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PUBLIC MENACE?**

Edited by

**ROBERT M. BAIRD &
STUART E. ROSENBAUM**

C O N T E M P O R A R Y I S S U E S



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Introduction

What is Pornography?

What are its effects on individuals and society?

What can be done about it?

What should be done about it?

These questions are as important now as they were when this collection first appeared in 1991. The social context in which we now ask these questions, however, is significantly different. Perhaps the most dramatic distinction as concerns the questions of this volume is the increasing prominence of the Internet as a medium of communication, entertainment, and research. The Internet is a new form of connectedness in society. No longer are telephones, magazines, newspapers, and TVs the most promising avenues into citizens' homes. These have been supplanted by computers. Computers offer a more comprehensive medium of connection with the social, political, entertainment, and commercial enterprises of society than any prior sources of access to individuals' homes and resources.

Like those prior sources, computers offer purveyors of pornography new possibilities of access to consumers. The World Wide Web is accessible to a home computer through any Internet service provider. The resources now available to ordinary consumers in the privacy of their homes are

unparalleled in the history of humanity. A few “clicks of a mouse” allows access to almost any source imaginable, including a range of explicit materials that would appeal to any sexual taste. Frequently, such Web sites require payment to the entity maintaining the site by credit card number. *Playboy*, for example, maintains such a site and requires subscribers to give their credit card number to access the more explicit sexual resources of the site. Other sites require only an adult identification number, which is available for a fee from Adult Check, a Web site dedicated to providing adult identification numbers so that sites providing sexually explicit materials can require the number for access. In this way, the sexually explicit sites can ensure that access to more explicit materials is restricted to those over eighteen years of age. Nonetheless, sites requiring credit card or identification numbers are among the minority. A few “clicks of a mouse” enable almost anyone to access materials that would be objectionable to all those who have traditionally objected to the availability of sexually explicit materials.

The World Wide Web, the Internet, is a highly controversial source of sexually explicit materials. The issues about restricting it, about holding providers legally responsible for making sexually explicit materials available to minors, about free speech, about citizen autonomy, and about paternalism are as acute for this new medium as they have been for every previous medium. This new medium—computers, the Internet, the World Wide Web—has become a new focal point for those who campaign against pornography. In February 1995, Nebraska Sen. James Exon introduced the Communications Decency Act in an effort to regulate what was available on the Internet. Senator Exon’s CDA passed by a large majority of both houses of Congress and was signed without controversy by President Clinton. On June 27, 1997, the Supreme Court upheld a district court ruling that the legislation abridged freedom of speech as protected by the First Amendment to the United States Constitution. The first of the five parts of this collection is now an account detailing this legislation and the controversy that did, and still does, surround it. The rest of the collection remains undisturbed in content.

In the earlier edition of this volume, Part One focused on the reports about the issue of pornography of two prestigious national commissions: the Presidential Commission, which delivered its report in 1970, and the Attorney General’s Commission, which delivered its report in 1986. The conflicting findings and recommendations of these two commissions are a measure of our national ambivalence about this issue. The Presidential Commission recommended not to regulate pornography. The Attorney General’s Commission, on the other hand, recommended “as a matter of special urgency” prosecuting producers and distributors of materials portraying sexual violence, and members of the Commission also were unanimous

about the desirability of prosecuting providers of materials they saw as “degrading.”

The issues which motivated the two earlier national commissions remain substantially unchanged. Their current context, however, has made them more urgent. No issue more poignantly elicits ambivalence within ourselves and within our culture than that of pornography. On one hand, we think we must not compromise individual freedom of expression and choice about what materials to see, hear, or read; indeed, we are committed to this idea as a matter of constitutional principle. On the other hand, we think our film, recording, publishing, and Internet service provider industries produce materials harmful to some individuals or to society as a whole.

The goals of the Presidential Commission, the Attorney General’s Commission, and of Senator Exon’s Communications Decency Act were to seek resolution of these competing tendencies within American society. Cynics might be inclined simply to “write off” the commission reports as to-be-expected products of their respective political contexts, the “permissive” report a product of the late ’60s and the “restrictive” report a product of the Reagan-inspired social agenda of the ’80s. A further cynical response to the Exon CDA might see it as a piece of legislation too politically volatile to contest, thus accounting for its passage by a huge majority and for its uncontested signing by the President. The cynicism of these responses would be unfortunate in failing to acknowledge the genuine ambivalence of American attitudes toward pornography. The reports must be taken seriously precisely because they mirror this ambivalence.

Complicating questions about pornography is our reverence for the centrality of sexuality in a fully satisfying human life; we recognize individuals’ sexuality as of profound importance to their happiness. Our recognition of this fact may move us to a tolerance of individual efforts to realize sexual personality that is greater than our customary acceptance of others’ efforts to achieve economic or political goals. We are a society founded on respect for individual autonomy, and we encourage appropriate self-expression in matters of sexuality as well as in matters of economics or politics.

In spite of our general respect for individual sexual autonomy, some would seek to regulate production and distribution of sexually explicit materials in all media. These desires raise the issue of defining pornography, an issue complicated by the need to distinguish it from “mere” erotica and “moral realism.” What people think pornographic and possibly harmful varies widely according to their judgments about the role sexuality ideally plays in human life, their sensitivity to the diversity of sexual expression, and their appreciation of sexuality in literary and artistic contexts. One perspective thinks all sexually explicit representations, pictures in *Playboy* for

example, are pornographic and harmful. A more discriminating view sees sexually explicit representations as pornographic only if they are also “demeaning” or “degrading” to an individual or group (usually women). A still more discriminating view sees sexually explicit representations as objectionable only if they involve portrayals of violence toward an individual or group (usually women).

Complicating the question of how these different classes of sexually explicit materials should be treated is the fact that serious and important works of art not infrequently make use of such sexually explicit portrayals. The attitude of the work toward what is portrayed, its intention or purpose, is of crucial importance in deciding how to regard its sexually explicit representations. As it would be rash and ill-informed to take Tolstoy’s *Anna Karenina* as an endorsement of suicide or Twain’s *Huckleberry Finn* as an endorsement of slavery, it would be equally rash and ill-informed to take the film *9½ Weeks* as an endorsement of profligate or indiscriminate sexual behavior. Judgments about sexually explicit materials must always take into account the larger context of the work as a whole.

When Skywalker Records distributed 2 Live Crew’s album *As Nasty As They Wanna Be*, they hoped for commercial success. They did not anticipate a pornography investigation by Florida’s Broward County sheriff, but when Sheriff Nick Navarro’s deputies warned record stores that selling the album might result in arrest on obscenity charges, Skywalker Records filed a federal complaint asking U.S. District Court Judge Jose Gonzalez for relief from unconstitutional prior restraint. Judge Gonzalez ruled against Skywalker Records in finding the album legally obscene. As the judge put it, “[the album] is an appeal to dirty thoughts and the loins, not to the intellect and the mind. . . . The recording depicts sexual conduct in graphic detail. The specificity of the descriptions makes the audio message analogous to a camera with a zoom lens, focusing on the sights and sounds of various . . . sexual acts. It cannot be reasonably argued that the violence, perversion, abuse of women, graphic depictions of all forms of sexual conduct, and microscopic descriptions of human genitalia contained on this recording are comedic art.”

Most Americans, like Judge Gonzalez, value artistic creativity and freedom of expression. Like Judge Gonzalez, however, when they see individual freedom of expression as harmful and as lacking intellectual, social, or artistic merit, many Americans are not bashful about “calling it as they see it,” and voicing their objection. They believe freedom to speak, to express, and to consume are properly left to individual choice, but when exercise of that freedom yields harm and no overriding reason appears to legitimate the harm, then they think regulation and restriction of individuals’ choices are warranted.

This rationale for censorship is much like the rationale for removing toys found to threaten the health or lives of children from the market. Toy companies may freely exercise their creativity to produce attractive and fascinating toys, but discovering that a product threatens children's safety legitimately results in efforts to remove it from the market. Likewise, when a drug company markets a product in the effort to profit from helping people and the product is subsequently found to yield harmful effects, then we generally think action to remove it from the market is warranted.

As noted above, people have different ideas of pornography, of what kinds of sexually explicit materials are objectionable, harmful, and lacking compensating intellectual, social, or artistic merit. When people do see sexually explicit representations as harmful they seek, by legal action or moral suasion, to remove them from the arena of public commerce. The belief that sexually explicit materials are harmful, however, is quite controversial. Showing a film, playing a musical lyric, or displaying a photograph are difficult to think of as harmful. How could viewing a photograph of unclad, passionately entwined lovers be harmful to the viewer? How could hearing lyrics of a group rapping about being macho and using women as sexual toys be harmful to the listener? If these things are harmful, surely they must appear so in a way very different from the way toys can be harmful to children or drugs can be harmful to their users. Understanding how films, photographs, and lyrics might be harmful to those exposed to them is crucial to understanding the position of those who would prohibit the distribution and consumption of sexually explicit materials.

Two potential harms naturally suggest themselves. The first is the harm of causing injuries to others of the same sort toys and drugs can cause, injuries to health or life. Just as a toy may be found harmful only after experience indicates more accurately than antecedent intentions and expectations how it affects children, likewise experience may indicate that viewing or hearing specific kinds of films, photographs, or lyrics can similarly lead to injuries to health or life. When opponents of pornography cite the testimony of convicted sex offenders about their regular use of sexually explicit materials, they think of themselves as adducing evidence that the offenders' use of those materials caused them to commit their particular crimes. Concern to avert this kind of injury, insofar as it might issue from viewing and hearing films, photographs, or lyrics, motivates empirical research into the causal effects of such materials on their consumers. If people are caused by their experience with some kinds of films, music, or photographs to harm others, then limiting the availability of those kinds of materials is as warranted as restricting the availability of toys or drugs found to be harmful to their users.

Another potential harm some see attending the availability of sexually explicit materials is harm to the values of those who experience it. Insofar as exposed individuals' values might be adversely affected, the larger society of which they are parts would also be adversely affected. A society in which significant numbers of people behave with sufficient disregard for the well being of others is a diminished society, one inadequate to cultivate in its members proper regard for the worth of others. The idea of this sort of harm, harm to individual and societal values, is more elusive and more controversial than the idea of the first sort of harm, injury to health or life. Nevertheless, it has been a powerful motive for feminists and religious leaders who have strong value commitments.

Although these different kinds of harm may seem quite distinct, some feminists and religious leaders have thought that harm to individual or social values might in some indirect way effect significant threats to citizens' health and lives. The "coarsening" of a culture, as George Will puts it in one of the essays that follow, may have behavioral consequences. If the idea of a causal connection among sexually explicit materials, consequent values, and resultant behavior becomes convincing, then less tolerance of pornographic materials, perhaps restrictions on their distribution and production, would be as warranted as current restrictions on pharmaceutical companies' distribution and production of drugs.

Having discovered that pharmaceutical companies, perhaps motivated by their desire to show a profit, occasionally market inadequately tested products, Congress established a federal agency, the FDA, to oversee and regulate their marketing activities. If evidence becomes equally compelling that companies marketing films, recordings, books, and magazines are occasionally, because of concern to make a profit, careless of consumers' health and lives, then perhaps another federal agency, analogous to the FDA and charged with overseeing and regulating film companies and publishers, would come to seem equally necessary.

The main objection to such an oversight agency is that it would be constitutionally unacceptable. The Bill of Rights, incorporating the First Amendment to the United States Constitution, expresses unequivocally our national commitment to freedom of speech and expression. Any law establishing an oversight agency like the FDA, charging it to regulate or restrict freedom of speech or expression on behalf of any particular set of values, no matter how pervasive those values appear in American society, would inevitably be found unconstitutional. The idea of constraints on expression to preserve or endorse particular value commitments is, finally, as un-American as ideas get.

As has been frequently remarked, however, this uniquely American commitment to freedom of speech and expression is not absolute. The

Supreme Court has held that several kinds of speech and expression are not protected by the First Amendment, among them inciting to violence, soliciting crimes, perjury, slander, libel, false advertising, and obscenity.² In spite of this official acknowledgment that some forms of speech and expression are not constitutionally protected, few efforts to restrict publication and distribution of sexually explicit materials have been made and fewer have been successful. In the case of 2 Live Crew's album, *As Nasty They Wanna Be*, Judge Gonzalez did find the album legally obscene, but the net effect on Skywalker Records was positive. While the obscenity finding made the album harder for Broward County residents to acquire, the attendant national publicity brought the album wider notoriety and increased profits for the producer and distributor. Although the sheriff's office successfully defended its actions in court, the producer and distributor were decisively more successful than the sheriff even though they lost the court case. This economic "halo effect" that accrues to producers and distributors in such obscenity proceedings is a reason many people and groups are reluctant to pursue their convictions in the legal arena.

Another reason for their reluctance is the difficulty even of winning such cases in court in view of the rigorous and vague legal standards that must be met. Current standards endorsed by the Supreme Court are as follows:

The basic guidelines for the trier of fact 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.³

The vagueness evident throughout this statement is daunting even to those offended only by the most graphic of sexually explicit publications. The difficulty of proving in court that a publication violates this standard is obvious.

These two problems, the difficulty of winning in court and the likelihood that a court proceeding will increase publicity for, and distribution of, the materials challenged, lead many opponents to avoid legal proceedings.

Suppose, however, that researchers produced convincing evidence that materials alleged to be pornographic or obscene were responsible for causing real harm to health and life. Imagine also that the evidence produced was as convincing as that adduced to establish the harmfulness of certain toys or drugs. Given the current "state of the art" of pornography research and the absence of any clear-cut causal tendency of materials thought pornographic, this supposition may seem unrealistic. Research about materials thought

pornographic may not resolve important causal questions, but real progress is not impossible.

If solid research supported the idea that pornographic materials caused significant threats to health and life, “piecemeal” attacks on those threats such as those of Sheriff Navarro and his deputies would seem even more clearly inadequate and counterproductive. Recourse to a federal agency, on the model of the FDA and charged with monitoring and regulating production and distribution of objectionable materials, might be the only effective way to address the threat to citizens’ health and lives.

Such an agency would be welcomed by many religious leaders and by prominent feminists who think that some kinds of publications, films, and recordings are clearly harmful. The religious leaders typically revere traditional family values, and they see those values threatened by ready availability of sexually explicit materials. The feminists standardly see some kinds of sexually explicit materials as demeaning and harmful to women and as contrary to their own commitment to sexual equality.

Feminists, under the leadership of Andrea Dworkin and Catherine MacKinnon, have already made efforts in the direction of the kind of regulation of publications a federal agency would impose. They authored and saw enacted an antipornography ordinance in Indianapolis, Indiana. The ordinance prohibited any “production, sale, exhibition, or distribution” of materials depicting “the graphic sexually explicit subordination of women, whether in pictures or words” and it made no exception for materials of literary or artistic value.⁴ The inevitable constitutional challenge resulted in a judgment that the ordinance was unconstitutional because it violated the First Amendment’s prohibition against restrictions on freedom of speech.

The feminists’ concerns in pushing for enactment of the Indianapolis ordinance were not lacking in merit. They sought to secure public support for treatment of women as equals worthy of respect rather than as mere means to men’s sexual gratification; indeed, that the ordinance was enacted itself suggests wide sympathy for their position. But the Court’s response to the ordinance suggests that feminists’ efforts to legislate their own values in the matter of sexually explicit publications conflicts with a more fundamental American commitment to freedom of speech and expression. Apart from some solid evidence that real harm—a significantly increased chance of rape or physical/sexual abuse, for example—attends the use of some kinds of sexually explicit materials, the fundamental commitment to freedom of speech and expression will undoubtedly prevail.

What feminists and religious leaders need is evidence that concrete harm attends the use of sexually explicit materials. To date, that evidence is unavailable, and what research there is is controversial. If adequate evidence

were available, court findings might change. The court might even permit congressional enactment of an oversight agency to screen materials suspected of being harmful. But short of such hard evidence, legal developments that would be satisfying to feminists and religious leaders seem unlikely.

We intend the essays of this volume to be informative across the main spectrum of controversy about the issue of pornography. Part One focuses on Senator Exon's Communications Decency Act and commentary relevant to it. Part Two focuses on the range of issues relevant to feminist concern about pornography. Part Three expresses the concerns of those strongly opposed to regulating sexually explicit materials because of their commitment to freedom of speech and expression. Part Four exhibits diverse religious perspectives on the issue of pornography. Part Five focuses on the causal issue, the last essay giving a careful account of relevant empirical research.

Each essay makes a unique contribution to the national conversation about this issue, and we hope readers will take each seriously. The more appreciation interested parties have for the diverse important perspectives relevant to this issue the wiser will be their responses to it.

NOTES

1. Mark Curriden, "But Is It Art," *Barrister* 17, no. 4 (Winter 1990-91): 13-14.
2. Helen Longino, "Pornography, Oppression, and Freedom: A Closer Look," in *Take Back the Night*, ed. Laura Lederer (New York: William Morrow & Co., 1980), p. 50. (This essay is included in the present volume.)
3. *Miller v. California*, 1973, quoted in Alan E. Sears, "The Legal Case for Restricting Pornography," in *Pornography: Research Advances and Policy Considerations*, ed. Dolf Zillman and Jennings Bryant (Hillsdale, N.J.: Lawrence Erlbaum Associates, 1989), p. 333.
4. Ronald Dworkin, "Liberty and Pornography," *The New York Review of Books* 38, no. 14 (August 15, 1991): 12-13. (This essay is included in the present volume.)