

**Remarks by Prof., Dr. William B. Allen,
addressing members of the
Los Angeles County Commission on Obscenity and Pornography**

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Commissioners, I am very happy to be here this morning and to get a glimpse of the work that you do that I've only seen from a considerable distance heretofore, and which I certainly appreciated. I urge you to carry on as there is much work which remains to do. And I hope to bring some of that to light in these few remarks, which I intend to make informally. Then, if you have questions we have time for a short discussion.

Pornography is in the eye of the beholder.

That's exactly what the problem with it is. I take it that that is pretty much what Justice Potter Stewart meant, or something like that, when he said he knows it when he sees it, even if he can't define it.

There are things that are seen publicly that ought to be never seen publicly. That becomes a problem by that alone without regard to anything else and, therefore, it is not clear that those kinds of things ought to be beheld at all, certainly not in public.

But, when people usually say pornography is in the eye of the beholder, they mean something different or at least the government of the United States meant something different twenty years ago, when it concluded that pornography is in the eye of the beholder.

What I want to talk with you about this morning is mostly that problem because it seems to me that you're fighting uphill against powers that are greater than the emergence of pornography and which need to be confronted directly if we're ever going to turn the tide in our country.

You know very well of course that there issued from the federal government twenty years ago a report on obscenity and pornography, which federal report concluded that "pornography is in the eye of the beholder"—which concluded that there is no empirical evidence or any harm caused, whether to children or others by obscenity and pornography and which, in effect, provided a broad federal license for most that has happened in our Country in the last twenty years.

To be sure, much happened before the Commission was appointed, which was appointed by President Johnson, of course (with exception of one member who was appointed by President Nixon) and in an era when most of the changes which we decry even today had already transpired. It wasn't difficult to find the sources and distribution of obscenity and pornography in 1970 because the 1960s had already lived through what came to be called the "sexual revolution." And you have to pause and think on the whole that there probably was not any great revolution in sexual custom and practice in technical terms, to be sure. The revolution consisted far more in public attitude toward sexual practices and customs.

Before that era of the revolution these were things that were appropriately considered to be private expressions. And in the best cases, of course, private expressions of love. And they were never regarded as fit for public display whether in printed media, photographic media or film media or otherwise. And it didn't mean merely the sex act as people sometimes imagined when you talk about obscenity and pornography.

There are aspects of interactions of society which require a certain kind of respect from us, if indeed we intend to preserve the bonds of civilization themselves. It would not, I expect, be very effective for me to try to deliver these few remarks this morning in the nude. Now, there wouldn't be anything particularly salacious about my trying to deliver these remarks in the nude. But, and I wouldn't be engaged in any improper activity in doing so, if you just try for a moment to imagine the absurdity of that, I think you'll begin to see what it is for so long we have labored to defend in our rejection of obscenity and pornography.

The human body is clothed not merely against inclement weather, it is also clothed against the diversions that interfere with that due respect in regard for one another and for our most important characteristics which are, of course, the contributions we make in the way of virtue and in the way of understanding to the human community.

Clothing, I say, advances our ability to focus on the things that count among us. That's advanced by the fact that we wear clothing. When we look into one another's faces, when we look into the light of the mind, into the light of the eye, we are coming immediately into contact with what is most distinctively human.

That is the bond that makes civilization possible. What that means then is that the area of our public engagement, the area of public deliberation is an area which ought not to be polluted by distracting us from those most valuable, most important human activities which otherwise are necessary to continue to defend the things that mean most to us, including most significantly this morning those rights and liberties which we are otherwise committed to defend.

I remind you that in this *Miller*-standard era, most of the terms in which we assess pornography and obscenity were elaborated prior to the *Miller* case. You find, in fact, the *Miller* standard already articulated in the *Roth* case of the late 1960s, the difference being that when the *Roth* case was decided it was left ambiguous whether the community were a national community or a local community. All that *Miller* added was the definition that these decisions be made on some local basis—whatever in the end you took that local community to be. I think that was perhaps a mistake. I think it represented a backward step in our struggling with the question of obscenity.

The best way for me to explain or to convey to you why I think a national standard is ultimately doomed as a justifiable and defensible standard is to try to put in context what happened in our setting up the *Miller* standard.

Remember, it was in the *Supinsky vs Hapsky* case in the mid 1940s, which had nothing to do with obscenity and pornography. It's a case in which the so-called fighting words rule was enunciated by the Supreme Court. It's a case in which one person who was insulted by an epithet from someone else struck out and was defended by the Court when the Court said, you can't speak that way to a man without expecting to be hit. These are fighting words. And so he, in responding with violence, broke no law.

In the process of making the fighting words court decision, the Court also observed, with regard to the First Amendment, freedom of speech. But then little forms of speech that are not protected and cannot be liable is the obvious case that everyone always refers to. But the Court without even giving a second thought equally said, of course, the obscene or the pornographic is not protected.

Now, when the Court spoke in that off-handed manner in the early 1940s, what it was doing was giving testimony to the existence of a national standard, a national community, a moral consensus which formed our attitude toward these things and our practices legally and socially toward them. So, what we have witnessed since that off-handed comment in the *Supinsky* case is nothing less than the deterioration of that moral consensus. But the *Miller* standard is there, an

unfortunate accepting as reality the loss of moral seriousness, of moral purpose, that previously characterized society.

Now, I have to remind you of this: at the time of *Supinsky*, America was not a country that was wracked by censors running around and governing people's lives. At that time in which we had this high moral standard it was nevertheless the case that the objections of the attempts to control freedom of expression were few and far between. In fact, the most serious attempt to control freedom of expression in that era occurred in the case of *Valentine vs. Christenson* in which the Supreme Court concluded that commercial speech may be limited. That was the most serious censorship that seemed to have been undertaken anywhere in the United States up until that period in the 1940s where communities tried to control door-to-door salesmen or control certain advertisements of professional associations and physicians; lawyers sought to control advertisement. And the Court said "Well, this is only commercial and, therefore, it doesn't count on the scale of information-things that were protected by the First Amendment."

There were no great breaks from Americans from the beginning of the Republic to that date as censors running riot through communities taking out famous works of literature, works of redeeming social importance and burning them.

It is a rare case. In fact, we usually have to find someone to resort to stories of burning of witches to give us any ability at all to imagine what vigorous censorship would be like and we all know that there were never any widespread incidents of burning of witches in American society.

So, what happened? How could we have lost what we simultaneously enjoyed before—namely, a strong consensus against widespread obscenity and pornography, at the same time as of enjoyment of considerable liberty of expression and the willingness to defend the First Amendment to the Constitution?

What happened in the *Roth* case era is that the Court was reflecting the ambiguities of the society itself, where we had lost our way.

We have, of course, the executive summary of the Federal Commission of around ten volumes, of detailed statistical reports all of which have been buried in the meantime over the last twenty years.

But what cannot be forgotten is that that was the authoritative voice of the national government.

The reason we had to settle for moral standards is because the national government told us there were no national standards and the people were left with no where else to turn.

What I suggest to you is that the struggle you are carrying on—and I listen to you talk about this news-rack deal which is vital and important to this state and for which it can take considerably greater effort than even now of the investigator to realize that what really stands in the way is having been thrown back to our own resources in local communities while the opponents of decency are able to constantly run into apparently a national consensus that the First Amendment is an "anything goes" amendment, is an amendment that says "pornography is in the eye of the beholder," is a national standard.

And national standard always trumps local standards. That's the struggle that you're fighting. So the *Miller* standards are not then truly and properly local standards. All they are, is an invitation to local communities to do what they wish so long as someone else doesn't want to oppose them, so long as they're not challenged in the name of the First Amendment. And I believe that there is no recourse to that, save to return to where the damage originated in the first place.

I think it's time for a new national commission on obscenity and pornography. I would

think it's time for those who are laboring in the area to lead the drive to establish such a commission.

Now, I do not know if you were to request of the present administration to name such a commission or the present Congress to provide the legislation to form one that it would agree. But it does seem to me that only in proportion as your efforts are brought to bear in that direction, will you gain the freedom within local communities to redirect some of these changes.

Only in proportion as an issue is made of this question nationally, would it be given serious consideration nationally.

What is the national consensus? What do we expect in the way of decency? How much in the way of public display is permissible and will permit us to refer to ourselves as a civilized community?

Unless these questions are raised at the national level, unless we ask again what freedom of the press means, at the national level, I don't see how you can readily find support in carrying on this activity.

A first, a clear-cut expression, meaning of the freedom of the press in the United States occurred in 1774 in what was called the Separate Resolve Congress. The First Continental Congress met as the Revolution was getting started and they wrote letters to the citizens of Quebec asking them to join and they pointed out the virtues of the new way of life that was being built in the United States—one of which was this freedom of the press which they said did many things to protect religion, for example, among a list of things. But the most important in that list including expression was that it provided for the better administration of government.

They made it perfectly clear that the purpose of freedom of press, freedom of expression under our republican form of government was to foster civil discourse, to have us pay attention to one another's moral intentions. And nothing can be clearer than that civil discourse is not fostered by constant focus on sexual activity per se.

I'd like to share with you just a brief passage or two as to how these things had developed already by 1970.

I want you to listen to this reading on how little has changed, how the problem has become intensified but the ways for expression are not different from what have already been accomplished twenty years ago when the National Commission gave its stamp of approval.

So, to avoid abstraction and be really academic let's just see some more or less concrete examples of the literature that was prevalent twenty years ago.

The adult book shops in larger cities featured what is called adult pictorial magazines. You then add news-racks to the book stores now.

These involve total nudity, very explicit portrayals of female sexual organs, usually with the legs spread wide apart and naked men and women posed together in provocative postures that stop just short of actual intercourse. Of course, they don't just stop, just short of actual intercourse any longer.

Some of the magazines specialize in homosexual-lesbian portrayals. Often a large number of the adult newspapers are clustered in the central section of the city with advertising blazing as to what is to be found inside. The difference now is that you no longer have pornographic ghettos. They have been disseminated far more broadly.

Another example can be found in New York City's exploitation film theaters, most off Times Square, which recently featured a movie called *The Morbid Snatch*. Two men conceived and executed a plan to capture a young girl and imprison her and compel her to submit to sexual

acts of various sorts.

The girl is drugged, confined in a basement, stripped naked and subjected to sexual intercourse. Periodically it focuses very closely on the sexual organs of all participants. And, periodically, the girl whose age was intentionally too difficult to determine is represented as responding erotically to these acts. The sexual scenes in preparation for them constitute practically the sole content and contribute to the total interest in this film. A companion film, about twenty minutes long, consists of close-up shots of a nude woman masturbating. The coming attractions promise scenes that go into rape violence, mass orgies and the intercourse of women with apes.

Then, consider the now standard field of the contemporary field of paperback novels, the systematic violation and humiliation of women. There are several variations on this theme. In a recent novel, *The Orgy*, another variation of theme is suggested, such as brutality and sexuality.

In this kind of scenario, the woman is virtually beaten into submission and was vividly portrayed as desiring and inviting the treatment. In a recent novel that carries this principle to its logical conclusion, the hero seduces women, tortures them, and then kills them. And you, of course, all know about the snuff films that have characterized our era as well.

Now it seems to me that what is consistent in those accounts of twenty years ago is that the whole purpose and direction of pornography of twenty years ago, and obscenity is to make passion the exclusive focus of attention. You will find that it's almost impossible to produce one of these things about a hero or heroine who pauses long enough along the way to reflect on that which he or she might be doing and that's what some might try to pass off as human reasoning, providing some redeeming social importance because it's a reflection on the state of the human soul or the condition of human life.

But the reality is that that is never significant, the point is to be consumed by passion. And whatever aims explicitly, whatever has the intention of making passion the consuming object of our attention by definition also seeks them to convert us from that which is at constant struggle with passion namely, reason and morality.

The only reason to seek to establish some kind of control over our passion is because there is a higher life to live. There's a life not exclusive of passion but beyond passion which therefore defines us as a civilized folk, as a decent folk. That's what we object to with respect to obscenity.

Why does that not run afoul of the First Amendment, not sanction, even argument, if you can call it an argument, that human beings should think of nothing but passion? It seems to me it is clear that the First Amendment cannot survive, can neither defend society nor be defended by the society, unless it fosters that kind of interaction among citizens that will, in fact, give the preeminence, give the position of chief priority to that rational and moral interaction that makes a common life understandable. If we are to call ourselves fellow citizens it is not by virtue of the fact we are all potentially one another's objects of fashion?

It is allowed because without becoming objects of fashion to every other woman we can nevertheless all engage in a common enterprise. We can engage in what we call a public life.

A public life is therefore precisely not a part of a life of passion, which is private both by nature of the practices themselves and also by nature of the fact that the attempt to make them anything more than private will divide and make common public life impossible.

I say then, the work of trying to eliminate the enduring influence of obscenity and pornography in our society and our culture is perhaps one of the hardcore instances at this stage, insofar as it aims to restore healthy national consensus, a healthy view of what it is that makes us

one people and how we are perceived as such; and to that work I commend you and pray that you will ultimately succeed.

Comments & responses to commissioners' questions:

Prof. Allen: This is a book of twenty years ago called *Censorship and Freedom of Expression*, a collection of essays.

Question: Through all of that, what you are really conveying to us is that on both sides of the line we are fighting, we still have to walk through the twilight zone.

Response: Yes. I think that's a very fine way of putting it. We're not going to eliminate from human life the ordinary temptations of human life. What we want to do is to define the appropriate sphere of those temptations clearly so that they remain in the appropriate sphere and don't therefore colonize the rest of our lives in such a way that we can carry over many more activities.

Question: OK. You take three parts: The First Amendment, Civil Rights and pornography. The First Amendment has always been fought for by the media. The fear of censorship, but yet and still, they're the greatest purveyors of censorship.

Response: You're certainly right about that. I've always made the argument that the First Amendment does not give the rights exclusively to the press. It gives the right of freedom of the press to citizens. It is not a newspaper's right exclusively; it's a citizen's right. It's greatly misunderstood for us to think that newspapers own the First Amendment.

Question: Then, in the second portion of the civil rights that, unfortunately, those persons that control the media take away the civil rights of the regular citizen.

Response: Yes. We know many things that parallel civil rights. One of the agencies that can do so is a government that acts improperly. Another thing, that can do so are people who act outside of the law and are unable to be restrained by the government. Among people who can act outside the law are sometimes instruments of the press, particularly in their waging the war of public opinion where they undermine our will to defend the rightful provisions of our Constitution that aim to defend us. Here's an example: We boast that in the discussion of obscenity and pornography, a typical argument is, that this cannot be in any way restrained because of the absolute freedom of the press, the absolute war between the government and the people's right of self expression. But we note that the press has no trouble becoming a major player in the formation of public opinion and a similar understanding of the Second Amendment to the Constitution, the right to bear arms which is in fact stated expressly and absolutely in a way the First Amendment is not. Nevertheless, they have no problem of supporting and educating the notion that government might restrain the ownership of arms and interfere with the distribution of arms. They would never allow you to place a Saturday night special on the news-rack outside the post office.

Response: (conclusion of the first inquiry) Pornography by national standard limits us to blue ribbon commissions rather than a commission of thinking citizens that would be put on its

membership, that would dig a little deeper than the blue ribbon panels and come up with a more viable answer.

Question: You mentioned a while ago that there should be another national commission to delineate obscenity. Do you still think that the one that was created in 1985 was adequate or should there be another more dedicated to more purity of purpose?

Response: I think the one in 1985 did nothing except leave us with the *Miller* standards as they were articulated by the Court and I think we need one quite independently of that one that will respond to the challenge of the 1970 Commission. The 1970 Commission is the one that set the benchmark of declaring that pornography is in the eye of the beholder. The 1985 Commission did not challenge that specifically.

Question: (inaudible questioning relating to nudity)

Response: Nudity is not a problem and there is nudity in art which is not objectionable. But there is something you can learn by trying to imagine how we would carry on some of the ordinary activities of life in the nude and this not an academic question. There are people who have made it a principle to live that way. They have formed nudist colonies. And they have what they call a philosophy which suggests that somehow their life is more complete and more humane because they don't allow clothing to come between them and another human being. I think it's a serious argument and I think it's seriously flawed. Our clothing then does not become an expression of our humanity. It's still the expression of our animal instinct looked at from that point of view. Clothing is not an expression of our animal nature. Clothing is exactly what it became in the hands of Adam and Eve. It's an expression of our removing ourselves from our animal nature, to focus on the distinctively human. That is, the power of reason and that speech which goes along with reason. What speech tells us is that human beings do not live alone. They bring words in family and society. They speak to one another. Their communication is essential to the full development to that humanity. Now, what is it that accentuates that communication? It is the constant drawing of the attention to the organs of communication. That is what makes the difference in human life.

The upright posture gives us the advantage to begin with because we're the only animals that look to the horizon. If we stand upright our eyes look toward the horizon. We're not focused on anything immediately in front of us. And our thoughts too are focused on the horizon. And our communication is to allow us to make ourselves clear to one another so that we can organize our exertions in conformity with that division.

Whatever tries to focus our attention to what is immediately in front of us instead of on the horizon is then in competition with our humanity. And nothing, of course, is more immediately in front of us than the passions. And those, of course, the erotic passions are the most irrational. And that's the distinction I wanted to make.

So, if I tried to deliver a talk in the nude, it doesn't mean that I am such an overpowering hunk, or whatever they say that you couldn't listen to what I was saying. It simply means that obviously I am then violating the conventions that we have evolved over a long period of time that permit us to think beyond the immediate future.

Question: (inaudible)

Response: In avoiding by the way, let me say, the pseudo-scientific question of whether reading pornography makes one a criminal or not is why I have focused today on the question of humaneness. That's why we object to obscenity. It may play a part in the criminal subculture. That's a secondary reason. The main reason is that it violates the bonds of community. That's what has to be made clear.

Question: With regarding to the 1970 Commission report, you'll notice that Congress didn't pass it into legislation as a result of its controversial conclusions of the Commission.

Response: Accepting or rejecting the report is the only responsibility Congress would have. It was however accepted by the Executive Branch only tacitly. So, the most significant thing about the Commission was its impact on public opinion and its relationship to court decisions. It stirs the pot and creates the impression that this is not something we can have a coherent national position.

Thank you, Commissioners.