

# HISTORY & IMPORTANCE OF LAW IN COMBATTING PORNOGRAPHY

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Orlando, FL, Sept. 12, 2015

## **I. Introduction**

When I began working at MIM as a staff attorney in May 1985, federal obscenity laws were rarely enforced; and state prosecutors who enforced obscenity laws were the rare exception. Not surprisingly, there were influential people back then who said that obscenity laws were no longer enforceable. **But the gainsayers were proved wrong; and here is why I think they were wrong:**

- **First**, most adult Americans still knew right from wrong and given a choice would support what is right.
- **Second**, the nation had a President who decided to do something about the explosion of pornography and an Attorney General who did not shirk his duty.
- **Third**, the federal courts had become more restrained and upheld obscenity laws and obscenity convictions against various “constitutional” challenges.
- **Fourth**, opposition to pornography had arisen from both sides of the political divide, and Congress was quick to enact legislation to fight pornography.
- **Fifth**, there were many state and local citizen organizations nationwide that focused primarily if not exclusively on fighting pornography. Many religious organizations also publicly supported enforcement of laws against pornography.
- **Sixth**, there was a silver lining behind the dark cloud of lax enforcement of obscenity laws. As hardcore pornography became more available, more people were harmed by it; and this caused alarm. As the content of pornography became more abusive, degrading, violent and perverse, juries in obscenity cases were also more apt to find that the material to be patently offensive.

## **II. History of pornography and laws against pornography**

There isn't time today to go into this topic in depth, but I will tell you this:

- Pornography has a long history as evidenced by drawings, paintings, engravings and three dimensional figures from antiquity that depict sex acts.
- The invention of the printing press in the 15<sup>th</sup> century would ultimately make

pornographic writings and illustrations available to a wide audience.

- Laws that regulate obscenity and indecency developed in England before the 13 British colonies became the USA in the late 18<sup>th</sup> century; and not surprisingly, our new nation's laws were patterned after British laws.
- In 1712, the Mass. colonial legislature passed a law that made it a crime to publish "any filthy, obscene, or profane song, pamphlet, libel or mock sermon"
- In 1815, the Penn. Supreme Court (*Commonwealth v. Sharpless*, 2 Serg & R. 91) held that the publication of obscenity was indictable at common law.
- In the 1957 *Roth* case (354 U.S. at 481), the Supreme Court said it had "always assumed that obscenity is not protected by the freedoms of speech and press."
- The invention of photography early in the 19<sup>th</sup> century would revolutionize the nature and production of pornography.
- The first Federal obscenity law (banning importation) was enacted in 1842.
- Beginning in the 1930s lower federal courts began to weaken obscenity laws, opening the door to widespread distribution of softcore pornography.
- Beginning in 1957, the Supreme Court began to weaken obscenity laws, and in the 1966 *Memoirs* case (383 U.S. 413), the Court for all practical purposes legalized even hardcore pornography for adults.
- In 1970, the Presidential Commission on Obscenity and Pornography issued a majority report recommending that obscenity be legalized for consenting adults. A minority report described the majority report as a "Magna Carta for the pornographer," and President Nixon and Congress also rejected the majority report. In 1973, the Supreme Court also cited the minority report in upholding obscenity laws, but the majority report took its toll.
- In the 1973 *Miller* case (413 U.S. 15), the Supreme Court set forth a *workable* obscenity definition which proscribed *hardcore* pornography, but by this time many prosecutors had stopped enforcing obscenity laws.
- By 1980 a grassroots backlash against the explosion of pornography was underway, led by feminists and religious Americans (vice versa).
- In the early 1980s, the primary types of hardcore pornography were magazines and paperback books. Those who had a movie projector or lived in one of the few cities that had an "adult theater" could also watch films.
- In the 1982 *New York v. Ferber* case (458 U.S. 747), the Supreme Court upheld a law prohibiting non-obscene child pornography; in 1984 Congress enacted a federal law prohibiting distribution of non-obscene child pornography. Prior to this, child pornography was openly sold in "adult bookstores."
- By the end of the 1980s, hardcore pornography was also available by telephone and on videotape; and so-called "cable versions" of hardcore pornography were available on a growing number of cable TV systems.

- In 1983, President Reagan and the heads of Federal law enforcement agencies met with citizen-leaders concerned about pornography. The meeting led to the formation of the Attorney General’s Commission on Pornography in 1985 and the creation of a new Justice Department Section (CEOS) in 1987 which initiated many successful obscenity prosecutions from 1987-1993.
- In 1988, Congress enacted a Child Protection and Enforcement Act that, *inter alia*, strengthened existing obscenity laws, added new obscenity laws aimed at “adult businesses,” cable/satellite pay pornography channels and dial-a-porn, and provided for criminal forfeiture of property in obscenity cases.
- In 1992, Bill Clinton was elected President, but despite his campaign pledge to vigorously enforce federal obscenity laws, Janet Reno, his choice for Attorney General, all but ignored commercial distribution of adult obscenity.
- The election of Bill Clinton couldn’t have come at a worse time for those who fought against pornography, because it wasn’t long after he became President that hardcore pornography began to proliferate on the World Wide Web.
- In the late 1990s Congress enacted legislation to restrict children’s online access to pornography, but the Supreme Court refused to uphold the law. In failing to uphold the law, the Court did our nation a great disservice.
- During the Bush Administration, the Justice Dept. resumed enforcement of federal obscenity laws against commercial distributors of hardcore adult pornography and proved once again that obscenity laws can be successfully enforced. But the Bush administration failed to enforce these laws vigorously.
- To my knowledge, the Obama administration has not initiated a single prosecution against a commercial distributor of adult obscenity.

### **III. The importance of law and its limits**

Let me begin with an “apparent contradiction.” On the one hand, I do not think enforcement of obscenity and related laws alone will solve the pornography problem. On the other hand, I think enforcement of these laws will be necessary if we are to reverse the floodtide of hardcore adult pornography engulfing our nation.

Laws are necessary because there are (very) bad people in the world. *Efforts at public education, moral persuasion and economic pressure are much needed;* but some individuals will refrain from wrong-doing only when severely punished or faced with stiff punishment. For those who read the Bible, the Apostle Paul said

much the same about law in 1 Timothy 1:9. I would add that when sound laws are vigorously enforced they serve as a very good teacher. I would also add that if we don't need obscenity laws, why do we then need child pornography laws?

#### **IV. Excuses for not enforcing obscenity laws**

##### **A. “You can't legislate morality”**

Well, if we can't enact laws that reflect moral judgments, then we must repeal the 13<sup>th</sup> and 14<sup>th</sup> Amendments because these Amendments were grounded in the *moral* judgments that slavery and unequal treatment of Blacks are wrong.

We must also repeal all laws prohibiting sexual exploitation of children because these laws are grounded in the *moral* judgments that it is wrong for adults to engage in sexual conduct with children and to photograph that conduct.

I could go on, but I think you get the point.

##### **B. “Pornography is a victimless crime”**

To begin with, why in this day and age would any legislative body in our nation want to make conduct a crime if there is no discernable harm to anyone? In this regard, I would point out that since the 1980s both Democrat and Republican controlled Congresses have enacted bills prohibiting/regulating pornography, and Democrat and Republican presidents have signed these bills into law. The Supreme Court has also recognized various harms linked to obscene materials. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57-63 (1973).

##### **C. “Enforcing obscenity laws is a waste of public resources”**

But why, I would ask, is it a waste of scarce public resources for society to do all it can to curb the production and distribution of pornographic materials that, among other things, morally corrupt and psychologically damages children and:

- Contribute to the breakdown of morality and family life
- Contribute to sexual assaults against adults and children
- Contribute to sexual harassment in the workplace
- Contribute to the decline of neighborhoods

- Contribute to the demand for prostitution
- Contribute to the spread of STDs

I read an article some years ago that lamented the large amount of money being spent to prevent shoplifting and the large amount being lost from shoplifting, despite earnest efforts to prevent it. I don't recall what advice if any was offered for the future, but I do know that no one criticized law enforcement agencies for enforcing laws against theft. I would add that federal obscenity laws allow for fines and forfeiture of property, which can offset the cost of enforcement.

But, some will surely say, laws that prohibit shoplifting are easy to enforce but obscenity laws are difficult to enforce and for that reason are rarely enforced. It is true that the federal Courts did make a mess of obscenity law. But federal and state prosecutors have proved over and over again that the obscenity test set forth in the 1973 *Miller v. California* case is a workable test. I would add that federal securities laws can also pose challenges for prosecutors, but that hasn't deterred U.S. Attorneys in Manhattan from enforcing these laws. The prosecutors win some and lose some. They also get hung juries and must retry cases.

#### **D. The American people won't support enforcement of obscenity laws**

But why not? In a recent Gallup poll [Frank Newport, "Americans Continue to Shift Left on Key Moral Issues," *Gallup*, 5/26/15] participants (aged 18 and older) were asked whether they "personally believe that in general pornography is morally acceptable or morally wrong?" Thirty-four percent said, "morally acceptable;" sixty-two percent said "morally unacceptable."

In 2009, Morality in Media commissioned Harris Interactive to ask participants (aged 18 and older) in a national omnibus survey whether they agreed or disagreed with the statement: "Viewing *hardcore* adult pornography on the *Internet* is morally acceptable." [*Italics* added] Fifteen percent agreed; 76% disagreed. Some will say that the discrepancy between the two polls is proof that

the public is more accepting of pornography today or that the 2009 poll was bogus. I would attribute the difference to the 2009 poll question's focus on *hardcore* pornography on the *Internet*, which is the elephant in the room. Cf., "Trends in Attitudes toward Religion and Social Issues: 1987-2007," *Pew Research Center*, 10/15/07 (While 53% of poll participants disagreed with the statement, "nude magazines and X-rated movies provide harmless entertainment for those who enjoy it," 70% disagreed that "nude pictures and X-rated videos *on the internet* provide harmless entertainment for those who enjoy it." [Italics added])

#### **IV. Concluding thoughts**

I began this presentation by explaining why I thought the gainsayers were wrong when they said in the 1980s that obscenity laws were unenforceable. I now conclude this presentation by telling you why I think they are still wrong.

- **First**, when it comes to pornography most adult Americans still know right from wrong and will if given the chance support what is right; and vigorous enforcement of federal and state obscenity laws is what is right.
- **Second**, while the Federal courts in particular have become more liberal, there is solid legal precedent to support enforcement of federal obscenity laws.
- **Third**, concern about the explosion of hardcore pornography, especially on the Internet, is again arising from a broad spectrum of the American public.
- **Fourth**, this conference is evidence of movement at the grassroots level.
- **Fifth**, next year the American people will have the opportunity to again elect a President that will fully support enforcement of obscenity laws.
- **Sixth**, there is again a silver lining behind the dark cloud of lax enforcement of obscenity laws. Internet pornography has been described as the crack cocaine of sexual addiction; and for children and young adults in particular the Internet is the medium of choice for viewing hardcore pornography. This is causing growing alarm. Much if not most hardcore pornography on the Internet is also abusive, degrading, violent and/or perverse, which will make juries in obscenity cases more apt to find that the material is patently offensive.

# APPENDIX

## Overview of Obscenity & Related Laws

### I. What Is Pornography?

The term "pornography" is a generic, not a legal term. As noted by the Supreme Court in its *Miller v. California*, 413 U.S. 15, 18, fn. 2 (1973) obscenity case:

“Pornography” derives from the Greek (harlot, and graphos, writing). The word now means “1: a description of prostitutes or prostitution 2: a depiction (as in a writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement.” Webster's 3rd New International Dictionary, *supra*.

The *Attorney General's Commission on Pornography: Final Report* (1986) defined pornography as, “Material that is predominantly sexually explicit and intended primarily for the purpose of sexual arousal.” [*Final Report* at <http://www.porn-report.com/defining-our-central-terms.htm>]

### II. What Is Obscenity?

In the 1973 case, *Miller v. California*, 413 U.S. 15 (as clarified/modified by subsequent cases), the Supreme Court established a three-pronged test for determining whether a “work” (i.e., material or performance) is obscene and, therefore, unprotected by the First Amendment.

To be obscene, a judge or a jury must determine:

1. That the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; AND
2. That the work depicts or describes in a patently offensive way, as measured by contemporary community standards, hardcore sexual conduct specifically defined by the applicable law; AND
3. That a reasonable person would find that the work, taken as a whole, lacks serious literary, artistic, political and scientific value.

Examples of “hardcore sexual conduct” that an obscenity law could include for regulation under the second prong of the test are patently offensive representations or descriptions of:

1. Ultimate sexual acts, normal or perverted, actual or simulated and
2. Masturbation, lewd exhibition of genitals, excretory functions and sadomasochistic abuse

Side note: Typical “hardcore pornography” in today’s marketplace consists of little if anything more than one depiction of hardcore sex after another (i.e., its “wall-to-wall” hardcore sex).

### III. Obscenity Is Not Protected by the First Amendment

**A. First Amendment does not protect “every utterance”**

The First Amendment reads: “Congress shall make no law ...prohibiting the free exercise [of religion]; or abridging the freedom of speech or of the press.”

But as Justice Brennan correctly observed in *Roth v. United States*, 354 U.S. 476, 483 (1957), “In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance.” In *Roth*, Justice Brennan also noted (at 481) that the Supreme Court had “always assumed that obscenity is not protected” by the First Amendment. The *Roth* Court went on to hold that obscenity is “not within the area of constitutionally protected speech or press” (at 485).

When it comes to freedom of speech, the issue has never been whether there should be any restrictions but rather what restrictions are necessary and how to define them.

**B. The difference between an exchange of ideas and exploitation of obscenity**

In *Miller v. California*, 413 U.S. 15, at 34-35, the Court said:

The dissenting Justices sound the alarm of repression. But, in our view, 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 free press”...“The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political or social changes desired by the people”...But the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.

**C. Enforcement of obscenity laws is not “censorship”**

There is a difference between a prior restraint upon publication and a subsequent punishment. As the Supreme Court stated in *Near v. Minnesota*, 283 U.S. 697, 713-717 (1931):

The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: “The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.” [*Italics* in the original]

**IV. Governmental Justifications for Obscenity Laws**

**A. *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973), the Supreme Court identified various governmental interests that justify a prohibition on obscenity.**



[T]here are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and passersby... These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself... Quite apart from sex crimes, however, there remains one problem of large proportions... As Mr. Chief Justice Warren stated, there is a “right of the Nation and of the States to maintain a decent society...” [at 57-59]

But, it is argued, there are no scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women or their society. It is urged on behalf of the petitioners that, absent such a demonstration, any kind of state regulation is “impermissible.” We reject this argument. Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature... could quite reasonably determine that such a connection does or might exist. In deciding *Roth*, this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect “the social interest in order and morality.” [at 60-61]

If we accept the... well-nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character, can we then say that a state legislature may not act on the corollary assumption that commerce in obscene books, or... obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior?... 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. [at 63]

## V. Community Standards

In a criminal obscenity trial, a judge or jury must apply “contemporary community standards” when determining whether the sexual material at issue “appeals to the prurient interest” and whether the material depicts sexual conduct in a “patently offensive manner.”

### **For a number of reasons citizens should not make the mistake of equating the widespread availability of pornography with community acceptance of it.**

**First**, just because hardcore adult pornographers, like drug traffickers, have made a great deal of money doesn’t mean that what they sell is acceptable under community standards. For example, if about 25% of U.S. adults (18 and over) purchase hardcore adult pornography on a regular basis, that means about 55,000,000 are doing so. And that means a lot of pornography is still being sold, and a lot of money is being made. But 25% of U.S. adults do not make a majority.

**Second**, much if not most hardcore adult pornography is consumed by individuals who are hooked on it. By “hooked” I mean the person would find it difficult (extremely difficult) to stop viewing pornography. Furthermore, many people who are hooked on pornography hate what they do, which doesn’t add up to community acceptance.

**Third**, just because a person, whether out of curiosity or at a weak moment, views pornography

does not mean the person has become accepting of pornography. This is especially true when Internet pornographers use aggressive and unscrupulous means to bring people to their websites. **Fourth**, just because a person thinks it is OK to view some types of hardcore adult pornography, Doesn't mean the person thinks it is OK to view all of it. In the absence of vigorous enforcement of obscenity laws, the content of much hardcore pornography has become more extreme. **Fifth**, many individuals who view hardcore adult pornography, especially on the Internet, are minors. The fact that most children (after a certain age) have viewed pornography online and that many are addicted to it doesn't make it acceptable under community standards.

In *Hamling v. United States*, 418 U.S. 87, 125-126 (1974), the Supreme Court also recognized that the mere fact that hardcore pornographic materials are available in the nation or in a community does not “make them witnesses of virtue” or prove that similar materials at issue in a criminal obscenity trial are acceptable under contemporary community standards.

## VII. Federal Obscenity Laws

Federal laws relating to obscenity crimes are contained in the following titles/sections of the U.S. Code: To obtain texts of these sections, go to: <http://uscode.house.gov>

18 U.S.C. 1461 – Mailing obscene matter

18 U.S.C. 1462 – Importation or use of a common carrier to transport obscene matter

18 U.S.C. 1464 – Broadcasting obscene language

18 U.S.C. 1465 – Interstate transportation of obscene matter

18 U.S.C. 1466 – Wholesale and retail sale of obscene matter which has been transported in interstate commerce (*must be engaged in business of selling or transferring obscenity*)

18 U.S.C. 1468 – Distribution of obscene matter by cable or satellite TV

18 U.S.C. 1470 – Transfer of obscene material to an individual knowing he or she is a minor

18 U.S.C. 1961-1968 – “Dealing in obscene matter” is a predicate offense under the Federal Racketeer Influenced and Corrupt Organizations (RICO) statute

18 U.S.C. 2252B – Using a misleading domain name on the Internet with the intent to deceive a person into viewing obscenity

18 U.S.C. 2252C – Embedding misleading words or digital images on the Internet knowingly embeds words or digital images into the source code of a website with the intent to deceive a person into viewing obscenity

47 U.S.C. 223 – Making an obscene communication by means of telephone

**Sections 1462, 1465 and 1470 apply to distribution of obscenity on the Internet.<sup>1</sup>**

The 93 U.S. Attorneys (*each state has at least one*) enforce the Federal obscenity laws. FBI Agents, Postal Inspectors and Customs Officers investigate violations of Federal obscenity laws.

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<sup>1</sup> Constitutional challenges to federal Internet obscenity laws were rejected in *U.S. v. Little*, 2010 U.S. App. LEXIS 2320 (11<sup>th</sup> Cir. 2010); *U.S. v. Kilbride*, 584 F.3d 1240 (9<sup>th</sup> Cir. 2009); *U.S. v. Extreme Associates*, 431 F.3d 150 (3<sup>rd</sup> Cir. 2005), *cert. den.*, 547 U.S. 1143 (2006); *Nitke v. Gonzales*, 413 F. Supp. 2d 262 (S.D.N.Y. 2005), *aff'd*, 547 U.S. 1015 (2006); *U.S. v. Thomas*, 74 F.3d 701 (6<sup>th</sup> Cir. 1996), *cert. den.*, 519 U.S. 820 (1996).

## VII. State & Local Obscenity and Related Laws

Workable statewide criminal obscenity laws exist in 40 states. State obscenity laws, which are published online as part of the statutes in each state, typically encompass both obscene materials and performances. The prosecuting attorney of each county or judicial district enforces state obscenity laws, and state and local police may make arrests.

Alaska, Maine, New Mexico, Vermont and West Virginia do not have a statewide obscenity law. Montana and South Dakota have ineffective state laws. New obscenity laws are needed in these states. Maine, Montana, New Mexico and South Dakota allow local control of obscenity. In Oregon, Colorado, Hawaii, and New Mexico the State Supreme Court either invalidated [Oregon] or weakened obscenity laws. Amendments to the state constitution are needed.

The statutes of every state are published online. To begin (and hopefully end) looking for your state's obscenity laws, do a search for "[STATE] statutes, obscenity."

In addition to obscenity laws, there are state laws and local ordinances that regulate the sale and display of pornography and the operation of "sexually oriented business." These laws include:

- **Harmful-to-minors distribution and display laws:** restrict minors' access in real space to material deemed obscene for minors.<sup>2</sup> Some laws apply only to commercial transactions.
- **Public indecency laws:** require performers in commercial establishments where no alcohol is served or consumed to at least wear "pasties" and "G-strings"
- **Alcoholic Beverage Control laws:** prohibit or regulate nudity in bars & bottle clubs
- **Lap dancing laws:** create a "buffer zone" between dancers and patrons
- **Nuisance laws:** allow closure of all or part of an "adult businesses" if prostitution, lewd conduct or high-risk sexual conduct occur on the premises
- **Zoning, hours of operation and open booth laws:** restrict the location and hours of operation of "adult uses;" require that the doors of "peep show booths" be removed
- **Sex supermarket laws:** restrict the number of "adult uses" that can exist at a premises
- **Licensing laws:** require that "adult uses" be licensed
- **Obscene device laws:** prohibit the sale of dildos and artificial vaginas
- **Massage parlor and Escort Services laws:** regulate these businesses to prevent prostitution

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<sup>2</sup> Congress enacted the Child Online Protection Act of 1998 to restrict children's access to pornographic websites. The Supreme Court foolishly failed to uphold this law, "reasoning" that when it comes to cyberspace it is up to parents to keep children away from pornography. As a result, if a child were to walk into an "adult bookstore," he/she would be told to leave because it is against the law to sell pornography to children in real space. But were that child to 'click' to most commercial websites that distribute hardcore adult pornography, he/she could view without restriction the free teaser material that these websites provide. He or she could also click to one of the many *free-to-users* "porn tube" websites that make their revenue through ads. For more on this see, Robert Peters, "It will take more than parental use of filtering software to protect children from pornography on the Internet," 31 *N.Y.U. Rev. L. & Soc. Change* 829 (2007).