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INTRODUCTION

My taste for women was awakened by the blows of a beautiful and voluptuous creature in a fur jacket who looked like an angry queen. From that day on my aunt became the most desirable woman on God's earth.¹

My omission of quotation marks uncomfortably decontextualizes the words of Leopold von Sacher-Masoch, a German novelist whose work and life inspired the term masochism.² Moreover, the omission threatens to color the perception of the subject at hand, which is not physical abuse, incest, or masochism, but the role of contextual analysis in relation to constitutional obscenity doctrine. In isolation, the above quotation can be construed by many as offensive and possibly even obscene, especially if perceived as the sexual musings of a child or if previous lines had been included which describe how the young narrator was tied and bound by the aunt and beaten bloody, all to his delight.³ But, placed in the context of the novel or even of this Comment, the offensiveness is mitigated.

¹ LEOPOLD VON SACHER-MASOCH, VENUS IN FURS (1870), reprinted in MASOCHISM 175 (Jean McNeil trans., Zone Books 1991).
² Dr. Richard von Krafft-Ebing in Psychopathia Sexualis, a scientific study of sexuality, coined the term masochism: "I feel justified in calling this sexual anomaly 'Masochism,' because the author Sacher-Masoch frequently made this perversion, which up to his time was quite unknown to the scientific world as such, the substratum of his writings." RICHARD VON KRAFFT-EBING, PSYCHOPATHIA SEXUALIS 131–34 (F.J. Rebman trans., 1926) (1886).
³ Von Sacher-Masoch wrote:

Without asking any questions, they seized me and in spite of my resistance, bound me hand and foot. Then with a wicked smile my aunt rolled up her sleeve and began to beat me with a long switch. She laid about me so hard that she drew blood . . . She had me
The relevance of context is integral to the current doctrine on obscenity law, as the trier of fact is asked to make her assessment of the material in question by considering it “as a whole.”\(^4\) In his concur-

rence in *Ashcroft v. ACLU*, Justice William Kennedy raised the issue of how to determine context for purposes of an obscenity analysis\(^5\) when the material in question is located on the Internet.\(^6\) His concern stems from the radical decontextualization of text and images contained in this medium, as opposed to other media such as books and film that have discernible origins and ends.\(^7\) The inherent lack of context of the Internet threatens to render the *Miller* test overbroad.

Though particularly evident in the context of the Internet, the problem of unconstitutional restrictiveness has characterized the obscenity standard since it was first implemented and incorporated as constitutional doctrine in 1957.\(^8\) The Supreme Court recognized the importance of looking at context when determining whether material was obscene and required that triers of fact not consider isolated excerpts, but “the dominant theme as a whole”—one gesture among many that was aimed to cure the defect of unconstitutional restrictiveness\(^9\) in the existing obscenity standard.\(^10\)

In this Comment, I argue that the incorporation of “as a whole” to the obscenity standard, while it was an improvement over the then-existing test, introduced an additional component of vagueness to an already unclear standard, and shifted the test’s purpose from detect-
ing protected sex speech, as Justice Brennan understood it, to detecting appropriate fora or media for sex speech. The Court has manufactured a series of glosses that render the “as a whole” part of the obscenity test a separate analysis, that by itself may be dispositive of the question of whether sex speech is protected speech.

Part I looks at the 1957 Supreme Court decision in *Roth*, where the current test was born, alongside an earlier Second Circuit opinion penned by Judge Augustus N. Hand, which was the first federal opinion to implement the contextual analysis later incorporated in *Roth*. The comparison highlights Justice Brennan’s construction of a test that would effectively cure the restrictiveness problem while not endangering the constitutional protection extended to sex speech. Though both Brennan and Hand subscribed to a similar theory of free speech doctrine, Hand’s version of the analysis, which is in effect today as the *Miller* test, represented a much more restrictive application.

Part II traces the evolution of the contextual analysis, noting its inevitable shift from Brennan’s hoped-for tool for detecting protected sex speech to a regulatory device that dictated the manner and form in which protected sex speech was to be communicated. This Part discusses the contextual requirements imposed by different glosses, and how they overlook the intrinsic nature of some media by requiring that they conform to the standards imposed by the glosses.

In concluding, I iterate that the evolution of the “as a whole” analysis reveals, as Brennan admits in his dissent in *Paris Adult Theatre I v. Slaton*, that there is no practical way of defining obscenity that does not create significant constitutional infirmities.

I. THE INHERENT LIMITATIONS OF CONTEXTUAL ANALYSIS IN DEFINING OBSCENITY

Though both Justice Brennan and Judge Augustus Hand approach the First Amendment question of whether obscenity is protected speech from the same perspective—that only speech contributing to the “marketplace of ideas” merits constitutional protection—each presents competing views on the same contextual analysis.

A. Justice Brennan’s Objective: To Preserve the Status of Protected Sex Speech

In 1957, the Supreme Court in *Roth v. United States* tackled the question of “whether obscenity is utterance within the area of protected speech and press” and unceremoniously held that it was not.

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13 *Roth*, 354 U.S. at 481.
Considering the "tortured history" this decision would spawn, the opinion was remarkably concise—yet also revealing, because it relied on two premises that no longer form part of contemporary obscenity doctrine: obscenity is speech "utterly without redeeming social importance," and sex speech has significant value worth protecting.

Brennan initially broached the matter by acknowledging that protection is given to speech and press "to assure unfettered interchange of ideas," and continued with heartening conviction: "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, unless exclu-
dable because they encroach upon the limited area of more important interests." This explanation is consistent with Brennan's adherence to the "marketplace of ideas" theory first articulated by Justice Holmes in 1919.

Brennan's framing of the issue gives the impression that obscenity might rightly be within the scope of protected speech, as it is certainly characterized by many as "unorthodox," "controversial," and "hate-
ful," and arguably does not encroach upon more important inter-
ests. But, the dies irae: "[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeem-

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14 See id. at 485 (holding that "obscenity is not within the area of constitutionally protected speech or press").
15 Miller v. California, 413 U.S. 15, 20 (1973) ("[I]t is useful for us to focus on two of the landmark cases in the somewhat tortured history of the Court's obscenity decisions.").
16 Roth, 354 U.S. at 484. Today, obscenity doctrine requires that speech possess "serious" value. See Miller, 413 U.S. at 24 (holding speech without "serious literary, artistic, political, or scientific value" to be unprotected); Paris Adult Theatre I, 413 U.S. at 97 (Brennan, J., dissenting) (objecting to the majority ignoring "the definition of 'obscenity' as expression utterly lacking in social importance").
17 See Roth, 354 U.S. at 487-88 (highlighting the importance of the "portrayal of sex, e.g., in art, literature and scientific works"); see also Geoffrey R. Stone, Justice Brennan and the Freedom of Speech: A First Amendment Odyssey, 139 U. Pa. L. Rev. 1335, 1336 (1991) (discussing Brennan's treatment of the First Amendment issue in Roth as inconsistent with his later approaches to similar questions).
18 Roth, 354 U.S. at 484.
19 Id.
20 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."); see C. Edwin Baker, Human Liberty and Freedom of Speech 8–10 (1989) ("Justice Brennan denied obscenity constitutional protection precisely by identifying obscenity as that material that does not contribute to the marketplace of ideas.").
21 Roth, 354 U.S. at 484; see Miller, 413 U.S. at 18–19 ("This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.").
OBSCENITY STANDARD

And that is how Brennan closes the discussion, only further substantiating the holding by adding, "This rejection . . . is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over fifty nations, in the obscenity laws of all of the forty-eight states, and in the twenty obscenity laws enacted by the Congress from 1842 to 1956."

This anticlimactic analysis reflects significant discomfort on Brennan's part with the issue at hand, as later evidenced by the Justice's revocation of the holding in Roth in his dissenting opinion in Paris I. Yet in Roth, his ability to articulate hastily the unworthiness of obscenity seems likely tempered by his belief that obscenity was obviously distinct from protected sex speech and that the two could be distinguished for constitutional purposes by a subjective standard. Significantly, Justice Brennan expostulates on the importance of sex speech:

[S]ex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex . . . is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.

As his interpolation on the value of sex speech and his dissent in Paris I suggest, the constitutional concern is over defining obscenity, in great part, to preserve protected sex speech. Brennan's understanding of sex speech is nuanced. As Professors Frederick Schauer and Edwin Baker have argued separately, what makes obscenity and not other sex speech unworthy of constitutional protection is not solely its appeal to prurient interest, but that beyond this "physical effect," it does nothing more. Protected speech, therefore, may have a physical effect but, as Brennan suggested, that "is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." Or, to put it differently, the speech in question

22 Roth, 354 U.S. at 484.
23 Id. at 484–85.
25 Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting) ("I am convinced that the approach initiated 16 years ago in Roth v. United States and culminating in the Court's decision today, cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values.") (citation omitted).
26 Roth, 354 U.S. at 487.
27 FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 182 (1982).
28 See BAKER, supra note 20, at 9 (discussing Frederick Schauer's argument that obscenity does not receive constitutional protection because it offers nothing beyond a physical effect).
29 Roth, 354 U.S. at 487.
must do more than perform a function or incite behavior; it must express ideas. By noting how tightly circumscribed the domain of unprotected sex speech was, Brennan constructed the obscenity analysis as a tool that would exclude, more than include, protected sex speech from its scope. Sixteen years later, Brennan would admit: "The 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." Yet even in 1957, there was subtle tension in Brennan's opinion. On the one hand, he pronounced, without much textual deliberation, that obscenity is unprotected speech; on the other, Brennan highlighted the importance of protecting controversial, unorthodox, and hateful ideas such as those contained in much sex speech; but he made no attempt to discuss some of the obvious issues that arise when these two sides collide. Namely, how will the new test elucidate the distinction between obscenity and protected sex speech? Or, more directly, is the new standard sufficiently non-vague to provide adequate notice to people involved in matters of sex speech as to when their expression crosses the line from protected to unprotected?  

Baker makes this point clearly:  
In the marketplace of ideas theory, however, speech must bring about change by the (at least partly) rational process of convincing people of ideas or opinions . . . . Thus, the marketplace theory denies protection to pornography because of the conclusion that pornography exercises influence in a manner more similar to engaging in sexual activity than to hearing argument and debate.  

Baker, supra note 20, at 10; see also Robert Post, Encryption Source Code and the First Amendment, 15 Berkeley Tech. L.J. 713, 720-21 (2000) (arguing that encryption software distributed as encryption source code does not garner First Amendment protection because it serves a functional purpose and does not participate "in public dialogue or debate," whereas the same software distributed in print, and therefore having an expressive and not functional quality, would merit protection); Robert Post, The Constitutional Status of Commercial Speech, 48 UCLA L. Rev. 1 (2000) (explaining the regulation of commercial speech, which, though constitutionally functional, does not express constitutional values, by comparing it to public discourse, which embodies core constitutional values fostering an exchange of ideas).  


32 In his dissent in Paris I, Brennan discusses the issue of adequate notice as it applies to the statute in question in that case. See id. at 86 (Brennan, J., dissenting) ("[A] vague statute fails to provide adequate notice to persons who are engaged in the type of conduct that the statute could be thought to proscribe."). A parallel issue arises in the application of a vague standard.
The issue of vagueness was not discussed at all partly because the focus of the case was on the overbreadth of the antiquated and undoubtedly inadequate existing standard borrowed from the English Common Law case Regina v. Hicklin. The task of repairing the Hicklin test was simple, as lower courts had already begun to implement an intuitive and seemingly innocuous substitute that called for a contextual analysis of the questionable material by requiring that it be taken as a whole. Moreover, replacing the Hicklin test promised to cure the glaring restrictiveness, while promising to clarify the distinction between obscenity and protected sex speech.

In rejecting the Hicklin test, for example, the Court wrote:

The Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity.

Because "sex and obscenity are not synonymous," the Court objected to sanctioning the implementation of a test that was effectively unconstitutionally overrestrictive in its sweep, brushing out unprotected as well as protected sex speech. Noting how other courts had already rejected the Hicklin test for a more flexible standard, the Court substituted the following test: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

In part, the changes enacted by the new test were aimed at remedying the problem of having the most susceptible person in the

53 In his dissent in Paris I, Brennan concedes that the potential for vagueness inherent in the Roth test evaded the majority because it had decided the case "in the abstract and without reference to the particular material before the Court." Id. at 80 (Brennan, J., dissenting). He further substantiates this explanation by discussing the multiple interpretations that have adhered to the test in attempts to render it functional. See id. at 84 (Brennan, J., dissenting) ("[W]e are manifestly unable to describe [obscenity] in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech.").

54 3 L.R. 360 (Q.B. 1868) (framing the issue of obscenity as "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall").

55 See Roth v. United States, 354 U.S. 476, 489 (1957) ("Both trial courts below followed the proper standard.").

56 See id. at 489 ("[T]he substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity.").

57 Id. (emphasis added).

58 Id. at 487.

59 Id. at 489 ("Some American Courts adopted [the Hicklin] standard but later decisions have rejected it.").

60 Id. (emphasis added).
community, say a literate child, act as the arbiter of obscenity. Also new to the test was the notion of “contemporary community standards,” which would give different jurisdictions across the country discretion in determining obscenity in relation to local standards. More pertinently, though, was the introduction of the phrase, “as a whole,” to the analysis, which served primarily to remedy the restrictiveness problem.

Brennan recognized that analysis of isolated excerpts was more likely to result in the banning of protected sex speech. One way of mitigating the problem was to expand the scope of the material to be scrutinized to allow for a fairer assessment of whether the speech was “utterly without redeeming social importance.” That is, it was intuitive to the Court that material taken out of context was more likely to appear obscene. A close-up photograph of human genitalia, for example, is certainly less likely to be deemed obscene in the context of a medical textbook than if it were evaluated in isolation.

B. Judge Hand’s Objective: To Protect Literature

The jurisprudential genesis of the phrase, “as a whole,” can be traced to a Second Circuit opinion delivered by Judge Augustus N. Hand in 1934. On trial was James Joyce’s novel Ulysses. Judge Hand held, “The book as a whole is not pornographic, and, while in not a few spots it is coarse, blasphemous, and obscene, it does not, in our opinion, tend to promote lust.... The questions in each case [is] whether a publication taken as a whole has a libidinous effect.” By requiring that ostensibly obscene material be considered in the greater context of the whole, Judge Hand guaranteed that literature, like “works of physiology, medicine, science, and sex instruction,”

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41 See Miller v. California, 413 U.S. 15, 33 (1973) (“[T]he primary concern with requiring a jury to apply the standard of ‘the average person, applying contemporary community standards’ is to be certain that... it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one.”).
42 The Court relied on the instructions to the jury as delivered by the trial judge. “The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community.” Roth, 354 U.S. at 490.
43 See Miller, 413 U.S. at 30 (explaining proper application of the contemporary community standards test).
44 Roth, 354 U.S. at 489.
45 Id. at 484.
46 See United States v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705, 707 (2d Cir. 1934) (holding that the test in determining whether a book is obscene within a statute prohibiting importation of any “obscene” book is whether the book taken as a whole has a libidinous effect).
47 Id. (emphasis added).
48 Id.
which were deemed outside the scope of the New York obscenity statute in question, would also be guaranteed constitutional protection. Hand explained: "We think the same immunity should apply to literature as to science, where the presentation when viewed objectively, is sincere, and the erotic matter is not introduced to promote lust and does not furnish the dominant note of the publication."

Judge Hand, like Brennan, approached the First Amendment question from a marketplace of ideas position, but his analysis was more restrictive than Brennan's. Hand, by openly acknowledging his desire to protect a certain forum of expression, implemented an analysis of the medium as a proxy for determining whether speech was obscene and used the contextual analysis to determine whether the medium, in this case the book, represented a legitimate forum for some obscene speech. Unlike Brennan's, this implementation of the contextual analysis provided an appealingly non-vague standard: in cases where the material in question contained obscene elements, if it was literature, then it would be deemed protected speech. This kind of analysis hopes that the "obscene" material in question will be subsumed by the legitimating integrity of the medium. The focus of the analysis is very simply on the medium.

The discussion in the Ulysses opinion, for example, is devoted to a debate on the differences between "standard" books and literature. Hand's reasoning for not banning Ulysses emphasized the characteristics of the medium: "The book before us has such portentous length, is written with such evident truthfulness in its depiction of certain types of humanity, and is so little erotic in its result, that it does not fall within the forbidden class."

But what it evaded in terms of vagueness, Hand's implementation of the contextual analysis rediscovered in restrictiveness. By implementing it as a tool to assess the degree of literary merit, the "as a whole" analysis excluded from consideration less esteemed writings that contemplated obscenity. It was a much more restrictive test because it preemptively foreclosed the use of media that traditionally

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49 Id.
50 Id.
51 Hand's approach, protecting media instead of protecting speech, is consistent with contemporary First Amendment doctrine. See, e.g., C. Edwin Baker, Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in Nike, 54 CASE W. RES. L. REV. 1161, 1169 (2004) (arguing that in the context of commercial speech, the identity of the speaker or the medium of communication is important to determining whether there is protection).
52 72 F.2d at 707 ("The main difference between many standard works and Ulysses is its far more abundant use of coarse and colloquial words and presentation of dirty scenes, rather than in any excess of prurient suggestion.").
53 Id. (emphasis added).
had not been used to communicate ideas as vehicles for sex speech. Hand thought that by considering the context in which questionable matter was presented, a court could determine if that context fit into one of the concretely defined categories—art or science, for example—that could serve as a legitimate vehicle for obscenity. In other words, only literary or scientific value could redeem obscenity. Hand’s test is essentially what is embodied in today’s Miller test.

Brennan’s understanding of the test, on the other hand, eschewed neither vagueness nor restrictiveness. Brennan’s nuanced understanding of the test embedded onto it a guise of clarity by overlooking that the “as a whole” analysis ultimately would require the trier of fact to assess the legitimacy of a given context. That is, the “as a whole” analysis requires an analysis of the material as a whole, but also of the greater context that encompasses the whole in order to determine whether the whole is merely a pretextual arrangement meant to garner protection. The test requires an analysis of the text that exceeds the text’s own boundaries. As future cases would demonstrate, this question would come up inevitably and frequently. The comparison between Brennan and Hand’s understandings of the contextual analysis presciently suggests that, unless implemented with the mechanical and restrictive precision used by Hand, context cannot serve as a sufficiently sensitive tool for distinguishing protected sex speech from obscenity.

II. THE “REMEDIAL” EVOLUTION OF THE CONTEXTUAL ANALYSIS

In the Supreme Court’s subsequent modifications of the obscenity doctrine, Brennan expanded the scope of contextual analysis with the

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54 Such a rationale is not inconsistent with the Court’s doctrine on extending First Amendment protection to new media. See, e.g., Mut. Film Corp. v. Indus. Comm’n, 236 U.S. 230, 244 (1915) (holding motion pictures are not a vehicle of communication to be protected by the First Amendment), overruled by Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952) (“It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.”).

55 See infra Part II.C (discussing the redefinition of obscenity under the Miller test).

56 In other words, in terms analogous to Hand’s opinion, the trier of fact would have to decide if the context is of sufficient caliber, i.e., literature, to garner protected status.

57 See, e.g., Splawn v. California, 431 U.S. 595, 598-99 (1977) (upholding jury instructions permitting the jury to consider the circumstances of distribution to determine whether petitioner’s claims of social importance were pretense or reality); Kois v. Wisconsin, 408 U.S. 229, 231-32 (1972) (finding that the publication in question was not a “mere vehicle” for insulating potentially obscene material); Ginzburg v. United States, 383 U.S. 463, 470 (1966) (discussing the relevance of circumstances of presentation in determining whether claims of social importance are “pretense or reality”).
hope of correcting the vagueness and lingering restrictiveness defects.

A. Pandering as Evidence of Obscenity

1. Memoirs and the Pandering Gloss

Before the Court in \textit{A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts} was the Massachusetts Supreme Judicial Court's judgment declaring John Cleland's 1749 novel, \textit{Memoirs of a Woman of Pleasure}, obscene. The novel recounts, by means of unapologetically graphic narration, the experiences of a young woman in a brothel. The Court in \textit{Memoirs} transformed the \textit{Roth} test into a three-prong test retaining the \textit{Roth} Court's understanding of obscenity as being "utterly without redeeming social value."

The \textit{Memoirs} test asked the trier of fact to determine whether, "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." The Court made clear that the test was conjunctive.

In reversing the Massachusetts Supreme Judicial Court's decision that \textit{Memoirs of a Woman of Pleasure} was obscene, the Court considered evidence of its literary merit, and also held that "evidence 'as to the manner and form of its publication, advertisement, and distribution' would also be relevant." That is, though a book was "ob-
scene," it may be redeemed by virtue of its status as literature, unless it was marketed as pornography, in which case it would not be protected speech despite its not being utterly without redeeming social importance.

By allowing evidence of the manner of distribution, the Court expanded the meaning of the "as a whole" analysis to encompass not only the boundaries of the text, but also the conduct on the part of the purveyor. The Court was willing to consider evidence of how and why material was sold in order to make a determination as to the kind of material under scrutiny. At this point in its history, the "as a whole" analysis began to resemble the analysis Judge Hand proffered in 1934. Through the addition of the pandering gloss, the "as a whole" analysis became both vague and restrictive, because the gloss impossibly aimed at assessing literary value as well as authorial or publisher intent, but also required the material in question to possess certain indicators of value.

2. The Consequences of the Pandering Gloss: More Vagueness and Restrictiveness plus Regulation of Protected Sex Speech

While it touched upon pandering in Memoirs, the Court delved into it in greater detail in its companion case, Ginzburg v. United States. At issue in Ginzburg were three adult publications deemed obscene by the Third Circuit. Whether each publication in its totality was obscene was not entirely answered or important. The Court assumed that none were obscene while still affirming the Third Circuit's conviction. Instead, the Court relied on evidence of pandering.

It does not necessarily follow from this reversal that a determination that Memoirs is obscene in the constitutional sense would be improper under all circumstances. On the premise, which we have no occasion to assess, that Memoirs has the requisite prurient appeal and is patently offensive, but has only a minimum of social value, the circumstances of production, sale, and publicity are relevant in determining whether or not the publication or distribution of the book is constitutionally protected. Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance.

Id. at 420.

See supra notes 58-66 and accompanying text.

383 U.S. 463 (1966) (holding that although accused publications might not be obscene themselves, convictions could be sustained based on evidence of defendant's pandering production, sale, and publicity with respect to publications).

Id. at 466 ("The three publications were EROS, a hard-cover magazine of expensive format; Liaison, a bi-weekly newsletter; and The Housewife's Handbook on Selective Promiscuity... a short book.").

The Court stated:

[T]he prosecution charged the offense in the context of the circumstances of production, sale, and publicity and assumed that, standing alone, the publications themselves might not be obscene. We agree that the question of obscenity may include considera-
ing to resolve "the ultimate question of obscenity" and held, "[w]here the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity." 

a. Vagueness

The Court declared that a court's perception of a reader's reception of the questionable material lent credence to a disposition of obscenity: "The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content." As for vagueness, at least two levels of highly subjective analysis must be scaled for the trier of fact to make the "decisive" determination and for the purveyor to understand what the standard requires. First, both the purveyor and the court must assess the ostensibly obscene material by engaging the first two prongs of the standard. Second, by speculating on the potential effect of the material on the public, both may consider the circumstances of distribution as well as evidence of textual merit to assess the creative and distributive intent.

b. Restrictiveness

Evidence of pandering may not only propel non-obscene sexual material into the realm of obscenity, but it may also transform obscene material with redeeming value into unprotected speech. Thus, evidence of pandering may be dispositive of whether speech is constitutionally protected. By allowing evidence of pandering to be determinative of the question whether the sexually oriented speech is unprotected, the Court bypassed the fundamental concern over preserving protected speech and rendered the obscenity standard overrestrictive.

The logic behind the Court's decision is to guard against pretextual claims aimed to insulate obscene material from judicial scrutiny:

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71 Id. at 465–66.
72 Id. at 470 (stating that the evidence of pandering "serves to resolve all ambiguity and doubt").
73 Id.
74 See id. (stating that certain evidence may clarify whether claims are spurious).
The circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes. . . . Certainly in a prosecution which, as here, does not necessarily imply suppression of the materials involved, the fact that they originate or are used as a subject of pandering is relevant to the application of the Roth test.\textsuperscript{75}

The pandering gloss is helpful, according to the Court's reasoning, in cases where the material in question is unabashedly sexual in nature and this feature is highlighted in its marketing.\textsuperscript{76} While pandering could never itself be a pretense,\textsuperscript{77} it may serve to shed light on the non-pretextual intentions of the purveyor. That is, a medical text on sexuality, or, returning to the previous case, a novel such as Memoirs of a Woman of Pleasure, each presumed protected speech, if sold as pornography would instruct a court of the purveyor's pretextual claim of social importance and render the text unprotected speech.

c. Regulation of Protected Sex Speech

Moreover, the pandering gloss requires that the manner of distribution temper the sexual intensity of the publication, and thus has the tacit effect of regulating sex speech. When litigated, all sex speech must conform to this analysis. The Court says that one cannot promote sexually provocative material as such or it might be deemed unprotected if it contains any obscene element. Moreover, by means of this gloss, the Court makes panderers sued under obscenity charges liable for obscenity even though they are engaging in an exercise of their First Amendment rights to disseminate otherwise protected speech.\textsuperscript{78}

Another illustration: in reversing the Supreme Judicial Court of Massachusetts, the Court considered the following evidence presented by Boston area scholars: "the book is a minor 'work of art'
having 'literary merit' and 'historical value' and containing a good deal of 'deliberate, calculated comedy.' It is a piece of 'social history of interest to anyone who is interested in fiction as a way of understanding society in the past.'

It is ironic that the Court found "obscene" material written over two-hundred years ago worthy of Constitutional protection because it provided insight into a "society in the past," but it may deem contemporary material of the same ilk unprotected speech. The Court further states:

A saving grace is that although many scenes, if translated into the present day language of "the realistic, naturalistic novel, could be quite offensive" these scenes are not described in such language. The book contains no dirty words and its language "functions . . . to create a distance, even when the sexual experiences are portrayed."

In essence, the Court is willing to protect old, arguably obscene novels because they provide insight into the past and do not use "offensive" language, by contemporary standards, but it is less willing to protect a contemporary novel that uses "present day" language and promises to provide similar historical insight to future generations. The Court is foreclosing the genre of the realistic novel to writers of sexual matters. In other words, because Memoirs of a Woman of Pleasure is not written in contemporary jargon, and consequently the erotic passages are cloaked in outdated English, it is less constitutionally suspect.

The Court is more inclined to protect speech that allows someone to read fiction as a way of understanding the past than as a way of understanding the present. Furthermore, if the book, written in language reflecting the characters' background or personality were to be marketed as a candid memoir, the courts would have a further opportunity to deny it constitutional protection. Memoirs of a Woman of Pleasure, however, in its time, was written precisely in the language of the day and likely not marketed as literature, and that is why, the Court concedes, it is valued today. The obscenity standard, as implemented by the Court, chills the speech of a contemporary John Cleland.

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80 Id. (quoting evidence submitted to the trial court).
81 See Amy Adler, Note, Post-Modern Art and the Death of Obscenity Law, 99 YALE L.J. 1359, 1366 (1990) ("[I]n Post-Modern art, the next Ulysses is likely to be a work that is precisely about its own 'second-rateness.'"). Professor Adler makes a similar argument regarding the chilling effect of the Miller test with regard to contemporary post-modern artists. Adler argues that the work of such artists, which relies, in part, on the tools, media, and language of their generation, represents a portrait of the thought, culture, and times that surround them. Sexually explicit material is integral to much of this work. Consequently, "[a]ny Post-Modern artist who uses sexually
B. Kois and the Rational Relation Requirement

*Kois v. Wisconsin*82 is significant because it introduced the gloss of "rational relation" to the "as a whole" analysis, justifying its incorporation into the test as a tool for detecting pretextual editorializing.83

In *Kois*, the defendant underground newspaper, Kaleidoscope, was convicted of disseminating obscene material, small photographs of a nude couple embracing, in violation of a Wisconsin statute. The accompanying article reported that the photographs were "similar" to one that lead to the arrest of a Kaleidoscope photographer for possession of obscene material.84 The U.S. Supreme Court reversed the State Supreme Court's conviction of the newspaper on grounds that there was no reason to believe "that the article was a mere vehicle for the publication of the pictures . . . because in the context in which they appeared in the newspaper they were rationally related to an article that itself was clearly entitled to the protection of the Fourteenth Amendment."85

1. Protecting Against Pretextual Claims

The case, interestingly, exemplified the quintessential application of the contextual analysis as Brennan envisioned it in *Roth*. "Obscene" and consequently unprotected pictures threatened to strip constitutional protection from an otherwise protected newspaper publication. Instead of looking at isolated excerpts (i.e., the two pictures in the newspaper), the trier of fact was required to consider the greater context, and the result was the salvation of the newspaper and the preservation of sex speech. The facts of the case and the Court's analysis follow closely the contours of the marketplace of ideas theory: while the pictures may be obscene and have a prurient appeal, they formed part of an exchange of ideas—notably so by virtue of their placement in a quintessential First Amendment medium, the newspaper.

explicit material could be at risk under *Miller*, and the potential chilling effect is incalculable." *Id.* at 1373.

82 408 U.S. 229, 230-31 (1972) (per curiam) (holding that two relatively small newspaper pictures, which showed a nude man and a nude woman embracing, were rationally related to an article in a newspaper, and, as such, were not unconstitutionally prohibited speech).

83 This is the genesis of the rational relation gloss to the "as a whole" part of the *Miller* test, which will spawn similar glosses such as, "thematic integration" and "interrelated," all requiring some kind of narrative or thematic cohesion of the material in question. See *Penthouse Intern. Ltd. v. McAuliffe*, 610 F.2d 1353, 1370 (5th Cir. 1980) (requiring that the content of the work be "thematic integration" or "interrelated").

84 *Kois*, 408 U.S. at 229-30 (summarizing the facts surrounding the allegedly obscene material).

85 *Id.* at 231 (emphasis added).
The Court's ruling in *Kois* curiously granted protected status to an "obscene" photograph by virtue of its placement in a protected publication. The Court acknowledged, however, that the factual holding of this case needed qualification to avoid exactly such a reading—one giving a green light to publishers to print obscene material alongside non-obscene text in order to insulate the former. In other words, the Court plugged a hole in the contextual analysis that would allow authors or publishers to create contexts that were mere vehicles of, or pretexts for ostensibly obscene material.

To this effect, the Court wrote:

> We do not think it can fairly be said... that the article was a *mere vehicle* for the publication of the pictures... We find it unnecessary to consider whether the State could constitutionally prohibit the dissemination of the pictures by themselves, because in the context in which they appeared in the newspaper they were rationally related to an article that itself was clearly entitled to the protection of the Fourteenth Amendment.

The Court expressed concern over the possibility that publishers or purveyors of sex speech might attempt to insulate potentially obscene material by including in their publications constitutionally redeeming text. As showcased in the *Memoirs* and *Ginzburg* opinions, this is an inevitable defect of the "as a whole" analysis. The Court attempted to patch it up, though, by requiring questionable material to be "rationally related" to the rest of the content. The question raised by the emergence of this gloss is: how do we know that requiring a rational relationship between items in a text is a constitutionally effective way of weeding out shams without also weeding out protected speech? What if a text does not lend itself to internal cohesion, such as a collage, a magazine, or the Internet?  

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86 *Id.* at 230–31 (emphasis added).

87 *See supra* notes 58-77.

88 In a slightly different way, Professor Amy Adler raises similar issues when discussing post-modern art. The movement, she argues, resists conventional art forms and depends on performance, mixed media, and other representations, for example. As such, the current obscenity standard does not represent a tool sufficiently adequate to analyze post-modern art because it is drafted with an understanding of art that predates this form of art. She writes, "Thus *Miller* has etched in stone a theory of art that was itself a product of only a transitory phase in art history—the period of late Modernism." Adler, *supra* note 81, at 1364; *see also* Margaret Jane Radin, *Online Standardization and the Integration of Text and Machine*, 70 FORDHAM L. REV. 1125 (2002) (discussing how online technologies and texts, in Internet space, occupy a role that is simultaneously functional and expressive, and speculating that the further conflation of these normally separate fields may lead to difficulty in distinguishing what is text and what is function for legal purposes).
2. Vagueness and Restrictiveness

To punctuate its reasoning, the Kois Court provided a conspicuously ambiguous metaphor requiring intratextual, as well as intertextual cohesion: "A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication." Because it incorporates a medium other than the one in question in the case and also inverts the factual pattern of the case, the analogy generated a series of interpretations that result in further vagueness and restrictiveness.

As applied to the facts of the case, the metaphor suggests a plain qualitative interpretation requiring a rational relation between the part and the whole: rationally unrelated obscene pictures will render unprotected otherwise constitutionally protected material. Such an analysis can be understood to require intratextual cohesion, that is, interrelation among elements of the text. Moreover, the quantitative incongruity of one singular quotation in the context of an obscene book—one erudite quotation will not redeem an obscene book—also suggests that triers of fact should engage a quantitative analysis. Multiple opinions citing to Kois have read the metaphor to require any of these interpretations.

The variety of interpretations presents a problem of vagueness for the trier of fact who must determine which one of these, if not all, the Court intended. While it does not by itself present a constitutional defect, this level of vagueness does also complicate matters for individuals or entities looking for practical guidance with regard to defining obscenity. Furthermore, the application of a quantitative analysis that would commit the trier of fact to counting pages, pictures, or articles to make a constitutional assessment raises an eyebrow. Such a proposition is certainly inconsistent with Brennan's rationale for the contextual analysis. Granting protected status on the basis of internal narrative or thematic cohesion seems arbitrary and irrelevant to the goal of distinguishing protected speech from obscenity.

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89 Kois, 408 U.S. at 231.
90 See, e.g., Penthouse Int'l, Ltd. v. McAuliffe, 610 F.2d 1353, 1375, n.4 (5th Cir. 1980) (Kravitch, J., concurring in part and dissenting in part) (analyzing the material in question by comparing the number of images to the number of articles); City of St. George v. Turner, 813 P.2d 1188, 1193 (Utah Ct. App. 1991) (citing Kois and quoting the Voltaire analogy as part of its contextual analysis; finding rational relation between two drawings and the collage in which they appear); State v. J-R Distrib., 512 P.2d 1049, 1074 (Wash. 1973) (citing Miller for its application of the Kois test and finding no rational relation between pictures and the article along which they appear).
91 See Penthouse, 610 F.2d at 1375 (Kravitch, J., concurring in part and dissenting in part) ("[T]he 'as a whole' test cannot begin and end with a page count. The quantity of the objectionable material is, however, one aspect which must be considered when determining whether the first prong has been satisfied.").
Moreover, by using a book in its analogy, the Court suggested that all media, not just newspapers or magazines, which are often less narratively or thematically coherent, may be subject to this analysis. It is generally not debated that when a book comes under scrutiny as potentially obscene, the whole book and not individual chapters should be contemplated when applying the "as a whole" analysis. As the Court's "rational relation" gloss suggests, by its nature the contents of a book are generally rationally related. Furthermore, the reference to a book's "flyleaf" imports the pandering gloss by suggesting that the marketing of the text is relevant and also opens the analysis to require intertextual cohesion between the text (the book) and associated media (the flyleaf)—that is, asking the trier of fact to find cohesion in scenarios involving multiple media as well as mixed media.

The logic behind the rational relation gloss stems from an implicit and inaccurate reliance on a conventional understanding of certain media that are quintessentially linear and cohesive, such as book and film. The Court believes that by identifying those qualities that characterize certain fora of speech—literature or books or novels, for example—it can assure the legitimacy of the media and, by force of labored reasoning, the protected status of its content. Certain media, like magazines and the Internet, however, possess qualities unlike those of books or film. And, the application of tests developed with

92 See Roth v. United States, 354 U.S. 476, 502 (1957) (Harlan, J., concurring in part and dissenting in part) ("I agree with the Court, of course, that the books must be judged as a whole.").

93 See People v. Mature Enter., Inc., 343 N.Y.S.2d 911 (N.Y. Crim. Ct. 1973) (stating that the "written word" is more resilient to obscenity analysis than film).

94 Courts, when considering mixed media under the obscenity doctrine, have analyzed each medium separately. See United States v. Merrill, 746 F.2d 458, 464 (9th Cir. 1984) (finding defendant's letter pasted with pornographic playing cards to be a "sham political statement").

95 It is common for contemporary theorists to draw qualitative distinctions among media or texts based on their linear attributes. See LUCIANO FLORIDI, PHILOSOPHY AND COMPUTING 126 (Routledge 1999) (noting at least four ways a document can be non-linear); id. at 94–97, 99 (discussing the destruction of the book, the fragmentation of knowledge, and the evolution of non-linear representations of knowledge); James Blustein and Mark S. Stavely, Methods of Generating and Evaluating Hypertext, 35 ANN. REV. OF INFO. & SCI. TECH. 299–335 (Martha E. Williams ed., 2001) (analyzing four different ways in which a text may be non-linear); see also Janet H. Murray, Inventing the Medium, in THE NEW MEDIA READER 3 (Noah Wardrip-Fruin & Nick Montfort eds., 2003) ("[The two authors] are both almost viscerally aware of the increased complexity of human consciousness and the failure of linear media to capture the structures of our thought."), available at http://www.mrl.nyu.edu/~noah/nmr/book_samples/nmr-intro-murray-excerpt.pdf.

96 This was the rationale guiding Judge Hand in his decision to require a contextual analysis in order to protect literature. See supra Part I.B.
older media in mind, such as the rational relation gloss, to newer media further exacerbates the potential for restrictiveness.  

While it is not inconsistent with constitutional doctrine for courts to use interpretive aids creatively, such an insensitive application of analyses is inconsistent with Brennan's desire in Roth to implement a test that would assist in detecting protected sex speech. Under the rational relation gloss, the subject of the analysis is not the quality or nature of the speech, but the integrity of the vehicle of communication.

C. The Miller Test: Obscenity Redefined as Speech Lacking in "Serious Value"

Significant in the Miller revision of the Roth-Memoirs test was the change in language, particularly, in the third prong. Both the first and third prongs take on "the work" in lieu of "the dominant theme" (prong one) and "the material" (prong three). More significantly, the third prong abandons the requirement that the material be "utterly without social value" because the Court felt it created "a burden virtually impossible to discharge under our criminal standards of proof." In its stead, the Court asked the trier of fact to determine "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

The effect of the modification was to replace the guiding definition of obscenity articulated in Roth with a standard requiring "serious value" of the work in question. Justice Brennan made this clear in his dissent in Paris I: "[T]he Court today permits suppression if the government can prove that the materials lack 'serious literary, artistic, political or scientific value.' But the definition of 'obscenity' as expression utterly lacking in social importance is the key to the conceptual basis of Roth and our subsequent opinions."

Moreover, the use of the word "serious" compels the trier of fact to evaluate the material in question much like Judge Hand suggested when he sought to use the contextual analysis to determine the value

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97 See Adler, supra note 81, at 1364 ("Thus Miller has etched in stone a theory of art that was itself a product of only a transitory phase in art history—the period of late Modernism.").
98 See, e.g., Penthouse Int'l, Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980) (interpreting the rational relation gloss in Kois to provide for a quantitative analysis of the material).
99 Miller v. California, 413 U.S. 15, 21 (1973) (discussing the three prongs of the obscenity standard as presented in Roth and modified by Memoirs).
100 Id. at 22 ("Thus, even as they repeated the words of Roth, the Memoirs plurality produced a drastically altered test that called on the prosecution to prove a negative, i.e., that the material was 'utterly without redeeming social value'—a burden virtually impossible to discharge under our criminal standards of proof.") (emphasis removed).
101 Id. at 24.
102 413 U.S. 49, 97 (1973) (Brennan, J., dissenting) (emphasis added).
or classification of the media in question. The requirement that a work is serious connotes or implicates qualitative integrity and questions of intent, and, as such, refers back to and imports the pandering gloss of *Memoirs-Ginzburg* and the "rational relation" gloss of *Kois*. While drafting the third prong with language that signifies or refers back to multiple glosses seems to be an efficient manner of condensing the test, in fact, the effect was to embed the analytical tools plagued with defects of vagueness and restrictiveness into a generic standard that would be applied indiscriminately to all media and fact patterns. The *Miller* revision effectively requires certain textual characteristics of all media under scrutiny without acknowledging the unique characteristics of each medium that enable it to generate serious value on its own terms.

A serious consideration resulting from this is a chilling effect on choice of media decisions, where individuals are less likely to use a medium, such as the Internet, because of its inherent inability to conform to protected sex speech standards. Justice Kennedy makes this clear when he wrote in *Ashcroft v. ACLU*: “Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression... [T]he danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech.”

**CONCLUSION**

Discussions on unconstitutional vagueness and overbreadth overlap, particularly in the context of obscenity, where the initial rem-

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103 A commentator argues that the application of the second rational relation analysis in *Kois* to a poem in the publication, turned on the Court’s finding that the poem “bears some of the earmarks of an attempt at serious art,” and links this to the Court’s decision in *Miller* to require serious value in the work in question. Edward John Main, *The Neglected Prong of the Miller Test for Obscenity: Serious Literary, Artistic, Political, or Scientific Value*, 11 S. ILL. U. L.J. 1159, 1164 (citing *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972)).

104 Furthermore, the “serious value” prong makes it more difficult to grant protected status to material that is deemed obscene by virtue of the first two prongs. The Court seemingly tempered this by having the trier of fact apply not “contemporary community standards,” which apply to the first two prongs, but a “national standard” to determine such value. Also, there is currently much debate over whether the change to national standards in the third prong is a phantom gesture to give the appearance that the standard creates a national floor of tolerance for obscenity. *Id.* at 1171 (discussing the difficulties of applying a national standard).

105 Justice Clarence D. Thomas in *Ashcroft v. ACLU* confirms this point when he suggested, “if a [web] publisher wishes for its material to be judged only by the standards of particular communities, then it need only take the simple step of utilizing a medium that enables it to target the release of its material into those communities.” 535 U.S. 564, 583 (2002).

106 *Id.* at 596 (Kennedy, J., concurring) (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994)).

107 See, e.g., *Keyishian v. Bd. of Regents*, 385 U.S. 589, 609 (1967) (“Where statutes have an overbroad sweep, just as where they are vague, ‘the hazard of loss or substantial impairment of
edy to unconstitutional restrictiveness was the implementation of a vague standard. The comparison between Justice Brennan's and Judge Hand's understandings of obscenity doctrine demonstrates that an inherent flaw in the obscenity standard is the shortcoming of the contextual analysis embedded in the "as a whole" part of the test.

Though analyzing questionable material in context is preferable to doing so in isolation, a contextual analysis opens the door widely to pretextual arrangements of the material. Consequently, the contextual analysis defends against this by becoming more restrictive and vague. In this manner, the "as a whole" analysis generates overrestrictive results by chipping away at protected sex speech that has the misfortune of being situated in inadequate media.

Moreover, because the standard so frequently conflates protected sex speech and obscenity, vagueness cloaks the entire analysis. The inherent vagueness of the standard has the concurrent and unfortunate effect of obfuscating the restrictiveness problem. The standard has so effectively blurred any concrete distinction between the two that no one can say when protected sex speech is being swept away as obscenity.

The obscenity standard functions in practice as a regulation of all sex speech and disrespects the acknowledgement made by Brennan that sex speech has value worth protecting. Moreover, it threatens to impose crippling requirements on those using new media. Because of these limitations, the Miller test should be retired and a shift toward a liberty theory of freedom of speech should emerge.

those precious rights may be critical." (quoting Dombrowski v. Pfister, 380 U.S. 479, 486 (1965)); see Kolender v. Lawson, 461 U.S. 352, 359 n.8 (1983) ([W]e have traditionally viewed vagueness and overbreadth as logically related and similar doctrines.).

108 Paris Adult Theatre I v. Slaton, 413 U.S. 49, 84 (1973) (Brennan, J., dissenting) ([W]e are manifestly unable to describe [obscenity] in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech.").

109 The liberty theory would justify the protection of sex speech simply because, as Baker explains, it "may play an important role in some people's self-fulfillment and self-expression," regardless of the speech's role within a marketplace of ideas. Baker, supra note 20, at 69 (1989); see also C. Edwin Baker, Of Course, More than Words, 61 U. CHI. L. REV. 1181, 1197-98 (1994) (critiquing the argument that because pornography silences certain groups it should be deemed unprotected speech, by offering a liberty theory interpretation that would, instead of silencing speech, protect (more) speech that manifests itself "through expressive behavior [rather] than through traditional arguments about ideas").