

Life, Liberty and the Pursuit of Pornography

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## Life, Liberty and the Pursuit of Pornography

“Pornography is in the groin of the beholder.” – Charles Rembar, Attorney<sup>1</sup>

As this sentiment would suggest, pornographic materials are subjective in nature and elicit a wide range of responses from a variety of people. Some find depictions of explicit sexual acts to be arousing while others find them morally reprehensible. There are those in society who believe all acts of a sexual nature, even kissing, should be saved until marriage whereas others, quite literally, make a career out of sex. No two people express their sexual desires in the same manner so why should pornography be any different? The endless varieties of films, magazine and online materials of a pornographic nature represent the multitude of sexual preferences and desires present in our society. Unfortunately, with such subjectivity comes conflict, heated debate and concerns regarding whether all pornography should be legal. In today's modern world, the issue of legality and appropriateness surround the pornography industry as adult film studios fight for their right to exist and thousands of disgusted individuals and organizations work towards the complete censorship of these materials.

Obscenity and pornography are some of the most confusing and controversial issues the Supreme Court has faced in the last century. The challenge for the Court has been to articulate a logical and comprehensive assessment of what obscenity is and in what circumstances it can be prohibited. The standard for obscenity has evolved over time, from the 1868 English *Regina v. Hicklin* “deprave and corrupt test” to the three part Miller Test currently used,

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<sup>1</sup> Quoted in Perry C. Cotham, *Obscenity, Pornography and Censorship* (Michigan: Baker Book House, 1973), 50.

but many questions remain unanswered by the Court. The difficulty of establishing a concrete definition for “obscenity” has resulted in vague terminology in the Court’s decisions and confusion among the American public regarding what materials are not protected as free speech. Using what Justice William Brennan described as “inevitably obscure standards,” the Supreme Court has arguably made decisions subjectively in cases of obscenity since the Miller Test was established in 1973.<sup>2</sup> While the test outlined in the *Miller* decision is a significant improvement from previous standards used by the Court, it still leaves much to be desired with regards to clarity and objectivity.

The inability of society or the Supreme Court to define “pornography” greatly contributes to the problem of legislating obscenity. Since the Miller Test has been established and implemented, the impact of pornography on our society has been widely debated among scholars, activists and legal professionals. Promoters of feminist ideals, such as law professor Catharine MacKinnon and writer Andrea Dworkin, believe that total censorship of pornography is a necessity because, by their definition, pornography “leads to discrimination and violence against women.”<sup>3</sup> However, many side with Nadine Strossen, former president of the American Civil Liberties Union and current New York Law School professor, who disagrees with the feminist pro-censorship perspective and argues that pornographic materials do not have a direct link to

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<sup>2</sup> “Paris Adult Theatre I et al. v. Lewis R. Slaton, District Attorney, Atlanta Judicial Circuit, et al” In *Pornography and Censorship*, edited by David Copp and Susan Wendell, (New York: Prometheus Books, 1983) 376.

<sup>3</sup> Andrea Dworkin and Catharine MacKinnon, “Questions and Answers,” In *Making Violence Sexy: Feminist Views on Pornography*, edited by Diana Russell, (New York: Teachers College Press, 1993) 80.

violence against women.<sup>4</sup> The debate over this issue is unlikely to be resolved in the near future but the test currently used in our legal system is an inadequate solution to many of the problems presented by pornography. In order to be coherent with the free speech ideals of the Constitution, pornography must not be censored as obscene material and the Supreme Court should abandon the Miller Test because of its many inadequacies. Pornography is, at its core, fantasy and is very similar to the motion picture industry in that pornographic materials are created to entertain and make a profit. Given that pornography has not been conclusively proven to cause violence of any kind, the government has no business regulating the content of pornographic materials. The content of pornography is a matter of taste and has no bearing on the legality of the materials. As long as the actors and models in the pornography industry are adults and explicitly consent to participating, the government has no right to regulate the content of adult materials.

First, it must be noted that the terms “pornography” and “obscenity” are not synonymous. “Pornography,” by nature, is a descriptive term and it describes materials that are sexually explicit and are designed for the general purpose of creating sexual excitement in its audience. However, “obscenity” is a legal term that is used to make a value judgment about a particular material. If something is decided to be obscene it is condemned as “blatantly disgusting” and can legally be prohibited by the government.<sup>5</sup> Pornography can be obscene but not all

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<sup>4</sup> Nadine Strossen, *Defending Pornography: Free Speech, Sex and the Fight for Women's Rights* (New York: Scribner, 1995), 249.

<sup>5</sup> Joel Feinberg, “Pornography and the Criminal Law,” in *Pornography and Censorship*, ed. David Copp and Susan Wendell (New York: Prometheus Books, 1983), 109-110.

pornographic materials are obscene by nature. For instance, *Playboy* magazine can be considered pornographic because its purpose is to illicit a sexual response from its audience but it does not meet the legal requirements to be deemed obscene. In order to determine a material as obscene it must be evaluated against the legal standard for obscenity, which is currently known as The Miller Test.

The complexity of the obscenity issue is outlined by the three-part Miller Test and this standard is used by the Supreme Court to determine which materials are not protected under the Free Speech clause of the First Amendment. The first aspect of the Miller Test is as follows: “whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest.”<sup>6</sup> The first issue with this part of the Miller Test is its vague several key terms. The necessity that the perspective of the “average person” must be used in determining whether or not a work is obscene is problematic. Who is the average person? Clearly this standard requires the opinion of an adult but does gender matter? What about socioeconomic status? Or sexual preference? There is no way to discern who is an “average” person and, as a result, any two people considering the same video or photograph might come to different conclusions regarding the material’s status as protected speech.

If an average person could be found, they would then have the problem of applying “contemporary community standards.” In today’s world there is simply

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<sup>6</sup> Daniel S. Moretti, *Obscenity and Pornography: The Law Under the First Amendment* (New York: Oceana Publications, Inc., 1984), 30.

no way to define a community. The widespread use of the internet and television provide people with access to thousands of communities, be they various political organizations, religious associations or even chat rooms. The ability of people to so easily connect with like-minded individuals makes defining a community nearly impossible. In the *Miller v. California* decision, Justice Burger believed it would be impossible to set a national standard for obscenity so community standards were the best alternative.<sup>7</sup> While this is an improvement upon earlier tests for obscenity, the requirement of applying contemporary community standards is just another hurdle for the Miller Test to overcome.

Perhaps most problematic with this component of the Miller Test is the term “prurient interest” and the requirement that obscene materials appeal to this interest. It has been articulated by the Supreme Court that materials appeal to the prurient interest when they have “a tendency to excite lustful thoughts.”<sup>8</sup> Although this explanation provides us with some direction, the subjectivity of what is considered “lustful” could lead one person to believe exciting the slightest sexual desire meets this requirement while another person feels it should only include the most extreme perversion.<sup>9</sup> The necessity to identify appeals to a prurient interest creates the first, but certainly not last, issue of subjectivity within obscenity law.

The second component of the Miller Test for obscenity is “whether the work depicts or describes, in a patently offensive way, sexual conduct specifically

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<sup>7</sup> Daniel S. Moretti, *Obscenity and Pornography*, 31-34.

<sup>8</sup> Robert C. McClure, “Obscenity and the Law,” *ALA Bulletin* 56, no. 9 (October 1962): 807-808.

<sup>9</sup> Daniel S. Moretti, *Obscenity and Pornography*, 9.

defined by applicable state law.”<sup>10</sup> The majority of the Supreme Court in the Miller decision explained that obscene materials would include “patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.”<sup>11</sup> Again we see that the Supreme Court attempted to provide more concrete standards for defining a work as obscene but the term “offensive” is still far too subjective to be effective. The truth is that the offensive nature of something cannot be common to people from different backgrounds that have had different life experiences.<sup>12</sup> The inherent vagueness and subjective nature of the word “offensive” does not provide the legal system with any concrete way to discern whether a material is obscene.

The third and final component of the Miller Test for obscenity is “whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.”<sup>13</sup> This aspect of the Miller Test, although it is probably the most clear and concise, still lends itself to the issue of subjectivity. By requiring that work lack “serious” value of a particular kind, the Court is leaving the door open for supporters of pornography and those against pornographic materials to disagree over what exactly constitutes a “serious” value. Some may think that the explicit depiction of a man sexually violating a woman has significant political value and is the only effective way to explain the social problems of our male-dominated society. Once again, the vagueness and subjectivity of terms utilized by the Court

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<sup>10</sup> Daniel S. Moretti, *Obscenity and Pornography*, 30.

<sup>11</sup> Daniel S. Moretti, *Obscenity and Pornography*, 31.

<sup>12</sup> William A. Linsley, “The Case Against Censorship of Pornography,” In *Pornography: Research Advances and Policy Considerations*, edited by Dolf Zillman and Jennings Bryant, (New Jersey: Lawrence Erlbaum Associates, Publishers, 1989) 346.

<sup>13</sup> Daniel S. Moretti, *Obscenity and Pornography*, 30.

in the Miller Test create more questions than answers and the decision of what is obscene will undoubtedly be left up to the nine individuals on the Supreme Court at any given time.

Finally, the Miller Test fails to provide citizens with fair notice regarding what materials are obscene. Since the Miller Test is so subjective, decisions will often be unpredictable and rely entirely on the feelings and experiences of the Supreme Court justices. Justice Brennan expressed this very concern in his opinion in the *Paris Adult Theatre v. Slaton* decision of 1973 worrying that the standard for obscenity “invites arbitrary and erratic enforcement of the law.”<sup>14</sup> Justice Douglas, in his dissenting opinion in the Miller case, expressed his concern that the new test did not give the public fair warning as to what material could and could not be published.<sup>15</sup> Without providing citizens with any concrete standards or reasonable sense of predictability, a chilling effect will occur as people will censor themselves more harshly in fear of arbitrary punishment. Although the Miller Test attempts to provide our nation with an effective standard to determine what materials are obscene, the many issues with its specific language and lack of predictability threaten to harm the free speech of our nation’s citizens.

The Miller Test has not resolved the many differing opinions regarding pornographic materials and their protection under the First Amendment. Those who want all pornography to be defined as obscene and those who fight for the

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<sup>14</sup> “Paris Adult Theatre I et al. v. Lewis R. Slaton, District Attorney, Atlanta Judicial Circuit, et al” In *Pornography and Censorship*, edited by David Copp and Susan Wendell, (New York: Prometheus Books, 1983) 374-375.

<sup>15</sup> Daniel S. Moretti, *Obscenity and Pornography*, 33.



protection of pornography as free speech are unlikely to ever find common ground as no two people will ever interpret sexual actions in the same way. For some supporters of pornography, works depicting sexual acts can be “wholly fantastic in nature” and are entirely separate from reality.<sup>16</sup> This type of perspective would lead to the conclusion that pornography is not a threat to our society because it is merely an escape for people from reality and is unlikely to influence their social behavior. In contrast, those in favor of censoring pornography believe the word “pornography” inherently means “the graphic depiction of women as the lowest, most vile whores.”<sup>17</sup> These anti-pornography champions believe that pornography will necessarily lead to dangerous behavior in society, primarily the physical and emotional abuse of women. It is therefore important to recognize that the differences between the opposing sides in the debate over pornography will be unlikely to reconcile their differences in light of research or statistical data; analyzing pornographic materials is simply too subjective and personal to yield concrete conclusions.

In a pairing of strange bed partners, many conservatives and feminists vehemently argue against pornography as a violation of women’s rights and believe the only remedy to this issue is total censorship of pornographic materials. The leaders of the feminist pro-censorship movement against pornography are University of Michigan law professor Catharine MacKinnon and writer Andrea Dworkin. Most basically, they believe that pornography should be

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<sup>16</sup> Anthony Burgess, “What is Pornography?” in *Perspectives on Pornography*, ed. Douglas Hughes (New York: St. Martin’s Press, 1970), 5.

<sup>17</sup> Andrea Dworkin and Catharine MacKinnon, “Questions and Answers,” In *Making Violence Sexy: Feminist Views on Pornography*, edited by Diana Russell, (New York: Teachers College Press, 1993) 84.

entirely suppressed because it “leads to discrimination and violence against women.”<sup>18</sup> Their fight against pornography centers around the harm it causes both women who participate in making these obscene materials and the women who are forced, in one way or another, to view these materials. Their ultimate goal is to achieve gender equality and they believe that pornography harms the equality of the sexes as it degrades women.<sup>19</sup> MacKinnon and Dworkin have written several books and articles illustrating their perspective and professing that research supports their claim that pornography significantly harms women physically, emotionally and socially.

Perhaps the greatest grievance that MacKinnon and Dworkin have with today's pornography industry is with the magazine *Playboy* and its seemingly unregulated standards. MacKinnon argues that *Playboy* is legitimized as a magazine through its many articles, some even written by feminists, and the foundation associated with the publication donates a fair amount of profits to women's organizations.<sup>20</sup> By including articles and information other than pictures of women, MacKinnon argues that *Playboy* is capitalizing on the Miller Test requirement that the work be analyzed “as a whole.” *Playboy* is, in a sense, manipulating the system by including legitimate articles in their publication so they can argue the magazine as a whole is not obscene.<sup>21</sup> Furthermore, MacKinnon and Dworkin believe that *Playboy*, “in both text and pictures,

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<sup>18</sup> Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987), 148.

<sup>19</sup> Zillah Einstein, *The Female Body and the Law* (Los Angeles: University of California Press, 1988), 170-171.

<sup>20</sup> Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987), 137.

<sup>21</sup> Catharine MacKinnon, *Feminism Unmodified*, 152.

promotes rape.”<sup>22</sup> While this accusation would strike most people as too strong, especially for readers of *Playboy*, MacKinnon and Dworkin believe the magazine directly promotes the sexual abuse of women and children and they feel that all “pornographers rank with Nazis and Klansmen in promoting hatred and violence.”<sup>23</sup>

Addressing the pornography industry as a whole, MacKinnon, Dworkin and their followers believe that women are forced to participate in the creation and consumption of these materials. They argue that most women who enter in pornography are forced to do so by abusive husbands or fathers.<sup>24</sup> Additionally, women who are not physically forced to participate are often uneducated and poor and they find themselves economically forced to sell their bodies.<sup>25</sup> Even women who are not involved in the creation of pornography are often forced to consume it, according to the feminist pro-censorship viewpoint. MacKinnon argues that “pornography is thrust upon unwilling women in their homes” and they are forced to watch videos and look at obscene pictures by their boyfriends and husbands.<sup>26</sup> Proponents of this viewpoint believe that the creation and consumption of pornography lacks adequate consent by women and this deficiency requires the censorship of pornographic materials.

Other conservatives argue that pornography has been given far too many protections by the Supreme Court and its prevalence in society is due to the

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<sup>22</sup> Andrea Dworkin and Catharine MacKinnon, “Questions and Answers,” In *Making Violence Sexy: Feminist Views on Pornography*, edited by Diana Russell, (New York: Teachers College Press, 1993) 79.

<sup>23</sup> Andrea Dworkin and Catharine MacKinnon, “Questions and Answers,” 92.

<sup>24</sup> Andrea Dworkin and Catharine MacKinnon, “Questions and Answers,” 82.

<sup>25</sup> Edward de Grazia, *Girls Lean Back Everywhere: The Law of Obscenity and the Assault on Genius* (New York: Random House, 1992), 587.

<sup>26</sup> Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987), 155.

actions of the judiciary. Constitutional lawyer and conservative political activist Phyllis Schlafly argues that the Court in the mid-twentieth century provided unprecedented protection to pornographers and their products. Schlafly's position refers to the period from May 1967 to June 1968 when the Supreme Court handed down twenty-six opinions that drastically altered the law on obscenity in favor of protecting pornography. Since all but one of these opinions was handed down by the Court anonymously (meaning no one justice authored the opinion), Schlafly argues that "the Justices could not defend the obscenity that they used the First Amendment to protect".<sup>27</sup> By consistently providing pornography with more legal protection, Schlafly believes that the Supreme Court had gone beyond interpreting the First Amendment and was instead "rewriting it to guarantee the profits of pornographers."<sup>28</sup> Regardless of the reasoning behind the Court's decisions, many conservatives agree that the judiciary has utilized its power to protect pornography without the consent of the American citizenry.

While most feminists and conservatives of this school of thought argue for the censorship of pornography on moral and social grounds, others have taken a different approach to the situation. Law professor and sociologist Ernest van den Haag makes an interesting claim that pornography and censorship must coexist in order for society to be stable. Pornography, Haag argues, is risqué but it needs moderate legal censorship to keep it exciting. If pornographic materials were entirely accepted in society, they would lose their appeal and no longer excite

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<sup>27</sup> Phyllis Schlafly, "The Morality of First Amendment Jurisprudence," *Harvard Journal of Law and Public Policy* 31, no. 1 (2006): 99.

<sup>28</sup> *Ibid* 103.

lust.<sup>29</sup> Furthermore, he argues that “the elimination of legal censorship would probably provoke arbitrary and damaging non-legal censorship by private persons and groups,” which would be harmful to society.<sup>30</sup> This perspective on censorship is compelling as it allows for a world where pornography and censorship coexist. However, such a society is not realistic because the balance between pornography and censorship, as shown by the problems of today’s world, is nearly impossible to define.

Opposition to the conservative/feminist pro-censorship argument promotes the ideals of free speech and denounces the claim that pornography promotes violence towards women and children. Former President of the American Civil Liberties Union, Nadine Strossen, argues that the censorship of pornography would actually aggravate violence and discrimination towards women. If all pornography was to be prohibited, people who would normally utilize those materials to live out their sexual fantasies would lack a suitable outlet and this might lead to the social harms MacKinnon and Dworkin are fighting to prevent.<sup>31</sup> Furthermore, it is simply illogical to blame pornography for sexual abuse, rape and violence towards women. Pornography is a relatively new practice in the history of civilization and people were raped and sexually abused before pornography was ever invented.<sup>32</sup> If pornography does contribute

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<sup>29</sup> Ernest van den Haag, “The Case for Pornography is the Case for Censorship and Vice Versa,” in *Perspectives on Pornography*, ed. Douglas Hughes (New York: St. Martin’s Press, 1970), 123.

<sup>30</sup> Ibid 126.

<sup>31</sup> Nadine Strossen, *Defending Pornography: Free Speech, Sex and the Fight for Women’s Rights* (New York: Scribner, 1995), 39.

<sup>32</sup> William A. Linsley, “The Case Against Censorship of Pornography,” In *Pornography: Research Advances and Policy Considerations*, edited by Dolf Zillman and Jennings Bryant, (New Jersey: Lawrence Erlbaum Associates, Publishers, 1989) 349.

to violence or the sexual abuse of women, it is certainly not the only cause of such deviant behavior.

While the anti-censorship viewpoint does not believe pornography is responsible for violence against women, the main focus of this perspective is to protect pornographic materials on the grounds of the First Amendment. Strossen cites the Supreme Court precedent that free speech can only be censored if it presents a “clear and present danger” to society, like the incitement of a riot. Unlike shouting “fire” in a crowded theater, the consumption of pornographic materials does not place society in immediate harm of dangerous activities.<sup>33</sup> There is a potential that all speech might lead to dangerous activities *at some point*, but pornography does not pose the threat of an imminent danger to society. Furthermore, speech can only be restricted if there is no other way to avoid the harm it presents. The Court must implement the least-restrictive means to protect our nation’s free speech ideals and while the cause of protecting the safety and equality of women is important, completely eliminating pornography from our social discourse is far too restrictive to be constitutional.<sup>34</sup> It is the duty of the judiciary and the legislature to explore other, less-restrictive means of curtailing the possible effects of pornography before resorting to censorship. Ultimately, without proof that dangerous behavior was the immediate and direct result of pornography no court can reasonably prohibit all pornographic materials.

The argument in favor of pornography as free speech also makes an important distinction between consumption of pornographic materials in private

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<sup>33</sup> Nadine Strossen, *Defending Pornography: Free Speech, Sex and the Fight for Women’s Rights* (New York: Scribner, 1995), 41-42.

<sup>34</sup> *Ibid* 42 & 49.

versus public scenarios. While a sex shop in the middle of a mall might lend itself to exposing sexual materials to children or easily offended individuals passing by, pornography viewed in private runs no such risk. Pornographic materials consumed in the privacy of one's home deserve every protection the First Amendment can provide as they are being used to facilitate the free and entirely private expression of an individual. No one can prevent praying anywhere, to any God, as long as it is done silently or in private so why is pornography any different?<sup>35</sup> The greatest worry that supporters of pornography have concerning the censorship of materials viewed in private is that it opens the door for the government to "controlling the minds of the public."<sup>36</sup> In *Stanley v. Georgia*, a case involving a man viewing pornographic materials in his home, Justice Marshall expressed this very fear in his opinion, writing "if the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."<sup>37</sup> Allowing the government to censor what individuals watch, look at or think about in private is a dangerous step towards the loss of democracy and the notion that America really is a land of the free.

The debate over the censorship of pornography illuminates pressing issues that need to be addressed. The first and most crucial issue is that of the Miller Test and its deficiencies as a standard for identifying obscenity. As

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<sup>35</sup> Jay E. Daily, *The Anatomy of Censorship* (New York: Marcel Dekker, Inc., 1973), 268.

<sup>36</sup> William A. Linsley, "The Case Against Censorship of Pornography," In *Pornography: Research Advances and Policy Considerations*, edited by Dolf Zillman and Jennings Bryant, (New Jersey: Lawrence Erlbaum Associates, Publishers, 1989) 357.

<sup>37</sup> Leon Friedman, *Obscenity: The Complete Oral Arguments Before the Supreme Court in the Major Obscenity Cases* (New York: Chelsea House Publishers, 1970), 333.

previously discussed, the Miller Test uses many vague terms, like “prurient interest” and “patently offensive,” that leave decisions regarding pornography to the discretion of the judiciary instead of a consistent standard. In order to better adjudicate cases of obscenity, the Miller Test needs to be abandoned by the Court and, if possible at some time, replaced so that its many ambiguities are diminished and the public has a clear idea of what the courts will determine to be obscene.

Perhaps the only way to create a concrete and easily applicable standard for obscenity cases is for the courts to compile a list of specific acts and situations that will always be considered obscene. While there are issues with this approach, as well, it is arguably the only way that the public will have fair notice of what the Supreme Court will prohibit as obscenity. The beginning of such a list exists and it is known among the adult film industry as “The Cambria List.” Major players in the pornography industry abide by this list to avoid prosecution under obscenity laws. The list indicates seven major categories that are most likely to gain the attention of prosecutors and are, generally speaking, in danger of being prohibited. The seven “taboo” areas are children, urine, rape, bestiality, fisting, homicide and the severe infliction of pain.<sup>38</sup> The list goes on to more specifically indicate sexual acts that shouldn’t be portrayed in order to avoid prosecution. The adoption of such a list by the courts could simply mean that questionably obscene materials that contain at least one of the “taboos” will then be subject to a higher level of scrutiny than materials that do not incorporate such

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<sup>38</sup> PBS, “American Porn: Prosecuting Obscenity,” Frontline, <http://www.pbs.org/wgbh/pages/frontline/shows/porn/prosecuting/cambria.html> (accessed November 20, 2011).



acts. The judiciary would still need to consider the context of the material and consider the work as a whole but the creation of a list would help the public and those in the adult film industry predict what materials are likely to be prohibited by the courts. Such predictability is not present in the current Miller Test and this would be an improvement on the vagueness and subjectivity of this standard. Yet, as many anti-censorship scholars acknowledge, “a necessary part of pornography is the happy violation of taboos”<sup>39</sup> and creating such a list could be the first step in the government’s censorship of ideas and free speech. The courts must decide which is more important to the legal justice of society: giving the public fair notice of what materials are likely to be prohibited or protecting the integrity of the free marketplace of ideas.

While the creation of such a list would be a relatively simple fix to such a complex problem, the specific identification of prohibited acts violates the public right to free expression. Even though bestiality is repulsive and wrong to most people, the minority that does appreciate such acts has every right to fantasize and consider them. Why should the power of the majority squash the right of the minority to freely express their opinions and sexual desires? If such a list was to be formally created and agreed upon by the government, the American public might generally be satisfied but the many sexual minorities would undoubtedly suffer. The adoption of such a list, while it may be tempting as an easy solution, would negatively impact the minorities in America as their right to free expression would be unfairly compromised.

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<sup>39</sup> Jay E. Daily, *The Anatomy of Censorship* (New York: Marcel Dekker, Inc., 1973), 256.

The feminist pro-censorship argument, although many would agree that it exaggerates the violence presented in pornography, does raise a valid claim that the creation of pornography has the potential to harm women. Women Against Pornography, a leading organization in the fight for censorship of pornographic materials, concedes that “only 6 percent of pornography is violent.”<sup>40</sup> While this percentage may seem negligible, other research has argued that the prolonged consumption of pornography is related to trivializing rape as a criminal offense and a loss of sympathy for victims of sexual assault.<sup>41</sup> Many concerns have been raised over the validity of research on the effects of pornography but whether pornography currently harms women or not is secondary to the fact that it has the potential to do so.

Even though pornography, like all speech and expression, has the potential to *at some point* lead to societal harm, anti-censorship activists stand firm that no evidence exists to prove a causal relationship between pornography and violence. The extreme opinion of MacKinnon and Dworkin that pornography of all kinds, even relatively tame publications like *Playboy*, promotes rape and the sexual abuse of women and children is, according to several studies, unfounded. A study that surveyed incarcerated sex offenders and compared them to incarcerated non-sex offenders found that there was “little or no difference between the groups” with regards to their average consumption of

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<sup>40</sup> Laura Kipnis, *Bound and Gagged: Pornography and the Politics of Fantasy in America* (New York: Grove Press, 1996), 8.

<sup>41</sup> Dolf Zillmann, “Effects of Prolonged Consumption of Pornography,” In *Pornography: Research Advances and Policy Considerations*, edited by Dolf Zillman and Jennings Bryant, (New Jersey: Lawrence Erlbaum Associates, Publishers, 1989) 154.

pornography.<sup>42</sup> The same study concluded that a common thread between rapists was generally that they grew up in abusive and violent homes rather than consumed too much pornography.<sup>43</sup> Another study found that the availability of pornography in a given area has no direct correlation to the rates of rape and sexual abuse for that region.<sup>44</sup> It is clear from accepted research that “sexual offending is the end result of a multitude of complex factors” and, consequently, pornography can not be held solely responsible for sexual violence.<sup>45</sup>

Those in favor of censoring pornography often cling to the findings of the 1986 report on pornography and its social effects which was published by the Meese Commission, founded by President Reagan. This commission concluded that there was “a direct link between pornography and...murder, rape, physical violence, prostitution, sexual abuse and drugs.”<sup>46</sup> The commission heard testimony from both men and women involved in the pornography industry and others who were not connected to the industry. The commission reported that the testimony presented showed pornography led to many adverse effects, including but not limited to, “rape, murder, sexually transmitted diseases...fear and anxiety, feelings of shame, amnesia and denial.”<sup>47</sup> The Meese Report also concluded that social harms, such as “loss of job, financial losses and loss of trust within a

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<sup>42</sup> W.L. Marshall, “Pornography and Sex Offenders,” In *Pornography: Research Advances and Policy Considerations*, edited by Dolf Zillman and Jennings Bryant, (New Jersey: Lawrence Erlbaum Associates, Publishers, 1989) 208-209.

<sup>43</sup> W.L. Marshall, “Pornography and Sex Offenders,” In *Pornography: Research Advances and Policy Considerations*, 189-190.

<sup>44</sup> Jay E. Daily, *The Anatomy of Censorship* (New York: Marcel Dekker, Inc., 1973), 259.

<sup>45</sup> W.L. Marshall, “Pornography and Sex Offenders,” In *Pornography: Research Advances and Policy Considerations*, 189.

<sup>46</sup> Ronald Berger, *Feminism and Pornography* (New York: Praeger Publishers, 1991), 28.

<sup>47</sup> Margaret C. Jasper, *The Law of Obscenity and Pornography* (New York: Oceana Publications, Inc., 1996), 51-54.

family,” were all results of exposure to pornography.<sup>48</sup> The findings of this commission were used by the Reagan administration to justify harsher law enforcement and crackdowns on sexual materials.

However, the results of the Meese Commission are not widely accepted and the commission itself admitted to some deficiencies with its findings. Two members of the Meese Commission wrote dissenting opinions regarding the commission’s findings arguing that “the commission’s methods themselves have hindered the adequate pursuit of information” and that it overemphasized the prevalence of violent materials which led to inaccurate findings.<sup>49</sup> The commission’s final report also conceded that a positive correlation between pornography and sex offenders did not establish a causal relationship between the two.<sup>50</sup> Many academics argue that the Meese Commission was biased against pornography from the start of its work as its official charter was “to find more effective ways in which the spread of pornography could be constrained.”<sup>51</sup> Critics argue that the commission set out to prove that pornography is harmful and conducted their research in ways to reach that conclusion.<sup>52</sup> The many concerns regarding the findings of the Meese Commission seriously depreciate the value of this report and this research is unreliable.

Since the research conducted on the social effects of pornography has met constant opposition from both sides of the censorship debate and it is

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<sup>48</sup> Margaret C. Jasper, *The Law of Obscenity and Pornography* (New York: Oceana Publications, Inc., 1996), 55-56.

<sup>49</sup> Zillah Einstein, *The Female Body and the Law* (Los Angeles: University of California Press, 1988), 168-169.

<sup>50</sup> Ibid 167.

<sup>51</sup> Ronald Berger, *Feminism and Pornography* (New York: Praeger Publishers, 1991), 25.

<sup>52</sup> Ibid.

obvious that a widely accepted conclusion has not been met, the judiciary should err on the side of caution and not censor pornography as a cause of violence in society. Before the courts take a drastic measure, like censoring pornographic materials, the harmful effects of such works must be proven *beyond a reasonable doubt*. Until that certainty is proven by conclusive research that is generally accepted in the scientific community, the courts have no place to censor pornographic materials.

Just as the courts have no business censoring pornography without conclusive evidence of its harmful effects, the government has no right to regulate the content of pornographic materials based on issues of taste. The Supreme Court stated in *FCC v. Pacifica* (1978) that “the fact that society may find speech offensive is not a sufficient reason for suppressing it.”<sup>53</sup> The right to free speech afforded by the First Amendment was specifically designed to protect the rights of the minority from the will of the majority. It is simply unconstitutional for the legislature or courts to prohibit specific content of pornographic materials on the grounds that some people find it “offensive.” The choice to watch pornography is made by each individual and society has no right to regulate what people can watch, read or consider in the privacy of their own home. Just as conservatives have the right to avoid pornographic materials, every American adult has the right to seek out the pornography of their choosing.

Given the lack of evidence against pornography, the Supreme Court should abandon the Miller Test and all attempts to regulate the content of pornographic materials to conform to the guidelines of the First Amendment. The

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<sup>53</sup> *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978): 2.

Miller Test is far too vague and terms like “prurient interest” and “contemporary community standards” are unlikely to ever be succinctly defined. Decisions made by the Supreme Court based on the parameters of the Miller Test yield unpredictable and subjective results that leave the public in the dark. The Miller Test is simply too deficient to be utilized as a test for obscenity and by basing decisions on this standard the Court is negatively impacting society as the public has no way of predicting what materials are obscene. Although a suitable replacement test is, at this time, unlikely to be created, the Court should not continue to implement a standard that leads to arbitrary decision-making and should instead defer to the legislature. Furthermore, the lack of trustworthy evidence linking pornography to any societal harm is great enough that the courts must abandon any attempts to regulate the content of pornographic materials. Until such a time when the scientific community can conclusively say that pornography causes violence the courts have no right to prohibit specific content.

The debate over pornography is not likely to be settled in the near future but there are steps that must be taken to protect the free speech ideals of the First Amendment. The specific language of obscenity laws is problematic and many Supreme Court justices have expressed concerns about using the current Miller Test to define obscenity. Legal professionals and the general public are not given fair notice regarding what materials are likely to be defined as obscene because the decisions made by the Supreme Court are subjective and often arbitrary. This lack of predictability seriously harms our criminal justice system

and every effort must be made to avoid this confusion. In order to eliminate this issue, the Miller Test should no longer be utilized by the Supreme Court as a test for obscenity and the Court should look to the legislature to remedy this problem. The legislature has the power to see that research is carried out to investigate the true consequences of pornography and then a reasonable and effective alternative to the Miller Test can be created. Our nation prides itself on protecting the free expression of ideas and allowing the public exchange of opinions, even if they are unpopular. In order to protect these ideals and uphold the values of our free country, pornography must be given protection as free speech until such a time when research conclusively proves such materials to be a danger to society. Until that time, however, citizens of our nation must be afforded life, liberty and the pursuit of pornography.