Supplementary Material

Chapter 10: The Reagan Era—Democratic Rights/Free Speech/Obscenity

Meese Commission on Pornography (1985–86)[1]

President Ronald Reagan in 1985 appointed a commission to study obscenity and pornography and make recommendations as to regulation. The Attorney General's Commission on Pornography was chaired by Attorney General Edwin Meese and was staffed primarily by noted social conservatives, most notably James Dobson, the founder of Focus on the Family. The Commission's findings, to the surprise of no one, were far more conservative than the findings made by the Presidential Commission on Obscenity and Pornography in 1970. The Meese Commission found that pornography was both likely to cause violence and was responsible for numerous other socially objectionable behaviors. Critics lambasted the commission for both bad law and bad social science.

The following excerpt is from that report. What harms did the commission believe can be traceable to pornography? How did the Commission reach those conclusions? Are those conclusions sound? What regulations did the Commission endorse? Are those regulations constitutional? Are they likely to be effective? To what extent do you believe the Commission was working within existing legal standards as established by the Supreme Court?

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[W]e start with the presumption that the First Amendment is germane to our inquiry, and we start as well with the presumption that, both as citizens and as governmental officials who have sworn an oath to uphold and defend the Constitution, we have independent responsibilities to consider constitutional issues in our deliberations and in our conclusions. Although we are not free to take actions that relevant Supreme Court interpretations of the Constitution tell us we cannot take, we do not consider Supreme Court opinions as relieving us of our own constitutional responsibilities. The view that constitutional concerns are only for the Supreme Court, or only for courts in general, is simply fallacious, and we do no service to the Constitution by adopting the view that the Constitution is someone else's responsibility. It is our responsibility, and we have treated it as such both in this Report and throughout our deliberation.

[T]he First Amendment cannot plausibly be taken to protect, or even to be relevant to, every act of speaking or writing. Government may plainly sanction the written acts of writing checks backed by insufficient funds, filing income tax returns that understate income or overstate deductions, and describing securities or consumer products in false or misleading terms. In none of these cases would First Amendment defenses even be taken seriously. . . . Providing information to the public about the misdeeds of their political leaders is central to the First Amendment, but providing information to one's friends about the combination to the vault at the local bank is not a First Amendment matter at all.

The regulation of pornography in light of the constraints of the First Amendment must thus be considered against this background—that not every use of words, pictures, or a printing press automatically triggers protection by the First Amendment. Indeed, as the examples above demonstrate, many uses of words, pictures, or a printing press do not even raise First Amendment concerns. . . . [B]oth the states and the federal government have long regulated the trade in sexually explicit materials under the label of "obscenity" regulation. And until 1957, obscenity regulation was treated as one of those forms of regulation that was totally unrelated to the concerns or the constraints of the First Amendment. If the

[1] Excerpt taken from U.S. Department of Justice, *Attorney General's Commission on Pornography: Final Report* (Washington, DC: U.S. Department of Justice, 1986).

aim of the state or federal regulation was the control of obscenity, then the First Amendment did not restrict government action, without regard to what particular materials might be deemed obscene and thus prohibited. . . .

. . . [The] treatment of obscenity by the Supreme Court . . . involves two major principles. The first . . . is the principle that legal obscenity is treated as being either not speech at all, or at least not the kind of speech that is within the purview of any of the diverse aims and principles of the First Amendment. As a result, legal obscenity may be regulated by the states and by the federal government without having to meet the especially stringent standards of justification, often generalized as a "clear and present danger," and occasionally as a "compelling interest," that would be applicable to speech, including a great deal of sexually oriented or sexually explicit speech, that is within the aims and principles of the First Amendment . . .

. . . The second major principle is that the definition of what is obscene, as well as the determination of what in particular cases is obscene, is itself a matter of constitutional law.

> [M]aterial is obscene if *all* three of the following conditions are met:
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> 1. The average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest [in sex]; and
> 2. The work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state [or federal] law; and
> 3. The work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
> 4.
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> . . .

In the final analysis, the effect of *Miller v. California* (1973) . . . and a large number of other Supreme Court and lower court cases is to limit obscenity prosecutions to "hard core" material devoid of anything except the most explicit and offensive representations of sex. As we explained in our Introduction to this part, we believe that the late justice Stewart was more perceptive than he has been given credit for having been in saying of hard-core pornography that he knew it when he saw it. Now that we have seen much of it, we are all confident that we too know it when we see it, but we also know that others have used this and other terms to encompass a range of materials wider than that which the Supreme Court permits to be restricted, and wider than that which

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. . . [W]e remain unpersuaded that the fundamental direction of *Roth v. United States* (1957) and *Paris Adult Theater v. Slaton* (1973) is misguided. Indeed, we are confident that it is correct. Although we do not subscribe to the view that only political speech is covered by the First Amendment, we do not believe that a totally expansive approach is reasonable for society or conducive to preserving the particular values embodied in the First Amendment. The special power of the First Amendment ought, in our opinion, to be reserved for the conveying of arguments and information in a way that surpasses some admittedly low threshold of cognitive appeal, whether that appeal be emotive, intellectual, aesthetic, or informational. We have no doubt that this low threshold will be surpassed by a wide range of sexually explicit material conveying unpopular ideas about sex in a manner that is offensive to most people, and we accept that this is properly part of a vision of the First Amendment that is designed substantially to protect unpopular ways of saying unpopular things. But we also have little doubt that most of what we have seen that to us qualifies as hard-core material falls below this minimal threshold of cognitive or similar appeal.

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In light of this, we are of the opinion that not only society at large but the First Amendment itself suffers if the essential appeal of the First Amendment is dissipated on arguments related to material so tenuously associated with any of the purposes or principles of the First Amendment. We believe it necessary that the plausibility of the First Amendment be protected, and we believe it equally necessary for this society to ensure that the First Amendment retains the strength it must have when it is most needed. This strength cannot reside exclusively in the courts, but must reside as well in widespread

acceptance of the importance of the First Amendment. We fear that this acceptance is jeopardized when the First Amendment too often becomes the rhetorical device by which the commercial trade in materials directed virtually exclusively at sexual arousal is defended. There is a risk that in that process public willingness to defend and to accept the First Amendment will be lost, and the likely losers will be those who would speak out harshly, provocatively, and often offensively against the prevailing order, including the prevailing order with respect to sex. The manner of presentation and distribution of most standard pornography confirms the view that at bottom the predominant use of such material is as a masturbatory aid. We do not say that there is anything necessarily wrong with that for that reason. But once the predominant use, and the appeal to that predominant use, becomes apparent, what emerges is that much of what this material involves is not so much portrayal of sex, or discussion of sex, but simply sex itself. As sex itself, the arguments for or against restriction are serious, but they are arguments properly removed from the First Amendment questions that surround primarily materials whose overwhelming use is not as a short-term masturbatory aid. . . .

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Like any other act, the act of making, distributing, and using pornographic items contains and sends messages. For government to act against some of these items on account of the messages involved may appear as problematic under the First Amendment, but to hold that such governmental action violates the First Amendment is to preclude government from taking action in every case in which government fears that the restricted action will be copied, or proliferate because of its acceptance. Government may prosecute scofflaws because it fears the message that laws ought to be violated, and it may restrict the use of certain products in part because it does not wish the message that the product is desirable to be widely disseminated in perhaps its most effective form. So too with reference to the kind of material with which we deal here. If we are correct in our conclusion that this material is far removed from the cognitive, emotive, aesthetic, informational, persuasive, or intellectual core of the First Amendment, we are satisfied that a governmental desire to restrict the material for the messages its use sends out does not bring the material any closer to the center.

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Although we are satisfied that there is a category of material so overwhelmingly preoccupied with sexual explicitness, and so overwhelmingly devoid of anything else, that its regulation does no violence to the principles underlying the First Amendment, we recognize that this cannot be the end of the First Amendment analysis. We must evaluate the possibility that in practice materials other than these will be restricted, and that the effect therefore will be the restriction of materials that are substantially closer to what the First Amendment ought to protect than the items in fact aimed at by the *Miller* definition of obscenity. We must also evaluate what is commonly referred to as the "chilling effect," the possibility that, even absent actual restriction, creators of material that is not in fact legally obscene will refrain from those creative activities, or will steer further to the safe side of the line, for fear that their protected works will mistakenly be deemed obscene. And finally we must evaluate whether the fact of restriction of obscene material will act, symbolically, to foster a "censorship mentality" that will in less immediate ways encourage or lead to various restrictions, in other contexts, of material which ought not in a free society be restricted. . . .

. . . [Wh]en we do our own researches, we discover that, with few exceptions, the period from 1974 to the present is marked by strikingly few actual or threatened prosecutions of material that is plainly not legally obscene. We do not say that there have been none. Attempted and unsuccessful actions against the film *Caligula* by the United States Customs Service, against *Playboy* magazine in Atlanta and several other places, and against some other plainly non-obscene publications indicate that mistakes can be made. But since 1974 such mistakes have been extremely rare, and the mistakes have all been remedied at some point in the process. While we wish there would be no mistakes, we are confident that application of *Miller* has been overwhelmingly limited to materials that would satisfy anyone's definition of "hard core."

Even without successful or seriously threatened prosecutions, it still may be the case that the very possibility of such an action deters filmmakers, photographers, and writers from exercising their creative abilities to the fullest. Once it appears that the likelihood of actual or seriously threatened prosecutions is

almost completely illusory, however, we are in a quandary about how to respond to these claims of "chilling." We are in no position to deny the reality of someone's fears, but in almost every case those fears are unfounded.

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. . . Since the clinical and experimental evidence supports the conclusion that there is a causal relationship between exposure to sexually violent materials and an increase in aggressive behavior directed towards women, and since we believe that an increase in aggressive behavior towards women will in a population increase the incidence of sexual violence in that population, we have reached the conclusion, unanimously and confidently, that the available evidence strongly supports the hypothesis that substantial exposure to sexually violent materials as described here bears a causal relationship to antisocial acts of sexual violence and, for some subgroups, possibly to unlawful acts of sexual violence.

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Sexual violence is not the only negative effect reported in the research to result from substantial exposure to sexually violent materials. The evidence is also strongly supportive of significant attitudinal changes on the part of those with substantial exposure to violent pornography. These attitudinal changes are numerous. Victims of rape and other forms of sexual violence are likely to be perceived by people so exposed as more responsible for the assault, as having suffered less injury, and as having been less degraded as a result of the experience. Similarly, people with a substantial exposure to violent pornography are likely to see the rapist or other sexual offender as less responsible for the act and as deserving of less stringent punishment.

These attitudinal changes have been shown experimentally to include a larger range of attitudes than those just discussed. The evidence also strongly supports the conclusion that substantial exposure to violent sexually explicit material leads to a greater acceptance of the "rape myth" in its broader sense—that women enjoy being coerced into sexual activity, that they enjoy being physically hurt in sexual context, and that as a result a man who forces himself on a woman sexually is in fact merely acceding to the "real" wishes of the woman, regardless of the extent to which she seems to be resisting. The myth is that a woman who says "no" really means "yes," and that men are justified in acting on the assumption that the "no" answer is indeed the "yes" answer. We have little trouble concluding that this attitude is both pervasive and profoundly harmful, and that any stimulus reinforcing or increasing the incidence of this attitude is for that reason alone properly designated as harmful.

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An enormous amount of the most sexually explicit material available, as well as much of the material that is somewhat less sexually explicit, is material that we would characterize as "degrading," the term we use to encompass the undeniably linked characteristics of degradation, domination, subordination, and humiliation. The degradation we refer to is degradation of people, most often women, and here we are referring to material that, although not violent, depicts people, usually women, as existing solely for the sexual satisfaction of others, usually men, or that depicts people, usually women, in decidedly subordinate roles in their sexual relations with others, or that depicts people engaged in sexual practices that would to most people be considered humiliating. Indeed, forms of degradation represent the largely predominant proportion of commercially available pornography.

With respect to material of this variety, our conclusions are substantially similar to those with respect to violent material, although we make them with somewhat less assumption than was the case with respect to violent material. The evidence, scientific and otherwise, is more tentative, but supports the conclusion that the material we describe as degrading bears some causal relationship to the attitudinal changes we have previously identified. That is, substantial exposure to material of this variety is likely to increase the extent to which those exposed will view rape or other forms of sexual violence as less serious than they otherwise would have, will view the victims of rape and other forms of sexual violence as significantly more responsible, and will view the offenders as significantly less responsible. We also conclude that the evidence supports the conclusion that substantial exposure to material of this type will increase acceptance of the proposition that women like to be forced into sexual practices, and, once again, that the woman who says "no" really means "yes."

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We need mention as well that our focus on these more violent or more coercive forms of actual subordination of women should not diminish what we take to be a necessarily incorporated conclusion: Substantial exposure to materials of this type bears some causal relationship to the incidence of various nonviolent forms of discrimination against or subordination of women in our society. To the extent that these materials create or reinforce the view that women's function is disproportionately to satisfy the sexual needs of men, then the materials will have pervasive effects on the treatment of women in society far beyond the incidence of identifiable acts of rape or other sexual violence. We obviously cannot here explore fully all the forms in which women are discriminated against in contemporary society. Nor can we explore all of the causes of that discrimination against women. But we feel confident in concluding that the view of women as available for sexual domination is one cause of that discrimination, and we feel confident as well in concluding that degrading material bears a causal relationship to the view that women ought to subordinate their own desires and beings to the sexual satisfaction of men.

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Our most controversial category has been the category of sexually explicit materials that are not violent and are not degrading as we have used that term. They are materials in which the participants appear to be fully willing participants occupying substantially equal roles in a setting devoid of actual or apparent violence or pain. . . .

. . . A larger issue is the very question of promiscuity. Even to the extent that the behavior depicted is not inherently condemned by some or any of us, the manner of presentation almost necessarily suggests that the activities are taking place outside of the context of marriage, love, commitment, or even affection. Again, it is far from implausible to hypothesize that materials depicting sexual activity without marriage, love, commitment, or affection bear some causal relationship to sexual activity without marriage, love, commitment, or affection. There are undoubtedly many causes for what used to be called the "sexual revolution," but it is absurd to suppose that depictions or descriptions of uncommitted sexuality were not among them. Thus, once again our disagreements reflect disagreements in society at large, although not to as great an extent. Although there are many members of this society who can and have made affirmative cases for uncommitted sexuality, none of us believes it to be a good thing. A number of us, however, believe that the level of commitment in sexuality is a matter of choice among those who voluntarily engage in the activity. Others of us believe that uncommitted sexual activity is wrong for the individuals involved and harmful to society to the extent of its prevalence. Our view of the ultimate harmfulness of much of this material, therefore, is reflective of our individual views about the extent to whether sexual commitment is purely a matter of individual choice.

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Perhaps the largest question, and for that reason the question we can hardly touch here, is the question of harm as it relates to the moral environment of a society. There is no doubt that numerous laws, taboos, and other social practices all serve to enforce some forms of shared moral assessment. The extent to which this enforcement should be enlarged, the extent to which sexual morality is a necessary component of a society's moral environment, and the appropriate balance between recognition of individual choice and the necessity of maintaining some sense of community in a society are questions that have been debated for generations. . . . We all agree that some degree of individual choice is necessary in any free society, and we all agree that a society with no shared values, including moral values, is no society at all. . . .

Thus, with respect to the materials in this category, there are areas of agreement and areas of disagreement. We unanimously agree that the material in this category in some settings and when used for some purposes can be harmful. None of us think that the material in this category, individually or as a class, is in every instance harmless. And to the extent that some of the materials in this category are largely educational or undeniably artistic, we unanimously agree that they are little cause for concern if not made available to children are foisted on unwilling viewers. But most of the materials in this category would not now be taken to be explicitly educational or artistic, and as to this balance of materials our disagreements are substantial. Some of us think that some of the material at some times will be harmful, that some of the material at some times will be harmless, and that some of the material at times will be beneficial, especially when used for professional or nonprofessional therapeutic purposes. And some of

us, while recognizing the occasional possibility of a harmless or beneficial use, nevertheless, for reasons stated in this section, feel that on balance it is appropriate to identify the class as harmful as a whole, if not in every instance. We have recorded this disagreement, and stated the various concerns. We can do little more except hope that the issues will continue to be discussed. But as it is discussed, we hope it will be recognized that the class of materials that is neither violent nor degrading, as it stands, is a small class, and many of these disagreements are more theoretical than real. Still, this class is not empty, and may at some point increase in size, and thus the theoretical disagreements may yet become germane to a larger class of materials actually available.

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The pattern of harm documented before the Commission, taken as a whole, supports the conclusion that the pornography industry systematically violates human rights with apparent impunity. The most powerless citizens in society are singled out on the basis of their gender—often aggravated by their age, race, disability, or other vulnerability—for deprivations of liberty, property, labor, bodily and psychic security and integrity, privacy, reputation, and even life.

So that pornography can be made, victims have been exploited under conditions providing them a lack of choice and have been coerced to perform sex acts against their will. Public figures and private individuals alike are defamed in pornography with increasing frequency. It is also foreseeable, on the basis of our evidence, that unwilling individuals have been forced to consume pornography, in order to pressure or induce or humiliate or browbeat them into performing the acts depicted. Individuals have also been deprived of equal access to services, employment or education as a result of acts relating to pornography. Acts of physical aggression more and more appear tied to the targeting of women and children for sexual abuse in these materials.

Through these means, the pornographers' abuse of individual members of protected groups both victimizes them and notifies all of society that such abuse of them is permitted. This in turn serves to terrorize others in their group and contributes to a general atmosphere of bigotry and contempt for their rights and human dignity, in an impact reminiscent of the Ku Klux Klan. Respect for law is undermined when such flagrant violations go unchecked—even more so when they are celebrated as liberties protected by government.

We therefore conclude that pornography, when it leads to coerced viewing, contributes to an assault, is defamatory, or is actively trafficked in, constitutes a practice of discrimination on the basis of sex. Any legal protections which currently exist for such practices are inconsistent with contemporary notions of individual equality.

The Commission accordingly recommends that the legislature should conduct public hearings and consider legislation affording protection to those individuals whose civil rights have been violated by the production or distribution of pornography. The legislation should define pornography realistically and encompass all those materials, and only those materials, which actively deprive citizens of such rights. At a minimum, claims could be provided against trafficking, coercion, forced viewing, defamation, and assault, reaching the industry as necessary to remedy these abuses, consistent with the First and Fourteenth Amendments.