited class of speech is defined by less widely accepted values favoring the protection of the relatively powerless. But this distinction between objectivity and subjectivity is hard to sustain. Indeed, one could imagine a world in which the harms produced by pornography were so widely acknowledged and so generally condemned that an antipornography ordinance would not be regarded as viewpoint-based at all.

All this suggests that the problem of identifying impermissible viewpoint regulation is far more complex than it at first appears. Regulation based on point of view is common in the law. The terms "viewpoint-based" and "viewpoint-neutral" often represent conclusions rather than analytical tools. In the easy cases, they serve as valuable simplifying devices. But in the hard cases, further analysis is needed. Specifically, three factors help identify impermissible viewpoint-based legislation.

The first factor is the connection between means and ends, a recurrent theme in constitutional law. If the harm invoked is minimal, or if it is implausible to think that the regulation will remedy the harm, it will be more likely that the regulation is in fact based on viewpoint.[151] The second factor is the nature of the process by which the message is communicated. Regulation of harms that derive from types of persuasion appealing to cognitive faculties is presumptively disfavored; more speech is the preferred remedy here. Regulation of antiwar speeches in the presence of soldiers is impermissible because any harm that results is derived from persuasion. More speech should be the solution. Finally, whether the speech is low- or high-value is also relevant.[152] The low-value issue, therefore, is not made irrelevant on the ground that antipornography legislation discriminates on the basis of viewpoint.[153] The viewpoint issue depends, in part, on whether the speech is low-value. Viewpoint-based regulation of high-value speech raises especially intense concerns about government motivation.

Under these criteria, antipornography legislation is defensible. First, the means-ends connection is quite close.[154] Such legislation could be tightly targeted to the cause of the harm: the production and dissemination of portrayals of sexual violence. Second, the "message" of por-

151. *See* J. ELY, *supra* note 126, at 106.

152. Whether the speech occupies a low position in first amendment hierarchy, however, should not be controlling. A statute forbidding commercial advertising unfavorable to Democrats could not be constitutional.

153. *See Hudnut,* 771 F.2d at 330-31; *see also* Stone, *supra* note 10, at 477.

154. *See supra* notes 22-79 and accompanying text.

nography is communicated indirectly and not through rational persuasion. The harm it produces cannot easily be countered by more speech because it bypasses the process of public consideration and debate that underlies the concept of the marketplace of ideas.[155] Finally, pornography falls in the general category of low-value speech. Under these circumstances, antipornography legislation should be regarded not as an effort to exclude a point of view, but instead as an effort to prevent harm. In this respect, the best analogy is to labor speech—with the important caveat that labor speech, which touches public affairs, is far closer to the heart of first amendment concern than is pornography.

The task, in short, is to sort out permissible and impermissible viewpoint discrimination, and to explain the circumstances in which discrimination arguably on the basis of viewpoint should be permitted. It is important in this respect that efforts to regulate pornography, as defined here, do not interfere with deliberative processes at all. By hypothesis, pornography operates at a subconscious level, providing a form of social conditioning that is not analogous to the ordinary operation of freedom of speech. What is distinctive about pornography is its noncognitive character; though it amounts to words and pictures, its purposes and effects are far from the purposes and effects that justify the special protection accorded to freedom of speech. In these circumstances, the response to the claim of viewpoint discrimination is that antipornography legislation does not pose any of the dangers that make discrimination on the basis of viewpoint so troublesome. The three factors identified above—means-ends connection, nature of the process by which the "message" is communicated, and low-value—point in this direction.

This three-factor analysis does have important limitations. Not all materials having a noncognitive appeal are unprotected; communication, whether or not political, is almost always a mixture of cognitive and noncognitive effects. Nor should viewpoint-based restrictions survive constitutional scrutiny in every case in which secondary harms can be identified. Finally, the harms invoked to defend antipornography legislation are not sufficient to justify regulation of political speech, broadly defined. It is the peculiar features of pornography that justify regulation: the low-value status of the speech, the powerful showing of harm, and the nature of the process by which the message is communicated. For this reason the case for antipornography legislation survives the weak version of the requirement of neutral principles.

155. It is thus incorrect to say, as have Professors Emerson and Dershowitz, that the appropriate remedy for the harms caused by pornography should rest solely on the power of "more speech." *See* Dershowitz, *supra* note 75, at 22; Emerson, *supra* note 45, at 142-43.

IV. SUBSTANTIVITY, FORMALITY, AND THE FREE SPEECH GUARANTEE

The argument thus far has been somewhat technical, and it operates within the framework of traditional first amendment doctrine. But proponents of antipornography legislation argue not only that such legislation will combat related harms, but also that restrictions on pornography will promote freedom of speech. At first glance, the argument is mysterious. Conventional first amendment doctrine is based on the assumption that restrictions on speech cannot promote freedom of expression. As we shall see, that assumption ultimately stems from a belief that serious threats to free expression come mostly or exclusively from the public sphere, and that one should always distinguish the public and private spheres for purposes of first amendment analysis.[156]

The argument that antipornography legislation can promote free speech touches on more fundamental issues than have been discussed here thus far. Essentially, the claim is that an attack on antipornography legislation represents legal formalism akin to Professor Wechsler's attack on *Brown v. Board of Education*.[157] In both cases an abstract notion of equality is decisive, though a substantive examination of issues of power and powerlessness would lead to a conclusion that the abstract notion is untenable. Wechsler's view that *Brown* produced a conflict between two coequal sets of associational preferences now appears quite odd. The argument ignores issues of substantive power that make the social meaning—the purposes and effects—of the associational preferences of blacks altogether different from that of the associational preferences of whites. Similarly, first amendment doctrine that refuses to examine issues of substantive power and substantive powerlessness might be thought to generate an indefensible system of expression.[158]

More concretely, the argument goes, the pornography industry is so well-financed, and has such power to condition men and women, that it has the effect of silencing the antipornography cause in particular and women in general. The silencing involved is not the kind of silencing associated with totalitarian regimes. Instead, women who would engage

156. This point suggests the close connection between the antipornography debate and recent discussions involving the problem of "state action." *See* L. TRIBE, CONSTITUTIONAL CHOICES 256-59 (1985).

157. *See* Wechsler, *supra* note 8, at 32-34.

158. *See* Dworkin, *Against the Male Flood: Censorship, Pornography and Equality*, 8 HARV. WOMEN'S L.J. 1, 13-17 (1985). The general attack on legal formalism described here resembles that set out in B. ACKERMAN, RECONSTRUCTING AMERICAN LAW 96-101, 110 (1984); Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296 (1982); and Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1776-78 (1976).

in "more speech" to counter pornography are denied credibility, trust, and the opportunity to be heard—the predicates of free expression. The notion that "when she says no, she means yes"—a common theme in pornography—thus affects the social reception of the feminist attack on pornography. Understood in this way, the case for antipornography legislation is a version of the arguments derived from the famous footnote in *United States v. Carolene Products*.[159] Legal intervention is required because of a maldistribution of private power that interferes with a well-functioning political marketplace.[160] Akin to the view that correction of market failures is a valid basis for governmental intervention,[161] the argument might be understood as a variation of traditional justifications for affirmative action.[162]

Thus stated, the argument has a long academic pedigree in writing about freedom of speech,[163] and it is reflected in recent legal commentary expressing skepticism about the free market in ideas[164]—though its application to the gender context is new.[165] The debate is not foreign to the courts. Related issues have reached the Supreme Court in several cases. In *Buckley v. Valeo*,[166] a limitation on campaign expenditures by political candidates was defended in part on the ground that the limitation would equalize access to the political process. In the view of the lower court, the restriction promoted rather than undermined freedom of speech.[167] Disparities in wealth enabled some to drown out the voices of others, and restrictions on the speech of the wealthy served the interest of disseminating information from diverse and antagonistic sources.[168] The Supreme Court, however, overturned the lower court decision and rejected this justification, stating that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[169]

159. 304 U.S. 144, 152 n.4 (1938).

160. *See* Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1516-18 (1983).

161. *See, e.g.*, Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 242 (1984).

162. For an exposition of those justifications, see Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 60 NW. U.L. REV. 363, 364-67 (1966).

163. *See, e.g.*, R. WOLFF, B. MOORE, JR. & H. MARCUSE, A CRITIQUE OF PURE TOLERANCE (1968).

164. *See, e.g.*, Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 967-81 (1978) (arguing that marketplace is biased in favor of groups having greater access and greater opportunity to speak); Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 22-24 (arguing against notion of a market in speech).

165. *See* MacKinnon, *supra* note 7, at 5-8.

166. 424 U.S. 1 (1976).

167. Buckley v. Valeo, 519 F.2d 821, 841 (D.C. Cir. 1975) (en banc).

168. *Id.* at 841.

169. *Buckley*, 424 U.S. at 49.

Equalization of political participation through restrictions of the speech of the wealthy was, in the Court's view, constitutionally unacceptable.

The reasoning in *Red Lion Broadcasting Company v. FCC*,[170] however, suggests that in some circumstances government regulation may be constitutionally acceptable, or perhaps even constitutionally compelled, in the interest of equalization and diversity. The Court held that the FCC's fairness doctrine, under which broadcasting stations are to present discussions of public issues and to assure fair coverage for each side,[171] requires that licensees make free reply time available.[172] Indeed, "the right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others."[173] For the Court, the fairness doctrine would "enhance rather than abridge the freedoms of speech and press,"[174] for free expression would not be served by "unlimited private censorship operating in a medium not open to all."[175] The Court continued:

> There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.[176]

Red Lion and *Buckley* are in considerable tension. *Red Lion* is based on an understanding that government regulation intended to promote equality may further first amendment interests—indeed, may even be required by them. *Buckley* treats such efforts as constitutionally proscribed. In this respect, *Buckley* may be associated with a conception of constitutional law that was most clearly developed in *Lochner v. New York*.[177] In *Lochner*, the Court understood the common law system, the "private" status quo, as natural and inviolate. Government readjustment of common law entitlements could be understood as a "taking" from *A* to give to *B*, a taking for which the public rather than *A* should pay.[178] This redistribution of entitlements did not fall within the range of government ends permissible under the police power.

The same understanding underlies *Buckley*. Disparities in power that come from the private sphere should be taken as natural and invio-

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170. 395 U.S. 367 (1969).

171. *See* 47 C.F.R. §§ 73.1910-1940 (1985).

172. *Red Lion*, 395 U.S. at 385-86, 391-92.

173. *Id.* at 387.

174. *Id.* at 375.

175. *Id.* at 392.

176. *Id.* at 389.

177. 198 U.S. 45 (1905). *See generally* Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. (1987) (forthcoming).

178. *See* Sunstein, *supra* note 130, at 1717.

late; government efforts to redress those disparities are unconstitutional because the end is itself illegitimate. In the post-*Lochner* period, however, the notion that reallocation of common law rights represents an impermissible end seems absurd. The common law system itself is regarded as a regulatory scheme with no prepolitical status. A decision to reallocate entitlements or to redistribute resources might thus be understood as a legitimate effort to promote the public good, falling comfortably within the police power.[179] This is the accepted interpretation of the due process clause; under the first amendment, a different understanding prevails.

Of course, both *Red Lion* and *Buckley* were shaped at least in part by the particular context and are of uncertain relevance to the debate surrounding antipornography regulation. *Red Lion*'s holding may have depended on the special qualities of the broadcast media, especially the perceived limited ability of the media to carry alternative sources of information. Though this perception may be faulty,[180] it can be argued that *Red Lion*'s reach is limited to the broadcast media.[181] In *Buckley,* meanwhile, the arguments on both sides were based on large part on the fact that it involved money. Thus one's view about *Buckley* may be limited to those government acts that regulate financial expenditure.[182]

In one sense the antipornography argument, carried to its logical extreme, goes further even than the lower court decision in *Buckley,* because antipornography legislation might be thought to establish a precedent for regulation whenever it is necessary to protect the powerless against the operation of a free expression regime. But a fundamental limitation is that antipornography legislation would apply only to low-

179. *See* Kennedy, *supra* note 158, at 1777; Sunstein, *supra* note 130, at 1718.

180. *See* Coase, *The Federal Communications Commission,* 2 J.L. & ECON. 1, 17-24 (1959) (arguing that free market allocation of available frequencies would increase both range and amount of information available); Spitzer, *Controlling the Content of Print and Broadcast,* 58 S. CAL. L. REV. 1351, 1394 (1985) ("[I]f there are many competing outlets the market will produce a substantial diversity of offerings").

181. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 245 (1974) (state statute guaranteeing political candidates right to reply to adverse editorials violated constitutional guarantees); Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media,* 75 MICH. L. REV. 1, 6-7 (1976) (interpreting *Red Lion* as establishing a special first amendment regime for the broadcast media). Furthermore, some have questioned the soundness of the decision in the first place. *See* Krattenmaker & Powe, *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream,* 1985 DUKE L.J. 151, 176 (contending that the fairness doctrine "violates every accepted principle of first amendment jurisprudence, represents ill-advised and inefficacious regulatory policy, and has no ascertainable content").

182. *See* Wright, *Politics and the Constitution: Is Money Speech?,* 85 YALE L.J. 1001, 1008-10 (1976) (arguing that limitations on campaign spending are manageable content-neutral controls on political abuses).

value speech.[183] This limited applicability, furthermore, distinguishes antipornography legislation from the high-speech regulation struck down in *Buckley*. One can accept arguments from substantive powerlessness in the antipornography context without accepting them generally.

But the foregoing discussion does not explain why the Court maintains a *Lochner*-like approach to the first amendment even though it has rejected the same approach with respect to the due process clause. Appeal to the text of the respective provisions does not suffice, for government action like that in *Buckley* could be regarded as promoting rather than abridging freedom of speech. Nor does the aggressiveness of the judicial role under *Lochner* explain the difference, for in *Buckley* and *Hudnut,* the Court also invalidated legislation enacted by the politically accountable branches.

The *Lochner*-like approach that underlies the Court's rejection of attempts to promote first amendment values through the regulation of powerful private actors instead appears to stem from an amalgam of three factors: (1) the view that disparities in private power do not significantly interfere with a well-functioning system of free expression; (2) the perception that if government is permitted to intervene on behalf of groups deemed powerless, lines will be impossible to draw, and government will be licensed to act for impermissible reasons; and (3) the belief that if some people—even if they have disproportionate power—are not permitted to speak, a genuine impairment of freedom results, even if that impairment is made in the interest of equality.

These concerns raise large and difficult issues that can be addressed only briefly and tentatively here. First, it is fanciful to suggest that disparities in private power do not undermine the operation of a system of free expression. When those disparities are large, the principal goals of free speech will be subverted unless the government intervenes with corrective measures.[184] The guarantee of free speech is designed largely to combat the evils of factional tyranny and self-interested representation, and to ensure that government outcomes are the product of some form of deliberation on the part of the citizenry.[185] If portions of the citizenry are powerless and for that reason unable to participate in deliberative

183. *See supra* notes 80-111 and accompanying text.

184. Market failure is a justification for government action in other contexts. *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 242 (1984) (condemnation of lots by state housing authority held to be proper and rational means to correct market failure). The notion—with a broad definition of "market failure"—has been applied in the first amendment area by some feminists. *See* A. DWORKIN, *supra* note 1, at 200-02. *But see* Ingber, *supra* note 164, at 24 (obscenity law incompatible with marketplace premise that alternative views are not in themselves harmful).

185. *See* Sunstein, *supra* note 99.

processes, free speech will not serve its goals.[186]

There is, however, a legitimate fear that judicial or legislative decisions about the relative power possessed by various groups are likely to be contingent and unreliable. Especially when freedom of expression is at stake, such contingency may be unacceptable. The best guarantor of freedom, according to this view, is a general rule forbidding the consideration of substantive power—not because this factor does not matter, and not because the disparities are not real, but because the cost of allowing the inquiry might be intolerable.[187] This general rule is based in part on the familiar fear of "slippery slopes." Judgments about who is powerful and who is not must refer to some baseline; they are highly manipulable—because of the lack of consensus or the absence of clearly defined standards on the issue—and they themselves can be affected by power. In light of these considerations, it may be best to avoid the inquiry altogether.

Finally, a decision to silence the views of the powerful may well be regarded as an infringement upon freedom that ought to be weighed in the constitutional balance, even if the goal of equality might be promoted by the infringement. To some degree this argument stems from concerns about the identity of the decisionmaker. But to some degree it depends as well on the understandable belief, underlying *Buckley* itself, that even comparatively well-off people have a right to complain if they are silenced.

These considerations suggest that as a general rule, inquiries into substantive powerlessness should not be used to defend restrictions on expression.[188] But the issue is a difficult one, and the tentative character of the conclusion should be emphasized. In *Buckley, Red Lion,* and here, however, the argument can be limited to a narrow context. As we have seen, pornography operates at a subconscious level; its influence is hard to match through "more speech."[189] Ideological counterargument cannot easily compete with the process by which pornography communicates its message. Moreover, pornography is far afield from the core of the first amendment. I conclude that examining substantive differences in power as a basis for regulation of pornography is appropriate in this

186. For discussion of an "ideal speech situation," in which distortions are removed from communication, see Habermas, *Towards a Theory of Communicative Competence,* 13 INQUIRY 360, 372 (1970) (arguing that "the idea of truth . . . can only be analyzed with regard to consensus achieved in unrestrained discourse"). *See also* Jacobs, *Patterns of Violence: A Feminist Perspective on the Regulation of Pornography,* 7 HARV. WOMEN'S L.J. 5, 45 (1984) (presenting feminist view regarding need for government suppression of pornography as means to further women's "right to speech").

187. *See* Ackerman, *supra* note 95, at 731-40.

188. *Cf. supra* note 164.

189. *See supra* notes 105-11 and accompanying text.

context, and helps the case for regulation, even if we ought to avoid such an examination as a general rule.[190]

In sum, first amendment doctrine reflects a strong version of the notion of neutral principles. With the important exception of *Red Lion,* issues of substantive power and powerlessness are avoided. Despite its *Lochner*-like quality, this general approach is sound. But it poses substantial disadvantages as well as benefits; and in some narrow contexts, its disadvantages are sufficiently great, and its benefits sufficiently doubtful, to justify a departure from the general principle. Regulation of pornography is such a context.

V. SLIPPERY SLOPES, VAGUENESS, AND OVERBREADTH

Some of the most powerful objections to antipornography legislation concern vagueness and overbreadth. Even if a definition of pornography identifies the specific class of materials with which one is most concerned, there remains the problem of overinclusion—regulating materials that have some social value and that are unlikely to produce the relevant harm. Three limiting strategies, therefore, might be helpful.

First, it might be desirable to limit antipornography legislation so that it applies to work "taken as a whole" or at the very least protects "isolated passages" in longer works.[191] Some materials that have pornographic components may on the whole generate little of the relevant harm. This might be the case, for example, where a motion picture contains pornographic scenes as part of a more general enterprise. In such circumstances the low-value argument is more difficult to make. Moreover, the resulting harm may be insufficient to justify regulation, and such materials are less likely to have a pernicious conditioning effect. They are thus less likely to produce sexual violence.

Second, as under current obscenity law, the regulation could be lim-

190. This conclusion, however, is hardly an endorsement of the broader position that the first amendment should be essentially irrelevant to the debate, because it protects those who "have" speech against those who "have not" the power of speech. *See* Dworkin, *supra* note 158, at 19 ("Protecting what they 'say' means protecting sexual exploitation.... Their rights of speech express their rights over us."); Note, *Patterns of Violence: A Feminist Perspective of the Regulation of Pornography,* 7 HARV. WOMEN'S L.J. 5, 45 (1984) ("Without a right of equal access to free speech, freedom of speech defined only in terms of the absence of government prohibitions is primarily beneficial to those who can afford it."). My purpose has been to show that pornography can be regulated without doing violence to the first amendment through a tight definition of those matters to be regulated.

191. The absence of such a provision in the Indianapolis antipornography ordinance was identified as a constitutional defect by the United States Court of Appeals for the Seventh Circuit. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 328 (7th Cir. 1985), *aff'd,* 106 S. Ct. 1172 (1986).

ited to material devoid of serious social value.[192] Matters having serious social value are, by definition, excluded from the category of low-value speech; their regulation is thus to be tested by more stringent standards which, for reasons suggested above, generally preclude regulation. There are costs as well as benefits associated with this limitation.[193] Without some such limitation, however, any argument for an antipornography legislation risks running afoul of competing analogies.

The costs arise in those cases in which pornography has been produced through coercive and abusive means. Distribution of such material may be regulable notwithstanding the value of the speech.[194] When regulation is based on harm, the social value of the material is ordinarily irrelevant; the speaker must excise the offending material, and is not given license to claim immunity on account of the general value of the communication.[195]

Third, it may be desirable to limit regulation to motion pictures and photography, and to exclude purely written materials. The evidence suggests that motion pictures and photography do the most to generate sexual violence; the data are more obscure with respect to written material.[196] Moreover, the harm to women participating in the production of pornography is, of course, limited to motion pictures and photography.

Strategies of this sort suggest that it should be possible to draft an antipornography ordinance that is sufficiently definite to withstand challenges of vagueness and overbreadth. But one final objection remains. That objection points to the familiar dangers posed by the "slippery slope"—dangers about which we are rightly concerned in the first amendment context.[197] The lines to which I have referred thus far are not so crisp as to alleviate all fear of misapplication. In light of these considerations, it might be suggested that the disadvantages of suppres-

192. *See* Miller v. California, 413 U.S. 15, 24 (1973) (requiring that state prohibition be limited to materials that "do not have serious literary, artistic, political, or scientific value"). It is not altogether clear, however, that the "taken as a whole" and the "serious social value" limitations are constitutionally required. In other areas—consider libel—the unprotected speech is not immunized by surrounding high-value speech.

193. *See* MacKinnou, *supra* note 7.

194. This point was recognized in *Hudnut,* 771 F.2d at 332.

195. *Cf.* New York Times v. United States, 403 U.S. 713, 736-37 (1971) (White, J., concurring) (publication permitted despite the illegality of the transmittal of information in Pentagou Papers to newspaper).

196. *See supra* notes 25-32 and accompanying text.

197. *See* Blasi, *The Pathological Perspective and the First Amendment,* 85 COLUM. L. REV. 449, 474-80 (1985) (favoring outcome-determinative, mechanical standards and discouraging rules that would be vulnerable duriug "pathological" times).

sion are simply too great to justify the acceptance of what has become a relatively elaborate and complex set of doctrinal distinctions.

Whether this argument, like others premised on slippery-slope concerns, is persuasive depends on two factors. The first is whether the problem at issue is a genuine one. If one believes that pornography is a legitimate source of concern, the possibility of misapplication will be relevant but not decisive. If one believes that pornography is not a serious social problem, or that the problem can be solved through "more speech," the dangers of misapplication support rejecting the argument entirely. The case for antipornography legislation thus depends on simultaneous beliefs that pornography produces significant harms and that those harms cannot be alleviated through public debate alone. I have offered arguments suggesting that both of these beliefs are true.[198]

The second factor is the possibility of holding the line. If one believes that pornography is genuinely indistinguishable from forms of speech that merit protection—either because of their value or because of their failure to produce harm—the argument premised on slippery-slope concerns will be quite powerful. But the rationale suggested here is designed to diminish the likelihood of misapplication. Pornography has special characteristics with respect both to its effects and to the harm it produces. With art and literature generally, attempts to regulate would be unlikely to be justifiable by reference either to low-value analysis or to harms, and both justifications are necessary under the approach set out here. The traditional lawyers' facility in identifying the difficult intermediate case, or the seemingly contrary hypothetical, sometimes operates as an obstacle to legislation that is on balance highly desirable. In the first amendment setting, fears about difficult intermediate cases and misapplication are generally salutary. But at least in the context of pornography, they have proved a barrier to legislation that would in all likelihood do more good than harm.

VI. CONCLUSION

Antipornography legislation tests constitutional doctrine in unexpected ways—the difference between low- and high-value speech, the relationship between sexual equality and the first amendment, the distinction between viewpoint-based and viewpoint-neutral regulation, and the commitment to neutrality in both weak and strong senses are all drawn into question by the recent proposals.

It is possible, however, to defend such legislation within the confines of conventional doctrine. Pornography falls within the general class of

198. *See supra* notes 48-79, 155 and accompanying text.

low-value expression, and the harm it produces is sufficient to justify regulation of that expression. One can reach this conclusion without compromising other well-accepted doctrines. The most troubling issue is that of viewpoint-neutrality, but other seemingly viewpoint-based restrictions are sometimes upheld when sufficient harm is present. Antipornography legislation is based on harm rather than viewpoint. Furthermore, to the extent that antipornography legislation might be deemed viewpoint-based, its status as such is less troubling in light of the peculiar character of the method by which the pornographic "message" is communicated.

I conclude that the skepticism about antipornography legislation is based on a simultaneous undervaluation of the harm pornography produces, a misapplication of conventional doctrines requiring viewpoint-neutrality, and—perhaps most important—an overvaluation of the dangers posed by generating a somewhat different category of regulable speech bound to have some definitional vagueness. At least as the notion is used here, antipornography legislation should produce important social benefits without posing significant threats to a well-functioning system of free expression.