Taking Safety Seriously: Using Liberalism to Fight Pornography

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Introduction

In the law review literature on pornography, there is sometimes the depressing story that either liberalism is limply unhelpful to combat pornography or, in its role as philosophical handmaiden, liberalism happily does pornography’s bidding. Liberalism as referred to here is not meant as shorthand for the political ideals of the Democratic Party. Rather, it is meant to serve as an emblem for a loose collection of commitments to free speech, legal equality, toleration, and limited government. But the description of liberalism that pervades the law review literature on pornography seems exaggerated and far from inevitable.

1. See infra notes 33–36 and accompanying text.
2. The most exemplary advocate of this form of liberalism in our contemporary times is likely John Rawls. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999); JOHN RAWLS, POLITICAL LIBERALISM (1996) [hereinafter POLITICAL LIBERALISM].
Liberalism, as a jurisprudential principle, need not be pornography's indifferent observer or spineless sycophant; liberalism can be used to fight pornography. In this Article, I propose to illuminate what appears to me the most essential aspect of liberalism in its inviolable dedication to peace and safety. By drawing upon the work of the early liberals, I argue that liberalism's most basic ethos is conceptually incompatible with pornography, as the latter celebrates an unjustified form of violence as its own end.

In Part I of the Article, I briefly define my conception of pornography. In Part II, I argue that the conventional criticism of pornography as conduct, and not speech, is unpersuasive. I then explain in Part III why the familiar argument against pornography as non-political speech is also ineffective. As an alternative, I introduce in Part IV the initial components of my liberal critique of pornography. I explain how liberalism, despite its contemporary view as a collection of abstractions about individualism and autonomy, finds its most basic and important commitment in the peace and safety of those in civil society. To develop this argument, I look to liberalism's origins in Hobbes, Mill, Locke, and Montesquieu. In Part V, I show that the existing case law of the First Amendment is informed by liberalism's abiding concern for peace and safety. Peace and safety, however, must be balanced against the First Amendment's interest in protecting opportunities for people to arrive at some truth by being exposed to a diversity of speech. However, I show in Part VI that conventional arguments to support speech to further truth cannot be effectively applied to pornography, for pornography's "truth" of rape, torture, and murder is a threat to a liberal society.

I anticipate that some will discount this argument as an example of "viewpoint discrimination," the worst form of discrimination in First Amendment jurisprudence. I respond in Part VII that the charge of viewpoint discrimination is less a valid objection to a legal argument than it is recognition of an unavoidable and constituent property within any legal argument that evokes the First Amendment as a means to challenge a regulation or to propose an adjudicative principle. To illustrate my point, I show the conceptual incoherence of Judge Frank Easterbrook's famous charge of viewpoint discrimination against the pornography statute endorsed by Andrea Dworkin and Catharine MacKinnon. Judge Easterbrook's opinion, I argue, does not bypass the ostensive viewpoint discrimination that he condemns in Dworkin and MacKinnon. Rather, his attack is itself defined by a form of viewpoint discrimination, and, thus, he himself implies its logical inevitability. What is important, then, is not whether a legal proposal is an instance
of viewpoint discrimination, but whether the viewpoint discrimination inherent in the proposal is justified in light of some higher principle.

I.Pornography Defined

By “pornography,” I do not mean to include any speech that contains explicit or inexplicit sexual material. Rather, I mean a particular sort of sexual material that is defined by Andrea Dworkin and Catharine MacKinnon’s proposed statute for Indianapolis, which was regretfully struck down in 1985. According to Dworkin and MacKinnon, pornography is “the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes [presenting women, men, children, or transsexuals]:”

1) ... as sexual objects who enjoy pain or humiliation; or
2) ... as sexual objects who experience sexual pleasure in being raped; or
3) ... as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
4) ... as being penetrated by objects or animals; or
5) ... in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or
6) ... as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.

This definition of pornography was rejected by Easterbrook in American Booksellers Ass’n v. Hudnut. I will argue later why his justifications were flawed but, for now, I want to use Dworkin and MacKinnon’s definition in its operative form.

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II. Objection I: Pornography Is Conduct

Some prominent scholars have argued that certain violent pornography deserves no constitutional protection, for it is not speech at all but only conduct. Here, unfortunately, what they consider to be speech is similar to what Jürgen Habermas's theory of discourse ethics idealizes it to be.\(^6\) That is, they tend to idealize speech as the kind of thing one finds in a first-year graduate school seminar on political theory where discussants solemnly offer ideas that are rational, meditative, analytic, and evidentially sound.\(^7\) For example, Cass Sunstein remarks that pornography is not really speech because “the ‘message’ of pornography is communicated indirectly and not through rational persuasion.”\(^8\) Or consider Frederick Schauer’s argument that pornography should receive no protection because it is “designed to produce a purely physical effect.”\(^9\) On the other end of the political spectrum, one may look to John Finnis, the natural law philosopher and conservative Catholic, who remarks that pornography “pertains, not to the realm of ideas, reason, intellectual content and truth-seeking, but to the realm of passion, desires, cravings and titillation.”\(^10\) And of course Catharine MacKinnon, the high-profile critic of pornography, argues that pornography is not

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\(^6\) In saying this, however, I do not mean to disparage Habermas's laudable aspiration to outline ethics by which diverse parties can agree on dialogue. For representative scholarship, see 1 Jürgen Habermas, The Theory of Communicative Action: Reason and the Rationalization of Society (Thomas McCarthy trans., Beacon Press 1984) (1981); 2 Jürgen Habermas, The Theory of Communicative Action: Lifeworld and System (Thomas McCarthy trans., Beacon Press 1987) (1981); Jürgen Habermas, Justification and Application: Remarks on Discourse Ethics (Ciaran P. Cronin trans., 1995); Jürgen Habermas, The Structural Transformation of the Public Sphere (Thomas Burger trans., 2000).

\(^7\) They thus tend to diminish the value of those expressions which are emotional, taunting, empathic and more. See Don Herzog, Poisoning the Minds of the Lower Orders 150–68 (1998) (arguing that public debate is and should permit room for passion, self-interest, and rhetoric, not merely stale impartial logic).


speech, for it “is largely unconscious and works as primitive conditioning, with pictures and words as sexual stimuli.”

For her, “[p]ornography consumers are not consuming an idea any more than eating a loaf of bread or consuming the ideas on its wrapper or the ideas in its recipe.” Pornography may induce sexual arousal, but MacKinnon rejects the notion that such effects result from ideas: “Try arguing with a[n] orgasm sometime. You will find you are no match for the sexual access and power the materials provide.”

I fear that these references to speech as rational and intelligent tend to suggest, in spite of their advocates’ democratic credentials, the air of the patrician, and, for legal purposes, they tend to exclude categories of speech that seem meaningful to many members of society (including, I suspect, some of pornography’s critics). While perhaps the furthest cultural analogue to pornography, religion would appear to be another form of speech that is not necessarily amenable to the qualifications for speech that pornography’s critics have enlisted. Some religions, and perhaps religion generally, are (as Sunstein says of pornography) “communicated indirectly;” religious views find expression through parables, sermons, faith and revelation in dreams, and not necessarily through “rational persuasion.”

Consider once more this statement by MacKinnon: “Try arguing with a[n] orgasm sometime. You will find you are no match for the sexual access and power the materials provide.” But something similar may be said for religious faith. One does not and often cannot “argue” for religion in the way that argument is idealized by MacKinnon, as religious faith is founded on an authority that is self-referential, mystical, and inherently resistant to secular-minded standards of evidence and logic. To paraphrase MacKinnon, you, the secularist, will find you are no match for the divine access and

12. Id.
13. Id. at 17.
14. MacKinnon argues that she is not opposed to emotional pleas but the logic of her arguments would tend to suggest otherwise. See id. at 16.
15. Id. at 17.
power that religious materials provide. Indeed, the very reasons that someone like John Finnis marshals to denounce pornography seem uncannily descriptive of the Christianity which he venerates, for Christianity is replete with biblical stories of those dispositions that Finnis associates with pornography in “passion, desire, and craving” by people lost amidst earthly pleasures as well as those in search of salvation. That the divine objects of such psychological operations sometimes differ dramatically from pornography’s carnal depictions is beside the point, since what Finnis formally critiques in pornography is not pornography per se but its shoddy means of communication.

Also problematic, when Schauer ridicules pornography for producing a “purely physical effect,” I find myself wondering what this can mean. Stated differently, what exactly would be a “purely mental effect?” The binary, I think, is less turgid than torpid, something that I can illustrate with the following: When Americans heard the National Anthem on the first anniversary of September 11, some cried (physically manifesting tears), others cheered (physically manifesting applause), and still others, angry at the terrorists or the federal government which potentially bungled an opportunity to preempt their attacks, were filled with outrage (physically manifesting clenched teeth and fists). Are they reacting in a physical or mental way? It would seem odd to insist that they would receive greater First Amendment protection if they would forego these physical manifestations for silent ruminations accompanied by blank stares. Or, think of another example: Would Johann Strauss receive less First Amendment protection if people were inclined to dance merrily to his waltzes but more if they merely sit and deliberate somberly about the alternative to a 3/4 time measure? Or, would a hug or a kiss from a father to his preschool daughter be less communicative than a coherent and well-supported five paragraph letter expressing the same affection? Or, let me return to religion: Would a painting of Mother

17. Recall here that the Bible begins with a story defined by what Professor Finnis calls “passion, desire, and craving.” Indeed, in Eve, Woman becomes gendered as wife, mother, and object through an act that is rife with the tropes of sexual initiation. Notwithstanding God’s warning that she will die if she even touches the fruit of knowledge, Eve (although at this point, she technically has no name and is just called “woman”) finds herself consumed with temptation by the serpent to eat of the fruit because she saw it as “good for food and pleasing to the eye, and also desirable for gaining wisdom.” Genesis 3:2-6 (New Int’l Version). She also gave the fruit to Adam, and after eating it, they acquired God’s knowledge in good and evil and came to know with embarrassment of their nakedness as a sexualized condition. Genesis 3:6-7 (New Int’l Version). As punishment for her indulgence, God ascribes to her the properties of her gender: the gift of pain during childbirth and the enmity and violent abuse of her husband. Acts 3:15-16 (New Int’l Version).

18. Schauer, Speech, supra note 9, at 922.
Mary receive less protection if it inspires its admirers to weep passionately but more protection if its admirers showed no physical reactions whatsoever and instead quietly reflected on the subtle play of light and shadow in the painting’s foreground?

These examples suggest, in disquieting terms, that pornography’s critics are troubled less by pornography per se than the physical exhibition of emotion. There is also an intuitively backward logic to their definition: They reward speech that is not especially effective as measured by its failure to impel action (they applaud speech that commends itself to subsequent review, to further dialogue and negotiation, to more committee meetings) while disparaging as conduct speech that is effective (speech that so provokes its audience as to move them physically to tears, laughter, rage, and frequently in the case of pornography, ecstasy). Pornography, I would argue, is most definitely speech because it communicates a message that produces powerful effects on its audience.

That is a point that is begrudgingly acknowledged by pornography’s critics. MacKinnon argues that pornography “is masturbation material” and hence is not speech. She cites for support Aristotle’s observation that “‘it is impossible to think about anything while absorbed [in the pleasures of sex].’” She notes, too, that the “Yiddish equivalent translates roughly as ‘a stiff prick turns the mind to shit.’” But to summon these epigrams for the proposition that pornography is not speech is questionable. For they can be marshaled for precisely the opposite conclusion. If pornography were merely conduct and lacked all communicative properties, it could not exercise such powers of emulation or arousal in its audience. It could not so distract Aristotle or so turn a Yiddish-speaking man’s ‘mind to shit.’ Far from denying pornography First Amendment protection, such powerful effects on the audience would seem to be a potential reason for bestowing it protection.

III. Objection II: Pornography Is Not Political Speech

Pornography’s critics argue that if pornography must be considered speech, it certainly cannot be considered political speech, which is traditionally afforded the highest protection by the Supreme Court. Rather,

20. Id.
they argue, pornography is low-value speech that deserves correspondingly low-value protection.\footnote{21}

In making this argument, pornography's critics invoke the Supreme Court's practice of affording different degrees of protection to speech based on its content. Some forms of speech—commercial speech, profanity, and libel, for instance—are considered "low value" and hence receive correspondingly low protection, while political speech is ranked highest and thus considered deserving of highest protection.\footnote{22} Some justices have offered support for this view. Writing for a plurality, Justice Stevens explained in \textit{Young v. American Mini-Theatres}:\footnote{23}

A remark attributed to Voltaire characterizes our zealous adherence to the principle that the government may not tell the citizen what he may or may not say. Referring to a suggestion that the violent overthrow of tyranny might be legitimate, he said: "I disapprove of what you say, but I will defend to the death your right to say it." The essence of that comment has been repeated time after time in our decisions invalidating attempts by the government to impose selective controls upon the dissemination of ideas.\footnote{24}

However, Justice Stevens refused to provide similar protection to erotic speech:

\begin{itemize}
  \item 23. 427 U.S. 50 (1976).
  \item 24. \textit{Id.} at 63 (citation omitted).
\end{itemize}
Even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society’s interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire’s immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen’s right to see “Specified Sexual Activities” exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.

In *Barnes v. Glen Theatre, Inc.*, the plurality opinion similarly observed “that nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so.” From this distinction, one might argue that pornography hardly qualifies as political speech and thus deserves, at most, low-value protection.

But it is dubious to suggest that speech which is erotic in content lacks the requisite properties to merit the status of political speech. There is a fairly straightforward criticism available in the observation that any legislative bill that regulates sexuality or gender is passed (or not) partly because of certain ideas regarding sexuality or gender. And such ideas are partly influenced by, or at least certainly reflected in, speech that is erotic. Thus, one can argue that erotic speech can inform or reflect how we view men’s and women’s gender roles, and that such views can affect how we think about statutes concerning sexual harassment, gender discrimination, same-sex education, rape statutes, and gender-based affirmative action. Consider, too, how one strand of MacKinnon’s criticism of pornography relies on the claim that pornography can shape our very ideas of gender: “Gender is sexual. Pornography constitutes the meaning of that sexuality. Men treat women as whom they see women as being. Pornography constructs who

27. *Id.* at 566.
that is. Men's power over women means that the way men see women defines who women can be. Pornography is that way.\textsuperscript{28}

Similarly, Andrea Dworkin writes that the "major theme of pornography as a genre is male power."\textsuperscript{29} If that is true (and it is difficult to see how pornography, at least the sort condemned by Dworkin and MacKinnon, is not), then pornography would also seem to reflect and reinforce notions of gender roles and, therefore, reflect and reinforce a myriad of political issues that are informed by issues of gender roles. Indeed, the line between political speech and pornography becomes paradoxically blurrier the more that feminists insist that it is dangerous and animated by misogyny. MacKinnon attempts to reorient the reader to treat pornography as an expression of male domination but, in doing so, she also awkwardly characterizes pornography as either a reflection or reinforcement of a certain form of "politics," and thus, by implication, as a form of political speech. Consider her litany of descriptions: "pornography is a political practice,"\textsuperscript{30} "[p]ornography identifies a political practice that is predicated on power and powerlessness—a practice that is, in fact, legally protected,"\textsuperscript{31} and "[p]ornography, in the feminist view, is a form of forced sex, a practice of sexual politics, an institution of gender inequality."\textsuperscript{32} Given these deliberate descriptions of pornography as political in its meaning, pornography's critics encounter difficulty in also condemning it as undeserving of the status of political speech in the law.

IV. LIBERALISM'S COMMITMENT TO PEACE AND SAFETY

Thus far, I have identified two broad objections with the current content-based criticisms of pornography: They fail to show that pornography is not speech, and they fail to show that it is non-political speech. There is a way, however, to overcome the problems that attend both objections. I want to identify and develop a liberal theory of pornography which denies pornography, as I have defined that term, constitutional protection because it threatens liberalism's most important philosophical dedication in peace and safety. Specifically, my argument will be that pornography should receive no constitutional protection because it approvingly depicts forms of violence which are hostile to liberalism's most basic goal of people's peace and safety, and, to that extent, tends to lack

\textsuperscript{28} Catharine A. MacKinnon, Toward a Feminist Theory of the State, 197 (1989).
\textsuperscript{30} MacKinnon, supra note 28, at 196 (emphasis added).
\textsuperscript{31} Id. (emphasis added).
\textsuperscript{32} Id. at 197 (emphasis added).
the capacity to contribute to some "truth." In this way, my aim to define pornography as undeserving of First Amendment protection reflects the structure of those conventional legal arguments against granting constitutional protection to obscenity and fighting words. The Court has denied constitutional protection to these latter categories because they, too, present some harm to society and lack redeeming values for public discourse.

In developing my thesis, I am bound to meet resistance from some critics of liberalism who will say that liberalism cannot possibly be conscripted to deny pornography First Amendment protection. If anything, they will say that liberalism serves as pornography's philosophical accomplice by refusing to do anything. The indictment that liberalism serves as pornography's silent handmaiden is surprisingly prevalent in the law review literature. Sometimes liberalism is portrayed as gleefully optimistic about men's propensity for mature disengagement from pornography's violent misogyny:

Liberalism assumes that consumers of pornography distinguish between reality and pornographic fantasy and will not be moved to try a particular antisocial act merely because they have seen the act represented in pornography. The feminist critique directly contradicts this liberal assumption. 33

So, too, the self-described radical feminist MacKinnon indicts what she perceives as liberalism's socially irresponsible preoccupation with free speech:

The liberal theory underlying First Amendment law further believes that free speech, including pornography, helps discover


  Underlying the liberal opposition to the feminist pornography proposal may be more than just discomfort with degree. Liberals, generally, have not viewed the MacKinnon/Dworkin ordinance as a step in the right direction that simply goes too far. Rather, they have attacked it outright. This may be because on the topics of sexuality and pornography, feminists and liberals begin their thinking from strongly divergent assumptions.

  Feminists see depictions of sexuality, if not sexuality itself, as dominated by inequality and politics. Liberals begin with the idea that sexuality and depictions of it are essentially liberating, healthy, and probably apolitical.

truth. Censorship, in its view, restricts society to partial truths…

To liberals, speech must never be sacrificed for other social goals. But liberalism has never understood that free speech of men silences the free speech of women.4

Other times liberalism is described as single-mindedly numb to the welfare of women:

Legal liberalism views pornography in the context of freedom of speech and individual autonomy, whereas radical feminism sees pornography as dehumanizing traffic in women that sets the standard for mistreatment of women, engendering "rape, sexual abuse of children, battery, forced prostitution, and sexual murder."… The attempts of radical feminism to restrict pornography have fallen victim to the dominant forces of legal liberalism that pervade our legal system's approach to speech issues.35

To this picture of a liberalism obsessed with individual autonomy, there is also the paradoxical charge that liberalism fails to intervene against pornography because it has no idea what it wants to do:

[L]iberal legalism is not persuasive on the legal and ethical issues surrounding the commodification of women's bodies by pornography and prostitution. This results from liberalism's uncertainty about which constitutional values are normatively superior: rational personhood values such as free speech and moral agnosticism, or embodiment values such as bodily inviolability and non-commodification.36

What becomes lost in these criticisms is how liberalism can contribute to peace and safety generally, including the peace and safety of

women who, as a class, are potentially threatened by pornography. At its heart, I argue, liberalism sought to establish peace and safety as the most important goals for civil society—hardly self-evident ends to many who hated liberalism when it was nascent (or, even now, if one cares to look around most places in the world, with its civil wars, ethnic genocide, and violent religious fanaticism). The primary purpose of a liberal society has been to maintain peace and to protect the personal safety of its members.\(^37\) It is an aspiration that stems significantly from the horrors experienced in early modern Europe by concerted attempts to cultivate virtue, or more precisely, some religious fanatics’ ideal of virtue, which has engendered intolerance, paranoia, torture, and civil war.\(^38\) As the political theorist Judith Shklar aptly notes, “[t]his is a liberalism that was born out of the cruelties of the religious civil wars, which forever rendered the claims of Christian charity a rebuke to all religious institutions and parties. If the faith was to survive at all, it would do so privately.”\(^39\) Hence, we live in a “liberalism of fear, which makes cruelty the first vice.”\(^40\) To be sure, Christianity and other religions also stress the virtue of rejecting physical cruelty, but “to put it first does place one irrevocably outside the sphere of revealed religion.”\(^41\)

This aspiration for a peaceful and safe civil society informs my arguments regarding pornography legislation. Common objections to pornography legislation become unpersuasive when seen in light of liberalism’s most fundamental commitment to peace and safety. Specifically, I tackle objections from what I call truth and viewpoint discrimination. I argue that the conventional legal categories of “speech” or “political speech,” while not in exclusive furtherance of liberalism’s most basic enterprise, should be significantly informed by it rather than trying to assume an ontological existence independent of the political structure in which they operate.


\(^{38}\) See Shklar, supra note 37.

\(^{39}\) Id. at 5.

\(^{40}\) Id. at 8–9.

\(^{41}\) Id. at 9. Shklar also remarks:

When [physical cruelty] is marked as the supreme evil it is judged so in and of itself, and not because it signifies a denial of God or any other higher norm. It is a judgment made from within the world in which cruelty occurs as part of our normal private life and our daily public practices. By putting it unconditionally first, with nothing above us to excuse or to forgive acts of cruelty, one closes off any appeal to any order other than that of actuality.

\textit{Id.}
No more emphatic case can be made for liberalism’s preoccupation with peace and safety than Thomas Hobbes’s grand account in *Leviathan*. By turning first to a proto-liberal in Hobbes, I can illustrate my case that liberalism’s political origins begin with a philosophical disposition that favors societal peace and the safety of its members. Hobbes’s case for a civil society dedicated to peace and safety hinges on juxtaposing a state of nature where he imagines what life would look like if devoid of a stable sovereign who enjoys the absolute authorization of his subjects. The state of nature is premised on the view that “[n]ature hath made men so equal in the faculties of body and mind” such that “the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others that are in the same danger with himself.” To this equality of ability in natural man is a deeply unsocial (and some may say antisocial) disposition that precluded trust and mutual accommodation; men fought for “competition,” “diffidence” and “glory.” Therefore, in the state of nature, Hobbes tells us, “without a common power to keep them all in awe, they are in that condition which is called war, and such war as is of every man against every man.” And, “worst of all,” the state of nature is characterized by “continual fear and danger of violent death, and the life of man, solitary, poor, nasty, brutish, and short.”

Because of the fear of violent death, men in the state of nature derive “law[s] of nature,” with a law of nature understood as “a precept or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life or taketh away the means of preserving the same, and to omit that by which he thinketh it may be best preserved.” A law of nature thus is not a “law” in the conventional

45. Id. at 76.
46. Id.
47. Id.
48. Id. at 79.
sense but “conclusions or theorems concerning what conduceth to the conservation and defence of themselves.” 49 The first and most fundamental law of nature, for Hobbes, is to seek peace:

And because the condition of man . . . is a condition of war of everyone against everyone (in which case everyone is governed by his own reason and there is nothing he can make use of that may not be a help unto him in preserving his life against his enemies), it followeth that in such a condition every man has a right to everything, even to one another's body. And therefore, as long as this natural right of every man to everything endureth, there can be no security to any man (how strong or wise soever he be) of living out the time which nature ordinarily alloweth men to live. And consequently it is a precept, or general rule, or reason that every man ought to endeavour peace, as far as he has hope of obtaining it, and when he cannot obtain it, that he may seek and use all helps and advantages of war. The first branch of which rule containeth the first and fundamental law of nature, which is to seek peace, and follow it. 50

This first law of nature functionally determines the content of Hobbes's other laws of nature. 51 Accordingly, the second law of nature commands that “a man be willing, when others are so too, as far-forth as for peace and defence of himself he shall think it necessary, to lay down this right to all things, and be contented with so much liberty against other men, as he would allow other men against himself.” 52 Under the third law of nature, “we are obliged to transfer to another such rights as, being retained, hinder the peace of mankind.” 53 And because men form a covenant by which such rights are transferred, Hobbes states that the third law of nature requires that “men perform their covenants made, without

49. Id. at 100.
50. Id. at 80 (first and second emphases removed).
51. Hobbes writes: “the laws of nature are immutable and eternal; for injustice, ingratitude, arrogance, pride, iniquity, acception of persons, and the rest, can never be made lawful. For it can never be that war shall preserve life, and peace destroy it.” Id. at 99–100. Hobbes also explains, “the laws of nature dictating peace for a means of the conservation of men in multitudes; and which only concern the doctrine of civil society. There be other things tending to the destruction of particular men (as drunkenness and all other parts of intemperance), which may therefore also be reckoned amongst those things which the law of nature hath forbidden; but are not necessary to be mentioned, nor are pertinent enough to this place.” Id. at 99.
52. Id. at 80 (emphasis and footnote removed).
53. Id. at 89.
which covenants are in vain, and but empty words, and the right of all men to all things remaining, we are still in the condition of war."

Hobbes's obsession with peace and safety also inform his curious definitions of terms familiar to us. In his fourth law of nature, he urges men to show gratitude to each other: "A man which receiveth benefit from another of mere grace endeavour that he which giveth it have no reasonable cause to repent him of his good will." The reason for doing so is not primarily to be nice, but to bolster those relations conducive to peace and safety:

For no man giveth but with intention of good to himself, because gift is voluntary, and of all voluntary acts the object is to every man his own good; of which, if men see they shall be frustrated, there will be no beginning of benevolence or trust; nor, consequently, of mutual help, nor of reconciliation of one man to another; and therefore they are to remain still in the condition of war, which is contrary to the first and fundamental law of nature, which commandeth men to seek peace.

Like the injunction to show gratitude, the injunction to accommodate others is motivated by Hobbes's abiding interest in peace:

A fifth law of nature is complaisance, that is to say, *that every man strive to accommodate himself to the rest*. . . . For as that stone which . . . takes more room from others than itself fills, and (for the hardness) cannot be easily made plain, and thereby hindereth the building, is by the builders cast away as unprofitable and troublesome, so also a man that (by asperity of nature) will strive to retain those things which to himself are superfluous and to others necessary, and (for the stubbornness of his passions) cannot be corrected, is to be left or cast out of society as cumbersome thereunto.

There are fourteen other laws of nature, and all of them individually and collectively reinforce the first and fundamental law of nature to seek peace.

54. *Id.* (emphasis removed).
55. *Id.* at 95 (emphasis removed).
56. *Id.* (emphasis removed).
57. *Id.*
58. Those laws of nature which are most obviously conducive to peace are as follows:

The sixth law of nature "is this *that upon caution of the future time, a man ought to pardon the offences past of them that, repenting, desire it*. For pardon is nothing but
At this point, the reader may wonder whether I am oversimplifying liberalism as a reductive Hobbesian obsession with peace and safety. Is not liberalism, you might ask, also about individual freedom and toleration? It is, but in the next section, I show why these two concepts can be underwritten by and conducive to peace and safety, rather than simply compete as independent categories.

granting of peace, which (though granted to them that persevere in their hostility be not peace but fear, yet) not granted to them that give caution of the future time is sign of an aversion to peace; and therefore contrary to the law of nature.” Id. at 96.

The seventh law of nature “is that in revenges (that is, retribution of evil for evil) men look not at the greatness of the evil past, but the greatness of the good to follow... Revenge without respect to the example and profit to come is a triumph, or glorying, in the hurt of another, tending to no end... and glorying to no end is vain-glory, and contrary to reason; and to hurt without reason tendeth to the introduction of war, which is against the law of nature, and is commonly styled by the name of cruelty.” Id.

The eighth law of nature is that “no man by deed, word, countenance, or gesture, declare hatred or contempt of another,” for “all signs of hatred or contempt provoke to fight, insomuch as most men choose rather to hazard their life than not to be revenged.” Id.

The ninth law of nature is that “every man acknowledge other for his equal by nature,” for invidious aspersions against another’s lack of talent or ability tends to cause fights. Id. at 97.

The tenth law of nature is that “at the entrance into conditions of peace, no man require to reserve to himself any right which he is not content should be reserved to every one of the rest,” for this threatens societal peace. Id.

The eleventh law of nature is that “if a man be trusted to judge between man and man, it is a precept of the law of nature that he deal equally between them. For without that, the controversies of men cannot be determined but by war.” Id.

The twelfth law of nature is that “such things as cannot be divided be enjoyed in common, if it can be.... For otherwise the distribution is unequal, and contrary to equity,” and thus tends to undermine peace. Id.

The fifteenth law of nature is that “all men that mediate peace be allowed safe conduct. For the law that commandeth peace, as the end, commandeth intercession, as the means; and to intercession the means is safe conduct.” Id. at 98.

The sixteenth law of nature is that “they that are at controversy, submit their right to the judgment of an arbitrator,” for “unless the parties to the question covenant mutually to stand to the sentence of another, they are as far from peace as ever.” Id.

The seventeenth law of nature is that “no man is a fit arbitrator in his own cause, and if he were never so fit, yet (equity allowing to each party equal benefit) if one be admitted to be judge, the other is to be admitted also; and so the controversy, that is, the cause of war, remains, against the law of nature.” Id.

The eighteenth law of nature is that “no man in any cause ought to be received for arbitrator, to whom greater profit, or honour, or pleasure apparently ariseth out of the victory of one party, than of the other; for he hath taken... a bribe; and no man can be obliged to trust him.” Id. The justification for this law of nature is “the same reason no man in any cause ought to be received for arbitrator.” Id.
B. Mill and Locke

A closer inspection of liberalism would reveal that toleration, a cornerstone of liberalism, is itself dependent upon the more basic value of peace and safety. John Stuart Mill’s plea for toleration provides a useful illustration. Mill conventionally exists in the imagination of the Supreme Court as the proto-libertarian who bravely embraced the pursuit of truth, not the banalities of peace and safety, as a worthy liberal goal. But this would be to ignore Mill’s harm principle which forms a constitutive part of his account of toleration. He states:

[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.  

Like Hobbes, then, Mill too is conspicuously concerned with physical harm. Specifically, one can argue that the liberty extolled by Mill is itself underwritten by a dedication to protect people’s peace and safety regardless of their expressed views. So Shklar observes that “[c]ruelty, to begin with, is often utterly intolerable for liberals, because fear destroys freedom.” Without fear that others will physically punish what they regard as burning impieties, one may deliver provocative and offensive opinions or embark on what Mill called “experiments in living” by exploring alternative lifestyles. Here,
Shklar’s remark is telling. She argues that liberalism does not pose a tension between “classical virtue” and “liberal self-indulgence” but, between cruel military and moral repression and violence, and a self-restraining tolerance that fences in the powerful to protect the freedom and safety of every citizen, old or young, male or female, black or white. Far from being an amoral free-for-all, liberalism is, in fact, extremely difficult and constraining, far too much so for those who cannot endure contradiction, complexity, diversity, and the risks of freedom.\footnote{Shklar, supra note 37, at 5.}

But toleration was not simply underwritten by liberalism’s commitment to peace and safety; the former also helped to underwrite the latter. The most explicit version of this argument for toleration comes from John Locke. Locke’s statements constitute arguably the single most important work on liberalism’s understanding of toleration, certainly up to his own time. Like Hobbes, Locke attempts to establish peace and safety among members of civil society for he too was living in politically violent times.\footnote{Smith, supra note 37, at 18.} He presents a law of nature whose first object is to “will the Peace and Preservation of all Mankind. . . .”\footnote{John Locke, Two Treatises of Government (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (emphasis removed). The state of nature has a “Law of Nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions.” Id.} However, whereas Hobbes proposed the creation of a sovereign with nearly absolute authorization from his subjects to do whatever he thinks necessary for peace and safety, Locke argues that to establish peace and safety the sovereign must tolerate dissenters and those who subscribe to competing cultural beliefs. Locke observes:

The magistrate is afraid of other Churches, but not of his own; because he is kind and favourable to the one, but severe and cruel to the other. . . . Let him turn the Tables: Or let those Dissenters enjoy but the same Privileges in Civils as his other Subjects, and he will quickly find that these Religious Meetings will be no longer dangerous. For if men enter into Seditious Conspiracies, ‘tis not Religion that inspires them to it in their Meetings; but their Sufferings and Oppressions that make them willing to ease themselves. Just and moderate Governments are
every where quiet, every where safe. But Oppression raises Ferments, and makes men struggle to cast off an uneasie and tyrannical Yoke.

Locke concludes succinctly that "some enter into Company for Trade and Profit: Others, for want of Business. . . . But there is one only thing which gathers People into Seditious Commotions, and that is Oppression." Locke tried to establish toleration by inserting a dichotomy between the religious sphere of faith and the civil sphere of government, something that appears to us living three hundred years later as probably intuitively right and finding general expression in the First Amendment's religion clauses, although the separation was hardly considered obvious by Locke's contemporaries. He announces that his purpose is to "distinguish exactly the Business of Civil Government from that of Religion, and to settle the just Bounds that lie between the one and the other," for if "this be not done, there can be no end put to the Controversies that will be always arising, between those that have, or at least pretend to have, on the one side, a Concernment for the Interest of Mens Souls, and on the other side, a Care of the Commonwealth." From this premise, Locke begins to elaborate on his general point that "the care of Souls is not committed to the Civil Magistrate, any more than to other Men." But the civil magistrate is entitled to regulate "civil interests" which Locke defines as those pertaining to "Life, Liberty, Health, and Indolency of Body; and the Possession of outward things, such as Money, Lands, Houses, Furniture, and the like." By keeping separate these two spheres, Locke hoped to create a condition of toleration that would preempt conflicts among religionists and thus benefit the cause of peace and safety.

Rogers Smith argues that Locke never insisted on peace and safety as overriding goals. Smith argues instead the purpose of government for Locke is to protect men's property and that failure to do so would justify

68. Id.
69. See HERZOG, supra note 43, at 162–81. Liberalism's desire to dichotomize contexts into public and private is not exclusive to Locke, of course. See SHKLAR, supra note 37, at 5: "This is a liberalism that was born out of the cruelties of the religious civil wars, which forever rendered the claims of Christian charity a rebuke to all religious institutions and parties. If the faith was to survive at all, it would do so privately." See also RAWLS, POLITICAL LIBERALISM, supra note 2, at xxvi–xxix.
70. LOCKE, supra note 67, at 26.
71. Id.
72. Id.
revolution, and hence justify violence. But that reading requires some qualification, for Locke defines property broadly, as including one’s body and therefore the right to property also includes a right to peace and safety in one’s person. Furthermore, Locke seems unable or unwilling to imagine a situation in which government would be protective of men’s bodies but not their property; if government is not protective of the latter, Locke appears to believe that it will hardly care to protect the former, since protection for both derives from an absence of a rule of law which places formal limits on the government. The desire for peace and safety is, therefore, more consonant with the desire for property than might first appear in Locke’s arguments.

But while Locke argued for the division of religious and governmental spheres, how does an internal arrangement of government itself affect toleration and its relationship to peace and safety in a liberal society? I turn to that question next in my discussion of Montesquieu.

C. Montesquieu

Montesquieu, the liberal cited most often in the Federalist Papers, also placed a premium on peace and safety. He begins his argument by stipulating that there are “relations of fairness prior to the positive law that establishes them . . . .” So, for instance, “if there were intelligent beings that had received some kindness from another being, they ought to be grateful for it . . . .” Montesquieu seeks to derive these “relations of fairness” by considering “man before the establishment of societies” and the “laws he would receive in such a state will be the laws of nature.” Similar to Hobbes and to a lesser extent Locke, Montesquieu describes a state of nature characterized by a fear of violent death. He states that man in the state of nature:

would think of the preservation of his being before seeking the origin of his being. Such a man would at first feel only his weakness; his timidity would be extreme: and as for evidence,

74. Locke writes that “every Man has a Property in his own Person. This no Body has any Right to but himself.” Locke, supra note 66, at 287.
75. It is worth considering here Locke’s discussion of slavery. Id. at 284–85.
77. Id. at 4.
78. Id. at 4, 6.
if it is needed on this point, savages have been found in forests; everything makes them tremble, everything makes them flee.  

Given this natural fear, Montesquieu believes that men in the state of nature “would not seek to attack one another,” and would infer that “peace would be the first natural law.”  

In saying this, he differs from Hobbes who argues that man is not naturally fearful but acquires such fear by having confronted or contemplated the prospect of violent death.  

Montesquieu also differs from Hobbes in suggesting that the “state of war” is not coexistent with the state of nature but begins in civil society: “As soon as men are in society, they lose their feeling of weakness; the equality that was among them ceases, and the state of war begins.”  

What displaces men’s initial fear is an ambition borne of confidence in one’s individual abilities such that “individuals within each society begin to feel their strength; they seek to turn their favor [sic] the principal advantages of this society, which brings about a state of war among them.”  

This state of war “bring[s] about the establishment of laws among men.”  

But the character and purpose of these laws are not the same for all peoples.  

While Montesquieu says that expansion “was the purpose of Rome; war, that of Lacedaemonia . . . commerce, that of Marseilles,” there is “one nation in the world whose constitution has political liberty for its direct purpose.”  

Here, Montesquieu had in mind England, but what he says of its constitution could just as easily apply to our own American constitution. Montesquieu illustrates how liberalism can conceive “political liberty” as intimately connected to peace and safety.  

“Political liberty in a citizen is that tranquility of spirit which comes from the opinion each one has of his security, and in order for him to have this liberty the government must be such that one citizen cannot fear another citizen.”  

The separation of governmental powers is, for

79. Id. at 6.  
80. Id.  
81. Id.  
82. Id. at 7.  
83. Id.  
84. Id.  
85. Montesquieu writes: “Laws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another.” Id. at 8.  
86. Id. at 156.  
87. Id.  
88. Id. at 156–57.  
89. Id. at 157.
Montesquieu, its most celebrated proponent, a means to prevent the fear on the part of citizens arising from threats to their peace and safety:

When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.

Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor.  

Montesquieu observes how in “most kingdoms in Europe, the government is moderate because the prince, who has the first two powers, leaves the exercise of the third to his subjects,” but in the Italian republics, where the three powers are united, “to maintain itself, the government needs means as violent as in the government of the Turks; witness the state inquisitors and the lion’s maw into which an informer can, at any moment, throw his note of accusation.” Montesquieu continues that, in these republics, the “body of the magistracy, as executor of the laws, retains all the power it has given itself as legislator” and it can “destroy each citizen by using its particular wills.” For Montesquieu, then, political liberty is not inconsistent with peace and safety, and a liberal republic whose governmental structure is based on a separation of powers can help to sustain the latter.

What I have tried to establish by my discussion of Montesquieu, Locke, Mill, and Hobbes has been the view that liberalism is founded principally on a dedication to people’s peace and safety, and that even those concepts like political liberty and toleration which by contemporary convention attach to liberalism are underwritten by or in furtherance of this most basic commitment. A liberal society is dedicated to values other than peace and safety. Even Hobbes lamented the state of nature, not just for its fear of violent death, but for all those other things which fear of violent death made impossible. “In such condition,” he wrote, “there is no place for industry, because the fruit thereof is uncertain, and consequently, no culture of the earth, no navigation, nor use of the commodities that
may be imported by sea, no commodious building, . . . no knowledge of the face of the earth, no account of time, no arts, no letters, no society . . . .”

And in our contemporary world, some have argued that liberal society is dedicated to other values, most importantly the pursuit of truth through a theoretically free public discourse. However, one may say with some confidence that whereas a liberal society might theoretically exist without legal protection for the pursuit of some truth, it cannot exist without peace and safety. Lest liberalism’s concern for peace and safety seem too abstract, one should recall the warring nobles and religious zealots in the English civil war of Hobbes’s day. Such men had quite distinct ideas about “truth” that were incompatible with peace and safety. Theirs was a “politics” that was fully coherent and persuasive to many but it was not politics according to liberalism for it eschewed the basic requirement of peace and safety.

But is this philosophical justification from liberalism compatible with the existing case law? I address that question in the next section.

V. From Philosophy to Case Law

In this section, I will argue that the account of liberalism that I have offered is not only theoretically compatible with the case law, but

93. Hobbes, supra note 42, at 76.
94. See William P. Marshall, In Defense of the Search for Truth as a First Amendment Justification, 30 GA. L. Rev. 1, 1 (1995) (“The most influential argument supporting the constitutional commitment to freedom of speech is the contention that speech is valuable because it leads to the discovery of truth.”). Frederick Schauer has also commented: “Throughout the ages many diverse arguments have been employed to attempt to justify a principle of freedom of speech. Of all these, the predominant and most persevering has been the argument that free speech is particularly valuable because it leads to the discovery of truth.” Frederick Schauer, Free Speech: A Philosophical Enquiry 15 (1982). Lee Bollinger writes:

In today’s discourse about free speech, the dominant value associated with speech is its role in getting at the truth, or the advancement of knowledge. Speech is the means by which people convey information and ideas, by which they communicate viewpoints and propositions and hypotheses, which can then be tested against the speech of others. Through the process of open discussion we find out what others think on the same issues. The end result of this process, we hope, is that we will arrive at as close an approximation of the truth as we can.

Bollinger, supra note 59, at 45.

95. Hobbes appears to allude to this idea in his famous description of the state of nature. Hobbes, supra note 42, at 76.
96. See Herzog, supra note 43, at ch. 3.
97. Id.
that the existing case law embodies liberalism's commitment to peace and safety. What is required, then, is not a wholesale abandonment of the present case law in favor of a transcendent philosophical substitute, but, rather, a reflective aspiration to develop the potential already imminent in the law.

To strengthen my argument, I draw upon cases from different domains of First Amendment jurisprudence: politically subversive speech, fighting words, and group libel. The cases suggest that the Supreme Court has never understood the Constitution as permitting the speaking of "truth" at the expense of peace and safety.

A. Politically Subversive Speech

In cases dealing with subversive speech, that is, speech that either directly or indirectly tries to undermine the present government's power or authority, what contemporary scholars and judges tend to emphasize is the capacious right of free speech gradually created by the Supreme Court's doctrine of clear and present danger. What garners relatively less attention is how the doctrine appears to make peace and safety a nonnegotiable end of civil society. In Schenck v. United States, where Justice Holmes first introduced the clear and present danger doctrine, America was combating Germany in World War I and Congress had instituted a draft to ensure a steady supply of troops. Defendants distributed a leaflet calling for resistance to the draft for which they were prosecuted under the Espionage Act of 1918. Narrowly construed, the issue in the case was whether Congress had the right to prohibit the defendants' speech in order to further the draft, a question that Holmes answered in the affirmative. More broadly, the case spoke to liberalism's commitment to protect peace and safety, as implied by Holmes's famous dictum that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." What is worth emphasis in the statement is that Holmes's commitment to peace and safety, while potentially flexible enough to accommodate speech that presents a certain risk to peace and safety,

98. 249 U.S. 47, 52 (1919).
99. Schenck, 249 U.S. at 49.
100. Schenck, 249 U.S. at 49–50.
101. Holmes wrote that the "question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Schenck, 249 U.S. at 52.
102. Schenck, 249 U.S. at 52.
seems ultimately nonnegotiable as a matter of principle. It is a position that finds support from his subsequent pronouncement in *Schenck* that the "most stringent protection of free speech . . . does not even protect a man from an injunction against uttering words that may have all the effect of force."  

To be sure, Holmes did not shy away from the radical political experimentation that could be theoretically sparked by free speech. Responding in *Gitlow v. New York* to potential critics that incitement to violence differs from speech, Holmes announces with characteristic aplomb that "[e]very idea is an incitement" and that the "only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result." For Holmes, as long as the speech does not pose a clear and present danger, its effects, however undesirable to some, cannot be prohibited: "If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." Despite the indifferent bravado of these pronouncements, Holmes never relinquishes his commitment to peace and safety. He could have, for instance, conceded an obvious theoretical option: peace and safety in their entirety must give way to a truth that is by necessity a clear and present danger. Or more nihilistically, Holmes could have asserted that although inconsistent with our generally pacific natures, speech that poses an otherwise unlawful clear and present danger to others or to one's self might ultimately represent a truth from the perspective of the First Amendment's right of free speech. He did neither and insisted that political change, if necessary, must nonetheless be peaceful and relatively safe.

A similar preoccupation with peace and safety can be found in Holmes's collaborator, Justice Louis Brandeis. In *Whitney v. California*, Holmes joined Brandeis's concurrence to articulate a justification for free speech that, while potentially compatible with the former's, was also logically distinct. Holmes had stressed a view of truth that was determined largely through the political process, and hence tended to remain agnostic about the possibility for moral or intellectual progress. But Brandeis offered a justification for free speech that was more compatible with Enlightenment assumptions that greater debate and deliberation

103. *Schenck*, 249 U.S. at 52.
104. 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).
107. 274 U.S. 357 (1927).
would lead to better ideas about what was true and desirable in politics. He drew much of his support from a kind of originalism where he portrayed the framers as bracing defenders of the pursuit of truth: "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty." That may be so, but Brandeis never claims that they did not fear violence and that they had exalted liberty at the cost of order, either.

Despite his glowing support for free speech, Brandeis, like Holmes, appears to treat peace and safety as nonnegotiable. Even when Brandeis says that "[f]ear of serious injury cannot alone justify suppression of free speech and assembly" and that "[o]nly an emergency can justify repression," he seems to imply that a fear of an emergency involving serious injury can justify to limit the right of free speech. Paradoxically, Brandeis also suggests that physical safety is not just the limit of free speech but also a prerequisite for its existence, for free speech and the idealized deliberation which it sometimes presupposes were impossible where "[m]en feared witches and burnt women."

The same nonnegotiable commitment to peace and safety inform the most celebrated contemporary justification for free speech in Brandenburg v. Ohio. There, the Court announced in a matter-of-fact tone that it was applying the traditional clear and present danger test, but the formulation presented a significant departure from the past. The Court stated that:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Despite the unprecedented protection for speech afforded by Brandenburg, the Court, as its language suggests, never subordinated peace and safety for freedom of speech and whatever rewards that may derive from it.

109. Brandeis writes that there "must be reasonable ground to believe that the danger apprehended is imminent." Whitney, 274 U.S. 376 (1927). And speech may be restricted for Brandeis if "the evil apprehended is relatively serious." Whitney, 274 U.S. 377 (1927).
110. Whitney, 274 U.S. at 376.
B. Fighting Words and Group Libel

The Supreme Court's fighting words doctrine, like its clear and present danger test, represents a classic liberal commitment to peace and safety. In *Chaplinsky v. New Hampshire*, Justice Murphy announced the Court's initial formulation of the fighting words doctrine.\(^{113}\) He stated:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, . . . and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that 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.\(^{114}\)

To these words, Justice Murphy also quoted with approval the language from the lower state court:

The statute [under which Chaplinsky was prosecuted] . . . does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker—including "classical fighting words," words in current use less "classical" but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats.\(^{115}\)

While the Court's language in *Chaplinsky* left ambiguous several questions, one thing remained relatively clear: peace and safety were nonnegotiable.

Conventionally regarded as a case of group libel, *Beauharnais v. Illinois*\(^{116}\) is better understood as animated by the concern for peace and safety announced in *Chaplinsky*. Beauharnais, the president of a white supremacist group, was passing out leaflets in Chicago urging the city's

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113. 315 U.S. 568 (1942).
mayor and city council “to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro.”\textsuperscript{117} The leaflet also stated that “[i]f persuasion and the need to prevent the white race from becoming mongrelized by the Negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro surely will.”\textsuperscript{118} Illinois prosecuted Beauharnais for distributing literature that “portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion, which exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots.”\textsuperscript{119}

Justice Frankfurter for the Court began with what appeared a discussion about libel. He explained that “[n]o one will gainsay that it is libelous falsely to charge another with being a rapist, robber, carrier of knives and guns, and user of marijuana.”\textsuperscript{120} The question remained whether the Constitution permitted a state from libel “directed at designated collectivities and flagrantly disseminated.”\textsuperscript{121} Justice Frankfurter answered that “if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group.”\textsuperscript{122} These formal references to libel, however, did not seem to be at the heart of Justice Frankfurter’s opinion. He focused instead on the potential for racist statements to spark civil unrest:

Illinois did not have to look beyond her own borders or await the tragic experience of the last decades to conclude that willful purveyors of falsehood concerning racial and religious groups promote strife. . . . From the murder of the abolitionist Lovejoy in 1837 to the Cicero riots of 1951, Illinois has been the scene of exacerbated tension between races, often flaring into violence and destruction. In many of these outbreaks, utterances of the character here in question, so the Illinois legislature could conclude, played a significant part.

\ldots

\begin{itemize}
  \item \textsuperscript{117} Beauharnais, 343 U.S. at 252.
  \item \textsuperscript{118} Beauharnais, 343 U.S. at 252.
  \item \textsuperscript{119} Beauharnais, 343 U.S. at 271.
  \item \textsuperscript{120} Beauharnais, 343 U.S. at 257–58.
  \item \textsuperscript{121} Beauharnais, 343 U.S. at 258.
  \item \textsuperscript{122} Beauharnais, 343 U.S. at 258.
\end{itemize}
In the face of this history and its frequent obligato of extreme racial and religious propaganda, we would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented . . . 123

While the dissenting opinions of Justices Black and Douglas were hostile to Justice Frankfurter's opinion, the former only disagreed with whether Beauharnais presented a legitimate danger, not whether being concerned with such danger was constitutionally justified in the first place.124 Beauharnais, then, like the other cases, seems to stand for the principle that peace and safety are inviolable.

VI. DEMOCRACY AND TRUTH

In the last section I argued that liberalism as articulated in the existing case law is dedicated to the protection of people's peace and safety as an inviolable principle. However, there is more to life than peace and safety, especially when it comes to free speech. We want speech to further commerce, advance science, and enlighten our artistic sensibilities; less piously, we also want it to titillate, entertain, and thrill us. More than anything else, however, a liberal society finds the counter-value to peace and safety in its collective regard for "truth," especially of a political nature, and the means to arrive at some truth.125 For the formal premise of democracy is that the people themselves and not governmental officials should have the authority to assess competing claims to some truth in their pursuit of self-government.126 It is not surprising, then, that legal justifications for pornography rely on this aspiration to protect the means for arriving at truth.

123. Beauharnais, 343 U.S. at 261.
124. Black's dissent, which Douglas joined clarified that Chaplinsky's prohibition on fighting words was premised on "insulting words directed at an individual on a public street." Beauharnais, 343 U.S. at 272 (Black & Douglas, JJ., dissenting). In a separate dissent, Douglas noted that the "peril of speech must be clear and present, leaving no room for argument, raising no doubts as to the necessity of curbing speech in order to prevent disaster . . . " Beauharnais, 343 U.S. at 285 (Douglas, J., dissenting).
125. See infra Parts VIA and VIB.
But such justifications are not persuasive, for pornography's only "truth" is the celebration of a form of violence incompatible with liberalism's premises. The traditional justifications marshaled by those who defend the sort of pornography that I would submit to punishment are articulated in two forms. Both forms are formally premised on the noble idea of democracy whereby people are treated as free and equal to determine truth for themselves without the condescending intervention of government censorship. The first, which I call the Enlightenment justification, argues that the First Amendment should permit the expression of different views and opinions, for through debate and deliberation, people are likely to arrive at more enlightened conclusions. The second, which I call the process justification, lacks confidence that people will reach such ends (assuming they exist as ontological entities) and instead posits truth as simply a product of the political process whereby people are treated as though they were free and equal (regardless of whether they actually are). Both justifications are often employed to support the view that pornography deserves First Amendment protection, and both are sometimes carelessly conflated with liberalism. But both justifications merely prove that pornography's content is utterly hostile to liberalism's commitment to peace and safety.

A. The Enlightenment Justification

The Enlightenment justification for the First Amendment right of free speech is premised on the view that people are equal and free to judge political arguments for themselves. I append the term Enlightenment to evoke its formal faith in the reasoning powers of human beings and their potential for improving themselves and society through the habits of sober deliberation. Justice Brandeis's concurring opinion in *Whitney v. California* 127 is the first sustained instantiation in the Supreme Court of the Enlightenment view. Endorsing an originalist interpretation of the Constitution, he argued that those:

> who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. . . . They believed that freedom to think as you

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127. 274 U.S. 357 (1927).
will and to speak as you think are means indispensable to the discovery and spread of political truth.  

There are anomalies here: men who are free and equal seeking vindication from their mythic ancestors, and the Enlightenment's bland universalist principles heavily sweetened with American patriotic syrup. But perhaps Brandeis's main purpose was less analytic and more aspirational in trying to efficiently enlist support for the premise that people are or should be considered free and equal in their right of free speech. For a more developed defense, we need to look elsewhere.

Mill's arguments are a good place to begin. As the Enlightenment justification's most conscripted philosophical workhorse, Mill justified free speech along three principal lines, underwriting all three with the assumption that people are free and equal to contribute to a collective understanding of some truth.

He claimed that "though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied." Such democratization of epistemic authority—of who is entitled to determine what is the truth—seems entirely apt to facilitate criticisms of governmental officials, clerics, and others who wield, and thus can abuse, uncommon power over others including in matters related to the production of truth. Yet more opaque is what is to be gained for truth by pornography that shows women as people, in the words of Dworkin and MacKinnon's proposed statute, "who experience sexual pleasure in being raped," or "as sexual objects tied up or cut up or mutilated or physically hurt, or as dismembered or truncated or fragmented or severed into body parts." How can such images, and the kind of social world they celebrate, form a truthful idea of who women really are? How can Mill's justification, situated as it is in a belief in reason, equality, and freedom, lead to such disturbingly unreasonable, unequal, and oppressive speech?

Mill's other justification for speech seems to fare no better in the case of pornography. He had stated that "even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehen-

130. Indianapolis Code § 16-3(q).
sion or feeling of its rational grounds." Yet it would seem that we hardly need reminding that murdering and raping women are wrong (a world in which we did might be imaginable, but just barely so). On the other hand, while the empirical evidence is not conclusive, there are probably some men who are stimulated to commit violence against women partly because of such images. While pornography's harm against women cannot be exactly calibrated, its potential would seem to outweigh whatever ambiguous victories are being claimed for truth.

There is one last argument that Mill offers. He states that the "meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession, ineffectual for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience." But there is already overwhelming news coverage of women being raped and assaulted. Do we really need to see it done with sadistic glee before we recognize that we should pass laws against it and condemn those who engage in it?

Mill, like Brandeis, applauds the view that all are equally free to express and assess arguments. But their justifications, taken straightforwardly, lead to conclusions that are surprisingly disturbing and, worse, threaten to unravel the very premise that people are in fact equal and free in their capacities to make responsible political decisions for themselves. The Enlightenment justification tends to conflate or obscure the distinction between the normative insistence that people should be considered equally free to assess speech and the factual conclusion that they actually are. If the latter is not the case, there need to be persuasive reasons for insisting that we accept the fiction of the former; unfortunately, such reasons appear lacking in Mill and Brandeis.

Things do not improve much with contemporaries like Professor David Richards. He explains:

In opposition to the Victorian view, which rigidly defines proper sexual function in a way analogous to ideas of excremental regularity and moderation, pornography offers an alternative model of plastic variety and joyful excess in sexuality. In opposition to the Catholic dismissal of sexuality as an unfortunate and spiritually superficial concomitant of propagation, pornography affords an alternative idea of the

132. Id. at 53–54.
independent status of sexuality as a profound ecstasy that may sustain intimate bonding between persons. Pornography, on this view of it, is a just vehicle for the liberation of starved and shriveled capacities of sexual imagination and experience in the service of moral powers engaged in the construction of more fulfilling and humane personal relationships.\textsuperscript{133} On Professor Richards's account, people are free and equal to explore and realize their sexual identities by exercising their right of freedom of speech. Like Brandeis's and Mill's justifications, Richards's justification for self-fulfillment seems optimistic that people, if regarded as free and equal, will likely arrive at better conclusions—understood as "more fulfilling and humane personal relationships"—through free speech than if they were subject to paternal governmental regulations. Yet, like Brandeis and Mill, Richards also appears unduly hopeful. While he chooses to celebrate the "joyful excess" of pornography against a crusty Catholic prudishness, he tends to skirt the question of pornography's potentially destructive tendencies. Far from contributing to "more fulfilling and humane personal relationships," pornography could very well lead to opposite outcomes: a vicious misogyny, a pathology of isolation and voyeurism, and an obsession with sex as an extension of violence. By treating people as though they were all free and equal to view and indulge whatever they please in the name of self-fulfillment, we also leave some to their worst devices.

But if Richards, Mill and Brandeis should be consumed by buoyant optimism, the other prominent justification for treating people as free and equal with regard to their right of speech slouches aloof with a hard boiled indifference to outcome while mesmerized by a belief in political process, and I accordingly call it the process justification.

\textbf{B. The Process Justification}

Oliver Wendell Holmes, Jr., Brandeis's frequent intellectual partner, articulates the earliest Supreme Court version of the process justification. In \textit{Abrams v. United States},\textsuperscript{134} he writes:

\begin{quote}
[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate
\end{quote}

\textsuperscript{133} Richards, supra note 59, at 206–07.

\textsuperscript{134} 250 U.S. 616 (1919) (Holmes, J., dissenting).
good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.\textsuperscript{135}

The marketplace metaphor is splendidly evocative, for silently underwriting it is the assumption familiar to the marketplace that all people are free and equal to buy or reject arguments like goods for sale, as they see fit, without the government’s paternal intervention. Here, the people’s freedom and equality to assess political arguments are limited mainly by their own preferences and the institutional force of majoritarian politics.

Sadly missing from such a muscular endorsement of the democratic process is an explanation for why Holmes thinks it is better to permit people—even if ignorant, confused, prejudiced, and violently misogynistic—to decide the nation’s future as ostensibly free and equal beings. While we may permit people in the marketplace to choose whatever they wish for themselves as individuals, we would need more justification for why consumers in the political marketplace should be permitted, based on what they hear and read (or fail to hear and read), to choose for others their political fates. Holmes does not explain whether people actually possess the sensibilities to be considered free and equal to each other. He is content with the mere assertion, which follows easily and tautologically from his unjustified premise that the “best test of truth is the power of the thought to get itself accepted in the competition of the market.”\textsuperscript{136}

This remarkable trust in the people coupled with an indifference to the outcome of the democratic process holds court in Easterbrook’s opinion in the case where he struck down Dworkin and MacKinnon’s statute, \textit{American Booksellers}:

\begin{quote}
John Stewart [sic] Mill’s \textit{On Liberty} defend[s] freedom of speech on the ground that the truth will prevail, and many of the most important cases under the First Amendment recite this position. The Framers undoubtedly believed it. . . . But the Constitution does not make the dominance of truth a necessary condition of freedom of speech. To say that it does
\end{quote}

\textsuperscript{135} Abrams, 250 U.S. at 630 (Holmes, J., dissenting).
\textsuperscript{136} Abrams, 250 U.S. at 630 (Holmes, J., dissenting).
would be to confuse an outcome of free speech with a necessary condition for the application of the amendment.\textsuperscript{137}

At one point, Easterbrook, far from prohibiting pornography's influence on men's psyches, wants to reward its potency. Responding to empirical findings of pornography's dangerous effects, he says flatly that "this simply demonstrates the power of pornography as speech."\textsuperscript{138}

There is a serious flaw with the process justification, however. Easterbrook congratulates American democracy with the following observation: "Totalitarian governments today rule much of the planet, practicing suppression of billions and spreading dogma that may enslave others. One of the things that separates our society from theirs is our absolute right to propagate opinions that the government finds wrong or even hateful."\textsuperscript{139} The conceit here is that treating people, including pornographers, as free and equal to exercise their right of free speech will ensure the freedom and equality of others, including women. But Easterbrook provides nothing to ensure that pacific and neutral result. Indeed, the very premise that people are free and equal, by logically permitting them to light upon any number of political designs including rabidly anti-democratic ones, can lead to its own destruction. If the misogyny that is visually endorsed in pornography manages to convince enough people of the sanity and rightness of its viewpoint, surely, at that time, women will no longer be able to speak and listen as free and equal beings. Easterbrook warns us that pornography must be protected, for "[a]ny other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us."\textsuperscript{140} Unbeknownst to Easterbrook, there is a thorny irony in this conclusion: leaving pornographers who glorify the murder and rape of women the opportunity to enlist public opinion in its mad cause would also lead to a world where the government is "the great censor and director of which thoughts are good for us" (and much worse). Notwithstanding Easterbrook's claims, the conflict is not properly one between the "government" and "us," for the government often acts at our behest, censoring speech that we hate. That is the unpleasant lesson gleaned from, among others, the Espionage Act of 1917\textsuperscript{141} and the Smith Act,\textsuperscript{142} both attempts by the public to squelch dissident views.

\begin{itemize}
\item \textsuperscript{137} 771 F.2d at 330.
\item \textsuperscript{138}  Am. Booksellers, 771 F.2d at 329.
\item \textsuperscript{139}  Am. Booksellers, 771 F.2d at 328.
\item \textsuperscript{140}  Am. Booksellers, 771 F.2d at 330.
\item \textsuperscript{141}  Espionage Act, ch. 30, 40 Stat. 217 (1917) (repealed 1948).
\item \textsuperscript{142}  Smith Act, 54 Stat. 670 (1940) (codified as amended at 18 U.S.C. § 2385 (1946)).
\end{itemize}
Easterbrook’s warning about empowering a totalitarian government has not quelled the threat of a world where people are denied their equality and freedom; he has merely delayed its gratification.

The process justification, like the Enlightenment justification, is founded on the assumption that people are free and equal and the aspiration that they will continue to enjoy a governmental regime that respects them as such. However, this assumption can theoretically lead to speech that, if persuasive enough, will demolish the regime that its advocates appear to treasure and whose existence is asserted to be underwritten by the assumption, a possibility that curiously raises no eyebrows, let alone a sustained defense, among the process justification’s advocates.

VII. VIEWPOINT NEUTRALITY IS NOT NEUTRAL

Thus far, I have argued that pornography, from the perspective of liberalism, lacks any redeeming values for truth and that it presents an unjustified threat to peace and safety. This argument might encounter the familiar objection offered by pornography’s defenders. They will argue that such criticisms of pornography smack of “viewpoint discrimination” by punishing the viewpoints of pornographers, and hence constitutes a presumptive violation of the First Amendment. But this objection is not effective. For the law, as a hierarchy of values, inevitably and incessantly engages in forms of viewpoint discrimination, something that I can illustrate by turning to the viewpoint objection itself as articulated by pornography’s defenders.

The best example probably comes from Easterbrook’s majority opinion in *American Booksellers*, where he struck down the pornography legislation drafted by MacKinnon and Dworkin. The statute, as I have stated before, defined “pornography” as “the graphic sexually explicit subordination of women, whether in pictures or in words . . ." What provoked Easterbrook’s ire was the statute’s claim that pornography was not protected speech because of its propensity to dehumanize women and make them culturally available as objects of contempt and male violence, a maneuver that defiantly challenged the Supreme Court’s limited protection of pornography outside of the legal category of obscenity. In other words, for Easterbrook, the statute was an unforgivable example of viewpoint discrimination.

144. *Am. Booksellers*, 771 F.2d at 324.
While pornography and obscenity sometimes overlap as a legal matter, they are, for Easterbrook, conceptually distinct. In *Miller v. California*, the Supreme Court stated that obscenity receives no First Amendment protection, with obscenity understood as material that, according to community standards, is patently offensive, appeals to prurient interests, and taken as a whole, lacks any serious literary, artistic, political, or scientific value. What troubled Easterbrook was that the anti-pornography statute failed to acknowledge the redemptive properties afforded by the work's literary and other values nor even cared whether the speech was patently offensive or prurient, focusing exclusively as it did on the material's harmfulness to women. And in doing this, the statute thus represented for him a dangerous example of the government's discrimination against a particular viewpoint regarding sex and gender:

Under the ordinance graphic sexually explicit speech is "pornography" or not depending on the perspective the author adopts. Speech that "subordinates" women and also, for example, presents women as enjoying pain, humiliation, or rape, or even simply presents women in "positions of servility or submission or display" is forbidden, no matter how great the literary or political value of the work taken as a whole. Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual content.

Such discrimination leads, for Easterbrook, to an appalling conclusion:

This is thought control. It establishes an "approved" view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not.

To permit such outright viewpoint discrimination would leave "the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us."

While the structure and content of Easterbrook's position may seem satisfactory according to conventional legal reasoning, his entire argument actually undermines the very premises that it takes inordinate care to establish. Easterbrook commits himself to the stark premise that you can confidently distinguish obscenity from pornography; that is, he commits himself to the premise that you can confidently distinguish one category of speech from another. It is a premise, which as I have shown, Easterbrook treats with guarded care and dutiful obligation in the beginning, but by the end of his opinion, he is busy at work demolishing it as logically implausible and politically dangerous. Easterbrook insists that to punish pornography is to renege on a string of legal precedent that points decidedly towards its protection. He tells us that pornography is protected because *Brandenburg v. Ohio* says the "ideas of the Klan may be propagated," because *Dejonge v. Oregon* says "[c]ommunists may speak freely and run for office," and because *Collin v. Smith* says the "Nazi Party may march through a city with a large Jewish population."  

All of these forms of speech have produced grim effects to be sure; "the beliefs of Nazis led to the death of millions, those of the Klan to the repression of millions." However, as Easterbrook tells us, we must keep in mind that "[t]otalitarian governments today rule much of the planet, practicing suppression of billions and spreading dogma that may enslave others" and "[o]ne of the things that separates our society from theirs is our absolute right to propagate opinions that the government finds wrong or even hateful." Here, Easterbrook renounces any ability to discern the unwanted effects of pornography from the unwanted effects of speech by the Klan or the Nazis. To make such an exception, he argues, would surely invite the calamity of censorship and eventually totalitarianism. Yet the drawing of such a rigid exception is precisely what Easterbrook does in assigning some forms of speech to the unprotected category of obscenity. He confesses to being at a hopeless loss to distinguish the speech of the Nazis from those of pornographers but he is utterly self-assured in his ability to distinguish pornography from obscenity, and hence, in his ability to discern the attendant categories of literary, artistic, political and scientific speech as well as the category of prurience. Indeed, Easterbrook at once disclaims any authority to determine one form of offensive speech from another in racist speech and pornography, but then knowingly insists that obscenity deserves no  

155. *Id.*
constitutional protection because its offensiveness is so obvious. Ultimately, then, he demonstrates why his rejection of the pornography statute makes no sense: he himself relies on the very technique which he condemns as logically impossible and politically precarious.

What deserves emphasis in the foregoing analysis of Easterbrook's opinion is that the blanket prohibition against viewpoint discrimination is not only unjustified in a normative sense but that it is logically impossible to follow. The proper question, therefore, should not be whether some legislation is or is not an example of viewpoint discrimination since anything can be easily described as such. A better question is whether one instantiation of viewpoint discrimination is more justified than another, according to some normative standard. To that end, there should be no constitutional protection for the expression of those viewpoints which endorse, either deliberately or implicitly, violence against women. Such viewpoints are hostile to the most basic enterprise of a liberal society, which is not to enshrine a muscular individualism or to maintain epistemic neutrality, but to guarantee the peace and safety of its members. 156

CONCLUSION

There is often the assumption that liberalism is of no help in fighting against pornography. Liberalism, the argument goes, lacks the epistemic resources to judge right from wrong or it harbors a naïve optimism that people are too enlightened to endorse pornography's destructive messages. I have suggested that these characterizations miss the most important aspect of liberalism in its commitment to peace and safety. If we take that commitment seriously, we can help to fashion legal rules that can protect women from the harms of pornography.

156. Rogers Smith writes that "[a]bove all, early liberals like Locke were concerned to provide for lasting civil peace and physical security. Every aspect of liberalism finds part of its motivation in this goal." Smith, supra note 37, at 18. Smith also explains: "To a surprising extent, early liberals conceived of popular governance, religious tolerance, the rule of law, and other forms of liberty only as means to basic goals. They also did not equate liberalism with fair legal and constitutional procedures, or with pursuit of the maximum freedom imaginable, as many modern liberals do. Instead, liberals originally held that only a specific and limited conception of liberty deserved to be an end in itself. And they were attached to other specific ends, for which liberty was a means—essentially peace, prosperity through economic growth, and intellectual progress." Id. at 14–15.