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THE PORNOGRAPHIC STATE*

Ronald K.L. Collins** & David M. Skover***

The standard tales of buggery, adultery, incest and promiscuity . . . became a kind of metaphor for a diseased constitution.

SIMON SCHAMA, *CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION*¹

We cannot rely on rigid rules and regulations to structure everything in our lives. . . . We are sexual beings, and . . . eroticism pervades every aspect of our consciousness.

CAMILLE PAGLIA, *SEX, ART, AND AMERICAN CULTURE*²

Each society gets the pornography it deserves.

ELIZABETH FOX-GENOVESE, *FEMINISM WITHOUT ILLUSIONS*³

America forever flirts with the pornographic. This tendency toward the graphic — the harlot-graphic⁴ — is a state of mind and a political state. Yet it is an uneasy state of affairs, for America both celebrates and condemns its love of the carnal. This janus-like view of erotic life animates our conceptions of free speech. Ultimately, America's ambivalent love affair with pornography gives rise to a new image of the state — a republic of images.

Imagine a nation in which there is little or no discord about pornography because there is little or no meaningful *discourse* about it. Imagine a nation in which people gladly trade the reality of human beings for *images* of that reality, a "virtual reality." Imagine a nation

* c. 1994, Collins & Skover. This is the latest installment of a much longer work in progress, entitled *THE DEATH OF DISCOURSE* (forthcoming). The initial installment, *The First Amendment in an Age of Paratroopers*, appeared in 68 *TEX. L. REV.* 1087 (1990) [hereinafter *Paratroopers*]. The second installment, *Commerce and Communication*, appeared in 71 *TEX. L. REV.* 697 (1993) [hereinafter *Commerce*]. Two other installments are *Paratexts*, 44 *STAN. L. REV.* 509 (1992), and *Pissing in the Snow: A Cultural Approach to the First Amendment*, 45 *STAN. L. REV.* 783 (1993) [hereinafter *Pissing*] (reviewing JAMES B. TWITCHELL, *CARNIVAL CULTURE: THE TRASHING OF TASTE IN AMERICA* (1992)).

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** Freelance writer and law professor, Takoma Park, MD.

*** Professor, Seattle University Law School. A.B. 1974, Princeton University; J.D. 1978, Yale University.

¹ SIMON SCHAMA, *CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION* 211 (1989).

² CAMILLE PAGLIA, *SEX, ART, AND AMERICAN CULTURE* 48 (1992).

³ ELIZABETH FOX-GENOVESE, *FEMINISM WITHOUT ILLUSIONS: A CRITIQUE OF INDIVIDUALISM* 87 (1991).

⁴ The term "pornography" derives from the Greek words *pornē*, meaning harlot, and *graphos*, meaning writing.

in which there is erotic *self*-expression but little or no communal expression. Imagine a nation in which sexual *war* and sexual *pleasure* are synonymous and unending. Imagine, again, a nation in which rubber speaks and people *know* it. Imagine a nation in which deliberative democracy is a *deliberate lie* and sexual harm is a *necessary lie*. Imagine, if you can, the death of discourse. As you will see, you have just imagined the pornographic state.

The state that we invite you to imagine — a state we call “pornotopia”⁵ — is *not quite* America as Americans *now* experience it. Yet in significant ways,⁶ it is the state that liberal America aspires to be. Pornotopia emerges as the forces of self-gratification, mass consumerism, and advanced technology merge. The greater this synergy, the greater is the tendency toward a culture in which self-gratification replaces self-realization, in which the irrational consumes the rational, and in which images dominate discourse. Pornotopia is a hormone-happy state. And pornography is the lodestar in this culture of images.

When the old utopian First Amendment becomes the new pornotopian First Amendment, James Madison’s reasoned discourse bends to pornotopia’s raw intercourse. Indeed, the commercial entertainment culture has left much of the old First Amendment utopia far behind but has yet to reach the apex of the new First Amendment pornotopia. As today’s culture is situated, America faces a conundrum. On the one hand, government regulation to keep pornotopia at bay is likely to become increasingly futile. If the current synergy of forces either remains constant or accelerates, constitutional attempts to constrain pornographic expression will collide with and eventually succumb to the popular culture. On the other hand, government indifference to the lure of pornotopia will reinscribe the First Amendment beyond all recognition. Deliberative discourse dies and is reincarnated as image-driven onanism. In what follows, consider how America’s quest for pornotopia will alter our culture and our traditional understanding of the First Amendment.

DISCOURSE & INTERCOURSE: THE LOGIC OF THE EROTIC

The Erotic speaks passionately even when it is silent.

Whatever else may be said of this proposition and its implications — and we will “say” more about both later — it is not likely to be held up as a core public value by any worthy system of freedom of

⁵ Apparently, the term “pornotopia” was coined by STEVEN MARCUS, *THE OTHER VICTORIANS: A STUDY OF SEXUALITY AND PORNOGRAPHY IN MID-NINETEENTH-CENTURY ENGLAND* 216, 266–86 (1966). Our use of the term is not necessarily tied to Marcus’s understanding of it.

⁶ See *infra* pp. 1382–83.

expression. In fact, the author of *A Worthy Tradition*,⁷ the late Harry Kalven, Jr., spoke to this point when he argued that constitutional protection of speech critical of government is indispensable to a free society although protection of erotic expression is not.⁸ Kalven's assertion reflects the age-old commitment of Western democratic societies to politics by public reason rather than by private passion.

As long as the First Amendment is rooted in Madisonian soil, the ideal of a democratic state inevitably entails reasoned political discourse. Though there are other free speech values, the traditional concept of the First Amendment would be unrecognizable without some meaningful dedication to the political function of public reason. A well-informed and active citizenry might best maintain a stable and just society through an open exchange of ideas rationally related to the public good. This, at bottom, is the premise typically invoked by jurists and scholars to legitimate American constitutional government.

Witness the testimony of Cass Sunstein concerning "a well-functioning system of free expression. . . . Following the Madisonian conception, I suggest that such a system is closely connected to the central constitutional goal of creating a deliberative democracy."⁹ The system promotes "government by discussion,"¹⁰ aiming "to ensure broad communication about matters of public concern among the citizenry at large and between citizens and representatives."¹¹ Above all, "the system of deliberative democracy is not supposed simply to implement existing desires."¹² Rising above narrow self-interests, the deliberative citizenry is to define and foster broad-based public interests. Building upon this cornerstone of public reason, John Rawls declares: "[T]he aim of political liberalism is to uncover the conditions of the possibility of a reasonable public basis of justification on fundamental political questions."¹³

In light of this, why should the free speech system of any deliberative democracy protect pornography? Sunstein's answer is quite simple: "Sexually explicit works can be highly relevant to the development of individual capacities. For many, it is an important vehicle for self-discovery and self-definition."¹⁴ This admittedly low-value speech, lying at the periphery of the Madisonian First Amendment,¹⁵

⁷ HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* (Jamie Kalven ed., 1988).

⁸ See HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 16 (1965).

⁹ CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 18 (1993).

¹⁰ *Id.* at 19 (quoting SAMUEL H. BEER, *TO MAKE A NATION* 96 (1993) and STEPHEN HOLMES, *PASSIONS AND CONSTRAINT* (forthcoming 1994)).

¹¹ *Id.*

¹² *Id.* at 21.

¹³ JOHN RAWLS, *POLITICAL LIBERALISM* at xix (1993).

¹⁴ SUNSTEIN, *supra* note 9, at 215.

¹⁵ See *id.* at 10-11.

is nevertheless catapulted up to virtually core constitutional protection on the presumed theory that individual self-realization might contribute ultimately to reasoned public discourse. In this sense, the pornographic experience enriches political expression.

However pornography is understood, there are troubling consequences for the Madisonian ideal when the pornographic experience is coupled with public expression. In this regime, is it any longer possible to differentiate Madisonian self-realization from pornotopian self-gratification? Is it any longer possible for rational logic to trump erotic logic? Is it any longer possible to distance public good from private self-indulgence? And finally, will this regime tend to collapse the First Amendment theory of reasoned discourse into a principle of pleasure?

Implicit in these questions is an important point rarely made explicit in current theories of free speech — the potentially corrupting influence of certain forms of private expression on public discourse. The Madisonian First Amendment stands to lose its staying power when it is trivialized, marginalized, and eroticized by a mass commercial entertainment culture wed to self-gratification,¹⁶ particularly pornographic gratification. In such a world, the Madisonian ideal is subverted precisely because key prerequisites for that system are perverted. Succinctly put, the traditional system of free expression *mis*-functions in our contemporary popular culture. It misfunctions to the extent that we equate gratification with realization. It misfunctions to the extent that pornographic images masquerade as political ideas. In all of this, the First Amendment is recreated so that personal pleasure is the ultimate political purpose. As recreated, the new maxim is: *Liberty is License*. And America saw that it was good — *very good*.

Any real awareness of the recreated First Amendment requires a vision of the world as seen through the pornographic eye. In other words, it is necessary to understand something about the workings of erotic logic and of pornographic expression. At the outset, we offer a few comments about the word “pornography.” Our use of the word is not limited to any current legal definitions, including definitions of “obscenity.” Nor is our use of the term confined to that of any of the current ideological camps on the legality of pornography, although

¹⁶ See generally *Commerce*, *supra* note *, at 724–25 (describing America’s shift from “citizen-democracy” to “consumer-democracy”); *Paratroopers*, *supra* note *, at 1090–97, 1120–21 (arguing that a “tyranny of pleasure” threatens Madisonian ideals of free speech).

such use cannot be divorced from politics. For us, what is important about pornography is that it trades in depictions of sexual acts, primarily through highly eroticized images. What is also important is that it is publicly available, typically through commercial distribution. Moreover, pornography is not a static phenomenon: its appearance alters as it pollinates the commercial entertainment culture. And if pornography is communication — a questionable proposition — it is communication of a different order than the deliberative discourse said to be at the core of the First Amendment.

Admittedly, our use of the word “pornography” might be seen as too narrow or too broad. Both the penal law and the Supreme Court reveal, of course, that there can be pornography without mass production, commercial distribution, or pictures.¹⁷ Yet for over two decades, pure print erotica, even if mass-produced and commercially distributed, have been functionally immune from criminal censorship.¹⁸ Today, prosecutors simply have little or no interest in the likes of the Marquis de Sade’s *The 120 Days of Sodom*, D.H. Lawrence’s *Lady Chatterly’s Lover*, Henry Miller’s *Tropic of Cancer*, or even the infamous *Suite 69*.¹⁹ This is, after all, the era of the image, in which the naked printed word provides comparatively little erotic rush. Furthermore, we have no squabble with those who may charge that our notion of pornography is so broad that it might encompass the artistic. Indeed, the pornographic enterprise aims to blur lines and to pose as a disseminator of material with serious artistic value.

Pornotopia emerges from the regimes of profit and pleasure. The pornographic state depends on a critical symbiosis of advanced capitalism, mass commercialism, electronic technology, and unbridled entertainment.²⁰ Clearly, sex appeals and sex sells. Pornography,

¹⁷ See, e.g., *Kaplan v. California*, 413 U.S. 115, 118–20 (1973) (holding an unillustrated book to be obscene).

¹⁸ See 1 ATTORNEY GEN.’S COMM’N ON PORNOGRAPHY, U.S. DEP’T OF JUSTICE, FINAL REPORT 382–85 (1986) [hereinafter FINAL REPORT].

¹⁹ This is the non-pictorial book that Chief Justice Burger and four of his colleagues found obscene in *Kaplan*, 413 U.S. at 118–20.

In a few highly publicized but isolated cases, prosecutors have gone after so-called obscene lyrics in rap or rock music. See MARJORIE HEINS, SEX, SIN, AND BLASPHEMY: A GUIDE TO AMERICA’S CENSORSHIP WARS 77–94 (1993); Kenneth W. Masters, *Law in the Electronic Brothel: How Postmodern Media Affect First Amendment Obscenity Doctrine*, 15 U. PUGET SOUND L. REV. 415, 449–67 (1992).

²⁰ See generally *Commerce*, *supra* note *, at 724–26 (describing the “commercialization of discourse”); *Paratroopers*, *supra* note *, at 1088 (warning of the danger of tyranny by “the public’s insatiable appetite for amusement”); *Pissing*, *supra* note *, at 785 (summarizing the “integrative forces of mass talk”).

whether the “vanilla” erotica of cable TV or the seedy hard-core video, commodifies sex. While our society prohibits the sale of sex, we are much more tolerant about the sale of the image of sex. We forbid the sale of men and women, but often allow the sale of their sex divorced from their persons. Basically, pornography tracks the modern mass advertising process: pornography takes an individual’s sex, imagistically transforms and packages it, and sends it out for commercial sale in a mass market. Like commodification generally, pornography trades the essence of the person for a money-making image. The pornographic state is a republic erupting with images — images that promise to make the unattainable attainable. It is a domain where “uninhibited, robust, and wide-open”²¹ fantasies dominate.

Within this fantasy realm, private passion all too easily replaces public reason as the key rationale for constitutional protection of expression. Pornotopia must disregard or disbelieve Justice Felix Frankfurter’s admonition: “It must never be forgotten . . . that the Bill of Rights was the child of the Enlightenment [and that behind] the guarantee of free speech lay faith in the power of . . . reason”²² Frankfurter’s plea for reasoned discourse will fall on deaf ears. Madison’s Enlightenment logic, which elevates the linear rationality of the printed word, will give way to pornotopia’s erotic logic, which exalts the chaos of the electronic image.

Indeed, the erotic logic of the pornographic state becomes an “anti-logic,” a system of contradictions. The power of pornography derives, in part, from its phantasmagoria — its shifting series of images are both there and not there, both real and not real. As Susan Keller suggests, “[i]t may be the combination of feeling real and not being real that makes the pornographic representation ‘work’ . . . by successfully imitating and not being at the same time.”²³ This phantom-like quality of pornography begets yet other contradictions. Viewers of pornography engage in voyeuristic and exhibitionistic experiences that both include and exclude them, and that never disappoint but often frustrate them. Media theorist Annette Kuhn summarizes well these oppositions: “While luring the spectator with the promise of visual pleasure, pornography in the final instance excludes him from the action. Frustrating though this may be . . . a lack of closure opens up a space . . . where he is free to complete the action as he pleases, in his own imagination.”²⁴ At its extreme, pornography le-

²¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (stating that “debate on public issues should be uninhibited, robust, and wide-open”); see also *infra* pp. 1387–88.

²² *Milk Wagon Drivers Union Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941).

²³ Susan E. Keller, *Viewing and Doing: Complicating Pornography’s Meaning*, 81 *Geo. L.J.* 2195, 2223 (1993).

²⁴ ANNETTE KUHN, *THE POWER OF THE IMAGE: ESSAYS ON REPRESENTATION AND SEXUALITY* 44 (1985).

gitimates logical contradictions in the viewer's conscious desires. For example, the "fantasy of rape"²⁵ — in which the victim resists seduction, is forcibly overpowered, but nevertheless finds sexual satisfaction — "may involve wishes and positions which, logically, cancel each other out — the wish to have something and not to have it."²⁶ In all of its modes — reality but unreality, inclusion but exclusion, fulfillment but frustration, anxiety but pleasure — pornography's erotic logic stimulates the old mind of the First Amendment in new ways. Concentration is protected to guarantee masturbation.

As erotic logic overtakes the traditional First Amendment, a liberal justification for constitutional protection — the promotion of individual self-realization — becomes increasingly indistinguishable from pornotopia's promotion of individual self-gratification.²⁷ Jerome Barron and C. Thomas Dienes intimate as much when they observe: "If one accepts the liberty model of speech, it can be argued that even obscene material can aid in self-awareness and self-development."²⁸ Indeed, becoming more self-aware of pornographic desires impels one to develop them further. The Delphic injunction of the Madisonian free speech guarantee is "know thyself"; the Dionysian maxim of the pornotopian First Amendment is "feel thyself." The primary appeal of self-realization in deliberative democracy is to master oneself; the "primal appeal"²⁹ of self-gratification in the pornographic state is "to lose one's self, lose it utterly."³⁰

Pornotopia's self-gratification radically transforms the First Amendment concept of self-expression. Pornography entices people to lust after sexualized images while readily abandoning the experience of real people. It concocts a pseudo-world in which all too frequently decent talk among men and women succumbs to indecent views of men and women; togetherness surrenders to selfness; and contact and communication between the sexes yield to auto-eroticization. When

²⁵ See Elizabeth Cowie, *Pornography and Fantasy: Psychoanalytic Perspectives*, in *SEX EXPOSED: SEXUALITY AND THE PORNOGRAPHY DEBATE* 132, 141-43, 146 (Lynne Segal & Mary McIntosh eds., 1993) [hereinafter *SEX EXPOSED*].

²⁶ *Id.* at 145-46.

²⁷ See *Commerce*, *supra* note *, at 733-36; Ronald K.L. Collins & David M. Skover, *The First Amendment in Bold Relief: A Reply*, 68 *TEX. L. REV.* 1185, 1186-87 (1990); *Paratroopers*, *supra* note *, at 1120-21.

²⁸ JEROME A. BARRON & C. THOMAS DIENES, *FIRST AMENDMENT LAW IN A NUTSHELL* 91 (1993).

²⁹ DONNA TARTT, *THE SECRET HISTORY* 155 (1992).

³⁰ *Id.*

pornography leaves the commercial quarters of its producers and enters the private sanctuaries of its consumers, "communication" between producers and consumers might be called discourse in only the loosest sense of the term. Alternatively, in a much more revealing sense, pornography might be seen as a "one-way process,"³¹ in which "[t]he image is not forged for purposes of communication, but for the joy which is the [viewer's]. The [viewer] and the medium are self-sufficient."³² Notably, this idea gives new meaning to the popular First Amendment phrase "*self-expression*." As reconstructed in the pornographic state, self-expression is not communication about the self to others. It is rather the self silently "talking" back to itself through an image. At the core of this revised notion of self-expression is a revised right to be *let alone*, a right to self-expression free of the entanglement of communication with living beings.

Electronic technology, along with profit and pleasure, plays a crucial role in the evolution of the pornographic state. Much of today's pornography is the product of the cinematic revolution that accustomed the American psyche to the human body in motion. Linda Williams insightfully observes: "With the invention of cinema, . . . fetishism and voyeurism gained new importance and normality Cinema implanted these perversions more firmly, normalizing them in technological and social 'ways of seeing.'"³³ Tomorrow's pornography may well be the product of a computer revolution that habituates the American psyche to a *virtual reality*.

Listen to Susie Bright and others muse on the delights of virtual reality: It is "an instant invitation to bring my most forbidden taboos to life. . . . 'The line between fantasy and reality would shift very quickly.'"³⁴ Moral and constitutional qualms aside, "you could even have sodomy in Georgia."³⁵ As envisioned by computer's high techies, virtual reality would be a regime of "interactive tactile telepresence,"³⁶ in which technology would offer a dizzying surfeit of sexual opportunities in a marketplace now called "cyberspace."³⁷ Without fear of

³¹ SUSANNE KAPPELER, *THE PORNOGRAPHY OF REPRESENTATION 188* (1986).

³² *Id.* at 179.

³³ LINDA WILLIAMS, *HARD CORE: POWER, PLEASURE, AND THE "FRENZY OF THE VISIBLE" 46* (1989).

³⁴ SUSIE BRIGHT, *SUSIE BRIGHT'S SEXUAL REALITY: A VIRTUAL SEX WORLD READER 68* (1992) (quoting Richard Kadrey).

³⁵ *Id.* at 69.

³⁶ HOWARD RHEINGOLD, *VIRTUAL REALITY 348* (1991).

³⁷ For a compendium of existing sexual opportunities in cyberspace, see PHILLIP ROBINSON,

venereal diseases or emotional commitments, and with full visual, aural, and tactile sensations, real people could share erotic moments with imagistic "people." Whatever today's technology may be, it is more important to ponder tomorrow's technology and its consequences. And what may those consequences be for the pornographic state?

Imagine a society of advanced technology in which pornographic virtual reality could be privately produced and privately experienced without any fear of law's intervention. In other words, imagine a culture in which consumers themselves are producers of pornography created with entirely generic and legal home technologies. *Practically speaking*, this would place pornography beyond virtually all legal restraints. Feminists, moralists, civic republicans, and other pornography critics would take their place in history alongside the likes of Prohibition's Anti-Saloon League. In pornotopia, people are intoxicated with their First Amendment rights.³⁸

BODY POLITICS & THE AMERICAN CITIZENRY

Pornography is not foreign to Western civilization. After all, even the Greeks embellished their drinking cups with group sex scenes and the Romans adorned the villas of Pompeii with bas-reliefs of bestiality. Still, it is a long way from the theater of Dionysus to the peep shows of New York's 42nd Street. Today, Americans spend upwards of ten *billion* dollars annually to peruse ribald magazines, ogle at hard-core films, ring sex-talk phone numbers, and cozy up with steamy cable TV and seamy videocassettes.³⁹ "[F]rom 1965 to 1985, all the major forms of pornographic communication became available in the United States through mainstream channels of commerce."⁴⁰ A 1986 survey in *Adult Video News* revealed that over 1,500 new X-rated videos were marketed annually.⁴¹ The Adult Video Association reported that

NANCY TAMOSAITIS, PETER SPEAR & VIRGINIA SOPER, *THE JOY OF CYBERSEX: THE UNDERGROUND GUIDE TO ELECTRONIC EROTICA* (1993). For imaginative accounts of the potential for cybersex, see Julian Dibbell, *A Rape in Cyberspace*, *VILLAGE VOICE*, Dec. 21, 1993, at 36; Joel Garreau, *Bawdy Bytes: The Growing World of Cybersex*, *WASH. POST*, Nov. 29, 1993, at A1; Chris Molnar, *Cybersex*, *ADBUSTERS Q.*, Winter 1994, at 22.

³⁸ Whether anyone (including us) could be immune to such intoxication remains in doubt. Consider the text on p. 1386.

³⁹ See U.S. DEP'T OF JUSTICE, *BEYOND THE PORNOGRAPHY COMMISSION: THE FEDERAL RESPONSE 6* (1988) [hereinafter *RESPONSE*].

⁴⁰ GORDON HAWKINS & FRANKLIN E. ZIMRING, *PORNOGRAPHY IN A FREE SOCIETY 70* (1988).

⁴¹ See Michael S. Kimmel, "Insult" or "Injury": Sex, Pornography, and Sexism, in *MEN CONFRONT PORNOGRAPHY 305, 317* (Michael S. Kimmel ed., 1990).

some 410 million pornographic videos were rented in 1991 alone.⁴² Notably, it is claimed that women now rent forty percent of all hard-core videos; and according to a *Redbook* magazine survey, almost half of the women polled view pornographic films regularly.⁴³

On the entertainment front, Americans revel in TV talk-show tales of bizarre sex escapades, delight in network TV's libidinal titillation, and take pleasure in a wide variety of risqué magazine advertisements.⁴⁴ In one wild week in 1992, Americans splurged on more than a half-million copies of Madonna's *Sex*, a pricey collection of photo erotica running the gamut from anal sex to naked men bound in dog collars.⁴⁵ Sex clubs, sex boutiques, sex classifieds, sex electronic billboards, sex computer technology, sex garb, sex toys, sex aids, sex aphrodisiacs, sex greeting cards . . . Sex, SEX, SEX!

While America passionately celebrates the carnal life, it occasionally strives to patrol the gates of pornotopia. Modern culture's strong tendency toward the pornographic is tempered by a weaker, though significant, opposition to it. Conservative religious groups, radical feminist organizations, and moderate civic leagues protest most vociferously the excesses of the sex movie and magazine industries. Obscenity commissions, task forces, law centers, and enforcement units study and crack down on erotic trafficking. All fifty states and the federal government have penal codes restricting materials of prurient interest. Anti-racketeering laws, FCC laws, prostitution laws, kiddie porn laws, dial-a-porn laws, civil rights laws, nuisance laws, zoning laws, anti-display laws . . . Laws, LAWS, LAWS!

This ambivalence toward the pornographic state affects the ways Americans do and do not communicate about pornography. On the one hand, the topic of pornography is so personally and politically charged in these times that "we the people" can never leave the subject. Americans must talk about pornography and the politics of pornography, and must talk about both intensely. On the other hand, the diverse and divisive quality of the debate has made it virtually impossible to establish even a starting point for meaningful discourse. Ideological camps — for example, conservative moralists⁴⁶ and radical

⁴² See HEINS, *supra* note 19, at 35.

⁴³ See WILLIAMS, *supra* note 33, at 231, 293 n.1 (citing a *Redbook* magazine survey of 26,000 women); Anne McClintock, *Gonad the Barbarian and the Venus Flytrap*, in *SEX EXPOSED*, *supra* note 25, at 111, 130. It is unclear to us whether the women represented in these studies engaged in the renting and viewing of pornography at their own or another's behest.

⁴⁴ Moreover, America's captains of commerce feed the public's sexual appetites by tendering ever more daring depictions of the erotic life to sell alcohol, cars, fragrances, jeans, and magazines (from *Sports Illustrated* to *Vanity Fair*). See generally ERIC CLARK, *THE WANT MAKERS: INSIDE THE WORLD OF ADVERTISING* 113-23 (1988) (describing the evolution of more and more sexually explicit advertising).

⁴⁵ See Giselle Benatar, *Sex and Money*, *ENT. WKLY.*, Nov. 6, 1992, at 19, 20, 23.

⁴⁶ For moralists, pornography is the glorification of hedonism, the degradation of the noble

feminists,⁴⁷ liberals and libertarians,⁴⁸ the exotic Freudian⁴⁹ and Foucauldian⁵⁰ feminists — may gather along anti-censorship or pro-pornography lines. These pro-and-con divisions, however, disguise the fact that conformity in result has little to do with conformity in reason. The camps disagree fundamentally on their respective understandings of key concepts for the First Amendment treatment of pornography. “[S]hould pornography be viewed as obscenity? as sexual exploitation? as gender-specific sexual exploitation? as tyranny or domination? as self-expression? as an indication of sexual liberation? as speech? . . . as ‘defamation’? or perhaps even a ‘harm’?”⁵¹ Without any rational meeting or near-meeting of the minds at even primary definitional levels (*i.e.*, the meanings of sex and pornography), productive discourse is unlikely.

Consider in this regard journalist Leon Wieseltier’s general observation: “[W]here once there were rational deliberations that led to an end, there are now emotional conversations that lead everywhere, and never end.”⁵² For that reason, “[t]here is no point in looking for consensus where there is no consensus, or where consensus is available only at a level of such generality that it is morally and politically banal.”⁵³ Ironically, though modern society prides itself on promoting the free *exchange* of ideas, in the battle over pornography few, if any, ideas are ever exchanged. Too often, there is controversy but no communication; there is monologue after monologue but no dialogue; and there is clamor but no reflective silence.

in humanity, and the public exposure of private intimacy. The government must regulate to prevent these evils. *See, e.g.*, HARRY M. CLOR, *OBSCENITY AND PUBLIC MORALITY: CENSORSHIP IN A LIBERAL SOCIETY* 6–7 (1969).

⁴⁷ For radical feminists, pornography subjugates, degrades, objectifies, defames, and even kills and rapes women. It is not mere speech, but gender inequality and violence, and ought to be regulated by government. *See, e.g.*, ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* 13–47, 129–98 (1981); CATHARINE A. MACKINNON, *ONLY WORDS* 38–41 (1993).

⁴⁸ For liberals and libertarians, pornography is expression that largely impacts the realms of moral autonomy and individual privacy, and the government must not therefore regulate private consumption of pornography. *See, e.g.*, MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 263 (1984); Ronald Dworkin, *Is There a Right to Pornography?*, 1 *OXFORD J. LEGAL STUD.* 177, 199, 206 (1981).

⁴⁹ For neo-Freudian feminists, pornography is the celebration of the innate human libidinal energy, and the government must not regulate to prevent women from becoming the equals of men where the enjoyment of sex — in all its ugly and beautiful forms — is concerned. *See, e.g.*, Cowie, *supra* note 25, at 132–52.

⁵⁰ For Foucauldian feminists, pornography is discourse about power that is currently male-centered. The government must not intervene to prevent women from forming their own pornographic vision of the erotic life. *See, e.g.*, WILLIAMS, *supra* note 33, at 229–30.

⁵¹ FOX-GENOVESE, *supra* note 3, at 90.

⁵² Leon Wieseltier, *Total Quality Meaning*, *NEW REPUBLIC*, July 19 & 26, 1993, at 16, 18. We adapt Mr. Wieseltier’s words for our own purposes without expressing any view on his particular topic.

⁵³ *Id.*

WAR & PLEASURE IN PORNOTOPIA

[The] Common-wealth [is] the mother of Peace

THOMAS HOBBS, *LEVIATHAN*⁵⁴

[T]he domain of eroticism is the domain of violence, of violation.

GEORGES BATAILLE, *EROTISM*⁵⁵

The state of pornotopia is like no other. Sex is pleasure. Sex is war. War is pleasure. Politics is paradox.

Thomas Hobbes, the father of the modern state, imagined a political order in which pleasure might co-exist with civic peace. Hedonism, properly understood, is the foundation upon which civil society can be erected. Life-sustaining pleasure is a common good, and politics should preserve the conditions for its pursuit. Indeed, mortal passions and appetites spawn the very notion of individual rights. The greatest of these passions — self-preservation and comfort — might be harnessed by the sovereign state to overpower the monstrous forces of uncivilized men in the state of nature.⁵⁶ Taking them out of that hostile state, speech assists in both the formation and the peaceful perpetuation of the commonwealth. Hobbes's momentous contribution to political discourse is that he "instill[ed] the spirit of political idealism into the hedonistic tradition."⁵⁷ As the first modern political theorist, he "liberated hedonism [from] its previously hidden, private or apolitical character, and transformed it into a political doctrine."⁵⁸

A bastardized Hobbes is the father of the pornographic state. The new *Leviathan*, like its 1651 predecessor, still celebrates lively hedonism as the foundation of society — but it is an eroticized selfishness. The new *Leviathan* still secures the greatest of human passions — but they are sexual passions too often untempered by the specter of death. The new *Leviathan* still promotes individual rights — but they are rights at civil war with the old commonweal. The new *Leviathan*

⁵⁴ THOMAS HOBBS, *LEVIATHAN* 459 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651) (emphasis omitted).

⁵⁵ GEORGES BATAILLE, *EROTISM: DEATH AND SENSUALITY* 16 (Mary Dalwood trans., City Lights Books 1986) (1957).

⁵⁶ See HOBBS, *supra* note 54, at 89, 91–92.

⁵⁷ LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 169, 188–89 (1953); see also FREDERICK VAUGHAN, *THE TRADITION OF POLITICAL HEDONISM* 69–80 (1982) (crediting Hobbes for introducing the "politics of hedonism" into Western social thought).

⁵⁸ SHADIA B. DRURY, *THE POLITICAL IDEAS OF LEO STRAUSS* 135 (1988); see also C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* 1 (1962) (attributing to Hobbes the development of a theory of "political rights and obligation[s] from the interest and will of dissociated individuals"); MICHAEL OAKESHOTT, *The Moral Life in the Writings of Thomas Hobbes*, in *RATIONALISM IN POLITICS* 248, 251–52 (1962) (characterizing Hobbes's theory as centered on human individuality driven by the pursuit of pleasure).

still cherishes speech — but it no longer concedes a difference between use and abuse where erotic expression is at stake. In the pornographic state, the animating principle is the pursuit of pleasure over and above all else, including the fear of death.

In the comfort of his Noe Valley condo, Anthony slips out of his clothes and onto his couch. He turns off the lights and zaps on the adult entertainment cable channel. Lysistrata,⁵⁹ a 1968 porno film, fills the darkness. Positioned for excitement, Anthony fixes on the man-hating heroine as she gently seduces her female friends. Ultimately Lysistrata is sexually betrayed, she stabs her female lovers and herself to death, and Anthony is spent.

The link between political power, war, and sex is as old as politics itself. Indeed, it is precisely this connection that the Greek poet Aristophanes played upon in the classic *Lysistrata*.⁶⁰ When the women of Athens and Sparta went on a sex strike in order to end a twenty-one year war, their gender power did more than obtain the peace — it changed the nature of the regime. The well-being of the state had to be left to women lest men destroy it; and the welfare of the state depended on women's governing men's *eros*. In this sense, body politics transformed the body politic. If, as this lesson teaches, the political can be sexual, then control over sex brought control over politics and vice-versa. The feminist *Lysistrata* seized this control for women. One problem for the *Lysistratan* agenda, of course, was that Aristophanes's classic work was anything but a morality play; it was a comedy. A gynecocracy based on female rule of body politics was seen as farcical because it was seen as futile, even unnatural.

In ancient Greece, men portrayed *Lysistrata* as comic. In modern pornotopia, men portray her as tragic, but only after she acts out her pornographic role. Where once she saved men, now she serves them. Where once she brought peace to men, now she is scripted to bring death to women. The pornographic *Lysistrata* is a discourse of death. But what are we to make of it? Is it basically pornographic violence against women? Or is it essentially an opinion about the desirability of violence? Or is it ultimately the violation of another that is inherent in sex?

The answers to these questions largely depend on who is responding. Listen, for example, to the stirring protests of Catharine MacKinnon: "[W]hat do men want? Pornography provides an answer. . . . It is their 'truth about sex.' . . . [W]hat men want is: women bound, women battered, women tortured, women humiliated, women degraded . . . , women killed. Or, to be fair to the soft core,

⁵⁹ See EDWARD DE GRAZIA & ROGER K. NEWMAN, *BANNED FILMS: MOVIES, CENSORS AND THE FIRST AMENDMENT* 343-45 (1982).

⁶⁰ See ARISTOPHANES, *Lysistrata*, in 3 ARISTOPHANES 2 (Benjamin B. Rogers trans., William Heinemann Ltd. 1924).

women sexually accessible . . . wanting to be taken and used”⁶¹ Accordingly, the radical feminists see in *pornographic violence against women* a complex link between political power and sex. For them, the welfare of the political state depends on women’s governing “men’s rea” — the male sexual disposition. They seek to transform the body politic by directing certain aspects of male “discourse” about the sexual. Essential to women’s political power, then, is control over both their bodies and over eroticized images of their bodies. Consequently, the radical feminists aim to seize regulatory control over pornography. And strangely enough, in this respect the modern view of the radical feminists harkens back to the traditional view of Thomas Hobbes — that all citizens are entitled to the full protection of the state. The state cannot assure the security of all women and at the same time tolerate pornography, “a form of forced sex, a practice of sexual politics, an institution of gender inequality.”⁶²

Some defenders of the modern liberal state may concede, “arguendo” or otherwise, that pornography represents male violence toward and subjugation of women.⁶³ For them, however, even that concession is not sufficient to trump the right of erotic expression in the service of pleasure. Why? Because some Americans deplore pornography’s violence and subjugation, while others celebrate pornography’s representations. Hence, representations of sexual violence and subjugation, even those that, “arguendo,” cause severe physical or psychological harms, are reduced to opinions about the desirability of such harms. Government, then, may not endorse one opinion or desire over another. Following this logic, Judge Frank Easterbrook warns the radical feminists that, in the eyes of his liberal state, there is no one correct view about the value of representations of sexual violence and subjugation: “This is thought control. It establishes an ‘approved’ view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not.”⁶⁴ Such arguments border on the absurd for the radical feminists: “Behind [Easterbrook’s] First Amendment facade, women were being transformed into ideas, [into] sexual traffic . . . protected as if it were a discussion, the men uninhibited and robust, the women wide-

⁶¹ CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 138 (1989).

⁶² *Id.* at 197.

⁶³ See, e.g., *American Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 328–29 & nn.1–2 (7th Cir. 1985) (Easterbrook, J.), *aff’d mem.*, 475 U.S. 1001 (1986). On the matter of just what the *American Booksellers* Court “conceded,” compare Catharine A. MacKinnon, *Pornography: An Exchange*, N.Y. REV. BOOKS, Mar. 3, 1994, at 47, 48 (arguing in a letter to the editor that the court conceded pornography’s harm to women) and Ronald Dworkin, *Reply*, N.Y. REV. BOOKS, Mar. 3, 1994, at 48 (arguing the court conceded harm only arguendo).

⁶⁴ *American Booksellers*, 771 F.2d at 328.

open."⁶⁵ Indeed, even Thomas Hobbes did not conceive of a hedonism so great as to question the desirability of physical security. As modern liberalism approaches the pornographic state, however, little but this hedonism is understandable.

Once unchecked hedonism is legitimated in the pornographic state, the *violation of another inherent in sex* and in its pornographic images becomes more understandable. Pornotopia knows no limits. In this state, Eros (the god of Love) and Thanatos (the god of Death) embrace each other. Eros yearns for life's ultimate passions even in the face of death. In modernity, Thomas Mann vividly portrayed these passions in his famous novella, *Death in Venice*.⁶⁶ His self-disciplined hero Gustave von Aschenbach gradually loses himself as he pursues the beautiful lad Tadzio in an "immensity of richest expectation[s]"⁶⁷ culminating in death. The champions of the pornographic state accept fully that erotic desire is a psychological quest to lose one's individuality in an uncivilized fusion with another. Georges Bataille, the philosopher of pornotopia, makes the point forcefully: "The whole business of eroticism is to destroy the self-contained character of the participants as they are in their normal lives."⁶⁸ The heightened erotic within us is a transgressor of taboos, particularly moral and legal edicts against violating the lover. As it frames reality, pornography re/presents the "elemental violence [that] kindles every manifestation of eroticism."⁶⁹ Hence, pornography represents the syllogism of primordial sex: Sex is pleasure. Sex is war. War is pleasure. As pornography violates Thomas Hobbes's rule of peace, pornotopia constitutes the new *Leviathan*.

Disputes about free speech are almost always high constitutional moments They signal that something is wrong somewhere, either with the body politic or with ourselves. That something may have little do with free speech.

SIMON LEE, THE COST OF FREE SPEECH⁷⁰

⁶⁵ MACKINNON, *supra* note 47, at 93; see also Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, in ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993, at 83, 232 n.7 (Stephen Shute & Susan Hurley eds., 1993) (asserting that *American Booksellers* condones pornography).

⁶⁶ THOMAS MANN, *DEATH IN VENICE AND SEVEN OTHER STORIES* 3-75 (H.T. Lowe-Porter trans., Vintage Books 1954) (1912).

⁶⁷ *Id.* at 75.

⁶⁸ BATAILLE, *supra* note 55, at 17.

⁶⁹ *Id.* at 16.

⁷⁰ SIMON LEE, *THE COST OF FREE SPEECH* 125 (1990).

In a "Letter from a War Zone," Andrea Dworkin throws down a gauntlet against pornography: "The war is men against women; the country is the United States."⁷¹ Camille Paglia, the nemesis of the radical feminists, picks up the mail glove: "[S]ex is basically combat. . . . [T]he sexes are at war."⁷² What is the war and who are the combatants? For Dworkin, the battle against pornography is part of the war against the subordination and violation of women. For Paglia, by contrast, the battle for pornography is part of the war for the liberation and fulfillment of women and men. In the struggle between these camps, those who demand protection clash against those who pursue unbridled pleasure; the sexually dominated clash against the sexually dominant; and the sexually objectified clash against their sexual objectifiers.

Interestingly, this war is producing a state of constitutional affairs in which free speech is no longer the exclusive domain of the First Amendment. For the radical feminists, the First Amendment must now share the battleground with the equality principle: "[T]o defend pornography as consistent with the equality of the sexes is to defend the subordination of women to men as sexual equality."⁷³ Constitutionally speaking, "if true equality between male and female persons is to be achieved, . . . the threat to equality resulting from exposure to audiences of certain types of violent and degrading material [cannot be ignored]."⁷⁴

Thus understood, the equality principle can be used as a cannonade against the pornographic state. Were concerns of gender equality to triumph over free speech liberties, pornotopia would never be actualized. Yet pornotopia's protectors are not without their own forceful strategic moves. Free speech liberties in the pornographic state will happily promote an egalitarianism for sexualized tastes that do not conform to community appetites. Hence, pornography's one-way sexual degradation (women demeaned by men) can be remedied by pornographic depictions equally degrading to both men and women of all sexual tastes. In pornotopia, women porn men, men porn women, women porn women, and men porn men with equal vengeance. At its pinnacle, the pornographic state is constituted to ensure equality of eroticized exploitation.

Thomas Hobbes would be mortified at the prospect that his theory of political peace might one day lead to a sexual war of all against

⁷¹ ANDREA DWORKIN, *Letter from a War Zone*, in *LETTERS FROM A WAR ZONE* 308, 308 (1993).

⁷² PAGLIA, *supra* note 2, at 74 (interview with CNN Television's Sonya Friedman).

⁷³ CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 174 (1987).

⁷⁴ *Regina v. Butler*, 2 W.W.R. 577, 609 (1992) (Can.). In *Butler*, the Canadian Supreme Court unanimously upheld its federal pornography law on the grounds of sexual equality. See *id.* at 618.

all. Such monstrous hedonism would devour the dictates of Right Reason. Indeed. By Job, we are asked, "Who can confront it and be safe?"⁷⁵ Perhaps no one. And that is just how life is "lived" in pornotopia.

RUBBER & REASON IN PORNOTOPIA

Years ago, the Justices gathered in the basement of the Supreme Court on "movie day" to watch such films as *I Am Curious (Yellow)*. During one of those showings, Justice John Marshall Harlan was heard to say, "By Jove. Extraordinary."⁷⁶ Borrowing Justice Potter Stewart's line, some law clerks chimed in jocularly: "'That's it, that's it, I know it when I see it.'"⁷⁷ Stewart's famous quip is commonly invoked to emphasize *seeing* as grounds for denying First Amendment protection to pornography. What is overlooked, however, is the *knowing* acknowledged in the "I know it when I see it" maxim. From that perspective, the meaning of Justice Stewart's playful quip turns 180 degrees: seeing pornography conveys a message that can be known.

*Anthony enters a sex shop on New Orleans' Bourbon Street, walks directly to the erotic clothes rack, and gawks at shiny black rubber skirts and stockings. The rubber speaks to him and he knows it.*⁷⁸ Is rubber speech? Absurd as this may seem, in the pornographic republic of images, this question must be answered, and answered seriously.

At its core — its hard-core — the pornographic state holds that it is impossible to define the meaning of *speech* in the text of the First Amendment. The pornographic man, though he may talk 'til the end of time, will never define or even concede the possibility of defining speech. For him, speech is many things; in fact, it is all things. At the very least, it is *expression*, and most assuredly it includes self-expression. It may be symbolic or just conduct. It may be ideational or simply emotional. It may be musical or pictorial. It may be intentional or unintentional, communicative or non-communicative, public or private, or it may be no more than an image of an image of something once thought real. Speech may even be rubber speaking to Anthony.

In the pornographic state, the very notion of a fundamental right to free speech is an occasion for unabashed dancing in the streets or topless dancing on bar tables. It is a cause for celebration, for waving

⁷⁵ Job 41:11 (New Oxford Annotated).

⁷⁶ BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 198 (1979).

⁷⁷ *Id.*

⁷⁸ Perhaps rubber also "spoke" to the nineteenth-century American anti-pornography crusader Anthony Comstock, who once boasted of using the federal law that was his namesake to confiscate and destroy 60,300 rubber articles. See HEINS, *supra* note 19, at 27-28.

flags or even burning them. It is a right to turn ideas into images, silence into sound, and even a right to turn nouns into verbs. It is, above all else, a constitutional license to porn the world and everything in it.

Thomas Hobbes, the philosopher of pleasure, reminds us that a refusal to define something reduces talk about it to mere opinion or belief.⁷⁹ That is precisely the point in pornotopia. There is no fact (even death?) that cannot be equated with fantasy, and truth resides only in the subjective eye. This refusal to define pornography might lead some to believe that First Amendment freedoms are the same as liberty interests under the Fifth and Fourteenth Amendments. Quite to the contrary. The two may otherwise be difficult to distinguish, but the defenders of pornotopia must label free speech as seminal, indeed as essential to the good life. They may not be able to define speech, but they know it when they see it.

Incredibly, no less noble a figure than Alexander Meiklejohn played a role in moving American constitutional law away from the old Madisonian utopia and toward the new pornotopia. When, in 1961, he extended his self-governance rationale for First Amendment protection beyond the political debates of the town meeting to literary and artistic expression,⁸⁰ Meiklejohn opened the gates of free speech in such a way that they might never be closed to pornography. Addressing the governmental regulation of print erotica, Meiklejohn asked: "Shall the government establish a censorship to distinguish between 'good' novels and 'bad' ones? And, more specifically, shall it forbid the publication of novels which portray sexual experiences with a frankness that, to the prevailing conventions of our society, seems 'obscene'?"⁸¹ He answered with an "unequivocal 'no.' . . . [T]he authority of citizens to decide what . . . they shall read and see, has not been delegated to any of the subordinate branches of government. It is 'reserved to the people,' each deciding . . . whom he will read, what portrayal of the human scene he finds worthy . . ."⁸² This self-authority, of course, glides all too readily from speech to art and music, and then to erotica and beyond in the American commercial entertainment culture. In principle (and especially in a democratic pleasure state), Plato well understood the consequences of mingling the political with the artistic; that is why, in the *Republic*, Plato sent the poets packing.⁸³ Even the less philosophical Robert Bork balked at the pornographic implications of Meiklejohn's admission:

⁷⁹ See HOBBS, *supra* note 54, at 48.

⁸⁰ See Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 262.

⁸¹ *Id.*

⁸² *Id.*

⁸³ See PLATO, *THE REPUBLIC* X.600 (Francis M. Cornford trans., 1941).

"[C]onstitutionally, art and pornography are on a par with industry and smoke pollution."⁸⁴

Mindful of this dilemma, the enemies of pornotopia seek to drive a wedge between the artistic and the pornographic, between the likes of the late Federico Fellini and the lively Larry Flint. The foes of the pornographic state hold firmly to Justice Potter Stewart's belief that hard-core pornography "cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment."⁸⁵ The opponents of pornotopia seek to make explicit what is implicit in this argument: speech *can* and *must* be defined to exclude erotic excesses. For them, the sine qua non of First Amendment protection is that expression be a *communication* — the transmission of a "mental stimulus" that is "designed to appeal to the intellectual process" rather than "to produce a purely physical effect."⁸⁶ Expression is speech "precisely to the extent that it derives from and appeals to the intellectual end of the intellect-emotion continuum."⁸⁷

Preeminent among the guardians of the old First Amendment gates are John Finnis, Frederick Schauer, and Joel Feinberg. They conclude that hard-core pornography is not protected by the First Amendment because it does not satisfy even the threshold requirement of "speech." Pornography is not "communication" because its intended and actual effect — sexual arousal — is "perceived as a primarily *physical* reaction."⁸⁸ And it is perceived as such by both the purveyor and the user of pornography. "The panderer is participating in the marketplace of prurient interest," we are reminded, "not in the marketplace of ideas."⁸⁹ As for the pornographic consumer, "[t]he fundamental question is simple: does the reader look for 'titillation' or for '*intellectual* content?'"⁹⁰ Essentially, hard-core pornography is no more than a "masturbatory aid."⁹¹ "So-called 'filthy pictures' and hard-core pornographic 'tales' are simply devices meant to titillate the

⁸⁴ Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 29 (1971).

⁸⁵ *Ginzburg v. United States*, 383 U.S. 463, 499 n.3 (1966) (Stewart, J., dissenting) (quoting brief of U.S. Solicitor General Thurgood Marshall).

⁸⁶ Frederick Schauer, *Speech and "Speech" — Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 921-22 (1979).

⁸⁷ John M. Finnis, "*Reason and Passion*": *The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222, 236 (1967).

⁸⁸ Frederick Schauer, *Response: Pornography and the First Amendment*, 40 U. PITT. L. REV. 605, 607 (1979).

⁸⁹ Finnis, *supra* note 87, at 241.

⁹⁰ *Id.* at 240 (quoting *Ginzburg v. United States*, 383 U.S. 463, 470 (1966)).

⁹¹ 1 FINAL REPORT, *supra* note 18, at 266. Frederick Schauer served as one of the members of the Attorney General's Commission on Pornography and significantly influenced the contents of its final report.

sex organs *via* the mediation of symbols. They are designed exclusively to perform that function and are valued by their users only insofar as they succeed in that limited aim.⁹² Hence, rubber can never be speech, for "much of what this material involves is not so much portrayal of sex, or discussion of sex, but simply sex itself."⁹³ Accordingly, "[t]he basis of the exclusion of hard core pornography from the coverage of the Free Speech Principle is not that it has a physical effect, *but that it has nothing else*."⁹⁴

If Finnis, Schauer, and Feinberg are genuine about their mission, they must trespass upon more First Amendment ground than they might be willing to admit. After all, how does one distinguish hard-core pornography from art in a culture that knows no definition of art? Robert Mapplethorpe answered playfully: "Pornography is fine with me. If it's good it transcends what it is."⁹⁵ Evidently, Frederick Schauer agreed: an "artist" is entitled to depict arms stretching into anuses or to represent one person's urinating into another's mouth.⁹⁶ Can that "speech" be abridged? "Absolutely not. It's not even close,"⁹⁷ Professor Schauer was heard to say. Apparently, Mapplethorpe's art/porn transcended what it is because of who he was and where it was.⁹⁸ "The very fact that it's by Mapplethorpe and it's in a museum would . . . lead me to say it's not even close,"⁹⁹ Schauer confirmed. Implicit in his observation is a perplexing premise: when a curator mounts a pornographic picture on a museum wall, he turns porn into art. But, it might just as well be the opposite. Hasn't the curator turned the museum into a porn palace? One need not take sides in this debate over aesthetics in order to appreciate that pornography is what it becomes and remains what it was.

Moreover, how does one fight hard-core pornography without likewise fighting the all-too-human mindset in our increasingly pornographic culture? Sexual release needs the mind's eye. May not as much mental energy be expended on hard-core pornography as on a dime novel? If so, is pornography non-speech more because of where

⁹² JOEL FEINBERG, 2 *THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS* 169 (1985).

⁹³ 1 *FINAL REPORT*, *supra* note 18, at 266.

⁹⁴ FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 182 (1982).

⁹⁵ EDWARD DE GRAZIA, *GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS* 626 (1992) (quoting Robert Mapplethorpe).

⁹⁶ See Robert Mapplethorpe, *X Portfolio, Jim and Tom*, and *Sausalito*, in *CULTURE WARS: DOCUMENTS FROM THE RECENT CONTROVERSIES IN THE ARTS* 321 (Richard Bolton ed., 1992) (photographs); see also SUNSTEIN, *supra* note 9, at 226 (arguing Robert Mapplethorpe's photography merits "fierce protection").

⁹⁷ DE GRAZIA, *supra* note 95, at 652 (quoting Frederick Schauer).

⁹⁸ For a thoughtful discussion of circularity in definitions of art and pornography, see KAPPELER, *supra* note 31, at 84.

⁹⁹ DE GRAZIA, *supra* note 95, at 652 (quoting Frederick Schauer).

it takes us than how it takes us there? In other words, it appears that the likes of Finnis, Schauer, and Feinberg may be more concerned with orgasm than with cognition. On this score, they are destined to be outcasts in a culture that prefers retinas in the service of pleasure to retinas in the service of reason. As Camille Paglia, the Queen of Pornotopia, reminds us: "The sexual revolution is not just about what you do with your body — it's about what you do with your mind."¹⁰⁰ This lesson is at least as old as classical mythology. The Greeks recognized that Pleasure was born from the union of Eros and Psyche.

If these adversaries of the pornographic state may not ultimately win the war, they can at least take comfort in the knowledge that they have launched a powerful broadside against pornotopia. For, indeed, there are troubling consequences from forsaking the search for a definition of speech that distinguishes art from pornography. Those consequences, Schauer reminds us, have to do with things like rubber — and plastic and leather.¹⁰¹ Unless the concept of speech is somehow delimited, the prophylactic of the First Amendment will protect any erotic act or eroticized object that might stimulate orgasm. And some call this the ultimate freedom. But even the critical Left appreciates that "a society unwilling or unable to trust to its own instinct in laying down a standard of decency does not deserve to survive and probably will not survive."¹⁰²

DELIBERATIVE DEMOCRACY, DELIBERATE LIES, & DIVERSIONARY TACTICS

There is an innocence in lying which is the sign of good faith in a cause.

FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL¹⁰³

[F]or a long time I have not said what I believed, nor do I ever believe what I say, and if indeed sometimes I do happen to tell the truth, I hide it among so many lies that it is hard to find.

NICCOLÒ MACHIAVELLI, LETTERS OF MACHIAVELLI¹⁰⁴

Does it matter whether the Shroud of Turin is fake? Perhaps as an article of faith — a First Amendment Free Exercise matter — it is of no moment whether the Cloth of Christ is real. After all, this is the realm of religious belief. But should the same principle hold

¹⁰⁰ BRIGHT, *supra* note 34, at 73 (quoting Camille Paglia).

¹⁰¹ See SCHAUER, *supra* note 94, at 182-83.

¹⁰² FOX-GENOVESE, *supra* note 3, at 107.

¹⁰³ FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL 93 (Walter Kaufmann trans., Vintage Books 1966) (1886).

¹⁰⁴ Letter from Niccolò Machiavelli to Francesco Guicciardini (May 17, 1521) in THE LETTERS OF MACHIAVELLI 200 (Allan Gilbert trans. & ed., 1961).

true when crossing the divide to the free speech guaranty of the First Amendment? Is there room in that realm for a deliberate lie?

Strange as it may seem, this question of lying may be necessary to many free speech theories — theories that cannot easily be reconciled with our popular culture. In fact, the need for a deliberate lie may well be key to any notion of a First Amendment premised on deliberative democracy. Cass Sunstein, for example, emphasizes the significance of the “civilizing force of hypocrisy”¹⁰⁵ and exonerates it by claiming that “at least we can say that in a system of public deliberation, everyone must speak as if he were virtuous even if he is not in fact.”¹⁰⁶ Such hypocrisy, the reader is assured, “is the tribute that vice pays to virtue.”¹⁰⁷ The animating hope is that the lie “might even bring about a transformation in preferences and values, simply by making venal or self-regarding justifications seem off-limits.”¹⁰⁸

The political genius of the “noble lie” traces back to Book III of Plato’s *Republic*. There, Plato assumes that a “good city is not possible . . . without a fundamental falsehood; it cannot exist in the element of truth.”¹⁰⁹ The disturbing fact is that “the character of men’s desires would make it impossible for a rational teaching to be the public teaching.”¹¹⁰ If even some of the same holds true for a First Amendment lie, then Madisonian deliberative democracy takes on new meaning.

That deliberative democracy animates the modern First Amendment culture is a lie precisely because today’s society tends ever more toward the pornographic state. As that state is dedicated primarily to self-gratification, virtually everything in it wars against the First Amendment norm of reason in the service of the common good. It is a state moved more by the Bacchanalian than the Apollonian, more by collective apathy than civic participation, more by commerce than communication, and more by private intercourse than public discourse. The pornographic state turns the Madisonian deliberative utopia into a debauched dystopia.

Why, then, should any deliberative notion of the First Amendment cling so fiercely to protection of pornography? There are at least two

¹⁰⁵ SUNSTEIN, *supra* note 9, at 244 (drawing on the words of Jon Elster, *Strategic Uses of Argument*, in *Barriers to Conflict Resolution* (Kenneth Arrow ed., forthcoming 1994)).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (quoting FRANCOIS DUC DE LA ROCHEFOUCAULD, *Maxims* 65 (Leonard Tancock trans., Penguin Books 1959) (1665)). It is well to remember that La Rochefoucauld also said: “We are never so ridiculous through qualities we have as through those we pretend to have.” LA ROCHEFOUCAULD, *supra* at 54.

¹⁰⁸ SUNSTEIN, *supra* note 9, at 244; see also JON ELSTER, *The Cement of Society* 109 (1989) (describing the culture of hypocrisy, which holds that preservation of social norms may be more important than admission of violations of them).

¹⁰⁹ LEO STRAUSS, *The City and Man* 102 (1964).

¹¹⁰ Allan Bloom, *Interpretive Essay*, in PLATO, *The Republic* 307, 367 (Allan Bloom trans., 1968).

possible answers. First, the liberal state (unlike its radical and conservative counterparts) will not withdraw constitutional protection from any but the most blatantly harmful forms of pornography. Consequently, the liberal state can only hope to redeem its Enlightenment ideal by endorsing a lie — that pornography somehow fosters self-realization which in turn fosters deliberative democracy. But insofar as pornography is allowed to flourish, is not the currency of deliberative democracy devalued proportionately? Labeling pornography as a deliberative force does not change pornography, but it may well change democracy. Plato's lie furthered the good of the state; the liberal lie paves the way for its ruin.

Lurking below the first answer is a more cynical one, a second lie. Is it possible that the larger hidden agenda is to perpetuate the lie of deliberative democracy simply to promote pornotopia? Phrased differently, are the proponents of deliberative democracy using a respectable lie to lend credence to an unrespectable state? We raise these questions because we suspect that the defenders of the liberal state realize the dissonance between their First Amendment theory and the culture's free speech practices. Moreover, we suspect that the defenders of the liberal state realize that they cannot endorse virtually unbridled and indiscriminate pleasure as a principle of the First Amendment without embracing hedonism. Ironically, the liberal state appears to invoke deliberative reason in order to realize impulsive passion.

Does it matter whether the arguments advanced by Louis Brandeis in the famous *Muller v. Oregon*¹¹¹ brief were false? Is it important whether the brief's claims of harmful effects to women from overwork were scientifically true? Perhaps as a commitment of turn-of-the-century progressive reform, it was of no moment whether there were actual harms necessitating legal protection of women workers. After all, the harm principle was the best argument to tender in an America then ruled by a laissez-faire constitutional philosophy. But can a similar harm principle prevail in today's debate over pornography and the First Amendment? Here again, is there a need for a deliberate lie?

What kind of argument against pornography can be made in a culture which trades in images of sexual pleasure, traffics in the commerce of endless amusement, and trumpets individualism as the governing ideology? Put another way, what kind of Brandeis brief might prevail in the approaching pornographic state? Since the sexual revolution of the 1960s, America's libidinal appetites have been unleashed and largely unaffected by regimes calling for civic decency.

¹¹¹ 208 U.S. 412 (1908) (upholding state legislation setting a maximum of ten hours work a day for women employed in factories and laundries).

Accordingly, the moral argument against patently offensive erotica has been unable to carry the day even under the Burger and Rehnquist Courts and the Reagan and Bush administrations. Meanwhile, an emerging feminist movement has often scrutinized male-dominated pornography with a critical eye while distancing itself from conservative moralism. What anti-pornography feminists needed was a striking argument for self-restraint and societal regulation, one that might win approval in a pleasure-bent commercial culture. Heed their rising voices:

Robin Morgan: "Pornography is the theory, and rape the practice."¹¹²

Wendy Kaminer: "Pornography is speech that legitimizes and fosters the physical abuse and sexual repression of women"¹¹³

Model Antipornography Civil-Rights Ordinance: "The harm of pornography includes dehumanization, psychic assault, sexual exploitation, forced sex, forced prostitution, physical injury, and social and sexual terrorism and inferiority presented as entertainment."¹¹⁴

Collectively, these and scores of other like charges present an argument that may be compelling even in today's culture: pornography must be prohibited to the extent that it is the embodiment and the cause of personal harms.¹¹⁵ There are, however, counterarguments that may be equally or more compelling:

Nadine Strossen: "[T]hat exposure to sexist, violent imagery leads to sexist, violent behavior [is a claim for which] there is no credible evidence."¹¹⁶

Elizabeth Fox-Genovese: "The proponents of curtailment would have an easier time if it could be demonstrated that pornography actually causes, or even substantially contributes to, the perpetration of . . . violent crimes against women Sadly, such proof is lacking"¹¹⁷

Edward Donnerstein and Daniel Linz: "The issue of pornography and its relationship to violence will continue for years, perhaps with-

¹¹² Robin Morgan, *Theory and Practice: Pornography and Rape, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY* 134, 139 (Laura Lederer ed., 1980).

¹¹³ Wendy Kaminer, *Pornography and the First Amendment: Prior Restraints and Private Action, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY, supra* note 112, at 241, 241.

¹¹⁴ ANDREA DWORKIN & CATHARINE A. MACKINNON, *PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY* 138 (1988).

¹¹⁵ Of course, there are other notable arguments offered by the radical feminists to justify censorship of pornography, including rationales tied to civil equality and critical race theory. See, e.g., MACKINNON, *supra* note 47, at 45-68. We confine our discussion to the personal harm argument because it appears to have received the most public attention and because it has been frequently attacked as rhetorical.

¹¹⁶ Nadine Strossen, *A Feminist Critique of 'The' Feminist Critique*, 79 VA. L. REV. 1099, 1173 (1993).

¹¹⁷ FOX-GENOVESE, *supra* note 3, at 95.

out any definitive answers. We may never know if there is any real causal influence."¹¹⁸

Essentially, these counterarguments challenge the validity of the antipornography harm principle. Inferentially, the critics invite us to ask: Can it be that the radical feminists are perpetuating their own necessary lie? Is it possible that their harm principle is purposefully more rhetorical than analytical? And, if so, is intentional resort to their noble lie a critical diversionary tactic in a culture otherwise charmed by erotica's excesses?

Pornography is but another commodity in a capitalist culture that exploits sexual fantasies to feed consumerist desires. If some pornography is sexist and misogynist, it reflects the larger culture of such mass messages. Simply observe the day-to-day fare on commercial television and radio, in magazines and on billboards, and in our ordinary conversations and social dealings. Like the commercial culture generally, pornography holds sex out as a disposable commodity — "a commodity to be turned in for next year's new, brand new model."¹¹⁹ Pornography is to the mass commercial state what blood is to the body; efforts to withdraw it "would be futile because pornography is not some wart on the surface of capitalist culture"¹²⁰ but is at the heart of that culture. Mindful of the culture's life-flow, Wendy Kaminer is blunt: "If society is as sexist as Andrea Dworkin and Catharine MacKinnon claim, it is not about to adopt a feminist agenda when it sets out to censor pornography."¹²¹ What are we to make of this?

If the antipornography feminists realize the futility of censoring pornography while tolerating rampant commercialism, then lurking below the harm principle is a more grandiose lie. Is it possible that the larger hidden agenda is to perpetuate the lie of pornography's harms simply to subvert the male-driven capitalist state? Could it be that for antipornography feminists "the dirty secret at the heart of our culture is not sex, but money"?¹²² Obviously, a great deal more than pornography is put into issue by the harm principle; it ultimately challenges the socio-economic structures at the base of today's republic of eroticized commercial images. A move toward a (radical) feminist theory of the state inevitably hacks at the very roots of mass com-

¹¹⁸ Edward Donnerstein & Daniel Linz, *Mass Media Sexual Violence and Male Viewers: Current Theory and Research*, 29 AM. BEHAVIORAL SCIENTIST 601, 616 (1986).

¹¹⁹ Todd Gitlin, *The Left and Porno*, in MEN CONFRONT PORNOGRAPHY, *supra* note 41, at 102, 103.

¹²⁰ Joel Kovel, *The Antidialectic of Pornography*, in MEN CONFRONT PORNOGRAPHY, *supra* note 41, at 153, 167.

¹²¹ Wendy Kaminer, *Feminists Against the First Amendment*, ATLANTIC MONTHLY, Nov. 1992, at 110, 118.

¹²² KAPPELER, *supra* note 31, at 157.

mercial entertainment society. "The alternative to pornography, then, stands or falls with the alternative to capitalist and patriarchal society as a whole."¹²³ Little wonder, then, that even a full-blooded conservative such as George F. Will could label the radical feminist agenda "the *most* radical assault on free speech in American history."¹²⁴ Antipornography is the practice, anticapitalism is the theory.

The legendary rock hero Jimi Hendrix quipped: "Once you are dead you are made for life."¹²⁵ Ironic as it "sounds," there is a curious ring of truth in Hendrix's whimsy. As the old Madisonian discourse dies, it is remade in pornotopia's images of intercourse. Enlightenment logic gives way to erotic logic. Ambivalence toward pornography surrenders to love of body politics. The common good lapses into a common sexual death wish. Deliberative democracy becomes a democracy of desires, and sexual harms become sexualized. America is not yet pornotopia. Ambivalence remains. The old discourse is not yet dead. Still, as the vital signs of Madison's First Amendment weaken, they make way for life in the pornographic state.

Clad in a long trenchcoat, Anthony enters the Venus Envy cinema, sits down in an empty row, and watches Caligula as the Roman emperor collapses in a bacchanalian revelry of sex and violence.¹²⁶ Anthony is too preoccupied to realize, however, that in the theatre of pornotopia the climactic moment is the death of discourse.

THE END

¹²³ Gitlin, *supra* note 119, at 104; see also ZILLAH R. EISENSTEIN, *THE RADICAL FUTURE OF LIBERAL FEMINISM* 220–53 (1993) (arguing that the contemporary capitalist state strives to contain the subversive quality of liberal feminist attacks on society's patriarchal organization).

¹²⁴ George F. Will, *Pornography Scare*, WASH. POST, Oct. 28, 1993, at A23 (emphasis added).

¹²⁵ TIMOTHY WHITE, *ROCK LIVES: PROFILES AND INTERVIEWS* 254 (1990) (quoting Jimi Hendrix).

¹²⁶ See DE GRAZIA & NEWMAN, *supra* note 59, at 378–79. *Penthouse International's* Bob Guccione, one of the film's producers, characterized it thus: "Comparing an X-rated film to *Caligula* is like comparing the shootout at the O.K. Corral to the Second World War." *Id.* at 148.