What is Obscenity?

Can it Be Defined?

Emily Conrad
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In a country that prides itself on free speech we are very limited in what we can and cannot say. Censorship, injunctions, and obscenity laws are just examples of how we as American’s are restricted in speech and action. Any view of obscenity is completely abstract. There have been many tests used in attempts to define obscenity but none that have really come to a socially definitive agreement. Miller v. California would be the mascot for obscenity cases and yet over the years from case to case, Justices have not even been able to agree on a correct way to address the situation. And in these tests, who is to decide what constitutes as obscene, and why? In order for a law to be implemented, it must be defined. The Miller v. California case only houses the definition; it has not been made to stand alone.

The first attempt to categorize obscenity and gather a collective criteria was the Hicklin test, first developed in *Regina v. Hicklin* and then later in *Roth v. United States*. The Hicklin test stated, "Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall,” (Roth v. United States). The test definition itself is vague at best as it has no concrete explanation for “minds...open to such immoral influences.” This test permitted courts to read the alleged obscene materials with no regards to the rest of the text or any kind of merit it may have. Hicklin was eventually retired during the *Roth v. United States* case. At this point in time, Justice William J. Brennan ruled that obscenity was "utterly without redeeming social importance.” The new test under his ruling was classified as, "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to a prurient interest” (Roth v. United States).
Again, the statement is ambiguous. No court could come to a firm conclusion on what “redeeming social importance” really meant and who would decide the criteria, as well as who is an average person and what constitutes “prurient interest.” The courts did see the error of the statement and in 1964 added on to the law, “substantially beyond customary limits of candor in description or representation." The Court also went on to specify that the "community" referred to in the definition was at a national level as opposed to a local one. The Miller v. California case later stated that a jury may measure "the essentially factual issues of prurient appeal and patent offensiveness by the standard that prevails in the forum community and need not employ a 'national standard,'” (Silver, 2003).

Miller v. California is the most monumental case in the history of obscenity. Without this case, obscenity would be different than it is today. The appellant, Marvin Miller, was with a mail order business that sent out sexually explicit material. Miller mass mailed advertisements for his books that depicted adults in various sexual situations. Miller was found guilty by a California Court because he was knowingly distributing obscene material. Miller appealed the case and lost.

From this case, the Miller Test evolved, also referred to as the “three prong test” because of the three guidelines it gives for recognizing obscenity. This test, though still used today, is also flawed. When it was first developed, one of the main components was what Justice Brennan’s clerks referred to, quite crassly, as the “limp dick” standard. This defined obscene material only if it showed an erect penis. Many inappropriate materials could easily fly under this radar, while others were stopped by the standard that turned out to be quite innocent (Clor, 1985). Though this standard was very transparent and had no real impact, the judges at the time were considered
more of the liberal ones. The Warren Court was the first to look at restrictions on sexually explicit literature and its violations to the First Amendment. Though it did address some parts of the problem, it left obscenity under the category of unprotected by the First Amendment (Koppleman, 2005). After Justice Warren and Justice Black resigned, two much more conservative men, Chief Justice Warren Burger and Justice William Rehnquist were appointed and took a harder approach to the topic.

The closest to a true definition of obscenity comes from Justice Potter Stewart when he said, “I know it when I see it,” (Jacobellis v. Ohio). The Jacobellis v. Ohio case revolved around the showing of a French movie, Les Amants. The issue at hand was whether or not the movie could be banned in the state. The court did rule that the movie was protected by the First Amendment but could not actually agree on any logic, which led to differing opinions among all four judges involved in the case. This is where Justice Stewart held Roth v. United States as protecting all obscenity except “hardcore pornography,” (Jacobellis v. Ohio) and was led to speak his most famous sentence.

This quote is an ironic statement considering the subject matter. This would affirm that each obscenity case is actually something that should be looked at on a situation by situation basis as opposed to trying to confine it to one category that would satisfy a nation. Justice Brennan was also quoted as admitting, “

... I am forced to conclude that the concept of 'obscenity' cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a byproduct of the attempt to suppress unprotected speech, and to avoid very costly institutional harms (Paris Adult Theatre I v. Slaton).
Obscenity is really a very vague term. Not only has it not been put into one solid definition but it does not meet the requirements of the Vagueness Doctrine. The *Miller vs. California* case, the precedent case for obscenity, couldn’t even fit the vastness of the term into one category, so they split it into two different definitions: contemporary community standards and hypothetical reasonable persons. The Vagueness Doctrine states that people must clearly be informed as to the prohibited behavior. There is also a test for the Vagueness Doctrine: Does the law give fair notice to those persons subject to it? Does the law guard against arbitrary and discriminatory enforcement? And can the law be enforced with sufficient "breathing room" for First Amendment rights? (Huston, 2005, p. 78). This being stated, that would make almost every case up to that point involving obscenity void. What constitutes a “hypothetical reasonable person?” There are no official criteria for a reasonable person. It is almost a contradiction in terms. In addition to that, no physical harm can come from someone violating an obscenity preference.

The fact that the Miller Test allows verdicts to be determined based on the local standards, something “obscene” in one state may not be considered “obscene” in another. This procedure is conflicting and therefore not unified under the First Amendment. The weight of deciding who can see what and what is acceptable is a heavy one. But the issue always comes back to the fact that many have differing opinions, morals and ethics. Time and era is also a relevant factor. As a whole, humanity has become more and more susceptible to whatever comes their way. For example, a burlesque show viewed fifty years ago would have been considered obscene to a group of women. But in the 21st Century, many go to burlesque shows and those like it for entertainment purposes with their friends. It is not considered to be obscene
but instead enjoyable. This can be seen in most every aspect of living. In the end, time, knowledge and education changes and shapes ideas.

Someone who uses foul language themselves will likely have no qualms with hearing it themselves, or an artist would have no issues with a naked body because they see it as art and not something that is obscene. This can apply to almost every issue that has been considered obscene at one point or another. If one person claims a case for obscenity, it can lead to more and more cases being brought to light, each one getting more radical each time. For instance, if a parent can try a case because their son or daughter heard something obscene on the radio or on television, then the court system must allow someone who is also offended by words a fair trial. If a vegetarian sees animals being treated cruelly on a television show, they too could have a case because their beliefs were just “injured by words,” (Huston, 2005, p. 79). At that point, anyone and everyone would be free to approach the subject since everyone has their own views.

Can obscenity be defined? Does obscenity even exist in today’s world? With the advancement in technology is has become harder and harder to track and punish crimes thought to be obscene. The Miller standard says that “obscenity is the subset of pornography which is prurient, patently offensive, and lacking in significant scientific, literary, artistic, or political value,” (Miller v. California). If this were truly the case, anything claimed to be obscene could argue its merit in the scientific, literary, artistic or political world. Therefore, that definition is inconsistent which would mean that obscenity itself is indefinable if it is indeed a “subset of pornography.” Most every ‘definition’ that has come about for obscenity has in some way led to contradictions and inconsistencies. What is obscenity is just a vague a question as can obscenity be defined. If the topic itself weren’t so obscure the issue could be narrowed down to a
more concrete point. But while the 'official definition' of obscenity (Miller v. California) remains as elusive as it is, the term itself will always be unclear as the matter of differing opinions will always be involved. America is a democracy and because of that its citizens have the right to unlimited access to information. It is up to them to decide what is obscene and what is not.
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