

POLITICAL PORNOGRAPHY

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Pornography and Law

Why would we want to talk about pornography? Isn't it nonsensical to suggest that "the pornographic imagination says something worth listening to?"¹ Beyond regulation, what can possibly attract the attention of the legal scholar to this commercial form of expression that draws its power from the unabashed exploitation of the most basic –even the lowest– drives of our physicality? I do not claim to have a neutral, all-embracing and compelling answer to this question because, in fact, objects of inquiry are not interesting in themselves; any object of interest only becomes such when linked to a personal interest, which we scholars like to invest with the distinction of the expression 'academic agenda.'

Pornography, as a serious topic of study, is a complex phenomenon that appeals to a variety of different audiences. From among the many possible reasons for this, I would like to single out its attraction for those interested in the incarnation of normative boundaries into prohibitions open to transgression; people who would agree that "a philosophy of concrete life must not withdraw from the exception and the extreme case, but must be interested in it to the highest degree."² For good or ill,

¹ SUSAN SONTAG, *STYLES OF RADICAL WILL* 70 (1969).

² CARL SCHMITT, *POLITICAL THEOLOGY. FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 15 (2005).

pornography challenges –and in doing so becomes attached to– fundamental notions about the proper role of reason, the body, and the passions. Pornography unsettles the moral sphere of our societies with the allure of the obscene. Conversely, obscenity –the overarching moral category to which pornography belongs– and law coincide in their intertwinement with the fundamental dimension of the prohibited, of the *taboo*. Rethinking pornography as a heterogeneous, self-contradictory genre whose narrative focus on the constant changes in the roles of the participants of sexual intercourse can provide promising insights for constitutional theory.

The relationship between constitutional law and pornography is usually considered in a unidirectional way. The most common question is *what does the law say about pornography*, accompanied with its variant of *what should the law say* about the same issue. These questions lead us to study the statutory and jurisprudential regulation of the production and distribution of pornography and to formulate its normative critique. This is nothing but a legal monologue; sometimes passionate, often judgmental, almost always self-righteous but, all in all, nothing but a monologue.

On this issue, despite its contestation in various legal and political forums by conservatives and some –not all– branches of feminism,³ the law seems to be

³ An account of the respective discourses on pornography of these movements and their coinciding strategies in the US context can be found in Robin West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report*, 12 AM. B. FOUND. RES. J. 681. A detailed study of the differences between so-called ‘pro- and anti- censorship feminists’ can be found in Nadine Strossen, *A Feminist Critique of “the” Feminist Critique of Pornography*, 79 VA. L. REV. 1099.

momentarily on the side of pornography. The current legal landscape prevailing in Western countries bears a general permissiveness towards the production and distribution of pornography, excluding merely those varieties of pornography which involve children or non-consensual violence.⁴ Certainly, the boundaries of this permission are the subject of a constant contention and negotiation grounded in “contemporary community standards;”⁵ the battlefield being, usually, the demarcation of the threshold that separates the pallid genre of softcore porn from its full-fledged big brother, hardcore pornography.

During the last three decades, both opponents and supporters⁶ of pornography have had their opportunity to contribute their arguments to the ethical, legal, and political debate.⁷ But I think that the time is ripe for bracketing the rhetoric of advocacy⁸ and asking a different kind of question; namely, *what can pornography tell us about constitutional law*. Of course, the paths for exploration opened by this shift are both numerous and various. Thus, my first step is to narrow down the focus of this paper. My object will be to explore the aesthetics and narrative of pornography, its underlying anthropology and sociology, and its psychological

⁴ But see *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), protecting simulated child pornography. This accounts for the legality of the so-called *barely legal* pornography, a subgenre of porn that toys with the idea that its porn actresses are teenagers.

⁵ *Miller v. California*, 413 U.S. 15, 24 (1973); *Roth v. U.S.*, 354 U.S. 476, 489 (1957).

⁶ See John B. McConahay, *Pornography: The Symbolic Politics of Fantasy*, 51 LAW & CONTEMP. PROBS. 31, for a characterization of the positions on the issue.

⁷ In this struggle, as in any other, the participants “project onto pornography their utopian desires or dystopian dreads about sexuality, power, gender, desire and social justice,” (Henry Jenkins, *Foreword: So You Want to Teach Pornography?*, in MORE DIRTY LOOKS: GENDER, PORNOGRAPHY AND POWER 2, 3 [Pamela Church Gibson ed., 2008]). “Pornography is a malady to be diagnosed and an occasion for judgment. It’s something one is for or against.” SUSAN SONTAG, *STYLES OF RADICAL WILL* 37 (1969).

⁸ I am echoing here Paul Kahn’s call to turn “legal scholarship away from the project of law reform.” PAUL KAHN, *THE CULTURAL STUDY OF LAW* 1 (1999).

appeal to our imagination, as an illustrative resource for some debates within constitutional theory.⁹ My point is, to be sure, not to prove the ultimate truthfulness or wrongness of competing theories, but rather, to illustrate and enrich the strength of the position to which I subscribe and that I would vaguely describe as a *political reading* of the Constitution.¹⁰ It is not a deductive maneuver as much as a rhetorical display; personally, I reject the approach so pervasive in the moral discourses (be they social sciences, philosophy, humanities, ethics) which, in awe of the Newtonian sciences, deceitfully strive to achieve the same binding power of the laws of gravity.¹¹ Thus, this work aspires to find a place in that “general turn against theory and toward narrative”¹² that has yet to come. I will call this particular reversal of the legal monologue an exercise in *Political Pornography*.¹³

Questioning Constitutional Theory

⁹ Again, this is only one of many approaches to the topic. I might equally have asked what does the statutory and jurisprudential regulations of pornography say about the beliefs of a community. This kind of question has been confronted by ROBERT POST in CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT (1995); see Ch. 3, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, and Ch. 4, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*. Yet another direction is to explore the place that sexuality, love, and pornography occupy within the imaginary that supports the political order of a community. This is the approach of PAUL KAHN in PUTTING LIBERALISM IN ITS PLACE (2004); see Ch. 5, *The Erotic Body*.

¹⁰ I develop at length what do I understand by this in *A Political Reading of the Constitution* (manuscript).

¹¹ “In almost every discussion one can observe the extent to which the methodology of the natural-technical sciences dominates contemporary thinking.” CARL SCHMITT, ROMAN CATHOLICISM AND POLITICAL FORM 12 (1996).

¹² RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY xvi (1989).

¹³ The implicit reference for the structure of this work is CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY (2005).

Political Pornography holds the mirror of popular culture up to the prevailing assumptions of constitutional theory. This is, then, an exercise in polemics. The focus of my criticism is a particular understanding of the nature and properties – that is, a particular model– of the constitution. I will call it the model of ‘contractarian constitutionalism.’

Although I do not directly refer to contractarian political philosophy of the kind associated with John Rawls, there are certainly deep entanglements and equivalences between these two schools, to the extent that it is possible to say that contractarian constitutionalism translates contractarian political philosophy into constitutional parlance, discarding some materials in the process but maintaining an identifiable core.¹⁴

The relationship between contractarian constitutionalism and economic thinking is deep indeed. We can start to see the premises and consequences of this relationship in Carl Schmitt’s treatment of the political and the juridical as grounded on the concept of representation. For Schmitt, representation is a fundamentally semantic power, the capacity for concretely evoking the thing represented. “[T]he power of speech and discourse –rhetoric in its greatest sense– is a criterion of human life,”¹⁵ he asserts. The powers of rhetoric are linked to a theory of authority, by so that “the spiritual resonance of great rhetoric derives from the belief in the representation

¹⁴ I think it would be relatively safe to identify as varieties of contrarian constitutionalism the work of, among others, Ronald Dworkin, Friedrich Hayek, Robert Bork, and Antonin Scalia.

¹⁵ CARL SCHMITT, ROMAN CATHOLICISM AND POLITICAL FORM 23 (1996).

claimed by the orator.”¹⁶ In conceptualizing the political and the juridical through the prism of representation, we grant to these phenomena a thickness¹⁷ that other forms of thinking, particularly economic, would deny them. Economic thinking dismisses the semantic powers of representation; it is materialistic in the more philosophical sense of the word,¹⁸ arising in a moment of Western history when the disruptive semantic powers of the symbolic –particularly in the form of the wars of religion– had exhausted the European nations. The emergence of contractarian constitutionalism is, under these terms, the answer of economic thinking to what Schmitt describes as “the glaring contradiction between the goal of making the economic into a social principle and the endeavor to perpetuate [private] civil law and especially private property.”¹⁹ As Schmitt insightfully perceived it so, this effort to conciliate an economic foundation of social life with the need to recur to a legal regulation (that is, a representational form as he already defined it), amounts necessarily to a limitation of the juridical sphere. This limitation of the juridical is radical; it does not limit itself to ask for, say, separation of powers, but it demands from the law a level of certainty that amounts to its crystallization, in an effort to locate the legal beyond “the frailty of human affairs”.²⁰

¹⁶ CARL SCHMITT, ROMAN CATHOLICISM AND POLITICAL FORM 24 (1996).

¹⁷ See: “culture is not a power, something to which social events, behaviors, institutions, or processes can be usually attributed; it is a context, something within which they can be intelligibly –that is, thickly– described.” CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 14 (1973).

¹⁸ Young makes this point regarding political philosophy: “A distributive paradigm runs through contemporary discussion about justice... (that) defines social justice as the morally proper distribution of social benefits and burdens among society’s members.” IRIS M. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 16 (1990).

¹⁹ CARL SCHMITT, ROMAN CATHOLICISM AND POLITICAL FORM 28 (1996).

²⁰ HANNAH ARENDT, THE HUMAN CONDITION 188 (1958).

Contractarian constitutionalism is a model that uses the image or metaphor of the rules of the game to describe the nature of a constitution. For thinkers of this school, the constitution, their preferred locus of reflection on governance,²¹ is not something that we are, nor an ethical way of living –as a Hegelian republicanism would probably claim–, but rather a set of rules that we adopt to regulate ways of living that are conceived of as prior to the political realm (whether chronologically or ontologically).²² The individuals that live in this prior world are rational agents that adopt these rules to satisfy the need for stability of their social arrangements.²³ Sometimes these rules are envisioned as a lesser evil, and sometimes as a good that enhances the pre-political world. It is worthy of mention, though, that if they are accepted it is because for the individuals making the rational choice of enacting them, who live surrounded by conflicts of interest and divided by moral disagreements, these rules of the game embody the minimum substantive and procedural agreements –the overlapping consensus, you could say– that they are willing to establish as precommitments.²⁴ The rules of the game appear as a locus of

²¹ Reflection on governance does not necessarily have to be centered on the constitution. It can be presented as a reflection on politics, on democracy, on certain principles of governance, among other forms.

²² Accordingly, politics can be seen as a “special sort of good,” as Walzer puts it, that at the same time “is like the other things that men and women make, value, exchange, and share” and “is the regulative agency for social goods generally.” MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 15 (1983).

²³ Schmitt reformulates Hegel’s definition of the bourgeois as “an individual who does not want to leave the apolitical riskless private sphere.” CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 62 (2007).

²⁴ JON ELSTER, *ULYSSES AND THE SIRENS* (1984) popularized the idea that constitutions work as a kind of precommitment. He has revisited his earlier arguments, emphasizing now the “extent of the disanalogy between individual and collective self-binding” that arises from the fact that “constitutions may bind others rather than being acts of self-binding” and that “constitutions may not have the power to bind in the first place.” JON ELSTER, *ULYSSES UNBOUND* 92 (2000). Waldron makes a thorough revision of the fallacies and shortcomings of this conceptual image and its consequences in JEREMY WALDRON, *LAW AND DISAGREEMENT* 255- 281 (2001).

neutrality, a constitution that regulates politics but that remains largely pre-political in itself.

In calling this view contractarian, I want to call attention to the fact that in modeling and dreaming the constitution it recurs to a familiar device of the pre-political world, the *contract*, entrusting the constitution with the kind of expectations that parties would have of a contract (as we can see, the very paradigm that gives its particular shape and identity to contractarian constitutionalism is an economic one).²⁵ The most relevant consequence of this assumption about the nature of constitutions are for the properties that are ascribed to the notion of a constitution, which in turn create expectations for existing constitutions. Among these properties I want to emphasize, for my present purpose, the requirement of clarity, stability, and certainty of *rules* and *roles*. Contractarian constitutionalism assumes that since the constitution contains the rules of the game –be it the game of private markets or the game of deliberative democracy–, these rules must be clear, stable, and endowed with legal certainty. Furthermore, contractarian constitutionalism demands that the roles of the constitutional actors, including but not limited to the definition of the powers of constitutional branches and the rights that individuals can invoke, are or at least ought to be clearly defined and not subject to the inclemencies of politics.

It is these assumptions about the constitution, and some often associated ideas about the human condition and its social arrangements, which I want to call into

²⁵ When I wrote this paragraph, I was not yet aware of the use by Foucault of very much the same image: “In the body of theory to which I am referring (what he calls ‘economism’ in the theory of power), the constitution of political power is therefore constituted by this series, or is modeled on a juridical operation similar to an exchange of contracts.” MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED. LECTURES AT THE COLLEGE DE FRANCE 1975-1976 13 (2003).

question –not necessarily to discard– in this paper and as part of my long-term project. This critique is certainly political in character, but it does not mean that in recognizing that dimension I renounce to its descriptive character.²⁶ I believe that contractarian constitutionalism is an inaccurate way of understanding the intersection between politics and law, and that this misunderstanding arises from false assumptions about the human condition and the political experience. Contractarian constitutionalism neglects, among other phenomena, the powerful – and legitimate– role that emotions and the body play in the political; the deep embedment of institutions in political and historical contexts that account for their operability; the plasticity and open-endedness of the languages that define those institutions; and the fact that disagreements in the constitutional domain not only arise from substantive –that is, moral– dissent but also from positional –that is, political– alignments whose convolutions question the very definition of the constitution. The “illusion of an undisturbed calm”²⁷ that serves as a defining benchmark of contractarian constitutionalism needs to be replaced by that phenomenological realism that “can frighten men in need of security.”²⁸

Going porn

We should identify three distinct dimensions of the complex phenomenon of pornography: the pornographic imagination, pornographic imagery, and the

²⁶ Descriptive utterances are “utterances which report facts or which describe situations truly or falsely.” JOHN L. AUSTIN, *Performative Utterances*, in PHILOSOPHICAL PAPERS 232, 232 (1979).

²⁷ CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 65 (2007).

²⁸ CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 65 (2007).

pornographic industry. The pornographic imagination is the recipient of the pornographic imagery that the pornographic industry produces.

More often than not, traditional discussion of pornography and law –the legal monologue– involves two distinct areas of scrutiny: the pornography industry, and the pornographic imagery. Thus, conservatives dwell on the erosive effects that the display of pornographic imagery has on traditional morality (usually begging two questions: whether those effects exist, and whether it is bad to erode traditional morality); while feminists have focused on the status of women within the porn industry and the cultural impact of pornographic imagery. Undoubtedly, the pornographic imagination is fundamentally dependent on the cultural and moral context of the material community that nurtures it. But most of these thinkers have neglected the pornographic imagination, which will be one of my focuses here.

The basic event of the pornographic imagination, its foundational myth, was described by Freud, speaking of the Battas of Sumatra: “These people assume as a matter of course that a solitary meeting between a man and a woman will lead to an improper intimacy between them.”²⁹ From this basic structure a myriad of forms are born, multiplying the possibilities of the pornographic moment by altering the gender of the participants, their number, the surrounding of their encounter, and so on.

As I insinuated above, in this work I will not focus on the pornographic industry but rather on the interplay between pornographic imagery and the pornographic

²⁹ Sigmund Freud, *Totem and Taboo*, in 13 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 1, 11 (James Strachey ed., 1955).

imagination, treating this construct as a single 'discursive formation.'³⁰ Discursive formations are large groups of statements that while characterized by their dispersion, heterogeneity, and contradictions, are held together by various 'rules of formation' that make possible their emergence.³¹ It might be useful to think of the totality of discursive formations in a given society as forming that society's specific social imaginary, that is to say "the ways people imagine their social existence, how they fit together with others, how things go on between the and their fellows, the expectations that are normally met, and the deeper normative notions and images that underlie these expectations."³²

Pornography is, in fact, a tremendously heterogeneous literary and cinematographic genre, one that is fraught with contradictions and which "refuses to make fixed distinction between the sexes or allow any kind of sexual preference or sexual taboo to endure."³³ Most of the debate on pornography focuses primarily on heterosexual porn and assumes as a given that in such material the roles of men and women are clearly defined and hierarchically arranged to the detriment of the female. But in fact, it is an ironist genre in Rorty's term, since on it "at each new stage of visual

³⁰ For Foucault, to analyze a discursive formation is to define the type of positivity of a discourse, to "deal with a group of verbal performances at the level of the statements and of the form of positivity that characterizes them." MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* 125 (1972).

³¹ According to Linda Williams, after devoting some attention to the genre of pornography she found that film pornography "did not so neatly illustrate such objectification" of women and that in fact "these apparently self-evident texts were fraught with contradiction," granting them more narrative richness than usually thought. LINDA WILLIAMS, *HARD CORE. POWER, PLEASURE, AND THE "FRENZY OF THE VISIBLE"* x (1989).

³² CHARLES TAYLOR, *MODERN SOCIAL IMAGINARIES* 23 (2004).

³³ SUSAN SONTAG, *STYLES OF RADICAL WILL* 66 (1969).

intensification the previous institution of pleasure is questioned.”³⁴ This static debate needs, first of all, to be reminded of the sheer variety of pornographies. Gay, lesbian, bisexual, pansexual porn; all-white, all-black, interracial porn; porn situated in a prison, in a courthouse, in the office, in a college, in a party; professional porn, amateur porn; porn with a single performer, with a couple, threesomes, orgies; with any kind of objects and species of life suitable for the purpose –and some unsuitable–; gerontophilic porn, porn with stars in their 20’s, “barely legal” porn with actresses who look like teenagers, and yes, of course, pedophilic porn located, together with snuff films, at the outskirts of legality and morality. Porn, porn, porn.

Not even that most scorned subgenre of pornography, heterosexual porn, is as simple as sometimes it is taken to be by the public debate. Often (in a way that opens interesting questions about the male heterosexual imagination) the female character takes the active role not only in sexual terms but also, more sophisticatedly, in socio-psychic terms. Sometimes she is the person in a position of authority; at times, she is the one that crosses the line of seduction, the first in taking action and tearing down the walls of propriety. Sometimes, she is the prize to be achieved, the unreachable idol for whom the male has to struggle with skill or courage. Even in narrative terms women are often granted in heterosexual pornography a symbolic prominence that other cultural expressions deny them, as when they tell the story from their own perspective and the material yields to them

³⁴ LINDA WILLIAMS, *HARD CORE. POWER, PLEASURE, AND THE “FRENZY OF THE VISIBLE”* 91 (1989).

the authority of the narrator's voice.³⁵ Pornography, surprisingly, would not pose objections to a contestation of the cultural character of both gender and sex, a shift that so prominently characterizes a good deal of contemporary feminist and queer reflection.³⁶ Within Butler's terms, pornography can claim to be "a repetition that is not fully constrained by the injunction to reconsolidate naturalized identities," a practice of parody that becomes "the site of a dissonant and denaturalized performance that reveals the performative status of the natural itself."³⁷

How is it that we denominate with a single word such a complex and diverse cluster of phenomena? Perhaps the underlying rules of formation of pornography include the deindividuation of objects and individuals by their simultaneous transformation into sexual objects and sexual subjects; an enunciative modality of repetitive, endless reenactment of the sexual act in unceasing variations, each of them more creative and daring than the last; a web of intertextuality through defining concepts like the sexual object/subject, the sexual act, the "money shot," and the disappearance of other concepts like procreation or disease; and the strategies used by the pornographic image to seduce and penetrate the pornographic imagination: veiled sensuality, open sexualization, and the interplay between the prurient and the obscene, the prohibited and the indulgent, the extravagant and the recurrent. If these are the rules of formation that define it, then pornography is surely an

³⁵ Indeed, "at the center of the pornographic tale is often a woman as the main character." PAUL KAHN, *PUTTING LIBERALISM IN ITS PLACE* 203 (2005).

³⁶ "If the immutable character of sex is contested, perhaps this construct called 'sex' is as culturally constructed as gender; indeed, perhaps it was always already gender, with the consequence that the distinction between sex and gender turns out to be no distinction at all." JUDITH BUTLER, *GENDER TROUBLE. FEMINISM AND THE SUBVERSION OF IDENTITY* 9-10 (1990).

³⁷ JUDITH BUTLER, *GENDER TROUBLE. FEMINISM AND THE SUBVERSION OF IDENTITY* 200 (1990).

interesting discursive formation. I am not even sure that we could refer to porn by saying “I know it when I see it”³⁸ (a moving but devoid instance of Wittgensteinian piousness) since the unpredictable forms that the pornographic can take on might prevent some people to recognize them as pornographic. A bondage film or a foot fetishism movie, with no explicit display of sexual organs, might look sick but not pornographic to some people.

As an example of exploitation fiction,³⁹ that is fiction “centered on some form of forbidden spectacle that served as [its] organizing sensibility”⁴⁰, pornography belongs to that heterogeneous, complex and contradictory depository usually referred as popular culture, often disapproved by some intellectuals⁴¹. But to dismiss popular culture as a resource for scholarly reflection would be a mistake for the humanities, since it “provides a reasonably reliable indicator of shared, conflicted, and newly emerging beliefs, values, and expectations.”⁴² Political Pornography is then an exercise in exploring the lessons that we can draw for political and constitutional theory from contemporary popular culture.⁴³ In that

³⁸ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

³⁹ That is, books and films that exploit the interest of audiences in a forbidden or morbid subject. Contemporary pornographic films were preceded by the genre of sexploitation, sort of soft-core films exhibited during the 60's in so-called grindhouse theatres, the precursors to the adult movie theaters.

⁴⁰ ERIC SCHAEFER, “BOLD! DARING! SHOCKING! TRUE!”: A HISTORY OF EXPLOITATION FILMS, 1919-1959 5 (1999).

⁴¹ For example, Adorno claims that the “total effect of the culture industry is one of anti-enlightenment, in which... enlightenment, that is the progressive technical domination of nature, becomes mass deception and is turned into a means for fettering consciousness.” THEODOR ADORNO, *THE CULTURE INDUSTRY* 106 (2001).

⁴² RICHARD K. SHERWIN, *WHEN LAW GOES POP. THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE* 171 (2000).

sense, it is a highly idiosyncratic exercise. It rejects the idea –implicit in so many academic projects– that it is the *best* way to accomplish its objective (in this case, to provide a narrative of political and constitutional theory) for other sources rather than pornography, even other than culture, can, and are encouraged to be, used in this process of questioning constitutional theory.

It is also a personalized project, because it does not indulge in the fantasy that everyone will draw the same conclusions from such an exercise. There are no methodologies or perfect technologies that can spare us from disagreements; because, after all, the moral sphere is governed not by the rules of logic or causality but rather by those of rhetoric. The paradigmatic structure of modern philosophy, the replacement of substantive concepts of the good by rational procedures that under ideal conditions would lead us to the right answer, seems incapable of producing the desired results;⁴⁴ it's certainly not one of the legacies of Enlightenment that I am eager to claim.⁴⁵ Considered as an argumentative technology, Political Pornography should spark off new disagreements about how to

⁴³ Conversely, the pop artist can also develop an interest in scholarship. The chameleonic composer and singer Iggy Pop read Gibbon's *THE DECLINE AND FALL OF THE ROMAN EMPIRE* and narrates his experience in a scholarly journal: "I would read with pleasure around 4 am, with my drugs and whisky in cheap motels, savouring the clash of beliefs, personalities and values, played out on antiquity's stage by crowds of the vulgar, led by huge archetypal characters." Iggy Pop, *Caesar Lives*, 2 CLASSICS IRELAND 94, 95 (1995). These readings would inspire him to compose the track *Caesar* for the album *AMERICAN CAESAR* (1993).

⁴⁴ Probably because these technologies avoid "bringing into question what is most important– the rationality of the purpose of this supremely rational mechanism." CARL SCHMITT, *ROMAN CATHOLICISM AND POLITICAL FORM* 15 (1996). The eagerness to elucidate substantive positions through technologies blinds modern thinking to the fact that "every strong politics will make use of it," of technologies. CARL SCHMITT, *The Age of Neutralizations and Depoliticizations*, in *THE CONCEPT OF THE POLITICAL* 95 (2007).

⁴⁵ "Neither a political question nor a political answer can be delivered from purely technical principles and perspectives." CARL SCHMITT, *The Age of Neutralizations and Depoliticizations*, in *THE CONCEPT OF THE POLITICAL* 92 (2007).

interpret the parallels and contrasts between political theory, constitutional theory, and the aesthetics of pornography.

Considering the limitations of space and time, in this version of the paper I will explore only one of the various parallels, contrasts or analogies that we can possibly draw regarding the relationship between pornography, its aesthetics and narrative, and constitutional theory.

From substance to power play

Much moral and aesthetic criticism of pornographic imagery assumes as a matter of fact, as I have been suggesting, that the pornographic universe has a fixed and stable topology, implying among other things a clear-cut sexual division of labor and functions. In this critique, female characters submitting and pleasing male characters through a specific artifact, the sexual act, occupy the pornographic space. But this theory of pornography mischaracterizes its object of reflection. In the pornographic discursive formation, the locus of appearance of the pornographic phenomena is never predetermined, nor positively –nothing is pornographic a priori– nor negatively –everything can become pornographic–. The roles and the positions of the characters are constantly contested and negotiated quite literally through their pornographic performance, which must not be conceived as a sexual act but properly speaking as sexual *intercourse*.

Sex in pornography defines a total universe, experiencing a two-way transformation into a sexual subject/object. We tend to think of female characters as mere sexual objects in the pornographic imagery/imagination; but the truth is that not only they

are so, but also they are sexual subjects, “engaged in the same self-discovery as men.”⁴⁶ Likewise, the same happens to the rest of the characters within pornographic imagery, which are sexual objects as much as sexual subjects.⁴⁷ Objects, strictly speaking, also become subjects; sex toys acquiring a personality of their own in a process resembling structurally the sacralization and personification of certain objects in religious rites. Just as the Host and the wine become the body and blood of Christ, in the pornographic world a dildo, a whip, a set of Chinese balls, become extensions of the eroticized body in their own merit; the pornographic universe is governed by a kinky prosopopoeia. Needless to say, the porn-watcher becomes within his/her imagination a sexual object him/herself; the fantasy of being desired, of being an object for someone else’s lust, runs parallel to the desire for acting on his/her object of craving. In the realm of the pornographic imagination everyone and everything is up for grabs. Any individual or object can become a focus for sexual intercourse.⁴⁸ That means not only that there are not inherent boundaries for sexuality but also that within the sexualized universe there are no stable structures of hierarchy or agreed upon roles.⁴⁹ This also means that there are no a priori sexual loci; not even those that have such condition in our everyday life.

⁴⁶ PAUL KAHN, PUTTING LIBERALISM IN ITS PLACE 203 (2005).

⁴⁷ Freud bases his analysis of paraphilias on two technical terms: “Let us call the person from whom sexual attraction proceeds the *sexual object* and the act towards which the instinct tends the *sexual aim*.” SIGMUND FREUD, *The Sexual Aberrations*, in THREE ESSAYS ON THE THEORY OF SEXUALITY 1-2 (1975).

⁴⁸ The “pornographic imagination tends to make one person interchangeable with another and all people interchangeable with things.” SUSAN SONTAG, STYLES OF RADICAL WILL 53 (1969).

⁴⁹ So “bisexuality, the disregard for the incest taboo, and other similar features common to pornographic narratives function to multiply the possibilities of exchange. Ideally, it should be possible for everyone to have a sexual connection with everyone else.” SUSAN SONTAG, STYLES OF RADICAL WILL 66-67 (1969).

It is not unheard of the case of pornographies where the seemingly attractive actor or actress is abandoned in favor of more normal looking, or even bad looking, sexual objects/subjects. Certain varieties of porn in fact assign a central place onstage either to overtly normal everyday sexuality rather than glittering porn stars (think of the *amateur* genre) or to odd and nonconventional sexuality (let's think of what is derogatorily or mockingly called *nugget porn*, "pornography in which one or both of the characters is a nugget; has no arms and leg;"⁵⁰ oriented to people with acrotomophilia or attraction towards others who are amputees, who prefer to call themselves the devotee/amputee community⁵¹).

Georges Bataille describes for us in beautiful terms the emotional texture that defines this world through the words of one of the protagonists of his *Story of the Eye*:

"I was not even satisfied with the usual debauchery, because the only thing it dirties is debauchery itself, while, in some way or other, anything sublime and perfectly pure is left intact by it. My kind of debauchery soils not only my body and my thoughts, but also anything I may conceive in its course, that is to say, the vast starry universe, which merely serves as a backdrop."⁵²

The capacity of sexuality to be at the same time all embracing and empty suggests us of its condition of a signifier devoid of signified. Sex and promiscuity in the pornographic discursive formation is not related to the many elements that in our familiar world serve as semantic signposts: emotion, love, childbearing, not even

⁵⁰ <http://www.urbandictionary.com/define.php?term=Nugget%20Porn>.

⁵¹ <http://www.overground.be/glossary.php?lan=en>.

⁵² GEORGES BATAILLE, *STORY OF THE EYE* 49 (1977).

diseases. This separation opens up new possibilities; to be sure, self-referential sexual possibilities. In elaborating his assertion “Because cinema has its center in the gesture and not in the image, it belongs essentially to the realm of ethics and politics (and not simply to that of aesthetics),”⁵³ Agamben goes on declaring that what characterizes gesture is “that in it nothing is being produced or acted, but rather something is being endured and supported.”⁵⁴ We should read this not only in light of the separation of signifier and signified, but also keeping in mind that even “if it communicates nothing, discourse represents the existence of communication; even if it denies the obvious, it affirms that speech constitutes truth; even if it is destined to deceive, it relies on faith in testimony.”⁵⁵ Politics for itself, a politics of pure gesture, is a politics that asserts its own existence and through this self-referentiality creates the conditions for our unfolding.⁵⁶

This is also related to what is perceived as the repetitiveness of the sexual act, which we have recasted as sexual intercourse. Many criticize this repetitiveness of pornography as a narrative shortcoming of this genre, failing to see the nuanced role-playing that porno movies display and to which I have already referred.⁵⁷ The

⁵³ GIORGIO AGAMBEN, MEANS WITHOUT END. NOTES ON POLITICS 57 (2000).

⁵⁴ GIORGIO AGAMBEN, MEANS WITHOUT END. NOTES ON POLITICS 60 (2000).

⁵⁵ JACQUES LACAN, ECRITS 209 (2007).

⁵⁶ Agamben has a criticism of his own towards pornography, adducing that through its effort at expressing something –the sexual smirk of the porn star–, porn seeks to neutralize the “profanatory potential” of performances that rejoice in their lack of signified. GIORGIO AGAMBEN, PROFANATIONS 91 (2007).

⁵⁷ Hard-core pornographic films dissolve the division between act and representation once again: the performance that we see on the screen is not only a representation, an enactment, but is at the same time the very same act that is being represented. The performers *are* having sex. Yet another turn of the screw is made by amateur pornographers that upload to the Internet their homemade videos: they are filming their *real-life* sexuality.

associated mistake to think that pornography has a well definite sexual structure. In this critique, the purported monotony of the pornographic universe reminds us of the derogatory attitude of the Greeks towards their non-Greek-speaking neighbors, which they called barbarians for their own incapacity to distinguish anything but mumblings in their speech. But “to imagine a language means to imagine a life-form;”⁵⁸ and behind the repetitiveness of the seemingly monotone surface of an unfamiliar discursive formation, often lies a world of subtleties and sophistication. Thus, under the apparent repetition of pornography lies a complex and often contradictory world of innuendos and explicitness, rebellion and surrender, temptation and self-indulgence, lust, enjoyment, seduction; where it is never clear who is who, who will behave in which way, how many will take part in what. Sexual intercourse in pornography is a struggle of constant redefinition and seduction, confusion and change of roles.⁵⁹ Even the most basic unity of pornography, one individual alone, offers infinite possibilities; many pornographic films revolve around a single individual exploring her/himself in a myriad of different variations. Furthermore, one of the assumptions of pornography is the idea that when two individuals get together they will engage in a limitless variety of different sexual positions, incarnating in the most straightforward way possible the element of constant change and redefinition that assimilate sexuality to the political process. In

⁵⁸ LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 7 (1958).

⁵⁹ “Examining the very different ways pornographers represent the same basic acts and create different structures of meaning and affect sheds light on how film style operates more generally.” Henry Jenkins, *Foreword: So You Want to Teach Pornography?*, in *MORE DIRTY LOOKS: GENDER, PORNOGRAPHY AND POWER* 2, 2 (Pamela Church Gibson ed., 2008).

the pornographic imagery the loci of sexualization are multiplied infinitely, giving us warrants to assert that the pornographic universe is polytheist.

In exploiting this resemblance between pornography and politics lie some of the benefits that political pornography can provide for the task of criticizing constitutional theory. Pornography is, after all, “hardly, the only form of consciousness that proposes a total universe;”⁶⁰ for some traditions of reflection on the political experience, this dimension of human life is also defined by its diffuseness, by the fact that “politics are both nowhere and everywhere.”⁶¹ One of the paramount formulations of this tradition is condensed in Carl Schmitt’s observation that the political “does not describe its own substance, but only the intensity of an association,”⁶² a kind of association that entails the “ever present possibility”⁶³ of defining concrete political antagonisms and alignments. That association is, to be sure, the definition of the enemies and friends, the sovereign decision over which are to be the prevalent conflicts. The content of the political is not authoritatively determined in a positive or negative way; its place of emergence remains always unpredictable and implacable. Constitutional theory is charged with the task of understanding the infinite ways in which constitutional law can become politicized and the reasons that explain that in our culture some areas seem to be more often politicized than others, without losing sight of the immanent stability of these constants. The embracement of a political theology to accomplish this task,

⁶⁰ SUSAN SONTAG, *STYLES OF RADICAL WILL* 67 (1969).

⁶¹ IAN SHAPIRO, *DEMOCRATIC JUSTICE* 10 (2001).

⁶² CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 38 (2007).

⁶³ CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 32 (2007).

rooted in Schmitt's manifesto that "all significant concepts of the modern theory of the state are secularized theological concepts,"⁶⁴ is all the more natural given that "total experiences, of which there are many kinds, tend again and again to be apprehended only as revivals or translations of the religious imagination."⁶⁵ But political pornography can also be helpful in this task of theorizing the political in relation to the constitutional, given that the ever present possibility of a pornographic sexual encounter functionally plays a similar role than the schmittian "ever present possibility of combat," both entailing a "mode of behavior which is determined by this possibility"⁶⁶ that remind us of the decentered subjects, the fragile social arrangements, and the open-textured texts that inhabit the constitutional world.

A constitutional theory shaped by political pornography must be particularly attentive to the instability of distributions of power because of the inherent instability of constitutional rules and roles, resulting in that the very allocation of power tends to be the object of constitutional struggle,⁶⁷ paralleling that genre where "narrative equilibrium does not necessarily lie in the permanent union of the couple."⁶⁸

Conclusion: Roles, Rules, and Rawls

⁶⁴ CARL SCHMITT, *POLITICAL THEOLOGY. FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 36 (2005).

⁶⁵ SUSAN SONTAG, *STYLES OF RADICAL WILL* 69 (1969).

⁶⁶ CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 37 (2007).

⁶⁷ Not even the locus of contestation and struggle is predefined; "[o]nly the actual participants can correctly recognize, understand, and judge the concrete situation and settle the extreme case of conflict." CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 27 (2007).

⁶⁸ LINDA WILLIAMS, *HARD CORE. POWER, PLEASURE, AND THE "FRENZY OF THE VISIBLE"* 151 (1989).

Pornography is at the same time *totem* and *taboo*: the glittering porn actress and her entourage are a focus of devotion, a phallic symbol in their own merit; but at the same time they inhabit a locus of moral prohibition and disapproval.⁶⁹ No wonder, pornography has proven to be during the time that I have been working in this project a resourceful topic for discussion and reflection.

I have argued in this paper that pornography is characterized by a tight grip on the decentered subject of all that we could vaguely refer to as its non-rational sides and the blurring down of sexual identities, hierarchies, sexual divisions of labor. I have emphasized the ambiguity of the normative boundaries and the constant renegotiation of roles that distinguish this discursive formation, can provide us an insightful and provocative thread to reflect critically on constitutional theory.

Probably a further prodding can come from other sexual practices that also reside in the outskirts of conventional morality. I am now thinking of bondage and other practices included in BDSM, “a complex acronym derived from the terms bondage and discipline (B/D), dominance and submission (D/s), sadism and masochism (S&M, S/M, or SM).”⁷⁰ For those who are not familiar with it, I should mention that these forms of involvement comprise practices of dominance and submission or *power exchange*⁷¹ (that can go up to *total power exchange*) whose animating

⁶⁹ Totem and taboo define the boundaries of the admissible; they are the benchmarks of our social imagination. The totem and the taboo replicate the structure of the sovereign and the exception that structure Schmitt’s *Political Theology*

⁷⁰ <http://en.wikipedia.org/wiki/BDSM>

⁷¹ “What makes one erotic encounter S/M and another not? The answer is power. The component that seems to be part of all S/M play is not any particular kind of physical activity, but rather the fact that there is an exchange of power between the partners.” RACE BANNON, *LEARNING THE ROPES. A BASIC GUIDE TO SAFE AND FUN S/M LOVEMAKING* 20 (1992).

philosophy is referred to by the communities of BDSM as *safe, sane and consensual* – otherwise we would be talking of kidnapping and rape–. Precisely because of the touchy and idiosyncratic practices that are involved, bondage is characterized by two features: a clear and unambiguous attribution of roles⁷² (a separation of powers, if you like) to the Master and slave;⁷³ and the establishment of distinct rules involving so-called safewords, “a codeword or series of codewords that are sometimes used in BDSM for a submissive (or 'bottom') to unambiguously communicate their physical or emotional state to a dominant (or 'top'), typically when approaching, or crossing, a physical, emotional, or moral boundary.”⁷⁴ This certainly cannot be farther away from what we have been conceptualized as the ambiguity of rules and the blurriness of roles of the pornographic; in fact, if we wanted to find some dimension resembling the world of bondage, we should rather look at the contractarian theories of constitutional law. The relationship between pornography and bondage resembles the distance between a contractarian theory of constitutionalism and a political reading of the constitution, where everything is constantly under discussion, including the terms of the relation (the rules of the game of the contractarian)⁷⁵ and the participants never submit to other people's

⁷² “Within the script (the negotiation) are the roles each of you will play in the S/M scene. Role decisions are an essential part of the initial negotiation process.” RACE BANNON, *LEARNING THE ROPES. A BASIC GUIDE TO SAFE AND FUN S/M LOVEMAKING* 57 (1992).

⁷³ But see: “Men and women appear to favor dominant and submissive roles equally. Actually, most enjoy both at one time or another... [Also, a] hidden assumption in this misconception is that submission is somehow demeaning. Nothing could be further from the truth.” RACE BANNON, *LEARNING THE ROPES. A BASIC GUIDE TO SAFE AND FUN S/M LOVEMAKING* 27 (1992).

⁷⁴ <http://en.wikipedia.org/wiki/Safeword>.

⁷⁵ “Because the terms of a representational relationship are not objectively fixed, there is no guarantee that those ‘within’ such a relationship will all see it in the same way.” PAUL KAHN, *THE REIGN OF LAW. MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* 197 (1997).

authority, constantly defying their interpretations. A contractarian constitutionalism, where rules are clear, where the participants know what is their role and submit to this precommitment, is very much like bondage.

Political pornography can ultimately inscribe itself in a tradition of reflection on the political experience that refuses to engage in a dispute on the ‘nature’ of politics or its proper locus of emergence, a “vain search for the true essence or site of politics;”⁷⁶ but rather undertakes a phenomenological exploration on how is this experience undergone. If we take Schmitt’s basic insight that the political is overshadowed by the possibility of the emergence of concrete antagonisms aligned across the axis of enmity and friendship, we should be particularly wary about mistaking this formulation as a claim that politics is about conflict. There is contention, consensus and appeasement in politics as well as there is conflict and turmoil. In this sense, political pornography not only calls into question our understanding of roles and rules in the constitution; it also vindicates different approaches to political theory that the one taken by John Rawls in *A Theory of Justice*, focused on constructing normative structures of legitimation that purport to provide normative guidance to the political. If political pornography can take us to reconsider the constitutional relevance of roles, rules, and Rawls, its task will have been fulfilled.

⁷⁶ IAN SHAPIRO, DEMOCRATIC JUSTICE 10 (2001).