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Serious Value, Prurient Appeal, and "Obscene" Books in the Hands of Children

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**SERIOUS VALUE, PRURIENT APPEAL, AND “OBSCENE”
BOOKS IN THE HANDS OF CHILDREN**

Todd E. Pettys*

ABSTRACT

Controversy has erupted across the country concerning sexually explicit books that are available to children in bookstores, schools, and libraries. Many have called for tough enforcement of obscenity laws, with some saying librarians and schoolteachers who distribute certain books to children should face jail time. Using four controversial books as examples, this Article takes today’s book wars as an opportunity to achieve two things. First, the Article explains the narrow circumstances in which the First Amendment permits the government to block the distribution of books to children due to concerns about the books’ prurient appeal. The Article’s second aim is broader and concerns an issue that has stymied courts in obscenity cases involving children and adults alike for nearly fifty years. In 1973, the Supreme Court held that the First Amendment places sexually explicit expressive works beyond the reach of obscenity restrictions if a reasonable person would say those works possess “serious literary, artistic, political, or scientific value.” When it comes to literary and artistic value, many have assumed the inquiry depends chiefly upon appraisals of aesthetic merit. But the lack of non-controversial criteria for making those appraisals can make that approach deeply problematic. This Article contends that, under the best reading of the First Amendment and the Court’s precedents, classifying a work’s value as literary, artistic, political, or scientific in nature is constitutionally irrelevant and assessments of aesthetic merit are unnecessary. Instead, the serious-value inquiry simply asks whether the author used the work to speak about one or more matters of public concern and whether the author spoke about those matters merely to create a pretext for publishing patently offensive, pruriently appealing content.

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INTRODUCTION

On May 18, 2022, a Virginia judge found probable cause to conclude that two books carried by a local Barnes & Noble bookstore—Maia Kobabe’s 2019 illustrated memoir *Gender Queer*¹ and Sarah J. Maas’s 2016 fantasy novel *A Court of Mist and Fury*²—qualified as obscene when placed in the hands of children.³ That ruling marked just the latest in a torrent of recent controversies concerning sexually

¹ MAIA KOBABE, *GENDER QUEER: A MEMOIR* (2019). In 2021, *Gender Queer* was the book most frequently targeted for restriction or removal in schools and public libraries. See *Top 10 Most Challenged Books List*, ALA OFF. FOR INTELL. FREEDOM [hereinafter *10 Most Challenged Books*], <https://www.ala.org/advocacy/bbooks/frequentlychallengedbooks/top10> [<https://perma.cc/HEQ7-HA75>] (last visited May 8, 2023); see also Alexandra Alter, *How a Debut Graphic Memoir Became the Most Banned Book in the Country*, N.Y. TIMES (May 5, 2022), <https://www.nytimes.com/2022/05/01/books/maia-kobabe-gender-queer-book-ban.html?referringSource=articleShare> [<https://perma.cc/825K-Q6GP>] (discussing *Gender Queer*); Brian Lopez & Cassandra Pollock, *How a YA Oral-Sex Scene Touched Off Texas’ Latest Culture War*, TEX. TRIBUNE (Nov. 12, 2021, 12:00 PM), <https://www.texastribune.org/2021/11/12/gender-queer-texas-books-investigation/> [<https://perma.cc/GVR6-2ZDB>] (reporting that some Texas officials believe the book’s availability in public school libraries might violate Texas criminal laws); Lisa Worf & Gwendolyn Glenn, *Why Is the Book ‘Gender Queer’ Being Removed from Public School Libraries, and Is It ‘Obscene?’*, WFAE (Nov. 18, 2021, 5:10 PM), <https://www.wfae.org/race-equity/2021-11-18/why-is-the-book-gender-queer-being-removed-from-public-school-libraries-and-is-it-obscene> [<https://perma.cc/56N4-PC68>] (reporting that South Carolina Governor Henry McMaster believes the contents of *Gender Queer* “easily meet or exceed the statutory definition of obscenity”). Kobabe has publicly responded to the controversy. See Maia Kobabe, *Opinion, Schools Are Banning My Book. But Queer Kids Need Queer Stories.*, WASH. POST (Oct. 29, 2021, 6:00 AM), <https://www.washingtonpost.com/opinions/2021/10/29/schools-are-banning-my-book-queer-kids-need-queer-stories/> [<https://perma.cc/S9LF-F9ZP>].

² SARAH J. MAAS, *A COURT OF MIST AND FURY* (2016).

³ See Hannah Natanson, *Va. Republicans Seek to Limit Sale of 2 Books in Barnes & Noble for ‘Obscenity’*, WASH. POST (May 20, 2022, 6:58 PM), <https://www.washingtonpost.com/education/2022/05/20/gender-queer-barnes-and-noble/> [<https://perma.cc/AJ4S-PGVA>] (explaining that the two plaintiffs—both Republican politicians—hope to obtain restraining orders barring Barnes & Noble from selling the two books to minors). If the court ultimately holds that the books are indeed obscene, that ruling will be sufficient “to establish scienter” in any criminal prosecution for selling, lending, distributing, or advertising the books. See VA. CODE ANN. § 18.2-384(M) (2022).

explicit books available to minors in the nation's bookstores, schools, and libraries. In October 2021, for example, North Carolina's lieutenant governor called for the removal of *Gender Queer* and two other books he called "pornographic" from that state's school libraries, and angry parents who shared his view called for enforcement of the state's obscenity laws.⁴ A few weeks later, amidst a chorus of complaints from lawmakers and others regarding numerous books in Texas's school libraries,⁵ the governor of that state urged school boards to investigate, saying that some of the books contain "clearly pornographic images and substance that have no place in the Texas public education system."⁶ Just days after that, South Carolina's governor demanded an investigation of obscene material in that state's schools, after parents complained about the fact that *Gender Queer* was on library shelves in local high schools.⁷ In February 2022, the president of the Iowa Senate introduced a bill that, if enacted, would have exposed schoolteachers and librarians to criminal liability if they knowingly made obscene material available to children or required their pupils to encounter obscene material as part of instructional programs.⁸ Conservative lawmakers in at least half a dozen other states have considered similar proposals.⁹

⁴ See Anisa Khalifa, *How a National Debate over Book Censorship Is Playing Out in North Carolina*, WUNC 91.5 PUB. RADIO (Feb. 1, 2022, 5:20 PM), <https://www.wunc.org/2022-02-01/how-a-national-debate-over-book-censorship-is-playing-out-in-north-carolina> [<https://perma.cc/6B45-S56U>] (reporting on concerns that Lieutenant Governor Mark Robinson voiced in October 2021).

⁵ See Rachel Treisman, *Gov. Greg Abbott Decries School Library Books with 'Pornographic or Obscene Material'*, HOUS. PUB. MEDIA (Nov. 2, 2021, 5:35 PM), <https://www.houstonpublicmedia.org/articles/news/politics/2021/11/02/412402/gov-greg-abbott-decries-school-library-books-with-pornographic-or-obscene-material/> [<https://perma.cc/3JHN-WWAE>]; cf. Holly Hansen, *Texas Parents Demand School District Action on 'Obscene' Library Books*, TEXAN (Dec. 9, 2021), <https://thetexan.news/texas-parents-demand-school-district-action-on-obscene-library-books/> [<https://perma.cc/8DYA-PRD8>] ("Parents in multiple school districts across Texas are not waiting for state intervention but are demanding that local officials take action to remove obscene materials from public school libraries and classrooms.").

⁶ Letter from Greg Abbott, Tex. Governor, to Dr. Dan Troxell, Exec. Dir., Tex. Ass'n of Sch. Bds. (Nov. 1, 2021), <https://gov.texas.gov/uploads/files/press/TroxellDan.pdf> [<https://perma.cc/FNL6-W97N>].

⁷ See WBTW Web Staff, *S.C. Governor Wants to Investigate Obscenity in School Libraries After Concerns About Book from Fort Mill Parents*, WBTW (Nov. 11, 2021, 6:07 PM), <https://www.wbtv.com/2021/11/10/sc-governor-wants-investigate-obscenity-school-libraries-after-concerns-parents-about-book-fort-mill/> [<https://perma.cc/D4KX-79VD>].

⁸ See Stephen Gruber-Miller & Ian Richardson, *Iowa Parents Could Sue Schools over 'Obscene' Books in Sen. Jake Chapman's Bill*, DES MOINES REG. (Feb. 3, 2022, 7:19 PM), <https://www.desmoinesregister.com/story/news/politics/2022/02/03/iowa-senate-jake-chapman-bill-charge-teachers-parents-sue-obscene-pornographic-books/6657641001/> [<https://perma.cc/T273-G6JE>]. The Iowa legislature did not approve the bill. See Katarina Sostaric, *Iowa's 2022 Legislative Session Has Ended: Here's What Passed and What Didn't*, IOWA PUB. RADIO (May 25, 2022, 7:33 PM), <https://www.iowapublicradio.org/state-government-news/2022-05-25/iowas-2022-legislative-session-has-ended-heres-what-passed-and-what-didnt> [<https://perma.cc/296T-PWDX>].

⁹ See Ronald Brownstein, *Book Bans Move to Center Stage in the Red-State Education*

And the national furor shows no sign of abating.¹⁰ The American Library Association has reported, for example, that during a three-month period in late 2021, there were more than twice as many challenges brought against books in schools and public libraries than there had been in all of 2020.¹¹

The debate about what constitutes acceptable reading material for children has many facets. From the point of view of human development, for example, at what age is it appropriate to expose children to sexual content in books, and what are healthy ways to present it?¹² Should elementary, junior high, and high schools be more broadminded when selecting books for optional borrowing in their libraries than they are when selecting books for mandatory curricula?¹³ After a government-operated library places a book in circulation, does the First Amendment restrain its ability to remove the book in response to objections?¹⁴

Wars, CNN (Apr. 5, 2022, 12:04 AM), <https://www.cnn.com/2022/04/05/politics/republican-states-book-ban-race-lgbtq/index.html> [<https://perma.cc/9EB7-DZT9>].

¹⁰ *See id.* (“The escalating red-state efforts to ban more books mark a new stage in the struggle to control the educational experience of America’s kaleidoscopically diverse younger generations.”); Elizabeth A. Harris & Alexandra Alter, *Book Ban Efforts Spread Across the U.S.*, N.Y. TIMES (Feb. 8, 2022), <https://www.nytimes.com/2022/01/30/books/book-ban-us-schools.html> [<https://perma.cc/HQ79-H9ZN>] (“Parents, activists, school board officials and lawmakers around the country are challenging books at a pace not seen in decades.”).

¹¹ *See* AM. LIBRARY ASS’N, STATE OF AMERICA’S LIBRARIES SPECIAL REPORT: PANDEMIC YEAR TWO 6 (Apr. 2022), <https://www.ala.org/news/sites/ala.org/news/files/content/state-of-america-libraries-special-report-pandemic-year-two.pdf> [<https://perma.cc/5TR9-RRTC>]; *see also* Hillel Italie, *Book Bannings Soared in 2021, According to Library Study: ‘Gender Queer’ and ‘Lawn Boy’ Top List*, USA TODAY (Apr. 4, 2022, 6:37 PM), <https://www.usatoday.com/story/entertainment/books/2022/04/04/book-banning-soared-2021-gender-queer-lawn-boy-top-list/9463355002/> [<https://perma.cc/LB8X-4KFS>] (“The association found 729 challenges—affecting nearly 1,600 books—at public schools and libraries in 2021, more than double 2020’s figures and the highest since the ALA began compiling challenges more than 20 years ago. The actual total for last year is likely much higher . . .”).

¹² *See* Elaine Blair, *The Books About Sex That Every Family Should Read*, N.Y. TIMES (July 22, 2022), <https://www.nytimes.com/2022/06/28/magazine/sex-ed-books-teens-parents.html?referringSource=articleShare> [<https://perma.cc/NLE7-LWVQ>] (discussing these issues).

¹³ *Cf.* Bd. of Educ. v. Pico, 457 U.S. 853, 869 (1982) (plurality opinion) (“[Junior-high and high-school officials] might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values. But we think that [their] reliance upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway.”).

¹⁴ *Pico* remains the Supreme Court ruling that speaks most directly to that question, and it is now thirty years old and featured a splintered Court. Justice Brennan’s plurality concluded that public school officials have “significant discretion to determine the content of their school libraries,” but they cannot make their removal decisions “in a narrowly partisan or political manner.” *Id.* at 870. Justice Blackmun concurred in the judgment, reasoning that “school officials may not remove books for the *purpose* of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials’ disapproval of the ideas involved.” *Id.* at 879–80 (Blackmun, J., concurring in part

My interests here are provoked by the charge that some of the recently targeted books are obscene in the constitutional sense of the term, such that distributing those books to children falls beyond the First Amendment's protection. Although I will defend some of the nation's most controversial books against that charge in this Article, providing that defense is not my chief aim. Rather, I use the ongoing controversy as an opportunity to do two things. First, I explain why the recent obscenity allegations reveal a deep misunderstanding of constitutional principles concerning the circumstances in which prurient appeal is grounds for banning the distribution of books and other expressive works. Those circumstances are very narrowly defined even when government officials' laudable goal is to protect children. My second undertaking here is more broadly significant for obscenity cases involving children and adults alike, and concerns a problem that has bedeviled courts and commentators for nearly half a century: How does one determine whether an expressive work has the kind of "serious value" that the Court has said insulates even patently offensive, pruriently appealing works from the reach of obscenity restrictions?

In Part I, I describe the evolution of modern First Amendment obscenity doctrine, including ways in which the Constitution allows government officials to modify obscenity laws to take account of concerns regarding the effects of sexual expression on children. That history is not idle background—understanding the path that lies behind us is crucial for understanding the law today. In Part II, to provide illustrative focal points for the First Amendment arguments that will follow, I briefly describe the three books that the American Library Association says were challenged most frequently in 2021—*Gender Queer*,¹⁵ Jonathan Evison's 2018 novel *Lawn Boy*,¹⁶ and George

and concurring in the judgment). Justice White similarly concurred in the judgment but preferred not to reach the First Amendment issue. *See id.* at 883 (White, J., concurring in the judgment). Chief Justice Burger dissented, arguing that removal decisions should be left to school officials. *See id.* at 893 (Burger, C.J., dissenting). Justice Powell filed a dissent making a similar point. *See id.* (Powell, J., dissenting). For recent discussions of the uncertainties that persist on the issue, see Nia Thimakis, Board of Education v. Pico: *Forty Years of First Amendment Legacy*, INTELL. FREEDOM BLOG (June 16, 2022), <https://www.oif.ala.org/board-of-education-v-pico-forty-years-of-first-amendment-legacy/> [<https://perma.cc/887J-4VFX>]; Mark Walsh, *Yanking Books from School Libraries: What the Supreme Court Has Said, and Why It's Murky*, EDUC. WEEK (Dec. 15, 2021), <https://www.edweek.org/policy-politics/yanking-books-from-school-libraries-what-the-supreme-court-has-said-and-why-its-murky/2021/12> [<https://perma.cc/P2ME-LVBK>].

¹⁵ KOBABE, *supra* note 1.

¹⁶ JONATHAN EVISON, *LAWN BOY* (2018). In 2021, *Lawn Boy* was the second most frequently targeted book among those seeking to restrict or remove books in schools and public libraries. *See 10 Most Challenged Books*, *supra* note 1. Much of the controversy began when the mother of a Texas high school student went to a school board meeting and read aloud several passages that she found offensive. *See* Pathikrit Sanyal, 'Lawn Boy': Texas Mom Says Son Found Book About 4th Graders' Sex in School Library, MEAWW (Sept. 19, 2021, 7:22 PM), <https://meaww.com/lawn-boy-texas-mom-says-son-found-book-about-4th-graders-sex-in-school-library-pedophile> [<https://perma.cc/WJS9-V5TK>]. Several parents contacted local police, urging them to determine whether school officials' decision to make the book available to children amounted to a crime. Melanie Torre, *Leander Police Investigating*

M. Johnson's 2020 memoir *All Boys Aren't Blue*¹⁷—as well as *A Court of Mist and Fury*,¹⁸ the book targeted along with *Gender Queer* in the May 2022 Virginia ruling.¹⁹

In Part III, I focus on the First Amendment requirement that a work not be deemed obscene unless, when taken as a whole, it appeals to the average person's prurient interest. Using historically influential litigation concerning James Joyce's *Ulysses*,²⁰ D.H. Lawrence's *Lady Chatterley's Lover*,²¹ and Henry Miller's *Tropic of Cancer*²² as reference points, I explain why it is so difficult for the government to prove that a work meets this component of obscenity's constitutional definition. I argue that, taking each of the four books described in Part II as a whole, none of them appeals to average readers' prurient interests, even when those readers are children.

In Part IV, I examine an elusive concept that the Supreme Court introduced in its 1973 ruling in *Miller v. California*.²³ That case holds that even a patently offensive, pruriently appealing expressive work enjoys the First Amendment's protection unless, "taken as a whole, [the work] lacks serious literary, artistic, political, or scientific value."²⁴ What it means to possess serious value remains unclear, however, and the

Parent Complaints About Library Book, CBS AUSTIN (Sept. 14, 2021, 12:57 AM), <https://cbsaustin.com/news/local/leander-police-investigating-parent-complaints-about-library-book> [<https://perma.cc/H89Z-LZXH>]. An obscenity-alleging North Carolina parent launched the same strategy the following spring by reading from the book at a school board meeting. News & Observer, *Wake County Parent Wants 'Lawn Boy' Removed from School Library*, YOUTUBE (Mar. 10, 2022), https://www.youtube.com/watch?v=Dz1_Ju8yD3A. Evison has publicly responded to the controversy. Jonathan Evison, *The Would-Be Banning of Lawn Boy, and Why I'm Not Booking Any Flights to Texas in the Near-Future*, ALGONQUIN BOOKS BLOG, <https://blog.algonquin.com/jonathan-evison-on-the-attacks-on-his-novel-lawn-boy/> [<https://perma.cc/PW5X-DRXE>] (last visited May 8, 2023).

¹⁷ GEORGE M. JOHNSON, *ALL BOYS AREN'T BLUE: A MEMOIR-MANIFESTO* (2020). In 2021, *All Boys Aren't Blue* was the third most frequently targeted book among those seeking to restrict or remove books in schools and public libraries. See *10 Most Challenged Books*, *supra* note 1; see also Madeleine Carlisle, *Their Memoir Has Been Removed from School Libraries in 8 States. This Black Queer Author Is Fighting Back*, TIME (Nov. 18, 2021, 12:57 PM), <https://time.com/6120915/george-m-johnson-all-boys-arent-blue-book-bans/> [<https://perma.cc/AFE8-K8KQ>] (reporting that a member of a school board in Florida filed a police report alleging that the book's inclusion in school libraries violated the state's obscenity laws); Kan. News Serv., *Salina Parents Want LGBTQ Memoir Removed from School Libraries*, KAN. PUB. RADIO (Feb. 7, 2022, 5:39 PM), <https://kansaspublishradio.org/local-news/2022-02-07/salina-parents-want-lgbtq-memoir-removed-from-school-libraries> [<https://perma.cc/JHV7-A6UD>] (reporting that parents in a Kansas school district want the book removed from school libraries because they believe its contents are "obscene"). Johnson has publicly responded to the controversy. See Carlisle, *supra* note 17 (interviewing Johnson).

¹⁸ MAAS, *supra* note 2.

¹⁹ See *supra* note 3 and accompanying text (noting the Virginia litigation).

²⁰ JAMES JOYCE, *ULYSSES* (1922).

²¹ D.H. LAWRENCE, *LADY CHATTERLEY'S LOVER* (1928).

²² HENRY MILLER, *TROPIC OF CANCER* (Grove Press 1961) (1934).

²³ 413 U.S. 15 (1973).

²⁴ *Id.* at 24.

leading theory for understanding literary and artistic value, in particular, is deeply problematic. I reject the common assumption that assessments of literary and artistic value rest in significant part upon appraisals of aesthetic merit. Indeed, I go further and argue that the classification of speech's value as literary, artistic, scientific, or political in nature is ultimately inconsequential, notwithstanding *Miller*'s recitation of that quartet. I contend that, under the best reading of the First Amendment and the Court's precedents—including *Miller* itself—an expressive work of any kind possesses serious value if its creator addressed a matter of public concern in the work and did so for reasons other than to insulate sexually explicit portions of the work from government regulation on obscenity grounds. I illustrate how the serious-value analysis should proceed by applying it to the four books that have recently drawn heavy fire. I conclude that each of those books possesses serious value that places them beyond the reach of obscenity laws.

I. THE MODERN OBSCENITY FRAMEWORK

Although Congress,²⁵ and many state legislatures,²⁶ began enacting obscenity restrictions in the nineteenth century, and although the Supreme Court followed those enactments with unelaborated declarations that obscene expression falls

²⁵ See, e.g., Act of Aug. 30, 1842, § 28, 5 Stat. 548, 566 (“[T]he importation of all indecent and obscene prints, paintings, lithographs, engravings, and transparencies is hereby prohibited”); Act of Mar. 2, 1857, 11 Stat. 168 (extending the 1842 ban to also include “articles, . . . images, figures, daguerreotypes, [and] photographs”). In 1865, Congress turned its attention to domestic use of the U.S. Postal Service, making it a crime to use “the mails of the United States” to send “an obscene book, pamphlet, picture, print, or other publication, knowing the same to be of a vulgar and indecent character.” Act of Mar. 3, 1865, § 16, 13 Stat. 504, 507. At the urging of anti-obscenity activist Anthony Comstock, Congress vastly expanded the reach of federal anti-obscenity laws in 1873, making it a crime to sell, lend, give away, exhibit, publish, or send through the U.S. mail “any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing or other representation.” Act of Mar. 3, 1873, §§ 1, 2, 17 Stat. 598, 598–99; see also KEVIN BIRMINGHAM, *THE MOST DANGEROUS BOOK: THE BATTLE FOR JAMES JOYCE’S ULYSSES* 5–6 (2014) (discussing the enactment of the 1873 law at Comstock’s urging). The Comstock Act, as the 1873 legislation is frequently called, also authorized federal judges to order the seizure and destruction of such materials. See Act of Mar. 3, 1873, § 5, 17 Stat. 598, 599–600. Through his subsequent work for the U.S. Postal Service, “Comstock destroyed books by the ton and imprisoned thousands of pornographers.” BIRMINGHAM, *supra*, at 5–6.

²⁶ See, e.g., Act Concerning Crimes and Punishments, Conn. Stat. Laws 151, § 69 (1821) (making it a crime to “print, import, publish, sell, or distribute, any book, pamphlet, ballad, or other printed paper, containing obscene language, prints, or d[e]scriptions”); Mass. Rev. Stat., ch. 130, § 10 (1835) (making it a crime to “import, print, publish, sell, or distribute any book, or any pamphlet, ballad, printed paper, or other thing, containing obscene language, or obscene prints, pictures, figures, or descriptions, manifestly tending to the corruption of the morals of youth”); N.H. Rev. Stat., ch. 113, § 2 (1843) (making it a crime to “sing or repeat . . . any lewd, obscene or profane song,” to “repeat any lewd, obscene or profane words,” or to “write or mark in any manner any obscene or profane word, or obscene or lascivious figure or representation on any building, fence, wall, post or other thing whatever”).

beyond the First Amendment's protection,²⁷ it was not until the late 1950s that the Court began to craft doctrines for identifying the circumstances when restricting expression on obscenity grounds is indeed constitutionally permissible.²⁸ Prior to that point, courts' obscenity discussions focused on issues of statutory interpretation: When legislatures restrict the distribution or display of "obscene" materials, what kinds of expression, precisely, are they targeting? The answer to that question would provide the Supreme Court with its starting point in the mid-twentieth century when finally confronting the First Amendment questions that anti-obscenity laws raise.

A. Interpreting Early Obscenity Statutes

Briefly told, the American story of obscenity-law interpretation begins in England with the Court of Queen's Bench's 1868 ruling in *Regina v. Hicklin*.²⁹ Acting under legislation that authorized the government to seize and destroy "obscene" materials, British officials seized anti-Catholic pamphlets, parts of which discussed Catholic confessional practices in legally unremarkable terms and other parts of which described sexually explicit conversations between priests and parishioners.³⁰ Chief Justice Cockburn wrote that the test for determining whether the publication fell within Britain's ban was whether its "tendency" was "to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."³¹ He concluded that the pamphlets were obscene because portions of them "would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character."³²

²⁷ See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . ."); *Pub. Clearing House v. Coyne*, 194 U.S. 497, 508 (1904) (finding it significant that "[t]he constitutionality of [federal anti-obscenity laws] has never been attacked"); *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897) (stating that the First Amendment does not bar the government from prohibiting "the publication of . . . indecent articles, or other publications injurious to public morals"); *Ex parte Jackson*, 96 U.S. 727, 736 (1877) (approvingly citing federal anti-obscenity legislation). See generally U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . .").

²⁸ See *Roth v. United States*, 354 U.S. 476, 481 (1957) ("Although this is the first time the question has been squarely presented to this Court, either under the First Amendment or under the Fourteenth Amendment, expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press."); see also William B. Lockhart & Robert C. McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295, 302–20 (1954) (discussing widespread censorship efforts on the eve of *Roth*); *infra* notes 59–61 and accompanying text (discussing *Roth*).

²⁹ See *R v. Hicklin* [1868] QB 360 (Eng.).

³⁰ See *id.* at 362–63.

³¹ *Id.* at 371 (Cockburn, C.J.).

³² *Id.*

Many American courts initially embraced the *Hicklin* formulation,³³ and the Supreme Court signaled its likely approval in 1896's *Rosen v. United States*.³⁴ Lew Rosen had mailed out a publication titled "Broadway," some pages of which contained a substance that could be scrubbed away to reveal images of unclothed women.³⁵ He was sentenced to thirteen months of hard labor for violating a federal statute that banned sending obscene material through the U.S. mail.³⁶ Although Rosen did not challenge the jury instructions—he focused his appeal on the judge's decision to involve the jury in the first place³⁷—the Court said that the jury instructions' definition of obscenity was "as liberal as the defendant had any right to demand."³⁸ Hewing to *Hicklin*, the trial judge had told the jury that its task was to decide whether "Broadway" would have "the tendency . . . to deprave and corrupt the morals of those whose minds are open to such influence and into whose hands a publication of this sort may fall," such as by "suggest[ing] or convey[ing] lewd thoughts and lascivious thoughts to the young and inexperienced."³⁹

The *Hicklin* standard's deployment in the United States created at least three problems. First, the standard gave judges and jurors tremendous latitude to decide for themselves what kinds of sexually oriented materials were morally corruptive and thus obscene—latitude that left content creators and purveyors with little guidance about what, exactly, could get them into trouble.⁴⁰ The *Rosen* Court did not see the problem. In its view, "[e]very one who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd, and lascivious."⁴¹ At either end of the spectrum, of course, obscenity determinations were easy to make. But there was a sizable gray area in the middle.⁴²

³³ See, e.g., *United States v. Harmon*, 45 F. 414, 417 (D. Kan. 1891); *United States v. Smith*, 45 F. 476, 477 (E.D. Wis. 1891); *United States v. Bennett*, 24 F. Cas. 1093, 1103–04 (S.D.N.Y. 1879); *City of St. Louis v. King*, 126 S.W. 495, 498–99 (Mo. 1910). Some courts found that the *Hicklin* test required modification because it did not consider the primary purpose of the work and gave too much weight to how a small number of the work's readers or viewers might respond to it. See, e.g., *United States v. Dennett*, 39 F.2d 564, 569 (2d Cir. 1930); *People v. Muller*, 96 N.Y. 408, 411 (1884).

³⁴ 161 U.S. 29 (1896).

³⁵ See *id.* at 31, 34.

³⁶ See *id.* at 30–31 (citing Rev. Stat. § 3893).

³⁷ Rosen contended that the trial judge should not have left it to the jury to determine whether the publication was obscene. See *id.* at 42. The Court disagreed. See *id.* at 43.

³⁸ *Id.* at 43. The Court noted its approval of the instructions to support its finding that Rosen had not been harmed by the trial court's decision to give jurors the task of determining whether "Broadway" was obscene. See *id.*

³⁹ *Id.*

⁴⁰ See, e.g., *United States v. Clarke*, 38 F. 500, 502 (E.D. Mo. 1889) ("The views that different persons might entertain of the tendency and effect of [the] publications [at issue in this case] are so various that these questions ought to be submitted to a jury.").

⁴¹ *Rosen*, 161 U.S. at 42.

⁴² Cf. *United States v. Levine*, 83 F.2d 156, 157 (2d Cir. 1936) (Hand, J.) ("[O]bscenity'

If you were writing a novel and wished to include a passage featuring two characters engaged in sexual intimacy, for example, how specifically could you describe the characters' conduct? To play it safe, you might omit the scene altogether, even if readers would have found the passage valuable and even if judges and jurors would have found it unobjectionable.⁴³

Second, the *Hicklin* approach took as its baseline the sensibilities of those who were especially susceptible to sexual suggestion—"the young and the inexperienced," as the *Rosen* Court put it, as well as any others "whose minds are open to such influence."⁴⁴ Even if an average adult would find a particular image or passage innocuous, the material could nevertheless be removed from the market if it would excite "lewd" or "lascivious" thoughts among those most easily swayed in that direction.⁴⁵ Exaggerating only a little, one judge wryly observed that "this rule renders any book unsafe, since a moron could pervert to some sexual fantasy to which his mind is open the listings in a seed catalogue."⁴⁶

Third, as the Supreme Court would later observe, the *Hicklin* approach "allowed material to be judged merely by the effect of an isolated excerpt."⁴⁷ In *Hicklin* itself, for example, it did not matter whether the sexually explicit exchanges between priests and parishioners filled all or only a portion of the pamphlets.⁴⁸ What mattered was that those passages were there, awaiting the eyes of corruptible readers. Even a thick work of literature that most adults would find praiseworthy when read in its entirety could be banned if, with some digging, one could find in it a passage or two that strayed too objectionably into the sexual realm.

is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premiss, but really a small bit of legislation ad hoc, like the standard of care.").

⁴³ *Cf.* *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) ("[W]here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.") (internal quotation marks and alterations omitted).

⁴⁴ *Rosen*, 161 U.S. at 43.

⁴⁵ *See* *Roth v. United States*, 354 U.S. 476, 488–89 (1957) (observing that, under *Hicklin*, material could be deemed obscene based on its impact "upon particularly susceptible persons"). Foreshadowing the approach that the Supreme Court would later take, some courts keyed their judgments to the sensibilities of an average person. *See, e.g., Dunlop v. United States*, 165 U.S. 486, 500 (1897) (noting that the trial court had instructed the jury that material is obscene if it is "calculated with *the ordinary reader* to deprave him, deprave his morals, or lead to impure purposes") (emphasis added); *People v. Wendling*, 180 N.E. 169, 170 (N.Y. 1932) (finding that the theatrical production under dispute was not obscene because it "cannot be said to suggest, *except 'to a prurient imagination, 'unchaste or lustful ideas'*") (emphasis added).

⁴⁶ *Commonwealth v. Gordon*, 66 Pa. D. & C. 101, 125 (C.P. Ct. Phila. Cnty. 1949).

⁴⁷ *Roth*, 354 U.S. at 488–89.

⁴⁸ *R v. Hicklin* [1868] QB 360 at 362–63 (Eng.) (observing that approximately one-half of the pamphlets consisted of excerpts from theological writings and other legally unobjectionable matters); *see also supra* notes 29–48 and accompanying text (discussing *Hicklin*).

The tide of American law began to turn decisively against *Hicklin* in 1933, when U.S. District Judge John Woolsey adjudicated the legal status of James Joyce's *Ulysses*.⁴⁹ Federal postal officials had blocked the importation of Joyce's novel, arguing that the Tariff Act of 1930 prohibited anyone from "import[ing] into the United States from any foreign country . . . any obscene book."⁵⁰ Reporting that he had carefully studied Joyce's dense and difficult work, Judge Woolsey found that *Ulysses* was not obscene within the meaning of the federal statute because it did not have a tendency "to stir the sex impulses or to lead to sexually impure and lustful thoughts."⁵¹ In reaching that conclusion, he influentially took two large steps away from *Hicklin*'s path.⁵²

First, he rejected the notion that courts should make obscenity determinations based on the sensibilities of those most susceptible to sexual suggestion. "Whether a particular book would tend to excite [impure and lustful] impulses and thoughts," he wrote, "must be tested by the court's opinion as to its effect on a person with average sex instincts."⁵³ Were the rule otherwise, anti-obscenity legislation could deprive the mainstream public of access to valuable, even transformative expression:

⁴⁹ See *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182, 184–85 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934); see also BIRMINGHAM, *supra* note 25 (providing a superb account of these events). This was not Judge Woolsey's first encounter with obscenity laws. See *United States v. One Book Entitled "Contraception"*, 51 F.2d 525, 528 (S.D.N.Y. 1931) (finding that a book written primarily for medical professionals about contraception was not obscene because it "would not stir the sex impulses of any person with a normal mind"); *United States v. One Obscene Book Entitled "Married Love"*, 48 F.2d 821, 824 (S.D.N.Y. 1931) (finding that a book written primarily to help husbands better understand their wives' emotional and physical lives was not obscene because Judge Woolsey could not "imagine a normal mind to which this book would seem to be obscene or immoral within the proper definition of these words or whose sex impulses would be stirred by reading it"). A handful of courts had begun to drift away from *Hicklin*'s prescriptions prior to Judge Woolsey's ruling, but these "were mere skirmishes" so far as marking a change in national law is concerned. Lockhart & McClure, *supra* note 28, at 327.

⁵⁰ See *One Book Called "Ulysses"*, 5 F. Supp. at 184.

⁵¹ *Id.*

⁵² In addition to the two steps noted above, he considered Joyce's intent in writing the novel: was it to stimulate readers' sexual appetites or was it something different? Judge Woolsey found it was something different—namely, to describe the "ever-shifting kaleidoscopic" mental lives of his characters over the course of a single day. See *id.* at 183–84. Some courts embraced that line of reasoning. See, e.g., *Parmelee v. United States*, 113 F.2d 729, 737 (D.C. Cir. 1940) (finding that the author of a sociology text had not included a few nude photographs "to promote lust or to produce libidinous thoughts"); *People ex rel. Savery v. Gotham Book Mart, Inc.*, 285 N.Y.S. 563, 568 (N.Y. Magis. Ct. 1936) (stating that the obscenity determination turns in large part on whether the "main purpose" of the work in question was "to cater to the lowest and most sensual part of human nature"). Other courts, however, rejected it. See, e.g., *Commonwealth v. Isenstadt*, 62 N.E.2d 840, 845–46 (Mass. 1945) (finding that an author's intent is irrelevant because the purpose of anti-obscenity laws is "to protect the public from that which is harmful" and a book can be harmful no matter what the author intended).

⁵³ *One Book Called "Ulysses"*, 5 F. Supp. at 184; see also *id.* at 185 ("It is only with the normal person that the law is concerned.").

If one does not wish to associate with such folk as Joyce describes, that is one's own choice. In order to avoid indirect contact with them one may not wish to read "Ulysses"; that is quite understandable. But when such a great artist in words, as Joyce undoubtedly is, seeks to draw a true picture of the lower middle class in a European city, ought it to be impossible for the American public legally to see that picture?⁵⁴

Second, Judge Woolsey determined that legal judgments about whether a work is obscene must be based on the work "in its entirety," rather than just scattered parts or passages.⁵⁵ Far from having the "net effect" of stimulating "sexual impulses or lustful thoughts," he said, *Ulysses* provided "a somewhat tragic and very powerful commentary on the inner lives of men and women," using "a new literary method for the observation and description of mankind."⁵⁶ Portions of the book do contain sexual terms and descriptions, Judge Woolsey reported, but "[e]ach word of the book contributes like a bit of mosaic to the detail of the picture which Joyce is seeking to construct for his readers."⁵⁷

Numerous state and federal courts embraced Judge Woolsey's two innovations,⁵⁸ and the Supreme Court elevated both of them to constitutional status when it finally brought the First Amendment into the obscenity discussion.

⁵⁴ *Id.* at 184.

⁵⁵ *Id.* at 185.

⁵⁶ *Id.*

⁵⁷ *Id.* at 184.

⁵⁸ They did so with respect to focusing on the sexual sensibilities of ordinary people. *See, e.g., Walker v. Popenoe*, 149 F.2d 511, 512 (D.C. Cir. 1945) (stating that "[t]he effect of a publication on the ordinary reader is what counts"); *Commonwealth v. Isenstadt*, 62 N.E.2d 840, 845 (Mass. 1945) ("The fundamental right of the public to read is not to be trimmed down to the point where a few prurient persons can find nothing upon which their hypersensitive imaginations may dwell."); *United States v. Levine*, 83 F.2d 156, 157 (2d Cir. 1936) (stating that "what counts is [a work's] effect, not upon any particular class, but upon all those whom it is likely to reach"); *ACLU v. City of Chicago*, 121 N.E.2d 585, 592 (Ill. 1954) (stating that a work "must be tested with reference to its effect upon the normal, average person"). And they did so with respect to considering works in their entirety. *See, e.g., Walker*, 149 F.2d at 512 (stating that "[t]he *dominant* effect of an entire publication determines its character"); *Parmelee v. United States*, 113 F.2d 729, 737 (D.C. Cir. 1940) (finding that a few nude photographs in an otherwise unobjectionable book did not "furnish the dominant note of the publication"); *Levine*, 83 F.2d at 157 (stating that "the work must be taken as a whole"); *ACLU*, 121 N.E.2d at 592 (stating that a work must be evaluated "as a whole"); *Commonwealth v. Gordon*, 66 Pa. D. & C. 101, 103 (C.P. Ct. Phila. Cnty. 1949) (stating that a work must be considered "as a whole" and "[t]his is now true in all jurisdictions that have dealt with the subject").

B. Interpreting the First Amendment

The Court began its journey into the details of First Amendment obscenity doctrine in 1957's *Roth v. United States*.⁵⁹ Writing for the Court, Justice Brennan said that the test for determining whether sexually oriented expression is "obscene" and thus beyond the First Amendment's protection is "whether to the *average* person, applying contemporary community standards, the dominant theme of the material *taken as a whole* appeals to prurient interest."⁶⁰ What Judge Woolsey had said as a matter of statutory interpretation thus became constitutional doctrine. Speech that predominantly appeals to the average person's prurient interest, Justice Brennan wrote, is "utterly without redeeming social importance" and outside the First Amendment's protective reach.⁶¹

Even with those First Amendment principles ostensibly in place, American obscenity law still left content creators and purveyors with significant uncertainty about what judges and juries could permissibly find unacceptable.⁶² The *Roth* majority itself acknowledged that fact-finders' applications of the Court's test would sometimes be difficult to predict.⁶³ But however bad that uncertainty was, prospective speakers' plight quickly became even worse because the justices soon found themselves disagreeing about the questions that the First Amendment required courts to ask.⁶⁴

⁵⁹ 354 U.S. 476 (1957).

⁶⁰ *Id.* at 489 (emphasis added). The Court offered multiple definitions of what it meant for material to "appeal[] to prurient interest." *Id.* at 487 n.20. One of those definitions appeared to include appeals to normal sexual interests: "material having a tendency to excite lustful thoughts." *Id.* (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY UNABRIDGED (2d ed., 1949)). Another definition, however, suggested the focus was on sexual interests of an unhealthy nature: material that stirs a "shameful or morbid interest" in sex. *Id.* (quoting MODEL PENAL CODE § 207.10(2) (AM. LAW INST., Tent. Draft No. 6, 1957)). The Court would later embrace the latter definition and shun the former. *See infra* note 98 and accompanying text (discussing *Brockett v. Spokane Arcades*, 472 U.S. 491 (1985)).

⁶¹ *See Roth*, 354 U.S. at 484–85.

⁶² *See id.* at 512 (Douglas, J., dissenting) ("Any test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment."); *cf. Jacobellis v. Ohio*, 378 U.S. 184, 187 (1964) (Brennan, J., announcing the judgment of the Court) ("Application of an obscenity law . . . requires ascertainment of the dim and uncertain line that often separates obscenity from constitutionally protected expression.") (internal quotation marks omitted).

⁶³ *See Roth*, 354 U.S. at 491–92. But these justices did not believe the problem rose to the level of a due process violation. *See id.*

⁶⁴ *Cf. Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964) (Brennan, J., announcing the judgment of the Court) ("The question of the proper standard for making [an obscenity] determination has been the subject of much discussion and controversy since our decision in *Roth* seven years ago."); *id.* at 199 (Warren, C.J., dissenting) ("The definition enunciated in [*Roth*] has generated much legal speculation.").

Those disagreements were laid bare in 1966's *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*.⁶⁵ In that case, the Court reviewed the Massachusetts Supreme Judicial Court's determination that John Cleland's mid-eighteenth-century novel *Memoirs of a Woman of Pleasure* was obscene and thus constitutionally unprotected.⁶⁶ With respect to both rationale and outcome, the justices badly splintered.⁶⁷ A three-member plurality led by Justice Brennan found that the *Roth* majority's reference to material being "utterly without redeeming social importance" was not merely a passing observation, but was instead the declaration of an independently necessary hallmark of obscenity, such that sexual expression with even just a little social value could not be deemed obscene no matter how much its dominant theme appealed to the average person's prurient interest.⁶⁸ Justice Stewart agreed with that reading of *Roth* but argued that "patent indecency" was an additional "essential element of that which is not constitutionally protected."⁶⁹ Justices Clark and White contended that no separate inquiries were required regarding "redeeming social importance" and "patent indecency."⁷⁰ Justice Black said that the plurality's obscenity test was "vague and meaningless" and that, no matter how one defines it, obscene expression received the First Amendment's protection.⁷¹ Justice Douglas contended that "the First Amendment does not permit the censorship of expression not brigaded with illegal action."⁷² Justice Harlan said that the federal government and the states actually operated under different First Amendment standards: the federal government could only attack "hard-core pornography" (which Justice Harlan defined as "prurient material that is patently offensive or whose indecency is self-demonstrating"), while states could define proscribed obscenity any way they liked, so long as their definitions were "not wholly out of step with current American standards."⁷³

⁶⁵ 383 U.S. 413 (1966).

⁶⁶ See *id.* at 415. See generally JOHN CLELAND, FANNY HILL OR, MEMOIRS OF A WOMAN OF PLEASURE (Modern Library 2001) (1749).

⁶⁷ This was not the first post-*Roth* case in which the Court was badly divided. See, e.g., *Jacobellis v. Ohio*, 378 U.S. 184, 184 (1964) (adjudicating the status of a French film and failing to produce a majority opinion).

⁶⁸ See *Memoirs*, 383 U.S. at 420 (Brennan, J., announcing the judgment of the Court).

⁶⁹ *Ginzburg v. United States*, 383 U.S. 463, 499 (1966).

⁷⁰ See *Memoirs*, 383 U.S. at 441–42, 445 (Clark, J., dissenting); *id.* at 460–62 (White, J., dissenting).

⁷¹ *Ginzburg*, 383 U.S. at 478 (Black, J., dissenting); see *id.* at 420–21 (Black, J., concurring in the judgment) (incorporating by reference his opinion filed the same day in *Mishkin v. New York*, 383 U.S. 502, 515–18 (1966)); cf. *Kingsley v. Regents of the Univ. of N.Y.*, 360 U.S. 684, 690 (1959) (Black, J., concurring) ("If despite the Constitution . . . this Nation is to embark on the dangerous road of censorship, my belief is that this Court is about the most inappropriate Supreme Board of Censors that could be found.").

⁷² *Memoirs*, 383 U.S. at 426 (Douglas, J., concurring in the judgment).

⁷³ *Id.* at 457–58 (Harlan, J., dissenting).

That mishmash of views on the nation's highest court poorly served anyone seeking to conform their sexual speech to the law's expectations. But rather than conquer their divisions in the obscenity cases that immediately followed, the justices succumbed to them. In 1967's *Redrup v. New York*,⁷⁴ handed down one year after *Memoirs*, the Court began the practice of having each justice apply whatever constitutional standard he thought appropriate, and then issuing unelaborated judgments that accorded with at least five justices' bottom-line selection of cases' winners and losers.⁷⁵ Every Term, for example, many of the justices and their clerks gathered in a room to watch the films brought to them that year for assessment, so that the justices could apply their varying tests for determining whether the films fell within the First Amendment's protection.⁷⁶ Those screenings were often the source of humor,⁷⁷ but the justices had no appetite for perpetuating the arrangement. Justice Brennan, for example, declared that he was "sick and tired of seeing this goddamn shit,"⁷⁸ while Justice Harlan complained that he and his colleagues had "to spend an inordinate amount of time in the absurd business of perusing and viewing the miserable stuff that pours into the Court."⁷⁹ In the worst position of all, however, were prospective speakers who wanted to know where the law's lines lay so they could steer clear of legal liability, and state and federal judges who wanted better guidance about how to adjudicate the cases that came before them.⁸⁰ Clearly, the *Redrup* approach could not last.

The Court's response to those challenges—the response that remains the centerpiece of First Amendment obscenity law today—came in two rulings handed down

⁷⁴ 386 U.S. 767 (1967).

⁷⁵ See *id.* at 770–71 (briefly summarizing the justices' varying standards and declaring that, "[w]hichever of these constitutional views is brought to bear upon the cases before us, it is clear that the [lower courts' findings of obscenity] cannot stand"); see also *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 82 (1973) (Brennan, J., dissenting) ("In the face of . . . divergence of opinion the Court began the process in *Redrup* . . . of *per curiam* reversals of convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, deemed not to be obscene.").

⁷⁶ BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 233–34 (1979) (discussing the *Redrup* era).

⁷⁷ See *id.* (stating that "[m]ovie day was the humorous highlight of most terms" and recounting some of the participants' exchanges).

⁷⁸ *Id.* at 228 (attributing that remark to Justice Brennan).

⁷⁹ *Interstate Cir., Inc. v. City of Dallas*, 390 U.S. 676, 707 (1968) (Harlan, J., concurring in one action and dissenting in two others).

⁸⁰ See *Paris Adult Theatre I*, 413 U.S. at 83 (Brennan, J., dissenting) (stating that "the *Redrup* approach . . . resolves cases as between the parties, but offers only the most obscure guidance to legislation, adjudication by other courts, and primary conduct"); *id.* at 86–93 (Brennan, J., dissenting) (cataloguing the significant costs imposed by a regime of uncertainty); *Interstate Cir.*, 390 U.S. at 707 ("The upshot of all this divergence in viewpoint is that anyone who undertakes to examine the Court's decisions since *Roth* which have held particular material obscene or not obscene would find himself in utter bewilderment.").

on the same day in 1973: *Miller v. California*⁸¹ and *Paris Adult Theatre I v. Slaton*.⁸² Those rulings did not remove all uncertainty for writers and others wishing to make predictions about whether particular instances of sexual expression would amount to constitutionally unprotected obscenity.⁸³ But a majority of the justices did at least agree upon a set of rules that enabled them to put the *Redrup* practice in the Court's rearview mirror.⁸⁴

Led by Chief Justice Burger, the Court identified four First Amendment requirements that must be met if lawmakers wish to restrict expression because it is obscene.⁸⁵ First, expression may be restricted on obscenity grounds only if it "depict[s] or describe[s] sexual conduct" that has been "specifically defined by the applicable [anti-obscenity] law, as written or authoritatively construed."⁸⁶ A legislature may say, for example, that speech is proscribed if it contains "representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated," or "representations or descriptions of masturbation, excretory functions, and lewd exhibitions of the genitals."⁸⁷ By specifying the conduct about which expression is restricted, the Court reasoned, anti-obscenity laws can "provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution."⁸⁸ Even if such descriptions lack "god-like precision," Chief Justice Burger wrote, they are adequate to strike a balance between prospective speakers' need to know what sexual speech is permissible and a community's desire to restrict sexual speech that many of its members find unacceptable.⁸⁹

Second, expression amounts to proscribable obscenity in a given jurisdiction only if, applying contemporary local standards, an average member of that community would find that the expression depicts or describes the specified sexual conduct in "a patently offensive way."⁹⁰ There need not be a nationally uniform understanding of what is patently offensive; the First Amendment permits jurors in one jurisdiction

⁸¹ 413 U.S. 15 (1973) (concerning sexually explicit books that the defendant marketed in a mass-mailing campaign targeting people in their homes).

⁸² 413 U.S. 49 (1973) (concerning sexually explicit films displayed in commercial theaters).

⁸³ Joined by Justices Stewart and Marshall in dissent, Justice Brennan wrote that "the concept of 'obscenity' cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials." *Id.* at 103 (Brennan, J., dissenting).

⁸⁴ *See Miller*, 413 U.S. at 29 ("Now we may abandon the casual practice of *Redrup* . . . and attempt to provide positive guidance to federal and state courts alike.").

⁸⁵ *See generally id.* As the Court would make clear in another ruling handed down that same day, these requirements apply regardless of whether the expression is pictorial, verbal, or a combination of the two. *See Kaplan v. California*, 413 U.S. 115, 118–19 (1973).

⁸⁶ *Miller*, 413 U.S. at 24.

⁸⁷ *Id.* at 25.

⁸⁸ *Id.* at 27.

⁸⁹ *Id.* at 27–28.

⁹⁰ *See id.* at 24.

to find that a given instance of expression rises to that level even if the same expression would hardly raise eyebrows in a more permissive American locale.⁹¹ As for what qualifies as “patently offensive,” the Court did not say.⁹² But drawing from the work of the Model Penal Code’s drafters, Justice Brennan had written for the Court in *Roth* that expression is obscene only “if it goes substantially beyond customary limits of candor in description or representation of” sexual activity,⁹³ and some courts and legislatures today recite that same language when describing what the phrase “patently offensive” means.⁹⁴ Other authorities offer somewhat different formulations, saying, for example, that sexual expression is patently offensive if it is “so offensive on its face as to affront current community standards of decency”⁹⁵ or “of tolerance.”⁹⁶

Third, echoing what the Court said in *Roth* and what Judge Woolsey had said before that, speech can be deemed obscene in a given jurisdiction only if an average member of that community—again applying contemporary local standards—would find that, “taken as a whole, [the speech] appeal[s] to the prurient interest in sex.”⁹⁷ The Court would later explain that the focus here is not on material that appeals to “normal, healthy sexual desires”; rather, it is on speech that stimulates “a shameful or morbid interest” in sex.⁹⁸

⁹¹ See *id.* at 30–34 (rejecting the notion that there must be a uniform national standard for what is patently offensive).

⁹² See *Miller*, 413 U.S. at 24.

⁹³ *Roth v. United States*, 354 U.S. 476, 487 n.20 (1957) (quoting MODEL PENAL CODE § 207.10(2) (AM. LAW. INST. Tent. Draft No. 6, 1957)); see also *supra* notes 59–61 and accompanying text (discussing *Roth*). The final draft of the Model Penal Code retained that definition. See MODEL PENAL CODE § 251.4 (AM. LAW INST., Proposed Official Draft 1962).

⁹⁴ See, e.g., TENN. CODE ANN. § 39-17-1002(4) (2022); *State v. Davidson*, 481 N.W.2d 51, 59 (Minn. 1992); *State v. Harrold*, 593 N.W.2d 299, 316 (Neb. 1999); Annalisa Siracusa, *Obscenity*, 6 GEO. J. GENDER & L. 347, 354 (2005) (“According to many state obscenity statutes, patently offensive depictions go substantially beyond customary limits of candor in description or representation.”) (internal quotation marks and alteration omitted).

⁹⁵ See, e.g., TEX. PENAL CODE § 43.21(a)(4) (2016).

⁹⁶ See, e.g., COLO. REV. STAT. § 18-7-101(4) (2016).

⁹⁷ *Miller*, 413 U.S. at 24; see also *infra* Part III (discussing this requirement). The Court adjusts the “average person” portion of the inquiry when the expression at issue “is designed for and primarily disseminated to a clearly defined deviant sexual group.” *Mishkin v. New York*, 383 U.S. 502, 508 (1966). In that instance, the question is whether “the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.” *Id.*; see also *Smith v. United States*, 431 U.S. 291, 300 n.6 (1977) (approvingly citing *Mishkin* for that principle in the post-*Miller* era); *Hamling v. United States*, 418 U.S. 87, 128–29 (1974) (same); *United States v. Ragsdale*, 426 F.3d 765, 773–74 (5th Cir. 2005) (stating that expert testimony concerning deviance can assist jurors when they might not already know that certain kinds of conduct are sexually stimulating for a deviant portion of society), *cert. denied*, 546 U.S. 1202 (2006).

⁹⁸ *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498 (1985) (internal quotation omitted); see also *Powell’s Books, Inc. v. Kroger*, 622 F.3d 1202, 1214 (9th Cir. 2010) (“Titillation

Finally, rejecting the view that speech can be judged obscene only if it is “utterly” without redeeming social merit,⁹⁹ Chief Justice Burger’s majority found that expressive works amount to obscenity only if, “taken as a whole, [they] do not have serious literary, artistic, political, or scientific value.”¹⁰⁰ Medical textbooks might contain “graphic illustrations and descriptions of human anatomy,” for example, and some readers might find those passages both pruriently appealing and patently offensive, but the textbooks nevertheless have sufficient scientific value to bring them under the First Amendment’s umbrella.¹⁰¹ “A quotation from Voltaire in the flyleaf of a book,” on the other hand, “will not constitutionally redeem an otherwise obscene publication.”¹⁰² Rather than rely upon local standards when making judgments about an expressive work’s value, fact-finders must make a more geographically generalized inquiry: Would a reasonable person find serious literary, artistic, political, or scientific value in the work?¹⁰³ If so, then the expression enjoys the First Amendment’s protection, no matter how patently offensive or pruriently appealing the expression might be.¹⁰⁴

C. Children and Obscenity

When children are introduced into the mix, two additional First Amendment issues arise. Both are important, but my focus here will be on the second of the two.

First, suppose photographs, films, or videos depict real children engaged in sexual activity, such as masturbating or simulating sexual intercourse. Does the First Amendment permit the government to ban the distribution and possession of those

and arousal are not synonymous with an abnormal or prurient sexual response . . .”). Both on this question and on the question of patent offensiveness, the assessment task rests primarily in the hands of local triers of fact. *See Miller*, 413 U.S. at 30 (“These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists.”). As the Court would explain in *Jenkins v. Georgia*—a case in which Georgia jurors impermissibly found that a mainstream film starring Candice Bergen, Art Garfunkel, Ann Margaret, and Jack Nicholson was obscene—fact-finders do not have “unbridled discretion” to make these judgments. 418 U.S. 153, 160–61 (1974). But absent obvious errors, jurors and judges are entrusted with the task of bringing local standards to bear on the expressive works that come before them.

⁹⁹ *See supra* notes 61, 68 and accompanying text.

¹⁰⁰ *Miller*, 413 U.S. at 24; *see also infra* Part IV (discussing the serious-value requirement).

¹⁰¹ *Miller*, 413 U.S. at 26.

¹⁰² *Id.* at 25 n.7 (quoting *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972)); *see also infra* notes 261–68 and accompanying text (discussing *Kois*).

¹⁰³ *Pope v. Illinois*, 481 U.S. 497, 500–01 (1987); *see also infra* notes 253–57 and accompanying text (discussing *Pope*).

¹⁰⁴ *See Pope*, 481 U.S. at 500–01.

materials even if it does not rise to the level of obscenity?¹⁰⁵ Yes, it does. Recognizing that “[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance,” the Court held in 1982’s *New York v. Ferber*¹⁰⁶ that for such expression to fall beyond the First Amendment’s protection, “[a] trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that [the children’s] sexual conduct [be] portrayed . . . in a patently offensive manner; and the material at issue need not be considered as a whole.”¹⁰⁷ After all, when children are made to engage in sexual activity for others’ entertainment, the physical or psychological harm they may suffer does not depend on whether the average adult would find the expression sexually stimulating or patently offensive, nor does it depend on whether the sexual conduct is merely a part of some larger work. No matter what others might think of such expression, and no matter what else the expressive work might contain, the First Amendment still allows lawmakers to try to “dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.”¹⁰⁸

The second issue involving children is more relevant for our purposes here. Does the First Amendment permit a state to treat adults and children differently when it comes to the sexually explicit expression they are permitted to acquire, see, or hear? May a state find, for example, that certain materials would foster a shameful

¹⁰⁵ I say “real” children because the government’s power to regulate nonobscene child pornography exists only when actual children are involved in the sexual activity. If the expression instead involves computer-generated images of children or involves adults with childlike appearances, the expression loses its First Amendment protection only if it satisfies *Miller*’s obscenity requirements. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249–51 (2002).

¹⁰⁶ 458 U.S. 747, 757 (1982). *Ferber* concerned the First Amendment status of two films “devoted almost exclusively to depicting young boys masturbating.” *Id.* at 752.

¹⁰⁷ *Id.* at 764. But “the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed.” *Id.* The *Ferber* majority stopped short of deciding whether depictions of children engaged in sexual conduct are constitutionally protected expression when they have serious social value. See *id.* at 773–74. Joined by Justices Brennan and Stevens, Justice O’Connor suggested that social value might be irrelevant to the analysis, since a child may suffer great harm regardless of the value that society ascribes to the expression. See *id.* at 774–75 (O’Connor, J., concurring). Joined by Justice Marshall, Justice Brennan took the contrary view, writing that “it is inconceivable how a depiction of a child that is itself a serious contribution to the world of art or literature or science can be deemed ‘material outside the protection of the First Amendment.’” *Id.* at 777 (Brennan, J., concurring in the judgment).

¹⁰⁸ *Id.* at 760. The government can even ban the possession of such material in one’s home. See *Osborne v. Ohio*, 495 U.S. 103, 108–11 (1990). When children are not involved and so only ordinary obscenity First Amendment rules are in play, the First Amendment blocks the government from criminalizing the in-home possession of the expression. See *Stanley v. Georgia*, 394 U.S. 557, 564–68 (1969).

or morbid interest in sex among children—and that children’s access to those materials should be restricted accordingly—even if the same expression would be unremarkable among adults?

The Supreme Court authority that speaks most directly to that question continues to be 1968’s *Ginsberg v. New York*,¹⁰⁹ handed down five years before *Miller* and *Paris Adult Theatre* brought the *Redrup* era to an end.¹¹⁰ The *Ginsberg* Court considered a New York statute under which Long Island proprietor Sam Ginsberg had been convicted of selling “two ‘girlie’ magazines” to a sixteen-year-old boy.¹¹¹ In prior litigation, the Court had determined that the magazines were not obscene when in the hands of adults.¹¹² But New York officials had not prosecuted Ginsberg under an ordinary obscenity statute; instead, they charged him under a law aimed specifically at barring the sale of certain kinds of sexually explicit publications to children.¹¹³ Taking as its starting point the then-reigning First Amendment analysis that the three-member plurality in *Memoirs* had embraced,¹¹⁴ the New York statute made it a crime to sell material to a person younger than seventeen years old if it contained descriptions or depictions of nudity or sex and the material “predominantly appeal[ed] to the prurient, shameful or morbid interest of *minors*,” was “patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material *for minors*,” and was “utterly without redeeming social importance *for minors*.”¹¹⁵

Ginsberg objected to the statute’s focus on children, arguing that “the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend upon whether the citizen is an adult or a minor.”¹¹⁶ The Court rejected that proposition and upheld Ginsberg’s conviction, concluding that the legislation was permissible “if it was rational for the legislature to find that the minors’ exposure to such material might be harmful.”¹¹⁷ Writing for the majority, Justice Brennan explained that nothing more than a rational basis was required to sustain New York’s law because the statute’s description of the targeted speech

¹⁰⁹ 390 U.S. 629 (1968).

¹¹⁰ See *supra* notes 74–83 and accompanying text (describing the *Redrup* era and its termination in 1973).

¹¹¹ See *Ginsberg*, 390 U.S. at 631.

¹¹² See *id.* at 634 n.3.

¹¹³ See *id.* at 631–33.

¹¹⁴ See *supra* note 68 and accompanying text (discussing the *Memoirs* plurality).

¹¹⁵ *Ginsberg*, 390 U.S. at 645–47 (quoting N.Y. PENAL LAW § 484-h (1965)) (emphasis added). Many states had adopted obscenity legislation written in one manner or another with the interests of children specifically in mind. See *id.* at 647–48 (citing numerous state statutes).

¹¹⁶ *Id.* at 636.

¹¹⁷ *Id.* at 639; cf. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) (“It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults.”).

tracked the *Memoirs* plurality's First Amendment definition of obscenity.¹¹⁸ The New York legislature had found that exposure to such speech would impair children's "ethical and moral development," and Justice Brennan said this was sufficient to rationally justify the statute's restriction on constitutionally unprotected speech.¹¹⁹

Even though legislation focusing specifically on children was not at issue five years later in *Miller*, the *Miller* Court did approvingly cite *Ginsberg* for the proposition "that because of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults."¹²⁰ But because *Miller* said nothing further about obscenity legislation focused on children, important questions remained unanswered. When enacting such laws, could legislatures adopt the *Memoirs*-influenced definition of obscenity that the *Ginsberg* Court blessed, or were they required instead to track the language of *Miller*? Were they obliged to identify the forms of sexual conduct about which speakers needed to be careful when presenting their descriptions or depictions? If sexual speech patently offended adults' sensibilities about what is appropriate for children, and if the speech would appeal to children's prurient interests, could the government restrict children's exposure to that speech even if a reasonable child could find serious literary, artistic, scientific, or political value in it?

Two years after *Miller* came down, in a ruling finding that a desire to protect children was insufficient to justify a municipal ordinance that barred the display of nude buttocks and breasts on the screens of drive-in movie theaters,¹²¹ the Court dropped a footnote acknowledging that it had not yet addressed *Miller*'s impact on *Ginsberg*.¹²² But the Court made clear that the First Amendment's rules for laws aimed at protecting children did not differ greatly from the rules for laws aimed at protecting adults.¹²³ The Court emphasized, for example, that "minors are entitled to a significant measure of First Amendment protection," that "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to [children]," and that "[i]n most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors."¹²⁴

¹¹⁸ See *Ginsberg*, 390 U.S. at 641.

¹¹⁹ *Id.* (internal quotation omitted). Because scientists had not proved that exposure to obscenity would *not* be harmful to minors, New York was not obliged to empirically demonstrate that such harm would, in fact, occur. See *id.* at 641–42.

¹²⁰ *Miller v. California*, 413 U.S. 15, 36 n.17 (1973) (quoting *Interstate Circuit v. Dallas*, 390 U.S. 676, 690 (1968), which in turn cites *Ginsberg*, 390 U.S. at 629).

¹²¹ See *Erznoznik*, 422 U.S. at 212–14.

¹²² See *id.* at 213 n.10.

¹²³ See *id.* at 212–14.

¹²⁴ *Id.*

In the absence of further guidance, lower courts proceeded on the assumption that child-protecting obscenity laws were constitutionally permissible only if they satisfied *Miller*'s requirements.¹²⁵ Then, in 2011's *Brown v. Entertainment Merchants Association*¹²⁶—the Court's most recent word on the subject—the justices signaled that this is indeed the constitutionally required approach. The *Entertainment Merchants* Court struck down a California law that restricted minors' access to violent video games.¹²⁷ Relying squarely on *Ginsberg*, California had argued that the statute was constitutionally permissible because it was a rational attempt to protect children from harm and because the statute's language largely tracked *Miller*'s requirements, but focused on depictions of violence rather than depictions of sex.¹²⁸ Writing for the majority, Justice Scalia rejected California's focal shift to depictions of violence, finding that *Ginsberg* had not given lawmakers a broad license to restrict children's access to harmful speech.¹²⁹ Absent "persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription," Justice Scalia wrote, lawmakers may not create new categories of unprotected speech based on their own assessment of speech's risks and benefits for kids.¹³⁰ Justice Scalia explained that the reason the *Ginsberg* Court sustained New York's statute was that, rather than attempting to define a new category of unprotected speech, the legislation had simply "*adjust[ed] the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults [wa]s not uncritically applied to children.*"¹³¹

Because *Miller* defines the constitutional boundaries of obscene speech today, *Miller*'s requirements must be met when lawmakers seek to withhold expressive works from children because of those works' sexual contents. Lawmakers in numerous jurisdictions have seen things the same way. After *Miller* came down, for example, New York amended its statute to embrace that ruling's doctrinal language, so that, today, New York bars disseminating material to minors when it depicts or describes nudity or sexual conduct and the material:

(a) Considered as a whole, appeals to the prurient interest in sex of minors; and

¹²⁵ See, e.g., *Powell's Books, Inc. v. Kroger*, 622 F.3d 1202, 1213–15 (9th Cir. 2010) (faulting a child-protecting statute for not tracking the requirements of *Miller*); *Am. Booksellers v. Webb*, 919 F.2d 1493, 1503 (11th Cir. 1990) (praising a child-protecting statute because it tracked the requirements of *Miller*), *cert. denied*, 500 U.S. 942 (1991).

¹²⁶ 564 U.S. 786 (2011).

¹²⁷ See *id.* at 789 (describing the statute); *id.* at 805 (describing the Court's conclusion).

¹²⁸ See Brief for Petitioners at 14–18, *Schwarzenegger v. Ent. Merch. Ass'n, sub nom. Brown v. Ent. Merch. Ass'n*, 564 U.S. 786 (2010) (No. 08-1448).

¹²⁹ See *Ent. Merch. Ass'n*, 564 U.S. at 792–94.

¹³⁰ *Id.* at 792 (citing *United States v. Stevens*, 559 U.S. 460, 470 (2010)).

¹³¹ *Id.* at 794 (emphasis added).

- (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
- (c) Considered as a whole, lacks serious literary, artistic, political and scientific value for minors.¹³²

Congress and numerous states have enacted comparable legislation,¹³³ and courts have generally sustained those enactments against First Amendment attacks.¹³⁴

Where does this leave us, then, with books like those that have recently provoked fierce controversy in communities across the country?¹³⁵ Do they qualify as obscene when disseminated to children, such that authors, publishers, bookstores, school officials, librarians, and others who distribute those books to minors cannot turn to the First Amendment for protection?¹³⁶

¹³² N.Y. PENAL LAW § 235.20 (LexisNexis 1996) (defining material that is “harmful to minors”); *see also id.* at §§ 235.21, 235.22 (making it a crime to disseminate material to minors when that material is “harmful to minors”); *see also* *People v. Foley*, 731 N.E.2d 123 (N.Y. 2000) (sustaining the legislation against First Amendment attack).

¹³³ *See, e.g.*, 18 U.S.C. § 2252B (2022); 47 U.S.C. § 231 (2022); CONN. GEN. STAT. § 53a-193(2) (2022); DEL. CODE ANN. tit. 11, §§ 1365(a)(1), 1366(b)(3) (2022); D.C. CODE § 22-2201(b); FLA. STAT. § 847.001 (2022); GA. CODE ANN. § 16-12-102(1) (2022); MINN. STAT. § 617.292(7) (2022); NEB. REV. STAT. § 28-807(6) (2022); N.M. STAT. ANN. § 30-37-1(F) (2022); 18 PA. CONS. STAT. § 5903(e)(6) (2022); S.D. CODIFIED LAWS § 22-24A-2(7) (2022); TENN. CODE ANN., § 39-17-901 (2022); UTAH CODE ANN. § 76-10-1201(5) (West 2022); WIS. STAT. § 450.155(1)(c) (2022). My home state of Iowa features a now-common regulatory arrangement, with two different sets of obscenity statutes. The first applies to all would-be purchasers and renters of obscene materials (adults and children alike) and the definition of the targeted material largely incorporates *Miller*’s language, unmodified with respect to people’s ages. *See* IOWA CODE § 728.4 (2022). The second focuses on children, banning people other than parents or guardians from “disseminat[ing] or exhibit[ing] ‘obscene material’ to a minor.” *Id.* § 728.2. The statute defines “obscene material” as

material depicting or describing the genitals, sex acts, masturbation, excretory functions or sadomasochistic abuse which the average person, taking the material as a whole and applying contemporary community standards with respect to what is suitable for minors, would find appeals to the prurient interest and is patently offensive; and the material, taken as a whole, lacks serious literary, scientific, political or artistic value.

Id. § 728.1(5). Note one apparent difference between the New York and Iowa approaches: New York explicitly tailored the serious-value inquiry to what has value for minors, while Iowa enacted a regime that evidently permits children to obtain works that are otherwise inappropriate for them, so long as adults—even if not the children themselves—could reasonably find serious value in the expression.

¹³⁴ *See, e.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 564 (2002); *Alexander v. State*, 290 So.3d 65 (Fla. Dist. Ct. App. 2020); *Davis-Kidd Booksellers v. McWherter*, 866 S.W.2d 520 (Tenn. 1993); *State v. Watts*, 498 P.3d 365 (Utah 2021).

¹³⁵ *See supra* notes 1–11 and accompanying text (describing those recent controversies).

¹³⁶ Although it is not my focus in this Article, government employees who work with children—such as teachers and librarians at public K–12 schools—face a great First Amendment

II. FOUR CONTROVERSIAL BOOKS

To provide timely examples for use in the First Amendment discussion that will follow in Parts III and IV, I have selected four books that recently have provoked substantial public controversy: the three most frequently challenged books in 2021 according to the American Library Association, plus the fantasy novel named in the Virginia ruling described in the opening line of this Article.¹³⁷ To varying degrees, each of the four books talks about sexual matters in strikingly candid terms.

A. Gender Queer: A Memoir

In the 2019 illustrated memoir *Gender Queer*—the book most prominently at the center of recent firestorms¹³⁸—Maia Kobabe tells the story of coming to identify as nonbinary and asexual.¹³⁹ (The book recounts Kobabe’s eventual decision to use “e, em, eir” pronouns,¹⁴⁰ so I will use those pronouns here.) Kobabe was born biologically female but spent many years wrestling with issues of sexuality and gender identity.¹⁴¹ E recounts numerous experiences that shaped eir perceptions during childhood and beyond, including (among many others) the distress e felt when puberty arrived; eir childhood hopes that breast cancer might eventually require the removal of eir breasts; the sense of community that e found in the lyrics of David Bowie, in a Queer-Straight Alliance during high school, and in queer books at a public library; declining eir sister’s suggestion that e taste eirself after placing a finger in eir vagina (this passage contains illustrations depicting Kobabe looking at the tip of her finger coated with a substance that the text calls “vagina slime”); masturbating while imagining having a penis (one image depicts Kobabe pressing the front of eir jeans, while another shows two naked, masculine figures kissing while pressed together, one lying between the other’s legs); the happiness e felt when a boyish haircut led others to perceive em as male; and a traumatic Pap-smear experience that prompted Kobabe to vow that nothing would ever again enter eir

difficulty if they assign or distribute controversial books to minors when performing their job duties: the job-performing speech of government employees generally gets no First Amendment protection. *See Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (“We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”); *see, e.g., Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 342 (6th Cir. 2010) (holding that the First Amendment did not insulate a public school’s ninth-grade teacher from discipline for the book-report assignments she gave her students, since “[t]he key insight of *Garcetti* is that the First Amendment has nothing to say about these kinds of decisions.”).

¹³⁷ *See supra* notes 1–3, 16–17 and accompanying text.

¹³⁸ *See supra* notes 1–11 and accompanying text.

¹³⁹ *See generally* KOBABE, *supra* note 1.

¹⁴⁰ *See id.* at 189–97.

¹⁴¹ *See generally id.* at 12–25.

vagina.¹⁴² The book also briefly describes Kobabe’s unsuccessful post-college experiment with a vibrator: Kobabe says that, after acquiring the device, e “got off by pressing the front of my jeans, the unopened box in my hand,”¹⁴³ but when e tries to use it (illustrated by images of Kobabe’s earnest but puzzled face), e says “I don’t think I like this.”¹⁴⁴ The book discusses eir decision to start wearing men’s underwear and eir identification with autoandrophilia, which Kobabe explains is the term used to describe a biological female’s arousal at the thought of having male genitalia.¹⁴⁵ In one panel, Kobabe illustrates “[a]n elaborate fantasy based on Plato’s *Symposium*,” featuring two nude males drawn in ancient-Greek style, one adult and one apparent minor, both with erections, the older male reaching out to grasp the younger male’s penis.¹⁴⁶

The passage that appears to have drawn critics’ greatest ire concerns a sexual encounter that Kobabe had after college with another person who was born biologically female and who shared some of Kobabe’s feelings about gender identity. During that encounter, Kobabe and eir friend experimented with performing oral sex on a strap-on phallus, an experiment in which Kobabe reports finding no pleasure. On one of the pages describing that experience, Kobabe provides two illustrations depicting two individuals engaged in forms of oral sex.¹⁴⁷ In both, Kobabe illustrates eirself standing with a phallic object extending from eir groin—in the first (depicting what Kobabe says e had imagined the experience would be like), the object could readily be mistaken for an actual penis, while in the second image (depicting what Kobabe says was the experience as it actually occurred) the object is a phallus strapped to the front of Kobabe’s underwear-clad body.¹⁴⁸ In both illustrations, Kobabe’s friend is kneeling in front of eir with a portion of the object in her mouth.¹⁴⁹

B. All Boys Aren’t Blue: A Memoir-Manifesto

In the 2020 book *All Boys Aren’t Blue*, George M. Johnson tells their story of growing up Black and queer.¹⁵⁰ (Johnson used masculine pronouns when writing the book but later shifted to “they, them, their” pronouns,¹⁵¹ so I will use the latter here.) Each chapter centers around an especially impactful experience in Johnson’s life. They write, for example, about having their teeth kicked out during a fight at the age

¹⁴² See generally KOBABE, *supra* note 1.

¹⁴³ *Id.* at 140.

¹⁴⁴ *Id.* at 141.

¹⁴⁵ *Id.* at 158, 183–84.

¹⁴⁶ *Id.* at 136.

¹⁴⁷ See *id.* at 168.

¹⁴⁸ KOBABE, *supra* note 1, at 168.

¹⁴⁹ *Id.*

¹⁵⁰ See generally JOHNSON, *supra* note 17.

¹⁵¹ See @IamGMJohnson, TWITTER (July 30, 2020, 4:31 PM), <https://twitter.com/iamgmjohnson/status/1288950351572459531?lang=en> [<https://perma.cc/GYJ8-LTBT>].

of five and the way it curbed their willingness to smile; the power of choosing one's own name and pronouns (as a child, Johnson struggled with whether to go by their first or middle name); pressure Johnson faced as a young boy to suppress their feminine qualities; Johnson's athletic talents; their teachers' poor handling of issues concerning slavery; Johnson's success in conquering a fear of water by learning to swim; the benefits Johnson obtained from having an attentive and loving grandmother; Johnson's relationship with their father and with a transgender cousin who died in her thirties; the joys of friendship that Johnson experienced upon joining a fraternity at an historically black university; Johnson's decision to keep their sexuality closeted until late in their college years; and the death of one of Johnson's beloved fraternity brothers.¹⁵²

Two of the book's sixteen chapters contain explicit sexual content. Chapter eleven discusses the sexual abuse that an older cousin inflicted upon Johnson; the cousin persuaded thirteen-year-old Johnson to engage in mutual oral sex, an experience about which Johnson said they (Johnson) felt conflicted at the time and that they condemn now in adulthood.¹⁵³ In the present day as an adult, Johnson expresses empathy for their abuser and describes the sadness they felt when learning that he had been killed defending a family member in a fight.¹⁵⁴ Johnson tells their readers that "[i]t is not a requirement that you ever find empathy for an abuser," but one should "[m]ake it a requirement to hold your abuser accountable."¹⁵⁵ In chapter fifteen, Johnson spends a few pages discussing their first consensual experiences with oral and anal sex, and they explain that one of those experiences left Johnson suffering physical pain.¹⁵⁶ In that chapter, Johnson writes about the lack of reliable information available to young people about gay sex and the risks of HIV and other sexually transmitted diseases.¹⁵⁷ Johnson acknowledges that these passages are likely to provoke controversy but they hope the book will help some young readers navigate their own lives:

Will this part of my story be met with pushback? Absolutely. But I'll be damned if I don't tell it because of fear. My greatest fear is that queer teens will be left to trial and error in their sexual experience. It's worth me feeling a little embarrassed so that you all are a bit more prepared.¹⁵⁸

¹⁵² See generally JOHNSON, *supra* note 17.

¹⁵³ In that same chapter, Johnson also describes a high-school classmate nonconsensually grabbing his penis briefly in a restroom, an experience that Johnson says "completely shut me down from the idea of wanting to have sex with anyone else." *Id.* at 209.

¹⁵⁴ *Id.* at 212.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 262–72.

¹⁵⁷ *Id.* at 273–76.

¹⁵⁸ *Id.* at 276.

C. Lawn Boy

Jonathan Evison's 2018 novel *Lawn Boy* features a twenty-three-year-old Mexican-American narrator named Mike Muñoz who—in a story often told with great humor—struggles to find and keep a lawncare job while also navigating several relationships (with his mother and her boyfriend, among others) and helping to care for his developmentally disabled brother.¹⁵⁹ In a few instances throughout the book, Muñoz experiments with dating females, but by the story's end he has concluded that he is gay.¹⁶⁰ The novel does not contain lengthy descriptions of sexual activity; it focuses instead on the narrator's employment woes and on his non-sexual relationships with a handful of people.¹⁶¹ But there are a few explicit references to sex. In one paragraph, the narrator recounts losing his virginity during his junior year of high school.¹⁶² The passages drawing the greatest fire concern an experience that the adult narrator describes having when he was in the fourth grade. Reflecting on his childhood, Muñoz says:

[I]n fourth grade, at a church youth-group meeting, out in the bushes behind the parsonage, I touched Doug Goble's dick, and he touched mine. In fact there were even some mouths involved. It's not something I'd even think about all these years later, except that Goble is the hottest real-estate agent in Kitsap County. His face is all over town—signs, billboards, Christ, even on shopping carts. Do you know what I think three times a day when I see his picture? I wonder, all these years later, why he just kicked our friendship to the curb like that. Was it shame?¹⁶³

¹⁵⁹ See generally Evison, *supra* note 16.

¹⁶⁰ See *id.* at 292.

¹⁶¹ See generally *id.*

¹⁶² In its entirety, that paragraph reads as follows:

Placing her knee between my legs, she wrestled off her sweater and unbuttoned her blouse and pulled off her panties, and she climbed on top of me before I even had a chance to savor the moment. I'm not saying I wasn't grateful. To this day, I remain grateful to Gina Costerello and whatever whim, or combination of alcohol and restlessness, prompted her to unbutton my jeans and straddle me in the passenger seat of that Malibu. And don't get the idea that it didn't feel good, either. It was a revelation, a delirious paroxysm like I'd never known, a welling of rapture from my heels to my temples. The experience literally emptied me.

Id. at 25.

¹⁶³ *Id.* at 19. At one point, Muñoz recalls Goble's "little salamander between my fourth-grade fingers, rapidly engorging with blood." *Id.* at 174.

In the present day, Muñoz relates this fourth-grade experience to his adult friend, Nick, and tells him the experience “wasn’t terrible.”¹⁶⁴

Muñoz eventually finds himself doing landscaping work for Goble, something that Muñoz finds awkward because, initially, the men say nothing to one another about what they did together that day in the fourth grade.¹⁶⁵ Late in the book, after their employment relationship has fallen apart, Muñoz reminds Goble about the sexual experience but Goble either does not recall it or refuses to acknowledge it:

“It was your idea behind the parsonage,” I said.
 “What are you talking about?”
 “You know exactly what I’m talking about.”
 “No, Mike, I have no idea what you’re talking about.” . . .
 “Why won’t you admit we sucked each other’s dicks?”
 He looked up from his phone. “Excuse me?” . . .
 “You hatched the plan, Goble, and you know it. You lured me behind the parsonage. We talked about girls. We shared a Hershey’s bar. Then you showed me your dick.”
 “Whoa. What the hell are you talking about?”
 “The next thing I know, it’s in my mouth.”
 “Are you high?”
 “I can’t believe you, Goble! Dude, you’re insane. We sucked each other’s dicks, and you’re pretending it didn’t happen.”
 “Have a nice life, Mike,” he said, repocketing his phone.¹⁶⁶

D. A Court of Mist and Fury

Sarah J. Maas’s 2016 novel *A Court of Mist and Fury* is the second installment in a fantasy romance series about a young woman named Feyre who has crossed from the human world to a sometimes treacherous, sometimes beautiful land of immortal faeries.¹⁶⁷ At 624 pages, the book is rich in detail about the fantasy world that Maas has created—the leading characters have a variety of magical powers and physical attributes, and their intentions range from loving to vengeful.¹⁶⁸ The story is bracketed by periods when Feyre is with a powerful, overly protective faerie lord named Tamlin, but the bulk of the narrative places her with a rival lord named Rhysand. With Feyre’s help, Rhysand is trying to spare the land from war.¹⁶⁹

¹⁶⁴ *Id.* at 91.

¹⁶⁵ *Id.* at 174.

¹⁶⁶ *Id.* at 230–31.

¹⁶⁷ See generally MAAS, *supra* note 2.

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

Although references to romantic attraction bubble along at or below the surface in many portions of the narrative, scenes featuring explicit sexual activity are few in number but frank in description. The first comes early in the book when, over the space of four pages, Feyre and Tamlin have a sexual encounter that Maas describes in candid anatomical and sensory terms.¹⁷⁰ The next scene featuring overt sexual contact does not come until nearly four hundred pages later, when Feyre and Rhysand erotically caress one another for several pages in a bid to distract onlookers while Rhysand’s allies steal a mysterious orb.¹⁷¹ More than 100 pages after that, the reader finds the book’s lengthiest and most sexually explicit passage, in which Feyre and Rhysand have sexual intercourse.¹⁷² The scene takes place over a dozen pages. The following excerpts illustrate the kinds of descriptions that readers find there:

He licked and kissed his way to the apex of my thighs, just as his fingers replaced where his mouth had been, pumping inside me as he sucked, his teeth scraping ever so slightly—
I bowed off the table as my climax shattered through me, splintering my consciousness into a million pieces. He kept licking me, fingers still moving. “Rhys,” I rasped. . . .
Wholly naked, I watched as he unbuttoned his pants, and the considerable length of him sprang free. My mouth went dry at the sight of it. I wanted him, wanted every glorious inch of him in me, wanted to claw at him until our souls were forged together. . . .¹⁷³

In Parts III and IV, I use those four books as vehicles for thinking more deeply about when the distribution of sexually explicit books to children lacks the First Amendment’s protection. To help set the stage for that discussion, let me make two stipulations. First, I will assume we are in a jurisdiction where the obscenity laws—either as written by legislatures or as construed by courts—have placed prospective speakers on notice that sexual content of the sort we find in these four books could bring that jurisdiction’s obscenity laws into play.¹⁷⁴ Second, I will assume we are in

¹⁷⁰ See, e.g., *id.* at 22 (“His tongue swept my mouth again, in time to the finger that he slipped inside of me. My hips undulated, demanding more, craving the fullness of him, and his growl reverberated in my chest as he added another finger.”); *id.* (“He palmed my breast, his thumb flicking over my nipple. I cried out, and he buried himself in me with a mighty stroke.”); *id.* at 24 (“His fingers slipped into me again and he growled in approval at the wetness between my thighs, both from me and from him.”).

¹⁷¹ See *id.* at 409–16; see, e.g., *id.* at 416 (“I faced forward, and Rhys dragged his mouth along the back of my neck, right over my spine, just as I shifted against the hardness pushing into me, insistent and dominating.”).

¹⁷² *Id.* at 531–33.

¹⁷³ MAAS, *supra* note 2, at 531–33.

¹⁷⁴ See *supra* notes 86–89 and accompanying text (describing this requirement).

a community where providing any of these books to minors would patently offend local standards about what kind of reading material is appropriate for children.¹⁷⁵ There presumably are jurisdictions where the second of those assumptions is inaccurate, such that the case for finding these books obscene in some locales has defects beyond those on which I elaborate below. But I nevertheless set such possibilities to the side. I focus on issues concerning prurient appeal (where First Amendment law is reasonably well settled) and serious value (where First Amendment law remains poorly developed and in need of the intervention I provide here).

III. PRURIENT APPEAL

Recall that, for more than half a century now, the Court has rejected the *Hicklin* doctrine, which holds that an entire expressive work can be proscribed as obscene even if only a portion of it appeals to the audience's prurient interest.¹⁷⁶ A book or other form of speech can lose its First Amendment protection today by virtue of sexually explicit content only if, under contemporary local standards, an average person would say that, "taken as a whole,"¹⁷⁷ the work stimulates "a shameful or morbid interest" in sex.¹⁷⁸ Properly understood and applied, that description does not fit any of the four books described in Part II, even when the readers are children.

A. *The Objective of the Inquiry*

The modern Court's requirement that works be considered in their entirety when evaluating their prurient appeal reflects the longstanding judicial determination that the instances in which the government may categorically restrict speech based on its contents must be carefully and narrowly defined, lest the government suppress speech that does not actually trigger the kinds of concerns that constitutionally justify categorical exclusions in the first place.¹⁷⁹ If a book contains pruriently

¹⁷⁵ See *supra* notes 90–95, 129–31 and accompanying text (describing this requirement).

¹⁷⁶ See *supra* notes 29–48 and accompanying text (discussing *Hicklin* and its eventual rejection).

¹⁷⁷ *Miller v. California*, 413 U.S. 15, 24 (1973) (emphasis added); see also *supra* notes 81–102 and accompanying text (discussing *Miller*).

¹⁷⁸ *Brockett v. Spokane Arcades*, 472 U.S. 491, 498 (1985) (internal quotation marks omitted); see also *supra* notes 97–98 and accompanying text (discussing *Miller*, *Brockett*, and the meaning of "prurient interest").

¹⁷⁹ Cf. *Brown v. Ent. Merch. Ass'n*, 564 U.S. 786, 791 (2011) (stating that the categories of unprotected speech are "well-defined and narrowly limited") (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992) ("From 1791 to the present, . . . our society . . . has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'") (quoting *Chaplinsky*, 315 U.S. at 572).

appealing passages but reading the book in its entirety lacks prurient impact, it presumably is because the book contains a nontrivial amount of speech that serves functions (or has impacts) other than stimulating shameful or morbid sexual thoughts in readers' minds. Allowing the government to restrict readers' access to that non-prurient speech is a cost that the First Amendment does not permit lawmakers to incur in their bid to keep readers' minds from being prodded in prurient directions.¹⁸⁰

The jurisprudential shift from judging isolated passages to judging works in their entirety was—and remains—enormously consequential. Consider, for example, courts' assessments of James Joyce's *Ulysses*,¹⁸¹ D.H. Lawrence's *Lady Chatterley's Lover*,¹⁸² and Henry Miller's *Tropic of Cancer*.¹⁸³ I noted earlier that one reason Judge Woolsey lifted the federal ban on *Ulysses*' distribution was that the novel is not pruriently appealing when read "in its entirety."¹⁸⁴ Although Joyce's book does contain passages that are sexually explicit, no one could reasonably say that, for the average person, the experience of reading *Ulysses* in its entirety is sexually charged.¹⁸⁵ Joyce's novel consists of a dense assemblage of widely varying narrative styles, literary and historical allusions of greater and lesser degrees of obscurity, and complicated renderings of the three principal characters' interior lives.¹⁸⁶ Much of the book is inaccessible to casual readers hoping to be swept away by a good story,¹⁸⁷

¹⁸⁰ Cf. Lockhart & McClure, *supra* note 28, at 392 ("To permit a book to be condemned as obscene solely because of isolated words or passages ripped from the total structure of the work would result in depriving society of the value of the particular book, and the value of freedom of expression through literature, without judicial consideration of the value of what is being destroyed.").

¹⁸¹ JOYCE, *supra* note 20.

¹⁸² LAWRENCE, *supra* note 21.

¹⁸³ MILLER, *supra* note 22.

¹⁸⁴ *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182, 185 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934); see *supra* notes 49–57 and accompanying text (discussing Judge Woolsey's ruling).

¹⁸⁵ Judge Augustus Hand agreed when affirming Judge Woolsey's ruling:

The net effect even of portions most open to attack, such as the closing monologue of the wife of Leopold Bloom, is pitiful and tragic, rather than lustful. The book depicts the souls of men and women that are by turns bewildered and keenly apprehensive, sordid and aspiring, ugly and beautiful, hateful and loving. In the end one feels, more than anything else, pity and sorrow for the confusion, misery, and degradation of humanity. Page after page of the book is, or seems to be, incomprehensible. . . . The book as a whole is not pornographic, and, while in not a few spots it is coarse, blasphemous, and obscene, it does not, in our opinion, tend to promote lust. The erotic passages are submerged in the book as a whole and have little resultant effect.

United States v. One Book Entitled "Ulysses", 72 F.2d 705, 707 (2d Cir. 1934).

¹⁸⁶ JOYCE, *supra* note 20.

¹⁸⁷ See Ben W. Heineman Jr., *Rereading 'Ulysses' by James Joyce: The Best Novel Since*

and much of it has nothing to do with sex. Those looking for a book whose cumulative impact is to provoke sexual desire—whether of a normal or a shameful variety—will come away from the experience greatly disappointed.

Judge Frederick Bryan of the Southern District of New York famously reached a comparable conclusion in 1959 regarding Lawrence’s *Lady Chatterley’s Lover*.¹⁸⁸ When the Postmaster General sought to block Grove Press from domestically distributing Lawrence’s tale of one woman’s marriage and adultery, Judge Bryan granted the publisher’s petition for injunctive relief.¹⁸⁹ He acknowledged that the novel contains “a number of passages describing sexual intercourse in great detail with complete candor and realism.”¹⁹⁰ But he concluded that even if those passages have a tendency “to arouse shameful, morbid and lustful sexual desires in the average reader,” the book as a whole cannot be condemned on that basis.¹⁹¹ Lawrence’s novel develops themes having nothing to do with sexual desire, Judge Bryan said, such as expressing Lawrence’s “deep and bitter dissatisfaction with what he believed were the stultifying effects of advancing industrialization” and its impact upon “the wholesome and natural life of all classes in England.”¹⁹² By trying to prevent the book’s distribution in the United States, the Postmaster General had done precisely what the First Amendment did not permit him to do:

He has lifted from the novel individual passages and language, found them to be obscene in isolation and therefore condemned the book as a whole. He has disregarded the dominant theme and effect of the book and has read these passages and this language as if they were separable and could be taken out of context.¹⁹³

1900, ATLANTIC (Nov. 29, 2010), <https://www.theatlantic.com/entertainment/archive/2010/11/rereading-ulysses-by-james-joyce-the-best-novel-since-1900/67092/> [<https://perma.cc/DCZ8-8R5F>] (stating that *Ulysses* presents a story “of surpassing complexity and, without careful study, limited accessibility”). Although praising *Ulysses* as “the most important contribution that has been made to fictional literature in the twentieth century,” one of Joyce’s early reviewers opened with the prediction that “the average intelligent reader will glean little or nothing from it.” Joseph Collins, *James Joyce’s Amazing Chronicle*, N.Y. TIMES (May 28, 1922), <https://archive.nytimes.com/www.nytimes.com/books/00/01/09/specials/joyce-ulysses.html?8bu> [<https://perma.cc/4CYM-K6AG>].

¹⁸⁸ See *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488, 500–01 (S.D.N.Y. 1959); see also Robert D. McFadden, *Judge Frederick Bryan Dies at 73; Ended Ban on ‘Chatterley’ Novel*, N.Y. TIMES (Apr. 18, 1978), <https://www.nytimes.com/1978/04/18/archives/judge-frederick-bryan-dies-at-73-ended-ban-on-chatterley-novel.html> [<https://perma.cc/55V7-NSVR>] (describing Judge Bryan’s legacy).

¹⁸⁹ *Grove Press*, 175 F. Supp. at 503.

¹⁹⁰ *Id.* at 500.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 501; see also *id.* at 503 (explaining that the ruling was grounded in both the First Amendment and statutory interpretation).

Because *Lady Chatterley's Lover*, when “taken as a whole,” was “not an appeal to the prurient interest of the average reader,” Judge Bryan ordered federal officials to permit its distribution.¹⁹⁴

The successful path that Henry Miller's *Tropic of Cancer* took through the American legal system was less direct, though the outcome was ultimately the same. Prior to 1973's *Miller* and *Paris Adult Theatre*,¹⁹⁵ many courts found that Miller's novel qualified as obscene under the laws of their respective jurisdictions.¹⁹⁶ The Court of Appeals of New York concluded in 1963, for example, that the book was “nothing more than a compilation of a series of sordid narrations dealing with sex in a manner designed to appeal to the prurient interest.”¹⁹⁷ Other pre-1973 courts reached the opposite conclusion.¹⁹⁸ The Supreme Judicial Court of Massachusetts found in 1962, for example, that although some portions of the book were “repulsive, vulgar, and grossly offensive,” the effect of the work taken as a whole was “not prurient.”¹⁹⁹ The Massachusetts court thereby situated itself on what proved to be the right side of history. Through the kind of splintered array of votes that typified many of the federal Supreme Court's obscenity rulings prior to *Miller*,²⁰⁰ the justices reversed a Florida court's finding that *Tropic of Cancer* was obscene.²⁰¹ As Justice

¹⁹⁴ *Id.* at 502.

¹⁹⁵ See *supra* notes 81–102 and accompanying text (discussing *Miller* and *Paris Adult Theatre*).

¹⁹⁶ See, e.g., *Besig v. United States*, 208 F.2d 142 (9th Cir. 1953) (finding the book obscene under federal legislation). See generally Elaine Woo, *Charles Rembar; Lawyer Won Key Obscenity Cases*, L.A. TIMES (Oct. 28, 2000, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2000-oct-28-me-43582-story.html> [<https://perma.cc/4TTH-Y2WR>] (stating that the book “was blocked by more than 60 court cases in 21 states”).

¹⁹⁷ *People v. Fritch*, 192 N.E.2d 713, 716 (N.Y. 1963).

¹⁹⁸ See, e.g., *Zeitlin v. Arnebergh*, 383 P.2d 152, 165 (Cal. 1963) (finding that the novel lacks the “treatment of sex in a morbid or shameful manner which frequently marks pornography”); *McCauley v. Tropic of Cancer*, 121 N.W.2d 545, 551, 554 (Wis. 1963) (finding that although some passages might be obscene if judged in isolation, the book as a whole does not appeal to readers' prurient interests).

¹⁹⁹ *Att'y Gen. v. Book Named “Tropic of Cancer”*, 184 N.E.2d 328, 334 (Mass. 1962).

²⁰⁰ See *supra* notes 59–80 and accompanying text (describing obscenity law's disarray prior to *Miller*).

²⁰¹ See *Grove Press, Inc., v. Gerstein*, 378 U.S. 577, 577 (1964) (per curiam), *rev'g*, 156 So. 2d 537 (Fla. Dist. Ct. App. 1963). Four justices said that the petition for certiorari should have been denied. The other five justices voted to reverse the Florida court's ruling, with each of those five incorporating by reference the reasoning they articulated that same day in their opinions in *Jacobellis v. Ohio*, 378 U.S. 184 (1964). See *id.* Justices Black and Douglas stuck to their position that the First Amendment protects obscene speech, however one might define it. See *Jacobellis*, 378 U.S. at 196–97 (Black, J., concurring in the judgment). Justices Brennan and Goldberg said the novel did not meet *Roth*'s definition of obscenity. See *id.* at 184–94 (Brennan, J., announcing the judgment of the Court); see also *supra* notes 59–61 and accompanying text (discussing *Roth*). Justice Stewart said that only “hard-core pornography” lacks the First Amendment's protection and “I know it when I see it.” *Jacobellis*, 378 U.S. at 197 (Stewart, J., concurring in the judgment).

Scalia would later observe, there is no doubt that the Court today would reach the same conclusion under the *Miller* criteria, including the requirement that works be judged as a whole rather than “on the basis of one or several passages that in isolation could be considered obscene.”²⁰²

B. Application to Our Four Books

What can be said, then, about the four controversial books described in Part II? Evaluating each of them as a whole, do they appeal to readers’ prurient interest? Because our focus is on minors, the question is whether the books—taking each of them in their entirety—would provoke in average children a shameful or morbid interest in sex, even if average adults’ own responses to the books would be unremarkable.²⁰³

Some of the anatomically candid passages that readers find in those books are unlikely to stimulate any sexual interest at all in average young readers. That seems true, for example, with respect to Maia Kobabe’s passages in *Gender Queer* about a traumatic pap smear and about her childhood hope that her breasts might one day have to be removed due to cancer,²⁰⁴ as well as portions of George M. Johnson’s discussion of sexual assault in *All Boys Aren’t Blue*.²⁰⁵ Moreover, some of the four books’ sexual passages presumably appeal to interests that are normal in children and thus lack the prurient appeal required to bring a state’s obscenity laws into play.²⁰⁶ That likely is true for some of Sarah J. Maas’s descriptions of adults’ sexual conduct and sensations in *A Court of Mist and Fury*,²⁰⁷ for example, and for at least some of Jonathan Evison’s references in *Lawn Boy* to fourth-grade boys wishing to touch one another’s genitals.²⁰⁸ Regarding the latter, even the conservative Christian

²⁰² *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 250 (1990) (Scalia, J., concurring in part and dissenting in part); see also *id.* at 251 (listing *Tropic of Cancer* among the works that the *Miller* criteria render nonobscene).

²⁰³ See *supra* Section I.C (discussing constitutionally permissible recalibrations of the obscenity test when dealing with children).

²⁰⁴ See *supra* Section II.A (describing *Gender Queer*).

²⁰⁵ See *supra* Section II.B (describing *All Boys Aren’t Blue*).

²⁰⁶ See *supra* notes 95–97, 161–62 and accompanying text (discussing prurient interest).

²⁰⁷ See *Sexual Development and Behavior in Children*, NAT’L CHILD TRAUMATIC STRESS NETWORK, https://www.nctsn.org/sites/default/files/resources/sexual_development_and_behavior_in_children.pdf [<https://perma.cc/6W9Q-GV2X>] (last visited May 8, 2023) (stating that, between the ages of seven and twelve, “[c]uriosity about adult sexual behavior increases—particularly as puberty approaches—and children may begin to seek out sexual content in television, movies, and printed material”).

²⁰⁸ See *id.* (stating that, approximately by the age of seven, “sexual behavior, such as touching another child’s private parts, . . . [is] not uncommon” and that “[m]ost sexual play [among children between seven and twelve years of age] is an expression of children’s natural curiosity and should not be a cause for concern or alarm”); see also *supra* Section II.D (describing Maas’s book).

organization Focus on the Family recognizes that it is normal for sexual curiosity among children as young as six to “lead to ‘playing doctor,’” and engaging in “sexual exploration with peers.”²⁰⁹

Whether those and other scattered passages in our four books are pruriently appealing is not, however, the ultimate question. Even if the books do contain passages that stimulate shameful or morbid sexual interests in children, the question is whether those books are pruriently appealing for children when taken as a whole. They are not.

Start with *Gender Queer*, the book that has drawn such strong condemnation from so many conservative quarters.²¹⁰ If one flips through it quickly, looking for material likely to offend some adults’ sensibilities about what is appropriate for children, it will not take long to spot candidates. But that is not how the First Amendment analysis works. Those who read the book in its entirety will find that Kobabe’s memoir presents a story that, taken as a whole, is far from sexually stimulating, regardless of whether one thinks of the possible stimulation as normal or shameful in nature. To a large degree, it is a story of confusion and emotional anguish that finally culminates with the author finding a greater sense of peace and self-understanding. Taking the book in its entirety, it is about the author’s struggle to be happy with eir own body and desires and to understand eir feelings of sex- and gender-based alienation from society’s prevailing norms.²¹¹ As *Publishers Weekly* puts it, “[t]his heartfelt graphic memoir relates, with sometimes painful honesty, the experience of growing up non-gender-conforming.”²¹² When describing sexual experiments or other conduct involving contact with eir body, Kobabe often reports feelings ranging from disappointment to distress; only sometimes does e report experiencing pleasure.²¹³ Children who share some of Kobabe’s feelings about their own bodies and sex- and gender-based identities might find in *Gender Queer* a welcome sense of community,²¹⁴ while other children might find that the book helps them better

²⁰⁹ *Differentiating Between Childish Curiosity and Inappropriate Sexual Interest*, FOCUS ON THE FAMILY, <https://www.focusonthefamily.com/family-qa/differentiating-between-childish-curiosity-and-inappropriate-sexual-interest/> [<https://perma.cc/6BZF-8YZN>] (last visited May 8, 2023).

²¹⁰ See *supra* Section II.A (describing *Gender Queer*).

²¹¹ See generally KOBABE, *supra* note 1.

²¹² *Gender Queer*, PUBLISHERS WKLY. (Feb. 8, 2019), <https://www.publishersweekly.com/9781549304002> [<https://perma.cc/A96W-YGG6>].

²¹³ See, e.g., KOBABE, *supra* note 1, at 140–42, 167–72.

²¹⁴ Cf. Abigail Ruhman & Rebecca Smith, *Maia Kobabe on Gender Queer: A Memoir: ‘A Lot of Why I Wanted to Write the Book Was Actually to Help Me Come Out.’*, KBIA (Apr. 18, 2022, 9:00 AM), <https://www.kbia.org/2022-04-18/maia-kobabe-on-gender-queer-a-memoir-a-lot-of-why-i-wanted-to-write-the-book-was-actually-to-help-me-come-out> [<https://perma.cc/CWR5-ULBK>] (“I did not have a book like [*Gender Queer*] for myself [when I was in high school], and it has been very, very powerful to hear from readers saying that the book meant a lot to them.”).

understand family members, friends, or classmates. Average young readers might find some of the images or passages sexually appealing (whether in a normal or prurient fashion), but they will not find that the book's net effect is to stir sexual desire. To permit governments to use obscenity laws to keep the book out of children's hands would be to restrict children's access to a great deal of nonprurient, constitutionally protected speech. That would have been permissible during the *Hicklin* era,²¹⁵ but it is impermissible today.

Considered as a whole, George M. Johnson's *All Boys Aren't Blue* is likewise far from sexually impactful.²¹⁶ Most of the book deals with matters other than sexual content or desires. When Johnson does turn to their physical encounters with others, Johnson reports that some of those experiences caused them to suffer significant emotional or physical pain, as when they had their first experience with anal sex.²¹⁷ Even if some of those passages would prod young people to think about certain kinds of sexual possibilities that a local community would regard as shameful or morbid for children, those passages are only a small portion of the book. If those sex-focused passages were removed, one still would have a rich narrative addressing such things as Johnson's relationships with family members, the sense of connection and friendship they discovered upon joining a fraternity, and the pain Johnson felt when losing one of those friends to death.²¹⁸ *Publishers Weekly* accurately reports that the book reads in large part as an "impassioned declaration[] about the importance of community and inclusive sex education, and the freedom to define oneself outside of society's conditioning."²¹⁹ Young or old, no reasonable reader could say that, taken in its entirety, Johnson's book provokes sexual desire.

Jonathan Evison's *Lawn Boy* presents a twist insofar as it describes a sexual encounter between two young children, but that twist is ultimately inconsequential.²²⁰ Apart from the few sentences in which the fictional Mike Muñoz describes losing his virginity, the central sexual episode in the novel is the encounter that Muñoz says he had with realtor Doug Goble back when the men were boys in the fourth grade. The young age of the two fictional characters when they had that encounter sits at the heart of why some find the novel so problematic.²²¹ Once again, however, those are only parts of a story that develops numerous other themes and

²¹⁵ See *supra* notes 29–48 and accompanying text (discussing *Hicklin*).

²¹⁶ See *supra* Section II.B (describing *All Boys Aren't Blue*).

²¹⁷ See JOHNSON, *supra* note 17, at 265–69.

²¹⁸ See generally JOHNSON, *supra* note 17.

²¹⁹ *All Boys Aren't Blue*, PUBLISHERS WKLY. (Apr. 15, 2020), <https://www.publishersweekly.com/978-0-37431-271-8> [<https://perma.cc/VUB4-B6GP>].

²²⁰ See *supra* Section II.C (describing *Lawn Boy*).

²²¹ See *supra* note 16 and accompanying text (describing the controversy's apparent origins). Because real-life children are not engaging in the sexual conduct, the Court's ruling in *New York v. Ferber*, 458 U.S. 747 (1982), regarding the absence of constitutional protection for speech involving the sexual exploitation of children, is inapplicable. See *supra* notes 105–08 and accompanying text (discussing *Ferber*).

plot lines. The book provides a fictional account of a young man who struggles to hold down a job and to successfully manage relationships with those around him, and who finally begins to find some stability and self-understanding by the book's end.²²² The pleasure one feels upon completing the story is not sexual in nature, but rather the pleasure that comes with having watched a likeable character confront a range of challenges, sometimes with enjoyable humor. As *Kirkus Reviews* puts it, the book is fundamentally “about triumphing over obstacles, and obstacles, and obstacles, and more obstacles.”²²³ Even if adults in a given community believe the book's references to the fourth-grade episode would stimulate shameful sexual interests in young children, one cannot plausibly contend that those children would be sexually stimulated by the book taken as a whole.

Sarah J. Maas's *A Court of Mist and Fury* contains three explicitly described sexual encounters.²²⁴ For adults and at least older minors, any sexual appeal that those portions of the book carry is likely normal, rather than shameful or morbid. The sexual conduct in which the book's adult heroine engages is both consensual and conventional—the characters' actions are akin to what one would expect to find in the latest Harlequin bestseller.²²⁵ But even if the racy passages' impact on children would be prurient in nature, those passages are still mere passages in a work that has a tremendous amount of nonprurient content. The book is approximately 650 pages in length and the three scenes featuring explicit sexual conduct fill only about twenty-five of them. The other 600-plus pages develop nontrivial storylines involving non-sexual relationships, tribal conflicts, competing interpersonal loyalties, and rumblings of possible war, as well as ordinary romantic quandaries and attractions.²²⁶ *Kirkus Reviews* says, for example, that “[a]s Feyre travels between courts and explores the consequences of her resurrection [following her life in the human world], she learns more about [the land of] Prythian, its history, and peoples (including its darkest sides: misogynistic cultures and tensions between High Fae and lesser faeries).”²²⁷ Those non-sexual storylines provide the structure for the narrative as a whole. Chief Justice Cockburn likely would have found the book obscene in nineteenth-century England, as would have American judges until the mid-twentieth

²²² See generally EIVSON, *supra* note 16.

²²³ *Lawn Boy*, KIRKUS REVS. (Feb. 20, 2018), <https://www.kirkusreviews.com/book-reviews/jonathan-eivson/lawn-boy-eivson/> [<https://perma.cc/L8TJ-686N>].

²²⁴ See *supra* Section II.D (describing *A Court of Mist and Fury*).

²²⁵ Cf. *Harlequin to Publish Its Most Explicit Romance Line Yet*, HARLEQUIN (March 15, 2007), <https://corporate.harlequin.com/press-room/harlequin-to-publish-its-most-explicit-romance-line-yet/> [<https://perma.cc/8GRR-7NFJ>] (“Harlequin DARE will deliver riveting, irresistible romance stories featuring highly explicit sexual encounters, making it the publisher's sexiest series ever.”).

²²⁶ See generally MAAS, *supra* note 2.

²²⁷ *A Court of Mist and Fury*, KIRKUS REVS. (Mar. 16, 2016), <https://www.kirkusreviews.com/book-reviews/sarah-j-maas/court-of-mist-fury/> [<https://perma.cc/2QP4-MRZN>].

century,²²⁸ but it cannot be deemed constitutionally unprotected obscenity in the United States today. To do otherwise would be to allow government officials to block readers' access to a great deal of speech that triggers none of the concerns that render obscene speech unprotected.

For all four of these books that have attracted such controversy, then, we find that any prurient sexual interest they might generate among young readers springs only from scattered passages within larger stories, stories whose thoughtfully developed contents extend far beyond sexual conduct. In that regard, they are constitutionally indistinguishable from Joyce's *Ulysses*, Lawrence's *Lady Chatterley's Lover*, and Miller's *Tropic of Cancer*.²²⁹ The cumulative impact of each of these works when taken in their entirety is not sexual in nature, much less sexually shameful or morbid. The First Amendment thus does not permit government officials to bar the dissemination of these works to children in a bid to prevent passages within them from igniting prurient thoughts among young readers. If public and private actors believe these books are harmful to children, they must deploy tools other than state and federal obscenity laws.

IV. SERIOUS VALUE

There is a second reason why the First Amendment protects those who distribute these four books to minors, but the analysis here is initially less straightforward because it involves a constitutional issue that has remained murky for nearly fifty years. Recall that, under *Miller*, the First Amendment permits government officials to treat expressive works as proscribable obscenity only if, "taken as a whole, [they] do not have serious literary, artistic, political, or scientific value."²³⁰ *Miller* thereby teaches that, even when a community finds a sexually explicit work both patently offensive and pruriently appealing, suppressing the work on those grounds would not serve objectives that are constitutionally sufficient to justify the loss of seriously valuable speech.²³¹ But the precise nature of the serious-value inquiry has proven to be elusive. What one commentator wrote in 2011 remains largely true today: "[E]ven after years of federal obscenity jurisprudence, there has arisen no set, uniform standard by which courts may discern whether a work" possesses the kind of value that the *Miller* standard contemplates.²³²

²²⁸ See *supra* notes 29–32 and accompanying text (discussing Chief Justice Cockburn's opinion in *Hicklin*).

²²⁹ See *supra* Section III.A (discussing those three points of comparison).

²³⁰ *Miller v. California*, 413 U.S. 15, 24 (1973); see *supra* notes 81–102 and accompanying text (discussing *Miller*).

²³¹ See *Miller*, 413 U.S. at 34–35.

²³² Ryen Rasmus, Note, *The Auto-Authentication of the Page: Purely Written Speech and the Doctrine of Obscenity*, 20 WM. & MARY BILL RTS. J. 253, 273 (2011).

I aim to solve that problem in the remainder of this Article. I argue that, notwithstanding the *Miller* Court's recitation of four species of value, classifying an expressive work's value as "literary," "artistic," "political," or "scientific" in nature is constitutionally inconsequential.²³³ Under the best interpretation of the First Amendment and the Court's precedents—including *Miller* itself—what ultimately matters is whether a work of any type has expressive "value" that is "serious," as I explain those terms in the pages that follow. But because my focus here is books, and because classifying value as "literary" is harmless so long as one defines that adjective broadly and does not make the mistake of believing its use is constitutionally significant, there is no harm in framing the issue using *Miller*'s familiar taxonomic vocabulary: What does it mean to say that a work has serious literary value? After explaining how the serious-value inquiry is best understood, I return to our four books to illustrate the inquiry's proper application.²³⁴

A. Refocusing the Inquiry

Although much about the serious-value inquiry has long been unclear, we do know that its objective is not majoritarian in nature. Writing for the Court in 1987's *Pope v. Illinois*,²³⁵ Justice White said the question is "not whether an *ordinary member* of any given community would find serious" value in an expressive work.²³⁶ "Just as the ideas a work represents need not obtain majority approval to merit

²³³ See *Miller*, 413 U.S. at 24.

²³⁴ If one persists in believing that taxonomy is constitutionally significant despite the arguments I will make to the contrary, *Gender Queer* and *All Boys Aren't Blue*—memoirs that explicitly or implicitly make a plea for broader societal acceptance of nontraditional understandings of sex and gender, see *supra* Section II.A (describing *Gender Queer*) and Section II.B (describing *All Boys Aren't Blue*)—may also be said to possess serious *political* value. Cf. *United States v. Various Articles of Merch.*, 230 F.3d 649, 658–59 (3d Cir. 2000) (holding that magazines celebrating the nudist lifestyle possessed serious political value because they were "publications dedicated to presenting a visual depiction of an alternative lifestyle"); FREDERICK F. SCHAUER, *THE LAW OF OBSCENITY* 146 n.41 (1976) ("While the advocacy of adultery may not be a 'political' idea in the narrowest sense of that word, this and related expressions of opinion [about society's standards of sexual conduct] seem clearly to come within what the *Miller* Court meant by 'serious political value.'"). But cf. Clay Calvert, *Regulating Sexual Images on the Web: Last Call for Miller Time, But New Issues Remain Untapped*, 23 HASTINGS COMM'NS & ENT. L.J. 507, 526 (2001) (stating that the Third Circuit in *Various Articles* "stretched the reach and meaning of serious political value . . . to a point certainly beyond what free-speech theorist Alexander Meiklejohn would have considered political speech").

²³⁵ 481 U.S. 497 (1987).

²³⁶ *Id.* at 500–01 (emphasis added); see also *id.* at 501 n.3 (finding error in a "community standards" jury instruction because "a jury member could consider himself bound to follow prevailing local views on value without considering whether a reasonable person would arrive at a different conclusion").

protection,” the Court said, “neither, insofar as the First Amendment is concerned, does the value of the work [ever depend upon]. . . the degree of local acceptance it has won.”²³⁷ Rather, fact-finders must ask “whether a *reasonable person* would find [serious artistic, literary, political, or scientific] value in the material, taken as a whole.”²³⁸ As Justice Blackmun approvingly put it in a separate opinion, the Court’s ruling “stands for the clear proposition that the First Amendment does not permit a majority to dictate to discrete segments of the population . . . the value that may be found in various pieces of work.”²³⁹

Note that *Pope* instructs fact-finders to ask what a reasonable person *would* find with respect to an expressive work’s value, not what a reasonable person *could* find. There is an important difference between the two: a “would” standard seeks a conclusion that should win the assent of all reasonable people, while a “could” standard leaves room for reasonable disagreement. Putting *Pope* and *Miller* together, then, we can say that (1) a work has serious value only if a reasonable person *would* perceive that it has such value, and so (2) a work *lacks* serious value if a reasonable person *could* perceive *no* serious value in it.

The *Pope* Court’s use of the word “would” was plainly deliberate—it prompted an exchange between Justices Stevens and Scalia, which the majority could have easily defused had its choice of words been merely inadvertent. A quick look at that exchange will help set the stage for considering how best to understand what it means for a reasonable person to find serious value in expression.

Dissenting in *Pope*, Justice Stevens argued that the majority’s “would” standard wrongly suggested “that all reasonable persons would resolve the value inquiry in the same way,” despite the fact that “there are many cases in which some reasonable people would find that specific sexually oriented materials have serious artistic, political, literary, or scientific value, while other reasonable people would conclude that they have no such value.”²⁴⁰ As the Court recognized long ago, he said, “[w]hat is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another.”²⁴¹ Justice Stevens warned that, by reducing the First Amendment’s protection down to only those works that *all* reasonable people would find valuable, the majority was establishing a principle that would permit juries to deny protection even to works

²³⁷ *Id.* at 500; *see also* *Reno v. ACLU*, 521 U.S. 844, 873 (1997) (emphasizing that the serious-value question “is not judged by contemporary community standards”); *Miller*, 413 U.S. at 34 (“The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent.”).

²³⁸ *Pope*, 481 U.S. at 501 (emphasis added).

²³⁹ *Id.* at 506 (Blackmun, J., concurring in part and dissenting in part).

²⁴⁰ *Id.* at 511 (Stevens, J., dissenting) (emphasis omitted).

²⁴¹ *Id.* at 512 (Stevens, J., dissenting) (quoting *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 157 (1946)).

akin to James Joyce's *Ulysses*—works that might hold no literary appeal for a majority of the population, but that some reasonable people would highly praise.²⁴² In Justice Stevens' view, it would be far better to say that the First Amendment shields an expressive work from obscenity restrictions “if *some* reasonable persons *could* consider it as having serious literary artistic, political, or scientific value.”²⁴³ If that were the law, the government would be obliged to prove in an obscenity case that no reasonable person could perceive serious value in the targeted work—a burden far more difficult for the government to carry than the burden that the majority's approach imposes.

The majority did not respond to Justice Stevens' critique, but Justice Scalia took on that task in a brief concurring opinion. He said that asking what a reasonable person “could” find would render the inquiry meaningless, since a reasonable person could plausibly find serious value in expression of any conceivable variety.²⁴⁴ If that were the rule, prosecutors likely could *never* prove that an expressive work lacked serious value.²⁴⁵ Yet Justice Scalia also doubted the utility of asking the “would” variation of the question, at least when it comes to literature and art. In his view, *any* inquiry about a reasonable person's assessment of literary or artistic value is based on the erroneous premise that such judgments are always the result of rational cogitation:

[I]t is quite impossible to come to an objective assessment of (at least) literary or artistic value, there being many accomplished people who have found literature in Dada, and art in the replication of a soup can. Since ratiocination has little to do with esthetics, the fabled “reasonable man” is of little help in the inquiry, and would have to be replaced with, perhaps, the “man of tolerably good taste”—a description that betrays the lack of an ascertainable standard. If evenhanded and accurate decisionmaking is not always impossible under such a regime, it is at least impossible in the cases that matter.²⁴⁶

²⁴² See *id.* (Stevens, J., dissenting); see also *supra* notes 49–57 (discussing *Ulysses*); cf. Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1580 (1988) (“[T]he ‘reasonable’ person’s judgment may not necessarily coincide with the opinion of members of the population who have a professional interest in preserving access to material in their respective areas of expertise, such as artists, writers, art scholars, scientists, and literary critics.”).

²⁴³ *Pope*, 481 U.S. at 512 (Stevens, J., dissenting) (emphasis altered).

²⁴⁴ See *id.* at 505 (Scalia, J., concurring).

²⁴⁵ See *id.* (Scalia, J., concurring).

²⁴⁶ *Id.* at 504–05 (Scalia, J., concurring); cf. María José Alcaraz León, *The Rational Justification of Aesthetic Judgments*, 66 J. AESTHETICS & ART CRITICISM 291, 291 (2008) (describing the antirealists' view that aesthetic judgments about a work are grounded entirely in the viewer's experience of encountering the work, rather than in ontological qualities that inhere in the work itself and are subject to objective truth claims). But see David Greene, *The*

When one puts all those pieces together, it might seem we are trapped in a box. The box's assembly goes like this. *Miller* promises that even patently offensive, pruriently appealing expressive works will be constitutionally insulated from obscenity laws' restrictions if they possess serious literary, artistic, political, or scientific value.²⁴⁷ Judgments about literary and artistic value often (if not always) entail judgments about aesthetic merit. To determine whether a work has such value, we look to what a reasonable person would say. But aesthetic criteria that all reasonable people would accept for distinguishing the serious from the frivolous, the valuable from the valueless, are exceptionally difficult—perhaps even impossible—to nail down, in part because aesthetic appraisals commonly do not flow from rational calculations. Questions of literary and artistic value are thus often not ones for which the law's reasonable person has useful input. And if the best we can say is that a reasonable person *could* find serious literary or artistic value in a patently offensive, pruriently appealing work, then the work does not have serious value and lawmakers will be permitted to block it from the hands of those who reasonably could find great value in its contents.

In that unhappy telling, a significant share of the problem rests with the premise that making judgments about aesthetic merit is often central to the task of assessing literary and artistic value. Is it? Like Justices Stevens and Scalia in *Pope*, many have assumed that it is.²⁴⁸ One commentator recently observed, for example, that, “since *Miller*, case-by-case, retail-level aesthetic value judgments have been part of every obscenity prosecution in the country.”²⁴⁹ A different writer finds that the serious-value inquiry is widely perceived as being “inherently subjective” and that judges often refrain from saying much about how they reach their conclusions because they are “uncomfortable with the idea of making aesthetic judgments.”²⁵⁰ A critic of the *Miller* regime argues that it was doomed from the start because of its reliance on outmoded sensibilities about aesthetic value: “[T]he very foundation of *Miller*, the belief that some art is just not good enough or serious enough to be worthy of

Need for Expert Testimony to Prove Lack of Serious Artistic Value, 10 NEXUS J. OP. 171, 173–74 (2005) (stating that, through expert witnesses, artistic “value” can be anchored to objective criteria”). In *Pope*, Justice Scalia was content to let the matter rest for the time being, but he hoped the justices would one day revisit *Miller*'s mandate. See *Pope*, 481 U.S. at 505 (Scalia, J., concurring). To date, the Court has evinced no desire to do so.

²⁴⁷ See *Miller v. California*, 413 U.S. 15, 34 (1973).

²⁴⁸ See, e.g., *United States v. McCoy*, 602 F. App'x 501, 505 (11th Cir. 2015) (concluding that the defendant's sexually graphic stories lacked serious value because they “contain tenuous plots at best”).

²⁴⁹ Brian Soucek, *Aesthetic Judgment in Law*, 69 ALA. L. REV. 381, 419 (2017); see also *id.* (stating that *Miller* made “aesthetic judgment a constitutional necessity in obscenity cases”).

²⁵⁰ Rasmus, *supra* note 232, at 272–73 (internal quotation marks omitted); accord Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 849 (2005) (stating that judges conducting the serious-value inquiry “rely almost exclusively on their intuition to guide the[m]”).

protection, [was already outdated at the time it was announced because it] mirrors the Modernist notion that distinctions could be drawn between good art and bad, and that the value of art was objectively verifiable.”²⁵¹

Chief Justice Burger’s opinion for the *Miller* majority, however, makes no explicit reference to aesthetics; all one finds are thinly elaborated references to serious value of the artistic, literary, political, and scientific varieties.²⁵² When it comes to art and literature, the ordinary meaning of the phrase “serious value” certainly does lend itself to a reading that foregrounds aesthetic appraisals: Is a work of art “serious” art, is a story a “serious” story? But that is not the best reading of the case. Not only does that reading render *Pope*’s invocation of the reasonable person problematic for the reasons Justices Scalia and Stevens separately identified, but it also pays little regard to what *Miller* itself signaled were the serious-value concept’s jurisprudential foundations.

When stating in *Miller* that the First Amendment requires an inquiry about serious value,²⁵³ Chief Justice Burger’s majority twice cited a trio of cases: *Thornhill v. Alabama*,²⁵⁴ *Roth v. United States*,²⁵⁵ and *Kois v. Wisconsin*.²⁵⁶ The *Miller* Court did not elaborate on those cases’ relevance; it simply provided pinpoint citations to particular passages within them and said they support the proposition that the First Amendment’s speech protections are “fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”²⁵⁷ But when one turns to those three rulings, one finds that, taken together, they point toward an understanding of serious value that does not require appraisals of aesthetic merit, is far more suited to the capacities of *Pope*’s reasonable person, and is grounded in values long recognized as sitting at the very heart of the First Amendment.

In 1940’s *Thornhill*, the Court said that the First Amendment “embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment,” and that “[f]reedom of discussion, if it would fulfil its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”²⁵⁸ In 1957’s *Roth*, the Court recited those lines from *Thornhill* and firmly situated sex among the subjects that people must be free to discuss in ways that are not merely pruriently appealing.²⁵⁹ Sex, *Roth* said,

²⁵¹ Amy M. Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359, 1359, 1364 (1990).

²⁵² See *Miller*, 413 U.S. at 16–37.

²⁵³ See *id.* at 26, 34–35.

²⁵⁴ 310 U.S. 88 (1940).

²⁵⁵ 354 U.S. 476 (1957).

²⁵⁶ 408 U.S. 229 (1972).

²⁵⁷ *Miller*, 413 U.S. at 34–35 (emphasis and internal quotation omitted).

²⁵⁸ *Thornhill*, 310 U.S. at 101–02.

²⁵⁹ *Roth*, 354 U.S. at 488.

“has indisputably been a subject of absorbing interest to mankind through the ages [and] is one of the vital problems of human interest and public concern.”²⁶⁰

Those observations in *Thornhill* and *Roth* set the table for 1972’s *Kois*. Decided just one year prior to *Miller*, *Kois* asked whether the First Amendment barred John Kois’s obscenity conviction for publishing an issue of his *Kaleidoscope* newspaper in which one of the stories was accompanied by two photographs of a nude man and woman “embracing in a sitting position.”²⁶¹ The story was about the arrest of one of the newspaper’s photographers on obscenity charges in Milwaukee, and the two photos “were described in the article as ‘similar’ to those seized.”²⁶² The tone of the story made clear that its author believed the charges were unwarranted; the article’s opening line stated, for example, that the arrest was “an action many believe represents an attempt to harass Kaleidoscope and its staff.”²⁶³ The Wisconsin Supreme Court sustained Kois’s conviction, finding that the photographs’ relationship to the article did nothing to shield them from that state’s obscenity laws: “We consider the news article to be an unjustifiable prop for the pictures. The pictures are not the ones involved in the story and the article is a lame excuse for their publication. The story is just as effective as news without the pictures.”²⁶⁴

The federal Supreme Court reversed, holding that the conviction violated Kois’s First Amendment rights. Citing *Thornhill* and *Roth*, the Court said the article “itself was clearly entitled to” the First Amendment’s protection²⁶⁵—indeed, the photographer’s arrest was plainly a matter of public concern. As for the two photographs, the Court found that “they were rationally related to” the topic of the constitutionally protected article, and so one could not “fairly” say the story was “a mere vehicle for the publication of the pictures.”²⁶⁶ There were rational grounds to conclude, in other words, that the newspaper’s editor had not included the article merely to provide a

²⁶⁰ *Id.* at 487; *see also id.* (stating that portrayals of sex are common in “art, literature and scientific works”); *supra* notes 59–61 and accompanying text (discussing *Roth*).

²⁶¹ *Kois*, 408 U.S. at 229–30. In its ruling below, the Wisconsin Supreme Court said that the photographs “depict[ed] a man and woman on a bed having intercourse in a sitting position.” *State v. Kois*, 188 N.W.2d 467, 469 (Wis. 1971), *rev’d*, 408 U.S. 229 (1972). The photographs depict a nude Black man seated on a bed, with a nude Caucasian woman facing him, seated on his lap, and the two individuals are intimately embracing. *See The \$100,000 Photos*, KALEIDOSCOPE (May 10–23, 1968), at 17, <https://collections.lib.uwm.edu/digital/col/lection/kal/id/1285/rec/> [<https://perma.cc/6ACK-GLTP>]. Regarding the title of the story, the arrested photographer reportedly overheard a law-enforcement officer say that “since the pictures involve a black man with a white woman,” the judge might set bail at \$100,000. *Id.*

²⁶² *Kois*, 408 U.S. at 230.

²⁶³ *The \$100,000 Photos*, *supra* note 261.

²⁶⁴ *Kois*, 188 N.W.2d at 474.

²⁶⁵ *Kois*, 408 U.S. at 231.

²⁶⁶ *Id.* at 230–31; *cf.* *State v. J-R Distributors, Inc.*, 512 P.2d 1049, 1073–74 (Wash. 1973) (finding no rational relationship between a magazine’s sexually explicit photographs and the stories they accompanied).

pretext for publishing photographs that government officials might regard as unacceptably offensive and pruriently stimulating if published on their own.²⁶⁷ In the Court's judgment, it did not matter whether the photographs would be obscene when seen in isolation: the rational relationship between the text and the two photos was sufficient to secure the photos' First Amendment protection.²⁶⁸

Miller's twice-signaled reliance upon the *Thornhill-Roth-Kois* trio indicates that the serious-value inquiry serves a function that ultimately has nothing to do with making judgments about what counts as aesthetically "serious" art or literature, or, for that matter, what counts as seriously valuable in the domains of politics and science. Rather, the inquiry aims to ensure that First Amendment protection is afforded to patently offensive, pruriently appealing works only if they non-pretextually address issues of public concern.²⁶⁹ If an expressive work does non-pretextually address one or more issues of public concern, then it has serious value, regardless of the species of the work; the speech on a matter of public concern provides the "value," and the fact that the speech is non-pretextual renders that value "serious."²⁷⁰ A sexually explicit expressive work that a community finds both patently offensive and pruriently stimulating thus *lacks* serious value—and so is constitutionally proscribable—only if the government can prove that, taking the work as a whole, either of two things is true: (1) the speaker did not address a matter of public concern in the work or (2) the speaker did address a matter of public concern in the work, but did so merely to try to insulate the work from governmental restriction on obscenity grounds.²⁷¹ If neither of those things is proven to be true, then the work

²⁶⁷ See *Kois*, 408 U.S. at 230–31.

²⁶⁸ See *id.* at 231 ("We find it unnecessary to consider whether the State could constitutionally prohibit the dissemination of the pictures by themselves . . .").

²⁶⁹ While Frederick Schauer has taken the position that evaluations of literary and artistic merit usually require the testimony of experts qualified to talk about what does or does not give value to a literary or artistic work, see SCHAUER, *supra* note 234, at 143–44, 146, he also says that serious value requires an intent to communicate an idea and to "stimulat[e] the mind," *id.* at 144–45, and that the serious-value inquiry can entail an inquiry about pretext, see *id.* at 140. Some courts have similarly blended talk of pretext with talk of literary or artistic values. In *In re Martinez*, 157 Cal. Rptr. 3d 701 (Cal. Ct. App. 2013), for example, the California Court of Appeals examined the author's credentials and expert testimony about the challenged book's literary qualities, see *id.* at 716–17, while also finding that "[t]his is not a book in which a minimal amount of literary material has been added as a sham to attempt to constitutionalize otherwise unprotected obscenity," *id.* at 718.

²⁷⁰ See SCHAUER, *supra* note 234, at 140; *Dworkin v. Hustler Mag., Inc.*, 867 F.2d 1188, 1198 (9th Cir. 1989).

²⁷¹ On a couple of occasions, courts have briefly gestured in this direction, either with respect to the public-concern piece of the puzzle or with respect to the matter of pretext. In *Dworkin*, for example, the Ninth Circuit stated without further explanation that magazine articles that "express[] opinions about matters of public concern [do] not lack 'serious literary, artistic, political, or scientific value.'" 867 F.2d at 1198. In *State v. Walden Book Co.*, the Louisiana Supreme Court concluded that the June 1980 issue of *Penthouse* magazine

has serious value and is constitutionally protected, even if local majorities find no value in the speaker's message and even if one can imagine ways in which the speaker could have communicated the message without the explicit sexual content.²⁷² In short, state and federal officials can regulate patently offensive, pruriently appealing expression, but not at the cost of restricting non-pretexual speech about matters of public concern.

Because the serious-value inquiry turns in part on speakers' intentions and not on expressive works' aesthetic merits, the very same expression that wins First Amendment protection on one story of authorial intentions might lose First Amendment protection on another.²⁷³ Take, for example, the *Kaleidoscope* article and the two accompanying photos.²⁷⁴ If Wisconsin authorities had been able to prove that John Kois published the article simply because he wanted a legal justification for putting potentially obscene photographs in his readers' hands—if, for example, one

possessed serious literary, political, and scientific value because, in addition to the sexual content, the issue contained articles on OPEC, the banking industry, the Arab world, the military draft, cameras, fashion, and other non-sexual matters. 386 So. 2d 342, 346 (La. 1980). The court wrote:

These articles are not a sham; they are not counterfeit. They are of a kind frequently and traditionally found in periodicals of general interest . . . The subject matter is important and current. These articles convey ideas, and purport to convey serious information. They do not lack serious political and scientific value, nor even serious literary value.

Id.

²⁷² See *Dworkin*, 867 F.2d at 1198; *Walden Book Co.*, 386 So.2d at 346.

²⁷³ Cf. *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182, 184 (S.D.N.Y. 1933) ("[I]n any case where a book is claimed to be obscene it must first be determined, whether the intent with which it was written was what is called, according to the usual phrase, pornographic, that is, written for the purpose of exploiting obscenity."), *aff'd*, 72 F.2d 705 (2d Cir. 1934). Some commentators will see this as a problem. In a related context, for example, Larry Alexander writes:

[T]rying to tell whether a piece of explicit sexual art is pornography based upon the intent of the speaker—that is, whether the artist intended to communicate a message or intended merely to create sexual arousal—is very difficult and problematic. One cannot, by definition, look at the art and make the distinction on that basis, since the same picture might be drawn with different intentions.

Larry Alexander, *Low Value Speech*, 83 NW. U. L. REV. 547, 552 n.19 (1989). Proving intention is indeed difficult—but often no harder, surely, than trying to prove what a reasonable person would conclude about a work's aesthetic merits. See *supra* note 246 and accompanying text (noting Justice Scalia's concerns on this point). Some intent-focused cases will be easy. See, e.g., *United States v. Rogers*, 474 F. App'x 463, 470 (7th Cir. 2012) (finding no serious value in a texted photograph of an erect penis). In any event, assigning the burden of proof to the government ensures that the speaker will benefit when the government cannot persuasively make its case that an expressive work lacks serious value.

²⁷⁴ See *supra* notes 261–68 and accompanying text (discussing *Kois*).

of Kois's associates testified that Kois revealed such a plan during an editorial meeting—then the Court might have upheld Kois's obscenity conviction, depending on whether the justices agreed that the two photographs were obscene when judged in isolation from their surrounding context. Because the state had not proved any such intent, however, and because the photographs were rationally related to the accompanying article about issues of public concern, the First Amendment shielded Kois from Wisconsin's punitive reach.²⁷⁵

When it comes to matters of proof, the rulings in *Miller*, *Pope*, and *Kois* interact in important ways. Through the authorities it invoked, *Miller* indicates that a work has serious value if it non-pretextually addresses one or more matters of public concern.²⁷⁶ *Pope* holds that a work has serious value only if a reasonable person would (and not merely could) find that a work possesses the value that *Miller* says it must have.²⁷⁷ If we added no further premises, we would say that, if a reasonable person *could* find that a patently offensive, pruriently appealing work speaks only pretextually to a matter of public concern, then we cannot say that a reasonable person *would* find serious non-pretextual value in the work and so the First Amendment does not shield the work from obscenity restrictions. In *Kois*, for example, if a reasonable person could have found that John Kois published the article merely to provide a vehicle for publishing the racy photographs—as the Wisconsin Supreme Court found that he did²⁷⁸—we would conclude that the publication lacked serious value.

But *Kois* itself adds a crucial piece to the puzzle. The Court's willingness in that case to find satisfaction in nothing more than a rational relationship between the article and the two photographs manifests the Court's judgment that, when a speaker combines speech on a matter of public concern with rationally related speech that might be deemed obscene if published in isolation, the First Amendment requires a presumption that the speaker was making a good-faith attempt to address a matter of public concern, and was not merely engaged in a pretextual ploy to evade obscenity restrictions.²⁷⁹ Or, to borrow the metaphor that Judge Woolsey used in his

²⁷⁵ The law of obscenity thereby resembles the law of "true threats": the very same statement that a recipient finds threatening might or might not be protected by the First Amendment, depending on the speaker's intent when making the statement. *See Virginia v. Black*, 538 U.S. 343, 359 (2003) ("True threats' encompass those statements where the speaker *means* to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.") (emphasis added).

²⁷⁶ *See Miller*, 413 U.S. at 20.

²⁷⁷ *Pope v. Illinois*, 481 U.S. 497, 500–01 (1987).

²⁷⁸ *See supra* notes 261–68 and accompanying text (discussing *Kois*).

²⁷⁹ *Cf. Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488, 498 (S.D.N.Y. 1959) ("Where a book is written with honesty and seriousness of purpose, and the portions which might be considered obscene *are relevant to the theme*, it is not condemned by the [federal obscenity] statute even though it justly may offend many.") (emphasis added) (internal quotation marks omitted); *see also supra* notes 188–94 and accompanying text (discussing *Grove Press*).

watershed ruling on James Joyce's *Ulysses*, the fact-finder is to presume that the speaker included the sexual components of the work in order to add "mosaic to the detail of the picture which [the speaker sought] to construct for his [audience]."²⁸⁰

That presumption provides crucial instructions to the fact-finder and to *Pope*'s reasonable person: if there is a rational relationship between the speech on issues of public concern and the sexually explicit content, then the fact-finder must rule in favor of the speaker unless the state's evidence is sufficient to overcome the presumption that the speaker addressed public matters non-pretextually.²⁸¹ In *Kois*, the only evidence that prosecutors introduced was the contested publication itself and a police officer's testimony about John Kois's status as the newspaper's publisher.²⁸² Given the presumption in favor of Kois's non-pretextual intent to report on the photographer's arrest, and given the absence of any evidence to the contrary, the only conclusion that a person could "fairly" reach, as the *Kois* Court put it²⁸³—the conclusion that a reasonable person *would* reach, as the *Pope* Court would put it instead—was that Kois believed the photographs would enhance his effort to communicate about the photographer's arrest. Perhaps he believed, for example, that seeing the photographs would help readers decide for themselves whether the photographer's arrest was legally justifiable or was instead merely an effort by law enforcement officers to harass the newspaper's staff, as the accompanying article suggested.²⁸⁴ The Court's reversal of Kois's conviction was thus appropriate.

Reading *Miller* as requiring an inquiry about speakers' messages and intentions, rather than about works' aesthetic merits, yields numerous benefits beyond fleshing out the implications of that ruling's citations to *Thornhill*, *Roth*, and *Kois*. First, the constitutional analysis no longer stumbles over the fact that reasonable people often disagree about how to appraise literary and artistic works' aesthetic merits. Aesthetics might still be relevant to the inquiry in a given case, insofar as the presence or absence of aesthetic virtues might signal the degree of effort that the speaker invested in the project, and the fact-finder's assessment of that effort might color its judgment about why the speaker created the work.²⁸⁵ But outcomes do not strictly turn on judgments about literary or artistic merit, and so the possibility of reasonable disagreement no longer presents conceptual difficulties.

²⁸⁰ United States v. One Book Called "Ulysses", 5 F. Supp. 182, 184 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934); *see also supra* notes 49–57, 184–87 and accompanying text (discussing *One Book Called "Ulysses"*).

²⁸¹ *Pope*, 481 U.S. at 500–01.

²⁸² *See State v. Kois*, 188 N.W.2d 467, 469 (Wis. 1971), *rev'd*, 408 U.S. 229 (1972).

²⁸³ *Kois*, 408 U.S. at 230–31.

²⁸⁴ *See supra* notes 261–63 and accompanying text (discussing the article).

²⁸⁵ *Cf.* United States v. Video Entitled "Eruption", No. 81-CIV-2152-CSH, 1981 U.S. Dist. LEXIS 14439, at *7 (S.D.N.Y. Sept. 3, 1981) (finding that, because a movie's sex scenes were poorly integrated with the movie's ostensible plot, "the film was intended by its producers as a 'mere vehicle' for the portrayal of sexual conduct in a patently offensive way").

Second, the First Amendment analysis no longer assigns *Pope*'s reasonable person a task that she often (if not always) is incompetent to perform. Rather than try to determine what a reasonable person would say about a literary or artistic work's aesthetic value, we focus on what a reasonable person would say about the speaker's delivery of messages concerning issues of public concern.

Third, when understood in the manner proposed here, *Miller*'s serious-value inquiry provides opportunities to build fruitful connections between the Court's obscenity jurisprudence and other areas of First Amendment law where the presence or absence of speech on matters of public concern is analytically important. The law governing the free-speech rights of government employees is an example. Public employees receive little or no First Amendment protection against adverse employer reactions when they speak in their private capacities about matters of merely private concern,²⁸⁶ but the First Amendment affords them fairly robust protection when they speak in their private capacities on matters of *public* concern.²⁸⁷ Moreover, the Court in that context has adopted a definition of "public concern" that should serve obscenity law well: "[P]ublic concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication."²⁸⁸ That description dovetails nicely with *Miller*'s reliance upon *Thornhill*'s statement that people must be able to speak freely about "all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."²⁸⁹

For another example of opportunities to build productive conceptual connections, consider the Court's ruling in *Snyder v. Phelps*.²⁹⁰ *Snyder* held that the father of a deceased American soldier could not recover tort damages from members of the Westboro Baptist Church who picketed the soldier's funeral with signs carrying

²⁸⁶ See *Schwamberger v. Marion Cnty. Bd. of Elections*, 988 F.3d 851, 856 (6th Cir. 2021) (citing *Rose v. Stephens*, 291 F.3d 917, 920 (6th Cir. 2002)) (explaining that, to state a claim of First Amendment retaliation, a public employee "must show that her speech touched on 'a matter of public concern'"); *Falco v. Zimmer*, 767 F. App'x 288, 302 (3d Cir. 2019) ("Whereas a public employee's speech involving matters of public concern are protected, speech involving matters of private concern are not protected."); *Sherrod v. Bd. of St. Lucie Cnty.*, 635 F. App'x 667, 672 (11th Cir. 2015) (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)) ("A public employee's speech is not protected by the First Amendment when the employee 'speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest.'"); *Sousa v. Roque*, 578 F.3d 164, 170 (2d Cir. 2009) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006)) ("If the court determines that the plaintiff either did not speak as a citizen or did not speak on a matter of public concern, 'the employee has no First Amendment cause of action based on his or her employer's reaction to the speech.'").

²⁸⁷ See *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)) ("[T]he First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.").

²⁸⁸ *City of San Diego v. Roe*, 543 U.S. 77, 83–84 (2004).

²⁸⁹ *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940); see also *supra* notes 253–58 and accompanying text (discussing *Miller*'s reliance on *Thornhill*).

²⁹⁰ 562 U.S. 443 (2011).

hateful messages.²⁹¹ Writing for the eight-member majority, Chief Justice Roberts said that “[w]hether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case.”²⁹² The Court stressed that “speech on matters of public concern is at the heart of the First Amendment’s protection,”²⁹³ “debate on public issues should be uninhibited, robust, and wide-open,”²⁹⁴ and “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”²⁹⁵ Largely because the picketers’ hatefully provocative signs addressed matters of public concern, the Court ruled in the picketers’ favor.²⁹⁶ *Snyder* thereby provides additional guidance about how to distinguish between matters of public and private concern, and it complements the *Miller* Court’s judgment that the values that justify restrictions on obscene speech are subordinate to the constitutionally preeminent importance of permitting uninhibited public dialogue about matters of concern to the larger community.

A fourth benefit rests in the fact that, by shifting from judgments about aesthetic merit to judgments about speakers’ treatment of matters of public concern, we build a jurisprudence that assigns greater importance to public dialogue than to excellence in artistic or literary craft. And we correspondingly reduce the risk that broad freedom of expression—freedom expansive enough to permit the inclusion of boundary-pushing sexual content in expressive works—will be reserved only for those who are sufficiently gifted to produce works of art or literature capable of winning favorable testimony from experts in those fields. Imagine two different paintings or short stories, both of which are (in the judgment of locals) patently offensive and pruriently appealing when taken as a whole. The first work makes no discernable comment on issues of public concern but is beautifully executed from an artistic or literary point of view, while the second is poorly executed but perceptibly makes a statement about an issue of public concern. If *Miller*’s serious-value inquiry is understood to be chiefly about aesthetic merit, we will spare the first work but permit government officials to restrict the second; if the inquiry is understood to be chiefly about preserving freedom to speak non-pretentually about matters of public concern, we will spare the second work but permit government officials to restrict the first. The Court’s precedents taken in their entirety leave no doubt about which of those outcomes the First Amendment prioritizes: first and foremost, the First Amendment aims to preserve people’s freedom to speak freely about public matters.²⁹⁷

²⁹¹ See *id.* at 448 (describing the signs).

²⁹² *Id.* at 451.

²⁹³ *Id.* at 451–52 (opinion of Powell, J.) (internal alteration and quotation marks omitted) (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985)).

²⁹⁴ *Id.* at 452 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

²⁹⁵ *Id.* (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

²⁹⁶ See *Snyder*, 562 U.S. at 451–59.

²⁹⁷ See, e.g., *supra* notes 290–96 and accompanying text (noting the Court’s reliance upon multiple authorities in *Snyder*).

Finally, by focusing on speech's substance rather than its aesthetic virtues, we rid ourselves of any need to police the boundaries of what counts as "art," "literature," "science," or "politics."²⁹⁸ Apart from the simple fact of its recitation of that quartet, there is no good reason to think the *Miller* Court believed those were the only four categories of speech for which the importance of freewheeling freedom of expression trumps the importance of allowing lawmakers to restrict offensive, pruriently appealing speech. Are we to believe, for example, that the Court regarded educational speech, religious speech, or journalistic speech as less important than the four species of speech that it listed?²⁹⁹ It is far preferable to read *Miller* as simply picking up on the *Roth* Court's observation in 1957 that "art, literature, and scientific works" are places where "[t]he portrayal of sex" can frequently be found,³⁰⁰ with *Miller* simply adding "political" works to the non-doctrinal mix. Moreover, if for some nonconstitutional purpose we wish to retain *Miller*'s vocabulary, we can broadly read "artistic" as covering any communication that is wholly or partially unwritten and "literary" as covering any communication that is wholly or partially written. Expression of any kind will then fall somewhere on the Court's list and we can focus our energies on assessing the substance, rather than the taxonomic classification, of the speech. That might not be how we would proceed if we had good reason to think there was something special about art and literature, narrowly defined, that uniquely brought the First Amendment powerfully into play. But we don't. What brings the First Amendment powerfully into play is non-pretextual speech on matters of public concern.

For an illustration of that final point, consider the federal district court's ruling in *Baker v. Glover*,³⁰¹ a 1991 case concerning Alabama authorities' decision to bring obscenity charges against a trucker for driving with a bumper sticker that said "How's My Driving? Call 1-800-EAT SHIT."³⁰² The court found that the bumper sticker could not be deemed obscene because (among other things) it possessed serious value of the literary variety:

²⁹⁸ *But see* SCHAUER, *supra* note 234, at 142 (stating that *Miller*'s recitation of the four species of value "are not listed as examples, but as a seemingly exclusive list of the kinds of value that are relevant," but also stating that "[t]he four categories enumerated in *Miller* should be read very broadly"); *id.* at 142–47 (wrestling with the boundaries of art, literature, politics, and science).

²⁹⁹ *But see* State v. Watson, 364 S.E.2d 683, 688 (N.C. App. 1988) ("In our view, any serious educational value of sexually-explicit materials must be derived, in turn, from some serious literary, artistic, political, or scientific value."). Some authorities worry that allowing educational value to spare sexually explicit material from regulation would allow *all* sexually explicit material to evade prosecution since one could always say that the material is sexually educational. *See, e.g.,* Rees v. State, 909 S.W.2d 264, 272 (Tex. Ct. App. 1995); SCHAUER, *supra* note 234, at 142.

³⁰⁰ Roth v. United States, 354 U.S. 476, 487 (1957); *see also supra* notes 59–61 and accompanying text (discussing *Roth*).

³⁰¹ 776 F. Supp. 1511 (M.D. Ala. 1991).

³⁰² *Id.* at 1513.

Although surely not a likely candidate for a literary prize, Baker's bumper sticker has serious literary value as a parody of stickers such as, "How's My Driving? Call 1-800-2 ADVISE." It and other similar bumper stickers can be compared in many respects to riddles, puns, and proverbs in that they are very short, usually a line or two, and concise in their message. As the Supreme Court has observed, "one man's vulgarity is another's lyric."³⁰³

Why bother with the literary invocation of parody and the comparisons to puns and proverbs? It would be more faithful to core, repeatedly emphasized First Amendment values to move directly to determining whether the bumper sticker contained speech on a matter of public concern. In essence, that is where the *Baker* court landed when it determined that the bumper sticker also possessed "political" value because it voiced a "protest against the 'Big Brother' mentality promoted by such other bumper stickers that urge the public to report the indiscretions of truck drivers."³⁰⁴ If one agrees that the bumper sticker addressed a matter of public concern, it would be remarkable, to say the least, to find that the bumper sticker could nevertheless be deemed obscene if it could not properly be classified as "literary" or "political" in nature. The First Amendment's commitment to public dialogue about matters of public concern does not wane if the expression fails to take the form of something that literary experts would find constitutes "literature," or that experts in art, science, or politics would find falls safely within those domains. Classification efforts are fruitless. All that matters for First Amendment purposes is whether expression has serious value as the Court in *Kois*, *Roth*, and *Thornhill* defined it.

B. Tailoring the Analysis for Children

As Section I.C explains, the First Amendment allows states to enact obscenity regulations that focus specifically on children, so long as states craft those regulations within the definitional framework that *Miller* provides. When it comes to the serious-value analysis that *Miller* requires, states are free to say that patently offensive, pruriently appealing expressive works cannot be distributed to children if those works, considered as a whole, lack serious value *for minors*.³⁰⁵ Under *Pope*, our focus when interpreting such a law must not be on whether the challenged work would have serious value for an ordinary or average minor within a given community; rather, we are to inquire about the value that a *reasonable* minor would find in the work.³⁰⁶

³⁰³ *Id.* at 1515 (quoting *Cohen v. California*, 403 U.S. 15, 25 (1971)). The court also found that the bumper sticker lacked prurient appeal. *See id.* at 1514–15.

³⁰⁴ *Id.* at 1515.

³⁰⁵ *See supra* note 132 and accompanying text (noting the example that New York law provides).

³⁰⁶ *See* *ACLU v. Ashcroft*, 322 F.3d 240, 254 n.16 (3d Cir. 2003) ("It does seem logical that if *Pope* requires a reasonable person standard for the 'serious value' prong of the *Miller*

Two obstacles arise when putting those principles into action, but both are surmountable. The first concerns the enormous maturational differences that exist among minors. When it comes to adults, one often can speak sensibly about what a reasonable person would conclude about a given issue, regardless of what we imagine the reasonable person's age to be.³⁰⁷ The value that a very young reasonable child perceives in an expressive work, however, will vary widely from the value that, say, a reasonable seventeen-year-old can perceive.³⁰⁸ From whose vantage point are we to conduct the serious-value analysis?

By virtue of the First Amendment's overbreadth doctrine, the answer must be that we take the perspective of a reasonable older teenager, someone at the upper end of the targeted group's age range.³⁰⁹ The overbreadth doctrine holds that a regulation is constitutionally invalid on its face if it "punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'"³¹⁰ To appreciate that doctrine's implications for us here, suppose a reasonable older teenager would readily perceive serious value in a patently offensive, pruriently appealing work, but the work's value would elude a much younger reasonable child. If we conducted our analysis from the perspective of the younger child, we would conclude that the work lacks serious value and thus may be proscribed, thereby robbing the work's creator and older teenagers of the opportunity to be in communication through the work. The loss suffered by the creator and the teenagers would be substantial collateral damage in lawmakers' campaign to protect younger children.

But if we run the analysis from the perspective of a reasonable older teenager and find that the teenager would not find serious value in the work, the overbreadth problem disappears. After all, it is difficult to imagine instances in which a young

test, then an analogous 'serious value for minors' prong of a 'harmful to minors' test would look to the value for a 'reasonable minor.'"); *supra* notes 235–46 and accompanying text (discussing *Pope*).

³⁰⁷ The *Restatement (Third) of Torts*, for example, requires fact-finders to consider a child defendant's precise age in negligence cases, but makes no such provision for adult defendants. See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 10 (AM. L. INST. 2010) (discussing the negligence liability of children); *id.* § 3 (discussing the negligence liability of adults).

³⁰⁸ See *ACLU v. Ashcroft*, 322 F.3d 240, 253–54 (3d Cir. 2003) ("[E]ven the Government does not argue, *as it could not*, that materials that have 'serious literary, artistic, political or scientific value' for a sixteen-year-old would have the same value for a minor who is three years old.") (emphasis added).

³⁰⁹ *Cf.* *Commonwealth v. Am. Booksellers' Ass'n*, 372 S.E.2d 618, 624 (Va. 1988) (concluding that the serious-value analysis should be conducted from the perspective of "older adolescents"); *accord* *Am. Booksellers Ass'n v. Webb*, 919 F.2d 1493, 1505 (11th Cir. 1990) (favorably citing the *Commonwealth* ruling), *cert. denied*, 500 U.S. 942 (1991); *Am. Booksellers Ass'n v. Virginia*, 882 F.2d 125, 127 (4th Cir. 1989) (same).

³¹⁰ *Virginia v. Hicks*, 539 U.S. 113, 119–20 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). The doctrine reflects the Court's "concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech." *Id.* at 119.

reasonable child would find serious value that eludes his or her older counterpart. And if a reasonable older teenager *would* find serious value in a work, then older teenagers cannot constitutionally be denied access to it even if younger children would find the value imperceptible. If lawmakers want to protect those younger children from the harms that might flow from exposure to such works, they can do so by other means, such as crafting obscenity laws that avoid speaking about “minors” in an age-undifferentiated fashion.

Putting the relevant pieces together, then, we can say that an expressive work has serious value for minors if a reasonable older teenager would perceive that it speaks to a matter of public concern. But what about the question of pretext?³¹¹ That query takes us to the second issue that arises when applying obscenity laws that focus specifically on protecting minors: Do we need to take the perspective of a reasonable older teenager when determining whether a work’s author opted to address a matter of public concern merely in a bid to block government regulation of speech that might be deemed obscene if published in isolation?

In short, no. *Pope* prescribed a reasonable-person standard to ensure that expressive works’ value is never dictated by local majorities.³¹² The possibility of pretext is an entirely separate concern. A work might speak to a matter of public concern in a manner that a broad audience finds greatly beneficial, but even that fact will not suffice to shield the work from the reach of obscenity laws if the reason the work’s creator spoke to the matter of public concern was simply to try to place a First Amendment obstacle in the path of government officials wishing to regulate the work’s sexually provocative components.³¹³ On the question of pretext, therefore, the perceptions of a reasonable older teenager have no unique constitutional significance.

C. Application to Our Four Books

To illustrate what all this means in practice, we can return to the four controversial books described in Part II. Do they possess the serious value required to place them beyond the reach of obscenity laws that focus specifically on protecting children? Do they, in other words, speak non-pretextually about matters of public concern in ways that a reasonable older teenager would perceive? Yes, they do.

Consider, first, the two memoirs: Maia Kobabe’s *Gender Queer*³¹⁴ and George M. Johnson’s *All Boys Aren’t Blue*.³¹⁵ In ways that no reasonable older teenager could miss, both of those works speak about social norms concerning sex and

³¹¹ See *supra* notes 261–83 and accompanying text (discussing pretext).

³¹² See *supra* notes 235–46 and accompanying text (discussing *Pope*).

³¹³ See *supra* notes 261–83 and accompanying text (discussing pretext).

³¹⁴ See *supra* Section II.A (discussing Kobabe’s memoir).

³¹⁵ See *supra* Section II.B (discussing Johnson’s memoir).

gender, as well as about individuals' struggles to understand and address questions concerning gender identity and sexual orientation.³¹⁶ All of those are matters of public concern: they are "subject[s] of legitimate news interest, . . . subject[s] of general interest and of value and concern to the public at the time of publication."³¹⁷ They are, in other words, issues about which public discussion is "appropriate to enable the members of society to cope with the exigencies of their period."³¹⁸

On the question of pretext, moreover, there plainly are rational relationships between the two books' speech on matters of public concern and any passages that might appeal to children's prurient interests and patently offend communities' standards for what is appropriate for children. Kobabe's illustrations of two individuals engaged in a form of oral sex, for example, help readers understand the chasm between what e had hoped to experience and what e actually experienced, and how that chasm fueled confusion about sexual desire.³¹⁹ Johnson's description of their first encounter with anal sex both illustrates and adds strength to their argument that there often is an important, consequential lack of queer-tailored sexual education for children, and it also helps Johnson execute their desire to provide information that some queer young readers will find useful when trying to protect themselves during their own first sexual encounters.³²⁰ Those rational relationships create a presumption that Kobabe and Johnson did not address matters of public concern simply as a pretextual ploy to get patently offensive, pruriently appealing expression into children's hands.³²¹ Nothing in the text of those books challenges that presumption; in both cases, the sexually explicit content seems clearly present to serve the aims of the surrounding narratives, rather than the other way around. Absent evidence sufficient to overcome the presumption against pretext, no reasonable fact-finder could conclude that *Gender Queer* and *All Boys Aren't Blue* lack serious value for minors.

Jonathan Evison's *Lawn Boy*,³²² and Sarah J. Maas's *A Court of Mist and Fury*,³²³ bring us to the world of fiction. Can novels and short stories speak to matters of public concern? Of course they can; indeed, that often is among the reasons we read them. On a limitless array of issues about which public dialogue is both prevalent and valuable, novels and short stories can help us better understand ourselves and others, consider aspects of the world from perspectives that differ

³¹⁶ I make no effort to catalogue all the matters of public concern that the books address. My point is simply that any reasonable older teenager would readily perceive that the books address matters of public concern.

³¹⁷ *City of San Diego v. Roe*, 543 U.S. 77, 84 (2004).

³¹⁸ *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940).

³¹⁹ *See supra* Section II.A (discussing Kobabe's memoir).

³²⁰ *See supra* Section II.B (discussing Johnson's memoir).

³²¹ *See supra* notes 261–80 and accompanying text (discussing *Kois* and the presumption that rational relationships of this sort create).

³²² *See supra* Section II.C (discussing Evison's novel).

³²³ *See supra* Section II.D (discussing Maas's novel).

from our own, think about the possible consequences of varying courses of action, and reflect on how we should live our lives.³²⁴ Fiction, in short, can help us engage more perceptively with the world around us. Reasonable people might not all agree on the specific matters of public concern that a given work of fiction addresses, but that is not what *Pope* and the First Amendment require. All that is necessary is that a reasonable person would perceive that a work does indeed address some matter of public concern,³²⁵ even if reasonable people might describe those matters differently.

In his ruling finding that James Joyce's *Ulysses* is not obscene, for example, Judge Woolsey explained that Joyce used that novel to try to show how people's minds "operate":

Joyce has attempted—it seems to me, with astonishing success—to show how the screen of consciousness with its ever-shifting kaleidoscopic impressions carries, as it were on a plastic palimpsest, not only what is in the focus of each man's observation of the actual things about him, but also in a penumbral zone residua of past impressions, some recent and some drawn up by association from the domain of the subconscious.³²⁶

How people's minds work is plainly a matter of public interest.

In his ruling finding that D.H. Lawrence's *Lady Chatterley's Lover* is not obscene,³²⁷ Judge Bryan explained that Lawrence had used the novel to "express[] his deep and bitter dissatisfaction with what he believed were the stultifying effects of advancing industrialization and his own somewhat obscure philosophic remedy of a return to 'naturalness.'"³²⁸ To develop those themes, Judge Bryan said, Lawrence contrasted Constance Chatterley's "artificial[] and steril[e]" relationship with her

³²⁴ The literature on the benefits of reading fiction is substantial. For readily accessible pieces that offer general reflections together with links to some of the scholarly literature, see Mike Kalin, *Kids Who Read Fiction Are More Engaged, Empathetic Citizens*, WBUR (Feb. 22, 2018), <https://www.wbur.org/cognoscenti/2018/02/22/civic-literature-mike-kalin> [<https://perma.cc/V7WV-LHZG>]; Francesca Lo Basso, *How Reading Fiction Can Shape Our Real Lives*, GREATER GOOD MAG. (Sept. 21, 2020), https://greatergood.berkeley.edu/article/item/how_reading_fiction_can_shape_our_real_lives [<https://perma.cc/N56G-6M2E>]; Christine Seifert, *The Case for Reading Fiction*, HARVARD BUS. REV. (Mar. 6, 2020), <https://hbr.org/2020/03/the-case-for-reading-fiction> [<https://perma.cc/DX69-XZ8B>].

³²⁵ See *supra* notes 235–46 and accompanying text (discussing *Pope*).

³²⁶ *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182, 183 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934); see also *supra* notes 49–57 and accompanying text (discussing Judge Woolsey's ruling). Judge Woolsey also found that Joyce had tried "to draw a true picture of the lower middle class in a European city." *One Book Called "Ulysses"*, 5 F. Supp. at 184.

³²⁷ *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488, 502 (S.D.N.Y. 1959).

³²⁸ *Id.* at 500.

industrially focused husband and her “deeply passionate and tender relationship” with “Mellors, the gamekeeper, sprung from the working class who, having achieved a measure of spiritual and intellectual independence, is a prototype of Lawrence’s natural man.”³²⁹ Those are all matters of public concern.

In its ruling holding that Henry Miller’s *Tropic of Cancer* is not obscene, the Supreme Judicial Court of Massachusetts approvingly noted one critic’s observation that Miller used the novel to express his disapproval of “[W]estern culture at a late stage.”³³⁰ That, too, is speech on a matter of public concern.

Evison’s *Lawn Boy* speaks unmistakably about (among other things) employment insecurity, familial responsibilities, and the difficulties that people sometimes face when trying to sort out their sexual orientations or make sense of their childhood sexual explorations.³³¹ Maas’s *A Court of Mist and Fury* speaks unmistakably about (among other things) navigating tribal loyalties, managing the ambivalence one can feel toward disliked others who have provided critical assistance in times of great need, and the conflicts that can arise when one finds other people’s well-intentioned protective urges stiflingly confining. One can readily imagine non-fiction essays, magazine stories, or talk-show conversations about any of those issues because they are matters of significant interest to the public. Speech about those matters does not become any less speech about matters of public concern when authors speak about them through fiction.

Moreover, in both novels there plainly is a rational relationship between the sexual passages and the narratives that surround them, and there is nothing in the novels’ text that would counter the resulting presumption that the authors’ treatment of matters of public concern was non-pretexual. In neither book do the non-sexual narratives read as if they were written simply to give the author an opportunity to deliver content that might otherwise get ensnared in obscenity laws’ nets. In *Lawn Boy*, Evison’s narrator reflects upon his childhood sexual encounter with another boy because it provides him with a clue regarding his own sexual orientation and because memories of that childhood encounter complicate the narrator’s relationship with a highly valued employer.³³² In *A Court of Mist and Fury*, the three sex scenes serve the surrounding plot; they illuminate the main character’s feelings toward the two lords with whom she has close ties, and they deepen the sense of conflict that the two relationships create when juxtaposed together in the main character’s life.³³³ To prove that the works lack serious value, prosecutors would need to present evidence of pretext that the works themselves do not provide.

³²⁹ *Id.*

³³⁰ *Att’y Gen. v. Book Named “Tropic of Cancer”*, 184 N.E.2d 328, 334, 334 n.10 (Mass. 1962) (quoting the testimony of a Harvard University professor).

³³¹ *See supra* Section II.C (discussing Evison’s novel).

³³² *See supra* Section II.C (discussing Evison’s novel).

³³³ *See supra* Section II.D (discussing Maas’s novel).

CONCLUSION

It is not difficult to understand why some of the books available to children today are so controversial among many parents, school officials, and lawmakers.³³⁴ The books provoking outrage contain explicit descriptions of sexual intercourse, oral sex, and masturbation, and sometimes the authors' depictions of those activities involve children.³³⁵ The book that has drawn the greatest share of angry fire—Maia Kobabe's illustrated memoir *Gender Queer*³³⁶—also contains anatomically candid drawings of such things as males with erections and two individuals orally experimenting with a strap-on phallus.³³⁷ Whether and when it is appropriate to expose minors to such material are plainly matters worthy of careful consideration.

If one takes the view that such material is never appropriate for children, can one go further and say that, by virtue of their sexually explicit content, these books are obscene in the constitutional sense of the term, at least when placed in the hands of minors, such that the First Amendment provides no protection to those who distribute them to children? In today's inflamed public discourse, lawmakers and laypeople have often made precisely that charge.³³⁸

I have argued here that those making that charge are mistaken, though mounting that defense has not been my chief aim. I have taken today's book wars as an opportunity to do two things. The first has been simply to explain the narrow circumstances in which an expressive work will—by virtue of its prurient appeal—lose First Amendment protection, even when lawmakers have tailored their obscenity regulations to focus specifically on protecting children.³³⁹ If a book does not appeal to children's shameful or morbid sexual interests when considered in its entirety, then depriving young readers of access to the work is a cost that the First Amendment does not permit lawmakers to incur in their bid to keep sexually explicit content from leading those readers' minds in prurient directions.³⁴⁰

The Article's second and more ambitious purpose has been to provide an answer to a First Amendment question that frequently arises in obscenity cases involving children and adults alike and that, for decades, has left courts grasping for holds.³⁴¹ The Supreme Court ruled in 1973 that the First Amendment permits government officials to treat expressive works as obscenity only if (among other things), they “do not have serious literary, artistic, political, or scientific value” when “taken

³³⁴ See *supra* notes 1–11 and accompanying text (describing the controversy).

³³⁵ See *supra* Part II.

³³⁶ See KOBABE, *supra* note 1.

³³⁷ See *supra* Section II.A.

³³⁸ See *supra* notes 1–11 and accompanying text.

³³⁹ See *supra* Parts I, III.

³⁴⁰ See *supra* Part III.

³⁴¹ See *supra* Part IV.

as a whole.”³⁴² But at least when it comes to literary and artistic value, the precise nature of the serious-value inquiry has never been clear. Many have joined Justices Stevens and Scalia in assuming that appraisals of literary and artistic value rest upon assessments of aesthetic merit.³⁴³ But objective, non-controversial criteria for making those assessments are elusive and so the inquiry is ill-suited to the capacities of the reasonable person from whose perspective the Court has said we must evaluate works’ value.³⁴⁴

I have charted a different path. I have argued that, notwithstanding *Miller*’s reference to four species of value, classifying an expressive work’s value as “literary,” “artistic,” “political,” or “scientific” in nature is constitutionally inconsequential. Under the best interpretation of the First Amendment, *Miller* itself, and the Court’s other precedents, what matters is whether a work has expressive “value” that is “serious,” regardless of whether the form of the work is “literary” or “artistic,” and regardless of whether the work’s subject matter is “political” or “scientific.” An expressive work has the requisite serious value if it non-pretentually speaks to one or more matters of public concern. More precisely for our child-focused purposes here, even if an expressive work patently offends a community’s sensibilities about what is appropriate for children and even if it appeals to children’s morbid or shameful interest in sex when considered as a whole, it still retains the First Amendment’s protection if the author addressed issues of public concern in the work in ways that a reasonable older teenager would perceive and the author did so for reasons other than trying to shield the work’s sexually explicit components from the reach of state or federal obscenity laws. Using four currently controversial books as illustrations, I have described ways in which works of non-fiction and fiction alike can meet those requirements.

Conducting the serious-value analysis in the way proposed here will resolve a quandary that has long stymied courts and commentators, will create an analytic agenda that the law’s reasonable person can execute, and will bring the serious-value inquiry into powerful alignment with priorities and values that have long been recognized as sitting at the heart of the First Amendment.

³⁴² *Miller v. California*, 413 US. 15, 24 (1973); *see supra* notes 81–102 and accompanying text (discussing *Miller*).

³⁴³ *See supra* notes 240–46 and accompanying text (discussing those justices’ opinions in *Pope*).

³⁴⁴ *See supra* notes 235–46 and accompanying text (discussing *Pope* and its reasonable-person requirement).