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Envisioning a Constitutional Right to Pornography

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ABSTRACT

The creative depiction of sex, sexuality and any associated concepts have since time immemorial been believed to be morally repulsive to the majority society and have been assumed to be morally degrading, so much so that even genuine literary or artistic works on such themes have been subjected to strict censorship citing grounds of public morality and decency. Almost all countries prefer substantial censorship if not outright prohibition on the sale, distribution and display of sexually explicit books, magazines, films or other materials.

This article seeks to approach the efficacy of such restrictions on pornography on three fronts. On the philosophical front, this article advocates for a Utilitarian Approach which stipulates determination of censures after a collective deliberation and an egalitarian decision making on the basis of equal consideration for individual autonomy and public safety. Secondly, this article tries to discern whether it is feasible to derive a constitutional right to pornography from the existing cluster of rights to free speech & expression, right to liberty, right to privacy and to bodily autonomy. Finally, the shortcomings of the currently applicable test for obscenity shall be evaluated, and an alternative test which unambiguously segregates obscenity from erotica on the basis of the harm posed by each form of pornography shall be proposed to replace the current standards of obscenity.

Keywords: *Right to Pornography, Obscenity Standards, Constitutional Law, Censorship, Morality.*

I. INTRODUCTION

The basis for all age-old controversies surrounding constitutional rights relates to determining the contours within which a person may constitutionally exercise his legal and constitutional rights without stricture. However, there are certain activities which are outrightly prohibited without even considering the myriad of rights that might be existing in favor of someone. Pornography, in its different levels, presents such a complication with the distribution or sale

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of pornographic materials penalised as an offence under most jurisdictions.

The prohibition has been justified by citing that sexually explicit works have been traditionally abhorred by large sections of the public and by questioning its implications on public morality and decency. However, in light of the evolving standards of decency and morality, it is imperative that a person's 'right to pornography' be urgently and comprehensively analysed in light of the rights to free speech & expression, to liberty, to bodily autonomy and privacy as guaranteed by the Constitution.

In pursuance of this objective, I shall decode the etymology of the term 'pornography' in the following Part of this article in an attempt to discern the reason behind the stigma associated with the term. Part III of this article has been devoted towards comprehensively explaining the philosophical arguments surrounding pornography.

Part IV discusses the constitutional provisions relating to freedom of speech and expression, liberty and obscenity in a bid to determine the provisions favouring a constitutional right to pornography. Part V of this article has been dedicated towards tracing the development of the existing standards for obscenity as enunciated by courts of law.

Finally, in Part VI of this article I shall endeavour to formulate a standard or test for obscenity which is, in light of the present social and political considerations, most effective at striking a balance between the guaranteed fundamental rights and social welfare. The right step towards reaching the above-mentioned objective is to find the right balance between public upset and individual liberty.

II. DECODING THE ETYMOLOGY AND THE INHERENT STIGMA

A fruitful discussion of the philosophical ideas surrounding the debate on the feasibility of recognizing a right to pornography primarily entails defining the term 'pornography' in a bid to develop a preliminary understanding of the social value that has come to be attached to the term.

The term pornography was derived from the Greek word "*pornographos*,"[2] which meant 'writing about prostitutes.'[3] The term subsequently came to be associated largely with erotica, and proliferated among the masses after the French Revolution, to which the government responded with censorship.[4] Thus the term which originally connoted a non-offensive depiction

[2] Coined from the words *'porne'* (which means prostitute) and *'graphein'* (which means to write or to record).
[3] Nicholas Wolfson, Eroticism, Obscenity, Pornography and Free Speech, 60 BROOK. L. REV. 1037, 1038-1039 (1994).
[4] *Id.* at 1038.

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of writing about prostitutes came to categorize 'objectionable or obscene works'.[5] Between the 16th and 19th century, pornography was largely associated with political change and revolution and was used frequently as a weapon against the aristocracy, thereby explaining the reason for its outright prohibition during that era.[6] Later it was associated with books such as 'Fanny Hill (Memoirs of a Woman of Pleasure)' and 'Lady Chatterley's Lover', or movies such as the 'Kamasutra' and the widely acclaimed 'Deep Throat'. An analysis of the etymology of the term in light of the contemporary social value attached to it, reveals that the term 'pornography' has always been impetuously attributed a salacious and lecherous interpretation, purely based on subjective considerations. In fact, the controversy surrounding its definition has been accurately described by defining pornography 'to mean in practice any discussion or depiction of sex to which the person using the word objects'.[7]

Add to this, the broad and ambiguous contours that law has prescribed for 'pornography', and one may reasonably infer the predominance accorded to the purported principles of morality over individual liberty and autonomy. For instance, Section 292 of the Indian Penal Code, 1860 (IPC) which restricts pornography in India, is so loosely worded so as to prohibit as obscene, any work which is deemed lascivious, or appeals to the prurient interest or when taken as a whole tends to corrupt or deprave a person.[8] Similarly, Section 67 of the Information Technology Act, 2000 penalises anyone who publishes or transmits electronically such material.[9] This is particularly distressing since, in India, pornography is *de facto* considered as intending to arouse sexual desire and is thereby seen as an aggravated form of obscenity.[10]

The position of law, as explained, raises a number of questions. Why has the law and the courts justified prohibition of pornography on the grounds of the moral harm likely to be suffered by those who inadvertently come to view it, at the cost of others who willingly view and enjoy pornography? Why has the law assumed that 'pornography', even when viewed privately tends to corrupt the minds of the viewers without actually performing an effects-based statistical analysis in light of the contemporary standards of decency? Why, as observed by the court in *M.F. Husain v. Raj Kumar Pandey*,[11] does India which is often called the land of Kama Sutra consider sexual pleasure and sensuality as taboo? Even if the public morality argument is accepted, why hasn't law permitted the 'sale and distribution of pornography only for private

[5] BETTE TALVACCHIA, TAKING POSITIONS: ON THE EROTIC IN RENAISSANCE CULTURE, 87 (1999).
[6] Wolfson, *supra* note 3, at 1041.
[7] Wolfson, *supra* note 3, at 1055.
[8] Indian Penal Code, 1860, Act No. 45 (India).
[9] Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India).
[10] Ranjit D. Udeshi v. State of Maharashtra, AIR 1965 SC 881 (India), ¶8.
[11] Maqbool Fida Husain v. Raj Kumar Pandey, 2008 Cri LJ 4107 (Del) (India), ¶110.

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use or viewing''?

III. MAKING SENSE OF THE PHILOSOPHICAL DEBATES

The traditional debates on legalization of pornography were between the conservatives who argue for an outright prohibition of pornography citing grounds of moral corruption and the liberals who seek to strike an equitable balance between public morality and the doctrine of individual autonomy.

Religious conservatives, who are traditionalists in sexual matters owing to their strict interpretation of religious scriptures, believe that eros is a powerful and dangerous (perhaps evil) force that must be severely disciplined into an acceptable path, i.e., within the boundaries of marriage.[12] Moral conservatives attack the 'legalization of pornography' on the grounds of (a) *legal moralism*, i.e., the state is justified in prohibiting such activities which offend public morality and decency, and (b) *legal paternalism*, i.e., the state is entitled to restrict individuals, who are mentally and legally competent, from exercising their individual liberty on the rationale of preventing them from harming themselves morally by indulging in the lowest form of pleasure and thereby corrupting their character.[13]

There is a wide misconception that liberals advocate an absolute right to pornography which is an exaggeration. Rather, they accept the legitimacy of censoring certain kinds of pornography – particularly violent and degrading pornography – which is likely to cause sufficiently great harm to others.[14] In fact, their points of disagreement may be condensed to two main arguments, (a) *empirical ambiguity*, i.e., there is a lack of empirical evidence to prove that the production and consumption of all forms of pornography are harmful to others, and (b) *moral vacuity*, i.e., the present method of determining 'sufficiently great harm' to restrict rights of individual liberty and privacy is not appreciative of the standards laid down under the *Millian* 'harm principle'.

A meaningful jurisprudential analysis on the right to pornography entails reviewing the Feminist approach towards pornography. The feminist approach, unlike the conservative approach, introduces a rights-based approach in that it creates a conflict of rights between the rights to freedom of expression of pornographers and that of the women. According to them, pornography commodifies women as sexual objects who derives sexual pleasure in rape, incest or other sexual assault, thereby silencing women (a) by reinforcing a hostile social environment

[12] Wolfson, *supra* note 3, at 1044.
[13] Stanford Encyclopaedia of Philosophy. Pornography and Censorship, May 5, 2004, available at https://plato.stanford.edu/entries/pornography-censorship/#WhaPor, (Last visited 24 Oct 2020)
[14] *Id.*

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which makes women reluctant to report a sexual assault, and (b) by causing their speech to be misunderstood (for example by promoting the view that women who say 'no' in a sexual context do not actually intend to refuse the advances of a man, but is encouraging it).[15]

Since each of the conservative, liberal and feminist approaches base their arguments in terms of the harm associated with viewing and distributing pornography, or its absence thereof, it is only judicious to examine the 'harm theory' as proposed by John Stuart Mill,[16] which sets out when a state may be justified in interfering with the liberty of citizens,

> *"The only principle for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant…… To justify interference, the conduct from which it is desired to deter him, must be calculated to produce evil to someone else. The only part of the conduct of any one for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute."*[17]

Prevention of harm to others is, according to Mill, the only justifiable instance for imposing statutory restrictions on the constitutionally guaranteed rights of citizens. In my opinion, if 'harm' is broadened to include harm of disgust or mental distress to the general public, then it constitutes a very strict standard whereby any conduct which is likely to cause distress or annoyance would be prohibited. Isn't such disgust a reaction fueled by a person's pre-established perceptions in the first place? Furthermore does such disgust, which is subjective from person to person pose sufficient reason for censorship?

Furthermore, even accepting the feminist view that certain violent and degrading forms of pornography would harm the rights of women, it would not justify an absolute prohibition of all forms of pornography (for example soft pornography which does not produce the same degree of harm as violent pornography). Such an absolute prohibition would amount to an endorsement that all forms of 'pornography' pose the same degree of harm to women and would warrant prohibiting even the mildly sensual scenes in movies.

All discussions regarding the implications of Mill's harm principle and its implications on the legality or conversely the extent of prohibitions to be placed on pornography, definitely entails

[15] Catharine A. MacKinnon, Pornography, Civil Rights, and Speech, 20 HARV. C.R.-C.L. L. REV. 1, 63 – 65 (1985). See also Ishani Maitra, The limits of free speech: pornography and the question of coverage, 13 LEG 41 (2007); Jennifer Hornsby & Rae Langton, Free Speech and Illocution, 4 LEG 21 (1998).
[16] JOHN STUART MILL, ON LIBERTY, 15 (1975).
[17] *Id.* at 15.

a perusal of Professor Ronald Dworkin's theory which endorses a rights based approach as opposed to a goal based approach.[18] Dworkin himself explains the concepts of both right based and goal based approaches. Accordingly, a Right-based approach seeks to analyse restrictions on pornography with respect to the individual moral and political rights that might be infringed by reason of such censorship, whereas, a Goal-based approach attaches more importance on the long term outcomes of such restrictions.[19] Dworkin, while endorsing that, pornographic materials which trigger a grave and uncontroversial harm are liable to be censured, placed a further requirement that a law which curtails individual rights must invariably state the special grounds which necessitates such curtailment.[20] Among such proposed rights, Dworkin gave special consideration for the right to privacy and the right to moral independence. Dworkin also explains the place occupied by utilitarian approach in aligning the conflicting interests of Conservatives and liberals and accepts the importance of real utilitarianism, but goes on to warn that such real utilitarianism which accords equal treatment to the preferences of each group in the society, has a high likelihood of disintegrating into a corrupt version of utilitarianism which might supersede the preferences of a particular section in favour of the others'.[21]

So, then it is left to determine an approach which is not only able to strike a balance between individual liberty and social rights but, is also incapable of being corrupted as mentioned above. While devising such an approach, consideration must also be accorded to the market-place principle devised by Mill, according to which a free marketplace of ideas presents society with the best conditions for human flourishing. The basic idea behind the principle has been accepted by the Committee on Obscenity and Film Censorship ("Williams Report")[22] when it reasoned that 'the value of free expression does not lie solely in its consequences, such that it turns out on the whole to be more efficient to have it rather than not'. Thus, the general presumption favors freedom of expression to naturally be indispensable to human development, which is only trumped if an action poses a grave and definite harm to such development itself.

In light of all the above considerations, I propose the **'Utilitarian Approach'** to be the most attractive one, which functions by administering equal consideration for both individual autonomy on one hand and social morality & public safety on the other. Owing to the

[18] Ronald Dworkin, Is There a Right to Pornography, 1 OXFORD J. LEGAL Stud. 177, 177-178 (1981).
[19] *Id.*
[20] *Id.* at 194-195.
[21] *Id.* at 201-202.
[22] Report of the Committee on Obscenity and Film Censorship, Cmnd 7772, HMSO, London, 1979. ¶5.24.

egalitarian cast of the Utilitarian Theory, no one would be entitled to have more of his preferences satisfied than anyone else.[23] Accordingly, the correct solution is to place adequate restrictions on pornography rather than either an absolute freedom of speech or a total prohibition, i.e., a prohibition on 'violent' & 'degrading', while simultaneously permitting to display, view and publish 'non-degrading & non-violent pornography' in a private sphere.[24] This argument in favor of permitting non-degrading and non-violent pornography is supported by the findings of the Attorney General's Commission on Pornography in the U.S, which, on the basis of clinical and experimental research reported that exposure to 'sexually violent material' increases the likelihood of aggression toward women, but, that 'non-degrading and non-violent' material does not bear a causal relationship to rape and other acts of sexual violence.[25] Hence, it is reasonable to assume that such an approach of only prohibiting the 'violent and degrading' forms of pornography forms a neutral ground between the contrasting philosophies mentioned above. Firstly, this approach appeases, if not completely then substantially, the arguments advocated through the feminist approach by ensuring that the violent forms of pornography, which commodifies women and glorifies rape, are not available for viewing, thereby preventing incitement in this regard. Secondly, I'm of the opinion that this approach also entails a truce between both the Conservatives and the liberals with regard to their the preferences and interests, in the sense that by censuring the more violent forms of pornography a negative influence on the conditions of development of general public may be prevented, while at the same time ensuring the protection of liberty as is necessary for free flow of ideas indispensable to human development.

This neutrality of utilitarianism is compromised both when moral preferences of some are given predominance over the actions of others, and even when all restrictions on pornography are ruled out on grounds of moral independence. The Utilitarian approach for determining the position of pornography in the society that I propose qualifies as a rights-based harm principle, since it evaluates the rights of each stakeholder in the society in terms of the harm entailed by the reasonable exercise of such rights. Furthermore, its dependence on the actual harm resulting from exercise of each right, would prevent the subsequent rise of a corrupt version of utilitarianism.

It must also be noted that the right to enjoy pornography in private would be a hollow right if

[23] T. R. S. Allan, A Right to Pornography, 3 OXFORD J. LEGAL Stud. 376, 378-379 (1983).
[24] *Id.* at 378; On Utilitarianism *see generally*, Ronald Dworkin, *supra* note 17.
[25] Report of the Attorney General's Commission on Pornography, 1986, Washington, D.C (United States Government Printing Office), *as cited in* Stanford Encyclopaedia of Philosophy, *supra* note 12.

it is unobtainable on account of the restrictions on its display and distribution.[26] Therefore, it is imperative that, if 'non-violent & non-degrading' form of pornography is legalized, a legislation be enacted specifically for guiding the production and distribution of such pornography.

IV. LOCATING A CONSTITUTIONAL RIGHT TO PORNOGRAPHY

The right to pornography has been supported under the aegis of various basic human rights including the right to expression, right to liberty and right to privacy. However, it is primarily regulated in India under the obscenity provisions that have been upheld time and again as reasonable restrictions which are permitted under the Constitution of India for safeguarding *inter alia* public order, decency and morality.[27]

(A) Right to Expression and Reasonable Restrictions

Right to pornography have since time immemorial been argued on the basis of Right to Freedom of Speech and Expression, guaranteed in India under Article 19(1)(a) of the Constitution.[28] It is however relatively extraneous to delve deeper into the ramifications of Article 19(1)(a) on right to pornography, primarily because of its limited applicability in light of Article 19(2)[29] which permits reasonable restrictions on the grounds of morality and decency and also because I favor approaching the issue by a harm-based approach rather than a morality- based one. Even so, I shall endeavor to explain why morality should not be considered as a valid reasonable restriction to freedom of speech and expression.

A fairly disappointing consideration in this regard is that these restrictions on free speech on the basis of *inter alia* morality and decency, was merely an entrenchment in Article 19(2), of the already existing legislatorial prohibitions of the bygone British era which was infamous for inordinately restricting the freedom of speech of the Indian nationalists.

The entire gamut with respect to the need for freedom of speech and expression has been expertly summarized by John Stuart Mill in terms of its importance in the search for truth:

> *"First, if any opinion is compelled to silence, that opinion may for aught we can certainly know, be true. To deny this is to assume our own infallibility. Secondly, though the silenced opinion be in error, it may, and very commonly does, contain a portion of the truth; and since the general or prevailing opinion on any subject is rarely or never*

[26] T. R. S. Allan, *supra* note 23, at 381.
[27] *See generally*, MADHAVI GORADIA DIVAN, FACETS OF MEDIA LAW 71-92 (2018).
[28] INDIA CONST. art. 19, cl. 1(a).
[29] INDIA CONST. art. 19, cl. 2.

> *the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied. Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of prejudice, with little comprehension or feeling of its rational grounds. And not only this, but, fourthly, the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct: the dogma of becoming a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience."*[30]

Thus, freedom to speech and expression must not be restricted on the basis of morality which is largely unfathomable, and which furthermore prevents the society from reaching a logical and well warranted decision on the basis of experience rather than speculations. Yet another aspect that falls for consideration is that of the need for public reason, in terms of collective deliberation and egalitarian decision making. Such an approach must further be embedded in the principle that the majority opinions or apprehensions must not be the sole basis for the restriction of constitutionally guaranteed rights.

The morality of individuals is subjective to each one of them and to determine the scope and extent of such an expression on a national level, if not impossible, is extremely implausible and therefore it must be concluded that the currently established norms of social morality are merely findings of an academic speculation. It is also possible that different sections of the society may find different works of expression to be immoral and some may even take offence at purely artistic creations.

(B) Right to Liberty & Moral Independence

The discussions envisaged under this part may be encapsulated into the one phrase by Justice Scalia *"De gustibus non est disputandum,"* which may be translated to mean, 'Just as there is no use arguing about taste, there is no use litigating about it.'[31] In fact this holds true and forms the basis of all the arguments put forth in this article. Incorporating this principle to our point of discussion raises the question as to why should the private tastes of one section of the society be appeased at the cost of the private tastes of the other sections. This brings us right back to the solution that has oft times been discussed in this article, that the individual tastes of different

[30] John Stuart Mill, *supra* note 16, at 53-54.
[31] Richard F. Hixson, Privacy, Pornography, and the Supreme Court, 21 J. Marshall L. REV. 755, 757 (1988).

sections of the society must not be the yardstick in evaluating the legality of pornography and its publication.

The Indian constitution and arguably the constitutions in every truly liberal state is violated when matters of personal and intimate choices are made subject to the whims and fancies of the state. Restricting a person's liberty to seek enjoyment out of their personal choices to access and view innocuous pornography by placing a blanket prohibition on pornography can be construed as nothing less than an unwarranted intervention into the liberty of individuals at the paternal whims of the state. Such an infringement is no less serious than an infringement arising out of a positive state action of forcing people to watch pornography against their wishes. A state action of placing a blanket ban on any work which qualifies as pornography would result in the following infringements of an individual's right to liberty, (a) the right of an individual to exercise his/ her liberty of exercising their moral independence to watch a work of their liking, provided it is non-offensive and innocuous, and (b) by placing a blanket ban on it the state is infringing upon the liberty of every groups of citizens to make an informed choice on whether to watch pornography. Since all individuals are denied the access to pornographic works their liberty to make a decision as an informed choice is being trampled by the state. While ordinarily a person, advocating for the prohibition of pornography would have an opportunity to take offence over it after experiencing it, in case of a blanket ban based on assumptions of community morality, it violates even the liberty of such advocates to make an informed choice in this regard.

A truly liberal state must take an official stand of neutrality of preferences, in that the actions taken must not be based on the preferences of anyone.[32] Simply put such a state must refrain from making any positive effort to regulate the life of one section of the society on the basis of the apprehensions or conceptions of another section of the society. Thus, every self-proclaimed liberal state is obligated not to infringe upon the moral independence and the liberty of any of its members on extraneous moral preferences or other superfluous grounds.

(C) Introducing Privacy Rights to the Fray

The concept of right to privacy in a philosophical sense, advocates that the private sphere of each individual must be substantially immune from external social factors such as morality or decency even if such a right tends to damage the long-term goals of the society or to affect the known social environment in general.[33] Right to privacy as developed initially by the U.S SC,

[32] David Dyzenhaus, Pornography and Public Reason, 7 CAN. J. L. & Jurisprudence 261, 268-274 (1994).
[33] Dworkin *supra* note 18, at 191.

in *Boyd v. United States,*[34] "prohibited "the government and its employees from violating or intruding into the sanctity of a man's home and the privacies of life." But as originally envisioned such right to privacy did not intend to protect a person performing an otherwise illegal act, merely by reason that it was committed in private. Rather, it sought to protect a person who is exercising his legitimate rights and preferences and enjoying his legitimate interests from unwanted intrusions by the State. The following discussions have been made in light of the question whether viewing of pornography qualifies as a sufficiently legitimate interest to warrant the protection afforded by their right to privacy.

The Supreme Court of India has declared right to privacy as a fundamental right under Article 21 of the Constitution of India[35] in *Justice K.S. Puttaswamy and Ors. vs. Union of India and Ors.*[36] Accordingly, the constitutional values of personal autonomy and individual choices which have been held to be the facets of right to privacy have to be respected. This is consonant with the position in the United States as decided under *Stanley v. Georgia,* [37] that a citizen's right to privacy prevents the state from regulating the individuals' private possession of obscene material in their homes. The U.S. SC while stressing that the state does not have the authority to control a person's mind, held that the State has no business telling a man sitting in his house, what materials he may view.[38]

Arguably, right to privacy also entails a completely conflicting set of protections, namely the right of a person to be 'let alone' from obscene materials which he holds as offensive and detrimental to his own interests or that of his close ones. Thus, by the same right to privacy a person may argue in favor of prohibition of pornography. But such an argument may be countered by ensuring that pornography is made available only through paid websites and under strict regulation by the state thereby ensuring that the materials are not inadvertently accessed by those who hold them as offensive.

However, the irony associated with the discussions and judicial decisions involving 'pornography' and 'right to privacy' is that it is still largely ambiguous as to which of the two mutually incompatible facets of right to privacy, among the 'right to be let alone' and 'right to decisional privacy', must be given predominance over the other. I shall endeavor to explain this position through two important case laws partly dealing with the issue, namely, the *Paris*

[34] Boyd v. United States 16 U.S. 616, 630 (1886).
[35] INDIA CONST. art. 21.
[36] Justice K.S. Puttaswamy and Ors. vs. Union of India and Ors, (2017) 10 SCC 1 (India).
[37] Stanley v. Georgia, 394 U.S. 557, 567-68 (1969), as cited in Debbie-Anne Reese Debbie-Anne Reese & Deva A. Kyle, Obscenity and Pornography, 4 GEO. J. GENDER & L. 137, 143-144 (2002).
[38] *Id.* read also Richard F. Hixson *supra* note 31, at 770.

Adult Theatre I v. Slaton,[39] which dealt with the right to let alone and that of *Lawrence v. Texas*,[40] which dealt with decisional privacy. In *Paris Adult Theatre I*,[41] the primary issue was whether a state prohibition on access to adult movie theatres violated the constitutionally protected right to privacy of consenting adult customers. The U.S. SC held that such adult movie theatres may be banned on the basis of the reasoning that it involved commercial exploitation of sex and effected the 'distortion of sensitive, key relationship of human existence, central to family life, community welfare, and the development of personality.'[42] Thus by endorsing the constitutionality of such regulations, the SC affirmed that if a right to privacy exists, it exists for the unconsenting majority, and not for those who wish access to obscene material.[43] Thereafter in *Lawrence*, the U.S. S.C while deciding whether a person practicing homosexuality within the contours of his home would be protected under the right to privacy, held that public morality, in the absence of third-party harm, is an insufficient justification for criminal legislations that restrict private, consensual sexual conduct.[44] An analysis of these decisions in light of the earlier case of *Stanley*,[45] leaves a reasonable confusion in one's mind as to the actual take of the courts on right to privacy with regard to accessing pornography. The SC has taken two sets of views on the right to privacy in the three instances mentioned above; *firstly*, that privacy cannot protect distribution of pornography even if only made accessible to 'willing' members of the society (in *Paris Adult Theatre)*, and *secondly*, that a person has right to store and view obscene works in private (in *Stanley*) and that right to privacy (essentially decisional privacy) should not be restricted solely by public morality (in *Lawrence*). The underlying ambiguity is that the SC has upheld both the facets of right to privacy on different occasions, without considering their implications to each other, thereby leaving it unsettled as to which one is predominant. In each of these instances the court had an opportunity to clarify the position of law regarding the 'right to pornography – right to privacy dyad,' however, it failed to solve either, let alone both. This in part highlights why a harm-based approach is the reasonable way forward in solving this dubiety by the courts of law which is unmistakably evident.

V. OBSCENITY AND PORNOGRAPHY

The currently applicable test for obscenity relies on evaluating each work of art in light of the

[39] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973).
[40] Lawrence v. Texas, 539 U.S. 558, 571 (2003).
[41] *Supra* note 39.
[42] Paris Adult Theatre, *supra* note 39, at 63.
[43] Richard F. Hixson, *supra* note 31, at 759
[44] Lawrence, *supra* note 40 as cited in Elizabeth Harmer Dionne, *infra* note 61, at 611.
[45] Stanley, *supra* note 37.

reasonably ascertainable 'contemporary community standards' with respect to morality and restricting any work which is found patently offensive to such standard. In this part of the article, I shall trace and explain the various tests which have been employed over the years to determine whether a given work of expression is obscene and shall subsequently analyze the contemporary relevance of the 'contemporary standards test'. In light of the same, an attempt shall be made at devising a feasible test for obscenity which is free from the issues plaguing the current tests in this respect.

(A) Recollecting the Obscenity Standards as developed by the Judiciary

Judiciary has traversed a long way in developing the current standard for determining obscenity from the 'vulnerable member test' or as it is more commonly called the *Hicklin's* test,[46] which was based on testing the effect of a publication on the most vulnerable members of the society, whether or not they were likely to view or otherwise access it. The test was abandoned by both the U.S. and U.K in late 1950s. However, it is perplexing to note that Indian judiciary had also preferred to adopt the Hicklin's test[47] even though Section 292 IPC expressly dictates the consideration of the effect of publication on *'the audience likely to access it'*, and not just on the most vulnerable person who might accidently come across it, to determine obscenity.

Hicklin's test was substituted with the test laid down under *Roth v. United States*[48], according to which, it was to be determined *'whether with respect to the contemporary community standards, the dominant theme of the material in question appealed to the prurient interests of an average person.'* [49] Even though the term 'prurient interest' was defined as "shameful or morbid interest in nudity, sex, or excretion, where the material goes substantially beyond customary limits of candor", the test still suffered from ambiguity with respect to *inter alia* who was an "average person," or what "contemporary community standards" entailed.[50] In the case of *Jacobellis v. Ohio*,[51] the U.S. SC attempted at definitively defining the term 'community' for the purposes of deciding the contemporary community standards and identified that it did not relate to a particular local community from which the case arises, but that of the Nation as a whole on the rationale that 'the court was after all interpreting the national constitution.'[52] However, it resulted in further ambiguities since a national standard

[46] R. v. Hicklin, (1868) LR 3 QB 360.
[47] Ranjith D. Udeshi, *supra* note 10.
[48] Roth v. United States, 354 U.S. 476, 479 (1957).
[49] *Id.*
[50] Roman A. Kostenko, Are Contemporary Community Standards No Longer Contemporary, 49 CLEV. St. L. REV. 105, 108-109 (2001).
[51] Jacobellis v. Ohio, 78 U.S. 184, 192-195 (1964).
[52] Michael P. Fix, A Universal Standard for Obscenity - The Importance of Context and Other Considerations, 37 Just. Sys. J. 72, 73-74 (2016).

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would be inaccurate by the reason that the concept of morality existent in cities would be different from that in the rural areas, and the perception would vary from place to place as well as person to person.

The current obscenity standard was enunciated by the U.S. S.C in *Miller v. California*.[53] The court set the following standards for determining obscenity,

> *'(a) whether '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.'*[54]

The *Miller* test (otherwise referred to as the Contemporary Community Standards test) brought about changes over the *Roth* test primarily on two fronts. *Firstly*, while the *Roth* test considered the 'dominant theme of a work' or as was later expanded 'the presence of redeeming social value',[55] the *Miller* test accords a much higher clarity by considering any of the following literary, artistic, political, or scientific value of the concerned work/ publication. *Secondly*, the court brought about a change as to the idea of 'community standards' and clarified that each work must be judged by the standards of the local community within the vicinity of which the material is found[56] (therefore each state in the U.S. is afforded sufficient flexibility to set standards for obscenity as per discretion). This alteration has however, caused a different set of ambiguities.

The concept of community standards faces a very grave issue in terms of its practical application, in that it is based on a number of assumptions; three to be precise.[57] This is especially arousing concern since penal provisions are required to be clear, unambiguous and well-defined to stand the constitutional scrutiny. *Firstly*, with respect to the target area or locality it assumes the existence of just one community, or in cases of more communities that all of them follow a common standard. *Secondly*, it assumes that the members within the given community all follow a homogeneous view regarding the concepts of 'obscenity', 'patent offensiveness' and 'the serious values required in a work to transform the work into a legal work.' *Thirdly*, it assumes that the Judge is able to ascertain the views of the community

[53] Miller v. California, 413 U.S. 15 (1973).
[54] *Id.* at 24.
[55] Roth, *supra* note 48. Expanded in John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts 383 U.S. 413, 418 (1966) so that 'to be obscene, a material must also be utterly without any redeeming social value.'
[56] Miller, *supra* note 53, at 31-34.
[57] Michael P. Fix, *supra* note 52, at 74.

objectively.

The second part of the three-pronged Miller test narrows down obscene work to those 'which depicts or describes patently offensive hardcore sexual content.'[58] The U.S. SC also gave two examples to substantiate this part of the test, namely (a) 'patently offensive' representations of ultimate sex acts, whether actual or stimulated, normal or perverted,[59] and (b) patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.[60] This merely provides a skeletal framework for states to develop their own obscenity laws and leaves room for states to make alterations as per the community standards exclusive to each of them. By considering whether a given work is 'patently offensive', the *Miller* test does not *prima facie* restrict erotica, which prompts one to reasonably conclude that it also would not restrict the milder forms of pornography, (even though sexually explicit) provided that they do not offend the standards of the community, as determined by the court representing the community.[61] Even so, it is open to numerous interpretations, some of which may not be in conformity with the originally envisaged application of the test.

Perhaps, the most popular criticism, which is also one of the most prevalent, levelled against the *Miller* test is the one explained by Justice Brennan in *Paris Adult Theatre v. Slaton*,[62] which was decided on the same day as the *Miller case*:

> *"I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness of the term 'obscene' to a tolerable level, while simultaneously striking an acceptable balance between the fundamental rights of liberty and freedom of speech and expression on one hand, and the state interest in regulating certain sexually oriented materials."*[63] (Emphasis added).

Even though not unconditionally adopted, even the Supreme Court of India has in recent decisions, acknowledged the concept of 'Contemporary Community Standards'. For example, the case of *Directorate General of Doordarshan & Ors v. Anand Patwardhan*,[64] where SC accepted that the movie which was sought to be censured by the government on the grounds of obscenity, was not patently offensive in terms of community standards. [65] The position is India

[58] Miller, *supra* note 53 at 27.
[59] Debbie-Anne Reese, *supra* note 35, at 140.
[60] *Id.*
[61] Elizabeth Harmer Dionne, Pornography, Morality, and Harm: Why Miller Should Survive Lawrence, 15 GEO. Mason L. REV. 611, 618-619 (2008).
[62] Paris Adult Theatre, *supra* note 39, at 73.
[63] *Id.*
[64] Directorate General of Doordarshan & Ors v. Anand Patwardhan, (2006) 8 SCC 433 (India).
[65] *See also*, Ajay Goswami v Union of India, (2007) 1 SCC 143.

is largely ambiguous in that the courts have refrained from adopting a single test for obscenity, but has largely referred to a number of tests, primarily the 'Likely Audience Test' and even the *Hicklin's* test before arriving at their decisions. The central idea of such decisions may however be accepted to be in conformity with that of the contemporary community standards doctrine. Even so, it is important in the Indian context to briefly discuss the Likely Audience Test as given under IPC Section 292[66] which seeks to analyze whether a given work appeals to the prurient interests of a person who is likely to access the matter embodied in such work. The Likely Audience test therefore suffers from the following drawbacks *viz*., (a) it is dependent on certain presumptions as to who constitutes the 'likely audience' to a given work, what is the standard of obscenity followed by such persons, and more importantly it assumes that the judge is able to accurately deduce such considerations and that such judge would refrain from relying on his personal morality in deciding the case; (b) it has not succeeded in unambiguously defining as to what constitutes obscenity, and (c) by simply instructing to consider the work as whole it has failed to correctly appreciate the literary, social, political or scientific value which a given work may truly albeit partly possess.

(B) Is Contemporary Community Standard Still Contemporary in the Internet Age?

The feasibility of the *Miller* test has been recently brought to trial with respect to its efficacy in distinguishing actual obscene materials and works in the internet age. In explaining 'community' under the test, the U.S. SC, rejected the proposition that "contemporary community standards" should be a national standard, but rather held that the material is to be judged by the standards of the local community within the vicinity of which the material was found.[67] This approach has become obsolete in the context of the internet age, which has made publications from across the globe available with the click of a mouse.[68] Thus a person who might be legitimately exercising their right to freedom of speech and expression by publishing sexually explicit material cannot be sure who will access the material and would thereby be bewildered as to which community's standard to adhere to.[69] It is also bound to raise complications for a judge while trying to ascertain the moral standards of the immediate local community. It would be difficult for a judge to fix a particular local area since once a given work is uploaded to the internet it can be accessed from anywhere around the globe by people

[66] Indian Penal Code, 1860, Act No. 45 (India).
[67] Miller, *supra* note 53, at 32.
[68] Ajay Goswami, *supra* note 65, ¶36.
[69] E. Morgan Laird, The Internet and the Fall of the Miller Obscenity Standard: Reexamining the Problem of Applying Local Community Standards in Light of a Recent Circuit Split, 52 Santa CLARA L. REV. 1503, 1522-1523 (2012).

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from separate communities with separate standards for obscenity.

Furthermore, applying a national community standard for the *Miller* test would also be improper, primarily by reason of the variable definition of obscenity which differs according to different cultures, different communities within each culture, and also between individuals within those communities.[70] This complication might force more tolerant communities to lower their standards for effecting a common standard, thereby reducing their access to even genuinely entitled material.

A number of authors argue in support of 'eliminating internet obscenity laws and permitting self-regulation of internet content'[71], but I do not favor such a drastic solution in consideration of the harms posed by pornography, especially its 'violent & degrading' forms.[72] Rather I would prefer a test based on the likelihood of harm posed by the each of the different forms of pornography.

VI. FORMULATING A FEASIBLE TEST FOR OBSCENITY

The inadequacy of the *Millers* test in judiciously prohibiting obscene materials, as has been explained in the foregoing paragraphs necessitates the formulation of a new test for obscenity which unambiguously addresses the present needs and future complications.[73]

(A) In order to establish 'obscenity', I propose the application of the following two-pronged test,[74]

> "(1) Whether the material by its nature causes harm or if published presents a significant risk of harm to individuals or society in a way that undermines or threatens to undermine a value reflected in the applicable laws, by
>
> a. Depicting in a patently offensive or degrading manner, sexual conduct specifically defined by law, or
> b. Inciting or reasonably likely to incite violent behavior or lawless action, either directly or indirectly, or
> c. Psychologically corrupting[75] or depraving a reasonable person, when taken as a whole.

[70] The variable nature explained by SC in Ajay Goswami, *supra* note 65, ¶44.
[71] See generally, Roman A. Kostenko, *supra* note 49; E. Morgan Laird, *supra* note 68.
[72] For more information on harms caused by pornography read Elizabeth Harmer Dionne, *supra* note 60, at 621-661.
[73] See, Michael P. Fix, *supra* note 51, at 83-85 (He proposes the pragmatic approach focusing on the consequences of pornography to the society).
[74] Inspired from the test for indecent criminal behaviour as laid down by Canadian SC in R. v. Labaye, [2005] 3 S.C.R. 728 (Can.).
[75] For example, 'violent and degrading' forms of pornography may be considered to be having the effect of

(2) Whether the harm or risk of harm of the material, taken as a whole is of such a degree that would hinder the proper functioning of society and thereby, outweighs the literary, artistic, political or scientific value of the work?"

By proposing the above test, I did not intend to include more forms of pornography within the ambit of protected speech than as envisaged by the U.S. SC as per *Miller's test*, but rather, wanted to develop a universally applicable test for obscenity which was an obstacle faced by *Miller's* test. I wanted to develop a test which places restrictions, not merely based on purported community standards of morality but which are commensurate to the harm entailed by each form of pornography.

The harm based test also holds certain other advantages over the other morality based tests such as the contemporary community standards test or the likely audience test. *Firstly*, the harm based test is not afflicted by the ambiguity with respect to the definition of obscenity that accompanies all the public morality based tests that I have mentioned in this article. Since this test only considers the tangible harm that a given work would cause and only restricts such forms of expression as causing harm or posing a significant risk of harm, it circumvents the almost impossible requirement of clearly distinguishing between obscene and non-obscene material. *Secondly*, the presumptions that are generally associated with the morality based tests, whether it be Contemporary Community Standards test or Likely Audience Test, are not necessary for the efficacious functioning of the harm based test. For example, a quintessential morality based test generally functions on certain presumptions relating to who all constitutes the target community, the standard of a given community, the objectivity of the person determining such standards and so on. *Thirdly*, the harm based test overcomes the difficulties involved in both the local as well as national standards of obscenity by providing a universal means of determining obscenity. *Finally*, the harm based approach is successful in bringing a balance between the fundamental rights of 'liberty and expression' and the state interest of regulating 'derogatory and offensive' forms of pornography, by clearly laying down the boundaries for rights as well as state intervention that is based on an egalitarian guidelines.

I would like to clarify that through this harm based approach I am neither recommending nor hoping for free reigns for pornography in the society, but rather a more egalitarian approach towards placing the necessary restrictions on pornography that is required to ensure a balance between personal rights of citizens and public order and public welfare.

psychologically corrupting viewers by instilling the idea that women are commodities to be sexually exploited even in the absence of consent.

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VII. CONCLUSION

Right to pornography must be viewed as a conflict of rights, namely between the rights of freedom of speech and expression, individual autonomy, liberty and privacy of the individual leading the fight in favour of private viewership of pornography, and the right to privacy from unwanted exposure to pornography, to civil liberties for women, and social moral rights advocating for a prohibition on pornography. The right solution in such a conflict of rights is to strike a balance between individual autonomy and social value without unduly favouring either one over the other. It was in this consideration that I proposed the harm-based test for obscenity in a bid to ensure that the prohibitions imposed on pornography are commensurate with the underlying harm.

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