

THE NEW POLITICS OF PORNOGRAPHY. By Donald A. Downs.¹ Chicago, Ill.: University of Chicago Press. 1989. Pp. xxiv, 252. Cloth, \$42.00; paper, \$14.95.

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This book deals with, but goes beyond, the initially successful efforts to get the city councils of Minneapolis in 1983, and of Indianapolis the following year, to pass anti-pornography ordinances based on a feminist definition of pornography. I say initially successful because, although two nationally prominent feminist activists, Catherine MacKinnon and Andrea Dworkin, persuaded both city councils to enact the ordinances they proposed, the Minneapolis ordinance was vetoed by the mayor and the Indianapolis one was declared unconstitutional by federal courts. Nonetheless, although the ordinances were finally struck down, the arguments for them and the tactics by which they were pushed through the city councils constitute "the new politics of pornography."

Professor Donald Downs gives a detailed account, in two of his five chapters, of the political process by which the ordinances were adopted. The process, however, is of less importance in his eyes than the "challenge to the modern doctrine of free expression" which it represented. The challenge, in turn, was provoked by "the recent explosion of pornography" in this country.

The new politics of pornography ultimately failed in Minneapolis and Indianapolis. But the resistance to the swelling tide of pornography that it symbolized will continue, and "suggests that society is presently reconsidering liberal tenets. At issue is which philosophy should govern free speech." This book addresses that issue, and properly so because, despite the ritual invocation of the first amendment by the press, it is not the amendment itself which is in question but the interpretation to be put on it.

Downs rejects the absolutist position taken in Minneapolis by the Minnesota Civil Liberties Union: "The MCLU would admit no line between tolerable and intolerable expression; any effort to deal with the potential harms of certain types of pornography was a threat to intellectual freedom." But he acknowledges three interpretations of the constitutional guarantee that deserve consideration in the controversy over the legal regulation of pornography.

The first is "the modern doctrine of free expression," which he

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sees as based on the liberal conception of society propounded by Ronald Dworkin. In Dworkin's words, equality means that "political decisions must be, so far as possible, independent of any particular conception of the good life, or what gives value to life." Government therefore does not treat its citizens as equals "if it prefers one conception to another, either because the officials believe that one is intrinsically superior, or because one is held by the more numerous or more powerful group." Downs does not think that Dworkin's liberalism does or should mold public policy in all areas of American life, but says:

What it does capture is the essence of the *modern doctrine of speech*, which mandates state neutrality toward the content of speech that has intellectual or social value and forbids discrimination among viewpoints for all types of expression. The state, of course, promotes different substantive moral ends, depending upon which political party or alliance controls it, but the modern doctrine of speech requires that all speech, if it can claim the necessary intellectual value, be equally unrestricted under the law.

In addition to state neutrality as to the content of speech and no discrimination among viewpoints, liberal doctrine permits legal restraint of speech only upon the "demonstration of direct harms" caused by the speech. The only exception is the limited category of unprotected kinds of speech which the Supreme Court established in *Chaplinsky v. New Hampshire*,³ and has made still more limited in subsequent decisions.

The "harm principle," Downs explains, "is central to the liberal doctrine of individualism because it protects liberty until the state finds specific, demonstrable, and sufficiently substantial harm resulting from it." This principle "is part of the movement from a traditional, communitarian theory of freedom to an individualist conception of legal right and responsibility." Hence the insistence that pornography is protected speech until it can be shown to cause specific, demonstrable, and substantial harm to individuals. American law still regards obscenity as in itself unprotected speech, but that is "a concept which derives from traditional morality and therefore represents a compromise between liberalism and conservatism." Liberals, however, "tend to interpret pornography in relativistic, individualistic terms. Moral judgments or values are mere 'metaphysics.'" So too, it follows, is the idea of a public morality.

Conservatism, the second of the interpretations mentioned above, sees pornography as "the explosive culmination of this liberal public philosophy" and asserts "the need for values and standards in society." Just as the liberal doctrine of free speech is

3. 315 U.S. 568 (1942).

derived from an individualistic theory of the nature of man and society, so the conservative doctrine is communitarian and based on "a normative notion of human nature and sexuality." There is, that is to say, a common human nature, of which sex is a constituent part, from which flow norms of conduct valid for all men, whether individuals or particular cultures agree with them or not, and these norms may, at least to some extent, be enforced by law.

Downs does not reject a normative view of sexuality out of hand. "While such a theory is inescapably bound to its time and place—today's deviance can be tomorrow's accepted practice—it is a mistake to dismiss all normative approaches as misguided traditionalism. . . . In defining ourselves as human, we necessarily posit some normative framework." A true child of his age, he hastens to add: "Because the standards of our own culture inevitably seem 'natural' and compelling, we must always remain skeptical and re-examine our assumptions."

He does agree, however, that pornography can "depersonalize the viewer," either by representing "a patently dehumanized model of sexuality" or by making the viewer "dependent upon the [pornographic] material, which then serves as a substitute for relations with another person." "Depersonalize" and "dehumanize" are normative terms which assume a normative human nature, and Downs uses them as such. But it is typical of his treatment of pornography that he will not allow law to be based on these normative ideas: "The law has no way of determining when the use of pornography assumes this character, unless it is willing to crash through the walls of privacy and invade even the realm of thought." But why must the law judge what is going on in the mind of the viewer before it can pass judgment on what he is viewing? No doubt there are university professors who can watch pornographic films without being affected by them, yet even they should be able to recognize the effect that the films are designed to produce in their viewers.

The third interpretation of pornography and free speech is the feminist one that inspired "the new politics of pornography." "The feminist critique of pornography," Downs explains, "rejects both the moralism of the conservative position and the freedom of choice of liberalism." In the feminist view, what is wrong with pornography is not that it impairs the morals of males by being sexually explicit and erotically arousing but that it is "an ideological instrument of male domination" of women. Hence, as Catherine MacKinnon has said, "the feminist critique of pornography is a politics" concerned, not with moral "good and evil," but with "power and powerlessness."

Pornography is "harmful *in itself*," not because of what it does to men, but because of what it does to women: "Pornography objectifies, degrades, and brutalizes women in the name of sexual stimulation or entertainment for men." It does this to women as a class, to the female sex as such, and not only to the particular women who may be raped or otherwise assaulted by men stimulated by pornography. The evil to be remedied is an *attitude*, one that sees women as worthless and powerless objects of domination by men.

Given these premises, the ordinances in Minneapolis and Indianapolis defined pornography as "the sexually explicit subordination of women, graphically or in words," of which both ordinances gave the following instances, among others: "women are presented as objects who enjoy pain or humiliation;" or "as sexual objects who experience sexual pleasure in being raped;" or "as sexual objects tied up or cut up or mutilated or bruised or physically hurt;" or "in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual."

In Minneapolis the mayor vetoed the ordinance as unconstitutional; in Indianapolis the finding of unconstitutionality was made by federal courts. In the district court, Judge Sarah Evans Barker found that the ordinance sought to create "a newly-defined class of constitutionally unprotected speech, labeled 'pornography' and characterized as sexually discriminatory." The premise of the ordinance was that "the State has so compelling an interest in regulating the sort of sex discrimination imposed and perpetuated through 'pornography' that it warrants an exception to free speech." But the exception is not warranted, said Judge Barker, because it would "permit every interest group, especially those who claim to be victimized by unfair expression, their own legislative exceptions to the First Amendment so long as they succeed in obtaining a majority of legislative votes in their favor."

In the Court of Appeals, Judge Frank Easterbrook found that the ordinance went beyond obscenity law into thought control: "Speech that 'subordinates' women . . . is forbidden, no matter how great the literary or political value of the work taken as a whole. Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual context." Such a law cannot stand: "It establishes an 'approved' view of women. . . . Those who espouse the approved view may use sexual images; those who do not, may not."

Downs's response to the conservative and feminist critiques of pornography is "yes, but." He agrees that "democratic society has

a right to draw the line of tolerance at the worst, most degrading depictions of sex that are unredeemed by art." But art ("a treatment of sexual reality that presents pornographic themes and scenes in an intellectual fashion which synthesizes passion and reason") brings all modes of expression under constitutional protection.

He also agrees that there is such a thing as "sheer pornography," which is not art and "reduces us to the lower aspects of our natures." The clearest example is "the association of pornography with masturbation." Yet masturbation is only ambiguously bad: it "may be part of normal sexual functioning or may weaken the ability to relate to another human being." Mere pornography, too, is therefore only ambiguously harmful. Healthy human beings live in a dialectic between the higher and lower sides of their natures, and so "even works that appear worthless or unimportant may actually be worthy of constitutional protection; we should always err on the side of protecting free speech."

Downs's conclusion is a compromise of sorts: (1) "the printed word should be considered as completely covered by the First Amendment;" and (2) as for other media of expression, "present obscenity law should be retained but . . . it should focus on violence rather than sexual explicitness." The "legal doctrine" of the Supreme Court's opinion in *Miller v. California*⁴ therefore "should be modified to cover only violent obscenity," defined to include "portrayals of murder, dismemberment, brutality, or violence in the context of obscene acts (that is, those which depict ultimate sex acts, lewdly displayed naked bodies, or excess of sexual detail)." Other material previously considered obscene would be constitutionally protected. In short, the experience in Minneapolis and Indianapolis leads Downs to recommend that we "recast the *Miller* approach, adjusting its rationale, its provisions, and its enforcement to reflect feminist concerns. It should focus on violent obscenity and the harm to women, while accommodating normative sexual expressions."

The merit of this book is less in its specific recommendations, however, than in the fact that it opens to discussion questions which liberals have striven to foreclose. For example:

1. Why would a rational and free people want a constitutional freedom of speech and press? Why should we assume that such a people would intend to protect all expressions other than violent obscenity?
2. Why should we accept Ronald Dworkin's radically indi-

4. 413 U.S. 15 (1973).

vidualistic model of society as the basis for freedom of speech? The standard answer is that we are a pluralistic society, and that this social fact demands the neutrality of government toward all conceptions of the good life. But does pluralism demand that? Does Dworkin's policy achieve its stated goal of neutrality, or does it not rather impose on all of society a liberal orthodoxy which is chiefly attractive to a self-centered, educated, upwardly mobile, and well-to-do opinion-making elite?

3. Is it possible to make any judgment on "speech" without regarding its content? Granted that it is not the function of government under our Constitution to pass judgment on the truth of doctrines, does it follow that government may never recognize the difference between political opinion and libel, religious speech and commercial advertising, scientific exposition and misrepresentation of facts, poetry and pornography?

4. To what extent does the free marketplace of ideas actually lead society to a better grasp of truth, morality, or beauty? Have we in fact achieved John Stuart Mill's promised goals of a convergence of minds on true ideas that have withstood the test of criticism and more elevated standards of taste and conduct? Or have we tended rather toward a pervasive skepticism about even the possibility of realizing those goals? And if they are unrealizable, what makes freedom of speech so important?

5. If we want a free marketplace of ideas—as the first amendment tells us that we do—what will rank as an idea? Why should an "idea" be anything that anyone wants to express, in any way that he wants to express it? In regard specifically to pornography, why should chronic inflammation of the libido be considered worthy of constitutional protection?

6. Why should we accept the "demonstration of direct harms" as the only ground for restricting "expressions"? Downs does not mention it, but the Supreme Court rejected that principle in a companion case to *Miller v. California*, where it said: "The sum of experience . . . affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data."⁵

7. What are liberals trying to safeguard in protecting pornog-

5. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973).

raphy and, conversely, what would society lose if it banned "sheer pornography," which is, after all, most pornography? The standard answers are that all expressions do, or at least may, contain something of value, and that the loss sustained in any restriction of freedom of expression is always greater than the gain. But why should we believe that?

Of course, these questions do not answer themselves; they are proposed here only as worth discussing seriously. Indeed, they must be discussed if we are to make sense of our constitutional freedom of speech. Downs seems to be aware of them, even though in the end he retreats into a slightly modified orthodox liberalism. But his book will have served a purpose if it helps to crack the shell of liberal denial that pornography is in any sense a problem, and makes it possible once again to face the questions that it raises.

MARBURY v. MADISON AND JUDICIAL REVIEW. By Robert Lowry Clinton.¹ Lawrence, Kan.: University of Kansas Press. 1989. Pp. xii, 332. \$35.00 cloth.

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Marbury v. Madison has always been the centerpiece in the history of judicial review. Its precise significance has, of course, been controversial. Some scholars, downplaying the originality of Marshall's opinion, argue that the Court simply spelled out the logic of the Constitution itself. Others contend—some approvingly, others disapprovingly—that the Chief Justice went far beyond what the framers intended and essentially created judicial review. A few see the decision as almost entirely political—a shootout for power between Federalists and Jeffersonians as represented by those implacable enemies, Marshall and Jefferson. Even those scholars who leave some law in Marshall's opinion often emphasize the deft political maneuvering which got the Chief Justice to the legal position he wanted to reach. But whether the opinion is seen as declaratory of constitutional intent, or usurpatory, or somewhere in between, traditional scholarship recognizes *Marbury* as the special moment in the development of judicial power.

Professor Robert Clinton challenges this fundamental proposition head on. Reading Marshall's opinion in light of contemporary canons of interpretation, derived from English common law as well

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