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Political Pornography

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# POLITICAL PORNOGRAPHY

## *Abstract*

Isn't it nonsensical to suggest, as Susan Sontag does, that "the pornographic imagination says something worth listening to?" The relationship between constitutional law and pornography is usually considered in a unidirectional way. The most common questions are what does the law say about pornography or what should the law say about it. This is nothing but a legal monologue; sometimes passionate, often judgmental, almost always self-righteous but, all in all, nothing but a monologue.

In this paper, I take the opposite road, exploring the aesthetics and narrative of pornography, its underlying anthropology and sociology, and its psychological appeal to our imagination, as an illustrative resource for some debates within constitutional theory. I call this particular reversal of the legal monologue an exercise in 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?"<sup>1</sup> 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."<sup>2</sup> For good or ill, 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.<sup>3</sup> Conversely, obscenity –the overarching moral

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<sup>1</sup> SUSAN SONTAG, *STYLES OF RADICAL WILL* 70 (1969).

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

<sup>3</sup> The historical wandering and stumbling of pornography "has much to tell us about the modern period,

category to which pornography belongs— and law coincide in their intertwining with the fundamental dimension of the prohibited, of the *taboo*. Rethinking pornography as a heterogeneous, self-contradictory genre whose narrative makes the constant redefinition of roles and position the focus of attention 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,<sup>4</sup> the law seems to be

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during which it has simultaneously been transformed from a tool of political propaganda in the seventeenth and eighteenth centuries to a private sexual practice in the nineteenth and twentieth, and from a limited circulation amongst elite circles to ever more widely distributed forms of magazines, photographs, and Internet web sites.” ALLISON PEASE, MODERNISM, MASS CULTURE, AND THE AESTHETICS OF OBSCENITY xv (2000).

<sup>4</sup> 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

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.<sup>5</sup> Certainly, the boundaries of this permission are the subject of a constant contention and negotiation grounded in “contemporary community standards;”<sup>6</sup> 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 supporters<sup>7</sup> of pornography have had their opportunity to contribute their arguments to the ethical, legal, and political debate.<sup>8</sup>

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found in Nadine Strossen, *A Feminist Critique of “the” Feminist Critique of Pornography*, 79 VA. L. REV. 1099.

<sup>5</sup> 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.

<sup>6</sup> *Miller v. California*, 413 U.S. 15, 24 (1973); *Roth v. U.S.*, 354 U.S. 476, 489 (1957).

<sup>7</sup> John B. McConahay, *Pornography: The Symbolic Politics of Fantasy*, 51 LAW & CONTEMP. PROBS. 31, classifies three families of thinking on pornography: the *Traditional/Conservative Position*, which sees pornography as “immoral in and of itself and because it leads to acts that violate the sacredness of sex: fornication, masturbation, and perversion, to name only a few;” the *Civil Libertarian Position*, which argues that “the dangers of censorship outweigh any threats to morality or offense to the sensibilities of the prudish;” and the *Feminist Positions*, which demands for equality for women but not in “a unified chorus of voices.” Without explanation, he omits to consider as a group those who believe that products and services that normalize sexuality and liberate the body and the mind from the chains of prudish morality constitute a good in themselves.

But I think that the time is ripe for bracketing the rhetoric of advocacy<sup>9</sup> 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 appeal to our imagination, as an illustrative resource for some debates within constitutional theory.<sup>10</sup> My point is, to be sure, not to prove the

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<sup>8</sup> As Susan Sontag writes, “the reasoned scrutiny of pornography is held firmly within the limits of the discourse employed by psychologists, sociologists, historians, jurists, professional moralists, and social critics. 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). 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]). In this instance of the particular, the whole universe of politics is contained; as we see, the above mentioned projections of the participants onto the subject undermine the condition for successfully performing the perlocutionary act that we call a *debate*, which relies on the homogeneity or sameness of the phenomenon debated.

<sup>9</sup> 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).

<sup>10</sup> 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*

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.<sup>11</sup> 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.<sup>12</sup> I will call this particular reversal of the legal monologue an exercise in *Political Pornography*.<sup>13</sup>

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*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*.

<sup>11</sup> I develop at length what do I understand by this in *A Political Reading of the Constitution* (manuscript).

<sup>12</sup> “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). A program for grounding the social sciences in the intellectual virtues of *phronesis* rather than in *episteme*, thus vindicating their protagonist role in contributing “to the reflexive analysis and discussion of values and interests, which is the prerequisite for an enlightened political, economic, and cultural development in any society,” has been launched by BENT FLYVBJERG, MAKING SOCIAL SCIENCE MATTER 3 (2001).

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

## *Questioning Constitutional Theory*

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,<sup>14</sup> 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.<sup>15</sup> The philosophical foundations of contractarian constitutionalism, its historical development, and its relation to the emergence of capitalism have been studied from very different positions by Hayek in *The Constitution of Liberty*<sup>16</sup> and by Foucault in *The Birth of Biopolitics*.<sup>17</sup>

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<sup>14</sup> JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

<sup>15</sup> I think it would be relatively safe to identify as varieties of contractarian constitutionalism the work of, among others, John Rawls, Ronald Dworkin, Friedrich Hayek, Robert Bork, and Antonin Scalia.

<sup>16</sup> FRIEDRICH HAYEK, *THE CONSTITUTION OF LIBERTY* (1978).

<sup>17</sup> MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLEGE DE FRANCE, 1978-1979* (2008).

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,"<sup>18</sup> 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 claimed by the orator."<sup>19</sup> In conceptualizing the political and the juridical through the prism of representation, we grant to these phenomena a thickness<sup>20</sup> 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,<sup>21</sup> arising in

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<sup>18</sup> CARL SCHMITT, ROMAN CATHOLICISM AND POLITICAL FORM 23 (1996).

<sup>19</sup> CARL SCHMITT, ROMAN CATHOLICISM AND POLITICAL FORM 24 (1996). An interesting discussion might spring from the contraposition of this statement with Derrida's critique of the appeal to presence, which promises interesting interstices given Derrida's later own embrace of other Schmittian categories.

<sup>20</sup> The implicit reference in my use of this word is to Geertz's belief that "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).

<sup>21</sup> An influence of this approach is detected by Young in political philosophy, which she singles out in these terms: "A distributive paradigm runs through contemporary discussion about justice, spanning ideological positions... The distributive paradigm defines social justice as the morally proper distribution of social benefits and burdens among society's members. Paramount among these are wealth, income, and other

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.”<sup>22</sup> 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”.<sup>23</sup>

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

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material resources. The distributive definition of justice often includes, however, nonmaterial social goods such as rights, opportunity, power, and self-respect. What marks the distributive paradigm is a tendency to conceive social justice and distribution as coextensive concepts.” IRIS M. YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 16 (1990). This distributive paradigm is so pervasive “that even critics of the dominant liberal framework continue to formulate the focus of justice in exclusively distributive terms.”

<sup>22</sup> CARL SCHMITT, *ROMAN CATHOLICISM AND POLITICAL FORM* 28 (1996).

<sup>23</sup> HANNAH ARENDT, *THE HUMAN CONDITION* 188 (1958).

constitution, their preferred locus of reflection on governance,<sup>24</sup> 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).<sup>25</sup> 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.<sup>26</sup> 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

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<sup>24</sup> 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.

<sup>25</sup> I take a critical stance towards this model. Nonetheless, this does not commit me to the view that democratic politics is an all-embracing *modus vivendi* that must colonize non-political or pre-political modes. I do claim for politics, in any case, the status of a way of living rather than the rules of the pre-political games; 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).

<sup>26</sup> 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).

to establish as precommitments.<sup>27</sup> The rules of the game appear as a locus of neutrality, a constitution that regulates politics but that remains largely apolitical 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).<sup>28</sup> 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

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<sup>27</sup> 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).

<sup>28</sup> 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).

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.<sup>29</sup>

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 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.<sup>30</sup> 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

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<sup>29</sup> A variety of contractarian complain in the field of rights is the critique of the judicial creation of rights. This critique led some authors, perplexed and troubled by the political role that courts were playing (particularly during the period of the Warren Court), to the search for “neutral principles” and “passive virtues.” This search refused to admit the fact that once the courts are taken to the bar of politics, they will almost unavoidably become another locus of politics, disagreement, and partisanship. Thinking on judicial review must come to grips with this fact and must be able to fully understand its consequences for the protection of rights, the overturning of democratically enacted legislation, and the review of administrative action.

<sup>30</sup> 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).

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”<sup>31</sup> 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,”<sup>32</sup> expressed in such authors as Machiavelli, Hobbes, Hegel, Nietzsche, Schmitt, Foucault, Mouffe, Agamben, Žižek, among others. These authors coincide in their encouraging call to embrace enthusiastically the contradictions of human life,<sup>33</sup> particularly what Arendt calls the boundlessness of political action.<sup>34</sup>

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<sup>31</sup> CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 65 (2007).

<sup>32</sup> CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 65 (2007).

<sup>33</sup> Foucault opposes to the contractarian tradition in political philosophy and constitutionalism, “with the contract as the matrix of political power,” another system that “tries to analyze power not in terms of the contract-oppression schema, but in terms of the war-repression schema,” where repression is not an abuse as oppression in the case of contractarianism but “simply the effect and the continuation of a relationship of domination.” MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED. LECTURES AT THE COLLEGE DE FRANCE 1975-1976” 17 (2003). The relevant thing is that Foucault is not calling in this analysis for a renunciation of this inherently problematic phenomenon, power (just as Freud is not calling for an abolition of society when he analyzes the inherent *discontent* in it). Unlike Schmitt, Foucault does not behave like “the demon of Αἰδω• (*Sham* [Shame]) (that) springs forth at the very moment the phallus is unveiled in the ancient mysteries.” JACQUES LACAN, *ECRITS* 581 (2007).

<sup>34</sup> HANNAH ARENDT, *THE HUMAN CONDITION* 190 (1958).

Pornography seems particularly suitable for my critical purposes, given that historically it has presented a counterpoint to the aesthetic assumptions of contractarian constitutionalism. It seems, then, that the moment is ripe to give our attention to porn.

### *Going porn*

I start by identifying three distinct dimensions of the complex phenomenon of pornography: the pornographic imagination, pornographic imagery, and the 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.”<sup>35</sup> 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. I will rather focus on the interplay between pornographic imagery and the pornographic imagination, treating this construct as a single ‘discursive formation.’<sup>36</sup> 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.<sup>37</sup> 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,

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<sup>35</sup> Sigmund Freud, *Totem and Taboo*, in 13 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 1, 11 (James Strachey ed., 1955).

<sup>36</sup> 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).

<sup>37</sup> Many make the mistake of attributing a simple, stable, univocal aesthetic to porn consisting in “sexual performances designed to gratify male viewers; literal voyeurism; sadism that punishes women for being as sexual as men imagine them to be; fetishism of the female body that would provide a textbook illustration of Freud’s famous essay on the subject.” Linda Williams remarks that after devoting some attention to this genre she found that film pornography “did not so neatly illustrate such objectification” and that in fact, “these apparently self-evident texts were fraught with contradiction.” LINDA WILLIAMS, *HARD CORE. POWER, PLEASURE, AND THE “FRENZY OF THE VISIBLE”* x (1989).

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.”<sup>38</sup>

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.”<sup>39</sup> 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 intensification the previous institution of pleasure is questioned.”<sup>40</sup> 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

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<sup>38</sup> CHARLES TAYLOR, *MODERN SOCIAL IMAGINARIES* 23 (2004). Imagination have clear political consequences; in the midst of the socialist government of Salvador Allende in Chile, a book theorized the political burden of Donald Duck and other Disney characters, affirming that “the threaten does not arise from the fact of (Donald Duck) being the spokesman of the ‘American way of life’ (sic), but because it represents the American *dream* of life (sic), the way in which the US dreams itself, redeems itself, the way in which the metropolis demands us that we represent to ourselves our own reality, for their own salvation.” ARIEL DORFMAN, *ARMAND MATTELART, PARA LEER AL PATO DONALD* 151 (1972).

<sup>39</sup> SUSAN SONTAG, *STYLES OF RADICAL WILL* 66 (1969).

<sup>40</sup> LINDA WILLIAMS, *HARD CORE. POWER, PLEASURE, AND THE “FRENZY OF THE VISIBLE”* 91 (1989).

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 the authority of the narrator’s voice.<sup>41</sup> 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.<sup>42</sup>

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<sup>41</sup> 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).

<sup>42</sup> “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).

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."<sup>43</sup>

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 interesting discursive formation. I am not even sure that we could refer to porn by saying "I know it when I see it"<sup>44</sup> (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

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<sup>43</sup> JUDITH BUTLER, *GENDER TROUBLE. FEMINISM AND THE SUBVERSION OF IDENTITY* 200 (1990).

<sup>44</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

foot fetishism movie, with no explicit display of sexual organs, might look sick but not pornographic to some people.

Pornography belongs to that heterogeneous, complex and contradictory depository usually referred as popular culture, and more specifically to the genre of exploitation fiction,<sup>45</sup> which is fiction “centered on some form of forbidden spectacle that served as

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<sup>45</sup> The adjective *exploitation* in fiction does not refer to the phenomena of subordination that legal scholarship and the social sciences often refer to with this label. Rather, in this context it refers to the strategy of certain books and films for creating a captive market by exploiting the interest of audiences in any 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.

The interest of younger generations of filmmakers in the various exploitation genres can be seen in GRINDHOUSE (2007), a double feature film co-written, produced and directed by Robert Rodriguez and Quentin Tarantino. The movie directed by Rodriguez, PLANET TERROR, focuses on the zombies genre and includes technological dystopian fantasies; the movie directed by Tarantino, DEATH PROOF, is a twist on slasher films (that is, movies about psychopathic mass murderers) mixing them with car chase films. Tarantino said of Death Proof: “I realized I couldn’t do a straight slasher film, because with the exception of women-in-prison films, there is no other genre quite as rigid. And if you break that up, you aren’t really doing it anymore. It’s inorganic, so I realized—*let me take the structure* of a slasher film and just do what I do. My version is going to be fucked up and disjointed, but it seemingly uses the structure of a slasher film, hopefully against you.”

[http://www.rollingstone.com/news/story/14022408/online\\_exclusive\\_horror\\_film\\_directors\\_dish\\_about\\_grindhouse\\_trailers](http://www.rollingstone.com/news/story/14022408/online_exclusive_horror_film_directors_dish_about_grindhouse_trailers). The interesting part, from a philosophical point of view, is the wreckage that the artist makes of a familiar and recognizable structure, separating its narrative elements –its signifier– from its ordinary associations and references –its signified.

[its] organizing sensibility”<sup>46</sup>. Despite a certain disapproval of popular culture on the part of intellectuals<sup>47</sup> –which is always more acute (if possible) in the case of pornography<sup>48</sup>– the gap between popular culture and philosophical activity has recently been bridged by the work of the likes of Slavoj Žižek, who introduces one of his books as “a reading of the most sublime theoretical motifs of Jacques Lacan together with and through exemplary cases of contemporary mass culture.”<sup>49</sup> For a re-reading of psychoanalytic

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<sup>46</sup> ERIC SCHAEFER, "BOLD! DARING! SHOCKING! TRUE!": A HISTORY OF EXPLOITATION FILMS, 1919-1959 5 (1999).

<sup>47</sup> For example, Adorno claims that the “total effect of the culture industry is one of anti-enlightenment, in which, as Horkheimer and I have noted, 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).

<sup>48</sup> Thus Sontag complains that “nowhere in the Anglo-American community of letters have I seen it argued that some pornographic books are interesting and important works of art. So long as pornography is treated as only a social and psychological phenomenon and a locus for moral concern, how could such an argument ever be made?” SUSAN SONTAG, STYLES OF RADICAL WILL 38 (1969).

<sup>49</sup> SLAVOJ ŽIŽEK, LOOKING AWRY vii (1991). Žižek recurs in his analysis not only to Hitchcock, “about whom there is now general agreement that he was, after all, a ‘serious artist,’” but also to *film noir*, science fiction, detective novels, sentimental kitsch, and Stephen King, among other sources. In this, Žižek proves himself an unparalleled user of the rhetorical strategy of ‘putting things in their worst light;’ that is, arguing the hardest cases, those located farthest from accepted conventions and the politically correct. When this strategy is successful, it allows to the arguer to advance much more than he would otherwise have done. Also, it evinces the resources of a proposition –its supporters and the arguments at its disposal–, allowing an estimation of its strength. Last but not least, putting things in their worst light is usually an enjoyable exercise in provocation.

theories, just as for cultural analysis, treating popular culture on its own merits as a discursive formation is appropriate. After all, popular culture represents for society very much what dreams represent for individuals. Popular culture “provides a reasonably reliable indicator of shared, conflicted, and newly emerging beliefs, values, and expectations.”<sup>50</sup> To dismiss popular culture and deny its capacity to serve as a valuable resource for scholarly reflection would be a methodological shortcoming if one were undertaking a project of cultural hermeneutics.

Political Pornography is then an exercise in exploring the lessons that we can draw for political and constitutional theory from contemporary popular culture.<sup>51</sup> In that 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,<sup>52</sup> even

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<sup>50</sup> RICHARD K. SHERWIN, WHEN LAW GOES POP. THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE 171 (2000).

<sup>51</sup> 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).

<sup>52</sup> In fact, I could have chosen other idiosyncratic sources to reflect about the human condition and social arrangements. One interesting topic could have been to compare the worlds of Martin Scorsese’s early filmography: the radically different New Yorks presented in *MEAN STREETS* (1973) –with its Italian neighborhoods interwoven by thick social commitments that give meaning to the lives of the protagonists

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;<sup>53</sup> it's certainly not one of the legacies of Enlightenment that I am eager to claim.<sup>54</sup> Considered as an argumentative technology, *Political Pornography* should spark off new disagreements about how to interpret the parallels and contrasts between political theory, constitutional theory, and the aesthetics of pornography.

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and contain their sociopathic tendencies— and *TAXI DRIVER* (1976) —where the city is totally stripped of the enchantment of the previous film and a certain moral autism isolates the protagonists—.

<sup>53</sup> Probably because these technologies duck “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).

<sup>54</sup> “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).

The remainder of the paper builds on the relationship between pornography and constitutional theory, developing the parallels, contrasts and analogies that the discursive formation of pornography, its aesthetics and narrative, can bring to bear on a political reading of constitutional law.

### *Arousal/persuasion*

It might be useful to start our quest by interrogating the very boundaries that have been erected to distinguish and to separate art from pornography. Given the slipperiness of trying to found such distinction on the quality of the works under consideration – *Philosophy in the Boudoir* and *The Story of the Eye* can justly claim their place in the literary canon– an effort has been made to draw the classificatory and evaluative line based on the kind of reaction elicited in the spectator: detachment or embodiment. Within this scheme of things, the aesthetic experience of art is characterized as “an experience of disembodiment, a movement away from sense toward rational or intellectual pleasure.”<sup>55</sup> The consumer of art is seen as a disembodied recipient whose exposure to art take place at an intellectual level and is defined by the ideals of symmetry and harmony that governed the arts from the Renaissance through the Age of Reason (ideals that were seriously questioned only by Modernism in the 20<sup>th</sup> century). In many senses, this aesthetic experience seems to belong to that noumenal dimension to which Kant looked for a foundation of his imperatives. Although this attitude is not hegemonic within

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<sup>55</sup> ALLISON PEASE, MODERNISM, MASS CULTURE, AND THE AESTHETICS OF OBSCENITY 2 (2000).

contemporary currents in the arts, it still has some defenders in authors of the likes of C. S. Lewis.<sup>56</sup>

This model of aesthetic experience defines itself in opposition to the pornographic experience, which is doubly anchored in the body. Pornography simultaneously deploys literary or visual descriptions of eroticized bodies interacting with each other and with sexualized objects, while at the same time creating “embodied readers, readers whose awareness of their own body is heightened as they consume pornographic texts.”<sup>57</sup>

This defining characteristic of pornographic texts and images has been used by its detractors to relegate it to an inferior level in the hierarchy of human experiences, arguing that “the play with interpretation, which surrounds all other media products, shuts down once we turn our attention to pornography, since intellectual activity is overwhelmed by physiological desire.”<sup>58</sup> The question remains whether the capacity to mobilize the body—through the appeal to the pornographic imagination in this case—necessarily degrades an expressive medium. That would certainly put music in a complicated position. The claim

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<sup>56</sup> Lewis distinguishes between the aesthetic appreciation of the many, who use art, and the few, who receive it. Real appreciation demands the opposite of what the many do; we “must not let loose our own subjectivity upon the pictures and make them its vehicles. We must begin by laying aside as completely as we can all our own preconceptions, interests, and associations.” CLIVE STAPLES LEWIS, *AN EXPERIMENT IN CRITICISM* 18 (1965). He then goes saying that the cognoscenti, the learned, “don’t hum or whistle while the music is going on;” that is a habit that only the many would indulge.

<sup>57</sup> ALLISON PEASE, *MODERNISM, MASS CULTURE, AND THE AESTHETICS OF OBSCENITY* 2 (2000).

<sup>58</sup> Henry Jenkins, *Foreword: So You Want to Teach Pornography?*, in *MORE DIRTY LOOKS: GENDER, PORNOGRAPHY AND POWER* 2, 2-3 (Pamela Church Gibson ed., 2008).

that pornography is “at odds with the tranquil, detached involvement evoked by genuine art”<sup>59</sup> at most, merely begs the question of what constitutes genuine artistic experience. Susan Sontag, who vindicates pornography as a genre in its own right, in which the critic can discover “the complexities of consciousness itself, as the medium through which a world exists at all and is constituted,”<sup>60</sup> demonstrates that this question cannot be taken as settled.

The undoubted involvement of the body in pornography elicits parallels and contrasts with the way that law engages its addressees. The center of this comparison is the respective capacity of law and pornography to influence their destined audiences, becoming reasons for action.

The contemporary analytic tradition in legal philosophy is defined by H. L. Hart’s erection of the ‘internal point of view’ as a paramount threshold of normativity. Hart defines this process in the following way: “if a social rule is to exist some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole.”<sup>61</sup> The building block of contemporary jurisprudence, it can be argued, is the notion that rules provide *reasons for action*. Joseph Raz, for example, formulates his account of *authority* as the ability to create *exclusionary reasons*, “reasons to refrain from

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<sup>59</sup> SUSAN SONTAG, *STYLES OF RADICAL WILL* 39 (1969).

<sup>60</sup> SUSAN SONTAG, *STYLES OF RADICAL WILL* 41 (1969).

<sup>61</sup> HERBERT HART, *THE CONCEPT OF LAW* 56 (1994).

acting for a reason;”<sup>62</sup> that is, reasons that have the power to override the initial reasons for action that the agent had.

The category of ‘reasons’ is certainly not restricted to those utterances that aim at persuading us through the display of logical reasoning. As Raz points, “a great variety of things are called reasons;”<sup>63</sup> as he puts it, both the fact that it is raining and the fact that one wants to be outside and not get wet are two distinctive reasons that taken together provide a reason for the action of carrying an umbrella.

Thus pornography can be seen as a reason for action that induces the viewer to recreate the level of sexualization performed in the text or image. “People masturbate to porn, enough said.”<sup>64</sup> Pornography seems to be a pretty straightforward reason of action. For its addressee, the ensuing behavior is pretty simple: the viewer will most probably be driven to initiate sexual activity, either alone or joined by someone else. There is not much else that can be done. Law, on the other hand, has to be interpreted; its prescriptive power is always ambiguous. Where pornography is determinative, law is open-ended and indeterminate.

In this, pornography certainly works like many other things that play upon bodily needs. Sexual arousal to some extent resembles hunger, thirst, or cold. Certainly all of these bodily imperatives can be resisted in scenarios that have much to do with the exceptional;

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<sup>62</sup> JOSEPH RAZ, *THE AUTHORITY OF LAW* 16 (1979).

<sup>63</sup> JOSEPH RAZ, *THE AUTHORITY OF LAW* 12 (1979).

<sup>64</sup> Henry Jenkins, *Foreword: So You Want to Teach Pornography?*, in *MORE DIRTY LOOKS: GENDER, PORNOGRAPHY AND POWER* 2, 2-3 (Pamela Church Gibson ed., 2008).

be it scarcity, or that self-induced state of exception that is asceticism. And we should steer clear of “confus[ing] anything that brings desire to an end with the intended object of desire, the thing that is actually wanted;”<sup>65</sup> lust, the sexual appetite, is an “enthusiastic desire, the desire that infuses the body, for sexual activity and its pleasures for their own sake”<sup>66</sup> that treats sex not as a means but as an end in itself. But no matter how much do we problematize the power of the pornographic over the body, we still assume that a qualitative difference remains between its effects and those achieved by the law.

Is it so? My first intention was to juxtapose the power of the pornographic to control the body with the heterogeneity of reactions prompted by the law: i.e., opposition, criticism, civil disobedience, compliance, interpretation. Not only we must think of those who reject the pornographic when they see it, refusing to take part in the discursive formation of pornography in a way that remembers us of the civil disobedient that repudiates a system of legality; but also we must be aware that the reactions elicited by the pornographic text are much more subtle, complicated, and sophisticated than simple arousal. It is precisely the inherently dialectical conjunction between the prurient –the totem– and the obscene –the taboo– that makes pornography interesting. The consumer of pornography often derives as much pleasure –maybe even more– from the sense of danger and even of shame that accompanies his breaking of moral conventions. Shame and self-deprecating behavior can be powerful sources of pleasure, meaning, and significance, playing out unpredictably both in a law-abiding citizen whose authoritarian

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<sup>65</sup> SIMON BLACKBURN, LUST 15 (2004).

<sup>66</sup> SIMON BLACKBURN, LUST 19 (2004).

personality provides him with psychic reasons to obey the law,<sup>67</sup> and in the rupturist or provocateur who rejoices in being disavowed by society.<sup>68</sup> On the other hand, we cannot take for granted what goes on between the pornographic imagination and the pornographic imagery. The unpredictable capacity for the multiplication of meaning that characterizes the relationship between signifier and signified is enhanced in sexual fantasies by the psychological mechanisms of displacement, representation by the opposite, and other processes that have been fundamental fields of study for psychoanalysis.<sup>69</sup> It seems very plausible that a straight male who enjoys watching heterosexual porn is unconsciously displacing his autogynephilia, that is his “propensity to be sexually aroused by the thought of himself as a female,”<sup>70</sup> and projecting his secretly held desire into the female protagonist from whose point of view the story is being told.

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<sup>67</sup> In times of political normalcy, the sources of political authoritarianism existing in “the striving for submission and domination, or, as we would rather put it, in the masochistic and sadistic strivings as they exist in varying degrees in normal and neurotic persons respectively” (ERICH FROMM, *ESCAPE FROM FREEDOM* 142 [1941]) does not fade away; it simply performs a social cohesive function.

<sup>68</sup> Pornography’s principal means of fascinating is “to advance one step further in the dialectic of outrage. He seeks to make his work repulsive, obscure, inaccessible; in short, to give what is, or seems to be, *not* wanted.” SUSAN SONTAG, *STYLES OF RADICAL WILL* 45 (1969).

<sup>69</sup> The building blocks of this school were laid down in SIGMUND FREUD, *THE INTERPRETATION OF DREAMS* (1980) and SIGMUND FREUD, *THE JOKE AND ITS RELATION TO THE UNCONSCIOUS* (1979).

<sup>70</sup> Ray Blanchard, *The Concept of Autogynephilia and the Typology of Male Gender Dysphoria*, in 177 *THE JOURNAL OF NERVOUS AND MENTAL DISEASE* 616, 616 (1989).

Ultimately, the moment that defines the pornographic discursive formation is the successful meeting of pornographic imaginary with the pornographic imagination. So that this can happen, pornographic imaginary needs to persuade, to seduce the pornographic imagination with a convincing set of reasons for action, a convincing set of fantasies. This is not so different from what happens in the legal realm, where different visions (of the rule of law, of principles such as justice or freedom, or the proper role for the different branches of government) make themselves available through all the institutional channels at their disposal.<sup>71</sup> The law is, in my understanding, a practice of rhetoric. The life of the law has not been logic, certainly; and the role that formalist thinking assigns to logic is played instead by persuasion, by the deployment of rhetorical strategies that appeal to commitments, to symbolisms, to emotions, to first principles, among many other resources, in order to navigate legal indeterminacy. Law and politics are sustained by the ability to create form, ability “which is essential to aesthetics, (and that) has its essence in the ability to create the language of a great rhetoric.”<sup>72</sup> Thus, the good law is the one that has the ability to reach our imagination and our emotions and seduce them with a more pleasant and satisfactory version of ourselves.

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<sup>71</sup> “The rule of law is a way of organizing and understanding political experience. It is a state of mind before it is an order of the state.” PAUL KAHN, *THE RULE OF LAW. MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* 177 (1997).

<sup>72</sup> CARL SCHMITT, *ROMAN CATHOLICISM AND POLITICAL FORM* 22 (1996).

*The objects of pornography and law: the irrationality of humans*

Pornography, it can be argued, has an underlying anthropology and sociology of its own that presents individuals as driven by their passions and desires. As such, it complements the view of humankind that certain theorists of deliberative politics present in their work: disembodied humans pallid behind their veils of ignorance. Pornography also normalizes the role of the contextual and the exceptional in the realm of the constitution, the very existence of which depends on the continuity of certain historical conditions and is constantly subject to the unpredictable.

In the contractarian model, the individual is perceived as a node of rationality and consciousness who has to model the public sphere, its rules and roles, in his own image. The development of the theories of the market as a technology for effacing and emasculating the passions is an interesting object of attention. In fact, for the theoretical counterparts of contractarian constitutionalism within economics, the markets are meant to be “a transformer, a civilizing medium” for “harnessing the passions of men, of making them work toward the general welfare.”<sup>73</sup> Hayek toys with this ideal when he proposes to replace the concept of ‘economy’ with the concept of ‘catallactics.’ Etymologically meaning not only ‘to exchange’ but also ‘to admit into the community’ and ‘to change from enemy into friend,’ Hayek describes a catallaxy as that “special kind of spontaneous order produced by the market through people acting within the rules of

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<sup>73</sup> ALBERT O. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS. POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH* 16-17 (1997).

the law of property, tort, and contract.”<sup>74</sup> A similar effort of neutralizing the passions has been made by some theorists of deliberative democracy and argumentation under ideal conditions.<sup>75</sup>

Pornography offers a narrative contrast. In pornographic imagery, individuals are presented as seized by their sexual frenzy, enraptured by debauchery, blinded by their need to satisfy their occult fantasies, perversions, desires. Thus, decentered individuals possess the stage. The aesthetic of porn displays human beings in a light that makes it difficult to preserve “against all decenterings, the sovereignty of the subject.”<sup>76</sup> Pornographic works do this because they suggest that “‘the obscene’ is a primal notion of human consciousness, something much more profound than the backwash of a sick society’s aversion to the body.”<sup>77</sup>

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<sup>74</sup> FRIEDRICH HAYEK, *LAW, LEGISLATION AND LIBERTY, VOLUME 2: THE MIRAGE OF SOCIAL JUSTICE* 109 (1978).

<sup>75</sup> As Walzer has argued, “[p]olitics has other values in addition to, often in tension with, reason: passion, commitment, solidarity, courage, and competitiveness (all of which also require qualification).” MICHAEL WALZER, *Deliberation... and What Else?* in *POLITICS AND PASSION: TOWARD A MORE EGALITARIAN LIBERALISM* 92 (2005). And as Young remarks, “to the extent that democratic theory and practice privilege such a standard of allegedly dispassionate, unsituated, neutral reason, it has exclusionary implications.” IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 63 (2002). Ranciere would speak of *epistocracy*, the “government by the most intelligent.” JACQUES RANCIERE, *ON THE SHORES OF POLITICS* 35 (2007).

<sup>76</sup> MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE*, 12 (1972).

<sup>77</sup> SUSAN SONTAG, *STYLES OF RADICAL WILL* 57 (1969).

The tools of effacement produced by markets cannot cope with the discursive formation of pornography: attempting to use rational interests to gain control of the pornographic does not sufficiently account either for its imagery or its imagination. Its power arises from forces lodged deep in the unconscious, forces that also shape from outside, with the strength of the excluded and the prohibited, the contents of the moral realms. Thus, since the subject is fractured, “our evaluations, our points of view, our interpretations of the world can never be grounded on any kind of reference to an *absolute* knowledge in its strict meaning (that is, unrelated to life's historicity).”<sup>78</sup>

Pornography contains also a narrative of the fragility of social arrangements and institutions. The pre-pornographic moments in the pornographic discursive formation are very much like our world: there is social division of functions and labor, reinforced by normative systems of morality and legality. But in the world of the pornographic discursive formation, constantly open to a radical sexualization of subjects and objects and their mingling into a symbiotic object/subject, those social orderings and social forces are swiped away in a matter of seconds by the combined power of lasciviousness and obscenity. The social ordering and its reinforcing forces are thus shown in what they really are: constructs that depend, for their existence and workability, of a *context* that human psyche cannot guarantee unconditionally and that tends to explode away in moments of abnormality.<sup>79</sup> As Viktor Frankl once observed, an “abnormal reaction to an abnormal situation is normal behavior. Even we psychiatrists expect the reactions of a

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<sup>78</sup> LUC FERRY, *HOMO AESTHETICUS: THE INVENTION OF TASTE IN THE DEMOCRATIC AGE* 175 (1994).

<sup>79</sup> Just as “[f]or a legal order to make sense, a normal situation must exist.” CARL SCHMITT, *POLITICAL THEOLOGY* 13 (2005).

man to an abnormal situation, such as being committed to an asylum, to be abnormal in proportion to the degree of his normality.”<sup>80</sup>

These lines should certainly evoke in the mind of the contemporary reader the worst nightmares of authoritarian seizure of power in 9/11-like scenarios. The virtue of pornography –a genre “aiming at disorientation, at psychic dislocation”<sup>81</sup>– is to break that linear link; it is not only the Schmittian dictator who lurks at the margins of the exceptional, but also the enraptured nymphomaniac and the irrepressible satyr. In between, a wide variety of unconventional othernesses can be brought about by further destabilizations of the already decentered subject. This awareness has a remarkable importance; for in making us think of the fragility of social arrangements that arise from their radical dependence on human conditions much more complex and not understood than bourgeois consciousness, pornography reminds us how precious is democracy and the rule of law, and what an extraordinary effort must be put for their survival by everyone who owes allegiance to them.<sup>82</sup> Pornography can do this because it because of

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<sup>80</sup> VIKTOR FRANKL, *MAN'S SEARCH FOR MEANING* 20 (1959). Before that, Freud had said “it must also be considered that an unbroken chain bridges the gap between the neuroses in all their manifestations and normality.” SIGMUND FREUD, *THREE ESSAYS ON THE THEORY OF SEXUALITY* 37 (1975).

<sup>81</sup> SUSAN SONTAG, *STYLES OF RADICAL WILL* 47 (1969).

<sup>82</sup> After all, a dystopian fantasy of a future of tribes governed by warlords is as real and as fantastic at the same time as once it was the idea of a government periodically responsive to the governed. The kind of threatens that I have in mind, though, are not authoritarian governments justified by terrorist attacks. I rather fear of the anarchy that a global catastrophe –be it a nuclear war, a famine, a shortage of water, or even the crash of a meteorite– would produce. Other disregarded subgenres of popular culture, like sci-fi or zombies movies, can illuminate our reflection on this issue.

its attachment with sexuality, “one of the demonic forces in human consciousness – pushing us at intervals close to taboo and dangerous desires;”<sup>83</sup> and as Weber so reminded us, “anyone who gets involved with politics, which is to say with the means of power and violence, is making a pact with diabolical powers.”<sup>84</sup>

Interestingly, this remark should renew our attention to a classic discussion in the field of democratic theory: whether democracy can be justified procedurally, or it needs some substantive ground for its legitimation. The truth, sympathetic as I am to proceduralist justifications of democracy, is that no system of governance, not even democracy, is autonomous or autopoietic. Without certain circumstances, democracy and the rule of law cannot hold and we would fail in ensuring that the “government of the people, by the people, for the people, shall not perish from the earth.”<sup>85</sup> Neglect this problem as a merely practical problem and not a problem of philosophical reflection would be certainly a mistake, since the distinction between rhetoric and rational justification is blurrier than this objection assumes; after all, justifications are so only when they effectively provide reasons for action to its addressees.

### *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

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<sup>83</sup> SUSAN SONTAG, *STYLES OF RADICAL WILL* 57 (1969).

<sup>84</sup> MAX WEBER, *The Profession and Vocation of Politics*, in *POLITICAL WRITINGS* 309, 362 (1994).

<sup>85</sup> ABRAHAM LINCOLN, *SPEECHES AND WRITINGS, 1859-1865* 536 (1989).

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.”<sup>86</sup> Likewise, the same happens to the rest of the characters within pornographic imagery, which are sexual objects as much as sexual subjects.<sup>87</sup> 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-

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<sup>86</sup> PAUL KAHN, PUTTING LIBERALISM IN ITS PLACE 203 (2005).

<sup>87</sup> 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).

viewer 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.<sup>88</sup> 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.<sup>89</sup> This also means that there are no sexual loci per se; not even those that have such condition in our everyday life. 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;"<sup>90</sup> oriented to people with acrotomophilia or attraction towards others who are amputees, who prefer to call themselves the devotee/amputee community<sup>91</sup>).

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<sup>88</sup> 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).

<sup>89</sup> 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).

<sup>90</sup> <http://www.urbandictionary.com/define.php?term=Nugget%20Porn>.

<sup>91</sup> <http://www.overground.be/glossary.php?lan=en>.

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.”<sup>92</sup>

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 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),”<sup>93</sup> 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.”<sup>94</sup> 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.”<sup>95</sup>

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<sup>92</sup> GEORGES BATAILLE, *STORY OF THE EYE* 49 (1977).

<sup>93</sup> GIORGIO AGAMBEN, *MEANS WITHOUT END. NOTES ON POLITICS* 57 (2000).

<sup>94</sup> GIORGIO AGAMBEN, *MEANS WITHOUT END. NOTES ON POLITICS* 60 (2000).

<sup>95</sup> JACQUES LACAN, *ECRITS* 209 (2007).

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.<sup>96</sup>

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,<sup>97</sup> failing to see the nuanced role-playing that porno movies display and to which I have already referred. The 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

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<sup>96</sup> 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).

<sup>97</sup> In any case, after Judith Butler’s work on repetitiveness as a crucial component of performativity, this uneasiness with the reiterative just looks just a little too old-fashioned. Indeed, she recurs to the idea to analyze the contextualized character of sex itself: “To construe sexuality as an ‘act’ is already to abstract from a cultural practice, a reiterative ritual, in which it takes place and of which it is an instance. Indeed, the very notion of a sexual practice is precisely that which overrides the distinction between ‘act’ and ‘representation.’” JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE 123 (1997). Hard-core pornographic films, interestingly enough, 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.

language means to imagine a life-form;”<sup>98</sup> 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.<sup>99</sup> 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 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

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<sup>98</sup> LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 7 (1958).

<sup>99</sup> “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).

universe;”<sup>100</sup> 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.”<sup>101</sup> 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,”<sup>102</sup> a kind of association that entails the “ever present possibility”<sup>103</sup> 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.<sup>104</sup> The content of the political is not

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<sup>100</sup> SUSAN SONTAG, *STYLES OF RADICAL WILL* 67 (1969).

<sup>101</sup> IAN SHAPIRO, *DEMOCRATIC JUSTICE* 10 (2001).

<sup>102</sup> CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 38 (2007).

<sup>103</sup> CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 32 (2007).

<sup>104</sup> “There are billions of potential conflicts in any modern society, but *only a few become significant*... A democratic society is able to survive because it manages conflict by establishing priorities among a multitude of potential conflicts.” ELMER ERIC SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA* 64 (1975). One of the consequences of that prioritization of conflicts is that the very outcomes of the political struggle are influenced by it because of the different configurations of majorities and minorities that different conflicts produce. This is more important than what Schattschneider seems to assume when he says that the “political universe remains the same in spite of the shift” from one conflict to another. The political universe –if we understand by it the set of resources that within a complex society are invested in the political– is highly dependent on the relevance to the population at large of the conflicts prioritized by political structure. People’s attention, time, efforts, and other resources, will be drawn with more or less intensity into the political depending on how relevant do they take the prioritized political conflicts to be. An interesting point to reflect about, then, is that the

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, rooted in Schmitt's manifesto that "all significant concepts of the modern theory of the state are secularized theological concepts,"<sup>105</sup> 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."<sup>106</sup> 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"<sup>107</sup> 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 way in which political actors use the constitution as a *political grammar*, that is not as capacity to detect and expose relevant conflicts lying under the surface of the society is a specifically political skill.

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<sup>105</sup> CARL SCHMITT, *POLITICAL THEOLOGY. FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 36 (2005).

<sup>106</sup> SUSAN SONTAG, *STYLES OF RADICAL WILL* 69 (1969).

<sup>107</sup> CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 37 (2007).

a document to which they refer to find answers and to which they yield, but as a set of syntactic rules and semantic signposts that they employ to formulate their own political views and strategies.<sup>108</sup> Also, such a constitutional theory makes an effort to produce a *political reading* of the constitution, an interpretation of this practice that takes as methodological assumptions 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,<sup>109</sup> paralleling that genre where “narrative equilibrium does not necessarily lie in the permanent union of the couple.”<sup>110</sup> I think that these concepts can shed light on why is it that, despite the fact that political actors do not really agree on what “the rule of law” means –or “the constitution,” or “freedom,” or “equality,” for that matter– they nevertheless keep using those signposts in a way that makes self-government possible?

### *Conclusion: Roles, Rules, and Rawls*

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

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<sup>108</sup> I have developed further this argument in *A Political Reading of the Constitution* (manuscript).

<sup>109</sup> 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).

<sup>110</sup> LINDA WILLIAMS, *HARD CORE. POWER, PLEASURE, AND THE “FRENZY OF THE VISIBLE”* 151 (1989).

time they inhabit a locus of moral prohibition and disapproval.<sup>111</sup> 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).”<sup>112</sup> 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*<sup>113</sup> (that can go up to

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<sup>111</sup> 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*

<sup>112</sup> <http://en.wikipedia.org/wiki/BDSM>

<sup>113</sup> “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).

*total power exchange*) whose animating 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 roles<sup>114</sup> (a separation of powers, if you like) to the Master and slave;<sup>115</sup> 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.”<sup>116</sup> This certainly cannot be farther

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<sup>114</sup> “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. Three distinct types of role decisions are usually made. They are *power direction, level of control, and the S/M persona.*” RACE BANNON, *LEARNING THE ROPES. A BASIC GUIDE TO SAFE AND FUN S/M LOVEMAKING* 57 (1992).

<sup>115</sup> In honor of truth, I must allow the S/m community to express itself at this point as to the misconception that S/m is demeaning to women or more generally to the enslaved individual: “Men and women appear to favor dominant and submissive roles equally. Actually, most enjoy both at one time or another... Secondly, the hidden assumption in this misconception is that submission is somehow demeaning. Nothing could be further from the truth. A dominant/submissive relationship is a carefully negotiated, safe, and caring exchange between partners. Is it demeaning when you care so much for someone that you want to make their fantasies come true? Of course not.” RACE BANNON, *LEARNING THE ROPES. A BASIC GUIDE TO SAFE AND FUN S/M LOVEMAKING* 27 (1992).

<sup>116</sup> <http://en.wikipedia.org/wiki/Safeword>. “The value of safe words is that they allow the status of the scene to be communicated quickly and easily, without necessarily interrupting the flow of the scene itself. Stopping a scene and engaging in long discussions disrupts the flow and mood of the scene. Safe words can

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)<sup>117</sup> and the participants never submit to other people's 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;"<sup>118</sup> 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

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help this." RACE BANNON, *LEARNING THE ROPES. A BASIC GUIDE TO SAFE AND FUN S/M LOVEMAKING* 56 (1992).

<sup>117</sup> "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).

<sup>118</sup> IAN SHAPIRO, *DEMOCRATIC JUSTICE* 10 (2001).

about conflict. There is contention, consensus and appeasement in politics as well as there is conflict and turmoil. It cannot be said; it could not be said by a contextual approach as ours that the ‘truly’ political is conflict, nor the other way around. It can be said, though, that the political appears when conflict or enmity appear on the horizon; that is a merely phenomenological topography of where will we find it, but not the stronger claim of having discovered the true essence or purpose of politics. Therefore, it cannot be argued against this kind of approach that it forgets that there are other aspects on the political that it does not cover; it does not deny that there are, nor it is providing normative guidance on what to do –it does not praise the politician to agitate or stir conflicts. The limits of this topography of the political are to be clear; for any theory that does not try to set its own limits makes itself warrant of sophistry in the traditional sense of the word because a theory that does not locate itself within a philosophical and historical context is like a syllogism lacking one or more premises: it could be easily found to be fallacious. 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– taken too much for granted about what can a model of individual in denial of its fractured and decentered condition do for politics. If political pornography can take us to reconsider roles, rules, and Rawls in constitutional theory, its task will have been fulfilled.