

**Different Music – the Same Keyboard:
Obscene Art/Pornography and the First Amendment Debate**

John G. Trapani, Jr.

*“ . . . different music is played on this same keyboard,
either in harmony or in discord with human dignity.”*

Introduction

The tension between pornography and offensive works of art, on the one hand, and freedom of expression and the right of public access to another’s ideas, on the other hand, frame much of the First Amendment debate. From Serrano’s “Piss-Christ” to Gangsta Rap lyrics; from Mapplethorpe’s homo-erotic photography to Scorsese’s film “The Last Temptation of Christ;” from Larry Flint’s *Hustler* magazine to the internet porn industry, the questions loom large: “where should a society draw the line concerning pornography and obscene art without violating the First Amendment rights of free expression and of public access to it?” And “is the aesthetic and moral offense that might arise from one’s encounter with pornography or certain pieces of art or art forms (themselves regarded as value-neutral) merely a matter of the variables of personal taste, where the risk of offense is simply the price we pay for preserving the fundamental right of free expression in a democratic society?”

In his book, *The Time of Our Lives*,¹ Mortimer Adler offers an important distinction that can provide a valuable insight in this discussion. There are, he says, essentially three levels of practical reasoning in the ethical order: the level of universal principles, the level of general rules, and the level of concrete decisions. Adler’s claim is that whatever measure of certitude there is to be found in ethics occurs on the level of universal principles. General rules have less certainty since their assertions are only generally, not universally, applied. In decisions made in the concrete or existential order, there is often little certitude to be found: the best that one can hope for in a specific case is that a decision be a principled one, i.e., based upon reasoning derived from universal principles and supported by virtue.

¹ Mortimer J. Adler, *The Time of Our Lives* (New York: Fordham University Press, 1996), pp. 188-200.

This paper will begin by exploring the basic categories involved in the First Amendment debate, namely: a) the virtue of art and the variability of taste, and b) human nature and the foundations of human rights and human society; it will conclude by reflecting on the three levels of ethical reasoning and by asking whether they can be successfully applied to aesthetic judgments and the issue of free speech. Or, to say the same thing in another way by borrowing a metaphor from Jacques Maritain, we will ask whether the one keyboard of universal principles can be legitimately used to play the different music of specific cases ... as long as they remain in harmony with human dignity.

The Virtue of Art and the Variability of Taste

The uses of the English word “art” obscure a subtle distinction that was known to the Ancients. In Book VI of his *Nicomachean Ethics*, Aristotle identifies five intellectual virtues, dividing them into two groups: three are grouped in the speculative order and two in the practical order. The two practical virtues are differentiated by two distinguishable spheres of action, the one called *praxis* or *agibilia* (“doing”), the other *poiesis* or *factibilia* (“making”). These two spheres of action are themselves usually identified in English as “ethics” and “art.” The intellectual virtue proper to each of these is rendered, respectively, *phronesis* (practical wisdom or prudence) in ethics, and *techne* (art or skill) in art. Thus, the term “art” is used in two related but subtly distinguishable ways: art as a work-producing activity, and art as a virtue or perfectible skill of this human activity. The possible confusion that can result when these two uses are not clearly distinguished becomes apparent when expressed in this analogy: prudence is to ethics as art is to art.

The value of this distinction is that it helps us to differentiate between the way a child might build a tree house (a making activity), as opposed to the way a skilled carpenter might do it (craftsmanship); they both engage in a work-producing activity while only the carpenter has the art of carpentry, the skill which seeks the good of the object made. When applied to the fine arts, we can observe the difference between one piece of music composition that is poorly executed and a second composition that is crafted with consummate skill. In this way we can distinguish, in principle, good art from bad art: both compositions are forms or pieces of art as products of a work-making activity, but the one is the result of a degree of competence or skill which the other does not possess. Although this distinction is perhaps more easily discernible in carpentry than in music, it is a valid distinction nonetheless.

Reflection upon Jacques Maritain’s signature use of the term “Poetry” as a form of intuition that is a gift which the creative, fine artist either does or does not have (and which passes from the artist to the work of art itself when the artist does have it) takes us further and helps to solidify the idea that a good work of art has an additional intrinsic quality (beyond the three traditional objective criteria of beauty: integrity, proportion, and radiance) which other works do not possess. By noting that all of these qualities *reside in the work of art itself*, we can understand something

about the foundation for both the objective evaluation of works of art, on the one hand, and the subjective variability of individual taste on the other. Thus, while it may be true that “*degustibus non est disputantum*” (taste is not disputable), it is also true that not all works of art are created equal — some indeed are better and more praiseworthy than others. In this way too, we can understand that the expression “beauty is in the eyes of the beholder” may be true in the limited sense of referring to individual, subjective taste (equivalent to saying that “I like what I like”), but certainly not true concerning the universal, objective criteria or principles involved in the critical evaluations about good art. The fact that there can be debate about the specifics of these criteria or principles should not lead us to the illogical conclusion that they therefore do not exist.

Moreover, in the concrete or existential order of judgments about specific works of art, truth and certainty are often as equally elusive and difficult to discern as judgments concerning concrete actions in the ethical order. And yet, as noted earlier, Mortimer Adler makes clear that this is precisely the best that can be hoped for. In saying this however, we should not be faint-hearted; to lack the precision of empirical verification on the level of concrete judgments in either the aesthetic or ethical orders does not mean that we have gained no truth or insight at all. Rather, we have gained the measure of wisdom that the subject matter allows; Aristotle himself observed long ago that we ought not expect greater certainty than a particular subject matter permits.²

From the above discussion, the following conclusions emerge:

- 1) that objective criteria for the evaluation of good art do exist, even if the articulation of those criteria is incomplete, imprecise, and evolving;
- 2) that these criteria may be both disputable in themselves and disputable on the existential level concerning their application to specific works of art;
- 3) that this fact of disputability and possible controversy should *not* lead anyone to the erroneous conclusion that the objective criteria of good art or a good work of art therefore do not exist;³
- 4) that the evaluation of these criteria involves expertise and knowledge commensurate with and proportioned to the particular art-medium and to the exercise of the intellectual virtue itself (i.e., just as the prudent person is the one qualified to make good moral judgment, so the artful or skillful person is the one who is more qualified to make sound judgments of artistic excellence);
- 5) that, as a result, judgments about good art are not simply a matter of the subjective determinants of personal taste, popular appeal, economic value, or political correctness;

² Aristotle, *Nicomachean Ethics*, Bk. I,3, trans. W. D. Ross, “Our discussion will be adequate if it has as much clearness as the subject-matter admits of, for precision is not to be sought for alike in all discussions, any more than in all the products of the crafts.”

³ Mortimer J. Adler makes the identical point concerning the moral order and the difficulty of relating universal principles to concrete decision-making; cf. his *Intellect* (New York: Macmillan, 1990), p. 160.

6) that, however much these influencing factors of personal taste may operate in the concrete social order, they are nonetheless extraneous to the objective quality of the work itself—fashions, trends, movements, and the appeals of popular taste may come and go, but the work of art, like the farmer-in-the-dell's cheese, "stands alone;"

7) that, as a result of the above considerations, the attraction and appeal of certain so-called pieces of art may be due to factors that have nothing to do with their artistic merit — from sensual or erotic attraction to shock value and a perverse delight in the scandalous, the reasons for their appeal may be legion but, considered in themselves, those things have nothing to do with true aesthetic merit or value; and

8) that, finally, judgments about artistic quality or merit should not be confused with judgments about freedom of expression. The former concerns judgments about the objective qualities that reside in a work of art and which are a result of the artist's virtue (bad art is still art, it's just poorly executed or has nothing to say), while the latter concerns the conflict that arises between the rights of the individual (for "free" self-expression) and the rights of a good society to protect itself from harm or detriment.

The discussion of this last point can be clarified by an example. It is one thing to render a negative judgment concerning the artistic merits of Serrano's "Piss-Christ," and it is quite another thing to assess and evaluate its social/cultural impact vis-a-vis the First Amendment. These are two distinct questions and they should be dealt with separately. Concerning judgments about aesthetic merit, we must remember to distinguish "an art work" from "a *good* work of art." Moreover, our judgments must be freed from the unassailable sanctimony of "artistic freedom" or "poetic license," which concludes that *all* art is automatically the result of superior, noteworthy human achievement. The truth to the contrary, however, is that when we dress up vulgarity as "serious art," we elevate it to a status that it does not deserve all the while that we insulate it from legitimate criticism. It is a myopia created by the aesthetic equivalent of the classic fable of the "King's New Clothes." The outcome is that, while pornography has been lawfully limited when a social community argues against the harm and offense that it creates within the community itself, crude vulgarity masquerading as art is euphemistically disguised and thus inoculated against the possibility of deserved criticism. And yet, the reality of the work is and remains what it is . . . or, as farmers here in the Mid-West are known to say: "you can call it 'organic fertilizer,' . . . but it's still manure!"

Beyond these insights, however, the second question still remains: what is the social impact of pornography and obscene or offensive art on society? Do artists have any moral or social responsibilities to society, or is their "artistic license" a free pass for them to do with impunity whatever it is they wish? Furthermore, does a society have any moral or social responsibility to protect its citizens by imposing restrictions on either artists or their work, and if so, do these restrictions then

become violations of the artists' right of free speech? To answer these questions, we must reflect upon the basic principles of human nature, and the foundations of human rights and human society.

Human Nature, And the Foundations of Human Rights and Human Society

The artist or pornographer is first and foremost a human person, situated essentially and existentially within all of the categories that define the members of the human family. Existentially, Maritain rightly observes that the person is not only a member of a social community or nation, he or she is also a member of a political society or body politic which is a work of human intelligence and design.⁴ As such, just as an individual aims at an ultimate end (viz., a good life) so too the state must aim at some end. In *Man and the State*, Maritain asks: "What is the final aim and most essential task of the body politic or political society?" Not "... the material convenience of scattered individuals, each absorbed in his own well-being and in enriching himself." Rather, the aim of society ought to be the betterment of "... the conditions of human life itself, or to procure the common good of the multitude."⁵ But what exactly is the common good, and how are human rights determined? The answer to this question is important for society since, without a secure, factually objective answer to it, any hope of grounding society upon true, universal social principles is lost.

The answer to this question is found in our common, shared human nature. Natural desires or needs are fulfilled by real goods; since these natural desires are the same for everyone, what is really good for one person is thus really good for everyone. In this way, real goods are common goods, and common goods are what everyone has a right to, i.e., they are universal human rights.⁶

The notion, "human nature," should not be understood as some simplistic, static, fixed and predetermined pattern. Rather, "human nature is constituted by all the potentialities that are the species-specific properties common to all members of the human species."⁷ This definition, while allowing for our nurtural differences, also takes into account the depths of human mystery which result in the difficulty of establishing any complete or definitive listing of these common, shared human goods or rights. Our understanding of the dynamics of human nature is highly complex, often obscure, and continually expanding and revising as all of the relevant sciences contribute new knowledge. The acknowledgment of these epistemological limitations, however, should not lead us to the error of concluding that there is no such thing as a common human nature and universal, inalienable human rights.

⁴ Jacques Maritain, *Man and the State* (Chicago: The University of Chicago Press, 1951), pp. 2-3.

⁵ *Ibid.*, p. 54.

⁶ Cf. Mortimer J. Adler, *Aristotle For Everybody: Difficult Thought Made Easy* (New York: Bantam Books, 1978), pp. 78-85.

⁷ Mortimer J. Adler, "Human Nature," *Ten Philosophical Mistakes* (New York: Macmillan, 1985), p. 161.

In *Man and the State*, Maritain asserts that, despite the advantages and disadvantages of individual and cultural pluralism, democracy is the only form of governance that can safeguard these human rights. Moreover, as a Christian philosopher, he recognizes that human nature is a sinful nature, fallen yet redeemed, and as such, since the end of the state is the realization of the common human good, achieved by attaining a “civilized life . . . which is ensured by . . . political rights, civil virtues, and the cultivation of the mind,” we can then see that it “cannot conceivably succeed . . . without the impact of Christianity on the political life of [humankind] and the penetration of the Gospel inspiration in the substance of the body politic.”⁸ In this regard, there are two Maritains, so to speak: the political theory of “Maritain the Christian Philosopher” affirms the highest principles concerning our human spiritual nature and the ideal of human society whose end is the same in the political realm as the ideal of human nature is in the moral or ethical realm: namely, human goodness and perfection. On the other hand, “Maritain the Political Realist” also recognizes “that the flesh is weak” and that it “would be nonsense to require perfection and impeccability from anyone who seeks justice.”⁹ This is certainly true in a non-Christian pluralist society as we observe it in America today.

It is in this context that Maritain identifies the intersection of what he calls the two “ultimate ends” of human life, the one temporal, the other eternal.¹⁰ The first occurs in the social order and concerns the terrestrial common good, while the second occurs in the metaphysical order and concerns the transcendent common good. Wisely, Maritain shows that individual ethics ought to take account of the former while aiming at the latter; political ethics, on the other hand, ought to take account of the latter while aiming at the former. All of these distinctions will be valuable when reflecting on the problems found in a pluralist society, particularly the First Amendment debate.

Conclusion: Different Music . . . the Same Keyboard

The problems of pornography and obscene or offensive art, though related, are really quite distinct. First, the problem of pornography or smut involves the examination of our human sexual nature. Our ethical principles concerning human sexuality are rooted in our understanding of human nature and natural law, which themselves are subject to revision due to our ever-increasing knowledge. It is now generally agreed, for example, that sexual relations are not for the purpose of propagation alone; conjugal intimacy is also a symbol and expression of love as well as a means to solidify and intensify the very union that is its origin. But what of erotica, where some may find the “naughty” and the “dirty” to be arousing and pleasurable, while others may not? What part do the erotic energies of the libido play

⁸ *Man and the State*, pp. 54-55.

⁹ *Ibid.*, p. 61.

¹⁰ *Cf.*, p. 62.

in human nature? Are they always simply the same as inordinate, immoral lust, even when considered inside of a marriage relationship where there might be the mutual consent of, and enjoyment by, both partners? What part of our individual responses to sexuality is the result of nurture rather than nature? Does erotica always and necessarily conflict with the call to the fulfillment of our higher spiritual nature?

The answers to these questions are neither simple nor clear; differing opinions abound, even within Christian circles. Although there is general agreement among both academics and ordinary citizens that deceptive, dishonest or non-consensual sex or erotica, or that which harms or coerces another against his or her will, is morally unacceptable, the same condemnation cannot be unilaterally directed against honest, consensual, non-coercive sexual activity (including erotica) between married couples or among single, emotionally healthy, mutually consenting adults.¹¹ Thus the question concerning pornography or erotica and the First Amendment finds its difficult resolution about specific cases wrapped up in both theoretical and practical judgments: theoretical judgments about our human sexual nature and nurture, and an individual's rights of free expression and access; and practical judgments which concern a society's right to restrict or prohibit expression of or access to certain things in order to protect its members from the unacceptable harm or detriment caused by some against others in that community (either as participants, consumers, or citizens).

The problem of offensive or obscene art is similar but different. First, the art work may be sexually offensive or not. The reason or source of the offense, objectionable to some but not to others, is, however surprising this may seem, irrelevant. In the end, in all cases that concern artistic merit, each work must be judged for its own intrinsic aesthetic value, as discussed earlier. Thus, on the one hand, qualitatively good art may be scandalous to some (nudity in painting, for example), while, on the other hand, simply calling something "art" does not automatically make it qualitatively good nor require that it be taken seriously. The skunk by any other name still smells as bad.

Moreover, it is one thing to have difficulty in making judgments about the acceptability or unacceptability of either pornography or offensive art vis-a-vis the sensibilities of individual taste and the demands of moral principles; but it is another thing to consider those difficulties that concern pornography/offensive art and the rights and common goods of a society as a whole. Together, these issues comprise the intersection of two conflicting but equally legitimate human rights—the right of individuals to freely express themselves and consume what they wish versus the right of a society to protect itself and its constituents from harm.

Maritain's discussion of natural law offers some insight to this problem. On the one hand, he tells us that we should not expect that positive law (the body of customary or statute law which is in force in a given social group) will ever perfectly

¹¹ For an argument justifying the latter, see *The Times of Our Lives*, pp. 325-28.

mirror natural law. There are too many variables in any pluralist, democratic society, and natural law still leaves the specific details of positive law undetermined. On the other hand, it is through the work of human reason that the specific determinations of positive law are worked out, and ideally, they should be related to, and an extension of, natural law in much the same way that the general rules of ethics are related to, and derived from, universal principles. However, just as the general rules have less certitude than the universal principles, so too is positive law related to the natural law. Thus it is easier for a pluralist culture to see the value and importance of preserving universal human freedoms, including the freedom of expression, than it is for these same people of good will to agree on the specific application of these universal human rights in positive laws. The successes or failures of human reason result in a variety of laws down through history, with truth, as the correction of history's imperfection, emerging slowly and gradually.¹²

Maritain acknowledges this difficulty. Some human rights, he says, are absolutely inalienable, while others, like free speech, are "inalienable only substantially." That is to say that, in the existential order (what Maritain calls the order of exercise) many of these inalienable rights may be "liable to limitation." In every case, however, whatever limitations are prescribed, they must be assessed by reflecting upon the relation between the positive law itself, on the one hand, and the human rights and common good affirmed by the natural law, on the other. It is in this way that Maritain distinguishes between the possession of a right and its exercise. The former may be inalienable, but the latter is not. This distinction is one that Maritain considers to be "of serious importance," since it "enables us to explain the limitations that can be justly imposed upon the assertion of certain rights under certain circumstances...."¹³

Taken at face value, it would appear that this last distinction *should* be successfully employed in restricting the social and moral harm and offense created by pornography and obscene or offensive art. Two problems, however, stand in the way of such a victory. The first is that we are reminded again of the evolution of our understanding of human nature and human desire. The "what," the "how," and the "how often" of human sexuality, both individually and culturally, defy clear answers. This imprecision inhibits a pluralist society's ability to adjudicate or legislate restrictions. In response, some may argue that this difficulty is but a case of our inability to distinguish between rights and limitations that are "clear in themselves" versus those that may or may not be "clear to us." This difficulty should not be taken lightly; indeed, Maritain writes: "... in natural law there is immutability as regards ... the law itself ... but progress and relativity as regards human awareness of it."¹⁴ It is in the concrete application of the various human rights to specific cases of law, not a disagreement over the rights themselves, that we find the source of so much confusion and conflict in our culture today. Thus

¹² Cf. *Man and the State*, p. 99.

¹³ *Ibid.*

¹⁴ *Ibid.*, p. 103.

our second problem: our tendency to absolutize certain rights at one time in history may blind us from seeing other rights which might “counterbalance” or otherwise conflict with them at another time. In a pluralist society, this type of conflict is as unavoidable as it is inherent in the nature of democracy.

Moreover, we cannot place too much stress, Maritain says, on the fact that these human rights are not the privilege of any particular school of thought. It is only normal that, in the unfolding of human history, as new awareness emerges, rights will conflict. “What creates irreducible differences and antagonisms among [humankind] is ... the determination of the *scale of values* that governs the exercise ... of these rights. Here we are confronted with the clash between incompatible political philosophies.”¹⁵ Among all persons of good will, living peaceably within the same society, their individual judgments about individual cases are filtered through the lens of their differing value systems and political philosophies. “It is by virtue of the hierarchy of values to which we thus subscribe,” Maritain writes, “that we determine the way in which [human rights], economic and social as well as individual, should, in our eyes, pass into the realm of existence.”¹⁶ Maritain identifies three prototypes of these competing political philosophies: 1) there are those who are the “advocates of a liberal-individualistic type of society,” and who emphasize personal goods and individual liberty over the common goods of society; 2) there are those who are the “advocates of a communistic type of society,” and who emphasize the common goods of a collective society over those of the individual; and 3) there are those who are the “advocates of a personalist type of society,” and who emphasize that the common goods of humanity should be used at the service of the moral and spiritual goods of individuals and the community, and vice versa.¹⁷

Maritain declares himself to be unequivocally in favor of the third of these political philosophies, recognizing as he does that we ought to be aiming at the things of heaven while attending to the things on earth. Our own society, by contrast, seems to be clearly of the first type, as romanticized by the image of the western cowboy, and defiantly expressed in the lyrics to the song “My Way,” which Frank Sinatra so proudly professed as our “true” National Anthem.

What becomes clear from this whole discussion is that the ethical, aesthetic, and social/legal conundrum created by the debate about pornography, obscene art, and the First Amendment is a direct result of both 1) the liberal, consumer-oriented value system which drives our American culture and is in many respects at odds with human goodness and dignity; and 2) our inability to understand adequately the relation between the objective certitude of universal principles, and the relative lack of it in judging concrete or specific cases, whether it be in morality or, as we have explored them in this paper, in works of art, erotica, human rights,

¹⁵ Ibid., p. 106 [emphasis added].

¹⁶ Ibid., pp. 106-107.

¹⁷ Cf., p. 107.

and civil law. With the first, we are challenged: challenged to rededicate ourselves to the work of ensuring that the laws of our society are in accord with a true understanding of our human, spiritual nature from which we discern our natural human needs, our common real goods, our inalienable human rights, and our true human dignity. With the second, we perhaps desire more clarity and certitude than we should; unfortunately, most people desire the simplicity of black-and-white answers and are not comfortable with the ambiguity that results from and is required by subtle philosophical distinctions which demand that we exercise our thinking differently when understanding universal principles as opposed to applying those principles clearly in concrete cases.

It is in the application of these universal principles to the contingencies and uncertainties of individual cases that is something like what Maritain has in mind when, to return to our modified adaptation of Maritain's metaphor quoted at the beginning of this paper, he writes that we are "... dealing with the tonality, the specific key, by virtue of which different music is played on this same keyboard, *either in harmony or in discord with human dignity.*"¹⁸ It is this final caveat concerning human dignity, and by extension, human sanctity, that is the secret to both the understanding of Maritain's thought and the resolution of the First Amendment debate.

¹⁸ Ibid. [emphasis added].