FREE SPEECH VALUES, HARDCORE PORNOGRAPHY AND THE FIRST AMENDMENT: A REPLY TO PROFESSOR KOPPELMAN

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INTRODUCTION

Is obscenity doctrine in principle consistent with the rest of the Supreme Court's free speech jurisprudence? To explore this issue I tried in my main contribution to this symposium to identify a value that was both a core free speech norm and likely to be implicated by the suppression of hardcore pornography.[1] The core value I identified[2] was the equal opportunity of each individual to participate in the speech by which we govern ourselves.[3] That norm, I concluded, would be violated if those interested in distributing hardcore pornography to change society's sexual mores were forbidden by law from doing so.[4] But I also found that forbidding people from distributing the same material with no intent to influence people's views but merely to provide sexual stimulation would not violate this or any other core free speech value.[5] I observed further that the *Miller* test[6] seems to provide First Amendment protection to political use of hardcore pornography.[7] Finally, I considered the possibility that, irrespective of any speaker's interests that might be implicated, suppression of hardcore pornography might violate the audience interest in democratic participation, but concluded that at least some morally based justifications for suppressing pornography do not offend this value.[8]

In his response to my article, Professor Andrew Koppelman insists that all

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1. James Weinstein, *Democracy, Sex, and the First Amendment*, 31 N.Y.U. REV. L. & SOC. CHANGE 865 (2007).

2. The reason I focused my inquiry on whether the suppression of hardcore pornography violates a core free speech norm rather than any free speech value is that discovering such a conflict with a core norm would demonstrate that obscenity doctrine was presumptively inconsistent with the Court's overall free speech jurisprudence. In contrast, because infringements of peripheral norms are often subject to some indeterminate balancing test, demonstrating that suppression of hardcore pornography infringes some lesser free speech value would be far less informative.

3. Weinstein, *supra* note 1, at 877–80.

4. *Id.* at 881–88.

5. *Id.* at 888–92.

6. *See* Miller v. California, 413 U.S. 15, 24 (1973) (setting forth a three-part test for determining whether sexually explicit material is legally obscene).

7. Weinstein, *supra* note 1, at 890–92.

8. *Id.* at 893–96.

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suppression of pornography, not just pornography used to shape views about sexual mores, infringes "values that lie at the heart of free speech."[9] In support of this view, he argues that the right to equal participation in the political process that I identified encompasses the right to distribute and use hardcore pornography merely for purposes of sexual stimulation.[10] More fundamentally, he disagrees that this democratic precept is the single core free speech norm.[11] He thus identifies two additional central free speech principles that he believes are violated by the suppression of hardcore pornography even when distributed merely for purposes of sexual stimulation: (1) that speech must not be regulated because of its persuasive effect and (2) governmental incompetence at regulating speech.[12]

Koppelman's critique of my argument usefully highlights several points in my analysis that need clarification, and for this I am enormously grateful. But unfortunately, his otherwise largely normative critique, though interesting in itself, fails to engage my primarily descriptive analysis as to whether obscenity doctrine is in line with the rest of the Court's free speech jurisprudence.[13] Koppelman is even less successful in advancing his own theory of what free speech norms are violated by the suppression of hardcore pornography. His claim that obscenity bans violate the principle that government may not target speech because of its persuasive effects fails for two related reasons: First, hardcore pornography distributed merely for purposes of sexual stimulation does not seek to "persuade" the consumer of anything. In addition, the commonly proffered "morals" justification for the suppression of this material does not violate the highly rationalistic version of the persuasion principle that Koppelman employs. Similarly, the argument from governmental incompetence is itself incompetent for Koppelman's purpose of identifying free values infringed by obscenity bans. The argument from incompetence is not itself a

9. Andrew Koppelman, *Free Speech and Pornography: A Response to James Weinstein*, 31 N.Y.U. REV. L. & SOC. CHANGE 899 (2007).

10. *Id.* at 902–03. Because he thinks the meaning of the term is "elusive," Koppelman eschews the adjective "hardcore" and uses the unmodified term "pornography" instead. *See* Koppelman, *supra* note 9, at 902 n.21. While the term "pornography" is equally uncertain, Koppelman is free to use any term he chooses. It should be clearly understood, however, that the material I am discussing is not all pornography, which in ordinary usage means any sexually explicit material, but only that subset of pornography that is the subject of the Court's obscenity doctrine, which the Court refers to as "'hard core' pornography." *See Miller*, 413 U.S. at 29 (1973). *See also* Weinstein, *supra* note 1, at 866 n.7.

11. Koppelman, *supra* note 9, at 904.

12. *Id.* at 905–06.

13. Relatedly, Koppelman and I have very different agendas in writing about obscenity doctrine: Before he even considered what free speech norms are implicated by the suppression of hardcore pornography, Koppelman knew he wanted to "bury" obscenity doctrine, and used this opportunity to find a theoretical explanation to support this conclusion. Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUMBIA L. REV. 1635, 1639 (2005). In contrast, I carry a brief neither for nor against obscenity doctrine, but am interested in this corner of the law primarily for what it can tell us about the overall structure and underlying values of free speech doctrine.

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free speech value but rather a pragmatic consideration that presumes various unstated free speech norms.

I.
KOPPELMAN'S CRITIQUE OF MY ANALYSIS

Although an analysis of something as richly normative as free speech doctrine cannot be purely descriptive,[14] the goal of my main article was to determine whether the Supreme Court's obscenity doctrine is consistent with the Court's overall free speech jurisprudence as it now stands, not as it should be. Crucial to any such investigation is explaining why some types of speech are rigorously protected under the Court's free speech jurisprudence, while other types of expression are readily regulable. The norm that in my view best explains these decisions is the equal opportunity of each individual to participate in the speech by which we govern ourselves,[15] expression that the Court and commentators have called "public discourse."[16] Building on an argument made

14. For one, to make sense out of most areas of constitutional law it is necessary to posit values explaining the pattern of decided cases. Moreover, if references to different values or clusters of values each offer a reasonable explanation for this pattern, then the "best" explanation arguably permits a choice between these values. *See, e.g.*, Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1233 (1987).

15. Contrary to Koppelman's implication, I do not claim that this norm is a "master free speech value" in the sense that it explains "all the decisions." *See* Koppelman, *supra* note 9, at 904. I thus discussed other values that inform free speech doctrine, such as the marketplace of ideas and the interest in information flow to facilitate both public and private decision making. Weinstein, *supra* note 1, at 875 n.46, 896 n.130. I should, however, have been more explicit, as I have been elsewhere, about this multiplicity of values. *See, e.g.*, James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons from* Nike v. Kasky, 54 CASE W. RES. L. REV. 1091, 1108–09 (2004) (describing secondary and peripheral values needed to fully explain free speech doctrine). I do, however, claim that the commitment to equal democratic participation is a "master free speech value" in the sense that it is the only *core* free speech norm. Weinstein, *supra* note 1, at 879–80. Not only does it explain the pattern of free speech decisions much better than any other norm, but it also safely grounds free speech as a fundamental individual right that can be infringed, if at all, only in truly extraordinary situations. *See id.* Accordingly, although I do not, as Koppelman erroneously charges, "want[] to confine [First Amendment] protection to 'public discourse,'" Koppelman, *supra* note 9, at 903, I do think that extremely rigorous protection should be confined to such expression.

16. *See, e.g.*, Cohen v. California, 403 U.S. 15, 22 (1971); Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 603, 629–34 (1990); Robert C. Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1276 (1995). *See also* Weinstein, *supra* note 1, at 878–79. Because this norm relies in part on a commitment to popular sovereignty—the precept that the people, not the government, are the ultimate governors of society—Koppelman is correct that this value "obviously has a collectivist dimension." Koppelman, *supra* note 9, at 901. But such a collectivist dimension does not detract from the individual nature of the right created by this value. The commitment to popular sovereignty, among other things, serves to mark the boundaries of public discourse by defining what is and what is not within people's collective decision-making authority. Far from diminishing the individual nature of the right, the setting of these boundaries is a necessary component of the individual right of free speech, for without such a demarcation, the right of *equal* participation would be satisfied so long as the government forbade anyone from speaking on a

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decades ago by philosopher Thomas Scanlon,[17] I maintained that the basic right of each individual to participate in the speech by which we govern ourselves would be violated if obscenity doctrine were construed to forbid speakers from distributing hardcore pornography in an attempt to change people's views on contemporary sexual mores.[18] I suggested, however, that obscenity doctrine could in principle be rendered consistent with the core underlying value of participatory democracy.[19] Such a reconciliation could be accomplished by deeming material distributed to persuade people about sexual mores as having "serious political value" and thus not eligible for suppression as obscenity under the *Miller* test.[20] Hardcore pornography distributed without such a purpose to engage in informal politics could, in contrast, be suppressed without violating this core value.

To the extent this analysis allows any room for the suppression of hardcore pornography, Koppelman objects to it on several grounds.[21] Significantly,

matter of public concern. Within the boundaries of this discourse, however, each person has an individual right of equal participation which cannot be abridged, even if a majority of the people in an exercise of popular sovereignty wish to do so. This is why the First Amendment can be violated not just by executive decrees or police action but also by laws enacted by the legislature that truly represent the "will of the people" or even by a popular referendum more directly expressing this sentiment. I am grateful to Koppelman for pointing out the need for me to clarify the relationship between the collectivist and individual-rights aspects of this theory.

17. T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519 (1979).

18. *See* Weinstein, *supra* note 1, at 881–88 (discussing Scanlon, *supra* note 17, at 544–47).

19. *Id.* Koppelman believes that the import of Scanlon's argument was that people involved in informal politics have a right to expose unwilling audiences to such material, and that Scanlon thought the issue of a more general right to distribute pornography for these purposes was, in Koppelman's words, "an easy question." Koppelman, *supra* note 9, at 910 n.63. Unlike Koppelman, I read Scanlon's point about unwilling audiences as one part of a larger argument about a more general right to distribute pornography and can find nothing in Scanlon's article to suggest that he thought that this latter concern was an easy question. In any event, such a general right is a necessary precondition to a right to distribute this material to an unwilling audience.

Koppelman also charges me with "minimizing" the "legitimate field of operation" of Scanlon's argument by limiting the right to distribute pornography to those who do so for political purposes. Koppelman, *supra* note 9, at 910. But while Scanlon concludes for pragmatic reasons that a line cannot be safely drawn between political and non-political uses of pornography and thus all uses of pornography should be protected, he apparently agrees with my contention that in principle First Amendment protection is not warranted where "the intent is merely that of the pornographer—who aims only to appeal to the prurient interest in sex . . . ." Scanlon, *supra* note 17, at 546.

20. *See* Miller v. California, 413 U.S. 15, 24 (1972).

21. Koppelman claims that the "most forthright predecessor" of my views on the First Amendment is a theory propounded (but later retracted) by Robert Bork in his *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). Koppelman, *supra* note 9, at 902. But even a cursory comparison reveals several basic differences between my views and Bork's. Most saliently, where Bork would extend First Amendment protection only to speech that is "explicitly political," Bork, *supra*, at 20, under my view, rigorous protection is available to a much wider range of "public discourse," even to hardcore pornography used as part of informal politics but with no explicit political content, *see* Weinstein, *supra* note 1, at 890–91. I also recognize that lesser protection may be appropriate for speech other than public discourse. *See supra* note 15. In addition, Bork grounds his theory in the instrumental concern for "the discovery and spread of

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however, he does not seriously quarrel with the enormous explanatory power I assign to the precept of democratic participation.[22] And it bears repeating that the explanatory power of this norm is key to my inquiry of whether obscenity doctrine is in conflict with the Court's overall free speech jurisprudence. Instead, Koppelman's main criticism is the normative objection that, even on a theory based in democratic participation, *all* speech should be protected because "[a]ll speech," including hardcore pornography, "constitutes the culture that shapes the citizens. Democracy requires that all citizens be free to participate in the evolution of that culture."[23] But even though on his view the precept of equal democratic participation would protect all uses of pornography, Koppelman would "start from a different place" and cash out the protection of speech, including all uses of hardcore pornography, from an "autonomy rationale" he attributes to Professor Frederick Schauer. This theory recognizes "'a right to receive information and, more importantly, a right to be free from

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political truth," Bork, *supra*, at 30, whereas my view is based firmly in the individual right of equal participation and the legitimacy that the practice confers on the entire legal system, *see* Weinstein, *supra* note 1, at 878. Thus, as I have frequently acknowledged and others have recognized, my views on free speech have been enormously influenced not by Robert Bork but by Robert Post. *See, e.g.*, Weinstein, *supra* note 1, at 873–74; Weinstein, *supra* note 15, at 1096, 1104, 1113, 1120; LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 140–41 (2005).

22. In passing, Koppelman correctly notes that I do not attempt to explain "the difference between art and pornography." Koppelman, *supra* note 9, at 903. I have suggested elsewhere that because art in general has often been an effective means of political persuasion, First Amendment protection has been extended across the board even to art that does not have a political purpose. *See* James Weinstein, HATE SPEECH, PORNOGRAPHY AND THE RADICAL ATTACK ON FREE SPEECH DOCTRINE 46 (1999). In addition, I noted that authoritarian governments have suppressed even certain types of nonideational art on the supposition that regardless of the artist's intent, the art in question will have a corrupting influence or might lead people to question authority. *Id.* at 15. I am not satisfied, however, that these two facts adequately explain the high level of First Amendment protection that nonideational art is assumed to have. Perhaps the rest of the explanation is to be found in the right of autonomy protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. But whatever the explanation, one unfortunate aspect of the Court's obscenity doctrine is that it assigns to the courts the non-judicial task of determining which expression has "serious" artistic value. *See Miller*, 413 U.S. at 24.

Koppelman also correctly objects that that my explanation of this core free speech value leaves unclear in certain situations what expression will be deemed highly protected public discourse and what speech is excluded from this realm. This is a legitimate complaint. But in arguing that an equal right of democratic participation is the value that *best* explains the pattern of decided cases, I do not claim that it is a *perfect* explanation, either descriptively or normatively.

23. Koppelman, *supra* note 9, at 903. Koppelman concedes that "there must be a boundary between public and non-public discourse, since not every speech act receives First Amendment protection." *Id.* at 904. He graciously acknowledges, however, that because he did not make this point clear in earlier drafts of his response I am "entitled to hammer repeatedly" on his statement that "'all speech' constitutes the culture that shapes the citizens." I would have in fact preferred not to "hammer" on a point about which we no longer disagree, but was informed that the production schedule would not permit such a substantial revision. I will therefore make a virtue of necessity and instead ask the reader to consider the discussion in the following two paragraphs about why the First Amendment does not and should not protect "all speech" to be aimed not at Professor Koppelman but at those who adhere to this commonly held but erroneous view. *See* Weinstein, *supra* note 1, at 879 & n.61. *See also* James Weinstein, *Institutional Review Boards and the Constitution*, 101 NW. U. L. REV. 493, 535–36 (2006).

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governmental intrusion into the ultimate process of individual choice.'"[24]

Whatever might be said as a normative matter about extending First Amendment protection to all speech,[25] this view simply cannot be squared with the actual pattern of decided cases, which is the focus of my inquiry. As I and others have demonstrated,[26] there is an enormous amount of communication—everything from contract formation to perjury, from placing a bet with a bookie to filing proxy statements—that could have an effect on our culture but which is manifestly not even within the coverage, let alone protection, of the First Amendment.[27] In a moment I will discuss Koppelman's attempt to protect hardcore pornography through an autonomy theory. But here I want to note that, descriptive problems aside, any attempt to extend the democracy-based justification for free speech that I described to cover all speech cannot withstand analysis. If the reason that the First Amendment rigorously protects the right of citizens to participate in the speech by which we govern ourselves is, as I

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24. Koppelman, *supra* note 9, at 905 (quoting FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 69 (1982)). Because I am "in other respects . . . heavily indebted" to Schauer, Koppelman thinks it "[s]trange[]" that I dismiss autonomy-based rationales without mentioning the one he attributes to Schauer. *Id.* at 905 n.39. But, in fact, not only do I mention a version of this autonomy-based rationale, I adopt it as a key part of my theory of the First Amendment. The autonomy rationale that Koppelman attributes to Schauer was actually developed by Thomas Scanlon, as Schauer acknowledges. SCHAUER, *supra*, at 68–69 (referring to Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972), and explaining that "Scanlon's theory, therefore, is best characterized . . . as a right to receive information and, more importantly, a right to be free from governmental intrusion into the ultimate process of individual choice."). And it is a narrower version of this autonomy-based rationale that I adopt as a constituent part of the norm that I believe lies at the core of the First Amendment. Weinstein, *supra* note 1, at 879. *See also* Weinstein, *supra* note 15, at 1103 (relying in part on Scanlon's autonomy rationale to formulate the precept that "if the state stops speech because it believes that the people may be persuaded to implement some unwise social policy, it insults us by denying our rational capacities."). For further discussion of this autonomy-based precept, see Weinstein, *supra* note 1, at 893–96. (Koppelman fails to mention, by the way, that, consistent with my narrower adaptation of his autonomy rationale, Scanlon later repudiated the very rationale Koppelman adopts (via Schauer) because upon reconsideration he found the principle "too strong and too sweeping to be plausible." Scanlon, *supra* note 17, at 532.)

25. From a normative perspective, I think that the Court has been correct in not extending First Amendment protection or even coverage to all human communications. One of the most valuable features of American free speech doctrine is that even a good reason is not sufficient to suppress core political speech. Thus even if it could be proved that antiwar protest encourages the enemy and dispirits our troops, or neo-Nazis marching in Skokie inflict psychic injury on survivors of concentration camps who live in that community, this is not a sufficient reason to suppress this speech. If, however, First Amendment protection or even coverage were extended to all communications, the Court would doubtless allow a great deal of this vast array of expression to be regulated, perhaps on some watered-down version of a compelling-state-interest test. My fear is that if what it means to have a First Amendment right is cheapened in this way, the protection of dissident political speech might be diluted.

26. *See* Weinstein, *supra* note 1, at 872 & n.31, 879–80 & n.65.

27. For a brief discussion of the distinction between First Amendment coverage and protection, see Weinstein, *supra* note 1, at 883 n.81 (quoting Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 905 n.33 (1979)).

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maintain, a concern for legitimacy,[28] then this protection should apply, in principle at least, only to speech by which one intends to participate, formally or informally, in collective decision making, not to all speech (or to many forms of conduct, for that matter) just because it has "the potential . . . to shape the culture as a whole."[29] It is for this reason that the First Amendment might well (and in my view should) protect those who want to distribute hardcore pornography to change society's sexual mores, but would not, as Koppelman urges, protect "cynics only out to make a buck."[30]

Defining the boundaries of the highly protected realm of public discourse is a difficult question, about which there can be reasonable disagreement. But if the commitment to participatory democracy is to have any explanatory power, this domain simply cannot be construed to include all speech.[31] Accordingly, though there might well be valid objections to my conclusion that the suppression of hardcore pornography distributed merely for purposes of sexual stimulation is in principle consistent with the commitment to democratic self-governance, the objection that this commitment must protect all speech is not one of them.[32]

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28. Weinstein, *supra* note 1, at 878.

29. Koppelman, *supra* note 9, at 903.

30. *Id.* at 910. However, the suppression of even unprotected hardcore pornography would violate the First Amendment if the government justified the ban on grounds that the First Amendment makes impermissible. As I explained, even in the absence of any constitutionally protected speaker's interest, the core right of democratic participation also includes an audience right that forbids government from suppressing speech because it might influence public opinion in a way of which the government disapproves. Weinstein, *supra* note 1, at 879. For this reason, irrespective of any speaker's interest, the suppression of hardcore pornography justified by an interest in controlling "the evolution of [our] culture," *see* Koppelman, *supra* note 9, at 903, would be highly problematic and, depending on exactly how this interest was articulated, might even be unconstitutional. *See* Weinstein, *supra* note 1 at 893–95. *See also infra* note 51.

31. Koppelman chides me for summarily dismissing other values often mentioned as core free speech norms, especially the marketplace-of-ideas rationale. My strategy, however, was to identify a core norm most likely to be imperiled by obscenity doctrine, not to comprehensively discuss the relationship between this doctrine and all free speech norms. Since the marketplace of ideas is a poor candidate to be imperiled by the suppression of hardcore pornography, it seemed sufficient to summarize briefly why it is not a core free speech value, leaving the details of this argument for another, more pertinent occasion.

In explaining why in my view the marketplace-of-ideas rationale is disqualified as a core free speech norm, I particularly emphasized that it justifies the protection of speech not as a true individual right but in terms of the good that it produces for society as a whole. Weinstein, *supra* note 1, at 875 n.46. Koppelman responds that the "collective benefits" of free speech are the "focus of most of the classic defenses of free speech" and that "[i]ndividual-centered theories of free speech are an innovation of the late twentieth century." Koppelman, *supra* note 9, at 901. This is an interesting observation and one which may explain why free speech was not adequately protected in this country until the late twentieth century. But this point has little relevance to my inquiry as to whether obscenity doctrine is consistent with *current* doctrine.

32. It is of course conceivable that obscenity doctrine is inconsistent with the Court's overall free speech jurisprudence because the suppression of hardcore pornography conflicts with some peripheral value (though for the reason suggested in note 2, *supra*, any such claim would be difficult to assess). I suggested that the non-core value most likely to be imperiled by the suppression of hardcore pornography is the right to receive information needed for private decision

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II.
KOPPELMAN'S ATTEMPT TO IDENTIFY FREE SPEECH VALUES INFRINGED BY THE SUPPRESSION OF HARDCORE PORNOGRAPHY

Koppelman identifies two free speech norms that he believes are infringed by the suppression of hardcore pornography even when distributed with no purpose other than to provide consumers with sexual stimulation.[33] The first is the principle that "'government may not justify a measure restricting speech by invoking harmful consequences that are caused by the persuasiveness of the speech.'"[34] The second is the argument from "government incompetence," specifically that "'governments are particularly bad at censorship, that they are less capable of regulating speech than they are of regulating other forms of conduct.'"[35] Neither of these alleged values, however, supports the view that the suppression of hardcore pornography distributed merely for purposes of sexual stimulation is inconsistent with the Court's overall free speech jurisprudence.

A. The Persuasion Principle

In arguing that the suppression of even nonpolitical uses of hardcore pornography violates an autonomy-based norm, Koppelman, though mentioning an argument he attributes to Schauer,[36] places particular emphasis on an argument developed by Professor David Strauss. In Strauss's view, suppressing

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making, specifically useful information about sex. *See* Weinstein, *supra* note 1, at 896 n.130. I concluded, however, that given the ready availability of almost every species of hardcore pornography to anyone with access to the Internet, together with the constitutional right to possess (or in that context, to download) this material, it is unlikely that the existence of obscenity doctrine imperils this value. I am at a loss to understand, as Koppelman asserts, how this observation "lets all the air out of [my] argument." Koppelman, *supra* note 9, at 910 n.62. In measuring the effect on an instrumental concern such as the flow of information needed for private decision making, a court must make an empirical judgment about the degree of burden the restriction places on the norm, an analysis that would properly seem to include an assessment of how effective the law is in prohibiting the activity in question. In contrast, an attractive feature of the core norm of democratic participation that I have described is that questions as to whether it has been violated can be decided largely as a matter of principle, without resort to such messy and largely indeterminate empirical assessments (a.k.a., guesses).

33. Koppelman, *supra* note 9, at 905–06. Although Koppelman believes that it is not possible to find a "master free speech value," he nonetheless apparently believes it is possible to identify core free speech values, since he contends that suppressing pornography infringes "values that lie at the heart of free speech." *Id.* at 899. Although he mentions only two such values, he suggest that there may be several more. *Id.* Any theory, however, that posits a multiplicity of core free speech values (or numerous values of any sort not hierarchically arranged) will have limited explanatory power: just as an artist can mix any color from only three primary hues, a judge or commentator free to pick and choose among several disparate core free speech values can argue that virtually any instance of speech is protected from government regulation. While this result is consistent with the view that all speech is protected, it is deeply inconsistent with the decided cases. *See supra* text accompanying notes 25–27.

34. Koppelman, *supra* note 9, at 905 (quoting David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 334 (1991)).

35. *Id.* at 906 (quoting SCHAUER, *supra* note 24, at 81).

36. *See supra* note 24.

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speech because it will persuade those who hear it to do something of which the government disapproves is "similar in kind (although not in degree) to lies that are told for the purpose of influencing behavior," for both activities "involve a denial of autonomy in the sense that they interfere with a person's control over her reasoning processes."[37] I agree with Strauss and Koppelman that some version of a principle that government may not regulate speech because of its persuasive power lies at the heart of the American free speech principle. Indeed, as I have explained, a key component of the fundamental commitment to equal political participation forbids the government from suppressing speech on the ground the expression will persuade the audience to form some view on a social policy matter that the government thinks is unwise or even dangerous.[38] Strauss, however, explicitly rejects resting his principle "on a conception of the proper relationship between the government and the citizen" and instead links his theory to "the wrongness of lying."[39] Cut loose from any political mooring, Strauss's version of the persuasion principle is thus broader than mine in crucial respects and is for that reason not nearly as powerful an explanation of the decided cases.

For one, Strauss's theory would protect the advertisement of potentially harmful commercial products or activities.[40] The Court, however, has upheld bans on cigarette advertising and gambling justified by the government's interest in preventing this speech from persuading people to engage in these potentially harmful activities.[41] While recent developments cast considerable doubt on the continued validity of these cases,[42] they have never been overruled. It thus remains uncertain whether it is in principle unconstitutional for government to ban speech because it might persuade people to purchase a potentially harmful commercial product or service. In contrast, there can be no doubt that government may not prohibit speech because of its power to influence citizens to support some social policy decision that the government thinks is unwise or even disastrous, such as prematurely

37. Strauss, *supra* note 34, at 354.

38. Weinstein, *supra* note 1, at 879.

39. Strauss, *supra* note 34, at 356 n.62.

40. *Id.* at 345.

41. *See* Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 342–44 (1986) (upholding a Puerto Rico law prohibiting advertising of gambling casinos aimed at inhabitants of Puerto Rico because Puerto Rico had a legitimate interest in preventing its citizens from being encouraged to gamble); Nat'l Ass'n of Broadcasters v. Kleindienst, 405 U.S. 1000 (1972), *aff'g mem.* Capital Broad. Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971) (upholding federal ban on cigarette advertising on radio and television). Other commercial speech cases, although invalidating bans, suggest that suppressing advertising because of its persuasive power is not in principle impermissible but would be upheld if narrowly tailored and sufficiently related to a substantial state interest. *See, e.g.*, Cent. Hudson Gas & Elec. Corp, v. Public Serv. Comm'n, 447 U.S. 557, 564 (1980).

42. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 502–03 (1996) (plurality opinion of Stevens, J., joined in relevant part by Kennedy and Ginsburg, JJ.) (referring to "the offensive assumption that the public will respond 'irrationally' to the truth" and striking down a ban on price advertising for alcoholic beverages).

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withdrawing our troops from Iraq.[43] In addition, because Strauss's theory is not based in a conception of the proper relation between the state and the individual, it cannot easily explain, as Strauss concedes, free speech doctrine's "focus[] on the dangers that government action creates, without considering whether private action might present comparable dangers or whether the government might help overcome the dangers created by private action."[44] I need not, however, belabor the problems with Strauss's theory as a description of current doctrine. For even if this principle accurately identified a core free speech norm, it is far from clear that the suppression of hardcore pornography would violate this principle, as Strauss himself recognizes.[45]

First, Strauss notes that there are some justifications for the regulation of obscenity, such as its inherent offensiveness, that do not even implicate the persuasion principle.[46] He acknowledges, however, that other justifications, such as a concern that obscenity will cause the commission of crimes and the "more general concern with the moral tone of society and the way in which society views sex," come "close" to infringing the persuasion principle.[47] But, unlike Koppelman, Strauss does not conclude that even these rationales actually violate the persuasion principle. In explicating his principle, Strauss emphasizes that the term "'persuasion' denotes a rational process" and therefore "not every kind of inducement through speech should be considered persuasion."[48] Strauss therefore suggests that "[p]erhaps the best way to understand the prohibition against obscenity . . . is that it rests on the premise that sexually oriented speech is peculiarly likely to make a manipulative, nonrational appeal that cannot be

43. Thus even if there is some larger principle that generally forbids government from suppressing speech because of its persuasive power, which there seems to be, it is not nearly as strong as the narrower, virtually absolute prohibition against suppressing speech because it will lead people to form views on public policy matters that the government does not want them to hold.

44. Strauss, *supra* note 34, at 361.

45. *Id.* at 345 n.35.

46. *Id.* This justification is of limited relevance to our inquiry, however, because it would not explain why the state has an interest in prohibiting hardcore pornography from being distributed to viewers who do not find this material offensive. A similar justification but one with greater explanatory power is that becoming sexually stimulated by viewing pictures of other people having sex is inherently immoral, a rationale for suppressing hardcore pornography discussed in my main article. *See* Weinstein, *supra* note 1, at 895. Like the offensiveness rationale, this justification focuses on the sexual stimulation provided by hardcore pornography, not on any change in attitude that it may cause, and thus falls outside of the persuasion principle, even one as all-encompassing as Strauss's. But unlike offensiveness, this moralistic rationale provides a reason for keeping the material from being distributed to even willing audiences. Koppelman protests that this interest "is precisely an interest in preventing citizens from thinking certain thoughts, specifically those thoughts that turn them on." Koppelman, *supra* note 9, at 909. But while such "[t]hought control," *id.*, might be obnoxious to a core precept of liberalism, it plainly does not implicate, let alone violate, the persuasion principle articulated by Strauss.

47. Strauss, *supra* note 34, at 345 n.35.

48. *Id.* at 334.

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resisted by answering speech."[49] Indeed, he notes that "the very difficulty of articulating the message involved in obscenity supports the notion that the message is being conveyed in such a way that reason cannot address it."[50] Strauss thus concludes that "[i]f the basis for the regulation of obscenity is that sexually oriented speech is peculiarly likely to produce a nonrational response then the regulation of obscenity would fit within the exception to the persuasion principal for speech that precipitates an ill-considered reaction."[51]

If there is one salient feature of Koppelman's critique of obscenity doctrine, it is his eloquent (and to me persuasive) protest that it is wrong to exclude expression from First Amendment protection just because it appeals to the passions rather than to reason. It is quite curious, then, that Koppelman should have selected a theory based in rationality to support his view that obscenity is protected by the First Amendment. Indeed, the core democratic value that I believe underlies the First Amendment offers greater protection to hardcore pornography than does Strauss's persuasion principle: to the extent that hardcore pornography is seen to change people's attitudes toward sexual mores through a "manipulative, nonrational appeal," Strauss's highly rationalistic persuasion principle offers no protection even to pornography distributed as an attempt to engage in informal politics.[52] In contrast, since the theory of democratic participation I propose is based on legitimacy and not rationality, such allegedly "manipulative, nonrational appeal" does not disqualify speech from rigorous First Amendment protection.[53]

B. The Argument from Governmental Incompetence

Koppelman next invokes Frederick Schauer's argument from governmental incompetence as a reason for protecting speech, including pornography distributed merely to provide sexual stimulation to the audience.[54] As Koppelman notes, this argument does not depend on there being anything especially valuable about speech but rather is based on our experience that, in Schauer's words, "governments are particularly bad at censorship, that they are less capable of regulating speech than they are of regulating other forms of

49. *Id.* at 346 n.35.

50. *Id.*

51. *Id.* I came to a similar conclusion about the legitimacy of the justifications for the suppression of pornography that Strauss thought came "close" to violating his version of the persuasion principle. Thus I referred to similar justifications as "troublesome" but concluded that if articulated in such a way as to make clear the concern was with controlling private behavior and not public opinion, they probably would not violate my narrower version of the persuasion principle. *See* Weinstein, *supra* note 1, at 894.

52. *See* Strauss, *supra* note 34, at 346 n.35. In this regard it should also be noted that Strauss's principle focuses exclusively on audience interests and thus, unlike the commitment to democratic participation I describe, provides no support for a speaker's right as such.

53. *See* Weinstein, *supra* note 1, at 878, 885–88.

54. Koppelman, *supra* note 9, at 906.

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conduct."[55] But as Stanley Ingber has observed: "Any argument for free speech based on governmental incompetence . . . ultimately must assume some positive theory; governmental actions can only be feared improper if we have some sense, even if only intuitive, of what actions would be proper given the functions we expect free speech to serve."[56] Thus when Schauer claims that government is particularly "bad" at regulating speech, or that such regulations have resulted in "fairly plain errors" or "mistakes,"[57] he must be making these judgments with reference to some unarticulated value or values. Like other pragmatic considerations, the argument from government incompetence can provide valuable guidance for determining how best to promote constitutional values in real-world practice, but only if we know what norms these instrumental considerations are meant to serve. Neither Schauer nor Koppelman, however, explains the criteria by which we are to evaluate whether government really is bad at regulating speech.[58]

Another flaw with this argument is that it is implausible that government is worse at regulating every species of communication than it is at regulating other forms of activity. Government, it is true, may be particularly bad at regulating certain types of speech—political expression, for example. It would be difficult to maintain, however, that government is any worse at regulating what information economic competitors may share, or the content of proxy statements, or what can be said to a jury in a criminal case, than it is at providing public education or deciding when to go war or protecting the environment. Still, with respect to Koppelman's specific objective of arguing for the protection of pornography, the argument from government incompetence has bite, for there is no gainsaying Schauer's more particular charge that among the governmental mistakes of the past have been "fairly plain errors," including "the banning of numerous admittedly great works of art because someone thought them obscene . . . ."[59] But this important observation can stand on its own without the implausible claim that government is particularly incompetent to regulate all communicative activity.

55. *Id.* (quoting SCHAUER, *supra* note 24, at 81).

56. Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 20 n.100 (1990).

57. SCHAUER, *supra* note 24, at 81.

58. Schauer, however, does give us a clue as to the identity of these unstated values when he claims that one reason that government is particularly bad at regulating speech is "the bias or self-interest of those entrusted with the task of regulating speech." *Id.* He correctly observes that there is a particular problem when "the regulation of speech on grounds of interference with government, such as by treason, sedition and so on, is entrusted to those very people who, as governmental officials, have the most to lose from arguments against their authority." *Id.* This argument would implicitly seem to contain either the assumption that people have a right to criticize their government or a version of the marketplace-of-ideas rationale dedicated to the pursuit of political truth. In any event, this consideration would apply not to all speech but only to "arguments against [government officials'] authority," which would not include the distribution of hardcore pornography merely to provide sexual stimulation to the consumer. *Id.*

59. *Id.*

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The pertinent inquiry, then, is what history can tell us about current obscenity doctrine, which was developed relatively recently with these "fairly plain errors" of the past in mind and which expressly seeks to protect all "serious" artistic expression.[60] This legacy of the suppression of great art may suggest that, despite its various safeguards, obscenity doctrine may in practice still allow for the suppression of art, either directly or, what is more likely, as an unintended side effect of criminal prosecutions of hardcore material with no artistic merit that "chill" legitimate artists from producing sexually explicit works. However, as important as this pragmatic consideration may be, it is distinct from my inquiry as to whether obscenity doctrine is *in principle* consistent with the Court's overall free speech jurisprudence.[61]

III.
KOPPELMAN'S CRITIQUE OF SCHAUER'S COMPARISON OF HARDCORE PORNOGRAPHY TO VIEWING LIVE SEX

As part of my exploration of what, if any, free speech values are impaired by the suppression of hardcore pornography, I considered in detail Frederick Schauer's comparison of the use of hardcore pornography to someone's hiring two prostitutes to engage in sex in front of him merely for his sexual gratification. With respect to the ordinary use of pornography—that is, material used purely for sexual stimulation and with no intent either by the distributor or viewer to engage in informal politics—I concluded that the comparison was apt.[62] Accordingly, if viewing prostitutes having sex is not protected by the First Amendment, neither would be the distribution of hardcore pornography purely for purposes of sexual arousal.[63] Koppelman objects that some of the work of this comparison is being done by the presumption that the state can legitimately

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

61. I did, however, note Justice Brennan's concern that "[t]he essence of our problem in the obscenity area is that we have been unable to provide 'sensitive tools' to separate obscenity from other sexually oriented but constitutionally protected speech, so that efforts to suppress the former do not spill over into the suppression of the latter," *see* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 79–80 (1973) (Brennan, J., dissenting), and expressed the view that this pragmatic concern might be a sufficient reason for abandoning obscenity doctrine. Weinstein, *supra* note 1, at 893 n.120. I also noted that because of the practical difficulty of distinguishing between political and non-political uses of hardcore pornography, the obscenity exception to First Amendment protection might have to be abandoned if use of hardcore pornography as a means of informal politics ever became commonplace. *Id.* at 891–92. With respect to this latter pragmatic concern, Koppelman states that I "come[] close to concluding that these difficulties make it impossible to craft an administrable doctrine" but then "shrink[] from that conclusion without explanation." Koppelman, *supra* note 9, at 909–10. What Koppelman calls "shrink[ing]" from conclusions, I call not jumping to them. While Koppelman and I might doubt that the Court can fashion administrable doctrine to distinguish between political and non-political use of hardcore pornography, until the Court is actually faced with the problem, neither he nor I can be sure that it would not be able find some workable solution.

62. Weinstein, *supra* note 1, at 868–88.

63. *See id.* at 888.

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forbid prostitution, a prohibition that does not "prevent citizens from experiencing certain thought processes."[64] I raised a similar concern but concluded that the production and commercial distribution of hardcore pornography arguably involves something akin to the act of prostitution hypothesized by Schauer.[65] I do, however, agree with Koppelman that a better comparison is, as he suggests, between pornography and a live sex show. But as I explained,[66] it is clear beyond cavil that under current doctrine a live sex show featuring sexual activity sufficiently graphic to be obscene under *Miller*[67] if captured on film would be entitled to no First Amendment protection. Indeed, if we are to be guided by the case that found nude dancing to be only within the "outer perimeters of the First Amendment, though . . . only marginally so,"[68] a live sex show featuring not just nudity but actual sexual intercourse would not qualify even for First Amendment coverage, let alone protection.

Koppelman does not seriously quarrel with my assertion that as a descriptive matter a live sex show such as this would be entitled to no First Amendment protection. Rather, he suggests that it "should" be assimilated to "other kinds of live performance with an erotic element, such as nude dancing or serious plays that incorporate nudity," and then criticizes the Supreme Court for not protecting nude dancing.[69] But even if the Court was wrong in not protecting nude dancing and would, as it has promised, protect nudity in a "serious" play such as *Equus*,[70] a live performance that contains nudity is a far cry from a live sex show featuring sexual intercourse or other "ultimate sexual acts."[71]

Next, Koppelman argues that even if such a live sex show could be banned, "the nonprotection of a film of such a performance does not follow" because "[a]n actual act is constitutionally distinct from the image of an act."[72] I agree with this statement so far as it goes. But in order to assess whether viewing an image of sexual intercourse should be treated differently for First Amendment

64. Koppelman, *supra* note 9, at 908.

65. Weinstein, *supra* note 1, at 870 n.21.

66. *Id.* at 870 n.19.

67. *See* Miller v. California, 413 U.S. 15 (1973).

68. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565–66 (1991) (plurality opinion). *See also* City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (plurality opinion in pertinent part) (referring to nude dancing as "only within the outer ambit" of the First Amendment).

69. Koppelman, *supra* note 9, at 908.

70. *See Barnes*, 501 U.S. at 585 n.2 (Souter, J., concurring in judgment); *id.* at 587–88 (White, J., joined by Marshall, Blackmun, & Stevens, JJ., dissenting). *See also City of Erie,* 529 U.S. at 296–98 (plurality opinion) (upholding a ban on nude dancing under a "secondary effects" rationale, which would presumably not apply to depiction of nudity in a "serious" play).

71. *See Miller*, 413 U.S. at 25. It is possible, though doubtful, that the Court might extend First Amendment protection to an act of sexual intercourse incorporated as part of a "serious" stage play in the same way *Equus* incorporates nudity. But the live sex show we are considering here is the analogue of the hardcore pornographic film, in which such sexual intercourse and other "ultimate sexual acts" are the primary content.

72. Koppelman, *supra* note 9, at 908.

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purposes than viewing this same activity live, we have to ask why a film of an activity will often have First Amendment protection even though the activity recorded by the film does not. The answer, I suggested, was that in order to effectuate democratic self-governance, any use of a medium of mass communication, such as film or the Internet, will be given presumptive First Amendment protection. But I also explained that such protection is rebuttable if analysis reveals that the particular use is not part of the "democratic dialogue,"[73] which in my view is the case with hardcore pornography not used as part of informal politics.

Tellingly, the First Amendment value that Koppelman thinks the government violates by banning a live sex show—"prevent[ing] citizens from experiencing certain thought processes"[74]—is precisely the same value he asserts is implicated by the suppression of a film depicting such activity—"preventing citizens from thinking certain thoughts, specifically those thoughts that turn them on."[75] Thus, far from refuting Schauer's argument, Koppelman's analysis confirms Schauer's claim that viewing a hardcore pornographic film merely for the sexual stimulation it delivers has no greater First Amendment value than watching the same activity live.

CONCLUSION

Difficult free speech cases typically involve a clash between an important free speech value and a pressing governmental interest. Sometimes, however, a hard case arises for precisely the opposite reason: both the free speech value and the government's interest are obscure and insubstantial. Such a murky, low-stakes conflict is what seems to be at issue in the persistent controversy over obscenity doctrine. In a previous article, Professor Koppelman persuasively showed that the various justifications for suppressing hardcore pornography were thin and problematic.[76] In responding to my article, he unwittingly demonstrates that the same is true for the free speech interest in distributing or viewing hardcore pornography for purposes of sexual arousal. If the best argument that a talented constitutional theorist such as Andrew Koppelman can come up with is the untenable claim that the suppression of hardcore pornography violates the persuasion principle, it is likely that, in principle at least, no important free speech norm is infringed by obscenity bans. Rather, the value most clearly violated by the suppression of the ordinary, nonpolitical use of hardcore pornography is the basic liberal precept against morals legislation. Perhaps this is why liberal and conservative justices, though agreeing on most free speech principles, continue to divide over obscenity and related issues. But

73. Weinstein, *supra* note 1, at 874.

74. Koppelman, *supra* note 9, at 908.

75. *Id.* at 909.

76. Koppelman, *supra* note 13.

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while the liberal precept against legal moralism is surely an important value, it is just as surely not a free speech norm.

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