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Restoring Obscenity Regulation in an Internet Age

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The U.S. Supreme Court has upheld a Texas law requiring websites with substantial sexual content to use age verification to prevent access by minors. This was a significant win for states enforcing online age restrictions for pornographic material and may signal a judiciary that is more open to society's need to control pornographic images. Unlike the mid-20th century, when liberal judges imagined they had a moral duty to protect James Joyce's Ulysses, current judges may have learned what their predecessors forgot: A society flooded with obscenity will be less open to marriage and more debased and corrupt. Judges should not stand in the way of efforts to fix this problem and restore an essential feature of human flourishing.

Introduction

Americans born after the mid-1990s have lived their entire lives in a world awash with hardcore pornography. Never has so much pornography been so available to so many at so little cost and with so little effort. Our laws leave pornography effectively unregulated. Our technology—including especially smartphones—brings portable, private porn shops to everyone's phone and mostly free of charge. Political scientist David Lowenthal, writing in the late 1990s before internet pornography had become so pervasive, observed that "never before in human history ha[s] such a volume and

intensity of obscene materials been loosed upon the world as has inundated our citizenry, through the mass media, starting about 1960."[1]

For most of American history, federal and state law prohibited the production and distribution of obscene and pornographic materials. In the colonial and early national periods before publishing was cheap and widely available, America had few obscenity regulations. As new technologies arose and reduced printing costs, the national government banned the importation of obscene materials, and state governments regulated obscene publications. When radio and films arose, and later as television became popular, regulations were promulgated and implemented. Even as courts loosened the definition of obscenity—the change Lowenthal bemoaned—governments still regulated pornography. Throughout the 20th century, when most obscene material was in print (or later on videocassette), zoning laws forced purveyors of obscene materials to remote interstate highway exits or other similar areas, keeping most pornography away from the home, even for the most part through the VHS video rental era.[2]

Then something broke. The internet leap-frogged over zoning and production, making the distribution of pornography both costless and effortless. Congress and state governments passed laws adapting obscenity regulations to the internet. But while courts in the past had upheld such efforts, the courts, seemingly besotted with the internet's technological promise, now struck down efforts to restrict online pornography and obscenity. As a result, the courts permitted private, ubiquitous, and unfettered access to pornography.

In 2025, the Supreme Court of the United States in *Free Speech Coalition v. Paxton* began to draw back from deregulated internet pornography by upholding state age-verification laws for pornography websites.[3] This decision opens the door both to a reconsideration of the current legal structure governing obscenity and, perhaps, to a return to the regulatory approach of the past. Precisely what principles should guide that return can be found by examining the past.

Obscenity and the Founders

There were no prosecutions for obscene libel in America before the 19th century. Some take this as evidence that the American Founders were indulgent toward obscenity. In reality, it speaks to the strictness of morals and the costs of publishing and distribution. Without obscene books, there was little need for laws to curtail them. Once obscenity gained wider circulation, laws were immediately passed, creating the American tradition of obscenity regulation.

There appear to be no records of 18th-century obscenity cases in the United States. Some interpret this dearth of enforcement as evidence that "[t]hroughout the colonial era, the distribution, exhibition, and possession of pornographic material was not thought to be any of the state's business."[4] Others similarly claim that "sexual expression and imagery were common, widespread, legal, and quite explicit" before and during the Founding era and that colonial bookstores "carried an extraordinary array of erotica."[5]

The Founders did not develop laws against obscenity because obscenity was neither printed in the colonies nor imported in appreciable quantities. The Founding generation accepted speech restrictions that furthered public morality, and the historical record suggests that the Founders agreed with Blackstone that the state had broad powers to regulate obscenity. In his *Commentaries*, Blackstone recognized that common law courts could sanction as libel "any writings, pictures, or the like, of an immoral or illegal tendency."[6] Justice James Kent, a leading legal scholar of the era who served as a state legislator and voted for New York State's adoption of the Constitution, wrote that, to protect "the tender mercies of the young" from "gross violation[s] of decency...[t]hings which corrupt moral sentiment, as obscene actions, prints and writings, and even gross instances of seduction, have...been held *indictable*."[7]

Such principles were not immediately put into practice because obscenity was so rare in colonial America and during the early Republic. Interpreting the absence of regulations requires careful parsing of the evidence.

There were no laws against obscenity until there was obscenity, and there was no obscenity until there was printing. The lack of technology made printing obscenity difficult, and legal arrangements apart from obscenity law deterred pornographic publishing for centuries. Throughout the 17th century, governments licensed printing presses in England[8] and in colonial America.[9] Licensing laws gave printing monopolies. England licensed the London Stationers' Company to publish, and only a few firms in London could import books. At the turn of the 18th century, England abandoned governmental licensing of the press,[10] but licensing regimes persisted in some American colonies until as late as 1730.[11]

Before 1700, government licensing ensured that printed material offended neither the ruling powers nor dominant moral sensibilities in England and the colonies. Sometimes American printers crossed local politicians or eminent and powerful people who in turn threatened their ability to publish.[12] Publishers often backed off when so threatened. Even after the colonies ended licensing laws during the early 18th century, the

colonial government remained the largest customers for printers—a business reliance that likely resulted in sub rosa censorship.[13]

Eventually, a system of free press began to emerge, and England developed legal categories to deal with obscenity. England's ecclesiastical courts relinquished jurisdiction over obscenity and other moral offenses in 1663.[14] England abandoned licensing a generation later, and the King's Bench (common law courts) took up the slack. Courts created the law of libel in the mid-1700s to cover "obscene libel."[15]

The Crown's courts developed the doctrine of "obscene libel" first in *Dominus Rex v. Curll* (1727).[16] *Curll* was a London publisher convicted of obscene libel for publishing *Venus in the Cloister* or *The Nun in Her Smock*. This "novel," depicting lesbianism, flagellation, and other sexual matters in a nunnery, was in a genre that recounted salacious and sometimes explicit stories about sexual acts in convents. Such novels were often tolerated as anti-Catholic political propaganda, but Curll was convicted for obscene libel.[17] Few obscenity trials occurred in the immediate aftermath of *Curll*, though the law was reinforced in such cases as *King v. John Wilkes*, which involved the racy *Essay on Woman*, in the early 1760s.[18]

In America, there was even less such activity. There were no prosecutions for obscenity in 18th-century colonial America or the early national period. This reflected the paucity of obscene material in America at the time. There are in fact many reasons to conclude that the lack of obscenity regulation or convictions did not mean that obscenity was tolerated.

First, few printed materials, let alone obscene materials, were available or distributed widely. It seems that no pornography was printed in the United States before the first decades of the 19th century.[19] According to one scholar, "[n]o homegrown pornography was published in 18th-century America,"[20] and another has written that "there seems to have been no domestically produced pornography" until the 1840s.[21]

Philadelphia had only five bookstores in 1742 but 30 by the 1770s.[22] Philadelphia, then the second biggest city in the British Empire, was the heart of American cosmopolitanism. According to the best evidence, a few stores had a few books that were somewhat racy. Imported copies of the *Connoisseur*, which described the debaucheries of the upper class, were sold in Philadelphia—as were the prints of Hogarth.[23] So was the printed *Father Abraham's Almanack*, which featured bawdy and sexually themed poems. It is not likely that any of these books were widely circulated throughout the Colonies, openly read, or obscene libel. American colonialists did not import pornographic material in significant amounts. Imported books were too expensive for all but the richest people—at least until the end of the 18th century.[24]

Local authorities or social sanction handled cases of obscenity without recourse to the courts. *Aristotle's Master-Piece*, for example, was circulated in 18th-century colonial America.[25] The book was a folkloric collection of information about reproduction and childbirth with quite primitive woodcuts. When congregants were found with *Aristotle's Master-Piece*, Jonathan Edwards demanded the book's destruction and extracted signed repentances from those who were reading and distributing it.[26] Donna Dennis argues that obscenity differed from other crimes in that its categorization as a crime was initiated by the state and lacked clearly defined injuries. Private citizens drove most legal actions, including criminal enforcement, and there was no government infrastructure to prosecute obscenity cases.[27]

The importation of obscene material, to the degree that it existed, was clandestine and in small quantities.[28] Episodes reveal how difficult and clandestine importing obscene material could be. Isaiah Thomas of Worcester, Massachusetts, for example, attempted to obtain a copy of *Fanny Hill* from London and reprint it in 1786. His efforts to publish "were halted after a few pages."[29] Thomas, undeterred, then "attempted to order the book in 1786 from a London supplier who declined to send a copy but suggested that a ship's captain might bring the English item back to America."[30]

There may have been advertisements for *Fanny Hill* in the 1750s and 1760s, but advertisements were cautious, indicating limited acceptance or approval of the book.[31] Maybe, as one scholar thinks, a New York man "proffered illustrated copies of what likely was an imported work [*Fanny Hill*] in 1798,"[32] but "[t]he earliest documented completed American edition of *Memoirs of a Woman of Pleasure [Fanny Hill]* was printed in 1813."[33]

Some scholars try to show that the Founders themselves owned and accepted pornographic material. Benjamin Franklin and Thomas Jefferson lived in Europe for years and—so the argument goes—were influenced by European tastes.[34] Jefferson's book collection is particularly important as it was one of the best in 18th-century America. He later sold it to the federal government as the nucleus for the Library of Congress. Jefferson "counted among his library...several bawdy Restoration plays, and Charles Johnstone's *Chrysal*,"[35] as well as a copy of *The Decameron*.[36] Both Jefferson and Franklin had copies of Sterne's *Tristram Shandy*,[37] and Franklin wrote several salacious and scatological essays including one recommending love affairs with older women rather than younger women and another on passing gas.

However, there is no evidence that either Franklin or Jefferson collected or approved of obscene material. None of these books was obscene. The Restoration dramas have sexual innuendo but contain no explicit

descriptions of sexual activity. *Chrysal* describes sex and scandal but is not explicit. Sterne's *Tristram Shandy* is simply one long sexual pun. Later English editions of *The Decameron* contain a somewhat explicit description of sexual intercourse, but Jefferson's edition was almost certainly in Italian. Jefferson purchased works that were simply bawdy depictions of sex rather than explicit pornography.

Printing Technology and the Rise of Obscenity

The increase in obscenity-related prosecution and legislation correlates to the increased production and distribution of obscene materials, and the increase in production and distribution is traceable to improvements in printing technology.

First, print became cheaper, thanks to technological innovations such as the Stanhope Iron Press, the cylinder press, and stereotype printing plates,[38] which allowed more efficient typesetting, in turn permitting scaled production.[39] While the colonial era faced constant paper shortages,[40] the early 19th century saw the emergence of better paper technologies, although its impact is harder to assess. "The cylinder papermaking machine was introduced in America in 1817, but only in the 1830s did papermaking machinery become common enough to drive down the price of paper."[41] Improved transportation in the first half of the 19th century allowed printers to market their goods beyond their localities.[42] This was an enormous boon to production, given that printing entails large fixed and relatively lower marginal production costs.[43]

With more printing came more obscenity, and with more obscenity came laws to regulate it.

- In 1803, Connecticut passed a law forbidding the "print, import, sale, or distribution of books, pamphlets, ballads or other printed material of an immoral tendency containing obscene language, prints, or descriptions."[44]

- Criminal statutes banning obscenity were introduced in Vermont in 1821, Connecticut in 1834, and Massachusetts in 1835.[45]

- In 1815, in *Commonwealth v. Sharpless*, a printmaker was indicted for displaying an obscene painting even in the absence of a state law. The Pennsylvania Supreme Court upheld the conviction.[46]

- In *Commonwealth v. Holmes*, an 1821 case, the Supreme Judicial Court of Massachusetts upheld a conviction for publishing an illustrated edition of *Fanny Hill*.[47]

Early legal action often appears to have been in response to specific, identifiable printings. One of the first known domestic printings of *Fanny Hill* came from Vermont.[48] "Vermont legislators," according to one scholar, responded with legislation to stop "the circulation in their own backyard" of this "clandestine edition."[49]

Consider the developments in New York when publication of *Fanny Hill* led to public outrage and legal responses. "New York merchants and booksellers," as one scholar writes, "were aware of the book's popularity and were importing it from England by the 1820s."[50] Editions of *Fanny Hill* in the 1820s were costly and accessible only to "wealthy men."[51] Then, the book circulated from out of state and was published in state. New York's penny press developed as technology advanced,[52] and "stories of sexual titillation, erotic scandals, and sexual violence" circulated cheaply.[53] So did *Fanny Hill*. As a result, obscenity prosecutions in New York City increased dramatically in the 1830s and 1840s.[54] Between 1841 and 1843, "nearly a dozen indictments for obscene libel" were initiated "against flash editors and publishers."[55] After the 1840s, obscenity indictments for pornographic books (or "fancy" books) became more common, and they increased even more in the 1850s.[56]

Eventually, New York passed an obscenity statute instead of relying simply on common law prosecutions. By the end of the Civil War, 20 states and four territories had passed obscenity statutes.[57] In 1866, the YMCA initiated a lobbying campaign against pornography that resulted in passage of the Obscene Literature Act by the New York legislature two years later.[58] The act "made it a crime for any person to sell or give away any 'obscene and indecent' book, pamphlet, drawing, painting, or photograph."[59] Uncertain of the law's strong enforcement, the YMCA "established its own private task force to ensure the vigorous implementation of its hard-won statute."[60] Anthony Comstock spearheaded the YMCA's efforts. Comstock's Committee for the Suppression of Vice soon took its efforts nationwide.

The federal government also got involved as pornographic books circulated. In 1842, Congress passed its first anti-obscenity statute, banning the importation of "all indecent and obscene prints, paintings, lithographs, engravings, and transparencies" and authorizing customs officials to seize such articles and bring court proceedings for their destruction.[61] The law was passed "without any debate whatsoever."[62] Reacting to England's 1845

Obscene Publications Act, Congress expanded the law to cover the importation of all "indecent or obscene articles, prints, paintings, lithographs, engravings, images, figures, daguerreotypes, photographs, and transparencies."[63] The revised law also was passed "without any discussion or explanation."[64]

Congress turned from importation bans to banning obscenity in interstate commerce. Civil War soldiers had been exposed to pornography that was delivered to the front lines. During a committee hearing on an unrelated matter, the Postmaster General brought up a "new problem....[A] good deal of obscene mail was being sent to men in the Union Army by purveyors operating in New York."[65] In response, Congress passed a law banning any "obscene book, pamphlet, picture, print, or other publication of a vulgar and indecent character" from the mail and made depositing such a publication in the mail a federal misdemeanor.[66] This legislation was reenacted and expanded in 1872.[67] In 1873, Congress passed the Act for the Suppression of Trade in and Circulation of Obscene Literature and Articles of Immoral Use, the so-called Comstock Act. This law, clearly modeled on the earlier law, expanded the scope of prohibited "obscene" materials from printed matter to articles and gadgets, advertisements for "obscene" publications, information about and advertisements for contraception and abortion, and devices designed to prevent conception or procure abortions. The new law also increased penalties.[68] Two days after its passage, the Postmaster General appointed Comstock a special agent, a position he occupied until his death in 1915.[69]

This history reveals how prosecutions and legislation followed as changes in technology increased the availability of obscene material. As delivery systems for obscenity proliferated, states and Congress rose to meet the challenge of suppressing vices that arose from the easy availability of obscene material. Congress, state legislatures, and local governments would continue to adapt regulations to meet the challenge presented by magazines, radio, television, and cable in the coming century.

Obscenity Regulations Adapt to New Technologies

The Comstock Act was part of a multi-pronged approach to obscenity in existence until the mid-20th century. The national government would exercise its power over commerce. The prevailing definition of obscenity for states and the national government came from what is known as the *Hicklin* standard, named for the English case *Regina v. Hicklin*, which gave government broad powers. During the antebellum period, courts

had broad, unsystematized, and somewhat inconsistent standards for obscenity.[70] Courts eventually converged on the *Hicklin* standard, which asks whether material would "deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[71]

Few doubted the constitutionality of the *Hicklin* standard or the national or state laws. In the License Cases,[72] the U.S. Supreme Court upheld state licensing of liquor sales, citing statutory prohibitions on obscenity as precedent for a state's police power:

> If the cargo of a vessel is infected and dangerous, it is destroyed; all revenue and private interests are sacrificed for the public safety. Gunpowder must be landed and stored in a way which saves life and property from jeopardy.... The publication, by sale or otherwise, of obscene books, prints, pictures, etc., is an indictable offense. Such laws are undeniably constitutional, and are maintained as police regulations to protect public health, morals, and property.[73]

Thomas Cooley, famed jurist and constitutional scholar of the late 1800s, wrote that "[t]he preservation of public morals is peculiarly subject to legislative supervision, which may forbid the keeping, exhibition, or sale of indecent books or pictures, and cause their destruction if seized...."[74]

Under *Hicklin*, states brought legal actions against Theodore Dreiser's *An American Tragedy*,[75] D.H. Lawrence's *Lady Chatterley's Lover*,[76] Arthur Schnitzler's *Reigen*,[77] James Joyce's *Ulysses*—and even books like *Cupid's Yoke*, a polemical critique of marriage that recommended sex outside of conjugal bonds.[78] Writers like Ernest Hemingway and Norman Mailer complained bitterly about self-censorship.[79]

Equally important is how states and the national government continued to regulate obscenity as new technologies arose. States regulated the transmission of obscene content through telegraphs and telephones.[80] As an exception to common carrier duties to serve and carry all messages, telegraph companies could refuse to carry obscene messages.[81] Later, telephone companies could refuse to serve customers known to transmit obscene messages.[82] These laws have been used countless times, have never been successfully challenged, and continue to exist in numerous states.

Congress applied obscenity regulation to cover the radio.[83] The Radio Act of 1912,[84] passed to implement America's treaty obligations regarding ship, marine ship-to-shore, and ship-to-ship radios, was the first federal effort to regulate radio transmission. Anyone with a radio transmitter could use the radio if he sent a postcard to the Secretary of Commerce.[85] The Radio

Act, though adopting a laissez-faire approach, nonetheless mandated that radio users must uphold decency standards. In 1914, the Department of Commerce published a volume entitled *Radio Communication Laws of the United States*. Regulation 210 stated that "[n]o person shall transmit or make a signal containing profane or obscene words or language."[86]

Later, the Radio Act of 1927[87] required government licensing to use the airways. The act had significant obscenity prohibitions. Section 28 forbade the broadcast of obscene, indecent, and profane speech, and the law empowered the newly formed Federal Radio Commission to "suspend the license of any operator" who "has transmitted superfluous radio communications or signals or radio communications containing profane or obscene words or language."[88] The act further specified that "[n]o person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication."[89]

The authors of the Radio Act intended that it embody the broad 19th century meaning of obscenity. For instance, then-Secretary of Commerce Herbert Hoover stated to the Third Radio Conference of 1924 that:

> Through the policies we have established, the Government, and therefore the people, have to-day the control of the channels through the ether just as we have control of our channels of navigation.... We will maintain them free—free of monopoly, free in program, and free in speech—but we must also maintain them free of malice and unwholesomeness.[90]

The 1934 Communications Act, which superseded the 1927 act, adopted the 1927 act's obscenity, indecency, and profanity language mostly verbatim. The ban on obscene, indecent, and profane language was amended in 1948 and replaced with criminal penalties for using such language over the airwaves. Congress struck the modified clause from the Communications Act and incorporated it into the Criminal Code, where it is found today.[91]

Obscenity prohibitions met no judicial resistance as they expanded into motion pictures.[92] In 1915, the Supreme Court ruled in *Mutual Film Corporation v. Industrial Commission of Ohio*[93] that movies were commercial products that received no First Amendment protection. In light of the Supreme Court's upholding of Ohio's regulation, states, cities, and localities across the United States "began to copy the inflexible, legally enforceable, statutory ordinance into their rule books."[94] This created a regulatory disaster for the film industry, which formed the Motion Picture Producers and Distributors of America Incorporated (MPPDA) in response. The MPPDA was later rebranded the Motion Picture Association of America (MPAA), which still exists.

The MPAA worked against the hodgepodge of local and state censorship boards. Will H. Hays, the MPPDA's first president, aimed to "forestall the demand for further censorship" and drafted a voluntary decency code, the eponymous Hays Code.[95] The central rule of the Hays Code was that "No picture should lower the moral standards of those who see it."[96] The Hays Code prohibited obscenity and extensively regulated portrayals of sex. Although the Supreme Court overruled *Mutual Film Corporation* in *Joseph Burstyn, Inc. v. Wilson*,[97] the Hays Code lasted until 1968 when the motion picture industry abandoned it in light of changing artistic and cultural norms.[98] The MPAA did not remain idle but responded with another form of self-regulation: the rating system that is still in use today.

Broadcast radio and television tell a similar story. As noted, prohibitions on obscene, indecent, and profane radio transmissions were incorporated into the 1934 Communications Act. However, until the 1970s, the Federal Communications Commission (FCC) pursued only a handful of indecency enforcement actions and issued no formal regulations to implement 18 U.S. Code § 1464.[99] For most of the provision's history, enforcement was unnecessary because the radio industry self-regulated. A salacious 1937 skit involving Mae West resulted in a stern FCC warning, widespread political outcry, the end of West's broadcasting career—and stronger self-regulation. The National Association of Broadcasters, the major industry group for radio stations, promulgated the 1938 Radio Code, which was enforced for most of the mid-century period, and later developed a similar code for television.[100]

The Mid-20th Century Consensus

As technology changed, portions of elite opinion moved away from the *Hicklin* standard in the 1930s. None of the reformers opted for simply leaving obscenity unregulated. The courts began to backtrack from *Hicklin* as well. In *United States v. One Book Entitled Ulysses by James Joyce*,[101] the eminent jurists Learned and Gus Hand, sitting on the same panel, declined to find that Joyce's *Ulysses* was obscene. Their decision became part of a narrowing trend of obscenity law as courts tried to come up with a new formula for determining what obscenity means. In a subsequent case, Judge Learned Hand reasoned as if the *Hicklin* test had been overruled.[102]

By the middle of the 20th century, courts were searching for a new definition of obscenity.[103] The development of the law of obscenity during this time is told capably elsewhere,[104] but the broad outlines start in 1957 with *Roth v. United States*, in which the Supreme Court began a 30-year inquiry[105]

to solve what Justice John Marshall Harlan would later call "the intractable obscenity problem."[106] In *Roth*, the Court modified *Hicklin* while establishing that obscenity was not protected.[107] Twenty years later, in *Miller v. California*, the Court settled on the obscenity definition to replace *Hicklin*:

> The basic guidelines for the trier of fact must be: (a) whether the "average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[108]

The *Miller* standard probably led to the end of most censorship of written texts that could make any claim to literary seriousness,[109] but images—as well as movies—could still be regulated. At the national level, the FCC continued to use the *Miller* standard to regulate indecency,[110] and local governments retained the ability to regulate pornography in order to avoid "secondary effects."[111]

The 20th century consensus allowed for the regulation of obscenity regardless of the medium. As new technologies arose, governments at all levels—national, state, and local—acted to prevent the circulation of obscene material on radio, in live shows and movies, and on both broadcast and cable television. As the quantity of pornography expanded, governments adopted a narrower understanding of the term. For example, the Supreme Court tolerated and protected practically nude live erotic dancing. The move from the *Hicklin* standard to the *Miller* standard was important, of course, as looser standards led to laxer enforcement, but there also was continuity: Hard-core pornography (active portrayals of people having sex) could be regulated under both standards, and the protection of children was always a crucial consideration.

Collapse of the American Consensus

The internet and the smartphone presented a new challenge to legislatures and courts, and Congress once again responded to the change. The courts, however, responded very differently: For the first time, they undercut political institutions that sought to prevent obscenity from flooding American culture.

The internet made the old middleman unnecessary. People could make pornography and then distribute it to anyone with a broadband connection;

consumers did not need a porn shop. Zoning laws would no longer cordon off obscenity. The *Miller* test remained in force. Obscenity prosecutions had been declining, and *Miller*'s multi-pronged tests and numerous exceptions seemed to shroud obscenity in mystery. Only intentional, feigned ignorance could fail to distinguish between *Ulysses* and a *Debbie Does Dallas* video cassette or between videos depicting group sex with animals and pictures of how to conduct a preliminary screening for breast cancer. *Miller* was good enough to regulate hard-core internet pornography.

The ubiquity of the internet should have prompted the Court to extend the powers to regulate obscenity. Internet pornography was more easily available and potentially more pervasive. *Miller* alone would not give communities and parents the level of control they need to decide what sorts of media content enters the home unless distributors and hosts could be held responsible. The Court instead rejected Congress's three efforts to regulate pornography as the internet era began. The result has been the largest mass experiment in permissive obscenity in world history; the Court's dedication to *de facto* expansion of the First Amendment to protect historically unprotected obscenity has become a social suicide pact.

In 1996, Congress passed the Child Pornography Prevention Act (CPPA), which expanded the federal definition of child pornography to include virtual depiction of minors engaging in sexually explicit conduct.[112] Congress justified this expansion on the grounds that virtual imagery could be used by pedophiles to groom children, that it would act as a gateway to some who would abuse real children, and that the existence of realistic virtual images made it harder for law enforcement to prosecute cases involving physical child pornography.

In 2002, the Supreme Court struck down the two key provisions of the CPPA in a six-to-three decision written by Justice Anthony Kennedy. In *Ashcroft v. Free Speech Coalition*, the Court held that the law was unconstitutionally overbroad, reasoning that it banned a substantial amount of speech that was neither obscene under the *Miller* test nor produced by harming real children. Virtual child pornography, Kennedy wrote, "records no crime and creates no victims by its production."[113] The decision left virtual child pornography with significant First Amendment protection that has yet to be tested in the age of hyper-realistic AI deepfakes.

Also in 1996, Congress passed the 1996 Communications Decency Act (CDA), which, tailored to the *Miller* test, prohibited the "knowing transmission of obscene or indecent messages to any recipient under 18 years of age" and the "knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age."[114] The CDA's

prohibition of "patently offensive" messages made no direct reference to obscenity and was therefore overly broad. Its restriction of constitutionally protected material (indecent messages) was likewise suspect. Some have suggested that this drafting was intentional to protect the nascent internet industry. The Supreme Court ruled against the CDA, but not on totally novel grounds. Congress, it seems, just needed to draft the law more carefully to meet constitutional muster.

The true revolution in jurisprudence came in 1998 when Congress, in its third attempt to regulate online pornography, passed the Child Online Protection Act (COPA).[115] COPA used a definition of obscenity that was consistent with *Miller* but also expanded its prohibitions to include material that would meet *Miller*'s strictures "with respect to minors." Sites with indecent material were required to obtain age verification from consumers.[116]

If the Supreme Court had followed centuries of precedent, it would have upheld COPA as another lawful effort by the legislature to update obscenity laws to take account of changing technology, as with telephones and radio. Courts for centuries have allowed society the tools to control the flow of obscene material, particularly to children. The Court should have been guided by *Ginsberg v. New York*, its own 1968 opinion upholding a state law that included age verification requirements for purchasing "girlie magazines" (admittedly tame fare by today's standards).[117] In 2004, in *Ashcroft v. ACLU*,[118] the Court instead ignored both *Ginsberg* and the deeper precedent that protects the power of society to restrict material that is obscene for children and hid its radical revolution within obscure First Amendment tests.

The *Ashcroft v. ACLU* Court reasoned that the cost and embarrassment of age verification burdened adults' speech, chilling their ability to receive constitutionally protected, non-obscene pornography that was *not* "harmful to children." For the sake of preserving unhindered adult access to a theoretical category of non-obscene pornography that is not harmful to children, the Court found that COPA's age verification requirements implicated free speech constitutional protections. Under applicable First Amendment strict scrutiny review, the Court therefore required Congress to use the "least restrictive means" to protect children from obscene material. The Court reasoned that "filters are more effective than age verification requirements" and, on that basis, struck down COPA.

Ashcroft v. ACLU sidelined the regime that *Miller* and the cases upholding zoning of porn shops created, which allowed states to shield American families from pornography. The smartphone's ability to distribute pornography costlessly and effortlessly with no parental oversight, combined with

Miller's vague standards, eliminated that entire structure. Further, *Ashcroft* was decided in the days of desktop computers when parents could exert over-the-shoulder supervision. Nevertheless, most parents could not stay in front of their more tech-savvy kids. Parents would not update filters, and children easily evaded filters when they were in place. The smartphone exacerbated this trend, allowing completely private communications, against which few filters could be effective. The Court's naive reliance on "least restrictive means" was always vulnerable to being overtaken by events in the ever-changing field of technology.

Online private distribution also makes prosecution difficult. While local police prosecute local shops, it is harder to investigate and assemble evidence against private online consumption. The national scope of internet distribution renders community standards harder to prove, and pornography is so ubiquitous that prosecutors have essentially given up. Judge Jennifer M. Kinsley describes the situation in an empirical analysis of cases since 2015:

> At the federal level, traditional obscenity prosecutions against adult content producers have all but disappeared. In their place, federal authorities now invoke obscenity statutes primarily as adjuncts to child pornography cases, repurposing these laws to address offenses involving minors rather than consensual adult expression.... Rather than pursuing large-scale distributors, state prosecutors increasingly apply obscenity statutes to cases involving non-consensual creation or dissemination of sexually explicit content—commonly referred to as "revenge porn." ...As a result, obscenity law at the state level now functions as a tool for remedying interpersonal violations...."[119]

Ashcroft v. ACLU's vague notion of burden has not aged well either. The Court ruled that COPA burdened the *receiver* of speech because users had to identify themselves to view constitutionally protected pornography. *Ashcroft* misunderstands privacy on the web. The decision assumes that users are anonymous but that age verification forces internet users to reveal their identities. This is no longer the case—if it ever was.

Internet users are typically tracked in everything they do on their web, and data brokers, using IP addresses and device identifiers that can easily be associated with real people, sell internet identities to advertisers. Internet users cannot conceal their identities with or without age verification. As a result, pornography regulations involving trusted third parties could track ages for users without requiring credit card numbers or government IDs. A bank then sends a cookie, which states only that the user is an account

holder, to a user's browser. A porn site could read the cookie and, without knowing the user's identity, conclude that the user is a legal adult. Cryptographic methods, such as zero knowledge proofs, take this principle to the highest achievable levels of privacy. Age estimations can be made simply by analyzing publicly available online information such as your email address or even pictures of your hand movements.[120] Pornographic websites could easily be required to read cookies for age appropriateness—and absent such use face fines or other criminal charges.

However this may be, when *Reno*'s and *Ashcroft*'s permissive requirements met the smartphone, the result was a pornographic free-for-all that lasted for a generation. The smartphone allowed a new way to view porn, freed from even the desktop's parental over-the-shoulder supervision. Unlike physical magazines, the novelty and allure of which quickly dissipate, a smartphone can deliver limitless amounts of infinitely varied pornography anywhere and in complete privacy, and the courts signaled nothing but toleration for this reality—until recently.

Conclusion: Does *Paxton* Point to a New Paradigm?

Some have sought to argue that today's obscene free-for-all is precisely what the Founders had in mind. During the Founding and colonial eras, there were few obscenity prosecutions, just as there have been few in our era, but this is just a superficial similarity. The culture at the time of the Founding was stricter than the laws—and obscenity was sanctioned socially in addition to being inaccessible and too expensive to produce. As soon as obscene literature could be produced, American states and the national government introduced measures to curb access to it so that sexual desire could be channeled more easily into marriage.

From the Founding through most of American history, courts allowed the legislature to control pornographic material. With the abandonment of *Hicklin*, this power diminished, leaving zoning laws as the primary limit on the distribution of pornography. With the internet, smartphone, and *Reno* and *Ashcroft*, zoning no longer mattered, and pornography became ubiquitous.

While Congress tried to stem the tide of pornography in the early days of the internet, it has been mostly silent in recent years even as evidence of the social maladies associated with pornography has mounted.[121] This may have been strategic given the Court's evident hostility toward the regulation of obscenity.

States, however, have begun to fill the gap. Nearly two dozen states have passed age verification laws restricting websites since the early 2000s. In

2025, the Supreme Court upheld Texas's age verification law. The case revived *Ginsberg*, the case involving age requirements to buy "girlie magazines." In *Free Speech Coalition v. Paxton*,[122] the Court affirmed the power of states to require age verification for material that is "obscene for minors" in the online context.

Paxton may signal the reinvigoration of a dual-track approach to the regulation of obscenity: States can require oversight for minors, and mostly anything goes for adults. At the least, it is unclear what effect, if any, *Paxton* will have on obscenity for adults. The most optimistic result under current law would be a reinvigorated *Miller* with the national government again able to regulate the transmission of obscenity. The case's flexible terms could allow for obscenity actions for internet-distributed pornography in state courts; the existing federal laws, specifically the modern version of the Comstock Act,[123] prohibit obscene material from interstate transmission. Motivated state and local prosecutors could still get convictions in conservative communities, and national prosecutors could go against the big platforms like Google, which do not enjoy immunity from federal laws, for distributing obscenity.[124]

Paxton may signal a judiciary that is more open to the essential societal need to control pornographic images. Unlike the mid-20th century, when liberal judges imagined they had a moral duty to protect James Joyce's *Ulysses*, *Paxton* suggests that current sitting judges may have learned what their predecessors forgot: A society flooded with obscenity will be less open to marriage and more debased and corrupt. Judges should not stand in the way of society's efforts to fix this problem—and restore an essential feature of human flourishing.

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Endnotes

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5. Geoffrey R. Stone, "Sex and the First Amendment: The Long and Winding History of Obscenity Law," *First Amendment Law Review*, Vol. 17, Issue 2 (2019), p. 135, https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1267&context=falr (accessed April 29, 2026). See also Mark Huppin and Neil Malamuth, "The Obscenity Conundrum, Contingent Harms, and Constitutional Consistency," *Stanford Law & Policy Review*, Vol. 23 (2012), https://www.thefreelibrary.com/The+obscenity+conundrum%2C+contingent+harms%2C+and+constitutional...-a0300644327 (accessed April 29, 2026) ("Nor did English law yield the constitutional Framers any overseas suggestion to exclude obscenity from First Amendment protection."); Rivka Weill, "Women's and LGBTQ Social Movements and Constitutional Change—On Geoffrey Stone's Sex and the Constitution: Sex, Religion, and Law from America's Origins to the Twenty-First Century," *Jerusalem Review of Legal Studies*, Vol. 23, Issue 1 (2021), p. 5 (pre-publication version), https://www.researchgate.net/publication/343451612_Women's_and_LGBTQ_Social_Movements_and_Constitutional_Change--On_Geoffrey_Stone's_Sex_and_the_Constitution_Sex_Religion_and_Law_from_America's_Origins_to_the_Twenty-First_Century (accessed April 29, 2026) ("During the Founding, there were no offenses of contraception, abortion before quickening, or obscenity. The laws prohibited sodomy but were never enforced.... Laws against obscenity also appear in the United States for the first time during the Second Great Awakening.").
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18. See *King v. John Wilkes*, 95 Eng. Rep. 737 (KB 1763), https://babel.hathitrust.org/cgi/pt?id=coo.31924064792470&seq=747 (accessed April 28, 2026).
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26. Mary E. Fissell, "Hairy Women and Naked Truths: Gender and the Politics of Knowledge in 'Aristotle's Masterpiece,'" *William and Mary Quarterly*, Vol. 60, No. 1 (2003), p. 43. By the same token, there were several printings of *Onania* in the early 18th century in Boston. The book was an anti-masturbation text. Some historians claim, however, that it contained "'confessions of 'offenders,' which constitute the salacious material of this pseudo-moral book." Wagner, *Eros Revived: Erotica of the Enlightenment in England and America*, p. 295.
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42. Hruschka, *How Books Came to America: The Rise of the American Book Trade*, p. 68.
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93. *Mutual Film Corporation v. Industrial Commission of Ohio*, 236 U.S. 230 (1915), https://tile.loc.gov/storage-services/service/ll/usrep/usrep236/usrep236230/usrep236230.pdf (accessed May 1, 2026), overruled by *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952), https://tile.loc.gov/storage-services/service/ll/usrep/usrep343/usrep343495/usrep343495.pdf (accessed May 1, 2026).
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95. Ibid., p. 102.
96. See Mark S. Lee, "Clean Cut: A Recently Filed Federal Court Case Will Decide Whether Consumers Have the Right to Edit Motion Pictures Against the Wishes of Directors and Studios," *Los Angeles Lawyer*, Vol. 26 (2003), p. 48 (citing Motion Picture Producers and Distributors of America). See also Appendix 1, "The Motion Picture Production Code of 1930," in Thomas Doherty, *Pre-Code Hollywood: Sex, Immorality and Insurrection in American Cinema*, 1930–1934 (New York: Columbia University Press, 1999), pp. 347–359, esp. p. 351, https://www.umsl.edu/~gradyf/theory/1930code.pdf ?pubDate=20260423 (accessed May 4, 2026); Appendix 2, "Particular Applications of the Code and the Reasons Therefore [*sic*] [Addenda to 1930 Code]," in ibid., pp. 361–364; and Appendix 3, "Amendments," in ibid., pp. 365–367. "*Author's Note*: Though various texts of the Production Code have been reprinted over the years in trade journals, memoirs, and scholarly work, the Production Code Administration archives at the Margaret Herrick Library in Los Angeles contain no 'definitive' copy of the Code as adopted in 1930 and enforced thereafter.... Cross-checked against other versions for accuracy, the text below derives from the version printed in Olga J. Martin's *Hollywood Movie Commandments*, published in 1937. As Joseph Breen's former Secretary, Martin had access to the most complete, contemporaneous document consulted by Hollywood's in-house censors." Ibid., p. 347. Breen was in charge of the Production Code Administration from 1934 to 1954.
97. *Burstyn*, 343 U.S. at 502.
98. See Lee, "Clean Cut: A Recently Filed Federal Court Case Will Decide Whether Consumers Have the Right to Edit Motion Pictures Against the Wishes of Directors and Studios," p. 48.
99. Ibid.
100. Bruce A. Linton, *Self-Regulation in Broadcasting* (Washington: National Association of Broadcasters, 1967), pp. 11–15.
101. *United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705 (2d Cir. 1934), affirming 5 F. Supp. 182 (S.D.N.Y. 1933).
102. *United States v. Levine*, 83 F.2d 156, 157 (2d Cir. 1936).
103. Arthur, "The Problems with Pornography Regulation: Lessons from History," p. 875 ("*Regina v. Hicklin*...covered materials with a 'tendency...to deprave and corrupt those whose minds are open to such immoral influences.'").
104. See, for example, John C. Stewart, "*Pope v. Illinois*: A Reasonable Person Approach to Finding Value," *University of Toledo Law Review*, Vol. 20 (1988), p. 231.
105. J. Todd Metcalf, "Obscenity Prosecutions in Cyberspace: The Miller Test Cannot 'Go Where No (Porn) Has Gone Before,'" *Washington University Law Quarterly*, Vol. 74, No. 2 (1996), pp. 488–489, https://openscholarship.wustl.edu/law_lawreview/vol74/iss2/9/ (accessed May 4, 2026).
106. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 704 (1968), https://tile.loc.gov/storage-services/service/ll/usrep/usrep390/usrep390676/usrep390676.pdf (accessed May 1, 2026) (Harlan, J., concurring in part and dissenting in part).
107. *Roth v. United States*, 354 U.S. 476, 486 (1957), https://tile.loc.gov/storage-services/service/ll/usrep/usrep354/usrep354476/usrep354476.pdf (accessed May 1, 2026).
108. *Miller v. California*, 413 U.S. 15, 24 (1973), https://tile.loc.gov/storage-services/service/ll/usrep/usrep413/usrep413015/usrep413015.pdf (accessed May 1, 2026).
109. Ryen Rasmus, "The Auto-Authentication of the Page: Purely Written Speech and the Doctrine of Obscenity," *William & Mary Bill of Rights Journal*, Vol. 20, No. 1, p. 281 (2011), https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1602&context=wmborj (accessed May 4, 2026) ("In light of the foregoing, it becomes clear...that Karen Fletcher's attorneys were correct in stating that written obscenity deserves to be excepted from the doctrine of obscenity....").
110. See Federal Communications Commission, "Industry Guidance on the Commission's Case Law Interpreting 18 U.S. Code § 1464 and Enforcement Policies Regarding Broadcast Indecency," Notice, Policy Statement, *Federal Register*, Vol. 66, No. 85 (May 2, 2001), pp. 21984–21986, https://www.govinfo.gov/content/pkg/FR-2001-05-02/pdf/01-10869.pdf (accessed May 4, 2026).
111. *City of Renton*, 475 U.S. at 48 (quoting *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)), https://tile.loc.gov/storage-services/service/ll/usrep/usrep425/usrep425748/usrep425748.pdf (accessed May 1, 2026).
112. See H.R. 3610, Omnibus Consolidated Appropriations Act, 1997, Public Law No. 104-208, 104th Congress, September 30, 1996, Division A, Title I, Section 121, https://www.congress.gov/104/plaws/publ208/PLAW-104publ208.pdf (accessed May 8, 2026).
113. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250 (2002), https://tile.loc.gov/storage-services/service/ll/usrep/usrep535/usrep535234/usrep535234.pdf (accessed May 14, 2026).
114. 47 U.S. Code §§ 223(a)(1), 223(d), https://www.law.cornell.edu/uscode/text/47/223 (accessed May 1, 2026).
115. H.R. 4328, Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Public Law No. 105-277, 105th Congress, October 21, 1998, Division C, Title XIV, Sections 1401–1406, https://www.congress.gov/105/plaws/publ277/PLAW-105publ277.pdf (accessed May 14, 2026).
116. *Ashcroft v. ACLU*, 542 U.S. 656, 668 (2004), https://tile.loc.gov/storage-services/service/ll/usrep/usrep542/usrep542656/usrep542656.pdf (accessed May 1, 2026). Compare 47 U.S. Code § 231 (2000) (COPA used a definition of "harmful to minors" that seemed quite similar to the *Miller* obscenity test and the FCC's indecency definitions: "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—(A) the average person, applying contemporary community standards, would find, taking the material as a whole and

with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest; (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.") *with Miller*, 413 U.S. at 24 ("(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, Kois v. Wisconsin [408 U.S. 229, 230 (1972)]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.").

117. *Ginsberg v. New York*, 390 U.S. 629 (1968), https://tile.loc.gov/storage-services/service/ll/usrep/usrep390/usrep390629/usrep390629.pdf (accessed May 1, 2026).
118. *Ashcroft*, 542 U.S. at 668.
119. Jennifer M. Kinsley, "The Myth Revisited: Obscenity Law Since 2015," *Harvard Journal of Sports & Entertainment* Law, Vol. 17, No. 1 (2026), p. 41, https://journals.law.harvard.edu/jsel/wp-content/uploads/sites/78/2026/03/The-Myth-Revisited-1.pdf (accessed May 1, 2026).
120. Adam Candeub, "Online Age-Verification: Protecting Children and Privacy," Center for Renewing America, July 21, 2023, https://americarenewing.com/issues/identity-on-the-internet-protecting-children-and-privacy-and-building-a-proof-of-humanity-regulatory-regime-for-an-ai-driven-internet/ (accessed May 1, 2026). See also Brief of the Manhattan Institute and Technology Scholars as *Amici Curiae* in Support of Respondent, *Free Speech Coalition, Inc., et al., Petitioners, v. Ken Paxton, Attorney General of Texas, Respondent*, Supreme Court of the United States, No. 23-1122, November 22, 2024, https://media4.manhattan-institute.org/wp-content/uploads/FSC-v-Paxton-merits.pdf (accessed May 1, 2026).
121. See Emily F. Rothman, *Pornography and Public Health* (New York: Oxford University Press, 2021); John D. Foubert, *Protecting Your Children from Internet Pornography: Understanding the Science, Risks, and Ways to Protect Your Kids* (Chicago: Northfield Publishing, 2022); Mark Regnerus, *Cheap Sex: The Transformation of Men, Marriage, and Monogamy* (New York: Oxford University Press, 2017); and Scott Yenor, "A Postmortem on the Sexual Revolution: What Deregulation of Pornography Has Wrought," Heritage Foundation *First Principles* No. 78, May 2000, https://www.heritage.org/sites/default/files/2020-05/FP-78_NEW.pdf.
122. *Paxton*, 606 U.S. ____.
123. 18 U.S. Code § 1462(a), https://www.law.cornell.edu/uscode/text/18/1462 (accessed April 29, 2026) ("Whoever…uses any…interactive computer service…for carriage in interstate or foreign commerce…any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character…Shall be fined under this title or imprisoned not more than five years, or both, for the first such offense and shall be fined under this title or imprisoned not more than ten years, or both, for each such offense thereafter.").
124. 47 U.S.C. § 230(e)(1), https://www.law.cornell.edu/uscode/text/47/230 (accessed April 29, 2026) ("Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title…or any other Federal criminal statute.").