

Module 4: Lust: Prostitution and Pornography

Introduction

One of the most known and common vices is lust. Lust is an overwhelming desire or craving typically of a sexual nature. The commonality of lust has manifested in at least two areas of American law; prostitution and pornography. In both cases American criminal law has struggled with and attempted different approaches to dealing with these problems. We begin with prostitution.

Part 1: Prostitution

Often referred to as the oldest (or second oldest) profession, prostitution has been a persistent phenomenon in human history. The following video offers a historical account of prostitution from ancient Greece to the modern America .

VIDEO: " History of Prostitution: Sex in the City ."

In American law prostitution was widely allowed (especially in the West) until the early part of the 20 th century. This is not to suggest that prostitution was an accepted profession, but it was legal. Some prostitutes were "streetwalkers" who solicited customers in the streets while others worked in brothels where many women would work. The brothel system had two advantages over streetwalking. First, it was not as visible so as not to upset the local community. Second, it was safer as it occurred in a controlled environment. Following a movement against prostitution Congress passed the "White Slave Traffic Act" (the Mann Act of 1910) forbidding the interstate transport of women and girls for immoral purposes.

This federal law was bolstered by many local laws prohibiting prostitution. There were three reasons given to criminalize prostitution. First, some prostitutes were said to be unfortunate victims coerced into an immoral trade who should be rescued and rehabilitated. Second, some prostitutes were said to be inferior people who sought to spread immorality and corrupt others with their trade. Third, various social and criminal problems were associated with prostitution, including drug use and theft.

The legal end to prostitution did not end the practice but did drive it underground. Today, there are streetwalkers (who are the most visible and the most commonly arrested), call girls who operate out of their residences seeing only regular customers, and there is a return of the brothel in so called "massage parlors" where sex is often exchanged as part of the massage. In modern America prostitution is illegal (but occurring) in 49 states. Only in Nevada is prostitution legal.

Prostitution in Nevada is legal in some areas but is also heavily regulated. It is illegal to solicit in the street, so streetwalkers do not operate legally. Nevada allows each county to determine its own prostitution laws, and they vary greatly. A typical county which allows prostitution only allows licensed brothels. Brothel owners pay a fee for a license. The prostitutes themselves must undergo mandatory testing for STD's, and the use of condoms is also required.

Thought Question: Is the prostitute motivated by vice?

It may be that the customer (John) of a prostitute is motivated by the vice of lust, but what about the actions of the prostitute? Certainly prostitutes themselves are not motivated by lust for their customers. If prostitutes are not motivated by lust, then what, if any, vice motivates them? We might find some prostitutes are motivated by greed (getting rich), but what about the significant amount of prostitutes who are in it to make a living? Are prostitutes motivated by vice?

Should prostitution be a crime? There are several arguments for and against this proposition which warrant our attention.

For:

1. Prostitution is going to occur whether it is a crime or not. Legalizing and regulating it has better consequences. Prostitutes would be safer due to working in a safer environment away from pimps and violent customers. Legal regulations can reduce the spread of STD's. The use of zoning (like Nevada) can keep it out of sight where children and citizens won't be bothered by it.
2. Prostitution is a victimless crime. When it is a consensual agreement between two (or more) adults, then there is no harm to others such that the harm principle holds that the state may not criminalize the behavior.
3. Criminalizing prostitution takes away liberty. Women and men are free to engage in sex for free (or exchange it for dinner, drinks, and a movie), so why do they not have the freedom to profit from their activities? Athletes and laborers profit by using their bodies; why can't a prostitute?

Against:

1. Legalizing prostitution only encourages the vice. Though criminalization may not stop it, legalization will lead to its expansion and sends the message that "it is ok" to be a prostitute. This only encourages the further sexual exploitation of women.
2. Prostitution does a harm to women. Prostitution is not a choice of liberty but is typically a necessity for the poor, homeless, and drug users. Legalization abandons these people to an unhappy life. Instead, society should stop their activities when possible for their own good and offer rehabilitation programs to help them lead a virtuous life.
3. Prostitution is not a victimless crime. What may appear as a consensual arrangement does affect other people. Where prostitution occurs, there is an increase in the crimes of theft, assault, and murder. Allowing prostitution may also increase the spread of STD's, which often does affect others (including the unknowing spouses of "Johns").

Part 2: Pornography

Even more pervasive and controversial than prostitution is the issue of pornography. As we will see pornography is, among other things, controversial, big business, and difficult to define. In this section we will touch upon several issues relating to pornography. Most notably:

- **What is pornography?**
- **Is pornography harmful to others?**
- **What restrictions, if any, ought society to place upon pornography?**

What is Pornography?

This is an especially difficult question. One answer we know to be insufficient, but common, was given by Supreme Court Justice Potter Stewart, who declined to define hard core pornography but added, "I know it when I see it." The law has struggled to define pornography, and many different standards have evolved.

The problem of defining pornography has led to several odd legal cases such as the mother arrested for violating "child pornography" statutes by possessing nude photos of her own 3- and 4-year-old children playing in the backyard pool. (The Wal-Mart photocenter turned in the pictures when she had them developed.) Or the case of the man who wrote short stories (which were never published) involving minors engaged in sexual acts who was arrested for child pornography. Ultimately the law, through Supreme Court decision, has settled on what is known as "the Miller test."

Miller v. California

WEBLINK: [Click here](#) to read *Miller v. California* .

In 1973 the Supreme Court handed down a decision in **Miller v. California** which has since served as the governing legal definition of pornography. The decision holds that pornography was a form of **obscenity** (specifically obscenity of a sexual nature). As we have seen, free speech rulings indicated that obscenity is not protected under the first amendment; therefore, the *Miller* decision gave the law the authority to regulate it. To be considered obscenity by the court:

. . . a publication must, taken as a whole, appeal to the prurient interest, must contain patently offensive depictions or descriptions of specified sexual conduct, and on the whole have no serious literary, artistic, political, or scientific value.

The court ruled that we can determine what is offensive by an appeal to the **community standards** . Obscenity goes beyond "normal, healthy sexual desires."

Thus the *Miller* decision sets forth a three-pronged definition of pornography:

1. An average person using **contemporary community standards** would find it to appeal to an " **arousing and unwholesome** " interest in sex.

2. It must depict or describe sexual conduct in an offensive way.
3. It must lack serious literary, artistic, political, or scientific value.

It is important to note that this definition encompasses all media, from drawings to pictures to written stories. Anything that meets these criteria would be considered pornography under the Court's decision. Still this definition in practice is not clear cut as it involves ideas of " **offense** " and " **community standards** ."

Thought Question: *Ex Post Facto* ?

One of the issues brought up in by the dissenting Justices in the *Miller* decision is the issue of " *ex post facto* " or after-the-fact laws. Prior to this decision, the "Miller test" was not law and therefore how could the defendant (Miller) have known his actions violated a legal standard that didn't exist when he acted? The court effectively allowed Miller to be punished under a standard that Miller could not have known when he acted. Was this justice?

Thought Question:

Can pornography have serious literary, artistic, political, or scientific value?

In one case a city sought to close down all strip clubs in the city using the argument that nude dancing had none of these values. In response one club owner had his nude dancers modify their "acts." They would still dance nude but would recite Shakespeare while they danced. Since Shakespeare has serious literary value, the club claimed that its dancers' performance could not be prevented.

Since the decision in *Miller*, pornography has changed dramatically. When the court decided *Miller* in 1973 pornography was limited to adult movie theatres, adult book stores, and published magazines. This meant that consumers of pornography had to risk exposure by walking into adult businesses or having magazines delivered in their mail. Such exposure deterred many would-be consumers. Technology has fundamentally altered the market of pornography. From the home VCR to the Internet, pornography is now easily accessible and consumable without risk of public exposure. This led to an explosion of the pornography market which in turn has turned pornography into a huge multi-billion dollar business such that even major American corporations are involved in it. These and other issues are brought to light in the following PBS video "American Porn"

VIDEO: Click here to watch *American Porn* .

The video mentions the "Cambria List" which aims to provide rules to the porn industry to avoid obscenity prosecution. The list is graphic, but if you are interested in it here is a link to it as presented on the PBS "American Porn" website.

WEBLINK: [Click here](#) to read the "Cambria List."

Part 3: Is Pornography Harmful to Others?

As we have seen, the focus on pornography as obscenity has several problems. Most notably, the definitions of obscenity are vague and difficult to enforce. This has led to many opponents of pornography to focus on the issue of harm instead. If pornography is harmful to others, then there would be a strong reason to criminalize pornography, even for libertarians and defenders of the harm principle.

Generally speaking, Mill's harm principle would defend pornography as not harmful to others. However, Mill's own arguments concerning free speech (that also apply to pornography which is a form of speech) seem to indicate that free speech is important because it can be true or false (that you actually may communicate something of value). It is not clear that pornography fits the general criteria that Mill has in mind for free speech. Still, the prime arguments surrounding pornography focus on the question of harm, which is Mill's central concern.

Pornography is said to be harmful in one of two ways.

- **First**, there is the paternalistic argument that pornography is bad for you (it is a vice). This argument is good, but does not persuade libertarians or harm principle supporters who oppose paternalism.
- **Second**, pornography causes a "secondary harm" to others. If this second argument is successful, then we can not only hold that pornography is bad for you, but also that it harms third parties (thus eliminating the harm principle as a defense of pornography). This line of argument brings us a new distinction between **primary harms** and **secondary harms**.

Primary harms cause a direct harmful effect (murder, rape, theft, and assault).

Secondary harms are indirect harms; they are harmless in themselves but lead to other harms. For example, owning burglar tools is not a harm in itself, but ownership is harmful in that it enables other harms to transpire.

This notion of a secondary harm is new to our discussion. It may turn out that we refuse to accept the idea of a secondary harm as a legitimate harm. For the moment, however, let us pursue this argument as it applies to pornography.

Pornography as a Secondary Harm

Pornography is claimed to be harmful (to women) in three ways:

1. Pornography, especially **violent** pornography, is implicated in the committing of crimes of violence against women. (For instance, Ted Bundy, who murdered many women, claimed that pornography made him do it.)
2. Pornography is the vehicle for the dissemination of a deep and vicious lies about women. It is **defamatory** and **libelous**. (If so it cannot be called "free speech" as libel is not a protected form of free speech.)
3. The diffusion of such a distorted view of women's natures in our society supports sexist attitudes and thus reinforces **oppression** and **exploitation** of women.

To bolster these three arguments, we can employ **Catharine MacKinnon's** definition of pornography:

. . . the graphic sexually explicit subordination of women through pictures or words that also includes women dehumanized as sexual objects, things, or commodities; enjoying pain or humiliation or rape; being tied up, cut up, mutilated, bruised, or physically hurt; in postures of sexual submission or servility or display: reduced to body parts, penetrated by objects or animals, or presented in scenarios of degradation, injury, torture; shown as filthy or inferior: bleeding, bruised or hurt in a context which makes these conditions sexual.

MacKinnon rejects the legal definition of pornography (as part of obscenity law) because the "average person" is not a gender neutral person; hence their judgment would not reflect women. In fact, MacKinnon does not think that pornography is a subclass of obscenity. Obscenity is a moral question about how we ought to act. In contrast, pornography "is a political practice, a practice of power and powerlessness." Sexual material not described in the above definition is what MacKinnon considers " **erotica** " and erotica is not necessarily something that society should prohibit. The claim contained in this definition is that pornography has implications for sexual equality, or, in other words, pornography presents a harm to women. To illustrate this point, the effect of pornography on the equal status of women is often compared to how segregation contributed to the subordinate status of African-Americans.

In order to understand the civil rights aspect of this argument, **two conditions** must be understood.

1. First, that as a fact of the matter, women do not have equal status in society.
2. Second, that pornography contributes significantly to the continuing subordinate position of women.

If we accept both of these conditions, then it does appear that women are harmed by pornography. These conditions are supported by the economic inequality between the sexes, but also in the sexual victimization of women. For instance, one study claims that 44% of women experience rape, 85% experience sexual harassment, and 38% of girls are molested. This stands, presumably, in contrast to very low numbers of men with the same experiences.

To recap: Pornography would be a harm to the **equality of women** in one of three ways.

1. Pornography sends a false message about women—a miscommunication of women's desires and their place in society.
2. Pornography influences male behavior towards women in a negative way.
3. Pornography is also linked as a causal factor in sexual crimes against women.

As an issue of free speech, pornography could be restricted because either **(a)** it constituted an incitement of harm (a condition Mill accepts) or **(b)** the right to pornography is outweighed by society's compelling interest in protecting women from discrimination. (This is an accepted U.S. constitutional limitation on free speech.)

These arguments cover "sexually violent material" and "nonviolent materials depicting degradation, domination, subordination, or humiliation." However, this argument does not cover two other types of pornography: **1)** non-violent non-degrading material (often called "erotica") and **2)** violent and degrading material that does not involve women or in which women are not the subject of degradation/violence but the perpetrators (Gay porn involving men or where women dominate the men). We will **not** address these issues here (though you should give them some thought); for now, we shall examine the above argument that pornography is harmful to women. This argument does two things.

1. It provides three claims of how pornography causes a secondary harm. They are secondary harms because it is not the viewing that causes the harm, but the viewing which will enable or lead to a future harmful action.
2. It limits the defense of pornography in terms of privacy and free speech. It attempts to accomplish the second part by claiming pornography is libel (which in all definitions is not free speech), and since pornography is an industry carried out in public, it cannot be defended as purely private.

Thought Question

Is pornography a sufficient harm to justify restricting it?

After answering the above question ponder the following two questions.

Q: Have feminist authors, like MacKinnon, left themselves vulnerable by describing pornography strictly in terms of violence against women? (i.e. excluding gay male porn or pornography in which men are treated as she describes in her definition of porn?)

Q: What role, if any, do the "liberty rights" of women to control their own lives by working in the pornography industry play in your answer?

Are these Secondary Harms really Harms? (Summary of the counter-argument)

The argument in defense of pornography only seeks to defend the morality of pornography in which all participants are (a) adults, (b) consenting, (c) non-deceived, and (d) rational.

Q: Is the fact that pornography is often demeaning to a group a reason to call it a harm?

Think of the Old Testament. A good many groups of people in the Middle East were portrayed as bad people. The Philistines were depicted as a bunch of yahoos who beat up on people until David defeated their giant. All kinds of literature demeans or degrades one group or other, yet we do not restrict it-only porn. Is this restriction really due to the **demeaning** portrayal or is it because "sexual content is **offensive** to many?" Many old films portray different groups very negatively, yet we do not ban them. *Birth of a Nation*, for example, portrays the Ku Klux Klan as heroically rescuing white women from the ravages of black men, but there was no movement to ban the film because it was demeaning.

Q: Does the fact that women are falsely depicted in porn, as desiring only to please men, make it a harm?

Again the fact that something is false does not justify us in preventing others from saying it. Granted, you can libel an individual, but do we really want to apply libel laws to any group or belief incorrectly portrayed? Imagine all the lawsuits against "stereotypes" on TV. If we have a TV show in which all southern men are depicted as driving big trucks with gun racks while wearing overalls and having a mouth full of chew, leaving them barely able to talk in a thick drawl, have we "**harmed**" southern men? Or is the real issue **offense**?

Q: Does pornography encourage sex crimes?

Does pornography cause more crimes than alcohol? Is pornography more of a crime causer than TV violence? There is little evidence that porn causes crimes. How many millions of people watch porn and never rape anyone? Even if evidence shows that pornography leads to some crimes, that evidence would have to show a significantly higher rate of crime than violent TV programs, movies, video games or drinking. If there is a correlation between pornography and sex crimes, we must remember that a correlation is not a cause. For example, there is a correlation between the number of doctors in a city and the amount of alcohol consumed. This is not a cause-and-effect relationship, though, because the cause of both factors is the size of the population. So too, if there is a correlation between the amount of pornography and the amount of sex crimes, this does not show a cause; the cause may be something else entirely.

The argument in defense of pornography attempts to break down the arguments against pornography into one of two things:

- **First**, the objection to porn is really about offense, which is irrelevant to the harm principle (but may trigger Feinberg's offense principle as we will see below).
- **Second**, if it is not offense, then it is paternalism. (You shouldn't see porn because it is bad for you.)

In neither case is it an issue of harm, leaving libertarians and supporters of the harm principle no cause to criminalize pornography.

If the defenders of pornography succeed in doing this, then they can employ the harm principle as a moral defense of pornography. Of course, this defense only works if both paternalism and Feinberg's offense principle are rejected.

There may also be a positive case offered for allowing pornography. For instance, some have argued that to restrict pornography on the grounds of protecting women is itself a harm to women. Many women freely take part in the pornography industry. One of the main goals of feminism is equality with men. To restrict pornography on the grounds of "protecting women" is to say that a woman's consent to a contract is invalid. This places women in an unequal status with men, a status in which women need protection as they cannot protect themselves. No one has argued that we need to restrict men from contracting to work in the porn industry to prevent their exploitation; why then do we think the women need protection from themselves? The argument can be made that to restrict pornography is a harm to women and a violation of women's liberty by invalidating the consent of women to engage in production, distribution, and consumption

of pornography.

In addition, even if we are not persuaded by the defense of pornography, there is a practical argument against any attempt to prohibit pornography. Prohibition of pornography depends upon our accepting that:

1. Exposure to pornography leads to harms against women.
2. That a prohibition against pornography would significantly reduce these harms.
3. Government censorship would effectively prohibit pornography.

Can we prove each step? Even if we accept (1), is it the case that (2) and (3) can be practically accomplished? Or will this only create an unregulated black market which causes all the harms of (1) and adds additional harms due to the nature of black markets?

Part 4: Cases and Arguments

American Booksellers Association v. Hudnut (1985)

WEBLINK: [Click here](#) to read *American Booksellers Association v. Hudnut*.

This case involved an Indianapolis ordinance which was motivated by the belief that pornography served to, and promoted, discrimination against women. The ordinance was based in large part on the arguments offered by Katherine MacKinnon. The ordinance defined pornography as "the graphic sexually explicit subordination of women," whether in pictures or in words, that also includes one or more of the following:

1. Women are presented as sexual objects who enjoy pain or humiliation; or
2. Women are presented as sexual objects who experience sexual pleasure in being raped; or
3. Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
4. Women are presented as being penetrated by objects or animals; or
5. Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or
6. Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.

Defenders of this ordinance argued that the ordinance focuses on pornography's role in increasing discrimination in the workplace, sexism in daily life, and violence against women. However, the court ruled that this ordinance is a content limitation on speech, as such the state cannot rule one view right (women's equality is violated by porn) and silence the opposition (violent porn).

How would this ordinance impact classic literature or film? The court ruled that this was a restriction upon speech and not upon the conduct of porn production. This may be justified if the case was made that the state has a compelling interest in reducing discrimination, but evidence of this was not established.

Thought Question: Criminalizing harmful media?

What would it mean if we could criminalize speech, film, books, etc. if we could show that they did in fact cause harm in society? What sorts of things might fall under this category? Would this restriction pass the "content vs. method" test? Should we adopt such a view?

The following is a synopsis of two articles by Joel Feinberg concerning pornography and offense.

Feinberg: Pornography, Feminism, and Liberalism

Traditional opponents of porn were sexual conservatives who morally objected to the pursuit of sexual pleasure for its own sake. They argued that pornography corrupted character (promoted vice, not virtue). Now liberal feminists argue that pornography is a harm to women mainly for its effect upon the behaviors and attitudes of men. This objection in itself yields the unstated conclusion that pornography is not the offender, but that a **specific element** of pornography is. This conclusion is often evident when liberal feminists make a distinction between erotica (sexual material that is not thought to harm women-the married couple having sex on camera) and "pornography" (sexual material that is harmful to women as depicted in the Indiana law).

Even "pornography" as feminists define it Feinberg finds is not about hostility towards women at all. The nature of **fantasy** is about over-glorifying the person doing the fantasizing. In romance novels, this means lovesick men worshipping the ground that the woman walks upon. In pornography this means women worshipping a man and his sexual talents, wanting to do anything to please him. We do not find the former degrading to men, nor should we find the second degrading to women. There exists both violent pornography, violent/harmful sexual acts or discriminations towards women, and the "cult of macho" male attitude that liberal feminists are against. Now, what is the relationship between these three things?

According to liberal feminists, it looks like this:

Violent pornography gives rise to ➡ the **cult of macho** which in turn causes ➡ violent/harmful sexual acts or discriminations against women

This picture is inadequate as there is no proven causation between the existence of violent pornography and sexual violence or discrimination against women. Also, men who commit these acts or have the "cult of macho" attitude did not get it from violent or degrading pornography. Those who possess the cult of macho tend to consume violent pornography and tend to commit violence/discriminations against women. Feinberg thus paints the relationship as follows:

The cult of macho ➡ creates a market for violent porn.

The cult of macho ➡ leads to violence or discrimination against women.

Notice, in this account, the existence of violent porn is not linked to violence or discrimination against women. Instead, both are caused by the cult of macho. Therefore, banning violent porn seems ineffectual. Feinberg's picture is one in which the cult of macho is a predisposition or preexisting event rather than one that is caused by porn. In other words, watching porn can't make you like violent porn and thereby commit violence or discrimination against women. Rather, those with the cult of macho will like violent porn and will tend to commit violence or discrimination against women. The real culprit on Feinberg's account is the cult of macho, which is cultural in nature. To combat it, education is necessary. Criminalizing pornography will not accomplish the goal the liberal feminist desires. Even if some pornography does lead some people to act improperly, this is not a justification to criminalize it any more than, as Mill mentioned, a drunk who gets violent justifies criminalizing alcohol. Most viewers of porn, even violent

porn, do not cause harm to others, and therefore no criminal justification is warranted.

Further, in traditional law, if A gives B information knowing and intending B to use that information in a crime against C, then A's actions were criminal. For instance, if A gives B information on how to make a bomb, knowing and intending that B use the bomb to kill C, then A's actions were part of the criminal conspiracy. However, if A gave information to B without **knowing or intending** B to use it in a crime, then we do not hold A's actions criminal. For instance, if A publishes a book on how to make bombs (say, to demolish old buildings or clear land for construction) and B uses that book to blow up C, we do not hold A's actions criminal. The same is true for pornography. Even if some people commit copycat crimes after watching violent pornography, this would not be enough to say the manufacturers of the pornography's actions were criminal as they had neither knowledge nor intent of the crime.

In order to conclude that pornography incites harm, Feinberg mentions three conditions which must be the case:

1. There must be strong evidence of a very likely and serious harm. [I would add-"that would not have occurred otherwise."]
2. The harms must be clearly and directly linked with the expression.
3. It must be unlikely that further speech or expression can be used effectively to combat the harm.

Not even violent pornography meets all three of these criteria. Therefore, it should not be criminalized due to inciting harm.

In the first article Feinberg argues against the position of MacKinnon and others that pornography incites a harm to women. In a second article Feinberg examines the possibility of restricting some pornography for a different reason. That reason is the profound offense some pornography causes. [*Note: some of this material was covered in module 3 but will be re-presented here*]

Joel Feinberg: The Offense Principle

Feinberg is generally in favor of Mill's harm principle and its protection of liberty. However, Feinberg thinks that we need an additional principle to regulate certain offensive actions. What is an offensive action? Feinberg describes offense as follows:

Passing annoyance, disappointment, disgust, embarrassment, and various other disliked conditions such as fear, anxiety, and minor ("harmless") aches and pains, are not in themselves necessarily harmful. Consequently, no matter how the harm principle is mediated, it will not certify as legitimate those interferences with the liberty of some citizen that are made for the sole purpose of preventing such unpleasant states in others. For convenience I will use the word "offense" to cover the whole miscellany of universally disliked

mental states. . .

Feinberg asks us to consider if Mill's harm principle was too limiting on society. Specifically, is society justified in restricting some behaviors that cause serious offense? Feinberg phrases such an **offense principle** as follows:

It is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offense (as opposed to injury or harm) to persons other than the actor, and that it is probably a necessary means to that end.

In other words, it is within society's legitimate power to regulate offensive conduct. Feinberg sets out **three conditions** for determining when offense has occurred.

1. I suffer a disliked state, and
2. I attribute that state to the wrongful conduct of another, and
3. I resent the other person for his role in causing me to be in this state.

Feinberg is not suggesting that all offensive acts must become matters of criminal law. Instead, he is suggesting that, under certain conditions, offensive acts can be so offensive as to morally justify a legal response such as a "cease and desist" order, license withdrawal, and injunction and fines against perpetrators of such behaviors. For instance, in module 3 it was discussed how Feinberg's offense principle would likely criminalize some, but not all, acts of flag burning. However, even when offensive acts become matters of criminal law, these actions do not seem likely to become matters of great punishment compared to actual harms. (Feinberg: don't think of "felony flag burning" as a likely charge; instead a misdemeanor seems in order.)

Another One Rides the Bus

Feinberg presents several cases that involve offensive actions occurring on a public bus. I will offer variations of a handful of these cases to test your intuitions regarding the acceptability of offensive conduct.

A man who has not bathed in over a month sits down next to you on a crowded bus. The stench is barely tolerable, and there is nowhere for you to go. Furthermore, the man seems to take a fancy to you such that he tries to sit next to you each day when possible.

A man rides the bus and sits in a seat across from you. During the ride he slips one hand down his pants and proceeds to masturbate while occasionally glancing and smiling at you. (Note: he remains completely clothed such that there is no "public exposure.")

A group of foreign passengers enters the bus and begins to eat their lunch on the trip. Lunch consists of live insects, fish heads, and the pickled sex organs of lamb, all smothered in sauce. Afterwards they burp, fart, and then use an American flag to wipe their hands and mouths.

Each case is offensive; the question is, are any of these actions offensive to the point that we are justified in restricting the liberty of those who are doing them? It seems that Mill is forced to accept these actions as they do not harm others, only offend them. So, what

sorts of offense are required for Feinberg's offense principle to justify a limitation on liberty? Feinberg says that we should take into account **two sets of factors** and balance them out.

The first set of standards is related to **the reasonable avoidability of the offense** :

1. The intensity and duration of the offense as well as the anticipation of this reaction. (Do you know in advance that your action will cause offense of high intensity and long duration?)
2. The ability of unwilling witnesses to avoid the display. (Did they sit and watch a full hour of an offensive TV show only to later claim offense or were they stuck in a room with the action without a way to avoid or withdraw from it?)
3. Did the witnesses "assume the risk" of being offended? (Did you pay to enter a freak-show, for example?)

The above should be counter-balanced against **the reasonableness of the offender's actions** :

1. The personal importance and social value of the action.
2. The availability of alternative times and places to perform the action.
3. The motive of the action. (Was this intended to offend?)

Feinberg claims that in balancing these criteria we should also consider the **character of the neighborhood** . For instance, they might establish zones for certain acts where people would not be surprised to find them. For instance, we might allow more actions in the "red light" district than in a residential neighborhood consisting mostly of conservative elderly churchgoers.

Applying the Offense Principle to Violent Pornography

Case Study: The Racist Movie Theater

Imagine David Duke opens a movie house which shows films portraying stereotypical blacks (minstrel-style) unable to do anything until set straight by righteous white folk. Further, imagine that the films glorify white violence against blacks, including "taunted and hounded, tarred and feathered, tortured and castrated, and in the climactic scenes hung up on gallows to the general rejoicing. . ." Now, like violent pornography, this movie house does not meet the conditions Feinberg requires for criminally inciting harm, yet do we imagine African Americans accepting the view that such a theatre should be tolerated? Feinberg thinks not. Feinberg thinks this is an issue of such **profound offense** (like some violent porn), and likely to promote harms, that criminalization is warranted.

However, even Feinberg's offense principle will not allow complete criminalization of violent offensive porn. The private viewing of these sorts of materials shields them from the offense principle as it cannot be an offense if others do not see it. However, the offense principle would justify criminalization of public displays of and public advertisements for such films. This would mean that David Duke's movie theater could exist (showing films inside but not in view of the public) but could not advertise the

content of the films.

Though this may not be enough for some, Feinberg says any further restriction would violate the liberties of those who enjoy such films. In addition, Feinberg doubts that many if any such businesses could exist, given the public protests, boycotts, and pressures that would be placed upon them. If the violent porn or racist movie theater is put out of business because continued boycotts drive away customers, then so be it. So long as the state doesn't eliminate them through criminalization.

Thought Question:

How would the offense principle impact Internet pornography?

One can hardly check their email account or surf the Internet without being exposed to advertisements for pornography websites. If such websites contain pornography offensive enough to trigger Feinberg's offense principle, would such sites be allowed to advertise?

Part 5: Discussion Question

The following real case is adapted from the PBS "American Porn" website. (See <http://www.pbs.org/wgbh/pages/frontline/shows/porn/> for more information on this and other porn related issues).

In a New Orleans suburb, Jefferson Parish and "Major Video" stores were accused of violating the state's obscenity law for renting three sexually explicit tapes:

- "Dale's House of Anal"
- "Back Door Club"
- "Indecent Obsessions"

The trial took place in June 2001. If found guilty, Major Video would face a \$2,500 fine per store and would be banned from stocking these three tapes. Adult movies made up 10 percent of Major Video's inventory and 25 percent of its monthly movie rentals.

What the Jurors Saw

It was a six-person jury: four men and two women. Five of the jurors said they previously had seen at least one adult film. The jurors spent five hours watching the three videos, which by all accounts leave nothing to the imagination. For example, in "Dale's House of Anal" (roughly 120 minutes long), nearly 90 minutes of it depict sexual acts. There are five "vignettes": one scene involving one man and one woman; three scenes involving two men and one woman; and one scene involving one man and two women. Each of the five vignettes has:

- Extreme close-ups of male-female vaginal and anal penetration, some lasting several minutes in duration.
- A "money shot," mostly involving a man (or men) ejaculating into the woman's mouth.
- Close-ups of a woman performing oral sex on a man.

In addition, "Dale's House of Anal" shows:

- Oral sex between two women.
- Men performing oral sex on women.
- "Double penetration": In two of the vignettes, the women have simultaneous anal and vaginal sex. In one of those instances, a woman is performing anal sex on another woman using a strap-on penis while a man penetrates the woman vaginally.
- Multiple uses of "dildos," including one instance of double-penetration,

where a man penetrates a woman vaginally while another penetrates anally with a dildo.

Imagine you were a juror having seen the evidence described above and knowing the law as derived from *Miller v. California* in which the court held criminal obscenity/pornography required:

*An average person using **contemporary community standards** would find it to appeal to an "arousing and unwholesome" interest in sex. And it must depict or describe sexual conduct in an offensive way. And it must lack serious literary, artistic, political, or scientific value.*

Discussion Question

Post your verdict, then go to the Discussion Board. Be sure to answer the following questions:

1. Why did you answer as you did?
2. If this video had been downloaded from the Internet rather than rented in a store, would your verdict change?
3. Is there a community standard on the Internet ? If so, what is it?

Assignments

Activities so far

As you proceeded through Module 4, you should have participated in the following online activities: discussion forum, poll questions, and readings.

If you have not, please make sure you go back and complete these before proceeding. Further activities for this unit are listed below.

- Poll Question: Are prostitutes motivated by vice?
- Poll Question: Should prostitution be a crime?
- WEBLINK READING : *Miller v. California*
- Poll Question: Do you agree with the Supreme Court ruling in *Miller v. California* ?
- Poll Question: Do you think pornography can have serious literary, artistic, political, or scientific value?
- WEBLINK READING : " Cambria List"
- Poll Question: Is the "Miller test" a good measure of when pornography constitutes a crime?
- Poll Question: Should videos like the one produced by Lizzy Borden's company Extreme Associates be criminalized?
- Poll Question: Is how pornography harms women the best reason to restrict pornography?
- Is restricting pornography a wrongful restriction of women's freedom?
- Poll Question: Is pornography a secondary harm to women?
- WEBLINK READING : *American Booksellers Association v. Hudnut*
- Poll Question: Did the court reach the right decision in *American Booksellers v. Hudnut* ?
- Poll Question: Do you think some pornography should be criminalized as inciting harm?
- Poll Question: Should we adopt Feinberg's offense principle?
- Poll Question: Is some pornography so offensive that it should be criminalized?
- Poll Question: Is "Dale's House of Anal" criminal obscenity/pornography under the Miller test?

Discussion Exercise and Poll

The discussion assignment appears in Part 5. Be sure to read the case, post your verdict in the Poll Question, and answer the following questions on the discussion board.

1. Why did you answer as you did?
2. If this video had been downloaded from the Internet rather than rented in a store would your verdict change?
3. Is there a community standard on the Internet? If so, what is it?

Quizzes

Just a reminder, There are four quizzes in the course. Each quiz is worth 10 points. These quizzes are designed to ensure that you are keeping up with the reading assignments. The

quizzes occur at the end of every even numbered module (2, 4, 6 and 8). Quiz questions are drawn from a random test bank, so it is unlikely any two students will encounter the same set of questions. You are free to use any materials you wish to aid you during the quiz however, quizzes are timed so you have only 20 minutes to complete and submit the quizzes. Quizzes are available 3 days prior to the due date giving you a total of 4 days in which to take the quiz.

The second quiz appears at the end of this module.