







# BARE-BAITING

HOW THINGS HAVE CHANGED WHEN IT  
COMES TO OBSCENITY.

BY ALAN M. DERSHOWITZ

**I**N 1969, I argued a case in the U.S. Supreme Court involving the banning of the 1967 Swedish film *I Am Curious (Yellow)*. My client had been sentenced to prison for showing this film at the Symphony Cinema, a respectable art-film theater across from Symphony Hall in Boston. Several of the justices, as well as some of the lower-court judges, were outraged at the nudity and sexuality portrayed in the film. (In reality, it showed no explicit sex and only a small amount of nudity.) We eventually won the case and my client was spared imprisonment, but the film was banned in many parts of the country, and claims that it was protected by the First Amendment were rejected by several courts.

This past year at the Cannes Film Festival, another film was shown and subsequently opened in select theaters around the U.S.: French director Gaspar Noé's *Love*. Although it shows explicit sex in graphic 3D, almost no one took notice, except some film critics. There wasn't a peep from law enforcement, despite the reality that existing Supreme Court precedents might well allow it to be banned, as it falls outside the protection of the First Amendment.

When I saw *Love* at the Angelika Film Center in New York City, the theater was nearly empty. Two elderly women sat behind me, and two middle-aged women in front of me. A scattering of other couples, all donning 3D glasses, constituted the remaining audience. The film was a bit too graphic for my taste, especially one in-your-face scene that I will not describe. The plot was about a man who regretted the loss of an earlier love and relived their passion in his mind (and on the screen). The 3D component added little.

The point of comparing *Love* to *I Am Curious (Yellow)* is that the law has hardly changed in the half century that separates the films, but public acceptance of cinematic sexuality has changed perceptibly. The internet, where all manner of porn is easily available, is both a cause and effect of this change.

It's important to remember that in a democracy, even a democracy in which the Supreme Court plays so central a role, it's the people who ultimately decide. This is especially true in an area

like obscenity, where "community standards" help define the law. These standards are ever-shifting, and are subject to influences outside of the law.

While the Supreme Court has insisted that the government has the power to punish the showing of "obscene" films in theaters and on cable and on-demand television, the people have voted the other way with their feet (and their remotes). The law in action today bears little resemblance to the law as articulated by the Supreme Court, which places obscenity outside the protection of the First Amendment. The law in action more closely resembles the approach I advocated in my first encounter with the law of obscenity back in 1969, when I argued that the government has no business telling a consenting adult what he or she may or may not watch in a theater (or on video or TV) from which children are excluded, so

long as the "externalities"—the images that appear in public view outside the theater, like trailers and movie posters—are not obscene.

Generally, the law as articulated by the courts will follow the law in action, lest it become anachronistic or patently hypocritical. Hypocrisy, it has been said, is the tribute vice pays to virtue. In the area of obscenity, hypocrisy functions to allow the courts to maintain a pretense of puritanism in a world of prurience. British historian and politician T. B. Macaulay once observed that, "The Puritan hated

bear-baiting, not because it gave pain to the bear, but because it gave pleasure to the spectators." Some adults enjoy watching sexually explicit films. Although some puritans and feminists hate this, there is no evidence that it causes the type of harm (or pleasure) that government should be empowered to prevent by censorship.

In recent years, few obscenity prosecutions involving adult films viewed by adult audiences have been brought. That, too, is the law in action—or inaction.

Most Americans seem to understand that obscenity, while offensive to some, is not provably harmful to others. That's why obscenity prosecutions have a relatively low rate of success. I have been involved in dozens of obscenity cases over the years and do not recall ever losing one.

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# DIALED IN

WE ACCEPT THE CHARGES FOR COMEDIAN ARI SHAFFIR.

INTERVIEW BY: CHRIS NIERATKO

**A**MERICA nearly elected a mindless buffoon as its 45th president last month, simply because “he spoke his mind.” By that philosophy, the hilarious and politically honest host of Comedy Central’s *This Is Not Happening*, Ari Shaffir, is way over-qualified. Shaffir speaks with a witty bluntness that can only be pulled off by a New York City native, yet his disarming California-stoner delivery makes topics like genocide seem not only acceptable but pleasant.

We caught up with the toast of the comic circuit on his flip phone as he prepared for his latest special, to discuss technology shaming, euthanizing both the young and the old, taking mushrooms after 40, and Tinder fail.





**“SHE CRIED AT FIRST. I ASKED IF IT WAS BECAUSE I’M HUGE AND SHE SAID, ‘NO, IT’S BECAUSE IT’S BEAUTIFUL.’”**

**What’s with the flip phone, Ari?**

I just didn’t want to deal with it anymore. **You had a smartphone? You went black and came back?**

Yeah, exactly. But it’s too much: Instagram, Snapchat, Facebook, Tinder, email. I just wasn’t being socially present anymore and we’re all like that—dinner with somebody, looking at the tops of their heads.

**Miss any of it?**

For sure. I get lost constantly. When I’m on the road I don’t know where to eat. I could eat around the corner from the best, cheapest place and I would have no clue.

**Why don’t you just throw the phone in the ocean and try it that way?**

I think about that, too. I have a friend, he only has a home phone. I asked him if

he missed out on stuff. He said, “What? What would I miss out on? There’s nothing to miss out on. There’s nothing that needs to happen that fast.” People ask if I miss out on work. The answer is no—my agent knows if they need to reach me they text me. I’m not off the grid. Off the grid is when you have nothing.

**How do you send/receive porn pics with a flip phone?**

I can get picture messages, but they come up really small. I can’t really send any out. I have to just do the texting, but that’s hard, too. It takes a long time. When people send me stuff I have to forward it to my email and then open it up wide, otherwise I can’t really see it. That’s a negative for sure. You try to get a girl’s number and take your phone out. She’s like, “What is that?!”

**She’s technology-shaming you.**

Exactly. They laugh and scoff. I’m like, “I did this on purpose.”

**I need the phone to be able to watch porn on the road.**

I don’t know, imagination is an amazing thing.

**I think the smartphone has killed imaginations.**

For sure! I got my imagination back. I can invent my own stories. It’s not an issue.

**How long does it take after you get rid of the smartphone to get back your inner child?**

It was immediate with being present socially. That day. People were asking me and I’m like, “I’m talking to you. I’m not going under the table to check my Instagram feed.”

**Speaking of the inner child, I read you barely change your sheets. You’re like a man-child. I’ve got a philosophy that if I don’t learn how to do something no one can ask me to do it.**

Oh, my brother was like that with mowing the lawn. I tried to show him and he’s like, “No, no. I can’t learn right now.” He tried pulling the same thing with sweeping, but you know how to sweep. Stop it.

**I was that way with laundry. Forty years and I’ve never done laundry.**

What a chump! When I got to college I would use the washing machines in the dorms. I would see these rich kids just staring at me, wondering how to do it, and I wouldn’t even try to help them. See ya, little spoiled kid. Go figure it out.

**I’m not rich, I’m just lazy.**

That’s a different kind of spoiled. Self-made spoiled.

**The only thing I left college with was foot fungus from the showers. What was your best memory of college?**

I lost my virginity, that was pretty nice. That was a highlight. I was late; 23.

**How’d that go down?**

Great. You put it right in then pull out a little bit, then put it in more, then you pull it out a little more, then you put it back in. That’s pretty much it.

**You got three put-ins. That’s impressive!**

Yeah, she cried at first. I asked if it was because I’m huge and she said, “No, it’s because it’s beautiful.”

**I thought you were going to say because the lights were on.**

Yeah, she was like, “I told you I didn’t want to do this!” No, that’s probably the

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highlight. That was a big moment. I can't imagine anything bigger.

**You mentioned Tinder earlier. I've been married for ten years. I've never experienced the joy of Tinder. Do you have experiences with it?**

I didn't really get going. I hooked up a couple times but it was always a weird thing. You match with somebody and you're like, "What do I say to you? Hi?"

**From what I'm told you just arrive pantless and that's it.**

It was supposed to be hetero-Grindr but it never became that. It's still kind of crazy. My friend hooked up with somebody in a park, in the daytime, during her period. He showed up at the comedy club and had to wash himself off.

**This guy I know fucked a woman in a KFC bathroom while her husband and kids were eating in the restaurant.**

No way. Oh, my God. How do you lose yourself with somebody to where that's an option? Jesus. Her kids are right there? That's somebody who just wants the risk and excitement, right? That is horrifying.

warmer, I'd probably do it at a music festival, and then I'd do it at Shroomfest; I started an international mushroom festival where everyone takes mushrooms. It's like my holiday. It's the best. It just helps you think right.

**Never any bad trips for you?**

Not one. I was with a guy who started contemplating death. He had a real hard time, like, "We're all going to die!" He had a bad hour but after that hour he was laughing with all of us like crazy. Even if it's bad it's better than a cross-country flight next to a two-year-old. Oh! One time I was at a music festival in Ottawa, a blues fest. Santana was playing. I was watching him for a little while, but it got weird because all of his fan base is old. On mushrooms, man, those wrinkles, they multiply on people. I didn't care for it so I just went to the side stage and lay down next to a tree. As I let my mind wander, I started to feel like I was on a river. Water was flowing around me and carrying me off. Then I came to and some dude was pissing on the other side of the tree. I was like, "Goddamn it!"

## "I STARTED AN INTERNATIONAL MUSHROOM FESTIVAL WHERE EVERYONE TAKES MUSHROOMS. IT'S LIKE MY HOLIDAY."

**But it makes for a great story. Your Comedy Central show is about amazing stories like that. Which has been one of the most memorable?**

Ali Siddiq told a story about his prison riot; it was pretty interesting. When the Mexicans come up wearing boots that means they're going to riot because they're going to kick people and stab them. It was like his first week in prison and he didn't know what that meant. Everyone's like, "The Mexicans got on boots!" He's like, "What does that mean?" Everyone starts running, he's asking, "Why are we running?" He got stabbed, too.

**I'm blown away that you're 42 and still do mushrooms.**

Well, I got into it later, at 30, because I was religious. I've just been making up for lost time. That and women. A lot of guys say, "I used to do that a long time ago." Great, you worked it out. I did not. I do it maybe five times a year. It's more of a summer drug to me. You want to be able to wander around. So once it gets

**I know in the past you've had issues with old people being out of touch. I'm not a big fan of old people. At what point do you think we should take them out to the farm?**

I just think they've got to retire and stay out of public eye. At some point you become irrelevant and you annoy people with your level of irrelevance. Go on vacation. Do whatever. Have your bus tour. Quit bugging us with your stupid irrelevant thoughts.

**I think that applies to all old people, not just public figures. At some point your usefulness is up and you should be put down mercifully.**

I was talking about this with somebody yesterday; her grandfather had just died. She said, "If I was him I would've committed suicide about eight years before." Any sort of senility I'm like, "Let's call it right now. Let me watch one Netflix series and then I'll be out." I won't be locked in my apartment or house all day, every day.