

REJECTING “MORAL HARM” AS A GROUND UNDER OBSCENITY LAW

*Anees Backer**

ABSTRACT

Indian society is still considerably puritanical when it comes to matters of sex, and the tendency to condemn any sexually explicit material as obscene, regardless of its context or purpose, is fairly widespread. The law relating to obscenity reflects this paranoia, expressing a paternalistic concern for the depravity and moral corruption of the consumers of allegedly obscene material, even when such material is received voluntarily by adults. The assumptions of moral harm underlying the existing legal regime on obscenity are constructed by judicial instinct, with little regard for its comportment with empirical reality. This paper argues for the rejection of moral harm, which forms the bedrock of obscenity law, as a ground for declaring materials as obscene.. This approach is promoted as better acknowledging human subjectivity, accounting for the subtle utility of sexually explicit material, and as being more conducive to a revolution in contemporary artistic enterprise.

Part I briefly describes the statutory provisions on obscenity in India and traces the judicial interpretation of the subject, signalling why the law in its present form poses a problem. Part II makes a case for the rejection of moral harm by choosing to focus on what is considered as the most aggravated form of obscenity – pornography. It foregrounds empirical findings on the effect of pornography on the consumer to expose its dissonance with judicial instinct, and goes on to describe why the law is incapable of countering the non-consequential harm of pornography. Part III speaks of the chilling effect of obscenity law, and analyses Indian cases on obscenity to demonstrate that there exists sufficient analytical weapons in the Court’s armoury to prohibit much of contemporary art as obscene. Part IV concludes the paper by emphasizing the unsuitability of prohibition as a strategy, and putting forth more speech as an alternative.

* Final Year Student, B.A. LLB. (Hons.), NALSAR University of Law, Hyderabad.

I. THE INDIAN LAW ON OBSCENITY

The Indian law on obscenity is primarily found in Section 262 of the Indian Penal Code¹, which declares any form of representation, including those in the form of books, pamphlets, paintings, drawings or any other object obscene if it is "lascivious or appeals to the prurient interest" or if its effect, when taken as a whole, is such as to "tend to deprave or corrupt persons, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it."² The provision relates to sale, hire, distribution and public exhibition of such material, as well as the import, export and the mere possession of such material for any of the aforementioned purposes.³ There are exceptions for publications made for the public good, such as those "in the interest of science, literature, art or learning or other objects of general concern" as well as materials kept bona fide for religious purposes.⁴ The provision as it stands today was the result of substantial amendments introduced by the Obscene Publications Act, 1925 to give effect to India's commitments made at the International Convention for Suppression of Traffic in Obscene Literature, 1923⁵ and further amendments made in 1969 to exclude publications in public good.

Likewise, the Indecent Representation of Women (Prohibition) Act, 1986 prohibits the publication and exhibition of any advertisements containing indecent representation of women,⁶ as well as the production, sale, letting for hire, distribution and circulation of indecent representation of women in any form.⁷ "Indecent representation" is defined as "depiction in any manner of the figure of a woman; her form or body or any part thereof in such way as to have the effect of being indecent, or derogatory to, or denigrating women, or is likely to deprave, corrupt or injure the public morality or morals."⁸ The exceptions available under S. 292 apply here as well.⁹ Incidentally, the Act was fiercely criticised by a segment of

1 Hereinafter IPC.

2 S. 292(1), IPC, 1860.

3 S. 292(2) and 292(3), IPC, 1860.

4 Proviso to Section 292, IPC, 1860.

5 Vishnu D. Sharma and F. Wooldridge, *The Law Relating to Obscene Publications in India*, 22 *The International and Comparative Law Quarterly* 632, 634 (1973).

6 S. 3, Indecent Representation of Women (Prohibition) Act, 1986.

7 S. 4, Indecent Representation of Women (Prohibition) Act, 1986.

8 S. 2, Indecent Representation of Women (Prohibition) Act, 1986.

9 Proviso to S. 4, Indecent Representation of Women (Prohibition) Act, 1986.

Indian feminists, especially the publishers of the magazine *Manushi*, who objected to the vague and all-encompassing definition of indecent representation and the wide-ranging powers given to administrative authorities to search and seize material that they deemed obscene. They worried that “treating women with respect” could have the effect of treating them as sexless beings, and the extraordinary focus on sexually explicit material could take attention away from other derogatory stereotypes of women that abound in popular media.¹⁰ These are valid concerns, and will be explored further in the sections below.

Finally, S. 67 of the Information Technology Act, 2000 punishes anyone who publishes or transmits material that is “lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons” who are likely to view the material.¹¹ The punishments prescribed are onerous, with imprisonment of upto five years and fine which may extend to one lakh rupees on first conviction, and imprisonment of upto ten years and fine which may extend to two lakh rupees on second conviction.

In deciding cases on obscenity, Indian courts have rejected a single test. The approach of the Courts have been different in different cases, in line with the Supreme Court’s observation that there can be no uniform test of obscenity and that each case will have to be judged on its own facts.¹² However, the Court in *Ranjit D. Udeshi* adopted the judicial test laid down in *R. v. Hicklin*¹³ by Chief Justice Cockburn, which reads as follows:

“ . . . I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall . . . it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character.”

10 *India: Feminists Criticise Porn Law*, (Issue No. 17(3)) Off Our Backs 9 (March, 1987).

11 S. 67, Information Technology Act, 2000.

12 *Ranjit D. Udeshi v. State of Maharashtra*, AIR 1965 SC 881.

13 (1868) L.R. 3 Q.B.

The Court further interpreted the word "obscene" to mean something "offensive to modesty or decency; lewd, filthy and repulsive."¹⁴ But the Court added another modification to the *Hicklin Test*, and held that regard must be had to "our community mores and standards" and whether the material "appeals to the carnal side of human nature, or has that tendency."¹⁵ Formulating explicit standards of mores, the Supreme Court in *Director General, Directorate General of Doordarshan and Ors. v. Anand Patwardhan and Anr.*¹⁶ considered and used part of the test laid down in the US Supreme Court case of *Miller v. California*.¹⁷ The Court imported the aspect of the test that states that "contemporary community standards" are to be used in determining what is obscene. This concretized the idea that where morality or decency is concerned, the community as a whole should be considered instead of parts in isolation. The concept adopted from *Miller* paved the way for the decision in *Ajay Goswami v. Union of India*,¹⁸ which created a category of material that while unsuitable for children, is perfectly acceptable when it comes to adults. The Court endorsed the position in America which does not allow for suppression of speech and expression solely for the sake of protecting children from potentially harmful materials.¹⁹

14 *Ranjit D. Udeshi, supra* note 12, 885; Madhavi Goradia Divan, *Facets of Media Law* 57 (Eastern Book Co., 2006).

15 *Ranjit D. Udeshi, Ibid*, 889.

16 AIR 2006 SC 3346.

17 13 U.S. 15 (1973) [This case expanded the scope of *Roth v. United States*, 354 U.S. 476 (1957), which ruled that the *Hicklin* test was inappropriate and introduced the aspect of contemporary community standards. The Supreme Court in *Miller* acknowledged "the inherent dangers of undertaking to regulate any form of expression," and stated that "the State statutes designed to regulate obscene materials must be carefully limited." In order to determine the limits to be set, the Court devised a set of three criteria which must be met in order for a work to be legitimately subject to state regulation:

"1. whether the average person, applying contemporary community standards (not national standards, as some prior tests required), would find that the work, taken as a whole, appeals to the prurient interest;
2. whether the work depicts or describes, in a patently offensive way, sexual conduct or excretory functions specifically defined by applicable state law; and
3. whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

The third part of the test is clearly of the same type as that employed by the Indian Courts in searching for exceptions to the offense of obscenity. The first part is a new consideration where it now expressly used, whereas initially it was impliedly used in the sense that when concepts like morals were considered, the standard is the community as a whole].

18 AIR 2007 SC 493.

19 *Alfred E. Butler v. State of Michigan*, 1 LED 2d 412 [The Supreme Court held that "The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare.

On the question of obscenity and art, it has been determined that “art must be so preponderating as to throw the obscenity into a shadow, or the obscenity so trivial and insignificant that it can have no effect and may be overlooked.”²⁰ This was approved in *K.A. Abbas v. UoI*,²¹ which held that “the line is to be drawn where the average moral man begins to feel embarrassed or disgusted at a naked portrayal of life without the redeeming touch of art or genius or social value. If the depraved begins to see in these things more than what an average man would, in much the same way, as it is wrongly said, a Frenchman sees a woman’s legs in everything, it cannot be helped. In our scheme of things, ideas having redeeming social or artistic value must also have importance and protection for their growth.”²² In some cases, the judiciary has built in a number of safeguards, such as in *Samaresh Bose v. Amal Mitra*,²³ wherein the Court held that the judge is required to place himself first in the position of the author to understand what he seeks to convey and whether it has any artistic value, then in the position of the reader of every age group into whose hands the book is likely to fall to study the influence the book is likely to have on the reader, and then apply his judicial mind dispassionately to determine whether the book is obscene, drawing on views expressed by reputed authors where appropriate.²⁴ However, the reliance on expert evidence is not a mandate, and is to be done only in “appropriate cases” to eliminate the judge’s personal predilections from affecting a “proper objective assessment.”²⁵

It is submitted that in all its myriad formulations judicial tests for obscenity are different means to achieve the same end, animated by a fear of corruption or

Surely, this is to burn the house to roast the pig.” The stance was upheld in later cases. In *Janet Reno v. American Civil Liberties Union*, 138 Led 2d 874, the court held that, “The Federal Government’s interest in protecting children from harmful materials does not justify an unnecessarily broad suppression of speech addressed to adults, in violation of the Federal Constitution’s First Amendment; the Government may not reduce the adult population to only what is fit for children, and thus the mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into the statute’s validity under the First Amendment, such inquiry embodies an overarching commitment to make sure that Congress has designed its statute to accomplish its purpose without imposing an unnecessarily great restriction on speech.”]

20 *Ranjit D. Udeshi v. State of Maharashtra*, *supra* note 12, 889.

21 (1970) 2 SCC 780.

22 *K.A. Abbas v. UoI* (1970) 2 SCC 780, 802.

23 (1985) 4 SCC 289.

24 K.D. Gaur, *Commentary on the Indian Penal Code 703* (Universal Law Publishing Co. Pvt. Ltd., 2006).

25 *Samaresh Bose*, *supra* note 23, 314.

“moral harm”. While the need for contextualizing the judicial assessments of obscenity has been introduced, including the need to review the work as a whole and the requirement to judge the likely impact with reference to the community as a whole, the judiciary’s understanding of obscenity is still defined primarily in terms of sexual explicitness, regardless of the attitude the work invites the viewer to adopt in relation to the work. Of course, such representation in art is excused where it reveals a preponderating social purpose, but the purpose must be of a kind that is palatable to the judiciary’s understanding of what is socially useful. This is of particular concern as art in this day and age is increasingly pushing the envelope, and is not necessarily purposive. Even where it makes a statement, a constructivist view of art is at odds with the essentialist view of art favoured by the Supreme Court. This will be discussed in detail in the following sections. Thus, the current law on obscenity will allow judges to hold potentially controversial speech hostage, with the consequence that the freedom of speech and expression will be significantly limited. It is clearly time for a revision in the law.

II. THE MORAL HARM OF PORNOGRAPHY

An argument against the use of moral harm as a ground in obscenity law is best made by focussing on the debate at the margins, and by demonstrating that it is not a valid ground even with respect to what is perceived as the most aggravated form of obscenity— pornography. If we are to conceptualise the moral harm basis of pornography law, we need to take a closer look at the fear of “depravity” and “corruption of minds” that sustains the modern law of obscenity. The conservative argument will likely draw on an attenuated form of nineteenth century fears that the availability of pornographic material will induce young boys (and it was assumed that they were mostly boys) to masturbate, thereby causing laziness, lowered productivity and even hastened death.²⁶ However, these theories stand discredited in today’s scholarship, and are rarely to be heard in anti-pornography advocacy except from the extreme right.²⁷ As a matter of academic integrity then, any rebuttal to the idea of moral harm caused by pornography should be offered to the best defence of pornography in contemporary thinking. Some consider Chief Justice Burger’s opinion in the US Supreme Court decision of *Paris Adult Theatre I*

26 Sharon Hayes, Belinda Carpenter and Angela Dwyer, *Sex, Crime and Morality* 39 (Routledge, 2012).

27 Whitney Strub, *Perversion for Profit: The Politics of Pornography and the Rise of the New Right* 2 (Columbia University Press, 2010).

v. *Slaton*²⁸ to be this defence,²⁹ wherein he argued that just as good books, plays and art lift the spirit and improve the mind, obscene publications have a tendency to exert a corrupting and debasing impact leading to antisocial behaviour, a crass attitude to sex and consequently debasement and distortion of sex.³⁰

Thus, it stands to reason that in its best form, the moral harm of pornography can either be conceptualised as a consequential harm, leading to increased proclivities towards sexual aggression or as non-consequential harm that leads to the degrading representation of human beings, particularly women. The truth of these claims as well as the possible justification that it offers for legal intervention are analysed below.

a. Consequential Harm and Empirical Reality

Various reports commissioned by governments around the world have debunked the illusory causal link between pornography and sexual aggression. These reports carry out or draw from extensive psychological studies on the effects of pornography viewing. The report of the Committee on Obscenity and Film Censorship headed by Prof. Bernard Williams, appointed to review the working of obscenity laws in England and Wales in 1977, deals with the same. Holding that there is a presumption in favour of individual freedom, the report considered that the law is justified in restricting such freedom only when the “harm condition” is fulfilled - that is, if it is proved beyond reasonable doubt that harm will be caused unless restrictions are imposed by law.³¹ After extensive research in Britain and abroad, the Committee concluded that there is hardly any evidence demonstrating a causal link between pornographic or violent material and sexual violence. What’s more, the Committee found little evidence of any attitudinal effects at all as a result of pornography, much less that which has been established beyond reasonable doubt.³² Likewise, the President’s Commission on Obscenity and Pornography set up by US President Lyndon B. Johnson in 1969 reached essentially the same conclusions. In general, the Commission concluded that legislation “should not

28 413 US 49 (1973).

29 Andrew Koppelman, *Does Obscenity Cause Moral Harm?* 105 Colum. L. Rev. 1635, 1640 (2005).

30 *Paris Adult Theatre*, at 63.

31 Simon Coldham, *Reports of the Committee on Obscenity and Film Censorship*, 43 MLR 306, 308 (1980).

32 Simon Coldham, *Ibid.*

seek to interfere with the right of adults...to read, obtain, or view explicit sexual materials.” The Commission applied a large part of its two million dollar budget on funding original research on the effects of sexually explicit materials, and found no causal connection between viewing pornography and delinquent or criminal behaviour. In one experiment, the repeated exposure of male college students to pornography was found to have “caused decreased interest in it, less response to it and no lasting effect”.³³ The findings of the Commission kicked up a storm in political circles, provoking President Richard Nixon to call them “morally bankrupt”.³⁴ The report was emphatically rejected by the US Senate.

The Attorney General’s Commission on Pornography ordered by Ronald Reagan published its report in 1986, and reached rather different conclusions, which have been assailed by psychologists since. For instance, the Commission’s finding that violence in pornography had increased since 1970 is not true. Its impression possibly arises from the greater prevalence of pornography in the US; the few studies on the levels of violence in pornography are inconclusive, and if liberally interpreted, actually suggest a decline in violence in mainstream pornographic fare.³⁵ The Commission found a causal relationship between violent pornography and attitudinal changes and increased aggression towards women, but expert opinion claims that this is true only of laboratory studies examining the effect of sexually violent images.³⁶ Further, studies suggest that the sexual imagery accompanied by violence need not be of an obscene or pornographic nature to produce the observed effect – rendering the conclusions which confound sexual explicitness with suspected violence.³⁷ The point is bolstered by the fact that “slasher” movies produced a more aggravated effect on the viewer than violent pornography did.³⁸ Further, there are several questions regarding the extrapolations that may be made from laboratory findings to real world situations. The Surgeon

33 David M. Edwards, *Politics and Pornography: A Comparison of the Findings of the President's Commission and the Meese Commission and the Resulting Response*, available at <http://home.earthlink.net/~durangodave/html/writing/Censorship.htm>.

34 Richard Nixon, *Statement About the Report of the Commission on Obscenity and Pornography* (October 24, 1970) available at <http://www.presidency.ucsb.edu/ws/index.php?pid=2759>.

35 Daniel Linz, Steven D. Penrod and Edward Donnerstein, *The Attorney General's Commission on Pornography: The Gaps Between "Findings" and "Facts"*, 12 American Bar Foundation Research Journal 713, 718 (1987).

36 Daniel Linz, et al., *Ibid*, 719.

37 Daniel Linz, et al., *Ibid*, 720-721.

38 Daniel Linz, et al., *Ibid*, 721.

General's report expressed this scepticism and was cautious about its conclusions. But it was ultimately excised and did not make it to the Final Report.³⁹ The Commission Report goes on to conclude that the effects of viewing non-violent pornography in which women play roles that are humiliating, degrading or purely instrumental are similar to those found in respect of violent pornography.⁴⁰ However, the studies that the Commission relied on produce no consistent evidence for these conclusions, and to infer direct causation between non-violent pornography and rape from a finding of correlation between callous attitudes towards rape and viewing of non-violent pornography in a *single* study indeed requires leaps of logic.⁴¹

Likewise, other laboratory studies by Edward Donnerstein at its most indicting, suggest that exposure to certain violent pornography shows an increase in attitudinal measures known to correlate with rape. However, when the same men were later given a pro-feminist debriefing session in which rape myths were busted and the harms suffered by women on account of rape were described, they were shown to have a more positive, less stereotyped attitude towards women than they did before the experiment.⁴² As for representative field studies, the most thorough study has as its most adverse finding a *correlation* (as opposed to a cause-effect relationship) between pornography exposure and sexual aggression levels in a small class of high risk men – more specifically, a total of 0.84% of the population – who reported four times the levels of sexual aggression as the subjects who did not use pornography.⁴³ This tells us nothing about the direction of causation, and we do not know whether high-risk men who are predisposed to employing aggression against women are more likely to watch pornography or whether pornography is the cause of the heightened level of aggression.⁴⁴

39 Avedon Carol, *The Harm of Porn: Just Another Excuse to Censor* available at <http://www.fiawol.demon.co.uk/FAC/harm.htm>.

40 Daniel Linz, et al., *Supra* note 35, 723.

41 Daniel Linz, et al., *Ibid*, 723-24.

42 Edward Donnerstein et al., *The Question of Pornography: Research Findings and Policy Implications* 4 (1987) as cited in Andrew Koppelman, *Does Obscenity Cause Moral Harm?* 105 Colum. L. Rev. 1635, 1666 (2005).

43 Neil M. Malamuth et al., *Pornography and Sexual Aggression: Are There Reliable Effects and Can we Understand Them*, Ann. Rev. Sex. Res. 85 (2000) as cited in Andrew Koppelman, *Does Obscenity Cause Moral Harm?* 105 Colum. L. Rev. 1635, 1666 (2005).

44 Andrew Koppelman, *supra* note 29, 1667.

Further, there are several therapeutic effects of fantasy and pornography that are routinely undervalued or plainly ignored. Michael Bader, a psychotherapist, explains the predicament of one of his female patients – an outspoken feminist – who could not achieve an orgasm with her husband without imagining a large, repulsive man holding her down and forcing sex on her. Bader explains this psychoanalytically by saying that the patient's fantasy was a way of resolving her belief that men are fragile and the guilt that expressing her sexuality fully would threaten and intimidate them. The vision of a large, aggressive man created the circumstances for her to escape this guilt and engage in sexual activity freely.⁴⁵ There are also significant studies of how gay adolescents, facing bigotry and alienation from the rest of society, find in gay pornography sexual possibilities that are not shameful or debased, the sort that shatters the negative stereotypes that are regularly fed to them.⁴⁶ The sexually explicit character of such representation is necessary to achieve this positive effect, especially in countries like India where it could be the only visibility for such sexual encounters – a necessary prerequisite for acknowledgment and self-liberation.⁴⁷ Indeed, sexual self-determination is an essential component of the capabilities approach touted by such thinkers as Amartya Sen and Martha Nussbaum, and it has been argued elsewhere that the ability to make choices about sexuality is necessary for an individual's fulfilment of what Aristotle calls the *ergon* – that is, his function, or better still, his work in being alive.⁴⁸

The ambiguity in the findings of these studies is evidence that the response evoked by the receipt of any form of communication is mediated and controlled by a number of factors. Sexual stimulation, for instance, is not uniform across individuals – it depends on the stimulus, the culture, individual tastes and desires of the observer.⁴⁹ Likewise, we cannot predict the effect of any kind of pornography on a particular individual since it is so inherently tied to his upbringing, relationships, cultural interactions and personal history. The second problem in regulating

45 Michael J. Bader, Arousal: The Secret Logic of Sexual Fantasies 51-55 (2002) *as cited in* Andrew Koppelman, *Does Obscenity Cause Moral Harm?* 105 Colum. L. Rev. 1635, 1660 (2005).

46 Jeffrey G. Sherman, *Love Speech: The Social Utility of Pornography*, 47 Stan. L. Rev. 661, 681-82 (1995).

47 Jeffrey G. Sherman, *Ibid*, 685.

48 Michael Weinman, *Living Well and Sexual Self-Determination: Expanding Human Rights Discourse About Sex and Sexuality*, 7(1) Law, Culture and the Humanities 101, 103 (2011).

49 Craig B. Bleifer, *Looking at Pornography Through Habermasian Lenses: Affirmative Action for Speech*, 22 NYU Rev. Law and Soc. Change 153, 165 (1996-97).

pornography – even on the basis of favourable empirical data – is that we have no conception of what it is about certain pornography that could lead to attitudinal changes or anti-social tendencies. What is the “active ingredient”? This is unlike the regulation of tobacco or alcohol where we need not worry about fine distinctions because there is no such thing as non-carcinogenic tobacco or non-impairing alcohol; on the other hand, it is impossible to draw a line between harmful and harmless pornography.⁵⁰ Indeed, in the face of empirical data that attribute greater violence-inducing tendency to otherwise non-controversial material such as “slasher” movies, a prohibition only on pornography, while slasher-movie representations continue to flourish, will amount to a mere moralistic knee-jerk reaction. However, on final analysis, psychological research enables us to upset the snap judgments that courts make about empirical reality in a cavalier manner. Even if we accept the argument that the decision whether to regulate pornography or not is ultimately a philosophical choice, this expose’ will make sure that it will not have the scaffolding of social science research to support the adequacy of its theory.

b. Non-Consequential Harm and the Impossibility of Targeted Prohibition

The second concern of Chief Justice Burger that pornography may lead to a crass attitude towards sex and the debasement of sex could be interpreted as a concern regarding dehumanising representation of individuals in pornography, which, in a patriarchal universe would mean predominantly women. This harm is not consequential in the sense of how we used it in the previous sub-section, although it may contribute to a misogynistic culture and reinforce negative stereotypes about women. The point of analysis in this issue is not the question of harm, but whether the law is equipped to exclusively regulate pornography that is degrading to women, and whether such a move makes sense when degrading representations of women that are not pornographic continue to circulate freely.

The difficulty begins with the very definition of pornography. Is pornography merely sexually explicit material, or should something more be present to qualify any work as pornography? Since this paper attempts to provide a response to the best defence of pornography, for the purposes of our analysis, pornography can be defined as sexually explicit material designed to titillate the viewer in a manner that is *bad* in some way – this means that there is also sexually explicit

50 Andrew Koppelman, *supra* note 29, 1669.

material that is not objectionable in the relevant way.⁵¹ Objectification, or the dehumanising representation of women has been dealt with in detail by Martha Nussbaum in her seminal work, *Sex and Social Justice*.⁵² To objectify is to treat a non-object as an object. There are at least seven different ways in which you can treat a person as an object: *first*, instrumentality, wherein the object is merely a tool, or a means to an end that the objectifier has in mind; *second*, denial of autonomy, in which the object is treated as lacking in autonomy and self-determination; *third*, inertness, wherein the object is treated as devoid of agency, and perhaps also activity; fourth, fungibility, in which the identity of the object does not matter because it is substitutable with other objects of the same type, or objects of other types; *fifth*, violability, by which the object is considered as lacking in boundary integrity, thereby leaving it open to be broken up, smashed or otherwise destroyed; sixth, ownership, wherein the object is treated as something that can be freely bought and sold or exchanged; *seventh*, denial of subjectivity, wherein it is considered that there is no need to take into account the experience and feelings of the object, if any.⁵³ It is not necessary that all of these features be present in any given case of objectification, though more than one is usually to be found. The treatment of a person as an instrument is the most morally egregious position since it automatically paves the way for several of the other features to manifest themselves. Indeed, it is disrespectful enough to treat as valuable an object as an inanimate Monet painting as a mere instrument; the moral repugnance of treating a human being that way increases manifold.⁵⁴ However, even instrumentalisation by itself does not result in a reprehensible form of objectification. The context of any instance of objectification is supremely

51 *Pornography and Censorship*, May 5, 2004, available at <http://plato.stanford.edu/entries/pornography-censorship/> [Feminists like Catherine MacKinnon acknowledge that there can be sexually explicit material that are not derogatory to women – presumably such material falls within what is commonly known as erotica, or what could alternatively be coined “gender-sensitive” porn. By not putting too fine a point on this, the paper will engage with anti-pornography advocates on their specific concern regarding degrading sexual material].

52 *Objectification* in Martha C. Nussbaum, *Sex and Social Justice* 213 (OUP, 1999).

53 Martha C. Nussbaum, *Ibid*, 218 [Nussbaum presents extracts from six different works and invites us to analyse the attitude the text takes towards the represented conduct with reference to her seven-point typology. This way she gives us examples of texts that objectify women in a perverse sense as well as objectification that celebrates desire and love].

54 Martha C. Nussbaum, *Supra* note 53, 221.

important, and in a situation of equality, respect and mutual trust, objectification can even be a wonderful part of sexual life.⁵⁵

However, any judgment of the nature of objectification in a represented work must respect the creator's liberty to express in any form that he wishes, and must make distinctions between the morality of the "conduct that consists in representing, as well as with morality of represented conduct."⁵⁶ In order to embark on ethical criticism of the text consistent with deference to literary form, we must train our eyes on the *implied author* – that is, the voice in which the text as a whole speaks to us, and the kind of interaction it promotes in us as readers. When looked at this way, it becomes apparent that the intense focus on genitalia by the protagonists in such a text as *Lady Chatterley's Lover* represents a surrender of agency and subjectivity in a world of rigid sexual mores, translating it into a celebration of freedom and a simultaneous concern for the subjectivity of the partner.⁵⁷ This form of objectification is benign, and indeed, desirable.

Several questions remain as to the viability of this exercise in a court of law. As held by the Seventh Circuit Court of Appeals in *American Booksellers Association v. Hudnut*,⁵⁸ to identify pornography that has the power to "subordinate" living human beings requires a "certain sleight of hand" to be incorporated as a doctrine of law. The determination of the meaning of any sexualised presentation relies heavily on context, specifically on such factors as, *inter alia*, the purpose of the presentation, the size and nature of the audience, the surrounding messages, the expectation and attitude of the viewer and the location where the presentation takes place.⁵⁹ Such assessment is particularly difficult in the case of sexual imagery, the impact of which on the viewer is "often multiple,

55 Martha C. Nussbaum, *Ibid*, 214.

56 Martha C. Nussbaum, *Ibid*, 217.

57 Martha C. Nussbaum, *Ibid*, 230.

58 598 F. Supp. 1316 [The decision struck down the anti-pornography ordinance drafted by feminists Catherine MacKinnon and Andrea Dworkin for the City of Minneapolis. The Court viewed the Ordinance as permitting only one "correct" and "approved" view of women and silencing all other perspectives. Government cannot ordain preferred viewpoints this way, however pernicious the silenced viewpoint may be. The decision was affirmed by the US Supreme Court in *Hudnut v. American Booksellers Association, Inc.*, 475 US 1132].

59 Nan D. Hunter and Sylvia A. Law, *Brief Amici Curiae of Feminist Anti-Censorship Task Force Et Al.*, in *American Booksellers Association v. Hudnut*, 21 U Mich. J. L. Reform 69, 107 (1988).

contradictory, layered and highly contextual.”⁶⁰ Thus, there can be stark disagreements over what sexual imagery is degrading to women. Some might consider the image of a woman lying on her back provocatively, inviting intercourse as an illustration of women’s subordination, while others might see in the same image women’s sexual emancipation, independence and initiative.⁶¹ Others may consider any sadomasochistic sex involving women as subordinating women, despite several studies demonstrating that the submissive partner retains control in such situations,⁶² and Nussbaum’s cautious statement that the mutual trust placed in each other in such an act can render it an example of benign objectification.

Further, anti-censorship feminists worry that the any objective standard that courts are required to apply to judge what images degrade women will lead to the imposition of a majoritarian view of “correct” sexuality which would marginalise the least conventional and privileged within a diverse sexual community.⁶³ This interferes with the right to “moral independence” as postulated by Dworkin, which is the “the right not to suffer disadvantage in the distribution of social goods and opportunities...just on the ground that their officials or fellow-citizens think that their opinions about the right way for them to lead their own lives are ignoble or wrong.”⁶⁴

Again, such paternalistic positioning by anti-pornography feminists on behalf of women as a whole fails to take account of the possibility that even pornography which is problematic, can be seen as providing a liberatory experience for women long considered sexless or whose sexuality had been tethered to religious and social dicta. By a single stroke it ends sexual repression and creates spaces for the expression of female sexuality in the public imagination. To the extent pornography endorses male supremacy, it is a corrosive influence - but it also represents a radical impulse by rejecting sexual expression.⁶⁵ The importance of such a space cannot be overemphasized in India, where women’s sexuality is constantly policed. For instance, the now banned online porno comic strip ‘*Savita Bhabhi*

60 Nan D. Hunter and Sylvia A. Law, *Ibid*, 106.

61 Nan D. Hunter and Sylvia A. Law, *Ibid*, 108.

62 Jeffrey J. Sherman, *supra* note 46.

63 Nan D. Hunter and Sylvia A. Law, *supra* note 59, 109.

64 Ronald Dworkin, *Do We Have a Right to Pornography* in *A Matter of Principle* 353 (Harvard University Press, 1985).

65 Nan D. Hunter and Sylvia A. Law, *supra* note 59, 121.

depicted an attractive, middle-class Indian housewife who is sexually promiscuous. Her casual attitude to sex and her ability to get away with her escapades every single time blazes a trail of sexual transgressions.⁶⁶ A survey of other pornographic material of Indian origin will reveal that its remarkable character is its ordinariness, its ability to visibilize women who do not meet socially accepted standards of beauty. What we see is a reversal of the mainstream obsession with slender, fair women, pointing to a schism between the body we desire socially and that we yearn for sexually.⁶⁷

Finally, the most pressing concern with the targeting of sexually explicit material alone is its sheer arbitrariness. Mainstream media are awash with images and representations of women that are derogatory, but not necessarily sexually explicit. While, “pornography may *sexualise* women's inequality, but advertising and romance novels plausibly *glamorise* and *romanticize* it respectively; and hence may celebrate, authorize and legitimise women's inequality in the same way as pornography.”⁶⁸ In the Indian context, this has taken the form of particularly obnoxious articulations of gender roles in advertisements and cinema. Indeed, we need to apply a more rigorous standard of scrutiny with respect to such images because they come clothed in the garb of “culture” and “propriety” and make women complicit in their own subordination. Moreover, commercial images are available for unrestricted viewing, including to impressionable young children during prime time hours, and the conditioning effect of representations that portray women as beings solely interested in inconsequential, “womanly” matters incapable of taking on leadership roles should surely be more worrying.⁶⁹ The advertisement of products promising to enhance complexion provide us an acute and culturally specific insight into the formation of such attitudes. Products such as ‘Fair and Lovely’ are promoted with the message that only women of fair skin can succeed at the workplace or find an eligible suitor. Likewise, a recent advertisement for vaginal bleach sparked outrage from various women, and feminist websites such as Jezebel, for portraying a woman whose husband was dissatisfied

66 Shohini Ghosh, *The Pleasures and Politics of Pornography*, September 2009, available at <http://himalmag.com/component/content/article/617-the-pleasures-and-politics-of-pornography.html>.

67 Shohini Ghosh, *Ibid.*

68 J. Cocks, *The Oppositional Imagination* (Routledge, London, 1989); M. Valverde, *Sex, Power And Pleasure*, (The Women's Press, Toronto, 1985) as cited in Stanford Encyclopaedia of Philosophy. *Pornography and Censorship* 30 May 5, 2004, available at <http://plato.stanford.edu/entries/pornography-censorship/>.

69 Nan D. Hunter and Sylvia A. Law, *supra* note 59, 101.

with her because – well, her vagina was too dark – only to later discover the joys of ‘Clean and Dry’ “Intimate Wash” as they frolicked in the house with renewed lust and family members watched with approval.⁷⁰ Thus, the fear of sexually explicit material, while imagery that is derogatory to women surround us everywhere, is perhaps rooted in a disgust of the female body, more than anything else.⁷¹ Catherine MacKinnon, who is one of the most well-known proponents of the feminist anti-pornography movement, rationalises this distinction by arguing that pornography, as opposed to any other form of degrading representation of women, is not merely symptomatic of the subordinate position of women caused by other material social and economic conditions – rather, it is the central cause of women’s oppression so that for as long as pornography exists, women will be unfree.⁷² With all due respect to MacKinnon, it is submitted that such sophistry does not provide the “best understanding of the complex, deep-seated and structural causes of gender inequality.”⁷³ Although this is far too massive an exercise to undertake within the limited scope of this paper, the factors that feminist scholars have identified for the asymmetrical position of women range from the gendered labour market, ascription of child-rearing and other care-giving roles to women along with the absence of systemic assistance for these tasks, impediments to reproductive autonomy and freedom, devaluation of work traditionally required to be done by women, segregation and lack of access in education and athletics, etc. Suffice it to say that “factors far more complex than pornography produced the English common law treatment of women as chattel property and the enactment of statutes allowing a husband to rape or beat his wife with impunity.”⁷⁴ The point that is being urged is that anti-pornography advocates have not demonstrated a qualitative difference between pornography and less explicit forms of degrading representation of women that are also likely to reinforce and fortify negative stereotypes of women. Therefore, to prohibit pornography solely, is to act on prejudice, and to threaten the transmission of a whole lot of communication that skirts the margins of the pornography definition. The latter point is explicated in the next section.

70 Alexandra Sifferlin, *Skin-Lightener for Woman’s Private Parts Sparks Controversy*, Time Healthland, April 17, 2012 available at <http://healthland.time.com/2012/04/17/skin-lightener-for-womens-private-parts-sparks-media-controversy-and-safety-concerns/#ixzz2B0o4nGH9>.

71 Martha C. Nussbaum, *Hiding from Humanity: Disgust, Shame and the Law* 134-47 (2004).

72 MacKinnon, C., 1984, Brief, Amicus Curiae, American Booksellers Association Inc. et al. v. William H. Hudnut III, US District Court, Southern District of Indiana, Indianapolis Division.

73 Nan D. Hunter and Sylvia A. Law, *supra* note 59, 124.

74 Nan D. Hunter and Sylvia A. Law, *Ibid.*

III. THE BAN ON PORNOGRAPHY AND THE CHILLING OF SPEECH

The problem of vagueness in the definition proposed by anti-pornography feminists and the interpretive difficulties in implementing a prohibition in an objective form have already been commented upon. The danger that such vagueness poses to socially useful speech is best understood through the lens of “chilling of speech”. The chilling effect is the deterrent effect produced on any person against engaging in an activity that is constitutionally protected, by a government regulation that is not specifically directed at that activity.⁷⁵ Litigation is *per se* an uncertain process, and we cannot repose much faith in our ability to predict the outcome of any proceedings;⁷⁶ in this context, judicial preference must be for a view that sees the harm of overbroad restriction as outweighing the harms of the overextension of freedom of speech.⁷⁷ Pursuant to this logic, the expression most likely to be chilled is expression at the margins of protection. Thus, speakers engaging in vitriolic political advocacy, disseminating unflattering information about a public official, or producing sexually explicit art are all likely to think twice before expressing themselves, fearing that their speech might constitute incitement, defamation and obscenity respectively. This fear is well-founded particularly in the context of obscenity, wherein judicial imagination may struggle to view expression on the borderline as useful, especially when it appears in forms hitherto unseen or unheard.⁷⁸ However, there is an interest in protecting this speech because free expression is necessary for human development and we cannot predict what kind of intellectual or moral development is possible from any manner of speech.⁷⁹ Besides,

75 Frederick Schauer, *Fear, Risk and the First Amendment: Unravelling the “Chilling Effect”*, 58 B.U.L. Rev. 685, 693 (1978).

76 Hermando Rojas, Dhavan V. Shah and Ronald J. Faber, *For the Good of Others: Censorship and the Third Person Effect*, 8 International Journal of Public Opinion and Research, 163, 167 (1996) [Psychological research tells us there is sufficient reason to be wary of judicial decision-making on obscenity on account of the *Third Person Effect*, which is said to be at the heart of the increasing support for censorship. The effect is characterized by an exaggerated expectation of media impact on others, as compared to the impact on the self. The cause behind the phenomenon is fundamental attribution error – when we view the message as negative, we attribute it to have more influence on others; When the message is positive, we attribute more effects to the self since we believe we are smart enough to recognise its value].

77 Frederick Schauer, *Supra* note 75, 687-88.

78 Leslie Kendrick, Speech, *Intent and Chilling Effect* presented at Legal Theory Workshop 42 (UCLA School of Law, Marh 22, 2012) available at <http://www.law.ucla.edu/home/index.asp?page=817>; Hin Yan Liu, *Pornography as Protected Speech? The Margins of Constitutional Protection*, 2 UCL Human Rights Review 224, 235 (2009).

79 Ronald Dworkin, *supra* note 64, 338.

it can be argued that rights are most in need of being defended not where they are uncontested, but where they are in danger of extinguishment.

To use one example, one might refer to the character of Post-Modern art and its fit within the existing contours of obscenity law. Post-Modern art emerged as a rebellion against the assumptions of Modern art which believed in the distinction between good and bad art, requiring of good art that it be pure, sincere, original and serious.⁸⁰ Post-Modern art, on the other hand, rejects the notion that art has to be pure or sincere in anyway; it embraces the inevitability of derivation, mocks ideas of originality and replaces sincerity with cynicism.⁸¹ When one of the early seeds of Post-Modern art, Marcel Duchamp's *Fountain* – which consisted of a toilet bowl placed upside down in a gallery - was first exhibited before an audience, it provoked shock and outrage. Thus, the movement attacks the very criterion that courts believe art must satisfy in order to justify the use of sexually explicit imagery, in that it undermines the very idea that art should have a purpose, be expressed in a particular form or reflect certain values. If this is subversive for the art community, it is bound to be near incomprehensible for courts of law. It is important to appreciate the nature of the threat from the judiciary - the danger is not that *Ulysses* will be banned again, but that a second-rate *Ulysses* that the Court does not regard as sufficiently "serious" will be banned.⁸²

A survey of Indian case-law will demonstrate that even where the Court has rendered outcomes that are laudable, it has adopted reasoning that has no room for boundary-pushing art or anything that does not profess a social purpose as traditionally understood. In *Ranjit D. Udeishi*, the Court begins with a sufficiently nuanced idea by stating that "treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more. It is not necessary that the angels and saints of Michaelangelo should be made to wear breeches before they can be viewed."⁸³ However, the Court goes on to say that

80 Amy M. Adler, *Post-Modern Art and the Death of Obscenity Law*, 99 YLJ 1359, 1363 (1990).

81 Amy M. Adler, *Ibid*, 1364.

82 H. Kalven, *A Worthy Tradition* 50 (1988) as cited in Amy M. Adler, *Post-Modern Art and the Death of Obscenity Law*, 99 YLJ 1359, 1367 (1990)

83 *Ranjit D. Udeishi*, *supra* note 12]However, this has not always been the case. In *Suo Motu Rajasthan*, the court took *suo motu* action against television programmes that were allegedly telecast in violation of Rule 6(1)(k) of the Cable Television Networks Rules, 1994, and where found to be indecent or derogatory to women, or likely to deprive, corrupt or injure public morality or morals. The Court specifically directed that "using scantily clad female models for products like car batteries, tobacco, electric inverters, shaving

“where obscenity and art are mixed, art must so preponderate as to throw the obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked.” The Court goes one step further and holds that the objective of the law is not to protect those who can protect themselves, but the most vulnerable whose “prurient minds” find in the text not poetry and incisive social criticism, but secret sexual pleasure. This is an unreasonably low threshold that expands the boundaries of obscenity law much beyond the standard of S. 292 which judges obscenity with reference to those who are likely to see the text, and will expose most representations in popular culture to the sceptre of obscenity prosecution. (Eventually, only the expurgated copy was made available in this case) To the Court’s credit, this standard has been revised in subsequent cases. In *K.A. Abbas*, while interpreting the powers of the Censor Board, the Court held, “Our standards must be so framed that we are not reduced to a level where the protection of the least capable and the most depraved amongst us determines what the morally healthy cannot view or read.” This standard was repeated in *Samaresh Bose* (in which the Court expressed the fear that the only material available for viewing will eventually be only that which is suitable for adolescents or texts that are purely religious.),⁸⁴ *Chandrakant Kalyandas v. State of Maharashtra*,⁸⁵ *Ajay Goswami v. UoI*,⁸⁶ and *Anand Patwardhan*.⁸⁷ Even then, the concern for a paternalistic state to protect the infantile public from corruption is evident. In some cases, this has manifested as a fear of the moving image that has gripped the Court in several cases.⁸⁸ In *K.A. Abbas*, the Court held: “the reason for treating cinema or moving image differently is that the motion picture is able to stir up emotions more deeply than any other product of art. Its effect particularly on children and adolescents is very great since their immaturity makes them more willingly suspend their disbelief

appliances and other advertisements should be stopped forthwith”, thereby walking into the pitfall of equating degrading representation with explicit representation in all cases].

84 *Samaresh Bose*, *supra* note 23.

85 (1969) 2 SCC 687.

86 (2007) 1 SCC 143 [“Therefore, we believe that fertile imagination of anybody especially of minors should not be a matter that should be agitated in the court of law. In addition we also hold that news is not limited to Times of India and Hindustan Times. Any hypersensitive person can subscribe to many other Newspaper of their choice, which might not be against the standards of morality of the concerned person.”].

87 (2006) 8 SCC 433 [“Therefore, one can observe that, the basic guidelines for the tier of fact must be: (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest.”].

88 Namita Malhotra, *Pornography and the Law* 15 (Center for Internet and Society).

than mature men and women". We may view a documentary on the erotic tableaux from our ancient temples with equanimity or read the *Kamasutra* but a documentary from them as a practical sexual guide would be abhorrent."

Although the court advocates substantial freedom and creative license, it does so conditioned upon acceptable form and delicacy. In the court's view, "carnage and bloodshed may have historical value and the depiction of such scenes as the sack of Delhi by Nadir Shah may be permissible, *if handled delicately* and as part of an artistic portrayal."⁸⁹ In *M.F. Hussain v. Raj Kumar Pandey*⁹⁰, the Court, even while upholding the artist's right to depict Bharat Mata in the nude, proceeded to set forth its judgment on what are aesthetic ways to depict nudity. Whether a nude/semi nude picture of a woman is obscene "would depend on a particular posture, pose, the surrounding circumstances and background in which woman is shown." In this case, "the aesthetic touch to the painting dwarfs the so-called obscenity in the form of nudity and renders it so picayune and insignificant that the nudity in the painting can easily be overlooked. The nude woman was not shown in any *peculiar kind of posture*, nor her surroundings painted so as to arouse sexual feelings or lust. The placement of the Ashoka Chakra was also not on any particular part of the body of the woman that could be deemed to show disrespect to the national emblem." The day the Court starts dictating the form that art should take, it is only a matter of time before art that does not conform to that mould is rejected as obscene. In other cases, the Court has also defined obscenity in terms of an argument of cultural nationalism, as it did in *Rangarajan v Jagjivan Ram*,⁹¹ "the Censor Board should exercise considerable circumspection on movies affecting the morality or decency of our people and the cultural heritage of the country. The moral values, in particular, should not be allowed to be sacrificed in the guise of social change or cultural assimilation". Thus, though the Supreme Court has provided valuable outcomes by allowing the unrestricted exhibition of *Bandit Queen* and *A Tale of Four Cities*, the free circulation of *Prajapati* and of adult content in newspapers and the exhibition of M.F. Hussain's paintings, the kind of reasoning that the Court has adopted may not serve us well in hard cases in the future. Further, the decisions cited above have all been handed down by the Supreme Court. The attitudes of the various High Courts to the obscenity question

89 *K.A. Abbas, supra* note 21.

90 Delhi HC judgment dated 8/5/2008 under Criminal Revision Petition No. 280 and 282/2007.

91 (1989) 2 SCC 574.

is another story altogether. To illustrate, even though the Supreme Court held the fictional story at issue in *Samaresh Bose* as non-obscene, the Calcutta High Court stated otherwise: “Pornography it is and with all the gross taste because it has sacrificed the art of restraint in the description of female body and also because in some part it has indulged in complete description of sexual act of a male with a female and also of lower animal.”

We have seen that even the judiciary is incapable of formulating a theory of pornography that does not exclude benign representations that are sexually explicit. We don’t have any reason to believe that the various administrative authorities who are tasked with determinations of obscenity in India are any more competent in this respect than judges. There are several laws in the country that require administrators or statutory authorities to make such evaluations, such as The Post Office Act, 1893, which prohibits the transmission of obscene matter over post, The Dramatic Performances Act, 1876, which prohibits the performance of obscene plays, the Sea Customs Act, 1878, which proscribes the import of obscene literature, the Cinematograph Act, 1952, which provides for pre-censorship of films and the Press Act, 1951, which proscribes grossly indecent, scurrilous or obscene publications.⁹² Most of these laws enable officials to impose prior restraint, with the consequence that the material deemed obscene may never be seen. The existence of moral harm as a ground for obscenity will inform these administrative acts that do not bring to bear the analytical rigour of the judicial mind, and will be grossly damaging to the cause of free expression.

IV. CONCLUSION

The fundamental agenda of the paper is to argue that even though there is much popular imagery that is degrading or belittling, we can never enact a law that embodies a theory of moral harm sufficiently precise that it does not flush out benign speech. It is also sought to be impressed that many popular representations that appear obscene at first blush may serve invisible therapeutic functions, or seek to make a political point, sometimes by challenging our deepest convictions regarding the definitions of art and obscenity. The appropriate legal response to this is not prohibition of the degrading speech; on the contrary, as evidence from

92 Vallishree Chandra and Gayathri Ramachandran, *The Right to Pornography in India: An Analysis in Light of Individual Liberty and Public Morality*, 4 NUJS L. Rev. 323, 323 (2011).

debriefing sessions conducted in pornography research shows us, the solution is to have more speech, so that we can expose the fallacies and myths that offensive speech conveys.⁹³ To conclude, it would be opportune to refer to the findings of a recent empirical study. The results of the study rebutted the assertions of anti-pornography feminists that pornography diminishes equal opportunities for women in all spheres of society and relegates them to second class citizens,⁹⁴ and found instead that pornography is associated with a cultural environment that is more conducive to cultural equality.⁹⁵ Of course, this is not to say that pornography causes gender equality – rather, pornography is freely available in politically tolerant societies that are also more likely to lend greater support for the equality of the sexes, thereby showing us that the circumstances to be created for both are the same.⁹⁶ The point we need to take away from this is that the interests of free speech and the rights of women are aligned in the same direction. The rejection of moral harm as a ground for obscenity signals a step in precisely that direction.

93 Nadine Strossem, *A Feminist Critique of "the" Feminist Critique of Pornography*, 79 *Virginia Law Review* 1099, 1185 (1993).

94 Andrea Dworkin and Catherine A. MacKinnon, *Pornography and Civil Rights* 33 (1988).

95 Larry Baron, *Pornography and Gender Equality: An Empirical Analysis*, 27 *The Journal of Sex Research* 363, 377 (1990).

96 Larry Baron, *Ibid.*