



LEGAL CONTROL OF PORNOGRAPHIC SITES AND ETHICAL AND MORAL ISSUES: A JURISPRUDENTIAL ANALYSIS

2. Ethics
3. Regulation
4. Statute
5. Jurisprudence

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Chapter 1. INTRODUCTION & MATERIALS AND METHODS

1.1. INTRODUCTION

ABSTRACT

Pornography can be considered as a broad and artistic culture. It can also be considered a concept, and it is left to individuals, who both approve and disapprove of pornography, to judge how it may affect their personal values, morality and ethics. In order for individuals to acknowledge these specific qualities, governments have developed censorship laws and feminists have argued for the rights of women, and against pornography. Yet, at the same time there is an opposition that advocates the right to use pornography. Pornography may also affect a person's perception of sex, general intimacy between genders (both alike and unlike), and in some cases, self-perception.

Throughout this project, there will be an analysis of the concept of pornography from ethical, sociological and psychological aspects. Through philosophical viewpoints, we will incorporate the notions of ethics, morals and values. This project will focus on the impacts that pornography has on the individual and its culture, rather than the whole culture of pornography itself.

KEYWORDS

1. Pornography

Pornography is the representation of sexual behaviour in books, pictures, statues, motion pictures, and other media that is intended to cause sexual excitement. The distinction between pornography and erotica is largely subjective and reflects changing community standards. The word *pornography*, derived from the Greek word *porni* ("prostitute") and *graphein* ("to write"), was originally defined as any work of art or literature depicting the life of prostitutes.¹

Pornography has been defined in the Merriam-Webster² as:

- 1:** the depiction of erotic behaviour (as in pictures or writing) intended to cause sexual excitement,
- 2:** material (such as books or a photograph) that depicts erotic behaviour and is intended to cause sexual excitement,
- 3:** the depiction of acts in a sensational manner so as to arouse a quick intense emotional reaction

¹ Encyclopaedia Britannica.

² Definition of Pornography, <https://www.merriam-webster.com/dictionary/pornography>.



The Blacklaw's Dictionary³ also defines pornography as:

“That, which is of, or pertaining to obscene literature; obscene; licentious.”⁴

Thus, any material, video or audio or books, that causes sexual or erotic reactions in human being, is termed as ‘Pornography’. The beginning of pornography is not a recent advent. As early as 30,000 years saw the sexual awakening of man, with Paleolithic people were carving large-breasted, thick-thighed figurines of pregnant women out of stone and wood.

Observing through history, the ancient Greeks and Romans created public sculptures and frescos depicting homosexuality, threesomes, fellatio and cunnilingus. In India during the second century, the Kama Sutra was half sex-manual, half relationship-handbook. The Moche people of ancient Peru painted sexual scenes on ceramic pottery, while the aristocracy in 16th century Japan was fond of erotic woodblock prints.⁵

In the West, many early explicit materials were political, rather than exclusively pornographic, said Joseph Slade, a professor of media arts at Ohio University. French revolutionaries, in particular, satirized the aristocracy with sexually charged pamphlets. Even the Marquis de Sade's famously brutal and erotic works were part philosophical.

³ Henry Campbell Black, Black's Law Dictionary 8th Edition, Westlaw.

⁴ People on Complaint of Savery v. Gotham Book Mart, N.Y.S. 563, 567.

⁵ Stephanie Pappas, *The History of Pornography*, LIVE SCIENCE (Oct. 11, 2010).

However, these artefacts were not purely meant for the sexual gratification of other men or women. They were viewed more as a form of art, to be looked at and appreciated for afar. The term ‘porn’, abbreviation of pornography, was started to be used in the 1800s, solely in the Western countries, when the pornographic industry was created, with technology given it the much needed boost. In 1839, Louis Daguerre⁶ invented the daguerreotype, a primitive form of photography. Almost immediately, pornographers commandeered the new technology. The earliest surviving dirty daguerreotype — described by Prof. Slade as “depicting a rather solemn man gingerly inserting his penis into the vagina of an equally solemn and middle-aged woman” — is dated at 1846. Video followed a similar path. By 1896, filmmakers in France were delving into the erotic with short, silent clips. Then, in the 1970s, changing social mores opened the door for public showing of explicit films. The Internet and the invention of the digital camera lowered the barriers to porn-making so low that entire websites are now devoted solely to non-professional videos.⁷

However, with the increasing demand of more enticing content from the porn industry, the makers have to come up with facets that are socially out-casted. This leads to not only an unhealthy knowledge of sexually aggressive activities, but also no guidelines of utilising them in an young adult's world. This project report aims to

⁶ Helmut & Alison Gernsheim, *L.J.M. Daguerre: The History of the Diorama and the Daguerreotype*, London, 1956.

⁷ Utkarsh Anand, *Background and Legal Aspects of Banning Pornography*, THE INDIAN EXPRESS (Aug. 6, 2015).



jurisprudentially analyse the legal issues that pertain to the functioning of pornographic sites in India, and their morals well as ethical aspects.

- To understand the growing popularity of pornography sites.
- To find out various laws regulating such sites all over the world.
- To examine its relation with morals and ethics with respect to jurisprudence.

1.2.MATERIALS AND METHODS

- **Title-**

Title of the research paper is Legal Control of Pornographic Sites and their Ethical and Moral Values: A Jurisprudential Analysis

- **Hypothesis-**

The idea about the topic is that pornography needs to be controlled by the cyber laws of a particular country as it is below the moral and ethical standards of society.

- **Problem-**

The main problem dealt in this project report is the high occurrence of the sexual content on the Internet, and how it is being legally maintained by the various countries, as well as its impact on the morals of the society.

- **Nature of the study-**

This research project is Doctrinal in nature since it is largely based on secondary & electronic sources of data and also since there is no field work involved while producing this research and it largely involves study of various theories and comparison from different books, journal and other online sources thus not being empirical in nature.

- **Rationale of the study-**

The study of the legal aspect of regulating pornography is necessary to understand the psychological impact it has on today's youth, and whether such activities should be allowed to be perceived by the society. It has become an immediate concern for the growing generation to understand the consequences of an activity that is now deemed as 'casual'. Whether pornography fits the moral brackets of the society, and whether regulating it can help curb the menace of objectification of sex, is something the researcher wishes to demonstrate through this paper.

- **Sources of Data-**

Data that were used for the completion of this research project are all secondary sources of data ranging from books, journal, articles and other online sources and as far as case laws are concerned these cannot be said to be primary sources since they are not first-hand information or judgment reports but a modified form found in books or journals.

- **Objectives-**

The main objectives of the study are:-

- **Chapterisation-**



This project report has been divided into following chapters:-

- ❖ **Chapter 1.-Introduction** deals about the general information and evolution of pornography and how it came to be.
- ❖ **Chapter 2.-Understanding the Legal Control of Pornographic Sites** is aimed at enabling the reader to understand how pornography is legally controlled in different parts of the world.
- ❖ **Chapter 3. – Legal Control under the Indian Law** is aimed at showing how Indian laws enable in controlling the viewership of pornography in the country.
- ❖ **Chapter 4.-Ethical and Moral Values of pornography** is aimed at showing how pornography fits into the ethical and moral brackets of society.
- ❖ **Chapter 5.- Jurisprudential Approach** is aimed at showing the approaches by jurists such as J.S. Mill as well as the Hart-Devlin debate on morality, to have a better understanding of law and morality

Chapter 2. DATA ANALYSIS

2.1. UNDERSTANDING THE LEGAL CONTROL OF PORNOGRAPHIC SITES

Cyber pornography is in simple words defined as the act of using cyberspace to create, display, distribute, import, or publish pornography or obscene materials.⁸ With the advent of cyberspace, traditional pornographic content has now been largely

⁸ Merriam-Webster.

replaced by online/digital pornographic content. Unlike the latter cyber crimes, which threaten the very creditability of the Internet, cyber pornography promotes the use of the Internet. Should cyber pornography be prohibited, or restricted? How much of cyber pornography should be legal? What are the powers of the state to prohibit or regulate cyber pornography? These are difficult issues to resolve. There are two reasons as to why cyber pornography has become difficult to regulate is: firstly, it is easily, freely, and conveniently available, secondly, its global accessibility. There are different legal statuses for cyber pornography around the world.

In *People v. Freeman*⁹ of 1988, the California Supreme Court stated that adult film production was to be protected as free speech under the First Amendment¹⁰. They ruled that since such films did not include obscene images and indecency, and stayed within society's standards, the adult film industry should be granted the freedom of speech.¹¹ Escaping highly regulated government intervention, regulation in the adult film industry has been limited to preventing child pornography. In the United States Code of Regulations¹², under title 'Title 18, Section 2257', no performers under the age of 18 are allowed to be employed by adult industry production companies. The failure to abide by this

⁹ (1989) 488 U.S. 1311.

¹⁰ Richard Wolf, *What the First Amendment Protects*, USA TODAY (Apr. 6, 2018).

¹¹ Randazza, Marc J., *The Freedom to Film Pornography*, NEVADA LAW JOURNAL (Nov. 27, 2016).

¹² US Government Publishing Office Federal Digital System.



regulation results in civil and criminal prosecutions. To enforce the age entry restriction, all adult industry production companies are required to have a Custodian of Records that documents and holds records of the ages of all performers.

'Extreme pornography' is a term introduced by the UK Government in Part 5, Section 63 of the Criminal Justice and Immigration Act (2008)¹³, which made possession of such images a criminal offense from 26 January 2009.¹⁴ It refers to pornography (defined as an image which "of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal") which is "grossly offensive, disgusting or otherwise of an obscene character", and portrays any of the following:

- (a) an act which threatens a person's life,
- (b) an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals,
- (c) an act which involves or appears to involve sexual interference with a human corpse,
- (d) a person performing or appearing to perform an act of intercourse or oral sex with an animal (whether dead or alive),

and a reasonable person looking at the image would think that any such person or animal was real.

¹³ The National Archives, <https://www.legislation.gov.uk/ukpga/2008/4/content> s.

¹⁴ Ministry of Justice, <http://www.justice.gov.uk/news/announcement261108a.html>.

The term covers staged acts, and applies whether or not the participants consent. Classified works are exempt, but an extract from a classified work, if the image was extracted for the purpose of sexual arousal, would not be exempt. Whether an image is "pornographic" or not is up to the magistrate or jury to determine simply by looking at the image; it is not a question of the intentions of those who produced the image.

2.1.1. LEGAL REGULATIONS

Some areas of legal concern regarding adult pornography are:

Prohibiting certain or all types of pornography that are illegal within a government's jurisdiction, for countries that do not prohibit all pornography, this might include pornography featuring violence or bestiality, and the likes.

Preventing those under the legal age (for most this means a minor under 18) from accessing pornographic content.

Enforcing laws designed to ensure that performers in pornography are of legal age.

In jurisdictions that heavily restrict access or outright ban pornography, various attempts have been made to prevent access to pornographic content. The mandating of Internet filters to try preventing access to porn sites has been used in some nations such as China¹⁵ and Saudi Arabia. Banning porn sites within a nation's jurisdiction does not necessarily prevent access to that site, as it may simply relocate to a hosting server

¹⁵ Associated Press, INDEPENDENT (Jul.23, 2010).



within another country that does not prohibit the content it offers.

Many nations that allow at least some types of pornography attempt to ensure that those under their legal age for accessing pornography (often 18 or 21) cannot easily access it. Various measures have been tried but with varying success. Within the United States, most websites have taken voluntary steps to ensure that visitors to their sites are not underage. Many Web sites provide a warning upon entry, warning minors and those not interested in viewing porn not to view the site, and requiring one to affirm that one is at least 18 and wishing to view pornographic content. Such warnings are at times used with other techniques, specifically on commercial and premium streaming sites.

The Adult Industry Medical Associates P.C. (formerly Adult Industry Medical Healthcare Foundation), also known simply as AIM¹⁶ or AIM Medical, was an organization that tested pornographic actors for HIV and other STDs on a scheduled basis.

Tests for the sex industry actors were done at the Foundation's offices in San Fernando Valley, Sherman Oaks, and Granada Hills. Each month, about 1,200 actors were tested for HIV, with results as early as 14 days after infection. This test is effective 10 days after potential infection, and anytime thereafter as compared to the alternative HIV test which requires a six-month waiting period to be effective. Other tests include such STDs as gonorrhea and syphilis.

¹⁶ Stevens, Sara: *Adult Industry Medical Healthcare Foundation*, STDAWARE.

AIM went out of business in 2011 after a lawsuit regarding violation of patient privacy.¹⁷

Chapter 3. LEGAL CONTROL UNDER THE INDIAN LAW

Cyber pornography is banned in many countries and legalized in some. In India, under the Information Technology Act, 2000¹⁸, this is a grey area of the law, where it is not prohibited but not legalized either.

Under Section 67 of the Information Technology Act, 2000 makes the following acts punishable with imprisonment upto 3 years and fine upto 5 lakhs:

Publication- which would include uploading on a website, whats app group or any other digital portal where third parties can have access to such content.

Transmission- this includes sending obscene photos or images to any person via email, messaging, Whatsapp or any other form of digital media.

Causing to be published or transmitted- this is a very wide terminology which would end up making the intermediary portal liable, using which the offender has published or transmitted such obscene content. The Intermediary Guidelines under the Information Technology Act put an onus on the Intermediary/Service Provider to

¹⁷ Dennis Romero, *Porn Clinic AIM Closes for Good*, THE WASHINGTON POST (May 3, 2011).

¹⁸ based on the *United Nations Model Law on Electronic Commerce 1996* (UNCITRAL Model) recommended by the General Assembly of United Nations by a resolution dated 30 January 1997.



exercise due diligence to ensure their portal is not being misused.

Section 67A of the Information Technology Act makes publication, transmission and causing to be transmitted and published in electronic form any material containing sexually explicit act or conduct, punishable with imprisonment upto 5 years and fine upto 10 lakhs.

- An understanding of these provisions makes the following conclusions about the law of cyber pornography in India extremely clear:
- Viewing Cyber pornography is legal in India. Merely downloading and viewing such content does not amount to an offence.
- Publication of pornographic content online is illegal.
- Storing Cyber pornographic content is not an offence.
- Transmitting cyber pornography via instant messaging, emails or any other mode of digital transmission is an offence.

This section also includes "causes to be published" and prohibits Internet Service Providers from transmitting adult content.¹⁹ But no ISP can block adult content on their own. They prefer to invoke Section 79 3(B), to block only on the direction of the government. ISPs insist on a list of websites common for all ISPs.²⁰

Govt provided such a list of 857 websites and ISPs blocked them for 5-days in 2015,

from 1-August till 5-August.²¹ Due to huge loss of revenue to ISPs²², govt softened its stance and instructed to block only child pornography.

In the infamous *Bazee.com* case²³, the CEO Avinash Bajaj was arrested for an advertisement by a user to sell the DPS sex scandal video. The video was not uploaded on the portal, despite that Avinash was arrested under Section 67 of the Information Technology Act. It was subsequent to this case that the Intermediary guidelines were passed in 2011 whereby an Intermediary's liability would be absolved if they exercised due diligence to ensure obscene content is not displayed on their portal. The act of collecting and storing cyber pornography is not an offence, but if the content involves minors, then it is punishable with imprisonment upto 5 years and fine upto 10 lakhs.

However, there is one case in which viewing Cyber pornography is punishable with imprisonment upto 5 years and fine upto 10 lakhs, where the content contains children engaging with one another or with adults in sexually explicit acts.

Browsing or downloading Child pornography online is also a punishable offence under the Information Technology Act.²⁴ The creation of child pornography is also punishable under the Act.

¹⁹ Section 67A of the IT Act, 2000.

²⁰ Kamlesh Vaswani v. Union of India, (2014) 6 SCC 705.

²¹ Banned: Complete List of 857 Porn Websites blocked in india, Deccan Chronicle (Aug. 4, 2015).

²² Shauvik Ghosh, *Porn ban could cost ISPs, telecoms 70% of Data Revenue*, LIVEMINT (Aug. 05, 2014).

²³ Avnish Bajaj v. State, (2005) 3 Delhi 364.

²⁴ Section 67B of the IT Act, 2000.



Recent Indian incidents revolving around cyber pornography include the *Air Force Balbharati School*²⁵ case. A student of the Air Force Balbharati School, Delhi, was teased by all his classmates for having a pockmarked face. Tired of the cruel jokes, he decided to get back at his tormentors. He scanned photographs of his classmates and teachers, morphed them with nude photographs and put them up on a website that he uploaded on to a free web hosting service.

S.292 of the Indian Penal Code²⁶, which deals with Indian law against obscenity, has been inherited from British, and the same has been borrowed for the IT Act 2000. The line of our present law go back to the decision of the Queen's Bench in the *R v. Hicklin*²⁷ in which the following test was evolved by the court;

"I think the test of obscenity is whether the tendency of the matter charged as 'obscene' is sufficient to deprave and corrupt those whose minds are open to such moral influences, and into whose mind a publication of this sort may fall".

This test has been applied by courts In India also by the Supreme Court of India in case of *Ranjit D. Udeshi v. State of Maharashtra*²⁸ approved the test and said that this test should not be discarded as it helps the courts in distinguishing between that which is artistic and that which is obscene.

²⁵Air Force Balbharati Svchool & Anr. v. Delhi School Tribunal & Ors., (2016) SCC 913.

²⁶ The Indian Penal Code (45 of 1860).

²⁷ (1868) 3 QB 360.

²⁸ (1965) SC 881.

In *Chandrakant Kalyandas v. The State of Maharashtra*²⁹, the Supreme Court held that the concept of obscenity would differ from country to country and from society to society on the standard of morals. Again it was recognised that the standards of contemporary society in India were also dynamic and if a reference to sex by itself were considered obscene, no books would be sold except those, which are religious. The court went on the say, what one has to see is whether a class, not an isolated case into whose hands the book, article or story falls, suffer in their moral outlook or become deprave by reading it or might have impure thoughts aroused in their minds. Again, in case of *Amresh Basu v. Amal Mitra*³⁰, the court said that the concept of obscenity is moulded to a great extent by the social outlook of the people who are generally expected to read the book. The court held that in order to constitute an offence u/s 292 of the IPC, the matter complained of as obscene must be so gross and its obscenity so pronounced that it is likely to deprave and corrupt those whose minds are open to influence of this sort.

3.1. INTERFACE BETWEEN INDIAN LAWS AND LAWS OF U.S. AND U.K.

The test of obscenity since Hicklin case has been variously stated with shifting emphasis, in the UK and the US. Broadly, it has been recognised that obscenity has to be judged in

²⁹ (1969) 2 SCC 687.

³⁰ (1985) 4 SCC 289.



the context of contemporary standards and prevailing attitudes towards sex. However, Hicklins test was objected on certain grounds by Justice Brennan in the famous American case, *Roth v. U.S.*³¹. The three grounds identified by J.Brennan were;

- it permitted books to be judged obscene on the basis of isolated pages read out of context;
- it allowed the obscenity of a work to be determined by its likely effects on unusually susceptible persons;
- it posited fixed standards of propriety regardless of time, place and circumstances.

In this case it was held that a book could be judged obscene only if the dominant theme of the material taken as a whole considered and its likely effect on the average person is taken into account. This came to be popularly known as Roth's 'three-pronged test'. The test was considered to be more effective than earlier Hicklin's test. Another important code that attempts to regulate obscenity is Indecent Representation of Women's (Prohibition) Act 1986.³² The title of the Act makes it amply clear that the legislature is to prohibit "indecent representation". Pornography, which amounts to indecent representation, is also an offence under this act. The issue to be determined is what may amount to indecent representation. To this section 2(c) of the Act defines indecent representation as –

"the depiction in any manner of the figure of a women, her form or body or any part

thereof in such a way as to have the effect of being indecent, or 135 derogatory to, or denigrating, women, or is likely to deprave, corrupt, or injure the public morality or morals".

The Supreme Court of India, in the case of *Khoday Distilleries Ltd. and Ors. v. State of Karnataka and Ors.*³³, held that there is no fundamental right to carry on business of exhibiting and publishing pornographic or obscene films and literature.

In *Kamlesh Vaswani vs. Union of India and Ors.* a PIL petition was filed in the Supreme Court of India seeking a ban on pornography in India. The Court issued a notice to the central government of India and sought its response. The government informed the Court that the Cyber Regulation Advisory Committee constituted under Section 88 of the IT Act, 2000 was assigned with a brief with regard to availability of pornography on the Internet and it was looking into the matter.³⁴

On 26 January 2016, the Supreme Court in written order, instructed govt "to suggest the ways and means so that these activities are curbed. The innocent children cannot be made prey to these kind of painful situations, and a nation, by no means, can afford to carry any kind of experiment with its children in the name of liberty and freedom of expression. When we say nation, we mean each member of the collective".³⁵

³¹ (1957) 35 US 476.

³² Ministry of Women and Child Development, <http://www.wcd.nic.in/act/indecent-representation-women>.

³³ (1995) 1 SCC 574.

³⁴ *Kamlesh Vaswani v. Union of India*, (2014) 6 SCC 705.

³⁵ *Ibid.*



Chapter 4. ETHICAL AND MORAL VALUES OF PORNOGRAPHY

Healthy sexuality combines emotional, social, intellectual, and physical elements, but pornography separates the mechanized components of intercourse from real sexuality itself. It leads to decreased sensitivity toward women and increased aggression. It also leads to a decreased ability to build healthy relationships or experience sexual satisfaction; users are increasingly unable to properly link emotional involvement with sex. Indeed, porn fosters incredibly unhealthy views about sexuality and human beings. Most porn portrays women as sex-obsessed, mindless objects, promiscuous, and subordinate.³⁶

There is a moral obligation within systematic social order, and this is referred to as 'ethics'. Along with moral obligation, there is the inclusion of moral concepts, and judgements that may define, or differentiate the values of morals and ethics, and all also have alternative meanings within an assortment of social orders. For instance, in terms of pornography, the standpoints of pro-pornographic theorists may defend the right and moral order to obtain, use and exercise pornography at their own free will.

On the other hand, the anti-pornographic stance may possibly exercise the right that pornography is considered harmful, and should be abolished from all modern day societies, since the outcome may or can lead to criminal offenses and unjust actions. Ethics, morals and values evolve with each

passing decade, and therefore it must be analysed and discussed with a modern perspective, not to mention a realisation of how modern day society acts, thinks and performs. Pornography is a large field that has many elements, as well as retains ethical attitudes from both a positive outlook and a negative outlook. It can be considered important to uncover the differences between values, facts and ethics from both sides of the argument.

When discussing values, the aspect and realm of utilitarianism may create cause in order to decipher the differences and similarities in the arguments. According to Hare³⁷, utilitarianism is the concept of concern for a person's well-being, rights, values and morals. The concept includes equality for all persons and establishes equal weight in both recurring arguments. However, there is a wide variety of variables in the consideration of utilitarianism, and in the concept of pornography, this is now perceived as equal and unequal rights. There is a fine line when developing arguments that are for or against the use and exercise of pornography. Individuals can be utilitarian, but still argue against pornography. For instance, a feminist, whom is anti-pornographic, can proclaim to be utilitarian, and can exercise the 'equal rights' aspect, and enable the 'discrimination' factor as the foundation of their argument. Or, the unequal rights aspect may be employed and the foundation could be 'harm' and 'humiliation' towards women, and in some cases, men. In regards to pornography, the

³⁶ Rachel L. Wagley, *Pornographic Ethics*, THE HARVARD CRIMSON (Mar. 28, 2011).

³⁷ R.M. Hare, White's Professor of Moral Philosophy at the University of Oxford from 1966 until 1983.



foundation begins with a moral code, or conduct.

A person's inner feeling and response to the idea and practice of pornography, and some arguments are based on the harmful outcomes that pornography, supposedly, produces. However, if free will and equal rights are in fact part of legislation, then both sides of the argument can be considered valid as both sides of a right to moral conduct and a code of values. In addition, it must be determined what can be considered fair, and what actions are considered right while governing a concrete world. When moral, values and attitudes are in constant change; it is proven difficult to maintain the just and unjust principles in government, society and social order.

Chapter 5. JURISPRUDENTIAL APPROACH

5.1. JOHN STUART MILL'S THEORY ON LIBERTY

John Stuart Mill, was born in London, lived from 1806 to 1873. He followed in his father's footsteps as an intellectual utilitarian philosopher. After a mental crisis at the age of twenty, he proceeded to reinterpret his philosophy "truth for purposes of action; and on no other terms can a being with human faculties have any rational assurance of being right".³⁸

Mill argues that though we act out of the best interest for everyone, no one can or should impose opinions on others or

suppress others' opinions or beliefs. The particular evil of such suppression is that one takes away an element of truth from the entire humanity for generations to come. If the opinion is right, the suppressors cheat themselves the opportunity to act according to the truth. Almost dire, if the suppressed opinion is actually wrong, one misses the opportunity to enhance the fundamental understanding and impression of such truth that comes from the conflict between opposing opinions. An individual can believe his or her opinions to be true but it is not until it has been exposed towards critique and discussion that the opinions can prove their infallibility and be called justified truths. This is because no one has the authority to settle the question of true or false on a universal level, as it is determined by the responding disagreement.

Mill asserts that by limiting freedom of discussion for the individual or a group, even though one is sure of one's beliefs, the truth can fade away. Therefore one must not limit speech or thought but let it out to the debate where it might manifest itself or disappear as it proves itself valid or invalid. The truth is not a justified truth if it cannot stand in an argument against it. Mill argues that by limiting freedom of speech of other people, it does not entail the disappearance of the opposed beliefs. It can in fact further the opposing notions and cause even greater damage to the truth than if it had been openly discussed. Mill gives the example of the teachings of Socrates and Jesus where their ideas and values did not die with their executions. In the case of pornography the censorship of "Deep Throat", an adult movie that came out in 1972, twenty-three American States only furthered the sale and distribution and eventually became a symbol

³⁸ John Stuart Mill, *Utilitarianism* page 79 (1985).



of the sexual revolution that changed the general perception of sexuality.³⁹ In relation to Mill's arguments for the truth not prevailing by itself, the prosecution of Harry Reems shows how an opposition that is large and efficient enough ensures the survival of a suppressed truth. The trail against Harry Reems and the aftermath⁴⁰ demonstrates how the interpretation of the law and thus the 'truth' is determined by moral codes and values, and the overturn of the verdict by the new precedential office in 1976 might not have happened had it been for the anti-censorship opposition. If the opposition had not taken action and the prosecution had not been coincidental, the 'truth' might not have prevailed.

Mill further states that neither society nor other people should have the right to restrict anyone from putting him - or herself in danger. This is a consequence of Mill's central thought on individual liberty. According to Mill, this means that the success of a person's existence is not defined by its goals, or whether its content is more or less reasonable. Instead, the 'good life' depends on the freedom to choose a way of life, no matter the outcome of such a decision. In other words, the good life comes from individual freedom to experiment with different ways of living. Each individual needs the freedom to choose and engage in different lifestyles of his or her own choosing in order to live a satisfactory life, because the individual knows what is best for him or her. Feminist

³⁹ Bailey, B: *Prescribing the Pill: Politics, Culture, and the Sexual Revolution in America's Heartland*, *Journal of Social History*, (1997) 841.

⁴⁰ Harry Reems was accused and convicted in accordance to the Law of Conspiracy in 1976, (Inside Deep Throat, documentary 2005).

Catherine MacKinnon⁴¹ believes pornography to be patriarchal and that it, no matter the content, is discriminating towards women. Here one has to consider if one is dealing with women in general or if one is 'only' looking at women who are participating in the pornography industry. A harmful outcome of its content as well as the context and that it is crucial to stop the subordination of women through the constant depiction of male superiority portrayed in pornography and the misogynistic violent behaviour that it can result in. These feminists base their arguments on narratives from women who argue that they have been subjected to misogynistic violence because of pornography. Furthermore, one can argue that a woman can have entered the industry voluntarily, but might be coerced to do other things on set than what she was initially told.

Thus, Mill's theory teaches us to respect the opinions of others, and allow individual liberty to prevail, even if the act renders disturbance to the society. He asserts that what an individual does within closed walls is her matter of business, and one else's.

5.2. LAW AND MORALITY- THE HART-DEVLIN DEBATE

Under the Criminal Law Amendment Act 1885, United Kingdom, any homosexual activity between males was illegal. After the Second World War there had been an increase in arrests and prosecutions, and by the end of 1954,

⁴¹ Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, page 20, *Harvard Civil Rights-Civil Liberties Law Review*, Vol.1 (1985).



in England and Wales, there were 1,069 men in prison for homosexual acts, with a mean age of 37 years. Following several sensational trials, notably that of Alan Turing and Lord Montagu of Beaulieu, the Conservative government set up a departmental committee under Sir John Wolfenden to consider both homosexual offences and prostitution.

Wolfenden Committee⁴² had to prepare a report on the issue of legalising homosexuality and prostitution. The report came in favour of legalisation as it stated that the law need not concern itself with immorality. HLA Hart, Lord Patrick and Lord Devlin took part in the debate. The primary reason for the decriminalisation of homosexuality was on the basis of:

- Freedom of choice
- Privacy of morality

• Devlin’s Position

- Law without morality destroys freedom of conscience and is the paved road to tyranny.
- He talked about society’s ‘moral fabric’ which the society holds together and if the criminal law does not respect and reinforce society’s morality, it will destroy the ‘moral fabric’ leading to the disintegration of society.
- Any category of behaviour that is capable of posing a threat to social cohesion can be governed by moral laws. They are justified as they protect society against the disintegrating effects of actions that undermine the morality of a society.

- There is no limit of reach of law and thereby immorality could also be governed by law.
- Devlin suggested that common morality could be determined from asking “what is acceptable to the ordinary man, the man in the jury box, who might also be called the reasonable man or the right-minded man”.
- Devlin, thus made the following recommendations:-
 - Privacy should be respected.
 - Law should only intervene when society will not tolerate certain behaviour.
 - Law should be a minimum standard, not a maximum standard.

Hart’s position

- His position was based on Mill’s Harm principle, i.e., no act should be interfered with, unless it affects the rights of another person.
- He warned against dangers of ‘populism’ and was against the view of imposing majoritarian perception of morality over the remaining members of the society.
- He also stated that mere change in moral views does not lead to disintegration of society.
- Hart’s approach is more individualistic to that of Devlin.

Thus, the Positive Morality and Critical Morality approaches of Devlin and Hart, respectively, compels one to think about which route to take, however, both theories are accurate in their own space. Pornography is definitely the subject of an individual’s choice, and that choice should not be interfered with unless the viewing of pornography by one person leads to violation of rights of another person.

⁴² Sir John Wolfenden, Wolfenden Report, 1957.



In cases where women are subjected to violent attacks by men who watch porn and wish to recreate the same situations in real life, law should interfere and try to protect not only the morality of society but also the freedom of another person.

CHAPTER 6. CONCLUSION & SUGGESTIONS

6.1. CONCLUSION

In conclusion, the result of ethical warrants is censorship. The evidence provided from the warrants is used differently in the pursuit of pornography, thus depending on the stance, might create the opposite effect of what was initially intended. If the individual is restricted from obtaining pornography, they may seek an alternative approach to obtain pornography because of their need for sexual autonomy. If people are denied the right to exercise their sexual autonomy they may rebel against the restriction in order to maintain their free will. Ethics are choices, and with those choices come consequences, thus creating different degrees of consequences. People aim at choosing the option that has the most preferable consequence for them. Ultimately, we can conclude that there is no correct perception of pornography, as it is a subjective field, where the individual develops a personal opinion, which can be affected by the extreme convictions. We have come to the realisation, that no person is justified to determine what is right or wrong for other people, in terms of pornography, as you cannot control another person's value-system.

6.2. SUGGESTIONS

Today it seems that the mentality or the way people think is changing, people are being more open about what ought to do and what not. The researcher thinks in a few years people will reach a point where they would think pornography should be legalized fully without any barriers. This in itself will give a huge relief to the sex industry in the country. If their profession becomes legal they would be able to enforce their rights fully and will also be able to fight any discrimination that comes their way. What is immoral for us might not be immoral for others therefore it can be said morals vary from person to person and since morals are not static only on the basis of morals if we regard prostitution illegal it should not be so.

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