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The Theory of Low-Value Speech

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THE THEORY OF LOW-VALUE SPEECH

*Jeffrey M. Shaman**

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I. INTRODUCTION

IN the course of interpreting the First Amendment, the Supreme Court has created a network of rules to maintain freedom of speech. Within this structure, regulations of speech are subject to searching judicial scrutiny, which allows speech to be restricted only when it is the cause of serious harm.¹ The harm must be real and demonstrably so.² The expression of an idea may not be prohibited merely because it is offensive or disagreeable.³ Any regulation of speech must be narrowly tailored to accomplish its purpose, and an overbroad regulation of speech will be struck down on its face.⁴ Content-based restrictions of speech are considered particularly suspect and are unconstitutional unless necessary to achieve a compelling governmental interest.⁵ Content-neutral restrictions, although somewhat less suspicious, are unconstitutional unless closely related to accomplishing an important governmental interest.⁶ These rules, along with others that amplify them, provide considerable protection for the First Amendment right of free speech.

This network of rules, however, is not operative in all cases concerning freedom of speech. In the view of the Supreme Court, "not all speech is of equal First Amendment importance."⁷ The Court has taken the position in various cases that some kinds of speech have less value than others and therefore are not entitled to the same quality of First Amendment protection as that given to more valued types of speech.⁸

The Court's use of the theory that some categories of speech have less value than others has been marked by vacillation and uncertainty. This

1. See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989) (burning American flag in public as means of political protest protected by First Amendment); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (holding judicial inquiry beyond legislative determination required in determining existence of First Amendment violation); *Cohen v. California*, 403 U.S. 15 (1971) (wearing jacket with words "Fuck the Draft" in public is speech protected by the First Amendment and may not be prosecuted as breach of the peace); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (holding government carries heavy burden to justify prior restraint enforcement); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding statute punishing mere advocacy of use of force violates First Amendment); *Tinker v. Des Moines Indep. Comm'y Sch. Dist.*, 393 U.S. 503 (1969) (holding school policy prohibiting wearing armbands to school in protest of Vietnam war violates First Amendment).

2. *Johnson*, 491 U.S. at 408-09; see also *New York Times Co.*, 403 U.S. at 733 (White, J., concurring).

3. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, 491 U.S. at 414.

4. See Jeffrey M. Shaman, *The First Amendment Rule Against Overbreadth*, 52 *TEMP. L.Q.* 259 (1979).

5. See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 *WM. & MARY L. REV.* 189 (1983).

6. *Id.*

7. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985) (holding credit report matter of purely private concern and therefore of lesser constitutional value than matter of public concern).

8. See cases discussed *infra* notes 28-63.

makes it difficult to say exactly what kinds of speech the Court believes to be low in value. At one time or another, the Court has ruled that fighting words, obscenity, and child pornography are of low value.⁹ Some members of the Court, though not quite a majority, would add non-obscene sexually explicit expression to that list.¹⁰ On occasion, a few members of the Court have expressed doubt about the value of profanity, but profane speech still clings to a valued position in the minds of a majority of the Court.¹¹ In the area of libel, the Court has said that "there is no constitutional value in false statements of fact,"¹² and that libelous speech on purely private matters is of less First Amendment concern.¹³ The Court also has stated that there are "common-sense" differences between commercial speech and other kinds of expression, and that commercial speech occupies a "subordinate position in the scale of First Amendment values."¹⁴

As we shall see, the applicability of the low-value speech theory to various forms of expression, not to mention the validity of the theory itself, is subject to considerable question. Therefore, it is important not to confuse the theory of low-value speech with other doctrines used by the Supreme Court to sustain restrictions upon expression. Some kinds of speech are said to be beyond the protection of the First Amendment strictly because of the harm they cause. In these instances the Court has been able to uphold regulations of speech by focusing entirely upon the harm resulting from the speech rather than its value or lack thereof.

Occasionally commentators see the low-value speech theory in places that it really has not been. For example, it has been claimed that the Court affords low value to speech that expressly incites lawless action¹⁵ when, in fact, the Court has given this kind of speech the protection of highly valued political speech.¹⁶ Examination of the Court's opinions in this area reveals a harm-based analysis of this sort of speech which allows its regulation only upon a demonstration that the speech in question is in fact likely to produce unlawful action.¹⁷ This is an approach that looks to the harm occasioned by the speech without assessing the merit of the speech.

Speculation also has been raised that the Supreme Court thinks that speech which is part of a labor dispute is low in value.¹⁸ Certainly, the

9. See *infra* part II.A-C.

10. See *infra* part II.D.

11. See *infra* part II.E.

12. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (holding lesser standard of liability exists for private libel actions than for public figures).

13. *Greenmoss Builders, Inc.*, 472 U.S. at 759.

14. *Ohralik v. Ohio State Bar Assoc.*, 436 U.S. 447, 455-56 (1978) (holding state may proscribe in-person attorney solicitation of contingent fee employment without a showing of actual harm).

15. See *Stone*, *supra* note 5, at 194.

16. *Brandenburg v. Ohio*, 395 U.S. 444 at 447-48.

17. *Id.* at 447.

18. See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1200-03 (2d ed. 1991).

Court has upheld various restrictions upon that sort of speech and has treated it with less solicitude than other forms of expression. The Supreme Court opinions upholding the regulation of labor-dispute speech, however, contain precious few statements indicating that the speech is low in value, and for the most part those opinions are concerned with the harm caused by such speech.¹⁹ Moreover, the Court has expressly said that the dissemination of information concerning labor relations is "indispensable" to the public.²⁰

Thus, there are many times when the Court upholds restrictions upon speech or affords certain kinds of speech an inferior brand of First Amendment protection without implicating the low-value speech theory. But in other instances, the theory is implicated with significant impact upon the right of freedom of speech. Indeed, the low-value speech theory has had a "curious persistence,"²¹ and in recent years has gained a renewed currency. Just a few terms ago, one of the Court's concurring opinions referred approvingly to the notion that the First Amendment does not apply to certain kinds of speech because its "expressive content is worthless or of *de minimis* value to society."²² Moreover, some commentators have urged, quite strenuously, that even more categories of speech—pornography and "hate" speech—be added to the registry of low-value expression.

The theory of low-value speech provokes some very fundamental questions, beginning with questions about its application. What kinds of speech are, in fact, of low social value? Can it be said that any category of speech is, in actuality, low in value? While particular instances of speech may be of low value, to say that all instances of speech within a general category are low in value is quite another matter.

Serious questions also exist about the basic validity of the low-value speech theory. Constitutional scholars have said that it is a theory at odds with fundamental First Amendment principles, that the government has no business evaluating the content of speech and may regulate speech only when it is the cause of serious harm.²³ By focusing upon the merit of speech, the low-value speech theory seems to fly in the face of well-established First Amendment precepts. Other scholars, though, disagree and have defended the low-value speech theory as a necessary element for a rational system of free expression.²⁴

19. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616-19 (1969) (holding First Amendment does not prohibit NLRB from regulating employer's retaliatory speech as unfair labor practice).

20. *Thornhill v. Alabama*, 310 U.S. 88, 102-03 (1940) (holding peaceful picketing is protected by First Amendment).

21. See Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 31 (1975).

22. *R.A.V. v. St. Paul*, 112 S. Ct. 2538, 2552 (1992) (White, J., concurring) (joined by Blackmun and O'Connor, JJ.).

23. See *infra* Part IV.B, notes 281-82 and accompanying text.

24. See *infra* notes 293-303 and accompanying text.

The theory of low-value speech operates by categorizing certain kinds of speech and giving them a low degree of constitutional protection. Because it eschews the balancing process and allows speech to be restricted with little or no showing that it causes harm, categorization is a questionable technique. Categorization has been the subject of debate among constitutional scholars, and its use in conjunction with the low-value speech theory in particular raises a number of questions.²⁵

Despite the questions that it has provoked, the low-value speech theory has never been seriously examined by the Supreme Court, nor have constitutional scholars fully assessed it.²⁶ Certainly some have criticized the theory while others have supported it, but usually in cursory fashion.²⁷ A fair amount of scholarly attention has been devoted to the use of the categorization technique in First Amendment cases, through which the low-value speech theory operates, but much less attention has been given to the theory itself. Thus, the low-value speech theory and the role it plays in First Amendment adjudication deserve to be thoroughly examined.

II. DEVELOPMENT OF THE LOW-VALUE SPEECH THEORY

A. FIGHTING WORDS

The low-value speech theory traces its genesis to a bit of Supreme Court dictum in the 1942 case of *Chaplinsky v. New Hampshire*.²⁸ In *Chaplinsky* the Court upheld the constitutionality of a conviction under a statute that prohibited addressing a person by "any offensive, derisive, or annoying word."²⁹ Mr. Chaplinsky had been convicted of violating the statute by calling a city marshall a "God damned racketeer" and a "damned Fascist."³⁰ There is little doubt today that any statute like the one in *Chaplinsky* would be struck down on its face as unconstitutionally vague and overbroad.³¹ More significantly, by contemporary standards there is not much question that even under a more narrowly drawn statute, it would violate the First Amendment to regulate Chaplinsky's words. In the last twenty-five years, the Supreme Court has consistently given constitutional shelter to words much more offensive than those ut-

25. See *infra* Part VII.

26. Some scholarship, such as Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U. L. REV. 372 (1979), has focused on the value of particular kinds of speech, but there have been few, if any, comprehensive studies of the low-value speech theory. The beginnings of a scholarly examination of the theory can be seen in the short exchange between Larry Alexander, *Low Value Speech*, 83 Nw. U. L. REV. 547 (1989) and Cass R. Sunstein, *Low Value Speech Revisited*, 83 Nw. U. L. REV. 555 (1989).

27. See *infra* text accompanying notes 272-97.

28. 315 U.S. 568 (1942).

29. *Id.* at 569.

30. *Id.*

31. See, e.g., *Lewis v. New Orleans*, 415 U.S. 130 (1974) (holding statute prohibiting public use of lascivious language overbroad); *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972) (holding statute prohibiting public use of offensive and indecent language overbroad); *Coates v. Cincinnati*, 402 U.S. 611 (1971) (holding ordinance prohibiting assembly on sidewalk and annoying conduct unconstitutionally vague and overbroad).

tered by Mr. Chaplinsky,³² and the Court has made it crystal clear that if there is "a bedrock principle underlying the First Amendment," it is that speech may not be prohibited simply because it is offensive.³³

The *Chaplinsky* dictum, which was destined to have a longer, if tortured, existence than the decision itself, is no more than a paragraph:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has [sic] never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.³⁴

Several points are worth noting about the Court's statement in *Chaplinsky*. First is the limited role that the Court saw for the low-value speech theory, a role that would obtain only for "certain well-defined and narrowly limited classes of speech."³⁵ However limited the Court may have believed that role to be, the Court surely was wrong in its assertion that the designated classes of low-value speech were "well-defined and narrowly limited." To the contrary, some of the classes of speech referred to by the Court in *Chaplinsky*—the lewd and obscene, the profane, the libelous, and fighting words—have proven remarkably resistant to precise definition. The Court has struggled for years trying to define obscenity, and eventually gave up the struggle by more or less handing the problem over to the states. Lewdness, like obscenity, is difficult to define, especially because, as the Court has noted, "one man's vulgarity is another's lyric."³⁶ While profanity may be defined more easily than obscenity and lewdness, it, too, raises definitional problems. Witness the words "Fuck the Draft" that were the subject of a later decision, *Cohen v. California*—should they be treated as low-value profanity or as political speech that garners the highest protection under the First Amendment? Nor at the time of *Chaplinsky* was the concept of fighting words well-defined and narrowly limited; in fact, it was not until some years after

32. See e.g., *Texas v. Johnson*, 491 U.S. 397 (1989); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (holding public figure's recovery for tort dependent on showing of actual malice); *Lewis*, 415 U.S. 130; *Rosenfeld*, 408 U.S. 901; *Cohen v. California*, 403 U.S. 15 (1971); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Kunz v. New York*, 340 U.S. 290 (1951) (holding ordinance vesting administrative officer with discretionary power to restrict public speaking about religion violated First Amendment); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (holding First Amendment protects religiously offensive speech); see also Note, *The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for Its Interment*, 106 HARV. L. REV. 1129 (1993).

33. See cases cited *supra* note 1; *Coates v. Cincinnati*, 402 U.S. 611 (1971).

34. *Chaplinsky*, 315 U.S. at 571-72 (citations omitted); see also *Beauharnais v. Illinois*, 343 U.S. 250, 255-57 (1952) (sustaining criminal group libel statute).

35. *Chaplinsky*, 315 U.S. at 571.

36. *Cohen*, 403 U.S. at 25.

Chaplinsky that the Supreme Court redefined and narrowed the concept of fighting words.

As recently as June of 1992 the Court was still describing the *Chaplinsky* approach as operative only in "a few limited areas."³⁷ As we shall see, however, the Court has not been as faithful as it professes to have been in complying with those limits.

Secondly, it should be noted that the Supreme Court has had serious second thoughts about the *Chaplinsky* dictum. Indeed, the Court has since given the highest First Amendment protection to lewd speech and profanity.³⁸ The Court has also given substantial constitutional protection to some forms of libel,³⁹ and even fighting words have been treated by the Court distinctly different than in *Chaplinsky*.⁴⁰ While the Court has never expressly overruled *Chaplinsky* nor expressly recanted the fighting words doctrine, it has made a point of confining the fighting words doctrine to a more narrow scope and for many years has not used the fighting words doctrine to uphold a regulation of speech. Given a number of more recent decisions, it is highly probable that today the kind of words spoken in *Chaplinsky* would not be considered of low value by the Court and in fact would be well within the protection of the First Amendment. Thus, the low-value speech theory has its roots in a case, *Chaplinsky v. New Hampshire*, which in all probability would be decided differently today, and which is based upon a good deal of reasoning that has since been repudiated by the Supreme Court itself.

But perhaps most interesting about the *Chaplinsky* calculus is that it looks not only to the value of speech, but also to the harm caused by the speech. True, the *Chaplinsky* dictum states that there are some categories of speech that are not essential to the exposition of ideas and have slight social value; but it also says that these same kinds of speech inflict injury or tend to incite immediate breaches of the peace. This led the Court to conclude in *Chaplinsky* that the slight social value that might be derived from the words is "outweighed" by the social interest in preventing the harm that they cause. The *Chaplinsky* calculus, then, is one that weighs or balances the benefit of speech against the social interest in proscribing it. This aspect of the *Chaplinsky* dictum, however, is often ignored.

In a 1992 decision, *R.A.V. v. St. Paul*,⁴¹ the Supreme Court once again encountered the fighting words doctrine and came away from the encounter with a fair amount of disagreement, not to mention confusion, about the regulation of fighting words. A concurring opinion in *R.A.V.* written by Justice White reiterated the *Chaplinsky* rationale and stressed the view that fighting words have little expressive value.⁴² On the other hand, the majority opinion, written by Justice Scalia, readily admitted

37. *R.A.V. v. St. Paul*, 112 S. Ct. 2538, 2543 (1992).

38. *See, e.g.*, *Cohen v. California*, 403 U.S. 15 (1971).

39. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

40. *See, e.g.*, *R.A.V.*, 112 S. Ct. 2538.

41. 112 S. Ct. 2538 (1992).

42. *Id.* at 2551-54 (White, J., concurring).

that some fighting words are extremely expressive and possess worthwhile content.⁴³ Still, the majority explained, fighting words are unprotected by the First Amendment, not because of the ideas communicated by their content, but because "their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey."⁴⁴ That is, "despite their verbal character," fighting words are "analogous to a noisy sound truck" and are excluded from the scope of the First Amendment due to their "'nonspeech' element of communication."⁴⁵

This is disingenuous, at best. Unlike the regulation of sound trucks, the regulation of fighting words is not directed at their mode of expression, but rather is directed exactly at their content. Regulation of fighting words typically is aimed at all modes of expression, including the purest forms of speech, the spoken word and the printed page. Many fighting words are not characterized by a "nonspeech" element, and laws restricting fighting words target the verbal content of the words rather than any "nonspeech" element they may manifest.

After stating that fighting words are unprotected by the First Amendment, the majority went on to treat them as if they were, by ruling that the First Amendment does not permit content-based regulations that selectively restrict particular fighting words (hate speech) because of their message.⁴⁶ Hence, the present Supreme Court is severely splintered as to the value of fighting words, and while all the members of the Court purport to claim that fighting words are unprotected under the First Amendment, a bare majority of the Court does in fact give some measure of First Amendment protection to fighting words.

B. OBSCENITY

The balancing aspect of the *Chaplinsky* approach was abandoned by the Court in 1957 when it ruled in *Roth v. United States*⁴⁷ that to prohibit the distribution of obscene materials does not violate the First Amendment. Though it has struggled over the years to define obscenity, the Court has generally characterized it as including any material that appeals to a prurient interest, is patently offensive, and lacks redeeming social value.

In reaching the conclusion in *Roth* that the First Amendment is not offended by the prohibition of obscenity, the Court stated: "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [First Amendment] . . ."⁴⁸ But,

43. *Id.* at 2543-44.

44. *Id.* at 2548-49.

45. *Id.* at 2545.

46. *R.A.V.*, 112 S. Ct. at 2542-43.

47. *Roth v. United States*, 354 U.S. 476 (1957).

48. *Id.* at 484.

the Court continued, obscenity is not protected by the First Amendment because it is "utterly without redeeming social importance."⁴⁹ After holding that obscenity was "not within the area of constitutionally protected speech,"⁵⁰ the Court found it unnecessary to determine whether obscene materials pose any harm that might justify their regulation. Obscene materials may be regulated, the Court made clear, without showing a need for the regulation because such materials have no value as speech and therefore possess no protection under the First Amendment.

It is apparent in *Roth* that the Supreme Court was treating obscenity as a separate category of speech that had no protection under the First Amendment because, in the Court's view, it had no value. The Court's approach in *Roth* is a manifestation of the low-value speech theory in pristine form. The Court eschews any discussion of balancing, flatly rejects the need for any showing of harm caused by obscenity, and rests its decision that obscene materials have no First Amendment protection strictly on the ground that such materials have no value.

The Court's statement in *Roth* that obscenity has utterly no redeeming social value is hyperbole. Michael Perry has observed that "there is no denying that obscene pornography constitutes a political-moral vision" and that it "communicates . . . certain ideas, values, and sensibilities."⁵¹ That the ideas conveyed by obscene materials may be hateful does not make them any less ideational; as stated in *Roth* itself, even hateful ideas have the full protection of the First Amendment.⁵² To use Professor Perry's example, even reprehensible ideas such as Nazi ideology are nonetheless ideas and hence are recognized as having expressive value under the First Amendment.⁵³

Sexually explicit material, even if offensive, nevertheless may convey information. In fact, in 1970 the President's Commission on Obscenity and Pornography concluded that substantial numbers of persons used sexually explicit materials as a source of information and that such materials often facilitate constructive communication about sexual matters among individuals.⁵⁴

Sexually explicit material, even though offensive, nonetheless may have artistic value. After all, odious ideas can be expressed in an artistic man-

49. *Id.*

50. *Id.* at 485.

51. Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 Nw. U. L. REV. 1137, 1182 (1983).

52. "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [First Amendment], unless excludable because they encroach upon the limited area of more important interests." *Roth*, 354 U.S. at 484. *See also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974): "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."

53. Perry, *supra* note 51, at 1182-83.

54. THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 53 (1970) [hereinafter 1970 REPORT].

ner. To create a book, movie, drawing, or photograph usually requires some degree of artistic ability, and it would seem to be a rare work that could be described accurately as being "utterly" lacking in artistic quality.

Thus, if taken seriously, the Supreme Court's description of obscenity in *Roth* as utterly lacking in redeeming social value would encompass very few, if any, works. No doubt it would include the "extreme example of . . . 'hard-core pornography'" that Frederick Schauer asks us to imagine: a ten-minute motion picture that consists entirely of "a close-up colour depiction of the sexual organs of a male and a female who are engaged in sexual intercourse," and that "contains no variety, no dialogue, no music, no attempt at artistic depiction, and not even any view of the faces of the participants."⁵⁵ But, as Schauer says, that is the extreme example; one can also imagine pornographic material that does include variety, dialogue, music, artistic endeavor, and even a view of the participants' faces, not to mention the ideas, values, and sensibilities noted by Professor Perry.

Almost all books, movies, and other creative works have at least slight value as ideas, information, or artistic expression. Perhaps that explains why, sixteen years after *Roth*, the Court decided in *Miller v. California*⁵⁶ to readjust its definition of obscenity by ruling that obscenity is not necessarily "utterly" lacking in redeeming social value but rather "lacks serious literary, artistic, political, or scientific value."⁵⁷ However, this is not much of a change in the definition of obscenity, and even this definition of obscenity, if taken for what it seems to mean, would leave a great deal of material that is both prurient and offensive within the protection of the First Amendment. That material is prurient and offensive does not preclude it from being ideational, informative, or artistic.

In a companion case to *Miller*, *Paris Adult Theatre I v. Slaton*,⁵⁸ the Court also revisited the question of why obscenity may be regulated and took a different tack in trying to constitutionally justify the prohibition of distribution of obscene materials.⁵⁹ This time the Court said that the distribution of obscene materials could be prohibited because there is a connection between obscenity and crime and other anti-social conduct.⁶⁰ However, the Court's attempt to demonstrate a link between obscenity and harmful behavior was feeble, at best. The Court cited the *minority* report of the 1970 Commission on Obscenity and Pornography for the proposition that "there is at least an arguable correlation between obscene material and crime."⁶¹ The Court, ignoring that correlation is quite different from causation, also neglected that a majority of the Commission had found that the empirical evidence indicated that exposure to

55. FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 181 (1982).

56. 413 U.S. 15 (1973).

57. *Id.* at 24-25.

58. 413 U.S. 49 (1973).

59. *Id.*

60. *Id.* at 58.

61. *Id.*

erotic material had "little or no effect" on attitudes about sex or morality, and did not significantly affect sexual behavior.⁶²

The empirical findings of the Commission's majority were downplayed by the Court. While admitting that there may be "no scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women or their society," the Court said that "[i]t is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself."⁶³ The latter half of that statement made it clear that the Court would continue to treat obscenity as a category of speech that did not raise First Amendment concerns. Whatever one may think of the result in *Slaton*, the reasoning in the opinion is nothing if not circular. The *Slaton* tautology proceeds as follows:

- (1) obscene material is not speech so far as the First Amendment is concerned because
- (2) the legislature has decided that obscene material causes crime and anti-social behavior; and
- (3) it is not for the court to review this legislative determination because
- (4) obscene material is not speech so far as the First Amendment is concerned.

Thirteen years later in a report of a new Commission, the Court could have found stronger—though still questionable—empirical support for the assertion that some obscene material causes harmful behavior. The 1986 report of the Attorney General's Commission on Pornography distinguished among three kinds of sexually explicit material: (1) material that contains graphic displays of violence, (2) material that contains no violence but that depicts women in a degrading way, and (3) material that is sexually explicit but is neither violent nor degrading to women.⁶⁴ The report concluded that research showed a causal relationship between sexually violent material and aggressive behavior toward women.⁶⁵ The Commission also reported some, although less, evidence suggesting that non-violent sexually explicit materials depicting women in a degrading manner caused aggressive behavior.⁶⁶ Finally, the report concluded that there was no evidence showing a causal relationship between non-violent, non-degrading sexually explicit material and aggressive behavior.⁶⁷

The Commission's conclusions, however, have been subject to a great deal of criticism, and the debate still rages as to whether obscenity causes anti-social behavior. The Commission's report, though, as well as the *Slaton* case, focuses upon the harmful effects obscenity may have, rather

62. 1970 REPORT, *supra* note 54, at 27.

63. *Slaton*, 413 U.S. at 60.

64. ATTORNEY GEN.'S COMM'N ON PORNOGRAPHY, U.S. DEP'T OF JUSTICE, FINAL REPORT 320-49 (1986).

65. *Id.* at 326.

66. *Id.* at 332-34.

67. *Id.* at 337-38.

than its value as expression. Though the logic of *Slaton* is seriously flawed and the empirical findings of the 1986 Commission are debatable, both represent a departure from the reasoning in *Roth* that originally excluded obscenity from the aegis of the First Amendment on the ground that obscenity had no expressive value.

Shortly after the decision in *Roth*, the eminent First Amendment scholar Harry Kalven noted that the Court had created a "two-level" approach to the First Amendment.⁶⁸ At one level were communications which, even though "odious to the majority opinion of the day," could not be regulated unless shown to cause significant harm; at another level were communications "apparently so worthless as not to require any extensive judicial effort to determine whether they can be prohibited."⁶⁹

Professor Kalven had strong doubts about the soundness of the two-level theory. Like Justice Douglas, who had dissented in *Roth*, Professor Kalven thought that the basic flaw of the two-level approach was that "[t]he First Amendment . . . was designed to preclude courts as well as legislatures from weighing the values of speech against silence."⁷⁰ In Professor Kalven's view the two-level theory of speech afforded the Court a diplomatic way to deal with the dilemma of obscenity, but was "difficult to accept as doctrine," and was "a strained [way] to trap a problem."⁷¹ He warned that the two-level approach "may have unhappy repercussions on the protection of free speech generally," and hoped that the Court would not find any other categories of speech to be lacking in redeeming social value.⁷²

In more recent times, it is still said that "the Court has adhered generally to a 'two-level' theory of free expression in its interpretation of the First Amendment."⁷³ This, however, is an oversimplification. In the years since its decision in *Roth*, the Court's use of the low-value speech theory has become increasingly intricate. The Court has developed a hierarchy of speech, within which different categories of speech, in the Court's view, have diminishing levels of social value and receive respectively diminishing degrees of constitutional protection. Obscene speech, however, remains at the bottom of the totem pole, having, as the Court sees it, no value and therefore no protection under the First Amendment.

C. CHILD PORNOGRAPHY

In *New York v. Ferber*⁷⁴ the Supreme Court upheld a statute prohibiting the distribution of material depicting children engaged in sexual con-

68. Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 10.

69. *Id.* at 11.

70. *Id.* at 19 (quoting *Roth*, 354 U.S. at 514 (Douglas, J., dissenting)).

71. *Id.* at 10-11.

72. *Id.* at 17-19.

73. GEOFFREY R. STONE ET AL., *supra* note 18, at 1144; see also Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 301-02 (1992).

74. *New York v. Ferber*, 458 U.S. 747 (1981).

duct. Although the statute applied to some material beyond the Court's definition of obscenity, Justice White's majority opinion noted that the standard of obscenity did not circumscribe the authority of a state to regulate child pornography and that the states were "entitled to greater leeway in the regulation of pornographic depictions of children."⁷⁵ The Court was willing to give that leeway to the states primarily because it believed there was a compelling interest in safeguarding the physical and psychological well-being of minors.⁷⁶ The use of children, the Court said, to produce pornographic materials is harmful to the physiological, emotional, and mental health of the children.

The majority opinion, however, also echoed *Chaplinsky* by placing child pornography outside the protection of the First Amendment,⁷⁷ not only because of the harm it caused, but because the Court thought that "[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*."⁷⁸ Although the majority opinion placed decidedly greater emphasis on the harm caused by child pornography to justify its regulation, the opinion did not stop short of adding that child pornography has very little value. It was, however, unnecessary for the majority to take that additional step of evaluating the merit of the speech in question, because the same result could have been reached in the case based solely on the harm caused by child pornography.

D. SEXUALLY EXPLICIT EXPRESSION

The Supreme Court's treatment of speech that is sexually explicit but not within the definition of obscenity has been marked by vacillation and splintered opinions. Some members of the Court, but not a majority, have taken the position that certain sexually explicit expression, even though not within the Court's definition of obscenity, is nonetheless of low value under the First Amendment. To a few Justices, non-obscene but sexually explicit "adult entertainment," though not as low in value as obscenity, still ranks rather poorly in the First Amendment hierarchy.

A majority of the Court, however, has thought otherwise, and in certain instances has been willing to accord high constitutional value to some forms of non-obscene, sexually explicit expression. In two cases decided in 1975, *Erznoznik v. City of Jacksonville*⁷⁹ and *Southeastern Promotions, Ltd. v. Conrad*,⁸⁰ the Court applied a searching degree of judicial scrutiny in invalidating restrictions upon sexually explicit expression. In *Erznoznik* the Court struck down on its face an ordinance prohibiting drive-in movies from showing motion pictures containing scenes of

75. *Id.* at 753-56.

76. *Id.* at 756-57.

77. See GERALD GUNTHER, CONSTITUTIONAL LAW 1120 (12th ed. 1991) (quoting *Ferber*, 458 U.S. at 763).

78. *Ferber*, 458 U.S. at 762.

79. *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

80. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

human nudity where the movie screens are visible from the street. In reaching its decision, the Court emphasized that the government may not selectively censor some kinds of speech on the ground that they are more offensive to the public than other kinds of speech.⁸¹ In the *Southeastern Promotions* case, the Court found that it was unconstitutional for city officials to bar the musical *Hair* from a municipal auditorium because it contained scenes of nudity. In this case, the Court treated the expression in question as a highly valued form of speech so far as the First Amendment was concerned.

Other cases involving non-obscene, sexually explicit expression have splintered the Court along several lines. In *Young v. American Mini Theatres, Inc.*,⁸² the Court upheld a city ordinance that compelled the dispersal of adult theaters and bookstores by limiting the sites where they could be located. Justice Stevens' plurality opinion utilized a form of minimal judicial scrutiny quite unlike the searching scrutiny the Court uses to review regulations of highly valued speech. Applying minimal scrutiny, the plurality readily accepted the city's assertion that the concentration of adult theaters and bookstores causes an area to deteriorate and become a focus of crime. Although that assertion was rather questionable, the plurality deferred to the city by stating that "[i]t is not our function to appraise the wisdom of its decision."⁸³

In adopting this deferential stance, the plurality noted that the ordinance did not ban adult theaters or bookstores, or even limit their number; it merely restricted the places where they may be located.⁸⁴ But the plurality opinion also stated that even though the First Amendment would not allow a total ban 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 untrammelled political debate . . ."⁸⁵ Adult entertainment, the plurality continued, was the sort of speech that "few of us would march our sons and daughters off to war" to protect.⁸⁶

There were four dissenters in the *Young* case, and they viewed the Court's decision as an "aberration."⁸⁷ As far as the dissenters were concerned, the plurality's statement—"few of us would march our sons and daughters off to war" to protect this sort of speech—was a drastic departure from well-established First Amendment principles and was "wholly alien to the First Amendment."⁸⁸

81. *Erzoznik*, 422 U.S. at 209-10.

82. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

83. *Id.* at 71.

84. *Id.* at 62-63.

85. *Id.* at 70.

86. *Id.*

87. *Young*, 427 U.S. at 87 (Stewart, J., dissenting, joined by Brennan, Marshall, & Blackmun, JJ.)

88. *Id.* at 84-87.

The Court's decision in *Young* was by a vote of 4-1-4. Providing the crucial fifth vote to support the judgment was Justice Powell, who wrote a concurring opinion pointedly critical of the plurality approach because it treated non-obscene, erotic expression differently under the First Amendment from other forms of speech.⁸⁹ In fact, a few years later in a case involving profanity,⁹⁰ Justice Powell again concurred in the judgment while refusing to join a plurality opinion written by Justice Stevens, and strongly objected to the low-value speech theory. Justice Powell stated:

I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most "valuable" and hence deserving of the most protection, and which is less "valuable" and hence deserving of less protection.⁹¹

Another ordinance regulating the location of adult theaters was upheld by the Court in *City of Renton v. Playtime Theatres, Inc.*⁹² In this case, however, a majority of the Justices found it unnecessary to say anything about the value of the speech subject to the ordinance. Avoiding any comment about the value of adult entertainment, the Court found that the ordinance was not directed at the suppression of adult entertainment and was justified as a means of preventing crime, protecting retail trade, maintaining property values, and preserving the quality of urban life.⁹³

In *Schad v. Mount Ephraim*⁹⁴ a majority of the Court did have something to say about the value of adult entertainment that was quite different from the position taken in Justice Stevens' plurality opinion in *Young*. In *Schad* a majority of the Court accorded high value to nude dancing at an adult entertainment establishment and used heightened judicial scrutiny in striking down a zoning ordinance that banned live entertainment. Noting that entertainment, as well as political and ideological expression, is protected by the First Amendment, the Court declared that an entertainment program may not be prohibited solely because it displays the nude human figure.⁹⁵ Even Justice Stevens, the author of the plurality opinion in *Young*, concurred in the result in *Schad*, although not without adding the metaphorical statement that "even though the foliage of the First Amendment may cast protective shadows over some forms of nude dancing, its roots were germinated by more serious concerns . . ."⁹⁶

Justice Stevens' metaphor foreshadowed the plurality opinion in *Barnes v. Glen Theatre, Inc.*,⁹⁷ a case in which the Court upheld the constitutionality of a public indecency statute banning nude dancing at lounges and adult entertainment stores. Grudgingly admitting that

89. *Id.* at 73 n.1 (Powell, J., concurring).

90. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

91. *Id.* at 761 (Powell, J., concurring).

92. 475 U.S. 41 (1986).

93. *Id.* at 47-51.

94. 452 U.S. 61 (1981).

95. *Id.* at 65-66.

96. *Id.* at 80 (footnote omitted) (Stevens, J., concurring).

97. 501 U.S. 560 (1991).

"[s]everal of our cases contain language suggesting that nude dancing of the kind involved here is expressive conduct protected by the First Amendment,"⁹⁸ the plurality nonetheless went on to say "we view it as only marginally so."⁹⁹

Ironically, a majority of the Court did not think that nude dancing was merely at the margin of First Amendment concerns. Justice White's dissenting opinion, joined by Justices Marshall, Blackmun, and Stevens, began by stating that, according to precedent, there was no question but that nude dancing was within the protection of the First Amendment, and that dancing was an ancient art form that inherently communicates ideas and emotions.¹⁰⁰

Similarly, Justice Souter allowed that performance dancing was inherently expressive and that nudity can enhance the expressive function of dancing.¹⁰¹ Nevertheless, Justice Souter concurred in the judgment upholding the ban on nude dancing, because in his view the ban was directed not at the message conveyed by nude dancing, but rather at the "secondary effects" of the dancing, such as prostitution, sexual assault, and associated crimes.¹⁰² Although Justice Souter showed little concern that scant evidence actually showed that nude dancing in fact leads to these secondary effects, he did suggest in a footnote that it would be difficult to sustain a prohibition of nude dancing in a theatrical production such as *Hair* or *Equus* on the ground of preventing harmful secondary effects.¹⁰³

Justice Souter, then, seemed willing to assume, with little or no proof, that nude dancing at the Kitty Kat Lounge is the cause of prostitution, sexual assault, and other crimes, but he was not willing to make the same assumption about nude dancing in a theatrical production of *Hair*. Although one may suspect that Justice Souter does not think that nude dancing at the Kitty Kat Lounge is as expressive as it is in *Hair*, the fact remains that Justice Souter did not say that in his opinion. What he did say was that nude dancing, wherever it may occur, has expressive value and therefore is entitled to protection under the First Amendment.¹⁰⁴ On that particular point, he and the dissenting judges formed a majority who agreed that nude dancing is a valuable form of expression.

E. PROFANITY

According to the *Chaplinsky* dictum, profanity is one of those certain well-defined and narrowly limited classes of speech . . . [that] are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived

98. *Id.* at 565.

99. *Id.* at 566.

100. *Id.* at 587 (White, J., dissenting).

101. *Id.* at 581 (Souter, J., concurring).

102. *Id.* at 582-86 (Souter, J., concurring).

103. *Id.* at 585 n.2 (Souter, J., concurring).

104. *Id.* at 581 (Souter, J., concurring).

from them is clearly outweighed by the social interest in order and morality.¹⁰⁵

Twenty-nine years later, in *Cohen v. California*,¹⁰⁶ the Supreme Court decisively repudiated that aspect of *Chaplinsky*. In *Cohen* the Court held that it was a violation of the First Amendment for a state to criminalize wearing a jacket in public emblazoned with the words "Fuck the Draft."¹⁰⁷ Offensiveness of speech, the Court proclaimed, furnishes no reason to regulate it, because otherwise the government's power to ban speech would be "inherently boundless."¹⁰⁸ Transcending its own limits, the Court was able to comprehend that "one man's vulgarity is another's lyric."¹⁰⁹

So, *Cohen v. California* squarely brought profanity back into the ambit of First Amendment protection, and treated it as speech of the highest constitutional order. Several subsequent Supreme Court decisions took a similarly tolerant approach to profanity,¹¹⁰ which by then seemed to be securely situated in the First Amendment hierarchy. And then . . . along came the comedian George Carlin with his seven dirty words that one can never say on television, which found a splintered audience in the halls of the Supreme Court.

The Supreme Court encountered George Carlin and his seven dirty words monologue, which is replete with profanity, in a case entitled *FCC v. Pacifica Foundation*.¹¹¹ A severely divided Court upheld a penalty imposed by the Federal Communications Commission upon a radio station for broadcasting the Carlin monologue in the early afternoon hours when, according to the Court, children might be listening. Although there was no majority opinion in the case, five Justices of the Court did agree that the FCC action was constitutionally justified on the grounds of protecting the right of privacy in the home and protecting the right of parents to shield their children from what the FCC referred to as "indecent" language.

Justice Stevens, who wrote the Court's plurality opinion, certainly emphasized reasons other than the nature of the speech for upholding the FCC action. Nonetheless, he could not resist commenting that the place of profanity in the hierarchy of First Amendment values was "aptly sketched" in *Chaplinsky*.¹¹² While he admitted that the Carlin monologue would be constitutionally protected in other contexts, he still main-

105. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

106. 403 U.S. 15 (1971).

107. *Id.* at 26.

108. *Id.* at 25.

109. *Id.*

110. *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972); *Lewis v. New Orleans*, 408 U.S. 913 (1972); *Brown v. Oklahoma*, 408 U.S. 914 (1972) (holding statute prohibiting obscene or lascivious language overbroad).

111. 438 U.S. 726 (1978).

112. *Id.* at 746.

tained that the words in question "ordinarily lack literary, political, or scientific value."¹¹³

It was over that very point that Justice Stevens lost majority approval for his opinion. Justice Powell wrote his concurring opinion (mentioned above),¹¹⁴ joined by Justice Blackmun, objecting to the "theory" that Supreme Court Justices may make determinations about the value of speech in deciding how much protection it has under the First Amendment.¹¹⁵

Notwithstanding the decision in *Pacifica* and the splintered views of the Justices, eleven years later in *Sable Communications, Inc. v. FCC*¹¹⁶ the Supreme Court unanimously struck down a federal provision, aimed at "dial-a-porn" services, prohibiting indecent telephone messages. While upholding a provision that banned obscene telephone messages, the Court sharply distinguished between obscenity and indecency and ruled that *indecent* sexual expression is protected by the First Amendment.¹¹⁷

Profanity, then, so far as the Supreme Court is concerned, has its place. It may not be banned from public places or telephone communications, but it may be stricken from commercial radio and television broadcasting during daylight hours.

F. LIBEL

In 1952 the Supreme Court decided *Beauharnais v. Illinois*,¹¹⁸ sustaining, by the slimmest of majorities, a so-called "group libel" statute that made it a crime to exhibit in public any publication which "portray[ed] depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed or religion, [or which] expos[ed] the citizens of any race, color, creed or religion to contempt, derision, or obloquy"¹¹⁹ Most of the Court's opinion, authored by Justice Frankfurter, was devoted to deferring to the legislative judgment that the statute in question prevented racial strife and violence.¹²⁰ Quoting *Chaplinsky*, however, the Court also noted that libel is one of those narrow classes of speech that is "no essential part of any exposition of ideas" and which has "slight social value."¹²¹

Although *Beauharnais* has never been expressly overruled, it is of extremely dubious validity by contemporary standards. It was decided by a 5-4 vote with dissenting opinions by Justices Black, Douglas, Jackson, and Reed, which "were a precursor to the future position of the Court con-

113. *Id.*

114. *See supra* note 91 and accompanying text.

115. *Pacifica*, 438 U.S. at 761.

116. 492 U.S. 115 (1989).

117. *Id.* at 124-26.

118. 343 U.S. 250 (1952).

119. *Beauharnais*, 343 U.S. at 251.

120. *Id.* at 258-63.

121. *Id.* at 256-57.

cerning libel."¹²² Since *Beauharnais* was decided in 1952, the Supreme Court has significantly revised and rewritten the doctrine regarding freedom of speech in general and libel in particular. The majority opinion in *Beauharnais* was characterized by a brand of minimal scrutiny that gave great deference to the legislature; since then, however, the Court has continuously applied stricter scrutiny to statutes that regulate speech. As the Court stated more recently, "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."¹²³ Thus, the basic approach to First Amendment issues used in *Beauharnais* no longer comports with the prevailing law.

Even more pertinent, however, is the fact that *Beauharnais* was decided prior to *New York Times Co. v. Sullivan*¹²⁴ and its progeny, in which the Supreme Court completely revamped the constitutional law of libel. *Beauharnais* rests upon the rationale that libel lies outside the protection of the First Amendment—a rationale that possesses little validity since the decision in *New York Times*. Accordingly, it has been noted that "while the Court has never explicitly overruled *Beauharnais*, it should be impossible to reach its results under the modern cases."¹²⁵

The genesis of the modern approach to libel was *New York Times Co. v. Sullivan*, a case which has been extolled as one of the most important First Amendment decisions ever made by the Supreme Court.¹²⁶ In *New York Times*, the Court repudiated the dictum in *Chaplinski* that libellous utterances "are no essential part of any exposition of ideas,"¹²⁷ and brought libel back within the ambit of First Amendment protection — at least to some degree. Noting that "debate on public issues should be uninhibited, robust, and wide-open," and that "erroneous statement is inevitable in free debate," the Court insisted that free speech needs "breathing space" if it is to survive.¹²⁸ To afford that breathing space for freedom of speech, the Court ruled in *New York Times* that a public officer may not recover damages for a defamatory falsehood relating to his or her official conduct unless the officer can prove the statement was made with actual malice, that is, the knowledge that it was false or with reckless disregard that it may have been false.¹²⁹

In the view of Harry Kalven, in *New York Times* the Supreme Court captured the "central meaning of the First Amendment," namely, the no-

122. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1036 (4th ed. 1991).

123. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978).

124. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding public official must prove actual malice to recover damages for defamatory falsehood regarding his official conduct).

125. NOWAK & ROTUNDA, *supra* note 122, at 1036.

126. See ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT (1991); Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

127. See *supra* note 34 and accompanying text.

128. *New York Times*, 376 U.S. at 270-72.

129. *Id.* at 292.

tion that seditious libel is not subject to sanction by the government.¹³⁰ This has been confirmed in subsequent cases where the Supreme Court has adhered to and even reaffirmed¹³¹ the *New York Times* ruling in regard to libel of public officials and public figures. But First Amendment protection has been withdrawn in cases involving libelous statements in the private arena beyond the public interest.

In *Gertz v. Robert Welch, Inc.* the Court adopted a different calculus for cases involving defamation of private individuals, rather than public officials or public figures. On the one hand, the Court readily acknowledged that under the First Amendment there is no such thing as a false idea.¹³² However pernicious an idea may seem, the Court said, it should be dealt with in the marketplace of ideas and not by government regulation.¹³³ On the other hand, the Court continued, "there is no constitutional value in false statements of fact."¹³⁴ While continuing to acknowledge the importance of robust and uninhibited debate on matters of public concern, the Court noted that false statements of fact are harmful; they wrongfully harm an individual's reputation and integrity.¹³⁵ Although the Court reaffirmed the actual malice standard of *New York Times* for dealing with defamation of public officials or public figures, it thought that a different criterion should apply to defamation of private individuals. These individuals have not thrust themselves voluntarily into the public spotlight and are more vulnerable to injury from defamation because, unlike public personalities, they lack access to the media to correct defamatory statements made about them.¹³⁶ Therefore, the Court was unwilling to extend the full scope of the actual malice standard to defendants accused of making defamatory comments about such purely private persons.

Accordingly, the Court ruled in *Gertz*, where a private individual seeks to establish defamation, actual malice need not be shown as an element of the cause of action.¹³⁷ If, however, the private plaintiff seeks to recover either presumed damages or punitive damages, actual malice must be proved as a condition of recovering such damages.¹³⁸ The cause of action itself and actual damages, though, do not depend on any showing of actual malice, so far as the First Amendment is concerned.¹³⁹

130. *Kalven, supra* note 126, at 221.

131. *See, e.g., Hustler Magazine v. Falwell*, 485 U.S. 46, 50-51 (1988); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 513-14 (1984) (holding appellate court must independently review lower court's actual malice finding in defamation case); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

132. *Gertz*, 418 U.S. at 339.

133. *Id.* at 339-40.

134. *Id.* at 340.

135. *Id.*

136. *Id.* 343-46.

137. *Gertz*, 418 U.S. at 347.

138. *Id.* at 349-50.

139. *Id.* at 350.

Had the Court in *Gertz* followed its own reasoning to its logical extreme, it should have come to the conclusion that punitive and presumed damages are constitutionally impermissible even if actual malice could be shown. The Court stated in *Gertz* that the only justification for regulating libel is that it wrongfully harms an individual's reputation and integrity.¹⁴⁰ Neither punitive nor presumed damages, however, are directed to that harm. The purpose of punitive damages, obviously, is to punish the wrongdoer and not to compensate for harm; in fact, such damages are a windfall for the plaintiff. Presumed damages are intended to compensate for harm that is difficult to prove or quantify and that may not in fact have occurred. Thus, if the Court had been true to its own reasoning, it should have ruled that the First Amendment precludes punitive and presumed damages in defamation actions, even upon a showing of actual malice, because those damages are not based upon a showing of harm that is the very justification for allowing defamation to be regulated.

Still, speech on matters of public concern is of high constitutional order, and even false statements about public matters enjoy a substantial degree of constitutional protection. Defamatory statements regarding a matter of public concern are only subject to liability when they can be shown to be accompanied by actual malice—that is, knowledge that they were false or reckless disregard that they may have been false. On the other hand, false statements of fact about purely private matters have no constitutional value and therefore enjoy only slight protection under the First Amendment. They may be subject to liability without a showing of actual malice and may even be subject to punitive and presumed damages if actual malice is proven.

G. COMMERCIAL SPEECH

On various occasions the Supreme Court has described commercial speech as speech that does “no more than propose a commercial transaction”¹⁴¹—a meager definition if not a circular one. Subsequently, the Court has pointed to three factors, which, when they exist in combination, are strongly indicative of the commercial nature of expression: (1) the speech is an advertisement; (2) it mentions a specific product by name; and (3) it is economically motivated.¹⁴² Justice Stevens has challenged the latter definition of commercial speech, arguing that some forms of “promotional advertising” which fall within the definition should

140. *Id.* at 341.

141. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973) (holding employment ad is no more than proposal of possible employment; not protected by First Amendment); *see also* *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (striking down statute making it illegal to advertise prescription drug prices).

142. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983) (holding contraceptive ad mailings constitute commercial speech).

not be considered in the same category as other commercial speech.¹⁴³ He believes that some expression related solely to the economic interests of a speaker and audience may nonetheless relate to issues of public significance and therefore should be entitled to the maximum protection provided by the First Amendment.¹⁴⁴ Furthermore, the economic motivation of a speaker should not diminish his or her constitutional protection; "even Shakespeare may have been motivated by the prospect of pecuniary reward."¹⁴⁵

In 1942 the Supreme Court ruled that the First Amendment placed no limitation whatsoever upon the authority of the legislature to restrict the dissemination of commercial advertising.¹⁴⁶ The Court offered little explanation for its conclusion that commercial advertising was not protected by the First Amendment, except to imply that commercial advertising was a business activity rather than a form of expression.¹⁴⁷ In subsequent years that ruling was criticized, and the Court saw fit to chip away at it in several cases. Eventually, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,¹⁴⁸ a 1976 decision, the Court reversed its previous position and welcomed commercial speech back into the arms of the First Amendment, though some portion of that welcome was retracted in later cases.¹⁴⁹

In *Virginia State Board of Pharmacy*, the Court stated that consumers and society at large have a strong interest in the free flow of commercial information. "Advertising," the Court said, "however tasteless and excessive it sometimes may seem," nonetheless disseminates information that is indispensable to intelligent decision-making about purchasing products and services.¹⁵⁰ In subsequent opinions the Court expanded on this theme, noting that while the "speaker's" interest in commercial speech is primarily economic, the "listener's" interest is substantial and in fact may be more important to him or her than political dialogue.¹⁵¹ Advertising, even though thoroughly commercial, may also carry information about issues important to the public.¹⁵² Thus, the Court came to view commercial advertising as a valuable form of expression because it provides information about consumer goods and services to the public and conveys other information as well.

143. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 579-81 (1980) (Stevens, J., concurring) (holding statute banning electrical utility promotional advertising violates First Amendment).

144. *Id.*

145. *Id.* at 580.

146. *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (upholding provision of sanitary code prohibiting distribution of advertisements in the streets).

147. *See id.* at 54.

148. 425 U.S. 748 (1976).

149. *See infra* notes 153-56 and accompanying text.

150. *Virginia Pharmacy*, 425 U.S. at 765.

151. *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977) (prohibiting attorney price advertising for routine legal services violates First Amendment).

152. *Id.*

The Court, however, has not remained quite so sanguine about the value of commercial speech. The Court has since indicated that there are "commonsense differences" between commercial speech and other varieties of expression.¹⁵³ The Court also has suggested that, because commercial speech is linked to the economic well-being of a business, it is less vulnerable than other forms of expression to overbroad regulations that have a chilling effect on speech. The Court has even echoed *Valentine* by alluding, albeit briefly, to the economic character of commercial speech.¹⁵⁴

All of this has led the Supreme Court to place commercial speech at the bottom of a middle level of the constitutional hierarchy. While more valuable forms of speech are entitled to the protection of strict judicial scrutiny, commercial speech receives the protection of intermediate scrutiny, a step up, of course, from minimal scrutiny, but a significant step down from strict scrutiny. In recent times, the Court has withdrawn some portion of that constitutional protection and now applies a combination of intermediate and almost minimal scrutiny in commercial speech cases. Moreover, commercial speech is not entitled to the protection of the overbreadth doctrine as are more valued categories of speech.¹⁵⁵ Furthermore, since the First Amendment's concern for commercial speech is based on the informational aspect of advertising, false or misleading advertising and advertising about unlawful activities are entitled to no constitutional protection.¹⁵⁶ The Supreme Court's current stance, then, is that commercial speech possesses an intermediate degree of value, but barely that.

III. PROPOSALS TO ADD NEW VARIETIES OF LOW-VALUE SPEECH

In recent years commentators have suggested that several new categories of expression should be added to the list of low-value speech which garners little or no protection under the First Amendment. Some commentators point to non-obscene pornography as low-value speech, while others point to racist "hate speech" as being low in value. The commentators also argue that these kinds of speech cause harm, but they are not content to rest their proposals on a harm-based analysis. They also claim that the value of the speech in question should be examined, and they find pornography and hate speech lacking in the value that entitles speech to First Amendment protection.

A. PORNOGRAPHY

Some of these commentators have suggested that certain sexually explicit pornographic expression, even though not within the Supreme

153. *Id.* at 380-81; *Central Hudson Gas*, 447 U.S. at 562.

154. *Central Hudson Gas*, 447 U.S. at 561-62.

155. *Bates*, 433 U.S. at 380-82.

156. *Central Hudson Gas*, 447 U.S. at 563-64.

Court's definition of obscenity, ought to be subject to regulation or even prohibition without violating the First Amendment. These commentators argue that non-obscene pornography should be amenable to prohibition or regulation without offending the First Amendment, because it causes harmful behavior and has little value as speech.

One of the more prominent proponents of the anti-pornography movement is Catharine MacKinnon, who has frequently written and spoken against pornography. Professor MacKinnon and Andrea Dworkin are the co-authors of a model ordinance to regulate pornography. The ordinance was approved twice by the City Council of Minneapolis, but vetoed twice by that city's mayor on the ground that it violated the First Amendment. The ordinance was also enacted by the City of Indianapolis only to be found unconstitutional by the federal Seventh Circuit Court of Appeals,¹⁵⁷ and was adopted by referendum in Bellingham, Washington, only to be found unconstitutional by a federal district court.¹⁵⁸ Versions of the MacKinnon-Dworkin ordinance, in statutory form, have been proposed in several other localities.

The MacKinnon-Dworkin position has found more acceptance in Canada, where the Supreme Court of Canada interpreted a criminal statute prohibiting the sale of obscene material as applicable to the kind of pornographic material targeted in the ordinance.¹⁵⁹ Moreover, that court also ruled that to ban the sale of pornography did not violate the free speech clause in the Canadian Charter of Rights and Freedoms.¹⁶⁰

The issue of pornography has divided the feminist community, and the MacKinnon-Dworkin ordinance has been the focus of that division.¹⁶¹ While many feminists support the regulation of pornography, others do not and have responded to the anti-pornography movement by forming the Feminist Anti-Censorship Taskforce, which has participated in challenging the MacKinnon-Dworkin ordinance and other efforts to ban pornography.¹⁶²

To Professor MacKinnon, pornography and obscenity are two very different things. The MacKinnon-Dworkin ordinance defines pornography as:

[T]he graphic sexually explicit subordination of women through pictures and/or words that also includes one or more of the following: (i) women are presented dehumanized as sexual objects, things or commodities; or (ii) women are presented as sexual objects who enjoy pain or humiliation; or (iii) women are presented as sexual ob-

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

158. *Village Books v. City of Bellingham*, Docket No. 88-1470 (W.D. Wash. Feb. 9, 1989).

159. *Regina v. Butler*, 89 D.L.R. 4th 449, 470-71 (Can. 1992).

160. *Id.* The objective of the ban, to prevent the harm fostered by pornography, was considered to be of sufficient importance to warrant overriding the free speech guaranteed by the Charter. *Id.* at 480.

161. See RONALD J. BERGER, *FEMINISM AND PORNOGRAPHY* (1991).

162. *Id.* at 120-22. See also *WOMEN AGAINST CENSORSHIP* (Varda Burstyn ed., 1985).

jects who experience sexual pleasure in being raped; or (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (v) women are presented in postures or positions of sexual submission, servility, or display; or (vi) women's body parts — including but not limited to vaginas, breasts, or buttocks — are exhibited such that women are reduced to those parts; or (vii) women are presented as whores by nature; or (viii) women are presented being penetrated by objects or animals; or (ix) women are presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.¹⁶³

Professor MacKinnon believes that pornography causes harmful behavior and therefore may be regulated. She also seems to reject First Amendment analysis altogether, however, and has made a laborious effort to remove pornography from the realm of speech entirely. It is a mistake, she claims, to "miscast" the regulation of pornography "into obscenity's old drama of ideas."¹⁶⁴ In her view, the concepts of pornography and obscenity are so different from one another that they have "literally nothing in common."¹⁶⁵ Obscenity, she claims, is a moral idea that deals with the abstract, while pornography is a political practice that deals with the concrete.¹⁶⁶ "Obscenity as such probably does little harm; pornography causes attitudes and behaviors of violence and discrimination which define the treatment and status of half of the population."¹⁶⁷ To Professor MacKinnon, pornography, unlike obscenity, "is not imagery It is sexual reality."¹⁶⁸

In attempting to recast the concept of pornography, Professor MacKinnon simply denies the essential attributes of pornographic material. Notwithstanding her view, words and pictures, including pornographic ones, are abstractions which represent ideas, and they are not concrete practices. They may well have a political content, but that does not exclude the possibility that they also have a moral content. Despite Professor MacKinnon's protestations to the contrary, the concept of pornography is not as different from the concept of obscenity as she would like to think; pornographic books, movies, and other materials, like obscene ones, are in fact imagery and not reality.

Professor MacKinnon further believes that pornography "constructs the social reality of gender,"¹⁶⁹ and that the reality it constructs is one of

163. Andrea Dworkin, *Against the Male Flood: Censorship, Pornography and Equality*, 8 HARV. WOMEN'S L.J. 1, 25 (1985).

164. ANDREA DWORKIN & CATHARINE A. MACKINNON, *PORNOGRAPHY AND CIVIL RIGHTS* 58 (1988).

165. Catharine A. MacKinnon, *Not A Moral Issue*, 2 YALE L. & POL'Y REV. 321, 329 (1984).

166. *Id.* at 322-23.

167. *Id.* at 323-24 (citation omitted).

168. *Id.* at 326-27.

169. Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 7 (1985).

male dominance, sex discrimination, and gender inequality.¹⁷⁰ Pornography itself, she concludes, "is a systematic act against women on every level of its social existence."¹⁷¹

Steven Gey has pointed out that this is a view that "ascribe[s] extraordinary powers to expression."¹⁷² It makes pornography the first source, the principal cause of discrimination against women.¹⁷³

The assertion that pornography constructs reality recalls the debate about whether art reflects reality or creates it. When all is said and done, it probably does both, and the same is true of many kinds of speech. Each individual has his or her own vision of reality, and expression of those visions may have an effect—in some cases greater, in other cases lesser—in constructing reality for those around us. The shamefully negative portrayal of African-Americans, Native Americans, Hispanics, and other groups in newspapers, magazines, movies, books, television, and other forms of popular culture, not to mention textbooks and more serious works of fiction throughout much of history, "constructed reality" and affected "attitudes and behaviors" no less than pornography does. While eventually these materials were criticized harshly and justifiably, it was never suggested that they were not speech, and only the most constrained interpretation of the First Amendment would have allowed them to be banned.

If pornographic materials construct reality, so do Communist, socialist, and anarchist leaflets, speeches, and meetings. So do flag burning and the editorial advertisement in *New York Times Co. v. Sullivan*. So do civil rights marches and the words on Paul Cohen's jacket. The political cartoons of Thomas Nast or Herb Block, as well as the vicious satire in *Hustler v. Falwell*, all may construct reality. That does not make them any less speech. Indeed, it confirms their expressive nature. They all are forms of expression, just as pornography is a form of expression. By its nature, speech reflects and constructs reality.

The irony of Professor MacKinnon's position is that the more artistic the content of what she defines as pornography, the greater the impact it is likely to have in "constructing" a reality that she opposes. Accordingly, the more meaningful the expression, the more reason she would see to regulate it—a position, it goes without saying, exactly at odds with the First Amendment.¹⁷⁴

There are others, however, who admit that pornography is speech but deny that it has much value as speech. Cass Sunstein, for one, argues that pornography causes harmful behavior and has such slight social value

170. MacKinnon, *Not A Moral Issue*, *supra* note 165, at 321-29.

171. DWORKIN & MACKINNON, *PORNOGRAPHY*, *supra* note 164, at 62.

172. Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography As Act and Idea*, 86 MICH. L. REV. 1564, 1606 (1988).

173. *Id.* at 1607.

174. *Id.* at 1605-06.

that it should not be protected by the First Amendment.¹⁷⁵ Professor Sunstein defines pornography that should be subject to regulation as including any material that: (a) is sexually explicit; (b) depicts women as enjoying or deserving some form of physical abuse; and (c) has the purpose and effect of producing sexual arousal.¹⁷⁶

Professor Sunstein sets forth a "four-factor analysis," admittedly controversial, according to which he finds pornography to have little value.¹⁷⁷ The analysis focuses on these factors: (1) political speech that relates to matters of public concern has more First Amendment value than speech that concerns other matters; (2) cognitive speech is more valuable than noncognitive speech; (3) the purpose of the speaker is relevant—if his or her intent is to communicate a message, more constitutional value is present; and (4) speech is less apt to be valuable if the government regulation directed at it reflects an area in which government is likely to be acting for constitutionally permissible reasons.¹⁷⁸ The general validity of these four factors (some of which have been suggested by other commentators) as applied to other kinds of speech will be examined more fully in a subsequent section of this article; at this point, however, some comment is appropriate regarding the application of the factors to the category of pornography defined by Professor Sunstein.

Sunstein sees the paradox which arises from Professor MacKinnon's view that pornography manifests an ideology with significant social consequences. For the very reason that pornography expresses a significant ideology, it could well be considered political speech lying at the core of the First Amendment.¹⁷⁹ Sunstein, however, claims that this is not a paradox, but a mistake about what entitles speech to the highest degree of constitutional protection.¹⁸⁰ "The question instead turns more generally on the speaker's purpose and on how the speaker communicates the message."¹⁸¹ As Professor Sunstein sees it, the pornographer's purpose is sexual arousal, a purpose of low value so far as the First Amendment is concerned.¹⁸² Nonetheless, it might be pointed out that sexual arousal is also the purpose of many mainstream books, magazines, motion pictures, television programs, advertisements, and other forms of expression in the mass media.

Professor Sunstein additionally suggests that the ideological content of pornography has little value because it is directed to noncognitive func-

175. Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589 (1986).

176. *Id.* at 592.

177. *Id.* at 603-08.

178. *Id.* at 603-04. As an illustration of the fourth factor, regulation of commercial speech, private libel, and fighting words is likely to be based on legitimate reasons and therefore scrutinized more deferentially. *Id.* at 604.

179. *Id.* at 607.

180. Sunstein, *supra* note 175, at 607.

181. *Id.*

182. *Id.* at 606-07.

tions rather than cognitive ones.¹⁸³ This distinction is one that has been questioned by modern psychological knowledge,¹⁸⁴ and it has been pointed out that “[m]uch pornography does indeed possess cognitive elements, especially as these elements are understood by the depth psychologies such as psychoanalysis.”¹⁸⁵ If pornography is as noncognitive as Sunstein seems to think, so is much of the world’s great art, not to mention a good deal of the world’s popular culture.

Perhaps the most questionable of Professor Sunstein’s assertions is his suggestion that when the government regulates pornography, it should be assumed that the government is acting for the constitutionally permissible purpose of preventing the harm pornography causes rather than acting for the impermissible purpose of suppressing the content of pornographic expression.¹⁸⁶ This assumption flies in the face of a long and dishonorable history of government censorship, especially directed at materials with a sexual content, that has been motivated by nothing more than disapprobation of the content of the materials. When it comes to censorship of pornography, history suggests that the government is particularly undeserving of deference, and suspicion of government motive should be the standard.¹⁸⁷

After examining the Sunstein four factors of low-value speech, Donald Downs, a political scientist and author of a comprehensive study of pornography, came to the conclusion that “[u]sing [the Sunstein] criteria, much pornography would be entitled to constitutional protection despite evidence that certain forms are related to harm.”¹⁸⁸

B. “HATE SPEECH”

In recent times, several commentators also have suggested that “hate” speech should be accorded little protection under the First Amendment.¹⁸⁹ Hate speech is usually considered to be highly offensive speech that vilifies, insults, or stigmatizes an individual on the basis of race, ethnicity, national origin, religion, gender, age, handicap, or sexual orientation.¹⁹⁰ Many persons who attempt to justify restrictions upon hate speech would add that before hate speech may be restricted, it must be shown that the speaker intended his or her words to vilify, insult, or stig-

183. *Id.* at 607-08.

184. *See Gey, supra* note 172, at 1586-96 nn. 100-48 and sources cited therein.

185. DONALD A. DOWNS, *THE NEW POLITICS OF PORNOGRAPHY* 164 (1989).

186. Sunstein, *supra* note 175, at 604, 611-16.

187. DOWNS, *supra* note 185, at 164.

188. *Id.*

189. Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Alon Harel, *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech*, 65 S. CAL. L. REV. 1887 (1992); Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320 (1989).

190. *See Doe v. University of Mich.*, 721 F. Supp. 852, 856 (E.D. Mich. 1989) (holding campus speech code overbroad and overly vague under First Amendment).

matize, or reasonably should have known that the words would have that effect.¹⁹¹

It should be emphasized that most of the commentators who assert that hate speech should not be protected by the First Amendment base their theories on the harm they believe to be caused by hate speech; some, however, supplement a harm-based approach with the notion that hate speech has little value. Mari Matsuda, for instance, offers an extensive harm-based discussion of racist speech, while further asserting that “collective historical knowledge” has led to “universal acceptance of the wrongness of the doctrine of racial supremacy.”¹⁹² “Racial supremacy,” she says, “is one of the ideas we have collectively and internationally considered and rejected.”¹⁹³

Another, and more recent, proponent of the proposition that hate speech should be restricted, Alon Harel, not only echoes Professor Matsuda, but is perhaps unique in basing his approach almost entirely upon the premise that racist speech has virtually no value. Moreover, Professor Harel makes the same claim about pornographic speech. He asserts that neither racist nor pornographic speech should be protected under the First Amendment because each possesses extremely little value.¹⁹⁴ Professor Harel approaches his theory of unprotected speech with a recognition that the current state of the law affords high First Amendment protection to racist and pornographic speech because they are perceived to be part of the political dialogue.¹⁹⁵ He argues, though, that racist and pornographic speech are so abhorrent and morally unacceptable that they should not be regarded as part of the political dialogue.¹⁹⁶ In his view, racist and pornographic speech are not a “legitimate” part of the political discourse because they have no “morally binding force.”¹⁹⁷

Professor Harel admits his theory is based upon “a value-laden characterization of political discourse.”¹⁹⁸ It is also a theory at odds with longstanding, basic First Amendment principles. Under the First Amendment, there has been a thorough rejection of the notion that the government can decide what speech is suitable for public discourse. To endow government with the power to decide whether speech is acceptable for discourse is a decidedly more dangerous risk than to allow an “uninhibited, robust, and wide-open” marketplace of ideas.¹⁹⁹

Moreover, defining low-value hate speech, like defining obscenity or pornography, presents a tremendously difficult line-drawing task that poses a threat to the kinds of speech that should not be excluded from the

191. See, e.g., Delgado, *supra* note 189, at 145-46, 179.

192. Matsuda, *supra* note 189, at 2359.

193. *Id.* at 2360.

194. Harel, *supra* note 189, at 1889.

195. *Id.* at 1888-89.

196. *Id.* at 1889.

197. *Id.*

198. *Id.*

199. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

protection of the First Amendment. Consider, for example, the novel *Huckleberry Finn*—a work that a number of people have suggested should be banned. There is no denying that Mark Twain's novel uses the word "nigger" on nearly every page and that it otherwise reflects, in some respects, the racial bigotry of its time. There is, however, no denying that in other respects *Huckleberry Finn* transcends that bigotry and stands as a great celebration of the essential worth and dignity of all individuals. And there is no denying that *Huckleberry Finn* is a great work of art, a classic American novel.

Yet there are those who see it as an instance of hate speech that should be censored or banned. There are those who have labelled Bernard Malamud's award-winning *The Fixer* as anti-semitic,²⁰⁰ while a more discerning eye might perceive it as an homage to Jewish people. Therein, of course, lies the problem. Offensiveness, like beauty, often lies in the eye of the beholder, and the censor can be counted on to see offensiveness and to ban expression again and again.

Contemporary attempts to define hate speech or, for that matter, pornography, that should be excluded from First Amendment protection often are plagued by the fundamental flaw of over-including a good deal of very important speech. When that flaw is addressed by refining the definitions, the result is such narrow definitions of regulable speech that little, if any, impact is made toward achieving their goals.²⁰¹

Perhaps Rodney Smolla has offered the most sensible approach to hate speech.²⁰² In a measured examination of the topic, he recognizes that hate speech is an abomination which should be opposed vigorously by all means permitted under the Constitution.²⁰³ Nevertheless, he continues, the appropriate balance for an open society is the one presently set by First Amendment rules, which allow the regulation of hate speech only in very narrow circumstances, e.g., when the speech presents a clear and present danger of physical violence or is intertwined with actual discriminatory conduct.²⁰⁴ Professor Smolla concludes that beyond those narrow circumstances, the fight against hate speech is more effectively waged through persuasion and education than by punishment and coercion.²⁰⁵

The proposals to regulate hate speech suffered a severe, though not entirely fatal, set back in 1992 when the Supreme Court decided *R.A.V. v. City of St. Paul*,²⁰⁶ ruling that the St. Paul Bias-Motivated Crime Ordinance violated the First Amendment. The ordinance made it a crime to display a symbol that one knows or has reason to know will arouse anger,

200. See *Board of Educ. v. Pico*, 457 U.S. 853 (1982) (disapproving removal of books from school library by board of education).

201. See Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 491-93.

202. See RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* ch. 6 (1992).

203. *Id.* at 167-69.

204. *Id.* at 169.

205. *Id.*

206. 112 S. Ct. 2538 (1992).

alarm, or resentment in others on the basis of race, color, creed, religion, or gender.²⁰⁷ In the view of a bare majority of the Supreme Court, the ordinance was unconstitutional on its face because it discriminated against speech on the basis of its message. The Court suggested, though, that some hate speech could be constitutionally proscribed under a more content-neutral law that generally prohibited fighting words.²⁰⁸

C. TOLERATING LOATHSOME SPEECH

At their core, the contemporary proposals seeking to suppress either hate speech or pornography are founded on the notion that the ideas expressed by such speech are intolerable.²⁰⁹ This is not the first time we have seen a debate over whether “words matter.” Alexander Bickel argued that we should not think that “words don’t matter, that they make nothing happen and are too trivial to bother with.”²¹⁰ He believed that offensive speech such as the phrase “fuck the draft” written on Paul Cohen’s jacket was a kind of verbal “assault” that “create[s] a climate, an environment in which conduct and actions that were not possible before become possible”²¹¹—an argument echoed by Professor MacKinnon’s notion that pornography “causes attitudes and behaviors of violence and discrimination.”²¹² Professor Bickel’s argument also is echoed by the contention that racist speech creates stereotypes that inflict emotional distress upon the people they are directed at and that create stereotypes affecting attitudes and behavior.

It is undeniable that a good deal of speech—and not just pornography or hate speech—does matter; it may construct reality, create stereotypes, or affect attitudes and behavior. According to First Amendment doctrine, however, that has never been reason enough to regulate speech. The fact that some speech may convey offensive, even pernicious, messages that contribute to generating an ugly reality has never been enough under the First Amendment to justify the regulation of speech. As Justice Holmes said, “we should be eternally vigilant against attempts to check the expression of opinions that we *loathe and believe to be fraught with death*”²¹³ And should there be any doubt that Holmes meant what he said, some ten years later he said much the same thing again, proclaiming that the most imperative constitutional principle was “the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.”²¹⁴ In a similar vein, Justice

207. St. Paul Bias-Motivated Crime Ordinance, ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990).

208. *R.A.V.*, 112 S. Ct at 2549-50.

209. See Franklin S. Haiman, *The Remedy Is More Speech*, THE AMERICAN PROSPECT, Summer 1991, at 30.

210. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 71 (1975).

211. *Id.* at 72.

212. MacKinnon, *Not A Moral Issue*, *supra* note 165, at 324.

213. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (emphasis added).

214. *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting).

Brandeis stated that "discussion affords ordinarily adequate protection against the dissemination of noxious doctrine."²¹⁵ Even Justice Jackson noted that "freedom to differ is not limited to things that do not matter much."²¹⁶ More recently, the Supreme Court has pointedly said in a number of cases that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."²¹⁷

One of the reasons for this "bedrock principle" is that there is no stopping place for the notion of offensiveness. If speech could be suppressed because it is offensive, little would remain of the First Amendment. There is no denying that hate speech is extremely offensive or that pornography can be pernicious. Neither is there any denying that some of the contemporary proposals to regulate those kinds of expression go to elaborate lengths to demonstrate just how offensive those forms of expression can be. But if pornography or hate speech can be restricted because it is so offensive, then so can flag burning;²¹⁸ so can the *Hustler* satire of Jerry Falwell;²¹⁹ so can the words of George Carlin²²⁰ and Paul Cohen;²²¹ so can the black armbands worn by Mary Beth and John Tinker to protest the war in Vietnam;²²² and so can civil rights marches,²²³ which were every bit as offensive to those "fine and upstanding" citizens who opposed desegregation as pornography is to many people today.

In response to Professor Bickel, Daniel Farber has eloquently reminded us why it is better to tolerate offensive speech than to suppress it.²²⁴ Offensive speech, Professor Farber points out, reveals something that we should know—that some people have offensive thoughts.²²⁵ Suppressing this kind of speech "violates a cardinal principle of a free society, that truths are better confronted than repressed."²²⁶ Banning speech is a repressive act that drives attitudes underground, rather than addressing or redressing them. Allowing the expression of offensive speech has the positive function of provoking responses to it, which can lead to change. The suppression of offensive speech does little to alter the odious atti-

215. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

216. *Board of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (punishing failure to salute U.S. flag violates First Amendment).

217. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989).

218. *See id.*

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

220. *See FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

221. *See Cohen v. California*, 403 U.S. 15 (1971).

222. *See Tinker v. Des Moines Indep. Sch. Dist.*, 395 U.S. 503 (1969).

223. *See, e.g., Gregory v. Chicago*, 394 U.S. 111 (1969) (holding peaceful protest advocating school desegregation protected by First Amendment); *Cox v. Louisiana*, 379 U.S. 536 (1965) (holding peaceful march to protest jailing of picketers protected by First Amendment).

224. Daniel A. Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of Cohen v. California*, 1980 DUKE L.J. 283.

225. *Id.* at 302.

226. *Id.*

tudes that spawn it, while a free marketplace of ideas is more likely to point the way to reform.

IV. HOW HIGH-VALUE AND LOW-VALUE SPEECH ARE TREATED

The two-level approach to freedom of expression that the Supreme Court originally developed in *Chaplinsky* and *Roth* has evolved into a more intricate structure composed of a number of tiers and a variety of rules. At each tier, the speech in question is viewed by the Court to have diminishing value and therefore is accorded diminishing measures of constitutional protection. Within the hierarchy of speech that it has created, the Court employs several different modes of constitutional review for various categories of speech, several different overall approaches to speech, and a number of special rules for certain categories of speech.

A. LEVELS OF SCRUTINY

The essential difference between the Supreme Court's treatment of high- and low-value speech concerns what the Court will accept as justification for regulating speech. As previously noted, a majority of the Court has never taken an absolutist approach to the First Amendment, even when dealing with the most valued kinds of speech. High-value speech is not beyond restriction if a sufficiently serious state interest can be shown for its regulation. However, the Court requires much less to sustain the regulation of low-value speech.

In First Amendment cases, as in cases involving other constitutional provisions, the Supreme Court has developed a multi-level system of judicial review.²²⁷ At the highest tier, the Court applies strict judicial scrutiny, which requires government action to be justified by a compelling state interest achieved through the least restrictive means possible.²²⁸ The Court employs this strict level of scrutiny when dealing with regulations that affect high-value speech. Obviously, this provides a substantial degree of constitutional protection for high-value speech.

Somewhat less, though not insignificant, protection is afforded by intermediate scrutiny, which requires government action to be justified by an important state interest achieved through carefully selected, although not necessarily perfect, means.²²⁹ The Court uses this intermediate tier of scrutiny when dealing with speech that it finds to be of middling value. Shortly after bringing commercial speech back into the ambit of the First Amendment, the Court decided to use intermediate scrutiny in dealing with regulations of commercial speech.²³⁰ More recently, however, the

227. See Jeffrey M. Shaman, *Constitutional Fact: The Perception of Reality By the Supreme Court*, 35 U. FLA. L. REV. 236, 242-52 (1983).

228. *Id.*

229. *Id.*

230. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

Court has been more grudging about the protection afforded commercial speech, having decided to use intermediate scrutiny only in reviewing the ends, and not the means, of regulations of commercial speech.²³¹ The means, the Court ruled, will be subject only to a level of review approaching minimal scrutiny.²³²

Minimal scrutiny is the lowest level of judicial review. It grants a great deal of deference to actions of the other branches of government and requires only that they justify their actions by a valid or legitimate state interest achieved through reasonable means.²³³ In practice, minimal scrutiny usually operates as no scrutiny at all and defers totally to the other branches of government.²³⁴ However, on occasion (although it is nearly impossible to predict when) the Court will put some "bite" into minimal scrutiny, and upgrade it from no scrutiny at all.²³⁵ Minimal scrutiny without bite is the kind the Court employs in obscenity cases.

In the eyes of the Supreme Court, regulations of high-value speech that focus on the content of speech are especially suspect and presumptively unconstitutional unless they are shown to be necessary to achieve a compelling governmental interest.²³⁶ But even content-neutral regulations of high-value speech are considered with a fair degree of suspicion and are unconstitutional unless closely related to accomplishing an important governmental interest.²³⁷ On the other hand, content-based regulations of low-value speech are regarded by the Court so deferentially that they ordinarily will be sustained as constitutional on the most meager showing of governmental interest.²³⁸

B. APPROACHES

In addition to the different levels of scrutiny, the Court has different approaches for dealing with different kinds of speech. When dealing with high-value speech, the Court uses what has been called "ad hoc balancing,"²³⁹ an approach that focuses upon each particular case individually, weighing the interest served by the speech in each particular instance against the asserted state interest in regulating the speech.²⁴⁰ Ad hoc balancing, though not absolutely protective of speech, tends to be highly

231. *Board of Trustees v. Fox*, 492 U.S. 469 (1989) (upholding ban on dorm "Tupperware parties"); *Posadas De Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328 (1986) (upholding law legalizing casino gambling and banning its advertisement to Puerto Rico residents).

232. *Fox*, 492 U.S. at 480; *Posadas De Puerto Rico Assoc.*, 478 U.S. at 340.

233. Shaman, *Perception*, *supra* note 227, at 243-44.

234. *Id.*

235. Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 166-68 (1984).

236. Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47-54 (1987).

237. *Id.*

238. *Id.*

239. MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH 2-9 to 2-14 (1984).

240. Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671, 673 (1983).

protective of it, allowing speech to be regulated only upon a showing that the particular speech in question will cause a serious harm that cannot be avoided by an alternative, less restrictive regulation.

Still, a regulation of highly valued speech may be constitutional if the particular speech is demonstrated to cause a serious harm that the government has a compelling state interest in preventing. Thus, even political speech, which the Supreme Court has always recognized as the most highly valued kind of speech, may be regulated if it is shown to cause a clear and present danger, or if a compelling state interest is demonstrated to support its regulation.

Ad hoc balancing should be distinguished from "definitional balancing,"²⁴¹ a technique the Court uses for some forms of speech that are lower on the Court's totem pole, though not at the very bottom. Definitional balancing might just as well be called "categorical balancing," because it focuses upon a category or class of speech, such as libel, and inquires whether the category of speech causes a sufficiently serious harm to justify restricting the speech. When using definitional balancing, the Court will uphold a regulation of speech if the Court is convinced that the class of speech in question is sufficiently harmful. No showing is required that the individual instance of speech in that particular case is harmful, so long as the Court believes that category of speech tends to cause harm.²⁴²

It has been pointed out that whether ad hoc or definitional balancing provides more protection for speech depends upon the specific content that the Court chooses to provide for each of those balancing approaches.²⁴³ Certainly the Court could devise a definitional balancing test that is highly protective of speech and could devise an ad hoc balancing test that is less so. In practice, however, it is clear that ad hoc balancing as used by the Court provides decidedly more protection for speech than definitional balancing provides. Definitional balancing is the primary method the Court uses for giving less constitutional protection to speech, such as libel, that the Court feels has less than full constitutional value. Speech that is lower, but not the lowest, in value receives diminished protection by denying it the safeguard of ad hoc balancing.

Still, definitional balancing does provide some constitutional protection that is denied to speech that the Court views as lowest in value. When dealing with the least valued speech, such as obscenity, the Court does not balance at all; that is, because the Court sees the speech as having little or no value, the Court designates it as a category of speech that receives no First Amendment protection. In effect, the Court "categorizes out" certain kinds of speech to deny them First Amendment protec-

241. NIMMER, *supra* note 239, at 2-15 to 2-24.

242. Compare *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), in which the Supreme Court upheld a regulation of lawyer solicitation in a commercial setting, with *In re Primus*, 436 U.S. 412 (1978), in which the Court struck down a regulation of lawyer solicitation in a political setting.

243. STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 15-17 (1990).

tion. This use of the categorization technique requires no showing of any harm, whether of the particular speech or of the class of speech. All the Court looks to is the value of the speech, and if the Court is convinced that the speech has no value, the Court gives no constitutional protection to the speech.

In comparing these three approaches, we see that when either of the balancing approaches is used, the constitutionality of a regulation of speech turns on an assessment of the harm caused by the speech. On the other hand, when the categorization technique is used, the constitutionality of a regulation of low-value speech turns on an assessment of the value of the speech.

C. RULES

Speech that is deemed high in value by the Supreme Court also enjoys the protection of the rule against overbreadth.²⁴⁴ According to this rule, an overbroad regulation of speech is considered unconstitutional on its face and therefore cannot be applied even to regulate speech that could be proscribed under a more precisely drawn statute.²⁴⁵ The purpose of the rule against overbreadth is to prevent a "chilling effect" upon constitutionally protected, valuable speech.²⁴⁶ The Court, however, has withdrawn the protection of the rule against overbreadth from a less valuable form of speech, namely, commercial speech, and has expressly said that "the overbreadth doctrine does not apply to commercial speech."²⁴⁷ Similarly, the Court uses an extremely truncated version of the overbreadth doctrine in cases involving child pornography, another category of speech low in value.

For some categories of low-value speech, special rules are devised to give them a modicum of First Amendment protection. For instance, while child pornography is low in value and certainly may be restricted, regulations prohibiting it must be adequately defined and may be applied only to material that actually involves the participation of children.²⁴⁸ In defamation cases involving matters of public concern, a showing of actual malice is required to establish a cause of action. In defamation cases involving private affairs, however, actual malice need be shown only to recover presumed or punitive damages.

Thus, we see a complex hierarchy of speech created by the Supreme Court over the years. The hierarchy encompasses three very different levels of constitutional review, three very different overall approaches to expression, and a number of special rules for various kinds of speech.

244. See *Shaman, Overbreadth, supra* note 4, at 259.

245. *Id.* at 260-61.

246. *Id.* at 260.

247. *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982) (upholding ordinance requiring business license to sell items designated for use with illegal drugs).

248. *New York v. Ferber*, 458 U.S. 747, 764-65 (1981).

V. DETERMINING THE VALUE OF SPEECH

First Amendment theory has been greatly influenced by the scholarly works of Alexander Meiklejohn. His view was that the central purpose of freedom of speech and the press is to enable individuals to participate in our democratic system of self-government.²⁴⁹ Meiklejohn believed that freedom of expression was an aspect of self-government that derived from the basic democratic premise that the people shall make decisions for themselves about their own governance.²⁵⁰ As Meiklejohn explained, the free flow of information and opinion about matters of public concern is essential to effective self-government.²⁵¹ Therefore, the central function of freedom of expression is to ensure the discussion of public issues.

Meiklejohn posited that speech about public matters was entitled to absolute protection under the First Amendment.²⁵² Although at first he applied his theory of absolute protection to a somewhat limited range of public issues,²⁵³ he later expanded its application to a broad range of expression that included all "human communications from which the voter derives the knowledge, intelligence, sensitivity to human values . . . [and] the capacity for sane and objective judgment which, so far as possible, a ballot should express."²⁵⁴ Meiklejohn specified that this expression encompassed all phases of education, philosophic and scientific understanding, literature and the arts, and public discussion of public issues.²⁵⁵

Meiklejohn's principal intent was to expand and protect freedom of speech by providing absolute First Amendment protection for all expression about matters of public concern. Some, however, see an implication in Meiklejohn's theory that limits freedom of speech. The range of public speech that Meiklejohn considered within the core of the First Amendment, though wide, was not without limits. Beyond those limits, nonpublic speech impliedly is not of central concern under the First Amendment and should enjoy considerably less constitutional protection.

Some commentators see this implication as unduly restricting freedom of speech. They assert that the First Amendment serves purposes other than enhancing democratic self-regulation. Thomas Emerson, for example, suggests that a primary purpose of the First Amendment is to foster individual self-fulfillment, and therefore, expression about matters, public or private, is within the ambit of the First Amendment.²⁵⁶ Martin Redish makes a strong argument that the ultimate purpose of the First Amendment is to enhance "individual self-realization," a concept that he means

249. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* ch. IV (1948).

250. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 20-27 (1960).

251. *Id.* at 116-18.

252. Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 256-57.

253. MEIKLEJOHN, *FREE SPEECH*, *supra* note 249, at 18-27.

254. Meiklejohn, *First Amendment*, *supra* note 252, at 256.

255. *Id.* at 256-57.

256. THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT*, 4-7 (1966).

to include individual self-fulfillment as well as autonomy in making decisions about one's own destiny.²⁵⁷ When the First Amendment is viewed in this light, Professor Redish points out, participation in public affairs is one, but not the only, means to the broader goals served by freedom of speech.²⁵⁸

Although a majority of the Supreme Court, despite the exhortations of former Justices Black and Douglas, has never adopted an absolutist view of the First Amendment, it has accepted the Meiklejohn view that the central purpose of the First Amendment is to ensure discussion of public matters. On a number of occasions, the Court has said that discussion of public issues lies "at the heart of the First Amendment's protection,"²⁵⁹ and therefore freedom of expression embraces discussion of "all matters of public concern."²⁶⁰ Conversely, discussion of matters of no concern to the public has less importance under the First Amendment and therefore is given less constitutional protection.

By this criterion a good deal of the expression said to be low in value should, in fact, be recognized as highly valuable. Some commercial speech, such as the prices of prescription drugs,²⁶¹ the availability of legal services,²⁶² and information about condoms, family planning, and the prevention of venereal disease,²⁶³ are of considerable concern to the public. As pernicious as it is, hate speech too often relates to political issues or matters of public concern.

Even the sort of "fighting words" the Court originally found to be of low value in *Chaplinsky* may be matters of public concern. Indeed, in a Ninth Circuit decision in which an individual directed profane gestures and speech at a police officer, the court observed that "[i]narticulate and crude as [the individual's] conduct may have been, it represented an expression of disapproval toward a police officer with whom he had just had a run-in. As such, it fell squarely within the protective umbrella of the First Amendment"²⁶⁴

Aside from the general stance that issues of public concern lie at the core of the First Amendment, the Supreme Court has never precisely explained what characteristics it considers in determining the value of

257. MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 11-14 (1984).

258. *Id.* at 21-22

259. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978).

260. *Thornhill v. Alabama*, 310 U.S. 88, 101; *see also Bellotti*, 435 U.S. at 776 (holding statute prohibiting corporate expenditure to express corporate view on proposed legislation violates First Amendment); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985).

261. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

262. *See Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

263. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).

264. *Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990) (holding profanity and obscene gesture directed toward police officer protected by First Amendment).

speech under the First Amendment.²⁶⁵ Commentators have noted the Court's failure to articulate a principle that unifies the various categories of speech it considers low in value. This "absence of a unifying principle is a source of continuing frustration to scholars of free speech law."²⁶⁶

Commentators have attempted to designate other factors that make speech more or less valuable. Several have asserted that the value of speech depends upon its ability to communicate a mental stimulus that is directed to reason or to the intellect.²⁶⁷ In a similar vein, it has been argued that cognitive material has more value as speech than non-cognitive material.²⁶⁸ Steven Gey, who is less than persuaded by these arguments, notes that they harken back to the ancient distinction between "reason" and "passion," a distinction that has been shaken, if not completely toppled, by modern psychological analysis.²⁶⁹ Similarly, Professor Redish notes that individuals often respond to expression with varying degrees of physical, emotional, and intellectual reaction, which are often inseparable.²⁷⁰ He concludes, therefore, that the purported distinction between the "physical" and non-physical impact of speech has no basis in reality and is unjustifiable.²⁷¹

Even if one adheres to the distinction, there is little support for the claim that intellectual expression is more valuable than emotive expression. A good portion of the world's great art, especially music and painting, could be described as appealing to "passion" rather than "reason." To exclude that sort of expression from the protection of the First Amendment on the ground that it has little value seems absurd and certainly would have disastrous results for freedom of speech.²⁷²

The notion that there is little First Amendment value to non-cognitive expression is one that has been decisively rejected by the Supreme Court:

[W]e cannot overlook the fact . . . that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function

265. The precise factors that the Court considers in determining whether a particular class of speech occupies only a "subordinate position in the scale of First Amendment values" remain somewhat obscure. The Court apparently focuses, however, on the extent to which the speech furthers the historical, political, and philosophical purposes that underlie the first amendment.

Stone, *supra* note 5, at 194 (footnote omitted); see also Sunstein, *supra* note 175, at 602-03.

266. Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 302 (1992).

267. See John M. Finnis, "Reason and Passion": *The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222 (1967); SCHAUER, *supra* note 55, at 178-88.

268. Sunstein, *supra* note 175, at 603.

269. Gey, *supra* note 172, at 1587.

270. REDISH, *supra* note 257, at 76.

271. *Id.*

272. See *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1092-96 (7th Cir. 1990) (Posner, J., concurring).

which, practically speaking, may often be the more important element of the overall message sought to be communicated.²⁷³

Professor Sunstein points to two additional factors which he claims are characteristic of low-value speech. First, a speaker who intends to communicate a message should be treated more favorably than one who does not.²⁷⁴ This factor seems to prove either too little or too much, because virtually all speakers intend to communicate a message. They may have other intentions as well—such as wanting to influence a vote, foment rebellion, reform government, stop the draft, increase sales of a product, save the environment, produce sexual arousal, provoke laughter—but they intend to accomplish those goals by communicating a message.

Later in his analysis, Professor Sunstein seems to equate the intent to communicate a message with cognitive speech.²⁷⁵ If, however, he means to suggest that we should only value a speaker's intention to communicate cognitive messages, he is merely repeating the questionable notion, discussed above, that non-cognitive speech is low in value.

Finally, Professor Sunstein suggests that in some areas—those involving commercial speech, private libel, fighting words, and pornography—it should be assumed that the government is acting for permissible reasons and therefore should be granted more latitude to regulate speech.²⁷⁶ Others, however, are not so willing to make that assumption about government, especially in light of the historical tendency on the part of government to overcensor speech.²⁷⁷ Perhaps it is correct that the government's tendency to overcensor has not been operative in regard to particular kinds of speech. No doubt many persons would agree with Professor Sunstein that the government usually is acting for permissible reasons in regulating commercial speech and private libel. It is difficult, though, to say the same about government regulation of fighting words—witness *Chaplinsky* itself—and even more difficult to say the same about government regulation of sexually explicit material, which historically has been characterized by constitutionally impermissible intent on the part of the government.²⁷⁸ Be that as it may, one wonders why, in any area involving freedom of expression, the government should be presumed to be acting for proper reasons. If government has good reason to regulate speech, why shouldn't it be expected to explain what that reason is? In-

273. *Cohen v. California*, 403 U.S. 15, 25-26 (1971).

274. Sunstein, *supra* note 175, at 603-04.

275. "Speech that is not intended to communicate a substantive message or that is directed solely to noncognitive capacities may be wholly or largely without the properties that give speech its special status." *Id.* at 606.

276. *Id.* at 604, 611-16.

277. See Vincent Blasi, *The Checking Value In First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977).

278. "[C]ensorship of sexual expression is indeed often laden with 'constitutionally impermissible' [sic] motives. Although there are reasons to be concerned about the effects of pornography, it is too simplistic to stress these concerns without also acknowledging the more ideological motives of censorship." DOWNS, *supra* note 185, at 164.

deed, if the government has good reason to regulate speech, it should be quite willing to say what that reason is.

VI. THE BASIC VALIDITY OF THE LOW-VALUE SPEECH THEORY

Several Supreme Court Justices and a number of prominent constitutional scholars have expressed serious doubts about the basic validity of the low-value speech theory. In his dissenting opinion in the *Roth* case, Justice Douglas expressed his belief that the First Amendment was designed to preclude courts as well as legislatures from weighing the value of speech.²⁷⁹ Some years later, Justice Powell declared that he did not subscribe to the theory that Supreme Court Justices could evaluate the content of speech and decide which expression was more or less deserving of First Amendment protection.²⁸⁰

One of our foremost First Amendment scholars, Thomas Emerson, believed that the *Chaplinsky* theory of low-value speech was fundamentally incompatible with First Amendment principles.²⁸¹ Professor Emerson pointed out that the *Chaplinsky* approach requires the Supreme Court to make value judgments about the content of expression, a role that Emerson believed is "foreclosed . . . by the basic theory of the First Amendment."²⁸² The same point was made by Justice Douglas in his dissenting opinion in the *Roth* case,²⁸³ and by Professor Kalven, who thought that Justice Douglas had "put his finger firmly on the fundamental difficulty of the two-level theory."²⁸⁴

Steven Shiffrin is a contemporary First Amendment scholar who believes that the low-value speech theory is basically inconsonant with First Amendment principles. According to Professor Shiffrin:

[T]he very concept of low-value speech is an embarrassment to first amendment orthodoxy. To say that government cannot suppress speech unless the speech is of low value sounds like a parody of free speech theory. The censor will always be inclined to say that the speech suppressed is of low value. Thus, the low-value exception mocks the rule. It seems almost like saying that South Africa has a humane racial policy except for its treatment of the blacks.²⁸⁵

The most devastating critique of the low-value speech theory comes from the work of Kenneth Karst.²⁸⁶ In Professor Karst's perceptive vision of the First Amendment, the central principle of the Amendment is equality of expression—that is, "equal liberty of expression, not merely in

279. *Roth v. United States*, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting).

280. *FCC v. Pacifica Found.*, 438 U.S. 726, 761 (1978) (Powell, J., concurring).

281. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 326 (1970).

282. *Id.*

283. See *supra* note 279 and accompanying text.

284. Kalven, *supra* note 68, at 19.

285. SHIFFRIN, *supra* note 243, at 44 (footnote omitted). It should be noted that Professor Shiffrin's statement was made when apartheid still prevailed in South Africa.

286. Karst, *supra* note 21, at 20.

the political arena, but throughout all the interdependent 'decisionmaking' processes of a complex society."²⁸⁷ Although Professor Karst believes that the principle of equality of expression is inherent in the First Amendment, he acknowledges that it was not crystallized until 1972 in the case of *Police Department of Chicago v. Mosley*.²⁸⁸ While it took the Court until that year to articulate the principle fully, it finally did so in no uncertain terms:

[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of the forbidden censorship is content control.²⁸⁹

Professor Karst believes that the *Chaplinsky* two-level approach to the First Amendment is "radically inconsistent with the principle of equal liberty of expression."²⁹⁰ He explains that, while the equality principle does not preclude all content-based regulation, it does begin with a presumption against content-based regulations that can be overcome, but only by a showing of a strong probability of serious harm.²⁹¹ Accordingly, Professor Karst joins the ranks of those who think the theory of low-value speech is fundamentally at odds with the meaning of the First Amendment.²⁹²

Others, however, disagree. In fact, some constitutional scholars believe that the low-value speech theory is an essential element of First Amendment doctrine. Geoffrey Stone, for one, asserts that

[t]he low value theory, or some variant thereof, is an essential concomitant of an effective system of free expression, for unless we are prepared to apply the same standards to private blackmail, for example, that we apply to public political debate, some distinctions in terms of constitutional value are inevitable.²⁹³

This assertion is echoed by Cass Sunstein, who says that "it would be difficult to imagine a sensible system of free expression that did not distinguish among categories of speech in accordance with their importance to the underlying purposes of the free speech guarantee."²⁹⁴ The alternative, he asserts, would be to apply the standards for political speech to all speech, thereby requiring the government to meet a test "so stringent as

287. *Id.* at 20 (footnote omitted).

288. 408 U.S. 92 (1972) (holding ordinance barring all but labor dispute picketing near school violates First Amendment).

289. *Id.* at 95-96.

290. Karst, *supra* note 21, at 31.

291. *Id.*

292. See also Alexander, *supra* note 26, at 552: "The 'high value,' 'low value,' 'no value' taxonomy is completely wrongheaded, if not incoherent."

293. Stone, *supra* note 5 at 252 n.24.

294. Sunstein, *supra* note 175, at 605.

to preclude most forms of regulation that are currently accepted.”²⁹⁵ More recently, Professor Sunstein has acknowledged that the Supreme Court has provided no clear principle to unify the various categories of speech which it designates as low-value, but he still maintains that any well-functioning system of free expression must distinguish between low- and high-value expression.²⁹⁶

Frederick Schauer makes a similar argument. He points out that there are a number of activities accomplished through speech that the government should be able to regulate.²⁹⁷ “Not only do we fix prices with speech, but we also make contracts with speech, commit perjury with speech, discriminate with speech, extort with speech, threaten with speech, and place bets with speech.”²⁹⁸ These classes of speech, or at least some of them, Professor Schauer claims, do not present the kind of harm that amounts to a clear and present danger, nor is there a particularly compelling governmental interest in prohibiting them.²⁹⁹ Thus, the only way of explaining why they may be regulated by the government without violating the First Amendment is the low-value speech theory—that is, these forms of speech “are to be tested under drastically different standards of protection” than other kinds of speech that are more valued under the First Amendment.³⁰⁰

The justification proffered for the low-value speech theory by Stone, Sunstein, and Schauer is what was formerly referred to (derogatorily) as “result-oriented.” The justification begins with a desired result, namely that there should be a system of freedom of speech which provides constitutional protection to most forms of expression, but that allows for the regulation and even prohibition of some kinds of expression, such as price-fixing, blackmail, perjury, libel, commercial speech, and obscenity. The only method of reaching this result that Stone, Sunstein, and Schauer can envision is to distinguish among various kinds of speech according to their value. This sort of result-oriented approach to legal analysis, though at one time considered illegitimate by some, should not be so quickly scorned as it once was, and, in fact, finds more acceptance in contemporary legal circles than in the past.

Other questions, however, remain about the arguments made in support of the low-value speech theory. The arguments, though somewhat convincing, are not entirely so. Certainly an effective system of free expression should proscribe some regulations of speech and uphold others. It is not at all clear, however, that such a system necessitates measuring the value of different categories of speech. After all, it may be possible to have an effective system of free expression that focuses upon the conse-

295. *Id.*

296. Sunstein, *Free Speech*, *supra* note 266, 301-04.

297. Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 *VAND. L. REV.* 265, 270-72 (1981) (footnote omitted).

298. *Id.* at 270.

299. *Id.* at 271.

300. *Id.* at 271-72.

quences of speech rather than the value of its content. Notwithstanding claims to the contrary, it is possible to imagine a sensible system of free expression that avoids any assessment of the value of expression, but that upholds regulations of speech upon the showing of a substantial or even a compelling state interest. Such a system might well allow the regulation of private blackmail and other speech that causes harm, while prohibiting the regulation of speech that does not cause harm. In other words, an effective system of freedom of expression might focus on the effects of speech rather than the putative value of its content. It may be a mistake to assume that an effective system of speech regulation must focus on the content of speech. It is altogether possible that an effective theory of free expression could ignore the content of speech and focus solely on its results.

The examples given by various commentators to demonstrate the need for the low-value speech theory are rather weak. Blackmail, price-fixing, perjury, and extortion are properly subject to regulation either because they pose a clear and present danger of a harm that the government has authority to prohibit or because there is a compelling state interest to regulate them. To the extent that contracts may be regulated, discrimination and threats prohibited, and betting restricted, there is also a compelling state interest for regulation. The regulation of libel already is based, at least partially, on the harm it causes—wrongful damage to individual reputation and integrity. By adopting a definitional balancing approach, the Supreme Court has shown that it is possible to regulate libel on the basis of its consequences rather than its value.

It also would seem that a harm-based analysis could be used to assess regulations of commercial speech without addressing the value of such speech. False or misleading advertising could be regulated because it is harmful; it deceives people into taking action they would not otherwise take. Advertising for dangerous products, such as cigarettes or alcohol, could be constitutionally restricted on the basis of the harm the products cause. Similarly, advertising for products that are harmful to the environment could be prohibited.

Indeed, if highly valued speech can be regulated, as it can be on the basis of harm, it seems possible to envision the same sort of system for low-value speech. After all, the most highly valued political speech may be restricted if it is shown to incite violence, damage the environment,³⁰¹ cause visual blight,³⁰² threaten pedestrian safety,³⁰³ violate privacy, or

301. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984) (upholding application of public park use regulation to prohibit demonstration).

302. See *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803-17 (1984) (upholding ordinance prohibiting sign posting on public property).

303. See *Heffron v. International Soc'y For Krishna Consciousness*, 452 U.S. 640, 647-55 (1981) (upholding rule confining merchandise sale or distribution to rented state fair booths); *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) (upholding law proscribing permitless public street procession).

cause other sorts of harm; there is no apparent reason why low-value speech could not be regulated on the same basis.

The low-value speech theory rests on the questionable premise that it is somehow necessary to evaluate the merit of speech in order to be able to regulate some kinds of speech. But a sensible system of free expression does seem possible by focusing upon the harm of speech, rather than evaluating its content. Indeed, the only justification for restricting speech is to prevent harm, and it is harm, therefore, that should be the key to the system.

VII. THE LOW-VALUE SPEECH THEORY AND THE TECHNIQUE OF CATEGORIZATION

A. THE PRACTICE OF CATEGORIZATION

The low-value speech theory operates through the technique of categorization. That is, the Supreme Court designates different kinds or categories of speech and assigns them high or low value. It can be said that the Court "categorizes" some kinds of speech as beyond First Amendment protection or at the fringes of the First Amendment and therefore entitled to little of its protection.

In *R.A.V. v. St. Paul*, decided in 1993,³⁰⁴ the Supreme Court found its members in serious disagreement regarding the categorization approach in First Amendment cases. The majority opinion, written by Justice Scalia, abruptly dismissed the categorization approach as nothing more than a metaphor.³⁰⁵ According to Justice Scalia's opinion, the metaphor of categorization literally means that the First Amendment is not violated by the regulation or prohibition of certain categories of speech.³⁰⁶

Justice White, believing that the majority was abandoning the categorization technique, defended it in a concurring opinion.³⁰⁷ The Court has long held, said Justice White, that certain categories of speech may be proscribed on the basis of their content.³⁰⁸ Moreover, he continued, the "categorical approach has provided a principled and narrowly focused means for distinguishing between expression that the government may regulate freely and that which it may regulate . . . only upon a showing of compelling need."³⁰⁹

Justice Stevens, who joined the other parts of the White concurrence, pointedly declined to join the part concerning categorization. In his own concurring opinion, Justice Stevens described the categorization approach as "unworkable" and "ultimately futile."³¹⁰ In Justice Stevens' view, categories correspond poorly to the complex reality of expres-

304. 112 S. Ct. 2538 (1993); see *supra* text accompanying notes 41-46.

305. *R.A.V.*, 112 S. Ct. at 2543.

306. *Id.* at 2543.

307. *R.A.V.*, 112 S. Ct. at 2551-54 (White, J., concurring).

308. *Id.* at 2551-52.

309. *Id.* at 2552.

310. *R.A.V.*, 112 S. Ct. at 2566-67 (Stevens, J., concurring).

sion.³¹¹ Categories, he said, are too fuzzy and do not account for the context in which speech occurs.³¹²

While Justice Scalia may be correct to say that the term "categorization" is a metaphor, it is nevertheless a metaphor which, like many others, has a certain accuracy that more literal statements lack. The Court does on occasion classify speech into categories and place some of those categories of speech beyond the protection of the First Amendment.

Frederick Schauer has written what is probably the most thorough attempt to justify First Amendment categorization.³¹³ He correctly notes that categorization often is presented as an alternative to balancing.³¹⁴ But categorization is necessary in First Amendment cases, Professor Schauer argues, because balancing does not provide a complete picture of First Amendment methodology and obscures the full importance of categorization in the structure of First Amendment doctrine.³¹⁵

Professor Schauer goes on to point out that the First Amendment itself sets up the category of speech, and that when we define the word "speech" to determine if a certain activity is within the scope of the First Amendment, we are categorizing.³¹⁶ This is undeniably so. The Constitution, like other laws, is replete with categories. Categorization can never be entirely eliminated from the process of constitutional interpretation. Indeed, it can never be entirely eliminated from any form of human thought. Words themselves are categories. Human beings inescapably think and communicate in categories, and when we define something, we are engaged, Professor Schauer tells us, in the act of categorizing. Thus, a certain amount of categorizing is unavoidable in constitutional decision-making, or, for that matter, in any other form of human decisionmaking.

Nonetheless, there are various ways to formulate categories, and not all of them are equally useful. *A priori* categories are particularly dangerous because they tend to be thoughtlessly devised. They have a beguiling appeal because they seem to be natural or even supernatural, handed down by some transcendental authority.³¹⁷ At base, however, *a priori* categories provide nothing more than a false security. They can be neither proven nor disproven, as they are founded upon neither empirical observation nor policy considerations.³¹⁸ Having no basis in reality or policy, *a priori* categories tend to be non-teleological—lacking in purpose—and therefore the results to which they lead are random and desultory.

311. *Id.* at 2566-67.

312. *Id.*

313. Schauer, *supra* note 297, at 270-72.

314. *Id.* at 265.

315. *Id.* at 265-66.

316. *Id.* at 267-73.

317. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 814-21 (1935).

318. *Id.*

Other categories that are devised according to reason or to accomplish certain purposes tend to be much more thoughtful and more useful depending upon the validity of the reasons or purposes that support them. Definitional or categorical balancing makes use of categories, though not *a priori* ones, and even ad hoc balancing makes use of categories, though they tend to be relatively concrete and narrow. Categories can be useful, but only to the extent that they are devised in terms of the purposes they are meant to serve. It has been said that categorical definitions of speech are plausible only if there is a single normative value served by freedom of speech or if several normative free speech values can coincide in a single category of speech.³¹⁹ Unfortunately, the Supreme Court has not yet achieved that sort of unified vision of the First Amendment, nor does it seem that any group of human beings is capable of agreeing upon what values underlie the First Amendment and exactly how those values should be delineated in the categorization of expression.

Categorization can be emphasized or de-emphasized in a human thought process, and it can be maximized or minimized in constitutional interpretation. There is an essential difference between categorization and balancing; the former looks to definitions, the latter to reasons, and that difference makes balancing the preferred method of constitutional interpretation.

The legal historian Morton Horwitz has pointed out that “[n]othing captures the essential difference between the typical legal minds of nineteenth- and twentieth-century America quite as well as their attitude toward categories.”³²⁰ Nineteenth-century legal thought, he continues, was overwhelmingly under the sway of categorical thinking, whereas twentieth-century thought emphasizes balancing of values and policies.³²¹ Twentieth-century thought recognizes that the differences of the kind presumed to be at the foundation of categories are actually differences in degree.³²² Thus, we have come to see reality “not as a series of mutually exclusive black-white bright-line boundaries . . . but rather as a series of continua involving shades of gray requiring line-drawing.”³²³ Categories, then, have a certain inherent fallibility.

Moreover, the efficacy of any category depends on how it is defined, and unfortunately, categories have a tendency to be over- or under-inclusive, or both. The Court’s definition of commercial speech, for example, is so broad that it includes wildly different kinds of expression. Professor Sunstein’s definition of pornography seems to be so narrow that it would exclude the regulation of a good deal of material that he no doubt be-

319. Schlag, *supra* note 240, at 695.

320. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870 - 1960* 17 (1992).

321. *Id.*

322. *Id.*

323. *Id.* at 199.

lieves to cause violent behavior.³²⁴ Professor MacKinnon's definition of pornography is so extensive that it would allow the regulation of much material that has substantial artistic merit.³²⁵

Although it may be unavoidable to some degree, categorization has a number of deficiencies that should not be overlooked. One of the obvious deficiencies of categorization is that because categories are abstract and general, they cannot adequately account for all of the specific instances within their scope. Low-value speech categories certainly are plagued by that deficiency. Probably all of the low-value categories of speech—commercial speech, libel, obscenity, etc.—are broad enough to encompass a fairly wide array of speech that may vary considerably in nature and communicative value. The category of commercial speech, for example, encompasses a wide variety of material which ranges from being barely informative to highly so. A sign that says "Chew Mailpouch" conveys little information, but brochures about family planning or venereal disease distributed by a company that produces condoms contain a good deal of useful information about important social issues.³²⁶ The same point can be made about pornography, some of which expresses very little in the way of ideas or information, but some of which expresses a significant amount of ideas and information. In fact, the same point can be made about virtually any category of speech, including highly valued categories. Traditionally, political expression about public issues has enjoyed the highest constitutional value, being considered at the very core of the protection afforded by the First Amendment. Certainly, political speeches, articles, debates, and the like express the kinds of ideas and data that are essential to an informed electorate. But a sign that reads "Roland Vincent—City Council"³²⁷ conveys about the same measure of information as one that says "Chew Mailpouch." Indeed, as our political campaigns become more and more like the packaging and advertising of products, the difference between political and commercial speech begins to pale.

A related drawback of the low-value speech theory is that it depends upon categories of speech which often overlap to a great extent and thus make it difficult, if not impossible, to determine the value of speech. For example, the category of political speech is highly valued; the category of profanity (at one time), less so; but what is the speech in *Cohen v. California*—political speech or profanity? Obviously it is both. Throughout history, political ideas often have been expressed in sexual, scatological, profane, or offensive images. The political satires of Jonathan Swift are replete with scatological images. The great works of William Shakespeare and Mark Twain include racist and anti-semitic language. The par-

324. In a letter to the editor, Professor Sunstein wrote: "In fact, my approach would probably allow less regulation of sexually explicit speech than does current law." Cass R. Sunstein, *Exchange*, THE NATION, Dec. 27, 1993, at 786.

325. See *supra* notes 163-74 and accompanying text.

326. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).

327. See *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984).

ody in *Hustler Magazine v. Falwell*³²⁸ is undeniably gross and offensive, but it also skewers political and religious hypocrisy. To many individuals, burning the American flag is “profoundly offensive,” and to some it may be nothing more than “an inarticulate grunt or roar,”³²⁹ but it is also a profound political protest that could be said to lie at the very heart of protection afforded by the First Amendment. All of these examples illustrate that the categories of speech designated by the Supreme Court, like most other categories, cannot be neatly separated. They tend to overlap one another, making it problematic to assess the value of speech.

A further problem in assessing the value of speech is that whatever value speech may or may not possess varies according to its context.³³⁰ Value, like beauty, resides in the eye of the beholder, and the meaning of any particular book, article, film, etc., changes from situation to situation. Expression has no constant value; rather, its value changes and shifts from one context to another. In one setting, speech may be taken as profane, racist, or obscene. In another setting the very same speech may be taken in a very different way. Categorization, then, has its pitfalls.

B. THE BASIS OF CATEGORIZATION

To acknowledge that some degree of categorization inevitably will occur is not to say that every act of categorization is done correctly or justifiably. To define First Amendment “freedom of speech” as encompassing only printed materials such as books and newspapers would surely be an act of categorization, albeit one that would be most difficult, if not impossible, to justify.

Therein lies the greater problem about the category of low-value speech. It is problematic not only because it engages in categorization, but more so because determining the specific content of the categories is based upon evaluating the social worth of speech. Unlike the approach of definitional or categorical balancing which looks to the harm caused by speech, low-value categorization looks to the value of speech, a highly questionable, uncertain, and subjective enterprise.

Moreover, these matters become a bit more complicated. As Professor Schauer readily acknowledges, while the First Amendment itself designates the category of speech, it does not designate any subcategories of speech.³³¹ The First Amendment speaks of “speech,” but says nothing of “high-” or “low-value speech.” The First Amendment speaks of “speech,” but makes no mention of “political,” “public,” or “private” speech. Nor does it refer to “fighting words,” “obscenity,” “libel,” “commercial speech” or any other kind of speech. These refinements, not to be found within the text of the First Amendment, have been devised by the Supreme Court. So, while some categorization may be inevitable in

328. 485 U.S. 46 (1988).

329. *Texas v. Johnson*, 491 U.S. 397, 432 (1989) (Rehnquist, C.J., dissenting).

330. See Alexander, *supra* note 26, at 551.

331. SCHAUER, *supra* note 55, at 282-83.

determining what is and is not speech, the further subcategorization the Court has formulated is neither inevitable nor unavoidable.

Professor Schauer admits this, but asserts that the subcategorization that has occurred at the hands of the Court is justifiable.³³² Though he would have the subcategories better defined,³³³ he advances several arguments "in favor of categorization within the First Amendment."³³⁴ First, in the absence of subcategories of speech, "there may be pressure to keep troublesome categories completely outside. When the choice is all or nothing, the difficulties of 'all' may lead courts to choose 'nothing.'"³³⁵

This argument appears a bit sophistic. It pretends to be protective of freedom of speech by allowing the suppression of some speech in order to protect other speech. The argument has a hollow ring when one considers that the list of low-value speech is growing longer, contrary to early warnings that it should be kept strictly confined to a few well defined and narrowly limited categories of speech.

Next, Professor Schauer argues that "not all forms of speech are . . . amenable to the same analytic approach."³³⁶ For example, the "clear and present danger" test used in cases dealing with advocacy of rebellion is not appropriate to deal with libel or false advertising.³³⁷ As Schauer sees it, most First Amendment doctrine has been formulated in response to cases dealing with advocacy of rebellion, and other lines of analysis are needed for other categories of speech.³³⁸

The assertion that most First Amendment doctrine has been formulated in regard to advocacy of rebellion ignores the scope and complexity of that doctrine. While the genesis of First Amendment doctrine occurred in advocacy cases, since then the Supreme Court has developed an extensive body of law dealing with many other kinds of speech. Professor Schauer may be on firmer ground when he suggests that not all forms of speech are amenable to the same analysis, but considerable question remains as to whether it is necessary to categorize speech, and if so, whether it should be categorized according to its presumed value or according to the harm that it demonstrably causes.

Finally, Professor Schauer argues that the refusal to categorize is "frightfully counter-intuitive."³³⁹ "Political argument," he says, "is simply more important than 'Specificized Sexual Activities,' and *Hamlet* is simply better literature than 'Dance With the Dominant Whip'. . . . Anyone who holds otherwise is just plain wrong."³⁴⁰ One who is not familiar with all of the cited material can only presume that Professor Schauer's

332. Schauer, *supra* note 297, at 282-83.

333. *Id.* at 288.

334. *Id.* at 286.

335. *Id.* On the other hand, it may lead them to choose "all," which is the choice that should be made unless some justification for the subcategory can be shown.

336. Schauer, *supra* note 297, at 286.

337. *Id.* at 287.

338. *Id.*

339. *Id.* at 287.

340. *Id.* at 288 (footnotes omitted).

assessment is correct, although it might be pointed out that a good deal of political argument hardly reaches the level of *Hamlet*. And even Professor Schauer is quick to admit that

things are not this simple. Our commonsense categories have fuzzy edges, and there is much more agreement that *Hamlet* is good literature and "Dance With the Dominant Whip" is bad literature than there is about in which category to put *Memoirs of a Woman of Pleasure* or George Carlin's "Seven Dirty Words" monologue.³⁴¹

What makes the fuzzy edges of the categories even more problematic is that it will be government officials who enforce the categories and who decide which speech falls into which category. Given the historical tendency of government to over-censor, fuzzy-edged categories pose a significant threat to freedom of speech.

Whatever the relative merits and demerits of the categorization technique, it should be emphasized that if categorization of speech does occur, it need not be based on the value of speech. Martin Redish points out that

although it may well be appropriate to distinguish among different forms of expression on the ground that some of them present greater danger of harming society, it is considerably more doubtful that an arm of the state should have the authority to decide for the individual that certain means of mental development are better than others.³⁴²

Speech can be categorized by standards other than its value. In fact, it could be categorized according to whether it causes harmful effects beyond its communicative impact. This is the approach taken, for example, in Justice Brennan's concurring opinion in *Ferber*.³⁴³ If this approach were taken toward obscenity or pornography, there would be a stronger case for regulating violent sexually-explicit materials than for regulating sexually explicit materials that contain little or no violence. Moreover, if the category were based upon the harmful effects of speech, the specific content of the category might be changed by stressing the component of the material—violence—that causes the harm, rather than the sexual component, which seems to have no harmful effects.

Although categorization may not be completely avoidable, it is a mode of thought that has serious flaws. Moreover, categories of speech can be formulated based upon the effects of expression without reference to its value.

VIII. CONCLUSION

The difficulties of categorizing speech on the basis of its value should not be underestimated. Lawrence Alexander has pointed out that attempts to "distinguish speech of different value leads to intractable diffi-

341. *Id.* (footnotes omitted).

342. Redish, *supra* note 257, at 57.

343. *See New York v. Ferber*, 458 U.S. 747, 775 (1981) (Brennan, J., concurring).

culties of classification.”³⁴⁴ Moreover, categorizing speech on the basis of its supposed value is a dubious practice that seems to contradict basic First Amendment principles. To the extent that fighting words, commercial speech, pornography, or other kinds of speech may be subject to regulation, it should be because they cause harm and not because they are presumed to be low in communicative value.

Perhaps the greatest danger of the low-value speech theory is the temptation it poses for expanding its application to new kinds of speech. From the very beginning of the theory³⁴⁵ to the Supreme Court’s most recent pronouncement about it,³⁴⁶ the Court has always described it as applicable only in “limited” areas. But whenever another kind of expression—be it flag-burning or hate speech—gains a renewed disfavor, there is a strong temptation to devalue it and restrict it on that basis. It is quicker and easier to deal with disfavored speech by denigrating its value than by making real assessments about the harm it supposedly causes. Certainly some kinds of speech seem, as Professor Schauer puts it, “intuitively” low in value.

It is one matter, however, to designate one or two categories of speech as low in value and attempt to keep those categories narrowly defined, and quite another matter to expand the list of low-value categories first to one new area and then to another. After all, there are serious questions about the basic compatibility of the low-value speech theory with First Amendment principles, and its expansion may amount to a serious threat to freedom of expression. If not properly cabined, the theory could swallow large chunks of the First Amendment and lead to extensive suppression of free speech. Over thirty years ago Harry Kalven cautioned that the two-level approach to the First Amendment “may have unhappy repercussions on the protection of free speech generally,”³⁴⁷ and that caution still pertains.

344. Alexander, *supra* note 26, at 551.

345. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942); *see also supra* Part II.A.

346. *R.A.V. v. St. Paul*, 112 S. Ct. 2538, 2543 (1992); *see also supra* notes 37-45 and accompanying text.

347. Kalven, *supra* note 68, at 17-19.