

Nan Goldin - contemporary art works seized from an English gallery

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CATEGORY:
ARTICLE

In early September 2007, police officers seized the photograph 'Klara and Edda belly-dancing' (1999) by the controversial contemporary artist, Nan Goldin from the Baltic Art Centre (North-East England) where it had been on display. The photograph was seized on suspicion that it might contravene UK anti-child pornography laws.

Goldin's photograph shows two young girls playing in a kitchen. One is scantily clothed. The other child is photographed lying naked beneath her on the ground; her knees bent and legs splayed towards the camera. After lengthy deliberation, the Crown Prosecution Service decided not to bring charges and to return the photograph to its owner, the singer Elton John. The seizure of the photograph by the police illustrates the potential dangers to art collectors, galleries and museums of owning and exhibiting art works involving nudity, particularly where children are involved.

Goldin has iconic status in the contemporary art world for her intimate photographs of her life among drug addicts, drag queens and alcoholics in New York. Goldin's photograph was part of an installation of one hundred and forty nine photographs entitled 'Thanksgiving' by Nan Goldin. The photograph was acquired by Elton John from the White Cube Gallery, London who then loaned it to the Baltic Gallery for a retrospective on Nan Goldin. The exhibition has now been closed. Goldin's photograph has been widely exhibited internationally, along with the other works in 'Thanksgiving'. Ironically, the photograph had been seized by the police when it was included in the exhibition 'I am a Camera' held at the Saatchi Gallery (London) in 2001. The Crown Prosecution Service declined to prosecute on that occasion also.

Both the exhibition's curator, Jane Jackson and the photograph's owner Elton John (as well as Nan Goldin), could potentially have been prosecuted under the Protection of Children Act (1978). Under section 1(1)(b) of the Act, it is an offence to distribute indecent photographs or pseudo photographs involving children (i.e. minors under the age of sixteen). 'Distribution' encompasses the showing of indecent photographs to others, which includes causing the indecent photographs to be publicly exhibited. Conviction under the Act carries with it a maximum term imprisonment of ten years.

Whether a photograph is 'indecent' is to be determined by a jury or a judge by reference to socially recognised standards of propriety. Case law on the meaning of indecency in the UK has confirmed that neither the circumstances of the photograph's creation nor the intention of the photographer are to be taken into consideration (save to establish whether the image was created accidentally or not). Neither is expert evidence on the meaning of 'indecency' admissible. Unfortunately, for those in the art world there is no legal defence of artistic merit or purpose available against charges of creating or distributing indecent photographs of children. It is also doubtful whether a collector, curator or a dealer would be able to rely upon the defences of innocent possession or possession for a legitimate reason, e.g. research. It has been argued accordingly that the UK's anti-child pornography law is in breach of Article 10 of the Human Rights Act (1998), which protects an individual's right to freedom of expression, but the courts have been unsympathetic to this proposition.

Avant-garde artists and art institutions have long battled with public morality laws in the UK and abroad. Obscenity laws typically emphasise the morally corrosive impact of images and words upon their audiences; indecency laws typically emphasise the offence and moral outrage that images and words can cause.

The most famous trial involving the display of allegedly obscene contemporary art works occurred in the United States in 1990 when the chief curator of the Contemporary Art Centre of Cincinnati, Robert Barrie and his assistant, Janet Kadron, were prosecuted under local state law for publicly exhibiting 'obscene' photographs made by the then recently deceased artist, Robert Mapplethorpe. A small group of Mapplethorpe's photographs in the exhibition were of a homosexual, sado-masochistic nature and depicted extreme sexual acts. During the trial, lawyers for the defendants were able to convince a jury (uneducated in art history) of the formal and aesthetic qualities of the photographs (despite their strong content), thus paving the way for their acquittal.

The UK's obscenity law is fraught with difficulties of definition. Under section 1(1) of the current 1959 Obscene Publications Act (UK), an article (including an art work) will be considered 'obscene' if its effect (taken as a whole) is to 'tend' to 'deprave and corrupt' persons who are 'likely, having regard to "all relevant circumstances", to read, see or hear the matter embodied in it'. A jury must be satisfied, in order to convict, that a 'significant proportion' of readers or viewers are likely to be depraved or corrupted. To 'deprave' and 'corrupt' have been construed by the court as 'to render morally unsound or rotten' which tends to involve subject matter of a sexual nature, but can also include violence. One problem with the Act is formulating a stable definition of depravity and corruption; standards for what is 'obscene' are culturally relative, shifting from generation to generation; a further problem is the assumption that certain members of the audience are susceptible to being depraved and corrupted by the material if it should fall into their hands as opposed to other members who are not. This assumption may merely serve to mask social prejudices and stereotypes.

The Act does, however, afford the art world with some protection. As part of the 'public good' defence, a person will not be convicted if it can be

demonstrated that the artwork is of 'artistic merit', so that its artistic purpose outweighs its obscene effects. Expert evidence is admissible in helping to establish what is artistic merit. The defence has been successfully relied upon, most notably by Penguin publishers in their defence of literary merit, when prosecuted for publishing and distributing D.H. Lawrence's novel 'Lady Chatterley's Lover' in 1961.

It is an indictable offence at common law to commit in public an act of a lewd, obscene or disgusting nature as to amount to an outrage to public decency. 'Indecency' is not confined to shocking sexual subject matter, but can include any subject matter an ordinary 'decent' person would find disgusting. It is not necessary to prove that the act disgusted those who saw it; merely that it was calculated to do so. However, to be 'in public' the act must be witnessed by more than one other person. Galleries and exhibitions which the public can access (as of right) obviously fall within the scope of 'in public'. In contrast to the Obscene Publications Act 1959, the common law offence is one of strict liability and offers no defence of artistic merit or purpose.

Whilst the absence of such a defence is easier to justify in relation to the protection of the welfare of children, the absence of a 'public good defence' under the common law offence of outraging public decency is seemingly incompatible with the requirements stated in 10(2) of the Human Rights Act 1998. The section states that any interference with an individual's right to freedom of expression, must be 'prescribed' by law in order to pursue a 'legitimate' social aim and must be 'necessary' in order to further this aim. The European Court of Human Rights has on several occasions repeated that wide latitude must be given to Article 10 in a democratic society, including the right to convey ideas that 'shock' and 'disturb'.

There have been no prosecutions of galleries or museums under the common law offence since the prosecution of R v. Gibson, R v. Sylveire in 1989 (which extended the common law offence to encompass artistic expression for the first time). Here, a gallery was successfully prosecuted for displaying a sculpture of earrings consisting of minute, aborted human foetuses. More recently, calls to prosecute have been made and resisted by the Crown Prosecution Service following controversial exhibitions such as 'Sensation' (1997) at the Royal Academy, London (which featured various provocative art works including, a portrait of the child murderer Myra Hindley by Marcus Harvey made using the hand imprints of small children) and 'I am a Camera' (2001) at the Saatchi Gallery.

Galleries and museums in the UK where contentious artistic subject matter is exhibited have on occasion followed the strategy of preventing minors from attending the exhibition. They have also placed warning notices around certain exhibits, as in the case of Jake and Dinos Chapman's mannequin models of mutant children with exposed genitalia shown in the 'Sensation' exhibition. While these strategies will help to reduce the risk of a gallery's legal liability, particularly in respect of allegations of distributing obscene material, they are not an absolute safeguard. They will not remove liability under the Protection of Children Act 1978, nor under the common law offence of outraging public decency.

Obscenity prosecutions in the UK as in other jurisdictions are primarily aimed at the distribution of pornographic material. The risk to artists, collectors and curators of being prosecuted is relatively remote. However, in the unlikely event of a prosecution, art world defendants at least have a safe-harbour of being able to point to the work's artistic purpose or merit. By contrast, the common law offence of outraging public decency and the Protection of Children Act 1978 offer no such safe-harbours. Until both laws have been reformed, artists, collectors, galleries and museums should proceed with caution at least where photographs involving nude children are concerned.