

PORNOGRAPHY AND THE LAW

By Ernest van den Haag

The Meese Commission report on pornography was released last year and is now old hat. Perhaps this is a good time to examine with some detachment the question on which it sought to shed light: Should we continue to outlaw pornography while, in effect, tolerating it? Should we legalize it? Or should we find a method of outlawing it effectively?

For those who wish to legalize pornography the answer is simple. Whether or not pornography is distasteful or morally harmful, it affects only those who buy it. The government is not in charge of their morals. It is part of one's freedom to make choices that are harmful to oneself or disapproved by others. Those offended by pornography can readily refrain. There is no need for the law to protect them; no one compels them to see X-rated movies or buy pornographic magazines. Legitimate questions about advertising, public visibility, and access by children are marginal and could be solved by such measures as plain wrappers and inconspicuous signs.

Ridicule by "Civil Libertarians." Surely the people who want to legalize pornography are right if, as they contend, pornography does no harm to those who do not volunteer to buy it. This is the question the Meese Commission addressed. The Commission has been ridiculed by all the usual "civil libertarians." However, if one actually looks at its report, one finds that the Commission did quite reasonable work in trying to answer the question it focused on: Does pornography lead to crime? If it does, obviously it harms persons who did not volunteer for the harm. They are entitled to protection, provided that protection is consistent with constitutional principles.

The Commission decided that pornography, particularly sado-masochistic pornography, stimulates, to say the least, sex crimes. One can argue about this. There is a chicken and egg problem. Does the prospective rapist consume pornography because he independently is a prospective rapist, or is it the pornography which causes, or stimulates, a disposition to rape that did not pre-exist or was minor? Which comes first? However, there seems to be little doubt that a disposition to commit sex crimes may be strengthened or activated by pornography, which appears to legitimize them and to weaken internal restraints.

Changing Sexual Mores. The general evidence strongly suggests that crime can be stimulated by communications, ideas and sensations aroused by movies or books. Few sayings are as silly as the dictum attributed to Jimmy Walker (the late New York mayor) to the effect that "No girl has ever been seduced by a book." Books do not seduce directly any more than whiskey does. But they help. After all, even if one discounts the "sexual revolution," one cannot deny that sexual mores have changed over time, owing not to changes in biology, but to changed ideas and sentiments that infect people and lead them

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to action. Books such as the Bible or Das Kapital influence people's actions because of the ideas they expound. Pornography, which is bereft of ideas, influences people because of the sensations and attitudes it stimulates. It is consumed for the sake of these sensations as drugs are and may influence actions analogously.

But pornography is not the only thing that may lead to sex crime, and certainly it does so only sometimes. Many people consume it without being led to crime. Others become criminals without pornography. Further, alcohol too may lead to crime, or TV violence--indeed myriad things. We cannot outlaw everything, not even every communication, that sometimes leads to crime. Why then outlaw pornography?

Exploits Sex. If the Meese Commission conclusion--let's prohibit pornography because it may lead to crime--does not quite follow from its evidence, the idea of some feminists, that pornography is a male conspiracy against females to exploit them, and foster, or help, violence against them, is even less well founded. Pornography exploits sex, not females. The criminal effects are not intended, let alone conspired for. Women are accidental. Pornographers would be just as willing to present pictures of males as of females if there were a market for them. There isn't, except for male homosexuals, who indeed are catered to by pornographers. Most females--be it for cultural, psychological, or biological reasons--do not seem to want to consume pornography. Actually males, who spend good money for the stuff, are more, not less, exploited than the females who earn it. At any rate, I can't see exploitation (a cloudy concept to begin with, meaning not much more than "I don't like it"), since both buyers and sellers volunteer and both have alternatives. They do what they want to do; they are not compelled to do it. Exploitation without compulsion is hard to figure out.¹

O.K., forget about the feminists. Why should we punish the sale of pornography? (Nobody advocates prior restraint, censorship, which is a pseudo-issue.) The Meese Commission reason, that it may lead to crime, is not sufficient. Are there other reasons? I believe there are. The social damage pornography does is greater, yet more diffuse than indicated by individual crimes. Just as chemical pollution may erode stones, statues, and buildings, so pornography erodes civility and our social institutions.

Avoiding Art and Humanity. By definition, pornography deindividualizes and dehumanizes sexual acts. By eliminating the contexts it reduces males and females simply to bearers of impersonal sensations of pleasure and pain. This dehumanization eliminates the empathy that restrains us ultimately from sadism and non-consensual acts. The cliché-language and the stereotyped situations of characters not characterized, except sexually, are defining characteristics of pornography. The pornographer avoids distraction from the masturbatory fantasy by avoiding art and humanity. Art may "cancel lust" (as Santayana thought) or sublimate it. The pornographer desublimates it. Those who resort to pornographic fantasies habitually are people who are ungratified by others (for endogenous or external reasons). They seek gratification in using others, in inflicting pain (sometimes in suffering it), at least in their fantasy. In this respect, The Story of O, which, itself pornographic, also depicts the rather self-defeating outcome of pornographic fantasy, is paradigmatic.

1. Depiction of females merely as sexual objects, expressions of hostility or contempt for them, and depictions of sadistic humiliation, are sometimes called "exploitation." If not exploitative, pornography of this sort is certainly antisocial. One may favor prohibition for this reason as much as for the sake of women.

In a sense, pornographic and finally sadistic literature is anti-human. Were it directed against a specific human group--e.g. Jews or Blacks--the same liberal ideologues who now oppose outlawing pornography might advocate prohibiting it. Should we find a little black or Jewish girl tortured to death and her death agony taped by her murderers,² and should we find the murderers imbued with sadistic anti-Semitic or anti-black literature, most liberals would advocate that the circulation of such literature be prohibited. Why should humanity as such be less protected than any of the specific groups that compose it? That the sexualized hate articulated is directed against people in general, rather than against only Jews or Negroes, makes it no less dangerous; on the contrary: it makes it as dangerous to more people.

Without Artistic Value. But shouldn't an adult be able to control himself and read or see, without enacting, what he knows to be wrong or, at least, illegal? Perhaps he should. But we are not dealing with a homogeneous group called grown-ups nor is it possible in the modern American environment to limit anything to adults. Children and adolescents are not supervised enough. Further, the authority of their supervisors has been diminished too much to make effective supervision possible. As for grown-ups, many are far from the self-restrained healthy type envisaged by democratic theory. They may easily be given a last, or first, push by the materials I would like to see prohibited.

Now, if these materials had artistic, indeed any but pornographic value, we would have to weigh the loss against the importance of avoiding their deleterious influence. We may even be ready to sacrifice some probable victims for the sake of this value. But pornographic "literature" is without literary value. It is printed, but it is not literature. Else it cannot be defined as pornography. Hence there is nothing to be lost by restricting it, and much to be gained.

Affects the Quality of Life. Self-restrained and controlled individuals exist and function in an environment which fosters reasonable conduct. But few such individuals will be created, and they will function less well, in an environment where they receive little social support, where sadistic acts are openly held up as models and sadistic fantasies are sold to any purchaser. To be sure, a virtuous man will not commit adultery. But a wise wife will avoid situations where the possibility is alluring and the opportunity available. Why must society lead its members into temptation and then punish them when they do what they were tempted to do? But more than individual cases are at issue.

Pornography affects the quality of our lives. It depreciates emotional ties and individual relationships in favor of fungible ones, in which physical pleasure is, in principle, separated from any emotional or even personal relationships. Yet, without "emotional ties which hold the group together," according to Freud there is "the cessation of all feelings of consideration" and therewith social disintegration and crime. "Emotional ties" are systematically depreciated by pornography.

Erosion of the Social Bond. Thus pornography undermines the social bond on which human association--from family to nation--must depend. It is this social bond which deters most of us, most of the time, from using our neighbors as we please, without regard to their own preferences. We are taught, and most of us learn, to perceive others as ends in themselves and not merely as means to our pleasure. This learning is the basis of society. Yet it is precarious. We need to be socialized continuously. Pornography undermines the internal restraints on which society must depend and which the criminal law with its sanctions can reinforce but not create. This seems quite enough to limit pornography (we

2. This was done by the "Moor murderers" in England.

will never succeed in doing more). No need (or possibility) to prove a direct and unavoidable relationship to crime. Such a direct causal relationship is likely occasionally, perhaps often. But it is largely beside the point when compared to the erosion of the social bond.

I prefer to live in a society in which public invitations to do without love in individual relationships, to regress to an infantile level of sexuality, stripped of emotion, are not consistently extended. Such invitations are all too likely to be tempting. We all are vulnerable to regression. After all, each of us developed laboriously and with much social effort from anti-social infants into acceptable adults. Invitations to regression should not be socially endorsed. Wherefore the case for prohibition of obscenity seems to be quite strong regardless of whether pornography can be shown to be among the many causes of crime.

Pornography Not Protected. Interstate commerce in pornography is already illegal under federal statutes, and intrastate pornography is illegal in most states. As interpreted by the Supreme Court the First Amendment does not protect pornography, defined as that which:

1) taken as whole predominantly appeals to the prurient interest (a morbid interest in sex); and

2) lacks serious literary, scientific, artistic, or political value (i.e. does not predominantly offer new ideas or aesthetic experiences); and

3) describes sexual conduct in ways judged to be patently offensive by the standards of the community in which the material is sold.

These legal criteria are rather porous. For instance, the depiction of intercourse with animals may be legal, since it may not appeal to the prurient interest of the average person. The depiction of excretion may be legal, since it may not appeal to the prurient interest of the average person either. The standards of the local community are vague (and costly to ascertain), unless the jury is taken to mean the community. The court could have been more concrete and specific.

Camouflage and Pretense. Further, present law requires that the material at issue be considered "as a whole" to determine whether it "predominantly" appeals to the prurient interest. This makes perfect sense for, say, novels, works meant to be taken as a whole, but no sense for periodicals, which, by definition, consist of independent articles or pictures. Why should it not be sufficient if some pictures, or other contributions, to a periodical are obscene, even if the rest consists of non-obscene essays? The non-obscene material usually serves as camouflage or pretense. For a movie, if more than 5 percent of its running time is devoted to images which, taken in isolation, would be regarded as obscene, the movie should be so regarded.

Traditionally pornography has not been thought to be protected by the First Amendment. The idea that the First Amendment licenses pornographers, though widespread, is quite recent. It has no legal basis. Further the First Amendment prohibits only abridging freedom of speech and of the press. Yet current interpretations have led the courts to conclude that the First Amendment protects "expression" (such as nude dancing)

as well. Although expression, dancing is certainly not speech, let alone print. Nothing in the First Amendment protects speechless expression, such as music or dance, or for that matter, pictures.

Thus, in accordance with the First Amendment, legislatures cannot abridge the communication of information or of ideas. But pornography as defined by the courts is bereft of either. Legislatures can constitutionally allow pornography or nude dancing, but they need not. The legal question is not, can we prohibit pornography? (The answer is yes.) What is in dispute in each case is only: Is this material obscene according to the legal definition given above?

Explicit Visual Depictions. Of course there will be doubtful cases--but no more so than in other areas of the law. Courts exist to decide doubtful cases and can do so in this area as well as in any other. Standards of obscenity vary over time. Yet at any time there are standards discoverable by the courts. There is no great difficulty in discerning them--as lawyers are aware, though they often pretend otherwise. Yet, although often professing to be unable to distinguish obscene from non-obscene material, lawyers do not expose their genitals in court. They must have some knowledge of prevailing standards.

Depiction of the nude body, even in alluring poses, is no longer regarded as offensive. Nor is explicit prose. Visual depictions that focus on the genitals--rather than to merely include them--are. Detailed and explicit visual depictions of genital actions, including copulation, masturbation, and depiction of genital arousal, are prurient and offensive. So are prurient depictions which make public what traditionally has been private and intimate.

Making Distinctions. The perception of pornographic qualities in any work depends on literary or aesthetic criticism. Therefore, some argue, it is a matter of opinion. In court, serious critics often behave as though they believed criticism to be a matter of opinion. But why be a critic--and teach in universities--if it involves no more than uttering capricious and arbitrary opinions? If criticism cannot tell pornography from literature, what can it tell us? Of course, critics may disagree; so do other witnesses, including psychiatrists and handwriting experts. The decision is up to the courts; the literary witnesses only have the obligation to testify truthfully as to what is, or is not, pornography.

Some of the critics who claim that they cannot make the distinction do not wish to, because they regard pornography as legitimate; others fear that censorship of pornography may be extended to actual literature. Whatever the merits of such views (I don't see any), they do not justify testifying that the distinction cannot be made. A witness is not entitled to deny that he saw what he did see, simply to save the accused from a punishment he dislikes. A critic who is really incapable of distinguishing pornography from literature certainly has no business being one; a critic who is capable of making the distinction has no business testifying that he is not.

200 Years of Outlawing Obscenity. Oh yes, there is one bugaboo: A "police state," it is feared, may develop from prohibiting the sale of pornography and punishing violators. That argument is not too plausible. To begin with, America did not become a "police state" although obscenity has been punished for the last 200 years. Not a single instance is known, throughout history, of a police state, or a dictatorship, developing by prohibiting obscenity, or even by censoring it, or by censoring anything else. It is the other way around. Once you have a police state, censorship follows. A police state cannot continue without it.

3. There are the usual ancillary questions: Was it offered for sale? Was it properly seized? But they need not detain us.

But no democracy has ever become a police state by using the criminal law to restrain obscenity. The Weimar Republic in Germany was not replaced by Nazism because it did. It did not. Once Hitler was in power, he used it to abolish all freedom and to institute censorship.

