DEMOCRACY, SEX AND THE FIRST AMENDMENT

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INTRODUCTION

Is the Supreme Court's obscenity doctrine—which permits government to ban hardcore pornography—a mere relic of the Victorian era, drained of all vitality by the momentous changes in First Amendment jurisprudence over the last forty years, and maintained on life support only by the prudishness of hide-bound justices? Or, notwithstanding the vituperative criticism leveled at it by commentators and dissenting justices, is this doctrine in fact consistent with the basic principles that animate the Court's contemporary free speech jurisprudence?

To explore this question, I will examine two powerful arguments on either side of the issue. I will begin by considering what, in my view, remains the best defense of the Court's obscenity doctrine: Frederick Schauer's argument that hardcore pornography is not "speech" within the meaning of the First Amendment because such material "shares more of the characteristics of sexual activity than communicative processes."[1] Schauer famously compared viewing hardcore pornography to hiring two prostitutes to engage in sex acts for one's sexual arousal. If viewing "live" sex is not protected by the First Amendment, then why, he asked, should the same activity be protected when viewed on film?[2]

Since the persuasiveness of Schauer's argument lies in his seeming demonstration that hardcore pornography has no free speech value, any effective rebuttal will not be found in arguments that suppression of hardcore pornography offends some general liberty or autonomy principle. Such arguments are unpersuasive because they depend on the questionable assumption that the First Amendment protects some large, undifferentiated interest in liberty or autonomy. Indeed, defending a right to hardcore pornography on general liberty or autonomy grounds serves only to reinforce Schauer's claim that hardcore pornography *is* sex, not speech *about* sex. Moreover, such an approach suggests that the real gripe against the suppression of hardcore pornography is not that it violates some central free speech interest, but that it offends the core liberal precept that government has no business enforcing sexual morality. The best

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1. Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 922 (1979).

2. *See id.* at 922–23.

argument against current obscenity doctrine would therefore seem to be one that demonstrates that the suppression of hardcore pornography implicates what nearly everyone agrees is a central First Amendment concern—the right of each citizen to participate freely and equally in the speech by which we govern ourselves.

Accordingly, after considering attempts to rebut Schauer's argument and pointing out the one major weakness of his approach, I will consider an argument against obscenity doctrine advanced by philosopher Thomas Scanlon and grounded in the right to participate in what he refers to as "informal politics."[3] In Scanlon's view, the suppression of hardcore pornography violates the First Amendment rights of those who produce and distribute pornography in an attempt to "influence the sexual mores of the society."[4] Although I conclude that this argument does not, as Scanlon urges, require that *all* hardcore pornography be given First Amendment protection, the argument does demonstrate that *some* uses of hardcore pornography are indeed core free speech activity. I will then discuss how in theory current obscenity doctrine offers protection to such political uses of pornography. Whether doctrine in practice is adequate to the task of identifying and protecting such political material, while allowing suppression of hardcore pornography lacking such free speech value, is a much harder question. Finally, I consider whether various justifications for suppressing hardcore pornography are consistent with the core First Amendment precept that government may not restrict speech because of its power to shape public opinion. I conclude that while some justifications commonly offered for suppressing hardcore pornography may well violate this precept, the rationale that viewing hardcore pornography is immoral does not.

I.
THE ARGUMENT THAT HARDCORE PORNOGRAPHY IS NOT "SPEECH" WITHIN THE MEANING OF THE FIRST AMENDMENT

In 1957, the Supreme Court held in *Roth v. United States* that "obscenity is not protected speech . . . ."[5] In 1973, the Court reaffirmed in *Miller v. California* that "obscene material is unprotected by the First Amendment"[6] and equated such material with "hard core" pornography.[7] Though commentators and

3. Thomas M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 545 (1979).

4. *Id.*

5. 354 U.S. 476, 486 (1957).

6. 413 U.S. 15, 23 (1973).

7. *Id.* at 29 (noting that "today, for the first time since *Roth* was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment"). *See also id.* at 27 ("Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct . . . ."). Throughout this article, I will therefore use the terms "obscenity" and "hardcore pornography" interchangeably,

dissenting justices have long decried this result,[8] hardcore pornography remains bereft of First Amendment protection.[9] The Court, however, has offered little justification for this exclusion.[10]

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though I will mainly use the latter term, because it is more descriptive of what actually is at issue. *See* Schauer, *supra* note 1, at 920 n.119 ("The word 'obscenity' should be entirely excluded from any discussion of this area of the law. It is 'pornography' and not 'obscenity' that is the focus of the non-speech approach that the Court adopted. The reader should exclude any consideration of the ordinary use of the word 'obscenity.'"). I use the term "pornography" in its unmodified form to refer to any sexually explicit material that has the purpose and effect of sexually stimulating the reader or viewer, including soft- or medium-core material such as *Playboy* or *Penthouse* magazines, which are not sufficiently explicit to be deemed legally "obscene." "Obscenity" is thus a subset of "pornography."

The "guidelines" to which the Court refers above are the three-part *Miller* test. This test allows, but does not require, government to ban material that, "taken as a whole": (1) "appeals to the prurient interest"; (2) "depicts or describes, in a patently offensive way, sexual conduct"; and (3) lacks "serious literary, artistic, political or scientific value." *Miller*, 413 U.S. at 24. The Court gives examples of material that would satisfy the second part of the test, including "[p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated[, or p]atently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.* at 25.

I agree with Professor Schauer that it was unfortunate that the Court defined obscenity in terms of "offensiveness," both because "[p]rotected speech is often offensive," *see, e.g.*, Cohen v. California, 403 U.S. 15 (1971) (upholding right of protestor to wear jacket bearing the message "Fuck the Draft"), and because "[o]ffensiveness has nothing to do with whether an utterance is speech in the constitutional sense," *see* Schauer, *supra* note 1, at 929–30.

8. *See, e.g.*, *Roth*, 354 U.S. at 508–14 (Douglas, J., joined by Black, J., dissenting); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73–114 (1973) (Brennan, J., joined by Stewart and Marshall, JJ., dissenting) (companion case to *Miller*); Harry Kalven, Jr., *The Metaphysics of Obscenity*, 1960 SUP. CT. REV. 1; David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 77, 81 (1974); Steven G. Gey, *The Apologetics of Suppression: Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564 (1988).

9. *See, e.g.*, Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 671 (2004) (upholding preliminary injunction against the Child Online Protection Act pending a trial on the merits but noting that "the Government in the interim can enforce obscenity laws already on the books"); Virginia v. Black, 538 U.S. 343, 363 (2003) ("[J]ust as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm.").

10. In *Roth*, the Court explained that "material that deals with sex in a manner appealing to the prurient interest" was "not protected speech" because "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." 354 U.S. at 484. In *Memoirs v. Massachusetts*, this historical explanation of why obscenity lacked First Amendment protection was adopted by a three-justice plurality as part of the test for defining obscenity, which was adopted in turn (in modified form) as the third part of the *Miller* test. 383 U.S. 413, 419 (1966). As Louis Henkin long ago astutely observed:

> Critics . . . have thought to trace circles in the Court's reasoning, and to identify questions that it seemed to beg. Some of the criticism might be met by reducing the reference to "redeeming social importance" from doctrine to rationalization, from a constitutional standard to an explanation of a historical exception.

Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 398 (1963).

In *Paris Adult Theatre I*, the Court noted the "legitimate state interests at stake in stemming the tide of commercialized obscenity," including "the interest of the public in the quality of life and the total community environment, the tone of commerce in great city centers, and, possibly,

A. Hardcore Pornography as Sexual Conduct

In an influential article published over a quarter of a century ago, Frederick Schauer offers an interesting and seemingly persuasive rationale for the exclusion of hardcore pornography from First Amendment protection.[11] Schauer argues that because hardcore pornography is not "designed to appeal to the intellectual processes" but rather "to produce a purely physical effect" of sexual arousal, such material has far too tenuous a connection with any plausible underlying First Amendment purpose to be considered protected "speech."[12] In Schauer's view,

> the Court's refusal to treat pornography as speech is grounded in the assumption that the prototypical pornographic item on closer analysis shares more of the characteristics of sexual activity than of communicative process. The pornographic is in a real sense a sexual surrogate. It takes pictorial or linguistic form only because some individuals achieve sexual gratification by those means.[13]

To defend this view, Schauer asks us to imagine someone who hires two prostitutes to sexually arouse him by engaging in sexual activity in his presence. Although this particular client does not touch either of the prostitutes but rather uses only his eyes and ears, the encounter is, in Schauer's view, "essentially a physical activity" that is "no more cognitive than any other experience with a prostitute."[14] Schauer then asks, if this activity is not speech entitled to First

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the public safety itself." 413 U.S. at 57–58. The Court also referred to the "tendency" of this material to exert a "corrupting and debasing impact leading to antisocial behavior . . . ." *Id.* at 63. But as the Court implied, these interests would probably be insufficient to justify suppressing speech protected by the First Amendment. *Id.* at 60. Significantly, however, the Court said nothing more than the *Roth* Court had about the quite different and distinct question of why this material was not entitled to First Amendment protection.

11. Schauer, *supra* note 1. Schauer's article builds upon John Finnis's similar defense of obscenity doctrine. *See* John M. Finnis, *"Reason and Passion": The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222, 227 (1967) (arguing that obscenity is outside First Amendment protection because "it pertains, not to the realm of ideas, reason, intellectual content and truth-seeking, but to the realm of passion, desires, cravings and titillation").

12. Schauer, *supra* note 1, at 922.

13. *Id.*

14. *Id.* at 923. For an example of art following legal commentary, consider the following scene from a recent John Irving novel in which the protagonist, Jack, meets with the staff of a psychiatric hospital in which his long-lost father is institutionalized:

> "On occasion," Dr. Berger began, in his *factual* way, "Hugo takes your father to see a prostitute."
> "Is that safe?" Jack asked Dr. Krauer-Poppe . . . .
> "Not if he has sex with the prostitute, but he doesn't," Dr. Krauer-Poppe said.
> "These visits are unofficial—that is, we don't *officially* approve of them," Professor Ritter told Jack.
> "We just *un*officially approve of them," Dr. von Rohr said . . . .
> "He's a physically healthy man!" Dr. Horvath cried. "He *needs* to have sex! . . ."
> "But you said he *doesn't* have sex," Jack said to Dr. Krauer-Poppe.
> "He masturbates when he's with the prostitute," she told Jack . . . .

Amendment protection, is there any real difference when this same activity is "presented on film rather than in the flesh?"[15] Schauer replies in the negative:

> If sex is not protected [by the First Amendment], then two-dimensional sex is protected no more than three-dimensional sex, visual sex no more than tactile sex. Underlying [the Court's obscenity doctrine] is the assumption that hardcore pornography *is* sex.[16]

Schauer concludes that hardcore pornography is essentially the equivalent of "rubber, plastic, or leather sex aides," for "if every other aspect of the experience is the same," the "mere fact that in pornography the stimulating experience is initiated by visual rather than tactile means" is irrelevant.[17] Schauer's argument that there is no essential difference between viewing the hardcore sexual activity on film and watching it live provides an interesting and powerful defense of the Court's obscenity doctrine.[18] It challenges those who believe that the Court's obscenity doctrine is inconsistent with the rest of its free speech jurisprudence to

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"Like a picture of a woman in a magazine, I suppose—only she's a real woman instead of a photograph," Dr. Berger said.

"Like pornography?" Jack asked.

"Ah, well . . ." Professor Ritter said *again*.

"[He] has those magazines, too," Dr. von Rohr announced disapprovingly.

JOHN IRVING, UNTIL I FIND YOU 769–70 (2005).

15. Schauer, *supra* note 1, at 923.

16. *Id.* at 926.

17. *Id.* at 923. Internet webcam pornography, which typically features a woman masturbating or having sex, is even more like procuring sexual stimulation at the local bordello in the way Schauer hypothesized than is viewing a hardcore pornographic film, especially where the technology enables interactivity between the viewer and the performer.

18. In recognizing the power of Schauer's argument, I am not, however, endorsing every aspect of his analysis. In particular, I have doubts about the stark mind/body dichotomy underlying such statements as "[viewing hardcore pornography produces] a physical or quasi-physical stimulus rather than a mental effect," Schauer, *supra* note 1, at 928, or his conclusion that "the use of pornography may be treated conceptually as a purely physical rather than mental experience," *id.* at 923. Though I can claim expertise in neither neuroscience nor philosophy of mind, Schauer's dichotomy between the "mental" and "physical" effects of pornography strikes me as too simplistic. Similarly, I am not sure that arousal caused by watching two prostitutes having sex (and by extension, watching this same activity in two dimensions) is "no more cognitive than any other experience with a prostitute." *Id.* And even if this claim were true, the arousal caused by even tactile sex would, for humans at least, often seem to involve significant elements of "cognition" as the term is currently used. *See, e.g.*, Wikipedia, Cognition, http://en.wikipedia.org/ wiki/Cognition (last visited Nov. 2, 2007) ("Traditionally, emotion was not thought of as a cognitive process. This division is now regarded as largely artificial, and much research is currently being undertaken to examine the cognitive psychology of emotion . . . ."). Therefore, it is perhaps better to say that hardcore pornography lacks any significant "intellectual" content than to deny that it involves "cognition" or engages "mental" processes. In any event, as a doctrinal matter, the fact that hardcore pornography may lack "mental," "cognitive" or even "intellectual" content would not deprive it of First Amendment protection if the pornography is used in a medium of mass communication to challenge conventional sexual mores. *See infra* text accompanying notes 87–98. *See also* Cohen v. California, 403 U.S. 15, 26 (1971) ("We cannot sanction the view that the Constitution, while solicitous of the cognitive function of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.").

explain why, if viewing people engaged in live hardcore sex is not protected speech,[19] this same activity should be protected in two dimensions.[20] This challenge has never been fully met.[21] Professor Martin Redish, however, offers a particularly interesting and thoughtful attempt worthy of careful consideration. Countering with his own comparison, Redish writes:

> The widespread reaction of non-stop uproarious laughter at a Marx Brothers movie is undoubtedly primarily emotive, and indeed may differ little from the purely physical effects of tickling or of a whoopee cushion . . . . But before the viewer [of pornography or a Marx Brother's movie] may manifest a physical response, he or she must first "intellectually" (i.e. through the use of the mind) have processed what he or she has witnessed. In that sense, viewing pornography is clearly distinguishable, for first amendment purposes, from a vibrator, just as the whoopee cushion is distinguishable from the Marx Brothers movie. In each of the two examples, one method of attaining the physical response (sexual arousal or laughter) requires the use of intellectual processes, while the other is physical in every respect—the mental

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19. Any argument that one has a right to view live sex acts is belied by Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991), and City of Erie v. Pap's A.M., 529 U.S. 277 (2000), both of which held that local authorities may, consistent with the First Amendment, ban totally nude dancing. Indeed, these cases support the view that live performance of hardcore sexual activity such as sexual intercourse or oral sex is not even within the coverage of the First Amendment. If nude dancing "is expressive conduct within the outer perimeters of the First Amendment, though . . . only marginally so," *Barnes*, 501 U.S. at 566 (plurality opinion), or activity "only within the outer ambit" of the First Amendment, *Pap's A.M.*, 529 U.S. 289 (plurality opinion), then it is certain that hardcore sexual activity unalloyed with some constitutionally recognized form of expression such as dance falls well outside of the First Amendment's ambit. *See also* Miller v. California, 413 U.S. 15, 25–26 (1973) ("Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation *any more than live sex and nudity can be exhibited or sold without limit in such public places*.") (emphasis added).

20. Arguably, the very process of recording sexual activity on film or DVD in a way that maximizes its arousing qualities contains at least a modicum of artistic expression. But a live sex show is also likely to contain a modicum of such artistic expression, as is, for that matter, the example of two prostitutes having sex with each other in order to arouse their client.

21. One could argue that the comparison of viewing pornography on film or DVD to procuring prostitutes to engage in sexual activity is not apt because the experience with the prostitutes involves the additional activity of paying someone to engage in sex, an activity that can be regulated without First Amendment hindrance, while viewing a film or DVD does not. This objection is unpersuasive for two reasons. First, if viewing a live sex show on a stage is not even within the coverage of the First Amendment, *see supra* note 19, then it is difficult to see why a private sex show would have any greater First Amendment value just because it was performed for no monetary compensation. (The fact that this activity takes place as a private non-commercial activity might, however, bring it within the coverage of the right to privacy and sexual autonomy protected by the liberty clause of the Fifth and Fourteenth Amendments). Second, in reality the production of hardcore pornography often involves something akin to prostitution. A person engaged in commercial distribution of hardcore pornography to customers for sexual stimulation can be seen as the middle man between these customers and performers paid to engage in sex. This objection does, however, show that a better comparison to viewing hardcore pornography might have been to a live sex show rather than to hiring prostitutes to engage in sexual activity. Some of the ideas in this footnote were developed through conversations with Eugene Volokh.

> processes have been totally circumvented. Since . . . one of the touchstones of first amendment protection is the use of the uniquely human mental or emotional processes, there exists no logical basis for excluding pornography from the first amendment or equating the viewing of pornography with purely physical means of sexual gratification.[22]

Although one could quibble with various details of Professor's Redish's response,[23] it has two salient shortcomings. The first is its equation of laughter and sexual arousal. Unlike laughter, sexual arousal is an essential component of a category of conduct—sex—that society has sought to control since the dawn of civilization. If laughter could cause problems as detrimental to society as unwanted pregnancy, murderous jealousy, or the breakdown of the family, then we would likely have strong moral taboos about producing laughter[24] and the government might well try to suppress material that elicited this response.[25] The suppression of hardcore pornography can therefore be seen as a part of the regulation of sexual activity such as prostitution, fornication and adultery,[26] or, in former times, masturbation.[27] No analogous relationship exists between laughter and a category of commonly regulated conduct.[28]

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22. MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 74–75 (1984).

23. For one, laughter caused by a whoopee cushion is not "physical in every respect": one has to have mentally "processed" seeing someone sit on the cushion before laughter is produced. In addition, it is not at all clear, as Redish implies, that the ability to become sexually stimulated by photographic imagery is a "uniquely human" trait. *See, e.g.*, CNN.COM, *Panda Porn to Cure Bedtime Blues* (July 27, 2002), http://archives.cnn.com/2002/TECH/science/06/27/giant.panda/ (reporting that in order to "arouse the sexual instincts" in giant pandas the breeders show them videos of other pandas copulating).

24. The ancient Greeks apparently thought "violent laughter undignified." PLATO, REPUBLIC 211 n.f (Paul Shorey trans., Loeb Classical Library 1963). *See also id.* at 211–13 ("'[The Guardians] must not be prone to laughter. For ordinarily when one abandons himself to violent laughter his condition provokes a violent reaction.' . . . 'Then if anyone represents men of worth as overpowered by laughter we must not accept it, much less of gods.'").

25. The possible ill effects of sexual conduct do not, of course, directly relate to the question of whether material whose primary function is to cause sexual arousal is speech for purposes of the First Amendment. Rather, these effects are relevant to the government's reason for regulating the activity. These effects do, however, indirectly explain why material whose sole purpose is sexual arousal can be conceptualized as "conduct" in a way that material that produces laughter cannot.

26. "Underlying all of the words of *Roth, Miller*, and *Paris* is the assumption that hardcore pornography *is* sex." Schauer, *supra* note 1, at 926.

27. *See* Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1640 (2005) (noting that the "anti-pornography crusaders of the nineteenth century thought that if sexual material came into the possession of teenage boys, it would induce them to masturbate, and this in turn would lead to lassitude, weakness, crime, insanity, and early death").

28. Depictions of food designed to arouse hunger and the accompanying physical reactions would be a closer analogy to hardcore pornography causing sexual arousal. *See* Barry W. Lynn, *"Civil Rights" Ordinances and the Attorney General's Commission: New Developments in Pornography Regulation*, 21 HARV. C.R.-C.L. L. REV. 27, 60 (1986). Just as sexual arousal is intimately related to sexual intercourse, appetite stimulation is intimately related to eating. Whether depictions of food that have no other purpose or effect than to stimulate hunger should be considered speech within the meaning of the First Amendment is an interesting question, but one

An even more serious defect is that Redish's response fails to come to grips with the central point of Schauer's thought experiment. The power of Schauer's argument lies not in its comparison of hardcore pornography to a vibrator but to watching two prostitutes engage in live sex, an activity that involves use of the same "intellectual processes" as watching the prostitutes perform the same acts on film. So, while Redish's argument may show that the further comparison of hardcore pornography to "rubber, plastic, or leather sex aides" may be inapt, the key part of Schauer's argument—the comparison of hardcore pornography to viewing live sexual activity—is untouched by Redish's rebuttal.[29] So Schauer's question remains unanswered: if the First Amendment provides no protection to viewing live sexual activity, why should it protect viewing this same activity on film or a DVD?

An objection that at least attempts to engage Schauer's central point is this: unlike engaging in "tactile sex," which is "conduct," reading a book, looking at a photograph or watching a film is "speech" in "ordinary usage."[30] Anticipating this objection, Schauer emphasizes the crucial but often overlooked point that the word "speech" as used in the Court's free speech jurisprudence often deviates from ordinary usage of the term. He notes the myriad activities, such as perjury, oral and written fraud, revealing military secrets and placing a bet with a bookie, that are undoubtedly "speech" in ordinary language but just as assuredly are not "speech" within the meaning of the First Amendment.[31] Conversely, he

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that is not likely to arise, at least not through a ban analogous to the suppression of hardcore pornography. In our society, government does not (at least not yet) commonly regulate eating on moral grounds; therefore, unlike sexual stimulation through pictures of people having sex, appetite arousal through pictures of delicious-looking food is not considered immoral. For discussion of hardcore pornography appealing to "the appetites," see *infra* note 92.

In arguing that the desire for sex is not a "purely physical appetite," Koppelman makes the curious argument, following Professor Martha Nussbaum, that unlike sexual desire, the "desire for food cannot be assuaged by food-pornography." Koppelman, *supra* note 27, at 1661–62 n.134 (citing MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 30 (2004)). Although Koppelman may be right that human sexual desire is in some sense less "physical" than desire for food, the distinction between sex-pornography and food-pornography that he posits does not exist: like food-pornography, sex-pornography arouses an appetite but does not itself assuage it. Just as the hunger aroused by food-pornography has to be assuaged by eating, the sexual desire aroused by sex-pornography must be assuaged by some analogous activity, such as masturbation or sexual intercourse.

29. Similarly, Steven Gey criticizes Schauer's conclusion that there is no difference between hardcore pornography and a rubber or plastic sex aid by protesting that pornography "must be seen by a conscious viewer" who "translate[s] the images into some mental diagram that then may well trigger some physical response." Gey, *supra* note 8, at 1594. But like Redish, Gey ignores Schauer's comparison of viewing hardcore pornography to watching two prostitutes have sex, an activity which also involves a "conscious viewer . . . translat[ing] images into some mental diagram." Such failure even to engage this key point of Schauer's argument is a tacit concession of its persuasive power.

30. *See* Gey, *supra* note 8, at 1590. *See also* H. POLLACK & A. SMITH, CIVIL LIBERTIES AND CIVIL RIGHTS IN THE UNITED STATES 79 (1978) ("Despite the Court's semantic gymnastics, obscenity is speech. . . . [N]o matter how many times the Court says that pornography is non-speech, in the real world it is speech . . . .").

31. Schauer, *supra* note 1, at 905. *See also* Frederick Schauer, *The Boundaries of the First*

cites examples of activities, such as improper use of the flag or wearing an armband, that, though not "speech" in everyday usage, qualify for protection as speech under the First Amendment.[32] Schauer thus properly insists that the term "speech" as used in First Amendment jurisprudence "must be defined with reference to the objective of that amendment."[33] Because hardcore pornography, in his view, promotes none of the purposes of the First Amendment, Schauer concludes that it is properly excluded from First Amendment coverage. In a moment I shall assess in detail his argument that hardcore pornography is valueless from a free speech perspective. But first I want to discuss the one major weakness in Schauer's otherwise powerful argument.

B. The Significance of the Media Employed by Hardcore Pornography

Though the argument that hardcore pornography should be protected simply because it is "speech" is unpersuasive, there is a more sophisticated version of this argument that presents a serious challenge to Schauer's position. In arguing that it does not matter that sexual activity is "presented on film rather than in the flesh," Schauer misses the First Amendment significance of the media through which hardcore pornography is conveyed. Unlike a live encounter with a prostitute, the usual channels of hardcore pornography—magazines, films and the Internet—are media of mass communication. For this reason, despite its alleged minimal intellectual content, sexual activity captured on film or a DVD and widely distributed in these media has far more potential to influence public attitudes towards sex, morals, the role of women and other matters of public concern than does the same activity taking place in the flesh and observed by a single person. In addition, because of the importance of these media to public discourse, any attempt by government to suppress material in these formats raises the concern that, irrespective of any political purpose of the speaker, the ban may be motivated by fear that the speech will influence public opinion in a way that government opposes.[34]

Amendment: A Preliminary Exploration of Constitutional Salience, 117 HARV. L. REV. 1765, 1771, 1773, 1783–84 (2004) (observing that the First Amendment does not protect most speech routinely regulated by securities, antitrust, labor, copyright and trademark law or the law of evidence). Moreover, as Schauer explains:

> If we do not restrict our inquiry to propositional speech—that is, if we include the speech by which we make wills, enter into contracts, render verdicts, create conspiracies, consecrate marriages, admit to our crimes, post warnings, and do much else—it becomes still clearer that the speech with which the First Amendment is even slightly concerned is but a small subset of the speech that pervades every part of our lives.

Id. at 1784. *See also* JAMES WEINSTEIN, HATE SPEECH, PORNOGRAPHY, AND THE RADICAL ATTACK ON FREE SPEECH DOCTRINE 40–43 (1999) (providing examples of regulation of speech on the basis of its content but which do not implicate free speech concerns).

32. Schauer, *supra* note 1, at 906 (citing activities at issue in Spence v. Washington, 418 U.S. 405 (1974), and Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)).

33. Schauer, *supra* note 1, at 909.

34. See WEINSTEIN, *supra* note 31, at 79.

As Robert Post has observed, certain modes of communication in modern democratic societies form "a structural skeleton that is necessary . . . for public discourse to serve the constitutional value of democracy."[35] For this reason, "it is assumed that if a medium [is] constitutionally protected by the First Amendment, each instance of the medium would also be protected."[36] Accordingly, hardcore pornography gains a presumption of First Amendment protection simply by virtue of the medium it employs.[37] As I have explained elsewhere, however, although there are good reasons to presume that any particular message in a medium essential to democratic communication is part of this democratic dialogue, this presumption is rebuttable.[38]

For instance, even though newspaper editorial columns are undoubtedly an essential medium for public discourse, a journalist who used such a column to tout a stock that he had secretly purchased would have no First Amendment immunity against laws forbidding stock manipulation.[39] And, particularly relevant to our inquiry here, the Court has found that despite the importance of film as a medium of democratic communication, the presumption of protection it provides has been rebutted in the specific case of hardcore pornography.[40] Similarly, although the Court has referred to "the vast democratic forums of the Internet"[41] and has vigorously protected this medium,[42] it has indicated that even in this context, hardcore pornography is entitled to no First Amendment

35. Robert C. Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1276 (1995). I discuss the essential connection between free speech and democracy at *infra* text accompanying notes 57–66.

36. *Id.* at 1253. In my view, the importance of the medium is the best explanation of why the Supreme Court rigorously protects nudity and "medium core" pornography in film and cable television—media that are plainly part of the "structural skeleton" of public discourse—but has not protected even nudity in live performances by erotic dancers on the stage of a strip club. *Compare* Playboy Entm't Group, Inc. v. United States, 529 U.S. 803 (2000) (invalidating on First Amendment grounds a federal law that required cable operators to fully scramble sexually oriented programming or, if they were unable to do so, to confine such programming to late-night hours in which children were unlikely to be in the audience), *with* City of Erie v. Pap's A.M., 529 U.S. 277 (2000) (upholding a city ordinance requiring nude dancers to wear pasties and G-strings while performing). The importance of the medium may also explain why a lawsuit against the publisher of a cookbook by a reader who followed a recipe that erroneously specified a poisonous wild mushroom would raise a serious First Amendment issue, while a suit against a drug manufacturer for erroneous instructions on a label of a medicine bottle that caused similar injury would not. *See* James Weinstein, *Campaign Finance Reform and the First Amendment: An Introduction*, 34 ARIZ. ST. L.J. 1057, 1079 (2002).

37. This phenomenon is not limited to hardcore pornography: baseball games, for instance, would not themselves seem to have any First Amendment value. Yet any attempt by government to ban television broadcasts of this activity would raise First Amendment issues.

38. *See* James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons from* Nike v. Kasky, 54 CASE W. RES. L. REV. 1091, 1121 (2004).

39. United States v. Wenger, 427 F.3d 840, 850 (10th Cir. 2005).

40. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 53 (1973).

41. Reno v. ACLU, 521 U.S. 844, 868 (1997).

42. *See id.*

protection.[43] But just because the Court has tacitly found the presumption of First Amendment protection rebutted in the case of hardcore pornography does not mean that this decision is consistent with the rest of its free speech jurisprudence. To answer this question, we must begin by looking closely at the First Amendment values that might be implicated by the suppression of hardcore pornography.[44]

II.
HARDCORE PORNOGRAPHY AND FREE SPEECH VALUES

It is generally agreed that constitutional protection of free speech serves one or more of the following three values: "[1] advancing knowledge and 'truth' in the 'marketplace of ideas,' [2] facilitating representative democracy and self-government, and [3] promotion of individual autonomy, self-expression and self-fulfillment."[45] For very different reasons, any argument against obscenity doctrine based on the marketplace-of-ideas rationale[46] or the cluster of norms comprising individual autonomy, self-expression and self-fulfillment[47] is

43. *See* Ashcroft v. ACLU, 542 U.S. 656, 671 (2004) (upholding preliminary injunction against the Child Online Protection Act pending a trial on the merits but noting that "the Government in the interim can enforce obscenity laws already on the books").

44. A shortcoming of Professor Koppelman's interesting critique of obscenity doctrine is that it fails to specify which free speech values, if any, the suppression of hardcore pornography implicates. *See* Koppelman, *supra* note 27.

45. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 987 (15th ed. 2004).

46. This theory posits that the truth will be discovered and society will be more likely to progress if all ideas are allowed to compete unimpeded by government regulation. First invoked by John Milton in the seventeenth century, *see* JOHN MILTON, AREOPAGITICA (William Haller ed., Macmillan 1966) (1644), the truth-discovery rationale for free speech was more fully developed in the middle of the nineteenth century by John Stuart Mill, *see* JOHN STUART MILL, ON LIBERTY (Edward Alexander ed., Broadview Press 1999) (1859). Justice Oliver Wendell Holmes introduced this rationale into Supreme Court jurisprudence when he wrote that "the ultimate good desired is better reached by free trade in ideas" and that "the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Although the marketplace-of-ideas rationale surely informs American free speech doctrine, it is not a core or even important free speech norm. If it were an important norm, the First Amendment would not permit the government to distort the marketplace of ideas through propaganda or to maintain a national communications policy that allows media concentration. *See* James Weinstein, *Database Protection and the First Amendment*, 28 U. DAYTON L. REV. 305, 344–48 (2002). An even more fundamental problem is that the marketplace-of-ideas rationale justifies free speech in terms of the good it will produce for society as a whole, not as an individual right. But free speech has long been understood in the United States as an individual right. Consistent with these theoretical problems, and despite the paeans it occasionally sings to the marketplace of ideas, *see, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969), the Court has in practice afforded at most only modest protection to speech that promotes only this norm. For instance, in Eldred v. Ashcroft, 537 U.S. 186 (2003), the Court refused to apply any meaningful scrutiny to a copyright law that arguably robbed the pubic domain of important ideas and information. Accordingly, the marketplace-of-ideas rationale is best described as a peripheral free speech norm.

47. An influential version of this theory posits that the core value of free speech is "self-realization," which comprises "development of the individual's powers and abilities" and the

unlikely to succeed. Rather, the best argument against obscenity doctrine is that it is inconsistent with the commitment to democratic self-governance underlying the First Amendment.

A. The Marketplace of Ideas; Autonomy, Self-Expression and Self-Fulfillment

In its classic conception as a bastion of rational discourse in which any idea can be proposed and debated, the marketplace-of-ideas theory offers no protection to hardcore pornography. As Ronald Dworkin (who defends the right to pornography on other grounds) explains, "because most pornography makes no contribution to political or intellectual debate," it is "preposterous to think that we are more likely to reach truth about anything at all because pornographic videos are available."[48]

In contrast to the lack of connection between the marketplace-of-ideas rationale and hardcore pornography, the ability to produce, distribute and consume hardcore pornography arguably promotes autonomy, self-expression and self-fulfillment.[49] But the problem with such an autonomy-based argument

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"individual's control of his or her own destiny through making life-affecting decisions." *See* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593–94 (1982).

48. Ronald Dworkin, *Women and Pornography*, N.Y. REV. BOOKS, Oct. 21, 1993, *available at* http://www.nybooks.com/articles/13790. *Accord* Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 616–17 (observing that the "'message' of pornography is communicated indirectly and not through rational persuasion" and therefore "cannot easily be countered by more speech because it bypasses the process of public consideration and debate that underlies the concept of the marketplace of ideas"). *See also* Roth v. United States, 354 U.S. 476, 484–85 (1957) (explaining 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 guaranties," but that obscenity is "utterly without redeeming social importance" and "no essential part of any exposition of ideas") (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)).

David Richards has argued, however, that if the marketplace of ideas includes non-propositional fare that appeals to the emotions as well as the intellect, then "pornography can be seen as the unique medium of a vision of sexuality, a 'pornotopia'—a view of sensual delight in the erotic celebration of the body, a concept of easy freedom without consequences, a fantasy of timelessly repetitive indulgence." *See* Richards, supra note 8, at 81. *See also* REDISH, *supra* note 22, at 69 ("Even under a 'search-for-truth' analysis, the Court's conclusion in *Roth* is subject to criticism, for regulation of obscenity can be seen as a means of rejecting whatever life style such expression may implicitly urge."). If the marketplace of ideas were truly a central concern of the First Amendment, this argument might bring hardcore obscenity within the ambit of First Amendment protection. But as this value is only a peripheral concern of the First Amendment, *see supra* note 46, the argument does not have much traction. Moreover, to the extent that the "unique" vision of sexuality described by Richards is a means not just of enriching the marketplace of ideas but is the content utilized by those wishing to challenge contemporary sexual mores, this argument merges with the argument from democracy on which this article focuses.

49. From the speaker's perspective, if self-expression includes the right to engage in virtually any form of communication, then the First Amendment obviously would protect the production or distribution of hardcore pornography. Similarly, from the audience perspective, "the right of each individual to decide what books he or she will read and what movies he or she will see" is "an important element of the freedoms of self-rule and self-fulfillment . . . ." REDISH, *supra* note 22, at 72.

against obscenity doctrine is that virtually any form of human communication can be seen as promoting these values. Consequently, as one leading proponent of an autonomy-based theory of the First Amendment concedes,[50] such a theory does not accurately describe current doctrine, which excludes from First Amendment protection many forms of communication that arguably promote self-realization, including fighting words, threats, certain categories of incitement and libel, criminal solicitation, child pornography and, of course, obscenity.[51] And as already noted,[52] government also routinely regulates a multitude of financial, commercial and professional speech without any First Amendment hindrance.[53] In addition, a theory that attempts to explain free speech in terms of a broad, undifferentiated autonomy interest would protect many forms of noncommunicative conduct as well, including drug use, "deviant" sexual behavior or even more mundane activities, such as travel to foreign lands, meeting new people and choice of occupation.[54] Thus, as Schauer has persuasively argued, such a theory justifies free speech not as an independent principle but as part of some more general liberty principle.[55]

Unlike a broad-based autonomy theory or the marketplace-of-ideas rationale, one norm that is centrally and uncontroversially connected to the First Amendment is the right of each individual to participate in the speech by which we govern ourselves.[56] At first blush, a democracy-based argument against obscenity doctrine might seem unpromising because, as with the marketplace-of-

50. *See* Redish, *supra* note 47, at 625 ("If the self-realization value were accepted as the guiding force behind constitutional protection of free speech, it is likely that the Court's approach to numerous issues of first amendment construction would have to change.").

51. See Weinstein, *supra* note 36, at 1076; Schauer, *supra* note 31, at 1769, 1771.

52. See *supra* text accompanying note 31.

53. *See* Schauer, *supra* note 31, at 1768, 1778–84.

54. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 57.

55. *Id.* at 5–6, 52 (1982). For this reason, this or any other broad-based autonomy justification for free speech fails to show what is special about speech. In particular, and especially relevant to our inquiry here, any theory that argues for the protection of speech as part of a general liberty interest fails to explain why, if the Constitution does not generally forbid "morals legislation," *see infra* note 129, it nonetheless prohibits the suppression of hardcore pornography for such moralistic reasons. For if free speech is merely an aspect of a general liberty interest, then the constitutional argument against obscenity doctrine rises or falls with a more general argument against morals legislation.

56. *See, e.g.*, Mills v. Alabama, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (explaining that "[s]peech concerning public affairs . . . is the essence of self-government" and such expression "has always rested on the highest rung of the hierarchy of First Amendment values"); Roth v. United States, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."); Stromberg v. California, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.").

ideas rationale, the connection between hardcore pornography and democratic self-governance is not obvious. But if Scanlon is correct that exposure to hardcore pornography is a potentially important means of changing people's sexual mores, then the argument from democracy is indeed the most promising avenue for demonstrating that the Court's obscenity doctrine is inconsistent with a core free speech norm. This, in any event, is the argument on which I shall focus for the remainder of the article.

B. Democracy and Public Discourse

A right of speech essential to any democracy flows from the commitment to popular sovereignty: if the government prevents the people from speaking freely to each other about matters of public concern, then the people are no longer self-governing.[57] But the American free speech principle recognizes more than the right of the people to govern collectively. As fundamental is the *individual* right to participate freely and equally in the speech by which we govern ourselves, expression that the Court and commentators have referred to as "public discourse."[58] The opportunity for each citizen to participate in public discourse is vital to the legitimacy of the entire legal system.[59] If an individual is excluded from participation in the discussion by which public opinion is formed, either because the government disagrees with her views or thinks her ideas are too disturbing or dangerous, then any public policy decision made as a result of that opinion would, as to that individual, lack legitimacy. And if this decision is imposed on her by coercive measures, it would be tyrannical.[60]

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57. As James Madison explained, under our constitutional scheme, "[t]he people, not the government, possess the absolute sovereignty," DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 569 (J. Elliot ed., 1836), and therefore, "the censorial power is in the people over the Government, and not in the Government over the people." 3 ANNALS OF CONG. 934 (1794). *See also* Masses Publ'g Co. v. Patten, 244 F. 535, 540 (S.D.N.Y. 1917) (L. Hand, J.) (explaining that "public opinion" is "the final source of government in a democratic state"). In excluding hardcore pornography from First Amendment protection in *Roth*, Justice Brennan emphasized the core democratic purpose of the First Amendment, explaining that "[t]he protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth*, 354 U.S. at 476.

58. *See, e.g.*, Cohen v. California, 403 U.S. 15, 22 (1971); Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 603, 629–34 (1990).

59. *See* Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1134 (1993) (arguing that "public discourse serves the value of self-government because it engenders the sense of participation, identification, and legitimacy necessary to reconcile individual with collective autonomy").

60. *See* Robert Post, *Democracy and Equality*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 29 (2006) ("To the extent that the state treats citizens unequally in a relevant manner, say by allowing some citizens greater freedom of participation in public discourse than others, the state becomes heteronomous with respect to those citizens who are treated unequally. The state thereby loses its claim to democratic legitimacy with respect to those citizens.").

This concern for legitimacy embodied in a right to free and equal political participation explains why the First Amendment generally prohibits government from regulating the content of public discourse (though not the content of virtually all speech, as some have erroneously claimed).[61] And, as discussed above, it is not just the content of the speech that determines whether it will be considered highly protected public discourse, but the nature of the medium it employs as well.[62]

In addition to the right to participate in democratic self-governance as a speaker, audience interests are rigorously protected as well, but only in the space created by an important limitation on *the reasons* that government may regulate speech. When addressing us as the ultimate governors in a democratic society, government may not limit speech because it believes that the speech will lead us to make unwise or even disastrous social policy decisions. To regulate speech for this reason would violate the core democratic precept that the people are the ultimate sovereigns.[63]

For at least three reasons, the right to participate in democratic self-governance, both as a speaker and auditor is properly referred to as the core free speech norm.[64] First, this norm explains the pattern of the Court's decisions far better than any other contender.[65] Second, it grounds free speech as a true

61. *See, e.g.*, Barry P. McDonald, *Government Regulation or Other "Abridgments" of Scientific Research: The Proper Scope of Judicial Review Under the First Amendment*, 54 EMORY L.J. 979, 1009 (2005) ("The Court has generally taken an 'all-inclusive' approach to the protection of speech, asserting that all speech receives First Amendment protection unless it falls with[in] certain narrow categories of expression . . . such as incitement of imminent illegal conduct, intentional libel, obscenity, child pornography, fighting words and true threats."); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.47, at 1226 (6th ed. 2000) ("A content-based restriction of [speech] is valid only if it fits within a category of speech that the First Amendment does not protect, for example, obscenity."). Despite occasional rhetoric in the Court's opinions supporting such an "all-inclusive" approach, the actual pattern of the Court's decisions reveals that there is a vast area of speech beyond the "narrow category" of traditional exceptions that government is allowed to regulate on the basis of content without First Amendment hindrance. *See supra* note 31 and accompanying text; *infra* note 65. *See also* WEINSTEIN, *supra* note 31, at 40–43; James Weinstein, *Institutional Review Boards and the Constitution*, 101 NW. U. L. REV. 493, 535–36 (2006).

62. *See supra* text accompanying notes 34–38.

63. *See* Weinstein, *supra* note 38, at 1104–06. As the Court explained in *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 791–92 (1978): "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of the conflicting arguments . . . . [I]f there be any danger that the people cannot evaluate the information and arguments . . . it is a danger contemplated by the Framers of the First Amendment."

64. *See, e.g.*, NAACP v. Claiborne Hardware, 458 U.S. 886, 913 (1982) (explaining that "expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values'" and "[s]peech concerning public affairs is more than self-expression; it is the essence of self-government") (quoting Carey v. Brown, 447 U.S. 455, 467 (1980), and Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)).

65. It explains, for instance, why defamation of a public official is afforded considerable First Amendment protection, *see, e.g.*, New York Times v. Sullivan, 376 U.S. 254, 269–71 (1964), while defamation of a private person on a matter not of public concern is entitled to no First Amendment protection, *see, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S.

individual right, not just as an instrumental welfare concern. Third, regulations that infringe this individual right of participation are invariably held unconstitutional, even if the government can show that serious harm might result if the speech is left unregulated. For instance, even if the government could persuasively demonstrate that protests in the United States against the war in Iraq both dispirit our troops and encourage the insurgents to continue fighting, antiwar protests could still not be forbidden on those grounds.[66] Accordingly, it is clear beyond peradventure that the interest of individuals to participate in public discourse lies at the heart of the First Amendment. Much less obvious is what the production and distribution of hardcore pornography have to do with this interest.

C. Public Discourse and Hardcore Pornography

Upon initial consideration, any argument that the suppression of hardcore pornography violates this core democratic norm underlying free speech would seem difficult to sustain. As Ronald Dworkin argues:

> No one . . . is denied an equal voice in the political process, however broadly conceived, when he is forbidden to circulate photographs of genitals to the public at large, or denied his right to listen to argument when he is forbidden to consider these photographs at his leisure.[67]

But there is, in fact, a strong argument that the distribution of hardcore pornography is a particularly effective way for speakers to challenge people's views about sexual conventions. There is in addition a related argument that in banning hardcore pornography, government is attempting to prevent people from being persuaded to question conventional sexual mores, thereby violating the core precept that the government may not restrict speech because it will influence people's views on a matter of social policy. I will consider both of these arguments in turn.

749, 759–61 (1985); why an anti-war protestor has a right to wear a jacket outside a courtroom emblazoned with the message "Fuck the Draft," *see, e.g.*, Cohen v. California, 403 U.S. 15, 22 (1971), but why someone inside the courtroom has no right to use vulgar epithets, *see, e.g.*, State v. Lingwall, 637 N.W.2d 311, 314–15 (Minn. Ct. App. 2001); why a lawyer has a First Amendment right to solicit clients when "seeking to further political and ideological goals" through litigation, *In re* Primus, 436 U.S. 412, 414, 439 (1978), but not for ordinary economic reasons, *see, e.g.*, Ohralick v. Ohio State Bar Ass'n, 436 U.S. 447, 449 (1978); and why politically motivated economic boycotts receive rigorous First Amendment protection, *see, e.g.*, Claiborne Hardware, 458 U.S. at 913, while ordinary economic boycotts receive no First Amendment protection whatsoever, *see, e.g.*, FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 425–28 (1990).

66. Similarly, the First Amendment would not allow government to excise racist ideas from public discourse, even on the quite plausible grounds that such expression leads to discrimination against minorities. *See* WEINSTEIN, *supra* note 31, at 52–59. *See generally* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Virginia v. Black, 538 U.S. 343 (2003).

67. RONALD DWORKIN, A MATTER OF PRINCIPLE 335–36 (1985) (explaining why the right to pornography should be defended as part of the right of moral independence rather than on free speech grounds).

1. Pornography and Speakers' Interests in Participating in "Informal Politics"

In an article published the same year as Schauer's, Thomas Scanlon argued that if the political process is conceived broadly enough to include "informal politics," then suppression of even hardcore pornography would violate the core right of democratic participation.[68] Scanlon starts with the premise that "we all have legitimate and conflicting interests in the evolution of social attitudes and mores" and that the majority cannot "be empowered to preserve attitudes they like by restricting expression that would promote change."[69] Moreover, unlike a controversy about where to build a road, which needs to be definitively resolved at a particular time, fairness demands that the conflict about sexual mores be resolved through "a continuing process of 'informal politics' in which opposing groups attempt to alter or to preserve the social consensus through persuasion and example."[70] Scanlon therefore concludes that "if what partisans of pornography are entitled to (and what the restrictors are trying to deny them) is a fair opportunity to influence the sexual mores of the society," then these partisans are entitled to distribute pornography as a means of informal politics.[71] This argument deserves careful consideration.

a. Is There a Right to Use Hardcore Pornography to Influence Social Mores?

One might object that no right to democratic participation has been infringed, so long as those interested in challenging contemporary sexual mores are allowed to publicly critique or even condemn these standards in books, articles, television and radio debates and other traditional forms of public discussion. But as Scanlon correctly observes:

> [T]his argument rests on an overly cognitive and rationalistic idea of how people's attitudes change. Earnest treatises on the virtues of a sexually liberated society can be reliably predicted to have no effect on prevailing attitudes toward sex. What is more likely to have such an effect is for people to discover that they find exciting and attractive portrayals of sex which they formerly thought offensive or, vice versa, that they find boring and offensive what they had expected to find exciting and liberating.[72]

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68. Scanlon, *supra* note 3, at 544–45.

69. *Id.* at 544.

70. *Id.* at 545.

71. *Id.* Scanlon adds that this right of participation includes "at least a certain degree of access even to unwilling audiences." *Id.* at 545–46. *Cf.* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 78, 106–07 (Brennan, J., dissenting) (urging that obscenity doctrine allows distribution of hardcore pornography to consenting adults, but reserving the possibility that the state may have sufficiently weighty interests to regulate such distribution so as to protect the interests of unconsenting audiences).

72. *See* Scanlon, *supra* note 3, at 547. Scanlon cautiously qualifies this point by stating that he does "not assume that the factual claims behind this argument are correct." *Id.* In fact, there is

The ability of material to shape people's attitudes on matters of public concern through nonintellectual appeals is not limited to hardcore pornography. A novel or a movie that succeeds in making the audience identify with a victim of social or political injustice or otherwise allows the audience to "experience" the life of some sympathetic character is often a more effective way of influencing beliefs than is a political treatise or letter to the editor. This is one reason that movies and novels enjoy strong First Amendment protection even in the absence of any patent political content.[73]

A more substantial objection to Scanlon's position is that it proves too much. Anticipating arguments such as Scanlon's, Schauer agrees that "[a]lmost any activity is itself an argument for its propriety" but insists that "implicit in any meaningful constitutional definition of speech as communication is the idea that one can separate advocacy of an act from the act itself, even though the act contains an element of advocacy."[74] Thus, even if hardcore pornography "is implicitly making a statement that the depicted activities are desirable," hardcore pornography would, in Schauer's view, still not be entitled to any more First Amendment protection than running down the street naked (which "may be a statement about sexual values or an appeal for casting off our sexual inhibitions by doffing our clothes") or assassinating the president (which "is at once a violent act and a political statement").[75]

Once again, however, Schauer fails to account for the constitutional significance of the media that hardcore pornography utilizes: unlike the act of running down the street naked or assassinating the president, hardcore pornography makes use of conventional media of public communication and thus presumptively qualifies as speech protected by the First Amendment. Whether this presumption should be rebutted or sustained turns on if Schauer is right that hardcore pornography fails to promote any First Amendment value, or if, to the contrary, Scanlon is correct that hardcore pornography can have

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some empirical evidence that at least prolonged exposure to pornography can influence one's view on sexual mores. *See, e.g.*, Dolf Zillman, *Effects of Prolonged Consumption of Pornography*, *in* PORNOGRAPHY: RESEARCH ADVANCES AND POLICY CONSIDERATIONS 127–57 (Dolf Zillmann & Jennings Bryant eds., 1989) (finding, among other effects, that prolonged use of pornography promotes acceptance of pre- and extra-marital sexuality and spawns doubts about the value of marriage). *See also* Lynn Hunt, *Introduction* to THE INVENTION OF PORNOGRAPHY: OBSCENITY AND THE ORIGINS OF MODERNITY, 1500–1800, at 9–10 (L. Hunt ed., 1993) ("In early modern Europe, that is, between 1500 and 1800, pornography was most often a vehicle for using the shock of sex to criticize religious and political authorities."); Lynn Hunt, *Pornography and the French Revolution*, *in* THE INVENTION OF PORNOGRAPHY, *supra*, at 301 ("Politically motivated pornography helped bring about the [French] Revolution by undermining the legitimacy of the ancien regime as a social and political system.").

73. *See generally* Winters v. New York, 333 U.S. 507, 510 (1948) ("The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine.").

74. Schauer, *supra* note 1, at 925.

75. *Id.*

significant First Amendment value when used in an attempt to influence society's views about contemporary sexual mores.

Schauer seems to be arguing that even if people produce and distribute hardcore pornography with the specific intent to "plead[] the case for a different sexual vision" and to "open[] the mind to a different view of sexual mores,"[76] this material should nonetheless be denied protection because it persuades not through advocacy appealing to reason or the intellect, but only by allowing the viewer to experience the very activity that the government seeks to regulate.[77] There are two separate arguments here: (1) although pornography can be used to change people's views, it does not do so in a sufficiently intellectual fashion, and (2) use of pornography to change people's views requires the viewer to engage in an activity that the state may legitimately regulate. I shall deal with these two arguments in reverse order.

Schauer is incorrect that an activity is automatically disqualified from First Amendment coverage just because it consists of conduct that government could otherwise regulate. Suppose Congress passes a law requiring people to carry a national identity card, and that upon being issued such a card, someone burns it as an act of protest in a public square in violation of the very law she is protesting. Under current doctrine, this act would likely be considered "symbolic conduct" within the coverage of the First Amendment.[78] Because symbolic conduct is less rigorously protected than "pure" speech[79] and because the government arguably has a substantial interest in requiring citizens to carry a national identity card, the protestor might not have a First Amendment right to burn this document.[80] Still, there can be no doubt that the act has free speech value, bringing it within the coverage of the First Amendment.[81] Indeed, under certain circumstances, the free speech value of the speech in question may be such that the First Amendment would provide immunity to violate the very law being protested. Suppose, for instance, that instead of protesting the Vietnam War, the protestor in *Cohen v. California*[82] had wanted to challenge what he believed to be a repressive law against the use of profanity in public by carrying

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76. *Id.*

77. *See id.* at 926.

78. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 406 (1989).

79. *See id.*

80. *Cf.* United States v. O'Brien, 391 U.S. 367, 380, 382 (1968) (concluding that Congress has "a legitimate and substantial interest" in preventing people from burning their draft cards and holding that the anti-war protestor did not have a First Amendment right to burn his draft card).

81. Schauer himself notes: "Coverage is not the same as protection. If an activity is *covered* by the first amendment, regulation of that activity is evaluated in light of the heightened standard of review required by the first amendment. If the state cannot meet the burden of showing [the required level of] governmental interest in regulating covered activity, that activity is *protected* as well. But if the state can put forth a justification that withstands [the applicable] scrutiny, the activity is not protected even though it is covered." Schauer, *supra* note 1, at 905 n.33.

82. 403 U.S. 15 (1971) (upholding the right of an anti-war protestor to wear jacket bearing the message "Fuck the Draft").

a sign in a public forum that read "Free Speech Now" on one side and "Fuck Linguistic Oppression" on the other. In light of *Cohen*'s holding, not only would such speech be covered by the First Amendment, it would also likely be protected.

By the same token, if a speaker's interest in "plead[ing] the case for a different sexual vision"[83] brings hardcore pornography within the coverage of the First Amendment, then the state's interest in enforcing sexual morality would probably not be sufficient to justify suppression of this material.[84] The fact that such expression violates the very law or norm it is protesting is pertinent to the state's interest in regulating the material, but has nothing to do with the free speech value that such material might have.[85]

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83. Schauer, *supra* note 1, at 925.

84. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60–61 (1973) (finding that government can "legitimately act . . . to protect 'the social interest in order and morality'" except where legislation "impinges upon rights protected by the Constitution" (quoting Roth v. United States, 354 U.S. 476, 485 (1957))) (emphasis omitted). *See generally* Lawrence v. Texas, 539 U.S. 558, 571–74, 578 (2003) (holding that the government's general interest in morality is not sufficient to prohibit the exercise of a liberty interest specially protected by the Due Process Clause of the Fourteenth Amendment). Contrary to what appeared to be the well-established view that the interest in enforcing morality was not sufficient grounds for impinging a right "protected by the Constitution," in Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991), a plurality consisting of Chief Justice Rehnquist and Justices O'Connor and Kennedy held that although nude barroom dancing was "expressive conduct within the outer perimeters of the First Amendment, though . . . only marginally so," *id.* at 566, the state's interest in enforcing morals was sufficient grounds for prohibiting this activity. *Id.* at 569. This view was properly criticized by the late Gerald Gunther. *See* David A. Kaplan, *Good for the Left, Now Good for the Right*, NEWSWEEK, July 8, 1991, at 22 (quoting Professor Gunther as stating that "the [C]ourt is saying that public morality trumps legitimate rights of expression. That's never happened before."). In a subsequent nude dancing case, however, the same plurality as in *Barnes* (with the addition of Justice Breyer) made no mention of the morality rationale, relying exclusively instead on the governmental interest in combating the "secondary effects" associated with nude dancing establishments, such as violence, public intoxication and prostitution. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 290–96 (2000). In any event, even if the interest in morality is sufficient to override an activity such as nude dancing at the outer reaches of First Amendment coverage, this interest would not be sufficient to justify an activity much more connected to the core of the First Amendment, such as the use of pornography to influence people's views about sexual mores.

85. There is a related argument, which, although it does not deny the First Amendment value of hardcore pornography used in informal politics, would nonetheless deny it First Amendment coverage. In *Barnes v. Glen Theatre*, Justice Scalia argued that the application of a law banning public nudity to nude dancing should be upheld not because it "survives some lower level of First Amendment scrutiny," as the plurality found, "but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all." 501 U.S. at 572 (Scalia, J., concurring). *See also Pap's A.M.*, 529 U.S. at 307–08 (Scalia, J., concurring) (same). As discussed above, it is possible to conceptualize the viewing of hardcore sexual activity, either live or on film or video, as sexual conduct. *See supra* text accompanying notes 11–28. If a state were to prohibit hardcore pornography as part of a more general law forbidding the public display of sexual conduct, then under Justice Scalia's approach, such a prohibition arguably would not be subject to First Amendment scrutiny even when applied to hardcore pornography used to challenge sexual mores. Scalia's view has, however, not been adopted by the Court. Denying hardcore pornography used in informal politics First Amendment coverage on this ground would thus be inconsistent with the Court's expressive-conduct jurisprudence.

Schauer's second argument is, of course, a restatement of his basic thesis: hardcore pornography has no First Amendment value because it lacks cognitive content and is a "purely physical" experience.[86] If hardcore pornography had no other effect but to produce sexual stimulation, then Schauer would be correct in insisting that, despite its use of media of mass communication, hardcore pornography is no different from watching two prostitutes engage in sex, and thus it is devoid of free speech value. But if, as Scanlon argues, this material is used by people interested in challenging and changing society's sexual mores and is likely to have that effect, then with respect to such uses, how can it be said that this material has no free speech value? It is one thing to argue that because hardcore pornography appeals to our nonintellectual faculties, such material appears to have no more constitutional significance than a visit to a prostitute. It is quite another matter merely to repeat this argument when it is claimed that, despite its lack of intellectual appeal, hardcore pornography can be used as an effective way to challenge and change people's views about sexual mores. Other than to deny that hardcore pornography is in fact ever used in this way, to effectively counter this claim, one would have to argue that despite its ability to shape people's views on public issues, the way hardcore pornography brings about these changes categorically disqualifies it from First Amendment coverage.

Catherine MacKinnon makes such an argument when she maintains that pornography (and not just hardcore material) is not speech in the constitutional sense because it affects our views not through the use of ideas or persuasion but through a form of "primitive conditioning, with picture and words as sexual stimuli," a process that is "largely unconscious."[87] As an abstract matter, this argument raises the interesting question of whether a system of free speech should protect material that shapes people's views through nonintellectual processes. But the question we are investigating here is whether the exclusion of hardcore pornography from such protection is consistent with the system currently in place. Under this jurisprudence there is no exception for speech that shapes views by appealing to nonintellectual aspects of the human mind. To the contrary, the Court has explained that expression

> conveys not only ideas capable of relatively precise, detached explication but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more

86. *See supra* text accompanying notes 12–14.

87. CATHERINE MACKINNON, ONLY WORDS 16–17 (1993). *See also* Sunstein, *supra* note 48, at 616 (observing that the "'message' of pornography is communicated indirectly and not through rational persuasion").

important element of the overall message sought to be communicated.[88]

Accordingly, under current doctrine rousing music played in connection with a political speech or on a soundtrack accompanying a film with a political message would have First Amendment value, even though the process by which this music affects people's views is a form of "primitive conditioning" that is "largely unconscious."[89] More generally, a system of free speech whose deepest value is the political legitimacy that the opportunity to participate in the political process provides should not debar someone from using a crucial medium of public discourse just because the expression is likely to persuade in a nonintellectual manner. For this reason, the Court's solicitude for the emotive function of speech may well apply only to speech constituting public discourse and not to expression outside this realm, such as highly emotional personal disputes.[90] While confining the protection of purely emotive speech only to that used in public discourse might exclude ordinary use of hardcore pornography from First Amendment coverage, hardcore pornography used in informal politics to challenge conventional sexual mores would be entitled to protection as part of this discourse.

Recognizing, as he must, that "[t]he first amendment protects the communication of emotions or the appeal to emotions as much as it does the communication of normative or factual propositions," Schauer argues that "[t]he emotive is essentially an intellectual or mental process," while the "psychic stimulation" produced by hardcore pornography is "physical."[91] Schauer does not specify, however, the criteria he uses to conclude that materials expressing or appealing to emotions involve processes that are more "intellectual" or "mental" than pictures triggering sexual arousal. It certainly cannot be just because hardcore pornography produces a physical effect. Appeals to emotions, whether through words, pictures or music, can make us laugh, cry, clench our fists, jump in our seats or even feel sick to our stomachs. None of this would disqualify expression from First Amendment protection in a medium of mass communication used by a speaker as a means of trying to change people's

88. Cohen v. California, 403 U.S. 15, 26 (1971) (upholding the First Amendment right of an anti-war protestor to wear a jacket bearing the message "Fuck the Draft").

89. From a First Amendment perspective, the regulation of subliminal messages is different from the regulation of overt stimuli that may affect us in ways that are "largely unconscious." As Scanlon explains:

> A law against subliminal advertising could be acceptable on first amendment grounds because it could be framed as a prohibition simply of certain techniques—the use of hidden words or images . . . . When we are concerned with the apparent—as opposed to the hidden—content of expression, however, things become more controversial (even though it is true that what is clearly seen or heard may influence us, and may be designed to do so, in ways that we are quite unaware of).

Scanlon, *supra* note 3, at 548.

90. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (finding that abusive epithets directed to an individual are not speech within the meaning of the First Amendment).

91. Schauer, *supra* note 1, at 924.

attitudes on matters of public concern.[92]

But even if it is the case that hardcore pornography changes people's views by a process that is less "intellectual" or "mental" than material that appeals to the emotions, this still does not explain why hardcore pornography has no free speech value even when used in an attempt to change people's attitudes towards society's sexual mores. Perhaps Schauer means to argue that the process by which pornography shapes views is more "physical" than appeals to the emotions because the sexual stimulation pornography provides is essential to the process by which viewers discover "that they find exciting and attractive portrayals of sex which they formerly thought offensive."[93] But hardcore pornography is not unique in shaping views through such a "physical" process. The "rush" one gets from listening to rousing music can be every bit as physical as the stimulation supplied by hardcore pornography. If the physically stimulating effect of rousing music used by politicians to sell their message, or of a Beethoven symphony, has First Amendment value, how can it be said that the stimulating effect of pornography used by informal politicians to "plead[] the case for a different sexual vision"[94] is devoid of such value?

Schauer argues that unlike an emotional epithet as part of a political commentary or rousing music before a political speech, hardcore pornography is not mixed with intellectual appeal but is "purely physical."[95] In other words, appeals to the "nonintellectual" parts of the mind have free speech value only as a supplement to intellectual material, which is the true concern of the First Amendment.[96] Again, in the abstract, this is not an implausible rule for a system of free expression in a democratic society. It does not, however, represent the policy currently in place. To the contrary, an anti-abortion protestor has a right to forego any appeal to the intellect and instead distribute leaflets on a public street bearing only a photograph of an aborted fetus in an attempt to persuade

92. As discussed above, the fact that hardcore pornography produces a physical effect that is part of a continuum of activity that government has regulated from time immemorial may provide a justification for regulating hardcore pornography, or at least explain why we might conceive of the sexual stimulation caused by pornography as being more "act-like" than the laughter caused by a Marx Brothers film. *See supra* text accompanying notes 22–28. But this fact alone does not make the process by which the physical reaction occurs any less "intellectual" than appeals to emotions.

Alternatively, perhaps the distinction is that pornography, like some food advertising, appeals to appetites, not emotions. *Cf.* Plato's distinction between the appetites and the "thumos" ("high spirit" or loosely, "emotions"), which together with rationality constitute the three parts of the human soul. *See* PLATO, *supra* note 24, at Book IV, 399d. Or perhaps appeals to the emotions are typically more "intellectual" than appeals to appetites.

93. *See* Scanlon, *supra* note 3, at 547. *See also supra* note 72.

94. Schauer, *supra* note 1, at 925.

95. *Id.* at 924–25.

96. *See id.* at 925 ("[T]he government under the first amendment may censor physical stimulation but not mentally oriented art or literature producing physical stimulation. The essence of the exclusion of hardcore pornography from the first amendment is not that it has a physical effect, *but that it has nothing else.*").

people that abortion is wrong purely through the experience of disgust that this picture elicits.[97] Similarly, Mothers Against Drunk Driving would have a right to distribute a film that consisted solely of images depicting in gruesome detail the carnage that can result from drunk driving. Such purely emotional appeals would be protected precisely because of their power to shape people's views on matters of public concern.

By the same token, use of explicit photographs of sexual activity to appeal to some similarly nonintellectual mental processes to shape people's views on sexual mores has considerable free speech value.[98] To deny those wishing to critique and change sexual mores in this way access to media essential to the speech by which public opinion is formed would therefore seem to violate these would-be speakers' equal treatment in the political process. Accordingly, to the extent that people produce and distribute pornography to advocate "for a different sexual vision," Schauer's argument that viewing pornography is no different than visiting a prostitute becomes inapt.

b. Doctrinal Implications of the Right to Use Hardcore Pornography in Informal Politics

Though it fails with respect to hardcore pornography used to shape people's view on a matter of public concern, Schauer's argument retains its persuasive force with respect to non-political uses of hardcore pornography. As Scanlon recognizes, "while some publishers of 'obscene' materials have this kind of crusading intent, undoubtedly many others do not."[99] Scanlon therefore concedes that his argument may lead only to the conclusion that First Amendment protection "can be claimed where the participant's intent is of the relevant 'political' character."[100] On this view, "sexually offensive expression in the public forum need not be allowed where the intent is merely that of the pornographer—who aims only to appeal to a prurient interest in sex—but must be allowed where the participant has a 'serious' interest in changing society."[101] But Scanlon argues for a broader implication of his argument on the grounds that

97. *See, e.g.*, World Wide St. Preachers' Fellowship v. City of Owensboro, 342 F. Supp. 2d 634, 636, 641 (W.D. Ky. 2004) (upholding First Amendment right to display a detailed, color photograph of an aborted fetus at a street concert); Grove v. City of York, 342 F. Supp. 2d 291, 316 (M.D. Pa. 2004) (finding that plaintiffs' First Amendment rights were violated when government officials prohibited them from carrying signs depicting aborted fetuses). Like hardcore pornography, disgusting pictures can also stimulate a physical response, including in the case of disgusting pictures, facial grimacing, nausea and, in extreme cases, vomiting.

98. More particularly, if gruesome pictures can shape views by stimulating an unpleasant physical sensation (disgust), then hardcore pornography can influence views by stimulating a pleasurable physical sensation (sexual arousal). Conversely, hardcore pornography might even reveal to viewers that a practice that they formally thought was attractive (or even about which they had neutral feelings) is actually disgusting. *See* Scanlon, *supra* note 3, at 547.

99. Scanlon, *supra* note 3, at 546.

100. *Id.*

101. *Id.*

"distinctions based on participant intent" in determining the availability of First Amendment protection are "nearly always suspect."[102] He therefore concludes that all hardcore pornography should receive First Amendment protection.[103]

Scanlon is right to eschew any analysis on which First Amendment protection turns on the intent of the speaker.[104] Especially if, like hardcore pornography, the material at issue either challenges orthodox ideas or is likely to offend majoritarian sentiments, any conclusion about something as intangible as a speaker's state of mind is likely to be infected with the political ideology of the finder of fact.[105] But it might be argued that the proper solution to this problem is just the opposite of what Scanlon proposes: on what I take to be the fairly safe assumption that the number of people who produce or distribute pornography primarily for political purposes is relatively small in comparison to those who do so with "merely [the intent] of the pornographer,"[106] it could be argued that the interests of these few to participate in informal politics in this particular way can legitimately be forfeited for the sake of a workable doctrine. Such a solution would, however, be inconsistent with the basic premise that free speech in this country is truly an individual right and not just an important social welfare concern. The rights of those who want to use highly graphic sexual material in a medium of mass communication to change social conditions should not, therefore, be sacrificed due to their paucity of numbers, especially not for a reason as insubstantial as enforcing the view that the use of pornography for sexual stimulation is immoral.[107]

If, then, the only way to protect the interests of these speakers were to extend First Amendment protection to all distribution of hardcore pornography, then the solution Scanlon suggests would be justified despite the massive overprotection of sexually graphic speech that this would entail. It is not clear, however, that any such a radical solution is required. Rather, it may be possible within the confines of current doctrine to reconcile the rights of the few speakers who want to use hardcore pornography primarily for informal politics and the

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102. *Id.*

103. *Id.*

104. *See* F.E.C. v. Wisconsin Right to Life, Inc., 127 S.Ct. 2652, 2665 (2007) (opinion of Roberts, C.J., joined by Alito, J.) (finding that use of an "intent-based test" to determine whether a political advertisement falls within a ban on "electioneering communications" would "chill core political speech"). It should be noted, however, that despite the problems with intent-based analyses, the Court has occasionally adopted such an approach. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 360 (2003) (holding that speech or symbolic conduct such as cross burning that might otherwise be protected as core political speech is constitutionally proscribable as "intimidation" if a speaker "directs a threat to a person or group of persons *with the intent* of placing the victim in fear of bodily harm or death") (emphasis added).

105. *See* James Weinstein, *Free Speech, Abortion Access, and the Problem of Judicial Discrimination*, 29 U.C. DAVIS L. REV. 471, 474–81 (1996) (noting the danger of judicial viewpoint discrimination in highly ideological free speech cases and explaining how this danger is mitigated by "bright line" doctrinal rules).

106. Scanlon, *supra* note 3, at 546.

107. *See infra* note 127 and accompanying text.

government's interest in upholding public morality. This can be accomplished by an objective assessment of the content of the material and the context in which it is distributed.

Under current jurisprudence, a sexually graphic depiction in a highly protected medium is presumed to be speech protected by the First Amendment unless, taken as a whole, it: (1) appeals to the "prurient interest" in sex; (2) graphically describes or depicts "ultimate sexual acts"; and (3) lacks serious literary, artistic, *political* and scientific value—i.e., the presumption of protection is rebutted if the material is the usual hardcore pornographic fare.[108] Indeed, the entire *Miller* analysis can be understood as an attempt to assess in objective terms, rather than on some specific finding about subjective "participant intent," whether a given instance of publicly distributed, sexually graphic material is merely the act "of the pornographer—who aims only to appeal to the prurient interest in sex"[109]—rather than that of a "participant [in public discourse having] a 'serious' interest in changing society."[110]

On this view, the implicit assumption of *Miller* seems to be that sexually explicit material truly intended by the producer or distributor to persuade people about contemporary sexual mores rather than merely to provide sexual stimulation will bear some characteristic differentiating it from ordinary hardcore pornography.[111] This distinguishing characteristic will most often be found in the content of the material.[112] Even though mere exposure to graphic sexual content might be sufficient to shape views on sexual morality, it might nonetheless be reasonably assumed that those genuinely interested in influencing people's views in this way, rather than merely providing sexual arousal for its own sake, will usually combine the graphic depiction with some sort of argument. This does not mean, however, that someone whose primary purpose is to critique or change sexual mores would not have a right to produce or distribute sexually explicit material indistinguishable in terms of its content from run-of-the-mill hardcore pornography subject to prohibition under *Miller*. Like anti-war protesters who have a First Amendment right to use highly

108. *See* Miller v. California, 413 U.S. 15, 24 (1973). *See also supra* note 7.

109. Scanlon, *supra* note 3, at 546.

110. *Id.* Or more commonly, the act of a serious artist or scientist.

111. *See Miller*, 413 U.S. at 26 ("At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection.").

112. While the First Amendment strictly prohibits the government (including the judiciary) from discriminating based on the content of speech within public discourse, it does not and practically could not forbid government from considering content in order to determine whether the speech in question is in fact part of public discourse and is thus entitled to the rigorous protection against content discrimination appropriate to such speech. Thus, sympathetically viewed, the Court's obscenity doctrine can be seen as an attempt to separate graphic depictions of sex that function primarily as sexual stimulants from those that are legitimately part of public discourse or artistic expression.

inflammatory words and symbols to express their views,[113] those who want to produce or distribute pornography as a means of critique and persuasion should similarly have a right to control the form of their expression, including the right to eschew any overtly political content.

However, if the content does not reveal the "serious political value" of a work, then the context will have to do so. Under current law, context alone is sometimes sufficient to provide First Amendment protection to otherwise legally obscene material. Suppose that a research scientist studying the mechanisms of sexual arousal wants to use hardcore pornography to sexually stimulate his subjects in laboratory experiments. Even if this material might be proscribable under *Miller* if sold in an adult bookstore, when used in this context it would have sufficient "serious . . . scientific value" to warrant First Amendment protection.[114] By the same token, hardcore gay pornography presented to an audience by a gay activist in the hopes of persuading people that "they find exciting and attractive portrayals of sex which they formerly thought offensive"[115] would have "serious . . . political value" even if this same material would be legally obscene if distributed by a pornographer. The same would be true of hardcore pornographic material sold in a bookshop at the headquarters of an organization dedicated to changing society's sexual mores.[116]

I recognize, of course, that any attempt to isolate hardcore pornography with "serious" political value from the ordinary fare might prove unworkable in practice. If the Court expressly recognized an "informal politics" exception to obscenity in the way I have suggested, pornographers with no genuine interest in engaging in informal politics would likely add just enough political content to qualify for this exemption.[117] More problematically, the two categories of

113. *See* Cohen v. California, 403 U.S. 15 (1971) (holding that anti-war protestor has First Amendment right to wear jacket bearing the message "Fuck the Draft"); Texas v. Johnson, 491 U.S. 397 (1989) (holding that anti-war protester has right to burn the American flag).

114. *See Miller*, 413 U.S. at 26 (explaining that "medical books for the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy") (internal citations omitted).

115. *See* Scanlon, *supra* note 3, at 547.

116. First Amendment protection that turns on the context of speech is not limited to graphic depictions of sex. For instance, the use of profanity is protected in the context of a political demonstration by an antiwar protestor. *See Cohen*, 403 U.S. at 15. In contrast, use of profanity by a lawyer in the courtroom is not protected, *see, e.g.*, Jackson v. Bailey, 605 A.2d 1350, 1359 (Conn. 1992); nor is use of profanity by a teacher in a classroom, *see, e.g.*, Martin v. Parrish, 805 F. 2d 583, 585–86 (5th Cir. 1986). *See also Johnson*, 491 U.S. at 404 n.3 (although finding that the First Amendment protects the right to burn the American flag as a form of political protest, the Court notes that similar protection might not be available to someone who desecrates the flag with "no thought of expressing any idea").

117. After a plurality of the Court held in *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966), that a work must be "utterly without redeeming social value" to be judged obscene, hardcore pornography with only a modicum of political or social commentary became eligible for First Amendment protection. *See* FREDERICK F. SCHAUER, THE LAW OF OBSCENITY 42–43 (Bureau of National Affairs, Inc., 1976) ("In the years following the *Memoirs* decision, obscenity convictions were few and many of those were reversed because the material had some modicum of

speakers that we are considering—the political crusader and the pornographer interested "only" in appealing to the viewer's prurient interest—are in fact just two ends of a spectrum that includes those with mixed motives. Indeed, even grand-pornographer Larry Flynt, though obviously in the business for commercial reasons, saw himself as a crusader against contemporary sexual mores.[118] Would Flynt's massive commercial distribution of pornography, much of which would otherwise be arguably obscene under *Miller*, be entitled to First Amendment protection because of this subsidiary political purpose? Or would such an exemption apply only to those whose intent is *predominantly* political? If the former, then the political exception would render obscenity doctrine virtually useless; if the latter, then the task of determining which purpose predominates would make this doctrine extremely difficult to administer.

Because there have been relatively few successful obscenity prosecutions since *Miller* was decided,[119] the Court has not confronted these or other potential administrability problems. But my concern here is not with the practicalities of obscenity doctrine, but whether it is in principle consistent with the basic norms underlying the First Amendment as expressed in the rest of the Court's free speech jurisprudence. The analysis so far, while revealing several areas of tension, has found no such inconsistency. Rather, in accordance with the basic rule that any use of a medium essential to public discourse is presumptively protected by the First Amendment, graphic depictions of sexual conduct in these media are, despite the physical effect they produce for many viewers, deemed public discourse rather than sexual conduct; this material loses protection only if a court determines that, taken as a whole, it is merely an appeal "to the prurient interest in sex" rather than a "serious" attempt to engage in informal politics or some other activity having First Amendment value.[120]

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arguable social value."). *Miller v. California* attempted to tighten up this prong of the obscenity test by expressly rejecting the "utterly without redeeming social value" criterion and substituting the requirement that the material must, taken as a whole, lack "serious literary, artistic, political, or scientific value." 413 U.S. at 24. *See also id.* at 25 n.7 ("A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication . . . ." (quoting Kois v. Wisconsin, 408 U.S. 229, 231 (1972))).

118. "For the past thirty years, I've been trying to get us beyond our hang-ups. Explicit sex is my business, and I'm good at it because I believe in it. To me, good sex and good porn are the perfect antidotes to the hypocrisy that undermines our health as a nation. That's why I see both good sex and good porn as political acts." LARRY FLYNT, SEX, LIES & POLITICS: THE NAKED TRUTH 190 (Kensington Books, 2004). *But cf.* Schauer, *supra* note 1, at 923 ("The purveyor of the pornography is in the business solely of providing sexual pleasure; it is unrealistic to presume that he is anything but indifferent to the method by which pleasure is provided and profit secured. Similarly, there is no reason to believe that the recipient desires anything other than sexual stimulation.").

119. Koppelman reports that when cases involving child pornography and distribution to minors are excluded, there have been only five successful federal obscenity prosecutions since 2001. Koppelman, *supra* note 27, at 1640 n.22.

120. Of course, even if obscenity doctrine is consistent in principle with basic free speech norms, we should nevertheless be concerned if in practice obscenity doctrine were inhibiting those

2. Audience Interests and Impermissible Justifications for Suppressing Obscenity

Even if the core First Amendment right of *speaker* participation is not impaired by obscenity doctrine, the correlative core *audience* right could nonetheless be violated if the government's justification for banning this material is the concern that it might persuade people to reject current sexual mores. Even though those who produce and distribute hardcore pornography may rarely have the primary intent of persuading others to reject current attitudes towards sex and sexuality, there is evidence that viewing hardcore pornography can have just such an effect.[121] This raises the possibility that the reason, or at least one of the reasons, that government wants to suppress hardcore pornography is fear of its persuasive power. To complete this survey of the relationship between hardcore pornography and public discourse, I will briefly discuss this problem.

Suppose that in the next obscenity case that comes before the Court, the government justifies the ban on hardcore pornography solely on the ground that viewing this material threatens to undermine committed sexual relationships by persuading people that promiscuous sex is a preferable practice. Would the First Amendment forbid such a justification? This is an extremely difficult question to which doctrine does not supply a clear answer. In *R.A.V. v. City of St. Paul*,[122] the Court held that even unprotected categories of speech, such as fighting words, threats and obscenity, are not "entirely invisible to the Constitution" and thus may not be "made the vehicles for content discrimination

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who wished to use depictions of explicit sexual activity to challenge and change society's sexual mores. But unlike an analysis of whether obscenity doctrine is in principle consistent with a fundamental free speech norm, numbers may legitimately be taken into account in making this pragmatic assessment. If use of hardcore pornography as a means of informal politics were commonplace, and if many of these speakers insisted on using ordinary pornographic fare under circumstances that did not reveal their political intent, then the aggregate burden that obscenity doctrine might place on the ability of these speakers to participate in public discourse, though not in principle inconsistent with the core democratic free speech norm, might nonetheless provide a pragmatic reason for abandoning this doctrine. But if, as I have assumed, there are in fact very few such speakers, then obscenity doctrine need not be abandoned for this reason.

There may, however, be a related pragmatic argument for overruling obscenity doctrine that has more force: while there may be few who want to produce or distribute extremely graphic depictions of sex for overtly political purposes, use of such depictions in art or literature is much more common. In his dissent in *Paris Adult Theatre I v. Slaton*, Justice Brennan wrote that "[t]he essence of our problem in the obscenity area is that we have been unable to provide 'sensitive tools' to separate obscenity from other sexually oriented but constitutionally protected speech, so that efforts to suppress the former do not spill over into the suppression of the latter." 413 U.S. 49, 79–80 (1973). In particular, he feared that the inherent vagueness of the obscenity standard would "chill" protected expression. *Id.* at 93. In order to minimize such chilling of protected speech, obscenity doctrine as it has developed intentionally overprotects sexually explicit speech. *See* Schauer, *supra* note 1, at 931–32. But, even with such over-protection, if reasonable fear of prosecution nonetheless deters artists or writers from publishing non-obscene yet sexually graphic speech, the obscenity exception should be overruled.

121. *See supra* note 72 and accompanying text.

122. 505 U.S. 377 (1992).

unrelated to their distinctively proscribable content."[123] *R.A.V.*, it is true, involved an ordinance that singled out *a subset* of unprotected speech for proscription based on such constitutionally prohibited content discrimination, not an entire category of speech.[124] The logic of *R.A.V.* suggests, however, that government should be similarly disabled from justifying the exclusion of an entire category of speech based on a rationale that offends a core First Amendment precept. A much more difficult question is whether various possible justifications for banning obscenity actually violate this limitation on justifications for regulating even unprotected speech.

Much would depend on the precise nature of the government's justification—specifically, whether its ultimate concern is with regulating private behavior, which is arguably a legitimate grounds for regulating unprotected speech, or with controlling public decision making, which the First Amendment plainly forbids. For instance, if the government defended a ban of hardcore pornography on the ground that this material might lead people to be less interested in entering into committed sexual relationships, this justification, while troublesome, might pass constitutional muster. Indeed, the Court itself has offered a similar rationale for the suppression of hardcore pornography.[125] In

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123. *Id.* at 383–84.

124. The ordinance banned "fighting words" that "insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.'" *Id.* at 391.

125. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973) (companion case to *Miller*). Writing for a majority of the Court in *Paris Adult Theatre I*, Chief Justice Warren Burger observed:

> If we accept the unprovable assumption that a complete education requires the reading of certain books, and the well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character, can we then say that a state legislature may not act on the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior? . . . The sum of experience . . . affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.

Id. This justification is in tension with the Court's later condemnation of a similar rationale for suppressing virtual child pornography in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002). In rejecting the government's argument that computer-generated images of children "whet[] the appetite of pedophiles and encourage[] them to engage in illegal conduct," Justice Kennedy, writing for the Court, replied:

> The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. The government 'cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.' First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.

Id. at 253 (quoting Stanley v. Georgia, 394 U.S. 557, 566 (1969)) (internal citations omitted). Professor Koppelman's objection to obscenity doctrine similarly identifies this tension. Koppelman, *supra* note 27, at 1640–41 & n.26.

Perhaps the *Free Speech Coalition* Court's condemnation of this justification as

contrast, it would plainly violate the core democratic audience interest underlying the First Amendment for the state to justify the ban on pornography solely on the grounds that the change in attitude produced by viewing this material was likely to lead people to support more liberal policies on sex, such as repealing laws against prostitution or even the obscenity laws themselves.[126] As a practical matter, however, such a case is unlikely to arise, for the government could easily steer clear of this First Amendment problem by justifying the ban as a species of morals legislation.

On this view, just as it is morally wrong to have sex with a prostitute or outside of marriage or some other committed relationship, it is morally wrong for people to become aroused by looking at pictures of other people having sex.[127] This view is, of course, anathema to a key tenet of liberalism that the only legitimate reason for prohibiting an activity by force of law is "the prevention of harm or offense to [nonconsenting] parties other than the actor."[128] For this reason, a ban on hardcore pornography justified purely on such moral grounds might arguably violate the "liberty" protected by the Due Process Clause of the Fifth and Fourteenth Amendments.[129] It would not, however,

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"impermissible" was hyperbole and all the Court meant to say was that banning material because of its tendency to affect viewers' behavior in some negative way, including inducing criminal activity, is insufficient grounds for suppressing material that has First Amendment value.

126. An even less chartered area of free speech doctrine is whether a ban on nonexpressive conduct (that is, activity that is neither protected nor unprotected speech, nor expressive conduct) would be vitiated by a justification that would be an impermissible ground for regulating unprotected speech. Suppose, for instance, that government were to justify a ban on prostitution on the grounds that the experience of sex with a prostitute might show people that such an experience was far more "exciting and attractive" than they previously thought, and thus was likely to change their attitude towards society's sexual mores. Even if the state were to further justify such a ban solely on the grounds that the change in attitude this experience was likely to cause might lead people to support more liberal policies on sex, including repealing the laws against prostitution, it is not certain that the Court would invalidate such a ban. In light of the alternative legitimate rationales for regulation of nonexpressive conduct readily available, the Court might well hold that, although the stated justification may be technically impermissible, it is "harmless error."

127. *See* Koppelman, *supra* note 27, at 1636 ("The harm that [obscenity] doctrine seeks to prevent is not offense to unwilling viewers. It is not incitement to violence against women. It is not promotion of sexism. Rather it is *moral* harm—a concept that modern liberalism finds hard to grasp."). The traditional moralistic rationale for banning obscenity is to prevent its allegedly corrupting influence. *See* Regina v. Hicklin, 3 L.R.-Q.B. 360, 371 (1868) (explaining that a publication is obscene if it has a "tendency . . . to deprave and corrupt those whose minds are open to such immoral influences"). *See also Paris Adult Theatre I*, 413 U.S. at 63 (referring to the "corrupting and debasing impact" of hardcore pornography). Especially if an essential part of the rationale is that "moral corruption" leads to "antisocial behavior," a rationale based on the corrupting "tendency" or "impact" of hardcore pornography is more problematic from a First Amendment standpoint than one that simply holds that it is immoral to be sexually aroused by pictures of others having sex. *See supra* note 125.

128. *See* Jeffrie G. Murphy, *Legal Moralism and Liberalism*, 37 ARIZ. L. REV. 73, 75 (1995) (quoting Joel Feinberg, *Some Unswept Debris from the Hart-Devlin Debate*, 72 SYNTHESE 249 (1987)) (bracketed text in Murphy).

129. Until recently there was no doubt that legal moralism was constitutional unless the restriction unduly burdened a fundamental liberty interest or other constitutional right. *See, e.g.*,

implicate the core First Amendment precept that the people are the ultimate source of political power in a democracy and as such must be trusted both collectively and individually to decide any issue within their sovereign authority. Though retaining sovereignty over one's self and having sovereignty over one's government are both crucial values in a free and democratic society, they are very different concerns, with only the latter being properly within the purview of the First Amendment.[130]

Paris Adult Theatre I, 413 U.S. at 60–61 (holding that except where legislation "impinges upon rights protected by the Constitution," government can act "to protect the social interest in order and morality"). Justice Scalia believes that this view was put in doubt by *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (arguing in his dissent that the majority opinion striking down a state law criminalizing consensual homosexual sodomy between adults "effectively decrees the end of all morals legislation"). One can reasonably doubt, however, that this was the import of the Court's reasoning in *Lawrence*. *See, e.g.*, Williams v. Att'y Gen., 378 F.3d 1232, 1238 n.8 (11th Cir. 2004) (observing that "[o]ne would expect the Supreme Court to be manifestly more specific and articulate than it was in *Lawrence* if now such a traditional and significant jurisprudential principal [as the permissibility of morals legislation] has been jettisoned wholesale (with all due respect to Justice Scalia's ominous dissent notwithstanding)"). Nonetheless, a district court invalidated a federal law prohibiting the distribution of obscene material, holding that *Lawrence* rejects the constitutionality of morals legislation. *See* United States v. Extreme Assocs., Inc., 352 F. Supp. 2d 578, 587, 590–91 (W.D. Pa. 2005). In reversing the district court, the Court of Appeals held that even if *Lawrence* did undercut the rationale underlying obscenity laws, a matter on which it declined to opine, it was improper for a lower court to fail to follow directly applicable Supreme Court precedent until expressly overruled by the Court. *See* United States v. Extreme Assocs. Inc., 431 F.3d 150, 161–62 (3rd. Cir. 2005).

130. It could also be argued that regardless of any intention by a speaker to influence public attitudes towards sexual mores or some illicit motive by government to prevent such attitudes from forming, the availability of hardcore pornography nonetheless provides people with information needed for public decisions. For instance, some might maintain that hardcore pornography provides citizens with information about whether the legal system should promote more hedonistic visions of sexuality rather than committed sexual relationships such as marriage. But while *the experience* of viewing hardcore pornography may affect attitudes towards sexual mores, *see supra* note 72 and accompanying text, it is difficult to believe that it is the *informational content* of this material that is responsible for the changed attitudes. Rather, as Scanlon suggests, the experience allows "people to discover that they find exciting and attractive portrayals of sex which they formerly thought offensive." *See* Scanlon, *supra* note 3, at 547. In any event, as I have discussed in detail elsewhere, although assuring informational flow necessary for public decision making is an important free speech norm, it is not a core one. *See* Weinstein, *supra* note 38, at 1108–09. Thus, regulations are rarely invalidated just because they interfere with information flow needed for public decision making. *Id.* at 1109 & n.76. Rather, the Court usually defers to legislative conclusions that restrictions on information concerning matters of public concern are justified by some greater social welfare consideration. *Id.* Accordingly, for hardcore pornography to be protected on this theory, it would have to be demonstrated that the ban on this material significantly impedes information needed for public decision making, which seems unlikely.

A better argument is that hardcore pornography provides viewers with information about sex that is personally useful. *See* THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 191–92, 314–16 (Bantam Books 1970) (finding that sexually explicit material can be a significant source of sexual information for many). In extending First Amendment protection to ordinary commercial advertising, the Court noted that in addition to providing information needed to decide matters of public concern, such speech aids private economic decision making. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976). If communications that promote useful economic information have First Amendment value, it is difficult to see why communications that provide useful sexual information should not have such

CONCLUSION

Although the search for truth through the clash of antithetical, powerfully argued ideas is not a core value underlying free speech doctrine, it is an indispensable means for gaining a better understanding of social phenomena, including free speech doctrine itself. In this article, I have pitted what I consider to be the best defense of the Court's obscenity doctrine against a particularly trenchant criticism of that doctrine. In the best Millian tradition, both arguments "contain a portion of the truth."[131] Schauer persuasively argues that for most of its uses hardcore pornography has no more free speech value than viewing live sex, but is unable to sustain the view that this material lacks First Amendment value when used in an attempt to change people's attitudes about sexual mores. Conversely, Scanlon persuasively argues that people have a First Amendment right, grounded in the core precept of equal participation in the political process, to use hardcore pornography to challenge society's sexual mores, but fails to make the case that First Amendment protection needs to be extended to all uses of hardcore pornography in order to vindicate this right.

This clash of ideas produces the following synthesis: so long as First Amendment protection is extended to those who want to use pornography to challenge society's sexual mores, the exclusion of other uses of hardcore pornography from First Amendment protection is, in principle, consistent with the overall structure and animating values of the Court's contemporary free speech jurisprudence. This does not mean, however, that obscenity doctrine necessarily comports with the best understanding of free speech doctrine all things

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protection. Still, while graphic depictions of sexual conduct might be necessary to fully convey sexual information, depictions that appeal to "the prurient interest " of the audience would not seem essential to this purpose. Thus, the audience's constitutional interest in receiving information about sex would seem satisfied so long as the government does not try to regulate the explicitness of depictions in sex manuals and the like. Arguably, material that is both explicit and "prurient" in its appeal might convey useful information that sex manuals or other "serious" discussions of sex cannot, or can do so in a way that better conveys this information. But this is a contention that would have to be proved in order show that the suppression of hardcore pornography interferes with the right to information recognized in *Virginia State Board of Pharmacy*.

Finally, despite the existence of laws banning obscene material, as Koppelman notes, hardcore pornography is readily available to anybody with unfiltered access to the Internet, not to mention in adult bookstores in most large communities and even in many hotel rooms in the United States. *See* Koppelman, *supra* note 27, at 1657–58. Thus, as a practical matter, whatever valuable information may be conveyed by hardcore pornography is not currently imperiled by obscenity doctrine. In this regard, it should be noted that although there is no constitutional right to distribute legally obscene material, there is a constitutional right to possess and view this material in the privacy of one's home. *See* Stanley v. Georgia, 394 U.S. 557, 568 (1969) ("[T]he First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime."). While in principle, obscenity doctrine is not inconsistent with the rest of the Court's free speech jurisprudence, *Stanley* is notoriously inconsistent with the underpinnings of obscenity doctrine. Thus, the best explanation of *Stanley* is that it was a stepping stone to the overruling of obscenity doctrine, which, because of changes in the composition of the Court, did not materialize. *Accord*, Koppelman, *supra* note 27, at 1656 n.108.

131. *See* MILL, *supra* note 46, at 97.

considered, for pragmatic concerns are among the things that must be considered in constructing optimal legal doctrine. Although in principle the typical use of hardcore pornography is not entitled to any First Amendment protection, it may be that the very existence of criminal sanctions against distribution of this material has a substantial chilling effect on expression that is entitled to First Amendment protection. If this is the case, then obscenity doctrine should be abandoned. This, however, is a question that theory alone cannot answer.