Today's Porn: Not a Constitutional Right; Not a Human Right

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The First Amendment of the U. S. Constitution states, "Congress shall make no law . . . abridging the freedom of speech. . . ."[1] That sounds simple enough, but our high court has spent more than 200 years and written countless opinions deciding what that means. The First Amendment, the Court has pronounced, protects the right to criticize political leaders, the right to burn the flag, and even the right *not* to speak, for example.

However, the Supreme Court has never found that the First Amendment protects a right to distribute obscene materials—hardcore pornography. ". . . to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a 'misuse of the great guarantees of free speech and . . . press.'"[2]

The Court has indicated in its jurisprudence that such materials are harmful and that the distribution of obscene material is not a right necessary to civil society.[3]

Both federal and state laws prohibit distribution of obscene material and those who do distribute can be prosecuted. But what is "obscene material" or rather, when is something "obscene" instead of merely "pornographic?" That is the key question in a prosecution.

Not all pornography is obscene and not all depictions of nudity or sexual activity are

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[1] U.S. Const. amend. I

[2] *Miller v. California*, 413 U.S. 15, 34 (1973).

[3] *Paris Adult Theatre v. Slayton,* 413 U.S. 49 (1973).

pornographic. Indeed, individual opinions on what constitutes pornography differ widely as do opinions on what constitutes obscene material.

My definition for the term “pornography” is this: “Nudity or sex acts, erotically depicted, intended to excite.” That definition distinguishes a depiction in a medical textbook from one in *Playboy* magazine.

In law, the depiction in *Playboy* may be no more obscene than that in the textbook. Both may be “free speech” and thus protected. I acknowledge that this is confusing to many, but keep in mind, even the Supreme Court of the United States was confused through many decades of its jurisprudence, only settling on a workable definition of “obscenity” in 1973.

One observation as we explore the topic: I would suggest that most pornography distributed for consumption today—which is far from that depicted in *Playboy* over the years, and certainly distant from that in medical textbooks—could be found to be obscene, in one or more jurisdictions in America.

The Supreme Court has used a variety of legal standards, many of them confusing, over decades to guide states and Congress in determining what material may be considered obscene and therefore the subject of a criminal prosecution. Finally, in 1973 the Court began to settle on a very understandable and effective standard in *Miller v. California* 413 U.S. 15. There the Court reaffirmed that, “This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.” This is true even for “consenting adults,” the Court said in a second obscenity case in the same year.[4]

The U.S. Congress and nearly all 50 states have passed laws prohibiting distribution of obscene materials. Why have they done so? In *Paris Adult Theatre v. Slaton*, The Supreme Court provided wonderful insight into that question:

> The sum of experience . . . affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. . . . The States [and Congress] have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize . . . the States’ “right . . . to maintain a decent society.”[5]

How prescient! Today’s symposium details the injury to our communities, to public safety, and to our society caused by pornography. In fact, we are in the midst of a public health crisis caused by pornography, a crisis that could have been prevented by the enforcement of obscenity laws and other measures that you will hear about today.

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[4] *Paris Adult Theatre v. Slaton*, 413 U.S. 49, at 57-59 (1973).

[5] Ibid.

This is how a judge or jury determines whether material is obscene, as set forth in a three-prong test set out in decisions of the U.S. Supreme Court, first in 1973 in *Miller v. California*, 413 U.S. 15, 24-25, and then as clarified in *Smith v. United States*, 431 U.S. 291, 301-02, 309 (1977) and in *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987).

Prong 1: Prurient interest – Whether the average person, applying contemporary adult community standards, would find that the work, taken as a whole, appeals to the **prurient interest.** That term refers to an erotic, lustful, lascivious, abnormal, unhealthy, degrading, shameful, or morbid interest in nudity, sex, or excretion. It need not be all of these to be "prurient." It is sufficient, for example, that it appeals to a lustful interest. In fact, it does not have to actually "appeal" at all but rather the Court looks to what the material was *intended* to do by the publisher of the material. Was the depiction or film intended to appeal to a lustful interest? The fact that a doctor may have lustful thoughts in review of a medical book is irrelevant. The intent or purpose of the material is legally critical, 413 U.S. at 26.[6] A pornographer is not saved from a conviction by noting that similar depictions to those that are the subjects of his works may be found in a gynecological study for the author of the study intends a scientific appeal rather than a prurient one. Thus, the test is not whether the viewer is aroused but whether the work is sexual exploitation.

Prong 2: Patently offensive – Whether the average person, applying contemporary adult community standards, would find that the work depicts or describes, in a **patently offensive** way, sexual conduct (*i.e.*, ultimate sexual acts, normal or perverted, actual or simulated; masturbation; excretory functions; lewd exhibition of the genitals; or sadomasochistic sexual abuse).

This prong of *Miller* does not ask whether the materials are offensive in the context in which the materials are expected to be used. Defense attorneys always argue that the material was intended for a willing adult buyer to be used in the privacy of his home. That statement is legally irrelevant.

Perhaps a more important question is whether the pornography in question should be shown on the city bus, in the window of a downtown porn shop, or on a television in your home during a coffee party. The answer is, of course, "No." Why? Such depictions would be found offensive.

It should also be noted that the acts depicted in the work may be normal sex acts. They need not be acts which some or even the majority would find in and of themselves offensive. It is the *exploitation* of the sex act or acts that count.

Thus, obscenity is not the portrayal of illegal sex acts but rather the illegal portrayal of sex acts, normal or perverted. It is, as the Court said in *Paris,* the injury to the community as a whole, the endangerment to public safety, or the jeopardy of the right to maintain a decent society that is the proper concern of legislatures expressed through obscenity laws.

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[6] See also: *Ginzburg v. United States,* 383 U.S.463, 471-74 (1966).

In contemporary society—in this Internet Age—we have all witnessed the injury to communities, to our safety or that of our spouses or children, and to the society in which we live.

Prong 3: Lacks serious value – A work must be lacking in **serious** literary, artistic, political, or scientific **value** to be legally obscene. This is referred to as the "LAPS Test" and the inquiry here is whether the work "genuinely" has value. It is not sufficient for the pornographers to merely assert, as they always do, that the material is art and thus it has serious value. This is a question for the jury to decide and the prosecutor will help the jury probe the intent of the pornographer by demonstrating how the work was pandered—as art or as pornography. Often a reading of a film's content description on the box cover will answer that question to the detriment of the defendant.

For prongs 1 and 2, the inquiry is whether the mythical "average person" in the community would say the work appeals to the prurient interest. This is included in the test to prevent each individual juror from making the decision based on his or her own tastes or preferences. For prong 3 the inquiry is whether a "reasonable person" would find the work lacks serious value.

Note that contemporary community standards play a significant role in the first two prongs of the Miller Test. This assures that the standards of New York City are not imposed on a community in Kansas, for example. A work may not be obscene in Manhattan but it does not then follow, according to Miller, that it is protected in your home town. In many obscenity prosecutions defendants argue that they should not be liable for knowing the community standards of each town to which they shipped material. The law, however, is settled on this point and the burden is on the pornographer to know the community standards or risk the legal consequences. Nor is the law different for Internet distribution. Many suggest that in the Internet Age, there are no such things as community standards, as though we are one big community. The hope of those who make this argument is to do away with obscenity laws for Internet depictions. There is no support for this in the Supreme Court.[7]

Justice Potter Stewart's widely panned statement referring to obscenity, ". . . I know it when I see it," is often quoted by those who wish to ridicule the notion that obscenity can be defined at all. In truth, most people know it when they see it, at least if we can trust the history of obscenity prosecutions where a jury is involved. Nearly all such cases have been won by the prosecution over the last four decades or so. The particular motion picture to which Justice Stewart was referring was a French film titled, *Les Amants*, or *The Lovers*, the subject of the case *Jacobellis v. Ohio* 378 U. S. 184, (1964) which involved adultery with only one depiction involving sex, and apparently, that was mild. Justice Stewart in his concurring opinion that the film in question was *not* obscene commented on the difficulty that the Court has had in defining "obscenity" and

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[7] See *Ashcroft v. ACLU*, 535 U.S. 564 (2002), where the High Court reversed the Third Circuit concluding that obscenity laws are not unconstitutional as applied to the Internet solely because obscenity laws require application of community standards. See also, *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996), cert. denied, 519 U.S. 820 (1996) (defendants operated a computer bulletin board system (BBS) from their home in California and were successfully prosecuted in Tennessee despite claims that community standards should not apply). The lesson to be learned is that if you are not sure of community standards where you distribute, whether by UPS or Internet, then don't distribute.

concluded, “But I know it when I see it, and the motion picture involved in this case is not that.”

I submit that if you find yourself on a jury in a federal obscenity trial where the hardcore pornography film involved is played in open court, you, like nearly 100% of all jurors who have gone before you, will know obscenity when you see it. Incidentally, the last federal adult obscenity trial took place in Los Angeles in 2012. It was a carry-over case from the Bush Administration, delayed in going to trial due to the conduct of the judge assigned. Prominent pornographer Ira Isaacs was convicted by a jury and received a 48-month sentence for distribution of obscene material. His conviction was upheld by the U. S. Court of Appeals for the 9th Circuit. I believe that if you can win an obscenity case in L.A., you can win anywhere.

Federal obscenity laws prohibit distribution of obscene material through the mails, by common carrier, via the Internet, and on cable or satellite TV (including hotel/motel porn). Most every state has a workable law prohibiting retail distribution of obscene pornography as well.[8] Enforcement of obscenity laws is a critical part of the overall strategy to halt the public health crisis of pornography and to curbing all sexual exploitation.

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[8] For a list of federal and state laws, see http://endsexualexploitation.org/woip.

Works Cited

Miller v. California, 413 U.S. 15, 34 (1973).

Paris Adult Theatre v. Slayton, 413 U.S. 49 (1973).

U.S. Const. amend. I