THE PRURIENT INVESTMENT: HOW FIRST AMENDMENT SPEECH JURISPRUDENCE OBSTRUCTS THE MOVEMENT FOR LGBT EQUALITY

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I. INTRODUCTION

The past half-century of First Amendment speech jurisprudence has informed, if not directly affected, popular conceptions of sex and sexuality in the United States. The U.S. Supreme Court's treatment of expression[1] that contains or depicts sexually related content, including the regulation of obscenity, adult entertainment venues, and pornography, influences the way society and lawmakers value sex and sexual minorities.[2] This Note argues that the Court has indirectly silenced LGBT related speech and impeded the movement for LGBT equality by discriminately and

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[1] This Note uses the term "expression" to mean all forms of speech, content, and depictions that fall under First Amendment speech jurisprudence. This includes all pictures, images, writings, and publications, in physical or electronic form; all types of audio and video recordings and compilations; all live or recorded entertainment; and any other content that communicates or expresses ideas or information.

[2] This Note uses the term "sexual minorities" to mean and encompass groups and individuals outside of the traditional sexual conceptions of heterosexuality and monogamy. In theory, this would include individuals who engage in polyamory, pedophilia, bestiality, and nonconsensual sex, but for purposes of this Note and its argument, "sexual minorities" can functionally be equated with the LGBT community, as defined *infra* note 3.

unjustifiably affording sexually related speech minimal constitutional protection.[3]

A 2011 Supreme Court case is particularly useful in illustrating the development of sexually related speech jurisprudence over the past fifty years and demonstrating how governments disvalue sexually related speech. In *Brown v. Entertainment Merchants Ass'n*,[4] the Court held a California law[5] that restricted the sale and rental of violent video games to minors unconstitutional under the First Amendment.[6] The Court invalidated the law on three grounds: (1) video games are speech,[7] (2) violent speech is not categorized as unprotected obscenity,[8] and (3) the law did not survive strict scrutiny review.[9]

Thus, Justice Antonin Scalia's majority opinion in *Entertainment* reaffirmed the Court's longstanding precedent that only "depictions of 'sexual conduct'" constitute obscenity.[10] This trenchant statement, and its inclusion at the outset of an opinion that involved *violent* content, sheds light on how the Court values sexually related content as a whole.

Parts II and III of this Note use the *Entertainment* Court's second and third lines of reasoning to showcase the inconsistent, contradictory, and inherently subjective nature of sexual speech jurisprudence. These parts show how the judicial, legislative, and executive branches of state and federal governments have regulated[11] sexually related speech almost entirely based on its content. The contrast between the juridical treatment of sexual speech on one hand, and violent speech on the other, demonstrates that state and federal governments act under the belief that the public should be protected from the harmful effects of sexual expression.

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[3] "LGBT" includes individuals that identify, or question their identity, as lesbian, gay, bisexual, transsexual, or transgender. The term "LGBT speech," and variations thereof, means any form of expression that is by, for, about, or in any way concerns LGBT individuals or the LGBT community.

[4] Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011).

[5] CAL. CIV. CODE §§ 1746–1746.5 (West 2006).

[6] *Brown*, 131 S. Ct. at 2742.

[7] *Id.* at 2733.

[8] *Id.* at 2734.

[9] *Id.* at 2738–39.

[10] *Id.* at 2734 (citing Miller v. California, 413 U.S. 15, 24 (1973)).

[11] This Note uses the terms "regulate" and "regulations" to encompass any form of legislation, agency-based rules and regulations, and other forms of government-implemented and enforced actions that have the power of mandating the conduct or content of any subset of the population. Specifically, regulating any form of expression includes censoring, limiting, or

Specifically, Part II uses the *Entertainment* Court's second line of reasoning to discuss the nature and history of obscenity as an unprotected category of speech under the First Amendment. Subpart A casts doubt on the *Entertainment* Court's seemingly rigid rule that obscenity is and can only be sexual by discussing how the Court has previously added, removed, and adjusted the content of these unprotected categories. Subpart B discusses why obscenity should not be an unprotected category of speech.

Part III uses the *Entertainment* Court's third line of reasoning to assess lawmakers' relative valuations of the harms and benefits of both sexual and violent speech. In doing so, Part III discusses how other kinds of unobscene sexually related expression, like adult venues and publications, have undergone inconsistent constitutional review by the Court with minimal, if any, legal foundation. Part III demonstrates that sexually related speech jurisprudence is based entirely on morality, rather than on logic or precedence, which suggests that various levels of government are motivated by the notion that sex is more harmful than violence.

Part IV shifts to the Note's primary argument. Subpart A shows how the "majority" indiscriminately censors LGBT related content via the obscenity doctrine's "contemporary community standards"[12] test. Subpart B shows how governments have impeded the LGBT equality movement by regulating sexually oriented speech. Subpart C demonstrates how the media and other information sources can and do limit the LGBT related content they disseminate, even when they are not legally obligated to do so. Subpart D discusses how each of these limitations on public viewership and access to LGBT related speech has led to social and institutional discrimination against LGBT individuals and stagnated the movement for LGBT equality. Part IV aims to show how the disproportionate restriction of sexual LGBT related speech from public airwaves reinforces the majoritarian public's alienation of, and aversion to, LGBT groups, which paves the way toward more blatantly discriminatory laws.

Part V offers two solutions to the problems described in Part IV. The first solution is to eliminate the unprotected category of obscenity. The second solution is to subject regulations of sexually related speech to heightened judicial review.

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otherwise reducing or negatively affecting the prevalence of the expression.

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

Overall, this Note is designed to show that First Amendment speech jurisprudence has and continues to play a substantial role in the movement for LGBT equality.

II. THE COURT'S MORALLY-BASED UNDERVALUATION OF SEXUAL EXPRESSION

The First Amendment was intended to protect *all* types of speech from government interference, including the most offensive, unpopular, and vulgar.[13] In his 1966 dissenting opinion in *Ginzburg v. United States*, Justice Potter Stewart described the use of personal values to regulate speech as the "hallmark of an authoritarian regime,"[14] and in 2004, the Court reasoned that content-based prohibitions are "repressive [to] the lives and thoughts of a free people."[15] By stifling dissenting or minority viewpoints, government control of speech threatens democracy itself.[16]

The Court, however, seems to forget these principles when assessing sexually related speech regulations. For example, the obscenity doctrine gives legal effect to the values and biases of individual community members,[17] and in general, sexually related speech jurisprudence inherently causes the government to invoke *nothing but* morality in deciding what content to regulate. Despite the different approaches taken to assess sexually related speech regulations, it is important to take note that the First Amendment does not explicitly exclude sexually related speech and that "obscene" materials were widely circulated at the time of its ratification. Together, these facts indicate that free speech protection extends to even the most obscene material.

Generally, courts review content-based speech regulations under strict scrutiny.[18] In order for the regulation to survive strict scrutiny, the government must demonstrate that the regulation is necessary to achieve a

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[13] *See, e.g.*, Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); Ginzburg v. United States, 383 U.S. 463, 482 (1966) (Black, J., dissenting); Elizabeth M. Glazer, *Seeing It, Knowing It*, 104 NW. U. L. REV. COLLOQUY 217, 234–35 (2009) [hereinafter *Seeing It, Knowing It*].

[14] *Ginzburg*, 383 U.S. at 498 (Stewart, J., dissenting).

[15] Ashcroft v. ACLU, 542 U.S. 656, 660 (2004).

[16] *See* PAUL R. ABRAMSON & STEVEN D. PINKERTON, WITH PLEASURE: THOUGHTS ON THE NATURE OF HUMAN SEXUALITY 192 (1995).

[17] *See infra* Part IV.A.

[18] Republican Party of Minn. v. White, 536 U.S. 765, 774 (2002).

"compelling interest" and that it is "narrowly-tailored,"[19] such that there are no less-restrictive means available to achieve the underlying goal.[20] Certain "categories" of speech, however, may be regulated based on their content with virtually no constitutional roadblocks.[21] These categories include "fighting words,"[22] speech that is "directed to inciting or producing imminent lawless action,"[23] and obscenity.[24] Despite being content-based by definition,[25] regulations of speech that fall within one of these categories are nearly immune from judicial scrutiny.[26]

Over the past forty years, the Court has invoked dramatically different rationales for deeming certain content obscene and despite the inconsistencies, each justification remains good law. These inconsistences make obscenity jurisprudence indisputably subjective by nature as a court can effectively choose to apply whatever Supreme Court precedent would result in the desired outcome.

The Court defines obscenity as "material which deals with sex in a manner appealing to the prurient interest,"[27] the prurient interest being "material having a tendency to excite lustful thoughts."[28] Notwithstanding this purported "definition," Justice Potter Stewart infamously explained that due to obscenity's indefinable nature, "I know it when I see it."[29]

In 1973, the Court set forth the current test for obscenity in *Miller v. California*.[30] The *Miller* test gives "basic guidelines" for determining obscenity:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently

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[19] *Id.* at 774–75.

[20] *Id.*

[21] United States v. Stevens, 130 S. Ct. 1577, 1584 (2010); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 540, 986–87, (3d ed. 2006).

[22] *Chaplinsky*, 315 U. S. at 572.

[23] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

[24] Roth v. United States, 354 U.S. 476, 485 (1957); *see also* Heidi Kitrosser, *Containing Unprotected Speech,* 57 FLA. L. REV. 843, 845 (2005) (listing categories of unprotected speech).

[25] CHEMERINSKY, *supra* note 21, at 933.

[26] *See* CHEMERINSKY, *supra* note 21 (explaining that governments can regulate and censor categorized speech for any reason that is merely "rational").

[27] *Roth*, 354 U.S. at 487.

[28] *Id.* at 487 n.20.

[29] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

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

> offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[31]

In invalidating a law that restricted the distribution of violent video games to minors, the *Entertainment* Court held that violent expression did not fit into one of the extant categories of unprotected speech, and that it could not be used to create a new category.[32] Justice Scalia stated that the violent video games could not constitute obscenity because that category is reserved for "sexual conduct" alone.[33] Relying predominantly on the one-year-old precedent in *United States v. Stevens*, which precluded the creation of new categories,[34] the Court invalidated California's law because violent speech could not possibly be obscene.[35]

This part aims to show that the categories of unprotected speech are not as rigid and impermeable as the *Entertainment* Court suggests. Subpart A demonstrates that because categories have been added, removed, and altered over time, the *Entertainment* Court over-relied on the *Stevens* precedent and acted under an unjustified bias against free-flowing sexual expression. Subpart B questions the logic to the existence of the obscenity category, as well as the logic in limiting its juridical definition to sexual content alone. By demonstrating how the Court predetermined the outcome in *Entertainment*, this part highlights how extant jurisprudence involving the unprotected categories sheds light on the Court's relative valuations of sex and violence.

Before proceeding, it should be made clear that this Note does not intend to argue for an opposite holding in *Entertainment*, in favor of regulating violent video games. Instead, it aims to identify arguments within *Entertainment* and other First Amendment speech cases to demonstrate the Court's use of morality in deciding to silence unfavorable sexually related speech.

A. ARBITRARY JURIDICAL STANDARDS

The *Entertainment* Court afforded violent video games the highest level of constitutional protection after determining that California

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[31] *Id.* at 24.

[32] Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2734–36 (2011).

[33] *Id.* at 2734.

[34] *Id.* (construing United States v. Stevens, 130 S. Ct. 1577, 1586 (2010)).

[35] *Id.* at 2735.

regulated an uncategorized type of speech based on its content.[36] The Court held that the violent speech at issue could neither fit within the extant category of obscenity, nor form "a wholly new category" of unprotected speech.[37] This subpart discusses the latter rationale to demonstrate the wide latitude of judicial discretion in obscenity jurisprudence.

In *New York v. Ferber*,[38] decided in 1982, the Court recognized child pornography as an entirely new unprotected category.[39] In *Ferber*, state prohibitions of the exhibition, sale, and distribution of child pornography were constitutionally permissible, even if the content itself was not obscene.[40] The *Ferber* Court refused to apply the *Miller* test for obscenity,[41] under which child pornography would certainly have passed, and instead invoked an unprecedented interest-balancing test to justify creating a *new* category of unprotected speech.[42] After balancing the "expressive interests" in prohibiting the speech at issue, the Court concluded that the danger that child pornography posed to children outweighed any individual free speech interests.[43]

The *Entertainment* Court disregarded *Ferber* and distinguished the case on the grounds that it concerned violent speech, and explicitly precluded the creation of a new category without proof that the speech has a "long . . . *tradition* of proscription."[44] Thus, any speech that could not fit within an extant category must be afforded the highest level of constitutional protection unless the government could provide "persuasive evidence" that this type of speech had been silenced throughout history.[45]

In invoking this standard, the Court errantly conflated the longstanding notion that the *categories*, as doctrinal constructs, are nearly as old as the nation itself[46] with the notion that the *censorship* itself must

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[36] *Id.* at 2738.

[37] *Id.* at 2734–36.

[38] New York v. Ferber, 458 U.S. 747 (1982).

[39] *Id.* at 763–66.

[40] *Id.* at 764.

[41] *Id.* at 761.

[42] *Id.* at 764–65.

[43] *Id.*

[44] Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2734 (2011) (emphasis added).

[45] *Id.*

[46] *See, e.g.*, United States v. Stevens, 130 S. Ct. 1577, 1580, 1584 (2010) ("Since its enactment, the First Amendment has permitted restrictions on a few historic categories of speech . . . and has never 'include[d] a freedom to disregard these traditional limitations.'"); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991)

be old. California, under this new standard, failed to provide the level of evidence required to show that the government traditionally silenced what the Court defined to be "violent entertainment" speech "directed at children."[47]

Given that there is no traditional basis for the regulation of child pornography, the *Ferber* Court arbitrarily imposed two different tests for the creation of a new category. For violence, the Court said tradition ruled—but for *sexual* violence, the Court balanced its own valuation of the harms within child pornography.[48]

The permanency of the unprotected categories, upon which the Court relied in refusing to add violent speech, is further brought into question by the fact that blasphemy and libel were removed from First Amendment jurisprudence.[49] *Ferber* helps demonstrate how the seemingly rigid categories are actually malleable, as they can be added to, subtracted from, and otherwise adjusted to include types of speech that the Court deems inappropriate.

B. THE UNIQUENESS OF THE OBSCENITY CATEGORY

Acknowledging that obscenity as a category unprotected by the First Amendment is inherently rife with courts' value judgments, the next question is: what is it about *sexual* content that merits government intrusion, both legally and morally? Sexual depictions are dissimilar from all of the other categories of censorable speech. For example, fighting words and speech that incites criminal activity directly threaten or cause physical harm to others.[50] In contrast, the rationale for excepting obscene content from constitutional protection does not rest in public safety or in

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(Kennedy, J., concurring) (describing the categories as "historic and traditional [and] long familiar to the bar").

[47] *Brown*, 131 S. Ct. at 2734–35, 2737. In his dissenting opinion, Justice Clarence Thomas spent ten pages identifying a longstanding tradition of *parents' controlling their children* and the speech to which they are exposed. *Id.* at 2751–61. However, the *Brown* majority refused to consider this evidence—instead, seeking only evidence demonstrating a longstanding tradition of restricting what it deemed "minors' consumption of violent entertainment." *Id.* at 2737.

[48] It should be noted that this Note does not put forth the argument that *Ferber* should have been decided differently or that child pornography should not be regulated or prohibited.

[49] *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 506 (1952) (failing to recognize blasphemy as a category). *Compare* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (including libel as an unprotected category of speech), *with* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964) (extending constitutional protection to certain kinds of libelous speech).

[50] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

preventing harmful or destructive criminal activity—rather, its rationale rests predominately, if not entirely, on whether the content *offends.*[51] Assessing offensiveness is an entirely subjective determination based on one's prior experiences and the content to which he or she has previously been exposed.

The subjectivity and unjustifiability of limiting obscenity to sexual content is further demonstrated by looking to its traditional and popularly conceived definition. According to *Webster's Dictionary*,[52] "obscene" extends far beyond sexual content and should include content that depicts violence, excretory functions, physiological dismemberment or decomposition, racism, sexism, poverty, genocide, profanity, and anything one could find "grossly repugnant to the generally accepted notions of what is appropriate."[53] Why, then, does the Court so adamantly maintain that obscenity may only involve sex, and sex alone? The Court's restriction of obscenity to sexual content[54] underscores the notion that sex is an aspect of life that is left open for the public to infiltrate, influence, and as the following parts will show, use as an avenue for discrimination.

In sum, the Court's selective creation and abolishment of the unprotected categories, and its inconsistent and unjustifiable reliance on tradition and relative government and individual interests, indicates that it uses value-based judgments to facilitate the censorship of sexually related content.

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[51] Miller v. California, 413 U.S. 15, 24 (1973) (obscenity must be "patently offensive"); *see also* James Peterson, *Behind the Curtain of Privacy: How Obscenity Law Inhibits the Expression of Ideas About Sex and Gender*, 1998 WIS. L. REV. 625, 632 (1998) (citing JOEL FEINBERG, OFFENSE TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW 1–2 (1985) ("[L]aws regulating obscenity are not founded on the principle that obscenity causes harm to anyone. Rather, obscenity is regulated because it offends, that is, it wrongfully engenders feelings of disgust and revulsion in others." Thus, regulating obscenity "is proper insofar as it serves to protect people from being seriously offended by sexually explicit material.").

[52] MERRIAM-WEBSTER, WEBSTER'S THIRD NEW INT'L DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED, 1557 (Philip Babcock Gove & the Merriam-Webster Editorial Staff, eds., 2002).

[53] *Id.* (applying the quoted terms from MERRIAM-WEBSTER, violence, excretory functions, physiological dismemberment or decomposition can be described as "filthy, grotesque, or unnatural," and "disgusting to the senses"; racism, sexism, poverty, and genocide can be described as "offensive or revolting as countering or violating some ideal or principle," "abhorrent to morality or virtue," and "repulsive by reason of malignance, hypocrisy, cynicism, irresponsibility, crass disregard of moral or ethical principles"; profanity can be described as "marked by violation of accepted language inhibitions and by the use of words regarded as taboo in polite usage").

[54] Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2734 (2011).

III. THE INCONSISTENT AND UNFOUNDED SEXUALLY RELATED SPEECH JURISPRUDENCE DEMONSTRATES LAWMAKERS' INTENTION TO PROTECT PEOPLE FROM SEX

The third and final rationale of the *Entertainment* Court was that the California law regulating video games failed to survive strict scrutiny.[55] By holding that video games constitute speech,[56] and that this speech was unobscene and therefore could not be permissibly regulated based on content,[57] the Court deemed that the law afforded video games the highest level of First Amendment protection. Thus, California had to show that the law was necessary to achieve a "compelling interest" and that it was "narrowly-tailored," such that there are no less-restrictive means available to achieve the underlying goal.[58]

This part demonstrates various ways in which the Court's rationale has led lawmaking bodies to regulate sexually related expression that is not actually obscene. While in theory only *obscene* sexual speech may be regulated based on its content,[59] content-based regulations of virtually all forms of sexual expression can and have passed constitutional muster. This part explores how the Court's inconsistent rationales have allowed lawmakers to discriminately censor sexual speech under the belief that the public needs to be protected from sexual content and ideas.

Subpart A demonstrates how laws that ban public nudity and place zoning restrictions on adult venues are actually content- and value-based and are not supported by the Court's rationale of mitigating the "secondary effects" of these venues. Subpart B discusses the subjective power a government has in being able to censor certain types of sexually related speech that is admittedly unobscene if it determines that the speaker's purpose was to incite arousal. Subpart C examines how the Court requires proof of *causation* between violent speech and specific harms in order to censor it, but upholds sexual censorship laws when there is at most only a *correlation* between the speech and its purported harms. Finally, Subpart D shows how lawmaking bodies have taken the stance that the public needs to be protected from sexually related speech.

Overall, this part discusses the harms in *Entertainment*'s violent video games as demonstrated by the State and compares them to the

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[55] *Id.* at 2738–39.

[56] *Id.* at 2733.

[57] *Id.* at 2734.

[58] *Id.* at 2738–39.

[59] *See supra* notes 17–24 and accompanying text.

purported harms resulting from certain sexual expression under which sexually related regulations have passed constitutional muster. It concludes by comparing how violent and sexually related expression, when the viewer is a consenting adult,[60] are treated differently depending on whether the purpose of the expression is sexual or aggressive.[61] One benefit to the inherent subjectivity of First Amendment speech jurisprudence is its capacity for institutional exposure: by analyzing how and where governments take advantage of their discretion to regulate certain types of speech, the public can better assess which voices they aim to silence.

A. DISPROVING THE RATIONALE THAT CERTAIN SEXUAL EXPRESSION REGULATIONS ARE "CONTENT-NEUTRAL"

Certain sexual expression regulations are upheld on the rationale that they are aimed to mitigate the "secondary effects" of the expression and not to suppress the actual content of the expression. This subpart explores how the Court has regulated sexually related speech on the basis of its perceived "low value" and how its attempt to censor sexual content on the basis of its "secondary effects" is anything but content-neutral.

1. Regulating Sexually Related Speech on the Basis of Its "Low Value"

In 1976, in *Young v. American Mini Theatres, Inc.*,[62] the Supreme Court upheld a city ordinance that limited, and at times entirely prohibited, the establishment of adult movie theatres on public streets.[63] The Court explicitly admitted that the ordinance's prohibitions were motivated entirely by the films' *content*,[64] but gave little reasoning for subjecting this speech to "a wholly different, and lesser, magnitude" of constitutional protection.[65] In fact, the five-member plurality could not agree on a single rationale for holding that a content-based regulation of unobscene expression did not merit full First Amendment protection.[66] Nonetheless,

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[60] *See infra* note 142–44 and accompanying text.

[61] *See infra* Part III.D.

[62] Young v. Am. Mini Theatres, Inc., 427 U.S. 50 (1976).

[63] *Id.* at 72–73.

[64] *Id.* at 70.

[65] *Id.*

[66] *See* Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46 (1986) (explaining how in *Young*, "although five Members of the Court did not agree on a single rationale for the decision," it agreed that the regulation regarding the permissible proximity of adult theaters to certain venues

the Court employed a subjective valuation of adult content's importance to society, based on its determination that "few of us would march our sons and daughters off to war to preserve the citizen's right" to access adult content.[67] By doing so, it unjustifiably sidestepped the precedent of reviewing content-based regulations under strict scrutiny. Unsurprisingly, adult videos failed to meet the ambiguous "march off to war" requirement for First Amendment protection, and the ordinance was upheld.[68]

In assessing *Entertainment*[69] under the *Young* standard,[70] it is difficult to imagine that anyone would march off to war to defend the ability to dismember, decapitate, disembowel, rape, and ethnically cleanse a video game opponent. Nonetheless, the *Entertainment* Court disregarded First Amendment precedent in assessing the constitutionality of the California regulation by not considering whether video games were of a sufficiently low value to fit within *Young*'s content-based exception to constitutional protection.[71]

2. The Impractical, Nonfunctional, and Morally Based Censorship of Sexual Content on the Basis of "Secondary Effects"

In a series of cases from the late twentieth century, the Court held that regulating sexually related speech based on its content may be constitutionally permissible where the government's purported goal is to prevent the speech's "secondary effects."[72] These "secondary effects" are defined as undesirable effects correlated with the speech but that have nothing to do with the speech's impact on the listener.[73] Courts deem these

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did not violate the First Amendment).

[67] *Young*, 427 U.S. at 70.

[68] *Id.* at 86 (Powell, J., concurring).

[69] Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011).

[70] The Court later invoked the same "march our sons and daughters off to war" standard for protected speech rights in *City of Erie v. PAP's A.M.*, 529 U.S. 277, 294 (2000).

[71] It should be noted that *Young*'s holding may have been contingent on the fact that the ordinance did not entirely *prohibit* the exhibition of adult films, but rather regulated the development and proximity of adult theaters. *See Young*, 427 U.S. at 52. However, the *Brown* Court similarly failed to consider whether California might be permitted to zone out violent video game distributors from 94 percent of the state, as the zoning ordinance in *Renton* did with adult theaters (*see Renton*, 475 U.S. at 52–54 (1986)), or more reasonably, whether California could have zoned video game distributors away from locations to which minors frequently have access.

[72] *See, e.g.*, *PAP's A.M.*, 529 U.S. at 291–96; Barnes v. Glenn Theatre, Inc., 501 U.S. 560, 581–86 (1991) (Souter, J., concurring); *Renton*, 475 U.S. at 47–48.

[73] *See Renton*, 475 U.S. at 49.

regulations "content-neutral," even though they target speech based on sexual content.

The "secondary effects" rationale has been used to regulate adult venues like strip clubs,[74] pornographic movie theaters,[75] and adult book and film distributors.[76] The Court first implemented this "secondary effects" rationale to uphold a regulation of unobscene speech in 1972,[77] suggesting that state regulations that directly target venues depicting adult content could be treated as content-neutral and therefore be without First Amendment protection.[78] Since the city ordinances in these "secondary effects" cases were justified as serving only to combat adult venues' "deleterious effects"[79] on "societal order and morality,"[80] these content-based laws were held to a lower standard of constitutional protection.

For example, in *City of Erie v. PAP's A.M.*,[81] the Court deemed an ordinance banning all public nudity constitutional because the purpose of the ordinance was actually to ban nude dancing venues.[82] The Court found that the ordinance's aim was not to suppress the venues' sexual expression, but rather to protect "the public health, safety and welfare"[83] from the "'violence, sexual harassment, public intoxication, prostitution, [and] the spread of sexually transmitted diseases'"[84] that result from "the presence of even one such establishment."[85]

The Court's "secondary effects" rationale poses two problems relating to judicial objectivity and the use of value judgments in assessing protected speech. First, the "secondary effects" specified by state and local governments are oftentimes incurable by the regulations at issue. In at least five cases from the last thirty years, the Supreme Court upheld local

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[74] *See, e.g., PAP's A.M.*, 529 U.S. at 277; *Barnes*, 501 U.S. at 560; City of Newport, Kentucky v. Iacobucci, 479 U.S. 92 (1986); N.Y. State Liquor Auth. v. Bellanca, 452 U.S. 714 (1981); California v. LaRue, 409 U.S. 109 (1972).

[75] *See, e.g., Renton*, 475 U.S. at 41; California v. LaRue, 409 U.S. 109 (1972).

[76] *See, e.g., Barnes*, 501 U.S. at 560.

[77] *LaRue*, 409 U.S. at 116 (acknowledging that some of the adult content showcased in liquor-serving venues may not qualify as obscene under the Court's prior precedents).

[78] *Renton*, 475 U.S. at 47.

[79] *PAP's A.M.*, 529 U.S. at 293.

[80] *Barnes*, 501 U.S. at 568.

[81] *PAP's A.M.*, 529 U.S. at 277.

[82] *Id.* at 302.

[83] *Id.* at 290 (quoting the preamble to the *Erie* ordinance).

[84] *Id.* at 290 (quoting the preamble to the *Erie* ordinance).

[85] *Id.* at 291 (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986) (internal quotation marks omitted)).

regulations of fully nude dancing because such a venue's atmosphere inevitably fosters crime and moral degradation.[86] In each of these cases, however, the venues could have complied with their respective regulations by having their dancers wear "pasties" and "G-strings" instead of dancing fully nude.[87] It is dubious that a bit of cloth, stretching no more than a couple of inches, could itself abate "'the debasement of both women and men'" as well as the "'violence, public intoxication, prostitution and other serious criminal activity'" the City of Erie claimed resulted from full-nude strip clubs.[88]

The *PAP's* Court recognized this practical flaw in the ordinance, admitting that "requiring dancers to wear pasties and G-strings," as opposed to full nudity, "may not greatly reduce these secondary effects."[89] As such, the rationale behind the "secondary effects" exception to First Amendment protection falls flat: if it is evident that regulating the speech will not remedy the secondary effects, the regulation is probably targeting the speech's content.[90]

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[86] *See id.* at 290–91; Barnes v. Glenn Theatre, Inc., 501 U.S. 560, 568, 585 (1991) (holding that a local statute prohibiting fully nude dancing at adult entertainment venues was permissible for "protecting societal order and morality" and "combating prostitution and other criminal activity"); City of Newport, Kentucky v. Iacobucci, 479 U.S. 92, 96–97 (1986) (holding that Newport had the authority to enact an ordinance prohibiting nude dancing in order to prevent "crime, disorderly conduct and juvenile delinquency" and the "deterioration of the City's neighborhoods" (quoting the preamble to the Newport ordinance)); N.Y. State Liquor Auth. v. Bellanca, 452 U.S. 714, 718 (1981) (holding that the New York legislature could enact a statute regulating topless dancing to "avoid the disturbances associated with mixing alcohol and nude dancing"); California v. LaRue, 409 U.S. 109, 111 (1972) (holding that state officials could prohibit sexually explicit films and live entertainment in venues serving alcohol in order to prevent "[p]rostitution" and "[i]ndecent exposure to young girls, attempted rape, rape itself, and assaults on police officers" that often occurred in and around these venues).

[87] *See PAP's A.M.*, 529 U.S. at 279; *Barnes*, 501 U.S. at 563; *Iacobucci*, 479 U.S. at 93 n.1; *N.Y. State Liquor Auth.*, 452 U.S. at 714 n.1; *LaRue*, 409 U.S. at 112.

[88] *PAP's A.M.*, 529 U.S. at 297 (quoting the preamble to the Erie ordinance).

[89] *Id.* at 301.

[90] In defending its decision to uphold the mandate that "performers wear a scant amount of clothing," the *Barnes* Court explained that "the requirement . . . does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic." *Barnes*, 501 U.S. at 571. As such, the Court seems to focus on the state's ability to determine the appropriate level of exhibition (that which is not "too graphic") rather than on the public safety concerns fueling the "secondary effects" test. Additionally, it is arguable that the secondary effects associated with adult venues are largely correlative of the neighborhoods where these venues are located, rather than resulting from the venues themselves. In *California v. LaRue*, for example, the Court accepted that secondary effects of live entertainment establishments are "attempted rape, rape itself, and assaults on police officers [that] took place on or immediately adjacent to such premises." *LaRue*, 409 U.S. at 111. In linking the adult venue to these criminal incidents, the Court failed to consider that the socioeconomic nature of the areas surrounding the

The second problem to the Court's "secondary effects" rationale is that in order to determine whether regulations targeting sexual expression are content-neutral, a court must use its own content-based assessment. That is to say, in deciding whether a state intended to regulate the speech because it disagreed with its message (content-based), or because it sought to prevent or remedy the purported consequences of the speech (content-neutral), a court must first assess the public *value* of the speech. Second, it must weigh this public value against the government's proposed interest in mitigating the "secondary effects." In doing so, courts do not merely assess the state's intent behind the law as the "secondary effects" jurisprudence suggests—instead, courts must assess the *quality* and public benefit of the speech. Thus, the "secondary effects" test allows a court to step outside of its role as an impartial interpreter of the law and into the role of a moral protectorate, asking: *should* the people be subjected to the sexual expression at hand? Indeed, courts have both wide discretion to decide whether to permit regulations of sexual expression, and great flexibility to choose which precedent to apply to any given case.

When looking at the arguments in *Entertainment*, California contended that its video game law was content-neutral because it was enacted to mitigate violent video games' secondary effects on the children who purchased them. The Court, however, rejected California's argument and found that the state law attempted to regulate the "*ideas* expressed" in the video games, and not their purported effects.[91]

The *Entertainment* Court's reasoning is inextricable from the subjective assessments required to find obscenity or deem certain laws content-neutral. For example, Justice Scalia explained that, in general, speech may not be regulated just because a legislative body thinks it is unsuitable, opposes its content, finds the content shocking, or is disgusted.[92] These subjective determinations, however, are inherent in *Miller*'s test for obscenity and other regulations of sexual expression.[93] When deciding whether a type of sexually related speech is obscene or otherwise inappropriate for public distribution, what factors other than a subjective assessment of the expression's suitability, content, shock, and disgust might a court consider?[94]

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adult venues might better explain the greater crime rate.

[91] Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011).

[92] *See id.* at 2734.

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

[94] *See* Michael P. Allen, *The Underappreciated First Amendment Importance of* Lawrence v. Texas, 65 WASH. & LEE L. REV. 1045, 1061 ("[T]he Court's modern obscenity jurisprudence,

The irresolute and foundationless nature of sexually related speech jurisprudence allows courts to exercise virtually unrestrained subjectivity in assessing the constitutionality of speech regulations. A court may effectively choose which precedent to apply to the specific speech regulations at hand, and further can freely invoke its personal values in assessing whether the regulations are in fact neutral. Consequently, a court may invoke its personal prejudices to censor certain types of sexual expression it finds abnormal and repulsive. The danger in this reality lies in the ensuing discrimination against sexual minorities, such as LGBT individuals; a topic discussed at length in Part IV of this Note.

B. CENSORING UNOBSCENE CONTENT WITH AN OBSCENE "PURPOSE"

"Although the proper aim of obscenity regulation is to prevent the community from being offended by sexually explicit materials, an obscenity prosecution does not require that anyone actually be offended by the material . . . . Material is obscene, and [] subject to prosecution, solely because it has the *potential* to offend."[95]

Another problem resulting from sexually related speech jurisprudence is that it permits governments to censor "pandering," defined as the distribution of unobscene speech that has an obscene *purpose*.[96] Pandering presents yet another circumstance where the government has wide discretion to censor speech based upon what it subjectively determines to be the speaker's intent. As such, the ability to

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both in terms of the rationale for categorically excluding obscene material from First Amendment protection and in defining what is, in fact, obscene, is inextricably linked with morality.").

[95] Peterson, *supra* note 51, at 635 (emphasis added).

[96] BLACK'S LAW DICTIONARY 1219 (9th ed. 2009) (defining "pandering" as the "act or offense of selling or distributing textual or visual material (such as magazines or videotapes) *openly advertised* to appeal to the recipient's sexual interest") (emphasis added); *see also* FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307 (2012) (leaving undisturbed a prior ruling in FCC v. Pacifica Found., 438 U.S. 726, 740 (1978), which upheld the FCC's authority to regulate broadcasts that had "prurient appeal"); Ginzburg v. United States, 383 U.S. 463, 471, 476 (1966) (holding that the "'deliberate and studied arrangement'" of the unobscene publications at issue were "'editorialized for the purpose of appealing predominantly to prurient interest,'" and thus, "the material is obscene even though in other contexts the material would escape such condemnation" (quoting United States v. Ginzburg, 224 F. Supp. 129, 131 (E.D. Pa. 1963)); FCC, IN THE MATTER OF INDUSTRY GUIDANCE ON THE COMMISSION'S CASE LAW INTERPRETING 18 U.S.C. § 1464 AND ENFORCEMENT POLICIES REGARDING BROADCAST INDECENCY, 16 FCC Rcd. 7999, 8003 (2001) [hereinafter FCC INDECENCY POLICY] (Particularly "exacerbating" among the three "principal factors that have proved significant in [the FCC's] decisions" is "*whether the material appears to pander or is used to titillate*, or *whether the material appears to have been presented for its shock value*.").

censor pandering impacts public access to and opinions of sexual content.

For example, in *Ginzburg v. United States*, the Supreme Court held that a series of essays and articles could be regulated because their distribution constituted pandering, while admitting that most of the articles did not actually offend anyone.[97] Though these publications predominately discussed the social, medical, psychiatric, and legal issues of sex,[98] the Court deemed them obscene because they could be exploited to those with a "weakness for titillation."[99] The fact that the Court deemed content obscene, yet "nonoffensive," has no basis under extant obscenity jurisprudence.[100]

Thus, the *Ginzburg* Court expanded the definition of obscenity to include pandering,[101] meaning that content can be censored merely because of its "obscene" presentation, advertisement, or format.[102] The problem with this rationale, aside from its lack of logic or basis in the law, is that identifying or determining the speaker's intent is another highly subjective assessment.[103] A speaker's *intent* is even more difficult to discern than whether the speech is actually obscene under the legal standards discussed above.[104]

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[97] *Ginzburg*, 383 U.S. at 471.

[98] *Id.* at 471–72. Additionally, the articles "had earlier appeared in professional journals," and the author distributed the publications "to persons whose names appeared on membership lists of medical and psychiatric associations, asserting its value as an adjunct to therapy," which caused "a number of witnesses [to testify] that they found the work useful in their professional practice." *Id.*

[99] *Id.* at 471 (quoting Louis B. Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 677 (1963)). This was so despite the fact that in one magazine, only four of the fifteen essays and articles appealed to the prurient interest. *Id.*

[100] *See infra* Part III.C.

[101] The dissenting opinions of Justices Black, Harlan, and Stewart explain that the majority did not find that the challenged obscenity statute explicitly prohibits pandering but rather that the *Ginzburg* Court expanded the overall common law definition of obscenity to include pandering. *Ginzburg*, 383 U.S. at 477–78, 494, 497, 500.

[102] *Id.* at 466 n.5, 470–71; *see, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 757 (Powell, J., concurring in part and concurring in the judgment) (explaining that the FCC could regulate the broadcast of a comedy routine it found indecent because the network intentionally aired it in order to be "vulgar and offensive").

[103] *See Ginzburg*, 383 U.S. at 478 (Black, J., dissenting) (finding that the new standards for purpose-based obscenity are "so vague and meaningless that they practically leave the fate of a person charged with violating censorship statutes to the unbridled discretion, whim and caprice of the judge or jury which tries him").

[104] Note that intent is not wholly irrelevant to assessing the constitutional protection of other kinds of speech. For example, the constitutional protection of "screaming fire in a theater" can be gauged by intent: prosecuting the speaker may turn on determining whether he intended to incite imminent harm or merely uttered the words in jest or performance. *See generally*

Thus, the dangerous result of purpose-based obscenity tests is that governments may pick and choose which speech to censor by identifying, or even fabricating, the speech's overall purpose. The *Ginzburg* Court, for example, did not empirically assess the speakers' intent in distributing the sexual publications—instead, the Court assumed the intent to pander and titillate, without considering who the recipients were, their intentions, or why they would be interested in reading the material.[105]

The Federal Communications Commission's (FCC) policy on regulating sexual broadcasting deems pandering to be censorable obscenity and indecency.[106] Since the FCC is a powerful government agency that determines censorship of content across American airwaves, these purpose-based obscenity regulations show the prevalence and intrusiveness of precluding sexually related speech.

In 2012, the Supreme Court heard a First Amendment challenge to the FCC's current regulatory policy.[107] The policy authorized the FCC to censor broadcasting with "obscene, indecent, or profane" content.[108] In this case, ABC, one of the television network plaintiffs, was fined in 2008 for airing an episode of *NYPD Blue* that contained a scene of a woman's naked backside.[109] Though the seven-second scene depicted a child accidentally walking into the woman's bathroom, and contained no sexual context or undertones,[110] the FCC found the scene "pandering, titillating, and shocking" in nature,[111] and fined ABC more than one million dollars.[112]

In effect, the government seems to be less concerned about the actual content broadcasted, and instead aims to prevent the erotic drive that may

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Brandenburg v. Ohio, 395 U.S. 444, 444 (1969) (per curiam) (discussing the category of incitement of illegal activity).

[105] *See Ginzburg*, 383 U.S. at 496 (Harlan, J., dissenting).

[106] FCC INDECENCY POLICY, *supra* note 96, at 8003.

[107] FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2311 (2012).

[108] FCC INDECENCY POLICY, *supra* note 96, at 7999.

[109] Brief for the Respondents at 4–5, 11, *FOX Television Stations, Inc.*, 132 S. Ct. 2307 (2012) (No. 10-1293) [hereinafter FCC Brief].

[110] *See id.* at 4–5 (describing the scene as follows: "[b]oth [the woman and child] are surprised and embarrassed. [The woman] covers herself with her hands and arms, [the child] exits and says "sorry"). ABC explained that the scene was "integral to the episode's storytelling of the awkwardness and discomfiture accompanying the introduction of a new romantic partner into the life of a single parent and his only child"). *Id.* at 5.

[111] Petition for Writ of Certiorari at 6, *Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012) (No. 10-1293).

[112] *Fox Television Stations, Inc.*, 132 S. Ct. at 2319.

result. Notably, while the FCC broadly censors content that is even minimally sexual in nature, it does not place *any* limitations upon broadcasting violent content.[113]

As stated previously, *Miller* requires that obscenity be "patently offensive."[114] Allowing the government to regulate unobscene content that merely panders fails to meet this test.[115] There is no injury to be remedied, and no one has actually been harmed or offended—the only offense is that the content *exists*. This means that pandering prosecutions allow the government to impose its viewpoints, often times masked by claims that there need be no reason to censor obscenity other than the fact that, under extant jurisprudence, one *can*.[116]

C. REQUIRING DIFFERENT LEVELS OF PROOF: THE COURT'S RELATIVE VALUATIONS OF SEX AND VIOLENCE

Before delving into the harms associated with sexual and violent expression, it is essential to recognize the nature of the content at issue in *Entertainment*, in which California sought to preclude minors from purchasing violent video games without parental permission:[117]

> Victims by the dozens are killed with every imaginable implement, including machine guns, shotguns, clubs, hammers, axes, swords, and chainsaws. Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. They cry out in agony and beg for mercy . . . Severed body parts and gobs of human remains are graphically shown. In some games, points are awarded based, not only

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[113] David Houska, *Indecent Exposure:* FCC v. Fox *and the End of an Era*, 7 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 193, 193 (2012).

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

[115] In *Ginzburg v. United States*, for example, the Court described one of the books it deemed obscene for pandering as "a sexual autobiography detailing with complete candor the author's sexual experiences from age 3 to age 36. The text includes . . . her views on such subjects as sex education of children, laws regulating private consensual adult sexual practices, and the equality of women in sexual relationships." *Ginzburg*, 383 U.S. 463, 467 (1966). At trial, the Court heard testimony that the book was "valuable" to women and that the members of "medical and psychiatric associations," to whom the book was exclusively sent, "found the work useful in their professional practice." *Id.* at 472. The Court admitted that it was "not seriously contest[ed]" that the book's content itself "ha[d] worth," but that its pandering nature nonetheless made it obscene. *Id.* at 472.

[116] *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60–62 (1973) (The Court upheld Georgia's right to prosecute adult film venues, despite there being no findings that the films adversely affected anyone, for no reason other than because the First Amendment permitted it.).

[117] Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2732 (2011). The law also required that the packaging of the games be labeled "18." *Id.*

> on the number of victims killed, but on the killing technique employed . . . There are games in which a player can take on the identity and reenact the killings carried out by the perpetrators of the murders at Columbine High School and Virginia Tech. The objective of one game is to rape a mother and her daughters; in another, the goal is to rape Native American women. There is a game in which players engage in "ethnic cleansing" and can choose to gun down African-Americans, Latinos, or Jews.[118]

1. Sexually Related Speech Can Be Regulated Without Proof of Any Resulting Harms

Notwithstanding the nature of this extreme and merciless violence, the *Entertainment* majority refused to seriously consider the idea that the video games may lead to violent behavior in children.[119] The Supreme Court summarized California's findings as derived from only a "few" research psychologists that found only "some correlation between exposure to violent entertainment" and "real-world" aggression in children; thus, the link between the speech and its harms was insufficient to warrant the regulation.[120] This disconnect is what the *Entertainment* majority primarily relied on in striking down the law.[121]

The doctrinal incongruity between permitting regulations of sexual versus violent expression may be identified through the difference in the government's burdens of proof in defending its regulation. Recall that the cases dealing with prohibitions on topless dancing and pornographic movie theatres were deemed content-neutral because they intended to combat the "secondary effects" of the venues.[122] Notwithstanding the argument in Subpart A of this part, that the laws at issue were actually content-based in nature and should have been subject to strict scrutiny, the Court accepted at best correlative and at worst deficient evidence of the harmful consequences of adult venues.[123] For example, the Court upheld

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[118] *Id.* at 2749–50 (Alito, J., concurring).

[119] *See id.* at 2739 (Not only was the majority unconvinced by the state's evidence, the Court failed to consider the possible differences in intensity and effect between violent video games and violent content in books and films, and on the radio and television); *Id.* at 2742 (Alito, J., concurring) ("We should make every effort to understand the new technology. We should take into account the possibility that developing technology may have important societal implications that will become apparent only with time.").

[120] *Id.* at 2739.

[121] *Id.*

[122] *See* cases cited *supra* note 86; discussion *supra* Part III.B.

[123] *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 (1973) (explaining that

ordinances banning nude dancing because "common sense" sufficiently demonstrated that societal harm would result.[124] Moreover, in upholding a similar adult movie theater ban, the Court *deduced* the harmful "secondary effects" in situations where the state provided none,[125] and could not identify any.[126]

2. Court Interests in Limiting Public Access to Sex

As stated above, the strict scrutiny invoked in *Entertainment* required that California "show a direct causal link" between video games and its harmful effects;[127] thus, imposing a higher standard of protection than in the sexual entertainment cases discussed in the previous subpart. The discrepancy in the burdens of proof required speaks largely about the Court's and the public's[128] general fear and valuation of sexual expression compared to violent expression. Any violent repercussions from the game must be proven; yet the possible harms resulting from sexual expression can be assumed, predicted, or even created from thin air.[129]

Further, once the Court determines and establishes a link between the

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content-based proscriptions of obscenity are constitutionally permissible where "there is at least an arguable correlation between [the] obscene material and [the] crime").

[124] N.Y. State Liquor Auth. v. Bellanca, 452 U.S. 714, 718 (1981) (The *N.Y. State Liquor Autho.* Court's brief opinion quickly mentioned that "[c]ommon sense" was enough to validate the claim that "undesirable behavior" resulted from nude dancing in venues serving alcohol, though neither the State nor the Court provided even one example of the resulting harms.); *see also Paris Adult Theatre I*, 413 U.S. at 60–61 (Though there was "no scientific data [to] demonstrate that exposure to obscene material adversely affects men and women or their society," the Court rested on the assumption that the State legislature "could quite reasonably determine that such a connection does *or might* exist.") (emphasis added).

[125] *See, e.g.*, Barnes v. Glenn Theatre, Inc., 501 U.S. 560, 567–68 (1991) ("It is impossible to discern, other than from the text of the statute, exactly what governmental interest the Indiana legislators had in mind when they enacted this statute, for Indiana does not record legislative history, and the State's highest court has not shed additional light on the statute's purpose.").

[126] *See, e.g.*, Renton v. Playtime Theatres, Inc., 475 U.S. 41, 44 (1986) ("[T]he Mayor of Renton . . . suggested to the Renton City Council that it consider the advisability of enacting zoning legislation dealing with adult entertainment uses. No such uses existed in the city at that time.").

[127] Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738–39 (2011) (applying strict scrutiny to the video game regulation).

[128] The popular effects of sexually related speech jurisprudence and Supreme Court cases otherwise dealing with First Amendment speech are discussed *infra* Part IV. Overall, the Court's valuation of sexually related speech, both systematically and collaterally, impacts the public's disdain for sexual minorities.

[129] *See infra* Part IV.D.

sexual expression and its resulting harms in one adult venue case,[130] other cities and states seeking to pass similar regulations need only rely on the Court's findings in earlier cases, rather than needing to present their own evidence concerning the correlation between the speech and the harms it may produce. This reliance is possible despite the facts of the case being entirely different from the prior cases.[131] Thus, state justifications for regulating certain sexual expressions are self-perpetuating, and may amplify lawmakers' efforts and ability to censor sexually related expression. This, in addition to the discrepancies between the burdens of proof required to show the constitutionality of sexual versus violent speech regulations, reveals how courts and legislatures act under the notion that the public must be protected from free sexual expression.

D. TOPLESS ASSASSINS: THE LOGIC IN REGULATING SEX, NOT VIOLENCE

> [W]hat sense does it make to forbid selling to a 13-year-old boy a magazine with an image of a nude woman, while protecting a sale to that 13-year-old of an interactive video game in which he actively, but virtually, binds and gags the woman, then tortures and kills her? What kind of First Amendment would permit the government to protect children by restricting sales of that extremely violent video game *only* when the woman—bound, gagged, tortured, and killed—is also topless?[132]
>
> – Justice Breyer

Thus far, the inconsistencies and flaws in First Amendment speech jurisprudence that allow the government to disproportionately and unjustifiably regulate sexually related expression have been demonstrated. This subpart discusses how recent Supreme Court jurisprudence suggests the Court's stance that sexual content is more harmful than violent content.

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[130] In *California v. LaRue*, for example, the Court relied partially on its own "common experience" to associate the harm with the adult entertainment at issue. *LaRue*, 409 U.S. 109, 116 (1972).

[131] Rather than require Erie to demonstrate how these venues posed any problems to the city, the Court accepted that these establishments necessarily had "negative secondary effects" because the Court itself had made these factual findings in two adult venue cases it had decided more than a decade earlier. City of Erie v. PAP's A.M., 529 U.S. 277, 291 (2000) (citing Boos v. Barry, 485 U.S. 312, 321 (1988)). Further, though the nature and prevalence of any criminal conduct surrounding adult venues assuredly changes with the time and place of the venue, the Court's perspective toward sexual propriety outlives generational and societal evolution. *See Renton*, 475 U.S. at 47–48, 50.

[132] *Brown*, 131 S. Ct. at 2771 (Breyer, J., dissenting).

In *United States v. Stevens*, decided in 2010, the Court invalidated a federal statute that made it a crime to sell, distribute or possess depictions of animal cruelty.[133] In 2004, defendant Robert Stevens was indicted under the statute for selling dogfighting videos and he challenged the statute as unconstitutional, claiming it infringed upon his freedom of speech.[134] The *Stevens* Court agreed with the defendant, stating that although dogfighting is illegal,[135] *filming* dogfights must be protected under the First Amendment.[136]

Had the statute banned depictions of animal cruelty designed to *arouse*, however, the statute would likely have been upheld. Chief Justice John Roberts explained that the statute was intended to combat sexualized animal cruelty, and that when the statute "was enacted, the Executive Branch announced that it would interpret [the statute] as covering only depictions 'of wanton cruelty to animals designed to appeal to a prurient interest in sex.'"[137] The Court was referring to the "interstate market for 'crush videos,'" or videos that "depict women slowly crushing animals to death 'with their bare feet or while wearing high heeled shoes' [that are designed to] appeal to persons with a very specific sexual fetish."[138] Thus, depictions of animal cruelty meant to *arouse* are unprotected by the First Amendment, while depictions of the very same conduct are protected so long as they lack sexual undertones. Thus, if Stevens had filmed the dogs fighting, and then having sex, his indictment would have been upheld, even though the harms would have been the same—the dogfighting would still have occurred, and the films would have been distributed. The Court, however, determined the statute's constitutionality based upon whether killing or torturing animals is done out of sadism or eroticism. The *Stevens* decision helps to show, that even today, the Court accepts and is unwilling to change its juridical viewpoint that the public's exposure to sexual content is more harmful than its exposure to violent content.

Whether or not government regulations of sexual content are

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[133] United States v. Stevens, 130 S. Ct. 1577, 1592 (2010) (invalidating 18 U.S.C. § 48 (2006) (amended 2010)).

[134] *Id.* at 1583.

[135] *Id.* at 1600.

[136] *See id.* at 1592.

[137] *Id.* at 1591 (quoting Bill Clinton, U.S. President, Statement on Signing Legislation To Establish Federal Criminal Penalties for Commerce in Depiction of Animal Cruelty (Dec. 9, 1999), *in* 34 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 2557, 2558 (1999), *available at* http://www.gpo.gov/fdsys/pkg/PPP-1999-book2/pdf/PPP-1999-book2-doc-pg2245-2.pdf).

[138] *Id.* at 1583 (quoting H.R. REP. NO. 106-397, at 2–3 (1999).

intended to preserve community integrity and safety[139] or restrain minors' prurient interest,[140] the regulations are justified as *protecting* people from certain sexual content and its consequences.[141] This state action goes as far as to protect adults from obscenity, even where they actively and consensually seek the content out for their own private sexual use. For example, it is still illegal to sell or distribute obscene material in the United States,[142] and federal law incentivizes libraries to block adults from viewing obscene material.[143] Last, the mere private possession of obscene material can be regulated.[144] In contrast, the fact that the FCC does not regulate violent content demonstrates the government's relative valuations of the harms resulting from violent and sexually related speech.

Moreover, the prohibition of possessing and distributing sexual content seems to contradict the 2003 groundbreaking decision in *Lawrence v. Texas*,[145] where the Court recognized one's right to engage in private sexual conduct without state intrusion.[146] Despite this holding,

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[139] *See* discussion *supra* Part III.A.

[140] *See* discussion *supra* Part III.B.

[141] Peterson, *supra* note 51, at 633 (1998) (citing JOEL FEINBERG, OFFENSE TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW 1–2 (1985)).

[142] 18 U.S.C. §§ 1461, 1465 (2006); *see, e.g.*, United States v. 12 200-ft Reels of Super 8mm. Film, 413 U.S. 123, 128 (1973) (Congress can regulate the importation of obscene matter even where it is not for public distribution); United States v. Reidel, 402 U.S. 351, 352 (1971) (federal statute prohibiting mailing obscene material to willing recipients, who state that they are adults, held constitutional); Blount v. Rizzi, 400 U.S. 410, 412 (1971) (Postmaster General may halt the use of mails for mailing obscene materials); *see* Victoria Kim & Aida Ahmad, *Fetish Filmmaker Convicted of Obscenity Charges*, L.A. TIMES, Apr. 28, 2012, available at http://articles.latimes.com/2012/apr/28/local/la-me-obscenity-trial-20120428 (court convicted creator of "fetish films" for selling obscene material despite his attracting only willing patrons by explicitly advertising his business as the "largest fetish VHS, DVD superstore").

[143] United States v. Am. Library Ass'n, 539 U.S. 194, 201 (2003) (connecting funding to the implementation of Internet safety policies); *see also infra* Part IV.D.1 (discussing the federal Children's Internet Protection Act and its pervasive effect on blocking both children and adults' access to obscene material in libraries and schools).

[144] The U.S. Customs and Border Protection Declaration Form, completion of which is mandatory for all individuals attempting to enter the United States, specifies that "[c]ontrolled substances, obscene articles, and toxic substances are generally prohibited" from entering the United States. U.S. CUSTOMS & BORDER PROT., U.S. DEP'T OF HOMELAND SEC., U.S. CUSTOMS & BORDER PROTECTION DECLARATION FORM 6059B (2011), *available at* http://www.cbp.gov/xp/cgov/travel/vacation/sample_declaration_form.xml. Thus, an American citizen who legally purchased and merely possesses a pornographic video would be banned from bringing it into the United States, despite having no intention of showing or distributing the video to anyone.

[145] Lawrence v. Texas, 539 U.S. 558 (2003).

[146] *Id.* at 577–79; Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 Nw. U. L. Rev. 1379, 1416–17 (2008) [hereinafter *When Obscenity Discriminates*] ("The *Lawrence* Court held

extant First Amendment jurisprudence has maintained that an individual may not receive, possess, and at times, cannot even see obscene or sexually explicit content.[147]

In sum, this part has demonstrated that by continuing to hold sexually related speech to a lower standard of constitutional protection, the present Court effectively asserts that society and the public need more protection from sex than from violence, at least where expression is concerned. This discrepancy is further highlighted by the fact that the harms resulting from sex can be assumed, while the harms stemming from violence must be inextricably proven.

Regardless of whether one believes that sexual content is more harmful than violent content, or vice versa, this Note argues that, in the spirit of the First Amendment, individuals should be able to make this choice themselves. Moreover, this Note argues that individuals should have the same level of autonomy in deciding what kinds of violent content to hear and view, and allow their children to access, as in deciding whether or not to view sexual content.

IV. HOW REGULATING NUDE AND LEWD FACILITATES LEADS TO DISCRIMINATION AGAINST LGBT INDIVIDUALS

> "Just as free speech has always been the strongest weapon to advance equal rights causes, censorship has always been the strongest weapon to thwart them."
>
> – Nadine Strossen[148]

This section demonstrates how existing First Amendment jurisprudence facilitates and leads to disparate treatment of LGBT and heterosexual speech. These speech regulations, often motivated by prejudice, eases, if not encourages, discrimination against LGBT groups and individuals.[149] Subpart A discusses how individuals can discriminate

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that the power of the state cannot be used to mandate a moral code. Of course, while *Lawrence*'s moral dimension may be regarded by some to be very broad (and perhaps justifiably so), *Lawrence*'s broad implications for morals-based legislation unfortunately already have proven unsuccessful.").

[147] *See infra* Part IV.C.

[148] Nadine Strossen, *"Is Minnesota Progressive?" A Focus on Sexually Oriented Expression*, 33 WM. MITCHELL L. REV. 51, 61 (2006) (Nadine Strossen is former President of the American Civil Liberties Union).

[149] The following are some examples of the institutional discrimination against LGBT individuals to which this Note refers: *Current Status—Marriage Map (U.S.)*, MARRIAGE EQUALITY USA (May 13, 2013), http://www.marriageequality.org/current-status-map

against LGBT people via *Miller*'s "contemporary community standards" test for defining obscenity. Subpart B shows how censoring sexual speech has been a useful tool for governments to quell public discourse and limit approval of relatively unpopular groups. Subpart C discusses how sexual speech jurisprudence affects the content that media sources publicize. Last, Subpart D discusses how sexual speech supports the LGBT community on both individual and sociopolitical levels, and concludes by explaining why people and communities with less access to sexually abnormal speech find it easier to discriminate against LGBT individuals.

A. GAUGING OBSCENITY THROUGH "CONTEMPORARY COMMUNITY STANDARDS" EMPOWERS THE MAJORITY TO CENSOR LGBT SPEECH

In addition to fostering the idea that sex is subject to public influence, regulations of sexual expression permit findings that certain types of sex, sexuality, and sexual content are obscene.[150] The propriety evaluation of sexually related content almost always involves "contemporary community standards," and sexual minorities are the ones that bear the brunt of the public's subjective determinations.[151]

The *Miller* test is one of the few current constitutional doctrines that relies primarily on community standards in reaching judicial determinations.[152] Determining whether something is obscene is a question of fact, which means that the fact finder (usually a jury) decides, using his or her own experiences and opinions, whether the content at issue is obscene.[153] In contrast to most civil and criminal jury trials where the requisite legal standards are explained to jurors with specificity, and compliance with these standards is ostensibly assured through jury

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(indicating that 41 states do not perform same-sex marriages); *Non-Discrimination Laws: State by State Information—Map*, ACLU (Sept. 21, 2011), http://www.aclu.org/maps/non-discrimination-laws-state-state-information-map (showing that 20 states offer no protections against sexuality-based employment discrimination); *LGBT Parenting*, ACLU, http://www.aclu.org/lgbt-rights/lgbt-parenting (last visited June 17, 2013) (demonstrating that some states prohibit LGBT people from adopting children or becoming foster parents).

[150] *See Seeing It, Knowing It*, *supra* note 13, at 220.

[151] *See* Peterson, *supra* note 51, at 631 *passim* (discussing how and why jury-determined obscenity disproportionately disfavors LGBT related content).

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

[153] Ginzburg v. United States, 383 U.S. 463, 479–80 (1966) (Black, J., dissenting); William N. Eskridge, Jr., *Body Politics:* Lawrence v. Texas *and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1022 (2005) ("[H]uman judgment is strongly influenced by cognitive stereotypes and emotional prejudices that are resistant to rational analyses and argumentation.").

instructions and special verdicts—obscenity verdicts rest solely in the hands of the heterosexual majoritarian community.[154]

As a result, jurors' personal biases and prejudices are afforded legal effect, including any biases that they may have against LGBT content.[155] For example, when a jury decides that sexual imagery involving same-sex or transgender individuals is obscene, the jurors are not required to identify what parts they determined to be "patently offensive," or explain why they believed it lacked any literary, artistic, political, or scientific value.[156] The "contemporary community standard" approach makes it so no one will know whether a decision to prohibit specific imagery is motivated by jurors' disgust and intolerance for the specific sex involved or something else.[157] With that being the case, provoking jurors' disgust is considered an acceptable prosecutorial tactic,[158] and much of the bias against LGBT individuals is founded in the majority's subjective disgust for LGBT individuals' sexual conduct.[159]

American history is rife with occurrences in which popular disgust has provoked discrimination against minority groups, such as people with AIDS and those with mental or physical disabilities.[160] Emerging sexual minorities, such as LGBT individuals, face this same obstacle in their pursuit of equal rights and social acceptance. With the current obscenity doctrine and other sexually related speech jurisprudence granting legal and institutional effect to the majority's voice, speech involving sexual minorities will continue to be censored.

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[154] *See* ABRAMSON, *supra* note 16, at 199.

[155] *Seeing It, Knowing It*, *supra* note 13, at 220–21; *When Obscenity Discriminates*, *supra* note 146, at 1385 ("The obscenity doctrine has failed to distinguish between 'sex' . . . and 'sexual orientation.' As a result, gays and lesbians have been folded into the constitutionally unprotected category of obscenity.").

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

[157] *See Seeing It, Knowing It*, *supra* note 13, at 234; Peterson, *supra* note 51, at 637.

[158] Elizabeth M. Glazer explains how prosecutors recognize that jurors' repulsed reactions often lead to obscenity convictions; thus, prosecutors strategically select the most "disgusting" depictions "most likely to make the average juror squirm." These depictions tend to feature homosexual and other "abnormal" sexual content, as people might be repulsed by sex that is unlike their own. *Seeing It, Knowing It*, *supra* note 13, at 220–21.

[159] *See* Eskridge, *supra* note 153, at 1022–23.

[160] *Id.* at 1063.

B. GOVERNMENTS THWARTING PUBLIC DISCOURSE ABOUT SEXUAL MINORITIES

When the government silences expression that concerns the disempowered, it often succeeds in quelling public support for and the social progress of these groups.[161] Various oppressive states throughout the twentieth century censored pornography and other obscene content in order to block citizens' access to ideas that conflicted with their sovereign prerogatives. For example, obscenity laws from China and the former Soviet Union censored anti-communist speech, while Nazi Germany and the apartheidic South African government stifled Jewish and black literature, respectively, because it was "pornographic."[162] In the United States, information about contraceptives has historically been suppressed in order to quell public discourse about premarital sex and abortions.[163] Governments recognize that keeping citizens unaware of, and unexposed to, speech from minority groups quashes these groups' potential to gain popular support. By censoring certain expression, the state can impact social norms without appearing discriminatory.

Homophobic government officials can use their regulatory powers to disproportionally, and somewhat covertly, regulate LGBT content.[164] This has been the case even where heterosexual content fell subject to censorship laws.[165] Canada's 1992 ban on all pornography that "degraded" or "dehumanized" women ended up largely censoring LGBT pornography.[166] Similarly, a proposed ban on heterosexual pornography in Minneapolis resulted in a mass "movement against pornographic

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[161] *See* Strossen, *supra* note 148, at 59–78.

[162] *Id.* at 73.

[163] *Id.* at 62 ("In the United States, the government has consistently used anti-obscenity laws to suppress information about contraception and abortion. For example, the government used the first federal anti-obscenity statute in this country, the 1873 'Comstock Law,' to repeatedly prosecute pioneering feminists and birth control advocates early in the twentieth century."). Additionally, a 1972 Massachusetts law that prohibited the distribution of contraceptives to unmarried persons was purportedly aimed at discouraging premarital sex. Eisenstadt v. Baird, 405 U.S. 438, 442 (1972). Though the law was rarely enforced, CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 148 (Harvard Univ. Press 2001), defendant William Baird was selectively prosecuted for giving a woman a contraceptive foam after presenting a university lecture about contraceptive use. *Eisenstadt*, 405 U.S. at 440. In actuality, the purpose of the Massachusetts law was to quell public discussion about contraceptive use, such as that occurring at the university. *Id.* at 148. In doing so, the state aimed to limit the possibility that the public might oppose other regulations of sexual conduct. *Id.*

[164] Strossen, *supra* note 148, at 70.

[165] ABRAMSON, *supra* note 16, at 184.

[166] Strossen, *supra* note 148, at 66, 70–71.

bookstores," leading to increased arrests and police brutality against gay men in particular.[167]

Even today, states recognize a danger in individuals sharing and circulating obscene materials. Recall that selling and distributing obscene material, even to willing adults, is illegal in the United States.[168] Thus, one can engage in *private* sexual conduct without state regulation, but a person can be prosecuted for *passing obscene materials to another.* In this way, governments can ensure that speech portraying sexual minorities is quarantined as much as possible,[169] prevent individuals from recognizing that they are not alone, and forestall the threat of a public outcry for sexual tolerance.

C. TRICKLE-DOWN DISCRIMINATION: LGBT SPEECH IN THE MEDIA AND OTHER WIDELY ACCESSED SOURCES OF INFORMATION

Abstracting LGBT speech from widely accessible media sources arguably affects the public's opinion of the LGBT community to a greater degree than censorship laws.[170] By silencing the LGBT, or "obscene" voice, media outlets prevent their audiences from understanding, accepting, and joining the movement for LGBT equality. This subpart discusses how legislative attempts to regulate sexually related speech and judicial approvals thereof, have lead private institutions, books, movies, television programs, and Internet search engines to follow suit, often without any legal obligation to do so.

1. Disproportionate Censoring of LGBT Related Content in Books, Movies, and Television Programs

As the primary institution that affords all films with traditional ratings for suitability, the Motion Picture Association of America (MPAA) directly affects the viewership of virtually every film that is distributed in the United States.[171] Unfortunately, the MPAA uses this power to give films that contain LGBT related content, such as depictions of homosexual intercourse, a rating of "No One 17 and Under Admitted" ("NC-17"), as

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[167] *Id.* at 57, 68.

[168] *See supra* note 142 and accompanying text.

[169] *See* Emily L. Stark, *Get a Room: Sexual Device Statutes and the Legal Closeting of Sexual Identity*, 20 GEO. MASON U. C.R. L.J. 315, 321–22, 337 (2010).

[170] *See When Obscenity Discriminates*, *supra* note 146, at 1404.

[171] *Id.* at 1405–06.

opposed to the "Parents Strongly Cautioned" ("PG-13") or "Restricted" ("R") ratings it gives to films that depict heterosexual content that is often more flagrant in nature.[172] An NC-17 rating severely limits the quantity and type of people that can and will see the film[173]—not only do many movie theaters refuse to show NC-17 films, but the rating also gives the impression that the film has limited artistic and informative value.[174]

The MPAA does not explain or justify its reason for giving the ratings it does or identify the individuals who rate the films.[175] This lack of transparency affords a select and anonymous group unparalleled discretion to determine what the public will see based upon their own personal notions of acceptable content.[176] In the end, the panel's relatively conservative and arguably homophobic views[177] tend to keep films depicting LGBT content out of the public eye.[178]

Obscenity laws also affect the prevalence of written publications that contain LGBT content. In addition to the resulting disproportionate

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[172] *Id.* at 1406–08.

[173] An NC-17 rating means that theaters must uniformly ban children 17 and under from viewing the film, regardless of parental consent. *What Each Rating Means*, MOTION PICTURE ASS'N OF AM. (2013), http://www.mpaa.org/ratings/what-each-rating-means. In contrast, R-rated films may be viewed by children under 17 when accompanied by a parent. *Id.* To exemplify the tremendous influence that MPAA ratings have on viewership, the highest grossing NC-17 film grossed only $20 million, while the highest grossing R-rated film grossed $370 million. *Domestic Grosses by MPAA Rating*, BOX OFFICE MOJO, http://boxofficemojo.com/alltime/domestic/mpaa.htm (last visited June 17, 2013).

[174] *See* Steve Chiotakis, *Can NC-17 Movies Make It at the Box Office?*, AM. PUB. MEDIA MARKETPLACE LIFE (Dec. 5, 2011), http://www.marketplace.org/topics/life/can-nc-17-movies-make-it-box-office (An NC-17 film "turns off a lot of more conservative movie goers who aren't interested in seeing something they imagine to have a lot of sexual or racy content. And then, the nation's number three theater chain, Cinemark, has a policy where they don't even show NC-17 rated movies," inhibiting a substantial portion of the population from accessing the films.).

[175] *When Obscenity Discriminates*, *supra* note 146, at 1406; *Frequently Asked Questions*, MOTION PICTURE ASS'N OF AM. (2013), http://www.mpaa.org/faq (the MPAA does not describe the rating individuals beyond "an independent board of parents") [hereinafter MPAA FAQ].

[176] *When Obscenity Discriminates,* supra note 146, at 1405–06; MPAA FAQ, *supra* note 175 ("Their job is not to determine if a movie is 'good' or 'bad,' but to rate each film as *they believe* a majority of their fellow parents would rate the film—taking into account sexuality, violence, language and other factors." (emphasis added)). The 2006 film THIS FILM IS NOT YET RATED revealed the identities of the MPAA raters for the first time. *When Obscenity Discriminates*, *supra* note 146, at 1406. Somewhat ironically, the documentary film, which sought to expose the bias of the MPAA, including that against films featuring LGBT content, itself received a NC-17 rating by the Association for "graphic sexual content" likely for its depictions of LGBT sex. *See This Film is Not Yet Rated*, INT'L MOVIE DATABASE, http://imdb.com/title/tt0493459/ (last visited June 17, 2013).

[177] *This Film Is Not Yet Rated* (Independent Film Channel 2006).

[178] *When Obscenity Discriminates*, *supra* note 146, at 1406–08; *id.*

criminalization of venues selling LGBT pornography, vendors have "self-censored" this type of content in order to preemptively prevent both police and customs seizures, and prosecutions that may result from the ban.[179] Further, book publishers are generally more hesitant to distribute publications containing homosexual subject matter for fear of being labeled as private vendors of obscene publications, which would affect their profitability in areas where communities have demonstrated their propensity to find LGBT speech obscene.[180]

In addition to censoring certain types of LGBT content entirely, media sources also impact the way homosexual sex is popularly perceived without actually removing the content from the airwaves. For example, crime television shows such as *Law & Order* and *CSI: Crime Scene Investigation* frequently involve criminals that brutally sodomize their victims, while sodomy practiced in healthy, consensual relationships is rarely shown.[181] This portrayal leads viewers to associate sodomy with torture, rather than with consensual sexual intimacy. When networks cast sodomy in this violent and asexual light, their purpose is not to titillate viewers, but to frighten or disgust them. As such, this type of programming airs frequently without interference from the FCC.

2. Internet Search Results and Google's Underground Influence on the Suitability of Sexual Content for Public View

The Internet is arguably the most important content source that has been impacted by institutional and social perspectives and regulations of LGBT speech. Though the Internet itself can house any and all content, search engines censor certain content from their results. Just as the MPAA deems films with homosexual content less suitable for public view than films with analogous heterosexual depictions, Internet search engines like Google disproportionately exclude LGBT related websites and images from search results while permitting relatively similar heterosexual content to appear.[182]

The tremendous influence Google has on public access to

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[179] Strossen, *supra* note 148, at 72.

[180] Nancy J. Knauer, *Homosexuality as Contagion: From* The Well of Loneliness *to the Boy Scouts*, 29 HOFSTRA L. REV. 401, 438–40 (2010).

[181] *See The Daily Show with Jon Stewart: Tilda Swinton* (Comedy Central Jan. 26, 2012), *available at* http://www.thewrap.com/tv/column-post/jon-stewart-tries-curse-tv-video-34839.

[182] *When Obscenity Discriminates*, *supra* note 146, at 1409–11; *Seeing It, Knowing It*, *supra* note 13, at 221–30.

information need not be doubted. In 2008, for example, Google controlled 63% of the world's Internet searches.[183] Google's role in filtering content is troubling because determinations of whether certain websites and images are obscene, and therefore more difficult to access, fall upon a small group of Google executives—and oftentimes on one individual alone.[184] Google's deputy general counsel is the ultimate authority on the search result content that appears.[185] In order for a decision to reach this person, Google executives must disagree on the propriety of the content at issue—and their opinions are oftentimes influenced by their varying sociopolitical ideologies about protected speech.[186] Thus, only a few individuals act as the world's gatekeepers of much of the online content, and their subjective determinations of what should be accessible to the public have a substantial effect on the availability of information at large.[187]

Just like with the MPAA's small group of rating panelists, if Google executives are in any way disgusted by homosexual content—or are outright homophobic—the millions of Google users around the world will have difficulty accessing such content when searching for something sexually neutral, like "having sex."[188] Whether influenced by juridical or personal notions of what is appropriate, LGBT content is disproportionately and subjectively censored from Internet search results.[189]

The media's ability to control the type of sexual content that people

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[183] Jeffrey Rosen, *Google's Gatekeepers*, N.Y. TIMES (Nov. 28, 2008), *available at* http://www.nytimes.com/2008/11/30/magazine/30google-t.html?_r=4&partner=rss&emc=rss&pagewanted=all&.

[184] *Seeing It, Knowing It*, *supra* note 13, at 222–23; Rosen, *supra* note 183.

[185] *Seeing It, Knowing It*, *supra* note 13, at 222–23; Rosen, *supra* note 183.

[186] Rosen, *supra* note 183 (In determining the legality of certain videos under Turkish law, "Google's director of global public policy, took an aggressive civil-libertarian position, arguing that the company should protect as much speech as possible," while "Google's general counsel, took a more pragmatic approach, expressing concern for the safety of the dozen or so employees at Google's Turkish office," thus opining that the videos be eliminated from search results in the area.).

[187] *Seeing It, Knowing It*, *supra* note 13, at 222–23 (The Deputy General Counsel "and her colleagues at Google have been said to have 'near-sovereign discretion' over, for example, the thirteen hours of content uploaded each minute to YouTube, a Google-owned website through which users can watch and share original videos online."); Rosen, *supra* note 183.

[188] *When Obscenity Discriminates*, *supra* note 146, at 1410–11.

[189] *Id.* Glazer found that depending on what content filter one sets, Google's search results for "having sex" resulted in homosexual depictions 0–25 percent of the time. *Id.* at 1411; *Seeing It, Knowing It*, *supra* note 13, at 223–24.

can see is a major roadblock for the LGBT equal rights movement. Further, the Supreme Court's valuation of obscenity has a more pervasive and far-reaching effect than what may appear at first glance. The Court skews the media's perception of what content should be available to the public, which in turn affects what communities and individuals consider obscene. The fact that sexually related LGBT speech is disproportionally limited in books, movies, television programs, and Internet searches amplifies the notion that it is inappropriate and obscene. Moreover, this "trickle-down discrimination" exists without public cognizance.

D. THE POWER OF SPEECH AND THE DANGER OF SILENCE

Freedom of sexual expression is integral to the movement for sociopolitical equality for the LGBT community. The first two subsections of this part discuss the benefits and harms of free-flowing sexual expression on LGBT individuals, the movement for LGBT equality, and society as a whole. The third subsection discusses how sexual censorship leads to social and institutional discrimination when the heterosexual majority cannot witness or appreciate the damage that stems from prejudicial laws.

1. Benefits to the Individual: Providing Information and Solidarity to LGBT and Heterosexual People Who Otherwise Lack Access to Sexually Alternative Viewpoints

The relative absence of sexual and LGBT content in the media impedes the effort to gain universal social and institutional tolerance for LGBT individuals. While the ramifications of the censorship described above reach all facets of the population, its effect on America's youth is particularly pervasive. The current framework allows media controlling adults to impose the cultural and ideological status quo without the progressive evolution that occurs naturally when older generations die off.

The Children's Internet Protection Act (CIPA)[190] exemplifies this problem. CIPA, enacted by Congress in 2000, provides financial incentives for public schools and libraries to implement Internet filters that block online content that is "obscene," "inappropriate," or "harmful to minors."[191] Most importantly, CIPA specifies that the assessment of these

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[190] Children's Internet Protection Act, Pub. L. No. 106–554, 114 Stat. 2763, 2763A-355 (codified as amended in scattered sections of 20 U.S.C. and 47 U.S.C.).

[191] 47 U.S.C. §§ 254(h)(5)–(6) (2006).

highly subjective standards is a "[l]ocal determination," that must "be made by the school board, local educational agency, library, or other authority responsible for making the determination," and that "[n]o agency or instrumentality of the United States Government" can "establish criteria for making such determination," "review the determination," or even "consider the criteria employed."[192] As such, Congress—as well as the Supreme Court, which upheld CIPA's constitutionality[193]—relinquished the ability to monitor the subjective or prejudicially biased reasons an entity may use to deem something "inappropriate" or "harmful." In doing so, Congress recognized and effectively discounted the dangers that could result if certain communities and local institutions decided to remove all LGBT related content from public access without being subject to judicial oversight.

Limitations on free-flowing sexually related content in the media impacts LGBT individuals in particular, and those individuals questioning their sexuality. Limiting speech and information about alternative sexual viewpoints strips these individuals of what is often the only resource available to those born to homophobic parents or within certain religious, conservative, or intolerant communities. This underscores the importance of keeping public facilities, like schools and libraries, free from censorship, as these are often the only havens where LGBT youth, and heterosexual youth who are curious about LGBT issues and viewpoints, can access this content.

Silencing sexual LGBT speech also strips people of the encouragement and solidarity they may find by engaging with the LGBT community.[194] Additionally, censoring this speech deprives people of positive LGBT role models and reinforces their surrounding communities' dogma that "people like [them] are sick, contemptible, and justly despised."[195] Thus, the true benefit that the deregulation of sexually

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[192] 47 U.S.C. § 254(l)(2) (2006).

[193] *See* United States. v. Am. Library Ass'n, 539 U.S. 194, 198–99 (2003).

[194] *See* Edward Stein, *Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace*, 38 HARV. C.R.-C.L. L. REV. 159, 162, 184 (2003) (The Internet "provides a virtual community that constitutes an emotional lifeline" and "a means of escape from the emotional and social isolation that for so many people is part of being gay.").

[195] Jeffrey G. Sherman, *Love Speech: The Social Utility of Pornography*, 47 STAN. L. REV. 661, 681 (1995); *see also* Carlin Meyer, *Reclaiming Sex From Pornographers: Cybersexual Possibilities*, 83 GEO. L.J. 1969, 1975 (1995); HEALTHY PEOPLE 2020, U.S. DEP'T OF HEALTH & HUMAN SERVS., LESBIAN, GAY, AND TRANSGENDER HEALTH, http://www.cancer-network.org/media/pdf/HP_2020_LGBT_factSheet.pdf (last visited June 17, 2013) [hereinafter LGT HEALTH] (transgender individuals have high rates of mental health issues and suicide); Mark L. Hatzenbueler, Katherine M. Keyes & Katie A. McLaughlin, *The Protective Effects of*

related speech can have for LGBT individuals is a popular acceptance of their sexuality and the LGBT movement as a whole.[196]

2. Benefits to Society: Exposing People to Different Sexual Viewpoints and Dispelling the Stigmas Founded in Ignorance

Individuals that fear or seek to prevent the dissemination of LGBT tolerant information are the first to recognize the threat it poses to antique constructs of homosexuality. Recall that numerous authoritarian states throughout history quelled sexually related speech in order to proselytize public hatred for the speaker.[197] Today, this idea takes the form of heterosexist activist groups like the Family Research Council (FRC), which for decades, distributed publications that instructed parents and community members on how to block "pro-sexuality propaganda" from entering their children's realms of awareness.[198] The FRC recognizes that any speech that touches on homosexuality inherently promotes it—exposing children to speech that merely acknowledges the existence of the LGBT community opens the door to public discourse about its advancement.[199] William Eskridge explains this regressive belief that "even tolerance of, or neutral reference to, homosexuality is dangerous because it sends the wrong message to youth. A teacher who is a known homosexual will automatically represent that way of life to young, impressionable students."[200]

In this sense, the FRC is not wrong. Simply meeting openly LGBT individuals can begin to dispel the stigmas and disgust that people who

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Social/Contextual Factors on Psychiatric Morbidity in LGB Populations, 40 INT'L J. EPIDEMIOLOGY 1071 (2011); Rob Whitley, *Commentary: Being Gay in Straight Places—Exploring Density Effects on the Mental Health of Homosexual and Bisexual Populations*, 40 INT'L J. EPIDEMIOLOGY 1081 (2011); Jamie M. Grant, *Outing Age 2010: Public Policy Issues Affecting Lesbian, Gay, Bisexual and Transgender Elders*, NATIONAL GAY & LESBIAN TASK FORCE POLICY INSTITUTE 1, 92 (2009), *available at* http://www.thetaskforce.org/downloads/reports/reports/outingage_final.pdf.

[196] *See* Meyer, *supra* note 195, at 1996.

[197] *See supra* Part IV.B.1.

[198] *See* Peter LaBarbera, *How to Protect Your Children from Pro-Homosexuality Propaganda in Schools*, FAM. RES. COUNCIL, http://tdmea.tripod.com/protectfrompropaganda byfrc.htm.

[199] *See id.* (Heterosexist activists should discount "claims by educators that the questionable [LGBT] programs do not 'promote homosexuality' but just teach 'tolerance.' Of course these programs promote homosexuality: When you take a behavior that has been considered immoral and unhealthy for centuries and start teaching children—even kindergartners—that it is morally acceptable and the basis for a healthy 'identity,' that is promotion!").

[200] Eskridge, *supra* note 153, at 1024.

have never known a LGBT person may have.[201] Why else would homophobic activists fear LGBT speech, if not for the power that merely informing a person of the existence of alternate sexual viewpoints and provoking heterosexual people to talk about the LGBT community has in advancing the LGBT rights movement?[202]

One empirical example of the sociopolitical benefits of allowing the public access to obscene or indecent sexual content is the German media's tolerance for sexually explicit content. As such, Germany's recognition of LGBT rights has drastically surpassed that of the United States.[203] Germany permits the broadcast of obscenity on the radio, explicit language and "mild nudity" on daytime television, and soft-core pornography on publicly accessible television at night.[204] Moreover, since 2011, Germany has afforded all rights and privileges of marriage to same-sex registered partnerships.[205] Additionally, in 2006, Germany enacted several anti-discrimination employment laws that have served to protect LGBT individuals.[206] Further, since 2000, German LGBT men and women have been able to serve openly in the military,[207] and since the late 1960s, the privacy of same-sex intercourse has been recognized and protected. While it is impossible to conclude that Germany's relatively open access to sexual speech has directly caused the success of its LGBT equality movement, there is a wealth of academic and scientific literature supporting the theory that sexual speech, even when unrelated to LGBT

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[201] Sarah Camille Conrey, *Hey, What About Me?: Why Sexual Education Classes Shouldn't Keep Ignoring LGBTQ Students*, 23 HASTINGS WOMEN'S L.J. 85, 107 (2011).

[202] *See* Knauer, *supra* note 180, at 495 ("[e]xposure to the idea of homosexuality in the media or in the schools is one site" where LGBT-tolerance becomes contagious).

[203] BEN ALLISON, PETER HUENE, DAVID PAROULEK, ROBERT ROSSMAN, & MARK SHAPIRO, *Comparison: Germany and the United States*, CENSORSHIP, http://courses.cs.vt.edu/cs3604/lib/Censorship/International/compare.htm (last visited June 17, 2013).

[204] *Id.*

[205] *See, e.g.*, *The World from Berlin: 'No Reason to Discriminate Against Gay Partnerships,'* SPIEGEL ONLINE INTERNATIONAL (Aug. 18, 2010, 02:15 PM), http://www.spiegel.de/international/germany/the-world-from-berlin-no-reason-to-discriminate-against-gay-partnerships-a-712473.html.

[206] Eugene Scalia, *German Parliament Passes General Equal Treatment Act, Which Will Have a Considerable Impact on German Employment Practice*, GIBSON DUNN (July 20, 2006), http://www.gibsondunn.com/publications/pages/GermanParliamentPassesGeneralEqualTreatmentActWhichWillHaveaConsiderableImpactonGermanEmployment.aspx.

[207] *Nations Allowing Gays to Serve Openly in Military*, PALM CENTER (June 2009), http://www.palmcenter.org/research/nations%20allowing%20service%20by%20openly%20gay%20people.

topics, is essential for LGBT equality.[208]

3. Silencing Alternative Sexual Expression Fosters the Perception of a Perverse LGBT "Culture" that is Easier to Discriminate Against

Silencing sexual LGBT speech pushes LGBT individuals to the fringes of society, where they are often considered a separate community or "culture" not integrated with the heterosexual norm.[209] Without actually witnessing or having exposure to the LGBT community and its viewpoints, it is easier for others to view the LGBT community as a homogenous group, all possessing the same qualities, virtues, and sexual fetishes. Unfortunately, the public ignorantly equates LGBT individuals with "perverse" sex acts like sadomasochism, prostitution, and bestiality.[210] For example, just ten years ago, Justice Scalia expressed his fear in *Lawrence v. Texas* that by recognizing and defending homosexual equality in *Lawrence*, a correlation in the rise of "adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity" would result.[211]

When these different types of sexual conduct are kept separate and out of the reach of certain social, religious, and political circles and organizations, it is easier to consider them as one and the same. Moreover, as a result of the creation of an unaccepted "culture" of sexual minorities, unassimilated with heterosexuals across much of the country, the heterosexual majority is better able to institutionally and socially discriminate against these strange, distant "perverts." It is much easier to support a prohibition of same-sex marriage or adoption, for example, when the injury is isolated within an imperceptible population. In the end,

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[208] *See, e.g.*, Knauer, *supra* note 180, at 495–98 (The "most important goal" of anti-gay activists and governments is to "silence the positive image of homosexuality or at least curtail its reach."); Stark, *supra* note 169, at 348–49; *supra* Part IV.B (explaining how governments have historically used sexual censorship to eliminate certain topics from public discourse in an attempt to stifle the advancement of unpopular minorities such as women, racial and ethnic groups, and LGBT individuals).

[209] Grant, *supra* note 195, at 89, 91–94 (describing the problems facing elderly LGBT individuals); *see* LGT HEALTH, *supra* note 195 (highlighting the history of oppression and discrimination the LGBT community has experienced and how it affects their health).

[210] *See, e.g.*, Yoel Inbar et al., *Disgust Sensitivity Predicts Intuitive Disapproval of Gays*, 9 AM. PSYCHOL. ASS'N 435 (2009); Sheila Marikar, *Paris Hilton: Gays 'Disgusting,' Most 'Probably Have AIDS'*, ABC NEWS (Sept. 20, 2012, 12:19 PM), http://abcnews.go.com/blogs/entertainment/2012/09/paris-hilton-gays-disgusting-most-probably-have-aids/.

[211] Lawrence v. Texas, 539 U.S. 558, 590 (2003).

it is easier to fear and hate what one does not know or see.

V. LEGAL SOLUTIONS

Acknowledging that the Supreme Court invokes value judgments in the way it determines the constitutionality of sexually related content regulations, this Note offers two proposals to mitigate the potential and actual discrimination that results from the extant jurisprudence. First, the nominally rigid—though selective and malleable in fact[212]—categorization of obscenity as unprotected free speech should be removed. Second, regulations of sexual content and expression should be afforded heightened judicial scrutiny. Governments should be required to show that any regulation on obscenity or other sexually related speech is the least restrictive way to achieve its purported interest. Instead of not requiring any judicial justification for content-based regulations of obscenity, this alternative would constrain judicial discretion and limit the extent and possibility of personal biases and prejudices infiltrating the lawmaking process.[213]

VI. CONCLUSION: TAKING SEXUAL MINORITIES OUT OF THE CLOSET

The current legal status of sexually related speech permits courts, legislators, government agencies, and individuals to broadly censor and limit the public's access to sexual content, which leads to discrimination against LGBT individuals. By discussing the various logical and legal inconsistencies in obscenity jurisprudence, Part II demonstrated the value judgments invoked by the Supreme Court to keep sexually related speech relatively free and isolated from public access. In comparing the Court's current treatment of sexual and violent expression with its treatment over the past few decades, it is apparent that the Court has disproportionately and discriminately stifled sexual speech while concurrently finding no legal basis for restricting violent speech. Part III discussed the inconsistencies in how the Court has upheld regulations of other types of sexually related expression under the First Amendment. This demonstrates the Court's tacit approval of governments deeming sexual expression more harmful to the public than violent expression. Together, Parts II and

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[212] *See* discussion *supra* Part II.A.

[213] *See* Allen, *supra* note 94, at 1061–66; *When Obscenity Discriminates*, *supra* note 146, at 1432.

III showed how the Court undervalues the dissemination of sexually related speech, and allows the government to take action under the pretext that the public needs to be shielded from sexual expression.

Part IV demonstrated how individuals, states, and the media use, or are affected by, sexually related speech jurisprudence. It showed that the absence of sexual speech facilitates social and institutional discrimination against LGBT individuals, and this discrimination is more readily tolerated because sexual minorities are considered foreign and perverse.

As sexually perverse or obscene content continues to be restricted from public consumption, the LGBT population associated with this "perversion" is similarly construed to be regulable in certain aspects of their private lives. Thus, while sexual acts themselves should be free from public interference, sexual *speech* should also be made publicly available in order to widen society's exposure to and acceptance of sexually alternate viewpoints.

As the Court itself once articulated, "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."[214] If sexual content continues to be deemed an evil facet of expression from which the people themselves may not appropriately gauge their tolerance, those with "obscene" voices will continue to be pushed to the margins of society, silenced by majoritarian disgust.

[214] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994).