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FREE SPEECH AND OFFENSIVE EXPRESSION

By Judith Wagner DeCew

I. Introduction

Free speech has historically been viewed as a special and preferred democratic value in the United States, by the public as well as by the legislatures and courts. In 1937, Justice Benjamin Cardozo wrote in *Palko v. Connecticut* that protection of speech is a "fundamental" liberty due to America's history, political and legal, and he recognized its importance, saying, "[F]reedom of thought and speech" is "the matrix, the indispensable condition, of nearly every other form of freedom."[1] It is likely notable that in the Bill of Rights free speech is protected in the *First* Amendment rather than later.[2]

Although the terms 'free speech' and 'freedom of expression' may be used differently, I will use them synonymously in this essay. Thus, 'free speech' will be taken to cover not only the spoken word, but also the written word as well as conduct conveying a message and expression through symbols, demonstrations, and so on.

A difficult legal, moral, and public policy problem is determining how to protect freedom of speech vigorously while also recognizing a community's concern to maintain a type of environment that its members can tolerate. Speech or conduct that is offensive, and even outrageously so, is usually still worthy of protection under the First Amendment. There is no easy answer to the question about how to deal with expression that causes great pain and is possibly even dangerous because it is degrading, or racist, or anti-Semitic, or sexist, or homophobic, or pornographic, or in other ways offensive. A review of the major philosophical justifications for freedom of expression, and many of the arguments in U.S. Supreme Court cases on offensive expression over the past thirty years, can help assess ways to confront difficult decisions concerning offensive speech. In this essay, I shall narrow my focus: I shall not address racist, homophobic, or other expression called 'hate speech', but shall focus instead on material that is 'sexually offensive', that is, material that is erotic or sexually explicit but that does not meet the definition of obscene.

[1] 302 U.S. 319 (1937).

[2] See Archibald Cox, *Freedom of Expression* (Cambridge, MA: Harvard University Press, 1981), 1. Cox is one constitutional scholar who believes the numerical position is symbolic of the primacy of free speech rights.

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II. Philosophical Arguments Defending Maximal Free Speech

Despite language about free speech as a right, and its articulation in the Bill of Rights, the most common defenses of free speech are consequentialist, citing the good effects of allowing it and the bad consequences of restricting it.[3] Most of these arguments were elucidated by John Stuart Mill in his famous 1859 treatise, *On Liberty,* although a few other justifications have become well known in the literature on free speech.[4]

One set of arguments focuses on the positive effects of allowing maximal freedom of expression. First, Mill outlined the benefits of *searching for and discovering the truth* to advance knowledge; open expression allows for the beneficial effects of acquiring justified beliefs and of identifying and correcting erroneous beliefs. Even if an opinion is false, Mill argued, the truth becomes better understood and justified by refuting the error. Beliefs are then founded on conviction. Moreover, since few opinions are either completely true or completely false, he pointed out, allowing free expression and the airing of competing views preserves the partial truth in various opinions.[5]

A second major justification for free speech given by Mill and others is a *political argument* that it is required by representative government to improve debate over public policy. Less accepting of majority rule than Locke, Mill was profoundly worried about the danger of suppressing minority opinions. This argument has led other commentators to focus on political speech as worthy of the highest protection, while other forms of speech may be less deserving. Legal scholar Alexander Meiklejohn first developed the distinction that "public" speech affecting civic issues and self-government must be wholly immune from infringement, while "private" or nonpolitical speech, including commercial, literary, and artistic expression, should be entitled to less complete protection.[6] One can reject Meiklejohn's extreme view on the primacy of political speech and nev-

[3] Some paragraphs from the early sections of this essay are drawn and adapted from Judith Wagner DeCew, "Free Speech on Campus," in Steven M. Cahn, ed., *Morality, Responsibility, and the University: Studies in Academic Ethics* (Philadelphia, PA: Temple University Press, 1990), 38–40, 48–50.

[4] John Stuart Mill, *On Liberty,* 1859, ed. Currin V. Shields (Indianapolis, IN: Bobbs-Merrill, 1985). Mill states he will forgo any advantage from an argument based on abstract right independent of utility. See Daniel Jacobson, "Mill on Liberty, Speech, and the Free Society," *Philosophy and Public Affairs* 29, no. 3 (2000): 276–309, for a novel interpretation of Mill's views.

[5] Mill, *On Liberty,* 43, 56, 64.

[6] Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper, 1948). In response to criticism, however, Meiklejohn seemed to agree that literature, art, philosophy, and science ought to be granted First Amendment protection. See Alexander Meiklejohn, "The First Amendment Is an Absolute," *Supreme Court Review* (1961): 245. Others, such as legal theorist Robert Bork, maintain that Meiklejohn's original view on the primacy of political speech was correct. See Robert Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47 (1971): 1.

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ertheless defend the political argument, which focuses on the beneficial value of free speech for a system of representative democracy where citizens serve a political function as electors who can bring about change and help limit governmental power.[7] The expression of more opinions and better access to as much information as possible enhance the development of public policy and generate a better informed citizenry and better educated voters. Electors also need the opportunity to question established values, and this avenue for dissent is provided by maximizing freedom of expression.

Third in the set of justifications focusing on the positive effects of free speech is an argument relating to individual integrity and autonomy. Freedom of expression provides many *benefits to individuals*. As Mill eloquently argued, liberty of expression allows personal growth and self-realization. Free speech serves as a vital way to guarantee one's ability to develop one's faculties and talents and to realize one's individual potential and creativity. Mill repeatedly urged that eccentricity is better than uniformity and stagnation. This defense is sometimes rephrased as a broader, nonconsequentialist argument that free speech enhances and protects individual autonomy, liberty, and self-development, and can also be justified in terms of fairness and respect for persons.[8] On this view, "an autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what he should do."[9]

In addition to these positive justifications of freedom of speech, another set of consequentialist arguments relies on articulating the negative effects of banning or restricting speech. First, as Mill pointed out, suppressing speech leads to *the possibility of banning the truth*. Unconventional or unpopular opinions may turn out to be correct; to assume otherwise is to assume one's infallibility. Restrictions on open and free discussion heighten the chance of losing true opinions.[10]

Second, a common argument given is that restriction of speech leads to a 'chilling effect', an effect that arises when banning some speech leads individuals to be more fearful, and thus more careful and conformist in what they dare to say. As restrictions on expression are added, individ-

[7] See Thomas Scanlon, "A Theory of Freedom of Expression," *Philosophy and Public Affairs* 1, no. 2 (1972): 204–26, reprinted in Ronald Dworkin, ed., *The Philosophy of Law* (Oxford: Oxford University Press, 1977), 153–71. See also John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980).

[8] Mill, *On Liberty,* especially 71–79. Among those who insist on incorporating both consequentialist and nonconsequentialist arguments for free expression are Thomas Scanlon, "A Theory of Freedom of Expression," in Dworkin, ed., *The Philosophy of Law,* 157; Fred R. Berger, "The Right of Free Expression," *International Journal of Applied Philosophy* 3 (1986): 1–10; and Lawrence H. Tribe, *American Constitutional Law,* 2d ed. (Mineola, NY: Foundation Press, 1988), 787.

[9] Scanlon, "A Theory of Freedom of Expression," in Dworkin, ed., *The Philosophy of Law,* 163.

[10] Mill, *On Liberty,* 21, 64.

uals worry about whether what they are expressing is too close to the line between speech that is allowed and speech that is not. In this way they become more fearful of saying everything they believe—"chilled" from full expression—and the negative result is likely to be more restrained and homogeneous expression.

Third is the well-known 'slippery slope' argument. As speech is restricted, it becomes easier and easier for those in power to restrict or suppress even more expression. It becomes more difficult to find a clear way to draw the line between acceptable and unacceptable speech, with the consequence that more and more expression is restricted. Closely related to this is a fourth negative effect of restricting more expression, namely the *enhanced power it gives to the government* over the individual. When fewer views can be heard, the individual loses the ability to choose what to listen and pay attention to or what to read. Instead, government has the power to make more of these choices for the individual, concentrating additional power in centralized governmental hands.

These philosophical and largely consequentialist justifications support the general importance and priority of free speech. Yet additional, more specific considerations arise about protection of particular types of speech. Legal interpretations have helped to address questions about concepts such as "offensive" versus "obscene" speech and the "value" of speech.

III. Justifications for Limiting Free Speech

Although the U.S. Supreme Court's first major encounters with disputes over limitations on free speech did not arise until after World War I, such disputes are now common court business. As courts heard more of these cases, they differentiated certain standard justifications for limiting free speech. Generally, courts have taken the view that illegitimate justifications for restricting or suppressing speech are those based on the *content* of the material. This view has likely grown from the lessons of American history, given that the early settlers and citizens were particularly concerned to protect each individual's ability to express unpopular political and religious views. Thus, content that the government finds objectionable has not in general been deemed an adequate justification for banning the expression. Alternatively, courts have deemed justifications for restricting speech based on considerations other than content, such as *time, place, and manner* (excessive loudness, for example), to be adequate and legitimate reasons to limit expression.[11]

One serious difficulty, of course, is that the two types of justifications are not always easy to separate to determine when speech ought to be protected. Consider the classic case of a sound truck blaring messages in

[11] See Scanlon, "A Theory of Freedom of Expression," in Dworkin, ed., *The Philosophy of Law,* 157.

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a quiet neighborhood at 2:00 A.M. On the one hand, if the message is about a politician's qualifications for office, bad timing and loud noise in an unacceptable place would presumably be legitimate justifications for banning the truck regardless of the political content of the message. If, on the other hand, the message is a warning about an impending tornado or imminent flood, content would override the otherwise inappropriate time, place, and manner. The truck might well be allowed precisely because of the content of the message. The reason this is a difficulty is that it highlights the malleability of the term "legitimate." Banning leaflets because of the litter they produce is likely legitimate. But if public officials ban leafleting on this ground when, in fact, they are trying to suppress the message on the leaflets—perhaps a political one—then they are concocting a "legitimate" reason to ban a message with a content they find objectionable, and this is an illegitimate reason for suppression.

Despite all the arguments in favor of maximal freedom of expression, both the positive effects of allowing maximal freedom of expression and the negative consequences of restriction and suppression, the First Amendment clearly does not guarantee protection of all expression. Justice Oliver Wendell Holmes's famous example of falsely crying "Fire!" in a crowded theater is one instance of speech that is not protected. Similarly, it has been uncontroversial that bribery, perjury, and counseling to murder are not protected under the First Amendment. As case decisions have carved out the guidelines further, it is clear that other speech is disallowed. In *Chaplinsky v. New Hampshire* (1942), the Supreme Court very clearly insisted that "obscenity" fell outside First Amendment protection, together with profanity, libelous speech, incitement to riot, and "fighting words" directed at someone close enough to the speaker that the words would "tend to incite an immediate breach of the peace" or convey "a quite unambiguous invitation to a brawl." All of these are categories of expression that are banned without hesitation.[12]

While most categories of unprotected speech are clearly unacceptable because of the danger or harm they cause, the Court's reasoning for banning obscenity stands out as distinctive. This is because the Court's decision to ban obscenity does not rely on an appeal to harm caused by such expression. The Court's discussions on obscenity are also problematic because it is not clear just what reasons the Court does find persuasive. As legal theorist John Hart Ely has pointed out, " 'Obscenity' or highly erotic material is . . . unprotected—for reasons it is difficult to make convincing."[13] Both the paternalistic argument that obscenity debases an individual's character and the claim that it is too offensive to others have been taken to be inadequate to justify complete suppression of obscene expression. Other justifications sometimes given for exclusion

[12] 315 U.S. 568 (1942); and Ely, *Democracy and Distrust*, 114.
[13] Ely, *Democracy and Distrust*, 114.

from First Amendment protection is the worry that obscene material leads to sex crimes and other criminal conduct, and that it is harmful because it erodes moral standards in society. Yet these are problematic as well, given the difficulty of establishing a causal relationship, not just a correlation, between obscene material and criminal behavior, and given concerns about permitting the government to enforce morals.[14] Certainly obscenity is not political speech, and some have argued that it is undeserving of protection because it is noncognitive as well.[15] Ultimately, the Court has relied on the reasoning that obscenity is "of such slight social value as a step to truth that any benefit that may be derived from [it] is outweighed by the social interest in order and morality."[16] The Court has continued to maintain that obscenity is unprotected and has added child pornography as an additional type of sexually explicit speech that is not covered by the First Amendment.[17]

A major difficulty facing the Court has been how to define or characterize material that is "obscene" and not merely "offensive." Commentators disagree on the extent to which the Court has been successful in excluding obscenity from First Amendment protection without curtailing or repressing important works of art and other properly protected speech. The Court struggled to develop standards for controlling obscenity over a period of about twenty years, beginning in 1957 in *Roth v. United States*.[18] Although throughout this period the Court continued to hold that the First Amendment did not protect obscenity, its justifications for excluding obscenity from protection varied. Justice William J. Brennan wrote for the Court in *Roth* that ideas having only the "slightest redeeming social importance" had guaranteed protection, whereas obscenity was "utterly without redeeming social importance." He stressed that sex and obscenity were not synonymous. Five members of the Court agreed that obscenity could be determined by asking "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest," namely a "shameful or morbid interest in nudity, sex, or excretion."[19]

[14] Note that the 1986 U.S. Attorney General's Commission on Pornography did conclude that some forms of obscenity could cause violent crime and antisocial behavior, and that legally obscene material should remain unprotected by the First Amendment. There has been criticism of this report, however. On the enforcement of morals, see the debate between Lord Patrick Devlin, "Morals and the Criminal Law," and H. L. A. Hart, "Immorality and Treason," in Ronald Dworkin, ed., *The Philosophy of Law* (Oxford: Oxford University Press, 1977), 66–82 and 83–88. Note especially Hart's replies to Devlin that legislation relying solely on a majority view of moral standards is unacceptable.

[15] See Frederick Schauer, "Speech and 'Speech'—Obscenity and 'Obscenity': An Exercise in the Interpretation of Constitutional Language," *Georgetown Law Journal* 67 (1979): 899.

[16] *Chaplinsky,* 315 U.S. at 568.

[17] *Roth v. United States,* 354 U.S. 476 (1957); and *New York v. Ferber,* 458 U.S. 747 (1982), for example.

[18] 354 U.S. at 476.

[19] *Id.* at 484, 487, and 489 (citing the American Law Institute Model Penal Code section 207.10 [Tentative Draft No. 6, 1957] in defining "prurient interest").

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Nevertheless, there seemed to be no clear majority view on obscenity. To the contrary, in the years following *Roth* there seemed to be hopeless confusion and a divergence of opinion among the justices over what Justice John Marshall Harlan called the "intractable obscenity problem." As the Court tried to come to terms with what is and is not obscene, different justices placed different emphases on three elements: an appeal to prurient interest, an affront to community standards, and a lack of redeeming social value. In his concurring opinion in 1964 in *Jacobellis v. Ohio,* Justice Potter Stewart made an observation that is now famous for capturing the Court's struggle to define obscenity. Stewart stated that he could not further define material that was obscene, adding, "But I know it when I see it."[20]

It was not until 1973, in the decisions in two cases decided together, *Miller v. California* and *Paris Adult Theatre I v. Slaton,* that the Court attempted a new definition of unprotected obscenity, abandoning its case-by-case review and shifting the burden of the determination to state and local courts.[21] The *Miller* case set the Court on its present course, and what is now called the '*Miller* test' is a three-pronged approach to defining obscenity. The basic guidelines are "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest [Roth] . . . ; (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." In *Miller* the Court rejected the constitutional standard of "*utterly* without redeeming social value."[22] Justice Brennan wrote in his dissent in *Paris Adult Theatre* that the Court's efforts to implement the *Roth* approach in subsequent cases made clear the painful reality that there was as yet no workable definition of obscenity, and he argued, moreover, that the *Miller* test was still vague and offered no stability on the topic. Nevertheless, the test remains today as the standard for prohibiting obscenity without violating the First Amendment and without trampling on other protected areas of speech.

In terms of content, the Court continues to rely on the standard set in 1973 in *Miller*: obscene materials lack "serious literary, artistic, political, or scientific value" regardless of whether the government or a majority of the people approve of the ideas these works represent. Critics of *Miller* have rejected this justification, urging that it allows government to punish sexual dissent. Nevertheless, I shall take the view that obscene expression is legitimately excluded from protection under the First Amendment. Moreover, as constitutional scholars Gerald Gunther and Kathleen Sulli-

[20] 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[21] *Miller v. California,* 413 U.S. 15 (1973), and *Paris Adult Theatre I v. Slayton,* 413 U.S. 49 (1973).

[22] *Miller,* 413 U.S. at 24.

van have observed, "[I]f speech is sexually explicit but is not obscene and does not constitute child pornography, it is within the realm of First Amendment protection, but the Court has wrestled with the question whether it should occupy a subordinate position as 'lower value' speech."[23] Nudity alone is inadequate to make material obscene under the *Miller* test. Thus, there is the practical question of determining which materials are obscene under the Court's guidelines and which are not. There is, in addition, the more policy-oriented question of how to handle pornographic and sexually explicit material that is not obscene or child pornography. In the following sections of this essay, I shall discuss the arguments for protecting such expression. I shall also examine the arguments for and against designating it as "lower value" and less fundamental than other speech and, hence, less worthy of protection than, for example, political speech.

IV. Legal Guidelines on Offensive Expression

Following Justice Cardozo's articulate defense in 1937 of the importance of free speech, Justice Hugo Black, who served on the Supreme Court from 1937 to 1971, became an eloquent advocate of the strong view that First Amendment rights are "absolute," and that the charge to Congress to make "no law" abridging free speech means exactly that: make no such law. In contrast, Justices Felix Frankfurter and John Harlan, both of whom sat on the Court during Black's tenure, and Justice Lewis Powell, who was appointed as Black's replacement, are all associated with the rival view that absolute rules are too rigid and that First Amendment interpretation requires a candid weighing and balancing of competing interests. Black worried, in response to this position, that the approach would allow free speech rights to be balanced away whenever judges found conflicting state interests.[24] Although Frankfurter rejected the view that free speech was an "absolute" right and seemed to attack statements in Court opinions asserting the "preferred status" of First Amendment protection, legal theorists maintain that he nevertheless did not completely reject "a hierarchy of values with free speech high on the list. In short, he, too, found that First Amendment rights were specially protected ones."[25]

[23] Gerald Gunther and Kathleen M. Sullivan, *Constitutional Law,* 13th ed. (Westbury, NY: Foundation Press, 1997), 1125.

[24] Justice Frankfurter served on the Court from 1939 to 1962, and Justice Harlan from 1955 to 1971. *Konigsberg v. State Bar of California,* 366 U.S. 36 (1961) provides one classic confrontation between these two views as articulated by Justice Black and Justice Harlan. See Judith Wagner DeCew, "Moral Rights: Conflicts and Valid Claims," *Philosophical Studies* 54 (1988): 63–86, esp. sections 2 and 4, for an evaluation of alternative ways of understanding rights as "absolute."

[25] Gerald Gunther, *Individual Rights in Constitutional Law,* 4th ed. (Mineola, NY: Foundation Press, 1986), 646.

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Even if there is agreement that the right to free speech is special in some sense, alternative methods of constitutional interpretation can affect the extent to which this preferred status is recognized. One type of interpretation, in the tradition of Harlan and Frankfurter, involves 'balancing' either the competing claims of the speaker and the protester or the right to express a message against the risk of harm. This is often viewed as the dominant constitutional theory, derived in large part from Justice Holmes's "clear and present danger" test.[26] The presumption is that a wide range of expression is protected by the First Amendment and can be repressed only when outweighed by a sufficiently strong governmental interest. Each case is evaluated individually based on the circumstances and the degree of the danger or other governmental interest at stake; thus, the special weight given to the value of free speech may vary. The balancing test avoids the extreme view that restriction of political speech is never justified, as well as the opposite extreme view that a speculative harm is sufficient to suppress speech. Yet balancing is often too flexible and vague to provide a very clear standard for judging which expression is allowable, and it may be too deferential to governmental interests in suppressing speech.[27]

Using a second type of interpretation, 'categorization', judges proceed by identifying and defining categories of speech that are not protected. Bribery, perjury, counsel to murder, lewd or obscene words, profanity, libel or slander, or "fighting words" that tend to incite an immediate breach of the peace fall outside of First Amendment protection. If the speech in question fits one of these excluded categories it is not protected; if it does not, it is protected.[28] The aim is to clarify standards for banning certain types of expression. Categorization precludes the balancing of interests in particular cases.

Balancing may give citizens insufficient notice of whether their speech will be allowed or not, because reasonable people can disagree in evaluating the weight of a governmental interest, such as danger or risk of danger. In other words, balancing appears to allow more judicial subjectivity. But it is worth noting that categorization is not always easy either. At what point do name calling and abusive language, or a pornographic image or film, cross the line from being merely offensive to being respectively fighting words or obscene?

Perhaps because of these difficulties, a third way of interpreting free speech cases has evolved. Using this newer way of distinguishing pro-

[26] *Schenck v. United States,* 249 U.S. 47 (1919).

[27] See Laurent Frantz, "The First Amendment in the Balance," *Yale Law Journal* 71 (1962): 1424 for a discussion of these criticisms of balancing. See also John Hart Ely, "Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis," *Harvard Law Review* 88 (1975): 1482.

[28] See Kathleen M. Sullivan, "Post-Liberal Judging: The Roles of Categorization and Balancing," *University of Colorado Law Review* 63 (1992): 293.

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tected from unprotected speech, the Supreme Court has sometimes struck down statutes as unconstitutional using 'overbreadth'. In such cases, the Court judged the statutes to be overly broad and hence likely, because of their vagueness, to repress too wide a swath of expression. This method of protecting free expression is beneficial because it avoids balancing, leaves the legislature the alternative of drafting narrower legislation, and takes seriously the chilling effect. But overbreadth is never well defined; accordingly, there is worry that it also is too manipulable a standard for consistent decision-making.[29]

In the 1971 decision in *Cohen v. California,* the U.S. Supreme Court majority opinion appears to illustrate the use of both balancing and categorization in its reasoning.[30] Young Mr. Cohen had worn a jacket emblazoned with the words "Fuck the Draft" through a California courthouse as a way of protesting the United States' involvement in the Vietnam War and the use of the draft to enlist those who would fight. The Supreme Court overturned Cohen's conviction or charges of violating a California state law that prohibited maliciously or willfully disturbing the peace by offensive conduct, thus defending his action as an exercise of free speech. Using the balancing method of constitutional interpretation, the Court felt that the words on Cohen's jacket did not pose a sufficient danger or threat to viewers to justify his conviction. The Court also argued, using categorization, that the words might be offensive but were not obscene, libelous, profane, or fighting words; offense was not deemed a sufficient condition for banning Cohen's expression.[31]

In *Cohen,* I find the categorization arguments to be the most compelling since they appear more likely to allow stronger protection of free speech than the balancing arguments. One way of interpreting the categorization arguments is to view the Court as holding that the list of categories of banned speech is settled, and the expression by Cohen did not fit in any of the categories on that list. In other words, the Court was clearly unwilling to expand the list by adding a new category of unacceptable speech, namely, offensive speech. This appears to be the stronger defense of free speech because it insists that the limited list of categories of unprotected speech is definitive; no new categories of expression can be suppressed. It seeks to provide clarity and guidance and to avoid exces-

[29] For an example of this type of reasoning, see *Gooding v. Wilson,* 405 U.S. 518 (1972).

[30] 403 U.S. 15 (1971). The earlier *Chaplinsky* case (*supra* note 12) can also be read as using both categorization and balancing.

[31] ". . . [T]his case cannot be said to fall within those relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain forms of expression. . . ." *Cohen,* 403 U.S. at 19–20 (Harlan, J.) (delivering the opinion of the Court). In paragraph 1 of his dissenting opinion, in which he was joined by Chief Justice Burger and Justice Black, Justice Blackmun claimed that Cohen's "immature antic" was conduct and not speech, and thus the case was not a First Amendment challenge at all. Since then, expressive conduct has been deemed to be speech under the First Amendment.

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sive flexibility.[32] In contrast, when the Court uses a balancing argument, which depends on circumstances and context, many types of expression could presumably be banned if a sufficient number of justices find that the message or material carries a risk of harm and danger or conflicts with some other compelling governmental interest strong enough to merit its suppression.

In cases after *Cohen,* the Court has continued to grapple with issues surrounding offensive expression. In *Texas v. Johnson* (1989), a very divided Court issued a decision that upheld flag burning as expressive conduct worthy of protection under the First Amendment.[33] The majority argued that Texas failed to show an interest in regulating the conduct that was unrelated to the content of the message being delivered. Although the majority used several arguments to reject Texas's claim that it had a right to preserve the flag as a symbol of nationhood, it is notable that in one of these arguments the majority insisted that the Texas claim ultimately related to the regulation of ideas, because only another idea could challenge the idea of nationhood. In sum, the majority found that Texas did not have a legitimate content-neutral justification for suppressing the expression.

What we can learn from these and other related U.S. Supreme Court cases is that offensive speech and expression have been repeatedly protected. Disgusting or torrid as they may be, offensive speech and expressive conduct have been tolerated under free speech rights.[34] There are surely a number of reasons for this. One reason is the subjectivity of determining what expression is offensive and what is not.[35] While a "reasonable person" standard could be used, it is difficult to see how even that could provide an objective and consistent way to separate offensive from nonoffensive expression. What is offensive? Who is to decide? How revolting must an expression be to be deemed offensive enough to ban it? Moreover, in the case of offensive expression, especially pornography, nude dancing, or other erotic or sexually explicit speech or conduct, one must ask whether the content passes beyond the bounds of whatever

[32] See also Thomas Scanlon, "Freedom of Expression and Categories of Expression," *University of Pittsburgh Law Review* 40 (1979): 519. Scott D. Gerber has pointed out to me that there is a political danger in categorizing types of speech, yet I contend that there is a similar and perhaps more serious opportunity for decisions to be politicized using balancing. C. Edwin Baker has suggested that my preference for categorization over balancing may indicate that I favor a more deontological approach over a consequentialist one, and his suggestion may well be correct.

[33] 491 U.S. 397 (1989).

[34] See also Judith Wagner DeCew, "Violent Pornography: Censorship, Morality, and Social Alternatives," *Journal of Applied Philosophy* 1, no. 1 (1984): 79–94. Reprinted in *Right Conduct: Theories and Applications,* Michael D. Bayles and Kenneth Henley, eds., 2d ed. (New York: Random House, 1989), 246–56.

[35] As Justice Harlan noted in his majority opinion in *Cohen,* it is "often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style [to] the individual." *Cohen,* 403 U.S. at 25.

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might be tolerated, and thus may be banned on the grounds that it is correctly categorized as obscenity. Alternatively, one must repair to 'balancing' and consider whether the harm or potential harm, or some other governmental interest, is so great that it justifies suppression or regulation. Both sorts of determinations are extremely difficult to make, as the former (categorization) requires assessing the content of the material, which is normally an illegitimate justification for restriction or censorship, and the latter (balancing) requires establishing not merely a correlation but a causal relationship between expression and its effects that usually cannot be documented. Surely, in addition to the subjectivity of determining offensiveness, a second reason for allowing offensive expression continued protection is to hold the line on the types of speech excluded from First Amendment protection, and thus to avoid the slippery slope of adding more categories to the list of excluded speech.

Ultimately, determining guidelines for what should or should not be suppressed, especially when dealing with blatantly noxious material, is extremely difficult. Increasing governmental control over information always carries the cost of giving additional power to government officials and judges to decide what is or is not acceptable, what passes beyond the bounds of decency. Legal theorist Frederick Schauer, for example, has pointed out that free speech raises special reasons to distrust government's ability adequately to determine when material is obscene. On his view, history has shown a high proportion of governmental errors in suppression.[36] Thus, we are left with another sort of balancing problem: how to balance the harm of the offensive expression, such as a pornographic film or nude dancing, against the harm of giving power to government to decide for us what we can and cannot see and hear.

V. Supreme Court Struggles with Sexually Explicit yet Not Obscene Speech

The U.S. Supreme Court has been particularly divided in its consideration of cases concerning expression that is sexually explicit but is not child pornography or does not meet the definition of obscenity. It has repeatedly ruled that such material, including pornography and nude dancing, is not an unprotected category of speech. At least three cases prominently illustrate the protection of such expression.

First, in *Erznoznik v. Jacksonville* (1975), the Court upheld a challenge to an ordinance prohibiting drive-in movie theatres with screens visible from public highways from showing nonobscene films containing nudity.[37] Following *Cohen,* Justice Powell in his majority opinion reiterated that offense to political or moral sensibilities was insufficient reason to

[36] Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982).

[37] 422 U.S. 205 (1975).

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allow government to decide that otherwise protected speech required suppression to protect unwilling viewers or listeners. Reiterating that not all nudity could be deemed obscene, he found the ordinance overbroad.

Second, in *Schad v. Mount Ephraim* (1981),[38] decided after the Court had in 1976 upheld a zoning ordinance aimed at adult theaters,[39] the Court struck down an ordinance that banned all "live entertainment," including nude dancing. Arguing again that nudity alone does not make expression obscene, and that a total ban on nudity is impermissible, the Court found that the ordinance prohibited a wide range of expression long held to be protected by the First Amendment. Third, similar reasoning led the Court, in *Sable Communications of California, Inc. v. FCC* (1989),[40] to refuse to ban "dial-a-porn" telephone services.

Commentators observe that in each of these three cases the Court indicated that "severe restrictions or total bans of such speech [sexual expression falling short of the definition of obscenity] will be strictly reviewed."[41] Moreover, in *Schad* the Court found that the ordinance did not further a sufficiently strong governmental interest, and found no evidence that live adult entertainment led to unusual problems.

Nevertheless, *restrictions* on sexually explicit but nonobscene expression have been defended. In *Young v. American Mini Theatres, Inc*. (1976), a zoning ordinance on adult entertainment establishments was upheld.[42] The impact was to move some establishments to particular areas of Detroit, not to ban such materials and displays entirely. Similarly, in *FCC v. Pacifica Foundation* (1978), regulation, though not censorship, of broadcasts deemed indecent but not obscene was upheld.[43]

An important question, then, is whether sexually explicit expression that is not child pornography or obscene, though not in an unprotected category, should occupy a subordinate position under the First Amendment. Is such expression less fundamental, less worthy of protection, and thus of "lower value" than other speech, especially political speech? Moreover, what are the implications of taking such a position? Early in his career, Justice John Paul Stevens appeared to be a major advocate of this view. As Gunther and Sullivan point out, "In several plurality opinions, Justice Stevens has supported content regulation of sexually offensive displays and speech under an approach that falls short of categorical exclusion of that type of communication from the First Amendment, but that treats such expression as less valuable than core, political speech and accordingly more readily restrainable."[44] In his plurality opinion in *American Mini Theatres,* for example, Stevens wrote:

[38] 452 U.S. 61 (1981).
[39] *Young v. American Mini Theatres, Inc*., 427 U.S. 50 (1976).
[40] 492 U.S. 115 (1989).
[41] Gunther and Sullivan, *Constitutional Law,* 1155.
[42] *American Mini Theatres,* 427 U.S. at 50.
[43] 438 U.S. 726 (1978).
[44] Gunther and Sullivan, *Constitutional Law,* 1155.

> Moreover, even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.[45]

Furthermore, Stevens observed that "the city's interest in attempting to preserve the quality of urban life is one that must be accredited high respect," concluding "the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures."[46]

Stevens's view that sexually explicit but nonobscene expression is less fundamental and has lower value than other speech has not been explicitly embraced by a majority of the Court. Indeed, the dissenters in *American Mini Theatres* retorted that

> The kind of expression at issue here is no doubt objectionable to some, but that fact does not diminish its protected status any more than did the particular content of the "offensive" expression in [*Erznoznik, Cohen,* et al.].
>
> What this case does involve is the constitutional permissibility of selective interference with protected speech whose content is thought to produce distasteful effects. It is elementary that a prime function of the First Amendment is to guard against just such interference. By refusing to invalidate Detroit's ordinance the Court rides roughshod over cardinal principles of First Amendment law, which require that time, place, and manner regulations that affect protected expression be content neutral. . . .[47]

[45] *American Mini Theatres,* 427 U.S. at 70–71 (Stevens, J., plurality opinion). The "immortal comment" attributed to Voltaire is: "I may disagree with what you have to say, but I shall defend, to the death, your right to say it."

[46] *Id.* at 72 and 73.

[47] *Id.* at 85–86 (Stewart, J. dissenting). Justice Stewart was joined in the dissent by Justices Brennan, Marshall, and Blackmun. Justice Blackmun wrote separately "to identify an independent ground" for holding unconstitutional the challenged ordinance: vagueness.

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They continued,

> The fact that the "offensive" speech here may not address "important" topics—"ideas of social and political significance," in the Court's terminology . . .—does not mean that it is less worthy of constitutional protection.[48]

Thus, it is interesting to wonder whether the regulations and restrictions upheld on such sexually explicit and nonobscene expression ultimately do implicitly categorize such speech as less valuable and less worthy of protection on the grounds that political speech would not be so regulated. If so, is this justifiable?

A decade later the Court still did not endorse Stevens's "lower value" speech approach, but, rather, reverted to Powell's balancing approach and treated the zoning-type ordinance in *City of Renton v. Playtime Theatres, Inc*. (1986) as "aimed not at the *content* of the films shown at the 'adult motion picture theatres,' but rather at the *secondary effects* of such theatres on the surrounding community."[49] These secondary effects were found to be a governmental interest important enough to justify the zoning.[50]

Then a 1991 challenge to Indiana's ban on public nudity as applied to nude dancing, in *Barnes v. Glen Theatre, Inc*., evoked sharp disagreement on the Court and a 5–4 decision upholding the state's public indecency law.[51] The plurality opinion agreed that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so."[52] The majority vote depended on three different opinions, however. The Court held that "the Indiana statutory requirement that the dancers in the establishments involved in this case must wear pasties and G-strings does not violate the First Amendment."[53]

In *Barnes,* Chief Justice Rehnquist and Justices O'Connor and Kennedy defended the ordinance as based on concerns of public health, safety, and morals, government interests unrelated to suppression of expression. Justice Scalia, concurring only in the judgment, urged that the regulation was about conduct and, thus, that this was not a First Amendment case at all. Justice Souter, also concurring, disagreed that the state interest in

[48] *Id.* at 87.

[49] 475 U.S. 41 (1986). See also Gunther and Sullivan, *Constitutional Law,* 1163.

[50] Interestingly, Ellen Frankel Paul has noted that the Court said it was a "substantial government interest" rather than a "compelling government interest," suggesting an intermediate test, perhaps because zoning was involved. The best reply is Justice Souter's, that the secondary effects were not justified empirically. Regarding the principle of secondary effects see Sections V and VI of this essay.

[51] 501 U.S. 560 (1991).

[52] *Id.* at 566 (Rehnquist, C.J., plurality opinion).

[53] *Id.* at 565.

order and morality was adequate to defend the ordinance, but justified the decision, following *Renton,* based on preventing the secondary effects correlated with nude dancing, including prostitution, sexual assaults, and other criminal activity unrelated to the suppression of free expression.

The four dissenters in *Barnes*—Justice Byron White joined by Justices Thurgood Marshall, Harry Blackmun, and John Paul Stevens—scoffed in response that the law was aimed at the communicative impact of nude dancing, arguing that "it is precisely because of the distinctive, expressive content of the nude dancing performances at issue in this case that the State seeks to apply the statutory prohibition."[54] This dispute over whether or not the ordinance is directed at the suppression of expression is key, since it affects the level of scrutiny that the Court will apply. If the governmental purpose in enacting the ordinance is unrelated to such suppression, the ordinance need only satisfy a so-called intermediate standard as set out in *United States v. O'Brien* (1968). The '*O'Brien* test' requires content-neutral laws to "further an important or substantial governmental interest" and involve an "incidental restriction on alleged First Amendment freedoms" not greater than what is necessary to further that interest.[55] The dissenters claimed, in contrast, that the *Barnes* case deserved a more exacting standard called 'strict scrutiny', as used in *Texas v. Johnson,* the flag-burning case, rather than the weaker *O'Brien* test, because the governmental interest was related to the expression's content.[56] They argued, in addition, that the interest cited by the state was not compelling.

It is clear in this sequence of cases, including *American Mini Theatres* and *Barnes,* that the justices struggled over the First Amendment threat and the weightiness of the secondary effects that they considered. There are multiple split decisions: plurality decisions, decisions cobbled together from three sets of opinions, and so on. The Court's confusion emphasizes the deep problems associated with dealing with sexually explicit but not obscene expression, and the need for clearer standards and tests.[57]

Nearly a decade after *Barnes,* the Supreme Court was confronted with another free speech case involving nude dancing. In 2000, in *City of Erie v. Pap's A.M.*,[58] the Court again grappled with the questions of how to

[54] *Id.* at 592 (White, J., dissenting opinion).

[55] *United States v. O'Brien,* 391 U.S. 367 (1968).

[56] The issue of level of scrutiny resurfaced in *City of Erie v. Pap's A.M.* (*see infra* note 58), but my focus is on arguments of a different nature.

[57] I am grateful to Ellen Frankel Paul for emphasizing this point.

[58] 529 U.S. 277 (2000). Justice O'Connor wrote the opinion for the Court with respect to Parts 1 and 2, in which Chief Justice Rehnquist and Justices Kennedy, Souter, and Breyer joined, and an opinion with respect to Parts 3 and 4, in which Rehnquist, Kennedy, and Breyer joined. Justices Scalia and Thomas issued a separate opinion concurring in the judgment. Justice Souter filed an opinion concurring in part and dissenting in part. Justice Stevens filed a dissenting opinion in which Justice Ginsburg joined. David Bernstein has posed an interesting question concerning why the cases on nude dancing have become a focus of the Court's struggles with nonobscene but sexually explicit expression: Does it being "live" make it more of a worry?

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deal with sexually explicit expression that is not obscene or child pornography, and how offensive expression must be to no longer be protected by the First Amendment. While the 7–2 vote seems to show a Court less divided, both the history of the case and the multiple opinions demonstrate deep divisions on how to handle sexually explicit material and the concerns of communities to protect their social values. The City of Erie in Pennsylvania had enacted a public indecency ordinance prohibiting knowingly or intentionally appearing in public in a "state of nudity." As in *Barnes,* to comply with the ordinance, female nude dancers had to wear, at a minimum, pasties and a G-string. A corporation that owned a nude dancing establishment filed a complaint against enforcement of the ordinance. The Erie County Court of Common Pleas struck down the statute as unconstitutional, and the Commonwealth Court reversed the decision of the trial court. The Pennsylvania Supreme Court reversed again, holding in part that nude dancing was expressive conduct entitled to some protection under the First Amendment, and that the ordinance was content based and thus unconstitutional. The U.S. Supreme Court reversed the Pennsylvania Supreme Court decision, and ultimately held that the ordinance banning nude dancing was constitutional. But nuances in the arguments of the justices (beyond the issue of mootness) show the difficulty of assessing cases concerning laws limiting sexually explicit offensive material and the implications for free speech.

Six of the justices in *Pap's A.M.,* four joining the plurality opinion and two dissenters, agreed that nude dancing performed as entertainment was expressive conduct entitled to some First Amendment protection. But the plurality judged the ordinance to be content neutral because it banned all nudity and did not target nudity that contained an erotic message. Moreover, they found the primary purpose of the ordinance to be the city's interest in combating the harmful secondary effects associated with establishments featuring nude dancing, including "violence, sexual harassment, public intoxication, prostitution, and the spread of sexually transmitted diseases." They considered this to be a legitimate governmental interest in deterring crime and promoting public health, safety, and welfare, and unrelated to the suppression of free expression, ultimately viewing the regulation as constitutional. The plurality also found that the ordinance imposed minimal restrictions on the dancers' ability to convey their erotic message. In contrast, Justices Antonin Scalia and Clarence Thomas concurred in the judgment, but argued that the ordinance was not subject to First Amendment scrutiny at all.

The dissenting justices, notably Justice Stevens joined by Justice Ruth Bader Ginsburg, argued that the secondary effects justification was just one rationale for the ordinance, and they contended that the ordinance was clearly intended to restrict erotic expression. More generally they argued:

> Far more important than the question whether nude dancing is entitled to the protection of the First Amendment are the dramatic changes in legal doctrine that the Court endorses today. Until now, the 'secondary effects' of commercial enterprises featuring indecent entertainment have justified only the regulation of their location. For the first time, the Court has now held that such effects may justify the total suppression of protected speech. Indeed, the plurality opinion concludes that admittedly trivial advancements of a State's interests may provide the basis for censorship.[59]

The dissenters worried that relying on the secondary effects test to defend the ordinance was not supported by any precedents. Also, they again defended past practice by the Court in limiting the secondary effects rationale to permitting zoning, declining to extend the rationale to justify total bans, on the grounds that zoning is a minimal imposition while a total ban is far more drastic.

In sum, the dissenters urged that "[t]he Court's use of the secondary effects rationale to permit a total ban has grave implications for basic free speech principles. . . . Under today's opinion, a State may totally ban speech based on its secondary effects. . . ." [60] Noting that the plurality had conceded that restricting dancers to wearing pasties and G-strings might not greatly reduce the harmful secondary effects, the dissenters insisted that it was likely that the restrictions would have no impact at all on the tendency for a nude dancing establishment to attract crime, prostitution, and other ills.[61] Banning expressive conduct "by the mere possibility of *de minimis* effects on the neighborhood," they said, is unjustifiable and goes far beyond previous precedents.[62]

VI. Implicit Recognition of "Lower Value" Expression

On one hand, if the ordinance prohibiting nudity in *City of Erie v. Pap's A.M.* is taken to be a ban on nude dancing, as the dissenters claimed and as the explicit wording in the ordinance supports, then the use of secondary effects arguments is now a new way, mirroring balancing, to repress expression long held to be protected by the First Amendment. On this interpretation, this type of sexually explicit expression is, in effect, a new category of unprotected speech.[63] On the other hand, if the ordi-

[59] *Id.* at 317–18 (Stevens, J., dissenting).
[60] *Id.* at 322–23.
[61] Justice Souter had agreed that the secondary effects were unrelated to suppression of expression, but found insufficient evidence or showing of the seriousness of the threatened harm. This echoes the argument in *Schad, supra* note 38, that there was no evidence adult entertainment led to unusual problems.
[62] *Pap's A.M.* 529 U.S. 277, at 324 (Stevens, J., dissenting).
[63] As noted, the ordinance prohibited "knowingly or intentionally" appearing in public in a "state of nudity" and the wording thus supports the dissenters and their interpretation.

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nance is viewed as a mere regulation, like zoning, and not a new way to suppress expression, the Court is nevertheless implicitly declaring that, in an important sense, sexually explicit and nonobscene speech is "lower value" expression. Indeed, the plurality in *Barnes v. Glen Theatre, Inc.*, called nude dancing expressive conduct "marginally" and placed it "on the outer perimeters" of First Amendment protection, and in *Pap's A.M.* the justices who agreed it was expressive conduct described it as entitled only to "some" protection under the First Amendment. In essence, on either interpretation, the Court appears to be slipping down a slope, either adding a new category of unprotected speech or differentiating levels of importance within speech traditionally protected by the First Amendment. Can this be justified?

It might be tempting to avoid the above conclusion about the erosion of free speech protection by agreeing with those justices who have argued that the ordinances in question in *Pap's A.M.* and similar cases are not really subject to First Amendment protection at all. In other words, one could argue that sexually explicit material that is not obscene or child pornography really is not expressive "speech" that communicates ideas. On this view, one could claim that such material is merely aimed at sexual arousal with no message of substance to convey. This account, however, directly conflicts with the views of the majority of the justices as well as the history of cases reviewed here, repeatedly reiterating that sexually explicit material that is neither obscene nor child pornography is not in one of the excluded categories and, thus, is protected as expressive conduct under the First Amendment.

Alternatively, one might argue that such expression is properly of lower value and less deserving of protection by the First Amendment. In support of this view, one could point to the major philosophical justifications for free speech, which focus on the benefits of maximal free expression. One could argue that not all of these justifications—(1) truth-seeking, (2) political advantages, and (3) individual benefit—and perhaps only the latter, apply as defenses for this type of sexually explicit expression. That is, as Justice Stevens argued in *American Mini Theatres,* it is difficult to see how pornographic material in general and nude dancing in particular can be defended by the political argument in favor of maximal free speech. The argument that free speech enhances representative government and democratic participation by citizens does not appear to apply to distasteful or indecent sexually explicit expressive conduct, whereas it clearly supports unpopular political speech.

While Mill's arguments for free speech based on the search for the truth apply more broadly than the political advantages argument to protect expression beyond political speech, including scientific and philosophical debate and perhaps even literary expression, it is far less clear that Mill's defense supports expression such as nude dancing. One could argue, however, that the third justification based on individual integrity and autonomy best defends artistic expression, including sexually explicit

and nonobscene expression. On this view, the best rationale for protecting such speech may be that it maximizes opportunities for self-realization and for individuals to express their identities. One could conclude, therefore, that if only one or two of these philosophical justifications applies to a type of expression, then it has a lower value than speech that can be justified by all three arguments. This clearly places political speech on the top tier as most valuable and most worthy of protection.[64] Nevertheless, this differentiation is clearly unacceptable, for then the slippery slope begins anew. This is because almost *any* nonpolitical speech will be supported by less than all three of the philosophical arguments, and thus all nonpolitical speech will end up as lower value speech, leading back to Meiklejohn's extreme view (discussed in Section II).

Are there better ways to justify restraining sexually explicit and nonobscene expression and treating it as lower value expression?[65] Here I shall explore five possible responses. First, as with obscenity, one might argue that such materials corrupt an individual's character and morals. This is a paternalistic argument, not generally found persuasive for banning obscenity and, thus, for the same reasons, unlikely to be deemed dispositive for a less obnoxious type of speech. Basically, the paternalistic argument grants far too much power to the state to decide what an individual may hear or see, leading to a slippery slope of its own by which the government could claim the power to restrict any expression it deemed damaging to an individual's character or moral development.[66]

Second, one might try to appeal to an offense justification, arguing that sexually explicit and nonobscene material is precisely the sort of material that offends the sensibilities of most audiences and thus ought to be curtailed.[67] But this is exactly the sort of argument that the Court rejected in the earlier categorization cases; no matter how offensive, such expression has not been deemed subject to suppression due to the subjectivity

[64] Lillian Reimer BeVier pointed out to me that there is a reverse argument, namely, that if the Court protects borderline sexually explicit speech, this can ultimately devalue political speech. Given the history of free speech protection in the United States, however, I see no danger of political speech being jeopardized under the First Amendment.

[65] See also DeCew, "Violent Pornography: Censorship, Morality, and Social Alternatives," in *Right Conduct,* Bayles and Henley, eds., 246–56.

[66] Philosopher Joel Feinberg writes, "The liberty-limiting principle called legal paternalism justifies state coercion to protect individuals from self-inflicted harm, or, in its extreme version, to guide them, whether they like it or not, toward their own good. . . . Put this bluntly, paternalism seems a preposterous doctrine. If adults are treated as children they will come in time to be like children. Deprived of the right to choose for themselves, they will soon lose the power of rational judgment and decision." Joel Feinberg, *Social Philosophy* (Englewood Cliffs, NJ: Prentice-Hall, 1973), 45–46, with further discussion at 46–52. See also Gerald Dworkin, "Paternalism," in Richard A. Wasserstrom, ed., *Morality and the Law* (Belmont, CA: Wadsworth Pub. Co., 1971), reprinted in Joel Feinberg and Jules Coleman, eds., *Philosophy of Law,* 6th ed. (Belmont, CA: Wadsworth/Thomson Learning, 2000), 271–80, for a discussion of paternalism and an argument about the types of cases for which it can be justified.

[67] See Joel Feinberg, *Offense to Others: The Moral Limits of the Criminal Law* (Oxford: Oxford University Press, 1985); and Feinberg, *Social Philosophy,* 41–45.

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of determining what is offensive and the chilling effect such an inquiry would cause.

Third, one could appeal to a moralism justification to argue that restriction of such material is needed to protect children against exposure and to protect society's moral standards from erosion.[68] Criticizing such justifications, legal scholar H. L. A. Hart persuasively asked, "[W]hy should we not summon all the resources of our reason, sympathetic understanding, as well as critical intelligence, and insist that before general moral feeling is turned into criminal law it is submitted to scrutiny. . . ? Surely, the legislator should ask whether the general morality is based on ignorance, superstition, or misunderstanding. . . ."[69] Given the difficulty of determining the appropriate moral standards for society, it is clear that justifications based on the enforcement of morals can at most support regulations such as zoning, but not outright bans.

Fourth, one might urge that sexually explicit though nonobscene material should be restricted to safeguard against violent and antisocial behavior and to improve the tone and quality of a city, community, or neighborhood. Both of these considerations fall in the category of secondary effects addressed by the Court in the recent cases that I previously discussed. Both provide more serious and persuasive arguments than the first three for treating such expression as lower level speech.[70] It seems that one has to acknowledge the value of a governmental interest in reducing crime, and one has to sympathize with the interests of a community in maintaining an atmosphere where residents can stand to live. Nevertheless, there is substantial controversy over whether sexually explicit but nonobscene material and nude dancing do cause sex crimes, prostitution, drug use, and violence. Thus, it is again difficult to see how such concerns can justify anything beyond regulations such as zoning, which allows communities to protect their neighborhoods.[71]

Fifth, and finally, one might argue that sexually explicit and nonobscene materials should be restricted to promote equality, that is, to minimize discrimination by curbing materials that contribute to the subordination of women and sexual harassment. This may well be the strongest argument against such expression. Nevertheless, it is difficult to see how this concern can justify bans and censorship on a category

[68] Feinberg, *Social Philosophy,* 36–41.

[69] H. L. A. Hart, "Immorality and Treason," in Dworkin, ed., *The Philosophy of Law,* 87.

[70] I thank Andrew Altman for pointing out that this also highlights the interesting and complex connections between the "secondary effects" arguments and "low value" speech arguments used by various members of the Court.

[71] In comments to me, Thomas G. West worried that zoning simply pushes problems associated with sexually oriented businesses onto others, especially the poor who cannot afford to move, and he suggested that neighborhood concerns could support a total ban. Adopting West's suggestion, however, gives rise to the danger of pushing such businesses underground, where they would be far more difficult to monitor than when regulated through zoning.

of expression traditionally held to be protected by the First Amendment. Moreover, it fails to justify ordinances that ban nude dancing based on secondary effects. An ordinance such as that challenged in *Pap's A.M.,* requiring slight covering to avoid total nudity, is surely unlikely to minimize subordination and discrimination against women.

Disgusting or distasteful as some speech may be, settled First Amendment law fails to justify a total ban on sexually explicit yet nonobscene expression. Nor do any of the arguments considered here justify treating this type of expression as lower level speech, although many justices on the Court appear to be at least implicitly making such a distinction. Moreover, cases show there is continuing lack of evidence that ordinances requiring nude dancers to wear pasties and G-strings will in any way reduce the alleged secondary effects of criminality and blighted neighborhoods. Indeed, there is good reason to doubt that such ordinances will have any effect at all on the level of criminal activity, on the quality of a neighborhood, or on the treatment of women. If my arguments are correct, then regulations such as those requiring zoning in *American Mini Theatres* and *Renton* do differ from the requirements of the ordinances in *Barnes* and *Pap's A.M.* There is good reason for viewing the former as legitimate, non-content regulation of location that does not suppress the expression but can help communities preserve neighborhoods in which residents feel comfortable. At the same time, one can understand ordinances against nudity—defended by some on the Court using secondary effects analysis, but probably aimed at suppressing erotic expression—as content-based regulation. Since the latter are unlikely in any event to minimize secondary effects, they constitute unacceptable and dangerous tampering with the traditions of First Amendment protection of expression.

VII. Conclusion

In sum, despite some difficulties, categorization is the interpretive method that provides the strongest way to protect free speech. It is also likely to be the most appropriate method to pursue in order to make difficult decisions about sexually explicit and nonobscene speech. By maintaining the principle that the categories of restricted speech remain the same, and that offensive expression will not be added as a category of banned speech, there is less likelihood of generating an increased chilling effect, less likelihood of traveling down the slippery slope to more and more suppression, and less likelihood of granting more power to government, including the judicial branch, to remove individual choice about what each of us may see and hear. What undeniably remains, however, is case-by-case decision-making about whether expression that some consider merely offensive, actually crosses the boundary into obscenity, an unprotected category.

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Ultimately, the Supreme Court's most recent cases focusing on nude dancing as sexually explicit material that is neither obscene nor child pornography, *Barnes* and *Pap's A.M.*, show a return to balancing and an almost chaotic disagreement and lack of consensus. Neither case generated a majority opinion, yet these cases point in an ominous direction of eroding free speech protection. The Court's decisions undermine categorization, arguably the strongest way of protecting free speech; undermine the traditional doctrine that sexually explicit but nonobscene expression or conduct is protected by the First Amendment; and undermine the established view that offensive and objectionable material and expression may be regulated, but not prohibited. Whether intended or not, the Court's moves support the view that political speech is special and because it is a higher level of speech warrants more protection. Sexually explicit and nonobscene expression is left on the fringes as lower level, despite a lack of adequate justification for such a view. While this type of sexually explicit expression may seem unimportant, how it is treated under the First Amendment has ramifications for free speech in general. In splitting levels of speech, even implicitly, the Court starts us down the slippery slope leading to other forms of nonpolitical speech being treated as lower level speech, thus jeopardizing the strong defense of free speech that has been the hallmark of First Amendment jurisprudence in the United States.

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