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RESPONSE: PORNOGRAPHY AND THE FIRST AMENDMENT*

*Frederick Schauer***

Imagine a scientific genius compelled to make a choice between two projects. He has the ability to design a new version of the hydrogen bomb, capable of killing more people with less effort than any existing weapon. He also has the ability to design a process for the manufacture of edible food from sand, grass, and salt water, a process that would end hunger and starvation throughout the world. Owing to a shortage of time and funds, he must choose between projects. He chooses to design the bomb, thereby causing the production of the world's most efficient and destructive weapon.

Would it be proper to criticize our scientist by saying that he has designed a bad bomb? Of course not. His choice of goals is morally outrageous,¹ and justifiably subject to criticism on those grounds. But the wrongfulness of his choice of ends has no bearing on the evaluation of how well he has accomplished his chosen ends. We can properly say he has done his job well, yet at the same time say that he has erred in his choice of job. The fact that he is a bad man does not mean that he has designed a bad bomb.

This distinction between criticism of ends and criticism of means is germane to Professor Feinberg's commentary on Supreme Court decisions dealing with pornographic materials.² Professor Feinberg employs the thesis of liberalism that harm to others and the prevention of nuisance are the only permissible justifications for

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1. Whether the wrongfulness of his choice lies in designing the bomb, in *not* designing the food manufacturing process, or both, is a question that encompasses virtually the entire range of moral philosophy. Deontological ethics in the Kantian tradition would focus almost exclusively on the wrongfulness of designing the bomb, rather than on the good that could have been done by designing the food manufacturing process. *See, e.g.*, C. FRIED, *RIGHT AND WRONG* (1978); W.D. ROSS, *THE RIGHT AND THE GOOD* (1930); Williams, *A Critique of Utilitarianism*, in J.J.C. SMART & B. WILLIAMS, *UTILITARIANISM: FOR & AGAINST* 77 (1973). By contrast, ethical theories variously described as utilitarian, teleological, or consequentialist would find as much if not more wrong in what was *not* done as in what was done. *See, e.g.*, *CONTEMPORARY UTILITARIANISM* (M. Bayles ed. 1968); J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (1789); J.J.C. Smart, *An Outline of a System of Utilitarian Ethics*, in J.J.C. SMART & B. WILLIAMS, *UTILITARIANISM: FOR & AGAINST* 3 (1973).

2. Feinberg, *Pornography and the Criminal Law*, 40 U. PITT. L. REV. 567 (1979).

criminal penalties.³ He then evaluates the doctrines of the Supreme Court in terms of that benchmark of liberalism. Such criticism assumes, however, that liberalism is a goal that the Constitution and the Court share with Professor Feinberg. But that assumption is erroneous. The Court's goal in the "obscenity" cases is to define the limits of the concept of freedom of *speech*.⁴ The initial evaluation of Supreme Court decisions in this area ought to be in terms of *that* goal. It may well turn out that the Court has served *its* goal quite well, but that it has defined its goal either erroneously or too narrowly.

I propose, therefore, to evaluate this same body of law in terms of the goals of free speech rather than the goals of liberalism. I believe that these goals are in large part distinct and must be separated for purposes of analysis. It is a fundamental error to treat freedom of speech as congruent with liberal political or social philosophy, just as it is a fundamental error to treat freedom of speech as a mere subset of liberalism.

Let us first, therefore, look at the three basic elements⁵ of the Supreme Court's test for the determination of legal obscenity: appeal to the prurient interest; patent offensiveness; and lack of serious literary, artistic, political, or scientific value.⁶

Attempts to define the concept of prurient interest with the aid of a dictionary are, as Professor Feinberg properly observes,⁷ both misguided and circular.⁸ A major stumbling-block is that these defi-

3. *Id.* Liberalism is best characterized as a bundle of concepts not susceptible of any one essentialist definition. See R. FLATHMAN, *THE PRACTICE OF RIGHTS* 44 (1976). In addition to what can be abbreviated as the "harm principle," see J. FEINBERG, *SOCIAL PHILOSOPHY* 20-54 (1973), most conceptions of liberalism incorporate related but independent concepts of individualism, equality, and political liberties. See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); J. RAWLS, *A THEORY OF JUSTICE* (1971). In the remainder of this commentary I will use the words "liberal" and "liberalism" to refer only to that particular aspect of liberalism which forms the basis for Professor Feinberg's Article: the limitation of governmental coercive power to those activities that are in the relevant sense other-regarding.

4. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476 (1957).

5. There are, of course, other aspects of these three basic elements, some of which, such as the evaluation of the material as a *whole* and the necessity of determining prurient interest in reference to the *average person*, were added to make clear the rejection of *Regina v. Hicklin*, L.R. 3 Q.B. 360 (1868). See Feinberg, *supra* note 2, at 584-85. A thorough analysis of the various tests is of course necessary in applying the basic test to actual materials, see generally F. SCHAUER, *THE LAW OF OBSCENITY* 69-168 (1976), but such detail is unnecessary to the more fundamental structure that Professor Feinberg and I are here discussing.

6. *Miller v. California*, 413 U.S. 15, 24 (1973).

7. Feinberg, *supra* note 2, at 572-73.

8. "Prurient interest" is a term of art, drawing its meaning from its use in the cases

nitions of prurience invariably refer to a certain *state of mind*, whether it be lecherous, leering, itching, or morbid.⁹ But the core meaning of prurience, in the legal context, is rather the idea of sexual arousal or excitement.¹⁰ The important feature of sexual arousal, in terms of separating speech from other conduct, is that it is perceived as a primarily *physical* reaction. While it is of course true that sexual arousal is significantly mental, so too is sexual arousal caused by direct physical stimulation. Another example is the enjoyment of food. The fact that I adore escargots, while many others find them disgusting, is not due to any physiological difference in taste buds. It is primarily a mental distinction. But that does not make the sale or ingestion of escargots an activity protected by the concept of free speech. The prurient interest test is the embodiment of Professor Feinberg's observation that some two-dimensional materials are less similar to books than they are to three-dimensional mechanical sex aids such as "French ticklers."¹¹ In short, that which appeals to the prurient interest is that which is designed to cause actual sexual stimulation and generally does so for its intended audience.

Such material is, of course, what we would ordinarily call pornographic, not obscene. Professor Feinberg is clearly correct in criticizing the Court for this confusing juxtaposition of terminology.¹² But he himself is still taken with the importance of the notion of the obscene. In fact, the Court's misuse of the distinction between the pornographic and the obscene is even more erroneous than is perceived by Professor Feinberg, since the concept of the obscene is wholly unrelated to the Court's professed aim of delineating the boundaries of protected speech. Whether pornographic material (all

and from the deeper purpose of the approach that is embodied in those cases. As with many legal terms, dictionary definitions are of little assistance, since the use in a legal system is what gives rise to the meaning of the legal term. See generally J. BENTHAM, A FRAGMENT ON GOVERNMENT ch. V, notes to § 6 (1776); H.L.A. HART, THE CONCEPT OF LAW 13-17 (1961); Hart, *Definition and Theory in Jurisprudence*, 70 L. Q. REV. 37 (1954); Summers, *Legal Philosophy Today—An Introduction*, in ESSAYS IN LEGAL PHILOSOPHY (R. Summers ed. 1968). I have recently made similar observations in the context of the constitutional definition of the word "speech." Schauer, *Speech and "Speech": Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979).

9. *Roth v. United States*, 354 U.S. 476, 487 n.20 (1957). Indeed, the Court has never again attempted to articulate a definition for the concept of appeal to the prurient interest.

10. See *Ginzburg v. United States*, 383 U.S. 463 (1966), referring to "titillation," *id.* at 470, "erotically arousing," *id.* at 471, and "sexual stimulation," *id.*

11. Feinberg, *supra* note 2, at 579.

12. *Id.* at 573.

or some) is obscene is indeed controversial, but it is also constitutionally uninteresting.¹³ It is true that the Court has never sought to demonstrate that pornographic material is obscene, but it is equally true that it is not incumbent on the Court to do so. If the function of a constitutional definition of obscenity is to exclude that which bears no relevant similarities to the type of communication protected by the first amendment, then the identification of a category of symbolic activity as primarily physical, rather than intellectual or mental, is sufficient. The lack of obscenity in the narrow sense, that is the lack of offensiveness, disgust, or abhorrence, has no bearing whatsoever on whether something is or is not speech in the constitutional sense. Obscenity is not a necessary condition for the exclusion of pornography from the ambit of the first amendment.¹³ Obscenity may be a necessary condition for the permissibility of regulation under liberal principles, but it has nothing to do with the determination of whether material is sufficiently intellectual in content to come within the scope of the underlying principles of freedom of speech. Unfortunately, space does not permit me fully to explore those principles here, so I must be content instead with the rather conclusory observation that none of the philosophical justifications of a distinct concept of freedom of speech would put direct sexual excitement within the confines of that principle.¹⁴

13. Except as the Court has made it so by the unnecessary addition of the requirement of patent offensiveness. See text accompanying notes 18 and 19 *infra*. See also Schauer, *Reflections on "Contemporary Community Standards": The Perpetuation of an Irrelevant Concept in the Law of Obscenity*, 56 N. C.L. Rev. 1 (1978).

14. Direct sexual excitement can hardly be said to contribute to the marketplace of ideas, *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), or to the exchange of ideas and information that supports the process of democracy, A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948). On these theories, see generally DuVal, *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 GEO. WASH. L. REV. 161, 188-198 (1972). If freedom of speech is based in whole or in part on the values of self-expression and self-fulfillment, see Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879-81 (1963), then it must be restricted to self-fulfillment by communication only, rather than include other activities that would lead to self-fulfillment, for otherwise free speech collapses into a general justification for individual liberty. See Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). There are those who expand this view of freedom of speech to include an almost unlimited range of self-expressive activity. See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 578-79 (1978); Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964 (1978). But then any reference to "speech" becomes superfluous. Aside from the extent to which such arguments abandon the constitutional text, they also must implicitly allow the restriction of communication to the same extent that they allow the restriction of non-communicative but self-expressive conduct. Such a result is likely to be insufficiently protective of communication.

Taken alone, however, the prurient interest test is constitutionally overinclusive, in that it allows the prosecution of material containing undoubted speech value. Prurient material may be inextricably coupled with material having intellectual value; or material not intended to cause sexual arousal may have that effect on a significant proportion of the recipients of that material; or material intended as pornography may have clear but perhaps unintended interest to scholars, as with *Fanny Hill*. In each of these instances the prurient matter coexists with the type of intellectual communication that it is the very function of the first amendment to protect. To compensate for this, we add the additional filter provided by the requirement that the material have *only* prurient value, that it have no "speech" value. This is the purpose of the mandate that the material have no "serious literary, artistic, political, or scientific value,"¹⁵ although the limitation to *serious* value is misguided. Once we realize the purpose of this aspect of the test for obscenity, its function as a filter for free speech values, and its function in filtering out everything that is not *wholly* physical, we can see that the limitation to the serious is wrong. In order for the test to function, we must be able to say that only material that is completely non-intellectual is excluded from the definition of "speech." But that is a minor problem at this level of inquiry. The significant factor is that what remains after applying these tests, is hard-core pornography¹⁶ in the strictest sense, material that is nothing more than a linguistic or pictorial sex aid. What is left is remarkably similar, in terms of speech values, to Professor Feinberg's characterization of coprophagia—material that is "not the expression in language of an opinion" and which does not "fall into a recognized genre of aesthetic expression."¹⁷ And if this observation is correct, then the Supreme Court has done its job well.¹⁸ It has devised a test that ex-

15. *Miller v. California*, 413 U.S. 15, 24 (1973).

16. The Court in *Miller* made reference for the first time to the requirement that only "hard-core" material may be proscribed. 413 U.S. at 27. See generally F. SCHAUER, *THE LAW OF OBSCENITY* 109-13 (1976). If the prurient interest and value tests are properly applied, the hard-core requirement adds nothing. It is purely analytic. But if there is any truth to Mr. Justice Stewart's observations that the recognition of hard-core pornography is virtually intuitive, *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), then the hard-core requirement can serve as a "check" to insure that the substantive tests are properly applied.

17. Feinberg, *supra* note 2, at 572.

18. In actuality, the evaluation of the Court's test must be empirical. That is, has it indeed allowed the prosecution of hard-core pornography while absolutely preventing the prosecution of anything else on the grounds of obscenity? *Jenkins v. Georgia*, 418 U.S. 153

cludes from regulation anything that can be called "speech" in terms of the values implicit in the free speech clause of the first amendment.

I have reserved until now any discussion of the second prong of the Court's test, the requirement of patent offensiveness, because it is here that the confusion of liberal values with free speech values becomes most apparent. There is nothing in the notion of offensiveness that relates in any way to the identification of whether certain conduct is or is not speech in the constitutional sense. Offensiveness has no bearing on the determination of whether something is or is not part of the process of intellectual communication. Material that is communication, designed to appeal to the process of thought, does not become less so because it is offensive. Thoughts and ideas that offend are nonetheless thoughts and ideas. Conversely, direct erotic stimulation does not become an idea or a thought or part of the process of intellectual communication merely because the community is not offended. Lack of offense is not a defining characteristic of "communication," in either the ordinary or constitutional sense. The patent offensiveness test is the bastard child of the test for legal obscenity; for the patent offensiveness test in no way relates to the purpose of the test for obscenity, if that purpose is to separate speech in the constitutional sense from material that contains no speech values.

Nonetheless, Professor Feinberg praises the concept of patent offensiveness, since that requirement adds an element of liberalism to the test for legal obscenity. It prevents the regulation of material that is not speech, but which also does not offend. This contrast between liberal values and free speech values is nowhere better illustrated than by Professor Feinberg's incisive example of the magazine designed for rock fetishists.¹⁹ As described, the magazine is designed solely to appeal to the prurient interest, and has absolutely no literary, artistic, political, or scientific value. Without the patent offensiveness test, the magazine is constitutionally unprotected. But the addition of that test saves the magazine from potential prosecution since it is unlikely that the magazine is offensive to any significant proportion of the contemporary community, however defined. But if we take Professor Feinberg's characterization of

(1974), is plainly a counter-example, but since *Jenkins* the tests set forth in *Miller* seem to have served tolerably well, at least in terms of the majority's own purpose.

19. Feinberg, *supra* note 2, at 594.

the magazine at face value, it is still not speech in the constitutional sense, even though its circulation causes no offense. In terms of the values of freedom of speech, a restriction on selling this particular magazine is analytically indistinguishable from a prohibition on the sale of rocks themselves, where those rocks are to be used by rock fetishists for the purpose of sexual stimulation. It is of course silly and illiberal to regulate the sale of rocks for this purpose, but not because of anything concerning the communication of ideas or information. Indeed, the impermissibility of regulation of the sale of rock fetishists' magazines or rocks for rock fetishists is analogous to the moral impermissibility of regulation of cigarettes, sweets, or fried foods. By drawing this comparison we can focus on the contrast between the principles embodied in the concept of free speech and the principles embodied in this particular facet of the concept of liberalism.

Both at the level of pure political theory and at the level of constitutional law, we must recognize that free speech concerns and liberal concerns are distinct. The two are certainly not inconsistent with each other. Indeed, they are frequently found together. But this is not a matter of logical necessity. The liberal would protect pornography for the same reason he would protect private homosexual behavior, prostitution, sweets, fried foods, long hair, and short skirts. They are all in the relevant sense self-regarding. But we do not protect speech because it is self-regarding. Indeed, it is one of the most important other-regarding activities in which we engage. Whatever truth there may be to the saying that "sticks and stones may break my bones, but names will never hurt me," it is hardly an appropriate generalization for the whole range of communicative conduct. On a personal level, speech may offend me, humiliate me, damage my reputation, or cause me to lose tangible advantages. Derogatory comments about my scholarship by an established scholar would do me far more harm than would be done if that same established scholar kicked me in the shins or broke my arm. Walter Kerr's critical review of a Broadway play is hardly self-regarding. It causes more financial damage than most of the actions that give rise to legal liability at common law.

Once we realize that these and most other forms of protected speech are covered by the principle of freedom of speech *despite* the fact that they are other-regarding, then the divergence between liberal theory and free speech theory becomes apparent. Under a principle of free speech that creates an *independent* restraint on govern-

ment power,²⁰ acts covered by the principle may be protected even though the consequences caused by these acts would be otherwise sufficient to justify regulation even in a society based upon liberal principles.

Drawing this distinction between liberal theory and free speech theory is important in two respects. First, it demonstrates that the concept of liberalism, as here used by Professor Feinberg, does little if anything to explain a free speech principle that protects other-regarding activity. For that we must look elsewhere, whether it be to the importance of speech in determining truth or identifying error,²¹ to the importance of speech as an adjunct of the democratic process,²² or to the importance of speech in providing the informa-

20. A principle of free speech that is totally congruent with or totally subsumed by a principle of individual liberty is for that reason unnecessary. When we talk about free speech, we are referring to a principle that is at least to some extent distinguishable from other principles of political or social philosophy.

21. There are in fact three permutations of the "marketplace of ideas" rationale for freedom of speech. The first assumes that there is some objectively verifiable truth, and that the free exchange of ideas and opinion will lead us to discover it. *See, e.g.*, T. JEFFERSON, FIRST INAUGURAL ADDRESS, in THE COMPLETE JEFFERSON 384-85 (S. Padover ed. 1943); *Viereck v. United States*, 318 U.S. 236, 251 (1943) (Black, J., dissenting); *International Brotherhood of Electrical Workers, Local 501 v. NLRB*, 181 F.2d 34, 40 (2d Cir. 1950) (L. Hand, J.); J. MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING 78, 116-28 (J.C. Suffolk ed. 1968); W. Bagehot, *The Metaphysical Basis of Toleration*, in II LITERARY STUDIES 422, 425 (3d ed. R.H. Hutton ed. 1884). This is the theory of rationality, the theory of the Enlightenment, and is properly subject to criticism by those who take a dimmer, and perhaps more realistic, view of the ability of people to identify truth: *See* Simon, *A Comment on Censorship*, 17 INT'L PHIL. Q. 33, 37 (1977); Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173, 187 (1956). This is hardly a new observation. *See* Horace's reference to "*civium ardor prava jubentium*" (the frenzy of the citizens bidding what is wrong), in HORACE'S ODES, bk III, ode iii, THE ODES OF HORACE 82 (R. Dunsany trans. 1947), quoted by Jefferson in his letter to Madison of December 20, 1787, 6 THE WRITINGS OF THOMAS JEFFERSON 391-92 (memorial ed. 1904).

Alternatively, there is the more skeptical epistemology of, for example, Holmes, which can be taken either to *define* truth in terms of what is accepted by the marketplace, or to take the marketplace as the best test of truth we have, even if it is not always perfect. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). For criticism of this pragmatist epistemology in a legal context, *see, e.g.*, Auerbach, *supra*, at 187; M. LERNER, THE MIND AND THE FAITH OF JUSTICE HOLMES 290 (Mod. Lib. ed. 1954).

Finally, one could look upon the process of exchanging and challenging views not as a means of identifying truth, but as a way to identify error. *See* J.S. MILL, ON LIBERTY ch. 2 (1859); K. POPPER, THE OPEN SOCIETY AND ITS ENEMIES (5th ed. 1966). As long as we appreciate the identification of an error as itself an epistemic advance, then such a view frees the marketplace theory from any dependence on the existence or identification of any verifiable truth.

22. *See* A. MEIKLEJOHN, *supra* note 14; Emerson, *supra* note 15, at 882-83; DuVal, *supra* note 15, at 194-98; Morrow, *Speech, Expression, and the Constitution*, 85 ETHICS 235 (1975);

tion and opinions that enable us to exercise individual autonomy, as Professor Scanlon has elsewhere argued.²³ Secondly, the distinction between free speech and liberalism renders the free speech principle immune from rejections of liberalism. If free speech is congruent with or derived from the principles of liberalism, then a rejection of liberalism must *pro tanto* be a rejection of freedom of speech. This has significant practical importance under the current interpretation of the American Constitution, since recent decisions have made it clear that the Supreme Court does not now see liberalism as one of the values embodied in *any* part of the Constitution.²⁴ This is amply demonstrated by recent decisions allowing the regulation of hair length,²⁵ private homosexual behavior,²⁶ and hard-core pornography,²⁷ as well as by lower court decisions such as those allowing the regulation of marijuana.²⁸ If and only if we distinguish between liberalism and free speech can we say that this judicial rejection of liberalism as a constitutional principle, whether right or wrong, has nonetheless caused no diminution of the free speech principle. Only a truly independent free speech principle emerges unscathed from judicial or societal rejections of liberalism.

The pitfalls of failing to maintain this separation are demonstrated by Professor Feinberg's observation that inoffensively expressed theological and political opinions fail to qualify as nuisances and thus cannot be regulated in any way.²⁹ But the implication of

Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

23. Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1974). See also Scanlon, *Rawls' Theory of Justice*, 121 U. PA. L. REV. 1020, 1042-44 (1973).

24. The clearest statement of this view is in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), where the majority catalogued various non-liberal justifications for the regulation of hard-core pornography and found them constitutionally sufficient. See generally Hindes, *Morality Enforcement Through the Criminal Law and the Modern Doctrine of Substantive Due Process*, 126 U. PA. L. REV. 344 (1977); Perry, *Abortion, the Public Morals and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689 (1976); Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 NW. U. L. REV. 417 (1976).

25. *Kelley v. Johnson*, 425 U.S. 238 (1976). See generally L. TRIBE, *supra* note 14, at 958 (1978); Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 600-10 (1977).

26. *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976), *aff'g without opinion*, 403 F. Supp. 1199 (E.D. Va. 1975). See Wilkinson & White, *supra* note 25, at 587-600.

27. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

28. See, e.g., *Commonwealth v. Leis*, 355 Mass. 189, 243 N.E. 2d 898 (1969); *People v. Aguilar*, 257 Cal. App. 2d 597, 65 Cal. Rptr. 171 (1968). See generally Hindes, *supra* note 24; L. Tribe, *supra* note 14, at 908-10.

29. Feinberg, *supra* note 2, at 571.

this observation is that *offensively* expressed theological and political opinions *can* qualify as nuisances and can thus be subject to some regulation. But this is not and should not be correct. Even offensively expressed theological and political opinions are immune from regulation based on their content,³⁰ as we can see from *Cohen v. California*,³¹ in which the Supreme Court refused to allow Cohen to be convicted for wearing a jacket bearing the message, "Fuck the Draft." If the capacity of this message to cause offense to unwilling viewers is the appropriate standard, then Cohen should have been kept out of the courthouse lobby, or perhaps excluded from the public forum entirely. He might have been restricted to wearing his jacket inside, with a sign on his house saying "Offensively expressed political commentary available within." Or he might have been forced to cover his jacket with a plain brown wrapper. Indeed, Cohen's commentary is rather mild compared to other instances that have come before the courts. In *Kois v. Wisconsin*³² and numerous other cases,³³ the courts have protected underground newspapers and similar publications expressing political commentary by the use of sexual and scatological references that would undoubtedly offend large numbers of people. Nor is it particularly relevant that these publications are avoidable. People may very well be offended by public speeches advocating atheism, by speeches referring to political figures in sexual or scatological terms, or by mutilation or desecration of the American flag.³⁴ The use of offensiveness as a relevant factor in free speech determinations would substantially limit the ability to express in forceful terms political and religious ideas that are inconsistent with those held by the majority of the population. The exclusion of the offensive in the area of

30. While time, place, and manner restrictions on speech are permissible, such restrictions, ultimately based on nuisance-type considerations, must be applied to all speech without regard to its content. See Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975). But see *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

31. 403 U.S. 15 (1971).

32. 408 U.S. 229 (1972).

33. See, e.g., *Bucolo v. Adkins*, 424 U.S. 641 (1976) (per curiam), enforcing *Bucolo v. Florida*, 421 U.S. 927 (1975), *rev'g without opinion*, 303 So. 2d 329 (Fla. 1974); *Dillingham v. State*, 9 Md. App. 669, 267 A.2d 777 (1970).

34. See *Spence v. Washington*, 418 U.S. 405 (1974). As the Court noted in *Spence, id.* at 411 n.4, the first amendment incorporates the view that the method of expression is protected just as is the substantive content of the message expressed. See generally Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263 (1978).

speech would limit commentary to polite commentary,³⁵ and such a limitation of the free speech principle would exclude from public consideration many of the ideas of the strident critics who have often made the most significant contributions to the public debate.

When the first amendment became part of the constitution in 1791, there existed only a few forums for expression. There was no radio or television, few newspapers, few periodicals, and comparatively few political tracts published for private distribution. It was not at all unreasonable to assume that a mildly expressed and closely reasoned political or social or theological opinion would in fact be read or heard by most people having any interest in such matters. But now, with radio, television, and film, with almost innumerable newspapers, magazines, books, and pamphlets, and with so many people speaking out about so many things, there is perhaps "too much" speech, in the sense that it is impossible to read or hear even a minute percentage of what is being expressed. There is a din of speech, and our limited capacity to read or hear has resulted in effective censorship by the proliferation of opinion rather than by the restriction of opinion.³⁶ Under such circumstances it is frequently necessary, literally or figuratively, to shout to be heard. The use of offensive words or pictures is one very important way of shouting to be heard, one way of getting the listener's attention. To say that offensive speech may be restricted, even as a nuisance, is to limit the effectiveness of speech, and also to engage in the very type of content regulation that most seriously contravenes current free speech legal doctrine.³⁷

All of this may call to mind the case of *FCC v. Pacifica Foundation*,³⁸ in which the Supreme Court upheld a restriction on George Carlin's "Seven Dirty Words" monologue as broadcast over the airwaves. The Court, without even mentioning the scarcity rationale for increased regulation of the electronic media,³⁹ relied on

35. For an argument for just such a limitation, see J. TUSSMAN, *GOVERNMENT AND THE MIND* (1977). See also A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* (1976); Kendall, *The Open Society and Its Fallacies*, 54 *AM. POL. SCI. REV.* 972 (1960).

36. See Reich, *Making Free Speech Audible*, 200 *THE NATION* 138 (Feb. 1965).

37. See, *supra* note 30.

38. 438 U.S. 726 (1978).

39. 438 U.S. at 748. The scarcity rationale holds that the technologically limited number of broadcast bands means that the allocating authority must of necessity engage in selections based on content that would not be permitted for other media. This doctrine has not gone uncriticized. See generally Van Alstyne, *The Möbius Strip of the First Amendment: Perspectives on Red Lion*, 29 *S.C. L. REV.* 539 (1978).

the extent to which the repeated use of these words would offend unwilling listeners.⁴⁰ Yet the monologue itself was intended solely as commentary on political values, on social values, and on the very concept of offense. It would be absurd to suggest that Carlin intended to cause sexual arousal, just as it would be absurd to suggest that this was Cohen's intention,⁴¹ even though some of the words used have sexual connotations in other contexts. This unfortunate opinion, I would submit, is perhaps related to the Court's inclusion of the test for patent offensiveness in its definition of obscenity, because it is based on the erroneous view that offensiveness of an utterance bears a relationship to its free speech value.⁴² By recognizing this error we may be less protective of pornography, but we will be more protective of constitutionally significant speech.

I do not intend to suggest that Professor Feinberg is totally oblivious to much of what I have said here. He recognizes that hard-core pornography is more analogous in relevant respects to sexual activity than it is to speech in the constitutional sense.⁴³ He recognizes, properly, that hard-core pornography is not an argument for sex—it is sex, and as such it is only implausibly protected by the first amendment.⁴⁴ Professor Feinberg notes as well that the mere fact that pornography is not protected by the first amendment does not mean that pornography cannot be protected by some other part of the Constitution, or that if the Constitution does not protect pornography at all, restrictions on pornography may still be subject to criticism on a philosophical level in terms of liberal values.⁴⁵ But it is this very observation that serves to make Professor Feinberg's commentary on the Supreme Court's obscenity decisions most

40. Indeed, the Supreme Court characterized the monologue as containing "patently offensive sexual and excretory language." 438 U.S. at 747.

41. *Cohen v. California*, 403 U.S. 15, 20 (1971). See Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1493 (1975) ("anyone who finds Cohen's jacket 'obscene' or erotic had better have his valves checked").

42. This conjecture as to causal relationship is supported by the Court's use in *Pacific* of the "patently offensive" language that originated with the obscenity cases. See generally Schauer, *Reflections on Contemporary Community Standards: The Perpetuation of an Irrelevant Concept in the Law of Obscenity*, 56 N.C. L. REV. 1 (1978).

43. Feinberg, *supra* note 2, at 585.

44. See Schauer, *Speech and "Speech": Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 920-28 (1979). See also Finnis, "Reason and Passion": *The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222 (1967).

45. Feinberg, *supra* note 2, at 579-80.

anomalous. It may seem paradoxical, but a liberal criticism of the *results* in obscenity cases must not be a criticism of the *decisions*. The only exception is *Paris Adult Theatre I v. Slaton*,⁴⁶ which in relevant respects is not a decision on obscenity, but an argument for the permissibility of regulation of self-regarding conduct in general. If one wants to criticize the Supreme Court's approval⁴⁷ of the regulation of pornography, one must criticize those decisions that have rejected liberal ideology as a constitutional doctrine, the decisions dealing with hair length, private homosexual conduct, and the like. For if one accepts the Court's goals, or non-goals if you will, then the obscenity decisions, with the exception of the patent offensiveness requirement, and with the exception of the limitation to *serious* value, embody a basic analytic structure that is consistent with the first amendment and that is consistent with the underlying philosophical premises of the concept of freedom of speech. Free speech has little to do with liberalism, and criticizing free speech decisions for not being liberal is like criticizing our misguided genius for building a bad bomb. The Court's goals are properly subject to criticism on liberal grounds, but it is not obscenity doctrine that provides the fodder for this criticism.

46. 413 U.S. 49 (1973).

47. The Court has itself contributed to criticism such as that of Professor Feinberg, in that it has frequently condemned pornography, rather than merely approving of its regulation. The Court does not regulate obscenity. It only allows its regulation by the states or by the federal government. In terms of the analytical structure of the *Roth-Miller-Paris* approach, the Court's caustic remarks about the business of pornography are mere surplusage, serving only to fuel criticism like Professor Feinberg's, and to lead many to question the Court's motives. After all, it is possible to come to the right result for the wrong reasons.

