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ART: IMMORAL OR IMMORTAL

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I

THE PORNOGRAPHIC CRITERION, A DEVICE TO JUDGE IMMORALITY IN ART

There is a difference, everybody is aware, between a work of art which we label indecent and one which shares the raw material with its illegitimate competitor, but is nevertheless above suspicion. What makes us think one is bad and the other good? What real progress, if any, have we made in our evaluation of immorality? Are we still trying to verbalize in the lawyer's parlance what is only our subjective individual prejudice? Are individual prosecutors, judges, "experts" and ladies and gentlemen of the bench guided by their particular preferences, repressions and regressions? Are there no more deep-rooted convictions to which we may resort?

In trying to answer these questions, let us first see whether there is in fact an identity of raw material used by pornography and by realistic works of art with their merciless, pining, anti-Victorian daring.

I once examined "Virginal" pornography,¹ i.e., that pornography of manuscripts and letters which, destined for private consumption only, is not written with an eye toward legal loopholes. One of its most striking traits is indefiniteness as to whether the author of such letters, or for that matter the addressee, is a male or a female. With due allowance for the anthropologist's revelation that the psychosexual traits of aggressiveness or submissiveness seem to be culturally rather than biologically determined, one will still have to state that in our civilization such "asexual sexuality" in adults is a sign of immaturity.

Small wonder then, that in the pornographic and veiled pornographic works of literature and art, the emphasis is on what Freud has called the Erogenic Zones of the body. Freud has shown this to be an early phase in the development of psychosexuality. In the private pornographic manuscripts as well as books, a technique known to the radio announcers is used: stereotyped repetition as often as humanly possible of the name of the product and its qualities.

Likewise, the following is characteristic of the pornographic style: A pornographic author never finds adjectives (qualities) enough to bandy about. There is a hurricane of attributes, but no substance; there are parts, but no whole. It is the same with the emotions as with the erogenic zones: There are the zones, but no body to which they belong; here are the emotions, but no personality to feel them; brush strokes but no painting and no painter.

¹ W. G. ELIASBERG, *Remarks on the Psychopathology of Pornography* JOUR. CRIM. PSYCHO. PATHOL., 3: No. 4, Apr. 1942, pp. 715-720.

And what is suggested? On the one hand the erogenic parts of the body, on the other sequences of cruelties and compassions, enjoyment of pining in one's own or the other fellow's sufferings. The sufferings are described either as physical pain or moral humiliation, with extolling of the perpetrator. All this is monotonously undramatic and infantile. And there is no individual, let alone group-symbolism, in all this.

We know that few human beings are endowed with ability to express their emotions verbally. Their torment is silent and so are their enjoyments, delights and raptures. But even the artistically refined expression of the emotions must follow a general pattern in order to be understood. Many more human beings than are able to find it in their own hearts and on their own tongues, feel the genuineness of an artistic expression put before them. Different words may exist for "the higher things", but our unbiased and unswerving feeling of the wholeness of a work of art contains substantially valuable psychological meaning. Even as the patient in the doctor's office experiences not only the physical effects of the treatment, but is benefited by the contact with his physician, likewise a work of art, apart from what it may tell us, enriches our life by what it conveys of the personality of its creator.

The raw material then, is not the same in pornography as in art. The true work of art, by its artistic quality, is moral in as much as it lifts the mind of the onlooker or the reader into the sphere of his own problems and urges him to find a solution within the framework of the civilization in which he lives. He no longer feels like a peepholer, he experiences compassion, fear and catharsis, which, since antiquity, have been recognized as marks of high art. The onlooker can take action. There is, then, no indecency. The reality of sexual actions is indecent only for the non-participant.

This is what the jurists have in mind and express clumsily in their argument on the necessary length of the narration or on the sufficiently interspersed and diluted immorality: (Such words were used by the *Tribunal Correctionnel de Paris* in the trial against Gustave Flaubert and his *Madame Bovary*, January, 1857, i.e., ninety-seven years ago.) They feel that quantity, as the philosopher Hegel said, may change the quality. This is not achieved by magic, though. Psychology, psychopathology and social psychology have led us to the lodes where we may dig for the genuine ore. It is worth separating the ore from the dross, since it has always been the "borderline cases" that are charged with the true dynamics of art. Michael Angelo and the young Goethe, Dostoievsky and Van Gogh were not people who took it easy, nor were their contemporaries and critics at ease with them and their works. Whatever the contemporaries felt about the esthetic rank and range of their works, moral problems were posed in them in a most dynamic way. Time and again the ideals, the ideology, the modesty, the hide-bound feelings and time-honored convictions, that would not go of their own, had to be given up, under the impact of high voltage bombardment and cathartic explosions. Such bombardment has always appeared immoral at first. If they would understand that ethics is not just dust-laden conservatism, that with the increase of frustration and abnegation, aggression and social unrest also increase, our moralists might be made to cooperate with advanced so-called daring writers and artists. Anti-vice societies would then understand that in such dynamism the reader and the onlooker may find a way of abreacting, of diminishing their own tensions, regressions and repressions, without heightening frustration. The true moralist will

grant that for morals to survive, there is necessary some "double morality" which is inherent in all face to face relationship anyway.²

The answer to our question as to the effect of immoral tainting of a work of art is a psycho-social and cultural one. As long as the work follows—anticipates—the development of civilization, illuminates the past or bears the torch into the future, it can not, though adjudged immoral by today's standards, lose its character as a classic. In certain cases, the future will teach. There are other cases, the majority of those reaching the courts, in which the application of the pornographic criterion, as outlined before, will allow of an immediate and definite decision.

I

LEGAL PROCEDURES FOR THE APPLICATION OF THE PORNOGRAPHIC CRITERION

Our problem is to work out such legal procedure as will guarantee the most fruitful application of the pornographic criterion to the controversial work of art. It is indeed the practical criterion which we are after. While the criterion of the immature psycho-sexuality and emotionality is beyond doubt, there still remains the problem of establishing it in the single case. A recent report has it that an apartment was burglarized of jewelry and the Varga girls. For better or worse, burglars are not always around; so we must find better psychological truth than that which grows alongside the path of crime.

That our democratic trial needs some revamping, without giving up the safeguards of the Constitution, is by now generally recognized. Judge Jerome Frank surveyed these opinions with Woodrow Wilson on the one end and Chief Justice Chas. E. Hughes on the other end of the line.³ Resemblance, if any, of the reform-procedures with methods used on the European continent in countries less democratic than we are, should not discourage us from accepting what good ideas they have to offer. We have to reckon with what degree of individual and social maturity we have in our present society; neither an inferior criminal nor a superior elite maturity can be accepted. In this predicament, we can still turn to the methods worked out in the democratic process, a combination of the two systems of fact-finding—polling and the jury trial. Both offer the principle of selection of the fact-finders from all walks of life. But here the road divides. The juror is sworn to disregard all pre-trial hearsay and to keep up his oath of impartiality. The interviewee, contrariwise, plays up his prejudices and hypocrisies or may boast of the lack of both. The man in the street, fraught with low-level aspirations and not knowing or understanding his own feelings, will not be able to express his genuine feelings. This experience gained in interviews on political questions applies even more to love-life. Experience also shows that interviewees gathered together in a panel where they can see and hear each other and discuss matters, feel themselves in a dramatic situation with more responsiveness and responsibility.

The panel-polling system should work in the following way: A panel composed of lawyers, psychiatrists, psychologists, sociologists, educators, writers, artists, representatives of the clergy of the various faiths, proven specialists in questions of public

² W. G. ELIASBERG. *The Stage Thriller*. JOUR. SOC. PSYCHOL. 19: 1944, pp. 229-230.

³ JEROME FRANK, *COURTS ON TRIAL*, Princeton Univ. Press, 1949.

morals and citizens of standing in the community will be sworn in each jurisdiction for a period to be determined by the courts and will serve as needed. The courts will get in touch with the various representatives of the professional and civic associations for selection of appropriate members and substitutes. The panel is to be asked for their opinion by the prosecuting attorney or the court or the grand jury, should the latter want to initiate action.

The members of the panel, as well as the grand jurors, shall be required to attend lectures to prepare them for their service. Such courses should be arranged by the Grand Jurors Association, in cooperation with the Bar Association and representative professional and artistic groups. In these courses, evaluation of the degree of psychosexual maturity and the application of the pornographic criterion to practical cases will be discussed. Only after attending such courses may the members of the panel qualify.

If upon receiving the panel's opinion, the prosecutor decides to take action, the bill of indictment together with the report (majority and minority) shall be handed over to the grand jury. Grand jury indictment shall be mandatory in each case of alleged immorality in art and literature. There should be no prosecution on the basis of mere information. The grand jury must have the right to hear the members of the panel under oath. Upon indictment by a grand jury, the prosecution shall be bound to have the case tried. No *nolle prosequi* after indictment by the grand jury. The purpose is to impress it upon the prosecuting attorney to carefully consider, after receiving the experts' reports, whether or not to continue action, especially in cases of divergence of opinion between the experts and the grand jury.

While the experts' panel will have to do its main job in the pre-trial phase, it will not, however, have a position above the finders of fact, as the court-appointed experts have in the continental, especially the German procedure. In Germany a rule was proclaimed by psychiatric experts according to which the laymen (i.e., in our law the finders of fact) should be told only what they can possibly understand. In our trial, opinions that are based not on facts and understandable theory, but on the claim of authority, are valueless because our experts are under obligation to persuade the finders of fact. Authority can be based on nothing but the reputation of knowledge, skill, experience and training. Insight or authority stemming from allegedly supernatural sources, belief, superstition, scientifically not recognized methods or devices, individual revelations, must not be admitted, as not in keeping with the Due-Process-of-Law-Principle.

Neither will the court-convened pre-trial panel be placed above the parties. Actuated by the lamentable spectacle of opposing party experts, the Briggs Law was passed in Massachusetts in 1921. It too provides for court-appointed pre-trial panels. But these panels, by the very way of their functioning, are actuated to place themselves above the parties, at any rate above the defense, and to develop that type of expert haughtiness which endangers the purpose of fairness in trial.

In the trial for immorality, the parties will have the right to see the pre-trial opinion and to put the panel members on the stand. They may also bring in their own experts, if they so desire. Practically, however, the pre-trial opinion will have sufficient authority, so that in most cases the parties will limit themselves to examination and

cross-examination of the panel members. In this way, the trial for immorality will be relieved of the whims, individual inclinations and disinclinations, "the jeer, sneer and leer" of the experts, the court itself, the jury and the parties.

Experiences have already been gathered with similar procedures.⁴ In Norway, the Commission on Forensic Psychiatry tries to straighten out the differences between the experts before trial. Cf. also Dr. Overholser's report to the Royal Commission on Capital Punishment: "The report of the examining doctors is not admissible as evidence, but they may be called by the prosecution or the defence to testify as to their findings. It appears that in practice the district attorney has hardly ever controverted their findings, and there have been extremely few cases (estimated as about six in 15 years) where the defence pleaded insanity although the report was negative."⁵

There are two possible errors in the interpretation and application of the Pornographic Criterion. It is easy to dispose of the first one: the whims, beliefs, personal experiences, the wrongly arrogated authority of the panel members should not be listened to. Quite to the contrary, the panel members, having been trained in the application of the criterion, in special training courses, should do nothing but apply it to the case at hand. Secondly, the criterion itself consists of evaluating the question whether or not immature sexuality is aroused. The concept of immaturity is defined above. It is the non-genital, not-individualized, not-loving, amorphous interest in sex, which we have come to know as characteristic of early stages of physical and psychological development toward sex. However, every genital, individualized, loving interest in heterosex is not yet acceptable and moral in our society. In other words, where the criterion applies, there can be no doubt about immaturity and immorality; where it does not so apply, the work of art may still be condemnable as immoral from the angle of religion.

Religious interests may have to be considered according to their intensity, strength, deep-rootedness in convictions and consciousness. Anger (Aergernis) may become a very strong religious force. It may be a practical question of great importance to handle such cases in accordance with local conditions. However, the question of immaturity and the criterion itself are independent of such local factors.

It is worth trying a method that bids fair to sift more reliably "Call House Madam" from "Madame Bovary."

⁴ G. LANGFELDT. *Some Outlines of Forensic Psychiatry in Norway*. AMER. JOUR. PSYCIAT. 110: No. 8, Feb., 1954, 599 ff.

⁵ WINFRED OVERHOLSER. *Report to the Royal Commission on Capital Punishment, 1949-1954*. H. M. Stationery Office, 1953, p. 418.