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THE AUTO-AUTHENTICATION OF THE PAGE: PURELY WRITTEN SPEECH AND THE DOCTRINE OF OBSCENITY

Ryen Rasmus*

> WARNING!!! WARNING!!! WARNING!!! Parts of this story may be EXTREMELY offensive to some readers. I offer no apologies, the story is written as it came to me and I WILL NEVER edit *my imagination*.[1]
>
> —Karen Fletcher

INTRODUCTION. KILLING THE "SACRED COW": THE CURIOUS CASE OF *UNITED STATES V. FLETCHER*

In 2006, the Department of Justice filed an unusual case against a highly unlikely defendant. Karen Fletcher, a 54-year-old grandmother living in Pennsylvania,[2] was indicted on six counts of distributing obscene material over the Internet.[3] A subsequent press release from the Justice Department explained that Fletcher's indictment was based on her having posted several fictional stories to her website, "red-rose-stories .com."[4] The stories, which "consist[ed] solely of written words and involve[d] absolutely no images, movies, photos, pictures or drawings of any kind,"[5] featured various accounts of children being abducted, raped, tortured, and sometimes killed.[6] Despite the shocking nature of her work, many within the legal community nonetheless expressed

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[1] Defendant Fletcher's Memorandum in Support of Motion to Declare Obscenity Statute Unconstitutional as Applied to Text or, in the Alternative, to Dismiss Indictment for Failure to Allege a Crime at 65–66, United States v. Fletcher, No. 2:06-cr-00329-JFC (W.D. Pa. Apr. 26, 2007) [hereinafter Motion to Dismiss].

[2] Clay Calvert & Robert D. Richards, *A War over Words: An Inside Analysis and Examination of the Prosecution of the Red Rose Stories & Obscenity Law*, 16 J.L. & POL'Y 177, 183–85 (2007).

[3] *Id.* at 195.

[4] *Id.* at 183, 195.

[5] *Id.* at 183.

[6] Motion to Dismiss, *supra* note 1, at 59–70. Fletcher was sexually abused as a child, and wrote her stories as a part of her recovery process, claiming that they allowed her to exercise control over her fears. *See* Scott Michels, *Art or Obscenity? Unusual Case Draws Controversy*, ABC NEWS (Feb. 1, 2008), http://abcnews.go.com/TheLaw/story?id=4222798&page=1.

surprise that the government was choosing to go forward with Fletcher's prosecution.[7] To begin with, obscenity cases in this country are few and far between.[8] Moreover, since the institution of the *Miller* test[9] in 1973, the government had, as of 2005, brought no such cases based solely upon text-only material.[10]

Fletcher's lawyers seized upon this latter point in their communications with the press and the court handling their client's case. Speaking of the written word as a "sacred cow," Fletcher's attorneys insisted that purely written speech is a form of expression that deserves special treatment within the doctrine of obscenity.[11] "[T]he time has come," they argued, "to excise the pure written word from the purview of obscenity laws. . . ."[12] When Fletcher decided to plead guilty to the charges against her in order to spare herself the ordeal of a highly public trial, her lawyers were intensely disappointed, not only because of the injustice being done to their client, but also because they saw her surrender as a missed opportunity to correct a mistake that has marred the American legal system since the inception of the federal obscenity doctrine more than half a century ago.[13]

This Note will consider whether Fletcher's attorneys were correct in stating that purely written speech is unique enough to merit preferential treatment in the obscenity context. Part I will review the woefully convoluted history of federal obscenity doctrine, taking particular pains to point out the conflicted tone of those court opinions that have addressed the special nature of purely printed speech. Part II will comb through these opinions in search of the factors that make judges uncomfortable with the idea of criminalizing the written word and will distill these factors down into the twin conclusions that the textual medium is simply too personal and too harmless to warrant regulation by the government. Part III will subsequently suggest that judges reviewing text-based obscenity convictions follow the lead of the Supreme Court of Louisiana in employing a liberal, postmodern interpretation of the "seriousness" prong of the federal obscenity test. As will be shown, such a strategy would extend First Amendment protection to any work that consciously seeks to "convey a literary, artistic, political, or scientific

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[7] *See* Michels, *supra* note 6; Paula Reed Ward, *Woman Charged Over 'Vile' Web Stories*, PITTSBURGH POST-GAZETTE, Sept. 26, 2006, http://www.post-gazette.com/pg/06271/725743-58.stm.

[8] *See* Michels, *supra* note 6.

[9] *See* Miller v. California, 413 U.S. 15, 24 (1973); Michels, *supra* note 6.

[10] Calvert & Richards, *supra* note 2, at 191; Robert A. Jacobs, Comment, *Dirty Words, Dirty Thoughts and Censorship: Obscenity Law and Non-Pictorial Works*, 21 SW. U. L. REV. 155, 177 (1992).

[11] Calvert & Richards, *supra* note 2, at 201.

[12] *Id.* at 191 (quoting Motion to Dismiss, *supra* note 1, at 33).

[13] *See* Paula Reed Ward, *Afraid of Public Trial, Author to Plead Guilty in Online Obscenity Case*, PITTSBURGH POST-GAZETTE, May 17, 2008, http://www.post-gazette.com/pg/08138/882650-85.stm. Fletcher has agoraphobia, and her lawyers recognized that she would likely have been unable to endure the spectacle of a trial, let alone a possible jail sentence. *Id.*

idea,"[14] and would thereby immunize purely written texts against obscenity prosecution. Part IV will go on to explain how this postmodern reading of the *Miller* test would allow courts to begin gradually dismantling the federal doctrine of obscenity piece by piece, beginning with the decriminalization of the written word and building toward the ultimate abrogation of the concept altogether. This Note will then conclude with the observation that the sloping path toward the death of obscenity will be a long one, but that text-based cases like Karen Fletcher's have already formed the first stepping stones by acting as platforms for judges and legal scholars to point out the most glaring flaws in the patchwork doctrine.

I. "I'M SICK AND TIRED OF SEEING THIS GODDAMN SHIT":[15] OBSCENITY'S "TORTURED" CONSTITUTIONAL HISTORY[16]

A. Roth*: The Trouble Begins*

It was not until 1957, in its opinion in *Roth v. United States*, that the Supreme Court declared "obscene" communication to be outside the purview of the First Amendment's protection of free speech.[17] "[S]uch utterances," the Court reasoned, "are no essential part of any exposition of ideas, and are of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ."[18] In substantiating this conclusion, the majority relied heavily upon a passage from the earlier case of *Chaplinsky v. New Hampshire*,[19] where the Court had once included obscenity in a list of various other types of speech that Americans have historically considered to be socially worthless, along with fighting words, slander, and incitement.[20] Perhaps nervous that the direct precedential basis for their decision consisted of a single piece of ten-year-old dictum, the Court also attempted to buttress its analysis by listing the many state and federal obscenity laws that had been enacted throughout the country during the past two centuries.[21] Satisfied that this list indicated that regulation of obscenity was "implicit in the history of the First Amendment," the Court felt confident enough to declare outright that "obscenity is not within the area of constitutionally protected speech or press."[22]

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[14] State v. Walden Book Co., 386 So.2d 342, 345 (La. 1980).

[15] H. Franklin Robbins, Jr. & Steven G. Mason, *The Law of Obscenity—or Absurdity?*, 15 ST. THOMAS L. REV. 517, 525 (2003) (quoting BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 228 (1981) (quoting Justice William Brennan)).

[16] Miller v. California, 413 U.S. 15, 20 (1973).

[17] Jacobs, *supra* note 10, at 169.

[18] Roth v. United States, 354 U.S. 476, 485 (1957) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (emphasis omitted)).

[19] 315 U.S. 568 (1942).

[20] *Roth*, 354 U.S. at 485 (quoting Chaplinsky, 315 U.S. at 571–72).

[21] *Id.*

[22] *Id.* at 484–85; *see also* Sarah Leonard, *Pornography and Obscenity*, *in* PALGRAVE ADVANCES IN THE MODERN HISTORY OF SEXUALITY 180, 192 (H.G. Cocks & Matt Houlbrook eds., 2006).

In the years since *Roth*, however, courts and scholars have repeatedly pointed out the intensely flawed nature of the historical analysis that formed the foundation of *Roth*'s holding.[23] In fact, had the Court properly examined the pedigree of the obscenity doctrine, it would have become only too clear that the idea of obscenity regulation is not only foreign to the "history of the First Amendment," but would actually have been an affront to those who conceived of and authored the Amendment itself, particularly when applied to written works.[24] If, for instance, one goes back to the very origin of the obscenity doctrine, one finds that early British obscenity law was not intended to apply to expressive works at all.[25] Rather, a charge of "obscenity" related directly to personal *behavior*, and was much more akin to the commission of indecent exposure.[26] The first time that the doctrine *was* applied with regard to expressive material in later years, the prosecution was a purely political exercise, intended to suppress a satirical work that offended the sitting government.[27] Even after the doctrine came to be applied primarily to expressive material, "obscene" works were traditionally identified as those that were libelous or sacrilegious—that is, anti-establishment—*not* sexual in nature.[28]

Perhaps because of this demonstrated potential for use as a weapon against those with ideas that differed from the majority's, the prohibition of "obscene libel did not travel to America with the colonists . . . ."[29] In fact, there was no American conception of obscenity at all until the early 19th century;[30] the first obscenity prosecution in this country did not take place until 1815, and the first to involve a book did not occur until six years later.[31] This disinterest in obscenity prosecution was an accurate mirror for early American attitudes toward the topic: "Through the first half of the 19th century,

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[23] *See, e.g.*, State v. Henry, 732 P.2d 9, 16–17 (Or. 1987); Robbins & Mason, *supra* note 15, at 529.

[24] *Henry*, 732 P.2d at 13 (quoting *Roth*, 354 U.S. at 484).

[25] *Id.* at 11–12 (citing LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 657 (1978)).

[26] *See id.* at 12; Jacobs, *supra* note 10, at 160; *see also* Leonard, *supra* note 22, at 182 (noting that the concept of "pornography" did not arise in Europe until the 19th century).

[27] *Henry*, 732 P.2d at 12. Ironically, the doctrine is being used for a very similar purpose in this country in the present day. *See infra* notes 147–48 and accompanying text.

[28] Motion to Dismiss, *supra* note 1, at 20; Jacobs, *supra* note 10, at 160.

[29] Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data be Criminalized?*, 13 ALB. L.J. SCI. & TECH. 273, 309 (2003); s*ee also* A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass. (*Memoirs*), 383 U.S. 413, 429 (1966) (citing Bridges v. California, 314 U.S. 252, 264 (1941)); Robbins & Mason, *supra* note 15, at 539–40.

[30] Bradley J. Shafer, *Sex, Lies, and Videotape: In Critique of the* Miller *Test of Obscenity*, 70 MICH. B.J. 1038, 1038–39 (1991) (pointing out that nearly all of the statutes quoted by the *Roth* Court were passed well after the First Amendment, and that the one that was not was directly linked to blasphemy).

[31] *Henry*, 732 P.2d at 12. It is interesting to note that the subject of the first prosecution was a picture, not a written work, FELICE FLANERY LEWIS, LITERATURE, OBSCENITY, AND LAW 7 (1976), while the subject of the second case was a written work containing sexually explicit illustrations, *Memoirs*, 383 U.S. at 425 n.1.

Americans were apparently not very concerned with sexual obscenity, and there were," accordingly, "very few prosecutions until after the Civil War."[32] In the meantime, there arose only a handful of new cases and no federal laws related to obscenity.[33]

When obscenity convictions did begin to issue with regularity in the later decades of the 19th century, it was only because of the self-righteous propaganda of Anthony Comstock, a hyper-moral "fanatical nut" who enjoyed boasting about how many suicides his anti-smut crusades had incited.[34] Truly, Comstock's singular effect on the concept of obscenity in the United States is staggering. Before 1890, there had been only one prosecution of a literary obscenity case in the United States: the one that took place in 1821.[35] By contrast, Comstock himself "convicted," in his own words, "persons enough to fill a passenger train of sixty-one coaches" and "destroyed 160 tons of obscene literature."[36] It was even the upstart Comstock who "single-handedly convinced 'Congress to pass the archetype of American anti-obscenity' laws . . . ."[37]

Thus, the *Roth* Court's statement that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance"[38] was manifestly wrong. To the contrary, Justice Reed later noted quite rightly that "it would startle [James Madison, Thomas Jefferson, and George Mason] to be told that any picture, whatever its theme and its expression, could be barred from being commercially exhibited."[39] Indeed, there is evidence that many of the Founders themselves purchased and enjoyed works that might at the time have been considered "obscene."[40] Benjamin Franklin's own "Advice to a Young Man on the Choice of a Mistress" was once widely censored due to its oblique sexual references,[41] while, for his part, Thomas Jefferson was "mortified" to hear that various books were being suppressed in the United States because of their content.[42] "[A]re we to have a

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[32] Robbins & Mason, *supra* note 15, at 522; *see also* LEWIS, *supra* note 31, at 8.

[33] *Memoirs*, 383 U.S. at 430. Significantly, when the first federal obscenity laws were eventually passed, they related to obscene pictorial matter only. *Henry*, 732 P.2d at 12.

[34] Robbins & Mason, *supra* note 15, at 522–23.

[35] LEWIS, *supra* note 31, at 11.

[36] *Id.* at 12.

[37] Robbins & Mason, *supra* note 15, at 522 (quoting CHARLES REMBAR, THE END OF OBSCENITY 21 (1968)).

[38] Roth v. United States, 354 U.S. 476, 484 (1957).

[39] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 518 (1952); *see also* Brenner, *supra* note 29, at 309 n.162; Debra D. Burke, *Cybersmut and the First Amendment: A Call for a New Obscenity Standard*, 9 HARV. J.L. & TECH. 87, 97–98 (1996); Jessica A. Newill, Comment, *A Dying Art: An Examination of the Death and Rebirth of Progressive Art Under United States Obscenity Law*, 76 UMKC L. REV. 203, 210 (2007).

[40] Burke, *supra* note 39, at 98 n.59 (citing NAT HENTOFF, FREE SPEECH FOR ME BUT NOT FOR THEE 317 (1992)).

[41] JOHN E. SEMONCHE, CENSORING SEX: A HISTORICAL JOURNEY THROUGH AMERICAN MEDIA 14 (2007).

[42] Robbins & Mason, *supra* note 15, at 541 (quoting THE COMPLETE JEFFERSON 889 (Saul Padover ed., 1943)).

censor," he asked, "whose imprimatur shall say what books may be sold and what we may buy?"[43] In a prescient statement that has formed the basis for many obscenity defenses, including Karen Fletcher's, Jefferson went on to wonder, "Whose foot is to be the measure to which ours are all to be cut or stretched?"[44] Cognizant of this inherent disjunction between censorship and the American system of liberty, many pre-*Roth* courts had repeatedly questioned whether the obscenity laws that sprang up over the course of the late 19th century could ever be squared with the First Amendment.[45]

In contrarily deciding that First Amendment history compassed the suppression of works that might make some Americans uncomfortable, the *Roth* Court thus totally ignored the actual historical fact that Americans' "distaste for censorship—reflecting the natural distaste of a free people—is deep-written in our law."[46]

B. Between Roth *and* Kaplan*: The Water Gets Muddier and the Court Gets Fed Up*

Tellingly, the Supreme Court's *Roth* opinion was followed closely by its decision in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, (*Memoirs*)[47] which made it much more difficult for the government to obtain guilty verdicts under the federal obscenity doctrine. Specifically, *Memoirs* required prosecutors to prove that a work was "utterly without redeeming social value" before they could convict the work's author.[48] Since, as Professor Arnold H. Loewy has pointed out, "Any lawyer worth his salt could establish something socially-important in almost any book or movie," the Court clearly intended *Memoirs* as a calculated move away from its original hard-line decision to deny obscenity the protection of the First Amendment.[49] This inching away continued in *Stanley v. Georgia*,[50] where the Court decided that private possession and consumption of obscenity could not be criminalized under the Constitution.[51] In a strongly worded opinion authored by Justice Thurgood Marshall, the Court stated that the government "has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[52]

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[43] *Id.*

[44] *Id.*

[45] LEWIS, *supra* note 31, at 185.

[46] Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975); *see also* Commonwealth v. Dell Publ'ns, Inc., 233 A.2d 840, 843 (Pa. 1967) ("The history and tradition of our institutions stand against the suppression of books.") (quoting Larkin v. G.P. Putnam's Sons, 200 N.E.2d 760, 761 (N.Y. 1964)).

[47] 383 U.S. 413 (1966).

[48] *Id.* at 418.

[49] Arnold H. Loewy, *Obscenity: An Outdated Concept for the Twenty-First Century*, 10 NEXUS 21, 29 n.25 (2005); Jacobs, *supra* note 10, at 169.

[50] 394 U.S. 557 (1969).

[51] *Id.*; John C. Stewart, Note, Pope v. Illinois*: A Reasonable Person Approach to Finding Value*, 20 U. TOL. L. REV. 231, 237 (1988).

[52] *Stanley*, 394 U.S. at 565.

Despite this declaration, the idea of obscenity itself continued to stand. The Court remained markedly uncomfortable with the doctrine, however, particularly with regard to those cases involving purely written speech.[53] In fact, prior to 1973, the Court handed down a seven-year string of decisions holding that various literary works could not be considered obscene within the meaning of *Roth* and *Memoirs*.[54] The Court's refusal to suppress these works led some lower courts to conclude that the Justices had decided to exempt written works from the doctrine altogether, so long as they were not aimed at children, foisted upon unwilling viewers, or marketed solely based on their prurient appeal.[55]

Increasingly, however, the Court itself was getting fed up with the obscenity question and the politically charged debates (and tiresome pre-hearing screenings) that went along with it.[56] With the sexual revolution in full swing, more and more obscenity-related cases were being brought before the Court, with its Justices having to evaluate the subject of each one and render an opinion as to whether the material possessed "redeeming social value."[57] Eventually, the sheer volume of potentially obscene work that the Court was required to sort through led Justice William Brennan, author of the *Roth* opinion, to remark, "I'm sick and tired of seeing this goddamn shit."[58] Having unwittingly set itself up as the country's "super censor," the Court began looking for an opportunity to tighten up the doctrine of obscenity and give the problem back to the states.[59]

C. Kaplan v. California

The political realignment of the Court following the election of President Nixon in the early 1970s provided just such an opportunity, and allowed the Justices to formulate a new constitutional standard for the identification of unprotected obscenity.[60] The test, set forth in the case of *Miller v. California*, had three prongs:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals

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[53] LEWIS, *supra* note 31, at 225.

[54] *Id.*

[55] State v. Carlson, 202 N.W.2d 640, 645 (Minn. 1972) ("Apparently the rulings demonstrate that the printed word, no matter how tawdry, is not obscene."), *quoted in* People v. Mature Enters., Inc., 343 N.Y.S.2d 911, 917 (Crim. Ct. 1973); *see also* Commonwealth v. Dell Publ'ns, Inc., 233 A.2d 840, 843–45 (Pa. 1967); LEWIS, *supra* note 31, at 225–26.

[56] Robbins & Mason, *supra* note 15, at 525.

[57] *Id.* (quoting A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass. (*Memoirs*), 383 U.S. 413, 419 (1966)).

[58] *Id.*(quoting WOODWARD & ARMSTRONG, *supra* note 15, at 228).

[59] *See* John Tehranian, *Sanitizing Cyberspace: Obscenity,* Miller*, and the Future of Public Discourse on the Internet*, 11 J. INTELL. PROP. L. 1, 22 & n.94 (2003) (citing WOODWARD & ARMSTRONG, *supra* note 15, at 201).

[60] Robbins & Mason, *supra* note 15, at 527–28.

> to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[61]

Dispelling any previous speculation as to written speech's exemption from the doctrine, the Court also explicitly laid out the *Miller* test's implications for purely textual works in a companion case called *Kaplan v. California*.[62] Perhaps ironically, this opinion—the one most widely cited for the proposition that purely written speech may be considered obscene under the Constitution—is itself one of the judiciary's most conflicted. On the one hand, the majority blatantly stated that "a book seems to have a different and preferred place in our hierarchy of values, and so it should be."[63] Yet somehow, the Court, in the very same paragraph, managed to lump written speech in with "pictures, films, paintings, drawings, and engravings," and to state that all must be subject to the same obscenity standard.[64] No quarter was given in light of the fact that purely written speech is fundamentally different from all other communicative media.[65] Instead, the Supreme Court repeated the mistake that it made in *Roth*, looking back to that very decision and declaring that because the *Roth* Court had made no distinction between written and non-written material in the obscenity context, the *Kaplan* Court would decline to do so as well.[66] The opinion in *Kaplan* thus stands as a paradoxical jumble—a judicial recognition of the fact that purely written speech is somehow different from all other types, but not different enough to warrant special treatment within the doctrine of obscenity.

*D. Post-*Kaplan*: The Lower Courts Become Slaves to Stare Decisis*

In reviewing the "tortured" history of the obscenity doctrine, one is forced to the same conclusion that Justice William O. Douglas made in his *Roth* dissent: "If experience in this field teaches anything, it is that 'censorship of obscenity'"—particularly written obscenity—"'has almost always been both irrational and indiscriminate.'"[67] Since 1954, the Supreme Court "has written scores of decisions on obscenity[,]" in which "[i]t has laid down rules, expounded principles, established standards, and then later ignored or dismissed them all."[68] The lower courts' exasperation with this constant

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[61] Miller v. California, 413 U.S. 15, 24 (1973) (internal citations omitted).

[62] 413 U.S. 115 (1973).

[63] *Id.* at 119.

[64] *Id.*

[65] *See infra* Part II.

[66] *Kaplan*, 413 U.S. at 119.

[67] Roth v. United States, 354 U.S. 476, 512 (1957) (quoting William B. Lockhart & Robert C. McClure, *Literature, the Law of Obscenity, and the Constitution*, 39 MINN. L. REV. 295, 371 (1938)).

[68] Commonwealth v. Dell Publ'ns, 233 A.2d 840, 863 (Pa. 1967). The truth of this statement might best be illustrated by Justice Hugo Black's observation that, as it stands, the Court's ruling

waffling is evident in many of the decisions that have been handed down in the wake of *Miller* and *Kaplan*, particularly with regard to the high court's confusing refusal to differentiate between purely written material and the various other media forms.[69] On the one hand, the lower courts, like the Supreme Court itself, cannot help recognizing that purely written speech is intrinsically unlike other types of media.[70] On the other hand, the lower courts are bound by stare decisis, whereby they must defer to Supreme Court precedent even when their own countervailing positions have merit, leaving it to the Court to decide whether and when its past precedent should be overruled.[71] The result has thus been a pattern of lower court opinions that dutifully toe the *Kaplan* line, even when presented with compelling reasons why, as a matter of both settled law and policy, they should not be doing so.[72]

Interestingly, this template was in use even before the Court's decision in *Kaplan*. In the 1968 case of *United States v. A Motion Picture Film Entitled "I am Curious-Yellow,"*[73] for instance, the majority literally conceded that books and movies should be "judged" according to different "standards" in the obscenity context, but elegantly declined to set forth the precise nature of these standards or to formally adopt them for itself.[74] One of the two concurring judges pointed out why: "Although, for reasons indicated in the opinions of both of my brothers, there might be merit to" the idea that a "stricter standard should apply to motion pictures and plays than to books . . . I find nothing in the Supreme Court's opinions that would justify a lower court in embarking on such a doctrinal innovation . . . ."[75]

The much more recent case of *United States v. Whorley* presents an even more interesting example of the tension between lower courts' contemporaneous desires to exempt written material from the obscenity doctrine and to stay in line with controlling Supreme Court precedent.[76] In *Whorley*, the majority managed to gloss over the question of whether pure speech *should* be considered obscene, and instead simply stated that it presently *may* be under the Supreme Court's ruling in *Kaplan*.[77] In executing this move, the court contended that if the defendant had given it some reason why purely written speech should be exempted from the purview of the obscenity doctrine,

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in *Stanley* is "good law only when a man writes salacious books in his attic, prints them in his basement, and reads them in his living room." United States v. Thirty-Seven Photographs, 402 U.S. 363, 382 (1971) (Black, J., dissenting).

[69] *See, e.g.*, United States v. Whorley, 550 F.3d 326, 335 (4th Cir. 2008).

[70] *See infra* Part II.

[71] *See* Agostini v. Felton, 521 U.S. 203, 238 (1997); *see also* United States v. Gendron, No. S2-4:08CR244RWS(FRB), 2009 WL 5909127, at *5 (E.D. Mo. Sept. 16, 2009) ("It is not within this Court's purview to renounce . . . Supreme Court precedent [related to the doctrine of obscenity].").

[72] *See Whorley*, 550 F.3d at 335.

[73] 404 F.2d 196 (2d Cir. 1968).

[74] *Id.* at 198.

[75] *Id.* at 201 (Friendly, J., concurring).

[76] *Whorley*, 550 F.3d 326.

[77] *Id.* at 335.

then it might have been inclined to listen.[78] Strangely, in making this statement the court managed to overlook the contents of Judge Roger L. Gregory's powerful partial dissent, which set forth a slew of reasons why text-only speech should not be allowed to qualify as obscenity, ranging from the present doctrine's dangerous proximity to mind control to the observation that suppressing purely written speech serves no socially valuable purpose.[79]

Not all courts are hesitant to stand their ground in the face of Supreme Court precedent, however. In *United States v. McCoy*, mention is made of two Minnesota judges—the Honorable Franklin L. Noel and Honorable Ann D. Montgomery—who refused, point-blank, to "participate in the criminalization of the written word . . . ."[80] Specifically, the judges denied the government's application for a warrant to search the home of an author named Frank Russell McCoy who—much like Karen Fletcher—specialized in "'fantasy' stories describing in explicit and graphic detail the sexual abuse, rape, and murder of children."[81] While the two judges could not overlook the fact that McCoy's work, like Fletcher's, was "depraved and disturbing," the judges nonetheless decided that because the stories were wholly the products of the author's imagination, they were essentially harmless, meaning that the government had no business trying to suppress them.[82]

Nonetheless, a court in the Middle District of Georgia not only refused to use Judge Noel's and Judge Montgomery's orders as a technical means of ending McCoy's prosecution, but also passed up a second opportunity to support the Minnesota judges' attempts to decriminalize purely written speech.[83] In its pleadings before the Georgia court, the government had failed to respond to McCoy's "clear [constitutionally based] attack against two facets" of the federal obscenity offense with which he was charged,[84] a "scenario" that "offer[ed] the Court the opportunity to accept outright [McCoy's] uncontroverted position" and enter a default judgment in his favor.[85] Instead, though, the Georgia court felt bound to adhere to Supreme Court precedent, which was "decidedly favorable to the government."[86] Just like the courts in *"I am Curious-Yellow"* and *Whorley*, the Georgia court went on to state that the Supreme Court had

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[78] *Id.* ("In essence, Whorley argues that text, standing alone, may not constitutionally be prohibited as obscene. He never explains why, however, nor does he cite any authority for his argument.").

[79] *Id.* at 343, 348–50 (Gregory, J., concurring in part and dissenting in part). For a full consideration of Judge Gregory's arguments and others like them, see *infra* Part II.

[80] *See* United States v. McCoy, 678 F. Supp. 2d 1336, 1341 (M.D. Ga. 2009).

[81] *Id.* at 1340.

[82] *Id.* at 1341.

[83] *Id.* at 1368.

[84] McCoy argued that because he "created no public nuisance" and did not participate in any "commercial endeavor" in distributing his stories, the government had no social interest in suppressing his work. *Id.* at 1367.

[85] *Id.* at 1368.

[86] *Id.*

not yet seen fit to exempt any media form from the purview of the obscenity doctrine, meaning that "states may broadly regulate obscenity in all forms—including written works of non-illustrated fiction provided to a willingly purchasing customer."[87]

II. WHY COURTS ARE CONFLICTED: THE INHERENT UNIQUENESS OF PURELY WRITTEN SPEECH

Time and again, then, post-*Kaplan* courts have refused to exempt text-only speech from the doctrine of obscenity, even when presented with compelling arguments why they should depart from established precedent in the interest of justice.[88] All the same, the arguments continue to be made by those like Fletcher and McCoy, and many judges are beginning to grow impatient with the Supreme Court's monolithic treatment of all forms of communicative media.[89] A brief overview of the various arguments advanced by those who feel that purely written material deserves special treatment nicely reveals the sound reasoning driving these courts' and defendants' irritation.

A. The Reader Runs the Rollercoaster: Why Printed Text is Less Dangerous than Other Media Forms

To begin with, at the risk of stating the obvious, it must be pointed out that the written word is inherently different from all other media forms. A text-only work, for instance—as opposed to a pictorial or audible one—can never be the product of the antisocial acts that are so often cited as justification for campaigns against traffic in obscenity.[90] Unlike in snuff films,[91] crush films,[92] or child pornography, "nobody gets vérité killed" or hurt, either physically or psychologically.[93] Further, there is no danger that the subject of a purely textual work is being forced to perform against

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[87] *Id.* at 1380.

[88] *See supra* Part I.D.

[89] *See* United States v. Whorley, 550 F.3d 326, 343 (4th Cir. 2008) (Gregory, J., concurring in part and dissenting in part); *McCoy*, 678 F. Supp. 2d at 1341.

[90] *See* LINDA WILLIAMS, HARD CORE: POWER, PLEASURE, AND THE "FRENZY OF THE VISIBLE" 185 (1989) (discussing the reasons why pictorial works might be considered obscene); Jacobs, *supra* note 10, at 177 n.145, 178; *see also* Trans-Lux Distrib. Corp. v. Bd. of Regents, 198 N.E.2d 242, 245 (N.Y. App. Div. 1964).

[91] These are films that purport to show people, usually women, being killed. *See* WILLIAMS, *supra* note 90, at 193.

[92] These are films "in which a woman, usually wearing high heels, tortures and crushes an animal with her foot" for the sexual gratification of the viewer. Joseph J. Anclien, *Crush Videos and the Case for Criminalizing Criminal Depictions*, 40 U. MEM. L. REV. 1, 2 (2009).

[93] WILLIAMS, *supra* note 90, at 193; *see also* Motion to Dismiss, *supra* note 1, at 40; *cf.* New York v. Ferber, 458 U.S. 747, 756–57 (1982) (discussing the importance of the law in preventing the actual sexual exploitation and abuse of children).

his or her will,[94] as such subjects exist solely within the realm of the author's and reader's imaginations.[95]

Also unlike a picture, sound, or film, a purely textual work has a far smaller chance of being inadvertently taken in by an unwilling or inappropriate party. Because of the time and effort that it takes to digest them,[96] written stories cannot be consumed "accidentally," as a poster, billboard, or film might be.[97] This is even truer in the present Internet Age, as the kinds of written speech from which obscenity laws seek to protect the underage and unwilling are often deliberately hidden behind several actual or virtual barriers that clearly indicate the shocking and sexual natures of the works that they conceal.[98] Thus, in the vast majority of cases in which a person gains access to shocking written material, he is, in the words of one court, "forewarned and willing."[99] Relatedly, and even more basically, written speech requires a certain degree of intellectual sophistication to consume and understand, a trait not shared by non-written media.[100] Spoken words, for instance, can be and usually are immediately consumed

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[94] Jacobs, *supra* note 10, at 177 n.145, 178.

[95] There is an argument to be made that some written works incorporate real persons as subjects, but it would be much simpler and more efficient to seek redress for any wrong done to an actual person as a result of these writings via a suit in tort (e.g., for intentional infliction of emotional distress or misappropriation of another's name or likeness) or prosecution for criminal harassment rather than by means of a federal obscenity prosecution. *See* Brenner, *supra* note 29, at 384–85.

[96] FRANK SMITH, UNDERSTANDING READING 94 (6th ed. 2004).

[97] This fact has led several courts to conclude in dicta that "a motion picture of sexual scenes may transcend the bounds of the constitutional guarantee [of protection under the First Amendment] long before a frank description of the same scenes in the written word." Landau v. Fording, 54 Cal. Rptr. 177, 181 (Ct. App. 1966), *aff'd per curiam*, 388 U.S. 456 (1967); *see also* People v. Bercowitz, 61 Misc. 2d 974, 982 (N.Y. Crim. Ct. 1970) (applying similar reasoning in the context of live theater and differentiating that medium from the medium of written speech). It is true that briefly stated phrases might present a greater danger, but these are almost certainly either suppressible by laws against use of profanity in public, see, for example, VA. CODE ANN. § 18.2-388 (West 2010), or indecent display, *see, e.g.*, ALA. CODE § 13A-12-191 (2010), or protected under the principles set forth in *Cohen v. California*, 403 U.S. 15 (1971) (holding that profane words may be displayed in public for legitimate political purposes) and, somewhat more creatively, in *Baker v. Glover*, 776 F. Supp. 1511, 1514 (N.D. Ala. 1991) (explaining how *Cohen*, not *Miller*, should control); *see also* SMITH, *supra* note 96, at 185–87 (explaining the difference between a short burst of writing and a global idea).

[98] Examples of such barriers include explicit warnings and summaries, age verifications, and even, in some cases, the requirement of personal or credit card information. *See* United States v. McCoy, 678 F. Supp. 2d 1336, 1341 (M.D. Ga. 2009); Calvert & Richards, *supra* note 2, at 200, 206; *see, e.g.*, THE BDSM LIBRARY, http://www.bdsmlibrary.com/stories/ (last visited Oct. 10, 2011).

[99] Southeastern Promotions, Ltd. v. Atlanta, 334 F. Supp. 634, 643 (N.D. Ga. 1971). This is particularly true in the Internet Age, since "the digital revolution has provided individuals with the ability to perfect customization of the content to which they are exposed." Tehranian, *supra* note 59, at 14.

[100] *See Landau*, 54 Cal. Rptr. at 181; Burke, *supra* note 39, at 119.

by anyone with the ability to understand them, whether such consumption is desirable or not.[101] Pictorial works have similar qualities. Films in particular, with their "unique combination of sight and sound . . . make[ ] the ideas presented [within them] comprehensible to a larger audience than is the case in any other medium except television."[102] Together, these facts make purely written works far less likely to be inadvertently consumed by improper audiences—particularly children—than other media forms.[103]

Moreover, once a consumer *has* gained access to a shocking written work, he retains far more control over the text than he does over a sound, picture, or film.[104] In fact, the human brain actually processes written speech in a way that is inherently different from the way that it processes pictorial speech; "visual content is processed using more of the right brain, which is more holistic and emotional," meaning that photographs, films, and drawings are "processed quickly and heuristically, sometimes bypassing conscious thought."[105] As such, visual images are more instantly affective than purely written accounts, having, in effect, the ability to catch at one's emotions within milliseconds of being seen.[106] Spoken language also has the potential to be thrust upon a consumer in an uncontrolled stream. While reading, "[t]he reader has control over time, can decide which parts of the text to attend to, the order in which they will be selected, and the amount of time that will be spent on them,"[107] but while listening, the consumer is held in thrall to the person doing the speaking, and must take the words that he hears as they come.[108] Admittedly, as the Supreme Court noted in *FCC v. Pacifica Foundation*,[109] "one [may] avoid further offense by turning off the radio" or leaving the theater "when he hears indecent language."[110] Yet the Court went on

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[101] *See* FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978).

[102] *Landau*, 54 Cal. Rptr. at 181. Interestingly, film's egalitarian characteristics once led the Government to try to exempt *all* motion pictures from the protection of the First Amendment. *See* Joseph Burstyn, Inc. v. Wilson, 434 U.S. 495, 501 (1952).

[103] *See Landau*, 54 Cal. Rptr. at 181 (explaining why visual images can be more readily consumed than text).

[104] Motion to Dismiss, *supra* note 1, at 14; SMITH, *supra* note 96, at 41; *see also* Freedman v. Maryland, 380 U.S. 51, 61 (1965).

[105] Clay Calvert, *Every Picture Tells a Story, Don't It? Wrestling with the Complex Relationship Among Photographs, Words and Newsworthiness in Journalistic Storytelling*, 33 COLUM. J.L. & ARTS 349, 361 (2010) (internal citations omitted).

[106] *Id.* at 350. Movies in particular "assure a high degree of attention and retention. The focusing of an intense light on a screen and the semidarkness of the room where distracting ideas and suggestions are eliminated contribute to the forcefulness of movies and their unique effect on the audience." *Landau*, 54 Cal. Rptr. at 181 (internal citations omitted); *see also* United States v. A Motion Picture Film Entitled "I Am Curious-Yellow," 404 F.2d 196, 203 (2d Cir. 1968); Gen. Corp. v. State, 320 So.2d 668, 672 (Ala. 1975); People v. Bloss, 171 N.W.2d 455, 458 (Mich. App. 1969); People v. Mature Enters., Inc., 73 Misc. 2d 749, 755 (Crim. Ct. 1973).

[107] SMITH, *supra* note 96, at 41.

[108] *Id.*

[109] 438 U.S. 726 (1978).

[110] *Id.* at 748–49.

to point out that this is rather "like saying that the remedy for an assault is to run away after the first blow."[111] Thus, every non-written media form has the ability to quickly throw its contents upon consumers without the consumers' conscious choice to take in the content. No time is required to "create" a communicative idea; the idea simply intrudes upon the consumer's mind.[112]

Consumption of the written word, however, necessitates a unique "psychic give and take" between an author and his audience—a serious process of encoding and decoding that takes both time and will on the part of both parties.[113] Unlike the act of watching television or listening to the radio, "reading" can never be an incidental or "meaningless activity . . . ."[114] Rather, "readers always read *something*, they read for a *purpose*, and reading and its recollection always involve *feelings* as well as knowledge and experience."[115] As they move along, readers actively exercise control over the text that they are consuming.

> Readers can stop the action, and pause in the middle of an experience for reflection. Readers can relive reading experiences, as often as they wish, and examine them from many points of view. Readers can even skip over experiences they are not interested in having or that would disrupt their flow of thought.[116]

Readers, then, much more so than consumers of non-written works, "have *power*."[117] For this reason, many have observed that it is incorrect to think of "the printed page impressing its meaning on the reader's mind . . . ."[118] Rather, Louise Rosenblatt has famously spoken of the act of reading as a "transaction" between the consumer and the text, a "non-linear, dynamic, dialectical process"[119] in which the "relationship between

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[111] *Id.* at 749.

[112] *See* Calvert & Richards, *supra* note 2, at 206.

[113] *See* People v. Mature Enters., Inc., 73 Misc. 2d 749, 754–56 (Crim. Ct. 1973); SMITH, *supra* note 96, at 41.

[114] SMITH, *supra* note 96, at 178.

[115] *Id.*

[116] *Id.* at 192.

[117] *Id.*, A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass. (*Memoirs*), 383 U.S. 413, 431 n.10 (1966) (Douglas, J. concurring) ("I should prefer that my own three daughters meet the facts of life and the literature of the world in my library than behind a neighbor's barn . . . . If the young ladies are appalled by what they read, they can close the book at the bottom of page one . . . ." (quoting Commonwealth v. Gordon, 66 Pa. Dist. & Co. 101, 110)); *Mature Enters., Inc.*, 73 Misc. 2d at 754–56; Calvert & Richards, *supra* note 2, at 196, 205.

[118] TODD F. DAVIS & KENNETH WOMACK, FORMALIST CRITICISM AND READER-RESPONSE THEORY 54 (2002).

[119] Ann E. Bertoff, *Democratic Practice, Pragmatic Vistas: Louise Rosenblatt and the Reader's Response*, *in* THE EXPERIENCE OF READING 77, 80 (John Clifford ed., 1991).

reader and signs on the page proceeds in a to-and-fro spiral," with the reader constantly taking in the precepts of the text, comparing them to what he already knows and believes, and reacting to the text in disparate ways—many of which are often quite different from the ones predicted by the text's original author.[120]

B. It's All in Your Head: How Criminalization of the Written Word Allows the Government to Regulate Thought

These different meanings arrived at by means of the "transactional" reading experience are, of course, intensely personal. This is true not only in that the meanings are impacted and shaped by each individual's own beliefs and experiences,[121] but also in that the mental manifestations they provoke are necessarily auto-generated.[122] In other words, while reading a written text, any image—unsettling or otherwise—that subsequently forms in the reader's mind ultimately is generated wholly *by* the reader's mind.[123] Critics note, however, that in enforcing obscenity laws the government necessarily seeks to limit this thought activity by taking away the stimulus for readers' mental image-construction.[124] Such regulation has thus often been characterized as a form of mind control or indirect punishment of thought-crime, since the activity that the government is actually seeking to prohibit via obscenity prosecution is the formation of unsuitable images within its citizens' psyche.[125] Yet American jurisprudence has traditionally drawn a very clear line: "We punish actual abuse and we allow thought."[126] This follows from the premise that ideas are not themselves inherently harmful, and that one cannot therefore be punished for harboring any given idea.[127]

In keeping with this precept, the censurable act that is ostensibly at issue in obscenity cases is articulated as an affirmative one: the conscious practice of producing

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[120] DAVIS & WOMACK, *supra* note 118, at 54; Amy Adler, *What's Left?: Hate Speech, Pornography, and the Problem of Artistic Expression*, 84 CALIF. L. REV. 1499, 1518 n.78, 1541 (1996); Edward John Main, *The Neglected Prong of the* Miller *Test for Obscenity: Serious Literary, Artistic, Political, or Scientific Value*, 11 S. ILL. U. L.J. 1159, 1174 (1987).

[121] DAVIS & WOMACK, *supra* note 118, at 54.

[122] Calvert & Richards, *supra* note 2, at 205.

[123] *Id.*

[124] Antony Grey, *Pornography and Free Speech*, *in* THE INFLUENCE OF PORNOGRAPHY ON BEHAVIOUR 47 (Maurice Yaffé and Edward C. Nelson eds., 1982); Brenner, *supra* note 29, at 364; Main, *supra* note 120, at 1173 (discussing the Seventh Circuit's concerns); Robbins & Mason, *supra* note 15, at 518.

[125] *See* Grey, *supra* note 124, at 56 ("Books in the dock . . . are ideas in the dock. And ideas in the dock . . . are the hallmark of the totalitarian state.").

[126] Calvert & Richards, *supra* note 2, at 206 (quoting Lawrence G. Walters, attorney for Karen Fletcher).

[127] United States v. Whorley, 550 F.3d 326, 348 (4th Cir. 2008); Nicole I. Khoury, *United States v. Playboy: Children and Sexually Explicit Material: Whose Problem is It?*, 33 U. TOL. L. REV. 431, 433 (2002).

and disseminating the material at issue in the case.[128] To use the words of the *Roth* Court, "[i]t is not the book that is on trial; it is a person. The *conduct* of the defendant is the central issue . . . ."[129] To say this is all very well, but the fact remains that the evil that censorship of purely written material purports to guard against is the mental and intangible "disgust" or "taking of offense" by an unwilling viewer or "corruption" of one who is underage.[130] Thus, "punishment" for violation of obscenity laws, particularly when the affirmative act is nothing more than the setting down of intangible ideas, is actually "inflicted for thoughts provoked" in the minds of readers, "*not for overt acts or antisocial conduct*."[131]

For Justice John Harlan, such "regulation of thought and desire . . . raise[d] the most acute constitutional as well as practical difficulties."[132] "The Federal Government," he explained, "has no business, whether under the postal or commerce power, to bar the sale of books because they might lead to any kind of 'thoughts' . . . . Thoughts and desires not manifested in overt antisocial behavior are generally regarded as the exclusive concern of the individual and his spiritual advisors."[133] For the government to take it upon itself to dam the flow of those unorthodox ideas that the majority might find offensive is thus a manifestly frightening and un-American concept—one that, again, would have appalled the Framers of the Constitution.[134]

The idea of the government punishing one man for images provoked in the mind of another is also disturbing in that it begs the question of how an author could possibly be expected to know whether his book will or will not provoke legally obscene images in its ultimate consumers' minds.[135] Unlike pictorial materials, in

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[128] *See, e.g.*, 18 U.S.C. §§ 1462, 1465 (2010) (punishing importation, transportation, production, distribution or sale of "obscene matters").

[129] Roth v. United States, 354 U.S. 476, 495 (1957) (Warren, C.J., concurring) (emphasis added).

[130] Calvert & Richards, *supra* note 2, at 206 (quoting Lawrence Walters). Note that, in any event, corruption of private morals is likely insufficient for constitutional justification of obscenity laws in the wake of *Stanley v. Georgia*, 394 U.S. 557 (1969) and *Lawrence v. Texas*, 539 U.S. 558 (2003). *See* United States v. Gendron, No. S2-4:08CR244RWS(FRB), 2009 WL 5909127, at *4 (E.D. Mo. Sept. 16, 2009) (describing one court's view of the rights afforded in obscenity cases).

[131] *Roth*, 354 U.S. at 509 (Douglas, J., dissenting) (emphasis added); *see also* Motion to Dismiss, *supra* note 1, at 33.

[132] *Roth*, 354 U.S. at 500 (Harlan, J., dissenting).

[133] *Id.* at 507 & n.9.

[134] *See* A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass. (*Memoirs*), 383 U.S. 413, 429 (1966) (Douglas, J., concurring); Commonwealth v. Dell Publ'ns, Inc., 233 A.2d 840 (Pa. 1967) (discussing the courts' role in obscenity cases).

[135] LEWIS, *supra* note 31, at 60, 172; Calvert & Richards, *supra* note 2, at 215, 222–23 (quoting Lawrence Walters); Bradley J. Schafer, *Sex, Lies, and Videotape: In Critique of the* Miller *Test of Obscenity*, 70 MICH. B.J. 1038, 1043 (1991); Cara L. Newman, Note, *Eyes Wide Open, Minds Wide Shut: Art, Obscenity, and the First Amendment in Contemporary*

which everyone sees largely the same thing,[136] the mental pictures provoked by a text differ widely from person to person, with various elements being screened out by some and amplified by others.[137] The question of what images will be provoked by written works describing sexually related subjects becomes even more unpredictable in light of the fact that the human mind is often irrational when it comes to matters of sexual excitement or disgust;[138] as cases like *Fletcher*, *Whorley*, and *McCoy* demonstrate, one man's obscenity is another's fantasy.[139]

Thus, obscenity is not, as Justice Harlan has put it, "as distinct, recognizable, and classifiable as poison ivy is among other plants."[140] Rather, the question in every obscenity trial is whether the contested book is offensive given the mental pictures provoked in the fact-finder considering the case.[141] This has led Justice Brennan to observe that one cannot know "with certainty that material is obscene until at least five members of [the Supreme] Court, applying inevitably obscure standards, have pronounced it so."[142] In a world where Justice Brennan's own definition of obscenity was, for a long time, "no erections,"[143] and Justice Byron White's was "no erect penises, no intercourse, [and] no oral or anal sodomy,"[144] even purveyors of the Bible might run the risk of being prosecuted.[145] For this reason, many artists have simply chosen to

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America, 53 DEPAUL L. REV. 121, 152–53 (2003); *see also* Miller v. California, 413 U.S. 15, 43–44 (1973) (Douglas, J., dissenting) ("To send men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process.").

[136] *See* Jacobs, *supra* note 10, at 176.

[137] *See* United States v. Pryba, 678 F. Supp. 1225, 1229 n.3 (E.D. Va. 1988), *cited in* Motion to Dismiss, *supra* note 1, at 34–35. Because, as argued before, individuals often come away with disparate meanings of a given text, it follows that they create different embodiments of these ideas as they read. *See* LAURA E. TANNER, INTIMATE VIOLENCE: READING RAPE AND TORTURE IN TWENTIETH-CENTURY FICTION 7 (1994).

[138] NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS 147 (2000).

[139] *See* Roth v. United States, 354 U.S. 476, 497 (1957) (Harlan, J., concurring in part and dissenting in part).

[140] *Id.*

[141] *See* Miller v. California, 413 U.S. 15, 24 (1973).

[142] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 92 (1973) (Brennan, J., dissenting); *see also* United States v. Whorley, 550 F.3d 326, 348 (4th Cir. 2008) (Gregory, J., concurring in part and dissenting in part) (discussing uncertainty in obscenity); LEWIS, *supra* note 31, at 247; Shannon Creasy, Note, *Defending Against a Charge of Obscenity in the Internet Age: How Google Searches Can Illuminate* Miller*'s "Contemporary Community Standards,"* 26 GA. ST. U. L. REV. 1029, 1039 & n.75 (2010) (discussing the subjectivity inherent in the idea of obscenity).

[143] Robbins & Mason, *supra* note 15, at 525 n.74 (quoting WOODWARD & ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 228 (1981)).

[144] *Id.* at 528 n.87 (quoting WOODWARD & ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 228 (1981)).

[145] STROSSEN, *supra* note 138, at 258; Main, *supra* note 120, at 1167.

censor their work for fear of becoming the next Karen Fletcher,[146] while those who have refused to stop producing controversial material must live in constant fear of obscenity prosecutions that can sometimes lead to the imposition of overwhelmingly harsh penalties.[147]

III. THE INEFFICACY OF *MILLER*: HOW POSTMODERN REINTERPRETATION CAN RENDER THE TEST USELESS

Considering all of the arguments set forth in the previous section, it becomes clear that Karen Fletcher's lawyers were right, and that written speech is unique enough to merit exception from the doctrine of obscenity.[148] All the same, the fact remains that the Supreme Court has unequivocally decreed that all speech—regardless of its form—must pass the *Miller* test before it can gain the protection of the First Amendment.[149] Further, as illustrated in Part I.D, lower courts have been exceedingly reluctant to disturb this clear-cut ruling.[150] Those courts that recognize the absurdity of the criminalization of the written word and wish to work toward its exoneration are thus faced with a poser: how can they simultaneously apply Supreme Court precedent and take into account all of the aforementioned arguments in favor of declaring text-only speech outside the scope of obscenity?[151] The answer lies in manipulation of the third, "serious value" prong of the *Miller* test for obscenity, whose turbulent and unsettled nature makes it ripe for creative interpretation by pro-speech judges.

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[146] Emma Hart, *Won't Someone Please Not Think of the Children*, PUBLIC ADDRESS (Jul. 22, 2008), http://publicaddress.net/speaker/wont-someone-please-not-think-of-the-children/ (discussing websites that opted to shut down or delete material rather than risk prosecution); *see also* Calvert & Richards, *supra* note 2, at 199 (discussing Fletcher's own decision to stop disseminating shocking works).

[147] One artist convicted of purveying obscenity, for instance, was "sentenced to three years of probation, fined $3,000, required to perform over 1000 hours of community service, required to maintain a full time job, and was prohibited from having *any* contact with children under age eighteen." Newill, *supra* note 39, at 204. The artist's home was also subject to warrantless searches for obscene material, and he "was court-ordered to engage in, and pay for, psychological testing and an ethics class geared toward rehabilitating his thinking processes." *Id.*

[148] *See* Calvert & Richards, *supra* note 2, at 205.

[149] Kaplan v. California, 413 U.S. 115, 119 (1973) (discussing how the Court treats all expressive media the same).

[150] *See, e.g.*, United States v. Whorley, 550 F.3d 326, 335 (4th Cir. 2008); United States v. A Motion Picture Film Entitled "I Am Curious-Yellow," 404 F.2d 196, 201 (2d Cir. 1968); United States v. Gendron, No. S2-4:08CR244RWS (FRB), 2009 WL 5909127 at *5 (E.D. Mo. Sept. 16, 2009).

[151] The debate as to whether such action is within the judicial purview to begin with is outside the scope of this Note. For a particularly well-reasoned argument on this point, see Leslie R. Weatherhead, *Letting Judges Judge: The Myth of "Judicial Activism,"* 59 OR. ST. B. BULL. 9 (1999).

A. The Third Prong as the Third Rail: Why Courts Avoid Discussions of "Serious Value"

The third prong of the *Miller* test—which holds that material with "serious literary, artistic, political, or scientific value" may not be declared obscene[152]—is fundamentally different from its two fellows; while the other prongs, "[p]rurient interest and patent offensiveness[ ] define obscenity,[ ] serious value identifies protected speech."[153] In other words, the first two prongs work to condemn a work, but the third offers it the chance to escape under the aegis of the First Amendment. Due to this constitutional import and also to the amorphous nature of its wording, the "serious value" prong has traditionally been the hardest of the three for the government to satisfy during the course of its obscenity prosecutions.[154] Further, it, unlike the other two prongs, must be judged according to national, rather than local standards.[155] On top of this, even after a conviction has been obtained at the trial level, the Supreme Court has declared that the "serious value" prong analysis is uniquely amenable to appellate review because of its constitutional underpinnings.[156]

On the one hand, this all-but-mandated review of the third-prong analysis is a good thing, since it makes it more likely that the "serious value" determination will be made by a truly impartial party applying a unified set of objective standards.[157] As many courts and scholars have noted, obscenity prosecutions often provide fact-finders, particularly juries, with the opportunity to "censor, suppress, and punish what they don't like . . . ."[158] Many convictions, therefore, have been obtained not because a controversial work truly had no serious value and thus failed the *Miller* test, but because the sitting jury did not approve of what it saw.[159] Further, there is always a

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[152] Miller v. California, 413 U.S. 15, 24 (1973).

[153] Main, *supra* note 120, at 1161.

[154] Khoury, *supra* note 127, at 435.

[155] Susan Elkin, Note, *Taking Serious Value Seriously: Obscenity,* Pope v. Illinois*, and an Objective Standard*, 41 U. MIAMI L. REV. 855, 865 (1987).

[156] *Id.* at 870, 872.

[157] *Id.* at 872.

[158] Roth v. United States, 354 U.S. 476, 512 (1957) (Douglas, J., dissenting); *see also* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 563 (1975); Matt Cook, *Law*, *in* PALGRAVE ADVANCES IN THE MODERN HISTORY OF SEXUALITY, *supra* note 22, at 64, 64–65, 68, 71, 82; Newman, *supra* note 135, at 157; Brenner, *supra* note 29, at 306–07 n.150. It is thus no coincidence that queer artists have borne the brunt of obscenity litigation in this country. *See* Tehranian, *supra* note 59, at 21; Pamela Weinstock, Note, *The National Endowment for the Arts Funding Controversy and the* Miller *Test: A Plea for the Reunification of Art and Society*, 72 B.U. L. REV. 803, 816 n.82 (1992) (discussing similar community sentiments related to the government funding of artistic projects).

[159] *See* David Greene, *The Need for Expert Testimony to Prove Lack of Serious Artistic Value in Obscenity Cases*, 10 NEXUS 171, 175 (2005); Grey, *supra* note 124, at 56; *see also* Jacobs, *supra* note 10, at 157 n.11.

serious risk that even if a juror were to find serious value in a shocking work, he would refrain from voicing his opinion in the presence of his peers for fear of being thought a pervert.[160]

Appellate judges are thought to be immune from these prejudicial factors, however, both because they are used to separating their personal beliefs from their legal determinations[161] and because they have the unique ability to disseminate a written opinion explaining the difference between the two.[162] Surprisingly, though, the "serious value" prong has received the *least* attention from appellate courts considering obscenity cases.[163] Indeed, "[m]ost [courts] are content with a simple recitation of the standard itself and a conclusory finding that the work in question has failed it."[164] There are thus, it would seem, wholly separate factors that prevent judges from applying the "serious value" prong properly.[165]

The most common explanation for this judicial reticence is the inherently subjective nature of a "serious value" finding—a finding that, in essence, depends upon the sitting judges' own understandings of artistic worth and aesthetics.[166] Faced with the necessity of making judgments as to a work's inherent value, many seem to feel the same way Justice Douglas did when he wrote: "We are judges, not literary experts or historians or philosophers. We are not competent to render an independent judgment as to the worth of this or any other book, except in our capacity as private citizens."[167] To this

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[160] *See* Creasy, *supra* note 142, at 1056 n.201 (internal citations omitted); Daniel Linz et al., *Discrepancies Between the Legal Code and Community Standards for Sex and Violence: An Empirical Challenge to Traditional Assumptions in Obscenity Law*, 29 LAW & SOC'Y REV. 127, 127, 134 (1995); Stewart, *supra* note 51, at 248.

[161] *See* Jacobellis v. Ohio, 378 U.S. 178, 188 n.3 (1964) (internal citation omitted); Zeitlin v. Arnebergh, 59 Cal. 2d 901, 910, *cert. denied*, 375 U.S. 957 (1963); Village Books, Inc. v. State, 323 A.2d 698, 703 (Md. Spec. Ct. App. 1974).

[162] *See, e.g.*, United States v. A Motion Picture Film Entitled "I Am Curious-Yellow," 404 F.2d 196, 199–200 (2d Cir. 1968) ("[W]hether or not we ourselves consider the ideas of the picture particularly interesting or the production artistically successful, it is quite certain that 'I Am Curious' does present ideas and does strive to present these ideas artistically."); *id.* at 202 (Friendly, J., concurring) ("[W]ith no little distaste, I concur for reversal.").

[163] Elkin, *supra* note 155, at 866 (discussing the neglect of this issue); Main, *supra* note 120, at 1161, 1163.

[164] Main, *supra* note 120, at 1165.

[165] *Id.*

[166] Jacobs, *supra* note 10, at 170. "[O]bscenity is," after all, "not a quality inherent in a book or picture, but wholly and exclusively a contribution of the contemplating mind, and hence cannot be defined in terms of the qualities of a book or picture, but is read into them" via the intensely personal transactional reading process. *Id.* at 159 n.17 (quoting THEODORE SCHROEDER, "OBSCENE" LITERATURE AND CONSTITUTIONAL LAW 13–14 (1972)).

[167] A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass. (*Memoirs*), 383 U.S. 413, 427 (1966) (Douglas, J. concurring). One might observe that findings as to negligence are just as potentially subjective, and that judges seem to have no trouble at all in articulating the reasons for their findings. However, as Justice Warren has pointed out, a negligence holding is seldom related to anything half so important as Americans'

end, judges "inevitably conceal their reasoning" when discussing the "serious value" prong in obscenity opinions "due to fears of lack of objectivity and support[,] the result [being] that these opinions do not adequately explain how the determinations have been reached."[168] In consequence, even after years of federal obscenity jurisprudence, there has arisen no set, uniform standard by which courts may discern whether a work has serious "literary, artistic, political or scientific value,"[169] leaving courts and scholars alike to interpret for themselves what the words of the *Miller* Test can and should mean.[170] Although this ambiguity has plagued generations of judges, it can rightly be seen as a blessing in disguise for those on the bench who—in light of the arguments made in Part II of this Note—might wish to work toward the decriminalization of the written word. Specifically, the third prong's amorphousness presents courts with the opportunity to set forth new and creative interpretations of its constituent words. This done, courts can easily apply the redefined terms in ways that automatically lend First Amendment protection to text-only speech, thereby effectively foreclosing future obscenity prosecutions based upon production of purely written works.

B. Shocking Written Works Can be Considered to Have Inherent "Literary and Artistic Value"

As Professor David Greene has pointed out, "'What is art?' [is] a great question for cocktail parties, doctoral dissertations, and water-cooler conversations . . . [b]ut it's a lousy legal question."[171] Yet this is precisely the question that fact-finders must answer when considering obscenity cases, since *Miller* explicitly states that works with serious literary and/or artistic value may not be declared obscene.[172] Many have argued that judges should ultimately be the ones to determine whether or not a work has such value, since, as mentioned before, they are usually more capable than jurors of separating their personal beliefs from objective inquiry.[173] Again, though, judges themselves are often uncomfortable with the idea of making aesthetic judgments,[174] and may in any event be totally uninformed about the "national standards" that must be applied when deciding whether a given work has "literary" or "artistic value."[175] In light of this reality, others have advanced the theory that a work should be considered to

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constitutional freedoms. *See* Jacobellis v. Ohio, 378 U.S. 184, 199, 202 (1964) (Warren, C.J., dissenting).

[168] Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 855 (2005).

[169] Main, *supra* note 120, at 1161 (internal citations omitted).

[170] *See generally* Elkin, *supra* note 155 (discussing the lack of an objective standard).

[171] Greene, *supra* note 159, at 171.

[172] Miller v. California, 413 U.S. 15, 24 (1973).

[173] *See supra* notes 161–62 and accompanying text.

[174] *See supra* notes 166–68 and accompanying text; *see also* Newman, *supra* note 135, at 150–51.

[175] Farley, *supra* note 168, at 814.

have value if a credible expert witness says that it does.[176] A majority of the Supreme Court, however, has stated that such experts' opinions may only be used as persuasive evidence with regard to value determinations,[177] possibly because experts are very often predisposed to find "value" where non-experts likely would not.[178] Still others turn, then, to an almost mathematical consideration of the number of "recognized literary devices" present within a work and argue that the resulting calculus should be used to determine whether true value is present.[179] Predictably, such determinations are necessarily illogical and totally unpredictable.[180] As a result, the means by which literary and artistic value is discerned throughout the United States remain disparate, obscure, and arbitrary.[181] This being so, those judges wishing to work toward decriminalization of the written word might easily pounce upon a reinterpretation of the meanings of "literary" and "artistic value" as a means for auto-exempting text-only speech from the doctrine of obscenity.

Perhaps the simplest means of going about this reinterpretation would be to shift the focus of the "literary and artistic value" inquiry away from questions of whether some external party can discern value in a given work, and instead to ask simply whether the work and its author "present ideas and . . . strive to present these ideas artistically" (or, as the case may be, literarily).[182] This is, after all, the formula by which pre-*Miller* courts—including the Supreme Court itself—most often discerned whether contested works contained "redeeming social value,"[183] and the method has never been explicitly denounced.[184] To the contrary, "[i]n those rare instances when serious value

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[176] *See, e.g.*, Southeastern Promotions, Ltd. v. City of Atlanta, 334 F. Supp. 634 (Ga. 1971) (noting that the defendant assumed such a position on experts); People v. Bercowitz, 308 N.Y.S.2d 1, 15 (N.Y. Crim. Ct. 1970); Greene, *supra* note 159, at 172; Main, *supra* note 120, at 1161.

[177] Hamling v. United States, 418 U.S. 87, 100 (1974).

[178] *See* LEWIS, *supra* note 31, at 121.

> These matters must be judged by normal people and not by the abnormal. Conditions would be deplorable if abnormal people were permitted to regulate such matters . . . . Substitute the word "literati" for "abnormal people" and we have an exact explanation of the letters, reviews, and other favorable comments presented in behalf of this book and its author.

Id. (quoting People v. Pesky, 230 A.D. 200, 204 (N.Y. App. Div. 1930)); *see also* Village Books, Inc. v. State, 323 A.2d 698, 703 (Md. 1974); Amy M. Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359, 1372 (1990).

[179] *See* Motion to Dismiss, *supra* note 1, at 70.

[180] *See generally* Greene, *supra* note 159 (discussing how individual opinions will influence value determinations).

[181] *See* Adler, *supra* note 178, at 1360–62.

[182] *See* United States v. A Motion Picture Film Entitled "I Am Curious-Yellow," 404 F.2d 196, 200 (2d Cir. 1968).

[183] *Id.* at 200 (J. Friendly, concurring); Attorney Gen. v. A Book Named "Tropic of Cancer," 184 N.E.2d 328, 329 (Mass. 1962); Main, *supra* note 120, at 1160 & n.9.

[184] Jacobs, *supra* note 10, at 161.

is discussed at all by courts and critics, this is the favored interpretation of the term."[185] Further, it is directly in line with the egalitarian precepts of the First Amendment. As Edward Main has pointed out, "The protection of speech should not be limited only to the articulate and the eloquent. The individual with 'something to say' ought to be allowed to say it as best he can, so long as his intent is sincere."[186]

Thus, judges interested in furthering decriminalization of the written word can easily force the terms "literary value" and "artistic value" to serve their purposes. Indeed, a judge need only cite the long string of cases that have enshrined an artist-centric standard[187] and subsequently state very simply that a contested work possesses literary and artistic value if it (1) presents ideas and (2) strives to do so artistically.[188] With this artist-centric standard in place, *every* written work could be said to have literary and artistic value. Certainly, every written work is, by its very nature, calculated to communicate ideas and provoke some corresponding reaction from its reader.[189] Further, every idea set down within a written work is, of necessity, presented artistically, because the act of writing requires an author to choose his words deliberately in order to convey his desired message.[190] This alone is enough to demonstrate creativity, and should accordingly be enough of a basis for a sympathetic court to conclude that the writer was "striving to present his ideas artistically."[191]

Of course, there are those who will shrill that "literary and artistic value" must refer to something more than the simple setting down of words and an intent to provoke a reader.[192] "Can there," as one judge has put it, "be value in a society where everything has value?"[193] The simple answer to this question is: "Of course." To understand why this is so, however, one must think seriously about the concept of "value" itself. At one time, many agreed that aesthetic "value" was a fixed constant—an objective quality that was either inherent in a particular work or was not.[194] Such thinking reached its apex

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[185] Adler, *supra* note 178, at 1368.

[186] Main, *supra* note 120, at 1164.

[187] *See supra* notes 183–84 and accompanying text.

[188] *See* United States v. A Motion Picture Film Entitled "I Am Curious-Yellow," 404 F.2d 196, 200 (2d Cir. 1968).

[189] This is true even if the desired reaction is simple physical arousal. *See* Zeitlin v. Arnebergh, 59 Cal. 2d 901, 918 n.25 (1963) (internal citations omitted); *see also* STROSSEN, *supra* note 138, at 50.

[190] SMITH, *supra* note 96, at 185–87; *see also* JOHN MAYNARD, LITERARY INTERPRETATION, LITERARY INTENTION, AND READERS 43 (2009). This is as differentiated from, say, a hastily taken snapshot or accidentally captured video.

[191] *See "I Am Curious-Yellow,"* 404 F.2d at 200; Motion to Dismiss, *supra* note 1, at 78–79.

[192] *See, e.g.*, Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 NW. U. L. REV. 1379, 1390–91 (2008) (examining relative values given to different kinds of speech).

[193] People v. Mature Enters, Inc., 343 N.Y.S.2d 911, 930 (Crim. Ct. 1973).

[194] *See* Greg R. Miller & Michael Real, *Postmodernity and Popular Culture: Understanding our National Pastime*, *in* THE POSTMODERN PRESENCE: READINGS ON POSTMODERNISM IN AMERICAN CULTURE AND SOCIETY 26 (Arthur Asa Berger ed., 1998) (discussing modernist idealism).

in the nineteenth century, during what is now called the "modernist era."[195] Over time, however, a new wave of thinkers called "postmodernists" began to reconceptualize the old idea of "value" as nothing more than a "grand narrative," that is, a fiction—similar to, say, "motherhood"—created by those in power in order to perpetuate their own ideas and opinions.[196] Postmodern thinkers made it their mission to challenge this and other old narratives and to expose their intrinsically arbitrary, constructed, and non-permanent nature.[197] As a result of their efforts, "motherhood" has, in the present post-modern era, come to mean more than a June Cleaver–esque life devoted to kinder, küche, and kirche, while aesthetic "value" has come to mean more than simply what those in authority or in the majority consider worthy of appreciation.[198] The result is that today, in the postmodern world, the question of whether or not a given work possesses "value" is wholly contingent upon the subjective interpretation of the individual who is judging it.[199] As the art critic and philosopher Arthur C. Danto has put it: "You can't say something's art or not art anymore. That's all finished."[200]

Since the idea of a monolithic concept of aesthetic "value" is no longer alive in contemporary society, then, judges are entirely justified in abandoning the fruitless search for the objective "literary or artistic value" of contested works in obscenity cases. This necessitates, however, a choice as to whose *subjective* concept of "value" should be used when applying the *Miller* test. Again, because of its long history within the obscenity context and also because of the thought-crime concerns that would arise if an outsider's perspective were allowed to rule,[201] the artist-centric approach discussed in this Note is by far the best choice.

Still, other parties might be uncomfortable with a liberal, postmodern reading of the terms "literary and artistic value" for fear that such an interpretation would open the doors for authors to produce whatever they like—no matter how disturbing or dangerous—and then hide behind the shield of the First Amendment.[202] This is simply not the case. On the one hand, it is true that an artist-centric standard would lend protection to a great many written works that most Americans would prefer to

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[195] *Id.*

[196] *Id.*

[197] *Id.*; ROLAND BARTHES, S/Z: AN ESSAY 40 (Richard Miller trans., Hill & Wang 1974) (1970); FREDERIC JAMESON, POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM xiv (11th ed. 2005) (describing basic tenets of postmodernism).

[198] *See, e.g.*, Farley, *supra* note 168, at 806; Adler, *supra* note 178, at 1377; Newman, *supra* note 135, at 141; Weinstock, *supra* note 158, at 820.

[199] *See* Tehranian, *supra* note 59, at 20 (discussing cultural differences in assessment of value); Adler, *supra* note 178, at 1377; Creasy, *supra* note 142, at n.22 (internal citations omitted); Weinstock, *supra* note 158, at 820; *see also* Karen M. Markin, *It's Not the Thought that Counts: A Political Economy of Obscenity*, 58 S.C. L. REV. 883, 891 (2007); Newman, *supra* note 135, at 141.

[200] Farley, *supra* note 168, at 806.

[201] *See supra* Part II.B.

[202] *See* Adler, *supra* note 178, at 1376.

keep from seeing the light of day,[203] yet this is the very reason why the Framers set the First Amendment in place: to protect the unorthodox few against the tyranny of the many.[204] As Justice Robert Jackson pointed out, "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 . . . ."[205] To ensure the preservation of this deep-seated principle, "[p]ublications and utterances were made immune from majoritarian control by the First Amendment, applicable to the States by reason of the Fourteenth," and "[n]o exceptions were made, not even for obscenity."[206] On the other hand, however, the *Roth* court was correct in pointing out that there are certain circumstances in which the government *may* constitutionally restrict the free exchange of ideas—namely those in which the ideas communicated have a good chance of causing serious harm.[207] If a shocking work were found to violate any of these legitimate strictures,[208] its non-obscene nature would not serve to protect its author from redress.[209]

Finally, some might argue that an artist-centric standard is unworkable because of the underlying precepts of postmodernism itself. Professor Amy M. Adler, for instance, states that because the iconoclastic movement "ridicules the notion of sincerity and rejects the possibility that a [consumer] can ever discover an artist's true intentions," a value standard akin to the one suggested in this Note is de facto unworkable.[210] Professor Adler's contention does not take into account, however, the auto-artistic nature of writing, discussed earlier in this section;[211] due to the degree of thought and calculation that must be employed in the creation of a written work, it is hard to imagine

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[203] *Id.*

[204] Calvert & Richards, *supra* note 2, at 192. "[Y]ou don't," as Fletcher's lawyers have pointed out, "need the First Amendment if you're going to show *The Sound of Music*." *Id.* at 217.

[205] W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[206] A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass. (*Memoirs*), 383 U.S. 413, 428 (1966) (Douglas, J., concurring).

[207] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

[208] These include, *inter alia*, restrictions associated with the corruption of minors, exposure of minors to harmful materials, public display of nudity or sex for advertising purposes, child pornography, criminal depiction, and cruelty to animals, as well as restrictions on retailers of sex-related materials and zoning laws governing the placement of sex-related businesses. *See generally* Federal and State Obscenity Statutes, THE NATIONAL OBSCENITY LAW CENTER, http://www.moralityinmedia.org/nolc/statutesIndex.htm (last visited Oct. 10, 2011); *see also* Jacobellis v. Ohio, 378 U.S. 184, 195 (1964) (describing the governmental duty to protect children from exploitation by pornographers); Baker v. Glover, 776 F. Supp. 1511, 1515 (N.D. Ala. 1991); State v. Henry, 732 P.2d 9, 17 (Or. 1987).

[209] *Compare, e.g.*, N.Y. PENAL LAW § 235.00 (Consol. 2011) (defining "obscenity" along the lines of the *Miller* test) *with* N.Y. PENAL LAW § 235.21 (Consol. 2011) (punishing the mere distribution of materials containing nudity to minors).

[210] Adler, *supra* note 178, at 1376.

[211] *See supra* notes 189–90 and accompanying text.

a situation in which a writer could fail to be creative in setting down a potentially obscene narrative. As such, a court could rightly find that any producer of an accused written work had the intention to convey an idea and to do so artistically.

In the end, then, those judges who agree that purely written speech deserves to be exempted from the doctrine of obscenity can easily vault text-only works past the "literary or artistic value" element of the third *Miller* prong by adopting an artist-centric standard for "value" itself. In addition to furthering the fight against undue government restrictions on speech, such an adoption would have the added benefit of mooting many of the time-consuming "value"-related debates that have made obscenity litigation overly lengthy and complex and resulted in decades' worth of unpredictable, inconsistent, and arbitrary judgments.[212]

C. Shocking Written Works Can be Considered to Have Inherent "Political Value"

In addition to adopting an artist-centric standard in the search for literary and artistic value, courts interested in decriminalizing the written word could further their cause by taking a more liberal stance with regard to the "political value" element of the third *Miller* prong. To date, the only appellate court to have explicitly defined "political value" is the Second Circuit, which defined the term as "that which might tend to bring about 'political and social changes.'"[213] At first blush, this definition seems to invite yet another convoluted fact-finding foray, replete with experts testifying as to whether a given work contains enough political content such that it actually has a chance of influencing the social landscape. Upon reflection, though, it becomes clear that such inquiries are unnecessary.

One must begin with the premise that every potentially obscene text is necessarily a work whose contents rebel against the prevailing social conception of what is tolerable and what is not.[214] As every such work nonetheless implicitly calls out for society to tolerate and, possibly, even embrace it,[215] each "might tend to bring about 'political and social changes'" if consumed.[216] The very existence of obscenity laws ratifies this

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[212] *See* Farley, *supra* note 168, at 813–14.

[213] United States v. Loy, 237 F.3d 251, 263 (2d Cir. 2001) (quoting United States v. Various Articles of Merch., 230 F.3d 649, 658 (3d Cir. 2000)).

[214] *See* Miller v. California, 413 U.S. 15, 24 (1973) (defining obscenity in part as that which "'the average person, applying contemporary community standards' would find . . . appeal[ing] to the *prurient interest*") (emphasis added); Baker v. Glover, 776 F. Supp. 1511, 1515 (M.D. Ala. 1991).

[215] *See* Newill, *supra* note 39, at 225; *see also* Laura Kipnis, *(Male) Desire and (Female) Disgust: Reading* Hustler, *in* CULTURAL STUDIES 373, 388–89 (Lawrence Grossberg et al. eds., 1992).

[216] See *Various Articles of Merch.*, 230 F.3d at 658; STROSSEN, *supra* note 138, at 31, 176; H.G. Cocks & Matt Houlbrook, *Introduction*, *in* PALGRAVE ADVANCES IN THE MODERN HISTORY OF SEXUALITY, *supra* note 22, at 1, 3–5, 7, 9, 15 (discussing social and political movements premised upon material perhaps considered obscene); Leonard, *supra* note 22,

proposition, for if legislators were not afraid of potentially obscene works' capacity to change society, there would be no reason to suppress them.[217] As such, it can confidently be said that every shocking written work has intrinsic political value, and so passes the "political value" element of the third *Miller* prong.

Notably, the Supreme Court has explicitly rejected this seemingly self-evident conclusion. Writing for the majority in *Miller*, Chief Justice Burger made it clear that the Court did "not see . . . 'repression' of political liberty lurking in every state regulation of commercial exploitation of human interest in sex."[218] As justification for this position, Chief Justice Burger pointed out that obscenity laws have not stopped cultural progress in the United States, nor "in any way limited or affected expression of serious literary, artistic, political, or scientific ideas."[219] Yet this statement is manifestly untrue. As mentioned previously, for instance, a great many artists have had to censor themselves—holding back new and transgressive works for fear of being prosecuted as criminals.[220] Further, many have pointed out that obscenity laws have consciously been used in recent years as means for the suppression of Queer expression and discourse in this country.[221] Chief Justice Burger's reasoning is thus seriously flawed; "'repression' of political liberty" *is* inherent in every obscenity prosecution, as each seeks to stamp out the kinds of unorthodox expression that, if allowed to circulate, have the potential to change the fabric of American society.[222]

Applied as suggested by a sympathetic judge, then, the "political value" element of the "serious value" prong would provide yet another avenue by which written works could escape criminalization under the *Miller* test. It is true that this method is somewhat less automatic than exemption by means of a finding of literary or artistic value, since a written work is not inherently political, but rather becomes so if it contains material that challenges the status quo.[223] Still, adding this additional argument to the battery supporting the exculpation of purely written works from the doctrine of obscenity certainly cannot hurt the cause.

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at 194–97 (discussing historical trends in defining types of obscenity); Tehranian, *supra* note 59, at 10, 13, 16; Newman, *supra* note 135, at 156 (discussing how art is essential to the search for truth).

[217] *See* Tehranian, *supra* note 59, at 16 (arguing that suppression of obscenity is meant to enforce a political status quo).

[218] *Miller*, 413 U.S. at 35–36.

[219] *Id.* at 35.

[220] *See supra* note 147 and accompanying text.

[221] *See supra* note 158 and accompanying text.

[222] *See* Tehranian, *supra* note 59, at 16. Whether this change is for good or ill is, as Chief Justice Burger rightly concedes, entirely beside the point, as Americans have a right to choose for themselves which ideas they will embrace and which they will reject. *See Miller*, 413 U.S. 34–35.

[223] *See* United States v. Various Articles of Merch., 230 F.3d 649, 658 (3d Cir. 2000) (describing the political value element).

D. Shocking Written Works Can be Considered Inherently "Serious"

Stating that shocking written works have inherent literary, artistic, and political value is all well and good, but this alone is not enough to merit such works the protection of the First Amendment; under the *Miller* test, the value found within the works must additionally be judged "serious."[224] To date, two appellate courts have isolated and defined the term "serious" for use in the obscenity context,[225] and both courts' conclusions can be made to serve the purposes of those judges seeking to decriminalize the written word.

The first definition was set forth by the Supreme Court of Wisconsin, which described the term "serious" as meaning simply "important and not trifling."[226] This definition, if adopted by other courts, could easily be applied in such a way as to automatically encompass shocking written works. As even the *Roth* court was forced to admit, "[s]ex [is] a great and mysterious motive force in human life, [and] has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern."[227] For this reason, "[t]he sexual life is," by its very nature, "not something trivial or superficial, but rather the root of human biography."[228] Therefore, because potentially obscene written works are, by definition, inextricably related to the non-trivial topic of human sexuality,[229] the value of such works may always be classified as "serious" according to the Wisconsin court's definition. As such, adoption of the Wisconsin definition constitutes a simple, tidy way for judges to auto-exempt shocking written works from the doctrine of obscenity. Under this definition, all value found within a shocking written work would be "serious." Because, as previously argued, all shocking written works contain value either of a political or an artistic and literary nature,[230] all shocking written works could thus be said to have "serious value" and so would not fall within the category of works criminalized under *Miller*.[231]

A similar result would issue from adoption of the second discrete interpretation of the term "serious," which was set down by Louisiana's Supreme Court in *State v.*

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[224] *Miller*, 413 U.S. at 24.

[225] State v. Walden Book Co., 386 So. 2d 342, 345 (La. 1980); State *ex rel.* Chobot v. Circuit Court, 212 N.W.2d 690, 693 (Wis. 1973).

[226] *Chobot*, 212 N.W.2d at 693.

[227] Roth v. United States, 354 U.S. 476, 487 (1957).

[228] Chris Waters, *Sexology, in* PALGRAVE ADVANCES IN THE MODERN HISTORY OF SEXUALITY, *supra* note 22, at 41, 42; *see also* Leonard, *supra* note 22, at 190 ("After Foucault's work, obscenity and pornography could no longer be dismissed as 'trivial'—that is, private, unimportant, not bound up with power."); Newman, *supra* note 135, at 144.

[229] Recall that *Miller* defined an obscene work as one that "depicts or describes, in a patently offensive way, *sexual conduct* specifically defined by the applicable state law . . . ." *Miller*, 413 U.S. at 24 (emphasis added).

[230] *See supra* Parts III.B–C.

[231] *See Miller*, 413 U.S. at 24.

Walden Book Co.[232] In that case, the court came to the very different and much more interesting conclusion that the moniker "serious" referred not to the *content* of the work in question, but rather to the *conduct* of its producer.[233] To wit, the court found that the content of a contested work need not itself be "serious."[234] Rather, the court held that "the 'serious' element allows the trier of fact to look to the intent" of the author of the contested work; "[i]f that intent is to convey a literary, artistic, political, or scientific idea, or to advocate a position, then the intent is 'serious.'"[235]

Adoption of the Louisiana definition would therefore auto-exempt shocking written works just as effectively as the Wisconsin definition. To begin with, as was demonstrated in Part III.C of this Note, authors of shocking works nearly always intend to convey a political message, as their writing deals with topics that the majority of Americans consider to be taboo.[236] Since the requisite intent is present, the value inherent in these authors' works must be considered "serious" under the Louisiana definition. Even if an author were somehow judged not to have had the requisite political intent, the court would still be compelled to find that the author had the intent to convey literary ideas, insomuch as he crafted a narrative that—regardless of its sophistication or crudity—deliberately seeks to provoke some kind of a response in the reader.[237] All shocking written works could thus be considered to have "serious value" under the Louisiana definition, and so would be auto-exempted from obscenity prosecution.[238]

IV. KILLING OBSCENITY SOFTLY: WHY JUDICIAL DECRIMINALIZATION OF THE WRITTEN WORD CAN SUCCEED WHERE OTHER TACTICS HAVE FAILED

In light of the foregoing, it becomes clear not only that Karen Fletcher's attorneys were correct in stating that written obscenity deserves to be excepted from the doctrine of obscenity, but also that the federal test for obscenity is itself so amorphous and malleable that it can be circumvented altogether by a creative and sympathetic judge.[239] At

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[232] 386 So.2d 342 (La. 1980).

[233] *See id.* at 345.

[234] *Id.*

[235] *Id.*

[236] *See supra* Part III.C.

[237] *See supra* notes 189–90 and accompanying text.

[238] The Louisiana court's treatment of *Miller*'s third-prong "seriousness" element is thus perfectly in line with the postmodern conception of value discussed in Part III.B of this Note. Rather than accepting the old idea that a work has a set amount and degree of worth, the Louisiana definition ascribes legitimacy based solely upon the intentions of the person whose acts the government seeks to punish—that is, the work's creator. *See Walden Book Co.*, 386 So.2d at 345.

[239] Although it is not the focus of this Note, it should be pointed out that most of the analyses set forth in Parts III.B–C could easily be applied to *every* consciously constructed work, written, pictorial, audible, or otherwise. In most cases, though, the analyses would be somewhat more complicated. With regard to the "artistic value" analysis, for example, creativity (and thus an intent to convey ideas in an artistic way) could not be automatically assumed, since it is quite easy to imagine a situation in which a person unintentionally or inartistically created a film, photograph, or audio recording. Thus, creativity would first have to be affirmatively established,

the same time, though, its liability has allowed fact-finders to use the test as a weapon against works that they simply do not like, even when those works legitimately have serious literary, artistic, or political value.[240] For these reasons, a number of scholars and advocates have argued that the *Miller* test should be abandoned in favor of a new, more lenient standard—perhaps one akin to the "clear and present danger" standard that applies in several other First Amendment contexts.[241] If implemented, such a test would require the government to show that a work presents a "clear and present danger" to "a substantial life or liberty interest" of an individual before that work could be branded obscene.[242] The system would thus protect all substantially harmless works. While it is undeniable that such a system would be better than the one now in effect, the reality is that a change of this magnitude is unlikely to be implemented in the near future; not even in more progressive obscenity-related opinions has the Supreme Court evinced an inclination to abandon the *Miller* test.[243] As such, while it is all well and good to call for *Miller* to be overturned, such activity is highly unlikely to yield timely results.[244]

Calls for the creative interpretation and application of *Miller*, on the other hand, have a far greater chance of being heeded in the short term. As was previously illustrated, some courts have already begun twisting the language of the federal test to serve their own ends,[245] while others have hinted at a willingness to do so if presented with the right arguments,[246] particularly with regard to cases involving text-only speech.[247] This more subtle approach thus has great potential, since it would allow courts to ostensibly comply with the strictures of the federal obscenity doctrine while actually chipping away at the doctrine little by little, building precedential steam all the while.

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perhaps by means of testimony establishing deliberate framing, lighting, staging, editing, or subject choice. *See, e.g.*, Landau v. Fording, 54 Cal. Rptr. 177, 180, 182 (Dist. Ct. App. 1966), *aff'd per curiam*, 388 U.S. 456 (1967). Of course, as Professor Christine Haight Farley notes, it can become somewhat "awkward to focus on the gradation of shadows and the play of values when the subject is one man urinating into another man's mouth." Farley, *supra* note 168, at 848. Yet such an inquiry is precisely in line with the precepts of the First Amendment; the fact that a work is repellent to a given viewer is no reason to keep others from accessing the material if they wish to do so and no harm is consequently perpetrated against any third party. *See* Newill, *supra* note 39, at 224; *supra* Part III.C.

[240] *See supra* note 158 and accompanying text.

[241] *See* Motion to Dismiss, *supra* note 1, at 37 (citations omitted); LEWIS, *supra* note 31, at 173 (internal citations omitted); Jacobs, *supra* note 10, at 181; Newill, *supra* note 39, at 224; *see also* Anclien, *supra* note 92, at 47.

[242] Newill, *supra* note 39, at 224; *see* LEWIS, *supra* note 31, at 173; Jacobs, *supra* note 10, at 181; *see also* Anclien, *supra* note 92, at 47.

[243] *See, e.g.*, Ashcroft v. ACLU, 542 U.S. 656 (2004); *see also id.* at 679 (Breyer, J., dissenting) (reaffirming the applicability of the *Miller* test).

[244] Recall Part I.D's discussion of lower courts' reticence to explicitly contradict the opinions of the Supreme Court.

[245] *See, e.g.*, State v. Walden Book Co., 386 So.2d 342, 345 (La. 1980).

[246] *See* United States v. Whorley, 550 F.3d 326, 335 (4th Cir. 2008) (showing a court's interest in an argument lacking authority).

[247] *See* United States v. McCoy, 678 F. Supp. 2d 1336, 1341 (M.D. Ga. 2009).

To this end, courts might begin by taking more easily defensible steps at the outset—interpreting and applying *Miller*, for instance, in such a way as to exempt the written word, based on that medium's demonstrated importance and harmlessness. These same courts could then use such decisions as the basis for the exemption of other media forms at a later date.[248] Eventually, so many exceptions could be codified as to render the *Miller* test entirely hollow and toothless.

Certainly, an impotent *Miller* test might at first appear frightening to some, calling up specters of library shelves filled with erotica and streets presided over by pornographic billboards.[249] Such fears are unfounded, however, due to the plethora of non-obscenity related legislation aimed at protecting unwilling or improper parties from exposure to sexually explicit materials.[250] Diligent enforcement of these laws would easily accomplish what the doctrine of obscenity has been trying to do since its inception—that is, keep sexually explicit speech from those who should not or do not wish to receive it, while maintaining access for consenting adults.[251]

There may also be those who argue that such a system does not take into account the adverse psychological effect that shocking works have upon their adult consumers.[252] This charge is entirely true, but also entirely irrelevant, as there is presently no proof that any "change of character or actual misbehavior follows from contact with obscenity."[253] To the contrary, studies have shown that regions in which

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[248] *See supra* note 239.

[249] *See, e.g.*, Dennis W. Chiu, Comment, *Obscenity on the Internet: Local Community Standards for Obscenity are Unworkable on the Information Superhighway*, 36 SANTA CLARA L. REV. 185, 213 (1995) (arguing that a weak *Miller* obscenity standard "could open the floodgates to all kinds of sexually explicitly materials").

[250] *See supra* note 208.

[251] *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 106–107, 113 (1973) (Brennan, J., dissenting); J. Todd Metcalf, Note, *Obscenity Prosecutions in Cyberspace: The* Miller *Test Cannot "Go Where No [Porn] Has Gone Before,"* 74 WASH. U. L. Q. 481, 508 (1996). Interestingly, at least one scholar has taken this argument one step further and suggested that there should be no limits at all on the public display of shocking material, both because such "materials are not typically publically displayed where individuals cannot avoid contact with them" and because "society is free to put [non-legal] pressure upon individuals who make or promote fringe material." Newill, *supra* note 39, at 220. This approach is unwise, however, in light of the potential harm to underage viewers, *see* Jonathan Miller, *Censorship and the Limits of Permission*, *in* THE INFLUENCE OF PORNOGRAPHY ON BEHAVIOUR, *supra* note 124, at 27, 40, and because of the widespread belief that Americans should not be forced to consume shocking speech any more than they should be kept from consuming it; *see* Stanley v. Georgia, 394 U.S. 557, 567 (1969).

[252] Because minors should, theoretically, not have access to any kind of sexually explicit material, obscene or otherwise, this Note does not consider how best to shield them. For a discussion on this point, see generally Ashcroft v. ACLU, 542 U.S. 656 (2004) (evaluating a federal statute aimed at protecting minors from exposure to sexually explicit Internet materials); Burke, *supra* note 39, at 142; Khoury, *supra* note 127.

[253] Roth v. United States, 354 U.S. 476, 500 (1957); *see also* Robbins & Mason, *supra* note 15, at 519; Newman, *supra* note 135, at 155–56.

shocking works are either decriminalized or easily accessible actually have *lower* rates of sexual violence than areas where sexually explicit material is more tightly controlled.[254] These studies reinforce the common-sense principle that something as trivial as a book or film is unlikely to lead to the commission of an act as serious as a sex crime.[255] Rather, scientists agree that sex crimes are most often the results either of mental illness,[256] or prolonged anguish and agitation at the hands of other human beings.[257] Indeed, despite years of trying, the Supreme Court itself has taken notice of the fact that critics of shocking material have "shown no more than a remote connection between speech that might encourage thoughts or impulses" and resultant antisocial conduct.[258]

Thus, there is no apparent downside to an abandonment of the doctrine of obscenity in favor of laws narrowly aimed at the protection of third parties. Expression is made available to those who wish to access it, potentially unsettling material is shielded from the view of unwilling consumers, and the government has the opportunity to put its resources to work in areas where enforcement of the laws *can* actually lead to a reduction in antisocial conduct.[259] Truly, the only thing standing in the way of the outright abolition of the obscenity doctrine seems to be the longstanding reticence of state judges and legislators to strike the final blow for fear of the popular backlash.[260]

CONCLUSION. "THE JOURNEY OF A THOUSAND MILES BEGINS WITH A SINGLE STEP": TOWARD THE DEATH OF OBSCENITY

In light of this reality, it is imperative that lower court judges continue to do all that they can to assist in creating a judicial atmosphere that is contemptuous of the absurdities of the federal obscenity doctrine. Those cases involving purely written speech allow judges a perfect opportunity to express such contempt, due to the various

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[254] STROSSEN, *supra* note 138, at 254–56; *see also* EDWARD DONNERSTEIN ET AL., THE QUESTION OF PORNOGRAPHY: RESEARCH FINDINGS AND POLICY IMPLICATIONS 11, 98–99 (1987); Edward C. Nelson, *Pornography and Sexual Aggression*, *in* THE INFLUENCE OF PORNOGRAPHY ON BEHAVIOUR, *supra* note 124, at 171, 222–23.

[255] Roth v. United States, 354 U.S. 476, 510–11 (1957) (Harlan, J., dissenting) (citations omitted); STROSSEN, *supra* note 138, at 257–58; LEWIS, *supra* note 31, at 172.

[256] *See* Nelson, *supra* note 254, at 229, 232; *see also* Hera Cook, *Demography*, *in* PALGRAVE ADVANCES IN THE MODERN HISTORY OF SEXUALITY, *supra* note 22, at 19, 31, 36.

[257] *See* DONNERSTEIN ET AL., *supra* note 254, at 71; *see also* Martin Roth, *Pornography and Society: A Psychiatric View*, *in* THE INFLUENCE OF PORNOGRAPHY ON BEHAVIOUR, *supra* note 124, at 1, 18–19.

[258] Calvert & Richards, *supra* note 2, at 187 (quoting Ashcroft v. Free Speech Coalition, 535 U.S. 234, 253–54 (2002)); *see also* ALBERT J. REISS, JR. & JEFFREY A. ROTH, UNDERSTANDING AND PREVENTING VIOLENCE 111 (1993), *quoted in* STROSSEN, *supra* note 138, at 251 ("[D]emonstrated empirical links between pornography and sex crimes in general are weak or absent.").

[259] *See* Newill, *supra* note 39, at 226–27.

[260] *See generally* Linz et al., *supra* note 160 (discussing public perceptions related to this issue). Ironically, researchers have shown that such fears are likely overstated. *Id.*

factors that make criminalization of the written word so uniquely repugnant in light of Americans' deep-seated respect for the freedom of expression. With the obscenity doctrine's patriarchal overtones, similarity to mind control, and potential to chill valuable speech, calls for the abandonment of the concept of obscenity in the context of purely written material appear far more reasonable than more general condemnations of the whole of the doctrine. Once gained, early victories in the text-only sphere can serve as excellent jumping-off points for later discussions about the exemption of other media forms and, more broadly, abandonment of the obscenity doctrine altogether. Thus, while it should pain any proponent of the First Amendment every time an author like Karen Fletcher is dragged before a court to answer for her work, such prosecutions also offer a glimmer of hope, for in the wake of each there arises a new opportunity for clear-minded judges to take up the arguments that may one day lead to the ultimate euthanization of the federal doctrine of obscenity.