COMMENT

PROSTITUTION AND OBSCENITY: A COMMENT UPON THE ATTORNEY GENERAL'S REPORT ON PORNOGRAPHY

E. EDWARD BRUCE*

In July of 1986, with a good deal of fanfare, Attorney General Meese released the Report of his Commission on Pornography.¹ That one leading magazine carried a "titillating" portrait of Mr. Meese on its cover² parodying the Report prior to its release suggested that the media was less than open-minded about its conclusions. In any event, few who waded through the Report's nearly 2000 pages came away with any enthusiasm for its approach to obscenity.³

In struggling with the task of separating proscribable obscenity from protected speech, the Supreme Court has for more than thirty years inquired whether the material has an undesirable impact on its audience and whether it has social value. Conceding that this approach has been widely condemned,⁴ the Attorney General's Commission nonetheless ratified it, attempted to provide empirical support for it, and ultimately suggested that it should be extended.

Though obscured by this commitment to the status quo, there lurks within the Report an idea that offers a way out of the morass created by

* Member of the District of Columbia Bar.

1. ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, U.S. DEP'T OF JUSTICE, FINAL REPORT (1986) [hereinafter FINAL REPORT].

2. THE NEW REPUBLIC, July 14 & 21, 1986.

3. Reaction in the press was generally unfavorable. See, e.g., Lipton, *No, the Evidence Against Porn is Shoddy*, L.A. Times, July 18, 1986, pt. II, at 5, col. 3; Chapman, *Defining the Real Issues on Pornography*, Chicago Trib., July 16, 1986, § 1, at 12, col. 1; Yardley, *The Porn Commission's Hidden Agenda*, Wash. Post, July 14, 1986, at C2, col. 1; *The Story of X*, N.Y. Times, July 13, 1986, § 4, at 28, col. 1 (editorial); *The Porno Proposals*, Wash. Post, July 11, 1986, at A16, col. 1 (editorial); Raspberry, *Porno-Lover's Dream*, Wash. Post, July 11, 1986, at A17, col. 1; *Not Smut, Just Trash*, L.A. Times, July 10, 1986, pt. II, at 4, col. 1 (editorial).

4. FINAL REPORT, *supra* note 1, at 261 (citing Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963); Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1; and Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974)).

the Supreme Court's obscenity cases. In an aside that bears little relationship to the traditional approach endorsed therein, the Report discusses the illicit conduct—prostitution or child abuse—that is essential to the production of most “hard core” pornography. An approach to obscenity that focuses on this illicit conduct, rather than on the impact of obscene material on its audience or the difficult question of social value, can provide both doctrinal clarity and broader protection of the free expression of ideas.

I. THE CURRENT STATE OF OBSCENITY LAW

The constitutional law of obscenity begins with *Chaplinsky v. New Hampshire*,⁵ a case that had nothing to do with obscenity. In *Chaplinsky*, the Court sustained the conviction of a person who had precipitated a sidewalk scuffle by calling a policeman a “God-damn racketeer” and a “damned fascist.” The Court held that such “fighting words” were within the “well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.”⁶

In dicta, the Court identified other such words—“the lewd and obscene, the profane, [and] the libelous.”⁷ They, like fighting words, “by their very utterance inflict injury or tend to incite an immediate breach of the peace.”⁸ The Court placed such words beyond the protection of the first amendment because they “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.”⁹

Like the “fighting words” that were actually at issue in *Chaplinsky*, the other kinds of words to which the Court referred naturally tended to injure or offend. “Libelous” speech falls into this category, as does the “profane.”¹⁰ “Lewd and obscene” speech is also often designed to offend. Although only a shade of difference separates these terms, the word “lewd” is often used when a speaker or actor confronts an unwill-

5. 315 U.S. 568 (1942).

6. *Id.* at 571-72.

7. *Id.* at 572.

8. *Id.* In *Schenck v. United States*, 249 U.S. 47 (1919), Justice Holmes expressed a similar view when he observed in his oft-quoted dictum that “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.” *Id.* at 52.

9. *Chaplinsky*, 315 U.S. at 572.

10. The *Chaplinsky* Court could not have intended to condemn all irreligious utterances irrespective of the setting; in placing profanity beyond the protection of the first amendment, the Court surely had in mind only irreligious utterances directed at those holding religious beliefs.

ing audience with indecent language or conduct.¹¹ Thus, the “fighting words” that were held to be proscribable in *Chaplinsky*, as well as the “lewd and obscene” utterances to which the Court referred, were words intimately bound with conduct because they are likely to cause an immediate retaliatory response given their inherent tendency to injure or offend the audience at which they are directed.

The Supreme Court comprehensively addressed the obscenity issue for the first time in *Roth v. United States*.¹² Justice Brennan, relying on *Chaplinsky*’s identification of the “lewd and obscene” as lying beyond the protection of the first amendment, declared that “obscenity is not expression protected by the First Amendment.”¹³ However, the Court failed to recognize that *Chaplinsky* so categorized the “lewd and obscene” because “their very utterance inflict[ed] injury or tend[ed] to incite an immediate breach of the peace.”¹⁴ In relying on *Chaplinsky*, Justice Brennan disregarded that premise and proceeded directly to *Chaplinsky*’s conclusion that such utterances are of slight social value.¹⁵

Of course, the *Roth* Court did define obscenity in terms of its impact on viewers or readers: “Obscene material is material which deals with sex in a manner appealing to prurient interest.”¹⁶ However, the definition of “prurient” to which the Court referred—“[i]tching; longing; uneasy with desire or longing; of persons, having itching, morbid or lascivious longings; of desire, curiosity or propensity, lewd”¹⁷—has little to do with the “injury” or “immediate breach of the peace” to which *Chaplinsky* referred. Indeed, obscenity has an audience precisely because it appeals to the prurient interest. Unlike the fighting words and the other utterances discussed by the Court in *Chaplinsky*, obscenity is not directed at an unwilling audience that is likely to retaliate against the speaker. Thus, unlike *Chaplinsky*, *Roth* failed to identify a nexus be-

11. See *Bethel School Dist. No. 403 v. Fraser*, 106 S. Ct. 3159 (1986). The Court in *Fraser* made repeated reference to the “lewd” speech given by a high school student in front of a captive student audience. *Id.* at 3165, 3166.

12. 354 U.S. 476 (1957). Prior to *Roth*, the Court had directly confronted the issue of obscenity regulation in *Butler v. Michigan*, 352 U.S. 380, 381, 383-84 (1957), where it held unconstitutional a Michigan statute that made it a misdemeanor to sell books containing language “tending to the corruption of the morals of youth.” In *Butler*, the Court opined that the state had “burn[ed] the house to roast the pig” by prohibiting the dissemination to adults of books that might fall into the hands of youths. *Id.* at 383.

13. *Roth*, 354 U.S. at 492.

14. *Chaplinsky*, 315 U.S. at 572.

15. *Roth*, 354 U.S. at 485.

16. *Id.* at 487.

17. *Id.* at 487 n.20 (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 1996 (2d ed. 1948)).

tween obscene speech and some resultant disruptive conduct.¹⁸

The Court refined the *Roth* formulation over the next ten years.¹⁹ One issue left undecided in *Roth* was whether material that appeals to the prurient interest necessarily is without redeeming social value or whether, instead, the lack of redeeming social value has to be independently established. This issue was resolved in *Memoirs v. Massachusetts*,²⁰ which made clear that the prosecution must establish that "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards; and (c) the material is utterly without redeeming social value."²¹

The *Memoirs* formulation of the *Roth* test made it exceedingly difficult to prosecute obscenity cases.²² The defense was almost always able to call an expert witness who would perceive some social value in the challenged material. Perhaps prompted by the flood of X-rated movies, peep shows, and the like that followed *Memoirs*, and certainly spurred by a change in its composition, the Court decided five separate obscenity cases on a single day in 1973 in a effort to restate *Roth*. The basic reformulation of the standard was set forth by Chief Justice Burger in *Miller v. California*:²³

18. Of course, it can be argued that obscenity need not be linked to harm to allow its regulation. Cf. Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 920-22 (1979) (obscenity having purely emotive appeal is outside first amendment protection).

19. One of the most notable opinions of that period is Justice Stewart's concurrence in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), where he acknowledged the difficulty of providing a definition of obscenity, but observed that "I know it when I see it, and the motion picture involved in this case is not that." *Id.* at 197 (Stewart, J., concurring). This confession of the need to judge obscenity in highly subjective terms seems much closer to the *Chaplinsky* dictum than the elaboration of the test in *Roth*. "Fighting words" necessarily are those which a speaker should know are likely to prompt swift retaliation; they are uttered at the speaker's risk because most people will react in a predictable fashion to them. Justice Stewart was perhaps saying much the same thing about obscenity in *Jacobellis*: the obscene is that which most people, at a given point in a society's cultural and social development, abhor.

20. 383 U.S. 413 (1966).

21. *Id.* at 418 (emphasis added).

22. *Stanley v. Georgia*, 394 U.S. 557, 568 (1969), in which the Court held that the first amendment prohibits making mere private possession of obscene materials a crime, seemed to provide a further obstacle to the prosecution of obscenity cases. However, *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 375-77 (1971), in which the Court upheld the right of customs agents to seize obscene materials notwithstanding the claim that they were to be used exclusively for private purposes, sharply limited *Stanley*. As Justice Black put it in his dissent in that case, "perhaps in the future [*Stanley*] will be recognized as good law only when a man writes salacious books in his attic, prints them in his basement, and reads them in his living room." *Id.* at 382 (Black, J., dissenting).

23. 413 U.S. 15 (1973). For a discussion of the other four decisions, see *infra* notes 32-34 and accompanying text.

The basic guidelines for the trier of fact must be: (a) 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.²⁴

The most significant change effected by *Miller* was the Court's repudiation of the *Memoirs* requirement that the work must be "utterly without redeeming social value." Instead of forcing the prosecution in obscenity cases to prove such a negative, *Miller* held that it would suffice to show that the material was without "serious value."

At least as significant as the *Miller* reformulation of the obscenity test was the dissenting opinion by Justice Brennan (joined by Justices Stewart and Marshall) in the companion case of *Paris Adult Theatre I v. Slaton*.²⁵ Repudiating *Roth* and all of its progeny, Justice Brennan observed that "[n]o other aspect of the First Amendment has, in recent years, demanded so substantial a commitment of our time, generated such disharmony of views, and remained so resistant to the formulation of stable and manageable standards."²⁶ This experience led Justice Brennan to the conviction "that the approach initiated 16 years ago in *Roth* . . . cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values."²⁷ Accordingly, he concluded that the interest advanced by the state in support of its general obscenity statute "cannot justify the substantial damage to constitutional rights and to this Nation's judicial machinery that inevitably results from state efforts to bar the distribution even of unprotected material to consenting adults."²⁸

The *Miller* majority conceded that "the absence, since *Roth*, of a single majority view of this Court as to proper standards for testing obscenity has placed a strain on both state and federal courts."²⁹ Moreover, the majority had no illusions that its reformulation of the *Roth* test would solve the problems identified by Justice Brennan; it recognized that its continued efforts to define obscene material "may not be an easy road, free from difficulty."³⁰ Nonetheless, the majority stated that it was compelled to persevere with the burdens left by *Roth*:

24. *Miller*, 413 U.S. at 24 (citations omitted).

25. 413 U.S. 49 (1973).

26. *Id.* at 73 (Brennan, J., dissenting).

27. *Id.* (citation omitted).

28. *Id.* at 112-13.

29. *Miller*, 413 U.S. at 29.

30. *Id.*

But no amount of "fatigue" should lead us to adopt a convenient "institutional" rationale—an absolutist, "anything goes" view of the First Amendment—because it will lighten our burdens. . . . "Our duty admits of no substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case."³¹

While thus acknowledging the difficulty of the task before it, the Court proclaimed in companion opinions that it would apply the *Miller* test not only to photographic materials but also to books,³² that the federal government could prevent the importation of materials found obscene under *Miller*,³³ and that it could bar the shipment of such materials in interstate commerce.³⁴

Perhaps the most important post-*Miller* obscenity decision is *New York v. Ferber*,³⁵ which upheld a New York statute prohibiting the use of children in specifically defined "sexual performances," as well as the transmission, sale, exhibition, or advertisement of materials depicting such performances. The Court articulated several justifications for a child-pornography exception to *Miller*: (1) the special state interest in protecting minors,³⁶ (2) the intrinsic relationship between the production and distribution of child pornography and the abuse of the children themselves,³⁷ (3) the fact that production of child pornography—the actual use of children for sexual performances—is "an activity illegal throughout the Nation,"³⁸ and (4) the "exceedingly modest, if not *de minimis*" social value of using children to enhance the presentation of literary, scientific, or educational work.³⁹ The Court concluded that New York's statute bore "so heavily and pervasively on the welfare of children" that any first amendment protection the materials might have was outweighed by the state interest advanced by the regulation.⁴⁰

Although limited to the special problems associated with the production of child pornography, *Ferber* marks a potentially dramatic departure from the *Roth-Miller* approach to obscenity regulation. The Court in *Ferber* was not concerned with the impact of the challenged materials on their audience. Moreover, the Court did not find it neces-

31. *Id.* at 29-30 (footnote and citations omitted; quoting *Jacobellis v. Ohio*, 378 U.S. 184, 188 (1964)).

32. *Kaplan v. California*, 413 U.S. 115, 119-22 (1973).

33. *United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123, 128-30 (1973).

34. *United States v. Orito*, 413 U.S. 139, 143-45 (1973). *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69-70 (1973), upheld a Georgia statute that permitted injunctions against the exhibition of obscene films.

35. 458 U.S. 747 (1982).

36. *Id.* at 756-58.

37. *Id.* at 759-61.

38. *Id.* at 761-62.

39. *Id.* at 762-63.

40. *Id.* at 764.

sary to decide whether the materials had any redeeming social value. Instead, the Court focused on the state's interest in regulating conduct rather than the effect on the audience as in *Chaplinsky* and concluded that this interest per se outweighed any slight social value of the speech.

Thus stood the state of obscenity law at the time the Report was written: the *Roth-Miller* inquiry into the "prurient interest" and "social value" of most material, coupled with *Ferber's* special approach for the problems of child pornography. Other than in the case of child pornography, the courts are still trying, as they have since *Roth*, to define obscenity by inquiring whether the material appeals to the "prurient interest" and whether it has "social value." There could hardly be a less edifying or more treacherous task for a court.⁴¹ Justice Brennan was surely correct in *Paris Adult Theatre I* when he described *Roth* and its progeny as giving rise to issues that are uniquely resistant "to the formulation of stable and manageable standards."⁴²

Beyond the difficulty of applying *Roth-Miller*, the Supreme Court's approach to obscenity is vulnerable to a more basic criticism. Having departed from the speech-conduct rationale of *Chaplinsky*, the *Roth-Miller* approach ultimately is based on the assumption that the state has the power to regulate ideas.⁴³ The proscription of expression that appeals to the prurient interest is based on the premise that it is unwise, unsafe, or undesirable to induce by a form of public communication the "itching," "longing" or "uneas[y] desire" associated with prurience. Moreover, the "serious value" test implies state power to decide which ideas deserve constitutional protection and which do not. The Court's obscenity decisions, therefore, threaten much more than the dissemination of sexually explicit materials designed to titillate their audience.

Most scholarly commentators have roundly condemned the *Roth-Miller* approach to obscenity.⁴⁴ More importantly, there seems to be an

41. As Justice Black lamented:

[T]his Court must sit as a Board of Supreme Censors, sifting through books and magazines and watching movies because some official fears they deal too explicitly with sex. I can imagine no more distasteful, useless, and time-consuming task for the members of this Court than perusing this material to determine whether it has "redeeming social value."

United States v. Thirty-Seven Photographs, 402 U.S. 363, 380 (Black, J., dissenting).

42. *Paris Adult Theatre I*, 413 U.S. at 73 (Brennan, J., dissenting).

43. See Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U.L. REV. 1137, 1181-82 (1984) (state has arguable interest in maintaining orthodoxy with respect to certain ideas and values regarding human sexuality).

44. See *supra* note 4 and accompanying text. Some commentators have attempted to limit the threat to free speech posed by the Court's obscenity decisions by categorizing pornography as "low-value" speech. According to these commentators, such speech can be distinguished from "high-value" speech, that is, speech dealing broadly with effective popular control of public affairs. See, e.g., Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 602-04. It is beyond the scope of this comment to explore the validity of the low-value/high-value speech distinction. Suffice

unwillingness, except in isolated circumstances, to prosecute obscenity cases. Although the present relaxed attitude toward regulating obscene materials doubtless has diverse origins, it seems likely that at least part of the explanation for the widespread availability today of sexually explicit materials in most communities may be the unwillingness of the people to permit the state to act as a general censor of ideas. At the very least, it is clear that producers and marketers of such materials have been able to acquire powerful allies in the media and elsewhere by arguing that acquiescence in the state's authority to regulate obscenity today is a step on the road toward the regulation of political or social thought tomorrow.

II. THE ATTORNEY GENERAL'S REPORT

A. *Deeper into the Roth-Miller Morass.*

The Attorney General's Report does nothing to dispel the threat to free expression of ideas posed by current obscenity law. To the contrary, it suggests an even more ominous future.

The Report accepts the status quo despite its pitfalls. Although recognizing "that the bulk of scholarly commentary is of the opinion that the Supreme Court's resolution of and basic approach to the First Amendment issues is incorrect,"⁴⁵ and although conceding that the testimony of various witnesses both "intelligently and forcefully" articulated arguments against the *Roth-Miller* approach,⁴⁶ the Commission was ultimately "unpersuaded that the fundamental direction of [these decisions] is misguided."⁴⁷ Indeed, the Commission stated that it was "confident that [this approach] is correct," since "[t]he special power of the First Amendment ought, in our opinion, to be reserved for the conveying of arguments and information in a way that surpasses some admittedly low threshold of cognitive appeal."⁴⁸

To the members of the Commission, the first amendment does not offer general protection for speech; instead, its "special power" is reserved for "arguments and information" that meet the *Miller* thresh-

to say that the case Professor Sunstein cited to support it, *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964), itself recognizes that the first amendment was designed to ensure an unfettered exchange of ideas not only for the "political . . . changes desired by the people," but also for "social changes." See Sunstein, *supra*, at 603 n.85. Producers of pornographic materials argue that they are facilitating a healthy evolution of "social" standards by inviting a reexamination of sexual mores and taboos. See *The Place of Pornography*, HARPER'S, Nov. 1984, at 31, 32 (comments of Al Goldstein, publisher of *Screw Magazine*) ("Pornography helps us free ourselves from the puritanical attitudes about sex that have long dominated our society.").

45. FINAL REPORT, *supra* note 1, at 261.

46. *Id.* at 264.

47. *Id.*

48. *Id.*

old.⁴⁹ Thus, the Report implicitly expresses confidence in the courts' ability to separate good and bad speech and to distinguish between worthwhile and worthless ideas. Certainly, this aspect of the Report offers no comfort to those who view *Roth-Miller* as a potential stepping-stone to a more general censorship of ideas.⁵⁰

The Report's approach to the question of the harm caused by pornography is even more troublesome. The Commission first speculated about the relationship between antisocial conduct and material appealing to the prurient interest within the meaning of *Roth-Miller*.⁵¹ Expanding beyond a constitutional focus, the Report then addressed as "[a] central part of [its] mission . . . the question whether pornography is harmful."⁵² It "made a conscious decision"⁵³ not to be constrained by the *Roth-Miller* test because it asserted that some forms of government regulation—such as zoning, as well as broadcast and liquor licensing—can be applied to speech which is not constitutionally obscene⁵⁴ and because other "techniques of social control"—such as public protest, picketing, and boycotts—were believed to be unaffected by constitutional guarantees.⁵⁵

Having thus put constitutional constraints aside, the Commission refused "to [be] burden[ed] . . . with an unduly narrow conception of harm."⁵⁶ For the same reason, the Commission adopted a relatively relaxed standard of proof of harm.⁵⁷ Accordingly, the Commission considered not merely the harm that comes immediately from the material itself—under *Roth-Miller*, the appeal to the prurient interest—but also the harm that results from the way in which the material may change the attitudes of the reader or viewer and enhance the likelihood of antisocial behavior.⁵⁸

49. *Id.*

50. See, e.g., Dershowitz, *Partners Against Porn*, HARPER'S, May 1985, at 22.

51. The Commission concluded:

[T]he predominant use of such [obscene] material is as a masturbatory aid. . . . [O]nce the predominant use, and the appeal to that predominant use, becomes apparent, what emerges is that much of what this material involves is not so much portrayal of sex, or discussion of sex, but simply sex itself. As sex itself, the arguments for or against restriction are serious, but they are arguments properly removed from the First Amendment questions that surround primarily materials whose overwhelming use is not as a short-term masturbatory aid.

FINAL REPORT, *supra* note 1, at 266.

52. *Id.* at 299.

53. *Id.*

54. *Id.*

55. *Id.* at 300.

56. *Id.* at 302.

57. *Id.* at 306-09.

58. *Id.* at 305-06.

On this basis, the Commission ultimately concluded that "sexually violent material"—material featuring actual or threatened violence presented in a sexually explicit fashion⁵⁹—leads to "an increase in aggressive behavior directed towards women."⁶⁰ Because it "believe[d] that an increase in [such] aggressive behavior . . . will in a population increase the incidence of sexual violence," the Commission "unanimously and confidently" concluded that "substantial exposure to sexually violent materials . . . bears a causal relationship to antisocial acts of sexual violence and, for some subgroups, possibly to unlawful acts of sexual violence."⁶¹

Similar though more tenuous conclusions were reached regarding nonviolent materials depicting degradation, domination, subordination, or humiliation.⁶² Materials that were neither violent nor degrading were thought by some members of the Commission to be harmful because they publicized sex;⁶³ such materials were also recognized as potentially harmful to children.⁶⁴ "Mere nudity" was not thought to be harmful,⁶⁵ but in some circumstances was considered "undesirable."⁶⁶

Even though it does not purport to provide a basis for a constitutional delineation of obscenity, this aspect of the Report is troublesome insofar as it lays a foundation for a social or political response to pornography. *Roth-Miller* identifies materials that can be proscribed by virtue of their immediate appeal to the prurient interest of a viewer or reader;⁶⁷ the Report proposes no change in this elusive standard. However, the Report suggests that focusing on second-order effects of speech—attitude and behavior modification—can help sustain either governmental regulation (such as zoning and licensing) or "informal" collective action (such

59. *Id.* at 323.

60. *Id.* at 325-26.

61. *Id.* at 326.

62. *Id.* at 329-35.

63. *Id.* at 340.

64. *Id.* at 343.

65. *Id.* at 347.

66. *Id.* at 348-49. At the conclusion of its discussion of the harm associated with pornography, *id.* at 349-51, the Commission discussed at length the need for further research:

There needs to be more research, for example, about the effect of pornography on the marriage relationship, about the nature of appetites for pornographic material and how those appetites are developed, about the effects of depictions of particular sexual practices on the sexual preferences of those who view them, and about the effects of exposure to pornographic material on children. This list could be much longer, but the point is only to show that much more needs to be done.

Id. at 349-50.

67. See *supra* text accompanying notes 43-44.

as picketing and boycotting).⁶⁸

Under conventional first amendment doctrine, the Supreme Court reserves the closest scrutiny for those types of regulation that appear to be aimed at the content of speech.⁶⁹ An approach that focuses on the secondary effects of speech—effects on beliefs, attitudes, etc.—resembles and may become indistinguishable from a constitutionally impermissible inquiry into content. Before the Report, the view that secondary effects justified regulation was for the most part held only by some feminists.⁷⁰ Now, this view appears to be gaining wider acceptance.⁷¹

Obviously, this part of the Report provides no solace for those concerned with the shortcomings of *Roth-Miller*. To the contrary, the Commission's willingness to justify social constraints upon speech based on a speculative linkage between speech, attitude modification, and antisocial behavior raises a more troubling spectre for free expression than anything ever decided by the Court in *Roth-Miller*.

B. *A Possible Escape.*

Although the Report endorses and indeed expands upon the *Roth-Miller* approach, it does contain evidence and observations that may provide the basis for an approach that leads out of the *Roth-Miller* morass. Specifically, the Report made the following self-evident observations about the conduct of those who participate in the making of pornographic films:

It seems abundantly clear from the facts before us that the bulk of commercial pornographic modeling[,] that is, all performances which include actual sexual intercourse, quite simply [are] a form of prostitution. So much was directly asserted by representatives of prostitutes' organizations who testified before us, as well as representatives of law enforcement and [was] effectively denied by no one. Every court which has examined the questions from this standpoint has agreed, reasoning that where persons are paid to have sex it is irrelevant that the act is for display to others. As prostitution is conduct which the state has a strong interest in regulating, the First Amendment does not preclude that regulation merely because it is labeled "speech" or is filmed.⁷²

68. To its credit, the Commission recognized the shortcomings of the type of studies upon which it relied to document the "harm" caused by pornography. FINAL REPORT, *supra* note 1, at 312-20.

69. See, e.g., *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 688-89 (1959) (state "struck at the very heart of constitutionally protected liberty" by banning film promoting adultery).

70. See, e.g., MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321, 322-24 (1984).

71. See, e.g., Sunstein, *supra* note 44, at 601-02.

72. FINAL REPORT, *supra* note 1, at 889-90 (footnotes omitted). The Report also describes the way in which "models" are selected and paid for their performances. Female performers are said

The Report goes on to explore the way in which the state could use the link between prostitution and the production of visual materials to regulate pornography.⁷³ The Commission had little doubt that the application of antiprostitution laws "at least to producers and agents seem[s] fully justified."⁷⁴ It therefore recommended that state and local prosecutors pursue producers of obscene material under pandering statutes.⁷⁵ It further suggested that local governments could impose sanctions on any persons trafficking in products or materials "which they know or have reason to know were manufactured or marketed through the use of persons engaging in prostitution."⁷⁶ The Commission even suggested that there was a sufficient federal interest in regulating interstate commerce to allow the exclusion of products manufactured by means of illicit prostitution.⁷⁷ Ultimately, however, the Commission felt that "the idea is sufficiently novel and could affect so much commerce not directly within the purview of our charter that we merely offer it for consideration and debate."⁷⁸ Accordingly, although the Commission made many other recommendations regarding the enforcement of obscenity laws within the framework of *Roth-Miller*, it offered relatively few recommendations regarding regulation of obscene materials based on the illicit conduct that goes into their making.⁷⁹

The Commission's decision to endorse *Roth-Miller* and to focus on the nexus between the consumption of obscene materials and antisocial behavior probably explains its failure to extend its inquiry into the connection between the production of obscene materials and prostitution. Whatever the explanation, the Report approached the brink of a conceptual breakthrough that could help courts come to grips with many of the

normally to earn between \$350 to \$500 per day, with better known "stars" earning as much as \$2500 per day. *Id.* at 1368-76.

73. The Commission's observations regarding the criminality of the conduct involved in the production of conventional pornographic films and videos also were made in the context of child pornography:

The distinguishing characteristic of child pornography, as generally understood, is that actual children are photographed while engaged in some form of sexual activity . . .

Thus, the necessary focus of an inquiry into child pornography must be on the process by which children . . . are induced to engage in sexual activity of one sort or another, end [sic] the process by which children are photographed while engaging in that activity.

Id. at 405-06.

74. *Id.* at 894.

75. *Id.* at 523-25.

76. *Id.* at 894.

77. *Id.* at 894-95.

78. *Id.* at 895.

79. For example, the Commission recommended that Congress enact legislation making it an unfair labor practice for an employer to hire individuals to participate in commercial sex performances. *Id.* at 478. As part of that recommendation, the Commission urged Congress "to prohibit the sale and distribution of any product made as a result of [such] unfair practices." *Id.* at 481.

contemporary moral and social concerns raised by obscenity and at the same time significantly reduce the threat to free expression of ideas posed by *Roth-Miller*.

III. THE SUGGESTED APPROACH

Ultimately, two basic rationales can be pursued to justify regulating obscenity: preventing the harm inherent in the production of the material and preventing the harm flowing from the way the material affects its audience. From *Chaplinsky* through *Miller*, the Supreme Court's focus has been on the second rationale; the inquiry in all the cases has been directed at the way in which the viewer is likely to react to the material.⁸⁰ The Commission would broaden this inquiry by asking whether, as a result of modification of attitudes or behavior, the affected viewer is likely to go on to engage in antisocial or illicit conduct.

As *Ferber* makes clear, however, the state can pursue the first rationale by considering the conduct underlying the production of the challenged materials.⁸¹ As the Report notes,⁸² very few would question that states can ban sex that is engaged in for pay. However, when such sex is intended for expressive purposes—when regulable conduct is mixed inextricably with protected speech—courts must determine the extent to which the conduct is immunized by its expressive impact.

Analysis of this question begins with *United States v. O'Brien*.⁸³ In upholding the conviction of a draft protestor who publicly burned his draft card, the *O'Brien* Court applied the following four-part test: Is regulation of the conduct in question "within the constitutional power of the Government"? Does it "further[] an important or substantial governmental interest"? Is that interest "unrelated to the suppression of free expression"? And is "the incidental restriction on alleged First Amendment freedoms . . . no greater than is essential to the furtherance of that

80. *Ginzburg v. United States*, 383 U.S. 463 (1966), requires a minor qualification of the above statement. In *Ginzburg*, the Court found that the "leer of the sensualist," *id.* at 468, which it detected in the advertising for the materials in question, evinced an intention on the part of the producer of the materials to appeal to the viewer's prurient interest. In this limited sense, the *Ginzburg* Court considered elements regarding the production or distribution of the obscene materials as they bore upon a viewer's likely reaction to them.

81. In *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 106 S. Ct. 1172 (1986), the United States Court of Appeals for the Seventh Circuit pointedly suggested that courts could uphold state statutes or local ordinances aimed at the illicit conduct portrayed in a film or video: "The offense of coercion to engage in a pornographic performance . . . has elements that might be constitutional." *Id.* at 332. The court read *Ferber* as "suggest[ing] that when a State has a strong interest in forbidding the conduct that makes up a film . . . it may restrict or forbid dissemination of the film in order to reinforce the prohibition of the conduct." *Id.*

82. See *supra* notes 72-78 and accompanying text.

83. 391 U.S. 367 (1968).

interest?"⁸⁴

The fact that prostitution laws are of ancient origin and have roots unrelated to the suppression of ideas would seem to demonstrate the validity of the state's interest in prohibiting sex for pay. Thus, affirmative answers to the first three parts of the *O'Brien* test are easily given.

However, the fourth part of the *O'Brien* test—whether the "incidental restriction" on first amendment expression is "no greater than is essential to further the government's interest"—raises a more difficult question. *O'Brien* suggests, however, that laws against prostitution, as applied to expressive conduct, could meet this test:

When *O'Brien* deliberately rendered unavailable his registration certificate, he willfully frustrated this governmental interest [in the smooth and efficient functioning of the Selective Service System]. For this noncommunicative impact of his conduct, and for nothing else, he was convicted.

The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful.⁸⁵

The Court upheld the law prohibiting draft card burning because it was "an appropriately narrow means of protecting [an important governmental] interest and condemns only the independent noncommunicative impact of conduct within its reach."⁸⁶ Statutes or ordinances broadly prohibiting sex for pay in all circumstances—customary prostitution or dramatic performances—would also "condemn[] only the independent noncommunicative impact of conduct," leaving authors or actors free to express themselves by a wide range of alternative means that would not run afoul of the statute.⁸⁷

84. *Id.* at 377.

85. *Id.* at 382.

86. *Id.*

87. While *O'Brien*, therefore, seems capable of sustaining the application of prostitution laws to at least the production of photographic materials, the Supreme Court's decision in *Ferber* suggests some hesitancy to rely on *O'Brien* when dealing with obscenity issues. In upholding a New York statute proscribing not only the production, but also the distribution and sale of child pornography depicting illicit acts, the Court at no point cited *O'Brien*.

The Court's decision last term in *Arcara v. Cloud Books, Inc.*, 106 S. Ct. 3172 (1986), may also show some uneasiness regarding application of the *O'Brien* test in the obscenity context. In *Arcara*, the New York Court of Appeals ruled that a New York public health law condemning the use of buildings for prostitution and other activities could not be applied consistently with the fourth part of the *O'Brien* test to close an "adult" book store where illicit sexual activities were shown to have occurred. *People ex rel. Arcara v. Cloud Books, Inc.*, 65 N.Y.2d 324, 336-37, 491 N.Y.S.2d 307, 316-17, 480 N.E.2d 1089, 1098-99 (1985). Although it reversed the New York court, the Supreme Court did not rule that the fourth element of the *O'Brien* test was satisfied. Instead, the Court held that the New York court had erred in even applying *O'Brien*, since "unlike the symbolic draft card burning in *O'Brien*, the sexual activity carried on in this case manifests absolutely no element of

Chaplinsky itself supports this reading of *O'Brien*. *Chaplinsky* stands for the proposition that the state can proscribe speech that can reasonably be expected to lead immediately to disruptive conduct.⁸⁸ *Chaplinsky* holds that the state's interest in avoiding such conduct justifies a ban on the speech itself, despite the uncertainty whether "fighting words" or similar terms hurled at an unwilling audience will provoke violence. Photographed prostitution entails no such uncertainty. There is direct nexus between the speech and the proscribable conduct.

Finally, in *Ferber* a majority of the Court had little difficulty finding that the state's interest in protecting the welfare of children justified prohibiting child pornography.⁸⁹ A state has a similar interest in proscribing prostitution by adults. Surely that interest, even if less weighty than the interest in protecting children from sexual abuse, is stronger than the administrative interest in the smooth functioning of the Selective Service System that sustained the statute in *O'Brien*.

Assuming the state can proscribe the prostitution associated with the production of obscene films, videos or photographs, the next question is whether it can proscribe the distribution and purchase of such materials. Materials that depict unlawful conduct are not necessarily unlawful to distribute or to view; there have been no challenges, for example, to television coverage of airline hijackings. But distributors or consumers of sexually explicit materials are doing more than merely viewing illegal acts; they are providing the funds necessary to finance the prostitution depicted on film.

Consumers of explicit photographic materials are buyers of sex, and the distributors or retailers through whom they obtain these materials are their procurers.⁹⁰ A voyeur who commissioned a man and a woman to engage in a sexual performance for his personal enjoyment would violate the laws against prostitution.⁹¹ The same result should obtain where a roomful of paying customers views the performance or where the performance is photographed and reproduced for sale or rental.

protected expression." *Arcara*, 106 S. Ct. at 3176-77. Of course, the same could not be said with respect to using prostitution laws to bar the production of plays, films, or videos.

88. See *supra* notes 5-11 and accompanying text.

89. *Posadas de Puerto Rico Assoes. v. Tourism Co.*, 106 S. Ct. 2968 (1986), represents a further concession to the power to regulate speech intertwined with illegal conduct. In *Posadas*, the Court held that a state's potential, but unexercised power to ban certain conduct (casino gambling) included the power to ban advertising of the conduct. *Id.* at 2979. Read together, *Ferber* and *Posadas* reinforce the notion that when expression is directly and necessarily involved with regulable conduct, the expression may also be regulated.

90. See Schauer, *supra* note 18, at 922 (prototypical pornographic item is "a sexual surrogate").

91. See *Lovisi v. Slayton*, 539 F.2d 349, 351 (4th Cir. 1976).

In each case, the state interest that sustains the proscription of prostitution should extend to the ultimate consumers who generate the cash necessary to finance the illicit transaction. *Ferber* clearly so holds with respect to child pornography. If the state can advance its interest in protecting children from being used for the production of child pornography by banning such materials, there would seem to be no reason why the state's interest in prohibiting prostitution cannot similarly be advanced by banning the sale and distribution of explicit materials.

An approach that focuses on the unlawfulness of the conduct that underlies obscene expression would provide a foundation for regulating all or most "hard core" pornography—movies, videos or still photographs of explicit sexual acts.⁹² It would leave books, drawings, or other materials that are not produced by means of illegal conduct free from regulation. Although the *Roth-Miller* test might be preserved to deal with these less offensive materials, the adoption of a conduct-based approach should ultimately lead to an abandonment of that test and a recognition that materials that are not the fruit of illicit conduct constitute speech deserving of full first amendment protection.⁹³

Undeniably, the approach suggested here does not answer every question that can be raised in obscenity cases.⁹⁴ Moreover, some will argue that it merely trades one set of difficulties for another—those under the *Roth-Miller* line of cases for those associated with *O'Brien* and other speech-conduct cases. However, several factors support a conduct-based approach to obscenity.

First, it is premised on the state's historic and undisputed power to regulate conduct. Ultimately more faithful to the foundation for obscenity regulation set down in *Chaplinsky*, it is concerned with a direct nexus between speech and conduct. The *Roth-Miller* line of cases obscured this nexus and caused the Court to seek a justification for the regulation of speech grounded in vague concerns over impure thoughts and necessarily subjective notions that particular kinds of speech lack social value. The approach suggested here refocuses the courts' inquiry on conduct—not on the difficult question of predicting a listener's reaction to the "lewd and obscene," which was the focus of *Chaplinsky*, but on the unambiguously illegal conduct underlying the production of the obscene materials themselves.

92. See Sunstein, *supra* note 44, at 625 (evidence suggests that pornographic motion pictures and photography harm participants).

93. Of course, room would remain for regulation to ensure that such materials are not "lewdly" thrust upon an unwilling audience nor made available to children.

94. For example, how would the approach handle simulated sex?

Second, the type of conduct-speech analysis suggested here moots the intractable social science questions associated with attempts to determine whether the consumption of obscenity causes harm.⁹⁵ Instead, it addresses the historically recognized harm that flows from the selling and buying of sex.

Third, this approach takes courts out of the business of assessing the social value of ideas. It is irrelevant whether the prostitution is offered in the form of a live sex act on 42nd Street in New York or as the consummation of young lovers' passion in *Romeo and Juliet*. Just as in *O'Brien*, no matter what the intent of the authors or actors, their expressive purposes cannot justify commission of the offense. But books, drawings, and other works that are the result of the imagination could not be reached through an approach to obscenity that turns upon the presence of prostitution. Acceptance of this approach would make it clear that the state cannot interfere with the willing exchange and expression of ideas, no matter how offensive those ideas may be to prosecutors or courts.

Fourth, an approach to the obscenity issue that recognizes both the illegality of the underlying conduct and the complicity in that conduct by those who pay for it should change the framework for public debate. No longer would purveyors of "explicit" materials be able to march under a banner combatting state censorship. Focusing on the illegal conduct that they commission properly identifies them as procurers of sex for pay. Moreover, consumers of obscene materials would no longer be able to see themselves as persons participating in the "free exchange of ideas;" they instead would have to recognize that they are the buyers of the sex that prostitutes sell.

IV. CONCLUSION

The Attorney General's Report has, perhaps unwittingly, laid the basis for a new approach to obscenity regulation. By discussing the prostitution involved in the production of obscene materials and emphasizing the way in which it can be regulated, the Report suggests a workable approach to obscenity regulation. The condemnation of actions that have historically been recognized as criminal, rather than the prosecution of impure thoughts or unworthy ideas, can extract obscenity law from the morass that *Roth-Miller* has created and the Report otherwise endorses.

95. For a discussion of the available social science data, see Sunstein, *supra* note 44, at 591-602.