

Lust or Liberty? A Feminist Perspective on Pornography and the First Amendment

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“I know it when I see it.” This famous definition of obscenity given by Supreme Court Justice Potter Stewart exemplifies the court’s struggle to pin a precise description of what is legally obscene. Through numerous decisions the Supreme Court has attempted to define and offer guidelines for identifying obscene material, with the boundaries of acceptable speech extending in each case. While some believe these actions are in the name of democracy and absolute freedom of speech, others call for more restrictive measures concerning pornography. These voices come not only from moral conservatives, but an insistent voice is emerging from the feminist movement hoping to quash the proliferation of demeaning depictions of women. The broad guidelines currently applied to obscene material allows the propagation of portrayals of individuals, particularly women, that in turn cultivate attitudes that are demeaning, violent, and potentially infringing on individual liberties.

The position of this paper is not to propose that all sexual depictions be declared illegally obscene. However, the paper does seek to show that the current standards allow the glorification of sexually violent behavior. Evidence suggests that such portrayals encourage some individuals to actualize the portrayed violence. Standards must be amended to alleviate desensitization to criminal sexual offenses.

Obscenity laws in the United States stretch well back into the nation’s earliest days. They have been revisited and revised numerous times from the common law origin. The current obscenity standards were defined in the U.S. Supreme Court case *Miller v. California* in 1973. The decision states:

A work may be subject to state regulation where that work, taken as a whole, appeals to the prurient interest in sex; portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, taken as a whole, does not have serious literary, artistic, political, or scientific value. (413 U.S. 15)

The three guidelines in the ruling define the legality of potentially obscene material, which is not limited to but includes pornography. Seemingly more specific than previous decisions, the precedent is vague and is rarely prosecuted. As a result, the pornography industry continues to grow and flourish, enjoying the protection of the First Amendment, a constitutional clause originally intended to maintain a climate of free political thought.

Radical feminists Andrea Dworkin and Catherine MacKinnon are among those demanding a revision of current obscenity law. Dworkin’s commentary in her book *Woman Hating* focuses on the violence of pornography: “It contains cultural truth: men and women, grown now out of the fairy-tale landscape into the castles of erotic desire; woman, her carnality adult and explicit, her role as victim adult and explicit, her guilt adult and explicit, her punishment lived out on her flesh, her end mutilation—death or complete submission” (53). Dworkin explores pornographic literature and the attitudes prevalent in these scenarios. In one essay she notes of the foremost female character, “Her body is *a* body, in the same way that a pencil is a pencil, a bucket is a bucket, or, as Gertrude Stein pointedly said, a rose is a rose” (58). She views pornography as the manifestation of the idea of woman as an object of male pleasure, which is predominantly a violent pleasure.

Catherine MacKinnon shares this view of pornography. She and Dworkin worked together drafting an anti-pornography ordinance passed in 1984 in Indianapolis and Minneapolis defining pornography as “the graphic sexually explicit subordination of women” (771 F.2d 323). Sexual explicitness was further explained as the presentation of women as objects enjoying pain, humiliation, rape, mutilation, bondage, or bestiality. The ordinance also objected to “scenarios of

degradation, injury, abasement, [and] torture” as well as “postures of servility or submission” (771 F.2d 323). An addendum was made that the descriptions of pornography indicated also applied to men, children, and transsexuals.

The ordinance passed in April 1984 but was met with contention. In a district court decision, it was ruled unconstitutional because of its lack of provisions set forth in *Miller v. California*. The court considered its failure to address the issue of prurient interest and the literary, artistic, political, or scientific value of the work as an attempt to define obscenity outside the bounds of the *Miller* case. The court held the ordinance overly broad in this sense, affecting not only hard-core pornography but also bringing into question classical Greek literature that includes women in subordinate sexual roles.

However, it was the issue of restricting speech content that ultimately led to the court’s decision in this case. Of the consequence of the ordinance, the court wrote, “Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual content. This is thought control. It establishes an ‘approved’ view of women” (771 F.2d 323).

Although this ordinance focused too closely on the portrayal of women, many observers agree with its intent, which was to attack pornography for the way it “promote[s] injury and degradation such as rape, battery, and prostitution and inhibit[s] just enforcement of laws against these acts . . . and undermine[s] women’s equal exercise of rights to speech and action” (Berger et al. 117). Pete Marksteiner, a Wyoming attorney, suggests a legal challenge to pornography that focuses on violence. For his purposes, he defines violence as “depictions wherein participants are presented as being forced, against their will, to participate, or where participants are physically injured” (Wekesser 71). Marksteiner’s ideas move away from Dworkin and MacKinnon’s preoccupation with the subordinate position of women and move into a realm in which the consideration becomes the infringement upon the individual in the circumstances. The definition of offensive content can now be tailored to include activities such as rape, torture, and brutality where the subject is not a consenting participant.

Combating the violence in sexual material is also important because of evidence that such portrayals affect attitudes of viewers and readers. For example, in a 1995 UCLA study, 51 percent of male students subjected to pornographic material containing violent situations admitted to being more likely to consider raping a woman if the possibility of being exposed were not present (Wekesser 73). Further, in an essay titled “Mitigating the Effects of Violent Pornography,” Margaret Jean Intons-Peterson and Beverly Roskos-Ewoldsen examine behavioral studies on this issue. While no evidence concluded that viewing violent pornography resulted in actualization of violent behavior, certain responses were observed. The authors write, “When watching a film that portrays the victim as becoming involuntarily sexually aroused by an assault, male viewers showed levels of sexual arousal that were as great or greater than the arousal induced by scenes of mutually consenting sex” (Gubar and Hoff 223). Not only does this material venerate the idea of forcing another person to participate in a sexual act, but it also perpetuates the attitude that the victim will eventually succumb to sexual desire. After long-term viewing, men developed a tendency to agree with statements such as “If they are old enough to bleed, they are old enough to butcher” (Gubar and Hoff 225-26). Intons-Peterson and Roskos-Ewoldsen conclude that though no direct correlation can be drawn absolutely, links can be made between viewing violent pornography and degrading attitudes toward women and a growing acceptance of abusive treatment of women.

Despite additional evidence that violent pornography often marks the path of violent offenders, the Supreme Court and others shrink from any restrictions on the First Amendment. In an article in the *Georgia Law Review*, Cheryl B. Preston writes, “Legal theorists oppose restrictions on even sexually explicit, violent speech for fear of undermining civil liberty generally. They believe, first, that the harms of censorship pose a far greater threat to personal autonomy and social development than does the most offensive, exploitive, dehumanizing pornography” (794). These theorists also hold that it would be difficult for any pornography legislation to satisfy the *Miller* tests without overreaching or becoming vague. Despite legislation

logistics, many legal experts are not interested in the idea at all, feeling instead that the First Amendment right is absolute (Preston 794-95).

On the other side, James Jackson Kilpatrick in his book *Smut Peddlers* argues that such an absolutist view of the First Amendment is a perversion of its original intent. “The strong rock of the First Amendment,” he says, “was intended to be a bulwark of liberty; it never was conceived as a shield for the merchants of filth” (230). As Kilpatrick argues, the freedom of speech clause was meant to maintain the marketplace of ideas; authors of the Constitution wanted to insure a nation in which all voices could be heard, but, as Justice William J. Brennan wrote in the *Roth v. U.S.* decision, did not intend “to protect every utterance” (229). And while many pornography proponents cling to their freedom-of-expression defense, many opposing pornography claim that the attitudes perpetuated in pornography actually hinder the marketplace of ideas.

While the Supreme Court has determined that obscenity is not protected under free speech, an aversion to prosecuting obscenity makes the decision nearly irrelevant and in effect allows obscenity to be protected. Cardinal Spellman addresses this point eloquently:

Perhaps the most widespread and popular form of perversion is the perversion of “freedom.” When hypocrites apply this sacred term to contemptible schemes in order to prey upon the weaknesses of unformed characters under the banner of “freedom of speech” or “freedom of the press,” they are not only victimizing our children but endangering our nation’s treasured heritage. (qtd. in Kilpatrick 230)

Though the Court has ruled that obscene material is not legal, Spellman makes a demand for action regarding this principle.

Spellman’s demands will never be met under the current test for obscenity. The definition is vague at best and leaves enough room for almost any material to squeeze into the bounds of legality. In answer to the “I know it when I see it” mentality of the Supreme Court, Kilpatrick argues that the average American recognizes it too: “Jurors know what it means, precisely as they know what other elusive terms of the law mean—to them” (233). Cheryl Preston agrees, saying, “Although the proper definition of ‘pornography’ is hotly disputed, most would agree that certain sexually explicit images are degrading to women, condone violence against women, or equate sex with female subordination” (814).

Combining the fact that the First Amendment does not protect obscene materials and the proposal that obscenity is not as difficult to define as is often claimed, it is conceivable that revisions could be made to the current test for obscenity that still respect the rights of the First Amendment. Preston offers a triad of elements that should be examined on the way to a solution, starting with content. First, one must ask what images are seen, in what context, in what arena. Second, the implications of those images should be weighed. Considering behavior and attitude, Preston questions how these images will influence culture. Last, one must look at how proposed solutions fit into the bigger picture. They must satisfy the *Miller* tests and the First Amendment and, perhaps most importantly, accomplish what they intend (817-18).

Once again, Dworkin and MacKinnon’s ordinance should not be forgotten. Although it focused too closely on the portrayal of women and the attitudes then perpetuated, the aspects of pornographic violence in several tenets of the ordinance contained merit. For example, it would rule material as obscene if women in it “enjoy pain or humiliation . . . [or] experience sexual pleasure in being raped . . . [or] cut up or mutilated or bruised” (771 F.2d.323). A marriage of the current standards and a more specific standard outlining unacceptable violent sexuality is in order. The following exemplifies an amended *Miller* test containing an appropriate clause: “the work as a whole appeals to a prurient interest in sex and portrays sexual content in a patently offensive manner *or in a violent manner in which one party is physically harmed through sexual activity to which said party does not consent* and the work as a whole lacks literary, artistic, political, or scientific value.”

This approach targets the pornography most offensive to the feminist mind. Though extremists like Dworkin and MacKinnon think justice will not be done until a vast majority of pornography comes under the obscenity umbrella, the more violent portrayals are the most

influential in shaping attitudes about sexual violence. While other submissive pornographic materials may contribute to degrading opinions about women, it is violent pornography that is most destructive to society's collective values and interests. In this regard, Elizabeth Fox-Genovese writes, "Only by grounding the idea of liberty in the collectivity—in the recognition that there has never been and cannot be any individual freedom unrooted in community discipline—can we hope to enact laws that recognize liberties as interdependent and as inseparable from social responsibility" (111). Her conclusion indicates a need for restriction in order to maintain liberty.

In *Miller v. California*, the Supreme Court set the current boundaries for obscenity in sexual expression. In trying to establish the least restrictive parameters possible, the court created a test lenient enough to accommodate most forms of sexual expression. However, the violent portrayals in pornographic material cannot be tolerated. Their ability to glorify criminal sexual offenses in the viewer's mind fosters the acceptance of rape, torture, and brutality and indicates violence as a means of sexual arousal. The law must take a stand against this form of obscenity that is far from protected under the intentions of the First Amendment of the Constitution and, in fact, threatens to undermine the liberty it was meant to uphold.

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