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**BUT IS IT SPEECH? MAKING CRITICAL SENSE OF THE DOMINANT
CONSTITUTIONAL DISCOURSE ON PORNOGRAPHY, MORALITY AND HARM UNDER
THE PERVASIVE INFLUENCE OF UNITED STATES FIRST AMENDMENT**

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AMENDMENT JURISPRUDENCE**

L van der Poll*

I shall not today attempt to define the kinds of material I understand to be [hard core pornography]; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it.*¹

Mr Justice Potter Stewart might have known obscenity when he saw it, but with respect, I do not, nor would in any way claim to any intuitive and immediate recognition of what is indecent.²

Obscenity law is concerned with morality, meaning good and evil, virtue and vice. The concerns of feminism with power and powerlessness are first political, not moral. From the feminist perspective, obscenity is a moral idea; pornography is a political practice. Obscenity is abstract; pornography is concrete. Obscenity conveys moral condemnation as a predicate to legal condemnation. Pornography identifies a political practice that is predicated on power and powerlessness – a practice that is, in fact, legally protected. *The two concepts represent two entirely different things.*³

1 Introduction

The quest for a suitable theoretical mould within which to explore the possible constitutional consequences of adult⁴ gender-specific⁵ sexually explicit material⁶ (often referred to as “obscene” or even “pornographic” material) is, by its very nature, premised on a particular conception (or definition) of such material. Although various attempts to produce a legal definition of sexually explicit material have been

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1 *Per* Stewart J in *Jacobellis v The State of Ohio* 378 US 184 (1964) 197. Emphasis added.

2 *Per* Sachs J in *Case; Curtis v Minister of Safety and Security* 1996 5 BCLR 609 (CC) par [108].

3 MacKinnon *Feminist Theory* 196. Emphasis added.

4 “Adult” signifies that the material must be both directed at persons who are eighteen years or older and must involve (or depict) persons who are eighteen years or older.

5 “Gender-specific” denotes that the material in question, through the medium of pictures (including films, photographs, sketches or prints) or sexually explicit words and prose, contain images of adult (heterosexual) women. See also n 6.

6 Adult gender-specific sexually explicit material is, for present purposes, understood to consist of sexually explicit images, irrespective of how created, of adult women specifically produced for, and consumed by, the adult male heterosexual market, to be set apart, therefore, from so-called “child”, “gay” and “lesbian” pornography. This genre of pornography could thus well be termed “adult heterosexual pornography”: see, in particular, Van der Poll 2010 *Stell LR* 387. See also n 11 and n 12.

criticised as either too vague or too broad (or even “under broad”),⁷ some attempt at a definition remains an essential preliminary to any meaningful discussion thereof. The theoretical mould(s) within which a definition is (are) cast will largely determine the extent of an effective constitutional challenge to material deemed sexually explicit and, in turn, set guidelines for its possible regulation or prohibition.

The constitutional parameters within which these debates should arguably be situated are determined by various factors. These, amongst other, include the political and constitutional history of a country, its current constitutional dispensation, its fundamental constitutional values and the founding principles of its democratic order.⁸ In the event of a constitutional democracy (which is characterised by the presence of a supreme constitution with a justiciable bill of rights) a legal definition of gender-specific sexually explicit material formulated with the objective to frame it as a possible infringement of women’s fundamental rights and freedoms must be mindful of these parameters. Certain constitutional rights and/or values might have to be prioritised and this process may be guided and/or influenced by various factors, each of which requires careful consideration.

And yet attempts to conceptualise sexually explicit material within a gender-specific human rights framework present distinct challenges which, in a patriarchal legal and political design, would appear to be near insurmountable. These challenges would seem to be related to the enduring impact of the common law conception of obscenity (with its strong moralistic overtones) on the jurisprudence of the Supreme Court of the United States, coupled with a subjective libertarian-inspired test,⁹ and the Supreme Court’s general reluctance (echoed also by the South African Constitutional Court)¹⁰ to consider a gender-specific conception of harm emanating from feminist arguments premised upon women’s constitutional interests in human dignity, equality and bodily integrity.

7 For a comprehensive discussion of the success of various attempts at formulating a legal definition of sexually explicit material in Anglo-American jurisprudence, see Lindgren 1993 *U Pa L Rev* 1156.

8 These hermeneutical “parameters” are fundamental to the interpretation of the possible constitutional implications of the material under consideration.

9 See, in particular, n 54.

10 See, in particular, par 7.1 n 121.

It is important to note that this article neither concerns so-called “child”¹¹ or “gay” and “lesbian”¹² sexually explicit material, nor does it proceed from the popular philosophical vantage point that sexually explicit material causes harm to, or threatens, the general moral character of society.

The article thus has essentially a two-fold objective. The first is to critically examine the dominant discourse on adult gender-specific sexually explicit material resulting from the pervasive influence of United States Supreme Court jurisprudence (which has found clear resonance in South African constitutional thought), and secondly, to assess whether this particular conception is indeed sensitive to the possible constitutional harm which may result from an abstract liberal-inspired accommodation of sexually explicit material in an imagined free and open democratic society, such as the one presented by the South African legal and constitutional contexts.

With these objectives in mind, the common law conception of sexually explicit material, with particular reference to its impression on the constitutional jurisprudence of the United States, will first be examined *briefly*.

2 Obscenity under Common Law

One of the oldest definitions of sexually explicit material under common law is found in the Obscene Publications Act of 1857,¹³ revisited in 1868 by the Queen’s Bench in

11 S 1 of the *Films and Publications Act 65 of 1996* (as amended by the *Films and Publications Amendment Act 34 of 1999*, the *Films and Publications Amendment Act 18 of 2004* and the *Prevention and Combating of Corrupt Activities Act 12 of 2004*) defines “child pornography” as “any image, however, created, or any description of a person, real or simulated, who is, or who is depicted or described as being, under the age of 18 years – (i) engaged in sexual conduct; (ii) participating in, or assisting another person to participate in, sexual conduct; or (iii) showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purpose of sexual exploitation.” This definition was inserted into the *Films and Publications Act 65 of 1996* by s 1(a) of the *Films and Publications Amendment Act 34 of 1999*, and substituted by s 1(a) of the *Films and Publications Amendment Act 18 of 2004*.

12 For present purposes, the terms “gay” and “lesbian” pornography refer to graphic sexually explicit images, irrespective of how created, of adult men and women specifically produced for, and consumed by, the adult gay and lesbian market.

13 *Obscene Publications Act 20 & 21 Vict c83 of 1857*. Its chief architect, Lord Campbell, articulated the purpose of the Act during a session of the British Parliament as follows: “[t]he measure was intended to apply exclusively to works written for the single purpose of corrupting the morals of youth and of a nature calculated to shock common feelings of decency in a well-regulated mind”.

Regina v Hicklin.¹⁴ The standard established by the Queen's Bench is a telling example of the strong moralistic nuances of Victorian legal thinking, both in its articulation of a positive obligation on the state to protect citizens who are particularly susceptible to immoral influences and in its attempt to ascertain the effect of obscene material on corruptible and susceptible minds.¹⁵ Consequently, any *bona fide* intention on the part of a distributor and/or publisher of obscene material was irrelevant under English common law.

It is somewhat perplexing that the common law approach to obscenity remained largely unchallenged in the United States for eighty nine years.¹⁶ Since the enquiry at common law was not conducted against the backdrop of a constitutional democracy, its usefulness remained limited at best. Two leading decisions by the Supreme Court, set sixteen years apart, have sought to establish a golden mean between the First Amendment¹⁷ guarantees of freedom of speech and the press and the recognised right of federal states to proscribe specific categories of sexually explicit material. These two judgments will be critically examined below.

3 Obscenity and the First Amendment: The *Roth* and *Miller* Judgments

In both *Roth v United States*¹⁸ and *Miller v California*¹⁹ the Supreme Court confirmed that the question whether sexually explicit material would enjoy any protection had to be considered under the First Amendment to the United States Constitution.

14 (1868) LR 3 QB 360.

15 In the words of Cockburn CJ 371: "I think the test of obscenity is this, 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".

16 See, for example, *United States v Kennerley* (DC NY) 209 F 119 (1913); *United States v Bennett* (CC NY) 16 Blatchf 338 (1879); *United States v Clarke* (DC Mo) 38 F 500 (1889); and *Commonwealth v Buckley* 200 Mass 346 86 NE 910 (1909). The *Hicklin* standard was only abandoned in the late 1950s: see, *inter alia*, *Walker v Popenoe* 80 App DC 129 (1957); *Parmelee v United States* 72 App DC 203 (1940); *United States v Dennett* (CA NY) 39 F2d 564 (1930); *Kahn v Leo Feist Inc* (DC NY) 70 F Supp 4 (1947); *United States v One Book Called "Ulysses"* (DC NY) F Supp 182 (1933); *American Civil Liberties Union v Chicago* 3 Ill2d 334 (1955); *Commonwealth v Isenstadt* 318 Mass 543 (1945); *Missouri v Becker* 364 Mo 1079 (1954); *Adams Theatre Co v Keenan* 12 J 267 (1953); *Bantam Books Inc v Melko* 25 NJ Super 292 (1953); and *Commonwealth v Gordon* 66 Pa D&C 10 (1949).

17 The First Amendment (which was added to the Constitution in 1791) reads: "*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances*". Emphasis added.

18 354 US 476 (1957).

19 413 US 15 (1973).

In tracing the history of the First Amendment in *Roth*, Brennan J found obscenity to be “utterly without redeeming social importance”,²⁰ a rejection mirrored in the “universal belief” which was on occasion articulated by the Supreme Court as follows:

[t]here are certain well-defined and narrow limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit which may be derived from them is clearly outweighed by the social interest in order and morality.²¹

And yet although the Supreme Court found that the common law standard had to be rejected as an inevitable encroachment upon the constitutional guarantees entrenched by the First Amendment,²² the terminology favoured by Brennan J nevertheless points to a distinctly puritanical (and thus moralistic) condemnation of material deemed obscene. Obscene material accordingly “deals with sex in a manner appealing to the prurient interest”, and thus constitute “material having a tendency to excite lustful thoughts”.²³

Yet subsequent to *Roth*, no majority of the Supreme Court could agree on a standard to subject obscene material to regulation. The period 1957 to 1973 saw “a variety of views among the members of the Court unmatched in any other course of constitutional adjudication”.²⁴ One matter that was, however, categorically settled was that obscene material, defined in terms of appealing to the “prurient interest”, “patently offensive” and “utterly without redeeming social value”,²⁵ enjoyed no protection under the First Amendment.

20 485. Emphasis added.

21 See, in particular, *Chaplinsky v New Hampshire* 315 US 568 (1942) 568.

22 485. Even though it was now established by the Supreme Court that obscenity deserves no constitutional protection, Brennan J nevertheless still had to determine whether a clear and present danger must exist before obscenity is punishable by law. In an attempt to resolve this issue, he relied on *Beauharnais v The State of Illinois* 343 US 250 (1952) where the Supreme Court held that if utterances are not within the areas of constitutionally protected speech, it becomes unnecessary for the court to consider whether these present a clear and present danger, in light of this precedent, Brennan J did not, therefore, find it necessary to first show that obscene materials create a clear and present danger of, for example, anti-social conduct before these may be punishable by state or federal law.

23 487.

24 Per Harlan J (concurring and dissenting) in *Interstate Circuit Inc v Dallas* 390 US 676 (1968) 704-705.

25 In *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v Attorney General of Massachusetts* 383 US 413 (1966) 418, popularly known as *Memoirs v Massachusetts*.

Then in 1973, the Supreme Court was called upon to review a group of obscenity cases, involving what Harlan J on occasion exasperatedly referred to as the “intractable obscenity problem”.²⁶ *Miller v California*,²⁷ one of the aforementioned cases under review, constitutes an interesting variation on the Supreme Court’s obscenity jurisprudence of the preceding twenty one years²⁸ in that it, for example, constitutes the first judicial acknowledgment of the term “pornography”.²⁹

According to Burger CJ, the appropriate standard for obscenity should forthwith only target “patently offensive hard core sexual conduct”³⁰ or “hard core pornography”,³¹ and thus material no longer needs to be “utterly without redeeming social value” to fall foul of the First Amendment.³² And since obscenity is to be determined by applying contemporary community standards (instead of “unascertainable” national standards),³³ federal legislatures can justifiably proscribe obscenity if the danger exists of offending the “sensibilities” of unwilling (adult) recipients of “sexually oriented material” or of exposure thereof to minors.³⁴ Evidently unaware of the extensive body of feminist literature on the meaning and gender politics of “pornography”, Burger CJ concluded that “obscene material” thus has a specific *legal* meaning, namely “obscene material which deals with sex”.³⁵

26 In *Interstate Circuit Inc v Dallas* 390 US 676 (1968) 704.

27 Marvin Miller conducted a mass mailing campaign to advertise the sale of illustrated books under the genre of “adult” material. After a jury trial in a California State Court, the defendant was convicted of a misdemeanor in violation of para 311 subpara 311.2(a) of the California Penal Code (as amended) for the distribution of five unsolicited advertising brochures through the mail to a restaurant in Newport Beach. The unsolicited package was opened by the restaurant manager who subsequently lodged a complaint with the police. The brochure, which advertised four books and a film respectively entitled *Intercourse*, *Man-Woman*, *Sex Orgies Illustrated*, *An Illustrated History of Pornography* and *Marital Intercourse*, consisted primarily of explicit pictures and drawings depicting men and women in groups of two or more engaging in a variety of sexual activities with genitals often prominently displayed. The Appellate Department of the Superior Court of California (Orange County) summarily affirmed the judgment without opinion: see 37 L Ed 2d 419 (1973). The matter was subsequently reviewed by the Supreme Court.

28 That is, since its 1942 decision in *Chaplinsky v New Hampshire* 315 US 568 (1942).

29 A particular category of pornographic material, which the court set forth to define, was included under so-called “obscene expression” in a footnote of Burger CJ’s opinion 18 n 2.

30 27.

31 29.

32 The third prong of the standard enunciated in *Memoirs v Attorney General of Massachusetts* 383 US 413 (1966) was expressly rejected by Burger CJ 24.

33 31.

34 19.

35 *Miller v California* (n 19) 487.

But even though Burger CJ essentially reaffirmed the Supreme Court's position, he endeavoured to formulate more "concrete standards" than those produced by the "somewhat tortured history of the court's obscenity decisions".³⁶ To realize this objective, he set forth to formulate the new standard of obscenity as follows:

[t]he basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards'³⁷ 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. We do not adopt as a constitutional standard the 'utterly without redeeming social value' test of *Memoirs v Massachusetts*.³⁸

Prurience and offensiveness, essentially, will be questions of fact. Consequently, works which, taken as a whole, have serious literary, artistic, political or scientific value will enjoy protection under the First Amendment, unlike the "public portrayal of hard core sexual conduct for its own sake".³⁹

4 Opening Pandora's Box: The Supreme Court's Conception of "Pornography"

The Supreme Court's conception and treatment of obscenity or, to use its own terminology, "hard core pornography"⁴⁰ is problematic for a number of reasons. Apart

36 20.

37 *Kois v Wisconsin* 408 US 229 (1972) 230, quoting *Roth v United States* 354 US 476 (1957) 489.

38 24. Emphasis in the original. The scope of this article precludes a detailed assessment of the Supreme Court's three-part standard of obscenity. And yet this standard is itself problematic for various reasons. These relate to the inherently subjective nature of the test (highlighted by the fact that the work must appeal to the "prurient interest", indicating that tastes and attitudes are to be elevated to a constitutional standard as prurience could well be said to be the lowest common denominator of sexually explicit material); its moralistic premise (highlighted by the fact that the work must be "patently offensive", thus misconstruing the harm of pornography by seeing it as an assault against the good moral social order); and lack of clarity regarding the precise meaning of key terms (particularly evident in the requirement that the work must lack "serious literary, artistic, political, or scientific value"). If "serious" is to be construed to mean *bona fide*, publications which combine graphic sexual explicitness with lifestyle articles on, for example, décor, leisure and cuisine would raise obvious difficulties. Since these articles have *some* "redeeming social importance" (*per* Brennan J in *Roth* 485), the publication is unlikely – when "taken as a whole" (*per* Burger J in *Miller* 24) – to fall foul of the Supreme Court's obscenity standard. In the United States, *Playboy* and *Hustler* magazines are not deemed legally obscene for precisely this reason and these two publications have managed to bask in, and indeed flourish under, the protection of the First Amendment.

39 30. The judgment of the court *a quo* was thus set aside and the case was remanded to that court for further proceedings consistent with the new standard established by the Supreme Court's opinion.

40 *Per* Burger CJ 29.

from the court's insistence on engaging an abstract libertarian paradigm for assessing the possible constitutional implications of sexually explicit material (in which common law-inspired moralistic sentiments continue to prevail), two additional aspects of the court's jurisprudence raise particular difficulties. The first relates to the court's justification for examining the matter under the First Amendment, and in what follows below, particular attention will be given to the court's intellectual and philosophical justification for freedom of expression and its constitutional consequences. The second problematic aspect relates to the shortcomings of a libertarian conception of harm, coupled with the constitutional standard proposed in *Miller*.

The validity of many of the assumptions that underpin the court's obscenity jurisprudence appears not merely insensitive, but indeed oblivious, to the dynamics of male privilege and control in relation to the actual social realities of women in a legal and political society founded on libertarian principles. The court therefore struggles to see that the very reason why sexually explicit material could be construed as a problem within a discourse on women's fundamental rights and freedoms may in some way be related to the tenets of individuality, autonomy and neutrality which indeed sustain its conception of obscenity. Consequently, the validity of the court's assumptions about the nature of debate (and ideas), the function of the state and the degree of autonomy and power enjoyed by individuals in the liberal state all warrant serious reconsideration.

4.1 *The philosophy of obscenity*

The Supreme Court's obscenity jurisprudence is characterised by two key features. First, the court subscribes to an abstract concept of free speech, which proceeds from the assumption that all speech is of equal value, and thereby surmises that non-obscene sexually explicit material has social value, as do esteemed works of literature and art. Secondly, the court assumes that all individuals have equal access to the means of expression and dissemination of ideas and thus fails to acknowledge substantive structural inequalities.

The court ought to be aware that systemic inequalities make it difficult for some

individuals to express their views, if not in practice then at least in theory. Consequently, the much favoured liberal argument that more speech should be allowed as a means to rectify such imbalances could thus, in reality, serve to exacerbate a deeply entrenched system of inequality. It is an utter fallacy to presume that freedom of expression is possessed by men and women, or even different racial or ethnic groups,⁴¹ in equal measure. Due to systemic gender and sex inequality, women find it difficult to enjoy the full benefits of free speech.

The structural power imbalance between men and women is a crucial determinant of the degree to which the latter have access to the means of expression. For one, women lack the resources required to articulate their unique experiences with the result that they could be effectively excluded from public discourse. The marketplace of ideas paradigm is both philosophically and in practice linked to the idea of capitalism. In reality, it serves to accommodate those with the most power and ultimately gives them access to the widest dissemination of their ideas. Women are furthermore silenced through endemic sexual abuse and violence which render it difficult to articulate their own experiences in a *credible* way. The manner in which criminal law treated a female complainant in a rape or sexual harassment case underscores this point.⁴² The Supreme Court does not seem mindful of the fact that an abstract system of free speech lacks the substantive means to empower those who have systematically been excluded from public discourse on the basis of race, gender and/or sex.⁴³ An abstract system of free speech cannot, therefore, be the

41 The furor surrounding the painting by artist Brett Murray named "The Spear" depicting President Jacob Zuma in a pose that is reminiscent of Wiktor Iwanof's propagandist poster of Wladimir Lenin, but with his genitals prominently exposed, underscores this point. In approaching the South Gauteng High Court for an urgent interdict against *City Press* and the Goodman Gallery to ban all depictions of the painting, the ANC argued, *inter alia*, that the painting was racist in its depiction of African sexuality in general and African men in particular.

42 For centuries under patriarchal rule, the testimony of a woman who alleges rape or indecent assault was subjected to the cautionary rule in the Anglo-American system of evidence. As in the case of children, the testimony furnished by a female complainant in sexual proceedings had to be viewed with suspicion and approached with caution. Her testimony was thought to raise particular problems of corroboration even though the danger of a false charge would ultimately be balanced by the normal incidence of the onus which serves to protect the accused in criminal proceedings. For more on the historical context of the cautionary rule in the Anglo-American system of evidence, see, in general, Hoffmann and Zeffertt *Law of Evidence* 579-580.

43 It is a historical fact that the First Amendment, together with its values of individuality, autonomy and neutrality, existed in harmony with both institutionalised slavery and (racial) segregation. No effective challenge to these two systems of racial subordination was ever mounted under the rubric of free expression, even though literacy tests were used in the United States to screen the eligibility of voters: see, for example, *The State of Oregon v Mitchell* 400 US 112 (1970) at 132-133. Since segregated separate-but-equal-education assured that African Americans remained

legal priority for any system characterised by institutionalised racial and gender oppression. I agree with Andrea Dworkin who argues that:

[i]f equality interests can never matter against first amendment challenges, then speech becomes a weapon used by the haves against the have-nots; and the First Amendment, not balances against equality rights of the have-nots, becomes an intolerable instrument of dispossession, not a safeguard of human liberty.⁴⁴

An investigation launched by the South African Human Rights Commission (the Commission) into racism in the South African media further underscores this point.⁴⁵ Submissions before a hearing of the Commission by black editors and journalists highlighted racial stereotyping, marginalisation and prejudice in the (then) still predominantly white owned South African media. Submissions by the latter largely denied that these problems continue(d) to exist.⁴⁶

It need not be argued that free speech, to the degree that it occurred in apartheid South Africa, was largely conceived to secure a particular political end, namely to entrench institutionalised racism and sexism as a means to secure patriarchal minority rule.⁴⁷ Since speech was intended to entrench the political *status quo*, those groups in South African society who did not enjoy fundamental freedoms prior to the adoption of the Interim Constitution in 1994,⁴⁸ appear not to have been secured these freedoms to the fullest extent in practice in post-apartheid South Africa either. It therefore makes no sense to assume that (previously) marginalised groups will enjoy the same measure of free speech through an abstract system, for an abstract

vastly illiterate, they had no reasonable opportunity to meet the literacy requirements in order to participate in a fundamental part of the political process. See also, in general, *Gaston County v United States* 395 US 285 (1969); *CF Griggs v Duke Power Company* 410 US 424 (1971); and *Baker* 1982 S Cal L Rev 293.

44 See MacKinnon and Dworkin (eds) *In Harm's Way* 319.

45 The South African Human Rights Commission formally resolved to conduct an investigation into racism in the media at its twenty-sixth Plenary Session held on 11 November 1998. The inquiry was conducted in terms of s 184(2)(a) of the Constitution of the Republic of South Africa, 1996.

46 The Interim Report of the Human Rights Commission (dated 21 November 1999) presents an overview of the various submissions received by the Commission as well as the results of the research that it commissioned. The Interim Report invited responses from both interested parties and those "adversely affected by what is contained in this report": see SAHRC *Interim Report* 1. Subsequent to the publication of this Report, public hearings were held in terms of s 15 of the *Human Rights Act* 54 of 1994: see GG 20837 of 4 February 2000 44.

47 Submissions before the South African Truth and Reconciliation Commission highlighted how the South African media were both used and structured to promote white male supremacy: see *TRC Report* 1998 165-181; Addison *TRC Report* 1998 182; and *TRC Report* 1998 166.

48 The *Constitution of the Republic of South Africa, Act* 200 of 1993, which entered into force on 27 April 1994.

system does not provide a substantive guarantee of free speech for those who were (and may continue to be) socially and politically disempowered. In a hierarchal society the speech of the (socially and politically) powerful group will inevitably dominate public discourse⁴⁹ and thus distort the “free” competition in the marketplace of ideas which effectively serves to maintain structural racial and sex inequality. The animated (and at times antagonistic) discourse evoked by the Protection of Information Bill⁵⁰ which proposes to allow officials in virtually all organs of state to classify information, the publication or possession of which will be subject to criminal liability, together with the establishment of a Media Appeals Tribunal,⁵¹ reinforces the argument that the control of access to information (and control of the media generally) serve a distinct political objective, one which is intended to ensconce socio-political power and control.⁵²

The two aspects of the Supreme Court’s obscenity jurisprudence which raise particular difficulties are, of course, interrelated. The court’s standard of obscenity (i.e. its test in three parts)⁵³ is, for example, the result of a particular philosophical framework, coupled with a particular interpretation of the (modern) doctrine of free

49 See, in particular, Lahey 1984-1985 *New Eng L Rev* 652.

50 See *Republic of South Africa Protection of Information Bill* (as introduced by the Minister of Intelligence (National Assembly)) BXX-2008 5 March 2008 <http://www.iss.co.za/uploads/POIBILL.PDF> 12 June 2011.

51 The idea of a tribunal was first raised at the conference of the African National Congress (the ANC) held in Polokwane, Limpopo, in 2007. It reappeared in 2010 as a working paper for the ANC’s National General Council. In essence, the ANC proposed that a tribunal should oversee complaints brought against the press, instead of continuing with the industry practice of self-regulation. The ANC reassured the media that the tribunal would function independently from government and that the tribunal would respect the constitutional guarantees pertaining to media freedom. Various interest groups, including the South African Civil Society Information Service, various newspaper editors and some schools of journalism (notably at Rhodes University and the University of the Witwatersrand), have vehemently criticised the ANC’s proposal. See, in general, Bischof 2011 <http://www.journalism.co.za> 12 June 2011.

52 Both the *Republic of South Africa Protection of Information Bill* and proposals for the creation of a Media Tribunal have been met with vehement opposition from, *inter alia*, the Right2Know Campaign, the Treatment Action Campaign and Section27. These interest groups have called for the *Republic of South Africa Protection of Information Bill* to be amended to: (a) limit secrecy to core state bodies in the security sector, such as the police, defence and intelligence agencies; (b) limit secrecy to strictly defined national security matters, insisting that officials must give reasons for making information secret; (c) not exempt the intelligence agencies from public scrutiny; (d) not apply penalties for unauthorised disclosure to society at large, but only to those responsible for keeping secrets; (e) make provision for an independent body to be appointed by Parliament, and not the Minister of State Security, to act as the arbiter of decisions about what information may be classified as secret, whose decisions should be subject to review by the courts; and (f) not criminalise the legitimate disclosure of secrets in the public interest. See, in general, Section27 <http://www.mail&guardian.com> 12 June 2011 and Duncan <http://www.universityworldnews.com/article> 12 June 2011.

53 See, in particular, par 3 and n 38.

speech. The fact that the *Miller* test has been widely criticised, especially for lack of clarity and effectiveness, means that American society is flooded with “non-obscene” sexually explicit material that indeed enjoys full constitutional protection. This very consequence puts the court’s rationale for the protection of material of this nature directly at issue.

4.2 Philosophical justification for freedom of expression: truth as political value

John Stuart Mill’s marketplace of ideas paradigm⁵⁴ facilitates the argument that to suppress the expression of a view or opinion is regarded as harmful to the quest for the truth. Freedom of expression, to quote Hand J, “presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection”.⁵⁵

Yet the First Amendment, like most clauses contained in a justiciable charter of fundamental rights, is by nature abstract and open-ended. The same holds true in respect of the Bill of Rights in the South African Constitution. In light of the abstract nature of the First Amendment (and absence of a general limitation clause), constitutional interpreters must seek a *political* justification for freedom of expression that not only corresponds with previous constitutional practice and precedents,⁵⁶ but also provides a compelling reason for granting this freedom such a privileged position among other liberties.

Mill’s paradigm embraces two main justifications of the protection of freedom of expression. The first considers free speech as important *instrumentally* (i.e. the truth

54 Mill’s open marketplace of ideas metaphor was developed in the second chapter of his essay on the struggle between liberty and authority entitled *On Liberty*, first published in 1859. In this chapter, Mill employs the so-called negative idea of liberty in his examination of freedom of opinion and of the press. Negative liberty is based on two key assumptions, namely that speech will naturally be free provided the state does not restrain it, and secondly, that the important issue is the avoidance of restrictions on speech rather than affirmative access to speech for those to whom it has been denied historically. Constitutional rights and interests are thus interpreted *in relation to* state action and the guarantee of liberty is interpreted to exist *to the extent* that there is no state interference. The idea of negative liberty has subsequently become entrenched as a cornerstone of the modern liberal state.

55 See *United States Associated Press* 52 F Supp 362 at 372, cited in *New York Times v Sullivan* 376 US 254 (1964).

56 See, in general, Schauer *American Approach to Obscenity* 68.

is more likely to be discovered and error eliminated if a free exchange of ideas and open debate is allowed, thus producing good *political* consequences);⁵⁷ the second views freedom of expression as an *essential and constitutive* feature of a just (liberal) political society which treats its (adult) members as responsible moral agents.⁵⁸

The constitutive justification of free speech, in turn, encompasses two dimensions. The first dimension requires that morally responsible individuals make up their own minds about what is good or bad or true or false in life, politics or matters of justice, and thus the law should adopt a neutral attitude towards matters of life, sexuality and politics. But as Ronald Dworkin rightly contends, moral responsibility is thought to not only denote the shaping of one's own convictions, but also the conveying of those convictions to others so that the truth be known, justice be served and the common good be secured.⁵⁹ Consequently, when government forbids the expression of some social attitude or restricts political speech, it effectively violates the moral responsibility of its people. The instrumental and constitutive justifications of free expression are obviously not mutually exclusive and Mill indeed conceived of these as interrelated ideas.⁶⁰

It follows, therefore, that if a court insists upon conducting its investigation into the extent to which sexually explicit material enjoys constitutional protection under the rubric of free speech, a court will have no option but to accommodate *both* the idea that free speech is important to the discovery of truth *and* that it is an essential feature of a fair political dispensation. Yet the obscenity jurisprudence of the Supreme Court shows that the court only relies upon the instrumental justification of freedom of speech. Free speech is thus seen as essential in the quest for the truth

57 See, in particular, Mill *On Liberty* 76-77.

58 See, in general, Van der Westhuizen *Freedom of Expression* 267-273 and Dworkin 1981 *OJLS* 178-179, 194-199. See also *Abrams v United States* 250 US 616 (1919) and *Whitney v The State of California* 274 US 357 (1927).

59 The underlying assumption is thus that citizens have as much right to contribute to the establishment of the moral or aesthetic climate as they do to participate in politics: see, in particular, Dworkin 1981 *OJLS* 184.

60 As did Brandeis J in a dissenting opinion in *Whitney v The State of California* 274 US 357 (1927). See also Scanlon 1972 *Philos Public Aff* 204 where he developed a Kantian argument for the constitutive justification of freedom of expression and 1979 *U Pitt L Rev* 519 where Scanlon emphasises the complex character of an account of the right to free speech and indeed concluded that instrumental and constitutive factors must both feature in a theoretical justification of free expression.

and elimination of error in *politics*. The *dicta* in obscenity cases conclusively underscore this point: obscenity is thought to have “no redeeming social value”;⁶¹ to form “no essential part of any exposition of ideas”⁶² and to lack “serious literary, artistic, political or scientific value”.⁶³

The possible constitutional consequences of the above justification of freedom of speech in relation to obscenity will be explored next.

5 An Instrumental Justification and its Constitutional Consequences

The reason why it has proved enormously difficult for United States courts (and the Supreme Court in particular) to distinguish obscenity from sexually explicit material that must have *some* redeeming value can be attributed squarely to the reliance on instrumental grounds as justification of freedom of expression. The Supreme Court has changed its mind about the ground of distinction so often and produced so many unworkable standards that Stewart J’s frank declaration that he could not define obscenity but knew it when he saw it⁶⁴ has not surprisingly become the most quoted judicial pronouncement on the issue.⁶⁵ The intellectual basis that the Supreme Court employs for freedom of speech, coupled with the court’s conception of “hard core pornography”, thus becomes highly suspect.⁶⁶

The categories employed by the Supreme Court whereby constitutionally protected speech is distinguished from unprotected obscenity seems highly arbitrary from the very perspective of the instrumental view of free speech that these categories are

61 See *Memoirs v Attorney General of Massachusetts* 383 US 413 (1966) 418.

62 In *Chaplinsky v New Hampshire* 315 US 568 (1942) 571.

63 In *Miller v California* 413 US 15 (1973) 24.

64 In *Jacobellis v The State of Ohio* 378 US 184 (1964) 197.

65 This pronouncement has also found favour with the South African Constitutional Court in *Case; Curtis v Minister of Safety and Security* 1996 5 BCLR 609 (CC) par [108].

66 Dworkin rightly observes that “[l]iberals defending a right to pornography find themselves triply on the defensive: their view is politically weak, deeply offensive to many women, and intellectually doubtful”: see *NY Rev* 21 October 1993. Brennan J’s change of course in *Paris Adult Theatre I et al v Lewis R Slaton, District Attorney, Atlanta Judicial Circuit, et al* 413 US 49 (1973) could possibly be seen as an attempt to reconcile his new view (namely that the United States Constitution prohibits government from suppressing obscenity *except* in the case of non-consenting adults and minors) with the instrumental justification of free speech. Had Brennan J more clearly recognized the constitutive justification of free speech when the court was first called upon to consider the issue, he would undoubtedly have been in a much stronger position to formulate a persuasive constitutional argument against hard core pornography.

presumed to reflect. Consequently, the court's conception of obscenity can only be interpreted to the effect that the First Amendment must be understood to protect sexually explicit material on the forced (and easily rebuttable) assumption that citizens need such material in order to participate effectively in the *political* process. The First Amendment could thus be understood to protect nothing but political speech, and consequently, the protection afforded to literature, art and science can only be explained as a derivative from that principal political function.

Yet the instrumental justification of freedom of expression on its own cannot provide an intellectually acceptable justification for the First Amendment. The liberal argument that free speech is necessary if citizens are to be in command of their own political arrangements could, for example, explain why a democratically elected government may not be allowed to resort to the secret censorship of sexually explicit material which citizens would reject if they were aware of its existence. But this does not explain why the majority of citizens should not be allowed to impose restrictions on sexually explicit material that they both approve of and indeed desire. If a distinction can be made between political and, for example, commercial speech (which the Supreme Court has firmly established enjoys much weaker protection),⁶⁷ then surely a distinction can also be made between racist or sexist speech and other forms of political comment and/or expression? This would enable the court to uphold legislative measures designed to prohibit political speech that violates the right to equality on grounds of race, sexual orientation, religion, sex, etc., as the instrumental justification of free speech would clearly offer little protection against a law designed with this political objective. This clearly shows that the Supreme Court finds itself in an untenable situation, since the instrumental premise of its analysis of obscenity actually serves to *undermine* the court's conception of a just and open political design.

Two critical consequences result from the Supreme Court's exclusion of obscenity from constitutional protection. On the one hand, the court has argued itself into a

67 See *Virginia Pharmacy Bd v Virginia Consumer Council* 425 US 748 (1976). Prior to 1976, United States constitutional jurisprudence viewed most kinds of commercial speech as an unprotected category situated outside of the scope of the First Amendment: see *Valentine v Christensen* 316 US 52 (1942). For an exposition of the criteria employed by the Supreme Court to determine whether the regulation of commercial speech violates the First Amendment, see *Central Hudson Gas v Public Service Commission* 447 US 557 (1980).

position where it can offer neither a constitutional nor philosophical basis on which to reject arguments for the regulation of *all* sexually explicit material. More particularly, the instrumental goal of a democratic and political order offers no challenge to a feminist argument that women are more effective participants in the political process when their fundamental rights and freedoms are not violated by the production and dissemination of gender-specific sexually explicit material. The court would therefore have no alternative but to agree that legislative measures which conceptualise such material as a violation of women's fundamental constitutional interests would enhance, rather than compromise, a democratic order, to the degree that these measures seek to restrict speech which decreases women's voice and role in the democratic political process.⁶⁸

On the other hand, the Supreme Court can also provide neither a constitutional (nor philosophical) justification not to endorse the markedly different approach adopted by the Supreme Court of Canada on the issue of obscenity.⁶⁹ By employing an instrumental argument, the Canadian Supreme Court upheld a provision of the Canadian Criminal Code⁷⁰ which prohibits certain categories of sexually explicit material. Although the Supreme Court conceded that the effect of its decision was to narrow the scope of the right to freedom of expression guaranteed under section 2(b) of the Canadian Charter of Rights and Freedoms,⁷¹ it maintained that sexually explicit material acutely offend the values fundamental to Canadian society. The Supreme Court thus found the restrictive effect of the Criminal Code on free expression justified, given the gravity of harm and the threat to the social and constitutional values at stake.

The distinct problems inherent to the particular conception of harm employed under the rubric of United States obscenity jurisprudence will be considered next.

68 Easterbrook J's rejection of this feminist strategy in *American Booksellers Association Inc v Hudnut* 771 F2d 323 7th Cir (1985) indeed shows that he parted ways with the Supreme Court's justification of free speech and *tacitly* relied on the constitutive rather than the instrumental justification of freedom of expression.

69 In *Regina v Butler* [1992] 1 SCR 452.

70 Section 163(8) of the *Criminal Code* RSC C-46 of 1985 (Canada).

71 *Canadian Charter of Rights and Freedoms, Constitution Act of 1982* Part I.

6 Harm and Injury: The Supreme Court's Standard of Obscenity

The abstract liberal paradigm which the Supreme Court employs in its test for obscenity has led the court to embrace a restrictive conception of both harm and injury by requiring a direct causal link between speech and the alleged harm caused.

In the well known case of *Brandenburg v The State of Ohio*,⁷² for example, the Supreme Court upheld the First Amendment rights of the Ku Klux Klan to publicly call for the expulsion of African Americans and Jews from society.⁷³ In determining the extent to which the state is permitted to forbid utterances of this nature, the Supreme Court held that the state may not proscribe advocacy of the use of force as a violation, except where such advocacy “is directed to inciting or producing *imminent* lawless action and is likely to *incite or produce* such action”.⁷⁴ Subsequent to this decision, the Supreme Court has also rejected the notion that imminent and likely harm can be shown by linking a class of harm with a class of speech.⁷⁵ Since the Supreme Court requires that particular harm be directly related to particular speech, its conception of injury is likely to bear adversely on measures which seek to proscribe sexually explicit material.⁷⁶ Given that the Supreme Court's conception of harm demands evidence of a causal connection between speech and harm or injury, it requires a sophisticated theory of psychological causation as a prerequisite for statutory measures against material that would fall outside the ambit of the established standard of obscenity. This translates into a requirement of conclusive evidence that “non-hard core pornography” (i.e. material not deemed obscene) causes harm to women in that it transforms attitudes which translate into specific acts of (sexual) violence against women.

And yet United States courts are reluctant (and here the South African Constitutional

72 395 US 444 (1969).

73 446.

74 447. Emphasis added.

75 See *Hess v The State of Indiana* 414 US 105 (1973). In this case, the Supreme Court overturned a conviction for disorderly conduct on the basis that the defendant's speech was neither directed toward a particular person nor intended to incite a specific act of violence.

76 107-109. This consequence was expressly affirmed by the Federal District Court in respect of pornography. The court held that the forms of expression defined as pornography under the anti-pornography ordinance for Indianapolis did not “by their very nature carry the immediate potential for injury”: see *American Booksellers Association Inc v Hudnut* 771 F2d 323 7th Cir (1985) 1331.

Court follows suit⁷⁷ to link violent material to evidence of sexual abuse. Social scientific studies that purport to show a *correlation* between sexually explicit material and instances of sexual violence against women⁷⁸ are dismissed by the courts as “very difficult to interpret”⁷⁹ and thus inconclusive. Since such material is assumed to constitute mere words and images, these cannot in themselves cause injury. And since it is required that harm must be direct, only sexually explicit material which directly incites the commitment of acts of imminent violence would be understood to “cause” harm, provided that actual injury occurs as a result.

The libertarian idea of injury has no way, therefore, of either conceptualising or recognising harm that does not cause direct (physical) injury or which advocates hate propaganda on the basis of race, ethnicity or gender. Consequently, the Supreme Court finds it especially difficult to conceive of non-violent sexually explicit material which contains degrading or dehumanising images of women as harmful. Research studies which found that material of this nature lower inhibitions, promote sexual aggression, increase the acceptance of women’s sexual servitude and male dominance in intimate relationships⁸⁰ appear to have no persuasive force whatsoever. The Supreme Court would not, therefore, find it reasonable to conclude, as its Canadian counterpart has done,⁸¹ that material of such a nature represents an appreciable risk of *social* harm, particularly to women and thus society as a whole.

The libertarian conception of harm, coupled with the test of obscenity articulated in *Miller*, indeed seem hard pressed to conceptualise sexually explicit material as a threat to women’s constitutionally entrenched interests in equality, dignity, freedom from violence and physical integrity.

77 In *Case; Curtis v Minister of Safety and Security* 1996 5 BCLR 609 (CC) par [93].

78 See, for example, Linz et al 1984 *J Commun* 142 (documenting that men exposed to filmed violence against women judged a rape victim to be less injured than did the control group); Malamuth and Check 1980 *J Appl Psychol* 542-543 (documenting that exposure to rape depictions affected future reactions to rape). See also n 106.

79 Per Easterbrook J in *American Booksellers Association Inc v Hudnut* 771 F2d 323 7th Cir (1985) n 2, citing *Gregg v The State of Georgia* 428 US 153 (1976) 184-187.

80 See, in particular, Check and Malamuth 1989 *Commun Yearb* 74; Russell 1988 *Polit Psychol* 41; Zillmann and Bryant 1988 *J Fam Issues* 518; Zillmann and Bryant *Massive Exposure* 130-131; and Zillmann and Weaver *Sexual Callousness* 95.

81 In *Regina v Butler* [1992] 1 SCR 452. See also *Regina v Wagner* (1985) 43 CR (ed) 318 (Alta QB); *Regina v Ramsingh* (1984) 14 CCC (3d) 230; and *Towne Cinema Theatres Ltd v The Queen* [1985] 1 SCR 494.

The definitive impact of United States obscenity jurisprudence on the thinking of the South African Constitutional Court will be critically examined next.

7 “Indecency”, “Obscenity” and “Offensiveness”: First Amendment Jurisprudence and the South African Constitutional Court

7.1 Case; *Curtis v Minister of Safety and Security*

The Constitutional Court’s first (and to date only)⁸² judgment on adult gender-specific sexually explicit material in *Case; Curtis v Minister of Safety and Security*⁸³ starkly reveals the dominant influence of United States obscenity jurisprudence in the South African constitutional context.⁸⁴

In a judgment of less than three pages, the majority of the Constitutional Court⁸⁵ held that any ban on the possession of “erotic material”⁸⁶ for the solitary purpose of personal use invaded the right to privacy guaranteed under section 13 of the 1993 Constitution. In the words of Didcott J:

What erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody’s business but mine . . . [i]t is certainly not the business of society or the State.⁸⁷

82 The subsequent decision of the Constitutional Court in *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 1 SA 406 (CC) concerned the constitutional ramifications of so-called “child” pornography which falls beyond the scope of this article. See also n 9.

83 1996 5 BCLR 609 (CC).

84 This judgment concerned the simultaneous adjudication of the matters of Patrick and Inge Case and Stephen Roy Curtis who had been arraigned before the Randburg Magistrates’ Court on charges of possession of sexually explicit video material in contravention of s 2(1) of the *Indecent or Obscene Photographic Matter Act 37 of 1967*. After a number of appearances in the Magistrates’ Court, the Case applicants lodged an application in terms of s 103(3) of the *Constitution of the Republic of South Africa Act 200 of 1993* (hereinafter the 1993 Constitution), for the proceedings to be postponed, pending an application to the Supreme Court regarding the constitutional status of s 2(1) of the *Indecent or Obscene Photographic Matter Act 37 of 1967*. The application was granted; proceedings in the Magistrates’ Court were suspended and subsequently referred to the Witwatersrand Local Division of the Supreme Court. In appearing before Schabert J, the Case applicants entered a motion to have the matter referred to the Constitutional Court. The motion was granted and the matter duly referred. Proceedings against Curtis followed a parallel route to the Constitutional Court and the two cases were heard together by the Constitutional Court in September 1995.

85 *Per* Didcott J par [90] – par [95]; Chaskalson P, Mahomed DP, Ackermann J, Kriegler J, O’Regan J and Ngoepe AJ concurring.

86 Madala J par [105] preferred the term “sexually explicit erotica” instead.

87 Par [91].

In the present instance, the majority of the Constitutional Court found that the invasion of personal privacy was aggravated by the “preposterous definition”⁸⁸ of indecent or obscene photographic matter contained in section 1 of the *Indecent or Obscene Photographic Matter Act* which read:

Indecent or obscene matter includes photographic matter⁸⁹ or any part thereof depicting, displaying, exhibiting, manifesting, portraying or representing sexual intercourse, licentiousness, lust, homosexuality, lesbianism, masturbation, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality or anything of a like nature.

The wide ambit of section 1 of the *Indecent or Obscene Photographic Matter Act* led the majority of the Constitutional Court to conclude that its scope inevitably also covered “reproductions of not a few famous works of art, ancient and modern, that are publicly displayed and can readily be viewed in major art galleries of the world”.⁹⁰ The Constitutional Court therefore found it indisputable that section 2(1) of the *Indecent or Obscene Photographic Matter Act*⁹¹ was in conflict with section 13 of the 1993 Constitution.

On the question whether section 2(1) of the *Indecent or Obscene Photographic Matter Act* was also incompatible with the right to freedom of expression guaranteed under section 15 of the 1993 Constitution as alleged by the applicants,⁹² the majority of the Constitutional Court felt that this question should “in the meantime . . . be left open”, because once a violation of section 13 has been established, “there is no need to consider any alternative attack on section 2(1)” of the *Indecent or Obscene*

88 Par [91].

89 “Photographic matter” was defined in the *Indecent or Obscene Photographic Matter Act* 37 of 1967 as “including any photograph, photogravure and cinematograph film, and any pictorial representation intended for exhibition through the medium of a mechanical device”.

90 Par [91].

91 S 2(1) of the *Indecent or Obscene Photographic Matter Act* 37 of 1967 read: “Any person who has in his possession any indecent or obscene photographic matter shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand rand or imprisonment for a period not exceeding one year or to both such fine and such imprisonment”. S 1 of the *Indecent or Obscene Photographic Matter Act* 37 of 1967 defined indecent or obscene photographic matter as follows: “Indecent or obscene matter includes photographic matter or any part thereof depicting, displaying, exhibiting, manifesting, portraying or representing sexual intercourse, licentiousness, lust, homosexuality, lesbianism, masturbation, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality or anything of a like nature.”

92 The applicants challenged s 2(1) of the *Indecent or Obscene Photographic Matter Act* 37 of 1967 on the basis of no fewer than five rights entrenched in the 1993 Constitution, namely s 8 (equality); s 13 (privacy); s 14(1) (freedom of conscience); s 15 (freedom of speech, expression and artistic creativity); s 24 (administrative justice); and s 33(1) (constitutionally permissible limitations of entrenched rights).

*Photographic Matter Act.*⁹³

The only issue that remained to be considered was whether section 33(1) of the 1993 Constitution which contained the general limitation clause, saved the prohibition contained in section 2(1) of the *Indecent or Obscene Photographic Matter Act* from nullification. Yet without alluding to, or even seeking to balance, the various interests at stake, the majority concluded that the intrusion into personal privacy that resulted from the prohibition contained in section 2(1) of the *Indecent or Obscene Photographic Matter Act* was neither reasonable nor justifiable.⁹⁴

Having found that section 2(1) of the *Indecent or Obscene Photographic Matter Act* infringed section 13 of the 1993 Constitution and that this infringement was neither a reasonable nor justifiable limitation on the right to privacy, the majority directed their attention to the submissions made by several *amici curiae*, including People Opposing Women Abuse (POWA), the NICRO Women's Support Centre, the Advice Desk for Abused Women, Rape Crisis (Cape Town), the NISAA Institute for Women's Development and Women Abuse (WAWA) on the impact of sexually explicit material on the lives of women and the exploitation of women and children in, and through, such material. On the question whether violent forms of sexually explicit material have an impact on the incidence of sexual crimes against women, the majority of the Constitutional Court, in similar fashion to the United States Supreme Court, furnished a standard dismissive response and maintained the "the results of the research that was drawn to our attention neither prove nor disprove it empirically".⁹⁵ Yet in the very same paragraph, the majority observed that:

The production of pictures like those, and of future types equally depraved, is certainly an evil and may well deserve to be suppressed. Perhaps, as a means to an end, the same even goes for their possession, making it both reasonable and justifiable for society to mind the private business of its members.⁹⁶

By contrast, Mokgoro J, in a separate judgment of more than thirty pages, sought to ascertain whether sexually explicit material would constitute a category of *expression* protected under section 15 of the 1993 Constitution and, if found to be the case,

93 Par [92].

94 Par [93].

95 Par [93].

96 Par [93].

whether the possession of such material would accordingly also be subject to constitutional protection.⁹⁷ With direct reference to United States First Amendment jurisprudence, she argued that it was not to be simply assumed that the Interim Constitution protected sexually explicit material. In light of the general limitation clause contained in section 33 of the 1993 Constitution, she thus argued for a generous definition of the right to freedom of expression so as to include “non-political expression”.⁹⁸ On the face of it, Mokgoro J argued, section 15 protected only expression and not the right to receive material generated and expressed by others. However, one’s freedom of expression would be “impoverished indeed if it does not embrace also [the] right to receive, hold and consume expression transmitted by others”.⁹⁹ By expressly embracing the free marketplace of ideas paradigm¹⁰⁰ and with reference to comparative case law,¹⁰¹ Mokgoro J was impelled to conclude that so-called “sexually expressive speech” was subject to the protection of section 15 and that such protection must necessarily extend to the right to possess sexually explicit material.¹⁰²

7.2 *The perilous territory of privacy, moralistic condemnation and harm*

A close reading of the Constitutional Court’s judgment on the possible constitutional implications of adult gender-specific sexually explicit material reveals a distinctly libertarian and moralistic understanding of both the constitutional mould within which such a debate ought to be cast as well as the actual impact of such material on women’s constitutional interests in equality, dignity and physical integrity. The Constitutional Court’s assessment thus raises a number of concerns, the majority of which emanate from the prioritization of the right to privacy, thereby misconstruing the ensuing (constitutional) harm, coupled with the use of imprecise (even contradictory) terminology and the deliberate avoidance of formulating a working (legal) definition of the type of material under constitutional scrutiny.

97 Par [17] – par [47].

98 Par [22].

99 Par [25].

100 Par [26].

101 Par [30] – par [34].

102 Par [35].

7.2.1 *The constitutional priority: privacy, not gender-specific harm*

The Constitutional Court's endorsement of a libertarian argument is nowhere more clearly illustrated than in its decision to frame the issue before it exclusively as one concerning the (individual's) right to privacy. Consequently, the constitutional implications of section 2(1) of the *Indecent or Obscene Photographic Matter Act* are unavoidably balanced against the interests, liberties and rights of the individual. The core tenets of liberal philosophy, notably individual sovereignty, (moral) freedom and privacy thus become elevated to present *unqualified* constitutional values, prioritised over other fundamental and significant constitutional values, most notably equality, human dignity and physical integrity. The Constitutional Court thus appears to subscribe to the liberal political assumption that the demarcation between the public and the private sphere is sound and seems completely unaware of the possibility that the private sphere, in which the individual is free to exercise all moral choices, could be construed as a seat of oppression and exploitation, manifesting in the physical, emotional and sexual abuse of women.¹⁰³ Consequently, women's experiences of sexual violence occurring in the private domain are overshadowed, even silenced, and thus the real harm is overlooked and/or misconstrued. The real harm is not, therefore, to be found in the curtailment of the individual's right to privacy, but in the fact that both the existence and the (violent) impact of patriarchal power and entrenched male privilege are rendered invisible in the private sphere. Gender-specific sexual violence is thus all too readily reduced to an arbitrary and indiscriminate *individual* incident,¹⁰⁴ all as a direct consequence of the fact that female sexuality, both expressed and conceptualised in the creation, use and dissemination of sexually explicit material, is understood as a matter exclusive to the private sphere where the individual is to remain undisturbed so as to freely exercise all moral choices.¹⁰⁵ The remark by Sachs J that "[i]t seems strange that what one

103 To be fair, even liberal feminist theory, which broadly supports arguments for the constitutional protection of adult gender-specific sexually explicit material, struggles to make political sense of this reality: see, for example, Pateman *Feminist Critiques* 118 and Morris *Violence Against Women* 352. See also Van Marle and Bonthuys *Feminist Theories* 31-32.

104 See Bronstein *The Rape Complainant* 202-227.

105 The radical feminist attack on the private/public distinction is not an attack on privacy as an ideal, nor does it advocate political involvement in personal and family life. Radical feminists simply seem to claim that the relations of family are political and should not be. See, in general, Van Marle and Bonthuys *Feminist Theories* 34-35.

can do in the privacy of one's bedroom one cannot look at in one's bedroom"¹⁰⁶ appears completely unaware of the fact that the private sphere is a seat of male privilege, manifesting in gender-specific oppression, subjugation and harm.¹⁰⁷ The Constitutional Court's libertarian justification for, and constitutional protection accorded to, adult gender-specific sexually explicit material is thus indeed cause for concern.

Moreover, the Constitutional Court's almost blunt refusal to accept social scientific studies that argue for a correlation between violent sexually explicit material and the commission of sexual crimes against women "and other socially repulsive behavior"¹⁰⁸ further illustrate the pervasive influence of United States obscenity jurisprudence.¹⁰⁹ It is not surprising, therefore, when the majority of the Constitutional Court first rejects the research as not "definitive",¹¹⁰ yet thereafter, in the identical paragraph, admits that the "production of pictures like those, and of further types of equally depraved, is certainly an evil and may well deserve to be suppressed".¹¹¹ The particular problems raised by the failure of the majority of the Constitutional Court to conceptualise the type of material under scrutiny will be examined next.

7.2.2 Defining pornography: free expression premised upon a moralistic condemnation?

Although the majority of the Constitutional Court shied away from explaining the precise meaning of the words "erotic material"¹¹² (even though it was expressly held that such material would enjoy constitutional protection), the majority appeared quite unaware of the distinct meaning that these words enjoy within (radical) feminist discourse.¹¹³ Only Mokgoro J, under the rubric of First Amendment jurisprudence,

106 Par [112].

107 See Clark *Liberalism and Pornography* 50.

108 Par [93].

109 See, in particular, par 6 and accompanying footnotes.

110 Par [93].

111 *Per* Didcott J par [93].

112 *Per* Madala J par [105].

113 Radical feminism distinguishes between erotica and pornography on the basis that the former bears three key characteristics which are distinctly absent from the latter. Erotic material, though sexually explicit: (a) does not subjugate women in its production or message; (b) does not involve coercion in its production, message or use; and (c) is devoid of any imminent or actual violence, including threats of violence. But since the majority of the Constitutional Court refused

bravely attempted to conceptualise the type of material proscribed by section 1 of the *Indecent or Obscene Photographic Matter Act* as “sexually explicit expression”¹¹⁴ and “sexually expressive speech”.¹¹⁵ None of the other members of the Constitutional Court ventured anywhere near to proposing a working definition. And yet the conclusions reached by the Constitutional Court invariably imply that its members must have embraced some definition or other. The vocabulary favoured by Didcott J is telling: “repulsive behavior”, “evil”, “depraved”, “obnoxious” and “unbearably vile pictures”¹¹⁶ point towards a distinctly libertarian and moralistic conception (and censure) of the matter under consideration.

And yet the Constitutional Court appears wholly unaware of the fact that a libertarian, moralistic condemnation of sexually explicit material unavoidably conceptualises it as a mode of expression which appeals to the “prurient interest” and which must be assessed, rather inescapably, with explicit reference to the likes and dislikes of the “average [male] person” against the background of “contemporary community standards”.¹¹⁷ Moreover, the Constitutional Court seems painfully unaware of the fact that since it is not the principal concern of a moralistic condemnation to safeguard the advancement of women (be it legally, socially or politically), such a conception stands in direct opposition to viewing the matter as a possible violation of women’s constitutional interests in equality, dignity and physical integrity. These fundamental constitutional concerns are far removed indeed from a position which regards such material in relation to the measure of revulsion or distaste that it is considered to provoke.

to even consider the (radical feminist) argument, presented by several *amici curiae*, that some link (or correlation) exists between acts of sexual violence against women and violent sexually explicit images, it cannot simply be taken for granted that the Constitutional Court subscribes to, and thereby embraces, this particular conception of erotica. Nor can it be assumed that the Constitutional Court is even aware of the distinction that (radical) feminists typically draw between so-called “erotic” as opposed to “pornographic” material.

114 Par [17].

115 Par [35].

116 Par [93].

117 See, in particular, *Kois v Wisconsin* 408 US 229 (1972) at 230, quoting *Roth v United States* 354 US 476 (1957) 489. See also par 3.4.1 n 54.

8 Concluding Observations

This article examined critically the particular understanding of adult gender-specific sexually explicit material emerging from the jurisprudence of the United States Supreme Court, the apparent uncritical endorsement thereof in South African constitutional thought, and argued that First Amendment jurisprudence is wholly insensitive to the possible gender-specific constitutional harm which may result from an abstract liberal-inspired accommodation of sexually explicit material in an imagined free and open democratic society.

Mindful of the fact that freedom of expression is characteristically valued on the basis that it advances the discovery of the truth, the individual search for autonomy (and self-fulfilment), and participation in the democratic process and its structures,¹¹⁸ the article has shown that the instrumental justification of freedom of expression is inherently flawed. And yet the South African Constitutional Court has explicitly recognised this philosophical justification as the basis for free speech and expression. The Constitutional Court has, in fact, both supported and emphasised the idea that freedom of expression stands central to the concepts of democracy and political transformation through participation,¹¹⁹ and has expressly confirmed the association between freedom of expression and the political rights safeguarded under the Bill of Rights.¹²⁰

And yet by embracing a moralistic, libertarian model of free expression in relation to sexually explicit material, the very ideal of a free, democratic and equal society, one in which women can live secure from the threat of harm, is put at risk. A moralistic, libertarian model is simply not capable of conceptualising such material as a possible violation of women's fundamental interests in equality, dignity and physical integrity. Far from it being a case of "fettering ourselves with premature decisions", it remains imperative for the Constitutional Court to critically engage with the consequences of

118 For a useful discussion of the philosophical underpinnings and justifications of freedom of expression, see, in general, Van der Westhuizen *Freedom of Expression* 267-270 and Currie and De Waal *Expression* 359-362.

119 In *South African National Defence Force Union v Minister of Defence* 1999 4 SA 469 (CC) par [7] and *Kauesa v Minister of Home Affairs* 1995 11 BCLR 1540 (NmS) (1554 C-D) and *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) (31F). See also n 75.

120 See, in particular, the observations of O'Regan J in *South African National Defence Force Union v Minister of Defence* 1999 4 SA 469 (CC) par [8].

adopting First Amendment jurisprudence into South African constitutional discourse. For the constitutional debate on gender, sexually explicit material and harm is far from settled and remains, in the words of Didcott J, an “important and contentious issue”.¹²¹

121 Case; *Curtis v Minister of Safety and Security* (n 83) per Didcott J par [94].

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List of abbreviations

| | |
|-------------------|---|
| Commun Yearb | Communication Year Book |
| J Appl Psychol | Journal of Applied Psychology |
| J Commun | Journal of Communication |
| J Fam Issues | Journal of Family Issues |
| New Eng L Rev | New England Law Review |
| NY Rev | The New York Review |
| OJLS | Oxford Journal of Legal Studies |
| Philos Public Aff | Philosophy and Public Affairs |
| Polit Psychol | Political Psychology |
| S Cal L Rev | Southern California Law Review |
| Stell LR | Stellenbosch Law Review |
| UCLA L Rev | University of California Los Angeles Law Review |
| U Pa L Rev | University of Pennsylvania Law Review |
| U Pitt L Rev | Uni |

**BUT IS IT SPEECH? MAKING CRITICAL SENSE OF THE DOMINANT
CONSTITUTIONAL DISCOURSE ON PORNOGRAPHY, MORALITY AND HARM
UNDER THE PERVASIVE INFLUENCE OF UNITED STATES FIRST
AMENDMENT JURISPRUDENCE**

L van der Poll*

SUMMARY

Under the pervasive influence of United States First Amendment jurisprudence, adult gender-specific sexually explicit (or “pornographic”) material is conceptualized, and thus protected in the “marketplace of ideas”, as a particular mode of expression; to be viewed as part of the fabric of an open, free and democratic society. The values which free expression are seen to promote centre upon the advancement of political debate and promotion of personal self-fulfilment and autonomy.

Attempts to conceptualise sexually explicit material within a gender-specific human rights framework present distinct challenges which, in a patriarchal legal and political design, appear to be near insurmountable. These challenges seem to be related to the enduring impact of the common law conception of obscenity (with its strong moralistic overtones) on the jurisprudence of the United States Supreme Court, coupled with a subjective libertarian-inspired test, and the Supreme Court’s general reluctance (also echoed by the South African Constitutional Court) to consider a gender-specific conception of harm emanating from feminist arguments premised upon women’s constitutional interests in human dignity, equality and bodily integrity.

The social revolution of the 1960s, coupled with the women’s liberation movement, called for a distinct departure from the traditional conception of sexually explicit material as a mode of constitutionally defensible free speech and expression, a conception which unavoidably calls for a moralistic approach, separating acceptable forms of expression from those not deemed worthy of (constitutional) protection (termed “obscenity”, specifically created to satisfy the “prurient interest”).

The Supreme Court’s obscenity jurisprudence is characterised by two key features. First, the court subscribes to an abstract concept of free speech, which proceeds from the assumption that all speech is of equal value, and thereby surmises that “non-obscene” sexually explicit

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material has social value, as do esteemed works of literature and art. Secondly, the court assumes that all individuals have equal access to the means of expression and dissemination of ideas and thus fails to acknowledge substantive (and gendered) structural inequalities.

A closer inspection reveals that the Supreme Court's justification of why freedom of expression is such a fundamental freedom in a constitutional democracy (and the reason that "non-obscene" sexually explicit material consequently enjoys constitutional protection) is highly suspect, both intellectually and philosophically. And yet the South African Constitutional Court has explicitly recognised the same philosophical justification as the basis for free speech and expression. The Constitutional Court has, in fact, both supported and emphasised the idea that freedom of expression stands central to the concepts of democracy and political transformation through participation, and has expressly confirmed the association between freedom of expression and the political rights safeguarded under the Bill of Rights. Moreover, the Constitutional Court has also endorsed the conception of adult gender-specific sexually explicit material as a form of free expression.

And yet by embracing a moralistic, libertarian model of free expression, the very ideal of a free, democratic and equal society, one in which women can live secure from the threat of harm, is put at risk. A moralistic, libertarian model is simply not capable of conceptualising sexually explicit material as a possible violation of women's fundamental interests in equality, dignity and physical integrity.

This article has a two-fold objective. The first is to critically examine the dominant discourse on adult gender-specific sexually explicit material emanating from United States jurisprudence (and its resonance in South African constitutional thought), and secondly, to assess whether this particular conception is sensitive to the possible constitutional harm which may result from an abstract liberal-inspired accommodation of sexually explicit material in an imagined free and open democratic society, such as the one presented by the South African legal and constitutional contexts.

KEYWORDS: Sexually explicit material · obscenity · morality · harm · free speech and expression · First Amendment · female sexuality · human rights framework · constitutional jurisprudence