

# Keeping the Constitutional Republic: Civic Virtue vs. Pornographic Attack

By WILLIAM A. STANMEYER\*

Scene: Outside the Constitutional Convention. The last day.

Passerby: "What kind of government do we have, Mr. Franklin?"

Benjamin Franklin: "A Republic. If you can keep it."<sup>1</sup>

The 200th anniversary of the Constitution challenges all Americans to rededicate themselves to the foundational principles upon which our ancestors erected a mighty structure. The architects of America constructed a political edifice which has withstood the seismic shaking of worldwide political changes during two centuries of upheaval. Conversely, most European nations have written constitutions, only to tear them up a generation, a decade, or even a year later. Here at home, in the last three decades, arguments over the reach or restriction of "constitutional rights" have risen to a crescendo. Seemingly intractable fiscal, social, and economic problems prompt not a few state legislatures to call for a Constitutional Convention, in wishful hope that somehow "The Answer" will miraculously materialize in an Amendment that will dam up the problems. Overall, from Peking to Paris, from Johannesburg to Jerusalem, from Moscow to London to Washington, the ageless argument goes on: how shall people be governed?

The text of the United States Constitution gives an answer. Indeed, experience and reflection suggest it is the only workable answer. *People shall be governed by certain ancient perennial principles*. There is a science of government. Good government is no accident: it emerges from wise application of correct political theory. If its statesmen follow these principles, the nation will prosper and the people will be free and orderly. If they flout these principles, the mighty structures will begin to crumble; if they reject them utterly, the winds of change, the myopia of selfish

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1. S. BLOCK, *BENJAMIN FRANKLIN: HIS WIT, WISDOM, AND WOMEN* 366 (1975).

leaders and dissolute citizens, and the radical “fault” running through human nature will at last cause the building to collapse.

The Founders knew that the building of a nation is no slapdash tossing together of a political house of cards. No lasting edifice arises by chance. The laws of gravity and physics compel the builders to conform to necessities beyond their own subjective whim. Neither romance nor wish, neither fantasy nor guess, has a place when one deals with natural laws. The architects of a nation, like the architects of a skyscraper, must understand—without the slightest error or doubt—the objective forces with which they work. The Framers’ Constitution, like the blueprints for the skyscraper, draws up on paper their prior discovery of the principles in objective reality which they then apply to the building task at hand.

As John Adams points out:

The science of government is my duty to study, more than all other sciences; the arts of legislation and administration and negotiation ought to take [the] place of, indeed to exclude, in a manner, all other arts. I must study politics and war, that my sons may have liberty to study mathematics and philosophy.<sup>2</sup>

Thomas Jefferson, whose skills as an architect of buildings paralleled his skills as an architect of a new nation, echoes the same theme, the need to adhere to correct political principles:

We owe every other sacrifice to ourselves, to our federal brethren, and to the world at large, to pursue with temper[ance] and perseverance the great experiment which shall prove that man is capable of living in society, governing itself by laws self-imposed, and securing to its members the enjoyment of life, liberty, property, and peace; and further to show, that even when the government of its choice shall manifest a tendency to degeneracy, we are not at once to despair, but that the will and the watchfulness of its sounder parts will reform its aberrations, recall it *to original and legitimate principles*, and restrain it *within the rightful limits* of self government.<sup>3</sup>

As our constitutional Republic enters its third century, its people enjoy the benefits of jet travel, satellite communication, closed-circuit television, and instant copiers to name but a few. All this technology the Founders lacked. But while these technological advances enable us to move more words than our ancestors, the thoughts they convey too often lack the Founders’ depth. It is still our duty to study “the science of government;” still the responsibility of our Nation’s “sounder parts” to

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2. Letter from John Adams to Abigail Adams (1780), *reprinted in* SELECTED WRITINGS OF JOHN AND JOHN QUINCY ADAMS 66 (A. Koch & W. Peden eds. 1946).

3. JEFFERSON: MAGNIFICENT POPULIST 92 (M. Larson ed. 1981) (emphasis added).

“recall it to original principles” and to obey “the rightful limits of self government.”

In 1986, Mexico, Honduras, and some other nations suffered devastating earthquakes. For a time the nightly news flashed films of dazed, distraught survivors prowling the twisted rubble of once proud buildings in fruitless search of buried property or person. The symbolism should not be lost on us: if the building is to withstand geologic shifts, sink the foundation deep; if it is to soar safely to the sky, build the foundation wide; if its upper stories are to scorn the downward clutch of gravity, brace the foundation's footings with steel. Never impose more weight at the top than that which the bottom is designed to bear. One obeys with care the rules of brick and stone and steel; and in politics, so too must one obey the objective order of things, sink the foundation deep and wide, and steel the structure with unbending first principles. If one does, the constitutional structure will outlast the winds of change and the shocks of time. But if one does not, the survivors will end their unhappy days poking the twisted rubble in fruitless search of lost prosperity and freedom.

The successive occupants of the buildings must also do their part by obeying the first principles that begot its starting strength, and through their watchfulness “reform its aberrations, [and] recall it to original and legitimate principles.”<sup>4</sup> However strong at the start, the building will crumble if later generations misuse it in foolish disregard for the perennial principles that permitted the Founders' challenge to the downward forces of nature.

This Article will explore five main areas: first, the Founders' ancient constitutional principles; second, the proper limits on “speech;” third, application of the analysis to the present free speech-pornography controversy; fourth, an examination of the distinctive political implications of the spread of hard-core pornography; and fifth, a conclusion which attempts to tie these points together into a coherent statement of constitutional policy.

On first glance, an anniversary celebration may seem an inappropriate occasion to inject a tawdry topic like obscenity. The mood of euphoria and self-congratulation at the passage of 200 years, not unlike enthusiasms on a birthday or a New Year's Eve celebration, seems dissonant with arguments over virtue and vice, causality of sex crimes, or the limits of liberty and harms from license. The student of constitutional history may believe it is better to leave to another forum arguments

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4. *Id.*

about the Meese Commission and *Playboy* magazine,<sup>5</sup> or X-rated television and the protection of children.

On the other hand, anniversaries provide milestones for assessment of achievement and examination of health. The more important the matter for examination, the more fitting the anniversary for the task: it provides a rare occasion to step back from daily immersion in detail and inspect the larger picture. For those serious about self-improvement, New Year's Eve, for instance, is a time to eschew complacency and engage in serious review and resolution. Despite popping champagne corks, questions of stewardship of wealth and health, as well as the direction and purpose of one's very life, must command a measure of attention. So it is with us: the Bicentennial Year reminds us to scrutinize our stewardship of the Founders' bequest and to inquire why the health of law and morals is not all it once was.

The topic embraces issues of cosmic social, legal, and constitutional import. We are dealing with nothing less than: (1) deciding the rightful extent of the criminal law in every community in the land; (2) formulating an accurate understanding of what is possibly the most important Amendment in the Bill of Rights; and (3) examining reasons for regulation, if any, of a multi-billion dollar industry which, unlike any other, substantially affects the moral-aesthetic tone of all of society, and influences, or can influence, the attitudes of virtually every man, woman, and child in the Nation on matters absolutely central to human life, liberty, and the pursuit of happiness—sexual activity, marriage, children, fidelity, safety, and respect for women and children.

Thus, there is no better time to consider the impact of widespread pornography on our ability as a people to adhere to the Founders' bedrock constitutional principles and to meet Franklin's challenge to "keep" the Republic "if you can."<sup>6</sup>

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5. ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT (1986) [hereinafter MEESE FINAL REPORT]. Persons interested in obtaining a single volume reprint of the unwieldy two-volume Government Printing Office edition of the Commission's report should contact Rutledge Hill Press, Inc., 513 Third Avenue South, Nashville, Tenn. 37210; or Word Books, P.O. Box 1790, 4800 Waco Drive, Waco, Tex. 76796. This privately published edition contains a valuable 41-page introduction by Michael J. McManus, a journalist who attended many of the Commission hearings; it gives a thorough summary, analysis, and commentary on the substance, as well as a concise history of the Commission's internal controversy. The publisher's preface closes with a statement which one hopes all persons who believe in first amendment values would endorse: "Few books have caused as much storm and controversy as has the *Final Report*. . . . It has been both praised and condemned. It should not, however, be itself censored."

6. See *supra* text accompanying note 1.

## I. The Ancient Constitutional Principles

One begins by clarifying just what is a "constitution." The best way to proceed with this task is to state generally what a constitution does or may do. Manifestly, one function is to set up a scheme or division of public authority: it sets forth who shall have the power to do what to whom in the conduct of public business. Second, it may seek to delimit the boundaries of the public business: it attempts to limit public authority, or conversely, to reserve certain areas of private freedom. Third, a constitution may grant certain public privileges, which we usually call "civil rights."<sup>7</sup> But beyond all these, there is a fourth function which underlies and extends well beyond the allocation of power and the granting of privileges.

This fourth function is to state the understanding among society's members as to what kind of society it is. The "letter" of the Constitution expresses the spirit of the people. It puts into words just what are society's purposes, what it "believes in," and what priorities animate its people. It sets minimal standards of agreement; it is society's internal treaty of peace; it states principles that are beyond argument. Because publicly held as "given," these agreed constitutional principles provide the framework within which citizens can disagree. For example, only because we agree on the method of transferring power from one regime to the next—through public elections—can ambitious partisans seek elective office knowing, by and large, what must be done to obtain power and what protections are theirs should they fail. By providing agreed upon "rules of the game," the Constitution enables citizens safely to contend for power knowing that those who win cannot become autocrats, and that those who lose do not thereby forfeit life, liberty, and property.

By the kind of rules it imposes, the Constitution teaches us something about those who conceived it. For example, the complicated checks and balances formula of the Federal Constitution tells us that the Founders believed, in the later words of Lord Acton, that "[p]ower tends to corrupt, and absolute power corrupts absolutely."<sup>8</sup> This judgment about human nature derives from metaphysical and even theological assumptions. Had we lacked the numerous expressions of fear of central-

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7. The first eight amendments to the United States Constitution embody specific civil rights, and both Congress and individual state legislatures have enacted statutes forbidding the invasion of citizens' civil rights. *See, e.g.*, 42 U.S.C. § 1983 (1982) (providing a federal cause of action for invasion, under color of state law, of a citizen's civil rights); CAL. CIV. CODE § 50 (West Supp. 1986) (Unruh Civil Rights Act).

8. Letter from Lord Acton to Mandell (later Bishop) Creighton (April 5, 1887), reprinted in *THE GREAT QUOTATIONS* 36 (G. Seldes ed. 1960).

ized power articulated in *The Federalist*<sup>9</sup> papers, and the personal writings of many of the Founders, the very structure of the federal system makes it abundantly clear that the Founders embraced the Biblical view of mankind's "fallen human nature."<sup>10</sup>

Some commentators search for the full meaning of the Constitution merely by inspecting its words.<sup>11</sup> In this view, the document appears, like a theorem of Euclid, to be largely the product of abstract ratiocination designed to encapsulate a closed, internally consistent system. At best, such a simple route to certitude will produce only partial understanding; at worst, it leads to serious error. The Constitution does not exhaust the Founders' beliefs about political order in a free society. They had profound insights into the kind of people Americans would have to be in order to maintain a constitutional republic. They believed, in opposition to most modern commentators who generally omit notions of self-restraint or "virtue" as important political elements, that only if "republican virtue" were widely practiced could the republic survive.<sup>12</sup>

This "classical" understanding originated with Plato and Aristotle.<sup>13</sup> It animated the common law, and the Founders took it as the starting point for political philosophy. The theory posits that a republic with democratic institutions is a form of self-government, but the "self" must be worthy of governing. Thus, the *character* of the people who govern—or more essentially, of the people who elect who will govern—is crucial to the merit, indeed the survival, of the polity. The right balance of freedom and authority, of liberty and order, did not just happen: it

9. See, e.g., THE FEDERALIST Nos. 68-85 (A. Hamilton).

10. See, e.g., *id.* No. 55, at 383 (J. Madison) (E. Bourne ed. 1937):

As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form.

11. Among the "literalists" we might include Justices Black and Douglas, who are often characterized as "absolutists" regarding the First Amendment's mandate that "Congress shall make no law . . . abridging the freedom of speech." See *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 61 (1961) (Black, J., dissenting):

As I have stated many times before, I do not subscribe to [the balancing of state interests against individual infringements] doctrine for I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the "balancing" that was to be done in this field.

See also *Roth v. United States*, 354 U.S. 476, 508 (1957) (Douglas, J., dissenting).

12. See THE FEDERALIST Nos. 10, 14 & 18 (J. Madison); see also *supra* note 10 & *infra* text accompanying notes 20-21.

13. See generally III ARISTOTLE, POLITICS (B. Jowett trans. 1905) (discussing the citizen, civic virtue, and the civic body); PLATO, CRITO (E. Hamilton & H. Cairns eds., 1961) (discussing Socrates' rationale for not fleeing from his unjust imprisonment and death sentence); see also A. WOOLEY, LAW AND OBEDIENCE: THE ARGUMENTS OF PLATO'S CRITO (1979).

resulted from a comparable moral balance in the lives of most citizens. A bad people could not produce good government. Rather, good government arose from good people; consequently, the government itself had to be solicitous for the character of the people—to be interested in encouraging a modicum of virtue among the citizenry. Again and again, the Founders came back to this theme: moral breakdown leads to political breakdown, so the people must maintain a strong commitment to basic morality.<sup>14</sup>

Thus, Benjamin Franklin noted: “Only a virtuous people are capable of freedom. As nations become corrupt and vicious [i.e., vice-ridden], they have more need of masters.”<sup>15</sup> John Adams echoed the sentiments of his colleague:

All sober inquirers after truth, ancient and modern, pagan and Christian, have declared that the happiness of man, as well as his dignity, consists in virtue. . . . If there is a form of government, then, whose principle and foundation is virtue, will not every sober man acknowledge it better calculated to promote the general happiness than any other form?<sup>16</sup>

Added to the list of Founders who vocalized the importance of strong societal morals was Thomas Jefferson, who declared that students should have instilled into their minds “the first elements of morality.”<sup>17</sup> In a report by James Madison and the other commissioners for the University of Virginia, Jefferson noted that the University should be devoted to the cultivation of morals among the youth of the state, to instill “in them the precepts of virtue and order.”<sup>18</sup> The Northwest Ordinance, passed in 1787 by the same Congress that approved the Constitution, also emphasized the importance of teaching religion and morality in the

14. See *infra* text accompanying notes 20-21.

15. 6 A. SMYTH, *THE WRITINGS OF BENJAMIN FRANKLIN* 569 (1906).

16. J. Adams, *The Foundation of Government*, reprinted in 2 *THE ANNALS OF AMERICA* 410 (Encyclopedia Britannica 1968) [hereinafter *THE ANNALS*].

17. Jefferson, *Notes on the State of Virginia*, cited in W. BERNS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* 205 (1976).

18. For Jefferson's insistence that religion and morality be a central part of the University of Virginia curriculum, see generally R. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* ch. 1-3 (1982). Jefferson's guidelines for the University were summarized as follows in W. SKOUSEN, *THE MAKING OF AMERICA* 683-84 (1985):

[1.] The responsibility for teaching “the proofs of the being of a God, the creator, preserver, and supreme ruler of the universe, the author of all the relations of morality . . . will be within the province of the professor of ethics.”

[2.] If the University faculty will also teach “the developments of these moral obligations, of those in which all sects agree, [together with] a knowledge of the languages, Hebrew, Greek, and Latin, a basis will be formed common to all sects.”

[3.] Encourage “the different religious sections to establish, each for itself, a professorship of their own tenets, on the [campus] of the University, so near . . . that their students may

schools.<sup>19</sup>

Finally, in his famous Farewell Address, George Washington drove the point home once again:

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. . . .

Let it simply be asked—Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths, which are the instruments of investigation in courts of justice? And let us with caution indulge the supposition that morality can be maintained without religion. . . .

It is substantially true that virtue or morality is a necessary spring of popular government. The rule indeed extends with more or less force to every species of free government.<sup>20</sup>

Franklin, Adams, Madison, Jefferson, Washington—these are the most important heroes in the pantheon of early American leaders. Their comments, and many more than one could adduce, make clear the founding generation's conviction that the Constitution would work only if the people were virtuous. The precondition of political freedom was personal virtue. This philosophy was the fruit of a tradition going back to ancient writings on the essence of good citizenship, political health, and social morality; a tradition that "stressed the moral character of the independent citizen as the prerequisite to good politics and disinterested

attend the lectures there, and have the free use of our library, and every other accommodation we can give them. . . ."

[4.] Enable "students of the University to attend religious exercises with the professor of their particular sect, either in the rooms of the buildings still to be erected [by each denomination on campus] or . . . in the lecturing room of each professor."

19. "Article 3: Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *The Northwest Ordinance*, reprinted in 3 *THE ANNALS*, *supra* note 16, at 194-95.

20. G. Washington, *Farewell Address*, reprinted in *THE ANNALS*, *supra* note 16, at 612. It is not surprising, then, that the brilliant observer of American mores, Alexis de Tocqueville, would sum up the relation between good private morals and a prosperous public wealth in these oft-quoted terms:

I sought for the greatness and genius of America in her commodious harbors and her ample rivers, and it was not there; in her fertile fields and boundless prairies, and it was not there; in her rich mines and her vast world commerce, and it was not there. Not until I went to the churches of America and heard her pulpits aflame with righteousness did I understand the secret of her genius and power. America is great because she is good and if America ever ceases to be good, America will cease to be great.

*Quoted in* E. BENSON, *GOD, FAMILY, COUNTRY: OUR THREE GREAT LOYALTIES* 360 (1975).



service to the country."<sup>21</sup>

Besides being fundamental law, the Constitution was, for the men and women of that original generation, also the institutional expression of the political order's philosophical foundation. The Constitution emerged from the same generation of practical political philosophers as that which produced the Declaration of Independence. Thus, the philosophical premises which Jefferson summed up in the Declaration provided the belief system, the intellectual framework, and the world view of the Constitutional Convention. Though more than a decade apart, the Declaration of Independence and the Constitution are cut out of the same philosophical cloth. No statesman living in 1787 would disagree with Jefferson's formulation of 1776. So it is appropriate to consider the Declaration's first principles:

When in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which *the Laws of Nature and Nature's God* entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these *truths to be self-evident*, that *all men are created equal*, that they are *endowed by their Creator with certain unalienable Rights*, that among these are Life, Liberty, and the pursuit of Happiness. *That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed . . . .*

We, therefore, the Representatives of the United States of America, in General Congress, Assembled, *appealing to the Supreme Judge of the world for the rectitude of our intentions*, do, in the Name, and *by the Authority of the good people* of these Colonies, solemnly publish and declare, That these United Colonies are, and *of Right* ought to be Free and Independent States . . . . And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.<sup>22</sup>

By a few strokes of the pen, Jefferson brilliantly blended Hebraic, Christian, classical, and seventeenth and eighteenth century theories. The italicized words highlight the accepted public philosophy of rights which he knew, as a polemicist, appealed to those he wished to rally to the revolutionary cause: there are "laws" or "truths" in the objective order of things; God is their author; some political truths are self-evident.

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21. Wood, *The Intellectual Origins of the American Constitution*, NAT'L F.: THE PHI KAPPA PHI J. 5, 6 (Fall 1984).

22. The Declaration of Independence paras. 1, 2 & 32 (U.S. 1776) (emphasis added).

Consequently, neither King nor Parliament nor clergy nor nobility have gnostic insights beyond those of the common man. Some "rights" are innate and cannot *justly* be alienated; governments derive their *just* powers *from the people* they govern; there is a standard of rightfulness—"rectitude"—known to God, who will protect those who obey the laws of nature. Indeed, because these rights are "natural," they cannot be "given" or "alienated" by the positive will of the Sovereign; should the Sovereign do so—as King George III had—his conduct will be measured by the "higher law" standard which binds both King and commoner.

The Founders did not think that the Declaration of Independence or even the Constitution itself *created* basic political rights. Quite the contrary; they believed rights first existed in the natural order of things, were then discovered by enlightened reason, and finally written down in charters.<sup>23</sup> As expressed by the revolutionary leader John Dickinson, "[o]ur liberties do not come from charters; for these are only the declaration of preexisting rights. They do not depend on parchments or seals; but come from the King of Kings and Lord of all the earth."<sup>24</sup>

The Constitution thus states on paper the Founders' grasp of true political principles first discovered in objective reality. Like the Apostles' Creed which states the highlights of the ancient Christian faith, the Constitution and the Declaration of Independence, together with explanatory documents such as the *Federalist* papers, state ancient political principles. First came the ideas; then the documents. The "body" of the federal political order emerges from the documents; the "soul" emerges from the belief system and moral character of the people. The Founders realized that words alone could not maintain the Republic; only the willingness of the people to *live out* the principles would make the system work.

In numerous places, Madison expressed worry about the baneful influence of "factions."<sup>25</sup> He and his colleagues were convinced that only the internal commitment of the citizen to the common good would enable the people to rise above private selfishness and short-sighted pursuit

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23. See, e.g., THE FEDERALIST No. 49, at 344 (A. Hamilton or J. Madison) (E. Bourne ed. 1937) ("[T]he people are the only legitimate *fountain of power*, and it is *from them* that the constitutional charter . . . is derived . . .") (emphasis added); see also D. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 133 (1984).

24. Grant, *The Natural Law Background of Due Process*, 31 COLUM. L. REV. 56, 56 (1931) (quoting John Dickinson).

25. See, e.g., THE FEDERALIST No. 10 (J. Madison) (on the nature of factions); *id.* No. 14 (on the "diseases of faction"); *id.* No. 18 (on the harm of factions to ancient governments); see also D. EPSTEIN, *supra* note 23, at 59-110. Today we are wont to call factions "special interests."

of personal advantage. Thus “civic virtue” or “republican virtue” is the key to long-term prosperity and freedom in the Republic.

The challenge to the statesman is twofold: to clear his mind enough to distinguish the true and false; to firm his will enough to apply true principles in the prudential world of daily political decision. That application is difficult: human nature is often selfish and short-sighted. The leaders will succeed, over the long haul, in consistent application of true and correct first principles only if they have moral stamina—such as good character and virtue. But a nation will have such good leaders pursuing good policies only if the people as a whole, who select the leaders or at least tolerate them, have comparable virtue. And finally, the Founders believed, in a way reminiscent of Old Testament notions of covenant, that obedience to true principles would bring blessings from God while disobedience would bring punishment.<sup>26</sup>

## II. The Founders and the Control of Speech

The previous section outlines the context in which the First Amendment was drafted. Understanding this context helps explain why the words seem absolute—“Congress shall make no law . . . abridging the freedom of speech, or of the press”—yet the Founders did *not* want speech or press to be *absolutely* unfettered. In Leonard Levy’s observation: “The First Amendment’s injunction . . . was boldly stated if narrowly understood.”<sup>27</sup>

To discover the actual meaning of the words one must use a mode of analysis more “organic” than “mathematical.” Justice Holmes best explained this theory by reasoning that:

[T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.<sup>28</sup>

Early first amendment jurisprudence originated within two political principles: first, the Founders’ sense that the purpose of speech and the press was the maintenance and improvement of the republican polity, and that speech which harmed the polity was either not “speech” or not

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26. See generally D. HOWE, *THE GARDEN AND THE WILDERNESS* (1965).

27. L. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 309 (1960).

28. *Gompers v. United States*, 233 U.S. 604, 610 (1914).

protected speech;<sup>29</sup> and second, their passionate commitment to multi-layered federalism. In the minds of Jefferson and Madison and the other Founders, to prohibit the *national* Congress from regulating speech did not leave speech untouched by governmental hand.<sup>30</sup> Rather, the states had the sole responsibility for regulating speech. For example, the Kentucky Resolutions of 1798 and 1799, designed to attack the national Alien and Sedition laws<sup>31</sup> and drafted by Jefferson, affirmed that because the Constitution delegated no power to the United States, it followed that “all lawful powers respecting the same did of right remain, and were reserved to the states, or to the people; that thus was manifested their determination to retain to themselves the right of judging how far the licentiousness of speech, and of the press, may be abridged . . . .”<sup>32</sup> Furthermore, Madison stated in 1799 that “[e]very libelous writing or expression might receive its punishment in the State courts.”<sup>33</sup>

Writing in 1804, Jefferson made it abundantly clear that he was not the full-fledged libertarian concerning speech that his modern admirers sometimes claim:

Nor does the opinion of the unconstitutionality [and] consequent nullity of that law [the Sedition Act], remove all restraint from the overwhelming torrent of slander, which is confounding all vice and

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29. This view is exemplified by the controversy over the Alien and Sedition Acts, and the position, which Jefferson and Madison shared, that the states could limit freedom of speech. See T. ANDERSON, *JACOBSEN'S DEVELOPMENT OF AMERICAN POLITICAL THOUGHT* 296-313 (2d ed. 1961) (quoting from the Kentucky and Virginia Resolutions of 1798-99, and from Madison's Report on the Virginia Resolution); see also *infra* notes 31-32 and accompanying text. The concepts of “nonspeech” and “speech plus” are used regularly by the Supreme Court when deciding first amendment challenges. See, e.g., *Miller v. California*, 413 U.S. 15, 36 (1973) (obscenity is not speech such that it merits constitutional protection); *Cohen v. California*, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting) (shocking words on jacket are not “speech”).

30. See *infra* note 33 and accompanying text, discussing Jefferson's vision regarding the states' ability to regulate areas which were constitutionally placed beyond federal regulation.

31. Act of June 25, 1798, 1 Stat. 570 (1798); Act of July 14, 1798, 1 Stat. 596 (1798). The Acts expired by their terms in 1801.

32. The Kentucky Resolutions of 1798 & 1799, reprinted in 4 J. ELLIOT, *THE DEBATES ON THE FEDERAL CONSTITUTION* 540-41 (1836).

33. L. LEVY, *supra* note 27, at 266. Jefferson felt the same way about religion, that the States could regulate (“establish”) it. Thus he wrote:

I consider the government of the US. [sic] as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment, or free exercise, of religion, but from that also which reserves to the states the powers not delegated to the U.S. Certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general government. It must then rest with the States . . . .

Letter from Thomas Jefferson to Rev. Samuel Miller (Jan. 23, 1808), reprinted in 11 *THE WRITINGS OF THOMAS JEFFERSON* 7 (P. Ford ed. 1905).

virtue, all truth [and] falsehood, in the U.S. The power to do that is fully possessed by the several State Legislatures. It was reserved to them, [and] was denied to the General Government, by the constitution, according to our construction of it. While we deny that Congress have a right to control the freedom of press, we have ever asserted the right of the States, and their exclusive right, to do so.<sup>34</sup>

Denying the federal government the power to "abridge" speech while permitting the states to do just that are scarcely acts of an absolutist who supposedly rejected any control over freedom of speech. In the federal system that Jefferson and Madison helped create and interpret, the question was not whether government could limit speech, but rather which government might do the limiting and what kind of speech could, or could not, be limited.

Even on the federal level, the First Amendment does not really mean "no law." There are laws, some of which go back to the country's earliest days, which forbid perjury,<sup>35</sup> conspiracy,<sup>36</sup> libel,<sup>37</sup> contempt of court,<sup>38</sup> incitement to violence,<sup>39</sup> copyright violation,<sup>40</sup> and disrespect toward commanding officers.<sup>41</sup> Indeed, one writer has suggested that "the First Amendment itself limits free expression; by implication, the 'establishment of religion' clause forbids the advocacy of religious doctrines in public schools."<sup>42</sup> Thus, by interpretation, the Establishment Clause of the First Amendment makes relative, not absolute, the Speech Clause of that same Amendment.

Though this discussion has dealt with possible limits on serious speech, one may readily infer, a fortiori, that Jefferson and Madison would have countenanced state-imposed limits on what their society usu-

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34. Letter from Thomas Jefferson to Abigail Adams (Sept. 4, 1804), *reprinted in* 10 THE WRITINGS OF THOMAS JEFFERSON 89-90 (P. Ford ed. 1905). *See* L. LEVY, *supra* note 27, at 267.

35. *See, e.g.*, 18 U.S.C. § 1621 (1964); *see generally* 1 W. BURDICK, LAW OF CRIME §§ 318-325 (1946) (perjury was a misdemeanor at common law).

36. *See generally* 3 W. BURDICK, *supra* note 35, at §§ 984-987.

37. *See, e.g.*, Act Respecting Libels (1799), N.J. REV. LAWS 411 (1800); *see generally* 3 W. BURDICK, *supra* note 35, at §§ 782-785 (criminal libel—statements against an individual, and seditious libel—statements directed against governmental institutions, were crimes at common law); *see also* Roth v. United States, 354 U.S. 476, 482 n.11 (1957).

38. *See, e.g.*, 18 U.S.C. § 402 (1984) (contempt of district court orders constitutes a crime); *see generally* 1 W. BURDICK, *supra* note 35, at § 286.

39. *See, e.g.*, 18 U.S.C. § 2101 (1984); *see generally* 3 W. BURDICK, *supra* note 35, at §§ 766-770 (disturbing public meetings is a crime).

40. *See, e.g.*, 17 U.S.C. § 109 (1984) (unlawful distribution of phonograph records); 18 U.S.C. § 2318 (1984) (unlawful reproduction of audiovisual works).

41. *See, e.g.*, 18 U.S.C. § 2387 (1984) (crime to advise, counsel, or urge insubordination in the military).

42. Christenson, *Without Redeeming Social Value?*, in WHERE DO YOU DRAW THE LINE? 309, 311 (V. Cline ed. 1974).

ally called "lewdness" or "public indecency." The Founders adopted the common law, which had criminalized such acts since at least as early as the 1663 case of *King v. Sidley*,<sup>43</sup> and the definitive commentator Blackstone had reported that "grossly scandalous [affairs] and public indecency" as well as "wilfully exposing and obscene print" were considered "open and notorious lewdness" and punishable at common law.<sup>44</sup> The first obscenity case on record in the United States took place in 1815 in Philadelphia.<sup>45</sup> In a common-law action, one Jesse Sharpless was convicted of exhibiting for money a painting "*representing a man in an obscene, impudent and indecent posture with a woman.*"<sup>46</sup> Finally, in the same generation, Congress and state legislatures added the Fourteenth Amendment to the Constitution as well as the Comstock Act<sup>47</sup> to our laws, and saw no "freedom of speech" difficulty in doing so.<sup>48</sup>

So we are left with the modest but important conclusion: *some* control of "speech" by government, certainly on the state level, was entirely consistent with the common law and the political theory of the Founders' generation, as well as with the actual language of the First Amendment. This is true whether the focus be the role of criminal law in maintaining public decency, the Founders' concern about responsible or virtuous use of freedom, or the unique brand of federalism they created.

It remains to be seen whether modern pornography should be included in that "some control"; and if so, whether failure to do so will harm constitutional government.

### III. The Reality of Pornography

One of the ironies of the argument over controlling pornography is that the disputants scarcely ever present concrete examples. Those who oppose any censorship of the pornographic work will, like their adversaries, censor their own discussion of it so as not to shock the audience.

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43. 83 Eng. Rep. 1146 (K.B. 1663).

44. W. BLACKSTONE, COMMENTARIES \*64.

45. Commonwealth v. Sharpless, 2 Serg. & Rawle 91 (Pa. 1815).

46. *Id.* at 91-92 (emphasis in original).

47. See 18 U.S.C. §§ 1461-1463 (1984) (declaring "obscene, lewd, lascivious, indecent, filthy or vile" articles and matters to be "nonmailable matters," and making their postage a criminal offense); see also *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 79 (1973) (Brennan, J., dissenting) (discussing the history of obscenity).

48. Apparently Congress had no qualms about restricting "filthy" speech, nor did it feel a need to define the terms of the Act. Though it might have been argued, perhaps as early as the 1870's, that congressionally imposed limits on certain forms of "indecent" speech are unconstitutional, the generation that ratified the Fourteenth Amendment did not view that Amendment as "applying" the First Amendment to the States. See R. BERGER, GOVERNMENT BY THE JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

Those who claim it cannot be defined and who joke about Justice Stewart's remark that "I know it when I see it,"<sup>49</sup> find it quite easy, in serious debates, to exclude visual specifics; obviously, *they* too can tell the difference between what is and what is not pornographic, when they see it. In a law review symposium several years ago, this writer's article was the only one out of eight which, apologetically, set forth some, slightly sanitized, examples.<sup>50</sup> But generally, good taste and the canons of scholarship force the discussion to take on a rarified and unrealistic tone. Scholars debate the pros and cons of controlling something—and that something is not exemplified for the readers of the debate. Rather, we indulge the unstated supposition that everybody knows exactly what the debate is about; it is as if we discussed the statistics on deaths through cancer and never show the inside of a chain-smoker's lungs. We argue the law before we have looked at all the facts. But a better course, which we must follow here out of deference to the enormity of the issues, is to put the facts into the record before we philosophize about the law.

The well-known dictum, "a picture is worth a thousand words,"<sup>51</sup> may be supremely apposite here. Yet the context prohibits pictures and limits words. Therefore, the fair-minded reader should review the Attorney General Commission's *Final Report*,<sup>52</sup> if only for its description of what modern pornography has become. Dr. James Dobson, a family psychologist and one of the Commissioners, struggled with self-censorship in an effort to inform, without outraging, a general audience about the true nature of pornography:

It is extremely important for [people] to know what is being sold by the pornographers today, although I can't adequately describe it in a family magazine like this. If our people understood the debauchery of this business, they would be far more motivated to work for its control. You see, most people believe that mainstream pornography is represented by the centerfolds in today's men's magazines . . . . But if one were to go into the sex shops on Times Square or in most other large cities in the country, he would find very little so-called normal heterosexual activity. Instead, he would encounter a heavy emphasis on violent homosexual and lesbian activity, on excrement, mutilation, sadomasochism, urination, defecation, cutting of the genitals, enemas, oral and anal sex, instrumentation for the torture of women and depictions of sex be-

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49. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

50. Stanmeyer, *Obscene Evils v. Obscure Truths: Some Notes on First Principles*, 7 *CAP. U.L. REV.* 647 (1978).

51. *THE MAXMILLAN BOOK OF PROVERBS, MAXIMS, AND FAMOUS PHRASES* 2611 (Stevenson ed. 1948).

52. MEESE FINAL REPORT, *supra* note 5.

tween humans and animals.<sup>53</sup>

In general, pornography is the visual depiction of ultimate erotic acts or violent acts with erotic overtones portrayed in such a way to stimulate the psychology and imagination of the viewer, who vicariously engages in the same sex acts while beholding and thereby experiencing, through masturbatory fantasy, sexual pleasure.<sup>54</sup> Pornography is thus far different from art.<sup>55</sup> Art does not seek to *immerse* the viewer in the depiction in order to stimulate the viewer erotically. One crosses the line from art to erotica when the depiction becomes overwhelmingly sexual, intimate, and active, with zoom-lens close-ups of sexual acts and sexual organs, and with proportionate loss of attention, meaning, or respect for the person, who becomes no more than a function or an organ—a momentary source of pleasure for the viewer.

Thoughtful writers such as Harry Clor and Irving Kristol have readily been able to define pornography,<sup>56</sup> producers of prime-time television shows have no problem in discerning the difference between “hard-core” and “soft-core” and excluding the former from their shows, and the Supreme Court has, as is well known, developed a formula which if complex, still in the proper case is adequate to guide the reasonable men and women of a jury. The *Miller*<sup>57</sup> test states that a work is “obscene” if the jury finds in the affirmative that:

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53. FOCUS ON THE FAMILY, August 1986, at 2 (interview with James Dobson).

54. Evers & Stanmeyer, *Insight Pornography—Extent of Pornography in Modern Society and Its Harm*, 3 J. CURRENT ADOLESCENT MED. 13 (1981).

55. van den Haag, *Democracy and Pornography*, in WHERE DO YOU DRAW THE LINE?, *supra* note 42, at 257.

Here one must keep in mind the aesthetic functions of art and literature which distinguish both from obscene or prurient works. Pornography has one aim only: to arouse the reader's [or viewer's] lust so that, by sharing the fantasy manufactured for him, he may attain the vicarious sexual experience it is intended to produce (which may be, but need not be, harmless). Literature, however, aims at the contemplation of experience, at the revelation of its significance. . . .

Since it is impossible to serve pornography pure, the vicarious experience it supplies must occur through some medium, words or pictures, and in a setting that permits the suspension of disbelief. This is as far as the similarity with literature goes. Aesthetic merit would be distracting. Pornography and literature are mutually exclusive. Pornographers no more produce literature than accountants do, or copywriters . . . .

Although many pretend to be, it is hard to imagine a literary critic actually unable to tell pornography from literature. What could a critic tell us if he cannot tell pornography from literature? . . . If he feels that, for the sake of freedom, he must pretend he cannot discriminate—just as communists used to be unable to tell democracy from dictatorship whenever such a distinction would interfere with their ideology—why take the pretention seriously?

*Id.* at 265-66.

56. I. KRISTOL, ON THE DEMOCRATIC IDEA IN AMERICA 31 (1972); H. CLOR, OBSCENITY AND PUBLIC MORALITY (1969); *see also infra* notes 84 & 88 and accompanying text.

57. *Miller v. California*, 413 U.S. 15, 20 (1973).



- (a) "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest;
- (b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>58</sup>

After giving two examples of what may be regulated under the second element, the Court noted the wide latitude this minimal line gives to artists and literary composers: in essence, no prosecutions for obscenity "unless these materials depict or describe patently offensive 'hardcore' sexual conduct specifically defined by the regulating state law."<sup>59</sup>

In a lengthy dissent in *Paris Adult Theatre I v. Slaton*,<sup>60</sup> a companion case to *Miller*, Justice Brennan raised the spectre of anticipated "sweeping suppression of sexually oriented expression."<sup>61</sup> "Sexually oriented" speech was surely a euphemism even in 1973, and today is especially inept to describe the mindless visual assault on the imagination that emerges from the backrooms of Hollywood and Copenhagen. Yet Justice Brennan did acknowledge the state interest in protecting children and in protecting unconsenting adults.<sup>62</sup> However, this concession appears inconsistent in this case, since the minority in *Miller* rests heavily on assumptions that either pornography cannot be defined,<sup>63</sup> or, if it could, that there is no "proof" it causes harm.<sup>64</sup> It is not clear how we could protect children from something we cannot define, or why we should protect either children or unconsenting adults from something that causes no harm. And if one is to permit this—whether defined or undefined—visual experience for nineteen-year olds but prohibit it for seventeen-year olds, where in the Constitution does Justice Brennan find support for such a distinction? The difference in treatment of the two groups of young people is manifestly a legislative judgment, not required by the First Amendment's sparse wording on the topic of speech. But if the Legislature is constitutionally permitted to ban pornography for minors, despite the words "Congress shall make no law," it seems impossible to find a *constitutional* reason why the Legislature cannot ban

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58. *Id.* at 24.

59. *Id.* at 27.

60. 413 U.S. 49 (1973).

61. *Id.* at 96 (Brennan, J., dissenting).

62. *Id.* at 106-07. See also *Miller*, 413 U.S. at 47 (Brennan, J., dissenting).

63. *Miller*, 413 U.S. at 37-42 (Douglas, J. dissenting). See also *Paris*, 413 U.S. at 73-114 (Brennan, J., dissenting).

64. *Miller*, 413 U.S. at 39 (Douglas, J., dissenting). See also *Paris*, 413 U.S. at 107-08 (Brennan, J., dissenting).

pornography for persons in their majority. In other words, it is a policy question, not a constitutional question.

In *Paris* the Supreme Court majority addressed these policy questions.<sup>65</sup> The majority stated that “there are legitimate state interests at stake in stemming the tide of commercialized obscenity . . . . These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself.”<sup>66</sup> Well aware that their critics would raise the issue of measurable causality, conclusive evidence, or empirical data “demonstrating” that obscenity causes harm, the majority opted for judicial restraint. They held that the Constitution as interpreted by the Court does not require legislatures to base their statutes on overwhelming empirical evidence before they can act:

If we accept the unprovable assumption that a complete education requires the reading of certain books, . . . and the well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character, can we then say that a state legislature may not act on the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior? . . . [There is] ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.<sup>67</sup>

Actually, there is considerable empirical evidence which tends to demonstrate that obscenity ostensibly causes harm.

#### IV. Harm to the Individual

It is hard to prove the obvious. It should be obvious that what we see becomes part of us. If we see and especially if we accept, embrace, and enjoy watching certain actions—whether good or evil—we will likely break down our inhibitions against doing those actions and, many times, build up motivation to do them. For example, Madison Avenue advertisement agencies write beer commercials showing burly former athletes quaffing the suds light heartedly—commercials designed to *cause* the television viewers to buy beer. Federal law bans television cigarette adver-

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65. 413 U.S. at 57-70.

66. *Id.* at 57-58.

67. *Id.* at 63 (citations omitted).

tisements<sup>68</sup> because smoking is widely deemed to cause cancer, and those advertisements allegedly encourage people to smoke. Psychiatrist Frederic Wertham has demonstrated that violent images saturating impressionable young minds will predispose many of them to violent actions.<sup>69</sup> In fact, the causal link between television violence and real-life violence by imitative viewers is widely deemed established and has been the subject of considerable probative social science study and governmental inquiry.<sup>70</sup> It is puzzling therefore, if not disingenuous, for the defenders of commercialized pornography to contend, as many do, that "there is no evidence" pornography causes antisocial behavior and, sometimes, even crime.<sup>71</sup>

The prime consideration is the change of attitude that results from continued exposure to pornography. Because the transformation from "Dr. Jekyll" to "Mr. Hyde" can, in real life, be quite gradual, it is important to pause a moment to consider the modest thesis being put forth. It is *not* asserted that a single experience with a "dirty" book or film turns that nice teenage boy next door into a sexual Jack the Ripper; nor is it

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68. 15 U.S.C. § 1335 (Supp. 1987).

69. F. WERTHAM, *SEDUCTION OF THE INNOCENT* 90-91 (1954). *See also* Wertham, *School for Violence, Mayhem in the Mass Media*, in *WHERE DO YOU DRAW THE LINE?*, *supra* note 42, at 157-75.

70. "There now exist no less than [600] pieces of scientific study which have demonstrated that there *is* a link between televised and social violence." D. TAME, *THE SECRET POWER OF MUSIC* 148 (1984) (emphasis added).

71. There is abundant evidence that hard-core pornography is associated with some sex crimes; in many cases it is eminently reasonable to conclude that the crime would not have occurred but for the influence of pornography. Thus, in one case, a defendant admitted at trial that he watched two little girls, age eight and ten, near their school for some time; he further admitted that he frequented adult bookstores and at the time was reading a pornographic book, and that one of the little girls reminded him of the girl in his book. He kidnapped them, sexually abused both, and killed one. *Presnell v. State*, 241 Ga. 49, 243 S.E. 2d 496 (1978).

In another case in the late 1970's, Michigan authorities used a computer to analyze thousands of sex-related crimes committed over two decades in that State. Detective Lieutenant Darrell Pople, a vice investigator with the State Police, in a public lecture on May 1, 1979, gave examples of numerous cases where the assailants in sexual assault cases had immersed themselves in pornographic films or pictures and then gone out and committed sex crimes. These crimes included rape, sexual assault, and even the bizzare erotic crime of piquerism (piercing with a knife till the blood flows, a kind of sexual torture). In some cases the attacker admitted that the urge to rape or torture erotically came over him while reading an obscene picture magazine or attending a movie showing rape and erotic torture.

I do not wish to burden this footnote with an excess of empirical data, since the central point is *not* causality of crimes, but the general debasement of attitudes. If the reader desires further confirmation of the correlation between immersion in hard-core pornography and sex crimes in general, he or she should consult the *MEESE FINAL REPORT*, *supra* note 5. *See also* W. STANMEYER, *THE SEDUCTION OF SOCIETY* 27-42 (1984) (discussion and examples of pornography as a "redispositive cause").

suggested that every law student or stock broker who flips the pages of *Hustler* in the barber shop will go out and rape someone tomorrow—or ever. There is a wide range of susceptibility and of exposure. There is little doubt that the readers of this Article, for instance, are generally well-balanced persons who, by and large, could “handle” a bit of pornography without serious psychological harm. Consequently, such readers may react to the argument concerning the proposed harmful effects of pornography by generalizing their own mental stability, minimally affected by occasional sorties into the world of porn films and magazines, into an unwarranted assumption about the mental stability of all men and women of their age and background. The logical answer to this fallacy may be: if one or two cases where pornography caused crime do not convince you that it has causal influence on some people, then please do not object if, when you cite one case in which involvement with pornography apparently caused no loss of mental health, the writer doubts that you have proved a universal.

A broader answer is this: in discussing whether there should be some legal control over commercial distribution of hard-core pornography, we are dealing with society as a whole. If we permit one person uninhibited access to hard-core, legally prohibitable pornography, we permit access in principle to all persons. Thus, if we remove entirely the law which restricts the distribution of pornography, we allow it to persons we think it will not harm; but we also allow it to those it might harm, and to those it certainly will harm. Moreover, in dealing with pornography it is not possible to allow the mature, nonsusceptible person to frequent such entertainments and at the same time somehow exclude the immature, susceptible person.

As in so many other areas, the law must deal with people in the aggregate. Except for excluding minors, a gesture in the direction of distinguishing the susceptible from the presumably impervious, there is simply no way to make exceptions for subjective differences. Lawmakers must make rules for the generality of men and women, despite the resulting restriction on some for whom it may not be necessary. As with the fifty-five mile per hour speed limit and prohibitions against selling alcoholic beverages to minors, lawmakers must weigh the evils to be prevented, to save *some* people from high speed crashes, adolescent drunkenness, or with pornography, psychosexual neuroses and greater propensity to antisocial conduct. Lawmakers must do this if the *general* harm is to be controlled, despite the fact that some might “handle” their speed, their booze, or their porn.

So, in the example that follows, it is utterly irrelevant whether the reader or the writer would ever, through immersion in pornography, turn into the sexual psychopath described. The case is typical of the extreme forms of psychological dysfunction that immersion in pornography can engender; the reader is asked only to keep in mind that what happened to "Marty" can happen to hundreds, thousands, and potentially even millions of other young people. The case was provided by Dr. Melvin Anshell, a psychiatrist with thirty years of experience:

Marty [pseudonym], age 17, came to me for treatment of recurrent headaches. [My experience as a father and as a physician practicing psychiatry has given me a certain rapport with teenagers; and it was not long before] Marty began discussing his real problem with me.

It had begun four years previously when Marty was in junior high. The son of affluent, professional parents, he was not only a bright student but popular, as well. One afternoon another 12-year-old boy invited Marty and a group of schoolmates, boys and girls, to his home to view a movie which his parents showed at grown-up parties. [Since every young person's ambition is to prove that he can act like an adult, he] had an eager audience while he played host during his parents' absence.

The movie [turned out to be] hard-core pornography, graphically depict[ing] sexual intercourse along with every type of perversion. [After the initial embarrassment, the majority of the children were completely seduced. They] attempted to outdo the adults in the movie then and there.

By the time he entered high school, Marty told me, [his earlier promiscuity had ceased because] he no longer "got a kick out" of [it]. His problem, he said was that he was impotent. For sexual stimulation, he now needed drugs. At present, he is a school dropout, finding release in drug-induced sexual [fantasies].

Is there [any] hope [for Marty to return to a normal] life? It is most improbable. You cannot stretch the bones of a dwarf. A dwarf's subnormal size [is due to] premature closure of the bones in childhood. Marty's impotence was due to his sexual growth having been stunted [before mature development occurred in adolescence] . . . .

Marty's experiences with pornography [sated him with sex] before the process of idealization was established in his relations with girls. As a result, he holds girls in contempt. His unresolved affectionate longings [have built up a continuous] succession of frustrations. [His bitterness and disappointment with carnal sex devoid of spiritualization have] created such a reservoir of hate for females that his sadism is almost fiendish. He has gradually [reverted] to satisfying physical sexual needs entirely through voyeurism and [sadism]. His greatest [delight is in having orgiastic responses after] beating his nude female cohorts. [Sadistic

pleasures have spilled inwardly into himself, and he is gradually destroying his life with drugs.]<sup>72</sup>

This young man's mental collapse is sad enough for him as an individual. But it portends no good for the country as a whole, should it be duplicated in thousands of other similar children "of affluent, professional parents." It is possible that excessive tolerance of hard-core pornography's pervasive spread through society will set up conditions for thousands of other young people to go the same way. Moreover, we may wonder what contribution "Marty" is able to make to the broader common good and transcendent political values in his present condition. One may doubt that a young man beset with such a psychosis would have offered much to a young America 200 years ago, even if his name were Thomas Jefferson. Similarly, those who fought the Revolutionary War might not have done so with, broadly speaking, such persistent moral stamina, if the colonists of that era had the benefit of VCR's showing scenes of explicit aberrant sexual conduct.

## V. Harm to Communal Attitudes

Multiplied by enough single cases, the attitudes of individuals become the attitudes of society as a whole. Thus, the psychological dysfunctions and distortions besetting individuals, replicated extensively in many people, will pervade and change a whole society. If too many people become alcoholic, we have an alcoholic society. If one individual can be neurotic or psychotic, so can whole groups; and if groups, so too wider communities. Mental health, like physical health, differs widely among millions of people, but widespread mental health surely is different from widespread mental illness. So let us state candidly what kind of individuals, in the extreme case at least, pornography produces.

In a conference lecture in May of 1985, Dr. Harold Voth, an experienced psychiatrist associated with the Menninger Foundation, described the usual qualities associated with the man who has become a pornography addict.<sup>73</sup> He used such terms as: selfish; infantile; uncontrollable; one who *uses* others; immature; solipsistic; lacking in genuine affection; debased; degraded; aggressive; sadistic; perverse; abnormal; destructive; normless; maladjusted; violence-prone; fixated on an immature level; one who shows incomplete human development; callous towards women; suf-

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72. Anchell, *Pornography Is Not the Harmless Recreation It Is Said to Be*, LIBERTY MAG. 11-12 (July/Aug. 1977). See also M. ANCHELL, SEX AND INSANITY (1983); M. ANCHELL, SEX AND SANITY (1971).

73. Voth, *The Psychological and Social Effects of Pornography*, in PORNOGRAPHY: SOLUTIONS THROUGH LAW 30 (1985).

fering impaired psychological development; filled with rage; and, absorbed in transient, meaningless sex.<sup>74</sup> It scarcely needs saying that society will be less stable and individuals therein less healthy and secure, to the degree that these qualities spread among the population.

In an impressively well-documented review of social and psychological studies on the point, writer David A. Scott summarized the impact of saturating one's mind with pornography:

Exposure to "soft core," consenting sex pornography desensitizes, leads to callousness, . . . can . . . trigger emotionally violent behavior . . . [and] can habituate the viewer.

Pornography affects the most dangerous sex-offender and the normal person, and it interferes with interpersonal relationships and personal moral development in *everyone* who uses it, not only in the disturbed and demented.

[Even normal people] develop a fondness for more deviant materials.

Dangerous offenders . . . develop a fondness for deviant material and incorporate it into their preparatory stimulation before seeking out a victim . . . Rapists, in particular, report a preference for "soft core," consenting sex depictions before seeking out a rape victim . . . .

The bottom line effect of long term exposure to these materials has been: i) an increasing callousness and insensitivity towards others; and ii) a more gradual, malignantly regressive "primitivization" of emotional relationships that cuts across all social strata.

Sex-offending, particularly for the dangerous offender, is compulsive and addictive. His mechanisms for reducing anxiety have become sexualized. Repetitive sexual molestation has become compulsive. The sex-offender's anxiety-reducing "fix" is sex with a child, or an adolescent, rather than drugs, alcohol or nicotine. An increasingly visible and steadily growing class of more than two million sexually deviant adults . . . are sexually victimizing a like number of children and youth.

The actual number of assaults is many times two million, due to the repeat offending against the same victim. Relatively few of these incidents are reported to the authorities.<sup>75</sup>

According to Scott's summary, magazine depictions of predatory sex have become as pervasive in society as the toxic effluents that at one time pervaded Lake Erie.<sup>76</sup> The widespread distribution of both soft-

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74. *Id.*

75. Scott, *Pornography and Its Effects on Family, Community and Culture*, in FAMILY POLICY INSIGHTS vol. IV, no. 2 (March 1985) (emphasis added).

76. Two hundred million issues, of over 800 soft-core and hard-core pornography magazines, were sold in 1984 in the United States, grossing over \$750,000,000 in revenue. This figure does not take into account movies and video cassettes. *Id.* at 17. See also *Sex Business*

core and hard-core pornography is potentially debilitating on the traditionally accepted mores of society. As the spread of pornography festers with each new generation, the effects become more momentous. The result of this metastasis ends with the prospect of a generation of young men like Dr. Anchell's patient "Marty."

When first confronted with obscenity cases, the Supreme Court's reaction was more instinctive than based on sound legal reasoning. Thus, in *Roth v. United States*,<sup>77</sup> the majority observed:

The dispositive question is whether obscenity is utterance within the area of protected speech and press. Although this is the first time the question has been squarely presented [here], . . . expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press.<sup>78</sup>

Later in that opinion, the Court remarked that obscenity is "utterly without redeeming social importance"<sup>79</sup> and that over fifty nations and forty-eight states adhere to "the universal judgment that obscenity should be restrained,"<sup>80</sup> a judgment further concurred in by Congress through twenty "obscenity laws enacted . . . from 1842 to 1956."<sup>81</sup>

The *Roth* Court's reasoning that "this Court has always assumed" obscenity is not protected speech was due in part to the "universal judgment" of nations, states, and Congress; and it seems that assumption was also due in part to an inchoate and unreflective sense that obscenity offers nothing of value, and much that is individually and socially evil. However, the Court had neither the need nor the expertise in 1957 to spell out the psychological reasons for its holding that obscenity was unprotected, and therefore it scarcely touched upon the concerns that Dr. Voth and Mr. Scott were later to elaborate. Furthermore, at the time of the *Roth* decision, printed and picturebook obscenity was not deemed as inhuman, debasing, and perverse as the Meese Commission concluded in 1985-1986.<sup>82</sup>

Thus, the phenomenon has outraced public awareness of it; and awareness must precede analysis. The analysis that the foregoing quotations espouse, in all too summary fashion, illustrates just what is wrong with pornography. As with any effort to capture in words the essence of

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*Booms Despite Cleanup Drive*, U.S. NEWS & WORLD REP., Mar. 16, 1981, at 55; *The X-Rated Economy*, FORBES, Sept. 18, 1978, at 81; MEESE FINAL REPORT, *supra* note 5, ch. 4.

77. 354 U.S. 476 (1957).

78. *Id.* at 481.

79. *Id.* at 484.

80. *Id.* at 485.

81. *Id.*

82. See MEESE FINAL REPORT, *supra* note 5.



human psychology, the formulas fall short of the reality. However, the lack of engineering precision does not necessarily mean that our basic insights are flawed, but merely our expression of them. Pornography itself, on today's enormous scale, is a new phenomenon; it is not surprising that psychologists are only beginning to understand its pathology.<sup>83</sup>

Further, the tools at hand to assess changes in communal attitudes are perforce imprecise. But in the aggregate, the fact of attitude changes and consequent communal harm is a matter that cannot be dismissed lightly. If one could teach young people to be racists by showing them repeated scenes of racist actions, sympathetically depicted, it stands to reason one could teach young people other negative attitudes, even predatory hedonism, sexual solipsism, total selfishness, and moral anarchy. This theory, when taken out of the hypothetical, takes on a different appearance of unpleasant reality. For example, Hitler built his "empire" by instilling racist attitudes in his followers. The spread of this attitude was rapid until finally it reached a certain "critical mass" wherein the deleterious effects were felt on society as a whole. Just as one could teach enough people racist attitudes, so it seems reasonable to believe at some point that normless pornography can affect enough people, so that a critical mass is reached and society as a whole becomes characterized by normless selfishness.

## VI. Pornography Versus the Constitution

In his article on pornography and censorship, Dr. Irving Kristol best framed the issue by stating:

[O]bscenity is not merely about sex, any more than science fiction is about science. Science fiction, as every student of the genre knows, is a peculiar vision of power: what it is really about is politics. And obscenity is a peculiar vision of humanity: what it is really about is ethics and metaphysics.<sup>84</sup>

This is the central political dimension of pornography; for, one must recall, the Founders' ultimate basis for the American experiment was also a matter of "ethics and metaphysics." Dr. Kristol argues in the same essay that pornography is "inherently and purposefully subversive

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83. See S. O'BRIEN, CHILD PORNOGRAPHY 171-74 (1983); M. ANCHELL, SEX AND INSANITY, *supra* note 72; Anchell, *A Psychiatrist Looks at Pornography*, LIBERTY MAG. (July/Aug. 1977); Gaylin, *The Prickly Problem of Pornography*, 77 YALE L.J. 579, 592 (1968); Wertham, *Medicine and Mayhem*, MD MAG. 11 (June 1978); Donnerstien, *Aggressive Erotica and Violence Against Women*, 39 J. PERSONALITY AND SOC. PSYCHOLOGY 269-77 (1980); WHERE DO YOU DRAW THE LINE?, *supra* note 42.

84. I. KRISTOL, *supra* note 56, at 35-36.

of civilization,"<sup>85</sup> yet the Framers of the Constitution set up a political system which, for more or less 200 years, the world outside our borders has viewed as the epitome of political-civilized order.<sup>86</sup>

To assert that pornography is "subversive of civilization" as does Kristol, or to urge the collateral, that it subverts the constitutional political order, as I do, are propositions not made lightly, nor understood easily. These conclusions result, I believe, from the following premises.

The key to a successful, constitutional, democratic republic is in the way the citizen views himself. The Founders insisted on political virtue: in the most generic sense, the citizen's instinctive or acquired ability to set aside private, selfish interests for the perceived "common good." To grasp the real communal good requires a dispassionate outlook, a willingness to stand back from one's immediate self-interest. Moreover, one must identify with his family, friends, community, state, and nation to the point of subordinating his own interests, at least occasionally, to their important communal interest. Thus, the good citizen must develop the habit of seeing clearly in which cases his own personal comforts must be subordinated to the public needs of the whole society. He can do this only if, at least subconsciously, he identifies with society's interests and he develops an objective cast of mind that accepts reality as it is, not as he would fantasize it—even if dealing with that reality calls for sacrifice.

This cast of mind is, at root, spiritual. A good citizen has to be concerned about the good of others, as well as himself; and these "others" include not only friends and family, whom he can see, but also the country as a whole, the ethical-constitutional side of which he cannot physically see with his eyes. The polity includes not just physical things, such as fortunes and farms, but also spiritual things, such as the values of personal freedom, racial-religious tolerance, and the democratic process itself. In the extreme case, the good citizen must be willing to make physical sacrifices in order to preserve and protect the spiritual assets and environment of others, for instance their rights, or the constitutional system itself. Without a fairly high level of social cohesiveness and shared

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85. *Id.* at 40.

86. Blaustein, *The United States Constitution: A Model in Nation Building*, NAT'L F.: THE PHI KAPPA PHI J. 14 (Fall 1984).

Any doubts which presently creep into Americans' self-confidence about the quality of the American system may be due either to totalitarian propaganda or to our own failure to consistently live up to the principles the Founders bequeathed us. Nonetheless, the waves of immigrants, which are still coming, show that people who must "vote with their feet" know that many other nations do not offer any real promise of life, liberty, and the pursuit of happiness. People who sacrifice, usually, all their worldly possessions to travel thousands of miles to a better political-civil order always seek the best that they can get. Thus, it is not chauvinism to state that in the eyes of the world, the United States still is the best haven for ordinary people.

commitment to these spiritual values at the beginning of World War II, the British and Americans would scarcely have shown the moral stamina to fight Nazi Germany with the tenacity they demonstrated. Surely, when John F. Kennedy later urged, "Ask not what your country can do for you; ask what you can do for your country,"<sup>87</sup> he was not inviting us to a fantasy life of solipsistic self-indulgence.

In the Founders' eyes, to sacrifice—time, treasure, obedience to law, simple convenience, and sometimes life itself—was essential if the country were to remain strong enough to deal with internal problems and external enemies. The men and women of the last three decades of the eighteenth century in America had the vision and will to put the country's objective good as a whole above subjective cost; in other words, they had a high measure of "republican virtue." Only because of this psychological-spiritual attitude could they pledge their lives, fortunes, and sacred honor to a cause that faced overwhelming odds.

This is why Jefferson, Madison, Franklin, Adams, Washington, and so many others, insisted that what kind of people we are—our degree of virtue—will determine whether we can maintain a constitutional republic. They knew that this form of government is not self-perpetuating, like some free-wheeling toy rolling along an endless gentle slope; that to the extent the legal-political order removes external compulsion from the lives of the citizens—giving them a wide range of liberty to pursue their own interests—to that extent they must have the character to impose internal commitment in their lives to the rightful use of that liberty, commitment to the public needs, commitment even to sacrifice private or "factional" interests of the self for the sake of the community.

The wellspring of such rightful conduct is called good character. It is moral sensibility structured by objective standards of the true, the good, and the beautiful. Moral sensibility is composed of many elements, including a person's conscious values, his sense of respect for other persons, his ease in setting aside present comfort for future reward, his sense of right and wrong, and the degree of his commitment to honor and decency. It includes conscious principles, half-conscious attitudes and beliefs, and subconscious feelings. Moral sensibility is the psychic and intellectual basis for character.

"Good character," however, is not an instant creation; it is neither random nor accidental. Rather, good character results from the consistent teaching of the elders, by precept and example, guiding the younger to understand and to want and do the noble rather than the ignoble, the

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87. INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 269 (1974) (John F. Kennedy Inaugural Address, Jan. 20, 1961).

right rather than the wrong, the decent rather than the indecent, the unselfish rather than the selfish. Character training starts young and lasts a lifetime. Good character usually exists in fact before tested in crisis; otherwise the hero, unprepared and lacking inner resources to rise to the challenge, would fail the test.

One begins to see why, in this, the "classical" view of government, the leaders of society must encourage good character and, through precept, example, and sometimes even law, to discourage the formation of bad character. For where society can trust its individual members to do right without being compelled, it can reduce to a minimum the rules it imposes on them. Yet, the people can govern themselves voluntarily and rightly because they have "internalized" right reason. There is right order in their personal lives; consequently there is right order in their interpersonal relations. Collaterally, there is right order in their "vertical" relations, as subjects, to the sovereign: they generally perceive and act on their legal and moral responsibilities, and they help mold public policy along the requirements of transcendent values rather than factional desires. To the extent that anything is self-perpetuating in this unstable world, the freedom-character symbiosis is: good character achieves freedom; the proper use of freedom educates the next generation to good character; they in turn preserve and protect freedom. However, the opposite cycle can take place as well.

As long ago as 1969, when the word was still *obscenity* and MTV and VCR's had not yet invaded our living rooms with the possibility of stereophonic rock coupled with sex-laden images, Professor Harry Clor captured the point succinctly:

Democracy cannot be characterized simply as the maximization of individual liberty in every area of life. And there are attributes and requisites of republican government which are not adequately expressed in the single word "freedom." The enterprise of self-government requires mutual respect and certain capacities of self-restraint, or, as these things used to be called, "civility." It depends upon a citizen body, the members of which will devote their energies to long-range public interests and who can, when necessary, sacrifice personal comforts and personal satisfactions, perhaps personal happiness, for vital public interests. A people devoted exclusively to the satisfaction of sensual appetites is not, strictly speaking, a citizen body at all. It is a collection of private individuals, each concerned with his private gratifications.<sup>88</sup>

Pornography has a strange and maleficent influence on this citizenship character. The issue here is deeper than causality of sex crimes;

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88. H. CLOR, *supra* note 56, at 200.

deeper even than whether pornography “pollutes the moral atmosphere” of society.<sup>89</sup> The inquiry here is: exactly what can happen to the *political* character of those thousands, if not millions, of young men and women who indulge themselves, over many years, without inhibition, in today’s hard-core, animalistic, predatory pornography? What will be the result, politically, if the vast majority live their lives hour upon hour, day upon day, week upon week, year upon year, in the fantasy world of vicarious sexual exploitation?

In an incisive essay written well over a decade ago, Walter Berns asked the question this way:

Is it politically uninteresting whether men derive pleasure from performing their duties as citizens, fathers, and husbands or, on the other hand, from watching their laws and customs and institutions being ridiculed on the stage [by plays, such as “Che” and “Hair”]? Whether the passions are excited by, and the affections drawn to, what is noble or what is base? Whether the relations between men and women are depicted in terms of an eroticism wholly divorced from love and calculated to destroy the capacity for love and the institutions, such as the family, that depend on love?<sup>90</sup>

Berns notes that much contemporary obscenity of the early 1970’s had an avowed political purpose: “It would seem that the pornographers know intuitively what liberals have forgotten, namely, that there is indeed a ‘causal relationship . . . between word or pictures and human behavior.’”<sup>91</sup> Nor was Berns alone, as a conservative, in urging the point. “Radical” thinkers of that epoch, such as Susan Sontag and Herbert Marcuse, *defended* pornography because, among other results, it “does . . . drive a wedge between one’s existence as a full human being and one’s existence as a sexual being—while in ordinary life a healthy person is one who prevents such a gap from opening up.”<sup>92</sup> In the late 1960’s, these and other theoreticians of student revolt coupled their call for political upheaval with a rhetoric deliberately cluttered with obscenities, acknowledging that obscenity-pornography is an essential tool of the demolition of adherence to traditional values.

Contrast the mindset of the pornography addict with the mind the Founders such as Jefferson, Madison, Franklin, Adams, and Washington desired for the citizens when they extolled “republican virtue.” The contrasts are stark:

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89. *Id.* at 175-209, 272-78.

90. Berns, *Pornography vs. Democracy: The Case for Censorship*, 22 THE PUBLIC INTEREST 3, 10 (Winter 1971).

91. *Id.*

92. I. KRISTOL, *supra* note 56, at 34.

The Founders believed that “all men are created equal”; the pornophile believes men may exploit both women and children.

Madison and the other Founders deeply feared “factions”; pornography addicts teach the pursuit of selfish interests above any other value. On the moral and psychological level, repeated immersion in pornography is the essence of factionalism.

The Founders stressed virtue as the only sound basis for freedom; those who promote pornography stress vice as the only exciting use of freedom.

The Founders deemed religion and morality to be intertwined fundamentals of society; the pornophile utterly rejects religion and morality.

The Founders taught that human happiness and dignity consists of virtue; people immersed in pornography live as if happiness consists in one-night sexual entertainments that tear away the other’s human dignity, that happiness consists in pleasure, and that pleasure is vice.

The Founders insisted that “virtue or morality is a necessary spring of popular government”; pornophiles insist that popular government should not interfere with their vice and immorality.

The Founders expected the good citizen to discern the communal good and to sacrifice self-interest for it—this means commitment to a political-ethical good that goes beyond immediate pleasure, personal gratification, or physical enjoyment; while indulging in pornography, the hedonist has no interest in any good other than his own: it is identical to his self-interest, and its essence is the abuse of others to produce pleasure and self-gratification.

The Founders believed Natural Law structured reality and right reason had to follow its patterns—failing that ontological obedience would bring sanction; the pornophile holds no particular beliefs about reality, right reason, or obedience to necessities of human nature. Rather, he rejects all these in an animalistic pursuit of pleasure, regardless of such sanctions as neurosis, venereal disease, or the more recent possibility of contracting AIDS.

The Founders believed that Divine Providence ruled the affairs of humans; the pornophile rejects the restraint taught by religion and, in practice, is an atheist.

The Founders embraced the ancient principles and followed them in their public lives, lives which manifested heroic personal sacrifice for the common good; the pornophile rejects ancient principles and, by and large, cultivates attitudes antithetical to personal sacrifice for the common good.

## VII. Forward to the Founders: On Keeping the Constitutional Republic

From the time of the ancient Greeks and Romans to 1787, some societies had set up constitutional republics. Save perhaps for pre-Caesarean Rome, most were short-lived. "Keeping" the republic, history dolefully teaches, is not automatic.

As the first section of this paper has shown, early American statesmen were acutely aware that we could maintain a lasting, free, orderly, constitutional republic only if we adhered to fundamental political principles built into the very nature of human society. Some of those principles are well remembered, if not perfectly practiced, even today: limited government; separation of powers; the decentralized federal structure; freedom of the press, speech, and religion; and equal protection and due process of the laws. The Founders believed two other principles were equally essential, yet today these rarely inform public discourse about the wellsprings of political freedom: the natural law-natural rights metaphysics of self-evident "truths" which included the overriding rule and providence of God; and the psychological-moral quality of "good character" in the people and their leaders.

It is certain that there never was a society on earth in which all the citizens were of good character. However, perfection is not necessary: society can tolerate a small percentage of evil citizens amid the masses of the good. Nonetheless, as disorder spreads among individual lives, at some point society as a whole is wounded and even endangered. This fact is true whether the disorder arises by physical illness, psychological dysfunction, or criminal conduct: at some point the quantitative changes in individual health or attitude or action add up to a qualitative change. An army can stay in battle even if a few soldiers are cowards; but when a large number lose the will to fight, the army will surrender. A church can get along despite a few dissenting theologians; but should a large number teach new doctrine, that church suffers heresy, schism, or apostasy. Domestic society may be fairly safe although some criminals are in its midst; but should the numbers of criminals swell to the danger point, vigilante justice, civil war, or even anarchy will result. And so it goes; every human organization has an inner life of shared purpose and values, and if too many of its members reject those purposes and discard those values, that inner life is shattered. In other words, when a "critical mass" of citizens who reject society's beliefs and norms develops, that society falls apart.

The process is complicated: history indicates it takes time, and usually those living during the days of social shattering do not grasp exactly

where present events are located along an indefinite continuum of moral decline. But the stages are clear and the thesis surely has merit: (1) corrupt enough private individuals and you corrupt public society as a whole; (2) corrupt the public morality and you interfere with its ability to discern and to choose right public policies; (3) harm that self-governing ability and you jeopardize the nation's ability to deal wisely with domestic problems and foreign enemies; (4) neutralize that ability and you endanger the nation's very freedom and independence. Without freedom and independence, constitutional government is impossible: the Constitution itself becomes a dead letter.

Because moral corruption among the citizens is virtually the antithesis of republican virtue, and because republican virtue is a necessary condition to sound constitutional government, moral corruption among citizens directly undermines constitutional government. Consequently, the future of the Constitution is intimately connected to the Nation's ability to encourage and strengthen "republican virtue," and to discourage and control vice and corruption.

As shown above, self-saturation in pornography can create a solipsistic selfishness in psychosexual matters that isolates the addict psychologically. He loses identification with others, concern for broader communal needs, respect for women and children, and the willingness to sacrifice present gratification for future reward or for broader public needs. He loses many of the qualities that citizens must have in some abundance if they willingly shoulder their share of demanding civic responsibilities. A constitutional republic needs citizens of solid, good character; pornography destroys solid, good character.

No one would suggest that the moral malaise spread by pornography is the only threat to lasting constitutional health, nor that a return to puritan prudishness should be the remedy. The point here is more modest: *some* control of exploitive sex depictions, by society acting through public law, is essential to long-term individual, social, and ultimately, political health. This control should *not* be over what people do in the privacy of their homes; but it *must* be over the more outrageous acts and attitudes we teach through the *public* channels of communication: magazines, movies, and video cassettes.

Thus the paradox: if we adopt the Founders' philosophy of civic virtue and constitutional government, we must protect the former in order to enjoy the latter. The parallel paradox is that *it is not slight legal control of pornography that threatens the Constitution; it is the spread of pornography itself that threatens the Constitution*. This subtle truth, based on the Founders' outlook as applied to the modern problem of



pornography, has eluded those well-meaning philosophers of socio-moral *laissez-faire*, whose vision of the good society seems to be a utopia of total private freedom wherein a majority of citizens collectively—the public—can have no public morality or legislative say on what a small minority of citizens may transmit through public communications channels into the minds of the majority's children.

As we celebrate the 200th anniversary of the Constitution, and anticipate with enthusiasm the next 200 years, a moment's pause is in order: the Founding Fathers wove into the fabric of our political order certain ancient and yet timeless principles. Along with transcendent notions of divine providence and natural rights, they believed that civic virtue and national character were essential to keeping the Republic. This Article has focused on one serious cause of erosion of that virtuous character. I realize that the analysis herein is not the usual activity of commencement speakers, legal scholars, or federal judges; but the anniversary we celebrate is surely the occasion to open the question whether we may tamper with the only successful political formula devised in modern human history, the handiwork of an extraordinary assemblage of statesmen who taught unequivocally that "virtue" is the bedrock of a lasting republic. How we teach it today, the nature of its connection with political freedom, what will happen with its deterioration, what sociomoral developments—such as the new flood of pornography—will do to it, are the questions to be addressed in the coming years.

There may be no simple formula to answer each of these questions. It is likely that some good citizens will disagree as to what is republican virtue or what threatens it. Nonetheless, renewed attention to the fundamentals of constitutional government as designed by Jefferson, Madison, Franklin, Washington, Adams, and the other early statesmen will only serve to benefit the Constitution: by reconsidering the interrelation among freedom, virtue, and the Constitution we may discover, or rediscover, how to "keep" the Republic for the next 200 years.

