

***ENFORCING* FEDERAL OBSCENITY LAWS**

Federal obscenity laws, which are not being enforced, prohibit distribution of hardcore, obscene pornography on the Internet, on cable/satellite or hotel/motel TV and in sexually oriented businesses and other retail shops. The role of the Federal Government should be, as it has been in the past, to prosecute the major producers and distributors of obscene pornography. However, rather than aggressively enforcing federal obscenity laws against large-scale distributors of obscene pornography, for several years the Department of Justice has targeted primarily small operations that trafficked in the most extreme hardcore pornography and prosecuted very few of them. Thus, illegal, obscene pornography is flooding our nation and the harm is great. Much can be done based on the following:

What Is Pornography?

The term "pornography" is a generic, not a legal term. As noted by the Supreme Court in the landmark 1973 obscenity case, *Miller v. California*, 413 U.S. 15, 20, n.2, the term:

"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 Third New International Dictionary [Unabridged 1969]..

What Is Obscenity?

The term "obscenity" is a legal term, and in *Miller v. California, supra* the Supreme Court 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:

First, that the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; AND second, 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 third, 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 website, DVD or magazine) consists of little if anything more than one depiction of hardcore sex after the other (i.e., it's "wall-to-wall" sex).

Obscenity Is Not Protected By the First Amendment

1. Enforcement of obscenity laws does not raise any Constitutional problem

In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942), the Supreme Court said: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene...It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

2. Obscenity is not within the area of constitutionally protected speech or press

In *Roth v. United States*, 354 U.S. 476 (1957), Justice Brennan observed that "this Court has always assumed that obscenity is not protected by the freedoms of speech and press" (at 481). In *Roth*, the Supreme Court went on to hold that obscenity is "not within the area of constitutionally protected speech or press" (at 485).

3. First Amendment was intended to protect ideas and debate, not obscene material

In *Miller v. California*, 413 U.S. 15, 34 (1973), the Supreme Court said: "[T]o equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a 'misuse of the great guarantees of free speech and...press.'"

More recently, in *Ashcroft v. ACLU*, 535 U.S. 564 (2002), the Supreme Court rejected a constitutional challenge to application of obscenity laws to the Internet. See also, *United States v. Extreme Associates*, 431 F.3d 150 (3rd Cir. 2005), *cert. den.*, 547 U.S. 1143 (2006).

Governmental Justifications for Obscenity Laws

In *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 57 (1973), the Supreme Court identified “legitimate governmental interests” that justify a prohibition on obscene materials “even if it is feasible to enforce effective safeguards against exposure to juveniles.” These include protecting the community environment, 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” (at 59).

The display of pornography is also a frequent factor in workplace sexual harassment cases, and time wasted viewing pornography reduces worker productivity. Our nation’s role in polluting the world with pornography is also making the war against terrorism more difficult. Common sense should also inform us that when children are exposed to graphic depictions of hardcore adult pornography their attitudes about sex, sexual desires and sexual behavior can be influenced for the worst. And especially on the Internet, large numbers of children are being exposed to hardcore adult pornography.

Federal Obscenity Laws

To obtain texts of the obscenity laws listed below, go to <http://www.moralityinmedia.org/nolc/index.htm>. 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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| 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
(<i>must be engaged in business of selling or transferring obscenity</i>) |
| 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.

Public Opinion

According to the results of a national opinion poll commissioned by Morality in Media and conducted by Harris Interactive in April 2008: 75% of adult Americans said they would support the next President were he to do all in his or constitutional power to ensure that federal obscenity laws are enforced vigorously.

Useful Resources:

- ▶ Pornography Harms Briefing Available at: <http://www.youtube.com/user/PornHarms>
- ▶ Porn Harms: www.pornharms.com
- ▶ The Witherspoon Institute’s Consultation on The Social Costs of Pornography: www.SocialCostsofPornography.org