EROS, CIVILIZATION, AND HARRY CLOR

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This essay is a critical appreciation of the scholarship of my friend and interlocutor Harry Clor. I've admired Professor Clor since I was a graduate student, when I read his marvelous essay on John Stuart Mill.[1] I recently wrote an extended attack on the conservative case for pornography regulation,[2] of which he is the most articulate defender. This essay extends that analysis. Here, focusing specifically on his work in which he defends morals legislation and specifically the censorship of pornography, I want to consider his most important claims.

Professor Clor makes the most thorough attempt I have seen to describe, on a commonsensical basis, the legitimate social interests that are served by morals laws in general and obscenity laws in particular.[3] The intuition that the prohibition of obscenity serves some important social interest is widely shared,[4] but is, for the most part, poorly articulated. This creates a problem for opponents of censorship, like me. We want to offer arguments that are responsive to the

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1. Harry M. Clor, *Mill and Millians on Liberty and Moral Character*, 47 REV. POL. 3 (1985).

2. Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635 (2005).

3. I admire ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY (1993), but find George less useful than Clor in this context. George's account has two difficulties. First, his book consists largely of a critique of liberal arguments rather than an affirmative defense of morals laws. Second, the affirmative defense that he does offer is closely tied to the highly controversial account of human flourishing and norms that has been developed by Germain Grisez and John Finnis. I engage their arguments, specifically in the context of their condemnation of homosexual conduct, in Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. 51 (1997), ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW 79–93 (2002), and Andrew Koppelman, *The Decline and Fall of the Case Against Same-Sex Marriage*, 2 U. OF ST. THOMAS L.J. 5, 16–25 (2004). George has specifically defended censorship regulation in ROBERT P. GEORGE, *Making Children Moral: Pornography, Parents, and the Public Interest, in* IN DEFENSE OF NATURAL LAW 184 (1999), but his argument there is much less thoroughly worked out than Clor's. Similarly brief treatments are Irving Kristol, *Pornography, Obscenity, and The Case for Censorship*, N.Y. TIMES, Mar. 28, 1971 (Magazine), at 24, and Walter Berns, *Beyond the (Garbage) Pale or Democracy, Censorship and the Arts*, in CENSORSHIP AND FREEDOM OF EXPRESSION: ESSAYS ON OBSCENITY AND THE LAW 49 (Harry M. Clor ed., 1971).

4. The effect of the concern about obscenity is not a negligible one. It played an important role in destroying the nomination of Abe Fortas as Chief Justice—and Fortas obviously would have been a very different Chief than Warren Burger. Obscenity was the most prominent basis for opposition to Fortas's nomination. His opponents organized a "Fortas Obscene Film Festival" in the Capitol press room, in which a striptease film that had been deemed constitutionally protected (with Fortas's vote) was shown from a projector operated by Senator Strom Thurmond. *See* EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS 538 (1992).

deepest concerns on the other side. In order for us to be able to do that, we need interlocutors who can present the case for censorship in its strongest form. No one has done more to fill this gap than Harry Clor. Even those who disagree with him are deeply in his debt. And he's not all wrong. I will argue that there are aspects of our present practice that are valuable, that badly need articulate defense, and that are much easier to understand and justify if we use the tools that Clor has given us.

WHY MORALS LAWS?

What are the interests that morals laws attempt to serve? Clor notes that they are of two kinds. Some concern civic virtue. Others aim at a certain ideal of human perfection.

Begin with the civic interests. In order for any society to function well, citizens must have basic civic virtues, such as truthfulness, obedience to law, refusal (if they are public officials) to take bribes, and so forth. More generally, they must regard their fellow citizens with a minimal level of respect. They must also have a measure of self-control; they cannot be slaves to their passions.[5]

The virtues just described are valuable as a means to social order, but they are also, Clor thinks, valuable in themselves, reflecting "notions of what is humanly respectable (or degrading) conduct."[6] It is hard to argue directly for these ideals simply because ultimate ends cannot be demonstrated deductively,[7]

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5. *See* HARRY M. CLOR, PUBLIC MORALITY AND LIBERAL SOCIETY: ESSAYS ON DECENCY, LAW, AND PORNOGRAPHY 10–12, 27–31, 45–86 (1996). I endorsed a variant of this argument for civic virtue before I ever read Clor's work on obscenity. On the basis of similar considerations, I have argued that a liberal state has a legitimate interest in reshaping culture to marginalize racism or sexism, for example. *See* ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY (1996).

6. CLOR, PUBLIC MORALITY, *supra* note 5, at 14.

7. *See id.* at 122–25. George observes that "intrinsic values, as ultimate reasons for action, cannot be deduced or inferred. We do not, for example, infer the intrinsic goodness of health from the fact, if it is a fact, that people everywhere seem to desire it . . . . We see the point of acting for the sake of health, in ourselves or in others, just for its own sake, without the benefit of any such inference." ROBERT P. GEORGE, *Recent Criticism of Natural Law Theory*, *in* IN DEFENSE OF NATURAL LAW, *supra* note 3, at 48. The intrinsic nature of these goods can only be defended dialectically:

> While they may be defended by dialectical arguments designed either to rebut arguments against them, or show up the defects or inadequacies of ethical theories that attempt to do without them, they cannot themselves be deduced or inferred or otherwise derived from more fundamental premises. One cannot argue one's way to them (the way one can, on the basis of more fundamental premises, argue one's way to a conclusion). The claim that they are self-evident does not imply that they are undeniable or, still less, that no one denies them. What it does imply is that the practical intellect may grasp them, and practical judgment can affirm them without the need for a derivation. (Which is not to say that they can be grasped without an understanding of the realities to which they refer).

Id. at 45.

but Clor's dialectical engagement with the opposing view is strong.[8]

It is on these two premises that Clor builds his case against pornography. Clor argues that citizens cannot respect one another while viewing each other "pornographically, or as mere objects and opportunities for self-gratification."[9] Pornography "dehumanizes in an area of great human importance and some sensitivity."[10] It "obliterates the distinction between human and subhuman sexuality."[11] Clor writes that "[t]he purpose [of pornography]—to arouse an elemental passion for other people's bodies independently of any affection or regard for a particular person—virtually guarantees that human beings will be represented as instruments."[12] For these reasons, Clor thinks that the law ought to make pornography "less plentiful, less obtrusive in the social environment, and more difficult to acquire than it would otherwise be."[13]

HOW READING CAN BE BAD FOR YOU

How does pornography cause moral harm? This is, I think, a subset of a larger question, which is how literature in general can cause moral harm. On this question, the implicit premises of Clor's position have been developed with great clarity by Wayne Booth.[14] In his book, *The Company We Keep*, Booth offers the following account of the moral effects of literature: as we read "a large part of our thought-stream is *taken over*, for at least for the duration of the telling, by the story we are taking in."[15] The reader is invited to view the world in the same way that the narrative does. Literature is good for us when it teaches us to view the world, and particularly human interaction, subtly and sensitively.

Some of the claims a narrative makes are not expected to refer to the real world. You aren't supposed to really think that there was once a greedy farmer who owned a goose that laid golden eggs.[16] But texts also incorporate what Booth calls "fixed norms," which are "beliefs on which the narrative depends for its effect but which also are by implication applicable in the 'real' world."[17] The moral of the story of the golden goose, that "overweening greed loses all," is something you're supposed to believe after you've finished reading the story.

Some literature incorporates morally bad fixed norms. Good literature invites us to perceive the world subtly and empathetically. It is, however, possible—indeed, it is common—for literature to depict the world crudely and

8. *See* CLOR, PUBLIC MORALITY, *supra* note 5, at 122–25; *discussed in* Koppelman, *Does Obscenity Cause Moral Harm?*, *supra* note 2, at 1641–43.

9. CLOR, PUBLIC MORALITY, *supra* note 5, at 68.

10. *Id.* at 192

11. *Id.* at 187.

12. *Id.* at 191–92.

13. *Id.* at 79.

14. WAYNE C. BOOTH, THE COMPANY WE KEEP: AN ETHICS OF FICTION (1988).

15. *Id.* at 141.

16. *Id.* at 142.

17. *Id.* at 142–43.

insensitively, and to spin out self-aggrandizing fantasies that invite self-centeredness and cruelty.

Though he never puts it in these terms, morally bad fixed norms are Clor's central concern. This becomes clear when he attempts to define obscenity. Obscene literature, he writes, is "that literature which invites and stimulates the reader to adopt the obscene posture toward human existence—to engage in the reduction of man's values, functions, and ends to the animal or subhuman level."[18] Or "that literature which presents, graphically and in detail, a degrading picture of human life and invites the reader or viewer, not to contemplate that picture, but to wallow in it."[19] Most recently, he has described pornographic productions as "characterized by graphic and detailed portrayal of sex acts without love or affection and with the result that the erotic life is reduced to its grosser physical or animal elements."[20] The core of Clor's interest is what Booth calls "the implied reader," the point of view that the text implicitly imputes to the reader.[21] As Clor puts it, "Everything depends on the way in which these matters are treated and the way in which the mind of the reader or viewer is solicited."[22]

It is doubtful that this concern about a text's fixed norms can adequately be captured in a definition that courts can administer. A test for morally bad pornography that captures Clor's concerns would be: *the text's fixed norms regard people as mere objects of sexual interest, whose feelings and desires do not matter.* It is unlikely that this test can be translated into a workable legal standard. Any attempt to do so is likely to produce pathologies of its own, of both overregulation and underregulation.[23]

Clor never, to my knowledge, endorses the present test for obscenity, laid

18. HARRY M. CLOR, OBSCENITY AND PUBLIC MORALITY: CENSORSHIP IN A LIBERAL SOCIETY 230 (1969).

19. *Id.* at 234. For similar definitions, see *id.* at 167, 225, and 243. Clor offers a long, formal definition, but it captures his core concerns less well, I think, because it does not focus on the character of the invitation to the reader. *See id.* at 245.

20. Harry M. Clor, *The Death of Public Morality?*, 45 AM. J. JURIS. 33, 36 (2000).

21. BOOTH, *supra* note 14, at 205.

22. CLOR, OBSCENITY, *supra* note 18, at 230. Clor offers a concept very much like Booth's implied reader. *Id.* at 232 n.*.

23. Koppelman, *Does Obscenity Cause Moral Harm?*, *supra* note 2, at 1656–60; Andrew Koppelman, *Reading Lolita at Guantanamo*, 53 DISSENT 64 (Spring, 2006). On the intractable difficulties of devising a definition of unprotected pornography that is not massively over-inclusive, *see* James Lindgren, *Defining Pornography*, 141 U. PA. L. REV. 1153 (1993). Clor acknowledges the difficulty of definition in CLOR, PUBLIC MORALITY, *supra* note 5, at 198, but he claims repeatedly that public debate and discussion were not much impeded by the massive censorship of the late nineteenth and early twentieth centuries. *Id.* at 102, 216; CLOR, OBSCENITY, *supra* note 18, at 114. For a very different assessment of that period, *see* HELEN LEFKOWITZ HOROWITZ, REREADING SEX: BATTLES OVER SEXUAL KNOWLEDGE AND SUPPRESSION IN NINETEENTH-CENTURY AMERICA (2002).

down in 1973 in *Miller v. California*.[24] And in this he is wise. The test is as follows:

> whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[25]

Miller focuses rather determinedly on irrelevancies. The problem is not particular images and subject matter. The *Miller* test addresses longstanding concerns with vagueness by declaring that any obscenity statute must specifically define the conduct that may not be depicted. It offers as examples "[p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," and "[p]atently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[26] Justice Brennan reportedly addressed the same concern with what his clerks called the "limp dick" standard: a work was obscene if and only if it showed an erect penis.[27] None of these standards have much to do with the kinds of real nastiness with which Clor is legitimately concerned.

SURPLUS REPRESSION

Just how dangerous is it for a society to tolerate pornography? What are the long-term consequences of such tolerance? How self-regulating can the culture be? Clor understands that these questions are "of the kind that don't lend themselves to conclusive, once-and-for-all resolutions having the character of proof."[28] But some answers are better than others.

Clor is right that minimal civic virtue requires some constraint of the sexual instincts. He shares this view with one of his deepest philosophical adversaries, Herbert Marcuse.[29] In *Eros and Civilization*,[30] Marcuse introduces the potentially very useful concept of "surplus-repression," repression that exceeds the needs of civilization.[31] If such repression exists, then relaxing it will not in fact jeopardize important civilizational interests. Clor must concede that the relaxation of some sexual repression in his lifetime has been salutary. Consider, for

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24. 413 U.S. 15 (1973).

25. *Id.* at 24. He comes close to endorsing *Miller* in CLOR, OBSCENITY, *supra* note 18, at 188.

26 413 U.S. at 25.

27 *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 229 (Avon 1981).

28. CLOR, PUBLIC MORALITY, *supra* note 5, at 7.

29. Marcuse is critiqued in *id.* at 92–93. Clor cites with approval the Freudian claim about the necessity of repression in OBSCENITY AND PUBLIC MORALITY, *supra* note 18, at 197.

30. HERBERT MARCUSE, EROS AND CIVILIZATION (2d ed. 1966).

31. *Id.* at 37.

instance, the decline of the taboo against interracial marriage.

Unhappily, Marcuse ties his definition to the silly idea that all unnecessary repression exists in order to sustain and enhance the privileged position of certain groups: controls on sexuality "over and above those indispensable for civilized human association" are those that are "exercised by a particular group or individual in order to sustain and enhance itself in a privileged position."[32] The useful idea I take from Marcuse is that, even if sexual repression cannot be done without, some sexual repression may be excessive. Marcuse provides little help in deciding where the line is to be drawn.[33] But draw it we must.

I offer the following as a test case, to show the complexities that are overlooked in Professor Clor's analysis.

An all-male club of sadomasochists had operated secretly in England for more than ten years when it was discovered and prosecuted.[34] The prosecution was based on a collection of videotapes that had come into the possession of police.[35] The tapes had been made for the benefit of club members who could not be present when the activities took place. They showed the defendants torturing willing victims by various acts of maltreatment of the genitalia, using such instruments as hot wax, sandpaper, fish hooks, and needles, and ritualistic beatings either with an assailant's bare hands or with instruments, including stinging nettles, spiked belts, and a cat-o'-nine-tails.[36] The defendants were convicted of assault and sentenced to prison.[37]

The House of Lords upheld the convictions, holding that consent was not a defense to assault.[38] On appeal from the House of Lords, the European Court of Human Rights rejected the claim that the convictions constituted a violation of the "right to respect for . . . private and family life" guaranteed by Article 8 of the European Convention on Human Rights.[39]

The case for regarding the club's activities as beyond the law's legitimate concern has been made pithily by William Eskridge:

> The SM club had been operating for a decade when Scotland Yard busted it, yet there was not a single person who claimed that he had

32. *Id.* at 36–37. This analysis represents a remarkably crude Marxism. Marx did not assign this degree of agency to the capitalists; indeed, his analysis of alienation insisted that capitalists produce consequences they do not intend, because they are ignorant of the causal laws that govern the economic system. Culture has a degree of autonomy that Marcuse doesn't grasp, and it can generate cruelties that have nothing to do with economic privilege. It wasn't the need to sustain privilege that induced the Aztecs to kill en masse their prisoners of war, whom a more economically rational ruling class would have enslaved.

33. This is emphasized in ALASDAIR MACINTYRE, HERBERT MARCUSE: AN EXPOSITION AND A POLEMIC 43–58 (Viking Press 1970).

34. R. v. Brown, [1992] Q.B. 491 (C.A.).

35. *Id.* at 495.

36. *Id.* at 495-96.

37. *Id.* at 492-93.

38. R. v. Brown, [1994] 1 A.C. 212 (H.L.).

39. Laskey, Jaggard & Brown v. United Kingdom, 29 Eur. Ct. H.R. 120, 130–34 (1997).

> been abused or mistreated by the participants. There was no evidence that any member of the SM club was sociopathic or had evidenced any violent tendencies outside the controlled context of the club; so far as can be determined, the members were model citizens, outlaws only after the House of Lords made them so. If you took a random sample of liaisons among twenty heterosexuals over the same period, you would not get such a good record.[40]

The countervailing claims were stated even more briefly by the House of Lords.[41] It relied primarily on the danger that the torture would produce permanent injury, but also cited purely moralistic considerations.[42] Lord Templeman thought it pertinent that "[t]he violence of sado-masochistic encounters involves the indulgence of cruelty by sadists and the degradation of victims."[43] He concluded, "Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised."[44] The European Court of Human Rights likewise relied primarily on the danger of injury, but noted that the law might also be sustained on the basis of the English government's claim that acts of torture "undermine the respect which human beings should confer upon each other."[45]

The themes here resemble Clor's. The dehumanizing character of sadistic sexuality is a persistent theme in Clor's writing.[46] He is particularly concerned about the tendency of some pornography to glorify sexual cruelty.[47] In this he is not alone. Didi Herman, for example, has argued that sadomasochistic practices are immoral because they "trivialize, exploit, and eroticize real pain and degradation;" sex of this kind "necessarily involves *and takes its pleasures in* the (consensual and ritualized) infliction of pain and humiliation within a setting that draws upon and mimics the non-consensual abuse (as in mistreatment) of real people—raped women, subjugated slaves, and tortured prisoners."[48]

The United States is more tolerant of sadomasochistic sex than England. It has been a very long time since there has been a prosecution for this type of crime.[49] On the other hand, such practices are typically well concealed. The

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40. WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 261 (1999).

41. R. v. Brown, [1994] 1 A.C. 212 (H.L.).

42. *Id.* at 235-37.

43. *Id.* at 236. The panel of lords was divided, three to two, in favor of the convictions, and each wrote a separate opinion. *Id.* at 229-83.

44. *Id.* at 237.

45. Laskey, Jaggard & Brown v. United Kingdom, 29 Eur. Ct. H.R. 120, 132 (1997).

46. *See* CLOR, PUBLIC MORALITY, *supra* note 5, at 3, 21, 23, 49, 83, 84, 109, 117, 141, 154, 190, 202, and 217.

47. *Id.*

48. Didi Herman, *Law and Morality Re-visited: The Politics of Regulating Sado-Masochistic Porn/Practice*, 15 STUD. L. POL. & SOC'Y 147, 152 (1995).

49. The most recently reported United States prosecution for consensual sadomasochistic assault is *People v. Samuels*, 58 Cal. Rptr. 439 (1st Dist. 1967). Consent was declared to be no

regime that now exists for SM subcultures in the United States resembles that which was sometimes (and sometimes still is) imposed on gays. Eskridge calls this "the mutually protective closet,"[50] in which deviants are allowed to pursue their sexual interests on condition that they hide them from the majority. For gays, the closet has been a terrible thing, not only because of the costs of concealment but because the whole institution rests on a false moral premise. It is not the case that homosexual conduct is per se inferior to heterosexual conduct.

In the case of SM, however, it is less clear that the closet is such a bad thing. Herman is reasonable to worry that, were the sexual mimicking of suffering to be uncloseted, the consequence would be to make genuine suffering "less real, more symbolic, and, ultimately repeatable (by all of us) by articulating it with *pleasure*."[51] The state cannot be indifferent to the thoughts of its citizenry. It matters whether citizens regard the infliction of pain as arousing.[52]

The trouble with this answer is that there's also something that the majority culture can learn from the SM club. SM subcultures have developed rituals of consent and control, which guarantee fairly reliably that the masochist is always the one in control of the interaction.[53] Meanwhile, in the mainstream culture of heterosexual sex, as many as one female in three is raped or sexually assaulted.[54] Perhaps it would be a good thing if the SM subculture became *less* closeted, and the majority began to internalize that group's norms.[55]

TOWARD A NEW SEXUAL ETHICS

I take it that the central task of modern sexual ethics is to figure out what is living and what is dead in the old rules about sex, and where the lines are now to be drawn.[56] Categories more refined than Clor's are necessary to that task.

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defense to sadomasochistic assault in *State v. Collier*, 372 N.W. 2d 303 (Iowa 1985), and *Commonwealth v. Appleby*, 402 N.E. 2d 1051 (Mass. 1980), but in both of those cases, the defendants' claims of consent were contrary to the testimony of their victims.

50. ESKRIDGE, *supra* note 40, at 84.

51. Herman, *supra* note 48, at 152.

52. The objections to sadomasochistic sexuality that I have stated here do not entail that one is wrong to act on those desires, if one has them. The satisfaction of desire is valuable in itself, and desire is not easily transformed. *See* SANDRA LEE BARTKY, FEMININITY AND DOMINATION 45–62 (1990).

53. *See* ESKRIDGE, *supra* note 40, at 260–61.

54. *See id.*

55. Clor observes: "For almost everyone everywhere, sexual activity engages the personality, involves one's sense of identity or an investment of the self. . . . And therefore one's relations and attitudes in the erotic realm are quite likely to have a larger bearing upon one's relations and attitudes in the other areas of life. It is not readily compartmentalized." CLOR, PUBLIC MORALITY, *supra* note 5, at 205. This can be conceded. Nonetheless, with consensual sadomasochism, one may wonder just what will spill over: preoccupation with pain, or attention to the genuineness of consent and solicitude for each person's quirks and kinks?

56. *See, e.g.*, DAN SAVAGE, SAVAGE LOVE: STRAIGHT ANSWERS FROM AMERICA'S MOST POPULAR SEX COLUMNIST (1998). Savage is one of my favorites among the many addressing this question. Savage delicately tries to work out an appropriate etiquette for group sex, bondage,

The idea of surplus repression is indispensable. The real question is whether any particular repression is necessary. What Marcuse articulates is the possibility of suspicion of received sexual norms, a suspicion that is in tension with the inarticulate reverence that Clor defends. That suspicion has brought forth valuable fruit, notably the gay rights movement and the movement to stop violence against women. More generally, we have seen that civic virtue is possible even without the traditional sexual restraints. Many have abandoned those restraints while remaining excellent citizens.[57] Gay people are one example. The English SM club is another. Perhaps Clor himself overlooks an element of civic virtue: the capacity to tolerate our fellow citizens' weird sexual proclivities, and not to regard those proclivities as more important than they really are.

This is not to say that censorship is never necessary. Cultural power silences certain viewpoints, and it is sometimes a good thing that that power is exercised. Consider the offenses against decency contained in racist literature. Racism used to be unremarkable in American culture. The 1915 film *Birth of a Nation*, which glorified the Ku Klux Klan, was the highest-grossing film of its time, and was shown in the White House to President Wilson.[58] There is no law that prevents anyone from making such a film today. But it couldn't be made, because the views it propounds are so repellent that it wouldn't make any money. This is a kind of censorship. But it's one that's accomplished without the state, and that doesn't need the state.[59]

There is, however, one area in which the state remains energetically involved in censorship, and is likely to remain so for a long time to come. The law can bar the sale of sexually oriented material to minors, even if it does not meet the *Miller* test for obscenity. The legal criteria for what children may or may not purchase are remarkably broad: even simple representations of nudity are typically forbidden.[60] The rule for merchants therefore is simple: they may not display or sell to minors anything that falls within the category of sexually oriented material. The boundaries of this category are, for the most part, fairly clear. This rule makes sense if it is understood that sexual explicitness is not constitutive of moral harm, but merely an indicator of possible danger. Child sexuality is malleable. It can be directed in morally bad ways. Censorship is thus a routine part of what parents do. Parents' task is facilitated if material

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fetishism, and other unusual tastes. The need to treat other people decently and with due consideration for their feelings is a dominant concern of his work, and his popularity suggests that in this he is not idiosyncratic.

57. Clor seems to doubt this in CLOR, PUBLIC MORALITY, *supra* note 5, at 76, 99.

58. ROY E. AITKEN, THE BIRTH OF A NATION STORY 51, 59 (1965); J. Hoberman, *Lighting, Camera, Action*, AM. PROSPECT, June 2005, at 65.

59. The state certainly played a role in promoting anti-racist norms, as Clor observes in CLOR, PUBLIC MORALITY, *supra* note 5, at 78. But it managed to do this without censoring racist speech.

60. *See, e.g.*, ARK. CODE ANN. § 5-68-501(2) (2006); FLA. STAT. § 847.001(6) (2001); N.Y. PENAL LAW § 235.20(6) (McKinney 1999); TEX. PENAL CODE ANN. § 43.24(2) (Vernon 2003); VA. CODE ANN. § 18.2-390(6) (2006).

objectionable to many of them cannot be given to their children without their permission.[61]

But the legal categories are necessarily crude, because parents' ideas about moral harm are necessarily dependent on their ideas about moral well-being. In a society as pluralistic as ours, different parents are going to have different ideas about morality. And each parent needs some room to create the cultural environment in which her child grows up. Even so firm a neutralist liberal as Bruce Ackerman supports strong parental control over primary education: children need cultural coherence and can confront only a certain amount of cultural diversity without being overwhelmed.[62] Parents' desire to shape the formation of their children is itself an important aspect of human liberty that deserves respect.[63] But all of this exists in order to facilitate a large family of different conceptions of moral well-being and moral harm.

Perhaps the most enduring aspect of modern pornography law is its restriction of access for minors. Since 1973, the Roper Center for Public Opinion Research has been asking the following question:

> Which of these statements comes closest to your feelings about pornography laws? 1. There should be laws against the distribution of pornography whatever the age. 2. There should be laws against the distribution of pornography to persons under 18. 3. There should be no laws forbidding the distribution of pornography.[64]

In 1973, about 40% of respondents said there should be laws against pornography regardless of age, and there hasn't been much movement in this number. When it comes to restricting pornography for those under eighteen, however, the number has risen from about 48% in 1973 to about 55% to 60% in the last few years. The number favoring no restriction on pornography has always been low: about 10% in 1973, about 4% today.[65]

So while Americans have never agreed that pornography should be suppressed for adults, a growing majority wants to keep it out of the hands of children. I would bet that the affirmative responses to statement two would be even higher if an age lower than eighteen were specified in the question.

I doubt that it is possible to explain just how pornography is supposed to be bad for children without relying on some idea of moral harm. So, while Clor may be wrong about censorship of pornography for adults, he offers the best justification we have yet seen for the censorship practices that we continue to maintain.

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61. Clor emphasizes this in CLOR, PUBLIC MORALITY, *supra* note 5, at 79

62. BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 141 (1980).

63. *See* WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY 93–109 (2002).

64. Roper Center, Univ. of Conn. General Social Survey. LEXIS, Public Opinion Location Library or Public Opinion Online Library, RPOLL file.

65. *Id. See, e.g.*, polls dated July 1973 and April 2007.