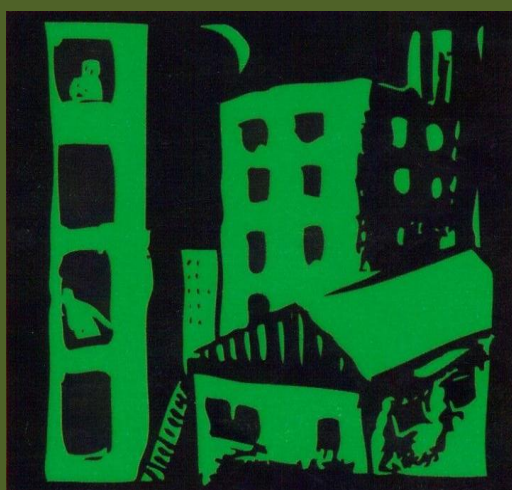


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## Pornography is going on-line: The harm principle in Dutch law\*

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### 1 THE OTHER VICTORIANS

The pornography of 19th century Victorian society, Steven Marcus observes in *The Other Victorians*, gave expression to a fantasy that exactly mirrored the public ideal image of chastity in reverse reflection.<sup>1</sup> As exemplary of Victorian morality, Marcus refers to an 1857 treatise on human sexuality, *The Functions and Disorders of the Reproductive Organs*, by the physician William Acton. Unlike Freud, Acton maintained that healthy children hardly manifest any sexual feelings. For youngsters who give in to titillations an ill fate awaits: "His intellect has become sluggish and enfeebled, and if his evil habits are persisted in, he may end in becoming a drivelling idiot or a peevish valetudinarian."<sup>2</sup>

\* Keynote address presented at 'Resisting Authority: A Colloquium on *Le Roux v Dey*', 30 September 2011, UWC.

<sup>1</sup> Marcus S *The Other Victorians* (1966).

<sup>2</sup> Quoted in Marcus (1966) at 19.

This happens as a consequence of *spermatorrhea*, exhaustion of the vital forces through waste of semen. Frequent intercourse within marriage, too, will severely affect one's health. Acton's remedy is to control any arousal by trained will power. In the rare passages on women the wife is portrayed as sexually uninterested. In Victorian pornography all this was reversed with just as much one-sidedness: women are in a continuous state of arousal, chaste abstention is replaced by never-ending orgies, the common denial of sexuality is shouted down by the call that sex is the only thing that counts.

The received view of Victorian morality has been challenged by Michel Foucault. In his *History of Sexuality* Foucault denies that 19th century sex life was characterized by extreme prudery, and was therefore beyond the order of the mentionable. On closer inspection Foucault finds that in no other period has as much been written on sex; 19th century "scientia sexualis" analysed it with an infinite curiosity. However, Foucault's findings are not necessarily contrary to the received view of Victorian morality, for they only show that sex was not completely unmentionable in that period. The fact that sexuality was the object of much scientific research may very well coincide with widespread prudery. Works of science, after all, only circulate among the intellectual elite. Moreover, scientific analysis of an instinctive phenomenon such as sex implies being at a distance, with an accompanying loss of spontaneity. The instincts and emotions under analysis are transformed into something alien, an alienation which one subsequently tries to overcome by re-appropriation in a rationalistic mode.<sup>3</sup> The extent to which the scientific approach may paralyse sexual practice is shown by the experience of the biologist Kinsey when studying the sex life of the human female. Once in a while Kinsey's questions aroused sexual responses on the part of the interviewees. Kinsey reacted with the same completely neutral attitude he had assumed during his earlier research on the sexual behaviour of bees, and neither encouraged nor fended off the advances. Indeed, scientific distance proved to be an effective way to calm down the undesired arousal – maybe even more successfully than Acton's will-power.

More startling than Foucault's *History of Sexuality* is Peter Gay's *Education of the Senses; the Bourgeois experience – Victoria to Freud*. Gay refers to diaries to show that for most women of the middle class, the 19th century was not a "period of latency": it was only their public image that was adjusted. But then again, even this does not repudiate Marcus's picture of Victorianism. Marcus only claims that women were frigid in the public ideal image, which was just as much a fantasy as its pornographic shadow.

One would expect public law, then, to affirm the public image by expelling pornography to the legal underworld. In this historical context it comes as a surprise that the Dutch Penal Code of 1886 permitted pornographic writings. The opposite may be suggested by the text of article 240, which prohibited pornographic publications when "*offensive to public decency*". Yet the explanatory memorandum gave an explicitly liberal explanation of this phrase: "*It is not for criminal law to protect individuals from voluntary moral self-corruption*". The state should interfere only when third parties

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<sup>3</sup> Foucault contrasts the modern Western 'scientia sexualis' with the ancient 'ars erotica', which regarded sex as an integral part of the art of living in general.

were affected by involuntary exposure to obscene pictures and slanders.<sup>4</sup> So, in the public domain of Dutch sex laws, prudery was overruled by the liberal state ideal.

Still, in this period prudery must have formed a strong undercurrent. In the decades that followed, Dutch elitist upper class rule gave way to full democracy, resulting in general suffrage in 1917. The lower and middle classes brought Christian parties to the centre of political power. In 1911 this resulted in severe moralistic legislation in the field of sexual morality. As new offences against public morality, adultery, extra-marital sex, abortion, contraceptives and the like were all criminalized. Article 240 was reinterpreted in this vein, making all production and possession of pornographic objects liable to punishment. In the explanatory memorandum the Catholic Minister of Justice, Regout, referred to the urgency of fighting depravity, defining “*offensive to public decency*” in the spirit of Christian morality, which was perceived as having eternal objective validity.

In social reality, however, Christian legal moralism, far from having eternal life, ruled for only half a century. It dissolved soon after the sexual revolution of the 1960s. Times changed, and the law changed with it. The Dutch Supreme Court elastically swayed with the spirit of the age by reinterpreting *offensive to public decency* in an inter-subjective key, as meaning that which a large majority considers offensive. Towards the end of the 1970s the majority regarded only involuntary exposure as such. In 1984 this liberalization process was completed by new legislation, which went full circle and returned to the liberal Criminal Code of 1886.

In the arguments supporting the successive stances in this circular movement of Dutch law over the course of a century, one may recognize the diverse positions in the philosophical debate on the relation between law and sexual morality. In this essay I reconstruct Dutch legal history on this topic along the lines of philosophical disputes, paying special attention to the liberal harm principle. In the liberal view, pornography – sexually explicit texts or pictures that are primarily aimed at arousal – should be freely available unless it is proven to cause harm to others. Modern advocates of a prohibition appeal to the very same principle, notably feminists who argue that porn incites to the rape of, and discrimination against women. The actual dispute thus boils down to the empirical question whether pornography really is that harmful.

## 2 1886: HARM PRINCIPLE

The regulation of pornography in the Dutch criminal code of 1886 largely corresponded to the liberal harm principle, which has found its paradigmatic expression in John Stuart Mill’s *On Liberty* (1859):

“The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public

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<sup>4</sup> Which would be more suitable for involuntary exposure than extensive writings.

opinion. That principle is, that (...) 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.”<sup>5</sup>

The harm principle provides each citizen with a domain of negative individual liberty that screens his private life from interference by the state and by his fellow citizens, as long as he does not harm others. In other words, the state may not prohibit behaviour in the name of *legal moralism*, or because the authorities find it immoral; nor out of *legal paternalism*, or to prevent an individual from harming himself. “His own good, either physical or moral, is not sufficient warrant.”<sup>6</sup> In the liberal view, then, pornography may not be made illegal because lust is considered a vice; nor because porn, in stimulating masturbation, turns the viewer into a “peevisish valetudinarian”.

Mill underpinned the harm principle with a mix of utilitarianism and the liberal ideal of individual autonomy. Individual liberty furthers social and individual flourishing, Mill claims, since only in an open society can one learn from one’s mistakes.<sup>7</sup> A free society promotes general wellbeing; “wellbeing” being defined by Mill in a qualitative way that privileges an autonomous way of life.<sup>8</sup> A liberal may complete this plea for freedom with the Lockean argument that a good life has value only if it is based on voluntary choice, and that the state lacks special moral competence.

This presupposes that “harm” can be defined in a non-moralistic, neutral way. At first, Mill defined it as the violation of someone’s *interests*. However, one may go against someone else’s interests in a legitimate way. Indeed, each fair competition ends up with winners and losers. Mill addressed this problem by narrowing the definition of “harm”: one is not free to violate the *legitimate* interests, or *rights*, of others. “Certain interests, which, either by express legal provision or by tacit understanding, ought to be considered as rights.”<sup>9</sup> The next problem is, then, how to give a non-moralistic definition of “rights”. The harm principle turns out not to be the “very simple principle” Mill had in mind.

In *Harm to Others* Joel Feinberg elaborated on the principle in a subtle way that is neutral vis-à-vis comprehensive moralities.<sup>10</sup> According to Feinberg, each individual has an “ulterior interest” to live his life in accordance with his own ideals, but this is his personal responsibility. The state should confine itself to protecting “welfare interests”, interests everyone has in basic goods that are instrumental to all ways of life, such as, safety, health, freedom and income. Therefore, all individuals have fundamental rights to life, property, freedom and compliance with contracts, as well as the more specific

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<sup>5</sup> Mill JS *On Liberty* (1977) at 135.

<sup>6</sup> See Mill (1977) at 135.

<sup>7</sup> Mill vehemently opposed conformism. Society should open up to brilliant innovators, instead of reacting negatively when their wild ideas overturn familiar customs: “Much as if one should complain of the Niagara River for not flowing smoothly between its banks like a Dutch canal” (Mill (1977) at 194).

<sup>8</sup> Even though most people find pleasure in conformist ways, full human flourishing consists of intellectual pleasures and free experiments: “The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs” (Mill (1977) at 138).

<sup>9</sup> See Mill (1977) at 205.

<sup>10</sup> Feinberg J *Harm to Others* (1984).

rights that follow from these. Violation of someone else's interests is "harmful" only when it infringes upon his legitimate interests, or rights. Some transgressions of welfare interests are not harmful in this technical sense. One has to accept loss in a fair competition over scarce goods like a job, since one has no *right* to win. Moreover, infringements of rights are permissible when the rights holder voluntarily agrees: *volenti non fit iniuria*. The consequence may be self-harm, but (hard) paternalism is not a legitimate ground for state interference.<sup>11</sup>

In *Offense to Others*, Feinberg supplements the harm principle with the offence principle.<sup>12</sup> He defines "offence" as an unpleasant state of mind, such as, anger, irritation or disgust, caused by the illegitimate behaviour of another. The state should exercise much more restraint in preventing offence than in preventing harm, else little freedom would remain. Yet on specific occasions the state should counteract severe offences, such as irksome noise pollution. Feinberg allows offence as a ground for prohibiting pornography, too, but only in the exceptional case of involuntary, intensive and sustained confrontation with obscene texts or pictures that are extremely offensive to persons of normal sensibility and in all fairness cannot be avoided. This immunises pornographic books and movies against censorship, for they rarely impose themselves on the public.

In this liberal vein (which Feinberg made explicit later on), the Dutch legislator of 1886 stated that criminal law has nothing to do with individuals who choose to devote themselves to moral self-corruption, but prohibited involuntary exposure to pornography.

### 3 1911: CHRISTIAN MORALISM

The liberal view of the state is utterly immoral in the eyes of orthodox Christianity, the source of inspiration of the moralistic Dutch legislation of 1911. Given man's essentially sinful nature, Christians argue, individual freedom of choice will inevitably result in abuse.<sup>13</sup> In order to prevent this evil, Dutch law now proceeded to prohibit all sexual activities that were not aimed at procreation within the institution of heterosexual monogamous marriage. The explanatory memorandum indicated that these measures

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<sup>11</sup> Or, rather, because of the assent of the right holder, this does not count as 'harm' at all. Moralistic interests are excluded, too: the interest of a perfectionist in imposing his ideals of the good life onto others does not deserve legal protection, for it stems from an other-directed ideal that as such infringes on the freedom of others. The latter also applies to the malicious interests of a sadist who finds pleasure in harming others (who are not masochists).

<sup>12</sup> Feinberg J *Offense to Others* (1985).

<sup>13</sup> Unlike liberals, moralists do not define liberty in a negative way as freedom from interference by others. In their view the freedom to live a good life is not primarily threatened by such external restrictions, but mostly by internal obstacles, such as one's own impulsiveness, animal instincts or sinful nature. These lower human features corrupt the *essential freedom* of man, his freedom *from* such inner restrictions in order *to* identify with his higher spiritual God-like self. In enforcing a virtuous way of life the state should compensate for the human weakness of will.

were based upon eternal Christian values, which were to guide the interpretation of the words *offensive to public decency* in the pornography section as well.<sup>14</sup>

What, then, is the orthodox Christian view of sex? According to Augustine, in Paradise Adam only had erections as a completely neutral means to procreation. Adam did not experience any erotic pleasure in them. It was just the result of muscular contractions, as when one wiggles one's ear. Only after the Original Sin, was human sexuality, now infected with animal lust, transformed into a vice. Shame on Adam and Eve! *Leviticus* presents a list of prescriptions for safeguarding purity. Do not eat unclean animals, such as the mole, the toad, the mouse, the snail and the chameleon; cloven-hoofed ruminants and grasshoppers are edible, swine and ostriches are not. The next section of *Leviticus* deals with human relations: do not touch a woman during her period; incest is an atrocity ("*None of you shall approach any one of his close relatives to uncover nakedness. I am the LORD*" (18:6)); as is gay sex: ("*You shall not lie with a male as with a woman; it is an abomination*" (18:22)). Atrocities, such as, adultery, incest and sodomy, are capital offences. In *Summa Theologica* (1265-1274) Thomas Aquinas summarizes Christian sexual morality as follows:

"The sin of lust consists in seeking venereal pleasure not in accordance with right reason. This may happen because it is inconsistent with the end of the venereal act. On this way, as hindering the begetting of children, there is the 'vice against nature,' which attaches to every venereal act from which generation cannot follow. Now it is evident that the upbringing of a human child requires not only the mother's care for his nourishment, but much more the care of his father as guide and guardian. Hence human nature rebels against an indeterminate union of the sexes and demands that a man should be united to a determinate woman and should abide with her a long time or even for a whole lifetime.... This union with a certain definite woman is called matrimony; which for the above reason is said to belong to the natural law."<sup>15</sup>

Following a similarly perfectionist view of human nature and natural law, articles 239-253 of the new Dutch Criminal Code presented prohibitions of adultery, extra-marital sex, abortion, contraceptives and pornography. This implied full legal moralism, enforcing a broad perfectionist morality that encompasses the whole of human life and leaves no space for principled individual liberties. Since then, voluntary consumption and production of as well as trade in porn had been criminal acts.

#### 4 1960s: MORAL MAJORITY

In the 1960s the Western world was turned upside down by an anti-authoritarian cultural and sexual revolution, generated by developments such as increasing economic welfare and new means of mass-communication like the television, which made people less dependent on traditional institutions. The introduction of the birth control pill

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<sup>14</sup> Yet, *offensive to public decency* was a vague term that required further judicial specification. The Supreme Court held that writings are offensive in this sense only if they are exclusively aimed at arousal in an obscene way. This is not the case if the titillation is justified by a higher aim, such as in works of art or science. After all, otherwise the prohibition might include Velasquez's *Rokeby Venus* and James Joyce's *Ulysses*.

<sup>15</sup> Aquinas T *Summa theologiae* (2008) Second Part of the Second Part, questions 153 and 154.

dissociated sex from procreation. No wonder the revolutionaries advocated a right to individual self-realization that included the sexual domain. In doing so, they appealed to critical philosophers like Herbert Marcuse, who's *Eros and Civilization* (1955), in turn, was inspired by Freud and Marx.

From Freud, Marcuse learned that human culture burdens man with discontent, as the civilization process demands extensive self-discipline in order to suppress his sexual and aggressive animal instincts. As a newborn baby, Freud contends, everyone starts off as a *polymorphous perverse* being that innocently turns his lust to everything within reach. During the process of upbringing, one learns to adapt to social reality, which requires postponing the gratification of one's desires. "Every sound reason is on the side of law and order in their insistence that the eternity of joy be reserved for the hereafter."<sup>16</sup> With the help of church and state, the sexual instincts are canalised within the institution of heterosexual marriage, at the service of reproduction. Marcuse mixed the Freudian theory of repression with a spoonful of Marxist class struggle: in modern capitalist societies sexual suppression is reinforced by industrialists who make workers invest all their energy in labour, instead of in sexual relaxation ("surplus repression"). He called for a sexual revolution: back to our original *polymorphous perversity*! Eroticising society would subvert the capitalist pressure to perform, and create space for a free, playful society.<sup>17</sup> "Make love, not war!" protested the hippie avant-garde of the 1960s in the heels of Marcuse's call for a sexual revolution. The *Kama Sutra* grew into a popular sex bible. Christian sexual morality gave way to free sex, and pornography entered public life.<sup>18</sup>

The Dutch Supreme Court, well aware that times were changing, soon adapted to the new cultural climate, distancing itself from Christian morality. As regards the pornography Act, Attorney-General Langemeijer rejected the interpretation based on legislative history. To be sure, the 1911 legislation had proclaimed that "offence to public decency" refers to the objective moral standards of Christianity. And yet, Langemeijer argued, "the lawmaker's metaphysical assumptions do not form part of the legal norm that has been laid down, and therefore lose their impact on its application when they have lost their persuasive force".<sup>19</sup>

That is not to say that the Dutch judiciary turned liberal overnight. In the 1965 case against the soft-porn novel *Bob and Daphne*, the defence hinted in this direction: in the light of the present emancipation struggle against taboos, the judge should honour the

<sup>16</sup> Marcuse H *Eros and Civilisation* (1966) at 234.

<sup>17</sup> In Marcuse's erotic Utopia, Eros and Thanatos, Pleasure principle and Nirwana principle, converge. Liberated from surplus repression and pressure to perform, Eros transforms from an irrational urge into a reasonable striving to sustain the order of gratification. The death instinct, operating under the Nirwana principle, no longer aims at the termination of life but at cancelling pain, that is, the absence of tension. In this way it transcends its destructive manifestations: "it tends towards that state of 'constant gratification' where no tension is felt – a state without want" (See Marcuse (1966) at 234).

<sup>18</sup> In 1972 *Deep Throat* "burst into the public consciousness", bringing about a "transition from illicit stag films to the legal fictional narratives" (Eric Schafer, quoting Linda Williams, in "Gauging a Revolution: 16 mm Film and the Rise of the Pornographic Feature" in Williams L (ed), *Porn Studies* (2004) at 371).

<sup>19</sup> *Pornobladenarrest* HR 13 juni 1972, NJ 973, 297.

responsibility of each individual citizen to design his sex life in his own way.<sup>20</sup> The Supreme Court responded that, although moral insights were indeed shifting, it did not follow that “in the received view everyone is free to decide for himself what should be considered as ‘offensive to public decency’.” Far from joining the revolutionaries on the barricades, the judiciary preferred an evolutionary approach. The Supreme Court replaced the contested objective interpretation of the phrase *offensive to public decency* with an inter-subjective reading, identifying it with what people *find* offensive. It redefined “offensive” as violating “a normal sense of shame”, which in 1966 was equated with the opinions of a large majority of the Dutch people.<sup>21</sup> In other words, the judiciary replaced the interpretation based on legislative history of Article 240 with a sociological interpretation. In the latter reading, a judge should ascertain whether some sexually loaded object would arouse a sense of strong disapproval on the part of a large majority of the Dutch population.

In its identification of legal morality with the opinions of the moral majority, the Dutch Supreme Court reflected an affinity with the philosophical position that the British judge, Lord Devlin, had advocated in his critique of the liberal Wolfenden Report (though with reverse effect).<sup>22</sup> In 1957 the Wolfenden Committee had advised that prostitution and homosexuality between consenting adults in private be removed from British criminal law, since such activities do not harm others. Devlin opposed decriminalization, not because prostitution and gay sex would be objectively immoral, but because they are indeed potentially harmful.

Though a Catholic himself, Devlin recognized that, as a consequence of the secularization process, Christian morality could no longer claim objective validity. And yet, he argued, it continued to play an important social role, as the dominant traditions were still permeated by Christianity. This enabled him to support the enforcement of Christian values in a roundabout way. Devlin appealed to the communitarian view that social cohesion is based upon shared traditional values: they provide the cement of the societal building by establishing the sense of identity and the mutual expectations of its members. Were they to lose their vigour, anomy and social disintegration would result. As an example, Devlin points out that each society needs some institution that regulates family life. In Britain, this role is performed by monogamous marriage, an arrangement of Christian origin but now a secular tradition. Since adultery and homosexuality may subvert this cornerstone of society, they are issues of public morality that cannot be left to individual judgement.

The harm principle, then, demands the enforcement of conventional morality, not because the latter is true but because it is useful. This functionalist argument implies moral relativism: in Devlin’s Britain, homosexuality was considered deviant and criminal, whereas in classical Greece it was generally accepted and should, therefore, have been free from any punishment (as it indeed was). Applied to British law, Devlin concluded, the harm principle does not allow for principled sexual freedom, because

<sup>20</sup> HR 23 maart 1965, *NJ* 1965, 260.

<sup>21</sup> HR 22 februari 1966, *NJ* 1966, 393.

<sup>22</sup> Devlin P *The Enforcement of Morals* (1965).



even the mere awareness that gay sex occurs somewhere in private might undermine the authority of conventional morals.

Devlin did not demand that the law punish *every* deviation from traditional morality. It was only when social integrity was at stake that the state should interfere. The actual occurrence of this hazard manifests itself in a general popular sentiment that a particular act is intolerable. More specifically, the state should interfere when the man in the street detests a vice so much that he considers its mere existence to be repulsive. “No society can do without intolerance, indignation, and disgust.”<sup>23</sup>

Devlin’s communitarian argument extended the harm principle in two ways. First, it shifted the focus from harm to individuals to harm to society at large; secondly, the harm in question is not direct harm, but indirect immaterial harm to social values. This specification allowed him to advocate legal moralism, by turning the harm principle against the very liberal ideal of the state from which it stems: the threat of harm to society is so overwhelming that it does not allow for principled individual freedom.

Devlin added to this that law should follow social dynamics at slow motion. He subscribed to the conservative view that governments should abstain from efforts to change society in accordance with some rationalistic design of unworldly philosophers: the ideal of a transformable society rests on a dangerous overrating of human reason. The intellectual *rationality* of the armchair philosopher is, in Devlin’s view, inferior to the intuitive *reasonableness* of the common man, or the man in the jury box: the common sense in which the accumulated experience of successive generations had been stored.

Liberal reform of sex laws, then, is anathema. There is no room for principled liberty rights, for the degree of social disgust may change depending on the times. In this communitarian view, the law’s role is to support the moral majority, not to shield individual freedom. In a kindred spirit the Public Prosecutor, J.C. Maris (my father), commented in the *Bob and Daphne* case: “Enlightened minds may find the prevailing sentiments narrow-minded. However, the purport of article 240 is to provide legal protection to these ‘narrow-minded’ sentiments”.<sup>24</sup>

However, in the 1960s and 1970s Dutch majority opinion changed much faster than Devlin would have thought possible in the 1950s, with the judiciary in its slipstream. This development finds its analogue in the critical comments of the legal philosopher Herbert Hart and other liberals on Devlin’s criticism of the Wolfenden Report.

A first objection (not Hart’s) is that Devlin’s functionalist social theory has an ambiguous relation to rationality. While rejecting rationalist philosophy, Devlin himself presents a rational argument in support of the irrationality of the majority opinion: it is rational to be irrational (and irrational to be rational). Devlin’s reply might be that he

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<sup>23</sup> See Devlin (1959) at 17.

<sup>24</sup> Quoted in Pam M “Buikjeswrijven. De vijftien jaar lange kruisgang van Bob, Daphne en Han B. Aalberse” (1979) at 5-6.

considers the traditional wisdom of the crowd as “reasonable”, not irrational. Yet, this still leaves him with an uneasy encounter between his own rational argument and popular common sense. Devlin cannot wish to convince the man in the street of his moral relativism, for this would subvert their commonsensical belief in the *truth* of their traditional convictions. As a consequence, conventional morality would lose the authority that is required for social cohesion. But then again, Devlin would not mind being a paternalist. A wise father may exchange rational arguments on education with fellow-parents that are not meant for pupils’ ears; in their presence he will switch to persuasion. Likewise, the intellectual elite may engage in a rational debate that is incomprehensible to the man in the street. Devlin did not reject rationality as such, just the pervasive rationalism of Enlightenment philosophers.

Hart objected that Devlin’s argument is irrational in other ways, both normative and empirical.<sup>25</sup> The normative objection goes as follows: from the perspective of critical morality, conventional morality may be utterly immoral. Indeed, the majority may very well think it right to burn witches. Devlin conceded that the social traditions of some societies may have been wrong, for instance in approving slavery and racism.<sup>26</sup> Even so, he insisted, the state should not allow critical views that may result in rebellion and disorder.

Against the latter argument Hart launched an empirical objection: as a matter of fact, speedy social change does not necessarily amount to anomy. Hart acknowledged that every society needs a minimal basis of shared morality, such as rules against violence and fraud. But conventional morality does not form a seamless web: as history shows, societies can readily survive drastic transformation in other spheres of justice. Devlin’s fears of societal disintegration appear to be conservative rather than rational, Hart concluded.

The *reasonableness* of the man in the street, then, is in need of *rational* revision. This includes finding a fair balance between the values of social cohesion and individual freedom. As such, the harm principle may require measures to prevent harm to society at large, as Mill recognized when he ascribed to each citizen the duty to defend society against “injury and molestation”.<sup>27</sup> However, as a non-conformist, hating “the moral coercion of public opinion” or “the tyranny of the prevailing opinion”,<sup>28</sup> Mill would have rejected Devlin’s communitarian interpretation of the harm principle. Moreover, as a utilitarian he would have objected that it is precisely majoritarian conformism that causes societal harm, because critical discussions and experiments in living are vital for social progress. Supplemented with Hart’s empirical objections against Devlin’s disintegration thesis, this leads to the conclusion that Devlin’s effort to dissociate the harm principle from its liberal aspirations fails: sex laws may very well be liberalized without harming society.

<sup>25</sup> In his public lecture *Immorality and Treason*, broadcast by BBC Radio in 1959, later elaborated in Hart HLA *Law, Liberty and Morality* (1963).

<sup>26</sup> Hart must have felt doubly excluded by Devlin’s definition of British culture as permeated with homophobic Christian traditions: he was both an (atheist) Jew as well as a repressed homosexual.

<sup>27</sup> See Mill (1977) at 205.

<sup>28</sup> See Mill (1977) at 130.

Devlin's disintegration thesis has, moreover, been proved false by the actual social and legal developments in the Netherlands and elsewhere since the 1960s, which corroborate Hart's social analysis. When the Supreme Court quickly followed the shifting public opinion on sexual morality, Dutch society did not fall apart. On the contrary, the Dutch resumed the tradition of tolerance of their Golden Age, turning into a worldwide liberal vanguard in such domains as euthanasia, abortion, gay marriage, drugs policy, and sexual morality. As for pornography, towards the end of the 1970s only involuntary exposure was considered offensive to public morality.

All the same, the historical fact that in this period the moral majority leaned towards liberalism was accidental. As Devlin pointed out, conventional morality may equally crush individual freedom. Liberals would prefer a more solid basis.

## 5 1984: BACK TO LIBERALISM

In 1984, the Dutch legislator followed the judiciary in decriminalizing pornography and other sexual offences, but on other, more principled grounds. Rather than identifying "offensive to public decency" with the shifting majority opinion, it returned to the liberal harm principle of the Penal Code of 1886. In this it followed the 1980 Report of the Melai Committee: *"it is not the task of the state to enforce its views of the sexually good life by means of criminal law"*.<sup>29</sup>

The Melai Report anchored its liberal advice in the European Convention on Human Rights, conceiving sexual emancipation as part of a general process of individual self-development that is protected by the basic rights of Articles 8-10 ECHR to private life, and freedom of thought and expression. The only valid reason for the state to infringe on these rights is to protect the equal rights of other citizens. Moreover, the Committee argued, nowadays opinions on sexuality diverge so much that a lawmaker would endanger social cohesion by enforcing any one of these. Following the spirit of the age, the Report applauded the new sexual openness as part of "a process of awakening, flourishing or emancipation of individuals".<sup>30</sup>

However, the proposal to decriminalize pornography met with strong feminist protests. Like Devlin, feminists appealed to the harm principle, not to legal moralism. They argued that porn is harmful because it stimulates the rape of, and discrimination against women.<sup>31</sup> The latter harm has an immaterial, ideal nature, as with Devlin; but unlike Devlin, the feminists invoked the harm principle to subvert traditional values. In their view, the emancipation of women required radical social change, notably of the patriarchal marriage institution and other sexist traditions. Although these protests caused some delay, in 1984 Dutch law was amended along the lines of the Melai Report.

In the preceding period a number of sexual offences had already been abolished, including adultery, homosexual acts with minors under sixteen and the use of

<sup>29</sup> *Eindrapport van de commissie zedelijkheidswetgeving 's-Gravenhage* (1980) at 9.

<sup>30</sup> *Tweede interimrapport van de adviescommissie zedelijkheidswetgeving*. Bijlage bij de memorie van toelichting, Tweede Kamer, zitting 1979-1980, 15836, nr. 4, at 11.

<sup>31</sup> See Maris CW "Pornografie moet vrij" (1985).

contraceptives. The 1984 amendment, with an appeal to the principles of harm and (implicitly) offence, liberalized the remaining offences. From then on, exhibitionism was punishable only in cases of unwanted confrontation in public places (as opposed to sex shows or nude beaches). The pornography section was rephrased in a similar way. In addition, extra protection was provided for vulnerable parties, such as minors under sixteen. In line with the harm principle, rape within marriage was included as a new criminal offence.

Between 1886 and 1984, then, Dutch law concerning sexual morality passed through a phased cycle that coincided with the main positions in the philosophical debate. In 1886, the Dutch Penal Code followed the liberal harm and offence principles; in 1911 it adopted Christian legal moralism; in 1966 the Supreme Court followed the moral majority; and in 1984 the legislator returned to liberalism.

The liberal approach seems to have the better credentials. Following the majority opinion may lead to the enforcement of racist or sexist values, which are utterly immoral from a critical point of view. Moreover, since in modern plural societies it is difficult to identify moral views that are shared by all citizens, the enforcement of particular views may endanger social cohesion.

Liberalism is also to be preferred to Christian perfectionism, and to legal moralism in general. Liberals reject Christian natural law as constituting an infringement of individual autonomy, which in the liberal view constitutes the essence of human dignity. As a standard response, their opponents counter with the *tu quoque* argument that liberalism itself rests on a partial metaphysical view of human nature, individual autonomy being just one more contested perfectionist ideal. To get around this problem, political liberalism withdraws to a meta-ethical position that is neutral vis-à-vis all perfectionist ideals of the good life, including metaphysical liberalism. Political liberals, such as John Rawls, argue that in a modern plural society, a plurality of worldviews will emerge. Since one may reasonably disagree about their claims to the truth, it would be unreasonable to enforce one of those views through state force. Instead, the state should pacify ideological controversies by confining its role to the provision of neutral basic goods that are needed by everybody, whatever his life ideals may be. Or, in Feinberg's terminology, the state should concentrate on protecting "welfare interests", such as income and freedom. This requires a constitutional democracy that guarantees individual liberties that trump moralism, whereas criminal law respects the harm principle.<sup>32</sup> The empirical question that remains to be answered then is: does pornography as a matter of fact cause harm, and particularly to women?

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<sup>32</sup> That is not to say that the Dutch Supreme Court was wrong in not being at the forefront of the received views. Devlin may have been right in advising the judiciary not to alienate itself too much from the mainstream, else it would lose its authority.

## 6 HARM TO WOMEN?

Feminist opponents of free pornography point to two kinds of harm. Porn would cause direct material harm in the form of rape and other sexual violence; as well as indirect ideal harm in the form of sexist discrimination.

As for the alleged material harm, evidently the harm principle demands prevention of sexual aggression. Does this include a prohibition of pornography as well? Indeed, radical feminists assume a direct causal relation between pornography and sexual violence.<sup>33</sup> In *Female Sexual Slavery* Kathleen Barry speaks of an “ideology of cultural sadism” that “consists of practices which encourage and support sexual violence, turning it into normal practice”<sup>34</sup>, with pornography playing a major role: “In movie after movie women are raped, ejaculated on, urinated on, anally penetrated, beaten, and (...) murdered in an orgy of sexual pleasure. Women are the object of pornography, men its largest consumers, and sexual degradation is its theme.”<sup>35</sup>

This claim implicitly appeals to the *imitation theory*, the hypothesis that (male) porn consumers copy the actions they encounter in pornographic fiction, even if their (female) counterparts say *no*. However, empirical evidence rather supports the *catharsis theory*, the thesis that pornography has a discharging function, which diminishes sexual violence.<sup>36</sup>

Predictably, experimental studies in laboratory settings show that exposure to non-violent blue movies turns on the viewers. It may be more surprising that both men and women find romantic versions less exciting than pure porn. During the viewing they have fantasies of their own. Afterwards both sexes tend to engage in increased sexual activity, but only of familiar kinds. Scenes showing unusual practices, like group sex, do not lead to imitation. Violent porn has a greater influence. Again, men as well as women find it erotic. For male viewers it is more exciting than normal porn, but only when it is suggested that women actually like being raped. Subsequently, viewers of aggressive pornography have more aggressive fantasies than control groups who have been watching non-violent porn. Moreover, afterwards more men credit the “rape myth”, the idea that deep down women enjoy being raped.

These findings might provide grounds for prohibiting the violent species of pornography if it could be proven that, in addition to violent sex fantasies, it leads to actual sexual aggression as well. However, field studies do not support the imitation theory in this regard. Those convicted of sex crimes do not use more pornography than the average person. Porn use does not incite them to imitation; rather to more self-gratification, as the catharsis theory predicts. Analysis of the personal background of rapists also indicates other causes.<sup>37</sup> Many offenders have grown up in incomplete or

<sup>33</sup> Other feminists have joined the ‘pro-sex feminism’ movement.

<sup>34</sup> Barry K *Female Sexual Slavery* (1979) at 174.

<sup>35</sup> See Barry (1979) at 175.

<sup>36</sup> I derive these findings from the surveys in Hullu J de *Strafrechtelijke en sociaal-wetenschappelijke gronden voor strafbaarstelling van pornografie* (1984); Tovar E at al “Effects of Pornography on Sexual Offending” (1999); and Diamond M “The Effects of Pornography: An International Perspective” (1999).

<sup>37</sup> These findings are derived from Frenken J & Doomen J *Strafbare seksualiteit* (1984).

unstable families, encounter general social problems, display strong sexual scruples and fear for intimate relationships, have a career in violence, and lead an impulsive, amoral way of life. Age is an important factor, too, the large majority being under 25 years of age (and one third under 18). Conversely, studies of porn consumers show that they do not constitute a specific aggressive section of the population. The prototypical user is a normal, married heterosexual male between 20 and 60. Moreover, the imitation theory is at odds with the fact that women too are aroused by violent porn movies (and that women enjoy rape fantasies as well), without wishing to be actually raped, let alone taking initiatives in that direction. In summary: no harm, therefore freedom.

This conclusion is affirmed by the fact that sexual violence has not increased in countries that have decriminalized pornography. Exemplary are Kutchinsky's statistical studies of the developments in Denmark, Sweden and West Germany between 1964 and 1984.<sup>38</sup> A similar trend can be observed in Japan during the 1990s. Among juveniles the numbers of rapes has even decreased considerably in those countries. By contrast in South Africa the incidence of rape had increased by 28 percent between 1964 and 1974, while anti-obscenity legislation was strictly applied.<sup>39</sup> All this leads to the conclusion that direct harm cannot be a ground for prohibiting pornography, either non-violent or violent.

What about indirect ideal harm? Feminists claim that pornography stimulates a discriminative attitude towards women by reducing them to sex objects. As Susan Brownmiller puts it: "Pornography, like rape, is a male invention, designed to dehumanize women, to reduce the female to an object of sexual access, not to free sensuality from moralistic or paternalistic inhibition."<sup>40</sup>

Or, in the words of Andrea Dworkin:

"The major theme of pornography is male power (...) Male power, as expressed in and through pornography is discernable in discrete but interwoven, reinforcing stains: the power of self, physical power over and against others, the power of terror, the power of naming, the power of owning, the power of money, and the power of sex."<sup>41</sup>

In Dworkin's view, all things erotic express male power: camera = penis = weapon. However, this thesis needs revision. Although pornographic texts and pictures certainly intend to turn the actors into sex objects, this does not necessarily come with

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<sup>38</sup> Kuchinsky B "Pornography and rape: Theory and practice? Evidence from crime data in four countries where pornography is easily available", in *International Journal of Law and Psychiatry*, vol. 14, 1991, no. 1 & 2, pp. 47-64 (1991).

<sup>39</sup> Diamond M "The Effects of Pornography: An International Perspective" (1999). In the early 1990s Japan turned more tolerant, making pornography widely available. Japanese crime statistics show a striking decrease from 4677 sex crime cases in 1972 to 1500 cases in 1995 (while the population had grown over 20 per cent). As Diamond points out, the decrease of sexual violence in liberal countries does not necessarily affirm the catharsis theory. The cause might just as well be that in an open society women are more open to voluntary sex.

<sup>40</sup> BROWNMILLER S "EXCERPT ON PORNOGRAPHY FROM AGAINST OUR WILL: MEN, WOMEN AND RAPE" (1980) AT 32.

<sup>41</sup> Dworkin A *Pornography. Men Possessing Women* (1981) at 24.

discrimination. In gay porn male actors act as objects of lust, without anybody taking this as discrimination against men.<sup>42</sup> The point of pornographic objectification may just be gratifying a need for impersonal sex, dissociated from emotional or social obligations. That is why pornography focuses on a specific aspect of mankind, the genital organs plus accompanying fantasies, without any intention of giving a full picture of humanity. This does not necessarily generate an objectifying attitude towards women (or men) in general, not even in the adjoining context of erotic love. The opposite is confirmed in daily life: if men would regard women primarily as sex objects, it would be difficult to explain why most social contacts between the sexes pass off peacefully, all the more since in modern Western societies they mingle continuously. As Kant says, one should not use one's fellow men as *mere* objects; this moral imperative does not forbid treating them as such on specific occasions.

All the same, pornography obviously functions within a culture that is permeated with sexist traditions, which will inevitably affect its production and consumption. This, however, is not a sufficient reason for criminalizing porn. Instead of fighting the symptoms, one should remedy the causes by changing the cultural context. To begin with, patriarchal and sexist traditions can be tackled with policies that strengthen the socio-economic position of the "weaker" sex. Emancipation in a material respect diminishes the vulnerability of women to other kinds of discrimination. Civic education may be helpful too.

From the perspective of the harm principle, the emancipation of the "second" sex may require mobilizing criminal law in order to prevent sexist actions. However, sexist speech, texts or pictures may give offence without causing harm. Few publications are as degrading to women as Otto Weininger's *Sex and Character*:

"As the absolute female has no trace of individuality and will, no sense of worth or of love, she can have no part in the higher, transcendental life. (...) Women have no existence and no essence; they are not, they are nothing. (...) all existence is moral and logical existence. So woman has no existence. (...) The relation of man to woman is simply that of subject to object."<sup>43</sup>

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<sup>42</sup> See Maris (1985). In *Pornographies* (2000), Leslie Green opposes feminists, such as Andrea Dworkin and Catharine MacKinnon who identify all pornography with heterosexual male dominion over women, including gay porn. Some quotes from Dworkin and MacKinnon: "Pornography shall mean the graphic sexually explicit subordination of women ... The use of men, children or transsexuals in the place of women ... shall also constitute pornography under this section" (Dworkin A & MacKinnon C *Pornography and Civil Rights: A New Day for Women's Equality* (1988) at 114); "The capacity of gender reversals (dominatrix) and inversions (homosexuality) to stimulate sexual excitement is derived precisely from their mimicry or parody or negation or reversal of the standard arrangement. This affirms rather than undermines or qualifies the standard sexual arrangement as the standard sexual arrangement" (MacKinnon C *Toward a Feminist Theory of the State* (1989) at 144); "Male homosexuals, especially in the arts and in fashion, conspire with male heterosexuals to enforce the male-supremacist rule that the female must be that made thing against which the male acts to experience himself as male" (Dworkin A *Pornography: Men Possessing Women* (1979) at 128). Against this, Green denies that gender roles (active-passive) are repeated in same sex relationships and porn. Gay sex is a class of its own, which does not mimic the straight world, nor reverse it. Moreover, the latter would imply that gay male porn breaks the hetero rule, instead of affirming it. Since pornography comes in different kinds, Green concludes, a general prohibition would infringe on the autonomy and equality of sexual minorities.

<sup>43</sup> Weininger O *Sex and Character* (1906) at 284-292.

Rather than prohibiting Weininger's book, one should publicly criticize his views, for instance, by pointing out that his sexist hate speech is metaphysical nonsense and may have been inspired by a pathological self-hatred of his own feminine side. An open discussion of pornography is all the more urgent since its alleged sexist nature is contested. Indeed, pro-sex feminists maintain that empowering women means the emancipation of female pornography.

## 7 POPULAR CULTURE, PORNOGRAPHIES AND INTERRACIAL PORN

In the second decade of the 21<sup>st</sup> century, the feminist anti-porn movement has certainly lost much of its momentum. Looking back at the "porn wars" of the 1980s, Linda Williams in *Porn Studies* observed that both the reception of pornography and its cultural context have changed. Nowadays porn has been absorbed into mainstream culture: "Feminist debates about whether pornography should exist at all have paled before the simple fact that still and moving-image pornographies have become fully recognizable features of popular culture."<sup>44</sup>

In the same volume, in "Going On-line: Consuming Pornography in the Digital Era", Zabet Patterson points at new ways of electronic distribution that stimulate this transformation: "Pornography is going on-line. (...) What was previously a marginal behaviour is emerging as a mainstream practice".<sup>45</sup> According to Williams, the feminist porn wars were the consequence of an ideological narrowing of vision into an exclusive focus on male dominion.<sup>46</sup> The essays in *Porn Studies* can be read as an elaboration of Green's stress on "pornographies"<sup>47</sup> (in the plural) in correction of the feminist view that there is only one kind of porn that "expresses the power and the pleasure of heterosexual men".<sup>48</sup> Same sex pornographies obviously do not.<sup>49</sup> Heterosexual pornography may ridicule men: Constance Penley points at the magazine *Hustler* in which "sex emerges as an arena of humiliation for men, not one as domination and

<sup>44</sup> Williams L (2004) at 1.

<sup>45</sup> Patterson Z "Going On-line: Consuming Pornography in the Digital Era" (2004) at 119. According to Patterson, initial fears that cyber porn would dissolve man into a machine or into a network, have given way to the integration of the Internet into everyday life. Yet she doubts the ideal that the wealth of images on the Internet would offer "a truly emancipatory scenario allowing subjects to project their virtual selves into a seemingly endless variety of scenarios and environment, to embody an infinite variety of freely chosen subject positions, roles, and desires" (Patterson Z (2004) at 106). Instead cyber porn offers options from fixed sets of categories ('gay', 's/m', 'ebony', 'Asian', MILF, etc.). "The 'contract' and financial exchange entailed by 'clicking through' to a Web site (...), then, forces this schema of classification to become fixed through acceptance and repetition" (See Patterson (2004) at 107).

<sup>46</sup> Williams was alarmed by publications of Catherine MacKinnon that blamed the ethnic rapes during the wars in former Yugoslavia on the influence of pornography (See MacKinnon C "Turning Rape into Pornography" (1993); *Only Words* (1993)): "Instead of concentrating on how Muslim and Croatian women became the targets of sexual crimes, MacKinnon preferred to blame pornography as their cause. We come away from her article that it is pornography we must fight, not rape (...) Pornography is conflated with genocidal rape, degradation, and abuse. It is never for an instant taken as to be a genre for the production of sexual viewing pleasure" (See Williams (2004) at 11).

<sup>47</sup> Green *Pornographies* (2000); see note 44 above.

<sup>48</sup> See Williams (2004) at 7.

<sup>49</sup> The essays of part II, "Gay, Lesbian, and Homosocial Pornographies", extensively discuss the differences in kind of hetero- and homosexual pornographies.



power over women”.<sup>50</sup> As an alternative to the radical feminist approach, Williams proposes to replace the distinction of bad/good with an open cultural analysis of the wide range of varieties of pornography.

Williams does not deny that some forms of pornography may be harmful.<sup>51</sup> In “Skin Flicks” she analyzes the exploitation of black/white stereotypes in interracial pornography: “Do these stereotypes do further harm to people of color and should they be eschewed?”<sup>52</sup> In general, she observes, in porn movies taboos are easily broken – such transgressions may even enhance the pleasure:

“Pornography, because it has so long existed in determined opposition to all other forms of mainstream culture, has often become the place where sex happens instantaneously. Pornoptia is the land, as Steven Marcus once wrote, where it is ‘always bedtime’.”<sup>53</sup>

This also goes for racial taboos: movies showing sex between African and Caucasian Americans are easily available on internet sites under the category “Interracial”. Previously, transgression of these taboos used to affirm the negative stereotype of the “oversexed black man”.<sup>54</sup> Stated more generally: “All depictions of interracial lust develop out of the relations of inequality that have prevailed between the races”<sup>55</sup>, starting from “the white racist scenario of white virgin/black beast”.<sup>56</sup> During the time of slavery in America, black women were available to the white master, while black men were not allowed to approach white women.<sup>57</sup> But the cultural context has changed during a “three-decade-long process of re-aestheticization and positive sexualization”.<sup>58</sup> Nowadays the official political code prescribes colour-blindness, but this taboo too is brushed aside in interracial pornography. In the new hedonistic culture, however, black is beautiful. Now the black man is considered to be sexy:

“Pornography as a genre has its own, changing norms. The large black penis once given by the white master as a reason for white women to abhor and fear black men is today valued by all in the world of interracial pornography.”<sup>59</sup>

Interracial porn may still be stereotypical, Williams concludes, but it has stopped keeping black men in their place. A prohibition would be wrong, for by fixing the initial meaning of racial stereotypes it ignores their flexibility in changing historical contexts. Moreover, one may enjoy racist stereotypes without actually believing in their truth:

<sup>50</sup> Penley C “Crackers and Wackers: The White Trashing of Porn” (2004) at 317.

<sup>51</sup> On the censorship of internet pornography and the harm principle, see Sandy GA “The Online Services Bill: Theories and Evidence of Pornographic Harm” (2001).

<sup>52</sup> Williams L “Skin Flicks on the Racial Border: Pornography, Exploitation, and Interracial Lust” in Williams (2004) at 274.

<sup>53</sup> See Williams (2004) at 274.

<sup>54</sup> See Williams (2004) at 278.

<sup>55</sup> See Williams (2004) at 302.

<sup>56</sup> See Williams (2004) at 302.

<sup>57</sup> During the period of Apartheid in South Africa, marriage between persons of different races was outlawed by the Prohibition of Mixed Marriages Act of 1949, while the 1950 Immorality Act made interracial sexual relations a criminal act.

<sup>58</sup> See Williams (2004) at 303.

<sup>59</sup> See Williams (2004) at 276.

“what is involved instead is a complex flirtation with the now historically proscribed stereotype operating on both sides of the color line.”<sup>60</sup> The bad news is that the pleasures are unequally distributed along another line: “The agency of white women, and black women even more, is difficult to discern.”<sup>61</sup> Feminism, then, may still have a function to empower women in interracial blue movies.

## 8 DUTCH YOUTH CULTURE

After the electronic revolution of the 1990s the feminist pleas for censoring pornography seem outdated. By now pornography has been integrated into mainstream culture. The complaint that porn would be inherently harmful to women has been lacking an adequate empirical basis right from the start. Even so, some authorities fear that the present “sexualisation of society” may produce new forms of harm, in particular with respect to young people. Young girls would mimic what they see in the media, offer sex in exchange for a soft-drink and be available for gangbangs.<sup>62</sup> Some critics even observe a “pornofication of society”.<sup>63</sup> The Dutch Minister of Education, Culture and Science, Ronald Plasterk, in his 2008 memorandum *Better Opportunities for Women. Emancipation Policy 2008-2011*, has stepped forward as an opponent to the sexualisation of society: although it brings liberation to some women, others see themselves being reduced to sex objects. Among youngsters the Minister observes an alarming coarsening of sexual manners.<sup>64</sup> To discourage such bad tendencies, the state should protect the youth by supporting their parents in laying down standards. The media should be regulated by codes of conduct that restrict the negative sexual portrayal of girls and women in reality-shows and music videos. Will Dutch history repeat itself in 2011 with a recurrence of the legal moralism of 1911, starting off a new hundred-year cycle? Or, can censorship be justified in terms of the harm principle, because the sexualisation of society indeed has harmful consequences?

Certainly, the pervasive influence of the Internet may give rise to the suspicion that cyber porn seduces youngsters to harm each other. Moreover, the harm principle allows special paternalistic measures to prevent young persons from harming themselves. After all, by definition minors are not consenting *adults*: since they have not yet fully developed the rational capacities that liberals ascribe to mature persons, their consent is not decisive. So, if the sexualisation and pornofication of society would actually be harmful to young people, censorship might indeed be the right answer. On the other hand, adults should remain free from paternalism. When it is not feasible to select protective measures that single out minors, censorship would reduce “the adult population of cyberspace to reading and speaking only what was fit for children”.<sup>65</sup>

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<sup>60</sup> See Williams (2004) at 286.

<sup>61</sup> See Williams (2004) at 286.

<sup>62</sup> *Seksueel gedrag in een subcultuur van Tieners in Amsterdam Zuidoost Amsterdam* (2006).

<sup>63</sup> Hilkens M *McSex: De pornoficatie van de samenleving* (2008).

<sup>64</sup> *Meer kansen voor vrouwen. Emancipatiebeleid 2008-2011* (2007).

<sup>65</sup> Heins M “Reno v. American Liberties Union: The 1966 Communications Decency Act” (1999) at 98.

Be that as it may, the ministerial fears are proved false by recent empirical research showing that the sexualisation of society does not have harmful consequences for Dutch youth in general. According to the 2005 report *Sex under 25. Sexual Health of Youngsters in the Netherlands in 2005*,<sup>66</sup> boys and girls start having sex at a younger age than in 1995: 7% had intercourse before the age of 15, 42% before 18, 76% before 20, and 88% before 24.<sup>67</sup> Only rarely do they suffer from feelings of shame or guilt, with the exception of Moroccan and orthodox Christian boys and girls. The use of contraceptives has increased considerably. A vast majority of 92% found their first sexual experience to have been pleasant. The quality of sexual contacts is high: boys and girls score 8,6 (out of 10) for their capacities to have pleasant sexual exchanges on an equal footing. Most of them are able to establish boundaries and openly discuss their preferences with their partners. Most are content with their last sexual contacts. In the majority of cases they had their latest intercourse with a beloved partner within a stable exclusive relationship. This coincides with the values held by Dutch youth: most of them approve of intercourse if the partners have a lasting relationship. A minority, 37% of the boys and 25% of the girls, do not object to having sex without emotional ties. According to the majority, both sexes should have equal rights. In summary, a large majority of Dutch youth has sex of high quality on the basis of reciprocity.

The Internet does not pose special problems for the majority. For Dutch youth it functions as a source of information about flirting, lovemaking and relationships. The majority also uses the Internet as a medium for dating and porn consumption. Although many have electronic sex, most of it is harmless. According to a 2006 study *Sex is a Game. Desired and Undesired Behaviour of Youngsters on the Internet*,<sup>68</sup> 82% of boys and 73% of girls had flirted on the Internet during the previous half year; 25% and 20%, respectively, had had cybersex; 57% and 42%, respectively, had dated through Internet; 40% respectively 57% had been confronted with a request to perform some sex act on cam, which 33% and 10%, respectively, had complied with, mostly because they liked it themselves. Girls (62%) dislike erotic suggestions and questions more than boys do (13%), but mostly they do not consider it to be a serious offence, partly because of the Internet's anonymous character.

The risks are concentrated in respect of the less-educated indigenous youth, and in respect of equally less-educated immigrant youngsters who have grown up in authoritarian macho cultures. Less-educated youngsters have extensive sexual experience before the age of 17 (notably girls of Caribbean background, in contrast to Islamic girls from Mediterranean cultures). Sexual violence, too, occurs mostly in respect of less-educated children, particularly Turkish and Moroccan boys. In particular, youths who have grown up in insensitive, violent families, tend to engage in sexual violence. All of this shows that the sexualisation of society, and, more specifically, the consumption of sexy video clips and cybersex have no direct causal relation with sexual

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<sup>66</sup> Graaf, Hanneke de, e.a., *Seks onder je 25<sup>e</sup>. Seksuele gezondheid van jongeren in Nederland anno 2005* (2005).

<sup>67</sup> Which implies that 12% has preserved his/her virginity at 24.

<sup>68</sup> Graaf H de et al *Seks is een game. Gewenst en ongewenst seksueel gedrag van jongeren op internet* Amsterdam (2006).

abuse. As class and culture prove to be strong stimuli, the solution is to be found in socio-economic policies and civic education, not in prohibiting porn.

In summary, the fears of Dutch authorities are based on a moral panic that lacks an adequate empirical basis. In reality most Dutch youngsters are searching for what the sociologist Cas Wouters has called a “lust balance”, a balance between a desire for sex and a longing for intimacy.<sup>69</sup> In doing so, they develop a subtle self-discipline that enables them to engage in intimate relationships on an equal footing. All this shows that the cultural and sexual revolution of the 1960s, in combination with the electronic revolution of the 1990s, have brought about a “sexualisation of society” without major general harmful consequences to its members, notably women and children. In this tolerant cultural setting, governmental concerns about the negative aspects of free sex should be seen as oversensitive reactions, not as a return to the Christian moralism of 1911.<sup>70</sup>

<sup>69</sup> Wouters *C Sex and Manners: Female Emancipation in the West 1890–2000* (2004).

<sup>70</sup> Meanwhile, in South Africa, history has taken a less gradual course. After the abolition of the racist Apartheid regime in 1994, the country adopted an exemplary liberal constitution, to be upheld by a Constitutional Court. In the *Le Roux* case concerning a soft-pornographic picture that involved minors, the judgment of the Court shows an attempt at balancing constitutional principles in relation to freedom of expression and the right of children to special protection (*Le Roux and Others v Dey* [2011] ZACC4; 2011(3) SA 274 (CC)). However, experts disagree about the right answer. Can the harm principle be helpful in deciding the case?

If the *Le Roux* case were concerned with a plain case of child pornography, the answer might be simple. Indeed, it may be harmful to vulnerable minors to act in adult movies, or to pose for porn photo shoots. As not-yet-autonomous persons they are easy prey for manipulative producers. But *Le Roux* is an atypical case of kiddy porno, for several reasons. First, it concerns *virtual* pornography: the dramatis personae have been constructed electronically by cutting and pasting portions of four different individuals to create two new protagonists. The real-life persons who claimed to be injured by the picture were not physically involved in its composition: pictures of their faces were attached to the bodies of a pair of naked gay men who had been photographed in an intimate, sexually suggestive interaction.

What is more, it was not the children who were the victim here, but the adult parties, while Le Roux (aged 15) and his minor accomplice (aged 17) acted as producer and distributor respectively. Le Roux composed the picture, using the faces of the principal and the deputy principal of his school; his friends made it public by putting it on a notice board in the school building. Roles were reversed in another way as well. In the asymmetrical dependency relationship between educator and learner, the wrong was not committed by a teacher abusing his authority to manipulate a vulnerable schoolchild; it was the pupils who launched an anti-authoritarian action against their teacher.

Lastly, the harm principle as elaborated by Feinberg primarily pertains to penal law. Le Roux and his partners had been criminally charged, but the present case concerns a private law action. All the same, the harm principle allows the state to guarantee compensation for damages in private law as well.

So what about the claim for compensation of Dr Dey, the deputy principal? Dey demanded R600 000 for injury to his self-respect (dignity) and to his respectability in the eyes of others (defamation), because the picture would suggest that he “masturbated either in public or in the presence of another person, was prone to indecent exposure, was of low moral character, was in a homosexual relationship with the other person depicted and was homosexual”. Does the harm principle require Le Roux cum suis to pay the satisfaction demanded?

In Devlin’s communitarian view, gay pornography, giving raise to deep indignation and disgust, might be rightfully forbidden because of its social harm. In the same vein, associating straight people with gay porn may be considered defamatory and insulting by any reasonable observer. In contrast, section 9 (3) of the liberal South African Constitution reads: “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

## 9 CODA

In these post-Victorian times, pornography persists in its traditional routine of showing women and men who, in a continuous state of arousal, indulge in never-ending orgies in which sex is the only thing that counts. However, it has outgrown its position as an underground phenomenon that represents the reverse image of a chaste public morality. Present-day pornography has been integrated into daily life. Through the Internet, everyone has easy access to free porn sites, such as, *PornHub* and *Youporn*, providing a wide range of categories to suit any taste: *Amateur, Anal, Asian, Ass, Babe, BBW, Big Dick, Big Tits, Blonde, Blowjob, Bondage, Brunette, Bukkake, Camel Toe, Celebrity, Compilation, Creample, Cumshots, Dancing, Double Penetration, Ebony, Euro, Female Friendly, Fetish, Fisting, Funny, Gay, Handjob, Hardcore, HD, Hental, Interracial, Latina, Lesbian, Masturbation, Mature, MILF, Orgy, Outdoor, Party, Pornstar, POV, Reality, Red Head, Rough Sex, Sex, Shemale, Small Tits, Squirt, Striptease, Teen, Threesome, Toys, Vintage, and Webcam*. Some fear that with this comes a “pornofication” of society which may harm women and children.

During the sexual revolution of the 1960s, for a moment it looked like the Dutch, following Marcuse, would convert to the polymorphous perversity that was on show in adult movies. But social reality did not follow the imitation theory. Although the legal climate was growing ever more liberal, around the turn of the millennium the majority preferred to flesh out their freedom with the less revolutionary ideal of serial monogamy: in the course of one’s adult sex life, one passes through a series of exclusive relationships with successive partners, which need not take the form of marriage and which last as long as both partners agree to do so. The majority of Dutch youth experiment with free sex while maintaining self-discipline and mutual respect. So far, Dutch tolerance has turned out to be relatively harmless. Therefore, freedom.

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Persons who are homosexually orientated, then, enjoy special protection under the Constitution. If pornography is not harmful, gay porn should not be considered as such either, and should therefore remain free from criminal prosecution. Yet, showing a photo to the general public of someone’s erotic interactions with another consenting adult in private may violate his right to privacy. With the picture of Le Roux, however, no such harm was done, since the naked bodies obviously are not those of Dey and his colleague. To the reasonable observer the picture is but a schoolchild’s joke. Therefore, Dey’s claims should be denied. Disciplinary measures at school are sufficient.

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