FREE SPEECH AND PORNOGRAPHY: A RESPONSE TO JAMES WEINSTEIN

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Professor James Weinstein offers a new iteration of an old argument, which holds that the suppression of pornography raises no free speech issue at all.[1] Weinstein's reformulation is a valuable contribution, not least because it captures an intuition that is shared by many, including, evidently, the Supreme Court. But the argument fails. It is a mistake to pretend that, when we suppress pornography, we are not infringing on values that lie at the heart of free speech.[2]

The argument that Weinstein is reviving has been endorsed several times by the Supreme Court. The germinal case of *Chaplinsky v. New Hampshire*[3] declared that "certain well-defined and narrowly limited classes of speech," among them "the lewd and obscene," were outside the protection of the First Amendment, because "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[4] When it announced the present constitutional test for unprotected obscenity, it declared that "[p]reventing unlimited display or distribution of obscene material, which by definition lacks any serious literary, artistic, political, or scientific value as communication, is distinct from a control of

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1. Professor Weinstein correctly points out that, although I've questioned the constitutional nonprotection of obscenity, I have not explained why obscenity should be thought to raise any free speech issue in the first place. James Weinstein, *Democracy, Sex and the First Amendment*, 31 N.Y.U. REV. L. & SOC. CHANGE 865, 875 n.44 (2007) [hereinafter Weinstein, *Democracy*], citing Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635 (2005). The present essay is a preliminary effort to fill that gap. My thanks to Professor Weinstein for pressing me on this issue.

2. In his response, Weinstein notes that his goal is to determine if "obscenity doctrine [is] in principle consistent with the rest of the Supreme Court's free speech jurisprudence." James Weinstein, *Free Speech Values, Hardcore Pornography and the First Amendment: A Reply to Professor Koppelman*, 31 N.Y.U. REV. L. & SOC. CHANGE 911, 911 (2007) [hereinafter Weinstein, *Free Speech*]. If I've misapprehended the purpose of his article, I'm relieved; I hate disagreeing with my friends. On the other hand, I may not be the only one who finds his argument to have normative implications, and so there is still a conversation worth having about those implications.

3. 315 U.S. 568 (1942).

4. *Id.* at 571–72.

reason and the intellect."[5]

The argument has been cashed out in various ways by different writers, each of whom has offered somewhat different statements of it.[6] An adequate response to the argument would have to take up at least the major formulations in turn, and this cannot be done here.[7] In this brief response, I will focus on Weinstein's specific formulation of the argument, which involves subtleties not previously encountered. Weinstein claims that obscenity doctrine is "consistent with the basic principles that animate the Court's contemporary free speech jurisprudence."[8] In developing this claim, he grapples, more carefully than any of his predecessors, with the objection that pornography can contribute to public discourse. It is testimony to his care and fair-mindedness that he sets forth this objection so clearly and sympathetically that he is then unable to overcome it.

A. WEINSTEIN'S MAJOR PREMISE: ONLY "POLITICAL" SPEECH IS ENTITLED TO PROTECTION

Weinstein's understanding of the scope of free speech is derived from democratic theory. "If an individual is excluded from participation in the discussion by which public opinion is formed, either because the government disagrees with her views or thinks her ideas are too disturbing or dangerous, then any public policy decision made as a result of that opinion would, as to that individual, lack legitimacy. And if this decision is imposed on her by coercive measures, it would be tyrannical."[9] This right, as Weinstein understands it, only applies to speech that is intended to influence (formal or informal) democratic deliberation. Free speech protects, not all expression of ideas, but the expression

5. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973), citing John M. Finnis, *"Reason and Passion": The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222 (1967); *see also* Miller v. California, 413 U.S. 15, 34–35 (1973); Roth v. United States, 354 U.S. 476, 484 (1957).

6. *See, e.g.*, CATHARINE MACKINNON, ONLY WORDS 16–17 (1993); HARRY M. CLOR, PUBLIC MORALITY AND LIBERAL SOCIETY 213–27 (1996); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L. J. 589, 603–08; CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 215 (1993); Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 181–82 (1997); FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 178–88 (1982); Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L. J. 899 (1979); ATT'Y GEN.'S COMM'N ON PORNOGRAPHY: FINAL REPORT 260–269 (1986); Finnis, *supra* note 5. Prominent critiques of this argument include MARTIN H. REDISH, FREEDOM OF EXPRESSION 75 (1984); David Cole, *Playing By Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 124–31 (1994); Simon Roberts, *The Obscenity Exception: Abusing the First Amendment*, 10 CARDOZO L. REV. 677, 710–13 (1989); Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1590–94 (1988).

7. *See* Andrew Koppelman, Is Pornography "Speech"?, LEGAL THEORY (forthcoming 2008) (manuscript, on file with the author).

8. Weinstein, *Democracy*, *supra* note 1, at 865.

9. *Id.* at 878.

of ideas that aim at shaping public opinion.

I note at the outset that this is not an uncontroversial account of free speech. Weinstein dismisses most of the major justifications for free speech in three remarkably summary paragraphs.[10] The marketplace of ideas justification, for example, is rejected because it focuses on collective goods, while "free speech has long been understood in the United States as an individual right."[11] Collective benefits of free speech are, however, the focus of most of the classic defenses of free speech, notably Milton's *Areopagitica*, Madison's *Report on the Virginia Resolutions*, Mill's *On Liberty*, Meiklejohn's *Free Speech and Its Relation to Self-Government*, and the judicial opinions of Hand, Holmes, Brandeis, and Brennan.[12] It is the central focus of *New York Times v. Sullivan*,[13] which held the First Amendment to be "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[14] Individual-centered theories of free speech are an innovation of the late twentieth century.[15] Moreover, "the right of each citizen to participate freely and equally in the speech by which we govern ourselves,"[16] on which Weinstein relies, obviously has a collectivist dimension. What Weinstein is offering us is a complex mix of collectivist and individualist ele-ments: given democracy, which is a collective enterprise, it follows that individuals are entitled to a certain right of free speech.

The right that individuals have is not the right to communicate, whatever state of mind they happen to possess. This right covers only "public discourse," and this, he claims, excludes pornography and perhaps much else.[17] But

10. *Id.* at 875–77. A critical survey of free speech theories is an appropriate topic for a monograph, and there are at least two excellent ones, by Frederick Schauer and Larry Alexander. SCHAUER, FREE SPEECH, *supra* note 6; LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? (2005).

11. *Id.* at 875 n.46. Here Weinstein lumps together Milton and Holmes, although the differences between them are dramatic. *See* VINCENT BLASI, *Milton's* Areopagitica *and the Modern First Amendment*, *in* IDEAS OF THE FIRST AMENDMENT 52 (2006); Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1.

12. JOHN MILTON, AREOPAGITICA (William Haller ed., Macmillan 1927) (1644); JAMES MADISON,THE VIRGINIA REPORT OF 1799–1800 (Da Capo Press 1970) (1800); JOHN STUART MILL, ON LIBERTY (Edward Alexander ed., Broadview Press 1999) (1859); MEIKLEJOHN, ALEXANDER FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (Lawbook Exchange 2004) (1948); Masses Pub. Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917) (Hand, J.), rev'd, 246 F. 24 (2d Cir. 1917); Abrams v. United States, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting); Gitlow v. New York, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting); Whitney v. California, 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring); New York Times v. Sullivan, 376 U.S. 254 (1964) (Brennan, J.).

13. 376 U.S. 254 (1964).

14. *Id.* at 270.

15. *See* BLASI, IDEAS OF THE FIRST AMENDMENT, *supra* note 11, at 832–33; L.A. Powe, Jr., *Situating Schauer*, 72 NOTRE DAME L. REV. 1519, 1530 (1997).

16. Weinstein, *Democracy*, *supra* note 1, at 877.

17. *Id.* at 878.

Weinstein observes that novels and movies can sometimes be effective political tools, and when this is the case, they are also within the amendment's protection.

There are hints that he thinks the boundaries of protection extend further. The political justification is "one reason" why films and novels are protected, implying other reasons that are not stated.[18] Beethoven's symphonies are deemed protected,[19] as are broadcasts of baseball games.[20] And Weinstein is untroubled by the protection of *Playboy* and *Penthouse* magazines, which may not have redeeming artistic or literary value but contain sexual images that "are not sufficiently explicit to be deemed legally 'obscene'."[21] If art and baseball are protected for nonpolitical reasons, however, then those reasons might also apply to pornography. Since the reasons for those protections are not stated, there is no way to tell.[22]

The political reading of the First Amendment has a long and distinguished pedigree. James Madison, the principal author of the Amendment, famously argued that it protected speech critical of government.[23] Yet in the course of writing his polemic against the Sedition Act, he had no reason to consider whether the Amendment only protected political speech, and he expressed no view on that question. Alexander Meiklejohn, the most prominent modern defender of the political interpretation, struggled with the question of whether art and literature were protected, and concluded that they were in a fairly summary fashion.[24] The most forthright predecessor of Weinstein's position is Robert Bork, who once argued (but later retracted the view) that only overtly political speech is protected, while art and literature get no protection at all.[25] Weinstein

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18. *Id.* at 882.

19. *Id.* at 887.

20. *Id.* at 874 n.37.

21. *Id.* at 867 n.7. Weinstein uses the term "hardcore," repeatedly, as though it were obvious what it referred to, to describe that subset of pornography that he considers outside the protection of free speech. Schauer noted long ago that the meaning of the term has "been elusive for many years" and that it "is more of a conclusion than a test." FREDERICK SCHAUER, THE LAW OF OBSCENITY 109, 113 (1975).

22. In his response, Weinstein indicates that he thinks that the protection of art is over-inclusive, protecting material that should not be protected by the free speech principle (though perhaps it is protected by some other principle, such as substantive due process). Weinstein, *Free Speech*, *supra* note 2, at 915 n.22. This reveals our fundamental disagreement. I think that art is at the core of what free speech protects.

23. *See* MADISON, *supra* note 12.

24. The evolution of Meiklejohn's thought is described in Gey, *supra* note 6, at 1582–83.

25. Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971). Bork substantially retreated from this position during the hearings on his failed Supreme Court nomination. NORMAN VIEIRA & LEONARD GROSS, SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS 99–105 (1998); ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 242–51 (1989). More recently, Bork has indicated that he would protect all ideas, but he has embraced the view that pornography contains no ideas. His claim that "stories depicting the kidnapping, mutilation, raping, and murder of children do not, to anyone with a degree of common sense, qualify as ideas" leaves continuing doubt about what he would protect. ROBERT BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 148 (1996). Most recently, he has

does not go this far; he is prepared to protect art as political speech. But now he must explain the difference between art and pornography, a problem that has puzzled some prominent aestheticians. He does not attempt to do that.

Even if one accepts only the political justification, Weinstein understands that it might protect some pornography. He accepts Thomas Scanlon's observation that, if some citizens want to persuade others to change their views about sexual mores,

> Earnest treatises on the virtues of sexually liberated society can be reliably predicted to have no effect on prevailing attitudes towards sex. What is more likely to have such an effect is for people to discover that they find exciting and attractive portrayals of sex which they formerly thought offensive or, vice versa, that they find boring and offensive what they had expected to find exciting and liberating.[26]

But Weinstein resists Robert Post's observation that the very effort to distinguish public from private matters is already politically loaded, and presupposes controversial criteria about the proper subject of politics.[27]

If public discourse is to be protected, then the implications are very broad coverage indeed for free speech. All speech constitutes the culture that shapes the citizens. Democracy requires that all citizens be free to participate in the evolution of that culture. Democracy is not simply voting and the procedures that lead up to voting. It describes a state of affairs in which everyone gets to have a say about what is to be done. It is manifest in individual decisions about what the culture is to be—decisions that need never eventuate in a vote.[28] This argument obviously extends to pornography as well, since it is a part of the culture that is privately generated and that has the potential, at least, to shape the culture as a whole. Pornography has become far more varied in its content and purport since the advent of the internet, because so many more people are able to

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denounced "the Court's reckless expansion of the 'speech' protected by the First Amendment to encompass . . . a sickening variety of obscenities." Robert H. Bork, *The Judge's Role in Law and Culture*, 1 AVE MARIA L. REV. 19, 21 (2003) [hereinafter Bork, *The Judge's Role*]. Appended to this sentence is a citation to, inter alia, Butler v. Michigan, 352 U.S. 380 (1957), which he accurately summarizes as "holding unconstitutional a ban on the sale to adults of books deemed harmful to children." Bork, *The Judge's Role* at 21 n.7. Evidently Bork now thinks that it is permissible for a state to "reduce the adult population . . . to reading only what is fit for children." *Butler*, 352 U.S. at 383. This may be an even narrower interpretation of the First Amendment than his original view, since some core political speech may be unfit for consumption by children. It is doubtful whether, on this view, the Amendment would protect publication of Independent Counsel Kenneth Starr's report on the Clinton-Lewinsky scandal, for example.

26. T. M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 547 (1979).

27. *See* ROBERT C. POST, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, *in* CONSTITUTIONAL DOMAINS 268, 280–82 (1995).

28. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 NYU L. REV. 1 (2004). These arguments by Post and Balkin show why, even if one accepts Bork's premise that only political speech is protected by the First Amendment, his restrictive conclusions do not follow. On examination, the range of "political speech" turns out to be very broad.

participate in its production. That phenomenon has democratic implications of its own. Weinstein wants to confine protection to "public discourse," but he is not embarrassed by the prospect of government deciding which art and literature counts as sufficiently public to be permitted.

As Post observes, there must be a boundary between public and non-public discourse, since not every speech act receives First Amendment protection.[29] Restrictions on pornography, however, apply to what clearly otherwise would be public discourse: sexuality is a matter of obvious public interest,[30] and as Weinstein observes, pornography is disseminated through media of mass communication.[31] The grounds for subtracting it from public discourse inevitably will involve the application of particular communities' civility rules, which is presumptively improper.[32] With respect to the topics which are normatively of public concern, I would add that public discourse ought to be understood to include art, literature, and even music, because these forms implicitly present to the world claims about what is valuable and what is pernicious in human life, and those questions have always been central to public discourse.[33]

I begin with a different set of beliefs about the foundation for First Amendment protections. Unlike Weinstein, I do not think that it is possible to find a master free speech value. As Schauer has suggested, "we might in fact have several first amendments,"[34] one directed toward government suppression of its critics, another toward open inquiry in the sciences, and so forth.[35] It is not

29. This was not adequately emphasized in earlier drafts of this paper, which is why Weinstein is entitled to hammer repeatedly on my statement that "all speech" constitutes the culture. Post, on whom Weinstein and I both draw, writes that "all speech is potentially relevant to democratic self-governance, and hence according to democratic logic all speech ought to be classified as public discourse." POST *supra* note 27, at 175. But, Post notes, we have other commitments beside public discourse, and public discourse itself depends on some civility norms. "The many factors relevant to the classification of speech as public discourse thus resist expression in the form of clear, uniform, and helpful doctrinal rules." *Id.* at 173.

30. "Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." Roth v. United States, 354 U.S. 476, 487 (1957).

31. On the importance of these factors for determining whether something is public discourse, *see* POST, *supra* note 27, at 164–73.

32. *See id.* at 148–50. Post also is unpersuaded by Schauer's argument that pornography is devoid of propositional content. *See id.* at 111–12.

33. Roger Scruton reports that in Russia under Stalin, "it was normal to reverse the last two movements of Tchaikovsky's Sixth Symphony in B Minor, Op. 74, so as to bring the work to a triumphal, rather than a despairing, conclusion. But almost all musical listeners found this intolerable. It proved impossible to hear the third movement as an *answer* to the fourth: on the contrary, the third movement displays the false humour of distraction, which plunges the music into the depth of despair, and so summons that final bleak negation." ROGER SCRUTON, THE AESTHETICS OF MUSIC 188 (1997). A regulation prescribing the order in which Tchaikovsky's movements can be played is not at the periphery of free speech concerns. The kind of heavy-handed thought control that Stalin attempted here is precisely at the center of what the amendment prohibits.

34. Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284, 1303 (1983).

35. *Id.*

possible to explain all the decisions in light of a single "core" principle—or at least, I have not seen it done yet.

When Weinstein takes up the autonomy rationale, he notes that Schauer, whose work he follows, rejects one version of it, but he does not mention that Schauer ultimately adopts a different one.[36] Schauer's book, *Free Speech: A Philosophical Enquiry*,[37] surveys the major justifications for free speech and concludes that many of them are weak. The two that he thinks are strongest and provide the best reasons for the distinctive protection of free speech are 1) the idea that the individual has a right to control his thoughts and 2) the judgment, based on experience, that governments are likely to abuse powers of censorship.[38]

The right to control one's own thoughts, Schauer thinks, entails "a right to receive information and, more importantly, a right to be free from governmental intrusion into the ultimate process of individual choice."[39] The dignity of the individual entails that he has a right to decide what to think.

Schauer's major premise is attractive and has been endorsed by many other First Amendment theorists.[40] A particularly careful development of the argument is that of David Strauss, who has argued that, as a general rule, "government may not justify a measure restricting speech by invoking harmful consequences that are caused by the persuasiveness of the speech."[41] Violations of this principle are wrong for the same reason that lies are wrong: both "interfere with a person's control over her own reasoning processes."[42] This is different in kind from restrictions on conduct: "outright coercion affects what people do, but restrictions on information affect what people are. For

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36. Weinstein, *Democracy*, *supra* note 1, at 877.

37. *Supra* note 6.

38. *Id.* at 67–72, 80–86.

39. *Id.* at 69 (summarizing and supporting Scanlon's First Amendment theory). Strangely, when Weinstein dismisses autonomy-based rationales for free speech, Weinstein, *Democracy*, *supra* note 1, at 876–77, he never mentions this one, although in other respects he is heavily indebted to Schauer.

40. *See, e.g.*, CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 78–142 (2004); MARTIN REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS (1984); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972).

41. David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 334 (1991).

42. *Id.* at 354. I take "reasoning" here to include any process by which one decides, with full awareness of what one is up to, what are appropriate objects of desire. I do not understand Strauss to be relying upon a sharp reason/emotion distinction, as Weinstein suggests in his response to me. Weinstein, *Free Speech*, *supra* note 2, at 921. Thus, for example, if you tell me that Tchaikovsky is a shallow composer, I find that you've only heard his ballet scores, and I play you his Sixth Symphony, I am appealing to your reasoning processes in just the way that Strauss has in mind. A law that bars me from playing the symphony to you (or that manipulates its manner of presentation, *see supra* note 33) violates the persuasion principle. On the dubiousness of the reason/emotion distinction, *see generally* MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS (2001).

government to frustrate the desire to gamble, for example, is different from the government manipulating the flow of information so that some people who would otherwise have developed that desire never do so."[43] In the former case, people at least know what is being done to them. "There is a value in being able to hold a belief or desire even if one cannot act on it. That is why 'thought control' is such an odious notion."[44]

The second reason for protecting speech, and the one that Schauer thinks most persuasive, is "the argument from governmental incompetence."[45] This argument does not depend on there being anything especially good about speech compared to other conduct. Rather, it is an argument from experience, "that governments are particularly bad at censorship, that they are less capable of regulating speech than they are of regulating other forms of conduct."[46] An example is "the banning of numerous admittedly great works of art because someone thought them obscene."[47]

I find both of these rationales for free speech persuasive. They suffice to resolve the pornography issue. Restrictions of pornography aim precisely at

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43. Strauss, *supra* note 41, at 360.

44. *Id.* Strauss thinks that this principle bars regulation of pornography unless pornography is peculiarly likely to elicit a nonrational response. *Id.* at 345–46 n.35. Current obscenity law may not adhere to this "persuasion principle," however. *Id.* at 345.

Larry Alexander has objected that Strauss's argument will not generate the general rule he proposes, because "*autonomy is on both sides of the equation.*" LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 176 (2005). The government, when it interferes with speech that it thinks will mislead its audience, may seem to be wrongly paternalizing that audience. But if it doesn't intervene, and the audience is in fact misled, then this will signify "some defect in the audience's ability to deliberate rationally about the message, a defect that impairs the audience's autonomy." *Id.* Suppression of messages that do this will enhance, rather than violate, the audience's autonomy. Alexander challenges Strauss at a more fundamental level, arguing that, if (as Strauss concedes) Strauss's principle does not bar the government from censoring false statements of fact, then nothing is left of the principle: any opinion that government wants to suppress will be dangerous only because it contains implicit assertions of facts that, in the government's view, the audience should not believe. *Id.* at 68–71.

Alexander's objection makes autonomy too easily disappear from the anticensorship side of the equation: if the state disagrees with anything the speaker is saying, then it is entitled (always? under some circumstances? what circumstances?) to conclude that the speaker must be manipulating or misleading the audience somehow, and that the audience's autonomy will be promoted if the speaker is silenced. The objection to thought control vanishes, because whenever thought control is exercised, the presumably benign control enhances rather than invading the patient's autonomy.

This goes too far. If human beings are going to live in respectful relations with one another, they must, as a general matter, regard one another as free and rational. *See* STEPHEN DARWALL, THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY 269–76 (2006). There may be exceptions, and Alexander is right that they cannot be ruled out, but the presumption must run strongly the other way.

45. SCHAUER, FREE SPEECH, *supra* note 6, at 86.

46. *Id.* at 81.

47. *Id.* Weinstein is correct to say, in his response, that the incompetence argument cannot plausibly be applied to "every species of communication." Weinstein, *Free Speech*, *supra* note 2, at 922. My claim is that, if the argument is valid with respect to any subset of speech, that subset includes speech deemed obscene.

preventing citizens from thinking certain thoughts. And the power to regulate pornography has been conspicuously abused.

Rather than try to settle my large disagreement with Weinstein about issues of foundational First Amendment theory, I will end this section by arguing that Weinstein's foundational commitments imply something very like the Schauer-Strauss autonomy position. If the people are to control the government, and the government is to be judged by whether it is promoting the people's good, then the people need to be able to discuss among themselves what is good. The question of what constitutes a good human life is not just addressed by learned treatises; it is a ubiquitous concern of art and literature. Fantasy has political implications.

All this implies that Meiklejohn was right: citizens have to be left free to decide what they are going to think about. The voter's answer to the question "What shall be read?" must be "What he himself decides to read."[48] The decision that sexual matters are not political is itself a political decision that government must not make on behalf of the voters, lest it usurp their function. It is they and not the state that set the political agenda. So Meiklejohn and Scanlon converge. Put in Weinstein's terms, absolutely any idea may concern matters "within people's collective decision-making authority."[49] The purpose of public discourse, as Post writes, is "to enable the formation of a genuine and uncoerced public opinion in a culturally heterogeneous society."[50] What that public opinion ought to concern itself with is not a matter for government to decide.

This does not imply a more general libertarianism, for the reasons nicely laid out by Strauss: restrictions on information are more manipulative and disrespectful than outright coercion, because in the latter case at least the patient knows what is being done to him and can choose to react by replacing the legislators. If people remain free to think, they can decide that the law's restrictions on conduct are a bad idea. But if they cannot even communicate thoughts to one another in an unfiltered way, then they cannot decide whether the laws ought to be changed or repealed.

B. WEINSTEIN'S MINOR PREMISE: IMAGES OF SEXUAL ACTS ARE NOT COMMUNICATION

To show that pornography is outside the First Amendment's protection, Weinstein borrows an illustration from Schauer. Suppose that a man with unusual sexual tastes requests "that two prostitutes engage in sexual activity with each other while he becomes aroused. Having achieved sexual satisfaction in this manner, he pays his money and leaves, never having touched either of the

48. POLITICAL FREEDOM 118 (1960).

49. Weinstein, *Free Speech*, *supra* note 2, at 913 n.16.

50. POST, *supra* note 27, at 145.

prostitutes."[51] This episode does not raise free speech issues, Schauer argues, because it is "no more communicative than any other experience with a prostitute."[52] And it should make no difference if the same activity is "presented on film rather than in the flesh."[53]

The hypothetical encounter with the prostitutes is, however, less clear in its implications than Weinstein or Schauer think. Both evidently assume that because it is prostitutes who are doing the performing, their actions can easily be assimilated to other professional activities of prostitutes. Some of the work is being done by the presumption that the state can legitimately criminalize prostitution. (This is certainly part of the justification for bans on live sex shows.) The state's interest in doing so is not obvious or uncontroversial, but its aim is not to prevent citizens from experiencing certain thought processes. Participation in the making of pornographic films is not deemed to be prostitution by every state. Most importantly, it is not prostitution in California, which is why so much American pornography is produced there.[54]

What Schauer has described is a live performance, a kind of intimate theatre. Why should this not rather be assimilated to other kinds of live performance with an erotic element, such as nude dancing or serious plays that incorporate nudity, such as *Equus*?[55] And even if such performances could be banned, the non-protection of a film of such a performance does not follow.[56] An actual act is

51. SCHAUER, FREE SPEECH, *supra* note 6 at 181.

52. *Id.* at 182.

53. *Id.*

54. People v. Freeman, 758 P.2d 1128 (Cal. 1988); Claire Hoffman, *Sex and this city . . . er, Valley, actually*, L.A. TIMES, Dec. 3, 2006, at S29 ("there's no question why Los Angeles became ground zero for the industry. It all boils down to a single court case, the people vs. Harold Freeman.").

55. For the conclusion that nude dancing is a form of performance art that is constitutionally protected, I will not attempt to improve on Judge Richard Posner's classic discussion. *See* Miller v. Civil City of South Bend, 904 F.2d 1081, 1089–1104 (7th Cir. 1990) (en banc) (Posner, J., concurring in opinion and judgment), *rev'd sub nom.* Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991). When the Supreme Court reversed Posner, it never really engaged with his argument, but a majority of the Justices agreed that any effort to enforce a ban on nude dancing against the performance of a serious play containing nudity (such as *Equus*), would violate the First Amendment. 501 U.S. at 585 n.2 (Souter, J., concurring); *id.* at 587 (White, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting). (The judges also argued about the significance of the nonenforcement of a nudity ordinance against *Equus* in City of Erie v. Pap's A.M., 529 U.S. 277 (2000).) *See also* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975) (holding that *Hair*, including the "group nudity and simulated sex" involved in the production, is protected speech, and rejecting the view "that live drama is unprotected by the First Amendment—or subject to a totally different standard from that applied to other forms of expression"). Weinstein is too quick in his claim in notes 19 and 36 that nude performance gets no protection. Weinstein, *Democracy*, *supra* note 1, at nn.19, 36.

56. Weinstein agrees that the use of a medium of mass communication—magazines, films, and the internet—matters, and provides a reason (though not, he thinks, a sufficient reason) to protect pornography. Weinstein, *Democracy*, *supra* note 1, at 874. But, of course, live performance is also a medium of mass communication (and so, obviously, is a performance broadcast via a webcam). The attendance at one Madonna concert in New York City vastly exceeds the number of people who will ever read this article. Or does Weinstein think that the

constitutionally distinct from the image of an act.[57]

C. THE STATE'S INTEREST

What could the state's interest be in suppressing pornography? This is relevant to the question of First Amendment coverage, because even unprotected speech may not be regulated in a viewpoint-discriminatory way.[58]

Weinstein writes that "sexual arousal is an essential component of a category of conduct—sex—that society has sought to control since the dawn of civilization."[59] But the state's legitimate reasons for wanting to control that conduct involve interpersonal consequences, most pressingly pregnancy, though venereal disease is also a concern. Why would consumption of pornography be in this category? Masturbation doesn't get you sick or pregnant. If it can be swept within the sphere of legitimate regulation by saying that it is part of a larger category called "sex," why stop there? It is also part of an even larger regulable category, "movements of the human body." None of this tells us what the state's interest is. Weinstein thinks that the state might be acting on the view that "it is morally wrong for people to become aroused by looking at pictures of other people having sex."[60] But this interest is precisely an interest in preventing citizens from thinking certain thoughts, specifically those thoughts that turn them on. Thought control is not a legitimate state interest.

D. ADMINISTRABILITY

Finally, Weinstein's suggestion that "political value" under the *Miller* test be understood to encompass Scanlon's "informal politics" leaves nothing unprotected by the test, because, as I have argued, all pornography participates in informal politics. Weinstein, of course, does not go this far. (Even by going as far as he does, however, he leaves existing law behind; the *Miller* test contains no safe harbor for otherwise obscene material produced with political intent.) But he would not require that pornography be overtly political in order to qualify for protection. He agrees with Scanlon's point that persuasion about sexual goods need not and probably should not be expressly didactic.[61] He comes close

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First Amendment protects recordings and broadcasts of Beethoven symphonies, but not live performances?

57. Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (holding images appearing to be child pornography made without child participation are constitutionally protected).

58. R.A.V. v. St. Paul, 505 U.S. 377 (1992).

59. Weinstein, *Democracy*, *supra* note 1, at 871.

60. *Id.* at 895.

61. For examples of pornography produced with political intention but which (sensibly) does not beat the audience over the head with that intention, see the films described in LINDA WILLIAMS, HARD CORE: POWER, PLEASURE, AND THE "FRENZY OF THE VISIBLE" 248–64 (1989). Weinstein notes the problem presented by Larry Flynt. Weinstein, *Democracy*, *supra* note 1, at 892. And how would one classify the intentions of Rob Black, whose views are a complex tangle of crassness and idealism, and who produces some of the nastiest pornography made today? *See*

to concluding that these difficulties make it impossible to craft an administrable doctrine, but in the end he shrinks from that conclusion without explanation.[62]

CONCLUSION

Weinstein's innovation, and it is a very valuable innovation, is to juxtapose Schauer with Scanlon in an attempt to identify each's legitimate field of operation.[63] But he exaggerates the force of Schauer's point, while minimizing that of Scanlon. Scanlon's observation, that people's attitudes toward sex will be affected by their discovering what they find exciting, obviously has political implications. It matters, for example, if some people decide that they find homosexual sex exciting, and pornography may be the medium by which they find that out. The same effects will occur if the pornography has no overtly political pretensions, and is produced by cynics only out to make a buck. Pornography with such origins played a significant role in the emergence of the gay rights movement, which gave rise to one of the most pressing and divisive questions in contemporary American politics.[64] Any thought at all about what is good for people—and sexual emotions are thoughts—will have political implications. The protection of political speech is considerably diluted if government gets to decide which matters are appropriate objects of political deliberation. So Scanlon's principle entirely swamps Schauer's, leaving the latter with no appropriate field of operation.

Frontline: American Porn (PBS broadcast Feb. 7, 2002) (interview with Rob Black and partner Lizzie Borden), *available at* http://www.pbs.org/wgbh/pages/ frontline/shows/porn/.

62. In his penultimate footnote, *Democracy*, *supra* note 1, at 896–97 n.130, he lets all the air out of his argument by claiming that obscenity doctrine does not much diminish the informational value of pornography because in the age of the internet, the law is completely ineffective. Weinstein, *Democracy*, *supra* note 1. But, of course, the informational and salacious values of pornography are inseparable. This suggests that the law is acceptable only so long as no one enforces it. Recall, however, that one objection to maintaining laws that have fallen into desuetude is that they can be revived capriciously at any time, to punish those who have displeased those in authority. As this is written, President Hugo Chavez of Venezuela has announced his intention not to renew the broadcast license of the country's oldest and largest private television station on the ground that it broadcasts indecent soap operas. The station happens to have been one of Chavez's most prominent critics. *See* Gary Marx, *Censorship Fears Deepen in Venezuela: Leading anti-Chavez station to lose license*, CHI. TRIB., Jan. 29, 2007; Juan Forero, *Pulling the Plug on Anti-Chavez TV: Venezuela's Decision Not to Renew Station's License Draws Accusations of Censorship*, WASH. POST, Jan. 18, 2007, at A16.

63. Weinstein, *Democracy*, *supra* note 1, at 887–88. Scanlon was not considering the question that Weinstein is trying to answer, whether the state could criminalize the sale of obscenity to consenting adults. He regarded that as an easy question. Scanlon, *supra* note 26, at 542–44. Scanlon was facing the rather different question whether one could, in some circumstances, force pornography on unwilling viewers. He reluctantly answered that question in the affirmative, because there is sometimes a right to force dissenting political speech on unwilling audiences. *Id.* at 544–50.

64. *See* Jeffrey G. Sherman, *Love Speech: The Social Utility of Pornography*, 47 STAN. L. REV. 661 (1995).