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Regulating the Porn Industry: Change from the Inside

Claire Mellish

CURRENT JUDICIAL STANDARD

The Supreme Court has cleaved a difference between pornography and obscenity: pornography is legal and falls under the constitutionally protected right to free speech; obscenity does not.¹ In the current judicial standard laid out in *Miller v. California*, in order to determine if something is obscene the jury must assess whether (a) the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.² At the time, dissenting Justices Brennan and Marshall criticized the vagueness of the *Miller* test asserting that the “community standard” was too ambiguous.³ To add to the confusion, the *Miller* test was established in 1973 before the rise of the internet and the technological revolution.⁴ In ensuing decades, the test has left courts to struggle with what “community” means in a day and age when 3.2 billion people, about half the world’s population, have access to the internet at any given time.⁵

Except for child pornography, the Supreme Court provided protection for individuals possessing obscene material in *Stanley v. Georgia*.⁶ Under the ruling in *Stanley*, individuals could legally possess obscene material in the privacy of their own homes.⁷ *United States v. Thomas* further clarified that it was the producer and the distributor that would be held responsible for the existence of obscene material, and not the individual who came to privately possess that material.⁸ Taken with *Miller*, this means the consumer perspective determines what is or is not obscene, and the consumer base may even privately possess

¹ *Miller v. California*, 413 U.S. 15, 36 (1973).

² *Id.*

³ *Id.* at 47.

⁴ *Porn in the USA*, CBS NEWS 60 MINUTES, <https://www.cbsnews.com/news/porn-in-the-usa-31-08-2004/>.

⁵ *Global digital population as of July 2018*, STATISTA, Jul. 2018, <https://www.statista.com/statistics/617136/digital-population-worldwide/>.

⁶ *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

⁷ *Id.*

⁸ *United States v. Thomas*, 893 F.2d 1066, 1070 (9th Cir. 1990).

obscene material, but the producers and distributors could ultimately bear the legal cost of such a violation.

Furthermore, the *Miller* precedent does not consider the people who are producing and creating content and whether they find the material obscene.⁹ By only defining community in terms of a consumer base, which is potentially global and infinitely diverse, the courts overlook a vital perspective from the communities that produce porn.¹⁰ These communities are the ones who give life to content by infusing it with the most intimate kind of physical labor, and they are the ones who will have to meet the demands of the global consumer. Shifting the focus to workers who stand at the very heart of the adult entertainment community not only reduces the need for consensus among vastly disparate consumer populations as to what is “obscene,” it also opens the possibility of a labor movement through formal union structures that would offer workers protection in a largely under-regulated industry.¹¹ The greater the ability of workers to self-determine through unions, the greater the possibility that content regulation will come from inside the industry itself.

PROBLEMS IN PORN, PROBLEMS IN CONTENT

In 2016, the International Entertainment Adult Union (IEAU) was officially approved by the federal government.¹² The IEAU is still in its infancy.¹³ The next step is collecting dues, democratizing positions, and strengthening collective bargaining synapses to push towards its first two goals: raising the legal age of participation in pornography from eighteen to twenty-one, and pay reform.¹⁴ While these are worthy goals, there are other systemic ills of the industry that could be further addressed through unions.

The production of porn is a unique and fascinating nexus of employment law, healthcare law, First Amendment free speech rights, Fourth Amendment privacy interests, Fourteenth Amendment equal protection, the Commerce Clause, and the Civil Rights Act of 1964. Given its complexity and its profitability, ex-performers report that laws and regulations enforced in other indus-

⁹ Interview with Timothy Gilfoyle, Professor of History, Loyola University Chicago (Nov. 6, 2018)

¹⁰ *Porn in the USA*, *supra* note 4.

¹¹ *Id.*

¹² INTERNATIONAL ENTERTAINMENT ADULT UNION (“IEAU”), *available at* <http://entertainmentadultunion.com/index.cfm>.

¹³ Aurora Snow, *Porn’s First Union President: Performers should be 21+*, THE DAILY BEAST <https://www.thedailybeast.com/porns-first-union-president-performers-should-be-21-only>.

¹⁴ *Id.*

tries are largely ignored in porn.¹⁵ Former porn star Tyler Knight aptly calls it, “the last bastion of American industry.”¹⁶ It is the only industry where racial and gender discrimination form the basis of hiring decisions and health and safety requirements are routinely not enforced.¹⁷

Racially Discriminatory Hiring Practices

According to actors within the porn industry, hiring choices are explicitly motivated by race and performers of different races are not compensated equally.¹⁸ Black actors get paid as little as half of what their white colleagues make.¹⁹ Widely accepted in the industry is the so called “interracial rate,” a premium that white female actors charge to perform interracial scenes with black men.²⁰ In porn, “it is okay to not be hired for something specifically because of your race,” says retired porn star Tyler Knight.²¹ This directly violates Title VII of the Civil Rights Act of 1964 which prohibits an employer from make hiring decisions on the basis of race or pay employees of different races differently.²²

Companies cannot assert customer preference as a legitimate defense against a Title VII discrimination claim, but may assert a Bona Fide Occupational Qualification, or BFOQ defense, where the trait is related to religion, sex, or national origin, and that trait is tied to a “business necessity”.^{23,24} A narrow defense called the “authenticity defense” has been used successfully to justify necessary discrimination on the basis of national origin, such as hiring exclusively Chinese employees to work at a Chinese restaurant.²⁵ Note that discrimination on the basis of race does not qualify for a BFOQ exception, presumably because Congress believed there would be no employment arrangement where race was justifiably relevant.^{26, 27}

¹⁵ *Hot Girls Wanted: Turned On* (Netflix, 2017).

¹⁶ *Id.*

¹⁷ *Id.*; Richard Abowitz, *How Will Porn Solve Its HIV Crisis?*, THE DAILY BEAST, <https://www.thedailybeast.com/how-will-porn-solve-its-hiv-crisis>.

¹⁸ International Entertainment Adult Union, *supra* note 12.

¹⁹ Kelly Goff, *Is The Porn Industry Racist?*, THE ROOT, Apr. 3, 2013, <https://www.theroot.com/is-the-porn-industry-racist-1790895844>.

²⁰ *Hot Girls Wanted*, *supra* note 15.

²¹ IEAU, *supra* note 12.

²² Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq. (1964).

²³ *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 297 (N.D. Tex. 1981).

²⁴ *Id.*

²⁵ EEOC Compliance Manual, Section 15, 2015.

²⁶ Goff, *supra* note 19.

In an industry where profitable fantasies hinge on race and certain genres are consumed solely because of the race of performers, an argument could be made by employers that it is not the race, but the national origin of performers that are the basis of discrimination and forms an authenticity exception in the uniquely situated world of porn. With no jurisprudence on the matter, it is unclear how the courts would rule. In the face of uncertain protection by the courts, it is imperative that workers continue to unionize and demand racially fair hiring practices and pay rates as a condition of employment.

Violence Against Women

Historically, calls for content regulation have been based on the assertion that violent pornography makes a more violent society, and there is no other group featured on the receiving end of pornographic violence more than women.²⁸ Older studies claimed that violence against women occurred as low as 1.9% of the time in porn.²⁹ But more recently, a comprehensive study done in 2010 revealed that out of 304 scenes from top selling pornographic DVDs, 90% contained violence against women.³⁰ 88.2% of the violence was in the form of physical aggression such as slapping or choking, and 48.7% of the scenes contained verbal aggression, such as being called a “bitch” or other demeaning terms.³¹ Previous studies had used distinctly different research parameters that required women resist aggression or act like they did not enjoy it in order to count an action as “violent.”³² This mindset was reminiscent of old rape laws where rape only legally occurred when the victim resisted and was overcome.³³ The 2010 study scrapped the resistance requirement and found that 95% of the time women were portrayed as responding positively or neutrally to aggression, meaning that previously these instances would not have counted as “violence.”³⁴ Furthermore, the study found scenes which were categorized as actually dangerous to women and could physically injure them, such

²⁷ Bryant, William R., *Justifiable Discrimination: The Need for a Statutory Occupational Qualification Defense for Race Discrimination*. 33 GA. L. REV. 211 (1998).

²⁸ Bridges AJ et al., *Aggression and sexual behavior in best-selling pornography videos: a content analysis update*, VIOLENCE AGAINST WOMEN, 16(10), 1065, 1075 (2010).

²⁹ *Id.* at 1068.

³⁰ *Id.* at 1076.

³¹ *Id.*

³² *Id.*

³³ *An Updated Definition of Rape*, U.S. DEPT. OF JUSTICE, Jan. 6, 2012, <https://www.justice.gov/archives/opa/blog/updated-definition-rape>.

³⁴ *Id.*

as double anal penetration, occurred in 41% of the sample videos.³⁵ Other studies in the past few decades have found that degrading pornography leads to increase in aggressive, domineering behavior towards women, harsher evaluations for real life partner, and loss of compassion for rape victims.³⁶ These studies support the argument that violence against women is prominently featured in porn, and that this violence does influence society.

Under Title VII of the Civil Rights Act of 1964, it is illegal to discriminate on the basis of sex.³⁷ Again, there could be a potential BFOQ exception that employers could argue: it is true that only women can fulfill certain kinds of sexual acts, and that may be considered essential to the job. This unique form of employment also entails activities that in any other context would be sexual harassment and also count as a form of discrimination.³⁸ The EEOC defines workplace sexual harassment as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual’s employment, unreasonably interferes with an individual’s work performance, or creates an intimidating, hostile, or offensive work environment.”³⁹ The work environment of the adult porn star is difficult to parse out if a female performer was to allege sexual harassment. What do unwelcome sexual advances look like in the context of a sex scene? What would it mean to interfere with work performance? What would a hostile and offensive work environment look like? And lastly, with stars getting paid per scene, can pressure to perform certain acts have the effect of influencing employment status? These questions are not easy to answer, and the questions are most appropriately answered by the people making the scenes rather than a court of law.

Unionization could be helpful in establishing rudimentary boundary lines that shape what sexual harassment looks like in the porn industry and could even allow female workers to collectively say no to performing certain acts. In the very least, the power of a union could provide a mechanism for recourse if an individual was kicked off a scene for saying no, thereby insulating female performers from economic harm.

³⁵ *Id.* at 1080.

³⁶ *Id.* at 1066.

³⁷ Goff, *supra* note 19.

³⁸ *Enforcement Guidance: Vicarious Employer Liability for Filing a Charge of Discrimination Unlawful Harassment by Supervisors*, U.S. Equal Employment Opportunity Commission (Mar. 29, 2010).

³⁹ *Facts About Sexual Harassment*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/laws/types/sexual_harassment.cfm.

Sexual Safety and OSHA

The California Occupational and Safety and Health Act is supposed to make sure that employees enjoy a safe working environment.⁴⁰ It compels employers to protect employees from blood-borne pathogens and prohibits them from discriminating against employees that complain about safety and health conditions.⁴¹ But when it comes to sexual safety, pornography is a self-regulating industry.⁴² Currently performers must pay for their own sexual health tests and producers are not required to cover the cost of tests or treatment for STDs and STIs.⁴³ Condoms are also not required to be used in scenes.⁴⁴ Current estimations place condom use in 10% of scenes.⁴⁵

When California attempted to pass condom requirements under the widely known Prop 60 bill, actors belonging to the Free Speech Coalition fought back, saying it would destroy the industry and the huge demand for condom-free porn.⁴⁶ The organizations chairman, Christian Mann, relied on market-oriented justifications for lack of regulation, saying “[t]here won’t really be a large viable market for condom-positive porn. You can’t force producers to make a product the market doesn’t want.”⁴⁷ Part of what makes the use of condoms in pornography so contentious is the lack of data capturing whether it really discourages consumer viewing.⁴⁸ However, the Brazilian porn industry uses condoms in 80% of scenes and still maintains its position as the second largest exporter of pornographic material.⁴⁹ Regardless, repeated outbreaks of HIV among performers impresses the need for compelled sexual safety, and some performers have come out in support of mandatory condom usage.⁵⁰ To date, there is no standardized, industry wide testing system, and

⁴⁰ California Occupational Health and Safety Act §15, 29 U.S.C. § 651 et seq. (1970).

⁴¹ *Id.*

⁴² *Hot Girls Wanted*, *supra* note 15.

⁴³ April Dembosky, *Call/OSHA rejects condom requirement in films*, KQED, Feb. 18, 2018, available at <https://www.kqed.org/stateofhealth/148728/california-porn-industry-protests-rules-mandating-condoms>.

⁴⁴ *Id.*

⁴⁵ Bridges, *supra* note 28 at 1074.

⁴⁶ Dembosky, *supra* note 43.

⁴⁷ *Hot Girls Wanted*, *supra* note 15.

⁴⁸ *Does Porn Need Condoms?*, VICE NEWS, https://www.vice.com/en_us/article/bn5en3/does-porn-need-condoms-literally-no-one-knows.

⁴⁹ Corita R. Grudzen & Peter R. Kerndt, *The Adult Film Industry: Time to Regulate?*, PUBLIC LIBRARY OF SCIENCE, June 2007, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1892037/>.

⁵⁰ Rory Caroll, *New HIV outbreak in US porn industry leaves insiders divided over condoms*, THE GUARDIAN, <https://www.theguardian.com/culture/2013/sep/12/porn-industry-california-hiv-condoms>.

when a performer contracts HIV, there is a life ban from participating in pornography.⁵¹ A recent study that examined the lack of sexual health regulation in California industry summed it up aptly, saying “It is unethical for industry executives, legislators, and consumers to continue to enjoy the profits, tax revenues, and gratification of adult film without ensuring the safety of performers.”⁵²

In the arena of sexual health, the power of a union could demand centralized testing and treatment that comes at cost to the producer and not the performer, and even create a form of workman’s compensation when a sexual disease is contracted and puts a performer out of work temporarily or even permanently.

LEGISLATIVE ATTEMPTS TO REGULATE PORNOGRAPHIC CONTENT

The Communications Decency Act (CDA) of 1997 had provisions that allowed the government to regulate not only obscene internet material but also indecent internet material.⁵³ In *Reno v. ACLU*, the Supreme Court struck down the indecency provisions because the term “indecent” was poorly defined and because enforcing a ban on indecent material would not only deprive parents of the right to define what was “indecent” for their children, it would also violate the right to free speech.⁵⁴

Next came the Kid’s Online Protection Act of 1998 which aimed to protect children from obscene and other offensive sexual material online.⁵⁵ The law was declared unconstitutional on similar free speech grounds as the CDA, with the Supreme Court finding the law could be more narrowly tailored to not effect willing and consenting adults from viewing pornographic material.⁵⁶ After that, the Children’s Online Protection Act was passed in 1998 which requires schools and libraries that serve children k-12 to have a filtering program on computers.⁵⁷ This law has been upheld by the Supreme Court and is enforced to date.⁵⁸

⁵¹ Grudzen & Kerndt, *supra* note 49.

⁵² *Id.*

⁵³ Roger L. Sadler, *Electronic Media Law*, 275 (Sage Publications 2005).

⁵⁴ *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870-71 (1997).

⁵⁵ Sadler, *supra* note 53 at 277.

⁵⁶ *Id.*

⁵⁷ Children’s Online Privacy Protection Act §15 U.S.C. § 6501–6506 (1998).

⁵⁸ *Id.*

A CONSTITUTIONAL BASIS FOR CONTENT REGULATION

Looking to Canadian Jurisprudence

Canada's definition of obscenity is much more specific than the United States.⁵⁹ Canada has defined obscenity as "the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty, and violence."⁶⁰ Moreover, Canadian jurisprudence has found a constitutionally based solution for regulating pornography.⁶¹ In contrast to the United States constitution, which has no equal rights amendment, the Canadian Charter of Rights and Freedoms specifically guarantees sex equality which the government is responsible for enforcing.⁶² Under this equality guarantee, the Supreme Court of Canada found that pornography disproportionately harmed women.⁶³ Therefore, the interest of regulating porn in the name of equality outweighed the interests protecting porn in the name of free speech.⁶⁴ It has been suggested that a similar argument in US courts could be made substituting the equality interest with the equal protection language of the Fourteenth Amendment.⁶⁵

CONCLUSION

Free speech is a treasured civil right, but has stymied repeated attempts at regulating pornographic content throughout American history.⁶⁶ The most realistic route for change within the industry would be a revision of the obscenity standard or change imposed from directly inside the industry by the continuing unionization.

From a judicial perspective, the current analysis to determine what is obscene is focused on the consumptive end of pornography and completely forgets the workers who produce the actual product.⁶⁷ Not only is the "community standard" vague, the evolution of the internet has rendered it

⁵⁹ *Statement by Catharine A. MacKinnon and Andrea Dworkin Regarding Canadian Customs and Legal Approaches to Pornography*, NO STATUS QUO, Aug. 26, 1994, available at <http://www.nostatusquo.com/ACLU/dworkin/OrdinanceCanada.html>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Gilfoyle Interview, *supra* note 9.

⁶⁷ Caroll, *supra* note 50.

virtually meaningless by giving content global access and therefore a global community.⁶⁸ By shifting the judicial focus of the definition of “community” to include the people who make porn, the industry stands to gain a say in what is considered obscene and possibly provide a way to judicially limit certain kinds of content.

From a civil rights perspective, there are glaring discriminatory hiring practices impermissibly based on gender and race within the industry and basic health and safety codes are neglected.^{69,70} Largely known as a self-regulating industry, people who produce porn are in the best position to determine solutions to these problems. Further unionization is essential in pressuring employers to change hiring practices, provide greater work place safety, and worker protection for sexual harassment. Unionization could even bring about content reform in mainstream production if there was a collective agreement among performers that certain types of pornography were too risky for performers to engage in, or in the very least bolstering performer ability to say “no” and still maintain economic security.

⁶⁸ *Global digital population as of July 2018*, *supra* note 5.

⁶⁹ *Hot Girls Wanted*, *supra* note 16.

⁷⁰ Dworkin, *supra* note 59.