

SUMMARY OF OBSCENITY AND 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 (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 Intern. Dictionary [Unabridged 1969].

II. What Is Obscenity?

The 1973 landmark case, *Miller v. California*, supra (as modified by two subsequent cases) established a three-pronged test for determining whether a "work" (i.e., material or a performance) is obscene and, therefore, unprotected by the First Amendment. To be obscene, a judge and/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.

Side note: Typical "hardcore pornography" (e.g., a magazine, video or Web site) consists of little if anything more than one depiction of hardcore sex after the other (i.e., it's "wall-to-wall" sex).

III. Obscenity Not Protected By 1st 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."

No one in their right mind, however, would say the First Amendment bestows on religious fanatics the right to kill "unbelievers;" and not even the ACLU says that the freedom of speech is absolute. As Justice Brennan put it 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 that the Supreme Court had "always assumed that obscenity is not protected" by the 1st Amendment. The Roth Court held that obscenity is "not within the area of constitutionally protected speech or press."

B. First Amendment intended to protect ideas and debate, not obscene materials

In the 1973 obscenity case, *Miller v. California*, 413 U.S. 15, at 34-35, the Court said:

[I]n 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"

Rest assured that our nation's founding fathers did not lay their fortunes, sacred honor and lives on the line so that citizens could produce and distribute pornography.

IV. Governmental Justifications For Obscenity Laws

In *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973), the Supreme Court identified "legitimate governmental interests" that justify a prohibition on obscene materials/performances, "even if it is feasible to enforce effective safeguards against exposure to juveniles." These include protecting the community environment, the tone of commerce, public safety, morality and family life. The Court also said there is a "right of the Nation and of the states to maintain a decent society."

V. 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](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
- 47 U.S.C. 223 -- Making an obscene communication by means of telephone

Sections 1462 and 1465 cited above also prohibit distribution of obscenity on the Internet. To report websites that may be trafficking in obscene materials, go to www.ObscenityCrimes.org Citizen complaints are forwarded to the U.S. Justice Department and to appropriate U.S. Attorneys' Offices

"Dealing in obscene matter" is also a predicate offense under the Federal Racketeer Influenced and Corrupt Organizations (RICO) statute. (Title 18, Section 1961-1968).

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.

VI. State Obscenity Laws

Workable statewide obscenity laws exist in 40 states. In some states, cities and counties can also enact obscenity laws. These laws can encompass both obscene materials and performances.

The prosecuting attorney of each county or judicial district enforces these laws. 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 totally ineffective state laws. New obscenity laws are needed in these states. Maine, New Mexico and South Dakota, however, allow local control of obscenity. In Oregon, Colorado, Hawaii, and New Mexico the State Supreme Court either invalidated [Oregon] or greatly weakened obscenity laws. Amendments to the state constitution are needed.

To obtain a copy of your state obscenity law, go to www.moralityinmedia.org/nolc

VII. Public Opinion

Almost three in four (73%) U.S. adults think that viewing pornographic websites and videos is morally unacceptable, according to a national survey conducted in July 2006 by Harris Interactive. A national survey conducted in November 2005 by Harris Interactive found that more than three out of four (77%) adult Americans support the Justice Department's effort to enforce federal obscenity laws. In a national survey conducted in March 2004 by Wirthlin Worldwide, 82% of adult Americans supported "vigorous" enforcement of Federal laws against Internet obscenity. In response to a virtually identical question asked by Wirthlin in March 2002, 81% supported vigorous enforcement of these laws.

VIII. Sexually Oriented Businesses

In 2001, Morality in Media's National Obscenity Law Center (NOLC) launched the "Safe States and Cities Project" to help

communities reduce the deleterious "secondary effects" associated with sexually oriented businesses. NOLC attorneys prepared case law studies (state-by-state) addressing the following problems: Nude Dancing, Peep Show Booths, Escort Services, Massage Parlors, and Swingers Clubs. The studies include examples of ordinances that have been upheld by the courts.

Completed case law studies are available FREE online at www.moralityinmedia.org/nolc (click to "Studies on SOBs") and may also be purchased in disk or paper format at little cost. To order a disk or paper version of a study, call (212) 870-3232 or write to the NOLC at the address below.

IX. Other Laws Regulating Smut

Other state and local laws that regulate the sale/display of pornography and sexually oriented businesses include:

- Harmful to minors sale/display laws: shield children from pornography
- Zoning laws: restrict the location of "adult businesses"
- Nuisance laws: allow closure of all or part of an "adult business" if prostitution or lewd conduct occur on premises
- Obscene device laws: prohibit the sale of dildos and artificial vaginas

X. Helpful Articles

Articles on the following subjects are available at www.ObscenityCrimes.org (Porn Problem & Solutions page): "How to get porn out of video stores," "What to do about mail porn," "What to do about hardcore pornography on cable/satellite," "Fighting back against 'adult' bookstores," "Zoning 'adult' businesses," "Open booth laws to curb sexually transmitted diseases," and "Nude entertainment in bars."

XI. Closing Thoughts

In 1964, New York City Mayor Wagner appointed a Commission to address the pornography problem. In 1968, at the instruction of Congress, President Johnson appointed a Commission to address the pornography problem. This was before the shift from mostly softcore to mostly hardcore pornography and before the mainstreaming of hardcore pornography via cable & satellite TV, telephone, neighborhood video stores, and the Internet. If porn was a problem then, what do you think it is today?

A quote from Alexander Pope (1688-1744): "Vice is a monster of so frightful face, as to be hated needs but to be seen; but seen too often, familiar with her face, we first endure, then tolerate, then embrace."

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