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The Visit and The Video: Publication and the Line Between Sex and Speech

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INTRODUCTION

In the recent debates over the constitutional status of pornography, there has been a strand of argument to the effect that pornography is not covered by the First Amendment because it is relevantly like sexual activity itself, or alternatively, like vibrators or other sexual devices. As Fred Schauer puts the point, if a contact-free visit to a prostitute for sexual purposes (e.g., voyeuristic) is not covered by the First Amendment, then why think that a video with similar content and used for similar purposes is covered? This strategy would avoid the need to show that pornography is regulable on the traditional narrow grounds involving harm or obscenity. The argument contends that (at least hard-core) pornography is, in this sense, "not a free speech issue."¹

I want to consider an interpretation of the First Amendment that would be able to meet Schauer's challenge, though it raises problems and questions of its own. One relevant difference between the voyeuristic visit and the video is that the video is published material. I want to consider what relevance this *has* under the First Amendment, as well as how much relevance it *should* have under a good constitution, and why. The basis for its actual relevance will be an interpretation of the press clause of the First Amendment. I will see how far it can be argued that the meaning of the press clause must be to protect publication in general—not just journalistic material, as the received meaning of "freedom of the press" would have it. The basis for thinking publication in general *ought* to be strongly protected in a good constitution will be located wherever the reader chooses to locate the rationale for a constitu-

tional protection for speech. Arguments for freedom of speech tend to work equally well as arguments for a freedom of publication.

If the publication test is accepted as a sufficient condition for First Amendment coverage, then published material ought apparently to be protected as strongly as "speech," whether or not the published material can be found to count as speech. Published pornography, then, would indeed be a free-speech issue since it would be constitutionally protected as if it were speech. This would be the legal difference between the visit and the video. This way of distinguishing between them, however, is only valid if the publication test has acceptable implications elsewhere. This can only be tested by considering a reasonably precise account of what will count as published and what will not. Accordingly, I describe and evaluate a conception of publication for use in a strong constitutional protection such as the First Amendment, especially for its consequences in the area of sexual material.

One worry about a publication criterion is that it discriminates against material that is used only privately. By including published material, it may seem to exclude unpublished or unpublishable material. As I will argue in more detail later, the effects of the publication criterion are *entirely inclusive and not in any way exclusive*. It would not necessarily repeal, replace, or undercut any particular standing or proposed basis for inclusion. For example, certain kinds of material might receive other kinds of constitutional protection precisely in virtue of their private nature. Such a protection may be more, less, or equally as stringent as the protections of speech and press. No position on that matter is explored here.

It is sometimes easier to show that certain material is *covered* by the protections in the First Amendment to the Constitution than it is to show that is ultimately *protected* against censorship or other regulation. The importance of doing so is that if something is covered, then it may only be regulated or censored on relatively narrow grounds; that is what its being covered amounts to. As I shall use the term, material is protected under the First Amendment just in the case that (1) it is covered, and (2) in the circumstances where there are insufficient grounds of the narrower kind for regulation (and coverage alone has rendered any other grounds as without legal weight).

Even if published sexual materials are covered, countervailing considerations may cancel the protection. Unless some category of material is protected absolutely (and probably none is), a sufficient showing of sufficient harm, for example, will defeat the protection. I mean to leave open the question whether some whole category of published sexual material might have its protection canceled in this way. The claim is only that it ought to have a defeasible claim to protection, simply by virtue of being published, that is similar to whatever protection speech receives and for the same reasons. The account proposed here decides the question of coverage (versus protection) without any regard to the sexual nature of the material. It is highly neutral with regard to content or viewpoint in this respect.²

PORNOGRAPHY AS SEX ITSELF?

The law of pornography ought to come to terms with Frederick Schauer's argument that some pornography has no better First Amendment standing than prostitution. It is more like the exchange of a sexual favor for money, Schauer argues, than it is like

speech or communication. Schauer's dichotomy of sex/communication is unfortunate since sex—even sex for money—falls easily within that capacious rubric. Schauer narrows his concept of communication, however, to material whose point is predominantly cognitive (another difficult term) or mental. Pornography is not a free-speech issue because it does not have a sufficiently mental point to count as the "speech" or communication" that the First Amendment addresses. I will argue that Schauer's mentality requirement is unacceptable since it would exclude much material that obviously is of a kind addressed by the First Amendment, such as horror films, slapstick comedy, tearjerkers, and much else. Sexual arousal is no less mental than fear, laughter, or tears, and they have involuntary physical correlates just as sexual arousal has.

His explanation of why some pornography ought not to be a First Amendment concern fails, but there is more to his argument than this. The strength of Schauer's idea lies in his attempt to push much pornography and some commercial sexual activity so close together as to defy any reasonable distinction in law. His best example is memorable: a man pays two females to perform sexually for him without touching him. The man is sexually aroused and perhaps satisfied by this encounter, and that is why he pays for it. They never touch each other, but the encounter is clearly a form of sexual activity. Furthermore, whether or not it counts as prostitution (as I shall call it), it is not the sort of activity whose regulation would usually be thought to raise any First Amendment questions. In any case, I will assume this for the sake of argument. The absence of interpersonal physical contact is no reason to exclude it from the category of sexual activity or to include it in the First Amendment category of speech. How, then, can the prostitutes' performance be reasonably distinguished from a videotape of the same performance, made and used for the same purposes?

When is this line crossed? Suppose there is just a glass barrier between the customer and the performer. Suppose there is an opaque wall, but a real-time, two-way video system. Suppose they are separated by miles, but retain the real-time video link.³ Suppose the video link is not real-time, but a video recording played later. If the live encounter with the prostitutes is not speech for First Amendment purposes, how could the videotape be speech? One notable difference is that the videotape represents (in this case, depicts) something, and much material that is representational thereby counts as speech for First Amendment purposes. The live encounter with the prostitutes might also be representational, however. Prostitutes sometimes portray (represent) characters such as schoolgirls or harsh task masters, or simply feign pleasure to arouse their clients. In addition, "rubber goods" are usually representations of penises. Since we ought to grant that neither rubber goods nor prostitution is typically covered by the First Amendment, representation cannot be sufficient for coverage. Representation, then, does not mark a difference between what I shall refer to as *The Visit* and *The Video*. What relevant difference is there? Or is Schauer correct that, like prostitution, pornography is not even a free-speech issue?

I will first discuss Schauer's own analysis of the issue in more detail and criticize his exclusionary approach. Next, I will propose a conception of publication and consider its significance for the First Amendment generally. Third, the more specific case of sexually explicit activity and material will be considered, with special attention to the boundaries of the legal category of prostitution. The publication approach

will be shown to have significant and useful implications in such difficult First Amendment areas as phone-porn and nude dancing, with a brief foray into "virtual reality" and cyberspace.

Schauer on Cognitivity and Communication

One natural reply to the attempts to separate pornography from unquestionably covered material on psychological grounds, is to dispute the psychology. This response has only limited value however. Even if a psychological dispute successfully pushed *The Video* back toward the vicinity of covered expression, it will tend to pull *The Visit* along in its train. Nevertheless, I consider the psychological question first, and then emphasize its limits against Schauer's ingenious dilemma.

Schauer's strategy is to defend an analysis of "communication," and then argue that "hard-core" pornography does not typically accord with it. It is instructive first to consider the development in his own view from a cognitivity requirement to a mentality requirement.

In an article on the subject, Schauer based his argument that hard-core pornography is not communicative on the claim that it is not "cognitive." He said the voyeuristic visit is "no more cognitive than any other experience with a prostitute," and that neither pornography nor the use of sexual "rubber products" "constitutes communication in the cognitive sense."⁴ In a later book, he includes a nearly identical passage in which the phrase "no more cognitive" becomes "no more communicative," and instead of saying neither pornography nor the use of rubber products "constitutes communication in the cognitive sense," he later says, "neither involves communication in the way that language or pictures do."⁵

The change apparently reflects the recognition that much material that ought to be covered under the First Amendment's conception of speech has little or no cognitive content. Cognitive content, broadly conceived,⁶ is that which falls within the province of the intellect⁷ involves knowledge, belief, reasoning, inference, and interpretation. To limit the scope of the First Amendment to cognitive material so conceived would be vastly to narrow its protections as they currently stand. Much artistic material would apparently be excluded, including at least some dance, instrumental music, and abstract painting, sculpture, and film. Schauer never intended such a narrow category of protection.⁸

In the book, Schauer uses more inclusive terms by arguing only against material that has "neither propositional, emotive, nor artistic content."⁹ This refinement allows him to retain the original strategy of disqualifying hard-core pornography by arguing that it involves predominantly a "physical rather than a mental experience."¹⁰ Since it is predominantly physical, it is not significantly propositional¹¹ or emotive (and is not, in any case, artistic). Schauer's terminology (especially "cognitive," "intellectual") may seem to suggest a constitutional privileging of reason over the passion,¹² but this impression is at odds with his explicit inclusion of "the emotive" as "essentially an intellectual or mental process."¹³ The privileged class includes emotive material and so does not privilege reason or the intellect. Rather, Schauer's root distinction is between the *physical* and the *mental*. "The emotive and the cognitive are distinguishable from the physical."¹⁴

Suppose we christen a third category of content, *visceral*,¹⁵ to reflect Schauer's emphasis on material that produces primarily physical rather than emotional or intellectual effects. Whether or not sexual arousal is properly regarded as predominantly a physical rather than a mental effect, it does not seem relevantly different in this respect from laughter, crying, nausea, revulsion, shock, suspense, or fright. In all these cases, as with sexual arousal, there is an undeniable mental component to the experience, and the physical effects are largely involuntary. So Schauer's argument ought to apply to visceral material as a class and not just to sexually visceral material.

"The basis of the exclusion of hard-core pornography is not that it has a physical effect, but that it has nothing else" (182). Schauer does not mean to exclude all material that has some visceral content, even if it is sexual. It could be redeemed by having content of another kind, too—cognitive or emotive—or by having an independent claim to be artistic. Still, this qualified exclusion ought consistently to apply to the whole class of material that is predominantly visceral in content. Two difficulties are obvious: (1) Why discriminate against visceral material? and (2) Isn't much material that is predominantly visceral obviously and properly protected by the First Amendment?

Regarding the first difficulty, Schauer gives no explicit argument for excluding material with predominantly visceral content from First Amendment coverage. His indirect argument is that such an exclusion is the only way to explain our exclusion of prostitution or rubber goods from the scope of the First Amendment. That analogy will be criticized below. As for the second difficulty, underprotection, consider a range of material that is predominantly visceral in content and that is produced and used primarily for visceral purposes: tearjerkers, slapstick comedy, horror films, certain kinds of rock music ("thrash," "speed metal"). Material of these kinds, like explicitly sexual material, often has other aims and contents as well, but not always. Some material is aimed and used entirely to make people laugh. Stand-up comedy is often like this. An even better analogy would, like Schauer's paradigm case of hard-core pornography, take a nonverbal form. Consider silent cartoons, or other comic films with no (or inconsequential) dialogue. Or consider clowns at the circus. In consistency, Schauer ought to hold that none of these is speech for First Amendment purposes and may be banned or regulated without constitutional qualm.

It may well be objected that humor, or fright, or the other examples actually involve emotive content, thus falling within Schauer's scope of protection. The question then is why sexual arousal should not be regarded as an emotion. Its having physical aspects would not distinguish it from most other emotions. Indeed, this may be a more direct route to the weakness of Schauer's account. Once the scope of protected material is enlarged to include that which aims and is used to produce emotions, there is no longer any ground for excluding hard-core pornography, whose effect is primarily to produce the emotion of sexual arousal.

So the attempt to separate pornography from clearly covered material on psychological grounds apparently fails. Still, this point does not yet answer the difficult question of how it could be speech *while the hands-off encounter with the prostitute is not*. What is the constitutionally relevant difference between these that allows *The Video* to be protected but not *The Visit to the prostitute*?

I propose that the general ground for regarding pornography as covered is that it is (typically) published. It is an important fact about a prostitute's performances that they are not before a live audience. If they were, they ought to be regarded as covered by the First Amendment and, so, protected unless they met specified exceptions. Any representational aspect, then, drops out; coverage would still be triggered if the play-acting part of the performance were removed, leaving only an erotic dance or even merely an erotic show,¹⁶ though still before a large audience. Such a show would differ from other clearly protected shows merely by having much sexual content. The suggestion here is that publication is sufficient for coverage under the First Amendment. Once it is covered, the state needs special and strong reasons to regulate it; it is presumed to be protected. In principle, the sexual content itself might be argued to provide special and strong reasons for regulation, or related reasons could be adduced, such as offensiveness, tendency to increase sexual discrimination, or abuse. However, in a clear sense, it will be much more difficult to justify regulating pornography if it is granted coverage under the First Amendment. It can no longer be excluded¹⁷ in the way that playing tennis is.

PUBLICATION AND THE PRESS CLAUSE OF THE FIRST AMENDMENT

I want to consider the basis for finding a broad freedom of publication in the First Amendment, via the press clause. First, I provide an interpretive argument about how to make sense of the existence of the press clause in addition to the speech clause. Second, I consider the historical arguments about the meaning of the press clause in the founding period. Third, I turn to the question of what rationale there is for a constitutional freedom of publication apart from historical and textual arguments. This can serve partly as an aid to constitutional interpretation, but also as a freestanding argument about what a constitution ought to be like.

Text

I take the main competitor to be the journalistic interpretation of the press clause. On this view, the freedom of the press is primarily a protection for published news and opinion. This interpretation faces a textual trilemma:

1. it regards the press clause as redundant after the speech clause, *or*
2. it says journalism wouldn't have been covered by the speech clause alone, *or*
3. it says the press clause adds stronger protection for journalism than for other speech.

The central problem with the journalistic interpretation is that journalism is already speech and so would have been clearly covered by the speech clause. Without some separate argument, the press clause should not be read as redundant unless absolutely necessary. The text clearly names two freedoms neither of which is to be abridged.

As for the view in (3) that the press clause adds additional protection for journalism, there is no textual support for this. The speech and press clauses are exactly parallel by all appearances.

If (1) and (3) are rejected, the only alternative for the journalistic interpretation is (2), the claim that journalism wouldn't have been protected by the speech clause alone. However, one would have to read the speech clause as extremely narrow to maintain (2). For example, one might say that the speech clause didn't clearly cover the printed word. This is not only an oddly narrow understanding of speech, but it would make a journalistic press clause very weak medicine. Nonjournalistic printed material, such as novels or textbooks, would still not be covered. Option (2), then, is also untenable, and the journalistic interpretation of the press clause is without textual support.

On a publication interpretation, the press clause is meant to protect published material of all kinds. This doesn't mean that there aren't exceptions allowed for strong reasons, but all published material would have a First Amendment claim against regulation.

There is a narrow and a broad publication interpretation, and I will be arguing for the broad. The *narrow publication reading* sees the press clause as protecting the publication only of speech. One could argue that this is not utterly redundant. A censor might limit a pamphleteer's circulation to some very small number on the ground that the small number is sufficient to allow her to say what she wishes. It might be seen as a separate issue whether one may publish what one says. However, this is something of a stretch. There isn't really a credible argument that a freedom to speak doesn't include a freedom to say the same thing to many people, or many times. The narrow publication reading still makes the press clause redundant.

The *broad publication reading* of the press clause sees it as protecting all publication (possibly subject to narrow exceptions), whether or not it might qualify as speech under the speech clause. This would relieve published materials of the need to show that they count as speech. Their protection would not depend on it.

Early History

In addition to these narrow textual arguments, the history of the speech and press clauses lends further support to a publication interpretation. The idea of freedom of press derives from the sixteenth- and seventeenth-century English system of licensed printing, the requirement that anything to be printed must first obtain the approval of Crown licensers.¹⁸

There are some distinctive features of material produced on a printing press: for one thing, the typography is usually standardized (unlike calligraphy); for another, it is easy to produce large editions of a single text. It is clear that the licensing system was motivated by the ease of producing large editions rather than by standardized typography or other distinctive features of printed material. Surely this was not the only manner of disseminating a message publicly: public posting of (handwritten or printed) bills, public speaking, and word of mouth, were among the other available means. But the printing press made it easier to reach a larger audience for most purposes. Whatever understanding of freedom of press the founders may have had, the

very idea was owed to the rejection of licensed printing. It seems clear enough that the important thing about printing—from the standpoints both of those who would censor it and of those who would resist censorship—was that it facilitated publication.

The intellectual background of the founders' ideas of free speech and press prominently featured the more general idea of free publication. John Milton, in his *Areopagitica—A Speech for the Liberty of Unlicensed Printing* (644), argued against the legal requirement of licensed printing and, in the process, defended the freedom to "write," "speak," and "publish," as well as "print." William Blackstone's influential *Commentaries on the Laws of England* (1769) argued that "the liberty of the press . . . consists in laying no previous restraints upon publications. . . . Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press." He argued that punishment after publication was no infringement of a person's free will, and, "[n]either is any restraint hereby laid upon freedom of thought or inquiry: liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive of the ends of society, is the crime which society corrects."¹⁹ Blackstone's argument supports the freedom to lay one's sentiments before the public. Whether or not Blackstone had the full scope of this idea in mind, it obviously goes beyond the freedom of printing, writing, or speaking. Since there are nonverbal printed ways, as well as nonprinted ways of laying one's sentiments before the public, the freedom Blackstone defends is a freedom of publication, even if the published material is neither spoken nor printed.

In 1720 John Trenchard and Thomas Gordon, in the open letters under the pseudonym, Cato, defended "freedom of speech" as "the great Bulwark of Liberty." They also argued "that freedom of the Press is one of the greatest bulwarks of liberty, and can never be restrained but by despotic governments."²⁰ Virginia's state constitution followed the language of Cato's *Letters*, but it didn't mention freedom of speech. It declared in 1776, that "the freedom of the press is one of the greatest bulwarks of liberty, and can never be restrained but by despotic Governments."²¹

We find similar language about publication in debates over whether to ratify the constitution, especially in proposals for a bill of rights:

Resolved . . . that the people have a right to freedom of speech, of writing and publishing their sentiments, and therefore that the freedom of the press ought not to be restrained, and²² the printing presses ought to be free to examine the proceedings of government, and the conduct of its officers.²³

Resolved . . . that the people have a right to freedom of speech, and of writing and publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated.²⁴

James Madison, in his first speech on the subject, combined the influential "bulwark" language of Cato's *Letters* with Blackstone's early emphasis on the freedom to publish one's "sentiments." Speaking on June 8, 1789, Madison proposed "The people shall not be deprived or abridged of their right to speak, write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."²⁵ This was changed by the House committee to "The freedom of speech

and of the press . . . shall not be infringed," and this was approved by the House and Senate on Sept. 25, 1789,²⁶ changing once more to become the First Amendment as ratified on December 15, 1791.²⁷

Before the federal constitution was ratified, nine states put declarations of rights in their own state constitutions, and every one of these included freedom of the press. Only one of them, Pennsylvania, mentioned freedom of speech.²⁸ It is not as if the idea of a separate freedom of speech only occurred to the framers in these last few years since it had to be known to them through the letters of Cato, as we have seen. It does suggest, however, that the press clause had the wider and more solid following among lawmakers of the day.

This historical evidence suggests that, in the tradition leading up to the Bill of Rights, the primary interest to be protected by "freedom of the press" was an interest in *publishing* one's sentiments without government censorship. These texts also suggest that the freedom was to protect not just journalism but all printing, since it was all printing that had been subject to licensing. It may be that the main goal in protecting all printing from government censors was to allow commentary, criticism, and information about political affairs as a way to protect against bad government. This does not mean, nor is there any strong evidence, that the protection was meant to be limited to, or especially strong for material found to be of this political nature.²⁹

For all this, however, there is no suggestion of a broad (all publication) rather than a narrow (only published speech) publication interpretation of the press clause. There's every indication that the protections were expected to apply to material that counted as speech apart from the fact of publication, though this may have included some nonverbal material such as editorial cartoons.³⁰ It is not entirely clear what protection, if any, was intended for published fiction, though the idea of laying one's sentiments before the public surely covers it.

There is a certain tension between the historical approach and the more text-based approach I applied earlier. The historical approach seems to suggest that the press clause was intended to protect published *speech*, despite the fact that after the speech clause such a narrow protection is pretty clearly redundant, as noted above.

There are, then, textual and historical resources to support interpreting the press clause as a broad protection for publication in general so that each citizen may "lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press."

Rationale

Why should there be a constitutional rule against legal regulation of published material? Of course, we might well ask the same thing about constitutional protection for speech. However, if a constitutional protection for speech is defended in certain familiar ways, then the same case supports a constitutional protection for publication. This conditional argument leaves aside consideration of the merits of the familiar defenses of a protection for speech, and it also allows that the protection in question might admit of exceptions for special well-defined cases (such as "clear and present danger"). The kind of constitutional protection that speech should receive on the weight of these arguments should also be extended to publication.

Here is a familiar Justification for a constitutional rule against legally regulating speech. Call it, *the Collective-Power Rationale*:

Speech is one of the most important ways that the power of government, or of the social orthodoxy generally, can be subjected to the reasoning of people across a wide social and economic spectrum. Where speech is used for this purpose, the collective power is likely to be exercised more wisely and fairly. Much of this kind of speech will be Mistaken, or uninformed, but the general run of opinion is bound to be better informed and more correct as a result of a freedom of speech, at least in the long run. Much speech will be used for other purposes and have no significant value in the guidance of collective power, but where this line should be drawn is among the fundamental questions that should be decided in public discussion, not prior to it.

This is just a sketch of a familiar line of argument, and its branches and siblings are abstracted out. It is merely stated here and not defended. The question is how this, or anything close to it, could be a good argument for a speech protection without also being a good argument for a publication protection. The argument is equally compelling if "publication," in the sense of "expressive material intentionally disseminated widely or in a public forum" is substituted for "speech." If the case for protecting speech admits narrow exceptions for cases of immediate danger or certain kinds of deception or whatever, then the conclusion about a protection for publication will be similarly qualified (and if it does not admit such exceptions, it will not be so qualified). The justification supports a protection for speech whether or not it is published and also supports a protection for publication whether or not it is speech.

A sharply different justification for constitutional protection of speech—one that places less emphasis on the imperatives of social deliberation—might be called, *the Self-Expression Rationale*:

Each individual has a deep interest in deliberately forming and acting on her own convictions, tastes, and tendencies. The ability to speak freely is necessary to the fulfillment of this interest. This is an interest whose exercise rarely harms anyone else directly. The danger produced by the freedom to speak is easily outweighed by the well-being the freedom promotes. Thus, society ought to be precluded from coercively restricting speech.³¹

Again, this is merely a sketch, and similar arguments can take different forms. Still, it is hard to see how anything similar could be a good argument for protecting speech without also being a good argument for protecting publication, whether or not it is speech. Whether the particular variant of this argument rests on the utility to the speaker, on the value for society of allowing such self-expression, or on rights of the speaker not to be interfered with, it seems certain to provide an equally good case for the freedom intentionally to disseminate expressive material widely or in a public forum, if, as in the case (arguably) of Thelonius Monk's music, the material is not speech.

These are only two examples, but it is hard to conceive of a plausible case for a free-speech principle that does not work as a case for a free-publication principle. This is no proof. What matters here is (1) whether there is a successful defense for a

free-speech principle, and if so, (2) whether it is equally successful as a defense of a free-publication principle. Since the question whether a free-speech principle can itself be defended is beyond my scope here, the rationale for a free-publication principle is both conditional and inconclusive: if there is a defensible free-speech principle, then probably, for the same reasons, there is a defensible free-publication principle of similar scope and strength.

WHAT COUNTS AS PUBLISHED?

What counts as published? This question has two parts. What *kind* of material can count as published? And *how public* does it have to be? Surely not all material that is reproduced and distributed, such as pens and cars, can count as published. It might seem that only speech can count as published, but there is no difference between the narrow publication interpretation (which is redundant after the speech clause) and my broad publication interpretation unless there is a viable concept of publication that can include material regardless of whether it is speech. So there is this question of what kind of material is publishable as a conceptual matter.

A second part of the question attends to the issue of *how public* it has to be. That is, supposing some material that may or may not be speech is in the category of material that can count as published, it could only so count if it were made public, distributed, put on view, or some such thing. Presumably, exposing the material to one other person only would not usually be sufficient. What would? I begin with this question, then turn to the question of why pens are not publishable.

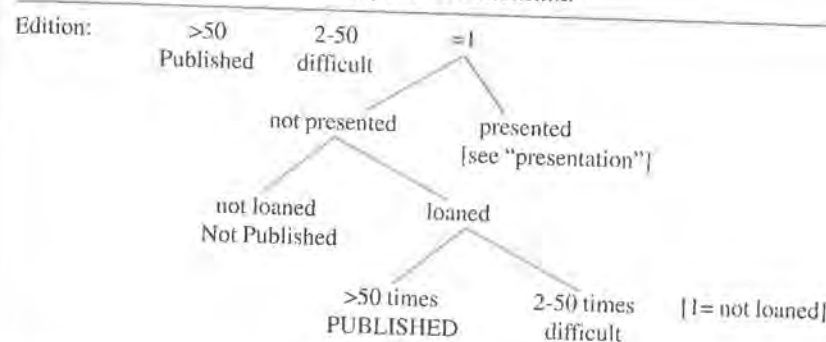
Dissemination

The paradigm case of publication is printed verbal material produced in a large edition and made widely available. I propose to sketch a theory of publication that can be applied to a wide variety of materials falling outside of the paradigm case. Clearly the idea of publication lying behind "freedom of speech or of the press" is not limited to printed material (consider broadcast journalism), to verbal material (consider editorial cartoons), or to material produced in large editions (consider public lectures).

The last component of the paradigm case, "made widely available," lies closer to the heart of the matter. Material that is made available only to one person is the clearest case of unpublished material. I shall assume that for some material that is made available to between one and fifty persons it will be difficult to say whether it should be regarded as published or not, but that above fifty it is clearly published. This number is chosen somewhat arbitrarily, and most of the account will be the same if the reader substitutes a preferred number to represent the smallest availability that is clearly sufficient to count as publication. The appropriate number may vary with different kinds of material as well, but I avoid these complications.

In some contexts, the number of people to whom some material is available does not seem the crucial issue in determining whether it is public or published. For example, in cases of very small availability but where the few are chosen randomly (or by first come, first served) from those who desire access to the material, some may

Figure 7.1. Produced Material



wish to regard the material as published. On the other hand, some may want to deny that material is published if its availability is limited to members of a private organization, even if that group is very large. I will try to avoid these questions by limiting my purview to material whose availability raises no questions about private membership or private circulation. I intend the account to apply primarily to material made available equally to whomever will pay for access to it (and I assume no exorbitant cost),³² within the constraints of limited circulation or room capacity or life of the material.

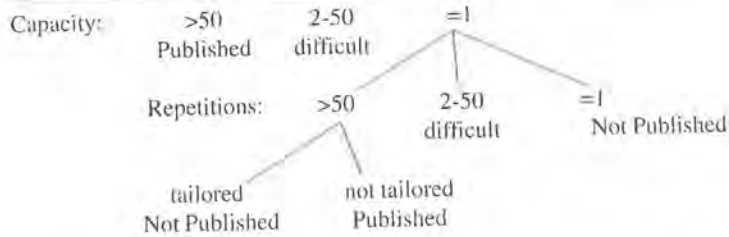
So consider first material that is produced in editions, such as printed and recorded material. Call this *produced* material (Figure 7.1). Where the edition is larger than fifty, it is published, and where it is less than fifty, it is a more difficult case. In the case of an edition of one piece, it is not published unless it meets the criteria under loaned or presented materials as these are defined below.

An important subcategory here is material that is *loaned*, since this allows even an edition of one piece to be made widely available. Where the size of the edition multiplied by the number of people that can borrow each piece is greater than fifty, the material is published. Cases less than fifty are difficult, and where this number equals one, the material is not published.

Next consider material that is displayed or performed, such as dramatic theater, film, gallery art, live music, and so on. Call this *presented* material (Figure 7.2). Where the capacity per presentation multiplied by the number of presentations is greater than fifty the material is published. Where this number equals one, it is not published, and where it is between one and fifty, it is a difficult case.

There are special difficulties in the case of live presented materials. For material to count as having an audience greater than fifty, it must be the same material. Live performances, however, vary from one performance to the next, and so two performances to audiences of twenty-five may not really be two performances of the same material. This problem about repeated performances does not arise where the audience per performance is greater than fifty. I have stipulated that the cases between one and fifty will be put aside here as difficult. What, then, about the case of repeated live performances to an audience of one? The pertinent question on this analysis is whether the performance is too tailored to the audience to count as the same material each time. The answer will often be difficult, though not always, and varies from

Figure 7.2. Presented Material



case to case. I will discuss this class of material in more detail in the context of specific kinds of sexual material. If it is tailored to audiences of one, then it is not published regardless of the number of performances.

In principle, tailoring can occur in performances to larger audiences, as when a lounge singer joins a table of patrons midsong. I will assume that such tailored episodes are outweighed by the fact of their presentation to a large audience. It may as well be regarded as tailoring the performance to that particular audience rather than as tailoring to any individual.

There are some cases of relatively narrow dissemination that should count as published if they are made available in a public forum. For example, a person on a street corner inviting passersby to browse through his portfolio of photographs is not expressing himself less publicly just because no one chooses to look. On the other hand, the idea of a public forum cannot be entirely separated from the question of the size of the (at least potential) audience. A space (or channel, etc.) is presumptively public only if there is a reasonable expectation that material posted there would be available to some significant number of people. Thus, the man with his portfolio is less likely to receive protection under a publication principle if he sets up in a dark alley late at night. Dissemination in a public forum can, then, substitute for dissemination to a large number of people.³³

Sexual material that fails the publication criterion because it is too tailored to a single patron would become a publication if the same highly tailored performance were simply also presented to a wide audience. In effect, prostitution counts as published expressive material if it is intentionally opened to public view. Then it would be covered by the publication-based press clause, for example. Regulation of live sex shows would raise serious questions of freedom of expression. The fact that the sex involved is illegal under prostitution laws simply shows that prostitution laws may be unconstitutionally overbroad in this way. On the other hand, the expressive interest might be legitimately limited in the case of public sex acts,³⁴ but I won't consider the case for that view here.

Is a Pen a Publication?

One advantage of a publication criterion is that it gains coverage for art without the need to argue that art is always speech. But this raises a challenge for the publication criterion: many widely disseminated materials, such as pens and cars, are not ordi-

narily regarded as published, and it would be a liability for the publication criterion if it had to count them as covered under the First Amendment press clause. But if they are not counted as published, how is it that art counts as published without reverting to the fiction that all art is speech?

I take it for granted that not only verbal material counts as speech within any adequate construal of the speech clause. Instrumental music, visual arts, dance, pantomime, and so on, are often covered, and this is widely agreed. It is not so clear, however, that *all* instances of material in these media count as speech even under this broad legal understanding of that term. It is far from clear, for example, that Abstract Expressionist painting in America (the "New York School": Kline, Motherwell, DeKooning, Stella, etc.) was *saying* something. That is certainly possible, but not at all obvious, and possibly false. If we nevertheless assume that it has a claim to First Amendment protection, then on what grounds? To fit it under the speech clause, we must either expand the notion of free speech in an *ad hoc* way, or show that the material is speech in some real sense. Or, of course, we could let the protection be limited to material that could be shown to be speech and let the chips fall where they may. On this view, our best understanding of much art may or may not qualify it for First Amendment protection. Are we really as unsure about whether such art should be protected as we are about whether it must be understood as saying something?

The publication interpretation of the press clause promises an alternative. Let us assume that much music, visual art, and so on, is *not* speech in any defensible sense. This material is often obviously published, and this doesn't depend on a prior determination that it really is speech. But here's the problem: if art counts as published whether or not it counts as speech, why doesn't a mass-produced pen also count as published?

Is a pen a publication? This question is a challenge for the publication criterion. Pens and many other mass-produced objects are not ordinarily thought of as the kind of thing that admits of publication, but it is difficult to say why not. The strategy of limiting publications to expressive, communicative, cognitive, or some other such kind of material fails at both ends: at one end, there may be no such characterization that would cover everything that it should, especially the diverse forms of art, while excluding what it seeks to (e.g., *The Visit*); at the other end, it is hard to find such a characterization that does not cover too much, including pens and other mass-produced and creatively designed objects.

One approach to this problem would be to take a page from the book of the opponent. The argument that pornography fails to have cognitive, or artistic, or emotive content simply fails, as I argued earlier. Specifically, there is no more reason to deny that sexual arousal is an emotion than there is to deny that grief is. Now that pornography meets that criterion, perhaps the criterion can be used to exclude pens.

The danger is that this strategy makes the publication criterion otiose. If something has, for example, emotive content, shouldn't it be covered whether or not it is published? In reply, however, if *The Video* has the emotive content of sexual arousal, then so does *The Visit*. If we take for granted that *The Visit* is not covered under the First Amendment, then not all material with emotive content is covered.

Some such disjunctive criterion as "cognitive, emotive, or artistic" might serve

as a necessary and sufficient condition for a kind of material's counting as publishable in principle. Let us use the term "expressive" to summarize them. Where many accounts go wrong, however, is in making expressiveness a sufficient condition for coverage. Those accounts cannot explain why *The Visit* is not covered but *The Video* is; the publication criterion can. Granted, almost anything, especially if it is intentionally made public, could be placed in the broad category of "expression." In the case of pens, however, the expressive component is usually very small, whereas it is the predominant characteristic of the prostitutes' performance. Material whose expressive component is too small should not be counted as publishable. That is, even wide and intentional dissemination of the material would not qualify as publication for the purposes of the press clause.

It is an implication of my view that the category "expression" should not be used to identify the material covered under the speech clause. Speech is covered whether or not it is published, and if all expression is "speech," then the press clause would never protect any material not already protected by the speech clause. (It would still, perhaps, protect the publication of such material, which is usually the issue anyway.) The main reason against counting all expression as speech for First Amendment purposes is that *The Visit* is undeniably expression. Of course, its protection could be canceled by an obscenity doctrine, but that analysis would yield no more protection for *The Video* than for *The Visit*. The publication approach exploits a relevant difference. Neither is speech, though both are expressive. Expression that is not speech is not covered under the speech clause, but is covered under the press clause if it is widely enough disseminated. Widely disseminated expressive material is publication whether or not it is speech and obtains protection on that basis.

Denying objects such as pens membership in the class of publishable materials when the expressive component is very small still leaves open the possibility that such material might be regulated for reasons that are impermissible on First Amendment grounds. Suppose the state sought to ban pens that didn't have a sufficiently "American" look, thereby suppressing pens popular with, say, certain ethnic or racial groups. We don't need to say pens are covered by the First Amendment in order to say that the state may not regulate the distribution of pens because of the state's disapproval of the pens' expressive content. Pens can be regulated much more freely than published material, but not on the basis of some real or imagined message that the state wishes to suppress.³⁵

Material that is widely disseminated, then, does not count as published material unless it has a significant expressive component, whether cognitive, emotive, or artistic. This helps us to draw the lines where we (I?) would like them to be, but what justification is there for drawing the line between expressive and nonexpressive, publicly disseminated material? The guiding idea is the effort to grant coverage and so presumptive (but defeasible) protection to a class of materials that has a special likelihood of addressing matters of public concern. Material that has little if any expressive dimension can safely be placed outside of that category. The concept of publication I propose then is *expressive material that is intentionally publicly disseminated*. Such material, whether or not it counts as speech, qualifies for the same sort of protection as speech, but under the press clause of the First Amendment.

IMPLICATIONS FOR SEXUAL MATERIAL

There is no difficulty distinguishing between Schauer's example of a no-contact visit to a prostitute and a video containing similar activities that is made and used for similar purposes. *The Visit* is in the category of presented materials with an audience of one, which is unlikely to be repeated in an untailed form. Therefore, it is not published material. *The Video* is in the category of produced material and is probably produced in an edition larger than fifty, or if not, is made available by loaning or presenting to a total number of people greater than fifty. Hence, the *Video* is published material. The implication is that the *Video* is covered by the First Amendment and so may only be regulated or banned for the usual reasons constitutionally permitted as bases for regulation of speech, such as sufficient showing of harm or categorization as obscene. The prostitute's one-time private show gets no First Amendment protection unless it finds some other way into that amendment's concerns, such as by qualifying as political speech or nonobscene art. Neither seems likely.

No theory is well defended by its ability clearly to dispose of one case. It is helpful to consider a number of kinds of sexual material to test the implications of the above analysis. One natural area to consider concerns telephone pornography, ads for which are now familiar in magazines, weekly newspapers, and late-night television. The publication analysis implies that whether phone porn receives First Amendment coverage depends on whether the caller hears a recorded message (published), or a live interlocutor (tailed; not published). This may seem at first like an arbitrary distinction, but it is driven by the idea of publication. If that idea seems to cut too finely here, consider that this implication closely parallels the distinction between the in-person encounter with the prostitute and the video having similar content, aims, and uses. In both cases, the publication criterion gives some measure of protection to the published form and (barring other unusual protected features, such as political or artistic content) allows the state to treat the unpublished form as a case of sex for money. This analysis treats live phone pornography as more like prostitution than speech, but cautiously allows First Amendment coverage when it takes a published form, as in the case of a recorded message.

Consider the broad category of live sex shows. These range from nude dancing with artistic ambitions to straightforward sexual activity made available for viewing, and even touching.³⁶ The publication criterion boils the issue down to the size of the audience. The fare in a common strip joint is clearly published material. The more difficult cases concern live performances for an audience of one. If there is no pretense of *repeating* the show, then the material is clearly unpublished. Where there is some suggestion of a repeated show, there is good reason for a strong presumption that such performances are too tailored to the individual to count as successive performances of a single show. However, to be consistent, if there is good reason to regard the performances as just as undifferentiated and untailed as they would be if the audience were more than fifty per performance, this analysis must count the show as published. What is more likely is that such private shows are unabashedly tailored, and so should not be regarded as published.

Where a putative show for an audience of one involves physical contact between

the audience member and the performer, the element of tailoring is too pronounced to allow that such an episode could be repeated with different single-member audiences in a way that should be counted as publication of a single show.

The publication criterion is well suited, I believe, to answer a difficult legal question: what is the difference, for First Amendment purposes, between a sex show and prostitution? As we have seen, the presence or absence of physical contact will not mark an appropriate line. The answer offered here is that sometimes there is no difference, but sometimes there is the fact of the publication of the sex show. Publication grounds at least minimal First Amendment protection.

Intentional Versus Unintentional Dissemination

I will only briefly note the need to limit the coverage of the press clause to only intentional as opposed to inadvertent dissemination of the material. The visit to the prostitute does not gain First Amendment coverage by being inadvertently broadcast over public airwaves (suppose a security camera that caught the action was accidentally patched into a public frequency, etc.). It doesn't matter whether we say that it only counts as published if the dissemination is intentional or that the intentionality requirement is additional to the publication criterion. The aim of the publication criterion is to mark off a range of material that might seek to address matters of public concern, on the model of political deliberation. The constitution's interest in this broad category is not that it is widely available, but that someone has intentionally *made* it so. Without that, there would be little reason to be especially sensitive to its possible bearing on public matters.

On Private Material

Consider a private letter, without political or artistic significance. On what basis can it claim First Amendment protection? The usual answer, I think, is that it is paradigmatically a case of speech. This answer is awkward in several respects. First, if it counts as speech under the First Amendment, then it is subject to the usual categories and exceptions. Speech is regulable if it is obscene, and the current standard of obscenity contains nothing that would prevent its being applied to private erotic letters. If the First Amendment is the whole basis of the protection of private letters, then they are apparently regulable when obscene. If that is the current state of the law about private letters, then my account is not much more repressive for its implication that private letters with no artistic or political significance receive no First Amendment protection. If the law protects private letters in some other way, such as a constitutional right to privacy, without use of the First Amendment, then this independent protection is in no way canceled by the publication criterion proposed here.³⁷

I have said that an advantage of protecting publication as such is that art can receive much protection even without having to pretend that it is speech. What about *unpublished* art? There are two possibilities: either it would be protected by privacy, or protecting it would require resorting to treating it as speech after all. In the latter case, the publication criterion would have no special consequences for art.

Cybersex

Consider now several more difficult cases, in which new technology raises questions about the very idea of publication. First, consider the sort of noncommercial phone sex explored in the novel *Vox*.³⁸ Two people have a sexual tryst over the phone with neither receiving payment from the other. I will call this phone *sex* to distinguish it from phone *pornography*, which is characterized by a caller's paying for the provision of the live or recorded message. Phone sex is like privately made and kept videos or photographs, and ought to receive whatever protection it does in a similar way.

The case of phone pornography supplies an interesting intermediate case for the publication analysis. This account bases the distinction between recorded and live messages on the question of whether the message is tailored to the individual and so not truly published. Consider a message that is both recorded and tailored, on the model of phone messages commonly employed in other contexts. Upon calling a certain number, you hear the message, "Press 1 for a woman, or 2 for a man." After pressing one or the other, you hear, "Press 1 for heterosexual, or 2 for homosexual," and so on. Or suppose that at various stages in the recorded erotic message, the listener is asked to press a key to choose various "plot twists." The point is that the message could be highly tailored to the individual, with the degree of specificity limited only by the state of computer technology. It will soon be possible to produce computer-generated phone pornography that is nearly indistinguishable from a live conversation, just as home computers rapidly approach the ability to (apparently) converse naturally with their owners. This is an intrinsically difficult case for the publication analysis since it blurs the line between a single presented content and spontaneous live interaction.

Similar problems are generated by more sophisticated sexual uses of computer technology. There are already computer games that employ CD-ROM technology to create a highly interactive experience including high-quality photographic, audio, and video material. As this genre improves, it will become increasingly unlikely that any two users will pursue exactly the same "route" through the interactive options, and this might suggest to some that the experience is highly tailored and not published. On the other hand, if the question is not whether a single run of the software is published but whether the software itself is, then doubts are likely to recede. Such a program is as clearly published as any board game. Certainly, we should say the same thing about prerecorded phone pornography, however "interactive" it might be.

There are more exotic speculations about sexual uses of emerging "virtual reality" technology. Consider, for example, a full bodysuit in which the senses of touch, sight, and hearing are completely controlled by interactive computer software. Here, perhaps, is the limiting case, the final test for Schauer's attempt to assimilate pornography to sexual activity. If they can be separated here, they can be separated anywhere. Consider first a genuine sexual interaction in which one person requests a certain sexual favor of another and the latter obliges, for payment. Next consider one person in the virtual reality suit and another at the controls. The suited user verbally requests certain kinds of sexual "contact" and the person at the controls clicks the mouse to oblige, producing a tactile, audio, and visual environment for the suited

user that approximates old-fashioned sexual interaction with a fantasy partner. This is highly tailored and not published (so long as the interaction is not opened to public view). Now remove the person at the controls and replace him or her with software that is exactly as obliging. Schauer bids us ask how this last scenario could enjoy any protection under freedom of expression that the first, nonvirtual interaction does not. The publication analysis asks whether the software program is intentionally disseminated widely or in a public forum and whether it has a sufficient expressive dimension. If so, it is a publication and should be covered under a constitutional protection. Since the protection for publication as such is principled and not designed just for this case and since this example is as difficult a version of Schauer's question as I can conceive, I believe the idea of freedom of publication provides an answer to Schauer's challenging suggestion that hard-core pornography is not even a free-speech issue.

Notice that, in this case, the publication analysis circumvents the mental/physical dichotomy on which many have rested arguments similar to Schauer's. In the virtual-reality example, the physical response is no more mentally mediated than it is in real sexual contact, and so that dichotomy provides no basis for treating the cases differently under the law. The closest the publication analysis comes to that distinction is in applying only to material that is expressive. Probably the virtual-reality program could be distinguished from a vibrator on those grounds, the former being publishable and the latter not, though I won't pursue the question further.

CONCLUSION

Let me summarize the publication interpretation of the press clause of the First Amendment as I have developed it. The publication interpretation of the press clause begins with a conception of expressive material that includes a broad range of contents, including cognitive, emotive, and visceral. Among other things it includes both *The Visit* and *The Video* with their predominantly sexual content. But, among other things, it excludes such things as mass-produced pens or cars. The second component of the publication interpretation is a criterion of how widely disseminated the material is. This criterion covers both produced material and presented material, and dissemination is allowed to take the form of editions, audiences, borrowers, downloads, and other forms. Material counts as published if it is both sufficiently expressive and sufficiently (intentionally) disseminated. Published material should be (and might be) covered by the press clause of the First Amendment and afforded the same kind of protection and exceptions as material that is covered only under the speech clause. Thus, when it is published, pornography would be better protected than prostitution (unpublished because not disseminated) or mass-produced sexual aids (unpublished because not sufficiently expressive). When it is not published, as in private letters or photographs, its degree of protection from legal regulation is unaffected by my analysis.

Notes

1. Schauer, *Free Speech: A Philosophical Inquiry* (Cambridge University Press, 1982), p. 184. Cass Sunstein follows Schauer in degrading the constitutional status of pornography on the basis of its lack of cognitive content ("Pornography and the First Amendment," *Duke Law Journal* 1986, no. 4 (1986: 606). However, Sunstein seems to grant that it is speech under the First Amendment, though "low-value" speech. Schauer's distinctive move is to argue that pornography may be regulated without scrutiny as to its "low value." Catharine MacKinnon gives a similar argument in *Only Words* (Harvard University Press, 1993), p. 184. She sees the viewer of pornographic pictures as in a sexual relationship with the models in those pictures. The women depicted really do the things that are documented in pictorial pornography. Men "experience this *being done* by watching it *being done*. What is real here is . . . that the materials . . . are part of a sex act" (p. 17).
2. I take no stand on whether strong content neutrality is necessary in the final determination of protection.
3. We are not dealing in science fiction. The real-time remote video link exists right now via computer and modem. See information on the Internet: *World Wide Web*, "Virtual Dreams," [http://www.virtualdreams.com/].
4. "Speech and 'Speech'—Obscenity and 'Obscenity': An exercise in the Interpretation of Constitutional Language," *Georgetown Law Journal* (1989): 923.
5. Schauer, *Free Speech* p. 182.
6. Cognitive content is sometimes defined as content that is either true or false. The criticism of Schauer is stronger if we allow him a somewhat broader use of the term.
7. See Schauer's unusually broad use of "intellect," which I avoid here, quoted in note 8.
8. "The emotive as well as the propositional or cognitive, is implicitly encompassed by the intellectual or communicative interpretation of the First Amendment" ("Speech and 'Speech,'" p. 923).
9. Schauer, *Free Speech*, p. 183.
10. Schauer, p. 923.
11. By "propositional," Schauer seems to mean what might be better called "cognitive." His is an imprecise use of the term since standard emotions are often propositional (even apart from whether they are cognitive). To fear that the sky will fall is to have a fear that has as its content the proposition, "the sky will fall." So propositional states are not properly contrasted with emotions. It is a separate question, and one much debated, whether cognition (belief, knowledge, reasoning) is properly contrasted with emotions, or whether instead many emotions are significantly cognitive. See, e.g., Philippa Foot, "Moral Beliefs," in *Virtues and Vices and Other Essays in Moral Philosophy* (University of California Press, 1978), originally published in *Proceedings of the Aristotelian Society* 59 [1958–59]; Donald Davidson, "Hume's Cognitive Theory of Pride," in *Essays on Actions and Events* (Oxford University Press, 1980, originally published in *Journal of Philosophy* 73 [1976]; and Martha Nussbaum, *Upheavals of Thought: A Theory of the Emotions* (forthcoming Cambridge University Press).
12. Schauer cites Finnis's defense of the distinction between reason and passion (Finnis, "Reason and Passion: The Constitutional Dialectic of Free Speech and Obscenity," 116 *University of Pennsylvania Law Review* 222 [1967] as one that his distinction parallels "to some extent" (Schauer, "Speech and 'Speech,'" p. 923 n. 146).
13. "Speech and 'Speech,'" p. 924.
14. "Speech and 'Speech,'" p. 924. Schauer claims to find this basic distinction in the Court's own reasoning, though his citations provide no support. He offers only three terms from *Ginzberg v. U.S.* None of these, "erotically arousing," "titillation," or "sexual stimulation," is a clear appeal to the physical. The Court could easily have named physiological

effects such as erection, or at least used some such term as "physical," "bodily," or "biological" if that had been its point.

15. Sunstein uses this term in "Pornography."

16. Judge Richard Posner proposes protecting nude dancing on the basis of its being art and usually representational in some way. (See *Miller v. City of South Bend*, U.S. Court of Appeals, Nos. 88-3006 and 88-3244 (7th Cir. 1990); Posner's concurring opinion; and *Sex and Reason* [Harvard University Press, 1992], pp. 363-64.) On my account, this often strained finding is not necessary in order to trigger First Amendment coverage.

17. When tennis is played before a large audience, it raises interesting questions for my analysis. Certainly sporting events can be controlled and used for expressive and ideological purpose, but so, perhaps, could anything (at least if we include successful and unsuccessful attempts).

18. Blackstone gives a brief history of licensing laws, *Commentaries on the Laws of England*, Vol. IV, p. 152, n. n (any edition).

19. Blackstone, *Commentaries on the Laws of England*, Vol. IV, p. 152 (any edition).

20. Letter #15, Feb. 4, 1720, Cato's Letters, Vol. I (Russell & Russell, 1969), p. 100.

21. Anthony Lewis, *Make No Law* (Vintage Books, 1991), p. 51.

22. Note that this mention of the "proceedings of government" is added to the previous general protection of the press as a second conclusion from the "right to freedom of speech, of writing and publishing their sentiments."

23. Resolutions of Maryland, April 28, 1788, *The Debates on the Constitution*, Part Two (Library of America, 1993), p. 555.

24. Resolutions of Virginia, June 1788. See *Debates*, p. 561 Same words in Resolutions of North Carolina, Aug. 2, 1788, *Debates*, p. 568.

25. Lewis, *Make No Law* p. 50.

26. Lewis, p. 50.

27. Hamilton associates liberty of the press with "newspapers" in ed. 84, 1788. But what he says doesn't limit it to this.

28. Powe, *The Fourth Estate*, p. 26.

29. To say that a certain freedom is a "bulwark of liberty" is ambiguous. A bulwark is a first line of defense, but also a leading edge. The freedom may be useful in protecting other liberties, but to call one liberty a bulwark of liberty may just be to say that it is typically the first liberty to go.

30. See Lewis, *Make No Law*, p. 55, on a cartoon of Washington as an ass.

31. An example of this approach is, C. Edwin Baker, *Human Liberty and Freedom of Speech* (Oxford University Press, 1989).

32. For example, the lectures at the \$100,000 Club (fund-raising banquet for George Bush) may not be properly regarded as published, even assuming anyone contributing \$100,000 was eligible to attend.

33. Neither of these—wide audience or public forum—has any necessary connection to the material's having content that is of public concern. See Schauer, "'Private' Speech and the 'Private' Forum: *Givhan v. Western Line School District*," 217 *Supreme Court Review* 217 (1979), for this three-way distinction.

34. David Cole usefully calls attention to the fact that while publication of expressive material usually heightens the presumption of protection in existing First Amendment law, the opposite is usually the case with sexual materials. There, publication is precisely what is objected to. I share Cole's concern that this is an indefensible double standard. See "Playing By Pornography's Rules: The Regulation of Sexual Expression," 143, no. 1, *University of Pennsylvania Law Review* 111 (Nov. 1994).

35. Sunstein, *Democracy and the Problem of Free Speech* (Free Press, 1993), pp. 154-59,

for elaboration of the point in the text. Also see the Supreme Court case, *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), arguing that even less-protected categories of speech are protected from certain regulations based on government disapproval of a message.

36. For some accounts of what is or has been available in Times Square, see *Village Voice*, collected articles under the head: "Sleazy Does It: Savoring Times Square Before Disney Takes Over," July 18, 1995.

37. I would be troubled if there were no other basis of protection and would count that against the present view.

38. Nicholson Baker, *Vox: A Novel* (Random House, 1992).