

## *Should Pornography be Protected by the Constitution of the United States?*

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### ABSTRACT

When pornography is discussed from a Constitutional perspective, conversations often take on a First Amendment lens. The issue is framed as an issue of speech, and since speech is free, pornography cannot be regulated. The simplification of discourse surrounding pornography is a disservice to a society that has been deeply impacted by porn culture. When protected by the guise of free speech, pornography is continually allowed to harm large groups of people, specifically women and people of color. The violence and degradation within pornography continue to increase, and this has begun to create adverse effects on consumers as well. The Constitution should not protect pornography because it violates several amendments, specifically the First Amendment and the Fourteenth Amendment. In this paper, I will show how the production and consumption of pornography create and reinforce gender inequality and discrimination against women by exploring a historical overview of pornography and the law, arguments for the protection of pornography under the Constitution, definitions and language surrounding the issue, the Speech Act Theory, and negative outcomes of pornography production and consumption.

### INTRODUCTION

Pornography has historically been regarded as a protected form of speech by the Supreme Court. These cases begin in 1952 with *Joseph Burstyn, Inc. v. Wilson*, which decided film was protected under the First Amendment. Five years later, *Roth v. United States* decided obscenity is not protected speech. Obscenity is “material whose ‘dominant theme taken as a whole appeal to the prurient interest’ of the ‘average person, applying contemporary community standards.’”<sup>1</sup>

*Jacobellis v. Ohio* decided that hardcore pornography is an obscenity that should not be protected but did not define what “hardcore” meant. In 1973, the Court provided a more narrow definition of what obscenity was. *Miller v. California* defined obscenity as “‘utterly without socially redeeming value’ to that which lacks ‘serious literary, artistic, political, or scientific value.’”<sup>2</sup> And finally, in 1990, we see one of the only legal limitations of pornography decided by *Osborne v. Ohio*. This case decided that states had the right to limit the production and consumption of child pornography.

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<sup>1</sup> “An Overview of Past Pornography Rulings by the Supreme Court.” PBS. Public Broadcasting Service, n.d.

<sup>2</sup> “An Overview of Past Pornography Rulings by the Supreme Court. *Public Broadcasting Service*. 2014

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The only case related to pornography and the Fourteenth Amendment is *Stanley v. Georgia* (1969). Stanley's home was being searched by officers under the authority of a warrant when they found three reels of film that they deemed to be obscene. He was later found guilty of possessing obscene materials in a Georgia court. In *Stanley v Georgia* (1969), the Court ruled that making the private possession of obscene materials illegal violates both the First and Fourteenth Amendments.<sup>3</sup> Because the framework of this case does not comment on the discrimination women are subjected to as a result of pornography, I would not even regard this as a Fourteenth Amendment case, but rather an issue of privacy and free speech.

The Civil Rights Act of 1964 is an extension of the Fourteenth Amendment that was created to prevent discrimination. "Discrimination based on 'gender, race, color, religion, or national origin' in public establishments that have a connection to interstate commerce or are supported by the state is prohibited."<sup>4</sup>

The history of these cases is important because they establish the legal precedent that protects pornography under the First Amendment as well as the Fourteenth Amendment. Although sexually explicit content has existed as long as humans have, the writers of the Constitution did not anticipate the ubiquity of modern-day pornography nor the violence depicted within it. The Courts must decide the legality, and as it is now, they have decided that pornography should be protected under free speech rights. The issue of pornography as a free speech issue has not come before the Court in a few decades which is concerning because it fails to account for the accessibility that the Internet has provided as well as the increased violence found in mainstream pornography. Privacy is cited as a necessary function of a free society; however, private possession of pornography has consequences within the public sphere.

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<sup>3</sup> Ibid

<sup>4</sup> Anonymous. "Civil Rights Act of 1964." Legal Information Institute. Legal Information Institute, December 4, 2014. [http://www.law.cornell.edu/wex/civil\\_rights\\_act\\_of\\_1964](http://www.law.cornell.edu/wex/civil_rights_act_of_1964). As later sections will discuss, pornography violates this piece of legislation as a form of gender based discrimination that is being ignored in order to avoid falling down a fictitious slippery slope.

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## ARGUMENTS FOR PROTECTION

Those who argue for the protection of all pornography under the guise of free speech often ignore the consequences private pornography production and consumption has in the public sphere. Conversations about the First Amendment usually lead to a discussion about censorship. Dworkin writes in *Against the Male Flood: Censorship, Pornography, and Equality*<sup>5</sup> about the way people feel threatened by the thought of censorship. It seems like an attack on the rights they feel to be absolute. The slippery slope of censorship is a common argument in ethics, and some feel that even extreme speech should not be regulated in fear of *1984* like consequences.

Robert Destro, professor of law at the Catholic University of America, believes that limiting the First Amendment can be harmful “The very idea that we start to say to people your thoughts are illegitimate, where does that stop?” “It’s very easy to say we should protect other people’s sensibilities. But it’s very easy for governments to turn that into a tool of political or religious oppression.”<sup>6</sup> Destro’s argument commits a slippery slope fallacy, as most privacy arguments do. A slippery slope fallacy occurs when a starting claim is rejected after a series of gradual assumption one arrives at an undesirable outcome, and therefore the starting claim should be rejected. To say that restricting violence within pornography would lead to the government restricting all forms of speech is a stretch that requires several incremental claims before arriving at that conclusion. There is not enough causal evidence that leads to such a conclusion, and therefore the slippery slope fallacy is present in this argument.

An issue with any argument about the topic of pornography is language. What is pornography? The legal system has struggled to create a clear definition. For this paper, I want to make a clear definition of what violent pornography is. I do not want to claim that all pornography should be illegal for two main reasons. The first is that absolutes are almost always wrong. I do believe that restricting all pornography may be an infringement on

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<sup>5</sup> Dworkin, Andrea. *Against the Male Flood: Censorship, Pornography and Equality*. Cambridge, MA, 1985.

<sup>6</sup> “Americans Say Curbing Anti-Muslim Speech Would Be 'Slippery Slope'.” Voice of America, September 26, 2012. <https://www.voanews.com/usa/americans-say-curbing-anti-muslim-speech-would-be-slippery-slope>.

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people's free speech rights because there can be some pornography that contributes positively to society. This leads to the second reason for avoiding a claim about all pornography, which is the fear of restricting the positive use of pornography. Mainstream pornography creates a negative, misogynistic narrative. But this is not its only potential.

I believe feminist pornography is possible and can benefit society in several ways through sexual education as well as sexual empowerment. Pornography can also be used as a political tool to bring light to and reclaim social issues such as issues of race and disability. However, while I recognize the benefits that ethical feminist pornography can have, I do not think that feminist pornography will ever have a place in mainstream pornography until the issue of violent pornography is addressed and we reject protecting it with freedom of speech.

For the sake of my argument, violent pornography will be defined using the guidelines set forth by Andrea Dworkin and Catharine MacKinnon in the Minneapolis Anti-Pornography Ordinance,<sup>7</sup>

1. "Pornography" means the graphic sexually explicit subordination of women through pictures and/or words that also includes one or more of the following:
  - a. women are presented dehumanized as sexual objects, things or commodities; or
  - b. women are presented as sexual objects who enjoy humiliation or pain; or
  - c. women are presented as sexual objects experiencing sexual pleasure in rape, incest, or other sexual assault; or
  - d. women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or
  - e. women are presented in postures or positions of sexual submission, servility, or display; or
  - f. women's body parts—including but not limited to vaginas, breasts, or buttocks—are exhibited such that women are reduced to those parts; or
  - g. women are presented being penetrated by objects or animals; or

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<sup>7</sup> Dworkin. *Against the Male Flood*. 1985

- h. women are presented in scenarios of degradation, humiliation, injury, torture, shown as filthy or inferior, bleeding, bruised or hurt in a context that makes these conditions sexual.
2. The use of men, children, or transsexuals in place of women in (a)–(h) of this definition is also pornography for purposes of this law.
3. “Person” shall include child or transsexual.

Pornography is defined specifically and strategically in this legal argument. Dworkin and MacKinnon do not specify that their definition only pertains to violent pornography. However, the definition only discusses pornography that harms and degrades women. When using this definition, it is difficult to argue that free speech rights protect acts that perpetuate violence and subordination based on gender because the specificity of the definition negates any slippery slope claims.

### **SPEECH ACT THEORY**

The issue of the legality of the First Amendment is being framed in the wrong way. Instead of solely questioning the right to pornography through free speech, one needs to question the way that pornography is an act, rather than just speech. J.L. Austin established the contemporary model of the Speech Act Theory in 1962. The Speech Act Theory recognizes the power of speech to cause action and speech acts can be divided into three main categories: locutionary, illocutionary, and perlocutionary. A locutionary act is a performance of the utterance, and an illocutionary act is a response to the utterance. For example, if someone asks for a knife that is locutionary and the illocutionary act is handing the person a knife. Perlocutionary acts are the effect from locutionary and illocutionary acts, such as persuasion, scaring, teaching, inspiring, or making someone do something.<sup>8</sup> The Speech Act Theory treats speech as a tool for a wide variety of actions.

Anti-pornography feminists have used the Speech Act Theory to negate the protection of pornography in different ways.

Easterbrook recognizes the way that violence in pornography encourages violence against women through perlocutionary acts. At the same time, MacKinnon and Longino focus

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<sup>8</sup> Austin, John L., and James O. Urmson. *How to Do Things with Words: the William James Lectures Delivered At*. London: Oxford Univ. Pr., 1976.

on the illocutionary side of things and on the way that the acts within pornography subordinate and degrade the women who are depicted.<sup>9</sup> Even if we recognize pornography as speech, it does not necessarily mean that it should be protected. The First Amendment is not an absolute right. The Speech Act Theory, along with data, prove the ways that the speech of pornography harms women, show that the First Amendment should not continue to protect pornography.

### **DISCRIMINATION WITHIN PORNOGRAPHY**

MacKinnon uses the basis of the Speech Act Theory to describe how pornography functions as more than speech in a way that is discriminatory and should not be protected by the Constitution. She states, “What pornography does, it does in the real world, not only in the mind.”<sup>10</sup> Pornography is often referred to as speech in the sense that it is an idea and not an act lined with potential consequences, which ultimately becomes a defense of it. People defend pornography by claiming it is fantasy and not meant to be taken seriously. Pornography is “only words” to its defenders. However, pornography is different from other genres of fantasy in the fact that the women who act in it are subjected to more than just the idea of gang rape, anal penetration, gagging, slaps, and other forms of violence. They must actually experience these acts in real-time in order to produce the pornography making it more than just an idea but a reality that is harmful to not only the women in pornography but those who experience the violence inspired by porn culture.

MacKinnon argues that pornography is neither speech, nor is it free. Pornography is hate speech because of the way it subordinates, mistreats, and harms women, and the guise of free speech should not protect it. Pornography depicts and promotes structures of power, specifically with race and gender, and continue to create acts that are harmful to women.

In her book, *Only Words*, MacKinnon makes the argument that pornography violates the Fourteenth Amendment because of its discriminatory nature.<sup>11</sup> She gives examples that are similar to pornography in the degradation and segregation they necessitate that have been named illegal such as bribery statutes, sexual harassment, and signs that said: “Whites Only.” All of these could be seen as “just speech”, but they have been labeled as unconstitutional

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<sup>9</sup> Langton, Rae. “Speech Acts and Unspeakable Acts.” *Sexual Solipsism*, 2009, 25–64.  
<https://doi.org/10.1093/acprof:oso/9780199247066.003.0002>.

<sup>10</sup> MacKinnon, Catharine A. *Only Words*. Cambridge, MA: Harvard University Press, 2002

<sup>11</sup> MacKinnon, Catharine A. *Only Words*. Cambridge, MA: Harvard University Press, 2002

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because of the connotation they all hold, so it would logically follow that pornography should also fall within the same category of unprotected speech.<sup>12</sup> As I will discuss later, “willing participants” in pornography face large consequences for their “choice.” Even those who are not directly part of the industry are affected in largely negative ways as a result of the widespread consumption of mainstream pornography.

### **HARMFUL NATURE OF PORNOGRAPHY**

#### ***Inside Industry***

A content analysis of top-selling pornography was conducted in 2005. At the time, video sales and rentals made up 34% of the consumption of pornography while the Internet only made up 20% of consumption.<sup>13</sup> Consumption rates and violence within pornography has increased since the analysis was conducted.

“Today’s pornography is described by researchers as far more shocking and extreme than ten or twenty years ago.”<sup>14</sup> While the research from the Adult Video Network is slightly outdated, it still provides insight into the harms pornography has for women who are involved in the industry. The analysis first reviewed the 250 top-selling videos as well as the 250 most rented videos and then from there randomly selected 30 videos from each category which led to the final random sample of 50 titles or 304 scenes. Codes were created to collect various pieces of information from each scene, including physical and verbal aggression. From the entire scenes, 88% of them portrayed a form of physical aggression including but not limited to spanking, open-hand slapping, hair pulling, choking, and bondage. A particularly degrading practice, ass to mouth (also referred to as ATM) appeared in 41% of scenes. If pornography is becoming increasingly violent and these statistics are over ten years old, it is difficult to imagine what the statistics would be if a similar analysis was conducted in 2019. The violence

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<sup>12</sup> Ibid

<sup>13</sup> “State of the U.S. Adult Industry.” *Adult Video Network*, January 2006.

<sup>14</sup> Foubert, John D., Matthew W. Brosi, and R. Sean Bannon. “Pornography Viewing among Fraternity Men: Effects on Bystander Intervention, Rape Myth Acceptance and Behavioral Intent to Commit Sexual Assault.” *Sexual Addiction & Compulsivity* 18, no. 4 (2011): 212–31.

<https://doi.org/10.1080/10720162.2011.625552>.

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is portrayed as normal and moves beyond an idea when the aggressive acts are carried out in real-time.

An anti-pornography organization known as Fight the New Drug, created a reference guide in 2016 to provide statistics about the harmful nature of pornography.<sup>15</sup> One section of the reference guide discusses a correlation between sexual violence and pornography. One study from 2013 analyzed mainstream violent acts within mainstream pornography and found that 94.4% of aggression in pornography is against women.

Another study from 2008 found that men who regularly consume pornography are more likely to commit marital rape. Researchers also found that depicting violence and aggression as consensual blurs the lines of consent within sexual relationships and makes violence against women invisible. The compilation of this data shows that the creation and consumption of violent pornography can contribute to the continuance of the cycle of violence against women.

### ***As a Result of Consumption***

Pornography is ubiquitous, and the culture it creates can be observed as both influenced by and distinct from pornography per se. A prevalent example is the way women are sexualized in the media, specifically within advertising. Porn culture perpetuates rape culture by encouraging violence against women and maintaining myths about their sexuality. Gale Dines, a prominent scholar within pornography studies, highlights this in her book, *Pornland*, by discussing several myths that pornography establishes about women that are related to rape culture such as women always wanting sex, men know best what women want, and women are inherently manipulative sexually.<sup>16</sup> This specific chapter of the book highlights the many ways in which pornography “leaks” into the lives of men outside their viewing time. Dines argues that porn culture exists even for those who do not consume pornography because of the way that advertisements and the media perpetuate the myths supported by pornography.

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<sup>15</sup> Sherwood, Jon. *Harmful Effects of Pornography. Fight the New Drug*. Fight the New Drug, 2016. <https://www.jonsherwood.com/post/harmful-effects-of-pornography-2016-reference-guide>

<sup>16</sup> Dines, Gail. *Pornland: How Porn Has Hijacked Our Sexuality*. Boston, MA: Beacon Press, 2014.

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Pornography normalizes and encourages problematic behavior toward women. Several studies have shown a correlation between pornography consumption and negative behaviors. For instance, “Recent meta-analyses and literature reviews have revealed in both correlational and experimental studies that pornography use, acceptance of aggression, and violence towards women are linked.”<sup>17</sup>

It has not been proven with absolute certainty that pornography is a direct cause of violence against women, but the correlative nature of violence and pornography are important to note. People who consume violent pornography are more likely to perpetuate and support violence against women than those who consume less violent pornography, but even “softcore” pornography users have more instances of harmful behaviors and actions than those who do not consume pornography.<sup>18</sup> As more people consume porn, and it becomes increasingly violent, the degradation of all women becomes a normalized part of life. Degradation of women has become a normalized part of the lives of people at alarmingly young ages recently. A compilation of data presented as a literature review was produced by Routledge Taylor & Francis Group. The goal of the literature review was to analyze recent research and literature regarding the way pornography affects children. The literature review explored the impact of pornography on attitudes and behaviors, sexual behavior, sexual aggression, self-concept and body image, social development, and the brain of adolescents. The conclusion made was, “...youth who consume pornography may develop unrealistic sexual values and beliefs. Among the findings, higher levels of permissive, sexual attitudes, sexual preoccupation, and earlier sexual experimentation have been correlated with more frequent consumption of pornography.”<sup>18</sup>

As I have made clear, the production of pornography has negative consequences for women directly involved in the industry. Not only are the women in the industry directly harmed, but women who are not involved also face severe consequences as a result of consumption of pornography.

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<sup>17</sup> Foubert, et. al. “Pornography Viewing among Fraternity Men.” 2011.

<sup>18</sup> Owens, Eric W., Richard J. Behun, Jill C. Manning, and Rory C. Reid. “The Impact of Internet Pornography on Adolescents: A Review of the Research.” *Sexual Addiction & Compulsivity* 19, no. 1-2 (2012): 99–122. <https://doi.org/10.1080/10720162.2012.660431>

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## CONCLUSION

The First or Fourteenth Amendment should not protect pornography. Historically, the influence that pornography has on society has been ignored under the assumption that it is only speech and therefore, should be protected in order to prevent too much government control over citizens' thoughts. Pornography is more than just speech as Catharine MacKinnon points out. It is actions that have severe consequences for those involved, whether they are producers, consumers, actors, or even someone who has never been in direct contact who experiences the effect of porn culture on society. Pornography can be compared to hate speech when it comes to law. Because of the violence it perpetuates and incites, it should not be protected by the First Amendment. This violence should be understood as gender-based discrimination which is a direct violation of the Fourteenth Amendment. While violent pornography continues to be incorrectly and blindly protected by the First Amendment, the Fourteenth Amendment will continue to be violated, and inequality will be allowed to flourish.

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