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# The Price We Pay for Pornography: A Karamazov View

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# COMMENT

## THE PRICE WE PAY FOR PORNOGRAPHY: A KARAMAZOV VIEW

ARGUMENTS against giving first amendment[1] protection to pornography and obscenity[2] are consistently made from a societal perspective. The Supreme Court of the United States has held that obscenity is not protected speech because of the harm such material causes to "the social interest in order and morality."[3] Similarly, critics of pornography have argued that the harms to society resulting from the distribution of pornographic materials outweigh any first amendment benefits.[4] Inherent in the Supreme Court's definition of obscenity is the idea that material is not ob-

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1. The first amendment states: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. Although the first amendment says "Congress shall make no law," the Supreme Court has carved out a number of exceptions to that restriction. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964)(holding that a newspaper may be sued for libel if the plaintiff proves "actual malice"); Roth v. United States, 354 U.S. 476, *reh'g denied*, 355 U.S. 852 (1957)(first amendment does not protect obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)("there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem").

2. Obscenity, which is not protected speech, differs from pornography. "The term 'obscenity' refers to indecency and filth; the term pornography. . . refers to materials that treat women as prostitutes and that focus on the role of women in providing sexual pleasure to men." Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 595. Generally, pornography that is not legally obscene cannot be banned under the present Supreme Court doctrine. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW, 1029 (3d ed. 1986). The Attorney General's Commission on Pornography defined pornography as material that "is predominantly sexually explicit and intended primarily for the purpose of sexual arousal." 1 ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, U.S. DEP'T OF JUSTICE, FINAL REPORT 228-29 (1986) [hereinafter FINAL REPORT].

3. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). *See also* Miller v. California, 413 U.S. 15, 17-23 (1973).

4. *See* MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL. REV. 321, 322-24 (1984). "[P]ornography causes attitudes and behaviors of violence and discrimination which define the treatment and status of [women]." *Id.* at 324. *See also* Sunstein, *supra* note 2, at 596-97, 601; Note, *Anti-Pornography Laws and First Amendment Values*, 98 HARV. L. REV. 460, 470-72, 475 (1984).

scene if it benefits society.[5]

One problem with balancing the societal harm caused by the distribution of pornography against the accompanying first amendment benefits is that commentators and studies have been unable to reach a consensus as to what the effects of pornography are on society.[6] Meanwhile, substantial resources are exhausted as the courts struggle to determine what material contributes so little value to society that it should be labeled obscene. Furthermore, costly studies conducted on the effects of pornography have been inconclusive.[7]

This Note will present an alternative to the legal and sociological viewpoints which require an expensive determination of the quantitative harms of pornographic material to society. By utilizing an argument from outside the realm of legal scholarship, it will propose a more individualized look at the harm created by such materials, as opposed to a general societal view. First, this Note will briefly discuss some of the Supreme Court cases addressing obscenity and pornography. Second, this Note will apply a renowned argument from Fyodor Dostoevsky's *The Brothers Karamazov* to argue that the harm to one is not worth the benefit to the many. Finally, this Note will analyze the argument presented, concluding that the focus of many commentators in this area is misplaced.

## I. PORNOGRAPHY IN THE COURTS

As long ago as 1942, the United States Supreme Court has suggested that the "lewd and obscene" are among "certain well-defined and narrowly limited classes of speech, the prevention and

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5. *Miller*, 413 U.S. at 24.

6. *See* Sunstein, *supra* note 2, at 600. "Other social factors, including demographic and ethical trends, may account for simultaneous increases in both pornography and violence — though some of the studies try to control for these possible distortions. Objections of these sorts of course do not disprove a connection; they do suggest, however, that the empirical data are imperfect." *Id.*

7. *See OJJDP Concedes Flaws in Study of Cartoons in Adult Magazines*, CRIM. JUST. NEWSL., Dec. 1, 1986, at 6 (The Federal Office of Juvenile Justice and Delinquency Prevention (OJJDP) spent $734,000 on a study of links between cartoons in adult magazines and sexual abuse of children. The OJJDP, however, decided not to officially issue the report because of its serious flaws.); *Attorney General's Panel Calls for War on Pornography*, CRIM. JUST. NEWSL., June 2, 1986, at 1-2 (The extensive Attorney General's Commission Report on Pornography, which took over one year to complete, caused disagreement even among the members of the commission. Two members of the eleven member commission dissented.).

punishment of which have never been thought to raise any Constitutional problem."[8] The justification for this exclusion from first amendment protection is that it will benefit society as a whole: "[A]ny benefit that may be derived from [such classes of speech] is clearly outweighed by the social interest in order and morality."[9] The Court's first decision on the subject, *Roth v. United States*,[10] created the foundation for later cases dealing with obscene materials.[11] In *Roth*, the Court held that "obscenity is not within the area of constitutionally protected speech or press."[12] Eleven years afer *Roth*, in *Ginsberg v. United States*, the Supreme Court upheld a statute which prohibited the selling to children of nude pictures which are "harmful to minors."[13]

The current test for obscenity was enunciated in *Miller v. California*.[14] The *Miller* test asks:

> (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 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.[15]

In *Miller*, the Court reaffirmed "the *Roth* holding that obscene material is not protected by the first amendment,"[16] while vacating and remanding the conviction of the defendant who had mailed unsolicited sexually explicit material in violation of a California statute.[17] Under the *Miller* test, speech which is valuable to society — speech with "serious literary, artistic, political, or scientific value" — is not obscene, and is therefore protected speech.

In *Federal Communications Commission v. Pacifica Foundation*,[18] the United States Supreme Court held that the Federal Communications Commission (FCC) could regualte a radio

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8. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).
9. *Id.* at 572.
10. Roth v. United States, 354 U.S. 476, *reh'g denied*, 355 U.S. 852 (1957).
11. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 2, at 1011.
12. *Roth*, 354 U.S. at 485.
13. Ginsberg v. New York, 390 U.S. 629 (1968).
14. Miller v. California, 413 U.S. 15 (1973).
15. *Miller*, 413 U.S. at 24 (citations omitted).
16. *Id.* at 36.
17. *Id.* at 37.
18. Federal Communications Comm'n v. Pacifica Found., 438 U.S. 726 (1978).

broadcast that is indecent but not obscene.[19] *Pacifica* involved an FCC declaratory order granting a complaint against a radio station for broadcasting a monologue by satiric humorist George Carlin entitled "Filthy Words."[20] Although *Pacifica*, unlike the other cases discussed in this Note, involved the broadcast medium, it is still relevant in that it allowed sanctions for speech which was indecent, but not obscene.[21] Another factor worthy of notice in the Court's decision was its concern over the broadcast's effect on children. Pointing out that broadcasting is accessible to children, the Court stated "that the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected expression."[22]

The Supreme Court confronted the issue of child pornography in *New York v. Ferber*,[23] where it upheld the constitutionality of a New York statute which prohibited persons from knowingly promoting a visual sexual performance by a child under the age of sixteen by distributing, disseminating, or advertising material which depicts such a performance.[24] The Court focused on the statute's role in protecting young children from being used as performers, not on the effect of such material on its viewers.[25] In examining the state's interest in protecting children, the Court claimed that the obscenity test from *Miller* was inadequate to protect children from exploitation.[26] By concluding that the New York statute was not substantially overbroad, the Court upheld that statute's definition of child pornography, which did not require the banned material to be obscene:

> The court adjusted the *Miller* test for obscenity as follows for child pornography: the trier of fact need not find that the material appeals to the prurient interests of the average person, it is not required that the sexual conduct be portrayed in a patently offensive manner, and the material at issue need not be considered as a whole.[27]

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19. *Id.* at 750-51.
20. *Id.* at 729, 730.
21. *Id.* at 739-41.
22. *Id.* at 749 (quoting Ginsberg v. New York, 390 U.S. 629, 639-40 (1968)).
23. New York v. Ferber, 458 U.S. 747 (1982).
24. *Id.* at 750-51.
25. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 2, at 1022.
26. *Ferber*, 458 U.S. at 760-61.
27. Annotation, *Validity and Construction of 18 USCS § 371 and 2252(a) Penalizing Mailing or Receiving, or Conspiring to Mail or Receive, Child Pornography*, 86 A.L.R.

The *Ferber* Court reasoned that the harm to society resulting from using children as sexual performers outweighed any benefits to society from the distribution of such material. The harm to society resulted from the harm to the children forced to perform.[28] Unlike statutes punishing the distribution of pornographic materials because of their effect on viewers, the statute in *Ferber* was aimed at preventing "the abuse of children who are made to engage in sexual conduct for commercial purposes."[29] This distinction is important, because in *Ferber* the connection between the pornography and the victim was clear. No studies were necessary to find a relationship between the pornography and the harm to the performing children. Furthermore, the harm to society was magnified because children were involved. The Court explained that " '[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.' "[30] The Court argued that the harm to society outweighed any benefits resulting from the use of children as sexual performers: "The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimus*."[31]

Two aspects of the *Ferber* decision appear important to the Court's holding that the harm outweighed the benefits. First, it seemed important to the Court that the connection between the pornography and the harm to a number of children was clear. Had the statute been aimed at banning child pornography because such material encourages child abuse, the Court would have probably struck down the statute. Indeed, the Court condoned the use of a person over sixteen years of age, who looked younger, if such material had literary or artistic value.[32] The Court did not seem to be concerned with the pornography's effect on its viewers.

A second important aspect of the Court's decision was that the child pornography under consideration was not alleged to have artistic, literary, educational, or scientific value. The majority was unclear as to what role such a value would play.[33] The justices who concurred, however, explicitly disagreed on whether child

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FED. 360, 363 (1988).

28. *Ferber*, 458 U.S. at 750-59.
29. *Id.* at 753.
30. *Id.* at 757 (quoting Prince v. Massachusetts, 321 U.S. 158, 168 (1944)).
31. *Id.* at 762.
32. *Id.* at 763.
33. *Id.* at 761, 763, 773.

pornography with artistic, literary, educational, or scientific value could be banned in order to protect the child performer.[34]

## II. REBELLION

The previously discussed Supreme Court cases have illustrated a number of themes in this area of the law. First, there is a strong interest in protecting "speech" which is valuable to society. Second, society has a strong interest in protecting its children. Third, if the connection between the speech and the harm to society is sufficiently direct, the harm will be found to outweigh any benefits resulting from the speech. This third theme raises the questions of how direct the connection and how great the harm must be to deny the "speech" first amendment protection. *Ferber* appeared to require a fairly direct connection between the speech and the harm, but the Court did not answer the question of how many child victims must be harmed to outweigh any benefits from the "speech." The next part of this Note adapts an argument from *The Brothers Karamazov*[35] to answer that question. It intertwines its analysis with the three themes taken from the Supreme Court cases and concludes that all pornography should be banned. The argument is presented in a manner which parallels Ivan Karamazov's discussion with his brother, Aloysha, in the novel.

### A. An Adaption of an Argument from Ivan Karamazov[36]

There are a number of examples of pornography's role in

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34. In *Ferber*, Justice O'Connor wrote a concurring opinion to stress that the compelling interests indentified by the majority "suggest that the Constitution might in fact permit New York to ban knowing distribution of works depicting minors engaged in explicit sexual conduct, regardless of the social value of the depictions." *Id.* at 774. Justice Brennan, however, was joined by Justice Marshall in a concurring opinion which differed with O'Connor on this issue. Brennan argued that application of any such "statute to depictions of children that in themselves do have serious literary, artistic, scientific, or medical value, would violate the First Amendment." *Id.* at 776.

35. F. DOSTOEVSKY, THE BROTHERS KARAMAZOV (A. MacAndrew trans. 1970).

36. The foundation for the argument comes from *The Brothers Karamazov*, a novel by Fyodor Dostoevsky. The argument in the novel is used in a different context, when one of the characters, Ivan Karamazov, refutes "the order of [God's] creation." E. SANDOZ, POLITICAL APOCALYPSE: A STUDY OF DOSTOEVSKY'S GRAND INQUISITOR 57 (1971). This argument, entitled "Rebellion," along with Ivan's follow-up argument, "The Grand Inquisitor," have sparked considerable discussion and have spawned a number of books. *See generally* V. ROZANOV, DOSTOEVSKY AND THE LEGEND OF THE GRAND INQUISITOR (1972); E. SANDOZ, *supra*. *See also* A. GIBSON, THE RELIGION OF DOSTOEVSKY 178-208 (1973).

Although at first it appears there is no connection between Ivan's argument and the relationship between pornography and the first amendment, a closer look reveals that

causing readers/viewers to perform violent acts against children.[37] Without assuming a direct connection in numerous instances, one may easily find a connection in at least a few instances. Pornography may affect everyone in society, but children are its most sympathetic victims. For example, one child was found crucified on a cross upon a mound of pornography.[38] It is disturbing to think of the suffering that poor child endured while the nails were being driven into his body.[39] More recently, a twelve-year-old girl was raped and murdered by a man who said that pornography stimulated his appetite for murder.[40] What benefits from pornography

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Ivan's argument focuses on the suffering of children. Where Ivan uses the suffering of children to refute God's order, this Note uses the suffering of children to refute the protection the first amendment supplies to pornography.

In the chapter entitled "Rebellion," Ivan Karamazov is trying to explain to his brother Aloysha, a novice at a monastary, why he does "not accept and cannot accept . . . the God-created world." F. DOSTOEVSKY, *supra* note 35, at 283. After giving some examples of atrocities committed against children, Ivan argues that the suffering of one child does not justify any plan that God has for eternal harmony:

> "I have no wish to be a part of their eternal harmony. It's not worth one single tear of the martyred little girl who beat her breast with her tiny fist, shedding her innocent tears . . . . It's not worth it, because that tear will have remained unatoned for. And those tears must be atoned for; otherwise there can be no harmony . . . . To me, harmony means forgiving and embracing everybody, and I don't want anyone to suffer anymore. And if the suffering of little children is needed to complete the sum total of suffering required to pay for the truth, I don't want that truth, and I declare in advance that all the truth in the world is not worth the price! . . . I feel, moreover, that such harmony is rather overpriced. We cannot afford to pay so much for a ticket. . . ."
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> "That's rebellion," Aloysha said softly, lowering his eyes.

*Id.* at 295-96.

> Finally, Ivan puts his argument in the form of a question and asks his brother: "[L]et's assume that you were called upon to build the edifice of human destiny so that men would finally be happy and would find peace and tranquility. If you knew that, in order to attain this, you would have to torture just one single creature, let's say the little girl who beat her chest so desperately in the outhouse, and that on her unavenged tears you could build that edifice, would you agree to do it?"

*Id.* at 296.

Aloysha, understandably, answers "no." *Id.*

37. *See generally* FINAL REPORT, *supra* note 2, at 767-1037.

38. H. CLOR, OBSCENITY AND PUBLIC MORALITY 141 (1969).

39. There is a reason for these explicit examples. Here, as in *The Brothers Karamazov*, the argument relies on an appeal to emotion more than on a straightforward logical analysis. These examples are necessary so that one may see the children as real human beings who have suffered instead of just as statistics.

40. The Plain Dealer (Cleveland), Jan. 29, 1989, at 6A, col. 3. The rapist/murderer, Ted Bundy, is quoted: "[Pornography] snatched me out of my home 20, 30 years ago, and, as dedicated as my parents were . . . and as good a Christian home as we had . . . there is no protection against the kind of influences that are loose in [a] society

could possibly justify her tears?

The harm to one child from the distribution of pornography is great enough to outweigh any accompanying first amendment benefits. Even if a pornographic film has a large scientific or artistic value, the harm from allowing its distribution is too great. If removing first amendment protection from pornographic materials protects just one child, it is worth the sacrifice. Nothing can outweigh one child's suffering.

"[L]et's assume that you were called upon to build the edifice of human destiny" so that men would have access to all the information necessary to run their government effectively and to achieve happiness. "If you knew that, in order to attain this, you would have to torture just one single creature," let's say the twelve-year-old girl raped and murdered by Ted Bundy, "and that on her . . . tears you could build that edifice, would you agree to do it?"[41]

## B. Legal Support

The argument that one child's suffering may outweigh any societal benefits resulting from pornography is not directly inconsistent with the Supreme Court cases. Those cases illustrate a strong concern for children. Where the connection between the speech and the harm is clear for any single instance, the harm seems to outweigh the benefits. It is not necessary for the Attorney General to conduct studies on the relationship of pornography to violence — one related incident is enough to justify a ban on all pornography.

Still, inherent in cases such as *Miller* and *Ferber* is the belief that the societal benefits from valuable speech outweigh any harm to one individual. One may wonder whether the Court is correct in assuming that there is a significant societal harm only where a large number of children are directly harmed.

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that tolerates (pornography)." *Id.*

Society may never know what really creates mass murderers like Bundy. Maybe it is pornography; or maybe as the mass murderer in the song *Nebraska* explains, "I guess there's just a meanness in this world." B. Springsteen, "*Nebraska*," NEBRASKA (Columbia 1982). Still, pornography does appear to have some role in a number of crimes. *See* FINAL REPORT, *supra* note 2, at 767-835.

41. F. DOSTOEVSKY, *supra* note 35, at 296.

## III. CONCLUSION

The argument presented in this Note is a very emotional one and difficult to address rationally. It is not easy for one to say that anything could outweigh the suffering of a single child. Still, this argument could extend such a protectionist view too far and remove all meaning from the first amendment. The issue becomes clouded when one talks about banning a medical textbook because the pictures of nude children in it may fall into the wrong hands. Also, the question of how much protection is overprotection arises when one argues that the law must protect the most sensitive child from the effects of all "harmful" novels or photographs. An advocate of spanking children as a disciplinary measure could be censored to protect children from corporal punishment. Extending the argument even further, one may ask whether the law should ban all drain cleaners because the benefit to society of clear drains does not outweigh the harm to the child who drank some of the poison.

Perhaps protecting pornography does benefit society, and perhaps somehow that benefit is great enough to outweigh the cost of crucifying a helpless child upon a mound of pornography.[42] Per-

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42. The burden on the party seeking censorship is high under the generally accepted first amendment doctrine applied by the courts:

> A would-be censor must, under generally accepted first amendment doctrine, persuade the democratic organ, and then a reviewing judge, that the censorship decision was not motivated by a desire to silence the speaker because of the censor's disagreement with the message. Second, the censor must persuade the legislature, and then a reviewing judge, that the government's interest in censorship is sufficiently significant to counter-balance a societal commitment to free expression. Third, the censor must persuade both the legislature and the reviewing judge that censorship is the only feasible way to safeguard the important government interest. Finally, a censor must show a virtually certain causal nexus between the target speech and the feared harm that allegedly justifies its suppression.

Neuborne, *Notes for a Theory of Constrained Balancing in First Amendment Cases: An Essay in Honor of Tom Emerson*, 38 CASE W. RES. L. REV. 576, 580-81 (1988)(footnotes omitted). The requirement that censorship be the only possible way to safeguard the government interest imposes the most difficult burden on the censor of pornography under the argument presented in this Note. The other requirements necessary to justify censorship are more easily satisfied. The censor could satisfy the first requirement by arguing that the governmental interest is preventing the harm caused by the pornography rather than regulating the content of the "speech" itself. Under the second requirement, this Note's argument would hold that the government's interest in protecting an individual child is insurmountable. As for the causal nexus requirement, this Note would require such a nexus to be shown for only one instance.

Another hurdle to implementing this Note's proposal is that in order to protect the children, pornographers must be prevented from publishing, not just punished after they do

haps there are better ways to protect the children, or maybe the connection between crime and pornography is not clear enough.[43]

Still, the argument presented in this Note should not be disregarded, just as the suffering of the child victims should not be disregarded. Too much time and money is spent searching for a relationship between pornography and the deterioration of the moral fabric of our society. This time and money is wasted. The efforts of legal commentators should not focus on the quantity of harm. The harm to one child is enough for one to acknowledge that the harm is very great. Instead, commentators should focus their debates on the benefits our society obtains from allowing the dissemination of pornography. The inquiry should not focus on the nature of the harm (the harm is clear), but on the nature of the benefits.[44] The next step is to decide whether the benefits justify the suffering. Finally, if the benefits do justify the harm, the Court should look for a way to limit the harm.

Often there are ways to limit the harm without dimming the benefits. First amendment protections can be precisely tailored to avoid as much harm as possible. An argument such as the one presented in this Note can be useful in distinguishing pornography from other types of speech, and can aid in the formation of proper first amendment categories for regulation. One commentator views *Ferber*'s role in first amendment analysis as supporting such a categorization of protected speech:

> [W]hat appears on closer inspection of *Ferber* is a growing con-

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publish such materials (although a very severe subsequent punishment may achieve the same goal). The first amendment doctrine of prior restraint makes such government restrictions in advance of publication more likely to violate the first amendment than subsequent punishments. *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 503-12 (1970).

43. *See supra* note 6. Still, the argument in this Note requires a solid connection between pornography and a violent act in only one instance.

44. There are arguments, however, that restrictions on pornography will actually *promote* free speech. "More concretely, the argument goes, the pornography industry is so well-financed, and has such power to condition men and women, that it has the effect of silencing the antipornography cause in particular and women in general." Sunstein, *supra* note 2, at 618.

Still, perhaps the best argument for protecting pornography, violence on television, and other culture-harming communications is that banning such speech would leave "the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us." American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). *See also* T. EMERSON, *supra* note 42, at 467-515. "Erotic reading may be injurious in its long-term effects. But no one contends that expression in any other area can be suppressed on such grounds. To do so would destroy the system of freedom of expression." *Id.* at 499.

> sensus within the Court on a doctrinal proposition of great importance in First Amendment theory — that the diversity of communicative activity and government concerns is so wide as to make it implausible to apply the same tests or analytical tools to the entire range of First Amendment problems. This premise provides the impetus for making First Amendment doctrine more precise and at the same time more complex, developing tools and tests that are greater in number but consequently applicable to increasingly smaller categories of First Amendment issues. And as the size of the categories shrinks, it becomes less necessary to protect that which ideally ought not to be protected solely to ensure the protection of the potentially valuable.[45]

In precisely tailoring the important protections offered by the first amendment, courts would do well to consider the twelve-year-old girl who was raped and murdered and the boy who was crucified upon a mound of pornography. If the courts fail at least to consider the pain suffered by these individuals, the benefits of first amendment protections will not be properly balanced in the interests of justice.

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45. Schauer, *Codifying the First Amendment:* New York v. Ferber, 1982 Sup. Ct. Rev. 285-317.