1979

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Repository Citation
Schauer, Frederick, "Speech and Speech - Obscenity and Obscenity: An Exercise in the Interpretation of Constitutional Language" (1979). Faculty Publications. 883.
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Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language

FREDERICK SCHAUER*  

Commentators have criticized the Supreme Court’s use of the “two-level” theory of speech to place obscenity beyond the pale of the first amendment. They charge the Court with shirking the task of balancing first amendment values and the states’ interests in regulating obscene material. Professor Schauer meets this criticism by examining the meaning of the word “speech” in the context of the purposes of the first amendment and the Constitution as a whole. He concludes that “speech” does not include a category of obscenity that performs the function of a surrogate sexual act and is lacking in communicative content. The Court’s treatment of obscenity, he maintains, is properly aimed at the isolation of such a category of material and actually operates to safeguard speech at the fringes of the amendment’s coverage.

A colleague of mine has observed that the essence of constitutional criticism consists of being “kind to your colleagues and unkind to the Supreme Court.” Although critical academic commentary about judicial decisions performs a valuable function, there are times when such criticism is misplaced. The Supreme Court can be right and prevailing academic criticism can be wrong about the same substantive issue. One such issue is the Supreme Court’s continued adherence to the “two-level” theory of speech in which obscenity is deemed not to be speech and thus not encompassed by the first amendment.


Earlier versions of this article have been presented in lectures at Cambridge University, the University of Nottingham, University College, Cork, and to the British Committee on Obscenity and Film Censorship. This version has benefited greatly from the comments and questions of those who have listened to these earlier presentations. I am also indebted to those with whom I have discussed in depth the basic themes of this article, especially Tom Collins, Patrick Elias, Mary Jane Morrison, Paul O’Higgins, Bernard Williams, and Glanville Williams. Without the incisive questioning of these people I would never have been able to refine my ideas to the present state. What errors and omissions remain are solely my own responsibility.

I owe a particular debt to William Van Alstyne, who provided detailed and insightful commentary on an earlier draft of this manuscript. The final product owes much to his forceful criticism, and I have benefited greatly from the necessity of responding to his arguments and critical evaluation. Nothing in the foregoing two sentences should be taken to indicate that Professor Van Alstyne agrees with any of the arguments in this final version.


3. The label “two-level” theory of speech was first used by Kalven, The Metaphysics of the Law of

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intellectually dishonest because it manipulates words in order to avoid the more difficult problem of balancing first amendment values against the state's asserted interests in regulating obscene material. But this criticism misconstrues the philosophical underpinnings of the non-speech approach and is itself disingenuous in assuming that the definition of the word "speech" is the same in constitutional language as in ordinary discourse. An examination of the purpose and interpretation of constitutional language leads to a clearer understanding of the analytical basis for the Court's approach to the particular issue of obscenity. Such analysis reveals that the Court's method is fundamentally sound and that it is the critics and not the Court that have failed to see the point.

In order fully to understand the Court's approach to obscenity, it is necessary to ignore much of what the Court has said about its approach, and look instead at what it has done. The Court has unwittingly encouraged criticism of its treatment by using language that is inconsistent with the method actually employed, and by demonstrating either an unwillingness to

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5. The preeminent philosophical justification for the Court's approach is Finnis, "Reason and Passion": The Constitutional Dialectic of Free Speech and Obscenity, 116 U. Pa. L. Rev. 222 (1967), an article to which I am heavily indebted.

6. See, e.g., H. POLLACK & A. SMITH, CIVIL LIBERTIES AND CIVIL RIGHTS IN THE UNITED STATES 79 (1978) ("Despite the Court's semantic gymnastics, obscenity is speech. Wishing won't make it so, and no matter how many times the Court says that pornography is non-speech, in the real world it is speech . . . ."); L. TRIBE, supra note 4, at 66; Shiffrin, Defamatory Non-Media Speech and First Amendment Methodology, 25 U.C.L.A. L. Rev. 915, 944 (1978).


8. See text accompanying notes 123-84 infra.

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Obscenity, 1960 Sup. Ct. Rev. 1, 10. The late Professor Kalven has been credited with having "destroyed the intellectual foundations of the two-level theory." Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20, 30 (1975). A closer reading of Kalven's article, however, casts doubt on this assessment. By assuming that obscenity is speech, 1960 Sup. Ct. Rev. at 3, Kalven fails to address the underlying premise of the two-level theory. Kalven would classify obscenity as "speech" under the first amendment and would insist on applying a balancing test to determine whether such speech is protected. The central proposition of the two-level theory and this article, however, is that some utterances are not speech at all, and that a balancing test need not be applied to exclude them from protection. Furthermore, Kalven admitted that a limitation of legal "obscenity" to hardcore pornography might legitimate the two-level approach. Id. at 13, 17, 25, 43. The Court has limited "obscenity" in this manner, thus rendering much of Kalven's criticism suspect. Kalven feared that the two-level theory would become a general method of first amendment analysis. Id. at 17. Although this has not in fact happened, his fear is a reasonable one. The non-speech approach is uniquely suited to the treatment of hardcore pornography. But the fact that not all unprotected speech can be treated as non-speech does not render invalid an approach that treats certain utterances as wholly outside the scope of the first amendment. The latter issue is the focus of this article but was not directly addressed by Kalven.

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2. The term "non-speech" appears in N. DORSEN, P. BENDER & B. NEUBORNE, supra note 4, at 52. See supra, infra note 4, at 52.
treat thoroughly the implications of the non-speech approach or a failure to perceive the full range of those implications.

The resulting inadequacies of the Court's articulation make it appropriate at this point to set aside the prevailing definition of obscenity, stated in Miller v. California and elaborated in subsequent cases. It is of course imperative that the definition employed be consistent with the underlying analytical structure, but deficiencies in the definition need not necessarily reflect deficiencies in the distinctions the definition is intended to embody. In order to clarify the problem, it is best to ignore for now the substance of the definition and focus instead on what the Court's definition of obscenity is designed to accomplish in the context of the non-speech methodology.

After excluding any consideration of the Supreme Court's language or its test for obscenity, the remaining analytical skeleton can be formulated in the following manner:

There is a category of pictorial or linguistic conduct (legal obscenity) that is not speech. Because it is not speech, it is not among the activities within the scope of the first amendment. Thus, the

9. 413 U.S. 15 (1973). The Miller test for obscenity is as follows:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24. It is not the purpose of this article to analyze every aspect of this test. For further analysis of this question, see F. Schauer, The Law of Obscenity 69-168 (1976).

10. In Jenkins v. Georgia, 418 U.S. 133 (1974), the Court noted that while Miller approved instructions to juries that they apply standards of a hypothetical statewide community in obscenity cases, such instructions need not specify what community was appropriate nor require application of a "national standard." Id. at 157. Furthermore, even though questions of appeal to the prurient interest or of patent offensiveness are questions of fact, the Court found that Miller permitted jury discretion to determine what was patently offensive subject to the independent review of constitutional claims by appellate courts. Id. at 160. In Hamling v. United States, 418 U.S. 87 (1974), the Court stated that although distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials, the federal statute is not unconstitutional because of the failure of application of uniform standards of obscenity. Id. at 106. The Court reaffirmed its decision in Mishkin v. New York, 383 U.S. 502, 508-09 (1966), that in measuring the prurient appeal of allegedly obscene materials, consideration may be given to the prurient appeal of the material to clearly defined deviant sexual groups. 418 U.S. at 128. Moreover, the Court cited with approval Ginzberg v. United States, 383 U.S. 463, 470 (1966), which held that evidence of pandering could be relevant in the determination of the obscenity of the materials at issue, as long as the proper constitutional definition of obscenity is applied. 418 U.S. at 130. In Marks v. United States, 430 U.S. 188 (1977), the Court found that the due process clause of the fifth amendment precludes retroactive application of the Miller standards to illegal conduct occurring before Miller but tried subsequent thereto if those standards would impose criminal liability for conduct not punishable before Miller. Id. at 191; see id. at 196-97 (reaffirming Hamling v. United States, 418 U.S. at 102). The Court in Smith v. United States, 431 U.S. 291 (1977), held that the state statutory definition of community standards for appeal to the prurient interest and patent offensiveness was relevant but not conclusive on the issue of the standards to be applied in a federal prosecution. Id. at 307-08. Later the same year, the Court rejected a claim that a state statute was overbroad because it failed to state specifically the kinds of sexual conduct proscribed; the statute's apparent adoption of the Miller explanatory examples gave substantive meaning to the statutory provisions. Id. at 775. Finally, in Pinkus v. United States, 436 U.S. 293 (1978), the Court held that children may not be included as members of the community for purposes of determining the effect of obscenity on the "average person." Id. at 297.
regulation of such conduct is not subject to first amendment standards of scrutiny.\textsuperscript{11}

Analysis of the Court's approach breaks down into a three-step evaluation. First, is it possible to construct a theoretical or philosophical foundation for a category of non-speech consistent with basic first amendment values? Second, does some or all pornographic material fall within that category? Third, does the Supreme Court's definition of obscenity properly describe such a category?

I. "SPEECH" AS A TERM OF ART

A. THE NEED TO DEFINE

Assuming that there is no meaningful distinction between "speech" and "press" in obscenity law analysis,\textsuperscript{12} the relevant text of the first amendment reads "Congress shall make no law . . . abridging the freedom of speech . . . ."\textsuperscript{13} Some definition of the word "speech" is unavoidable. The first amendment does not say that Congress shall make no law abridging the freedom of action, the freedom of contract, the freedom to sell heroin, or the freedom to fly a kite. The first amendment is not a total prohibition of governmental action, nor can it sensibly be taken to apply the same burden of justification to all governmental regulation. Implicit in the first amendment is the notion that there is on the one hand a general standard of justification for governmental action, and on the other hand a higher standard when speech is the object of the regulation.\textsuperscript{14} Considerations that would be sufficient to justify official action not constrained by a specific constitutional prohibition may be insufficient to justify restrictions on speech. The first amendment protects speech even though it may produce consequences that could be regulated constitutionally if those consequences were caused by conduct other than speech.\textsuperscript{15} In order that the first amendment be applied effectively to

\textsuperscript{11} This formulation is derived primarily from Roth v. United States, 354 U.S. 476 (1957), Miller v. California, 413 U.S. 15 (1973), and Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973). This basic analytical structure is assumed rather than discussed in the Court's other obscenity opinions.


\textsuperscript{13} The type of sexually descriptive material generally at issue in litigation is of such a nature that the question of any distinction between speech and the institutional press is likely never to arise. In those cases in which material in the press has been charged with being obscene, the material has been found clearly nonobscene without any reference to special press protection. See Bucolo v. Florida, 421 U.S. 927 (1975), enforced sub nom. Bucolo v. Adkins, 432 U.S. 641 (1976); Kois v. Wisconsin, 408 U.S. 229 (1972).

\textsuperscript{14} Such a distinction is indeed inherent in the concept of a "right." See R. DWORKIN, TAKING RIGHTS SERIOUSLY 190-91 (1977). This distinction is implicitly embodied in United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

\textsuperscript{15} Scanlon, A Theory of Freedom of Expression, 1 PHIL. & PUB. AFF. 204, 204 (1972) ("There will be
carve out a category of activity for special protection, consideration must be
given to the meaning of the word “speech” as used in the first amendment.
The point here is not that it is necessary to adopt a “definitional,” “definitional balancing,” or “categorization” approach to first amendment
analysis. Rather it is that some definition of the word “speech” is required
under any approach to first amendment methodology simply to delimit the
scope of the constitutional protection.
Definitions are particularly important in the context of the “literalist”
method of first amendment analysis, a method that frequently leads to an
“absolutist” view of first amendment protection. But absolute in force is not
the same as unlimited in range or scope. A principle or a right can be
absolute when applied without being applicable to every situation. Even the
staunchest literalist or absolutist would laugh if a defendant in a prosecution
for murder, rape, speeding, or littering raised the first amendment as a
defense. These activities are not covered by the first amendment because they
are not speech. They fall outside the range of activities to which the first
amendment applies. If a defendant in a murder case raised the first
amendment as a defense to a prosecution for disintegrating the victim with a
twelve-gauge shotgun, our response would not be that prosecution is per­
mitted because there is a “clear and present danger” or a “compelling state
interest,” but instead that such standards are applicable if and only if the
activities concerned are in fact speech. The rigorous standard of review,
imposing a heavier burden of governmental justification, applies only to
government regulation of human activity described as “speech” in the
constitutional sense.

One method that adds a measure of sophistication to the literalist or
absolutist approach is referred to as “definitional balancing.” This method
also recognizes that the force and scope of a right are, or should be, distinct,
and that the difficulties associated with balancing first amendment interests

amendment rights cannot be “balanced” because object of adopting amendment was to put freedoms
protected therein completely beyond congressional control); Barenblatt v. United States, 360 U.S. 109, 143-
44 (1959) (Black, J., dissenting) (Bill of Rights means what it says and court must enforce that meaning;
balancing by court improper); Roth v. United States, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting)
(first amendment prohibition in terms absolute; designed to preclude courts as well as legislatures from
weighing values of speech against silence). See generally DuVal, Free Communication of Ideas and the
Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication, 41 GEO. WASH. L.

18. Assume the crime consisted of discarding an apple core, not a political leaflet.


established the same strict scrutiny, or heavy burden of justification, that is implicit in the clear and present
danger test.

21. See generally, T. Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION 494 (1970); DuVal, supra
note 16, at 178-82; Frantz, The First Amendment in the Balance, 71 YALE L.J. 1424 (1962); Nimmer, The
Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy, 56

22. See R. Dworkin, supra note 14, at 260-61; Kalven, The Reasonable Man and the First Amendment: Hill,
against other interests are best avoided by focusing on the scope of a right, and mandating absolute protection within that scope. Hence the focus here is on defining the limits of the first amendment, on describing the conduct covered by the first amendment, and on distinguishing such conduct from that outside the reach or range of the first amendment. Balancing is required in order to determine which activities are reached by the first amendment.

Thomas Emerson's treatment set the boundary between expression and action; Alexander Meiklejohn and others deemed political or (later) public speech to be the relevant category. Just like the literalists or absolutists, those committed to categorization cannot avoid some definition of the word "speech."

Ad hoc or particularized balancing, in the tradition of Justice Frankfurter, involves weighing the free speech interests involved in a particular case against other countervailing interests, such as the public or state interests in order and security and the interests in deferring to legislative judgment. Although it is common to think of defining and balancing as opposing techniques of first amendment analysis, this is an oversimplification. Definers balance, albeit at a different level of particularity, and balancers define. Take again the case of the "routine" murder. If the defendant argues that the interests protected by the first amendment ought to be balanced

24. Emerson, supra note 23, at 915; Frantz, supra note 21, at 1434; Kauper, supra note 21, at 626.
25. T. EMERSON, supra note 21, at 292-98; Emerson, supra note 23, at 917-55. The fundamental flaw in Professor Emerson's argument is that the expression/action distinction is almost wholly conclusory. The speech he labels expression is not fundamentally distinguishable from the speech he labels action, especially since in many troublesome cases it is impossible to separate the expression from the action. See Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 HARV. L. REV. 1482, 1494-96 (1975). See generally L. TRIBE, supra note 4, at 579.
26. A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1946). For additional commentary on the Meiklejohn theory see Blostein, The First Amendment and Privacy: The Supreme Court Justice and the Philosopher, 28 RUT.-CAM. L. REV. 41, 72-77 (1974); Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 HARV. L. REV. 1 (1965); Shiffrin, supra note 6, at 917-21; Chafee, Book Review, 62 HARV. L. REV. 891 (1949). Other commentators have shared Meiklejohn's view that the first amendment protects political speech. See, e.g., BeVier, The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle, 30 STAN. L. REV. 299 (1978) (need to protect political speech fully may justify courts' extending first amendment protection to other categories of speech); Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 26 (1971) (explicitly and predominantly political speech is only form of speech that principled judge can prefer to other claimed freedom); Scanlon, supra note 15, at 222 (right of individual to maintain certain beliefs and make informed decisions precludes government from controlling sources of information necessary to those beliefs).
27. See Meiklejohn, The First Amendment is an Absolute, 1961 SUP. CT. REV. 245.
28. See Dennis v. United States, 341 U.S. 490, 519-56 (1951) (Frankfurter, J., concurring in the judgment) (absolute rules lead to absolute exceptions which corrode rules).
29. Id. at 532.
30. Compare Frantz, supra note 21, at 1449 (balancing test does not permit first amendment to perform function as constitutional limitation; virtually converts amendment into its opposite) with Mendelson, On the Meaning of the First Amendment: Absolutes in the Balance, 50 CALIF. L. REV. 821, 821 (1962) (language of first amendment ambiguous, ambiguity compounded by history).
31. See generally Fried, Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test, 76 HARV. L. REV. 755 (1963) (Court's role is to balance "interests," which represent appeals to broad scheme of justification, and to exert "managerial competence" to determine constitutional allocation of competence to parties before it).
against the state's interest in punishing murder, the proper response is that there are no free speech interests to be balanced. No such interests exist either because murder is not speech, or because protection of murder is not within the ultimate goals of the principle of freedom of speech. The relevant inquiry is what activities call forth the application of first amendment principles. Defining the range of activities that require a first amendment analysis is essential to balancing as well as to any other approach. No matter what approach is taken, some definition of speech that will give the first amendment discrete application and meaning is required.

B. THE SOURCE OF THE DEFINITION

Establishing that a definition of the word “speech” is necessary is merely the first step in the analysis. What must follow is the more important and more difficult process of determining how to define “speech.” Showing that it is necessary to define “speech” will have been a wasted exercise unless we can ascertain a method for the definitional process and a source for the definition.

Alluringly uncomplicated is the proposition that the words of the Constitution, such as “speech,” can and should be interpreted as ordinary language, having substantially the same meaning in constitutional text as they do in everyday discourse. Those adopting such a view criticize the Supreme Court’s obscenity decisions for ignoring the obvious. If pornography is a form of speech, according to the dictionary or according to ordinary usage, pornography must be a form of speech for first amendment purposes.

If, however, ordinary usage supplies us with the definition of the word “speech,” then what excludes from first amendment coverage the many other activities that plainly are speech as the word is ordinarily used? Perjury is speech, conspiracy is speech, oral or written fraud is speech, verbally describing military secrets to an enemy is speech, and calling a bookie to place a bet is speech. Yet none of these activities has been held to be within the scope of the first amendment. It is especially important here to distinguish between activities that are within the scope of the first amendment and those that are not, and at the same time to distinguish between coverage and protection.

32. See note 6 supra.

33. Coverage is not the same as protection. If an activity is covered by the first amendment, regulation of that activity is evaluated in light of the heightened standard of review required by the first amendment. If the state cannot meet the burden of showing a very strong governmental interest in regulating covered activity, that activity is protected as well. But if the state can put forth a justification that withstands strict scrutiny, the activity is not protected even though it is covered.

34. See, e.g., United States v. Choate, 576 F.2d 165, 181 (9th Cir. 1978) (“Speech thought to promote a criminal scheme . . . is hardly within the ambit of the First Amendment.”); Bangor & Aroostock R.R. Co. v. ICC, 574 F.2d 1096, 1107 (1st Cir. 1978) (first amendment does not limit regulation in areas of extensive economic supervision where exchange of information among firms possible vital element in illegal scheme); United States v. Lampley, 573 F.2d 783, 787 (3d Cir. 1978) (federal regulation proscribing threatening and harassing telephone call not violative of first amendment); United States v. Buttorff, 572 F.2d 619, 623-24 (8th Cir. 1978) (speech advocating tax fraud not entitled to first amendment protection); United States v. Rosenberg, 195 F.2d 583, 591-92 (2d Cir.) (communication to foreign government of secret material connected with national defense not free speech under first amendment), cert. denied, 344 U.S. 838 (1952).

Were it otherwise, every conspiracy case, every aiding and abetting case, among others, would be a first amendment case.

35. See note 33 supra.
crowded theater is within the scope of the first amendment, but is not protected because even first amendment speech that causes a clear and present danger may be regulated. Similarly, public speeches that incite immediate violence are covered by the first amendment, but can be regulated only if the state can show the compelling interest that is implicit in the current "incitement" formulation of the clear and present danger standard. But the compelling state interest analysis has not been applied to the earlier examples. Perjury may be prosecuted without any showing of clear and present danger, and so may a conspiracy, a verbal bet, or verbal fraud. To illustrate: a person orally describes harmless military secrets to the enemy in such a way that the enemy's reliance on those secrets has the actual effect of hurting the enemy. In a prosecution for treason or espionage, the lack of potentially harmful effects would not be a defense. Yet in Brandenburg v. Ohio and Hess v. Indiana, the lack of violent or harmful effects is treated as relevant if not dispositive on the issue of incitement. Certain uses of words, although speech in the ordinary sense, clearly are not speech in the constitutional sense, and thus do not require a governmental showing of harm or allow a defense of harmlessness.

The ordinary meaning of the word "speech" is thus constitutionally overinclusive. It should not come as a surprise that the term "speech" as commonly used is underinclusive as well. The wearing of an armband in Tinker v. Des Moines Independent School District, the wearing of a military uniform while performing a skit in Schacht v. United States, and the improper use of the flag in Spence v. Washington are symbolic activities that one would not, but for the first amendment, think of as speech. This dual

37. See Hess v. Indiana, 414 U.S. 105, 109 (1973) (words not intended or likely to produce imminent disorder cannot be proscribed on ground that they had tendency to lead to violence); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (state cannot proscribe advocacy of use of force or of violation of law except when such advocacy directed to inciting or producing imminent lawless action and is likely to incite or produce such action); Watts v. United States, 394 U.S. 705, 708 (1969) (political hyperbole not a threat to incite violence). See generally Strong, Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—and Beyond, 1969 Sup. Cr. Rev. 44; Comment, Brandenburg v. Ohio A Speech Test for All Seasons, 43 U. Chi. L. Rev. 151 (1975).
38. See Kamakita v. United States, 343 U.S. 717, 738 (1952) (defendant charged with cruelty to American prisoners; defendant's limited contribution to enemy war effort not fatal to treason verdict); Chandler v. United States, 171 F.2d 921, 941 (1st Cir. 1948) (affirming treason conviction for ineffective psychological warfare broadcast to United States).
41. Brandenburg v. Ohio, 395 U.S. at 447 (state may proscribe only advocacy intended and likely to produce imminent lawless action); Hess v. Indiana, 414 U.S. at 109 (regulated speech must be intended or likely to produce imminent disorder; cannot be proscribed because possessed tendency to lead to violence).
42. 393 U.S. 503 (1969).
44. 418 U.S. 405 (1974) (per curiam).
phenomenon of overinclusiveness and underinclusiveness gives “speech” a vastly different meaning in the first amendment context than it possesses in ordinary usage. Accordingly, even if a consensus as to the ordinary meaning of the word “speech” existed, the coverage of the first amendment could not be determined simply by reference to that meaning.

The fact that courts have excluded a wide range of verbal acts from the coverage of the first amendment does not mean that they were right in so doing. An alternative methodology would treat all verbal acts, including verbal betting, perjury, price-fixing, and oral delivery of military secrets to the enemy, as first amendment speech, although not necessarily protected speech. Such a theory seems unworkable, however, if we assume that first amendment theory must by some means allow the prosecution of such activities. If prosecution can occur only if each of these activities involves a clear and present danger, the next question is “clear and present danger of what?” The dangers involved in many of these activities are less substantial than the dangers of imminent physical violence or grave harm to national security. If the clear and present danger test is applied to justify prosecution of verbal betting or price-fixing or soliciting for prostitution, the Brandeis gloss that requires an evil to be of a certain magnitude as well as of a degree of imminence is effectively nullified. By the same token, incitement to littering would be unprotected by the first amendment. Such a weakening of the clear and present danger test would result in far less protection of speech, certainly of the kind of speech we consider most important.

A second alternative would be to maintain that all uses of words are covered by the first amendment, but that some categories of utterances are protected to a lesser degree than others. This approach, however, does not succeed in confining the meaning of “speech” to its ordinary usage. The decision to give some categories of utterance slight protection is functionally the same as the decision to exclude these categories totally from the coverage of the first amendment. It is difficult to justify a first amendment theory that treats a verbal bet as less subject to regulation than the operation of a one-armed bandit. Moreover, as the law creates new categories of weak protection, it diminishes the overall protection of speech in the same way that it lessens protection by restricting definitional coverage.


46. I am grateful to William Van Alstyne for providing the challenge that provoked this and the following paragraph.

47. See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (first amendment permits proscription of advocacy of criminal syndicalism only if such advocacy was “directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action”).

48. See Schenck v.United States, 249 U.S. 47, 52 (1919) (question is whether words used in such circumstance to create clear and present danger that they will cause substantive evils that Congress has right to prevent, such as obstruction of recruiting service).

49. Whitney v. California, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring) (“This Court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech . . . .”).

50. Indeed, new categories are as likely to be categories of lesser protection. See FCC v. Pacifica
"speech" literally, it is inevitable that we must take the words "no law" less than literally. The dangers inherent in giving courts the power to define the word "speech" are less than those involved in granting power to decide how much restriction is allowed by the words "no law." At the heart of a definitional approach to the first amendment is the idea that decreased pressure at the level of coverage is reflected in increased pressure at the level of protection. Ultimately, the argument of those who would narrow the scope of the first amendment is not for less protection, but for stringent protection of a more restricted area instead of weaker protection of a broader area.

The foregoing comments should cause neither surprise nor alarm. It is foolish to suppose that a word can have a fixed meaning independent of the sentence in which it is used. The word "good" means something very different in "He is a good person" than it does in "He is a good golfer." Proper names alone designate a particular object or activity regardless of context or use. There are as many different meanings as there are different uses. The word "shut" in "Is the door shut?", can have two divergent meanings depending on whether the purpose of shutting the door is to keep ants from getting in or a horse from getting out. Consequently, the word "speech" in the first amendment at the very least must draw its meaning from the sentence in which it appears.

If context within a sentence can determine meaning, surely the broader context can also be relevant to this inquiry. The first amendment is contained in a Bill of Rights, which is in turn contained in a constitution. Constitutional language performs a unique function. The first amendment cannot be true or false. It neither describes a state of affairs nor communicates a proposition. Nor is it primarily ascriptive, in the sense of ascribing responsibility for actions or events. Rather, constitutional language, like statutory language, is to a great extent regulatory and classificatory. The words of the Constitution regulate an activity—the permissible limits of state action—and they classify or delineate the conduct to which the regulation applies. The fact that constitutions restrict governments rather than individuals renders the ordi-
nary meaning of the language less important than it would be in a criminal statute. A criminal statute requires communicative content in order to inform the general public of its stricures. Constitutional language restricts government and not individuals and thus its communicative function is much less significant. Because language derives meaning from the purpose it serves and the function it performs, the interpretation of constitutional language should be responsive to its special regulatory function—to restrict the scope of governmental action or power.

"Speech" in the first amendment therefore must be defined with reference to the objective of that amendment, as a term of art, just as the technical language of architects or surgeons is defined by the fields in which it is used. The scope of first amendment protection is determined by the rationale underlying freedom of speech. The exclusion of a category of utterance from the meaning of the word "speech" is justified as long as the exclusion is consistent with that rationale. This does not mean that the ordinary definition of a word is never applicable in the constitutional context. Legal definitions and ordinary definitions of concrete objects frequently converge. For example, if a constitutional amendment read: "Congress shall make no law concerning giraffes," the ordinary meaning of "giraffe" would define the object of the provision. Even concrete terms, however, may contain latent ambiguities. If the provision prohibited laws "concerning cats," the status of lions, tigers, and leopards would be in doubt. When the object of the provision is vague and ambiguous, as is "speech," the context and purpose become essential to interpretation.

Difficulties in interpretation most frequently arise in dealing with fringe rather than core applications of language. Widely accepted meanings constitute a core applicable in a variety of contexts. Although context and purpose are critically important at the fringes, the determination of what is

56. On this point I am especially indebted to my student Mary Jane Morrison.
57. See generally J.L. AUSTIN, supra note 52; J. Searle, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE (1969); Frankena, supra note 52; Ryle, Ordinary Language, in ORDINARY LANGUAGE (V.C. Chappell ed. 1964).
58. This proposition frequently leads to the rejection of conventional modes of definition for legal purposes. See generally J. BENTHAM, A FRAGMENT ON GOVERNMENT ch. V (1776); Cohen & Hart, Theory and Definition in Jurisprudence, PROC. ARIST. SOC., vol. 29 Supp. (1955); Hart, Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer, 105 U. PA. L. REV. 953 (1957); H.L.A. HART, THE CONCEPT OF LAW 13-17 (1961); Hart, Definition and Theory in Jurisprudence, 70 LAW Q. REV. 37 (1954); Summers, Legal Philosophy Today: An Introduction, in ESSAYS IN LEGAL PHILOSOPHY 1, 14 (R.Summers ed. 1968); Summers, Notes on Criticism in Legal Philosophy, in MORE ESSAYS IN LEGAL PHILOSOPHY 1, 9 (R. Summers ed. 1971). A reasonably comprehensive summary of contemporary definitional theory in jurisprudence is contained in D. LLOYD, INTRODUCTION TO JURISPRUDENCE 39-73 (3d ed. 1972). Support for the general proposition that language must be interpreted with reference to its function or purpose may be found in J.L. AUSTIN, supra note 52; Frankena, supra note 54, at 134-38.
60. I am not suggesting that the constitutional text itself serves no purpose, or that some constitutional provisions may not be more explicit than others. Rather I am asserting that the enormous range of human conduct that involves words indicates that the first amendment in general and the word "speech" in particular may be far less explicit than is often assumed.
62. Pornography, particularly pictorial pornography, is covered, if at all, only at the fringes of the first
at the core also may depend on context. A first amendment scholar on the street corner asked to give an example of speech might respond, "Standing on a soap box in Boston Common arguing that President Carter's anti-inflation measures are misguided." According to many first amendment theorists, this is the core meaning of speech. A philosopher responding to the same request is likely to answer, "The cat is on the mat" or "Socrates is mortal." Thus even core meaning may vary with context; constitutional interpretation requires a functional, purposive, and contextual view of the definitional process.

A full inquiry into function, purpose, and context of first amendment language reveals that the Court's decision to exclude obscenity from the scope of the first amendment is not the linguistic sleight-of-hand suggested by some commentators. The Court's approach is grounded in good linguistic philosophy—the recognition that the constitutional definition of speech need not parallel the definition of speech derived from other contexts and purposes. The fundamental question for the Court is whether obscenity is properly within the constitutional definition of speech. The answer to this critical question must be derived from the underlying philosophy of the first amendment. It is to this question that I now turn.

II. THE SCOPE OF THE FIRST AMENDMENT

Because "speech" has a specialized constitutional definition, the term "two-level theory of speech" is fundamentally misleading. The term suggests that the Supreme Court in Roth, Miller, and Paris has recognized two categories of utterance encompassed by the first amendment, only one of which is protected. This misconception results from a confusion of constitutional "speech" and ordinary "speech." Properly interpreted, the cases merely establish two categories of utterance—"speech" and non-speech. Some conduct is covered by the first amendment and some conduct simply is not; political criticism is clearly included and, equally clearly, murder is excluded. This approach assumes that some verbal or, as is often the case in the obscenity context, pictorial activity will not be covered. The purpose of this section is to ascertain the boundary drawn by the Court between speech and non-speech. As previously discussed, the boundary must be drawn with reference to the underlying purposes of the first amendment, and must distinguish conduct that the first amendment was designed to protect from the broader range of human activity. One must therefore ask: What activities

63. See Kalven, The New York Times Case: A Note on the "Central Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191. There need not be only one core or central meaning. See L. Tribe, supra note 4, at 579. Free speech may indeed be a bundle of interconnected concepts not susceptible to any single definition. This fact does not alter the proposition that the core or cores are determined by reference to the underlying theory of the first amendment.

64. See notes 4 & 6 supra.

65. It is tempting to maintain that the explicit language of the first amendment deprives the courts of power to formulate varying justifications for the first amendment. The exercise of such power is unavoidable, however, unless the first amendment protects every use of words to an equal extent.

66. The vast majority of obscenity cases have involved pictorial materials, the notable exception being Kaplan v. California, 413 U.S. 115, 118-20 (1973) (plaincover, unillustrated book could be obscene). The few earlier cases involving verbal materials are noted in Kaplan, id. at 118 n.3.
should be protected by the first amendment? What is its underlying philosophy? Only if the justifications for the first amendment lead to protection of obscenity is the Court's approach wrong.

It is impossible within the scope of a single article to present a comprehensive and critical survey of first amendment theory. Nor is it feasible to discuss exhaustively the various philosophical justifications for the concept of free speech. But inasmuch as the boundaries of first amendment “speech” cannot be determined without a basic understanding of the purposes of this constitutional guarantee, some analysis of the various justifications and purposes is necessary. The objective of this analysis is not to determine the most appropriate justification for free speech, but merely to identify a justification, if one exists, that is consistent with the Supreme Court's treatment of obscenity as non-speech. If there is such a justification, criticism should focus on that underlying rationale, rather than on the distinctions generated by it.

The exclusion of obscenity from the scope of the first amendment is most illogical if one views the guarantee of individual freedom of action, freedom of choice, or individual self-expression as the fundamental purpose of the first amendment. If the aim of the first amendment is to allow a person to express himself, or determine his own life style, or to act in any manner that causes no harm to others, then an individual's right to the use of obscene materials as a form of self-expression or individualism is properly within the scope of the first amendment.

The defect of the liberty theory is its treatment of freedom of speech and freedom of expression as synonymous terms. This treatment leads to confusion, because “expression” has two rather divergent meanings. “Expression” is frequently used to mean communication, requiring both a communicator and a recipient of the communication. For example, if my new color television set insisted on presenting its offerings solely in black and white, I would express my dissatisfaction to the manager of the store where the television was purchased. “Expression” in this sense can easily be replaced.

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67. A useful but abbreviated survey can be found in DuVal, supra note 16. For authorities reviewing particular first amendment theories, see note 69 infra.

68. I am currently attempting such a task in a book tentatively entitled THE PHILOSOPHY OF FREE SPEECH.


71. See generally Alston, Expressing, in PHILOSOPHY IN AMERICA 15-34 (M. Black ed. 1965) (distinguishes between expressing sentiment linguistically and evincing emotion physically).
with the word "communication" without any significant change of meaning. The word "expression" also can be used to mean self-expression—an activity not necessarily involving communication. I might express my anger or hostility toward the absence of color on my new color television set by throwing a paperweight at the screen. Thus "expression" can signify either communication, or external manifestation of inner feeling. The existence of these two meanings has created some confusion as to the object of first amendment protection.

The confusion is compounded because communicating is one very important way of "expressing oneself." Artists, poets, and writers express their own emotions, and at the same time communicate their ideas and emotions to viewers and readers. One who protested the Vietnam war by shouting obscenities at public officials was expressing his own anger and at the same time communicating disagreement with government policy to listeners. The major shortcoming of the liberty theory is its failure to analyze these forms of expression to determine which are consistent with the underlying justification for first amendment protection.

If freedom of speech is in fact synonymous with freedom of expression—encompassing communication as well as other forms of self-expression—speech is virtually indistinguishable from other action. While communicative speech is undoubtedly a mode of self-expression, any activity may be a form of self-expression to the actor. Mode of dress is a form of self-expression, as is hair length and style. The same can be said of choice of residence or occupation. I may express myself in one way by driving a Pinto or a Buick, but in quite another by owning a Ferrari or an Hispano-Suiza. These examples emphasize that self-expression is a general concept that subtracts far more than it adds to any rational view of what free speech means. A theory that does not functionally distinguish speech from this vast range of other conduct reduces free speech to a general principle of liberty. 73

72. In Kelley v. Johnson, 425 U.S. 238 (1976), the Supreme Court upheld the regulation of hair length and style by a police department. The majority of lower court cases dealing with hair and clothing, mostly in the context of public school dress codes, have upheld the validity of such regulations. See L. Tribe, supra note 4, at 958-65. Professor Tribe and Dworkin both seem to recognize this consequence of the liberty model, but appear untroubled by the implications. In fact, Professor Tribe uses freedom of speech, in part, to develop an expansive view of individual rights. L. Tribe, supra note 4, at 899-900. Professor Dworkin finds essentially the same moral basis for freedom of speech as he finds for a wide range of other conduct, including the right to engage in private homosexual conduct and the right to use contraceptives. R. Dworkin, supra note 14, at 275-76. Undoubtedly, excessive government intrusiveness disturbs most of us. Motivated in part by that fear, the drafters of the constitution established a limited government. It is tempting to try to stuff these values into the first amendment. Such values, however, have no legitimate role in justifying freedom of speech. Incorporating them into that concept can only arouse the same objections that were levied against Roe v. Wade, 410 U.S. 113 (1973). See Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L. J. 920, 927-28 (1973) (Constitution does not directly address abortion issue, nor can holding legitimately be inferred); Epstein, Substantive Due Process by Any Other Name—The Abortion Cases, 1973 Sup. Cr. Rev. 159, 167-88 (Roe definition of person derived from policy considerations, not from constitutional principle). Indeed, if the protection of self-expression is to be found anywhere in the constitution, it is more likely to be encompassed by the due process clause or the ninth amendment. See Griswold v. Connecticut, 381 U.S. 479, 484 (1965). Such an approach is less than satisfactory, but at least it is more honest in terms of what is being done. Thus, if the Court's holding in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65-67 (1973), that the state may constitutionally regulate the showing of adult films in public theatres, is wrong, it
This approach would extend first amendment protection to any of the above examples. If freedom of speech is coextensive with freedom of action, the government is no less free to regulate speech than it is to regulate any other form of human activity.74 If freedom of speech means freedom of self-expression, then anyone who has conceded to limitations upon his freedom of action must pro tanto have conceded to limitations upon his freedom of speech.75 Any meaningful conception of free speech must prohibit governmental restriction of speech even if that speech causes conduct that could otherwise be regulated.76 Without this distinction free speech is little more than a platitude. A justification for free speech that does not make this distinction, as the liberty model does not, deprives the principle of freedom of speech of all vitality.

In any event, the key issue here is the Supreme Court's vision of the first amendment, not mine. It is clear from the obscenity cases and other recent decisions that the Court does not adhere to the liberty model. Notwithstanding the Court's occasional use of "self-expression" language,77 the first amendment has not been interpreted to permit any conduct that does not cause harm to others.78 Even if self-expression is constitutionally important, it is only self-expression by communication that comes within the first amend-

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74. See Bork, supra note 26, at 25 (two benefits assigned to speech by Justice Brandeis—development of individual faculties and achievement of pleasure—do not distinguish speech from other forms of human activity; judge cannot choose to protect speech more than any other conduct on these justifications alone).

75. Thus the real danger in equating free speech with personal liberty is in its reverse implication. I do not like to think that the rejection of libertarian political theory as a constitutional value (as in Paris) should have any effect on the extent of freedom of speech.

76. See Scanlon, supra note 15, at 204.


The mere fact that reading or viewing obscenity may be self-regarding is not sufficient to bring it within the definition of the word "speech." We must not put the cart before the horse. The fact that there may be no good reason for regulating obscenity does not ipso facto render it protected speech. Harmslessness does no more to invoke the first amendment than murder, speeding, or the emission of sulphur dioxide.

A similar but perhaps weaker theory finds that free speech is essential to self-fulfillment and personal growth. This argument stresses the uniqueness of human powers of reason and rationality, and accords special treatment to these qualities. If this theory is correct, it follows that the process of communication is particularly important. Communication informs us of the choices and hypotheses of others while allowing us to refine our own thoughts by articulating them. But the connection between communication and the full realization of the human potential, although seductively sensible, is logically incapable of generating an independent justification for freedom of speech. The fact that A may cause B, or even that A must cause B does not in any way lead to the conclusion that only A can cause B. There is no reason why X, Y, and Z cannot also cause B. Although communication may be a sufficient condition for intellectual self-fulfillment, it does not follow that it is a necessary condition. Self-fulfillment can also be obtained by a wide range of experiences, as opposed to ideas alone. Mental self-realization can be fostered by world travel, by keen observation, or by changing employment every year. Each of these experiences and many others can open one's eyes and trigger deeper thought and self-fulfillment. This model fails to indicate why communication is necessarily better than any of these other methods of "mind expansion."

Even if we accept the proposition that communication is a necessary condition for this ideal state of mental development, it does not follow that it is also a sufficient condition. The value of communication in the development of reason is limited by the range of experiences that are the subject of the communication. Hayek has argued that the importance of freedom of thought and ideas is overestimated at the cost of underestimating the significance and value of actually doing things. He maintains that new ideas often spring from new environments and experiences and that speech is merely the culmination of experience. Freedom of speech, therefore, is meaningful only

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79. It is clear in the cases mentioned above that the Court is using "self-expression" to mean only communication. See First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777, 783 (1978) (first amendment protects public access to discussion, debate, dissemination of information and ideas); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) (first amendment embodies commitment to uninhibited debate on public issues).

80. The Court's obscenity decisions result in discrimination between "polite society and the hoi polloi." L. Tribe, supra note 4, at 699 n.81. But this has no impact on the initial determination of what is speech. The polite society is more likely than the hoi polloi to prefer books to the pool hall, and thus polite society may find that its pleasures are more protected by the constitution than those of the hoi polloi. But this does not make shooting pool speech.

81. The philosophy of John Stuart Mill provides direct support for a libertarian position. According to Mill, society may act only to prevent activities causing harm to others. See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 n.14 (1973); Perry, supra note 77, at 433 n.106. But the issue is not whether Mill is wrong. Rather it is whether Mill's principles are contained in the concept of free speech.

82. This view is most commonly associated with the theories of Professor Emerson, supra notes 21 & 23, but it has its origins in Aristotelian notions of the perfectability of man.

when freedom of action exists. Although Hayek's thesis may not be relevant to some theories of freedom of speech, it is especially helpful in this context. If our concern is with expansion of the mind, then choice, diversity, individuality, and novelty are clearly as important as communication in the whole range of human conduct. If the value of communication is dependent on what can be communicated, then the other forms of conduct are logically prior to and therefore more important than communication.

Communication is nevertheless valuable as one aspect of an extremely broad Aristotelian concept of freedom of action. The use of this theory to justify freedom in the broad sense, however, has only limited utility as applied to freedom of speech. Freedom of speech under such a theory is merely a component of that general good often denominated freedom or liberty. To the extent that freedom in the general sense is interpreted expansively, freedom of speech is included pro tanto. To the extent that general liberty is limited, this theory provides no reason why freedom of speech should not be subject to the same limitations. Thus the argument generates no principle that justifies special protection for speech. The conclusion is the same as that reached when examining speech as self-expression. An argument for individual freedom may be derived from both theories, but neither presents an argument that demonstrates why freedom of speech is any more valuable than any other conduct. Without this distinction the discussion is limited to personal freedom in general, not freedom of speech, and without this distinction it is not possible to identify an underlying philosophy for the first amendment.

Having discarded the view that freedom of speech is merely an indistinguishable subset of a broader notion of individual liberty, the main theories that compete for attention are the marketplace-of-ideas model, long recognized in first amendment jurisprudence, and the democratic theory model most commonly associated with the writings of Alexander Meiklejohn. It should be recognized that these theories are not wholly or even substantially without defects. The marketplace model, based on the pragmatic

84. Id. at 33-35. I suppose that it is possible to argue that the language of the first amendment commands that speech be treated differently, no matter the reason. I am not yet willing to attribute the magnificence of the first amendment to a fortuitous inconsistency.
85. Hayek treats freedom of speech solely as an individual right of the speaker, rather than a right that benefits society as a whole. The latter is implicit in both the Meiklejohn interpretation and the marketplace theory.
86. See note 75 supra.
87. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (purpose of first amendment is to preserve uninhibited marketplace of ideas in which truth will ultimately prevail); DuVal, supra note 16, at 188-94 (discussion of marketplace theory).
89. See notes 26 & 27 supra. See generally DuVal, supra note 16, at 194-98; G.C. FIELD, POLITICAL THEORY 132-40 (1956). Although the modern articulation of the theory is the product of Alexander Meiklejohn, the seeds are in fact found much earlier. See B. SPINOZA, TRACTATUS THEOLOGICO-POLITICUS ch. XX (1670); D. HUME, OF the Liberty of the Press, in ESSAYS, MORAL, POLITICAL, AND LITERARY 8 (Oxford ed. 1963); cf. Gilbert v. Minnesota, 254 U.S. 325, 337-38 (1920) (Brandeis, J., dissenting) (right of citizen to take part in making of federal laws and conduct of government necessarily includes right to speak or write about them).
epistemology of Justice Holmes,\textsuperscript{90} can be criticized by the observation that our moral senses have reached the point where the assumption that the best test of truth is the ability of an idea to command popular acceptance in an open interchange of competing views appears questionable.\textsuperscript{91} Slavery was not wise policy merely because it was accepted in many parts of the world, Nazism was not "correct" in Germany in the 1930's, and any prevailing American view is not automatically right solely because it is the product of a system characterized by freedom of discussion. Equally naive is the view that freedom of speech in fact leads to the identification of some objectively verifiable truth.\textsuperscript{92} Although such an assumption permeates the arguments of Milton,\textsuperscript{93} Locke\textsuperscript{94} Mill,\textsuperscript{95} and Jefferson,\textsuperscript{96} we have too often witnessed falsehood triumph over truth to have faith in the empirical proposition that truth always prevails.\textsuperscript{97}

The existence of defects, however, should not be allowed to obscure the value of the marketplace model. The real issue is whether popular selection among ideas arrives at truth more readily than governmental selection, not whether the marketplace of ideas always produces truth. History does support the proposition that, whatever the failings of popular choice among ideas, this method has proved superior to choice by public officials.\textsuperscript{98} In addition, one must not be misled by repeated references to "truth" in the literature of the marketplace of ideas. The real value in open discussion is not so much the discovery of truth as it is the identification of error.\textsuperscript{99} Maximizing

\textsuperscript{90} See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."); Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (same).

\textsuperscript{91} See Auerbach, supra note 69, at 187 (criticizing Holmes; dangerous to define truth in terms of what marketplace has come to accept; experience may refute assumption that truth will "survive"). See generally M. LERNER, THE MIND AND FAITH OF JUSTICE HOLMES 290 (1954).


\textsuperscript{93} J. MILTON, AREOPAGITICA 78, 126 (J.C. Suffolk ed. 1968) ("Who ever knew truth put to the worse, in a free and open encounter?").

\textsuperscript{94} J. LOCKE, A LETTER CONCERNING TOLERATION 151 (J.W. Gough ed. 1948) ("For the truth certainly would do well enough if she were left to shift for herself.").

\textsuperscript{95} J.S. MILL, ON LIBERTY ch. 2, reprinted in ESSENTIAL WORKS OF JOHN STUART MILL 268-304 (M. Lerner ed. 1961).

\textsuperscript{96} Jefferson, First Inaugural Address, in THE COMPLETE JEFFERSON (Padover ed. 1943)

If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.

\textsuperscript{97} See Comment, The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil, 70 YALE L.J. 1084, 1116 (1961); Auerbach, supra note 69, at 187. The idea that open discussion will lead to the truth is a product of the Enlightenment and the optimistic view of humanity's rationality that characterized that period and its philosophy. See Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293 (1941) (Frankfurter, J.). More contemporary insights into philosophy, psychology, and mass communications have properly cast doubts on these underlying assumptions.

\textsuperscript{98} See Dennis v. United States, 341 U.S. 494, 519-56 (1951) (Frankfurter, J., concurring in the judgment); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

\textsuperscript{99} See Thornhill v. Alabama, 310 U.S. 88, 95 (1940); Auerbach, supra note 69, at 188; DuVal, note 16 supra, at 205-06.
the possibility of challenge to accepted views increases the chances that error in received opinions will be exposed. Although continued identification of error may not lead to truth, it can lead to an increase in knowledge. Reformulated, the marketplace model retains value as a first amendment theory.

The Meiklejohn interpretation is simply a variant on the themes just expressed. Although Meiklejohn purported to reject the Holmesian marketplace model, his writings apply the marketplace methodology to the democratic process. Holmes' holding that the best test of truth is the marketplace of ideas does not differ significantly from Meiklejohn's view that a democracy, by definition, considers acceptance by the populace after full and open discussion to be the test for political truth. When in his later writings Meiklejohn expanded his doctrine to include all issues of public importance—not only those that were explicitly political—the similarity between Meiklejohn's theories and the "survival" theory of truth espoused by Feinberg, Limits to the Free Expression of Opinion, in J. FEINBERG & H. GROSS, PHILOSOPHY OF LAW 135 (1975).

There are serious risks involved in granting any mere man or group of men the power to draw the line between those opinions that are known infallibly to be true and those not so known, in order to ban expression of the former. Surely, if there is one thing that is not infallibly known, it is how to draw that line.

Id. at 136-37 (emphasis in the original).


102. Meiklejohn, Free Speech and its Relation to Self-government, in POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE, at 42 (1960) ("The First Amendment was not written primarily for the protection of those intellectual aristocrats who pursue knowledge solely for the fun of the game, whose search for truth expresses nothing more than a private intellectual curiosity or an equally private delight and pride in mental achievement.").

103. See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Holmes recognized that this theory was most applicable to political truth, and thus in a sense anticipated Meiklejohn. See Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

104. Meiklejohn, supra note 102, at 27.

105. See Meiklejohn, supra note 27 at 255-57 (first amendment protects means by which citizens meet responsibility of making free judgment, including education, philosophy and sciences, literature and arts, and public discussion of public issues).

106. See note 91 supra.
by Holmes became even more apparent. Meiklejohn's contribution to first amendment theory is a reasoned justification for giving some issues priority in the process of open discussion; the idea that the importance of open discussion and the importance of pointing out error in accepted views varies directly with the importance of the issues under discussion.\footnote{107}

Analysis of the preceding sample of philosophical views reveals that the protected activities share two main features. First, they are all communicative. It has been suggested that freedom of speech, properly defined, is freedom of communication.\footnote{108} Communication is not, however, a sufficient condition for first amendment protection. Perjury,\footnote{109} conspiracy, blackmail, threats,\footnote{110} and verbal treason, while outside the scope of the first amendment, are all communicative. But communication is still a necessary condition for first amendment protection. Once individualism per se is excluded, any rational justification for the principle of free speech requires both a communicator and an intended object of the communication.\footnote{111} Justifications other than individualism and self-expression are based on the transmission or dissemination of information or ideas resulting in an increase in the number of people having access to a particular view. Because all these justifications are in some sense based on the free flow of factual information and normative propositions, it is at the very least a two-person process. If Paul Cohen wishes to vent his anger by shouting "Fuck the Draft!" in the middle of the Mojave Desert or on top of Mount Rainier, the first amendment should not protect his activity.\footnote{112}

\footnote{107. See Kaiser, Book Review, 58 Mich. L. Rev. 519, 624 (1960).}
\footnote{108. See Henkin, supra note 45, at 79-80 (first amendment protects conduct that "communicate"); Morrow, supra note 69, at 236 (speech means deliberate communication of ideas, beliefs by "broadly linguistic" means). The Supreme Court frequently uses the word "communication," as in Paris Adult Theatre 1 v. Sloton, 413 U.S. 19, 67 (1973).}
\footnote{110. See Watts v. United States, 394 U.S. 705 (1969) (reversing per curiam, 402 F.2d 676 (D.C. Cir. 1969)). See generally Comment, United States v. Kelner: Threats and the First Amendment, 125 U. Pa. L. Rev. 919 (1977). Although the use of threatening words may at times be protected political speech, the first amendment does not cover one who calls a private individual on the telephone and threatens physical harm.}
\footnote{111. See Scanlon, supra note 15, at 206. Scanlon defines an act of expression as "any act that is intended by its agent to communicate to one or more persons some proposition or attitude" which would include "speech and publication... symbols... demonstrations, many musical performances, some bombings, assassinations, and self-immolations." Id.}
\footnote{112. See Cohen v. California, 403 U.S. 15 (1971). Professor Dworkin argues that the fact that we protect the right of people to march where they are unwanted, see National Socialist Party v. Skokie, 432 U.S. 44 (1977) (per curiam) demonstrates that we are concerned as much if not more with the speaker than with the listener. Dworkin, The Rights of M. A. Forber: An Exchange, supra note 70, at 41. This argument ignores the fact that the particular venue for the march increases the communicative impact on those outside of that venue. More significantly, the real issue in Skokie is neither those particular marchers nor those particular listeners, but the danger of granting power to any government to decide among political utterances in any situation, a danger that would have a more harmful effect in other situations where there might be willing listeners. See Rawls, Two Concepts of Rules, 64 Phil. Rev. 3 (1955) (distinguishes between justifying general practice and justifying particular action falling within it). It is true that certain justifications of the first amendment, notably the liberty theory, focus on the interests of the speaker in voicing the protected communication. Cf. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 806, 807 (1978) (White, J., dissenting) (one first amendment function is use of communication as means of "self-realization," "self-fulfillment"; amendment protects "communications emanating from individuals"); "[i]dea which are not a product of individual choice are entitled to less first
Furthermore, any justification for free speech requires that the category of the communication be in the public interest. Only if there is some particular value in what is conveyed does it make sense to protect the process. This task is unavoidable unless the first amendment is to protect every conceivable use of language. It is a mistake to say that the first amendment protects only political communication, but it is equally fallacious to say that the first amendment covers whatever one person may say to another. By defining "speech," an area of conduct is carved out for particular protection. The area should encompass that which has some value for society, not in terms of a particular proposition, but in terms of a category of propositions. The Skokie marchers are protected not because what they have to say is particularly valuable, but rather because the category of political utterances is deemed worthy of protection, and we have wisely chosen not to entrust to courts or other bodies the power to make value judgments within that category. If there is a category of utterance that, as a whole, has no value in the context of the justifications underlying the first amendment, and if this category can be adequately identified, then such a category ought not to be within the scope of the first amendment.

Cohen is the prototype decision upholding the speaker's interest in voicing protest and expressing emotion. 403 U.S. at 25 ("one man's vulgarity is another's lyric"; Constitution protects individual taste and style largely because government cannot make principled distinctions in those areas). Other first amendment theories concentrate on the interests of the audience, the recipients of the communication. See Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977) (listener's interest is substantial; protected speech serves individual and societal interests in informed, reliable decisionmaking); Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1976) (first amendment protection of free flow of drug price information is enjoyed by recipients of information and disseminators; right to communicate presupposes reciprocal right to receive communication). Supreme Court decisions in the area have also emphasized general societal interests in the free flow of communication. See First Nat'l Bank of Boston v. Bellotti, 435 U.S. at 776 ("The Constitution often protects interests broader than those of the party seeking vindication."); first amendment serves important societal interests); Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 764-65 (society has strong interest in free flow of commercial information; first amendment is instrument to enlighten public decisionmaking). Much discussion has centered around this question of "the right to know," whether the first amendment focuses on the interests of speakers or hearers or society in general. See generally Symposium, The First Amendment and the Right to Know, 1976 WASH. U. L.Q.1. That inquiry, however, is not directly relevant to this article. In every first amendment case, there has been a communicative act, involving both a speaker (or writer) and a hearer (or reader). No matter whose interests are viewed as paramount under a given justification of the first amendment, protected speech is distinguished by its content. See Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 756, 761 (freedom of speech presupposes willing speaker; protection extends to communication, source, and recipient; speech that lacks all first amendment protection must be distinguished by content). It is worthwhile to note that in general the self-expression theories are speaker-directed, and the "search for truth" and democratic process theories are hearer-directed. Even if the concern is directed at hearers or society at large, speakers that provide the ideas or information must be protected equally.

113. See Morrow, supra note 69, at 237-38 (freedom of speech protects communication of public matters—policy, government, procedures, officials, education, social organization—including matters "necessary to prepare for political life, . . . that is, general intellectual and moral education").

114. See Canavan, supra note 69, at 96-99.


116. See text accompanying notes 33-40 supra.

117. See note 112 supra.
III. Is Obscenity “Speech”?

The question now is whether there can be a category of linguistic or pictorial conduct that serves no first amendment purpose and thus is not within the constitutional definition of the word “speech.” In particular, can some hardcore pornography,\textsuperscript{118} or obscenity,\textsuperscript{119} comprise such a category? In Roth v. United States,\textsuperscript{120} and Chaplinsky v. New Hampshire,\textsuperscript{121} the Court appears to suggest that utterances or other conduct that comprise “no essential part of any exposition of ideas”\textsuperscript{122} are not reached by the first amendment. Unfortunately, precedent fails to supply examples of such “idea-less” utterances. If an utterance exists that does not contain an idea, it was not the utterance in Chaplinsky\textsuperscript{123} or Beauharnais v. Illinois,\textsuperscript{124} and it is not clear whether it was the utterance in Roth since in that case the Court was not passing on the obscenity of specific materials.\textsuperscript{125} But the questionable origin of the idea-less concept does not alone render it invalid. There may be examples of idea-less utterances even if the Court failed to identify them. The core principle, detailed in the previous section, is that speech is protected not for what it is, but for what it does.\textsuperscript{126} Speech is protected only because it contains certain properties. If there are utterances that do not serve the purposes for which speech is protected, or that do not contain the properties that justify the principle of free speech, there is no reason to place such utterances within the ambit of the first amendment.\textsuperscript{127} The Court is saying that the communication of ideas is at once the essential first amendment purpose and the essential first amendment property. Without this purpose or property, activity is not

\begin{itemize}
  \item \textsuperscript{118} By beginning with hardcore pornography, I anticipate my conclusion. The main defect of Roth is that the Court repeatedly used the word “obscenity” without giving it any concrete definition. See generally Lookhart & McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 MINN. L. REV. 5 (1960). I do not suggest that anything other than hardcore pornography can be outside the constitutional definition of the word “speech.”
  \item \textsuperscript{119} The word “obscenity” should be entirely excluded from any discussion of this area of the law. It is “pornography” and not “obscenity” that is the focus of the non-speech approach that the Court has adopted. The reader should exclude any consideration of the ordinary use of the word “obscenity”;
  \item For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law. We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought.
  \item Holmes, The Path of the Law, 10 HARV. L. REV. 457, 464 (1897).
  \item 354 U.S. 476 (1957).
  \item 315 U.S. 568 (1942).
  \item Roth v. United States, 354 U.S. at 485 (quoting Chaplinsky, 315 U.S. at 571-72).
  \item 315 U.S. at 569. Calling a public official a “racketeer” and a “damned Fascist” contains an idea and a political idea at that.
  \item 343 U.S. 250 (1952) (group libel was not speech). The Court in Roth relied on Beauharnais as well as on Chaplinsky, 354 U.S. at 486-87.
  \item 354 U.S. at 496-98 (Harlan, J., concurring in part and dissenting in part).
  \item Free speech is seen as an instrument of good, not as a good in itself. Although Professor Emerson, among others, considers free speech a good in itself, see Emerson, Communication and Freedom of Expression, SCIENTIFIC AMERICAN, September, 1972, at 163, 164, he speaks rather loosely. To say that free speech promotes self-fulfillment and a realization of man’s potential is not to say that it is simply good.
  \item On defining speech by its function, see H. LASKE, A GRAMMAR OF POLITICS 118-19 (4th ed. 1938).
\end{itemize}
protected by the first amendment. Even assuming the validity of the Court's articulation, there is no reason why this purpose or property must be found in every utterance. Because this purpose or property can be found in cases not involving verbal or pictorial activity, such as the symbolic speech cases, it is by no means inconceivable that certain verbal or pictorial activity will not contain these qualities. Professor Henkin's observation about symbolic speech seems especially relevant here: There is "nothing intrinsically sacred about wagging the tongue or wielding a pen."129

The Court's discussion of ideas, however, is troubling. Language may serve many purposes other than the expression or communication of ideas, and many of these purposes are clearly within the scope of the first amendment. To use language to arouse feelings or emotions, to induce someone to take action, to create a sense of beauty, to shock, to offend, or to ask a question is in each instance a use of language for some purpose other than the exposition of ideas. There are many instances in which this very type of linguistic activity falls well within the confines of the first amendment. For example, if I stand on a platform and say the word "God," I have uttered something that has conceptual content, even though my statement is in the strict sense nonpropositional. It follows from this that what the Court really had in mind, or should have had in mind, is the communication of a mental stimulus—an attempt by a speaker or writer or artist to influence his audience in a particular fashion. If this is what the Court meant by "expression of ideas," then art and entertainment no longer hinder the formulation of an ideational theory consistent with first amendment precedent. If art is thought to be communicative, a pictorial rather than linguistic way of conveying an idea, art is

128. See note 45 and accompanying text supra.
129. Henkin, supra note 45, at 79.
131. See generally Frankena, supra note 54; Frankena, Cognitive and Noncognitive, in LANGUAGE, THOUGHT & CULTURE 146 (P. Henle ed. 1958).
133. Frankena, Cognitive and Noncognitive, supra note 131, at 146, uses the term "primary conceptual content."
134. Criticism of possible exclusion of art and entertainment under Roth is clearly outlined in Richards, supra note 69, at 76-77. However, Richards is enamored with the conception of "obscenity" as words or expressions designed to shock. He assumes that the exclusion of legal obscenity from the first amendment is based on the same theory used to justify regulation of "obscenities," such as shocking words, and concludes that regulation of obscenity in any form is constitutionally impermissible under his moral theory of the first amendment, a theory derived in part from John Rawls in A Theory of Justice (1971). But the similarity between excluded legal "obscenity" and obscenity in the ordinary sense is more apparent than real. See note 118 supra. Thus Richards does not directly address the issue faced by the Court, although he would probably disagree with the Court's position because he holds a libertarian rather than a communicative view of the first amendment. Richards, supra note 69, at 62.
135. See generally N. GOODMAN, LANGUAGES OF ART, AN APPROACH TO A THEORY OF SYMBOLS (1968).
protected by the first amendment. But if, as some theories of aesthetics hold, art is not communicative, then a theory of the first amendment that excludes material not a part of the exposition of ideas may exclude serious art and literature. If the Court's reference to "ideas" is taken with a grain of salt, however, the heart of the Roth analysis becomes the idea of cognitive content, of mental effect, of a communication designed to appeal to the intellectual process. This theory, which cannot be reduced to a single word without being burdened with unwieldy philosophical baggage, would protect the artistic and the emotive as well as the propositional. This cognitive content may not be a sufficient condition for first amendment protection, but the Court finds it a necessary condition. If the foregoing represents the deeper meaning of Roth, the exclusion of hardcore pornography, and hardcore pornography alone, makes more sense. Implicit in the Court's reasoning is the notion that hardcore pornography is designed to produce a purely physical effect. The key to understanding the Court's treatment of pornography as non-speech is the realization that the primary purpose of pornography is to produce sexual excitement. The distinction between the pornographic and the sexually explicit is completely artificial unless pornography is viewed as essentially a physical rather than a mental stimulus.

Thus the refusal to treat pornography as speech is grounded in the assumption that the prototypical pornographic item on closer analysis shares more of the characteristics of sexual activity than of the communicative process. The pornographic item is in a real sense a sexual surrogate. It takes pictorial or linguistic form only because some individuals achieve sexual gratification by those means. Imagine a person going to a house of prostitu-

136. For a sampling of various theories, see AESTHETICS (H. Osborne ed. 1972). An interesting discussion justifying the exclusion of obscenity from legal protection on the basis of the aesthetic theory of detachment is found in Kaplan, Obscenity as an Esthetic Category, 20 LAW & CONTEMP. PROBS. 544 (1955). Kaplan also argues that the distinguishing factor of obscenity (in the pornographic sense) is that it provides a stimulus to an experience that is not focused on the material providing the stimulus. Id. at 548.

137. The term "cognitive" has a philosophical meaning restricting it to the propositional and distinguishing it from the emotive. See Frankena, Cognitive and Noncognitive, supra note 131, at 154-63. I do not use the word in that technical sense. To react cognitively is to react mentally, or intellectually, not necessarily to "know" a proposition.

138. Many terms in this article are capable of being interpreted in an everyday, legal, or philosophical sense. There may not be a solution to this problem, except perhaps the one suggested by Justice Holmes. See Holmes, supra note 119.

139. See Cohen v. California, 403 U.S. 15, 26 (1971) (first amendment protects "emotive function" as well as "cognitive content").

140. It was not until Miller v. California, 413 U.S. 15 (1973), that the Court made it clear that only hardcore pornography could be regulated. Id. at 27; see Jenkins v. Georgia, 418 U.S. 153, 160-61 (1974) (further clarification of "patent offensiveness" standard). Had the Court recognized earlier that the Roth approach required that regulation be restricted to hardcore pornography, such unfortunate results as Ginsburg v. United States, 383 U.S. 463 (1966), might have been avoided. On the hardcore requirement generally, see F. Schauer, THE LAW OF OBSCenity 109-13 (1976).


143. Pornography has been called "a substitute for a sexual partner." Burgess, supra note 142, at 5.
tion, and, in accord with his or her particular sexual preferences, requesting that two prostitutes engage in sexual activity with each other while he becomes aroused. Having achieved sexual satisfaction in this manner, he pays his money and leaves, never having touched either of the prostitutes. Imagine an individual who asks that a leather-clad prostitute crack a whip within an inch of his ear. Are these free speech cases? Hardly.\footnote{144} Despite the fact that eyes and ears are used, these incidents are no more cognitive than any other experience with a prostitute. It is essentially a physical activity, the lack of actual contact notwithstanding. If the above examples are not free speech cases, is there any real difference between the same activity when presented on film rather than in the flesh? Consider further rubber, plastic, or leather sex aids. It is hard to find any free speech aspects in their sale or use. If pornography is viewed merely as a type of aid to sexual satisfaction, any distinction between pornography and so-called "rubber products" is meaningless. The mere fact that in pornography the stimulating experience is initiated by visual rather than tactile means is irrelevant if every other aspect of the experience is the same. Neither means constitutes communication in the cognitive sense. Pornography involves neither a communicator nor an object of the communication. The purveyor of the pornography is in the business solely of providing sexual pleasure; it is unrealistic to presume that he is anything but indifferent to the method by which pleasure is provided and profit secured.\footnote{145} Similarly, there is no reason to believe that the recipient desires anything other than sexual stimulation. Hardcore pornography, then, is distinguished by its similarity in all relevant respects to a wide range of other sexual experiences.

The point is that the use of pornography may be treated conceptually as a purely physical rather than mental experience. This is of course an oversimplification. Physical sensations, including sexual arousal, have mental elements. Is pain physical or mental? Some of both, surely. The same is true of physical attributes of sexuality. A helpful illustration of this phenomenon is a spectrum, or a range—the intellectual predominates one extreme and the physical predominates the other.\footnote{146} At the physical extreme of the spectrum the conduct possesses so few mental attributes that it has none of the characteristics of the intellectual process constituting the core of the constitutional definition of speech. This concept of predominance of the physical is the proper meaning of the phrase "no essential part of any exposition of ideas."\footnote{147} To reiterate, the physical must be distinguished from the emotional. As Justice Harlan noted in Cohen v. California,\footnote{148} the emotive, as well as the propositional or cognitive, is implicitly encompassed by the intellectual or communicative interpretation of the first amendment.\footnote{149} The first amendment

\footnote{144. Unless, of course, we equate free speech with freedom to engage in arguably self-regarding activities, a position I reject. See text accompanying notes 69-81 supra.}

\footnote{145. See Roth v. United States, 354 U.S. 476, 495-96 (1957) (Warren, C.J., concurring) (defendant purveyors who openly advertised to appeal to customers' erotic interest "plainly engaged in commercial exploitation of the morbid and shameful craving for materials with prurient effect").}

\footnote{146. To an extent this illustration parallels Finnis, supra note 4. Finnis points out that the distinction commonly drawn between "reason" and "passion" has a sound philosophical and psychological basis. Id. at 217-22.}

\footnote{147. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).}

\footnote{148. 403 U.S. 15 (1971).}

\footnote{149. Id. at 26; see Nimmer, supra note 45, at 34-35. Professor Nimmer represented Cohen before the
protects the communication of emotions or the appeal to emotions as much as it does the communication of normative or factual propositions. The emotive is essentially an intellectual or mental process. Thus the emotive and the cognitive are distinguishable from the physical. This is the distinction drawn in Cohen between the emotive on the one hand and "psychic stimulation" on the other. The same distinction is implicit in the Roth-Miller-Paris approach to obscenity. Cohen, in telling us what obscenity is not, explains legal obscenity better than any of the cases that purport to tell us what obscenity is. Once the emotive is included with the propositional, art, music, or poetry receive ample constitutional protection.

It has been suggested, however, that serious literature as well as hardcore pornography may evoke this same type of physical or quasi-physical arousal. No doubt many people have been aroused by Lady Chatterly's Lover, or Tropic of Cancer, and there are people somewhere who are aroused sexually by the plays of Shakespeare, by the Kinsey Report, or even by Bambi. People may become sexually excited by art or music; it is said that Hitler's speeches had the effect of arousing some of his listeners. The argument is that because all of the above constitute conduct protected by the first amendment, a distinction based on the capacity to cause sexual arousal is meaningless.

This argument misconceives the issue; it fails to recognize that an act may have multiple effects. Oral speech can have an intellectual effect and can have the physical effect of hurting the ears, breaking glass, or causing disruption by noise alone. The former is within the first amendment; the latter is not. The first amendment bars neither prohibitions on the use of sound trucks nor restrictions on talking in libraries. Books have intellectual content as well as physical mass. Although regulating the former is presumptively prohibited by the first amendment, barring a person from stacking two tons of books on a sidewalk is not. Assuming that the purely physical stimulus of a picture, book, or magazine is outside the scope of the first amendment, the result in the case of Lady Chatterly's Lover, Tropic of Cancer, or perhaps Bambi, is protected intellectual appeal and effect inseparably admixed with physical appeal and effect. The first amendment prohibition of regulation of commingled intellectual and physical effects is not intended to protect the intellectual nature of man than to the police power justifications for regulating obscenity. Given this constitutional balance of interests, the first amendment nevertheless poses no bar to the regulation of material.

Supreme Court.

150. 403 U.S. at 20 ("It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket."). [Anyone who finds Cohen's jacket "obscene" or erotic had better have his valves checked." Ely, supra note 142.

151. See Barber, supra note 142.


154. See Kaplan v. California, 413 U.S. 115, 118 n.3 (1973) (Mishkin v. New York, 383 U.S. 502 (1966) only case since Roth where Court held books obscene and most were illustrated).
that has a solely physical content. The sexual stimulus in Lady Chatterley's Lover is only a side effect. Lawrence himself, after all, "would censor genuine pornography, rigorously."\(^{155}\) Just as the government can censor noise but not a noisy political speech,\(^{156}\) as it can rigidly control automobile traffic but must be more circumspect in regulating parades and demonstrations, so the government under the first amendment may censor physical stimulation but not mentally oriented art or literature producing physical stimulation. The essence of the exclusion of hardcore pornography from the first amendment is not that it has a physical effect, but that it has nothing else.

Similarly, it has been argued that it is impossible to distinguish the pornographic from the propositional, to distinguish legal obscenity from thematic obscenity, because pornography is implicitly making a statement that the depicted activities are desirable or that pornography itself is valuable.\(^{157}\) In short, pornography appeals for a different sexual vision, opening the mind to a different view of sexual mores.\(^{158}\) But this argument proves too much. Almost any activity is itself an argument for its propriety. Chomsky has shown that all action is communicative.\(^{159}\) An assassination of the President is at once a violent act and a political statement.\(^{160}\) Pollution by a steel company is simultaneously an act and a statement that pollution is the necessary price of economic growth. Running down Main Street naked may be a statement about sexual values or an appeal for casting off our sexual inhibitions by doffing our clothes. But implicit in any meaningful constitutional definition of speech as communication is the idea that one can separate advocacy of an act from the act itself, even though the act contains an element of advocacy.

This is the distinction that is essential to an understanding of the holding in Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations.\(^{161}\) There is a difference between arguing in favor of discrimination and discriminating.\(^{162}\) Likewise there is a distinction between arguing for a new sexual vision and embodying it. Arguments for revolution are protected—revolution is

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156. See Gregory v. City of Chicago, 394 U.S. 111, 112 (1969); Terminiello v. Chicago, 337 U.S. 1, 6 (1949); cf. Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975) (some offense to members of the public does not justify restricting speech); Cohen v. California, 403 U.S. 1, 6 (1971) (distinguishing between visual and aural offense; viewer can avert his eyes, listener cannot so easily protect his sensibilities).

157. See Richards, supra note 69, at 81-82.

158. For a judicial rejection of such an argument under current obscenity standards, see United States v. One Reel of Film, 481 F.2d 206, 210 (1st Cir. 1973).

159. See J. LYONS, CHOMSKY (2d ed. 1977).


161. 413 U.S. 376 (1973) (upholding ban on newspaper listing employment openings according to sexual classifications).

162. Id. at 391. Scanlon makes the same point by noting that there should be no bar to the prosecution of someone who discovers and publishes a recipe for making nerve gas out of gasoline, table salt, and urine. Scanlon, supra note 15, at 211 ("[H]e could be prohibited by law from passing out his recipe on handbills or broadcasting it on television as ... he could be prohibited from passing out free samples of his product in aerosol cans or putting it on sale at Abercrombie & Fitch.").
Arguments for sex are protected—sex is not. Sex in and of itself is not protected by the first amendment. If sex is not protected, then two-dimensional sex is protected no more than three-dimensional sex, visual sex no more than tactile sex. Underlying all of the words of Roth, Miller, and Paris is the assumption that hardcore pornography is sex. The relevant precedent is not Schenck v. United States, Chaplinsky v. New Hampshire, or Kingsley Pictures v. Regents; it is Doe v. Commonwealth’s Attorney. And it is this conception of pornography as action, pornography as physical, that rationalizes the exclusion of pornography from the protection of the first amendment.

As I have previously suggested, the Court has experienced difficulty in articulating the concept of pornography as non-speech. The historical discussion in Roth is perhaps its least successful attempt. The fact that some forms of obscenity were prohibited in colonial America is largely irrelevant to a meaningful, contemporary conception of constitutional “speech.” Blasphemy was a criminal offense, as was political libel, but that is of little moment in 1979. Moreover, obscenity in 1791 was a far more encompassing term than it is today. Although anyone can cite constitutional history and the scriptures to his purpose, historical analysis should not be completely discounted. At a minimum it demonstrates that the constitutional meaning of


164. See Kingsley Int’l Pictures Corp. v. Regents, 360 U.S. 684, 688-89 (1959) (“What New York has done, therefore, is to prevent the exhibition of a motion picture because that picture advocates an idea—that adultery under certain circumstances may be proper behavior. Yet the First Amendment’s basic guarantee is of freedom to advocate ideas. . . . It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax.”)


166. 249 U.S. 47 (1919).

167. 315 U.S. 568 (1942).


170. 354 U.S. at 482-84 (Court reviewed colonial laws and intent of Continental Congress; amendment intended to guarantee uninhibited expression of political ideas; libel and obscenity not protected because did not achieve that purpose).

171. See New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964) (Constitution denies recovery by public official for defamation or libel unless he can prove “actual malice”); standard protects public criticism); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505-06 (1952) (impermissible under first and fourteenth amendments for state to censor motion pictures on grounds they are “sacrilegious”).

172. See generally F. Schauer, THE LAW OF OBSCENITY 8-29 (1976). In many cases, courts were unwilling, in the interests of dignity, to discuss the details of the cases before them. Id. at 11. Furthermore, the few opinions that discussed the charges involved prosecutions for publication of works dealing with sexual intercourse and venereal disease, words no longer considered profane. Id. at 12.

"speech" has never coincided with the ordinary meaning of "speech." The Roth opinion relies too heavily on the historical treatment of obscenity; that treatment is but one example of the proposition that "the unconditional phrasing of the First Amendment was not intended to protect every utterance." But, as I have suggested in the first part of this article, the latter is an argument better made philosophically than historically.

The phrases "social value" and "social importance" are as fundamentally misleading as the historical inquiry. Of course pornography can have social value. So can pollution, sex, political assassination, twelve-hour days, small children working at sewing machines, long hair, or short skirts. The issue is not whether the activity has social value, but whether it is speech. It is speech in the constitutional sense if and only if it has a certain kind of value: value as the process and result of intellectual communication. There are many other kinds of value, but this is the only one protected by the first amendment. The first amendment is not and cannot be the guardian of everything that is valuable, and value per se does not give rise to first amendment protection.

Justice Brennan's statement that obscenity was without social importance was mistaken on two counts. First, he assumed that anything without value as speech must be without value. Second, he thereby invited anyone who could show that obscenity did possess social value, regardless of first amendment value, to challenge directly the analytical underpinnings of the Roth methodology. If the Court in Roth had distinguished communicative value from other sorts of value, it would have established a foundation for isolating "speech" from other forms of conduct. The Court attempted to salvage the Roth rationale in Paris Adult Theatres I by observing that the control of obscenity "is distinct from a control of reason and the intellect," by focusing on the "communication of ideas," by excluding free will or social laissez-faire as constitutional values, and by observing that "the fantasies of a drug addict are his own and beyond the reach of government, but government regulation of drug sales is not prohibited by the Constitution." Both Paris and Miller, however, relied too heavily on the language in

175. Id. Other examples include blasphemy, profanity, and libel.
176. See text accompanying notes 66-117 supra.
177. See Memoirs v. Massachusetts, 383 U.S. 413, 418-19 (1966) (literature possessing minimal "social value" not obscene even if appealing to the prurient and patently offensive to average member of society based on contemporary community standards).
178. See Roth v. United States, 354 U.S. at 484 (all ideas of "social importance" deserve full constitutional protection); Jacobellis v. Ohio, 378 U.S. 184, 191 (1964) (Brennan, J.) (inappropriate to balance appeal to prurient interest and "social importance"; any social importance guarantees protection under Roth).
179. Two interesting collections outlining various uses and misuses of obscenity are R. DHAVAN & C. DAVIES, CENSORSHIP AND OBSCENITY (1978) and D. HUGHES, PERSPECTIVES ON PORNOGRAPHY (1970).
180. See note 178 supra.
181. 413 U.S. at 67.
182. Id. (incidental interference with "communication of ideas" not prohibited by first amendment).
183. Id. at 64.
184. Id. at 67-68. The Court in Paris undermines its own position by engaging in unnecessary justification for obscenity regulation. If its purpose was only to define the parameters of constitutional speech, and if hardcore pornography falls outside those parameters as well as outside the protection of any other constitutional provision, the state need show only a rational basis. A footnote would have been more than sufficient. See Hindes, supra note 78, at 353-54 & n.38.
Roth and, more significantly, on the definition of obscenity thereafter developed. The role of the definition of obscenity in promoting the distinction suggested here and implicit in Roth is critical, and must be evaluated in light of the purposes the definition is designed to serve.

IV. THE DEFINITION OF "OBSCENITY"

The fundamental premise of this article is that certain verbal or pictorial materials are not speech in the constitutional sense. Because most verbal or pictorial materials do possess intellectual content, the purpose of a legal definition of obscenity must be to separate those that do not possess such content from those that do. Like "speech," "obscenity" is a term of art that derives its meaning from its purpose—the essential separating function. Once "obscenity" is confined to non-speech, as set forth in Roth, the distinction between legal obscenity and ordinary obscenity becomes apparent. Ordinary obscenity includes four-letter words and sexually explicit or offensive material having cognitive content. The purpose of the legal or constitutional definition of obscenity is to isolate that which lacks cognitive or intellectual content and not to describe certain forms of expression or communication.

Having established that the separating function is the purpose of the definition of obscenity, the true meaning of "appeals[] to the prurient interest" becomes apparent. Material which appeals to the prurient interest is intended to, and does in fact, produce a physical or quasi-physical stimulus rather than a mental effect. The Court's opinion in Roth is curiously inconsistent because it suggests that "speech" has a constitutional meaning apart from its ordinary meaning, but that the definition of "prurient" can be obtained by looking in the dictionary. The dictionary definitions should not be determinative, but they do suggest that it is the physical or arousing characteristics that are essential to the exclusion of "obscenity" from the first amendment. The concept fundamental to the Miller test is that material appealing to the prurient interest is sex, and not merely describing or advocating sex. Material that appeals to the prurient interest is material that turns you on. Period.

Some literature, art, or other protected speech may also turn people on physically; the last prong of the test is designed to restrict legal obscenity to

185. See Schauer, Reflections on "Contemporary Community Standards": The Perpetuation of an Irrelevant Concept in the Law of Obscenity, 56 N. CAR. L. REV. 1, 3-4 (1978) (definition of obscenity permits court to "separate" materials protected by constitution from those which are not). To determine whether regulation is permissible it is first necessary to decide on a definition and then to ascertain whether the material falls within the scope of the definition. Id.

186. The need to distinguish dictates that the Court establish a definition to use as its standard. Id. at 4-5.

187. See notes 119 & 134 supra.


189. See Schauer, supra note 185, at 14-17 (noncognitive material having physical effect and appealing to prurient interest classified as conduct rather than speech).

190. 354 U.S. at 487 n.20. Not only are the Roth definitions largely irrelevant, they are at times inconsistent with each other.

191. See Schauer, supra note 185, at 14-17.

192. See text accompanying notes 151-56 supra.
that material which possesses only physical attributes, and is a necessary adjunct to the inherently overinclusive prurient interest test. The two tests operate to identify that which is solely physical. The "utterly without redeeming social value" test of Memoirs v. Massachusetts\footnote{193. 383 U.S. 413, 418-19 (1966) (unless book can be found to be "utterly without social value," it is protected by first amendment).} recognized the need to isolate the purely physical, but by using the criterion of social value it unnecessarily restricted state power, for reasons that I have discussed previously.\footnote{194. See text accompanying notes 177-81 supra.} The Court in Miller erroneously concluded that both the "utterly" and the "social value" tests of Memoirs were unnecessarily strict.\footnote{195. 413 U.S. at 24-25.} Although that was true of the "social value" criterion, it was not true of the "utterly" prong. The latter serves to exclude anything cognitive and thus serves to distinguish speech and non-speech. As Justice Brennan suggested in his Paris dissent, removal of the word "utterly" was inconsistent with the analytic underpinnings of Roth.\footnote{196. 413 U.S. at 96 (Brennan, J., dissenting) (modification of this aspect of the Memoirs test "may prove sufficient to jeopardize the analytic underpinnings of the entire scheme.").}

A more appropriate test would be "utterly without literary, artistic, political, or scientific value," or, better still, "utterly without intellectually communicative content." If the word "serious" is to remain, it must be defined in terms of intent alone, a point I have made previously.\footnote{197. F. SCHAUER, supra note 9, at 140-41 (1976) (requirement that value be serious determines whether material is intended to convey literary, artistic, political, or scientific message). Dean Lockhart concurs in this interpretation. Lockhart, Book Review, 28 Hastings L.J. 1325, 1327 (1977).} So defined, it serves only to exclude the case of "[a] quotation from Voltaire in the flyleaf of . . . an otherwise obscene publication."\footnote{198. Kois v. Wisconsin, 408 U.S. 229, 231 (1972).} But if the word "serious" is interpreted to allow jury or court evaluation of the worth of cognitive communication, then it is totally at odds both with the non-speech methodology and the philosophy of the first amendment.

I have reserved discussion of the second prong of the Miller test, patent offensiveness, because by now it should be clear that it serves no purpose in the definitional methodology. If the prurient interest test isolates material that has physical as opposed to mental effect, and if the "value" test restricts regulation to material that is solely physical in nature, what is left is not speech in the constitutional sense, regardless of whether anyone is offended, and regardless of whether any community's standards are affronted. This test is inconsistent with the underlying premise of Roth, Miller, and Paris. By including "offensiveness" within the definition of obscenity, the Court suggests that offensiveness has a role in the determination of whether material constitutes speech. Protected speech is often offensive,\footnote{199. See Erznoznik v. City of Jacksonville, 422 U.S. 205, 206-12 (1975) (to prohibit showing of drive-in movies containing nudity too extreme and may inhibit showing of "innocent" or "educational" films; privacy can be protected by averting one's eyes); Cohen v. California, 403 U.S. 15, 16, 26 (1971) (mere display of "Fuck the Draft" on a jacket in courthouse offensive, but risk of stifling ideas too great; conduct}
contexts the Court has never suggested that offensiveness is relevant to the extent of first amendment protection.\textsuperscript{200} Offensiveness has nothing to do with whether an utterance is speech in the constitutional sense, and thus is not properly part of a definition whose sole purpose is to separate speech from non-speech.\textsuperscript{201} 

The purpose of the definition of obscenity, therefore, is the isolation of material devoid of intellectually communicative content. The requirement that the material be hardcore pornography\textsuperscript{202} is but a check on the process;\textsuperscript{203} only hardcore pornography could survive the proper application of the first and third prongs of the \textit{Miller} test. The test must ultimately be evaluated in terms of the results. Does it work? The \textit{Miller} test appears to have worked\textsuperscript{204} after \textit{Jenkins v. Georgia}\textsuperscript{205} made it clear that “community standards” were a minor factor in the determination of obscenity.\textsuperscript{206} 

Although the \textit{Miller} formulation has been attacked as inherently too vague, the criticism has been on the grounds of practicality—that the test is incapable of principled application—and not that it lacks constitutional validity. This is essentially Justice Brennan's argument in his dissents in \textit{Paris} and \textit{Miller}.\textsuperscript{207} Justice Brennan recognized that as long as the first amendment does not create a right of individuality per se, the non-speech approach remains intellectually defensible.\textsuperscript{208} His criticism was limited to the claim that protected under first and fourteenth amendments.\textsuperscript{209} There is, however, some question as to the extent to which these holdings survive \textit{FCC v. Pacifica Foundation}, 98 S. Ct. 3026, 3039, 3040-41 (1978) (ease with which child might listen to broadcast justifies special regulation). By relying on the degree of intrusiveness of the medium, the Court has cast a cloud on both \textit{Cohen} and \textit{Erznoznik}, since it seems as easy if not easier to turn off a radio or a television as it is to divert one's eyes from a jacket in a courthouse lobby or a motion picture screen that can be seen from a highway. It may be that the assumption that offensiveness is relevant to speech value led to the unfortunate result in \textit{Pacifica}. 

\textit{Id.} at 84.

\textsuperscript{200} But see \textit{FCC v. Pacifica Foundation}, 98 S. Ct. at 3040-41 (offensive speech can be prohibited from airwaves when special facts render it unwarranted nuisance). The \textit{Pacifica} holding may have implications beyond the regulation of the broadcast media.

\textsuperscript{201} See generally Schauer, supra note 185, at 17-21 (offensiveness of language not relevant or reliable determinant of constitutional protection).

\textsuperscript{202} \textit{Miller v. California}, 413 U.S. at 27 (no one subject to prosecution unless materials “patently offensive ‘hardcore’ sexual conduct”).

\textsuperscript{203} \textit{Id.} at 159-61 (“Carnal Knowledge” not patently offensive and \textit{Miller} does not place it outside scope of first amendment; community standards, although relevant, are subsidiary factor).

\textsuperscript{204} This judgment is made negatively, after noting that only hardcore pornography is the subject of current prosecutions and convictions. The few attempted convictions of “softer” material have not survived appellate review.

\textsuperscript{205} \textit{418} U.S. 153 (1974).

\textsuperscript{206} \textit{Id.} at 159-61 (“Carnal Knowledge” not patently offensive and \textit{Miller} does not place it outside scope of first amendment; community standards, although relevant, are subsidiary factor).

\textsuperscript{207} Justice Brennan went on to state: 

\textquote[40x264]{After 16 years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protection of the First and Fourteenth Amendments, on the one hand, and on the other the asserted state interest in regulating the dissemination of certain sexually oriented materials.}
if this theoretically valid approach does not work in practice it should be abandoned. This is certainly a legitimate argument. If there is a substantial risk that the test will suppress or chill speech, the interests in obscenity regulation must give way to the interest in protecting speech. Moreover, the inability of government to make difficult distinctions between obscene and protected verbal or pictorial activity provides an independent justification for expanding the constitutional definition of speech at the fringe. Justice Brennan's dissent must be taken more seriously than it was by the majority, because it properly recognizes the uncertainty inherent in the process and the practical results of that uncertainty.

Justice Brennan failed to recognize, however, that unconstitutional chilling occurs only when the chilled material is itself material worth protecting. It is clear that the Miller test will cause some chilling. But what is it that is chilled? The division between speech and non-speech is somewhere between the two extremes of a continuum of intellectual content, ranging from political argument on the one end and a close-up photograph of an ejaculating male sexual organ (EMSO) shown solely for the purpose of stimulating a similar reaction on the other.

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<th>political speech</th>
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Justice Brennan erroneously assumes that the Miller division is congruent with the speech/non-speech demarcation. By adding the specificity requirement, a special scienter requirement, and the requirement that material be patently offensive to contemporary community standards, we have in fact moved the actual definition to the right of the division between speech and non-speech.

Thus, the material in area (B), which is not speech, is nevertheless protected under the Miller definition. If Miller remains vague and some

209. See Note 66 supra.
211. Miller v. California, 413 U.S. at 24 (obscene material must portray "sexual conduct specifically defined by the applicable state law"). This factor has little bite today. See Ward v. Illinois, 431 U.S. 767, 771-73 (1977) (prior state court decisions may specify types of material that law considers obscene, specific statutory definition unnecessary).
212. See Hamling v. United States, 418 U.S. 87, 119-24 (1975) (must be aware of contents of material, knowledge that material obscene not required); Smith v. California, 361 U.S. 147, 152-53 (1959) (prosecution of bookseller without knowledge of book's contents for possession of book containing materials subsequently held obscene impermissible; conviction would hamper freedom of press). Thus, it is no longer required that the defendant be shown to have known that the materials were legally obscene.
213. 413 U.S. at 24. Thus, the patent offensiveness requirement may serve the solely pragmatic function of making it more difficult to prove that material is legally obscene.
214. However, this may be material of the type held subject to regulation in Young v. American Mini
material in area (B) is subjected to regulation, no harm is done. In any event, an ideal separating function would subject the material in area (B) to state control. Unless Mr. Justice Brennan can show that the test is so vague as to have a chilling effect on area (A), his warning is unfounded.

V. CONCLUSION

Careful attention to the context and purpose of constitutional language produces a definition of speech that legitimates the Court's refusal to accord first amendment protection to hardcore pornography. This definition reveals that "obscenity" in the constitutional sense can be isolated in a category of non-speech that does not possess first amendment value. This is not to say that the conception of the first amendment underlying this definition is necessarily correct; that judgment requires more critical examination. Rather, it is significant that the Court's treatment of obscenity is consistent with a vision that emphasizes intellectual (and perhaps public) communication and not self-expression. If the Court is to be criticized, it must be for that conception of the first amendment and not for the approach to obscenity that flows naturally from it.

The Court's treatment of pornography is easily justified, particularly since pornography is almost wholly pictorial. Pictures, after all, are not mentioned in the first amendment. Most pictures come within the purview of the first amendment because they are similar in relevant respects to linguistic communication. When these similarities are not present, there is no reason to extend the first amendment in this manner. Pornography is in this sense at the "fringe" of the amendment's protection. Those who take a literal approach to the constitution should not worry about the Court's pornography rulings. They should be concerned about the treatment of verbal betting, bigamy, price-fixing, and the truthful advertisement of unregistered securities, all of which inevitably involve the use of words.

Distinguishing between speech and non-speech is a constitutional function. The legislative or regulatory function is to identify a particular harm. Difficulty arises because many of the legislatively perceived harms flowing from obscenity are present in speech as well as non-speech. Obscenity may offend, degrade the environment, or cause antisocial conduct. The same damage may in most instances be caused by sexually explicit speech as well as by pornographic non-speech. In drawing the constitutional line, the Supreme Court has placed it somewhere in the middle of the area of legitimate legislative concern. Often a legislature cannot deal with an entire class of harm without infringing upon speech as well as non-speech. It cannot regulate speech without making a far greater showing of need than is currently available on the evidence. The effect of the first amendment, therefore, is to limit the legislative bodies to regulating only part of a problem.

Theatres, Inc., 427 U.S. 50, 54, 62-64 (1976) (zoning ordinance prohibiting location of adult bookstores and theaters within 1000 feet of other such establishments valid exercise of police power and not prior restraint on speech).

215. See note 68 supra.

216. 413 U.S. at 58-61 & n.8 (obscenity has been found to correlate with crime; its existence arguably degrades level of decent society and invades right of privacy of those who wish to but cannot avoid it).

217. See generally Richards, supra note 69.
The latter proposition in itself is not startling. If a city council wants quiet parks it can keep out trucks but not speeches, both of which cause noise but only one of which is outside the scope of first amendment protection. But the problem here is that any constitutionally drawn legislation will be largely futile. A legislature restricted solely to dealing with non-speech may be doomed to failure in trying to make society safer, more moral, less subject to offense, or more pleasant. Yet no other solution is possible. Ultimately the legislative goals must yield to the first amendment. In the interest of maximum first amendment protection, the Court has doomed the legislature to largely ineffective measures. I would suggest that faced with this reality the legislature should refrain from regulation. But this is a legislative and not a constitutional choice. The Constitution properly limits the legislature to what may seem an artificially constrained area. What remains to be regulated is not a constitutional concern.