# GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS*
# CHAPTER 30
# JUST A PRO-CHOICE KIND OF GAL

EDWARD DE GRAZIA**

In the summer of 1989 the photographic art of the late Robert Mapplethorpe received a dose of national notoriety when Christina Orr-Cahall, director of the prestigious Corcoran Gallery of Art in Washington, D.C., canceled a scheduled show of Mapplethorpe photography partly funded by the National Endowment for the Arts. With the show's opening just two weeks away, Orr-Cahall pulled out because, she said, she feared that Congress would object and the NEA would be embarrassed. Thereafter, Senator Jesse Helms of North Carolina not only objected to Mapplethorpe's art but claimed that the time had come for Congress to erect a system of government supervision of NEA-funded arts and artists. For Helms, if not for Orr-Cahall, what was wrong with Mapplethorpe's photography was that the artist was gay and his work was "obscene" in a peculiar way: it disseminated homoerotic images regarding black and white men. That could not be "art."

SENATOR JESSE HELMS: There's a big difference between "The Merchant of Venice" and a photograph of two males of different races on a marble table top. . . . This Mapplethorpe fellow was an acknowledged homosexual. . . . the theme goes throughout his work.

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Christina Orr-Cahall became director of the venerable 118-year-old Corcoran Gallery of Art and its affiliated art school in October 1987; she was forty years old and was one of a small, growing number of women who headed major American art museums. The Corcoran is the largest non-government-related art institution in Washington and, according to Orr-Cahall, one of the few blessed with a board of directors ready to accept the



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premise that a woman should be able to manage a large and venerable organization such as the Corcoran. She had the bad luck, nevertheless, to be at the Corcoran when Jesse Helms learned that Robert Mapplethorpe's 150-work retrospective, "The Perfect Moment," was to be shown. The original catalogue for the Mapplethorpe exhibition had been funded by a grant from the National Endowment for the Arts, an agency of the federal government. The show at the Corcoran had been arranged for by the gallery's chief curator, Jane Livingston, before Orr-Cahall's arrival.

INGRID SISCHY:* "The Perfect Moment" . . . offers a sensible cross-section of Mapplethorpe's work. The images that are said to have caused the blowup in Washington belong to three portfolios of prints titled "X," "Y," and "Z." As the exhibition travels, the portfolios (which also include flowers, portraits, and texts) are always installed in a Mapplethorpe-designed slanting cabinet at counter height. They are avoidable; by just looking at what's on the walls, one could go through the show without seeing them. But to miss this tougher aspect of his work is to miss what gives Robert Mapplethorpe his place in photographic history.

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Senator Helms showed his wife, Dorothy, the Mapplethorpe exhibition catalogue. Helms told reporters what happened.

DOROTHY HELMS: Lord have mercy, Jesse, I'm not believing this.

JESSE HELMS: [My favorite painting] shows an old man, sitting at the table, with the Bible open in front of him, with his hands (folded in prayer) like this! And it is the most inspiring thing to me. . . . We have ten or twelve pictures of art, all of which I like. But we don't have any penises stretched out on the table. . . .†

I'm embarrassed to even talk to you about this. I'm embarrassed to talk to my wife. . . . They say I don't know anything about art and I confess that all I know about art is that I know what I like. . . .

Underlying everything that I've done and everything I've said is, this nation is on the slippery slope in terms of morals and decency. And it's way past the time that we back up and say to ourselves, "We become a part of what we condone. . . ." Mapplethorpe was a talented photographer. But clearly he was pro-

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* Editor in chief, *Interview* magazine.

† An allusion to "Mark Stevens (Mr. 10½)," 1976, reproduced in Robert Mapplethorpe, *The Perfect Moment* (1988).

moting homosexuality. He was a homosexual, acknowledged to be. He died of AIDS. And I'm sorry about that. But the fact remains that he was using this, using his talent, to promote homosexuality.

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Mapplethorpe was widely regarded as one of the major photographers of the past two decades. Works of his were in the permanent collections of the National Gallery of Art and the National Museum of American Art, both federal institutions, and in the Art Institute of Chicago's highly selective historical-photography exhibition, "On the Art of Fixing a Shadow." He had two major shows, in 1988 and 1989; the first, titled "Robert Mapplethorpe," was a 110-work retrospective at New York's prestigious Whitney Museum of American Art.

The second, a larger show, was the one that Jesse Helms heard was coming to town in June 1989; it had been organized by Janet Kardon of the Institute of Contemporary Art ("ICA") in Philadelphia, where it had been well received the previous December. It had also been well received in Chicago, Hartford, and Berkeley, and was scheduled to travel to Washington, Cincinnati, and Boston later in 1989 and in 1990.

His work came to public attention during the late seventies because of its sensational subject matter, black-white male homosexual sadomasochism and autoeroticism. But he also created beautiful photographic portraits of cultural celebrities and of flowers.

ANDY GRUNDBERG: Robert Mapplethorpe is perhaps the most topical artist of the moment. Less than 20 years since he first decided to make art with a camera, his elegant but often provocative photographs are being heralded as exemplars of the new stylish sensibility. . . .

Like scores of photographers before him—Lewis Hine, Brassaï, Weegee—Mr. Mapplethorpe chose to depict a subculture seldom photographed before, or at least seldom in the context of fine-art photography. . . . While his compulsive, unabashed and carefully staged chronicle of this particular strident variety of homoeroticism may not be everyone's cup of tea, it has proven irresistibly fascinating to much of the art world.

INGRID SISCHY: Mapplethorpe's flowers can have a riveting beauty that derives from a sense of their short life. Some are at such a peak that you want to smell them. A lot of painters and

photographers have worked with flowers, and often these pictures are said to be sexual. Mapplethorpe's flowers can certainly be erotic, as Georgia O'Keeffe's can, but that's due to the nature of the flowers. Mapplethorpe certainly didn't need to use flowers as vehicles of sexual allusion, because he worked with sex directly. Besides, when his flower photographs are at their best it is because he saw some quality—prickliness, say, or purity—that he had to catch before it passed. Mapplethorpe also treated flowers cursorily or used them as a prop. In those instances, his flowers are forgettable. His last flowers are not forgettable. It is as though all the life and color that were being drained from him were being sucked into the petals, the stems, and even the backgrounds that he used.

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The "stars" of Mapplethorpe's social ambience were artists, and in the five years before he died, Mapplethorpe made portraits of almost every fashionable younger figure in New York, from Francesco Clemente to Cindy Sherman, along with, from an earlier generation, Marisol, Warhol, and Louise Bourgeois, who is shown "bearing under her arm, as if to please her portraitist, an enormous phallus of her own fabrication." Possibly the most moving of Mapplethorpe's portraits of artists is the one of Alice Neel, "serene in her exhaustion and age," in a picture taken only days before her death.

ROBERT MAPPLETHORPE: Alice Neel was incredible. It was right before she was dying, and Robert Miller called me and told me you've really got to go up there, she really wants this picture. And she was the sweetest old thing. She had the reputation for being hard as nails, but right before she died she somehow went to heaven, she was just this angelic creature. She closed her eyes through half the shooting. She knew she was . . . giving me her death mask.

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Jesse Helms did not escape criticism for his attacks on Mapplethorpe's homoerotic art, and on the National Endowment for the Arts for enabling large numbers of Americans to view it. After he was criticized by the Raleigh, N.C., *News and Observer*, Helms challenged the paper's editor to publish—to make "available to people who are genuinely interested to see what I am talking about"—just three of the Mapplethorpe photographs that were in the NEA-funded "The Perfect Moment." The three se-

lected by Helms featured exposed genitals but, he said, were "by no means the worst." The editor declined.

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Robert Mapplethorpe was born into a middle-class Catholic family in Floral Park, New York. He went to art school at Pratt Institute in Brooklyn, where he "did collages" and "was also making photographic objects with material from pornographic magazines."

ROBERT MAPPLETHORPE: At some point, I picked up a camera and started taking erotic pictures—so that I would have the right raw materials and it would be more mine, instead of using other people's pictures. That was why I went into photography. It wasn't to take a pure photographic image, it was just to be able to work with more images.

INGRID SISCHY: There's irony in Mapplethorpe becoming such a political cause célèbre. He may have been political in terms of whom to talk to at a dinner party, but he didn't give a hoot about real politics. . . . The reason he is controversial now is that he touched on all those territorial questions about the body which are once again such a vivid part of American politics.

ROBERT MAPPLETHORPE: Have you ever seen the X, Y, and Z portfolios? X portfolio is thirteen sex pictures, Y is flowers, and Z is blacks. The earliest of the S & M pictures are in the X portfolio. They're small, they're 8 x 10s mounted to cards, and they come in a box. . . .

I know somebody in New Orleans who photographs black men, too, but nobody's done it the way I do it. . . . I was attracted visually. That's the only reason I photographed them. But once I started, I realized there's a whole gap of visual things. There have been great photographs of naked black men in the history of photography, but they are very rare. Some of my favorite pictures happen to be the pictures of black men. . . .

I think I was subconsciously influenced by Warhol. I couldn't have not been—because I think he's *the* most important pop artist—but I'm not sure how. . . . Warhol says that "anything can be art," and then I can make pornography art.

HELLE BERING-JENSEN: Though Mapplethorpe's work in his later years had moved away from the violently homoerotic to include portraits, some of them radiantly ethereal, still lifes and flower studies, it has always been the presence of the works from his so-called X portfolio that have attracted attention at his shows. Art

critics have hailed Mapplethorpe's honesty and courage in portraying the outer reaches of sexual experience— sadomasochism, male bondage, leather fetishism and sodomy.

SUSAN WEILEY: There is a long tradition of the erotic in both the literary and the visual arts. The nude has been the cornerstone of Western art, and attitudes toward the artifice of nakedness have varied throughout the centuries. . . . Today we feel great art should never be overtly sexual. The sexually provocative is relegated to pornographic magazines. . . . In fact, although Mapplethorpe studied art for seven years, it was just those magazines that provided his initial inspiration. He has often described discovering 42nd Street at age 16, gazing through porno-shop windows at magazines wrapped in cellophane.

ROBERT MAPPLETHORPE: The feeling I got was a strong stomach reaction, and I thought it would be extraordinary to get that gut feeling from a work of art. I'm not talking about arousal. The feeling was stronger and much more interesting than that. . . . But that had already been done. So it had to be different. Those magazines are like raw material. I've always found it irritating to hear people say erotic when they mean sexual material. I'm not afraid of words. Pornography is fine with me. If it's good it transcends what it is.

SUSAN WEILEY: Mapplethorpe's sexual photographs raise many issues. When [they were] first exhibited, in the late 1970's, even sophisticated viewers found their terrible beauty disturbing, particularly those detailing sadomasochism. Moreover, he installs his exhibitions so that the sexual images are interspersed with other subjects. We view a sadistic tableau side by side with a celebrity portrait or a lyrical still life of baby's breath. The distinctions between corruption and innocence are blurred. He insists that it is all the same.

ROBERT MAPPLETHORPE: My intent was to open people's eyes, to realize anything can be acceptable. It's not what it is, it's the way that it's photographed.

SUSAN WEILEY: The sexual photographs also disturb us in light of our shift in attitude during this decade. These exotic images bloomed in a hothouse atmosphere now grown chill with fear and death. Today it is difficult to view them without considering their celebration of sensuality as, in retrospect, indictments of our innocence. We are all implicated. They provoke a shudder similar to the one we feel looking at smiling faces in photographs

of the Warsaw ghetto. Mapplethorpe . . . stopped making the pornographic photographs—because of the AIDS epidemic, because he found them exhausting to do and his own health [was] fragile, but also because he [felt he had] already explored that subject thoroughly.

WILLIAM F. BUCKLEY, JR.: If a democratic society cannot find a way to protect a taxpaying Christian heterosexual from finding that he is engaged in subsidizing blasphemous acts of homoeroticism, then democracy isn't working.

SENATOR STROM THURMOND: The federal government has the power to control that which it subsidizes and experience shows that when the federal government has that power, that power is eventually exercised.

SENATOR ALPHONSE D'AMATO: This matter does not involve freedom of expression; it does involve the question whether American taxpayers should be forced to support such trash.

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In his *Washington Times* column, during September 1989, President Nixon's former press secretary Patrick Buchanan called for "a cultural revolution in the '90s" as sweeping as the "political revolution of the '80s" that had been engineered by Ronald Reagan; the new "revolution" was meant to overthrow the dominance of the arts by secular humanists.

PATRICK BUCHANAN: The [eighties] decade has seen an explosion of anti-American, anti-Christian, and nihilist "art." . . . [Many museums] now feature exhibits that can best be described as cultural trash. . . . [A]s in public television and public radio, a tiny clique, out of touch with America's traditional values, had wormed its way into control of the arts bureaucracy.

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This was an oblique attack on the National Endowment for the Arts. Combining the language of environmental "pollution" strategy that Chief Justice Warren E. Burger used in 1973 to deplore the leading obscenity case decisions of the Warren Court* with metaphors about a "poisoned land" and "poisoned fruits"

* More recently, *U.S. News & World Report* columnist John Leo warned his readers about the "pollution" that pop-music artists like Madonna, Prince, and 2 Live Crew were causing: "The popular culture is worth paying attention to. It is the air we breathe, and 2 Live Crew is a pesky new pollutant." Lee did not recommend government censorship, however, but suggested "complaining" and "boycotting" as the best means of getting "the 2 Live Crew Pollutants out of our air" (July 2, 1990).

favored by fundamentalists, Buchanan warned his readers of the consequences of government support of decadent art.

PATRICK BUCHANAN: As with our rivers and lakes, we need to clean up our culture: for it is a well from which we must all drink. Just as a poisoned land will yield up poisoned fruits, so a polluted culture, left to fester and stink, can destroy a nation's soul. . . . We should not subsidize decadence.

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Senator Jesse Helms's proposal to establish government supervision of American artists and arts institutions who were supported by National Endowment for the Arts grants was introduced as a Senate bill in July 1989, about a month after Buchanan's pollution alert and the Corcoran Gallery of Art's announcement that it had canceled its scheduled opening of "The Perfect Moment." Christina Orr-Cahall attributed the cancellation to the Corcoran's wish to stand clear of politics.

CHRISTINA ORR-CAHALL: We really felt this exhibit was at the wrong place at the wrong time. We had the strong potential to become some person's political platform.

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Only the week before, however, the Corcoran's director had reaffirmed the gallery's commitment to open the show on schedule. In announcing the cancellation, Orr-Cahall suggested she had done that in order to relieve the NEA of the congressional criticism that had developed over government support of blasphemous and pornographic art.

CHRISTINA ORR-CAHALL: We've been fighting since April against the initiatives that we saw were coming in Congress against the N.E.A. and the punitive measures against institutions that had organized controversial shows. . . . We thought perhaps not doing the Mapplethorpe show would allow members of Congress and supporters of the arts to deal with this more quietly; have more room to maneuver and avoid all this controversy.

DAVID LLOYD KREEGER:* If proceeding with this exhibition hurts NEA appropriations, it is detrimental to the Corcoran and to every other art institution.

VINCE PASSARO:† The Corcoran's savvy board, which had hauled in $1.6 million in NEA moola (plus $7 million in matching grants) for their gallery over the past several seasons, and which

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* Chairman of the board of the Corcoran Gallery of Art.
† Writer.

was taking part in the mania for museum expansion by preparing to launch a fund-raising drive to increase their endowment six-fold, had been "monitoring" the rumblings in Congress about the NEA with the sweat-stained anxiety of air-traffic controllers on a heavy day at O'Hare. They showed their keen appreciation for the hermetic politics of their town and did what until then, for a major museum, had been unthinkable: They canceled an exhibition on the eve of its unveiling for fear someone might not like it.

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Other members of the art world viewed Orr-Cahall's behavior in a similar light. New York art dealer Harry Lunn considered it plain "censorship." New York Artist Andres Serrano—himself a target of Religious Right and conservative congressional ire—saw it as a betrayal.

ANDRES SERRANO: It's pretty bad when a museum is censored, and it's even worse when it censors itself.

JOSHUA SMITH: The Corcoran's decision [was] also bad for artists, who rely on museum exhibitions to develop their careers and to perpetuate their work and reputations. The message the cancelation sends artists is that they must conform to "acceptable" *norms as dictated by outside interest groups in order to* have museum shows.

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Orr-Cahall thought that canceling the Mapplethorpe show not only was in the artist's interest but was the opposite of "censorship."

CHRISTINA ORR-CAHALL: The Corcoran's withdrawal from the exhibition's tour is not a comment on the quality of the artist's work. Neither is it an abrogation of the artist's right of free expression, nor is it a questioning of the Endowment's award system. . . .

We decided to err on the side of the artist, who had the right to have his work presented in a non-sensationalized, non-political environment, and who deserves not to be the hostage for larger issues of relevance to us all. If you think about this for a long time, as we did, this is not censorship; in fact this is the full artistic freedom which we all support.

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After hearing rumors of trouble brewing on Capitol Hill for the Corcoran and the NEA, Orr-Cahall had sent three scouts to the host art institute in Philadelphia, the ICA, to obtain photo-

copies of Mapplethorpe's pictures. On the basis of these copies—which she showed to the Corcoran's board of directors at a thinly attended meeting whose agenda had not mentioned Mapplethorpe—the board approved Orr-Cahall's decision.

INGRID SISCHY: How could the Corcoran's director have allowed her museum to respond to political rather than cultural imperatives? How could she have allowed an artist's work to be rejected on the basis of photocopies, when so much of this photography's message depends on the feeling and scale of the actual prints?

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The political imperatives that replaced the cultural imperatives in Orr-Cahall's mind had first emerged in April, four months after an exhibition of photographs mounted by a Winston-Salem, North Carolina, art gallery, the Southeastern Center for Contemporary Art (SCCA), had ended. A grantee of the NEA located in Senator Helms's home state, the SCCA was scheduled to send this show to ten other cities. At that time the powerful right-wing religious group called the American Family Association, founded by Donald Wildmon, sent out a newsletter to its estimated 380,000 followers, and to 178,000 affiliated churches, urging all and sundry to send it money and to write their representatives in Congress to clamp down on the federal officials in Washington who were spending government money on blasphemous works of so-called art. Wildmon's principal gripe was not Mapplethorpe but another New York artist, Andres Serrano, whose photographic artwork "Piss Christ" had found a place in the SCCA's traveling exhibition, with NEA support.*

One of the first congressmen to respond to Wildmon's outcry was Senator Alphonse D'Amato, Republican, of New York. On May 18, speaking on the Senate floor, he vilified the NEA's action in supporting Serrano's work, which he described as "garbage" and "a deplorable despicable display of vulgarity." The attack was picked up by Helms, who characterized Serrano as "not an artist" but "a jerk," and instructed an aide, John Mashburn, to try to enlist the collaboration of the SCCA's head, Ted Potter, in putting the blame for including Serrano in the SCCA exhibition on the NEA. Potter thought that Helms had bigger

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* An NEA grant to the SCCA of $75,000 represented about one fourth of the funds needed for the show; other donors were the Rockefeller Foundation and Equitable Life Insurance. Each of ten contributing artists received an award of $15,000. There is a good account of the origins of the Serrano and Mapplethorpe imbroglio in *Vanity Fair*, September 1990 ("Mean for Jesus"), and a cover article on Wildmon in *The New York Times Magazine*, September 2, 1990.

fish than the SCCA to fry, suspecting that his underlying plan "was to abolish the National Endowment for the Arts."

TED POTTER: This thing is so complex and so bizarre, I'm not sure the people who have raised this as an issue have even seen this photograph. It's a pawn in the ultraconservative confrontation with the NEA, just as the Mapplethorpe show is. . . . It has been taken out of an intellectual environment of a museum installation of protest art. It's been vilified and emotionalized as an anti-Christian piece of bigotry. But it took a lot of courage to make such a powerful and uncomfortable statement.

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Andres Serrano's "Piss Christ" has been interpreted as a protest by the artist against the contemporary exploitation of religious values. His "statement" about Christ, the symbol of the crucifixion, and the Christian religion inspired powerful fundamentalist leaders to seek the aid of politicians and the force of law to suppress both commentary and commentator. Allen Wildmon is the brother of Donald Wildmon and a spokesman for the American Family Association.

ALLEN WILDMON: The whole bottom line here is, whose set of values is going to dominate in society? This is just one spoke in the wheel so far as the overall picture—you've got rock music, you've got abortion. Somebody's values are going to dominate. Is it going to be a humanistic set of values, or a Biblical set of values?

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The highest law in the land is not the Bible but the Constitution, and the Constitution—particularly in its Bill of Rights guaranteeing fundamental liberties that include the freedoms of speech and press and due process of law—embodies humanistic values, not right-wing fundamentalist religious values.

During the row in Congress over his work, Andres Serrano spoke about it to a reporter for *The New York Times*, on condition that he not be photographed and that his Soho address not be published; Serrano had already received "at least seven" written threats.

ANDRES SERRANO: First and foremost ["Piss Christ"] reflects my Catholic upbringing, and my ambivalence to that upbringing, being drawn to Christ yet resisting organized religion. . . . When I first showed that picture at the Stux Gallery [in Soho], a reverend's wife came up to me and said, "My husband and I don't

agree about anything when it comes to religion, but we were both very moved by your picture." I liked that.

WILLIAM H. HONAN:* The Serrano photograph measures 60 inches by 40 inches and shows Jesus on the cross in a golden haze through a smattering of minute bubbles against a dark, blood-colored background. By slight twisting and considerable enlargement, the image takes on a monumental appearance and the viewer would never guess that a small plastic crucifix was used. The work appears reverential, and it is only after reading the provocative and explicit label that one realizes the object has been immersed in urine.

ANDRES SERRANO: If there's been a running theme throughout my work, it's this duality or contradiction between abstraction and representation, between transforming that little cross into this monumental and mysterious-looking object and then making you reconsider it in another context when you read the label. . . . I've always had trouble seeing things in black and white. . . . I have an African-Cuban mother and a Spanish white father. My great-grandfather was Chinese.

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Serrano's decision to use his urine as an artistic medium followed his working with other bodily fluids: blood and milk. In 1984 he began using blood in his work when he photographed a cow's head drenched in blood (which he bought from a butcher on Thirty-eighth Street). After that he splashed cattle blood into milk, for a work called "Blood Stream."

ANDRES SERRANO: These are life's bodily fluids. They have both a visual impact and are symbolically charged with meaning. . . . By 1987, I had red and white and . . . I needed another color to add to my palette. In keeping with bodily fluids I turned to urine. It gave me quite a vivid and vibrant color.

MICHAEL BRENSON:† One of the few unintended benefits of the Congressional outrage against Andres Serrano is that it has brought widespread attention to a good artist. His photographs are indeed provocative. They are also serious art. There are 14 of them at the Stux Gallery [in Soho], including the reviled and dreaded one from 1987, with its 13-inch plastic-and-wood crucifix upright in a Plexiglas tank filled with the artist's urine. This religious emblem enveloped in a dreamy golden haze (without

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* Culture editor, *The New York Times*.
† Art critic, *The New York Times*.

the title, there would be little or no way of knowing what the liquid is) suggests the arty images and the mass production of religious souvenirs that have been partly responsible for the trivialization and exploitation of both religion and art.

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In an essay in the SCCA's show catalogue, Donald Kuspit, a professor of art history and philosophy at the State University of New York at Stony Brook, said that works like "Piss Christ" were attacks upon "American superficiality, which denies the 'life blood' of things." But evangelist Pat Robertson declared over the Christian Broadcast Network that the Serrano work "slaps in the face the values that Americans hold dear," and Senator D'Amato dramatized his verbal attack on "Piss Christ" on the Senate floor by tearing up his copy of the show's catalogue. D'Amato commented: "Shocking, abhorrent and completely undeserving of any recognition whatsoever."

Serrano, who had wanted to be an artist for as long as he can remember, says he lacked the physical dexterity to go far as a painter or sculptor, "so I decided to use the camera." By 1984 he was realizing enough money through occasional sales and grants to devote himself full time to his art; but unlike Robert Mapplethorpe, he has never done commercial work and until "Piss Christ" was not known outside a relatively small circle of avant-garde artists.

Serrano received grants from private and public sources, including the New York Foundation for the Arts, Art Matters, Inc., and the NEA, and his work has been exhibited in group shows at many institutions, including the Whitney Museum in New York. He uses terms like "duality" and "contradiction" in describing his work, which he says has been influenced by the films of Luís Buñuel and the paintings of Picasso, Mondrian, Duchamp, and Goya. But he also has a streetwise rap.

ANDRES SERRANO: You know, man, I made the picture in my own time on my own dime.

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In the Congress of the United States in 1989, and then again in 1990, however, the issue became whether taxpayers should be required to support artists who flout tenets of orthodox morality and religion. The position taken by Republican senators Helms, D'Amato, Slade Gorton, and Richard Armey of Texas came down to this: If the NEA could not go about its business of helping to "create and sustain . . . the material conditions facilitating the

release of . . . creative talent" (a statutorily designated main purpose of the NEA at the time of the Mapplethorpe events) without sponsoring blasphemous and obscene art and artists, it ought to go out of business. In New York, when the uproar had subsided somewhat, Serrano feared not only that he would not receive further support from the NEA but that it might now be more difficult for him to obtain recognition and support from the private sector because some arts organizations could be expected to keep their distance from his work, in fear of retaliation by Congress or defunding by the NEA.

GARRY WILLS: The idea that what the Government does not support it represses is nonsensical. . . . What pussycats our supposedly radical artists are. They not only want the government's permission to create their artifacts, they want federal authorities to supply the materials as well. Otherwise they feel "gagged." . . . They want to remain avant-garde while being bankrolled by the Old Guard.

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After the Corcoran dropped the Mapplethorpe show, a less prestigious but gutsier gallery called the Washington Project for the Arts—whose chairman was James Fitzpatrick, a respected First Amendment arts lawyer with the liberal Washington law firm of Arnold and Porter—defiantly picked it up and exhibited it to packed houses. Some nine hundred members of the Washington arts community and gay and lesbian groups mobilized several protests against the Corcoran's action. On the evening of June 30, 1989, spectacular images of some Mapplethorpe works from the canceled exhibition were projected from a truck onto the Corcoran's outer walls. Among these were "American Flag, 1977" and "Honey, 1976."* "Honey" was the photograph that had especially distressed Mrs. Jesse Helms; it was one of two works in the exhibition that some people said were "child pornography."

ANDREW FERGUSON: Mapplethorpe's leitmotif embraced photos of "children in erotic poses," a form of personal expression more commonly known, when not federally funded, as child pornography.

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Before a year was up, "Honey" and another Mapplethorpe photograph, "Jessie McBride," would become the basis for two

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* Reproduced in *The Perfect Moment* (1988), 61, 49.

of seven criminal charges brought against art curator Dennis Barrie and his Center for Contemporary Arts in Cincinnati.

INGRID SISCHY: I spoke to one of the subjects who had been cited as a victim of Mapplethorpe's abuse—Jessie McBride. His mother and Mapplethorpe were close friends. In Mapplethorpe's photograph, McBride is naked and he has leaped onto the back of a chair.

JESSIE MCBRIDE: I must have been four or five then.† I remember jumping around and laughing. I'm not as free minded now. In those days, I'd just take off my clothes and start jumping on the chair. It was fun—Robert snapping away, and my mom laughing. When I got older, up to when I was twelve, I was embarrassed by the picture. I turned it toward the wall when my friends came over. I didn't want them to see my private parts. I didn't mind the adults seeing me naked, but when you're that age you're easily embarrassed by friends. Now when I look at the photograph I think it's a really beautiful picture. I think back to when I was so young and innocent. I look particularly angelic.

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On Wednesday, July 26, in the evening, when the Senate floor was predictably deserted except for a handful of lawmakers not off on vacation, Senator Jesse Helms tacked onto a $10.9 billion Interior Department appropriation bill an amendment intended to keep the NEA from making grants for "obscene and indecent" art, or for any works that "denigrate the objects or beliefs of the adherents of a particular religion or nonreligion, or material which denigrates, debases or reviles a person, group or class of citizens on the basis of race, creed, sex, handicap, age, or national origin." In a voice vote, the bulldozed Senate approved the Helms proposal, which was so wide-ranging and vague in its terminology that all works of art offensive to the sexual proclivities, moral beliefs, political dogma, or religious feelings of any person or group having a legislator's ear would be subject to the ban.

Helms said he saw "blue skies" for his almost certainly unconstitutional amendment; but the Bush White House was silent on the issue, busying itself instead with the recruitment of a new chairman for the NEA, one who might satisfy not only a truculent

† He is nineteen now, 1991. He "remembers being pleased" when his picture was selected for "The Perfect Moment" (C. Carr, "War on Art," *The Village Voice*, June 5, 1990).

Senate but a surprisingly militant artistic constituency;* and Helms knew he had a formidable opponent on the House side in Democrat Sidney Yates of Illinois. Helms's bill was to go to a House-Senate conference committee which would try to reconcile the differences between it and a House bill.

Unlike the Helms bill, the one passed by the House merely voted a budgetary slap on the wrist to the NEA, slashing $45,000 from its annual $171 million budget—a cut equivalent to the amount granted by the agency to the arts organizations that had sponsored the exhibitions containing the "offensive" Serrano and Mapplethorpe works. The Senate bill was more vindictive and censorious, completely barring any federal grant over the next five years to the two grantees—the Institute of Contemporary Art in Philadelphia and the Southeastern Center for Contemporary Art in Winston-Salem. It also would have sliced $400,000 from the Endowment's visual arts programs, and added $100,000 to the Endowment's $171 million budget for folk art—nondangerous and favored by Helms. Informed constitutional lawyers foresaw that the key provisions of the Senate bill were potential candidates for Supreme Court invalidation: for violating the constitutional guarantees of freedom of speech and press and for amounting to an unconstitutional bill of attainder, or legislative indictment, against the ICA and the SCCA.

During the summer, twenty-two of the eighty-eight House Democrats who voted against the $45,000 cut in the NEA's budget were targeted by the National Republican Congressional Committee. The NRCC sent press releases to the news media in the home districts of those twenty-two, whom the committee considered most vulnerable politically, bearing headlines reporting these men had cast VOTES IN FAVOR OF FEDERALLY SUBSIDIZED OBSCENITY.

JOHN BUCKLEY: I know that we scored because of the yelps of rage and because over the next four days we got 150 calls from news organizations in the members' home districts.

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Democratic senator Daniel Patrick Moynihan of New York was not cowed. He announced in the Senate that he would vote against the entire appropriations measure because it singled out two arts groups for a cutoff of funds.

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* President Bush seems to have been opposed to the establishment of any censorship of the arts through the NEA but proved indisposed to fight Congress, or right-wing political and religious leaders, to keep the arts free of government regulation.

SENATOR DANIEL PATRICK MOYNIHAN: Do we really want it to be recorded that the Senate of the United States is so insensible to the traditions of liberty in our land, so fearful of what is different and new and intentionally disturbing, so anxious to record our timidity that we would sanction institutions for acting precisely as they are meant to act? Which is to say, art institutions supporting artists and exhibiting their work.

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For his part Jesse Helms tried to make sure the House-Senate committee conferees would realize what was at stake by sending each of them copies of what he saw as especially offensive Mapplethorpe works.

SENATOR JESSE HELMS: I suggest you take a look at the enclosed materials. It's your call as to whether the taxpayer's money should be used to fund this sort of thing.

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In a press interview Helms announced that if the Senate conferees dropped his amendment he would "request a roll-call vote so that whoever voted against it would be on record as favoring taxpayer funding for pornography." Helms basked in the resulting publicity and put the controversy he provoked to use in raising money for his 1990 reelection campaign. A mass-mail letter dated August 18 from his finance chairman urged donors to rush $29 to Helms to help him "stop the liberals from spending taxpayers' money on perverted, deviant art."

In the *Times*, Anthony Lewis deplored the 1989 "Summer of the Booboisie" and wished that H.L. Mencken were back.

ANTHONY LEWIS: Through the 1920s and '30s H.L. Mencken savaged the follies of American life. His special targets were the narrow minds, the intolerant certainties, of what he called "the booboisie." He revelled scornfully in the trial of John Scopes for teaching evolution, describing the onlookers who believed that God literally created the world in six days as "gaping primates."

Mencken is out of fashion now. His style of verbal assault seems slightly embarrassing in today's journalism, which is so self-consciously (some would say self-importantly) concerned with "balance." Besides, we thought the country had outgrown the primitivism that Mencken deplored.

This summer's Congressional follies over the National Endowment for the Arts have shown how wrong we were: wrong in estimating the primitive strain in our society, wrong in regarding Mencken as an anachronism. We need him more than ever. . . .

Senator Helms and other critics of the National Endowment say the issue is whether public money should be spent on art that . . . would offend most of the American public. But that is not the issue. The issue is whether politicians are going to make artistic judgments. . . .

Culture makes politicians nervous. But somehow the Germans, the French and others manage to understand that national greatness is a thing of the spirit, not just of weapons. What a people gain by supporting the arts, as non-politically as possible, is civilization.

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When the House-Senate conference committee met, on September 27, 1989, Representative Sidney Yates argued that the Helms amendment should be rejected and the compromise bill should contain language that would "be the same as used by the Supreme Court in defining obscenity." He was referring to the Brennan doctrine as glossed by Chief Justice Burger in *Miller v. California*. Under Yates's legislative proposal it would become in the first instance the business of the NEA artist peer-review panels, next the duty of the NEA Advisory Council, and finally the job of the NEA chairperson "administratively" to screen out from funding eligibility arts projects that might be obscene under the Supreme Court's *Miller* definition. Although any decision by the NEA to deny funds to an artist or arts project that appeared to it obscene would presumably be reviewable in federal court, such NEA administrative actions would, I believe, be tantamount to censorship.

Intense bargaining took place among leaders of the committee; from this a compromise bill emerged, and an explanatory report was agreed upon which rejected the Helms amendment and incorporated Yates's proposals. This included one that there be established "a legislative commission to review the procedures of the N.E.A. and to keep in mind standards of obscenity accepted by the Supreme Court." At that time, Jesse Helms, who was not a member of the committee, threatened once again to require a roll-call vote when the matter was returned to the Senate floor, "so that whoever votes against [my amendment] would be on record as favoring taxpayer funding for pornography."

At the session of September 28, the day when the conference committee reached a tentative agreement to reject Helms's amendment, the senator from North Carolina angrily protested on the Senate floor and waved copies of several Mapplethorpe pictures in the air. He called them "garbage" and referred to the

man who had created them as "a known homosexual who died of AIDS." He urged all women and children to leave the chamber so he could show everyone else what was at issue.

SENATOR JESSE HELMS: Look at the pictures! Look at the pictures! Don't believe *The Washington Post*! Don't believe *The New York Times*! Don't believe any of these other editors who have been so careless with the truth. . . . I'm going to ask that all the pages, all the ladies, and maybe all the staff leave the Chamber so that senators can see exactly what they're voting on.

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Helms had been awakened to the fact that a grant from the NEA in support of a work of art or art project would carry with it a kind of legal immunity from attack for being obscene: the NEA's imprimatur would bestow the designation of "art" upon whatever work was supported; once identifiable as art, expression could not be found obscene, for it had the "value" that bestows constitutional protection upon expression under prevailing obscenity law, which is to say under *Miller v. California*. To Helms, a grant from the NEA now looked like a government license to create obscene works and have them circulated at government (i.e., "the taxpayers' ") expense. Soon he would base his final effort to defeat Yates's proposal on this argument.

HELEN DEWAR: Three times in less than 24 hours, the Senate yesterday said no to "Senator No," an exasperated Sen. Jesse Helms . . . as he tried to end federal funding for "obscene" and "indecent art" and then attempted to scuttle proposed reparations for Japanese Americans interned during World War II.

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The House-Senate conference committee wound up its work by adopting the Yates proposal; allocating $250,000 for the "legislative commission" on standards; requiring the NEA to notify Congress if it expected during the coming year to make any award to the "blackballed" Philadelphia and Winston-Salem art museums that had organized the Mapplethorpe and Serrano shows; retaining the House cut of $45,000 in the NEA's budget; and restoring the $400,000 that the Senate had shifted from the NEA's visual arts program to other programs within the NEA.

On October 7, 1989, the Senate took up the conference committee's report. The same day Helms made an unsuccessful last-ditch stand to substitute his amendment for that agreed upon by the conferees. His new argument must have surprised some other legislators: the Yates-sponsored language that had been

adopted, Helms charged, was a subterfuge that "creates a loophole that will clearly allow the National Endowment for the Arts to fund the Mapplethorpe photographs again."

SENATOR JESSE HELMS: [I]f Senators do not believe me that the conference language is worthless as a check on the NEA, perhaps they will believe Congressman Yates. Perhaps they will believe sources in the National Endowment for the Arts and a prominent arts lawyer with a Los Angeles firm.* I call Senators' attention to an article from the *Los Angeles Times* written by the *Times* art correspondent, Alan Parachini, which I have asked the pages to place on the desk of each Senator.

That article states absolutely correctly that in an exchange with Congressman Rohrabacher over in the House of Representatives, Congressman Yates said that: "Funding of obscene art was not effectively prohibited by the conference report." Mr. Parachini also reported that James Fitzpatrick, a prominent arts lawyer with the prestigious firm of Arnold & Porter, who submitted a legal brief to the conferences on the bill on behalf of the American Arts Alliance, concluded from his reading of the conference report that the wording of the conference report "fails completely to achieve any degree of subject matter control."

Is this where the U.S. Senate wants to leave this question, which is very much on the minds of the American people? Do we want to say, "Well, we went through some motions here and reported out some gobbledygook but it is behind us now"? . . . In any case, the *Los Angeles Times* quoted unidentified sources within the National Endowment for the Arts itself that "the wording appears to be so vague that virtually no artistic subject matter would be taboo."

So here we go. Any yoyo out there across America's land can get himself a glass jar and fill it with his own urine, stick a crucifix in it, take a picture of it and get a $15,000 award subsidized with the taxpayer's money. That is exactly what Mr. Andres Serrano did.

I do not know about other Senators, but I find this state of affairs somewhat ironic in that my original amendment was unfairly and incorrectly criticized as prohibiting everything from the Bible to Shakespeare. And now Congressman Yates comes along and compromises the amendment passed by the Senate of the United States. And what does his compromise prohibit? Abso-

* Helms seemed to have in mind not a Los Angeles lawyer but Washington arts lawyer James Fitzpatrick of Abe Forta's former law firm, Arnold and Porter.

lutely nothing. Nothing. It creates a loophole so wide you can drive 12 Mack trucks through it abreast. . . .

Mr. President, note what section (A) of the conference report says in setting forth a test for obscenity in NEA funding decisions. It would be laughable. If it were not so serious. It says: "None of the funds authorized to be appropriated for the National Endowment for the Arts or the National Endowment for the Humanities may be used to promote, disseminate, or produce materials which in the judgment of the National Endowment for the Arts or the National Endowment for the Humanities may be considered obscene, including but not limited to depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts, and"—here is where the cookie crumbles, Mr. President—"which, when taken as a whole, do not have serious literary, artistic, political, or scientific value."

Who makes that judgment? You got it, the NEA, the very crowd that caused the controversy in the first place. . . .

If we do not close this barn door, Mr. President, all the horses are going to be galloping over the horizon. . . .

One other thought, and I shall yield the floor. I met at some length with John Frohnmayer, the new Chairman of the National Endowment for the Arts.* I say to my friend from the West Coast, he is a delightful man, and not only did he tell me then, but he called later to reiterate that on his watch things like Mapplethorpe and Serrano will not happen again. And I believe that.

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Within a matter of weeks, the new NEA chairman would be tested by an activist New York arts community to see whether *he* believed he had powers of censorship under the new legislation. In the event, Frohnmayer showed that he was not sure: he behaved erratically and equivocally. And within the course of a year, when Frohnmayer found himself heavily pressured by conservative politicians and newspapers to demonstrate that he at least knew *how* to censor, he rejected the applications of four "solo performance artists" known for the feminist, gay, and lesbian aspects of their work but declined to specify his grounds for doing so.

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* On July 6, 1989, President Bush named John E. Frohnmayer to become chairman of the NEA and fill the vacancy that had existed since February. A forty-seven-year-old lawyer and past chairman of the Oregon Arts Commission, Frohnmayer had worked for Bush in the Oregon presidential campaign; both senators from the state, Republicans Mark O. Hatfield and Bob Packwood, had lobbied the White House for his appointment.

SENATOR JESSE HELMS: But suppose Mr. Frohnmayer goes down in a plane or leaves office for some other reason and somebody else replaces him? Congress ought to spell it out now, that we, the Congress of the United States, will not further permit the waste, the awesome waste, of taxpayers' money in such fashion. I support Mr. Frohnmayer. I know he is a man of integrity, and I know he is a man of his word. I am not worried about him. But I think we ought to do our duty and be glad that we have a man who agrees with us.

SENATOR JAMES M. JEFFORDS (VERMONT): I rise in opposition to the Helms amendment. I also am not really exactly pleased with what is in the bill itself as passed out of conference. On the other hand, I certainly will accept it under the circumstances. . . .

I would have preferred that the [Helms] amendment was removed in conference. There is no question in my mind that the original version would fail a First Amendment test.* It would represent an impermissible attempt by the Government to restrict speech through a Federal funding program.

Instead, the conferees agreed upon a more moderate version of the Helms amendment. They looked to the 1973 U.S. Supreme Court *Miller* standard for a definition of obscenity, and agreed that Federal funding should be denied to artistic work that "when taken as a whole does not have serious literary, artistic, political, or scientific value." Thus, the First Amendment test is probably passed.

However, I want to express once again my strong concern that we in the Congress might be moving dangerously close to setting standards for artistic merit. I hope that we have not created an atmosphere in which artists will fear Government or public reprisal for work that is supported by the Endowments. . . .

I would like to focus on a little bit different aspect of the problem in our mind. . . .

A cornerstone of democracy is the First Amendment. Any action which denigrates this Amendment creates a risk to the success of the democracy. At the same time, adherence to the free speech preamble creates the risk of serious controversy and public fury. And I agree that some of the art we have seen here does excite me to some sense of concern and fury.

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* The original version would have instructed the NEA not to fund art that "denigrates," "debases," or "reviles" religion or persons because of their "race, creed, handicap, age, or national origin." Such a law would almost certainly have been struck down as unconstitutionally vague, overbroad, and otherwise in violation of protected expression.

SENATOR JESSE HELMS: I wish the distinguished Senator from Vermont [Mr. Jeffords] was still on the floor, because I would like to ask him two or three questions. He raised again the totally ridiculous question of censorship. It is not censorship when the U.S. Government refuses to fund anything it does not want to fund. To suggest that censorship is involved is just not sensible. . . .†

A unanimous Supreme Court in 1983 in *Regan v. Taxation with Representation*, 461 U.S. 540, reiterated a long line of cases holding that Congress' decision not to subsidize the exercise of a fundamental right, such as free expression, does not infringe upon that right. In other words, it does not amount to censorship.

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Helms's reading of this case was misleading. A fairer reading was recently supplied by constitutional law scholar Geoffrey Stone, dean of the University of Chicago Law School, in his *Statement Before the Independent Commission on the National Endowment for the Arts*, July 31, 1990:

GEOFFREY STONE: [G]overnment, through its various officials and agencies, must and does speak in its own behalf. But when government crosses the line between legitimate government speech that is essential to fulfilling government's core responsibilities, and more aggressive efforts to use government resources to shape public debate, it enters the realm of unconstitutional conditions. And although this line may be unclear at the margin, there can be no doubt that the use of NEA funds selectively to support only those points of view that are congenial to government is on the unconstitutional conditions side of the line. As the Court has recognized, government may not "discriminate invidiously in its subsidies in such a way as to [aim] at the suppres-

† The political and religious Right has been obliged in recent years to call by another, less offensive, name the censorship over communications and the arts it craves. Even Helms does not stand up for "censorship." Carole S. Vance commented on the phenomenon in the thoughtful piece "The War on Culture" in *Art in America*, September 1989: "The second new element in the right's mass mobilization against the NEA and high culture has been its rhetorical disavowal of censorship per se and the cultivation of an artfully crafted distinction between absolute censorship and the denial of public funding. . . . In the battle for public opinion, 'censorship' is a dirty word to mainstream audiences, and hard for conservatives to shake off because their recent battle to control school books, libraries and curricula have earned them reputations as ignorant book-burners. By using this hairsplitting rhetoric, conservatives can now happily disclaim any interest in censorship, and merely suggest that no public funds be used for 'offensive' or 'indecent' materials."

sion of dangerous ideas" (citing *Regan v. Taxation with Representation*).

SENATOR JESSE HELMS: So, Mr. President, a unanimous Supreme Court says that Congress is free to choose not to fund the NEA at all, or to fund it with absolutely no strings attached. Or, Congress may choose to regulate the NEA anywhere between those two extremes and not violate anybody's rights under the Constitution.

Thus restricting the conditions under which the NEA will spend Americans' tax dollars does not amount to censorship, so says the Supreme Court. . . .

Congressman Yates used the *Miller* language which—as we can see from the NEA's own interpretation of it—would allow the NEA to do exactly as it pleases without regard to the public's sensitivities. Artists will continue to compete with adult bookstores for customers, one of which has been the Federal Government because the evidence is overwhelming that the self-proclaimed "art" experts—whose judgment the NEA defers to—consider works such as Mapplethorpe's obscenity to have "some redeeming artistic and political value."

GEOFFREY STONE: There is no doubt that Congress can constitutionally prohibit the NEA from funding art that is obscene within the meaning of *Miller v. California*. Because government may prohibit such material in its entirety, it may decline to fund it. This is not to say, however, that Congress should *explicitly* prohibit the NEA from funding work that is obscene. To the contrary, the mere fact that government has the power to suppress—or refuse to fund—expression does not mean it should exercise that power.

It is important to note that the legislation that currently governs the NEA already provides that grants may be made only to works that have serious artistic value. Because art can constitute obscenity only if it lacks serious artistic value, the existing legislation already prohibits the NEA from funding obscene art. That some NEA grants may have been used to fund obscenity in the past proves only that standards and administrative schemes are invariably imperfect, not that amendment of the legislation would serve any useful function.

SENATOR WARREN RUDMAN (NEW HAMPSHIRE): The question is whether or not we are going to apply a First Amendment standard to grants that the endowment will give. There is no question, and the [conference] managers have not disagreed, and I

was part of the conference, that when the House insisted on language that started to put [in] the value judgment from the *Miller* case, then that obviously made it a First Amendment matter. . . .

The Senator from North Carolina may not want to admit it, but I think he knows it, that he has won his case and it was a good case. He has had his victory. It is inconceivable to anyone who knows those two organizations that they would fund anything like Mapplethorpe or the other artist involved, Serrano, with the language that is in here which specifically says to them, you better watch what you fund if it gets across the bounds of the ordinary, decent judgment of the average American.

As a matter of fact, that is exactly what the [Washington] *Post* said this morning. The Senator from North Carolina did not quote that particular part of it, but he conveniently made it available to us. They say, and they are right: "The endowments and the institutions they fund are more likely to respond to their narrow escape with increased caution, making their choices with a view toward avoiding another firestorm."

Of course, that is right. Of course, after what has gone on here, there is a victory for the Senator from North Carolina.

SENATOR CLAIBORNE PELL (RHODE ISLAND): I rise again to defend the National Endowment for the Arts and its well-tested and proven system of peer review without the interference of the Federal Government. I guess I am the only remaining principal sponsor of the NEA in this body and I well recall how Congress endorsed the freedom of artistic and humanistic expression back in 1965 at the very time we established the National Endowment for the Arts. In doing so, we established the principle that politics should not be allowed to interfere with the NEA in its handling of grants and applications. . . .

The language in the committee's conference report, while not necessary in my view, does send an important signal that the Endowment must not spend the taxpayer's money on obscene art. But the Endowment must be the final arbiter of what it does and does not support—not those of us in the Congress.

SENATOR ROBERT BYRD (WEST VIRGINIA): Mr. President, I believe that . . . if the endowments and the institutions they fund do not take heed, after this shot across the bow, there will be another and greater firestorm, and it may be that, in the final analysis, the Congress will just have to stop its funding to the endowments.

SENATOR JESSE HELMS: Mr. President, it is all well and good to assume that the National Endowment for the Arts has gotten the

message. . . . If they have not gotten the message, then they have wax in their ears.

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On October 7, 1989, the Senate voted 91 to 6 to approve the House-Senate conference report compromise legislation requiring the NEA's chairman to decline to fund any art project that in his judgment was obscene under the *Miller* definition and voted 62 to 35 to table the Helms amendment. Helms put a good face on what his opponents hoped was a defeat for him, claiming the conference committee decision was actually a victory for his side. In any event the legislation authorizing the NEA to continue to operate was due to expire the next session, at which time the congressional and media debates over whether the NEA could constitutionally censor the art and artists it supported, and whether the NEA ought even to be authorized by Congress to operate, would come up anew, with greater intensity. "Firestorms" on the subject would be lit by right-wing religious leaders (Donald Wildmon and Pat Robertson among them) in Congress, and by right-wing newspapers like *The Washington Times*.

In the midst of these debates, in the spring of 1990, Chairman Frohnmayer would feel pressure to abandon his public stance as a defender of artistic freedom and would reach decisions unprecedented in the NEA's twenty-five-year history tantamount to censorship, denying grants to four sexually controversial performance artists who had received unanimous grant recommendations from the NEA's own performance art panel. At virtually the same time, state and federal police and prosecutors in Cincinnati, Miami, and San Francisco—unchecked by the local courts—would unleash the force of obscenity and child pornography laws against a nationally renowned art institution, a popular music group, a record store manager, and a fine-art photographer.

Not long after John E. Frohnmayer took over as chairman of the NEA, he tried, as mentioned earlier, to demonstrate to Congress that he knew what was expected of him. In doing this he understandably exhibited uncertainty concerning his authority under the law and the Constitution, confusion concerning his official role, and a conflict of loyalties with respect to his political and artistic constituencies. The first episode occurred after Susan Wyatt, executive director of the gallery Artists Space in New York, informed Frohnmayer that an art show concerning AIDS that contained some arguably homoerotic works was about to be mounted there—thanks to a $10,000 NEA grant. Wyatt thought

it might be construed to fall within the new legislation's funding ban, and she informed the Endowment about the nature of the show "as a way of testing to see whether or not Helms had won."

SUSAN WYATT: I was concerned that the Endowment not be blindsided in case there might be some controversy on this show.

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Frohnmayer's attention was drawn to the show's catalogue, which contained an essay by artist David Wojnarowicz in which he expressed his "feeling of rage" about having AIDS and watching his friends die of the disease. Wojnarowicz said that "fantasies" gave him "distance from my outrage for a few minutes." The fantasies he mentioned in the catalogue included dousing Senator Jesse Helms with gasoline and setting him on fire, and throwing Representative William E. Dannemeyer—another proponent of arts censorship and the author of a book that argued that homosexuality was "curable" acquired behavior—off the Empire State Building. The essay also attacked Senator Alphonse D'Amato, Mayor Edward Koch, New York City Health Commissioner Stephen C. Joseph, and John Cardinal O'Connor, the Roman Catholic archbishop of New York, for his opposition to abortion and to making information about "safe sex" available to gay men. According to the Wojnarowicz essay, O'Connor was a "fat cannibal" and the Roman Catholic Church "a house of walking swastikas." The show, which presented works by twenty-three painters, photographers, and sculptors, included some nonobscene images of homosexual acts and eroticism. Its curator was Nan Goldin, a Boston artist and photographer.

After examining the catalogue, the new NEA chairman asked Wyatt to "relinquish" the $10,000 grant. His reasoning disclosed no appreciation of the First Amendment role of the arts.

JOHN FROHNMAYER: Political discourse ought to be in the political arena and not in a show sponsored by the Endowment. . . .

Because of the recent criticism the Endowment has come under, and the seriousness of Congress's directive, we must all work together to insure that projects funded by the Endowment do not violate either the spirit or the letter of the law. The message has been clearly and strongly conveyed to us that Congress means business. On this basis, I believe the Endowment's funds may not be used to exhibit or publish this material.

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Frohnmayer, a lawyer who had studied religion for a year at Union Theological Seminary and obtained a master's degree in

Christian ethics from the University of Chicago, sounded a little like a scoutmaster lecturing the troop. Susan Wyatt did not comply with the NEA head's request that Artists Space "relinquish" its NEA grant.

SUSAN WYATT: Instead I went public, hoping to encourage other organizations who are also checking out their shows with the Endowment to do the same.

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Although Senator Helms and Congressman Dannemeyer understandably expressed satisfaction with Frohnmayer's action, Representative Sidney Yates proved incredulous.

REPRESENTATIVE SIDNEY YATES: I have great respect for Mr. Frohnmayer, and he's new and we have to give him a chance. [But] I'm not sure what he means. What do you do with Daumier? Or Goya's "Disasters of War"? What if a gallery wants to put up the cartoons of Thomas Nast against Boss Tweed? In itself, political statements are not a barrier to grants.

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The day after Frohnmayer announced he was rescinding the NEA grant, he shifted ground in a way that made his untenable position ludicrous. Trying to placate his arts constituency, Frohnmayer stated that on second thought, the trouble with the Artists Space exhibition, from the NEA's standpoint, was that it wasn't "artistic" enough.

JOHN FROHNMAYER: The word "political," I'm coming to see, means something different in Portland, Oregon, than it does in Washington, D.C. I think I used the word unadvisedly. I think it has sounded like I was saying you look at the political content and you decide whether or not you like it. What I meant to say was you look at the *artistic* quality and you decide on that. . . .

In looking at the [Artists Space] application and then in looking at what was actually happening in the show, there was a substantial shift and, in my view, an erosion of the artistic focus. I described that with the "P" word, and it was taken by the arts community as a suggestion that I had been influenced by political pressure, or that it wasn't all right for artists to make in the context of their superior artistic efforts a political statement. That was not my intent.

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Having shot himself in one foot, Frohnmayer nonchalantly shot himself in the other. His explanation could have pleased no one. In Washington, the members of an NEA visual arts panel

that had now convened to make grant recommendations to the new chairman bluntly advised him of their "disappointment and distress" over his decision to rescind the grant to Artists Space. When their meeting ended, panel member Elizabeth Sisco, an artist from San Diego, resigned in protest over what Frohnmayer had done. Frohnmayer now traveled to New York to see the controversial exhibition for himself and shortly thereafter told the press that he was rescinding his rescission of the grant to Artists Space.

JOHN FROHNMAYER: I visited Artists Space in New York City yesterday and saw the exhibition "Witnesses: Against Our Vanishing." Prior to this time I had only seen the catalogue. After consulting with members of the National Council on the Arts, several of whom have also seen the show, I have agreed to approve the request of Artists Space to amend the fiscal '89 grant and will release the grant for the exhibition only.

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What happened in fact was that Susan Wyatt accepted a grant from the Robert Mapplethorpe Foundation to pay for the politically offensive catalogue, and the NEA paid for the show. This obtained a mixed reaction:

SENATOR JESSE HELMS: I do hope that Mr. Frohnmayer is not retreating from his voluntary commitment to me [to refuse to fund controversial art], and I will not assume he has done so until I hear from him about a publicized statement attributed to him.

KAREN KENNERLY:* It is a reprieve we are celebrating, not a victory. Not until the law has been repealed is there a victory for freedom of expression.

REPRESENTATIVE PAT WILLIAMS (MONTANA): There may be two irreconcilable forces here. One is the right of taxpayers to determine how their money is spent. The other is the absolute necessity to protect freedom of expression, particularly in the arts. If those two forces are irreconcilable, then the future of the Endowment is in doubt.

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* Kennerly is Executive Director of the PEN American Center. Some in the liberal, intellectual, and arts communities were opposed to the obscenity restriction in the NEA compromise legislation, understanding that it would require Frohnmayer to administratively censor artwork that he feared would be deemed obscene by Congress. In fact, even the narrow definition of "obscene" set forth in *Miller* is unconstitutionally vague and overbroad in the judgment of Justice Brennan, dissenting in *Miller*. There is a good explanation of the meanings of constitutional "vagueness" and "overbreadth" in Professor Lawrence Tribe's readable and valuable treatise *American Constitutional Law* (1978), 718ff.

But taxpayers have no direct voice in determining how their money is spent; if they had, many would have forbidden their taxes to be spent supporting Star Wars, the Stealth bomber, and the Gulf War, to mention just a few more recent controversial government programs. The constitutional separation-of-powers doctrine precludes Congress from intruding into the administration of a program like the NEA's and deciding for itself which artists and arts institutions should receive support. The federal government need not encourage or promote the work of artists and writers, but when it does undertake such a program, it cannot choose the individual artists or arts institutions to be supported, or require the NEA to do so, on grounds that interfere with the freedom of artists to communicate images or ideas that are controversial or that criticize or attack, however violently, politicians, religious figures, government officials, and even religion and government itself. The only constitutionally valid grounds for grantee selection and denial are ones exclusively related to artistic values such as "merit," "quality," and "promise."

A six-member group of constitutional law experts who were asked to advise the twelve-member commission established to counsel the NEA and Congress concerning these problems would express the same view in the fall of 1990. Its members also told the commission that a condition such as that imposed by Frohnmayer requiring recipients of NEA grants to certify under oath that they would not use grant proceeds to create "obscene" works was unwise and would have a chilling effect on artistic freedom and creativity. They also said (in a joint statement) that if Congress chooses to finance the arts, it may *not* do so in a way that the Supreme Court has said "is aimed at the suppression of dangerous ideas." One of the constitutional law experts was the dean of the University of Chicago Law School:

GEOFFREY STONE: Government need not fund any art. But it does not necessarily follow that, if it chooses to fund some art, it is free to fund only that art that supports its point of view. Wholly apart from concerns about coercion, such selective funding would distort public debate in a viewpoint-based manner, treat different points of view unequally, and reflect a constitutionally impermissible use of public resources. Government neutrality in the field of ideas is an essential premise of the first amendment, and this applies not only to direct government ef-

forts to suppress ideas but to government efforts selectively to promote certain ideas as well. . . .

Although government could not criminally punish the production or exhibition of art [because it] lacks "serious artistic value," and could not refuse to fund the expression of political ideas [because they] lack "serious political value," it can refuse to fund art that lacks "serious artistic value." This is so for two reasons. First, and perhaps most important, judgments about artistic quality, unlike judgments about political quality, do not implicate core first amendment concerns. In its most central meaning, the first amendment focuses on political expression, and this is so, in part, because government efforts to judge the worth of competing political ideas are especially subject to abuse. Thus, we are more willing to tolerate [government] judgments about quality in the realm of artistic than political expression. Second, insofar as we have some confidence in our ability to make reasonable judgments about artistic quality, the decision to subsidize only that art that has "serious artistic value" represents an acceptable tradeoff in a world of limited governmental resources.

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After the cancellation of Mapplethorpe's "The Perfect Moment," the reputation of the Corcoran Gallery and the fate of its director, Christina Orr-Cahall, were in limbo for months. A retaliatory artists' boycott forced the gallery to cancel two other shows and placed in question a third. Then artist Lowell Nesbitt withdrew a gift to the Corcoran of over $1 million in property and art that he had planned to will to the museum, and willed it to the prestigious Phillips Collection instead. After Jane Livingston, the Corcoran's chief curator and the organizer of the Mapplethorpe show, resigned in protest over what Orr-Cahall and the Corcoran board had done, the Corcoran's staff confronted Orr-Cahall with a request that she resign. The director tried to stand her ground.

CHRISTINA ORR-CAHALL: I work for the board of trustees and I'm working as hard as I can to try to move the institution forward, and I'm hoping that the staff will work with me to do that.

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Orr-Cahall blamed the government for what had happened.

CHRISTINA ORR-CAHALL: It was the federal funding, and in a sense Mapplethorpe gets used. It could have been any other artist—Serrano or whomever.

JO ANN LEWIS:* But cancellation did not happen to another artist. It happened to Mapplethorpe, whose prices subsequently went up; and it happened to the Corcoran, whose stock has hit a low point.

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By late September 1989, the Corcoran had lost nearly 10 percent of its membership, but Christina Orr-Cahall was still hanging on as the museum's director, after three months of largely negative criticism from the arts community and the press. In an interview on September 22 with an empathetic reporter from *The Washington Post*, she confessed to having been "unrealistic" to imagine that art could be independent of politics, especially in Washington. This was a lament that John E. Frohnmayer would voice, over and over again, during his first two years as head of the NEA.

CHRISTINA ORR-CAHALL: I mean, I don't know Washington! How would you know this?

I don't look at it as my sole decision. I think it had an entire board of trustees behind it. . . . The bulk of the curators were out of town, which was very unfortunate. So when the decision was actually made, I said we are unable to do this exhibition and a voice vote was taken in support of the director's point of view. . . . It was brought up at a subsequent meeting and the decision was split, and the board voted independently and opposed the showing of the exhibition. . . .

I certainly now wish we had done the show. You can't predict history: you're at a crossroads and you have to take one or the other road. . . . Now I think we should have done it, we should have bitten the bullet, we should have stood up for artistic rights.

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Officially, the Corcoran board was not considering firing Orr-Cahall. On September 25, however, a quorum of the fifty-four-member Corcoran board of directors met and appointed a special "damage-control" committee to study "some concerns"— including whether the prestigious art center should fire its director. By now the Washington Project for the Arts—the gallery in Washington that had picked up the Mapplethorpe show after the Corcoran dropped it—had exhibited "The Perfect Moment" to nearly 50,000 visitors, in less than a month.

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* Art critic, *The Washington Post*.

Three months later, on December 18, 1989, just a few days before the Corcoran's damage-control committee was supposed to meet again, Christina Orr-Cahall announced her resignation; she cited "extraneous and disruptive difficulties" of the last several months that had put the museum's future in doubt.

CHRISTOPHER KNIGHT:* We are not talking here about the momentary failure of judgment on the part of a single museum employee, which can be neatly swept away with her departure. We are not even talking about a director's repeated failures. After all, the cancellation of the Mapplethorpe exhibition was accomplished with the official backing and continued support of the Corcoran's board of trustees. There was virtually no indication Monday, as there had not been from Day One, that the museum board has in any way changed its mind about that calamitous decision. . . . Amazingly enough, six months later the crisis still is being perceived as a gross public relations problem, an even more nagging problem that might miraculously disappear with the director.

It won't. Public life is forever being confused with public relations, but the Corcoran scandal is at heart a catastrophe of public life. For it is finally the board of trustees, not the director, that holds the museum, its collections and its programs in trust for the public. It is the board of trustees, not its employee, in whom ultimate fiduciary responsibility is vested. That is what the word "trustee" means. Except for a staff change, the Corcoran Gallery of Art today is no different than it was last week, when public confidence and support were virtually nil.

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Harry Lunn, a longtime friend of Robert Mapplethorpe's and one of the dealers in Mapplethorpe's work, had spoken at the rally on the street outside the Corcoran when Mapplethorpe's art was projected onto the Corcoran's walls. After Orr-Cahall's resignation we talked about some of the consequences of l'affaire Orr-Cahall.

HARRY LUNN: Look! The unthinkable has occurred! Mapplethorpe has eliminated an incompetent director and forced a difficult board to reconstitute itself. They're going to cut down the board's size and maybe even get rid of people like Kreeger. I doubt he will stay on; it would be like Ceaucescu staying on in Romania. The Corcoran was being run like a social club where

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* Art critic, *The Los Angeles Times*.

for $5,000 you could get a seat on the board like a box at the Met. They've said they are going to restructure the board, which is something that has been needed for twenty years.

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David Lloyd Kreeger had been chairman of the board of directors and president of the Corcoran Gallery for twenty years. He was an internationally known collector of Impressionist and modern painting and sculpture, had served as president of the National Symphony Orchestra, and had founded the Washington Opera. On November 18, 1990, he died of cancer at the age of eighty-one.

The next day, the Corcoran announced that the chancellor of the New School for Social Research in Manhattan, David C. Levy, would become the new president and director of the faltering gallery. When Levy took over, he and the Corcoran's revamped board issued a strong public statement about the gallery's new commitment to the preservation and enhancement of "freedom of speech, thought, inquiry and artistic expression" in its exhibitions and educational programs. One of the reasons for Levy's appointment was that as head of the New School he had approved the act of suing the NEA in federal court to obtain a ruling that Frohnmayer's pledge was unconstitutional. By naming him as the gallery's new head, Levy said, the Corcoran was saying: "We understand where we need to go." With the First Amendment.

"The Perfect Moment" was scheduled to open at the Contemporary Arts Center in Cincinnati (CAC) on April 6, 1990. The gallery's forty-two-year-old curator, Dennis Barrie, had decided to bring Mapplethorpe to Cincinnati the year before the Corcoran canceled its scheduled show. At that time, the CAC board voted unanimously to mount the show; it voted the same way a second time, when the original decision was brought up for reconsideration after the Corcoran Gallery cancellation.

DENNIS BARRIE: Way back in June [1989], when the Corcoran announcement was made, we took it back to our board and said now look, this is no longer just another show. To the credit of the board, they reviewed all the photos, they reviewed our contract, and said we must honor our contract.

ROGER ACH (president of the CAC's board): We saw the catalogue, we saw the difficult photographs in copy form and had them described. We were well briefed and convinced that this was an important retrospective of a very well known artist.

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But Cincinnati proved even more aversive to Mapplethorpe's art than Washington. The city was the base of Citizens for Decent Literature* and of a group called Citizens for Community Values (CCV). On April 7, 1990, as a result of goading from these groups, Cincinnati police entered and temporarily closed the Contemporary Arts Center to secure the evidence needed to prosecute Barrie and the gallery for exhibiting "obscenity" and "child pornography." Only hours before, Barrie and the gallery had been indicted by a Cincinnati grand jury. Commented CCV's president:

MONTY LOBB: If Mr. Barrie had exercised better judgment, this could have been avoided.

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The board of directors of the Contemporary Arts Center had stood fast behind the gallery's director. Instead of pressuring Barrie to drop the Mapplethorpe show, its chairman resigned from the board because of boycott and other threats that had been mounted against his bank by CCV. The vigilante group had first sought to force the gallery to cancel the scheduled Mapplethorpe show by pressuring local business concerns that had signed up to support the exhibition, and by intimidating board members who worked for firms that were vulnerable to economic boycott. Dennis Barrie told reporters that the chairman of his board resigned "because his bank came under massive attack from the Citizens for Community Values, who tore up their credit cards, while businessmen who supported them threatened the bank on other levels." This was followed by activity aimed at destroying Cincinnati's annual arts fund-raising program by portraying the drive as "a form of sponsorship for pornography." To save the drive, Barrie's gallery withdrew from participation in it, at an estimated cost to it of $300,000. There followed an "anti-porn" attack from the vigilante group's "friends in the media," who spread disinformation about the nature of the show. Barrie said that the media people "beat us up pretty badly for a couple of weeks." The gallery also drew down upon its head anonymous "hate mail, bomb threats, and feces."*

After Citizens for Community Values informed Hamilton

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* CDL was renamed after Charles Keating's involvement in the 1989-1990 home savings and loan scandals was made known. It was later called National Coalition Against Pornography and is now known as Children's Legal Foundation.

* *Newsday*, April 10, 1990.

County sheriff Simon L. Leis, Jr., about the approaching Mapplethorpe show, Leis—a former Marine, former assistant U.S. attorney, and former judge in Cincinnati Common Pleas Court—publicly announced that he would do his duty regarding Dennis Barrie and his gallery if the local Cincinnati police chief, Lawrence Whalen, would not. Leis was described as the Cincinnati public official who came closest to filling the boots of CDL's old smut-buster Charles E. Keating, with this difference: Leis was, and Keating was not, a law enforcement official; as such, Leis should not have been advancing a personal moral agenda. His announcement moved Chief of Police Whalen into action: after attempts to frighten Dennis Barrie into closing the Mapplethorpe show or at least removing the "worst" pictures failed, Whalen led the investigative raid on the Contemporary Arts Center.

POLICE CHIEF LAWRENCE WHALEN: Those photographs are just not welcome in this community. The people of this community do not cater to what others depict as art.†

KIM MASTERS: Police and Sheriff's officers swept into the packed Contemporary Arts Center here today and ordered more than 400 visitors to leave while they took videotaped evidence to support obscenity charges against a public showing of the controversial Robert Mapplethorpe photo exhibit.

The police action was taken after a Hamilton County grand jury, whose nine members paid the $4 admission fee, and quietly viewed the exhibit with other patrons this morning, returned an indictment against the art center and its director, Dennis Barrie, a few hours later.

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Both Dennis Barrie and the Contemporary Arts Center were indicted under two Ohio laws, one that proscribed "pandering obscenity" and another that criminalized possessing or viewing child pornography. On the surface, the Ohio child pornography

† Of course, the *Miller* test of obscenity does not give local policemen, juries, or even judges the power to decide what is art, or whether expression has serious artistic value. This is a mixed question of constitutional law and fact, ultimately to be decided *de novo* by the Supreme Court on the basis of national or even supranational standards of artistic value. The local Miami law enforcement officials who recently arrested Luther Campbell, the leader of 2 Live Crew, for playing obscene songs also acted on the mistaken belief that local community standards of decency, as interpreted by them, determined whether the songs were constitutionally protected or obscene. The confusion of law enforcement officials regarding this matter, and the tendency to make local community standards apply to questions of artistic value, as well as to what the average person in the community considers "prurient" or "patently offensive," can be directly traced to the opinions Chief Justice Burger wrote in the 1973 obscenity cases in his attempt to roll back the Warren Court's decisions. See Chapter 28.

law posed the more dangerous of the two prosecutive attacks on Barrie and the Contemporary Arts Center and on the freedom of all adult Cincinnatians to see shows that the CAC mounted for them to see. It was one of the country's most repressive "kiddy porn" laws, a law that the Supreme Court had recently acted to uphold (with Justices Brennan, Marshall, and Stevens dissenting because the law was "fatally overbroad" and authorized the police to violate the free speech and privacy right of persons in their homes). That happened while Barrie's prosecution was pending.

After the indictments, legal experts of the Left, Right, and Center called the attack made by the Cincinnati police upon the visual arts outrageous. One reporter asked University of Michigan law professor and former Meese commissioner Frederick Schauer whether the Supreme Court's 1973 decision in *Miller v. California* supported the prosecution of art curator Barrie:

PROFESSOR FREDERICK SCHAUER: Absolutely not. It's not even close. Let's take the worst case, or the best from the [prosecution's] point of view. Take one Mapplethorpe photograph, and it shows gay men engaging in sadomasochistic acts. The very fact that it's by Mapplethorpe and it's in a museum would still lead me to say it's not even close.

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Another former Meese commissioner, the former federal prosecutor Tex Lezar, agreed, saying he "thought as long as it appeared in a museum it was safe." The conservative public-interest lawyer and consultant Bruce Fein was of the same opinion.

BRUCE FEIN: People don't usually walk into museums to have their prurient interests aroused. I think it's a very maladroit use of the criminal-justice system to go after a curator. This is not some kind of degenerate conduct that is worthy of criminal prosecution.

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In New York, the preeminent First Amendment lawyer Floyd Abrams called the Cincinnati prosecution "outside the realm of obscenity prosecution in recent memory." More forebodingly, Abrams predicted that if the Cincinnati museum and curator were convicted, the Supreme Court, given its present membership, might refuse to review the case. This would leave artists, and the constitutional protection afforded artists, in limbo. When American Family Association founder Donald Wildmon was asked for his comments on the Cincinnati prosecution, he

feigned naïveté: "Isn't obscenity illegal even if it's displayed in an art gallery?"

Knowledgeable First Amendment lawyers agreed that the criminal charges against Dennis Barrie and his art gallery should never have been brought, and that, once brought, they should have been dropped, or both defendants should have been swiftly acquitted, for the simple reason that serious artistic expression cannot constitutionally be found "obscene," regardless of its "prurient appeal" or "patent offensiveness." As Dean Geoffrey Stone, a constitutional scholar, stated: "[A]rt can constitute obscenity only if it lacks serious artistic value."* What is indisputable is that the child pornography and obscenity prosecution in Cincinnati and the temporary closing of the art gallery by the police, in advance of any judicial finding that the show was obscene, took place notwithstanding the constitutional guarantees of free expression and applicable Supreme Court decisions.

PROFESSOR FREDERICK SCHAUER: It's a sad commentary on the American constitutional system. . . . We rely on the Supreme Court to do all our constitutional enforcement, and we do not penalize officials for ignoring constitutional values. We shouldn't be surprised when they do ignore them.

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On Friday, October 5, 1990, the Cincinnati jury empaneled

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* The parallel proposition—that art can constitute child pornography only if it lacks serious artistic value—unfortunately is not settled law. In *Ferber v. New York*, the Supreme Court upheld the validity of New York's child pornography law as applied to the seller of peep show-type movies (showing young boys masturbating) making no claim to even the slightest artistic or social value. But the New York statute involved did not expressly exempt expression having such value from its reach, and in addressing the *abstract* question of whether the constitutional protections afforded by *Miller*'s three-pronged test for obscenity applied as well to child pornography prosecutions, the Court expressly said that the first two prongs would not apply, but implied that the third prong would. This indicated that for a child pornography prosecution to succeed there would be: (a) a need to prove that a child was induced to engage in explicit sexual conduct (or poses); (b) no need to prove that the images either appealed to the average person's "prurient interest" or were "patently offensive" to contemporary community standards of decency; but (c) a need to show that the material had no "serious literary, artistic, scientific, or political value." In light of the protection meant to be afforded by the First Amendment to all artistic works, the presence of "artistic value" should insulate works such as Mapplethorpe's—and the acts of creating, exhibiting, and viewing them—from suppression or criminal prosecution under a child pornography law such as Ohio's, as it should remove them from the reach of obscenity laws like the one in force in Ohio. Unfortunately, the law on the former point cannot be deemed settled, especially given the present makeup of the Court now that Justice Brennan, who nailed down the point in his concurring opinion in *Ferber*, has retired. Justice O'Connor, who took the opposite view in her concurring opinion in *Ferber*, is still on the Court and seems unlikely to change her mind. The threats to freedom of artistic expression presented by child pornography laws that seek to repress the creation and exhibition of art that portrays mere child nudity, as Ohio's law does, are taken up in Chapter 29.

to try the Mapplethorpe case made history by acquitting Dennis Barrie and his art gallery on all charges. The liberal press saluted them, and the constitutionalized law of obscenity.

*The New York Times:* The jurors in the Robert Mapplethorpe obscenity trial in Cincinnati sent a strong and sensible message yesterday to local prosecutors and to all those who've been posturing on the obscenity issue this year. The jurors took about two hours to acquit the Contemporary Arts Center, and its director, Dennis Barrie, of the charge of pandering obscenity for showing sexually explicit photographs that were part of Mapplethorpe's traveling retrospective, "The Perfect Moment."

The case began by conferring on Cincinnati the onerous distinction of being the first city to try a gallery on obscenity charges. It ended with Cincinnati proudly resisting restrictions on artistic expression. . . .

The judge sided with the prosecution's attempt to give an unfairly narrow portrait of the Mapplethorpe exhibit. Only 7 of its 175 photographs were allowed into evidence—a travesty given the fact that it was meant to display the artist's life work, much of which involved innocuous photographs of celebrities and flowers.

The prosecution's argument that the exhibit offended "community standards" was disproved by the community itself, which had already voted with its feet. A record 80,000 visitors thronged to see the show when it passed through Cincinnati in April and May.

The two photographs of children that the prosecution objected to were no more lewd than Michelangelo's "David," or babies on the beach in summer. . . .

To some, the photographs were obscenities; to others, art. The rights of the museum to display the pictures and the rights of citizens to make up their own minds have been upheld.

DAVID MARGOLICK:* The judge hearing the case was a law-and-order Republican and a close friend of the sheriff who shut the museum down briefly to videotape evidence when the exhibit opened. Several of the judge's preliminary rulings favored the prosecution. Seven of the eight jurors hailed from the still more conservative suburbs of an already conservative community; only three had ever been to an art museum, and none had seen the exhibition. The only thing the museum and its director, Dennis

* Law page editor, *The New York Times.*

Barrie, had going for them was the law. And that appears to have been enough.

DEFENSE LAWYER H. LOUIS SIRKIN: They did exactly what we hoped they would do. Personally, I didn't like the pictures either. Our battle strategy was the third prong [of the *Miller* test].

JUROR ANTHONY ECKSTEIN: That's what it boiled down to. It was missing an ingredient. It had artistic value, and that's what kept it from being obscene.

We thought the pictures were lewd, grotesque, disgusting. But like the defense said, art doesn't have to be pretty or beautiful.

JUROR JAMES JONES: We had to go with what we were told. It's like Picasso. Picasso from what everybody tells me was an artist. It's not my cup of tea. I don't understand it. But if people say it's art, then I have to go along with it.

JUROR ANTHONY ECKSTEIN: At one point we said to ourselves, "Is this really us making this decision?" We all had to go home and face family and relatives. We were saying to ourselves, "Oh my gosh, how are we going to explain this to people? What will everybody think?" There was a lot of pressure.

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Professor Cass Sunstein of the University of Chicago Law School thought the jury's verdict meant the "War on Art" was over.

PROFESSOR CASS SUNSTEIN: Unless the political climate changes very dramatically, the *Miller* test provides quite solid protection for civil liberties.* The [Cincinnati] Mapplethorpe case shows there's a wide consensus that we shouldn't regulate speech just because it's disturbing.

Even people who seem to have very traditional values are

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* In my opinion a test or doctrine that is likely to bend with dramatic changes in the political climate cannot rightly be depicted as providing "quite solid protection." Prior to its dilution by Chief Justice Burger in the *Miller* case, the Brennan doctrine—by virtue of its unamenability to manipulation by judges and its assertion of suzerainty over lower judge and jury rulings repressive of speech—might accurately have been said to provide "quite solid protection" to all speech not "utterly without" value. The only limit to the protection was the capacity of the justices themselves to perceive that expression challenged as obscene was not completely worthless. This was indirectly demonstrated by Brennan himself when, in the *Ginsburg* case, a strong political wind forced him to import a new doctrine, the "pandering" doctrine, to affirm the lower court's decision that Ginzburg's expression was obscene. What I have called the Brennan doctrine could not be bent to fit the conclusion favored by the Court that what Ginzburg had published was obscene.

opposed to censorship. Those who think we're entering into a period of widespread prosecution are wrong.

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A few days later, a spokesman for the Cincinnati vigilante organization that had been mainly responsible for the police and prosecutorial attacks on Barrie and the museum offered a different assessment of the future of artistic freedom in Cincinnati:

PHILLIP BURRESS: We have sent a signal that even CAC is held accountable. We have proven what we will go after. And if they come back with those pictures and they're in color or are bigger, our citizens will demand that it go to a grand jury.

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On August 1, 1990, after the Cincinnati indictments were filed but before the trials and acquittals took place, Mapplethorpe's "The Perfect Moment" was opened in Boston by curator David Ross at the Institute for Contemporary Art (ICA).

Several local religious vigilante groups, including Morality in Media and Citizens for Family First, had sought unsuccessfully to prevent the show from opening by pressuring Massachusetts Attorney General James Shannon to prosecute Ross and ICA and threatening to oppose Shannon's reelection if he did not. Said Shannon: "In my view, this exhibit should not be prosecuted because it doesn't fall within the definition of what's obscene. The laws were written so as not to have public officials tell museums what is art and what is not art."

Although a local district attorney who also felt empowered to prosecute declined to make a similarly reassuring declaration, and the Boston antipornography groups stepped up their pressures for a prosecution, the police did not attack the show. By the time the nine-week run ended, more than 103,000 gallery visitors had seen it, far more than had visited the ICA during the entire preceding year.

Nevertheless, ICA spokesman Arthur Cohen was less than ebullient about the lesson to be taken from the Cincinnati prosecution, the threats of prosecution in Boston, and the well-organized vigilante action that had nearly closed the show in both cities. He predicted that "The Perfect Moment" would never again be shown in the same fashion, saying, "this is the [exhibition's] swan song."

During the summer of 1989 in Broward County, Florida, a campaign was launched by police to suppress a best-selling record album called *As Nasty As They Wanna Be* by the rap music

group 2 Live Crew. Although nationwide the recording had sold nearly two million copies, Charles Freeman, a Fort Lauderdale record-shop owner, was arrested under Florida's obscenity law for selling the record to adults. Freeman, who is black, was quickly tried and convicted by an all-white Broward County jury.

One week later, also in Fort Lauderdale, after a local appearance by the group, criminal proceedings were brought against three of 2 Live Crew's four members: Luther Campbell, 2 Live Crew's leader; Mark Ross, the group's chief lyricist; and Chris Wongwon, the group's founder. As in Cincinnati, prosecutors had been pressured to act by right-wing religious vigilantes.

LUKE CAMPBELL:
*You can say I'm desperate,/ even call me perverted*
*but you'll call me a dog/ when I leave you fucked and deserted*
*I'll play with your heart/ just like it's a game*
*I'll be blowing your mind/ while you're blowing my brain*
*I'm just like that man/ they call Georgie Puddin' Pie*
*I fuck all the girls/ and I make them cry*
*I'm like a dog in heat,/ a freak without warning,*
*I have an appetite for sex,/ cause me so horny*
FEMALE VOCALIST:
*Uhh, me so horny, me so horny, me so horny, me love you long time. . . .*
MALE VOCALIST:
*What we gonna do?*
FEMALE VOCALIST:
*Sock it to me.*
*Uhh, me so horny, me so horny, me so horny, me love you long time. . . .*
LUKE CAMPBELL:
*It's true you were a virgin/ until you met me*
*I was the first to make you hot/ and wetty-wetty*
*you tell your parents/ that we're going out*
*never to the movies/ just straight to my house*
*you said it yourself,/ you like it like I do*
*put your lips on my dick, / and suck my asshole too*
*I'm a freak in heat,/ a dog without warning,*
*my appetite is sex,/ cause me so horny.*
FEMALE VOCALIST:
*Uhh, me so horny, me so horny, me so horny, me love you long time. . . .*

LIZ SMITH:* In my time I've had a lot to say about how sticks and stones can break one's bones; but words can never hurt. . . . And

* Columnist, formerly at the New York *Daily News*, now at *Newsday*.

this column has been an active defender of First Amendment rights and also the right of others to say anything they like about those in the public eye. I've always felt if we in the press offend, at least it is better than suffering suppression, censorship, etc.

But a July 2 column by John Leo in *U.S. News & World Report*, which I clipped and put aside before I went on vacation, has me on the ropes. . . .

JOHN LEO: The issue at the heart of the controversy over the rap group 2 Live Crew is not censorship, artistic freedom, sex or even obscene language. The real problem, I think, is this: Because of the cultural influence of one not very distinguished rap group, 10- and 12-year-old boys now walk down the street chanting about the joys of damaging a girl's vagina during sex. . . .

The popular culture is worth paying attention to. It is the air we breathe, and 2 Live Crew is a pesky new pollutant. The opinion industry's advice is generally to buy a gas mask or stop breathing. ("If you don't like their album, don't buy it," one such genius wrote.) But by monitoring, complaining, boycotting, we might actually get the 2 Live Crew Pollutants out of our air. Why should our daughters have to grow up in a culture in which musical advice on the domination and abuse of women is accepted as entertainment?

LIZ SMITH: So, is censorship the answer? The performance of 2 Live Crew—so violent, so anti-female—forces an almost involuntary yes! But once you censor, or forbid or arrest the real culprits, how do you deal with other artists who "offend"? Where do you draw the line? This is a tough one. But the average child isn't likely to encounter the kind of "art" that the National Endowment is trying to ban. Kids are not all over art galleries and theaters. But pop music assails them at every level and at every moment of their lives.

What I WOULD like to see is every responsible, influential and distinguished black activist, actor and role model—Jesse Jackson, Spike Lee, Whoopi Goldberg, Arsenio Hall, Eddie Murphy, Diana Ross, et al.—raising his or her voice to decry the horrible "message" of 2 Live Crew.

I would advise famous and caring whites to do the same, though they may be accused of racism. However, the issue goes far beyond race. Clips of 2 Live Crew in concert show that the audiences are not exclusively black by any means. What they are is young and unformed and dangerously impressionable.

DEBBIE BENNETT:* It's nice to see that Liz Smith is keeping racism in America alive and kicking. She's so stupid it's unbelievable. She wrote that since kids don't go to art galleries or see shows with people like Karen Finley, obscene art is okay. But since they listen to music, 2 Live Crew should be banned. Way to pass judgment on every teenager in America.

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In an account of the 2 Live Crew members' trial that appeared in *The Village Voice*, Lisa Jones reported what two teenaged black women, courthouse fans of Luther Campbell, had to say about the prosecution and the music:

ANTOINETTE JONES (18): They're just giving Luke a hard time because he's black. He's trying to make a living like everyone else. If someone wants to listen to his music that's their business. What do they think music is? They're acting like music is a gun.

LATONIA BROOKS (17): [Their lyrics] do have to do with sex and body parts, but when they rap, they put it all together. It's not like a man on the street saying dirty words to you. Their music makes sense. What they're saying is the truth. That's what most people do in bed. I don't, but that's what most other people do in bed.

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Unlike the jury that convicted the record-store owner Charles Freeman for selling the "obscene" album, 2 Live Crew's jury was not all white; it found all three Crew members not guilty. Two of the (white) jurors told reporters why they had voted to acquit.

SUSAN VAN HEMERT (JUROR): I basically took it as comedy.

BEVERLY RESNICK (JUROR): This was their way of expressing their inner feelings; we felt it had some art in it.

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The verdict came after four days of testimony during which the jurors "spent hours" listening to, and occasionally laughing at, two garbled tape recordings of a performance by the group that had been made by undercover deputies from the Broward County sheriff's office. The tapes, one of which had been enhanced by the police to eliminate background noise, were the prosecution's only evidence.

Defense lawyers Bruce Rogow and Allen Jacobi won the case by producing expert witnesses to testify about the artistic and

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* 2 Live Crew publicist.

political values in the group's songs, a strategy like the one that defense lawyers in the Cincinnati Mapplethorpe case had successfully used. One of the 2 Live Crew witnesses, *Newsday* music critic John Leland, gave an annotated history of hip-hop music. Another, Duke University professor and literary critic Henry Louis Gates, Jr., placed the music in its African-American oral and literary tradition. Gates explained the "signifying," and the use of "hyperbole" and "parody"; he described why it was that artistic works like *As Nasty As They Wanna Be* were not to be taken literally. This probably was the evidence which persuaded the jury that there was at least a reasonable doubt that the music was obscene.

Gates said that the Crew's lyrics took one of the worst stereotypes about black men—that they are oversexed animals—and blew it up until it exploded. He also suggested that the "clear and present danger" doctrine that judges still sometimes used to justify the suppression of speech was not applicable to the Crew's music.

PROFESSOR HENRY LOUIS GATES, JR.: There is no cult of violence [in this music]. There is no danger at all [from] these words . . . being sung.

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The Crew's chief lyricist defended the group's music, and its success, on essentially political grounds.

MARK ROSS (AKA BROTHER MARQUIS): The bottom line is getting dollars and having your own. It's really a black thing with us. Even though people might say we're not positive role models to the black community, that if you ask us about our culture, we talk about sex, it's not really like that. I'm well aware of where I come from, I know myself as a black man. I think I'm with the program, very much so. You feel I'm doing nothing to enhance my culture, but I could be destroying my culture, I could be out there selling kids drugs.

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Performers and purveyors of rap music, like curators of art galleries, are engaged in the communication of images and ideas through artistic means. Because of this, interference with their work by policemen, prosecutors, or judges violates the freedoms guaranteed under the First Amendment. No one can intelligently suggest that the country's musicians and distributors of music are not as entitled to be free in their professional activities as its writers and booksellers and museum curators are. The only

constitutional limitations permissible with respect to songs are also applicable to books, paintings, photographs, films, and the other arts, as to all speech and press—which is to say, the restraints ought to be limited in their application to persons who use music intentionally to incite others to crime or violence,* or who force nonconsenting or captive audiences to listen to it.

Purposeful disseminations to children of music that may be deemed "obscene" *for them* (in the constitutional sense mentioned in *Miller v. California*) would raise different questions.† When 2 Live Crew played Fort Lauderdale, they were not arrested and charged with inviting or alluring minors to hear their sexually explicit songs, playing to "captive audiences" of persons who did not wish to hear what was played and could not escape it, or intentionally inciting the men in the room to rape or sexually abuse women. They were charged with singing lyrics that policemen, prosecutors, and lower court judges had heard about, decoded, and decided were not art, but were obscene.‡ As reported in the press, the Fort Lauderdale arrests were reminiscent of the law enforcement actions that had been successfully taken more than twenty-five years before in New York to silence the social satirist Lenny Bruce.

While the criminal proceedings worked their way through the courts in Cincinnati and Fort Lauderdale during the spring and summer of 1990, John Frohnmayer in Washington showed Congress that he knew how to deny government funds to controversial artists even in the absence of express statutory authority. In June 1990, Frohnmayer rejected applications to support the work of four performance artists—Karen Finley, Holly Hughes,

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* The leading case here is *Brandenburg v. Ohio*, 895 S. Ct. 1827 (1969), which, in a few words, recapitulated the long experience with the "clear and present danger" test. In testimony to Lord Longford's committee in Britain, art historian Kenneth Clark defined "art" and "pornography" in such a way as to confirm this proposition: "To my mind art exists in the realm of contemplation, and is bound by some sort of imaginative transposition. The moment art becomes an incentive to action it loses its true character. This is my objection to painting with a communist programme, and it would also apply to pornography." Quoted in Lord Longford, *Pornography: The Longford Report* (1972), 99-100.

† The basis for this difference was established by Justice Brennan writing for the Court in *Ginzberg v. New York*, decided in 1968, reprinted in de Grazia, *Censorship Landmarks* (1969) at 610. Justice Brennan's "solution" to the problem of "obscenity" permitted legislators to prevent or punish communications and publications aimed at children which were "obscene" for children and not consented to by the children's parents or guardians. Thus no law could, for example, constitutionally punish 2 Live Crew for playing music that was "obscene" for an audience including children if the children's parents had arranged for, or consented to, the performance.

‡ The law officials based their actions upon a written transcription of some of the lyrics said to have been sung, prepared by a moral vigilante organization.

Tim Miller, and John Fleck—against the unanimous recommendations of the NEA's peer-group performance arts panel. Frohnmayer implied that he had rejected the panel's recommendations because of "political realities," lest the NEA itself be defunded by Congress. These measures may have "saved" the NEA, but they were taken at great cost to the reputation Frohnmayer had sought to establish in the art world as an advocate of artistic freedom. They also put the NEA into the business of censorship, an agenda the agency had assiduously avoided during the twenty-five years of its existence. There were calls for Frohnmayer's resignation from members of the NEA's arts constituency and barbed criticism from the press, including the syndicated columnist Suzanne Fields.

SUZANNE FIELDS: To fund or not to fund, that is the question. . . .

Like Hamlet, Frohnmayer can't make up his mind. He rejected four performance-art grants that he considered of dubious merit, and after the artists cried "Boo!" he said they could appeal, even though there's no precedent for appeal.

He thinks government artists shouldn't be required to sign a pledge that they won't commit obscene art, but he wants them to avoid "confrontational" art.

He tried to explain what confrontational art is. It might not be "appropriate"—this is the bureaucrat's favorite word—to fund a photograph of victims of the Holocaust for display at the entrance to a museum where everyone would have to confront it, like it or not.

When this predictably enraged a lot of people, he apologized and fired the woman who gave him the example.

Nevertheless, the hapless Frohnmayer identified the bottom-line issue in the billowing controversy over the National Endowment for the Arts. Instead of looking at the way artists are abused by politicians, we should look at the way government subsidy abuses art.

John Sloan, the turn-of-the-century American painter of the "ashcan school" whose work shocked the art establishment of his day, understood how art had to define itself against the established order rather than become a part of it.

"It would be fine to have a Ministry of the Fine Arts in this country," he said. "Then we'd know where the enemy is." . . .

Painter Larry Rivers recognized the danger of artists taking money from the government: "The government taking a role in

art is like a gorilla threading a needle. It is at first cute, then clumsy, and most of all impossible."

John Updike has the right idea: "I would rather have as my patron a host of anonymous citizens digging into their own pockets for the price of a book or a magazine than a small body of enlightened and responsible men administering public funds."

Now *that's* confrontational. . . .

HOLLY HUGHES: Frohnmayer is the Neville Chamberlain of arts funding. He's an appeaser. There are two schools of thought about Frohnmayer: Either he was put in there because he was not a right-wing ideologue, and he was a nice guy and he would be inoffensive; and then he turned out to be spineless in a dangerous time, which is actually more destructive than anything else . . . to be spineless.

Or, my opinion is—and it's just based on a hunch—there are many ways to destroy the Endowment. The most obvious but most risky politically is outright to defend it. Or attach ridiculously prohibitive and probably unconstitutional language to grant recipients. Another way is to get a person in there who will just completely erode the process that has been established for twenty-five years—which is what Frohnmayer actually has done. His job is supposed to be to insulate the funding decisions from political pressure but instead he opened the door wide to it.

JOHN FROHNMAYER: I am an advocate for the arts, a spokesperson for the arts, a devotee for the arts, a participant in the arts, and I would hope that by who I am and the position that I hold I could articulate for the country why the arts are essential to our existence.

HOLLY HUGHES: Our work *is* controversial, but it seems like at different times there are different targets, and at the time that these grants were turned down the buzzwords were "pornography" and "obscenity" and this whole equation; and, you know, just being gay makes you "obscene." By the very definition. I could just walk down the street and I'd be considered a pornographer; Jesse Helms is denying my very existence. . . .

The pattern has been that once somebody in the national council* targets you as being controversial then it's leaked to the

* The National Council for the Arts, the NEA's twenty-six person advisory board, receives grant recommendations from the artists' peer-review panels and makes recommendations to the chairperson. In the past (before Frohnmayer), the council regularly adopted the arts panels' recommendations, and the chairperson regularly accepted the recommendations of the council.

press, confidential information goes to the Right Wing press, and there comes the whole domino effect . . .

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The syndicated columnists Rowland Evans and Robert Novak were the first to target Karen Finley's work, referring to it in a May 11, 1990, column as "the performance of a nude, chocolate-smeared young woman." The first member of the right-wing press to target Holly Hughes was *The Washington Times*, a newspaper that began publication after the *Washington Evening Star* folded. Some people said that it was the first newspaper that President Ronald Reagan read in the morning. In that piece, the newspaper also presented distorted sketches of the work of two other performing artists who had applied for NEA grants: Karen Finley and John Fleck.

*THE WASHINGTON TIMES* (June 12, 1990): National Endowment for the Arts Chairman John Frohnmayer, in a secret telephone vote of the agency's 26-member advisory council,* is recommending rejection of grants to five controversial artists, including:

• KAREN FINLEY: A regular at NEA-funded avant-garde theatres such as the Kitchen and Franklin Furnace Archive, she smears her nude body with chocolate and with bean sprouts symbolizing sperm in a piece entitled "The Constant State of Desire." Miss Finley also coats make-believe "testicles" with excrement and sells it as candy. In one monologue, she spreads her legs and puts canned yams into her body. . . .

• JOHN FLECK: Considered a "fixture" in the "underground culture" of Los Angeles and New York, he urinates into a toilet bowl with a picture of Jesus in a piece titled, "Blessed are All the Little Fishes." In another act, Mr. Fleck urinated into the audience. In a skit titled "He-Be-She-Be's," where he is half-man, half-woman, he strips and has sex with himself.

• HOLLY HUGHES: A solo performer and writer of theatre skits, she demonstrates how her mother imparted the " 'Secret

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* Normally the council had recommended to the NEA's chairperson what grants should be made and the chairperson had adopted the recommendations. In this case, Frohnmayer justifiably feared that unless he intervened in advance to make his preemptive decision known to the council's members, the council would overwhelmingly recommend that the four grants be made, placing him in the practically unprecedented position of having to veto his advisory council's recommendations. See C. Carr's "The Endangered Artists List" in *The Village Voice* of August 21, 1990, regarding the "politicization" of the council and the creation of an artist's blacklist by "neocon" council members Jacob Neusner and Joseph Epstein.

meaning of life' by displaying her body and placing her hand up her vagina"† in a skit titled "World Without End." Her works are less concerned with male-female sexual relationships than "she is with lesbian desire," said a review of another work, "Dress Suits to Hire."

HOLLY HUGHES: I feel like the Endowment is trying to stop us from working, and I mean openly gay and lesbian and feminist artists. And others, like artists who deal with religious symbolism and artists that deal with the American flag and don't treat it right.

And the next step is they're hassling the places that present us and they're ordering audits. . . . The place that sponsors me is the Downtown Art Company. . . . So far they have not been a direct target but The Kitchen, which has funded me and presented Karen Finley and Annie Sprinkle, has now borne the brunt of three different government audits. Franklin Furnace, which has funded me and has presented Karen Finley, has been targeted, and they've been asked to submit to the NEA not just a list of everyone they are going to present but what the work is about—much more detailed information than other institutions are required to provide. . . .

Franklin Furnace was closed down—their performance base is shut (because of fire regulation violations). It was when Karen Finley's installation was up. Franklin Furnace existed with these violations for fifteen years, and we think it was more than coincidental that suddenly on opening night of Karen Finley's installation somebody would show up and know all of the existing fire-code violations. . . .

In June, that stuff started appearing in *The Washington Times*, misrepresenting me and Karen and John Fleck. Obviously somebody from the NEA, either on the National Council or within the NEA, leaked confidential materials to *The Washington Times*, which they distorted, took out of context, and in a few cases outright lied about.

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Shortly after Frohnmayer rejected the grant applications of the "scapegoat" performance artists, *The Washington Times* reported that Frohnmayer might give up the futile attempt he was making to please and placate both his congressional and his arts constituencies. The newspaper used the occasion to again ma-

† Hughes and her patron Downtown Art Company both deny that she has ever used this gesture in her work.

lign Finley, Hughes, and Fleck and to attack a fourth rejected performance artist, Tim Miller of California, as "a member of the gay community" whose work was "always political."

*THE WASHINGTON TIMES* (July 2, 1990): National Endowment for the Arts Chairman John Frohnmayer has the arts community speculating that he plans to resign sometime this year after remarks that he cannot accept "political" restrictions on taxpayer-funded art.

"He's making sounds that he can't stomach having to make grant decisions for political reasons and not just on artistic grounds," said an artist with connections to the endowment.

Mr. Frohnmayer on Friday denied grants to four sexually explicit performers after telling local art representatives in Seattle earlier in the week to expect such action because of "political realities."

The NEA chairman for the past eight months has vigorously opposed congressional restrictions on federal funding of artworks said to be obscene or blasphemous.

"I'm looking for him to leave sometime after Congress has acted on the endowment's reauthorization [legislation]" after the Fourth of July recess, said the artist, who asked not to be named. "I think he's laying the groundwork. It would be around the time of the [first-year] anniversary of his nomination by President Bush."

Mr. Frohnmayer did not respond to requests for comment.

JOHN FROHNMAYER: Mid-summer [1990] was probably the lowest ebb of this whole conflict. I would be less than candid . . . if I told you the thought [of resignation] had never crossed my mind, but the reason that I came here was to do what I really could to promote the arts, and I was determined to see it through. I always felt that Congress would see the wisdom of not trying to place content restrictions on an agency whose function it is to promote creativity. You really have diametrically opposed ideas when you're talking about creativity on the one hand and content restrictions on the other.

PAULA SPAN AND CARLA HALL: Performance art, a form that coalesced in New York and California in the mid '70's, borrows from movement and dance, theatre, music, the visual arts and video. It can be scripted or extemporaneous, performed solo or with others, involve props and costumes or not. . . .

Performance art can be confrontational, phantasmagoric, threatening, emotional, bizarre. So perhaps it is not surprising,

in the intensifying tumult over art and obscenity and the National Endowment for the Arts, that the first artists to be denied the 1990 NEA fellowships for which they'd been recommended were four performance artists, two from each coast.

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The work of artists like the "NEA Four"—Holly Hughes, Tim Miller, Karen Finley, and John Fleck*—has been described by some commentators as "Post-Modern" art, a form that deliberately flouts standards for obscenity—and especially the "serious value" gloss that Chief Justice Burger laid upon the Brennan doctrine in *Miller v. California* in 1973—because, as Amy M. Adler has said, it "rebels against the demand that a work of art be serious, or that it have any traditional 'value' at all." Adler, who at the time was a third-year student at Yale Law School, elaborated on the point in *The Yale Law Journal*.

AMY M. ADLER: Chief Justice Burger devised the *Miller* test for "serious artistic value" at precisely the time that Modernism in art was in its death throes. One year earlier, the art critic Leo Steinberg had been perhaps the first to apply the name "Post-Modernism" to the revolutionary artistic movement that was budding just as *Miller* was decided. That the Court drafted *Miller* at this turning point in art has dramatic implications, for the metamorphosis into Post-Modernism that occurred in the 1960's and early 1970's has led not to another style in art, but to an entirely transformed conception of what "art" means. . . .

The wording of *Miller* clearly reflects the Modernist era in which it was drafted. As an art critic wrote of Modernism, "the highest accolade that could be paid to any artist was this: 'serious.' " It is as if the word "serious" were a codeword of Modernist values: critics consistently equate it with the Modernist stance. In fact, the very foundation of *Miller*, the belief that some art is just not good enough or serious enough to be worthy of protection, mirrors the Modernist notion that distinctions could be drawn between good art and bad, and that the value of art was objectively verifiable. Thus *Miller* has etched in stone a theory of art that was itself a product of only a transitory phase in art history—the period of late Modernism. . . .

The most pressing challenge to the *Miller* test comes from a sector of Post-Modern artists who not only defy standards like

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* The work of each of these artists was sketched in Paula Span and Carla Hall, "*Rejected*: Portraits of the Performers the NEA Refused to Fund," *The Washington Post*, July 8, 1990.

serious value, but also attack the most basic premise of *Miller*: that art can be distinguished from obscenity. Some of the artists . . . are extremely—and deliberately—shocking and offensive. It may be hard to understand the value that critics find in this kind of work. Yet it is precisely because these works are so hard for many people to see as "art" that they are of pressing importance for the legal community to consider. . . .

An important and established artist . . . is Karen Finley, whose performance art has been called "obscenity in its purest form." She is indeed a shocking performer.

MARCELLE CLEMENTS: Karen Finley's subject is not obscenity. Her subject is pain, rage, love, loneliness, need, fear, dehumanization, oppression, brutality and consolation. Like the other three performing artists who were denied grants recently by the National Endowment for the Arts, Ms. Finley uses strong sexual images. In her performances she is often nude and often places, dabs, smears, pours and sprinkles food on her body to symbolize the violation of the female characters whose tales she shrieks and whines on stage. It is not her sexuality but her emotional intensity that engages her audiences. A conceptual and performing artist, her most recurrent themes are incest, rape, violence, alcoholism, suicide, poverty, homelessness and discrimination. . . . Her work is nearly always shocking and invariably—some would say relentlessly—political.

KAREN FINLEY: When I was very young my parents saw Lenny Bruce and so his myth had a lot of impact of me. And I just felt—when these situations started to happen with me—I didn't want to have happen what happened to him. Which is stopping my ability to create. It's the biggest form of censorship, where you question yourself. When people are attacked it stops the creativity from growing.

KAREN FINLEY (*Aunt Mandy*):
*It's my body*
*It's not Pepsi's body*
*It's not Nancy Reagan's body*
*It's not Congress's body*
*It's not the Supreme Court's body*
*It's not Cardinal O'Connor's Catholic-church-homophobic-hate women-hate queers-oppressive-DEVIL-SATAN-no children body*
*IT'S NOT YOUR BODY. . . .*

*One day, I hope to God, Bush*

*Cardinal O'Connor and the Right-to-Lifers each*
*returns to life as an unwanted pregnant 13-year old girl working at McDonalds at minimum wage.*

C. CARR: Finley began performing in 1979 after her father's suicide. . . . She's still working out of the emotional range she discovered in her rage, the skinless panorama of taboo. She says the charge she gets from performing balances the pain she feels about his death. . . . *Deathcakes and Autism* was an early performance piece based on the events of her father's funeral, where everyone became preoccupied with the food brought to the bereaved.

KAREN FINLEY: People were actually having arguments over which ham to eat. Or saying, "Was it much of a mess? Did you clean it up?" While they were bringing in two dozen Tollhouse cookies.

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She was twenty-one years old, on spring break from the San Francisco Art Institute, when her father shot himself in the garage, leaving behind "a vague unhappy note." He used a small gun no one knew about. Finley still searches her memory for the clues she missed.

MARCELLE CLEMENTS: She points to a drawing on her drafting table. "I'm working on these little things," she says, leaning over the drawing. "I do think it's sort of sad." The legend reads: "I shot myself because I loved you. If I loved myself I'd be shooting you." Ms. Finley says at the time she remembered a dream she had years earlier about her father's death.

KAREN FINLEY: And the thing that was very strange in my dream. . . . I remember this Spic & Span and in my black humor moment I said to them, "Who's going to clean it up?" Because the image of my father's brain being out there in the cold of the night really disturbed me and I said, Who's going to get out the Spic & Span? I remember I just couldn't go into the garage to see him.

C. CARR: When she returned to college, the San Francisco Art Institute, she felt an "incredible yearning" to spill it, to get up and tell the awful truth in front of people. . . . The result is both fascinating and horrifying to behold, because audiences can't help but recognize their own most mortifying obsessions in the fast-flowing bile. . . .

Women have no tradition of foul-mouth visionaries, as men do—Céline, Genet, Lenny Bruce, et al. But at least women now

have a sort of rude girl network that provides a context for outrageous work. Think of Lydia Lunch and that baby-faced dominatrix image so startling in the late '70s, or the obscene and sexually demanding narrator in any Kathy Acker story, or the oddball menace of Dancenoise (Lucy Sexton, Anne Iobst) on stage at 8BC swigging "blood" from coffee cans, tearing dolls limb from limb, shouting, "Give me liberty or give me head!"

KAREN FINLEY: When I was very young in my life I noticed that due to the fact that I was a woman I wasn't able to express myself in the same way that men could. Certain opportunities weren't open to me, and I considered that going against my freedom. When I was six, in Catholic school, I wore culottes and I was told I couldn't wear them to school. But I did anyway, and talked back to everyone, and wore shoe boots, which I guess were considered sexual or something. I didn't know what shoe boots meant but I continued to wear them, and the culottes, and I felt that I had more body freedom wearing culottes and boots.

When I was in seventh grade I wore pants to public school. It really caused a big ruckus; and then, when they wouldn't allow me to come to school with pants, I wore old ladies' dresses that were totally ugly. And when I did that we won. And so I feel that from when I was a child I was always kind of outspoken. . . .

When I was twenty-one, I performed in the window of [an abandoned] J.C. Penney store in San Francisco. . . . There was no language in it, because people couldn't hear me, but I was kissing the window and putting my breasts up there. I was fully clothed but I put my body up there, it was supposed to be a joke—the woman as a sex symbol. And then I took all these bananas and I put my head up to the window and I was mushing them in my mouth, really close up there. Someone called the police and said there was this woman who's on drugs, insane, and nude, let loose in this J.C. Penney window. . . .

And these two officers came and dragged me off and put me in a squad car, and what I decided to do was continue my performance in the squad car. So I was on the seat, kissing all the windows. I think that was sort of funny, that I continued doing this show, and I never broke the energy. That was the first time my gender helped me . . . being a woman, and being young.

The curator came up and he said to the police that he was a curator and this was art. "This is part of a performance, it's part of a series." He had asked me to perform there, at J.C. Penney's.

What struck me was that this was art and it was okay, I could go. And I thought that was funny, or odd; I felt sad.

What if I was a person who didn't go to art school and wasn't given that educational privilege? I would have been arrested, if I was just a person expressing myself that way, and didn't have a curator. I thought what about if I *was* on drugs, or insane? It made me start thinking of things in a different way: that art is a shelter.

So I've been stopped numerous times; but the next time was when I went to Germany with Harry Kipper.* We did a performance in Cologne, where we saw a lot of anti-Semitic graffiti in the town. It was during a Theatre of the World Festival, and we were totally appalled at not just one anti-Semitic slogan but consistently, in bathrooms, on walls, even in the theatre festival office. . . . We couldn't believe that no one even covered that up. We felt that it was still part of the culture, so we decided to do a performance where we were really going to be discussing, dealing with, Hitler's own personal sex life and things like that.

So Brian Routh,* who I performed with, he was Hitler and I was Anna. And we did all those German songs and we pretended like we were dogs and we took chocolate pudding and put it on our rear ends.

C. CARR: [Finley and Routh] had installed several rotting carcasses of beef in the space, where it was [standing room only]—over 800 people—on each of their four nights. [Routh] goosestepped and saluted, naked from the waist down. Finley wore a corset and garter belt. . . .

The audience became increasingly agitated. Finley stuffed toy sharks with hot dogs and sauerkraut and hung them from her body for [Routh to eat]. They began reporting anti-Semitic incidents they had witnessed in Cologne, then began to rub chocolate pudding on each other's asses. Spectators started arguing among themselves. "Get off!" "No, she's right . . ." "We don't need to hear this about Hitler," and so on.

KAREN FINLEY: We were drinking beer and pretending we were

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* The Kippers, aka the Kipper Kids, "became infamous in the '70s for performances that deconstructed every learned nicety into the raw human behavior observable in infants." One of the Kippers was Martin von Haselberg; the other was Brian Routh. They were scheduled to tour Europe in 1981; when von Haselberg could not go, Finley replaced him and, as described in the text, touched off a near riot in Cologne at the Theatre for the World Festival when she and Routh appeared as Eva Braun and Adolf Hitler. C. Carr, "Unspeakable Practices, Unnatural Acts," *The Village Voice*, June 24, 1986.

* Karen Finley's graduate adviser at the San Francisco Art Institute, whom she later married.

dogs, lapping it up, with these German patriotic tunes, and one time this woman comes down to the stage with this mop saying "Germans are not dogs!" and takes this mop and starts attacking me and hitting and beating me.

I needed help, I'm not a violent person, I didn't hit back. Brian took the mop out of her hands and said, "If you touch her again I'll kill you," and with that, all these people from the crowd started coming down to the stage, screaming, really upset with us. And it was just totally amazing; we had to go backstage and end the performance because they didn't want to hear about it anymore. They yelled "It's over with, we weren't the Nazis"—*and we realized we had struck a chord.*

This was 1981. So then they told us—the Theatre of the World Festival—that they couldn't guarantee our security, meaning we were supposed to perform, to honor our contract, but they weren't guaranteeing our safety. And they said they were receiving threats and, being twenty-six years old, I was really scared. I was scared to go on stage. I thought someone was going to shoot me.

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In 1987, Finley was asked to be part of *Mike's Talent Show*, a show that Michael Smith, the *Village Voice* critic, had put together for a cable TV taping. But when Finley would not "soften" it for television, the piece she was scheduled to perform, *I'm an Ass Man*, hit the cutting-room floor.

C. CARR: Police stopped a couple of her performances in San Francisco. Her reputation began to precede her, so that when a Los Angeles club booked her, they told her "No four-letter words and don't show your body." She canceled.

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In London, Finley ran into a more serious problem because of *I'm an Ass Man* and her unwillingness to compromise her art by self-censoring it.

KAREN FINLEY: I had this problem in London when Scotland Yard came to my show, and I was actually threatened with deportation. I do a short monologue called "I'm an Ass Man," which is about a man—in his voice—wanting to rape a woman in the subway. And when he is about to, she has her period; so he stops the rape. It's only about five minutes, it's in my new book.

KAREN FINLEY (*Shock Treatment*): *Even though I'm married and I've got work and kids, I can't stop looking at butt. I can't stop looking at derriere.*

*I can't stop looking at tush. I can't stop looking at rump roast. Baby, I'm an ass man.*

*Once I spotted her in the subway: short, Hispanic, Polish, Chinese, Irish or Jewish, with a huge butt just waiting to be fucked, just asking to be fucked. She was short-waisted and all I wanted to do was get her against that cold, slimy, rat turd wall and get my cock inside her. She's wearing those four-inch cork wedges that went out of style in the early '70s. And she's wearing those polyester pants and I can see her panty lines through her slacks. . . .*

*I crack open the seat of her pants, just listening to the fabric tear. I love the sound of ripping polyester. I love the smell of ass in open air. Then I get my fist, my hand, and I push myself up into her ass. I'm feeling the butt pressure on my arm, on my wrist, it's feeling good. I'm feeling her up. It's turning me on. It's turning me on. I can hear that sound. I'm feeling her up. I reach up to her pussy, feeling that fat little mound, that little bird's nest. I keep my hand in there and then, just when I'm ready to mount her, I take my hand out. I see my arm, my hand, and I see that THE WOMAN HAS HER PERIOD.*

*How could you do this to me, woman? How could you do this to me? How could you be on the rag on me! I'D BE THE BEST FUCK IN YOUR LIFE! THE BEST PIECE OF COCK IN YOUR LIFE, GIRL! THE BEST RAPE IN YOUR LIFE!*

*And I was running. I'm running. I'm trying to get those purple hearts off my hands, out of my cuticles, but the blood won't come out of my lifeline, out of my heart line, the blood won't wash off my hands. Be a long time before I use that hand to shake my dick after I piss.*

KAREN FINLEY: I was to perform "I'm an Ass Man" at the Institute of Contemporary Art in London, and they would not let me. Scotland Yard basically told the museum that their funding would be cut off if I performed there. Their funding is millions of pounds each year; it would be like cutting off the funding to the Whitney. They also told me they couldn't guarantee my safety, and that if I performed, there would be a strong possibility of being deported, which would also mean I couldn't come back.

They would come to my performances, I saw them come, Scotland Yard. I was given a way out, that I could perform if I didn't take my clothes off. Or I could take my clothes off—I could do a strip show—but I couldn't talk. There's a law in London that a woman cannot talk while she is taking her clothes off. . . .

It really got very, very ugly. I basically had to leave the country. I was fearful for my life. That is how dangerous and unset-

tling the feeling was, because of the protesters and people there . . . at the hotel, and walking down the street. I still cannot perform in London. They told me that my type of work, the kind of work I do, cannot be done in WI, London, or wherever, because it's close to the queen. My records could not be sold in London.

The tabloids in London, there was a cover story on me; they made up things about me, said I did all these things, called me Fruity Karen, they called me the Porno Queen. They had pictures of me. They even made up my entire biography, make up stories about me. I do get a lot of press, it's sort of funny. I still can't perform in London.

I'm going to do an installation in Philadelphia next week, the end of the month [March 1991], and the title is "The Virgin Mary is Pro-Choice, and Other Relevant Truths." Already there's a fear of blasphemy. I want to put important women through history: Eve was pro-choice; Joan of Arc was pro-choice; Cleopatra was pro-choice; and I believe that the Virgin Mary was pro-choice. Gabriel came down and told her that this was happening. I feel like she was just a pro-choice kind of gal. So, already there are letters about blasphemy coming in, and I'm going to be doing anti-[Persian Gulf] war work, too. So I know that this situation with the NEA isn't something that's going to go away.

This is my life and I know I'm going to be bringing up controversy, and I think that it would be so much easier if American society just accepted the fact that that's what the artist's job is, to basically bring a mirror to the culture, and turn it around, and make us look at ourselves.

C. CARR: In [Finley] id-speak, shitting and vomiting and fucking are all equal. Desire attaches to disgust. Finley's work moves beyond rage to the trigger for that rage. To damage and longing, the desperate want for something, the hole in all of us that nothing ever fills.

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Finley was afraid that the NEA in the future would deny supports to any artist like her who refused to adhere to whatever political agenda was set in Washington, D.C.

KAREN FINLEY: I was the first generation of my family who was able to become an artist, so I took [the help I received] very seriously. I looked at it as my being given equal access, the same access, as people who have money or inherited wealth. That's why I look at what's happening now as censorship, because in the future people getting out of school, if they don't really have the

correct political agenda in their work, then they won't be able to get that grant. And if you come from a working-class background, like me, if I hadn't got that first NEA grant I just wouldn't be here. That's how it is. I wouldn't have gone to art school if I didn't get a grant. That's what I'm mostly fighting for, the right of people to become the artists that they want to be.

BILL KAUFFMAN:* [T]here are actually writers and artists in the American heartland who want nothing to do with the National Endowment for the Arts. They think that government subsidy is corrupting and crippling, suitable only for fat and happy eunuchs. . . .

Is it then the artist's lot to starve and scrape, to eat rice and home-baked bread and scribble feverishly in the darkest hours? Yes! Comforted, coddled, cossetted artists create mediocre art.

Can anyone name one major piece of American fiction that would not have been written without the NEA's beneficence? How about a significant minor work?

BARBARA RASKIN:† Being awarded an NEA grant for fiction saved my life. I think I would have stopped writing forever if I hadn't gotten it. In 1980 $12,500 meant the difference between down-and-out or up-and-coming. I had never before received any professional support or financial encouragement. This money from the government was an affirmation of my artistic intention; somebody out there had heard me and believed in what I was trying to do.

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Like the work of the other artists denied performance arts grants in the summer of 1989, Holly Hughes's work had received critical acclaim:

LAURIE STONE: [Hughes's] language soars like skywriting; keen ironies, delivered in her characteristic tough-girl drawl, flare into lush poetic riffs . . . her poetry has never been more subtle.

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Hughes's work is softer than Karen Finley's, less controversial. In her grant application to the NEA, Hughes cited a piece she had written and performed in 1989, *World Without End*.

HOLLY HUGHES (*World Without End*): *The woman leans back in the chair and closes her eyes, remembering her mother's immortal French. From*

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* Novelist; author of *Every Man a King* (1989).

† Author of five novels including the 1987 best-seller *Hot Flashes*, which she wrote with the assistance of an NEA grant.

*off-stage left comes the faint sounds of an accordion. I'd really prefer a set of bagpipes, but the accordion is more reasonable. The song is sweet, like a remembered childhood song, something upbeat, por favor. The woman smiles, the song is part of her reverie. Suddenly, her eyes open. She realizes the song is not part of the dream, but is really happening. A woman enters playing the accordion. She is tall, with broad shoulders and good bones, elegant and eccentric. A mid-western Marlene Dietrich, let's say. She's wearing a smoking jacket and very little else other than the accordion. She reminds you of those Saturday mornings when your dad would dress up like Clark Gable and chase your mother around the breakfast nook with his semi-annual hard on.*

*As the song progresses, the woman in the chair relaxes and dives back into her dream. She speaks as though she's dictating a letter into a foreign language, one she barely knows. . . .*

*I'd say "O Mama, I can't sleep at night. I smell the ocean." Not that far-off Atlantic, not the unbelievable Pacific. I'm talking about that old ocean, that blue blanket that used to cover this country, all of us, from the teenage anorexics to the Burger King evangelists, all of us sleeping with the dinosaurs, the blackcapped chickadees, our heads full of fish, waiting to be born.*

*That's the ocean that floods my bed each night, and what can I do about it, Mama?*

*I get up in the morning and the world is just flat and dry and there is no hint, in the parking lot, at the mall, at the 7-11, of why I am so full of ocean. . . .*

*O, I can't watch TV anymore, I can't watch TV. There's always the same guy on TV laughing and everyone laughing with him, except for this woman and me. I know she's gonna cry enough in the next week to flood us all out of our houses, even the ones who are laughing.*

*Am I the only one who's afraid of drowning?*

*Teach me to swim, Mama! Teach me how to read this sorrow so I can resist the common current. Mama, teach me that French!*

*Mama says: "What makes you think I know any French?" Her voice is cool and blind, but, and this is a big but, she puts her hand on her hips and I see those hips move under her wrap-around skirt so heavy and full, I can smell the memory of ocean drifting out from between her legs. O, there is POWER in my mother's hips! I tell you what I've seen! I've seen her hands with their tapered fingers run from her hips down to her thighs, I've seen her tongue sneak out of her mouth to wet her lips when everyone else was just watching TV and I know, O, yes, I know, my mother is FULL of FRENCH. . . .*

*Mama took me to the bathroom and started asking me questions. Taking off her clothes and asking me questions. With every garment I got a new*

*question. She unbuttons her blouse and asks: "Do you want to know where babies come from?" She shimmies out of her skirt and says: "Are you ready for the meaning of life? I'm talking about the secret life, the French night club where we're all dancing? The hidden room where we stash our gold." She says this and VOILA!*

*My mother's got no underwear on. Her pantyhose . . . it's down there on the ground, sulking, feeling sorry for himself. Then that mean old pantyhose just slinks on out of there, belly to the ground. And my mother is standing in front of me. . . . (She mimes to the audience) NAKED. Uh HUH. NAKED. And glistening. Bigger than life, shining from the inside out, just like that giant jumbo Rhode Island Red Hen in front of the Chicken Palace and Riborama. . . .*

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NEA Chairman Frohnmayer gave no official reason for denying those grants to Holly Hughes, Karen Finley, Tim Miller, and John Fleck. But the situation was a familiar one in the history of censorship of literature and art, going back at least to the day when Henry Vizetelly was imprisoned for publishing Zola's *The Soil*: Newspaper editors and columnists in touch with the agendas of right-wing political and religious groups publicize "scandalous" information about the work of certain authors, publishers, or artists, received from confidants within the government or sources in the literary or arts community; this prompts the right-wing groups to bring pressure on government officials to take repressive action.

The idea for the *Washington Times*'s "exposure" of the "political" and "obscene" character of the work of Finley, Fleck, and Hughes had probably originated a month earlier, on May 11, when in the *New York Post* the conservative syndicated columnists Rowland Evans and Robert Novak (basing their report on information supplied them by "an administrative insider") labeled Karen Finley's act as "the performance of a nude, chocolate-smeared young woman in what an NEA memorandum calls a 'solo theatre piece' and what the artist herself describes as triggering emotional and taboo events."* But Evans and Novak made no mention of canned yams and said nothing whatsoever about Holly Hughes's work.

A few days later, Frohnmayer's advisory council, the National Council for the Arts, having read the newspapers, met to

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* Even earlier, the country's most powerful unofficial czar of popular culture, Donald Wildmon, had opened a campaign to smear the NEA with a full-page ad in *The Washington Times* of February 13, 1990.

discuss eleven performance arts applicants (including Finley, Hughes, Miller, and Fleck) and voted to defer action on all of these, pending receipt of further information on those they feared were "controversial." The aim evidently was to remove Frohnmayer from the administrative hot seat that Washington politicians and conservative newspapers had put him in. If he stalled until after Congress acted on pending legislation to reauthorize the NEA, he would be spared the necessity to prove to Capitol Hill that he had their concerns about "controversial" art in mind, and in hand. In the event, however, Frohnmayer chose to act.

The *Washington Times*'s June 12, 1990, story gave no source for its depictions of the Finley, Fleck, and Hughes pieces. When these descriptions were repeated in the newspaper's July 2 edition, after Frohnmayer had announced his rejection of grants to the four performance artists, the newspaper listed the following as its sources: "National Endowment for the Arts, *High Performance* magazine, *New Art Examiner, Artweek, The Drama Review, The Village Voice.*"

It was, however, an article by David Gergen in the July 30, 1990, issue of *U.S. News & World Report* that was most upsetting to Holly Hughes. The article repeated the inaccurate information about Hughes's work that had been published in *The Washington Times*, giving it greater credibility and a wider audience. It led Cliff Scott of Hughes's performance art group, Downtown Art Company, to write a letter of protest, and a demand for retraction, to editor-at-large Gergen:

CLIFF SCOTT: Dear Mr. Gergen, Regarding your article in the July 30th issue of *U.S. News and World Report*, not only do I disagree with the opinions you express in the entire article, but its inaccuracies are shocking. I am writing in behalf of Holly Hughes and the Downtown Art Co. to express outrage for the blatant factual inaccuracy which your article embraces. . . .

In writing about Holly Hughes's play WORLD WITHOUT END, you state that Holly Hughes's "performance on stage includes a scene in which she places her hand up her vagina." *This is just not true. Holly Hughes's work does not involve nudity or simulated sex acts.*

Have you ever seen any of the work of these artists? Specifically, have you seen Holly Hughes's work? In speaking to your researcher, Ann Andrews, she told me that your only source for information for describing Ms. Hughes's work was obtained from

*The Washington Times*, a source which is, as you should know, a highly suspicious source for accurate information relating to the work of Holly Hughes.

No other publication has repeated *The Washington Times*'s misinformed description of Ms. Hughes's work. In all the months of this controversy, to our knowledge, not a single other publication has relied on *The Washington Times* as an accurate source to describe Ms. Hughes's work. . . .

The appearance of your gross inaccuracy at this time is particularly damaging to Holly Hughes's career, and, as a partner in Downtown Art Co., adversely affects the work of the company. As you probably know, since it has been reported widely by the press, the National Council of the National Endowment for the Arts is meeting in Washington next weekend to review, among other things, a proposal from Downtown Art Co. for a new project written by Holly Hughes and directed by Ellen Sebastian.

An editor, reporter, and commentator of your reputation and stature increases the likelihood that this lie about Ms. Hughes's work will be viewed as accurate. And since this lie is printed in such a respectable magazine, your byline will become the "primary source" for other publications. *You will be believed.* Your outrageously inaccurate article may influence the members of the National Council on the Arts and many others. . . .

On behalf of Holly Hughes and her company, Downtown Art Co., we demand an *immediate, clear, and prominent retraction* of your misrepresentation of Ms. Hughes's work. If there is any syndication of your article, in print or broadcast, including wire service, we also demand an immediate, clear, and prominent retraction. These retractions in no way limit Holly Hughes's or Downtown Art Co.'s right to seek additional relief in the future. . . .

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Gergen did not acknowledge Scott's letter. However, *U.S. News & World Report*'s Kathryn Bushkin responded with a letter dated August 3, 1990, addressed not to Scott but to John Frohnmayer, with a copy to Scott:

KATHRYN BUSHKIN: Dear Chairman Frohnmayer, In Dave Gergen's July 30th editorial in *U.S. News & World Report* regarding the National Endowment for the Arts funding, he inaccurately described one scene in Holly Hughes's work. We are running a correction in our 8/13 issue, and a copy is enclosed for your information.

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The correction—in very small print, in a very unobtrusive place—read as follows:

*U.S. NEWS & WORLD REPORT:* Correction. David Gergen's July 30 editorial described one segment of artist Holly Hughes's performance as including "a scene in which she places her hand up her vagina." That was incorrect. David Gergen regrets the error.

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Gergen and *U.S. News* were seeking to support the embattled NEA and Frohnmayer's floundering efforts to save it—even if that meant maligning, and supporting censorship of, artists like Karen Finley and Holly Hughes. Although Gergen's article did not back the position consistently voiced by Frohnmayer that Congress should delete the existing Helms-Yates "obscenity" limitation in the NEA's authorization law, it did support Frohnmayer's (and the Bush administration's) position that Congress should attach no other "content" restrictions on the art and artists funded by the NEA. Gergen seemed to believe that the new chairman should have been trusted by Congress (and the White House) to censor politically, sexually, and religiously obnoxious art on his own, without an explicit command in the law that he do so.

DAVID GERGEN: In its laudable desire to maintain standards of decency, Congress should leave in place its current rules against funding obscene works but should avoid imposing new restrictions that would handcuff the NEA. By rejecting the four controversial grants this summer, the NEA has shown a sufficient sensibility that it should now be allowed to run its own show. It knows where to draw the line.

C. CARR: As attacks on the National Endowment for the Arts escalate, each terribly civilized meeting of its august advisory body—the National Council on the Arts—seems to move the culture war to some new and barbarous plane. The council convenes quarterly to approve grants, and used to rubber-stamp [the artist peer-review panels' recommendations to] them. But no more. The meetings have begun to follow an insidious pattern: Days before they begin, some explosive misrepresentation is leaked to the press, distraught council members recoil at the specter of public outrage, and Chairman John Frohnmayer tosses a few artists/scapegoats to the Right. . . .

In the apparent hope that the NEA would make its own list of restrictions, council member Jacob Neusner arrived with a

proposal that made the Helms amendment look benevolent. Neusner suggested no funding for "any project that advocates or promotes a particular political, ideological, religious, or partisan point of view, or a particular program of social action or change. . . ."* A professor of religious studies at the University of South Florida, Neusner is the man who voted against all solo performance fellowships because that art form "serves a part of our population." This is the man William Safire calls a "prickly intellectual giant."

Even though Neusner's resolution was defeated, the Right's agenda expanded at this meeting, from sexual politics to any kind of politics. During the long battle over the Interarts grants, Neusner and *American Scholar* editor Joseph Epstein—neocon down to his little bow tie—moved to reject grants to [sixteen arts organizations and] artists, because, as Epstein put it, "I sniff politics." . . .

To paraphrase Pastor Niemoeller: "First they came for the homosexuals; then they came for the chocolate-smeared women; then they came for . . . Martha Clarke?" She's working on a piece about endangered species. Others on the endangered artists' list address racism, homelessness, environmental issues.

HOLLY HUGHES: So . . . Bill T. Jones, who is an African-American dancer, very well respected as a dancer, just did a concert in Atlanta, and he does a solo piece that he performs in the nude, a memorial piece for his lover Arnie Zane, who was also his partner, who died a few years ago of AIDS. He performed the piece the first night, someone in the theatre called the vice squad, and he was informed by the police that if he did the piece a second night in the nude he would be arrested. . . .

Jock Sturges does photographs that are large-format nude, done with parental approval. They're nude and they're not exploitive, he's not selling them to some sort of porn magazines, and he's been very much respected, for years, as a photographer in the Bay Area.†

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* Neusner's proposal for censorship was almost as sweeping as the defeated Helms amendment, quoted earlier.

† The "censorship" of fine-art photographer Jock Sturges's work, by a Justice Department-inspired joint FBI-San Francisco police raid on his studio, which resulted in the seizure of all of Sturges's work and records relating to children, was described in Chapter 29. The press and the public are only beginning to become aware of the formidable threat to civil liberties, freedom of expression, and the right of privacy presented by child pornography laws and their enforcement by police, prosecutors, and judges. See in this connection the insightful and foreboding analysis of the potentially broad consequences of the Supreme Court's recent ruling (in *Osborne v. Ohio*) that states may criminally punish the mere possession (or viewing) of "child pornography" at home, by

I think the same judge that outlawed 2 Live Crew would probably have outlawed me, and Karen Finley. I think they outlawed them because black men making money outside of the system and having power and having control of their own voice is very threatening. Even if their work is sexist . . . you don't get rid of anything you don't like by censoring it.

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These developments at the NEA and the politically appointed National Council—this politization of the grant-awarding process—pointedly raised anew the question: Was it possible for the federal government to encourage the arts and assist artists without also "censoring" them, and, if not, was it not the better part of wisdom—and of liberal politics—to seek to remove the government from this sort of invidious involvement with the arts.

BARBARA RASKIN: Discrediting or discarding government support of the arts—because of unreasonable demands initiated by the likes of Jesse Helms—would be cutting off our nose to spite our face. "They" would simply use the same dollars for even more mischievous deeds. It is better to fight each act or case of censorship individually rather than throw away a subsidization needed by America's artists. We might have to wage war block by block but conflict at the barricades strengthens both the artists and the arts.

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In the fall of 1990, Congress went back to work on new NEA authorization language; but now the stakes for the NEA and the country's artists and art institutions were higher. During the previous session the main question had been whether legislation might be enacted that would restrict the award of federal funds to artists who could be relied upon not to produce what many legislators, and the NEA's critics, considered to be obscene or sacrilegious work. Now Congress began seriously debating whether the federal government should not discontinue all direct funding of artists and arts institutions, as well as whether restrictions might be placed upon the artistic expression funded by the government without violating the First Amendment. At bottom, for the arts community, the latter issue was the profoundly distressing one of

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Stephen Wermiel in *The Wall Street Journal*, April 23, 1990. There are eighteen states with laws similar to Ohio's; the New York legislature has been fiercely pressured by anti-pornography organizations to enact such a law. Now that the Supreme Court has upheld the Ohio statute, the pressures on other state legislatures and Congress to enact equally repressive laws are likely to increase.

whether Congress might be bulldozed into passing a new law that would allow presidentially appointed government officials like John Frohnmayer, popularly elected politicians like Jesse Helms, and self-appointed religious leaders like Donald Wildmon to control the images that American artists and arts institutions communicate.

By November 1990, the strident move by conservatives in Congress to take the federal government out of the business of providing assistance to the arts was defeated; it had been passionately opposed by the arts community and their advocates in Congress, and the principle of government assistance was by now too deeply entrenched to be dislodged even by insistent complaints that taxpayer money was being spent on trash and filth as well as on art. The Bush White House was also disposed not to go along with the proposition that if the government could not identify a constitutional way to deny funding to deeply offensive art, it ought to stop funding art altogether.

The question of what restrictions, if any, could and should be placed on federally funded art, and how this might be done, proved even more nettlesome in this Congress than in the previous one. Legislative bills posed answers ranging from no restrictions whatever to restrictions like those proposed during the previous Congress by Jesse Helms. Finally, in a session characterized by more than usual confusion, "compromise" legislation would emerge that Harvard Law Professor Kathleen Sullivan described as "both better and worse than the old law." While the new legislation appeared to be clean of overt restrictions on artistic expression, it concealed what one disconsolate arts council member would aptly describe as a "booby trap."

The White House had opposed the imposition by Congress of any restriction on the NEA's grant-giving authority, wanting Congress to let its man at the NEA, Chairman Frohnmayer, deal personally with the problem of ideologically offensive art. At a press conference held in April 1990, the president made this clear, saying, "[I am] deeply offended by some of the filth that I see into which federal money has gone."

PRESIDENT GEORGE BUSH: [B]ut I would prefer to have this matter handled by a very sensitive, knowledgeable man of the arts,*

* Frohnmayer grew up "surrounded by music and the law." His father was a lawyer, his mother a pianist and singer. Two siblings became professional singers; a brother is Oregon's attorney general. An "accomplished singer himself," Frohnmayer chose a career in law but remained an active amateur singer. He went to Stanford University, spent a year a Union Theological Seminary, then earned a master's degree in Christian

John Frohnmayer, than risk censorship or getting the federal government into telling every artist what he or she can paint or how he or she might express themselves.

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From the beginning, in an effort to keep politics out of the NEA's programs to promote the arts, nongovernmental artist peer-review panels were established to serve as the NEA's critical grant-making mechanism, with the twenty-six politically appointed members of the Council, as well as the presidentially appointed chairperson, relegated essentially to reviewing and vetoing roles. The impact of the NEA bureaucracy on the politics of art was for over twenty years largely limited to the role it had in selecting the membership of, and organizing, those artist peer-review panels. The professional artists who made up the panels were the real decision makers; inasmuch as they were outside the government, they were not susceptible to political control. The only criticism this left them open to was cronyism, and that at times they voted on each other's applications. (To avoid direct conflict-of-interest situations, the practice had developed that a panel member who was a potential grantee would leave the meeting room when his or her application came up for action.)

However, under the legislation Congress enacted in late 1990, the political independence of the artist peer-review panels was deliberately weakened by a requirement that lay members, recommended by senators and other politicians, be added to each panel. On January 3, 1991, after the new reauthorization legislation was enacted, Chairman Frohnmayer sent a letter to all U.S. senators requesting them to "forward the names of prospective panelists from your state/district" who have "some expertise" in the panel's art area and who could help "*assure that general standards of decency and respect for the diversity of beliefs and values represented by the American public are considered*" in the recommendations made by the panels (my italics). Frohnmayer noted that each year over one hundred such panels were convened by the NEA.

In addition, under the new law the presidentially appointed members of the National Council on the Arts were given increased power to refuse to support artists and arts projects which to them, as one neoconservative Council member intimated,

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ethics at the University of Chicago. After spending three years in the Navy, he went to Oregon Law School; obtaining his degree in 1972, he entered the practice of law. See "Fresh Focus," *University of Chicago Magazine*, April 1991. Frohnmayer was picked for the job of NEA head by President Bush after working on Bush's election campaign in Oregon.

smell of politics. This was accomplished by stripping the chair of the power to overrule a Council decision to reject a grant recommended by a peer-review panel; the chair retained the power only to veto a Council recommendation to make a grant. While the Chair's previous blanket power to reverse Council recommendations had almost never been used, it was potentially a formidable power; limiting it entailed a major dispersal of the chair's political power and signified the extent to which Congress had lost faith in John E. Frohnmayer's ability or willingness to prevent government funds being spent on politically controversial art.

Finally, the NEA bureaucracy was given the task of arranging to inspect and monitor funded work in progress. The design of these changes became plain enough: the NEA was being restructured by Congress and a reluctant Frohnmayer the better to control the arts.

The rhetoric for this transformation was that the NEA was to be regeared to serve the interests not of artists, the direct beneficiaries of NEA grants and fellowships, but of American taxpayers, the indirect beneficiaries. The amended legislative declaration of purpose regarding the NEA is headed by these words: "*The arts and the humanities belong to all the people of the United States.*"

Officially, the late-1990 legislation kept the NEA in the business of helping "to create and sustain" not only a "climate encouraging freedom of thought, imagination, and inquiry" but also the "material conditions facilitating the release of creative artistic talent." It justified continued government "financial assistance" to American "artists and the organizations that support their work" as a means, first, to sustain "worldwide respect and admiration for the Nation's high qualities as a leader in the realm of ideas and of the spirit" and, second, to "preserve [the Nation's] multicultural heritage as well as support new ideas." But in carrying out these functions, said Congress, the NEA must be "sensitive to the nature of public sponsorship," and to "the high place accorded by the American people to . . . the fostering of mutual respect for the diverse beliefs and values of all persons and groups." These admonitions were contained in the new legislation's "Declaration of Findings and Purposes."

The "booby trap" was in the law's authorizing provisions, which in critical part read: "No [grant of assistance] payment shall be made . . . except upon application therefore . . . in accordance with regulations issued and procedures established by the Chairperson, [who] shall ensure that (1) artistic excellence

and artistic merit are the criteria by which applications are judged, *taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public* [emphasis mine]; and (2) . . . that obscenity is without artistic merit, is not protected speech and shall not be funded. Projects, productions, workshops, and programs that are determined to be obscene are prohibited from receiving financial assistance . . . from the National Endowment for the Arts." The phrase "determined to be obscene" was defined in another section of the law to mean: "determined in a final judgment of a court of record and of competent jurisdiction . . . to be obscene;" and the term "obscene" was defined to mean what the Supreme Court in *Miller* had said it meant.

The new law attempted to establish three tiers of morally and politically sensitive censors of American art and artists: the politically recommended lay members of the artist peer-group panels; the politically appointed Council members; and the politically appointed chairperson. Under the law, these "decency and respect" censors could, in the future, turn down an application on the ground that the project ran afoul of the legislatively mandated "general standards of decency," or failed to respect "the diverse beliefs and values of the American public." The potential efficacy of this new system of art censorship can easily be seen by considering whether Robert Mapplethorpe's "Man in Polyester Suit," Andres Serrano's "Piss Christ," Karen Finley's "Aunt Mandy," or Holly Hughes's "World Without End" violate general standards of decency or show disrespect for American racial, religious, and family values. No doubt they do, and many persons feel strongly that they should not be subsidized or assisted by the government. But there should be little doubt that the deliberate rejection of applicants seeking assistance for the creation and exhibition of such "indecent" or "disrespectful" art would violate freedom of expression and therefore be unconstitutional.

The result of the new legislation was this: (a) the NEA was officially relieved of the task given it by the legislation of 1989 to administratively censor artists by rejecting arts projects considered *by the NEA* to come within the *Miller* definition of the obscene as amplified in the 1989 law; (b) the NEA was given explicit authority to defund (require the repayment of a grant already paid out to) any artist or art organization found by it (after a hearing) to have been *found by a court of law* to have created or disseminated with financial assistance from the NEA any art work that was legally obscene; however, (c) the NEA was for the first

time required to refuse to fund arts projects that in its judgment—not a court's—might violate "general standards of decency," or fail to show "respect for the diverse beliefs and values of the American public." Neither one of these enormously elastic phrases was defined.

The true import of the new legislation did not get well ventilated either on the floors of Congress or in the press. However, at a publicized symposium held shortly after the enactment of the legislation, Council member Roy Goodman, a state senator from Manhattan, reported on the "booby trap" in the new legislation. As California lawyer Peter Kyros, a former cultural advisor to President Carter, said, "What Congress has done is craft a content restriction that doesn't look like one. It's very subtle." For his part, the NEA's Frohnmayer expressed relief that the arts agency had at least survived, saying that the new legislation was "far better than what we expected only a few weeks ago."

Postmortem comments from the NEA's most influential and ardent defenders in Congress, Sidney Yates of Illinois and Pat Williams of Montana, were cautiously phrased. Williams said he had "questions about the constitutionality" of the "decency" language but considered the legislation as a whole to be "a genuine win." Yates said he disliked the "decency" provision that had been inserted on the eve of enactment, but that after months of conflict, "you begin to think in terms of acceptabilities." Somewhat surprisingly, some of those on the other side of the political aisle who had sought unsuccessfully to get rid of the NEA also professed frustration. Thus, Dana Rohrabacher of California claimed that the new law left taxpayers "without one guarantee that their money won't be used to subsidize things that they believe are totally immoral."* The most candid analysis of the new law was given by Representative Ted Weiss of New York on the House floor on October 15, 1990:

TED WEISS: Mr. Chairman, listen to the language of the Williams-Coleman substitute. It requires that in establishing application procedures the NEA chairperson has to ensure that "artistic excellence and merit are the criteria by which applicants are judged, taking into consideration general standards of de-

* Rohrabacher's use of the term "guarantee" may be a clue to his real thinking: congressmen like him and Helms will still need to rely on the judgments of the NEA chair, Council members, and lay peer-review panel members to reject controversial art projects.

cency and respect for the diverse beliefs and values of the American public."

What does that mean? Mr. David Duke, the former head of the Ku Klux Klan, who got 44 percent of the vote for the U.S. Senate in Louisiana, does he represent the values of the American public, that we are supposed to be abiding by?

The language is so vague that it is exactly the kind of thing the Supreme Court has repeatedly held to be unconstitutional, and I think that will happen again. . . .

What "standard of general decency" will be used? How can one determine whether a particular work of art is within "general standards of decency" or respects "the diverse beliefs and values of the American public?" What is the American public? Who is to take into consideration these standards—the Chairperson when making the regulations, or the panels when they are reviewing the applications?

These funding standards are so broad that they have no constitutional meaning, they permit any administrator to make speech-based decisions without any fixed standards. Consequently, they will chill creative output because an artist simply will have no clear indication of their meaning. These considerations have led the Supreme Court consistently to hold vague and amorphous content standards, such as the ones in the Williams-Coleman substitute, to be unconstitutional. . . .

In addition to being unconstitutionally vague, the Williams-Coleman prohibition against indecency and disrespect violates the bedrock principle that the government may not impose content restrictions on speech merely because society may find that speech offensive or disagreeable. Until the Court decides something is "obscene," it is protected by the First Amendment. The First Amendment stringently limits restrictions on indecent speech and art. In *Sable Communication v. FCC*, 109 S. Ct. at 2836, the Supreme Court stressed that "sexual expression which is indecent but not obscene is protected by the First Amendment." And the First Amendment does not disappear because the government picks up the tab. The Supreme Court has upheld this principle over and over again.

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Writing in the April 15, 1991, issue of *The Nation*, Professor Owen Fiss of the Yale Law School also read the legislative outcome of the protracted 1990 congressional debates as providing nothing to celebrate.

PROFESSOR OWEN FISS: The specter of N.E.A. censorship is still with us. The infamous Helms amendment has lapsed [but] the danger to artistic freedom remains. . . .

Last November a new N.E.A. statute was enacted that ostensibly supplants the Helms amendment. . . . The new statute appears to be a step forward, but it actually moves in the opposite direction.

It compounds the sanctions for an obscenity conviction by providing that if N.E.A. funds are used to produce a work later deemed obscene by a court, the funds will have to be repaid and the recipient will be ineligible for further funding until full repayment is made. . . .

Even more worrisome is Congress' decision to consolidate the decisionmaking power over grants in the hands of the N.E.A. chair. . . .* What standards will the chair use in making this choice? The new statute is explicit. It directs the chair to insure that "artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." By directing the chair to apply "general standards of decency" . . . the statute frees the N.E.A. chair to deny funding to a bold and provocative project that he or she deems offensive to "decency," even though the project has serious artistic or political value and thus falls outside the constitutional definition of obscenity. Moreover, as with grants under the Helms amendment, N.E.A. recipients must give assurances that their projects comply with the new decency standards.*

N.E.A. chair Frohnmayer recently sought to reassure his advisory body, the National Council on the Arts, when it expressed opposition to promulgating explicit decency standards, saying, "I am not going to be a decency Czar here." But in light of the structure of the statute, as well as the overall policies of the Administration and Frohnmayer's performance over the past year, that disclaimer rings hollow.

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In the spring of 1991, a suit was filed in a federal court in California on behalf of Karen Finley, Holly Hughes, John Fleck,

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* The more serious problem, it appears to me, is that the new law disperses the chair's decision-making power, as discussed in the text.

* The new law and implementing NEA regulations established unprecedented procedures for applicant artists and art institutions that require detailed periodic descriptions of the works to be produced or performed in compliance with the terms of the application and the law.

and Tim Miller—the "NEA Four"—which seeks, as amended, to have the court declare unconstitutional for violating freedom of expression both Frohnmayer's controversial decision to deny them performance art grants under the 1989 law, and the new "decency" and "respect for beliefs and values" restrictions that Congress attached to the NEA's grant-making authority in the legislation enacted in November 1990. It is to be hoped that the federal judiciary will nullify both these recent efforts by a distracted, distraught, and deeply divided Congress to attach to American artists and arts an ideological and sexual censorship that is thoroughly obnoxious to democratic traditions. But such action by the courts is unlikely to forestall further efforts to legislate a moral censorship over artists who accept federal assistance, or to eliminate government assistance of this kind to the arts.

It seems plain to me that while the Constitution does not require the government to adopt a program of support or encouragement of the arts (or for that matter of public schools, libraries, or museums), it does require that such a program, once adopted, should not deny its support to an artist or arts organization on any ground other than insufficient artistic merit or promise. Even the denial of public support to artistic works that have been found by a court to be "obscene" seems to me of doubtful wisdom and dubious constitutional validity, because—as Justice Brennan pointed out in his dissenting opinion in *Miller*— the definition of the "obscene" adumbrated by Chief Justice Warren Burger in that case is too broad and too vague to assure to artists and writers the freedom of expression that the First Amendment contemplates. The NEA's refusal to make grants to Finley, Hughes, Fleck, and Miller; the arrests and prosecutions of museum curator Dennis Barrie, record-store owner Charles Freeman, and the leader and members of the rap music group 2 Live Crew; and the chill on artistic freedom that indirectly resulted from those attacks on the freedom of artists* testify to the shortcomings inherent in the *Miller* doctrine.

Flawed as was the *Miller* doctrine at its inception, it recently was further weakened by the Rehnquist Court. In a little-noticed case decided in 1987, *Pope v. Illinois*,† the "serious artistic value" clause of the tripartite "test" for obscenity was reexamined and

* For example, Ellen Stewart, world-renowned founder of the La Mama Experimental Theatre in New York, told the press that in response to the congressional attempts to require the NEA to censor funded art programs, she had instructed her troupes "to clean up their acts."

† 481 U.S. 497 (1987).

attenuated; another ambiguous and potentially debilitating gloss was laid upon the formula established during the sixties by Justice Brennan and the Warren Court for the constitutional protection of writers and artists, publishers and curators.

The "social value" doctrine provided that if expression had (under Brennan, "even the slightest"; under Burger, "serious") literary or artistic value, it could not constitutionally be branded obscene—regardless of how great its appeal to prurient interests and of how far it might exceed national or local community standards of decency. In *Pope*, Justice Byron White seemed to recognize that the freedom of expression having artistic value could not be left vulnerable to the parochial attitudes of local officials.

JUSTICE BYRON WHITE: Just as the ideas a work represents need not obtain majority approval to merit protection, neither, insofar as the First Amendment is concerned, does the value of the work vary from community to community based on the degree of local acceptance it has won.

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But instead of referring the finder of "literary, artistic, political, or scientific value"—whether policeman, prosecutor, judge, or juror—to the opinion of the relevant constituency, for example, the (national or world) art community, White fell back on the old war-horse of negligence law, the "reasonable man," now called, in deference to feminists, the "reasonable person."

JUSTICE BYRON WHITE: The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.

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In *Pope*, Justice Brennan did not write an opinion but instead joined the dissenting opinion of Justice John Paul Stevens. Stevens, appointed to the Court by President Gerald Ford in 1975, has frequently opposed the steps taken by the solidly conservative block of Nixon-Ford-Reagan appointees and Justice Byron White to undercut Warren Court constitutional doctrine. In his dissent, Stevens pointed out that White's seeming "rejection of the community values test" with respect to artistic value concealed a "standard [that] would still, in effect, require a juror to apply community values, unless the juror were to find that an ordinary member of his or her community is not 'a reasonable person' "—not a very likely event.

JUSTICE JOHN PAUL STEVENS: The problem with [Justice White's "reasonable person"] formulation is that it assumes all reasonable persons would resolve the value inquiry in the same way. In fact, there are many cases in which *some* reasonable people would find that specific sexually oriented materials have serious artistic, political, literary, or scientific value, while *other* reasonable people would conclude that they have no value. [Justice White's] formulation does not tell the jury how to decide such cases.

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Stevens further faulted White's reliance on the "reasonable person" by pointing out that he "has been described as an 'excellent' character who 'stands like a monument in our Courts of Justice, vainly appealing to his fellow-citizens to order their lives after his own example.' " And then he made this even more unsettling criticism of what White had done:

JUSTICE JOHN PAUL STEVENS: The problems with [Justice White's] formulation are accentuated when expert evidence is adduced about the value that the material has to a discrete segment of the population, be they art scholars, scientists, or literary critics. Certainly a jury could conclude that although those people reasonably find value in the material, the ordinary "reasonable person" would not.

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The age-old disposition of judges to ignore or discount what an attacked or censored author's peers have to say about his literary reputation has proven over time to be one of the shortest cuts to literary censorship that government can take. This book is full of examples. The only significant breakthrough to freedom that was made over the past century by authors and publishers, in this country as in England, was made when the courts were required by law (statutory in England, constitutional in the United States) to admit and give weight to the testimony of "expert" authors and critics concerning a challenged work's values. Perhaps it would be better if—as Justices Black and Douglas in particular argued—there were no need to show any value at all to obtain protection for a literary or artistic work threatened with suppression or defunding under obscenity law. But given some such need in constitutional jurisprudence, it is insidious to counsel jurors to disregard the testimony of experts in favor of that of "reasonable persons." The "reasonable person" does not exist; he must be fabricated by the judge's or juror's mind. Expert witnesses do exist and can help the judge or jury carry out its consti-

tutional task of saving literary expression from the toils of vague and overbroad obscenity law. Jurors, like judges, ought to be required to reach outside and above their individual consciousness, if necessary to experts, for an understanding of what is of value in the world.

In her *Yale Law Journal* piece "Post-Modern Art and the Death of Obscenity Law," Amy Adler noted that Stevens's dissent in *Pope* underlined the threat that White's gloss on the "serious value" standard posed "for unpopular or misunderstood art." The glossed standard "will provide room," Adler said, "for juries to disregard the testimony of experts such as art critics; a jury might conclude that the experts represent an unreasonable minority, and that the majority of the population, who are less likely to see the work as valuable, are more reasonable than the critics."

AMY M. ADLER: This leeway for the jury to disregard expert testimony* is extremely dangerous for artists like [Karen] Finley, [Annie] Sprinkle, [Robert] Mapplethorpe, and [Richard] Kern;† because their work might appear shocking and remain far moved from lay notions of art, the majority of the population probably would not consider this work to be art. Only expert testimony could save these artists in an obscenity prosecution.

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In *Pope*, Justice Antonin Scalia also criticized White's resort to the "reasonable person" as a solution to the obscenity problem, even though he subscribed to the Court's adoption of that standard.

JUSTICE ANTONIN SCALIA: Since ratiocination has little to do with esthetics, the fabled "reasonable man" is of little help in the inquiry, and would have to be replaced with, perhaps, the "man of tolerably good taste," a description that betrays the lack of an ascertainable standard. . . . Just as there is no use arguing about taste, there is no use litigating about it. For the law courts to decide "What is Beauty" is a novelty even by today's standards. . . .

I must note, however, that in my view it is quite impossible to come to an objective assessment of "at least" literary or artis-

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* It is a long-standing rule of American law that fact-finding judges and jurors are free to discount, even entirely, the opinions of expert witnesses.

† Kern is a filmmaker who, Adler reports, was "ejected" (along with his film) from a New York nightclub "after showing the first few minutes of one of his 'Death Trip' films.

tic value, there being many accomplished people who have found literature in Dada, and art in the replication of a soup can.

DEAN GEOFFREY STONE: A central purpose of serious art, like serious political discourse, is to challenge conventional wisdom and values. That a particular work may be offensive to contemporary standards does not in itself lessen its value or add to the legitimacy of government's desire to suppress or not fund it. To the contrary, once a particular work of art is found to have serious artistic value, government is no more justified in withholding funding for a work of political expression because of its offensiveness.

As the Supreme Court only recently observed, "if there is a bedrock principle underlying the first amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."‡ The essence of that "bedrock" first amendment principle governs [the NEA situation] as well. Government may not selectively refuse to fund a particular work of art that has serious artistic value merely because "society finds [the work] offensive or disagreeable."

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The events described in this book began about a hundred years ago, in London, when Henry Vizetelly went to prison for publishing Zola's "obscene" novels. Now, one hundred years later, Holly Hughes and Karen Finley in New York are wondering who will want them to perform once the NEA has blackballed their art, and a gallery curator in Ohio and a rap music group in Florida are recovering from criminal trials which might have resulted in their imprisonment and the destruction of their careers. While the law of obscenity and interpretations of the First Amendment today permit far more to be said, shown, and sung than ever in the past, the power of art to offend and alarm seems to be as great as ever. And so a censorious response comes to seem inevitable.

Now Justice Brennan is gone from the Court* and the future direction of the high bench is even more uncertain than it was when, in 1969, both Earl Warren and Abe Fortas resigned and, within six years, Hugo Black and William O. Douglas left the

‡ *Texas v. Johnson*, 109 S. Ct. 2533, 2544 (1989), the first "flag desecration" case.

* Yale law professor Owen Fiss recently assessed the damage to the Court's work likely to result from Justice Brennan's retirement in "A Life Lived Twice," *Yale Law Journal* 100 (1991), 1117.

bench. After that occurred, the central meaning of the Brennan doctrine—forged during the sixties to protect literature and art from the heightened repression of the fifties—was weakened by the Burger Court and further eroded by the Rehnquist Court.† Whether it—and First Amendment freedom more generally—will hold fast under renewed tensions generated by the collision of works created by morally defiant artists and writers with values held by reactionary politicians and judges is today anything but a settled question.

† The Rehnquist Court's 1991 decision, noted above, that nude dancing is not constitutionally protected expression, and that it may be suppressed under a thoroughly vague and overbroad "public indecency" law in the name of "morals" and "order," is further evidence that a leading item on the agenda of the Court's present chief justice is to prevent the further growth of the constitutional law of freedom of expression and prolong the struggle between art and the censors for the foreseeable future. This portends social and cultural conditions under law that enlightened conservatives and liberals alike have good cause to fear. One hopes that the Court will find a way to abjure the Rehnquist agenda and resurrect instead the reason and passion of the great humanist Brennan, who labored in the cause of freedom of expression without regard for the fears that freedom so often brings.