

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 9: Liberalism Divided—Democratic Rights/Free Speech/Obscenity

The President's Commission on Obscenity and Pornography (1970)¹

Congress responded to the Supreme Court's decision in Stanley v. Georgia (1969) by funding a commission established by President Johnson to study the effect of obscenity and pornography and make policy recommendations on the basis of that study. The bipartisan commission was chaired by William Lockhart, then dean of the University of Minnesota Law School. At the outset, most persons expected that the commission would challenge the Supreme Court's ruling that persons had a constitutional right to read erotic materials of any sort in the privacy of their homes. After an extensive investigation, which placed particular emphasis on social science findings, however, the Commission reached a very different conclusion. Rather than ban most erotic literature, the Commission recommended more sex education and more frank talk about sex. Indeed, as noted below, the Commission even concluded that some exposure to obscenity was healthy. Both President Nixon and the Senate (by a 60-5 vote) y condemned the Commission's conclusions. Nixon "categorically reject[ed] [the Commission's] morally bankrupt conclusions and major recommendations. Four years later, in Hamling v. United States (1974), a 5-4 judicial majority sustained the conviction of a person who mailed advertisements for the Illustrated Version of the Commission Report.

When reading the following excerpts from the Commission's Report, President Nixon's response, and excerpts from Supreme Court opinions in there supplementary materials, consider how institutional settings may have influenced constitutional positions. Most commission members initially believed that stricter regulation of obscenity was necessary. Their year of study convinced most otherwise. By comparison, both elected officials and Supreme Court justices seemed uninterested in the social science data. Was this simply an historical accident that the members of the commission were more open to persuasion than government officials? Does the experience suggest, contrary to some scholarship, that suggests life tenure frees the justices from politics, that justices are more likely to think like elected officials than academics?

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The Report of the Commission on Obscenity and Pornography

...

EFFECTS ABOUT SEXUAL BEHAVIOR

... In general, established patterns of sexual behavior were found to be very stable and not altered substantially by exposure to erotica. . . .

...

Several studies suggest that there is a correlation between experience with erotic materials and general attitudes about sex: Those who have more tolerant or liberal sexual attitudes tend also to have greater experience with sexual materials. . . .

...

CRIMINAL AND DELINQUENT BEHAVIOR

¹ Excerpt taken from Commission on Obscenity and Pornography, *The Report of the Commission on Obscenity and Pornography* (US Government Printing Office: Washington, DC, 1970).

...
In sum, empirical research designed to clarify the question has found no evidence to date that exposure to explicit sexual materials pays a significant role in the causation of delinquent or criminal behavior among youths or adults.

NON-LEGISLATIVE RECOMMENDATIONS

The Commission believes that much of the "problem" regarding materials which depict explicit sexual activity stems from the inability or reluctance of people in our society to be open and direct in dealing with sexual matters. . . .

...
The Commission believes that interest in sex is normal, healthy, good. . . .

...
The Commission believes that accurate, appropriate sex information provided openly and directly through legitimate channels and from reliable sources in healthy contexts can compete successfully with potentially distorted, warped, inaccurate, and unreliable information from clandestine, illegitimate sources; and it believes that the attitudes and orientations toward sex produced by the open communication of appropriate sex information from reliable sources through legitimate channels will be normal and healthy, providing a solid foundation for the basic institutions of our society.

The Commission, therefore, presents the following positive approach to deal with the problem of obscenity and pornography.

1. The Commission recommends that a massive sex education effort be launched. . . .

...

LEGISLATIVE RECOMMENDATIONS

... The Commission recommends that federal, state, and local legislation prohibiting the sale, exhibition, or distribution of sexual materials to consenting adults should be repealed.

The Commission believes that there is no warrant for continued governmental interference with the full freedom of adults to read, obtain or view whatever such material they wish. Our conclusion is based upon the following considerations.

1. Extensive empirical investigation . . . provides no evidence that exposure to or use of explicit sexual materials play a significant role in the causation of social or individual harms such as crime, delinquency, sexual or nonsexual deviancy or severe emotional disturbances.

...
2. On the positive side, explicit sexual materials are sought as sources of entertainment and information by substantial numbers of American adults. At times, these materials also appear to serve to increase and facilitate constructive communication about sexual matters within marriage. . . .
3. Society's attempts to legislate for adults in the area of obscenity have not been successful. The Constitution permits material to be deemed obscene only if, as a whole, it appeals to the "prurient" interest of the average person, is "patently offensive" in light of "community standards," and lacks "redeeming social value." These vague and highly subjective aesthetic, psychological and moral tests do not provide meaningful guidance for law enforcement officials, juries or courts. As a result, law is inconsistently and sometimes erroneously applied and the distinctions made by courts often appear indefensible. Errors in application of the law and uncertainty about its scope also cause interference with the communication of constitutionally protected materials.

...

6. The foregoing considerations take on added significance because of the fact that adult obscenity laws deal in the realm of speech and communication. Americans deeply value the right of each individual to determine for himself what books he wishes to read and what pictures of films he wishes to see. Our traditions of free speech and press also value and protect the right of writers, publishers, and booksellers to serve the diverse interests of the public. The spirit and letter of our Constitution tell us that government should not seek to interfere with these rights unless a clear threat of harm makes that course imperative. Moreover, the possibility of the misuse of general obscenity statutes prohibiting distribution of books and films to adults constitutes a continuing threat to the free communication of ideas among Americans—one of the most important foundations of our liberties.

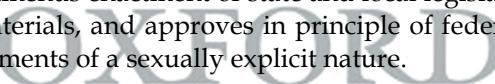
7. . . . We do not believe that the objective of protecting youth may justifiably be achieved at the expense of denying adults materials of their choice. It seems to us wholly inappropriate to adjust the level of adult communication to that considered suitable for children. . . .

...
9. The Commission has also taken cognizance of the concern of many people that the lawful distribution of explicit sexual materials to adults may have a deleterious effect upon the individual morality of American citizens and upon the moral climate in America as a whole. This concern appears to flow from a belief that exposure to explicit materials may cause moral confusion which, in turn, may induce antisocial or criminal behavior. As noted above, the Commission has found no evidence to support such a contention. Nor is there evidence that exposure to explicit sexual materials adversely affects character or moral attitudes regarding sex and sexual conduct.

...
... The Commission takes the view that parents should be free to make their own conclusions regarding the suitability of explicit sexual materials for their children, and that it is appropriate for legislation to aid parents in controlling the access of their children to such materials during their formative years.

...
The Commission believes that only pictorial materials should fall within prohibitions upon sale or commercial display to young persons. . . .

...
The Commission recommends enactment of state and local legislation prohibiting public displays of sexually explicit pictorial materials, and approves in principle of federal legislation . . . regarding the mailing of unsolicited advertisements of a sexually explicit nature.


Richard Nixon, "Statement About the Report of the Commission on Obscenity and Pornography"

Several weeks ago, the National Commission on Obscenity and Pornography—appointed in a previous administration—presented its findings.

I have evaluated that report and categorically reject its morally bankrupt conclusions and major recommendations.

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.

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.

The Commission calls for the repeal of laws controlling smut for adults, while recommending continued restrictions on smut for children. In an open society, this proposal is untenable. If the level of filth rises in the adult community, the young people in our society cannot help but also be inundated by the flood.

Pornography can corrupt a society and a civilization. The people's elected representatives have the right and obligation to prevent that corruption.

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.

The pollution of our culture, the pollution of our civilization with smut and filth is as serious a situation for the American people as the pollution of our once-pure air and water.

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.

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 Supreme Court has long held, and recently reaffirmed, that obscenity is not within the area of protected speech or press. Those who attempt to break down the barriers against obscenity and pornography deal a severe blow to the very freedom of expression they profess to espouse.

Moreover, if an attitude of permissiveness were to be adopted regarding pornography, this would contribute to an atmosphere condoning anarchy in every field—and would increase the threat to our social order as well as to our moral principles.

Alexis de Tocqueville, observing America more than a century ago, wrote, America is great because she is good—and if America ceases to be good, America will cease to be great.

We all hold the responsibility for keeping America a great country—by keeping America a good country.

American morality is not to be trifled with. The Commission on Pornography and Obscenity has performed a disservice, and I totally reject its report.



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