Censorship: A Comparative Approach
Offering A New Theoretical Basis For Classification In Australia

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I INTRODUCTION

The question of what types of sexually explicit expression should be prescribed is one which frequently gives rise to public controversy, yet in Australia little challenge is offered to the underlying assumption that a community standard test ('the standards of morality, decency and propriety generally accepted by reasonable adults' as it is phrased by s 11 of the Classification (Publications, Films and Computer Games) Act 1995 (Cth)) should form the basis of censorship legislation. The focus of this article is thus not whether the Office of Film and Literature Classification accurately applies the community standard, but rather whether that standard is itself appropriate and, if not, what standard should replace it. This article is also confined to an analysis of films (which includes videos and DVDs) and publications (such as magazines). It does not address computer games. Part II of the article begins by examining competing theoretical approaches to obscenity, focusing on cases decided by the Supreme Courts of Canada and the United States. Part III examines the empirical evidence relating to the extent to which sexually explicit material causes harm, and proposes a harms-based test for what should be banned. Part IV contains an overview of the statutory provisions applicable in Australia and critiques them in the light of the approach discussed in Part III, and concludes with a proposal for a new statutory regime for Australia. As a preliminary point it should be noted that this article is concerned exclusively with the regulation of material which may be viewed by adults. It does not challenge restrictions on access of materials by minors.

II COMPETING DOCTRINES

Why is it thought necessary to regulate sexually explicit material? What is the theoretical basis underlying censorship legislation? Although space does not permit a comprehensive examination of all theoretical approaches towards this issue, the two major schools of thought can be illustrated by reference to case law from the United States and Canada.

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1 Classification (Publications, Films and Computer Games) Act 1995 (Cth), s 5.
2 Ibid.

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The 'community morals' approach

In the leading case of Chaplinsky v New Hampshire, obscenity was one of the categories of expression which the court held did not merit constitutional protection under the First Amendment. However the court offered no definition of what was meant by 'obscene'. Such a definition came in the case of Roth v United States, in which the court defined 'obscenity' as 'material which deals with sex in a manner appealing to prurient interest', that is 'material having a tendency to excite lustful thoughts'. Whether material was of this nature would be determined by ascertaining 'whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' This test was clearly rooted in concepts of social morality, and offered no explanation as to why such moral concerns should over-ride individual rights. It was both the moralism which penalised thoughts, and the majoritarianism that sought to replace the moral judgment of the individual with that defined by society, that were criticised by Douglas and Black in their dissent.

The next leading case on obscenity was Miller v California, in which the court propounded a new composite test for obscenity, in terms of which for speech to be obscene it had to satisfy a tripartite test, the elements of which were:

   (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appealed to prurient interest;

   (b) whether the work depicted or described, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

   (c) whether the work, taken as a whole, lacked serious literary, artistic, political or scientific value.

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1 315 U.S. 568 (1942) 571-72.
2 354 U.S. 476 (1957) 484.
3 Ibid 487.
4 Ibid 487.
5 The salient excerpts from the dissenting opinion (at 511-12) are as follows:
   The standard of what offends "the common conscience of the community" conflicts with the command of the First Amendment ... Certainly that standard would not be an acceptable one if religion, economics, politics or philosophy were involved. How does it become a constitutional standard when literature treating with sex is concerned?
   Any test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment. Under that test, juries can censor, suppress, and punish what they don't like, provided the matter relates to "sexual impurity" or has a tendency to "excite lustful thoughts". This is community censorship in one of its worst forms. If the First Amendment guarantee of freedom of speech and press is to mean anything it must allow protests against the moral code that the standard of the day sets for the community ...
7 The test is found at 24 of the report.
8 The application of the Miller test is discussed in detail in Bruce Taylor 'Hard-core Pornography: A Proposal for a Per Se Rule' 21 (1987) University of Michigan Journal of Law
The court held that it was unrealistic to expect 'community standards' to refer to a national standard, and that it was up to a jury in such cases to apply the standard of its particular community, even though this inevitably meant that expressive rights would vary from place to place.

The philosophy underlying Miller continues to govern the law in the United States today - thus in Barnes v Glen Theatre Inc,\textsuperscript{11} the court re-asserted that the government may validly legislate to preserve 'morality',\textsuperscript{12} and the only instance in which the court adopted a harms-based rationale for restricting sexually explicit material was in its decisions relating to the separate category\textsuperscript{13} of child pornography (Ginsberg v New York,\textsuperscript{14} New York v Ferber\textsuperscript{15} and Osborne v Ohio\textsuperscript{16}). The Miller test was most recently applied in Ashcroft v ACLU\textsuperscript{17} in which the Supreme Court invalidated the Online Protection Act (COPA),\textsuperscript{18} on the ground that it imposed excessively broad restrictions on those publishing material on the internet. Yet the Miller doctrine is clearly unsatisfactory - in Pope v Illinois,\textsuperscript{19} for example, the court held that the community standards test was not applicable to the third aspect of the Miller test, because a work might have objective literary or artistic value even though it was offensive according to the standards of the particular community from which the jury was drawn, and that therefore an objective test should be applied in determining redeeming value.\textsuperscript{20} Yet surely the same argument could be made against the community standard in general? If the inherent subjectivity of the community standards test was recognised as making it inappropriate to determine matters of artistic value, was not its application in order to test prurience or offensiveness equally objectionable?

Finally, the inconsistency in thinking underlying the obscenity doctrine and the rest of First Amendment law can no better be illustrated by Cole’s observation\textsuperscript{21}...

\textsuperscript{12} 501 U.S. 560 (1991) 575. Nadine Strossen 'A Feminist Critique of "The" Feminist Critique of Pornography' 79 (1993) Virginia Law Review 1099, 1120-21 cites this case as evidence of the difference in treatment accorded sexual expression, which can be proscribed simply because the community finds it offensive, and non-sexual communication in relation to which content based restrictions are not permitted.
\textsuperscript{13} Depictions of minors engaged in sexually explicit conduct constitute a category of proscribed speech entirely separate from and unrelated to the category of obscene speech as defined in Miller, see William Layman 'Violent Pornography and the Obscenity Doctrine: The Road Not Taken' 75 (1987) Georgetown Law Journal 1475, 1487 and Deana Pollard 'Regulating Violent Pornography' 43 (1990) Vanderbilt Law Review 125, 145-48.
\textsuperscript{14} 390 U.S. 629 (1968).
\textsuperscript{15} 458 U.S. 747 (1982).
\textsuperscript{16} 495 U.S. 103 (1990).
\textsuperscript{17} 124 S.Ct. 2783 (2004).
\textsuperscript{18} 47 U.S.C. § 231.
\textsuperscript{19} 481 U.S. 497 (1987).
\textsuperscript{20} Furthermore, in Smith v United States 431 U.S. 291 (1977) 301 the court also held that the third element was to be tested by a national rather than local standard.
\textsuperscript{21} David Cole 'Playing by Pornography's Rules: The Regulation of Sexual Expression' 143 (1994) University of Pennsylvania Law Review 111, 112. This article contains a comprehensive examination of First Amendment law relating to obscenity, and highlights the fact that the difference in treatment accorded sexually explicit expression as compared with other forms of speech cannot be justified on any principled basis (see in particular 119-21).
that whereas under part (b) of the Miller formulation the offensiveness of expression denies it constitutional protection, in relation to other types of expression the courts have been unwavering in holding that speech may not be proscribed simply because society finds it offensive.

The feminist approach

In contrast to the community morality rationale, some contemporary scholars have sought to develop an approach in terms of which sexually explicit material should be proscribed on the ground that it causes harm (rather than that it offends societal moral codes), specifically that the publication of such material constitutes an act of gender discrimination and thus an infringement of equality rights. This section explains the equality-based argument and then examines its application by the courts in Canada and its rejection by the courts in the United States. One preliminary point needs to be made: in this article I frequently refer to the equality-based rationale as the ‘feminist’ critique. This should not however be taken to mean that all feminists necessarily support the position - as I make clear, many feminists do not, and their arguments will be given due attention. My use of the word ‘feminist’ must therefore be always interpreted with regard to the context in which I place it.

Among the leading proponents of the equality-based critique are Andrea Dworkin and Catherine MacKinnon. The essential argument they advance is that the harm of what they term pornography lies in the fact that

It eroticises hierarchy, it sexualizes inequality. It makes dominance and submission sex. Inequality is the central dynamic ... Pornography in this view is a form of forced sex, a practice of sexual politics, an institution of gender inequality ... pornography is neither a harmless fantasy nor a corrupt and confused representation of an otherwise natural and healthy sexual situation. It institutionalizes the sexuality of male supremacy, fusing the eroticization of dominance and submission with the social construction of male and female ... Men treat women as who they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be. Pornography is that way. Pornography is not imagery in some relation to a reality elsewhere constructed. It is not a distortion, reflection, projection, expression, fantasy, representation or symbol either. It is a sexual reality ... to defend pornography as consistent with the equality of the sexes is to defend the subordination of women to men as sexual equality.

Because it promotes a particular image of gender relations that is predicated upon sexual inequality, pornography is, according to MacKinnon:

... a political practice, a practice of power and powerlessness ... Pornography is integral to attitudes of violence and discrimination which define the status and treatment of half the population.

\textsuperscript{23} ibid 21-22. See also Catherine MacKinnon ‘Pornography as Defamation and Discrimination’ 71 (1991) \textit{Boston University Law Review} 793.
Thus under this critique, sexually explicit material is rejected not simply because it is sexually explicit (which is the ground upon which the moralist-conservative camp and indeed the Supreme Court in *Miller* rejected it), but rather because it amounts to sexist ideology which serves to buttress male domination.

Given that the feminist objection to sexually explicit material centres on the sexist ideology that it is alleged to promote, it goes without saying that the equality-based approach is not viewpoint neutral - the ‘harm’ that this approach points to as justifying proscription of sexually explicit material is the fact that such material works an attitudinal change in its consumers in relation to how they think about women. As such, this argument strikes at the foundation of free speech theory, which presupposes that the government should be neutral in relation to the political viewpoint espoused by speakers. As has frequently been re-iterated by the courts in the United States, the essence of viewpoint neutrality is that ideas may not be regulated simply because it is thought they may have adverse social consequences. In *Kingsley International Pictures Corp v Regents*, for example, the Supreme Court struck down a New York state decision to deny a licence for the showing of a film version of D H Lawrence's *Lady Chatterley's Lover*. The licence had been denied on the ground that the film portrayed adultery (which was then still illegal under New York law) in a favourable light, and thus arguably advocated it. The Supreme Court held that New York had denied the licence

... because the picture advocates an idea - that adultery under certain circumstances may be proper behaviour. Yet the First Amendment's basic guarantee is of freedom to advocate ideas. The state, quite simply, has struck at the very heart of constitutionally protected liberty. Advocacy of conduct proscribed by law is not ... 'a justification for denying free speech where advocacy falls short of incitement'.

Certainly the evils produced by adultery - break up of marriages, dysfunctional families, adolescent crime *et cetera* cannot be denied, but is this any reason to prohibit the idea? Thus although the argument for regulation put forward by feminists claims to be harms-related and therefore to represent an advance on the moralistic approach embodied in *Miller*, in fact it turns out to be just as values-dependant as the conventional obscenity doctrine; the only difference between the approaches being that instead of elevating the idea of sexual morality to a position of pre-eminence, the feminist position chooses to privilege a political idea, namely equality.

Finally, if pornography has a negative impact on ‘culture, cultural discourse and ideology (on ideas and the imagination), in conditioning attitudes [and] beliefs’, should other ideas that have such negative impacts also be proscribed, and how will it be decided (and by whom) which ideas are ‘bad’ and which are

25 Ibid 688.
'good'? This illustrates the dangers of what Wilson, writing from a feminist but anti-censorship perspective, refers to as the 'secular fundamentalism' of the feminist anti-pornography movement. As Gey states, MacKinnon

... embrace[s] with relish the notion that the state should rigorously control the attitude-shifting effects of pornography. The MacKinnon view reduces all expression to its explicit or implied position on one issue - the subjugation of women. If the expression carries the wrong message on this issue, then the expression may be properly suppressed.

The feminist approach and the conflation of speech and action

There is more to the equality-based critique of sexually explicit materials than the allegation that such materials express the ideology of sexism. The further important step of arguing that sexist expression is itself an act of discrimination. This is well exemplified by MacKinnon who states:

... when a man looks at a pornographic picture - pornographic meaning that the woman is defined to be acted upon, a sexual object, a sexual thing - the viewing is an act, an act of male supremacy. [emphasis added]

MacKinnon's quotation reveals what Downs calls the 'absolute conflation of speech and action' which suggests that '... images of sex are the same as real sex, and that the images themselves are responsible for women's subordination', so that merely viewing pornography is itself an act of gender discrimination because it inspires discriminatory attitudes in the consumer.

The feminist position on sexually explicit material is therefore that the 'harm' caused by such material resides in the fact that it embodies sexist ideas. Although, as will be shown later, many feminists claim that such ideas manifest themselves in the form of anti-social behaviour (a claim which is challenged in Part III below), it is crucial to the understanding of the feminist position, and my critique thereof, to recognise that its proponents see the propagation of sexist ideas as sufficient justification for the suppression of sexually explicit material even in the absence of such ideas leading to anti-social conduct. Contrary to this, I would argue that whereas acts of discrimination are proscribable, the idea of discrimination (or communism, or capitalism or socialism, ideas which may or may not be pernicious in varying degree) ought not to be proscribed in a

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society that purports to uphold freedom of expression. What the equality-based critique tries to do is transform idea into act and, conversely, also to elevate the idea of equality to a status of privilege above other ideas, to the extent that advocating anti-egalitarian ideas is itself an act of discrimination.

Case law in Canada

The equality-based approach to sexually explicit material has been favourably received by the courts in Canada. As in the United States, early Canadian decisions imported the English definition of obscenity found in R v Hicklin.34 This test was superseded35 by a statutory definition of obscenity in 1959, when s 159 (now s 163) was added to the Criminal Code. Section 163(1)(a) provides that an offence is committed by anyone who...

... makes, prints, publishes, distributes, circulates or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatever.

'Obscenity' is defined in s 163(8) as follows:

For the purposes of this Act, a publication the dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely crime, horror, cruelty and violence, shall be deemed to be obscene.

Clearly much turned on what meaning is given to the term 'undue exploitation', and in R v Dominion News and Gifts (1962) Ltd6 the Canadian Supreme Court, like its counterpart in the United States, adopted a 'community standards' test of 'undueness'. However, the turning point in the approach to obscenity in Canada came in R v Butler7 in which a challenge under the Canadian Charter of Rights and Freedoms was launched against s 163.

In Butler the appellant, who operated a shop that sold pornographic material, had been convicted under s 163. On appeal to the Supreme Court of Canada he challenged the validity of the section under s 2(b) of the Canadian Charter of Rights and Freedoms. Section 2 of the Charter provides as follows:

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(c) freedom of peaceful assembly; and
(d) freedom of association.

34 (1868) LR 3 QB 360.
35 In Brodie v R (1962) 132 C.C.C. 161 it was held that the statutory definition must be read as having been intended to supplant that found in Hicklin.
Along with other freedoms, abridgment of freedom of expression is permitted in terms of s 1 of the Charter, which provides as follows:

**Guarantee of Rights and Freedoms**
1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Speaking for the majority in rejecting the challenge, Sopinka J examined the community standards and 'degradation or dehumanisation' tests, and expanded upon the concepts of degradation and dehumanization, holding that...

... degrading or dehumanizing materials place women (and sometimes men) in positions of subordination, servile submission or humiliation. They run against the principles of equality and dignity of all human beings...

This type of material would, apparently, fail the community standards test not because it offends against morals but it is perceived by public opinion to be harmful to society, particularly to women. While the accuracy of this perception is not susceptible to exact proof, there is a substantial body of opinion that holds that the portrayal of persons being subjected to degrading or dehumanizing sexual treatment results in harm, particularly to women, and therefore to society as a whole...

Later on in his judgment, Sopinka J had this to say about the harm caused by obscene material:

Essentially these objectives [sought to be achieved by s 163] are the avoidance of harm resulting from antisocial attitudinal changes that exposure to obscene material causes and the public interest in maintaining a "decent society".

He also held that:

While a direct link between obscenity and harm to society may be difficult, if not impossible, to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs.

In his concurring judgment, Gonthier J placed great emphasis on the fact that what s 163 proscribes is representations of a certain type, and that the definition of obscenity in s 163(8) ('sex and ... crime, horror, cruelty and violence' and 'undue exploitation of sex') obviously embraced a far broader range of activities than the fairly limited number of sexual offences prohibited by the Code. Thus he stated:

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36 Lamer CJ, La Forest, Cory, McLachlin, Stevenson and Iacobucci JJ concurred with Sopinka J. A separate concurring judgment was delivered by Gonthier J with L'Heureux-Dube J concurring.
37 Ibid 466h - 467b.
38 Ibid 475b.
40 Ibid 483a.
This difference in content [between acts which the Code prohibits one to perform and the wider range of activities which it prohibits one from representing] stems from the element of representation found in s 163 of the Code. Parliament ascribed a broader content to obscenity because it involves a representation. In this combination of a given content and its representation lies the particular essence of obscenity, as was mentioned above. The type of scenes vividly described ... might perhaps be legal if done between consenting adults, but they become obscene if represented.

Amazingly, this key issue - the disjunction between what it may be lawful to do and what it may be lawful to represent - was not further elucidated upon but, as will be argued later, it ought to be a crucial issue in the law governing freedom of expression.

The Canadian courts thus define obscenity primarily as harm taking the form of the inspiration in its consumers of discriminatory attitudes. It was, in the words of Anderson J in *R v Red Hot Video,* the 'social philosophy' underlying pornography, 'antisocial attitudinal changes,' negative 'perceptions and attitudes towards women' (Sopinka J in *Butler*) and 'attitudinal changes' (Gonthier J in the same case) that justified censorship of sexually explicit material. In essence then, the courts passed beyond the debate relating to what *behaviour* sexually explicit material might or might not cause. For them the fact that studies linking such material with anti-social *conduct* were equivocal was irrelevant - such materials were held to be proscribable simply because of the possibility that they might foster anti-social *attitudes.* But if, as Gonthier J held in *Butler,* the projection of a 'distorted image of human sexuality' is a harm that can legitimately be suppressed, does this not imply the existence of a socially approved image of sexuality, and if so, raise the question of how and by whom such an image will be defined? Furthermore, does not the restriction of freedom of expression inherent in legislative measures such as s 163 simply become a vehicle for what I would suggest is the far more disturbing objective of limitation of thought and opinion? The inevitable (but infrequently recognised) threat posed to freedom of thought by regulation of freedom of expression is explained with particular clarity by Smolla, who writes:

> The fulfillment that comes from speech is bonded to man's capacity to think, imagine, and create. Conscience and consciousness are the sacred precincts of mind and soul. The linkage of speech to thought, to man's central capacity to reason and wonder, is what places speech above other forms of fulfillment, and beyond the routine jurisdiction of the state.

> It might however be maintained that even thought deserves no special protection from the state as a matter of right. The precincts of the mind are not sacred, merely inaccessible; men have been able to get away with free thinking in those precincts because up to now no state has devised a means of patrolling them. ... Technology, of course, might someday change that; it is possible to imagine a world in which thoughts can be monitored like

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43 (1992) 89 DLR (4th) 449 at 475h.
44 Ibid 486h.
45 Ibid 490g - 491f, 496c and 498g - 499a.
46 Ibid 490g.
radio transmissions, and thought police could presume to intercept and regulate thought ... If, through such a technological "breakthrough", thought could be monitored, a case for regulating "potentially harmful thought" could be made on the same grounds that cases are made today for regulating "potentially harmful speech". Indeed, the line we now instinctively recognise between "speech" and "thought" could itself begin to dissolve.

There is irony in the fact that whereas Smolla apprehends the development of justifications for restriction of freedom of thought were the necessary technology to be developed, the position is that the courts in Canada have developed the rationalisation in advance of the technology.48

The decision in American Booksellers Association Inc v Hudnut

Given the fundamental importance of attitudinal regulation to the decision in Butler, it is instructive to contrast that case with American Booksellers Association Inc v Hudnut49 in which a United States court dealt with the same issue, but came to a very different conclusion.

In 1984 the city of Indianapolis passed an anti discrimination ordinance.50 Included in this enactment were clauses drafted by Catherine MacKinnon and Andrea Dworkin which identified pornography as a discriminatory practice51 and which entitled complainants to recover damages for coercion into pornography, having pornography forced on them, for assault due to pornography or, at its broadest, for trafficking in pornography. Pornography itself was broadly defined, and included depictions of women being penetrated or of women in postures of sexual submission or servility or display, a definition which potentially included within its scope any material depicting women as the objects of sexual desire. Thus, although supporters of the ordinance claimed that it would not have led to the prohibition of those sexually explicit materials which were 'not based on subordination' but were rather 'premised on

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48 As an example of the type of thinking supportive of thought-control see Itzin’s rejection of what she terms the ‘fallacious Cartesian body/mind dichotomy’ in her defence of censorship in Catherine Itzin ‘Pornography and Civil Liberties: Freedom, Harm and Human Rights’ in Catherine Itzin (ed.) Pornography - Women, Violence & Civil Liberties (New York, Oxford University Press, 1992, 553, 577.

49 598 F. Supp. 1316 (S.D. Ind. 1984) (affd 771 F. 2d 323 (7th Cir. 1985), 475 U.S. 1001 (1986)).


51 Section 16-1 was a ‘findings’ provision wherein the reason for the ordinance was recited. Included in this section was the statement that: Pornography is a discriminatory practice based on sex which denies women equal opportunities in society. Pornography is essential in maintaining sex as a basis for discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it promotes, with the acts of aggression it fosters, harm women’s opportunities for equality of rights ...

equality', the fact that mere display of the body or depictions of heterosexual intercourse met the ordinance's definition of pornography makes it difficult to imagine what non-discriminatory sexually explicit material would consist of. Indeed, as feminist opponents of the ordinance stated:

At its heart, this analysis implies that heterosexual sex is itself sexist; that women do not engage in it of their own volition...

As Strossen argues, implicit in the pro-censorship view of sexually explicit materials is the Victorian stereotypical idea that sex is 'bad for' women and that women need to be protected from heterosexual eroticism. This is confirmed by that portion of the ordinance dealing with defences, which listed a 13 point series of circumstances (including, for example, proof that women involved in the making of sexually explicit material had consented to the making of it, that they had signed contracts consenting to make it or that no physical threats were used in the making of it) which did not in themselves negate a finding that a woman had been coerced into making the material. Some supporters of the measure were of the view that where women do become involved in pornography, either as actors or even as viewers of it, this must be seen as a result of their sexuality having been 'moulded within a hetero-patriarchal culture' - in other words that they have been falsely conscientised into enjoying it, and that their consent should not be seen as real, an argument which effectively sees some women maternalistically deciding when the consent of other women is valid. Similarly, women who themselves engage in 'pornographic' speech by acting in or producing such materials were accused of engaging in expression which could legitimately be suppressed because, as MacKinnon put it, it was 'not speech for women'.

52 See for example the defence of the ordinance in Catherine Itzin 'A Legal Definition of Pornography' in Catherine Itzin (ed.) Pornography - Women, Violence & Civil Liberties New York, Oxford University Press, 1992, 435, 446-69.

The argument that the making of pornography itself constitutes violence against women is fuelled by a belief, common among anti-pornography campaigners, that women do not really like sex. The popular stereotype in which women, who are not really interested in sex, perform sex only under pressure from men, forms the foundation of a theory that every woman who appears in visual pornography must have been forced to perform the acts shown, as no woman would actually wish to do these things. The assumption is applied to the full range of sexual activities, including and, in some cases, especially, to common sexual intercourse. Some feminists say that, therefore, to portray women enjoying these acts constitutes a misrepresentation of women. But the facts do not support this portrayal of women; in reality many of us enjoy penetrative sex with men as well as lesbian sex or other sexual practices.
54 Strossen, above n 12, 1147-51.
55 Section 16-3(5).
56 Easton, above n 32, 83.
57 This point is well made by Strossen, above n 12, 1137-40.
The ordinance sought to make pornography actionable on the basis of the harm it caused, rather than because it infringed community standards of morality (the rationale underlying the *Miller* test), which pro-censorship feminists reject.\(^6\)

However, whereas plaintiffs alleging harm in the form of coerced participation in the making of sexually explicit materials, involuntary exposure to them, or use of such materials in the commission of crime against themselves would at least have had to demonstrate that they had been caused direct personal harm, the type of harm which its drafters argued could sustain a claim brought by a plaintiff under the ‘trafficking’ provision could amount simply to attitudinal change towards women in the minds of the consumers of such material\(^6\) - a feature of the ordinance that would become central to its failure to surmount First Amendment review.

Having been declared unconstitutional in Federal District Court by Barker J,\(^6\) an appeal was lodged with the 7th Circuit Court of Appeals, where judgment was delivered by Eastbrook J. Among the most significant aspects of the judgment was the acceptance by the court of the city’s argument that sexually explicit material effects attitudinal change. Thus Eastbrook J stated\(^6\) that:

Indianapolis justifies the ordinance on the ground that pornography affects thoughts. Men who see women as subordinate are more likely to treat them so. Pornography is an aspect of dominance ... It does not persuade people so much as change them ... There is much to this perspective. Beliefs are also facts. People often act in accordance with the images and patterns they find around them, ... Therefore we accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets ... In the language of the legislature, pornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women’s opportunities for equality and rights ...

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Feminist critique is concerned with sexism, not with indecency or obscenity. The values of "obscene" and "indecent" change with changing mores ... A feminist critique of pornography is not primarily concerned with censorship ... but with the exposition of the pervasive presence of sexism and pornographic structures throughout our culture.

\(^6\) Complaints under the ordinance would simply have to show that the pornography did the harm of ‘subordinating women’ which it did by ‘increasing attitudes ... of discrimination by men against women...’ See the judgment of Easterbrook J in *American Booksellers Association Inc v Hudnut* 771 F. 2d 323 (7th Cir. 1985) at 325 (aff’d 475 U.S. 1001 (1986)) where, in reviewing arguments presented by counsel seeking to uphold the ordinance, he stated:

They maintain that pornography influences attitudes, and the statute is a way to alter the socialization of men and women rather than to vindicate community standards of offensiveness ... Those supporting the ordinance say that it will play an important role in reducing the tendency of men to view women as sexual objects, a tendency that leads to both unacceptable attitudes and discrimination ...


\(^6\) 771 F. 2d 323 (7th Cir. 1985) at 328-9 (aff’d 475 U.S. 1001 (1986)).
Yet, having accepted the rationale of the legislation, Eastbrook J held that 'this simply demonstrates the power of pornography as speech' and that the argument that pornography was 'low value' speech, unworthy of First Amendment protection because it did not advance truth-seeking failed because:

Indianapolis seeks to prohibit certain speech because it believes this speech influences social relations and politics on a grand scale, that it controls attitudes at home and in the legislature. This precludes a characterization of the speech as low value. [emphasis added]

In other words, it was precisely because pornography embodies a view about and an attitude towards the issue of gender equality revealingly stated by MacKinnon as follows:

Pornography is propaganda, an expression of male ideology, a hate literature, an argument for sexual fascism,

that its suppression was held inconsistent with the First Amendment. Rejecting legislation which would 'put the government in control ... of which thoughts are good for us', Eastbrook J cited Jackson J's defence of freedom of opinion in West Virginia State Board of Education v Barnette where it was held that:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion ... and concluded that under the Indianapolis ordinance

Speech that "subordinates" women and also, for example, presents women as enjoying pain, humiliation or rape, or even simply presents women in "positions of servility or submission or display" is forbidden, no matter how great the literary or political value of the work taken as a whole. Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual context. This is thought control. It establishes an "approved" view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not.

In a sense then, supporters of the ordinance were hoist with their own petard - having successfully argued that pornography carries a discriminatory political message, it was inevitable that an enactment prohibiting pornography for that

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64 Ibid.
65 Ibid 331.
67 771 F. 2d 323 (7th Cir. 1985) at 327.
68 319 U.S. 624 (1943) at 642.
69 771 F. 2d 323 (7th Cir. 1985) at 328.
70 See for example Catherine MacKinnon 'Not a Moral Issue' in MacKinnon above n29, 147: Obscenity law is concerned with morality, specifically morals from the male point of view, meaning the standpoint of male dominance. The feminist critique of pornography is politics, specifically politics from women's point of view, meaning the standpoint of the subordination of women to men.
reason would fall foul of the rule against viewpoint discrimination. Furthermore, the idea that there is an orthodox feminist view of sexuality encountered opposition not only from traditional libertarians, but also from sectors of the feminist movement itself.

III THE HARMS-BASED APPROACH AND THE EMPIRICAL DATA

In Part II above I rejected the argument that the creation of discriminatory attitudes amounts to a legally cognizable harm, arguing that that theory entails viewpoint discrimination and is thus fundamentally at odds with the principle of viewpoint neutrality upon which freedom of expression is founded. In this section I discuss what is perhaps the more obvious question of whether there is any category of material which should be regulated because it causes consumers not just to hold discriminatory attitudes but rather causes the more direct harm of inciting them to commit unlawful acts.

Sexually explicit material as a direct cause of harm - the empirical evidence

Can exposure to sexually explicit or other types of material cause consumers to commit harmful acts? The obvious importance of this question both to those seeking to prove and to refute the proposition that expressive material causes harm has led to copious academic writing on this issue.

The most frequently cited research on this issue by Donnerstein, Linz and Penrod measured the response of laboratory subjects to films containing sex, violence or combinations of the two. Before discussing the data, it is crucially important to define precisely what is meant by ‘sex’ and ‘violence’. Starting first with violence, this is given its ordinary meaning of assault, battery, sexual assault and rape. It does not include degradation in the absence of violence, in relation to which there is no convincing data showing an increase in aggressive attitudes by consumers. So far as sex is concerned, it is crucial, in discussing the research results, to appreciate that material containing sex includes but is not limited to the sexually explicit. In other words, although material ‘containing

71 Thus as was stated by R Tigue ‘Civil Rights and Censorship - Incompatible Bedfellows’ 11 (1985) William Mitchell Law Review 81, 93: What makes sexually explicit material pornography under the MacKinnon/Dworkin ordinance is not its degree of sexual explicitness, not its appeal to prurient interests, not even its lack of social value. Rather, it is the content or the ideas advocated by the material.

72 See for example Diamond, above n 31, 54 who states: Some feminists have defined erotica as images about sexuality that show equal power relationships and exchanges between mutually loving and committed people. But who will define what constitutes “equality,” “love” and “commitment”? And even if we agree on the meaning of these words, one woman’s dream may be another’s prison.


74 Ibid 171.
sex' most often depicts sexual activity in a manner that would fall within the Miller definition of obscenity because of its sexual explicitness, much depicts sex in a non-explicit manner. The important implications of this rather broad definition of sex will become apparent later in this article. What then does the research show? The results can be summarised as follows: Where subjects were exposed to different types of material (in this case, motion pictures), an increase in aggression was measured after exposure to films containing a combination of sex and violence, a lesser degree of aggression after exposure to films containing violence alone but no sex, and equal lowest levels in aggression after exposure either to films containing sex but no violence or to films containing neither sex nor violence. Indeed the evidence in respect of films containing sex but no aggression is not wholly reliable, as some studies show that exposure to non violent sexually oriented material actually lowers levels of aggression, while others indicate that exposure to any stimulus (ranging from comic films to physical exercise) increases all responses by the subject, both aggressive and non-aggressive. The conclusion that has therefore been drawn from these studies is that it is not sex but rather violence that is responsible for increased levels of aggression in subjects, and that it is material that combines both violence and sex that ought to give rise to greatest concern. As Donnerstein et al state:

[V]iolent pornography influences attitudes and behaviours ... Viewers come to cognitively associate sexuality with violence, to endorse the idea that women want to be raped, and to trivialize the injuries suffered by a rape victim. As a result of the attitudinal changes, men may be more willing to abuse women physically (indeed, the laboratory aggression measures suggest such an outcome).

This having been stated, however, one must also note the argument that shortcomings inherent in laboratory experiments have led some commentators to question whether the data so derived can justify censoring even material combining sex and violence: While the experimental data does show an immediate increase in aggressiveness after exposure to films containing a combination of sex and violence, the studies have not shown whether exposure to such material has any long term effects. Furthermore, it cannot be

75 This point is emphasised in Donnerstein, Linz and Penrod, above n 73, 175 and in Frederick Schauer, 'Causation Theory and the Causes of Sexual Violence' 1987 American Bar Foundation Research Journal 737, 741 and 766.
77 Tested either by provoking the male subjects subsequent to their exposure to the material and measuring their willingness to act aggressively to a female participant in the research, or by questioning the subjects as to their attitudes about rape.
78 Downs, above n 30, 168 and 191.
79 Donnerstein, Linz, Penrod, above n 73, 79.
82 Donnerstein, Linz and Penrod, above n 73, 20.
83 Downs, above n 31, 168.
overemphasised that such increases in aggression as have been demonstrated are valid for the laboratory, and must therefore be interpreted as being derived from that artificial background. In particular researchers have cautioned that increased aggressive attitudes stimulated in a laboratory does not necessarily mean that one can therefore predict increased aggressive behaviour in real life settings. As Donnerstein et al themselves emphasise, their findings that material leads to short term attitudinal changes does not necessarily prove the different assertion that there is an increased probability that the viewer will commit harmful acts, although the fact that it produces aggressive responses in the laboratory does at least indicate a possibility that such aggression may affect subsequent behaviour. Of course there is no means of devising an experiment in which the real life behaviour of subjects towards women could be tested after exposure to such materials, short of putting them into situations where they were allowed to commit unlawful acts.

In 1986 the United States federal government published the report of the Attorney General’s Commission on Pornography (the Meese report). One of the findings of the report was that:

[S]ubstantial exposure to sexually violent materials as described here bears a causal relationship to antisocial acts of sexual violence, and for some subgroups, possibly to unlawful acts of sexual violence.

However, in light of the empirical research discussed above, this finding must be qualified. As Downs emphasises, the very most that can be said on the basis of existing data is that there is what the 1986 Attorney General’s Commission termed ‘probabilistic’ causality between material combining sex and violence and violence itself - in other words, that on the basis of laboratory responses to materials that combine sex with violence, and an assumption that such responses are a likely pointer to behaviour, all one can say is that violence is more likely to occur if there has been exposure to such material, but that this could be true of many other factors, none of which can be demonstrated as having a direct, deterministic causal relationship with violence, as indeed the Commission itself admitted. Thus even supporters of censorship concede that only a correlation and not causation has been demonstrated between violent pornography and

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84 Donnerstein, Linz and Penrod, above n’73, 174.
85 Ibid 180-85.
86 Ibid 20.
87 Attorney General’s Commission on Pornography (1986) 326.
88 The findings of this Commission, as well as the earlier reports the United States President’s Commission on Obscenity and Pornography (1970) and the United Kingdom’s Williams Committee Report on Obscenity, Cmd. 7772 (1979), are discussed in detail in Gordon Hawkings and Frank Zimring Pornography in a Free Society Cambridge, University Press, 1988.
91 Easton, above n 32, 36.
92 Downs, above n 30, 169. The difference between correlation and causation can be illustrated as follows: Assume research showed that the United States has a high incidence of violent crime, and that most people in the United States professed Christian belief. While this
harmful social conduct. D'Amato is therefore highly critical of the use of the word 'causation' (whether in conjunction with the word 'probabilistic or not)93 rather than 'correlation'94 by the Commission and by Schauer in his analysis of the Commission's findings,95 and argues that the fact that millions of events correlate without bearing a causative relationship with one another makes the Commission's leap from correlation to causation all the more questionable.96 Indeed, he points out that given that the vast majority of consumers of sexually explicit materials do not commit crime, there could even be said to be a negative correlation between exposure to such material and criminal acts - in other words that the argument that exposure to sexually explicit material is cathartic is possibly correct.97

What conclusion ought then to be drawn from the laboratory findings? Firstly, given the fact that the laboratory results indicate that material containing violence alone (without any sex) increases aggressive attitudes (although to a lesser extent than material combining the two), and that some studies indicate that depictions of sex without violence lower aggressiveness, it seems clear that it is violent imagery that is the true culprit in such materials, and that it is therefore violence rather than sex on its own that should be the focus of attention.98 Secondly, although the empirical research has failed to demonstrate a causal connection between exposure to such material and criminal conduct, this does not mean that regulation of such material is not justified under a harms-based approach. As is pointed out by Wesson99, the Supreme Court in United States v O'Brien100 accepted that evil social consequences can justify regulation of expression, provided that the expression is regulated not because of its message but rather because of those other consequences. Thus in Barnes v Glen Theatre Inc.,101 the court held that it was permissible to regulate nude dancing because of the links between it and other criminal activity, even though such links are of course not the inevitable consequence of every nude dancing establishment. The same rationale surely applies in respect of materials which depict violence or sex and violence combined. Even if it is not certain that the effect of such material measured in the laboratory will manifest itself in real life, the fact that such material incites aggression in consumers surely creates a significant risk of social evil.
Defining ‘pornography’ as material that combines sex with violence (not forgetting that violence on its own is also socially harmful) has received academic support of late. Wesson argues that the important characteristic of what she calls the ‘new hard core’ of pornography is the fact that it equates

... sexual pleasure with the infliction of violence or pain and implements approval of conduct that generates the actor's sexual arousal or satisfaction through this infliction ...

This leads her to define pornography as follows: 103

I define "pornography" as material that links the viewer's or reader's sexual gratification with the infliction of violence. Pornography is a depiction, in any medium, of violence directed against, or pain inflicted upon, an unconsenting person or child, for the purpose of anyone's real or apparent sexual arousal or gratification, in a context suggesting endorsement or approval of such behaviour, and that is likely to promote or encourage similar behaviour in those exposed to the depiction.

The harms-based approach is clearly very different from both the morals-based approach in Miller (although of course everything that Wesson identifies as pornography would probably fall into the Miller definition simply because the latter is so wide), 104 and that found in the Minneapolis ordinance. As Sunstein states:

Only pornography - not sexist material in general or material that reinforces notions of female subordination - is regulated. Because of its focus on harm, anti-pornography legislation would not pose the dangers associated with viewpoint-based restrictions.

Incitement of unlawful conduct: the definition of ‘violence’

Prohibition of expression that tends to incite unlawful conduct (as distinct from ‘unlawful attitudes’) raises no problem from a free speech point of view. What characteristics must material display for it to be said that it is of a type combining sex with violence?

As a preliminary and obvious point, one may say that by material ‘combining sex and violence’ is not meant material that has sexually explicit and violent elements which, although both found in the work, are represented separately in it - for example, a film in which a bank robbery and a scene of sexual intercourse appear in different scenes. Rather the term refers to material which sexualizes violence or, to use the definition by Donnerstein et al, 106 to material which ‘depicts sexual coercion in a sexually explicit context’. On the other hand, as has frequently been emphasised in this chapter, the class of material

102 Wesson, above n 99, 915.
104 Wesson, above n 99, 915.
106 Donnerstein, Linz and Penrod, above n 73, 4.
comparing sex and violence is wider than the class of materials combining sexual explicitness with violence. This is well illustrated by the definition proposed by Schauer who states:

Thus sexual violence is here defined to include rape, attempted rape, sexual acts that are not rape but involve actual or threatened physical coercion, and actual or attempted acts of nonsexual physical violence inspired by a search for sexual fulfilment. [emphasis added]

Similarly, Donnerstein et al emphasise that films that depict violence in a sexual but not sexually explicit context (the example they frequently cite 'slasher' films which frequently have as their theme the pursuit and murder of a sexually attractive woman) produce the same aggressive effect as do films which depict violence in conjunction with sexual explicitness (for example, a sexually explicit rape). Clearly then, the context in which violence is shown will be crucial in identifying which materials are harmful because they ‘sexualise violence’, and this will in some cases make it more difficult to make a decision in respect of specific material than would be the case if the presence of sexual explicitness and violence was sufficient to identify objectionable material. Yet this must be attempted, simply because the research is so clearly indicates that, irrespective of explicitness, material combining sex and violence causes aggression in those exposed to it.

But is it satisfactory to condemn material simply on the basis of what it depicts? Could it not be argued that it is crucial in cases of incitement to discover what message, if any, is conveyed by the depiction? As Soble argues:

The issue, then, is whether depictions ... can endorse what they depict, and if so, what conditions must be satisfied for a depiction to be an endorsement ...

Taking a specific example, one might think of a film (such as The Accused) containing a depiction of a rape that is sympathetic to the victim. Would such a depiction fall into the category of material combining sex and violence, or would it be 'saved' by the message it contains disapproving of rape? Here it is useful to refer back to the definitions of pornography proposed by Wesson and Sunstein, who stipulate that material would be proscribable only if it depicted sexual violence ‘in a context suggesting endorsement or approval’ of the violence (a requirement which Wesson includes precisely to exempt from liability works containing sympathetic portrayals of victims), or which depicts women as ‘enjoying or deserving physical abuse’ (Sunstein). Similarly, Donnerstein et al cite research which indicates that while material depicting sex and violence which concludes with a ‘positive’ outcome for the victim (suggesting that women want to be raped and ultimately find the act pleasurable) causes aggression in those exposed to it, aggression does not

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107 Schauer, above n 75, 742.
108 Donnerstein, Linz and Penrod, above n 73, 4, 113, 125-35 and 175.
109 Alan Soble ‘Defamation and the Endorsement of Degradation’ in Baird and Rosenbaum, above n 90, 103.
111 Wesson, above n 103, 864.

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increase where the outcome is shown as being 'negative'\textsuperscript{112}. For this reason they emphasise that the most harmful material is that which depicts sexual violence 'where the victim(s) are shown enjoying or somehow benefiting from this treatment'\textsuperscript{113} or 'that portrays the myth that women enjoy or in some way benefit from rape, torture, or other forms of sexual violence'\textsuperscript{114}. Similarly Schauer condemns\textsuperscript{115}

... sexual violence directed against women which is portrayed as desirable, acceptable or appropriate; male sexual violence directed against women which is portrayed as consistent with the real if unexpressed desires of the women involved (the view that "no" means "yes"); and male violence against women ... in which the violence is seen as spurred by sexual desires or as a source of male sexual satisfaction [by which Schauer is clearly seeking to incorporate the 'slasher' films already referred to].

This then suggests that context will have a further role in determining whether material is actionable, because not only will it determine whether the material depicts violence in a sexual (rather than a sexually explicit) way, but it will also be used to determine whether the material depicts the sex and violence in an approving way, and that only in that circumstance will it be objectionable.

But this raises another problem. Gracyk argues that one should distinguish the subject matter of a representation and the attitudes of the people represented in it, on the one hand, from the attitude expressed towards their activity by the work itself, on the other.\textsuperscript{116} He points to the example of the Roman Polanski film Repulsion,\textsuperscript{117} which depicts a mentally ill woman repeatedly imagining that she is being raped, and on one occasion imagining herself taking pleasure from the rape, but which, taken as a whole, elicits pity for her mental suffering. From this he concludes that 'showing a woman enjoying a rape does not mean that the work endorses rape as pleasurable to women.'\textsuperscript{118} Furthermore, the point has also been made that if a depiction which would otherwise be proscribable should escape liability because of the manner (such as a message of disapproval for the crime and sympathy for the victim) in which it was presented, should one not also exempt from regulation those materials which are simply accompanied by an express disclaimer from their producers warning consumers that the activities depicted are harmful or criminal?\textsuperscript{119} Would this simple expedient not negate whatever inciting effect the material might have?

The other side of this argument is presented by Gilbert who, in her analysis of Andrea Dworkin's novel Mercy, notes firstly that its depiction of sexual violence means that it would clearly fall foul of Dworkin's own definition of pornography, and then argues that while Dworkin depicts rape from a point of

\textsuperscript{112} Donnerstein, Linz and Penrod, above n 73, 93-9 and 102.
\textsuperscript{113} Ibid 160.
\textsuperscript{114} Ibid 171.
\textsuperscript{115} Schauer, above n 75, 740.
\textsuperscript{116} Theodore Gracyk, "Pornography as Representation: Aesthetic Considerations" in Baird and Rosenbaum, above n 90, 117.
\textsuperscript{117} Compton-Tekli, 1965.
\textsuperscript{118} Gracyk, above n 16, 131.
\textsuperscript{119} Selke, above n 109, 104-5.
view sympathetic to its victim, some readers will find the descriptions of sexual
violence arousing whatever the intention of the author. In other words, Gilbert
argues that some consumers will read past the message and concentrate on the
depiction. Indeed, one could also imagine the situation where consumers do not
even bother to view the whole of a work, and select only those parts they find
arousing. How then is one to solve the tension between the contextual approach
discussed in the preceding paragraph, which suggests that material is harmful
only if sexual violence is presented in a favourable light, and practical
considerations which indicate that even if the overall message of a production is
condemnatory of violence, harm might still be done by discrete parts of the
work which, seen on their own, do not bring that message home?

In the final analysis, I would argue that the answer to this question is dictated by
the fundamental characteristic of sexually explicit material - namely that it is
non-cognitive, by which is meant that its predominant effect is to arouse the
physical senses rather than communicate an idea. The key issue here is that
common to all sexually explicit depictions (even those which are combined with
intellectual or artistic features) is the capacity to cause physical arousal, a
phenomenon which is not shared by other types of material, such as material
which depicts violence unaccompanied by sex. Furthermore, as Schauer states,
this characteristic is a feature not only of material which is sexually explicit, but
any material which is sexually arousing. This also accords with the
empirical research discussed above which, whatever ambiguities it might suffer
from, was unambiguous in its conclusion that peculiar to material containing
sexual themes is the capacity to arouse. This, I submit, is the crucial factor
which distinguishes material combining sex and violence from other types of
publication. The fact that material containing sex stimulates the powerful urge
of sexual desire gives no cause for concern in and of itself, as is shown by the
fact that material depicting sex on its own has no greater effect on levels of
aggression than does material containing neither sex nor violence. However, the
fact that when combined with violent material, sex related imagery (whether
sexually explicit or not) produces the highest levels of aggression, shows why
material that combines sex with violence needs to be singled out for prohibition.
The response produced by sexual material is peculiar to that type of material
simply because the very concept of 'arousal' implies a consequent wish for
gratification, a wish that is not (in normal individuals at least) the consequence
of viewing imagery that contains violence alone. It is the fact that material

110 Harriet Gilbert 'So long as it's not sex and violence' in Segal and McIntosh, above n 27, 216,
223-24.
121 Frederick Schauer 'Speech and "Speech" - Obscenity and "Obscenity": An Exercise in the
Interpretation of Constitutional Language' 67 (1979) Georgetown Law Journal 899. See also
John Finnis "Reason and Passion": The Constitutional Dialectic of Free Speech and Obscenity'
122 Furthermore, this category would not be confined only to graphic depictions - as is clear from
Schauer's definition of pornography (see Schauer, above n 75, 740) there is no reason why, if
written materials cause the same harm as do graphic ones, that they too should not be subject to
regulation. Furthermore, the empirical studies show that written materials combining sex and
violence produce an aggressive response in consumers just as do graphic materials - see
Donnerstein, Linz and Penrod, above n 73, 101-103.
123 Pathological cases where individuals experience abnormal arousal from non sexually explicit
stimuli aside.
124 Schauer, above n 75, 741-42, and 765-66.
combining sex and violence links the urge to gratification with violence, and thus, as Donnerstein et al state, ‘cognitively associate[s] sexuality with violence’, that defines such material as harmful.

The very fact that arousal is non-cognitive means that sexual depictions are to a large extent beyond the moderating appeal of any separately delivered message based on reason or emotion. I would therefore argue that in practice, depiction is everything, and that unless a depiction of sexualised violence is itself presented in a manner that condemns the activities shown, it should not be saved by a message (such as one of sympathy for rape victims) appearing elsewhere in the material. In other words, in saying that the ‘context’ of a depiction may save it, one can only mean the immediate context of the specific depiction, rather than the context of the work as a whole. Similarly, as far as disclaimers are concerned, I would agree with Crump’s observation that if the effect of material is to incite harm, liability could be imposed notwithstanding any disclaimer. As he argues,

... the varieties of camouflaged incitement can include descriptions or depictions that are (or purported to be) straightforward depictions of violent scenes, without words of express incitement. They also may include incitement by attractive presentation that glamourises the activity. They may even include incitement accompanied by disclaimers, like those in Mark Antony's exhortation.

Thus, as Crump emphasises, disclaimers themselves may heighten the effect of incitement, just as lurid ‘warnings’ on the packaging of sexually explicit materials are designed to attract custom.

The same considerations apply when one comes to address the question of whether a so-called ‘artistic’ defence, such as that provided for by the third leg of the Miller test should be available in respect of material depicting sex and violence in an approving manner. For example, Downs argues that even material combining sex and violence should be saved if it has redeeming artistic or social features, citing the works of Sade, Pauline Reage’s The Story of O and films such as Last Tango in Paris as examples. This he justifies essentially on the basis that such material assists humankind understand its own duality - animal and human, reason and passion, personalisation and objectification - and the struggle to keep a balance between these competing impulses.

Clearly it would be extremely difficult to avoid subjectivity when seeking to distinguish artistic from non-artistic examples of material combining sex and violence. Yet even setting that difficulty aside, Downs’ argument that the law should adopt a more liberal attitude to depictions of unlawful forms of sexual

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128 Downs, above n 30, 172-75.
129 Ibid 175.
activity than it does to the activities themselves, \(^{130}\) is open to the criticism that it ignores the fact that the arousing effect of such materials means that they have the effect of inciting consumers to emulate what they depict. Dow's argument is thus well answered by Itzin, who states that if material causes harm it ought not to be exempt from censorship simply because it has attained the status of ‘art', \(^{131}\) and by Crump who argues that incitement ought not to receive constitutional protection simply because it is found in the context of artistically valuable material. \(^{132}\) In support of this Crump points to the precedent of *Hamling v United States*, \(^{133}\) in which it was held that obscene depictions were not protected simply because they were juxtaposed with a description of the Presidential Commission on Obscenity and Pornography. For this reason I would conclude that ‘artistic’ portrayal of harmful material ought not to be a defence to liability.

**Conclusion: comparing the community standards approach with the harms approach**

As will be recalled, the *Miller* test was to the effect that in order for material to be found legally obscene, it would have to be such that 'the average person applying contemporary community standards' would find that, taken as a whole, it appealed to prurient interest in that it depicted or described sexual conduct in a patently offensive way, and lacked serious literary, artistic, political or scientific value.

As a starting point it should be noted that since I have argued that material combining sex and violence should be proscribed, and that this category is unaffected by the presence or absence of sexual explicitness, the scope of the prohibition that I am arguing for is to some extent wider than that provided by *Miller*, since the *Miller* test applies only to material which is sexually explicit. Furthermore, since I have argued that materials combining sex and violence would not be saved by an ‘artistic’ defence, the ‘serious value’ exception to *Miller* would not apply, and so here again prohibition would be wider than that provided for under *Miller*. On the other hand, there would be a large class of material which fell foul of the *Miller* test because it was sexually explicit but which, because it did not portray sex coupled with violence in an approving manner, would not be proscribed under my proposal. In this respect my proposal would clearly be far less restrictive than *Miller*. As Cole points out \(^{134}\) whereas the law generally imposes lesser restrictions on depictions of acts than on the acts themselves, and thus a novelist or film-maker may depict a bank robbery, the reverse seems to be true in relation to sexual expression, since depictions of acts that may lawfully be performed will not necessarily pass the *Miller* test of obscenity. There will, of course, be many instances in which material would fall foul of both approaches - in particular, material that combines explicit sex with violence and which is not saved by the ‘artistic value’ exception to *Miller*. It

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\(^{130}\) Ibid 188.

\(^{131}\) Itzin, above n 26, 451-52.

\(^{132}\) Crump, above n 126, 67-69.

\(^{133}\) 418 U.S. 87 (1974).

\(^{134}\) Cole, above n 21, 113-14.
would, however, be wrong to compare the approaches simply on the basis of the scope of materials that could be prohibited under them. Far more important is the difference in purpose underlying each approach: whereas *Miller* is morals-based and is directed towards preventing 'prurient' sexual arousal, the approach I am arguing for is harms-based and targets only those materials which, because of their combination of sex and violence, create the empirically verifiable risk that those exposed to them will be incited to harm others.

### IV A CRITIQUE OF THE CENSORSHIP REGIME IN AUSTRALIA

Having analysed competing approaches to obscenity in the United States and Canada, it is now necessary to examine the statutory regime in Australia to determine which theory forms the basis of statutory regulation in this country. As a preliminary point, it must be remembered that such constitutional protection for freedom of expression as exists in Australia is limited to political communication - there is no general doctrine of freedom of expression as exists in the United States or Canada.

In passing it is useful to mention the long-standing common law test of obscenity in Australia contained in *Crowe v Graham*, where Windeyer J held that in determining whether a publication was obscene the question to ask was: 'Does the publication transgress the generally accepted bounds of decency?' He further held that that question was to be answered in light of contemporary standards, such standards being defined as 'those currently accepted by the Australian community ... which ordinary decent-minded people accept'. Thus it is clear that the common-law embodies a community standards test very similar to that which applies in the United States. The common law definition has however declined in importance in the light of more precise statutory definition of censorship categories.

#### Statutory regulation by the Commonwealth

At the federal level, the Commonwealth uses its s 51(i) trade and commerce power to regulate material imported into Australia. Classification of materials within Australia is based on the s 122 Territories power, and is governed by the Classification (Publications, Films and Computer Games) Act 1995 (Cth), which formally applies only to the ACT. However, the Classification Board...
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established by the Act may also exercise such powers as are conferred on it by virtue of any arrangements made between the Commonwealth and the State and Territory governments. This means that the Act forms the basis of a national classification system in terms of which the States and Territories allow the Commonwealth to determine classifications nationwide. One should however note that classification by the Commonwealth is one thing, and access to materials once classified is another, and that, as we shall see, the States and Territories exercise the power to limit access to publications after they have been classified by the Commonwealth. The Act also establishes a Classification Review Board with which applications for review of decisions by the Classification Board may be made by the Minister (in the case of the Commonwealth this is the Attorney-General), the party who sought classification of the publication or wishes to publish it, or 'a person aggrieved by the decision'.

Under s 11 of the Act, the matters to be considered by the Board in determining classifications include (but are not limited to):

(a) the standards of morality, decency and propriety generally accepted by reasonable adults; and
(b) the literary, artistic or educational merit (if any) of the publication, film or computer game; and
(c) the general character of the publication, film or computer game, including whether it is of a medical, legal or scientific character; and
(d) the persons or class of persons to or amongst whom it is published or is intended or likely to be published.

Section 11 must be read in light of the National Classification Code, which is contained in the Schedule to the Act and which may be amended only with the concurrence of the Commonwealth and State and Territory governments. The code lists the principles governing the classification process as follows:

Classification decisions are to give effect, as far as possible, to the following principles:

(a) adults should be able to read, hear and see what they want;
(b) minors should be protected from material likely to harm or disturb them;
(c) everyone should be protected from exposure to unsolicited material that they find offensive;

" Section 42.
" Section 4.
" Section 3.
" Section 72.
" Section 45.
" Section 6.
(d) the need to take account of community concerns about:

(i) depictions that condone or incite violence, particularly sexual violence; and

(ii) the portrayal of a person in a demeaning manner.

The Act also provides that the Commonwealth and the States and Territories may agree on a set of classification guidelines to assist the Publications Board in its application of the Code.\textsuperscript{147}

Under the current guidelines, the R classification (which restricts material to those aged 18 and over) states that:

Sexual activity may be realistically simulated. The general rule is "simulation, yes – the real thing, no".\textsuperscript{148}

Under this categorization, sexual violence may be implied if justified by context. The X category permits depictions of actual sexual intercourse between consenting adults. No depictions of violence are permitted (whether implied or actual), which means that sexually explicit depictions coupled with violence will lead to an RC classification.

Statutory regulation by the States

Before discussing the actual classifications which the Code provides for in more detail (and in particular the RC and X classifications which are my focus) it is necessary briefly to explain how the statutory regimes in the States and Territories operate in concert with the Commonwealth’s classification scheme: Each of the States has its own censorship legislation governing what material may be sold or hired by persons in each State.\textsuperscript{149} All jurisdictions adopt the classification regime established by the Commonwealth Act, except that South Australian legislation continues to make provision for classifications by the South Australian Classification Council which will over-ride those made by the Commonwealth,\textsuperscript{150} while Queensland does the same in relation to publications,\textsuperscript{151} although in both instances Commonwealth classifications will apply in the absence of a State classification. The primary function of the State

\textsuperscript{147} Section 12. There are two sets of guidelines: one for publications and another for films and computer games, both of which can be viewed at http://www.oflc.gov.au/content.html?n=123&p=65.


\textsuperscript{149} Classification (Publications, Films and Computer Games) Enforcement Act 1995 (SA), s 3.

\textsuperscript{150} Classification of Publications Act 1991 (Qld), ss 4 and 6.
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and Territory legislation is to determine to whom material falling within the Commonwealth classifications may be exhibited, sold or otherwise distributed. It is therefore the State and Territory legislation which is the vehicle for the enforcement of censorship in Australia and which penalises unlawful distribution of material. There are significant differences between the jurisdictions in this regard. All jurisdictions prohibit the public exhibition or sale of RC films. The ACT and NT are the only jurisdictions to permit the exhibition and sale to adults of X-rated films. So far as publications are concerned, Queensland prohibits the sale of Category 1 and Category 2 publications. All other jurisdictions permit the sale of Category 1 publications (although only in registered premises in Western Australia), and permit the sale of Category 2 publications in registered premises (except in the case of Tasmania, where such materials cannot be publicly displayed in any premises and must be specifically requested by the customer).

Decisions under the current statutory regime

A number of recent decisions by the Classification Board and the Classification Review Board illustrate the application of the statutory provisions. These cases engendered a high level of public controversy, and it is instructive to examine their outcomes in light of the approach I have argued for.

The film Romance contained both explicit sexual activity, as well as a non-explicit scene of sexualised violence. The film was initially classified RC, the Classification Board finding that the scenes of explicit sexuality put the film outside the R category, and that the scene of sexualised violence put it outside the X category (because that category permits the depiction of only consensual sexual activity). I would however submit that the Board erred in this finding, because the X classification prohibits 'real depictions of sexual activity' which are violent, and in this case the sexual violence was only implied. The Board’s decision was taken on review. 152 In its report, the Classification Review Board held that while the film contained actual depictions of fellatio and masturbation, it could nevertheless be accommodated within the R classification, because although the guidelines for that classification state that:

the general rule is "simulation, yes – the real thing, no",

in the case of Romance an exception should be made, because of the film’s artistic merit. Furthermore, since the scene of sexualised violence was not explicit, did not condone or incite violence, and, taken as a whole, did not depict the female character in a demeaning manner, it too could be accommodated within the R category. The film was accordingly classified as R18+. The final outcome in the Romance case is consistent with the approach I have advocated, because the explicit sex was not violent, and the sexual violence was not explicit.

151 Classification Board decision T99/3292, 21 December 1999.
152 Classification Review Board decision, 28 January 2000.
153 See n 147 above.
The decision in *Irreversible* was justifiable for the same reason. In this case, the Classification Review Board held that although there were scenes of actual sex, these were justified because of the artistic merit of the film, and that although there was a scene of high level sexualised violence, an R18+ classification was warranted because that scene was not sexually explicit. The film *Intimacy*, which contained explicit scenes of consensual sex, was classified R18+ for the same reasons.

In contrast to *Romance, Irreversible* and *Intimacy*, the film *Baise Moi* was classified RC. This was because of a graphic rape scene that combined explicit sex with violence. Here too, I would argue that the outcome was justified because of the combination of sexual explicitness and violence.

Although, as indicated, the outcome of these cases are consistent with the approach I have advocated, it should be noted that *Romance, Irreversible* and *Intimacy* were granted an R, rather than an X rating only because of their ‘artistic merit’. In other words, the distinction between R films (which do not permit explicit depictions of sexual activity unless an exception, such as ‘artistic merit’ can be found to the ‘general’ rule) and X films (which do permit explicit depictions, but which are banned in all but the ACT and NT), has the consequence that adults in most of Australia cannot access sexually explicit material (other than by mail order from the Territories), notwithstanding the first principle of the National Classification Code that ‘adults should be able to read, hear and see what they want’. Only the ‘artistic merit’ factor provides an exception for such material and, as argued earlier, this is an inherently subjective criterion that ought therefore not to be decisive in determining whether adults ought to be able to access such material. Assuming one wishes to maintain the distinction between the R and X categories, the only way of remedying the situation is to permit access to X-rated material irrespective of geographic location. I return to this in the context of a reform to the statutory regime discussed later in this article.

**A critique of the principles in the Act and the Code**

As indicated earlier, this article is concerned only with the question of what types of material the law should prohibit adults from viewing and not with classifications which permit material but subjects access to it to age restriction. Thus the focus of my critique is s 11 of the Act, the Code and the classifications RC (which means that the material is prohibited for exhibition or

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154 Classification Review Board decision, 30 June 2004.
155 Classification Board decision TOI/3181, 28 November 2001.
156 Classification Review Board decision, 10 May 2002.
157 In the case of publications the categories other than RC are: Category 2 Restricted (material depicting sexual intercourse or revolting or abhorrent phenomena), Category 1 Restricted (material depicting nudity or describing sexual activity or violence) and Unrestricted. In the case of films the classifications other than RC and X are: R18+ (films unsuitable for minors), MA15+ (films unsuitable for persons under the age of 15), M15+ (films not recommended for persons under the age of 15), PG (films not recommended for viewing by persons under 15 without guidance by parent or guardian) and G (all other films).
sale nationwide) and X (which has the consequence that material is prohibited in all the States but is allowed in the Territories).

First it is clear that a community standard test (that of reasonable adults), mitigated by considerations of artistic or scientific merit and the audience to which the material is likely to be published, lies at the foundation of s 11 of the Commonwealth Act. Of course this does not mean that much material that would be proscribable under a harms test would also not fall foul of the community standard, but equally it is possible that material that would not be proscribable under a harms test would fall foul of the community test.

Second, the Commonwealth scheme contains an internal tension, in that the community standards test contained in s 11(a) of the Act would in many cases lead to a classification decision that is inconsistent with the Code, because the principles contained in the Code are more consistent with a harms approach of the type I have argued for. Indeed, with the possible exception of criterion (d)(ii) relating to demeaning conduct, the principles contained in the Code are consistent with the view that adults should be able to access whatever material they wish so long as it does not fall into that category of sexual explicitness coupled with violence which the empirical research indicates has the propensity to incite unlawful conduct.

Turning then to the RC and X classifications themselves, RC publications and films are those which:

(a) depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified; or

(b) depict in a way that is likely to cause offence to a reasonable adult a minor who is, or who appears to be, under 16 (whether or not engaged in sexual activity); or

(c) promote, incite or instruct in matters of crime or violence.

What can one say about categories (a) – (c) in light of the theoretical discussion earlier in this article? First it is clear that category (a) embodies a community standard approach rather than a harms approach. This is not to say that material captured by category (a) would not also be captured by a criterion which was harms-based, the problem is that much material which is captured by criterion (a) would not be captured under a harms approach because, although offensive to reasonable members of the public, it would not be found harmful under the approach I have argued for in Part III. A re-drafted criterion aimed at material which has been found to be harmful in the empirical studies would simply refer to materials that:

describe, depict, express or otherwise deal with violence or a combination of sex and violence in such a way as, taken in its immediate context, it has the propensity to incite or encourage unlawful behaviour.
Criterion (b) is unobjectionable in so far as it is designed to protect minors from participation on sexually explicit publications. However, as phrased the criterion depends upon a community standards criterion rather than the fact that the material depicts minors in a sexually explicit manner. I would therefore argue that (b) be re-drafted to read:

describe or depict in a sexually explicit manner a minor who is, or who appears to be, under 16 (whether the minor is engaged in sexual activity or not).

Criterion (c) clearly captures the idea of harm as incitement to violence that I argued for in Part IV, and should therefore remain as is:

promote, incite or instruct in matters of crime or violence.

The X classification (which applies only to films, not to other publications) is used in the case of films which:

(a) contain real depictions of actual sexual activity between consenting adults in which there is no violence, sexual violence, sexualised violence, coercion, sexually assaultive language, or fetishes or depictions which purposefully demean anyone involved in that activity for the enjoyment of viewers, in a way that is likely to cause offence to a reasonable adult; and

(b) are unsuitable for a minor to see.

Since X-rated material contains only depictions of consensual, non-violent sexual activity, there can be no objection to such material under the harms-based approach I advocate. From this it follows that all State statutes which prohibit the distribution of such material to adults are inconsistent with that approach. The same argument applies in relation to publications, and so State laws – specifically those in Queensland – which prevent adults from accessing Restricted Category 1 and 2 materials, are also inconsistent with the harms-based theory I advocate.

A reform proposal

Assuming one accepts the harms-based theory advocated in Part III of this article, I would propose a new legislative provision (to replace s 11 and the Code), and new definition of the RC classification (to apply to films, video games and publications) as follows:

Principles governing classification of films, video games and publications

Classification decisions are to give effect, as far as possible, to the following principles:

(a) adults should be able to read, hear and see what they want;

(b) are unsuitable for a minor to see.
(b) minors should be protected from material likely to harm or disturb them;

(c) everyone should be protected from exposure to unsolicited material that they find offensive;

(d) the need to protect everyone from exposure to material which has the propensity to encourage or incite unlawful conduct.

RC classification

Films, publications or computer games which:

(a) describe, depict, express or otherwise deal with violence or a combination of sex and violence in such a way as, taken in its immediate context, it has the propensity to incite or encourage unlawful behaviour; or

(b) describe or depict in a sexually explicit manner a minor who is, or who appears to be, under 16 (whether the minor is engaged in sexual activity or not)

(c) promote, incite or instruct in matters of crime or violence.

At State level, moving to the harms-based approach I advocate would require the repeal of legislation prohibiting distribution of X-rated films to adults, and in Queensland repeal of the prohibition on Restricted Category 1 and 2 publications. In the absence of the States effecting the necessary legislative changes voluntarily, the only way of achieving a uniform national approach to censorship would be for the Commonwealth to tie reform of State law to the financial assistance the States receive from the Commonwealth, using its s 96 power to subject such assistance to such conditions as the Commonwealth sees fit.

Prospects for reform

How likely is it that reform of the type advocated above might be achieved? So far as academic commentary is concerned, the idea that material should be censored if it is inconsistent with community values attracts little support. Most commentators advocate a harms-based approach. However views on how ‘harm’ should be defined echoes the debate that has taken place in North America, discussed in Part II. Thus some theorists advocate censorship of sexually explicit material on the ground that the material undermines gender equality because of its effect on how men think about women, an approach

which I have rejected. Others adopt the position that what it is lawful to do ought to be lawful to depict, and define harm as the depiction of violence (be it sexually explicit or not) rather than sexual explicitness itself.159 That approach which is close to that which I have argued for earlier in this article, although it lacks the important qualification that it is material that combines sex and violence that ought to be proscribed.

The greatest difficulty that will confront any reform proposal is political opposition arising from socially-conservative politicians. The strength of this political grouping was well illustrated in 2000 when the government introduced an amendment to the Act that would have replaced the X classification as NVE (Non-Violent Erotica).160 Given the political furore which arose, it is important to appreciate that the main effect of the Bill was to narrow the range of materials available under this category by prohibiting material containing fetishes, sexually aggressive language, any violence at all (sexual violence already being prohibited under the RC category) or the portrayal of persons over the age of 18 as minors.

The Bill was considered by the Senate Legal and Constitutional Legislation Committee. A significant feature of the hearings was the fact that those who gave evidence did so within the boundaries of the community standard paradigm, commenting on whether, in their opinion, contemporary Australian society accepted the view that adults should have the right to access non-violent erotica. Although one witness adverted to research data indicating that no socially harmful conduct is caused by adult exposure to non-violent sexually explicit material,161 none of them explicitly challenged the community-standard hypothesis, nor did the Committee’s report address this issue.

While the failure of the committee to consider the issue of harm is regrettable, of greater concern was the ultimate fate of the Bill which, even within the confines of the community standard paradigm, one would have thought would have received legislative support. Several witnesses gave evidence to support the conclusion that a change to an NVE classification was consistent with contemporary community standards, citing opinion polls which indicated widespread public support for the proposition that adults should be allowed to access to non-violent sexually explicit material.162 However notwithstanding

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159 Sandra Berns 'Pornography, Women, Censorship and Morality' (1989) 7 Law in Context 30, 45-48 and Margaret Bateman 'Protecting Freedom of Speech – The Case of Sexually Explicit Material' (1994) 1 Wiser 22, 25. See also Tony Pitman 'What’s wrong with seeing sex?' (2000) 53 Australian Rationalist 12, 14-17, who rejects the subjectivity and majoritarianism inherent in the community standard, but who does not address the question of whether violent material can incite harmful acts.

160 The Bill was called the Classification (Publications, Films and Computer Games) Amendment Bill (No. 2) 1999.

161 See, for example, the evidence of Ms Linda Jaivin at http://www.aph.gov.au/hansard/senate/committee/s898.pdf page 64.

162 See for example the evidence of Fiona Patten, President of the Eros Foundation, at http://www.aph.gov.au/hansard/senate/committee/s898.pdf page 67-68. For a more detailed discussion of the opinion poll results see http://libertus.net/censor/sUTveys.html, where reference is made to an AGB McNair poll published in 1997 which showed that 85% of respondents
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this, and the fact that the Committee recommended that the Bill be enacted unamended, the NVE proposal was withdrawn from the Bill. This was due to lobbying by a small group of politicians in favour of censorship of sexually explicit material, who opposed the Bill because they believed that replacing the X-rated category with one termed NVE would have the effect of making sexually explicit material more socially acceptable and thus more likely to be allowed to be distributed by the States, in contrast to X-rated material which, as has been shown, may not be distributed. Opposition to the change to an NVE category was led by Independent Senator Brian Harradine, a noted campaigner against sexually explicit material, who provided National Party MP De-Anne Kelly with a number of sexually explicit videos which she then screened before a number of Liberal and National Party MPs. Despite the fact that of the videos screened, one had been classified RC, three contained material which would have taken them out of the proposed NVE category, and one had not been classified at all, the showing had the effect of persuading those present to reject the government’s Bill. In the face of this backbench revolt, the then Attorney-General, Mr Daryl Williams, withdrew the proposed NVE classification from the Bill.

The important observation to be made about these events is the moral basis for the politicians’ intervention – as Bromley points out, several of those who attended Kelly’s screening were members of the Lyons Forum, an informal grouping of Christian parliamentarians from the Coalition parties, and Kelly herself applauded the increasing influence of the churches on policy formation in this area. Harradine went even further in revealing his attitude to sexually explicit material, expressing disappointment after withdrawal of the NVE proposal that the law still permitted depictions of oral sex in X-rated materials. That a national legislator could object to adults viewing material depicting lawful sexual activity provides a stark illustration of the extent to which, despite the principle contained in the Code that ‘adults should be able to read, hear and see what they want’, subjective moralism remains a force in relation to this issue.

Australia’s censorship regime is flawed in that it is underpinned by a community-standards approach, rather than a harms-based approach. Of equal concern is the fact that a political pressure group was able to impose the views of a minority sector of the community, in the face of what they perceived to be

believed that adults should be able to access X-rated videos, and a Ray Morgan Research Survey published in 1999 which indicated 73% support for that proposition.


Ibid 37.


Bromley, above n 164, 36.

See the interview with Kelly on the ABC’s Four Corners programme, a transcript of which is at www.abc.net.au/4corners/stories/s124743.htm.

Ibid.
the threat of the law being amended so as to reflect a more tolerant community attitude to non-violent sexually explicit material. In other words, not only is the censorship regime flawed in theory, it is flawed in practice in that, as the events of 2000 show, the community-standard system was unable to deliver what it itself promises – namely, that censorship will keep step with changes in community attitudes. The lesson to be drawn is clear: thoroughgoing reform of the censorship regime is needed if the law is to be put on a basis that respects the autonomy of the individual, with material being proscribed only if it meets the definition of harm as determined by empirical research.