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pornography and law

Brajesh rajak, National Law School of India University

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Introduction:

Pornography refers to material that “the average person, applying contemporary community standards, would find that the work taken as a whole appeals to the prurient interest.”\footnote{Black law dictionary.} Every pornographic material is considered as obscene in common parlance. However, pornography is subset of obscenity.

In this project, I have tried to answer the main question that why pornography should be prohibited by law? Should it be prohibited because it is immoral or because it causes harms or because it is not a speech or because it may lead to sexual crimes or due to any other reasons?
Pornography and Law

Pornography tends to corrupt public morals by its indecency applying contemporary community standards. Public morals are the collection of views, ethics and ideologies that define people’s usual course of life. These morals are not always associated with reason or logic. According to Dany Lacombe pornography as an immoral phenomenon only originated in the 19th century only. Before this century, pornography was privileged for bourgeoisie. However with the upcoming of new century, to control and preserve their privilege, they termed it as immoral which depraves and corrupts the mind of women, children and lower strata of society. Due to externality, pornography became immoral for them also.

Actually it does not matter why and how pornography is being considered immoral in society. After all there is nothing naturally immoral. The fact that now it is considered immoral in society by majority is sufficient to regard is as an immoral element. However, the issue is whether the majority may use the power of the State to enforce these morals on the whole of society through operation of the law? If law purports to enforce majority view of morality then the law would not cater the vital interest of all those from whom it demands obedience. In modern world the standard of morality is changing according to the place and time. That is why the argument against pornographic laws is being shifted from morality to harm caused by it. Now it is believed that the governing majority in a

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2 However it may have some causal explanations behind their existence like human vulnerability, approximate equality, limited altruism, limited resources and limited understanding and strength of will. see H.L.A. Hart, Concept of Law 197 (Oxford: Oxford Universal Publication, 1970).
4 Professor Michael Perry noted, ‘There is not just one morality in the world; there are many.’ See Michael J. Perry, Morality and Normativity, “Legal theory” available at http://ssrn.com/abstract=1009604.
5 In United States of America, gay bath house were shut down by the former New York governor, not due to immorality of gayness but due to the peril of spreading AIDS in 1980. see Bernard E. Hardcourt, “The collapse of the harm principle” 90(1) The Journal of Criminal Law and Criminology 111 (Autumn, 1999). Available on www.westlaw.com. In a recent case involving question of legality of virtual child pornography Ohio Supreme Court relied on harm principle and said that virtual child pornography is legal because it does not cause any harm to children even if it may be considered as immoral. See State of Ohio v. Tooney, full judgement available on
State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice. The question is should we prohibit pornography even if it is only immoral and does not cause harm to anybody. If no body is harmed then what are we prosecuting? Are we prosecuting the freedom of speech of any citizen? This is also another reason why the argument for pornography is shifted to harm from morality.

According to John Stuart Mill, the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. The fact that the exercise of power is for his own good or for advancing morality, is not a sufficient warrant. So, the justification behind the laws against strip clubs, dance bars or brothels should be the harm caused by them to the community, not morality of them. However, today the issue is no longer whether the moral offences causes harm, but rather what type of and what amount of harm the challenged conduct causes and how to compare the harms. On those issues the harm principle is silent. Harm principle doesn’t tell us how to compare harms. For example both Pornography and liquor cause harm to society. But the harm caused by each of them is different in type. Whereas liquor may harm human body, pornography may deprave or corrupt the minds of people which ultimately lead to commission of sexual crimes. As a result the harm principle no longer acts as a limiting principle in field of legal enforcement of morality. So, neither morality nor harm principle are the sole factor to judge validity of anti-pornography law.

So, is there any third factor which can be considered to judge the validity of anty-pornography laws? Let’s consider freedom of speech. Pornography can be justified in the


6 Lawrence v. Texas, 539 U.S. 558 (Stevens, J., dissenting)).
name of freedom of speech and expression only if it is considered as a part of speech and expression. Some prominent scholars have argued that pornography is not speech at all but only conduct. However, this view cannot be considered as true. Pornography is not a conduct but speech because it is about transpiring and communicating one's ideas and perceptions about an object which may be a photo or even women. Conduct is the effect of such ideas on its bearer.

So, it is established by now that pornography is speech not conduct. The next question is that is it protected or curtailed by law? Plato very insistently forbids from putting any restrictions on freedom of speech. Thus freedom of speech cannot be curtailed at any cost. By the same logic, pornography also can not be restricted at any cost. However laws like Article 19 (2) of Indian constitution permits to restrict freedom of speech in order to maintain public order and preserve morality. Thus Freedom of speech does not enjoy complete immunity in India. In United States also pornography is not completely protected under 1st amendment. Child pornography is still considered as illegal. But why does the law prohibit pornography or freedom of speech? Why the legislature and Courts is persuaded that something very bad happens when citizens contemplate obscene materials. So the question is what that is and why it is supposed to be so bad?

The answer to this question is that pornography arouses sexual fantasies. Pornographic laws usually prevent only those objects which incites formation of certain thoughts,

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9 Cass Sunstein argued that pornography is not really speech because the ‘message’ of pornography is communicated indirectly and not through rational persuasion, see Cass R. Sunstein, Pornography and the First Amendment, 1986 Duke L.J. 589, 616-17 (1986). Frederick Schauer’s argues in the same way that pornography should receive no protection because it is “designed to produce a purely physical effect.” Catharine MacKinnon, the high-profile critic of pornography, argues, ‘in pornography, consumers are not consuming an idea any more than eating a loaf of bread or consuming the ideas on its wrapper or the ideas in its recipe.” see John M. Kang, TAKING SAFETY SERIOUSLY: USING LIBERALISM TO FIGHT PORNOGRAPHY, 1 15 MIJGL 1, Michigan Journal of Gender and Law, 2008.

10 He says that “Then we must not only compel our poets, on pain of expulsion, to make their poetry the express image of noble character; we must also supervise craftsmen of every kind and forbid them to leave the stamp of baseness, license, meanness, unseemliness, on painting and sculpture, or building, or any other work of their hands; and anyone who cannot obey shall not practice his art in our commonwealth.” See David Copp, Susan Wendell; Pornography and Censorship, 4 (Buffalo: Prometheus books, 1983), available at www.questia.com.
typically, erotic ones, in the minds of willing viewers.\textsuperscript{11} Booth observes that our understanding of any text develops and changes in conversation with others.\textsuperscript{12} So, having intercourse with a girl and transmitting about that experience through picture, writing or any other means are not the same thing. Thus pornography is a medium to arouse sexual fantasies which may lead to sex crimes. However, the feelings, ideas or fantasies aroused by pornography are not by itself blameworthy. For example watching a crime movie can lead one’s desire to become wealthy by robbing a bank. That does not mean that desire to become wealthy (desire to have sex in case of pornography) is culpable but the mean to acquire it is culpable. So, by the same logic watching a crime movie or seeing a pornographic magazine is also not culpable.

The harms of pornography depend on the perspective of people. Criminals will commit crimes irrespective of the medium. Rapists will rape whether they read pornographic material or not. Professor McKinnon was right in saying that opponents of pornography have been held to an unreasonably strict standard of causation.\textsuperscript{13} Do countries that have criminalized pornography have no sexual crimes or less sexual crimes? In a country like India, which has criminalized pornography and has much legislation to control it, rape is the fastest growing crime. The number of rapes in India has been increased by 733.8 \% in India in 2007 from 1971.\textsuperscript{14} If one compares between rape per thousand people between India and Japan (more paternalistic country) [0.0143187/ 0.017337], there is not much difference irrespective of the fact that India had stricter laws for pornography.\textsuperscript{15} Sexual crimes are the questions of criminal psychology not of morality or of law.

The next question is does pornography really corrupts or depraves the minds of those in whose hands it may likely to fall and therefore leads to sexual crimes? A report of the Committee on Obscenity and Film Censorship, which was published in 1979 suggested that Pornography should not be prevented from the users who are willing to consume it

\textsuperscript{12} Andrew Koppelman, DOES OBSCENITY CAUSE MORAL HARM, 13 \textit{105 CLMLR} 1635, Columbia Law Review, June, 2005
\textsuperscript{15} http://www.nationmaster.com/graph/cri_rap_per_cap-crime-rapes_per_capita.
because it does not depraves the minds of people to such extent that they would commit crimes. However, Meese Commission Report published in 1986, said that in long run people get affected by pornography and it works as instigating factor in committing sex-crimes. Thus there is still not consensus between all the reports on ill effects of pornography. So, we can say that it is not always that the objects which appeals to the prurient interest of an average person always depraves or corrupts the minds of youth. Thus there is no proper justification to validate anti-pornography laws.

Finally let’s consider Andrea Dworkin’s argument against pornography. She thinks that pornography dehumanizes women by portraying them as objects and commodities and commercializes them in market. Even if we accept that pornography commercializes women it is no justification to ban pornography because industries like glamour industry also commercializes women. The difference between both the commercialization is only that glamour industry commercializes women without her private parts whereas pornography commercializes women with her private parts. Although this is an argument ad homonym but this argument assails the basic premises of her argument by asking a simple question that is really commercialization of women’s body a culpable thing? According to Alan Soble, pornography will become just like another activity in human life because people would be less obsessed with sex due to freely production of pornographic material for mutual satisfaction of men and women in a condition where alienation associated with production and consumption ceases to exist and workers will get true value of their work. Thus in a communist society commercialization of women’s body is worthy and produces benefit for both society as well as workers.

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17 Meese Commission Report, Available at cultronix.eserver.org/california/meese/ - 25k. accessed on 22/10/08.
There may be one argument that the present society is not a communist society and workers are being exploited in pornographic industry, so pornography should be legalized to protect the workers from being exploited. However, Illegalizing pornography is not a solution for ill treatment of women in pornographic industry. Government should take action for the betterment of women working in pornographic industry under labour laws or industrial laws. Government agenda should be to tackle the harm caused to the women and not to start a moral crusade against pornography. Thus after considering all the factors again, I think that the best way is to decriminalize or illegalize pornography.

Conclusion

Let’s again reexamine all the factors in brief. Morality varies according to place and circumstances. In the modern world of internet which has no boundaries, morality has no role to play. As far as the question of harms of pornography are concerned, there is not adequate evidence to support the ill effects of pornography. State can not interfere with the right of freedom of speech and expression of a citizen. He is free to watch whatever he wants to, except in certain conditions which need freedom of speech to be controlled to maintain social order.

To punish a person who is doing an immoral act is not always required in criminal law. For example an student who sees a person raping a girl and does nothing to prevent it, can not be punished under criminal law. However, he can be given moral sanctions in society like giving him a bad character certificate which would make him inapt to get any job. By the same logic, a person dealing with pornography also commits an immoral act, he should be given moral sanctions not legal sanctions.

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20 Example taken from Louis F. Del Duka, Enriching the Law School Curriculum in an interrelated world learning from each other, (26 Penn St. Int'l L. Rev. 831) 7 (2008).