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# HARMFUL SPEECH AND THE CULTURE OF INDETERMINACY\*

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I advocate two propositions in this Essay: the constitutional law of at least one category of content regulation of free speech is indeterminate, and recognition of this indeterminacy has been and ought to continue to be the Supreme Court's decisional basis for protecting speech against content regulation. My claim that the Court has actually used the idea of indeterminacy as a decisional basis has probably not been made before, at least not explicitly.

The category of speech I shall focus upon comes within the general area of "harmful speech." There is no doubt that some speech causes harm. According to Lawrence Tribe,

One may not be privileged to mislead a blind man into thinking that a window is a door or to extort a sum for telling him the truth. Justice Holmes was surely right that the first amendment does not protect "a man in falsely shouting fire in a theater and causing a panic."<sup>1</sup>

Another example might be a news reporter who happens to discover the present address of Salman Rushdie, author of *The Satanic Verses*.<sup>2</sup> The Shiite government of Iran has called upon Iranians everywhere to track down and kill Rushdie.<sup>3</sup> If the reporter willfully discloses Rushdie's address, and within hours of publication someone murders Rushdie, the reporter surely cannot claim a first amendment privilege.

One might label the above examples Harmful Speech Type I. Such a category would also include speech used to effectuate fraud, misrepresentation, conspiracy, blackmail, and the like. What these examples have in common, and what distinguishes them from what I call Harmful Speech Type II, is that the factfinder

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1. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-8, at 837 (2d ed. 1988) (citing *Schenck v. United States*, 249 U.S. 47, 52 (1919)).

2. S. RUSHDIE, *THE SATANIC VERSES* (1989).

3. Reaves, *Moslem leader says hit squads hunt author*, *Chicago Tribune*, Feb. 16, 1989, at 1, col. 1.

and/or decisionmaker— whoever is called upon to decide *whether* a first amendment privilege exists— does not need to make a judgment as to the harmfulness of the precise speech in question in order to reach a conclusion that the speech caused harm. Rushdie's particular street address is of no intrinsic consequence; all the factfinder and/or decisionmaker needs to know is that the disclosed address was Rushdie's. The harm in all these cases is provable independently from the content of the speech.

Harmful Speech Type II includes cases in which the factfinder and/or decisionmaker must arrive at a judgment, perhaps a better word is "impression,"<sup>4</sup> that harm must have occurred because the particular utterance in question is itself harm producing. For example, a speaker utters an epithet that allegedly causes emotional harm to members of a particular minority group. Whether the epithet in fact caused emotional harm is a judgment that the decisionmaker can hardly make independently from her own judgment that this particular epithet caused harm.<sup>5</sup> Professor Tribe writes that "[t]he Constitution may well allow punishment for speaking words that cause hurt just by their being uttered and heard."<sup>6</sup> This is a good capsule statement of Harmful Speech Type II, although Tribe does not divide harmful speech into two distinct types.

My argument in this Essay is that Tribe's judgment in this instance is wrong. The Constitution should not, and more importantly cannot, allow punishment for speaking words that themselves allegedly "cause hurt." I base my argument on what I have elsewhere called "pragmatic indeterminacy."<sup>7</sup> Pragmatic

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4. Perhaps the best term would be "subjective judgment," which well connotes what I have in mind. Unfortunately, all judgments are more or less subjective; it is hard to imagine what a purely objective judgment might be.

5. Suppose I am presenting a paper at a scholarly conference, and a commentator refers to me as a "dumb wop." (The word "wop" originally came from the abbreviation of the words "with out papers," referring to immigrants from Italy who arrived at Ellis Island at the turn of the century.) Suppose the same commentator refers to my fellow panelist as a "dumb nigger." Suppose he and I both sue the commentator for libel and intentional infliction of emotional distress, and suppose we can both prove, through expert psychiatric testimony, the *same* degree of emotional distress and feeling of harm to integrity and reputation. Nevertheless, it seems quite likely that a trier of fact will sympathize more with my fellow panelist than with me, simply because the trier of fact will probably find the word "nigger" intrinsically more harm causing than the word "wop."

6. L. TRIBE, *supra* note 1, § 12-10, at 856. He adds: "The first amendment need not sanctify the deliberate infliction of pain simply because the vehicle used is verbal or symbolic rather than physical." *Id.* But how does Tribe *know* that "pain" was inflicted? Who is supposed to determine *that* matter?

7. See D'Amato, *Pragmatic Indeterminacy*, 85 Nw. U.L. Rev. 148 (1990).

indeterminacy is the current version of American legal realism, stating that law-words,<sup>8</sup> whether statutory or precedential, cannot constrain judges to decide a particular case in a particular way.<sup>9</sup> Many academics and jurists, who have claimed that judges can correctly or incorrectly interpret and apply "the law" in individual cases, find the indeterminacy thesis to be a threat to their professional lives. Consequently, they reject the thesis and have called its proponents nihilists.<sup>10</sup> Yet the Supreme Court, as I shall try to show here, has not only accepted the indeterminacy thesis in Harmful Speech Type II cases, but also for some time has used indeterminacy as the decisional basis for its approach to these cases.

Normally, the pragmatic indeterminacy thesis is not a cause for alarm because even if law-words do not constrain judicial decisions, we really want lower court judges to decide cases according to their own sense of justice.<sup>11</sup> Because "justice" perhaps can only be properly assessed in the full particularity of a given case, we can accept the pragmatic indeterminacy thesis as a mere descriptive statement that law-words cannot constrain judicial decisions. Life goes on as usual under pragmatic indeterminacy because generally courts adjudicate cases in a way that does not lead to organized social discontent.<sup>12</sup>

Nevertheless, in some areas of the law we do not want judges to decide cases at all—not justly or any other way. In these areas, the mere possibility of judicial decisionmaking exerts a chilling effect that can undermine what we want the law to

8. By "law-words" I mean *everything* that can be found in any law library or computer retrieval system, such as case reports, statutes, regulations, law journals, philosophy journals, books, newspapers, magazines, legislative histories, diaries, and biographies.

9. Although the meaning of "indeterminacy" is by no means settled, see Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283 (1989) (attempt to define indeterminacy), and although the term itself would seem to preclude any attempt to pin down its meaning, there is general agreement that indeterminacy at least stands for the proposition that the words of the law (statutes, precedents, rules, even theories of law) do not compel a decision for one side or the other in any given case. See D'Amato, *Can Any Legal Theory Constrain Any Judicial Decision?*, 43 U. MIAMI L. REV. 513 (1989).

10. See Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639, 679 (1990) ("the legal academy is experiencing a state of epistemological crisis").

11. This sense of justice can include deciding the case "according to law" (whatever that means), so long as the judge's interpretation of the law-words accords with her sense of justice. One supposes that, for most judges most of the time, their sense of justice accords with their interpretation of the available law-words. In this latter respect as well, pragmatic indeterminacy is no cause for general societal alarm.

12. People do not normally protest against government by judiciary because cases are more or less decided according to justice. Justice perceived can be a greatly stabilizing element in society.

achieve. Thus, Professor Tribe talks about the effect of self-censorship that can arise from a well-founded fear that a trier of fact "will not fairly find the facts in cases involving unpopular speakers or unorthodox ideas."<sup>13</sup> We cannot achieve the goal of freedom of speech if self-censorship takes place. Hence, in this Essay I have chosen to focus on one of the most sensitive categories of the free speech area: categories in which the trier of fact might decide the question of "harm" by virtue of his or her impression about the harmfulness of the particular utterance in question. I contend for pragmatic indeterminacy reasons that decisions in this area can go *either way*, entirely unregulated by *anything* that the Supreme Court might lay down by way of guidelines, standards, or admonitions. It would follow from my thesis that prediction of the legal effect of one's utterance is so problematic that self-censorship will surely occur. The consequence of my argument is that the Constitution mandates a more sweeping stance: *no* cause of action should exist for allegations of Harmful Speech Type II.

#### I. THE IMPERATIVE OF CULTURAL INDETERMINACY

The conception of indeterminacy that I use in this Essay is not merely jurisprudential; it stems from an indeterminate culture. The melting pot culture of the United States is fertile soil for skepticism and indeterminacy. There may be a deep relation between cultural indeterminacy and freedom of speech, a relation that has animated not just Harmful Speech Type II cases but perhaps most cases involving first amendment freedoms.

Law is rooted in culture. Judges do not make decisions "out of the blue." Rather, judges are embedded in the cultural presuppositions that engulf us all. To examine the law of free speech apart from social culture is like observing the motions of a steamship without noticing the ocean: we will fail to account for the movements of the boat if we refer exclusively to mechanisms in the engine room and ignore the motion of the water. The strong currents of our culture propel the constitutional law of free speech.

The United States, consisting largely of immigrant peoples and thought of as a "melting pot" of all racial, ethnic, and religious groups, is a heterogeneous culture in which ideological conformity is deeply suspect. In addition, strong traditions of individualism,

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13. L. TRIBE, *supra* note 1, § 12-12, at 864.

privacy, pluralist diversity, and pragmatism exist. In general, these elements would predict a wide tolerance for expression.<sup>14</sup> To be sure, other countries have different mixes of social diversity and respect for individuality; a relatively homogeneous society that has evolved a greater respect for individualism than the United States might possibly exceed our commitment to free speech.

To these commonplace observations one might add the peculiar fact that, in this century, admission to the bar in the United States has been open to all, with the result that persons of the poorest and humblest origins can and have become successful attorneys and judges. Law is primarily a verbal endeavor, and lawyers are socialized to be receptive to two sides of any story. Freedom of advocacy is grounded on deep intuitions and convictions similar to freedom of speech. Because many higher court judges are self-made persons who owe their success to verbal skills and the ability to see both sides of an argument, judges are likely to be somewhat ahead of society in championing freedom of expression. When the Supreme Court began to deal in earnest with free speech cases under the first amendment at the time of the first World War, some of the Justices were themselves self-made jurists from humble origins. Since the 1920's, one may say fairly that the Court has been ahead of the American public in securing—and teaching—respect for freedom of speech.

## II. THE USE OF INDETERMINACY

One of the most quoted and significant statements on personal liberty by a Justice of the Supreme Court came in a first amendment freedom of religion case in 1943:

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14. Some writers have called for laws that would *secure* diversity by criminalizing "hate speech" against particular groups. See, e.g., Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) (intolerance); Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603 (1990) (community values in a heterogeneous state). Although I disagree with Professors Matsuda and Post that the state ought to enforce heterogeneity, their essays perhaps inadvertently constitute another proof of indeterminacy: even *given* a theory (tolerance or communitarianism), the theory itself admittedly can yield diametrically opposite applications (uninhibited speech versus enforcement of tolerance by banning intolerant utterances).

Professor Post recognizes the dilemma and calls it "paradoxical." See Post, *supra*, at 684. If paradoxical is another word for "indeterminate," I would agree with Post. I fear, however, that he believes that the paradox might be resolved by "articulat[ing] with sufficient clarity what is actually at stake in the definition of public discourse." *Id.* at 683. That articulation is precisely what I believe cannot ever be done, not even by Post in his superb 83-page article, which at the end left me, at least, completely in the dark as to where his theory could lead a court in any conceivable future case.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.<sup>15</sup>

“[N]o official, high or petty,” is usually taken to mean elected public officials or bureaucrats. Yet including judges and juries within that phrase would be consistent with the spirit of Justice Jackson’s statement. If we allow judges and juries to make rulings in cases involving “matters of opinion,” officially preferring the content of some ideas over others, then they would be no different from any “official, high or petty,” in the phrase just quoted. Clearly, the prescriptions and rulings of any public official, including the rules deriving from precedents established by judges, can endanger freedom of expression.<sup>16</sup> Indeed, invasion of the “sphere of intellect and spirit” is most dangerous when the official is a judge because a judge deals with the specific facts of a case and the specific circumstances of the intellect and spirit of the parties. Thought control is more efficiently accomplished in face-to-face confrontations, such as those that can occur in court, than through the legislative process.

I suggest that what has become even more important than deciding the limits of freedom of speech in this country is the

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15. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (Jackson, J.).

16. The Supreme Court prefers to pin the indeterminacy blame on juries rather than on judges. Justice Stevens, dissenting in *Pope v. Illinois*, 481 U.S. 497 (1987), said that the guilt or innocence of a defendant in an obscenity trial should not be “determined primarily by individual jurors’ subjective reactions to the materials in question.” *Id.* at 514 (Stevens, J., dissenting). Justice Scalia seemed to agree in concurrence: “It is quite impossible to come to an objective assessment of (at least) literary or artistic value [of allegedly obscene material] . . . Just as there is no use arguing about taste, there is no use litigating about it.” *Id.* at 504-05 (Scalia, J., concurring). In another major recent first amendment case, Chief Justice Rehnquist’s opinion for the Court in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), said that the “outrageousness” test of Virginia law has “an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression.” *Id.* at 55.

Nevertheless, clearly it is judges who allow cases to go to the jury, so that the “officials” the Court must be concerned about, if the Court is to be effective in achieving its will in the free speech cases, include judges as well as juries.

decision not to let judges decide those limits.<sup>17</sup> If I am correct about this basic point, the operative question for the Supreme Court becomes, "How can the Court prevent officials from making such decisions?" One way that would not work would be to attempt to define the parameters of freedom of speech based on types of speech content. Such an approach would simply invite pragmatic indeterminacy back in, allowing lower court judges to decide as they please. For instance, if the Supreme Court were to rule that the only speech that government may regulate is speech whose content is marginal to or outside Jackson's "sphere of intellect and spirit," such a prescription would obviously have no constraining power on lower court judges. But the indeterminacy thesis goes much further. It says that no collection of words about what speech the state may regulate will do the job. No verbal prescriptions, no specifications, no reasoned opinions, and no theories by the Supreme Court can adequately bar lower court judges from prescribing what is orthodox in matters of opinion.

Yet judges have to rule on controversies involving speech. To the extent that the speech causes harm that is provable independently of a judgment that the particular words uttered caused harm in themselves, judges must resolve those cases under the fundamental Calabresi-Melamed proposition that courts exist to redress harms.<sup>18</sup> However, cases that consider whether the harm occurred, and in which the answer involves a guess as to whether the actual words uttered must have produced the alleged harm, come close to begging the question whether a harm occurred. This is the area of cases I have labelled Harmful Speech Type II.

My prime candidate for the role of indeterminacy as a decisional basis for the Supreme Court in a case of Harmful Speech Type II is found in Chief Justice Rehnquist's opinion in *Hustler Magazine v. Falwell*.<sup>19</sup> The courts below affirmed a jury verdict against Hustler Magazine for the intentional infliction of emotional distress upon Jerry Falwell.<sup>20</sup> Hustler had printed a parody of a Campari advertisement that exemplified Hustler's brand of

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17. This is the "chilling effect" principle discussed in the text accompanying *supra* note 13.

18. See Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

19. 485 U.S. 46.

20. *Falwell v. Flynt*, 797 F.2d 1270, 1275 (4th Cir. 1986), *rev'd sub nom. Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).



outrageous humor.<sup>21</sup> The jury found that under Virginia law the parody was "outrageous" in that it "offend[ed] generally accepted standards of decency or morality."<sup>22</sup> The *Second Restatement of Torts* sets out a "test" for outrageous conduct: "Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'"<sup>23</sup> Rehnquist, speaking for a unanimous Court,<sup>24</sup> held:

"Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.<sup>25</sup>

Rehnquist appeared to be saying that "outrageousness" is too subjective and standardless to constrain judges and juries. This much is surely correct. The indeterminacy thesis, however, goes much further: *all* law-words are inherently subjective.<sup>26</sup> Words as subjective as "outrageousness" are used routinely in jury instructions in all varieties of cases. These subjective words allow juries to vote their tastes and preferences or allow judges acting as triers of fact to use them routinely to justify their determinations. Such terms include "willful, wanton, and reckless" (torts and criminal law), "malice aforethought" (criminal law), "good faith" (contracts), "material" (contracts), "unconscionable" (contracts), "substantially different" (patents), "proximate cause" (torts), "strict scrutiny" (constitutional law), "nuisance" (torts and criminal law), and "reasonable person" (all cases).<sup>27</sup>

21. *Id.* at 1272.

22. This is the Virginia standard for the intentional infliction of emotional distress. *Id.* at 1275 n.4 (quoting *Womack v. Eldridge*, 215 Va. 338, 342, 210 S.E.2d 145, 148 (1974)).

23. RESTATEMENT (SECOND) OF TORTS § 46 comment d (1977), quoted in Post, *supra* note 14, at 623. The "test" is easily parodied. According to the RESTATEMENT (SIXTIETH) OF PATENT LAW § 46 comment q (1999), "Generally, the test is whether an average member of the community would resent the actor and be led to exclaim, 'Infringer!'"

24. Justice White concurred in the judgment, and Justice Kennedy did not participate. *Hustler Magazine*, 485 U.S. at 57.

25. *Id.* at 55.

26. I have tried to spell this out in D'Amato, *supra* note 7.

27. See Williams, *Language and the Law*, 62 L.Q. REV. 387 (1946).

One might try to distinguish the term "outrageousness" on the basis that it came into the law so recently<sup>28</sup> that it has not had the opportunity, afforded to many other "standards," to be well delineated as a result of application to thousands of cases. That distinction, however, does not work. All the terms I quoted are as subjective as the term "outrageous." The fact that juries have been able to decide whether certain conduct is "reckless" for hundreds of years does not make that term determinate *in the next case with a new jury looking at a new set of facts*.

To say that thousands of tort decisions flesh out the term "reckless" makes no real difference to a newly empaneled jury. First, the judge does not tell the jury about those thousands of tort decisions when he or she instructs them to vote on whether the defendant's conduct was reckless. Second, even if the jury heard about those cases, the jury would not be able to remember them, much less apply them to the facts of the instant case. Third, the fact situations in past cases are sufficiently dissimilar to the next case that such umbrella terms as "negligence," "failure to take reasonable precautions," or "reckless" cannot meaningfully translate prior fact situations into the instant case that the jury has heard in all its particularity. Fourth, the judge's instructions typically use synonyms to describe "negligent" and "reckless," yet the synonyms are not, and cannot be, more determinate than the word they define. Fifth, if one were to attempt to construct a determinate meaning for the word "reckless" by organizing the facts of thousands of cases, one would soon find that the contexts in which those facts took place are unknowable to readers of judicial opinions that "state the facts" in only conclusory and summary fashion. We end up with the vacuousness of a hornbook on tort law defining "reckless conduct" in sentences constructed out of equally vague synonymous terms.

Thus, the Court's opinion in *Hustler Magazine* points the way to a much further-reaching jurisprudence. Sooner or later, the Court will recognize the pragmatic indeterminacy proposition that *no* statutory language can constrain lower court decisions in the Harmful Speech Type II area. Whether *harm* occurred just by the utterance itself can be nothing better than a random guess.

### III. THE CONTEXT OF THE UTTERANCE

I have briefly mentioned the problem of interpreting words in their context. Sometimes, however, people argue that context

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28. Dean Prosser seems to have introduced the term "outrageousness" in 1939. *See Post, supra* note 14, at 622.

gives particularity to words so that reasonable people will agree about what a word means in a given context. Thus, the argument goes, when a jury learns about the full facts of a situation and the context in which those facts took place, it can make a sounder and more deterministic decision as to whether the speech harmed the listener. By applying community standards, juries can determine whether, in Professor Tribe's words, the words constituted a "deliberate infliction of pain."<sup>29</sup>

The jury did just that, however, in *Hustler Magazine*. Yet the Supreme Court second-guessed the jury as to *context* when it held that the utterance in question was a *parody* that neither a jury nor Falwell himself should have interpreted as an assertion of truths about Falwell.<sup>30</sup> Two years later, however, the Court seemed to have forgotten the indeterminacy of context. *Milkovich v. Lorain Journal Co.*<sup>31</sup> is an object lesson in the folly of attempting to remit the question of contextual interpretation to the trier of fact.

In *Milkovich*, the Court reversed and remanded a libel case in which a reporter in a news column implied that Milkovich, a high school coach, lied at a court hearing.<sup>32</sup> The Court attempted to lay down guidelines of the sort that were impossible to lay down in *Hustler Magazine*. *Milkovich* is worth examining at some length, not only because of the Court's failure to come up with general guidelines (after all, pragmatic indeterminacy predicts *that* failure!), but also because what the Court did say cannot even guide the lower court on remand.

In *Milkovich*, the respondent newspaper implied in an article that a high school coach lied under oath when testifying in an Ohio common pleas court about a wrestling match fracas involving the coach and his team. The following considerations were salient in the Court's judgment.

1. A public accusation that someone committed the crime of perjury clearly *harms* that person's reputation. Writing for the majority, Chief Justice Rehnquist cited Shakespeare: "[H]e that filches from me my good name / Robs me of that which not enriches him, / And makes me poor indeed."<sup>33</sup> The dissenters agreed with this proposition.<sup>34</sup> No one seemed to question the

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29. L. TRIBE, *supra* note 1, § 12-10, at 856.

30. See *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988).

31. 110 S. Ct. 2695 (1990).

32. *Id.* at 2697-98.

33. *Id.* at 2702 (quoting SHAKESPEARE, *OTHELLO* III.iii).

34. See *id.* at 2709.

assumption that merely saying that someone lied in court might not in itself inflict harm to reputation.<sup>35</sup>

2. The Court rejected the respondent's contention that expressions of *opinion*, as opposed to statements of *fact*, cannot constitute libel.<sup>36</sup> Rehnquist pointed out that the statement, "In my opinion Jones is a liar," can cause as much damage to [Jones'] reputation as the statement, 'Jones is a liar.'<sup>37</sup> The dissenters agreed with this proposition as well.<sup>38</sup>

3. Rehnquist held that, given a media defendant in the present case, the burden was on the high school coach to show falsity.<sup>39</sup> The Chief Justice was careful not to say that the coach could prove falsity on the negative facts that the common pleas judge did not find the high school coach guilty of perjury and the public prosecutor did not subsequently prosecute the coach for perjury. Rehnquist felt constrained, however, to say that it *was* possible for the coach to show falsity on the basis of the existence of a "core of objective evidence."<sup>40</sup>

The word "objective" suggests the possibility of a standard that could resolve the issue in *Milkovich*. Curiously, the dissenters seem to have assumed that no problem existed in this formulation.<sup>41</sup> Yet unpacking what is purportedly "objective evidence" in the present case reveals a veritable *Finnegans Wake*<sup>42</sup> of interpretive complexity of which the majority, not to mention the dissent, seems to be unaware. Without going into exhaustive detail, I will pick an example—the "shrugging" allegation—that may indicate what is at stake with respect to this core of objective evidence.

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35. Saying that someone lied in court is not *necessarily* harmful to that person. If a foreign power captured a CIA agent and forced the agent to testify in its court, we would probably *applaud* the agent on his subsequent release if in fact he lied to that court.

36. *Id.* at 2705-07. It is safe to predict that we will soon see a plethora of law review notes and comments addressing the opinion-fact dichotomy in the *Milkovich* case. Because we can draw no determinate line between fact and opinion, the alleged dichotomy can lead only to unproductive theorizing.

37. *Id.* at 2706.

38. *Id.* at 2709-10 (Brennan, J., dissenting). Justice Marshall joined Justice Brennan's opinion. *Id.* For a sound, skeptical analysis, see Halpern, *Of Libel, Language, and Law: New York Times v. Sullivan at Twenty-Five*, 68 N.C.L. REV. 273, 300-11 (1990).

39. See *Milkovich*, 110 S. Ct. at 2706; *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777, *cert. denied*, 475 U.S. 1134 (1986).

40. *Milkovich*, 110 S. Ct. at 2707 (quoting Diadiun, *Maple beat the law with the 'big lie,' Willoughby News-Herald*, Feb. 29, 1974).

41. *Id.* at 2699 n.2, 2708.

42. J. JOYCE, *FINNEGANS WAKE* (1939).

According to the newspaper article at issue in the case, at the high school wrestling meet,

Milkovich's ranting from the side of the mat and egging the crowd on against the meet official and the opposing team backfired . . . and resulted in first the Maple Heights team, then many of the partisan crowd attacking the Mentor squad in a brawl which sent four Mentor wrestlers to the hospital.<sup>43</sup>

A hearing by the Ohio High School Athletic Association Board of Control followed, resulting in the placement of Milkovich's Maple Heights team on probation for a year.<sup>44</sup> The author of the newspaper article, J. Theodore Diadiun, goes on to say the following about Coach Milkovich and Superintendent of Schools H. Donald Scott:

[T]hey chose to come to the hearing and misrepresent the things that happened to the OHSAA Board of Control, attempting not only to convince the board of their own innocence, but, incredibly, shift the blame of the affair to Mentor.

I was among the 2,000-plus witnesses of the meet at which the trouble broke out, and I also attended the hearing before the OHSAA, so I was in a unique position of being the only non-involved party to observe both the meet itself and the Milkovich-Scott version presented to the board.

Any resemblance between the two occurrences [*sic*] is purely coincidental.

To anyone who was at the meet, it need only be said that the Maple coach's wild gestures during the events leading up to the brawl were passed off by the two as "shrugs," and that Milkovich claimed he was "Powerless to control the crowd" before the melee.<sup>45</sup>

The Board of Control seemingly did not accept Milkovich's story and placed him on probation,<sup>46</sup> but the Ohio Court of Common Pleas reversed the Board. Apparently, the court accepted Milkovich's story.

Rehnquist stated that a determination of whether Milkovich in fact lied to the court of common pleas "can be made on a core of objective evidence by comparing, *inter alia*, [Milkovich's] tes-

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43. *Milkovich*, 110 S. Ct. at 2698-99 n.2 (quoting Diadiun, *supra* note 40).

44. *Id.* at 2698.

45. *Id.* at 2699 n.2 (quoting Diadiun, *supra* note 40).

46. *Id.* at 2698.

timony before the OHSAA board with his subsequent testimony before the trial court.”<sup>47</sup> But what did Rehnquist expect that such a comparison would reveal? There are only two logical possibilities: (1) Milkovich told the OHSAA board the same thing he told the trial court, or (2) Milkovich told the OHSAA board one story and the trial judge a different story. In the first situation, there can be no objective evidence of perjury on the basis of comparing two stories that are the same; Milkovich may have been lying *consistently*. In the second situation, even if Milkovich told the judge a different story from the one he told the OHSAA board, we cannot determine from the fact that the two stories were different whether he lied to the trial judge. It is equally probable that he lied to the OHSAA board and told the trial judge the truth. Hence, in either situation, the core of objective evidence simply does not exist.

On remand, the Supreme Court gave Milkovich no guidance. He has no way to prove that he was telling the truth to the trial judge. Similarly, the Court gave Diadiun no guidance. All he can do is repeat his story that he saw Milkovich ranting, not shrugging, and that he said so in his column.<sup>48</sup>

Nor has the Court given the trial judge any guidance on remand. How is the judge supposed to determine whether Milkovich was shrugging or ranting? If he asks the partisan crowd that was present at the wrestling meet, they might side with Coach Milkovich’s version. But is not a newspaper reporter entitled to report what he sees? Does not the first amendment privilege him to report that Milkovich was ranting, if that is what he saw, rather than constrain him under fear of legal punishment to report what a partisan crowd might want him to report? And is not the reporter entitled to state his own opinion

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47. *Id.* at 2707.

48. *See id.* at 2699. The only other logical possibility—presumably farfetched in this particular case—would be to show that Diadiun was lying intentionally when he characterized Milkovich’s behavior as ranting and not shrugging. Yet this may be the only path open to Milkovich if he is to discharge his burden of proving that Diadiun uttered a libelous *falsehood*. As Justice Brennan pointedly said in a footnote in his dissenting opinion,

I would think that documentary or eyewitness testimony that the speaker did not believe his own professed opinion would be required before a court would be permitted to decide that there was sufficient evidence to find that the statement was false and submit the question to a jury. Without such objective evidence, a jury’s judgment might be too influenced by its view of what was said.

*Id.* at 2713 n.9 (Brennan, J., dissenting).

that Milkovich lied both to the Board and to the common pleas court when Milkovich told them that he had only shrugged? How is the trial judge, reading the Supreme Court's opinion, possibly going to figure out what the law of libel is in this case?

4. We fare no better in analyzing what, if anything, this decision teaches lower courts when we consider the one issue that actually divided the majority from the dissenters. Rehnquist stated the "dispositive question" in the case as whether "a reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding."<sup>49</sup> In dissent, Justice Brennan found that the statements "cannot reasonably be interpreted as either stating or implying defamatory facts."<sup>50</sup> Brennan pointed out that because reporter Diadiun clearly indicated that he was not present at the trial court proceeding, no reasonable reader could interpret him as saying that Milkovich perjured himself at the trial.<sup>51</sup> Nor did Diadiun ever say that Milkovich committed perjury. Diadiun was only using exaggerated rhetoric and hyperbole. Moreover, he sprinkled his article with such cautionary words as "seemed," "probably," and "apparently."<sup>52</sup> The majority, however, said that other things in the newspaper article implied that Milkovich committed perjury, including the sentence, "Anyone who attended the meet . . . knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth."<sup>53</sup> The dissenters, quoting the same sentence, said that the phrase "knows in his heart" clearly warrants the opposite conclusion because it signals that Diadiun "[did] not purport to have researched what everyone who attended the meet knows in his heart."<sup>54</sup>

It might be helpful to speculate what went on in the judicial conference when the Justices retired to vote on *Milkovich*. Suppose that three Justices said, "This article is clearly libelous." Suppose that three others, including the two Justices who eventually dissented, said, "No, it is clearly not libelous." The Justices then quoted phrases from the article, most likely those that I summarized in the preceding paragraph. The straw vote was three for libel, three for free speech, and three undecided. What

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49. *Id.* at 2707.

50. *Id.* at 2709 (Brennan, J., dissenting).

51. *Id.* at 2711 (Brennan, J., dissenting).

52. *Id.* at 2711-12 (Brennan, J., dissenting).

53. *Id.* at 2698 (quoting Diadiun, *supra* note 40).

54. *Id.* at 2713 (Brennan, J., dissenting).

then occurred, we might surmise, was a process akin to Kenneth Arrow's description of the social welfare function in group decisionmaking.<sup>55</sup> The three Justices voting for libel offered to modify their position: instead of deciding the libel question, let a fact-finder on remand decide it. The three undecided Justices went along with this modified position, which presumably won an extra vote from one of the three Justices who wanted to find the article nonlibelous. As a result, seven Justices say a reasonable person could find the article libelous, and two Justices adhere to their original position and say that no reasonable person could find the article libelous.

Whether my guess fits the real facts that occurred does not matter. The dynamics of group decisionmaking should at least make the guess plausible. What resulted was the worst possible decision: leave the question to a jury. The initial straw vote (I speculate) resulted in a sound division: either the article is libelous or it is not. The Court can discover no more "facts"; a jury has no special provenance to interpret the article any better than a judge. Yet if a majority on the Supreme Court would not hold that the article was libelous, and if some Justices thought that the article was clearly privileged speech, the result may well have been to compromise by leaving the question to a jury.

A jury will surely fare no better than the Supreme Court Justices in interpreting the article. Some jurors will feel the way the majority did, and some will side with the dissenters' viewpoint. Different juries will reach different results. The jury can be no more single-minded on this point than the Court itself. One might as well flip a coin.

Whether heads or tails comes up, no one will be the wiser about the law of libel. There will never be another newspaper article exactly like the one Diadiun wrote. Even in roughly similar cases, the incoherence of the Court's opinion virtually guarantees random lower court decisionmaking in this area.<sup>56</sup>

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55. See K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 22-33 (2d ed. 1963).

56. To be sure, a more cynical view is possible: the Court knew that its own opinion was incoherent, but wrote it anyway just to use *Milkovich* as a vehicle for saying that the laws of libel do not necessarily shield matters denominated as "opinion." This proposition may remove a source of confusion from prior cases, and it may even encourage more libel lawsuits. Perhaps that is all the Court wants—if, as I have argued elsewhere, the Court is really unconcerned with what happens to the parties and is interested only in enacting broad social legislation under the guise of judicial decisionmaking. See D'Amato, *Aspects of Deconstruction: Refuting Indeterminacy with One Bold Thought*, 85 Nw. U.L. REV. 113 (1990).



Only one difference will exist: instead of asking the juries to determine whether the text is libelous, the Court will ask juries to determine whether the context is libelous. And that is a difference that makes no difference.

#### IV. IS ANY SPEECH HARMFUL PER SE?

The Supreme Court in *Milkovich* came close to holding as libelous per se a statement that someone lied in court. Perhaps an extra sensitivity to truth in judicial proceedings impels judges to regard a charge of perjury as clearly defamatory. To be sure, it would be convenient if courts could hold some class of utterances as per se harmful to the audience, just as in medieval times believers considered blasphemy per se harmful to God. I can think of no utterance as harmful per se, however, even though many utterances can have harmful consequences to the audience. Independent proof of harmful consequences is possible. For example, if I write falsely that someone is a perjurer and my writing leads to his dismissal from his job, then assuming he proves this causal chain, my statement will have defamed that person, and he will have an action in libel against me.

When we consider per se harmful words, however, we run up against an indeterminate culture that is changing so rapidly in the television age that today's startling expression is next year's parody and the following year's playground yell. We can follow a given expression through its initial shock value a year ago to today's rap music lyric and to next year's television commercial. At an accelerating and almost dizzying pace, our culture is legitimizing expression that in the recent past it considered outrageous, if not sinful. Can any young person today even begin to comprehend what all the fuss was about Henry Miller's *Tropic of Cancer*<sup>57</sup> fifty years ago? Can today's film viewers put themselves in the mindset of the era of Breen and Hayes' offices and the Legion of Decency, when motion pictures were required to show single beds in bedroom scenes<sup>58</sup> or when gangster movies were not allowed to end their stories with the suggestion that the criminal successfully got away with committing the crime? Today's most successful standup comedians—Eddie Murphy and Richard Pryor—use language far “dirtier” than the routines that

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57. H. MILLER, *TROPIC OF CANCER* (1934).

58. The idea of an adult couple contemplating retiring together to a double bed was considered obscene.

prompted Lenny Bruce's arrest and prosecution in the 1960's.<sup>59</sup> Such television sitcoms as *All in the Family* routinely excoriate minority groups with epithets that were punishable as criminal acts under the reasoning of *Chaplinsky v. New Hampshire* in 1942.<sup>60</sup>

The poor defendant who is caught in an utterance in a town that has not yet heard it (but will be hearing it on prime-time television in a year or two) could be prosecuted and sent to jail if we accept Professor Tribe's position that "[t]he Constitution may well allow punishment for speaking words that cause hurt just by their being uttered and heard."<sup>61</sup>

Suppose someone calls me a "wop." Are my feelings hurt because the epithet is true or because it is false? If someone calls me a "mickey," presumably I should not feel hurt because the epithet does not apply. But then, why should I feel hurt if I am called a "wop"? Have I impliedly chosen to say that it applies by virtue of my very declaration that the statement has harmed me?

It seems that many levels of meaning and interpretation are hidden in the apparently simple claim that someone is hurt just because someone else uttered certain words. Apparently, no one in *Milkovich* noticed this problem. The reporter Diadiun claimed that Coach Milkovich was "ranting," whereas Milkovich claimed he was only "shrugging." Presumably the actor is in the best position to know what he is doing; Milkovich may well have thought he was shrugging, may well have tried to shrug, may well have commanded his shoulders and arms to shrug, and yet Diadiun looked at his behavior and interpreted it as "ranting." How credible is Diadiun's statement that Milkovich was *lying* when he said he was shrugging? Milkovich may have sincerely thought he was shrugging. Perhaps Diadiun's statement should be interpreted only as saying, "I saw Milkovich ranting; he later told the court he was shrugging, but it sure looked like ranting to me." Perhaps that is what we should interpret Diadiun as really saying when he wrote that Milkovich lied to the court when he told the court he was shrugging.

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59. My favorite example of meta-mindless censorship occurs in the rerecording of Cole Porter's "Anything Goes" in the 1950's. Porter's original lyrics, written in 1934, were: "Good authors, too, who once knew better words, Now only use four-letter words writing prose—anything goes!" These lyrics were considered too suggestive for radio broadcast in the 1950's, so the phrase "four-letter words" was changed to "three-letter words."

60. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

61. L. TRIBE, *supra* note 1, § 12-10, at 856.

As far as Milkovich is concerned, he could have interpreted Diadiun's statement as only Diadiun's erroneous interpretation of what Milkovich intended to do. Milkovich, as actor, is in no better position to say definitively that he was in fact shrugging instead of ranting than Diadiun, as observer, was to say that Milkovich was ranting instead of shrugging. Milkovich is in a better internal position only to know his own mind, and because *we*, as readers or even as jurors, know that Diadiun could not have known what was in Milkovich's mind, we cannot credibly conclude that Diadiun's statement that Milkovich was *lying* was anything other than an abbreviated and hyperbolic way of saying, "I saw him ranting even though he told the court he was shrugging and even though he may have thought that he was only shrugging."

Strong social pressures compel us to find certain utterances harmful *per se*. The Catholic Church used to publish a list of "condemned books" that it forbade Catholics to read<sup>62</sup> because those books might tempt Catholic readers to stray from the faith. Many groups agitate for media censorship of epithets that they say degrade them. There is always an *A* who is worried about the effect on *B* of what *C* says. The best strategy for *A* is to argue that *C*'s words are harmful in themselves. That way, *A* spares himself or herself the need to prove actual harm to *B*. In the area of censorship, obviating the need of such proof is often critical because *B* usually desires access to the very material that *A* is trying to suppress in order to prevent harm to *B*.

The area of pornography regulation illustrates well this point. Suppose *A* wants to criminalize the dissemination of pornographic materials. *A* has three plausible approaches. First, *A* might call it nonspeech; second, nonpolitical speech; and third, harmful speech. Decades ago, the first approach worked fairly well. In *Roth v. United States*,<sup>63</sup> the Supreme Court, capitalizing upon an incredible blunder by petitioners' lawyers, held that "[o]bscenity is not within the area of constitutionally protected speech or press."<sup>64</sup> The blunder that the petitioners made was their decision not to appeal the jury determination that the materials the petitioners circulated were "obscene."<sup>65</sup> Thus, they invited the tautology the Supreme Court was happy to give them: obscenity,

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62. Immanuel Kant's works were on the list.

63. 354 U.S. 476 (1957).

64. *Id.* at 485.

65. *Id.* at 481 n.8.

*whatever it might be*, is not "speech" as the first amendment uses that term. Conviction affirmed! Other attorneys in the aftermath of *Roth*, however, began challenging the *factual* component of arrests for disseminating pornography, arguing that the particular materials confiscated were not factually obscene.

Sixteen years after *Roth*, the Court reexamined "the intractable obscenity problem" in *Miller v. California*.<sup>66</sup> The Court in *Miller* attempted to lay down verbal guidelines in precisely the manner that pragmatic indeterminacy insists must fail. The Court allowed juries to find materials obscene if they appeal to the "prurient interest," are "patently offensive," and lack "serious literary, artistic, political, or scientific value."<sup>67</sup> Such "standards" are no better than,<sup>68</sup> nor even significantly different from, the "outrageousness" test that the Court invalidated in *Hustler Magazine*.<sup>69</sup> Short of a case-by-case examination of all pornographic materials by appellate courts and by the Supreme Court, along the lines of Justice Stewart's candid "I know it when I see it,"<sup>70</sup> the *Roth-Miller* content-based approach is withering away.<sup>71</sup> The Court has probably reached the conclusion that no single determination that a given X-rated movie is obscene will serve as precedent for another, different X-rated movie. Thus, the only workable solution is for the Court to view each and every X-rated movie. (After viewing the first dozen or so, the self-inflicted penalty from then on would clearly be cruel and unusual.)

If calling pornography "nonspeech" cannot work because it leaves lower courts and juries a free hand in banning individual films, proponents of regulation early tried a second approach: pornography is nonpolitical speech. Consider the assertion that if the Framers intended to protect political speech, an X-rated pornographic movie, for example, must fall outside the meaning of the first amendment because it has no political speech content

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66. 413 U.S. 15 (1973) (quoting *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 704 (1968) (Harlan, J., concurring and dissenting)).

67. *Id.* at 24.

68. That pornographic materials are now regarded as eminently "political," see *infra* note 75, should be enough to blow a hole in the *Miller* "test."

69. See *supra* note 16 and accompanying text.

70. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

71. See Taylor, *Hard-Core Pornography: A Proposal for a Per Se Rule*, 21 U. MICH. J.L. REF. 255, 257-60 (1987-88); cf. Helms, *Art, the First Amendment, and the NEA Controversy*, 14 NOVA L. REV. 317, 320-21 (1990) (*Miller* standard unworkable for government funding of art).

whatsoever.<sup>72</sup> The conclusion that pornography is neither "political" nor speech gained almost universal acceptance a few decades ago. Any suggestion that one could possibly label a film of unclothed adults engaging in quasi-acrobatic, semirhythmic activities as "speech having a political content" would have struck academic lawyers as "weird," "clearly erroneous," "frivolous," and wholly outside the permissible realm of normal discourse about law.

Today, however, some radical feminists have turned the situation around. They have asserted that pornography not only is political speech, but it is the most basic and political of all speech. It is ironic—and additional proof of indeterminacy—that the leading proponents of this viewpoint nevertheless wish to ban pornographic movies!<sup>73</sup> They have pointed out that pornographic movies dealing with sexual relationships between adults depict attitudes of dominance and submission and that these attitudes concern fundamental power relationships in our society and hence are profoundly political.<sup>74</sup> Thus, instead of pornographic movies being so unrelated to political speech that one would label any proponent of that view a nihilist, the radical feminists have persuaded many people, certainly myself included, that we could hardly have expression that is more political than a pornographic movie.<sup>75</sup>

Of course, if a pornographic movie is political speech today, it was political speech in the 1950's. The fact that most people did not then recognize it as such does not mean that its nature somehow changed between 1950 and today. What seemed like a weird misinterpretation in the 1950's has simply become a commonplace interpretation today by virtue of our culture, and not

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72. Under *Miller v. California*, 413 U.S. 15 (1973), the first amendment does not protect sexually explicit speech that is obscene. In subsequent cases, the problem of determining whether any given expression is obscene has proved well-nigh intractable. See, e.g., *Sharp v. Texas*, 414 U.S. 1118, 1119 (1974) (Brennan, J., dissenting); *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973).

73. See *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

74. See, e.g., A. Dworkin, *Pornography is a Civil Rights Issue for Women*, 21 U. MICH. J.L. REF. 55, 65 (1987-88) ("the reality of pornography . . . is that it is the act of sexual subordination of women"); MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

75. "[S]exual speech is political. One core insight of modern feminism is that the personal is political. The question of who does the dishes and rocks the cradle affects both the nature of the home and the composition of the legislature." Hunter & Law, *Brief Amicus Curiae of Feminist Anti-Censorship Taskforce, et al.*, in *American Booksellers Association v. Hudnut*, 21 U. MICH. J.L. REF. 69, 119 (1987-88).

by virtue of anything particularly different in the content of X-rated movies.<sup>76</sup>

We thus come to the third approach: calling pornography Harmful Speech Type II. It is probably the only tactic that offers any hope of success. All that is necessary is to convince a court that exposure to pornographic materials per se, without particular regard to their individual content or subject matter, causes sexual violence. This approach removes the problem of identifying harm with content.

Former Attorney General Meese hoped the Attorney General's Commission on Pornography would establish a basis for the per se harmful effects of viewing pornographic materials. The Commission indeed reached a "unanimous and confident" conclusion that "substantial exposure to sexually violent materials as described here bears a causal relationship to antisocial acts of sexual violence and, for some subgroups, possibly to unlawful acts of sexual violence."<sup>77</sup> Armed with this governmental commission's "finding" of a "causal relationship," prosecutors are achieving increasing success in banning the dissemination of pornographic materials in cities and towns across the United States.<sup>78</sup> Their strategy is a good one, not only because busy courts are apt to take the finding of causal relationship by a governmental commission at face value, but also from the point of view discussed in this Essay that the harm appears to be separate from the question of the particular content of the materials. So long as a court labels the materials "pornographic" in the broad sense of that term, the Court can simply tack on the Pornography Commission's finding of "causal relationship" and thus prove the requisite social harm.

One may, however, challenge this harmful speech approach to pornography on two grounds. First, the Commission's key finding of causal relationship may have been spurious. I argued in another

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76. I have made this point with respect to the constitutional provision regarding the age of the President. I used a futuristic context as a vehicle for reinterpreting that provision and then argued that even today the existence in the imagination of such a potential context could radically reinterpret the present legal significance of the constitutional provision. See D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-Aged President*, 84 NW. U.L. REV. 250, 255 (1989).

77. ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, U.S. DEP'T OF JUST., FINAL REPORT 326 (1986).

78. See D'Amato, *A New Political Truth: Exposure to Sexually Violent Materials Causes Sexual Violence*, 31 WM. & MARY L. REV. 575, 575 n.2 (1990).

issue of this Journal that the finding of causation was scientifically erroneous; it was just a political invention designed to manufacture a harm that could give prosecutors of pornography a non-content-based weapon.<sup>79</sup> More significant from a jurisprudential standpoint, a court's actual labelling of certain materials as pornographic is necessarily indeterminate and will shift from case to case and over time.<sup>80</sup> R-rated movies are increasingly encroaching on the domain of what used to be labelled X-rated.<sup>81</sup> Zoning and public display ordinances do not solve the problem of what is pornographic, but at best deflect it to other fields of battle.<sup>82</sup> It seems that no way exists to instruct lower courts in making content-based distinctions on what is pornographic and what is not, even if courts are given freedom to pick and choose among X-rated movies those that are legally obscene.<sup>83</sup> Yet there is momentum in this area due to the zealotry of certain prosecutors taking up Mr. Meese's crusade against pornography.<sup>84</sup>

The root problem in pornography is similar to that in *Milkovich*. In *Milkovich*, the Court assumed from the content of the alleged libel—that one person accused another person of lying to a court—that the latter was in fact harmed. As I have argued in

79. I attempted such an argument at length. *See id.* at 578-604.

80. Contributing to the uncertainty is the background cultural perception regarding the AIDS epidemic that perhaps, after all, viewing pornographic materials is a desirable form of "safe sex."

81. Theatrical-release movies are invariably more extreme than those shown on network television because of the commercial need to lure people away from free television and get them to pay for tickets to the cinema. But the time period for theatrical-release movies to be shown on television is getting increasingly shorter; the movies go from theatre to cable to VCR to network television. Hence, the theatrical releases predictably should increase ever more rapidly in sexual explicitness. What this increase means is that soft-core pornography is bombarding our culture such that the average viewer will soon become jaded, if not insensitive, to the harder-core material. In the predictable future, prosecutors of pornography will find it increasingly difficult to get juries to return convictions. (Over the longer term, however, one cannot rule out a massive social revulsion against pornography and a "born-again" approach to its regulation that could take us back to more innocent times.)

82. *See, e.g.,* Staffelbach, *Pope v. Illinois: Suggestions for Civil Regulations of Non-Obscene Pornographic Material and Adult Businesses*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 131 (1989).

83. The assumed line between pornography and nonpornography would be located in the region of soft pornography. In contrast, if we take the radical feminist position that pornography is a form of highly political speech, the assumed line between political-speech pornography and non-political-speech pornography would be located at the opposite end of the spectrum—in the extreme hard-core region of pornography. Under the radical feminist view, *see supra* note 75, the more violent and sadomasochistic the film, the more its message is clearly political! Thus, the (hopeless) attempt by lower courts to define pornography is being challenged at both ends of the spectrum!

84. *See* Cohn, *The Trials of Adam and Eve: Are the Feds being overzealous in fighting porn?*, NEWSWEEK, Jan. 7, 1991, at 48.

this Essay, one of the biggest mistakes that one can make in the free speech area is to deduce from the content of the utterance the fact of harm. The claimant should prove harm independently from the utterance if we are to give free speech breathing room. If particular pornographic materials cause harm, one must demonstrate that harm by tests other than having the trier of fact look at the pornographic materials and guess whether they would cause harm.<sup>85</sup>

Both the majority and dissent in *Milkovich*<sup>86</sup> prominently cited *Hustler Magazine*. I think that fact betokens an implicit recognition that what is at issue in all Type II areas of harmful speech, including individual and group libel and pornography, is the indeterminacy of lower court decisionmaking. The only rational way to respond to the fact of such indeterminacy is to deny a cause of action to anyone who alleges that an utterance itself caused harm. That is the road I believe the Court is generally taking. I believe that future cases will interpret the very incoherence of the *Milkovich* result as a point in favor of the indeterminacy recognized as the decisional basis in *Hustler Magazine*. Grounding judicial protection of speech on the uncertainty of lower court results should eventually reduce the incidence of defamation cases and maybe even catch up to the permissiveness in the pornography area that is already part of our culture.

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85. See D'Amato, *supra* note 78, at 587-90 (describing and criticizing such psychological tests).

86. *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695 (1990).