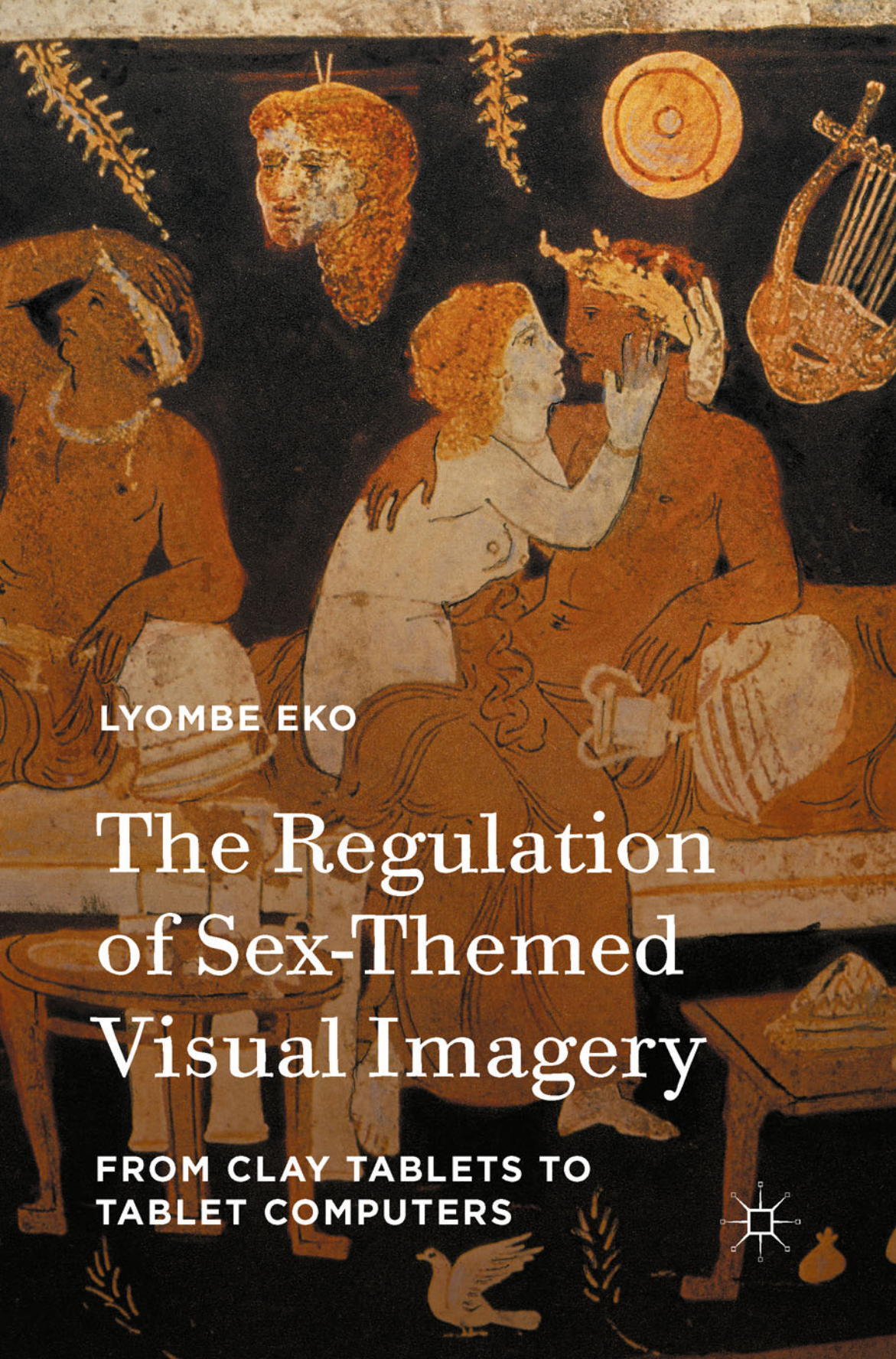

LYOMBE EKO

The Regulation of Sex-Themed Visual Imagery

FROM CLAY TABLETS TO TABLET COMPUTERS

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Lyombe Eko

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THE REGULATION OF SEX-THEMED VISUAL IMAGERY

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Sex-Themed Visual Imagery as Regulated Representations

From the Euphrates Valley to Silicon Valley

One of the ironies of explicit images that portray sexual scenes is that they are rooted in the religious experiences of most cultures. From the dawn of time, religion and sex have been intertwined. This is especially true of the civilizations of the peoples of the ancient Near East, the region of the world that covers parts of modern-day Turkey, Iraq, Iran, Syria, Lebanon, Jordan, and Israel. Contemporary events in this part of the world remind us of this fact from time to time. In 2006, a court in Istanbul, Turkey, acquitted 92-year-old Turkish archeologist Muazzez Ilmiye Cig of the criminal charge of inciting religious hatred. The crime with which Cig had been charged was connected to her academic research. One of the foremost experts in ancient Near Eastern civilizations, and especially the civilization of Sumeria, Cig had written that the veil worn by millions of women in the Middle East—and by religious women in the Western world—was a religious and sexual artifact that predated both Christianity and Islam. She stated that five thousand years ago, the religious headscarf, or veil, was a symbolic garment that helped set sacred temple prostitutes or priestesses apart from other women (Arsu, 2006). She had written that these sacred prostitutes had sex with young men in the pagan temple as an act of worship and celebration of the goddess of love, sex, and fertility. Cig argued that wearing a headscarf in contemporary society should therefore not be taken as an expression of a woman's morality or religiosity (Arsu, 2006).

Many Turks were not amused. The claim that the religious headscarf, or veil, was the distinguishing attire of temple prostitutes in ancient Sumeria was an explosive claim to make in Turkey, an Islamo-secular country. Though Turkey has a secular constitution and sees secularism as its official creed, it has a population that is almost 98 percent Muslim. Furthermore, its Islamist prime-minister-turned-president, Recep Tayyip Erdogan, and increasingly assertive Islamist political parties slowly but surely oriented Turkey away from its twentieth-century dogmatic secularism toward being a country in which Islam is the guiding politico-cultural ideology (Eko, 2012). Indeed, in Turkey, it is a criminal offense to offend the

religious sensibilities of others. Article 24 of the Turkish Constitution (1982) states that "no one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever." As a result, Turkey criminalizes "incitement to religious hatred," a coded expression for blasphemy, criticism of God and of religion. Cig was charged under this provision of the law. Professor Cig's trial and acquittal demonstrates that issues of politics, sex, religion, and freedom of expression are very sensitive in many parts of the world, especially in the "Muslim world," where it is believed that all sex-themed material—obscenity, pornography, erotica, and indecency (four-letter words that describe sexual and toilet functions)—originate from a decadent "Western world" out to infect the cultures of the rest of the world. Indeed, in virtually all majority Muslim countries, portrayals of sex or sexuality of any kind in the media or in public are part of the so-called triple taboo. The two other legs of the taboo are religion and politics (Hafez, 2002).

In India, censors ensure that Bollywood (India's movie industry) is not allowed to depict kissing or other acts of sexual intimacy. Activists of the Hindu nationalist movement, the Vishwa Hindu Parisad; the Bajrang Dal (Brigade of the Monkey God); and the ruling party of Prime Minister Narendra Modi, the Bharatiya Janata Party, use legal means to exert pressure on the Film Censor Board to censor objectionable films and sometimes resort to extralegal means to enforce the no-overt-intimacy rule in Bollywood. Indeed, activists from these groups have vandalized art pieces; attacked artists whose work was viewed as indecent, immoral, and decadent; and forced the closure of exhibitions on university campuses as part of a "campaign against artists and writers who linked Hindu deities with sexuality, or talked openly and frankly about sexuality" (Doniger, 2014, pp. 396–97). As we see in Chapter 6, activists of the Bajrang Dal come out in full force on Valentine's Day and proceed to attack shops selling flowers and cards, as well as couples showing any signs of public intimacy (Ghosh, 2012). In the last few hundred years, India has moved, in the words of Doniger (2014), "from *Kama* [the god of sex] to *Karma* [the sum total of one's deeds and misdeeds]" (p. 396). The government of Prime Minister Nehru criminalized homosexuality and other sexual acts, claiming that their existence in India was the result of "Western influence" (Doniger, 2014, p. 406). These examples demonstrate that people from many parts of the world consider the West to be the epicenter of sexual decadence. These critics of Western sexual mores claim that liberal Western sexual immoralities have diffused to the rest of the world through the traditional media and the Internet (Eko, 2001). The thinking behind this perspective is that pornography is a decadent Western phenomenon and that the pervasive presence of pornography on the Internet is a testament to the globalization of Western decadence and debauchery. Some countries declared that if this Western cultural filth were allowed into their countries unimpeded, it would infect and destroy their religions, political systems, cultures, and ways of life (Eko, 2001).

The notion that explicit, sex-themed visual imagery or pornography is a product of Western depravity and debauchery is not a new one. Indeed, association of Western decline with decadence was advanced by works like Edward Gibbon's *The History of the Decline and Fall of the Roman Empire* (1782), which postulated that the Roman Empire declined and succumbed to northern European Germanic tribes in part because Romans had lost their "civic virtue" as well as the moral and ethical ideals that put society and the state over personal interests. This loss of

virtue supposedly made it easy for them to succumb to decadence and immorality. In Western academia and Hollywood popular culture, the theme of Western depravity and decadence has focused on the life of the decadent, syphilitic emperor Tiberius and especially on his successor, the autocratic emperor Gaius Caesar Germanicus, known as Caligula (37–41 AD). Caligula, who became the third emperor of the Roman Empire in 37 AD was the most notorious of all Roman rulers (Barrett, 1998). He was deified as a "living god" and led an extremely self-indulgent, decadent lifestyle marked by public spectacles, homosexuality, extreme sexual perversity, and orgies that turned the imperial palace into a brothel. Caligula's extreme sexuality was crowned by an incestuous relationship with his sister, Julia Drusilla (Barber and Reed, 2001). As we see in Chapter 13, Emperor Caligula was the subject of *Penthouse* magazine owner Bob Guccione's 1980 hardcore Italian-American international pornographic movie *Caligula*, which presented a fictionalized, imaginary, cinematic account of the sexual perversity, decadence, and downfall of Emperor Caligula (Hawes, 2009).

More recently, works like Hendrik de Leeuw's *Sinful Cities of the Western World*, published in 1934, have emphasized the theme of Western decadence. De Leeuw's list of decadent Western cities consisted of Marseilles, Paris, Amsterdam, Berlin, and New York. Interestingly de Leeuw (1934) included Algiers, Tangier, Casablanca, and Sidi-Bel-Abbès—North African cities that were part of the French colonial empire—in his list of decadent Western fleshpots whose sole purpose was "pandering to the lusts of men" (p. 98). In her book, *March of Folly: From Troy to Vietnam*, Pulitzer Prize–winning American historian Barbara Tuchman (1984) echoes the theme of the role of decadence and depravity in the fall of Western kingdoms and empires. She chronicles the "self-destructive acts" carried out by a virtual historical fool's gallery of Western leaders and governments, from the city-state of Troy to the American war in Vietnam. Tuchman wrote that one of the Renaissance popes who provoked the Protestant "secession" was the depraved Pope Alexander VI. Despite his strenuous efforts to "maintain the purity of Catholic doctrine by censorship of books" (p. 90), Alexander VI, who was notorious for having many mistresses and children, was depraved and decadent to the point of organizing sexual orgies with nude courtesans (prostitutes) in the Vatican (p. 88). Tuchman suggests that his open depravity and decadence helped usher in the Protestant Reformation.

The US Attorney General's Commission on Pornography (US Department of Justice, 1986) gave some credence to the thesis of Western decadence. In its survey of the history of pornography, the commission wrote that "pictures of sex have been around as long as pictures . . . It is odd that historical treatment of pornography turns out to be historical treatments of the *regulation* [emphasis in the original], governmental or otherwise, of pornography. To understand the phenomenon of pornography is to look at the history of the phenomenon itself prior to, or distinct from, the investigation of the practice of restricting it" (p. 233). The commission then proceeded to discuss the presence of explicit sexual references in ancient Greek and Roman dramas and other writings. It specifically mentioned the presence of scenes of sexual intercourse in the brothels of Pompeii (p. 234). Though the commission mentioned the presence of sexual references in *The Thousand and One Nights* and the *Kama Sutra*, its "Western Civilizational" approach to the subject ignored the ancient Near Eastern and ancient Asian cultures, where regulation of explicit, sex-themed visual content did not mean restricting it. As

we see in Chapters 4 and 8, pre-Christian ancient Greece and Rome regulated sex-themed material within the context of their heterogeneous sexualities and polytheistic cultures.

The premise of this book is that sex-themed visual imagery, or what we now call pornography and erotica, is not a Western phenomenon per se. Indeed, visual depictions of scenes of human sexuality are as old as the earliest human civilizations. Archeological, historical, literary, and art-history evidence point to the fact that all civilizations in all continents had cultures of sex-themed visual imagery that were regulated under culture-specific religious and secular laws. The earliest and most well-documented sex-themed visual imagery is that of the early human civilizations that once existed in the ancient Near East and Egypt, the part of the world now known as the Middle East. The point is that visual representations of nudity and explicit sex—pornography and erotica—are universal phenomena that have existed since the dawn of human civilization. They conveyed different political, economic, social, religious, and cultural meanings in different parts of the world before and even after the advent of Christianity and Islam. In other words, archeological, historical, and art-history evidence shows that visual images of human sexuality are "pregnant" with the mentalities and worldviews of specific civilizations and cultures. Since they are produced within specific cultural contexts, explicit, sex-themed visual images abide by the values, rules, and regulations of the cultural milieus within which they are produced. As such, sex-themed visual imagery is what Kaplan (2012) calls "regulated representations" (p. 25). These are rule-based creations and depictions that carry symbolic and metaphorical messages. As used in this book, the expression "regulated representations" runs the gamut from referring to hard-and-fast, enforceable rules of law handed down by competent authorities to referring to soft, unenforceable, elastic exhortations; hortatory texts; religious edicts; commandments; institutional policies; and guidelines that rely on voluntary compliance rather than coercion. Before writing was invented, ideographs, pictographs, cave wall graffiti, and clay tablets depicting human sexuality were the first regulated representations of sex-themed visual imagery produced within the politico-cultural and religious contexts of early man and ancient civilizations. As such, they are "memory objects" that have recorded reality at specific times and in specific geographic locations (Olivier, 2011, p. 132).

Muazzez Ilmiye Cig's trial and acquittal shined the international spotlight on visual representations spawned by an ancient politico-religious institution, sacred or temple prostitution whose existence has been documented by art historians, anthropologists, archeologists, classicists, and others. This volume surveys some of those ancient civilizations' regulated sex-themed visual content. Cig's trial also cast the spotlight on the intertwined political and religious cultures of Mesopotamia—the land between the Tigris and Euphrates river system, which historians call the "cradle of civilization." This region included the Sumerian, Akkadian, Babylonian, and Assyrian empires. The Sumerians invented mankind's first medium of systematic mass communication—writing—in the form of the cuneiform script. Interestingly, the Sumerians did not have a word for religion because the worship of gods and goddesses was an integral part of their very existence.

Figure 1.1 The Ishtar vase depicting Ishtar, or Innana, the winged, nude Sumerian goddess of love and war (second century BC; reproduced with permission from The Louvre Museum, Paris, France)

Figure 1.2 Detail of the Ishtar vase. Note the pubic triangle (reproduced with permission from The Louvre Museum, Paris, France)

Rationale for the Book

Human beings are sexual animals. They are also expressive, religious creatures. When human sexuality, religiosity, and art mix, a sex-themed, visual culture develops. Archeological, historical, and art-history evidence demonstrate that in some ancient civilizations and cultures, these three dimensions of humanity coexisted harmoniously, were represented visually, and communicated to large national and transnational audiences. The term "sex-themed visual expressions" refers to representations of nudity in explicit scenes of human sexual conduct. These graphic depictions are as old as the human race. Archeological and art-history discoveries have shed light on the worldviews of the peoples of the ancient Near East whose civilizations flourished in the so-called Fertile Crescent: the valleys of the Tigris and Euphrates rivers. It was in this geographic region that organized agriculture began, the wheel was invented, the first writing (cuneiform) emerged on clay tablets, and the first urban settlements sprang up. It was also in this part of the world, specifically in Babylon, that the world's first recorded assembly and "publication" of law, the Code of Hammurabi, was undertaken. In this volume, I argue that archeological, historical, and art-history evidence demonstrate that explicit, sex-themed visual imagery has existed in virtually all human cultures—from the "cradle of civilization,", to Silicon Valley in California. In other words, explicit, sex-themed visual imagery is a form of regulated representation that has been depicted in the visual media of every culture, from the clay tablets of Mesopotamia to the digital tablet computers of Silicon Valley.

Indeed, Mesopotamia is famous for its sex-themed visual communication "texts." These visual images are the vestiges of regulated representations that were part of the religious and political cultures of these early civilizations (Assante, 2002). In Chapter 3, we see the entanglement of sex and religion in ancient Greece, the crucible of Western civilization. In Chapters 5 and 6, we note that numerous Asian cultures also had explicit visual depictions of sexual conduct in the context of religious observances. China has a tradition of depicting explicit, sexual imagery in art, while there is an old culture of depicting explicit sex scenes in traditional Japanese comic book art (manga). For its part, India has an ancient tradition of religious-erotic temple art that expressed the religious worldviews of many of the peoples of the subcontinent.

In order to explore explicit, sex-themed visual imagery as universal cultural artifacts that have existed and were regulated within the framework of virtually all the major civilizations and cultures of the world, this book explores the regulation of explicit, sex-themed visual content by asking the following questions:

- How have the major civilizations and cultures historically conceptualized and regulated explicit, sex-themed visual imagery from the dawn of civilization in Mesopotamia to the present?
- How did the regulation of sex-themed visual imagery evolve in the civilizations of the ancient Near East, Ethiopia, Greece, Rome, China, Japan, and India? In other words, what are the roots of contemporary regulation of obscenity, pornography, and erotica?
- Why has explicit, sex-themed visual imagery thrived in some modern cultures and not in others?

- How have specific cultures struck a balance between freedom of expression on the one hand and legal and cultural prohibitions against depictions of explicit scenes of sexual conduct on the other hand?

The aim of this book is thus to survey, present historical information on, and explain the regulation of representative, explicit, sex-themed visual narratives that are part of the mosaic of "symbols and myths carried by the great cultural traditions that have instructed the Western mind," to use the apt formulation of Ricoeur (2013). This book therefore explores the relationship between culture-specific, explicit, sex-themed visual art and the specific politico-religious civilizations that produced and regulated it. In other words, this book is concerned with regulation of visual depictions of explicit human sexual conduct from their earliest appearances on the clay tablets in the valley of the Tigris and Euphrates rivers in Mesopotamia to the tablet computers of Silicon Valley. In order to understand the contemporary cultural issue of pornography regulation in a Western world whose values have been globalized by the mass media in general, and the Internet in particular, we need to understand the heterogeneous historical and cultural conceptualizations of explicit, sex-themed visual imagery in other parts of the world. This volume is therefore concerned with the regulation of visual representations of explicit sexual conduct, or pornography, from the age of the advent of writing (Sumerian cuneiform and Egyptian hieroglyphs) to the present. This book is not designed to be a straight-forward, black-letter law text on the law of obscenity and pornography in a number of jurisdictions. Rather, it goes beyond legal rules to present diverse historical, cultural, and philosophical contexts that undergird contemporary regulation of sex-themed visual imagery. Ecklund (2014) suggests that legal scholars from the European civil law tradition have "unflatteringly concluded" that lawyers and scholars in the pragmatic Anglo-American common law tradition are preoccupied with legal rules to the exclusion of "general philosophical questions" that underpin these legal rules. As a result, his complaint continues, "Anglo-American lawyers have made no great contribution" to the history and philosophy of law (p. 7). While there might be a gist of the truth in that claim, legal pragmatism does not necessarily exclude historical and cultural analyses. Though this book focuses on the regulation of explicit, sex-themed visual imagery and treats all depictions of human sexuality as "rule-based representations," to use the expression of Kaplan (2012), it explores diverse historical, cultural, and philosophical contexts of law making with respect to this type of material. We are also concerned with the problem of the human right of freedom of expression and the application of that right to rule-based representations of human sexuality over time. To that end, we undertake a broad survey of the visual depiction of explicit sex scenes as rule-based representations ensconced in the visual arts of ancient Mesopotamia, Egypt, Ethiopia, ancient Greece, China, Japan, India, and the Roman Empire; the art of the Renaissance, the Enlightenment, the British Empire, the United States and Canada, France, and the Internet.

Erotica, Pornography, and the Law: A Few Words about Terminology

The first issue one encounters when discussing mass dissemination of images or scenes of human sexuality is the issue of terminology. In a January 2014 report on

The Israel Museum's exhibition of archeological discoveries of art pieces depicting graphic sexual activity in the ancient Near East, Ilan Ben Zion (2014) of *The Times of Israel* described the artwork as "4000-year-old . . . Mesopotamian erotica." He further wrote that "artifacts from ancient Babylon exhibit latent—even shockingly graphic—sexuality." Elsewhere, one of his sources described the sex-themed clay plaques as a "very early version of *Playboy*, Middle-Eastern style" (Ben Zion, 2014). This informative article unfortunately reads contemporary moral values, mentalities, and perspectives into ancient artifacts. The sex-themed art pieces of Mesopotamia were created long before the words "erotica," "prostitution," "pornography," or "obscenity" became part of Greek vocabulary—their pathway to our modern, global usage. *Playboy* magazine is not the functional equivalent of the sex-themed visual imagery of the ancient Near East. The word "erotic" comes from the name of the Greek god of sexual love and passion, Eros. The Greco-Roman mythology of Eros (whose Roman equivalent is Cupid) emerged long after the cultures of the ancient Near East.

In an attempt to bring some clarity to the issue, some artists, critics, and writers make a distinction between art and erotica. Scholars also classify certain representations of sex as erotic art, or erotica, and others as mere pornography. The distinction between erotica and pornography seems to be widely accepted in art scholarship. Mahon (2007) suggests that pornography is essentially known for its intent to sexually arouse—nothing more, nothing less. This obsession with sexual arousal for its own sake precludes pornography from being classified as "art." This is because art comes with culture-specific conventions of aesthetics and almost always elicits complex emotional and intellectual responses. She adds that erotic art may have aspects of pornography, but those aspects are not there for sexual arousal alone. She says of erotica, "It plays on the aesthetics of imagination, uses sexual imagery to critique social, religious and political realities, as well as artistic taste" (Mahon, 2007, pp. 14–15). Cahill (2012) also makes the distinction between erotica and pornography in Chinese painting. He says, "I make a distinction, then, between erotic art, which I take these to be, and pornography, low-level pictures meant mainly for sexual arousal. I am aware of post-structuralist arguments that aim at blurring or erasing that distinction, preferring to see erotic art and pornography as simply representing higher or lower social classes in the consumers." For her part, Matthews-Grieco (2010) applies the distinction between pornography and erotica to the Renaissance: "'Pornography' refers to explicit sexual imagery, while erotica refers to implicit 'erotic' representations of the human body in more evocative and sexually suggestive ways" (p. 5). In short, to some people, pornography is considered to be the crude, vulgar, exploitative commercialization of sex, while erotica is considered to be the aesthetically pleasing, or at least acceptable, depiction of sex. Erotica is considered to be tasteful and classy material that brings out the noble sentiments in people, while pornography is considered to be crass, tasteless, commercialized artistic tripe aimed at the baser, animalistic instinct of the viewer. This distinction is roughly the modern distinction between hardcore and softcore "pornography."

While this distinction may have placated censors over the years and given art critics a way of seeing and classifying diverse representation of sex, the pornography–erotica dichotomy is not helpful, legally speaking, because it is subjective and does nothing to solve the problem of vagueness. The word "erotic" is said to refer to libidinous desire (Morgan, 2012). One person's titillating pornography is another's

high-class erotica. Indeed, as the Canadian Special Committee on Pornography and Prostitution noted in 1985, critics have come up with the word "pornokitsch" to describe pornography with artistic pretentions (Special Committee on Pornography and Prostitution, 1985). Therefore, one person's erotica is another person's pornokitsch. As we will see later, in Chapter 8, the Renaissance had its fair share of explicit, sex-themed art. The opulent art of the European grand masters, which is believed to represent the height of aesthetics and culture, also expresses power and gender dynamics. This is because the sex-themed art of the Renaissance is almost always presented from the perspective of the ogling gaze of the European male (Howell and Negreiros, 2011). The rich artistic environment of the Renaissance also gave rise to the word *obscenus* the ancestor of the English word "obscene."

In 1967 and 1986 respectively, the Johnson and Reagan administrations established commissions to study the problem of the regulation, distribution, and effects of consumption of pornography (Presidential Commission on Obscenity and Pornography, 1970). In the absence of a clear legal definition, the commission described the type of material it was assigned to study as "sexually-oriented material" (p. 3). The Attorney General's Commission on Pornography (US Department of Justice, 1986, pp. 323–47) listed the following categories of pornography: (1) sexually violent material that intermingles sex and violence; (2) sexually explicit, nonviolent materials depicting degradation, domination, and subordination, or humiliation; (3) sexually explicit, nonviolent and nondegrading materials; and (4) nudity presented in a sexual context. Social science researchers do not make a clear distinction between pornography and erotica. Harris and Bartlett (2008) suggest that because "the term *pornographic* is highly value laden . . . and as such is rather scientifically imprecise," it is preferable to refer to sex-themed visual images as "'sexually explicit' rather than 'pornographic.'" (p. 306).

For its part, the Attorney General's Commission on Pornography (US Department of Justice, 1986) decided that since the word "pornography" had, over time, acquired a highly pejorative ring to it due to value judgments that did not exist in the word's original Greek context, the word should be used sparingly and only to describe material that was "predominantly sexually explicit and intended primarily for the purpose of sexual arousal" (US Department of Justice, 1986, pp. 228–29). The committee took no position on whether some or all of the material that fell under that definition should be prohibited or even banned. The commission defined hardcore pornography as "extreme" forms of pornography. As for the word "obscene," the committee noted that the word had a ring of moral and legal condemnation to it. Therefore, obscenity referred to material that could be prosecuted without violating constitutional guarantees of freedom of expression (p. 230). As for the term, "erotica" the committee stated that "the term as actually used is the mirror image of the broadly condemnatory use of 'pornography' being used to describe sexually explicit material of which the user of the term approves" (p. 230). The committee noted that the word was so elastic that it covered everything from "any sexually explicit material that contains neither violence nor subordination of women" to all sexually explicit material to "only material containing generally accepted artistic value" (p. 231). In view of this overbroad, imprecise, and diverse (from a law enforcement perspective) deployment of the term "erotica," the committee decided to avoid using the word where a more precise term would suffice.

Some art historians and other scholars, who do not put much stock in the legal niceties and semantic precision of law enforcement, have continued to maintain the pornography–erotica divide. The scholarly distinction between erotic art and pornography is not legally recognized in the United States or most other democratic countries. From a regulated, representational perspective, there is little or no distinction between graphic, sexually explicit pornography and subtle, allusive, softcore pornography. Legally speaking, in the United States, there is no distinction between pornography and erotica. They are both classified as sex-themed "speech" that is regulated under the First Amendment. This is because under the "radically nonjudgmental" First Amendment, to use the expression of Schauer (2005), "there remains a pervasive American suspicion of official valuation of ideas and enterprises." There is, however, a distinction between protected sex-themed speech and unprotected "obscenity." As we see in Chapter 10, obscenity is material that, a jury, using contemporary community standards, would adjudge as content that appeals to prurient (sick, disgusting, abnormal, morbid) interest in sex. Furthermore, the material has to consist of highly offensive depictions of certain kinds of sex acts that are clearly defined and forbidden under the law. Furthermore, juries must also decide whether the material in question, taken as a whole, lacks serious literary, artistic, political, social, or scientific value (*Miller v. California*, 1973). In other words, *Miller v. California* stands for the proposition that when it comes to explicit, sex-themed visual imagery, there is a distinction between unprotected, hardcore pornography (obscenity) and protected, explicit, sex-themed visual imagery (*Marks v. United States*, 1976). Therefore, the legal distinction between what is acceptable and what is not depends on local community standards as determined by members of the community (juries), not the government, judges, or even scholars. Therefore, since the words "pornography" and "erotica" are vague and imprecise, we will use the expression "explicit, sex-themed imagery" to refer to rule-based visual representations of explicit and subtle sexual scenes: erotica, pornography, and obscenity.

In this volume, I use Kaplan's (2012) expression "regulated representation" to conceptualize explicit, sex-themed visual imagery as rule-based "re-presentations" that are produced and serve political and cultural functions in specific politico-cultural, religious, and legal regimes. Using archeological, historical, legal, literary, scriptural, linguistic, and art-history evidence, we study the problem of sex-themed visual imagery in diverse politico-cultural, historical, and religious contexts. We therefore

1. Describe and explain the sex-themed politico-religious visual imagery of Babylon and Assyria;
2. Focus on sex-themed hieroglyphic art produced during the reign of Ramses II of Egypt;
3. Discus the politico-cultural and religious significance of a sex-themed image in the national narrative of imperial Ethiopia;
4. Survey the role and place of sex-themed visual imagery in the polytheistic, sexual religiosity of classical Greece;
5. Trace the diffusion of Judeo-Christian notions of obscenity and morality from Palestine to the Greco-Roman Empire;
6. Survey the heterogeneous, explicit, sex-themed art of China and Japan;

7. Analyze the role and place of religious sexuality in Hinduism, using as a case study sex-themed temple art in India;
8. Survey and explain the politico-cultural context of the erotic art of the European Renaissance and the Enlightenment;
9. Discuss the regulation of sex-themed visual imagery in the Muslim world, using as exemplars erotic art from Muslim Persia (Iran), the Indo-Islamic Mughal Empire, and the Ottoman Caliphate;
10. Analyze the rise of Anglo-American regulation of "obscenity" in Victorian England;
11. Survey the regulation of obscenity in the Puritan culture of the United States;
12. Trace the origins of global sexual capitalism in Hollywood;
13. Discuss the transfer of sex-themed content and its regulation from real space to cyberspace and analyze the problem of American public-sector workers who participate in the production of, and who feature in, explicit, sex-themed visual imagery on the Internet;
14. Discuss the problem of copyright or intellectual property with regard to explicit, sex-themed visual imagery;
15. Compare and contrast how the United States and Canada regulate explicit, sex-themed visual imagery in the context of politics and women's rights;
16. Analyze the regulation of computer-generated child pornography in the United States and France in the online environment; and
17. Discuss the novel, online sex-themed phenomena of sexting and revenge porn in a number of jurisdictions.

Along the way, we trace the origin of the word "pornography" to the Greek words *porné* and *porno* (female and male prostitute, respectively) and the word *graphos* (writing). Taken together, those words form the neologism *pornographos* (pornography), which meant "writing about prostitutes" (Kapparis, 2003). The Enlightenment in eighteenth-century France gave us the word *pornographe* (pornographer), which means "one who writes a treatise on prostitutes." That is the modern origin of the word "pornography." Along the way, the word took on new patterns of political, religious, moral, social, and culture-specific meanings.

We will approach our safari of explicit, sex-themed visual imagery within the framework of three theoretical perspectives: (1) Regulated representation and re-presentation (the process of presenting phenomena anew in cultural idioms, figures of speech, and literary devices) for purposes of restatements of the law, moral evaluation, or ritual acknowledgement; (2) diffusion, the dispersal of ideas, technologies, and innovations from centers of political, economic, and cultural power to the periphery; and (3) deterritorialization, the movement of ideas, religions, laws, and policies from their places, spaces, and territories of origin (their natural habitats) to new territories and geographic areas. Greek culture diffused from its place of origin to the rest of the Western world. Judeo-Christian values deterritorialized, through translation, from their place of origin in Palestine to the Greco-Roman world, while Islam diffused from Mecca and Medina in Saudi Arabia to all continents of the world. Buddhism diffused from its birthplace in India to its strongholds in China, Southeast Asia, and Japan. In this volume, explicit, sex-themed visual cultures are conceptualized as regulated representations that were

re-presented, diffused, or deterritorialized from one region, culture, or civilization to other civilizations and cultures.

Mitchell (2005) conceptualized visual images as living objects that "arrest" their viewers and demand a reaction, any reaction, from them. He asked an intriguing question: "What do pictures want?" The idea is that visual communication is a value-laden process toward which we cannot be indifferent. In the light of the important politico-cultural role that sex-themed visual images played in the ancient world, we can ask this question, which is informed by Mitchell: What did the sex-themed politico-religious and cultural art of the Ancient Near East want? Human beings produce visual depictions of sex acts because human beings are sexual animals. Existence, indeed life itself, is grounded in sexuality. Ancient visual depictions of sex demonstrate that human sexuality had a religious dimension. To the ancients, religion, sex, and sexuality were inseparable. Sacred marriages to gods and goddesses and the performance of sex acts in temples symbolically united human beings and divinities in numerous cultures.

Mankind's First Sex Objects: Mythical Goddesses

In the United States and other Western countries, the "adult entertainment" or pornography industry is perpetually on the prowl, looking for the next sex "goddess." Its agents trawl college and university campuses, beauty pageants, and talent shows in their endless search for the next super "playmate," "kitten," or "bunny" to pose nude and grace the covers of its magazines. Others seek "performers" in the industry whose stock-in-trade is sex. The beauty, fashion, and cosmetics industries search fashion shows, beauty pageants, cheerleading contests, and dance competitions looking for the next all-American, fresh-faced beauty. What the billion-dollar sexual capitalism industry is doing is reenacting, through secular means, the ancient religious practice of worshipping revered goddesses of love, sexual passion, and fertility. Since even the most beautiful women and the most handsome men grow old and die, the beauty, fashion, and sex industries profit from the human fears of old age, death, and decay. They attempt to assuage human existential anguish through the perpetual—and highly lucrative—presentation of new sex goddesses and gods on whom segments of society project their hopes, desires, and intimate longings. Magazines give the sex goddesses and gods the title "sexiest man alive" or "sexiest woman in the world" until their "sexiness" fades or ceases to be profitable to the sexual capitalism industry, which proceeds to look for the next mortal god or goddess. These are modern manifestations of ancient practices, albeit with capitalist, rather than religious, motives.

The ancient world was replete with gods and goddesses. This is especially true of the ancient Near East, the focus of the first part of this book. Archeologists tell us that virtually all the nations of what today is the Middle East and North Africa had female deities who symbolized the physical and spiritual ideals and aspirations of their people (Goodison and Morris, 1998). The most famous goddesses of the Near East were the Babylonian Ishtar, or Ashtoreth, who was the contemporary and counterpart of the Egyptian goddess Isis. The cult of these two goddesses was very widespread in the region. Depending on the language spoken, the name of the goddess was Ashera, Ashtoreth, Astarte, Ishtar, Innana, or Astart. She was the goddess of love, sexual instinct, and fertility. Her cult was famous for setting

aside certain "groves" in which worshippers engaged in all kinds of sexual activities as acts of religious "worship" (Watson, 1833). These acts took place under the watchful eyes of statues of the goddess. In a sense, goddesses were mankind's first sex objects. It is believed that King Solomon introduced the worship of Ishtar or Ashtoreth in Israel through his wife, Queen Jezebel, who was from Sidon in what today is Lebanon. The Babylonian goddess Inanna and her Semitic counterpart Ishtar are described as infinitely diverse and ambiguous. Inanna is the "perpetually marriageable maiden . . . the unattached woman, whether unmarried maiden or harlot, eternally free of the marriage tie" (Westenholz, 1999, p. 72).

In the Biblical book of Acts, we read that when St. Paul first preached Christianity in Ephesus, a city that today is part of modern-day Turkey, craftsmen who made silver shrines and replicas of the goddess Diana of Ephesus to sell to her devotees caused a riot because they felt that Paul had discredited or blasphemed the goddess. Diana of the Ephesians was actually a combination of the Greek goddess Artemis and the Semitic goddess Ashtoreth, patroness of the sexual instinct. An impressive statue of Diana stood inside the temple of Ephesus, considered to be one of the seven wonders of the ancient world. The cult of Ashtoreth, or Astarte, ultimately became the model for Aphrodite, the Greek goddess of love, beauty, sexual pleasure, and procreation that we discuss in Chapter 4. Her Roman equivalent is the goddess Venus, who was recognized as the mother of the Roman people as well as the goddess of love, beauty, sex, fertility, and prosperity.

Structure of This Volume

This volume is organized into three parts. The first part covers the theoretical and historical approaches: re-presentation, diffusion, and deterritorialization. In this part, I discuss the origins and regulation of explicit, sex-themed visual images in Babylon, Assyria, Egypt, Ethiopia, ancient Greece, the Ming dynasty in China, the Tokugawa era in Japan, and the Chandella Dynasty in India. I discuss the diffusion of Judeo-Christian notions of sex, sexuality, and obscenity from Palestine to the Greco-Roman Empire. Thereafter, I discuss regulation of explicit visual sexual imagery as regulated representations during the Roman Empire, the Renaissance, and the Enlightenment. We also discuss the Islamic empires: Persia, Mughal and Ottoman Empires. This section serves as the background for modern regulation of pornography and obscenity in real space and cyberspace. Since the sexual revolution of the 1960s triggered a culture war in the United States over sex and sexuality, the courts have become the final arbiters and regulators of sex-themed visual imagery. The second part of the book focuses on the regulation of sex-themed speech, obscenity, and pornography under the First Amendment free speech regime of the United States. The third part of the book deals with comparative and international and approaches to the regulation of explicit, sex-themed imagery, and the epilogue traces the evolution of the regulation of sex-themed visual imagery in the United States and France and discusses the novel phenomena of sexting and revenge porn in a number of jurisdictions.

Chapter Summaries

In Chapter 2, I approach explicit, sex-themed visual imagery from a number of perspectives. Since it has been established that virtually all civilizations had some

form of sex-themed visual culture, these frameworks will help us describe and explain how different cultures, societies, and legal systems have viewed and regulated this kind of material over time. Some of these perspectives help us account for the diffusion and dissemination of ideas and worldviews regarding sex-themed visual imagery across cultural territories. The first perspective is that of Frédéric Kaplan (2012), who advanced the idea that mass-mediated content is a form of "regulated representation." The premise of this book is that all societies have an attitude toward explicit, sex-themed visual images and regulate these images accordingly. Even the most liberal, permissive societies have laws that specify the kinds of acts or activities that are not permitted in pornographic movies. For example, the production and possession of child pornography is banned in virtually all countries of the world. It is also banned under international law. The second theoretical perspective is that of diffusion. This term refers to the outflow of ideas and innovations from a geometric center to the periphery of international communication systems. Moral philosophical and religious attitudes toward explicit, sex-themed visual imagery diffused from early Judaic and Christian cultures to the Greco-Roman cultures. By the same token, classical artistic and aesthetic values diffused from ancient Greece and Rome to the rest of the world during the Renaissance. Deleuze and Guattari (1972) call acts of transferring technological innovations and ideas from centers of power to other cultures and geographic areas "deterritorialization" (p. 222). The root of the word is "territory." Deterritorialization describes and explains the act of moving innovations, ideas, material objects, and even people from one territory to other territories. The last perspective is that of re-presentation. This theoretical approach explains how cultures and societies present the "problem" of sex-themed imagery anew, from time to time, for purposes of finding political, cultural, and legal solutions to social problems associated with the phenomenon.

In Chapter 3, I introduce the earliest medium of written human communication: the clay tablet. This was a surface on which ancient scribes inscribed information, using mankind's first writing system: the cuneiform script. Terra-cotta clay tablets also served as a medium for the representation and memorialization of scenes of explicit human sexual conduct for religious and other purposes. In this chapter, we explore and explain explicit visual sexual imagery as rule-based representations in the religious and political cultures of Mesopotamia (Babylon and Assyria), as well as ancient Egypt, and Ethiopia. I use five visual narrative artifacts discovered by archeologists—the Uruk Vase (3200–3000 BC); Babylonian terracotta clay tablets containing scenes of explicit sexual intercourse; the explicit, sex-themed graphic art of Assyria; and the so-called Turin Erotic Papyrus, an ancient Egyptian sex-themed papyrus scroll painted around 1150 BC, an artifact from the Amuq Valley—as well as a sex-themed visual narrative of the ancient Ethiopian text, the *Kebra Nagast* (*The Glory of the Kings*)—as case studies in cultural representations of sexuality.

In Chapter 4, we survey the ancient Greek conceptualization of sexuality, as manifested in surviving heterogeneous, sex-themed visual representations. This survey is significant because ancient Greece is the source of the different vocabularies of sexuality that are represented in contemporary globalized society. As we saw previously, the ancient Greeks gave the world the term "pornography," a word formed from the words *porné* and *porno* (female and male prostitute, respectively) and the word *graphos* (writing). Taken together, those words form the neologism

pornographos (pornography). In ancient Greece, that new word meant "writing about [male and female] prostitutes" (Kapparis, 2003).

The aim of Chapter 5 is to describe and explain the diversity of regulation of explicit, sex-themed visual media content in the Sinic civilizations of Asia (cultures influenced by the ancient Chinese and the Confucian moral philosophical system) using as exemplary case studies the historical, cultural, and regulatory contexts of explicit, sex-themed visual imagery in China and Japan. This chapter shows that both cultures had well-developed systems of explicit, sex-themed visual imagery. In the contemporary, globalized world, the challenge faced by these countries is how to reconcile the right of freedom of expression with restrictions against media content considered to be obscene and detrimental to public order and morality within the specific politico-cultural and religious context of each country.

Chapter 6 focuses on the historical and cultural conceptualization and regulation of explicit, sex-themed visual imagery in India. I argue that though postindependence India is being "sanitized" of what is considered to be obscene content (pornography and erotica) in the traditional media and on the Internet, India's ancient Hindu culture is known for its intermingling of religion and human sexuality. This is evident in the elaborate, explicitly erotic sculptures that adorn several Hindu temples. The most famous surviving example of explicit Hindu erotic temple art is found in the Khajuraho temple complex, which has been declared a UNESCO World Heritage site. These sex-themed Hindu temple complexes survived Muslim invasions and British colonialism.

The aim of Chapter 7 is to survey the diffusion of Judeo-Christian religious, moral and sexual values from their origin in the "legislative texts" (Ricoeur, 1980) of the Hebrew Bible, the Holy Scriptures of the ancient Israelites, and the Greek New Testament of the early Christian church to the Greco-Roman Empire and the rest of the Western world. The main premise of the chapter is that Judeo-Christian conceptualizations of the human body and of sex originate in the "legislative texts" of the Hebrew Bible (Ricoeur, 1980). Christianization of the West led to the enactment of these values in the laws of Western countries. Victorian-era prohibitions against public displays of pictures of the *Venus of Milo* in the United Kingdom, and twentieth-century controversies over seminude, neoclassical sculptures in the US Department of Justice are manifestations of the clash between the polytheistic, sexually permissive Greco-Roman culture and monotheistic Judeo-Christian culture, with its austere, ascetic sexual morality.

In Chapter 8, we discuss the newly discovered erotic art of Pompeii and Herculaneum, two cities of the Roman Empire that were buried by the Mount Vesuvius eruption of 79 AD. Archeological excavations of these buried cities have opened a window to the explicit, sex-themed visual culture of this part of the Roman Empire. Pompeii and Herculaneum serve as the backdrop for our survey of the regulation of explicit, sex-themed visual representations in two overlapping historical periods: the Italian Renaissance, which is dated roughly between 1348 and 1648, and the Protestant Reformation, which was begun by Marin Luther in 1517 and ended in 1648. We discuss Catholic evangelism in Latin America as an offshoot of the Counter-Reformation. In Mexico, Catholic priests discovered a pre-Columbian cosmology and visual narratives that included gods and goddesses of sensuality. We subsequently explore how the Roman Catholic Church moved to occupy the power vacuum left by the collapse of the Western Roman Empire and became the lawgiver of the West,

patron of the arts, and gatekeeper of artistic taste during the high Renaissance. The Renaissance (which means "rebirth" in French) was a metaphor for the reemergence of learning after the decline and fall of the Roman Empire in the Middle Ages (historians used to call this period "the Dark Ages"). While mainstream art flourished during the Renaissance, the movement also had an erotic undercurrent, a sexual subculture that involved male and female prostitution, and sex-themed visual representations. The Renaissance also produced "sexually connotative" visual art that has not received much scholarly attention (Ruggiero, 2010, p. 5). Matthews-Grieco (2010) suggests that in the fifteenth century, technical innovations in the mechanical reproduction of images led to the emergence of erotic engravings, "sexually allusive pictures aimed at a variety of viewing publics" (p. 19). We conclude this chapter with a discussion of the regulation of sex-themed visual imagery during the European Enlightenment of the late seventeenth and eighteenth centuries. We survey the philosophical postures of thinkers and artists toward explicit, sex-themed art during the Enlightenment, a period that stressed the primacy of reason, human rationality, and individualism. Using art history and literary sources, Chapter 9 surveys and explains the politico-cultural and religious contexts of the regulation of sex-themed visual imagery in the Muslim world, using as exemplars the Safavid Empire (Persia/Iran), the Indo-Islamic Mughal Empire, and the Ottoman Caliphate of Turkey. Though Islamic legal texts frown upon representations of human and animal forms in art, these empires conceptualized and officially promoted the production of visual imagery in general and sex-themed visual imagery in particular as parts of the collective memory of their empires.

The aim of Chapter 10 is to survey the regulation of explicit, sex-themed visual imagery in the United States. I argue that sexual capitalism, the ethos that drives the pornography industry, emerged during the sexual revolution of the 1960s and 1970s in the United States. Innovations in information and communication technologies grounded in the arts, sciences, and technologies of ancient civilizations, led to the explosion and globalization of pornography and erotica in cyberspace. This a virtual sphere that the US government defines as "the interdependent network of information technology infrastructures that include the Internet, telecommunications networks, computers, information or communications systems, networks, and embedded processors and controllers" (US Office of the Press Secretary, 2014).

The fundamental premise of this chapter is that all mass-mediated material that depicts explicit sexual conduct is regulated as "speech" under the First Amendment. This constitutional provision protects a wide array of mainstream and extreme speech about sex. I argue that the history of American pornography and obscenity law is a history of the perpetual clash between the partisans of Judeo-Christian *agape* (other-directed, sacrificial love) and those of Eros and Aphrodite (the classical Greek god and goddess of egocentric, sexual love and desire). The Catholic Church advanced *agape* love while the sexual capitalism industry proclaimed the message of sex as liberation from repression. The history of American regulation of sex-themed visual imagery is therefore a history of the gradual transformation of explicit, sex-themed visual imagery from material that was banned by the austere and ascetic Puritans to mainstream content that is constitutionally

protected by the nonjudgmental First Amendment. The law gave Americans the right to consume or not to consume sex-themed visual material.

In Chapter 11, I suggest that the sexual and countercultural revolutions of the late 1950s and early 1960s led to the emergence of sexual capitalism: the commodification, industrial production, commercialization, and global distribution of sex-themed visual imagery (obscenity, pornography, and erotica) for profit. The sexual revolution is grounded on the idea that human beings are, at the subconscious level, biological beings driven by sexual fantasies and desires and that repression of these sexual impulses by societal and cultural taboos often leads to neurotic conditions (Freud, 1924). For his part, Marcuse (1966) believed that *Eros*, sexual love and passion, is liberating, not repressive. Taken together, these ideas became the seedbed of sexual capitalism, a phenomenon that capitalized on the sexual revolution and the counterculture movement to produce and commercialize sex-themed images on a global scale. The chapter also explores the expressive status of sex-industry professionals under the First Amendment. We analyze how American courts have interpreted and defined the First Amendment free speech claims of a number of sex industry "professionals." Certain persons who are featured in the production of explicit, sex-themed visual imagery are included in this analysis. These persons define their "performances" in pornographic movies as constitutionally protected speech acts that amount to symbolic speech and expressive conduct protected under the First Amendment.

Chapter 12 provides background information and discusses the so-called *Deep Throat* phenomenon, the series of cases and legal actions undertaken in different jurisdictions around the country in response to the unprecedented phenomenon of the commercially successful pornographic film *Deep Throat*. In effect, *Deep Throat* was an unprecedented pornographic blockbuster film funded and distributed by the Mafia through strong-arm tactics. The success of the film made it the model of the cinematic components of sexual capitalism. *Deep Throat* was such a major social and cultural phenomenon that it gave rise to a number of cases that expanded the scope of the sexual capitalism industry's freedom of expression.

Chapter 13 provides background analysis on the issue of the First Amendment rights of municipal agents (local and municipal government workers) who become participants in the production and marketing of pornography and erotica in real space and cyberspace. It is based on the premise that commercial pornography and erotica have become pervasive cultural artifacts that even government officials, who have traditionally been the enforcers of morality, now engage in for purposes of making a profit. The chapter explores how courts interpret and define the First Amendment rights of municipal workers who involve themselves in sex-related activities when they are off-duty. Furthermore, I explore how regulations designed to control the speech of municipal agents in real space has been transferred to the dematerialized realities of cyberspace. The aim of Chapter 14 is to describe and explain the copyright or intellectual-property-law regime of the United States with regard to explicit, sex-themed visual representations. The chapter summarizes the approach taken by courts as they interpret and apply intellectual property laws designed for real space to explicit, sex-themed visual imagery in the dematerialized world of cyberspace. The chapter consists of case studies that demonstrate how courts have approached intellectual property issues that include the domain-name disputes over Sex.com and the phenomenon of pornography

copyright "trolls." These are unscrupulous lawyers who use a wide array of legally and ethically questionable methods to violate the privacy of individuals who are suspected of downloading copyrighted pornography from the Internet. Copyright trolls harass persons who allegedly download copyrighted pornography into settling fictitious claims to avoid legal action for unauthorized, illegal downloading and sharing of pornography on the Internet.

Chapters 15 and 16 explore international and comparative legal aspects of sex-themed visual imagery. The aim of Chapter 15 is to compare and contrast American and Canadian regulation of explicit, sex-themed visual representations of pornography, erotica, and obscenity. The point of this comparison is to determine how the United States and Canada strike a balance between the right of freedom of speech and expression—guaranteed by the First Amendment and the functionally equivalent Canadian Charter of Rights and Freedoms, respectively—and the right of the government to restrict sex-themed material that is considered to be detrimental to women. Chapter 16 analyzes how France and the United States responded to the social, legal, and ethical challenges posed by developments in the field of information and communication technologies, using as a case study the contrasting regulatory postures of both countries with respect to computer-generated pedopornography (child pornography). While both countries criminalize child pornography that uses real children, the United States does not criminalize computer-generated pedopornography, which uses so-called video game children rather than real children. For its part, France regulates computer-generated child pornography within the framework of its moral philosophical ideals, which frown on all forms of pedopornography. Chapter 17 is an epilogue that discusses the earliest examples of the transfer of laws that regulate sex-themed visual imagery from real space to cyberspace in the context of the Minitel and the Internet. It concludes with a discussion of the early regulation of two emerging issues involving sex-themed visual imagery: (1) sexting, or the act of sending sexually explicit texts or images through text-messaging applications, and (2) revenge porn, the unauthorized posting of nude or sexual images of former lovers on the Internet and social media sites for purposes of humiliating them.

Conclusion

The representation of sex and sexuality in the visual arts is as old as the oldest human civilization. This book argues that sex-themed content is a universal phenomenon that is conceptualized and regulated within the framework of specific cultures, religions, and political systems. As such, it constitutes regulated representations of the reality of sexuality as perceived by specific societies. The dominant mode of regulating sex-themed visual imagery used to be through patronage: emperors, kings, and even popes commissioned visual images that reflected and refracted their views of life. As new technologies of interpersonal, organizational, and mass communication provided new avenues of communication, regulators adapted their rules and regulations to keep them abreast of technological developments. In matters of sex, sexuality, and explicit, sex-themed visual communication, many Western countries are returning to the pre-Christian heterogeneous sexualities of the ancient world. Different sexualities are being recognized and celebrated as civil rights. The rules and regulations governing explicit, sex-themed visual imagery

are evolving. Despite the long stretch of time, and the generations of technology that separate the artisans of the valley of the Tigris and Euphrates in Mesopotamia from the computer code writers of Silicon Valley, both groups have one thing in common: their work is regulated by the politico-cultural context in which they operate.

Part I

Theoretical and Historical Approaches

2

Theoretical Approaches

Explicit Visual Sexual Imagery as Rule-Based Re-presentations

In 2013, the leftist coalition government of Iceland, led by Jóhanna Sigurðardóttir, the first female prime minister in the country's history, announced it was going to introduce a parliamentary bill that would ban pornography in the print media and especially on the Internet. The government declared that Iceland, one of the most wired countries in our interconnected world, had had enough of violent pornography. The Icelandic minister of the interior, Ogmundur Jonasson, told reporters that the reason for the proposed ban was to protect children from the negative psychological impact of violent pornography that was readily available to them in real space and cyberspace. Jonasson's proposal was the outcome of a lengthy consultation process on the negative impact of sexual violence. Participants in the consultation process had included the Ministry of the Interior; the Ministry of Education, Science, and Culture; and the Ministry of Welfare. A wide range of experts, including the police, child welfare and protection specialists, lawyers, and members of the academic community, participated in the consultation exercise. The consensus of the experts was that pornography in general, and violent pornography in particular, was having a negative social impact on children in Iceland. The concern was that by being exposed to hardcore violence perpetrated in the context of sex, Icelandic children were being socialized into sex and violence by the pornography industry, not their parents or sociocultural institutions (Gunnarsdottir, 2013). The experts arrived at a series of recommendations. Iceland was feeling the impact of sexual capitalism in a highly networked society.

Several of the recommendations of the experts were implemented in Icelandic schools and other social institutions without any problems. However, one of the recommendations made international news headlines. It was a draft bill whose intent was to craft a narrowly tailored definition of pornography that would have banned violent and degrading sexual content that treated women as sex objects. The draft bill was modeled after Danish Penal Code provisions against violent and degrading pornography. Actually, Iceland is one of the few countries of the world that bans the distribution of pornography. The problem is that the law is not being

enforced, because the country does not have a legal definition of the term "pornography" (Gunnarsdottir, 2013).

Iceland's proposed law was not popular in Europe. Human rights organizations and media outlets denounced the proposed bill as an affront to the cherished human right of freedom of expression. Politicians criticized it as a censorious violation of freedom of expression. Too much freedom of sexual expression kills freedom of expression, the Icelandic government suggested. The excesses of sexual capitalism had left Iceland with no choice but to propose the elimination of commercialized violence that was intermingled with sex. The government of Iceland had to strike a balance between protecting the rights of Icelandic adults to have access to pornography and the interest of the government in protecting the psychological and social well-being of children by eliminating the violent sexual pornography available to them. That argument was not persuasive. The draft bill against violent and degrading pornography died a natural death in committee. The coalition government that had proposed the pornography ban was defeated in the 2013 elections. Interestingly, even though the proposed pornography ban was intended to protect children, Iceland did not propose a legal solution to the problem of "sexting," the widespread practice of young people sending nude pictures of themselves or others to their friends. Sexting among minors and teenagers is a major problem. The unauthorized release of "sexted" images to third parties has caused a lot of children emotional distress and has even led to suicide in certain cases. (Sexting has become a global problem. See discussion of this subject in the Epilogue.)

Iceland's attempt to define pornography in general, and violent and degrading pornography in particular, out of legal existence is fraught with irony. When the sexual revolution began in the United States in the 1960s, sex "liberation" activists rejected what they considered to be America's austere—nay, ascetic—seventeenth-century Puritan notions of sexuality as well as its eighteenth-century Victorian social propriety and religiosity. The new worshippers of Venus looked to the "sexually liberated" Scandinavian countries for inspiration (Schaefer, 2014). Sexually liberated Iceland's discontent with pornography demonstrates that pornography, the rule-based, explicit representation of human sexual activity, has become a major problem. Due to historical, political, religious, ethical, and cultural concerns, explicit visual sexual images are problematic even in the most liberal social democratic countries. In the age of the Internet, the Scandinavian countries have come to the realization that too much pornography kills pornography—and human dignity. That is why every society and culture has an attitude toward the display of explicit, sex-themed imagery in public places and in the media. That also explains why a large component of communication law in the Western world is concerned with regulating representations of sexually explicit images in the media and in public spaces. In societies where freedom of speech and expression is a fundamental human right, regulation of pornography is always in tension with freedom of expression. Countries around the world have resolved that tension in different ways. Countries that do not have democratic cultures or the time for democratic niceties have banned pornography outright. Iceland is an example of a country that took the democratic route. Despite the failure of the draft bill, the nation became aware of the problem.

This chapter approaches explicit, sex-themed visual imagery from a number of perspectives that describe and explain how different societies and legal

systems view and regulate this kind of material. The first perspective is that of "re-presentation." This explains how societies and cultures present the problem of sex-themed imagery anew for purposes of finding political, cultural, and legal solutions to the social problems associated with it. This was the case with violent pornography in Iceland. The government presented it anew as a phenomenon that had negative social and psychological consequences for children. The second theoretical perspective is that of diffusion. This term refers to the outflow of ideas and innovations from a geometric center to the periphery of communication systems (Rogers, 1995; Tarde, 1962). As we will see later, moral philosophical attitudes toward explicit, sex-themed visual imagery diffused from early Judaic and Christian cultures to the Greco-Roman cultures. By the same token, classical artistic and aesthetic values diffused from ancient Greece and Rome to the rest of the world through the Renaissance. Furthermore, in our interconnected, global information society, explicit, sex-themed visual imagery diffuses from a few major centers of production that are located in California to the rest of the world.

Human beings are sexual animals; they are also religious animals. Conceptualizations of pornography are grounded in conceptualizations of the human being. Various ideas about human beings and views about explicit, sex-themed visual imagery have diffused from culture to culture over time. These ideas have influenced perceptions of sex-themed visual imagery in various societies. As we see in Chapter 3, one of the ironies of implicit or explicit visual images that portray sexual scenes is that they are rooted in the religious experiences of a number of cultures. In ancient Near Eastern and the Greco-Roman civilizations, politics, religion, and sex were intertwined. In the Judeo-Christian tradition, attitudes toward explicit, sex-themed visual material are grounded in perceptions of the human body as being sacred. The influential Roman Catholic Church doctrine of "ensoulment" perceived humans as special beings created by God and endowed with a soul (Murphy and Coleman, 1990, p. 78). During the Renaissance, the philosophy of humanism placed human beings at the center of human experience, concerns, and intellectual activity. This paved the way for the emergence of secular art that did not look at the human being and the human body from a "spiritual" perspective. The Enlightenment emphasized human rationality, individuality, autonomy, and freedom. The result is that in our contemporary, globalized, interconnected world, some cultures tolerate pornography in the name of freedom of expression, while others vehemently oppose it on ethical, religious, social, and moral grounds.

Visual Communication as Regulated Re-presentation of Reality

From time immemorial, human beings have represented reality through the instrumentalities of communication available to them. The earliest form of human communicative re-presentation in visual form is cave art. When archeologist Denis Valou, saw the 2.5-million-year-old Paleolithic (early Stone Age) cave drawings in Lascaux, France, he exclaimed, "Lascaux is like a theatre, a story plays out on its walls." Aujoulat (2005) called Lascaux "mankind's first book of mythologies." These are stories and beliefs about early human existence and coexistence with realistic-looking animals. Lascaux was one of the earliest human rule-based re-presentations. The early Stone Age "artists" of Lascaux used the most primitive artistic techniques, implements, and paints, to re-present or present anew the

reality of their existence and beliefs on the surface of the cave. They did this within the rules and limitations of technology, space, time, and their beliefs about the origins of the universe and of life. Cave drawings are communicative re-presentations that tell tales about our cave-dwelling ancestors. These pictorial records show that our ancestors re-presented (presented anew or retold) stories that portrayed their worldviews, day-to-day activities, exploits, rituals, and myths. The ancient Egyptians and Nubians, and the Mayans and Aztecs, re-presented their cosmology as well as the main events of their time in hieroglyphs, while ancient Greeks re-presented their military, religious, and sports exploits on their temple walls and on utilitarian objects.

French philosopher Jacques Derrida (1967a) presented the concept of re-presentation as a dramatic reenactment or a replay of events. According to him, re-presentation means to present anew: "Re-presentation, as [in] repetition or reproduction of presentation . . . can be understood as what takes the place of, what occupies the place of another" (p. 54). Pierre Legrand (2003) moved the concept of "representation" away from the narrow confines of identity and identity politics by emphasizing that representation means "to present a second time" within certain political and cultural contexts. Used in this manner, re-presentation moves representation away from the narrow ideological emphasis on the formulation of individual and collective identities, individual and collective self-awareness, and reaffirmation of group specificities or particularities. Emptied of its identity and interest-group trappings, re-presentation becomes "a retrospective continuity" (Nora, 1989, p. 16) that departs from the overpersonalization of representation. Re-presentation—the act of constructing and presenting reality anew for artistic, journalistic and ideological purposes—enables producers of media messages to link the past and the present for political, social, religious, aesthetic, commercial, and ideological purposes.

Re-presentation is generally a synthesis; it involves presenting only carefully selected highlights and summaries of facts, significant happenings, or landmark events. At the turn of the twentieth century, British classicist Jane Harrison (1912) advanced hypotheses about the psychological and sociological importance of ritualistic redoing, re-presenting, reenacting, and recounting of landmark events in ancient Greek drama and religion. She put forth the notion that major events have dramatic, religious, or ritualistic aspects and that they are "sometimes *re-done* or *pre-done* . . . enacted or re-presented . . . In all religion as in all art, there is this element of make-believe. Not the attempt to deceive, but a desire to re-live or re-present" (p. 43). Each re-presentation is couched in specific political, cultural, historical, and social contexts.

Re-presentation is also, to use the formulation of James Carey, ritual communication that involves distilling and communicating principles, concepts, ideas, ideologies, and cultural practices anew (Carey, 1989). Re-presentation is "directed not toward the extension of messages in space but toward the maintenance of society in time; not the act of imparting information but the representation of shared beliefs" (p. 18). According to Carey, ritual communication thus involves shared ceremonies that are intended to "represent an underlying order of things" (p. 19). Ritualistically speaking, then, communication is a "re-presentational" activity "in which a particular view of the world is portrayed and confirmed" (p. 20). In short, explicit, sex-themed art tells us a lot about the societies in which it is produced and consumed. This is because explicit, sex-themed visual imagery

encodes specificities of the politico-cultural, legal, and historical milieu in which it is produced and disseminated. Such images are "figures of memory," to use the expression of Assmann (2011, p. 24).

Explicit, Sex-Themed Visual Imagery as Regulated Representations

Explicit, sex-themed visual re-presentations are narratives bound by laws and ethics. The premise of this book is that sex-themed visual imagery is a rule-governed phenomenon that is subject to a series of restrictions ranging from grammar and composition to artistic, sociocultural, and legal logics (Ricoeur, 1980, p. 13). All societies have an attitude toward images that depict explicit sexual scenes. They therefore regulate the content within the framework of their laws, ethics, and religious and cultural conventions. Frédéric Kaplan (2012) advanced the idea that mass-mediated content is a form of "regulated representation." That is because it is "a man-made material document that stands for something else, typically, a highly dimensional event or phenomenon . . . A *regulated representation* is a representation governed by a set of production and usage rules. These rules can be intrinsically embedded in the production process of the representation or the result of cultural conventions" (pp. 25–26). In other words, regulated representation involves abiding by the laws that govern the production of sex-themed visual imagery. It amounts to "the subordination of a particular case to rules, laws, or structures" of specific political, cultural, and legal contexts (Ricoeur, 2013, p. 9). In short, pornography is, to borrow the expression of Ricoeur (2013), a "rule-governed creation" (p. 10). Meister and Schönert (2009) also suggest that narratives are simplified communication techniques: "Like any representation, it reduces the complexity of its reference domain to the carrying capacity of its medium and to the processing capacity of its senders and receivers" (p. 11). This concept is applicable to pornography and other sex-themed visual narratives.

Explicit, sex-themed visual images are regulated representations in specific cultural contexts. Hollywood, the movie capital of the world, was the cradle of global pornography. Hollywood productions have been regulated since the advent of the movie industry. As we see in Chapter 8, the voluntary Motion Picture Production Code of the 1930s was a system of self-regulation that the American movie industry adopted. The movie industry agreed to police itself, within the parameters of the law and social conventions of decency, in order to avoid censorious federal regulation (Doherty, 1999). That practice continues with the movie rating system. Additionally, the state of California and the city of Los Angeles have a battery of regulations that control all aspects of the movie industry. This is especially true of the billion-dollar American adult entertainment or pornography industry. As we see in Chapter 10, Los Angeles County, the center of the adult entertainment industry, has a barrage of laws regulating everything from the participation of children in movies to specific types of sex acts that are not allowed in pornographic movies. This edifice of state and local laws is crowned by the federal law of obscenity that was set forth in *Miller v. California* (1973). Under this First Amendment standard, pornography is protected speech. However, obscenity, which is defined as material that appeals to prurient (sick, disgusting, morbid) sexual tastes, is not protected speech. Furthermore, the material must consist of highly offensive depictions of sex acts that are defined and forbidden under the law, and the reasonable person

(the jury), using local community standards, must find that the material in question, taken as a whole, lacks serious literary, artistic, political, or scientific value (*Miller v. California*, 1973). When the law reflects the cultural norms, moral values, or specific community standards, it is part of the culture of that community. Legrand (1999) called this phenomenon "law-as-culture" (p. 5).

Legal re-presentation is often necessitated by politico-cultural and technological change. The United States has a tradition of legal re-presentation and recapitulation. The American Law Institute periodically issues or reissues restatements of the law in areas as diverse as torts, contracts, trusts, international relations, trademarks and patents, and the like. These are synoptic re-presentations aimed at organizing specific areas of case law and "distilling" the rules that come out of it. At the international level, all countries of the world ban child sexual exploitation and child pornography under the UN Convention on the Rights of the Child, which was adopted by the UN General Assembly in 1989. In order to get the convention adopted, child welfare and law enforcement officials from around the world represented the problem of child pornography to the international community as a vice that had harmful psychological and physical effects on children.

Diffusion of Innovations, Ideas, Mentalities, and Moralities

The diffusion-of-innovation theory holds that innovations—and ideas—often diffuse from a geometric center of origin like concentric circles of waves created by a drop of water in a quiet pool (Tarde, 1962). Thus each innovation has a logical geographical center from which it is spread to other areas. Some innovations diffuse from one country or one culture to another through war; others diffuse through imitation. Still others diffuse through mere chance cultural encounters (Pemberton, 1936). Furthermore, innovations are often modified or reinvented in the course of the diffusion process (Rogers, 1995). This reinvention enables innovations to fit each new culture or environment they come in contact with (Kinnunen, 1996). This is true of the innovative technologies of cuneiform writing on clay tablets, hieroglyphic writing on papyrus, paper, books, printing, newspapers, magazines, photography, film, radio, television, video, computers, and the Internet. This is also true of the ideas, values, conventions, moralities, laws, meanings, and worldviews of given cultures that are transmitted to other cultures.

The diffusion-of-innovation perspective explains proliferation of the phenomenon of sex-themed visual imagery around the globe as well as different cultural attitudes toward this kind of material. As we shall see in Chapter 3, in the ancient Near East, as well as in ancient Greece and Rome, there was no separation between religion and the state. In the ancient Near Eastern religions, sex was part of religious worship. The Code of Hammurabi, the first surviving collection of laws in the ancient world, has provisions for protecting the rights of temple prostitutes. Furthermore, emperors and kings were high priests of national religious cults. In some ancient states, including the Roman Empire, some emperors proclaimed themselves gods. Under these situations, national religions—and their attitudes toward sex—spread through wars of conquest.

Translation is one of the most effective tools of diffusion of ideas and innovations. The translation of religious texts from one language and culture to another language and culture necessarily involves the diffusion of moral philosophical

norms and worldviews from the culture of the source language to the culture of the target language. Examples of the diffusion of the worldview and morality of one culture to other cultures abound. Buddhism arose in India and spread throughout Asia and the rest of the world through translation of its teachings from Sanskrit, the classical language of India, to other Asian languages. An identical phenomenon took place when the Hebrew Scriptures (Old Testament) were translated into Greek. The diffusion-of-innovation perspective also explains how Judeo-Christian views of the human being, attitudes toward sex, sexuality, and sex-themed visual imagery spread from Palestine to the Greco-Roman empire and the rest of the Western world. Diffusion of innovation also explains how pornography spread from its "cradle" in Hollywood, California, to all parts of the world.

Deterritorialization

The world is a territorial phenomenon characterized by territorial logics. It is divided into geographic, politico-cultural, economic, ethno-national, and regional territories demarcated by physical boundaries or "symbolic territorialities" (Deleuze and Guattari, 1980 p. 184). These philosophers coined the term "deterritorialization" to critique capitalism as a "movement of displacement" (p. 231). The act of transferring technological innovations and ideas from centers of power to other cultures and geographic areas is what Deleuze and Guattari call "deterritorialization" (p. 222). The term refers to the act of moving innovations, ideas, material objects, and even people across territorial boundaries. The concept of deterritorialization is now used in a number of fields, including globalization studies, art, media, cultural studies, anthropology, and politics. In globalization studies, deterritorialization has come to refer to the interconnection of nations and peoples and its role in diffusing cultural products from centers of production in the Western world to the periphery of the global system. Therefore, deterritorialization is the global diffusion of cultures, technologies, and worldviews without regard to territorial boundaries and jurisdictions. To "deterritorialize is thus to breakdown well-marked political, cultural, biological, and social boundaries or territories. A fish out of water is deterritorialized; human beings in space are deterritorialized" (Deleuze and Guattari, 1972, p. 437).

Throughout this book, we will see how innovative technologies, from cuneiform tablets to tablet computers; new ideas about human beings; and sexual moralities were deterritorialized from specific cultural territories and globalized. Some of these ideas have changed entire civilizations, cultures, religions, and worldviews. Communication is deterritorialization because it takes texts out of their "natural habitats," or territories, and literally transmits them to other territories through the airwaves, cable, the Internet, and even the postal system. Telecommunication is the deterritorialization of messages because it is communication across territories. Messages in real space and cyberspace contain ideas, values, philosophies, and cultural perspectives that are instantly transmitted across national and regional territories.

In art and photography, to deterritorialize is to take slices of reality and recreate them in imaginary territories or contexts in order to make statements, express ideas, or pass ethical or moral judgment on individuals, groups, and institutions. Explicit, sex-themed images are instruments of deterritorialization. They take their

subjects, who are mostly women, out of their familiar territories and re-present them in the highly artificial, restricted, and fantasy world of *Playboy, Playgirl*, *Hustler*, *Penthouse*, and Internet pornography. By doing so, the sexual capitalism industry profits from the perpetual search for the mythic Greco-Roman goddess of sex and beauty, Aphrodite (whose Roman equivalent is Venus). The mythic cult of Aphrodite/Venus was deterritorialized to modern Europe during the Renaissance and continues to be used in the lucrative beauty, advertising, and pornography industries to sell unrealistic ideas of beauty, sex, and sexuality.

When technologies and ideas are deterritorialized from one culture to other cultures, they change the recipient cultures. However, the technologies themselves are reinvented or changed in the process. Deterritorialization is not a passive or even accidental process. Communicators are change agents and active promoters of the deterritorialization of ideas and values. The early Christian church, led by St. Paul, deterritorialized Judeo-Christian sexual values of sin, obscenity, and morality from Palestine to the Greco-Roman Empire. That deterritorialization changed Europe profoundly. Today, many countries, including China, Cuba, and North Korea, block the Internet because they fear it will deterritorialize and spread Western ideas about democracy and freedom to their countries.

Reterritorialization

For every act of deterritorialization, there is a counteract of reterritorialization. Therefore, reality is a question of striking a balance between deterritorialization and reterritorialization. Reterritorialization is defined as the "reconstitution of territorialities" for purposes of compensating for the original "movement of displacement" (Deleuze and Guattari, 1980, p. 315). That movement is deterritorialization. The world is therefore caught between "the simultaneity of the two movements of deterritorialization and reterritorialization," to use the expression of Deleuze and Guattari (1980, p. 260). The philosophers conclude that "there is no deterritorialization . . . that is not accompanied by global or local reterritorializations, reterritorializations that always reconstitute shores of representation" (p. 316). This means that for every action of displacement of reality, there is a reaction, a counteraction aimed at restoring the status quo. Though the two forces seem to be polar opposites, the fact is that since nature abhors vacuums, when ideas, innovations, mentalities, or moralities are deterritorialized, they take on a life of their own in their new territories. The vacated space is filled with functionally equivalent ideas, media, and content. We see this phenomenon at work in Judeo-Christian morality's deterritorialization from Palestine to the Greco-Roman Empire (Chapter 7).

Explicit, Sex-Themed Imagery and Contrasting Philosophies of Love

One of the main themes of this book is that the regulation of pornography and other explicit, sex-themed material in Western countries—and their former colonies—is influenced by an ancient tension between the Greek idea of love, *Eros*, and the Christian idea of love, *agape*. The British Museum has one of the world's largest collections of Greco-Roman painted vases, featuring a wide array of red and black illustrations of Greco-Roman mythologies and mythic figures. A large part of these vase paintings depict "erotic-religious unions," the intertwining

of the erotic and religious worship (Keuls, 1985, p. 50). Many of these paintings depict Eros—the nude, winged god of sexual desire—floating, bow and arrow in hand, in all kinds of sexual and nonsexual scenes. Some of these vase paintings are homoerotic representations of the "homosexual ethos" of ancient Greece that is so evident in Greek literature. Keuls (1985) concludes that evidence from Greek history, literature, archeology, and vase paintings demonstrates that "the striking feature of Athenian mores is not the glorification of pederasty [sexual relations between a mature man and a childlike or pubescent boy] but the extraordinary propensity for prostitution, both heterosexual and homosexual" that was a hallmark of the culture (p. 299).

The early Christian church, whose center was Constantinople, is famous for its iconography (religious imagery). A mosaic at the entrance of the Hagia Sophia (Church of the Holy Wisdom), which Emperor Justinian had reconstructed and dedicated in 537 AD in the former Constantinople (now Istanbul, Turkey), depicts the Virgin Mary with the Christ child, flanked by a hallowed Emperor Constantine and a hallowed Emperor Justinian bearing gifts to the Christ child like the magi of the Biblical nativity story. The Imperial Gate Mosaic in the same church depicts Emperor Leo prostrating himself before Jesus Christ. As we discuss in Chapter 6, Judeo-Christian sexual morality, contained in the Hebrew Scriptures and the teachings of St. Paul in the New Testament, diffused with Christianity from Palestine to the Greco-Roman world and the Mediterranean basin.

However, religious influence was not a one-way street. Since the New Testament was written in Greek, Christianity spoke the language of the culture it diffused into and adopted the methodology of Greek or Hellenic philosophical speculation. As Nygren (1982) suggests, the "Hellenic spirit . . . gained an entry into Christianity along with Hellenic forms of thought" (p. 238). Early Christianity thus had some unmistakable Greek cultural characteristics, though not its worldviews. Nevertheless, Nygren (1982) suggests that there soon arose a tension between the Christian and Greek cultures over the idea of love, which happens to be the "fundamental motif" of both worldviews. A fundamental motif is the basic idea, the driving force, or the main characteristic of something (p. 27). There are profound differences between the fundamental motif of Christianity, *agape* love, and the fundamental motif of ancient Greek culture, *Eros*, or sexual love (Nygren, 1982, p. 238). The Christian idea of love, *agape*, is that God, "in compassionate love, descends to the human. *Agape* is primarily God's love, unveiled at its deepest in the Cross of Christ, in his offering of Himself for sinners" (Nygren, 1982, p. 236). The grand masters of the Renaissance portrayed this teaching in countless works of art. The most well-known icon of *agape* love is Leonardo da Vinci's *la Pietá*. This piece of sculpture, which is located in the Vatican, depicts Mary, the Mother of Jesus, cradling her mostly nude, dead son, Jesus Christ.

In contrast, erotic love is different. *Eros* is sexual passion, love, desire, and longing that is personified as a winged, nude Greek god flying around and shooting couples with arrows of love The Roman equivalent of the god Eros is Cupid. Nygren (1982) states that "the central motif of the Hellenic [Greek] theory of salvation is desire, egocentric love, for which man occupies the dominant position as both starting-point and goal: The starting point is human need, the goal is the satisfaction of this need" (p. 235). *Eros* has become very pervasive in Western culture. There is a whole class of sex-themed material that is classified as "erotic." This is sex-themed material that is considered to be artistic, to have literary value, and

to rise above the level of pornography. As Heller (cited in Morgan, 2012) put it, "desire (*Eros*) and satisfaction are ineliminable elements in the experience of the beautiful. The beautiful is erotic" (p. 33). Furthermore, she argues that while the object of *agape* love, humanity, is stable, the "objects of *Eros*" are heterogeneous and perpetually evolving. *Eros* is the source of all our unconscious desires; it is "Freud's libido" (p. 34).

Nygren (1982) suggests that at some point, the fundamental motif of early Christianity, *agape* love, became intermingled with the fundamental Greek motif of love, *Eros*. The two fused into one fundamental motif, which was expressed as such by Christian philosophers from Augustine to C. S. Lewis. *Agape* love is one of four types of love—and they are all grounded in the Greek culture—that appear in the Greek New Testament. C. S. Lewis (1960) described the four types of Christian love as familial love (affection or fondness through biological and social closeness), filial love (friendship between brothers and friends), *Eros* (romantic love), and *agape* (other-directed charity or God's love). Lewis (1960) distinguished the Christian *Eros* from the raw, instinctual, animalistic sexuality represented by the Greek goddess Aphrodite (Venus is her Roman equivalent). Christian religious teaching represented a radical departure from "pagan" or "heathen" Greco-Roman polytheistic religion and sexuality.

The synthesis of Christian (*agape*) and Greek (*Eros*) ideas of love lasted until the Protestant Reformation (Nygren, 1982). This clash of fundamental motifs and worldviews on the very nature and purpose of love continues to this day. It is reflected in the regulation of sex, sexuality, obscenity, and indecency around the world. Pornography is grounded in *Eros*, human sexual need and its satisfaction. Under the post–World War II human rights regime, the fundamental motif of ancient Greek culture, *Eros*, takes precedence over the fundamental motif of Christianity, *agape*. Since sex has been declared a human right, the focus of concern is the human being. Love begins and ends with human sexual desires and their satisfaction. In the Western world, the fundamental motif of government is protection of human rights and human dignity. Sex (in its diverse manifestations) between consenting adults has become a fundamental motif of human rights. In the domain of visual communication, the conflict between *Eros* and *agape* appears to have run its course. Both ideas of love are now mostly played out on different terrains. *Agape* love is now confined mostly to the church, whose icons remind the faithful of God's self-giving love through Christ's vicarious death on the cross. *Eros* in enacted in pornography, where the raw, instinctual, animalistic sexuality personified by the Greek goddess, Aphrodite, and her Roman equivalent, Venus, is played out. In our modern, secular world, pornography—and its extreme form, obscenity—are regulated representations in real space and cyberspace. This regulation is necessary, because the ancient tension between *agape* and *Eros* continues in the "post-Christian" societies of western Europe.

Figure 2.1 Vase painting of a Greek mythological scene. Eros is the god of passionate physical love (Shutterstock image)

3

Explicit,S ex-Themed Visual Imagery as Rule-Based Representations in t he Ancient World

Babylon, Assyria, Egypt, and Ethiopia

One of the consequences of the 2003 US invasion of Iraq was the theft, from the National Museum of Iraq in Baghdad, of a five-thousand-year-old piece of decorated pottery, the Uruk vase (Figure 3.1). This piece of art was fashioned in ancient Sumer, one of the earliest civilizations that flourished in the "cradle of civilization," the territory between the Tigris and Euphrates rivers in "Mesopotamia." That name means "the land between the rivers" in Greek. This region is known as the "cradle of civilization" because it gave mankind its first writing system (cuneiform); its first governments, empires, codification of law (the Code of Hammurabi); and the wheel. Additionally, the peoples of the region laid the foundation for mathematics, astronomy, and medicine. The Uruk or Warka vase, which archeologists had excavated from the site of the ancient city-state of Uruk, was one of the most significant archeological discoveries of Mesopotamia. It is one of the earliest known pieces of "narrative relief sculpture." It shed light on the worldview and culture of the people of that city-state (Haywood, 2012). Fortunately, the vase was recovered and returned to the Iraqi National Museum.

The Uruk Vase as Mankind's First Extant Sex-Themed Representation

When legal historians and classical scholars discuss mankind's early sexual practices, they either quote the account written by the Greek Historian Herodotus in 440 BC or Hebrew Bible references to the sexual practices of the peoples of the ancient Near East with whom the Hebrews had to coexist. Both narratives were written from the Greek and Hebrew perspectives. However, archeological and art-history evidence points to the fact that Hebrew Biblical and Greek historical texts give us, at best, an

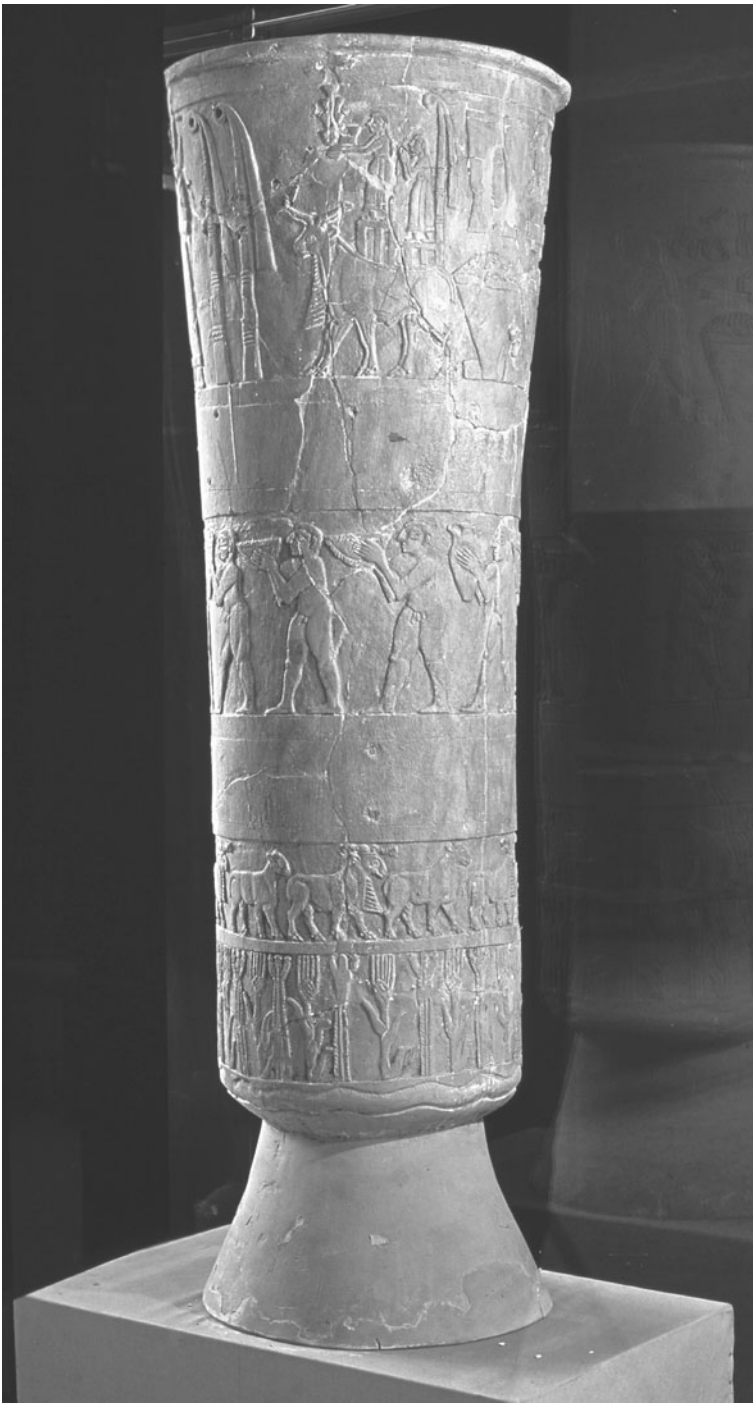

Figure 3.1 The Uruk or Warka vase. Notice the line of naked men carrying offerings to the goddess of love, sexual attraction, and beauty, Inanna (Iraqi National Museum, Baghdad)

incomplete picture of the conceptualization and deployment of sex in the politico-cultural lives of the major empires of the ancient Near East, the region that today is known as the Middle East. The premise of this chapter is that explicit, sex-themed visual imagery—what we now call "pornography"—is as old as mankind itself. However, its context and cultural significance has evolved over time. At the dawn of civilization, the state, religion, sex, and artistic re-presentations of reality were intertwined with the worldviews and realities of the peoples of the ancient world. The Uruk Vase, which dates back to 3200–3000 BC, is probably the earliest example of sex-themed, narrative visual representation. In effect, part of the vase depicts an erotic-religious festival held in honor of the goddess Inanna, or Ishtar, the complex, multifaceted, widely revered patron goddess of Uruk, Mesopotamia, who was worshipped as the planet Venus (Westenholz, 1999, p. 73). She was also the goddess of love, sexual attraction, fertility, and war—"a sort of ancient Wonderwoman" (Westenholz, 1999, p. 75). Sacred prostitutes devoted to the worship of the goddess lived in dormitories in the temple complex and offered themselves to worshippers on religious holidays (Smith and Morehead, 1939). Mesopotamian hymns and literary compositions about Inanna are, however, contradictory. Some of them refer to her as a virgin, while others "exalt her as a licentious harlot" (p. 73). She was also known as the youthful, nubile, "perpetually marriageable maiden . . . Inanna is the 'unattached woman' whether unmarried maiden or harlot, eternally free of the marriage tie" (Westenholz, 1999, p. 74).

Aim of the Chapter

The aim of this chapter is to explore and explain explicit visual sexual imagery as rule-based representations in the religious and political lives of Mesopotamia (Babylon and Assyria), ancient Egypt, and Ethiopia. We will use five visual narrative artifacts discovered by archeologists—including the Uruk Vase (3200–3000 BC), the sex-themed graphics of Assyria, and the so-called Turin Erotic Papyrus, an ancient Egyptian sex-themed papyrus scroll painted around 1150 BC—as case studies. In order to set up the legal and historical contexts of these visual texts, we will discuss the Code of Hammurabi (780 BC) and the historical narratives of Greek historian Herodotus. The visual communication texts under study demonstrate that the ancient civilizations on which our contemporary cultures are grounded had conceptualizations of pornography and sexuality that were grounded in culture-specific views of the role and place of religion in public life (Eko, 2012). Knowledge of these ancient cultures is important because some of their innovations—the invention of writing and alphabets, codification of law, invention of paper, architecture, and so on—diffused to ancient Greece and Rome and from there diffused to the rest of the world.

Cuneiform Writing on Clay Tablets

The earliest medium of written human communication was the clay tablet. This was a surface on which scribes inscribed information using mankind's first writing system—the cuneiform script. This was the beginning of recorded human history. Naturally, the authorities controlled both the writing system and the content of the tablets (Postgate, 2013). This was the first "state medium." The Assyrian Empire had an elaborate system of governance with a bureaucracy and legal

regime made possible by cuneiform writing. This was a sign-writing system whose main medium was the *tuppu*, or inscribed clay tablet. Writing involved impressing cuneiform wedges on slabs of soft clay and baking them into solid tablets. To inscribe meant to prescribe. The word "tablet" referred to clay cuneiform legal and administrative documents of all types. These included "message tablets," or government directives. Sometimes, clay cuneiform tablets that shared common features or dealt with identical subjects were assembled and stored together to create the very first archives or databases (Postgate, 2013, pp. 67, 81). The largest of these archives was the Offering House Archive, the record of required offerings delivered to the House of Assur, the Assyrian national god, from each of the provinces of the Assyrian state. Writing was therefore the first technology of governance.

The Code of Hammurabi (780 BC)

We have seen that art-history and archeological evidence point to the fact that in the ancient Near East, sex and religion were intertwined. There was no separation of the sacred and the profane, the temple and the state. Archeologists have unearthed ancient artistic works, like the Uruk Vase, that support this hypothesis. Art-history evidence also shows that artistic renditions of sacred rituals were rule-based representations produced under the auspices of state-administered temples and palaces. There was therefore no separation between religious law and secular law. This phenomenon is exemplified in Babylon, where the ruler, King Hammurabi, put together the earliest surviving collection of human laws. He inscribed them on the most common mass medium of the day: a colossal stele. This is an upright stone pillar that French archeologists unearthed, reconstructed, and moved to the Louvre Museum in Paris. The Code of Hammurabi was written in cuneiform, one of the earliest human sign-writing systems. Bartz and König (2001) suggest that the Code of Hammurabi, which began the legal history of humanity, had religious, legal, literary, and artistic significance. The top of the stele is crowned by artwork that depicts King Hammurabi in a posture of reverent prayer before the sun god Shamash, the god of justice, who is handing him the law. Indeed, legal history scholars hail Hammurabi as one of the primary lawgivers of the world. Americans view Hammurabi from a legal-evolutionary perspective. This perspective views the American republic as the epitome of democracy and law, a system that is built on the foundation of previous legal and democratic traditions. A marble portrait over the gallery doors of the chamber of the US House of Representatives celebrates Hammurabi as one of 23 historical figures whose work helped establish "the principles that underlie American law" (Architect of the Capitol, 2014).

While the US government celebrates Hammurabi and his law code, the content of the famous code depicts a world that is radically different from that of the United States. The Code of Hammurabi (780 BC) is a window on the worldview of the Babylonians. It describes the politico-cultural, religious, and economic life of Babylonian society as it existed more than four thousand years ago. The code begins and ends with prayers addressed to the gods. We will focus only on the parts of the Code of Hammurabi that are relevant for this book. Sections 178 and 179 of the code read as follows:

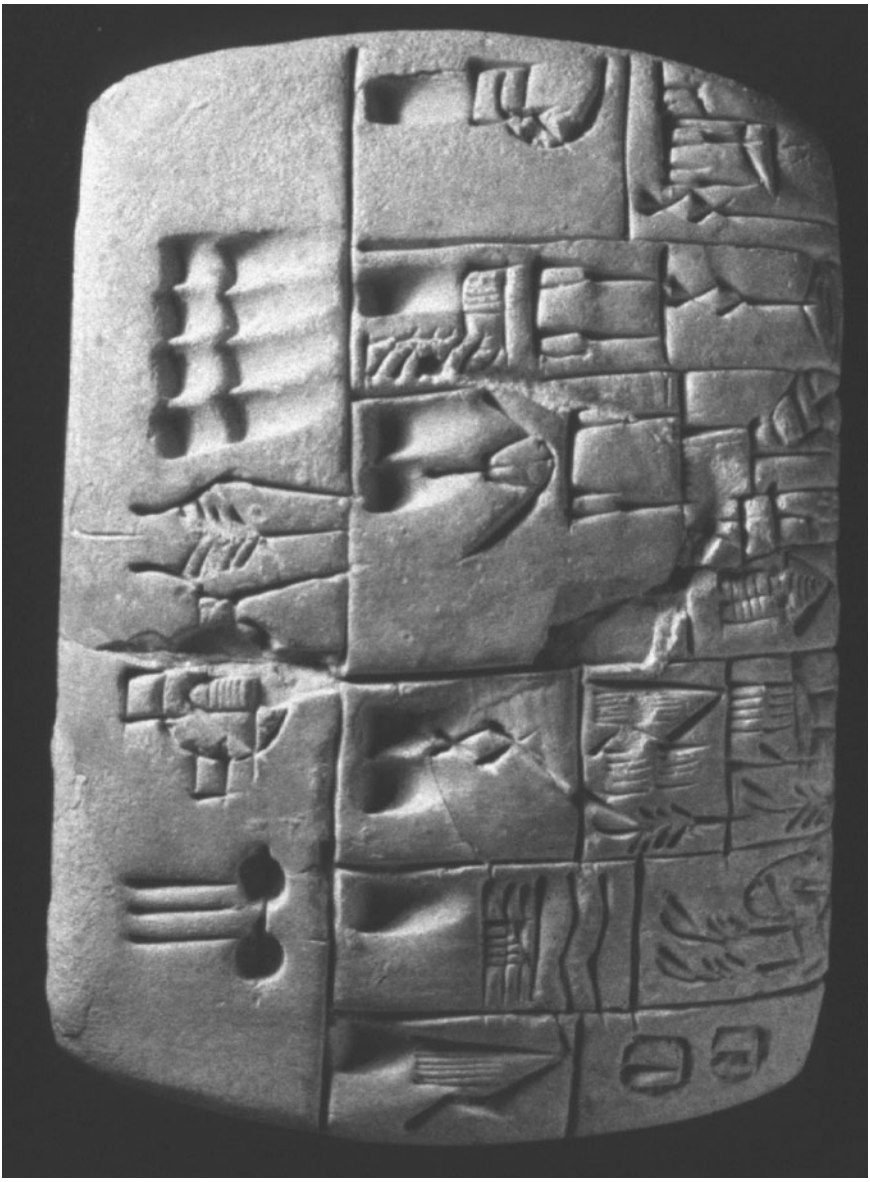

Figure 3.2 W 20274: Uruk (modern, "Warka") Mesopotamian protocuneiform clay tablet. This is a legal document listing identities of female and male slave names (ca. 3350–3000 BC; Iraqi National Museum, Baghdad; courtesy of Robert Englund, Cuneiform Digital Library Initiative, UCLA)

178. If a "devoted woman" or a prostitute to whom her father has given a dowry and a deed therefore, . . . her brothers shall hold her field and garden, and give her corn, oil, and milk according to her portion, and satisfy her . . .
179. If a "sister of a god," or a prostitute, receive a gift from her father, and a deed . . . then she may leave her property to whomsoever she pleases. Her brothers can raise no claim thereto.

These provisions of the code deal with a subject that we would find rather strange today. The expressions "'a devoted woman' or a prostitute" and "'a sister of a god,' or a prostitute" refer to a class of women who were devoted to the service of a god or goddess as sacred or temple prostitutes. They came from propertied, upper-class families and were apparently offered to the god or goddess by their families. They wore special veils and were forbidden to open or enter a tavern to drink alcoholic beverages. Recall the dispute that arose in Turkey when a scholar claimed that the veil was the costume of temple prostitutes (Chapter 1). The most prominent Babylonian goddess was Inanna, or Ishtar, the goddess of sexual love and beauty. She was involved in royal rituals that included "sacred marriages," a Mesopotamian ritual enactment of the consummation of the marriage of two deities in the temple (Westenholz, 1999, p. 73).

In ancient Babylon, religion, politics, sex, and art were intermingled. The king of Babylon himself was the high priest of the temple. Sex was a religious sacrament, an act of worship. Temple prostitutes were not allowed to marry. They lived together in the temple complex and performed sex acts with worshippers as part of their religious duty. The Code of Hammurabi has provisions protecting the rights of sacred prostitutes, including the children of these women. The Uruk Vase depicts naked men heading to the temple to offer gifts to the goddess and "worship" at her altar. The king kept an elaborate register (clay tablets) of all offerings—which were required by law—brought to the temples (Postgate, 2013). The religious temples and shrines of the ancient Near East (Babylon, Assyria, and even Israel) also had special shrines for male cult prostitutes who serviced other men (2 Kings 23:7).

The Historical Narrative of Herodotus

The first record of sacred prostitution in Babylon was written by the Greek historian Herodotus. He lived between 484 and 425 BC and is known as the "father of history." In his famous work, *The Histories*, Herodotus (1920) wrote that "the most shameful" custom of the Babylonians was that every local woman was required to sit in the temple of Aphrodite, the goddess of sexual love and beauty (whose Roman equivalent is Venus) once in her life and have intercourse with a stranger. On this occasion, she was given a silver coin that became sacred:

> The foulest Babylonian custom is that which compels every woman of the land to sit in the temple of Aphrodite and have intercourse with some stranger once in her life. Many women who are rich and proud and disdain to mingle with the rest, drive to the temple in covered carriages drawn by teams, and stand there with a great retinue of attendants. But most sit down in the sacred plot of Aphrodite, with crowns of cord on their heads; there is a great multitude of women coming and going; passages marked by line run every way through the crowd, by which the men pass and make

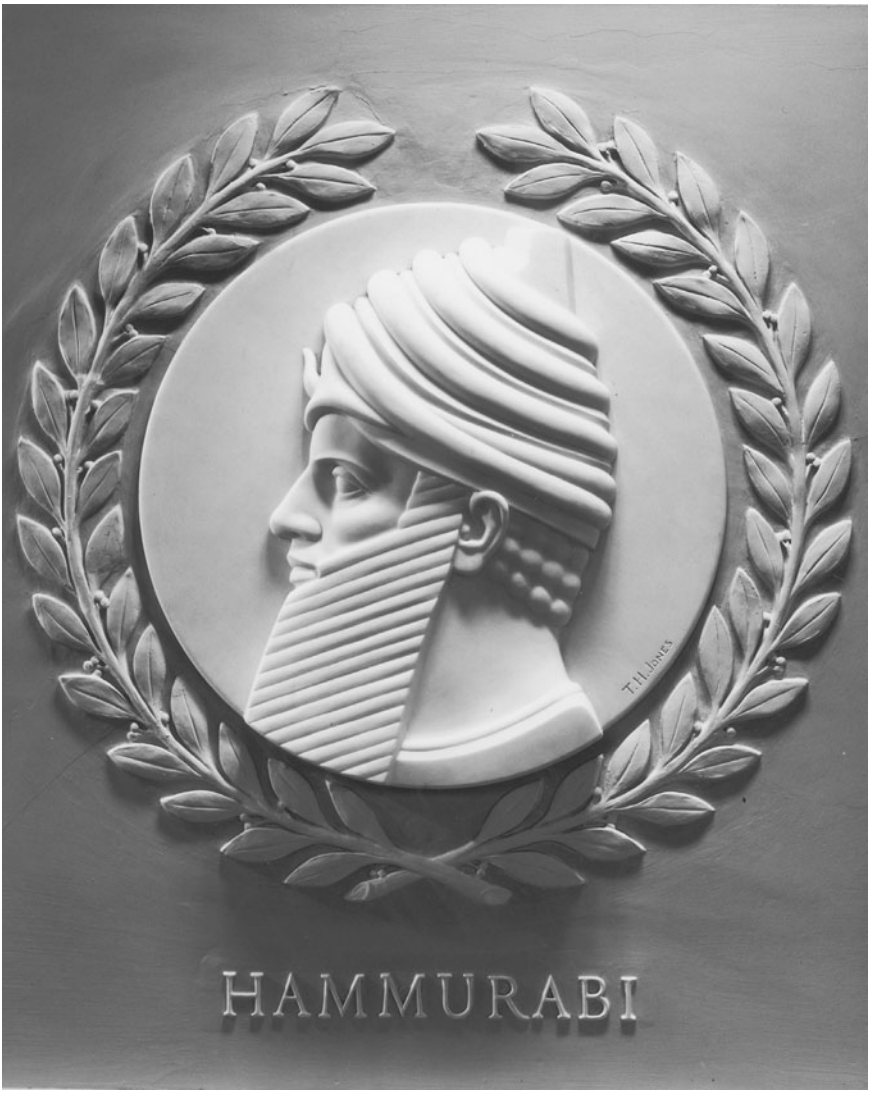

Figure 3.3 Hammurabi bas-relief in the US House of Representatives, Washington, DC (sculpted by Thomas Hudson Jones, 1950)

their choice. Once a woman has taken her place there, she does not go away to her home before some stranger has cast money into her lap, and had intercourse with her outside the temple; but while he casts the money, he must say, "I invite you in the name of Mylitta" (that is the Assyrian name for Aphrodite). It does not matter what sum the money is; the woman will never refuse, for that would be a sin, the money being by this act made sacred. So she follows the first man who casts it and rejects no one. After their intercourse, having discharged her sacred duty to the goddess, she goes away to her home; and thereafter there is no bribe however great that will get her. So then the women that are fair and tall are soon free to depart, but the

> uncomely have long to wait because they cannot fulfill the law; for some of them remain for three years, or four. There is a custom like this in some parts of Cyprus (Herodotus, 1920, book 1, chapter 199).

What makes the Herodotus's historical account interesting is that it "preserved" the narrative of the lifestyles and religious practices of the Babylonians in the Greek language, transmitted it, and universalized it (Guénoun, 2013). While some modern scholars question the accuracy of Herodotus's historical narrative, Guénoun asserts that "there is some history before that, or elsewhere. But it is thanks to Ancient Greece that we know it; it is Greece that tells it" (p. 11). Archeological and art-history evidence like the sex-themed Uruk vase give us a clearer picture of life and culture in the prehistoric world. That there are multiple constructions and interpretations of the evidence is not surprising. These findings are often filtered through the cultural and intellectual lenses of researchers and scholars.

The Uruk Vase as "Memory Object"

Olivier (2011) states that valuable archeological discoveries are "memory objects" (p. 132) that record moments in time and give scholars glimpses of past civilizations, cultures, religions, and worldviews. Mesopotamia was known for ritualistic sexual practices that were linked to polytheistic religious cults. These

Figure 3.4 Terra-cotta plaque of sexual intercourse (Old Babylonian Period, first half of second millennium BC; reproduced with permission from Israel Museum, Tel Aviv)

ritualistic sexual practices are evident in explicit visual sexual imagery that has been unearthed by archeologists. Old Babylonian visual erotica, which was inscribed mostly on terra-cotta clay plaque reliefs, was mass-produced and served certain political and cultural purposes (Assante, 2002; 2007). These erotic reliefs, which depicted Babylonians having sex in ritualistic and orgiastic contexts, were distributed throughout Mesopotamia for more than three centuries (Assante, 2002). As the Warka Vase shows, sex-themed visual communication is as old as recorded human history.

The Uruk Vase was thus an ancient, rule-governed representation. The production of its sex-themed narratives was subject to the cultural conventions and rules of the civilization that produced it. These rules ranged from those of grammar and composition to the artistic, legal, and cultural logics that transformed these relics into narratives of this ancient human civilization's ways of life (Ricoeur, 2004). As such, the Uruk Vase has become a visual "memory object . . . a material entity in which the memory of a moment in time is recorded" (Olivier, 2011, p. 132). The Uruk or Warka vase demonstrates that in the ancient world, sex, religion, and art were intermingled. The king or emperor was often the high priest of the official polytheistic cult, which often involved sexual or fertility rites. As we saw previously, the Code of Hammurabi, the earliest complete codification of law in human history, has provisions for sacred or temple prostitutes, who were dedicated to serve the goddess of sexual love. In Assyria, the king set up an elaborate bureaucracy to regulate and monitor ritual offerings brought to the temple of the national cult (Postgate, 2013).

The Uruk Vase depicts, among other things, a procession of naked men carrying offerings to the temple where Inanna, or Ishtar—the Sumerian goddess of sexual love, attraction, fertility, and war—was venerated (Haywood, 2012). The Uruk Vase was probably the world's first decorative "pornographic" depiction. It is a visual vestige of the religious and cultural worldview of the earliest civilizations that emerged in Mesopotamia. The Uruk Vase is part of the archeological and art-history evidence that points to the fact that the peoples of the city-states, successive kingdoms, and empires of Mesopotamia had cultures in which sex and religion were intertwined. Indeed, the earliest written evidence from Mesopotamian literary culture paints a picture of peoples with well-developed sexual and erotic cultures in which passion and pleasure, temple prostitution, love, magic, and even deviant sexual practices were prevalent and tolerated as part of religious rituals and cultural ceremonies (Leick, 2003).

Art-history evidence shows that explicit visual sexual imagery was common in the ancient Near East, where it had a wide variety of cultural meanings (Assante, 2007). Babylon was a society drenched in imagery of a rather explicitly sexual nature (Bahrani, 2001). These visual sexual images had talismanic, magic, and religious functions as symbols of veneration of Inanna/Ishtar, the goddess of sexual love. They were affixed to gateways, entranceways, thresholds, and doorposts to shield buildings from evil gods and spirits. This visual imagery therefore went hand in hand with the extensive, sex-themed literary erotica of Mesopotamia (Assante, 2002).

Furthermore, unearthed visual imagery shows that some of the peoples of the region made adoration of the female principle the impetus of an "erotic-religious union" (Keuls, 1985, p. 50). This consisted of sacred prostitution in which male and female temple prostitutes performed sex acts with worshippers as part of religious

sacraments. In his essay, "Mother Right," Swiss scholar Johann J. Bachofen (1967) advanced the notion that from the earliest stages of their social and cultural development, human beings have venerated the "female principle" as the giver of life (p. 69). Senghor (1997, p. 30) called this female principle "the primordial mother" (p. 69), while Ndaw (1997) called it the symbolic, "primordial mother, the female parent of the earth, the first matriarch of the world" (p. 130). This primordial nurturing mother is the mother of all mothers—that is to say, the mother of all human beings. From time immemorial, human beings across cultures have worshipped this primordial mother.

The Sex-Themed Visual Graphics of Assyria

Another ancient Near Eastern civilization that has left vestiges of a rich, sex-themed visual culture is the Assyrian Empire. In Assyria, sex, religion, and politics were also intertwined. Assyrian culture was very different from Sumerian culture, which required that all temple prostitutes be veiled. The Code of Assura (1075 BC; Arkenberg, 1998) distinguished prostitutes from other women through dress code: "If the wives of a man, or the daughters of a man go out into the street, their heads are to be veiled. The prostitute is not to be veiled. Maidservants are not to veil themselves. Veiled harlots and maidservants shall have their garments seized and 50 blows inflicted on them and bitumen [asphalt or tar-like substance] poured on their heads" (Arkenberg, 1998). In Assyria, an empire whose worldview Brajamovic (2013) describes as "a dark blend of religious and militaristic ideology," there was a "fusion of royal and priestly power" (p. 139). The king of Assyria was also the high priest of Assur (Postgate, 2013, pp. 89, 129). Since there was no separation of temple and state in the ancient Near East, the processing of these offerings of honey, grain, seeds, fruit, nuts, live animals, and so on was managed by the state and used to supply divine daily meals for the personnel of the religious shrines (Postgate, 2013). The word "tablet" also refers to visual images drawn in relief. Tablets like those found in the Assyrian Offering Archive were also prescriptive texts, legal and administrative documents that set forth obligations related to the cultic offerings of the temple of Assur (Postgate, 2013, p. 417). These tablets contained the norms, conventions, ethics, and laws of Assyrian society. Art-history evidence of explicit, sexual imagery in Assyria suggests that clay tablets also had a prescriptive role. They ascribed roles to the deity, the high priest (the king), the priestesses, and others involved in the cultic worship system. Thus we can conclude that religion was the mother of sex-themed visual imagery in Assyria, as was the case in Babylon.

Assyria is also known for its system of regulated representation of erotic art, or sexual imagery. This was very prominent under the reign of King Tukulti-Nurta I, who reigned from 1240–1207 BC. During this period, erotic content was carved in decorative furniture inserts (Assante, 2002). These erotic depictions were made in the New Palace Terrace at Assur. Assante (2002) suggests that these pornographic pieces were politicized in that they expressed Assyrian sexual and imperial discourses. They depicted the national or geographic origins of the men depicted in the sex scenes in furtherance of the imperial ideologies of the rising Assyrian empire: "The ideology behind physical exposure in the reliefs can partly be deduced from law and official art, in which the display of physical exposure was long used as a sign for the conquered or criminalized. Full nudity for both men

and women in a secular context signified loss of identity, the abject, submitted, and obedient" (p. 381).

Sex-Themed Speech in the Northeastern Mediterranean: The Amuq (Amik) Valley

One of the most exciting early twentieth-century archeological sites of the Mediterranean region was the Amuq, or Amik, Valley. This area is the ancient, or classical, Plain of Antioch that became part of the Republic of Turkey in 1939. The fertile Amuq Valley, which is watered by the ancient Orontes River and is surrounded by mountains, is near the city of Antakya. Archeological evidence points to the fact that human beings have settled the Amuq Valley since 6000 BC. As a result, it is the site of rich archeological excavations (Oriental Institute, 2014). In the 1930s, the Oriental Institute of the University of Chicago carried out excavations in the Amuq Valley. American and British archeologists discovered many ancient artifacts—"objects of cultural memory," to use the expression of Assmann (2011)—that give us glimpses of the cultural life of this ancient culture. Some of the artifacts provide evidence that the ancient inhabitants of the Amuq Valley had a cultural worldview that allowed explicit, sex-themed visual imagery. One of these artifacts is a symbolic horse frontispiece (Figure 3.5) that depicts a nude woman holding the tails of two lions while standing on the rumps of two others. The bottom part of the horse frontispiece depicts two nude women holding their breasts and looking straight at the viewer. Sex-themed visual artifacts like this one seem to have had religious significance. This horse frontispiece was probably a symbolic re-presentation—an homage to a powerful sex goddess who could tame and trample on lions. The fact that this artifact was a horse frontispiece probably meant that it was used as a religious amulet or good-luck charm. This kind of utilitarian use of sex-themed visual imagery is consistent with what Assante (2002) found to be common in Assyria (discussed earlier).

Papyrus Porn: Erotic Art in Ancient Egypt

Ancient Egyptian art is a series of tableaux that are essentially windows on some of mankind's earliest mythologies. Therefore, when we speak of ancient Egypt, we think of colorful and vivid visual communication through hieroglyphs, pharaohs, the pyramids, the Sphinx, mummies, and myths of the afterlife. However, there is a little known aspect of ancient Egyptian life: sexuality and its visual representation in art. In effect, ancient Egypt had a culture of erotic art that is not well known. A lot of the material may have been lost due to the perishable medium (papyrus rolls) on which it was reproduced. Other factors that may have been responsible for the disappearance of the erotic art of Egypt include Christianization, the Muslim conquest, and the Western Christian cultural filters of Egyptologists and other scholars. One of the earliest and only surviving tableaux of human sexual mythologies is the Erotic Papyrus: an ancient, explicit, sex-themed tableau of pornographic vignettes that is also known as the Turin Erotic Papyrus (Papyrus 55001). The name comes from its current location, the Museo Egizio (Egyptian Museum) in Turin, Italy. The Erotic Papyrus is one of the earliest examples of a visual erotic representation. It is a piece of "cultural memory," to use the

Figure 3.5 Horse frontispiece from the ancient (Amik) Valley. The woman is holding tails of lions. The lower part depicts nude women holding their breasts (courtesy of Oriental Institute Museum, University of Chicago)

expression of Assmann (2011), that opens a window and sheds light on another aspect of Egypt's celebrated ancient culture. The Erotic Papyrus is a regulated representation because its drawings were executed within the rules and limitations of ancient Egyptian space, time, and beliefs about the origins of the universe and of life, death, and the afterlife.

Scholars believe the Erotic Papyrus was created during the *Ramesside* period (1292–1069 BC). This is a period named after the 11 pharaohs who took the name "Ramses." It was a period in which ancient Egypt was at the height of its power. It was a prosperous empire in which art flourished (Shaw, 2000). The Erotic Papyrus shows that ancient Egyptian life was not just about gods, sacrifices, and preoccupation with death, judgment, and the afterlife. There was a sensual side to ancient

Egyptian life on this side of the funerary complex. The personification of ancient Egyptian sexuality was Ramses the Great (Ramses II), who is known to have built the grandiose funerary complex of the Valley of the Kings in Giza as well as temples and obelisks. He was famous for the number of wives and concubines he had, as well as the number of children that issued from these relationships. Besides his "Great Royal Wife," the legendary Queen Nefertari Mertymut, who was sometimes

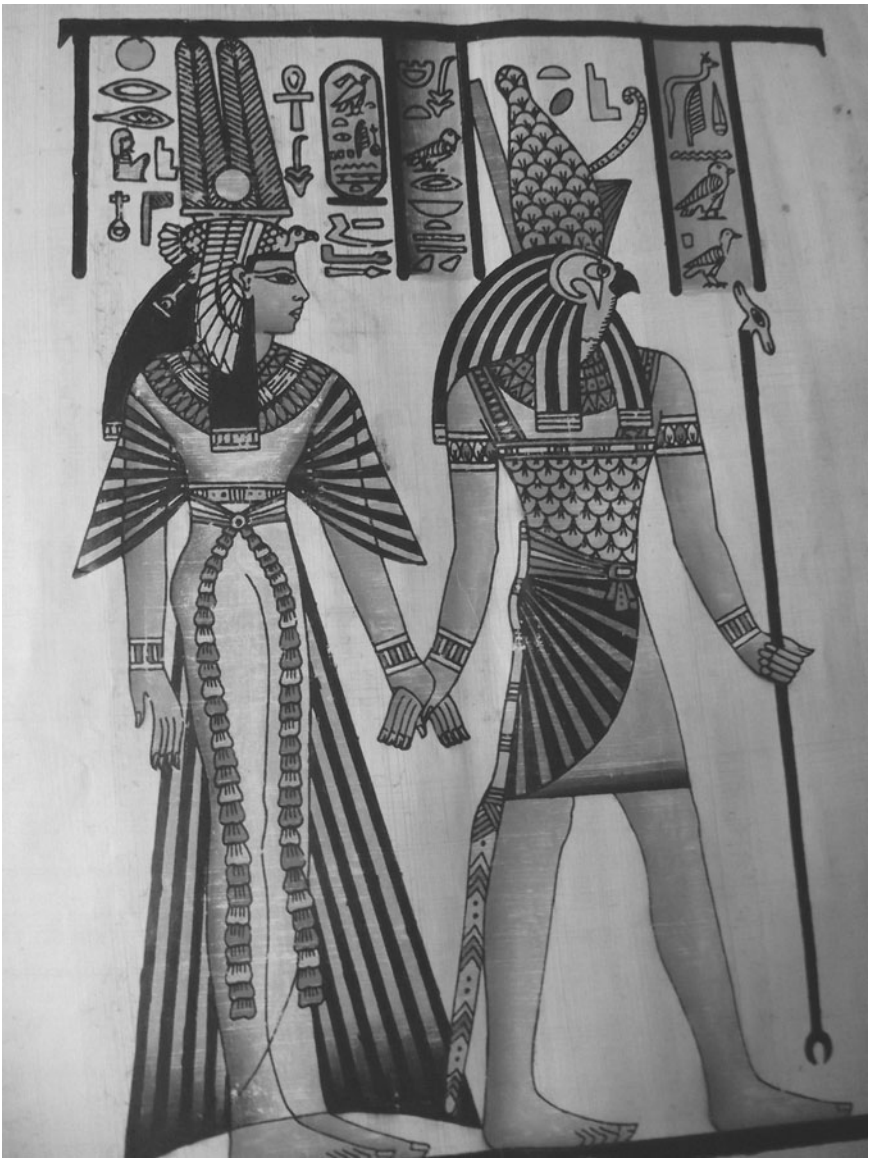

Figure 3.6 Horus, the falcon-headed god of the sky, and his consort, Hathor, goddess of feminine love and motherhood. Her name meant "mansion of Horus" (photo: Lyombe Eko)

given the title "Wife of the Strong Bull," Ramses the Great had another Royal Wife and a harem of concubines. He fathered more than one hundred children. That is more than any other pharaoh in Egyptian history (Clayton, 1994). Ramses the Great's reign was a period of great artistic and architectural flowering. The Erotic Papyrus was probably produced during his reign.

The Turin Erotic Papyrus clearly revealed a new, unknown, perhaps suppressed side of ancient Egypt. Archeologists and historians had generally grounded their knowledge of ancient Egyptian ethics and morality in the text of the Book of the Dead, which recounts the journey of the soul in the afterlife. In the afterlife, every person's heart is weighed against the "Feather of Truth." If the person's heart balances (if he or she is truthful), his or her soul proceeds to an appointment in a judgment hall known as the "Chamber of Two Truths." In this judgment hall, the soul is required to recite a "Negative Confession" to prove his or her virtue. The Negative Confession includes the following statements:

> I did not do any vile act in the abode of Truth
> I had no acquaintance with evil
> I did not fornicate
> I did not commit any shameful act with a priest
> I am pure, pure, pure. (Egyptian Book of the Dead, 1898, spell 126)

The Turin Erotic Papyrus was clearly at variance with the sentiments expressed in the Negative Confession. It may be that in ancient Egyptian Society, as in all human societies, there was an unorthodox, even blasphemous, element that did not scrupulously follow the religious and moral strictures of society. Egyptologists have long noted that ancient Egyptian literature had sexually explicit elements and erotic mythology. They stated that Egyptian visual art also had a visual code—metaphors and symbols used to express sexual themes and messages (Derchain, 2012). This made Egyptian literature and art rule-based representations. However, the Erotic Papyrus, which has been written about and featured in television programs in many parts of the world, definitely changed perceptions of ancient Egypt. Some Egyptian art was explicitly and sexually graphic. The Erotic Papyrus scroll is more than eight feet long and consists of depictions of a series of sexual activities and positions (Schmidt and Voss, 2000). The Erotic Papyrus does not seem to have any religious significance or connotations. Unlike the erotic art of Babylon and Assyria, this ancient Egyptian erotic art is not linked to any kind of religious observance.

The Hebrew Biblical View of Sacred Temple Prostitution

The Hebrew Scriptures (the Old Testament) give us another view of the institution of temple prostitution, which was prevalent among the peoples of what today is the Middle East, Egypt, and the Mediterranean basin. The Torah, the first five books of the Hebrew Scriptures, states that God called Abraham, the patriarch of the Israelites, from his home in Ur, a city in the southern area of the "cradle of civilization" in Mesopotamia, to travel to the land of Canaan. The covenant that Abraham entered with God stipulated that Abraham's descendants were expected to be different from all the other peoples of the region in terms of their religion

and morality. God is said to have carved the law on tablets of stone and handed them to Moses on Mount Sinai. The "Law of Moses" contained in the Torah, which Ricoeur (1980) calls "legislative texts," stipulated that the Israelites were to have only one God, Yahweh, and reject all other gods and goddesses. The prophets therefore warned the Israelites against participating in sacred temple prostitution and the sexual cults of goddesses. The book of Deuteronomy states, "No Israelite man or woman is to become a shrine prostitute. You must not bring the earnings of a female prostitute or of a male prostitute into the house of the LORD your God to pay any vow, because the LORD your God detests them both" (23:12). Nevertheless, the cult of the goddess of sexual love and beauty was so pervasive that King Solomon, who is famous for having seven hundred wives and three hundred concubines of diverse nationalities, introduced the worship of Inanna or Ishtar in Israel through his wife, Queen Jezebel, who was from Sidon, Lebanon. As this passage indicates, male shrine prostitution was part of sacred prostitution and was a feature of the religious cultures of the ancient Near East, a region that roughly corresponds to the present-day Middle East.

Sex-Themed Visual Imagery in the Ancient Ethiopian National Narrative

The Federal Republic of Ethiopia, a country in East Africa, is the successor state of the ancient kingdom of Ethiopia, whose history goes back to the period of the Hebrew Scriptures (the Old Testament). Ethiopia's national epic, the *Kebra Nagast* (*The Glory of the Kings*), contains a sex-themed visual image that is at the core of the country's national identity (Budge, 1932). The *Kebra Nagast*, which traces the Solomonic ancestry of the emperors of Ethiopia, is the functional equivalent of the *Shahnameh*, the Persian *Book of Kings* that we discuss later in Chapter 9. In effect, the Ethiopian national narrative is that the tenth-century unmarried queen of Ethiopia, Makeda (better known as the biblical queen of Sheba, whose story is told in I Kings 10), received word of the legendary wisdom of Solomon, the king of Israel. She traveled down the Nile—one of the branches of the Nile rises from the Ethiopian highlands—through Egypt to Jerusalem to visit King Solomon. With his seven hundred wives and three hundred concubines, King Solomon is the greatest ladies' man in the Bible (I Kings 11:3). King Solomon did not see a princess or beautiful lady whom he did not like. Queen Makeda would soon discover that. King Solomon welcomed her into his palace, and she was enthralled by his wisdom and the splendor of his grand court.

The Ethiopian national narrative states that King Solomon wooed Queen Makeda and tricked her into having sex with him. The *Kebra Nagast* (1932) puts it euphemistically and briefly: "He worked his will with her and they slept together" (chapter 30). Out of their liaison was born a son: Menelik I, the founder of the Solomonic dynasty of Ethiopian emperors. That dynasty lasted from the tenth century until 1974, when Emperor Haile Selassie was overthrown and murdered by Marxist soldiers (Marcus, 1994).

This national narrative of Ethiopian identity has permeated all aspects of Ethiopian culture for centuries. The explicit, sex-themed visual image of King Solomon sleeping with Queen Makeda legitimated the imperial rulers of Ethiopia and gave them divinity through their membership in the house and lineage of King David of Israel. The Bible states that Jesus Christ himself was a descendant

of King David. Illustrated versions of this national narrative have been reproduced on parchment, canvas, paper, silk scarves, and wood for centuries. The government-owned Ethiopian Tourist Trading Enterprise (ETTE) makes official reproductions of the narrative for tourists and pilgrims—black nationalists and Caribbean Rastafarians—who visit Ethiopia. Figure 3.7 is from an ETTE silk scarf reproduction of the narrative of Queen Makeda's visit to King Solomon in Jerusalem. This sex-themed visual image is the regulated representation of Ethiopia's politico-culturalm emory.

This chapter was aimed at exploring early conceptualizations of pornography in the cultures of the ancient Near East and Africa and specifically its manifestation in the "symbols and myths carried by the great cultural traditions that have instructed the Western mind," to use the apt formulation of Ricoeur (2013). The ancient, sex-themed images of Babylon, Assyria, Amuq, Egypt, and Ethiopia depict sexual scenes that represent some of the first narratives of human sexuality, the first mythologies of sex, written and reproduced in graphic and visual form. Taken together, these explicit, sex-themed images are mankind's first iconography of sexuality. These case studies of ancient cultures are the perfect springboard for the study of the regulation of sex-themed speech and expression in contemporary society. This historical and cultural background will help us understand the contemporary cultural problem of sex-themed speech—pornography—in a globalized, networked world.

Figure 3.7 Visual representation of the Ethiopian national narrative that is grounded in the sexual relationship between King Solomon of Israel and the tenth-century Ethiopian queen, Makeda (the biblical queen of Sheba; photo: Lyombe Eko)
Detail from the *Kebra Nagast*: **the Amharic caption reads, "King Solomon** worked his will with her, and they slept together." **The child born of this liaison, Menelik I, shown at the edge of the frame, is believed to have founded the Ethiopian imperial dynasty that lasted from the tenth century to 1974.**

4

The Origins of Pornography

The Heterogeneous, Sex-Themed Art of Ancient Greece

In May 2008, residents of the Greek island of Lesvos (Lesbos) filed suit in a court in Athens, Greece, asking the court to ban gay females from calling themselves "lesbians." Brandishing a sign that read, "Silent no more! If you are not from Lesbos, you are not a lesbian!" the plaintiffs, led by magazine editor Dimitris Lambrou, claimed that the 100,000 residents of the Greek island of Lesbos, and the more than 250,000 Greeks who originated from the island, were the only true Lesbians. They asked the court to issue an injunction restraining the Homosexual and Lesbian Community of Greece (OLKE), the main gay organization in the country, from using the word "lesbian" in a sexual context (Anast, 2008). The residents of Lesbos claimed that the OLKE's use of the name of their island and its inhabitants to describe female sexual preference was an insult to them and a "violation of their right to a national and regional identity" under European Union law. The men and women of Lesbos were "Lesbians," but not "lesbians," they claimed (Anast, 2008). Speaking in defense of the OLKE's use of the term, a lesbian activist told the court that the lawsuit was "racist and ridiculous." She said the word "lesbian" evolved from Greek history and mythology, not from an intent to insult people who originated from the island of Lesbos.

The issue before the court was whether the OLKE's use of the word "lesbian" to refer to the sexual preference of females violated the identity and human rights of the island residents of Lesbos. The court declined to issue the injunction, ruling that use of the word "lesbian" to define the sexual orientation of women did not violate the human rights of the people of Lesbos. This case was a clash between pre-Christian Greek mythology and the Christianized sexual and moral sensibilities of some Greek citizens. The island of Lesbos, which is located in the Aegean Sea, is the birthplace of the ancient Greek poet Sappho, who lived in the seventh century BC. Her poems expressed her love for other women and inspired the terms "lesbian" and "lesbianism." These words are now used around the world to describe women who are sexually attracted to other women. The island of Lesbos has become a major tourist destination for gay women around the world.

Aim of the Chapter

Ancient Greece is considered to be the "cradle" of Western civilization. This is usually said with reference to the fields of philosophy, government, the arts, architecture, religion, mythology, and learning. Ancient Greece is also recognized as the culture that gave the Western world the standard—the template, so to speak—of beauty, the ideal manifestation of the human form (Konstan, 2014). An aspect of Greek culture that has not received very much scholarly attention is the visual representation of sexuality in the arts. In effect, art history and archeological evidence demonstrate that Greek sexuality was as heterogeneous as its religion was polytheistic. Indeed, Greek religion was intertwined with Greek sexuality. In ancient Greece, sex was part of religious observances. Ancient Greek mythology is replete with tales of the dalliances of the gods, goddesses, and mortals. This aspect of ancient Greece has been overshadowed by the idealized image of classical Greek civilization presented and re-presented during the Renaissance, the Enlightenment, and the modern era. Additionally, archeologists and other scholars from the Christianized West filtered Greek civilization through their modern Western worldviews.

The aim of this chapter is to survey ancient Greek heterogeneous conceptualizations of sexuality as manifested in sex-themed visual representations. This survey is significant because ancient Greece is the source of the different manifestations and vocabularies of sexuality that are represented in the media in general and sex-themed commercial visual imagery in particular. The survey therefore sets the stage for discussion of the regulation of visual representations of explicit, sexual scenes in the contemporary media in real space and cyberspace. The fact is that due to their heterogeneous sexuality, ancient Greeks bequeathed to the world a vocabulary of sexuality and an array of art and visual imagery of sexuality that has become part of the global vocabulary of sexuality. The Greeks gave us the words "homosexuality" (in Greek, the prefix *homo-* means "same," while in Latin, it means "man," as in mankind). They also gave us the terms "bestiality" (sexual intercourse between a human being and an animal), "pederasty" (the practice whereby adult men have sex with boys), "necrophilia" (sexual relations with, or sexual attraction to, corpses), "pedophilia" (sexual attraction to children), and so on. All the practices represented by the terminology of sexuality inherited from ancient Greece are regulated, while some of them are hotly contested in contemporary society, as the legal conflict in Greece over the word "lesbian" demonstrates. This study will focus on an expression that the Greeks bequeathed to the modern world: "pornography." This is the phenomenon, whose roots are in ancient Greece, of public display of explicit, sexual texts and imagery. Today pornography consists of commercially produced narratives designed to entertain and cater to voyeuristic tastes.

Pornography is a major phenomenon in contemporary society. It is the stock-in-trade of sexual capitalism: the billion-dollar, globalized, industrial production, distribution, commercialization, and consumption of explicit, sexual imagery across media platforms in real space and cyberspace. Each country and culture has an attitude toward pornography. Countries around the world therefore regulate pornography within the framework of their respective political, cultural, social, and religious mentalities in matters of sex, sexuality, and morality. All countries have struck, or are in the process of striking, a balance between the

human right of freedom of expression (which in Western countries includes the right to create, possess, and disseminate pornography) and the state's right to protect children from sexual exploitation—and the recording of that exploitation in commercial child pornography. Furthermore, countries around the world seek to balance their duty to protect freedom of expression with their duty to keep children from being exposed to explicit, sexual material, to protect women from being exploited and used as objects in the production of pornography, and to safeguard the morals of society through eliminating certain kinds of violent, hardcore pornography. This legal balancing act has essentially made pornography a "regulated representation," to use the expression of Kaplan (2012). This discussion brings up the following questions: What is pornography? What are its origins? In order to answer those questions, we need to discuss Greek mythology, religion, and sexuality, which spawned the phenomenon of pornography.

Origins of the Terminology of Pornography in Ancient Greece

Ancient Greece gave the world the word "pornography." This word is now used to define the rule-based, explicit, visual depiction of sex acts or sex scenes in the media in real space and especially cyberspace. However, the word underwent a number of changes before it came to mean what it means today. Classical scholar, Kapparis (2011) tells us that the word "pornography" comes from the seventh-century Greek words *porné* (literally "woman for sale," or female prostitute) and *pornos* (literally "man for sale," or male prostitute), plus the word *graphos*, which meant "writing." This is also the origin of our modern word "graphics." Taken together, these words form the word "pornography," which originally meant "writing about [female and male] prostitutes." That word has now been adapted in languages across the world (Kapparis, 2011, p. 223). The first question we need to ask is this: what was it that Greeks wrote about prostitutes? Kapparis (2011) states that the Greek words *porné* and *pornos* were part of a rich and diverse terminology of prostitution. In effect, he suggests that the Greek language has more than two hundred different words to describe the concept of offering "sexual services for a fee" (p. 223). This is because prostitution was a legal or rule-based institution in ancient Greece, where it was practiced for centuries in a number of different contexts (Kapparis, 2011). For her part, Keuls (1985) states that "the Athenian Greeks developed a reputation among the Romans and in the later Western culture for having raised prostitution to a unique level of refinement" (p. 194). Writing about prostitutes (pornography) would therefore make sense in this context.

Literary sources and archeological and art-history evidence (visual depictions of explicit, sexual imagery on vases) show that in ancient Greece, prostitution was legal and rampant. The universal availability of male and female prostitutes was seen as a sign of egalitarian democracy (Fischer, 2013). Glazebrook (2011) suggests that prostitution was so widespread that it was an equalizing factor in the unequal society of ancient Greece. Free citizens, slaves, ex-slaves, men, and women worked as prostitutes. A special class of prostitute, called *hetaera*, consisted of high-class women who took part in Greek "symposia," social gatherings dedicated to eating, drinking, games, entertainment, philosophical speculation, and sex with prostitutes and concubines (Fischer, 2013; Kapparis, 2011; Roose, 2005). The ancient Greeks were sexually heterogeneous. They bequeathed to the

world a lot of the vocabulary of modern sexuality. We saw previously that the word "lesbian" comes from the Greek island of Lesvos (Lesbos). Other words of Greek origin include "homosexuality" (the root *homos* means "same" in Greek—not to be confused with the Latin root *homo*, which means "man," or person). The word "heterosexual" comes from the Greek root *heter*, which means "different" or "other." The word *ped* ("child"), from which we get the word "pedophile," is also of Greek origin.

The Context of "Pornography" in Ancient Greece: Entwinement of the Sacred and the Sexual

In classical Greece—and later Rome—life was a drama of regulated representations that revolved around an array of myths in which gods and goddesses were the lead actors and actresses. Greek city-states were dominated by a "polis," or community, religion. The founding myth of Europe is grounded in the mythological entanglement of the sacred and the sexual in Greek culture. Artistic re-presentations of Greco-Roman mythology were regulated representations populated by ubiquitous gods and goddesses who had sexual liaisons and dalliances of all types with each other and with human beings. One of the most famous regulated representations in Greco-Roman art history was the founding myth of Europe, the mythological narrative of "The Rape of Europa." In effect, Greco-Roman mythology holds that Zeus the supergod (whose Roman equivalent is Jupiter) was enamored of Europa, daughter of the Phoenician king of Tyre, a city in modern-day Lebanon. In order to capture the object of his sexual desires, Zeus transformed himself into a white bull, which kidnapped Europa while she was picking flowers among her father's herd of cattle. Zeus fled with Europa to the Hellenic world, the Greek island of Crete, where he ravished (raped) her and fathered three sons with her. This myth has been the subject of numerous artistic renditions, ranging from Greek vase paintings and Roman mosaics to gaudy Renaissance art pieces. In the eighth century, the term "Europa," or "Europe," became a geographical identifier that differentiated the domains of the Western, Christian parts of the Eurasian landmass from the territories controlled by Muslim conquerors (Lewis, 2009).

Zeus/Jupiter was the subject of numerous other sexual narratives. One of the most famous is "Leda and the Swan." In this narrative, Zeus admired Leda, wife of Tyndareus, king of Sparta. He transformed himself into a swan, in whose arms Leda sought protection from a preying eagle. Zeus, the swan, seduced (raped) Leda the same night she had sex with her husband. As a result of these encounters, she laid two eggs, one of which hatched into the beautiful Helen of Troy (Schmidt, 1980). This myth was one of the most popular subjects of Renaissance artists. Indeed, the myths of "The Rape of Europa" and "Leda and the Swan" were the subjects of numerous famous artistic re-presentations. Again these ancient artists used media that ranged from vase paintings and Roman mosaics to Renaissance paintings. The level of explicitness of the images ranges from the very sexually explicit to more modest portrayals, depending on the rules and regulations of the specific European country or region in which the artist resided.

Clearly, religion permeated and accompanied all public community activities in ancient Greece. Large festivals were held in honor of specific gods and goddesses: "Both gods and heroes were worshipped publicly by the whole community

in connection with the large festivals." Greeks also paid homage to a goddess named Demokratia, who represented the abstract concept of "democracy" (Hansen, 2013, p. 272). As Keuls (1985) put it, "Every major function of life was associated with one or more patron divinities and a body of myths and rituals. Our own distinction between the 'sacred' and the 'profane,' the realm of the church and that of the street would hardly have been intelligible to ancient Greeks" (Keuls, 1985, p. 300). Greek cities were full of all kinds of images of gods and goddesses, as well as paintings and sculptures of mythological and historic figures. Things were no different in the domestic arena: a wide array of red and black vases decorated with paintings of mythologies and mythic figures were ubiquitous (Rasmussen, 1991). These "archeological vestiges" were "memory objects" that recorded "moments of time" (Olivier, 2011, p. 132) in Greek history and civilization.

Additionally, many of these vase paintings were homoerotic representations of the "homosexual ethos" of ancient Greece that is so evident in Greek literature. Keuls (1985) states that literary, archeological, and artistic evidence shows the "widespread practice of homosexuality" in ancient Greece. There was also widespread sex between adult men and young boys (p. 274). She concludes that evidence from Greek history, literature, archeology, and vase painting demonstrates that "the striking feature of Athenian mores is not the glorification of pederasty [sexual relations between a mature man and a childlike or pubescent boy] but

Figure 4.1 P484: François Boucher, *The Rape of Europa* (reproduced with permission from the trustees of the Wallace Collection, London)

Figure 4.2 Ruins of the temple of Diana/Artemis in Ephesus (modern-day Turkey; photo: Lyombe Eko)

the extraordinary propensity for prostitution, both heterosexual and homosexual," that was a hallmark of the culture (p. 299). Furthermore, the cultural backgrounds of archeologists and scholars affected their interpretation of art history and archeological evidence of the ancient Greek civilization. Keuls (1985) states that the ancient Greeks were noted for their "sexual diversity," to use a contemporary expression. She notes that many classical scholars approached the subject of widespread homosexuality in Greek culture with preconceived (Judeo-Christian) opinions about sexual morality: "Heterosexual classicists of a puritanical bent have castigated the Greeks for their homosexuality, and even excised evidence of homosexual practices from the record" (p. 275).

Greek cities were full of all kinds of images of gods and goddesses and paintings and sculptures of mythical and historic figures, as well as a wide array of red and black vase paintings of mythologies and mythic figures. These "archeological vestiges" have become "memory objects" that recorded "moments of time" in Greek history and civilization (Olivier, 2011, p. 132). Ancient Greek art, which provided the aesthetic foundations of contemporary Western visual art, was replete with heterogeneous, sex-themed visual imagery. Evidence of this is found in fragments of marble sculptures, paintings, wood and ivory carvings, various decorated metals, and thousands of surviving painted pottery, the dominant subjects of which were human and divine figures (Robertson and Beard, 1991). Many of these visual representations included graphic sexual scenes that would be considered lewd, obscene, or pornographic by modern standards. The fact is that ancient Greece was a non-Puritan society that did not have the religious sensibilities of

Figure 4.3 Vase painting of Silenus and Maenad. Hydria from Caere (Ionian Greek; 525 BC; Kunsthistorisches Museum, Vienna, Austria)

contemporary Western society. In her book *Reign of the Phallus: Sexual Politics in Ancient Greece*, Keuls (1985) summarized classical Athenian society as follows: "a society of men who sequester their wives and daughters, denigrate the female role in reproduction, erect monuments to the male genitalia, have sex with the sons of their peers, sponsor public whorehouses, create a mythology of rape, and engaging in rampant saber-rattling . . . Athenian men habitually displayed their genitals, and their city was studded with statues of gods with phalluses happily erect. The painted pottery of the Athenians, perhaps the most widespread of their arts portrayed every imaginable form of sexual activity" (pp. 1, 3).

In ancient Greek culture, art in general and "pornographic" vase-painting in particular were regulated representations that were produced within the matrix of the law and a culture of "frankness about sexuality." These mythic and symbolic visual representations of sexuality expressed Greek political values and a sexual ethos famous for its candor (Keuls, 1985, p. 50). These visual representations had an "overriding phallocratic element" (Keuls, 1985, p. 33). These regulated visual representations are windows to ancient Greek society and culture. They are thus, to paraphrase Leopold Sedar Senghor (1997), pregnant with political and social values.

One of these values was organized prostitution that included symposia (drinking parties that took place in men's quarters of private homes) and sacred or temple prostitution (Keuls, 1985). Scholars across the ages agree that "male and female prostitution was an uncommonly lively trade in Classical Athens and its harbor, Piraeus" (Keuls, 1985, p. 153). Visual representations—black-figure and red-figure vase painting and other forms of visual "art" that was painted on utilitarian objects of pottery by craftsmen—paint a general picture of the sexuality of ancient Greece. Some of these images are sexually explicit re-presentations of courtesans or prostitutes who joined men in drinking parties, games of all sorts, philosophical discourse, and conversation. These women provided their clients with what Robertson and Beard (1991) euphemistically called "erotic delight" (p. 24).

A statue of the Aphrodite of Milos, which is widely known as *Venus de Milo*, was discovered in 1820 among the ruins of the Hellenic city of Milos, then part of the Ottoman (Turkish) Empire. A French naval officer supervised its excavation, and the French ambassador to Turkey purchased it on behalf of the French government. The sculpture has become a permanent fixture of the Louvre Museum in Paris. *Venus de Milo* has become the perfect example of Western female beauty. Archeologists have also uncovered statues of the *Venus de Syracuse*, the *Venus de Medici*, and Venus statues of other city-states.

Sacred or Temple Prostitution

We saw in Chapter 3 that religious, or temple, prostitution, which involved sexual activities as acts of adoration of specific goddesses, was common in the ancient Near East. In ancient Greece, sacred or temple prostitution was also a popular organized institution. The great goddess who features prominently in ancient Greek mythology and whom ancient Greeks adored was Aphrodite, the goddess of beauty, love, sexual pleasure, and procreation. In ancient Greek art and sculpture, she was depicted as a beautiful woman, the symbol of beauty itself, who was usually accompanied by Eros (whose Roman equivalent is Cupid), the winged, mischievous little god of love who flew about, armed with a bow and an arrow, shooting darts of love at couples. The adoration of Aphrodite (whose Roman equivalent is Venus) was at the center of the religious experience of ancient Greeks. There was clearly a mixture of religion and sex in the cult of Aphrodite. The artistic and architectural heritage of ancient Greece depicts a connection between the erotic and the religious in the worldview of the Hellenic peoples. Keuls (1985) called these connections "erotic-religious unions" (p. 50). This was the entwining of sex and religious worship in the form of sacred prostitution in temples dedicated to Aphrodite, the goddess of beauty, love, sexual pleasure, and procreation. Sacred,

or temple, prostitution was thus associated with the cult of Aphrodite, who was also the patron deity of prostitutes. Fischer (2013) states that "prostitutes' association [with Aphrodite] resulted in the social legitimacy of their profession" (p. 250). Male prostitution was also an aspect of Greek religion. Female temple prostitutes and male prostitutes, who were called "effeminates," provided sexual services to worshippers in Greek temples.

Male and female sacred cult prostitutes offered sexual services to worshippers of the goddess as part of their adoration of her. Apparently, female sacred prostitutes provided sexual services to males, while male temple prostitutes provided sexual services to other males. Keuls (1985) suggests that in Corinth, male and female prostitutes "were owned by the sanctuary [temple] of Aphrodite, as in many other cities, they were sacred slaves" (p. 155). Greek vase paintings were regulated representations that served the purpose of reinforcing "men's heavy-handed policing of the female sex" (Robertson and Beard, 1991). Temple prostitution was so much a part of ancient Greek culture that it was exported to Hellenized (Greek-influenced) territories in Italy and the Middle East. In the Hebrew Scriptures, the Jews complained that the Greek overlords called their holy temple in Jerusalem "the temple of Zeus" and desecrated it by having drunken revelries and sexual intercourse with prostitutes in it (2 Maccabees 6:4).

Examples of Pornography in Ancient Greece

We have seen that the ancient Greeks gave us the term "pornography." However, their "pornography" was mostly confined to written texts. Furthermore, these texts were not moralistic or judgmental. In its earliest incarnation, pornography consisted mostly of epigrams (witty, ingenious, often satirical sayings) whose subject was "the cultic veneration by prostitutes of Aphrodite." Many of these writings about sacred prostitutes—and heterogeneous sacred sex, including specific categories of sexual intercourse in religious contexts—are collected in the *Greek Anthology*, a vast and influential collection of Greek epigrams and poems from ancient and Byzantine Greece (Pirenne-Delforge, 2009).

By modern twenty-first-century standards, this ancient, text-only "pornography"—which was composed of pithy writings about prostitutes—was not explicitly or even overtly sexual. In his translation, *Puerilities: Erotic Epigrams of "The Greek Anthology,"* Hine (2001) suggests that this "pornography" was trivial and often couched in "ambiguous hints and metaphors" (p. xi). Nevertheless, he notes that the epigrams in the *Greek Anthology* are "pleasantries" that contain words that would be considered "obscene," lewd, crude, or vulgar by modern readers. He states that the reason for this use of vulgarity is that the ancient Greeks did not regard these types of words as obscene because the concept of "obscenity" did not exist in pre-Christian Greek culture: "Obscenity is a result of repression, and it is difficult to see signs of repression anywhere in Greek life or art" (p. xvi). Unfortunately, Hine (2001) inaccurately applies Freudian psychoanalytic terminology to a cultural context that existed hundreds of years before Sigmund Freud. When he advanced his theory of psychoanalysis, Freud (1924) defined the process of "repression" as the withdrawal of "an impulse, a mental process seeking to convert itself into action" as a result of "rejection by what we call 'repudiation' or 'condemnation'" (p. 304). Under Freudian psychoanalysis, "repression of mental

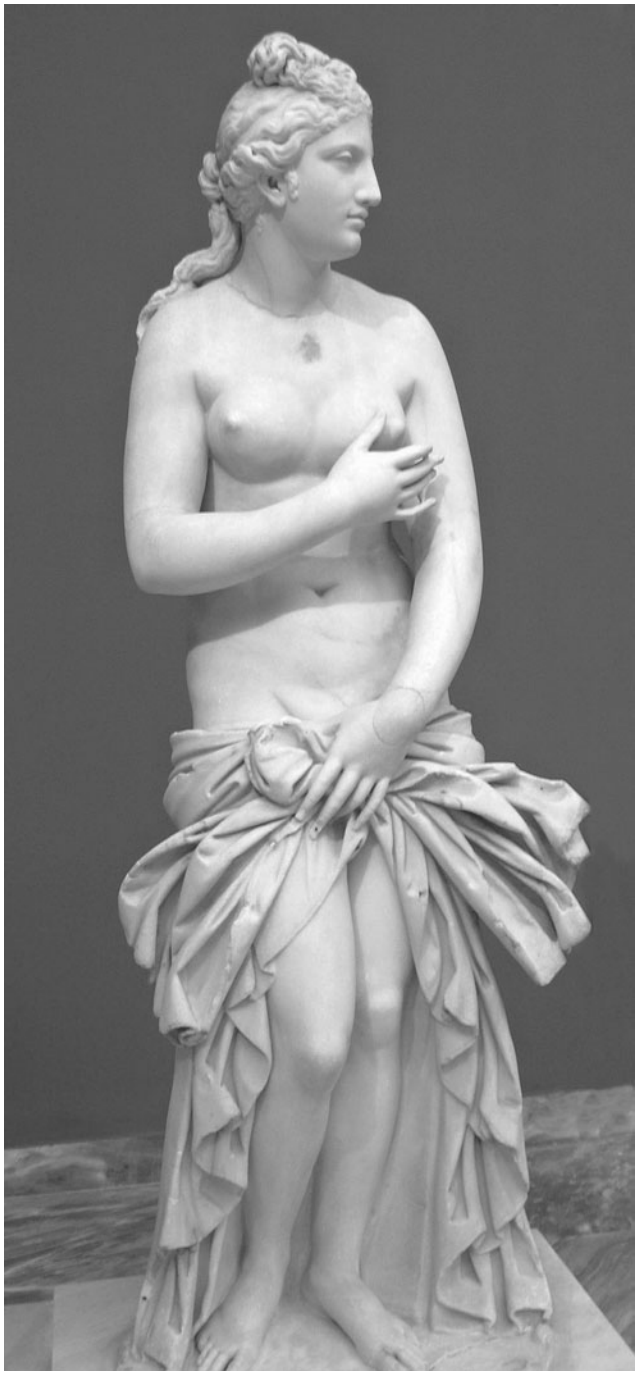

Figure 4.4 Aphrodite of Syracuse (courtesy of the National Archeological Museum of Athens, Greece; © Hellenic Ministry of Culture, Education and Religious Affairs/ Archaeological Receipts Fund)

excitations" (p. 308) is a psychological rather than a sociocultural phenomenon. It occurs at the "unconscious" level: "The forces behind [repression] proceed from the ego, from character-traits, recognizable or latent" (p. 308). Elsewhere, Freud states that repression means bringing sexual instincts "to submission" (p. 419). In other words, repression is psychological and emotional underdevelopment or impoverishment.

Hine (2001) probably meant that in matters of sex and sexuality, the ancient Greeks showed no inhibitions, fear of repudiation, condemnation, or sense of guilt, because of the cultural and religious context in which they lived. The point is that ancient Greece was a polytheistic culture that had an elaborate ethical and moral system, but not the notion of "sin" in the Judeo-Christian sense of the word. Greeks performed religious rituals to thank, appease, or seek favors from their gods. In Judaism and Christianity, the "original sin" was Adam and Eve's disobedience of God in the Garden of Eden. This was the sinful "stain" that supposedly passed to all of Adam's descendants. Sin is therefore disobeying or breaking the laws of a Holy God. This means falling short of his standards. Sin was a novel but fundamental theological concept that diffused from Judaism to the Greco-Roman world through the Greek translation of the Hebrew Scriptures, the Septuagint, and the Greek New Testament. As we see later in Chapter 6, Judeo-Christian morality was not just about sexual repression. Sin was viewed as a "universal human condition" characterized by the shocking notion—from the perspectives of pagan Greeks—that all human beings are fallible creatures who have fallen short of the moral standards of a Holy God and thus needed change within themselves through conversion and baptism. Thus the New Testament church was a "school of virtue" that defined itself in opposition to Greco-Roman polytheistic, pagan cultures (Brown, 2013, p. 67–68). The church also introduced the unprecedented, intimate interconnection of morality, philosophy, and religious ritual, which resulted in what Brown (2013) calls "stern moralizing and urgent theological speculation" (p. 71). Additionally, the concept of obscenity (filthy and immoral words or actions) diffused to the Greco-Roman world—and by extension, the Western world—from the Greek New Testament.

Evolution of the Concept of Pornography: From Text to Images

This volume explores how different legal systems and cultures view, define, and regulate pornography, a concept that the ancient Greeks gave to the world. As a rule-governed creation, sexual expression is subject to a series of rules ranging from grammar and composition to art, sociocultural and legal logics, and strictures that make it a narrative (Ricoeur, 2013, p. 13). Despite the fact that ancient Greece had a system of legalized sacred and "profane" prostitution, which was the subject matter of a lot of sex-themed art, that material was not considered "pornographic" in the modern sense of the term. The ancient Greeks did not view explicit, sex-themed art, or even prostitution for that matter, in moral and ethical terms. That terminology was confined to textual material like that recorded in the *Greek Anthology*. The meaning of the term "pornography" has evolved over time. It is now generally viewed as commercialized, explicit depictions of sexual activity that are intended solely for sexual arousal, lust, and profit. That view has a heavy ethical or moral undertone. Pornography is often contrasted with erotica,

sex-themed material that has literary or artistic value. Ruggiero (2010) suggests that in its original Greek sense, the word "pornography" represents the act of phallic penetration, while the erotic represents the human body in more evocative and sexually suggestive ways (p. 5). For her part, Matthews-Grieco (2010) states that the different meanings attached to pornography and erotica seem to have been in vogue in sixteenth-century Renaissance Italy. While this is an interesting idea, we shall see later in this book, from a legal and regulatory perspective, that distinction is not helpful. Pornography remained a vague and obscure concept until the nineteenth century, when it acquired its contemporary meaning.

The Roman Conquest of Greece and the Romanization of Greek Culture

We have seen that Greek classical culture, and especially its mythologies, philosophical ideas, and historical and literary narratives, provided the building blocks of Western civilization. Europa was a Greek goddess mentioned in Homer's ancient epic poem *The Iliad*. The heterogeneous sexualities of ancient Greece also gave the world its vocabulary of sexuality. However, years of warfare between Greek city-states and kingdoms exhausted the Greeks and made them vulnerable to the rising superpower in the West: Rome. The Romans, whom the ancient Greeks considered nothing but primitive "barbarians," conquered Greece after a long series of wars that took place over a 53-year period, culminating in the destruction of Corinth in 146 BC and the installation of a *Pax Romana* (a Latin expression for Roman peace) in the Mediterranean region (Waterfield, 2014). The Romans plundered Greek cultural treasures and, like all imperialists, developed a sense of moral superiority toward the Greeks. They also developed a love–hate relationship with Greek culture. They admired ancient Greek culture and learning but were contemptuous of the contemporary Greeks whom they had conquered. Romans attributed to Greeks "sexual deviance, or general moral weakness" (Waterfield, 2014, p. 210). Indeed, the Romans believed that "it was their moral superiority that had awarded them the backing of the gods and ensured their success in warfare" (p. 11). Nevertheless, the Romans borrowed generously—in public and in private—from Greek religion and culture. This included borrowing Greek sex-themed artistic styles. Waterfield (2014) describes the conflicted cultural identity of the Romans as follows: "So the Romans did not merely imitate Greek art, but they emulated it; they did not just take it over, but made it their own. The Hellenization of Rome went hand in hand with its Romanization, the development of Roman forms on a Greek foundation . . . But Rome did not thereby become less Roman, it just became more Greek" (p. 212). This also explains the dual names of the gods and goddesses: the Greek goddess of love, beauty, pleasure, and procreation, Aphrodite, is equivalent to the Roman goddess Venus, while the Greek god of love and passion, Eros, is equivalent to the Roman god Cupid.

5

Explicit,S ex-Themed Visual Imagery as Regulated Representations in China and Japan

In November 2003, the Chinese News Agency Xinhua reported that three Japanese students and a lecturer were expelled from the Chinese Language School of Northwest China University in the historic city of Xi'an after they staged an "obscene" cultural performance in which they wore red brassieres and fake genitals over their clothes. The Chinese students in the audience were outraged. They disrupted the performance, and the next day, thousands of them held a demonstration in front of the dormitory of the international students of the university, demanding an apology from the Japanese performers. The matter quickly became a diplomatic incident between China and Japan. The Chinese Foreign Ministry lectured the Japanese government about intercultural respect. It asked Japan to educate Japanese students who wished to study in China to abide by the laws of China and the regulations of Chinese universities and to respect the customs of the Chinese people (Japanese FM Criticizes Obscene Performance in China, 2003). In response, the Japanese Foreign Minister, Yoriko Kawaguchi, criticized the three Japanese students and teacher for the performance. She said Japanese students studying abroad should understand and respect the customs of their host countries (Japanese Embassy Cops an Earful, 2003).

The "obscene" performance, which resulted in the expulsion of the Japanese students and teacher from the Chinese Language School of Northwest China University, demonstrates cultural differences between China and Japan over explicit, sex-themed images and performances. However, it is also a testament to the historically sensitive relations between Japan and China over matters of sex. Japan invaded Manchuria, China, in 1931 and occupied it until the end of World War II in 1945. In 1937, Japanese soldiers carried out the infamous "Rape of Nanking," during which thousands of civilians were massacred with the utmost savagery, and more than twenty thousand women were raped in the most savage and sadistic fashion imaginable (International Military Tribunal For the Far East, 1948). Additionally, the Japanese Army is believed to have kept a large group of women as "comfort women." This deceptive term describes women and girls forced to work as sex slaves in Japanese Army brothels or comfort stations in China, Korea, the Philippines, Indonesia, Thailand, Burma, and other territories the Japanese

Imperial Army occupied during World War II (Argibay, 2003). The sex-themed performance of the Japanese students and lecturer at Northwest China University opened up old emotional scars in Sino-Japanese history, a painful past that has not been forgotten.

Aim of the Chapter

The aim of this chapter is to describe and explain the diversity of regulation of explicit, sex-themed visual media content in Asia, using as exemplary case studies the specific cultural and legal contexts of China and Japan. The chapter seeks to explore how these countries reconcile the right of freedom of expression with restrictions against media content considered to be obscene and detrimental to public order and morality within each country's specific politico-cultural and religious context. This chapter therefore surveys regulation of explicit, sex-themed visual imagery in China and Japan. These countries have ancient cultures of sex-themed visual communication that stand in stark contrast to the traditions and cultures of the Western countries we have studied so far. In these Asian countries, explicit, sex-themed imagery was produced in several media, including woodblock printing and painting on silk, wood, and other surfaces. The explicit, sex-themed visual imagery of each of these countries had some religious element. Though the two countries now regulate explicit, sex-themed imagery on the Internet within the context of contemporary political, social, and religious realities, a survey of their regulations over time shows that in these countries, explicit, sex-themed visual imagery has always been a form of regulated representation that was controlled within specific national cultural contexts.

Explicit, Sex-Themed Art as Regulated Representation in China: A Brief Survey

In April 2014, the English-language edition of the government-owned Chinese News Agency Xinhua reported that the Chinese government had launched one of its periodic antipornographic campaigns on the Internet. Xinhua reported that more than 3,300 accounts on the China-based social networking sites WeChat and Sina Weibo, as well as numerous Chinese-language online forums, had been deleted by the government (Xinhua News Agency, 2014). Additionally, 7,000 advertisements and 220,000 texts had been deleted as part of China's antipornography campaign, code-named "Cleaning the Web 2014." Frequent antipornography campaigns are a feature of China's gateway model of Internet regulation, under which the government censors all Internet content that it considers to be politically or morally unacceptable. This system of control is sarcastically referred to as the "Great Fire-Wall of China." This system controls citizens' access to the Internet and prevents them from accessing political, pornographic, and news media, as well as other sites that the government considers objectionable (Eko, Kumar, and Yao, 2011; Riley, 2014).

As this frequent Internet pornography crackdowns demonstrate, in China, explicit, sex-themed imagery (pornography) on the Internet is a rule-based phenomenon. For more than seventy years, the Chinese Communist Party's regime has suppressed explicit, sex-themed imagery on the grounds that it is part of the feudal system that was overthrown in 1911 and was replaced by the Republic of

China and ultimately the People's Republic of China in 1949. The Communist Party of China also views pornography as being part of Western imperialism, capitalist decadence that undermines the country's constitutionally mandated "socialist spiritual civilization." Nevertheless, as the Chinese economy has grown exponentially, pornography has expanded. In China, the government sets general principles and rules that government agencies, Chinese interactive services companies, Internet service providers, hosts, networks, universities, and other institutions are required to follow. These rules also apply to global information and communication technology companies like Google, Microsoft, Yahoo!, and so on (Eko, Kumar, and Yao, 2011). Finally, these rules apply to websites and individual Chinese citizens.

In 2010, the Information Office of the State Council of the People's Republic of China issued a policy document, a *White Paper*, that set forth the basic principles for Internet management in China. Under government regulations, pornography is illegal in China (Information Office of the State Council of the People's Republic of China, 2010). This is especially true of pornography that is available to minors: "Online pornographic, illegal and harmful information is seriously damaging the physical and psychological health of young people, and this has become recognized as a prominent issue of public concern" The government has issued a series of "self-disciplinary regulations" that include rules against distribution of "pornographic and other harmful information." Citizens who come across "pornographic and vulgar information" on the Internet are required to report it to the Pornography Crackdown and Press and Publication Copyright Joint Reporting Center (Information Office of the State Council of the People's Republic of China, 2010).

Survey of Sex-Themed Visual Imagery in Chinese Art History

When one thinks of China or Chinese art, one thinks of serene, idealized landscapes and peaceful, beautifully manicured gardens with transparent pools teeming with colorful fish. However, despite the Chinese government's crackdown on Internet pornography, explicit, sex-themed or erotic art has existed in China from time immemorial. Over the centuries, Chinese dynasties, religions (like Daoism, Confucianism, and Buddhism), and their respective artistic schools of thought left behind a multifaceted body of art (Honour and Fleming, 2009). As such, explicit, sex-themed art has been regulated within the context of specific religions, dynasties, or regimes. Some of this art was erotic art associated with Taoism, a naturalistic, mystical, and spontaneous religion that had a system of prescribed and illustrated sexual practices. Some Taoist sects considered sexual intercourse a religious observance and spiritual practice. In Taoism, the union of female and male cosmic principles (Yin and Yang) creates spiritual sexual energy. In sex-themed Chinese Buddhist art, Guanyin, or the Bodhisattva, who was associated with the Chinese mother goddess, was believed to have "the spiritual virtues of both men and women, and able to manifest themselves in either form . . . The sexual organs and other physical features . . . [were] ignored in order to create an image of androgynous love which transcends sexuality" (Honour and Fleming, 1991, p. 238).

The rise of the relatively ascetic philosophy of Confucianism, which emphasizes harmony in human relations, hierarchy, respect for parents, and education, led to

the suppression of visual sexual imagery and ultimately eliminated it from the public sphere. Furthermore, the coming to power of the Chinese Communist Party in 1949—with its emphasis on class struggles, socialism, and anti-imperialism—meant that religion and erotic art were suppressed and eliminated from the public sphere. Furthermore, the Cultural Revolution ravaged art, literature, and thought that was considered counterrevolutionary, backward, or bourgeois. Red guards of the Cultural Revolution set alight ancient Chinese sex-themed books and art pieces in huge bonfires in accordance with the official Marxist ideology, according to which pornography was described as "the opium of the spirit" (Dalmas, 1999, p. 59). As a result, a lot of Chinese Taoist and other erotic art survive only outside mainland China. Nevertheless, explicit, pictorial erotic art is an aspect of China's hidden cultural heritage that is coming to light in more recent years. A number of books on Chinese erotic art have been published in the last twenty years. They include Lin Yi's 2007 book, *The Tao of Seduction: Erotic Secrets from Ancient China*; Ferdinand Bertholet and Jacques Pimpaneau's 2004 book, *Gardens of Pleasure: Eroticism and Art in China*; Yimen's 1997 book, *Dreams of Spring: Chinese Erotic Art*; and so on.

The world of art was pleasantly surprised when the British auction house Sotheby's announced in April 2014 that its Hong Kong gallery would be holding an exhibition of ancient Chinese erotic art, titled "Gardens of Pleasure: Sex in Ancient China." The objects in the exhibition ranged from artifacts from the Han Dynasty (206 BC to 220 AD) to those of the Qing Dynasty (1644–1911). The exhibition gave an insight into the explicit, visual sexual imagery of ancient China (Payne, 2014). Some of these erotic art objects were created in palace environments under the sponsorship of emperors. As such, they were regulated representations produced within the framework of specific political, social, cultural, and legal controls. Some of the erotic art came with an imperial seal of approval (Cahill, 2012). Painting and woodblock and silk printing flourished during the Ming dynasty (1368–1644). For more than 275 years, the country experienced a flowering of different schools of painting. A subset of this art was erotic, or explicit, sex-themed art (van Gulik, 2004). This art was called "secret-play [erotic] pictures" (Cahill, 2012). Chinese explicit, sex-themed art has been described as symbolic, aesthetically beautiful, and harmonious rather than pornographic (Bertholet and Pimpaneau, 2004; Yimen, 1997). The explicit, sex-themed visual art of the Ming dynasty was composed of erotic paintings, erotic book illustrations, and woodblock and color prints with symbolic or metaphorical titles like *Variegated Positions of the Flowery Battle* and *The Plum in the Golden Vase*. As we later see, this art inspired the Japanese erotic art of the same period (Cahill, 2009; Clunas, 2009; van Gulik, 2004). The Ming dynasty is also known for its sex-themed literature—handbooks of sex and explicit, sex-themed imagery. One of the most common artistic themes of that era was sex in the imperial palace. Artists drew idealistic images of the palace with its concubines and courtesans. The most common theme was the concubines or mistresses of the emperors. One of the most famous pieces of Chinese art is the painting *The Concubines of Emperor Chu* by Tang Yin of the Ming dynasty (1368–1644). The theme of this piece of art has become one of the mainstays of modern China's commercial ceramic art design. The country's billion-dollar household ceramics industry replicates this period in mass-produced ceramics, artware, china, and other products exported around the world. Figure 5.1 is a commercial flowerpot that depicts a reproduction of

Figure 5.1 Commercial ceramic flowerpot reproduction/variation on the theme of "The Concubines of Emperor Chu" (Ming dynasty; photo: Lyombe Eko)

an idealized palatial scene featuring concubines, or courtesans. This reworking of the ancient theme of royal sexuality contains a subtle visual sexual innuendo: the exposed tiny foot (Figure 5.2). In effect, extremely small feet resulted from the practice of foot binding, an ancient Chinese cultural practice, and were a marker of social class and a symbol of femininity and beauty. Foot binding was practiced for almost 1,300 years under different dynasties beginning with the Tang Dynasty (618–907) and officially ending with the Qing Dynasty (1644–1911). In his book *The Lotus Lovers: The Complete History of the Curious Erotic Custom of Footbinding in China*, Levy (1992) states that foot binding was part of Chinese erotic culture. The illustrated sex manuals of the Qing Dynasty featured representations of erotic activities involving small, bound feet. Foot binding was thought to enhance the sexual attractiveness of women—their delicate, tentative walk, the sway of their hips, the shape of their buttocks, and the tightness of their vaginas (Levy, 1966). Women with bound feet were considered sexually attractive, desirable, and marriageable (Ko, 2001).

Ultimately, the Qing Dynasty (1644–1911) replaced the Ming dynasty. A resurgent Confucian movement condemned erotic literature and explicit, sex-themed art as material that had a corrupting influence on society. It therefore ushered in conservative attitudes toward sex and eroticism. Early Christian missionaries from the West, who preached an austere brand of Judeo-Christian morality, also influenced the Qing Dynasty's regulatory policies. The communist takeover of China in 1949 led to a radical reappraisal of the past. The communist government of Mao Zedong set out to systematically discard all aspects of Chinese culture, philosophy,

Figure 5.2 Detail of commercial ceramic art design from a Ming dynasty palace garden scene (commercial Chinese flowerpot). Note the display of the tiny foot, a symbol of beauty and sexuality (photo: Lyombe Eko)

and worldview that were considered backward and decadent. The Communist Party's economic program, "The Great Leap Forward," and its Cultural Revolution "cleansed" China of all that was considered feudal and backward, including ancient Chinese art. As part of its campaign to rid China of the so-called Four Olds—old customs, old culture, old habits, and old ideas—the Red Guards of the Cultural Revolution destroyed public and private works of art that were considered to be decadent, depraved, backward, or counterrevolutionary, or those that did not reflect socialist realism (Spence, 1999).

Regulation of Explicit, Sex-Themed Content in Japan

Japan is so comics-crazy that segments of its population approach the genre with a mixture of religious ecstasy and unrestrained sexual excitement. Japan clearly has a culture-specific version of the intermingling of religion and sex. Japanese young people travel in droves to Shinto shrines and Buddhist temples to dedicate "fictional characters from their beloved animation works" (Miyamoto, 2013). These young people are reenacting ancient cultural rituals connected to religion, spirituality, and sometimes sexuality. Japan has a long history of narrative visual arts that can be traced to the eleventh century. Millions of manga (comic art books) based on Japanese historical and mythological narratives, rituals, religion, and beliefs have been created in recent years (Ito, 2005). Manga flourished during the

Tokugawa era (1603–1867) and covered both religious and secular themes. Manga comic books are a mirror of Japanese society, culture, and worldviews (Ito, 2005; Ito and Crutcher, 2014). Animated versions (anime) of manga are all the rage among the youth. Hundreds of manga have been translated into many languages across the world. Millions of them have been made into video games and other forms of mass consumption. Manga is one of the most popular forms of mass entertainment in Japan. The manga phenomenon serves hundreds of thousands of subcultures, niches, and interests, ranging from archery and time travel to Zen Buddhism and fringe sexualities.

Explicit, Sex-Themed Art: The *Shunga*

Japan, a nation that has been described as "oversexed and comics-crazy," has one of the world's most thriving sexual-capitalist economies (Lemons, 2001). In 2013, the British Museum held an exhibition of sexually explicit Japanese *shunga* (pictures of spring) painted from 1600 to 1850 (British Museum, 2013). This was the Edo period, when Japan was culturally isolated from the rest of the world (Sooke, 2013). The exhibition opened up the unknown world of very explicit, ornate, artistic, and refined Japanese sex-themed or erotic paintings, prints, and books, some of which were made by grand masters. According to the curators, the material was used for education and entertainment in a culture that did not consider sex to be unclean and something that should take place only behind closed doors. A lot of the material in the exhibition had been kept in a secret room reserved for "obscene material." Despite their complex religious and philosophical worldview, the Japanese do not consider sex and sexual pleasure to be sinful (Sooke, 2013). Monta (2013) states that *shunga* were widely available to men and women, young and old: "Shunga was not simply for stimulating sexual desire, but aimed to depict a wide range of aspects of sexuality" (p. 17). One of the reasons for this widespread availability of *shunga* is that explicit, sex-themed art is part of Japanese religion and culture. This type of sexual-religious expression diffused to Japan with the arrival of Buddhism from Korea in 552 AD. Explicit, sex-themed imagery featuring "grossly exaggerated" human sexual organs were found painted onto the wooden planks of the ceiling of the Horyuji Buddhist Temple (literally "Temple of the Flourishing Law") in Ikaruga, Japan. This temple, which was built in the eighth century, is inscribed in the register of UN Educational, Scientific, and Cultural Organization (UNESCO) World Heritage sites. These grotesque, graphic images are considered to be the oldest surviving examples of Japanese comic art (Ito, 2005).

Japan is the land of the extremely violent, gory, grotesque, and often sex-themed animated cartoons, or anime, and manga (comic books). However, these macabre representations draw on a thousand-year-old tradition of explicit, sex-themed or erotic woodblock pictures, the *shunga* (Ito, 2005). In effect, the *shunga* phenomenon, which originated in Buddhist teachings, started in the Hein period (794–1185) and reached its height in the Edo period (1615–1868; Lim, 2009). Like a number of other Japanese cultural phenomena, *shunga* originated in China. It was inspired mostly by illustrations in Chinese medical manuals. Specifically, the word *shunga* is a Japanized version of the *Shunkuyu-higa*, 12 Chinese scrolls that depicted the 12 sexual acts that a Chinese Crown Prince carried out as an

expression of the Taoist principle of cosmic balance: yin and yang. The *shunga* was thus a Chinese regulated representation that diffused and was presented anew in the Japanese feudal cultural context. The *shunga* was thus a deterritorialized art form. A culture-specific aspect of this graphic art form is that in Japan, complete nudity was not considered erotic. As a result, with a few exceptions, even the most sexually graphic images portrayed fully clothed characters. Nevertheless, the feudal Shogunate (warrior rulers) banned the publication and sale of *shunga*. However, the ban was not enforced, because there was high demand for it among the elite. After 1722, *shunga* artists used pseudonyms to avoid identification and to evade governmental prohibitions. We saw previously in our discussion of China that the diffusion of Confucian philosophy during the Qing Dynasty led to restrictions on explicit, sex-themed art in China. Japan had a similar experience. The deterritorialization and diffusion of Confucianism from China to Japan between 1716 and 1736 meant further restrictions against *shunga* art (Lim, 2009). However, the Tokugawa period (1603–1867) saw the reemergence of *shunga* that depicted uninhibited, sexually explicit Japanese eroticism (Ito, 2005). One of the most famous artists of this period was Hishikawa Moronobu, an artist whose sex-themed *shunga* ranged from subtle to very explicit. Figure 5.3 depicts a mild erotic scene. Nudity was not always a feature of Japanese erotic art. Japanese artists often depicted fully clothed individuals involved in sexual intercourse. Depictions of uninhibited, sexually explicit eroticism are a common phenomenon in contemporary Japanese society. Indeed, Japan is known for its re-presentation of extreme

Figure 5.3 HishikawaM oronobu,b lack-and-white *shunga* (erotic art; woodblock print; late 1670s or early 1680s; image from the Library of Congress, Washington, DC)

and fringe sexualities of all kinds. All kinds of erotic manga and *shunga* cater to all male and female tastes (Ito, 2005; Monta, 2013). However, as we will see later, the production and possession of violent pornography featuring children, particularly school girls, has been progressively criminalized in Japan as a result of international pressure.

Manga in Post–World War II Japan

Japan's most popular cultural product is manga. It is a multibillion-dollar phenomenon that reaches all sectors of Japanese society and constitutes one of Japan's major cultural exports (Ito and Crutcher, 2014). Japan is also known as the main production, promotion, and distribution nexus of the most violent pornography products of the global sexual capitalism industry. More so than most developed countries, Japan has traditionally been very tolerant of the production, marketing, distribution, and consumption of commercial, explicit, sex-themed imagery that depicts fringe and perverted sexuality. The stock-in-trade of this material is a mixture of the erotic and the neurotic in manga comic books and magazines, anime, DVDs, and web videos. Extreme commercial pornography and even child pornography is pervasive in Japan. This explosion followed the relaxation of censorship in the 1990s. The Japanese manga or comic book industry is a billion-dollar industry. The mentality of Japanese comic book publishers and animations producers was "everything goes." "Everything" included pedopornography, some of which featured abducted middle-school girls (Adelstein, 2008).

The extremely sexually violent productions of Japanese manga and anime have found a global audience through their connection with global, mass-mediated sexual capitalism. A number of Japanese photographers and artists are renowned for their explorations of "fringe sexuality." Hajime Sorayama's cyberwomen appeared regularly in *Penthouse* magazine before it filed for bankruptcy. Masaaki Toyoura's bondage photos are published in *Hustler* and various other publications owned by Larry Flynt (Lemons, 2001). Japanese manga and anime contain the most extreme forms of sexual perversion and dysfunction, material that would be legally classified as obscenity in the United States. The expression "everything goes" includes pornographic images of underage girls involved in explicit sexual activity. Such pictures would be considered as illegal child pornography and banned in most other countries (Tabuchi, 2011). Cultural tolerance is the only explanation for the persistence of pedopornography in Japan. Nevertheless, even in Japan, extremely violent sex-themed content is regulated and sometimes censored (Lemons, 2001).

Explicit Japanese Sex-Themed Visual Imagery and International Law

Though it might not seem like it, Japanese manga are rule-based mass productions that reflect Japanese society and culture. One of the differences between Japan and most other countries is that Japan did not criminalize child pornography until the 1990s, after experiencing intense pressure from the international community. This laissez-faire, "everything goes" attitude in the face of extremely violent Japanese pornography, and the easy availability of pornography featuring the sexual exploitation of children, put Japan at odds with other developed countries. Feminists,

child welfare advocates, and human rights activists denounced Japan's indifference toward the commercial sexual exploitation of women and children. Japan ultimately decided to sign the UN Convention on the Rights of the Child (1989). In 2000, with the opening up of the Internet and the migration of pornography and child pornography to that forum, the UN General Assembly adopted the Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography. Japan also signed this treaty. In order to show that it was serious about regulating child pornography, Japan passed the Law for Punishing Acts Related to Child Prostitution and Child Pornography and for Protecting Children (Law No. 52 of 1999). This law officially outlawed production and distribution of child pornography. However, possession of child pornography was technically not illegal until 2015 (Tabuchi, 2011).

In order to demonstrate that it was fully engaged in the global fight against the sexual exploitation of children, child prostitution, and child pornography, Japan agreed to host the Second UN World Congress against Commercial Sexual Exploitation of Children. The conference was held in Yokohama, Japan, from December 17–20, 2001. This congress, which was organized by the United Nations, came up with the Yokohama Global Commitment (UNICEF, 2001), which reiterated the international community's belief that children had a right to be protected from "commercial sexual exploitation in the form of child prostitution, child pornography and trafficking of children for sexual purposes . . . and to promote education and information to protect children from sexual exploitation, including educational and training programmes on the rights of the child addressed to children, parents, law enforcers, service providers and other key actors" (UNICEF, 2001).

Impact of the Yokohama World Congress against the Sexual Exploitation of Children

After the UN Yokohama Congress against the Sexual Exploitation of Children, Japanese authorities began to carry out frequent investigations and crackdowns on manga that contained excessive, explicit, and sometimes violent content that featured girls younger than 13 years of age (Tabuchi, 2011). Some of these manga had titles that left nothing to the imagination: *Temptation of Little Girls*, *Child Crime Oni*, *Girl Violation Office*, *Rape Me in My School Uniform*, *Pedophile's Banquet II*, *Child Like Hole*, and so on (Kyoto Police Identifies 13 Loli Manga as "Harmful Books," 2007). This kind of violent, sex-themed material involving minors is common in Japan, despite laws against its production and despite the Yokohama Congress commitments. This is because possession of child pornography involving real children is not a crime in Japan. Only commercial production and distribution of such material is illegal. Indeed, the Japanese National Police Agency reported that the number of cases of illegal child pornography distribution hit a record high of 1,596 in 2012. The number of underage victims identified in these child pornography cases rose to 1,264 (Jiji, 2013). The reality is that criminalizing the production of child pornography without criminalizing the market for the product has not solved the problem of the sexual exploitation of children in Japan.

Tension between Freedom of Expression and Obscenity Law in Japan

The Yokohama Congress enabled Japanese society to come to terms, for the first time, with the tension between freedom of expression and the government's interest in eliminating harmful, explicit, sex-themed speech. In 2004, an unprecedented prosecution took place. Famous manga artist Suwa Yuuji was tried and convicted in a Japanese court of publishing and distributing obscene pornographic literature—namely, his *Misshitsu* (Honey) manga—in violation of article 175 of the Japanese Criminal Code. He was originally fined 500,000 yen and only avoided jail time by pleading guilty. Yuuji however sought refuge in his constitutional right of freedom of expression and appealed to the Japanese Supreme Court. He claimed that article 175 of the Criminal Code violated Japanese constitutional guarantees of freedom of speech and of the press. The issue before the court was whether article 175 of the Criminal Code violated article 21 of the Japanese Constitution, which guarantees freedom of speech and of the press. The Court answered in the negative and affirmed Yuuji's conviction. Interestingly, the Japanese Supreme Court not only upheld the obscenity conviction but actually increased Yuuji's fine. More important, Misshitsu and all other manga titles created by Yuuji were completely removed from the marketplace. A number of Japanese bookstores quickly closed down their "adults only" sections for fear of prosecution.

There was also movement on the statutory track. In order to show that it was serious about the problem of harmful, obscene manga and anime, the Tokyo Metropolitan Assembly passed the Tokyo Metropolitan Ordinance Regarding the Healthy Development of Youths in 2010. The aim of the law was to regulate the excesses of the anime and manga industry, whose center of gravity is Tokyo. The law passed despite vigorous opposition from the Comic Ten Companies Association, the trade group of the manga and anime industry. The law bans comic books that the authorities consider to be "harmful" to youth (Tokyo Tries to Ban "Harmful" Anime and Manga, 2010). However, the law is applicable only within the city limits of Tokyo.

The unprecedented conviction of Yuuji, the crackdowns on pornography featuring children under 13, and the passage of the Tokyo Youth Ordinance raised questions about the tension between constitutional guarantees of freedom of expression and the substantial interest of the government in protecting children from sexual exploitation and society from the negative effects of violent pornography. In effect, the Japanese Constitution of 1947 guarantees freedom of expression: "Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed. No censorship shall be maintained, nor shall the secrecy of any means of communication be violated" (Constitution of Japan, 1947, art. 21). Though the Japanese Constitution bans censorship, during the prosecution of Suwa Yuuji, the government argued that it was trying to strike a balance between freedom of expression and the Japanese Criminal Code of 1907, which bans obscenity. The relevant provision states, "Whosoever shall have published and distributed indecent (obscene) books, writings, pictures or other objects, or publicly exhibited or sold, or held same with the object of selling them, shall be punished with a fine not exceeding five hundred yen, or a police fine" (Criminal Code of Japan, 1907, art. 175). Censorship of Suwa Yuuji's manga was carried out under the Criminal Code. It is therefore technically not censorship, though the practical effect is the same. It is interesting that Japanese law equates obscenity

and indecency. It is also interesting that the law had not been enforced for decades prior to the trial of Yuuji.

Nevertheless, in its *Country Reports on Human Rights Practices for 2013*, the US State Department (2013) reported that Japan "continued to be an international hub for the production and trafficking of child pornography." The report stated that although production and commercialization of child pornography that depicted the brutal sexual abuse of small children had been criminalized in 1999, possession of the material was not illegal. The result was "a situation that continued to hamper police efforts to enforce the law effectively and participate fully in international law enforcement." The business of child pornography has, for decades, been one of the cash cows of Japanese organized crime. Adelstein (2008; 2009), a former crime reporter for Japan's largest newspaper, the *Yomiuri Shimbun*, writes that the legendary, powerful Japanese organized crime syndicate the Yakuza, whose origin can be traced to the Japanese feudal society of the sixteenth century, was deeply involved in human trafficking, prostitution rings, and the production and distribution of all forms of child pornography. The fact that Yakuza bosses could openly socialize with Japanese prime ministers, politicians, and government officials at all levels, since the Yakuza is a "legal entity" in Japan, made the criminalization of the possession of child pornography extremely difficult.

However, under intense international pressure, and despite the intense resistance of the powerful and influential Japan Magazine Publishers' Association and the Japan Animation Creators' Association, Japan passed a law in 2014 criminalizing the possession of child pornography. However, the law does not apply to explicit depictions of children engaging in sex acts in animations (anime) or comic books (manga). Japan is the last developed country to ban the possession of pedopornography that uses or features real children (Japan Bans Child Pornography Possession, 2014). In the context of Japan, this refers to explicit images of child sexual abuse. Japan banned the production and distribution of child pornography in 1999, but possession of the material was not criminalized. The 2014 law does what the United States and other Western countries have done to fight child pornography: dry up the market for the material by criminalizing its possession. The law gave Japanese owners of child pornography one year to get rid of the material. It is apparent that the Japanese government changed its child pornography law and enforcement policies after it signed the 1989 UN Convention on the Rights of the Child and after it hosted the Yokohama World Congress against Commercial Sexual Exploitation of Children in 2001. This shows that even a rich and powerful industrial country like Japan sometimes allows policies to diffuse from the international community into its domestic law in order to enhance its international standing.

China and Japan are part of the Sinic world, an Asian cultural sphere influenced by the civilization of ancient North China and shaped by Confucian moral philosophical ideas adapted to suit specific national political contexts (Reischauer, 1974). China and Japan have ancient cultures of sex-themed visual art that express the worldviews of both societies on matters of sexuality. In the twentieth century, both countries took divergent political, economic, and social paths. The People's Republic of China adopted an ascetic, antipornography policy. We saw earlier that during the Cultural Revolution, the Chinese Communist Party launched a program to eradicate the so-called Four Olds: old customs, old culture, old habits, and old ideas. This led to the destruction of public and private works of art

that were considered decadent, backward, or counterrevolutionary, or those that did not reflect socialist realism (Spence, 1999). The historic erotic art of China that survived political ideology and turmoil is now mostly held abroad by private collectors or foreign museums. Despite the massive economic changes in China, vestiges of the "Four Olds" campaign still remain. Pornography is still officially banned as a product of Western decadence and depravity that, if allowed to circulate unchecked, would poison the minds of Chinese young people. China's Internet monitoring and filtering system, the so-called Great Firewall of China actively filters and blocks pornographic websites.

For its part, Japan continues to maintain a lot of its traditional cultural attitudes toward erotic art despite its defeat in World War II, the American occupation, and its adoption of a democratic constitution. Japan has a thriving and aggressive system of sexual capitalism grounded in comic books (manga) and anime (animations). Media products that focus on sex and violence make up an important proportion of the country's multibillion-dollar comic book and animation industries. As a result of the economic muscle of Japanese sexual capitalists, the country became the focal point of the most extreme forms of pornography, including violent pornography involving children. Things changed in the 1990s when it was announced that Japan would host the Second UN World Congress against Commercial Sexual Exploitation of Children in 2001. Japan banned the production of violent pornography involving real children in 1999. Nevertheless, despite the country's commitment to combat the sexual exploitation of children after the Yokohama Congress, Japanese sexual capitalists ensured that possession of violent pornography featuring real children was not illegal in the country. That was the situation until 2014, when, under international pressure, the Japanese Parliament enacted a law declaring possession of child pornography featuring real children illegal. All those who possessed such material were given a one-year grace period to destroy it. Nevertheless, the ban did not include comic books and animations featuring child characters. In the meantime, Japan has become a global exporter of violent, sex-themed media content involving real and animated "video game" children.

6

Regulation of Sex-Themed Visual Imagery in India

From Entwinement of the Sacred and the Sensual to Emphasis on Karma

The Bajrang Dal (the Brigade of Hanuman, the Hindu monkey god) is a militant, Hindu nationalist organization in India. It is famous for its cow protection activities (i.e., saving cows, which are considered sacred in Hinduism, from slaughter). As we saw in Chapter 1, the Bajrang Dal is also famous for its campaign against celebrations of Valentine's Day, which it considers to be a Western conspiracy to destroy Hindu culture. Members of the organization hold demonstrations every year against Valentine's Day and throw rotting tomatoes at couples who display affection publicly. They have been known to burn down shops selling Valentine's Day cards and destroy the stands of florists selling flowers on Valentine's Day (Ghosh, 2012). The militant political religiosity of the Bajrang Dal and other Hindu religious groups is a nationalistic reaction against the perceived evils of Western sexual capitalism and its globalization, as well as the diffusion of "Western" cultural products like advertising, pornography, and erotica—and their perceived underlying decadent values—to all corners of our interconnected world. The actions of these militant groups may also be a repudiation of Western ideals of love and sex, in which sexuality has, over time, become a secularized right that is completely cut off from its sacred, religious roots. The anti-Valentine's Day demonstrations are thus a rejection of Western gods and goddesses of love: Eros (Cupid) and Aphrodite (Venus), whose roles in Western mythology are different from that of the gods and goddesses in Hindu mythology. In India, Valentine's Day deterritorializes love and sex from the Hindu cultural context to the Greco-Roman cultural context. At best, it creates a hybrid of both cultures, which the Bajrang Dal considers to be dangerous.

Aim of the Chapter

The post-Enlightenment separation of the sacred and the secular in the Western world does not exist in Hinduism, Buddhism, or other Indian religions. In India, sexuality was regulated under ancient Hindu law. Hindu and Jain temple architecture is liberally adorned with explicit, sex-themed imagery that emphasizes a direct connection between the religious and the erotic. The aim of this chapter is to survey the historical, political, and cultural context of the regulation of explicit, sex-themed visual imagery in India. Historically, there was no separation of the religious from the secular, the state from the temple. Brahmin priest-kings were at the apex of the Hindu caste system. This is a hierarchical, politico-religious order in which society is divided into separate groups, and each group is assigned a specific place and role in life. Though India is the world's largest democracy, its multireligious and multicultural character means that it must pay attention to the sensibilities of different religious communities. Nevertheless, anti-Valentine's Day demonstrations are ironic because India is known for its ancient Hindu erotic tradition and its vivid erotic temple art. It is, after all, the land of the *Kama Sutra*, the ancient philosophical treatise on "desire, love, pleasure and sex" (Doniger, 2014, p. 371). The Hindu religion is famous for comingling the religious and the sexual, the ascetic and the erotic. This ancient regulatory system offered Hindus two perspectives, or pathways, to eternal happiness: on the one hand, the erotic pathway, which exalted, and even visually celebrated, Rama, the god of sex, and Rati, the goddess of pleasure and, on the other hand, the ascetic pathway of renunciation of sex and all other worldly pleasures as the route and gateway to ultimate enlightenment (Doniger, 2014). As a result, Indian society has always existed in the interstice of what Doniger (2014) calls "the old tension between the erotic and the ascetic strains of Hinduism" (p. 406). She suggests that the Hindu elite in India and the Indian Hindu diaspora now advocate a "sanitized" form of "spiritual" Hinduism devoid of its traditional eroticism due to Mahatma Gandhi's public insistence on celibacy and his attempts to "harness sexuality" to advance his political ends (p. 404). In the long run, the modern Hindu penchant for the ascetic over the erotic is the result of long-term "Muslim and British [Protestant/Victorian colonial] scorn for Indian sexuality" (Doniger, 2014, p. 406). Finally, in their efforts to transform Hinduism from a religion with a pronounced erotic culture—replete with erotic images regulated under Hindu law—to a "puritan" religion influenced by Christian and Muslim notions of sexuality, contemporary Hindus have, to use the expression of Doniger (2014), precipitated "the fall of *Kama* [the god of sex] and the rise of *karma* [the sum total of one's good and bad deeds]" (p. 399). The Sanskrit word *Karma* means "the act." This essentially means that modern day Hindus have suppressed the erotic aspects of Hinduism, which they consider embarrassing, in favor of its moral philosophical and ascetic aspects. As we shall see later, this primacy of the ascetic over the erotic in contemporary Indian society is reflected in the contemporary Indian law of obscenity in real space and cyberspace.

In Hinduism and other Indian religions and mythologies, life is a cosmic drama in which the gods descend on earth as *avatars* (divine beings in human form) that interact—and even copulate—with mortals and shape their destinies. These cosmic dramas involving the interaction of gods and human beings are the subject of much of the religious art of India. These visual religious texts became regulated

representations when they came under the control of political and religious groupings. Misra (2000) suggests that art became part of religion when politico-religious groups codified their "canons"—worldviews, doctrines, rituals, ideologies, iconography, and "internal laws of governance"—and transformed them into laws. As a result, art—including erotic art—and religious rituals became inseparably intertwined in Indian culture (Misra, 2000).

An Example from Hindu Mythology: Krishna Steals the Clothes of the Bathing Gopis (Milkmaids)

Hinduism is a polytheistic religion that also has monotheistic aspects (Doniger, 2014). One of the most prominent gods of India is Lord Krishna, who is often depicted as a young boy or a Hindu prince playing a flute. He is found in a number of religions from Hinduism and Buddhism to certain Islamic sects. One of the attributes of Krishna is that he is the perfect lover, a model boyfriend, and the ideal husband. More than that, he is the personification of love in all its dimensions—at the metaphysical (spiritual), psychological (psychic), and physical (sensual) levels. Lord Krishna is the theme of countless Hindu and Buddhist poems, tales, and artworks. One of the most popular tales of Krishna that is retold through text and visual imagery in many Hindu traditions is "Krishna Stealing the Garments of the Unmarried Gopis" (milkmaids). In this tale, all the unmarried girls were so struck by the spiritual and physical beauty of Krishna that they went to the highly venerated Yamuna River to take a ritual bath in its sacred waters and pray for Krishna to marry them. They took off their clothes and proceeded to bathe in the river, whereupon Krishna mysteriously appeared on the bank of the river, stole their clothes, climbed up a tree, and sat on a branch. Seeing that Krishna had stolen their clothes, the nude girls prayed to him to return the vestments. Ultimately, Krishna persuaded them to come out of the water and collect their clothes one by one. In the process, the god symbolically married each one of them, since in the Hindu tradition, a woman can appear nude only in front of her husband. This myth is interpreted as a Hindu spiritual metaphor (Tirth, 2012). Hindu artists have represented the myth visually for hundreds of years. Images of Krishna and the bathing beauties range from very explicit to more modest renditions. It is an example of sex-themed visual imagery produced within the context of religion and law.

The *Kama Sutra* as Rule-Based Treatise in Hindu Religion and Culture

India's oldest and most famous erotic literary text is the *Kama Sutra*. In Sanskrit, the literary language of ancient India, the word *Kama Sutra* is a neologism formed from two words *kama*, which means "desire," "love," "pleasure," and/or "sex," and *sutra*, which means "treatise" (Doniger, 2014, p. 371). The *Kama Sutra* is thus a treatise on desire, love, pleasure, and sex. Kama is also the name of the Indian love god. His wife, Rati, is the "goddess of sexual pleasure" (Doniger, 2014, p. 249). Pande and Dane (2001) suggest that the main religious dogma of the *Kama Sutra* is that sex partners are supposed to revere each other as gods in human flesh. Therefore, at the personal level, *kama*, the sexual act, is an act of religious worship that is identical to meditation: "It is philosophical, the act itself [of] being elevated

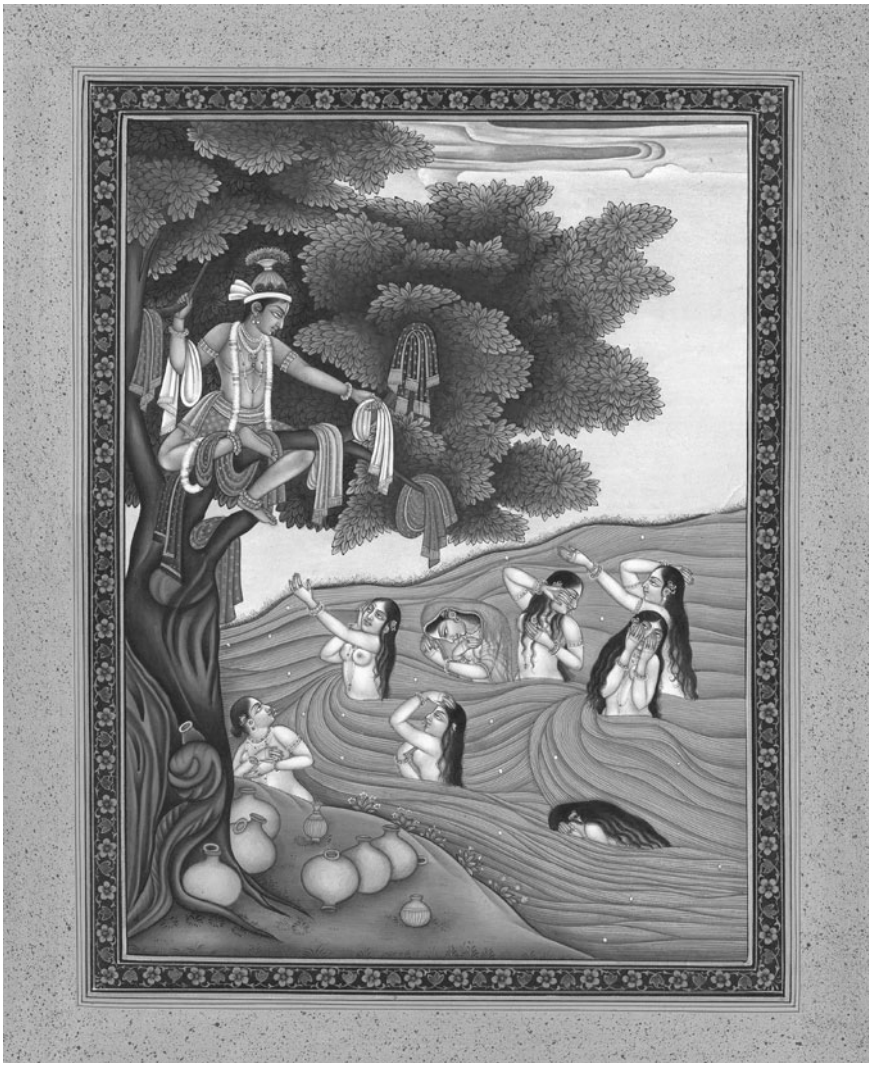

Figure 6.1 *Chir-Harana*. The Gopis (unmarried milkmaids) plead with Lord Krishna to return their clothing (reproduction of Hindu religious art by Kailash Raj)

to . . . a metaphor for unity with Godhead" (Pande and Dane, 2001, p. 12). As we shall see later, in Chapter 9, the *Kama Sutra* diffused from India to Persia (Iran), the Ottoman Empire, and other parts of the Muslim world. In these jurisdictions, it became a regulated representation of sex and sexuality that was translated into the Turkic languages of central Asia and illustrated in the royal workshops of Muslim emperors.

Doniger (2014) suggests that at the societal level, Hinduism is marked by a religious worldview known for its contradictory value system of eroticism and asceticism. This is the juxtaposition and coexistence of an ancient erotic tradition

in literature and religious art that is in tension with an equally ancient philosophical system of self-denial and sexual renunciation. In other words, it was a system in which the erotic existed side by side with the antierotic. Indeed, some schools of Hinduism interpreted the erotic passages of religious texts literally, while others saw them as symbolic or metaphorical references. Doniger (2014) further suggests that "erotic religious imagery is as old as Hinduism . . . Sensuality continued to keep its foot in the door of the house of religion throughout the history of India" (p. 398). Explicit visual representations of the idea of sex as a religious experience and practice, a ritual that elevates mortals to the level of gods and goddesses, abound in the erotic sculptures in Indian temples. This is because in India, sex-themed material—erotica—was designed to excite "a sexual impulse which generated divine pleasure and led to union with the superior being" (Pande and Dane, 2001, p. 14). Naturally, scholars differ on whether the erotic temple art should be read literally or metaphorically/philosophically.

The Khajuraho Erotic Temple Complex and International Law

Numerous Indian temples are famous for their explicit erotic art. The most famous of these temples are at Khajuraho, Konarak, and Bhuvanesvar. The Khajuraho temple complex is a vast collection of Hindu and Jain temples built between 950 and 1050 AD. Their facades are covered with ornate, erotic décor—sculpted panels that serve artistic, religious, architectural, and sculptural functions (Pande and Dane, 2001). They were built within the politico-cultural context of the period. These temples also had a political function in that they were royal temples designed to "proclaim" the prestige of the ruling Chandella Dynasty. The twenty surviving temples of the complex are now officially known as the Khajuraho Group of Monuments. The UN Educational, Scientific, and Cultural Organization (UNESCO) has declared that these temples constitute a "World Heritage" site (UNESCO, 2014). This designation recognizes that the temples have special cultural value as works of art that express the sacred and the sensual aspects of human reality. This designation brings these temples within the ambit of international law. The sculptures represent different Hindu and Jain mythologies. UNESCO (2014) says of Khajuraho, "The sculptors of Khajuraho depicted all aspects of life. The society at that time believed in dealing frankly and openly with all aspects of life, including sex. Sex is important because Tantric cosmos is divided into the male and female principle . . . according to Hindu and tantric philosophy, one can not achieve anything without the other . . . Nothing can exist without the cooperation and coexistence."

As political, religious, and social productions, the sculptures and façades of the Khajuraho monuments were regulated representations. They were produced "in accordance with ancient treatises on architecture, erotic depictions were reserved for specific parts of the temple" (UNESCO, 2014). Today they are protected under the Ancient Monuments and Archaeological Sites and Remains Act (1958, no. 24) and The Antiquities and Art Treasures Act (1972, no. 52). Temples like Khajuraho are spaces in which, as Pande (2004) put it, "sensuality and sexual interaction is displayed without inhibition" (p. 97). Intricate and explicit sexual images on temple walls served as decorative ornaments and icons of sexuality and fertility (Desai, 2000). These erotic images, whose placement is guided by the norms and canons of

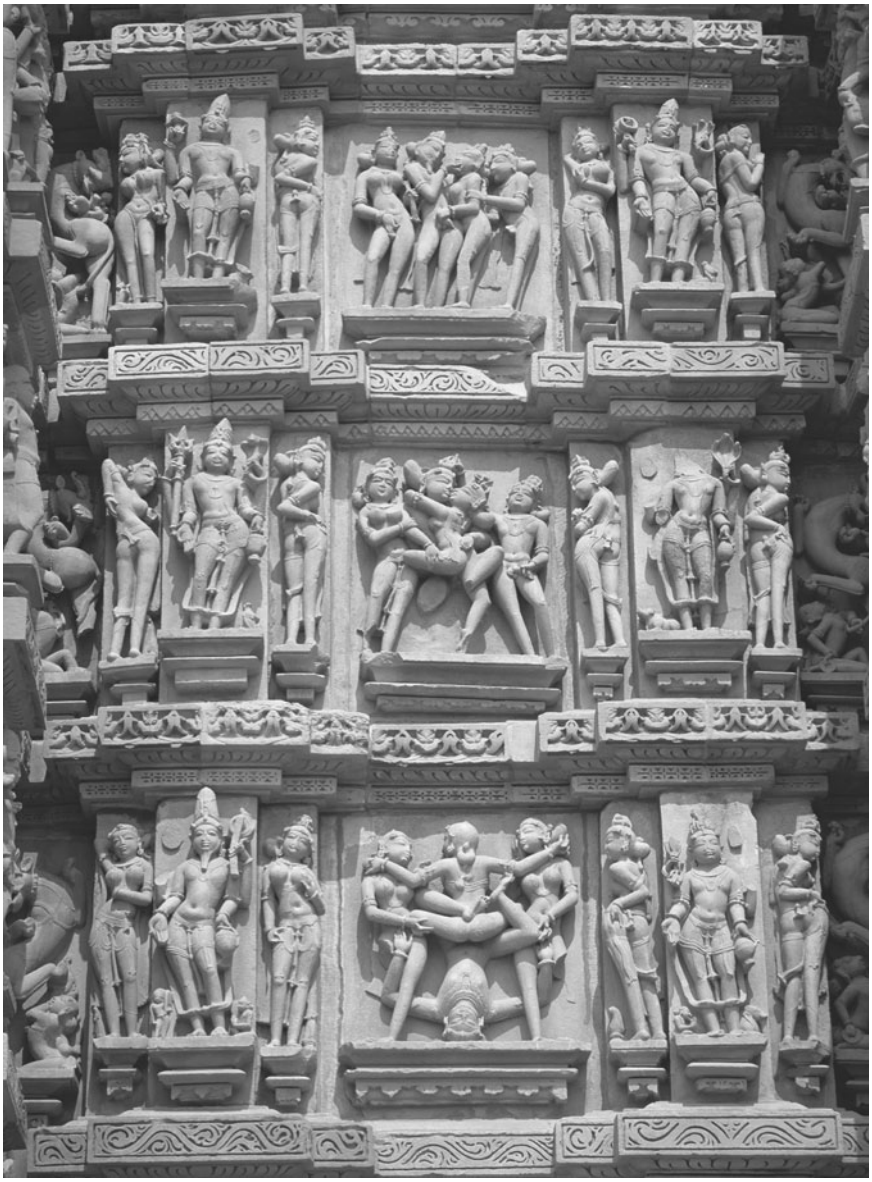

Figure 6.2 Erotic art façade from the Khajuraho sex-themed temple complex in Madhya Pradesh, India (built between 950 and 1050 AD)

the Hindu, Buddhist, and Taoist religions, are illustrative of belief in the "compatibility of human sexuality and human spirituality. Erotic desires were not considered antagonistic to spiritual liberation but an important component of spiritual release . . . Religion was not based on sensual starvation" (Desai, 2000, p. 98).

At the philosophical level, some of these erotic motifs represent "amorous imagery" and "visual puns" from Sanskrit allegories and sacred Hindu texts, which

deal with dalliances between gods, goddesses, and human beings (Desai, 2000, p. 97). However, here too, there is tension between the explicit, erotic motifs of Indian temples and the "mood of austerity and renunciation" that is characteristic of strands of Hindu and Buddhist religious thought (Desai, 2000, p. 95). It should be noted that when Muslim armies conquered India and Muslim dynasties ruled the subcontinent from 1129 to 1868, their record of tolerance of Hindu art and architecture was mixed. Some rulers of the Indo-Islamic Delhi Sultanate, and the Mughal Empire that replaced it, destroyed many Hindu temples along with the idols and other art that adorned them (Khandalavala, 1981). Islam is a fiercely monotheistic religion that views the depiction of gods, as well as human and animal forms of any kind, as sacrilege. However, in some parts of India the erotic temple art "escaped the attentions of the Muslim invaders" and rulers (Cawthorne, 2006, p. 73). Incidentally, some Muslim rulers were themselves connoisseurs of Indian erotic art. Doniger (2014) asserts that the sixteenth-century Muslim Lodi Dynasty of the Delhi Sultanate commissioned "great" works of Sanskrit eroticism, while the Mughal emperors, Akbar and Dara Shikoh, commissioned the translation of Hindu erotic arts and religious texts from Sanskrit to Persian, the language of the Muslim conquerors, "and illustrated them with Persian painting techniques" (p. 405).

The *Devadasi* Temple Prostitution System

We saw in Chapters 3 and 4 that the ancient Near East and ancient Greece had systems of temple prostitution that were represented in the art of the cultures of those regions. India had its own ancient Hindu system of temple prostitution, the *devadasi* system. Desai (2000) suggests that erotic temple motifs may have been created in a "permissive atmosphere" linked to medieval festivals in which sex was prevalent. Furthermore, since there was no wall of separation between sex and religion, the existence of the institution of *devadasi* (temple prostitution), whose vestiges still survive in parts of contemporary India, "could have influenced the profuse display of erotic motifs" on the façades and walls of Indian temples (p. 96). Vestiges of the *devadasi* system continue to linger despite attempts by the government to eradicate it. Under this system, impoverished parents marry off a daughter to a deity or to a temple, and the girl's virginity is auctioned off to the highest bidder. The girl essentially becomes a temple prostitute for upper-class members of the Hindu community where the temple is located (Kermorgant, 2014).

Erotica as Regulated Representation in Postcolonial India

Despite its storied history of religious-based explicit, erotic art, contemporary India has some of the world's most draconian laws against pornography and erotic material in real space and cyberspace. As we saw earlier, it is the result of the de-eroticization of Hinduism under the cultural influence of British colonial (Victorian Christian) morality and Muslim sexual morality, as well as the idealization, aestheticization, and internationalization of the sex-themed temple art of India. The Khajuraho temples survived the Muslim conquests of India. The British Empire took over India in 1858 during the Victorian era (named after Queen Victoria, who reigned from 1837–1901). The Victorian era was a period of British

imperial self-confidence. It was marked by an emphasis on respectability, gentility, and refined sensibilities. This genteel façade was accompanied by an emphasis on religious morality and "modesty" in the arts. Victorian moral sensibilities and attitudes about nudity and sex were transferred to India and diffused to all parts of the British Raj. Nevertheless, the British considered the vestiges of Indian erotic temple art to be part of the exotic, oriental sexuality of the polytheistic Indians they ruled (Doniger, 2014). The Ancient Monuments Preservation Act (1904) gave the colonial government the power to declare protection for ancient monuments that were of "historical, archaeological or artistic interest" or that served a "public purpose."

Under the British Empire, laws regulating sex-themed material in India took on the coloration of Victorian English laws. The Indian Penal Code was first enacted in 1860. As we will see later, in Chapter 8, a Victorian-era British court formalized the definition of obscenity in the British Isles and, by extension, the British Empire. The Court of the Queen's Bench provided a definition of obscenity: the so-called *Hicklin* test that was precedent in the United States for almost three-quarters of a century and is still evident in Indian law. The *Hicklin* test defined obscenity as material that had a tendency "to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication [an anti-Catholic tract] of this sort may fall" (*Regina v. Hicklin*, 1868).

Echoes of the *Hicklin* test are found in Indian obscenity and pornography law. Section 292 of the Indian Penal Code (1860) set forth the provisions for the regulation of obscenity in India:

> Any book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene, if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effects of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely . . . to read, see or hear the matter contained or embodied in it.
>
> Whoever—
>
> - sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation or for purposes of sale, hire, distribution public exhibition of circulation, makes produces, or has in
> - Possession any obscene book, pamphlet, paper, drawing painting, representation or figure or any other obscene objects whatsoever, or
> - Imports, exports or conveys any obscene objects for any of the purposes, aforesaid, on knowing or having reason to believe that such objects will be sold let to hire, distributed or publicly exhibited or in any manner put into circulation . . .

The law does not define "obscenity." However, that terminology applied to any material that a court considered to be "lascivious or appeal[ed] to the prurient interest or if its effect [was] to deprave and corrupt." Essentially, the term was imprecise, elastic, and malleable. Interestingly, section 292 of the Indian Penal Code of 1860 has culture specific exceptions to obscenity. Some of these exceptions link the current law with India's past. The enumerated exceptions include the arts, sciences, and literature: "art of learning and other objects of

general concern, or which is kept or used bona fide for religious purposes; any representation sculptured, engraved, painted or otherwise represented on or in any ancient monument, . . . any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose" (§ 140, Indian Penal Code, 1860, § 292 [140][a][b]).

A close reading of these exceptions show that in India, obscenity (or pornography) is allowed if it is possessed and used for legitimate religious purposes. The law therefore recognizes the fact that sexually explicit images still serve religious purposes in the multicultural context of India. Additionally, the Indian Penal Code states that it does not classify the erotic art of ancient Indian temples as obscene material.

Regulation of Explicit, Sex-Themed Imagery on the Internet

With the advent of the Internet and its associated social media, the media law regime of India has been expanded by the Information Technology Act (2000) to include material published on the Internet. Section 67 of the Act is identical to section 292 of the Indian Penal Code in its description of obscenity. It states that publishing information that is obscene in an electronic (digital) form is an offense: "Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely . . . to read, see or hear the matter contained or embodied in it" (Information Technology Act, 2000). However, section 79 of the Information Technology Act immunizes "intermediaries"—Internet or network service providers and interactive computer service providers like social media companies—from liability for granting access to or hosting objectionable or illegal third-party content: "No person providing any service as a network service provider shall be liable under this Act, rules or regulations made thereunder for any third party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention." This provision is identical to section 230 of the American Communications Decency Act, which treats Internet service providers and interactive computer service providers as distributors, not publishers, thereby granting them immunity from liability for offensive or illegal third-party content that is hosted on their servers, portals, or websites. However, the Indian Information Technology Act's emphasis on the network service providers' duty to exercise due diligence to prevent violation of the law gives the Internet service providers an editorial role that could be used against them in legal disputes.

Interestingly, neither the Indian Penal Code nor the Information Technology Act defines the words "obscenity" and "prurient." Indian law seems to be deliberately vague and obscure. This lack of precision should be seen in the context of the specific circumstances of India, a multicultural, multireligious country of more than one billion people. The vagueness of the law serves to regulate sex-themed speech in real space and cyberspace if and when members of different religious communities object to it. Interestingly, the term "pornography" is not defined in Indian law either. Nevertheless, it appears that the mere private possession and/or viewing of pornography in real space or cyberspace may not be considered to

be a crime under Indian law (Dholakia, 2005). India is an interesting case study of the coexistence of an ancient Hindu culture of regulated representations in which erotic and ascetic elements once coexisted. This system has been directly influenced by ascetic Muslim sexual morality; the Puritan, Judeo-Christian morality inherited from British colonialism; and the international re-presentation of Hindu erotic art as a secularized UNESCO World Heritage site.

7

Clash of Civilizations

Deterritorialization of Judeo-Christian "Legislative Texts" to the Greco-Roman Empire

On July 9, 1986, the attorney general of the United States, Edwin Meese III, received the final report of the Attorney General's Commission on Pornography. President Ronald Reagan had given the commission the mandate to investigate the effects of pornography on American society. The commission's very existence, as well as its specific terms of service, reflected the concerns of the government, politicians, religious leaders, and educational and cultural authorities over the mainstreaming of pornography. From the 1950s to the 1980s, the pornography industry had exploded, spreading from the seedy "red-light" districts of America's major cities to the comfort of the suburban home through new media outlets that employed new distribution technologies. The videotape and the videocassette recorder had been invented and soon became the "ideal medium" for the production, editing, and distribution of relatively cheap adult videos for rent or purchase.

The Supreme Court of the United States had ruled that pornography was part of the "speech" protected by the First Amendment, even though sex-themed speech had less protection than political speech. The court had also ruled that only obscenity—material that presents human sexual and toilet functions in a highly offensive manner and appeals to prurient tastes—was not constitutionally protected. Furthermore, the court had ruled that if federal, state, or local governments wished to ban pornography, they had to use local community standards to ensure that the material had zero political, social, cultural, or artistic value (*Miller v. California*, 1973). This essentially granted constitutional protection to all but the most extreme forms of hardcore pornography. *Playboy*, *Playgirl*, *Hustler*, *Penthouse*, *Screw*, and other "adult" (i.e., pornographic) magazines were now essentially part of mainstream American culture.

The Commission presented its report, which is discussed in Chapter 13, to Attorney General Meese in the Great Hall of the Department of Justice. Ironically, two partially nude sculptures—"Spirit of Justice," an artistic and verbal allusion to the Roman goddess of justice, *Justitia*, and "Majesty of Justice," a male

sculpture—grace the Great Hall. The irony was not lost on the media. Photographers had a field day, taking pictures of Meese holding aloft the final report while standing in front of the partially nude "Spirit of Justice." Fast-forward to 2002. Under the tenure of Attorney General John Ashcroft, the Department of Justice draped the sculptures during official events to prevent the art pieces from serving as distracting backdrops (Justice Department Covers Partially Nude Statues, 2002). The $8,000 drapes were ultimately removed in 2005.

The controversy over the neoclassical sculptures in the US Department Justice was a modern reenactment of an ancient clash of civilizations. This clash pitted classical Greco-Roman culture, consisting of two of the founding cultures of the Western world, against the third: Judeo-Christian culture. Guénoun (2013) suggests that when third-century Jewish scholars translated the Hebrew Bible into Greek,

Figure 7.1 *Spirit of Justice*. Neoclassical statue at the US Department of Justice (1933; sculptor, C. Paul Jennewein; image from the Library of Congress, Washington, DC)

the Greco-Roman Empire's language of learning and culture, this code-switching kicked off a process whereby the rather austere, monotheistic, Judaic culture, with its strict sexual morality, diffused and encountered the amoral, polytheistic Greco-Roman cultures that were famous for their heterogeneous sexualities. Furthermore, by writing the Christian New Testament in Greek and combining it with the Hebrew Bible, or the Old Testament, to form the Biblical canon that was eventually translated into Latin, the early fathers of the Christian church ensured the linguistic relevance of early Christianity. The Judeo-Christian worldview, doctrines, and sexual morality embedded in what Ricoeur (1980) called the "legislative texts" of the Bible—the Ten Commandments and other statutes that made up Jewish law—would spread to the "uttermost parts of the earth," to use the Biblical description of the farthest reaches of the known world (Acts 1:8). The encounter of the Jewish and Greek worldviews resulted in a certain hybridity, a mutual cultural and philosophical interpenetration that changed the world forever (Hughes, 2014). This situation was further complicated by the encounter between the Greek worldview and the Christian worldview, which came with a scriptural canon that was made up of the Hebrew Scriptures (the Old Testament) and the Greek New Testament.

The regulation of sex-themed media content in the United States originated from British Puritanism, a worldview that had an impact on the mentality of the British years after the demise of Puritanism. In Victorian England, the nineteenth-century era named after Queen Victoria, society was marked by an ethic of respectability, gentility, and refined sensibilities. Though Victorian morality did not have the austerity or religiosity of the Puritan movement of the seventeenth century, the mentality of Puritanism was unmistakable in Great Britain during the Victorian era. Social relations were marked by sexual restraint as well as an emphasis on religious observance.

Victorian morality came face to face with a number of developments in the nineteenth century. Archeological discoveries in the Aegean brought to the fore ancient tensions between now-Christianized western Europe and the polytheistic culture and permissive sexual morality of pre-Christian Greece, the area considered to be the cradle of Western civilization. One of the most significant artistic discoveries of the nineteenth century was the statue of Aphrodite (whose Roman equivalent is Venus) in the ruins of the ancient Greek city of Milos in 1820. The *Venus* (or Aphrodite) *of Milo*, which is now on permanent display at the Louvre Museum in Paris, is the nude sculpture of the Greco-Roman goddess of love, beauty, pleasure, and procreation. She was also the patron goddess of prostitutes. The sensational discovery of the *Venus of Milo*, as well as other ancient artistic works that depicted explicit sexual activities of all persuasions, gave many archeologists and art historians pause. As we saw in Chapter 4, Greek vase painting was famous for its depiction of all kinds of explicit, sexual imagery.

The cultural tension created in Britain by ancient Greek archeological artifacts was evident in the 1868 case *Regina v. Hicklin*, an important case that set the standard for regulation of "obscenity," or sex-themed speech, in the British Empire. When anti-Catholic polemicist Henry Scott was charged with publishing a "grossly obscene" and blasphemous anti-Catholic pamphlet, he argued that pictures of the seminude Venus (Aphrodite) displayed in a public gallery were more obscene than his pamphlet, to which a judge replied that just because pictures of Venus could be exhibited in a public gallery did not mean that "photographs of it might be sold in the streets with impunity" (*Regina v. Hicklin*, 1868, p. 5). Clearly

the court, true to Victorian morality and values, held the paternalistic view that there was no problem if the British elite and upper classes viewed images like the *Venus of Milo* in museums. However, these same images were believed to have a corrupting and corrosive influence on the morals of the masses, whose minds could be depraved by them. Keuls (1985) states that as a result of this tension between the idealized European image of classical Greek civilization and the sexually explicit images of that culture discovered by archeologists, large numbers of explicit, sex-themed archeological artifacts ended up being unexhibited and left in the back rooms of British and other European museums. Furthermore, Kant and other European philosophers conceptualized sex and sexuality in essentially Judeo-Christian terms. As a result, explicit, sex-themed visual images became regulated representations within the context of the Christianized West.

Aim of the Chapter

Victorian-era prohibitions against public displays of the *Venus of Milo* and twentieth-century controversy over seminude, neoclassical sculptures in the US Department of Justice were manifestations of the clash between polytheistic Greco-Roman culture and its permissive sexuality and monotheistic Christian culture and its austere sexual morality. The aim of this chapter is to survey the diffusion of Judeo-Christian religious, moral, and sexual values from their origin in the Hebrew Bible and the New Testament to the Greco-Roman Empire and the rest of the Western world. The main premise of the chapter is that Judeo-Christian conceptualizations of the human body, and of sex, originate in the "legislative texts" of the Hebrew Bible (Ricoeur, 1980) and the teachings of the Greek New Testament. These values have influenced regulation of explicit visual depictions of sex and sexuality in the Western world. Explicit, sex-themed images in the Western world are, like similar images in other parts of the world, "regulated representations" that transmit context-specific civilizational, cultural, and national ideas, expressions, and meanings. This is the explanation for the differences in the definitions and regulations of indecency, pornography, and obscenity.

The Law of Moses and Hebrew Sexual Morality

We have seen that cuneiform writing on clay tablets was a technological innovation that emerged in Mesopotamia and diffused to other civilizations and cultures. Many of these cultures reinvented writing to suit their specific cultural realities. This process continued for thousands of years. The result is that there are modern alphabets and digital fonts in virtually all written languages. Those ancient Mesopotamian clay tablets have morphed into tablet computers. We saw in Chapter 2 that explicit visual imagery of sex-themed speech and expression is a regulated representation in specific politico-cultural contexts. We will now apply these ideas to concrete historical and cultural situations. Our survey of contemporary regulation of sexually explicit visual expressions begins in the ancient nation of Israel, which coalesced under the leadership of Moses, a lawgiver who was believed to have been inspired by God. The Torah, the first five books of the Hebrew Bible—Genesis, Exodus, Leviticus, Numbers, and Deuteronomy—is considered to be the founding "legislative text" of the Jewish nation (Ricoeur, 1980). Legislative texts

are written laws enacted by legislative assemblies. In this case, the law is believed to have been revealed to Moses, the leader of the Israelites, whom the Supreme Court of the United States includes among the greatest lawgivers of the world. The first part of Christian Bible—and there are many versions of the Bible—is called "the Old Testament." It contains the Torah and the rest of the books of the Hebrew Scriptures. The first five books of the Hebrew Bible contain the founding narratives as well as the legal and moral precepts of the fledgling nation of Israel. The core of these "legislative texts" is the Ten Commandments. These commandments regulated the people's relationship with God and with each other. They were supplemented by other laws, which, taken together, reflect the theocratic, or God-centered, worldview and austere sexual morality of the emerging nation of Israel. The legislative texts of the Torah ban premarital sex, adultery, prostitution, homosexuality, bestiality, incest, and other forms of eccentric sexuality. However, the law allowed polygamy. In the Hebrew Bible, love and all expressions of love had to take place, as Nygren (1982) put it, "within the scheme of law" (p. 251). Indeed, the Hebrews were commanded to "love the Lord your God with all your heart and with all your soul and with all your might" (Deuteronomy 6:5).

As legislative texts, the Hebrew Scriptures are essentially a charter of religious, cultural, and moral difference. They define the monotheistic Hebrews or Israelites as being in opposition to their polytheistic neighbors in Palestine. Indeed, the Hebrew Scriptures give us a good picture, from the perspective of the Israelites, of course, of the taboo "sexual" rituals and practices that were prevalent among the peoples of the ancient Near East and draws sharp distinctions between the Israelites and these other peoples. The Hebrew Scriptures contain teachings and injunctions against the intermingling of sex and religion, a practice that was prevalent in the polytheistic religions of the region. In the book of Deuteronomy (23:12), the Law of Moses gives the following injunction: "No Israelite man or woman is to become a shrine prostitute. You must not bring the earnings of a female prostitute or of a male prostitute into the house of the LORD your God to pay any vow, because the LORD your God detests them both." The major critique of these practices was that they dehumanized human beings by reducing sex to an immoral, exploitative commercial transaction with a religious façade.

This call for difference can best be understood in the geographic and religious contexts of the Mediterranean ancient Near East. In Chapter 1, we discussed the controversy that arose in Turkey over archeological and art-history evidence of the veiled sacred prostitutes of Sumeria. These prostitutes were probably women dedicated to the Semitic goddess of fertility and the sex instinct, Ashtoreth, who was sometimes referred to as the "Queen of Heaven" by the peoples of the ancient Near East. We just saw that the cult of Ashtoreth proliferated in Israel from time to time. Many ancient peoples, including Canaanites, Assyrians, Babylonians, Egyptians, Greeks, and Romans, worshipped this goddess under various names (Hardon, 1999). So pervasive was the influence of Ashtoreth in the nations of the region that even the monotheistic Hebrews, whose founding covenant and legislative texts called on them to forsake all other gods, turned their backs on their God, Yahweh, and worshipped Ashtoreth from time to time (Jeremiah 44:17, 19).

However, once in a while, the kings of Israel would abandon the religious and sexual practices of their neighbors, enemies, and rivals. In 2 Kings 23, King Josiah is reported to have cleansed the temple in Jerusalem of articles made for the pagan gods Baal and Asherah. Asherah is a variant of Ashtoreth, the goddess of love, sex,

and fertility, whose cult had been introduced into Israel by the non-Israeli wives of King Solomon (I Kings 11; Watson, 1833). King Solomon, the third king of Israel, is said to have been a follower of Ashtoreth, whose cult intermingled sex and religious worship. The idea of the cult of Ashtoreth is that sex is the mediator between humans and gods—the path through which human beings can ascend to the divine (Nygren, 1982). As we saw in Chapter 3, King Solomon had seven hundred wives of royal birth (princesses from neighboring nations) and three hundred concubines or mistresses (1 Kings 11). He essentially made Ashtoreth, the goddess of sex and fertility, the national goddess. This goddess was worshipped through sexual acts performed in her honor in religious shrines. Prominent nineteenth-century Biblical scholar, Richard Watson (1833) wrote, "In groves [shrines] consecrated to [Ashtoreth], lasciviousness was committed as rendered her worship infamous" (p. 98). Years later, a new king, Josiah, a descendant of King Solomon, decided to end the cult of Ashtoreth. The narrative states that the King "also tore down the quarters of the male shrine prostitutes that were in the temple of the LORD, the quarters where women did weaving for Asherah [Ashtoreth]" (2 Kings 23:7). Male shrine or temple prostitution was part of sacred prostitution, which, according to the ancient Greek Historian Herodotus (1998), was part of the religious culture of the region that is now known as the Middle East.

Deterritorialization and Diffusion of the Judeo-Christian Biblical and Moral Worldview to the Greco-Roman World

As we saw in Chapter 2, communication is the art of deterritorialization, the process of crossing cultural and territorial boundaries, borders, limits, and thresholds (Deleuze and Guattari, 1972, p. 222; 1980, p. 400). To deterritorialize is to transmit a message, to move a cultural artifact, a technology, an idea, or even an expression from one political, cultural, biological, or social territory to another. Culturally speaking, deterritorialization is the communicative act that consists of taking human beings out of their familiar political, cultural, social, and religious "territories" to new literal or symbolic territories. Two monumental historical acts of deterritorialization radically transformed Greek and, by extension, European cultures and moralities. Guénoun (2013) asserts that translation of the Hebrew Bible into Greek, the *lingua franca* and language of learning and culture of the Greco-Roman Empire, deterritorialized the rather austere, monotheistic Hebrew religion and culture from its place of origin in Palestine to the rather amoral, sexually permissive, polytheistic, "pagan" Greek culture. That translation, the Greek Septuagint (named after the seventy Jewish scholars who translated it), transformed ancient Greece into the transmission culture for Hebrew history, culture, and religion because the Septuagint gave the accounts, narratives, moral prescriptions, and religion of the Jews an element of *mondialité* (universality): "It is . . . only thanks to its translation into Greek during the Roman times that the Bible enters our [European] history" (p. 11). This is because translation is cultural transmission (Munday, 2001, p. 149). It is the "deterritorialization" (Deleuze and Guattari, 1972, p. 222) and transfer of cultural values, civilizational norms, identities, and worldviews into new geographic and geocultural spaces (Vuaille-Barcan, 2012). Indeed, translation—the transformation of texts from one language and culture to another language and culture—can be conceptualized as an act of communication

that involves a text in a specific source language, a person who translates or interprets that text into a target language, the translated or deciphered text, and the intended receiver of that translated text in the target language. Translation is thus deterritorialization. It is one of the most effective tools for the transfer and diffusion of ideas, cultures, and innovations from one culture to other cultures. That is because translation involves the transfer of language and culture (Vuaille-Barcan, 2012).

The Greeks progressively domesticated, or Hellenized, the Septuagint and incorporated its values into their culture (Vuaille-Barcan, 2012). Walter Kaiser (1998) suggests that the Law of Moses soon made its appearance in Greek law and culture: "Greek quotations from Genesis and Exodus appear in Greek literature before 200 B.C." (p. 467). Ironically, it was Ptolemy II Philadelphus, the king of Ptolemaic (Greek) Egypt from 283 to 246 BC, who is believed to have asked Jewish scholars to translate the Hebrew Scriptures into Greek, resulting in the Greek Septuagint. Judaic moral philosophical ideas soon began to "percolate" into the Hellenic culture and were "distilled into slogans" and values, to use the expressions of Gombrich (1961), that shaped the mentalities and ways of life of Greek-speaking peoples. This act of deterritorialization had a number of legal and regulatory implications in matters of sex and sexual morality. As we will see later, the legalistic Judeo-Christian concept of "sin"—the idea that all human beings have fallen short of the standards of a Holy God—together with the guilt and psychological distress that goes with this idea of spiritual failure would spread from Judaism and Christianity into Greek culture through the Septuagint. Ecklund (2014) suggests that the Septuagint and the compilation of the Greek New Testament "meant that Jewish ideas about law gained their entry into the European legal tradition" (p. 6). Additionally, he states that the juridical writings of Protestant Reformation leaders like John Calvin meant that "the powerful legal tradition of Israel came directly to influence England and America . . . Unlike the gods of the Greeks and unlike the deities of old China, the God of the Old Testament was a legal source; he gave guidance to man in the form of law and the function of his earthly priests was to interpret correctly his codices" (p. 6).

The translation of divinely inspired, canonical texts from their original languages and cultures to other languages and cultures necessarily involves the diffusion of moral philosophical norms and theological worldviews from the culture of the source language (in this case, Hebrew) to the culture of the target language (Greek). Alvarez and Vidal (1996) advance the idea that translation involves power dynamics and subversion of the translation's target language and culture. This is what happened when the Hebrew Scriptures—with their austere moral precepts, including the Ten Commandments—were translated into Greek. These commandments and proscriptions extended to "all domains of life of the community, and the individual, whether moral, juridic, or cultic" (Ricoeur, 1980) and essentially subverted Hellenic polytheistic and amoral sexual cultures.

The Jewish philosophy of law therefore entered European thought through the Septuagint and the Greek New Testament (Ecklund, 2014). These texts slowly but surely diffused into Greco-Roman culture. In the end, these "legislative texts" transferred the monotheistic, religious experience and moral philosophy of Judaism and Christianity to western Europe and the rest of the known world. This culminated in the diffusion and adoption of Christian sexual morality, which put

an emphasis on personal belief, separated sex from the sacred, and essentially confined sex to the sphere of heterosexual holy matrimony.

Diffusion of the "Legalistic" Concept of Sin from the Hebrew Scriptures to Greek Culture

One of the fundamental concepts that the Hebrew Scriptures transferred to the Greco-Roman world was the concept of "original sin." This is the Biblical idea that Adam and Eve, the first human beings, disobeyed God—sinned—in the Garden of Eden. All human beings are believed to "inherit" their sinful natures from the original sin of Adam and Eve. Sin is defined as "an offense against God—by any thought, word, deed, or omission against the law of God" (Ripley, 2002, p. 53). Sin is a concept that has spiritual and moral ramifications. The ancient Greeks did not have a word for sin (in the Christian sense of the term). The Latin word *peccare*, from which we get the English word "impeccable" (flawless, sinless, incapable of sin) is the root of the modern Christian concept of sin. The Greeks must have been bewildered when they read what St. Paul wrote in the Greek New Testament: "for all have sinned and fall short of the glory of God" (Romans 3:23). In effect, the Greeks did have gods and goddesses, but as Van Riel (2013) puts it, they did not have the notion of "religion," "theology," or even "a technical exploration of religious beliefs. To be sure, there was no uniform set of Greek beliefs; there were no sacred texts, no dogmas. There was just a general acceptance of the existence of gods and social pressure to observe the more or less institutionalized rituals and ceremonies. But there do not seem to have been demands concerning personal belief or concerning a sincere commitment to religious practice . . . One must do what pleases god, knowing that god, and not human kind, is the measure of all things" (p. 12). Furthermore, van Riel (2013) suggests that Plato envisioned a situation where the legislators and lawgivers would not interfere with religious matters, because "laws and constitutions belonged to a different anthropological level than religion" (p. 11). This is a very different worldview from that of the Hebrews, whose sacred religious texts were also legislative texts, and their dogmas, laws (Ricoeur, 1980).

The early church, which believed that lust (unbridled sexual desire) was one of the "seven deadly, or capital, sins," enlarged the Hebraic doctrine of sin. The church fathers taught that lust was the source of all other sins. Additionally, under the Judeo-Christian doctrine of sin, believers are exhorted to "fight against the flesh"—their corrupt inclinations, lusts, and passions—which are considered to be the most dangerous of all human enemies (Ripley, 2002, p. 55). This enlarged theological concept of sin came with a high degree of "moral angst," or anxiety, to borrow the expression of Witham (2007, p. 45). Human beings who "transgressed," or broke the law of God, were supposed to feel a sense of shame, guilt, and remorse for their sinful actions that fell short of God's expectations. From the Judeo-Christian perspective, the amoral, pagan Greco-Roman cultures sprang out of a corrupt and sinful worldview.

St. Augustine (419 and 420 AD) and other leaders of the early church believed that one of the domains in which the original sin of mankind manifested itself was the evil of sexual desire. Augustine called it "fleshly concupiscence or lust." In his view, these "evil" human sexual desires could only be "rightly employed" in the context of "lawful marriage," defined as an arrangement in which "male and

female are united together as associates for procreation of children" (p. 769). The mentality and morality of the early church fathers was that lust and sex were necessary evils that resulted in a good thing, marriage, and the birth of children. As Gibbon (1782) put it in his monumental *History of the Decline and Fall of the Roman Empire*: "The chaste severity of the fathers, in whatever related to the commerce [interaction] of the two sexes, flowed from the same principle; their abhorrence of every enjoyment which might gratify the sensual, and degrade the spiritual nature of man" (chapter XV). As Harper (2013) suggests, the early church considered sex and its representation in art to be both shameful and sinful.

This "new" sexual morality was different from ancient Greek sexual amorality. The teachings of St. Augustine of Hippo continue to be the official doctrine of the Roman Catholic Church with respect to marriage, sex, and contraception. Interestingly, Augustine and the other early church fathers used classical Greek philosophical and rhetorical tools to undermine Greek religion and sexuality and propagate the new religion. During the Middle Ages, the major European universities taught their students the art of preaching scholastic sermons. These "manuals" of preaching were grounded in the classical rhetorical techniques of Cicero and others (Wenzel, 2014, pp. xii, 121).

Though most of the other civilizations of the ancient Near East, Greece, and Rome had systems of ethics and moral philosophy, they do not appear to have had the concept of sin, at least in the Judeo-Christian sense of the term. They worshipped their numerous patron gods and goddesses and offered sacrifices to appease them, seek favors, or give thanks for successes, but they did not venerate the gods and goddesses or offer sacrifices to atone for their sins. In contrast, the Jewish legislative texts (Leviticus 16; Numbers 29) decree that Jews must observe the "Day of Atonement" (Yom Kippur), a solemn day of soul searching on which the priest is required to offer "sin offerings" and the people are required to "afflict their souls," mourn, fast, and confess their sins against God. The closest Greek equivalent to the Judaic concept of sin was the vice of *hubris*—nationalistic pride, overconfident militarism, and a "failure to recognize the limitations of the human condition" (Keuls, 1985, p. 382). The Septuagint injected the Hebrew conceptualization of sin into Greek consciousness and sowed the seeds of the eventual Judeo-Christianization of the Greco-Roman world.

Ancient Greek society was the antithesis of Hebrew society, whose diffusing values it was encountering. While the Ten Commandments of the Hebrew Scriptures forbade "graven images"—that is, carved images of all kinds—Greek cities were full of all kinds of images of gods and goddesses, paintings and sculptures of mythical and historic figures, and a wide array of red and black vase paintings of mythologies and mythic figures. These "archeological vestiges" were "memory objects" that recorded "moments of time" (Olivier, 2011, p. 132) in Greek history and civilization. As we will see later in Chapter 8, during the Renaissance, European grand masters made Greco-Roman mythology, with its stories of the dalliances between gods, goddesses, and human beings, the subject of most of their art, within the framework of the rules of the Catholic Church and secular princes.

Greek vase paintings depict close connections between the sexual and the religious that Keuls (1985) called "erotic-religious unions" (p. 50). This was the entwining of sex and religious worship in the form of sacred or temple prostitution. Keuls suggests that in Corinth—one of the Greek cities St. Paul would later visit and to whose fledgling church he wrote the two New Testament epistles 1

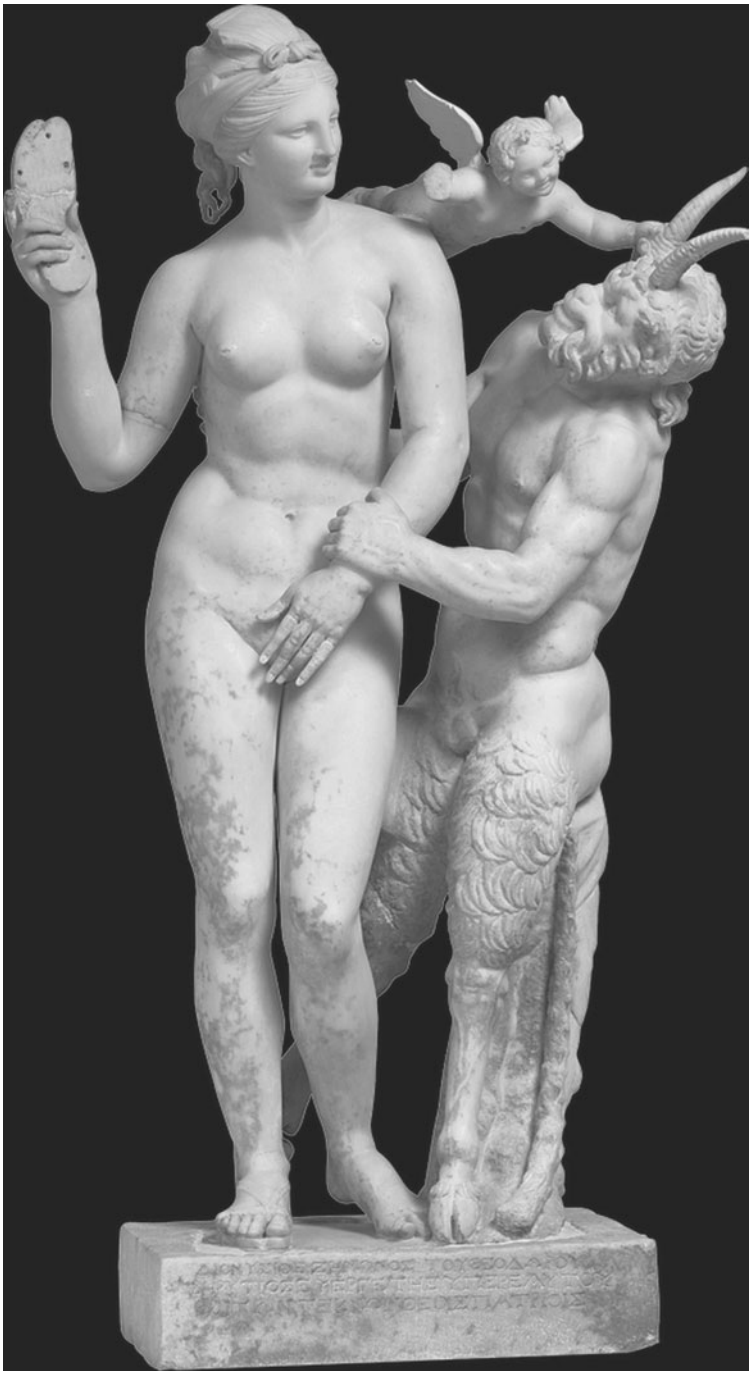

Figure 7.2 Marble group with Aphrodite, Pan, and Eros—symbols of sexuality in Greek mythology (courtesy of the National Archeological Museum, Athens, Greece; © Hellenic Ministry of Culture, Education and Religious Affairs/Archaeological Receipts Fund)

and 2 Corinthians—male and female prostitutes "were owned by the sanctuary [temple] of Aphrodite; as in many other cities, they were sacred slaves" (p. 155). Vase paintings from Corinth featured male nude figures (Rasmussen, 1991). Greek vase paintings were regulated representations that served the purpose of reinforcing "men's heavy-handed policing of the female sex" (Robertson and Beard, 1991). The strict moral prescriptions, commandments, and sexual prohibitions of the Hebrew Bible ran counter to the "amoral" philosophy and candid visual sexualities of the polytheistic Greek culture. Indeed, the laws of Moses (the Ten Commandments) forbade the Jews from making "graven images" (idols and other engraved representations) of the deity. This religious worldview was the diametric opposite of Greek art and visual culture, which was populated with the dalliances and exploits of Greek gods and goddesses.

The Greek New Testament and the Diffusion of Christian Sexual Morality

The second event that changed Hellenic civilization and culture, and especially its views on sexuality, was the writing of the New Testament in Greek. The essence of translation and interpretation is the transmission and appropriation of the thought and worldview of the source text (Ricoeur, 1980). To begin with, the "pulsation of the *Torah*," to use the expression of Ricoeur, was evident in the teachings of Jesus Christ: "The Sermon on the Mount proclaims the same intention of perfection and holiness that runs through the ancient Law" (Ricoeur, 1980, p. 84). Jesus Christ declared, "Do not think that I have come to abolish the law or the Prophets; I have not come to abolish them but to fulfill them" (Matthew 5:17). He subsequently expanded the command given to Jews in Deuteronomy 6:5 to read, "You shall love the Lord your God with all your heart and with all your soul and with all your might, and your neighbor as your self" (Luke 10:27).

Translation of the Hebrew Bible into Greek in the second century BC and the writing of the Greek New Testament paved the way for the Christianization of the Greco-Roman Empire. Christianity came with a specific outlook toward relations between the sexes, sexuality, sacred temple prostitution, homosexuality, marriage, and so on. Early Christianity also had a strong iconoclastic streak, which rejected the pagan imagery of the Greeks. The cultural and moral transformation from Greco-Roman polytheism to Christian monotheism led to the "dethroning of the goddess" and the abolition of the sacred prostitution carried out in her name (Slipp. 1993, p. 37). Worship of Ashtoreth, Aphrodite, Ishtar, Venus, and other gods and goddesses was replaced by worship of a crucified Messiah, Jesus Christ, and veneration of his mother, the Virgin Mary. The Greek New Testament has greatly influenced religious, moral, political, social, and cultural life in Christendom. We can trace the evolution and diffusion of political, religious, and social attitudes toward prostitution and pornography from Palestine to the cradle of Western civilization in ancient Greece to the rest of the Western world, and indeed to the rest of the world over time.

Diffusion of Judeo-Christian Sexual Morality to the Greco-Roman World

As we saw earlier, the rather austere sexual morality of Judaism and early Christianity diffused into the Hellenic culture of the known world through the Hebrew Bible and the Greek New Testament. Paul, a Jewish convert to Christianity from

the territory that today is known as Turkey, wrote the vast majority of the epistles of the New Testament. These letters were addressed to churches in specific cities: Rome, Korinthos (Corinth), Ephesus, and so on. Though the whole of the New Testament contains passages that spell out Christian doctrines on morality and sexuality, Paul's letters to the Corinthians (inhabitants of the ancient Greek city of Korinthos, which is about fifty miles from Athens) and the Romans (Christians in Rome) spell out the tenets of Christian sexual morality. Christians in ancient Greece were commanded to renounce the pagan sexual practices that existed in their society. In his first epistle to the Corinthians, Paul wrote,

> Do not be deceived: Neither the sexually immoral nor idolaters nor adulterers nor male prostitutes nor homosexual offenders [10] nor thieves nor the greedy nor drunkards nor slanderers nor swindlers will inherit the kingdom of God. [11] And that is what some of you were. But you were washed, you were sanctified, you were justified in the name of the Lord Jesus Christ and by the Spirit of our God . . .
>
> [13] . . . The body is not meant for sexual immorality, but for the Lord, and the Lord for the body. Do you not know that your bodies are members of Christ himself? Shall I then take the members of Christ and unite them with a prostitute? Never! [16] Do you not know that he who unites himself with a prostitute is one with her in body? [18] Flee from sexual immorality. All other sins a man commits are outside his body, but he who sins sexually sins against his own body. [19] Do you not know that your body is a temple of the Holy Spirit . . . ? Therefore honor God with your body. (1 Corinthians 6)

This passage clearly demonstrates that St. Paul, the Jewish convert to Christianity, creates direct continuities between the austere sexual morality set forth in the Hebrew Scriptures and the morality that emerged from the new religion based on the teachings of Jesus Christ and his disciples. Christian sexual morality was essentially a morality of difference. It emphasized the difference between monotheistic Judeo-Christian morality and polytheistic "pagan" immorality. St. Paul and other leaders of the early Christian church therefore defined Christian sexual morality and ethics in opposition to the "pagan" immorality of the Near East and the Greco-Roman world. This morality propagated by St. Paul re-presented, or presented anew, the sexual morality of the Hebrew Scriptures.

Origins of the Concept of "Obscenity"

The Greek New Testament also introduced the word *aischotes* (obscenity, filthiness), which became the yardstick for describing the lascivious, immoral, unclean, and unchaste (Thayer, 1886). In the book of Ephesians (New International Version), which was addressed to believers in Ephesus (the city known as Ephes in modern-day Turkey), St. Paul wrote, "But among you there must not be even a hint of sexual immorality, or of any kind of impurity, or of greed, because these are improper for God's holy people. Nor should there be obscenity [filthiness], foolish talk or coarse joking, which are out of place, but rather thanksgiving" (Ephesians 5:3–4). The word "obscenity," which is synonymous with filthiness, depravity, and things that are shameful, appears nowhere else in the Greek New Testament (Thayer, 1886). The words "obscenity" and "obscene" entered the Latin language

during the Renaissance, a period marked by rich, colorfully exuberant, and voluptuous paintings, including sex-themed visual imagery that the Catholic Church considered to be lascivious and profane. "Obscenity" would become the yardstick by which explicit, sex-themed visual imagery would be measured in many Western countries and their colonies.

Having condemned the sexual amorality of the "pagan" Greek culture, St. Paul advanced an expansive Christian definition of the concept of love in its place. In his first epistle to the Corinthians, he wrote,

> [4] Love is patient, love is kind. It does not envy, it does not boast, it is not proud. [5] It does not dishonor others, it is not self-seeking, it is not easily angered, it keeps no record of wrongs. [6] Love does not delight in evil but rejoices with the truth. [7] It always protects, always trusts, always hopes, always perseveres.
>
> [8] Love never fails. But where there are prophecies, they will cease; where there are tongues, they will be stilled; where there is knowledge, it will pass away . . .
>
> [13] And now these three remain: faith, hope and love. But the greatest of these is love. (1 Corinthians 13)

This passage describes the early Christian concept of *agape*, a Greek word that means "unconditional love." It is a selfless, spiritual love that has no sexual connotations. It describes God's self-sacrificing love for humanity and the duty of human beings to love others without preconditions. It is a love that emphasizes putting others first before oneself. *Agape* love is one of four types of love—all of which are grounded in the Greek culture—that appear in the Greek New Testament. C. S. Lewis (1960) described the three other types of Christian love as (1) familial love, affection or fondness through biological and social closeness; (2) filial love, friendship between brothers and friends; and (3) *Eros*, which is named after the Greek god of romantic and sexual love. Lewis (1960) distinguished the Christian *Eros* from the raw, instinctual, animalistic sexuality represented by the Greek goddess Aphrodite (Venus is her Roman equivalent). Christian religious teaching represented a radical departure from "pagan," or "heathen," polytheistic Greco-Roman religion and heterogeneous sexuality.

Emperor Constantine as Catalyst for Christianization of the Greco-Roman Empire

It is ironic that the early Christian church was led by Hellenized Jews who, with the faith and flaming zeal born of their encounter with Jesus Christ, considered Greco-Roman polytheistic religion and culture to be pagan, or heathen. In effect, it was the Greeks who historically dismissed anyone who did not speak Greek as being a babbling "barbarian." The Romans also had an attitude of superiority toward all others peoples, especially the non-Roman peoples of the Roman Empire (Eko, 2012). Greek perceptions of all non-Greeks as barbarians and early church perceptions of Greek and Roman religions as pagan led to a clash of civilizations that resulted in the persecution of Christian minorities in Greece and Rome until the era of Emperor Constantine.

We have seen that the translation of the Hebrew Bible into a Greek-language Bible, called the Septuagint, introduced Judaic religious, moral, and philosophical

principles into Greek culture. Christianity, the religion founded by the disciples of Jesus Christ, spread rapidly and became so Hellenized that its Scriptures, the New Testament, were written in Greek, the language of learning in the classical world. Formation of the Biblical canon of the Old and New Testaments facilitated diffusion of the new religion from its place of origin in Israel/Palestine to Asia Minor (most of modern-day Turkey) and subsequently to Greece and the Hellenic territories of the Mediterranean basin and North Africa. The Greek Bible accelerated diffusion of Christianity in the Greco-Roman Empire despite intermittent persecution by emperors who felt that the new religion threatened the political and cultural system of the empire (Brown, 2013). The greatest single factor that led to the ultimate Christianization of an erstwhile pagan Europe was the conversion of Emperor Constantine.

When Emperor Constantine entered Rome in 312 AD after a decisive military victory over his rival, Maxentius, rather than offer sacrifices to the gods for the victory, as was the tradition, Constantine stated that he owed his victory to the One God, whose sign, the cross, he had seen on the battlefield (Brown, 2013). Constantine then announced that he had converted to Christianity and that he owed his protection to the High God. The emperor declared that "Christianity was a religion fit for a new Empire" (Brown, 2013, p. 61). This stunning conversion put an end to the prosecution of Christians.

In effect, Constantine was the first Greco-Roman emperor to convert to Christianity. One of the things he did to protect the Christian minority was issue the Edict of Milan in 313 AD. This edict called for toleration of Christianity and Christians within the Roman Empire. Constantine ultimately made Christianity the official religion of the Greco-Roman Empire, thereby making Judeo-Christian sexual morality the official morality of the Greco-Roman Empire that stretched from Rome in the west to Constantinople (modern-day Istanbul) in the east. Gibbon (1782) suggests that Constantine ushered into the Roman Empire "a new spirit of legislation." The legislative texts of the Hebrew Bible (the laws of Moses) and their austere morality became the model for Roman legislation. On the religious front, Constantine "dethroned" the goddess of love and sex, whose cult was observed under different names in different parts of the Roman Empire. An early church historian, Eusebius Pamphilius (1890), writes that Emperor Constantine closed down a temple and a shrine of a goddess cult, as well as a temple of Venus that was not far from his palace. The temple is said to have been "a school of wickedness" (pp. 534–35), the center of male and female sacred prostitution in what today is Lebanon. Not only did Constantine tear down the temples of Aphrodite and other goddesses; he built the first church in that province. Additionally, Constantine dealt harshly with all persons—including bishops of the church—who violated the sexual morality of the laws of Moses. Gibbon (1782) suggests that under Christian emperors like Constantine and Justinian, "Romans were oppressed at the same time by the multiplicity of their laws and the arbitrary will of their master." The Septuagint and the Greek New Testament were translated into Old Latin and ultimately into the Latin Vulgate edition of the Bible in 383 AD. This became the official version of the Bible for Latin-speaking Western Christendom.

The Early Church and Pagan Greco-Roman Mythology

After the era of Emperor Constantine, the church mellowed its attitude toward the nonsexual aspects of Greco-Roman mythology. We have noted that the Judeo-Christian worldview, as well as Christian art and iconography, are grounded on the legislative texts of the Hebrews (the Torah) and the Greek New Testament, which emerged in the Hellenic cultural milieu. As such, "pagan" Greco-Roman cultural values influenced Christian thought to a certain extent. As the church became a politico-religious regulatory institution, it had to come to terms with the ubiquitous Greco-Roman mythology and its visual re-presentations. While early Christian "purists" like St. Paul contrasted Judeo-Christian teachings with the environing "heathen," or "pagan," cultures, he taught that both Jews and Gentiles (non-Jews) had a home in Christianity, the new religion he was propagating in Asia Minor and Europe.

The Christianized Eastern Roman Empire, whose seat was in Constantinople, regulated the early church and was deeply involved in its struggle over the problem of icons—representations of Jesus Christ, Mary, and the saints—for hundreds of years (Gibbon, 1782). For periods of time, the state-run church initially turned against the pervasive, explicit, sex-themed visual imagery of ancient Greece. The early church, immersed as it was in Greco-Roman culture, went through a process of counterdiffusion in which certain philosophical and rhetorical traditions of the classical cultures were appropriated and incorporated into the new religion and used as tools for its propagation. One of the earliest church leaders to formally teach that Christian youth could benefit morally from the heathen, or pagan, Greco-Roman classics was St. Basil the Great (330–79 AD), the Greek bishop of Caesarea, which today is the city of Kayseri in Turkey. In his *Exhortation to Youths as to How They Shall Best Profit by the Writings of Pagan Authors*, Basil (1902) wrote, "We shall not praise the poets when they scoff and rail, when they represent fornicators and winebibbers, when they define blissfulness by groaning tables and wanton songs. Least of all shall we listen to them when they tell us of their gods, and especially when they represent them as being many . . . The adulteries of the gods and their amours, and especially those of the one whom they call Zeus, chief of all and most high, things of which one cannot speak, even in connection with brutes, without blushing, we shall leave to the stage" (p. 100). It is interesting that St. Basil tolerated Christian performances of narratives from Greek mythology in their theatrical productions as "negative pedagogy," morality tales that provided negative examples of sinful conduct that should be shunned. Using a metaphor from the world of art—and iconography has been a controversial subject in the church for centuries—he instructed the youth against hypocrisy: "I think it is as if a painter should represent some marvel of manly beauty, and the subject should actually be such a man as the artist pictures on the canvas."

The Fall of the Roman Empire and Papal Regulation of Sex-Themed Visual Imagery

In 380 AD, Christianity became the religion of the Roman Empire. John Ecklund (2014) suggests that in the fourth and fifth centuries, the Roman Emperor gave the church the power to establish *curia* (courts) that were "an integral part of the

secular judicial system" (p. 148) After the collapse of the Western Roman Empire in the fifth century, the Catholic Church filled the resulting power vacuum. It became the heir to the empire and assumed the role of unifier of western Europe under laws it promulgated or approved (Ecklund, 2014). The church, as John Ecklund suggests, was grounded in the ethical codes of Jesus, the "law giver and law teacher," and became, upon the fall of the Roman Empire, "the government of all Western Europe," in which the pope replaced the emperor and assumed the "dual role of ecclesiastical and imperial lawgiver" (pp. 132, 144). All legislative, executive, and judicial power was vested in the pope, who had the official title of Bishop of Rome. Pipes (1974) states that as the Western church filled the vacuum left by the collapse of the Roman Empire, Pope Gregory the Great (590–604 AD) "boldly proclaimed the supremacy of the church over the state" (p. 225). Ecklund adds that under this arrangement, the bishop of Rome (the pope) became the "sole autocrat." The church stood for most of her medieval history as one "state" under the pope as "emperor." Western Christendom thus became "a divinely inspired nationhood in which only the baptized orthodox had full citizenship" (Ecklund, 2014, p. 168). From the perspective of governance, the Roman Catholic Church became "the gatekeeper Church which was legislating mankind" (p. 168). Thelma Lavine writes that from the fourth to the fifth century, "Christianity shaped the entire cultural world of Europe, its political and personal life, social institutions, economic relations, knowledge of the natural world and the arts—all these were under Church Direction and control" (Lavine, 1984, p. 77).

Deterritorialization, Appropriation, and Reterritorialization of Greco-Roman Culture

The main premise of this chapter is that Judeo-Christian morality diffused from Palestine to the Greco-Roman Empire because it was embedded in the Hebrew Scriptures and their Greek translation, the Septuagint, as well as the Greek New Testament. For example, the Hebrew word, *Hallelujah*, which means "Praise ye, Jehovah" diffused from the Hebrew Scriptures to the Greek New Testament to Latin, French, English, Spanish, Chinese, Swahili, and countless other languages around the world. Handel's majestic composition *The Messiah*, with its soaring "Hallelujah Chorus," is an excellent example of deterritorialization and Westernization of a Hebrew cultural concept of singing praises to God. Since cultural deterritorialization always triggers a countermovement—cultural reterritorialization (Deleuze and Guattari, 1980)—early Christianity also borrowed heavily from the Greek language and culture to which it had diffused. The subsequent interpenetration of cultures resulted in appropriations and reterritorializations. These took the form of Hellenization of certain aspects of Christianity. As we saw earlier, the early Christian church redefined and re-presented (presented anew) ancient Greek concepts of love. Inasmuch as Christian ideals of love and morality diffused from Palestine to the Greco-Roman world, the very fact that the New Testament employed the Greek language meant that the "new" religion borrowed aspects of ancient Greek culture. For example, the word "Christ" comes from the Greek word *christos*. The book of Revelation describes Jesus Christ as "the Alpha and the Omega" (the beginning and the end). *Alpha* and *omega* are the first and last letters of the Greek alphabet. These words are now part of the English language.

Additionally, the early fathers of the church made generous use of the tools of classical Greek literature, culture, philosophy, art (iconography), drama, oratory, and architecture to advance their religion. The outcome was the near-total disappearance of the polytheistic cultures and amoral sexual ethos of Greece, Rome, Egypt, and other parts of the Mediterranean basin that became Christianized. In order to emphasize the Christian break with the sexualized religion of Greece, where temple prostitution was a way of life, the Greek New Testament made the ancient Babylonian Empire the negative metaphor—the very personification of evil and immorality. The Judeo-Christian worldview is synthesized in the apocalyptic book of Revelation. The book dealt a fatal blow to the amoral religious and sexual culture of the Greco-Roman Empire, which recognized and regulated prostitution in sacred and profane contexts under Greek and Roman law. The Book of Revelation makes the ruthless Babylonian Empire the perfect exemplar of sexual decadence by calling the long-gone Babylon "the Great Prostitute": "Then the angel carried me away in the Spirit into a desert. There I saw a woman sitting on a scarlet beast that was covered with blasphemous names and had seven heads and ten horns. The name written on her forehead was a mystery: BABYLON THE GREAT THE MOTHER OF PROSTITUTES AND OF THE ABOMINATIONS OF THE EARTH" (Revelation 17:3, New International Version). The woman in this passage resembles a shameless (from a Judeo-Christian perspective) temple prostitute. As we saw in Chapter 3, the religion of ancient Babylon included sex rites involving thousands of temple prostitutes. The word "Babylon" is therefore the metaphor for sexualized pagan religions and their immoral excesses. The word "mother" is also symbolic. To early Greek and Roman Christians, this image of Babylon, of the metaphorical harlot, conjured images of statues of goddesses in temples and shrines full of male and female sacred prostitutes performing all kinds of sex acts in honor of patron goddesses. In Revelation 19:2, the mother of all prostitutes is accused of "corrupting the earth with her immorality." The great prostitute in the book of Revelation certainly alludes to the legal society prostitutes, the *hetaera* of the Greco-Roman period: "The Athenian Greeks developed a reputation among the Romans and in the later Western culture for having raised prostitution to a unique level of refinement" (Keuls, 1985, p. 194).

Clearly, early Judeo-Christian morality was a morality of separation. New Testament Christians, like the Old Testament Hebrews before them, defined themselves in opposition to the "pagan" cultures to which their religion diffused. Though it was Hellenized to a certain extent, monotheistic Christianity was essentially the foil of Greco-Roman polytheism. These two civilizations clashed philosophically and physically. While Christians were a small minority in the Greco-Roman world, they were persecuted even as their religion spread relentlessly. The conversion of Emperor Constantine and the Christianization of the Greco-Roman Empire was a civilizational shift that has influenced the production and regulation of sex-themed images ever since. Ultimately, the Western world became Christianized, and Judeo-Christian sexual morality, as taught in the Hebrew Scriptures (the Old Testament), the teachings of Jesus Christ, and the writings of St. Paul, came to govern all facets of life, including visual imagery.

Kant's Christian Philosophical Turn

Judeo-Christian perceptions of sexual morality permeated all aspects of Western culture, including Western philosophy. The most visible and most influential exemplar of this reality was the eighteenth-century German philosopher Immanuel Kant. Kantian ethics is known for its emphasis on human dignity and autonomy. The fundamental principle of Kantian ethics is that human beings are rational beings who should never be treated as a means to an end. These politico-ethical principles that are intended to guide human actions are set forth in the two variants of Kant's "categorical imperative" (practical principle; Timmermann, 2007, p. 92), which spell out how rational human beings who have the will—the autonomous capacity to act in accordance with laws—ought to behave toward each other: "Act only on a maxim by which you can will that it, at the same time, should become a general law . . . Act so as to treat man, in your own person as well as in that of any one else, always as an end, never merely as a means" (cited in Korsgaard, 1985, p. 1).

Kantian ethics has a pronounced New Testament theological bent. Indeed, the categorical imperative quoted earlier sounds very much like what Jesus Christ said was the summary of the legislative texts of the Hebrew Scriptures (the Torah): "Do Unto Others as you would have them do unto you" (Matthew 7:12). The idea is for people to treat others as they would like to be treated.

In matters of sex, Kant echoes the morality of the New Testament. In *Conjectures on the Beginning of Human History*, Kant advances the notion that sexual instincts should be governed by reason and rational control if sex is to rise above the animalistic level: "The first incentive for man's development as a moral being came from his *sense of decency*, his inclination to inspire respect in others by good manners" (Kant, 1991, p. 224). Thus the main tenet of Kantian ethics is that human beings progress from creatures governed by their base sensual perceptions and animalistic instincts to creatures of reason and morality. Morality is therefore the height, the logical progression, of human development and maturity. This is one of the sources of the claim that "Kant's ethics was an attempt to pursue Christianity by secular means" (Murphy and Coleman, 1990, p. 77). Modern international human rights law and policy are grounded in Kantian ethics. Kant would frown on sex-themed visual imagery, since much of its production involves the exploitation of women, and a lot of the content depicts women as objects for male desire. Furthermore, from a Kantian perspective, one can say that child pornography represents a morally deplorable regression to the state of bestial instincts from which rational human beings are supposed to have evolved. Kantian ethics is very influential in UN and the European conceptualizations of child pornography in real space and cyberspace. It is regulated as a universal "ethico-political problem," to borrow the expression of Byron Kaldis, that violates the human rights of children (2002, p. 188).

We began this chapter with a discussion of the clash of cultures between Judeo-Christian, other-centered *agape* and Greco-Roman, egocentric *Eros*. This clash is still evident in the arts and in the billions of images that are produced daily for commercial consumption, entertainment, education, and good, old-fashioned exhibitionism in real space and cyberspace. The one point of convergence between the two cultural perspectives is pedopornography in real space and cyberspace. As we see in Chapter 5, child pornography, which would have been tolerated in Greco-Roman culture, is universally criminalized under the UN Convention on the Rights of the Child.

8

Explicit Visual Sexual Imagery as Regulated Representations during the Roman Empire, the Renaissance, and the Enlightenment

In June 1987, Italian porn star Ilona Staller, whose professional name was La Cicciolina (Cuddles), was elected to the Italian Chamber of Deputies (the Italian Parliament) under the banner of the Radical Party. The 35-year-old Staller celebrated her election victory by exposing her breasts to a pack of jostling photographers, excited young male fans, and teenagers who had gathered around her in front of the Italian Parliament shouting, "*Nuda!*" "*Nuda!*"—the Italian word for nude (Lilla, 1987). This scene of "nudity on demand" performed by a political representative of the people at the steps of Parliament was characteristic of Staller, who had made a name for herself by acting in pornographic movies, appearing in pornographic magazines, and performing sexual exhibitions open to the public. Needless to say, campaigning topless had made her political rallies "must see" events. Her political platform was simple: she would ban the Italian Modesty Act that criminalized public nudity, fight to conquer AIDS, start sex education in public schools, and provide incarcerated prisoners with sexual services. Her foreign policy platform included an offer to have sex with Iraqi President Saddam Hussein (while closing her eyes and holding her nose) if he would cooperate with the United States to end the Iran–Iraq war (1980–88).

Staller was the modern incarnation of Italian political theater and art. She had been nominated by the Italian Radical Party in a cynical and contemptuous attempt to satirize Italian politics (Lilla, 1987). To make a mockery of the system, Staller continued to make pornographic movies and "adult" appearances in nightclubs while she was a member of the Italian Parliament. She also continued her career as a stripteaser. Her parliamentary immunity came in handy when she performed an explicit, sexual skit with her pet python (Lilla, 1987). The police could not arrest her for violating the Modesty Act, which banned public nudity and public sex acts. Staller came on the political scene at a time of technological change. Satellites, personal computers, databases, and videotapes had been invented. Sexual capitalism (big pornography) was beginning to use the new, digital media to produce and disseminate its wares to wider and wider transnational

audiences. The infrastructure of the network of computer networks, known as the Internet, had been put in place and would be opened up to the world before her term of office ended. Staller was a sort of human milestone. She marked a specific point in the evolution of attitudes toward sexuality and sex-themed visual imagery from ancient Greece and Rome through the Middle Ages, the Renaissance, the Enlightenment, and our modern, globally interconnected world.

Staller's unprecedented public nudity and pornographic films and exhibitions were regulated representations made possible by her parliamentary immunity. For five years, Member of Parliament Ilona Staller (La Cicciolina) enacted anew the ancient conflict between what remained of the other-oriented, Christian love, *agape*, which had diffused to Italy with Christianity, and the passionate, egocentric, sexual love, *Eros*. The fact that Staller was elected to the Italian Parliament is not surprising. Italians have a knack for showing cynical contempt for their political system and the political class by electing to Parliament eccentric politicians who have a penchant for theatrics and exhibitionism. Staller was a superb public performer, whom the Italian people used to send a sex-themed message to the system.

Aim of the Chapter

The aim of this chapter is to survey regulation of explicit, sex-themed visual representations during the Roman Empire and the Italian Renaissance. This was the period between 1348 and 1648. It also surveys philosophical postures toward sex-themed art during the Enlightenment (from the mid-seventeenth century through the eighteenth century). The word "Renaissance," which means "rebirth" in French, is a metaphor for the reemergence of learning after the decline and fall of the Western Roman Empire in the Middle Ages (historians used to call this period "the Dark Ages"). The Renaissance, which began in a number of major Italian city-states, eventually spread to the rest of Europe. It was characterized by an emphasis on humanism, the idea that human beings should be the focus of political, cultural, and social endeavors. Human beings could make progress through individual effort. The Renaissance was characterized, above all, by a neoclassical turn, a return to classical, polytheistic, and pagan Greek and Roman cultures for philosophical ideas, political ideology, and inspiration in the arts and architecture, education, and culture (Kuhn, 2014). This meant reviving classical cultures that had been condemned by Christianity as it diffused from its place of birth in Palestine to Greece, Rome, and the rest of the Western world. In the arts, this made for interesting combinations of pre-Christian, classical ideas and mythologies with humanistic and Christian themes. Ironically, the fall of the Western Roman Empire had left a power vacuum that was easily filled by the Roman Catholic Church, which created a new European order loosely based on the dogma of the church. During the Renaissance, the church became the patron and regulator of the arts. It commissioned the grand masters—Leonardo da Vinci, Michelangelo, Raphael, and others—put its imprimatur on artwork it considered to be appropriate, and censored art and books it considered to be heretical or blasphemous. This chapter explores archeological and art-history evidence of the regulation of sex-themed visual imagery during the Roman Empire, the Renaissance, and the Enlightenment, the historical period stretching from the early to mid-seventeenth century

Figure 8.1 Ilona Staller: porn star, exhibitionist, and Italian member of parliament

through the eighteenth century. The Enlightenment is famous for its emphasis on reason, even in the domain of the regulation of sex-themed art and visual imagery.

A Window on Sex-Themed Art in the Roman Empire: Pompeii and Herculaneum

We saw in Chapter 1 that academic and popular discussions on the causes of the decline and fall of the Roman Empire are often colored by Hollywood and other cinematic portrayals. The major theme of these academic and popular-culture renditions of history is that the Roman Empire collapsed due to its depravity and decadence. Popular-culture accounts inevitably point to the decadent, syphilitic Emperor Tiberius and especially his successor, Emperor Gaius Caesar Germanicus (Caligula, 37–41 AD), as leaders who fiddled around while Rome burned (Tuchman, 1984). Caligula, who became the third emperor of the Roman Empire in 37 AD, was the most notorious of Roman emperors. He was deified as a "living god" and led an extremely self-indulgent, decadent lifestyle marked by public spectacles, homosexuality, extreme sexual perversity, and orgies that turned the imperial palace into a brothel. Caligula's extreme sexuality was crowned by his marriage to his sister, Julia Drusilla (Barber and Reed, 2001).

A natural calamity that occurred 38 years after the death of Caligula has enabled us to get a clear picture of the sex-themed art of that era. Indeed, one of the best-kept secrets of Western art was the sex-themed, or erotic, art of Pompeii and Herculaneum, two cities of the Roman Empire. Natural and human forces conspired to keep this art out of public view for more than 1,800 years. In effect, on August 24, 79 AD, when Titus Flavius Vespasianus was emperor, Mount Vesuvius had a cataclysmic eruption, the extremely high temperatures of which (up to 570° F) instantly suffocated thousands of people and buried buildings in the Roman resorts of Pompeii, Herculaneum, and other towns in more than thirty feet of tephra (lava, boulders, hot ash, fiery cinders, and rocks; Mastrolorenzo et al., 2010; Moser, 2007). Pompeii and Herculaneum were buried and forgotten in volcanic debris for 1,500 years. The dead cities were discovered in the eighteenth century, and excavations opened an unknown window to the Roman Empire. Archeologists discovered large quantities of sex-themed, or erotic, art in Pompeii and Herculaneum. This art was in the form of well-preserved wall frescoes of explicit sexual acts, sex-themed murals in brothels and private homes, and sex-themed mosaics, as well as sex toys and objects. These art pieces were so sexually graphic that they were kept from public view for close to two hundred years after their discovery. In his monumental work, the *Decline and Fall of the Roman Empire*, Gibbon (1782) stated that during the Roman Empire,

> the innumerable deities and rites of polytheism were closely interwoven with every circumstance of business or pleasure, of public or of private life; and it seemed impossible to escape the observance of them, without, at the same time renouncing the commerce of mankind, and all the offices and amusements of society . . . besides the immediate representations of the gods, and the holy instruments of their worship, the elegant forms and agreeable fictions consecrated by the imagination of the Greeks, were introduced as the richest ornaments of the houses, the dress and the furniture of the Pagan. Even the arts of music and painting, of eloquence and poetry

> flowed from the same impure origin . . . Even the common language of Greece and Rome abounded with familiar but impious expressions. (chapter XV)

The discoveries of Pompeii, Herculaneum, and other historic sites provide archeological and art-history evidence that support Gibbon's conclusions.

In its summary of the history of pornography in the Western world, the US Attorney General's Commission on Pornography stated that "scenes of intercourse have been found on the walls of the brothel at Pompeii" (US Department of Justice, 1986, p. 234). The commission was no doubt referring to the artwork that the Italian authorities had kept from the general public's view for 1,800 years due to religious and moral inhibitions. In 1819, the Bourbon prince who would later become King Francis I of Naples (1825–30) visited the Archeological Museum in Naples with his wife and daughter to see the sensational discoveries that archeologists had made in Pompeii and Herculaneum. He was so shocked by the explicitly erotic content of many of the Roman sculptors, mosaics, and frescoes that he ordered the museum to place these sex-themed pieces under lock and key in a *gabinetto segreto* (secret room for "obscene objects") that only gentlemen of high moral character could have access to (Morton, 2014). Since the king—and the crown prince's—word was law, the National Archeological Museum of Naples (2014) created a secret room of sex-themed visual imagery from Pompeii and Herculaneum that was kept out of public view. According to the Museum, the art piece that the king found the most obscene and licentious was a piece of garden sculpture depicting the god Pan having sex with a goat. That piece of sculpture was excavated from a villa in 1752. The National Archeological Museum of Naples notes that "the scandalous nature of the object in the eyes of the [ruling] Bourbon society made it possibly the most strongly censored work amongst the collection: only the king was permitted to see it before it was locked in a cupboard and hidden even from the eyes of Winkelmann [the pope's famous archeologist and art historian]." That secret room was kept out of public view for close to two hundred years. It was opened only intermittently, depending on the whims of the regime in power in Italy. It was finally opened to the public as a thematic exhibit in 2000. Apparently, this type of sex-themed art was common in the interiors and exteriors of villas during the Roman Empire. A second exhibit—the so-called House of Faun, a sumptuous Roman villa excavated in Pompeii—was also found to contain a number of magnificent art pieces that included a famous sex-themed mosaic. The House of Faun was opened to the public in 2001 (National Archeological Museum of Naples, 2014).

In 2013, the British Museum held a major exhibition, titled "Life and Death: Pompeii and Herculaneum." This exhibition featured some of the sexually graphic art that had been buried under volcanic ash for more than 1,800 years and subsequently locked away in the secret cabinet for almost two centuries. This archeological and art-history evidence provided a glimpse into the social life of the elite at the height of the Roman Empire. During that period, male and female prostitution was legal and common, and the cities of Pompeii and Herculaneum advertised their sexual services. These sexually explicit artifacts point to the fact that before the arrival and diffusion of Judeo-Christian morality and the concept of sin in the Roman Empire, Romans did not consider sex outside of heterosexual matrimony to be a sinful practice. They also did not view explicit, sex-themed visual images

Figure 8.2 Fresco in a brothel in Pompeii

and articles as filth (obscenity). Their way of life had not been affected by the *Vetus Latina* (Latin translations of Greek biblical texts) that would diffuse austere Judeo-Christian morality to the Roman Empire and the rest of the Western world.

The Decline and Fall of the Roman Empire, the Renaissance, and the Rise of the Roman Catholic Church as International Regulator of Sex-Themed Visual Imagery

In 380 AD, Christianity became the religion of the Roman Empire. The Roman Empire ultimately split into the Western Roman Empire, based in Rome, and the Eastern Roman Empire, based in Constantinople (modern-day Istanbul, Turkey), in 476 AD. The Western Roman Empire degenerated as a result of internal misrule. In 410 AD, Visigoths sacked and looted Rome, and in 455 AD, the Vandals pillaged Rome. The Western Roman Empire was finally dissolved in in 476 AD, when Germanic tribes overthrew the last emperor (Gibbon, 1782). John Ecklund states that in the fourth and fifth centuries, the weakening Roman Emperor had given the church the power to establish *curia* (courts) that were "an integral part of the secular judicial system"(Ecklund, 2014, pp. 138, 148).

As the Western Roman Empire declined and ultimately collapsed, the Catholic Church gradually filled the resulting power vacuum. Despite the fact that Italy was governed by Germanic rulers, the Roman Catholic Church assumed the role of unifier of western Europe, by law, and created a new Western world order whose vestiges are still evident in most western European countries (Ecklund, 2014). The Roman Catholic Church, as John Ecklund further suggests, was grounded in the ethical codes of Jesus, the "law giver and law teacher," and became, upon the fall of the Roman Empire, "the government of all Western Europe," a regime in which the

pope assumed the "dual role of ecclesiastical and imperial lawgiver" (pp. 132–42). Legislative, executive, and judicial power was now vested in the person of the pope, who had the official title of bishop of Rome. Ecklund (2014) adds that under this arrangement, the pope became the "sole autocrat" and ruler of a church that was, for most of her medieval history, an imperial "state." Gibbon (1782) specifically singles out Pope Gregory the Great (590–604 AD) as an example of an "ecclesiastical dictator," a religio-political leader who "attacked the [pagan] temples and mutilated the statues of the city [of Rome]." The pope was a sovereign who ruled over swaths of territory (the papal states). At least one pope is known to have personally led his army in a war of subjugation in the Italian peninsula (King, 2002). Western Christendom thus became "a divinely inspired nationhood in which only the baptized orthodox had full citizenship" (Ecklund, 2014, p. 168). From the perspective of governance, the Roman Catholic Church became "the gatekeeper Church which was legislating mankind." By so doing, it laid the foundation of law in the Western world. Indeed, Lavine (1984) wrote that from the fourth to the fifth century, "Christianity shaped the entire cultural world of Europe, its political and personal life, social institutions, economic relations, knowledge of the natural world and the arts—all these were under Church Direction and control" (p. 77). Interestingly, the Catholic Church did not ban sex-themed art altogether; it simply appropriated it, put a "Christian" veneer on it, and presented it anew as a source of sublime inspiration or Christian moral instruction.

The High Renaissance, the Roman Catholic Church, and the Regulation of Sex-Themed Visual Imagery

Despite the Christianization of the Roman Empire and subsequent transformation of the Italian peninsula into a Catholic sphere, Italy has always had a culture in which nudity and sex were implicitly and explicitly interwoven into the fabric of verbal and written communication, as well as the visual arts. This phenomenon was prevalent in the art of the Italian Renaissance. Michelangelo, Leonardo da Vinci, Raphael, and other grand masters experimented extensively with the nude human body, just as ancient Greeks had done with their sculpture during the archaic period. Since the pope had become a political and religious leader, the church had to put its imprimatur (stamp of approval) on all public art. It so happened that the High Renaissance in Italy coincided with the height of papal power and influence. The result was that the Roman Catholic Church and the pope became major patrons of the arts. Popes commissioned the grand masters to produce majestic masterpieces that retold Christian narratives and reflected church dogma. This meant that all significant works of art, especially those commissioned by the Roman Catholic Church, were regulated representations that had to have the assent of the papal gatekeeper.

Between the Aesthetics of the Renaissance and the Iconoclasticism of the Protestant Reformation: The Roman Catholic Church's Regulation of Sex-Themed Visual Imagery

The Renaissance (a French word that means "rebirth") was the historical period that stretched roughly from 1348 to 1648. Historians state that the Renaissance

was characterized by the rebirth of learning and the flowering of art after the medieval period, a historical period that used to be known as the Dark Ages. This three-hundred-year period was also the period in which the powerful Roman Catholic Church, which had filled the vacuum left by the disintegration of the Roman Empire, became the religious and secular power, as well as the foremost patron and regulator of the arts. The Renaissance was clearly a period of renewed appreciation of classical Greek and Roman art, architecture, politics, literature, philosophy, culture, and religion. When we think of Renaissance art, we think of the grand masters and their humanistic works: Michelangelo's *David* and his *la Pietá*, Leonardo da Vinci's *Mona Lisa* and *The Last Supper*, and Raphael's *Ceiling of the Loggia di Psyche*. Renaissance art is praised for being a sign of the times, a reflection of the rekindling of the human spirit and human sensibilities after the Middle Ages.

The vibrant and dynamic, sacred and "profane," artistic creations of the Renaissance were highly regulated representations. The story of Michelangelo, the legendary grand master who was known as the "pope's artist," exemplifies this historical reality. Michelangelo, who drew inspiration from classical Greek art—specifically sculpture that explored the nude human form—produced some of the greatest masterpieces of Western sacred and secular art. Michelangelo, who was commissioned by popes and royal and aristocratic families to produce a wide range of artistic products, exemplified the creativity, dynamism, and humanistic spirit of the Renaissance. His work, which extensively explored the human body, displayed an interesting intermingling of the sacred and the secular, the Christian and the pagan, the religious and the sexual. American art scholar Camille Paglia,

Figure 8.3 Sandro Botticelli (1445–1510), *Birth of Venus* (*Nascita di Venere*). The shell symbolizes the womb and birth canal (courtesy of the Ministry of Cultural Affairs and Tourism and the Museum of the City of Florence, Italy)

a self-described "alienated" Catholic, stated that Italian Catholicism was noted for what she delicately called its "pagan residue" (Salai, 2015). Michelangelo's artistic works were also regulated representations produced within the context of canon (Roman Catholic) law and the aesthetic rules of classical sculpture, painting, and architecture. In effect, a number of popes were exceedingly generous patrons, regulators, and gatekeepers of artistic content during the Renaissance.

Michelangelo, Leonardo da Vinci, Raphael, and others had two main sources of inspiration that were perpetually in tension with each other: biblical narratives and classical Greco-Roman mythology. The Bible was the safest source of narrative inspiration. The church viewed artistic representations of biblical morality tales as necessary for the edification of the masses. These tales include God's creation of Adam, the nude Adam and Eve driven from the Garden of Eden after the "original sin," God's destruction of the cities of Sodom and Gomorrah because of the inhabitants' sexual immorality, the incestuous acts between a drunken Lot and his three daughters, the tale of Joseph and his unjust punishment for rebuffing the sexual advances of Potiphar's seductive wife, the story of Samson and his fatal love affair with Delilah, the sensual love between King Solomon and his beloved, recounted in the *Songs of Solomon*, and so on. Numerous Renaissance artists used the artistic license granted to them under canon law to produce nude, voluptuous, and gaudy art pieces, at all levels of explicitness, that ostensibly retold and re-presented the sex-themed narratives of the Hebrew Scriptures. These narratives had been translated into the Latin Vulgate (Bible) in the fourth century and domesticated by the church.

Additionally, popes, who were the main patrons and regulators of literature and the visual arts during the Renaissance, commissioned artists to depict church dogma in their work. The most extensive collaboration between a grand master and the church was that of Michelangelo and Pope Clement VI. This pope, who was a patron of the arts, commissioned Michelangelo to paint the apocalyptic Last Judgment described in the New Testament on the altar wall of the Sistine Chapel. As we will see later, the resulting masterpiece, *The Last Judgment*, turned out to be a dazzling cascade of anatomically accurate nude characters of Jesus, the Virgin Mary, and the saints. Michelangelo's work was in keeping with the artistic traditions of classical Greco-Roman sculpture and art. It (1) reflected the Christian doctrine of "bodily resurrection" set forth in chapter 15 of St. Paul's first epistle to the Corinthians (Hall, 1999) and (2) demonstrated that Christianity had not completely engulfed Greco-Roman pagan mythology and aesthetics. Rather, the Roman Catholic Church had domesticated classical Greco-Roman artistic culture and aesthetics—complete with its mythological pagan characters—and used it to encode and propagate church dogma. This "seepage" of Greco-Roman mythology and aesthetics into the Christian art of the Renaissance grand masters commissioned by popes was to become an international bone of contention during the Protestant Reformation and the Roman Catholic Counter-Reformation.

The Iconoclastic Protestant Reformation and Regulation of Nudity in the Church-Commissioned Art of the Grand Masters

Renaissance artists experienced, firsthand, the regulatory and censorious power of the pope and the Catholic Church on their work. One of the most interesting

realities of Renaissance art is that the grand masters who produced it were caught between the iconoclastic hammer of the Protestants and the censorious anvil of the Roman Catholic Church. In 1517, Martin Luther nailed his famous Ninety-Five Theses, outlining the doctrinal aberrations and corruption in the Roman Catholic Church, on the door of the *Schlosskirche* (Castle Church) in Wittenberg, modern-day eastern Germany. This act, which triggered the largely iconoclastic Protestant Reformation, earned Luther a conviction for heresy at the Diet of Worms, an international politico-religious regulatory assembly held in 1521 and presided over by Emperor Charles V of the Holy Roman Empire. The Edict of Worms, a decree issued by Emperor Charles V in 1521, declared Martin Luther a wanted heretic, a virtual death sentence. Luther's crime was that he had claimed, among other things, that "Rome was the seat of the Devil and the Pope worse than the Ottoman Sultan" (King, 2002).

In 1522, an austere and ascetic Dutch professor and diplomat named Adriaan Florensz was elected pope and took the name Adrian VI. Pope Adrian VI believed that the Catholic Church needed thorough reform from top to bottom. He wrote, "We know that in the Holy See there have been many abominations these many years, abuses in spiritual things, excessive decrees, and everything perverted." It is interesting that in the next international regulatory assembly, the Diet of Nuremberg, which was held in an attempt to contain the Reformation and bring its leaders to book, Pope Adrian VI admitted partial guilt for the corruption and sorry state of affairs in the Catholic Church. Indeed, upon his election as pope, Adrian VI, who had never been to Rome before, was stunned by Michelangelo's nude frescoes in the Sistine Chapel, the "most significant chapel in Christendom" (Hall, 1999). The pope was revolted by what he thought were pagan, sex-themed images in the Sistine Chapel and let it be known that he was "unhappy about celebrating Mass beneath images that were, in his opinion, more appropriate to a bathhouse than a Christian chapel" (Ross, 2002, p. 292; Figure 8.4). King (2002) states that Pope Adrian VI "threatened to bring the fresco crashing to the floor" (p. 292). Pope Adrian VI did not live long enough to carry out his threat. He died after only 18 months in office.

If Pope Adrian VI was repulsed by the humanistic emphasis and the nudity of Michelangelo's Sistine fresco, his successor, Pope Clement VI (1478–1534), was a great patron of the arts and admirer of the grand master. Under his papacy, artists who had fled Rome as a result of Pope Adrian VI's austere and ascetic posture toward the fleshly visual art pieces commissioned by the church flocked back to Rome and received new commissions from the pope. Nevertheless, even Pope Clement VI had a certain ethical and theological threshold that he did not want Renaissance artists to cross. One of the first things the new pope did when he was elected was to ban artist Giulio Romano's explicit, sex-themed sketches titled *Love of the Gods*. These sketches were based on Ovid's mythological narrative poem *Metamorphosis*. In this poem, Ovid describes the diverse sexual escapades and dalliances of ancient Greco-Roman gods and goddesses. In 1524, Marcantonio Raimondi (1480–1534) published an album of explicit erotic engravings based on Giulio Romano's explicit, sex-themed sketches. The title of the album was *I Modi* (*The Positions*, or *The Sixteen Pleasures*). In *I Modi*, Raimondi depicted gods and goddesses in a series of explicit, sexual positions. This album was based on sketches commissioned by the ruler of the city of Mantua, Duke Frederico II

Gonzaga (Romano et al., 1988). These engravings used classical Greco-Roman mythology as a subtle ruse to present sexually explicit content.

Using his spiritual and secular power, Pope Clement VI promptly imprisoned Raimondi and ordered the seizure and destruction of all copies of *I Modi*. However, fragments of the work survived and are now housed in European museums (Romano et al., 1988). Other artists copied Raimondi's engravings and smuggled them to other countries beyond the jurisdictional reach of the pope. These copies enabled the explicit sketches to survive. Vasari (1902) describes the papal imprisonment of Raimondi and the destruction of his sex-themed work as follows:

> After this, Giulio Romano caused Marc' Antonio to engrave twenty plates showing all the various ways, attitudes, and positions in which licentious men have intercourse with women; and, what was worse, for each plate Messer [Mister] Pietro Artino wrote a most indecent sonnet . . . This work was much censured by Pope Clement; and if, when it was published Giulio had not already left for Mantua, he would have been sharply punished for it by the anger of the Pope. And since some of these sheets were found in places where they were least expected, not only were they prohibited, but Marc' Antonio was taken and thrown into prison; and he would have fared very badly if Cardinal de Medici and Boccio Bandinelli, who was then in Rome in the service of the Pope, had not obtained his release (Vasari, 1902).

Despite the fact that he censored sex-themed mythological art that did not please him, Pope Clement VI was one of the greatest patrons of the arts during the Renaissance. In 1534, he commissioned Michelangelo (1475–1564) to paint the famous fresco of *The Last Judgment* on the altar wall of the Sistine Chapel in the Vatican. Hall (1999) suggests that the theological focus of *The Last Judgment* was the Christian doctrine of the resurrection of the body on the Day of Judgment. In keeping with the theme of bodily resurrection, Michelangelo infused his fresco with a humanistic dynamic: a cascade of nude characters that belied the fact that the work was a theological narrative. Hall (1999) suggests that the nude bodies of Jesus, Mary, and the multitude of saints depicted in *The Last Judgment* "are the most emphatically corporeal figures he [Michelangelo] had ever created" (p. 406). This fleshly aspect of the fresco made it controversial to sections of the Roman Catholic Church and especially to Martin Luther and the iconoclastic Protestants who had launched the Reformation. In his monumental work *Lives of the Artists*, published in 1550, Vasari (1902) wrote that

> Michelangelo had already carried to completion more than three-fourths of the work, when Pope Paul went to see it. And Messer Biagio da Cesena, the master of ceremonies, a person of great propriety, who was in the chapel with the Pope, being asked what he thought of it, said that it was a very disgraceful thing to have made in so honorable a place all those nude figures showing their nakedness so shamelessly, and that it was a work not for the chapel of a Pope, but for a bagnio or tavern. Michelangelo was displeased at this, and, wishing to revenge himself, as soon as Biagio had departed he portrayed him from life, without having him before his eyes at all, in the figure of Minos with a great serpent twisted round the legs, among a heap of Devils in Hell; nor was Messer Biagio's pleading with the Pope and with Michelangelo to have it removed of any avail, for it was left there in memory of the occasion, and it is still to be seen at the present day.

As Vasari's narrative indicates, sections of the Roman Catholic Church found the nude, corporeal images of Jesus, Mary, and the saints offensive to their religious sensibilities. To compound the problem, Michelangelo had inserted elements of Greek mythology into the fresco. As Vasari noted, Michelangelo depicted Biagio da Cesena—the papal master of ceremonies, who did not like *The Last Judgment* because of its nudity—as Minos, the mythological Greek god who judged damned souls in the underworld. Interestingly, the pope refused to censor Michelangelo's *The Last judgment* despite the appeals of his master of ceremonies. Michelangelo's majestic, awe-inspiring frescoes in the Sistine Chapel would become a bone of contention within the Roman Catholic Church and between the church and the iconoclastic Protestants who thought the grand master's cascade of classical-style nude images was vulgar and pagan. They proclaimed that the artwork amounted to a clear violation of the legislative texts of the Old Testament—specifically, the second commandment of the Hebrew Scriptures, which forbade the Jews from making "any graven [carved] images, or any likeness of anything that is in heaven above or that is in the earth beneath, or that is in the water under the earth; thou shall not bow down thyself to them or serve them" (Exodus 20:4, New International Version). Though the paintings in the Sistine Chapel contain metaphorical meanings drawn from the Bible (Barolsky, 1999), Martin Luther and other reformers saw these art works populated by nude images as evidence that the pagan Greco-Roman cultures and values had engulfed the Roman Catholic Church. The Protestants used the carnal (fleshly as opposed to spiritual) art commissioned by the popes to highlight their theological differences and to "whip up enmity against the Church" (Ross, 2002, p. 292).

Tuchman (1984) suggests that for long periods of time, the Papacy was detached from religion and became, instead, mired in depravity, immorality, and the acquisition of political power and territories. As a result, reformist Catholic priests challenged the corrupt church and complacent believers. Tuchman writes that one rabble-rousing priest "inspired bonfires into which crowds with sobs and hysteria threw their luxuries and valuables, their paintings, fine garments and jewelry" (p. 83). The paintings that were destroyed were undoubtedly the popular, sex-themed visual imagery Matthews-Grieco (2010) describes in her work.

The Council of Trent (1546–63) and International Regulation of Sex-Themed Visual Imagery

As the Protestant Reformation diffused in Europe, the Roman Catholic Church, the Holy Roman Empire, and Catholic nations and principalities went into Counter-Reformation mode. They held a series of international regulatory assemblies that were called "the Council of Trent," between 1546 and 1563, to launch a Counter-Reformation. In 1564, three years after Michelangelo had completed *The Last Judgment*, the Council of Trent issued a number of dogmatic decrees, rules of association between the sacred and the secular, and statements and clarifications regarding the doctrines of the church. These international legislative acts were aimed at countering the Protestant Reformation and guiding the Catholic clergy. These decrees included restrictions on Christian art and imagery in response to the concerns of church leaders and the iconoclastic declarations of the Protestants. The new pope, Paul IV, like Pope Adrian VI before him, did not find Michelangelo's

nudes in the Sistine Chapel edifying. He would have removed them except for the pleadings of a number of cardinals and bishops. Indeed, as soon as he was elected, Pope Paul IV cut off the pension Michelangelo was receiving from the Roman Catholic Church and ordered him to modify the nudes in his *Last Judgment* fresco. Now advanced in years, Michelangelo ignored the new pontiff's orders.

Nevertheless, the Council of Trent, which the Roman Catholic Church assembled to counter the Protestant Reformation and its perceived heresies, became a major regulator of Renaissance art and aesthetics. Though the aim of the council was to reform the Catholic Church by ridding it of the numerous abuses that had become entrenched in its midst, the assembled religious and political dignitaries of the Catholic world issued a number of dogmatic decrees with respect to images: "Moreover, in the invocation of saints, the veneration of relics, and the sacred use of images, every superstition shall be removed, all filthy lucre be abolished; finally,

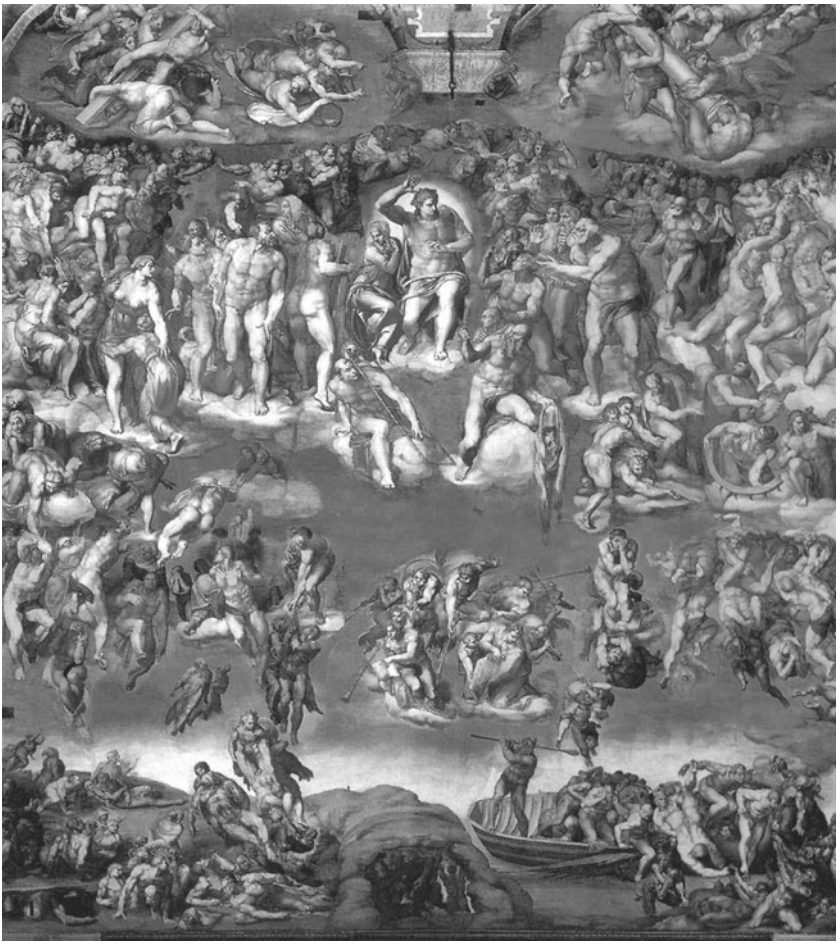

Figure 8.4 Fresco of *The Last Judgment* by Michelangelo (painted 1536–41; Sistine Chapel, the Vatican; Shutterstock image)

Figure 8.5 Detail of Mary and Jesus in Michelangelo's *The Last Judgment* (painted 1536–41; Sistine Chapel, the Vatican; courtesy of Vincent Finnan, *italian-renaissance-art.com*)

all lasciviousness be avoided; in such wise that figures shall not be painted or adorned with a beauty exciting to lust" (Council of Trent, 1848, pp. 236–37). The church clearly decreed that Christian icons could contain nudity, but they were not to have any type of erotic appeal.

This Council of Trent's decree on art and imagery transformed European art into a regulated representational phenomenon. The decree had a great impact on the content of European art. The art decree of the Council of Trent, as interpreted by the church, banned all religious artworks that did not have a solid scriptural foundation as their basis. That is, all art pieces had to re-present or closely reflect biblical narratives. Furthermore, no classical (pagan) Greek or Roman mythological themes or elements were allowed in Christian art. Finally, all nudity and sexual hints were banned (Blunt, 1985). While the Council of Trent did not create a zone of separation between the things of the flesh and those of the spirit in matters of artistic representation in a religious milieu, it resolved, nevertheless, to either censor or remove *The Last Judgment* fresco altogether from the Sistine Chapel. Vasari (1902) writes that Pope Paul IV did not exactly like the stark nakedness of the corporeal images of *The Last Judgment*, painted by Michelangelo. He wanted to have the images removed from the altar wall of the chapel. However, many cardinals appealed to the pope to spare the art, claiming that the masterpiece was so magnificent that "it would be a great sin to spoil." The pope then commissioned Daniele da Volterra, one of Michelangelo's associates, to make alterations to *The Last Judgment*. Da Volterra eliminated the stark nakedness of the characters by painting over their exposed genitalia with loincloths and light draperies that did not materially alter the fresco (Figure 8.5).

Ironically, when the frescoes in the Sistine Chapel were restored in the 1980s and 1990s, a large proportion of the "draperies" da Volterra used to censor the genitalia of the characters of *The Last Judgment* were removed. Removal of da Volterra's draperies revealed that the snake coiled around Biagio da Cesena was in fact biting his genitals. Michelangelo had the last laugh—from the grave—more than five hundred years later! Historically, the Council of Trent had a major regulatory impact on art—especially on church-sponsored art in Catholic Europe and ultimately the rest of Europe. It led to the emergence of an important group of Counter-Reformation painters and sculptors—artists who followed the directives and aesthetics of the Council of Trent. The most influential members of this group included Tintoretto, El Greco, Peter Paul Rubens, and Rembrandt.

The Counter-Reformation, the Church, and Sex-Themed Visual Imagery in Mexico

One of the outcomes of the Counter-Reformation was the deployment of missionaries of the Society of Jesus or Jesuits, whose order had been approved by the Pope Paul III in 1540, to several parts of the world. In 1549, in the midst of the Council of Trent and the Counter-Reformation, the Jesuits arrived in Latin America (Klaiber, 2009). The first Jesuits arrived in Mexico in 1572. They and other European Catholic missionaries who arrived in Mexico found that the people there had a vibrant culture of pre-Columbian art that included explicit, sex-themed visual imagery. They found that the Aztecs had a vast cosmology that included male and female gods of sensuality (Diaz and Rogers, 1993). They found

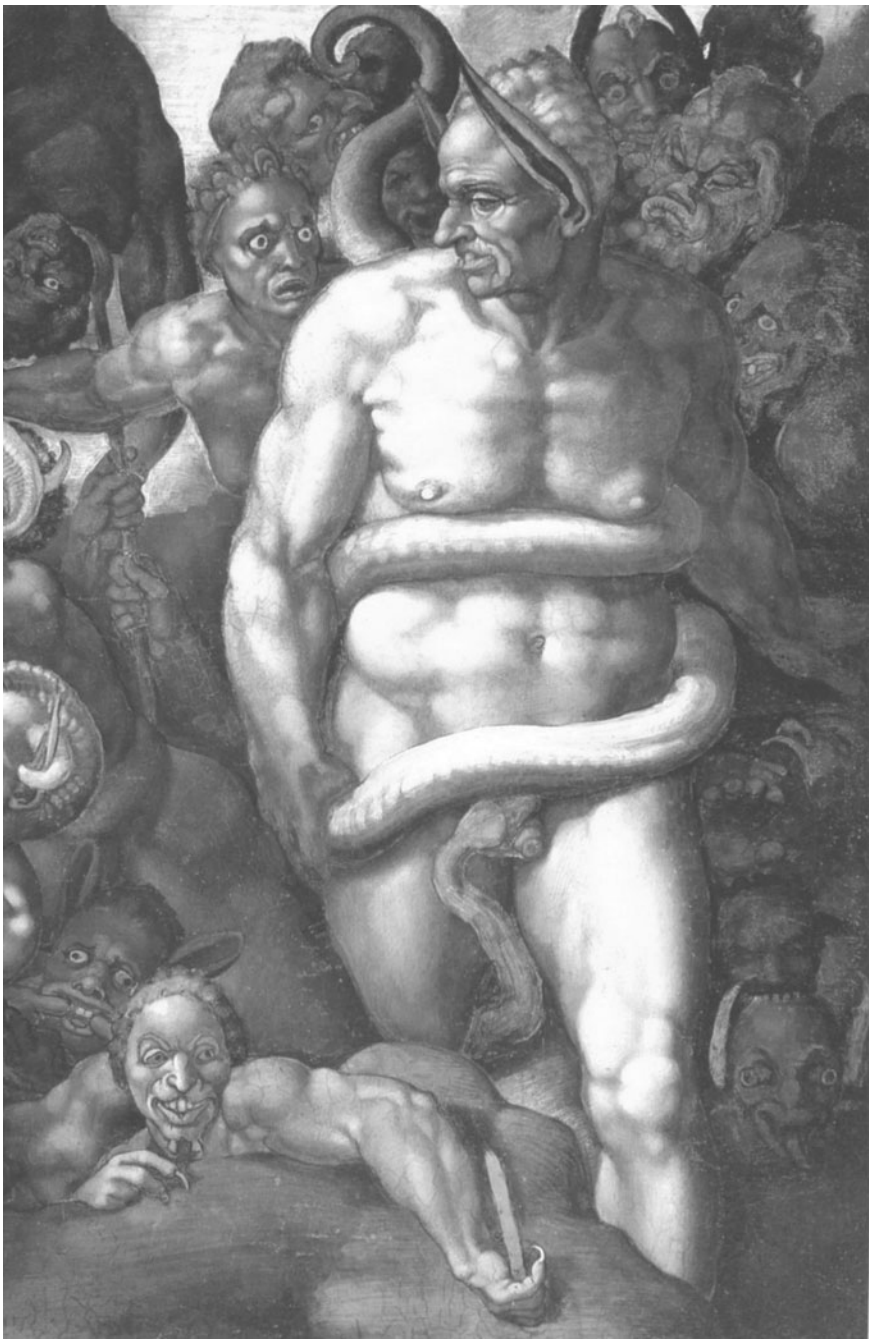

Figure 8.6 Detail of Biagio da Cesena as Minos, god of the underworld, being bitten by a snake in Michelangelo's *The Last Judgment* (painted 1536–41; Sistine Chapel, the Vatican; courtesy of Vincent Finnan, *italian-renaissance-art.com*)

evidence of pre-Columbian art in codices. The most well-known Mexican codex is the Codex Borgia, or Codex Yoalli Ehēcatl. This is a Mesoamerican, precolonial, pre-Christian, pictorial religious manuscript that was a record of the cultural and religious worldview of the Aztec peoples in what today is central Mexico (Diaz and Rogers, 1993). The Codex Borgia shows that the peoples of the region had phallic religious cults that involved homosexual temple prostitution, homosexuality, pederasty (sex between older and younger males), and pedophilia (sex with children; Diaz del Castillo, 2008). The Codex Borgia is a veritable pre-Columbian regulated representation of the cosmology, religion, and cultural memory of the Aztecs before the Spanish conquest. The Codex Borgia parchment is now owned by the Apostolic Library in the Vatican. Copies have been made available to the public. Like all colonialists, Spanish and Portuguese conquistadores, colonial administrations, and missionaries suppressed all native religious and cultural practices that were considered to be contrary to Catholic religious teachings, especially during the iconoclastic Protestant Reformation and Catholic Counter-Reformation in Europe.

Regulation of Secular Art after the Council of Trent

As a result of the restrictions of the Council of Trent, secular art became a regulated representation. Renaissance artists developed ways of going around the censors. Matthews-Grieco (2010) states that artists developed different versions of the same print and targeted them at different audiences. Prints with explicit, sexual themes, suggestive poses, and naked human bodies were directed at elite audiences and collectors, while more nuanced, "sexually allusive pictures" were aimed at more popular audiences (p. 20).

Furthermore, after the dogmatic image decree of the Council of Trent, the erotic artists of the Renaissance used a certain level of deterritorialization (shifting from one religious, historical, cultural, or geographic space to another) in order to overcome censorship and gain social acceptance. Matthews-Grieco (2010) states that mythological sex scenes became sanitized visual narratives into which artists injected themes from the pantheon of idealized, pre-Christian classical Greek and Roman cultures. These scenes mostly featured frolicking gods and goddesses. In short, pagan mythology "provided a convenient forum for dealing with sexuality in visual media" (p. 29). The aim was to give this erotic material "a veneer of intellectual respectability" (Ruggiero, 2010, p. 5). It also provided artists the "historical license" (Matthews-Grieco, 2010, p. 23) to include erotic material that otherwise would not have survived the censorious gatekeepers of the Catholic Counter-Reformation had they not been placed in mythological contexts. Many artists took advantage of this historical license to produce sexually explicit imagery. A good example is Joachim Wtewael, who produced very graphic art that was based on classical Greek and Roman mythology, as well as biblical stories of abnormal sexuality, such as "Lot and His Daughters," a story about incest recorded in the Book of Genesis in the Hebrew Scriptures (Old Testament). Wtewael and other artists appropriated Biblical themes and used them as facades to advance secular and sensual visual aesthetics.

As a rule-governed creation, sex-themed artistic expression is subject to a series of rules ranging from grammar and composition to the artistic, sociocultural

logics that make it a narrative (Ricoeur, 2013, p. 13). Sex-themed visual imagery is also expected to pass aesthetic and legal tests. The impact of the Christianization of Europe, the Protestant Reformation, and especially the Counter-Reformation is noticeable in the art of the Renaissance. Indeed, these powerful political and religious forces made Renaissance art a regulated representation. All works of art had to abide by the conventions, rules, and regulations of the Council of Trent, as well as social "decency thresholds" (Matthews-Grieco, 2010, p. 29). Ironically, while the Catholic Church was preoccupied with doctrinal purity, the decadence, degeneracy, and depravity of what Tuchman (1984, p. 51) calls the "Renaissance popes" (those who ruled from 1470 to 1530) helped trigger the Protestant Reformation that was to change the course of the history of the world.

A large proportion of the work of the Renaissance grand masters consisted of re-presentations. These included new visual presentations of old biblical narratives and themes. Nevertheless, a number of grand masters and artists produced material that did not reflect Christian themes. Indeed, some of the material deliberately but subtly subverted Christian themes. Matthews-Grieco (2010) states that a sex-themed visual culture flourished alongside and just beneath the surface of the classical and humanistic art of the Renaissance. She suggests that during the Italian Renaissance, there was an accepted, almost regulatory, "decency threshold" (p. 22) that guided the work of Renaissance artists who dabbled in sex-themed material. This sex-themed material included (1) single erotic prints by recognized masters, (2) commercially successful prints of "mythological sex scenes" (p. 23), and (3) morality prints that echoed Christian sexual morality as a warning against the "'animal' nature of carnal [sexual] appetites" (p. 31). This suggests that the Roman Catholic Church did not have absolute sway over all artistic creation during the Renaissance.

This sixteenth-century niche marketing of the explicit, allusive, sex-themed prints of the Renaissance was an early forerunner of the market segmentation of modern sexual capitalism. The purveyors of mediated sex carve the world into demographic slices for purposes of efficiently disseminating pornography on an industrial, global scale. It is interesting that the vocabulary used to describe explicit, sex-themed visual imagery in law emerged during this period. We saw in Chapter 7 that the Greek New Testament introduced the word *aischotes* (obscenity, filthiness) in the context of sexual morality. A new word for "obscenity" entered the Latin language in 1511. That year, the word *obscenitas*, which meant "immoral, or indecent," came into use. That is the root of the modern word "obscenity." In 1534, another new word, *obscenus*, which meant "ill-omen" or "inauspicious," became part of the Latin vocabulary. It was used to describe sex-themed visual imagery that "deliberately and shamelessly offended decency and modesty through lascivious or lustful sexual representations" (Robert, 1992, p. 1294). That is the root of the modern word "obscene." Those two words form the basis of the diverse definitions and regulations of explicit, sex-themed visual imagery in contemporary France, the United States, and Anglo-American jurisdictions.

The Renaissance and Popular Sex-Themed Visual Imagery

While mainstream art flourished during the Renaissance, the movement also had an erotic environment and a sexual subculture that involved male and female

Figure 8.7 Venetian masks flourished during the Renaissance as symbols of the anonymous celebration of sexuality and hedonism (photo: Lyombe Eko)

prostitution, as well as "sexually-connotative" visual art that has not received much scholarly attention (Ruggiero, 2010, p. 5). Matthews-Grieco (2010) suggests that in the fifteenth century, technical innovations in the mechanical reproduction of images led to the emergence of erotic engravings: "sexually allusive pictures aimed at a variety of viewing publics" (p. 19). She states that this was an urban phenomenon that emerged during, and became characteristic of, the

Italian Renaissance. These images, produced for the print market, "responded to a growing consumer taste for visual discourse on love, sexuality, and the pitfalls of human frailty" (p. 19). Famous artists had a two-tiered market. They produced one version of a piece of erotic art for their elite urban clientele and a "more erotically allusive version of the same engraving" that was reworked for a larger market (p. 4). Sixteenth-century Roman artists and print makers essentially developed "a two-tiered market for licentious images" (p. 23). Furthermore, in order to sell material that would have been considered objectionable by the church and the state, artists injected themes from classical Greek and Roman mythology into their work. The result was "mythological sex scenes" that passed tests of cultural refinement (Matthews-Grieco, 2010, p. 23) and escaped the ire of the censors.

Books as Regulated Representations during the Renaissance: The Censorious *List of Prohibited Books*

As the Renaissance moved into high gear and new ideas and imagery that challenged Roman Catholic dogma sprouted and grew all over Europe, the Roman Catholic Church assumed a stridently defensive posture toward all ideas and artistic expressions that went counter to church dogma. Additionally, the Protestant Reformation, which emphasized the "heretical" ideas of freedom of thought and of conscience, as well as individual salvation by the grace of God through faith in Jesus Christ rather than through the suffocating orthodoxy and strictures of the Roman Catholic Church, posed an existential threat to the church. In effect, church dogma said that "there is no salvation outside the [Roman Catholic] Church." As the ideas of Martin Luther, John Calvin, and other protestant leaders spread like wildfire in Europe and adopted national, cultural colorations, their followers began to call themselves "Lutherans," "Anglicans," "Calvinists," and so on. The Roman Catholic world (the church, the papal states, Catholic nations, territories, and principalities) was not amused. It went into Counter-Reformation mode. It countered the "heretical" and blasphemous secular ideas of the Renaissance and theological interpretations of the Protestants. We have seen that the Catholic "world" held an international regulatory assembly, the Council of Trent, between 1545 and 1563 to counter the Protestants and address some of the charges of corruption leveled against the church. While the Council of Trent was under way, the so-called scholastic Pope Paul IV transformed books into "regulated representations," to use the expression of Kaplan (2012). The Holy Father issued the famous *Index Librorum Prohibitorum* (*The List of Prohibited Books*) in 1559. The list banned all publications that the pope considered to be heretical, blasphemous, anticlerical, anti-Catholic, immoral, or lascivious (Grendler, 1988). These broad categories included sex-themed texts and images that were believed to incite lustful thoughts. Since *The List of Prohibited Books* was aimed first and foremost at controlling information and ideas, it included German and Italian translations of the Latin Bible. The Council of Trent modified the pope's list slightly and placed its stamp of approval on it. *The Tridentine Index* (so called because it was issued by the Council of Trent) became the law in the Catholic world. The Catholic Church published *The List of Prohibited Books* and banned books on that list for 407 years. The list was finally abolished in 1966.

Incidentally, despite its power, reach, and control, the Roman Catholic Church did not have the last word on all matters that touched on publication of the written word. Around 1595, a phenomenon that would change the world emerged. It was the *gazzetta*. This was the earliest form of the collections of news we now call newspapers. *Gazzettas* were first handwritten. The invention of printing gave them a boost. These early newspapers were called *gazzettas* because they were sold for one *gazzetta*, a unit of currency minted under the semi-independent Republic of Venice. The *gazzetta* phenomenon soon spread to other European countries. In 1631, French physician Théophraste Renaudot obtained a royal charter and launched *La Gazette de Paris*. This event marked the birth of modern journalism (Bellanger et al., 1969). With the advent of journalism, the world would never again be the same.

The Enlightenment and Sex-Themed Art

The Enlightenment was the historical period stretching from the early to mid-seventeenth century through the eighteenth century. It is the period that brought revolutionary changes in science, philosophy, religion, politics, culture, and society. It led to changes in worldviews, changes in attitudes toward religion and governmental authorities, and ultimately revolutions. The Enlightenment ushered in the modern world. The Enlightenment was known for its emphasis on human reason (Bristow, 2011). French *philosophes* (philosophers)—Voltaire, Rousseau, Montesquieu, Diderot, D'Alembert, and others—are often associated with the Enlightenment. However, the Enlightenment went beyond this group of philosophers, who started an encyclopedia project, *l'Encyclopédie*. Other well-known Enlightenment philosophers include David Hume, Adam Smith (known for his laissez-faire, or hands-off, theory), and Immanuel Kant, the father of modern human rights. The wide variety of ideas associated with the Enlightenment means that the phenomenon was characterized by "general tendencies of thought" rather than, specific philosophical doctrines or theories (Bristow, 2011). The cornerstone of Enlightenment philosophy was rationality.

Nevertheless, the Enlightenment rediscovered the value of the senses not only in cognition or thinking but also in human lives in general. Therefore, given the intimate connection between beauty and human sensibility, the Enlightenment was naturally interested in aesthetics. However, aesthetic tastes in art and nature were subject to rational thinking that was supposed to mimic a rational order of nature. Also, the Enlightenment included a general recovery and affirmation of the value of pleasure in human lives—despite past Christian asceticism—and the flourishing of the arts, of criticism of the arts, and of philosophical theorizing about beauty. The Enlightenment also enthusiastically embraced the discovery and disclosure of the rational order in nature, as manifested most clearly in the development of the new sciences. Thus in the phenomenon of aesthetic pleasure, human sensibility discloses a rational order (Bristow, 2011). The "new rationalism" of the seventeenth century enthroned reason and made it the cornerstone of the human experience. French philosopher, Rene Descartes proclaimed that *cogito ergo sum* ("I think, therefore I am"). Kant added that human beings are special creatures because they have a capacity to reason (Kant, 1991). The enlightenment mentality

reached its apogee in the French Revolution, which swept away the monarchy and dechristianized the state (César, 2006).

While the European grand masters of the Renaissance drew on ancient Greco-Roman mythology to make the nude female body the object of elite art, "refined" tastes, and the "cultured" male gaze, writers and artists of the eighteenth- and nineteenth-century Enlightenment assumed a more "rational" view of the human body and of sex. The main proponent of this philosophical tendency was the German philosopher Immanuel Kant, who is known for his emphasis on human dignity and autonomy. The fundamental principle of Kantian ethics is that human beings are rational beings who should never be treated as a means to an end, because human beings are ends in themselves. The political and ethical principles that are intended to guide human actions are set forth in the two variants of Kant's "categorical imperative," or practical principle (Timmermann, 2007). They spell out how rational human beings who have the will—the autonomous capacity to act in accordance with laws—ought to behave toward each other: "Act only on a maxim by which you can will that it, at the same time, should become a general law . . . Act so as to treat man, in your own person as well as in that of any one else, always as an end, never merely as a means" (Kant, 1991).

Kantian ethics is premised on the progressive moral improvement of mankind over time. In his work *Conjectures on the Beginning of Human History*, Kant advances the notion that sexual instincts should be governed by reason and rational control if sex is to rise above the animalistic level: "The first incentive for man's development as a moral being came from his *sense of decency*, his inclination to inspire respect in others by good manners" (p. 224). The main tenet of Kantian ethics is that human beings progress from creatures governed by their base, sensual perceptions and animalistic instincts to creatures of reason and morality. Morality is therefore the height, the logical progression, of human beings. Furthermore, in his work *Lectures on Ethics*, Kant (1963) writes, "Sexual love makes of the loved person an Object of appetite; as soon as that appetite has been stilled, the person is cast aside as one casts away a lemon which has been sucked dry . . . as soon as a person becomes an Object of appetite for another, all motives of moral relationship cease to function, because as an Object of appetite for another a person becomes a thing and can be treated and used as such by every one" (p. 163). This statement led Ricoeur (2013) to suggest that Kant is noted for his "puritanical evaluation of desire . . . [and] his refusal of any diversity among, and of a hierarchy of feelings which leads him to reduce love to 'pathological' desire" (p. 42). Nevertheless, Kant is clearly against using people as sex objects, whether in religious contexts, as in the practice of temple, or sacred, prostitution in the ancient Near East, Greece, and Rome, or in India, where the *devadasi* system of temple prostitution still continues despite governmental attempts to stamp it out (Kermorgant, 2014). Additionally, from a Kantian perspective, pornography, and especially child pornography, represent a morally deplorable regression to the state of bestial instincts from which rational human beings are supposed to have evolved. Furthermore, though Kant wrote nothing about pornography, his philosophy would lead one to believe that he would reject all kinds of pornography as material that dehumanizes and devalues actors and actresses in the pornography industry and reduces them to the level of sex objects. Using people for the sexual gratification of others goes against Kantian ethics. Kant is considered the "father" of human rights because his ideas about

human autonomy and rationality have inspired the human dignity provisions of the international human rights regime.

The Enlightenment's "Libertine" Philosophers

A group of Enlightenment thinkers held a different "tendency" than that of Kant. These were the so-called European libertine writers and artists who linked their work to the baser cultural origins of European art and literature. In 1946, French philosopher Jean-Paul Sartre wrote a philosophical play with a title that was an oxymoron (a contradiction in terms): *La Putain Respecteuse* (*The Respectful Prostitute*). Sartre's ascription of respectability to a profession and way of life that is not reputable in most modern societies harks back to morally nonevaluative or judgmental usages of the term "prostitute" in many ancient societies. Strictly speaking, Sartre's work would be classified as "pornography" according to the ancient etymology of the word. Sartre was following an old French literary tradition that featured the entwinement of the passionate and the rational—sex and philosophy. The master of this literary genre was Le Marquis de Sade, whose work led to the invention of neologisms like "sadist" (one who derives sexual pleasure from inflicting pain and suffering or from humiliating a willing or unwilling "submissive" partner), "sadistic," and "sadomasochism." In effect, the Marquis de Sade is part of an Enlightenment tendency that puts emphasis "on the pursuit of pleasure, celebrate[s] the avid pursuit of sexual pleasure and explicitly challenge[s] the sexual mores, as well as the wider morality, of their time" (Bristow, 2011).

The Catholic Kingdom of France regulated all printed matter and censored all material that was at variance with Catholic orthodoxy. As a result of his highly perverse lifestyle, de Sade was incarcerated under a sealed royal edict: the *lettre de cachet*. These letters were royal judgments: edicts signed by the King of France, countersigned by the chief minister, and sealed with a royal seal, or cachet. The orders contained in the *lettres de cachet* concerned the enforcement of decrees that could not be appealed. They often involved imprisonment of antisocial or socially undesirable elements without trial. During de Sade's multiple incarcerations in the infamous Bastille prison in Paris, as well as other penal or mental institutions, he wrote perverse, sex-themed novels that were a mixture of extremely violent pornography—in which the abused and brutalized victim was almost always a naïve and innocent woman—and philosophical speculations. In 1790, after he had been transferred from the Bastille during the French Revolution, he published two very graphic and violent sadomasochistic novels, *Justine, or the Misfortune of Virtue* and *Juliette, or Vice Rewarded*, under a pen name. Claude Bornet, a French painter and engraver, illustrated a Dutch edition of *Juliette* because de Sade's work, some of which was biographical, was considered illegal in France. Taken as a whole, de Sade's works were essentially a catalogue of baseness, debauchery, sexual cruelty, violence against women, sadism, and extreme perversion that amounted to "transgressive" self-gratification at the expense of others. As a self-described libertine, he repudiated any belief in God, faith, and Christian morality and believed in extreme freedom that knew no moral bounds. Indeed, one of Sade's themes is "the overwhelming force of the sex drive," which neither religion nor culture or breeding can tame (de Sade, 2012, p. vii). Despite the fact that the Revolution of 1789 dechristianized France after *Justine* and *Juliet* were published, Emperor

Napoleon Bonaparte ordered the arrest of Le Maquis de Sade because the books were outrageously obscene. De Sade was committed to an insane asylum in 1801 under "administrative arrest." He stayed there for the last 13 years of his life. All in all, de Sade spent more than thirty years in prison because of his perverse, criminal, and sexually violent lifestyle and his extremely violent pornographic writings.

However, it was another French Enlightenment intellectual, Rétif de la Bretonne (1769), who reached into the classical Greek language, dusted off the word "pornographer," and made it part of late eighteenth-century French literary culture. In his work *Le Pornographe ou, Idées d'un honnête-homme sur un projet de règlement pour les prostituées* (*The Pornographer: A Plan by an Honest Man for Regulating Prostitutes*), de la Bretonne (1769), who grounded his work in ancient Greek and Roman mythologies and lifestyles, stated that the word *pornographe*, or "pornographer," meant "a writer whose subject is prostitution" (p. 32). As we have seen before, that word is made up of the seventh-century Greek words *porné* (literally "woman for sale," or female prostitute) and *pornos* (literally "man for sale," or male prostitute), plus the word *graphos*, which means "writing." Taken together, the word "pornography" originally meant "writing about [female and male] prostitutes" (Kapparis, 2011, p. 223). In de la Bretonne's treatise on the regulation of pornography, the word *pornographe* (pornographer) also meant the "author of a treatise on prostitution" or an "author who specializes in obscene writings" (Robert, 1992, p. 1484). De la Bretonne's use of the word *pornographe* was consonant with the nonjudgmental and amoral ancient Greek meaning of the word. However, the new use to which he put the word included the evaluative word "obscene" (filthy, disgusting) that St. Paul had introduced in the Greek New Testament. De la Bretonne (1769) used the word *pornographe* in the context of regulatory proposals: ideas to regulate prostitution. In his day, the word *pornographe* went hand-in-hand with another Greek word, *pornognomonie*, which meant the regulation of places of debauchery. Since de la Bretonne was writing about the regulation of prostitutes in France, he was, in fact, a pornographer in the Greek sense of the word. It should be noted that de la Bretonne's book *Le Pornographe* is a regulatory treatise, not pornographic material in the modern sense of the term. Ancient Greek artists, who painted explicit, sex-themed visual representations of male and female prostitutes on vases and other visual media, were the first pornographers. However, due to the tolerant nature of their culture, their work was not considered "pornographic" in the modern sense of the term.

In 1803, the word *pornographie* (pornography), entered the French language. It was an adaptation of the word *pornographe* (a treatise on prostitution). This was followed by the adjective *pornographique* (pornographic). By that period, its meaning had evolved to include explicit representations of sex in writings, drawings, paintings, and prints, as well as "obscene materials destined to be communicated publicly" (Robert, 1992, p. 1284). De la Bretonne's *Le Pornographe* therefore played a key role in pornography's evolution from ancient Greece to the present by giving a name to the modern phenomenon of pornography (Wyngaard, 2012). Renaissance and Enlightenment ideas still inform the regulation of pornography and child pornography at the national and international levels. These ideas include humanism (focus on the individual), human rights, and human dignity.

As we saw in Chapter 5, countries around the world have signed treaties aimed at protecting children from sexual exploitation. As soon as the virtual world of the Internet was opened up in the 1990s, pedophiles and pedopornographers (child

pornographers) moved online and transformed parts of the Internet into sleazy child pornography enclaves. This transformed child pornography from a problem that was confined to specific nation-states into a global problem. Child welfare advocates around the world re-presented the problem to the international community in order to keep international law abreast of technological innovation and media convergence. As a result, in 2000, the UN General Assembly strengthened the UN Convention on the Rights of the Child by adopting the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography. Under the provisions of the Convention on the Rights of the Child, police and law enforcement agencies around the world work hand in hand to suppress child pornography because it violates the human rights and human dignity of children. Child pornography is now illegal in all countries of the world.

9

Regulation of Sex-Themed Visual Imagery in the Muslim World

The Persian, Mughal, and Ottoman Empires

Until very recently, the expression "sex-themed Islamic imagery," or "erotic Islamic art," would have been considered a contradiction in terms. This is because sex-themed visual imagery, whether in real space or cyberspace, is one of the most unwelcome forms of media content in the Arab-Islamic world. Indeed, sex is a "taboo" subject in virtually all Muslim countries (Hafez, 2002). Indonesia, the largest Muslim country in the world, is illustrative of this reality. In 2007, it came face to face with the reality of the omnipresence of sex-themed visual imagery in our globalized, interconnected world. The *Djakarta Post* reported that in 2007, Erwin Arnada, editor of *Playboy Indonesia*, was prosecuted for violating his overwhelmingly Muslim country's indecency laws through the publication of *Playboy*, the flagship magazine of global sexual capitalism. Indonesia also happens to be the largest Muslim country in the world in terms of population. During Arnada's trial, the court was packed with members of Islamic groups who were offended that he was peddling the "moral decadence" of the Western world in Indonesia. The activists repeatedly interrupted court proceedings with shouts of "Hang him, hang him!" (Dhume, 2007). Interestingly, *Playboy Indonesia*, which had been launched in 2006, featured no nudity and no explicit sex acts. Nevertheless, Indonesian police investigated the two females who had been featured in the premiere edition of *Playboy Indonesia* for violation of the country's public indecency laws. A district court in Djakarta soon ruled that *Playboy Indonesia*, which had been adapted to the Muslim context of Indonesia and contained no nude images, could not be classified as pornographic. The judge discharged and acquitted Arnada (Former Playboy Editor Walks Free on Historic Ruling, 2011). The Indonesian Playboy bunnies were not prosecuted.

Indonesian Muslim groups appealed the ruling, claiming that Arnada, the *Playboy Indonesia* publisher, had violated the indecency provisions of the Indonesian Criminal Code. Arnada was arrested and ordered to face another trial (Former Chief Editor of *Playboy Indonesia* Arrested in Bali, 2010). The Jakarta High

Court convicted Arnada of publishing "soft" pornography and sentenced him to two years imprisonment (Court Ruling on Playboy a Threat to Press Freedom, 2010). Apparently, the name *Playboy* alone was sufficient to secure a conviction. On appeal, the Indonesian Supreme Court ruled that Arnada should have been tried under the Press Law of Indonesia, not the public indecency provisions of the country's Criminal Code. The court therefore discharged and acquitted Arnada after he had served all but one month of his sentence (Former Playboy Editor Walks Free on Historic Ruling, 2011). While Arnada was in jail, *Playboy Indonesia* folded—a victim of the six-year legal dispute. Sexual capitalism's foray into the world's most populous Muslim country had failed. The abortive attempt to open a *Playboy* franchise in Indonesia resulted in calls for stringent laws against pornography and indecency in the country. These laws essentially resulted in restrictions on some of the age-old, pre-Islamic artistic and cultural manifestations of Indonesia that featured bare-breasted men and women.

Figure 9.1 Globalization of sexual capitalism: International editions of *Playboy* magazine

Example of Regulation of Sex-Themed Visual Imagery in Saudi Arabia

Saudi Arabia is the birthplace of the Islamic religion and of the Prophet Mohammed. It is also the territory in which the holiest shrines of Islam—the Kabaa, an ancient stone building in the Grand Mosque in Mecca, and Medina, the burial place of the Prophet Mohammed—are found. In 2009, the *Los Angeles Times* reported that a court in Saudi Arabia had sentenced a 22-year-old journalist, Rozanna al-Yami, to sixty lashes for helping to produce a television talk show ironically titled *Bold Red Line*, in which a Saudi man from the Red Sea port of Jeddah bragged about his sexual exploits and displayed his sex toys—they were blurred in the broadcast. The Saudi government, which does not permit any sex-themed media content in real space or cyberspace, was not amused. The Saudi Arabian offices of the Lebanese Broadcasting Corporation, the television channel that broadcast the show, were promptly closed, effectively shutting down the station (Sandels, 2009). Fortunately for al-Yami and another female journalist indirectly involved in the production aspects of *Bold Red Line*, King Abdullah of Saudi Arabia intervened and granted them a pardon. Al-Yami declared that despite the pardon, her involvement in the production of the show had led Saudi society to pass a "death sentence" on her (Sandels, 2009).

The guests on the talk show were not so fortunate. The main guest's boasts about his sexual exploits earned him a sentence of five years imprisonment and one thousand lashes for "incitement to sin." The two other guests also received jail terms and three hundred lashes each (Sandels, 2009). Though this story sounded outlandish to Westerners who worship at the altar of "freedom of expression," it is not so strange in the Muslim world, where discussion of sex and sexuality in the media is part of a troika of taboos. The other two forbidden topics are religion and politics (Hafez, 2002). The fact is that all sex-themed imagery is strictly forbidden in Saudi Arabia and the rest of the Arab world, with the notable exception of Lebanon. In this part of the world, governments regulate the Internet through a series of measures that include licensing of bloggers, website filtering, and blocking of undesirable content through other means.

As the Erwin Arnada and al-Yami cases demonstrate, sex-themed visual imagery is highly problematic in the Arab-Islamic world. Governmental actions in Indonesia, Saudi Arabia, and elsewhere against pornography show that the Muslim world is in the midst of a "flare of moralistic iconoclasticism," to borrow the expression of Artan and Schick (2013, p. 161). The word "iconoclast," from which the word "iconoclasticism" originates, was an epithet used to describe Christians in the Byzantine Empire who considered religious images idolatrous and sinful. These iconoclasts, or breakers of images, destroyed religious imagery in churches and other places of worship. The term now describes systems or worldviews that frown on visual images of human beings and animals.

Fundamentalism, Iconoclasticism, and Terrorism

Since the last quarter of the twentieth century, the world has watched—and recoiled in horror—at mass-mediated and online images of individuals and groups who, with flaming zeal and supremacist religiosity, wantonly destroyed monuments, images, sacred places of worship, and priceless and irreplaceable works of art that

the UN Educational, Scientific, and Cultural Organization (UNESCO) had classified as part of the common cultural heritage of humanity. The most prominent and most dramatic examples of modern moralistic, self-righteous iconoclasticism include the Taliban's destruction of the sixth-century Buddhas of Bamiyan that were carved out of a mountain in Afghanistan and the Islamic State of Iraq and Syria's (the Islamic State's) destruction of ancient Assyrian artifacts in the Mosul Museum and Nineveh, in Iraq, as well as its bulldozing of ancient ruins in Nimrud, Northern Iraq, and Palmyra, Syria. The Islamic State has also occupied the ancient archeological sites of Palmyra, Syria. As the Islamic State approached the sites, archeologists made frantic attempts to cart away as many artifacts as possible to keep them from being destroyed by the Islamic State (Barnard and Saad, 2015; Parkinson, Albayrak, and Mavin, 2015). This destruction of supposedly idolatrous ancient images was carried out in accordance with Taliban and Islamic State interpretations of Islamic teachings.

The moralistic, iconoclastic turn in Islam has also been evident in happenings that have brought to the fore tensions between Western ideals of human rights and freedom of expression and Islamic ideals of respect for God, sacred religious rites, and personalities. The most prominent exemplars of this clash were (1) the Mohammed cartoons controversy of 2005–7—a global conflict triggered by the Danish newspaper *Jyllands Posten*'s publication of 12 cartoons of the Prophet Mohammed as a reaction against the censorious actions of Muslim groups in Denmark (Eko, 2012; Klausen, 2009)—and (2) the *Charlie Hebdo* terrorist attack, in which terrorists attacked the editorial offices of the French satirical newspaper *Charlie Hebdo* and killed 12 journalists, cartoonists, and police officers in retaliation against the publication of satirical cartoons of the Prophet Mohammed (Brody, 2015; Editorial Board, 2015). In these two crises, Islamic iconoclasts attacked Western iconoclasts who believed that the human right of freedom of expression trumped religious rights, that blasphemy was a sacred right/rite, and that they had a right to offend (Berkowitz and Eko, 2007).

Aim of the Chapter

Widespread and persistent media reports of Islamic moralistic iconoclasticism give the impression that Islam is, and has always been, an iconoclastic religion, a religion that abhors human and animal figural images of all kinds. Historical, cultural, and art-history evidence demonstrates that claims of universal Islamic iconoclasticism are inaccurate exaggerations. There are no explicit prohibitions against the representation of human and animal forms in the Qur'an. However, early Muslim religious art was generally characterized by vegetal, floral, and calligraphic decorations whose abstraction signified the transcendence of God (Lapidus, 2014). However, recent well-researched and well-illustrated scholarly studies, edited by Francesca Leoni and Mika Natif and published under the title *Eros and Sexuality in Islamic Art*, demonstrate that the expression "erotic Islamic art" is not a contradiction in terms. The material has been there all along. It has just been ignored. The fact is that since Islamic law is made up of diverse cultural interpretations of the Qur'an and the Hadith (the body of reports on the teachings, deeds, and sayings of the Prophet Mohammed), three of the major non-Arabic Islamic empires—Persia/Iran, India (the Delhi Sultanate and the Mughal Empire), and the

Ottoman Empire—produced masterpieces of decorative art that featured human and animal images. Some of these images were explicitly sexual in nature and illustrated equally explicitly sexual literary texts.

The aim of this chapter is to describe and explain the conceptualization and regulation of sex-themed visual imagery under the Safavid Empire of Persia/Iran, the Indo-Islamic Delhi Sultanate, the Indo-Mughal Empire, and the Ottoman Caliphate of Turkey. Though these empires had Islamic establishmentalities—there was an intimate entwinement between Islam and the state (Eko, 2012)—the degree of entanglement between religion and politics differed from the state-controlled popular and institutional religion in Safavid Persia/Iran to the relatively looser intermixture of religion, the state, and the arts in Mughal India to the institutional control and instrumentalization of Islam in the Ottoman Empire (Lapidus, 2014). Though they had different cultural interpretations of the Qur'an on a wide variety of issues, their postures toward the arts, including sex-themed visual imagery, are surprisingly identical. Indeed, in matters of art, architecture, and culture, the Safavid (Persian/Iranian) Empire was very influential on the artistic expressions of both the Ottoman Empire and the Indo-Islamic Mughal Empire.

Sources of Islamic Iconoclasticism

While sex-themed visual imagery has become taboo in virtually all Muslim countries—irrespective of their specific political systems, establishmentalities, and creeds—literary, cultural, and art-history evidence points to the fact that sex-themed visual imagery has not always been regarded in a negative light in Arab-Islamic cultures and civilizations. Indeed, what many contemporary Islamists, jihadists, and fundamentalists would consider idolatrous, "pornographic," "indecent," or "evil" today was considered acceptable artistic expression that constituted regulated representation under the great Arab-Islamic empires and caliphates. As we see later, in recent years, the field of Islamic studies has seen the emergence of studies of Muslim empires that highlight sex and sexuality in the arts and visual cultures of these empires. Scholars of the Middle East, the Ottoman Empire, Persia (Iran), the Indian subcontinent, and central Asia inform us that Muslim empires had thriving, sex-themed visual cultures that were essentially regulated representations commissioned by the sovereign and his ruling elite for purposes of depicting all aspects of life—from historic events to love and sexual activity.

In 2012, the Paris-based Institut du Monde Arabe (Institute of the Arab world) held an exhibition titled "Le Corps découvert" ("the Body Discovered"). It featured Arab artists from across the Arab world. The theme of the exhibition was the representation of the body and of nudity in Arab visual arts. The aim of the exhibition, which clearly had a political subtext, was to enable Western audiences to discover contemporary Arabic art and to appreciate the fact that despite repression and censorship, Arabic erotic art that features the nude bodies of men and women has been around for centuries and continues to exist despite the prevalence of moralistic iconoclasticism (Institut du Monde Arabe, 2012).

The question then is where Islamic prohibition against representations of humans and animals originates. Traditionally, Islamic iconoclasticism, with regard to artistic works that represent human and animal figures, is based on the Prophet Mohammed's teachings against idolatry (the worship of images), recorded in the

Hadith. According to the Hadith, the Prophet Mohammed prohibited artwork representing human and animal forms when he was reported as saying that "an angel will not enter a house where there is a picture on the wall or a dog on the floor." Mohammed is also reported to have declared that "those who paint pictures will be punished on the Day of Resurrection" (*Sunnah an-Nasa'i*, 5347, n.d.). This and other Hadiths regulate visual representation in the home. Iconoclasticism is observed in most of the Muslim world because the vast majority of Muslims regard the six authorized collections of Hadiths as being the highest written authority in Islam after the Qur'an.

We saw in Chapters 3 and 8 that European historians, archeologists, archivists, and museum curators of Greco-Roman art tended to ignore or downplay explicit sexual works of art in their research or exhibitions for politico-cultural reasons. Erotic pieces of art were often hidden away in museum backrooms that were accessible only to carefully selected scholars and important members of the political or cultural elite. This was the case with the erotic art of Pompeii and Herculaneum, which was hidden from public view for decades. It is therefore not surprising that historians of Islamic art, like their counterparts who study Greco-Roman art, would have tended to ignore, downplay, overlook, or even give symbolic spiritual interpretations to implicit and explicit erotic, or sex-themed, visual imagery produced in the Islamic world (Leoni and Natif, 2013; Natif, 2013). This occurs despite the fact that there is a substantial body of sexually explicit erotic material produced under royal patronage in the Muslim world. Indeed, scholars of the history of Islamic art have found "multiple, often contradictory beliefs about sexual activity and eroticism that challenge any assumptions of a monolithic Islamic attitude towards eroticism and sex" (p. 7). The "erotic iconography" of the Muslim world encompasses a range of sexualities and desires that include the portrayal of "male and female figures as sexualized objects, the spiritual dimensions of eroticism, licit versus illicit sexual practices, and the exotic and erotic 'others' as a source of sensual delight" (Leoni and Natif, 2013, p. 4).

Scholars have found that there are "two rather different divergent approaches to dealing with erotic and sexual themes in the art of the Muslim world. On the one hand there is the more subtle and elusive attitude that utilizes an indirect, often metaphoric visual language . . . On the other hand, we are faced with more explicit visual examples, going from scantily-clad bodies and flirtatious expressions of individuals and amorous couples . . . to images with orgiastic undertones . . . that culminate in the pornographic mode of both sex manuals and stand-alone pictures" (pp. 8–9). Natif (2013) suggests that in many cases, "without using explicitly sexual elements [artists] created sensual images that were infused with nuanced symbolism and sophisticated visual amorous allegories" (p. 43). Furthermore, "some Islamic mystical groups linked sexuality with religious practices" (p. 51).

The next section shows that despite prohibitions against pictorial representations of human beings and animals, the Shi'ite Safavid (Persian/Iranian) Empire, the Sunni Indo-Islamic Mughal Empire, and the Sunni Ottoman Empire did not consider pictorial representations of humans and animals—including sex-themed visual imagery—to be violations of Islamic doctrines. In these empires, the rulers were both sovereigns and grand patrons of the arts (Khandalavala, 1981; Lapidus, 2014; Mitchell, 2007; Welch, 1979). As such, they commissioned works of art and architecture, including sex-themed visual imagery, thorough systems of royal patronage. These were royal workshops that produced artistic, literary, and

utilitarian works and products for the royal household and for the elite. Lapidus (2014) summarized the state of the arts in the three empires as follows: "In all three empires, poets were summoned to court to entertain and praise the ruler and to compose poetry for military victories, birthdays, and royal celebrations. Through their poetry they expressed political, religious and erotic concepts" (p. 415). These artists framed their artistic representations—including representations of human and animal forms—in accordance with the cultural interpretations of Islam advanced by their royal patrons and their Sufi advisers rather than the strict, literal interpretations of the Ulama (preachers; Lapidus, 2014). One of the prominent themes of these visual and cultural memory objects was love and sex (Leoni and Natif, 2013). The visual images produced by the royal patronage systems of the Muslim empires under study were regulated representations of the life of the royals, and sometimes commoners, in specific historic periods. One of the most famous paintings of any Islamic empire is Sultan Muhammad's "The Ascent of the Prophet to Heaven," produced under Safavid (Persian) royal patronage. The painting depicts the Prophet Mohammed wearing a Safavid turban, riding on the human-headed steed Buraq, and ascending into heaven, accompanied by angels (Welch, 1979). Clearly, the Safavids had no prohibitions against images of the Prophet, since this painting was patronized by the shah himself. Interestingly, Shah Tamshap presented a copy of the *Book of Kings*, which contained this image, to the Ottoman Emperor (Welch, 1979).

Regulation of Sex-Themed Visual Imagery under the Safavids of Persia (Iran)

When one thinks of Iran, what comes to mind is a cascade of mass-mediated images of a country convulsed by the excesses of religion-inspired revolutionary fervor, strict segregation of the sexes, veiled women, the imposition of an austere and ascetic politico-religious regime that has no place for amusement or entertainment of any kind, censorship of the Internet, and the abolition of decadent Western music and sex-themed visual imagery of all kinds. That stereotypical image of Iran as cauldron of ascetic religiosity, religious fervor, and fanaticism is at variance with the rich art-history evidence and cultural legacy of pre- and post-Islamic Persia/Iran. History, Persia's literary and material cultures demonstrate that it was an artistic and cultural powerhouse that influenced the arts and literatures of central and southern Asia for centuries. Persian dynasties left a glorious legacy of crown-patronized and regulated visual imagery—especially the visual illustration and illumination of manuscripts, books, and erotic poetry—that greatly influenced the cultural and religious lives of the two other Islamic empires that are the subject of this chapter: the Indo-Islamic Mughal Empire, whose official language was Persian, and the Ottoman Caliphate, headquartered in Istanbul.

The most illustrious period of Persian history, in terms of artistic production, was the Safavid period (1501–1722). With its capital at Isfahan, the Safavid Empire encouraged the flowering of the arts. The shahs were connoisseurs of the literary and fine arts (Lapidus, 2014). The royal court patronized royal artists who produced works of extreme brilliance and sophistication despite Islamic prohibitions against images and likenesses of humans and animals and the severe punishment that, according to the Hadith, awaits artists and "painters of pictures" on the Day of Judgment. This was possible because the Safavid emperors were

politico-religious sovereigns as well as royal patrons of the arts. The shahs established famous royal workshops that produced majestic works of art and artifacts of all types. All artistic productions from these royal workshops were essentially regulated representations that bore the imprimatur of the shah. Welch (1979) suggests that "for an Iranian artist of the sixteenth century, the peak of worldly success was recognition at the Shah's court and membership in the royal workshop, a virtual magnet to which exceptional artistic talent was drawn" (p. 12). As we shall see later, the Indo-Islamic Mughal Empire and the Ottoman Caliphate created artistic workshops patterned after royal Persian workshops and often staffed them with famous Persian artists and craftsmen. Lapidus (2014) states that "Persian painting and crafts—including textile and carpet weaving, ceramics and metal work—flourished under the Safavids" (p. 380). Indeed, the Persians perfected the art of illuminating and illustrating manuscripts with miniature paintings and made the art "court practice" (Doniger, 2010).

The works of art created in the royal workshops ranged from exquisite miniature illustrations of manuscripts like the royal *Shahnama* (*Book of Kings*), the national epic of Persia, to royal portraits and large wall paintings in the shahs' palaces and harems. Leoni and Natif (2013) suggest that these royally sanctioned, regulated representations included erotic iconography, "Islamic erotic visual material . . . [a] rich array of images representing subjects such as love relationships, carnal desire, and sexual intercourse" (p. 9). The erotic works that were produced included Persian translations and illustrations of the Indian sex manual, the *Kama Sutra* (Babaie, 2013, p. 147). The state-sponsored Safavid workshops thus produced some of earliest sex-themed visual imagery in the Muslim world. The miniature erotic art of Figure 9.2, the Pen Box, crafted in 1712–13 by Hajji Muhammad (Isfahan), is a narrative that progresses from tender embrace to sexual intercourse. Despite the explicitness of the third image, the delicate sensuality of the piece is so skillfully executed that it does not strike us as being "pornographic," "obscene," or even indecent. The mostly clothed figures remind us of the delicate eroticism of the *shunga* of seventeenth-century Japanese artist Hishikawa Moronobu (Chapter 5).

The illustrated books and manuscripts of sixteenth-century Persia were what Welch (1979) calls "portable galleries of small masterpieces" (p. 11). The most famous artistic work produced by the Safavids under the ruler Shah Tahmasp was the richly illustrated Persian epic *Shahnama* (*Book of Kings*). This is the Iranian

Figure 9.2 Pen box (Isfahan, Iran; dated 1124 AH [1712–13 AD]; signed by Hajji Muhammad; papier-mâché body with lift-off lid and a lift-out inner compartment, painted and varnished, and all lined with leather; 36.5 cm. × 8.8 cm. × 8.2 cm.; courtesy of the Nasser D. Khalili Collection of Islamic Art, London)

national epic that was written by Firdawsi (ca. 934–1025). This grandiose work contains illustrations of the lives and loves of the kings of Persia—including some discreet depictions of their sex lives. The *Book of Kings* contains more than 250 paintings and is considered "one of the greatest masterpieces of Iranian-Islamic illuminated manuscript art" (Lapidus, 2014, p. 383). Among the most famous narratives and images from Shah Tahmasp's *Book of Kings* is that of Ardashir and his love affair with the slave girl Gulnar (Welch, 1979, p. 96; see Figure 9.3). Ardashir was the founder of the Sasanian Dynasty, and Gulnar happened to be the concubine of the Parthian king. The narrative states that Ardashir went to serve in the court of King Ardavan of the Parthians. Ardavan had constructed a special turret for his beloved concubine, the slave-girl, Gulnar. In an uncharacteristic twist, Gulnar sees Ardashir from her abode and falls in love with him at first sight. In the middle of the night, Gulnar uses a rope to lower herself from her tower to Ardashir's bedside. The young man is thrilled to see her. The lovers continue their nocturnal amorous rendezvous until Ardashir is forced to return home and succeed his late grandfather. He escapes Parthia with Gulnar. Ardavan tries in vain to pursue and stop the lovers. The illustration of "Ardashir and the Slave Girl Gulnar" is one of the masterpieces of the *Book of Kings* (Figure 9.3). It depicts, to use the expression of Lapidus (2014), "sensuality and realism" (p. 383). Shah Isma'il is believed to have commissioned miniature illustrations of the epic as a present to his son and the future shah, Tahmasp, who continued to patronize the illustration of the *Book of Kings* when he became king (Welch, 1979).

Another interesting sex-themed Safavid illustrated royal manuscript is the *Khamsa* (Quintet) *of Nizami*. It contains a narrative and illustration titled "Shirin Bathing" by Sultan Muhammad. It is a story about the love-struck Prince Khusraw of Iran, who sits on his horse and gazes trancelike at the object of his love, the Armenian Princess Shirin taking a bath in a pool (Welch, 1979). The ancient artist embedded in this sensual image a number of "visual amorous allegories . . . subtle yet irresistible sexual undercurrents," to use the expressions of Natif (2013, p. 3), to tell the story of the frustrating, unconsummated love between the prince of Iran and the princess of Armenia (Welch, 1979).

Kelly (1984) suggests that during the sixteenth century, "Safavid court artists in Tabriz elevated the arts of the book, miniature painting, and calligraphy, to unsurpassed levels. The achievement of Safavid miniature painters in intellectual conception, refinement of execution, and brilliance of color was also admired in Ottoman and Mughal domains . . . Safavid artists sometimes accepted employment in Indian and Ottoman courts and influenced the course of artistic development there as well" (p. 124).

Besides book illustrations and illuminations, the Safavids were also patrons of public and palatial mural art. Indeed, the Persians were masters of very large wall paintings (Welch, 1979). Shah Abbas is said to have decorated his summer palace with sex-themed or "licentious paintings" (Scerrato, 1994, p. 255). The most spectacular public mural art of the Safavid period was the mural decoration on the entrance gate into the Qaysariyya bazaar, "the royal-sponsored principal marketplace in Isfahan" (Babaie, 2013, p. 131). Isfahan, the capital of the Shi'ite Safavid Empire, was a vivid and colorful gallery of figural imagery of all sorts. Indeed, urban mural painting programs in Isfahan were mandated by royal decree. These paintings thus had political, religious, social, and sexual significance (Babaie, 2013). Some of these figural representations with "erotic undertones" were part of

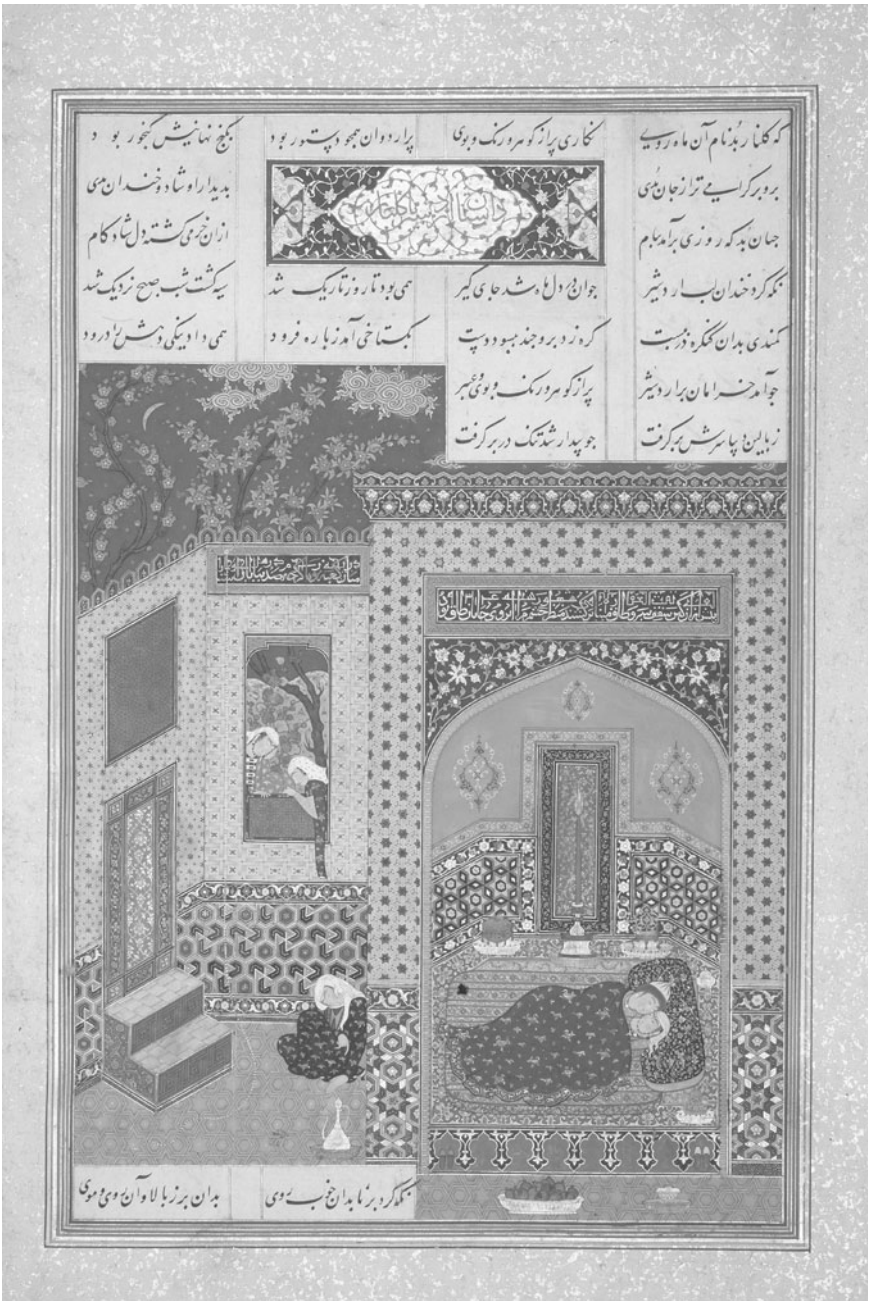

Figure 9.3 Ardavan's slave-girl Gulnar with the young Ardashir from the *Shahnamah* (*Book of Kings*) of Shah Tahmasp (Tabriz, Iran; dated 934 AH [1527–28 AD]; painting attributed to Mir Musavvir; 20.8 cm. × 17.1 cm. [illustration, within rules]; image courtesy of the Nasser D. Khalili Collection of Islamic Art, London)

the Safavid "politics of sexuality," which simultaneously parodied European "moral laxity" and condemned sexual abstinence: "The murals partake in the same visual conversation about the European practice of celibacy, and its generation of sexual perversity" (Babaie, 2013, p. 146). They thus had geocultural and political significance. The Safavid murals of Isfahan were political, social, religious, and cultural narratives writ large. Babaie (2013) concludes that the murals were context-based visual articulations of the geopolitical worldview of the Safavid ruler, the shah. As such, they were regulated representations:

> The Isfahan period represents what might be called a "sexual age" during which literary, theological and pictorial musings on sex seem to be on the rise . . . In the [Safavid] murals, we find the most publicly visible and surprisingly candid representations of a period fascination with the obscene and the indecent, a phenomenon that has literary and theological manifestations in such examples as the contemporary translation into Persian and the illustration of the *Kama sutra*, the writing of anti-Christian treatises that condemn sexual abstinence, and poetic visuals in single sheet paintings that point to the sordid side of European male yearning for sex. (p. 147)

Regulation of Sex-Themed Visual Imagery under the Islamic Dynasties of India

Islam came to India like it did to most parts of the world—through military conquest. Islamized Arabs, Turks, and Mongols attacked India at different periods in time. After defeating the Hindu armies of Indian kings and princes in 1192 and 1193, Muslim armies from northeast and central Asia captured and occupied Delhi. They subsequently spread their rule to other parts of the predominantly Hindu Indian subcontinent. These conquests led to the establishment of the Delhi Sultanate, an independent Indo-Islamic state that ruled India from 1206 to 1526. The rulers of the Delhi Sultanate ruled under the Hanafi School of Sunni Islamic Law, which was the most liberal and the most flexible of the Islamic schools in matters of criminal law, treatment of non-Muslims, and individual freedoms (Warren, 2013). The Hanafi School was the dominant school of Islamic law in the Ottoman Empire as well as other parts of central Asia. It is still the most influential school of Islamic law in the world (Warren, 2013). The fundamental tenet of this school of Shari'a law, in terms of treatment of non-Muslims who lived in lands conquered by Muslim armies, was that these "infidels" could be allowed to live under Muslim rule and worship as they pleased as long as they acknowledged Islamic governance and paid a religious tax to the Muslim authorities (Warren, 2013).

In 1981, the National Museum of India in New Delhi held an exhibition titled "The Islamic Heritage of India" and published an accompanying commemorative book. The purpose of the book was to celebrate the fourteen-hundredth anniversary of the Hijra, the journey of the Prophet Mohammed and his followers from Mecca to Medina in 622 AD, the first year of the Islamic calendar. The exhibition contained an eclectic collection of Islamic artifacts, works of art including illustrated manuscripts, and miniature paintings influenced by the Safavid period in Persia. It also included a Persian painting of the Prophet Mohammed, paintings on Christian and Hindu religious themes, decorative art, armaments, and even a piece on a mundane subject: an elopement. However, the exhibition did

not feature or mention the considerable sex-themed art that flourished under the Delhi Sultanate and especially under the Mughals. The rest of this chapter explores that aspect of Indo-Islamic art.

Regulation of Sex-Themed Visual Imagery under the Delhi Sultanate

In terms of the arts in general and visual arts in particular, the successive rulers of the Delhi Sultanate had, with a few notable exceptions, a rather liberal attitude toward illustrative art that included human and animal forms. Since the Muslim conquerors of India had come from central Asia, the artistic works produced under the Delhi Sultanate were of a style of Indo-Islamic art that was heavily influenced by the artistic traditions of Persia and Afghanistan (Khandalavala, 1981). In matters of learning and artistic and cultural production, the main characteristic of the Delhi Sultanate was its system of state patronage of the arts. Khandalavala (1981) advances the idea that throughout the three-and-a-quarter centuries of the Delhi Sultanate period (1206–1526), there were royal *karkhanas*, or workshops, that produced both artistic and utilitarian products. Generally speaking, the sultan was both the sovereign of the sultanate and the patron of the arts and of learning (Khandalavala, 1981; Mitchell, 2007; Vatsyayan, 1987). This Persian-style system essentially made Indo-Islamic visual arts and literary culture regulated representations produced within the framework of the religious and cultural values of the sultanate. This was therefore a system of royal regulation and control through patronage. Khandalavala (1981) states that even though Indian Hindu and Muslim artisans who were employed in the royal workshops were "required to conform to the designs that were favored by the Sultanate rulers and their entourages, their own artistic ideas . . . constantly crept into and Indianized their work" (p. 4). Art-history evidence points to the fact that "despite the Islamic injunctions" against the representation of human and animal forms, "figural and bird and animal painting was prevalent in Sultanate India from early Sultanate times" (Khandalavala, 1981, p. 4). Both mural paintings and manuscript illustrations were part of the regulated artistic representations of the Delhi Sultanate.

Though sex-themed visual imagery is generally absent in books, catalogues, and exhibitions of Indo-Islamic art, there is sufficient evidence that such art did exist as murals as well as miniature illustrations in manuscripts. In his essay "Islamic Heritage of India," which accompanied the National Museum of New Delhi's exhibition, Khandalavala (1981) writes, "With regard to wall paintings in palaces we know of erotic paintings having adorned palaces in the Ghaznavid kingdom [Persia] and also in India during the reign of Sultan Iltumish. That figural wall painting was prevalent in Sultanate India is confirmed by the edict of Shah Tughluq (1351–88) whereby he forbade the drawing of animate forms either in private apartments or picture galleries . . . and ordered the effacement of pictures and portraits painted on doors and walls of palaces" (p. 5). The most common forms of Indo-Islamic painting were manuscript illustrations. As we saw in Chapter 6, Doniger (2014) suggests that some Muslim rulers of the Delhi Sultanate were connoisseurs of Indian erotic art. Sikander Lodi of the sixteenth-century Muslim Lodi Dynasty of the Delhi Sultanate commissioned the illustration of a manuscript of the Indian love story *Chandayana* from the *Mahābhārata*, one of the two major Sanskrit epics of ancient Hindu India. Khandalavala (1981) suggests that in the

last quarter of the fifteenth century, the Muslim sultans of India looked to Persia for artistic and literary inspiration. Persian, rather than Arabic, was the official language of the Mughal court. Translation and illustration of Indian Hindu epics—Hinduism was the religion of the majority of the ruled—was part of "the new movement in [Indo-]Islamic painting of manuscripts by Persian as well as Indian artists of Persian texts which had manifested itself in India" (Khandalavala, 1981, p. 7).

Regulation of Sex-Themed Visual Imagery under the Indo-Islamic Mughal Empire

The greatest phase of Islamic painting in India was that of the Mughal School (Khandalavala, 1981). In effect, in 1526, the Mughal (Mongol) warriors of Emperor Babur defeated the last of the Muslim Lodi sultans, Ibrahim Shah Lodi. The Mughals were Islamized ethnic Turks of Mongol origin who had been part of the Mongol Empire of Genghis Khan, the warrior who had conquered most of central Asia and parts of eastern Europe (Mitchell, 2007). The "Indianised" Muslim Mughals ruled India for more than six hundred years. During that period, they created a "visual world" with a remarkable "artistic harmony" that reflected the patronage, artistic taste, preferences, and imprint of the Mughal emperors (Mitchell, 2007). In short, the artistic world of the Mughals was a world of regulated visual representations. Though early Mughal miniature painting (mostly manuscript illustration) demonstrated a marked Persian and Turkish influence, the intermixture of Islamic and indigenous Hindu cultures under the Mughals led to the emergence of an Indo-Islamic art, culture, and architecture (Doniger, 2010; Khandalavala, 1981). We saw previously that the Delhi Sultanate had a system of artistic workshops patronized by the rulers. The Mughal emperors who defeated and overthrew the Delhi Sultanate continued this system.

Like the Persian shahs, the Mughal emperors were patrons of the arts. They created imperial workshops and commissioned artistic and architectural works that combined Muslim, Hindu, and even Christian themes. Emperor Akbar formed a famous imperial workshop of skilled artists trained by Persian masters. The artists from this royal workshop produced works of art, calligraphy, and miniature paintings that illustrated manuscripts of epic stories and royal biographies. This workshop was patterned after the famous and influential Safavi workshop created by the Persian leader Shah Tahmasp, whose illustrated *Book of Kings* we discussed earlier (Doniger, 2010; Khandalavala, 1981; Mitchell, 2007).

Under the Mughals, and specifically Emperor Akbar, the visual arts were regulated representations that came under the direct purview of the royal court. Doniger (2010) suggests that the Mughals extended patronage to many Hindu scholars and commissioned the translation and illustration of many Hindu works from Sanskrit to Arabic and Persian. From 1580 onward, the imperial workshops of the Mughals translated and illustrated manuscripts on a wide range of subjects. These included the *Ramayana* and the *Mahābhārata*, the two major sacred Sanskrit epics. The *Mahābhārata* has narratives that depict all kinds of sexualities, including polyandry: its heroine, Draupadi, had five husbands who also happen to be brothers. She is also mentioned in the *Kama Sutra* (Doniger, 2014). Additionally, the Mughal emperors Akbar and Dara Shikoh commissioned translations

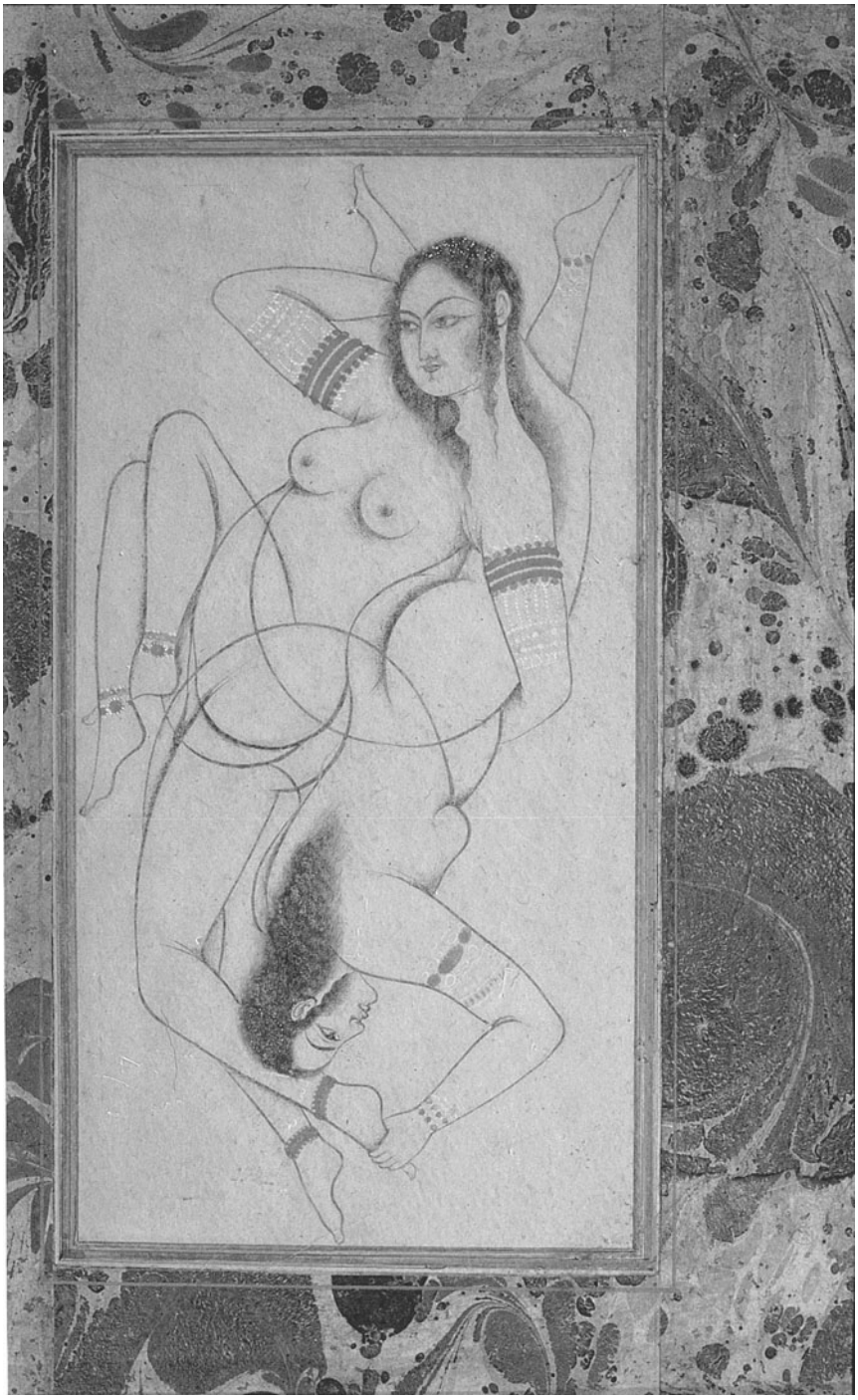

Figure 9.4 Album leaf depicting two intertwined women (Mughal art; eighteenth century; Mughal School)

of Hindu erotic arts and religious texts from Sanskrit to Persian, the language of the Muslim conquerors, "and illustrated them with Persian painting techniques" (Doniger, 2014, p. 405). The Hindu erotic works translated and illustrated by the Mughals included the *Kama Sutra*. Doniger (2014) asserts that the Mughals commissioned the translation—into Persian and Arabic—and illustration of the "great" works of Sanskrit eroticism, of which there are many. Doniger (2010) adds that the "erotic literature of the Turks and Persians easily assimilated translations of the *Kama-sutra* into Persian, often with wonderful illustrations; the Persian was then translated into European languages" (p. 549). Some Mughal paintings depict Muslim emperors engaged in very intimate sexual activities in their royal harems. Some paintings of Emperor Jahangir (1605–27) depict the ruler making love in a sexual position "reminiscent of Hindu depictions of Krishna and Radka, and illustrations in the Kama Sutra" (Schimmel and Burzine, 2004, p. 277).

Regulation of Sex-Themed Visual Imagery under the Ottoman Caliphate and the Turkish Republic

As we saw in Chapter 1, in 2006, the Turkish government prosecuted Turkish archeologist Muazzez Ilmiye Cig, one of the foremost experts in ancient Near Eastern civilizations, on the criminal charge of inciting religious hatred. In effect, the 92-year-old scholar had published a scholarly paper in which she wrote that in ancient Sumeria, one of the first human civilizations, the religious headscarf, or veil, was a symbolic garment worn by sacred or temple prostitutes or priestesses (Arsu, 2006). Cig's archeological research had essentially revealed that the veil was a religious/sexual artifact that predated both Christianity and Islam. We also saw that a court in Istanbul, Turkey, discharged and acquitted Cig of all criminal charges. This case revealed the binary tensions that are part of the reality of modern Turkey: the pull of Westernization and democracy and the resistance of Islamic conservatism. Turkey is a country whose geography, history, and governmentality (logic of governance) are marked by layers of binary realities and tensions. Part of Turkey is in Europe, while the other is on the Asian landmass. Turkey is a republic that is the successor state of the Ottoman Empire, the vast Muslim caliphate that, at its height, stretched across North Africa, the Middle East, most of southeastern Europe (the Balkans), and the Caucasus, as well as central and southern Asia. Turkey is a predominantly Muslim country (98 percent) with a secular constitution. However, the imprint of religion on Turkey is unmistakable. The largest Turkish city, Istanbul, is the former Constantinople, capital of the Christian Eastern Roman (Byzantine) Empire that was captured by invading armies of the Ottoman Empire in 1453. Istanbul was once the center of the Muslim world. Despite this legacy, art-history evidence shows that Turkey was a center of visual art and culture that included sex-themed visual imagery produced under the patronage of a number of Sultans.

Regulation of Illustrated and Illuminated Book Manuscripts in the Ottoman Empire

In the early sixteenth century, after successful military conquests, the Ottoman Empire inherited the role of "Muslim world leadership." Istanbul became the center

of the Muslim world, and the Ottoman rulers took on the titles "Warrior of the Faith" and "Defender of the Shari'a" (Lapidus, 2014, p. 337). From a legal and governance perspective, the Ottoman Empire was an absolute, authoritarian, dynastic, Islamo-Turkic caliphate. Lapidus (2014) observes that "the Ottoman Empire was not only governed but 'owned' by the sultan. All the revenues of the empire were his property . . . The patrimonial authority of the Ottoman sultan was foremost. The state was his household; the subjects his personal retainers. The soldiers were his slaves. The territory of the empire was his personal property" (pp. 339, 344). Nevertheless, like the Mughal Empire discussed previously, the Ottoman Empire adopted the relatively liberal Hanafi School of legal interpretation as the official legal regime of the empire. Though Islamic courts applied Islamic legal precedents, legal scholars were brought under state control, and Islamic law was supplemented by royal decrees that regulated many aspects of life. These executive actions were "considered to be a valid extension of religious law . . . What makes the Ottoman period distinctive in Islamic legal history is the leading role of the state [rather than religious leaders] in law making and adjudication" (Lapidus, 2014, p. 342). This is an important distinction because it gave rise to diverse cultural interpretations of the Qur'an with respect to representational art that contained human and animal images, including the image of the Prophet Mohammed (Welch, 1979). In the Ottoman Empire, as in the Safavid (Persian) and Mughal Empires, the ruler was both the sovereign and the patron of the arts. Over the centuries, these royal patrons sponsored art that was at variance with Islamic iconoclasticism. Lapidus (2014) further suggests that pictorial art that contained human and animal figures was produced in royal ateliers under the auspices of Muslim caliphs, sultans, and sheikhs: "Representational images were found in 'Abbasid, Fatimid, Persian, Indian, and Ottoman art produced under royal patronage and for court consumption, although this was much less common in the Arab world" (p. 101). These artistic representations were thus royally regulated representations.

We saw previously that in 1568, Shah Tahmasp of Shi'ite Safavid Persia (Iran) presented a copy of the illustrated Persian national royal epic *Shahnama* (*Book of Kings*), which contained sex-themed narratives and illustrations, to Sultan Selim II of the Ottoman Empire (Welch, 1979). Despite the fact that both empires had theological and political differences, the arts of the Ottoman Empire were greatly influenced by the artistic endeavors of their neighbor, the Safavid Empire. Indeed, in the literary and artistic domain, the Ottoman court competed with the Mughal, Safavid, and Uzbek courts for the best artistic talent (Welch, 1979). Manuscript illustration was part of the Ottoman sense of "imperial destiny," as Lapidus (2014) put it. In effect, during the fifteenth and sixteenth centuries, the Ottoman Empire, like its rivals in central Asia, maintained a royal court atelier of calligraphers, painters, illuminators, map makers, and bookbinders to produce manuscripts, illustrated histories of the major events of the caliphate, and utilitarian products. Persian illustrated manuscripts served as the template that Ottoman artists used to reproduce illustrated Persian classics. One such classic was the *Love Story of Khostraw and Shirin* discussed previously (Lapidus, 2014).

Regulation of Sex-Themed Visual Imagery in the Ottoman Empire

Artan and Schick (2013) suggest that though the Ottoman Empire left a rich legacy of erotic literature compared to the Safavid Islamic Empire of Persia and the Indo-Islamic Mughal Empire discussed previously, the Islamic Ottoman Empire was relatively tame in terms of its production, consumption, and regulation of sex-themed visual imagery. Nevertheless, it was not an enclave immune from the diffusion of the sex-themed visual images produced in other parts of the Muslim world. In effect, art-history evidence points to the fact that the Ottoman Empire became the cultural confluence of the Islamic world. In matters of art, architecture, literature, book production, and illustration, Istanbul became the cultural center that provided the ideal conditions for the diffusion, translation, circulation, and consumption of Arabic, Safavid (Persian/Iranian), and Indo-Mughal artistic and literary works. Some of these literary works were illustrated manuscripts and books of famous sex-themed poetic and prose narratives.

Artan and Schick (2013) advance the idea that once sex-themed Arabic, Safavid, and Indo-Mughal literary works diffused to the Ottoman Empire, these prototypes were "Ottomanized, . . . [through] a process of localization, vernacularization" (p. 163). In this process, Ottoman artists created "an iconography for stories which had never been illustrated before" (p. 164). This enculturation process was generally overseen by the royal court, which served as the patron of the arts. The royal Ottoman court had a patronage system that was identical to that of the Safavids in Persia and the Mughals in the Indian subcontinent. The Ottoman sultans commissioned translations and adaptations of Persian or Mughal illustrated literary works, localizing them in the process (Artan and Schick, 2013; Lapidus, 2013). Sometimes royal patronage of sex-themed visual imagery had a very personal touch. Artan and Schick (2013) write that a physician at the imperial Ottoman court adapted an explicit, sex-themed work titled *A Treatise on sex and Conception* "from a number of Eastern sources" and presented it to Sultan Ahmed III: "The text dwells particularly upon the subject of reviving diminished sexual appetite . . . from which he [the Sultan] is said to have suffered" (p. 159). Imperial Ottoman patronage essentially made sex-themed works regulated representations. However, the Ottoman rulers were not the only patrons of illustrated sex-themed books. Artan and Schick (2013) suggest that throughout the course of time, "the outstanding proliferation of such [erotic] themes was the outcome of a new kind of artistic patronage at the time—liberated from the court, its official agenda(s) and its visual decorum" (p. 174). This was elite patronage of artistic works for commercial purposes. A market had developed in Europe for exotic and erotic Turkish art.

In the eighteenth century, the Ottoman Empire produced a significant body of regulated sex-themed imagery—paintings "that ranged from the mildly suggestive sinuous dancers and lounging ladies . . . to highly explicit images of copulation . . . the principal venue for erotic images were works of prose literature" (Artan and Schick, 2013, p. 157). We noted that the Japanese *shunga* originated from illustrated medical books written and "published" in China. The phenomenon of medical books serving as templates for sex-themed visual imagery also took place in Ottoman Turkey. The cultural phenomenon of *bàhnàme* (books of sex-related subjects) emerged during the Ottoman Caliphate. These were "part-medical, part-erotic treatises covering a wide range of subjects from taxonomies of

genitalia to catalogues of sexual positions, aphrodisiac recipes to risqué anecdotes" (Artan and Schick, 2013, p. 157). One of the first sex-themed books to diffuse in the Ottoman Empire was the *Imperial Bàhnàme (Imperial Book of Sexology)* that originated in Persia. This work was translated from the Persian and presented to Sultan Murad II, caliph of the Ottoman Empire. Scholars have been able to identify more than fifty illustrated sex-themed books published during the Ottoman Caliphate. One of the illustrated books was titled *The Book of Sexual Intercourse* (Artan and Schick, 2014). The most famous sex-themed work of the Ottoman realm was the Turkish translation and localization of a very sexually explicit book titled *Return of the Old Man to Youth through the Power of Sex*, which contained explicit heterosexual and homoerotic illustrations (Artan and Schick, 2014). Illustrated stories from this officially sanctioned work would be classified as illegal hardcore pornography in Turkey today.

European Influence on Eighteenth-Century Ottoman Sex-Themed Art and Turkish Influence on European Erotica

One of the most interesting facts about the regulation of sex-themed visual imagery in the Ottoman Empire in the late seventeenth century is that artistic endeavors evolved beyond royal patronage and official commissions intended to supplement the Topkapi Royal Palace's manuscript collections. It is a testament to the spirit of the age that one of the Sultan's official painters, portraitist Musavvir Hüseyin, progressively added elements of "beauty, sensuousness, and erotic appeal" to his portraits of females (Artan and Schick, 2013, p. 162). As the exotic Ottoman Empire, and especially its harems, became the subject of European orientalist fascination, Musavvir Hüseyin tailored his paintings to suit European tastes. He painted harem scenes and attractive, sexy women (Artan and Schick, 2013). These "exotic" Ottoman harem images had a lasting impact on European sex-themed art: "Although it is true that these figures were later adapted to European tastes by prominent Orientalist artists and thus contributed to making up the corpus of modern Western erotica, they are in fact not necessarily erotic in themselves" (Artan and Schick, 2013). Nevertheless, regulated representations in the Ottoman Empire were perceived and reinterpreted within the framework of the Western orientalist imaginary. Artan and Schick (2013) conclude that "the fact that most Ottoman erotic miniatures are or have been in European collections would suggest that they were in demand among European travellers" (p. 176). The historic irony is that European erotic art was influenced, to a large extent, by European artistic interpretations of the perceived exotic sexuality of Turkey and other Muslim countries of Asia and the Middle East.

Regulation of Sex-Themed Visual Imagery in the Turkish Republic

After the defeat, occupation, and partition of the Ottoman Empire in World War I, Turkish nationalists fought a victorious war of independence against proxies of the Western powers that had defeated and dismembered the empire. In 1923, Mustafa Kemal Atatürk and the Grand National Assembly proclaimed Turkey a republic. The following year, the Ottoman Caliphate was officially abolished. Atatürk conceptualized the young Turkish republic as a modern secular state with Western

values grounded on Islamic culture and traditions. This gave Turkey a unique Islamo-secular political culture in which religion and the state are entwined (Eko, 2012). Turkey traditionally frowns on ostentatious religiosity but criminalizes blasphemy, which is officially called defamation of religion. Turkey is a member of the North Atlantic Treaty Organization (NATO) and has ambitions of becoming a member of the European Union. As a result, the country is torn between Islamic traditionalism and Westernization. This is what Çolak (2006) calls the tension between Ottomanism and Kemalism. That has meant invocation and deployment of the collective memory of Turkey's Islamist Ottoman past as a bulwark against the forces of globalization and cultural pluralism. It has also meant the revival of the modernization and Westernization ideology of Mustafa Kemal Atatürk, the founder of the Turkish Republic. Turkey's head wants to be in Europe, but its heart is in central Asia. Regulation of the sex-themed visual imagery in the age of the Internet and the globalization and interconnection of nations and peoples reflects these politico-religious logics and tensions. Turkey has struggled to balance Westernization—and the freedom of speech and of the press that are part and parcel of membership in the European Union—with an expectation of respect for Islam. Under the combative, Islamist prime minister and president, Recep Tayyip Erdogan, Turkey took a sharp Islamist, "Ottoman" turn that is reflected in the regulation of sex-themed visual imagery. Turkey criminalizes pornography as an offense against public morality. In 2006, the government banned four pornographic television channels—*Playboy TV*, *Exotica TV*, *Adult Channel*, and *Rouge TV*—on the grounds that pornography violated Turkish cultural values.

The Turkish Criminal Code has a battery of content-based regulations that have shaped the nature of the Internet in the country. Law 5651, "On Regulations Concerning Publications on the Internet Environment and the Crimes Committed through These Publications," was enacted in 2007. Under this law, anyone who wanted to start a website or cybercafe, or to become an Internet service provider or an interactive service provider, was required to have a permit or the euphemistic-sounding "location provider activity certificate." The law amended the Turkish Criminal Code to penalize "child abuse," "obscenity," and prostitution on the Internet. Under this law, which does not define the word "obscenity," the Prosecutor of the Republic, the National Internet Regulatory Agency, the Presidency of Telecommunication and Communication, criminal courts, and the president of Turkey have the power to block offending websites, bloggers, and social media applications. The Turkish Internet Regulatory Agency has the power to ban websites containing child pornography and the vague, malleable crime of "obscenity" and to forward the decision to a court of law for approval (Presidency of Telecommunication and Communication, Turkey, 2015). Article 226 of the Turkish Criminal Code provides the closest definition of the word "obscenity" under Turkish law. The article states, in part, "Any person who produces audio-visual or written material containing sexual intercourse by using violence, or with animals, or body of a dead person, or performed in an unnatural manner; or engages in import, sale, transportation, storage of these materials or presents such material to other's use is punished with imprisonment from one year to four years" (Turkish Criminal Code, 2004, art. 226/4). Courts have interpreted the "*unnatural manner*" clause to include oral and anal sex.

Additionally, less than a decade after the US Congress opened up the Internet to national and international educational, cultural, and commercial transactions,

Turkey moved to control objectionable pornographic, political, and entertainment content (video games) at the local level for social, moral, and religious reasons. Cybercafes were not allowed within 100 yards of a mosque or school. The Ministry of Internal Affairs subsequently passed an ordinance restricting the content that cybercafe owners grant viewers access to. Those cybercafes that allowed their patrons to surf pornographic or "separatist" (Kurdish) websites on the Internet faced immediate closure (Yesil, 2003). The suppression of pornographic material in real space and cyberspace is part of Turkey's movement toward censorship of media content that is critical of the government or of religion (Pierini and Mayr, 2013).

Regulation of Sex-Themed Visual Imagery in the Muslim World: The Arab Satellite Broadcasting Charter

In matters of pictorial representation, and especially sex-themed visual imagery, the three Muslim empires that we have discussed in this chapter had legal systems that amalgamated Islamic law and imperial law. While the former is iconoclastic, the latter tolerated pictorial forms of all types, including officially sanctioned, sex-themed visual images. This was especially true of literary narratives and their accompanying illustrative imagery that echoed exhortations from the Qur'an or paid lip-service to religiosity. Since the 1960s, countries of the Arab-Islamic world have watched the sexual revolution and the rapid expansion of sexual capitalism in Western countries with a mixture of disgust, revulsion, and righteous indignation. As we saw previously, sex is one of the taboos broadcasters in the Arab-Islamic world have to avoid at all cost. As a result, all Muslim countries ban pornographic websites and systematically block all pornographic content on religious and moral grounds.

The launching of *Al Jazeera, Al Arabiya*, and other international broadcasters based in the Middle East led to intense competition for audiences. The explosion of pornography on specialized television and cable channels, as well as on the Internet, led the Arab League to advance the Arab Satellite Broadcasting Charter. The signatories of this charter, which is drawn within the framework of the communications policies of the League of Arab States, stated that the charter "reflects the collective Arab will." The preamble of the charter said broadcasting in the Arab world was aimed at maintaining Arab identity and Islamic culture. Arab broadcast signatories undertook to "prevent from satellite broadcasting transmission and satellite broadcast programming any materials that would include obscene scenes or dialogue or pornography" (Arab League, 2008, art. 6[11]). All member countries of the Arab League signed the charter. The only country that declined to sign it was Qatar, home of *Al Jazeera*, the international broadcaster founded and funded by the Emir of Qatar.

This chapter compared the regulation of sex-themed visual imagery by the Indo-Islamic Delhi Sultanate and three historic Islamic empires: the Safavid (Persian) Empire, the Indo-Islamic Mughal Empire, and the Ottoman Empire. These empires patronized artistic and literary creations that included representations of human and animal forms, a category of material that is frowned upon in the legislative texts of Islam. These empires also regulated sex-themed visual imagery within the framework of their specific cultural interpretations of Islam.

This chapter shows that the Delhi Sultanate, the Safavids, the Mughals, and the Ottomans conceptualized visual imagery, including sex-themed visual imagery, as an instrument of cultural memory that preserved the narratives of their times. These empires did not conform to the stereotypical, homogeneous, ascetic religiosity that is often ascribed to all Muslims. Indeed, Persian, Mughal, Indo-Islamic, Turkish, and even Afghani sex-themed visual imagery that was produced under the patronage of the great Muslim empires shaped European erotica (Artan and Schick, 2013). The Mughals and Persians globalized the *Kama Sutra*, the ancient Indian Hindu treatise on love, desire, sex, and sexuality, by translating it from Sanskrit to Persian and Arabic (Doniger, 2014).

Part II

Regulation of Sex-Themed Visual Imagery

Continuity, Change, and the Legal Turn

The regulation of sex-themed visual imagery is marked by a perpetual tension between continuity and change. Our modern regulatory systems evolved from ancient roots and sources. We saw in Chapter 3 that the US House of Representatives recognizes Hammurabi, whose celebrated code regulated temple prostitutes in ancient Babylon, as a historical figure who has helped established the principles of American law (Architect of the Capitol, 2014). We saw in other chapters that the very vocabulary of sexuality and its regulation emerged from ancient cultural conceptualizations and regulations of sex and sex-themed visual imagery. At the heart of contemporary regulation of sex-themed visual imagery is the tension between the status quo and change, between traditionalism and "modernism." This section of the book traces how the clash between the advocates of sexual liberation led by Hugh Hefner, founder of *Playboy* magazine, and his sexual capitalist allies went to war—a cultural war—with conservative forces led by the Roman Catholic Church over issues of sexual freedom and public morality. While Hefner saw his magazine as an instrument of liberation for men, the church saw it as debasement, commercial sexual exploitation, and a loss of human dignity.

In effect, the sexual revolution of the late 1950s and early 1960s touched off a cultural war over sex and sexuality that is still ongoing. As the revolution relaxed cultural taboos against the portrayal of sex in the media, softcore pornography became mainstream entertainment (Southwell, 2006). In the face of calls for sexual liberation, the elimination of Puritan and Victorian hang-ups, and free love, the Roman Catholic Church wasted no time reiterating its traditional dogma on sexuality and the family. The church's Twenty-First Ecumenical Council, which took place from 1963 to 1965, reiterated the position of the Catholic Church with respect to the media, marriage, sex, and the family. In its Decree on the Instruments of Social Communication, the Second Vatican Council classified the media as instruments of social communication that have a "socializing force." As such, they were to be governed by "moral norms" such that sexual content was to be handled delicately, reverently, and decently in order not to "trigger base desires in

man, wounded as he is by original sin." Therefore, the church advised Christians to consume only media content that "fosters virtue, knowledge or art," material that did not "jeopardize faith or good morals" (Abbott, 1966, pp. 323–24). The Ecumenical decree called on the "public authority" (governments) to ensure, "in a just and vigilant manner, that serious danger to public morals and social progress do not result from a perverted use of these media instruments" (p. 326). In its pronouncements on the family, the Second Vatican Council reiterated its teaching on the sanctity of traditional marriage and family. It noted that the "excellence of the lofty sacrament of marriage was being obscured by polygamy, the plague of divorce, so-called free love, and other disfigurements . . . in addition, married love is being profaned by excessive self-love, the worship of pleasure, and illicit practices against human generation" (p. 249).

When it appealed to the governments to use the power of the state to protect and promote public morality, the Catholic Church essentially appealed to the courts to act as referees in the brewing culture wars. The sexual capitalism industry in the United States was happy to engage in this war. From the outset, *Playboy* and other actors of the pornography industry assumed a libertarian posture. They shrewdly appropriated the terminology of freedom and effectively deployed it to counter the moral pronouncements of the church. Hugh Hefner, the founder of *Playboy*, proclaimed at every opportunity that pornography was emancipation. Ultimately, the pornography industry called itself the "Free Speech Coalition," essentially seeking shelter under the umbrella of the near-sacred First Amendment. The courts became the final arbiters of the definition and regulation of sex-themed visual imagery: pornography, obscenity, and indecency. In the last fifty years, American courts have issued landmark decisions that have defined the contours of freedom of expression in real space and cyberspace under the First Amendment.

This section surveys how mass-mediated, sex-themed visual expression was transformed from morally dubious fringe entertainment to the multibillion-dollar stock-in-trade of global sexual capitalism, using as case studies a number of legal disputes adjudicated by the courts. These landmark cases have defined the contours of the regulation of sex-themed visual imagery in the United States. Chapter 11 explores the phenomenon of sexual capitalism and its skillful instrumentalization of the Freudian notion of repression to argue for sexual emancipation and present pornography as "sexual speech and expression" protected by the First Amendment. Chapter 12 explores the role of organized crime in the production, distribution, and popularization of sex-themed visual imagery. It discusses a number of cases that show how the Mafia was instrumental in mainstreaming pornography and expanding the scope of freedom of expression in the United States. Chapter 13 explores challenges posed by government employees who thought they had a constitutional right to indulge in sexual speech. In Chapter 14, I explore the intellectual property aspects of the regulation of sex-themed visual imagery and discuss a few cases that demonstrate how the sexual capitalism industry attempted to use copyright law to censor and control former employees of the industry and blackmail consumers of pornography into paying hush money. Since we are in the age of globalization, a phenomenon marked by the interconnection of nations, peoples, and cultures through the Internet and social media, some of these American court decisions have impacted sex-themed visual imagery around the world.

10

Regulation of Explicit Visual Sexual Imagery in the United States

The Tension between *Agape* and *Eros*

In 1999, the Brooklyn Institute of Arts and Sciences organized a temporary exhibition called "Sensation: Young British Artists from the Saatchi Collection." The mayor of the city of New York, Rudi Giuliani, called the exhibition "sick" and "disgusting." The mayor found one particular work, a "painting" titled *The Holy Virgin Mary* by Chris Ofili, particularly offensive to Catholics. In effect, the painting was made of elephant dung and the background was composed of cutouts of vaginas and buttocks from pornographic magazines. The mayor asked the museum to cancel the exhibition or risk losing the millions of dollars that the city of New York paid to support the museum annually. Furthermore, since the building occupied by the museum was leased from the city, the mayor threatened to evict the museum for violating the terms of its lease by mounting an exhibition that was inaccessible to school children. The mayor also made a statement to the effect that public funds should not be used to fund the desecration of important national and religious symbols. The city subsequently informed the museum that all city funding to the museum would be canceled unless the museum agreed to remove *The Holy Virgin Mary* from the exhibit (*Brooklyn Institute of Arts and Sciences v. City of New York*, 1999).

The museum sued the city of New York and Mayor Giuliani in the US District Court for the Eastern District of New York, seeking to prevent the city and the mayor from punishing the museum or retaliating against it for displaying the Sensation exhibit. The museum claimed that the punitive and retaliatory actions of the city and the mayor—cutting off appropriated funding, terminating the museum's lease, seizing the building or attempting to replace the board of trustees—violated the museum's First and Fourteenth Amendment rights to freedom of speech and due process, respectively. The issue before the court was whether the city of New York and Mayor Giuliani's actions violated the First and Fourteenth Amendment rights of the museum. The court said that the actions of the city and the mayor toward the museum were retaliatory and discriminatory because they

were motivated by a desire to suppress speech the mayor disagreed with. This was ruled as being a violation of the First Amendment. The court concluded that "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." The court concluded that the city of New York's actions against the museum "threatened the neutrality required of government in the sphere of religion" and issued an injunction barring the city from retaliating against the museum because state officials found the Sensation exhibition offensive (*Brooklyn Institute of Arts and Sciences v. City of New York*, 1999).

Aim of the Chapter

At face value, this case looks like a case of artistic overreach and governmental overreaction. However, since the art exhibition had elements of pornography—cutouts of vaginas and buttocks from pornographic magazines—and religion, the case neatly illustrates how the First Amendment has struck a balance between freedom of expression and respect for religious beliefs. The First Amendment requires the government to assume a neutral posture in all matters touching on religion. The bigger picture is that this case demonstrated a clash of cultures: *agape* love, symbolized by the Holy Virgin Mary, and erotic love, symbolized by the vagina and buttock cutouts. The aim of this chapter is to survey the regulation of explicit, sex-themed visual imagery in the United States. The fundamental premise is that all mass-mediated material that visually depicts sexual conduct (sex-themed material) is regulated as "speech" under the First Amendment, which protects a wide scope of mainstream and extreme speech. American pornography and obscenity laws demonstrate a perpetual clash between the partisans of Judeo-Christian *agape*, other-directed, sacrificial love, and the classical Greek *Eros*, egocentric, sexual love and desire. The history of American regulation of sex-themed material is the history of the gradual transformation of sex and sexuality from material that was barely tolerated by the austere and ascetic Puritans to constitutionally protected civil rights available to all Americans. By transforming sex into a human right, the law decisively tilted the scales in favor of *Eros* without necessarily diminishing *agape*.

Diffusion of Judeo-Christian Sexual Morality to the United States

In his book *From Yahweh to Yahoo!*, Underwood (2002) suggests that a distinctive mind-set diffused from the Judeo-Christian legislative and moral texts to the Greco-Roman world. This was "the impulse to protest injustice and root out corruption" (p. 20). Underwood is referring to the famous Hebrew prophetic concept of speaking truth to power and suggests that our modern concepts of freedom of expression and human rights enshrined in constitutions and international legal instruments are rooted in the Hebrew legislative and prophetic texts, as well as the Greek New Testament. His title *From Yahweh to Yahoo!* suggests that there are philosophical and moral continuities traceable to that encounter between the Greco-Roman world and the Judeo-Christian worldviews. Diffusion of the Judeo-Christian worldview to the Western world is nowhere more evident than in the United States, where Americans are some of the most highly religious people in

the world. Despite the fact that the First Amendment of the American Constitution has an antiestablishmentarian posture—Congress (meaning federal, state, and local government entities and state universities) may not decree an officially recognized state religion—religion is a significant aspect of the American way of life. In his book *Unsecular Media*, Silk (1995) suggests that the constitutional separation of church and state in the United States offers religion a certain "moral insulation" that officially puts it outside the "established order" (p. 3) and often above criticism. Silk (1995) also suggests that Judeo-Christian religious themes are implicitly interwoven in the cultural practices and rituals of the media in general and news reporting in particular. They are, by tradition, explicitly stated in the "homiletic [sermonic or preachy] business of editorial writers, columnists and talk-show hosts" (p. 51). This tradition can be traced to the Puritan founders of the United States

Puritanism, American Exceptionalism, and the Regulation of Sex-Themed Speech

As we noted in Chapter 7, Judeo-Christian sexual morality diffused to all regions of the Western world, first through the Septuagint, the Greek translation of the Hebrew Scriptures, and subsequently through the Greek New Testament. Ascetic Christian morality reached its height among the Puritans, members of a "purifying" movement in the Established Church of England. The Puritans felt that the Protestant Reformation, which had swept through much of Europe, had not gone far enough in England. They denounced the liturgy and ceremonial trappings of the Anglican Church as too Catholic (Witham, 2007). As a result of their dissatisfaction with the Church of England, beginning in 1630, English Puritans started a "Great Migration" to a place in North America that they named "New England." They founded the Massachusetts Bay Colony there. From the Old Testament, the Puritans adopted the idea that they—and by extension, the United States of America that they helped create—were God's chosen people, a "new Israel with a covenant" (Witham, 2007). As such, they saw themselves as reenacting the biblical story of the exodus of the Israelites from bondage in Egypt to freedom. They felt that they had been chosen by God to accomplish a special historic mission: to establish a pure, God-fearing Christian Commonwealth devoid of the oppression, corrupt practices, and ceremonial trappings of the established Church of England. They borrowed metaphors directly from the teachings of Jesus Christ in the New Testament. They saw themselves as "the Light of the World," a "'City on a Hill' whose providential mission entitled it to God's special protection . . . New Englanders were God's new chosen people, a prophetic army, a model to the world" (McKenna, 2007, p. 36–37). Puritans gave us the idea of American exceptionalism, the belief that the United States is different from all other countries of the world.

In matters of sex and sexuality, the word "Puritan" has become an epithet for extreme sexual prudishness and repression. The sermons and practices of the Puritans provide most of the evidence for that charge. The fundamental dogma of Puritanism was human depravity. Puritans preached that God was a Holy God, while human beings were "fallen" sinners, depraved creatures who deserved damnation in the fires of hell. Though human beings were saved by grace, salvation in the hereafter and entry into God's heaven were not guaranteed. They had to work

hard to deserve it. The private and public lives of individuals, particularly leaders, were inseparable in the eyes of Puritans. Their political leaders (magistrates) were viewed as God's agents who were responsible for maintaining public morality. All known evildoers in the church were to be expelled or excluded. Sexual "purity" was an important part of Puritanism: "Sexual love between husband and wife was a mirror of the ecstatic union between the soul and Christ, but adultery, fornication, homosexuality, bestiality, and the like, were perversions of God's gifts and sins to be severely punished" (Morgan, 1963, p. 50). New England Puritans thus lived in an atmosphere of existential angst. In his famous moralistic publication *Bonifacus, or Essays to do Good*, Puritan preacher and historian Cotton Mather (1710) wrote, "But, O rational, immortal, heaven-born soul . . . Why should a soul of such high capacities, a soul that may arrive to be clothed in the bright scarlet of angels, yet embrace a dunghill!" (p. 28). Mather talked of doing good to those with whom one had "endearing ties of natural relation" (p. 51). This "relational goodness," which echoes part of New Testament *agape* love, was to be directed at one's "domestic relations" (family)—especially "conjugal relations" with one's wife or husband. However, Puritans were warned that "family passions cloud faith, disturb duty, darken comfort" (p. 52). Puritan preachers communicated their theological ideas with the classical rhetorical tools they had learned from the pre-Christian and Christianized Greco-Roman world as part of their theological training. The Puritan settlers of the Massachusetts Bay Colony were guided by a "social covenant" grounded in "Christian Charity," justice and mercy, and legislative texts from the Old Testament and the Ten Commandments (Witham, 2007), with their sexual prohibitions: "Thou shalt not commit adultery," "Thou shalt not covet their neighbor's wife," and the like.

New England Puritanism, like its English ancestor, therefore emphasized discipline and strict moral standards, among other attributes. The leaders of the Puritan community saw themselves as God's soldiers, whose responsibility was to protect God's people from moral decay. They brought to American shores the British institution of religious "reforming societies" or "societies for the suppression of disorders," which "inflicted punishment" on those who "transgressed the laws of good morality" (Mather, 1710, pp. 167–68). These societies shut down brothels, which they called "houses which were chambers of hell, and scandals of earth," and put an end to "raging profanity" and profanation of the Lord's Day (Sunday; Mather, 1710, p. 168). They used legislative power to enforce their brand of morality (p. 169). While New England preachers borrowed liberally from the techniques of classical Greco-Roman rhetoric, they shunned the amorality of ancient Greece and Rome.

McKenna (2007) states that this "patriotic romance" exerted a powerful influence on the emerging nation, while Yankee migration to other parts of what was to become the United States diffused this unquestioned politico-religious patriotism: "Yankee patriotism simply assumed that everything authentically American was built on the foundation of Reformation Protestantism of the kind nurtured in New England" (McKenna, 2007, p. 42). The founding fathers of the American Republic conceptualized the United States as a new republican constellation in the eighteenth-century "sky" of divine-rights kings, and absolute monarchs. The stars in the American flag are symbolic representations of this emerging reality. The laissez-faire, free enterprise economic system of the United States is a legacy of American exceptionalism, a logic that is rooted in the political and religious

philosophy of the seventeenth-century Puritan settlers of New England (Madsen, 1998). Puritanism was so pervasive that Benjamin Franklin, one of the most influential founding fathers of the American republic and a signer of the Declaration of Independence, was the victim of censorship. His raunchy writings, especially his 1745 letter "Advice to a Friend on Choosing a Mistress," were officially censored from publication in order to maintain the patriotic, Puritan myth of American leaders as virtuous and morally upright persons in public and in private (Semonche, 2007). In a dissenting opinion, US Supreme Court Justice William O' Douglas, following lower courts, cited Franklin's work as a rationale for softening the iron grip of laws regulating sex-themed imagery (obscenity and pornography) and literary works in the United States (*United States v. 12,200-ft. Reels of Film*, 1973).

French political observer, Alexis de Tocqueville (1843), one of the most astute students of American society and democracy, observed that religion was America's foremost political institution. More than that, religion was necessary for the smooth running of America's institutions. According to him, the origin of America's religious heritage was Puritanism: "Puritanism was not merely a religious doctrine, but it corresponded in many points with the most absolute democratic and republican theories . . . in event after event . . . we see moral purpose defining our highest goals and our highest achievements . . . Americans agree overwhelmingly about the importance of moral matters" (p. 35).

Origins of the Regulation of Sex-Themed Speech in the United States

Having surveyed the political and moral background of the Puritans, whose heritage influenced the fledgling American nation, we now survey how the American republic has dealt with sex-themed visual material that is more suitable to the "erotic" ethos of ancient Greece than to the Christian morality of the New Testament. We have seen that the Hebrew Scriptures and the New Testament had condemned egocentric lust, personified by the Greek god Eros and his Roman equivalent Cupid, as sinful. Christians were urged to fight against the "flesh"—"corrupt passions"—because lust was deadly for the soul. The rebirth of learning during the Renaissance increased focus on human beings, and the development of innovations in painting and printing led to a proliferation of visual imagery that was not always approved by the Catholic Church. However, many of these images were tolerated because they drew their inspiration from pre-Christian, pagan Greco-Roman mythology, with its pantheon of gods, goddesses, and superhuman beings who engaged in sexual dalliances with other gods and with mortals (Matthews-Grieco, 2010). In the nineteenth century, new printing and photographic technologies diffused to the United States. With these technologies came "obscene," or "filthy," images—the kind of erotic material condemned in the New Testament. In Chapter 7, we saw that the Greek New Testament word "obscene" referred to "filthy" material. Obscenity thus became the catchall phrase for all publications that alluded to sex or had an explicit sexual theme. The Puritans would definitely not have approved of the "obscene" images that were being produced by the new printing technologies.

In order to regulate this obscene material, the US courts looked to the British courts for legal precedent. They found the *Hicklin* test from the case *Regina*

v. Hicklin (1868). Under nineteenth-century British law, it was illegal to keep "obscene books" in a house or other location for purposes of sale or distribution. The law gave justices the power to seize and destroy the allegedly obscene publications and prosecute the occupier of the house. Copies of the anti-Catholic pamphlet *The Confessional Unmasked: Shewing the Depravity of the Romish Priesthood, the Iniquity of the Confessional, and the Questions Put to Females in Confession* were seized from the home of Henry Scott, a member of the Protestant Electoral Union, whose mission was to "expose the errors of the Church of Rome, and particularly the immorality of the Confessional" (*Regina v. Hicklin*, 1868). A court declared that the pamphlet fell within the prohibited category of legally "obscene books." The court arrived at this conclusion because it adjudged the book to be "grossly obscene, as relating to impure and filthy acts, words, and ideas." On appeal, Scott claimed that the pamphlet was aimed at exposing the errors of the Catholic Church "and particularly the immorality of the confessional." The order to destroy the pamphlets was reversed. The queen's government appealed to the Court of the Queen's Bench, the superior court in the United Kingdom from 1215 to 1875. One of the duties of the court was to ensure that public authorities did not abuse their power through unlawful actions.

The issue before the court was whether the order to seize and destroy Scott's pamphlet was correct. The court said it was: "The publication of such an obscene pamphlet was a misdemeanor, and was not justified or excused by the appellant's innocent motives or object" (*Regina v. Hicklin*, 1868). Scott argued that pictures of the seminude Venus (Aphrodite), the goddess of sex, love, and beauty, displayed in a public gallery were more obscene than his pamphlet, to which a judge replied that such a picture could be exhibited in a public gallery, but it may not be "sold in the streets with impunity." The court then established the famous "*Hicklin* test of obscenity" that is still influential in some Anglo-American common-law jurisdictions and former British colonies. The court ruled that for material to be declared "obscene," the court must decide "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." The court further held that the pamphlet in question "would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character" (*Regina v. Hicklin*, 1868). This ruling demonstrated the two-tier system of regulation of obscenity in Victorian England. The aristocracy and the upper classes could consume obscenity in the privacy of their homes or in museums frequented by the elite, but ordinary British citizens were not considered culturally sophisticated enough to handle material like the nude or erotic imagery of classical Greece and the Renaissance. Vestiges of the Hicklin test still exist in former British colonies like India.

The Influence of *Hicklin* on American Obscenity Law: The Federal Obscenity Statute

A few years after *Regina v. Hicklin* was decided, its values diffused to the United States. American courts had used the test for more than one hundred years before the US Supreme Court developed a homegrown definition of obscenity that applied American First Amendment values to the burgeoning pornography

industry spawned by sexual capitalism. The first piece of American legislation that drew on the *Hicklin* test was the Comstock Act (1873). This law regulated material that could be mailed by the US Postal Service under the postal clause of the Constitution of the United States (art. 1, § 8). This clause gives Congress the power to establish post offices and post roads. Under its provisions, Congress was empowered to create post offices and determine the kinds of material that could be deposited in the mail and transported and distributed by the US Postal Service.

Late nineteenth-century technological developments in art, illustration, image visualization techniques, printing, and publishing led to a visual revolution in which images became prominent in newspapers, magazines, and other periodicals (Kovarik, 2011). A lot of this printed matter was commercial material whose predominant theme was sex. The origin of American mass-mediated sexual capitalism can be traced to this era. The postal system had to come to terms with these developments and advance a regulatory framework for handling sex-themed material deposited in the mail. As the monopoly mail carrier and predominant interstate distributor of printed matter in the United States, the US Postal Service found itself playing the role of moral checkpoint of American society. It quickly became the sieve through which the material that society considered illegal, lewd, indecent, immoral, or obscene was filtered out and prevented from reaching mainstream audiences. Acting within the scope of its constitutional mandate, Congress set out to regulate the mailing, handling, and distribution of sex-themed material. Impetus for regulating such material was provided by the New York Society for the Suppression of Vice (NYSSV), whose leader was Anthony Comstock, a man who was also closely associated with the Young Men's Christian Association (YMCA). The NYSSV was appalled that obscene (pornographic) images made possible by new lithographic and printing technologies flourished in the seedy, overcrowded, immigrant-filled streets, hovels, and tenements of New York City. Pornography often went hand in hand with prostitution because it was the main vehicle for the advertisement of the "flesh trade" or "white slavery" in New York City and other fast-growing metropolitan areas of the East Coast. This set the stage for a rerun of the classic clash between ancient Greek *Eros*—egocentric, erotic, sexual love and desire—and New Testament *agape*, or other-directed Christian love that had diffused to the Western world through Christianity.

Congress gave Comstock and the NYSSV a national political platform, which the crusading moralists used to re-present, or present anew, to American society the dangers that obscenity (pornography) presented to its moral fabric. The popularly held belief of members of the NYSSV was that the Roman Empire had collapsed due to its moral decadence. The outcome was that Congress passed America's first federal obscenity statute: the Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use. Under the provisions of this act,

> no obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion, nor any article or thing intended or adapted for any indecent or immoral use or nature, nor any written or printed card, circular, book, pamphlet, advertisement, or notice of any kind, giving information, directly or indirectly, where, or how, or of whom, or by what means, either of the things before mentioned may be obtained or made, nor any letter upon the

> envelope of which, or postal-card upon which indecent or scurrilous epithets may be written or printed, shall be carried in the mail. (Comstock Act, 1873)

This act immediately made it impossible for owners of brothels to distribute fliers, advertisements, pictures, postcards, and other images of their "goods" (prostitutes) to potential clients through the mail. It also banned the mailing of material advertising contraception and abortions. The act linked prostitution, abortion, and contraception in order to elicit maximum moral outrage from the public. The act also banned importation of obscene material produced in other countries. Since 1873, the Comstock Act's provisions against "nonmailable material" have been used to ban certain categories of books, pamphlets, pictures, papers, and letters designated as "obscene" from US mail.

The Comstock Act reflected the spirit of the *Hicklin* rule. Classifying certain kinds of material as obscene and nonmailable was determined by "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall" (*Regina v. Hicklin*, 1868). Anthony Comstock, who became the special agent of the US Postal Service and held that position for more than forty years, felt that it was his duty to prevent the US government from becoming a facilitator of the "flesh trade." Furthermore, under the Comstock Act of 1873 (as amended), "Obscene, lewd, lascivious, or filthy publications or writings, or mail containing information on where, how, or from whom such matter may be obtained, and matter that is otherwise mailable but that has on its wrapper or envelope any indecent, lewd, lascivious, or obscene writing or printing, and any mail containing any filthy, vile, or indecent thing is nonmailable" (Comstock Act, 1873). This postal regulatory scheme was possible because in 1782, Congress had given the US Postal Service a monopoly on mail carriage but had restricted its power to censor mail to times of war. In 1792, Congress had formally permitted newspapers to use the mail for distribution. This was a formality, since postal riders had been permitted to carry newspapers at moderate rates since 1782. The federal obscenity act essentially eliminated sex-themed newspapers and magazines from being distributed through the network of the US Postal Service. The Comstock Act (as amended) is still the law of the land.

Application of the *Hicklin* Test to Early Sex-Themed Imagery Cases: *Rosen v. United States* (1896)

The relentless cascade of printing and image-reproduction technologies led to the appearance of better and cheaper sex-themed visual imagery. A number of late nineteenth-century pornography and obscenity cases give us a good picture of the early manifestation of pornography in the United States. These trials also portray the attitude of US society with respect to this early, sex-themed visual imagery, as reflected by the law enforcement activities and court decisions of the time. Early American sexual capitalists (pornography entrepreneurs) understood that in a society grounded in Puritan values, human beings had a certain ambivalent, if not contradictory, attitudes toward sex and its depiction in art and pornography. Social ambivalence driven by the tension between religious prescriptions regarding the sanctity of the human being, and proscriptions against satisfying

the desires of the "flesh," versus the secular values of individuality and freedom of expression have always relegated the explicit visual re-presentation of sexual activity to the margins of American society.

Nevertheless, sexual capitalism and individual pornography entrepreneurs have taken advantage of new communication technologies to propagate their wares. The story of pornography is that it has effectively used new communication technologies—writing, the typewriter, photography, color printing, film, video, computers, and the Internet—to transform itself into a mass market industry. This is the sexual capitalism industry that has moved commercial pornography from the margins of society to the mainstream of Western culture.

The first high-profile pornography prosecution in the United States took place in New York in 1896. In *Rosen v. United States* (1896), Lew Rosen, the owner and publisher of an early, ironically titled pornographic publication, *Broadway* (the word "broad" was a colloquial term for woman or girl), was convicted and sentenced to 13 months imprisonment with hard labor and was fined one dollar for depositing the obscene, lewd, and lascivious 12-page publication in the US mail "against the peace of the United States and their dignity." The material that troubled the peace of the United States and violated "their dignity" included partially covered pictures of females "in different attitudes of indecency" (*Rosen v. United States*, 1896). The black material that partially obscured the pictures could be easily erased with a piece of bread. The prosecution charged that the reason for sending the partially covered pictures was to make people curious about the content of the magazine that was being concealed.

Rosen was charged with mailing this material in violation of the Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use (Comstock Act, 1873). The content of *Broadway* scandalized the Puritan sensibilities of the court, which wrote that "the said paper consists of twelve pages, minute description of which, with the pictures therein and thereon, would be offensive to the court, and improper to spread upon the records of the court, because of their obscene, lewd, and indecent matters" (*Rosen v. United States*, 1896). Rosen's claim that the prosecution had not proved that he knew that *Broadway* "was obscene, lewd, and lascivious" was not persuasive.

Sex-Themed Films as Regulated Re-presentations in the United States

Regulation of obscenity in the United States through the federal obscenity statute known as the Comstock Act, as well as state and local rules, was taking place in the context of the emergence of sensational or "yellow" journalism that focused on gossip about the private lives of famous people, highlighted real or imagined occurrences, and exaggerated social and natural phenomena in order to sell newspapers. Printing technologies also made the production of early forms of pornography possible. The excesses of the late nineteenth-century press, and especially its total disregard for individual privacy, moved two famous American jurists, Samuel Warren and Louis Brandeis, to call for the enactment of a law of privacy in the United States (Warren and Brandeis, 1890). Furthermore, the invention of cinema and the transformation of silent film into collective viewing experiences changed the social relationship between movie audiences and movie stars. The introduction of sound and color to movies further transformed them into realistic experiences

that approximated real life. In 1915, the US Supreme Court reflected societal angst about the moral impact of the new medium that was re-presenting social reality and taking communication where it had never been before. In *Mutual Film Corp. v. Industrial Commission of Ohio* (1915) the court ruled that film were pure and simple commercial products, mere spectacles that were not part of the "press" or "agencies of civil liberties" protected by the First Amendment of the Constitution of the United States. The court ruled films could be censored because, as a result of their mere projection and consumption, "a prurient interest may be excited and appealed to. Besides, there are some things which should not have pictorial representation in public places and to all audiences" (*Mutual Film Corp. v. Industrial Commission of Ohio*, 1915, pp. 242–43). This case essentially transferred the logic of the *Hicklin* test from printed material to films.

Hollywood's Motion Picture Production Code of 1930 as Regulated Self-Regulation

The invention of color film and sound recording in the early twentieth century, as well as the embedment of these new technologies in feature films in the 1920s, gave these "talkies" an unprecedented, realistic look and feel that surpassed, by far, the quaint, whitewashed, hyperactive realism of the silent, black and white movies. These new technologies enabled a fledgling, highly commercialized Hollywood, buffeted by the winds of the Great Depression, to experiment with unprecedented, sensational, sex- and violence-themed narratives that shocked many Americans. In his book *Pre-Code Hollywood: Sex, Immorality, and Insurrection in American Cinema; 1930–1934*, Doherty (1999) states that during the period before Hollywood began to regulate itself under pressure from federal, state, and local governments, the industry earned the wages of "cinematic sin," "packaged vice," and "models of immorality" (pp. 103–18). During that period, Hollywood was marked by "unbridled, salacious, subversive, and just plain bizarre films . . . The films of the period do indeed have the look of Hollywood cinema—but the moral terrain is so off-kilter that they seem imported from a parallel universe" (p. 118). In the late 1920s, the treatment of crime, violence, sexual infidelity, profanity, and even nudity were alarming to some people. Film posters with scantily dressed actresses in seductive poses became too much for most Americans. Film titles like *Stolen Magic*, *Laughing Sinners*, *The Divorcee*, *Red-Headed Woman*, *Bad Girl*, *Tarzan and his Mate*, and *The Wages of Sin* troubled the political, educational, and religious establishments, which put pressure on Hollywood to curtail the production of "obscene" or filthy movies.

The law was not on the side of Hollywood. As we saw previously, the US Supreme Court had ruled in 1915 that states could censor films because they were just crass, commercial products that did not have First Amendment free speech protection. States were essentially given the green light to censor what they perceived to be indecent, tasteless, immoral, obscene, or sacrilegious films. In order to forestall federal censorship of movies, the Motion Pictures Producers and Distributors Association (later renamed the Motion Picture Association of America) adopted the Motion Picture Production Code (Hays Code), in 1930. This was a code of self-regulation and restraint that the film industry imposed on itself in response to complaints that its movies were undermining morality in America.

The Motion Picture Production Code called movies the "art of the multitudes." The idea behind the code was that all movies would be suitable for viewing by audience members of all ages.

The code established standards of "good taste" as well as a list of dos and don'ts for the film industry. Article 2 of the code states, "Sex hygiene and venereal diseases are not subjects for motion pictures." Article 4 of the code, titled "Obscenity," states, "Obscenity in word, gesture, reference, song, joke, or by suggestion (even when likely to be understood only by part of the audience) is forbidden" (The Motion Picture Production Code, 1930). The code called on Hollywood film producers to handle "sexual sin" with caution in order not to glamourize immorality. Adultery was to be avoided as well as seduction and rape. Scenes of passion were to be shown only when necessary to the plot of the movie, and in such cases, they were not to be explicit. Seminudity was permitted in certain cases, but nudity was never allowed. Male and female sexual organs and female breasts were never to be shown. The Motion Picture Production Code was a form of regulated self-regulation. The movie industry regulated itself within the laws of the United States and the perceived conventions of decency of American society.

Although most producers followed these voluntary rules, after a few years, the guidelines started to relax. The system of regulated self-regulation continues under the Motion Picture Association of America (MPAA), which first established another form of regulation, letter ratings (i.e., "G," "PG-13," "PG," "NC-17," "R," and "X"), for movies in 1968.

The fate of a 1933 Czechoslovakian film called *Ecstasy* illustrates the attitude of the authorities with respect to films that were declared violators of conventions of American decency and morality. US Customs listed the movie as obscene and unfit to be imported into the country under the Comstock Act of 1873 and the Tariff Act of 1930. This act banned the importation of "any obscene book" into the United States from any foreign country. *Ecstasy* was banned because it had nude scenes and was the first film to portray sexual intercourse and female orgasm (Robinson, 2001, p. 66). The film industry stayed in this legal limbo until 1952, when the US Supreme Court ruled that state laws that banned films on the grounds that they were sacrilegious constituted a "restraint on speech" that violated the First Amendment (*Joseph Burstyn v. Wilson*, 1952).

The Comstock Act and *the United States v. One Book Called "Ulysses"* (1933)

In the 1930s, Irish writer James Joyce published a book that got into trouble with the Comstock Act. Parts of his book *Ulysses* contained profanity. The US Postal Service made a determination that the material was obscene. A magazine that serialized the book was declared obscene and prosecuted by the NYSSV. The US Customs Court soon added *Ulysses* to the list of prohibited obscene books under the Tariff Act of 1930, which banned the importation of "any obscene book" into the United States from any foreign country: "All persons are prohibited from importing into the United States from any foreign country . . . any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material."

The publisher of the American edition of *Ulysses*, Random House, denied that the book was obscene and subject to confiscation. The issue before the court was

whether *Ulysses* was pornographic—that is, whether the author wrote it for the purpose of exploiting obscenity. At that time, obscenity was defined as material that tended "to stir the sex impulses or to lead to sexually impure and lustful thoughts." The court ruled that though *Ulysses* did have some profanity, taken as a whole, it "did not tend to excite sexual impulses or lustful thoughts . . . whilst in many places the effect of *Ulysses* on the reader undoubtedly is somewhat emetic, nowhere does it tend to be an aphrodisiac." As such, the court ruled that the book could be admitted into the United States (*United States v. One Book Called "Ulysses,"* 1933). The United States appealed to the US Court of Appeals for the Second Circuit. The issue before the court was whether *Ulysses*, which had literary and artistic merit, could be regarded as "obscene" within the meaning of section 305(a) of the Tariff Act. In other words, did the book, taken as a whole, have "a libidinous effect"? The court concluded that though the book may offend many readers: "We think that '*Ulysses*' is a book of originality and sincerity of treatment and that it has not the effect of promoting lust" (*United States v. One Book Called "Ulysses,"* 1933). This case would prove to be influential in future obscenity cases.

Toward a Legal Definition of Obscenity

In the late 1950s and early 1960s, the United States was gripped by a "sexual revolution." Millions of young people rejected traditional Judeo-Christian standards of morality that had existed in North America since the arrival of the Puritans in the seventeenth century. Long-haired hippies moved into communes where illegal drugs, "free love," and group sex were the norm. The catchphrase of the sexual revolution was "if it feels good, do it." When the Vietnam War broke out, the sexual revolution and the antiwar movement coalesced and produced slogans like "Make love, not war" and "Girls say yes to boys who say no [to the draft]": "The sexual revolution equated sexual freedom and promiscuity with personal liberation and autonomy" (Bronstein, 2011). This era also saw the emergence of explicit, commercial, sexual pornography in the form of adult movies, specialized adult magazines, and adult videos. The challenge the courts faced was how to regulate this unprecedented flood of explicit, sex-themed material within the framework of the First Amendment. The task was to strike a balance between freedom of expression and the government's interest in checking the excesses of the pornography industry by limiting sexual material that was physically harmful, protecting children from exposure to sexual content and from being exploited by unscrupulous adults for their sexual gratification or financial gain, and maintaining conventions of morality and decency. A number of landmark cases that dealt with pornographic material that tested the outer limits of freedom of expression helped define the contours of obscenity laws in the United States. The first of these cases was *Roth v. United States* (1957). The facts show that Roth conducted a pornography business in New York. He used circulars and advertising matter to solicit customers for his products. Roth was charged with mailing obscene circulars and advertising, as well as an obscene book, in violation of the federal obscenity statute, the Comstock Act. He was convicted, and his conviction was affirmed by the US Court of Appeals for the Second Circuit. Roth appealed to the Supreme Court of the United States. The novel issue before the court was whether the federal obscenity statute, the Comstock Act of 1873 (as amended), violated the First Amendment. There was

also a question of whether the First Amendment protected obscenity. The court answered both questions in the negative. It held that there was an assumption that obscenity was not protected by the freedom of speech and of the press guaranteed by the First Amendment: "Implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance" (*Roth v. United States*, 1957, pp. 484–85). Indeed, freedom of speech was intended to promote morality, the court said. In *Roth*, the Supreme Court parted company with the British *Hicklin* standard that had governed obscenity law in the United States since 1868. The court said that sex and obscenity were not synonymous and proceeded to fashion a new test for obscenity that looked at whether a work, taken as a whole, appealed to the "prurient [sick, morbid, disgusting, lustful] interest" (pp. 488–89) of the average person (the jurors) and whether it was "utterly without redeeming social importance." The court concluded that the federal obscenity statute did not violate the freedom of speech or press guaranteed by the First Amendment (*Roth v. United States*, 1957).

A Landmark Case: *Smith v. California* (1959)

The next stop along the way toward a stable, predictable law of obscenity in the United States was the case *Smith v. California* (1959), a case dealing with the legal standard that the government has to meet to successfully convict someone of illegally possessing obscenity. Eleazar Smith, proprietor of a Los Angeles "adult" bookstore, was convicted of violating a city law that made it unlawful "for any person to have in his possession any obscene or indecent writing, [or] book . . . in any place of business where . . . books . . . are sold or kept for sale." Courts in California claimed that Smith was criminally liable because he was in possession of the obscene material in his bookstore, even though he had no knowledge of the contents of the book. The law did not specify that he had to have *scienter*, a Latin word that means "knowledge of illegal activity or content." Smith appealed to the Supreme Court of the United States, claiming that the law violated the due process clause of the Fourteenth Amendment of the US Constitution. Due process is the fundamental fairness that all federal, state, and local government entities are required to exercise if the outcome of their decisions were to deprive citizens of life, liberty, or property. The issue before the court was whether the Los Angeles law under which Smith was convicted violated the freedom of the press guaranteed by the First Amendment. The court ruled that the law was unconstitutional because it did not require the city of Los Angeles to prove that Smith had knowledge of the book's obscene content before his conviction (*Smith v. California*, 1959). This case established the important First Amendment principle that in order for a court to convict an individual of possession of obscene material, the government must prove that the defendant had knowledge of that material. This case is important because it distinguishes content publishers from content distributors. Bookstores, libraries, and book depots are content distributors who are not expected to know the content of every book or other product in their possession. They are therefore not liable for any illegal content in their possession unless they have knowledge of it. This is a very important legal principle that was transferred to the Internet. Under section 230 of the Communications Decency Act of 1996, interactive computer service providers like Google, Facebook, Twitter, Yahoo!, Instagram, Flickr,

Figure 10.1 Sex shop in Seattle, Washington (photo: Lyombe Eko)

YouTube, Snapchat, and so on are not liable for illegal or offensive content on their servers unless they have knowledge of it. This provision also extends to Internet service providers like AT&T, Comcast, and others. Furthermore, under section 515 of the Digital Millennium Copyright Act of 1998, interactive computer service providers are not liable for the illegal or objectionable material they host if they did not produce or edit the material. The principles of *Smith v. California* have thus been transferred from real space to cyberspace.

Contemporary Obscenity Standards in Real Space and Cyberspace

Our survey of obscenity law in the United States started in nineteenth-century Victorian England, a period marked by colonialism and an emphasis on social refinement, moral sensibility, and conventions of decency and religiosity. The law reflected this worldview. From 1868, when *Regina v. Hicklin*—the case that gave the Anglo-American world the contours, if not the precise legal definition, of obscenity—was decided, to 1973, when the Supreme Court of the United States decided the landmark *Miller v. California* case, which set the standard for regulating obscenity, the path was not linear. Courts zig-zagged their way through issues spawned by innovative technologies, new forms of media, and the sexual revolution, as well as changing social attitudes toward sex, sexualities, and explicit, sex-themed visual content. One of the last legal struggles that the US Supreme Court engaged in on its way to the Miller decision took place in a case called *Jacobellis v. Ohio* (1964). In this case, Nico Jacobellis, manager of an "adult" movie theater in Cleveland Heights, Ohio, was convicted under Ohio law on two counts of possessing and exhibiting an obscene film. He appealed to the Supreme Court of the United States, claiming that his First Amendment rights had been violated by the state of Ohio. The issue was whether his First Amendment rights had been violated. The court answered in the affirmative and reversed the conviction. *Jacobellis*

v. Ohio is best known for Justice Stewart's concurrence in the reversal of the conviction: "Under the First and Fourteenth Amendments, criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that" (*Jacobellis v. Ohio*, 1964). The practical effect of *Jacobellis v. Ohio* is that the US Supreme Court decided to specifically identify "hardcore" pornography as the category of sex-themed visual imagery that was not protected by the First Amendment. By specifying a specific category of sex-themed content that was not protected by the First Amendment, the court essentially granted protection to virtually all other types of sex-themed visual content, with the notable exception of child pornography. The practical result is that the sexual revolution did indeed expand the range of sex-themed visual material protected under the law.

Contemporary Pornography Standards in Real Space and Cyberspace

We conclude our survey of American obscenity law by showing that the Supreme Court of the United States has distinguished adult pornography from pedopornography, or child pornography. In *New York v. Ferber*, the court ruled that adult pornography is legally different from pornography featuring children. Therefore, the standard that states must use to determine which adult pornographic material is legally obscene is different from the standard used to criminalize child pornography. Since the objective of regulating child pornography is to prevent the sexual exploitation of children, and the physical and psychological harm that goes with such exploitation, the *Miller* test of obscenity does not apply. States may therefore prohibit the creation, possession, and dissemination of child pornography without abiding by the standards set forth in *Miller v. California*.

The journey from *Hicklin* to *Miller* was a long and arduous one. By the end of the trip, mass-mediated sex had been granted a modicum of constitutional protection. By the turn of the twenty-first century, sex had become a civil right, and the legal and cultural landscape of the United States had changed radically. We saw earlier that the Motion Picture Production Code was undermined by explicit, sex-themed visual imagery imported from Europe. That issue reared its head again in the 1970s. In *United States v. Thirty-Seven Photographs* (1971), Milton Luros returned from Europe, which was in the throes of the sexual revolution, with 37 sex-themed photographs of different sexual positions, which he said he intended to use to illustrate an edition of the *Kama Sutra*, the ancient Indian treatise on sex and sexuality. US Customs agents seized the sex-themed imagery on the grounds that they were obscene and began forfeiture proceedings against the photographs. Luros, the owner of the images, challenged the constitutionality of the Tariff Act, under whose provisions the photographs were seized. The US District Court for the Central District of California ruled that the provisions under which the photographs were seized were overly broad and unconstitutional and ordered that the photographs be returned to Luros. The federal government appealed to the Supreme Court of the United States. The issue before the court was whether section 1305 of the Tariff Act, under which the photographs were seized, was constitutional. The court answered in the affirmative. It held that section 1305 of the

Tariff Act of 1930 (as amended) applied to the 37 photographs in question because Congress has the power to declare obscenity to be contraband and to prohibit its importation into the United States: "Obscene materials may be removed from the channels of commerce when discovered in the luggage of a returning foreign traveler even though intended solely for his private use" (*United States v. Thirty-Seven Photographs*, 1971, p. 401). On the same day, the court ruled in *United States v. Reidel* (1971) that Congress could constitutionally prevent US mail from being used for distributing pornography.

Despite this ruling against the importation of sex-themed visual imagery, American obscenity and pornography law ultimately broke with its Puritan past. In 1973, the US Supreme Court set in place specific standards that states had to employ to identify hardcore visual representations of sex scenes (obscene material) that could be regulated without violating the First Amendment. These standards were set forth in the landmark case *Miller v. California* (1973). In this case, Marvin Miller, the operator of a mail-order "adult" pornography business, conducted a mass-mailing advertising campaign to promote illustrated pornographic books. He was found guilty under the California Penal Code of knowingly distributing obscene material to a mother–son restaurant business partnership that had not requested the material. Miller appealed to the Supreme Court of the United States. The issue before the court was whether Miller's First Amendment rights had been violated. The court answered in the affirmative and advanced the so-called *Miller* test of obscenity that states must use to regulate obscenity: "The basic guidelines for the trier of fact [jury] must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . , (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value" (*Miller v. California*, 1973). The core of this decision is that in regulating obscenity, states must take into consideration local community standards. This is because community standards vary widely across the United States: "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City" *(Miller v. California*, 1973*)*.

Hours after the *Miller v. California* decision, the Supreme Court of the United States decided a case about the importation of explicit, sex-themed visual imagery into the United States. In the 1970s, the Supreme Court of the United States decided two cases that concerned the importation of explicit, sex-themed visual material into the United States. In *United States v. 12 200-ft. Reels of Super 8MM Film* (1973), the issue before the courts was whether American citizens had a First Amendment license to import explicit, sex-themed visual imagery (classified at the time as "obscenity") from abroad for their personal consumption despite the prohibitions of the Tariff Act of 1930 (as amended). In effect, in 1970, Paladini attempted to import sex-themed films, color slides, photographs, and other graphic material into the United States from Mexico. Customs officials at the Los Angeles International Airport declared the material to be obscene and seized it. The US District Court for the Central District of California declared that the Tariff Act was unconstitutional and dismissed the forfeiture (seizure) action brought by the government. The government appealed to the Supreme Court of the United

States, as provided in the statute. The issue before the court was whether the US government could ban the importation of obscene material destined for private personal use without violating the First Amendment. The court answered in the affirmative, holding that the law did not permit the importation of obscenity simply because it was imported for private use only (*United States v. 12 200-ft. Reels of Super 8MM Film*, 1973).

Miller v. California settled obscenity law in the United States. Its localism (community standards) requirement gave it a distinctly American touch. In 2010, the Iowa Supreme Court affirmed the conviction of an 18-year-old high school student who had been found guilty of "sexting" (sending through text messaging) a picture of his erect penis to a 14-year-old girl. The court ruled that the picture violated the community standards of Dallas County, Iowa. The court used *Miller v. California* as its precedent (*Iowa v. Canal*, 2010).

Penthouse Magazine and Sexual Capitalism in the United States: The Case of *Caligula*

The history of the pornography industry in the United States is a history of single-minded sexual capitalists and entrepreneurs—exemplified by Hugh Hefner of *Playboy*, Larry Flynt of *Hustler*, and Bob Guccione of *Penthouse*—bringing their mediated products within the ambit of the libertarian guarantees of freedom of speech and freedom of expression set forth in the First Amendment. In order to make pornographic materials sound like mainstream cultural products, the sexual capitalism industry used euphemisms like "adult magazines" and "adult entertainment" to describe explicit, sex-themed visual imagery. Indeed, the trade association of the pornography industry is called the Free Speech Coalition. Sexual capitalist and sex-themed-imagery entrepreneur Bob Guccione was the founder and president of the board of the explicit, sex-themed magazine *Penthouse*. He quickly concluded that the commercial success of *Deep Throat*, America's first pornographic blockbuster film (Lewis, 2000), could be the template for his own venture into pornographic movies. In effect, organized crime had invested $22,000 in *Deep Throat* and earned millions of dollars in profits. Organized crime's first venture into Hollywood thus turned out to be a very profitable investment by all accounts (US Department of Justice, 1986). *Deep Throat* and the legal actions that resulted from its production and dissemination began the process of the mainstreaming of pornography in the United States—and the world (Blumenthal, 1973). Indeed, when the owners of two of the most popular pornographic magazines in the United States—Larry Flynt of *Hustler* and Robert Guccione of *Penthouse*—were involved in what the US Court of Appeals for the Second Circuit called a legal "grudge match" over accusations of libel, the court ruled that it would not "accord either the pornographer plaintiff or the pornographer defendant less protection than would be accorded libel litigants who publish more traditional works of literature or journalism" (*Guccione v. Hustler*, 1986). This case stands for the idea that in the United States, sexual capitalists are no different from other capitalists who resort to the remedies of the law to settle disputes.

Penthouse International, Guccione, and *Caligula*

Successful foreign "art" films that "treated sex and morals in a manner not permissible under the code" of the Motion Picture Association of America helped to loosen pornography standards in the United States. Explicit, sex-themed visual imagery is part of the array of cultural products spawned by "the capitalization of cultural production," to use the expression of Miège (1989). Bob Guccione, the founder and owner of *Penthouse* magazine, decided to attempt to replicate the financial success of the *Deep Throat* phenomenon with a movie of his own. He chose the story of Caligula, the notorious Roman emperor who was known for his schizophrenic combination of extreme autocracy and extreme sexual perversion. Caligula was the perfect subject for a commercial, explicit, pornographic movie produced by Guccione and Penthouse International. Guccione was following a tried and true practice of the film industry that consisted of reaching into history or the Bible, taking an account, commissioning a screenplay from it, and presenting it anew as a commercial film narrative aimed at mass audiences. While the Bible has been a favorite source of Hollywood movie ideas (Reinhartz, 2013), pre-Christian, "pagan" classical Greece and Rome have also been the source of many Hollywood movie ideas.

Caligula was a biographical film based on an adaptation of a script by Gore Vidal. Guccione wanted the film—which narrated, in a highly exaggerated manner, the megalomaniacal political style and extreme sexual perversions of Roman Emperor, Gaius Julius Caesar Augustus Germanicus (Caligula)—to be a popular, landmark film that would ensure a return on his investment. As a result, the film, which was shot on location in Italy, featured "*Penthouse* pets" in scenes of orgies complete with explicit, hardcore sexual intercourse and violence. Guccione wanted to take advantage of the US Supreme Court's ruling in *Miller v. California* (1973), which had specified that sex-themed content that was not obscene (did not present sexual and/or scatological (toilet) functions in a highly offensive manner and did not appeal to prurient tastes), was protected "speech" under the First Amendment. The court had also ruled that in order for states to ban sex-themed content, juries were to use local community standards to determine whether the material appealed to prurient tastes and whether it had any literary, artistic, social, or political value (*Miller v. California*, 1973).

We saw previously that section 1305(a) of the Tariff Act of 1930 was an obstacle to the importation of sex-themed visual imagery into the United States. It is therefore not surprising that when the filming of *Caligula* was completed in Italy, importing the footage into the United States turned out to be legally problematic. Though the film ran into legal obstacles in a number of states, it was never officially banned. Guccione welcomed the publicity brought about by the legal problems encountered by the film. When distributors of the film leased the Saxon Theater Corporation of Boston for a special exhibition of the film, the state of Massachusetts charged the theater with exhibiting obscene material. In *Commonwealth v. Saxon Theatre Corp. of Boston* (1980), the criminal division of the Boston Municipal Court ruled that *Caligula* could not be banned because it had "redeeming political value." The court was persuaded by the expert testimony of a political science professor who testified that *Caligula* had a political theme—namely, "absolute power corrupts absolutely." As such, it was protected by the First Amendment (*Commonwealth v. Saxon Theatre Corp. of Boston*, 1980). Highlighting the political

message of the film brought it within the ambit of First Amendment protection. *Caligula* was a commercial success in a number of countries, while it was banned in others. Though this monument to pagan Roman decadence and debauchery is still considered a "cult" film in certain quarters, it never attained the financial success and critical acclaim that Guccione had hoped for.

II

Pedagogy of the Repressed

Sexual Liberation, Sexual Capitalism, and Freedom of Expression in the United States

The city of Los Angeles is used to it: the red carpet, the limousines, the skimpily dressed stars, the hot, bright lights, the air heavy with the pungent aroma of competing perfumes, the crush of paparazzi jostling each other for the best locations to take pictures, a sea of flashing cameras, journalists seeking interviews, and fawning fans straining shoulder-to-shoulder at the edge of the roped-off red carpet to catch a glimpse of their favorite stars with the hope of getting autographs. The scene could have come out of any entertainment-industry awards ceremony. However, this event was different. The stars, starlets, directors, "creators," and leading men and women were not from traditional Hollywood studios and movies; they were from the nerve center of sexual capitalism: the pornography industry in Hollywood, California. They were participating in the Twelfth Annual XBiz Awards, the "Academy Awards" of the pornography industry, which Miller (2014) described as a "mixture of red-carpet propriety and porno prurience." The sponsors and participants of the event included everyone from online pornography "retailers" to pornography product designers. As Miller (2014) put it, the XBiz Awards "celebrate the performances and infrastructure that have made the adult entertainment a $10 billion industry." Pornography performers were competing for awards, like "Girl–Girl Performer of the Year" and the rather objectified "Male Sex Toy of the Year," and for recognition by their peers that they were the best in the pornography business (Miller, 2014). True to its name, the XBiz Awards are for adults only. They are not broadcast on American network or cable television like the Oscars or the Golden Globe Awards. However, they are not as risqué as the extremely uninhibited Adult Video News (AVN) Awards and the Adult Entertainment Expo, which have been held in Las Vegas, Nevada, dubbed "Sin City" by supporters and detractors alike, for more than a quarter-century (Miller, 2014). The XBiz Awards, the AVN Awards, and the Adult Entertainment Expo are initiatives launched by the sexual capitalism industry to show its professional face and integrate itself into mainstream America. Like all mainstream, performance-based organizations, the sexual capitalism industry has created a shrine for its

"immortal" gods and goddesses. This is the X-Rated Critics Organization (XRCO) Hall of Fame, which lists the industry's most notable pornographic films and inducts the most notable performers—the list of porn actresses is much longer than the list of porn actors—directors, and creators in the adult entertainment (pornography) industry.

The glitzy and glamorous XBiz, XRCO, and other pornography industry awards that mimic the Academy Awards demonstrate the image management, professionalization, and mainstreaming of the global pornography industry. Since the late 1950s, pornography has gone from an American countercultural phenomenon that sprang up in the shadow of Hollywood to a global, multibillion-dollar phenomenon in real space and cyberspace. Pornography, an industry that used to be known as the purveyor of "smut," has, with the blessing of the First Amendment, become "Sexual Capitalism Inc.," a multibillion-dollar global phenomenon that has been made possible by the Internet and the interconnection of nations, peoples, and cultures. Sexual capitalism has taken advantage of the constitutional guarantee of freedom of expression to re-present sex as protected expressive conduct. This enabled it to capitalize on sex and to sell fantasies and ideals of beauty, sexiness, and sexuality. This has been done for the most part by exploiting the mostly female "models" and "performers," whose faces and bodies populate the fantasy world of sexual capitalism.

Aim of the Chapter

The most important package of rights available to Americans is the bundle of communicative rights guaranteed by the First Amendment. Professionals, practitioners, artists, students, activists, corporations, and workers from diverse fields have asserted claims to speech rights under the First Amendment. These communicative rights include what courts call "symbolic speech and expressive conduct." This refers to actions that are pregnant with meanings and messages and thus communicate to specific publics. "Speech acts" include wearing certain items of clothing or no clothing at all, wearing armbands and political buttons, carrying signs and symbols, displaying political signs on yards, "liking" friends' posts on Facebook, and so on. Since the beginning of the 1950s, the sexual capitalism, or pornography, industry and the performers in it—ranging from "exotic dancers" to actors and actresses in all kinds of pornographic movies and videos to legal prostitutes—have, in the words of Murphy and Coleman (1990), made "claims against certain kinds of interferences" (p. 83) with their fundamental right to communicate through the production of, performance in, or distribution of pornography.

We saw in Chapter 10 that First Amendment freedoms were extended to the domain of mass-mediated, sex-themed visual imagery (pornography and erotica) over a period of close to one century. We also saw the Supreme Court of the United States attempt to define obscenity and set up a template for its regulation. By claiming First Amendment protection, the pornography industry declared that making pornographic movies is a right that is essential to the individuals who perform in it "if they are to fully exercise their roles as human beings" in the American marketplace of ideas, to use the formulation of Murphy and Coleman (1990, p. 87). The aim of this chapter is to provide some background information

on the sociocultural and regulatory context of the emergence and regulation of sexual capitalism, which can be defined as the commodification, industrial production, and global distribution of sex-themed visual imagery (pornography and erotica) for profit. This phenomenon, which emerged in the United States in the late 1950s, capitalized on the social dynamism and sexual liberation championed by the hippie, counterculture, and libertarian free-love movements. The free love movement, which had a strident antiregulatory ethos, suggested that the government should not regulate sexual relations of any kind that are entered into by consenting adults. The counterculture, free love, hippie, and other movements jointly organized an event that exemplified the sexual utopian ideals of the period: the "Summer of Love" that transformed San Francisco into "Psychedelphia," the city of drug-fueled psychedelic love in the summer of 1967 (Peck, 1985, p. 50). The Summer of Love took place despite the objections of the mayor (Peck, 1985). The free love movement was one of the main currents of the loosely organized countercultural coalition that organized the Summer of Love. The free love movement was against laws that criminalized the cohabitation of unmarried couples, adultery, homosexuality, abortion, birth control, and prostitution. Sections of the counterculture movement were also against age-of-sexual-consent laws as well as laws that restricted divorce. The antiregulatory, countercultural Summer of Love was aimed at transforming San Francisco into the love capital of the universe, the "Rome of a future world founded on love . . . the love-guerilla training school for dropouts from mainstream America" (Peck, 1985, p. 46). The counterculture movement and its "underground" publications soon floundered under the weight of its contradictions and psychedelic utopianism (Peck, 1985).

Sexual capitalism, the monetization of sexual fantasies and imagery, emerged from the ashes of the sexual revolution of the 1960s. It deftly capitalized on, commercialized, and monetized the countercultural ideals of universal love and acceptance. Sexual capitalism became a multibillion-dollar global phenomenon that ultimately spread from real space to cyberspace at the advent of the Internet in the 1990s. The emergence of sexual capitalism was facilitated by broad, libertarian legal interpretations that brought sex-themed speech within the ambit of the constitutional guarantees of freedom of speech and expression. I submit that Freud's idea of "repression," as developed by Marcuse (1966), who called for a socialist "non-repressive civilization" (p. 5), helped spark the sexual revolution of the late 1950s and early 1960s in the United States and Europe and ultimately shaped the regulation of sex-themed visual imagery in Western countries. Sexual capitalism has essentially capitalized on, and monetized, the struggle against sexual repression in Western societies. This industry, which began with pornographic magazines, movies, and videos, has now metamorphosed into the global pornography industry in cyberspace. After exploring the "pornocracy" (democratization of the culture of pornography) noted by Canada's Special Committee on Pornography and Prostitution (1985, p. 49), I explore the status of sex-industry professionals under the First Amendment and analyze how courts have interpreted and defined the First Amendment claims of a number of these "pornocracy" "performers." This analysis includes certain persons who are featured in or participate in the production of explicit, sex-themed visual imagery and define their conduct as constitutionally protected speech acts or expressive conduct.

Pedagogy of the Repressed: Freud, Marcuse, Sexual Liberation, and Sexual Capitalism

Sigmund Freud was one of the most influential thinkers of the early twentieth century. Freud is known as the father of psychoanalysis, the branch of medicine that is concerned with the diagnosis and treatment of psychological disorders (Freud, 1924). Freud's fundamental idea was that human beings are the products of their individual, unconscious, repressed mental processes—their "wishes and excitations"—the most important of which is sex (Freud, 1924, p. 307). Freud conceptualized the human mind as a metaphorical archeological site from which layers and layers of debris have to be removed in order to unearth the psyche, the unconscious. This is the valuable "treasure" that lies buried beneath layers of repressed memories and desires that excite individuals but dare not express themselves (Olivier, 2011). Freud's "archeology of memory," to borrow the expression of Olivier (2011, p. 62), is an excavation of the mind that can lead to the "discovery" that human beings are driven by *Eros*, the life instinct: physical, sensual, emotional, egocentric, sexual love that is named after the Greek god Eros (whose Roman equivalent is Cupid). *Eros* includes all the self-preserving and erotic instincts. It also includes irrational drives.

According to Freud (1929), the most powerful human drive is the sex instinct, or the sex drive. The sex drive is, however, compromised by society's "renunciation of instinctual self-gratification" (p. 16). He suggests that culture imposes limitations on the erotic life of its citizens through the imposition of "taboos, laws, and customs" (p. 19). Watson (2014) claims that under the influence of Freud, Westerners came to see human beings as psychological or biological beings endowed with sexual organs rather than theological beings created by God and endowed with souls. Psychological and biological beings instinctually express themselves with a sexual freedom that is considered to be taboo to theological human beings for whom sex is a necessary evil confined to the strictures of reproductive, heterosexual marriage. Under Freudian psychoanalysis, the unconscious became the secular equivalent of the soul (Watson, 2014). Freud thus laid the foundation for the modern conceptualization of sexuality in the Western world. If Freud was the genesis of the conceptualization of modern human beings as creatures of repressed sexuality, Marcuse (1966) stood on the metaphorical shoulders of Freud and essentially became the philosophical brain behind the contemporary sexual revolution in Europe and the United States. The intellectual project of Marcuse (1966) was the fight against sexual repression. In his work *Eros and Civilization: A Philosophical Enquiry into Freud*, Marcuse (1966) perceived life as a perpetual struggle against sexual repression in a psychological and sociological sense. He believed that sexual love and passion, *Eros*, are liberating, not repressive. He therefore envisaged a socialist "non-repressive civilization" (p. 5), which was essentially a "non-repressive instinctual order" (p. 196). He suggested that "a non-repressive instinctual order . . . must first be tested on the most disorderly of all instincts—namely, sexuality. Non-repressive order is possible only if the sex instincts can, by virtue of their own dynamic and under changed existential and societal conditions, generate lasting erotic relations among mature individuals" (p. 199). Thus Marcuse suggests that there is a hierarchy—a pyramid of liberties of which sexual freedom is the apex. The idea that sexual freedom is the highest of all freedoms is indirectly enshrined in many European individual privacy laws, which erected a

wall of separation between the public and private lives of politicians and ordinary citizens. For example, former French president François Mitterrand was married and had a mistress, Anne Pingeot, with whom he had a daughter. When the picture magazine *Paris Match* revealed the affair, the magazine was roundly condemned for invading the privacy of the president. Mitterrand faced no political consequences. Around the same period in the United States, President Bill Clinton was impeached by the House of Representatives and nearly removed from office for lying about his sexual relations with a 19-year-old White House intern, Monica Lewinsky (Eko, 2000). These two cases demonstrated the different conceptualizations of sex and privacy in the United States and France. Individual privacy is also an impetus for the so-called European right to be forgotten.

From the Sexual Revolution to Sexual Capitalism: Using the American Entrepreneurial Ethos to Capitalize on Sex

We saw in Chapter 7 that Aphrodite, the ancient Greek goddess of love, beauty, and sexual passion (whose Roman equivalent is Venus) and other Greco-Roman goddesses were "dethroned" when the Greco-Roman Empire became Christianized in 332 AD under the reign of Emperor Constantine. Discovery of the nude marble statue of Aphrodite among the ruins of the Hellenic city of Milos in 1820 and installation of the sculpture as a permanent fixture of the Louvre Museum in Paris, France, began the rehabilitation and symbolic reenthronement, capitalization, and commercial exploitation of Aphrodite/Venus as the Western symbol of beauty, attractiveness, and sexuality. By the turn of the twentieth century, *Venus de Milo* had become the commercialized ideal of Western female beauty. She was soon used in advertising products ranging from aspirin to skin creams. *Venus de Milo* fit the commercial ethos that used sex as an instrument of advertising. The use of sex in advertising exploded in the post–World War II era.

The countercultural sexual revolution of the late 1950s became the springboard for the emergence of a new mass-mediated commercial behemoth: sexual capitalism. This is the billion-dollar global "adult entertainment" industry whose stock-in-trade is the consumerism of mediated sex. Its modus operandi is the capitalization, commodification, mass production, commercial distribution, and consumption of sex-themed visual imagery—pornography, erotica and literary texts—as well as related trademarked merchandise in real space and cyberspace. Explicit, sex-themed visual imagery is part of the array of sex-themed cultural products spawned by "the capitalization of cultural production," to use the expression of Miège (1989). In the post–World War II era, sexual liberation, pornography, drugs, and the hippie culture joined together to form the countercultural movement, whose rallying cry was "If it feels good, do it." The anti–Vietnam War movement and its allies defined sex as the antithesis of war through the catchy phrase "Make love, not war." Posters featured girls offering young men sexual rewards for resisting the draft (i.e., the US Selective Service System or military conscription) with the slogan "Girls say 'yes' to boys who say 'no.'" In order to further its financial interests, sexual capitalism made common cause with the antiwar movement. It appropriated the vocabulary of the antiwar and sexual revolution movements. Indeed, antiwar groups were allowed to hold antiwar fundraisers in the Playboy mansion in Chicago (Ryan, 1985). The amalgamation of ill-defined

pacifism and uninhibited sex became complete. To be antiwar was also to be pro–sexual liberation. The irony is that many individuals and groups that allied themselves with sexual capitalism were opposed to "capitalism"—and the inequality, oppression, and wars it supposedly caused—while being oblivious to the mostly gendered oppression of sexual capitalism.

The sexual "revolutionaries" clearly repudiated the ascetic sexual worldview of Puritanism, which was in the political DNA of the United States. The sexual revolutionaries also scoffed at the nineteenth-century British Victorian moral propriety that still held sway in American society in the 1960s and at the early twentieth-century Christian moral sensibilities that had led to the passage of the Mann Act, or White Slave Traffic Act, of 1910. This act had criminalized the transportation of women and girls across state lines for purposes of "white slavery" (prostitution) or "immorality." The Supreme Court of the United States would ultimately rule that the Mann Act applied to "adultery, and fornication as well as prostitution" (Compton, 2014, p. 131). The sexual revolutionaries of the 1960s defied this edifice of moral legislation and essentially signaled a return to the pre-Christian, classical age of "liberated," heterogeneous, unrepressed, amoral Greco-Roman sexuality. The sexual revolution created the fertile soil from which sexual capitalism, the commercial production of sexually explicit visual content for mass consumption, sprouted and blossomed.

Sexual capitalism has done very well since the 1950s. One reason for this success is that it is ensconced in the highly entrepreneurial capitalist economy of the United States. Early sexual capitalists like Hugh Hefner and Larry Flynt essentially applied Max Weber's "Protestant work ethic" to the production, commercialization, and distribution of pornography and erotica in the United States and other countries. In his book *The Protestant Ethic and the Spirit of Capitalism*, Weber (1958) talks of the spirit of hard work and commercial risk taking, a spirit of capitalism (honest frugality and the duty to acquire and increase one's capital) to the point of exploiting others. He suggested that entrepreneurship, risk taking, and hard work lead to individual economic success and national progress (Weber, 1958).

Sexual capitalism is noted for its risk taking and exploitation of women. Sexploitation filmmakers invested in pornography, gambling that "increased publicity for movies attacked on moral grounds attracted a greater audience" (Presidential Commission on Obscenity and Pornography, 1970, p. 28). Additionally, film producers successfully challenged state and local censorship boards in court. For example, in 1957, the Court of Appeals of New York ruled that "nudity in itself, and without lewdness or dirtiness, is not obscenity in law or in common sense" (*Excelsior Pictures v. Regents of the University of the State of New York*, 1957, p. 144). The Supreme Court of the United States later ruled in *Jenkins v. Georgia* (1974) that, in and of itself, nudity was not patently offensive. Legal victories like these enabled sexual capitalists to produce more sexually explicit films without fear of censorship. Every "successful, high grossing sexploitation film led to imitations" (Presidential Commission on Obscenity and Pornography, 1970, p. 28). Sexual capitalists made films that crossed acceptable social limits and tested the thresholds of acceptance of local audiences. Furthermore, successful foreign "art" films that "treated sex and morals in a manner not permissible under the code" of the Motion Picture Association of America helped to loosen pornography restrictions in the United States. In 1969, the sexploitation industry formed its own trade

group, the Adult Film Association of America (AFAA), to defend the interests of the industry. The AFAA promptly sought shelter under the First Amendment. Its code of conduct states, "We will exhibit only films that are in conformity with the Free Speech Provisions of the Constitutional of the United States" (Presidential Commission on Obscenity and Pornography, 1970, p. 37).

Playboy as a Barometer of Sexual Liberation and Exemplar of Sexual Capitalism

Sexual capitalism created a magazine and cinematic fantasy world of nude, gorgeous, sexually suggestive, glamorous secular goddesses who were tailor-made to appeal to the sexual fantasies of men, and it sold them all kinds of values and merchandise to go with those fantasies. Sexual capitalism took shape in men's adult magazines like *Stag*, *Playboy, Hustler, Penthouse, Celebrity Skin*, and *Screw*. Women's magazines like *Cosmopolitan* pushed the sexual "envelope" (Landers, 2010). It published articles with titles like "Low Fidelity Wives" (1969) and "Nymphomania" (1967). *Playgirl* soon appeared on the scene and offered women the same instant sexual gratifications offered by pornographic magazines targeted toward a male clientele. Sexual capitalism thus appropriated and capitalized on the feminist ideal of sexual equality. Sexual capitalism essentially gave the word "goddess" a modern, secular-religious, erotic, and commercialized meaning. Sexual capitalism quickly appropriated the rhetoric of liberation and couched its commercial interests in the language of emancipation. *Playboy* magazine, which Hugh Hefner founded in 1953, is the archetypal pioneer of sexual capitalism. Hefner stated that his magazine would be the equivalent of the "the Emancipation Proclamation of the sexual revolution" (Mills, 2013). This was clearly a parody of emancipation—the Emancipation Proclamation signed by President Abraham Lincoln in 1863 to order Union soldiers to treat all slaves they encountered in the American South as free men and women during the Civil War. *Playboy*, which boldly announced on every cover that it was "ENTERTAINMENT FOR MEN" was all about making money from the commercialization of fantasies that appealed to males. Indeed, it made its money by rejecting and ridiculing "archaic" notions of morality and sexuality and "enslaving" women in its male fantasy world.

Playboy magazine was literally born in the vortex of a legal controversy over its nomenclature. Watts (2008) suggests that Hugh Hefner had originally intended to name the magazine *Stag Party* (a men's only social gathering), but his plans were changed by a last-minute legal roadblock. A cease-and-desist order from the copyright holder of the name *Stag Party* led him to change plans. Hefner changed the male deer mascot of his magazine to that of a prodigious breeder: the bunny rabbit. Brown (2012) suggests that Hefner's ostensible goal was to "give the American male a few extra laughs and a little diversion from the anxieties of the atomic age" (p. 2). That "little diversion" has outlived the existential angst of the atomic age. In effect, *Playboy* was a classic sexual-capitalist venture. Hefner began the magazine in 1953 with a $600 loan and $8,000 from stocks that he sold to friends and family. His first move was to purchase nude photographs of Norma Jean Baker, also known as Marilyn Monroe, who had made her first nude images in 1949 for the paltry sum of fifty cents (Brown, 2012). The sexual capitalism industry promptly killed off Norma Jean Baker and, for less than one dollar, ethroned Marilyn Monroe

as America's glamourous, vulnerable, and much-exploited sex goddess (Steinem, 1986). Her pictures have earned the sexual capitalism industry millions of dollars. Even President John Kennedy got into the act. *Time* magazine lists Marilyn Monroe among its "Top 10 Mistresses" and claims that she became one of Kennedy's "conquests" after she sang him a very public, sultry "Happy Birthday" in 1962.

The FBI was so obsessed with a possible sexual relationship between Marilyn Monroe and President Kennedy that it recorded a secret 15-minute black-and-white film of Marilyn Monroe having sex with an unidentified male. However, J. Edgar Hoover, and the FBI could not prove conclusively that the mystery man in the secret sex film was President John Kennedy (Top 10 Mistresses, 2015; Marilyn Monroe Sex Film is "Graphic," 2008). The original of the Marilyn Monroe sex film is still classified by the FBI. The alleged affair between Kennedy and Monroe only contributed to her sexual glamour and mystique. The sexual capitalism industry continued to exploit and monetize the wholesome, glamourous, public image of Marilyn Monroe that it had created, despite her troubled private life and tragic probable suicide by drug overdose at age 36. Marilyn Monroe has been globalized and re-presented as America's answer to the Greco-Roman goddess of love and sex, Aphrodite (Venus). The sexual capitalism industry is on a perpetual lookout for the next Marilyn Monroe, the sex object of the age of globalization, who will be a lucrative, global cash cow. Millions of women are dying for the opportunity to be the new Marilyn Monroe.

The invention of video, and videotape recorders a few years later, led to a veritable explosion in the production of sex-themed visual content. Sexual capitalism thus transformed sex from a purely Darwinian evolutionary mechanism that ensures the propagation of the human race, in a process that Herbert Spenser (1820–1903) called "survival of the fittest," to a highly lucrative, mediated, commercial, political, psychological, social, economic, and cultural phenomenon that turns a hefty profit for its corporate investors, producers, distributors, and Internet hosts. Pornographic magazine owners and porn video producers Hugh Hefner, Bob Guccione, Larry Flynt, and others became millionaire sexual capitalists who diversified their businesses into other areas of sexual capitalism—such as product merchandizing, international distribution, and licensing—that served as new revenue streams.

On the sixtieth anniversary of the founding of *Playboy*, sexual capitalist Hugh Hefner framed the mission of the magazine within the context of freedom of speech and expression. He wrote that he created *Playboy* magazine to "reflect on and influence the cultural change taking place in America, as well as to become the voice of sophisticated men all over the world. From its beginning, *Playboy* has stood for freedom of speech, freedom of choice and freedom of the press" (Playboy Celebrates 60 Years of Stunning Pictorials and Journalistic Excellence, 2014). At its height, *Playboy* magazine had language editions in more than thirty different countries. The fall of the Berlin Wall and the collapse of ascetic communism in Eastern Europe led to the creation of *Playboy* editions in a number of Eastern European countries. Asian editions included a short-lived edition published in Indonesia, the world's largest Muslim country. Playboy has also launched an Israeli edition. These different editions mostly translate and adopt content from the English-language edition of *Playboy*. The *Playboy TV* cable channel also operates in a number of countries, including Israel.

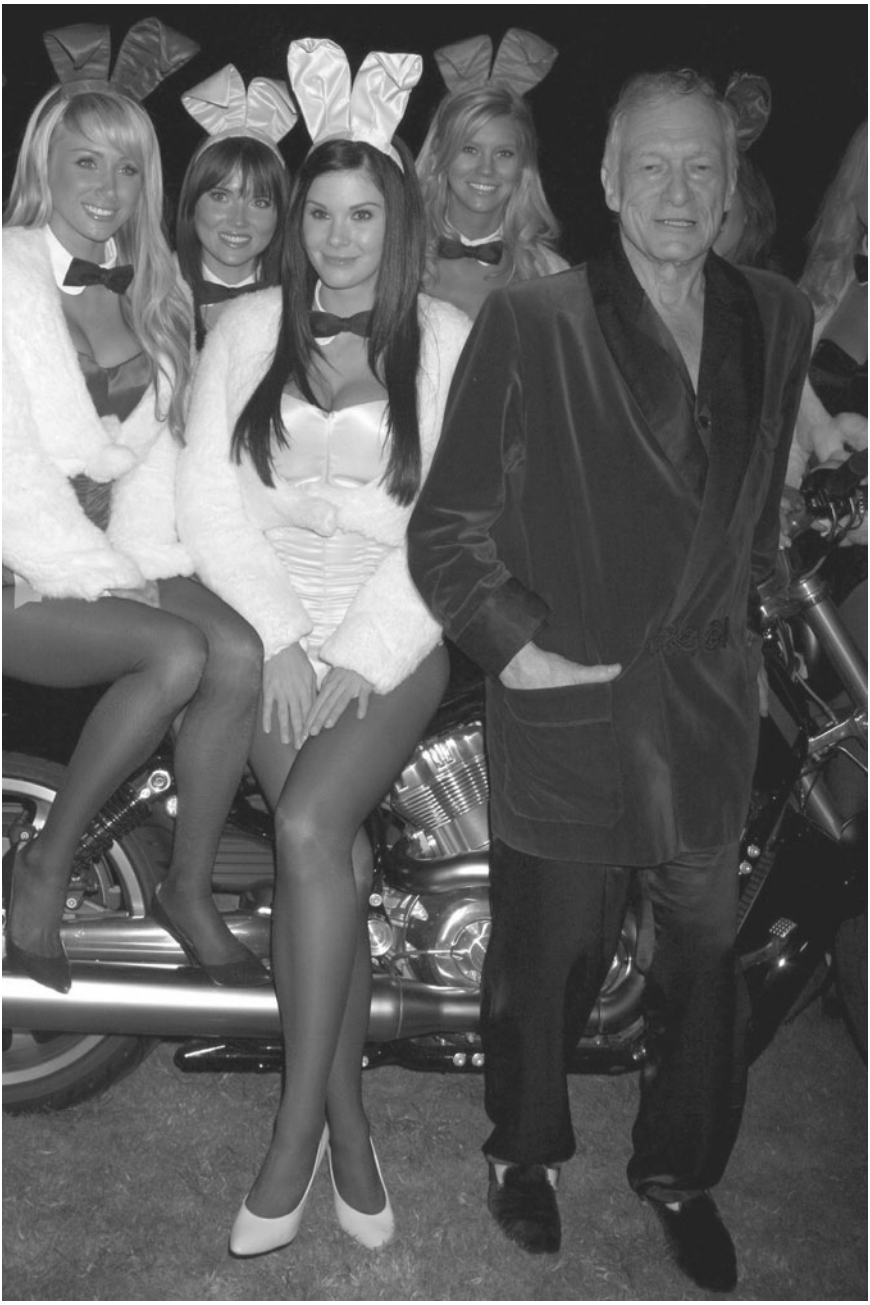

Figure 11.1 Hugh Hefner and Playboy bunnies at Playboy Mansion Halloween party preview (Shutterstock image © S. Bukley)

Sexual Capitalism and the Objectification of Women: Gloria Steinem's Undercover Reporting as a Playboy Club Bunny

As we see later, in Chapter 15, many women differed with Hugh Hefner's celebratory, libertarian view of *Playboy*'s brand of commercial sexual capitalism. They believed Hefner's sexual liberation was a mirage that enslaved and exploited women (Bronstein, 2011). Indeed, women were "sexploited" by all sectors of sexual capitalism, which made lots of money by selling an idealized, consumerist fantasy image of sex, "sexiness," and beauty. It sexualized and objectified women under the pretext of introducing them to the exciting and "glamorous" world of show business and sexual capitalism. We have seen that "exploitation" and "sexploitation" films used sexual themes and female movie stars for purposes of making money. *Playboy* magazine and Playboy Clubs became popular sexual capitalism ventures. Playboy Clubs were a chain of night clubs and adult entertainment venues that existed in a number of major American cities and a few foreign countries. They were open to all who wanted the "Playboy experience," but parts of the club were reserved for a clientele consisting mainly of rich, middle-aged men (Steinem, 1963b). In its recruitment advertisements, Playboy Enterprises called Playboy "bunnies" "the most envied girls in America" (Steinem, 1963a). In 1963, a courageous journalist named Gloria Steinem decided to find out for herself the reality of the "bunnies" who worked in Playboy Clubs. She went undercover, posed as a potential Playboy "bunny," and carried out a daring investigative journalism assignment in New York's Playboy Club. Steinem's investigative report of her undercover work was published in the May and June 1963 editions of *Show* magazine (1963b).

Steinem's report was a bombshell—a damning indictment of the exploitative ways of sexual capitalism. It revealed that Playboy bunnies were "sexy" young women who were selected solely on the basis of their looks. They were physically examined to ensure that they met Playboy's standards of beauty. Thereafter, they were given invasive medical examinations to ascertain whether they were free of sexually transmitted diseases. Those who passed the physical and medical examinations were given a "tryout." The finalists were groomed, indoctrinated, and trained to serve as scantily clad Playboy Club "bunnies" (waitresses; Steinem, 1963a). Every aspect of the lives of Playboy "bunnies" was minutely controlled to maximize the profits of Playboy Enterprises, while bunnies were paid an average of $1.50 an hour (close to minimum wage). They received only 50 percent of tips charged to credit cards. Tips given to bunnies assisting clients in the cloak room went to the club, not the bunnies (Steinem, 1963a). The task of Playboy bunnies was to charm Playboy Club clients into spending lavishly in the clubs. Steinem's undercover exposé painted a picture of sheer exploitation.

Furthermore, Steinem's exposé revealed that Playboy Clubs had a list of clients who received preferential treatment there. Since sexual capitalism has always had a cordial relationship with the mainstream media industry, Playboy's VIP list included newspaper and magazine reporters and writers, as well as radio and television personalities, who were granted special privileges at Playboy Clubs around the country: "The press names [on the Playboy Club's VIP list] form a pretty uniform list of the gossip columnists and entertainment editors to whom many big restaurants and nightclubs extend hospitality" (Steinem, 1963b, p. 115). Steinem (1963b) further revealed that one of the reporters on the list had written a favorable review of the Playboy Clubs for the *Chicago American* magazine. That column

was reprinted in *Playboy Club News*, a public relations periodical published by Playboy Clubs. The Playboy Club bunnies were specifically groomed and trained to give clients the impression that they were perpetually "available"—while in fact being unavailable to all but "Playboy executives, members of the press and others important to Playboy whose checks are paid by the Club" (p. 115). Hugh Hefner and his daughter Christie were not amused by Steinem's investigative journalism. However, they probably had the last laugh. Gloria Steinem's Playboy Club work photo, which she had released at the time of her undercover employment at the Playboy Club, was published in *Playboy* magazine without an explanation of the context in which it was taken. The full-size picture, of which Playboy Enterprises holds the copyright, graces the Playboy mansion in Chicago and is one of Christie Hefner's favorite Playboy magazine illustrations (Ryan, 1985).

Gloria Steinem is not the only Playboy bunny to give a grim and disturbing image of the inner workings of sexual capitalism. A number of former playmates and habitués of the Playboy mansion have recounted sickening details of mental abuse, brainwashing, and dehumanization at Hefner's pleasure palace (Saginor, 2015). The latest former Playboy bunny to write about the horrors of sexual capitalism is Holly Madison (2015), who for five years was the number-one girlfriend of the 89-year-old Hugh Hefner, *Playboy* founder, pre-eminent entrepreneur, and guru of sexual capitalism. Madison claims that life in the Playboy Mansion was hellish. The young, unsophisticated women who ended up in Hefner's modern-day harem were controlled, manipulated, treated like inmates, and used as objects that existed solely for Hefner's sexual gratification.

Sexual capitalists and countless nightclub owners around the world have imitated the lucrative Playboy sex club model. These clubs recruited women from Thailand, the Philippines, India, Nepal, Tunisia, Morocco, Egypt, and other developing countries with promises of high-paying, glamorous "international jobs." Many of these women ended up as sex slaves in exotic places like Moscow, Russia; Bangkok, Thailand; New Delhi, India; Marrakech, Morocco; Cairo, Egypt; Tunis, Tunisia; and Abidjan, Ivory Coast. It is not only females who are exploited and discarded by sexual capitalism. Men who outgrow their youth and usefulness to the industry also get discarded. Figure 11.2 features a former sexual capitalism industry worker who lost his job and was seen begging for alms during a Vancouver, British Columbia, Pride Week.

Playboy Magazine, Sexual Capitalism, and the Mainstreaming of Sex-Themed Visual Imagery

By consistently challenging governmental restrictions on sex-themed speech, Playboy Enterprises has successfully demonstrated that it qualifies for protection under the First Amendment as part of the institutional press and as a user of media technologies (Volokh, 2012). In *United States v. Playboy Entertainment Group* (2000), the Supreme Court of the United States ruled that if the government wants to regulate sex-themed speech of the type purveyed by Playboy Enterprises and other sexual capitalists, it must demonstrate that regulation of that category of speech is constitutionally permissible. The court essentially reaffirmed the fact that sex-themed speech was protected under the First Amendment. With legal victories like these, Playboy Enterprises presents itself in the global marketplace as a

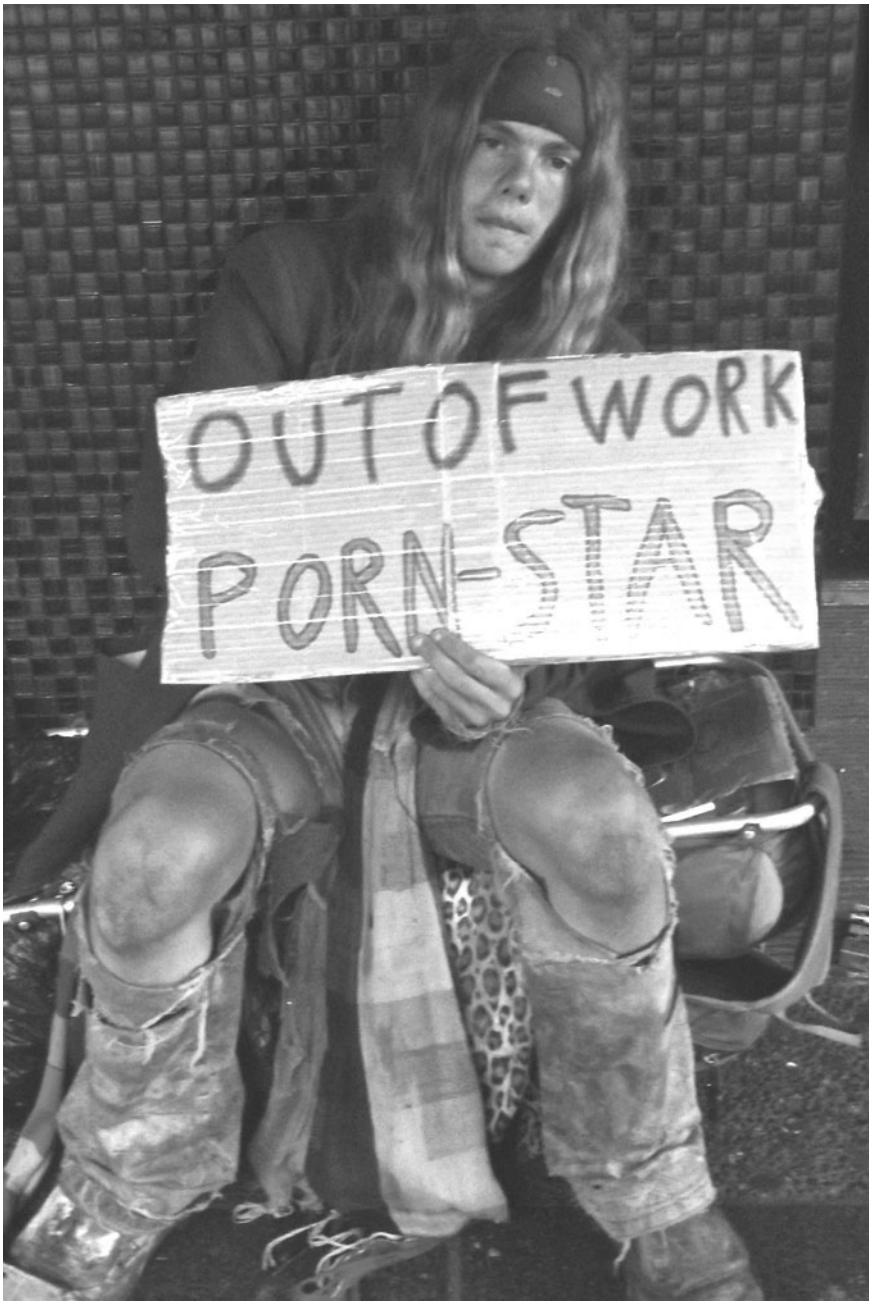

Figure 11.2 Unemployed and homeless sex industry worker on the streets of Vancouver, British Columbia, during Pride Week, 2012

champion of the democratic values of freedom of speech and expression. Its role as the pioneer and purveyor of exploitative sexual capitalism is carefully disguised by the contemporary buzzwords of freedom of expression.

The sexual revolution soon diffused to the mainstream media, and American television developed a new, "liberated," uninhibited sexual culture in the 1970s. It became what Levine (2014) calls "a central force in the mediation of the sexual revolution" (p. 81). America would never be the same again in matters of sex and sexuality. Before too long, sex became a civil right, a constitutional and human right protected by law not only in Europe but also in the United States (Wheeler, 2013). Under the ethos of "sexual liberation," the consumption of explicit, sex-themed media products and accessories was equated with freedom and sophistication. The sexual liberation movement was a movement against sexual temperance and self-control—a celebration of instant sexual gratification. Through pornography, viewers formed what social scientists of that era called "parasocial relationships" with their favorite porn stars. This means that viewers developed a certain bond with those stars, sometimes to the point of abnormality (Horton and Wohl, 1956). Furthermore, sexual capitalism assured viewers that by watching the vivid and dramatic sexual acts of these stars and consuming the commercial products they used or endorsed, these ordinary viewers could become actors in their own personal, imaginary movies. The sexual revolution therefore marked the democratization and popularization of sex and led to sexual consumerism (the consumption of sex aids, sexual accessories, and the trademarked merchandise of sexual

Figure 11.3 Retail porn for the masses; sex shop in Seattle, Washington (2014; photo: Lyombe Eko)

capitalists). The sexual revolution moved sex from the privacy of the bedroom to the public sphere (Schaefer, 2014). In the atmosphere of sexual hypercapitalism, all kinds of actors jumped into the business of sex and the enhancement of sexual pleasure. Television advertisements for Viagra and other drugs intended to cure "erectile dysfunction" became celebrated cultural artifacts. Millions of Americans consumed "male [penile] enhancement" products like the bestselling "herbal supplement" Enzyte, which grossed hundreds of millions of dollars. Enzyte and its "Smilin' Bob" advertisements turned out to be a massive fraud perpetrated on a public eager to be part of the sexual revolution (Ads for Male Enhancement Pill Bogus, 2008). A federal court convicted the perpetrator of the fraudulent advertising campaign, Steven Warshak, and his mother of a laundry list of crimes, including bank and mail fraud and money laundering. They were sentenced to federal prison and ordered to forfeit more than $600 million, the proceeds of the crimes. On appeal, the United States Court of Appeals for the Sixth Circuit affirmed the convictions and forfeiture judgments (*United States v. Warshak*, 2010).

Sexual Capitalism, Explicit, Sex-Themed Imagery, and the Law

Perhaps the most important result of the sexual revolution is that it transformed the production and consumption of sex-themed imagery into a right. This was due to the fact that sexual capitalism and the sexual liberation movement challenged legal and customary strictures on the public dissemination of sex-themed speech and expression. As a result of these legal challenges, since the late 1950s, a large proportion of media law in the United States has focused on the regulation of sex-themed content: obscenity, indecency, and pornography. As sexual capitalism challenged antipornography statutes around the country, it broadened the scope of freedom of expression and helped transform mass-mediated, sex-themed speech into a special category of regulated representation under the First Amendment. From the 1950s to the 1970s, the Supreme Court of the United States progressively liberalized laws governing the commercial production, advertisement, and dissemination of explicit visual depictions of sex (pornography) under the First Amendment. Pornography was regulated not because it was considered sinful—in modern, rights-based, liberal democratic societies that value freedom of expression, it is not the role of the government to enforce morality or religious commandments and edicts—but because of the physical, sociological, and psychological harm it was believed to inflict on human beings (mostly women and children).

In media law, the bulk of the legal disputes involving explicit, sex-themed speech have concerned distribution of the products of sexual capitalism. Actors in this sector have included adult (pornography) bookstores, adult movie theatres, and other distributors of explicit, sex-themed material in real space and cyberspace. In *Smith v. California* (1959), the Supreme Court of the United States set forth the principle that in order for a court to convict an adult pornographic bookstore owner of possession of "obscene" material, the government must prove that the defendant had knowledge that the material was obscene or illegal. In *Jacobellis v. Ohio* (1964), the US Supreme Court ruled that pornographic movies that were not "hardcore" were protected under the First Amendment. Indeed, Justice

Stewart's concurrence in the reversal of an obscenity conviction in *Jacobellis v. Ohio* summed up the libertarian ethos of the age: "Under the First and Fourteenth Amendments, criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that" (*Jacobellis v. Ohio*, 1964).

A few years later, the court ruled in *Cohen v. California* (1971) that "one man's vulgarity is another's lyric" (p. 25). This opinion emerged from a case in which the US Supreme Court reversed the conviction of an antiwar demonstrator who wore a shirt with the slogan "Fuck the Draft." In *Miller v. California* (1973), an adult pornographic bookstore owner, Marvin Miller, tried and failed to assert a right to mass distribute pornographic material to people who did not request the material. In *Ginsburg v. New York* (1968) and *New York v. Ferber* (1982), adult bookstore owners lost First Amendment challenges to laws that banned the distribution of child pornography. In *Hustler v. Falwell* (1988), a pornographic magazine successfully asserted its First Amendment right to offend the sensibilities of a public figure—a well-known preacher, no less—through the use of a "gross and repugnant" advertising parody. In *Ashcroft v. Free Speech Coalition* (2002), the trade association of the pornography industry, the Free Speech Coalition, succeeded in persuading the Supreme Court of the United States to strike down a section of the Child Pornography Prevention Act that criminalized the production, distribution, and reception of images of persons who appeared to be minors engaging in sexual conduct. The court ruled that the provision was overbroad. In *United States v. Matthews* (2000), an appellate court ruled that the First Amendment is not a license for journalists to traffic in child pornography under the pretext of researching the topic.

Sexual Capitalism Migrates to Cyberspace

In 1996, Congress enacted the Telecommunications Act. A section of that act sought to prevent children from seeing images or hearing sounds resulting from "signal bleed," the unintended "leakage" of sounds or images from scrambled sexually oriented cable programming. Playboy Enterprises and the pornography industry resisted this Congressional attempt to require them to "fully scramble or otherwise fully block" those channels or to "limit their transmission to hours when children are unlikely to be viewing." In keeping with the post-1960s libertarian ethos of the country in matters of sex-themed content, the Supreme Court of the United States held that "under our Constitution, esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority" (*United States v. Playboy Entertainment Group, Inc.*, 2000, p. 818).

The sexual revolution had reached its peak as a rule-based phenomenon, and sexual capitalism had taken its place as a major regulated entity in the global capitalist economic system. As we see in Chapter 12, segments of society, mostly feminist scholars, took issue with sexual capitalism and what they perceived as its discriminatory and dehumanizing treatment of women as sex objects.

The First Amendment and the Symbolic Speech Rights of Sex Industry "Professionals"

After that contextual survey of the regulation of sex-themed speech, we will now take a look at a few cases where sex-industry "professionals" sought legal refuge under the First Amendment from what they considered to be governmental censorship of their protected "expressive conduct." These so-called speech acts ranged from nude or seminude erotic dancing that was said to "speak" to the audience to explicit sexual intercourse that was believed to "send" political, social, and cultural messages to audiences. As such, they did not want the government to set the rules of the "game" of sex. In many jurisdictions, and especially in the United States and Europe, where freedom of speech and expression is considered a human right (Murphy and Coleman, 1990), courts and policymakers are often faced with controversies involving professionals, social interest groups, corporations, and unions seeking to bring their symbolic and expressive activities within the ambit of constitutionally protected freedom expression by virtue of their professional status or standing. The Supreme Court of the United States has held that political speech is "central to the meaning and purpose of the First Amendment" (*Citizens United v. Federal Election Commission*, 2010, p. 329). Therefore, all speech pertaining to matters of public concern is at the apex of the American free speech pyramid. It therefore follows that sex-themed media content has lesser protection than political speech. However, because sexual capitalism and its stock-in-trade, pornography and erotica, have become mainstream products in the United States, western Europe, and Japan, sex and sex-themed content often thrust themselves into the public political arena.

In the United States, governmental agencies regulate sexual capitalism under occupational safety and health rules that are applicable to all workplaces. The fact is that the sexual capitalism industry exploits its "performers" and tosses them out into the street when they are no longer deemed useful or profitable. Figure 11.2 is a photo of a homeless young man who was begging for alms on a street corner in Vancouver, British Columbia. He held up a sign stating that he was an unemployed "porn star." The desperate young man posed for photos for anyone who offered him a little money. Apparently, the Canadian pornography industry does not provide unemployment benefits for sex-industry workers. In the state of California, headquarters of the sexual capitalism industry, the California Occupational Safety and Health Act grants the state jurisdiction over the pornography industry. The California Division of Occupational Safety and Health (CalOSHA), whose mandate is to protect workers from health and safety hazards in workplaces through standards enforcement, protects workers in the pornography industry from sexually transmitted infections, including the human immunodeficiency virus (HIV). The law is aimed at eradicating the excesses of sexual capitalism, which does not care about the health and welfare of its "performers." The government clearly sets the rules and parameters of the "game of sex." As part of its labor standards enforcement, the state of California also has a Child Performer Services Permit System, which requires anyone who represents a minor or provides services to a minor who is an "artist" or actor in mainstream Hollywood productions to obtain a permit. This permit system is intended to protect minors from persons who are registered as convicted sex offenders (Child Performer Services Permit, 2013).

Sex as Symbolic Speech and Expressive Conduct: *Vivid Entertainment, LLC v. Fielding* (2013–14)

In August 2013, the US District Court for the Central District of California decided an unprecedented case: *Vivid Entertainment, LLC v. Fielding* (2013). This case involved claims of entitlements to freedom of expression based on professional or occupational status. In effect, in 2012, a pornographic film "performer" and an "adult entertainment" (pornographic film production) company jointly sued Los Angeles County, California, claiming that the "Safer Sex in the Adult Film Industry Act," which had been passed by the residents of the county in a referendum, constituted a censorious prior restraint that intruded on their First Amendment rights. The plaintiffs claimed that performing explicit sex acts in pornographic movies without using condoms was a protected activity that sent a certain "message" of eroticism and sexuality to the viewers of the films. As such, the plaintiffs argued, the First Amendment put the explicit, commercial sexual "performances" of members of their profession beyond the reach of "censorious" and intrusive laws. The plaintiffs exhorted the federal court to order the people of Los Angeles County not to interfere with the sexual "speech acts" and explicit, expressive performances of members of the pornographic film industry. The issue before the court was whether "engaging in sexual intercourse for the purpose of making a commercial film receives First Amendment protection." The court ruled that a commercial pornographic performance is "expressive conduct, is therefore speech, and therefore any restriction on this expressive conduct requires First Amendment scrutiny" (p. 8). Nevertheless, the court noted that the Los Angeles Department of Public Health had persuasive public health reasons for requiring performers in adult pornographic films to wear condoms when they engaged in sex acts that could propagate sexually transmitted infections. The court thereby concluded that the sexual activity banned by the Safer Sex in the Adult Film Industry Act was banned, in the words of the US Supreme Court, because of its "noncommunicative impact" (*United States v. O'Brien*, 1968, p. 382). Therefore, it was constitutional for the county of Los Angeles to require the pornography industry to obtain permits to shoot pornographic movies and to require actors featured in pornographic films to wear condoms when they engaged in explicit sexual intercourse. On appeal, the US Court of Appeals for the Ninth Circuit affirmed the decision, stating that "the requirements that producers of adult films in Los Angeles County obtain permits, train employees about the sexual transmission of disease, and require performers to wear condoms when engaged in vaginal or anal intercourse" did not violate the First Amendment rights of the pornography industry or its performers. The court added that the condom mandate has a "de minimis [minimal] effect on [sexual] expression, is narrowly tailored to achieve the substantial governmental interest of reducing the rate of sexually transmitted infections, and leaves open adequate alternative means of sexual expression" (*Vivid Entertainment v. Fielding*, 2014).

After these rulings, CalOSHA stepped up enforcement of occupational safety measures in the adult entertainment, or pornography, industry. When two performers working for pornography producer Kink.com tested positive for HIV, the AIDS Health Care Foundation, a Los Angeles public advocacy group, lodged a complaint with CalOSHA. The government agency carried out an inspection, gathered evidence, and fined Kink.com $80,000 for maintaining dangerous

workplace conditions that included allowing performers in pornographic films to have sexual intercourse on camera without using condoms. Such performances violate state laws against exposing employees to blood and other potentially infectious bodily fluids like semen. Nevertheless, there is no state-wide law in California requiring all performers in pornographic films to wear condoms (S. F. Company Fined for Unsafe Conditions, 2014).

Thanks to the First Amendment, the sexual liberation soon diffused from the *Playboy* mansion, hippie communes, and Hollywood movie sets to mainstream America. The Vivid Entertainment case was a re-presentation of the interesting legal and policy issue of the professionalization of the sexual capitalism industry: the professional status of and constitutional protections granted to performers in the "adult entertainment," or pornography, industry under diverse jurisdictions. The First Amendment free speech regime of the United States, which essentially puts the brakes on unnecessary governmental intervention in the marketplace of ideas, has tackled this issue. The US Supreme Court has held on numerous occasions that "adult" performances, whether they be exotic dances or explicit sex acts, are what Ricoeur (2013) calls "speech-acts" (p. 27). These are considered to be protected symbolic speech or expressive conduct if they follow the rules.

From Porn Movie Sets to Exotic Dancing: The First Amendment Rights of Nude Dancers

Sexual capitalism is an industry with many interconnected branches in real space and cyberspace. These range from traditional pornographic magazines to pornographic films to Internet "webcam" work to exotic dancing in strip clubs to legal prostitution. Many women who work in the industry gravitate from pornographic magazine "spreads" toward adult entertainment (pornographic movies), "webcamming," exotic/erotic dancing in strip clubs, or contracts in legal brothels in Las Vegas, Reno, and other places. Sometimes these women work in two or three branches of the sexual capitalism industry at the same time (Brents, Jackson, and Hausbeck, 2010). Many "adult" porn establishments use the products of the sexual capitalism industry in their businesses. Some adult entertainment businesses augment pornographic videos with live entertainment in the form of nude or seminude erotic performers who may or may not be working in the pornography industry as webcam performers or performers in adult porn movies. We saw in *Vivid Entertainment, LLC v. Fielding* that performers in the pornography industry claimed that making explicit, commercial, pornographic films that involved sexual intercourse without wearing condoms was a "communicative" endeavor because sexual intercourse without condoms "sent a message" to viewers of the film. This claim is due to the fact that in the libertarian context of the United States, "communicative freedoms have become more important than other individual rights." Furthermore, the preference for individual liberties often exists in tension with the moral values of segments of society: "A radically nonjudgmental First Amendment is the natural repository for a culture in which libertarianism, *laissez-faire*, and distrust of government remain the hallmark of a distinctive American ideology" (Schauer, 2005, p 47). It is also a fundamental feature of American First Amendment law that the individual liberty rights of the speaker almost always take precedence over the feelings of the listener (Eko, 2012).

The next set of cases shows how a group of sex-industry professionals, nude or erotic dancers, sought to take advantage of these First Amendment freedoms. As the sexual liberation continued in the United States, nude or exotic dancing became a new business venture for sexual capitalists. The phenomenon became common in bars and specialized clubs across the country. Concerned states, counties, and municipalities responded with zoning regulations and anti–public nudity statutes. The owners of establishments that featured nude dancing fought back by seeking legal remedies. One of the first nude/exotic dancing cases to reach the Supreme Court of the United States was *California v. LaRue* (1972). In this case, the court ruled that barroom nude dancing was entitled to First Amendment protection "under some circumstances." The next time the issue surfaced was in *Schad v. Borough of Mount Ephraim* (1981). In this case, the court invalidated a law that sought to outlaw all nude dancing in the county of Mount Ephraim, New Jersey. The court ruled that nude dancing was expressive conduct that had First Amendment protection. Therefore, performances could not be prohibited solely because they featured a nude human figure.

The Case of *Barnes v. Glen Theatre* (1991)

In *Barnes v. Glen Theatre*, the Supreme Court of the United States dealt with another exotic dancing case. This time, the case came from America's heartland: the city of South Bend, Indiana, home of Notre Dame University. The case involved the Kitty Kat Lounge, an "adult entertainment" outfit that constituted an adult bookstore, a pornographic movie projection center, and a live nude and seminude performance theater. On the entertainment menu was nude or "go-go" dancing. The proprietor wanted to present "totally nude dancing," where the dancers wore only their birthday suits, but an Indiana law regulating public nudity required that the dancers wear "pasties" and a "G-string" during their performances.

Since Indiana law banned totally nude performances, the proprietors of Glen Theatre and one of its dancers sued the state of Indiana in the US District Court for the Northern District of Indiana requesting the court to restrain the state of Indiana from enforcing the Indiana public indecency statute on the grounds that it was unconstitutional. They claimed that the law's prohibition against complete nudity in public places violated the First Amendment. The District Court granted Glen Theatre's request for an injunction on the grounds that the statute was facially overbroad; that is, the law banned more activity than was necessary. The US Court of Appeals for the Seventh Circuit reversed that decision and sent the case back to the district court, which ruled that "the type of dancing these plaintiffs wish[ed] to perform [was] not expressive activity protected by the Constitution of the United States" and rendered judgment in favor of the state of Indiana. Glen Theatre again appealed to the Seventh Circuit Court, where a panel of judges reversed the district court's decision, holding that the nonobscene nude dancing involved in this case was expressive conduct protected by the First Amendment. The court ruled that Indiana's public indecency statute interfered with the expressivity of nude dancing because "its purpose was to prevent the message of eroticism and sexuality conveyed by the dancers." The state of Indiana appealed to the Supreme Court of the United States, which granted a writ of certiorari and agreed to review the case. The issue before the court was whether the requirement that nude dancers

wear pasties and G-strings violated the First Amendment. The court answered in the negative.

While affirming the idea that nude dancing is expressive conduct protected by the First Amendment, the US Supreme Court ruled that "customary 'barroom' type of nude dancing may involve only the barest minimum of expression" protected from official regulation: "Nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment." The court ruled that Indiana's public indecency statute was "justified despite its incidental limitations on some expressive activity." This decision reiterated the fact that nude dancing, like other sex-themed speech, was a regulated representation of sexuality due to the fact that from time immemorial, society has regulated public indecency for reasons of social order and morality. "Public indecency statutes such as the one before us reflect moral disapproval of people appearing in the nude among strangers in public places," the court wrote. The court concluded that Indiana law banned public nudity, not the communicative element (dancing) of the performance that the nudity of the dancers sends (*Barnes v. Glen Theatre*, 1991).

The Case of *City of Erie v. Pap's A. M. "Kandyland"* (2000)

The Internet and its associated discussion groups and social media make nude dancing sound like an ancient phenomenon. However, the phenomenon helped the courts shape the contours of permissible, sex-themed expressive conduct. The next major nude dancing case heard by the US Supreme Court was *City of Erie v. Pap's A. M. "Kandyland"* (2000). Pap's A. M., an Erie, Pennsylvania, outfit whose stock-in-trade was female nude erotic dancing, clashed with the city of Erie, Pennsylvania, because the city had passed a law making it illegal for anyone to knowingly or intentionally appear in public in a "state of nudity." This posture was problematic because Pap's A. M. wanted its dancers to dance totally nude without the benefit of pasties or G-strings. Pap's A. M. claimed that its nude dancers had a First Amendment right to dance totally nude because by performing in nothing but their birthday suits, they communicated a message of eroticism and sexuality to their audiences just like other speakers communicate messages to their audiences. In other words, Pap's A. M. claimed that dancing in the nude was, in and of itself, the message the dancers and the "club" were sending. In short, it claimed that dancing in the nude was protected expressive conduct. The city of Erie countered that its ordinance banned "conduct," not speech. The issue before the court was whether the ordinance banning nudity was intended to suppress the expression of Pap's A. M. and its exotic dancers. The court answered in the negative and ruled that "being 'in a state of nudity' is not an inherently expressive condition . . . nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection." The court proceeded to hold that the law banning public nudity was "aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments like Kandyland and not at suppressing the erotic message conveyed by this type of nude dancing." The court concluded that a ban on public nudity was not necessarily a ban on the erotic message of nude dancing: "Even if Erie's public nudity ban has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped, the

dancers at Kandyland and other such establishments are free to perform wearing pasties and G-strings" (*Erie v. Pap's A. M. "Kandyland,"* 2000). The contested ordinance was ruled constitutional because it regulated conduct, not First Amendment expression.

Conclusion

These cases demonstrate that the sexual emancipation championed by *Playboy* in the 1950s had diffused from the center of the adult entertainment (porn) industry in California to the American heartland. This deterritorialization was made possible by First Amendment protections for "speech" that some Americans found immoral. The First Amendment claims of workers in the pornography industry demonstrate the wide scope of the First Amendment. These cases also show how courts balanced the speech rights of these workers against the moral, economic, and social interests of society. While the nude dancing phenomenon seems to have waned, due in part to the Internet and new communication technologies, the nude dancing cases illustrate an aspect of First Amendment law. The take-home lesson is that the First Amendment is not absolute. Courts always have to strike a balance between the right of freedom of expression and the interests of society. Though sex-themed speech in general and pornographic performances and erotic dancing in particular are constitutionally protected, they have lesser First Amendment protection than hardcore political speech.

12

Sexual Capitalism, Organized Crime, and Explicit, Sex-Themed Visual Imagery

The *Deep Throat* Cases

As we saw in Chapter 11, sexual capitalism had succeeded in relaxing cultural taboos against pornography and in transforming it into a mainstream entertainment product consumed by American audiences. An important client for *Playboy* magazine is the Library of Congress. In effect, since 1973, the Library of Congress has reproduced books and magazines in braille and recorded editions for blind and visually impaired individuals (*American Council of the Blind v. Boorstin*, 1986). The Library of Congress essentially reproduced and distributed free copies of the textual portions of *Playboy* magazine in braille, under license from *Playboy* magazine. Pictures and cartoons were not reproduced in braille due to technical limitations. Playboy turned out to be one of the most popular magazines in the program. In 1981, a congressman requested that the Librarian of Congress, Daniel J. Boorstin, stop reproducing and distributing free braille copies of *Playboy* and introduced an amendment to the House appropriations bill to defund the reproduction of Playboy in braille. The congressman stated that the federal government had no business supporting a sex-themed magazine like *Playboy*. The House of Representatives passed the bill to defund the *Playboy*-in-braille program, and Boorstin discontinued it.

The American Council of the Blind sued Boorstin, claiming that his discontinuance of the *Playboy*-in-braille program amounted to viewpoint discrimination and sought a declaratory judgment to the effect that Boorstin's actions in discontinuing the program were unconstitutional, viewpoint-based actions. The issue before the court was whether discontinuance of the program amounted to viewpoint discrimination. The court answered in the affirmative. It held that the Program for the Blind and Physically Handicapped was a nonpublic forum created for the communication of ideas. The court found that "eliminating Playboy from the program was tantamount to viewpoint-based discrimination impinging

on freedom of expression . . . Censorship whether by Congress or by the Librarian of Congress is equally abhorrent to a society built on the tenets of freedom of speech and expression." The court concluded that the government's action in terminating the *Playboy*-in-braille program violated the First Amendment. The fundamental principle of this case is that though individuals have no right to government subsidies or benefits, once a government program or benefit is in place, the government may not apply it in a manner that is discriminatory and violates the First Amendment (*American Council of the Blind v. Boorstin*, 1986).

Though this was a victory for the American Council of the Blind, it was also a victory for sexual capitalism in general and for *Playboy* in particular. As we saw in Chapter 10, victorious legal challenges against local antipornography regulations enabled sexual capitalists to produce more sexually explicit films without fear of censorship. One of the legacies of sexual capitalism is that it has broadened the scope of freedom of expression in the United States. The Presidential Commission on Obscenity and Pornography (1970) noted that every "successful, high grossing sexploitation film led to imitations" (p. 28). In the early 1970s, the Mafia saw Hollywood movies as an excellent business in which to invest and launder its ill-gotten gains from prostitution, drugs, and other illegal activities. Categories of sexploitation movies that were produced included names like "roughies," "kinkies," "ghoulies," and hardcore, pornographic "stag films" directed at male consumers. These kinds of materials almost always consisted of a combination of sex and violence (Presidential Commission on Obscenity and Pornography, 1970, p. 28).

The most well-known and most successful cinematic investment of organized crime was a pornographic movie titled *Deep Throat*. In effect, the mob invested $22,000 in the production of *Deep Throat* and proceeded to distribute it to theaters using its well-known strong-arm tactics. This Hollywood venture turned out to be a very profitable investment (US Department of Justice, 1986). The explicit, hardcore porn flick turned out to be "the most profitable porno film ever made" (Keeps, 2005). A new subsidiary of sexual capitalism had been born. San Francisco, California, became the epicenter of hardcore pornography because it had that perfect mixture of idealism, counterculture, counterinstitutional ethos, and oppositional sexual politics (Duong, 2014). *Deep Throat* became America's first pornographic blockbuster film (Lewis, 2000; Steinem, 1986) and began the process that led to the mainstreaming of pornography in the United States (Blumenthal, 1973). Other countries made different-language versions of *Deep Throat*. The most noted version was the French-language version, *Gorge profonde (*Keeps, 2005*)*.

Deep Throat soon became such a pervasive part of American culture that it served as the inspiration for "Deep Throat," one of the most enigmatic characters in American politics. In effect, Deep Throat became the codename of the clandestine source who helped the *Washington Post* reporters Bob Woodward and Carl Bernstein link the Nixon administration to the series of illegal political activities that came to be known as "the Watergate scandal." Deep Throat turned out to be FBI Deputy Director Mark Felt (Woodward, 2005). The movie *All the President's Men* would further sear the name "Deep Throat" into the American consciousness.

Aim of the Chapter

The aim of this chapter is to analyze the so-called *Deep Throat* cases, litigation that took place in different jurisdictions around the country in response to the unprecedented phenomenon of the pornographic film *Deep Throat*, which was funded and distributed by the Mafia as part of the business of sexual capitalism. The political and economic capital of sexual capitalism—of the global adult entertainment (pornography) empire—is located in Southern California. Indeed, pornography is one of the largest industries in California. It produces thousands of films, videos, and video games, as well as tons of sexual paraphernalia, each year, and it generates billions of dollars in revenue. Due to a rather permissive regulatory environment in California, the adult film industry, driven by its capitalist ethos and a profit motive that had appropriated the language of liberation and the counterculture movement, exploded and progressed from "soft porn" to hardcore pornography (Duong, 2014). It has amassed revenues, gained political clout, and become accepted in mainstream financial and investment centers like Wall Street (Cesare, 2006). The major telecommunications companies and hotel chains distribute its products in real space and cyberspace. This is possible because sexual capitalism is a rule-based industry. At the federal level, the Supreme Court of the United has ruled that sex-themed content that was not obscene (i.e., did not present sexual and scatological functions in a highly offensive manner and did not appeal to prurient tastes) was protected "speech" under the First Amendment. Additionally, the court has held that in order for states to ban sex-themed speech, they must use local community standards to determine whether the material has any literary, artistic, social, or political value (*Miller v. California*, 1973). As a result of its First Amendment protection, and its political clout, "Sex Inc." ensured that the state of California would turn a blind eye to the excesses of the pornography industry. This state of affairs continued until the human immunodeficiency virus (HIV) reared its ugly head and posed a serious health and safety threat to the freewheeling industry in which almost any kind of sexual activity between paid, consenting adult "performers" was tolerated in the name of freedom of expression and the First Amendment (Cesare, 2006).

The *Deep Throat* Phenomenon and Regulation of Explicit, Sex-Themed Speech in the United States

The history of the regulation of explicit, sex-themed visual imagery is the history of the production and public divulgation of unprecedented texts or images that challenge the religious, political, legal, social, and cultural status quo and led to a reexamination of settled media law and regulation. In the twentieth century, the film *Deep Throat*, which was financed, produced, and distributed by the Mafia in 1972 turned out to be a sociocultural and legal phenomenon that had implications for freedom of speech and expression guaranteed under the First Amendment. *Deep Throat* was unprecedented and contentious from the very beginning because it pushed the boundaries of contemporary American mores with respect to the mass mediation of sexually explicit visual imagery. The legal history of the *Deep Throat* affair shows that the pornographic film made its appearance on the American scene at a cultural turning point. The sexual revolution and the hippie culture of the late 1950s and early 1960s were beginning to loosen the grip of traditional, Puritan and

Victorian values on American society. The US government, specifically the FBI, was fighting organized crime in the major metropolitan areas of the country, and sexual capitalists and investors like Hugh Hefner (founder of *Playboy*), Larry Flynt (founder of *Hustler*), Robert Guccione (founder of *Penthouse*), and others transformed explicit, sexual visual imagery into a very lucrative business.

Organized crime salivated at the potential of making pornography into a cash cow. With an investment of less than $50,000, the Mafia transformed *Deep Throat* and other pornographic films into a lucrative commercial enterprise that could be used to launder revenues from other less reputable lines of "business." While sexual capitalists and mobsters were pushing the limits of the acceptable in explicit, sex-themed visual imagery, their activities forced the courts to rule on the place of pornography in the hierarchy of freedom of speech guaranteed under the First Amendment. Their task was to strike a balance between freedom of expression and the rights to produce, possess, and disseminate pornographic material across state lines. The courts had to clarify the concept of obscenity and differentiate unprotected hardcore pornography (obscenity) from other forms of sex-themed visual speech that were protected by the First Amendment. In short, the courts had to bring the old law of obscenity that had been imported from the United Kingdom in the nineteenth century abreast of new mass-media technologies. The production and distribution of *Deep Throat* and other notorious pornographic films spawned federal prosecutions and expensive litigation that lasted almost a decade. A complicating factor was organized crime's use of its clandestine networks and racketeering tactics to strong-arm movie theaters into showing their films. The *Deep Throat* affair emerged from the "sexploitation" phenomenon whereby sexual capitalists invested in short, pornographic movies that circulated outside traditional Hollywood movie distribution circuits. The *Deep Throat* phenomenon was interesting because that movie became one of the most litigated movies in the history of American film.

The *Deep Throat* Cases

We have seen that the sexual revolution of the late 1950s and early 1960s diffused to mainstream American and European society and that sexual capitalists profited from young people's often naïve entwinement of anti–Vietnam War sentiments and advocacy of sexual freedom, which was at variance with traditional Puritanical sexual morality. The zeitgeist of the movement was summarized by the rallying call "Make love, not war" and by slogans like "girls say yes to boys who say no [to the draft]." To sexual capitalists like Playboy Enterprises, *Hustler* magazine, *Penthouse*, and especially pornographic movie makers, this evolving social and cultural climate provided a golden opportunity to produce, commercialize, and disseminate sex-themed visual imagery. Not to be outdone, organized crime, which has always been a foil of law and order, emerged like a leech, fastened itself on the underbelly of the "adult entertainment" sector of Hollywood, and operated in the shadows of the celebrity and glamour of the movie industry.

The Los Angeles crime family La Cosa Nostra, which had set up shop in Southern California in the early 1900s, became active in the pornography business. In the *Final Report of the Special Crime Study on Organized Crime*, a commission of the state of California (Special Crime Study Commission on Organized Crime, 1953), members of the commission concluded that organized crime was a major

threat to the political and social system of the state of California due to its involvement in illegal narcotics distribution, extortion, loan-sharking, prostitution, pornography, and gambling. Furthermore, it soon became clear that La Cosa Nostra had infiltrated entertainment labor unions and become past masters at extorting money from the emerging sexual capitalism industry in Southern California (Demaris, 1981). Some members of the La Cosa Nostra became sexual capitalists themselves and muscled in on the lucrative pornography production and distribution industry. They soon controlled pornography production and distribution companies and networks through extortion and intimidation of producers, performers, and movie theaters (Lovelace, 1986; US Department of Justice, 1986). In response, the state of California set in place a number of progressively restrictive regulatory mechanisms aimed at protecting the movie industry and workers under labor and occupational safety rules and regulations.

The perfect example of organized crime infiltration of the movie industry was the *Deep Throat* affair, a series of legal controversies over the distribution of one of the earliest and most successful cinematic, pornographic products of sexual capitalism. The primary investors and controllers of *Deep Throat* were either members of organized crime groups or persons who had connections with organized crime (US Department of Justice, 1986). In her book *Escape from Bondage*, Lovelace (1986, p. 68) the female "star performer" of *Deep Throat*, claimed that the FBI had identified Anthony Joseph "Lou" Peraino, the producer of the movie, as a member of the Colombo crime family. She claimed that she was forced to have sex with Peraino regularly during and after shooting of the movie. As we shall see later, Peraino was convicted in one of the numerous *Deep Throat* cases. Organized crime involvement in the production and coercive distribution of *Deep Throat* attracted the unwanted attention of the Federal Bureau of Investigation (FBI), and the Internal Revenue Service (IRS), which suspected that the Mafia engaged in massive tax evasion and used pornography to launder proceeds from its criminal activities. The result was a series of prosecutions directed at the director, producers, main performer, and distributors of the film.

The *Deep Throat* Cases and Evolution of the Regulation of Sex-Themed Visual Imagery in the United States

The emergence of sexual capitalism—with its stock-in-trade, explicit, sex-themed, commercial visual imagery (obscenity and pornography)—led to a clash between First Amendment freedom of expression and Fifth Amendment due process of law. In other words, courts had to strike a balance between freedom of expression, protected by the First Amendment, and governmental regulation of explicit, sex-themed speech and its purveyors within the due process requirements of the Bill of Rights. In effect, organized crime's investment in the production of *Deep Throat* and the opaque methods it used to distribute the film and other hardcore pornographic movies in the United States caught the attention of the federal government. Discovery of organized crime's foray into commercial hardcore pornography emerged when the federal government's war against organized crime syndicates was having a lot of success. As early as 1951, the Senate Special Committee to Investigate Organized Crime in Interstate Commerce had revealed that a nationwide criminal syndicate known as the Mafia operated in many metropolitan

areas including New York City, Chicago, Los Angeles, and Boston. In 1966, FBI Director J. Edgar Hoover declared that the criminal syndicate known as the Mafia, or La Cosa Nostra, was a "fraternity whose membership is Italian either by birth or national origin" (Hoover, 1966). In 1967, the President's Task Force on Organized Crime investigated criminal mob activities across the country with the assistance of federal, state, and local law enforcement agencies. Additionally, the FBI, the Secret Service, the Internal Revenue Service, and the Bureau of Narcotics in the Treasury Department all participated in the fight against organized crime across the country (President's Commission on Law Enforcement and Administration of Justice, Task Force on Organized Crime, 1967).

When the government concluded that *Deep Throat* was funded and distributed by individuals with mob connections, it proceeded to investigate and prosecute the persons directly or indirectly involved in the distribution of the film "in interstate commerce" (across state lines). The result was a series of *Deep Throat* investigations and prosecutions that lasted from 1973 to 1981. A survey of this litigation shows how federal courts at all levels wrestled with the task of striking the right balance between freedom of expression, due process of law, and the suppression of hardcore pornographic material that had no redeeming social value. The government targeted mostly the distribution end of hardcore pornography because of First Amendment concerns. This section gives a brief survey and analysis of the so-called *Deep Throat* cases that played a role in shaping obscenity law under the First Amendment and ironically led to the mainstreaming of pornography in the United States.

Marks v. United States (1977)

The so-called *Deep Throat* cases commenced in 1973, when the federal government began an investigation into the illegal distribution of *Deep Throat* across state lines. The *Deep Throat* cases are interesting because the Supreme Court of the United States used them to clarify the due process rights of alleged pornographers and reiterated the regulatory standards that apply to obscenity and pornography under the First Amendment. In early 1973, Stanley Marks and others were charged with transporting copies of "obscene, lewd, lascivious and filthy films and film previews" across state lines for the purpose of sale and distribution in violation of federal laws. The law in question also criminalized conspiracies to distribute such material:

> Whoever knowingly produces with the intent to transport, distribute, or transmit in interstate or foreign commerce, or whoever knowingly transports or travels in, or uses a facility or means of, interstate or foreign commerce or an interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934) in or affecting such commerce, for the purpose of sale or distribution of any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined under this title or imprisoned not more than five years, or both. (18 USC § 1465, 1976)

> The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five

> such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable. (18 USC § 371, 1976)

The aim of these legal provisions was to keep "obscene" material (i.e., hardcore pornography that was not protected under the First Amendment) from entering the legitimate stream of interstate commerce in the United States. The only problem was that the concept of obscenity was still a vague and legally elastic concept that had not been defined with any exactitude since its inception in the Greek New Testament and its elaboration (without a clear definition) by the British Court of the Queen's Bench in the nineteenth century. American courts had imported British obscenity standards that did not define the word "obscenity" with any level of exactitude and incorporated that word into the American First Amendment regime. At the time of the indictment, the Supreme Court of the United States had not yet advanced its "final" obscenity standard. In June 1973, the court set forth the "settled" obscenity standards in its decision in *Miller v. California* (1973). Four months later, Marks and others were charged with involvement in the production and distribution of the *Deep Throat* and other explicit, sex-themed films.

Deep Throat was at the top of the list of obscene materials that Marks and the other defendants were charged with distributing or conspiring to distribute across state lines. Despite the objection of the defendants, the district court applied the obscenity standards set forth in *Miller v. California* (1973). Under these standards, in order for a court to declare material obscene, and thus outside the ambit of First Amendment protection, the jury must take community standards into consideration when making the following determinations:

1. Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest
2. Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law
3. Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value

Marks and his codefendants argued that since the offenses they were alleged to have committed occurred prior to the *Miller* standard, the applicable standard of obscenity should be the less stringent *Roth–Memoirs* standard (distilled from *Roth v. United States*, 1957 and *Memoirs v. Massachusetts*, 1966), which stipulated that in order for material to be declared obscene, the court must make a determination whether

- the dominant theme of the material taken as a whole appeals to a prurient interest in sex;
- the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; or
- the material is utterly without redeeming social value.

The main argument of the defendants was that the third prong of the *Miller* test was much more stringent than the third prong of the *Roth–Memoirs* test, which was in force at the time *Deep Throat* was produced and at the time Marks and his

codefendants were alleged to have conspired to distribute it across state lines. As a result, they argued, application of the *Miller* test to offenses that allegedly occurred prior to its formulation was *ex post facto* application of the law, a violation of their constitutional rights to due process and a fair trial (*United States v. Marks*, 1975). The court disagreed and convicted Marks and his codefendants. On appeal, the US Court of Appeals for the Sixth Circuit affirmed, holding, "It is plain to us that the material in the present case was obscene, irrespective of which standards are applied . . . There can be no question but that the material in 'Deep Throat' was hard core pornography" (*United States v. Marks*, 1975, p. 920).

Marks and his codefendants appealed to the Supreme Court of the United States, which granted a writ of certiorari and agreed to review the case. Marks and his codefendants argued that their involvement with *Deep Throat* was premised on the law of obscenity in force in 1972. This was the so-called *Roth–Memoirs* test, which stated that sex-themed material was constitutionally protected unless it could be found to be "utterly without redeeming social value." The defendants claimed that the standard the district court applied to them was the more stringent *Miller* test, under which the jury was to take community standards into consideration when deciding "whether the work, taken as a whole, lack[ed] serious literary, artistic, political, or scientific value." The issue before the court was whether the Fifth Amendment due process rights and the First Amendment free speech rights of the defendants had been violated by their prosecution and conviction. In other words, could the obscenity standards set forth in *Miller v. California* (1973) to differentiate "hard core, illegal pornography from expression protected by the First Amendment" be applied retroactively to the *Deep Throat* case to the detriment of Marks and his codefendants? The court answered in the negative, stating that the due process clause of the Fifth Amendment protected the *Deep Throat* defendants from retroactive application of the *Miller* standards, inasmuch as those standards could result in criminal penalties that were not available to the government under the *Roth–Memoirs* standard that was in force at the time the alleged offenses were committed. In effect, the *Roth–Memoirs* standard, developed in the cases *Roth v. United States* (1957) and *Memoirs v. Massachusetts* (1966), required juries to convict defendants who were found in possession of explicit, sex-themed material that was "utterly without redeeming social value." The more stringent *Miller* test penalized conduct that was not punishable under this standard. The court concluded that the due process clause precluded the application of the standards announced in *Miller v. California* to Marks and the other petitioners to the extent that those standards could impose criminal liability for conduct not punishable under the *Roth–Memoirs* standard. Specifically, since the petitioners were indicted for conduct occurring prior to the court's decision in *Miller*, only the "utterly without redeeming social value" standard of *Roth–Memoirs* could be applied to them. The convictions of Marks and the other defendants were therefore reversed. This case was important because it demonstrated that sexual capitalists and purveyors of hardcore pornography were entitled to due process (fundamental fairness) under the law.

However, that was not the end of the story. Marks and his codefendants were tried again and convicted of knowingly transporting obscene material (*Deep Throat* and another pornographic film, *Swing High*) across state lines (in interstate commerce) and of conspiracy to transport obscene material across state lines. Marks appealed his conviction to the US Court of Appeals for the Sixth Circuit, claiming that *Deep Throat* and *Swing High* were not legally obscene and were thus protected speech under the First Amendment. The substantive issue before the court was whether

Deep Throat and *Swing High* were, in fact, obscene and therefore outside of the protective umbrella of the First Amendment. The appellate court viewed the films and concluded that they were in fact "classic examples of hard core pornography"; that is to say, they rose to the level of obscenity (*Marks v. United States*, 1977).

United States v. Battista (1981)

In order to prevent the distribution and screening of *Deep Throat* in the United States, the US government decided to draw the line in Memphis, Tennessee. In their second trial for conspiracy to violate federal obscenity statutes by transporting *Deep Throat* across state lines, Louis Peraino, the film's producer; Gerard Damiano, the director; Anthony Battista; and other persons who played roles in the distribution of the movie were convicted and sentenced to jail terms ranging from two to eight months and ordered to pay fines ranging from $1,500 to $10,000, depending on the jury's determination of the degree of their involvement with the movie. On appeal, the defendants raised a number of issues, including propriety of the grand jury proceedings and the constitutionality of the federal obscenity statute under which they were convicted. They also questioned the constitutionality of the government's seizure of *Deep Throat*. The issue before the court was whether the federal obscenity statute (18 USC § 1465) was vague, overbroad, and thus unconstitutional. The court held that it was not. It ruled that "*Deep Throat* is obscene under constitutional standards," and affirmed the convictions and sentences of all defendants but Joseph Peraino and his movie distribution company, Plymouth Distributors, Inc. Since Peraino had raised separate constitutional issues, the court issued a separate opinion in his case (*United States v. Battista*, 1981).

A notable feature of the *Deep Throat* cases is that those indicted for conspiracy to distribute obscenity included Herbert Streicher (a.k.a. Harry Reems), the main male "performer" in *Deep Throat* (*United States v. Peraino*, 1981). As a result of the indictment and conviction of Streicher, *Deep Throat* garnered national attention and notoriety. This was because the media, Hollywood personalities, and celebrities raised several First Amendment issues connected to Streicher's prosecution and conviction. They touted it as the first time in which an American "actor" or "performer" in a movie was charged and convicted as a coconspirator with the Mafia in distributing obscene material. They created a legal defense fund and hired the famous Harvard professor Alan Dershowitz to defend him on First Amendment grounds. Though the conspiracy charge was dismissed, the obscenity conviction was not. A federal judge ordered a new trial for Streicher, but that trial never took place. The porn "superstud" died in 2013 at age 65. The mob had paid him $100 in 1972 for his starring role in *Deep Throat* (Siemaszko, 2013).

United States v. Peraino (1981)

This was a companion *Deep Throat* case to *United States v. Battista* (discussed previously). We saw that *United States v. Battista* involved the prosecution and conviction of a cast of characters who participated in the production and distribution of the movie. In 1974, a grand jury in Memphis, Tennessee, had indicted and convicted Louis Peraino, the producer of the film, and seven other persons for being part of a national conspiracy to distribute an obscene film across state lines. On appeal,

Peraino claimed that his First Amendment and due process (fundamental fairness) rights were violated when he was made to stand trial in the Western District of Tennessee, a community with which he had had no contact and no personal or business connections. He claimed that he did not distribute or transport *Deep Throat* to or through that region. The court of appeals ruled that since there are no national community standards in obscenity prosecutions, only contemporary, local community standards were applicable under the Supreme Court ruling in *Miller v. California* (1973). The appellate court found no evidence that Peraino intended to distribute *Deep Throat* in Tennessee communities where it would give rise to community outrage and lead to legal action. The court therefore ruled that *Deep Throat* was entitled to constitutional protection, except when it violated community standards. Furthermore, the court found no evidence that Peraino was part of a national conspiracy to distribute *Deep Throat* (*United States v. Peraino*). The court therefore reversed the conviction of Peraino. The importance of this case is that it used the community standards set forth in *Miller v. California* to reverse the conviction of the producer of *Deep Throat*. By declaring that the movie was constitutional unless it violated specific community standards, the US Court of Appeals for the Sixth Circuit essentially took the wind out of the sails of the Federal government's attempts to stamp out obscenity in the United States at the national level.

United States v. DeFalco (1981)

A last-gasp attempt at a national solution to what the federal government perceived to be a national obscenity problem was made in 1981. After a two-and-a-half-year undercover investigation of national distributors of sexually explicit films, magazines, and other allegedly obscene material, the FBI obtained search warrants against 45 indicted individuals in New York City, Baltimore, Cleveland, Chicago, San Francisco, and Fort Lauderdale. These individuals, many of whom allegedly had organized-crime connections, were considered to be the major national pornography distributors in the United States. The FBI also sought search warrants for 19 unindicted companies owned or controlled by these individuals or groups of individuals. US magistrates authorized the FBI to seize specific sex-themed or obscene films, as well as all business and telephone records related to the production and distribution of the named pornographic films. On February 14, 1980, the FBI simultaneously carried out raids across the country, seizing allegedly obscene movies and hundreds of business records. The individuals and businesses who were the subjects of the search warrants and seizures filed a motion in the US District Court for the Southern District of Florida seeking to suppress the physical evidence obtained from the FBI searches and seizures. They claimed that the FBI's actions were unconstitutional violations of their First, Fourth, and Fifth Amendment rights. The First Amendment guarantees freedom of speech and of the press (among other rights), the Fourth Amendment protects citizens from unreasonable searches and seizures, and the Fifth Amendment protects Americans against self-incrimination (testifying against oneself) and requires that due process (fundamental fairness) be a part of any legal proceeding whose outcome would be the taking of a citizen's "life, liberty, or property" (*United States v. DeFalco*, 1981).

The issue before the court was whether the FBI's searches of the defendants' business premises and seizures of allegedly obscene films and the business records

associated with their production and distribution were violations of the constitutional rights of the defendants such that the evidence collected should be suppressed. The court ruled in the affirmative, stating that the search warrants were overbroad and that the FBI had not shown probable cause that the defendants had committed a crime that justified the searches and seizures. The court therefore granted the motion to suppress the evidence (*United States v. DeFalco*, 1981). This decision essentially crippled the FBI's ability to prosecute alleged conspirators for trafficking *Deep Throat* and other sex-themed movies across state lines. *Deep Throat* ultimately became a profitable international phenomenon that influenced the regulation of explicit, sex-themed movies in several countries.

The legal battles over *Deep Throat* represented the last major skirmish between *Eros* and *agape* in the United States. Organized crime, which was the pioneer of sexual capitalism, won numerous legal battles by framing the issue in libertarian terms: Explicit, sex-themed movies constitute freedom of speech and expression. The constitution protects producers, distributors, and possessors of explicit, sex-themed movies from unreasonable governmental searches and seizures, like other citizens. Individuals and communities have the right to decide for themselves the media content they wish to consume.

Sexual Capitalism and Politics: Federal Pornography Commissions

As we saw in Chapter 8, the Renaissance had an undercurrent of sexually explicit art. Improved printing technologies in the fifteenth century enabled artists to produce explicit, sex-themed material for different "markets" or sectors of society (Matthews-Grieco, 2010). The modern phenomenon of sexual capitalism—the mass commercial production and distribution of pornography and erotica in diverse media (print, film, video and ultimately, the Internet) for profit—emerged with the advanced printing and film technologies of the late nineteenth century. Some sexual entrepreneurs produced explicit images of women in furtherance of the so-called flesh trade in the immigrant-filled slums of New York City and other eastern cities. Sexual capitalism developed between the "roaring twenties" and what Doherty (1999) calls "pre-Code Hollywood," the period between 1930 and 1934 when films were mass-produced, commercial "unbridled . . . models of immorality" (p. 118) aimed at the masses. World War II put a damper on all non-essential movie productions, but the postwar period saw a reemergence of the production of sexually explicit material. Investors and entrepreneurs capitalized on the sexual revolution to invest in the commercialization, mass production, and distribution of pornography between the late 1950s and early 1970s (Bailey, 1994). Sexual capitalism, or the business of mass-produced pornography for "adult" audiences, became a small but important part of the economy.

Segments of American society were alarmed by these developments. In 1967, President Lyndon Johnson responded by creating the Presidential Commission on Obscenity and Pornography to study the problem of pornography. One of the terms of reference of the commission was to analyze the commercialization of explicit, sex-themed visual imagery. Specifically, the commission was given the task of examining the "commercial traffic in sexually-oriented material." This was essentially an assignment "to ascertain the methods employed in the distribution of obscene and pornographic material and to explore the nature and volume of

such material" (Presidential Commission on Obscenity and Pornography, 1970, p. 3). This was because entrepreneurs had transformed sex into a commercial commodity. The Presidential Commission on Obscenity and Pornography was therefore tasked with the responsibility of studying and drawing conclusions about the exploitation of sex as a commercial product and determining whether such commercialization had nefarious psychological and social effects on segments of society. The commission found that by 1970, an expanded market for sexually oriented "exploitation/sexploitation films or skin flicks" that emphasized "the erotic" had emerged in the United States. It said that this situation was caused by "radical changes in marketing sexually oriented films" (p. 7) put in place by sexual capitalists and entrepreneurs who operated mostly "underground" or behind the scenes.

The Attorney General's Commission on Pornography (US Department of Justice, 1986) reported that sexual capitalism, or what it called "the pornography industry," had vastly expanded its output to become an industry that still had a substantially "underground" component made up of distributors, wholesalers, and retailers. The commission reported that the industry had linkages with many mainstream broadcast and cable companies. These linkages have expanded in the age of the Internet. Mainstream telecommunications, network, mobile telephony, satellite, cable, Internet search, web hosting, database, social media, Internet storage, and streaming companies have lucrative connections with the pornography industry. These relationships ensure the seamless streaming of explicit, sexually oriented products to home computers and mobile devices. They also ensure transmission of "adult" content to traditional receivers in real space and cyberspace. The major hotel chains have become major distributors of pornography industry products. The invention and diffusion of videotape technology made the production and national distribution of "adult" pornography easier, cheaper, and more profitable. The commission concluded that major parts of the pornography industry were controlled by organized crime (p. 291).

Despite the findings of these commissions, the march toward liberalization of the restrictions on sex-themed visual imagery continued. The language of liberty carried the day. Freedom of expression soon trumped limitations on sex-themed visual imagery. Nevertheless, organized crime did not have the pleasure of savoring its legal and social victories in the porn wars. Its involvement in major criminal activities led to its suppression, thereby paving the way for mainstream sexual capitalism to hitch its business model to America's libertarian ethos and profit from the legal victories of organized crime. In the struggle between *Eros* and *agape*, American society seems to have arrived at a balance, an equilibrium in which individuals and communities are at liberty to consume explicit, sex-themed visual imagery, in real space and cyberspace, in the privacy of their homes. When the Internet was opened up to private businesses, sexual capitalism was one of the first businesses to set up shop in cyberspace, where sex-themed content is still one of the largest categories of commercial content. Critiques of sex-themed visual imagery, and of sexual capitalism, now emanate mostly from feminist circles in academia, which take pornography to task for dehumanizing women and reducing them to mere objects for male sexual gratification. For its part, *agape* has become part of America's civic religion, which extols charitable activities and sacrificial engagement in the service of others. The proponents of *agape* no longer actively campaign for the abolition of explicit, sex-themed visual imagery.

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Portrayal of Government Workers in Explicit, Sex-Themed Visual Imagery

First Amendment Issues

In October 2013, Cristy Nicole Deweese, a Spanish teacher at a Dallas, Texas, high school was terminated after a parent found out that she had posed nude for *Playboy* magazine. She had been featured as a "Coed of the Month" while she was a college student. Parents of students at Townview Magnet High School in Dallas complained that students in the school were accessing the nude pictures of Miss Deweese from the Internet on their mobile devices (Moran, 2013). As Eric Nicholson (2013) of the *Dallas Observer* put it, the Dallas Independent School District was apparently not amused that "Deweese's body of work [was] at the fingertips" of her students. Cristy Deweese joins a long list of women who lost either their jobs or other positions as a result of posing nude for pornography magazines. Though pornography has become more available than ever before, due to the Internet and social media, it is neither perceived nor accepted in the same manner throughout the United States. This is because the country has differing community standards. Some states are more conservative than others, while parts of some states are more liberal than others. The Supreme Court of the United States has stated that when it comes to regulating obscenity, courts need to take the community standards approach. That is because the community standards of states like Maine and Mississippi are very different from those of New York or California (*Miller v. California*, 1973).

The United States has a decentralized federal system of government in which localism (i.e., self-government at the local level) is a fundamental principle. Under this principle, local communities, independent school boards, municipalities, counties, and states govern themselves. When a confluence of communications innovations—the invention of photography, new printing technologies, and the advent of cinema—launched a visual communication revolution, early forms of sex-themed visual imagery became available. Soon enough, the phrase "Sex

sells" became a truism of American advertising. However, visual sexual imagery went beyond the subtle suggestiveness and innuendo of advertising. Early forms of pornography became the main instrument for advertising the "flesh trade" (prostitution) in New York City and other fast-growing metropolitan areas of the East Coast. Concerned municipal and county councils, school boards, and state legislatures were the first lines of regulatory "defense" against material that local communities considered to be objectionable on religious or moral grounds. As a result, a substantial part of obscenity and pornography law in the United States emerged from the regulatory activities of local communities, which set out to control objectionable, sex-themed, visual "speech" and expression under local ordinances. Interestingly, a number of free speech controversies in real space and cyberspace have involved municipal agents, including school board, municipal, county, and state officials, who assert their rights to freedom of speech and expression. In such circumstances, courts have to decide whether the speaker speaks as a citizen whose speech is protected by the First Amendment or as a public employee denouncing wrongdoing in government—essentially, a whistle-blower speaking on a matter of public concern. This line of cases have involved municipal agents who either view illegal, sex-themed Internet content (mostly child-pornography) on the job, become actors who participate or are featured in sex-themed print and Internet content, or distribute sex-themed content while off duty. These cases point to the tension between freedom of expression and the government's interest in the efficient delivery of services to the public.

Aim of the Chapter

The aim of this chapter is to provide background information on the issue of the First Amendment rights of municipal agents (government officials) with regard to explicit visual sexual images in real space and on the Internet. We analyze the approach taken by courts in interpreting and defining these rights. Furthermore, this chapter explores how rules designed to regulate the speech of municipal agents in real space have been transferred to the dematerialized realities of cyberspace. The chapter therefore explores the scope of freedom of expression accorded the online sex-themed speech of uniformed military officers and municipal agents (government workers) under the First Amendment by using as case studies a number of legal disputes that have helped map the contours of freedom of expression on the Internet. Before we explore the First Amendment and its application to the Internet, let's discuss a case that demonstrates how the problem of municipal agents and pornography was handled in the pre-Internet days.

Law Enforcement Officers and Sexual Capitalism

In 1994, Carol Shaya-Castro, a New York Police Department (NYPD) officer, appeared nude in *Playboy* magazine. She was wearing only certain parts of her official uniform, her badge, and her work-issued equipment. The NYPD filed departmental charges against her for engaging in unauthorized off-duty employment and misusing the NYPD uniform and insignia. The next year, the commissioner of the NYPD dismissed Shaya-Castro from the force, stating that by appearing in *Playboy*, she had violated the charter of the city of New York, as well as the

NYPD Patrol Guide. Castro filed a $10 million suit against the city of New York for wrongful termination, gender discrimination, and violation of her First Amendment right of freedom of speech and expression. She claimed that male NYPD police officers who had appeared in pornographic films had been suspended but not terminated by the NYPD. A New York court dismissed the case. On appeal, the Appellate Division of the Supreme Court of the State of New York upheld the termination. It ruled that "the Police Department has a special accountability to the public for integrity and efficiency of its operations and must maintain discipline among officers . . . Petitioner [Shaya-Castro] did not merely pose nude, but used her position, uniform and police equipment, without authorization, for her personal commercial benefit, and actively promoted the commercial product, in a manner that was likely to hold the department up to public ridicule" (*Shaya-Castro v. NYPD*, 1996). The court further ruled that NYPD was acting as Shaya-Castro's employer. As such, her "First Amendment right of free expression could be restricted to the extent that it interfered with the discharge of the department's police operations." The court also dismissed her claims of gender discrimination stating that the NYPD Patrol Guide was gender neutral (*Shaya-Castro v. NYPD*, 1996). An interesting point here is that the Supreme Court of the State of New York ruled that by terminating Shaya-Castro, the NYPD was acting as an employer, not a regulatory agency.

Shaya-Castro was not the first uniformed female officer to get in trouble for posing nude or seminude for *Playboy*. In November 1980, the self-styled "entertainer of men" produced a special "patriotic" edition captioned, "The Women of the U.S. Government: Ten Pages of Unimpeachable Beauty." This special edition, which was timed to coincide with the elections, featured seminude images of Washington, DC–based female naval enlistee Darlene Aubrey Rein. The US Navy was not amused by the seminude photography and commenced court martial proceedings against Rein for violating the Uniform Code of Military Justice and for conduct prejudicial to good order and discipline. Months into the proceedings and after Rein had incurred heavy legal expenses, the Navy decided to terminate the court martial and honorably discharge Rein from the service. The Navy said pretrial proceedings were taking longer than expected and that Rein had been kept in the service longer than her discharge date pending the court martial trial. The Navy issued a statement that said, "The Navy does not condone activities either on duty or outside normal working hours which bring discredit upon members of the Naval services, the Navy uniform or the Naval Services. The Navy considers it inappropriate for its personnel to pose in the nude or semi-nude" (Playboy Model Is off the Hook, 1981). Rein was discharged a few months later.

The "Women of the US Government" issue of *Playboy* seems to have been spurred by stiff competition between segments of the sexual capitalism industry. In effect, in October 1980, *Playgirl* magazine, the explicit, sex-themed women's magazine, published a "Men of the Military" section, which featured nude photos of nine active-duty members of the military. The servicemen were promptly disciplined. One of the officers was an optician at the Balboa Naval Hospital in San Diego. His commanding admiral reprimanded him and stated that posing nude for *Playgirl* made him "a disgrace to the military, a disgrace to the medical profession, a disgrace to the hospital corps, a disgrace to the uniform and a disgrace to [himself]" (Wilson, 1980). Despite these disciplinary actions, the allure of *Eros* was irresistible. At least three more active-duty female members of the

military still posed nude for *Playboy*. Lieutenant Frederica Spilman posed for Playboy in June 1998 and was discharged from the military. In 2000, Naval Petty Officer Sherry Lynne White was discharged for posing nude for *Playboy* (Silverman, 1997). In 2007, Staff Sergeant Michelle Manhart, an Air Force training instructor, was immediately relieved of her duties and put under investigation soon after she posed nude for *Playboy*. That proved to be the end of her military career. She was demoted and discharged from the Air Force (Winn, 2007). Incidentally, the women who posed for *Playboy*'s "Women of the US Government" issue were paid $100–$300 (Mansfield, 1980). The allure, glamour, fame, fortune, and celebrity that attracted these government workers and military officers to pose nude for *Playgirl* and *Playboy* did not materialize. *Washington Post* reporter Stephanie Mansfield (1980) summed up the reality of the situation as follows: "*Playboy* magazine: 5 million readers, a flotilla of flesh, the sexual stamp of approval, U.S. prime for the U.S. male." Mansfield quoted one former *Playboy* model as saying, "I just don't want my name connected to [Playboy], . . . It's not been a pleasant thing. I want to wash my hands of the whole thing." Even military officers are not above being exploited by the sexual capitalism industry.

The *Playboy* "Women of the US Government" issue came at roughly the same time that the *Deep Throat* cases were winding their way through federal courts. Although actors in the sexual capitalism industry successfully marshalled the language and ethos of American individualism and libertarianism—which has a deep distrust of governmental prescriptions on morality and privacy—to broaden the scope of First Amendment protection granted to sex-themed visual imagery, attempts by military officials to bring posing nude for explicit, sex-themed magazines within the ambit of expressive conduct protected by the First Amendment were shot down by the military brass. The explanation for this was that military officers were not covered by the First Amendment right to freedom of expression to the same extent that civilians were. Indeed, military officers are subject to the Uniform Code of Military Justice (UCMJ), which circumscribes the right of freedom of speech and expressive conduct in the interests of discipline, duty, and *esprit de corps*. The Supreme Court of the United States has ruled that "while the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." (*Parker v. Levy*, 1974, p. 758). The UCMJ views the ethos of *Eros* as antithetical to military discipline and morality.

Government Workers and Sexual Capitalism

The stories of Shaya-Castro and the military officers exemplify the negative posture of the American armed forces and law enforcement agencies toward female officials who pose nude or seminude for the media. America's attitude toward sex-themed visual imagery has changed since the 1980s and 1990s. The Internet and the explosive growth of online pornography have created new outlets for pornography. The question is whether the standards applied to Shaya-Castro and Rein apply to male officers who involve themselves in sex-themed capitalistic

activities on the Internet. The fact is that online sexual capitalism is a lucrative, multibillion-dollar industry that allows ordinary citizens to go into business as human "franchises" or lessees of the interactive computer infrastructure of major pornography companies. These individuals set up live, camera-based, online porn businesses from their homes and stream nude or sex-themed images of themselves or others to paying customers. This sex-themed business attracted some government employees who were fledgling online sexual capitalists while off-duty. When their employers objected to their off-duty pornographic activities, these officers raised First Amendment defenses. This led to legal clashes between the free speech rights of these workers and the right of municipal employers to render efficient services to the public. This chapter explores the expressive rights of municipal workers (state and local government employees) under the First Amendment by using as case studies legal disputes involving police officers who "performed" or were featured in online pornography (with or without their official uniform and equipment). Needless to say, these performances were unauthorized. This chapter also discusses the case of police officers who indulged in "sexting" (sending sexually explicit messages or images) using government equipment. Before we discuss these legal disputes, let's look at the First Amendment freedom-of-speech regime of the United States and how it was extended to the Internet.

Extending the Reach of the First Amendment to Cyberspace

The origins of the Internet can be traced to the Cold War between the United States and the Soviet Union. This was a massive economic, military, and cultural competition for global dominance. In 1957, the Soviet Union launched Sputnik, the first artificial satellite to orbit the earth. This event triggered a technology race between the United States and the Soviet Union that culminated, in part, in the development of the Internet. The US Department of Defense had a need to network American defense research laboratories and ensure the survivability of its command and control networks in case the Soviet Union attacked the United States. As a result, the government funded a network of computer networks that came to be known as the Internet. The Internet has grown so rapidly that it is now the center of cyberspace. This is a virtual sphere that the US government defines as "the interdependent network of information technology infrastructures that include the Internet, telecommunications networks, computers, information or communications systems, networks, and embedded processors and controllers" (US Office of the Press Secretary, 2014).

When the Soviet Union and its military alliance, the Warsaw Pact, were dissolved in 1991, the urgencies of the Cold War receded. The American Congress soon passed the Scientific and Advanced Technology Act of 1992, which opened up the nonmilitary parts of the Internet to science, technology, and engineering, as well as educational, cultural, and commercial activities. The network of computer networks quickly became a virtual, interactive, global, multicommunication platform—a sphere of freedom of expression (Scientific and Advanced Technology Act, 1992). The Internet quickly became the domain of electronic commerce: online commercial, financial, and business transactions. One of the first "industries" to establish a presence on the Internet was pornography. For a time, it appeared as if the Internet would be a virtual "Wild West," a lawless online domain

beyond the reach of rules and regulations applicable to real space. In the 1990s, Congress and the courts began the process of applying to the Internet laws that were enacted to regulate telecommunications and the media in real space.

In 1997, a federal district court ruled that the Internet could be regulated within the framework of the First Amendment and the commerce clause of the Constitution of the United States, which gives Congress the power to regulate foreign, interstate, and intrastate commerce. The court said the Internet ought to be protected from state laws whose practical effect would be to hamper its development as a national free speech and commercial platform (*American Library Association v. Pataki*, 1997). Congress also granted the Internet implicit First Amendment protection under the Communications Decency Act (CDA) of 1996. However, it was a case challenging certain provisions of the CDA that enabled the Supreme Court of the United States to transfer the First Amendment to the Internet. In effect, as pornography and erotic material of all kinds began a massive migration from real space to the Internet, Congress wrote two provisions into the CDA with the intent of protecting minors from harmful online content. These provisions criminalized (1) the knowing transmission of obscene and indecent material to minors under 18 years of age and (2) the knowing transmission of material that described, in patently offensive terms, sexual or excretory activities or organs (Communications Decency Act, 1996). Several organized interest groups, including commercial pornographers, filed suit challenging the constitutionality of the two provisions (*Reno v. ACLU*, 1997). The US District Court for the Western District of Pennsylvania issued an injunction against the enforcement of both provisions of the act on the grounds that they violated the First Amendment by reason of their vagueness and overbreadth. The federal government appealed to the Supreme Court of the United States. The issue before the court was whether the two contested provisions of the CDA violated the freedom of speech guaranteed by the First and Fourteenth Amendments. The Court held that they did and ruled that the two provisions in question were imprecise, content-based, blanket restrictions that had the potential of censoring speech that adults had a constitutional right to receive and impart (*Reno v. ACLU*, 1997). The court, however, allowed the government to investigate and prosecute obscenity (i.e., material that has no redeeming literary, social, cultural, scientific, or artistic value and appeals to prurient tastes) and child pornography on the Internet. The main outcome of this case was that the court ruled, for the first time, that the Internet had full First Amendment protection. Under this regime, the Internet has the same level of freedom as the print media. Therefore, the government may not impose a regime of prior restraints or censorship on the Internet unless the regulation furthers a substantial government interest and is not aimed at suppressing freedom of speech and expression. The Internet and its associated social media platforms have become fundamental instruments of global communication, culture, and commerce.

First Amendment Standards Applicable to the Sex-Themed Online Speech of Public Employees

Government workers at the local, state, and federal levels wear two hats. They are citizens who have the right of freedom of speech and expression like any other citizen. They are also employees who are subject to professional rules of conduct

that may impair their right of free speech. In situations of dispute over expressions uttered by workers, the trick is to decide whether these workers are speaking as private citizens, whose speech is protected under the First Amendment, or as municipal agents, whose speech may be restricted by professional codes of conduct but who decide to speak anyway because their speech involves matters of public concern. This problem has come to the fore due to the arrival of the Internet and its associated social media—particularly Facebook, Twitter, and Instagram. Many workers who have grievances in the work place "vent" or "gripe" on social media platforms, assuming that they are complaining to close circles of friends or relatives. However, many of these speakers are shocked to find that their Facebook or Twitter posts find their way to their employers and colleagues. Many workers have been disciplined or terminated as a result of comments or photos they posted on social media about their place of work. The situation is further complicated by the fact that the government also has two roles to play: It is an employer that, like all employers, has a mission to accomplish and wishes to accomplish it effectively and efficiently. The government is also a sovereign—a regulatory entity—that makes rules and regulations governing its workers. As they resolve disputes involving the free speech rights of public employees, courts strike a balance between freedom of speech on the one hand and governmental efficiency on the other. In 1968, the Supreme Court of the United States gave us the *Pickering* test, which is used to balance the free speech right of public employees with the government's interest in carrying out its mission.

The *Pickering* Balancing Test

In 1964, High School teacher, Marvin Pickering wrote a letter to the editor of a local newspaper criticizing the local school board's allocation of school funds between educational and athletic programs. The letter also criticized the method used by the school board and the superintendent to prevent the circulation, to the school district's taxpayers, of information regarding the real reasons why a tax increase was being proposed to raise additional revenues for the schools. Pickering's letter was in response to a letter by the teachers' organization and the superintendent of schools to the local newspaper. The school board terminated Pickering because his letter was considered detrimental to the efficient operation and administration of the schools. Pickering sued, claiming that his dismissal violated his First Amendment rights. The courts in Illinois backed the school board. Pickering appealed to the Supreme Court of the United States, which agreed to review the case. The issue before the court was whether the school board violated Pickering's First Amendment right when it terminated him for writing the letter to the editor discussing important matters of public interest. The court answered in the affirmative. It held that the matter required that it strike a balance "between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" (*Pickering v. Board of Education*, 1968). The court ruled in favor of Pickering, holding that Pickering was speaking as a member of the general public on a matter of public concern rather than as an employee of the school board when he wrote the letter to the editor.

This case gave us the *Pickering* test that is used to evaluate controversies involving the scope of the free speech rights of public employees. The test is now used to strike a balance between the First Amendment rights of workers in real space and cyberspace and the government's right to protect its legitimate interest in accomplishing its mission efficiently. The implicit threshold test in *Pickering* requires public employees involved in free speech disputes with their employers to show that they are speaking on a matter of public concern rather than as employees complaining or commenting on matters that are only of personal interest (*Connick v. Myers*, 1983). Thereafter, courts strike a balance between the employee's First Amendment rights and the employer's rights to efficiency and discipline in the workplace. It is interesting that the *Pickering* test has now become the standard of judging employee comments on the Internet and specifically on social media platforms like Twitter, Facebook, and Instagram.

Case Studies: Municipal Agents, the First Amendment, and Explicit, Sex-Themed Visual Imagery

The Police Officer as Commercial Pornography Actor: City of San Diego v. Roe *(2004)*

The increasing interconnection between social media and the workplace has led to a burgeoning area of the law. Social media case law is expanding as more and more people discuss work-related matters on social media. One subgroup of public employees who have appeared frequently in court due to Internet and social media controversies is that of municipal police officers. This category of public servants has provided many abject lessons on professionalism and online conduct. As we saw previously in *Shaya-Castro v. NYPD*, the case of the New York Police Department (NYPD) officer who posed nude for *Playboy* magazine and was terminated in 1996, a New York state appellate court ruled that "the Police Department has a special accountability to the public for integrity and efficiency of its operations and must maintain discipline among officers." A San Diego police officer, John Roe, learned that lesson the hard way on the Internet when he got involved in the commercial pornography business. He made a video depicting himself stripping off his police uniform and masturbating. He sold the video on the adults-only section of eBay, the popular online auction site. His eBay user name was Code3stud @aol.com, a wordplay on the high-priority code police used in emergency radio calls. Roe also sold custom videos as well as police equipment, including official uniforms of the San Diego Police Department (SDPD), on eBay *(City of San Diego v. Roe, 2004)*. Roe's eBay user profile identified him as someone who was employed in the field of law enforcement. Roe's supervisor, a police sergeant, discovered Roe's activities when he came across an official SDPD police uniform for sale on eBay, offered by an individual with the user name Code3stud@aol.com. The supervisor searched for other items Code3stud@aol.com offered and discovered listings for Roe's videos, including the video depicting sexually explicit material. The sergeant recognized Roe's picture and passed that information to the SDPD authorities. The SDPD's internal affairs department opened an investigation. In response to a request by an undercover officer, Roe produced a custom video. It showed Roe,

again in police uniform, issuing a traffic citation to a lady but revoking it after undoing his uniform and masturbating *(City of San Diego v. Roe, 2004)*.

The internal SDPD investigation concluded that Roe's conduct violated specific SDPD policies, including "conduct unbecoming of an officer, outside employment, and immoral conduct." When confronted, Roe admitted to selling the videos and police paraphernalia. The SDPD ordered Roe to stop selling or offering for sale the material he had been offering on eBay. Roe removed some of the items he had offered for sale, but he did not change his seller's profile, which described his videos. This meant the videos were still available for sale online. Roe was cited for disobeying lawful orders and was terminated from the SDPD. He sued the SDPD in the US District Court for the Southern District of California, claiming that his dismissal from the police force constituted a violation of his First Amendment right of free speech. The court granted San Diego's motion to dismiss after deciding that Roe had not demonstrated that selling official police uniforms and producing, marketing, and selling sexually explicit videos was a matter of public concern.

On appeal, the Ninth Circuit Court of Appeals reversed the decision, stating that Roe's activities were matters of public concern because he did them while off duty and because they were unrelated to his employment. The city of San Diego appealed to the US Supreme Court, which decided to review the case. The issue before the court was whether Roe's activities were matters of public concern and whether the city of San Diego had violated Roe's First Amendment rights when it terminated him for making the sexually explicit videos and selling official SDPD paraphernalia on the Internet. The court answered in the negative and analyzed the case within the framework of the principles set forth in the *Pickering* test. The court held that "the use of the uniform, the law enforcement reference in the Web site, the listing of the speaker as 'in the field of law enforcement,' and the debased parody of an officer performing indecent acts while in the course of official duties brought the mission of the employer and the professionalism of its officers into serious disrepute." The court concluded that Roe's sex-themed activities were not a matter of public concern. As a result, there was no need to proceed to the next leg of the *Pickering* test, which requires that the courts strike a balance between Roe's right to freedom of expression and his employer's right to a police force with integrity and discipline (*City of San Diego v. Roe*, 2004).

Indirect Participation in Sex-Themed Visual Communication on the Internet: Dible v. City of Chandler *(2007)*

Exactly four years after the US Supreme Court decided *City of San Diego v. Roe*, an identical case appeared before the courts in the state of Arizona. In *Dible v. City of Chandler*, the wife of a Chandler, Arizona, police officer, Ronald Dible, sold pornographic photographs online in conjunction with the operator of a commercial sex website. Her photos depicted her having sex, as well as posing in sexually suggestive positions. Some photos portrayed her in sexual poses and activities with Officer Dible and another woman, as well as with "inanimate objects" (sex toys). Dible himself did some of the filming. Mrs. Dible posted the pictures online under a pseudonym and sold some of them on DVDs. Officer Dible's face was apparently shown only in one pornographic photograph. To promote the commercial

sex website, Mr. and Mrs. Dible held "barmeets," where fans met Mrs. Dible and Officer Dible in bars and took pictures with them.

Officer Dible did not disclose this off-duty business to his employer, the Chandler Police Department, but rumors about its existence led to an investigation. Dible was not truthful about his activities when confronted by investigators. In the meantime, the media picked up the rumors and reported on the pornography business activities of the Dibles. This impacted the working conditions and morale of the Chandler Police Department. Police officers testified that they were mocked about the Dible's commercial sex website when they answered calls. One female officer stated that she was called a "porn whore" when she showed up to stop a bar fight. Officer Dible was terminated for bringing discredit to the Chandler Police Department and for lying to investigators.

Dible sued the city of Chandler claiming that his First Amendment rights had been violated when he was terminated for participating in his wife's pornography business. The Chandler Police Department told the court that Mrs. Dible's pornography website would hurt the recruitment of female officers to the force. The issue before the court was whether Officer Dible's participation in his wife's online sex business was protected by the First Amendment. The court answered in the negative. On appeal, the Ninth Circuit court of Appeals affirmed this decision. It held that Officer Dible's participation in his wife's pornography website business was not protected speech under the First Amendment. The court held that Dible was engaged in vulgar, indecent, public activity solely for profit. The court applied the *Pickering* test and concluded that Dible's speech was not a matter of public concern. If it were related to his job, the court said, his speech would be balanced against the government's interest in performing its mission efficiently. The court ruled that Dible could not separate his official persona as a police officer from his persona as a participant in a pornographic enterprise. The judges thought it was questionable "whether a police officer can ever disassociate himself from his powerful public position sufficiently to make his [sexual] speech entirely unrelated to that position in the eyes of the public and his superiors." The court then concluded that "it would not seem to require an astute moral philosopher or a brilliant social scientist to discern the fact that Ronald Dible's activities, when known to the public, would be 'detrimental to the mission and functions of the employer.'" Police officers are apparently not free to enjoy the fruits of the commercial sexual revolution on the Internet.

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Explicit, Sex-Themed Visual Imagery and Intellectual Property Law

One of the most sensational news stories of the 1980s involved Vanessa Williams, a beautiful young woman who was crowned Miss America in 1984. As the first African American Miss America, Williams received extensive media coverage. However, ten months into her "reign," *Penthouse*, a hardcore pornographic magazine, published nude photos that had been taken of Williams before she became Miss America. The cover of the *Penthouse* edition in which Williams appeared read, "Miss America, Oh, God, She's Nude!" The revelation shocked Americans who had come to view Miss America as a wholesome, moral role model for American girls. Williams claimed that the photos, taken by a New York photographer for whom she had worked as an assistant and makeup artist, were not meant to be published. She claimed that she had not signed a release permitting either the photographer or *Penthouse* to publish the pictures. The ensuing uproar was too much for Williams. She relinquished her Miss America crown and filed a $500 million lawsuit against *Penthouse* and the photographer who had taken the pictures and sold them to *Penthouse* without her authorization. She claimed invasion of privacy, appropriation, and copyright violation, among other charges. However, she soon learned that the remedies of the law are very expensive and time-consuming and do not always favor the victimized. She dropped the case a year later, stating that she wanted to put the matter behind her. While Vanessa Williams's pre–Internet era case did not go to trial, it involved some of the issues that would come to dominate media law in the age of the Internet and its associated social media. These include invasion of privacy through publication of private facts, appropriation of the image or likeness of another person for personal gain, and false-light invasion of privacy. The case also raised the specters of copyright, or intellectual property, and consent.

Aim of the Chapter

The aim of this chapter is to provide some background information on copyright or intellectual property law in the United States in the context of explicit,

sex-themed visual imagery. The chapter describes and explains how courts have applied American intellectual property laws designed to protect copyrights in real space to sex-themed visual imagery in the dematerialized world of cyberspace. I analyze a few cases that illustrate how courts have approached intellectual property issues and interpreted intellectual property laws that involve explicit, sex-themed visual imagery. The premise is that explicit, sex-themed speech is a regulated representation under the Copyright Act of 1976.

Background: The Nature and Scope of Copyright or Intellectual Property

Copyright is a bundle or rights granted to authors, inventors, and other creative persons under the law to protect their works from being duplicated without their authorization. The model for the contemporary Anglo-American copyright system is the Statute of Anne of 1710, a British copyright act whose stated rationale, in addition to the encouragement of learning, was to compensate "the authors or proprietors" of books. The rationale for the law was to prevent printers, booksellers, and "other persons" from reproducing published books "without the consent of the authors and proprietors for such books and writings, to their very great detriment, and too often to the ruin of them and their families: for preventing therefore such practices for the future and for the encouragement of learned men to compose and write useful books" (Statute of Anne, 1710). Though the rationale for the Statute of Anne was solicitude for the material welfare of authors and publishers, the act effectively served as an instrument of information control. Since it was the first copyright act in the world, the Statute of Anne served as the model for copyright acts in Anglo-American countries (former British colonies and overseas territories). The Constitution of the United States gives Congress the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" (art. 1, § 8).

The aim of copyright law is thus to protect the very creative and innovative minority among the population—people like Bill Gates, cofounder of Microsoft; Steve Jobs, the brains behind Apple; Larry Page and Sergey Brin, founders of Google; Jerry Yang and David Filo of Yahoo!; Mark Zuckerberg of Facebook; movie makers George Lucas and Stephen Spielberg; and so on—for the betterment of society as a whole. That is what is called the "incentive purpose" of copyright law (Posner, 2003). The idea is that if the creations and inventions of this very smart "1 percent" are protected from unauthorized copying, these smart people will have an incentive to create more products that will improve the lot of everyone in society. The Supreme Court of the United States has held that the ultimate objective of copyright is to "stimulate artistic creativity for the general public good" (*Sony Corp. v. Universal City Studios*, 1984). This principle has worked very well. For example, before the invention of personal computers and word processing, writing was a slow and tedious process. The invention of word processing programs like Microsoft Word has revolutionized writing around the world. Word is now available in virtually all written languages of the world, from Arabic to Zulu. Word processing has made life easier for hundreds of millions of people across the globe.

The copyright law that is in force today is the Copyright Act of 1976. It focuses first and foremost on the subject matter of copyright, which grants protection

to "original works of authorship fixed in any tangible medium of expression" (§ 102[a]). Furthermore, as Lange and Powell (2009) suggest, by its very nature and subject matter, copyright touches on, and coexists rather harmoniously with, expression protected by the First Amendment: "The stuff from which intellectual property interests are spun is also the stuff of First Amendment interests" (p. 171). In order to underline the link between copyright and freedom of expression, the Supreme Court of the United States has held that the framers of the Constitution of the United States intended for copyright to serve as "the engine of free expression" (*Eldred v. Ashcroft*, 2003). Therefore, American copyright law has substantial free speech dimensions that are expressed in terms of fair use, an exception to prohibitions against copying works without authorization. This principle is set forth in the fair use provision of the Copyright Act of 1976: "The fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright" (§ 107).

Fair use is a defense in circumstances where existing works are used to create new, transformative, critical works. A notable category of transformative work protected by the First Amendment is parody, which serves as a vehicle for political and social criticism. This is one instance in which freedom of speech clearly takes precedence over the exclusivity of copyright. In order to make a determination about whether a fair use claim is valid, federal courts employ these four fair use factors set forth in the Copyright Act of 1976:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work. (Copyright Act, 1976, § 107)

Federal courts have transposed this fair use test to the online environment in the framework of the legal disputes that arose after the creation of peer-to-peer file-sharing networks and "cybersquatting." Before we discuss application of intellectual property law and policy to explicit, sex-themed imagery, it would be instructive to survey the journey of intellectual property law from the real space—and the traditional media—to cyberspace.

Transfer of American Copyright Law from Real Space to Cyberspace

Technological innovations like the Internet create new realities that present policymakers with unprecedented legal and policy challenges. This is especially true with the Internet, where copying and distributing material has become very cheap and easy. For example, new, ubiquitous recording technologies have made it easy to copy and reproduce all kinds of copyrighted and noncopyrighted material. These technologies and the Internet have made photography a mass activity. Transformation of the Internet into a converged, multicommunication platform that has become the center of content creation, storage, and dissemination

immediately raised intellectual property issues. One of the first major issues concerned "cybersquatting."

As the Internet diffused to all parts of the world in the 1990s, web pages on the Internet increased exponentially. All kinds of businesses, educational institutions, and individuals rushed to stake a claim in a very valuable virtual real estate: a domain name on the Internet. The trademarks or service marks of companies served as the alphanumeric strings of their domain names because their websites were their virtual storefronts, the gateways to their goods and services. Domain names therefore had an inbuilt intellectual property element. Legitimate domain-name registrants own the intellectual property rights in their domains, since they merely transfer their trademarks or service marks from real space to cyberspace.

However, many domain-name "brokers" saw cyberspace as the place to make money by registering domain names. They rushed to register most of the words in the English language for purposes of reselling these words to businesses that were interested in transitioning to the brave new world of cyberspace. These brokers also registered online, without authorization, the trademarks and service marks that well-known corporate entities had registered in real space under trademark law. The aim of these unauthorized domain-name registrations was to traffic in the names—that is, offer to resell these domain names to the rightful owners of the trademarks in real space.

The practice of unauthorized registration of trademarks and service marks as domain names on the Internet for purposes of trafficking in them came to be known as "cybersquatting." This practice became so widespread that in 1999, Congress passed the Anticybersquatting Consumer Protection Act (ACPA) of 1999. Congress essentially amended and expanded the reach of title 15 of the US Code, which forbids false designations of the origins of goods, false descriptions of goods and services, and dilution of trademarks and service marks, to the Internet. The ACPA defines cybersquatting as the practice whereby an individual or business entity, acting in bad faith, "registers, traffics in, or uses a domain name that . . . is identical or confusingly similar to that mark . . . or in the case of a famous mark that is famous at the time of registration of the domain name, is identical or confusingly similar to or dilutive of that mark" (§ 1125[D]). The act prescribes civil liability for abusive registration of famous trademarks and famous personal names as domain names. In other words, registering the name of a famous company or a famous person as a domain name without the knowledge and authorization of the holder of the trademark or of the person concerned is illegal. The intent of the ACPA was to eradicate fraudulent practices that impaired electronic commerce on the fledgling Internet. The ACPA granted trademark and service-mark holders a course of action against cyberpirates (domain-name traffickers). These are persons or companies who, in bad faith, registered the domain names of corporate entities and individuals for purposes of offering the domain names for resale to the rightful owners of the trademarks or service marks. The ACPA enumerates indicators of bad faith and exceptions for legitimate, unauthorized fair use of domain names. In other words, the ACPA has a First Amendment component, which includes the fair use of trademarks and service marks for purposes of parody.

The exceptions to the exclusivity of trademarks and service marks set forth in ACPA are especially relevant when a parodist registers a specific corporation's trademark, trade name, or service mark without permission for purposes of

spoofing, parodying, or criticizing that company. The fair use provisions of trademark law have been transferred to cyberspace, a domain that is rife with parody domain names. These types of domain names are called "gripe sites." They are set up to mimic well-known company names or their trademarks as well as famous individuals. The parody domain name is often distinguished from the original trademark or service mark by a pejorative epithet—a prefix or a suffix such as "*x* corporation sucks.com," or "*y* celebrity sucks.com"—that is intended to critique the corporate or celebrity subject of the parody and portray it in a negative light (Eko, 2013).

However, there must not be any type of commercial activity on the parody website. Commercial activities render the gripe site illegal under the ACPA. An example of this situation occurred in the case *PETA v. Doughney* (2001). People for the Ethical Treatment of Animals (PETA) is a militant animal rights group that uses various forms of symbolic speech and expressive conduct to protest perceived animal abuse in entertainment and public spectacles ranging from bullfighting to dog shows. PETA also protests the use of animal products in consumer goods ranging from fur coats to hamburgers. PETA's militant activities—and their subsequent controversies—are often drenched in irony. PETA's militant actions and parodies of existing media content soon led to counterparodies against PETA. In *PETA v. Doughney* (2001), Michael Doughney registered the domain name peta .org and created a parody website called "People Eating Tasty Animals," a spoof of the acronym and name of People for the Ethical Treatment of Animals. The parody website claimed that it was set up for "those who enjoy eating meat, wearing fur and leather, hunting, and the fruits of scientific research." Additionally, the website contained links to organizations that dealt in meat, fur, leather, hunting, and animal research. Doughney, who was also a domain-name broker, offered to sell PETA the peta.org domain name. PETA sued Doughney for service-mark infringement, unfair competition, service-mark dilution, and cybersquatting under federal and state law. In his defense, Doughney claimed that the website was a parody of PETA that was protected by the First Amendment.

The issue before the court was whether Doughney's website was a parody that was protected under the First Amendment. The US District Court for the Eastern District of Virginia rejected the parody defense and found Doughney liable for cybersquatting under the ACPA. The court ordered Doughney to relinquish the PETA domain name and transfer its registration to PETA. Doughney appealed to the US Court of Appeals for the Fourth Circuit. The court noted that Doughney's website provided links to more than thirty commercial operations offering goods and services. By providing links to these commercial operations and entities, Doughney's use of PETA's service mark was "in connection with" the sale of goods or services. The court affirmed the lower court's ruling, which had stated that Doughney's PETA website was not a parody in the legal sense of the term. As a result, the website amounted to illegal cybersquatting that was not protected speech under the First Amendment. Courts in the United States soon applied these principles of anticybersquatting law to sex-themed visual imagery.

Intellectual Property Law and Explicit, Sex-Themed Speech

That background discussion sets the stage for discussion of copyright or intellectual property law and explicit, sex-themed visual communication. The World Intellectual Property Organization (WIPO), the international organization responsible for regulating intellectual property and resolving domain name and other disputes in real space and cyberspace, states that intellectual property rules and regulations "had traditionally been regarded primarily as a means to exclude or limit others from using certain protected subject matter, through litigation if necessary" (World Intellectual Property Organization, 2008). The knowledge economy created by information and communication technologies changed that logic. Intellectual property law and policy took on greater significance as intellectual property became the lifeblood of the global knowledge economy and the information society. The challenge has been to make intellectual property rules and regulations that had been drafted for real space content and real space media relevant and applicable to cyberspace. This required a change of mentalities, different conceptualizations of the nature of the Internet, and different expectations regarding its role in society. The following case studies illustrate how the United States has dealt with the issue of Intellectual property in cyberspace with respect to explicit, sex-themed visual imagery.

Protection of the Copyright of Pornographic Magazines: *Playboy v. Frena* (1993)

The multibillion-dollar sexual capitalism or pornography industry, which is popularly known under the sanitized euphemism "the adult entertainment industry," has been very aggressive in protecting its intellectual property rights in its various nomenclatures, formulations, reformulations, and iterations in real space and cyberspace. The industry has often come down like a sledgehammer on any individual or business entity suspected of even remotely infringing on its very lucrative copyrights. George Frena and his company Techs Warehouse BBS Systems and Consulting were operators of a subscription Internet bulletin board service. Internet bulletin boards were early online discussion groups or forums where members could post messages and pictures. They were designed to be the notice boards of cyberspace. Paying customers could view pictures on the bulletin boards and download high-quality copies onto their computers. In 1993, just one year after Congress had opened up the Internet for economic, cultural, educational, and social uses, Playboy Enterprises filed suit in the US District Court for the Middle District of Florida against Frena, charging him with copyright violation, trademark infringement, and unfair competition. Playboy Enterprises alleged that Frena had uploaded its pictures to his commercial bulletin board without its knowledge and consent and that Frena's bulletin board contained copyrighted images from fifty issues of *Playboy* magazine (*Playboy v. Frena*, 1993). Frena argued that uploading the images on the bulletin board was fair use. The issue before the court was whether Frena had infringed on the copyright of Playboy Enterprises. The court ruled in the affirmative: "There is no dispute that Defendant Frena supplied a product containing unauthorized copies of a copyrighted work. It does not matter that Defendant Frena claims he did not make the copies himself." The

court said that Frena's bulletin board was a commercial venture. That fact negated a fair use defense: "There is irrefutable evidence of direct copyright infringement in this case. It does not matter that Defendant Frena may have been unaware of the copyright infringement. Intent to infringe is not needed to find copyright infringement. Intent or knowledge is not an element of infringement, and thus even an innocent infringer is liable for infringement" (*Playboy v. Frena*, 1993). This case may have been one of the reasons why Congress enacted section 230 of the Communications Decency Act of 1996, immunizing online bulletin boards and other interactive computer service providers from liability for material uploaded by third parties.

Playboy and Cybersquatting: *Playboy v. Calvin Designer Label* (1997)

In the early years of the Internet, before Congress passed the Anticybersquatting Consumer Protection Act, a number of aspiring sexual capitalists sought to hitch their fledgling pornographic businesses to the locomotive of the successful sexual capitalism industry. They quickly learned, to their detriment, that sexual capitalism deals ruthlessly with its competitors. In *Playboy v. Calvin Designer Label* (1997), Playboy Enterprises requested that the US District Court for the Northern District of California issue a preliminary injunction against Calvin Designer Label, a business that had registered domain names and created the following websites without the knowledge or authorization of Playboy Enterprises: www.playboyxxx.com and www.playmatelive.com. Calvin Designer Label also used the registered trademarks "Playboy" and "Playmate" on its webpages to refer to services offered to the general public (e.g., "Playmate Live Magazine," "Get it all here @ Playboy"), accompanied by Playboy Enterprises' distinctive trademark and logo. The court concluded that these activities violated Playboy Enterprises' trademarks and ordered that Network Solutions Inc., the organization responsible for domain-name registrations, cancel "http://www.playboyxxx.com" and "http://www.playmatelive.com," the domain names registered by Calvin Designer Label.

Restrictions on a Former Playmate's Use of Playboy's Trademarks: *Playboy v. Welles* (2002)

In *Playboy v. Welles* (2002), we see an attempt by Playboy Enterprises to quash a former "playmate's" attempt to use her past association with Playboy Enterprises to advance her personal, post-*Playboy* online modeling business. In 1998, Playboy Enterprises filed a complaint against Terri Welles, a self-employed model and spokesperson who had appeared on the cover of Playboy magazine in 1980 and had been named "Playmate of the Year" in 1981. She appeared in 13 issues of *Playboy* and 18 Playboy Enterprises newsstand specials. In 1997, she started her own website, whose heading was "Terri Welles—Playmate of the Year 1981." In some pictures, she appeared nude, while in others, she was clothed. She used the trademarked terms "Playboy" and "Playmate" in the metatags or index of the website and the trademarked phrases "Playboy Playmate of the Year 1981" and "Playmate of the Year 1981" on various banner ads. She also used the watermark "PMOY '81" in the background of the webpages. Playboy Enterprises filed a complaint against Welles in the US District Court for the Southern District of California,

alleging inter alia, trademark infringement, false designation of origin, and unfair competition. The district court granted summary judgment to Welles, essentially dismissing Playboy's claims.

Playboy Enterprises appealed to the US Court of Appeals for the Ninth Circuit. The issue before the court was whether Welles's use of the phrase "Playmate of the Year 1981" to describe herself in the masthead of her website, the trademarked terms "Playboy" and "Playmate" in the metatags or index of the website, and the watermark "PMOY '81" in the background of the webpages violated the intellectual property of Playboy Enterprises. The Ninth Circuit ruled that Welles's uses of Playboy Enterprises' trademarks in the masthead of her webpage, in its banner ads, and in her metatags were "permissible, nominative uses," which "serve to identify Welles as a past Playboy Enterprises 'Playmate of the Year.'" The court said that Welles could identify herself clearly only by using Playboy Enterprises' trademarked title. Therefore, banning the use of Playboy's trademarked terms "would have the unwanted effect of hindering the free flow of information on the Internet, something which is certainly not a goal of trademark law." However, the court ruled that using "PMOY '81" was not necessary to describe Welles. "Playboy Playmate of the Year 1981" was quite adequate (*Playboy v. Welles*, 2002). Welles essentially won the major aspects of the case. In this case, federal courts sided with a person who had worked in the sexual capitalism industry and promoted its interests for several years, only to find herself at the receiving end of a lawsuit. This clearly occurred because she tried to include her work with Playboy Enterprises in her professional résumé and use that experience to make a living after her relatively long career with Playboy Enterprises.

The Case of the Formerly Anonymous Penthouse Pet: *Penthouse International v. Barnes* (1986)

Due to the notoriety involved in posing nude for pornographic magazines, some women prefer that their real names not be associated with their nude photographs. That was the situation in the case *Penthouse International v. Barnes* (1986). It all started in 1976 when Priscilla Barnes, a hostess at a Hollywood club, signed a model release contract with the then London-based, American-owned company Penthouse International to pose nude for its magazine. Barnes subsequently appeared nude in the March 1976 edition of *Penthouse* under a fictitious name. In 1983, after tabloid magazines identified Barnes by name as the *Penthouse* 1976 centerfold, *Penthouse* decided to republish the same nude photographs of Barnes under her real name. The aim was to capitalize on the media publicity. However, before the publication, Penthouse International submitted its 1976 contract with Barnes to the US District Court for the Central District of California, asking the court to issue a declaratory judgment to the effect that the magazine had the right to republish the photographs with Barnes's real name. The issue before the court was whether *Penthouse* could legally republish Barnes's photographs as it intended to do.

Barnes filed an answer and counterclaim in which she stated that her contract with Penthouse forbade the magazine from publishing her name and associating it with the nude photographs taken and published in 1976. Barnes sought compensatory and punitive damages against *Penthouse* for, among other claims,

breach of its duty of confidentiality. The district court ruled that the model release contract did not grant Penthouse the right to identify Barnes as the subject of the nude photographs. The court declared the contract null, void, and of no effect. It ordered *Penthouse* to return the negatives of the photographs to Barnes and to cease and desist from publishing photographs of her. *Penthouse* appealed to the US Court of Appeals for the Ninth Circuit. The issues before the court were whether the model release contract signed by Barnes in 1976 stipulated that *Penthouse* could not publish the photographs under Barnes's real name and whether the district court was correct in ordering *Penthouse* not to publish the photographs of Barnes and to return the transparencies to Barnes. The Ninth Circuit Court affirmed the lower court's ruling, which had stated that as per the terms of the contract, *Penthouse* could not republish the photographs under Barnes's real name. However, the court vacated the district court's orders to *Penthouse* not to publish the photographs at all. It also vacated the order that *Penthouse* hand all the transparencies (negatives) of the 1976 photo session to Barnes. The court noted that another district court had denied Barnes's request that the case be put under seal—that is, to make the case file unavailable to the public and to prevent the names of the parties from being revealed. The practical effect of this decision was that *Penthouse* could republish the nude photographs of Barnes if it wanted to, but it could only do so by giving her a pseudonym.

Sexual Capitalist Exploitation Is Forever: The Case of the Nude Photographs of Madonna

As the struggle between *Penthouse* and Barnes demonstrates, women who pose naked for pornographic magazines are exploited for life. These magazines own the copyrights to the women's pictures and can monetize them at any time. Attempts to change that situation are frowned upon by sexual capitalists. The Madonna pictures are illustrative of this fact. When *Penthouse* magazine went bankrupt in 2003, an online "adult" dating company, FriendFinder Networks, purchased the magazine out of bankruptcy in 2004. *Penthouse* founder Bob Guccione, a sexual entrepreneur and capitalist who is believed to have earned more than $4 billion since he launched the magazine in London, England, in 1965, died bankrupt and penniless in 2010 (Nathan, 2013). According to the *Wall Street Journal*, in 2012, a secret archive of unpublished photos, slides, personal letters, and other erotic material was found in an abandoned New Jersey storage locker purchased from Guccione's bankruptcy liquidators. Guccione Collection, a company that had bought Guccione's entire estate—more than 250,000 erotic images—put it up for sale on a website "dedicated to the life and art of Mr. Guccione" (Fitzgerald, 2013). Nude pictures that were sold in a public auction included "long-lost" pictures of Madonna, Arnold Schwarzenegger, Bill Clinton's former mistress Gennifer Flowers, and other celebrities (Nathan, 2013). FriendFinder Networks, the Internet company that then owned *Penthouse* magazine, filed for bankruptcy protection in 2013 (Pfeifer, 2013). In a bid to protect its interest in *Penthouse* and increase its revenue, FriendFinder Networks demanded that Guccione Collection stop "infringing on its content" and asked Guccione Collection's Internet service provider (ISP) to take down the website. Guccione Collection sued FriendFinder Networks, asking a court for a declaration that it did in fact own the Guccione archive

(Fitzgerald, 2013). A subsequent public auction of Guccione's erotic photographs and art pieces realized $200,000. Nude photos of pop singer Madonna taken in 1979 and 1980 sold for $30,000, a drop in the bucket compared to how much Guccione owed (Moss, 2013). The photographs of Madonna now belong to an anonymous collector somewhere in the world. In 2014, Guccione Collection and FriendFinder Networks reached an out-of-court settlement, and the case was dismissed.

Explicit, Sex-Themed Visual Imagery and "Pornography Copyright Trolls"

Intellectual property refers to that family of intangible rights conferred on authors and inventors under the law by different national and international regimes—within the framework of their specific governmental ideologies (Lange and Powell, 2009). Since intellectual property law in national and international law was largely a nineteenth-century construct, emphasis was placed on the physicality of the copyrighted material. Therefore, the presumption was that the copyright holder always had physical, moral (in continental Europe), and contractual control over copying and distributing the tangible work. In the United States, copyright protection was extended to "original works of authorship fixed in any tangible medium of expression" (Copyright Act, 1976, § 102). With the advent of the Internet, the common problem that confronted intellectual property regimes was how to apply intellectual property rules and regulations designed for physical property in real space and real time to the dematerialized, virtual world of cyberspace. Specifically, new communication technologies and networked phenomena like peer-to-peer file-sharing and social media applications wreaked havoc on settled intellectual property law. Unlike physical, copyrighted works, digitized works are dematerialized data that can be copied and distributed with lightning speed around the globe.

As we saw earlier, American courts have ruled that explicit, sex-themed visual imagery (including sexually violent media) falls under the protective ambit of First Amendment and intellectual property law like other works of authorship that are eligible for protection. In recent years, one of the most remarkable developments in the regulation of explicit, sex-themed visual imagery in the United States has been attempted use and abuse of copyright laws by sexual capitalists, acting alone or in concert with other actors, to advance their monetary interests. In order to make a quick "killing" from the bountiful opportunities offered by the Internet, copyright "trolls" (opportunistic intellectual property lawyers who troll the Internet seeking opportunities to make money by misusing and abusing the legal system) sought to manipulate intellectual property procedures to advance their personal goals. These trolls thus transformed the Internet into a metaphorical intellectual-property Wild West where might is right. In the United States, a notable feature of copyright disputes is the extensive use of discovery. In federal district courts, discovery is the process whereby civil litigants are allowed to seek, from each other and from third parties (such as expert witnesses), information that may or may not be material to their case under conditions set forth in the Federal Rules of Civil Procedure. Discovery was designed to avoid surprises during trials and to create a level playing field in terms of informational availability between litigating parties. Discovery has been applied to the Internet within the

framework of electronic discovery, or "e-discovery," which allows litigating parties to seek documents in electronic form. In peer-to-peer file-sharing of explicit, sex-themed visual imagery, the chief copyright troll was Prenda Law, a firm that was known as a "porno-trolling collective" (*AF Holdings v. Does 1–1058*, 2014). Copyright trolls use a wide array of legally and ethically questionable methods to violate the privacy of individuals who are suspected of downloading copyrighted pornography from the Internet and to harass them into settling fictitious claims or face legal action for the unauthorized and illegal downloading and sharing of pornography on the Internet (Stoltz, 2014).

The mode of operation of copyright trolls is simple. They invest in pornography by acquiring the copyrights of pornographic movies from the sexual capitalism industry. In order to get a quick return on their investment, copyright trolls allege that a group of individuals have violated their copyright to certain online pornographic material through the illegal downloading and sharing of that material. They file multiple "John Doe" suits against a collective group of alleged, anonymous pornographic copyright violators who are identified only by their Internet Protocol (IP) addresses. Then, under the guise of discovery, the trolls use the subpoena power of the courts to force ISPs to reveal the real identities of the persons associated with the IP addresses that allegedly violated copyright law through their unauthorized downloading of copyrighted pornography. Once this is done, the copyright trolls identify and pressure each of the alleged pornography copyright violators to pay $2,000–$4,000 "settlements" (Stoltz, 2014). Due to the "delicate" and embarrassing subject matter (i.e., pornography), many of the accused persons quickly settle by paying the amounts demanded by the porno-copyright trolls. These trolls have never actually sued any of the alleged copyright violators. They have promptly dropped cases against any individual who contested the charges. They just use the court system to pressure and extort money from as many alleged pornography downloaders and sharers as possible (Suddath, 2013).

Courts across the United States have heard numerous cases involving pornography copyright trolls. The most significant of these cases was *AF Holdings v. Does 1–1058* (2014). In this porno-trolling case, AF Holdings, a limited liability company formed in the Caribbean islands of Saint Kitts and Nevis, was the star. AF Holdings had been formed by what the Federal District Court for the Central District of California described as "attorneys with shattered law practices . . . [s]eeking easy money . . . acquired several copyrights to pornographic movies" for purposes of using the legal system to "shake down" persons who allegedly downloaded and exchanged these copyrighted porn movies without authorization (*Ingenuity 13 LL v. John Doe*, 2013). AF Holdings was a pornographic copyright troll that had invested in the copyrights to pornographic movies from the sexual capitalism industry. One of the pornographic films AF Holdings had acquired was titled *Popular Demand*. AF Holdings and its agents monitored the peer-to-peer file-sharing platform BitTorrent on the Internet and recorded the activities of its subscribers who allegedly downloaded and shared *Popular Demand*. AF Holdings then initiated massive copyright infringement lawsuits in the US District Court for the District of Columbia against 1,058 unknown, unnamed persons—John Does—whom it alleged had illegally used the peer-to-peer file-sharing protocol known as BitTorrent *to* downloaded and share *Popular Demand*. The BitTorrent software enables "swarms" of Internet file sharers to simultaneously upload and download large files at high speeds. As an attachment to its complaint, AF Holdings listed the

1,058 IP addresses assigned to those subscribers whose Internet connections had allegedly been used to share *Popular Demand* (*AF Holdings v. Does 1–1058*, 2014).

AF Holdings requested permission from the federal district court to begin the process of discovery: uncovering the identities of the 1,058 John Does who had allegedly violated its copyright in the pornographic movie. The district court granted the request, and AF Holdings served subpoenas on the five ISPs—Cox Communications, Verizon, Comcast, AT&T, and Bright House Networks—who served the 1,058 IP addresses AF Holdings had identified. The ISPs were compelled to relinquish the names, addresses, telephone numbers, and email addresses of the subscribers who owned the IP addresses that had allegedly illegally downloaded the copyrighted pornographic film. The ISPs refused to comply with the subpoena, claiming jurisdictional and other issues. The ISPs appealed subsequently to the US Court of Appeals for the District of Columbia Circuit, asking it to annul the subpoenas. The issue before the court was whether AF Holdings was manipulating the judicial procedures that govern copyright law to further its selfish, unethical objectives. The appeals court answered in the affirmative and ruled that AF Holdings and other "porno-trolling collective[s]" had extensively misused e-discovery in peer-to-peer online file-sharing disputes. The court frowned on AF Holdings' overbroad, scattergun information seeking, stating that the porno troll had not met the basic test of showing that the district court had personal jurisdiction over the unnamed defendants in the John Doe pornography copyright suit. AF Holdings also had not made a good-faith showing that the discovery was relevant to the case because it had not used geolocation technology to confine its information and identity search efforts to "those defendants who might live or have downloaded Popular Demand in the District of Columbia," where the trial court had jurisdiction. Geolocation technology makes it possible for anyone to estimate the location of Internet users based on their IP addresses. The court concluded that AF Holdings blatantly abused the discovery, or information-seeking, process and that use of discovery procedures to obtain information for ulterior motives "is prohibited." The court suggested that AF Holdings had used forged documents to support its copyright claims *(AF Holdings v. Does 1–1058*, 2014*)*.

The porno-copyright trolls made millions of dollars by colluding with segments of the sexual capitalism industry to use court procedures to violate the privacy and due process rights of persons who allegedly engaged in the illegal downloading and sharing of pornographic films (*AF Holdings v. Does 1–1058*, 2014). Though courts around the United States had frowned upon the lucrative phenomenon of pornographic copyright trolling—using court procedures to obtain private information, blackmail, intimidate, extort, and threaten to publicly disclose the identities of persons whose IP addresses are allegedly associated with unauthorized peer-to-peer downloading and sharing of pornography—this case was the first time an appellate court in the United States took steps to halt the practice. Though explicit, sex-themed visual imagery (pornography and erotica) is more prevalent in Western societies today than ever before, it is still considered material that is socially harmful, morally wrong, psychologically questionable, and embarrassing. That is the reason why segments of the sexual capitalism industry have used the legal system to facilitate invasions of privacy, violations of the due process rights of citizens, and the blackmailing of persons who are even remotely associated with explicit, sex-themed visual imagery.

The Wages of Sexual Capitalism: The Sex.com Domain-Name Saga

Sexual capitalism is the transformation of explicit, sex-themed visual images into commercial products, and distribution of these products through the media, in real space and cyberspace. It appropriates the language of sexual liberation and freedom of expression and uses it to capitalize on mythic ideals of sex and beauty—to the point of exploiting and discarding its sex objects. Sexual capitalism in the United States is exemplified by the "Sex.com affair," a series of infamous, decades-long cases that emerged from the information and communication technology revolution of the last quarter of the twentieth century. This revolution culminated in the convergence of the once-disparate media of mass communication—books, newspapers, magazines, photography, movies, music, radio, television, and computers—on the Internet and its emerging social media platforms. The Sex.com affair was triggered by the massive migration of huge segments of the primary product of sexual capitalism, pornography, from real space to the Internet in the 1990s.

It all began in 1994, when computer entrepreneur and sexual capitalist Garry Kremen uncannily foresaw the possibility of the explosion of pornography on the vast, unexplored, and unoccupied frontiers of cyberspace. He registered the domain name Sex.com with the domain-name registrar Network Solutions Inc. Before he could exploit the commercial potential of Sex.com, he lost control of the domain name. In effect, in 1995, another aspiring sexual capitalist, Michael Cohen, fraudulently convinced Network Solutions Inc. to transfer Sex.com to him without the knowledge or consent of Kremen. Cohen quickly transformed Sex .com into the premier online exchange for classified advertisements for goods and services related to sex and sexuality, making millions of dollars in the process (*Kremen v. Cohen and Network Solutions*, 2003). Sex.com was what Internet law scholar Eric Goldman (2006) called "perhaps the most valuable domain name of all time" (para. 2). Sexual capitalism had created a highly lucrative, virtual, mass marketplace whose stock-in-trade was explicit, sex-themed commercial imagery.

Sex.com would go on to become a "lucrative online porn empire" (*Kremen v. Cohen and Network Solutions*, 2003, para. 4). Kremen sued Cohen in the US District Court for the Northern District of California and won a judgment that included return of the domain name and $65 million in compensatory and punitive damages (Morian, 2001). Cohen ignored the court order and fled to Mexico (Goldman, 2006). In the face of this development, Kremen sued Cohen and Network Solutions Inc., claiming that by handing over Sex.com to Cohen, Network Solutions Inc. was liable for breach of contract and conversion, among other claims. The district court rejected all the claims. Kremen appealed to the US Court of Appeals for the Ninth Circuit. The question before the court was whether domain-name registrants had property rights in their intangible domain names. The court answered in the affirmative. The court held that "registering a domain name is like staking a claim to a plot of land at the title office" (*Kremen v. Cohen and Network Solutions*, 2003). The court held that under common law, Network Solutions Inc. was liable for giving away Kremen's domain name on the basis of a facially suspect forged letter from Cohen. After losing this case, Network Solutions Inc. settled with Kremen for about $20 million (Goldman, 2006). In 2006, Kremen sold the Sex.com domain name to a pornographic company named Escom, for $12–14 million. Escom promptly announced a "strategic partnership"

with Playboy Enterprises to turn Sex.com into the primary marketing portal for Playboy's products, services, and content (Saracevic, 2006; Goldman, 2006). This transfer of the highly coveted, much-litigated, lucrative emblem of sexual capitalism in cyberspace to the "father" of modern sexual capitalism sealed the union of global sexual capitalism in real space and cyberspace.

The fundamental premise of this chapter is that sexual capitalism has successfully used the First Amendment and legal provisions that recognize corporate personhood for certain legal purposes to advance its economic interests. This is especially true in the domain of intellectual property law. In 1970, President Richard Nixon (1970)—in rejecting the findings and recommendations of the Presidential Commission on Obscenity and Pornography, which had called for relaxing control on pornography for adults—suggested that the United States build legal and moral barriers against obscenity and pornography: "So long as I am in the White House, there will be no relaxation of the national effort to control and eliminate smut from our national life . . . Smut should not be simply contained at its present level; it should be outlawed in every State in the Union. And the legislatures and courts at every level of American government should act in unison to achieve that goal." In hindsight, Nixon's pronouncements sound Puritanical and moralistic. American acceptance of pornography has changed radically since the days of the Nixon administration. As a libertarian nation that prizes individualism and distrust of government, the United States is in the process of striking a balance between individual freedoms with respect to sex-themed media content and the right of society to protect the victims of sexual capitalism. That process has necessarily meant recognizing the corporate personhood of individual, corporate members of the sexual capitalist club. In *Guccione v. Hustler* (1986), the US Court of Appeals for the Second Circuit addressed the status of rival pornography industry litigants Penthouse International and *Hustler* magazine in the eyes of the law. The court stated that pornographers may not be discriminated against due to the nature of their stock-in-trade. It said courts must not "accord either the pornographer plaintiff or the pornographer defendant less protection than would be accorded litigants who publish more traditional works of literature or journalism."

In the age of the sexual revolution and interconnected online media, sexual freedom is becoming the most important freedom because it is a very lucrative freedom. As the cases discussed demonstrate, explicit, sex-themed images are regulated representations under the intellectual property law regime of the United States. As such, the sexual capitalism, or adult porn, industry has used its financial clout to fend off all real or perceived competitors. Nevertheless, once in a while, the courts step in and remind the adult porn industry that intellectual property protection is not absolute—not even for sex-themed visual imagery.

Part III

International and Comparative Approaches to the Regulation of Explicit, Sex-Themed Visual Imagery

One of the main theses of this book is that sex-themed visual imagery is a global phenomenon that lends itself to comparative cross-national and cross-cultural analyses. Comparative studies in media regulation enable us to transcend narrow national and parochial world views and perspectives. This is especially applicable to the study of the regulation of the global phenomenon of explicit, sex-themed visual imagery. Part 3 of this volume is aimed at exploring the international aspects of the regulation of sex-themed visual imagery from a comparative perspective. The featured countries are Canada and France, whose regulatory postures are compared with those of the United States. In Chapter 5, we saw that one category of sex-themed visual imagery, child pornography in real space and cyberspace, is the subject of worldwide prohibitions. We also saw how Japan was dragged "kicking and screaming" to accept the international child pornography norms and to criminalize pornography that was produced through the exploitation of children. Chapter 15 compares and contrasts American and Canadian approaches to the thorny issue of freedom of expression and women's rights. Chapter 16 compares and contrasts how the United States and France regulate pedopornography (sex-themed visual imagery that involves real or imagined children) in real space and cyberspace.

We end with an epilogue that looks back at the transfer of laws that regulate sex-themed visual imagery from real space to cyberspace and discuss the emerging regulatory issues involving two sex-themed visual phenomena that have become global problems: (1) sexting, the practice of sending sexually explicit texts or images through text-messaging applications, and (2) revenge porn, the practice of posting nude or sexually explicit images of people on the Internet or its associated social networking sites for purposes of humiliating the person or persons who are the subject of the photographs. The fact that individuals and corporations use sex-themed visual imagery to name, shame, blackmail, or extort is a testament to the fact that *Eros* and *agape* are still at war in contemporary society.

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Sex-Themed Visual Imagery, Freedom of Expression, and Women's Rights

American and Canadian Approaches

In August 2013, syndicated Canadian columnist, blogger, and radio talk show hostess Lori Welbourne took off her brassier and bared her breasts during an interview with Walter Gray, mayor of the city of Kelowna, British Columbia. Welbourne posted the video, with her exposed breasts pixilated, on YouTube. The "topless" interview, which was actually a staged stunt carried out with the connivance of the mayor, became a sensational global story. Within days, newspapers around the world picked up the story, and millions of people from all corners of the globe had watched the pseudotopless interview. Welbourne (2013), who champions what she calls a woman's "constitutional right to bare her chest anywhere a man can bare his without cruel judgment," had taken her camera operator to the interview in the mayor's office and videotaped the stunt a few days before "Go Topless Day" to demonstrate that female toplessness was not illegal in Kelowna, British Columbia. Go Topless Day was a demonstration held on August 25, 2013, in Kelowna by a group of women. The attendees of the event turned out to be hordes of mostly male, camera-wielding voyeurs (Welbourne, 2013).

While Welbourne's self-serving stunt is the stuff media ethics debates are made of, it exemplifies the difference in attitude between the United States and Canada on the subject of public nudity as well as the representation of images of nudity, sex, and sexuality. Lori Welbourne's stunt can be compared to Justin Timberlake and Janet Jackson's so-called Super Bowl wardrobe malfunction stunt of 2004. In effect, on February 1, 2004, during the Super Bowl halftime show—a live broadcast event watched by almost 144 million people—Justin Timberlake and Janet Jackson performed Timberlake's song "Rock Your Body." At some point in the show, Timberlake ripped off Janet Jackson's bustier, revealing, for a split second, her breast covered only by a sun-shaped "nipple shield." This occurred exactly when Timberlake was singing the line "I'm gonna have you naked by the end of this

song" (Dakss, 2004). Michael Powell, former chairman of the Federal Communications Commission (FCC), which regulates the electronic media in the United States, denounced the incident as "a classless, crass and deplorable stunt" and launched an investigation (Dakss, 2004). Officials of the Super Bowl and the event's broadcaster, CBS, denounced the stunt. Millions of viewers flooded the FCC with phone calls and emails complaining about the incident, which came to be known as "Nipplegate." Many saw it as being symptomatic of diminishing morality in the United States. After the uproar, Justin Timberlake claimed that Jackson's breast had been mistakenly exposed as a result of a "wardrobe malfunction."

The FCC fined CBS and its syndicates half-a-million dollars for broadcasting the nudity, stating that the incident violated the FCC's policy on broadcasting indecent content such as nudity and expletives: "It is now clear that the brevity of an indecent broadcast—be it word or image—cannot immunize it from FCC censure" (*FCC v. CBS*, 2012). Global Television Network broadcasted the Super Bowl halftime show in Canada. Probably because public nudity was not an issue in Canada, the incident did not raise any controversy. The number of complaints the Canadian Broadcast Standards Council received over the wardrobe malfunction incident was negligible.

Aim of the Chapter

The United States and Canada are North American neighbors who also happen to be former British colonies. They both have the common law system—except for the Canadian province of Quebec, which has a civil law system—and have been influenced for more than two hundred years by Judeo-Christian moral principles and Enlightenment ideas of freedom of speech and expression, human rights, and human dignity. Nevertheless, they have different approaches to freedom of speech and expression, specifically in matters of extreme speech (also known popularly as "hate speech"). This is speech that targets individuals on the basis of their race, religion, ethnicity, gender, sexual orientation, and other markers of identity. Both countries also differ on certain standards of defamation. In recent years, the two countries have developed divergent conceptualizations of the contours of the permissible in matters related to obscenity and pornography—the explicit visual depiction of sexual scenes or sex acts.

The aim of this chapter is to compare and contrast American and Canadian regulatory approaches to the issue of, explicit, sex-themed visual representations—pornography, erotica, and obscenity. The aim of this comparison is to determine how the United States and Canada strike a balance between the right of freedom of speech and expression guaranteed to producers and consumers of sex-themed speech under the First Amendment of the US Constitution (1791) and the Canadian Charter of Rights and Freedoms (1982), respectively, and the right of these governments to restrict sex-themed material that is harmful to society and especially to women and children. The focus of the chapter is on legal conceptualizations of the impact of explicit, sex-themed speech on women. The first part of the chapter surveys the balance between freedom of expression and obscenity and indecency law in the United States, culminating in the landmark US Supreme Court case *Miller v. California*. This case set the standard for regulation of obscenity in the United States. The second part analyzes *American Booksellers v. Hudnut*,

a case that addressed the issue of politics, pornography, and women in the United States. The third part of the chapter surveys the balance between freedom of expression, obscenity, and pornography laws in Canada. The fourth part analyzes the landmark Canadian Supreme Court case *Regina v. Butler*, a case that set forth the parameters of obscenity law as it concerns women in Canada.

The First Amendment "Negative Rights" Regime of the United States

The American Constitution is conceptualized as "a bridle" on the government, to use the expression of political commentator George Will (2012). Additionally, the Bill of Rights (the first ten amendments to the Constitution) enumerates what the Supreme Court of the United States calls a number of "affirmative prohibitions" against governmental action (*National Federation of Independent Business v. Sebelius*, 2012). The Bill of Rights, which forms the pillar of the architecture of US freedom in general and freedom of expression in particular, is a negative charter of expressive liberties, which sets forth certain censorious activities that the government is not permitted to engage in, since these activities have a tendency to eviscerate the rights of citizens (*Jackson v. Byrne*, 1984). This ideological edifice is grounded in an ancient theory of free speech: good and popular ideas will ultimately prevail over bad, unpopular ones if the government—that is, the law—enables a level playing field in the public sphere, such that there is a free, uninhibited exchange of ideas. The United States is known for its exceptional freedom of speech and expression regime, which is anchored in the First Amendment. The First Amendment expressly forbids Congress—and by extension federal, state, and local governments; state colleges and universities; school boards; and other public bodies—from infringing on the rights of freedom of speech, freedom of the press, and freedom of religion: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and petition the Government for a redress of grievances." The words "speech" and "press" are highly elastic legal terms that cover everything from nonverbal communicative activity, like wearing arm bands in protest against war (*Tinker v. Des Moines Independent School District*, 1969), to "expressive conduct," like burning the American flag in protest against governmental policies (*Texas v. Johnson*, 1989), to "expressive association," like getting together with like-minded individuals to express religious or ethnic pride in public places while excluding people whose conduct expresses undesirable speech (*Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston*, 1995). Free speech also includes freedom from forced speech: "the right to speak and the right not to speak." The word "press" is a malleable term that covers all kinds of "publications" that provide information to the general public and comment on all matters of "public interest." It also includes the traditional electronic media—like broadcasting, cablecasting, and satellite communication—as well as the Internet and its associated social media. Recently, courts in the United States have extended First Amendment protection to Facebook "likes" (*Bland v. Roberts*, 2013) and to the comments of bloggers (*Obsidian Finance v. Cox*, 2014). Under the American system, the government is perceived as being the greatest danger to free speech. Schauer (2005) has described the American First Amendment freedom of speech regime as "exceptional"; that is to say, the American approach to freedom

of expression under the First Amendment is unique and much stronger than that of other Western, liberal democracies to the point where the United States is an "outlier" in terms of its protection of freedom of speech and expression. He suggests that the United States has made the values of health, privacy, safety, civility, respect, and dignity subservient to "the paramount constitutional concerns with freedom of speech and freedom of the press" (p. 30). The United States is a laissez-faire marketplace of ideas that puts a premium on the free flow of ideas, information, and discourse (*Abrams v. United States*, 1919).

The result is that the United States has a rights tradition that is more protective of speakers' rights than any other legal tradition in the world. Bunker (2001) has written that freedom of speech and of the press as practiced in the United States "leads us to exercise great caution before silencing viewpoints with which we disagree" (p. 8). The First Amendment does not demand that the government take affirmative steps to promote acceptable speech; it merely forbids the government from injecting itself into the public speech arena and unduly interfering with content that it finds politically or socially objectionable (*R. A. V. v. City of St. Paul*, 1992). Indeed, a common thread that runs through First Amendment case law is that the rights of the speaker almost always trump the feelings of the listener if the speaker's speech is protected under the broad umbrella of the First Amendment (*Snyder v. Phelps*, 2011; *Terminiello v. Chicago*, 1949). The result is that under the First Amendment, "free speech"—in the broadest sense of the term—takes precedence over metaphysical issues like morality, decency, and human dignity. Freedom of expression also takes precedence over considerations of the negative emotional and psychological impacts of the speech on those at whom it is directed (*Hustler Magazine v. Falwell*, 1988). Schauer (2005) suggests that American exceptionalism in matters of freedom of experience may be "the reflection of longer, more extensive American experience with freedom of communication issues" (p. 31).

Regulation of Obscenity and Pornography in the United States: Federal Pornography Commissions

The sexual revolution of the late 1950s and early 1960s; technological developments in filmmaking that facilitated sexual entrepreneurism, including the capitalization, production, commercialization, and distribution of low-budget, pornographic films; and the launching and marketization of sexually oriented magazines directed at "sophisticated" men led to judicial disputes that resulted in the liberalization and explosion of sexually oriented material in the United States. As early as 1957, the New York Court of Appeals assumed the European Renaissance aesthetic posture toward nudity that we saw in Chapter 8 when it ruled that "nudity in itself, and without lewdness or dirtiness, is not obscenity in law or in common sense" (*Excelsior Pictures v. Board of Regents*, 1957, p. 144). This was the standard that had been set by the Roman Catholic Church in the fifteenth century. In effect, the Council of Trent (1546–63), a continental gathering organized by the Catholic Church in response to the Protestant Reformation, happened to take place during the Renaissance, when Italian, Dutch, and other grand masters were borrowing liberally from the mythology and aesthetics of "pagan" classical Greece and creating new artistic masterpieces. As we saw in Chapter 8, the Roman

Catholic Church, which had become the dominant lawgiver and regulator of the arts after the collapse of Roman law, made peace with nudity in sacred and "profane" art. Nevertheless, the church insisted that in sacred art, "figures shall not be painted or adorned with a beauty exciting to lust" (Council of Trent, 1848, pp. 236–37). In *Excelsior Pictures v. Board of Regents* (1957), the court was essentially Americanizing and secularizing the Renaissance-era regulatory posture of the Roman Catholic Church.

American courts soon brought explicit, sexually oriented visual material within the ambit of the First Amendment. In 1969, the Supreme Court of the United States held that mere possession of "obscene" material in the privacy of one's home was not a criminal offense. The court implied that when adults viewed whatever they wanted to view in the privacy of their homes, the First Amendment granted them a zone of privacy that was secure from governmental interference (*Stanley v. Georgia*, 1969). This and other judicial decisions confirmed the reality that the sexual revolution had diffused to all parts of the United States and that the bulk of sex-themed speech and expression was protected by the First Amendment.

Federal Commissions on Obscenity and Pornography

Segments of American society were alarmed at this development, given the Puritan religious roots of the United States. Congress showed its alarm when it stated that the traffic in obscenity and pornography was "a matter of national concern" (Presidential Commission on Obscenity and Pornography, 1970, p. 1). The fear that ubiquitous sex-themed material was dangerous for society and the assumption that such material would be harmful to minors who were exposed to it drove politicians to action. In 1967, Congress set up the Presidential Commission on Obscenity and Pornography. The terms of reference of the commission were as follows:

1) to analyze the laws pertaining to the control of obscenity and pornography; and to evaluate and recommend definitions of obscenity and pornography.
2) to ascertain the methods employed in the distribution of obscene and pornographic materials and to explore the nature and volume of traffic in such materials;
3) to study the effect of obscenity and pornography upon the public, and particularly minors, and its relationship to crime and other antisocial behaviors
4) to recommend such legislative, administrative, or other advisable and appropriate action . . . to regulate effectively the flow of such traffic, without in any way interfering with constitutional rights. (Presidential Commission on Obscenity and Pornography, 1970, p. 1)

The commission was essentially charged with the responsibility of studying obscene and pornographic materials' relation to antisocial behavior and determining whether a need existed for more effective methods of controlling the transmission of such materials. The commission concluded that sexually oriented material—pornography and erotica—had taken their place as bona fide products handled by individual retail and wholesale distributors in the American capitalist marketplace. As such, they were protected by the First Amendment. The

commission cast around for legislative exemplars that could provide a working model for the United States. In Scandinavia, it found a situation where, by the late 1960s, Norway, Sweden, and Denmark had stopped using the courts to enforce sexual morality and, specifically, moral disapproval of pornography or obscenity. The result was the near-total decriminalization of pornography to the point where only persons who sold "obscene pictures" to anyone below 16 years of age were liable for a fine (Presidential Commission on Obscenity and Pornography, 1970, p. 128).

The commission found that the market share, or size, of sexual capitalism (what it called "the 'smut' industry in the United States") was grossly exaggerated (p. 7). It found that "exposure to erotic stimuli appears to have little or no effect on the already established attitudinal commitments regarding either sexuality or sexual morality" (p. 26). The commission concluded that "for America, the relationship between the availability of erotica and changes in sex crime rates neither proves nor disproves the possibility that availability of erotica leads to crime, but the massive overall increases in sex crimes that had been alleged do not seem to have occurred" (p. 27). In short, the commission glossed over the problem of the harms of pornography. It concluded that at worst, pornography was a benign phenomenon that did not contribute to juvenile delinquency or crime. It did not mention the impact of pornography on woman at all. Political and social actors across the political spectrum were not amused by the report. The Nixon administration rejected the findings, conclusions, and recommendations of the report outright:

> I have evaluated that report and categorically reject its morally bankrupt conclusions and major recommendations . . . The Commission contends that the proliferation of filthy books and plays has no lasting harmful effect on a man's character. If that were true, it must also be true that great books, great paintings, and great plays have no ennobling effect on a man's conduct. Centuries of civilization and 10 minutes of common sense tell us otherwise . . . Pornography can corrupt a society and a civilization . . . The warped and brutal portrayal of sex in books, plays, magazines, and movies, if not halted and reversed, could poison the wellsprings of American and Western culture and civilization . . . I am well aware of the importance of protecting freedom of expression. But pornography is to freedom of expression what anarchy is to liberty; as free men willingly restrain a measure of their freedom to prevent anarchy, so must we draw the line against pornography to protect freedom of expression . . . The Commission on Pornography and Obscenity has performed a disservice, and I totally reject its report. (Nixon, 1970)

Leaders of religious organizations, antipornography groups, educationists, and others chimed in and roundly denounced the report's conclusions and criticized its methodology and validity. In an unprecedented move, the Senate overwhelmingly rejected the commission's findings of fact and its recommendations. Political developments would lead to the creation of another pornography commission in the 1980s. One of these developments was the rise of the women's antipornography movement, which advanced the idea that pornography was harmful to women.

The Sexual Revolution, Women, Pornography, and Politics

In Chapter 10, we noted that in the 1960s and 1970s, the United States underwent a countercultural sexual revolution. This phenomenon diffused to Canada and other Western countries (Duong, 2014; Levine, 2014; Schaefer, 2014). Several forces drove this revolution. At the intellectual level, Freudian psychoanalysis was a crucial, contributing current. Freud (1924) introduced the negative concept of "repression" into academic jargon. He defined the process of "repression" as the withdrawal of "an impulse, a mental process seeking to convert itself into action" (p. 304). He further stated that "repression of mental excitations" (p. 308) is a psychological rather than a sociocultural phenomenon that occurs at the "unconscious" level. Elsewhere, Freud stated that repression was a learned sociocultural phenomenon that meant bringing sexual instincts "to submission" (p. 419). The implication was that sexual repression was a psychological malady, a syndrome that had to be eliminated because it led to emotional stuntedness, underdevelopment, or impoverishment. As part of Freudian psychoanalysis, patients who showed symptoms of psychological dysfunctions brought about by repression were allowed to vocalize and exorcise their thoughts, fantasies, and dreams. For secular Westerners, the psychologist or psychoanalyst's couch became the secular equivalent of the church confessional. Getting rid of repression meant getting rid of learned Puritan and Victorian sexual inhibitions. Members of the American sexual liberation movement looked to the liberated countries of Scandinavia for direction as they brought the sexual revolution into high gear (Schaefer, 2014). As we saw previously, the Presidential Commission on Obscenity and Pornography studied the Scandinavian experience with pornography and seemed to have been influenced by it.

As we saw in Chapter 10, organized crime pioneered the capitalization, production, and distribution of explicit, sex-themed visual imagery in the United States when it funded and distributed America's first pornographic blockbuster movie, *Deep Throat* (US Department of Justice, 1986). The handsome return on investment in the film attracted lots of other investors to the sexual capitalism industry to the point that pornography soon became a global, consumerist, cultural phenomenon. The investment model of sexual capitalism was now firmly in place. The industry capitalized on Freud's "discovery" and medicalization of sexual "repression," or natural and cultural inhibitions against sexual eccentricity. As McRobbie (1996) put it, psychoanalysis "allowed feminists to confess to the pleasures which they otherwise felt obliged to repress or which they assumed they had overcome or transcended" (p. 174). Pornographic movies, *Playboy*, and other pornographic magazines became cultural phenomena that naturalized pornography and erotica and reduced them to consumer products known by the neutral-sounding euphemism "adult entertainment." Sexual capitalism positioned itself as a libertarian phenomenon, the outlet and voice of the sexual revolution, whose main goal was freedom. Additionally, the sexual revolution was viewed as the antidote and the cure for the social malady of repression. The main industrial product of sexual capitalism was commercialized sexuality.

By the 1980s, pornography had become a mainstream media product in North America. In the United States, the Supreme Court had, over time, brought sexual capitalism and its stock-in-trade—pornography and erotica—under the protective umbrella of the First Amendment. This aggressive industry pushed the legal

and ethical bounds of acceptability. Some pornographic magazines prided themselves on publishing unauthorized nude, sexual, or sexualized images of nonconsenting female celebrities (Colker, 1986). At the same time, debates about the harms pornography caused women, children, and the "moral fabric" of society began to take place.

Sexual Capitalism, the Objectification of Women, and Antipornography Activism

On the sixtieth anniversary of *Playboy*, its editor, Jimmy Jellinek (2013), said that the magazine's anniversary edition was a testament to "60 years of beautiful women, discerning taste, sexual emancipation, groundbreaking fiction and world-changing journalism." This highly sanitized summary of the legacy of *Playboy* magazine turned a blind eye to the fact that many women—including well-known feminists—had soured on the 1960s sexual revolution and the "sexual emancipation" that *Playboy* and the rest of the sexual capitalism industry were promoting. A number of feminist antipornography groups sprang up in the 1970s to challenge the pornography industry for being at the forefront of the subjugation of women. These antipornography feminist groups included Women against Violence against Women (WAVAW), Women against Violence in Pornography and Media (WAVPM), and Women against Pornography (WAP) (Bronstein, 2011). These women's groups claimed that *Playboy* magazine and the rest of the sexual capitalism industry were objectifying and using women for financial gain. The case of Marjorie Thoreson illustrates this point.

The Case of *Thoreson v. Penthouse International* (1990)

We saw in Chapters 10 and 12 that sexual capitalists not only objectified women but capitalized on them through exploitative work contracts and intellectual property restrictions. Sexual capitalism is a cut-throat industry that is regulated like other capitalist industries: with a good deal of laissez-faire (noninterference) from governmental authorities within the context of the First Amendment and business contract laws. Sexual capitalism is as hardnosed and as exploitative as any other profit-driven industry. It just so happens that its stock-in-trade is the commercial production, transmission, storage, and re-presentation of sex in narrative, artistic, or just plain libidinous contexts. It so happens that women are treated as sex objects and used as money-making objects for the industry. As a result, courts in the United States have adjudicated cases in which sexual capitalists exploited models and "performers" in their industry. One such case was that of Marjorie Thoreson, a young woman who fell into the clutches of sexual capitalist Robert Guccione, who sacrificed her rights and emotional and physical health to further his sexual, financial, and business interests.

In *Thoreson v. Penthouse International* (1990), the aspiring actress and pornographic magazine model Marjorie Thoreson sued Penthouse International and its founder, chairman, and principal shareholder, Robert Guccione, at the Supreme Court, New York County, New York, for, among other claims, fraud, misrepresentation, unjust enrichment, intentional infliction of emotional harm, and sexual harassment. In effect, when *Penthouse* decided to make the then twenty-year-old

Thoreson the 1975 Penthouse "Pet of the Year," Guccione flew her to London, where he photographed her and then became sexually intimate with her. He assured her that he would use his contacts to assist her in becoming an actress in Hollywood. Thereafter, Thoreson signed a management agreement with Penthouse International in exchange for "exclusive control over her career and exclusive rights to commissions . . . [and] a power of attorney to allow Penthouse to handle her finances and receive payments on her behalf" (*Thoreson v. Penthouse International*, 1990, p. 970). She worked for Penthouse International under a pseudonym for seven years. As the 1975 "Pet of the Year," Thoreson was entitled to receive prizes valued at $50,000. She later claimed that the value of what she actually received was considerably less than that amount. After the 1975 "Pet of the Year" issue, she did an international tour on behalf of the US Department of Defense. She claimed that in order to perform a role in *Penthouse*'s explicit pornographic movie, *Caligula*, she had surgery to enlarge her breasts at Guccione's urging. She said she had reluctantly performed explicit sex acts in the movie after she was persuaded that it would further her acting career (*Thoreson v. Penthouse International*, 1990, pp. 970–71). She claimed that Guccione had coerced her into having an 18-month sexual affair with his London-based financial adviser. She further charged that when Guccione wanted to open a gambling casino in Atlantic City, New Jersey, he coerced her into having a sexual affair with an Italian furniture manufacturer whom he thought would invest in the venture. In 1980, when Thoreson refused to fly to Japan to promote *Caligula* because the US promotional tour she had done for the same movie had been "degrading and humiliating," Guccione fired her (*Thoreson v. Penthouse International*, 1990, p. 971).

The issue before the court was whether the actions of Guccione violated the rights of Thoreson as alleged. The Supreme Court, New York County, New York, answered only the sexual harassment claim in the affirmative. It held that "under the Human Rights Law ('HRL'), an employer is prohibited from exploiting a dominant position of power in the workplace by imposing sexual demands upon an employee as an implicit condition of continued employment. Any attempt by an employer to use the terms, conditions or privileges of employment to coerce an employee, targeted on the basis of gender, to agree to participate in sexual activity is a form of sex discrimination outlawed by state law" (*Thoreson v. Penthouse International*, 1990, p. 972). The court ruled that Guccione used his employment relationship with Thoreson to coerce her into having sexual intercourse with a furniture manufacturer and with his financial adviser for purposes of advancing his business interests. The court held that Thoreson's employment as a model for Penthouse International "did not constitute a waiver of the right to be free from sexual harassment in the workplace." The court ordered Guccione and Penthouse International to pay Thoreson $60,000 as compensatory damages for emotional distress and $4 million as punitive damages (*Thoreson v. Penthouse International*, 1990, pp. 972–73).

On appeal, the New York Appellate Division affirmed the compensatory damages but held that punitive damages were not recoverable under the laws of the state of New York and annulled the $4 million award. Thoreson appealed to the Court of Appeals, the highest court in the state of New York. This court of last resort affirmed the Appellate Division's ruling to the effect that punitive damages were not permitted in New York because "the purpose of the permissible remedies

is solely to right the wrong done to the aggrieved person, not to punish the wrongdoer" (*Thoreson v. Penthouse International*, 1992).

This ruling was the end of the legal road for Thoreson, who suffered from paranoia later in life. In 2011, the 58-year-old Thoreson's naked body was found on a restricted US Marine training beach in San Diego, California. Her neck and back were broken, and she was covered with knife wounds. The US Navy has not been able to solve the case (Whitewell, 2011).

Politics, Pornography, and Women: *American Booksellers v. Hudnut* (1986)

As more and more social science studies showed that violent, sexually explicit material was harmful to women, activists began to resort to the legal and legislative system to denounce the evils of pornography and to campaign against it. Legal scholar Catherine MacKinnon and feminist author Andrea Dworkin decided, in the 1980s, to take the civil rights route to combat pornography. They drafted and introduced ordinances that classified pornography as a form of sex discrimination that violated women's civil rights (MacKinnon, 1993). MacKinnon and Dworkin would draft model antipornography ordinances that classified pornography as discrimination against women. That ordinance passed twice in Minneapolis, Minnesota, but its mayor vetoed it twice on the grounds that it violated free speech (Bronstein, 2011). The story was different in Indianapolis, Indiana, where, in 1984, MacKinnon worked with social conservative members of the city council to pass an antipornography ordinance. A consortium of interest groups, led by the American Booksellers Association, challenged the ordinance in federal court. As we shall see later, MacKinnon and Dworkin's antipornography efforts diffused to Canada (MacKinnon, 1993). Their antipornography campaign in the United States and Canada give us a chance to compare and contrast the free speech contexts of both countries as well as the outcomes of that campaign in both countries. We discuss the outcome of the case spawned by the Indianapolis antipornography ordinance and analyze the impact of MacKinnon and Dworkin's antipornography crusade in Canada.

As we saw previously, Catharine MacKinnon worked with members of the city council of Indianapolis to enact an antipornography ordinance that essentially banned pornography from the city. The sponsors of the measure claimed that pornography influences negative attitudes toward women and that the statute was a way to alter the social perceptions and relationships between men and women. This, they claimed, would eliminate the subjugation and sexual subordination of women. The idea was that by eliminating pornography, the city would be reducing the tendency of men to view women as sexual objects. This, they claimed, would reduce discrimination and sexual harassment. The law defined "pornography" as

> the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:
>
> (1) Women are presented as sexual objects who enjoy pain or humiliation; or
> (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or

(3) Women are presented 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) Women are presented as being penetrated by objects or animals; or
(5) Women are presented 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) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.

The statute provided that the "use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section" (*American Booksellers v. Hudnut*, 1986). The ordinance was based on a number of findings of fact, which stated, in part, "Pornography is a discriminatory practice based on sex which denies women equal opportunities in society. Pornography is central in creating and maintaining sex as a basis for discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women" (*American Booksellers v. Hudnut*, 1986). The Indianapolis ordinance essentially defined pornography as "discrimination against women." The thinking behind the Indianapolis anti-pornography statute was a feminist view of pornography spelled out by Gloria Steinem (1986): "We have a First Amendment right to demonstrate against pornography, to boycott its creators and sellers, to explain that pornography is to women of all groups what Nazi literature is to Jews and Ku Klux Klan literature is to blacks . . . after all *porné* means harlot, prostitute or female captive, thus, pornography is the writing about or depiction of female sexual slavery" (p. 10).

The American Booksellers Association, a trade grouping of bookstores in the United States, and a consortium of other interested organizations, challenged the ordinance in the US District Court for the Southern District of Indiana, claiming that the law was an unconstitutional violation of the First Amendment. The issue before the court was whether the ordinance was unconstitutional. The court answered in the affirmative and ruled that the ordinance restricted pornography, a form of speech that is protected by the First Amendment, rather than illegal conduct. The court also stated that the ordinance conflated pornography with obscenity, material that is not protected under the First Amendment, and that the law was overbroad because it went beyond unprotected obscenity. The law had essentially set up a censorship system. On appeal, the US Court of Appeals for the Seventh Circuit also addressed the constitutionality of the ordinance. The appellate court affirmed the district court's ruling. It ruled that the ordinance was unconstitutional because it constituted unlawful viewpoint discrimination. The court said the law "discriminates on the ground of the content of the speech. Speech treating women in the approved way—in sexual encounters 'premised on equality' . . .—is lawful no matter how sexually explicit. Speech treating women in the disapproved way—as submissive in matters sexual or as enjoying humiliation—is unlawful no matter how significant the literary, artistic, or political qualities of the work taken as a whole. The state may not ordain preferred viewpoints in this way" (*American Booksellers v. Hudnut*, 1986).

The court further ruled that "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein" (*American Booksellers v. Hudnut*, 1986; citing *West Virginia State Board of Education v. Barnette*, 1943). The court concluded that the definition of "pornography" in the statute was unconstitutional because it did not follow the standard set forth in *Miller v. California*. The *Miller* standard for determining whether material is obscene is as follows: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value" (*Miller v. California*, 1973). Indianapolis clearly re-presented a definition of pornography that is at variance with the Greek definition of the term as well as its re-presentation during the Enlightenment. The Indianapolis definition was also at variance with the American definition of obscenity. The court implied that under the ordinance, a lot of material in the libraries would be censored: "It is unclear how Indianapolis would treat works from James Joyce's *Ulysses* to Homer's *Iliad*; both depict women as submissive objects for conquest and domination" (*American Booksellers v. Hudnut*, 1986). The Indianapolis ordinance was a rhetorical and ideological statement rather than a constitutionally sound legislative enactment, to paraphrase Posner (1995, p. 360). It clearly was about social engineering rather than the defense of the civil rights of a segment of society.

The Attorney General's Report on Pornography (US Department of Justice, 1986)

A significant development that took place the same year the Court of Appeals decided *American Booksellers v. Hudnut* was the release of the final report of the Attorney General's Commission on Pornography. This commission had been created under the recommendation of President Ronald Reagan. As a result of dissatisfaction with, and congressional rejection of, the findings and recommendations of the Presidential Commission on Obscenity and Pornography, political and social debate on the thorny issue of pornography continued in the United States. President Reagan requested that the attorney general of the United States establish another commission on pornography. Attorney General Edwin Meese announced the formation of the commission in 1985. The commission was mandated to "determine the nature, extent, and impact on society of pornography in the United States, and to make specific recommendations to the Attorney General concerning more effective ways in which the spread of pornography could be contained, consistent with constitutional guarantees" (US Department of Justice, 1986, p. 219). This commission took a different approach than that of the Presidential Commission of Obscenity and Pornography that we saw earlier. The Attorney General's Commission on Pornography focused mainly on legal regulatory and law enforcement issues related to pornography. One of the first things the commission decided to do was to recognize that defining the word "pornography" was futile because the word was pregnant with negative meanings and connotations that did

not exist in its original religious and cultural meaning (writing about prostitutes) in ancient Greece. The commission concluded that the intermingling of sex and violence in sexually explicit material caused harm to women: "There is a causal connection between exposure to sexually violent material and an increase in violent behavior directed toward women . . . Substantial exposure to violent sexually explicit material leads to a greater acceptance of the 'rape myth' in the broader sense—that women enjoy being coerced into sexual activity, that they enjoy being hurt in sexual contexts" (US Department of Justice, 1986, p. 327). It should be noted that Andrea Dworkin testified before the Attorney General's Commission on Pornography to the effect that violent pornography degraded women and led to violence against them. The commission's findings and recommendations, which were published in 1986, reflected these views.

The American refusal to give legal effect to the distinction between pornography and erotica and to regulate violent pornography as discrimination against women is grounded in a libertarian ethos of skepticism with regard to "the ability of any governmental institution to reliably to distinguish the good from the bad, the true from the false, and the sound from the unsound" (Schauer, 2005, p. 46). Additionally, the United States has a preference for freedom over civility and equality: "The United States, increasingly alone, stands as a symbol for a certain kind of preference for liberty even when it conflicts with values of equality, and even when it conflicts with important community values" (Schauer, 2005, p. 45).

Regulating Explicit, Sexually Violent Visual Imagery in Cyberspace

When the US government transformed the Internet from an instrument of military communication and information technology research into a general-purpose educational, cultural, social, and commercial platform in 1992, cyberspace became a magnet for sexual capitalism—and the site of a legal tug-of-war between Congress, sexual capitalists, organized libertarian interests, and the courts over Internet content. This struggle intensified as explicit, sex-themed visual material of all tastes, or lack thereof, including child pornography and sexually violent content, became available on the Internet. The accessibility of explicit, sex-themed material (pornography) to children, as well as media stories of child predators and child molesters who met their unwitting prey on the Internet, gave Congress justification to pass the Communications Decency Act (CDA) of 1996. Two provisions of the CDA sought to protect minors from harmful, sex-themed material on the Internet. Several interest groups, led by the American Civil Liberties Union, filed suit, challenging the constitutionality of the two provisions that criminalized (1) the knowing transmission of obscene and indecent material to minors under 18 years of age and (2) the knowing transmission of material that describes, in patently offensive terms, sexual or excretory activities or organs. A US District Court entered an injunction against enforcement of both provisions of the act, stating that they violated the First Amendment by reason of their vagueness and overbreadth. The government appealed to the Supreme Court of the United States.

The issue before the court was whether the two contested provisions of the CDA violated the freedom of speech guaranteed by the First and Fourteenth Amendments. The Court held that they did because they were imprecise, content-based, blanket restrictions on speech that had the potential of censoring content

that adults have a constitutional right to receive and impart (*Reno v. ACLU*, 1997). The Court, however, allowed the government to investigate and prosecute obscenity and child pornography on the Internet. The main outcome of this case was that the Supreme Court of the United States ruled, for the first time, that the regulatory regime of the Internet is identical to that of the print media. The Supreme Court of the United States essentially transferred First Amendment values from real space to cyberspace.

The Case of *United States v. Alkhabaz* (1997)

As explicit, sex-themed material proliferated on the Internet, early regulation was concerned first and foremost with the availability of pornography to children as well as the dissemination of explicit, sexual images that featured children (pedopornography). Before long, feminist legal scholars and activists began campaigning for the transfer of restrictions on violent, sex-themed visual imagery from real space to cyberspace. One of the most significant cases in this struggle was *United States v. Alkhabaz* (1997), a case that was decided the same year as *Reno v. ACLU*. In *United States v. Alkhabaz*, Jake Baker (also known as Abraham Jacob Alkhabaz) was an undergraduate student at the University of Michigan. In the early 1990s, he regularly contributed sadistic, hair-curling fictional "short stories" to alt.sex. stories, a thematic Usenet news group. Usenets were worldwide-distributed discussion forums identical to electronic bulletin boards, the earliest online social media forums. Usenets were open to interested members of the general public. Subscribers could post stories and comment on the postings of others if they wanted to. Baker's contributions generally appealed to fringe sexual tastes of the most misogynistic nature. His writings indicated a twisted, psychopathic mind that obtained sexual gratification and pleasure from the most sickening psychological abuse, physical torture, mutilation, and murder of women and young girls. His writings, which were written in the first person, expressed the most extreme form of hatred and sexual violence against women. In 1995, one of Baker's stories described the abuse, torture, rape, and murder of one of his classmates at the University of Michigan. An alarmed citizen who read the story on the bulletin board alerted the University of Michigan. A University investigator discovered a second violent story featuring the actual name and residential address of Baker's classmate. A search of Baker's email revealed blood-curdling correspondence with an individual named Arthur Gonda, who was supposedly from Canada and was conspiring with Baker to carry out a plan of "abduction, bondage, torture, humiliation, mutilation, rape, sodomy, murder, and necrophilia . . . of a female person" (*United States v. Alkhabaz*, 1997).

Baker was indicted together with Gonda, who was not before the court, in the US District Court for the Eastern District of Michigan. They were charged with five counts of violations of title 18, US Code, section 875(c), which states, "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both." Baker challenged the indictment and asked the court to quash it, claiming that his First Amendment rights were being violated. The District Court dismissed the indictment against Baker, reasoning that the email correspondence between Baker

and Gonda "did not constitute 'true threats' under the First Amendment and, as such, were protected speech" (*United States v. Alkhabaz*, 1997). On appeal, the issue before the Sixth Circuit Court of Appeals was whether email correspondence between two individuals about horrible crimes they merely fantasized about but never actually carried out could constitute true threats. The National Coalition Against Sexual Assault (NCASA), a national organization of rape crisis centers and individuals from across the United States, wrote a friend-of-the-court brief stating that "sexual threats are often precursors to sexual violence and that sexual violence can be actively inflicted and promoted through pornography . . . The materials charged are 'true threats' under existing legal standards and are unprotected by the First Amendment . . . Overwhelmingly, it is women, who, on the basis of their gender, are targets of sexual threats through pornography" (MacKinnon, 1995).

The Sixth Circuit Court did not find the protestations of MacKinnon and the NCASA to be persuasive. It concluded that Baker's fringe sexual fantasies posted on online bulletin boards did not violate section 875(c) of the US Code: "E-mails do not constitute 'true threats' and, as such, do not implicate First Amendment free speech protections. We conclude that the communications between Baker and Gonda do not constitute 'communication[s] containing a threat' under Section 875(c). Even if a reasonable person would take the communications between Baker and Gonda as serious expressions of an intention to inflict bodily harm, no reasonable person would perceive such communications as being conveyed to effect some change or achieve some goal through intimidation." MacKinnon and the NCASA's attempt to transfer their definition of pornography—which included written, as well as explicit, violent, sex-themed imagery—from real space, where it had been rejected by the courts on First Amendment grounds, to cyberspace failed.

Politics, Pornography, Women, and the Law: The Canadian Context

Canada is a constitutional monarchy. French and British kings and queens have reigned over Canada since 1497. Queen Elizabeth II of England is the current head of state of Canada. She has been the Canadian monarch since February 6, 1952, when she became queen of the United Kingdom. In 2012, Canada celebrated the queen's Diamond Jubilee, or the sixtieth anniversary of her majesty's accession to the throne as queen of Canada. Canada has a federal system of government composed of provinces and a Westminster (British)–style parliamentary democracy. The Canadian monarch and head of state, Queen Elizabeth II, lives permanently in the United Kingdom, but her resident representative in Canada, the governor general, carries out most of the royal governmental and ceremonial duties. A lieutenant governor represents the Crown (queen) in every province. The head of the Canadian government is the prime minister (officially, the "right honourable prime minister"), whose office is modeled after that of the British prime minister. He is officially the primary minister of the British crown. After general elections, the governor general selects the leader of the political party most likely to form a government. This is typically the party with the largest number of seats in the Canadian parliament, the House of Commons. This background is important because it explains the system of protection of freedom of expression that is in force in Canada. It also explains why the landmark cases analyzed in this

chapter are set in the form *R. v. x* (the defendant), as in *R. v. Butler*, discussed below. The letter *R* stands for *regina*, the Latin word for "queen." In short, Canada can be described as an interesting North American liberal democratic constitutional monarchy, albeit without a resident monarch, a hereditary aristocracy, or an established church.

Regulation of Freedom of Expression under the Canadian Charter of Rights and Freedoms

The Canadian Charter of Rights and Freedoms (1982) protects freedom of expression in Canada. The Canadian Charter is functionally equivalent to the American First Amendment. The Charter states in relevant part,

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
2. Everyone has the following fundamental freedoms:
   (*a*) freedom of conscience and religion;
   (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
   (*c*) freedom of peaceful assembly; and
   (*d*) freedom of association. (Constitution Act, 1982)

The "reasonable limits" or "limitations" clause allows the Canadian government to legally limit the rights guaranteed to Canadian citizens under section 2 of the Charter if the limits are prescribed by law and are justified in a free and democratic society. Though the Canadian Charter is functionally equivalent to the First Amendment, the reasonable limits clause differentiates the Charter from the First Amendment. The clause makes Canada a European-style "marketplace for ideas," to borrow the formulation of van Gerven (2005, p. 242). Indeed, the reasonable limits clause parallels Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), which states, in part,

- Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers . . .
- The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society.

The Canadian Charter's European inspiration is not in doubt. The government of Canada, like the 47 member countries of the Council of Europe, is allowed to take affirmative steps, under the proportionality system, to promote governmental and social interests by limiting certain kinds of speech that are considered prejudicial to social peace, harmony, and multiculturalism. Schauer (2005) describes the proportionality approach as a "flexible and open-ended approach" that contrasts with the American "rule-based categorization" approach (p. 31). In short, by stating what the government *may do* in matters of freedom of expression, the

"limitations" clause of the Canadian Charter grants Canadians "positive rights" as determined and orchestrated by their government.

This reasonable limits clause contrasts with the First Amendment, which grants citizens "negative rights" by limiting what Congress (federal, state, and local governments) may do. This makes the United States a "marketplace for ideas" (*United States v. Abrams*, 1919). This is accomplished by a recitation of what the government may not do. In short, the Canadian Charter limits certain types of speech and expression, while the First Amendment limits the government's ability to restrict speech and expression. The theory is that the government is the enemy of freedom, not citizens or even institutions like the church. This does not mean that free speech is absolute under the First Amendment. The reality is that under the First Amendment, free speech is canalized by time, place, and manner restrictions that are required to be content-neutral. In other words, the government may not regulate speech on the basis of its content unless it falls within a narrow band of illegal content: fighting words (statements that incite immediate retaliation and are said "in your face"); incitement to imminent violence; speech that promotes illegal goods and services; false, deceptive, and misleading advertisements; defamation; indecent speech used in over-the-air radio and television (the seven dirty words that describe sexual and toilet functions); and obscenity (material that describes sexual and toilet functions in a highly offensive manner, appeals to prurient tastes, and has no literary, artistic, scientific, political, or social value).

The limitations on freedom-of-expression rights set forth in the Canadian Charter of Rights and Freedoms have been used to promote multiculturalism and other governmental interests in Canada. This has resulted, in part, in what Levant (2009) calls an Orwellian system of "thought crime" control that is policed by Canadian Human Rights Commissions: "Human rights commissions now monitor political opinions, fine people for expressing politically incorrect viewpoints, censor websites, and even ban people, permanently, from saying certain things" (p. 3). Levant believes Canadian Human Rights Commissions are being used against freedom of speech. The "reasonable limits" clause has also been used to prevent a variety of objectionable conduct—notably, speech that targets people on the basis of their race, gender, nationality, national origin, sexual orientation, religion, and so on. This section discusses Canadian Supreme Court cases that struck a balance between freedom of expression and hate speech. We will end with *R. v. Butler*, the landmark case that addressed the issue of politics, sex-themed speech (obscenity), and women.

Regulation of Hate Speech in Canada: *R. v. Keegstra* (1990)

Canada's hate speech regulatory system is closer to the European rather than the American model. In *R v. Keegstra*, a landmark freedom-of-expression decision handed down by the Supreme Court of Canada in 1990, the court upheld the Criminal Code of Canada provision that criminalizes the willful promotion of hatred against an identifiable group on the basis of its race, gender, religion, ethnicity, sexual orientation, national origin, and so on. Keegstra was an Alberta public school teacher who was charged with "promoting hatred against an identifiable group by communicating anti-Semitic statements to his students." Keegstra was tried, convicted, and fined $5,000, and his professional teaching certificate was

suspended. On appeal, a court of appeals held that the hate speech provisions of the Criminal Code violated Keegstra's freedom of expression and that this violation was not justified under the Canadian Charter of Rights and Freedoms. The case was appealed to the Supreme Court of Canada. The issues before the court were whether sections 319(2) and 319(3)(a) of the Criminal Code of Canada violated sections 2(b) and 11(d) of the Charter of Rights and Freedoms and, if so, whether this violation was necessary in a free and democratic society. The Court found that the provisions of the Criminal Code violated the Charter but stressed that the violation of Keegstra's freedom of expression was justified under the limiting clause of the Charter. The court ruled that suppression of hate propaganda represented a limitation of the individual's freedom of expression that was constitutional under the limiting clause of the Charter. This case demonstrates how the Canadian Supreme Court uses the "reasonable limits" clause of the Charter of Rights and Freedoms to further multiculturalism, civility, and equality in the country.

Bias-Motivated Historical Revisionism: *R. v. Zundel* (1992)

This was also a landmark freedom-of-expression case brought about by bias-motivated expressions—namely, denial of the magnitude of the Holocaust. Zundel published a pamphlet titled "Did Six Million Really Die?" The main thesis of the pamphlet, considered to be part of so-called revisionist history, is that it has not been scientifically established that six million Jews were killed before and during World War II and that the Holocaust was a myth perpetrated by a worldwide Jewish conspiracy. Zundel was charged with spreading false news in violation of section 181 of the Criminal Code, which provides that "every one who wilfully [*sic*] publishes a statement, tale or news that he knows is false and causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment." He was convicted after a lengthy trial. On appeal, his conviction was upheld on constitutional grounds but struck down for errors in admitting evidence and in the charge to the jury. Zundel was retried and convicted again, and he ultimately appealed to the Supreme Court of Canada. The issue before the court was whether section 181 of the Criminal Code violated the guarantee of freedom of expression set forth in section 2(b) of the Canadian Charter of Rights and Freedoms and, if so, whether section 181 of the Canadian Criminal Code is justifiable under the Charter of Rights and Freedoms. The Canadian Supreme Court ruled that section 181 of the Criminal Code, which prohibited publication of false information or news, was unconstitutional and struck it down. The court said that the protection provided by the Charter included expression of minority beliefs, even where the majority may find it false. Therefore, banning speech that was not accompanied by violence was not justified in a free and democratic society. It is interesting that the Canadian Supreme Court refused to be drawn into a dispute over historical facts. The court rightly abstained from being the judge of historical facts that professional historians are still sifting through and debating by refusing to put its imprimatur on an "official" version of a historical phenomenon whose parameters are not carved in stone and whose sheer magnitude is still unfolding.

Explicit, Sex-Themed Visual Imagery in Canada: The Fraser Commission

Soon after Canada's Charter of Rights and Freedoms came into force in 1982, the country was faced with the problem of pornography, most of which was imported from the United States. In 1983, the government of Canada established the Special Committee on Pornography and Prostitution (the Fraser Committee) to study the problems of pornography and prostitution in the country and to come up with recommendations for their resolution. With respect to pornography, the terms of reference of the committee were "to consider the problems of access to pornography, its effects and what is considered to be pornographic in Canada" (Special Committee on Pornography and Prostitution, 1985). The committee took the opportunity to re-present, or present anew, to Canadians the problem of explicit, sex-themed visual imagery in Canada. The committee held public hearings across Canada and listened to experts in pornography and prostitution from the United States and the United Kingdom. Before presenting its report, the Special Committee on Pornography and Prostitution (1985) re-presented its fundamental philosophical posture with respect to pornography as

> the freedom of individuals to develop their own view of life, without direction from the state or from the majority . . . the necessary corollary of this view of society is that the state is justified in intervening only to punish or control human conduct when it does harm to other people . . . Apart from children and adults incapable of conducting their own affairs, what people do to themselves or in concert with others, which had no injurious impact on third parties, is the individual's own business, even if it involves the self infliction of either physical or moral harm. With respect to pornography, it would be argued that the law has no acceptable role in preventing the production, distribution, sale or possession of pornographic material, unless some recognized harm can be attributed to it. (pp. 15–16)

The committee prominently featured the MacKinnon-Dworkin definition of pornography as any material that depicted sexual violence against women, as well as the exploitation, degradation, and subordination or debasement of women (p. 55), and recommended that the term "pornography" be redefined to make it consistent with the position advanced by the two feminist activist scholars: that sexually violent material amounted to discrimination and hatred against women. As such, the committee was said to have been informed by, and to have taken, a liberal feminist approach (Kanter, 1985). The committee concluded that pornography was an assault on human rights, not on sexual morality. As such, it should be viewed as an offence to "equality, dignity, and physical integrity" (p. 27). The committee was a watershed moment in Canada's regulation of sex-themed visual imagery. It represented a parting of ways with American law, which is grounded on criminalization of obscenity from the perspective of sexual immorality rather than from the perspective of civil or human rights.

The Canadian Supreme Court and Obscenity: *R. v. Butler* (1992)

We have seen that Catharine MacKinnon and Andrea Dworkin were at the forefront of the antipornography campaigns of the 1980s. Their influence in the

United States peaked in 1984, when the City Council of Indianapolis enacted an ordinance that described pornography as discrimination against women. We saw previously that courts in the United States invalidated the Indianapolis law on the grounds that its definition of pornography was unconstitutional and that it constituted an unconstitutional, content-based regulation that also happened to promote viewpoint discrimination. MacKinnon (1993) notes that politicians and the courts in the United States had rejected the antipornography ideas she advanced under the rubric of "equality and speech" but that these ideas had diffused to Canada, where they were embraced (p. 97). Interestingly, MacKinnon worked with the Women's Legal Education and Action Fund (LEAF), a group created to ensure respect for women's rights under the Charter of Rights and Freedoms. LEAF intervened in the *Keegstra* case discussed previously and in *R. v. Butler*, the landmark case that interpreted Canada's obscenity law.

Regulation of Obscenity under Canadian Law

Interestingly, despite MacKinnon's preoccupation with pornography and her expression of satisfaction that the Canadian Committee on Pornography had accepted her view of pornography as discrimination against women, the Canadian Criminal Code does not mention the word "pornography" with respect to explicit, adult, sex-themed imagery. The word appears only in the context of child pornography. Canadian law criminalizes "obscene" material under section 163 of the Criminal Code. The relevant section defines obscenity as follows: "Any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene" (Canadian Criminal Code, § 163[8]). It is interesting that mailing obscene matter is an offense, as is giving "immoral, indecent or obscene" theatrical performances. The law has a provision for the seizure and forfeiture of obscene materials, which Canada Customs has used to seize a wide array of material, ranging from crime comics and Japanese manga to child pornography. Casavant and Robertson (2007) state that "it should be noted that crime, horror, cruelty and violence by themselves are not obscene; it is only when they are portrayed in conjunction with sex that obscenity exists for legal purposes."

Pornography as Discrimination against Women: *R. v. Butler* (1992)

R. v. Butler is the landmark case in which the Canadian Supreme Court interpreted the obscenity provisions of the Canadian Criminal Code and enshrined the MacKinnon-Dworkin "pornography as harmful sex discrimination against women principle" in Canadian law (MacKinnon, 1993). Donald Butler owned a pornography shop that sold and rented "hardcore" videotapes and magazines, as well as sexual paraphernalia in Winnipeg, Manitoba. He was charged with selling obscene material, possessing obscene material for the purpose of distribution or sale, and exposing obscene material to public view, contrary to section 163 of the Canadian Criminal Code. The trial judge concluded that the obscene material was protected by the guarantee of freedom of expression in section 2(b) of the Canadian Charter of Rights and Freedoms and that only those materials that contained scenes involving violence or cruelty intermingled with sexual activity, that

depicted lack of consent to sexual contact, or that could be said to dehumanize men or women in a sexual context were legitimately banned under the Canadian Charter of Rights and Freedoms. Butler was convicted on some counts and acquitted on others. The Crown (government) appealed the acquittals.

The Court of Appeals convicted Butler on all the counts. The majority concluded that the materials in question were not protected by the Charter of Rights and Freedoms, since they involved the undue exploitation of sex and the degradation of human sexuality. The court held that section 163 of the Criminal Code infringed on section 2(b) of the Charter but that infringement could be justified in a free, democratic society. Butler appealed to the Canadian Supreme Court, which ruled that "material that exploits sex in a 'degrading or dehumanizing' manner fails the community standards test, not because it offends against morals but because it is perceived by public opinion to be harmful to society, particularly women" (*R. v. Butler*, 1992). The court concluded that the law was rational and proportionate to the objective of protecting society, particularly women, from the harm of obscenity. The court found the law to be proportional because it minimally impaired freedom of expression: "There is a sufficiently rational link between the criminal sanction, which demonstrates our community's disapproval of the dissemination of materials which potentially victimize women and restricts the negative influence which such materials have on changes in attitudes and behaviour, and the objective. While a direct link between obscenity and harm to society may be difficult to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs" (*R. v. Butler*, 1992). The Canadian Supreme Court essentially accepted Catharine MacKinnon's ideas on equality, speech, hate propaganda, pornography, and discrimination against women. The court quoted extensively from a brief she coauthored in her work with LEAF. Interestingly, the court confined itself to the narrower, more precise definition of criminalized sex-themed images—obscenity—than that of the Indianapolis ordinance she authored. Canada is still the only country that defines obscenity as material that harms women by degrading them.

Conclusion

While the United States and Canada are liberal democratic countries that guarantee their citizens freedom of speech and of the press, their philosophical postures and methodological approaches to freedom of expression are different. While the First Amendment and the Charter of Rights and Freedoms are functionally equivalent, the First Amendment limits the actions of government with respect to the content of speech, while the Canadian Charter gives the government the power to set in place reasonable limits on speech if the limits can be "justified in a free and democratic society." While the United States has a libertarian, content-neutral First Amendment free speech regime in which the rights of the speaker almost always trump the feelings of the listener, Canada has a proportionality system that is similar to that of the European Court of Human Rights. This system ensures that the feelings of the listener are sometimes important enough to justify interference with the freedom of expression of the speaker enshrined in the Charter. This European-style proportionality methodology, which Schauer (2005) describes as an "open-ended discretionary" approach (p. 55), is grounded

in a moral philosophical posture that values human dignity and civility above the human right of freedom of expression. As Levant (2009) points out, this system can be used and abused to punish Orwellian "thought crimes" (p. 3).

Additionally, the approaches of both countries toward the regulation of explicit, sex-themed visual imagery are different. In the area of regulation of obscenity and pornography, the United States has advanced the *Miller* test, which instructs courts that juries trying obscenity cases are required to use local community standards to determine what types of sex-themed speech are to be deemed protected obscenity and what types are to be deemed unprotected obscenity. In Canada, the Criminal Code provides a workable definition of obscenity that criminalizes material that amalgamates sex and violence. The relevant provision of the Criminal Code has been interpreted as criminalizing sex-themed visual depictions that intermingle sex and violence, thereby degrading women. *American Booksellers v. Hudnut* and *R. v. Butler* demonstrate that though the United States and Canada are neighbors, on matters of freedom of expression and sex-themed speech, they are worlds apart.

16

Regulation of Online Pedopornography (Child Pornography) in the United States and France

Digital pedopornography—images of children engaging in explicit, sexual activities with adults or with other children—is one of the most nefarious categories of imagery on the Internet. We saw in Chapter 5 that a global consensus has emerged to criminalize this kind of legally, morally, and ethically questionable depiction of child sexual abuse that is as old as the Internet itself. In 1992, the US Congress enacted the Scientific and Advanced Technology Act, which opened up government-controlled networks and infrastructures in order to "spur competition in network services" (Scientific and Advanced Technology Act, 1992). This was the beginning of the online information and communication technology revolution that profoundly changed the world in fewer than 25 years. One of the first industries to make its presence felt and colonize the vast, virtual reaches of cyberspace was that of sexual capitalism, whose stock-in-trade was sex-themed visual imagery (pornography) that catered to all tastes. The "products" of sexual capitalism included pedopornography, material that was illegal in real space but had been digitized and transferred to cyberspace, which was essentially a lawless domain at that time. In effect, the fledgling network of computer networks—the Internet—became the perfect platform for pedophiles to dissimulate, store, and disseminate images of child pornography for pleasure and profit.

As early as 1993, the US Federal Bureau of Investigation (FBI) discovered that individuals were using computer equipment, early online bulletin boards, and telecommunications infrastructure to openly publicize and exchange pedopornography. The FBI (2007) reported that some sex offenders used these novel online technologies to share "pornographic images of minors, and identified and recruited children into sexually illicit relationships." This led to the creation, in 1995, of the Innocent Images National Initiative to address illegal activities in commercial and private online services and on the Internet. The FBI soon discovered that due to the networked nature of the Internet, pedopornography was a global problem. The matter was compounded by the fact that different countries conceptualized and regulated pedopornography differently. Countries like Japan and

Russia tolerated child pornography, while the United States and France outlawed it. The Innocent Images program was thus internationalized with the creation of the Innocent Images International Task Force. In 2012, the FBI's Crimes against Children Program and the Innocent Images National Initiative were merged to form the Violent Crimes against Children Program. For its part, the Innocent Images International Task Force was soon renamed the Violent Crimes against Children International Task Force (VCACITF) and became a forum for online child sexual exploitation investigators from more than forty countries around the world. These national and international task forces created to eradicate pedopornography demonstrate the importance of the problem at the national and international levels. In Chapter 5, we saw that the international community literally dragged Japan into the international consensus on the need to eradicate child pornography around the world.

While global sexual capitalism has succeeded in mainstreaming pornography and erotica as expressive artistic productions under the First Amendment and equivalent constitutional instruments in Canada, Europe, and France, pedopornography is excluded from constitutional protection under national, regional, and international law because its production necessarily involves the sexual exploitation of children. Since this type of material is criminalized, child pornographers resort to all kinds of technological means to produce, dissimulate, disseminate, and disguise it. Innovations in computer graphics, artificial intelligence, video animation, and encryption, coupled with rapidly evolving and converging information and communication technologies, have facilitated the creation of pedopornography, or child pornography—material depicting persons under the age of 18 engaging in real or simulated, explicit sexual activity. The Internet has become a major platform for the dissimulation, storage, and dissemination of this material at the global level. While the primordial rationale for child protection in the United States and France has been the physical and psychological well-being of children, the regulatory means used to achieve this goal are different in both countries. France classifies and regulates online child pornography within a moral philosophical, humanitarian perspective, while in the United States, online child pornography and computer-generated child pornography are regulated within the framework of the country's exceptional First Amendment free speech jurisprudence.

Aim of the Chapter

The aim of this chapter is to analyze how the legal regimes of the United States and France conceptualize and approach the problem of child pornography. The chapter's focus is on how each regime strikes a balance between freedom of expression and the protection of children, using as a comparative case study their respective postures toward child pornography in general and computer-generated child pornography in particular. The units of comparison are each country's adherence to the UN Convention on the Rights of the Child and their respective domestic child pornography laws. The chapter will therefore compare and contrast the differential regulation of online child pornography under American and French law. The main thesis of the chapter is that as information and communication technologies evolved and became the loci of creation, transmission, and storage of child pornography—thereby making it a global problem—legislators in France and

the United States responded to the new challenges by re-presenting them to their different constituencies within the framework of their different politico-cultural regimes. In the United States, the problem was approached within a "free speech" framework, while in France, it was presented in stark, moral, and human rights terms.

The first section of this chapter will survey the ideological underpinnings of child pornography regulation in France, while the second section will discuss the theoretical rationale for the regulation of child pornography in the United States. The third section will discuss the postures of both countries with regard to the UN Convention on the Rights of the Child. The fourth section will compare and contrast the child pornography regulations of the United States with those of France. I will show that in spite of the similarity of the positions of France and the United States toward child protection and child pornography, both countries have taken contrasting positions with respect to the ratification of international child-protection instruments and initiatives for ideological reasons.

Technological Evolution and "Re-presentation" of the Problem of Child Pornography under French and American Law

In order to maintain legal and cultural continuity from one generation to the other and to bring the law of communication abreast of technological developments, nation-states re-present, or present anew, the status quo, show why it is untenable, and advance rationales for change. Ultimately, change is advanced through mechanisms like commissions of inquiry, investigations, findings of fact, recommendations, restatements of the law, and the like. Legrand (2003) used the concept of "re-presentation": the act of presenting texts and facts anew as a result of changes in politico-social circumstances. He asserts that because of the need for re-presentation, "law is performance [whether voluntary or involuntary]—not a 'being,' but a 'doing'" (p. 244). The showmanship of the law is reflected in the natural tendency of lawyers to demonstrate, to perform, its penchant for presentation and re-presentation of legal principles, precedents, and doctrines. Early child-protection measures at the international and domestic levels were aimed at granting children social protection, improving the lot of those who were underprivileged, and taking care of children in emergencies. In the wake of the atrocities of World War II, the United Nations reframed and re-presented the problem of child protection as a human rights issue. With the proliferation of child pornography on film and video in the 1970s and 1980s, the problem was re-presented as a matter of child sexual exploitation. The advent of the Internet and the development of digital technologies that have facilitated the production, storage, and transmission of child pornography led to another re-presentation of the problem in France and in the United States within the context of each country's legal regime.

French Regulation of Online Child Pornography: Historical Background

The French child-protection regime has three basic components: (1) a culture-specific, universalistic, human rights ideology grounded in the Declaration of the Rights of Man and of the Citizen of 1789, (2) regulations that are applicable in

France by reason of the country's membership in the system of the Council of Europe and the European Union (EU), and (3) the country's adherence to the international human rights system that is characterized by UN child-protection conventions, protocols, declarations, and plans of action. Taken together, these regulatory strands form a formidable French regulatory arsenal against child sexual exploitation and abuse.

French regulation of pedopornography in general and online child pornography in particular is radically different from regulation of the same phenomenon in the United States. Child pornography regulation in France is based on an idealistic, moral philosophical, human rights ideology. Modern French public policy on child protection and children's rights is traceable to the French Revolution of 1789 and to the country's strong Roman Catholic cultural heritage. The French politico-legal regime has a strong social, moral philosophical, and human rights orientation. The law stresses the primacy of, and respect for, the human being from the onset of his or her life. The human body is considered to be inviolable, and any harm to human dignity is intolerable. Since the Revolution of 1789 was political, moralistic, and humanistic, it reached down to the level of the family and made child protection an important state interest. These protections were continued or extended by the regimes that succeeded each other in postrevolutionary France through a series of paternity laws designed to protect all children, including those born out of wedlock. In 1889, a law aimed at protecting "unfortunate and unloved children" from abusive fathers covered all children whose physical and mental health and well-being were threatened. Additionally, the law of April 19, 1898, criminalized the abandonment of children.

As a result of the devastating effects of World War II on French children, postwar France re-presented the problem of child protection in nationalistic terms: French children were a limited, precious resource whose welfare was a substantial governmental interest. Habitual acts of violence against children were prohibited. Under the French Code Civil (a body of law that regulates all aspects of the life of the citizen), parents whose behavior or activities endangered the security, health, or morality of a child lost parental authority over, and custody of, that child (Stark, Roland, and Boyer, 2000). After its liberation from the claws of Nazi Germany, France's concern for the welfare of its children led to the creation of a separate judicial branch for minors in 1945. Child protection was given constitutional recognition in the preamble of its 1946 Constitution. Under a 1949 law, it became illegal to "offer, give or sell to minors under 18 years of age, publications of any kind that present a danger to the youth by reason of their licentious and pornographic character, or that feature crime, violence, racial discrimination or hatred, incitement to use, possess or traffic in drugs . . . or to display these publications or advertise them" (Law of 1949 on Publications Directed at Youth).

Under this law, French ministers of justice were given the authority to ban recorded pornographic material that they thought presented a danger to young people. Additionally, the importation, for sale or free distribution, of foreign publications aimed at young people had to be authorized beforehand by the minister of information on the recommendation of a commission in charge of monitoring and checking publications aimed at children or adolescents.

Under the humanistic, moral philosophical ideology on which French law is grounded, pedopornography is classified as material that is prejudicial to human dignity. It is not considered to be a form of speech or expression. This explains

the country's embrace of all international, multilateral human rights treaties and declarations adopted under the post–World War II UN human rights regime and under the European human rights regime.

The Internet and Re-presentation of the Problem of Child Sexual Exploitation and Pedopornography in France

As we have seen, France has one of the most stringent child-protection-law regimes in the world. The advent of the Internet and the migration of child pornography to that communication platform led to a re-presentation of the problem of child protection and child sexual exploitation in France. In 1997, Minister of Justice Jacques Toubon declared that the eradication of pornography featuring children was a "great national cause." In 1998, the French Parliament passed new criminal laws bringing all sex crimes, including child pornography in the traditional media and on the Internet and computer-generated child pornography, within the purview of the child-protection provisions of the French Penal Code. In his exposé of the justifications for, and intent of, the new law, the minister of justice said that it was aimed at taking into consideration the use of new media, especially the Internet, in child sexual exploitation and human rights violations. The minister said that the law was intended, in part, to prevent and suppress sexual crimes, crimes against human dignity, and crimes that endangered children. In 2013, French Penal Code provisions on child pornography were amended to strengthen the law and bring it in line with European Union directives on the protection of minors. French law against pedopornography states, in part, that "fixing, recording or transmitting the image or likeness of a minor, with a view to distributing it, is punishable by five years imprisonment and a fine of 75,000 Euros [about $90,000], if the image is pornographic in nature . . . If the image or representation is of a minor who is less than 15 years old, the penalties apply even if the material is not distributed . . . The penalty increases to seven years imprisonment and 100,000 Euros [about $120,000] if the image or likeness of the minor is transmitted to an undifferentiated audience through a telecommunications network [the Internet]" (French Penal Code, 2013, arts. 227–23). The 2013 EU-inspired amendments essentially increased the penalties for pedopornography in France.

Finally, article 32 of Law No. 98-468 of 17 June 1998, Concerning the Prevention and Suppression of Sexual Crimes as well as the Protection of Minors (arts. 321–1, French Penal Code), criminalizes possession of child pornography. The law addresses the moral or psychological component of the crime as distinct from its legal or material component. Thus persons found in possession of child pornography are charged with two crimes—namely, possession of the fruits of the corruption of minors (a crime against morality) and possession of the fixation, recording, or transmission of the pornographic image of a minor (a delict). Possession of pedopornography carries a penalty of ten years imprisonment and a fine of close to $400, 000.

Furthermore, France has sponsored and acceded to all international treaties on child protection and child pornography, since these treaties are generally consistent with the country's universalistic human rights values. Under French constitutional law, treaties and agreements relating to international organizations or the status of persons take effect in France only after they have been ratified or approved by an

act of Parliament and promulgated into law by the president. Additionally, treaties and agreements that have been ratified and incorporated into French law and published in the Official Journal of the Republic have higher authority than acts of Parliament. France was an early signatory of the UN Convention on the Rights of the Child and its Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography. Transposition of this treaty into French followed soon thereafter. Parliament also passed laws authorizing ratification and publication of the optional protocol. These two pieces of international law are consequently part and parcel of French law. This demonstrates France's commitment to the international fight against child pornography and pedophilia at the national and international levels.

Transposition of Council of Europe and EU Child Pornography Legislation into French Law

As a founding member of the Council of Europe and the EU, France is part of the European human rights regime. As such, conventions of the Council of Europe and legislation of the European Community are binding on France. The country has been on the receiving end of extensive legal transfers from Europe on matters of child protection. The 1998 Law on the Prevention and Suppression of Sexual Crimes as well as the Protection of Minors amended French child pornography and sexual exploitation statutes and brought them in line with the more stringent provisions of EU legislation that was aimed at combating pedophilia and eradicating pedopornography on the Internet. The amended French child sexual exploitation law is also said to meet or exceed the requirements of the Council of Europe's Framework on Combating the Sexual Exploitation of Children and Child Pornography. French laws have been declared to be in conformity with EU child-protection standards enacted as part of the multilateral Audiovisual Media Services Directive (AVMSD). The child-protection provisions of this directive ban, among other things, television programs that could harm the physical, mental, or moral development of minors. These provisions were subsequently extended to include pornographic material available on the Internet. We saw previously that France amended its penal code in 2013 to further strengthen its laws against pedopornography. The aim of this amendment was to further align French laws with EU directives on the protection of minors.

Statutory and Case Law on Child Pornography in the United States

The American child-protection regime is very different from the French regime in terms of its scope, precision of legal definitions, and exactitude of language. In the United States, child pornography is defined as

> any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or
(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct. (Definitions, 18 USC 2256, 2003)

The legal definition of "sexually explicit conduct" does not require that an image depict a child engaging in sexual activity. A picture of a naked child may constitute illegal child pornography if it is sufficiently sexually suggestive. It is a crime to possess, receive, distribute, or produce child pornography across state lines and international borders (in interstate or foreign commerce). The United States has a two-pronged approach to the regulation of child pornography in general and online child pornography in particular. At the federal and state levels, the country has the largest and most comprehensive legislative arsenal against child pornography in the world. Inasmuch as the mass media are the major platforms for the production, dissemination, and storage of child pornography, regulation of that material falls within the ambit of the First Amendment.

In matters of pedopornography, the health and welfare of children is a substantial government interest.

At the international level, the United States has been reluctant to accede to several international human rights treaties. This includes the UN Convention on the Rights of the Child. Though the United States signed and ratified the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography in 2002, the United States has not acceded to the convention proper, because the US Senate has refused to consent to its ratification. Indeed, while the Senate voted to support the optional protocols, it made its consent subject to a number of "understandings and conditions." The most important condition was that "the United States assumes no obligations under the Convention on the Rights of the Child by becoming a party to the Protocol." Nevertheless, despite ratification of the optional protocols, questions of enforceability remain, since human rights treaties are considered to be non-self-executing under American law. The reason for this American reluctance is that, as Schauer (2005) put it, the United States is an "exceptionalist" country that is an "outlier" in international affairs (p. 31).

Re-presenting the Problem of Child Pornography in Federal Law

A survey of the history of child pornography regulation in the United States shows a concerted effort by Congress and the courts to curb the activity, using a number of justificatory criteria. It is clear that as technological developments have facilitated the production, storage, and dissemination of child pornography, federal authorities have re-presented the problem from time to time to keep the law abreast of technological developments. As early as 1944, the Supreme Court of the United States held that the government had a compelling interest in protecting the

physical and psychological well-being of minors (*Prince v. Massachusetts*, 1944). In the 1970s and 1980s, as a result of a marked increase in the use and portrayal of children in pornographic videos, films, and magazines, Congress and virtually all states enacted a steady stream of statutes that sought to combat the alarming increase in child pornography. In 1977, Congress passed the Protection of Children against Sexual Exploitation Act, which prohibited, for the first time, the use of minors in the production of pornography as well as the production and distribution of material advertising child pornography.

In 1984, Congress amended the Protection of Children against Sexual Exploitation Act of 1977 and criminalized interstate or foreign transport of minors for the purpose of engaging in any sexually explicit conduct or for the purpose of producing any visual depictions of such conduct. Anyone who knowingly made prints or published any notice or advertisement for child pornography was subject to criminal and civil penalties. The law also made it illegal to employ, use, persuade, induce, entice, or coerce any minor to engage in, or to assist any other person to engage in, sexually explicit activity. Finally, anyone who participated in any sexually explicit conduct involving a minor for purposes of producing a visual depiction of such conduct was liable for criminal penalties. The material did not have to be obscene under the *Miller* test, the framework under which obscenity—defined as pornographic material that, taken as a whole and judged under contemporary, local community standards, is found to have no scientific, literary, artistic, or political merit—is illegal and can be prohibited in the United States (*Miller v. California*, 1973). The Child Protection Act of 1984 essentially widened the scope of proscribed material by classifying all explicitly sexual material involving persons under the age of 18 as child pornography.

In order to justify new regulations, Congress presented a number of Congressional findings of fact that essentially re-presented the gravity of the problem to the American people. In the Child Protection Act of 1984, Congress made findings of fact that stated, *inter alia*,

> (1) child pornography has developed into a highly organized, multi-million dollar industry that operates on a nationwide scale;
> (2) thousands of children including large numbers of runaway and homeless youth are exploited in the production and distribution of pornographic materials; and
> (3) the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the individual child and to society.

These findings of fact re-presented the amplitude of the problem and led to the passage of the act.

Two years later, Congress re-presented child pornography as a vice controlled by criminal syndicates and enacted the Child Sexual Abuse and Pornography Act of 1986. This act strengthened provisions against advertisements for child pornography and included provisions for civil remedies in cases where minor victims suffered personal injuries due to pedopornography. In the Child Abuse Victims' Rights Act of 1986, Congress found, in part, that "child exploitation has become a multi-million dollar industry, infiltrated and operated by elements of organized

crime, and by a nationwide network of individuals openly advertising their desire to exploit children."

With the invention of personal computers in the early 1980s, child pornography migrated to the new medium. Congress moved to apply child pornography laws to the digital age with the passage of the Child Protection and Obscenity Enforcement Act. With this act, Congress brought personal computers within its regulatory ambit. The act prohibited the use of computers to transmit advertisements for child pornography. It also prohibited visual depictions of children in advertisements for child pornography. The act further criminalized the acquisition of children for purposes of producing child pornography. The rationale for federal and state prohibitions against child sexual exploitation and pornography was generally the psychological and physical health of children. American child-protection law does not have the heavily moralistic, human rights overtones of French law.

Child Pornography in American Case Law

American courts, both state and federal, have historically protected children from being exposed to pornography and from being used in its manufacture. As early as 1968, the Supreme Court of the United States let stand the conviction of Samuel Ginsburg, who was found guilty of violating a New York state statute that criminalized selling pornography to minors (*Ginsburg v. New York*, 1968). In *New York v. Ferber* (1982), the Supreme Court of the United States handed down a landmark decision that still serves as precedent in child pornography cases. Ferber, the proprietor of a Manhattan bookstore specializing in pornography and sexual products, was charged with violating a New York state statute that prohibited knowingly promoting sexual performances by children under the age of 16 through distributing material depicting the criminalized performance.

The issue before the court was whether the New York state statute violated the First Amendment of Constitution of the United States. The Court held that it did not. The majority stated that under the First Amendment, states could regulate pornographic depictions of children because the use of children as subjects in pornographic material has adverse psychological, emotional, and mental health implications for the children. The Court further held that even though child pornography may not be legally obscene under the definition set forth in *Miller v. California*, it is *not* protected by the First Amendment. The Court's decision in *New York v. Ferber* had the twofold aim of (1) protecting the physical and psychological well-being of minors by eliminating the record of child sexual abuse and (2) suppressing the market for the exploitative use of children by penalizing those who possess and view the offending materials. Furthermore, the court said that the standard of *Miller v. California*, which is used to determine what is legally obscene, was not a satisfactory standard for the problem of child pornography.

The Supreme Court of the United States revisited the child pornography issue in 1990 and reiterated the rationale for singling out content depicting minors in sexually explicit situations for punishment, even though the content did not rise to the level of the obscenity standard set forth in *Miller v. California*. In *Osborne v. Ohio* (1990), Clyde Osborne was convicted under an Ohio statute that made it illegal to possess child pornography. An Ohio appellate court and the Supreme

Court of Ohio affirmed. On appeal, the Supreme Court of the United States held that the state of Ohio may constitutionally proscribe the possession and viewing of child pornography because the use of children as subjects of pornographic performances is harmful to their physiological, emotional, and mental health. The state may criminalize child pornography without violating the First Amendment because it has a compelling interest in protecting the physical and psychological well-beings of minors.

Journalism and Online Child Pornography: *United States v. Matthews* (2000)

Lawrence Matthews, an award-winning journalist was convicted of sending and receiving child pornography over the Internet. Matthews admitted that he trafficked in child pornography but maintained that he did so only to research a news story on child pornography on the Internet. After the FBI monitored Matthews's computer and found that he was actively involved in trafficking child pornography, Matthews was charged, tried, and convicted of violating the Protection of Children against Sexual Exploitation Act. This act criminalized "any visual depiction of a minor engaging in sexually explicit conduct" or the knowing receipt of such a depiction that has been "transported in interstate commerce by any means including by computer." A federal district court in Maryland refused to allow Matthews to present a First Amendment defense to a jury, stating the First Amendment could not be used as a defense in child pornography cases. Matthews appealed to the US Court of Appeals for the Fourth Circuit. The issue before the court was whether the First Amendment permitted a bona fide reporter (Matthews) to trade in child pornography in order to "create a work of journalism." The court answered in the negative. It ruled that Matthews had failed to establish, by a preponderance of the evidence, that his motivation for trafficking in child pornography was solely to obtain information for an article. The court ruled that the First Amendment is not a defense in child pornography cases: "The law does not permit a defendant to present a defense unless the law recognizes that defense." The court said that there was no exception in the Protection of Children from Sexual Exploitation Act for the transmission or receipt of child pornography with artistic, scientific, literary, journalistic, or any other "legitimate" value. Matthews's conviction was affirmed accordingly. This case shows that journalists are not above the law. It also shows that the First Amendment is neither absolute nor a license for journalists or other media personnel to indulge in illegal activities that ordinary citizens may not indulge in.

Re-presentation of the Problem of Online Child Sexual Exploitation in France and the United States

Despite their respective statutory enactments, revolutionary developments in information and communication technologies allowed pedopornographers to stay one step ahead of French and American law. Legislative authorities in both countries took steps to address these new realities. This section compares and contrasts French and American regulation of child sexual exploitation through digital and online representations.

Regulation of Computer-Generated Child Pornography under French Law

The French law on child pornography of 1998, discussed previously, was part of a larger government bill aimed at preventing sex crimes. These sweeping reforms of the Penal and Public Health Codes were aimed at bringing the law up to date with new technologies and complying with France's international commitments. These included articles 34–36 of the UN Conventional on the Rights of the Child and their stipulations against child pornography. Law No. 98-468 of 17 June 1998 modified a fifty-year-old law that banned selling pornographic publications capable of violating the human dignity to minors. The amendment lengthened the list of banned materials to include "video tapes, electronic video discs, and computer programs, video games . . . documents fixed on magnetic and digital optical media and semiconductors that violate the dignity of children." The French initiative seems to be an attempt to close the loophole in international child pornography law enforcement that was created by the US Supreme Court when it held that federal statutes banning child pornography featuring persons who "appear to be minors engaging in sexually explicit conduct," as well as computer-generated child pornography that does not feature real children, were unconstitutional (*Ashcroft v. ACLU*, 2004). In effect, in December 2003, the Council of Europe created a regulatory framework for child pornography that, in contradistinction to the decision of the Supreme Court of the United States, called on European countries to punish depictions of "a real person *appearing* to be a child involved or engaged in" child pornography unless that person is 18 years of age or older. Furthermore, the Council called on all its member states to criminalize virtual or computer-generated child pornography, including "realistic images of a *non-existent child* involved or engaged in sexually explicit conduct." In 2013, France amended its pedopornography laws to criminalize "pornographic images of a person whose physical features are those of a minor, unless it is established that this person was at least 18 years of age on the day of the fixation or recording of his or her image [in a pornographic production]" (French Penal Code, 2013, arts. 227–23).

Regulation of Computer-Generated and Online Child Pornography under American Law

With the transformation of the Internet from an instrument of military communication and information technology research to a general-purpose educational, cultural, social, and commercial platform, it soon became a magnet for commercial pornography. It was also the theater of a legal tug-of-war between Congress, organized interests groups, and the courts over online pornography. This struggle intensified as sexual material of all tastes, or lack thereof, including child pornography, became available on the Internet. Indeed, the relentless march of information and communication technologies and the new products they continued to spur enabled child sexual exploitation to stay one step ahead of the law. The new battlefield for child protection soon became computer-generated, or virtual, child pornography. This is a category of images that are produced or modified through computer imaging technology, digital graphics, artificial intelligence, and video animation. Virtual child pornography may or may not use actual children. The major problem is that it has become virtually impossible to determine whether

or not real children or photographic models of real children are the basis of computer-generated child pornography.

The accessibility of online pornography to children, as well as media reports of child predators and child molesters who met their unwitting prey on the Internet, gave Congress justification to pass the Communications Decency Act (CDA) of 1996 as part of the Telecommunications Act of 1996. Before passage of the act, Congress once again re-presented the problem in the form of 13 findings of fact set forth in the Child Pornography Prevention Act (CPPA) of 1996. The Congressional Findings of Fact stated, in part, that

> (1) The use of children in the production of sexually explicit material, including photographs, films, videos, computer images and other visual depictions, is a form of sexual abuse which can result in physical or psychological harm, or both, to the children involved; . . .
> (5) new photographic and computer imaging technologies make it possible to produce by electronic, mechanical, or other means, visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct;
> (6) computers and computer imaging technology can be used to—
> (A) alter sexually explicit photographs, films and videos in such a way as to make it virtually impossible for unsuspecting viewers to identify individuals, or to determine if the offending material was produced using children. (CPPA, 1996)

These findings of fact show that in 1996, Congress re-presented the problem of child pornography in terms of the misuse of computers in the production, dissemination, storage, and dissimulation of child pornography. The combination of realistic, high-quality graphics and artificial intelligence had resulted in the increasing use of computers to morph or modify images of children and to generate "virtual" children that were virtually indistinguishable from real children (Stewart, 1997).

The CPPA of 1996 was part of the CDA, which framed the Internet as a dangerous space for children. The CPPA extended the federal prohibition against child pornography to images of individuals that appeared to be minors. The CPPA also outlawed computer-generated or virtual child pornography, which was represented as socially harmful, potentially confusing material that could be used to mask real children and therefore make prosecution of child pornographers virtually impossible. In the eyes of Congress, this material had no First Amendment protection. The findings of fact justified the new restrictions and ensured passage of the statutes.

Statutory Developments: Legal Tug-of-War over the Child Pornography Prevention Act

In the face of successful legal challenges to laws regulating aspects of the Internet, the Free Speech Coalition, the trade association for the sexual capitalism industry that is euphemistically called the "adult entertainment industry," soon locked

horns with the US government over another provision of the Telecommunications Act—namely, the CPPA of 1996. The CPPA had expanded the federal prohibition on child pornography to include not only pornographic images that were made using actual children but also "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct" and any sexually explicit image that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" of "a minor engaging in sexually explicit conduct." The result is that the CPPA expanded federal prohibitions on child pornography to include not only images made using actual children but also "virtual child pornography" produced by means other than using real children.

In its suit, the Free Speech Coalition alleged that the statutory provisions "appears to be" and "conveys the impression" were vague and overbroad and were thus constitutionally defective under the First Amendment. Additionally, the Free Speech Coalition took issue with the criminalization of the portrayal of "youthful looking adults" in child pornography material. The US District Court for the Northern District of California granted the government summary judgment. The US Court of Appeals for the Ninth Circuit reversed, holding that the CPPA was unconstitutional by reason of its overbreadth (*Ashcroft v. Free Speech Coalition*, 1999). The US government appealed to the Supreme Court of the United States, which granted certiorari. The issue before the court was whether the CPPA was consistent with legal precedent. The court held that it was not. The court ruled that the CPPA was overbroad because it banned a large category of speech that was neither obscene under the test set forth in *Miller* nor produced by the exploitation of real children, as held in *Ferber*: "The reasons the Government offers in support of limiting the freedom of speech have no justification in our precedents or in the law of the First Amendment and abridge the freedom to engage in a substantial amount of lawful speech" (*Ashcroft v. Free Speech Coalition*, 2002). The court rejected the government's contention that the CPPA was necessary because pedophiles may use virtual child pornography to seduce children. The court said this reasoning "runs afoul of the principle that speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it" (*Ashcroft v. Free Speech Coalition*, 2002).

The Child Online Protection Act and *Ashcroft v. Free Speech Coalition* (2002)

In the meantime, Congress passed the Protection of Children from Sexual Predators Act of 1998. Furthermore, in order to rectify the constitutional defects of the CDA, Congress passed the Child Online Protection Act (COPA). COPA was challenged once again by several organized interest groups led by the American Civil Liberties Union. The Supreme Court of the United States enjoined the government from enforcing COPA until all outstanding legal issues related to its implementation had been resolved.

On remand, the US Court of Appeals for the Third Circuit found that COPA was also constitutionally defective. The court held that COPA was not narrowly tailored to serve the government's stated interest in protecting minors from harmful material on the Internet. The court further held that the undifferentiated, nonspecific definition of the term "minors" in COPA was too vague and overbroad to

meet the First Amendment's strict scrutiny and "narrow tailoring" standards. The government appealed the case to the Supreme Court of the United States, which invalidated COPA on the grounds that content filtering and other technological solutions were preferable to governmental control of Internet content because filtering imposes selective restrictions on web speech at the level of the receiver and does not impose blanket restrictions on the senders of messages.

The decision of the Supreme Court of the United States in *Ashcroft v. ACLU* gave credence to the perception held by some European scholars that the common law system is extremely rigid, mechanistic, and inflexible, even in the face of evolving political and social situations triggered by rapidly evolving information and communications technologies. Indeed, the court's earlier ruling in *Ashcroft v. Free Speech Coalition*, which was bereft of any ethical considerations regarding the evils of child pornography, essentially raised the manufacture of computer-generated child pornography to the level of a fundamental right at both a systemic and individual level. This is a romantic right, which, as Murphy and Coleman (1990) state, is politically essential to the existence and the very survival of the American politico-legal system. It is a right, they add, that is essential to individuals if they are to fully exercise their roles as human beings in the American marketplace of ideas.

Indeed, the court ruled that makers of computer-generated child pornography have, in the words of Murphy and Coleman, "claims against certain kinds of interferences" (p. 83)—with their right to manufacture, transmit, buy, sell, possess, or exchange computer-generated child pornography—under the First Amendment. It follows that this fundamental right against governmental or other interference cannot be infringed upon or eviscerated unless the government provides compelling reasons.

By granting First Amendment rights to computer-generated child pornography in *Ashcroft v. Free Speech Coalition*, the Supreme Court of the United States raised the manufacture, transmission, possession, sale, exchange, and distribution of computer-generated child pornography to the level of a human right—defined by Murphy and Coleman as a natural or respect-based obligation that "is a mandatory way in which persons must be treated if their essential humanity is to be respected and preserved" (Murphy and Coleman, 1990, p. 86). By transforming computer-generated child pornography into an American-style "human right"—albeit one without an ethical foundation that takes into consideration the impact of such material on society—the Supreme Court of the United States undermined the moral basis of laws against child pornography.

Ethical issues aside, the fundamental problem with the US Supreme Court's decision to grant such sweeping First Amendment rights to computer-generated child pornography is that the decision is grounded on an extremely shaky dichotomy between computer-generated, or virtual, child pornography and child pornography featuring real children. In effect, the US Supreme Court decision is based on an erroneous premise—namely, that virtual, or computer-generated, child pornography is easily recognizable and distinct from pornography that features real children and that just because images of children engaged in explicit sexual acts are designed on a computer, they are physically, psychologically, and ethically harmless to real children and to society in general. This shows a lack of appreciation, on the part of the court, of the revolutionary technological advances that have been made in computer graphics, artificial intelligence, and video animation

since *Miller v. California* was decided in 1973 and *New York v. Ferber* was decided in 1982. In this day and age of the Internet and YouTube, the decision in *Ashcroft v. Free Speech Coalition* seriously undermines domestic and international child pornography eradication efforts.

The ruling in *Ashcroft v. Free Speech Coalition* failed to take into account the convergence of the sophisticated, fast-evolving fields of digital graphics, artificial intelligence, and animation, which has led to the production of lifelike images for video games and movies. In effect, virtually all child pornography is now digital because its creation involves digital imaging technologies. Though the law requires that all producers of explicit adult books, magazines, periodicals, films, videotapes, or other material that, *inter alia*, "is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce" keep individually identifiable records of the name and age of each performer in the visual depiction, enforcement is expensive, intrusive, and problematic. Though many commercial online pornography producers and holding companies from around the world file this certification, law enforcement agencies have to take them at their word, without proof that the images do in fact comply with the law. Besides, the sheer number of commercial pornography producers, websites, and holding companies makes the task of verification and enforcement virtually impossible.

Comparative Analysis of the Regulatory Postures of France and the United States with Regard to the Regulation of Child Pornography

The child pornography regulatory regimes of the United States and France represent two political and cultural approaches to the problem of mass-mediated child exploitation. Though America's and France's freedom of speech and freedom of the press traditions have their roots in the European Enlightenment, both countries have evolved differing, even contrasting, cultures of free expression over the years. Indeed, both countries have different, sometimes contrasting, political and cultural values with respect to matters of freedom of speech and of the press, invasion of privacy, hate speech, the depiction of human sexual activity, and the very nature of the Internet.

In the United States, child pornography is regulated within the framework of First Amendment free speech jurisprudence. Under this system, the right of free speech has systemic and individualistic functions. It is fundamental to the maintenance of the integrity of the American politico-cultural, economic, and social systems, as well as the humanity and respect of individual American citizens (Murphy and Coleman, 1998, p. 88). The Supreme Court of the United States has summarized the free speech philosophy of the United States as follows: "As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear" (*Ashcroft v. Free Speech Coalition*, 2002). The First Amendment thus puts the brakes on unnecessary governmental intervention in the marketplace of ideas.

By way of contrast, France has a particularistic, secular humanist, moral philosophical system of freedom of expression that stresses the rights and obligations that speakers, as citizens, owe other members of society. In France, child pornography is criminalized as an affront to human dignity, a violation of human rights, and an abuse of the right of freedom of expression. One of the characteristics of

this system is that it is an interventionist, positive freedom-of-expression regime where the government actively intervenes in public discourse and takes affirmative legal steps to eliminate content that is considered to be abusive of the right of freedom of expression. This is especially true of speech that the government deems prejudicial to human rights and human dignity. The state therefore actively seeks to create a "democratic free speech environment" and to protect victims of the misuse of the right of freedom of expression under the presumption that speech deemed objectionable by the government forecloses the right of freedom of expression by violating the dignity of its recipients and victims (Uyttendaele and Dumortier, 1998). Consequently, under France's moral philosophical jurisprudence, all kinds of child pornography—real or computer generated—are illegal and have no constitutional protection whatsoever.

I suggest that the differences between the American and French approaches to the common problem of computer-generated child pornography are philosophical. The American position advanced in *New York v. Ferber* and re-presented in *Ashcroft v. Free Speech Coalition*, is a harms-based approach that focuses on the physical and psychological harm child pornography causes real children. This harms-based approach operates within the framework of First Amendment free speech jurisprudence. By way of contrast, the French child-protection regime is a grounded in a moral philosophical approach that considers child sexual exploitation and child pornography to be moral harms and "serious violations of human rights and of the fundamental rights of a child to a harmonious upbringing" (Council of Europe Framework, 2003). Indeed, the Council of Europe Framework's definition of child pornography is broader that that adopted by the Supreme Court of the United States. In the framework, child pornography is defined as "pornographic material that visually depicts or represents a real child involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or the pubic area of a child, or a real person appearing to be a child involved or engaged in such conduct, or realistic images of a non-existent child involved or engaged in such conduct" (Council of Europe Framework, 2003).

Table 16.1 summarizes the major characteristics of the child pornography regulatory regimes of the United States and France. It compares the regulatory frameworks, types of child pornography criminalized, and definitional exactitude of the laws in both countries. It also compares the postures of both countries toward international child pornography prevention laws. The litmus test of commitment to the fight against child pornography at the international level is twofold: (1) signature and ratification of international human rights treaties and conventions and (2) implementation of international human rights values at the domestic or country level. Since the United States has signed and ratified the Optional Protocol to the Convention on the Rights of the Child (though it has not ratified the convention itself), the question is whether the United States can live up to its obligations under the optional protocol in the light of the *Ashcroft v. Free Speech Coalition* decision discussed previously.

Conclusion and Discussion

Child pornography production and dissemination is a global problem. This chapter was concerned with how the different politico-cultural regimes of France and

Table 16.1 Comparison of child porn regulation under French and American law

Characteristics	*France*	*United States*
Regulatory framework	Exceptional human rights/ dignity–basedr egulation Marketplace *for* ideas	Exceptional first amendment freedom of speech regime/ harms–based regulation Marketplace *of* ideas
Type of criminalized child porn	Real and virtual child porn	Obscenity and porn using real children
Status of computer-generated child porn	Dissemination to second party: illegal	Legal
Definitional exactitude	Malleable and elastic definitions	Narrowly tailored definitions
UN Convention on the Rights of the Child (1989)	Signed and ratified	Signed but not ratified
Optional Protocol on the Rights of the Child (Sale of Children and Child Pornography)	Signed and ratified	Signed and ratified

the United States pose and philosophize the problem differently. It was found that France and the United States regulate child pornography in general, and computer-generated child pornography in particular, within the framework of their respective constitutional regimes. The French position is based on a universal human rights ethic that condemns all child pornography, without distinction, as being repugnant to morality, human rights, and human dignity. The international and French law regimes conceptualize human beings as dignified beings whose sanctity as people should not be compromised by media content in real space and cyberspace, including computer-generated child pornography. In contrast, the United States applies First Amendment standards that originate from the traditional mass media and were transferred to computer-generated child pornography. The US Constitution conceptualizes human beings as communicative beings whose right to transmit information should not be infringed upon, except in exceptional and extreme cases. The US Supreme Court applied that perspective in its ruling in *Ashcroft v. Free Speech Coalition*. This decision severely undermined the global struggle against child pornography. Though the Council or Europe and France have moved to close the loophole created by the US Supreme Court, American courts need to pay more attention to technological developments in the field of artificial intelligence, computer animation, and computer graphics that can be used to disguise real children or use real children as models for computer-generated pedopornography.

17

Epilogue

Looking Back and Looking Forward: Sexting and Revenge Porn

The fundamental premise of this volume is that sex-themed visual imagery (pornography and obscenity) is not a uniquely Western phenomenon. It is therefore not the telltale sign of Western decadence that some countries and cultures would have us believe it to be. We have seen that from a historical perspective, sex-themed visual imagery was part and parcel of the cultural reality of a wide swath of nations, empires, and cultures around the world. The convergence of once discrete media—books, magazines, newspapers, photography, the cinema, music, radio, television, and so on—and innovations in the fields of information and communication technology led to globalization: the interconnection of nations, cultures, and peoples. Globalization and media convergence have not taken place in a legal or cultural vacuum. When the US Congress passed the Scientific and Advanced Technology Act of 1992, which opened up the Internet to science, technology, and engineering, as well as educational, cultural, and commercial activities, the network of computer networks quickly became a virtual, interactive, global multicommunication space. It also became the virtual domain of sexual capitalism, which pioneered online payment and other technologies that enabled it to commercialize pornography and obscenity.

We saw in Chapter 13 that the Supreme Court of the United States transferred American First Amendment values from real space to cyberspace in the 1997 case *Reno v. ACLU*. This case had arisen because of US congressional attempts to penalize sexual capitalists who knowingly made their pornographic "wares" available to minors. The practical effect of this ruling was that the US Supreme Court transferred American First Amendment values from real space to cyberspace and globalized them in the process. Nevertheless the United States was not the first country to regulate sex-themed visual and textual content in the online environment. That distinction goes to France.

French Regulation of Sex-Themed Content on the Minitel

The US Department of Defense funded early command-and-control network security research that led to the development of the innovative network technologies and transmission protocols of what ultimately became the Internet. Early applications on the Internet included newsgroups and bulletin boards. While some early American online bulletin board services featured sex-themed visual imagery in the 1990s, France deployed the first successful nationwide online telecommunications technology, the Minitel, in 1982. Despite the relatively "low tech" nature of the Minitel, the centralized, government-controlled system became famous for its sex-themed content and chat rooms. This prompted calls for the regulation of the pioneering online system. In 1992, French senator Henri Goetschy claimed that huge, erotic billboards in real space that were being used to advertise so-called *Minitel rose* sites, which were online message boards in the adult "red light district" of the Minitel, were an outrage against public decency. Goetschy added that besides the ubiquitous billboards, which first made their appearance in France in 1986, the erotic Minitel message boards were commercial sex services (Reglement concernant l'affichage publicitaire pour le minitel rose, 1992). In his response, the minister of justice stated that a recent legal enactment had amended and extended the French Penal Code provisions from real space to the online space of the Minitel. He said the intent of the new law was to sanction the excesses of pornographic Minitel message boards, the so-called adult *Minitel rose* that constituted an outrage to *bonne moeurs* (morality; Reglementation concernant l'affichage publicitaire pour le minitel rose, 1992).

Those regulations, which constituted the first ever transfer of the regulation of sex-themed communication from real space to cyberspace, were triggered by a scandal that shook the French political and cultural establishment in 1991. In effect, a number of French newspapers had exposed the fact that the Minitel had become a platform for the open advertisement and distribution of videos of illegal child pornography and illegal, sadomasochistic, sexually violent pornographic material, as well as the promotion of telephone-based, high-class international prostitution (Solé, 1993). Despite the initial technical limitations of the Minitel—it was mostly text based; had minimal graphical capabilities; lacked the capacity to upload, download, or host pictures; and was not truly interactive—inventive operators of certain pornographic message board sites were able to use text and its limited graphics to produce Minitel versions of the notorious sadomasochistic works of Le Maquis de Sade and others (Solé, 1993). The Minitel had become known for its free-for-all, profitable sexual "services," whose content was essentially unregulated. Many mainstream newspapers, including the conservative *Le Nouvel Observateur, Le Parisien*, *La Libération*, *Nice-Matin, Gai Pied*, and others, invested in and reaped very profitable returns from sex-themed *Minitel rose* bulletin boards. The Minitel had become, in the words of Solé (1993), a "tentacular, lucrative marked whose pornographic networks had become the rallying point of the sexually unhinged" (p. 461). The Minitel turned out to be, like all modern communication technologies, the building block of "modern temples of Eros" (p. 465).

In response to newspaper exposés and complaints from the general public about the pornographic Minitel billboards in real space, the French government raised the possibility of regulation through taxation. It proposed a 50 percent tax on the revenues of the sex-themed *Minitel roses* and their associated erotic

bulletin board services. The Union of French Telematics Professionals opposed the tax, stating that the *messageries roses* (erotico-pornographic message services and bulletin board services) created 5,000 jobs and generated up to 40 percent of the traffic on the Minitel. This heavy traffic in turn generated more than one billion Francs (about $250 million), a third of which went to France Télécom, the government operator of the Minitel, and the rest of which went to the *Minitel rose* service providers (Solé, 1993).

While the *Minitel roses* gave the French elite a golden opportunity to engage in philosophic speculation on the nature and sociohumanitarian utility of online expressions of sexuality, the French government was not amused at what Solé (1993) called the unbridled, computer-mediated, "telematic expression of desire" (p. 460). Political pressure forced the French government to enhance regulation of sex-themed content on the Minitel. Despite the fact that the government already had a surveillance commission aimed at monitoring the Minitel and removing message boards set up to promote networks of prostitution and pedophilia, the Ministry of Finance set up a 14-member consultative commission that drew up a list of pornographic message boards on the Minitel. The commission succeeded in disconnecting extreme, sex-themed message boards that were considered to be an affront to decency. Despite complaints of governmental invasion of privacy, the Ministry of Finance announced that it was going to impose a special tax on a category of *messageries roses* that it classified as pornographic. Additionally, the consultative commission cancelled the Minitel contracts of bulletin boards that hosted text and images that, in the view of the commission, constituted offenses against public decency (Solé, 1993).

The roaring success of the Minitel, and especially its commercially successful *messageries roses*, fluidly transferred French sexual capitalism from real space to the online world, where it blossomed in the legal vacuum of the virtual environment before the Ministry of Posts and Telecommunications spearheaded regulation of the sex-themed bulletin boards. Ultimately, the superior technologies, protocols, and graphics of the Internet led French audiences to progressively abandon the Minitel and migrate to the Internet, which the French intelligentsia had rejected. The revolutionary network was ultimately closed down in 2012, a victim of governmental overcentralization and control.

Fast-Forward: Regulation of Sexting and Revenge Porn

One of the subtexts of this volume is that sex-themed textual and visual content has an uncanny ability to adapt to new technologies. As a result, regulators constantly strive to keep the law abreast of new information and communication technologies. This is the case with two new types of controversial sex-themed visual imagery that have come to preoccupy parents, teachers, regulators, and law enforcement officials: sexting and revenge porn. Policymakers around the word are coming to terms with these phenomena. Many countries are transferring and adapting harassment and obscenity laws from real space to the realities of sexting and revenge porn.

Sexting

Sexting is the act of sending nude or sexually explicit images to others through text messaging or social media applications. There are four types of sexting:

1. *Private sexting that takes place between two or more consenting adults*. This is considered legal in Western countries.
2. *Sexting between minors*. This is a controversial practice that is frowned upon and is criminalized in certain jurisdictions. We saw in Chapter 2 that the government of Iceland made unsuccessful attempts to ban pornography and change the attitudes of its youth toward sex-themed visual imagery. Due to the fact that child pornography is a criminal offense in the United States, law enforcement officials originally tended to classify "sexts" between minors as criminal child pornography. Courts have tended to chastise overzealous prosecutors who take such a heavy-handed approach to sexting by minors.
3. *Sexting to nonconsenting adults*. If an adult sends sex-themed images or texts to another adult who has not asked for the images or does not wish to receive such material, sexting in this context can be classified as a form of sexual harassment (Sanders, 2013).
4. *Sexting between adults and minors*. It is illegal for an adult to send sex-themed images to a minor or minors in real space in most jurisdictions. The Iowa Supreme Court decided such a sexting case in 2009. In *Iowa v. Canal*, an 18-year-old high school student sent two photographs via text message to a 14-year-old female schoolmate. One photograph was of the sender's erect penis; the other was a photograph of his face. A text message attached to the photograph of his face said, "I love you." The sender of the text, Jorge Canal, and the 14-year-old were friends and had known each other for roughly a year before she asked him to send her a picture of his genitals. The minor's parents checked her phone, found the photograph, and reported the matter to the police.

   The state of Iowa charged Canal with violating Iowa Code provisions, which criminalize knowingly disseminating obscene material to a minor. A jury at the Iowa District Court for Dallas County found Canal guilty of knowingly disseminating obscene material to a minor, and the court imposed a deferred judgment, a civil penalty of $250, and a one-year probation with the department of corrections. The court also ordered Canal to register himself as a sex offender. Canal violated the terms of his probation, so he was sentenced to 19 days in jail and was ordered to pay a fine of $250 and to once again register himself as a sex offender. The Iowa Court of Appeals and the Iowa Supreme Court affirmed the conviction and sentence. The court ruled that an average person in Iowa, applying contemporary community standards with respect to what is suitable material for minors, would find that the material was patently offensive, appealed to the prurient interest, and lacked serious literary, scientific, political, or artistic value. The Iowa courts essentially applied the real-space obscenity standard that the US Supreme Court had set forth in *Miller v. California* to the fast-changing world of mobile media.

City of Ontario v. Quon *(2010)*

Sexting is not only a problem involving young people. The Supreme Court of the United States decided a case involving police officers sexting on the job in 2010 (*City of Ontario [Cal.] v. Quon*, 2010). The Police Department of Ontario, California, issued text-message pagers to Jeff Quon and other police officers. They were told they should have no expectation of privacy when using these pagers. Quon and another officer used their work-issued, official pagers to "sext" during work and exceeded the monthly data limits for several months running. The police department opened investigations to determine what the problem was. The wireless company contracted to provide the texting service provided the chief of police with transcripts of texts sent by Quon and the other officer. It was found that most of their texts were not work related. In fact, most of them were sexually explicit "sexts." Quon and the other employee of the police department who engaged in sexting were disciplined for misusing work-issued pagers.

The officers filed suit against the city of Ontario and its police department in federal court, claiming that the police department violated their Fourth Amendment right against unreasonable searches and seizures, as well as the federal Stored Communications Act, which protects email and other digital communication stored on the Internet and limits the ability of the government to force Internet service providers to hand over such information. A district court granted the city summary judgment. On appeal, the Ninth Circuit Court of Appeals reversed, holding that Quon had a reasonable expectation of privacy in his text messages and that the search (the review of the transcripts of the "sexts") was not reasonable. The court concluded that the wireless company that provided the pager service had violated the Stored Communications Act when it gave the city the transcripts of the "sexts." The city of Ontario appealed to the Supreme Court of the United States, which granted certiorari. The issue before the court was whether Quon had a reasonable expectation of privacy in the text messages and whether the search (the review of the transcripts of their texts) was reasonable. A unanimous court held that the search was reasonable. Therefore, the Fourth Amendment, which guarantees privacy, dignity, and security against arbitrary and invasive governmental acts, was not violated. The court further held that the warrantless review of Quon's pager transcripts was reasonable because it was motivated by a legitimate, work-related purpose and because it was not excessive in scope. This case raises several issues regarding expectations of privacy when government workers use work-issued equipment as well as the limitations of the Fourth Amendment in the dematerialized world of cyberspace. It is apparent that municipal agents who use work-issued equipment should expect that equipment to be monitored. The Fourth Amendment principle of "reasonable expectation of privacy" was designed for real space. It is very difficult to enforce in cyberspace. The point to remember is that the transcripts of all texts, tweets, emails, and other types of data sent on official, work-related equipment are stored on third-party servers, even when they are deleted by senders and receivers.

Revenge Porn

The explosion of social networking sites (social media) and mobile telephony has created new challenges for regulators of sex-themed visual imagery in all parts of the world. One of these challenges is so-called revenge porn: the act of posting online nude images or sex tapes recorded with or without the knowledge and consent of the party who is the object of the revenge porn. In 2006, Iranian photographer, television soap opera actress, and short movie director Zahra Amir Ebrahimi fled Iran when an explicit, amateur videotape of a woman, who was alleged to be Ebrahimi, having sex with an unidentified man was posted on the Internet and released on a black-market DVD that was sold under the table in Iranian bazaars. Ebrahimi quickly became the subject of an official criminal investigation. She denied being the woman on the sex tape and said it was a fake video that was edited and posted online by a former fiancé who was intent on destroying her career (Tait, 2006). The man who had allegedly posted the sex tape on the Internet fled to Armenia, but he was arrested there, extradited to Iran, and charged and convicted with violating public morality law. The Iranian Parliament ultimately passed a law imposing the death penalty on makers of pornography. Ebrahimi's life was never the same again. Her ordeal was one of the first cases of what has become a global phenomenon. Besides Iran, sensational revenge porn cases have been reported in the United States, Israel, the United Kingdom, Uganda, and other jurisdictions.

Revenge Porn and Sexual Imperialism in Uganda

Globalization and the diffusion of information and communication technologies to all parts of the world has led to the appearance of sex-themed visual imagery, sexting, and revenge porn in the periphery of the global communication system. The global reach of Facebook, Twitter, Instagram, WhatsApp, YouTube, and other social media applications means that sex-themed visual imagery can be used and abused in Africa as it is misused in other parts of the world. That fact was made clear in Uganda in 2014. Popular musician Desire Luzinda went into hiding when the country's powerful minister for ethics and integrity, Simon Lokodo, called for her arrest. Her alleged crime had nothing to do with her music. She had not composed or played music that offended the authoritarian government of President Yoweri Museveni or his very powerful wife, Janet K. Museveni. Her alleged crime was that she was a victim of revenge porn. In effect, her former boyfriend, Franklin Emuobor Ebenhron, had posted nude photos and sex tapes of her on social media sites with the intent to "teach her a lesson" (Byaruhanga, 2014). The images soon appeared in Ugandan newspapers. The government-owned *New Vision* newspaper reported that the "images and video clips contravene the laws of Uganda" and that Mr. Lokodo had stated that a "thorough investigation would be conducted" (Ouga, 2014). The minister asked the police to track down Luzinda and her jilted lover, Ebenhron, to face charges for violating section 13 of the Anti-Pornography Act (2014) of Uganda, which criminalizes all types of pornography and makes it an offense to "produce, traffic in, publish, broadcast, procure, import, export, sell or abet any form of pornography" in real space and cyberspace. The penalty for the offense is ten years imprisonment (Luzinda Faces 10-Year Jail Sentence over

Nude Pictures, 2014). The jilted boyfriend fled the country shortly after posting Luzinda's videos and images on social media. In order to mitigate the wrath of the government and of her fans, Luzinda went on Facebook and apologized profusely, stating that her former boyfriend had uploaded her private images in the public domain without her knowledge or consent. She said it was an act of revenge on the part of the former boyfriend, who was intent on destroying her. She said she was extremely sorry for allowing the pictures and videos to be taken: "We all have 'moments of madness' . . . I take full responsibility for having lost my mind to take such shameful pics," she said. The focus of the investigation soon turned to her former boyfriend, Ebenhron, who had fled the country. The International Criminal Police Organization (Interpol) soon arrested him in Dubai. Luzinda was apparently given immunity from prosecution in exchange for helping the police track down Ebenhron in another country (Osbourne, 2015; Desire Luzinda's Nigerian Boyfriend Arrested, 2015). However, efforts to extradite him to Uganda to face charges of trafficking in pornographic material (producing and posting revenge porn images and videos), drug trafficking, and fraudulently obtaining a Ugandan passport have not been successful, because he is a Nigerian national. Months later, Uganda's minister of ethics and integrity apologized to Luzinda for "being rough on her" and seeking her arrest and prosecution under the Anti-Pornography Act of 2014. He said the police investigation of her former boyfriend, who had apparently been deported to his native Nigeria, would continue until he was brought to Uganda to face the charges against him (Okoth, 2015).

Uganda, a former British colony, has become a byword for sexual intolerance and modern-day Puritanism. However, the country's attitude toward all things sexual should be seen in the light of its colonial experience. The British Empire called Uganda the "Pearl of Africa" and imposed strict Victorian sexual mores on the colonial territory. Only monogamous heterosexual relations that took place within the bounds of holy matrimony were permitted. Homosexuality and other "deviant" sexual practices or arrangements were banned by missionaries and criminalized by the colonial administration. The story of Uganda can be replicated in all African countries except Ethiopia, which we discussed in Chapter 3. Colonial-era restrictions on African artistic expression effectively eliminated realistic, sex-themed art from the vast repertoire of African visual arts. Contemporary attempts on the part of the United States and Great Britain to impose sexual diversity on Uganda and other African countries by withholding development aid are seen as sexual imperialism or neocolonialism. Laws like the very stringent Anti-Pornography Act (2014), which bans all kinds of sex-themed visual imagery, are a reflection of a certain desire to stand up to sexual neocolonialism. Unfortunately, these and other laws ostracize and further victimize African victims of revenge porn and other vices of the age of the Internet and global communication.

The widespread nature of the revenge porn phenomenon around the world has led to the enactment of laws aimed at curtailing it. As we just saw with Uganda, several states in the United States and countries in all parts of the world have passed laws criminalizing revenge porn. However, in the United States, the cases of victims of revenge porn are considerably weakened if these victims consented to the video recording of sex acts in which they were involved or willingly sent nude images of themselves to the person or persons who posted the images online. Though persons who have set up revenge porn websites and used them to blackmail victims into paying large sums of money have been convicted, American

courts have ruled that interactive computer service providers that host revenge porn websites are immune from civil liability. This is because they are classified as content distributors, not producers (*GoDaddy v. Toups*, 2014).

As the emerging law and regulation of sexting and revenge porn demonstrate, conceptualization, management, and regulation of sex-themed visual imagery has come a long way from the clay tablets of ancient Mesopotamia to the tablet computers of the age of the Internet, social networking sites, and mobile telephony. Sex-themed visual imagery has existed and evolved from mankind's earliest civilizations in the valley of the Tigris and Euphrates rivers in Mesopotamia to the high-tech hubs of Silicon Valley. It has been conceptualized in multiple ways and in multiple cultural contexts. Sex-themed visual imagery does not exist in legal and cultural vacuums. What is common to all cultures is that they treat sex-themed visual imagery as regulated representations.

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