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The Problems with Pornography Regulation: Lessons from History

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THE PROBLEMS WITH PORNOGRAPHY REGULATION: LESSONS FROM HISTORY

Thomas C. Arthur*

ABSTRACT

A growing new anti-pornography movement has arisen in reaction to the ready availability of pornography on the Internet. It includes both traditional social conservatives, who still complain that pornography damages the moral tone of society, corrupts immature minds, and could lead to sexual assault and other violence against women, and feminists who still complain that some pornography furthers the subordination of women. Both groups may be joining forces behind a new public health approach that focuses on new alleged harms caused by Internet pornography. Critics claim that online pornography negatively affects sexual relationships between real couples and in some cases causes psychological harms, perhaps even addiction. These are serious claims that, while contested, deserve to be taken seriously. Just as some who drink or gamble come to have a serious problem and need help, the same may be true for some viewers of pornography on the Internet. Just as with alcohol and gambling, we may need to educate potential users about online pornography's possible harms and provide help for those having difficulty with its use.

But many, if not most, of those in the anti-pornography movement also urge stricter legal prohibitions on "obscene" materials, even when viewed in private homes, and greater enforcement of existing laws, or both. This Article draws three lessons from history that demonstrate that these proposals are unsound and should not be adopted. First, "obscene" pornography is difficult, if not impossible, to define satisfactorily under basic First Amendment principles. At most, it can be imprecisely limited to the ill-defined concept of "hard core" pornography, which might reach some of the online material criticized, but certainly not all of it. In particular, the current definition does not come close to reaching the materials that allegedly corrupt the moral tone of society, the health of relationships and family life, and the status of women. Second, the history of Prohibition demonstrates the almost intractable difficulties of using legal coercion to deprive large segments of society of goods that they desire on moral grounds that they do not share. Censorship is another form of prohibition, which also has proved difficult to enforce even in authoritarian countries. Censorship of the Internet is especially difficult in free countries, although

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modern technologies are increasingly enabling authoritarian countries to control what their citizens view online. Third, any broader definition of obscenity would be inconsistent with basic First Amendment principles and could not be limited to sexually explicit materials in any principled way. It could easily pave the way for a radical curtailment of free expression across the board. What is more, enforcing such a sweeping suppression on what even adults may watch in the privacy of their homes would be impossible if we are to remain a free country.

The thesis of this Article is simple. Even if Internet pornography has all the ill effects that its critics assert, the appropriate remedy in this liberal democracy cannot be censorship. The remedy for this speech is more speech, not legal repression.

INTRODUCTION	869
I. LESSON ONE: THE DEFINITION PROBLEM	874
A. <i>The Nature of the Problem</i>	874
B. <i>The Judicial Struggle to Define Obscenity</i>	875
C. <i>Why Defining Obscenity Is So Hard</i>	886
II. LESSON TWO: THE PROHIBITION PROBLEM	888
A. <i>Prohibition and Its Legacy</i>	888
B. <i>Prohibition of Pornography, Traditionally and on the Internet</i>	894
III. LESSON THREE: THE FIRST AMENDMENT/LIBERAL DEMOCRACY PROBLEM	897
A. <i>The New Anti-Pornography Movement</i>	897
B. <i>The Frontal Attack on the First Amendment</i>	898
C. <i>The Challenge to Privacy</i>	902
D. <i>The Challenge to Liberal Democracy</i>	903
CONCLUSION	906

INTRODUCTION

“A page of history is worth a volume of logic.”

—Oliver Wendell Holmes, Jr.¹

There is a growing anti-pornography movement, inspired by the ready availability of pornography on the Internet.² The movement still includes critics who object to pornography on the traditional bases: that it injures the moral tone of society, corrupts immature minds, and leads to rape and other sexual crimes.³ It also includes the newer arguments of feminists that pornography furthers the subordination of women.⁴ Now both groups seem to be coalescing behind a new approach, illustrated in the 2016 Concurrent Resolution passed by both the legislature and Governor of Utah, which asserts that “pornography is a public health hazard leading to a broad spectrum of individual and public health impacts and societal harms.”⁵ Among these harms are the old claims that pornography corrupts public morals and young minds and leads to violence and discrimination against women.

This is not just old wine in new bottles with new labels, however. The Resolution also includes the new claims related to the widespread availability of Internet pornography, even to children.⁶ Critics point to statistics showing that pornography sites are among the most visited online;⁷ that most men visit them

¹ N.Y. Trust Co. v. Eisner, 256 U.S 345, 349 (1921).

² For a brief but thorough introduction to the anti-pornography activists and their arguments, see *infra* notes 7–17. Professor Gerard Bradley also provides a longer, scholarly presentation of the current arguments, citing the growing literature on Internet pornography; Professor Bradley is also part of the new anti-pornography movement, but rigorously adheres to scholarly standards. See Gerard V. Bradley, *Prolegomenon on Pornography*, 41 HARV. J.L. & PUB. POL’Y 447, 447–56, 484–96 (2018).

³ Concurrent Resolution on the Public Health Crisis, S.C.R. 9, 2016 Gen. Sess. (Utah 2016) (stating that “pornography equates violence towards women and children with sex and pain with pleasure, which increases the demand for sex trafficking, prostitution, child sexual abuse images, and child pornography” and that “potential detrimental effects on pornography’s users can impact brain development and functioning, contribute to emotional and medical illnesses, shape deviant sexual arousal, and lead to difficulty in forming or maintaining intimate relationships, as well as problematic or harmful sexual behaviors and addiction”).

⁴ *Id.* (stating that “because pornography treats women as objects and commodities for the viewer’s use, it teaches girls they are to be used and teaches boys to be users” and that “pornography treats women and children as objects and often depicts rape and abuse as if they are harmless”).

⁵ *Id.*

⁶ *Id.*

⁷ The National Center on Sexual Exploitation, an organization dedicated to studying the “social toxin” of pornography, released a white paper in 2017 outlining their statistical and sociological arguments against pornography. NAT’L CTR. ON SEXUAL EXPLOITATION, PORNOGRAPHY & PUBLIC HEALTH: RESEARCH SUMMARY 1 (2017), http://endsexualexploitation.org/wp-content/uploads/NCOSE_Pornography-PublicHealth_ResearchSummary_8-2_17_FINAL-with-logo.pdf (“A popular tube site reports that in 2016, people watched 4.6 billion hours of pornography on its site alone; 61% of visits occurred via smartphone. Eleven pornography sites are among the world’s top 300 most popular Internet sites. The most popular such site, at number 18,

at least on occasion (and some far more than that);⁸ and that these sites are available even to prepubescent children and have become de facto sex education for many.⁹ At the same time, much Internet pornography now features far more than ordinary sex acts, and especially portrays women in demeaning and even violent sex.¹⁰ Critics claim that the ubiquity of Internet pornography has “pornified” our culture and “hijacked our sexuality,” in the words of Professor Gail Dines, a leading feminist critic and proponent of the new public health arguments.¹¹ She and others point to research suggesting that pornography is negatively affecting sexual relationships, as viewers expect sex partners to submit to degrading and even violent sex acts they have viewed.¹² In other cases, men have not been able to enjoy healthy sexual relations with women, as real sex partners cannot compete with those online.¹³ Other men have substituted watching pornography for sex with real women altogether.¹⁴ Women report having less sex, and less satisfying sex, with their partners.¹⁵ It gets worse. Critics cite psychological harms from watching too much pornography.¹⁶ Some

outranks the likes of eBay, MSN, and Netflix.”).

⁸ NAT’L CTR. ON SEXUAL EXPLOITATION, *supra* note 7 (“A nationally representative survey found that 64% of young people, ages 13–24, actively seek out pornography weekly or more often. A popular tube site reports that in 2016, people watched 4.6 billion hours of pornography on its site alone.”).

⁹ *Id.* (“A study of university students found that 93% of boys and 62% of girls had seen Internet pornography during adolescence. . . . Another sample has shown that among college males, nearly 49% first encountered pornography before age 13.”); *see also* Utah S.C.R. 9 (stating that “exposure to pornography often serves as childrens’ and youths’ sex education and shapes their sexual templates”).

¹⁰ *Id.* at 4 (arguing that “the distribution and availability of pornography has become increasingly normalized. Pornography exposure among college males is now almost universal. Boys and men are consuming hardcore pornography, which may include depictions of sex with persons who look like children or teens, scenarios portraying incest, and other paraphilic interests such as sex with animals (i.e. zoophilia), excretory activities (i.e. coprophilia/urophilia), and violence against women, including rape . . . and torture”).

¹¹ Bradley, *supra* note 2, at 452; Gail Dines, *Is Porn Immoral? That Doesn’t Matter: It’s a Public Health Crisis*, WASH. POST (Apr. 8, 2016), https://www.washingtonpost.com/posteverything/wp/2016/04/08/is-porn-immoral-that-doesnt-matter-its-a-public-health-crisis/?utm_term=.a21bf1b387ba. *See generally* GAIL DINES, *PORNLAND: HOW PORN HAS HIJACKED OUR SEXUALITY* (2010).

¹² *See, e.g.*, NAT’L CTR. ON SEXUAL EXPLOITATION, *supra* note 7, at 4 (“Analysis of the 50 most popular pornographic videos (those bought and rented most often) found that 88% of scenes contained physical violence, and 49% contained verbal aggression. Eighty-seven percent of aggressive acts were perpetrated against women, and 95% of their responses were either neutral or expressions of pleasure.”).

¹³ *See, e.g., id.*

¹⁴ *Id.* at 24 (“In a study of 15,246 Americans, a symmetrical relationship was revealed between men and women as a result of viewing pornography. . . . [M]en reported being more critical of their partners’ bodies and less interest in actual sex. The findings also suggest that males are more likely to use Internet pornography as a solitary, autoerotic activity.”).

¹⁵ *See id.* at 22 (discussing a “cross-sectional study of 405 sexually active men and women who had viewed pornography, frequency of pornography consumption was directly related to a relative preference for pornographic rather than partnered sexual excitement. This preference, as well as devaluing sexual communication, was associated with less sexual satisfaction for both men and women”).

¹⁶ *See id.*

claim that watching pornography actually physically alters the brain and can even lead to an addiction to pornography.¹⁷

As a discerning journalist wrote at the time of the Utah Resolution, the new public health claims are a shrewd way for anti-pornography advocates “to modernize their arguments” and emphasize the ubiquity of pornography on the Internet “to tie it to headlines of sex gone wrong.”¹⁸ According to anti-pornography activists: “[t]een sexting. Tales of porn addiction. Campus sex assaults. Divorce. Hypersexualized teens. Barely clothed pop stars. Sexual violence. All these problems can be tied back [to] ‘young men [who] have been getting a regular diet of rampant pornography since their adolescence.’”¹⁹

The new public health crisis approach thus provides an umbrella under which both the feminist and conservative sides of the current cultural divide can find common ground on pornography. Cultural conservatives still argue that pornography must be curbed on moral grounds, but also endorse the new public health arguments and find common ground with the feminist argument that pornography portrays women as sex objects to be dominated.²⁰ Feminists like Professor Dines combine the new public health claims with the feminist arguments pioneered by Andrea Dworkin and Professor Catharine MacKinnon, implemented in their famous Indianapolis ordinance.²¹

These claims are disputed, of course. Some social scientists claim that pornography actually reduces sexual violence, as it provides a release for harmful impulses.²² Others point out that critics miss the entire point of

¹⁷ *Id.* at 18–20 (“A 2014 study of the brain scans of 64 pornography users found that increased pornography use . . . is linked to decreased brain matter in the areas of the brain associated with motivation and decision-making, and contributed to impaired impulse control and desensitization to sexual reward. . . . Longitudinal research has found that among Internet activities, searching for pornography has the most addictive potential and should be regarded as the most important risk factor for the development of Compulsive Internet Use (also referred to as Internet addiction).”).

¹⁸ Amber Phillips, *Porn Has Been Declared a ‘Public Health Crisis’ in Utah. Here’s Why.*, WASH. POST (Apr. 22, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/04/22/anti-porn-advocates-are-changing-the-game-and-it-starts-with-utah-declaring-it-a-public-health-crisis/>.

¹⁹ *Id.*

²⁰ Matthew LaPlante, *In Utah, the Fight Against Porn Is Increasingly Being Framed as a Public Health Crisis*, WASH. POST (Feb. 17, 2018), https://www.washingtonpost.com/national/in-utah-the-fight-against-porn-is-increasingly-being-framed-as-a-public-health-crisis/2018/02/17/87bf761e-13ea-11e8-9065-e55346f6de81_story.html (“In this heavily religious state, the fight against porn is increasingly being framed not as a moral crusade but as a public health crisis. Although there is significant debate on whether that is actually true, Utahns have been a very receptive audience to the message. . . . ‘We do need to see this like avian flu, or cholera, or diphtheria, or polio,’ Elder Jeffrey Holland, a member of . . . the LDS church, told Utah Coalition Against Pornography conference attendees in 2016. ‘It needs to be eradicated.’”).

²¹ *Id.*

²² Melinda Wenner Moyer, *The Sunny Side of Smut*, SCI. AM. (July 1, 2011), <https://www>.

pornography, which is ultimately “about fantasy, boundary crossing and exploration of all that lies outside of the charmed circle of good old-fashioned vanilla, heterosexual sex,” according to Professor Mireille Miller-Young.²³ She also challenges the methodology of the studies behind the claims relied on by Professor Dines and other critics, asserting that “they make problematic assumptions about what constitutes violence, agency and consensual pleasure in pornography” and “often obscure proper methodologies for selecting an accurate sampling across the myriad porn sub-genres and modes of production.”²⁴

This is a serious policy debate, which deserves to be taken seriously. Its resolution, however, is beyond the scope of this Article. This Article is about the proposed remedies of this new movement’s proponents. Specifically, it is concerned with the problems posed by proposed new prohibitions on the availability of pornography, and in particular pornography on the Internet.

These new anti-pornography advocates urge a variety of remedies. An obvious one is further research and study on the use and effects of Internet pornography and the policy issues it raises.²⁵ Some remedies are educational: proper sex education, which is sadly lacking in many school systems and homes;²⁶ information about possible harmful effects of Internet pornography on healthy relationships between men and women;²⁷ and on the possibility of psychological harms from, and even addiction to, pornography on the Internet.²⁸

scientificamerican.com/article/the-sunny-side-of-smut/ (“Within the U.S., the states with the least Internet access between 1980 and 2000—and therefore the least access to Internet pornography—experienced a 53 percent increase in rape incidence, whereas the states with the most access experienced a 27 percent drop in the number of reported rapes, according to a paper published in 2006 by Anthony D’Amato, a law professor at Northwestern University.”).

²³ Mireille Miller-Young, *Porn Isn’t a Public Health Hazard. It’s a Scapegoat.*, WASH. POST (May 23, 2016), <http://www.washingtonpost.com/news/in-theory/wp2016/05/23/porn-isnt-a-public-health-hazard-its-a-scapegoat/>. She adds that pornography is “a countercultural force against gendered norms and sexual respectability, and at the same time a reflection of our darker, social anxieties It’s an idea and an argument.” *Id.*

²⁴ *Id.*; see also Ronald Weitzer, *Pornography’s Effects: The Need for Solid Evidence*, 17 VIOLENCE AGAINST WOMEN 666, 666–75 (2011); Ronald Weitzer, Opinion, *This Look at Porn Was Biased*, WASH. POST (Apr. 14, 2016), https://www.washingtonpost.com/opinions/this-look-at-porn-was-biased/2016/04/14/c0234afe-00f9-11e6-8bb1-f124a43f84dc_story.html?utm_term=.dd198ea4d6df (responding to DINES, *supra* note 11).

²⁵ See Rubén de Alarcón et al., *Online Porn Addiction: What We Know and What We Don’t—A Systematic Review*, J. CLINICAL MED., 15 Jan. 2019, at 1, 11–12.

²⁶ See Bradley, *supra* note 2, at 465.

²⁷ NAT’L CTR. ON SEXUAL EXPLOITATION, *supra* note 7, at 11.

²⁸ Bradley, *supra* note 2, at 491; see also Isaac Abel, *Was I Actually ‘Addicted’ to Internet Pornography?*, ATLANTIC (June 7, 2013), <https://www.theatlantic.com/health/archive/2013/06/was-i-actually-addicted-to-internet-pornography/276619/> (“Rich qualitative data and physiological evidence may never be enough to “prove” the existence or non-existence of porn addiction as was true with tobacco, so it’s worth asking: would

Others would add programs to wean users away from compulsive viewing of Internet pornography, along the lines of programs aimed at alcohol, drug, and gambling addictions.²⁹ These and other noncoercive remedies do not pose the problems discussed below.

Some—probably most—of the anti-pornography critics would also like new legal restrictions, even extending to what adults can view in their own homes.³⁰ These calls for a new form of prohibition pose problems of compliance and enforcement in a free society, just as the original Prohibition of alcoholic beverages did,³¹ and similar ones on gambling, gay and lesbian sex, narcotics, and marijuana have done.³² Prohibitions of expression, however, pose new and unique problems of enforcement, especially on the Internet. Worse, they pose severe legal difficulties under the First Amendment and the Supreme Court’s current doctrines of just what and how “obscene materials” may be forbidden or otherwise regulated.³³

This Article details three lessons from history that inform the current debates over pornography. First, “obscene” pornography is difficult, if not possible, to define satisfactorily under basic First Amendment principles. At most, it can be imprecisely limited to the ill-defined concept of “hard core” pornography, which might reach some of the online material criticized, but certainly not all of it. In particular, the current definition does not come close to reaching the materials that allegedly corrupt the moral tone of society, the health of relationships and family life, and the status of women. Second, the history of Prohibition demonstrates the almost intractable difficulties of using legal coercion to deprive large segments of society of goods that they desire on moral grounds that they do not share. Censorship is another form of prohibition. It also has been difficult

the consequences of formally recognizing “porn addiction” be good or bad?”).

²⁹ Alexander Rhodes, *The Conversation We’re Not Having About Porn*, WASH. POST (May 26, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/05/26/the-conversation-were-not-having-about-porn/?utm_term=.20e3a721b2c6 (anti-censorship views of founder of website providing tools for those wishing to quit viewing pornography).

³⁰ The Utah Resolution, S.C.R. 9, is typical. It “recognize[s] the need for education, prevention, research, and policy change at the community and societal level . . . to address the pornography epidemic that is harming the people of our state and nation.” Concurrent Resolution on the Public Health Crisis, S.C.R. 9, 2016 Gen. Sess. (Utah 2016) (emphasis added). Professor Bradley urges the formation of a blue-ribbon commission, patterned on the Meese Commission of 1986 (formally known as the Attorney General’s Commission on Pornography), to study the issue for a variety of purposes, but especially to recommend “what public authorities should do about those injustices and about public morality as it pertains to pornography.” Bradley, *supra* note 2, at 457–58, 478; *see also* David L. Tubbs & Jacqueline S. Smith, *Pornography, the Rule of Law, and Constitutional Mythology*, 41 HARV. J.L. & PUB. POL’Y 499, 506–07 (2018).

³¹ *See infra* Part II.

³² *See infra* text accompanying notes 199–202.

³³ *See infra* Section I.B.

to enforce. Censorship of Internet pornography is especially difficult in a free country. Third, any broader definition would be inconsistent with basic First Amendment principles and could not be limited to sexually explicit materials in any principled way. It could easily pave the way for a radical curtailment of free expression. What is more, enforcing such a sweeping suppression on what even adults may watch in the privacy of their homes would be impossible if we are to remain a free country.

Part I will review the courts' struggle to define "obscenity." These efforts began long before the Supreme Court faced up to the problems that they posed to basic First Amendment doctrine. Once the Court did confront this dilemma, it struggled mightily to create the doctrines that have arisen since 1973. Part II will review the story of Prohibition, the paradigmatic attempt to curtail a practice against the will of large sections of the population. After discussing Prohibition's long-term unintended consequences—in particular the rise of organized crime and organized federal law enforcement practices, often previously unthinkable, to combat it (e.g., wiretapping)—it will turn to the even more imposing task of regulating Internet content, using China's current efforts at content control as an illustration. Part III will discuss the incompatibility of more extensive prohibitions on pornography with the basic principles underlying the First Amendment. It will conclude by showing that the combination of any such diminution of our basic free speech rights and Orwellian attempts to prohibit the viewing of Internet pornography, even in private homes, are incompatible with liberal democracy.

I. LESSON ONE: THE DEFINITION PROBLEM

A. *The Nature of the Problem*

Every legal regulation presents a line-drawing problem: the law must distinguish forbidden conduct from benign activities. Three important concerns inform this definitional problem. The first is the need to provide a workable legal standard to guide courts and regulators as they administer the law. The second is the need to provide sufficient guidance to enable voluntary compliance with the law and, more importantly in a liberal democracy, to provide fair notice to citizens of their legal obligations. The third is to ensure that the regulation does not forbid or chill socially useful, or at least unobjectionable, activities.

The third concern is especially important when expression is regulated. An overly broad regulation will prohibit protected expression; a vague one will chill

protected speech. The Supreme Court has often struck down enactments for overbreadth or vagueness.³⁴

As the following brief account will show, the courts originally did not worry about overbreadth and vagueness when enforcing state and federal prohibitions on “obscene,” “lewd,” and “indecent” materials. These courts apparently assumed that the First Amendment and similar provisions in state constitutions did not apply to this category of expression. As the courts began to be concerned with the anomaly of book-banning and -burning in a free country, they had great difficulty defining obscenity—that type of pornography judges considered to be so harmful and so lacking in redeeming social value that it could be banned without undue damage to a free society.³⁵ The rest of this Part will summarize the courts’ struggles in defining obscenity and then explain why this task is so difficult.

B. The Judicial Struggle to Define Obscenity

The struggle to define obscenity predates the Court’s efforts under the First Amendment by almost a century. For decades, the leading definition of obscenity, implemented in both state and federal statutes, came from an 1868 English case, *Regina v. Hicklin*, and covered materials with a “tendency . . . to deprave and corrupt those whose minds are open to such immoral influences.”³⁶ Scholars have routinely noted that this definition allowed the banning of even serious literary works based upon isolated passages that judges believed might corrupt the morals of susceptible persons.³⁷ Less noted is the fact that the *Hicklin* definition was not limited in so many words to sexual morality, nor did it describe the specific elements of obscene material that in fact would tend to “deprave and corrupt.” In fact, it failed to specify just what depravity and corruption in the sexual realm was, although it surely was at least the Victorian view that sex should be limited to marital relations only and not discussed in public.³⁸ Only slightly more specificity came in the form of state and federal

³⁴ See, e.g., *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (provisions of Communications Decency Act invalid for vagueness and overbreadth); *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (Ohio Criminal Syndicalism Act held invalid because it “sweeps within its condemnation speech which our Constitution has immunized from governmental control”).

³⁵ See generally Leo M. Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40 (1938) (discussing the historical development of judicial approaches to obscenity).

³⁶ See, e.g., *U.S. v. Kennerley*, 209 F. 119, 120 (S.D.N.Y. 1913) (quoting *R v. Hicklin* [1868] L.R. 3 QB 360 at 371 (Eng.)). For an overview of early English and American obscenity regulation, see generally Alpert, *supra* note 35.

³⁷ See, e.g., THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 469 (1970).

³⁸ See, e.g., Lata Marina Varghese & Algy Idiculla, *Immoral Ethics Redefined: Tess of D’Urbervilles and*

statutes aimed at obscene materials. The federal Comstock Act of 1873, for example, banned from the mails any “obscene, lewd, or lascivious book, pamphlet, picture, paper, print or other publication of an indecent character,”³⁹ and also anything intended to prevent conception or induce abortion. State laws used similar language.⁴⁰

Under these statutes, courts famously banned as obscene such literary classics as *An American Tragedy*⁴¹ and *Ulysses*.⁴² Federal and state officials seized copies of books deemed obscene, and burned them.⁴³ Authors and publishers routinely self-censored their works to avoid censorship. Ernest Hemingway complained that in writing dialogue for *A Farewell to Arms*, his classic novel of World War I, he was unable to use the actual words that soldiers used in real life.⁴⁴ Norman Mailer had to invent a new f-word (“fug”) for his critically acclaimed World War II novel, *The Naked and the Dead*.⁴⁵

At the same time, many older works that were far more salacious were still sold, read, and viewed without interference from the authorities. A modern version of *Canterbury Tales*—at least *The Miller’s Tale*—or *The Decameron* would surely have been suppressed.⁴⁶ But as Judge Augustus Hand explained in upholding the Post Office’s ban of a literary magazine, these “classics” had “the sanction of age and fame and usually appeal[ed] to a comparatively limited number of readers.”⁴⁷ In other words, the readers of classics were few and, in any event, were not susceptible to corrupting and depraving influences.

The French Lieutenant’s Woman, 2 INT’L J. ON STUD. ENG. LANGUAGE & LITERATURE 49, 49 (“In a period obsessed with the idealization of female virginity, the consequences of sexual experience outside wedlock often resulted in ruin.”); *id.* at 52 (“It is a well known fact that that the Victorian era was silent on sexual matters.”).

³⁹ Act of March 3, 1873 (Comstock Act), ch. 258, § 2, 17 Stat. 598 (1873) (codified as amended at 18 U.S.C. § 1461 (2012)).

⁴⁰ Alpert, *supra* note 35, at 56 & n.45, 64.

⁴¹ Commonwealth v. Friede, 171 N.E. 472, 472–74 (Mass. 1930); Alpert, *supra* note 35, at 54–55.

⁴² See generally KEVIN BIRMINGHAM, THE MOST DANGEROUS BOOK: THE BATTLE FOR JAMES JOYCE’S *ULYSSES* (2014) (describing both the judicial and political attempts to suppress the circulation of *Ulysses*).

⁴³ See, e.g., *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 210 (1964) (considering the constitutionality of procedures used to implement a Kansas statute authorizing the seizure and burning of books deemed to be obscene).

⁴⁴ Scott Donaldson, *Censorship and A Farewell to Arms*, 19 STUD. AM. FICTION 85, 87, 90 (1991). He argued with his iconic editor Max Perkins for the “full use of the language” in his writing. A. SCOTT BERG, MAX PERKINS: EDITOR OF GENIUS 143 (1978). He saw it as an important principle for all of American literature. *Id.* In a letter to Perkins, Hemingway argued that the words he wanted to use could be found in Shakespeare even if not in American literature, and compared “first rate writing” to “American writing (genteel writing).” Letter from Ernest Hemingway to Maxwell Perkins (June 7, 1929), in ERNEST HEMINGWAY: SELECTED LETTERS 1917–1961, at 297 (Carlos Baker ed., 1981).

⁴⁵ NORMAN MAILER, THE NAKED AND THE DEAD 7 (1948).

⁴⁶ Alpert, *supra* note 35, at 53–54, 57–58.

⁴⁷ BIRMINGHAM, *supra* note 42, at 116 (quoting *Anderson v. Patten*, 247 F. 382, 384 (S.D.N.Y. 1917)).

The Supreme Court did not begin to develop First Amendment doctrine until 1919, when it decided the famous *Schenck*⁴⁸ and *Abrams*⁴⁹ cases, and did not uphold a First Amendment claim until 1931.⁵⁰ By mid-century, however, the Court had created a substantial body of expression-protecting doctrine, featuring the “clear and present danger” test.⁵¹ In the meantime, Judge John Woolsey employed a new test of obscenity that required the work to be viewed as whole.⁵² Applying this test, he held that *Ulysses* could be imported and sold in the United States.⁵³ Other courts, however, continued routinely to suppress books of literary merit, most famously a novel by the country’s leading literary critic, Edmund Wilson.⁵⁴ The New York Court of Appeals decided Wilson’s case without even issuing an opinion.⁵⁵ The obvious disparity between the Court’s new freedom of expression jurisprudence and the banning of books was apparently too much for some of the Justices. The basic principle of legality, after all, is that like cases be treated alike. So the Court took Wilson’s case to determine for the first time whether and how the First Amendment applied to obscenity cases. Unfortunately, Justice Frankfurter had to recuse himself,⁵⁶ the remaining Justices split 4–4, and the Court affirmed without opinion.⁵⁷

The Supreme Court finally considered obscenity under the First Amendment in 1957, when it decided *Butler v. Michigan*⁵⁸ and *Roth v. United States*.⁵⁹ *Butler* struck down a statute that made it criminal to distribute to the general public

⁴⁸ *Schenck v. United States*, 249 U.S. 47, 52 (1919) (holding that anti-war activist efforts to advocate for draft resistance were not protected by the First Amendment).

⁴⁹ *Abrams v. United States*, 250 U.S. 616, 618–19 (1919) (briefly considering the constitutionality of amendments to the Espionage Act under the First Amendment, and subsequently dismissing that claim based on *Schenck*).

⁵⁰ *Near v. Minnesota*, 283 U.S. 697, 722–23 (1931) (holding that a state statute prohibiting the publishing and circulating of obscene material violated the First Amendment); *Stromberg v. California*, 283 U.S. 359, 369–70 (1931) (finding a state statute preventing the flying of red flags to be unconstitutional under the First Amendment).

⁵¹ *Schenck*, 249 U.S. at 52. See generally *FCC v. Pacifica Found.* 438 U.S. 726 (1978); *Dennis v. United States*, 341 U.S. 494 (1951).

⁵² *United States v. One Book Called “Ulysses”*, 5 F. Supp. 182, 185 (S.D.N.Y. 1933) (ultimately finding that “reading ‘Ulysses’ in its entirety, as a book must be read on such a test as this, did not tend to excite sexual impulses or lustful thoughts, but that its net effect on them was only that of a somewhat tragic and very powerful commentary on the inner lives of men and women”).

⁵³ *One Book Called “Ulysses”*, 5 F. Supp. at 184.

⁵⁴ *People v. Doubleday & Co.*, 77 N.E.2d 6 (N.Y. 1947).

⁵⁵ *Id.*

⁵⁶ Frankfurter and Wilson were friends. Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 5.

⁵⁷ *Doubleday & Co. v. People of New York*, 335 U.S. 848 (1948).

⁵⁸ 352 U.S. 380, 384 (1957) (rejecting a Michigan statute outlawing obscenity as overly broad and thus in violation of the Constitution).

⁵⁹ 354 U.S. 476, 479 (1957) (considering the constitutionality of criminal obscenity statutes).

“materials tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth”⁶⁰ For a unanimous Court, Justice Frankfurter objected that the statute “reduce[d] the adult population to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual . . . that history has attested as the indispensable conditions for the maintenance and progress of a free society.”⁶¹ *Butler* presaged the end of *Hicklin*’s use of the most susceptible members of the community as the test audience. It also highlighted the tension between regulation to “protect” individual morals and the freedom of thought necessary for a liberal society.

The Court faced this tension again in *Roth*.⁶² The case presented a dilemma. On the one hand, obscenity statutes were popular and vigorously enforced. Striking them down in one clean stroke was too much for the beleaguered Warren Court to do just three years after deciding *Brown v. Board of Education of Topeka*.⁶³ On the other hand, the Court could no longer ignore the incompatibility of then-current censorship with the First Amendment. For as Justice Brennan’s opinion conceded, all “ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guarantees [of the First Amendment] unless excludable because they encroach upon the limited area of more important interests.”⁶⁴ This included ideas about “sex, a great and mysterious . . . force . . . of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.”⁶⁵ The logical question, of course, was what harms from allegedly obscene works would justify their suppression? No consensus was available in 1957, just as none exists today upon this hard, contested question.

As Harry Kalven argued in his classic article *The Metaphysics of Obscenity*,⁶⁶ there were at least four possible harms: “(1) the incitement to antisocial sexual conduct; (2) psychological excitement resulting from sexual imagery, (3) the arousing of feelings of disgust and revulsion; and (4) the

⁶⁰ *Butler*, 352 U.S. at 381.

⁶¹ *Id.* at 383–84.

⁶² *Roth*, 354 U.S. at 476.

⁶³ *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

⁶⁴ *Roth*, 354 U.S. at 484.

⁶⁵ *Id.* at 487.

⁶⁶ Kalven, Jr., *supra* note 56, at 1.

advocacy of improper sexual values.”⁶⁷ As he noted,⁶⁸ all are problematic. Then, as now, the evidence that pornography leads to antisocial conduct is mixed.⁶⁹ The arousal of sexual thoughts short of action seems trivial, at least in our age, and in any event, in a liberal society one’s thoughts, sexual or otherwise, would hardly seem to be the state’s business. Likewise, feelings of disgust are a thin basis for regulation.⁷⁰ In a pluralistic society, something disgusts almost everyone, and disgust is not limited to sexual matters. Advocacy of “improper” sexual values should be no more acceptable as a ground for censorship than the advocacy of any other views. After all, the Court has held that only exigent conditions justify the proscription of the advocacy of violence or law violation, including advocacy of the violent overthrow of the government itself.⁷¹

Justice Brennan avoided the harms question by resorting to a strange mixture of originalism and functionalism. The bulk of his argument was originalist. Obscenity was, like fighting words and libel, one of the “well-defined and narrowly limited categories of speech, the prevention . . . of which has never been thought to raise any constitutional problem.”⁷² In support of this historical assertion, Brennan cited numerous state and federal statutes and judicial decisions applying them.⁷³ Like “fighting words,” obscene works were “no essential part of any exposition of ideas, and are of such slight social value as a step toward truth that any benefit . . . from them is clearly outweighed by the social interest in order and morality.”⁷⁴ Indeed, “implicit in the history of the First Amendment is the rejection of obscenity as *utterly without redeeming social importance*.”⁷⁵

This last statement, of course, was nonsense. The statutes and decisions cited by Justice Brennan to support his historical argument had not been limited to works of no redeeming social importance. Clearly, the *Roth* definition of obscenity would have to be something far more limited than those the courts had been using.

⁶⁷ *Id.* at 3–4. In a footnote, Professor Kalven also suggested the possibility of a fifth harm from the impact over time of obscenity on character and ultimately on conduct. *Id.* at 4 n.19.

⁶⁸ *Id.* at 4.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (advocacy of violence or law violation protected except where “directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

⁷² *Roth v. United States*, 354 U.S. 476, 485 (1957).

⁷³ *Id.* at 491–94.

⁷⁴ *Id.* at 485.

⁷⁵ *Id.* at 484 (emphasis added).

The Court struggled with the definitional problem for the next sixteen years before announcing the current definition in *Miller v. California*.⁷⁶ In *Roth*, Brennan asserted that contemporary courts had replaced the *Hicklin* definition with a new formulation: “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”⁷⁷ As *Butler* had portended, the target audience for determining obscenity would not be children or other “susceptible” groups.⁷⁸ Nor would isolated portions of a work any longer render it obscene. The term “contemporary community standards” made room for evolving sexual attitudes.⁷⁹ This much was clear.

Many things, however, remained unclear. Three were particularly important. First, just what did it mean for material to appeal to the prurient interest? The term did not have an established legal meaning. The Court borrowed the concept from a tentative draft of the Model Penal Code.⁸⁰ The American Law Institute (ALI) had adopted the language in its model statute to get away from the prevailing overbroad tests for obscenity. It specifically rejected the test of “tendency to arouse lustful thoughts or desires” as unsuitably broad for a modern society that even in the 1950s “plainly tolerate[d] a great deal of erotic interest in literature, in advertising and art.”⁸¹ The ALI rejected the test of “tendency to corrupt or deprave” for lack of evidence that obscenity led to misconduct.⁸² Instead, it defined prurient interest as a “shameful or morbid interest in nudity, sex, or excretion,”⁸³ and as “an exacerbated, morbid, or perverted interest growing out of a conflict between the universal sex drive of the individual and universal social controls of sexual activity.”⁸⁴ In other words, prurient interest is what society thinks it is.

Justice Brennan made things even worse by not accepting the ALI’s attempted narrow definition. Instead, he claimed that the term meant “a tendency

⁷⁶ 413 U.S. 15 (1973).

⁷⁷ *Roth*, 354 U.S. at 477.

⁷⁸ *Butler v. Michigan*, 352 U.S. 380, 382–83 (1957). The Court quickly held, however, children and other groups, e.g., the LGBT community, could be target audiences for materials distributed to them. *Ginsberg v. State of New York*, 390 U.S. 629 (1968) (children); *Mishkin v. State of New York*, 383 U.S. 502 (1966) (LGBT).

⁷⁹ *Roth*, 354 U.S. at 489.

⁸⁰ MODEL PENAL CODE § 207.10(2) (AM. LAW INST., Tentative Draft No. 6, 1957).

⁸¹ *Id.* § 207.10 cmt. 2(A).

⁸² *Id.* § 207.10 cmt. 6(A).

⁸³ *Id.* § 207.10(1).

⁸⁴ *Id.*

to excite lustful thoughts,”⁸⁵ the meaning that, as Justice Harlan’s dissenting opinion noted, the ALI had expressly rejected.⁸⁶

In any event, prurient interest proved impossible to define meaningfully. It is easy to see why. The Court has defined prurient interest as a “shameful or morbid interest in sex,” as opposed to a “good, old fashioned, healthy interest in sex.”⁸⁷ This is an impossible line to draw. How different is Brennan’s “tendency to excite lustful thoughts” from a teenager’s “good, old fashioned, healthy interest in sex”? Or from a married couple’s desire for each other after a long absence? Should we interview spouses and significant others who have been deployed abroad by the military to find out?

Second, which community’s contemporary standards govern? Would each locality be able to have its own standards, so that residents of more tolerant communities would have access to materials denied to the residents of other localities? Third, was the question of obscenity a routine question of fact to be determined by a judge or jury, reviewed only for substantial evidence? The answers to these questions were interdependent. If the Court was to be the ultimate decision maker in each case, it would have to employ a national standard and stand ready to review each case to ensure that local prosecutors, judges, and juries were properly applying it.

Justice Brennan addressed these questions in *Jacobellis v. Ohio*,⁸⁸ seven years after *Roth*. He argued forcefully that only a unitary, national standard was acceptable for determining the scope of protected expression.⁸⁹ He also asserted that “the question whether a particular work is obscene necessarily implicates an issue of constitutional law . . . [which] must ultimately be decided by this Court.”⁹⁰ Brennan also attempted to flesh out the definition of obscenity by stressing two points. He emphasized that obscenity was unprotected because it was “*utterly* without redeeming social importance.”⁹¹ Courts may not weigh a work’s prurient appeal against its social importance.⁹² This, of course, would

⁸⁵ *Roth v. United States*, 354 U.S. 476, 487 n.20 (1957) (quoting the 1949 Webster’s New International Dictionary’s definition of obscenity, and stating that “[w]e perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I., Model Penal Code”).

⁸⁶ *Id.* at 499.

⁸⁷ *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985).

⁸⁸ 378 U.S. 184 (1964).

⁸⁹ *Id.* at 195.

⁹⁰ *Id.* at 188.

⁹¹ *Id.* at 191 (emphasis added).

⁹² *Id.* (“[M]aterial dealing with sex in a manner that advocates ideas, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscene and denied the constitutional protection.” (citation omitted)).

make the utter lack of social importance an independent element of the definition of obscenity. Brennan's second point suggested yet a third element. *Roth* required in the first instance a finding that the material "goes substantially beyond customary limits of candor in description or representation" of sex.⁹³ In other words, it was offensively explicit.

Unfortunately, there was no opinion of the Court in *Jacobellis*.⁹⁴ Justice Brennan's opinion merely announced the result, that the film at issue was not obscene.⁹⁵ Only Justice Goldberg joined his opinion; four other Justices concurred—most famously Justice Stewart, who summed up the definition problem.⁹⁶ Only "hard-core pornography" was constitutionally obscene.⁹⁷ He was not sure he could define it further, but he said, "I know it when I see it and the motion picture in this case is not that."⁹⁸

Justice Brennan tried again in the notorious *Fanny Hill* case,⁹⁹ which held that a famous eighteenth-century pornographic work was not legally obscene, despite the fact that it contained nothing but sex scenes, as vividly described in Justice Clark's dissent.¹⁰⁰ Writing for himself and two others, Brennan laid out a three-part test: (1) dominant appeal to the prurient interest, (2) patent offensiveness of explicitly sexual material, and (3) utter lack of redeeming social value.¹⁰¹ Three other Justices concurred.¹⁰² Justices Black and Douglas maintained, as they had all along, that no work could be banned as obscene.¹⁰³ Having read it, Justice Stewart did not consider *Fanny Hill* hard-core pornography.¹⁰⁴

⁹³ *Id.* (citing *Roth*, 354 U.S. at 487 n.20 (quoting MODEL PENAL CODE § 207.10(2) (AM. LAW INST., Tentative Draft No. 6, 1957))).

⁹⁴ *Id.* at 184–85.

⁹⁵ *Id.* (Brennan & Goldberg, JJ., majority opinion).

⁹⁶ *Id.*; *id.* at 196 (Black & Douglas, JJ., concurring); *id.* at 197 (Stewart, J., concurring); *id.* at 197 (Goldberg, J., concurring).

⁹⁷ *Id.* at 197 (Stewart, J., concurring).

⁹⁸ *Id.*

⁹⁹ A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. (*Fanny Hill*), 383 U.S. 413 (1966).

¹⁰⁰ *Id.* at 419–20; *id.* at 441 (Clark, J., dissenting). Ironically, *Fanny Hill* had been the subject of the earliest reported obscenity case in America, *Commonwealth v. Holmes*, 17 Mass. (16 Tyng) 336 (Mass. 1821), and was relied upon by Justice Brennan in *Roth* in support of his historical argument. *Roth v. United States*, 354 U.S. 476, 483 n.13 (1957); see EMERSON, *supra* note 37, at 468; Alpert, *supra* note 35, at 53.

¹⁰¹ *Fanny Hill*, 383 U.S. at 418.

¹⁰² *Id.* at 421 (Black & Stewart, JJ., concurring); *id.* at 424 (Douglas, J., concurring).

¹⁰³ *Id.* at 421 (Black & Stewart, JJ., concurring); *id.* at 424 (Douglas, J., concurring).

¹⁰⁴ *Id.* at 420–21 (Black & Stewart, JJ., concurring).

Fanny Hill was one of three 1966 cases that together generated fourteen separate opinions by the Justices. None commanded a majority of the Court. In the next Term, the Court conceded its inability to coalesce around a common definition. In *Redrup v. New York*,¹⁰⁵ the Court's per curiam opinion stated that it had limited review to "certain particularized questions," assuming that the materials in the case all were obscene under *Fanny Hill*.¹⁰⁶ This assumption had proved unwarranted, and the Court was now required to consider whether the materials were in fact obscene even though there was no majority for any test. Two of the Justices believed that states could not regulate obscenity at all. Another believed that state power was "narrowly limited to a distinct and clearly identifiable class of material."¹⁰⁷ Four others adhered to the *Fanny Hill* formulation.¹⁰⁸ Finally, yet another Justice did not consider the social value part of the *Fanny Hill* test to be an independent factor.¹⁰⁹ All the Justices could agree on was that whatever the test, the materials were not obscene.¹¹⁰

After *Redrup*, the Court continued issuing per curiam opinions indicating that at least five Justices, using their individual tests, did not find the particular materials obscene.¹¹¹ The Justices would screen offending films at the Court. Justice Marshall would sit by Justice Harlan, who by this time was almost completely blind, and describe what was taking place on the screen.¹¹² Justices Black and Douglas did not attend these sessions, in keeping with their view that the First Amendment protected even hard-core pornography.¹¹³ Despite the apparent consensus of the other seven that at least hard-core pornography was legally obscene, the Justices did not in fact know it when they saw it. Their clerks instead learned each Justice's individual test.¹¹⁴

By 1973, a majority of the Court was ready for a new approach, one that did not require the court to continue watching blue movies. In *Miller v. California*, five Justices opted for a revised definition and a new approach to obscenity, which would no longer require the Court to consider particular cases.¹¹⁵ Specifically, Chief Justice Burger's opinion for five Justices did three important

¹⁰⁵ 386 U.S. 767 (1967) (per curiam).

¹⁰⁶ *Id.* at 769.

¹⁰⁷ *Id.* at 770.

¹⁰⁸ *Id.* at 770–71.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 771.

¹¹¹ JEROME A. BARRON & C. THOMAS DIENES, *FIRST AMENDMENT LAW IN A NUTSHELL* 115 (5th ed. 2018).

¹¹² BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN* 198 (1979).

¹¹³ *Id.*

¹¹⁴ *Id.* at 128–33.

¹¹⁵ 413 U.S. 15, 36–37 (1973).

things. First, it modified the “utterly without redeeming social value” element to ensure that, for example, a pornographic work could not be insulated by the insertion of a few pages discussing Aristotle’s *Politics*.¹¹⁶ Under the new formulation, the “work, taken as a whole,” must lack “serious literary, artistic, political, or scientific value.”¹¹⁷

Second, Burger rephrased the patently offensive element to permit states to forbid the depiction or description “in a patently offensive way [of] sexual conduct” only if “specifically defined by the applicable state law.”¹¹⁸ He provided two examples of patently offensive acts the state could specify: (1) “ultimate sexual acts, normal or perverted, actual or simulated” and (2) “masturbation, excretory functions, and lewd exhibition of the genitals.”¹¹⁹

Third, the prurient interest and patently offensive elements were no longer to be determined by national standards with Supreme Court review.¹²⁰ Instead, local fact finders would decide with appellate review in the lower courts.¹²¹

Four Justices dissented.¹²² Douglas continued to adhere to his longstanding view that obscenity regulation was always unconstitutional.¹²³ Significantly, Brennan’s opinion for himself, Stewart, and Marshall came very close to the Douglas view. Brennan now conceded that the definition problem had no solution that would “bring stability to this area of the law without jeopardizing fundamental First Amendment values.”¹²⁴ The Court’s “experience since *Roth*” had forced him to conclude that obscenity “cannot be defined with sufficient specificity and clarity,” to provide fair notice to producers and distributors of sexually explicit materials, to prevent the erosion of protected speech, and to avoid “very costly” institutional harms, no doubt referring to the Court’s case by case involvement in obscenity regulation.¹²⁵ Accordingly, Brennan would now hold, in the absence of distribution to minors or obtrusive exposure to unconsenting adults, the First Amendment does not permit states wholly to

¹¹⁶ *Id.* at 24–26.

¹¹⁷ *Id.* at 24.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 25.

¹²⁰ *Id.* at 32 n.13.

¹²¹ *Id.*

¹²² *Id.* at 37 (Douglas, J., dissenting); *id.* at 47 (Brennan, Stewart, and Marshall, JJ., dissenting).

¹²³ *Id.* at 40–41 (Douglas, J., dissenting).

¹²⁴ *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting); *see also Miller*, 413 U.S. at 47 (Brennan, J., dissenting).

¹²⁵ *Miller*, 413 U.S. at 47.

suppress allegedly obscene materials, although he would permit regulations on the manner of their distribution to protect minors and unwilling adults.¹²⁶

Miller remains the law more than forty-five years later, and the Court has shown no desire to revisit the subject. However, this does not mean that Justice Brennan's fears about fair notice were wholly unwarranted. What is legally obscene now varies by locality. Pornography distributors that sell throughout the country, by mail or via the Internet, may be prosecuted under the community standards of any place to which they sell,¹²⁷ and thus need to know what these standards are. Many have tables mapping ZIP codes to a code indicating the severity of the standards there.¹²⁸ Professor Eugene Volokh included in earlier editions of his casebook a "community standards map" using one distributor's table.¹²⁹ That distributor had categorized locales based on the number of prosecutions there.¹³⁰ As Volokh admits, this is less than precise, but it is what the distributor relies on to avoid prosecution, and is "thus our best guess about the actual effects of the law."¹³¹

Volokh's contact at the distributor told him that it would ship virtually anything to a "lenient" location, with the possible exception of material depicting bestiality or male homosexual penetration.¹³² To "strict" locales it would ship almost nothing showing any form of penetration, though it would send nude pictures—and as for "intermediate" places, Volokh's contact told him that "it all depends on how paranoid we're feeling that day."¹³³

On the other hand, Brennan's fears for "fundamental First Amendment values" may have been unwarranted. *Miller*'s lack of social value and patent offensiveness elements, along with the results in the Court's pre-*Miller* cases (e.g., *Fanny Hill*), have protected all but arguably hard-core pornography from prosecution. Indeed, the current complaints about obscenity regulation come

¹²⁶ Brennan's dissent proved to be very influential. His view that the only acceptable limitations on pornography were those to protect children from accessing it and unwilling adults from exposure to it or its "secondary effects" on neighborhoods (e.g., zoning regulations on adult bookstores) guided the Court's subsequent cases, according to two of the new anti-pornography advocates. Tubbs & Smith, *supra* note 30, at 522–23.

¹²⁷ *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 124–26 (1989).

¹²⁸ EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES* 132 (4th ed. 2011).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

from parties on both the left and the right who assert that the *Miller* regime protects too much.¹³⁴

C. *Why Defining Obscenity Is So Hard*

There are at least three reasons why the definition problem is so intractable. The first we have already encountered. Overbreadth and vagueness may be acceptable costs for many types of regulation, even though they prohibit or chill some legitimate activity. Where the legitimate activity affected is protected expression, however, this poses a danger to fundamental First Amendment values, as Brennan argued in *Miller*. To avoid this danger, most of the Justices have favored defining obscenity narrowly to cover only “hard-core” pornography. To many, however, including some on the Court, the resulting definition was seriously underinclusive. In their view, it failed to achieve the legitimate goals of obscenity legislation. Justice Clark asserted this view in a vigorous dissent in *Fanny Hill*.¹³⁵

The second reason flows from the fact that the terms “obscenity” and “pornography” do not mean the same things to different people. For many, “obscene” is simply a term for anything they view as excessive, as in “obscene profits.” As a legal term, its use in the nineteenth and early twentieth centuries was far broader than the term “pornography,” as we have seen. Now, it does not even cover all pornographic materials.

Even more uncertain is the meaning of “pornography” itself. Caroline West provides a helpful guide to various uses of the word in the *Stanford Encyclopedia of Philosophy*.¹³⁶ First, pornography could be any sexually explicit material.¹³⁷ West adds that the concept of sexually explicit has meant different things in different cultures and at different times. “Displays of women’s uncovered ankles” are still sexually explicit in some cultures, though not in the West, at least not since Victorian times, when it “was regarded as quite risqué.”¹³⁸ West adds that some things are widely regarded as sexually explicit today, including depictions and descriptions of sex acts, including oral sex, and exposed body parts, “especially the erect penis.”¹³⁹ This definition, however,

¹³⁴ See *supra* text accompanying note 30; *infra* text accompanying notes 233–50.

¹³⁵ A Book Named “John Cleland’s *Memoirs of a Woman of Pleasure*” v. Attorney General (*Fanny Hill*), 383 U.S. 413, 441–54 (1966) (Clark, J., dissenting).

¹³⁶ Caroline West, *Pornography and Censorship*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* 1, 3–6 (Edward N. Zalta ed., 2018).

¹³⁷ *Id.* at 3.

¹³⁸ *Id.*

¹³⁹ *Id.* at 3.

includes too much. No one would consider anatomy texts pornographic, and very few would so find classic sculptures (e.g., Michelangelo's *David*).¹⁴⁰

West's second definition is "sexually explicit material . . . primarily designed to produce sexual arousal in the viewer."¹⁴¹ This comes closer, as a descriptive matter, to the Court's definitions, but is not quite the same. Her third definition adds to sexual arousal the qualifier "that is bad in a certain way."¹⁴² She notes that advocates of pornography restriction tend to use this harm-based definition, "although they disagree as to the relevant source of its badness, and consequently about what material is pornographic."¹⁴³ She sees the definition of pornography in terms of "obscenity" as such a harm-based approach, noting that social conservatives, who object that "obscene" materials give offense to "reasonable" people, deprave and corrupt viewers, and erode family and religious values, favor it.¹⁴⁴

While these harms have clearly been the motivation behind traditional restrictions on pornographic materials, "the badness of pornography need not reside in obscenity."¹⁴⁵ As Professor MacKinnon and other feminist scholars have urged, pornography is sexually explicit material that depicts women's subordination in such a way as to endorse it.¹⁴⁶ Under this definition, some sexually explicit material may merely be harmless "erotica."¹⁴⁷

West's third definition leads us to the heart of the matter, and the third reason for the difficulty in defining obscenity. The definition of pornography necessarily varies with the evil to be cured. As Harry Kalven noted in his critique of *Roth*, however, the Court has avoided any serious discussion of the harms that justified regulating it.¹⁴⁸ The closest it has come is Chief Justice Burger's statement in *Paris Adult Theater I v. Slaton*,¹⁴⁹ the companion case to *Miller*. There, Burger pointed to a variety of public "rights and interests," including "quality of life and the total community environment, the tone of commerce in

¹⁴⁰ *See id.* at 3–4.

¹⁴¹ *Id.* at 4.

¹⁴² *Id.* at 5.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 6.

¹⁴⁵ West, *supra* note 136, at 6.

¹⁴⁶ *See infra* text accompanying notes 233–50.

¹⁴⁷ *Id.* at 5. West goes on to argue that this definition could lead to yet a fourth definition that tends to subordinate women even if not sexually explicit, as with certain advertisements or art depicting women bound or bruised in a glamorized manner. *Id.* at 7–8.

¹⁴⁸ HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 33, 36–37 (Jamie Kalven ed., 1988).

¹⁴⁹ 413 U.S. 49 (1973).

the great city centers, and, possibly, the public safety itself” in view of the “arguable correlation” between pornography and crime.¹⁵⁰ There was also the “tone of the society, . . . the style and quality of life, now and in the future.”¹⁵¹ As discussed below in Part III, this vague statement echoes recent arguments from both social conservatives and feminist critics of pornography. The *Miller* court made no effort to tie its revised definition of legal obscenity to these interests, however, and anti-pornography advocates find the *Miller* definition inadequate to serve them. In retrospect, it is clear that *Miller*, while allowing more obscenity prosecutions than before, did not differ significantly from *Roth* and its progeny. Its second and third elements still limit obscenity to “hard-core” materials. “Hard-core” has vagueness problems of its own, as we have seen, but it clearly does not cover a great deal of sexually explicit material that many on both the left and the right would like to censor.

II. LESSON TWO: THE PROHIBITION PROBLEM

Censorship of pornography is, of course, a form of prohibition. Reform efforts in the late nineteenth and twentieth centuries produced a variety of prohibition regimes in addition to the anti-obscenity efforts described above. The most famous is the national prohibition of alcoholic beverages from 1919 to 1933, commonly referred to simply as Prohibition.¹⁵² There have in fact been many more prohibitions, of course. State and federal laws have forbidden various forms of gambling, including lotteries, sports betting, poker games, and casinos.¹⁵³ Other laws target prostitution, marijuana, and possession of narcotic drugs without a prescription. As our national experience with the prohibition of alcohol shows, these prohibitions usually present more problems than they solve.

A. *Prohibition and Its Legacy*

The first temperance movements in America arose before the Civil War and were very different from later efforts in two important ways. First, they emphasized moderation in drinking—what today would be called “drinking responsibly,” including the substitution of drinks with lesser alcoholic content for hard liquor—rather than total abstinence from all alcoholic beverages.¹⁵⁴

¹⁵⁰ *Id.* at 58.

¹⁵¹ *Id.* at 59.

¹⁵² U.S. CONST. amend. XVIII, *repealed* by U.S. CONST. amend. XXI.

¹⁵³ *See, e.g.*, UTAH CODE ANN. § 76-10-1102 (West Supp. 2015) (prohibiting gambling in the state of Utah).

¹⁵⁴ DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* 9 (2010).

Second, they did not advocate legal constraints on alcohol consumption. They relied on persuasion rather than compulsion.¹⁵⁵ By 1851, however, the movement switched to Prohibition as we now know it. That year, Maine passed the first statewide Prohibition law, with fines for sellers of liquor and jail terms for manufacturers.¹⁵⁶ Maine's law was promptly copied in other states, but the antebellum Prohibition did not last. By the end of the decade all the new laws, including Maine's, had been repealed—victims of both intense opposition, especially by Irish immigrants, and the rise of the Republican Party, whose leaders quickly saw that Prohibition was a threat to party unity and the antislavery movement.¹⁵⁷

A new movement grew up after the war, arising from a loose combination of women's groups, especially the Woman's Christian Temperance Union (WCTU), formed in 1874; Protestant clergymen from all the major denominations except the Episcopalians and Lutherans; and civic and business leaders. What united these proponents was the late nineteenth century American concept of the home. According to historian Richard White, the concept of home linked the prevailing concepts of the proper relationship between manhood and womanhood.¹⁵⁸ Hardworking, economically mobile men, like Abraham Lincoln, would obtain the wherewithal to support "a wife and mother who would reproduce and nurture future citizens."¹⁵⁹ Together they would nourish future citizens of a great middle class republic, where few were very rich and few very poor, at least for long.

The WCTU brought women into politics in order to protect the home. Women and their children bore the consequences of drunkenness and alcoholism, even though few of them drank. Drunken husbands "did beat their wives, abuse their children, and neglect their homes," and wasted both their and their wives' wages in saloons.¹⁶⁰ Emma Willard, the longtime head of the WCTU, emphasized "Home Protection," the title of her standard temperance lecture.¹⁶¹ Home protection became the basis of a host of other moral uplift

¹⁵⁵ *Id.* at 9–10.

¹⁵⁶ *Id.* at 11; *see also* LISA MCGIRR, *THE WAR ON ALCOHOL: PROHIBITION AND THE RISE OF THE AMERICAN STATE* 8 (2016).

¹⁵⁷ OKRENT, *supra* note 154, at 12. Irish immigrant anger over the Maine law resulted in violence in 1855, resulting in the death of one and wounding of seven in a crowd of over 3,000 protesting the law. *Id.*

¹⁵⁸ RICHARD WHITE, *THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING RECONSTRUCTION AND THE GILDED AGE, 1865–1896*, at 136–40 (2017).

¹⁵⁹ *Id.* at 137.

¹⁶⁰ *Id.* at 164.

¹⁶¹ *Id.* at 166.

efforts of the WCTU under Willard and her successors,¹⁶² including opposition to pornography.¹⁶³

Protestant clergymen organized the Anti-Saloon League (ASL), the prototype of modern single-issue pressure groups like NARAL and the NRA.¹⁶⁴ They joined forces with the WCTU, along with Protestant laymen, including William Jennings Bryan¹⁶⁵ and John D. Rockefeller, who donated millions to the cause.¹⁶⁶ Business leaders, like Henry Ford, also joined in out of concerns about the effect of drinking on their workers' productivity.¹⁶⁷ With its single-issue focus, the ASL combined "five distinct, if occasionally overlapping components" into a de facto coalition.¹⁶⁸ Southern racists cited the dangers of whiskey drinking black men who lacked the capacity to resist it.¹⁶⁹ Progressives cited a variety of ills connected to saloons, and saw alcohol as a leading source of poverty.¹⁷⁰ They especially loathed the corrupt political machines who operated in saloons.¹⁷¹ WCTU members sought to protect the home in a variety of ways, and sought the vote to further their ambitious programs.¹⁷² Populists, like their leader Bryan, were overwhelmingly Protestants from the countryside and small towns of the South and West.¹⁷³ Nativists were the last of the group. Their main concern, of course, was the huge increase in immigration in the period before World War I.¹⁷⁴

This united front of white, Protestant, middle class reformers sought to and did impose their policies on a far less organized group of opponents: brewers and distillers; saloons and taverns; and, most significantly, their customers, particularly those who were not white or Protestant. The reformers particularly targeted the saloons where urban working class men met.¹⁷⁵ These were vital social and political institutions in their communities.¹⁷⁶ Urban machines often

¹⁶² *Id.* at 164.

¹⁶³ *Id.* at 168.

¹⁶⁴ OKRENT, *supra* note 154, at 36–52 (describing political ruthlessness and success of the ASL).

¹⁶⁵ *Id.* at 55–56.

¹⁶⁶ MCGIRR, *supra* note 156, at 29. Rockefeller matched 10% of the ASL's contributions from other sources. OKRENT, *supra* note 154, at 39.

¹⁶⁷ MCGIRR, *supra* note 156, at 17–18; OKRENT, *supra* note 154, at 42–44.

¹⁶⁸ OKRENT, *supra* note 154, at 42.

¹⁶⁹ *Id.* at 42–44.

¹⁷⁰ MCGIRR, *supra* note 156, at 12.

¹⁷¹ *Id.* at 15–17.

¹⁷² *Id.* at 27.

¹⁷³ OKRENT, *supra* note 154, at 56–57.

¹⁷⁴ MCGIRR, *supra* note 156, at 13–15.

¹⁷⁵ *Id.* at 16; OKRENT, *supra* note 154, at 26–29.

¹⁷⁶ OKRENT, *supra* note 154, at 26–29 (describing various functions of saloons in immigrant communities).

operated through these gathering spots.¹⁷⁷ The newer, non-Protestant immigrant groups in America—the Irish, Italians, Polish, Jews, and others from Eastern and Southern Europe—had very different cultural views of drinking.¹⁷⁸ Prohibitionists typically looked down on these newer arrivals and had no qualms in imposing their views on them.¹⁷⁹ They in turn had few compunctions about continuing to consume their favorite beverages in spite of the new law.

The failure of Prohibition is an oft-told and familiar story. Millions of otherwise law-abiding citizens refused to obey the new laws.¹⁸⁰ Many who had supported the Eighteenth Amendment to curb the real harms from excessive drinking assumed that the new laws would only ban liquor, and social drinkers could still have access to wine and beer. After all, the Amendment’s text only prohibited “intoxicating liquors.”¹⁸¹ But the Volstead Act, passed in 1919 over President Wilson’s veto, covered all alcoholic beverages.¹⁸² Others opposed prohibition altogether. Many continued to imbibe. Some did it by persuading doctors and druggists to abuse exceptions for “medicinal use” of alcohol.¹⁸³ Other simply bought “moonshine” from local suppliers or frequented “speakeasies.”¹⁸⁴ Frequenting speakeasies became glamorous, associated with urban sophistication. The characters in the novels and stories of the “second flowering” of American literature in the 1920s all drank illegally.¹⁸⁵ “Bathtub gin” became as much a cultural artifact of the new era as the flappers who drank it. Worse, gangsters like Al Capone and Lucky Luciano become national celebrities. Capone portrayed himself as a businessman supplying his customers’ needs, which in a twisted way he was. Jay Gatsby, the most famous fictional character of the 1920s, made his fortune from the new criminal enterprises.¹⁸⁶

¹⁷⁷ MCGIRR, *supra* note 156, at 16.

¹⁷⁸ *Id.* at 14.

¹⁷⁹ *Id.* at 12–13; OKRENT, *supra* note 154, at 46–49. The newer immigrants from these countries had not settled in the South yet. Southern prohibition advocates targeted African American and poor white drinkers, MCGIRR, *supra* note 156, at 17–18; OKRENT, *supra* note 154, at 42–46, and they in turn did their best to retain their old habits.

¹⁸⁰ See generally MALCOLM COWLEY, *A SECOND FLOWERING: WORKS AND DAYS OF THE LOST GENERATION 26–27* (1973).

¹⁸¹ U.S. CONST. amend. XVIII.

¹⁸² *Historical Highlights: The Volstead Act*, U.S. HOUSE REPRESENTATIVES, <https://history.house.gov/Historical-Highlights/1901-1950/The-Volstead-Act/> (last visited Mar. 26, 2019).

¹⁸³ MCGIRR, *supra* note 156, at 51.

¹⁸⁴ OKRENT, *supra* note 154, at 118–20, 124–31, 146–69, 174–224.

¹⁸⁵ See COWLEY, *supra* note 180.

¹⁸⁶ F. SCOTT FITZGERALD, *THE GREAT GATSBY* (1925); see also Stephen Brauer, *Jay Gatsby and the Prohibition Gangster as Businessman*, 2 F. SCOTT FITZGERALD REV. 51, 55–56 (2003).

This new black market was huge and very lucrative, but supplying it was challenging. Legal distillers and brewers ceased production. Illegal alcoholic beverages had to be produced elsewhere or imported from abroad. The new supplies had to be stored, transported, distributed, and retailed. All of this had to be under the noses of law enforcers or, more often, with their connivance. Organizing and coordinating these large-scale enterprises was beyond the capability of the existing criminal gangs.¹⁸⁷ To meet the need the better led gangs banded together, and organized crime was born. National Prohibition ended in 1933 with the ratification of the Twenty-First Amendment,¹⁸⁸ but organized crime did not. It moved on to supply the demand for gambling, prostitution, and drugs. Organized crime produced violence as crime families fought for market share in real wars rather than price wars; they also corrupted a multitude of public officials whom they bribed to stay out of the way.¹⁸⁹

Not surprisingly, this new wave of almost public lawlessness put tremendous pressure on law enforcement, at least those not complicit in it. Prohibition saw the beginning of an exponential increase in the budgets and personnel of law enforcement and in the number of Americans in state and federal prisons. The growth in the federal apparatus of law enforcement and incarceration was especially significant. Prior to Prohibition, the “federal government had been only a negligible player in the administration of criminal justice.”¹⁹⁰ The number of federal prisoners in 1930 was four times higher than in 1915, and most of the new convicts were violators of the Volstead Act.¹⁹¹ The Justice Department’s new Prohibition Unit was the first significant federal police force, dwarfing the nascent Bureau of Investigation led by a young J. Edgar Hoover.¹⁹² By the end of Prohibition, the FBI, the Bureau of Prisons, and an expanded Border Patrol were the core of the modern federal criminal justice establishment.¹⁹³

With the new federal and state enforcement practices came novel developments in criminal law and procedure. Plea bargaining appeared in federal courts for the first time, and entrapment claims became a staple of defense lawyers in Prohibition cases, as did Fourth Amendment claims.¹⁹⁴ The

¹⁸⁷ Wayne Hall, *What Are the Policy Lessons of National Alcohol Prohibition in the United States, 1920–1933?*, 105 ADDICTION 1164, 1166 (2010).

¹⁸⁸ U.S. CONST. amend. XXI.

¹⁸⁹ Chris M. Smith & Andrew V. Papachristos, *Trust Thy Crooked Neighbor: Multiplexity in Chicago Organized Crime Networks*, 81 AM. SOC. REV. 644, 653–54 (2016).

¹⁹⁰ MCGIRR, *supra* note 156, at 201.

¹⁹¹ *Id.* at 201–02. The number of state prisoners similarly increased. *Id.* at 202.

¹⁹² *Id.* at 208.

¹⁹³ *Id.* at 211.

¹⁹⁴ *Id.* at 206.

Supreme Court minted the novel doctrine of dual sovereignty as an exception to the constitutional ban on double jeopardy so that bootleggers could be convicted and sentenced under both national and state prohibition laws.¹⁹⁵ Wiretapping by federal agents, without warrants, was approved by the Supreme Court in *Olmstead v. United States*¹⁹⁶ and remained legal until 1967, when the Court finally reversed it.¹⁹⁷ Police searched for contraband in private homes, although these searches were mostly in poor and minority neighborhoods.¹⁹⁸

This transformation of criminal law and procedure did not cease with the end of Prohibition in 1933. The “War on Drugs” was inspired by the Prohibition movement and supported by much the same proponents.¹⁹⁹ It has not been much more successful than the war on alcohol. Police have resorted to many practices that are an uneasy fit with a liberal society: sting operations, undercover agents, paid informers, aggressive searches of homes, businesses, and especially automobiles in the hunt for contraband.²⁰⁰ This pressure did not cease with the end of Prohibition in 1933.²⁰¹ Legislators have imposed draconian penalties in their efforts to deter the illicit drug trade: mandatory sentences, asset foreclosures, and the like. Incarceration rates in the United States are now among the highest the in world.²⁰²

With all these efforts, in both Prohibition and the War on Drugs, the results have been disappointing. An unforeseen consequence of Prohibition was the switch to liquor by wine and beer drinkers, as bootleggers found liquor, with its higher alcohol content, easier to distribute clandestinely. Women, in particular, became consumers of hard liquor and frequenters of speakeasies.²⁰³ The same is true of the unending War on Drugs. Despite the efforts of federal, state, and local authorities, the consumption of illegal drugs continues unabated.

¹⁹⁵ *United States v. Lanza*, 260 U.S. 377, 382 (1922) (“We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory.”).

¹⁹⁶ *Olmstead v. United States*, 277 U.S. 438 (1928).

¹⁹⁷ *Katz v. United States*, 389 U.S. 347 (1967).

¹⁹⁸ MCGIRR, *supra* note 156, at 89–90.

¹⁹⁹ *See generally id.* at 211–19.

²⁰⁰ Hannah LF Cooper, *War On Drugs Policing and Police Brutality*, 50 SUBSTANCE USE MISUSE 1188, 1189 (2015).

²⁰¹ *Id.*

²⁰² Tyjen Tsai & Paola Scommegna, *U.S. Has World's Highest Incarceration Rate*, POPULATION REFERENCE BUREAU (Aug. 10, 2012), <https://www.prb.org/us-incarceration/>.

²⁰³ Jack S. Blocker, *Did Prohibition Really Work? Alcohol Prohibition as a Public Health Innovation*, 96 AM. J. PUB. HEALTH 233, 241 (2006).

B. Prohibition of Pornography, Traditionally and on the Internet

The history of pornography prohibition before the Supreme Court decisions described above is similar to that of these other prohibitions. Just as Prohibition restricted social drinking of even wine and beer, enforcers of federal and state obscenity laws kept serious readers from reading even literary masterpieces. Not surprisingly, readers continued to read banned books. In the most famous case, Sylvia Beach, an American expatriate who ran an English language bookstore in Paris, published James Joyce's *Ulysses* in Paris in 1922.²⁰⁴ No American or British publisher dared print it.²⁰⁵ At first, New York booksellers imported copies, apparently unnoticed by the Customs and Post Office censors operating under the Comstock Act. Shortly thereafter, Beach and her associates, including a prominent New York attorney and a young Ernest Hemingway, had to smuggle copies into the country, just like forbidden spirits.²⁰⁶ By the end of the year, U.S. authorities were seizing every copy they could find and, after the Solicitor of the Post Office declared them obscene, burning them.²⁰⁷ British officials soon followed suit.²⁰⁸ To be sure, the size of the black market for obscene books, even ones with little literary merit, was nothing like that for liquor, gambling, and drugs. Organized crime did not participate, and the police did not feel the same pressures.

Importantly, however, the obscenity laws did not reach readers and viewers. The police limited their enforcement actions to distributors. They did not search homes and automobiles for forbidden books, even before the Supreme Court held in *Stanley v. Georgia* that states could not forbid the private consumption at home of even legally obscene materials by adults.²⁰⁹

Other countries, of course, have more vigorously regulated what their citizens can read or see, on political grounds. In authoritarian countries as diverse as Nazi Germany and the Soviet Union in the twentieth century and China, Turkey, and Cuba today, police have arrested producers, distributors, *and* consumers of works that diverge from the party line.²¹⁰ Often, those arrested

²⁰⁴ BIRMINGHAM, *supra* note 42, at 144–50, 202–05, 215–18.

²⁰⁵ *Id.* at 129–30, 182–84, 201–02.

²⁰⁶ *Id.* at 228–40.

²⁰⁷ *Id.* at 249–50.

²⁰⁸ *Id.* at 250–53.

²⁰⁹ 394 U.S. 557, 559 (1969).

²¹⁰ ADRIAN SHAHBAZ, FREEDOM HOUSE, FREEDOM ON THE NET 2018: THE RISE OF DIGITAL AUTHORITARIANISM 5 (2018), https://freedomhouse.org/sites/default/files/FOTN_2018_Final%20Booklet_11_1_2018.pdf.

have been subject to severe penalties.²¹¹ Yet even the Soviet Union with its secret police and labor camps could not completely suppress dissident opinions, which circulated in self-published *samizdat* editions.²¹²

The modern critics of pornography may object that this history is mostly beside the point. They are less concerned with dirty books, magazines, pictures, and movies. Their concern is with pornography on the Internet, which they claim is more harmful than traditional materials.²¹³ The accuracy of these claims is beyond the scope of this Article. Assuming they can persuade legislatures and courts to adopt a more aggressive prohibition of at least Internet pornography, however, the prohibition problem would remain.

Internet censorship is both easier and harder than traditional censorship. As China has shown, an authoritarian government can very effectively control the Internet in its own country. A free country cannot. China uses a variety of legal and technical strategies to create its “Golden Shield,” which is “a giant mechanism of censorship and surveillance that blocks tens of thousands of websites deemed inimical to the Communist Party’s narrative and control, including Facebook, Twitter and even Instagram.”²¹⁴ Some of the techniques are technical, such as “DNS poisoning,” which makes it impossible to find a site’s correct Internet address.²¹⁵ Others are regulatory. For example, China restricts foreign companies from publishing online content in China or bans them from operating there altogether.²¹⁶ As the *New York Times* reported recently:

Over the past decade, China has blocked Google, Facebook, Twitter and Instagram, as well as thousands of other foreign websites, including The New York Times and Chinese Wikipedia. A plethora of Chinese websites emerged to serve the same functions—though they came with a heavy dose of censorship.²¹⁷

²¹¹ *Id.* at 6.

²¹² Hyung-min Joo, *Voices of Freedom: Samizdat*, 56 EUR.-ASIA STUD. 571, 576–83 (2004); see also GEOFFREY HOSKING, *THE FIRST SOCIALIST SOCIETY: A HISTORY OF THE SOVIET UNION FROM WITHIN* 412, 415, 425–26 (2d enlarged ed. 1992).

²¹³ See *supra* text accompanying notes 6–18.

²¹⁴ Simon Denyer, *China’s Scary Lesson to the World: Censoring the Internet Works*, WASH. POST (May 23, 2016), https://www.washingtonpost.com/world/asia_pacific/chinas-scary-lesson-to-the-world-censoring-the-internet-works/2016/05/23/413afe78-fff3-11e5-8bb1-f124a43f84dc_story.html?utm_term=.fdf2d9cd2fd6.

²¹⁵ Thomas Brewster, *Accidental DDoS? How China’s Censorship Machine Can Cause Unintended Web Blackouts*, FORBES (Jan. 26, 2015, 1:28 PM), <https://www.forbes.com/sites/thomasbrewster/2015/01/26/china-great-firewall-causing-ddos-attacks/#450820296a47>.

²¹⁶ *Id.*

²¹⁷ Li Yuan, *A Generation Grows Up Without Google, Facebook or Twitter*, N.Y. TIMES (Aug. 6, 2018), <https://www.nytimes.com/2018/08/06/technology/china-generation-blocked-internet.html>.

This technique has worked, per the *Times*:

Many young people in China have little idea what Google, Twitter or Facebook are, creating a gulf with the rest of the world. And, accustomed to the homegrown apps and online services, many appear uninterested in knowing what has been censored online, allowing Beijing to build an alternative value system that competes with Western liberal democracy.²¹⁸

China relies on Internet sites to censor themselves and their posters. Chinese officials cultivate a perception that users are being watched and may be arrested for what they say online. This creates a chilling effect on speech, of course, which is reinforced by actual arrests and imprisonments, especially of journalists.²¹⁹

These are only a handful of techniques that China uses to create what critics call the Great Firewall of China.²²⁰ The full array of techniques is beyond the scope of this Article. Suffice it to say that the techniques generally work,²²¹ and China actively encourages other illiberal governments to use them.²²²

By contrast, effective censorship is far more difficult in free countries. Even if prominent websites are inclined, required, or bullied into censoring themselves, other sites will serve the demand for content that people want. These sites may not even be in the same country. Blocking them, as China does, is a massive undertaking, and is not the type of thing that free countries do. Free countries do not spy on their citizens or monitor what they watch or read, particularly in their homes. In the United States, *Stanley v. Georgia* specifically forbids it.²²³

²¹⁸ *Id.*

²¹⁹ Beina Xu & Eleanor Albert, *Media Censorship in China*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/background/media-censorship-china> (last updated Feb. 17, 2017).

²²⁰ See generally JAMES GRIFFITHS, *THE GREAT FIREWALL OF CHINA: HOW TO BUILD AND CONTROL AN ALTERNATIVE VERSION OF THE INTERNET* (2019).

²²¹ These techniques are not completely effective, according to senior China researcher at Human Rights Watch. See Maya Wang, *China's Bumbling Police State*, WALL STREET J., Dec. 27, 2018, at A15.

²²² Denyer, *supra* note 214.

²²³ There is one key exception: child pornography. Consumers of child pornography can be punished, even if they view it in the privacy of their own home. *U.S. v. Ferber*, 458 U.S. 747 (1982). Child pornography is unprotected not because it is obscene. Indeed, the definition of child pornography is far broader than the definition of obscenity, *id.* at 764–65, and properly so. The harm here is well-defined: a nasty form of child abuse. *Id.* at 758–59. The rationale behind the Court's treatment of it is that the only effective way to combat this exploitation of minors is to cut off the demand. *Id.* at 759–60. While this is no doubt a worthy objective, it comes at considerable cost. Police have necessarily had to resort to online sting operations, search and seizure of suspects' hard drives and other practices that mimic the Chinese regime. See, e.g., *United States v. Williams*, 553 U.S. 285 (2008) (possession of child pornography conviction after Secret Service sting operation led to

III. LESSON THREE: THE FIRST AMENDMENT/LIBERAL DEMOCRACY PROBLEM

A. *The New Anti-Pornography Movement*

It is not clear exactly what the new anti-pornography crusaders want. They may seek a new, broader definition of obscenity to attack the pornography that they describe. As we saw in Part I, the Supreme Court's decisions limit the legal prohibition of pornography to a narrow definition of "obscenity."²²⁴ Even under *Miller*, the "redeeming social value" element protects any material, no matter how erotic or explicit, if taken as a whole, it has social value.²²⁵ Yet *Miller*'s social value prong would not save the new Internet pornography, at least if it is just one sex scene after another, as the critics claim.²²⁶ The famous Indianapolis ordinance drafted by Professor MacKinnon and Andrea Dworkin, on the other hand, did go far beyond the *Miller* definition.²²⁷ Even so, the *Miller* definition includes a lot of the material targeted by the ordinance.

They may also want greater enforcement of the state statues that *Miller* already permits,²²⁸ along with a new federal statute directed to the problem of Internet pornography. Some criticize *Stanley v. Georgia* and *Butler v. Michigan*, asserting that even in their homes adults should be limited to reading and viewing only what is fit for minors, lest it ultimately find its way to children.²²⁹ The control of Internet pornography, which they find most disturbing, would

search of suspect's home, where agents found child pornography on home computer); H. MARSHALL JARRETT & MICHAEL W. BAILIE, U.S. DEP'T OF JUSTICE, SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS 71 (2009), <https://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ssmanual2009.pdf> (stating that when "the computer hardware is itself contraband, an instrumentality of crime, or fruits of crime, the warrant should describe the hardware and indicate that the hardware will be seized"). The child pornography exception has been strictly limited to materials where minors are actually depicted—for example, it does not extend to computer-generated images that appear to depict minors. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

²²⁴ See discussion *supra* Part I.

²²⁵ *Miller v. California*, 413 U.S. 15, 37 (1973). The *Miller* formulation actually says "serious" value, but in practice courts have wisely avoided becoming literary critics of fiction or peer reviewers of scholarship—if the challenged work as a whole is more than just sex scenes, that suffices. *Id.* at 34.

²²⁶ *Bradley*, *supra* note 2, at 470–71.

²²⁷ See *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 324 (7th Cir. 1985), *summarily aff'd*, 475 U.S. 1001 (1986) (describing Indianapolis ordinance); see also E.R. Shipp, *A Feminist Offensive Against Exploitation*, N.Y. TIMES (June 10, 1984), <https://www.nytimes.com/1984/06/10/weekinreview/a-feminist-offensive-against-exploitation.html>.

²²⁸ Recall that what is legally obscene varies across the country. Under *Miller*, prurience and offensiveness are determined per local community standards, as interpreted by local juries in cases brought by local prosecutors. *Miller*, 413 U.S. at 30. While there are strict states to which distributors of adult materials will not send their wares, there are also lenient jurisdictions. See VOLOKH, *supra* note 128.

²²⁹ *Bradley*, *supra* note 2, at 462–66, 472–74, 487–88 (criticizing *Stanley* and *Butler*); Tubbs & Smith, *supra* note 30, 544–45 (criticizing *Stanley*).

require new federal provisions that mimic the Chinese techniques for controlling Internet content. These draconian measures are probably necessary for the effective prohibition of pornography, although the history of censorship in even police states suggests they might not suffice.

Any measures that go beyond the enactment and enforcement of the laws *Miller* already permits, however, are incompatible with basic First Amendment principles and, even more important, liberal democracy itself.

B. The Frontal Attack on the First Amendment

As we saw in Part I, the Supreme Court's approach to obscenity was not to balance the alleged social harms from pornography against the norm of free expression. Rather, it has avoided that inquiry by holding that obscenity historically was not protected under the First Amendment, and therefore could be proscribed without considering its possible harms, which were and still are contested.²³⁰ As Professor Kalven predicted in 1960, this approach logically requires a very narrow definition of obscenity.²³¹

In theory, however, even "protected expression" not included in the *Miller* definition could be restricted if the restriction passes "strict scrutiny." To do so, it would have to be narrowly tailored to serve a compelling state interest. It is hard to see how a new anti-pornography statute could pass this test, assuming that the Court would actually apply it at all. The lower courts assume that in the areas carefully defined as exceptions to the protections of the First Amendment—such as libel, fighting words, true threats, and obscenity—"operate within their own framework, and do fine without any sort of strict scrutiny."²³²

What is new in the current anti-pornography arguments is the claim that pornography alters users' attitudes. Conservatives are no longer content merely to claim it corrupts morals; they now argue that it alters the entire moral tone of society. Put bluntly, the harm they cite is that they must live in a society that they do not like. Anti-pornography feminists claim it alters attitudes about the proper status of women, insidiously persuading men—and probably women too—that women should be subject to men and their desires.²³³ They argue that

²³⁰ See discussion *supra* Part I.

²³¹ Kalven, Jr., *supra* note 56, at 25.

²³² Eugene Volokh, Essay, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2456 & n.161 (1996).

²³³ See, e.g., Evangelia Papadaki, *Feminist Perspectives on Objectification*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY 1, 10 (2018) ("Pornography, according to MacKinnon, makes women's sexuality into

its ultimate message is that women exist to serve and please men.²³⁴ Professor MacKinnon goes further: “Pornography is not imagery in some relation to a reality already constructed. It is not a distortion, reflection, projection, fantasy, representation or symbol either. It is a sexual reality.”²³⁵

The MacKinnon/Dworkin ordinance thus defined pornography as the “graphic sexually explicit subordination of women, whether in pictures or in words,” provided that it included at least one of six features.²³⁶ While some were quite specific, others were not. The last feature was especially vague: the presentation of women as “sexual objects” for “exploitation, possession or use,” or in “postures or positions of servility or submission.”²³⁷ The ordinance did not require that a work be viewed as a whole. Specific sections were enough.²³⁸ Nor did it matter if the work had social value. As Professor MacKinnon wrote, “if a woman is subjected, why should it matter that the work has other value?”²³⁹

When challenged in court in the 1985 case *American Booksellers Ass’n v. Hudnut*, the City of Indianapolis and various amici defended these features on the grounds “that pornography influences attitudes, and the statute is a way to alter the socialization of men and women rather than to vindicate community standards of offensiveness.”²⁴⁰ As Judge Easterbrook’s opinion noted, “works from James Joyce’s *Ulysses* to Homer’s *Iliad* . . . depict women as submissive objects for conquest and domination.”²⁴¹ A great deal of women’s literature does, too, from romance novels to “mommy porn” like the *Fifty Shades* novels and movies.²⁴²

‘something any man who wants to can buy and hold in his hands. . . . She becomes something to be used by him, specifically, an object of his sexual use.’”).

²³⁴ *Id.* (“Similarly, Dworkin talks about men being the only ‘human center’ of the world, surrounded by objects for use, including women. A man experiences his power, according to Dworkin, in using objects, both inanimate objects and ‘persons who are not adult men.’”).

²³⁵ Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 18 (1985).

²³⁶ *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 324 (7th Cir. 1985), *summarily aff’d*, 475 U.S. 1001 (1986).

²³⁷ *Id.*

²³⁸ *Id.* at 324–25.

²³⁹ CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 202 (1991).

²⁴⁰ 771 F.2d at 325.

²⁴¹ *Id.*

²⁴² *See, e.g.*, Mark Hughes, *Review – ‘Fifty Shades Of Grey’ Is Abusive Gender Roles Disguised as Faux-Feminism*, FORBES (Feb. 13, 2015, 5:12 PM), <https://www.forbes.com/sites/markhughes/2015/02/13/review-fifty-shades-of-grey-is-abusive-gender-roles-disguised-as-faux-feminism/#43fed3071e0e> (“Women submitting to men, women’s narratives as subservient to men’s narratives – even male supporting characters – isn’t new, nor is it a radical concept to portray women as sex objects for men. The film seems to think that noting women can experience sexual gratification sometimes while playing typical subservient roles to male gratification is some kind of empowering message.”).

As Judge Easterbrook and a good many commentators²⁴³ have observed, the arguments for the ordinance are nothing less than a frontal assault on the First Amendment. As then-Professor Kagan put it, the socialization rationale “rebels against the very core” of First Amendment doctrine “by accepting the government’s power to suppress viewpoints as such whenever the viewpoints are thought to cause some requisite harm.”²⁴⁴

This is clearly correct. As Justice Jackson wrote in the famous flag salute case: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or faith their faith therein.”²⁴⁵ The Court has made the same point in numerous other cases. As we have seen, Justice Brennan emphasized this very point in *Roth*.²⁴⁶ Justice Stewart relied on it when New York tried to censor the movie version of *Lady Chatterley’s Lover* because, per its highest court, it portrayed adultery “as being right and desirable for certain people under certain circumstances.”²⁴⁷ In doing so, the “State, quite simply, . . . struck at the very heart of constitutionally protected liberty, the First Amendment’s basic guarantee . . . of the freedom to advocate ideas.”²⁴⁸ And it did not matter that these ideas were, as New York asserted, immoral, sinful, or even illegal, for the “guarantee is not confined to the expression of ideas that are conventional or shared by a majority.”²⁴⁹ It protects advocacy of adultery “no less than advocacy of socialism or the single tax.”²⁵⁰

Significantly, these principles would also doom the conservative argument that pornography not only corrupts the morals of its consumers, but also injures the moral tone of society, which the state legitimately may shape. As Professor Gerard Bradley puts it, in words similar to those of Professor MacKinnon, “[w]e are not the authors of *all* that we think and believe”—to some extent, we are all

²⁴³ Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873 (1993); see also Geoffrey R. Stone, *Anti-Pornography Legislation as Viewpoint Discrimination*, 9 HARV. J.L. & PUB. POL’Y 461 (1986).

²⁴⁴ Kagan, *supra* note 243, at 880.

²⁴⁵ *Hudnut*, 771 F.2d at 327 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

²⁴⁶ See discussion *supra* Section I.B.

²⁴⁷ *Kingsley Int’l Pictures Corp. v. Regents of the Univ. of the State of N.Y.*, 360 U.S. 684, 687–88 (1959).

²⁴⁸ *Id.* at 688.

²⁴⁹ *Id.* at 688–89.

²⁵⁰ *Id.* at 689.

“the products of our culture.”²⁵¹ Since culture affects everyone, society may use the law to make “this inescapable common force a wholesome one.”²⁵²

Like Professor MacKinnon, these critics also attribute to pornography a power that other forms of persuasion supposedly lack. The argument from both, apparently, is that pornography is too persuasive. This stems from the fact that it stirs up feelings and emotions, rather than making rational arguments.

Put together, these arguments prove far too much. For one thing, a great deal of expression, including political speech on important public issues, appeals more to emotion than to reason. Appeals to fear, reactions of anger, and “outrage” have for better or (probably) worse, been part of our public discourse since the time of George Washington.²⁵³ The First Amendment necessarily protects not only the content of what we express, but how we express it. The flag burning case is the most obvious example.²⁵⁴

Most importantly, as Judge Easterbrook concluded, “[a]ny rationale we could imagine in support of [the Indianapolis] ordinance could not be limited to sex discrimination.”²⁵⁵ The same is true of the arguments from Professor Bradley and others that the government can ban pornography to maintain the moral tone of our society. If so, what expression might the government not ban? What

²⁵¹ Gerard V. Bradley, *The Moral Basis for Legal Regulation of Pornography*, in *THE SOCIAL COSTS OF PORNOGRAPHY: A COLLECTION OF PAPERS 199, 209* (James R. Stoner, Jr. & Donna E. Hughes eds., 2010).

²⁵² *Id.*

²⁵³ Washington’s decision not to seek reelection in 1796 was due in large part to the slanderous claims against him by his political opponents. He had been vilified, in his words, “in such exaggerated terms as could scarcely be applied to a Nero; a notorious defaulter; or even a common pick-pocket.” GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 206 (2009). Newspapers supporting the emerging political parties made wild accusations against their opponents. Federalist papers called Republicans “filthy Jacobins” and “monsters of sedition,” while Republican papers referred to Federalists as “Tory monarchists” and “British-loving aristocrats.” *Id.* at 256; see also JOHN C. MILLER, *THE FEDERALIST ERA, 1789–1801*, at 233 (1960) (“In their efforts to turn the Washington and Adams Administrations out of office, Republican journalists had freely used lies, canards, and misrepresentations; nothing was too scurrilous to serve as grist for their propaganda mills”). This hysteria was not limited to the founding eras divisions over the French Revolution. The Russian Revolution of 1917 engendered the “Red Scare” of 1919–1920, see ROBERT H. FERRELL, *WOODROW WILSON AND WORLD WAR I, 1917–1921*, at 210–12 (1985). There was another “Red Scare” following World War II, featuring the House Un-American Activities Committee and Joseph McCarthy. See JAMES T. PATTERSON, *GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974*, at 179–205 (1996).

²⁵⁴ See generally *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that the physical act of flag burning is protected speech under the First Amendment); *Cohen v. California*, 403 U.S. 15 (1971) (overturning conviction for disturbing the peace by wearing a jacket bearing the words “Fuck the Draft” in a courthouse corridor).

²⁵⁵ *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 332 (7th Cir. 1985), *summarily aff’d*, 475 U.S. 1001 (1986).

banner may it not require us to salute? These arguments are nothing less than a frontal attack on the First Amendment.²⁵⁶

C. *The Challenge to Privacy*

Regardless of the definition of obscenity, the increased enforcement of laws directed against pornography on the Internet would entail an unheard-of level of intrusion by the police into the American home. This new prohibition cannot be achieved merely by forbidding legitimate companies from providing pornographic content or hosting pornographic websites, or by disallowing individuals to seek out such content or websites. This is the lesson from Prohibition and the unending War on Drugs: if legitimate businesses will not provide what people want, criminals will. If the country really is “pornified” or “awash in a sea of pornography,”²⁵⁷ the demand for Internet pornography should finance a huge black market.²⁵⁸

As in the other prohibitions, consumers will have to work harder to find the product. Just as drinkers could no longer walk into a saloon or liquor store to slake their thirst, consumers of illegal pornography will have to find suppliers. They will find them on the dark web, where we can be sure that virtual speakeasies will spring up to serve them.²⁵⁹ We can also be sure that law enforcement will seek intrusive new ways to deal with this threat to the law.

If, as some now urge, the Court were to overturn *Stanley v. Georgia* and allow state and federal laws to forbid viewing obscene materials in the home, enforcers will surely push for new ways to surveil suspects in their homes. The technology already exists to do so. Hackers already know how to access the hard drives of private computers. They can also break into home Wi-Fi networks and access any cameras homeowners use in their security systems, baby monitors, or digital assistants.²⁶⁰ Apple had to fix a bug in its FaceTime video chat

²⁵⁶ Both groups also make less sweeping arguments, based on more specific harms from pornography. These are beyond the scope of this Article. Briefly, though, the evidence that pornography is addictive and that it leads to sex crimes and violence against women, for example, continue to be fiercely contested. See discussion *supra* Part I. Professor Bradley even admits that “it is undeniable that we are awash in a sea of pornography as never before, and yet there is no corresponding rise in the rates of sex offenses.” Bradley, *supra* note 2, at 484.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ Or they may simply obtain pornographic DVDs to play in their homes. As with the War on Drugs, this will lead to more searches of private homes, especially in poor neighborhoods.

²⁶⁰ See, e.g., Joanna Stern, *What I Learned From the Hacker Who Spied On Me*, WALL STREET J. (Feb. 7, 2019, 12:15 PM), <https://www.wsj.com/articles/what-i-learned-from-the-hacker-who-spied-on-me-11549559728> (authorized “ethical hacker” sends technology columnist photo of her baby son from baby monitor on her home Wi-Fi network).

software that allowed one user in a group chat to listen and view another person while the recipient's device was still ringing.²⁶¹ Similar software could easily be used by law enforcement to surveil citizens through their smartphones and tablets.

After the law enforcement's experience with wiretaps since the 1920s, can anyone doubt that the enforcers of new anti-pornography laws will seek warrants to use this new technology to "tap" the devices of the consumers of outlawed materials? Only *Stanley v. Georgia* stands in their way, and the new anti-pornography activists already have it in their sights. This would be the first step in bringing the nascent Chinese surveillance state to the United States. Worse, the underlying drive to employ censorship and surveillance to "alter the socialization of men and women" presents an existential challenge to liberal democracy itself.

D. The Challenge to Liberal Democracy

Frontal attacks on the First Amendment are no longer uncommon. Their basic theme is that the Amendment should not stand in the way of desirable social policies to ensure equality²⁶² or morality,²⁶³ or public health.²⁶⁴ What's so important about it anyway?

Free expression is essential to liberal democracy. A truly democratic government is impossible without it. Voters cannot choose without information on candidates and issues, which is available only when expression is free. Authoritarian governments rely on propaganda and censorship, so that the party line is the only one available. Even if they permit elections with competing candidates, as such notable current autocracies as Russia, Turkey, and Venezuela do, the deck is so stacked in favor of the dominant side that it always wins.

A healthy civil society also requires free expression outside the political realm, for liberal democracy is more than just a form of government. It is also the way that free societies form their culture, including the moral environment

²⁶¹ Robert McMillan, *Apple to Reward Teen as It Patches Facetime Bug*, WALL STREET J., <https://www.wsj.com/articles/apple-to-reward-teen-as-it-patches-facetime-bug-11549572939> (last updated Feb. 7, 2019, 6:02 PM) (Apple rewards teen who brought the flaw to its attention).

²⁶² See, e.g., Catharine A. MacKinnon, *The First Amendment: An Equality Reading*, in THE FREE SPEECH CENTURY 140 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019).

²⁶³ Bradley, *supra* note 2.

²⁶⁴ See *supra* text accompanying notes 5–21 (detailing new public health rationale for suppression of pornography).

that both the social conservatives and feminists would like to control. As Ronald Dworkin cogently argued:

[T]he question of who shall have the power to help shape that environment, and how, is of fundamental importance. Only one answer is consistent with the ideals of political equality: that no one may be prevented from influencing the shared moral environment, through his own private choices, tastes, opinions, and examples, just because these tastes or opinions disgust those who have the power to shut him up or lock him up.²⁶⁵

Civil society and everyday life in a liberal democracy take shape from the free activities of its citizens in business, the arts, literature, religion, learning, and every other aspect of its culture. As Dworkin wrote, its society is not dictated by its government or by any elect group, but by the myriad interactions of free people in a pluralistic society, all in the pursuit of their own happiness as they understand it. The primary driver of social change in a free society is the people, not the government. There is no established faith, whether religious or ideological, to which everyone must adhere. There is no mandatory lifestyle, no monolithic culture. The shape of society is not imposed from above, but bubbles up from the myriad activities of its diverse, independent, free people.²⁶⁶

The protection of privacy, especially in the home, and the general freedom from search and surveillance are also vital parts of liberal society, flowing naturally from its basic nature. Even a free society, however, must have a criminal justice system and effective law enforcement has to be weighed against privacy interests. In the United States, of course, the Fourth Amendment with its presumption of privacy provides the legal frame for this balancing.

A full defense of liberal democracy as the best form of a society like this one is beyond the scope of this Article. But compare it to the “communitarian” alternatives, past and present, of both the left and the right and their institutions—the Inquisition and Index, the Gestapo, the NKVD, the concentration and “reeducation” camps of Soviet Russia and Mao’s China—or to the array of authoritarian, communal countries of the present century, from the Islamic Republic of Iran to today’s China. All attempted to impose by

²⁶⁵ RONALD DWORIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1997), excerpted in VINCENT BLASI, *IDEAS OF THE FIRST AMENDMENT* 423–25 (2d ed. 2012).

²⁶⁶ A liberal democracy may, of course, regulate conduct. It need not be narrowly libertarian, and it is not inconsistent with a generous welfare state. Franklin Roosevelt (“four essential freedoms”) was a liberal, too. William E. Leuchtenburg, *Franklin D. Roosevelt: Life in Brief*, MILLER CTR., <https://millercenter.org/president/fdroosevelt/life-in-brief> (last visited Mar. 26, 2019). But a liberal state regulates only conduct, not expression and thought. Expression can only be limited in exigent circumstances to prevent imminent harms.

surveillance and coercion a monolithic religious or ideological view of their society's moral universe.²⁶⁷

Finally, consider the realities of the United States. Liberal democracy is the only viable form of society for a country this large and diverse. There can be, and are, many communities here, but no one is compelled to belong to any one of them. A liberal society is not just a virtue. It is a necessity. Over 325 million people, of different races, religions, political beliefs, backgrounds, ethnicities, interests, and backgrounds cannot be "socialized" by legal coercion without civil strife or worse.

The United States is and always has been a liberal republic. It quickly became a liberal democracy.²⁶⁸ To be sure, many illiberal things have occurred in America. The history of censorship sketched above is just one example; Prohibition is another. Slavery, of course, was the worst. But the founding principles of the new republic, as expressed in the Declaration of Independence and implemented in the new state constitutions of the revolutionary period and the federal Constitution, were liberal.²⁶⁹ The Religion Clauses of the First Amendment kept the new government out of the business of dictating the moral life of the nation through an established church.²⁷⁰ Even before the Amendment was ratified, George Washington assured minority congregations of their religious freedom.²⁷¹ Out of the strife surrounding the short-lived Sedition Act of 1798²⁷² came "a profound national commitment to the principle that debate

²⁶⁷ A classic example is the Communist effort to create a "new Soviet man" (and woman) after the Russian Revolution. See ORLANDO FIGES, *THE WHISPERERS: PRIVATE LIFE IN STALIN'S RUSSIA passim* (2007); Slava Gerovitch, "New Soviet Man" *Inside Machine: Human Engineering, Spacecraft Design, and the Construction of Communism*, 22 *OSIRIS* 135, 137–38 (2007). Censorship was an essential part of this project. See HOSKING, *supra* note 212, at 181–82, 221–25, 228, 406–15.

²⁶⁸ For the evolution from liberal republic to liberal democracy, see SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY* (2005). See generally STEPHEN M. FELDMAN, *FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY* (2008).

²⁶⁹ FELDMAN, *supra* note 268, at 14–23.

²⁷⁰ See JOHN WITTE, JR. & JOEL A. NICHOLS, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 41–105 (4th ed. 2016). At the same time, the Religion Clauses avoided the strife over which church would be the established one; the religious wars of the sixteenth and seventeenth centuries, see *id.* at 13–15, would not be repeated in the new republic.

²⁷¹ Letter from George Washington to the Hebrew Congregation in Newport, Rhode Island (Aug. 18, 1790), in GEORGE WASHINGTON: *WRITINGS* 766, 767 (John Rhodehamel ed., 1997) ("All possess alike liberty of conscience" because "happily, the Government of the United States . . . gives to bigotry no sanction, to persecution no assistance"); Letter from George Washington to the United Baptist Churches of Virginia (May 1789), in *id.* at 738, 739 ("[E]very man . . . ought to be protected in worshipping the Deity according to the dictates of his own conscience.").

²⁷² See FELDMAN, *supra* note 268, at 70–100 (Chapter 4: The Sedition Act Controversy); ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 56–66 (1991).

on public issues should be uninhibited, robust and wide open.”²⁷³ Alexis de Tocqueville had to come to America to study democracy.²⁷⁴ It did not exist anywhere else. Abraham Lincoln could credibly claim the Civil War was fought so that the nation would have “a new birth of freedom” and that “government of the people, by the people, for the people, shall not perish from the earth.”²⁷⁵ Only a liberal democracy meets that iconic description.

CONCLUSION

When I was an undergraduate, I attended a program at which Paul Goodman, a prominent social critic of the 1960s, spoke. I have forgotten all he said with one exception that I have carried with me and held dear for over fifty years: “No one understands America who hasn’t heard a six-year-old, arguing with his mother over bedtime, say, ‘It’s a free country, and I don’t have to if I don’t want to.’” It is still a free country, but there is never any guarantee that a liberal democracy will endure. In the course of human history, liberal institutions were a relatively late development. They are not inevitable. They must be built—and maintained.

This is particularly true in the digital age. The telescreen in Orwell’s *1984*, the two-way television that allowed everyone to be surveilled in their own home, is no longer mere science fiction. The technology now exists to create it.²⁷⁶ We can now FaceTime with Big Brother. The calls for new and more effective restrictions on Internet pornography must be evaluated against the background of this new technology and the history of prior prohibitions, and particularly of the prior history of censorship.

The lessons from history are three. First, the definition problem is intractable. Obscenity cannot be defined with any satisfactory degree of clarity. It is inherently vague. Worse, expanding the current definition of obscenity would necessarily impose the views of one group of society on others. Second, many of those who currently view pornography on the Internet will look for ways to continue to do so, regardless of laws which they will regard as silly and puritanical at best, and oppressive and discriminatory at worst. Virtual

²⁷³ N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). See generally LEWIS, *supra* note 272 (history of case).

²⁷⁴ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Arthur Goldhammer trans., 2004) (1840).

²⁷⁵ Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), *reprinted in* 2 ABRAHAM LINCOLN: SPEECHES AND WRITINGS (Don E. Fehrenbacher ed., 1989).

²⁷⁶ Richard Fontaine & Kara Frederick, *The Autocrat’s New Tool Kit*, WALL STREET J. (Mar. 15, 2019, 11:10 AM), <https://www.wsj.com/articles/the-autocrats-new-tool-kit-11552662637>.

speakeasies on the dark web will spring up to meet this demand. Third, police will push to use the new digital surveillance technology to enforce the new laws, just as they did during Prohibition, and the legal system will probably let them.

The thesis of this Article is simple. Even if Internet pornography has all the ill effects that its critics assert, the appropriate remedy in this liberal democracy cannot be censorship. The remedy for this speech is more speech, not legal repression.