BOOK REVIEW

GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS

by Edward de Grazia.
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In 1968, a First Amendment lawyer named Charles Rembar published a book entitled *The End of Obscenity*. Rembar described his adventures defending such twentieth century literary classics as Henry Miller's *Tropic of Cancer* and D.H. Lawrence's *Lady Chatterley's Lover* against obscenity prosecutions. He predicted that because of then-recent Supreme Court rulings, the philistine dark ages of obscenity law were ending. The so-called obscenity exception to the First Amendment, an exception unjustified by history, logic, or constitutional law, would soon be eliminated.[1]

The Supreme Court decisions on which Rembar relied had held that a literary work could not be banned unless it was — in the then-current phrase — "utterly without redeeming social value."[2] This "utterly without" standard, as one scholar recently observed, ushered in a sort of "glasnost" in obscenity law. "For if obscenity was utterly devoid of social value, it was an immediate corollary that anything that was *not* utterly devoid of social value, no matter how salacious, was ipso facto not obscene."[3]

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1. The obscenity exception had its origins in Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (holding that some categories of speech, including libel, profanity, "fighting words," and "the lewd and obscene," 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"). The other exceptions mentioned in *Chaplinsky* have eroded with time and increased understanding of the "emotive" as well as the "cognitive" value of speech. *See* R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (limiting the fighting words exception); Cohen v. California, 403 U.S. 15, 25 (1971) (eliminating the "profanity" exception identified in *Chaplinsky*); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (limiting the libel exception). Nevertheless, the Supreme Court repeated the *Chaplinsky* justification for banning obscenity in Roth v. United States, 354 U.S. 476, 484 (1957), and again in Miller v. California, 413 U.S. 15, 20-21 (1973), which set forth the current test distinguishing obscenity from constitutionally-protected speech.

2. This was the standard articulated in A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413, 418 (1966) (*Memoirs v. Massachusetts*). The standard derived from the statement in *Roth*, 354 U.S. at 484, that "obscenity" was not entitled to First Amendment protection because it was "utterly without redeeming social importance."

3. Henry Louis Gates, Jr., *To 'Deprave and Corrupt'*, 254 THE NATION 898 (1992).

Alas, Mr. Rembar and his First Amendment colleagues proved overly optimistic. In 1973, by a slim 5-4 margin, a newly Nixonized Supreme Court rejected arguments for ending the dubious enterprise of banning, suppressing, and jailing people for disseminating material with sexual themes. The case was *Miller v. California*, and instead of doing away with obscenity laws, the Court, now led by Nixon appointee Warren Burger,[4] made obscenity convictions easier to obtain. *Miller* did this in two ways: first, by relaxing the "utterly without redeeming social value" requirement,[5] and second, by delegating to "contemporary community standards" a determination of the other two prongs of the obscenity test — patent offensiveness and appeal to the "prurient" interest in sex.[6]

One is reminded of the halcyon hopes of Rembar and others, and how they were dashed by that slim majority in *Miller*, when reading through Edward de Grazia's exhaustive, fascinating, juicy, and encyclopedic new book, *Girls Lean Back Everywhere*.[7] De Grazia's densely detailed opus provides ample evidence of the harm inflicted by obscenity law to personal lives and to literature, both before and after the decision in *Miller*. De Grazia's message is especially timely given the demagogic climate that has dominated cultural politics in the United States of late, with hot button accusations of "pornography" and "blasphemy" being freely hurled at artists and works that offend somebody's standard of decency.

De Grazia brings to his task — an account of literary censorship from about the time of Emile Zola to the present — a passion for the literature he discusses and defends, as well as personal experience as a First Amendment attorney. Indeed, the author played a pivotal role in the fights to legalize Henry Miller's *Tropic of Cancer* and William Burroughs' *Naked Lunch*.

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4. GIRLS LEAN BACK EVERYWHERE reminds us that *Miller* was an ironic accident of history. Had Arthur Goldberg not resigned from the Supreme Court in 1965 at the behest of Lyndon Johnson to become U.N. Ambassador, and had Abe Fortas not replaced him, only to be hounded out of office four years later (in part because of his libertarian votes in pre-*Miller* obscenity cases), then Richard Nixon would not have had the opportunity to appoint Warren Burger to the Court in 1969. EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE 525-50 (1992). Among the highlights of the attack on Fortas was the "Fortas Obscene Film Festival," produced by Charles Keating's "Citizens for Decent Literature" with the help of Senator Strom Thurmond, from materials in various cases that Fortas had voted were not obscene. As in our current culture wars, so in 1968, opponents of sexually explicit literature titillated their public with the very material they condemned. As de Grazia drily remarks: "The 'Fortas Obscene Film Festival' would be shown again and again on the Hill." *Id.* at 538.

5. To be obscene under *Miller*, works now had only to lack "serious literary, artistic, political, or scientific value." 413 U.S. at 24.

6. *Id.* On the so-called obscenity exception to the First Amendment, both pre- and post-*Miller*, and on the development of the three-part test, see generally FREDERICK SCHAUER, THE LAW OF OBSCENITY (1976); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 904-19 (2d ed. 1988).

7. The title is a quote from Jane Heap, editor of THE LITTLE REVIEW, defending the "Nausicaa" episode of James Joyce's ULYSSES. "Girls lean back everywhere, showing lace and silk stockings; wear low-cut sleeveless blouses, breathless bathing suits; men think thoughts and have emotions about these things everywhere — seldom as delicately and imaginatively as Mr. Bloom — and no one is corrupted." DE GRAZIA, *supra* note 4, at 10.

The book is not a quick or easy read, nor does it offer profound legal analysis, but it is a priceless resource for any student of constitutional or literary history. It interweaves biographies of literary giants with detailed renditions of their legal troubles. Its heroes and villains include not only struggling writers and courageous editors but publishers: some principled, some venal, many caught in the familiar dilemma of weighing what is right against what is expedient, given the censorship pressures of the time. The book includes much direct documentary material, frequently allowing the actors in this history to speak for themselves, and serves up generous excerpts from the prosecuted works.

Most of *Girls* recounts, in sometimes numbing detail, historical obscenity battles, from the cruel prosecution and imprisonment of Henry Vizetelly, the English publisher of Emile Zola, through the celebrated cases involving *Ulysses*, *Lady Chatterley*, almost all the novels of Theodore Dreiser, Vladimir Nabokov's *Lolita*, Edmund Wilson's *Memoirs of Hecate County*, and the bitterly satiric (and vulgar) comedy routines of the trenchant social commentator Lenny Bruce. A fascinating section describes the English and American obscenity cases brought against Radclyffe Hall's novel, *The Well of Loneliness*, a groundbreaking if often mawkish defense of homosexuality written at a time (not very long ago) when it was still called "inversion." The work was far from pornographic (i.e., sexually arousing), and as a New York court that condemned it acknowledged, it had "no unclean words." Yet because it "plead[ed] for tolerance on the part of society," *The Well of Loneliness* was declared obscene.[8]

Because de Grazia combines law and literature, and plainly loves them both, he is often able to select the perfect quote or anecdote to illuminate his discussion. My own favorite is Lenny Bruce's letter to his attorney, Ephraim London. The letter brings back Bruce's comic genius with painful immediacy; it is also a sardonic commentary on the judicial system and the absurdity of obscenity law:

> Dear Ephraim,
> If the court had appointed you as a public defender, I would have less rights as far as instructing you. . . . I have given you $1000, and the hi-fi equipment and camera I sent you were worth about $200, used.
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> . . . .
> . . . You accepted that money on the condition that you would conduct yourself in a manner that would be effective in the trial court and . . . not assume that the trial court is merely a recording studio waiting to be admonished and overturned by the appellate court. . . .

8. People v. Friede, 233 N.Y.S. 565, 567 (N.Y. City Magis. Ct. 1929) (denying motion to dismiss criminal charge). The Court of Special Sessions in New York later dismissed the criminal charges. DE GRAZIA, *supra* note 4, at 200.

> But you are an appellantophile, you are possessed with "a shameful and morbid interest in finding statutes unconstitutional on their face."[9]

As this excerpt suggests, Bruce had a notoriously difficult relationship with his lawyers and often tried to represent himself. On one such occasion, during jury voir dire, he asked a potential juror whether she ever masturbated. The judge admonished him, but Bruce maintained "that the question was a legitimate one, which would [if she denied it] establish that she was a liar, for scientific statistics showed that in fact 'everybody jerks off.' "[10]

De Grazia devotes about the last fifth of his considerable opus to our more recent censorship controversies. He reviews the debate over pornography, starting with the 1970 Report of the President's Commission on Obscenity and Pornography,[11] which recommended repeal of existing obscenity laws and noted that the major problem in this area was "the inability or reluctance of people in our society to be open and direct in dealing with sexual matters."[12] The 1986 Meese Commission Report reached quite opposite conclusions, and its recommendations for cracking down on erotic entertainment have spawned a new repertory of governmental censorship techniques in the last several years: simultaneous multiple prosecutions designed to force distributors out of business; prosecutorial demands that defendants stop selling *any* erotic material as conditions of plea bargains; oppressive labeling, record-keeping, and disclosure requirements for photographers of nudes; and invocation of draconian forfeiture penalties to destroy thousands of nonobscene books and films, simply because their owners were convicted of selling one or a few obscene items.[13]

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9. DE GRAZIA, *supra* note 4, at 449.

10. *Id.* at 446.

11. The Commission was also known as the Lockhart Commission.

12. THE REPORT OF THE PRESIDENT'S COMMISSION ON OBSCENITY AND PORNOGRAPHY 47 (1970).

13. Amendments to the federal Racketeer Influenced and Corrupt Organizations law (RICO), adding obscenity as a predicate offense, see 18 U.S.C. § 1961, *amended by* Pub. L. No. 98-473, Title II, § 1020(1), 98 Stat. 2143 (1988), as well as amendments to the federal obscenity statute adding harsh forfeiture provisions, see 18 U.S.C. § 1467, *added by* Pub. L. No. 100-690, Title VII, § 7522(a), 102 Stat. 4490 (1988) and Pub. L. No. 101-647, Title XXXV, § 3549, 104 Stat. 4926 (1990), have allowed federal prosecutors to seek to close down entire businesses based on a judge's or jury's finding that one or two magazines or videotapes are obscene under a particular community's standards. *See* Alexander v. Thornburgh, 943 F.2d 825 (8th Cir. 1991), *cert. granted*, 112 S. Ct. 3024 (1992); *see also* Adult Video Ass'n v. Barr, 960 F.2d 781 (9th Cir. 1992); United States v. California Publishers Liquidating Corp., 778 F. Supp. 1377 (N.D. Tex. 1991). A special obscenity enforcement unit in the Justice Department, by initiating simultaneous investigations and prosecutions in multiple jurisdictions, has pressured producers and distributors of erotic works to enter into plea bargains under which they must promise to stop distributing any sexually-oriented material, even PLAYBOY or THE JOY OF SEX. *See* United States v. P.H.E., Inc., 965 F.2d 848 (10th Cir. 1992); P.H.E., Inc. v. United States Dep't of Justice, 743 F. Supp. 15 (D.D.C. 1990); Freedberg v. United States Dep't of Justice, 703 F. Supp. 107 (D.D.C. 1988). The Child Protection Restoration and Penalties Enhancement Act of 1990, 18 U.S.C. § 2257, *added by* Pub. L. No. 100-690, Title VII, § 7513(a), 102 Stat. 4487 (1988), *amended by* Pub. L. No. 101-647, Title III, § 311, 104 Stat. 4816 (1990), a reenactment

De Grazia also reviews the battles that have made an ideological killing field of the National Endowment for the Arts over the past three years. Within the context of artistic and literary struggles just recounted, the more current controversies over provocative artists like Robert Mapplethorpe, Andres Serrano, or Karen Finley can be understood as another outbreak in our nation's long history of Comstockery,[14] another attempt by demagogues, now using "not with my tax money" rhetoric, to force an anti-"indecency" political agenda not only on the NEA, but on schools, libraries, arts institutions, and the mass media.

For his thoughts on these more current debates, de Grazia was pilloried last spring in *The New York Times Book Review*; reviewer Richard Pildes dismissed de Grazia's insistence on drawing lessons from the past and his adherence to basic First Amendment principles as "obsessive" and "a lifelong set of cliches."[15] Pildes evidently was not persuaded that the history of literary censorship so elaborately recounted in *Girls Lean Back Everywhere* has much in common with what goes on today. Joining the current bandwagon that unites some (but far from all) feminists with religious fundamentalists in urging censorship of pornography, Pildes accused de Grazia of simply being on the wrong side of "the generational divide over experiences of the First Amendment."

Perhaps Pildes needs to reread *Tropic of Cancer*, *Naked Lunch*, or some of the other gross, raunchy, or arguably misogynist works that have been banned in the United States. Little that Robert Mapplethorpe or Karen Finley have created would be shocking by comparison. The trendy intellectualized belittling of the First Amendment by Pildes and others has contributed significantly to the beating that artistic freedom has taken in these last several years.

As *Girls Lean Back Everywhere* eloquently demonstrates, this beating has occurred in no small part because of the continued existence of obscenity law. The obscenity exception to the First Amendment remains the primary legal or rhetorical club used by prosecutors, legislators, government bureaucrats, and private pressure groups as they attempt, often with fair success, to suppress

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of a 1988 statute invalidated in American Library Ass'n v. Thornburgh, 713 F. Supp. 469 (D.D.C. 1989), *vacated on other grounds*, 956 F.2d 1178 (D.C. Cir. 1992), requires producers of "sexually explicit" photographs or films to collect extensive information about every model, and to maintain such information indefinitely, with elaborate cross-indexing. Any publisher or producer of a work covered by the law must affix a label disclosing where the records are kept. The reenacted statute was struck down in American Library Ass'n v. Barr, 794 F. Supp. 412 (D.D.C. 1992), *appeal filed*, No. 92-5271 (July 29, 1992).

14. Anthony Comstock, founder of the New York Society for the Suppression of Vice, successfully lobbied for passage of the 1873 federal Comstock Law, the obscenity statute which is still on the books today, and boasted that in six months the law had made it possible for him to destroy 194,000 pictures, 134,000 pounds of books, 5,500 sets of playing cards, and 60,300 "rubber articles." (The law also banned distribution of contraceptives.) DE GRAZIA, *supra* note 4, at 4.

15. Richard Pildes, *An Absolute Faith*, N.Y. TIMES BOOK REV., July 26, 1992, at 15 (review of GIRLS LEAN BACK EVERYWHERE).

erotic movies and books, to manipulate government arts funding to conform to their sexual/religious ideology, and to legislate all manner of burdensome and chilling regulations and civil liabilities on producers of sexually oriented works.[16]

Given these realities, what are the prospects for a renewed assault on the obscenity exception to the First Amendment? I submit that the prospects are less dim than might at first be supposed. There are signs that some members of our current Supreme Court recognize the dubious justifications and insoluble vagueness problems that beset obscenity law.

In *Brockett v. Spokane Arcades, Inc.*,[17] for example, plaintiffs challenged a Washington statute that defined "obscene matter" as material appealing to a "prurient interest" (a standard part of the *Miller* obscenity test), and defined "prurient" as "that which excites lasciviousness or lust." The United States Court of Appeals for the Ninth Circuit invalidated the statute on grounds of overbreadth because it defined "prurient" to reach materials that "merely stimulated normal sexual responses."[18] Six members of the Supreme Court basically agreed with this conclusion, ruling that the statute was invalid insofar as its definition of prurience reached healthy, as opposed to "shameful or morbid," sexual desires.[19] In the immortal words of the Court:

> If, as we have held, prurience may be constitutionally defined for the purposes of identifying obscenity as that which appeals to a shameful or morbid interest in sex, *Roth v. United States*, . . . it is equally certain that if the statute at issue here is invalidated only insofar as the word "lust" is taken to include normal interest in sex, the statute would pass constitutional muster.[20]

Brockett thus articulated the "healthy lust" standard of obscenity law. The Court left it to trial judges and juries to try to figure out what books, magazines, or movies appealed to unhealthy as opposed to healthy sexual urges. For example, are homosexual acts healthy or unhealthy? Bondage fantasies? An addiction to Harlequin romances? Does the standard change with locale — i.e., can homosexuality be ruled healthy in San Francisco but unhealthy in San Jose? Although none of the justices joining the majority in *Brockett* indicated any discomfort with the prospect of judges and juries trying to make these distinctions, *Brockett* certainly dramatized the overwhelming definitional and vagueness deficiencies that have plagued obscenity law since its inception, which persuaded Justice Brennan in 1973 that attempts by government to suppress this elusive category of expression were

16. *See supra* note 13.

17. 472 U.S. 491 (1985).

18. *Id.* at 495 (citing 725 F.2d 482 (9th Cir. 1984)).

19. Justices Brennan and Marshall dissented on the grounds that there is no basis for an obscenity exception to the First Amendment. *Id.* at 510; *see* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting). Justice Powell did not participate.

20. *Brockett*, 472 U.S. at 504-05 (citations omitted).

unconstitutional.[21]

Two years after *Brockett*, in *Pope v. Illinois*,[22] Justice Scalia indicated that he understood the absurdity of the obscenity enterprise. *Pope* held that the "serious value" prong of the *Miller* test referred to a nationwide, not a local community-based, "reasonable person" standard. Scalia observed in a concurring opinion:

> I join the Court's opinion with regard to an "objective" or "reasonable person" test of "serious literary, artistic, political, or scientific value," . . . because I think that the most faithful assessment of what *Miller* intended, and because we have not been asked to reconsider *Miller* in the present case. I must note, however, that in my view it is quite impossible to come to an objective assessment of (at least) literary or artistic value, there being many accomplished people who have found literature in Dada, and art in the replication of a soup can. Since ratiocination has little to do with esthetics, the fabled "reasonable man" is of little help in the inquiry, and would have to be replaced with, perhaps, the "man of tolerably good taste" — a description that betrays the lack of an ascertainable standard. If evenhanded and accurate decisionmaking is not always impossible under such a regime, it is at least impossible in the cases that matter. I think we would be better advised to adopt as a legal maxim what has long been the wisdom of mankind: De gustibus non est disputandum. Just as there is no use arguing about taste, there is no use litigating about it. For the law courts to decide "What is Beauty" is a novelty even by today's standards.[23]

Justice Stevens dissented in *Pope*, in an opinion joined by Justices Marshall, Blackmun, and Brennan. One ground for the dissent was Stevens's long-held view that because of the inherent ambiguities of obscenity law, "government may not constitutionally criminalize mere possession or sale of obscene literature, absent some connection to minors or obtrusive display to unconsenting adults."[24] Referring to his dissent ten years before in *Smith v. United States*,[25] Stevens noted that in recent years while the Court "has struggled with the proper definition of obscenity, six members of the Court have expressed the opinion that the First Amendment, at the very least, precludes criminal prosecutions for sales such as those involved in this case."[26] The reason, as Stevens had said in *Smith*, was that

> [i]n the final analysis, the guilt or innocence of a criminal defendant in an obscenity trial is determined primarily by individual jurors'

21. *Paris Adult Theatre I*, 413 U.S. 49.
22. 481 U.S. 497 (1987).
23. *Id.* at 504-05 (Scalia, J., concurring).
24. *Id.* at 513 (Stevens, J., dissenting).
25. 431 U.S. 291, 315 (1977).
26. *Pope*, 481 U.S. at 513 (Stevens, J., dissenting).

> subjective reactions to the materials in question rather than by the predictable application of rules of law. . . . In my judgment, the line between communications which "offend" and those which do not is too blurred to identify criminal conduct.[27]

The latest word on this subject has come from Justice Scalia, speaking for five members of the Court in *R.A.V. v. City of St. Paul*.[28] *R.A.V.* struck down a local "hate speech" ordinance that the Minnesota Supreme Court had already construed to reach only constitutionally-unprotected "fighting words."[29] Even though the ordinance, thus construed, only criminalized unprotected speech, *R.A.V.* held that First Amendment principles still applied. Government could not discriminate on the basis of content and viewpoint even within a category of constitutionally unprotected speech.

Reviewing the history of categorical exceptions to the First Amendment, the *R.A.V.* majority noted, first, that "[o]ur decisions since the 1960's have narrowed the scope of the traditional categorical exemptions" for defamation as well as obscenity; and, second, that the very notion of categorical exemptions was a bit of a misnomer:

> Such statements [that some categories of speech are not protected by the First Amendment] must be taken in context, . . . and are no more literally true than is the occasionally repeated shorthand characterizing obscenity "as not being speech at all". . . . What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.) — not that they are categories of speech entirely invisible to the Constitution. . . .[30]

The Court noted, for example, that child pornography laws are constitutional only so long as they do not " 'censor[ ] a particular literary theme' " or " 'attempt to suppress the communication of particular ideas.' "[31]

The *R.A.V.* majority thus attempted to distinguish between constitutionally permissible proscription of "essentially 'non-speech' element[s] of communication"[32] and constitutionally impermissible proscription of the actual content or viewpoint found in fighting words or other categories of presumptively unprotected speech. This distinction, of course, breaks down in the area of obscenity, where the majority had to acknowledge that the exclusion from First Amendment protection *is* content-based (i.e., the material has to be

27. *Id.* at 514-15 (quoting Smith v. United States, 431 U.S. 291, 315-16 (1977)).

28. 112 S. Ct. 2538 (1992). The four justices joining Scalia's majority opinion were Thomas, Rehnquist, Kennedy, and Souter. As noted above, Justices Stevens and Blackmun have already indicated that they do not think criminal penalties for "obscenity" are permitted by the First Amendment.

29. *Id.* at 2542; *see* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (providing a "fighting words" exception to the First Amendment).

30. 112 S. Ct. at 2543 (citations omitted) (emphasis in original).

31. *Id.* (quoting New York v. Ferber, 458 U.S. 747, 763, 775 (1982)).

32. *Id.* at 2545.

about sex).[33] Here the Court seemed to fall back on a distinction between content discrimination and viewpoint discrimination, the latter being impermissible even within state regulation of "obscenity."[34]

R.A.V. thus opens the door to a First Amendment-based challenge to the obscenity exception grounded in the proposition that obscenity laws *do*, in essence, constitute viewpoint discrimination. As commentators in the field of obscenity and pornography have often noted, explicit books and films, designed and used largely for purposes of sexual arousal, contain many social and political messages: that there is value in simple sexual gratification; that sex without emotional commitment (or for nonreproductive purposes) is okay; that there is nothing wrong with unconventional varieties of sex; that "adultery may sometimes be proper."[35] Indeed, the otherwise chilling pro-censorship writings of Professor Catharine MacKinnon do make the perceptive point that obscenity laws may be no more viewpoint-neutral than the anti-pornography ordinance that she and writer Andrea Dworkin drafted for the City of Indianapolis, and that was invalidated on grounds of viewpoint discrimination.[36] MacKinnon writes:

> Why is it that obscenity law can exist and our trafficking provision [in the Indianapolis ordinance] cannot? . . . Why aren't obscenity and child pornography laws viewpoint laws? Obscenity, as Justice Brennan pointed out . . . , expresses a viewpoint: sexual mores should be relaxed . . . . If one is concerned about the government taking a point of view through law, the laws against these things express the state's opposition to these viewpoints, to the extent of making them crimes to express . . . .
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> When do you see a viewpoint as a viewpoint? When you don't agree with it. When is a viewpoint not a viewpoint? When it's yours.[37]

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33. *Id.* at 2546 (holding that a state might legitimately "choose to prohibit only that obscenity which is the most patently offensive *in its prurience*") (emphasis in original).

34. *Id.* (holding that a state may not prohibit "only that obscenity which includes offensive political messages").

35. Kingsley Int'l Pictures Corp. v. Regents of the Univ. of New York, 360 U.S. 684, 689 (1959) (invalidating New York censors' denial of a license to the film version of LADY CHATTERLEY'S LOVER because the denial was based on disapproval of the film's message approving adultery in some circumstances).

36. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir.), *aff'd*, 475 U.S. 1001 (1985). The MacKinnon-Dworkin ordinance defined pornography as "the graphic sexually explicit subordination of women, whether in pictures or in words," that also contained various other elements, e.g., women "presented in scenarios of degradation, injury, abasement, [or] torture," or "presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display." *Id.* at 324.

37. CATHARINE MACKINNON, FEMINISM UNMODIFIED 212 (1987). Even the Meese Commission recognized that pornography could be seen as "the process by which an alternative sexual vision is communicated." U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY FINAL REPORT 263 (1986); *see also* Paula Webster, *Pornography and Pleasure*, *in* CAUGHT LOOKING 34 (K. Ellis ed., 1986) ("I am convinced that pornography, even in

To date, only one court has explicitly held that when government censors speech because of its sexual explicitness, it is engaging in viewpoint discrimination.[38] But the argument is ripe for development. The current Justices of the Court may not be uniformly libertarian in approach; but a number of them are both perceptive enough to see the legal and logical deficiencies of the obscenity exception, and pragmatic enough to understand that in today's world, the inherent vagueness of the *Miller* obscenity definition (or any obscenity definition, for that matter[39]) has risen from the level of fundamentally unfair to completely irrational.[40]

Human sexuality has been a subject of endless fascination from the phallic satyr statues of ancient Greece to the most tawdry pornography of the present video age. *Girls Lean Back Everywhere* reminds us of the persistence of this eternal theme in literature and the other arts and the equal persistence of the impulse to censor speech about it. Even when, at long last, the obscenity exception to the First Amendment is eliminated, the censorship impulse will remain, and, as Arthur Miller wrote, "will have to be struggled with to the end of time."[41]

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its present form, contains important messages for women .... [I]t does not tie women's sexuality to reproduction or to a domesticated couple or exclusively to men.").

38. American Council for the Blind v. Boorstin, 644 F. Supp. 811 (D.D.C. 1986) (holding that a decision by the Librarian of Congress to cease translating PLAYBOY into Braille constituted viewpoint discrimination).

39. Justice Potter Stewart's famous "I know it when I see it," Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (concurring opinion), is an amusing quip, but also a good illustration of the definitional problems with obscenity law.

40. Two state supreme courts, those in Oregon and Hawaii, have invalidated obscenity laws under the free speech and privacy provisions, respectively, of their state constitutions. State v. Henry, 732 P.2d 9 (Or. 1987); State v. Kam, 748 P.2d 372 (Haw. 1988). Justice Stevens reported in 1987 that at least five additional states — Alaska, Maine, New Mexico, South Dakota, and Vermont — do not have adult obscenity statutes. Pope v. Illinois, 481 U.S. 497, 513 n.7 (1987).

41. Arthur Miller, *On Censorship and Laughter, in* FIRST AMENDMENT LAW HANDBOOK 5 (James Swanson ed., 1991).