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# The OnlyFans Conundrum: Understanding the Intersection of Privacy, Morality, and Digital Expression in Indian Law

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AJITESH SINGH<sup>1</sup>

## ABSTRACT

*"Obscenity is hard to define, but I know it when I see it." This remark by U.S. Supreme Court Justice Potter Stewart in *Jacobellis v. Ohio* (1964) encapsulates the inherent difficulty in defining obscenity—an issue that continues to challenge the Indian legal framework.*

*In India, the regulation of pornography is characterized by contradictions, rooted in colonial-era laws and juxtaposed with the modern realities of a digital society. While the Supreme Court has recognized privacy as a fundamental right under Article 21 of the Constitution, this right is curtailed by laws governing obscenity under the Indian Penal Code (IPC) and the Information Technology (IT) Act, 2000. Platforms like OnlyFans, which rely on user-generated and subscription-based content, exist in a legal grey area, raising critical questions about individual freedoms, societal morality, and enforcement mechanisms.*

*This paper examines the historical and legal trajectory of obscenity laws in India, focusing on their implications for platforms like OnlyFans. It explores the interplay of consent, privacy, and state regulation, while drawing comparisons with international legal frameworks. Ultimately, the paper argues for a nuanced regulatory approach that balances individual rights with societal values.*

**Keywords:** *OnlyFans, pornography, obscenity, Information Technology Act, Article 21, legal grey area, digital content.*

## I. INTRODUCTION

Pornography is widely accessible in India, available both online and through print media, although the majority of people consume it via the internet. As smartphones and internet usage become increasingly widespread, the consumption of pornographic content has seen a steady rise.<sup>2</sup> However, despite its growing accessibility, the topic of pornography continues to remain a taboo in many sections of Indian society, with discussions around it often avoided due to

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<sup>2</sup> Rajak, Brajesh, *Pornography Laws: XXX Must not be Tolerated* (Universal Law Co., Delhi, 2011).

cultural and moral sensitivities. Furthermore, the production, distribution, and sharing of pornographic material are explicitly prohibited under Indian law.

The term "porn" refers to sexually explicit or graphic material that is primarily designed to stimulate sexual arousal. Indian law categorizes such content as "lascivious" or material that "appeals to prurient interests" or "tends to deprave and corrupt individuals." Possessing, distributing, or publishing such content is considered a punishable offense under various legal provisions. Despite these restrictions, the adult entertainment industry has become a massive online business, with an estimated 420 million pornographic websites available globally. This widespread availability highlights the challenge of regulating access to such content in an increasingly connected digital age.<sup>3</sup>

The Department of Telecommunications (DoT) in India has stated that "reasonable restrictions" on the freedom of speech and expression can be applied to pornographic content, particularly as it pertains to questions of morality and decency. In an effort to address specific concerns, such as child pornography, Additional Solicitor General Pinky Anand recommended to the Department of Electronics and Information Technology that "appropriate measures" be implemented. This led to a government order issued on July 31, directing Internet Service Providers (ISPs) to block access to 857 pornographic websites as part of a broader initiative to regulate and curb the consumption of such content.

OnlyFans, a subscription-based content platform launched in 2016, allows creators to monetize their work by offering exclusive content to subscribers.<sup>4</sup> The platform features a wide range of material, including topics related to exercise, beauty, fitness, healthy living, and sexually explicit content. A significant portion—approximately 75%—of the content on OnlyFans comprises sexually explicit and pornographic material, for which creators often charge a premium. The platform is fully legal in countries like the United States, Canada, and the United Kingdom, and it operates lawfully in most other jurisdictions, with a few exceptions where it has been explicitly banned.<sup>5</sup>

Under Indian law, the posting or dissemination of sexual content online is considered a violation of legal provisions governing obscenity. Platforms like OnlyFans fall under this category, as they facilitate the creation, sharing, and monetization of such content. Consequently,

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<sup>3</sup> Emily van der Nagel, "Competing Platform Imaginaries of NSFW Content Creation on OnlyFans," *Porn Studies*, vol. 8, no. 4, 2021, at 394.

<sup>4</sup> Peter Ryan, "Net, Porn and the Amateur Turn on OnlyFans," in *Male Sex Work in the Digital Age* (Palgrave Macmillan, 2019) 119.

<sup>5</sup> Diniz Cardoso & Chiara Maria Scarcelli, "The Bodies of the (Digitized) Body: Experiences of Sexual(ised) Work on OnlyFans," *MedieKultur: Journal of Media & Communication Research*, vol. 37, no. 71, 2021.

participating in or hosting sexually explicit content on OnlyFans is unlawful in India, exposing users to potential legal risks.<sup>6</sup> Additionally, the platform's operation raises broader concerns about its role in fostering cybercrime in the Indian context, where legislation explicitly prohibits the production, distribution, and circulation of obscene images, pornographic material, and blue films.

In August 2021, OnlyFans announced a controversial policy prohibiting sexually explicit content, set to take effect in October of that year. This decision, initially aimed at appeasing investors, sparked significant backlash from creators and users, many of whom rely on the platform for their livelihood. In response to the widespread criticism and recognizing the financial impact of such a prohibition, the platform promptly reversed its decision. A public statement by OnlyFans expressed gratitude for the feedback received, noting that the policy change<sup>7</sup> had been postponed following assurances to safeguard the interests of its diverse creator community. The company reaffirmed its commitment to providing a supportive environment for all creators, emphasizing that explicit content would continue to have a home on the platform.

Despite this reversal, the legal status of OnlyFans in India remains unchanged. Any activity involving the creation or dissemination of sexually explicit material on the platform is strictly prohibited under Indian law. Furthermore, such activities are viewed as contributing to the escalation of cybercrimes, posing additional challenges for law enforcement. India's legal framework explicitly prohibits not only platforms like OnlyFans but also the sharing and distribution of any obscene or pornographic content, reinforcing the nation's stringent stance on the issue.<sup>8</sup>

## **II. THE CONCEPT OF OBSCENITY**

The term "obscene" is used to describe materials or actions that are offensive, particularly in a sexual context, and aim to incite lust. While the Indian Constitution guarantees freedom of speech and expression under Article 19(1)(a), this freedom is curtailed by laws penalizing obscene expressions. The paper explores how unclear interpretations of obscenity have led to violations of this fundamental right and discusses judicial inconsistencies in distinguishing between art and vulgarity or reality and obscenity. It emphasizes the need for legal reforms to

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<sup>6</sup> Aryan Safaee, *Sex, Love, and OnlyFans: How the Gig Economy Is Transforming Online Sex Work* (Doctoral Dissertation, San Diego State University, 2021).

<sup>7</sup> Karen Robson, "OnlyFans' Sexual Content Policy," *SAGE Business Cases Originals* (2021).

<sup>8</sup> Gary Sinclair & David G. Jordan, "Generation OnlyFans: The Internalization of Objectification in Young Adults," (2022).

balance public interest with creators' rights.<sup>9</sup>

The right to Freedom of Speech and Expression is a fundamental entitlement that grants individuals the liberty to articulate their thoughts, beliefs, and emotions freely. Enshrined in the 1948 Universal Declaration of Human Rights (UDHR), this right encompasses not only the ability to hold personal opinions without external interference but also the freedom to seek, receive, and disseminate information or ideas through any medium. Article 19 of Part III of the Indian Constitution guarantees this right, enabling individuals to think, speak, and express without fear, while also providing the liberty to access information through publications without the threat of unreasonable punishment, censorship, or penalties.

As rational beings, humans have inherent desires and aspirations. To maintain order within a civil society, these desires are subject to limitations and restrictions that prioritize public welfare. Such constraints are articulated in Article 19(2) of the Indian Constitution, which imposes reasonable restrictions on the right to freedom of speech and expression, ensuring it is not an unrestricted or absolute right.<sup>10</sup>

The advent of modern technologies and advancements in the scientific sector has significantly simplified global communication and the dissemination of information. This evolution has rekindled interest in the legal frameworks surrounding obscenity in India. To balance individual freedoms with the broader public interest, the Indian government has implemented various measures at both national and state levels.

### ***What is Obscenity?***

Under Indian law, obscenity is broadly understood as any material that primarily appeals to lustful or voyeuristic tendencies. It includes literary, artistic, or other works that explicitly and offensively depict or outline sexual conduct in a clear and unmistakable manner. Legally, obscenity refers to indecent expressions that can be conveyed through words, actions, or gestures.

The concept of obscenity is often equated with pornography, and the terms "obscene" and "porn" are frequently used interchangeably. The word "pornography" derives from the Greek words *porne*, meaning harlot, and *graphy*, meaning writing. However, the modern interpretation of "obscene" remains ambiguous and is typically assessed using established legal tests.<sup>11</sup> The

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<sup>9</sup> Shilpi Datta, Ranjita Panda & Subhramaniam Das, "Need for Personal Space: Legalizing Pornography in India," *Media Watch*, vol. 8, no. 3, 2017, at 355.

<sup>10</sup> Kriti Chowkhani, "Pleasure, Bodies, and Risk: Women's Viewership of Pornography in Urban India," *Porn Studies*, vol. 3, no. 4, 2016, at 443.

<sup>11</sup> S.B. Math et al., "Sexual Crime in India: Is It Influenced by Pornography?" *Indian Journal of Psychological Medicine*, vol. 36, no. 2, 2014, at 147.

Miller Test, widely recognized internationally, is a key standard for determining obscenity (discussed later in this paper). To be considered obscene under the Miller Test, the material must fail all three specified criteria.

In India, obscenity encompasses anything considered offensive to modesty or decency, or material that is lewd, repulsive, or filthy. Indian law analyses obscenity closely with the concepts of decency and morality. Decency is defined as avoiding the use of obscene language or gestures, but it extends beyond sexual morality to ensure actions align with societal standards of public and private decorum. Indecent exposure and indecent publications are considered criminal offenses under common law.

Although terms such as "vulgar" and "indecent" are often used synonymously with "obscene," they are distinct in meaning. Vulgarity may evoke feelings of disgust or aversion but does not necessarily corrupt moral standards. In contrast, obscenity involves content that degrades or corrupts individuals exposed to it, making it a more severe concern in the legal framework.

Indian jurisprudence has evolved over time to incorporate more nuanced tests for obscenity. One such standard is the Community Standards Test, which was adopted by the Supreme Court in *Aveek Sarkar v. State of West Bengal* (2014)<sup>12</sup>, replacing the age-old Hicklin Test. Under the Community Standards Test, obscenity is judged based on the norms and sensitivities of an ordinary, reasonable member of society. The test evaluates whether the material in question has the tendency to deprave or corrupt individuals when considered within the broader societal context. Unlike the Hicklin Test, which focused on protecting the most vulnerable members of society, the Community Standards Test is rooted in contemporary societal values and emphasizes a balanced, pragmatic approach.

This test reflects the principle that obscenity cannot be evaluated in isolation but must be understood in context. It considers the material's potential to provoke lascivious thoughts or arouse prurient interests, judged through the lens of an average person. The adoption of this test marked a significant step towards aligning Indian obscenity law with global standards, ensuring that evaluations are both objective and reflective of evolving community norms.<sup>13</sup>

### ***Vulgarity and Obscenity***

Vulgarity, as distinguished from obscenity, is defined by its capacity to provoke feelings of disgust, aversion, and detestation, yet it does not necessarily lead to the degradation or

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<sup>12</sup> AIR 2014 SC 1495.

<sup>13</sup> Gautam Sood, "Pornography and Laws: A Comparative Study of India & USA," *Strani Pravni Zivot*, vol. 1, 2015, at 199.

corruption of an individual's moral faculties. In contrast, obscenity is more directly concerned with the contamination or moral corruption of individuals susceptible to such immoral influences.<sup>14</sup> Accordingly, while vulgarity and obscenity may occasionally overlap, they are not synonymous. It follows that a work deemed vulgar does not automatically meet the criteria for obscenity under the law in every instance.

### ***Indecency and Obscenity***

As elucidated by the courts in England, both indecency and obscenity constitute offenses against the prescribed standards of civility; however, they differ in their degree of severity. The term "indecency" refers to conduct or expressions that deviate from societal standards but on a lesser scale, whereas obscenity encompasses material that constitutes a more severe violation of public decency and morality. Thus, while all obscene material is necessarily indecent, the reverse is not invariably true. Indecency refers to actions or expressions that fail to conform to the accepted standards of societal propriety, while obscenity involves explicit, lewd behaviour or expressions of a sexual nature.

### ***Obscenity, Media, and the Freedom of Expression***

India, being one of the largest democracies in the world, has witnessed the evolution of mass media, which has played a significant role since the late 18th century. The advent of print media, film screenings, and radio broadcasting in the 1780s marked the beginning of India's media landscape. Following independence, the media retained its autonomy, save for the period during the Emergency in 1975. However, the discourse surrounding the content disseminated through the media has long been contentious, with certain materials being criticized for violating cultural and moral norms, thereby categorizing them as "obscene."

While Indian courts have made considerable efforts to balance the reasonable restrictions placed on the public's right to free expression, their record in this regard remains inconsistent and at times, imbalanced. Various cases have been brought before the courts seeking to limit or curtail what is deemed reasonable expression within the country.

Notably, advertisements such as the *Amul Macho* (2007) campaign, which featured actress/model Sana Khan washing a man's underwear while a background track with suggestive lyrics (a subliminal sexual innuendo) played, as well as the *Tuff Shoes Footwear Print Ad* (1995), which depicted models Milind Soman and Madhu Sapre posing nude with a python wrapped around them, have been deemed offensive and unfit for public viewing. Similarly, the

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<sup>14</sup> Varun Kumar et al., "Internet Pornography Use Among Medical Students in India: Extent and Effect," *Journal of Psychosexual Health* (2022).

*Fastrack TV Commercial* (2011), which depicted actress Genelia D'Souza and cricketer Virat Kohli in a suggestive scene in an airplane's cockpit, was also criticized for challenging conservative Indian sensibilities. In contrast, an advertisement for *Zatak talcum powder*, in which a woman is shown being sexually aroused by a tailor taking her measurements, was not considered objectionable and was consequently not banned.<sup>15</sup>

The issue with India's judicial system in these matters lies in its inefficiency and lack of consistent jurisprudence. Despite the constitutional guarantee of the right to freedom of speech and expression under Article 19 of the Indian Constitution, this right can be easily curtailed due to the overly broad and subjective nature of the laws that govern obscenity, decency, and public morality. The overburdened legal system, which struggles with significant case backlogs, results in lengthy and costly delays in adjudication. These delays discourage victims and innocent individuals from asserting their legal rights, as the process becomes financially and emotionally burdensome.

Furthermore, there are instances where the Indian government has failed to protect individuals who express minority or dissenting views. Such individuals often face harassment from local authorities or attacks from extremist groups. Rather than focusing on addressing these critical issues, the government frequently resorts to banning books, films, or works of art that may offend particular groups, thus restricting expression in a disproportionate and often arbitrary manner. These restrictions are typically justified on the grounds of maintaining public order, with the justification often hinging on the spectre of violent protests or communal unrest. This approach not only stifles free expression but also exacerbates the culture of censorship, undermining the broader constitutional right to freedom of speech and expression.

Historically, various creators, including writers, actors, and artists, have been subjected to prosecution for disseminating material deemed obscene. While some argue that such content necessitates regulation in order to shield society, recent events suggest that the vagueness within India's obscenity laws has given rise to arbitrary actions. These actions often result in decisions based on subjective interpretations rather than objective legal criteria.

The rapid expansion of mass media, particularly with the proliferation of television and the internet, has compounded the need for a precise and transparent legal framework governing obscenity. The emergence of these new platforms has provided a broader avenue for artists to express their views through literary works, visual art, and films. However, this development has

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<sup>15</sup> S. Kumar et al., "An Empirical Investigation on Consumer Behaviour Concerning Online Shopping During Covid-19 in India," *12 Int'l J. Aquatic Sci.* 3087, 3087-96 (2021).



concurrently prompted efforts to more rigorously define, objectify, and regulate material deemed obscene, reflected in the enactment of various statutory provisions. It is imperative, therefore, that clear, consistent, and coherent legal standards be established to address the evolving challenges posed by new media forms while safeguarding the constitutional right to freedom of expression.

### **III. EVOLUTION OF THE OBSCENITY TEST IN INDIA: FROM HICKLIN'S TEST TO THE COMMUNITY STANDARDS TEST**

Indian courts currently apply the community standards test to determine whether a particular material is obscene, a practice rooted in the judgment of *Aveek Sarkar v. State of West Bengal*. This test, which draws inspiration from legal jurisprudence in Canada and the United States, has been adopted to evaluate obscenity in the context of contemporary societal values. However, while India's transition from the Hicklin's test to the community standards test is a notable shift, the question remains whether the current method is the most appropriate measure of obscenity. The growing influence of the internet has added complexity to this issue, challenging the test's applicability in a digital era where the boundaries of community standards are continuously evolving.

#### ***Evolution from Hicklin's Test to the Community Standards Test***

In *Ranjit D. Udeshi v. State of Maharashtra*<sup>16</sup>, the Supreme Court of India initially embraced the Hicklin's test, derived from the *United States v. Hicklin*<sup>17</sup> case. The Hicklin's test is criticized for its two major flaws: it judges the material without context, and it bases the determination on the potential effect on the most vulnerable or susceptible audience members. This narrow view often results in overbroad censorship.

A significant shift occurred with the ruling in *Aveek Sarkar v. State of West Bengal*, where the Supreme Court moved away from the Hicklin's test and adopted the community standards test. The court emphasized that obscenity should be evaluated based on the contemporary and national standards, reflecting changes in societal attitudes toward decency and morality. A pivotal departure from the Hicklin test was the court's decision to disregard the sensitivities of the most vulnerable individuals, focusing instead on the broader societal norms of the nation.

#### ***Community Standards Test: Reconsideration Needed?***

The Supreme Court in *Aveek Sarkar* relied on judgments from the United States and Canada,

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<sup>16</sup> AIR 1965 SC 881.

<sup>17</sup> (1868) LR 3 QB 360.

where the community standards test had been applied. However, at the time India adopted the test, both countries had already moved away from it. Legal scholars and jurists in the U.S. began criticizing the application of the test, particularly in cases like *Roth v. United States*<sup>18</sup>, leading to reforms. Notably, subsequent decisions like *Memoirs v. Massachusetts*<sup>19</sup> and *Miller v. California*<sup>20</sup> introduced additional criteria, including whether the material is "patently offensive" and whether it has "redeeming social value," resulting in a more refined, three-pronged approach to evaluating obscenity.

In *R v. Butler*<sup>21</sup>, the Canadian Supreme Court noted that the community standards test should not be applied in isolation but should be coupled with a dehumanizing test, emphasizing the need for greater objectivity in obscenity decisions. The Court moved further away from the sole reliance on community standards, advocating for a more holistic and conceptual linkage between obscenity and contemporary societal norms. In *R v. Labaye*<sup>22</sup>, the Canadian Supreme Court abandoned the community standards test altogether, signalling a growing disillusionment with this approach.

### ***Shortcomings of the Community Standards Test in India***

Despite the Supreme Court's shift to the community standards test, its application in India remains underdeveloped. While the Indian courts have set national standards to determine obscenity, there is insufficient clarity regarding how these national standards should be defined or ascertained. Furthermore, India's legal system has largely ignored criticisms of the community standards test raised in Canada and the United States. While courts sometimes consider artistic expression when assessing obscenity, the lack of well-established legal principles has left room for inconsistent interpretations, which can lead to misapplication and misuse of the test.

### ***National Standards in India***

In *Aveek Sarkar*, the Supreme Court applied the community standards test based on national standards rather than local community standards, acknowledging the diverse nature of Indian society. However, *Miller v. California* argued that national standards are inherently hypothetical and unascertainable, particularly in a country like India, which is known for its vast diversity in culture, language, religion, and regional differences. For example, individuals from southern

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<sup>18</sup> 354 U.S. 476 (1957).

<sup>19</sup> 383 U.S. 413 (1966).

<sup>20</sup> 413 U.S. 15 (1973).

<sup>21</sup> [1992] 1 SCR 452 (Canada).

<sup>22</sup> [2005] 3 SCR 728 (Canada).

India tend to be more liberal regarding matters of gender and religion, while other regions may have stricter views on issues like nudity and gender relations. This diversity makes the establishment of a uniform national standard nearly impossible, raising questions about the feasibility and fairness of applying a single community standard across the entire country.

### ***Is the "Reasonable Person" the Right Standard?***

The Supreme Court has also wrestled with the question of whether to rely on the opinion of the "reasonable person" or the "average man" in determining community standards. This reliance on the "reasonable person" standard presents significant challenges, particularly in a country as diverse as India, where individuals' perceptions of obscenity can vary widely based on factors like culture, religion, education, and social norms. The idea of a "reasonable person" itself is problematic because it is subjective and depends on individual biases. As noted by Patrick Delvin, the "reasonable person" is not necessarily rational or objective, which complicates its use as a definitive measure for determining what constitutes obscenity. In a pluralistic society like India, using this standard risks aligning the law with the personal biases of judges rather than the collective values of the community.

### ***The Lack of Objectivity in the Judicial Process***

When determining the obscenity of material, Indian courts often fail to gather objective evidence regarding national standards. For instance, in *XXX v. State of Kerala*, the judge recognized the existence of societal double standards when it came to the portrayal of male and female bodies, but the judgment ultimately relied on the judge's subjective biases, rather than empirical data. The Canadian Supreme Court has criticized the idea of "community standards" as being unascertainable in large, diverse countries like India. Given the variety of opinions and beliefs across the nation, it is ethically questionable to define a uniform standard of obscenity.

### ***Lack of Adequate Protection for Artistic Expression***

Article 19(1)(a) of the Indian Constitution guarantees the fundamental right to freedom of speech and expression. However, the application of obscenity laws restricts this right by imposing "reasonable" limits. In *Ranjit D. Udeshi*, the Supreme Court acknowledged the need to protect artistic expression but placed the burden of distinguishing between what is art and what constitutes obscenity on the courts. The problem is that while the Court has made broad declarations about protecting artistic content, there is insufficient jurisprudence or procedural guidance for lower courts to follow when making such determinations. Without a clear framework, the risk of arbitrary decisions is high, which undermines the protection of artistic freedom.

Reforming the community standards test in India requires a more objective framework for determining what constitutes obscenity. While some propose using algorithms based on internet search data, this approach may not yield reliable results given that a significant portion of the Indian population still lacks internet access. A more viable solution may involve considering factors such as the “essentiality” of the material, a concept developed in *R v. Butler* in Canada, where courts assess whether the sexually explicit material in question is essential to the overall artistic or literary work. This approach could offer a more nuanced, contextual evaluation of material, safeguarding the rights to freedom of speech and expression while also considering the potential harm caused by certain types of content.

In the context of India, however, the Apex Court must reconsider how community standards are determined, ensuring that they reflect the diverse and pluralistic nature of the country. The absence of uniformity and the inconsistency in lower court rulings are clear indicators of the need for reform. Without addressing these issues, the legal system risks perpetuating arbitrary convictions and continuing to stifle freedom of expression, especially in the realm of art, literature, and digital content.

#### **IV. STATUTORY PROVISIONS**

##### ***Indian Penal Code, 1860***

Under the Indian Penal Code, 1860, Sections 292-294<sup>23</sup> prohibit the publication and sale of obscene materials.

The Indian Penal Code, 1860 (IPC) enumerates various offenses punishable under Indian law, including the offense of obscenity, which is specifically addressed in Section 292. This provision clearly outlines what constitutes obscenity, stating that any material which appeals to lascivious, voyeuristic, salacious, or lustful interests and thereby depraves or corrupts the morals of an individual in a sexual context is deemed obscene. Clause 1 of Section 292 lists specific types of materials considered obscene if they are likely to stimulate or cater to such interests, thereby degrading the moral and sexual integrity of the viewer or reader.

Furthermore, Section 293 prescribes penalties for individuals involved in the promotion, sale, possession, hiring, distribution, importation, exportation, purchase, or any form of profit derived from obscene materials. This provision criminalizes a wide range of actions related to the creation and dissemination of obscene content, imposing penalties in the form of imprisonment and/or fines for those found guilty of such conduct.

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<sup>23</sup> Indian Penal Code, 1860, § 292-294.

In addition, Section 294 of the IPC extends the offense of obscenity to the public performance of obscene acts, including songs, dances, or any act that is deemed obscene in nature. This section seeks to address the performance and exhibition of obscene material in public spaces, subjecting offenders to punishment under the law.

It is important to note that the Indian Penal Code includes certain exceptions to the general definition of obscenity. The law explicitly exempts works that fall within the bounds of public interest. Public interest is a term broadly construed to encompass materials that are related to literature, science, history, or religion, and thus are not subject to the same legal scrutiny as obscene content. This exemption allows for the preservation of artistic, educational, and cultural works that may otherwise contain content that, in different contexts, could be considered obscene.

However, it is important to note that the indecent representation of women does not fall within the scope of these sections.

### ***Indecent Representation of Women (Prohibition) Act, 1986***

Women are often depicted in a derogatory, indecent, and obscene manner, reducing them to mere objects of lust. This portrayal not only contributes to their victimization within society but also leads to the corruption of the minds of viewers or others exposed to such depictions. Recognizing this issue, the Indecent Representation of Women (Prohibition) Act, 1986 was introduced to criminalize the indecent, improper, and scandalous depiction of women in various forms of media, including publications, writings, paintings, advertisements, and other public communications. Under Section 2(c) of the Act<sup>24</sup>, the term "indecent representation of women" is clearly defined, and the law prohibits the publication or display of any material that portrays women in an indecent or degrading manner, whether in books, posters, circulars, advertisements, or other media.

### ***Cable Television Networks (Regulation) Act, 1995***

The Cable Television Networks (Regulation) Act, 1995 seeks to regulate television broadcasts that may offend public sensibilities by violating established standards. It provides for penalties, including imprisonment and fines, for violations. Specifically, Rule 6(1)(o) of the Cable Television Networks Rules, 1994, read in conjunction with Section 5 of the Act<sup>25</sup>, prohibits the telecasting of programs deemed unsuitable for "unrestricted public exhibition," a standard further clarified under Section 5-A of the Act.

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<sup>24</sup> Indecent Representation of Women (Prohibition) Act, 1986, § 2(c).

<sup>25</sup> Cable Television Networks (Regulation) Act, 1995, § 5, Rule 6(1)(o).

***Cinematograph Act, 1952***

The Cinematograph Act, 1952 sets forth provisions for the regulation and certification of cinematograph films. Section 4 outlines the rules for the examination of films, while Section 5-A addresses the certification of films for public viewing. This Act<sup>26</sup>, in conjunction with Section 5-A of the Cable Television Networks Act, mandates that the Board of Film Certification (CFBC) review and certify films to ensure they meet appropriate standards before public exhibition.

***Young Persons (Harmful Publication) Act, 1956***

The Young Persons (Harmful Publication) Act, 1956 restricts the publication of material that could potentially corrupt or influence children or young people. Specifically, it targets material that may incite them to engage in violent, cruel, or unlawful acts. Any individual found violating the provisions of this Act is subject to penalties, including imprisonment and fines.

***Information Technology Act, 2000***

The Information Technology Act, 2000 (IT Act)<sup>27</sup>, enacted to address legal issues arising from the use of electronic media and digital technologies, contains several provisions that deal specifically with the regulation of obscene, lascivious, or inappropriate content in electronic form. These provisions are designed to safeguard individuals from harm caused by the transmission, publication, or communication of material that violates public decency, individual privacy, and moral standards. The IT Act criminalizes the publication and transmission of content that appeals to prurient or lascivious interests, intending to protect citizens from digital exploitation and to preserve societal values.

***Section 66E - Violation of Privacy through Transmission of Images***

One of the key provisions in the IT Act that protects an individual's privacy is Section 66E, which specifically addresses the unauthorized transmission of images depicting a person's private or intimate body parts. The provision makes it an offense to capture, transmit, or publish images that expose the private portions of an individual without their consent. The law is clear in its intent to safeguard a person's right to privacy, particularly in an era where digital technology makes it easier to share images and videos that could invade personal boundaries.

This section explicitly criminalizes the act of disseminating such images, offering a punishment that includes a fine not exceeding two lakh rupees, or imprisonment for a period not exceeding

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<sup>26</sup> Cinematograph Act, 1952, § 4, § 5-A.

<sup>27</sup> Information Technology Act, 2000, § 66E, § 67, § 67A, § 67B, § 79(3)(b).

three years, or both. These penalties reflect the severity with which the Indian legal system views privacy violations in the digital age. The right to privacy was further entrenched in Indian law through the Right to Life guaranteed by Article 21 of the Indian Constitution, a right that was emphatically reaffirmed in the landmark case of Justice K.S. Puttaswamy (Retd) & Anr. v. Union of India (2017), where the Supreme Court declared the right to privacy as a fundamental right. The ruling reinforced the principle that any action that violates an individual's privacy, particularly the unauthorized sharing of intimate content, must be treated as an offense under the law.

### ***Section 67 - Obscenity and Lascivious Content***

Section 67 of the IT Act addresses the transmission, publication, and dissemination of lascivious or obscene material in digital form. This provision covers a broad spectrum of obscene content, including material that is titillating, sexually explicit, or likely to deprive or corrupt the morals of those who encounter it. It aims to prevent the spread of materials that appeal to the sexual desires of individuals, as such content is viewed as harmful to both the individuals exposed to it and society at large. The law focuses on protecting public morals and maintaining societal standards of decency.

The penalties under Section 67 are quite severe. For a first-time offense, the individual found guilty of transmitting or publishing obscene content faces imprisonment for a term that can extend up to three years, along with a fine not exceeding ten lakh rupees. This punishment is meant to deter individuals from engaging in the distribution of content that could harm public morality. If the offense is repeated, a second conviction can result in a longer term of imprisonment—up to five years—and a fine of up to ten lakh rupees. These enhanced penalties for subsequent offenses serve as a strong deterrent to prevent the spread of obscene material and emphasize the gravity of such violations.

### ***Section 67A - Pornographic Content***

Further addressing the issue of sexually explicit materials, Section 67A of the Information Technology Act, 2000 specifically criminalizes the publication or transmission of material that explicitly involves sexual acts or behaviour. This provision directly targets the distribution of pornographic material and any content that depicts or alludes to sexual activities, whether or not it involves graphic imagery. The law takes a firm stance against such content, reflecting societal concerns over the negative impacts of pornography and similar material on individuals, particularly minors and vulnerable individuals.

Under Section 67A, individuals found guilty of publishing or transmitting pornographic content

face imprisonment for a period not exceeding five years, and a fine that may reach up to ten lakh rupees. The law recognizes the potential harm caused by such content, including the psychological and social effects on viewers, and aims to prevent its widespread distribution. The provision also aims to protect the public from exposure to explicit sexual content, which can be both harmful and degrading to individual dignity. For repeat offenders, the penalties may be even more severe, reinforcing the importance of protecting society from the effects of pornography and sexually explicit material.

These provisions in the Information Technology Act, 2000 are particularly significant in the context of contemporary challenges involving digital privacy and online harassment. For instance, in the Bois Locker Room incident, where sexually explicit and altered photographs of women were shared on social media without their consent, these legal provisions were invoked. In such cases, Section 66E addresses the unauthorized transmission of private images, while Section 67 and Section 67A are relevant to the distribution of obscene or pornographic material, ensuring that offenders face appropriate legal consequences.

The IT Act's stringent penalties for violations, including both imprisonment and substantial fines, provide a robust legal framework for addressing digital exploitation and the violation of privacy. The law serves not only to punish offenders but also to deter others from engaging in the unlawful transmission of inappropriate or explicit content. Through these provisions, the legal system strives to protect individuals from the harmful effects of digital abuse while upholding public morality and individual privacy in the digital age.

### ***Section 67B***

Section 67B of the Information Technology Act, 2000 imposes a stringent penalty for the publication and transmission of content involving minors in obscene, indecent, or sexually explicit contexts. This provision does not limit itself to images of minors engaged in explicit sexual acts but extends to any digital text or image that represents children in an obscene or sexually suggestive manner. The law recognizes that the circulation of private images of young girls, particularly in contexts that violate their dignity, is a significant concern in today's digital landscape. A first offense under this section is punishable by a maximum sentence of five years imprisonment and a fine of up to ten lakh rupees.

### ***Section 79(3)(b)***

In addition, Section 79(3)(b) holds intermediaries accountable for failing to take action when notified of such unlawful content. Intermediaries, including digital platforms, are required to remove or block access to offensive material upon receiving actual knowledge or being formally



notified by the government or its agency that the content resides in or is connected with a prohibited computer resource. Failure to comply with this obligation can lead to liability under the law.

### ***Information Technology (Intermediary Guidelines) Rules, 2011***

Furthermore, The Information Technology (Intermediary Guidelines) Rules, 2011 impose additional responsibilities on intermediaries. These rules mandate that intermediaries issue clear warnings to users of computer resources, explicitly informing them that they must not engage in activities such as the mass collection, modification, publication, transmission, or display of content that is:

1. *Blasphemous or defamatory*
2. *Obscene or grossly harmful*
3. *Harassing, pornographic, or libelous*
4. *Invasive of another's privacy*
5. *Ethnically offensive*
6. *Harmful to minors in any way*

These requirements aim to ensure that digital platforms and online intermediaries actively manage the content shared by users and prevent the dissemination of harmful, illegal, or offensive material. By enforcing these guidelines, the law seeks to protect individuals, particularly minors, from online exploitation, harassment, and abuse, while also holding digital platforms accountable for the content they host.

### ***Advertising Standards Council of India (ASCI)***

To regulate advertisements on television, the Advertising Standards Council of India (ASCI) was established in 1985. The ASCI aims to protect consumer interests by ensuring that advertisements adhere to a self-regulated framework. The primary goal of the ASCI is to encourage responsible advertising practices that uphold public trust. One of the central tenets of the ASCI's Self-Regulating Code is to ensure that advertisements conform to generally accepted standards of public decency and propriety, avoiding content that is indecent, vulgar, or offensive and may cause widespread or significant offense.

## **V. EVALUATING KEY CASE LAW**

Article 21 of the Indian Constitution guarantees the right to life and personal liberty. In a landmark oral ruling in 2015, the Supreme Court of India affirmed that individuals have the

right to watch pornography within the privacy of their own home under the constitutional guarantee of personal liberty (RPL). As such, the act of viewing pornography in one's private space is entirely lawful and cannot be infringed upon by the state. However, it is important to note that materials depicting child pornography, rape, or violence against women are prohibited, even when viewed in a private setting.

***Ranjit D. Udeshi v. State of Maharashtra (1965)***

In the case of *Ranjit D. Udeshi v. State of Maharashtra (1965)*, the Supreme Court established the Hicklin Test to determine whether the ownership and sale of a book constituted "obscene behaviour" under Section 292 of the Indian Penal Code (IPC), 1860. According to the test, any book, pamphlet, or material deemed "lascivious" or appealing to the prurient interest was considered obscene. However, the test failed to provide clear criteria for determining what constitutes "lascivious" or "prurient," or what material has the potential to corrupt or deprive individuals. As a result, in cases such as *Ranjit D. Udeshi*, the obscenity of the work was the central factor in determining the guilt of the accused. The Hicklin Test was used in India until 2014 to evaluate whether certain art, materials, or actions were obscene.

***Aveek Sarkar v. State of West Bengal (2014)***

In *Aveek Sarkar v. State of West Bengal (2014)*, the Supreme Court rejected the Hicklin Test and instead adopted the community standards test to assess what constitutes obscenity. Despite this shift, the community standards test remains relevant when determining the pornography status of materials, subject to the numerous restrictions outlined in the Indian Penal Code (IPC), 1860, the Information Technology Act (2000), the Protection of Children from Sexual Offences (POCSO) Act (2012), and the Indecent Representation of Women (Prohibition) Act (1986).

The creation of adult pornography is strictly prohibited by law, despite the legality of private consumption. Additionally, forcing any individual, regardless of gender, to view pornography is a criminal offense, with particular emphasis on the protection of women. Child pornography is prohibited in all forms, including its viewing, creation, and distribution. Sharing pornographic content, even in private messages on platforms such as WhatsApp, Facebook, Instagram, or OnlyFans, is illegal. Participating in or facilitating pornography in public spaces or group activities also constitutes a criminal offense under Indian law.

***Ryan Maharashtra v. John Michael Thorpe (2021)***

In the high-profile case of *Ryan Maharashtra v. John Michael Thorpe (2021)*<sup>28</sup>, Raj Kundra, a

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<sup>28</sup> 2021 SCC OnLine Bom 4897.

businessman and the spouse of actress Shilpa Shetty, faced serious charges related to infidelity and pornography. The Mumbai Police Department had received multiple complaints from women who claimed that they were coerced into performing in obscene films for Raj Kundra's app, Hotshots, which was later taken over by Kundra's brother-in-law, Pardeep Bakshi, a UK-based businessman. The accusations led to a series of arrests and raids, with Raj Kundra being detained in connection with the production and distribution of pornography. He was subsequently charged under various legal provisions, including those in the Indian Penal Code, 1860, the Information Technology Act, 2000, and the Prohibition of Indecent Representation of Women (Prohibition) Act, specifically under Section 420 (cheating).

In the case of *Ryan John Michael Thorpe v. The State of Maharashtra (2021)*, Raj Kundra was accused of actively engaging in the promotion and marketing of pornographic films, as well as overseeing the operation of the Hotshots App through his company Viaan Industries. His involvement included monetizing the app by distributing content through social media platforms. It was revealed that Raj Kundra had set up Armsprime Media Pvt. Ltd., a company specifically to manage the production and distribution of the explicit content. As a result of these developments, the investigating agency sought permission from the Magistrate to search the office of Viaan Industries, which led to the discovery of 51 pornographic films with the Hotshots and Bollyfame logos on his mobile phone and SAN device. Investigators also uncovered messages exchanged between Raj Kundra and his brother-in-law, Pradeep Bakshi, regarding their involvement in the operation of the Hotshots app.

Despite the significant evidence gathered during the investigation, Raj Kundra, through his attorney Prashant Patil, filed for bail, arguing that the prosecution had failed to present any conclusive evidence linking the Hotshots app to a criminal offense. Kundra contended that no evidence had been shown to suggest he was directly involved in the filming of the videos, and it was up to the content creators to decide whether or not their work would be published on the app. The bail petition further claimed that no prima facie case had been established against him in the complaint filed by the prosecution.

The Bombay High Court reviewed the application and determined that the investigating officer's actions and the Magistrate's decision to remand Raj Kundra to police custody on July 20, 2021, were in compliance with legal requirements. As a result, the court decided that no intervention was necessary. Subsequently, on September 20, 2021, both Raj Kundra and Ryan Thorpe, the IT chief of Viaan Industries, were granted bail by the Mumbai Magistrate Court in connection with the alleged pornography racket. Despite the legal challenges, the case has drawn considerable attention due to its association with prominent figures in the entertainment

industry, and the legal implications surrounding the Hotshots app and its distribution of explicit content.

### ***K.A. Abbas v. Union of India (1970)***

One significant case that illustrates the complexities of defining obscenity is *K.A. Abbas v. Union of India*<sup>29</sup>, which dealt with a film depicting the lives of urban and rural communities, including scenes featuring the lives of prostitutes in Bombay. Initially, the Censor Board rejected the film's application for a 'U' certificate, but the Central Government's Appellate Authority approved the certification, provided certain scenes, specifically those depicting prostitution, were removed. The petitioner moved the Supreme Court under Article 32 for the violation of his fundamental rights. The Court referenced American jurisprudence on obscenity, emphasizing that the mere mention of sex should not automatically classify material as obscene. The Court ruled that the test for obscenity should not be based on the sensitivities of the most depraved or vulnerable, but on broader societal norms. This judgment clarified that sex, in and of itself, is not necessarily obscene, and merely mentioning the word "sex" does not render material indecent or immoral.

### ***Samaresh Bose v. Amal Mitra (1986)***

In *Samaresh Bose v. Amal Mitra* (1986)<sup>30</sup>, a Bengali writer was prosecuted under Section 292 of the Indian Penal Code for publishing a novel titled 'Prajapati' in a Bengali journal. The Supreme Court overturned the conviction, reasoning that when determining the obscenity of a work, the judge must first understand the author's perspective and the literary or artistic value of the content. The Court emphasized that the judge should not only consider the artistic and literary merit of the work but also evaluate its impact on readers of varying ages. This case reinforced the principle that obscenity should not be judged solely based on subjective moral sensibilities but in the context of the work's social, artistic, or cultural value.

### ***Bobby Art International v. Om Pal Singh Hoon (1996)***

In *Bobby Art International v. Om Pal Singh Hoon*<sup>31</sup>, the Delhi High Court initially banned the film 'Bandit Queen' on grounds of obscenity. However, the decision was challenged in the Supreme Court, where an expert tribunal consisting of three female members overturned the ban, granting the film an 'A' certificate. The tribunal reasoned that the depiction of nudity in the film was not intended to arouse lust but was essential to portraying the protagonist Phoolan

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<sup>29</sup> AIR 1971 SC 481.

<sup>30</sup> AIR 1986 SC 967.

<sup>31</sup> AIR 1996 SC 1846.

Devi's trauma and the humiliation she suffered, which motivated her subsequent acts of revenge. The Court concluded that the nudity was necessary to communicate the gravity of the protagonist's plight and should not be viewed as prurient or obscene. The judgment highlighted the importance of context in assessing artistic works and the role of nudity in portraying serious societal issues.

### ***Maqbool Fida Hussain v. Raj Kumar Pandey (2008)***

In *Maqbool Fida Hussain v. Raj Kumar Pandey*<sup>32</sup>, M.F. Hussain, a renowned Indian painter, faced several complaints about a painting depicting a nude woman in grief. The painting, titled 'Bharat Mata', was part of a charity auction for the victims of the Kashmir earthquake. Although Hussain was not involved in the auction, he apologized for offending public sentiments. The key legal issue was whether the painting could be considered obscene under Section 292 of the IPC. The Supreme Court ruled that there was no prima facie evidence to suggest that the painting was obscene, as it did not elicit prurient or sexual interest. The Court affirmed that nudity alone does not equate to obscenity and that the aesthetic value of the artwork overshadowed its nudity. This judgment reinforced the notion that artistic expression must be evaluated holistically, with due regard to its cultural, historical, and artistic significance.

### ***Ajay Goswami v. Union of India (2004)***

The case of *Ajay Goswami v. Union of India*<sup>33</sup> concerned the protection of minors from sexually exploitative material, regardless of whether such material is legally considered obscene. The Supreme Court in this case held that when evaluating material that could potentially be obscene, courts must weigh the artistic, literary, or social merit of the content against its potential harm. The Court emphasized that material should be judged from the perspective of an ordinary person, devoid of hypersensitivity or overreactive moral standards. The judgment reiterated the importance of context and cautioned against isolating individual elements of a work without considering the whole. This ruling also stressed that speculative or imaginary scenarios involving minors should not be brought to court without sufficient cause.

## **VI. COMPARISON WITH LAWS OF OTHER COUNTRIES**

When discussing the legal framework governing obscenity, the United States has had a significant influence through its jurisprudence, particularly with the Supreme Court's decision in *Miller v. California*. In this landmark case, the Court established the guidelines for evaluating obscenity under what is now referred to as the Miller Test, which introduced the community

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<sup>32</sup> 2008 SCC OnLine Del 399.

<sup>33</sup> AIR 2007 SC 493.

standards test. According to the Miller Test, a work is considered obscene if it meets the following three criteria:

*Contemporary Community Standards:* The work must be assessed against contemporary community standards, with the determination that the work does not appeal to the lustful or voyeuristic interests of an average person.

*Offensiveness:* The work must be clearly and without any doubt offensive to contemporary societal norms. This criterion essentially considers whether the material crosses the boundary of accepted public decency.

*Absence of Value:* The work must lack any literary, artistic, scientific, or political value in its entirety. If the material holds any legitimate social, intellectual, or cultural merit, it would not be considered obscene.

The Miller Test has been pivotal in obscenity cases in the United States, but over time, it has come under scrutiny for its failure to keep pace with the modern realities of the digital age. The test has often been criticized for its reliance on subjective community standards, which can vary significantly depending on location, demographics, and the changing social landscape. Moreover, with the rise of the internet and digital media, the standards for determining obscenity have become even more challenging to apply consistently.

In the United Kingdom, the legal approach to obscenity also evolved significantly over time. Initially, the Obscene Publications Act of 1857 was enacted, which introduced the Hicklin Test as the standard for determining obscenity. The Hicklin Test focuses on the vulnerability of the audience exposed to the material in question, particularly whether the material has the potential to deprave or corrupt those whose minds are susceptible to such immoral influences. This test was applied in both the U.K. and the U.S. for many years as a method of determining what constituted obscene material.

However, in 1957, the U.S. Supreme Court rejected the Hicklin Test as inadequate, particularly due to its overly broad and subjective application. The Court criticized the test for failing to account for the broader social and artistic context of the material and for its disproportionate focus on the most susceptible individuals, rather than considering how the material impacts the general public<sup>34</sup>. The Hicklin Test's focus on protecting the vulnerable led to an overly restrictive approach to freedom of expression, and its rejection paved the way for the more nuanced Miller Test.

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<sup>34</sup> D. Maggen, "Law In, Law Out: Legalistic Filter Bubbles and the Algorithmic Prevention of Nonconsensual Pornography," 43 *Cardozo L. Rev.* 1 (2022).

The Hicklin Test's influence persisted in the United Kingdom until significant shifts in the law were triggered by high-profile cases. One such case was the tragic murder of Jane Longhurst by Graham Coutts, which brought attention to the role of violent pornography in shaping criminal behaviour. During the investigation, it was revealed that Coutts had spent considerable time watching extreme videos of women being violently strangled, suffocated, hanged, and drowned. The fact that Coutts was influenced by such explicit and violent material led to widespread public outcry and calls for stronger regulation of violent pornography. In the wake of this case, significant changes were made to the UK's obscenity laws.

The Criminal Justice and Immigration Act of 2008 was introduced as a response to the growing concerns over extreme pornography. This new legislation represented a marked departure from the earlier Obscene Publications Act of 1857 in two key respects:

*Shift in Focus:* The 2008 Act moved the focus from the production and publication of obscene materials to the individual in possession of such material. It made it an offense for an individual to possess extreme pornography, even if it was not intended for distribution. This shift aimed to address the growing problem of private consumption of violent and extreme content that could potentially encourage harmful behaviours.

*Clear Definition of Extreme Pornography:* The 2008 Act provided a more comprehensive and precise definition of "extreme pornographic materials", which had been vague under the previous legislation. The Act explicitly defined such materials as intended solely for the purpose of arousing sexual feelings, marking a clear distinction between artistic or educational content and materials designed purely for sexual stimulation through extreme depictions of violence or degradation.

These reforms in the UK sought to address the dangers posed by certain types of obscene materials, particularly those depicting sexual violence or extreme fetishes that could have serious psychological or social consequences. By focusing on possession rather than the broader production and distribution of obscene material, the law aimed to better protect individuals and society from the harms of such content while maintaining a clearer boundary between permissible and illegal material.

In summary, while both the U.S. and U.K. legal systems have struggled with the challenge of defining and regulating obscenity, their approaches have evolved to reflect changing societal values and the increasing complexity of modern technology. The Miller Test in the U.S. and the Criminal Justice and Immigration Act of 2008 in the U.K. highlight ongoing efforts to refine the standards for obscenity, with particular emphasis on protecting vulnerable individuals,

limiting the spread of harmful material, and balancing freedom of expression with public morality. However, the continuing debates and legal reforms underscore the difficulties in creating a universal standard for obscenity in a rapidly changing cultural and technological landscape. As digital media continues to grow and evolve, the challenge for lawmakers and courts in both countries remains to develop effective and appropriate methods for addressing the regulation of obscene content in a way that respects both individual freedoms and societal protection.

## **VII. IS BEING AN ONLYFANS CREATOR EQUIVALENT TO BEING AN ADULT CONTENT CREATOR?**

To begin with, it is important to note that OnlyFans operates as a legally accessible platform in India, though it requires careful consideration of the specific content being shared. Platforms like Patreon, which allow creators to monetize a wide range of content across various genres, have existed for some time. OnlyFans, however, distinguished itself by offering heightened standards of data safety and identity protection, attracting significant attention by marketing itself as an ideal space for adult content monetization. Despite the global recognition of OnlyFans as a platform for adult content creators, the legal landscape in India presents unique challenges. While the platform itself is not prohibited in India, the sale or distribution of explicit content through OnlyFans violates Indian laws that prohibit "obscenity" and the dissemination of sexually explicit material. Therefore, despite the platform's lawful existence, adult content creation, including the production and distribution of explicit content, remains illegal under Indian law.<sup>35</sup>

### ***The Dichotomy of Adult Content Platforms: Consent and Obscenity***

The distinction between platforms like OnlyFans and more niche platforms such as Feetfinder<sup>36</sup> primarily revolves around how they are perceived in relation to "obscenity." The term "obscenity" is inherently subjective and remains a point of ongoing legal debate in many jurisdictions. Historically, obscenity has been defined in various legal systems, most notably through the Hicklin Test, established in the English case of *R. v. Hicklin*. The Hicklin Test aimed to determine whether material could deprave or corrupt the minds of those exposed to it, especially those considered vulnerable. While the interpretation of obscenity is far from static,

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<sup>35</sup> Marc Jonathan Blitz, "The Right to Privacy in the Age of Surveillance," *Journal of Law and Technology*, vol. 42, 2016, at 115.

<sup>36</sup> Sharanya Chowdhury, "Feetfinder vs. OnlyFans: Bans, Business Models and Data in Adult Content Creation," *Cell for Law & Technology*, Dr. Ram Manohar Lohiya National Law University (2024), available at <https://clt.nliu.ac.in/?p=1032>.



evolving alongside societal norms and moral values, a recent judgment by the Bombay High Court on October 12, 2023, illustrated how the understanding of what constitutes "obscene" content is fluid. The Court ruled that provocative dance performances and suggestive gestures by women, when presented within appropriate contexts, do not necessarily equate to "obscene" or "immoral" acts. This underscores how cultural perceptions of obscenity may change over time and vary depending on the prevailing societal attitudes and moral frameworks.

On platforms like OnlyFans, the boundary between what constitutes explicit content and what is deemed acceptable often remains ambiguous and subject to interpretation, further complicated by global access and varying definitions of what is deemed "obscene." Interestingly, while uploading content that may be considered explicit or pornographic is illegal under Indian law, there seems to be little legal intervention for other content—such as uploading pictures of alluring ankles—on platforms like Feetfinder, or similar e-commerce platforms. These platforms, which may cater to the sexual interests of users, often exist within the confines of acceptable legal standards because they do not overtly focus on explicit sexual imagery. This paradox, wherein content that may seem suggestive but not overtly explicit is often legally accepted, highlights the discrepancies in legal frameworks surrounding adult content. The Information Technology (Amendment) Act of 2008, particularly Section 67, underscores this dichotomy. The Act criminalizes obscene material in electronic form but fails to consider the nuances between content that is produced consensually and for commercial purposes versus content that may lead to exploitation or harm.

### ***The Overarching Legal Question: Consent and Autonomy***

The current framework of obscenity laws in India raises significant questions about consent and individual autonomy. The regulation of adult content often places the onus on content creators, penalizing them for engaging in work that is consensual and, in some cases, lucrative. These regulations are predicated on the assumption that such content, particularly explicit or pornographic material, is inherently harmful to public morals, without sufficiently considering the personal agency of the creators involved.<sup>37</sup> For platforms like OnlyFans, which provide a degree of control over content creation and monetization, the legal system's focus on prohibiting the sale and distribution of explicit material fails to account for the autonomy of content creators who voluntarily engage in these activities. This legal oversight can disproportionately impact adult content creators, leaving them vulnerable to legal consequences for content that, while

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<sup>37</sup> Nishtha Chopra, "What is Obscene in India: Is the Community Standards Test the Best Answer?" Centre for Legal Studies, National Law University Odisha (2023), available at <https://clsnuo.com/2023/07/16/what-is-obscene-in-india-is-the-community-standards-test-the-best-answer/>.

deemed explicit, is consensually produced.

### ***Advertising to Audiences Outside India: Legal Considerations***

A critical aspect of adult content regulation arises when creators on platforms like OnlyFans seek to advertise their content to audiences outside India. While advertising such content to international audiences may not necessarily violate Indian laws or Advertising Standards Council of India (ASCI) guidelines, it is essential for creators to comply with the legal frameworks of the countries where the content is marketed. Indian laws relating to intermediary liability and the promotion of adult content pose challenges to the advertising of adult content, particularly if it is done through surrogate advertising—a practice often used to indirectly promote adult material. The Ministry of Information & Broadcasting has explicitly stated that promotional content that violates the ASCI guidelines, including those promoting products or services that contravene the established code, is prohibited. While platforms like Instagram, Facebook, and Twitter may allow users to promote accounts, the mere act of promoting an adult content account does not automatically make it illegal. However, the nature of the content being advertised remains a key factor in determining whether it violates ASCI regulations.

The ASCI has strict guidelines to prevent the promotion of adult content in India. However, challenges arise when individuals engage in indirect promotion of adult content, such as promoting a social media account without explicitly disclosing the nature of its content. In such cases, determining whether the promotion violates ASCI rules becomes a grey area. The ambiguity surrounding the promotion of accounts that may host explicit content but do not overtly advertise it as such creates difficulties in enforcement. Consequently, ensuring compliance with ASCI guidelines in such instances requires a nuanced approach, considering the intent behind the promotion and the nature of the content being shared.

### ***Banning Versus Regulating Adult Content: A Threat to Data Privacy***

The ongoing debate about banning versus regulating adult content raises significant concerns about data privacy and creator protection. The current Indian regulatory approach tends to focus on banning adult content without addressing the fundamental issues surrounding creator consent, autonomy, and the privacy of creators. By imposing blanket bans, the regulatory system inadvertently stifles discourse on data privacy for content creators and sex workers who rely on platforms like OnlyFans for a safer and more autonomous means of monetizing their work. The OnlyFans model, which prioritizes the protection of creators' identities and financial data, stands in contrast to the lack of comprehensive data protection regulations in many other sectors of the adult entertainment industry.

India's reluctance to have an open conversation about adult content regulation contributes to a lack of safeguards for creators, leaving them vulnerable to exploitation, data breaches, and non-consensual content distribution. By failing to regulate adult content ethically, Indian authorities inadvertently push such content into the shadows, where creators may have little control over their data and content. The trade of deepfake pornography and the evolution of adult content production methods further complicate these issues. If India is to adequately regulate adult content, it must also address the data privacy concerns that are essential to safeguarding the rights and well-being of content creators.

While banning consensual adult content may seem like an effective way to control its distribution, it ultimately pushes these activities into unregulated spaces where the line between consensual and non-consensual content becomes increasingly blurred. Instead of addressing the root causes of exploitation and illegal content distribution, such bans only create an environment where it is harder to differentiate between ethically produced and harmful content. Thus, the legal system must shift toward ethical regulation of adult content that prioritizes creator consent and data privacy, ensuring that such content is regulated in a way that protects both individuals' rights and public morality.

## **VIII. CONCLUSION**

The regulation of pornography in India, particularly on platforms like OnlyFans, underscores the complex interplay between individual freedoms, societal morality, and legal enforcement. Indian law, steeped in colonial-era constructs, continues to struggle with the evolving realities of digital consumption and the autonomy of content creators. The shift from the Hicklin Test to the Community Standards Test illustrates an attempt to modernize legal standards, yet inconsistencies in interpretation and enforcement persist. While Indian law permits private consumption of adult content under certain conditions, it strictly prohibits the creation, distribution, and monetization of explicit material, reflecting a stringent stance on obscenity.

International comparisons reveal that more nuanced frameworks, like the Miller Test in the United States or the Criminal Justice and Immigration Act in the United Kingdom, offer valuable insights into balancing the rights of creators with societal concerns. However, these approaches also highlight the challenges of applying consistent standards in diverse societies.

The OnlyFans conundrum exemplifies the paradoxes within India's regulatory framework. While the platform operates legally, its primary content—adult material—violates Indian obscenity laws. This contradiction underscores the need for legal reforms that distinguish between consensual adult content and exploitative material. Ethical regulation, coupled with

robust data privacy protections, could address these gaps while safeguarding individual autonomy and public decency.

As India grapples with these challenges, it must consider shifting its focus from outright bans to creating a transparent and enforceable regulatory framework. Such reforms would not only ensure consistency in the application of obscenity laws but also uphold the fundamental rights enshrined in the Constitution. The discourse on platforms like OnlyFans should serve as an impetus for India to engage in an informed and balanced conversation about the regulation of adult content in the digital age.

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