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Discussion

THE MORAL RIGHT OF THE MAJORITY TO RESTRICT OBSCENITY AND PORNOGRAPHY THROUGH LAW

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Obscenity and pornography may be defined as the use of language or images relating to the body, violence, or sex that exceed the bounds of propriety that a significant part of the public finds appropriate for the context and requirements of the situation in which they are used. Efforts to limit obscenity and pornography either legally or informally are frustrated by the lack of an acceptable intellectual basis in liberal societies for such limitations. Appeals to community standards or lack of redeeming social value are weakened by a widespread feeling, especially in academic circles and the media, that the majority has no right to impose its standards on individuals or to decide on social values unless clear physical harm is involved. Moreover, attempts to regulate obscenity are frequently criticized on the ground that the regulators are enforcing standards that neither they nor the majority observe in their own lives.

The recent controversy that has focused on the works of H. L. A. Hart and Lord Devlin on the one hand, and the reports of government commissions to look into the regulation of obscenity on the other, has summarized but not greatly advanced the argument.¹ In his defense of controls, Lord Devlin fails to accept the intellectual weakness and thus ultimate unsatisfactoriness of controls defended largely by populism and conservatism, nor is he sufficiently aware of the dangers of an open-ended appeal to the popular will. On the other hand, in the Mill tradition, Hart fails to stake out the rights of the majority as firmly as he does those of the minority. He promotes a form of libertarian elitism that should be rejected because it represents an undue infringement on the freedom of potential majorities that they will not freely accept. Devlin's intuition that law and morality should reinforce one another cannot simply be ignored. Since inadequacies in the Hart position lead to an unacceptable libertarianism and those in Devlin's may

1. See Patrick Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965); H. L. A. Hart, *Law, Liberty and Morality* (Stanford, Calif: Stanford University Press, 1963); Basil Mitchell, *Law, Morality and Religion in a Secular Society* (London: Oxford University Press, 1967); the *Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution* (New York: Stein & Day, 1963); and *Report of the Commission on Obscenity and Pornography* (Washington, D.C., 1970), esp. p. 53.

lead to a purely instrumental view of freedom, both may lay the groundwork for a new "escape from freedom."²

In order to avoid this danger, I suggest that we build a case for the control of obscenity by establishing the following: (1) a distinction of private from public rights to expression, (2) a distinction of political from nonpolitical rights to expression, and (3) a plausible case that the majority can claim harm from public obscenity.

1. THE PRIVATE/PUBLIC DISTINCTION

In a free society, the majority is responsible for establishing the laws of the community, while at the same time this responsibility is limited by certain absolute privileges granted to minorities and individuals because of attachment to a concept of basic rights or freedoms. Aside from those rational political and civil freedoms that are necessary to guarantee a democratic structure, these include rights to that degree of freedom that is consonant with the freedom of others. Yet what are the rules for this consonance? For example, surely one freedom of those in the majority is to have the kind of social and aesthetic environment that they desire in the moral mode. It is with this in mind that nudists are asked to disrobe only in private or in camps segregated for that purpose. If the clash between the majority and minority over nudism meant that nudists could appear anywhere in public, then in this case majority rights would be nugatory while the minority rights would be guaranteed. To expect majorities to long accede to such situations is to imagine that people will give up being interested in determining many aspects of their social environment that have formerly been considered of importance.

The problem for the liberal, therefore, is to define basic civil rights in such a way that they preserve a meaningful area of freedom both to individuals who can form majorities capable of determining a way of life for themselves and to individuals who have not or cannot form a majority. The right to try to form new majorities is the basic right given to individuals in both the majority and the minority that makes meaningful the rights of either. Adding to this an absolute right to a private sphere of life guarantees the development of that degree of individuality that would seem consonant with human dignity in the liberal view. Once he has staked out a private realm for minority rights beyond the public political sphere, the liberal may go on to make the utilitarian case that the majority will also benefit from eschewing regulation of most social behavior. But this is an area appropriate for continual readjustment of interests and not for basic guarantees.

David Conway has recently argued in regard to pornography that there is little sense to the private/public distinction that H. L. A. Hart and the *Wolfenden Report* have affirmed as a basis for distinguishing between what may or may not be prohibited.³ He suggests that it is not the public nature of acts that prohibitionists

2. On the undermining of freedom by liberalism see Thomas Molnar, "Zur Gesellschaft der Zukunft," *Schweizer Monatshefte* 54, no. 2 (1974): 97–104.

3. David Conway, "Law, Liberty, and Indecency," *Philosophy* 49, no. 188 (1974): 135–48.

wish to control but the acts themselves. He believes that public and private acts lie along a continuum that cannot be arbitrarily demarcated without a clear moral boundary. Finally, Conway suggests that since many personal actions, such as marriage, are necessarily public, the public/private distinction does not adequately preserve an arena of personal freedom.

Conway's last point is an unavoidable weakness of the distinction, but the first two objections are unconvincing. First, the public or private value of an action may be an integral part of its "rightness" or "wrongness," for, physically and biologically, actions are generally neutral and their morality or immorality is in most cases judged with reference to the context of their occurrence. Opposition to sexual obscenity might be founded upon a desire to control the tone of sexual behavior by reinforcing one set of meanings associated with it rather than another. If so, the place and the participants in expression determine its relative desirability. Second, there are many continuums upon which we wish to start and do not desire to finish but where nevertheless the exact stopping point must be arbitrary and conventional. For example, everyone should have equal political and civil rights, but how we define "everyone" is necessarily conventional. It would be foolish to give one-year-olds voting rights, but whether the age at which one receives this right should be twelve, eighteen, twenty-one, or twenty-five can be discussed as a matter of reasoned argument. Therefore, as a basis of compromise between majority and minority rights, the private/public distinction remains the most salient available—a view supported by its acceptance in both of the reports cited above.

2.

THE POLITICAL/NONPOLITICAL DISTINCTION

In the United States, the argument against controls on obscenity is frequently made in the context of the right of free speech under the First Amendment to the Constitution. Yet as Alexander Meiklejohn has pointed out: ". . . the principle of freedom of speech is derived . . . from the necessities of self-government by universal suffrage. . . . The guarantee by the First Amendment is . . . assured only to speech which bears, directly or indirectly upon issues with which voters have to deal—only, therefore, to a consideration of matters of public interest. Private speech, or private interest in speech . . . has no claim whatever to the protection of the First Amendment."⁴ Therefore, it is wrong for the authors of the *Report of the Commission on Obscenity and Pornography* to assert that controls should not be imposed because of the American tradition of free speech.⁵ American history has not been remarkable for libertarianism, except in regard to politically related speech and behavior. This is even more true of a democracy such as Switzerland.

There are borderline cases. Profanity and nudity are sometimes regarded as political expression, or random violence may carry a political message. However, if the courts were not confused by the claim that the First Amendment gave an unlimited right to all expression, they might plausibly determine what is an authentic political message.

4. Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper & Row, 1948), pp. 93–94.

5. *Report of the Commission on Obscenity and Pornography*, pp. 53–54.

But they have been so confused.⁶ Although in the Roth case (1957) the Supreme Court exempted obscenity from coverage by the First Amendment, the stipulation that any redeeming social value would lift a work of art or literature into legality was based more on J. S. Mill than the writers of the Constitution. A more recent (1973) Supreme Court decision that a work must have serious literary, artistic, political, or scientific value to escape potential condemnation as obscene⁷ gives more recognition to the fact that the majority has a right to intervene when it feels there is more social disvalue than value in a particular unit of expression. Yet the court signally fails to distinguish politically and nonpolitically relevant rights and by adding "scientific" appears to rest its justification on utilitarian arguments for freedom that may unfortunately wilt when calculations change. In a majoritarian state, freedom of speech must, instead, be protected by a more absolute but less all-inclusive principle that refers to rational political discourse as an ineluctable requirement of political democracy.

3. A PLAUSIBLE CASE THAT THE MAJORITY CAN CLAIM HARM FROM PUBLIC OBSCENITY

Since regulation of obscenity and pornography limits freedom, and since they bring pleasure to many, their legal restriction in a liberal society cannot be advocated unless a plausible case can be made that lack of restriction does substantial harm to potential majority interests.

Both Mill and Hart assert that only harm to individuals can be a basis of regulation, and primarily harm to individuals other than the actors. But this is hardly a confining limit if the concept of harm may be extended through psychic to social and spiritual harm to individuals or to the society of which they are a part. Three broad extensions of the principle of harm have been proposed.⁸ The first is the conservative hypothesis that since received moral and legal codes are the tested results of trial and error, they are likely to meet social needs better than untested alternatives. The second is the disintegration hypothesis that lack of regulation of conduct offensive to the majority will result in the loss of a unified moral consensus in the community and thus undercut its whole moral structure, washing away finally even the limitations that the most libertarian would hate to lose. In Lord Devlin's hands, the disintegration hypothesis is often defended by an additional consequentialist appeal to what would happen if we were to lose present restraints. It is, then, both a claim that any code is better than none and a claim that the code on which we have built our civilization is apt to be more supportive of social goods common even to libertarians than would be a truly libertarian world. By easy stages, this brings us to the third or majoritarian hypothesis⁹ that the people of any community have a right to legislate their way of life. If wearing

6. See *ibid.*, pp. 295–370.

7. *New York Times* (January 24, 1973).

8. In addition to Hart and Devlin, see C. L. Ten, "Enforcing a Shared Morality," *Ethics* 82, no. 4 (1972): 321–29; and Basil Mitchell, pp. 45–47.

9. Mislabeled "conservative" by Ten, *ibid.*

clothes, for example, is a part of their way of life, they have a right to enforce this custom irrespective of lack of proof as to the harm of individual nudity to others.

These arguments are supportive of control, yet they are not enough for a plausible case. As to the majoritarian hypothesis, in a democracy, of course, a majority can force its will eventually, but this fact does not help us decide whether majorities or their leaders should be taught that they have a right to exert force in a particular sphere of life. Majorities are often wrong and frivolous, and this is one reason for constitutions and basic civil rights. The disintegration hypothesis may be correct—clashing views do lead to instability—but this is a weak case for enforcing old standards. It is true that attitudes about decency in the arts and on the streets have been changing rapidly, and the wide dissemination of pornography is speeding up the change. One result of any social change is instability, and instability has losses. Yet it might be possible in the future to achieve consensus that “anything goes” in obscene expression, and in these terms stability could be restructured. Conservatively, I would argue that those who launch confusion have the heavier burden of proof. Yet this does not alter the fact that the defender of the old assumptions of a society has the responsibility to give a rational case for those assumptions or to suggest revisions in those assumptions that accord with a rational case. A living conservative tradition must be a changing tradition, or else it will fail to preserve social integration, community identity, and cherished values.

In a recent review of the relevant theoretical and empirical evidence for potential harm that has been developed by the social sciences, James Q. Wilson compared two attempts to summarize such evidence for policy purposes in the United States.¹⁰ He found that in both cases the supporting evidence for the conclusions was weak and often only tangentially related to real-world concerns. Nevertheless, the National Commission on the Causes and Prevention of Violence recommended that violence in the media should be controlled, or further investigated with an eye to control, because of the probability that fictional violence may make individuals behave violently. On the other hand, the Commission on Obscenity and Pornography recommended widespread decontrol of sexually explicit materials because no negative results of their general dissemination could be demonstrated. Wilson reasonably surmises that the reason for the disparity between the treatment of the relation between evidence and conclusion in the two reports is due to the bias of their authors against violence and in favor of sex.

Wilson, however, goes on to point out that almost all recent major American studies testing hypotheses that major long-term behavior changes result from particular social policy or educational inputs have provided inconclusive or negative findings. Thus, studies have in recent years shown that the type of school or educational method makes no difference (Coleman report), that Head Start accomplishes little, that prison correction systems produce little gain, and that psychiatry

10. James Q. Wilson, “Violence, Pornography, and Social Science,” *Public Interest* 22 (Winter 1971): 45–61. Even a strong defender of the report of the pornography commission agrees with this analysis. See Weldon Johnson, “The Pornography Report,” *Duquesne Law Review* 10 (Winter 1971): 190–219 (note p. 219).

does little for the patient. He suggests, and it is probably true, that in real-life situations there is too much going on, too many cycles of reinforcement stretched over too many years, for particular interventions to get up out of the noise. Still this does not mean that there is not a great deal of change over time¹¹ and that the arts, the schools, and the media do not participate in positive or negative feedback relationships that eventuate in these changes. Because Head Start did not work very well does not mean early education is not important. As the violence commission report suggests, since advertisers feel that exposure to certain symbols and fictional experiences will influence buying behavior, it is reasonable to suppose that an increasing flow of violent pornography will influence other social behavior. The "no harmful effects" of sexual pornography reported by the pornography commission included an observation that exposure led to a more open attitude toward sex and, after initial increase in sexual interest, a general adaptation to pornography.¹²

But what is behavior? One of the curious aspects of the claim that obscenity and pornography are not significant influences on behavior is that both their production and consumption (direct and indirect) are forms of behavior. In this sense, there are then two significant but not unrelated results of uncontrolled pornography and obscenity. First, we are granted only so much time in our lives, and our minds have only so much capacity for attention at any one time. Therefore, if there is more of X there will be less of Y in our attention. And so if there is more obscenity there is less of something else. Our lives are changed (of course, some not at all, many to a degree, and few greatly changed). Second, the parts of our lives are unlikely to be either watertight compartments or tightly interconnected. The verbal and artistic forms and images we use are just that, and yet at the same time they carry meanings that habituate us to different attitudes and eventually to different qualities of behavior. With the generalization of violent and sexual pornography, our bodies become depersonalized emotive machines with many buttons to push. As Walter Berns writes:

Consider the case of the parent who wants to convince his children of the impropriety of the use of the four-letter verb meaning to copulate. At the present time the task confronting him is only slightly less formidable than that faced by the parent who would teach his children that the world is flat. Until recently propriety required the use of the verb "to make love," and this delicacy was not without purpose. It was meant to remind us—to teach us, or at least to allow us to be taught—that whereas human copulation can be physically indistinguishable from animal copulation generally, it ought to be marked by the presence of a passion of which other animals are incapable. Now, to a quickly increasing extent, the four-letter verb—more "honest" in the opinion of its devotees—is being used openly and therefore without impropriety. The parent will fail in his effort to educate because he will be on his own, trying to teach a lesson his society no longer wants taught—by the law, by the language, or by the schools.¹³

11. For example, a Gallup poll shows a 20 percent drop in the percent opposing premarital sexual relations over the four years 1969–73 (*New York Times* [August 12, 1973]).

12. *Report of the Commission on Obscenity and Pornography*, pp. 139–264.

13. Walter Berns, "Pornography vs. Democracy: The Case for Censorship," *Public Interest* 22 (Winter 1971): 19–20.

As an analogy, let us imagine an attractive but small square in a large city surrounded by medium-sized apartments. Among those who used the square, 25 percent were inclined to be disorderly and kept trash lying around their apartments for days, while 75 percent were neat. However, the square was always neat, for few people dropped trash in the square and a weekly cleaning by the city was quite enough for even its neatest users.

One year, however, 5 percent of the users began to drop their trash in the square. Those disturbed by the change in its appearance asked for the enforcement of antilittering laws, but the courts held that no one was being injured, for there was no danger to health because of the weekly municipal cleanup. Yet, toward the end of each week trash grew so thick that users who had not previously dropped their trash began to become less careful, and so the percentage of litterers grew to at least equal the percentage who were also disorderly inside their own apartments. By now many of those who had formerly enjoyed the square partially because of its appearance stayed away, so that finally more than 50 percent of the users were also litterers, and in the end dropping trash casually about became the social custom. For health reasons cleanup was now three times a week, but with the heavy population it was a rather trashy park most of the time. By now, many of those who formerly had kept clean apartments but had become litterers in public also kept littered apartments.

This is the course of events which those disturbed with pornography and obscenity believe they are witnessing today. I do not know if any court has ruled against littering laws in the way they have against blue laws. But if the question of the extra cost of cleanup were kept out of the legal calculation, I see no reason why in the name of individual freedom the courts should not equally do away with such laws. Why is the filling of the public arena with pornography and obscenity to be regarded as different from the delict of littering? When the movie marquee, newsstands, and popular songs all blare out *Deep Throat* and its equivalents, the city becomes a different place to walk in just as it does when everyone carelessly drops his lunch sack, candy wrapper, or pop bottle. Since everyone's likes and dislikes cannot be accommodated in the same square, the obvious basis of decision as to regulation becomes the desire of the majority of its users.

Let me, then, somewhat formalize the case for restriction of obscenity in perfectionist terms such as those of Rashdall, Moore, or de Jouvenal.

First, I define the moral-action mode as one in which a person assumes that one of his interests will be to act in ways that accord with his highest image of how a man should act. He knows he will have other interests at other times and from other vantage points, but in the moral mode he wants to act in terms of this image, and he wants to advocate that others act in these terms. If we view all actions as basically self-interested, we will assume that the actor believes that his moral actions will improve the esteem in which he is held and thus his status, and that this gain is better than other possible gains. If we assume that an actor can internalize desires to achieve the good of others or of society, then he may act morally or support such action when projected gain to self-esteem outbalances other possible gains pursued by other means.

Since the moral mode is only one of several, there is no obvious hypocrisy in

a society prohibiting obscenity or pornography that most of its members in fact enjoy. One may believe that it would be better for him to eat less ice cream; he will avoid ice-cream shops, but when faced with an ice-cream counter he will always order two scoops.

Let us, then, define morality as action that is guided in the moral-action mode by a reasoned balancing of the claims to consideration of a variety of ultimate goods for man or society, limited by a set of basic moral rules placed outside immediate consideration. A moral society is one that forms its customs and laws in terms of trade-offs within limits among the ultimate goods accepted by its members. The ultimate goods are many, and no two people will have the same list. But moral persons will, in fact, develop lists that have a great deal of overlap.

For the purposes of this discussion I will classify ultimate goods under three headings. First are the goods of pleasure in all of the manifold forms in which they occur. Second are the goods of creativity, the making and doing of something beyond the self. Creativity may be intellectual, technical, organizational, or artistic. Third are the goods of significance. Most people are concerned with their place in time, with their dignity as men and women, with their specialness. It is true of course that heroic generalization would allow us to reduce all goods to those of pleasure. Yet ancient Athens was not as remarkable for the pleasures of its inhabitants as for Athenian creativity and the significance that Athenian high culture gave to man as separate from nature. For many, satisfaction with life does not come from a quantum of fun but from the significance that they find in it. The rights and dignities afforded by policies that guarantee individual freedom offer one basis of individual significance, but not the only one.

In the moral society, limits are placed on the balancing of ultimate goods both because of a mistrust of rationalization and because of the hierarchical relation of ultimate goods. For example, if an analyst hypothesizes basic social rights such as those to food, respect, and life and basic civil rights such as those to freedoms that do not infringe on the freedom of others, he in effect sets limits that he will not recommend infringing except in such extreme circumstances as a danger of imminent destruction of the human race. On the other hand, less basic ultimate goods may in ordinary circumstances be traded off against other personal and social interests in deciding upon moral action.

In order to go beyond conservative, disintegration, and majoritarian hypotheses to build a case for limiting pornography and obscenity, it is necessary to show that it is not irrational for men to value the ultimate goods of creativity and significance equally with those of pleasure. For those who evaluate in these terms, actions that move society away from a balanced mix of the ultimate goods do moral harm to individuals both separately and collectively.

As I have pointed out, moral harm may come in a variety of forms. The *Brave New World* could offer most people manifold pleasures yet fall short in offering what the reader might consider sufficient significance to the average human life. Therefore, the controls of this society would harm its members. Similarly, lack of sufficient discipline may result in a person who is so unable to put off immediate gratification that he falls short of what others consider true humanity. Lack of discipline has harmed this person as surely as dropping a rock on his foot.

In perfectionist terms, the case against obscenity is either that it diminishes man or reduces his creativity. Since the second case depends on an analysis of extensive empirical evidence that I do not have, I shall limit the argument largely to the first. Historically, one way to achieve human significance has been to emphasize the specialness of man either as an individual or as a human group. This may be because many feel that there can be no meaning to a life except to itself if it is a replacable part in a process that could do without it. And to have meaning only to oneself is ultimately to seem to have no meaning at all.

An obvious way to establish meaning is to sharply distinguish human from animal life. No civilization has placed human and prehuman life on a plane, even when, as in Hinduism and Buddhism, animal life is highly respected. Only in recent years has man come, by means of science, to concentrate on the similarities among existences—to flatten all differences, including those between animate and inanimate matter. This is one reason why the naive reaction to Darwin was so strong. If man is only part of a process and probably not a final stage, then his consciousness, ideals, and creativity are only epiphenomena. Since what is really important is his biology, beyond eugenics the reformer's goal can only be to make the progress of individuals through the stages of life as painless as possible for all. For a person to believe that he should really live up to a set of symbolic standards or should not try to get away with whatever he can seems to be to allow oneself to be brainwashed by a social machine justified as oiling the succession of the generations. Self-fulfillment becomes letting everything happen to oneself that can, enjoying all the possibilities before it is too late. From this perspective, even self-actualization is a mocking game.

Maintaining a system of symbolic restraints on language and the arts has historically been a means of underscoring the difference between man and the process from which he emerged. Let me pose as a critical difference between man and animal the development of symbolic systems that allow us to disvalue public viewing of biological processes such as defecation, urination, or sexual intercourse. Why? There is nothing "wrong" with these actions. I suggest that what is wrong, just as what is "wrong" with the naked body, is that they remind us of our biology, of our presymbolic connections. This is why Duncan Williams attacks modern literature as the depiction of *The Trousered Ape*,¹⁴ and this is why he sees pornography as both violent and sexual—the realm of the forbidden and animal in the popular mythology.

The spread of obscenity through the popular arts and up and down the streets can be interpreted as a reflection of the victory of science over religious belief. The Marquis de Sade reasoned that since man was determined and essentially a machine, anything that he might do that he found pleasurable he should do. As Francis Schaeffer has pointed out, as this view of man has come to be popularly accepted, it has been accompanied by an overriding mood of despair in the arts.¹⁵ But literary and artistic critics have gone further to note the resulting shattering of

14. Duncan Williams, *Trousered Apes: A Study in the Influence of Literature on Modern Society* (London: Churchill Press, 1971).

15. Francis A. Schaeffer, *Escape from Reason* (Downer's Grove, Ill.: Intervarsity Press, 1968).

a sense of purpose and order and standards in the arts, with dependence on sex and violence as the most universal and easiest to understand common denominator.¹⁶ It may be plausibly argued, then, that once casual sex and violence fill our viewing and creating lives, this feeds back to further reinforce and popularize a diminished view of man.

The case, then, is that the presentation or acting out of sex or violence in public, or advertising such activities in public, will tend to popularize and familiarize a view of man and an attitude toward the self that will diminish the view that people have of the significance through specialness of human life and also divert creative artists from creative activity through the diversion of the time and money of the public toward an art world whose standards have been undermined, both directly (through taking up the space and time of the audience) and indirectly (through its feedback support of nihilism) by pornography. In the account of some people, the losses in significance and creativity are not made up for by gains in creativity and significance (freedom) released by the decontrol of pornography, or by the gains in sensual pleasure. These judgments are contingent upon a time and place in which nihilism is already far advanced and in which culture as "adversary culture" is the accepted stance.¹⁷ The relative gains and losses in a Victorian age such as that which Freud encountered might well be different.

4.

CONCLUDING NOTE

In making these arguments, it is well to note that I have not tried to prove the contentions of those who would regulate obscenity but only to establish the extent of their moral right. The majority has a moral right to legislate, outside of the political realm, their not unreasonable conclusions as to what should be permitted in public in a moral society. In the case of pornography and obscenity, their representatives can make a plausible case for regulation. Beyond this, for any particular legislation or mode of enforcement, advocates must establish more detailed consequentialist arguments for particular definitions of public and private, political and nonpolitical, and obscenity and pornography before a framework for effective control can be preserved or constructed.

16. In addition to Williams, see Paul Horgan, "The Abdication of the Artist" *Proceedings of the American Philosophical Society* 109, no. 5 (1965): 267-71; Katherine Ann Porter, "A Country and Some People I Love," *Harper's Magazine* 231 (September 1965): 58-68.

17. See Daniel Bell and Irving Kristol, *Capitalism Today* (New York: Basic Books, 1971), p. 22; and Irving Howe, *Decline of the New* (New York: Harcourt, Brace & World, 1963).