

4 Liberalism: Objections and Defenses

IRVING KRISTOL

Pornography, Obscenity, and the Case for Censorship

Being frustrated is disagreeable, but the real disasters in life begin when you get what you want. For almost a century now, a great many intelligent, well-meaning, and articulate people—of a kind generally called liberal or intellectual, or both—have argued eloquently against any kind of censorship of art and/or entertainment. And within the past ten years, the courts and the legislatures of most Western nations have found these arguments persuasive—so persuasive that hardly a man is now alive who clearly remembers what the answers to these arguments were. Today, in the United States and other democracies, censorship has to all intents and purposes ceased to exist.

Is there a sense of triumphant exhilaration in the land? Hardly. There is, on the contrary, a rapidly growing unease and disquiet. Somehow, things have not worked out as they were supposed to, and many notable civil libertarians have gone on record as saying this was not what they meant at all. They wanted a world in which “*Desire Under the Elms*” could be produced, or “*Ulysses*” published, without interference by philistine busybodies holding public office. They have got that, of course; but they have also got a world in which homosexual rape takes place on the stage, in which the public flocks during lunch hours to witness varieties of professional fornication, in which Times Square has become little more than a hideous market for the sale and distribution of printed filth that panders to all known (and some fanciful) sexual perversions.

But disagreeable as this may be, does it really matter? Might not our unease and disquiet be merely a cultural hangover—a “hangup,” as they say? What reason is there to think that anyone was ever corrupted by a book?

This last question, oddly enough, is asked by the very same people who seem convinced that advertisements in magazines or displays of violence on television do indeed have the power to corrupt. It is also asked, incredibly enough and in all sincerity, by people—e.g., university professors and school

teachers—whose very lives provide all the answers one could want. After all, if you believe that no one was ever corrupted by a book, you have also to believe that no one was ever improved by a book (or a play or a movie). You have to believe, in other words, that all art is morally trivial and that, consequently, all education is morally irrelevant. No one, not even a university professor, really believes that.

To be sure, it is extremely difficult, as social scientists tell us, to trace the effects of any single book (or play or movie) on an individual reader or any class of readers. But we all know, and social scientists know it too, that the ways in which we use our minds and imaginations do shape our characters and help define us as persons. That those who certainly know this are nevertheless moved to deny it merely indicates how a dogmatic resistance to the idea of censorship can—like most dogmatism—result in a mindless insistence on the absurd.

I have used these harsh terms—“dogmatism” and “mindless”—advisedly. I might also have added “hypocritical.” For the plain fact is that none of us is a complete civil libertarian. We all believe that there is some point at which the public authorities ought to step in to limit the “self-expression” of an individual or a group, even where this might be seriously intended as a form of artistic expression, and even where the artistic transaction is between consenting adults. A playwright or theatrical director might, in this crazy world of ours, find someone willing to commit suicide on the stage, as called for by the script. We would not allow that—any more than we would permit scenes of real physical torture on the stage, even if the victim were a willing masochist. And I know of no one, no matter how free in spirit, who argues that we ought to permit gladiatorial contests in Yankee Stadium, similar to those once performed in the Colosseum at Rome—even if only consenting adults were involved.

The basic point that emerges is one that Prof. Walter Berns has powerfully argued: No society can be utterly indifferent to the ways its citizens publicly entertain themselves. Bearbaiting and cockfighting are prohibited only in part out of compassion for the suffering animals; the main reason they were abolished was because it was felt that they debased and brutalized the citizenry who flocked to witness such spectacles. And the question we face with regard to pornography and obscenity is whether, now that they have such strong legal protection from the Supreme Court, they can or will brutalize and debase our citizenry. We are, after all, not dealing with one passing incident—one book, or one play, or one movie. We are dealing with a general tendency that is suffusing our entire culture.

I say pornography *and* obscenity because, though they have different dictionary definitions and are frequently distinguishable as “artistic” genres, they are nevertheless in the end identical in effect. Pornography is not objectionable simply because it arouses sexual desire or lust or prurience in the

mind of the reader or spectator; this is a silly Victorian notion. A great many nonpornographic works—including some parts of the Bible—excite sexual desire very successfully. What is distinctive about pornography is that, in the words of D. H. Lawrence, it attempts “to do dirt on [sex] . . . [It is an] insult to a vital human relationship.”

In other words, pornography differs from erotic art in that its whole purpose is to treat human beings obscenely, to deprive human beings of their specifically human dimension. That is what obscenity is all about. It is light years removed from any kind of carefree sensuality—there is no continuum between Fielding’s “Tom Jones” and the Marquis de Sade’s “Justine.” These works have quite opposite intentions. To quote Susan Sontag: “What pornographic literature does is precisely to drive a wedge between one’s existence as a full human being and one’s existence as a sexual being—while in ordinary life a healthy person is one who prevents such a gap from opening up.” This definition occurs in an essay *defending* pornography—Miss Sontag is a candid as well as gifted critic—so the definition, which I accept, is neither tendentious nor censorious.

Along these same lines, one can point out—as C. S. Lewis pointed out some years back—that it is no accident that in the history of all literatures obscene words—the so-called “four-letter words”—have always been the vocabulary of farce or vituperation. The reason is clear—they reduce men and women to some of their mere bodily functions—they reduce man to his animal component, and such a reduction is an essential purpose of farce or vituperation.

Similarly, Lewis also suggested that it is not an accident that we have no offhand, colloquial, neutral terms—not in any Western European language at any rate—for our most private parts. The words we do use are either (a) nursery terms, (b) archaisms, (c) scientific terms or (d) a term from the gutter (that is, a demeaning term). Here I think the genius of language is telling us something important about man. It is telling us that man is an animal with a difference: he has a unique sense of privacy, and a unique capacity for shame when this privacy is violated. Our “private parts” are indeed private, and not merely because convention prescribes it. This particular convention is indigenous to the human race. In practically all primitive tribes, men and women cover their private parts; and in practically all primitive tribes, men and women do not copulate in public.

It may well be that Western society, in the latter half of the 20th century, is experiencing a drastic change in sexual mores and sexual relationships. We have had many such “sexual revolutions” in the past—and the bourgeois family and bourgeois ideas of sexual propriety were themselves established in the course of a revolution against 18th century “licentiousness”—and we shall doubtless have others in the future. It is, however, highly improbable

(to put it mildly) that what we are witnessing is the Final Revolution which will make sexual relations utterly unproblematic, permit us to dispense with any kind of ordered relationships between the sexes, and allow us freely to redefine the human condition. And so long as humanity has not reached that utopia, obscenity will remain a problem. . . .

JOEL FEINBERG

Harmless Wrongdoing

The most characteristic argument for the strict moralistic position in its pure form involves the imaginative use of examples. The strict moralist must find actual or hypothetical examples of actions or states of affairs that are not only “evil in the generic sense” but *morally* evil as judged by “natural” objective standards, and perfectly free-floating, that is not evil simply because harmful (in the liberal’s sense), offensive, or exploitatively unfair, but *evil in any case*. Then, if the example is such that the liberal, reacting spontaneously, would be embarrassed to have to oppose criminal prohibition, the example has telling probative impact. Indeed such arguments, while technically *ad hominem* in form, have as much force as can normally be expected in ethical discourse. This strategy requires that the strict moralist cite some plausible (though admittedly uncharacteristic) free-floating moral evils that are such great evils that the need to prevent them *as such* is likely to be accepted by the reader as a weightier reason than the case for individual liberty on the other side of the scales. All the legal moralist can do at this point is present relevant examples in a vivid and convincing way, pointedly reminding the reader of certain principles of critical morality that he holds in common with the legal moralist and takes equally seriously. The relative “weight” of acknowledged reasons is not otherwise amenable to proof. More exactly, the legal moralist offers *counterexamples* to the liberal thesis that personally harmless transactions between consenting adults in private cannot be evils of sufficient magnitude to justify preventive coercion.

Let us begin with the standard liberal example of the pornographic film or the nude stage show. Imagine that the advertising for these entertainments is perfectly honest and straightforward. On the one hand, it is not lurid or titillating in a way that would offend passersby; on the other hand, it does not conceal the nature of the shows in a way that would mislead

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customers into expecting something that is not pornographic. Imagine further that children are not permitted entrance. Since neither compulsion nor deception is used to dragnet audiences, everyone who witnesses the show does so voluntarily, knowing full well what he is in for. No one then can complain that he has been harmed or offended by what he sees. The shows therefore can be banned only on the ground that the erotic experiences in the minds of the spectators are inherent evils of a free-floating kind.

The playfully skeptical legal moralist can now begin to alter these hypothetical paradigms until his liberal adversary begins to squirm. He asks us to suppose, for example, that the voluntary audience is thrilled to watch the explicit portrayal on the stage of sexual intercourse, or even "sodomy and other sexual aberrations." Imagine live actors and actresses performing live sex for the delectation of live voyeurs. Well, surely this would be degrading and dehumanizing for the actors, protests the liberal. In that case, the state has a right to make sure that the actors too, and not only the audience, are voluntary participants. But why shouldn't some contracts between producers and actors be capable of passing the test of voluntariness? No doubt the actors' work would be unpleasant, but let us suppose that it is well paid. People have been known to put up, quite voluntarily, with great discomfort for the sake of earning money. Could sexual exhibitionism be that much worse than coal mining? Maybe it could. But should it not be up to the free choice of the actor to decide whether a certain amount of public degradation is worth ten thousand dollars a week? It would be paternalistic to prevent him from doing what he wants to do on the ground that we know better than he what is good for him. Liberal principles, then, offer no grounds to justify the legal prohibition of such diversions. That may not embarrass the liberal (very much), but other counterexamples lie in wait for him.

Imagine a really kinky live sex show primarily for voluntary spectators who prefer their sex with sadomasochistic seasoning. William Buckley eagerly takes up the argument from here:

Does an individual have the right to submit to sadistic treatment? To judge from the flotsam that sifts up in the magazine racks, there is a considerable appetite for this sort of thing. Let us hypothesize an off-Broadway show featuring an SM production in which the heroine is flailed—real whips, real woman, real blood—for the depraved. One assumes that the ACLU would defend the right of the producers to get on with it, trotting out the argument that no one has the right to interfere with the means by which others take their pleasure.

The opposing argument is that the community has the right first to define, then to suppress, depravity. Moreover, the community legitimately concerns itself over the coarsening effect of depravity.¹

That the community has the right to define and suppress depravity as an inherent evil is, of course, the moralist thesis here at issue. That the commu-

nity can be concerned with "coarsening effects," on the other hand, is the sort of consideration a proponent of the harm principle might invoke if he thought on empirical grounds that people with coarsened characters tend to cause harm to unwitting victims, so it is a consideration that can be put aside here.

Vicarious sexual pleasures of a "depraved" sort are not the only examples of private enjoyments found repugnant by some legal moralists. Professional boxing matches are another case in point. Here some of the liberals themselves are among the most denunciatory. *The New York Times* published an editorial demanding the abolition of professional boxing altogether shortly after the bloody first Frazier-Ali fight. One of the many indignant letters to the editor that followed denounced *The New York Times*, in turn, on familiar liberal principles:

Ali and Frazier fought of their own free choice. Neither of them has complained that he was forced to submit to brutal and dehumanizing treatment. Those who paid money to see the fight did so willingly and most of them thought they got their money's worth. . . . [W]hat was immoral about this fight? No rights were transgressed. Those who disapprove of professional boxing were not forced to watch.

. . . The parallel to declining civilizations of the past referred to in your editorial is without any basis in fact. The contestants in the cruel sports that were practiced in the dying days of the Roman Empire, for example, were not free men with free choice. . . .²

The liberal author of that letter is set up for the last of the ingenious moralistic counterexamples to be considered here. Irving Kristol has us consider the possibility of gladiatorial contests in Yankee Stadium before consenting adult audiences, of course, and between well-paid gladiators who are willing to risk life or limb for huge stakes. The example is not far-fetched. We can imagine that, with closed circuit television, the promoter could offer twenty million dollars to the winners and ten million to the estates of the losers. How could we advocate legal prohibition without abandoning the liberal position that only the harm and offense principles can provide reasons of sufficient strength to override the case for liberty? Kristol has no doubts that the liberal is stuck with his huge free-floating evil and can urge prohibition only at the cost of hypocrisy:

I might also have [used the word] . . . "hypocritical." For the plain fact is that none of us is a complete civil libertarian. We all believe that there is some point at which the public authorities ought to step in to limit the "self-expression" of an individual or a group even where this might be seriously intended as a form of artistic expression, and even where the artistic transaction is between consenting adults. A playwright or theatrical director might, in this crazy world of ours, find someone willing to commit suicide on the stage, as called for by the script. We would not allow that—any more than we would permit scenes of

real physical torture on the stage, even if the victim were a willing masochist. And I know of no one, no matter how free in spirit, who argues that we ought to permit gladiatorial contests in Yankee Stadium, similar to those once performed in the Colosseum of Rome—even if only consenting adults were involved.³

The example of the gladiatorial show, at first sight, satisfies the requirements for argumentative cogency. Almost anyone would concede that the bloody contest would be an evil, and most would be willing to concede (at least at first) that the evil would be in the non-grievance category, since in virtue of the careful observance of the *Volenti* maxim, there would be no aggrieved victim. Moreover, the evil involved, in all of its multiple faces, would be a moral one. It is morally wrong for thousands of observers to experience pleasure at the sight of maiming and killing. It is an obscenely immoral spectacle they voluntarily observe, made even worse by their blood-thirsty screams and vicarious participation. If we reserve the term “immoral,” as some have suggested, for *actions*, then the immoralities are compounded and multiplied, for the promoter acts immorally in arranging the contest, advertising it, and selling tickets; each gladiator acts immorally by voluntarily participating; and millions of voluntary spectators share the guilt. If all these individual moral failings can be coherently combined, they add up to a social evil of great magnitude indeed. And yet it seems at first sight that the evil is a non-grievance one, since no one can complain in a personal grievance that he has been wronged.

From liberals who are determined to avoid hypocrisy, Kristol's examples will elicit at least three types of reply. First, Kristol is entirely too complacent about the problem of determining genuine “willingness” and “voluntary consent.” The higher the risk of harm involved, the stricter must be the standards, one would think, for voluntariness. When it is a person's very life that is at issue, the standards would have to be at their strictest, especially when the life involved is clearly of great value to its possessor, unlike the life of the would-be suicide suffering from a painful terminal illness. Perhaps, as we have seen, the state would have the right, on liberal principles, to require such things as psychiatric interviews, multiple witnessing, cooling-off periods, and the like, before accepting a proffered consent as fully voluntary. Kristol talks glibly of finding “willing” public suicides in “this crazy world of ours,” not noticing that an agreement is hardly consensual if one of the parties is “crazy.” To exploit a crazy person in the way he describes is not distinguishable from murder and equally condemned by the harm principle. On the other hand, we must admit that a self-confident and powerful gladiator need not be “crazy” to agree to risk his life before the howling mobs for twenty million dollars. There could be a presumption that such a person doesn't fully understand what he is doing, or is not fully free of neurotic

influences on his choice, but these hypotheses are rebuttable in principle, and in some cases that we can easily imagine, with only minor difficulty and expense rebuttable in fact. The liberal's second and third responses (below), then, are the more pertinent ones.

In conceding to the legal moralist that the wholly voluntary contest *is* an “evil” we are not making that judgment primarily because of the injury or death, the utterly “defeated interest,” of the losing contestant. That result is an “evil,” one might say, because it is regrettable that anyone had to be injured in that way, but so long as we adhere to the doctrine of the absolute priority of personal autonomy that sort of evil is always more than counter-balanced (indeed it is as if cancelled out) by prior consent to the risk. The primary evil relied upon by the legal moralist is not that anyone was harmed (i.e., injured *and* wronged), for no one was, and not that anyone was injured even without being wronged, since that “otherwise evil” is nullified by consent, and there would be an even greater evil, indeed a wrong, if consent were overruled. The fatal maiming of the loser was an “evil” (regrettable state) that he had an absolute right to risk. In reaffirming that right we are making it clear that we are not backtracking on our opposition to paternalism. The acknowledged evil that makes this case a hard one for the liberal is apparently a free-floating one, an evil not directly linked to human interests and sensibilities. That evil consists in the objective regrettable-ness of millions deriving pleasure from brutal bloodshed and others getting rich exploiting their moral weakness. The universe would be an intrinsically better place, the strict legal moralist insists, if that did not occur, even though no one actually was wronged by it, and there is no one to voice a personal grievance at it.

The liberal who is sensitive to the charge of hypocrisy may, in the end, have to reply as follows. Gladiatorial contests and “voluntary” submission to torture are among the most extreme hypothetical examples of non-grievance evils that the legal moralist's imagination can conjure. There seems little likelihood that they will ever occur, at least in the foreseeable future. Yet they seem to be convincing hypothetical examples of very great evils. A liberal might treat them as the limiting case of the “bloated mouse” that has more weight than the undernourished human being. The need to prevent them would be, in his view, one of the very weightiest reasons for coercion that one could plausibly imagine from the category of (merely) free-floating evils. He could then concede that the question of whether they could legitimately be prevented by state coercion is a difficult and close one, and admit this without hypocrisy or inconsistency. He would still hesitate to resort to legal coercion even to prevent the greatest of free-floating evils, simply because he cannot say who is *wronged* by the evils. At any rate, he can concede that the case is close. But the actual examples that people quarrel over:

pornographic films, bawdy houses, obscene books, homosexuality, prostitution, private gambling, soft drugs, and the like, are at most very minor free-floating evils, and at the least, not intuitively evils at all. The liberal can continue to oppose legal prohibitions of them, while acknowledging that the wildly improbable evils in the hypothetical examples of Buckley and Kristol are other kettles of fish. The liberal position least vulnerable to charges of inconsistency and hypocrisy would be the view that the prevention of free-floating evils, while always a relevant reason for coercion, is nevertheless a reason in a generally inferior category, capable of being weighed on the same scale as the presumptive case for liberty only in its most extreme—and thus far only hypothetical—forms.

The preceding paragraph describes a rather uncomfortable fallback position for the liberal who wishes to preserve without hypocrisy what he can of his liberal principles in the face of Kristol's vivid counterexample. Before he settles in to that position, however, he would be well advised to look more carefully at the complex of images and associations we experience when we ponder the example that is supposed to appeal to our "intuitions." What exactly is it about that example that we are responding to when it inclines us toward Kristol's conclusion? Inevitably, I think, we import into the example a nightmare of unconsented-to indirect harms. We naturally set the example in a brutal society full of thugs and bullies who delight in human suffering, whose gladiatorial rituals concentrate and reenforce their callous insensitivity and render it respectable. We cannot hold an image of these wretches in our minds without recoiling, for each of them alone will seem threatening or dangerous, and thousands or millions of them together will be downright terrifying. It is highly difficult, if not plain impossible, to think of widespread indifference to suffering as a mere private moral failing unproductive of further individual and social harm. And so we move quickly (too quickly) in the direction of Kristol's conclusion, ready to endorse with enthusiasm his judgment that the gladiatorial contest would be a huge evil, and to accept uncritically at the same time that the evil would be free-floating.

The immorality of the participants in Kristol's story, then, is not like that of the solitary taboo-breakers or other harmless wrongdoers who can righteously rebuff our interference with the claim that what they do is none of our business. Rather it is an inseparable component of our spontaneous reaction to the story that the wrongdoing and "wrongfeeling" in it powerfully threaten basic human interests and are therefore quite assuredly everybody's business. I have insisted that moral corruption as such is not a relevant ground for preventive criminalization, but when the moral dispositions that are corrupted include concern about the sufferings of others, then the interests of others become vulnerable, and the corrupting activity can no longer be thought to be exclusively self-regarding. Nor are we considering

here the mere "speculative tendency" of actions to endanger others, short of a clear and present danger that they will. When the bloody maiming and slaughtering of a human being is considered so thrilling and enjoyable that thousands will pay dearly to witness it, it would seem to follow that thousands are already so brutalized that there is a clear and present danger that some innocent parties (identities now unknown) will suffer at *their* hands. Indeed, it may be too late, in Kristol's gladiator example, to prevent such harms by prohibiting the show. If seventy thousand people will fill Yankee Stadium and enough others will attend closed television showings in theaters to permit the producer to pay thirty million dollars (my example) to the gladiators and still make a profit, then we are as a people already brutalized, and legal coercion, at best, can only treat the symptoms and slow their speed.

Kristol might reply to the above argument as follows. "I am writing the story," he might say, "in order to make *my* point. And in *my* version of the story, the spectators, for all their love of gory thrills, are not dangerous to other people. None of them would ever be likely to commit battery, mayhem, or homicide. Perhaps providing them with an orderly outlet for their savage passions makes them even less dangerous than they would otherwise be." In any case, he might say, they resemble in their motives and actions the dutiful wife of the dying invalid who secretly welcomes his sufferings but would never do anything to cause them herself or the honorable bigot who values whites more than blacks but would never intentionally violate the rights of a black. The participating spectators then are, *ex hypothesi*, harmless to others. They all witness the spectacle voluntarily, and the gladiators themselves participate voluntarily, and no third parties are endangered or directly offended, so no one has a grievance. Yet it remains a monstrous moral evil that people should get pleasure in this way from the suffering of others, an evil whose prevention justifies prohibition, even though it is free-floating.

So might Kristol rejoin. But then the liberal reader might reply: "I never thought to interpret your example in *that* way. Indeed, it is highly unlikely that one could cultivate genuine joy at others' suffering without himself becoming more of a danger to others, and it is wildly improbable that hundreds and thousands of spectators could come to be bloodthirsty without constituting a threat to at least *some* of the rest of us. Perhaps what you ask us to assume is psychologically impossible. But never mind; I agree that it is at least *logically* possible that people should be capable of such compartmentalization in their responses. So have it your way. But now my problem is that the original intuition to which you appealed, that the gladiator show is a sufficiently great evil to counterbalance autonomous liberty on the scales, is now substantially weakened. I can still acknowledge it *is* a free-floating evil that a person derives pleasure from the suffering of others, while

now denying that it is the business of the law to interfere." The example of a free-floating evil is now a purer one, but what it has gained in purity it has lost in intuitive forcefulness. Kristol's new mouse would no longer be as bloated as it was.

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Kristol's Gladiatorial Contest

The counterexample that gave me the most trouble in the category of free-floating evils (non-grievance evils that are not welfare-connected) was the gladiatorial contest story proposed by Irving Kristol. In Chapter 30, where I considered this proposed counterexample, I wavered in my response between cautious and bold liberalism. There is especially strong incentive to affirm the bold position in the face of arguments that purely free-floating evils should be criminalized, and it is a tribute to the ingenuity of this example that it caused me to waver at all. A *pure* free-floating evil, after all, is nothing that anyone needs protection from in any sense. It neither violates any one's rights nor causes any setback to interests the risk of which had not already been voluntarily accepted by the interest-holder. If the "evil" in question, nevertheless, truly is an evil, then its occurrence is regrettable and the universe as a whole would be a better place without it, but it is nothing that anyone has a right to make a personal complaint (or feel personally aggrieved) about. *I* don't have a right, for example, that *you* think only pure thoughts. That is your business, no one else's. I am not harmed either with or without my consent by your thoughts, and neither are you (necessarily) harmed either. It is better, perhaps, that you not have such thoughts, and regrettable that you do, but no one is made worse off by them, so why bring the law into it at all (one might naturally ask)?

Kristol's example, however, is impure. There is a sense in which the voluntarily produced and witnessed contest *is* a free-floating evil. It is objectively regrettable (to put it mildly) that several hundred thousand adults should derive great pleasure from gory bloodshed, human suffering, and the sight of savage cruelty. When we isolate that grossly inappropriate mass response we find it *very* regrettable indeed and morally revolting even to think about. But who would need protection from it, given that no children are exposed to it and there are no unwilling participants or spectators? To us disapproving outsiders the spectators might all say "It is none of your business." If the isolated free-floating evil (the morally inappropriate response of the audience) were all there was to consider in the example, the slightly fazed liberal might maintain some of his boldness. He might concede that the free-floating evil has some weight on the scales, if only because the moral responses of so many people are so extremely distorted, but he might still deny that preventing the evil has substantial weight, given that it is freely

chosen and harmless to the disapproving "others." He can boldly insist, therefore, that the law be kept from interfering, and thereby reject the force of the story as a counterexample.

The free-floating evil in the example, however, is not so easily isolable. The story is drenched in ominous danger. The imagery in the reader's mind includes excited, savage mobs thirsting after the blood of those who have been paid to take extreme risks, but how easily contained or limited is their bloodlust to those who consent? One tries to think of the sorts of people who would enjoy such an experience, and it is hard to bring into focus the image of a "fan" whom one would be prepared to trust outside the arena. The sensitive reader then feels threatened in his imagination as well as repelled, and reasons of the harm principle type are on his mind when he judges that "there ought to be a law against it." If one argued against him that for the enthusiastic spectators the contest is a mere healthy catharsis leaving them less prone to violence in ordinary life, he will probably reply not that the contest should be prohibited despite its innocuous character, but rather that the prohibition should hold because he doesn't believe for a minute that it is "innocuous."

Kristol's example is also impure in another way. It not only brings in harm principle considerations, it also naturally implicates legal paternalism and incites the paternalist to defend his favored sorts of reasons. The evils in the story include not only free-floating moral evils in the response of the spectators and the enrichment of the pandering promoter, but also welfare-connected non-grievance evils in the injuries to the gladiators themselves. Taken as an argument in favor of paternalism the example has more initial force. Its form is quite the same as the argument from voluntary slavery in Volume three (pp. 71-81) and the bold liberal will respond in similar ways. The gladiators in principle have a right to risk their lives if they truly wish to do so, but the humane element in the liberal spirit rises to the fore when the liberal thinks about it, and he is moved to ask: "Do they really know what they are doing?" In the end, he will find nonpaternalistic grounds—doubts about voluntariness and appeals to the prevention of public dangers—for refusing permission to the promoter.

Think of how a legalized fight to the death before paying spectators would work. The state would insist on a licensing procedure to confirm voluntariness and protect innocents from indirect dangers. In the beginning, the criminal law need not be involved at all. It would be reserved as a back-up sanction to enforce the prohibition of unlicensed promotions. The explicit aim of the contest in the promoter's application for a license would not be the vindication of the combatants' honor, as in a duel; nor would it be to put one of them out of his misery, as in legalized euthanasia. Rather the aim of the combat would be to establish the dominance of one of the combatants, to establish once and for all which of them is the more formidable

gladiator, and incidentally to give thrills of the most basic animal kind to the audience. If the combat is to achieve these aims, if it is to be a *contest* at all (as opposed, for example, to a public mugging), it must be governed by fair rules impartially administered. Both wary gladiators would want to insist on that in advance, and most spectators would agree. Without such rules the spectacle might be a mere homicide committed with impunity by a cheater. It might also occur to the contracting contestants, and certainly to the state licensors, that there would be just as much excitement of the primordial thrilling kind if the rule-governed contest were permitted to last only until one party has clearly established his superiority. At that point it could be stopped by an impartial referee appointed by the licensing commission. This would surely make the deal more attractive to the gladiators, and because it would be no less exciting to the spectators, it would be no less remunerative to the promoter and the participants. It might even be *more* attractive to the audience because it is less gruesome, shocking, and heart-breaking. And the appeal of the contest would be not just primitive thrills but also the spectacle of skill and technique, and even strategy and tactics. It would be no less thrilling but much more interesting than a mutual bashing with clubs. In fact, its appeal would be more effective if the weapons that could be used were restricted. The contest would also last longer that way. Just as a pornographic show will be more exciting if more subtle, the performers teasing their audiences along rather than being unrestrained and fully naked from the start, so the fighting match will be more thrilling if the battlers are less destructive.

Given the greater reasonableness all around of the sublimated type of contest, and especially its lesser risks to the pugilists themselves, it would bring into question how truly voluntary the participants' insistence on combat to the death with lethal weapons would be. Unreasonableness is not the same thing as involuntariness, of course, but extreme unreasonableness creates a strong presumption of nonvoluntariness that would be difficult to rebut, and the state might even be justified in making the presumption conclusive for practical reasons. The sublimated form of contest would also be less likely to cause harm to others by leading to a general coarsening of sympathies and a sharpening of lethal impulses in real life. In short, the arrangement most appealing to promoter, participants, audience, and the state in its role as protector of the public, would resemble our own boxing, wrestling, and fencing matches, not the barbarous killings in Kristol's example, and a liberal state would have many reasons for refusing to license the latter. Liberalism might remain bold in the face of the Kristol example, even though the liberal concedes some weight to preventing the evil of exploitation by pandering and the evil of inappropriate thrills at the sight of injuries being inflicted on a human being.

Notes

1. William F. Buckley, Jr., "Death for Gilmore?" *New York Times Magazine*, December 7, 1976, p. 32.
2. *The New York Times*, editorial, March 10, 1971.
3. Irving Kristol, "Pornography, Obscenity, and the Case for Censorship," *The New York Times Magazine*, March 28, 1971.