

Pacta turpia cannot be speech

by Florent Boucharel

I

It is my understanding that many people, perhaps most or even all people, in America and the world at large have the notion that pornography is legal in the United States. (Pornography today is above all filmed and/or photographed pornography with real performers.) The opinion may have arisen quite naturally from a host of conspicuous facts, such as that performers in those productions are invited on TV and radio shows, have books written under their names, and engage in various other activities derived from their pornography performer status.

Yet, as far as filmed or photographed pornography is concerned, it is illegal in all states except Nevada, to the best of my understanding of American law. Indeed, this seems to be the necessary corollary of two sets of positive law.

First, prostitution is illegal in all states except Nevada.

Second, the U.S. Supreme Court has ruled that child pornography is not protected by the First Amendment because its content, namely “sexual exploitation of children,” is illegal: *New York v. Ferber*, 1982.

The Court talks of a “compelling interest” in preventing the sexual exploitation of children. Clearly all that is a crime is so defined –a crime– by law because there is a compelling interest in preventing it. Therefore, filmed pornography cannot be a constitutionally protected right where its content, namely prostitution, is illegal, that is, in all states except Nevada. As a consequence, any statute dealing with obscenity is valid against filmed pornography even without looking for the outcome of a pruriency test adopted by the U.S. Supreme Court when dealing with obscene contents (so-called *Miller* test). This kind of test, when applicable, is limited to writings, drawings, computer-generated imagery, even the most realistic, and such like.

I believe all states have the statutes. Even if they might be reluctant to enforce them under the notion that they should apply some kind of test and are not quite sure of the result, I deem as sufficiently demonstrated that no test is to apply with filmed pornography: By virtue of *Ferber*, filmed pornography is a prima facie breach of the law in all states where prostitution is illegal, because it is nothing but filmed prostitution.

Even if there existed no such local or state laws at all, I wonder what prevents federal authorities from prosecuting filmed pornography under the federal law on obscenity, for a cause of action seems obvious anywhere pornography is made of illegal prostitution. In other words,

the authorities do not have to prove that filmed pornography is obscene even when they enforce an obscenity statute.

All this may be rather intricate but I believe it is because judges and legislators have missed one fundamental principle, which may be encapsulated in few words:

PACTA TURPIA CANNOT BE SPEECH.

Acknowledgement of the principle would have prevented muddling of the discussion by those who make out *pacta turpia* (plural of *pactum turpe* or meretricious contract) as works of imagination and art. While the jurisprudence on obscenity has focused on the words of poets or would-be poets, it consistently ignored that the bulk of obscene material has become filmed prostitution with real people and that the issue therefore is quite remote from the potentially damaging effects of imagination.

II

Is the reasoning applicable to sex tapes, two or more people who would agree to film a sexual intercourse and distribute the video without compensation, for the fun of it? At least there is no pactum, no covenant, no contract in that case? There would be no financial covenant but a covenant still. Be that as it may, the authorities have ample evidence, from the buzz the people in the industry make and to which I already alluded, that they are sex workers, prostitutes, and they can act accordingly, against the performers and above all against their pimps. That would be relevant given the fact with which I began this short essay, namely that most people think staged pornography is legal, although the average person may well be cognizant of the fact that prostitution is not legal while realizing at the same time that both are the same.

III

In *United States v. Stevens* (2010) the U.S. Supreme Court has ruled that a federal law meant to ban so-called crush videos depicting violence against animals was too broad considering the constitutional freedoms granted to speech.

In his dissent Justice Alito explained that “(t)he most relevant of our prior decisions is *Ferber*, 458 U.S. 747, which concerned child pornography. The Court there held that child pornography is not protected speech, and I believe that *Ferber*’s reasoning dictates a similar conclusion here.” Which I believe too.

However, *Stevens* is one reason which precluded me from phrasing the principle as “Delinquency cannot be speech.”

The other reason is that, even if prostitution were made legal in all states, I would keep arguing that “Pacta turpia cannot be speech” and that materials based upon meretricious covenants have no constitutional rights as speech.

But in the current state of affairs, it is as if prostitution were decriminalized no sooner is it filmed and circulated (as speech). The defenders of pornography must explain how it is not

the same as prostitution. Both prostitution and filmed pornography are meretricious covenants, and where one is illegal as such, the other must be illegal too.

One defense for crush videos and other snuff movies is that there is a difference between making the content, i.e. the illegal acts that are the basis of the circulated material, and distributing it, which is speech. Allowing for this, one sees at once that the pornography industry, which presents itself as both maker and distributor of its products, cannot make use of the defense. How is it possible that an industry be legally based on pactum turpe at all when at the same time prostitution is banned? Allowing for free speech protection of contents depicting illegal acts, cannot protect the porn industry, which would have to fabricate fictitious reports by which it disentangles itself from production and claims to be only selling materials it finds God knows where, say on the internet (like sellers of snuff CDs homemade with material found on the web, war footages, etc.) but the industry does not bother to do that, and I don't understand how it can be something like a respectable and respected business (in the mainstream media).

Nor do I understand such an assertion as "For adults at least, most pornography receives constitutional protection" (*The First Amendment Encyclopedia* online, Middle Tennessee State University, Article Obscenity and Pornography). Inasmuch as most pornography is filmed and photographed pornography requiring real actors and therefore pactum turpe, its constitutional protection is, as I claim from *Ferber*, dubious at best. It looks like even academia, no different from mainstream media, is eager to clear the porn industry of suspicions.

Of course, I limit my discussion here to filmed pornography, namely products requiring real people. If the encyclopedic author of the article means that most pornographic *writings* are protected, I may agree with him, but although I have the faint idea that a good deal of current fiction books are pornographic I would nonetheless see as out of touch with the current world any person who under the word pornography would understand books rather than clips and photos. When one talks of a pornography industry, one does not mean books or song lyrics.

As production of pornography requires pactum turpe same as prostitution, what do the states that ban prostitution do against the pornography industry?

IV

Here is how I summarized the above to the attention of the nonprofit organization Fight the New Drug: "There seem to be a couple of confusions on the legal issue of pornography. Filmed pornography involving real people is –as meretricious covenant– no different from prostitution, which is illegal in all states except Nevada, yet pornography does seem to be legal. It would even be constitutionally protected as speech, that is, no sooner is prostitution filmed and circulated than it is decriminalized, which is absurd."

To be sure, there is debate about the criminal status of prostitution to begin with, even in states where it is illegal, which tend to adopt extrajudicial and pretrial diversion approaches such as the "john schools." This is immaterial to the point I am making.

I note Fight the New Drug's claim: "We're not seeking to ban porn." As I argue that filmed pornography is illegal –but for the fact that nobody seems to know or care–, I don't agree

with the statement, but still, I can only hope they don't mind if others seek precisely that: to ban porn.

In his *Democracy in America* Tocqueville says that some degree of corruption among public officials is inevitable in a representative government but that the benefits of the representative form of government outweigh the inconvenience. In some circles, for instance inside the political class, the idea has become a rather commonplace, if not necessarily quite vocal, defense of democracy. The argument, however, as it revolves around a question of degree, implies that above a certain degree one must expect the balance to shift. Whereas in Tocqueville's times organized crime did not exist and therefore could not be an agent of corruption, the question of corruption has become quite acute with the mob's advent among corruptors, because criminal organizations are thriving on the very activities which the government has, to speak like the Supreme Court, a "compelling interest" in preventing. When public officials are occult servants of the mob, one or several or all compelling interests in the society are met with the highest obstacles one can conceive. Unable to sustain her compelling interests, such a society sooner or later must collapse.

I can well imagine the Chinese regime describing America along these lines, as a sheer "mobocracy." (Mobocracy in the second sense of the word mob; one could use, for a government of the mob in sense one, the other existing word ochlocracy instead.)

When the Chinese government says it is not repressing speech disproportionately but is merely cracking down on pornography, I can't help thinking that failing to crackdown on pornography, on the other hand, is a bad service rendered to freedom of speech, most of all when fear of stifling one nightingale's voice is not even warranted, as it is not in the case of applying to filmed pornography with real actors the treatment it deserves as the illegal prostitution, if not even human trafficking, that it is to every reasonable person.

The long, complete, benighted overlooking of the substantive difference between purely imaginative forms of pornography and the other, dominant one, namely prostitution under the name of pornography, will be looked in the future with incredulous eyes. People will ask: Were institutions completely rotten by the influence of the mob?

V

"Nobody seems to know or care" and that bodes ill as to the condition of the society, because that means either one of three things.

1/ People just don't know that prostitution is illegal and that by way of consequence filmed pornography is illegal too. If you wish, I qualify the consequence by saying that the *making* of pornographic films and video clips with real people is illegal, because the making and the circulating of material would be two different issues, the latter being protected by First Amendment. However, I already made clear that there is no such difference between making and circulating as far as child pornography is concerned (*New York v. Ferber*)[†] and, besides, when the Supreme Court ruled in a way somewhat different from *Ferber* (in *United States v. Stevens*) it is because the statute considered was too broad, and the federal government therefore passed another, narrower bill, namely the Animal Crush Video Prohibition Act of 2010, that criminalizes *circulation* of material just like the downstruck bill.

Ignorance of the law, on this issue, would still characterize people who, knowing prostitution is illegal, do not draw the necessary consequence as to filmed pornography, which utilizes for its making the same illegal contracts as prostitution, namely meretricious contracts.

Where people have no clue about the law, we have not a polity of free citizens but a herd of slaves.

†One would mistakenly argue that, as the Supreme Court ruled on child pornography specifically, it excluded adult pornography from its ruling, that is, that the court did not ignore adult pornography but ruled *en creux* (in hollow) that as far as adult pornography is concerned making and circulation are two different issues, contrary to child pornography. That would be mistaken because the court ruled on the facts of the case and those facts *only*.

2/ People know the law but it is so unpopular that they prefer to ignore it. Where laws are unpopular, it is unwarranted to talk of a popular regime, that is, of a representative government.

3/ The people know and approve of the law but the mass media, law and other scholars, and mass culture companies are against it, and it is only the view of these media in the broad sense that we are made to hear. Some, inside these circles, are paid mercenaries of the pornography industry, others mere cowards, for instance scholars who fear that this or that mainstream newspaper will crack jokes on them, poor chaps. A case of successful leverage by mobsters against the rule of law.

VI

Likewise, sport on TV is not speech. If the legislator attempted to regulate or limit TV sport, some people would claim this violates the First Amendment, just as people claim filmed pornography is speech. Ask yourself if you find speech in sport. Because the legislator does not find it relevant to regulate sport on TV it occurs to no one to call it speech. But sport is a legal activity, so its broadcasting has none of the implications of filmed porn, which necessitates, to be produced industrially, people who prostitute themselves. It is called speech in the U.S. because in the U.S. speech is protected: The mob won through their lawyers.