

# STUDENT NOTE\*

## ASSESSING THE NON-COGNITIVIST DEFENSE OF THE SUPREME COURT'S OBSCENITY DOCTRINE

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### I

#### INTRODUCTION

Legal academics have criticized the U.S. Supreme Court's obscenity doctrine as unprincipled, vague, and obsolescent.<sup>1</sup> Developed during the middle of the last century,<sup>2</sup> when norms around sexuality were undergoing rapid change,<sup>3</sup> the doctrine represents the Court's attempt to accommodate the new sexual

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1. See generally David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111 (1994); Steven Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564 (1998); Joel Feinberg, *Pornography and the Criminal Law*, 40 U. PITT. L. REV. 567 (1979); Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635 (2005); Andrew Koppelman, *Free Speech and Pornography: A Response to James Weinstein*, 31 N.Y.U. REV. L. & SOC. CHANGE 899 (2007); Simon Roberts, *The Obscenity Exception: Abusing the First Amendment*, 10 CARDOZO L. REV. 677 (1989); David Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974); James Weinstein, *Democracy, Sex and the First Amendment*, 31 N.Y.U. REV. L. & SOC. CHANGE 865 (2007).

2. See generally *Roth v. United States*, 354 U.S. 476 (1957); *Miller v. California*, 413 U.S. 15 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973). The *Miller* test embodying the Court's obscenity doctrine, including refinements from later cases, is as follows. Speech is unprotected if: (a) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) the work depicts or describes, in a patently offensive way under contemporary community standards, sexual conduct specifically defined by the applicable state law; and (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value from the perspective of a reasonable person. See *Miller*, 413 U.S. at 24 (setting forth the basic test); *Smith v. United States*, 431 U.S. 291, 301 (1977) (recognizing appropriateness of the "contemporary community standards" standard in the patent offensiveness inquiry); *Pope v. Illinois*, 481 U.S. 497, 501 (1987) (holding that the serious value prong looks to whether a reasonable person would find serious value in the material). The Court has also held that a "prurient interest" is a "shameful or morbid" interest in sex—as distinct from a "'good, old fashioned, healthy' interest in sex." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499 (1985) (citation omitted).

3. For an accessible history of the so-called "sexual revolution," see generally DAVID ALLYN, *MAKE LOVE, NOT WAR: THE SEXUAL REVOLUTION: AN UNFETTERED HISTORY* (2001).

frankness while preserving one of the “historic and traditional” exemptions from First Amendment coverage.<sup>4</sup> As such, the doctrine can be viewed as a kind of uneasy settlement between competing interests: on the one hand, an increasingly sexually libertarian society’s appreciation of the cultural, scientific, and political value of frank depictions of sexuality;<sup>5</sup> on the other hand, a traditional concern with the “corrupting and debasing impact[s]” of the “commerce in . . . [or] public exhibitions [of]” obscenity.<sup>6</sup> Judging by the weight of scholarly opinion, that settlement was a failure.

However, the doctrine is not wholly without its academic champions. One of the most prominent is—or at least, was—Frederick Schauer.<sup>7</sup> In an article and much-admired book, Schauer argued that the Court’s doctrine “naturally flows” from a plausible underlying account of free speech.<sup>8</sup> His is still widely considered one of doctrine’s best defenses.<sup>9</sup> In this article, I will show that it is still a fruitful point of departure for a philosophical and doctrinal examination of the obscenity doctrine.

4. The Court listed obscenity as a traditional category of expression exempted from First Amendment coverage in *R.A.V. v. St. Paul*, 505 U.S. 377 (1992); *United States v. Stevens*, 559 U.S. 460 (2010); *United States v. Alvarez*, 567 U.S. 709 (2012); and *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786 (2011). In *Brown*, the Court asserted that it would tolerate no new categorical exemptions without evidence that the new restriction “is part of a long . . . tradition of proscription . . .” 564 U.S. at 792. The Court repeated this assertion in *Alvarez*. With this “traditional proscription” requirement, the Court has, for all practical purposes, ruled out any new carve-outs from First Amendment coverage. For an accessible history of obscenity law in the United States, see Geoffrey Stone, *Sex and the First Amendment: The Long Winding History of Obscenity Law*, 17 *FIRST AMEND. L. REV.* 134 (2018). For a discussion of the distinction between First Amendment “coverage” and First Amendment “protection,” see FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 89–95 (1982).

5. For example, in *Roth*, Justice Brennan wrote that “sex . . . is one of the vital problems of human interest and public concern.” 354 U.S. at 487. Brennan went on to quote *Thornhill v. Alabama*’s assertion that “[t]he freedom of speech and the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern . . .” *Id.* at 488 (citing *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940)). Thus, by identifying sex as a vital subject of public concern, Brennan placed non-obscene portrayals of sex squarely at the *core* of First Amendment concern. In *Manual Enterprises, Inc. v. Day*, Justice Harlan (admittedly, in an opinion joined by only one other Justice) argued for the necessity of the obscenity test’s “patent offensiveness” prong on the grounds that “one would not have to travel far even among the acknowledged master-pieces in any fields to find works whose ‘dominant theme’ might, not beyond reason, be claimed to appeal to the ‘prurient interest’ of the reader or observer.” *Manual Enters., Inc. v. Day*, 370 U.S. 478, 487 (1962). Even the conservative Justice Burger grudgingly conceded in *Miller* that “the ‘sexual revolution’ of recent years may have had useful byproducts in striking layers of prudery from a subject long irrationally kept from needed ventilation.” *Miller*, 413 U.S. at 36.

6. *Paris*, 413 U.S. at 110. See also *Manual Enters., Inc.*, 370 U.S. at 487 (discussing how the *Roth* standard, the precursor of the *Miller* test, incorporated “the element of the likely corruptive effect” of obscenity “brought into federal law via *Regina v. Hicklin*”).

7. See generally SCHAUER, *supra* note 4; Frederick Schauer, *Speech and “Speech”—Obscenity and “Obscenity”*: An Exercise in the Interpretation of Constitutional Language, 67 *GEO. L.J.* 899 (1979).

8. Schauer, *supra* note 7, at 932.

9. See Weinstein, *supra* note 1, at 897 (“[Schauer’s] remains the best defense of the Court’s obscenity doctrine.”); Andrew Koppelman, *Is Pornography “Speech”?*, 14 *LEGAL THEORY* 71, 71 (2008) (“The most prominent and careful of [the arguments for the exclusion of obscenity from First Amendment coverage is that] of Frederick Schauer . . .”).

Schauer's account has two logically independent parts.<sup>10</sup> In one part, Schauer argues that the *best explanation* of the Court's doctrine—that is to say, the underlying theory of the First Amendment and the nature of “obscenity” that can best make sense of its decisions—takes the First Amendment's purpose to be protecting acts that communicate valuable ideas or information. Combined with a conception of obscenity as material that does not communicate ideas or information *at all*, this theory can explain both why the Court defines obscenity in the way it does and why the Court denies First Amendment coverage to obscenity so defined.<sup>11</sup> In making this explanatory argument, Schauer advises that he looks more to what the Court has *done* rather than what it has *said*.<sup>12</sup> Although I will frequently advert to what the Court has said to support my arguments against Schauer's explanatory account, nothing ultimately hinges on this methodological difference; as I hope will become clear, even if restricted to the Court's holdings, there is sufficient evidence to warrant rejecting Schauer's view.

The second part of Schauer's account argues for the substantial soundness of the Court's doctrine and its underlying justification.<sup>13</sup> He contends that “hardcore pornography” does not communicate ideas or information, and that the Court's test for obscenity reasonably maps onto hardcore pornography. As for the idea that First Amendment coverage extends only to acts that communicate valuable ideas or information, Schauer thinks this follows from *any* plausible philosophical justification of the First Amendment.<sup>14</sup>

The scholarly reception of Schauer's work has largely focused on this second, normative part of his overall account. Put simply, the most common criticism of Schauer's normative account is that obscenity does, or at least can, communicate ideas.<sup>15</sup> If this is the case, then even assuming that the First Amendment only

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10. To head off potential confusion, I should note that I am not claiming that his discussions of obscenity are actually *divided up* into these two parts.

11. Schauer refers to this as the “non-speech” theory of or the “non-speech approach” to obscenity. The label derives from Schauer's plausible argument, which I will not explore in this article, that “speech” is a term of art in the First Amendment context. By the lights of the First Amendment, “speech” must communicate ideas. It follows that obscenity is not “speech,” even if in ordinary language obscenity is clearly speech (e.g., a supremely trashy erotic novel). The Court seems to affirm this approach (i.e., distinguishing between “speech” in the ordinary sense and “speech” in the constitutional sense) in *St. Paul*: “In other words, the exclusion of ‘fighting words’ from the scope of the First Amendment simply means that, for the purposes of the Amendment, the unprotected features of the words are, despite their verbal character, essentially a ‘nonspeech’ element of communication.” *R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992).

12. Schauer, *supra* note 7, at 900. I understand this to mean that Schauer restricts his evidence base to the Court's holdings while largely ignoring its reasoning.

13. Thus, Schauer writes that the Court's “non-speech approach” to obscenity is “fundamentally sound.” *Id.* However, as we will see, Schauer does not accept all aspects of the Court's doctrine.

14. Thus, while on Schauer's view all justifications of the First Amendment imply that only valuable communicative acts are covered, exactly *which* communicative acts or classes of act are covered will depend on the particular value the First Amendment is taken to promote. See SCHAUER, *supra* note 4, at 103–04.

15. See Koppelman, *supra* note 9, at 72–79; Gey, *supra* note 1, at 1585–96; Roberts, *supra* note 1, at 708–12; MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 75 (1984); ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 111–12 (1995).

covers acts that communicate valuable ideas, Schauer is unable to explain why obscenity is not covered. Somewhat regretfully, my contribution to this part of the discussion is to pile on: I will argue that given his remarkably ecumenical view of what a “communicative act” is, Schauer’s dialectical position is even worse than his critics make it out to be.

Even if Schauer’s critics are right about the ultimate failure of his normative account, it remains possible that his *explanatory* account of the obscenity doctrine is correct—recall that they are logically independent. Nevertheless, I will argue that his explanatory account is mistaken. The Court’s obscenity doctrine is not best explained by the idea that obscenity fails to communicate ideas or information, and for that reason falls outside of First Amendment coverage.

Furthermore, I will argue that Schauer’s work on rules, and in particular his notion of the “second-best” First Amendment, raises some fundamental problems for his project. First, Schauer’s interpretation of the *Miller* test arguably vitiates its status as a rule. More importantly, there is a deep tension between recommending a rule-based conception of the First Amendment and defending a First Amendment rule that necessarily allows legal decision-makers to exercise significant discretion in its application.

This article will proceed as follows. In Part II, I make some brief remarks about the Dworkinian methodology I employ in the rest of the article. In Part III, I lay out Schauer’s normative theory of obscenity. In Part IV, I discuss the main criticism of Schauer’s normative account. In Part V, I explain and criticize Schauer’s explanatory account of obscenity. Finally, in Part VI, I remark upon the tensions between Schauer’s work on obscenity and his later work on rule-based decision-making in the law.

## II

### PLAYING HERCULES: A BRIEF METHODOLOGICAL INTERLUDE

Before embarking upon my discussion of obscenity in earnest, it is fitting to begin with a few remarks about the methodology I will be employing. That methodology derives from Ronald Dworkin’s notion of “law as integrity,” a theory of legal interpretation he elaborates in his famous book, *Law’s Empire*.<sup>16</sup>

The key propositions describing the theory of law as integrity are as follows. First, law as integrity “instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness.”<sup>17</sup> What Dworkin calls “legal practice,” which in our case consists of key Supreme Court decisions concerning obscenity and the First Amendment more broadly, is to be interpreted *as if* it expresses the coherent conception of justice and fairness of a single person. The judge’s interpretive aim is to “justify [legal

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16. RONALD DWORKIN, *LAW’S EMPIRE* (1986).

17. *Id.* at 225.

practice]” in a “story with a complex claim: that present practice can be organized and justified in principles sufficiently attractive to provide an honorable future.”<sup>18</sup> The aim, in other words, is to choose those underlying moral principles that best organize and justify legal practice. Dworkin distinguishes between two dimensions of the judge’s interpretive judgment: fit and justification.<sup>19</sup> “Fit” refers to the degree of consistency between the legal practice under interpretation and the moral principles with which the judge purports to organize that practice. “Justification” refers to the strength of the moral reasons that those principles provide in support of the legal practice. Law as integrity, then, depicts legal interpretation as a complex process of identifying those principles that best fit and justify some aspect of legal practice.

In this article, I will practice law as integrity, with First Amendment obscenity doctrine as the target legal practice to be organized and justified by a theory of obscenity. In essence, I will argue that Schauer’s theory of obscenity fails the test of fit. Of course, I am not acting as a judge: my aim is not to *apply* the moral principles to new fact situations, only to say what they are. In addition, the theories of obscenity I will be evaluating are not exactly moral theories in Dworkinian terms, since they do not propose a set of first-order moral rights or duties. A comparison with how Dworkin describes the ideal judge’s process of interpreting the Fourteenth Amendment’s Equal Protection Clause may be illustrative here.

Dworkin says that the ideal judge will draw from his examination of constitutional history and practice that the Constitution “insists that each state recognize certain rights qualifying any collective justification it uses, any view it takes of the general interest.”<sup>20</sup> In addition, it “seems plain” to the judge that the Constitution “mandates some individual right not to be the victim of official, state-imposed racial discrimination.”<sup>21</sup> In light of these preliminary conclusions, the judge constructs three accounts of this right and tests each of them as an interpretation of constitutional practice under the Fourteenth Amendment. The relevant point about this discussion for our purposes is that the interesting interpretive work does not take place at the stage of identifying *that there is* a right to non-discrimination, but at the stage of elaborating the character and dimensions of the right.<sup>22</sup> I see the theories of obscenity I will be examining in this article in a similar light. It seems plain that the Free Speech Clause of the First Amendment mandates some individual right to be free from government interference in speech. The interesting questions concern the scope, character, and justifications of that right. The theory of obscenity is part of the answer to

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18. *Id.* at 227.

19. *Id.* at 239.

20. *Id.* at 382.

21. *Id.*

22. *See id.* (asking what are the “character and dimensions” of the Fourteenth Amendment’s nondiscrimination right).

the scope question, and it involves both an account of what obscenity *is*, and of the reasons why obscenity falls outside the scope of the right.

Two aspects about law as integrity are particularly important for my project. The first is Dworkin's notion of "local priority."<sup>23</sup> On the one hand, since law as integrity ideally envisions the unification of a society's entire body of law under the banner of a coherent set of fundamental moral principles, the test of fit of an interpretation of one department of law is not restricted to its consistency with that department alone. That is why my examination of obscenity will consider non-obscenity First Amendment decisions as data points that any interpretation of obscenity law ought to accommodate. On the other hand, the interpreter of a department of law presumptively ought to give priority to its fit with decisions in *that* department over decisions in others—hence, *local* priority. So, it is presumptively more important that a theory of obscenity fits the Court's obscenity cases than that it fits, for example, the commercial speech cases.

The second point about law as integrity is the distinction between the academic and the practical elaboration of a moral theory.<sup>24</sup> "Moral theory" is shorthand for a coherent set of moral principles constituting the purported interpretation of a legal practice. The academic elaboration of a moral theory could, in principle, develop moral rules that cover "every nuance of fact."<sup>25</sup> But such an elaboration would produce too many rules to understand and master for the practical purpose of adjudication. So, the interpreter may translate the moral theory into rules of decision that simplify, to a certain extent, the theory that informs them. She can do this either by framing rules with words, like "reasonable under the circumstances," that call for more specific calculation on particular occasions, or alternatively by setting out rules with crisp bright lines that ignore subtleties. The derivation of rules of decision from the moral theory, guided by considerations of manageability and efficiency, constitutes the practical elaboration of the theory. I understand the Court's obscenity doctrine as a practical elaboration of a theory of obscenity, which means that workability concerns are paramount.

### III

#### SCHAUER'S NORMATIVE THEORY OF OBSCENITY

Schauer's normative theory of obscenity is grounded in a theory of what qualifies as "speech" in the sense relevant to the First Amendment.<sup>26</sup> For Schauer, speech in the First Amendment sense is intimately tied to communication. This conclusion is not primarily grounded in Court decisions, but in Schauer's examination of the philosophical justifications for the First

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23. *Id.* at 250–54.

24. *Id.* at 285–86, 385.

25. *Id.* at 285.

26. See SCHAUER, *supra* note 4, at 89–113; Schauer, *supra* note 7, at 905–10.

Amendment. According to Schauer, “[c]ommunication dominates all the arguments that would with any plausibility generate” special protections for speech.<sup>27</sup> For Schauer, communication consists of three elements: communicative intent on the part of the speaker, a communicated message, and a recipient of the communication.<sup>28</sup> Thus, a communicative act is an act that involves an intentional dissemination of a message by a speaker, which is then understood by a hearer.<sup>29</sup>

A key question for Schauer’s view is the nature of the communicated message. In his 1979 article, Schauer initially uses the word “idea” to describe the message.<sup>30</sup> This might suggest that a message must be a thought or proposition. However, Schauer recognizes that this would be unduly restrictive. For example, it would exclude uses of language that are not intended to express propositions, but which are clearly protected by the First Amendment.<sup>31</sup> It would also exclude much non-representational art and even famous poems such as Lewis Carroll’s *Jabberwocky*.<sup>32</sup> So, Schauer ultimately identifies the message of a communication not with a proposition, but with a “mental stimulus,”<sup>33</sup> “an appeal to the intellectual process,”<sup>34</sup> or “cognitive content.”<sup>35</sup> In this way, his claim that speech in the constitutional sense requires communication does not exclude non-propositional uses of language or art, since even these plausibly cause (and are meant to cause) some sort of “intellectual process” in the recipient.<sup>36</sup>

However, conduct that is communicative is not necessarily speech in the constitutional sense. In addition to being communicative, the conduct must in some way relate to the philosophical justifications for the First Amendment. For example, the argument from democracy might restrict the extension of “speech” in the constitutional sense to communications of political messages. In short, “[i]f

27. See SCHAUER, *supra* note 4, at 94. Thus, Schauer argues that “[w]ithout communication the argument from truth is nonsensical”; similarly, in the context of the argument for free speech from democracy, “[c]ommunication is the distinguishing feature that justified including freedom of speech among the principles that together form what we call ‘democracy’ . . .” *Id.* at 95.

28. *Id.* at 98.

29. This definition raises the question of whether misunderstandings deserve First Amendment coverage. For discussion of this interesting issue, see MARK V. TUSHNET, ALAN K. CHEN, & JOSEPH BLOCHER, *FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT* 122 (2017).

30. See, e.g., Schauer, *supra* note 7, at 920 (entertaining the notion that the “communication of ideas” is the “essential” property of an utterance that warrants First Amendment coverage).

31. *Id.* at 921. An example might be the use of language purely to express emotion: “Ouch!”; “Hear! Hear!”; perhaps “Fuck the Police!”

32. Lewis Carroll, *Jabberwocky*, in *THE RANDOM HOUSE BOOK OF POETRY FOR CHILDREN* 170 (Jack Prelutsky ed., 1983). The first stanza of this poem reads: “‘Twas brillig, and the slithy toves/ Did gyre and gimble in the wabe:/All mimsy were the borogoves,/And the mome raths outgrabe.”

33. Schauer, *supra* note 7, at 921.

34. *Id.* at 922.

35. In philosophy, the term “cognitive” is usually used to distinguish belief-like mental states from affective states (i.e., emotions) or conative states (i.e., desires), but Schauer would count any *mental* state as “cognitive.” *Id.* at 922 n.137.

36. *But see* SCHAUER, *supra* note 4, at 110 (“To the extent that art is seen as something other than communication, it may not be within the scope of the principles of freedom of speech.”).

there is a category of utterance that, as a whole, has no value in the context of the justifications underlying the first amendment [sic] . . . then such a category ought not be within the scope of the first amendment [sic].”<sup>37</sup> Thus, Schauer concludes that “many, perhaps even most, forms of communication will be outside the coverage” of the First Amendment.<sup>38</sup> Since Schauer argues that obscenity is not even communicative, for the purposes of his theory of obscenity he is not required to choose a particular justification or set of justifications for free speech in order to provide a more complete and precise account of what counts as speech in the constitutional sense.

Next, Schauer argues that obscenity, which he identifies with hardcore pornography, is not communicative.<sup>39</sup> First, hardcore pornography has no significant “mental effect” on the viewer; its effect is almost entirely physical.<sup>40</sup> Of course, Schauer recognizes that physical sensations like sexual arousal have “mental elements.”<sup>41</sup> But on a spectrum with one end dominated by intellectual activity and the other end dominated by physical activity, Schauer squarely locates obscenity far toward the physical end.<sup>42</sup> In addition, the purveyor of pornography has no communicative intent. Schauer thinks that the experience of watching or reading obscene material is much like the experience of watching two prostitutes engage in sexual activity with each other in order to achieve orgasm. Clearly, this conduct is not speech: it does not convey a discernible message, and the prostitutes do not intend to communicate one. Just so with hardcore pornography, which Schauer repeatedly refers to as a mere “sex aid.”<sup>43</sup>

The implication of Schauer’s argument is easy to discern: if hardcore pornography is not communicative, then it is not speech in the constitutional sense. And if it is not speech in the constitutional sense, then it is not covered by the First Amendment. Thus, Schauer seems to succeed in vindicating hardcore pornography’s exclusion from First Amendment coverage.

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37. Schauer, *supra* note 7, at 919.

38. SCHAUER, *supra* note 4, at 103.

39. Schauer’s “hypothetical extreme example” of hardcore pornography is a “motion picture of ten minutes’ duration whose entire content consists of a close-up colour [sic] depiction of the sexual organs of a male and a female who are engaged in sexual intercourse. The film contains no variety, no dialogue, no music, no attempt at artistic depiction, and not even any view of the faces of the participants.” *Id.* at 181.

40. The idea that pornography’s effect on viewers is “non-cognitive,” if not “purely physical,” is also advocated by, among others, Cass Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 607–08 (1986); CATHARINE MACKINNON, *ONLY WORDS* 16 (1993); and Danny Scoccia, *Can Liberals Support a Ban on Violent Pornography?*, 106 ETHICS 776, 787 & n.2 (1996). I believe these theorists’ views differ somewhat from Schauer’s in that these theorists do not deny that pornography has content, even propositional content. For them, what pornography “says” is secondary to its non-cognitive effects on the listener; its status as speech is incidental.

41. Schauer, *supra* note 7, at 923.

42. *Id.* See also SCHAUER, *supra* note 4, at 182 (“My point is that much pornography is more accurately treated as a physical rather than a mental experience.”).

43. See, e.g., *id.* at 183.



In order to complete his defense of the Court's obscenity doctrine, Schauer must defend the *Miller* test<sup>44</sup> as a definition that both reasonably maps onto what he calls "hardcore pornography"—erotic material "devoid of intellectual content"<sup>45</sup>—and practically workable as a rule of decision. Schauer has no difficulty explaining the first prong of the test—the appeal to the prurient interest prong—in relation to his theory of obscenity: "Material which appeals to the prurient interest is intended to, and does in fact, produce a physical or quasi-physical stimulus rather than a mental effect."<sup>46</sup> However, Schauer recognizes that the first prong alone is "inherently overinclusive," since it sweeps in artistic works that "may also turn people on physically," while still aiming at producing a mental effect.<sup>47</sup> Schauer argues that the third prong, which excludes all material with "serious literary, artistic, political, or scientific value," more or less serves to restrict legal obscenity to "that material which possesses only physical attributes . . . ."<sup>48</sup>

In *Roth*, the Court defined "obscenity" partly as material "utterly without redeeming social importance."<sup>49</sup> This poses a problem for Schauer, since the Court's switch to defining "obscenity" as material without "serious" value in *Miller* means that *Miller*'s third prong does not sweep in *only* material that *entirely* lacks cognitive content. Even material that has some value, but not serious value, could have some cognitive content. Not surprisingly, Schauer believes this prong would better comport with his theory if the Court either (a) had retained the "utterly without" value requirement from *Roth*, or (b) interprets the "serious" qualifier as requiring only that the speaker have a *genuine intention* to convey a literary, artistic, political, or scientific message.<sup>50</sup> Despite this imprecise fit between Schauer's theory of obscenity and the third prong of the test, the first and third prongs nevertheless reasonably pick out the kind of material Schauer labels "hardcore pornography."

The second prong of the *Miller* test focuses on the material's patent offensiveness as measured by contemporary community standards. From Schauer's point of view, this prong is a constitutional and philosophical albatross. Philosophically, there is simply no justification for an offensiveness requirement in the legal test for obscenity if, pursuant to Schauer's theory, obscenity should be excluded from First Amendment coverage solely because it lacks cognitive content. For the purposes of picking out material that lacks cognitive content, the material's offensiveness is irrelevant. In addition, Schauer notes that in other

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44. See generally *supra* note 2.

45. Schauer, *supra* note 7, at 930.

46. *Id.* at 928.

47. *Id.* at 928–29. It would be clearer that the first prong alone is over-inclusive if Schauer had simply said that the first prong picks out material that is designed to have a physical effect, leaving out "rather than a mental effect."

48. *Id.* at 929.

49. *Roth v. United States*, 354 U.S. 476, 484 (1957).

50. Schauer, *supra* note 7, at 929 n.197.

contexts the Court has never suggested that offensiveness is relevant to First Amendment coverage.<sup>51</sup>

The history of the development of the Court's obscenity doctrine might actually help Schauer rationalize the inclusion of the second prong. In *Roth*, the Court stated that it perceived "no significant difference between the meaning of obscenity developed in the case law and the definition of the Model Penal Code."<sup>52</sup> That definition included an element requiring that the material "goes substantially beyond the customary limits of candor in description or representation of such matters."<sup>53</sup> This requirement was explicitly incorporated into the Court's obscenity test in *Manual Enterprises, Inc. v. Day* as the patent offensiveness prong.<sup>54</sup> The Tentative Draft of the Model Penal Code, which the *Roth* court cites, explains the inclusion of the "customary limits of candor" requirement as follows:

Our civilization tolerates much that experts or particular segments of the population might regard as appealing primarily to the prurient interest . . . the penal prohibition must be restricted by its terms not only to the prurient but to the prurient which is disapproved by generally observed custom.<sup>55</sup>

This passage can be read as indicating that the function of the customary candor requirement is primarily to narrow the scope of legal obscenity, rather than to target erotic material for its offensiveness. The Court seems to confirm this function for the patent offensiveness prong in *Manual Enterprises, Inc.*, where it writes that "[t]o consider that the 'obscenity' exception . . . does not require any determination as to the patent offensiveness *vel non* of the material itself might well put the American public in jeopardy of being denied access to many worth-while works in literature, science, or art."<sup>56</sup> Here the Court suggests not only that the primary purpose of this prong is to restrict the scope of legal obscenity, but that it functions much like the third element of the *Miller* test to exclude erotic material that has, in Schauer's terms, cognitive content or communicative value. Thus, Schauer could perhaps explain the second prong of the test as another means of excluding from the definition erotic material that has at least some cognitive value.<sup>57</sup>

51. *Id.* at 930.

52. *Roth*, 354 U.S. at 487 n.20.

53. MODEL PENAL CODE § 207.10 cmts. (AM. L. INST., Tentative Draft No. 6, 1957).

54. *Manual Enters., Inc. v. Day*, 370 U.S. 478, 482 (1962).

55. MODEL PENAL CODE § 207.10 cmts. (AM. L. INST., Tentative Draft No. 6, 1957). As it was 1957, the commentary of course mentions Marilyn Monroe, the "great American love goddess" whose "primary function" is "to serve as the object of autoerotic revelry." *Id.*

56. *Manual Enters., Inc.*, 370 U.S. at 487. Admittedly, only two Justices joined this opinion. *See also* *State v. Hudson Cnty. News Co.*, 196 A.2d 225, 229 (N.J. 1963) (arguing that if the obscenity test did not include patent offensiveness prong, it would sweep in many worthwhile works in literature, science, or art).

57. Schauer in fact suggests this interpretation in a footnote: "the patent offensiveness requirement may serve the solely pragmatic function of making it more difficult to prove that material is legally obscene." Schauer, *supra* note 7, at 931 n.213.

Finally, Schauer considers objections to the *Miller* doctrine's fitness as a rule of decision. Specifically, he considers whether the test is unconstitutionally vague, as Justice Brennan claims in his *Miller* and *Paris* dissents.<sup>58</sup> Although Brennan actually identifies three problems that flow from the doctrine's vagueness—lack of fair notice, chilling effect, and institutional stress—Schauer considers only the chilling effect argument.<sup>59</sup> His reply starts with the plausible observation that chilling only occurs when the chilled material is worth protecting.<sup>60</sup> Next, he claims that by adding the specificity requirement,<sup>61</sup> scienter requirement,<sup>62</sup> and the patent offensiveness prong,<sup>63</sup> the Court has ensured that a lot of obscene material will be covered by the First Amendment, despite not *deserving* First Amendment coverage because it is not speech in the constitutional sense.<sup>64</sup> So, if such material is chilled because of the vagueness of the *Miller* test, this is a tolerable result.<sup>65</sup>

Schauer proposes a non-speech theory of obscenity and defends the *Miller* doctrine as a reasonable and workable translation of that theory into a rule of decision. In Part IV, I will argue that both the theory and the defense of the *Miller* test informed by that theory fail.

#### IV

##### WHY SCHAUER'S NORMATIVE THEORY FAILS

The basic argument against Schauer's normative theory of obscenity is that, in virtue of his ecumenical theory of the communicative act as any act that produces, and is intended to produce, any kind of mental stimulus—or perhaps any kind of stimulus that is *largely* mental—Schauer cannot realistically maintain that hardcore pornography involves no communicative act. For example, Steven Gey says that treating the use of pornography as a “purely physical” experience “simply does not describe human behavior in a way that anyone would recognize”:<sup>66</sup>

Pornography must be seen by a conscious viewer; the viewer must read the prose (or watch the video) and translate the images into some mental diagram that then may well

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58. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 84 (1973) (Brennan, J., dissenting) (stating that none of the available formulas defining obscenity can reduce vagueness to tolerable levels); *Miller v. California*, 413 U.S. 15, 47 (1973) (Brennan, J., dissenting) (statute at issue was overbroad under Brennan's *Paris* dissent).

59. *Paris*, 413 U.S. at 93 (Brennan, J., dissenting).

60. Schauer, *supra* note 7, at 931.

61. See *Miller*, 413 U.S. at 24 (obscene material must portray “sexual conduct specifically defined by applicable state law.”).

62. See *Hamling v. United States*, 418 U.S. 87, 119–24 (1975) (defendant must be aware of the contents of the material, but they need not have knowledge that the material is legally obscene).

63. Cf. Schauer, *supra* note 7, at 931 n.213.

64. *Id.*

65. *Id.*

66. Gey, *supra* note 1, at 1594.

trigger some physical response. But the physical response cannot occur without the intercession of a series of mental processes.<sup>67</sup>

Thus, the *means* of achieving sexual arousal invariably involve mental processes. Andrew Koppelman adds that when people pay for pornography, they are generally not paying for the purely physical experience of orgasm—they could get this for free. Instead, “[t]hey are paying for fantasy—a kind of fantasy that is appealing to them only in a state of preorgasmic arousal, but a fantasy nonetheless.”<sup>68</sup> Koppelman’s suggestion here is that the sexual experience itself has a significant mental component. Moreover, if we accept that human sexual experience is significantly mental, then insofar as the pornographer aims at providing sexual pleasure, the pornographer has a communicative intention. Thus, pornography involves both communicative content (the sexual experience itself) and communicative intent. Therefore, it—or, perhaps, its distribution—qualifies as communicative conduct by Schauer’s lights.

Once the fact that “[h]uman sexuality . . . is always mediated by thought”<sup>69</sup> is appreciated, it appears obvious that Schauer’s theory would count a plethora of conduct as communicative acts that we would not ordinarily consider communicative in any significant sense. For example, consider Schauer’s example of the two prostitutes. As we saw with pornography, if the prostitutes aim, by engaging in sex, at providing sexual pleasure for the observer, and if sexual pleasure is to a substantial degree a mental state, then the prostitutes’ sexual acts are communicative acts according to Schauer.

Indeed, *most* conduct is communicative in Schauer’s ecumenical sense. Consider the example of spanking a child to teach him a lesson, or giving a big tip in order to impress a date. Terrorist attacks, rapes, and lynchings are often communicative, too. Indeed, very little human conduct of any degree of sophistication is undertaken *without* the intent to influence other human beings, and most often that influence necessarily involves significant mental processes.<sup>70</sup>

It is true that labelling most conduct as communicative does not, according to Schauer’s theory, automatically entitle that conduct to First Amendment coverage, since on this theory First Amendment coverage requires both that conduct be communicative and that it have value vis-à-vis some plausible justification for the First Amendment. Schauer could concede that obscenity, rape, etc. are all communicative, but deny that they have First Amendment value, thus avoiding the implausible conclusion that most conduct is covered by the First

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67. *Id.* See also Roberts, *supra* note 1, at 711 (arguing that “the mind must respond in a certain way to produce the physical response to obscenity”); POST, *supra* note 15, at 111–12; Cole, *supra* note 1, at 124–31; REDISH, *supra* note 15, at 75.

68. Koppelman, *supra* note 9, at 77.

69. *Id.*

70. Furthermore, since Schauer does not distinguish between conscious and unconscious mental stimulus, apparently even conduct aimed at having a purely *unconscious* mental impact, such as subliminal messaging, counts as “communicative” on his view.

Amendment.<sup>71</sup> The viability of this move would probably vary from case to case.<sup>72</sup> However, the suggestion as a whole seems to violate what Tushnet, Chen, and Blocher call the “too much work” principle: one should reject an approach to a problem that requires a complicated analysis to reach an answer that intuitively seems so obvious that a simple analysis should suffice.<sup>73</sup> It seems obvious that rape used as a way of maintaining psychological control over a spouse, despite being communicative in Schauer’s sense, simply does not implicate any First Amendment concerns—not because it lacks First Amendment value, but because it is not *speech*.<sup>74</sup> Indeed, even if it had First Amendment value, intuitively that would not be enough to require even a small additional increment in the justification for its restriction.<sup>75</sup> That could only be the case, again, because it is not speech *despite* its First Amendment value. In any case, even if Schauer can avoid extending First Amendment coverage to most conduct, he will have to abandon his non-speech approach to obscenity.

Schauer could retreat from his claim that causing mental stimulus is sufficient for communication, requiring instead the communication of ideas, thoughts, or propositions. Of course, if he does this, then he would have to offer a different account of why non-propositional uses of language and non-representational art are still covered, since they do not communicate ideas. We can get a sense of the kinds of strategies Schauer might use to defend First Amendment coverage of conduct that does not convey ideas by looking at how he handles cases of non-communicative conduct in *Free Speech: A Philosophical Enquiry*.

Schauer briefly addresses the issue of non-propositional uses of language in that book—specifically, “statements of pure emotive content.”<sup>76</sup> He first rather lamely suggests that this communication actually *is* propositional, since the speaker is “asserting a proposition about his own feelings.”<sup>77</sup> Here he flatly contradicts his description of such language as non-propositional in his 1979 article.<sup>78</sup> But his discussion taken as a whole at least suggests another solution. Ignoring his claim that purely emotive uses of language actually are propositional, we can take up Schauer’s suggestion that such uses of language are within the scope of First Amendment coverage because (1) they register the extent of agreement or disagreement in society about a certain issue, and (2) there is danger in entrusting government to determine when “factual or

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71. He could also claim that there is a third necessary condition for First Amendment coverage that this conduct does not satisfy. However, it is difficult to imagine what this third condition would be.

72. For example, Tushnet, Chen, and Blocher argue that protecting ticket-scalping would advance the scalper’s autonomy interests, a classic First Amendment value. *See* TUSHNET, CHEN & BLOCHER, *supra* note 29, at 144.

73. *See id.* at 83.

74. *Cf.* MACKINNON, *supra* note 40, at 34.

75. *Cf.* TUSHNET, CHEN & BLOCHER, *supra* note 29, at 85.

76. SCHAUER, *supra* note 4, at 104.

77. *Id.*

78. Schauer, *supra* note 7, at 921.

normative content *coupled* with emotive content shades into emotive content alone.”<sup>79</sup> The upshot of his argument seems to be that in order to effectively protect speech, the First Amendment ought to cover at least some non-speech.<sup>80</sup>

Schauer also considers the problem of non-communicative art. He mentions two types of non-communicative art: art that is intended solely as a mode of self-expression, and art that is such that there is a necessary gap between what is intended by the artist and what is perceived by the observer.<sup>81</sup> We could add to this non-representational art, such as music. While non-communicative art fails to communicate owing to properties of the communicator’s intention, non-representational art fails to communicate because it lacks communicative content. His solution is that as long as state regulation of non-communicative art is directed at the communicative impact of the art, then “free speech considerations are triggered, regardless of the format of the work, regardless of how some might characterize the work in philosophical terms, and regardless of the artist’s own intent.”<sup>82</sup> Schauer seems to be suggesting that even if some art is not communicative, either because there is no communicative intent or no communicative content, it may still warrant First Amendment protection if it is regulated as if it is communicative. Thus, Schauer again may be read as claiming that the First Amendment ought to cover some non-speech, since sometimes conduct that is not speech in the constitutional sense is still targeted for its communicative impact.<sup>83</sup>

Schauer also considers the problem of “non-linguistic symbols,” such as black armbands, a display of a demolished automobile on one’s lawn to communicate a message about the consequences of a high-speed police chase, and other “non-traditional” methods of communication.<sup>84</sup> Schauer concedes that there may be ways of communicating so unconventional “as to be incapable of understanding of recipients of that communication,” and thus actually incapable of transmitting a message to a recipient.<sup>85</sup> Such forms of communication do not count as communicative conduct, and thus perhaps ought to fall outside of First

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79. SCHAUER, *supra* note 4, at 105.

80. As we have seen, Schauer makes the same suggestion in his 1979 article for a different reason. See *supra* note 64 and accompanying text. There is also a definitional puzzle here, since speech in the constitutional sense *just is* speech properly covered by the First Amendment. Therefore, if some non-propositional speech ought to be covered, it is speech in the constitutional sense. Perhaps we should recognize three categories: “core” constitutional speech, which communicates ideas; “peripheral” constitutional speech, which does not communicate ideas but deserves coverage for reasons that are parasitic on the reasons for protecting core speech; and constitutional non-speech. Schauer can be interpreted as arguing that some non-propositional speech, though falling outside the core, warrants First Amendment coverage as peripheral constitutional speech.

81. SCHAUER, *supra* note 4, at 110.

82. *Id.* at 111.

83. Schauer does not explain *why* the state would think that non-communicative art has a communicative impact.

84. SCHAUER, *supra* note 4, at 98–99.

85. *Id.*

Amendment coverage. But again, Schauer rejects this conclusion on two grounds. First, he says that there is a need for a “margin of error” when we draw the boundaries of First Amendment coverage, particularly if one of the justifications of the First Amendment is the inability of the state to regulate communication as effectively as it regulates other forms of conduct.<sup>86</sup> In other words, when it comes to coverage, it is better to be over-inclusive than under-inclusive and include any method of communication “even remotely capable of transmitting a message.”<sup>87</sup> Second, if “development of the tools of communication is seen as one of the goals of a principle of freedom of speech,” then again we ought to include non-traditional methods even if they are actually non-communicative for the sake of progress.<sup>88</sup> Again, Schauer seems to be entertaining the idea that some non-speech ought to be covered by the First Amendment for the sake of protecting, or perhaps promoting, covered speech.

So Schauer has a number of strategies for arguing that some conduct that does not count as speech because it does not communicate ideas nevertheless deserves First Amendment coverage. These strategies could be used to argue for coverage for non-representational art and non-propositional uses of language, despite the fact that they do not communicate ideas, thoughts, or propositions. But these strategies produce a serious tension between his theory of obscenity and his theory of First Amendment coverage. For if some non-speech ought to be covered—if being speech in the constitutional sense is not strictly necessary for coverage<sup>89</sup>—then Schauer cannot justify excluding hardcore pornography from coverage simply on the grounds that it is not speech in the constitutional sense. He must also show that the various justifications he offers for including some non-speech in First Amendment coverage do not apply to hardcore pornography.

However, it would appear that some of these justifications do, in fact, apply. For example, in other countries pornography is restricted because of its communicative impact: Canada focuses on pornography that depicts women in a degrading and dehumanizing way;<sup>90</sup> Germany is concerned about pornography that offends against human dignity;<sup>91</sup> and Japan is only worried about pornography that reflects an “un-Japanese” view of the world.<sup>92</sup> To the extent that anti-obscenity laws in the United States reflect similar concerns, the state is

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86. *Id.* at 98. For arguments that speech is particularly difficult for the government to regulate, see *id.* at 80–85. Cf. David A.J. Richards, *Pornography Commissions and the First Amendment: On Constitutional Values and Constitutional Facts*, 39 ME. L. REV. 275, 282 (1987) (arguing that skepticism about the abuse of state power should lead us to protect both cognitive and non-cognitive communication).

87. SCHAUER, *supra* note 4, at 98.

88. *Id.* at 99.

89. See *supra* note 80 and accompanying text.

90. RONALD J. KROTOSYNSKI, JR., *THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE* 69–82 (2006).

91. See generally Mathias Reimann, *Prurient Interest and Human Dignity: Pornography Regulation in Germany and the United States*, 21 U. MICH. J.L. REFORM 201 (1987–1988).

92. KROTOSYNSKI, *supra* note 90, at 164–71. Of course, these examples belie the claim that pornography does not communicate ideas, a point to which I return below.

targeting obscenity for its communicative impact. That makes pornography, like non-communicative art, eligible for First Amendment coverage in Schauer's scheme. Furthermore, Schauer's plea for a built-in margin of error in First Amendment coverage due to governmental regulatory incompetence and/or censoriousness seems to apply to pornography, since all agree that some materials which appeal to the prurient interest and are patently offensive by community standards still have significant First Amendment value. Why trust the government to reliably differentiate between pornography that has First Amendment value and pornography that does not?

In any case, the assumption that pornography does not express propositions is at least questionable. The restrictions on pornography in other countries mentioned in the last paragraph reflect a widespread assumption that pornography conveys certain objectionable messages. At the same time, many spirited liberal defenses of pornography are predicated upon the idea that pornography expresses propositions; for example, Ronald Dworkin writes that pornography is akin to political speech "advocating that women occupy inferior roles."<sup>93</sup> A more sophisticated approach to pornography's propositional content (and certainly not one aimed at defending pornography) is Rae Langton's theory that pornographic representations presuppose certain factual and normative propositions, and such presuppositions can become part of the conversational "common ground" between speaker and hearer.<sup>94</sup>

Consider, for example, what the social scientists studying pornography describe as a 'favourable [sic] rape depiction.' In one example of such pornography, a woman is gang raped on a pool table in a bar, the men ignoring the woman's resistance, the woman eventually reaching a 'shuddering orgasm' . . . in speech like this, rape myth propositions such as 'when women say "no," they mean "yes"', might become part of . . . the 'common ground' . . . shared between speaker and hearer.<sup>95</sup>

Finally, in his discussion of the moral effects of pornography, Koppelman employs Wayne Booth's idea of "fixed norms," or "beliefs on which the narrative depends for its effect but which are also by implication applicable in the 'real' world."<sup>96</sup> He argues that pornography can express such norms and force its viewers to entertain these norms; moreover, viewers may be more likely to adopt them because the sexual arousal that accompanies consumption of pornography heightens its "rhetorical appeal."<sup>97</sup>

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93. Ronald Dworkin, *Two Concepts of Liberty*, in ISAIAH BERLIN: A CELEBRATION 100, 104, 105 (Edna Margalit & Avishai Margalit eds., 1991).

94. See generally Rae Langton, *Beyond Belief: Pragmatics in Hate Speech and Pornography*, in SPEECH & HARM: CONTROVERSIES OVER FREE SPEECH 72, 72-94 (Ishani Maitra & Mary Kate McGowan eds., 2012) (discussing how pornographic representations presuppose certain factual and normative propositions). "Common ground" is Robert Stalnaker's term for the set of factual and normative beliefs that are shared by conversational partners. *Id.* at 83.

95. *Id.*

96. Koppelman, *supra* note 1, at 1644 (quoting WAYNE BOOTH, *THE COMPANY WE KEEP: AN ETHICS OF FICTION* 142-43 (1988)). Koppelman's example of such a norm is the moral of Aesop's story about the goose who laid golden eggs: "overweening greed loses all." *Id.*

97. *Id.* at 1652.



A final strategy that Schauer might consider is to claim that while conduct must be meaningful in order to count as speech in the constitutional sense, having meaning does not require that the conduct express ideas. Tushnet, Chen, and Blocher draw a distinction between “representational” and “use-meaning” approaches to linguistic meaning.<sup>98</sup> According to the former, an utterance has meaning just in case it expresses extralinguistic ideas or concepts (or propositions, which are just series of concepts strung together). Tushnet, Chen, and Blocher argue that this approach to meaning “is a poor guide to what speech the First Amendment actually does or should protect,” including non-representational art and various kinds of “nonsense.”<sup>99</sup> Instead, they urge the adoption of a Wittgensteinian “use-meaning” approach, according to which an utterance possesses meaning if and only if it adheres to the rules of the relevant intersubjective “language game.” Such games or practices “establish one’s statements . . . as ‘legitimately assertable’ by persons within the interpretive community that constitutes the practice in question.”<sup>100</sup> Using this approach, Schauer need not worry about rationalizing First Amendment coverage for non-communicative art or non-propositional uses of language. On the use-meaning approach, such speech gets its meaning not from its content or the intentions of the speaker but because it is intelligible against the backdrop of a linguistic practice. For example, on this approach Marcel Duchamp’s *The Fountain* may be properly recognized as artistic speech because it is presented in an “art context”<sup>101</sup> constituted by the “shared norms of the artistic community.”<sup>102</sup>

Of course, the important question for Schauer is whether hardcore pornography has use-meaning. The answer is surprisingly complicated. According to the use-meaning approach, whether hardcore pornography has meaning depends upon its use. Clearly, hardcore pornography *can* be used in ways that endow it with use-meaning. For example, James Weinstein argues that hardcore pornography is entitled to some First Amendment protection *when used* “in an attempt to change people’s attitudes about sexual mores.”<sup>103</sup> In the context of political advocacy about sexual morality, hardcore pornography can take on a distinctly political meaning—even if it lacks clear propositional content. Jeff Koons’s “Made in Heaven” series—explicit photographs depicting Koons having sex with his then-wife, Italian porn star Llon Staller—used pornographic images to examine the role of sexuality in contemporary visual culture. Still, it seems safe to say that the most common use of hardcore pornography is not as a

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98. See generally TUSHNET, CHEN & BLOCHER, *supra* note 29, at 114–49.

99. *Id.* at 138. Examples of “nonsense” include the famous “BONG HiTS 4 JESUS” sign from Morse v. Frederick, 551 U.S. 393 (2007), and Lewis Carroll’s *Jabberwocky*.

100. TUSHNET, CHEN & BLOCHER, *supra* note 29, at 140.

101. *Id.* at 141.

102. *Id.* at 140.

103. Weinstein, *supra* note 1, at 897. Weinstein does not invoke the notion of “use-meaning” to differentiate pornography that is deserving of First Amendment coverage, but he does say that context is sometimes sufficient to “reveal [its] ‘serious political value.’” *Id.* at 891. The focus on context is a hallmark of the use-meaning approach to linguistic meaning.

political or high-art prop, but as a masturbatory aid. When used in the latter fashion, what meaning does it have?

This is a difficult question. One thought is that pornography itself is a kind of language game. For example, in pornography, the phrase “pizza with extra sausage” has a different meaning than in other contexts. It is an interesting fact that one can often tell that one is watching pornography before anything explicitly sexual happens, and that sometimes non-pornographic representations *seem* like “something out of a porno.” These observations suggest that there is a distinctive pornographic language with its own set of rules. Pursuing this suggestion is beyond the scope of this article, but it seems plausible enough on its face to present a serious problem for Schauer’s use of the use-meaning approach to vindicate the non-speech theory of obscenity.

Another suggestion is that “the medium is the message”: pornography has meaning just in virtue of being conveyed through pictures, videos, or text, which are traditional media for the communication of ideas. Just as *Jabberwocky* might get its meaning not from the ideational content of its words but from being recognizable as a poem—and so interestingly comparable to other poems—so pornography might get its meaning from being recognizable as a movie. Robert Post offers a sophisticated justification for this approach, arguing that “[i]n the absence of strong countervailing reasons, whatever is said within such media is covered by the First Amendment.”<sup>104</sup> This approach provides another reason for doubting the prospects of employing use-meaning to vindicate the non-speech theory of obscenity.

The final aspect of Schauer’s normative theory is his defense of the *Miller* doctrine as a theoretically sound and practically workable test for legal obscenity. In certain respects, this issue is unimportant if the criticisms of that theory detailed at length in this Part are well-founded. Moreover, the problems of fit between the *Miller* test and Schauer’s theory have already been discussed; the main issue is that neither the “patent offensiveness” prong nor the “no serious value” prong is well-explained by the theory.

Schauer’s normative theory of obscenity and his defense of the *Miller* test both fail to hold up under scrutiny. However, this does not automatically mean that Schauer is incorrect in his claim that the Court’s holdings and rationales in its famous obscenity decisions of the 1950s through the early 1970s are best explained by this theory. Nonetheless, in Part V I will argue that this claim is false.

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104. ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 20 (2013). *See also* Weinstein, *supra* note 1, at 874 (“[H]ardcore pornography gains a presumption of First Amendment protection simply in virtue of the medium it employs.”).

## V

SCHAUER'S EXPLANATORY THEORY OF THE *MILLER* DOCTRINE

If the Court's decisions are best explained by Schauer's theory of obscenity, then its basic theory can be analyzed into the following propositions: (1) for the purpose of First Amendment coverage, speech requires the communication of ideas and (2) legal obscenity does not communicate ideas.

The question is: How much evidence can we find in the Court's First Amendment jurisprudence for these two propositions?<sup>105</sup> Following Dworkin's requirement of local priority, we will begin with the Court's key obscenity cases, *Roth*, *Miller*, and *Paris*. In *Roth*, the Court does make some statements that support proposition (1). In its discussion of the history of free speech, the Court says that "[t]he protection given speech and press was fashioned to ensure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."<sup>106</sup> If the singular purpose of the First Amendment is to ensure the interchange of ideas, it would not be unreasonable to think that at least presumptively, any act that communicates ideas falls under its coverage. The *Roth* court also suggests that obscene speech falls outside of First Amendment coverage because it is "no essential part of any exposition of ideas."<sup>107</sup> This can be read as recognizing obscenity as a class of idealess utterances and denying First Amendment precisely in virtue of their idealessness.<sup>108</sup> As many have noted, *Miller* does not provide much by the way of a rationale for its decision, probably because it was decided in the same session as *Paris*.

However, *Paris* has some statements that seem to strongly support both propositions. In *Paris*, the Court affirmed its holding in *Roth* that obscenity has no constitutional protection, and it held that the State of Georgia had a legitimate interest in regulating public exhibitions of obscene material.<sup>109</sup> Importantly for our purposes, the Court also considers the argument that because Georgia has no legitimate interest in the control of the moral content of a person's thoughts, obscenity laws are unconstitutional. First, the Court argues that preventing the display or distribution of obscene material is "distinct from a control of reason and the intellect."<sup>110</sup> This claim seems difficult to reconcile with a view of legal obscenity as possessing intellectual content, since if it had such content,

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105. The Court has cited Schauer's work favorably. *See e.g.*, *Pope v. Illinois*, 481 U.S. 497, 500 (1987); *Smith v. United States*, 431 U.S. 291, 301 (1977). However, the Court has never explicitly endorsed his "non-speech" theory of obscenity.

106. *Roth v. United States*, 354 U.S. 476, 484 (1957).

107. *Id.* at 485.

108. However, as Schauer himself notes, the source of this phrase is *Chaplinsky v. New Hampshire*, where it is used to refer to so-called "fighting words," libelous speech, and the "lewd and obscene." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). But fighting words and libelous speech are obviously not idealess utterances.

109. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973).

110. *Id.* at 67.

preventing its display or distribution would obviously be a way of controlling what people think.<sup>111</sup> The Court continues: “Where communication of ideas, protected by the First Amendment, is not involved . . . the mere fact that, as a consequence, some human ‘utterances’ or ‘thoughts’ may be incidentally affected does not bar the State from acting to protect legitimate state interests.”<sup>112</sup> Again, the Court appears to be claiming that in targeting the display and distribution of obscenity, the state does not target the communication of ideas, which supports proposition (2). In addition, the Court’s suggestion that it is the communication of ideas that is the concern of First Amendment protection also supports proposition (1).

Moving out from the three major obscenity cases to more peripheral obscenity cases, we find still more evidence for propositions (1) and (2). In *Stanley v. Georgia*, for example, the Court describes the First Amendment as a right “to receive information and ideas” — and this is crucial — “regardless of their social worth.”<sup>113</sup> Here the Court seems to endorse proposition (1), the view that the scope of First Amendment coverage tracks whether conduct has intellectual or informational content. The Court lends its weight to proposition (2) in *Jacobellis v. Ohio*, where it says that “material dealing with sex in a manner that advocates ideas” is not legal obscenity.<sup>114</sup> Again, the suggestion seems to be that legal obscenity is idealess.

In more recent years, some states and the federal government have attempted to restrict the distribution of objectionable material that they defined by analogy to the *Miller* test.<sup>115</sup> Some of the discussion in these cases provides support for proposition (1). In *Brown v. Entertainment Merchants Ass’n*, the Court explained that “violent video games,” even when defined in terms that mimicked a statute regulating obscenity-for-minors that the Court had previously upheld, are

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111. The Court actually cites John Finnis’s article, *‘Reason and Passion’: The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222 (1967), as support for this distinction between control over obscenity and control over reason, thought, or intellect. Finnis’s article is in many ways an early variation on Schauer’s “non-speech” approach. See *Paris*, 413 U.S. at 67.

112. *Id.*

113. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). See also *Winters v. New York*, 333 U.S. 507, 510 (1948) (“Though we can see nothing of any possible value to society in these [pulp] magazines, they are as much entitled to the protection of free speech as the best of literature.”); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (arguing that the First Amendment “necessarily protects the right to receive” information).

114. *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964). See also *Kingsley Int’l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 689 (1959) (“[The First Amendment] guarantee is not confined to the expressions of ideas that are conventional or shared by a majority.”).

115. See *United States v. Stevens*, 559 U.S. 460, 465 (2010) (striking down a federal law banning distribution of depictions of animal cruelty that do not have “serious religious, political, scientific, educational, journalistic, historical, or artistic value”); *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 793 (2011) (striking down a California law prohibiting the sale to minors of “violent video games,” defined in a manner that mimicked a statute regulating obscenity-for-minors that the Court had previously upheld); *Ashcroft v. ACLU*, 535 U.S. 564, 584 (2002) (holding that a federal law’s use of “community standards” to identify material that is harmful to minors was not unconstitutionally overbroad).

covered by the First Amendment because they “communicate ideas . . . . [t]hat suffices to confer First Amendment protection.”<sup>116</sup> Here, as in *Winters v. New York*, the Court implicitly denies that social value is a criterion of inclusion in First Amendment coverage; what matters is just that video games communicate ideas, however objectionable. Even Justice Breyer, dissenting from the Court’s decision to strike down the California law at issue, does not deny that violent video games are presumptively protected by the First Amendment—presumably because they do communicate ideas. Instead, he argues that the law passes strict scrutiny because of evidence that such video games cause harm to children.<sup>117</sup>

Perhaps the area of First Amendment jurisprudence that provides the most support for proposition (1) is the series of cases dealing with symbolic expression.<sup>118</sup> Symbolic expression receives some of the same protections as ordinary speech.<sup>119</sup> In *West Virginia State Board of Education v. Barnette*, for example, the Court explains that the government may not compel flag saluting because the latter is a “form of utterance . . . . a primitive but effective way of communicating ideas.”<sup>120</sup> In other words, what brings conduct into the First Amendment’s ambit is the communication of ideas. In *Spence v. Washington*, the Court sets out to evaluate whether conduct is “sufficiently imbued with elements of communication to fall within the scope” of the First Amendment.<sup>121</sup> The Court suggests a two-part test for whether conduct qualifies as symbolic expression: (a) there must be an intent to convey a particularized message, and (b) there must be a great likelihood that the message would be understood by those who viewed it.<sup>122</sup> Tushnet, Chen, and Blocher remark that here the Court “doubles down” on the importance of communicating ideas as a criterion for First Amendment coverage.<sup>123</sup>

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116. *Brown*, 564 U.S. at 790.

117. *Id.* at 851, 857 (Breyer, J., concurring).

118. *See Spence v. Washington*, 418 U.S. 405, 406–07 (1974) (holding that a Washington law prohibiting “improper use” of the United States flag was unconstitutional as applied to a college student who used a flag to express his disapproval of the Cambodian invasion and Kent State shooting); *Texas v. Johnson* 491 U.S. 397, 399 (1989) (holding that a Texas statute prohibiting flag desecration was unconstitutional as applied to a man who burned the flag to protest the 1984 Republican National Convention); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (upholding injunction against regulation requiring children in public schools to salute the American flag); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (“[R]egulation prohibiting wearing armbands to schools . . . was an unconstitutional denial of the students’ right of expression of opinion.”).

119. *See United States v. O’Brien*, 391 U.S. 367, 376 (1968) (“[W]hen ‘speech’ and ‘non-speech’ elements are combined in the same course of conduct, a sufficiently important government interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”).

120. *Barnette*, 319 U.S. at 632.

121. *Spence*, 418 U.S. at 409.

122. *See id.* at 410–11 (“An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”).

123. TUSHNET, CHEN & BLOCHER, *supra* note 29, at 138.

There is, then, not an insignificant amount of evidence that the Court is employing a non-speech theory of obscenity. However, this evidence is outweighed by evidence to the contrary. The first problem is the *Miller* test itself. I have already explained the ways in which the test does not fit the non-speech theory. First, the “no serious value” prong allows material with cognitive content to be swept into the definition. Second, and most importantly, Schauer must dismiss the “patent offensiveness” prong as pure error, since it plays no role in picking out idealess hardcore pornography. However, since Schauer concedes that the test does not perfectly embody the non-speech approach to obscenity, I will not dwell on this point.

Another problem is the way the Court discusses the relation between obscenity and other categories of uncovered speech, such as incitement,<sup>124</sup> defamation,<sup>125</sup> speech integral to criminal conduct,<sup>126</sup> fighting words,<sup>127</sup> child pornography,<sup>128</sup> and true threats.<sup>129</sup> Clearly, not all of these categories of speech can plausibly lack cognitive content. If the Court is nevertheless exempting them from First Amendment coverage, it must be for some other reason, such as that they lack First Amendment *value*. Yet the Court has never distinguished between the categories in this way; it has never claimed that some categories are exempted because they lack cognitive content, while others are exempted because they lack First Amendment value. In *Chaplinsky*, for example, the Court provides the same explanation for exempting the “lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words”<sup>130</sup>: 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.”<sup>130</sup> In addition, most discussions of these categories refer to laws that prohibit any of these categories as “content-based

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124. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

125. *See generally* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding that the First Amendment was primarily designed to keep the discussion of public affairs and public officials within the area of free discussion).

126. *See generally* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (discussing the constitutionality of sections 2256(B) and 2256(8)(D) of the Child Pornography Prevention Act of 1996).

127. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have 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”).

128. *See generally* *New York v. Ferber*, 458 U.S. 747 (1971) (holding a statute which prohibited persons from knowingly promoting a sexual performance by a child under the age of sixteen as constitutional under the First Amendment as applied to the States through the Fourteenth Amendment).

129. *See* *Virginia v. Black*, 538 U.S. 343, 359 (2003) (stating that the First Amendment permits a State to ban a “true threat” (quoting *Watts v. United States*, 394 U.S. 705 (1969))).

130. *See* *Chaplinsky*, 315 U.S. at 572 (discussing the benefits of limiting the right to speech in certain well-defined and narrowly limited classes of speech).

restrictions.”<sup>131</sup> The most natural way of reading this is to mean that like the content-based restrictions on covered speech that must survive heightened scrutiny, restrictions on the exempted categories of speech, including obscenity, target the viewpoint or ideas expressed by this speech.

*Contra* proposition (1), the Court has repeatedly claimed First Amendment coverage for non-cognitive content. In *Cohen v. California*,<sup>132</sup> for example, the Court famously observes that “linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well.”<sup>133</sup> It then affirms that the Constitution has regard not only for the “cognitive content” of individual speech but also for its “emotive function.”<sup>134</sup> This suggests that First Amendment coverage could apply even to utterances that lack cognitive content. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*<sup>135</sup> tweaks the *Spence* standard in an arguably non-cognitive direction. First Amendment coverage no longer depends on something’s having a “narrow, succinctly articulable message,” since if it did, it would not reach “unquestionably shielded” expression such as the paintings of Jackson Pollack, the music of Arnold Schönberg, or the nonsense *Jabberwocky* poem.<sup>136</sup> Thus, while First Amendment coverage may require meaning of some kind, it is not necessarily propositional meaning.<sup>137</sup> Even the Court’s discussion in *Brown* cited above does not strongly support proposition (1): the communication of ideas may suffice for First Amendment coverage, but the Court nowhere claims that it *requires* the communication of ideas.<sup>138</sup> In general, proposition (1) is a “poor guide to what speech the First Amendment actually does” protect.<sup>139</sup>

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131. See *United States v. Stevens*, 559 U.S. 460, 468 (2010) (content restrictions limited to “historic and traditional categories long familiar to the bar”); *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (quoting *Stevens*); *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 791 (2011) (no “novel restriction on content” without a “tradition of proscription”); *R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1992) (certain categories of speech can, consistently with the First Amendment, be regulated because of their “constitutionally proscribable content”).

132. 403 U.S. 15 (1971).

133. *Id.* at 26.

134. *Id.*

135. See generally 515 U.S. 557 (1995) (modifying the *Spence* standard). For the Court’s discussion of First Amendment coverage of music, see *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (“Music, as a form of expression and communication, is protected under the First Amendment.”). See also *Reed v. Vill. of Shorewood*, 704 F.2d 943, 950 (7th Cir. 1983) (“If the defendants passed an ordinance forbidding the playing of rock and roll music . . . they would be infringing a First Amendment right, even if the music had no political message—even if it had no words.”) (citation omitted).

136. See *Hurley*, 515 U.S. at 569 (providing that an expression does not need to be a “narrow, succinctly articulable message” to be a protected expression under the First Amendment).

137. Tushnet, Chen, and Blocher note that *Rumsfeld v. FAIR* suggests a “reasonable observer” standard: the reasonable observer must understand that the object on view *is* expressive, though not all observers will agree on what it expresses. TUSHNET, CHEN & BLOCHER, *supra* note 29, at 104.

138. This point also applies to the passage from *Barnette* quoted above.

139. TUSHNET, CHEN & BLOCHER, *supra* note 29, at 104.

On balance, the obscenity cases do not support proposition (2). Although *Roth* does describe obscenity as “no essential part of any exposition of ideas,” there is good reason to believe that the Court was not referring to a class of idealess utterances.<sup>140</sup> Moreover, in the same case the Court says that “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, but the First Amendment rejects obscenity because it is “utterly without redeeming social importance.”<sup>141</sup> The Court seems to be saying that the First Amendment does not cover obscenity because its ideas lack social importance, not because it lacks ideas. This, in any case, is evidently the rationale the Court adopted in all of its cases before *Miller* and *Paris*.<sup>142</sup> Even the Court’s discussion in *Paris*, which clearly provides the strongest support for proposition (2), is amenable to a different reading: not that obscene material does not communicate ideas, but that the target of obscenity restrictions is the moral effects of obscene material, which it produces by non-cognitive means. Thus the Court analogizes obscenity restrictions to laws prohibiting drug sales, which do not touch the “fantasies of a drug addict.”<sup>143</sup> In any case, as we have seen, the Court has long since abandoned the distinction between cognitive and non-cognitive content as the boundary line for First Amendment coverage.

Finally, the holding of *Stanley*, that the First Amendment prohibits criminalization of the private possession of obscenity, is difficult to square with propositions (1) and (2). Pursuant to proposition (2), obscenity has no more cognitive content at home than it does when displayed in public or sold in shops. If obscenity is not covered by the First Amendment because it lacks cognitive content, then it should not come under its ambit just because it is consumed at home. One reply to this argument is that *Stanley* is about preserving the privacy of the home as a place to engage in any activity, whether cognitive or non-cognitive. On this reading, *Stanley* is like *Griswold v. Connecticut*,<sup>144</sup> a case that

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140. See *Roth v. United States*, 354 U.S. 476, 484 (1957) (affirming the inclusion of lewd and obscene expressions in the limited class of speech in which the prevention and punishment of has not been thought to raise any Constitutional problem).

141. See *id.* (holding that obscenity is not within the area of constitutionally protected speech or press).

142. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 97 (1973) (Brennan, J., dissenting) (“the definition of ‘obscenity’ as expression utterly lacking in social importance is the key to the conceptual basis of *Roth* and our subsequent decisions”); *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Massachusetts*, 383 U.S. 413, 418 (1966) (“A book cannot be proscribed unless it is found to be utterly without redeeming social value.”); *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964) (“A work cannot be proscribed unless it is ‘utterly’ without social importance.”).

143. See *Paris*, 413 U.S. at 67 (“Where communication of ideas, protected by the First Amendment, is not involved, or the particular privacy of the home protected by *Stanley*, or any of the other ‘areas or zones’ of constitutionally protected privacy, the mere fact that, as a consequence, some human ‘utterances’ or ‘thoughts’ may be incidentally affected does not bar the State from acting to protect legitimate state interests.”).

144. 381 U.S. 479 (1965).



protects marital sex, not speech, from government intrusion. This reading comports with Schauer's view that obscene material *is* sex, not merely advocacy or description of sex.<sup>145</sup> However, the Court's opinion is grounded in a notion of privacy that is specifically cognitive: "Our whole constitutional heritage rebels at the thought of giving the government the power to control men's minds," at least in the privacy of their own homes.<sup>146</sup> This rationale is hard to explain if consuming obscene material is not a cognitive activity.

Recall from Part II that the assessment of an interpretive theory of a body of law involves two criteria: fit and justification. In this Part, I have shown that Schauer's theory of obscenity fails the test of fit with the balance of First Amendment jurisprudence. In Part VI, I will discuss some fundamental problems for Schauer's theory raised by Schauer's own idea of the "second-best" First Amendment.

## VI

### OBSCENITY AND THE "SECOND-BEST" FIRST AMENDMENT

Schauer is well-known for his later work on rules in legal decision-making and his related notion of the "second-best" First Amendment.<sup>147</sup> In this Part, I will explore a tension between Schauer's defense of the *Miller* test and some of this work. I will also reveal an even more fundamental tension between the project of defending an obscenity exception to the First Amendment and the concept of the "second-best" First Amendment.

In this work, Schauer argues that the First Amendment is a species of rule.<sup>148</sup> Schauer opens his argument with the premise that the First Amendment "immunizes from governmental control certain acts that would not be so immune were their regulation measured merely against a rational basis standard."<sup>149</sup> This interesting and important fact calls for some justification, which virtually always takes the form of showing how protecting speech in this way promotes some important value or goal—for example, the goal of fostering the search for and identification of truth or error, or the goal of facilitating popular decision-

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145. Schauer, *supra* note 7, at 928.

146. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969). Note that this rationale flatly contradicts the Court's claim in *Paris* that regulation of obscenity is not a form of mind control.

147. See generally Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1 (1989) (arguing that the First Amendment reflects a risk-adverse distrust of decisionmakers). See also FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991) (analyzing rules as having two parts: a factual predicate and a consequent).

148. A "rule" has two important features: (1) the existence of a probabilistic relationship between the rule and its background justification; and (2) a decision-making procedure pursuant to which the inclusion of an event within the rule is itself a reason for treating the event in the way indicated by the rule, even in those cases in which the event falls outside of the applicability of the rule's background justification. Schauer, *supra* note 147, at 11–12.

149. *Id.* at 2.

making. Schauer calls such demonstrations the First Amendment's "background justification."<sup>150</sup> He next observes that as a conceptual matter, any definition we give to speech will never be perfectly extensionally equivalent to the set containing all and only those acts that promote the relevant value or goal.<sup>151</sup> As a result, when judges adjudicate cases or legislators frame legislation by, *inter alia*, applying the constitutional mandate to protect speech, they will always protect some acts that do not promote the goal, and fail to protect some acts that do promote the goal.

If protecting speech is only worthwhile because it promotes the goal, why do we not *directly* apply the background justification to particular cases? Why does the Constitution not say "Congress shall make no law abridging the search for truth" or "Congress shall make no law abridging popular decision-making"? Schauer offers two reasons. First, we believe that there is at least a significant overlap between the extension of speech and the set containing all and only acts that promote the goal, so that protecting speech will at least usually promote the goal.<sup>152</sup> In this sense, the freedom of speech mandate operates like a rule that instantiates its background justification.<sup>153</sup> Second, there is an empirical assumption that the errors of over-inclusion and under-inclusion inherent in the use of the free speech rule are, at least in the long run, likely to be less in frequency and smaller in magnitude than the errors that might be expected were the background justification alone used as an instruction or rule of decision.<sup>154</sup> Thus, the First Amendment is "second-best" because its application, even if ideal, will sometimes lead to sub-optimal outcomes in particular cases compared to the ideal application of its background justification. Still, for the reasons just offered the First Amendment is preferable to direct application of its background justification in our very non-ideal world.

Insofar as Schauer understands it is a sub-rule of the First Amendment, the *Miller* test fails to provide the benefits of a rule. To see this, it is necessary to briefly return to Schauer's discussion of the test. As we have seen, Schauer insists that the third prong of the test—the "no serious literary, artistic, political, or scientific value" prong—should be read as excluding all erotic material with communicative or cognitive content. Schauer also claims that the kind of value that the First Amendment protects is "value as the process and result of

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150. *Id.* at 7.

151. The sole exception to this is if we defined "speech" as "any act that promotes the relevant goal," but in that case the definition will have collapsed into the background justification. *Id.* Schauer provides a detailed and sophisticated argument for this claim in SCHAUER, *supra* note 147, at 31–37.

152. *Id.* at 9–10.

153. *Id.* at 12.

154. *Id.* at 15. Schauer elaborates on this point, and also adds some other arguments for rule-based decision-making, in SCHAUER, *supra* note 147, at 135–62. He summarizes the virtues of rule-based decision-making as follows: "stability for stability's sake, unwillingness to trust decision-makers to depart too drastically from the past, and a conservatism committed to the view that changes from the past are more likely to be for the worse than for the better." *Id.* at 174.

intellectual communication.”<sup>155</sup> Thus, the third prong of the *Miller* test, as Schauer understands it, excludes all erotic material that has *First Amendment value*.<sup>156</sup> To have First Amendment value just is to promote the goal that justifies protecting speech. It follows from this that applying the third prong of the *Miller* test to a particular case is tantamount to applying the First Amendment’s background justification to a particular case.

Schauer himself notes that when the language of a rule is “open-ended and theory-laden,” as is often the case with the First Amendment and its numerous sub-rules, there is a danger of the rule “simply collapsing into its justification . . . .”<sup>157</sup> This is what has happened, in a particularly spectacular fashion, with Schauer’s interpretation of the *Miller* test. Since the test has collapsed into its justification, it has none of the benefits of a rule. Thus, Schauer’s defense of the test is in significant tension with his conception of the First Amendment as a species of rule, and in particular with his ambition to formulate First Amendment rules that are “informed by background justifications but extensionally divergent from those justifications.”<sup>158</sup>

Perhaps Schauer could concede that his theory of obscenity is not explanatorily adequate, that the *Miller* test is not defensible as a workable embodiment of that theory, and that his theory fails as a normative defense of the First Amendment obscenity exception. Surely, he might insist, the project of defending that exception is still in principle compatible with the idea of the “second-best” First Amendment. Indeed, in some respects the latter idea makes defending an obscenity rule of decision easier, since considerations of fit between the rule and its background justification are not as pressing as Schauer treated them in his own work on obscenity. Nevertheless, I believe that Schauer’s work on rules raises fundamental problems for any attempt to defend this exception.

The difficulty arises from the fact that obscenity is an intrinsically normative or value-laden term. It denotes an example of what Bernard Williams famously calls “thick” ethical concepts: concepts that contain irreducibly normative *and* descriptive contents.<sup>159</sup> This means that any attempt to define obscenity, to break it into component parts, will inevitably need to invoke open-textured and contestable normative concepts.<sup>160</sup> We can see this in *Miller*’s inclusion of the “no serious value” sub-test. While the Court tried to substitute empirical for normative judgments by calling on the “community standards” sub-tests for offensiveness and prurience—changing the question for the finder of fact from “what is prurient?” to “what do members of my community find prurient?”—it

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155. Schauer, *supra* note 7, at 927.

156. Indeed, Schauer says that the *best* formulation of that prong would be “utterly without intellectually communicative content.” *Id.* at 929.

157. Schauer, *supra* note 147, at 22.

158. *Id.* at 23.

159. See generally BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* (1985). More familiar examples are concepts like *courageous*, *murder*, and *dogmatic*.

160. For discussion of the concept of *open-textured* terms, see SCHAUER, *supra* note 147, at 35–36.

could not avoid including a requirement that calls for value judgment on the part of legal decision-makers.<sup>161</sup> My claim is that this is because of the nature of the concept *obscenity*, and not because of any ineptitude on the part of the Court.<sup>162</sup> For example, Andrew Koppelman considers the prospects of redefining obscenity in terms of the concept moral harm, but he persuasively argues that “the idea of moral harm is not susceptible to codification in a legal definition” precisely because it is “too vague and contestable to be workable as a rule of law.”<sup>163</sup> Clearly, asking legal decision-makers to employ normative concepts is tantamount to handing a large amount of discretion over to them.<sup>164</sup> And discretion in legal decision-making is precisely what rule-based decision-making is supposed to eliminate. Thus, there is an inherent tension between defending obscenity’s exclusion from First Amendment coverage, which necessarily requires defining the concept, and wanting First Amendment decision-making to be at least presumptively rule-based.

Of course, both discretion and constraint come in degrees, and different mixes of discretion and rule-based constraint might be appropriate for different decision-making contexts.<sup>165</sup> Perhaps Schauer could respond to my objection by arguing that in the area of obscenity, relatively more discretion is not only inevitable, but desirable, or at least tolerable. However, it is hard for me to see the argument for this; indeed, all the considerations seem to point in the opposite direction. For example, in the general context of carving out exceptions to First Amendment coverage, we surely want to be as careful as possible to avoid any over-inclusivity or chilling effect. By leaving these carving-out exercises to the discretion of legal decision-makers, we risk both of these outcomes because of bias against speech that has some of the properties of the disfavored category. This is particularly likely in the case of obscenity due to pervasive moral and religious aversion to material deemed obscene in the colloquial sense. The risks associated with under-inclusivity in the enforcement of obscenity law are, comparatively speaking, rather slight. Furthermore, since First Amendment rules govern so many different kinds of decision-makers, including legislators, the value of intertemporal consistency that rule-based decision-making provides is particularly important in this area. It is notable that most other categories of

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161. In *Pope v. Illinois*, the Court held that the serious value prong looks to whether “a reasonable person would find [serious] value in the material,” not to whether “an ordinary member of any given community” would find such value. 481 U.S. 497, 500–01 (1987).

162. Individual Justices have often acknowledged the definitional difficulties in this area. Justice Stewart famously opined that obscenity “may be indefinable” but “I know it when I see it.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

163. See Koppelman, *supra* note 1, at 1660, 1674.

164. Cf. SCHAUER, *supra* note 147, at 172 (referring to judges as being “substantively unfettered” by rules employing normative terms such as “reasonable” or “appropriate”).

165. Cf. *id.* at 152 (“Where decision-makers are likely to be trusted, and where the array of decisions they are expected to make will contain a high proportion of comparatively unique decision-prompting events with serious consequences if they are decided erroneously, we might expect the rule-based mode to be rejected, or at least its stringency tempered.”).

speech that are excepted from First Amendment coverage are defined in non-normative terms, for example incitement,<sup>166</sup> defamation,<sup>167</sup> fighting words,<sup>168</sup> speech integral to unlawful conduct,<sup>169</sup> and true threats.<sup>170</sup> Obscenity is almost the only excepted category that is defined in value-laden terms.<sup>171</sup>

For these reasons, it would appear that Schauer's "second-best" First Amendment is not a theory that is highly amenable to an obscenity exception. In fact, the obscenity exception would likely find a more welcoming home within the framework of a Dworkinian First Amendment because of precisely those features of that framework that Schauer sharply criticizes. Schauer points out that in Dworkin's anti-positivist framework, it is not clear how much "resistance" a legal rule has, by which he means the presumptive force that rules retain even when adhering to them leads to outcomes divergent from those recommended by their background justification.<sup>172</sup> On one understanding of Dworkin's framework, a legal rule is always to be interpreted in the morally and politically best way. Precedent does constrain this interpretation, and perhaps in the usual cases judges will not seriously reflect upon whether the accepted construction of the rule is the best it could be. But this is always an option, and when judges engage in such reflection, there is no presumption that it will be strongly constrained by the accepted construction. In other words, Dworkin's view might "collapse the idea of a rule by requiring that it be interpreted in the morally and politically best way on [each] occasion."<sup>173</sup> A Dworkinian First Amendment, then, might be one that routinely calls for the application of the moral and political principles that lie behind the rules directly to cases. The inherent normativity of the concept *obscenity* would not be so problematic in this decision-making context because it is already shot through with normative judgments. It is beyond the scope of this article to develop a fully-fledged theory of obscenity, but if one wants to develop

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166. Advocacy of unlawful action intended to produce, and likely to produce, imminent unlawful action.

167. The key concept of *actual malice* is essentially a recklessness requirement.

168. Speech that tends to incite an immediate breach of the peace by provoking a fight; is an epithet which, when addressed to an ordinary citizen, is, as a matter of common knowledge, inherently likely to provoke violent reaction; and is directed to the person of the hearer, and is thus likely to be seen as a direct personal insult.

169. Usually defined as speech that causes, attempts to cause, or makes a threat to cause illegal conduct.

170. Threats of criminal or tortious conduct.

171. This claim may be doubted, but I suspect that the doubt arises from a semantic dispute over the meaning of "value-laden." By "value-laden," I mean "necessarily involving concepts like *right* and *wrong*, or (moral or aesthetic) *good* or *bad*." *Miller* obscenity is defined partly in terms of the absence of serious political or aesthetic value, and so necessarily involves such concepts. The other categories of excepted speech are not defined in that way, although of course values may *inform* their definitions. For example, it is probably true that the Court's definition of "incitement" was guided by value judgments concerning the proper balance between free speech and other values like social harmony or order.

172. SCHAUER, *supra* note 147, at 210.

173. *Id.* at 210 n.6.

such a theory, Dworkinian premises about the nature of law are much more favorable to that project than Schauerian ones.

## VII

### CONCLUSION

In this article, I have examined Frederick Schauer's non-speech theory of obscenity and concluded that it is neither philosophically sound nor explanatorily adequate, and in fact that there is a tension between the theory and Schauer's own work on rule-based legal decision-making. If I am correct about this, then Schauer should abandon the project of defending the obscenity exception altogether.

Why does any of this matter? The internet did not exist when Schauer wrote his articles on obscenity. Now, largely thanks to the internet, we live in what Amy Adler calls a "porn-saturated society."<sup>174</sup> Congress's attempts to curtail the firehose of online erotic material even at the margins have been consistently rejected by the Court on free speech grounds.<sup>175</sup> In that context, obscenity laws and the *Miller* test can seem painfully antiquated and irrelevant. Indeed, according to Adler, Americans' increasing tolerance of the sea of pornography in which they live has meant that the *Miller* test's "community standards" requirements are unpredictable and hard to satisfy, which discourages prosecutors from pursuing obscenity cases.<sup>176</sup> In a pornography-ridden society such as ours, it is not even clear that "the obscene" is a moral category that has any meaning or force to most people.

For all this, over the past twenty years prosecutors on the state and federal levels have continued to bring obscenity cases. Under the second Bush administration, the Gonzales Justice Department made prosecuting obscenity "one of [its] top priorities."<sup>177</sup> Adler argues that federal prosecutors turned to obscenity law to "make up for limitations and defeats in the realms of child pornography and the doctrine of 'harmful to minors.'"<sup>178</sup> Jennifer Kinsley shows that obscenity cases have been "vigorously and aggressively prosecuted" on the

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174. Amy Adler, *All Porn All the Time*, 31 N.Y.U. REV. L. & SOC. CHANGE 695, 707 (2007).

175. See *Reno v. ACLU*, 521 U.S. 844 (1997) (striking down the major provisions of the Communications Decency Act, which prohibited the knowing transmission of obscene or indecent messages to minors); *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (upholding preliminary injunction of the Child Online Protection Act, which criminalized online material that was deemed harmful to minors).

176. Adler, *supra* note 174, at 701–02.

177. Barton Gellman, *Recruits Sought for Porn Squad*, WASH. POST, Sept. 20, 2005, at A21. For examples of Bush-era federal obscenity prosecutions, see, e.g., *United States v. Coil*, 442 F.3d 912 (5th Cir. 2006); *United States v. Extreme Assocs., Inc.*, 431 F.3d 765 150 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 2048 (2006); *United States v. Ragsdale*, 426 F.3d 765 (5th Cir. 2005); *Carter v. MGA, Inc.*, 189 F. App'x 893 (11th Cir. 2006). For examples of Obama-era prosecutions, see, e.g., *United States v. McCoy*, 678 F. Supp. 2d 1336 (M.D. Ga. 2013); *United States v. Stagliano*, 693 F. Supp. 2d 25 (D.D.C. 2010); *United States v. Isaacs*, 565 F. App'x 637 (9th Cir. 2014).

178. Adler, *supra* note 174, at 708.

state level as well, particularly in the Bible Belt.<sup>179</sup> Juries in large metropolitan areas are still willing to convict certain content as obscene despite its mass availability online.<sup>180</sup> As a result, even today no sexually explicit speech is fully immune from being criminalized, punished, and censored as obscenity.<sup>181</sup>

For this reason, the *Miller* doctrine remains important both because it determines which erotic materials may be proscribed by the states or federal government, and because it stands for the Court's continuing commitment to the proposition that some sexually explicit speech, even if only consumed by consenting adults, can be criminalized. If the arguments in this article are sound, then the best defense of the doctrine fails on multiple levels. This raises the question: After twenty years of silence, should the Court revisit its obscenity exception?

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179. Jennifer Kinsley, *The Myth of Obsolete Obscenity*, 33 CARDOZO ARTS & ENT. L.J. 607, 641, 644 (2015).

180. *Id.* at 644.

181. *Id.*