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Freedom of expression and categories of expression

I. INTRODUCTION

Freedom of expression, as a philosophical problem, is an instance of a more general problem about the nature and status of rights. Rights purport to place limits on what individuals or the state may do, and the sacrifices they entail are in some cases significant. Thus, for example, freedom of expression becomes controversial when expression appears to threaten important individual interests in a case like the Skokie affair, or to threaten some important national interest such as the ability to raise an army. The general problem is, if rights place limits on what can be done even for good reasons, what is the justification for these limits?

A second philosophical problem is how we decide what these limits are. Rights appear to be something we can reason about, and this reasoning process does not appear to be merely a calculation of consequences. In many cases, we seem to decide whether a given policy infringes freedom of expression simply by consulting our conception of what this right entails. And while there are areas of controversy, there is a wide range of cases in which we all seem to arrive at the same answer. But I doubt that any of us could write out a brief, noncircular definition of freedom of expression whose mechanical application to these clear cases would yield the answers on which we all agree. In what, then, does our agreement consist?

My aim in this essay is to present an account of freedom of expression that provides at least a few answers to these general questions. I will also address a more specific question about freedom of expression itself. What importance should a theory of freedom of expression assign to categories of expression such as political speech, commercial speech, libel, and pornography? These

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categories appear to play an important role in informal thought about the subject. It seems central to the controversy about the *Skokie* case, for example, that the proposed ordinance threatened the ability of unpopular *political* groups to hold demonstrations.[1] I doubt whether the residents of Skokie would have been asked to pay such a high price to let some other kind of expression proceed. To take a different example, laws against false or deceptive advertising and the ban on cigarette advertising on television suggest that we are willing to accept legal regulation of the form and content of commercial advertising that we would not countenance if it were applied to other forms of expression. Why should this be so?

While I do not accept all of these judgments, I find it hard to resist the idea that different categories of expression should to some degree be treated differently in a theory of freedom of expression. On the other hand some ideas of freedom of expression seem to apply across the board, regardless of category: intervention by government to stop the publication of what it regards as a false or misleading view seems contrary to freedom of expression whether the view concerns politics, religion, sex, health or the relative desirability of two kinds of automobile. So the question is, to what extent are there general principles of freedom of expression, and to what extent is freedom of expression category-dependent? To the degree that the latter is true, how are the relevant categories defined?

I will begin by considering the individual interests that are the basis of our special concern with expression. In section III I will consider how several theories of freedom of expression have been based on certain of these interests, and I will sketch an answer to the first two questions raised above. Finally, in sections IV and V, I will discuss the place of categories of expression within the framework I have proposed and apply this to the particular categories of political speech, commercial speech, and pornography.

II. INTERESTS

What are the interests with which freedom of expression is concerned? It will be useful to separate these roughly into those interests we have in being able to speak, those interests we have in being exposed to what others have to say, and those interests we have as bystanders who are affected by expression in other ways. Since, however, I want to make it clear that "expression" as I am using it is not limited to speech, I will refer to these three groups of

[1] *Village of Skokie* v. *National Socialist Party of America*, 69 Ill. 2d 605, 373 N.E. 2d 21 (1978).

interests as the interests of participants, the interests of audiences, and the interests of bystanders.

A. Participant interests

The actions to which freedom of expression applies are actions that aim to bring something to the attention of a wide audience. This intended audience need not be the widest possible audience ("the public at large"), but it must be more than one or two people. Private conversations are not, in general, a matter of freedom of expression, not because they are unimportant to us but because their protection is not the aim of this particular doctrine. (It is a matter, instead, of privacy or of personal liberty of some other sort.) But private conversations might be viewed differently if circumstances were different. For example, if telephone trees (or whispering networks) were an important way of spreading the word because we lacked newspapers and there was no way for us to gather to hear speeches, then legal restrictions on personal conversations could infringe freedom of expression as well as being destructive of personal liberty in a more general sense. What this shows, I think, is that freedom of expression is to be understood primarily in terms of the interests it aims to protect and only secondarily in terms of the class of actions whose protection is, under a given set of circumstances, an adequate way to safeguard these interests.

The most general participant interest is, then, an interest in being able to call something to the attention of a wide audience. This ability can serve a wide variety of more specific purposes. A speaker may be interested in increasing his reputation or in decreasing someone else's, in increasing the sales of his product, in promoting a way of life, in urging a change in government, or simply in amusing people or shocking them. From a social point of view, these interests are not all equally important, and the price that a society is required to pay in order to allow acts of expression of a particular kind to flourish will sometimes be a function of the value of expression of that kind.

This is one reason why it would be a mistake to look for a distinction between pure speech (or expression), which is protected by freedom of expression, and expression that is part of some larger course of action, which is not so protected. It is true that some acts of expression seem not to qualify for First Amendment protection because of the larger courses of action of which they are a part (assault, incitement). But what distinguishes these from other acts of expression is not just that they are part of larger courses of action (which is true of almost all acts of expression), but rather

the character of the particular courses of action of which they form a part. Their exclusion from First Amendment protection should be seen as a special case of the more general phenomenon just mentioned: the protection to which an act of expression is entitled is in part a function of the value of the larger purposes it serves.

This cannot mean, of course, that the protection due a given act of expression depends on the actual value of the particular purposes at which it aims. It would be clearly antithetical to freedom of expression, for example, to accord greater protection to exponents of true religious doctrines than to exponents of false and misleading ones. Despite the fact that the objectives at which these two groups aim are of very different value, their acts of expression are (other things being equal) accorded equal status. This is so because the "further interest" that is at stake in the two cases is in fact the same, namely the interest we all have in being able to follow and promote our religious beliefs whatever they may be.

Here, then, is one way in which categories of expression arise. We are unwilling to bear the social costs of granting to just any expressive purpose the opportunities for expression that we would demand for those purposes to which we, personally, attach greatest importance. At the most concrete level, however, there is no agreement about the values to be attached to allowing particular acts of expression to go forward. It is just this lack of consensus, and the consequent unacceptability of allowing governments to regulate acts of expression on the basis of their perceived merits, that makes freedom of expression an important issue. In order to formulate a workable doctrine of freedom of expression, therefore, we look for something aproaching a consensus on the relative importance of interests more abstractly conceived – the interest in religious expression, the interest in political expression, etc. Even this more abstract consensus is only approximate,[2] however, and never completely stable. As people's values change, or as a society becomes more diverse, consensus erodes. When this happens, either the ranking of interests must change or the categories of interests must be redefined, generally in a more abstract manner.[3] Recent shifts in attitudes toward religion have

[2] How the existence of an approximate consensus, even though it is only approximate, can contribute to the legitimacy of the agreed-upon values as a basis for justification is a difficult problem which I cannot here discuss.

[3] I have assumed here that categories of interests are disrupted by a decrease in consensus and an increase in diversity of views since this is the course of change we are most familiar with. I suppose that the reverse process – in which increasing consensus makes an abstract category seem pointlessly abstract and leads to its being redefined to include what was before only a special case – is at least possible. On the former, more familiar kind of transition, see E. Durkheim, "Individualism and the Intellectuals," in R. Bellah, ed., *Emile Durkheim on Morality and Society* (Chicago: University of Chicago

provoked changes of both these kinds. As religion (or, as it is more natural to say here, *one's* religion) has come to be seen more as a matter of private concern on a par with other private interests, it has become harder to justify assigning religious concerns the preeminent value they have traditionally received. In order to make contemporary sense of this traditional assignment of values, on the other hand, there has been a tendency to redefine "religion" more abstractly as "a person's ultimate values and deepest convictions about the nature of life," thereby preserving some plausibility for the claim that we can all agree on the importance of religion in one's life even though we may have different beliefs.

The categories of participant interests I have been discussing are naturally identified with familiar categories of expression: political speech, commercial speech, etc. But we should not be too quick to make this identification. The type of protection that a given kind of expression requires is not determined by participant values alone. It also depends on such factors as the costs and benefits to nonparticipants and the reliability of available forms of regulation. Not surprisingly, these other factors also play a role in how categories of expression are defined. As will later become apparent, the lack of clarity concerning these categories results in part from the difficulty of seeing how these different elements are combined in their definition.[4]

B. Audience interests

The interests of audiences are no less varied than those of participants: interests in being amused, informed on political topics, made aware of the pros and cons of alternatives available in the market, and so on. These audience interests conflict with those of participants in an important way. While participants sometimes aim only at communicating with people who are already interested in what they have to present, in a wide range of important cases their aims are broader: they want to gain the attention of

Press, 1973), p. 43. See also E. Durkheim, *Division of Labor in Society*, trans. G. Simpson (1933). Perhaps Marx's view of the transition to a socialist society includes an instance of the latter kind.

[4] Here libel provides a good example. One reason for assigning it low status as a category of expressive acts is the low value attached to the participant interest in insulting people and damaging their reputations. This is something we sometimes want to do, but it gets low weight in our social calculus. Another reason is the high value we attach to not having our reputations damaged. These are not unrelated, but they do not motivate concern with the same class of actions. Other relevant considerations include the interest we may have in performing or having others perform acts which incidentally damage reputations. A defensible definition of libel as a category of expressive acts will be some resultant of all these factors, not simply of the first or the second alone.

people who would not otherwise consider their message. What audiences generally want, on the other hand, is to have expression available to them should they want to attend to it. Expression that grabs one's attention whether one likes it or not is generally thought of as a cost. But it should not be thought of only as a cost, even from the audience's point of view. As Mill rightly emphasized,[5] there is significant benefit in being exposed to ideas and attitudes different from one's own, though this exposure may be unwelcome. If we had complete control over the expression we are exposed to, the chances are high that we would use this power to our detriment. The important and difficult question, however, is, when unwanted exposure to expression is a good thing from the audience's point of view.

This question is relatively easy to answer if we think of it as a problem of balancing temporary costs of annoyance, shock or distraction against the more lasting benefits of a broadened outlook or deepened understanding. But it becomes more complicated if we take into account the possibility of more lasting costs such as being misled, having one's sensibilities dulled and cheapened, or acquiring foolish desires. This balancing task is simplified in the way we often think about expression by a further assumption about the audience's control. We are inclined to think that what would be ideal from the audience's point of view would be always to have the choice whether or not to be exposed to expression. Similarly, we have a tendency to assume that, having been exposed, an audience is always free to decide how to react: what belief to form or what attitude to adopt. This freedom to decide enables the audience to protect itself against unwanted long-range effects of expression. If we saw ourselves as helplessly absorbing as a belief every proposition we heard expressed, then our views of freedom of expression would be quite different from what they are. Certainly we are not like that. Nonetheless, the control we exercise over what to believe and what attitudes to adopt is in several respects an incomplete protection against unwarranted effects of expression.

To begin with, our decisions about what to believe are often mistaken, even in the best of circumstances. More generally, the likelihood of our not being mistaken, and hence the reliability of our critical rationality as a defense mechanism, varies widely from case to case depending on our emotional state, the degree of background information we possess, and the amount of time and energy we have to assess what we hear. As these things vary, so too does the value of being exposed to expression and the value of being able to avoid it. Commonly recognized cases of diminished

[5] J. Mill, *On Liberty*, ed. C. Shields (New York: Bobbs-Merrill, 1956), ch. 2.

rationality such as childhood, panic, and mental illness are just extreme instances of this common variation.

Quite apart from the danger of mistakenly believing what we hear, there is the further problem that a decision to disbelieve a message does not erase all the effects it may have on us. Even if I dismiss what is said or shown to me as foolish and exaggerated, I am slightly different for having seen or heard it. This difference can be trivial but it can also be significant and have a significant effect on my later decisions. For example, being shown powerful photographs of the horrors of war, no matter what my initial reaction to them may be, can have the effect of heightening (or ultimately of dulling) my sense of the human suffering involved, and this may later affect my opinions about foreign policy in ways I am hardly aware of.

Expression influencing us in this way is a good thing, from the point of view of our interests as audiences, if it affects our future decisions and attitudes by making us aware of good reasons for them, so long as it does not interfere with our ability to weigh these reasons against others. Expression is a bad thing if it influences us in ways that are unrelated to relevant reasons, or in ways that bypass our ability to consider these reasons. "Subliminal advertising" is a good example of this. What is bad about it is not just that it is "subliminal," i.e. that we are influenced by it without being aware of that influence. This, I think, happens all the time and is, in many cases, unobjectionable. What is objectionable about subliminal advertising, if it works, is that it causes us to act – to buy popcorn, say, or to read Dostoevsky – by making us think we have a good reason for so acting, even though we probably have no such reason. Suddenly finding myself with the thought that popcorn would taste good or that *Crime and Punishment* would be just the thing is often good grounds for acting in the relevant way. But such a thought is no reason for action if it is produced in me by messages flickered on the screen rather than by facts about my present state that indeed make this a good moment to go out for popcorn or to lie down with a heavy book.

I have assumed here that subliminal advertising works by leading us to form a false belief: we acquire a positive feeling toward popcorn which we then take, mistakenly, to be a sign that we would particularly enjoy some popcorn. One can easily imagine, however, that the effect is deeper.[6] Suppose that what the advertising does is to change us so that we both have a genuine desire for popcorn and will in fact enjoy it. One can still raise

[6] Here I am indebted to the discussion following the presentation of this paper at Berkeley and to comments by members of my graduate seminar for the Spring Term, 1979.

the question whether being affected in this way is a good thing for us, but an answer to it cannot rely on the claim that we are made to think that we have a reason to buy popcorn when in fact we do not. For in this case we will have as good a reason to buy popcorn as we ever do: we want some and will enjoy it if we get it. Advertising of this kind will be a bad thing from the audience's point of view if one is worse off for having acquired such a desire, perhaps because it leads one to eat unhealthily, or because it distracts one from other pursuits, or for some other reason.

It is particularly galling to think of such effects being produced in us by another agent whose aim is to have us benefit him through actions we would not otherwise choose. But the existence of a conscious manipulator is not essential to the objections I have presented. It is a bad thing to acquire certain desires or to be influenced by false reasons, and these things are bad whether or not they are brought about by other agents. But while the existence of a conscious manipulator is not essential to this basic objection, it can be relevant in two further ways. What we should want in general is to have our beliefs and desires produced by processes that are reliable – processes whose effectiveness depends on the grounds for the beliefs and on the goodness of the desires it produces. We prefer to be aware of how we are being affected partly because this critical awareness increases the reliability of the process; although, as I have said, this safeguard is commonly overrated. Particularly where effects on us escape our notice, the existence of an agent controlling these effects can decrease the reliability of the process: the effects produced will be those serving this agent's purposes, and there may be no reason to think that what serves his purposes will be good from our point of view. (Indeed, the reverse is suggested by the fact that he chooses surreptitious means.) So the existence of a controlling agent can be relevant because of its implications for the reliability of the process. Beyond the question of reliability, however, we may simply prefer to have the choice whether or not to acquire a given desire; we may prefer this even where there is no certainty as to which desire it is better to have. This provides a further reason for objecting to effects produced in us by others (although this reason seems to hold as well against effects produced by inanimate causes).

The central audience interest in expression, then, is the interest in having a good environment for the formation of one's beliefs and desires. From the point of view of this interest, freedom of expression is only one factor among many. It is important to be able to hear what others wish to tell us, but this is not obviously more important than having affirmative rights of access to important information or to basic education. Perhaps freedom of expression is thought to differ in being purely negative: it consists merely in

not being denied something and is therefore more easily justified as a right than are freedom of information or the right to education, which require others to provide something for us. But this distinction does not withstand a careful scrutiny. To begin with, freedom of expression adequately understood requires affirmative protection for expression, not just the absence of interference. Moreover, even nonintervention involves costs, such as the annoyance and disruption that expression may cause. On the other side, restrictions on freedom of information include not only failures to provide information but also attempts to conceal what would otherwise become public. When a government makes such an attempt for the purpose of stopping the spread of undesirable political opinions, this contravenes the same audience interests as an attempt to restrict publication, and the two seem to be objectionable on the same grounds. The fact that there is in the one case no "participant" whose right to speak is violated, but only a fact that remains undiscovered, seems not to matter.

C. Bystander interests

I have mentioned that both participants and audiences can sometimes benefit from restrictions on expression as well as from the lack thereof. But the most familiar arguments for restricting expression appeal to the interests of bystanders. I will mention these only briefly. First are interests in avoiding the undesirable side effects of acts of expression themselves: traffic jams, the noise of crowds, the litter from leafletting. Second, and more important, are interests in the effect expression has on its audience. A bystander's interests may be affected simply by the fact that the audience has acquired new beliefs if, for example, they are beliefs about the moral character of the bystander. More commonly, bystanders are affected when expression promotes changes in the audience's subsequent behavior.

Regulation of expression to protect any of these bystander interests can conflict with the interests of audiences and participants. But regulation aimed at protecting bystanders against harms of the first type frequently strikes us as less threatening than that aimed at protecting bystanders against harmful changes in audience belief and behavior. This is true in part because the types of regulation supported by the two objectives are different. Protecting bystanders against harmful side effects of acts of expression calls for regulation only of the time, place, and manner of expression, and in many cases such regulation merely inconveniences audiences and participants. It *need* not threaten central interests in expression. Regulation to protect interests of the second kind, however, must, if it is successful, prevent

effective communication of an idea. It is thus in direct conflict with the interests of participants and, at least potentially, of audiences as well. But this contrast is significant only to the degree that there are some forms of effective expression through which participant and audience interests can be satisfied without occasioning bystander harms of the first type: where there is no surplus of effective means of expression, regulation of time, place, and manner can be just as dangerous as restrictions on content.

III. THEORIES

Although "freedom of expression" seems to refer to a right of participants not to be prevented from expressing themselves, theoretical defenses of freedom of expression have been concerned chiefly with the interests of audiences and, to a lesser extent, those of bystanders. This is true, for example, of Mill's famous defense in *On Liberty*,[7] which argues that a policy of noninterference with expression is preferable to a policy of censorship on two grounds: first, it is more likely to promote the spread of true beliefs and, second, it contributes to the well-being of society by fostering the development of better (more independent and inquiring) individuals. A similar emphasis on audience values is evident in Alexander Meiklejohn's theory.[8] He argues that First Amendment freedom of speech derives from the right of citizens of a democracy to be informed in order that they can discharge their political responsibilities as citizens.

This emphasis can be explained, I think, by the fact that theories of freedom of expression are constructed to respond to what are seen as the most threatening arguments for restricting expression. These arguments have generally proceeded by calling attention to the harms that unrestricted expression may bring to audiences and bystanders: the harm, for example, of being misled, or that of being made less secure because one's neighbors have been misled or provoked into disaffection and unrest. The conclusion drawn is that government, which has the right and even the duty to protect its citizens against such harms, may and should do so by preventing the expression in question. Responding to this argument, theories of freedom of expression have tended to argue either that the interests in question are not best protected by restricting expression (Mill) or that "protecting" citizens in this way is illegitimate on other grounds (Meiklejohn).

The dialectical objective of Mill's argument helps to explain why, although he professes to be arguing as a utilitarian, he concentrates on just

[7] Mill, *On Liberty*, ch. 2. [8] A. Meiklejohn, *Political Freedom* (New York: Harper & Row, 1960).

two goods, true belief and individual growth, and never explicitly considers how these are to be balanced off against other goods that would have to be taken into account in a full utilitarian argument.

The surprising narrowness of Meiklejohn's theory can be similarly explained. Meiklejohn was reacting against the idea that a "clear and present danger" could justify a government in acting to protect its citizens by curbing the expression of threatening political ideas. This seemed to him to violate the rights of those it claimed to protect. Accordingly, he sought to explain the "absolute" character of the First Amendment by basing it in a right to be informed and to make up one's own mind. But is there such a right? Meiklejohn saw the basis for one in the deliberative role of citizens in a democratic political order. But a right so founded does not apply to all forms of expression. Debates over artistic merit, the best style of personal life, or the promotion of goods in the marketplace may have their importance, but Meiklejohn saw these forms of expression as pursuits on a par with many others, unable to claim any distinct right to immunity from regulation. He was thus led to concede that these activities, in the main, fall outside the area of fundamental First Amendment protection or, rather, that they qualify for it only insofar as their general importance makes them relevant to political decisions.

This narrowness is an unsatisfactory feature of what is in many ways an interesting and appealing theory. Moreover, given this emphasis on political rights as the basis of First Amendment protection of speech, it is particularly surprising that Meiklejohn's theory should take audience values – the right of citizens to be informed – as the only fundamental ones. For prominent among the political rights of democratic citizens is the right to participate in the political process – in particular, the right to argue for one's own interests and point of view and to attempt to persuade one's fellow citizens. Such rights of participation do not entirely derive from the need of one's fellow citizens to be informed; the right to press one's case and to try to persuade others of its validity would not evaporate if it could be assumed that others were already perfectly informed on the questions at issue. Perhaps Meiklejohn would respond by saying that what is at stake is not a matter of being informed in the narrow sense of possessing all the relevant information. Democratic citizens also need to have the arguments for alternative policies forcefully presented in a way that makes their strengths and weaknesses more apparent, stimulates critical deliberation and is conducive to the best decision. Surely, it might be asked, when political participation reaches the point where it becomes irrelevant to or even detracts from the possibility of good political decisions, what is the

argument in its favor? I will return to this question of the relation between participant and nonparticipant interests in section v.[9]

Several years ago I put forward a theory of freedom of expression[10] that was very much influenced by Meiklejohn's views. Like him, I wanted to state a principle of freedom of expression which had a kind of absoluteness or at least a partial immunity from balancing against other concerns. But I wanted my theory to be broader than Meiklejohn's. I wanted it to cover more than just political speech, and I thought it should give independent significance to participant and audience interests. The basis of my theory was a single, audience-related principle applying to all categories of expression.

The Millian Principle
There are certain harms which, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of a justification for legal restrictions on these acts. These harms are: (a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; (b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing.[11]

I undertook to defend this principle by showing it to be a consequence of a particular idea about the limits of legitimate political authority: namely that the legitimate powers of government are limited to those that can be defended on grounds compatible with the autonomy of its citizens – compatible, that is, with the idea that each citizen is sovereign in deciding what to believe and in weighing reasons for action.[12] This can be seen as a generalized version of Meiklejohn's idea of the political responsibility of democratic citizens.

The Millian Principle was intended to rule out the arguments for censorship to which Mill and Meiklejohn were responding. It did this by ruling that the harmful consequences to which these arguments appeal cannot count as potential justifications for legal restriction of expression. But there are other ways to arrive at policies that would strike us as incompatible with freedom of expression. One such way would be to restrict expression excessively, simply on the ground that it is a nuisance or has other undesirable consequences of a kind that the Millian Principle does allow to

[9] See pp. 105–112 below.
[10] Scanlon, "A Theory of Freedom of Expression" (1972), in this volume, essay 1.
[11] Ibid., p. 14. [12] Ibid., pp. 15–21.

be weighed. So the second component in a theory of the type I described counters "excessive" restriction of this type by specifying that participant and audience interests in expression are to receive high values when they are balanced against competing goods. (As I have indicated, these values vary from one type of expression to another.) But freedom of expression does not only require that there should be "enough" expression. The two further components of the theory require that the goods of expression (for both participants and audiences) should be distributed in ways that are in accord both with the general requirements of distributive justice and with whatever particular rights there may be, such as rights to political participation, that support claims for access to means of expression.

This theory identifies the Millian Principle as the only principle concerned specifically with *expression* (as opposed to a general principle of justice) that applies with the same force to all categories of expression. If correct, then, it would answer one of the questions with which I began.[13] But is it correct? I now think that it is not.[14]

To begin with, the Millian Principle has what seem to be implausible consequences in some cases. For example, it is hard to see how laws against deceptive advertising or restrictions such as the ban on cigarette advertising on television could be squared with this principle. There are, of course, ways in which these objections might be answered. Perhaps the policies in question are simply violations of freedom of expression. If, on the other hand, they are acceptable this is because they are examples of justified paternalism, and my original theory did allow for the Millian Principle to be set aside in such cases.[15] But the theory provided for this exception only in cases of severely diminished rationality, because it took the view that any policy justified on grounds violating the Millian Principle would constitute paternalism of a particularly strong form.[16] The advertising cases seem to be clear counterexamples to this latter claim. More generally, clause (a) of the Millian Principle, taken as a limitation that can be set aside only in cases where our rational capacities are severely diminished, constitutes a rejection of paternalism that is too strong and too sweeping to be plausible. An acceptable doctrine of justified paternalism must take into account such factors as the value attached to being able to make one's own decisions, as well as the costs of so doing and the risks of empowering the government to make them on one's behalf. As the advertising examples show, these factors

[13] See p. 85 above.
[14] In what follows I am indebted to a number of criticisms, particularly to objections raised by Robert Amdur and by Gerald Dworkin.
[15] Scanlon, "A Theory of Freedom of Expression," pp. 19–20. [16] Ibid., p. 20.

vary from case to case even where no general loss of rational capacities has occurred.

But the problems of the Millian Principle are not limited to cases of justified paternalism. The principle is appealing because it protects important audience interests – interests in deciding for oneself what to believe and what reasons to act on. As I have remarked earlier, these interests depend not only on freedom of expression, but also on other forms of access to information, education, and so on. Consideration of these other measures shows that there are in general limits to the sacrifices we are willing to make to enhance our decision-making capacity. Additional information is sometimes not worth the cost of getting it. The Millian Principle allows some of the costs of free expression to be weighed against its benefits, but holds that two important classes of costs must be ignored. Why should we be willing to bear unlimited costs to allow expression to flourish provided that the costs are of these particular kinds? Here it should be borne in mind that the Millian Principle is a restriction on the authority of legitimate governments. Now it may well be that, as I would argue, there is *some* restriction of this kind on the costs that governments may take as grounds for restricting expression, and that this is so because such a restriction is a safeguard that is more than worth the costs involved. But an argument for this conclusion, if it is to avoid the charge of arbitrariness and provide a convincing account of the exact form that the restriction takes, must itself be based on a full consideration of all the relevant costs.

What these objections mainly point to, then, is a basic flaw in the argument I offered to justify the Millian Principle. There are many ways in which the appealing, but notoriously vague and slippery notion of individual autonomy can be invoked in political argument. One way is to take autonomy, understood as the actual ability to exercise independent rational judgment, as a good to be promoted. Referring to "autonomy" in this sense is a vague, somewhat grandiloquent and perhaps misleading way of referring to some of the most important audience interests described in section II. The intuitive arguments I have offered in the present section appeal to the value of autonomy in this sense. These audience interests were also taken into account in the second component of my earlier theory. My argument for the Millian Principle, on the other hand, employed the idea of autonomy in a different way, namely as a constraint on justifications of authority. Such justifications, it was held, must be compatible with the thesis that citizens are equal, autonomous rational agents.[17]

[17] Ibid., p. 15.

The idea of such a constraint now seems to me mistaken. Its appeal derives entirely from the value of autonomy in the first sense, that is, from the importance of protecting central audience interests. To build these interests in at the outset as constraints on the process of justification gives theoretical form to the intuition that freedom of expression is based on considerations that cannot simply be outweighed by competing interests in the manner that "clear and present danger" or "pure balancing" theories of the First Amendment would allow. But to build these audience interests into the theory in this way has the effect of assigning them greater and more constant weight than we in fact give them. Moreover, it prevents us from even asking whether these interests might in some cases be better advanced if we could shield ourselves from some influences. In order to meet the objections raised to the Millian Principle, it is necessary to answer such questions, and, in general, to take account of the variations in audience interests under varying circumstances. But this is not possible within the framework of the argument I advanced.

Most of the consequences of the Millian Principle are ones that I would still endorse. In particular, I still think that it is legitimate for the government to promote our personal safety by restricting information about how to make your own nerve gas,[18] but not legitimate for it to promote our safety by stopping political agitation which could, if unchecked, lead to widespread social conflict. I do not think that my judgment in the latter case rests simply on the difficulty of predicting such consequences or on the idea that the bad consequences of allowing political controversy will in each such case be outweighed by the good. But I do not think that the difference between the two cases can be found in the distinction between restricting means and restricting reasons, as my original article suggested. The difference is rather that where political issues are involved governments are notoriously partisan and unreliable. Therefore, giving government the authority to make policy by balancing interests in such cases presents a serious threat to particularly important participant and audience interests. To the degree that the considerations of safety involved in the first case are clear and serious, and the participant and audience interests that might suffer from restriction are not significant, regulation could be acceptable.

In this way of looking at things, political speech stands out as a distinctively important category of expression. Meiklejohn's mistake, I think, was to suppose that the differences in degree between this category and others mark the boundaries of First Amendment theory. My mistake, on the other hand, was that in an effort to generalize Meiklejohn's theory beyond the

[18] Ibid., p. 12.

category of political speech, I took what were in effect features peculiar to this category and presented them, under the heading of autonomy, as a priori constraints on justifications of legitimate authority.

In order to avoid such mistakes it is useful to distinguish several different levels of argument. At one extreme is what might be called the "level of policy," at which we might consider the overall desirability or undesirability of a particular action or policy, e.g. an ordinance affecting expression. At the other extreme is what might be called the "foundational level." Argument at this level is concerned with identifying the ultimate sources of justification relevant to the subject at hand. In the case of expression, these are the relevant participant, audience, and bystander interests and the requirements of distributive justice applicable to their satisfaction. Intermediate between these levels is the "level of rights."[19] The question at this level is what limitations and requirements, if any, must be imposed on policy decisions if we are to avoid results that would be unacceptable with respect to the considerations that are defined at the fundamental level? To claim that something is a right, then, is to claim that some limit or requirement on policy decisions is *necessary* if unacceptable results are to be avoided, and that this particular limit or requirement is a *feasible* one, that is, that its acceptance provides adequate protection against such results and does so at tolerable cost to other interests. Thus, for example, to claim that a particular restriction on searches and seizures is part of a right of privacy would be to claim that it is a feasible form of necessary protection for our important and legitimate interests in being free from unwanted observation and intrusion. What rights there are in a given social setting at a given time depends on which judgments of necessity and feasibility are true at that place and time.[20] This will depend on the nature of the main threats to the interests in question, on the presence or absence of factors tending to promote unequal distribution of the means to their satisfaction, and particularly on the characteristics of the agents (private individuals or governments) who make the relevant policy decisions: what power do they have, and how are they likely to use this power in the absence of constraints?

Most of us believe that freedom of expression is a right. That is, we believe that limits on the power of governments to regulate expression are necessary

[19] For a presentation of this view at greater length, see Scanlon, "Rights, Goals, and Fairness" (1978), in this volume, essay 2.

[20] Of course there may be multiple solutions to the problem; that is, different ways in which a right might be defined to give adequate protection to the interests in question. In such a case what there is a right to initially is *some* protection of the relevant kind. At this point the right is incompletely defined. Once one adequate form of protection becomes established as a constraint on policy making, the other alternatives are no longer *necessary* in the relevant sense. In this respect our rights are partly determined by convention.

to protect our central interests as audiences and participants, and we believe that such limits are not incompatible with a healthy society and a stable political order. Hundreds of years of political history support these beliefs. There is less agreement as to exactly how this right is to be understood – what limits and requirements on decision-making authority are necessary and feasible as ways of protecting central participant and audience interests and ensuring the required equity in the access to means of expression. This is less than surprising, particularly given the fact that the answer to this question changes, sometimes rapidly, as conditions change. Some threats are constant – for example the tendency of governments to block the expression of critical views – and these correspond to points of general agreement in the definition of the right. But as new threats arise – from, for example, changes in the form or ownership of dominant means of communication – it may be unclear, and a matter subject to reasonable disagreement, how best to refine the right in order to provide the relevant kinds of protection at a tolerable cost. This disagreement is partly empirical – a disagreement about what is likely to happen if certain powers are or are not granted to governments. It is also in part a disagreement at the foundational level over the nature and importance of audience and participant interests and, especially, over what constitutes a sufficiently equal distribution of the means to their satisfaction. The main role of a philosophical theory of freedom of expression, in addition to clarifying what it is we are arguing about, is to attempt to resolve these foundational issues.

What reasons are there for taking this view of rights in general and of freedom of expression in particular? One reason is that it can account for much of what we in fact believe about rights and can explain what we do in the process of defending and interpreting them. A second reason is that its account of the bases of rights appears to exhaust the relevant concerns: if a form of regulation of expression presents no threat to the interests I have enumerated, nor to the equitable distribution of the means to their satisfaction, what further ground might there be to reject it as violating freedom of expression? Beyond these two reasons, all I can do in defense of my view is to ask, what else? If rights are not instrumental in the way I have described, what are they and what are the reasons for taking them seriously?

IV. CATEGORIES

Let me distinguish two ways in which arguments about freedom of expression may involve distinctions between categories of expression. First, not every participant or audience interest is capable of exerting the same

upward pressure on the costs freedom of expression requires us to bear. Freedom of expression often requires that a particular form of expression – leafletting or demonstrations near public buildings – be allowed despite high bystander costs because important participant or audience interests would otherwise be inadequately or unequally served. Such arguments are clearly category-dependent: their force depends on the importance of the particular participant or audience interests in question. But, once it is concluded on the basis of such an argument that a given mode of expression must be permitted, there is the further question whether its use must be permitted for any form of expression or whether it may be restricted to those types of expression whose value was the basis for claiming that this mode of expression must be allowed. If the latter, then not only will categories of interests be assigned different weights in arguments about the content of the right of freedom of expression, but the application of this right to particular cases will also involve determining the category to which the acts in question belong. I will refer to these two forms of categorization as, respectively, categories of interests and categories of acts.

This distinction can be illustrated by considering the ways in which "political speech" can serve as a category. For the purposes of this discussion, I will assume that "political" is to be interpreted narrowly as meaning, roughly, "having to do with the electoral process and the activities of government." We can distinguish a category of interests in expression that are political in this sense, including both participant interests in taking part in the political process and audience (and bystander) interests in the spread of information and discussion about political topics. As a category of acts, on the other hand, "political speech" might be distinguished[21] either by participant intent – expression with a political purpose – or by content and effect – expression that concerns political issues or contributes to the understanding of political issues. These two definitions correspond, roughly, to the two sets of interests just mentioned. I will assume for the moment that the category of political speech is to be understood to include acts falling under either of these definitions.

While the political interests in expression are not uniquely important, the fact that they are inadequately or very unequally served constitutes a strong reason for enlarging or improving available modes of expression. Their particular importance as a source of upward pressure is something that rational argument about freedom of expression must recognize. Must

[21] Distinguished, that is, from other forms of protected expression. I am concerned here only with what marks speech as political. A full definition of "political speech" (i.e. permissible political expression) would, in order to exclude such things as bombings, take into account features other than those mentioned here. See note 4 above.

"political speech" be recognized as a category of acts as well? That is, can the fact that an act of expression has the relevant political intent or content exempt it from regulation that would otherwise be compatible with freedom of expression?

Special standards for defamation applicable to expression concerning "public officials," "public figures," or "public issues"[22] indicate that something like "political speech" does function as a category of acts in the current legal understanding of freedom of expression. Reflection on the *Skokie* case may also suggest that "political speech" has a special place in our intuitive understanding of this right. It seems unlikely that expression so deeply offensive to bystanders would be deemed to be protected by freedom of expression if it did not have a political character – if, for example, its purpose had been merely to provide entertainment or to promote commerce. But I do not see how this interpretation of freedom of expression can be defended, at least unless "political" is understood in a very broad sense in which any important and controversial question counts as a "political issue." Expression that is political in the narrow sense is both important and in need of protection, but it is not unique in either respect. Furthermore, even if "political" is understood broadly, the idea that access to a mode of expression can be made to depend on official determination of the "political" nature of one's purposes or one's message does not sit comfortably with the basic ideas of freedom of expression.

This suggests a second, more plausible analysis of the *Skokie* case, one which relies more heavily on categories of interests and less on categories of acts. The judgment that the Nazi march is protected may reflect the view that no[23] ordinance giving local authorities the power to ban such a march could give adequate protection to central interests in political expression. This argument avoids any judgment as to whether the content and purposes of this particular march were "genuinely political." It relies instead on the judgment that such a march could not be effectively and reliably distinguished from political expression that it is essential to protect.

The distinction between categories of interests and categories of acts can be used to explain some of the ambivalence about categories noted at

[22] See the line of cases following *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). See, e.g., *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974); *Herbert* v. *Lando*, 99 S. Ct. 1635 (1979); *Hutchinson* v. *Proxmire*, 99 S. Ct. 2675 (1979).

[23] Of course an actual decision need only find a particular ordinance unconstitutional. I take it, however, that an intuitive judgment that an action is protected by freedom of expression is broader than this and implies that *no* acceptable ordinance could restrict that action.

the beginning of this article. Reference to categories of interests is both important and unavoidable in arguments about freedom of expression. Categories of acts may also be unavoidable – "expression" is itself such a category, and assault, for example, is distinguished from it on the basis of participant intent – but there are good reasons for being wary of categories of acts and for keeping their use to a minimum. Even where there is agreement on the relative importance of various interests in expression, the purposes and content of a given expressive act can be a matter of controversy and likely misinterpretation, particularly in those situations of intense conflict and mistrust in which freedom of expression is most important. (Well-known difficulties in the application of laws against incitement are a good illustration of this point.) Thus the belief that the fundamental principles of freedom of expression must transcend categories derives in part from the recognition that categories of acts rest on distinctions – of intent and content – that a partisan of freedom of expression will instinctively view with suspicion. Nonetheless, in interpreting freedom of expression, we are constantly drawn toward categories of acts as we search for ways of protecting central interests in expression while avoiding unacceptable costs. The current struggle to define the scope of special standards of defamation[24] is a good example of this process. Identifying the categories of acts that can actually be relied upon to give the protection we want is a matter of practical and strategic judgment, not of philosophical theory.

I have mentioned the possibility of official misapplication as one reason for avoiding categories of acts, but this is not the only problem. A second difficulty is the fact that it is extremely difficult to regulate one category of speech without restricting others as well. Here the recent campaign financing law is an instructive example.[25] The basic aim of restricting money spent during a campaign in order to increase the fairness of this particular competition is entirely compatible with freedom of expression. The problem is that in order to regulate spending effectively, it was deemed necessary to make campaign funds flow through a single committee for each candidate. In order to do this a low limit was placed on the amount any private person or group could spend on expression to influence the campaign. But since spending on expression to influence a campaign cannot be clearly separated from expression on political topics generally, the limit on private spending

[24] See cases cited in note 22 above.

[25] *Buckley* v. *Valeo*, 424 U.S. 1 (1976). Federal Election Campaign Act of 1971, Pub. L. No. 92–225, 86 Stat. 3 (1972), *as amended by* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93–443, 88 Stat. 1263 (1974), *as amended by* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94–283, 90 Stat. 475 (1976).

constituted an unacceptable restriction on expression. Limits on spending for "campaign speech" are in principle as compatible with freedom of expression as limits on the length of speeches in a town meeting: both are acceptable when they enhance the fairness of the proceedings. Unlike a town meeting, however, "campaign speech" is not easily separated from other expression on political topics, hence not easily regulated in a way that leaves this other expression unaffected.

In addition to the difficulty of regulating one category without affecting others, there is the further problem that the categories within which special regulation is held to be permissible may themselves suffer from dangerous overbreadth. I believe that this is true, for example, of the category of commercial speech. Presumably "commercial speech" is to be defined with reference to participant intent: expression by a participant in the market for the purpose of attracting buyers or sellers. It is not identical with advertising, which can serve a wide variety of expressive purposes, and it cannot be defined by its subject matter: *Consumer Reports* has the same subject matter as much commercial speech, but it is entitled to "full" First Amendment protection. Why, then, would anyone take commercial speech to be subject to restrictions that would not be acceptable if applied to other forms of expression? This view is widely held, or has been until recently,[26] and it appears to be supported by the acceptability of laws against false or deceptive advertising, the regulation of cigarette advertising and restriction on the form of classified advertisements of employment opportunities. One reason for this attitude may be that the participant and audience interests at stake in commercial speech – promoting one's business, learning what is available in the market – are not generally perceived as standing in much danger from overrestriction. There is, we are inclined to think, plenty of opportunity for advertising, and we are in no danger of being deprived of needed information if advertising is restricted. In fact, the relevant audience interests are in much more danger from excessive exposure to advertising, and from false and deceptive advertising. In addition, laws against such advertising seem acceptable in a way that analogous laws against false or deceptive political or religious claims would not be, first because there are reasonably clear and objective criteria of truth in this area, and second, we regard the government as much less partisan in the competition between commercial firms than in the struggle between religious or political views.

[26] See *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977) *reh. denied* 434 U.S. 881 (1977); *Virginia State Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748 (1976).

Much of this is no doubt true, but it does not support the generalization that commercial speech as a category is subject to less stringent requirements of freedom of expression. The restrictions I have mentioned, where they seem justified, can be supported by arguments that are applicable in principle to other forms of expression (for example, by appeals to qualified paternalism, or to the advantages for audiences of protection against an excessive volume of expression). It is a mistake to think that these arguments are applicable only to commercial speech or that all commercial speech is especially vulnerable to them. In particular, if, as I believe, the assumption that governments are relatively neutral and trustworthy in this area is one reason for our complacent attitude toward regulation of commercial speech, this assumption should be made explicit and treated with care. There are many cases that clearly count as commercial speech in which our traditional suspicions of governmental regulation of expression are as fully justified as they are elsewhere. One such example might be an advertising battle between established energy companies and antiestablishment commercial enterprises promoting alternative energy sources.[27]

V. PORNOGRAPHY

In this final section I will consider the category of pornography. This example will illustrate both the problems of categories just discussed and some of the problems concerning participant and audience interests that were discussed in section II above.

The question to ask about pornography is, why restrict it? I will consider two answers. The first appeals to the interest people have in not being unwillingly exposed to offensive material. By offense, I do not mean a reaction grounded in disapproval but an immediate discomfort analogous to pain, fear, or acute embarrassment. I am willing to assume for purposes of argument that many people do have such a reaction to some sexual material, and that we should take seriously their interest in being protected against it. I also agree that what offends most people will differ from place to place depending on experience and custom. Therefore the appropriate standards of protection may also vary. But if this were the only reason for restricting

[27] It might be claimed that insofar as this example has the character I mention it is an instance of political, not merely commercial, speech. Certainly it does have a political element. Nonetheless, the intentions of the participants (and the interests of audiences) may be thoroughly commercial. The political element of the controversy triggers First Amendment reactions because it raises the threat of partisan regulation, not because the interests at stake, on the part of either participants or audience, are political.

pornography the problem would have an easy solution: restrict what can be displayed on the public streets or otherwise forced on an unwilling audience but place no restrictions whatever on what can be shown in theaters, printed in books, or sent through the mails in plain brown wrappers. The only further requirement is that the inconvenience occasioned by the need to separate the two groups should be fairly shared between them.

The idea that this solution should be acceptable to all concerned rests on specific assumptions about the interests involved. It is assumed that consumers of pornography desire private enjoyment, that sellers want to profit from selling to those who have this desire, and that other people want to avoid being forced to see or hear what they regard as offensive. Rarely will one find three sets of interests that are so easily made compatible. There are of course certain other interests which are left out of this account. Perhaps some people want to enjoy pornography in public; their pleasure depends on the knowledge that they are disturbing other people. Also, sellers may want to reach a larger audience in order to increase profits, so they would like to use more stimulating advertisements. Finally, those who wish to restrict pornography may be offended not only by the sight of it but even by the knowledge that some people are enjoying it out of their sight; they will be undisturbed only if it is stopped. But none of these interests has significant weight. There is, to be sure, a general problem of explaining what makes some interests important and others, like these, less significant; but this is not a problem peculiar to freedom of expression.

Unfortunately, offense is not the only reason to restrict pornography. The main reason, I think, is the belief that the availability, enjoyment and even the legality of pornography will contribute to undesirable changes in our attitudes toward sex and in our sexual mores. We all care deeply about the character of the society in which we will live and raise our children. This interest cannot be simply dismissed as trivial or illegitimate. Nor can we dismiss as empirically implausible the belief that the evolution of sexual attitudes and mores is strongly influenced by the books and movies that are generally available and widely discussed, in the way that we can dismiss the belief that pornography leads to rape. Of course, expression is not the only thing that can influence society in these ways. This argument against pornography has essentially the same form as well-known arguments in favor of restricting nonstandard sexual conduct.[28] If the interest to which these arguments appeal is, as I have conceded, a legitimate one, how can the arguments be answered?

[28] See Patrick Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1965).

I think that transactions "between consenting adults" can sometimes legitimately be restricted on the ground that, were such transactions to take place freely, social expectations would change, people's motives would be altered and valued social practices would as a result become unstable and decline. I think, for example, that some commercial transactions might legitimately be restricted on such grounds. Thus Richard Titmuss,[29] opposing legalization of blood sales in Britain, claims that the availability of blood on a commercial basis weakens people's sense of interdependence and leads to a general decline in altruistic motivation. Assuming for the purposes of argument that this empirical claim is correct, I am inclined to think that there is no objection to admitting this as *a* reason for making the sale of blood illegal. To ban blood sales for this reason seems at first to be objectionable because it represents an attempt by the state to maintain a certain state of mind in the population. What is objectionable about many such attempts, which violate freedom of expression, is that they seek to prevent changes of mind by preventing people from considering and weighing possible reasons for changing their minds. Such interventions run contrary to important audience interests. As far as I can see, however, the presence of a market in blood does not put us in a better position to decide how altruistic we wish to be.

There are of course other objections to outlawing the sale of blood, objections based simply on the value of the opportunity that is foreclosed. Being deprived of the opportunity to sell one's blood does not seem to me much of a loss. In the case of proposed restrictions on deviant sexual conduct, however, the analogous costs to the individuals who would be restricted are severe – too severe to be justified by the considerations advanced on the other side. In fact, the argument for restriction seems virtually self-contradictory on this score. What is the legitimate interest that people have in the way their social mores evolve? It is in large part the legitimate interest they have in not being under pressure to conform to practices they find repugnant under pain of being thought odd and perhaps treated as an outcast. But just this interest is violated in an even more direct way by laws against homosexual conduct.

The case for restricting pornography might be answered in part by a similar argument, but there is also a further issue, more intrinsic to the question of freedom of expression. Once it is conceded that we all have legitimate and conflicting interests in the evolution of social attitudes and

[29] R. Titmuss, *The Gift Relationship* (New York: Random House, 1971), chs. 13–15. See also Singer, "Altruism and Commerce," *Philosophy and Public Affairs* 2 (1973), 312.

mores, the question arises how this conflict can fairly be resolved. In particular, is majority vote a fair solution? Can the majority be empowered to preserve attitudes they like by restricting expression that would promote change? The answer to this question is clearly no. One reason is that, as Meiklejohn would emphasize, the legitimacy of majoritarian political processes themselves depends upon the assumption that the voters have free access to information and are free to attempt to persuade and convince each other. Another reason is that, unlike a decision where to build a road, this is an issue that need not be resolved by a clear decision at any one time. There is hence no justification for allowing a majority to squeeze out and silence a minority. A fair alternative procedure is available: a continuing process of "informal politics" in which the opposing groups attempt to alter or to preserve the social consensus through persuasion and example.

This response to the argument for restricting pornography has several consequences. First, since it rests upon viewing public interaction under conditions of freedom of expression as an informal political process that is preferable to majority voting as a way of deciding certain important questions, the response is convincing only if we can argue that this process is in fact fair. It will not be if, for example, access to the main means of expression, and hence the ability to have an influence on the course of public debate, are very unequally distributed in the society. Thus, equity in the satisfaction of participant interests, discussed above as one goal of freedom of expression, arises here in a new way as part of a defense of freedom of expression against majority control.

A second consequence of the argument is that time, place, and manner restrictions on obscene material, which at first seemed a satisfactory solution to the problem of offense, are no longer so obviously satisfactory. Their appeal as a solution rested on the supposition that, since the interests of consumers and sellers of pronography were either purely private or simply commercial, unwilling audiences were entitled to virtually complete protection, the only residual problem being the relatively trivial one of how to apportion fairly the inconvenience resulting from the need to shield the two groups from each other. But if what the 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 it seems that they, like participants in political speech in the narrow sense,[30] are entitled to at least a certain degree of access even to unwilling audiences. I do not find

[30] Perhaps Meiklejohn would defend "offensive" discussion of sexual topics in a similar fashion, construing it as a form of political speech. Several differences should be noted, however. First, my argument appeals to participant interests rather than to the audience interests Meiklejohn emphasizes. Second,

this conclusion a particularly welcome one, but it seems to me difficult to avoid once the most important arguments against pornography are taken seriously. Let me conclude by considering several possible responses.

The argument I have presented starts from the high value to be assigned to the participant interest in being able to influence the evolution of attitudes and mores in one's society. But while some publishers of "obscene" materials have this kind of crusading intent, undoubtedly many others do not. Perhaps the proper conclusion of my argument is not that any attempt to publish and disseminate offensive sexual material is entitled to full First Amendment protection but, at most, that such protection can be claimed where the participant's intent is of the relevant "political" character. This would construe "pornography" as a category of acts in the sense defined above: 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. To take "the obscene" as a category of acts subject to extraordinary regulation would involve, on this view, the same kind of overbreadth that is involved when "commercial speech" is seen as such a category. In each case features typical of at most some instances are taken to justify special treatment of the category as a whole.

As I indicated in section IV above, distinctions based on participant intent cannot be avoided altogether in the application of the right of freedom of expression, but they are nearly always suspect. This is particularly so in the present case; expression dealing with sex is particularly likely to be characterized, by those who disapprove of it, as frivolous, unserious and of interest only to dirty minds. To allow expression in this area to be regulated on the basis of participant intent would be to set aside a normal caution without, as far as I can see, any ground for doing so.

The conclusion that unwilling audiences cannot be fully protected against offensive expression might be avoided in a second way. Even if the "political interest" in expression on sexual topics is an important interest,

the politics I am concerned with here is an informal process distinct from the formal democratic institutions he seems to have in mind. Participation in this informal process is not important merely as a preliminary to making decisions in one's official capacity as a citizen. But even if Meiklejohn would not construe the political role of citizens this narrowly, a further difference remains. Having an influence on the evolving mores of one's society is, in my view, only one important participant interest among many, and I would not make the validity of all First Amendment claims depend on their importance for our role in politics of either the formal or the informal sort. It is true, however, that those ideas controversial enough to be in greatest need of First Amendment protection are likely also to be the subject of politics in one or both of these senses. See note 27 above.

and even if it supports a right of access to unwilling audiences, there is a further question whether this interest requires the presentation of "offensive" material. Perhaps it would be enough to be entitled to present material that "deals with" the question of sexual mores in a sober and nonoffensive manner. Perhaps Larry Flynt and Ralph Ginzburg should, on the one hand, be free to sell as much pornography as they wish for private consumption, and they should on the other hand be free to write newspaper editorials and books, make speeches, or go on television as much as they can to crusade for a sexually liberated society. But the latter activity, insofar as it presses itself on people's attention without warning, is subject to the requirement that it not involve offense.

On the other side, it can be claimed that this 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 towards 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. How can partisans of sexual change be given a fair chance to make this happen except through a relaxation of restrictions on what can be publicly displayed? I do not assume that the factual claims behind this argument are correct. My question rather is, if they were correct what would follow? From the fact that frequent exposure to material previously thought offensive is a likely way to promote a change in people's attitudes, it does not follow that partisans of change are entitled to use this means. Proponents of a change in attitude are not entitled to use just *any* expressive means to effect their aim even if the given means is the only one that would actually have the effect they desire: audience interests must also be considered. It must be asked whether exposure to these means leads to changes in one's tastes and preferences through a process that is, like subliminal advertising, both outside of one's rational control and quite independent of the relevant grounds for preference, or whether, on the contrary, the exposure to such influences is in fact part of the best way to discover what one really has reason to prefer. I think that a crucial question regarding the regulation of pornography and other forms of allegedly corrupting activity lies here.

It is often extremely difficult to distinguish influences whose force is related to relevant grounds for the attitudes they produce from influences that are the work of irrelevant factors. Making this distinction requires, in many cases, a clearer understanding than we have both of the psychological

processes through which our attitudes are altered and of the relevant grounds for holding the attitudes in question. The nature of these grounds, in particular, is often a matter of too much controversy to be relied upon in defining a right of freedom of expression. The power to restrict the presentation of "irrelevant influences" seems threatening because it is too easily extended to restrict any expression likely to mislead.

Subliminal advertising is in this respect an unusual case, from which it is hard to generalize. 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 – thus avoiding controversial distinctions between relevant and irrelevant influences. Where 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 be designed to do so, in ways that we are quite unaware of).

The case for protecting unwilling audiences against influence varies considerably from one kind of offensive expression to another, even within the class of what is generally called pornography. The separation between the way one's attitudes are affected by unwanted exposure to expression and the relevant grounds for forming such attitudes is clearest in the case of pornography involving violence or torture. The reasons for being opposed to, and revolted by, these forms of behavior are quite independent of the question whether one might, after repeated exposure, come to find them exciting and attractive. This makes it plausible to consider such changes in attitude produced by unchosen exposure to scenes of violence as a kind of harm that an unwilling audience is entitled to protection against.[31] The question is whether this protection can be given without unacceptably restricting other persuasive activity involving scenes of violence, such as protests against war.

The argument for protection of unwilling audiences is much weaker where what is portrayed are mildly unconventional sexual attitudes or practices, not involving violence or domination. Here it is more plausible to say that discovering how one feels about such matters when accustomed to them is the best way of discovering what attitude towards them one has reason to hold. The lack of independent grounds for appraising these attitudes makes it harder to conceive of changes produced by expression as a kind of harm or corruption. Even here there are some independent grounds for

[31] Prohibiting the display of such scenes for willing audiences is a separate question. So is their presentation to children. Here and throughout this article I am concerned only with adults.

appraisal, however.[32] Attitudes towards sex involve attitudes towards other people, and the reasons for or against holding *these* attitudes may be quite independent of one's reactions to portrayals of sex, which are, typically, highly impersonal. I believe that there are such grounds for regarding as undesirable changes in our attitudes towards sex produced by pornography, or for that matter by advertising, and for wanting to be able to avoid them. But, in addition to the problem of separability, just mentioned with regard to portrayals of violence, these grounds may be too close to the substantive issues in dispute to be an acceptable basis for the regulation of expression.

It seems, then, that an argument based on the need to protect unwilling audiences against being influenced could justify restriction of at most some forms of offensive expression. This leaves us with the residual question of how much offense must be tolerated in order for persuasion and debate regarding sexual mores to go forward. Here the clearest arguments are by comparison with other categories of expression. The costs that audiences and bystanders are required to bear in order to provide for free political debate are generally quite high. These include very significant psychological costs, as the *Skokie* case indicates. Why should psychological costs of the particular kind occasioned by obscenity be treated differently (or given a particularly high value)? A low cost threshold would be understandable if the issues at stake were trivial ones, but by the would-be restrictors' own account this is not so. I do not find the prospect of increased exposure to offensive expression attractive, but it is difficult to construct a principled argument for restriction that is consistent with our policy towards other forms of expression and takes the most important arguments against pornography seriously.

[32] Here the moral status of attitudes and practices may become relevant. Moral considerations have been surprisingly absent from the main arguments for restricting pornography considered in this section: the notion of offense quite explicitly abstracts from moral appraisal, and the importance of being able to influence the future mores of one's society does not depend on the assumption that one's concern with these mores is based in morality. A person can have a serious and legitimate interest in preserving (or eliminating) certain customs even if these are matters of no *moral* significance. But morality is relevant to the argument for audience protection since, if sexual attitudes are a matter of morality, this indicates that they can be appraised on grounds that are independent of subjective reaction, thus providing a possible basis for claiming that a person who has come to have a certain attitude (and to be content with having it) has been made worse off.