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# Can Liberals Support a Ban on Violent Pornography?\*

*Danny Scoccia*

Proponents of a ban on violent pornography have defended their position in a number of different ways. One type of argument alleges that violent pornography harms women and that banning its production and distribution would prevent much of the harm. For example, some have claimed that it (as well as much nonviolent pornography) defames all women.<sup>1</sup> Another argument is that the abuse and degradation of women depicted in violent pornography is often real rather than simulated and inflicted on unwilling models or actresses afraid to report their victimization because of their vulnerability to further harm. This argument implies that we should ban violent pornography for more or less the same reasons that we currently ban child pornography. Yet another argument taps the resources of J. L. Austin's speech act theory in an attempt to show that violent (as well as much nonviolent) pornography performs a speech act with the illocutionary force of "subordinating" and the perlocutionary force of reinforcing women's subordinate sociopolitical status.<sup>2</sup> There are other harm arguments in addition to these, but perhaps the most popular of them is that violent pornography produces and/or strengthens in its male consumers desires to sexually assault women. Many of these consumers act on the desires, and the end result is an increased number of sexual assaults.

Without elaborating on the reasons why, I believe that this last

\* I wish to thank Paul Sagal for his invaluable instruction on the topic of behavior conditioning.

1. See Helen Longino, "Pornography, Oppression, and Freedom: A Closer Look," in *Take Back the Night: Women on Pornography*, ed. Laura Lederer (New York: Morrow, 1980); and Judith M. Hill, "Pornography and Degradation," *Hypatia* 2 (1987): 39–54. For penetrating criticism of the argument, see Alan Soble, "Pornography: Defamation and the Endorsement of Degradation," *Social Theory and Practice* 11 (1985): 61–87; and Joel Feinberg *Offense to Others: The Moral Limits of the Criminal Law* (Oxford: Oxford University Press, 1985), pp. 147–49.

2. See Rae Langton, "Speech Acts and Unspeakable Acts," *Philosophy and Public Affairs* 22 (1993): 293–330.

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argument is the one that poses the most serious challenge to defenders of free speech. Of course it invites some familiar objections. One is that there simply is not enough evidence to support the causal claim on which it rests. (I take that claim to be not that the consumption of violent pornography is by itself a causally necessary or sufficient condition of committing sexual assaults on women, but rather that there is a statistically significant connection between the two, such that curtailing the availability of the pornography would significantly reduce the total amount of sexual violence against women).<sup>3</sup> Still another objection is that even if violent pornography does lead many of its consumers to sexually assault women, that still would not justify a ban. For a ban enacted to prevent those assaults would violate a principle which lies at the heart of a liberal theory of free speech, namely, that it is seldom if ever permissible to censor speech on the grounds that it might or in fact does persuade hearers to accept and act on a bad viewpoint or noxious ideas.

I shall argue that this second objection is misguided. It is misguided not because the principle in question is incorrect, and not because it is not part of the most attractive version of a liberal theory (though I confess to being less than certain that it is), but because a ban on violent pornography enacted to reduce male violence against women is in fact quite consistent with it. The principle does not protect speech insofar as it nonrationally affects its hearers' mental states, and violent pornography affects its consumers in just that way. My thesis is not that liberals *must* support a ban on this material, but rather that their theory of free speech does not plainly forbid one. Whether or not liberals should support a ban turns on difficult empirical questions about which there is room for reasonable disagreement.

## VIOLENT PORNOGRAPHY

Following Anthony Burgess, Joel Feinberg, and others, we may define "pornography" as representations, verbal or pictorial, whose function is to produce arousal in those who view or read them. As Burgess observes, "Such works encourage solitary fantasy, which is then usually quite harmlessly discharged in masturbation. A pornographic book is, then, an instrument for procuring a sexual catharsis, but it rarely promotes the desire to achieve this through a social mode, an act of erotic congress: the book is, in a sense, a substitute for a sexual partner."<sup>4</sup> Of course, if it is to fulfill its function, pornography will have

3. A careful and well-informed discussion of the causal claim can be found in Frederick Schauer, "Causation Theory and the Causes of Sexual Violence," *American Bar Foundation Research Journal* (1987): 737–70.

4. Anthony Burgess, "What Is Pornography?" in *Perspectives on Pornography*, ed. Douglas A. Hughes (New York: St. Martin's, 1970), pp. 4–8; quoted in Feinberg, *Offense to Others*, p. 130.

to be "sexually explicit" to some minimal degree. But clearly representations can have a high degree of sexual explicitness without being for arousal (e.g., photographs of diseased genitalia in medical journals).

For our purposes it will help to distinguish the following categories of pornography:

- a) Pornography which is not sexist or degrading to women; material which those feminists who regard "pornography" as a pejorative term prefer to call "nonsexist erotica"
- b) Pornography which does not contain an explicit degradation or domination theme, but which is nevertheless sexist (e.g., portraying women as silly, stupid, and eagerly servile to men)
- c) Nonviolent pornography which does contain an explicit degradation or domination theme (e.g., photos of a naked woman being urinated on, or on her hands and knees while wearing a dog collar and leash)
- d) Violent pornography, containing depictions of women being raped, tortured, tied up, and so forth; in some of this material the victim is depicted as both enjoying and consenting to the sexual abuse she (or occasionally he) suffers, and in some as unwilling and terrorized<sup>5</sup>

The restrictions on pornography called for by the argument we are considering would cover only some of the material in *d* and perhaps *c*. They are narrower in scope than the Indianapolis antipornography ordinance coauthored by Catherine Mackinnon and Andrea Dworkin, which appears to be directed at all of the material in *b*, *c*, and *d*.<sup>6</sup> They are also narrower in scope than restrictions which apply to all graphic depictions of sexual violence. They would not cover *Toolbox Murders*, an R-rated "slasher" film which shows "a naked woman taking a tub bath, masturbating, then being stalked and killed with a power drill by a masked male," because it probably does not satisfy our definition of "pornographic."<sup>7</sup> It was R rated and, hence, almost certainly did not contain the unremittingly high level of sexual explicitness which

5. The *Final Report of the Attorney General's Commission on Pornography* (Washington, D.C.: U.S. Department of Justice, 1986) distinguished *c* from *d*. For further discussion of the distinction, see Schauer, pp. 741–42.

6. For a statement and defense of the ordinance, see Catherine Mackinnon, "Pornography, Civil Rights, and Speech," *Harvard Civil Rights—Civil Liberties Law Review* 20 (1985): 1–70. Included in the material which it would recognize as a civil rights violation are depictions of women "presented as sexual objects . . . through postures or positions of servility or submission or display." The sort of pornography typified by *Playboy* magazine centerfolds clearly "displays" women. If the ordinance is meant to include it, and if there is really nothing sexist or morally objectionable about it, then it targets more than just *b–d*.

7. *Final Report of the Attorney General's Commission on Pornography*, pp. 986–87; quoted in G. Hawkins and F. E. Zimring, *Pornography in a Free Society* (Cambridge: Cambridge University Press, 1988), p. 103.

men looking for a "substitute for a sexual partner" seem typically to want and which undoubtedly would have led to its receiving an X rating. On the other hand, the restrictions would apply to photographs of women having cigarettes extinguished on their breasts, in magazines with titles like *Black Tit and Body Torture*.<sup>8</sup> No doubt the lines between "violent" and "nonviolent" and between "pornographic" and "nonpornographic" are fuzzy. The fact that they are fuzzy generates worries about "chilling effects" which any thorough defense of a ban on violent pornography must address. I only claim that the typical R-rated "slasher" movie, however disgusting, violent, devoid of artistic merit, and socially harmful it may be, is not in the gray area which separates clear cases of the pornographic from clear cases of the non-pornographic. It is clearly nonpornographic and, thus, outside the scope of a ban which targets violent pornography.

#### THE PERSUASION PRINCIPLE AND VIEWPOINT-BASED RESTRICTIONS

Can liberals support such a ban? To what principles do they appeal in deciding whether or not to support this or any other restriction on speech? Perhaps the first and most important one is the "harm principle," which says that the only good reason to restrict speech (or conduct) is to prevent harm to vital social institutions or nonconsenting third parties. Liberals reject "pure legal moralism" (the view that the prevention of harmless immorality, if there is such a thing, is sometimes sufficient to justify restrictions on either conduct or speech), and further, they insist that there are types of harm (such as harm to which a person consents, and the frustration of external preferences) the prevention of which does not justify state coercion.<sup>9</sup>

The harm principle says that only speech which causes harm may be restricted. But is the fact that a type of speech causes much harm *sufficient* to justify restricting it? More precisely, if the expected good of restricting a category of speech exceeded the expected evil, would that make restrictions on it permissible? The liberal's answer would seem to be no. We have an interest in acquiring true beliefs and avoiding false ones. Since most of the more sensational stories in super-

8. Also, the "Beaver Hunters" advertisement in *Hustler* magazine, which "shows a nude woman strapped to the top of a car; the copy below the photography states that the woman would be 'stuffed and mounted' as soon as the 'hunters' got her home." The example in the text and this quotation are taken from Cass Sunstein, "Pornography and the First Amendment," *Duke Law Journal* (September 1986): 589–627, p. 593.

9. I take the canonical liberal text to be John Stuart Mill, *On Liberty*; and Joel Feinberg's four-volume work *The Moral Limits of the Criminal Law* (vol. 1, *Harm to Others* [Oxford: Oxford University Press, 1984], and vol. 4, *Harmless Wrongdoing* [Oxford: Oxford University Press, 1988]) to be the most powerful elaboration and defense of the Millian position.

market tabloids are patently false and even ridiculous (the “Elvis is alive; he was kidnapped by Martians” variety), but many of their readers still gullibly believe them, a ban on such journalism would prevent some of the harm these readers suffer when they accept the stories as true. But clearly the liberal cannot support such a ban. Because of the way this harm comes about—the reader’s decision (for which he alone is responsible) to believe what is patently absurd—the liberal is unwilling to count its prevention as a good reason for limiting speech. In addition to the harm principle, the liberal theory of free speech seems to include what might be called the “persuasion principle,” namely, that the prevention of a risk of harm created by the persuasive effects of speech does not ordinarily justify restricting that speech.

Ronald Dworkin, David Strauss, and (at one time) Thomas Scanlon have all embraced something like this principle.<sup>10</sup> What is more, they have rejected a defense of it based on an appeal to utilitarian or other consequentialist considerations and instead sought to derive it from the Kantian injunction to respect one’s own and others’ autonomy. Dworkin says, “Morally responsible people insist on making up their own minds about what is good or bad in life or in politics, or what is true and false in matters of justice or faith. Government insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to hear opinions that might persuade them to dangerous or offensive convictions.”<sup>11</sup> We violate the autonomy of (or deny the status of full personhood to) adults when we censor speech because we regard them as so impressionable or feeble-minded that they can be easily persuaded to act wrongly.<sup>12</sup>

In a way, Dworkin’s remarks do not go far enough. Normative questions and “matters of faith” are not the only topics on which morally responsible people insist on forming their own judgments.

10. Thomas Scanlon, “A Theory of Freedom of Expression,” *Philosophy and Public Affairs* 1 (1972): 204–26 (he calls it “the Millian principle”); Ronald Dworkin, “The Coming Battles over Free Speech,” *New York Review of Books* (June 11, 1992), pp. 55–64; and David A. Strauss, “Persuasion, Autonomy, and Freedom of Expression,” *Columbia Law Review* 91 (1991): 334–71 (“the persuasion principle”; I borrow this label from Strauss). Strauss claims that the persuasion principle has been respected in nearly all recent Supreme Court First Amendment decisions, with *Puerto Rico Associates v. Tourism Company* 478 US 328 (1986), which upheld a ban on casino advertising on the grounds that the state has a legitimate interest in shielding its citizens from encouragements to gamble, being a notable exception.

11. Dworkin, pp. 56–57.

12. The persuasion principle also implies that it is wrong to restrict speech either to spare an audience the shock or offense of hearing opinions they detest or to prevent possible violence against the speaker by an unsympathetic audience. But it is hard to see how restrictions enacted to prevent these two harms (at least the first one) would violate actual or potential listeners’ autonomy. This is one reason for thinking that the persuasion principle cannot be defended on exclusively Kantian grounds.

Surely certain purely factual questions, such as whether the explanation of why black Americans as a group have a lower average IQ score than white Americans is largely genetic, or whether capitalism is more efficient than socialism, also belong in that category. The liberal theory of free speech is no less inimical to a ban on books like Charles Murray and Robert Herrnstein's *Bell Curve*, enacted to eliminate threats to racial harmony caused by false psychological and biological views, than it is to a ban on the advocacy of atheism or socialism. On the other hand, morally responsible people need not insist on judging for themselves all claims made by advertisers about the health benefits of their products. It seems consistent with remaining fully responsible and autonomous that one support a government ban on false advertising, FDA regulations requiring scientific evidence to back up claims about foods or medicines, and so on. It is not obvious what criteria distinguish factual claims that an autonomous person must judge for herself from those which she may defer to experts. But I assume that the persuasion principle as stated above can be amended so that it forbids a ban on false and racist biology but not false advertising.<sup>13</sup> Furthermore, if any pornography implicitly endorses factual claims about women, sexuality, or related matters, they will be in the category of claims the autonomous person must judge for herself. Hence, the amendment to the principle (whatever it is) will not put violent pornography's false claims about women (assuming it makes any), or the harm caused by men believing those false claims, outside the principle's scope.

Note that while the persuasion principle is probably best construed as a side constraint on laws which it is permissible for legislators to enact, it need not be regarded as an "absolute" one. That is, it need not be so strong as to protect even speech which it is highly probable will soon cause very great harm through its persuasive effects.<sup>14</sup> A nonabsolute persuasion principle thus affords no protection to specific and immediate incitements to criminal conduct (when the audience is suitably receptive to such calls, able to heed them, etc.), to false cries of "fire" in crowded theaters, nor, perhaps, to the vague advocacy of draft dodging in a society which finds itself in the dire circumstance

13. The Millian principle defended by Scanlon in "A Theory of Freedom of Expression" had the counterintuitive implication that a ban on false advertising is impermissible. In a later article ("Freedom of Expression and Categories of Expression," *University of Pittsburgh Law Review* 40 [1979]: 519–50), Scanlon argued that the only way to avoid such implications is by rejecting the Millian principle (as derived from a "respect autonomy" side constraint) in favor of a thoroughly consequentialist theory of free speech. Though an acceptable consequentialism will recognize that we have a strong interest in being autonomous or making our own well-informed decisions, it will also require that that interest be balanced against other interests when they conflict.

14. For discussion of the notion of a "side constraint," see Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic, 1974), pp. 28–33.

of needing to mobilize an army of conscripts quickly, to repel a military invasion. The fact that it does not protect immediate incitements does not put violent pornography outside its scope, because this material clearly is not an immediate incitement to specific criminal conduct.<sup>15</sup>

Why think that a persuasion principle, so amended and circumscribed, lies at the heart of the liberal theory of free speech? Mainly because it helps to organize and explain many of the liberal's considered judgments about the permissibility of viewpoint-based restrictions, content-based but viewpoint-neutral restrictions, and content-neutral restrictions. A citywide ban on all billboards would be a content-neutral restriction, while a ban on billboards with commercial advertising would be content based but viewpoint neutral, and a ban on billboards with "pro-choice" or antiwar messages would be viewpoint based.<sup>16</sup> The main reason (though certainly not the only one) why this last restriction seems so clearly wrong is that it (or the rationale behind it) is bound to violate the persuasion principle. A nonabsolute version of the principle, permitting restrictions on speech which very probably causes great harm, implies that viewpoint-based restrictions must satisfy something like a "clear and present danger" test to be permissible. Such restrictions can seldom if ever pass that test.

A ban on "any public speech likely to elicit a violent audience response," though content neutral in formulation, seems clearly unacceptable, and the fact that it violates the persuasion principle explains why.<sup>17</sup> On the other hand, a ban on all billboards with commercial advertising, enacted in a quaint town whose members are strongly averse to urban blight, seems acceptable both because it is consistent with the principle (the harms it seeks to prevent are not caused via the targeted speech's persuasiveness) and because the belief that its benefits outweigh its harms is reasonable. The reasonableness of that

15. It seems to me doubtful that it is an immediate incitement to anything, but even if it were an incitement to sexual hatred, that would not make it an incitement to criminal conduct, because there is nothing criminal about sexual hatred per se. For further discussion, see Feinberg, *Offense to Others*, pp. 155–57.

16. See Geoffrey R. Stone, "Content Regulation and the First Amendment," *William and Mary Law Review* 25 (1983): 189–252, and "Comment: Antipornography Legislation as Viewpoint Discrimination," *Harvard Journal of Law and Public Policy* 9: 461–80. Sunstein (p. 615) argues that the distinction between viewpoint-based and content-based restrictions cannot be neutrally formulated, that is, drawn in a way that does not itself presuppose a contested normative viewpoint.

17. Stone, "Comment," p. 467, discusses this example. Though viewpoint neutral in statement, this restriction is likely to be viewpoint based in motivation (enacted by conservatives wishing to curtail the expression of controversial viewpoints opposed to the political status quo or critical of widely held moral beliefs). It would certainly have unequal effects on different political viewpoints, hampering the dissemination of controversial ones more than noncontroversial ones. But as nearly all restrictions are bound to have such unequal effects, that can hardly be an objection to it.



belief would seem to be enough. Strong, quantifiable, "scientific" evidence that the aesthetic benefits outweigh the setback to economic efficiency seems unnecessary. While something like a "clear and present danger" test must be satisfied for viewpoint-based restrictions to be permissible, a weaker standard seems appropriate for viewpoint-neutral ones.

Nothing said so far implies that if a restriction is consistent with the persuasion principle, it is automatically acceptable to liberals. Consider a citywide ban on all large gatherings in public places, enacted to prevent excessive noise and litter. Though it is consistent with the principle, liberals will unanimously reject as misguided the belief that reducing these harms justifies such a broad restriction on free speech and assembly. It fails to recognize the inestimable importance of preserving many opportunities for public, political speech in a democratic society.

Would a ban on violent pornography be a viewpoint-based restriction that violates the persuasion principle? It would be a mistake to answer no either on the grounds that it does not explicitly state any viewpoint or on the grounds that there is reasonable disagreement about what viewpoint it implicitly endorses. A ban on flag burning is a clear instance of a viewpoint-based restriction, even though the act banned does not involve the explicit statement of a viewpoint and it will often be unclear what precise message the flag burner wishes to communicate. Of course the function or purpose of pornography is to arouse, not polemicize. But its having that function does not preclude it from implicitly endorsing a viewpoint as well. Many people have thought that violent pornography endorses violence against women, and it is not obvious that they are mistaken. It is not obviously wrong to interpret pornography in which, say, Asian women are bound and tortured, as implying that it is good to so treat some, many, or all Asian women. In any case I shall assume that violent pornography does condone misogyny in general and sexual violence against women in particular. To concede that it does is to concede that it contains or expresses a viewpoint, which in turn makes it harder to reconcile a ban on it with any theory which rejects viewpoint-based censorship, as the liberal theory does.

It also will not do to claim, as Cass Sunstein has, that a ban on violent pornography is viewpoint neutral if it is "directed at harm rather than at viewpoint" and it targets only this material, not all speech which explicitly or implicitly endorses violence against women.<sup>18</sup> Sunstein is wrong on both points. First, from the fact that some expressions of a viewpoint are tolerated, it does not follow that

18. Sunstein, p. 612.

restrictions on other expressions of it are viewpoint neutral. If there is a ban on the oral advocacy of atheism but not Christianity, that is a viewpoint-based restriction (in statement and probably justification) even if it does not extend to the written advocacy of atheism (perhaps because the censors believe that only the illiterate can or need to be shielded from blasphemy). So even if violent pornography alone were banned, and the public speech of a quack psychoanalyst who holds that rape cures many female neuroses were tolerated, that by itself would not make the ban viewpoint neutral. Second, "harm rather than viewpoint" is a false dichotomy. Viewpoint-based censorship typically does not aim at the elimination of harmless immorality, but instead at the prevention of harms which it is thought statements of the viewpoint will cause. Often the fear is that gullible or easily corrupted listeners will be persuaded to accept a bad viewpoint, act on it, and harm others. A ban enacted with the aim of preventing harms so caused is still viewpoint based. And it will almost always be forbidden by the liberal's persuasion principle.

#### DISTINGUISHING PERSUASION FROM NONPERSUASION

The objection to the argument for a ban which we are considering is that it would be a viewpoint-based restriction of speech and thus in violation of the persuasion principle. The claim is that the liberal must judge it no less wrong than a ban on the speech of the quack psychoanalyst or on the speech of a fundamentalist minister who, citing the authority of Saint Paul, advocates the use by husbands of a stern discipline, including corporal punishment, in dealing with uppity wives who challenge their authority to rule the family. Though the persuasion principle is nonabsolute and so does not protect speech which via its persuasiveness poses a clear and present danger of substantial harm, speech which endorses or advocates a misogynistic viewpoint typically does not pose such a danger. That is why, according to the objection, the liberal theory of free speech protects all misogynistic speech, violent pornography included.<sup>19</sup>

But whether or not a ban on violent pornography violates the persuasion principle all depends on *how* it influences the psychological states of its users. The principle protects only persuasion, so if violent pornography alters its users' desires or beliefs by nonpersuasive means, a ban on it would not violate that principle. Of course, pornography clearly is not an attempt at persuasion in the sense of marshalling evidence, offering arguments, or citing reasons in support of its view-

19. Stone seems to hold this view. His thesis in "Comment" is that broad antipornography restrictions of the sort exemplified by the Indianapolis ordinance are viewpoint based. But it seems clear that he would lodge the same complaint against narrower restrictions aimed only at violent pornography.

point. Neither are works of art like paintings or sculptures or acts of political protest like flag burning. Yet bans on flag burning and "decadent art" are clear examples of viewpoint-based restrictions which violate the persuasion principle. So the principle cannot rest on a narrow construal of persuasion in terms of offering reasons in support of an explicitly stated viewpoint. I suggest that the best way to distinguish persuasion from nonpersuasion, the one presupposed by the principle, sees them as two modes of influencing persons at the opposite ends of a continuum. At the extreme nonpersuasion or nonrational end would lie the following, if it were possible: oral speech with a certain pitch and modulation excites the aggression center in the brains of its listeners, causing in them strong urges to act violently even if they do not understand what is being spoken. At the other end lie most articles written by academics and published in scholarly journals. The speeches made by campaigning politicians to voters, in spite of the rhetorical tricks and fallacious arguments they frequently contain (ad hominem attacks, "straw man" caricature of an opponent's position, appeals to emotion, etc.), lie much closer to this pure persuasion end of the continuum. So too will be the speech of the quack psychoanalyst and the fundamentalist minister. On the other hand, a command which affects your behavior only if you understand its meaning, but which was given to you while you were drugged and under hypnosis, lies nearer the nonpersuasion end of it.

The key to determining where on the continuum an instance of speech belongs is not whether it influences its hearer against his will. If someone presents me with knockdown proof that a certain proposition is true, she affects my beliefs via persuasion, even if, having recognized her proof as cogent, I cannot help but assent to the proposition. The key seems to be the extent to which the speech allows in an idealized, "average" listener an appreciation of what he takes to be "good reasons" to shape whatever response (laughter, outrage, embarrassment, acceptance of a proposition, etc.) the speech leads him to have. If the speech causes the listener to have a certain mental state, and it either does not allow him to weigh reasons for and against having the state, or allows such deliberation to occur but somehow renders it impotent (so that he would have the mental state even if he judged it unreasonable, immoral, or whatever), then the speech is substantially nonpersuasive.<sup>20</sup> The listener of such speech is not responsible or to blame for whatever states it causes him to have.

20. To use speech at the far nonrational end of the continuum in order to control the behavior of one's listener is, in effect, to use coercion, or to affect him via mere "causes" rather than "reasons." And that certainly violates the Kantian injunctions to respect others' autonomy and treat all persons as ends in themselves, never as mere means. But not all speech which violates these injunctions belongs at the nonrational

The claim that there is a continuum here is consistent with the admission that nearly all speech has nonrational features which contribute to its ability to elicit a desired response from listeners. All that is being denied is that all speech contains or relies on them to the same extent. Speech at the far nonpersuasive end of the continuum relies on them to a greater extent than speech at the other end. The existence of a continuum implies that the persuasion principle can be understood in a number of different ways: for example, as covering only speech at the pure persuasion end or as covering all speech except that which lies at the far nonpersuasive end. Understanding it in the latter way seems more consistent with the Kantian injunction to respect autonomy from which Scanlon, Dworkin, and Strauss all wish to derive it. Surely it is a violation of the injunction to try to shield the average adult from speech which lies at the far rational end of the continuum. We would justifiably regard as insulting a ban on commercial endorsements by famous athletes or actors, enacted because it was supposed that we are so gullible, stupid, or easily manipulated that we need to be protected from their mildly insidious effects.

The criterion I have suggested for distinguishing persuasion from nonpersuasion no doubt implies that all pornography belongs closer to the nonrational or nonpersuasion end of the continuum as regards the way it produces arousal. Of course, judgment does mediate the arousal response to pornography in a certain way. Pornography is composed of pictorial or verbal representations, which can arouse only if one grasps their content or reference. In this respect it differs from both speech which causes aggression via its pitch or modulation and mechanical "sex aids." (The latter have no representational or semantic properties, and a fortiori, cannot produce arousal by anyone understanding them.)<sup>21</sup> The reason for saying that it causes arousal in a nonrational way is simply that the average person, exposed to sexually explicit depictions of the right sort, will be aroused even if she believes that she ought not be (e.g., because she judges arousal per se to be sinful).

But from the fact that pornography produces arousal in a nonrational way, it does not follow that a ban on some or all of it is consistent with the persuasion principle. Arousal per se is surely harmless. A

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end of the continuum. Though it is usually manipulative knowingly to give another bad or false reasons for acting, it is still to give reasons rather than merely to pull causal levers. Indeed, not even all coercive speech is nonrational in the sense at stake here. If it does not impede one's ability to deliberate about whether to accede to it, a threat belongs at the persuasion end of the continuum.

21. This seems to be the obvious reply to Frederick Schauer, "Speech and 'Speech'—Obscenity and 'Obscenity': An Exercise in the Interpretation of Constitutional Language," *Georgetown Law Journal* 67 (1979): 899–933, which argues that pornography is not really speech, because it functions no differently from sex aids.

ban on all pornography, enacted because it nonrationally causes what is claimed to be the harmless immorality of lusting for someone who is not one's spouse, would not violate the persuasion principle, but it would violate the harm principle. According to the argument for a ban which we are considering, the harm caused by violent pornography is increased sexual assaults against women. To reconcile a ban enacted to prevent that harm with the persuasion principle, what needs to be shown is that violent pornography causes misogynistic beliefs and/or desires, not just arousal, in a substantially nonrational way.

#### "SUBLIMINAL SUGGESTION"

Cass Sunstein has suggested in passing that violent pornography instills in its users an "ideology" through a process akin to "subliminal suggestion or hypnosis."<sup>22</sup> Subliminal suggestion, I assume, is the process whereby speech causes an unconscious mental state in the average person exposed to it, and it causes the mental state even if one consciously judges it unreasonable, imprudent, or immoral to have the state in question. Thus, subliminally suggestive speech belongs at the far nonrational end of the continuum. The claim that violent pornography affects its consumers' psychology in this or any other nonrational way of course does not imply that its producers intend it to do so. The pornographer surely does not intend to brainwash men into wanting to hurt women, if only because it is not in his interests. Quite the contrary: the sexual assaults committed by some of his product's users lead many to demand that the state shut down his business.

One problem with the subliminal suggestion hypothesis is that it seems hard pressed to explain why violent pornography is any more subliminally suggestive than misogynistic jokes or songs, or nonpornographic speech which condones sexual violence. Some studies have found that "favorable" rape depictions (the victim first resists but eventually appears willing and aroused) cause more "calloused" attitudes toward rape victims and a greater acceptance of rape myths (e.g., "no" really means "yes") than "unfavorable" ones. Presumably, rape myths are part of the ideology which Sunstein had in mind. But one of the studies found that nonpornographic movies containing similarly "favorable" rape depictions (e.g., "The Getaway," "Swept Away") had the same bad effects on viewers, and further, that the effects could be eliminated by a "debriefing session," in which the researchers conducting the experiment explained to the subjects why the myths are false.<sup>23</sup>

22. Sunstein, pp. 607–8. This, together with the fact that it is meant to produce arousal, makes pornography "noncognitive" speech.

23. See Neil M. Malamuth and James V. P. Check, "The Effects of Mass Media Exposure on Acceptance of Violence against Women: A Field Experiment," *Journal of Research in Personality* 15 (1981): 436–46; on the efficacy of the debriefing sessions in

These findings imply that violent pornography is no more subliminally suggestive with respect to rape myths than nonpornographic movies, and indeed, that neither communicate the myths in a way whose efficacy is unaffected by conscious consideration of objections to the myths.

Another problem with the subliminal suggestion hypothesis is this. A common objection to our argument for a ban is that its defenders face a dilemma: Either one can believe that his exposure to violent pornography caused this rapist to commit his crime, or one can believe that he has free will and is responsible for his actions; one can't have it both ways. Any reply to this objection will assume that compatibilism is a defensible position in the debate over free will and determinism. For the compatibilist it is only free will and certain kinds of causation (e.g., coercion by another) which are incompatible. As long as violent pornography does not affect its consumers' behavior in one of those responsibility-negating ways, the compatibilist insists that the consumers are morally and legally accountable for any sexual assaults they commit. But it seems that subliminal suggestion would have to count as one of those ways. To someone in whom a brainwashing has implanted strong but not irresistible urges to commit crimes, but not impaired his ability to engage in moral deliberation, it makes sense to say, "Your knowledge that it is wrong to act on those urges should have led you to resist them." But to someone in whom the brainwashing has gone much deeper, implanting false or immoral beliefs and anesthetizing his ability to hold them up to critical scrutiny, that cannot be said. We must excuse him for his wrongdoing.

Of course if one chooses to subject oneself to a brainwashing the foreseeable consequences of which include one's forming false or immoral beliefs, then one is fully responsible for having them, as well as for the actions one performs because one has them. But precisely because the subliminal suggestion hypothesis alleges that violent pornography causes misogynistic beliefs and values surreptitiously, it can hardly be "common knowledge" that it does so. So I conclude that the subliminal suggestion hypothesis is incompatible with the widely held and presumably correct belief that consumers of violent pornography who commit sexual assaults are fully responsible for their crimes.

## CONDITIONING

Sunstein's hypothesis is not the only one which would put violent pornography at the far nonrational or nonpersuasive end of the con-

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counteracting the bad cognitive effects that viewing "favorable" rape depictions had on experimental subjects, see Neil M. Malamuth, "Rape Proclivity among Males," *Journal of Social Issues* 37 (1981): 138-57.

tinuum. Another—the one I wish to endorse—is that it produces new or reinforces preexisting desires or urges to harm women through a process akin to operant conditioning. Operant conditioning rests on the “law of effect,” which says that rewarding or reinforcing a behavior  $x$  in circumstances  $y$  increases the probability that  $x$  and sufficiently similar behaviors will recur in  $y$  and sufficiently similar circumstances. Suppose, for example, that on many occasions, after a child has said “Thank you” to his mother for giving him a candy, she smiles at him and gives him another. That increases the probability not only of the child’s uttering the same words to the same person in the same circumstances in the future, but also, via “response generalization,” of his thanking others when they bestow on him similar favors. The child may learn to show his gratitude in nonverbal ways, with gestures or facial expressions that are very different in “topography” from the verbal behavior that was first reinforced.

There is some evidence that if one repeatedly thinks about drinking a cocktail and then conjures up thoughts of nausea, that diminishes the probability of one’s actually drinking cocktails.<sup>24</sup> This suggests that response generalization can and does occur from contemplating an act to its actual performance and vice versa. Another more commonplace example of conditioning is advertising which makes no attempt to provide information about the product that a rational consumer might want, but instead merely tries to create an association in the consumer’s mind between the product and something else the consumer finds desirable. Cigarette ads which portray smokers as especially gregarious, physically unblemished, or macho (the Marlboro man) do this, using, perhaps, both classical and operant conditioning. Evidently, the ads are quite effective, causing many consumers to start smoking Marlboros and not just to look at more Marlboro ads or imagine being a Marlboro man. Obviously it does not have that effect on everyone who repeatedly views the ads—not every male who is already a cigarette smoker, or even every male for whom the thought of being macho is reinforcing. But it does have it on a sufficiently large number of consumers to make it rational for Marlboro executives to spend millions of dollars on it.

24. This example is mentioned by Richard Brandt. See *A Theory of the Good and the Right* (Oxford: Oxford University Press, 1979), p. 99, for citation of the relevant psychological literature. This example also serves to make the point that nothing in the law of effect requires that the behavior in question be publicly observable (thinking of drinking a cocktail is not). Also, one can accept the law without being a behaviorist and holding (as Skinner did) that all human behavior (apart from reflex behavior) is the product of operant conditioning. Finally, I take it that one can accept the law but reject the behaviorist’s claim that talk of “behavioral tendencies” is always preferable to talk of “desires.”

Turning now to violent pornography, we can distinguish the following behaviors:

1. Looking at sexually explicit pictures of someone else raping women
2. Fantasizing about raping women oneself
3. Looking at others pretending to rape women (e.g., in a live sex show)
4. Having perceptions of one's actually raping a woman

My claim is that the typical consumer of violent pornography frequently engages in behaviors 1 and 2, which are reinforced by the strong pleasures of arousal, masturbation, and orgasm. That creates not only an increased probability, stronger tendency, or (as I shall say henceforth) stronger *desire* to repeat 1 and 2 in the future, but also, via response generalization, a desire to engage in 4 (as well as 3). The response generalization required here seems neither different in kind nor greater in extent than that involved in aversion therapy for alcoholics or in Marlboro ads. Indeed, one difference between violent pornography and Marlboro ads tells in favor of the claim that the former is a more potent conditioner. What underlies the efficacy of the ads is pleasure at the thought of being a Marlboro man, whereas in the case of violent pornography there are the much stronger, more intense pleasures of sexual arousal and orgasm. The stronger the pleasure, the more potent the "reinforcer," other things being equal.

The conditioning hypothesis about violent pornography which I am defending would put it at the far nonrational end of the continuum only if a similar conditioning would have similar effects on the average male. It seems likely that it would. To claim as much is not to insult men or to suggest that they are all latent misogynists, but rather to recognize the potency of the reinforcer in question. If a vegetarian were forced repeatedly to look at pictures of steaks while neuroscientists stimulated pleasure centers in her brain, she would form a tendency to look at more pictures of steaks, look at real steaks, and perhaps even eat steaks. That does not mean that she will forsake her vegetarianism. If she firmly believes that there are strong prudential or moral reasons not to eat meat, she should succeed in resisting her steak urges (which presumably will be extinguished soon after the conditioning ceases). Similarly, if men who are not misogynistic (contra Andrea Dworkin, I assume there are many) were repeatedly forced by neuroscientists to view violent pornographic images while the pleasure centers of their brains were being stimulated, producing in them pleasures of the same intensity as those the consumer of violent pornography produces for himself via fantasy and masturbation, I surmise that they would eventually find themselves with urges or dispositions to sexual violence which they did not previously have, but which many of them



would successfully resist owing to their belief that such violence is wrong.

A couple of objections may be raised to this conditioning hypothesis about violent pornography. First, granting that the repeated masturbatory use of it does have the conditioning and generalization effects described above, why think that it generates or reinforces a desire which can be satisfied only by actually harming women? Why not suppose instead that the desire which gets reinforced is one which can be satisfied either by the continued consumption of violent pornography or by actual sexual assaults on women? If the desire has that disjunctive structure, then women have little to worry about so long as the use of violent pornography remains a cheaper, more cost-effective way of satisfying it than actual sexual assaults. Its use would then be a sort of catharsis, and a ban on it would probably be counterproductive, increasing rather than decreasing harm to women. Second, it has already been admitted that some users may have the desire (i.e., the one which can be satisfied only by actual sexual assaults) but not act on it, because they have stronger, countervailing desires. For example, it could be the case that many of the men who fantasize about raping women who resist at first but then submit, enjoy, and give retroactive consent believe that it would be wrong to rape a woman who did not behave that way, believe that it would be okay to rape one who did, but realize that it is impossible to predict which women in the real world will behave the way they would like. And perhaps many other (fewer?) men, who enjoy the sadistic fantasy of raping women who look terrorized throughout, judge real sadistic rape so wrong that they never engage in it (in which case one would still expect them to feel some guilt for engaging in the fantasies). Indeed, the conditioning hypothesis about violent pornography is quite consistent with the possibility that none of its users hurt women, because all of them have stronger countervailing desires of some sort. The conditioning hypothesis is not identical to the causal claim that the consumption of violent pornography produces a significant increase in the total number of sexual assaults, nor does it entail it. Given this, is there any reason at all to believe that most users of violent pornography have no strong, countervailing desires, or that among those who do, their continued use of violent pornography will tend to weaken those desires?

These are fair questions. But they do not challenge the conditioning hypothesis *per se*. All I have claimed to this point is that if violent pornography leads to an increase in the total number of sexual assaults on women, that increase occurs because it has strengthened in its users a desire to assault women through a process of operant conditioning. It does not occur because violent pornography communicates a misogynistic viewpoint or ideology which its users decide to accept and act on. If the conditioning hypothesis is correct, acceptance of the view-

point plays no role at all in the causal chain leading from consumption to sexual assaults on women. Hence, if violent pornography produces an increase in harm to women, it does so in a way that falls outside the coverage of the persuasion principle. The objections in the preceding paragraph do not cast doubt on that claim. Rather, they express doubts that violent pornography is responsible for any increase at all. I shall return to them shortly.

#### AN ADDITIONAL WORRY

Geoffrey Stone has noted that "it is too easy to characterize 'undesirable' ideas as insidious. The concept is too open-ended, too subject to manipulation to justify viewpoint-based discrimination."<sup>25</sup> He expresses a legitimate worry here. As the persuasion principle was stated earlier, it protects only speech which is not "substantially nonpersuasive." Clearly, the line between speech which is and speech which is not substantially nonpersuasive is not sharp, so there are cases which fall in a grey area, and courts would have to make tough decisions. Many groups would demand state interference with speech which they claim falls outside the protection of the persuasion principle and causes significant harm but which they really oppose only because it promotes a viewpoint they despise. (For example, some liberals are quick to label the sort of education that religious schools provide children as "indoctrination," but it seems to be the content of the teaching rather than the means by which it is imparted to which they really object). Isn't the claim that the repeated masturbatory use of violent pornography gives rise to a kind of brainwashing really just a smoke screen for a viewpoint-based attack on misogynistic or sexist ideas? Wouldn't acceptance of the claim put us on a slippery slope which would make it increasingly difficult to resist calls for a ban on graphic nonpornographic depictions of sexual violence, sexist but nonviolent pornography, or even sexist TV commercials?

I do not see why it should. The conditioning hypothesis seems to me to succeed where the subliminal suggestion hypothesis failed, namely, in explaining why the masturbatory use of violent pornography affects the psychology of its user in a substantially more nonrational way than any of these other types of speech. Let us begin with graphic, nonpornographic depictions of sexual violence. While the spectator of *Toolbox Murders* may enjoy watching the gore on the screen, he does little more than watch and enjoy watching. There is nothing comparable to masturbation in this case, no reinforcer of the behaviors of watching the violence or imitating it which approaches the strength of orgasm as a reinforcer. Slasher movies instead seem

25. Stone, "Comment," p. 478.

to produce their deleterious effects in other ways. On those spectators already strongly disposed to violence, they affect the timing and especially the manner in which violent crimes are committed. But there is no reason to believe that they inspire copycat crimes in an insidious way, one that circumvents the conscious, rational thought processes of these spectators. On minors and especially impressionable adults, such movies are likely to promote violence through providing bad "models" whom they strive to emulate, or through their "desensitizing" or "habituating" effects (i.e., their tendency to weaken inhibitions to acting violently). The worry that they have such corrupting effects on the young seems well founded and may justify restricting their viewership to adults. But it does not support the claim that graphic depictions of nonpornographic violence belong at the far nonrational end of the continuum and, thus, outside the scope of the persuasion principle.

Let us turn now to the question whether it is plausible to suppose that nonviolent but sexist pornography conditions its consumers to support patriarchy, accept the ideology of sexism (that men have a duty to display a condescending "gallantry" toward the "weaker" sex; it is "natural" for women to stay at home and raise children; women are too emotional to be entrusted with leadership responsibilities; etc.), or both.<sup>26</sup> That some pornography is sexist seems beyond doubt, though there seems to be much disagreement about which pornography is sexist and why. I assume that pornography is sexist if it features women who conform to an insulting, derogatory stereotype (e.g., the frivolous, empty-headed "bimbo"), and especially if it portrays women in positions of socioeconomic subordination happy to provide sexual services on command (e.g., a male executive orders a female secretary into his office to perform fellatio, and she dutifully and eagerly complies). Such pornography implicitly endorses a sexist viewpoint.<sup>27</sup> The

26. Appellants' brief to *ABA v. Hudnut* claims that it does: "By conditioning the male orgasm to female subordination, pornography . . . makes the subordination of women pleasurable and seemingly legitimate. Each time men are sexually aroused by pornography, they learn to connect a woman's sexual pleasure to abuse and a woman's sexual nature to inferiority. They learn this in their bodies, not just their minds, so that it becomes a natural physiological response. At this point pornography leaves no more room for further debate than does shouting 'kill' to an attack dog." Quoted by Nan D. Hunter and Sylvia A. Law, "Brief *Amici Curiae* of Feminist Anticensorship Task Force et al., in *ABA v. Hudnut*," reprinted in Patricia Smith, ed., *Feminist Jurisprudence* (Oxford: Oxford University Press, 1993), p. 474.

27. It is often claimed that *Playboy* magazine centerfolds are sexist because they "objectify" women, but it is unclear to me exactly what that is supposed to mean. No doubt the male consumer of such pornography has a purely carnal interest in the model posing. But why should taking a temporary, purely carnal interest in another person be any more objectionable than any of the many other ways in which people take a

question we need to consider is whether it conditions its users to accept that viewpoint.

Consider the following. Sexist pornography stimulates fantasies in which voluptuous but servile women satisfy the sexual desires of a man—presumably the one doing the fantasizing—on command. He masturbates, and the pleasure he receives reinforces a tendency to repeat such fantasy in the future. Through a first stage of response generalization, a tendency to control real women during sexual encounters, or perhaps to seek out slavish sexual partners, is also reinforced. Through a second state of it, the fantasy and arousal strengthen a desire to keep women politically and economically subordinate in the real world. Of course anyone who believes sexist pornography does all this can and should admit there are many other causes of that desire. Sexist pornography is a less important cause than traditional Judeo-Christian teachings about women, marriage, and family, and thus, it is far from being the linchpin of patriarchy, as some more radical feminists have claimed. But the advocacy of religious beliefs opposed to women's equality is clearly protected by the persuasion principle. Sexist pornography, if it affects its users in the way just described, would not be protected by it.<sup>28</sup>

But the suggestion that sexist pornography is just as potent a conditioner as violent pornography is implausible. It exaggerates how far response generalization can or normally does go. The conditioning hypothesis about violent pornography did not require anything like the second stage of response generalization described above. In the case of violent pornography, the acts which its users fantasize about are the very same acts as the ones they acquire urges to commit in the real world. This is not so in the case of sexist pornography: its users do not fantasize about keeping women at home to raise children or passing them over for job promotions in favor of less qualified male coworkers. A conditioning hypothesis about sexist pornography requires that generalization occur from behaviors of sexually dominating women to behaviors like opposing the Equal Rights Amendment or the legalization of abortion. Possibly it does occur to some

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temporary, limited interest in one another? See Janet Radcliffe Richards, *The Skeptical Feminist* (Boston: Routledge & Kegan Paul, 1980), pp. 197–202.

28. Ronald Dworkin has argued, "It would plainly be unconstitutional to ban speech directly advocating that women occupy inferior roles, or none at all, in commerce and the professions, even if that speech fell on willing male ears and achieved its goals. So it cannot be a reason for banning pornography that it contributes to an unequal economic or social structure, even if we think it does" ("Liberty and Pornography," *New York Review of Books* [Aug. 15, 1991], pp. 12–15, p. 14). Someone who believes in the conditioning story about sexist pornography will reply that the reason for banning this pornography is not simply that it contributes to women's inequality, but rather that it does this in a way not protected by the persuasion principle.

degree. But the greater dissimilarity between these two types of behavior, as compared to fantasizing about raping and really raping, surely implies that if it occurs at all, it does so to a much lesser extent.

I do not deny that pornography with a sexist content will promote sexist attitudes in a nonrational way. Repeated exposure to any speech that depicts a class of persons in subordinate roles can habituate one (especially children) to the belief that it is natural for them to occupy such roles. I deny only that the masturbatory use of sexist pornography gives it a significantly greater ability nonrationally to promote patriarchy than the hearing or watching of sexist jokes or songs, sexist insults, televised beauty pageants, or the like, to do the same. Hence, I doubt that the reasons I have offered for believing that violent pornography lies outside the coverage of the persuasion principle apply with equal cogency to nonviolent but sexist pornography. A ban on sexist pornography, enacted to reduce the harm of subordinate socioeconomic status for women, cannot avoid violating liberalism's commitment to the persuasion principle.<sup>29</sup>

#### WHY LIBERALS CAN SUPPORT A BAN

To show that a ban on violent pornography is consistent with the persuasion principle is not (yet) to show that liberals can or should support it. To show that, one would also need to argue that they can or should accept the causal claim made by the argument for a ban. That claim, recall, is that the availability of violent pornography in our society causes a significant increase in the total number of sexual assaults on women. How high are the evidentiary standards that must be satisfied before we are entitled to accept that claim and base public policy decisions on it?

If violent pornography were protected by the persuasion principle, the theory of free speech which I have defended would permit a ban only if there were strong, indisputable evidence that its consumption causes an increase, that is, only if a ban could pass a "clear and present danger" test. This is the test to which Joel Feinberg and Fred Berger would subject a ban.<sup>30</sup> It is fairly obvious, I think, that the

29. Mackinnon, I take it, would agree. She appears to simply reject liberalism's commitment to no viewpoint-based censorship. More surprising is that *Hudnut* overturned the Indianapolis ordinance on the grounds that it was a viewpoint-based restriction forbidden by the First Amendment, and Mackinnon finds that decision legally flawed. She cites a number of cases in which the Supreme Court upheld restrictions on speech and claims that *Hudnut* was inconsistent with them. But since none of the restrictions in those cases was clearly viewpoint based, they are irrelevant to *Hudnut*'s holding. See Mackinnon, pp. 24–25.

30. Feinberg endorses Berger's claim that "there must be strong evidence of a very likely and serious harm." See Feinberg, *Offense to Others*, p. 157; and Fred Berger, "Pornography, Feminism, and Censorship," in *Philosophy and Sex*, 2d ed., ed. R. Baker and F. Elliston (Buffalo, N.Y.: Prometheus, 1984), p. 341.

evidence of violent pornography's harmfulness does not and probably never will pass it. The idea that social science has or can provide hard evidence in support of the causal claim seems utterly misguided. Laboratory experiments which expose subjects to varying sexual/non-sexual and violent/nonviolent materials and then measure their responses will always be subject to the methodological objections that they create potentially significant causal conditions absent in the real world and that there are potentially significant conditions in the real world which cannot be replicated in the laboratory. (One such condition is that "outside the laboratory violence is not sanctioned, but inside the laboratory aggression is condoned, even encouraged, after the subject has viewed the violent material.")<sup>31</sup>

Because violent pornography falls outside the protection of the persuasion principle, the "clear and present danger" test is the wrong one to use. The weaker test to which we should subject a ban on this material is a purely consequentialist one which weighs its expected benefits against its expected costs. That test in turn implies that the lower those costs are, the less evidence is needed for the causal claim on which the argument for a ban is based. The potential costs of a ban include the resources expended in enforcing it, the desire frustration which it would cause those violent pornography users who never commit acts of sexual violence, and the setback to various interests which free speech ordinarily promotes. Among those interests are the search for truth, the formation of autonomous beliefs and values, and the maintenance of a democracy in which the interests and ideals of different citizens are fully and fairly represented in debate over public policy. A ban could harm these interests either through reducing the availability of violent pornography, which might itself be thought to

31. Daniel Linz, Steven D. Penrod, and Edward Donnerstein, "The Attorney General's Commission on Pornography: The Gaps between 'Findings' and Facts," *American Bar Foundation Research Journal* 81 (1987): 713–36, p. 722. Several other methodological problems are mentioned by the authors, who themselves have conducted several such experiments. In one they describe (p. 720), male college students are first angered and then shown one of four films: (i) "aggressive pornography," (ii) a film that was "X-rated but with no aggression or sexual coercion," (iii) a film that "contained scenes of aggression against women but without any sexual content," and (iv) a film with "neutral content." The men who viewed i "displayed the highest level of aggression against women," and those who viewed iii showed more aggression than those who viewed ii. Note that slasher movies like *Toolbox Murders*—R-rated movies which contain graphic sexual violence but not enough sexual explicitness to give them an X rating—belong to none of these categories, and hence, the results of this experiment do not support the claim that violent pornography is more harmful to women than this category of sexually violent speech. Both Deana Pollard ("Regulating Violent Pornography," *Vanderbilt Law Review* 43 [1990]: 125–59) and Sunstein (p. 593) misinterpret the social science research when they maintain that it does support such a claim.

advance them, or through its “chilling effects” on other kinds of speech which certainly do advance them.

It seems to me that these evils are either avoidable or, to the extent that they are unavoidable, fairly minor. It can hardly be maintained that the availability of violent pornography is vital to the search for moral truths or that a ban on it would seriously impair autonomous belief and value formation (as a ban on the advocacy of atheism or socialism would). Nor is it plausible to claim that a ban is inconsistent with democratic ideals, because it would distort public debate about sexual violence, sexual equality, or the like. In this respect violent pornography seems no different from other pornography. It is precisely because restrictions on *any* pornography are much less likely to damage important free speech interests than restrictions on religious proselytizing, artistic expression, or political advocacy that it seems correct to regard pornography in general as a “low value” category of speech.<sup>32</sup>

A more serious objection to a ban is that it would set back these interests through its chilling effects on other, “high value” speech. It might be claimed that any ban would necessarily be couched in vague, sweeping terms and, as a result, would inhibit those who wish to include graphic depictions of sexual violence in nonpornographic works of art or political protest. A vaguely drafted ban could be exploited by Andrea Dworkin-type feminists intent on extirpating from the culture all “favorable” depictions of rape or sexual violence, even in nonpornographic works with serious artistic or political value. It would also be exploited by conservative prudes who wish to rid society of all erotica.

If a ban could not avoid such side effects, then its costs might well outweigh its benefits. But there is no good reason to believe that these slippery slope costs are unavoidable. While it may well require great care and skill to draft a ban which, unlike the Indianapolis anti-pornography ordinance, is not excessively vague or overly broad, there is no reason why it should be impossible in principle.<sup>33</sup>

32. For further discussion of the analysis of categories of speech as having low and high value, see Stone, “Content Regulation and the First Amendment,” and Sunstein. The relatively low value of commercial speech seems to be an important part of the reason why the ban on billboards with commercial messages is acceptable, while the relatively high value of political speech is the reason why the ban on all large gatherings in public parks, to prevent excessive noise and litter, is unacceptable.

33. One reason for not extending a ban to all pornography which contains an explicit degradation or domination theme (to the *c* category as well as the *d* category distinguished earlier) is that the difficulties in operationalizing ‘violence’ and ‘pornographic’ pale in comparison to the difficulties that beset any attempt to operationalize ‘degradation’. Some of the latter difficulties are described in Berger.

Does the loss suffered by law-abiding violent pornography users who have been denied ready access to the material they desire provide a reason against a ban? To remain faithful to the harm principle, liberals must admit that it does. They cannot refuse to count as one of the costs of a ban the diminished satisfaction of users' desires to fantasize about raping women on the grounds that such fantasy is immoral even if it is never acted on. That would be legal moralism. Perhaps it can be argued that for many of these men a ban would be in their long-term self-interest. But even if it cannot be, it is hard to believe that it would impose a serious deprivation.

If a consequentialist test is the appropriate one to apply to a ban on violent pornography, and if the costs of a well-drafted ban are fairly minor, it would follow that fairly weak, speculative evidence in support of the causal claim is all that is needed. In response to the objection that the use of violent pornography may well be a catharsis, satisfying a desire with a disjunctive structure (for either more violent pornography or actual sexual assaults), I would advert to the cigarette advertising example used earlier. If the desire which Marlboro man ads produce in consumers were the disjunctive one (to smoke Marlboros *or* look at more Marlboro ads), the ads would not be so effective, since looking at more ads would be the cheaper way to satisfy it. Their effectiveness is evidence that the desire that they produce is the nondisjunctive one, simply to smoke Marlboros. Since the continued use of violent pornography involves the same nonrational, conditioning process, only with a more potent conditioner, it seems likely that it reinforces a similarly nondisjunctive desire. So violent pornography is unlikely to be a catharsis.

But, as has already been admitted, its reinforcing a desire that only sexual assaults can satisfy does not mean that it produces any increase in sexual assaults, much less a significant one, because it is possible that consumers of violent pornography have strong countervailing desires, beliefs, or personality traits. It must also be admitted, I think, that there is little reason to believe that the continued use of violent pornography is bound to weaken or eliminate such countervailing states in consumers who have them. But how many consumers are likely to have them? A sort of schizophrenic attitude toward women, involving gallantry toward "ladies" but hostility and a desire to dominate sexually independent women ("sluts"), seems prevalent and "normal" in some subcultures of our society. It seems to me at least reasonable to believe that those violent pornography users who were socialized within these subcultures will not have any strong countervailing desires.

Whether the above constitutes a strong enough reply to doubts that there is sufficient evidence to support the causal claim—and hence to doubts that a ban on violent pornography can satisfy even a test



weaker than the “clear and present danger” test—seems to me to be a question about which there is room for reasonable disagreement. The liberal theory of free speech neither clearly forbids nor clearly requires a citywide ban on all billboards with commercial advertising, enacted to prevent excessive urban blight, because there is room for reasonable disagreement about whether its benefits (aesthetic) outweigh its cost (the setback to economic efficiency). The same is true of a ban on violent pornography.