

Review Essay: Amy E. White's *Virtually Obscene: The Case for an Uncensored Internet*

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In *Virtually Obscene: The Case for an Uncensored Internet* Amy E. White addresses the question of whether the availability of sexually explicit materials on the Internet should be subject to state-sponsored regulation or prohibition.¹ She argues that, *contra* the claims of the proponents of such regulation and prohibition, there is no evidence to suggest that sexually explicit material causes harm. Yet *Virtually Obscene* is not an unnuanced apology for an unregulated Internet, for White also argues that anti-regulation arguments that appeal to a right to free speech to provide protection for sexually explicit materials are similarly flawed. Having criticized these arguments, White argues that even though sexually explicit materials should not receive any special protections against regulation out of respect for free speech, since there is no reason to believe that they cause harm, there is nothing to be gained by subjecting them to regulation and prohibition. White, however, is not neutral on the question of whether the Internet should be regulated, for she concludes *Virtually Obscene* by arguing that such regulation will actually lead to harm, and so, rather than praising regulation, we should instead bury it.

Virtually Obscene is divided into seven chapters, with a Foreword by Nadine Strossen, the President of the American Civil Liberties Union. In the first chapter White outlines historical and contemporary attempts to regulate sexually explicit materials, as well as offering a brief outline of the development of the Internet. In Chapter 2 she considers current attempts to regulate the availability of sexually explicit materials on the Internet, focusing in particular on the claim that community standards should be used to guide what material should and should not be available on the Internet. White argues that this approach is utterly unworkable in the context of the Internet. After

¹ Amy E. White, *Virtually Obscene: The Case for an Uncensored Internet* (Jefferson, NC: McFarland & Company, Inc., 2006).

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noting the difficulties associated with defining what is obscene, White observes that they might be solved by appealing to a community-standards approach, such as that adopted in *Miller v. California*. The advantage of such an approach, she notes, is that it serves to identify the persons whose sensibilities should be considered when considering whether something is obscene or not, a question that would otherwise be unresolved owing to the subjective nature of obscenity. Yet although this approach might be workable “in a physical community limited by geographic boundaries” (p. 31), it is unworkable when applied to the Internet, for it is not clear what would constitute the relevant community to adjudicate the question of whether something was obscene. Would it be the physical community from where the material originated, the community where it was downloaded, or even the virtual community of persons who were viewing it? White shows that each of these answers to the question of which community the community-standards approach to defining obscenity should be based upon faces serious difficulties, and so concludes that this approach is inapplicable to the Internet.

Having defended the Internet availability of sexually explicit materials from this approach to grounding its regulation, White turns in Chapter 3 to consider the primary anti-regulation argument: that such material should be protected by an umbrella protection of freedom of speech. White considers this to be her most ambitious chapter, for in it she argues that the most common arguments offered in defense of affording special protection to speech (from the search for truth, a concern for autonomy and dignity, the importance of free speech for democracy, and the slippery-slope argument that to restrict speech would lead to negative effects), not only fail, but are “not applicable to most sexually explicit Internet materials” (p. 50). Having criticized these common defenses of freedom of speech, White turns in Chapters 4, 5, and 6 to consider the arguments in favor of regulating the availability of sexually explicit material that are based on purported harm to children, purported harm to women, and purported harm to the moral environment. Finding all of these wanting, she argues in Chapter 7 that “substantial harm will doubtlessly result from regulating sexually explicit Internet materials” (p. 127). This is because, she argues, regulating “any material that persons wish to circulate or access” will lead to injury through the restriction of liberty that it entails (p. 129). Moreover, sexually explicit material is valuable; not only do people enjoy it, but “because of the immense demand for pornography, it is a pioneer in providing content using new technology” (pp. 130-31). More generally, White argues, attempts to regulate the Internet might stifle the expression of minority views and lead to widespread invasions of privacy.

In *Virtually Obscene* White draws on an impressive range of material, from philosophical arguments concerning the nature of harm, empirical data concerning the effects that such material can have, policy

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arguments concerning the proper treatment of public places, and legal arguments concerning the possibly libelous nature of pornography and obscene materials. Her arguments are clear and persuasive, and are written in a manner that is accessible to all. However, although White's responses to those who favor regulation are generally sound, I think that there are two main areas in which her arguments are vulnerable to criticism: her responses to the pro-regulation arguments from harm to children, and her responses to the pro-regulation argument that pornography should be treated as libel.

Following Joel Feinberg, White defines harm as a "wrongfully set-back interest" (p. 71). She then notes: "Most proponents of the harm to children argument ... assume that the transitory injury (if any occurs) that may be caused by a child viewing sexually explicit Internet material is the level at which they should be evaluating harm" (p. 73). With this in hand, White argues that simply considering a child's transitory injuries from sexually explicit Internet material "is much too narrow" a focus, for even if it is accepted that some children might suffer some such harm, "an unregulated Internet might result in ... a net benefit for society as a whole as well as any given individual (due to the benefit derived from living in such a society)" (p. 73). Unfortunately, White here unwittingly vacillates between two different accounts of harm. The account of harm that she *explicitly* endorses is Feinberg's *normative* sense of harm, on which "[t]o say that *A* harmed *B* ... is to say much the same thing as that *A* has wronged *B*, or treated him unjustly."² But the account of harm that she uses in her discussion of the type of arguments offered by the proponents of the pro-regulation argument from potential harm to children is another of Feinberg's accounts of harm: a *descriptive* account, of "harm conceived as the thwarting, setting back, or defeating of an interest."³ That White uses this descriptive account of harm in her arguments against the proponents of the harm-based pro-regulation arguments is clear, for the type of harm that she draws on is that which could befall a child while "riding a bike on a sidewalk or even walking down a street" (p. 74).

Noting this ambiguity in White's use of the term "harm" is not mere pedantry, for it affects both her arguments and their implications. In *Virtually Obscene*, White masterfully shows that there is little reason to believe that children are harmed (in the descriptive sense of the term) by the availability of sexually explicit material on the Internet. Since this is so, and since such material has value to many, she concludes that the Internet should remain

² Joel Feinberg, *Harm to Others: The Moral Limits of the Criminal Law*, vol. 1 (Oxford: Oxford University Press, 1984), p. 34.

³ *Ibid.*, p. 33.

unregulated. This is a persuasive argument. However, insofar as they are based on this descriptive sense of harm, White's arguments have serious anti-liberty implications that she might not wish to endorse. If public policy is based upon simply weighing and balancing descriptive harms and benefits in this way, it is possible that some persons' liberty might be curtailed solely to mollify the overly delicate sensibilities of others. For example, if the members of a conservative and patriarchal religious group are seriously distressed (and so harmed in the descriptive sense) simply by seeing what they consider to be the immodest uniforms of the pupils at the local private Catholic girls' school, and if public policy is to be decided simply by the weighing and balancing of descriptive harms and benefits, the school could be required to change its dress code. Presumably, White would object to this restriction on the liberty of the school to set its dress code as it wishes. But if she wishes to retain her focus on harm as a guide to public policy, to do so she would have to change the focus of her argument from harm in its descriptive sense, to harm in its normative sense, as a "wrongfully set back interest." Since the dress code of the school in question does not wrong the members of the conservative patriarchal sect who are offended by it even though they might be harmed by it in a descriptive sense (for their interests in not seeing people in what they consider to be immodest dress are indeed set back), they are not harmed by it in the normative sense, for their interests are not *wrongfully* set back.

Yet while focusing more clearly on the normative sense of harm will enable White to avoid the anti-liberty implications of her argument here as it stands, to do so would undercut her argument itself. Although White persuasively argues that children are not harmed by sexually explicit materials in the descriptive sense of harm, this tells us nothing about whether they are harmed by them in the normative sense of the term. It is possible that a person might not be harmed in the descriptive sense of this term, and yet still be harmed in the normative sense. Feinberg is clear about this. Writing of the normative sense of harm, Feinberg claims that "in all but certain very special cases such conduct [i.e., harming in the normative sense by one person] will ... invade the other's interest and thus be harmful in the sense already explained [i.e., the descriptive sense]."⁴ In such "very special cases," then, a person might be wronged but not harmed. Feinberg reiterates this point, noting that "there are few wrongs that are not *to some extent* harms," and that "*almost all* harms in the special narrow sense (wrongs) are also harms in the sense of invasions of interest"⁵ Feinberg offers no example of such a "very special case," but one can be developed out of the reputed response of Arthur Wellesley, the Duke of Wellington, to the courtesan Harriette Wilson's threat

⁴ Ibid., p. 34.

⁵ Ibid., p. 35. The italics are added in the second quotation.

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to publish her memoirs and his letters: “Publish and be damned!” Altering this case for the sake of argument, let it be stipulated that Wilson’s revelations about her relationship with Wellington were untrue. Let it also be stipulated (and this is possibly true!) that Wellington had no interest in having a good reputation among people who would be scandalized by Wilson’s (fictitious) revelations, insofar as he did not stand to gain or lose owing to their view of him. Here, then, while Wilson would wrong Wellington by besmirching his reputation, and thus harmed him in Feinberg’s normative sense of the term, none of Wellington’s interests was set back by this, and so he was not harmed in the descriptive sense of this term. But if a person might be harmed in the normative sense without being harmed in the descriptive sense, and if it is the former, and not the latter, sense of harm that should be used in framing public policy, then the fact that children are not descriptively harmed by the availability of sexually explicit materials on the Internet tells us nothing about whether or not such materials should be regulated out of concern for protecting them from harm.

White, then, is faced with a dilemma. If she adopts the descriptive account of harm, her responses to the pro-regulation argument from harm-to-children are persuasive—but they then might have implications that she might not wish to endorse. If, however, she adopts the normative account of harm in order to avoid such implications here, it is not clear that her responses to the pro-regulation argument from the potential harm to children are relevant to it. This is not to claim that White’s arguments here fail. But it is to claim that to rebut completely the pro-regulation argument from the potential harm to children White should show why it is that the availability of sexually explicit material on the Internet does not wrong children, and so does not harm them in the normative sense of this term. While such a task is not a difficult one (for it is not clear how children could be wronged by access to sexually explicit materials, unless this also harmed them in the descriptive sense), it needs to be undertaken before White’s responses to the pro-regulation arguments from the potential harm to children are complete.

If White’s responses to the pro-regulation harm-to-children arguments are incomplete, what of her responses to the pro-regulation argument that pornography should be treated as libel insofar as it is lying about women? White has two responses to this argument. The first is that “While it is quite likely that a certain pornographic picture may be degrading to the person (or persons) featured in the picture and depict her (or them) as ‘eager to be used and abused’ this does not necessarily libel *all* women,” for “[m]any persons in countless works of art are portrayed in a negative light but the artworks are not libelous to any group” (p. 100). The second—and related—response is that even “when there is a vast amount of material available that portrays persons with certain characteristics in a negative fashion” this need not constitute libel, for such depictions cannot be

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generalized to all members of the class portrayed (p. 101). To illustrate her point here, White notes that “it is often the case that in historical depictions of early America, persons with white skin are shown as cruel, violent, greedy, and supportive of slavery” (p. 101).

Neither of these responses to the pro-regulation argument from libel is convincing as it stands, although, like White’s responses to the pro-regulation argument from harm to children, they could be defended with additional argument. Putting to one side the legal gloss of these arguments (i.e., their focus on libel), they suffer from two problems. First, White’s artwork example of an individual person depicted in an artwork is unpersuasive. Surely the anti-pornography argument here is that a *class* of persons is systematically portrayed in a negative light, and not that *particular individuals* are so portrayed. It is clear that the portrayal of particular *individuals* is not generalizable, but it is less clear that the portrayal of women *as a class* as being submissive, sexually available, and so on, is not generalizable to women as a whole.

White might reply that she has anticipated this objection in her second response—as indeed she has. However, her example of historical depictions of people with white skin as being “cruel, violent, greedy, and supportive of slavery” is problematic, because it trades on conflating persons’ reflective and unreflective responses to the images at issue. Consider here historical depictions of African-Americans as being “fetch-and-steppits,” “uncles,” “mammies,” and the like. Reflectively, it should be clear to people that these images fail to reflect the characteristics of African-Americans as a class. But this reflective response is presumably not that which the opponents of pornography are concerned about. Rather, they are concerned about an *unreflective* response in which persons outside the group portrayed might think, “Well, everything we’ve seen about these people says they have such-and-such properties, and so maybe they do.” White does not explicitly address this concern of those opposed to the Internet availability of sexually explicit materials. However, her arguments do contain the germ of a disanalogy between the cases of African-Americans and women that could be used to support her case. This is that although some persons (especially under American Jim Crow laws) might never have really engaged with African-Americans, it is unlikely that persons viewing pornography would not have engaged with women. As such, it is unlikely that the deleterious effects that the proponents of regulation claim for pornography would transpire, for it is unlikely that, owing to their interactions with women (indeed, many will *be* women), the consumers of sexually explicit material would adopt the unreflective attitudes toward women that the proponents of regulation believe will hold as a result of their enjoyment of it.

The two major criticisms that might be leveled at White’s arguments in *Virtually Obscene*, then, can be met with additional argumentation. There

are, however, two further minor criticisms that could be leveled at *Virtually Obscene*, both of which have to do with White's understanding of autonomy. White claims that, for Harry Frankfurt, "in order for ... [a person's] ... first-order desires to be autonomous they must be endorsed by ... [her] ... second-order desires" (p. 157, n. 32). Three points are worth making concerning this claim. First, it is not clear that Frankfurt was developing an account of autonomy in the essay that White refers to here, since he was developing an account of what it is for a person to act freely and of his own free will.⁶ (It must be noted, though, that White is not alone in reading Frankfurt as offering an account of autonomy, and so she is not alone in making this error.) Second, autonomy is usually taken to be a property of persons *with respect to* their desires, actions, preferences, and so forth, rather than as a property of desires, actions, preferences, and so forth themselves. Third, White here omits a crucial element of Frankfurt's account of identification (or autonomy): A person must not merely endorse her (effective) first-order desires with a second-order desire, but she must also endorse them with a second-order *volition*. That is, she must not just want to have them, but also want them to move her to act.⁷

The second minor criticism of White's view of autonomy concerns her claim that "[w]henver freedom is suppressed, autonomy is hindered" (p. 127). This is untrue. If, for example, we suppress a person's freedom by removing an individual-constraining option from her choice set, we would in so doing enhance her autonomy, not hinder it. An individual-constraining option is an option that, if chosen, would be likely to lead to the diminution of the autonomy of the person who chose it. For example, it might be that the sale of a kidney would be a constraining option of this sort, if persons who sell their kidneys would typically suffer from a constriction in the (subjectively attractive) options that are available to them afterward. If so, then even though we would suppress a person's freedom by prohibiting her from selling a kidney, we would not thereby hinder her autonomy but protect her from its

⁶ For an argument that Frankfurt's account of identification (of what it is for a person to identify with her effective first-order desires, for her to act freely, and of her own free will when she is moved by them) is not also an account of autonomy, see James Stacey Taylor, "Autonomy, Inducements, and Organ Sales," in Nafsika Athanassoulis, ed., *Philosophical Reflections on Medical Ethics* (Hampshire, UK: Palgrave MacMillan, 2006), 135-59.

⁷ Harry G. Frankfurt, "Freedom of the Will and the Concept of a Person," in Harry G. Frankfurt, ed., *The Importance of What We Care About* (Cambridge: Cambridge University Press, 1988), pp. 14-16.

hindrance.⁸ This is because in suppressing her freedom with respect to the constraining option to sell a kidney we would be protecting her possession of a wider range of options in the future than she would be likely to have were she to sell, and, as such, would be protecting her ability to exercise her autonomy in choosing among them.⁹ More generally, in Prisoner's Dilemma situations the suppression of freedom would not hinder the autonomy of those who were thereby curtailed, since were certain options not to be available to them they would be better able to exercise their autonomy in the successful pursuit of their goals.¹⁰

We have, then, four criticisms of White's arguments and claims in *Virtually Obscene* in hand: those concerning her responses to the pro-regulation arguments from the potential harm to children and from the view that pornography libels women, and those concerning her claims about autonomy. It should be stressed that none of these criticisms is fatal to White's overall argument; the first two merely indicate where further argumentation is needed, and the latter two are technical objections that do not affect her arguments. With these objections noted, it is time to turn to praising White's achievements in *Virtually Obscene*—and these are many. White's style is

⁸ For a discussion of this issue, see James Stacey Taylor, *Stakes and Kidneys: Why Markets in Human Body Parts Are Morally Imperative* (Aldershot, UK: Ashgate Publishing, 2005), chap. 4.

⁹ Insofar as White seems to understand the "hindering" of autonomy to include the restriction of a person's ability to exercise it by choosing from a range of options, the above argument shows that she is mistaken to claim that suppressing a person's freedom will hinder her autonomy. However, it is not clear that this is an accurate understanding of the relationship between autonomy and choice, for the mere fact that a person has very few options does not in itself hinder her exercise of her autonomy; she is still able herself to choose between them just as much as she would be able to were her option set to be vast. Perhaps, though, White is concerned here not with a person's ability to exercise her autonomy *per se*, but with its instrumental value to her? This view of the relationship between autonomy and choice makes more sense, for it is likely that the autonomy of a person who has more options rather than less will be more instrumentally valuable to her, in that its use will be more likely to enable her to fulfill her desires and achieve her goals. But even on this more accurate understanding of the relationship between autonomy and choice White's claim is mistaken, for suppressing a person's freedom with respect to those constraining options that would otherwise be available to her would not hinder the instrumental value of her autonomy, but enhance it.

¹⁰ For a discussion of this point, see Joseph Heath, "Liberal Autonomy and Consumer Sovereignty," in John Christman and Joel Anderson, eds., *Autonomy and the Challenges to Liberalism* (Cambridge: Cambridge University Press, 2005), pp. 217-23.

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clear and engaging, and she has the ability to render complex arguments accessible, even to non-philosophers. She also uses humor to admirable effect. Moreover, *Virtually Obscene* is one of the few books where the endnotes are almost as interesting as reading the text, for in addition to the usual scholarly minutiae, White there treats us to discussions of furniture pornography (in which pieces of furniture are placed on top of each other with graphic descriptions added), “Voodoo doll” subprograms, and amusing personal anecdotes that illustrate the points that she is making. Given the importance of the topic that White is addressing, the value of these aspects of her work should not be underestimated, for they—together with the Foreword by Nadine Strossen—will help ensure that *Virtually Obscene* will have the most chance of being read by persons who are in a position to work to enshrine White’s admirable conclusion in public policy.

Yet it is not only the style of *Virtually Obscene* that deserves praise: the substance does too. Like the crew of the Titanic, those who favor regulating the Internet availability of sexually explicit materials typically put “women and children first,” and argue that it is harmful to these two vulnerable groups that they are most concerned to protect. But, in Chapters 4 and 5 of *Virtually Obscene*, White shows that (and again like the crew of the Titanic) the proponents of these pro-regulation arguments are too confident in the unsinkability of their position. In Chapter 4 White assembles a persuasive set of arguments to show that the widespread concern with the potential harm to children that could be inflicted upon them by the Internet availability of sexually explicit materials is misplaced. To be sure, these arguments could be made even more powerful with the inclusion of the argumentative addenda outlined above. But noting this does not detract from the wealth of empirical and historical evidence that White assembles to rebut the arguments for regulation that are based on the Internet’s potential for placing children in harm’s way. Similarly, while White’s response to the pro-regulation argument from libel could be strengthened in the ways outlined above, in Chapter 5 she persuasively rebuts the most common arguments in favor of regulation that are based on the potential of sexually explicit material to cause them harm.

Praising the best aspect of *Virtually Obscene* has, however, been saved till last. In her ambitious Chapter 3, White outlines the “common rationales given for a principle of free speech” and argues that “they can not logically be used to protect sexually explicit Internet materials” (p. 66). This, at first, might strike many people as alarming—especially if they believe that individual liberty is of great moral value. Such persons might become even more alarmed once they recognize the cogency of White’s arguments. But this alarm should dissipate once White’s arguments in this chapter are read in conjunction with those that she offers in Chapter 7, where she argues against regulating the Internet on the grounds that the disutility that would “doubtlessly be produced by regulation is clear” (p. 147). This is because

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when White's arguments in these chapters are placed together, it becomes clear that she offers a powerful case not just for freedom of speech, but for freedom of action (provided that this is compatible with that enjoyed by others). To see this, note that in Chapter 3 White addresses the argument that "autonomy is good and that freedom of speech is a necessary condition for autonomy to emerge" (p. 56). The proponents of this argument in favor of protecting free speech base this claim on the view that "only by affording people the opportunity to explore opinions through freedom of discussion will they truly develop independent judgments and make autonomous decisions" (p. 58). As such, they conclude, insofar as we value autonomy we should afford speech special protections. However, notes White, the proponents of this argument fail in their aim of securing a sphere of special protection for free speech. This is because, she observes, "restrictions on actions also affect individual autonomy and decision-making" (p. 60), for such restrictions might prevent a person from gaining knowledge that would help him make more informed decisions in the future. As such, concludes White, "the argument from autonomy is not satisfactory in providing a justification as to why speech should be given a special status that actions do not merit."

The first point to make about White's argument here is simple: In both her outline of the pro-speech argument from autonomy and in her own discussion of it, White implicitly focuses on the *instrumental* value of autonomy. In discussing this argument, then, White casts it in its most persuasive form, for she does not attribute to its proponents the less-plausible claim that autonomy is primarily of intrinsic value. The second point to make about White's argument here is much more interesting, and pertains directly to one of the ways in which *Virtually Obscene* is an important book. White's conclusion here is that freedom of speech does not merit any special protection that freedom of action does not also merit. Coming in a chapter whose avowed aim is to show that "the common justifications given for protecting speech are ... flawed," this conclusion might at first sight be troubling. But, once one reads Chapter 7 of *Virtually Obscene*, the subtlety and importance of White's position become clear, for it is there that she argues against regulation in general, and against the regulation of the Internet availability of sexually explicit materials in particular. Putting Chapters 3 and 7 together, then, it appears that White is subtly reminding us that we would only assume that speech requires some sort of *special* protection if two conditions are met: that we believe free speech to have value, and *that we have already implicitly accepted that our actions can be regulated beyond that which is needed to prevent us from harming others* (in the normative sense). Rather than being concerned by White's rejection of the autonomy-based argument in favor of free speech in Chapter 3, then, persons concerned with liberty should embrace it, for the lesson that we should draw from it is

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not that speech should be regulated, but that normatively harmless actions should not.

In *Virtually Obscene* White addresses an issue that is of pressing importance, and, in so doing, cogently and persuasively defends a position that runs counter to the accepted wisdom of most of the participants in the debate over whether or not to regulate the Internet. As such, she should be congratulated on a book that not only draws from a broad spectrum of areas of research, but which is also provocative, nuanced, engaging, and accessible to a wide range of people. *Virtually Obscene* should be read by all who are interested in the questions of both Internet regulation and the regulation of sexually explicit material, as well as by persons interested in both freedom of speech and the defense of liberty in general.