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Pornography as a Species of Second-Order Sexual Behaviour. A Submission for Law Reform*

R. A. Samek*

1. Preliminary

The immediate subject-matter of law reform is law, and the immediate reason for reforming the law is dissatisfaction with the law as it is; but the ultimate subject-matter of law reform is the human behaviour contained in a social practice, and the ultimate reason for reforming the law is dissatisfaction with such behaviour. The immediate task of the law reformer is to bring about a change in the legal rules; but his ultimate task is to bring about a change in human behaviour. Hence, law reform ultimately presupposes a set of evaluative standards according to which human behaviour can be evaluated. If the human behaviour leaves nothing to be desired, then the law can be left alone except perhaps to make it more elegant. If, on the other hand, dissatisfaction is felt with the human behaviour, the relevant legal rules must be looked at. Perhaps they can be changed so as to produce the desired human behaviour; perhaps nothing can be done, the case being simply one in which human behaviour will not respond to legal pressure, or the necessary pressure will be so great as to involve more unsatisfactory behaviour than it will be able to cure.

Section 11 of the *Law Reform Commission Act* sets out the objects of the Commission:

> The objects of the Commission are to study and keep under review on a continuing and systematic basis the statutes and other laws comprising the laws of Canada with a view to making recommendations for their improvement, modernization and reform, including, without limiting the generality of the foregoing,
>
> (a) the removal of anachronisms and anomalies in the law;

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> (b) the reflection in and by the law of the distinctive concepts and institutions of the common law and civil law legal systems in Canada, and the reconciliation of differences and discrepancies in the expression and application of the law arising out of differences in those concepts and institutions;
> (c) the elimination of obsolete laws; and
> (d) the development of new approaches to and new concepts of the law in keeping with and responsive to the changing needs of modern Canadian society and of individual members of that society.[1]

Sub-sections (a) and (c) merely stress the value of tidiness. Sub-sections (b) and (d) reflect the two somewhat clashing ideals of liberal democracy: the regard for established tradition, and the need to keep it in tune with the changing needs of society and its individual members. Unfortunately, the statement of the former in (b) refers to the existing legal framework partly with reference to itself. In consequence, the ultimate task of the law reformer tends to become overshadowed by his immediate task. Instead of seeing his task as the *social* one of evaluating actual human behaviour and bringing about changes in the social practice in which it is contained, he tends to see it simply as the *legal* one of evaluating and reforming the existing law. Thus, in the area under discussion, the task of the law reformer tends to appear to him as one of evaluating and reforming the law of obscenity, and not as one of evaluating and changing the human behaviour contained in the social practices of reading certain books and magazines, seeing certain films, etc.

In short, I submit that law reform has a social as well as a legal aspect, and that the former should be predominant. The recognition of the social aspect of law reform is important for two main reasons: First, it makes us realize that we are ultimately concerned with evaluating human behaviour according to certain evaluative standards, and changing it through the instrumentality of the law where this is thought desirable. Hence, we will focus on the kind of human behaviour that we want to see continued in a social practice, and the kind that we do not want to see so continued. We will look at law as a tool

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1. R.S.C. 1970 (1st. Supp.), c. 23.

for bringing about desired social changes, and not as the subject-matter or object of law reform in its own right.

The recognition of the social aspect of law reform is also important for another reason. The existing legal framework may have been misconceived, or it may have become hopelessly tangled. Consequently, if we conceive our task as simply one of reforming the law, we may find our efforts stultified by the mould in which the law has been cast. This may lead us wrongly to conclude that our choice is limited to either merely tinkering with the present unsatisfactory legal framework, or renouncing legal control of the human behaviour in question altogether. These are precisely the horns of the false dilemma that threaten to impale the would-be reformers of the law of obscenity; they seem to have only the choice of tinkering with an intrinsically inadequate legal framework, or giving up any hope of legal control in the area.

If we bear in mind the social aspect of law reform, the threat of this dilemma is removed. Indeed, a little reflection should show it up to be false. As long as we know the kind of human behaviour we want to control, *and* as long as it is possible to control it with advantage through *a* legal framework, it can be so controlled, even though it cannot be controlled through the existing legal framework. However, we must have a clear idea of what we want to control. Indeterminacy of aim is a standing danger of legal concepts. In a system such as the common law, concepts grow up organically and are bent by the prevailing social and doctrinal winds. A concept with strong roots will adapt itself to these twists and turns at different stages of its development and emerge stronger than ever. A concept with weak roots, on the other hand, will become stunted and die. In such a case it is better to bury the old concept, and start afresh, though we should salvage from it as much as we think is useful. Thus, not all that has been done in the name of obscenity has been in vain.

So far I have dealt with the legal and social aspects of law reform. The former focuses on the existing legal framework, the latter on the human behaviour contained in the social practice which the legal framework purports to control. Of course, eventually these two aspects must be brought together. The old concepts must be taken out, or modified, to make room for the new. This cannot be done through a process of internal reform

of the law; it must be done through a process of external reform in response to the needs of the external social situation.

The semantic aspect of law reform is often entangled with the legal aspect. The task of the law reformer is conceived as one of defining the *essence* of the meaning of the legal concepts under investigation. This metaphysical approach to legal concepts is just as much doomed to failure as the metaphysical approach to philosophical concepts. It typically takes the form of the "What is?" type of question, which leads to a wild goose chase after the true essence of the concept. "What is (the essence of) obscenity?" does not lend itself to a true or false answer any more than the question "What is (the essence of) time?" Legal concepts do not have one true essence which can be found, any more than philosophical or any other concepts.

Contrary to the belief of many linguistic philosophers, ordinary language does not provide a way out. Metaphysical questions cannot be reduced to ordinary language questions, for they are by definition not concerned with ordinary language problems. The question "What is time?" cannot be answered by cataloguing all the ordinary usages of the concept or word "time". Similarly, the difficulties of legal concepts, such as the concept of obscenity, cannot be cured by an appeal to ordinary language. Ordinary language usage may be a useful guide to both a philosopher and a lawyer, but it cannot provide them with answers for the simple reason that they are not looking for that kind of answer. They have different *points of view.*

Law reform *has* a semantic aspect. Law should be perspicuous, that is, as perspicuous as possible. The task of the law reformer, however, is not limited to the polishing of legal concepts so that they display their meaning; and even this limited task cannot be achieved by polishing legal concepts in the image of ordinary concepts. The law reformer, as I have already indicated, should be ultimately concerned with social problems. It is bad enough if he reduces social problems to merely legal problems. If he reduces legal problems to ordinary language problems, all hope of adequate law reform is lost. The dismemberment of law into an infinite number of legal atoms, each endowed with its own essence, leads naturally to this kind of reduction. Law makes use of ordinary language, and the spell of this language is so strong that lawyers tend to forget that they use it from a very special point of view. Hence, the quest

for the essence of legal concepts tends to get confused with the search for the meaning of ordinary concepts. Thus the spell of the ordinary language concept of obscenity tends to bind the most sophisticated lawyer in his search for its legal essence. Obscenity, it is reasoned, after all is obscenity and not something else.

This kind of approach leads to the wrong diagnosis of the problem and therefore to the wrong solution. The law of obscenity is concerned with human behaviour, with social practices. If it has failed, it has failed because it did not exert the desired kind of control. The solution lies in developing a legal framework that can do the job which we want done and which the concept of obscenity has failed to do; it does not lie in extracting the essence of the legal concept of obscenity, and *a fortiori* it does not lie in extracting the essence of the ordinary language concept. Conversely, failure to extract the legal essence of obscenity does not show that there is no case for control in this area of human behaviour; it only shows that this particular means of control has failed. One of the great dangers of the approach which I have criticized is that it tends to lump together quite distinct problems under the cloak of essential homogeneity. The question "Do we want to control obscenity?" is already misleading. It oversimplifies the problem by putting a large number of diverse problems into the one essential basket of obscenity. Yet, clearly, we may think it desirable to control some alleged instances of obscenity, and not others. This, of course, has been recognized to some extent. Nevertheless, a master concept of the essence of obsenity continues to magnetize the whole area, giving the false appearance of affording the solution to all the problems by one simple act of understanding its essence.

Alas, there is no such simple solution. Not only must we look differently at different areas of human behaviour; we must look to different means of controlling the human behaviour in these areas. We must not be in advance fired, or repelled, by an all embracing concept of obscenity that we must follow through thick and thin. We may find it useful to bend the concept to our needs, stipulating that this is obscene, and that not; that one case requires control through the criminal law, another by an administrative device, and another still be left to informal moral sanctions. We may also find, however, that such a model

concept, bent as it is this way and that, would be more of a hindrance than a help.

What have I achieved so far? I have not just played with words. I have submitted that the task of law reform is something more than a reform of the law, that it is ultimately concerned with human behaviour which forms the content of a social practice. Our attitude to such behaviour, and to controlling it, will depend on our values. The case for reforming the law in a certain way is always subjective in as much as it can only be justified according to the speaker's subjective evaluative standards. No proposal for law reform can be true or false. Subjectiveness is not the same as arbitrariness. Subjective standards have to be justified if they are to qualify as rational. Moreover, the subjectiveness of the evaluative standards applied in a democratic society cannot be too far ahead of public opinion, or lag too far behind it. A political balance is essential. In a pluralistic society such as ours, consensus across the board, except on absolute fundamentals, is unlikely to be obtained. The best we can hope for is a compromise, and a tilting of the compromise this way and that, reflecting the strength of geographical and group biases. The Commission rightly set itself the aim of achieving a broad consensus: The law depends upon a broad consensus to achieve an effective ordering of social relations in a democratic society. In pursuing our objectives we envisage the process of law reform as involving a reciprocal educative function.[2]

2. *Pornography as a Species of Second-Order Sexual Behaviour*

In this submission I shall be, like the Study Paper, mainly concerned with what is commonly known as pornography. I shall not, however, follow the predominantly legal approach of the Study Paper, but attempt to look at the subject in a new light. For that purpose, I shall first introduce a distinction between first-order and second-order sexual behaviour, and then relate this distinction to the concept of undue commercial exploitation of sex which seems to me to offer the key to the legal solution of the social evil of pornography. It will be clear from what I have said already that there is no one *true* diagnosis

2. *Law Reform Commission of Canada, Research Program 1*, at p. 6.

of the problem, and no one true solution. I am not claiming that my approach is the only way of approaching the problem, or of solving it. Indeed, the problem is too complex to fit into any one framework, or to be disposed of by any one solution. As long as an approach takes us some of the way, we should be satisfied.

To come now to my distinction between first-order and second-order sexual behaviour: By first-order sexual behaviour I mean any overt sexual behaviour, normal or abnormal, self-directed or other-directed, *and* any sexual fantasies. Thus, group sex, bestiality, masturbation, indecent exposure, burlesque, and any fantasies relating to them, are first-order sexual behaviour. By second-order sexual behaviour I mean any behaviour that is not itself sexual, but which can reasonably be supposed to stimulate some form of first-order sexual behaviour. The test is the objective one of the reasonable man, and not the subjective one of the person engaging in the second-order sexual behaviour. Such behaviour is not limited to what is normally known as pornography, for it may take the form of running theatres, brothels, strip-joints, massage parlours, etc., as well as the presentation of first-order sexual behaviour in the form of books, magazines, films, videotapes, slides, records, television and radio. The ordinary language concept of obscenity usually includes all these kinds of sexual behaviour as well as first-order sexual behaviour. As I have already indicated, I will limit myself here to second-order sexual behaviour that can be described as pornographic. My reason for this is not primarily the example of the Study Paper, but the view that socially it is the most objectionable, since it lends itself easily to mechanical presentation and is therefore ideally suited to commercial exploitation.

If we think it desirable to control certain first-order sexual behaviour, then we should also control any second-order sexual behaviour which can reasonably be supposed to stimulate the first-order sexual behaviour, unless there are countervailing reasons that make it undesirable on balance to control the second-order sexual behaviour. For instance, if we think it desirable to control homosexual fantasies, then we should also control any second-order sexual behaviour which can reasonably be supposed to stimulate such fantasies. Similarly, if we think it desirable to control certain clearly anti-social first-order

behaviour such as rape, then we should also control any second-order sexual behaviour which can reasonably be supposed to stimulate rape.

The converse, however, is not true. We may think it desirable to control certain second-order sexual behaviour without necessarily thinking it desirable to control the first-order sexual behaviour which it can reasonably be supposed to stimulate. One reason for this may be that we merely want to take prophylactic measures against certain first-order sexual behaviour without wanting to interfere with it if it does in fact eventuate. For instance, we may want to discourage homosexuality without wishing to actually interfere with the behaviour of already practising homosexuals. Another reason, which is the one I will sponsor, is that we want to control the commercial exploitation of sex which manifests itself in second-order sexual behaviour.

The trend of late has been away from the control of first-order sexual behaviour, except in cases where there is clear physical harm or coercion, or where a minor is involved; and even in those still restricted cases the tendency has been towards greater permissiveness. The prevailing trend is to allow everyone to do his own thing, provided that it does not interfere unduly with the freedom of others to do the same, and this attitude has spilled over to second-order sexual behaviour. In the past, the reason for the control of second-order sexual behaviour has been *moral* condemnation of certain forms of first-order sexual behaviour – indeed, we may say condemnation of *most* forms of first-order sexual behaviour. The present attitude of permissiveness is the antithesis of the previous attitude of almost total prohibition. The pendulum will no doubt swing back again. In the present climate of opinion, however, it is extremely unlikely that the impetus for the control of second-order sexual behaviour will come from a stricter attitude to first-order sexual behaviour. On the contrary, the trend is in the opposite direction. This trend is reinforced by the failure to demonstrate significant statistical correlations between specific forms of second-order sexual behaviour and the commission of sexual offences.

Any tightening of controls of second-order sexual behaviour will have to be justified on separate grounds if it is to be politically acceptable. Although our attitude to first-order sexual behaviour is likely to remain a hidden moral factor in our

attitude to second-order sexual behaviour, the case for controlling second-order sexual behaviour can, and in the present political climate must, be made out separately. The case for such control will be the stronger the more clearly we can separate it from our attitude to first-order sexual behaviour. It is those who advocate the wholesale removal of restrictions on second-order sexual behaviour who point to the prevailing tolerance of first-order sexual behaviour, and claim that tolerance of the latter should lead to tolerance of the former. The more adamant they are in their demand for freedom for anyone to do his own thing, the louder they protest at restrictions on second-order sexual behaviour.

3. Undue Commercial Exploitation of Sex

I have already submitted that the concept of undue commercial exploitation of sex offers the key to the legal solution of the social evil of pornography, though I have stressed that the problem is too complex to fit into any one framework, or to be disposed of by any one solution. For many people "commercial exploitation" has the clean, metallic ring of change and progress. Human and material resources cry out to be exploited, to be turned into money, which can then be recycled for further exploitation. Nothing can be allowed to stand in the way of this money-producing force – certainly not sex. It is a resource like any other, to be manufactured, packaged and sold for anything the market will bear. Its effect on other goods, on the consumer, on neighbourhoods, on culture, are perhaps unfortunate by-products, but inevitable in a market economy. Matters can only be made worse by attempting to meddle with these pure economic forces. They will work themselves out and all will be for the economic best, which is, of course, the best. The free enterprisers could hardly have found a more acquiescent attitude on the part of law reformers than the authors of the Study Paper.

Section 4 of the Study Paper acknowledges that commercial exploitation has been used as a quasi-economic justification for the prohibition of obscenity on the ground that making money out of people's weakness for obscenity is a particularly detestable activity that ought not to be tolerated. To disseminate obscene material is bad enough, but to do so for

profit is worse. Section 160 of the Criminal Code, the Study Paper states, expressly recognizes the commercial side of obscenity by authorizing the seizure and forfeiture of obscene publications kept for sale or distribution; and the compilers of the American Law Institute's Model Penal Code were so concerned with the fear of commercial exploitation that they proposed that persons who promoted the sale of non-obscene material by advertising it to be obscene, should be punished. The authors of the Study Paper are not sympathetic to this approach. According to them, there is no good reason to treat the case of falsely advertising an article as obscene differently from false advertising generally, unless money made from sexual exploitation is thought to be uniquely tainted.

> "It is obvious that one function of the dissemination of sexually explicit material is to make profit for the producers and distributors. This form of economic activity also provides paid work for their employees and for sellers at the end of the distribution line. It also provides employment for the disseminators' professional opponents. But in a capitalist society, such as Canada which has long been exploiting sex for commercial purposes, it scarcely seems appropriate to make the profit motive a ground for the censorship of obscenity. It would be anomalous, to say the least, to permit the sale of some products and services designed and sold primarily to exploit sexual interest, but to prohibit commercial capitalization upon the same interest through the sale of books, magazines, or films."[3]

It is hard to follow the logic of this argument. Apparently once we live in a capitalist society, commercial exploitation is the price we must pay, however widespread and distasteful it may be. Once exploited, we must continue to allow ourselves to be exploited and accept the growth both in the range and intensity of exploitation as part of the free enterprise system. It seems irrational to the authors of the Study Paper that we should wish to draw a line at certain forms of exploitation, though they themselves later come down somewhat reluctantly on the side of protecting juveniles from exploitation. We can

3. *Study Paper*, at p. 41.

almost hear them breathe a sigh of relief that in the "United States context the Commission on Obscenity found itself unable to draw any conclusions with respect to the involvement of organized crime in the distribution of obscene material."[4] The fact that the Commission did note a considerable arrest record for those selling sexually explicit material is put down to the fault of the obscenity laws rather than to the kind of people willing to engage in the commercial exploitation of sex. If criminal restrictions were removed, legitimate businessmen could move in and commercial exploitation of sex would become indistinguishable from any other form of commercial exploitation.

We do not have to go along with the sweeping claims of Freud to recognize that sex is an all pervading human drive. Hence, its attraction for the exploiters. Once the vast and hitherto virtually untapped resources of sex can be harnessed, there is no knowing what magnificent profits might be reaped. The words "Open sesame" have long been known to have a special sexual significence. It is not surprising that we have seen a staggering growth in sex products and in the dividends flowing from them. Bookstores, theatres, cinemas, whole streets and neighbourhoods have received this new commercial infusion, driving out the old fashioned forms of literature, art and architecture. Notwithstanding the incontrovertible evidence of our senses, and the world-wide nature of the phenomenon, the impact of the sex industry tends to be played down. After all, it is argued, we have always had sex, prostitution and graffiti and the quality of life generally has not suffered. To argue in this way is like comparing the ravages of the motor car to the evils of the horse and buggy days, and the modern pollution menace to the danger of toxic smoke belched from the inefficient chimneys of the industrial revolution. The size of the operation, the range of injurious consequences and the defencelessness of the victims in the exploited jungles of urbanization are conveniently discounted.

It is interesting to observe that while economic *laissez faire* has steadily diminished, and the need for government control has been recognized in an ever widening number of spheres, the

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4. *Ibid.* The Commission referred to is *The Commission on Obscenity and Pornography* which reported in 1970.

reverse has been true in the area of commercial exploitation of sex. Under the libertarian banner of the freedom of the individual, his appetite for sex has been utilized to open up a new market for exploitation. It followed logically on the exploitation of man's other basic wants – food, drink, clothing and shelter. Sex itself had of course not remained untouched. There would have been no cinema industry without the commercial exploitation of the sex symbols of the twenties. But sex then had still retained a human face, in spite of, or perhaps because of its romantic make-up. It had not yet been exploited to the point of stripping it down to its cold entrails.

When sex is dehumanized and frozen into a commercial product, perversion is never far away. The potential of natural sex is alas limited. So it must be expanded to afford a wider range of consumer goods. The banner used again is that of individual liberty. The very words "natural" and "perversion" are discredited. Anything goes, provided it is not "harmful" to anybody else, and nothing is considered harmful unless it is *physically* harmful. This is completely in line with economic *laissez faire.* The market will take care of everything except the bare protection of human beings from physical harm, and even that might have to be accepted in some cases as an inevitable by-product of the market system.

If we look at the banner and at the reality, we find a very marked contrast. In the name of the liberty of the individual, the individual has become dehumanized and has lost his individuality. Sex has been added to the long list of items that he is stimulated to consume not for its own enjoyment, but to serve the commercial goals of a whole new industry. First-order sexual behaviour had been successfully exploited for ages. However, to the new captains of industry its limitations were painfully obvious. Prostitution could never yield a mass market. It retained an ineradicable human element. Second-order sexual behaviour was a very different proposition. It was ideally suited both to mass production and to mass consumption. All that was required was to make it respectable, and the times were propitious. The decline in religion, the advent of efficient birth control, the harsh treatment of homosexuals, the ill-advised prosecutions of genuine works of art and literature on the ground of obscenity, had created a reaction in favour of greater sexual and artistic freedom. Reformers of all hues were pushing

this cause, aided by revolutionaries who were determined to gut the phony bourgeois morals. Excesses were encouraged *pour épater les bourgeois.* The bandwagon was ready to roll, and roll it did under the glorious banner of the liberty of the individual. In time, however, the meaning of the inscription on the banner changed. It ceased to be a call for the cultural freedom of the individual, and became instead a consumer right, a right to consume a product which he had been stimulated to demand. The liberty of the individual now meant the right to have his demands as a consumer satisfied, whatever they might be, provided only they were not harmful to anybody else. In this way Mill's grand idea of positive liberty,[5] which was to produce a sort of rational superman through his own unfettered endeavours, became deflated to the liberty of the consumer, the little man who is entitled to consume his "chosen" brand of pornography just as he is entitled to consume his "chosen" brand of groceries and liquor, and his "chosen" brand of soft drugs.

The producers who cater to the "needs" of the consumer are not concerned to satisfy his instinctive wants. These are far too limited, too chaotic, and too unprofitable. The object of advertising is to "educate" consumers, to create consumer needs and rights that can satisfy the market, and not just the consumer. In this way, man's crude appetite for food is raised to a consumer need for the processed, packaged, canned and frozen products of the food industry. Similarly, man's primitive sexual drives are diverted into more sophisticated and profitable channels. The producers of pornography are not more concerned than the producers of processed food to satisfy their consumers' instinctive wants. On the contrary, natural sex and pornography are as far removed from each other as natural food and the processor's glossy product. Plastic can never replace food, and pornography can never replace sex; but food can be made more like plastic, and sex more like pornography. The evil of undue commercial exploitation lies not only in its generation of unnecessary production and consumption, and in the consequent waste of economic resources; it lies above all in turning man into a consumer. Whatever freedom and security

5. See R. A. Samek, The Enforcement of Morals (1971), 49 Can. Bar Rev. 188, at pp. 195-196.

have been gained by the mechanization of primitive methods of production and distribution, have been lost by the mechanization and multiplication of human wants. Through the media, the consumer is plugged into the market place, and his whole life is governed by it. Sex has been one of the last bulwarks of natural man. Now even that is becoming a consumer product. Second-order is taking over from first-order sexual behaviour, and the latter is conceived increasingly in the image of the former. It is not sex, or any of his other wants, that dominates man. What dominates him is the commercial exploitation of these wants, and his own debasement to the role of a consumer.

The authors of the Study Paper accurately point out the cure for commercial exploitation. It is, they say, "also argued in support of the commercial exploitation rationale that if production and circulation of obscene material for gain could be eliminated the supply would be cut off its source."[6] However, they reject this suggestion on the ground that in a capitalist society such as Canada it is inappropriate to make the profit motive a ground for the censorship of obscenity. I have already submitted that even in such a society commercial exploitation should have certain limits. It is one thing to say that as a matter of political realism we can only strike at the extreme manifestations of commercial exploitation, and quite another thing to debate the merits of permissiveness in regard to second-order sexual behaviour as if it were a separate issue unconnected with commercial exploitation. If we accept commercial exploitation of every kind, whether we do so happily or reluctantly, we no longer have a case for controlling second-order sexual behaviour as such. We will then have to make out a case for controlling first-order sexual behaviour, and for extending its control to second-order sexual behaviour. Given the prevalent permissiveness in regard to first-order sexual behaviour, we will almost certainly fail in this task. The best we can hope for will be to continue to control the first and second-order sexual behaviour of juveniles. This is in fact the conclusion reached both in the Study Paper and in the report of the *United States Commission on Obscenity and Pornography.*

The thrust of my own submission is that we should strike at *undue* commercial exploitation of second-order, without

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6. *Study Paper,* at p. 40.

basing our case on the control of first-order sexual behaviour. I do not thereby wish to suggest that there should be no control at all over such behaviour, or that our present legal controls are adequate or well directed. I think that the removal of criminal sanctions from homosexual conduct between consenting adults was completely justified. But it would be wrong to deduce from this that all forms of sexual conduct should be treated as equivalent and left entirely to individual discretion. The old fashioned view that sex is connected with morals, and that morals are something more than private likes and dislikes, has solid roots. Unfortunately, they were exhausted in the rank growth of dogmatic prohibitions and needlessly intolerant attitudes which brought this view into disrepute. The pendulum now has swung to the opposite extreme. While previously the earthy aspect of sex had been hidden, the modern tendency has been to deny its spiritual and specifically human aspects. The commercial exploitation of sex has spilled over from second-order to first-order sexual behaviour, and has begun to mechanize and dehumanize the latter. The sexual partner, if any, has become a mere tool for the achievement of auto-erotic fantasies.

Although the control of second-order sexual behaviour will have certain effects on first-order sexual behaviour, my case for controlling the former is not based on its effect on the latter. This is simply a significant added benefit of controlling undue commercial exploitation. People with very different attitudes to first-order sexual behaviour may agree to control second-order sexual behaviour on the ground of undue commercial exploitation. Indeed, one would have thought that the New Left would come out firmly in favour of such control. If they have not done so, the reason presumably lies in their fear of censorship of political as well as of sexual ideas, and in their reluctance to line up with a conservative pro-censorship lobby that seeks to put the clock back rather than forward. The anti-pornogrpahy lobby has all to often played into the hands of the pornographers by basing their crusades on fundamentalist *mores* that are no longer accepted either in the sphere of first-order sexual behaviour or in any other.

The exploitation of women as sex objects should, I submit, be treated as a special case of undue commercial exploitation of sex. The economically and socially inferior position of women

has made them an ideal object of commercial exploitation in many industries, and has also helped to swell the ranks of the oldest profession in the world. Insofar as the commercial exploitation of sex is largely one of the exploitation of the female sex, the Women's Lib. movement rightly plays an active part in opposing it on this ground. Homosexual organizations should feel equally strongly about the exploitation of men for purely commercial ends. What is objectionable in my view is not that any particular group be singled out, but that undue commercial exploitation of sex should be allowed at all. Pornography is not only degrading to the subject; it is also degrading to the object, the consumer. In other words, it is not only the subject that is turned into a sex object; the consumer, as the target of the commercial exploitation, is turned into a sex object as well.

The exploitation of juveniles should also, I submit, be treated as a special case of undue commercial exploitation of sex. Since they tend to be sexually more naive, excitable and unstable, it is particularly important to control second-order sexual behaviour that is aimed at them, or to which they are exposed. The guiding rationale of this view is to protect them from undue sexual exploitation, not to protect their morals by shielding them from the temptation to engage in related forms of first-order sexual behaviour. It should be noted that this rationale differs from that reluctantly endorsed by the Study Paper. After asserting that the justification for legislation aimed specifically for withholding obscenity from juveniles cannot be found in scientifically established facts as to the effect of obscenity on juveniles, the authors of the Study Paper spell out their rationale as follows:

> "It rests upon the view that protection of youngsters from risk of distorted sexual learning, moral danger and the potentiality of delinquency (even though the risk is extremely remote) is a value of greater significance than unregulated freedom of expression and that, provided adults are not restricted in their access to this material, the interference with freedom of expression is in any event not substantial."[7]

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7. *Ibid.*, at p. 112

The approach to pornography in terms of undue commercial exploitation of sex has as its corollary the freeing from control of non-commercial second-order sexual behaviour that is now controlled on the ground of obscenity or pornography. This applies to the second-order sexual behaviour of juveniles as well as of adults; but it does not mean that such behaviour may not be controlled on other grounds. Thus juveniles will continue to be protected under child welfare and juvenile delinquency legislation.

4. Criteria and Methods of Control

One of the standard arguments against controlling obscenity and pornography is the difficulty of defining these concepts. I have already indicated that this difficulty is not inherent in the subject-matter, but is the result of the approach that has been taken. The fact that the essence of obscenity and pornography has continued to elude us does not mean that we cannot shed light in this area because it is *eo ipso* one of total darkness. I have proposed that we shed this light by means of distinguishing between first-order and second-order sexual behaviour, and by relating this distinction to the concept of undue commercial exploitation of sex. By framing our inquiry in this way we not only sidestep the historical difficulties of defining obscenity and pornography; we also make it possible to evaluate second-order independently of first-order sexual behaviour, and thus avoid the dilemma of being either a hardliner on sex *and* pornography, or a liberal on both counts. If we look at the old problems of pornography in this light, we will no longer be terrified by the spectre of a situation that we cannot control. It would be truly extraordinary if, in a control-ridden society such as ours, no effective and acceptable means of controlling certain forms of second-order sexual behaviour could be found, assuming that we think it desirable to do so. We should not, however, look to the criminal law as the appropriate instrumentality. The choice of criminal law rests on its concern with sexual morality; its concern with second-order is rooted in its concern with first-order sexual behaviour. I do not subscribe to the positivist view that law is law and morals are morals, and never the twain shall meet. However, moral attitudes may change, and this may involve a breakdown in a legal system that attempts to enforce outdated attitudes. A standard argument

against controlling pornography is that since there is no general support for the kind of morality that condemns it, we cannot, even it we wanted to, enforce such control. This may be true, if we try to control it through the criminal law on moral grounds. But if, as I submit, we seek to prevent undue exploitation of sex by striking at its roots by *administrative* means, the control of pornography is in principle in tune with the temper of the times.

It might be argued against me that so far I have been avoiding the real difficulties. To speak of undue commercial exploitation, it might be said, begs the very question in issue, namely what constitutes such exploitation; and that if I were to attempt to answer it, I would run into the same sort of difficulties which I tried to avoid by abandoning the method of definition. I submit that this argument does not hold. The problem of spelling out certain second-order sexual behaviour that is postulated as unacceptable on the ground of undue commercial exploitation of sex is a very different problem from that of defining the true essence of pornography. Unlike the latter, the former is inherently soluble.

There are two elements involved in undue commercial exploitation of sex: the element of commercial exploitation and that of sex. Mere commercial exploitation is not enough, nor is uncommercial second-order sexual behaviour. There must be a combination of both elements, and the total must be *undue*. While some measure of exploitation of sex is permissible and inevitable in a capitalist society, the exploitation becomes undue when it exceeds certain boundaries. In order to trace these boundaries, we must lay down evaluative standards of *what is to count as undue.* There is no inherent difficulty in doing this as long as we know what forms of second-order sexual behaviour we want to control. Many of the difficulties of the past are the result of the indeterminacy of aim which has shrouded the vague concept of pornography.

What we need then is a model that tells us what forms of second-order sexual behaviour should be controlled on the ground that they amount to an undue commercial exploitation of sex. The relevant evaluative standards are those which we postulate, and not those of the alleged exploiter. An intention to exploit sex is neither a necessary nor a sufficient condition of

undue commercial exploitation. On the other hand, undue commercial exploitation of sex is only possible if it can reasonably be supposed that this was the intention of the exploiter. The test, as in the case of determining whether certain forms of second-order sexual behaviour stimulate some forms of first order sexual behaviour, is the ojective one of the reasonable man, and not the subjective one of the exploiter. Commercial exploitation of sex is only possible if the second-order sexual behaviour can reasonably be supposed to stimulate some form of first-order sexual behaviour for the purpose of commercial exploitation.

Although, obviously, a model such as I have proposed will have to be descriptive of the second-order sexual behaviour that is to be controlled, it cannot be divorced from the guiding concept of undue commercial exploitation of sex. For instance, the explicitness of the second-order sexual behaviour cannot by itself be a sufficient reason for controlling it. This is so because the reason for the explicitness may have nothing to do with commercial exploitation. The reason for it may be perfectly legitimate, as in the case where it is required for the purpose of art, medicine or education. Conversely, second-order sexual behaviour that is only suggestive may, nevertheless, be considered to amount to undue commercial exploitation if, for instance, it consists in the production of unpleasantly titillating material on a large scale. The class of undesirable second-order sexual behaviour cannot be frozen. Not only are not all instances of such behaviour necessarily foreseeable, their social consequences may vary in time, and the law must remain sufficiently flexible to block the ingenuity of lawyers in avoiding existing road blocks.

It may now be objected that it is precisely this irreducible value element, which cannot be eliminated by any mere description of second-order sexual behaviour, that creates insuperable difficulties. Thus, it will be said, what is unduly suggestive to one person may not be so to another, and one man's art is another man's pornography. This is all very true, but it only underlines that legal determinations require the application of evaluative standards. The need for their application is a characteristic of the normative nature of legal determinations generally and in no way peculiar to pornography.

I have said that what we need is a model of the forms of second-order sexual behaviour that we want to control because we consider them to amount to an undue exploitation of sex, and that such a model cannot be divorced from the rationale of the guiding concept of commercial exploitation. All the same, the description of the second-order sexual behaviour that is to be controlled will obviously be of the greatest importance. Such description requires that we lay down certain criteria of classification for describing the various categories of second-order sexual behaviour which we want to control. These criteria, however, cannot be postulated without regard to existing commercial practices, for their object is not to create an ideal set of standards, but to control certain forms of existing or anticipated commercial exploitation. If we are to beat the "pulp" industry, we must beat it at its own game, and to do so we must have adequate knowledge of how it operates, what its standards and techniques are, and we must have a record of the profitability of its various operations. This empirical homework must be done here; we cannot rely on studies done in the United States or elsewhere, though they will provide us with an initial framework to set up our own investigations.

An empirical study of the commercial exploitation of sex will be revealing both in regard to its sexual and in regard to its commercial element. It will tell us how the trade distinguishes between various grades of "hard" and "soft" pornography, and also where they are to be found and how profitable they are. The motivational force of all forms of second-order sexual behaviour is their stimulation of first-order sexual behaviour, which I have stipulated to include sexual fantasies. For this reason, I have defined second-order sexual behaviour as any behaviour that is not itself sexual, but which can reasonably be supposed to stimulate some form of first-order sexual behaviour. The degree of sexual stimulation of the second-order sexual behaviour does not necessarily vary directly with its degree of explicitness, since the law of diminishing returns will begin to operate and the "hardness" of the pornography will become self-defeating. Nevertheless, the greater the explicitness of the second-order sexual behaviour, the more reluctant will we be on ideological (including moral) grounds to allow its commercial exploitation.

Obviously, as long as our rationale for controlling certain forms of second-order sexual behaviour is the prevention of undue commercial exploitation, its sexual element alone cannot be a sufficient reason for its control. Thus, the stimulating effect of erotic art is not sufficient to amount to *commercial* exploitation of sex. Consequently, we escape the trap of classifying something as pornographic and recognizing at the same time that it has some remedial social quality, such as being a work of art. There is something very unfortunate, to say the least, in the notion of *good* pornography.

Switching now to the *commercial* element of the exploitation of sex, we may say that it denotes a quantity, while the sexual element denotes a quality; and that the quantity of our tolerance of such exploitation should vary in inverse proportion to the obnoxious quality of the pornography. By quantity, I mean a combination of the quantity of goods sold, the quantity of the consumers, and the quantity of the profits earned, depending on the kind of commercial operation that we are concerned with. For instance, a television programme that is performed only once may still be unacceptable if its quality is such that it should not be commercially exploited by beaming it to a large number of viewers, even if we could be sure that no juveniles would be watching it. Moreover, there is here the added factor of exploiting the consumer in his own home. It is no defence to plead that he is a volunteer, that he need not turn on his set unless he wishes to. The plain fact is that he has lost the capacity of being a true volunteer; he has become a perfect consumer, willing to consume what he has been conditioned to consume. Not everyone, of course, is a perfect consumer. There can be little doubt, however, that if free reign were given to the commercial exploitation of sex on television, its captive market would be greatly increased.

We will be more tolerant of the medium of radio, since it lacks the visual appeal of television, though the advent of "topless" radio has opened a surprising commercial potential. Films shown commercially are in an intermediate class. They have the visual appeal of television and a greater commercial potential insofar as they can be shown for long periods of time. On the other hand, their audience cannot match that of television, and they present less of a temptation because they are not brought into the home. The consumer has to seek out

his pornographic film instead of being virtually exposed to it, and protection of juveniles is a good deal easier. For these reasons no doubt television is much more strictly controlled than films. Pictorial material in the form of slides, magazines and "art" books lack the life-like character of films, but they are generally easier and cheaper to mass-produce. Purely literary material has a weaker appeal than pictorial material. On the other hand, it is cheaper to produce, and the entrepreneurs specializing in it tend to support their market by exploiting to the full its potential for violence and perversion.

Once we are agreed on the desirability of destroying the profitability of undue commercial exploitation of sex, the question of what are the best methods of achieving this end becomes largely an empirical problem. However, we still have to preserve a balance between the value of achieving it, and the undesirable side-effects of the means we may have to adopt in order to do so. We must not use a sledge-hammer to crack a nut. What we are looking for are the administrative methods that will control most effectively the various forms of second-order sexual behaviour that we consider desirable to control on the ground of their undue commercial exploitation of sex. The two methods that immediately spring to mind are licensing and taxation, or a combination of both. Licensing regulates directly permissible second-order sexual behaviour; taxation regulates it indirectly by making some forms of it more expensive than others. Both involve the setting of standards that must be attained if a license is to be granted, or if a certain rate of tax is to be avoided. To construct a satisfactory model of methods of controlling second-order sexual behaviour presupposes a grasp of existing commercial practices, for their object is not to create an ideal set of methods, but to control certain forms of existing or anticipated commercial exploitation. Obviously, some methods will be better for some forms of second-order sexual behaviour than for others. Thus, licensing presumably will continue to play a key role in the control of television, radio and films. On the other hand, the usefulness of a special tax on pornographic television and radio programmes is more problematical. Certainly, no system of monetary deterrents alone will be sufficient to curb undue commercial exploitation of sex, though I am not convinced that it has not an important part to play. One of the most pernicious effects of this kind of

exploitation is the deterioration and even the destruction of whole neighbourhoods. The only way to deal with the evil of pornographic urban blight is to restrict the number of outlets and permissible displays. Control should not, however, be limited to store fronts. The blight is spread by the lurid packaging of the pornographic products into the very hearts of bookstores, drugstores and supermarkets, exposing juveniles to the bare flesh of what are now regarded as very innocuous books and magazines. Perhaps the idea of plastic covers which has already been utilized by the exploiters to prevent gratuitous handling, could at least be extended for the benefit of non-pornographic customers and juveniles.

I have submitted that the most appropriate and effective way of controlling undue commercial exploitation of sex is to strike at its roots through administrative means. I shall now submit that the most appropriate and effective tribunals for determining disputes about the existence of such exploitation, or about the legal validity of any method of control, are administrative tribunals specially set up for that purpose. Appeal to the courts should be allowed in certain circumstances. It would be the function of such a tribunal, for instance, to determine whether the reproduction for sale of certain pictures should be considered as amounting to an undue exploitation of sex. The issue would not be whether the reproductions are in essence a work of art or pornography, but whether or not they can be reasonably supposed to have been made for the commercial exploitation of sex, and whether the tribunal considers the degree of exploitation undue. Although expert evidence should be permitted to support or rebut the claim that the work possesses artistic merit, the finding that it does or does not have such merit should be merely one factor in the situation and not conclusive one way or the other. A completely non-erotic work of art may by false advertising be misused for undue commercial exploitation of sex; a work of erotic art may be commercially reproduced for sale without amounting to undue exploitation, and so may a work that is entirely devoid of artistic merit, even though it is sexually explicit, provided that its commercial appeal is relatively insignificant.

5. Public and Private Sexual Behaviour

The approach to pornography in terms of undue commercial exploitation cuts across the distinction between public and private sexual behaviour; for second-order sexual behaviour in private may amount to undue commercial exploitation of sex (for instance, the taking of indecent photographs at home for the purpose of sale), and second-order sexual behaviour in public may not (for instance, the free distribution of pornographic material with no strings attached). The objection to the second-order sexual behaviour is often simply put on the ground of its public aspect, but this in itself is clearly not a sufficient ground for controlling it. The plausibility of the objection rests on the hidden premise that such behaviour shocks the sensibilities of the public. Yet if is difficult to see why the mere fact that certain second-order sexual behaviour shocks the sensibilities of the public should amount to a sufficient reason for controlling it. After all, some sensibilities are notoriously easily shocked, and it is often necessary to shock people if you want to change them. The argument from shock to public sensibilities, I submit, only holds if the shock is justified. The counter-argument that in a democracy values can be reduced to numbers, since the values of the majority must prevail, is not, in my view, valid. Although values are incurably subjective, they must be capable of justification according to certain evaluative standards if they are to be rationally defensible. These standards must have a certain ideological content, and not merely a certain numerical support. For instance, to prohibit the exhibition of a nude statue by Michelangelo on the ground that it shocks the sensibilities of the public is not, I suggest, a sufficient reason for banning it. (However, the probability that this would lead to a breach of the peace might be.) To base a value system simply on the registration of shock is to debase the very notion of a value system. This is not to deny that in a democracy the majority enjoys, theoretically, decisive political power, and that it therefore constitutes an important political factor in deciding what kind of social practices to control.

Shock to the sensibilities of the public then is not a sufficient reason for controlling second-order sexual behaviour; and, conversely, the private nature of such behaviour is not a

sufficient reason for not controlling it. Hence the case for controlling second-order sexual behaviour if, and only if such behaviour is public, falls to the ground. This case must not be confused with the very different case put forward by Mill,[8] namely that legal and moral intervention is not justified in regard to any behaviour that is purely self-regarding. The distinction between private and public acts is not the same as that between self-regarding and other-regarding acts. The former refers to the private or public setting of acts; the latter refers to the kind of harm done by the acts. The rationale of the former, as we have just seen, is shock to public sensibilities; the rationale of the latter is that each person, once he has reached maturity of judgment, is the best judges of his own good, and that social intervention should be limited to acts which are harmful to others and to society.

The validity of the distinction between self-regarding and other-regarding acts was challenged by Stephen[9] and Devlin.[10] They maintain that no act is purely self-regarding, and that the distinction therefore is false. I have suggested that it has been misconceived:

> "The distinction between self-regarding and other-regarding acts is . . . a *normative* and not a factual distinction. The question is where we *ought* to draw the distinction, not where it *is,* and how we answer it will depend not only on our values, but also on the purpose for which the question is asked. Thus, all other things being equal, we will be more reluctant to classify an act as other-regarding for the purpose of imposing a *legal* sanction than for the purpose of imposing a moral sanction."[11]

We may find it fruitful to pose the question of whether we ought to control first and second-order sexual behaviour in terms of whether we ought to regard such behaviour as self-regarding or as other-regarding. However, to pose the question in this way does not give us an answer to it independently of our own evaluative standards. Certainly, the

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8. See J. S. Mill, *On Liberty* (1859).
9. See J. F. Stephen, *Liberty, Equality, Fraternity* (1873).
10. See P. Devlin, *The Enforcement of Morals* (1959).
11. Samek, *supra,* n. 4, at p. 195

public nature of the second-order sexual behaviour does not mean that it is other-regarding; an act done in public may not significantly affect the public, and conversely an act done in private may significantly affect the public.

The labelling of pornography as a "victimless" crime begs the question of whether it ought to be regarded as a self-regarding or as an other-regarding act. We can argue the case either way. The sale of a pornographic article to a customer may be regarded as a victimless crime because the customer willingly buys the article and derives pleasure from it, or he may be regarded as a victim who is being exploited by the seller. Similarly, society may be regarded as unaffected by the transaction, or as the ultimate victim; and the person whose body is treated as a sex object may be regarded as a volunteer who is handsomely paid for his services, or as the victim of the pornographer. I submit that where the second-order sexual behaviour amounts to undue commercial exploitation of sex, both the consumer and the person whose sex is being exploited, and the society to whom they belong, are all the victims of the exploitation.

6. Conclusion

My submission on the whole has taken a different line of approach from the Study Paper. While the thrust of the Study Paper is in favour of relaxing the existing controls on pornography as part of a general withdrawal of criminal law from the protection of private morals, the burden of my proposed submission has been that it should be controlled by administrative means on the basis of the new guiding concept of undue commercial exploitation of sex.

The concluding remarks of the Study Paper are prefaced by the following quotation from Alice B. Toklas, *What is Remembered.*

> "By this time Gertrude Stein was in a sad state of indecision and worry. I sat next to her and she said to me early in the afternoon, What is the answer? I was silent. In that case, she said, What is the question?"[12]

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12. *Study Paper*, at. p. 116.

Gertrude Stein's remark is illuminating, not only for pornography, but in a much more general way. The inability to answer a question should alert us to the possibility that there is something wrong with the question. This was the basis of Wittgenstein's later approach to philosophy.[13] Traditionally, philosophers had directed their attention to the *answers* given in reply to philosophical questions. They seemed to have been unaware that the form of the question itself might conceal an error. The new line of approach was concerned with getting to the root of the entanglement which led to the asking of the wrong kind of question, and laying it to rest so to speak.[14]

This therapeutic approach to philosophy is, I submit, very fruitful for the subject under discussion. What has confused us in the past is not that a false answer has been given to the question "What is (the essence of) pornography?" What has confused us is that this type of question should have been asked at all. Once we recognize that we must formulate the question in clearer terms, that *we must construct* an answer to it, and not expect to find it revealed as a self-evident truth when we grasp the essence of the question, we will stop tilting at windmills and grapple with the real problems.

I have submitted that the ultimate subject-matter of law reform is the human behaviour contained in a social practice, and the ultimate reason for reforming the law is dissatisfaction with such behaviour. Hence, reforming the law of pornography involves spelling out the kind of behaviour that should be controlled. I have proposed a distinction between first-order and second-order sexual behaviour, and limited myself to second-order sexual behaviour that can be described as pornographic. My reason for singling out this kind of behaviour is the view that socially it is the most objectionable, since it lends itself easily to mechanical presentation and therefore is ideally suited to commercial exploitation.

Perhaps I should now, at this late stage, meet an argument which might be considered fatal to my case. The argument

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13. See L. Wittgenstein, *Philosophical Investigations*, transl. G.E.M. Anscombe, 2nd. ed., Oxford, Blackwell, 1958.

14. See F. Waismann, *The Principles of Linguistic Philosophy*, London, Macmillan, 1965, at pp. 3-4.

would go something like this: "You have based your case for the control of pornography on the ground of undue exploitation of sex, and you have been at pains to distinguish control of second-order sexual behaviour by administrative means on this ground from control of such behaviour by the criminal law on the ground of the immorality of some forms of first-order sexual behaviour. On the other hand, you have admitted that our attitude to first-order sexual behaviour is likely to remain a 'hidden' moral factor in our attitude to second-order sexual behaviour. You have given us no reason for striking at what you call undue commercial exploitation of sex. It is not enough *to say* that it is undesirable. Even subjective evaluative standards must, on your own admission, be justified. The only ground on which you can justify striking at undue commercial exploitation of sex is on moral grounds. Hence we are back where we started from. Pornography is undesirable and should be controlled because it is immoral."

This argument, I suggest, is not valid. The case against undue commercial exploitation can be made on a number of grounds, from different points of view, and not merely on the ground of its immorality, from the moral point of view. I am happy to admit, however, that ultimately it rests on a moral premise. Undue commercial exploitation could still be undesirable even if man were not regarded as autonomous; but what makes it ultimately so objectionable is that it debases a free subject into a consumer object. This is not the place to expound my conception of the moral point of view, and I mention it only by way of defence to meet an argument which might be raised against me. Although I have treated pornography in this submission as a *social* evil, I would not wish to deny its *moral* roots. We must be careful, however, to distinguish the immorality of undue commercial exploitation of second-order sexual behaviour from the immorality of first-order sexual behaviour. Even if we admit that our attitude to the latter is likely to remain a hidden factor in our attitude to the former, the immorality of the former is not reducible to that of the latter. Undue commercial exploitation is immoral as such; it need not be connected with sex, and when it is so connected, it is the commercial exploitation of this connection, and not its sexual nature, that makes it objectionable.

No doubt we should have resisted earlier, and more strongly, the manipulation of our wants. Yet it is better to resist late than never, and our failure to act sooner is not a good reason for capitulating now to the undue commercial exploitation of sex. I am not saying that this is the greatest danger that faces the human race, that there are not other and more pressing concerns. Too many people have preached control of second *and* first-order sexual behaviour as if it were an end in itself. It is not sex that disfigures our capitalist society; it is our capitalist society that disfigures sex. What we need are not greater controls on sex, but greater controls on its exploitation. Looked at in this light, the control of pornography is not a distraction from attending to other and more serious social ills; on the contrary, it sets a useful precedent for tackling many of them at their source.

To those who believe in *laissez faire*, the free market system generates its own antidotes against any excess. The unsoundness of this doctrine should have been exposed for all times by the great depression; in fact, even in this post post-Keynesian era, the ritual appeal to free market forces continues to be dinned into our ears. The law of supply and demand is invoked as an explanation and a cure for every kind of economic happening and malpractice. Increase the supply of pornography beyond a certain point, the *laissez faire* argument goes, and the law of diminishing returns will begin to operate. It is true that even the demand for pornography has its limits, and that eventually it will level off. There is no reason to believe, however, that it will dry up, or that it can be contained within tolerable limits. The waters of pornography run deep; for they have been effectively linked to the well-spring of sex.