

PORNOGRAPHY, THE RULE OF LAW, AND CONSTITUTIONAL MYTHOLOGY

DAVID L. TUBBS* & JACQUELINE S. SMITH**

I. INSTABILITY IN THE LAW OF OBSCENITY	500
II. TRIUMPH OF A LIBERAL NARRATIVE.....	507
III. JUSTIFICATIONS FOR REGULATION	512
A. Promoting Human Dignity	512
B. Protecting the Private Realm of Life	515
C. Affirming Human Responsibility	518
IV. A PIVOTAL RULING	520
V. A COMPENDIUM OF MYTHS.....	524
A. Myth #1: There Is an Easy Solution to the Problem of Sparing Minors and Unconsenting Adults Exposure to Pornography	525
B. Myth #2: The Framers Opposed All Restrictions on Freedom of Expression ...	530
C. Myth #3: The Supreme Court Continues to Recognize the “Compelling” Public Interest in the Psychological Well-Being of Youths.....	533
D. Myth #4: Regulatory “Burdens” on the Freedom of Speech Are Constitutionally Indistinguishable from Flat Prohibitions ...	536
E. Myth #5: Laws Establishing a Minimum Age to View Pornography Are Indefensible	539
F. Myth #6: Self-Censorship Is Always Bad ...	541
VI. CONCLUSION	543

* Associate Professor of Politics, The King’s College; 2017–18 Ann & Herbert W. Vaughan Visiting Fellow, James Madison Program, Princeton University. For comments and suggestions, the Authors wish to thank Robert P. George, George Kateb, Jack Nowlin, Rochelle Gurstein, Adam J. MacLeod, Robert Carle, and Daniel Hay. For research assistance, thanks to Madeleine Castle, Breanna Duffy, Nicholas Gulley, Helen Healey, Kelly Jarboe, Lydia Moynihan, Rachelle Peterson, and Kelly Rocha.

** J.D., Boston University, 2013.

I. INSTABILITY IN THE LAW OF OBSCENITY

In the judicial branch of government, a chief benefit of adherence to “the rule of law” is predictability with respect to future developments.¹ The rule of law encompasses more than one concept, but its role in helping to predict legal developments in the near future is widely acknowledged.² The phrases “helping to predict” and “in the near future” should be stressed. No one believes that scrupulous adherence to the rule of law leads to unfailingly correct predictions about rulings in particular cases or reliable predictions about legal developments far into the future.

In the United States, the predictability that is being described here is linked to the law’s respect for precedent. Because *stare decisis* requires judges to decide similar cases similarly, it creates expectations among judges, attorneys, and scholars.³ Those expectations lead to arguments being formulated in anticipation of future cases and controversies.

Because it allows persons to order their lives in certain ways and limits judicial arbitrariness, the rule of law has moral dimensions. There is something good or desirable about promoting conditions that give people some predictive power about the judiciary’s actions and rulings, as well as actions that may follow them in the legislative and executive branches. Some of the moral dimensions are captured in Lon Fuller’s account of the principal elements of the rule of law.⁴ They are also seen in Robert P. George’s defense of Fuller’s position in the latter’s famous debate with H.L.A. Hart.⁵

1. See Stefanie A. Lindquist & Frank C. Cross, *Stability, Predictability and the Rule of Law: Stare Decisis as Reciprocity Norm 1* (Univ. Tex. Sch. Law, Measuring the Rule of Law Conference Papers), <https://law.utexas.edu/conferences/measuring/The%20Papers/Rule%20of%20Law%20Conference.crosslindquist.pdf> [https://perma.cc/ZK3G-DGUA].

2. See *id.*

3. See, e.g., Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 9–13 (2012).

4. LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969).

5. Robert P. George, *Reason, Freedom, and the Rule of Law: Their Significance in the Natural Law Tradition*, 46 AM. J. JURIS. 249, 250–52 (2001). Hart’s critique of Fuller’s argument about the “internal morality of law” is found in H.L.A. Hart, Book Review, 78 HARV. L. REV. 1281 (1965) (reviewing LON L. FULLER, *THE MORALITY OF LAW* (1964)).

Fuller identifies eight elements essential to the idea of legality and the rule of law.⁶ In his account, a bona fide legal system will exhibit the following: (1) the prospectivity and nonretroactivity of legal rules; (2) the promulgation of the rules; (3) their clarity; (4) their coherence with one another; (5) their constancy over time; (6) their generality of application; (7) the absence of impediments to compliance with the rules by those subject to them; and (8) the congruence between the rules and official actions.⁷

Assessing the debate between Fuller and Hart, Professor George agrees with Fuller that a state's faithfulness to the rule of law is typically a matter of degree.⁸ The eight elements identified above will sometimes be found in bad or even unjust legal systems.⁹ Nonetheless, in some circumstances these elements allow observers to say that one state hews more closely to the rule of law than does another.

If Fuller and George are correct, fidelity to the rule of law in constitutional jurisprudence involves very high stakes because of the "architectonic" character of constitutional law.¹⁰ For those political communities with a written constitution, the document significantly defines or "constitutes" the community. One would therefore hope that the predictability associated with the rule of law can be detected in many areas of constitutional law today.¹¹

In at least one area, however, the predictability and relative stability associated with adherence to the rule of law is absent. One could perhaps go further and even argue that there is rad-

6. FULLER, *supra* note 4, 33–94.

7. *See id.*

8. George, *supra* note 5, at 250.

9. *Id.*

10. *See, e.g.*, MARTIN EDELMAN, *DEMOCRATIC THEORIES AND THE CONSTITUTION* 18 (1984).

11. Regarding predictability in the federal executive, see 5 U.S.C. § 706(2)(A), which prohibits "arbitrary" and "capricious" actions. Apart from express constitutional (federal and state) limitations, legislatures in the States are expected to pass only laws that have a rational basis, meaning a recognizable public purpose. *See, e.g.*, *Charlton v. Kimata*, 815 P.2d 946, 950 (Colo. 1991) (en banc) ("If the classification neither affects a fundamental right, nor creates a suspect classification, nor is based on gender, then the rational basis test is applied. This test requires that the statutory classification bear a rational relationship to a permissible government interest.").

ical instability hiding behind an artifice or Potemkin village of stability. Yet that appearance of stability has led many persons to believe that the essential questions in this area of constitutional law have been satisfactorily answered and that the rule of law is being followed.

The area in question involves the public regulation of pornography and the competing requirements of the First Amendment. In the more than forty years since the Supreme Court decided *Miller v. California*,¹² the nation seems to have had a stable framework for regulating pornography and honoring the constitutional values of freedom of speech and of the press. *Miller* put forward a three-part test for determining the constitutionality of obscenity prosecutions, and that test—to judge from its longevity and the absence of controversy surrounding it today—surely seems “workable.”¹³ The *Miller* test asked (1) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the “prurient interest”; (2) whether the work depicts or describes in a “patently offensive way” sexual conduct defined by the relevant state law(s); and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹⁴

Even if this three-part test appears straightforward, *Miller* was not and could not have been the last word on the subject of obscenity and the First Amendment. Today, some persons might be inclined to regard *Miller* as a case that thoroughly answered the central questions in this area of constitutional law. In fact, it did nothing of the sort.

As one piece of evidence, consider the following: just five years after the Supreme Court decided *Miller*, it conceded in *Pinkus v. United States*¹⁵ that *Miller* failed to discuss some basic matters relating to the application of its three-part test, including the reference point for the first part of the test.¹⁶

12. 413 U.S. 15 (1973).

13. *Id.* at 21.

14. *Id.* at 24.

15. 436 U.S. 293 (1978).

16. *See id.* (holding that children are not part of the “community” referred to in the first part of the *Miller* test, but “sensitive persons” and deviant groups are).

Miller also fails to provide legal definitions or practical guidelines for two common situations that legislators have historically felt obliged to address—one involving children, the other involving the legal category of “unconsenting adults.”¹⁷ More specifically, legislators have recognized the public interest in sparing children and other minors from exposure to pornography and the legitimacy of an adult’s asserted interest in being spared from unwanted exposure to pornography in public places and in the home.¹⁸

Miller and its companion case *Paris Adult Theatre I v. Slaton*¹⁹ helped to establish a regulatory framework for pornography viewed by “consenting” adults in a “private” setting, including places outside the home, such as a cinema with admission restricted to adults.²⁰ Yet as *Pinkus* suggests, the *Miller* Court needed to say more about its understanding of “community” because human communities are composed of adults and minors.²¹ Even though the litigation in *Pinkus* raised an important question, the ruling was in at least one way unsatisfactory because *Pinkus* held that the reference to “community” in the first part of the *Miller* test does not include children and adolescents (commonly referred to as “minors” when they are taken as a single group).²²

One might still defend the rulings in *Miller* and *Pinkus* by putting them in a larger context. Five years before deciding *Miller*, the Supreme Court in *Ginsberg v. New York*²³ upheld a state law forbidding the sale of pornographic magazines to mi-

17. See 413 U.S. at 27.

18. See, e.g., *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728 (1970) (upholding a federal statute that allowed an individual to request that sexually offensive materials not be delivered through the mail to his home).

19. 413 U.S. 49, 69 (1973) (upholding state regulation of adult movie houses).

20. See *id.* at 69; *Miller*, 413 U.S. at 24, 36–37. The controversy in *Miller v. California* involved the conviction of Marvin Miller for violating California’s obscenity law. *Id.* at 16. Miller mailed materials that advertised pornographic books and films, with depictions of men and women engaged in sexual acts and displaying their genitals. *Id.* at 17–18. Subsequent references to *Miller* in this article will mean both *Miller* and *Paris Adult Theatre* (because they are companion cases) unless the context indicates that only one of the two cases is being singled out.

21. See *Pinkus*, 436 U.S. at 297–303.

22. See *id.* at 297.

23. 390 U.S. 629 (1968).

nors.²⁴ The Court ruled that the State of New York was permitted to employ “variable” concepts of obscenity, meaning different legal definitions of obscenity for minors and adults.²⁵

Reading *Miller* and *Pinkus* with *Ginsberg* in mind, one should conclude that the obscenity standard put forth in *Miller* applies only to adults who are viewing pornography of their own accord and in a private setting. Further support for this interpretation comes from *FCC v. Pacifica Foundation*,²⁶ decided five years after *Miller*. Here the Court ruled that the Federal Communications Commission could have subjected Pacifica Foundation to penalties because of a “patently offensive” radio broadcast aired in the middle of the day (when children were presumably part of the audience), involving indecent words referring to sexual or excretory acts or sexual organs, and audible in both public and private spaces.²⁷ *Pacifica* did not involve visual images, but it has been cited in cases involving pornographic films as a way of affirming the legitimacy of a state’s interest in sparing minors and unconsenting adults from exposure to pornography that may not be obscene.²⁸

The regulatory framework just sketched—based on the rulings in *Ginsberg*, *Miller*, *Pinkus*, and *Pacifica*—might strike many persons as “workable” and potentially stable over the long term. Over time, such regulations have been enacted to meet the following purposes: (1) to deny minors access to different kinds of pornography or at least limit their access and exposure to them;²⁹ (2) to spare unconsenting adults exposure to indecent and obscene pornography (whether they are at home or in public);³⁰ (3) to keep indecent and obscene stimuli (and not only visual stimuli) out of public space.³¹ The notion of “private

24. See *id.* at 643–46.

25. See *id.* at 635–39.

26. 438 U.S. 726 (1978).

27. See *id.* at 731–32, 748–50.

28. See, e.g., *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 838 (2000) (Breyer, J., dissenting).

29. See, e.g., *Constitutionality of Sexually Oriented Speech: Obscenity, Indecency, and Child Pornography*, 14 *GEO. J. GENDER & L.* 319, 331–32 (Sara Collins & Liadin Donnelly eds., 2013).

30. See, e.g., *id.* at 329.

31. See, e.g., *id.* at 327. Public space might be defined as space outside the home, access to which is not restricted to adults. It can be distinguished from private

space” that is found outside the home generates mental images of places that cannot be breached by minors. Outside these private settings, the scope for governmental regulation of pornography will be much greater, as *Ginsberg*³² and *Pacifica*³³ suggest.³⁴

The regulatory framework being described here would give adults much freedom to indulge in pornography in private places, with scarcely any limits in one’s home. Nonetheless, the framework requires broad public understanding about the meaning of phrases such as “in private” or “in a private setting.” It also requires a readiness on the part of public officials to maintain, through the enforcement of the relevant laws, the boundaries separating private space from public space.³⁵

spaces outside the home (for example, “adult” movie theaters, “strip clubs,” and nudist camps). In *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000), the Court upheld a city ordinance making it a crime to appear in public “in a state of nudity” and which was applied to prohibit “totally nude” dancing in a club restricted to adults. The majority stressed that the ordinance was meant to regulate the “secondary effects” of such entertainment, including impacts on public health, safety, and welfare. *See id.* at 291. Writing for the majority, Justice Sandra Day O’Connor observed that dancers could perform wearing only pasties and a G-string, thereby making the ordinance’s effect on protected expression negligible. *See id.* at 294.

32. *See* 390 U.S. 629.

33. *See* 438 U.S. 726.

34. In *Stanley v. Georgia*, 394 U.S. 557 (1969), the Court overturned an obscenity conviction in Georgia because the materials were viewed at home. The key idea in the ruling was that simply possessing obscene materials at home is not a prosecutable offense. *See id.* at 568. In the Court’s words, “If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch.” *Id.* at 565. But in *Osborne v. Ohio*, 495 U.S. 103 (1990), the Court upheld an Ohio statute banning the viewing and possession of child pornography (even at home), thereby limiting the holding in *Stanley v. Georgia*. As shown by *New York v. Ferber*, 458 U.S. 747 (1982), child pornography needs to be distinguished from pornography that involves only adults (the latter being the focus of this Article). Like obscene materials, child pornography is, according to *Ferber*, unprotected by the First Amendment. *See id.* at 764–66.

35. A few ambiguities in *Miller* must be noted. As mentioned in the previous note, four years before *Miller*, the Court had decided *Stanley*. On the basis of this ruling, someone might wonder why *Miller*’s conviction was upheld. The pivot of the decision seems to be that *Miller* sent out *unsolicited* ads for pornographic films. *See Miller*, 413 U.S. at 17–18. What of *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973), in which the Court upheld regulations on “adult” movie theaters? That the conviction was upheld matters little today in light of the ideas in *Stanley* about viewing pornography in a private setting—ideas that seem to be the foundation of Justice William Brennan’s highly influential dissent in *Paris Adult Theatre*, dis-

Why, then, does this Article maintain that there is now great instability in this area of constitutional law? The short answer is that the Supreme Court has been unfaithful to the regulatory arrangements described above. Little by little, in a series of cases spanning decades, the Court silently abandoned the regulatory framework and the corresponding constitutional principles. In doing so, it may have satisfied some segments of American society, including powerful commercial interests. But as this Article will show, the Court seems unwilling to admit what it has done.

The Court's lack of candor regarding its own rulings is regrettable for two reasons. First, by not acknowledging the development just described, the Court has contributed to public misunderstanding about the status of the law of obscenity and indecency under the Constitution. This is worrisome from the standpoint of the nation's commitment to the rule of law.³⁶

Second, many Americans still find pornography morally objectionable and morally harmful,³⁷ and they do not want minors and unconsenting adults exposed to it, so they will see the development described here as bad policy. They are apt to say that the abandonment of the regulatory framework described above created an environment in which ever larger numbers of

cussed below. *See id.* at 73–114 (Brennan, J., dissenting). Whatever else Justice Brennan's dissent might have achieved, it energized a legal and social movement that sought to decriminalize every instance of viewing pornography, however vile, "in private." *See infra* Part IV.

36. It is worth recalling that constitutional adjudication is not reducible to strict adherence to *stare decisis*. Judges and Supreme Court justices who identify as "originalists," for example, believe that the principal task is to recover the original meaning of the relevant constitutional provision, on which the outcome of a case may pivot. Originalists concede that a judge may in certain circumstances need to take account of rulings that have been affirmed over time and that those rulings sometimes cannot be reconciled with the original meaning of the relevant constitutional provision. *See, e.g.,* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1987). Some scholars argue that the reaffirmation of a ruling over a long period of time may lead to the existence of "super precedents" in constitutional law. *See, e.g.,* Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204 (2006). This Article does not take a position on whether super precedents exist or whether their existence might at some point preclude an appellate court from overruling a particular decision. But Professor Gerhardt may be too quick in ascribing a belief in super precedents to President Abraham Lincoln. *See* Lincoln's stringent criteria for the existence of such a precedent, cited by Gerhardt. *Id.* at 1205 n.5.

37. *See* the reasons described *infra* Section III.

minors easily access pornography and unconsenting adults have pornography foisted upon them. Yet the law, remarkably, offers these persons (and the parents of these minors) exceedingly limited recourse.³⁸

In view of these assertions, a principal goal of this Article is to document the gaps and instability in this area of First Amendment law. This documentation must precede any discussion of possible remedies to the problem. At the outset, however, some attention must be given to the larger intellectual context in which the problem arose. To that end, Part II of this Article considers two rival narratives about the public regulation of pornography and briefly reviews the history of obscenity law in the United States. Thereafter, the Article identifies the fundamental problems in the Court's obscenity and indecency jurisprudence and catalogs a series of myths that have arisen in the years since *Miller* was decided—myths that are traceable to that case and which undermined the regulatory framework described above. The Article concludes with an argument about the need for greater candor about the matters considered here and a summary of the gaps that the Court needs to fill if it wishes to demonstrate its commitment to the rule of law in this area. As the analysis proceeds, the Article takes account of and documents the strong opposition that many citizens have to pornography, including more recent opposition that stresses the connections between pornography and sexual trafficking and the exploitation of minors.

II. TRIUMPH OF A LIBERAL NARRATIVE

Scholarly and public discussions about the regulation of pornography are often characterized by references to abstract

38. The rule of law and the predictability associated with it are not *ordinarily* undermined or compromised by periodically unexpected rulings in cases. Consider, as an example, congressional legislation to regulate interstate commerce and the Supreme Court's ruling in *United States v. Lopez*, 514 U.S. 549 (1995), which surprised many observers, especially because the majority continued to apply the "substantial-effects test," which had been used in cases such as *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), *Wickard v. Filburn*, 317 U.S. 111 (1942), and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). But the situation with respect to the public regulation of obscene and indecent materials is very different because of a substantial catalog of errors and the constitutional mythology arising from those errors.

moral principles. Those who favor little or no regulation are apt to justify their views on the basis of concise and relatively simple principles. Such principles are found in theoretical works by John Stuart Mill,³⁹ Ronald Dworkin,⁴⁰ and Thomas Nagel,⁴¹ with Mill's "very simple principle" (also known as the "harm principle") and Dworkin's principle of "equal concern and respect" having much currency today.

Those who favor greater regulation of pornography must articulate the grounds for such a policy. But it is difficult to encapsulate all of the grounds in a single principle, which suggests that those who favor minimal or no regulation of pornography have a significant rhetorical advantage in this debate.⁴² The advantage consists in the regular invocation of relatively concise principles. The words of the First Amendment's Free Speech and Free Press Clauses are also easily invoked, and the directness of those words may confer a similar rhetorical advantage.⁴³

In the United States, pornography became a matter of intense public discussion and controversy in the 1960s and 1970s. During those decades, the proliferation of sexually explicit films and magazines led to many lawsuits in state and federal courts, testing the limits of freedom of expression under the First Amendment. These lawsuits and a growing public wariness about the spread of pornography even became "talking points" in the presidential election of 1968.⁴⁴

39. See, e.g., JOHN STUART MILL, *ON LIBERTY* (David Bromwich & George Kateb eds., 2003).

40. See, e.g., RONALD DWORKIN, *FREEDOM'S LAW* (1997).

41. See, e.g., THOMAS NAGEL, *CONCEALMENT AND EXPOSURE* (2004).

42. For two important scholarly books that describe the grounds for greater regulation of pornography with much attention to historical context, see HARRY M. CLOR, *OBSCENITY AND PUBLIC MORALITY* (1969), and ROCHELLE GURSTEIN, *THE REPEAL OF RETICENCE: A HISTORY OF AMERICA'S CULTURAL AND LEGAL STRUGGLES OVER FREE SPEECH, OBSCENITY, SEXUAL LIBERATION, AND MODERN ART* (1996).

43. The First Amendment to the United States Constitution reads, "Congress shall make no law establishing a religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

44. See DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 33–106 (10th ed. 2014).

Since that era, pornography has become both a multibillion dollar industry and a seemingly ineradicable feature of American life. It has infiltrated homes, hotels and motels, and even places of work. It is nonchalantly or enthusiastically accepted by millions of adults, while it is surreptitiously viewed by a similarly high number of minors.⁴⁵ Its greater acceptance over the last fifty years has corresponded with vast changes in the ways that many Americans understand romantic love, marriage, and human sexuality.⁴⁶

Social transformations as consequential as this one are often accompanied by a sweeping legal and theoretical narrative, made up of discrete arguments, meant to explain and justify what has taken place. That narrative is typically dynamic, not static. As it strives to explain and to justify what has already taken place, it prepares the ground for further changes. A distinction can thus be made between the arguments and principles used to justify a more permissive legal approach to pornography (including arguments put forth in real cases) and the larger narrative in which those principles and arguments are situated. Certain narratives become so dominant that they may in the future come to define a historical era, such as the periods now known as the Enlightenment and the “Counter-Enlightenment.”⁴⁷

45. For a recent account, see Belinda Luscombe, *Porn and the Threat to Virility*, TIME (Apr. 11, 2016), http://time.com/4277510/porn-and-the-threat-to-virility/?iid=toc_033116 [<https://perma.cc/87HB-SWET>].

46. For important evidence, see the articles found in *THE SOCIAL COSTS OF PORNOGRAPHY: A COLLECTION OF PAPERS* (James R. Stoner, Jr. & Donna M. Hughes eds., 2010), especially the contributions in Part I. Some of the changes associated with the “mainstreaming” of pornography are morally problematic, as even popular accounts concede. See, e.g., David Amsden, *Not Tonight, Honey. I’m Logging On*, N.Y. MAG. (Oct. 20, 2003), http://nymag.com/nymetro/news/trends/n_9349/ [<https://perma.cc/U5LA-3SCN>]. The tag-line on the cover concludes with a simple question: “Generation XXX: Porn Is Everywhere, Thanks to the Internet. It’s Never Been Less Shocking. But What Is It Doing to Real Relationships?” See also Alex Morris, *They Know What Boys Want*, N.Y. MAG. (Jan. 30, 2011), <http://nymag.com/news/features/70977/> [<https://perma.cc/AQ8B-VWEX>]. For additional perspectives on these matters, see *infra* notes 62–63 and accompanying text.

47. For scholarship on these two periods, see the work of the late Isaiah Berlin and commentaries on this aspect of his work, including JOHN GRAY, *BERLIN* (1995); *THE ONE AND THE MANY: READING ISAIAH BERLIN* (George Crowder & Henry Hardy eds., 2007).

These points can also be understood with reference to nineteenth-century American history. In the decades preceding the Civil War, a sweeping legal and theoretical narrative—a highly illiberal narrative—developed among defenders of chattel slavery, particularly in the southern states. As the historian Don Fehrenbacher has argued, this narrative lay behind the “pro-slavery gloss” that the Constitution acquired during this period, culminating in the Supreme Court’s ruling in *Dred Scott v. Sandford*.⁴⁸ Other Americans, not only abolitionists, challenged this narrative, and a protracted war may have been the only way to defeat it.⁴⁹

Today in the United States, the dominant narrative regarding pornography endorses and defends a highly permissive or liberal outlook. This narrative replaced an earlier, less permissive narrative. The evidence for the less permissive outlook of yesteryear consists of legal and social commentary from the late nineteenth century to the 1950s, as well as the judicial records of both state and federal courts during the same period.⁵⁰

The legal category of “obscenity” is also telling. As noted above, obscene materials do not receive the protection of the First Amendment’s Free Speech and Free Press Clauses. But the constitutional requirements for an obscenity conviction steadily moved in a more permissive direction in the twentieth century (meaning more protection for pornography), leading to the three-part test of *Miller*, which remains valid law today.⁵¹

Long before *Miller*, the constitutional requirements for an obscenity conviction were less complicated. At common law, obscenity usually referred to any sexually-oriented materials,

48. See DON E. FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC* (Ward M. McAfee ed., Oxford Univ. Press, 2001); Don E. Fehrenbacher, *Slavery, the Framers, and the Living Constitution*, in *SLAVERY AND ITS CONSEQUENCES: THE CONSTITUTION, EQUALITY, AND RACE 1* (Robert A. Goldwin & Art Kaufman eds., 1988). For the “culmination” of this way of reading the Constitution, see *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

49. See ALLEN C. GUELZO, *FATEFUL LIGHTNING: A NEW HISTORY OF THE CIVIL WAR AND RECONSTRUCTION* (2012).

50. See GURSTEIN, *supra* note 42.

51. See *Miller v. California*, 413 U.S. 15, 15 (1973). The three-part test is discussed above, *supra* notes 13–14 and accompanying text. For the relevant antecedents, see DAVID L. TUBBS, *FREEDOM’S ORPHANS: CONTEMPORARY LIBERALISM AND THE FATE OF AMERICAN CHILDREN 151–61* (2007). See also CLOR, *supra* note 42, for a close analysis of developments in obscenity law in the first half of the twentieth century.

whether words or images, that were contrary to public morals.⁵² To persons living today, the common law standard for obscenity might sound hopelessly vague, but the standard was intelligible in the context of England's historic identity as a Christian nation, as reflected in many of its institutions and practices both before and after the Reformation, lasting until about the middle of the twentieth century.

A slightly different formulation defined obscenity as sexually-oriented material that would lead to the moral corruption of youth.⁵³ In 1857, Parliament wrote this standard into legislation, which Lord Chief Justice Cockburn further specified in *Regina v. Hicklin*.⁵⁴ His test for obscenity was whether "the tendency of the matter . . . is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."⁵⁵

For most of American history, few persons questioned the legitimacy of either the public regulation of pornography or the legal category of obscenity. Regulating pornography was considered both constitutionally permissible and morally necessary. The dominant public narrative regarding pornography therefore comprised a constitutional argument (pornography can be regulated) with a hortatory perspective (pornography needs to be regulated).⁵⁶

52. See, e.g., *Commonwealth v. Holmes*, 17 Mass. (17 Tyng) 336 (1821); *Commonwealth v. Sharpless*, 2 Serg. & Rawle 91 (Pa. 1815). The primary focus of this Article is *visual* pornography and obscenity. For an early argument that no serious work of literature should be considered obscene, see generally Leo M. Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40 (1938).

53. See, e.g., *Rex v. Hill* (1699) Mich. 10 W. 3, summarized in *Rex v. Curl* (1727) 93 Eng. Rep. 487; 2 Strange 789.

54. [1868] 3 QB 360 (Eng.).

55. *Id.* at 371. Even before *Hicklin*, at least two American states understood obscenity as "tending to the moral corruption of youth." See *Commonwealth v. Tarbox*, 55 Mass. (1 Cush.) 66 (1848); see also *State v. Hanson*, 23 Tex. 233 (1859). In *Hicklin*, Lord Chief Justice Cockburn did not elaborate on the meaning of "deprave and corrupt," and the idea of moral corruption sounds extremely "Victorian" to contemporary ears. But the phrase is not meaningless, and it is hard to dismiss the idea of moral corruption today if one reflects on either the problem of pornography addiction or the mental state of a man who considers women inferior beings whose sole purpose in life is to fulfill the sexual desires of men. Such a mental state must have at least a few things in common with that of men involved in sexual trafficking. See *infra* notes 60–61 and accompanying text.

56. See GURSTEIN, *supra* note 42.

III. JUSTIFICATIONS FOR REGULATION

Why has the regulation of pornography been considered such an urgent public priority? Historically, regulation has been justified on three grounds: respect for human dignity; the need to protect or shelter the private realm of life; and the need to ensure that basic responsibilities linked to human sexual behavior are not mocked, derided, or attacked. The historical record shows that there is some overlap among these ideas, but each receives separate discussion here.

A. Promoting Human Dignity

Whatever the disagreements surrounding the idea of “human dignity” today—and the disagreements span several areas of intellectual inquiry⁵⁷—some notion of human dignity has figured in many arguments for the regulation of pornography. Those arguments typically involve reflection on and research into the deeper meanings or “metaphysics” of pornography, so as to avoid violations of human dignity.⁵⁸

The critical point here is that pornography “instrumentalizes” persons, essentially representing them as sources of sexual gratification, rather than as individual men and women with distinct needs, desires, and personalities. As the political theorist Harry Clor wrote, “The passion depicted and solicited [in pornography] is a thoroughly *depersonalized* sexuality Human beings, women especially, are vividly portrayed as objects to be used.”⁵⁹

57. See, e.g., HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT’S COUNCIL ON BIOETHICS (2008); GEORGE KATEB, HUMAN DIGNITY (2011); MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING (2012).

58. Various philosophic arguments recognize that pornography raises deep questions about our identity as human beings, insofar as the sexual behavior of our species differs so much from that of other animals, whose behavior seems wholly determined by laws of nature (or instinct). The German philosopher Immanuel Kant made this point long ago. See IMMANUEL KANT, *Conjectures on the Beginning of Human History*, in KANT: POLITICAL WRITINGS 221 (Hans Reiss ed., H.B. Nisbet trans., 2d ed. 1991), for Kant’s “philosophic” reading of the opening chapters of the Book of Genesis.

59. Harry M. Clor, *The Death of Public Morality?*, 45 AM. J. JURIS. 33, 36 (2000); see also CLOR, *supra* note 42. Notice also the subtitle in Andrea Dworkin’s widely discussed feminist critique, ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1979).

It is easy to understand why most women would resent such depictions. Even if one cannot prove that such imagery contributes to violence against women, human beings generally do not like to be viewed as objects or instruments of others. The point applies to both men and women, regardless of whether they consider themselves heterosexual, bisexual, gay, or lesbian.⁶⁰

Another basis for regulating pornography is to reduce the likelihood of some persons regarding others merely as a means to the end of sexual pleasure. This is a kind of moral corruption because it is a failure to appreciate the full humanity of others (for example, their dignity), which comprises their moral agency and their capacity as human beings to make *choices* pertaining to their sexuality. Thus, graphic images of sexual slavery (for example, women being in a state of sexual servitude to a man or men) or of women being raped or sexually humiliated and enjoying the experience may affect those viewing such images, particularly young persons and persons of below-average intelligence.⁶¹

A possible long-term effect on those who regularly view pornography is difficulty in recognizing others as fully human—a failure to appreciate their needs, status, agency, and vulnerabilities. Another possible long-term effect—because pornography is the great short-cut to sexual pleasure—is ad-

60. The idea of using or possessing other persons for sexual gratification seems incompatible with basic norms of American liberal democracy, which, following the ratification of the Thirteenth Amendment, presupposes personal freedom as a birthright and not using anyone as an object or solely as an instrument (for a comparison, one might examine Aristotle's account of slavery found in Book I of his *Politics*). If pornography typically involves the idea of using or possessing another person for sexual purposes (even temporarily), without regard to that person's needs and personality, it is hardly surprising to find so much violent imagery in pornography. For two complementary assessments separated by roughly twenty years, see DWORKIN, *supra* note 59, and Norman Podhoretz, "Lolita," *My Mother-In-Law, the Marquis de Sade, and Larry Flynt*, COMMENT., Apr. 1997, at 23–35. Any serious discussion of pornography must acknowledge the recurring feature of violent imagery. Podhoretz's account is an important source because it documents the kind of violent imagery found in some pornographic magazines (for example, *Hustler*) before the advent of "cyberporn."

61. Until the Supreme Court's ruling in *Butler v. Michigan*, 352 U.S. 380, 384 (1957), which contradicted *Hicklin*, courts in various jurisdictions still assessed obscenity from the standpoint of the most impressionable members of the community, meaning minors and persons of below-average intelligence.

diction.⁶² Unsurprisingly, each of these outcomes may lead to significant difficulties for heterosexual men (and their partners) in forming and maintaining long-term, loving, and intimate relationships.⁶³

All the scenarios mentioned in the previous paragraph are discussed in the scholarly literature on pornography.⁶⁴ Human dignity has multiple dimensions, and its violation may apply both to those who consume pornography and those who appear in it. A kind of moral harm occurs to both groups, and this is evident in the man who has become addicted to pornogra-

62. For a valuable overview, based on research on the plasticity of the human brain, see Norman Doidge, *Acquiring Tastes and Loves*, in *THE SOCIAL COSTS OF PORNOGRAPHY*, *supra* note 46, at 21, taken from his international bestseller, *THE BRAIN THAT CHANGES ITSELF* (2007). Luscombe's article, *supra* note 45, explores the debate about whether regular indulgence in Internet pornography can lead to "porn-induced erectile dysfunction (PIED)" for young men in good health.

63. It is important to point out the ways in which pornography has changed in the Internet era. As Doidge notes:

Thirty years ago [that is, in the 1980s] "hardcore" pornography usually meant the explicit depiction of two aroused partners, displaying their genitals. "Softcore" meant pictures of women, mostly on a bed, at their toilette . . . in various states of undress, breasts revealed Now hardcore has evolved and is increasingly dominated by the sadomasochistic themes of forced sex . . . all involving scripts fusing sex with hatred and humiliation. Hardcore pornography now explores the world of perversion, while softcore is now what hardcore was a few decades ago

DOIDGE, *THE BRAIN THAT CHANGES ITSELF*, *supra* note 62, at 102. Scholarly research connecting one's use of pornography to greater difficulties in establishing and maintaining a long-term loving relationship is summarized in the appendix to *THE SOCIAL COSTS OF PORNOGRAPHY*, *supra* note 46. A few of the findings: "Male domestic violence offenders who utilize the sex industry (pornography and strip clubs) use more controlling behaviors, and engage in more sexual abuse, stalking and marital rape against their partners than do males who do not use the sex industry." *Id.* at 228. "The use of pornography (by the batterer) significantly increases [by a factor of almost 2] a battered woman's odds of being sexually abused." *Id.* at 232. "Persons ever having an extramarital affair were 3.18 times more apt to have used cyberporn than ones who had not had affairs." *Id.* at 232. "Exposure to sexually explicit online movies was significantly related to beliefs about women as sex objects for both male and female 13–18 year-old Dutch adolescents." *Id.* at 229. These findings about the prominence of violent themes in contemporary pornography receive further support from Luscombe's article, *supra* note 45.

64. See also CLOR, *supra* note 42; see generally *THE SOCIAL COSTS OF PORNOGRAPHY*, *supra* note 46.

phy and the woman who agrees to appear in something that is viciously degrading to her *qua* woman.⁶⁵

The matters under review have led to some important initiatives in both the private and public sectors. Consider the October 2013 decision of Nordic Choice Hotels, the largest hotel group in Scandinavia, to ban “pay-per-view” pornography in its rooms. According to the owner, Petter Stordalen, the decision was based on the firm’s work with UNICEF against sexual trafficking and the exploitation of children.⁶⁶ And in 2013, then-British Prime Minister David Cameron announced that every Internet Service Provider (ISP) in the U.K. would be required to block access to pornography as the “default” setting for customers, as an effort to minimize children’s exposure to pornography.⁶⁷

B. *Protecting the Private Realm of Life*

A second ground for regulating pornography has been to extend legal protection to the private realm of life—the realm associated with the basic life processes of our species, including (but not limited to) sex, reproduction, and birth.⁶⁸ Because this

65. To assert that regularly viewing pornography may have certain consequences for a sizable number of persons is different from claiming to know how pornography will affect an *individual’s* behavior. Similar distinctions are seen elsewhere in the law. The Supreme Court, for example, has cited the greater moral impressionability of young persons as a possible mitigating factor in cases involving the death penalty for juveniles, but that is merely a generalization. Accordingly, the Court has not claimed to possess the kind of deep knowledge of moral impressionability that might allow one to make predictions about the behavior of individuals. See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005); *Stanford v. Kentucky*, 492 U.S. 361 (1989).

66. Helen Russell, *Nordic hotel magnate replaces pay-TV porn channels with contemporary art*, *GUARDIAN* (Aug. 25, 2013), <http://www.theguardian.com/culture/2013/aug/25/nordic-hotel-petter-stordalen-pornography-tv> [https://perma.cc/T664-XQA9].

67. Notice that this policy does not censor or deny access to pornography. It merely requires customers to expressly request access from their ISP. For a defense of the policy, see Alexandra Harrison, Note, *Nudge, Don’t Thrust: The Application of Behavioral Economics to America’s Porn Addiction*, 19 *TEX. REV. L. & POL.* 337 (2015). The United Kingdom’s proposed opt-in system features age-verification technology, and is expected to debut before the end of 2018. See Matt Burgess & Liat Clark, *The UK wants to block online porn. Here’s what we know*, *WIRED* (Mar. 12, 2018), <http://www.wired.co.uk/article/porn-block-ban-in-the-uk-age-verification-law> [https://perma.cc/DR4E-Z6GR].

68. See the discussion in GURSTEIN, *supra* note 42, at 9–31, which is indebted to Hannah Arendt’s analysis in *THE HUMAN CONDITION* (1958).

realm also involves other basic biological functions (for example, sleep; the consumption of food; the elimination of waste), it is the realm of life where human beings are least individuated, and as Hannah Arendt argued, it is in many respects a realm of necessity, not freedom.⁶⁹

Precisely because so much of the private realm involves necessity and not freedom, this realm of life was treated with a certain contempt in the ancient world, especially in classical Greece.⁷⁰ The private realm was contrasted with the public realm, the latter being a realm of competitive or “agonistic” freedom for those persons having the status of citizens.⁷¹ But even though the private realm was scorned, it was also, somewhat paradoxically, regarded with awe because of the great mysteries surrounding human life and the processes that sustain life.⁷² That sense of awe endured for centuries in the West, having been reinforced in sundry ways by the Judeo-Christian tradition. It was thus relatively easy for law-givers and legislators to provide legal protections for the different activities associated with the private realm of life.⁷³

How, on secular grounds, might one understand and defend policies that protect the private realm of life? Begin with the point made above: the sexual behavior of human beings, unlike that of other animals, is not wholly determined by impulse or biological urge. To underscore our freedom and our ability to control certain urges and desires, we (collectively) have set

69. GURSTEIN, *supra* 42, at 9–13; ARENDT, *supra* note 68, at 28–37. To say that the private realm of life is where human beings are least individuated does not mean that everything in this realm is a matter of necessity. As explained above, human beings exercise choice with respect to many matters pertaining to sexuality, even during marriage.

70. See ARENDT, *supra* note 68, at 28–37.

71. See *id.*

72. See *id.*

73. In both Judaism and Christianity, there are great mysteries associated with the private realm of life, owing to scriptural accounts of events in that realm which must be regarded as miraculous or supernatural, such as the birth of Isaac to Sarah at Sarah’s advanced age and Mary’s status as a virgin when she gave birth to Jesus. Whatever nonbelievers may think of such accounts, they have historically tended to support the sense of mystery or awe surrounding the private realm and what takes place there. As these remarks show, it would be a serious conceptual error to see “the private realm of life” as synonymous with the “right to privacy” as developed in cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Roe v. Wade*, 410 U.S. 113 (1973).

aside space, to which certain activities have been relegated. Pornography, however, subverts the private realm because it takes things and experiences that are intimate and puts them on display for others. Pornography is, in different ways, a perpetual war on the private realm of life.⁷⁴

Most persons living in the United States today are likely to take the existence of the private realm for granted. Death or torture may be objectively worse than denying someone the privacy that is typically taken for granted, but the humiliation associated with the latter can persist for a long time. This can be seen in some personal narratives from the Second World War. Consider the perspective in Primo Levi's essay "Useless Violence":

The convoy [to Auschwitz] on which I was deported in February 1944 was the first to leave from the Fossoli collection camp [I]n my car there were quite a few old people, men and women, among others, all the inmates of the Jewish Rest Home in Venice. For everybody, but especially for them, evacuating in public was painful or even impossible: a trauma for which civilization does not prepare us . . . an aggression which is obscene and ominous, but also the sign of deliberate and gratuitous viciousness [I]n our car there were also two young mothers with their infants of a few months and one of them had bought along a chamber pot: one only, and it had to serve about fifty people. Two days into the journey we found some nails stuck into the wooden sides, pushed two of them into a corner and with a piece of string and a blanket improvised a screen, which was substantially symbolic: we are not yet animals, we will not be animals as long as we try to resist.⁷⁵

Levi describes acts of extraordinary cruelty in extraordinary circumstances. It is safe to say that the vast majority of Americans living today have not experienced and are unlikely to experience anything remotely like what he describes. Yet his ac-

74. The cultivation of one's private life through friendship, or marriage, or both—long considered a mark of personal depth—is also jeopardized today by indiscriminate and casual revelations about private affairs (say, for example, in social media) and by "reality shows" that uncover and dwell on so many aspects of one's private life.

75. PRIMO LEVI, *THE DROWNED AND THE SAVED* 96–97 (Raymond Rosenthal trans., 1988).

count should give readers an awareness of the fragility of the private realm of life.

In a liberal democracy, the security of the private realm depends on both law and social convention. The private realm can be secure only where there is widespread respect for what it is and what it requires. This prompts the question: Why are so many persons today indifferent to the subversion of the private realm by pornography?

Consider an additional perspective on the matter. Even now, when the discourse of personal rights is well established and the world has become more secular, aspects of the private realm of life are still deemed worthy of legal protection. Until very recently, for example, the law reinforced the idea that human sexuality and sexual activity should be regarded with some sense of awe and not be brazenly commercialized. This view is still reflected in laws prohibiting prostitution, which are found in nearly every state. The constitutional validity of those laws has rarely been challenged, leading one to ask why pornographic films were ever treated differently by the law, because the vast majority of such films have persons being paid to perform sex acts.⁷⁶

C. *Affirming Human Responsibility*

A third ground for regulating pornography in the United States was to ensure that the basic responsibilities of human sexual behavior were widely understood and respected. Those responsibilities rest primarily (but not exclusively) on the vulnerability and special needs of children and pregnant women. Unsurprisingly, most pornography is pitched to men, many of whom might be insufficiently sensitive to the needs and vulnerabilities just mentioned. By promoting lust or sexual desire for their own sake, pornographers play down, mock, or trivial-

76. This point is discussed in several of the chapters in the collection *THE SOCIAL COSTS OF PORNOGRAPHY*, *supra* note 46. Much seems to pivot on this matter because if pornographic films essentially involve conduct in violation of laws against prostitution (and are not "speech"), they would probably receive no protection under the First Amendment. Nonetheless, the analysis in this Article proceeds using a key premise employed by the Supreme Court: a substantial amount of pornography in the United States receives First Amendment protection as "speech," *see e.g.*, *Miller v. California*, 413 U.S. 15 (1973).

ize the responsibilities associated with human sexuality, especially the basic duties of parenthood (namely, that men and women who beget children are responsible for them) and fidelity to one's spouse. Even while some have defended pornography as a realm of pure "fantasy," American judges and legislators historically have had no difficulty in describing it as socially dangerous.⁷⁷

* * * * *

Because of the long history of legally regulating pornography, it is reasonable to ask why the older narrative about regulation was displaced by the contemporary narrative that favors little or no regulation. What happened?

As the historian Rochelle Gurstein has shown, the narrative opposing the regulation of pornography derived from a larger social movement that argued there was too much "reticence" or muted conversation about the private realm of life. Despite having different goals, various reformers and activists in this movement were broadly committed to fostering public discussion about different aspects of the private realm. Some argued that too much of private life was shrouded in mystery and that promoting knowledge about human sexuality was an urgent priority. Others believed that public discussion about marriage and family life were the only way to change or eliminate regulations on contraceptives, which existed in most states following the Civil War and into the 1950s. Still others advocated "free-love" and wanted to change the whole structure of family life and end the regulation of pornography. At some point in the twentieth century, different figures within this movement started to insist that all consenting adult sexual behavior (including the behaviors involved in making pornography)

77. See, e.g., *United States v. Harmon*, 45 F. 414, 416–20 (D. Kan. 1891); *Commonwealth v. Sharpless*, 2 Serg. & Rawle 91, 101–03 (Pa. 1815). On pornography as a realm of pure fantasy, see Podhoretz, *supra* note 60. The legal history of regulating pornography shows that both those producing pornography and those consuming it were thought to be morally corrupt insofar as they ignored or denied basic duties associated with human sexuality and the begetting of children. With its emphasis on the tactile pleasures of sex, pornography that is pitched to heterosexual men plays down or ignores vital social interests of children and mothers and fails to respect their dignity. Earlier jurists would have said that this failure to respect the dignity of children and women amounts to an injustice against them.

should be considered “self-regarding conduct” (to use Mill’s terminology) and ought to lie beyond government regulation. Over time, many of the ideas associated with this movement found their way into legal and constitutional discourse.⁷⁸

IV. A PIVOTAL RULING

One purpose of this Article is to argue that the displacement of the older narrative favoring government regulation of pornography was partly because of certain ideas that circulate freely today, but which can be shown to be false. Most of these ideas have been circulating for several decades and have contributed to the dominant contemporary narrative. Yet because the ideas are demonstrably false, they should be regarded as constitutional myths. As myths, they may contain some elements of truth, in the way that some religious or quasi-religious myths (for example, classical Greek mythology) may contain metaphysical truths about humanity or human nature. But in the ideas being considered here, there is more that is false than is true.⁷⁹

Most of the myths identified here can be traced to *Miller* and its companion case *Paris Adult Theatre*. Among other reasons, *Miller* is noteworthy because the two competing narratives regarding pornography were so prominent in the case.⁸⁰ One could even say that *Miller* more vividly represents the clash between the two narratives than does any other Supreme Court case involving the law of obscenity.⁸¹

At the same time, there is something genuinely new in the case. In his dissent in *Paris Adult Theatre*, Justice William J. Brennan was simultaneously defending the newer narrative about pornography and introducing a serious error into public and scholarly discourse on that subject.⁸² That error came about

78. See GURSTEIN, *supra* note 42 (especially chapters 4, 6, 7, and 9).

79. See *infra* Part V.

80. See *Miller v. California*, 413 U.S. 15, 15 (1973).

81. In other words, this Article argues that *Miller* is the most important obscenity case decided by the Supreme Court in the twentieth century because of the stark contrast between the majority opinion and Justice Brennan’s dissent and because of the influence of the latter.

82. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73–113 (1973) (Brennan, J., dissenting).

when Justice Brennan proposed a new principle for the regulation of pornography.⁸³ This was not the first time that a Supreme Court Justice or a majority of the Court contributed to widespread confusion on an important constitutional issue,⁸⁴ and it is regrettable that others have followed Justice Brennan's error. For these reasons, his dissent in *Miller* deserves a careful review and assessment.

When read today, the Court's opinion in *Miller* might seem "conservative," which is how Chief Justice Warren Burger wanted it to be read. Writing for the majority, Chief Justice Burger essentially declared that the recent impasse in the Supreme Court over pornography had been resolved.⁸⁵ He reminded his readers that obscene materials are constitutionally unprotected—as the Court had again noted in *Roth v. United States*⁸⁶—and then asserted that the ruling in *Miller* gave the states a framework to preserve norms of public decency while also honoring the requirements of the First Amendment.⁸⁷

To Chief Justice Burger, the achievement of *Miller* was its clarity on the constitutional requirements for an obscenity conviction.⁸⁸ He envisioned regular prosecutions, subject to the three-part test put forth in the case, discussed above.⁸⁹

Chief Justice Burger may have been correct in supposing that the three-part test in *Miller* was a practicable standard, but the new standard embodied in the test was more permissive than he realized. The "community standards" provision may have accommodated regional sensibilities and principles of federalism, but taken as a whole, the test also accommodated a lot of pornography.

83. See *id.* at 106–07 (Brennan, J., dissenting).

84. Don Fehrenbacher regards the *Dred Scott* decision of 1857 as the culmination of the "pro-slavery gloss" that the Constitution had acquired in the preceding decades, and the Court's decision must be seen as adding to public confusion about a host of matters. See *supra* note 48 and accompanying text.

85. See *Miller*, 413 U.S. at 27–28.

86. 354 U.S. 476 (1957). In *Roth*, the Court sustained the conviction of Samuel Roth for violating a federal statute that forbade sending "obscene, lewd, lascivious, or filthy" advertisements through the mail. *Id.* at 491–94.

87. See *Miller*, 413 U.S. at 27.

88. See *id.* at 24.

89. See *id.*; *supra* notes 13–14 and accompanying text.

Much more problematic than the three-part test was the dissent written by Justice Brennan in *Paris Adult Theatre*⁹⁰ and referenced in his dissent in *Miller*.⁹¹ In a surprising development, Justice Brennan expressed his skepticism towards all attempts to regulate pornography because of the ambiguity in every definition of “obscene.”⁹² This skepticism, he conceded, broke with his earlier thinking about obscenity.⁹³ Justice Brennan wrote the majority opinion in *Roth*, where he admitted that the language in obscenity statutes was sometimes “not precise.”⁹⁴ But he also argued in *Roth* that this lack of precision does not typically violate due process requirements, because the Constitution does not expect impossible specificity.⁹⁵

Sixteen years later, however, in his dissents in *Miller* and *Paris Adult Theatre*, Brennan questioned whether any definition of “obscenity” would be sufficiently precise to avoid the “erosion” of protected speech and to give fair notice to people who might be violating the law.⁹⁶ Because statutory vagueness might increase the number of “marginal” cases presenting difficult questions, he worried that obscenity prosecutions could unduly strain the judicial system.⁹⁷

There was one twist. Justice Brennan conceded that the existence of two social groups—children and “unconsenting” adults—provided grounds for regulating pornography.⁹⁸ In his judgment, shielding these two groups from pornography provided the *only* basis for regulation.

This created a conundrum for Justice Brennan. Skeptical of all definitions of obscenity, he feared that they would always be somewhat imprecise and therefore likely to “chill” constitutionally protected expression.⁹⁹ Yet he knew that adults unin-

90. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73–113 (1973) (Brennan, J., dissenting).

91. See *Miller*, 413 U.S. at 47–48 (Brennan, J., dissenting).

92. See *Paris Adult Theatre*, 413 U.S. at 84.

93. See *id.*

94. See *Roth v. United States*, 354 U.S. 476, 491 (1957).

95. See *id.*

96. See *Paris Adult Theatre*, 413 U.S. at 85–87, 103.

97. See *id.* at 91, 93.

98. See *id.* at 106.

99. See *id.* at 93.

terested in pornography should not be exposed to it and that children deserved protection from it.

In this face-off between moral skepticism and a commonsensical moral realism, Justice Brennan's skepticism prevailed. Because of his desire to avoid "chilling" any expression, he failed to describe or specify which kinds of materials are inappropriate for children and consenting adults. But any effective regulation of pornography requires some specification in the form of legal definitions.¹⁰⁰

Even if few persons have noticed, Justice Brennan was leaving a large matter of public policy to chance. He apparently believed that those producing and distributing pornography would exercise some self-restraint towards children and respect the wishes of those adults who did not want sexual materials foisted upon them. If so, he was badly mistaken, with much litigation since *Miller* providing the evidence. In their relentless search for new customers, pornographers now litigate to assert their rights and commercial interests, even if this means flouting basic interests of children and disparaging the interests of adults who do not under any circumstances want to see pornography.¹⁰¹

When *Miller* was decided, effectively regulating pornography was not easy, but it was a less daunting prospect than it is today. In the era before the Internet, smart phones, and computing tablets, "portable" pornography consisted of books, magazines, and eight-millimeter films. In that context, Justice Brennan could assume that children and adults would not ordinarily encounter pornography unless they went looking for it. It was not an unreasonable assumption at the time, but it led to serious problems when pornography became highly portable and the Court abandoned the regulatory framework described above.¹⁰²

100. This was acknowledged by Chief Justice Burger in his majority opinion in *Miller*. See *Miller v. California*, 413 U.S. 15, 27–28 (1973).

101. See, for example, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803 (2000), discussed below.

102. In taking account of the rise of portable pornography, one must regard the Internet as the great facilitator of this process, at least initially, as acknowledged by many of the contributors to *THE SOCIAL COSTS OF PORNOGRAPHY*, *supra* note 46. See also PAMELA PAUL, *PORNIFIED: HOW PORNOGRAPHY IS DAMAGING OUR LIVES, OUR RELATIONSHIPS, AND OUR FAMILIES* (2005).

Brennan's failure to offer concrete protections for children and those "unconsenting" adults set a bad example for judges and scholars. Even though he dissented, his opinions were offered as broad statements of principle, and others have accepted them as sound principles, without noticing the serious flaw in his analysis.¹⁰³

After *Miller*, the judiciary elevated the legal interests of adults intent on buying, producing, or distributing pornography to an unprecedented level. The Supreme Court led the way by failing to honor the regulatory framework it had adumbrated in the period from 1968 to 1978 when cases such as *Ginsberg*, *Miller*, and *Pacifica* were decided. Scarcely anything in the history of obscenity jurisprudence could have prepared the American people for the judicial solicitude that would now be shown to those involved in the pornography business. A set of constitutional presumptions was created in favor of this industry, a spectacular reversal of the presumptions that operated in Anglo-American law for centuries.

This new solicitude towards pornographers needed a justification. But what was offered was a body of myth, not fact, with nearly all of the myths relating to matters that were either explicitly or implicitly raised in Justice Brennan's dissents in *Miller* and *Paris Adult Theatre*.

V. A COMPENDIUM OF MYTHS

Like a bad legal precedent, constitutional myths can be passed on indefinitely. For that reason, persons who lament any of the effects of pornography on American society and culture should take note of these myths. Even those who might be averse to using the law to regulate pornography—such as author Pamela Paul, who proposes that we censure, but not censor¹⁰⁴—need to recognize how crucial this mythology is to understanding the status quo. To confront the myths is to discover much about the *status quo ante* in both law and society. It also allows critics of the Supreme Court's obscenity jurispru-

103. See, e.g., DWORKIN, *supra* note 40, at 205, 207.

104. See PAUL, *supra* note 102, at 255–56.

dence to imagine alternative futures besides those that now seem foreordained.¹⁰⁵

A. *Myth #1: There Is an Easy Solution to the Problem of Sparing Minors and Unconsenting Adults Exposure to Pornography*

In his dissent in *Paris Adult Theatre*, Justice Brennan omitted questions regarding juveniles and unwilling adults from his analysis. Because the obscenity statutes at issue did not reflect a specific and limited concern for these two groups, Justice Brennan did not consider them in framing his dissent.¹⁰⁶ Implying that there is a straightforward solution to protecting juveniles and unwilling adults, he failed to give any guidance on how to craft such a solution without defining “obscenity” and in a way that would be consistent with his skepticism.

Dissenting separately in *Paris Adult Theatre*, Justice William Douglas took a similar line.¹⁰⁷ What Justice Brennan implied, Justice Douglas made explicit. How do we protect juveniles and unwilling adults from pornography? According to Justice Douglas, unwilling adults should just look away: They should just say “No.”¹⁰⁸

His strategy for protecting minors was equally simplistic.¹⁰⁹ If he were a parent, priest, or teacher, he would be “edging” the children under his care away from these materials.¹¹⁰ So Justice Douglas expected the adults in the lives of American children to protect them from pornography, but those adults cannot look to the law for help.

Four decades after *Miller*, the consequences of this approach are plain. Pornography increasingly invades public space, and it is routinely found in private spaces occupied by children and

105. It would be an error to suppose that each of these myths, considered individually, has been equally consequential. The order in which these myths is presented below is not meant to suggest anything about which are the most and least consequential.

106. See *Miller v. California*, 413 U.S. 15, 47 (1973) (Brennan, J., dissenting); *Paris Adult Theatre*, 413 U.S. at 73–114 (Brennan, J., dissenting).

107. See *Paris Adult Theatre*, 413 U.S. at 73 (1973) (Douglas, J., dissenting).

108. See *id.* (“[O]ur society—unlike most in the world—presupposes that freedom and liberty are in a frame of reference that makes the individual, not the government, the keeper of his tastes, beliefs, and ideas.”).

109. See *id.* at 72.

110. See *id.*

unconsenting adults.¹¹¹ Pornography's pervasiveness in these spaces, according to the regulatory framework of *Ginsberg*, *Miller*, and *Pacifica*, was not supposed to happen. It is therefore regrettable that leading scholars such as the late Ronald Dworkin of New York University and Northwestern's Andrew Koppelman were endorsing Justice Brennan's simplistic notions about children and the regulation of pornography long after *Miller* and *Paris Adult Theatre* were decided.¹¹²

To any fair-minded observer, the need for more robust regulatory principles should be apparent. American society needs legal definitions that indicate which sexually oriented materials violate the interests of unconsenting adults and are inappropriate or harmful for minors, especially young children. Following its ruling in *Cohen v. California*¹¹³ and the dissenting opinion of Justice Douglas in *Miller*,¹¹⁴ the Supreme Court evidently still believes that unconsenting adults are always supposed to "avert their eyes" when they encounter sexual imagery that offends them.¹¹⁵ But the absence of legal definitions that will protect the interests of minors and unconsenting adults means that American society leaves itself open to the possibility of child pornography or obscene materials appearing in public space.

This is not hyperbole. Consider two long-running controversies from the world of advertising. In the 1980s, many televi-

111. See *infra* note 163 and accompanying text, for a discussion of hard-core pornography on cable television channels, sometimes seen by children and unconsenting adults even when the adults in a household have not subscribed to the channels.

112. See DWORKIN, *supra* note 104; Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635 (2005). The main problem with the analyses of both Professor Dworkin and Professor Koppelman is that each fails to consider the need for legal definitions to promote the social interests in sparing minors and unconsenting adults exposure to certain kinds of pornography. It is significant that Koppelman, writing from a liberal perspective, concedes that pornography can cause moral harm. In a more recent account, Geoffrey R. Stone discusses Justice Brennan's dissenting opinion, but does not say whether it is a legitimate legislative goal to spare children and unconsenting adults exposure to pornography. See GEOFFREY R. STONE, *SEX AND THE CONSTITUTION* 292–93 (2017).

113. 403 U.S. 15 (1971) (striking down a "disturbing the peace" statute, as applied to a man in a courthouse wearing a jacket with the words "F[**]k the Draft" on the back).

114. See *Miller v. California*, 413 U.S. 15, 43 (1973) (Douglas, J., dissenting).

115. See, e.g., *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000).

sion stations banned Calvin Klein commercials featuring fifteen-year-old Brooke Shields, seductively purring, "You know what comes between me and my Calvins? Nothing."¹¹⁶ In 1995, Calvin Klein pushed the boundaries further, launching an infamous advertising campaign on billboards and city buses, which featured photos of teenage models in "tasteless" and "suggestive"¹¹⁷ poses. Although it was later learned that the models were eighteen years old, they appeared to be much younger. The males wore denim shorts that showed their underwear, while others sat with their legs splayed in "tacky crotch shots,"¹¹⁸ wearing only briefs and jean jackets.

Were the ads pornographic? Some quickly called them "kiddie porn."¹¹⁹ Journalist John Leo described them as "opening scenes to a porn movie."¹²⁰ He castigated corporations and ad agencies for "financing our social meltdown."¹²¹ Columnist John Greenfield found the ads "much worse" than pornography because they amounted to "a deliberate attempt to invoke the cheap thrill of pornography while preserving 'deniability' to the company,"¹²² while further observing that the ads left one "feeling as if he had peeped through a keyhole into a pedophile's fantasy world."¹²³ The Justice Department launched an investigation into whether the campaign violated child pornography laws.¹²⁴ Many Americans considered the ads obscene. Faced with this public backlash, Calvin Klein ended the campaign and issued a statement in the *New York Times*.¹²⁵

116. Stuart Elliott, *Calvin Klein To Withdraw Child Jean Ads*, N.Y. TIMES (Aug. 28, 1995), <http://www.nytimes.com/1995/08/28/business/the-media-business-advertising-calvin-klein-to-withdraw-child-jean-ads.html> [<https://perma.cc/Z8N6-Y5DL>].

117. *See id.*

118. *See* John Leo, *Subversive Ads Contribute To Our Social Breakdown*, U.S. NEWS & WORLD REP. (Aug. 22, 1995) <http://community.seattletimes.nwsourc.com/archive/?date=19950822&slug=2137569> [<https://perma.cc/GK5U-WGTJ>].

119. Elliott, *supra* note 116.

120. Leo, *supra* note 118.

121. *Id.*

122. John Greenfield, *Calvin's kiddie con*, UKIAH DAILY J., Sept. 5, 1995, at 6.

123. *Id.*

124. *See U.S. Starts Inquiry On Calvin Klein Ads*, N.Y. TIMES (Sept. 10, 1995), <http://www.nytimes.com/1995/09/10/us/us-starts-inquiry-on-calvin-klein-ads.html> [<https://perma.cc/KZ77-4XEU>].

125. *See* Elliott, *supra* note 116.

Twenty years after this controversy, would the American public respond so forcefully to sexually oriented materials involving minors? It's difficult to imagine because both minors and adults are now exposed to so much sexual imagery in advertising and popular entertainment. Other companies surely learned a lesson or two from the backlash against Calvin Klein, and a few continue to test the social boundaries, hoping to stand out from their competitors. Such is the story of Abercrombie & Fitch.

Under controversial CEO Mike Jeffries' leadership, Abercrombie adopted the strategy of hyper-sexualizing fashion.¹²⁶ The goal? To "sizzle with sex"¹²⁷: to sell an experience, not merely jeans and T-shirts. And Abercrombie does just that, from the moment a customer is enticed into a store by the brand's signature Fierce cologne¹²⁸ and dance music soundtrack,¹²⁹ welcomed by "muscled young men standing guard at the front entrance,"¹³⁰ and entranced with black-and-white photos of scantily-clad models covering the walls and shopping bags. As the *New York Times* noted at the height of Abercrombie's sexualized marketing, "Never has a store that sells bluejeans and T-shirts more closely resembled a hookup joint."¹³¹

And as much as its stores are racy, Abercrombie's publications have been even more so. Shortly after the Calvin Klein advertising scandal, Abercrombie welcomed controversy with its *A&F Quarterly*, a magazine sold as a main source of adver-

126. See Robert Berner, *Flip-Flips, Torn Jeans – And Control*, BLOOMBERG BUSINESSWEEK (May 30, 2005), <http://www.bloomberg.com/bw/stories/2005-05-29/flip-flops-torn-jeans-and-control> [<https://perma.cc/BZE7-6MK6>].

127. *Id.*

128. See Ashley Lutz, *Abercrombie Employees Have to Spritz Clothes With Cologne Every Hour*, BUS. INSIDER (May 17, 2013), <http://www.businessinsider.com/abercrombie-employees-spritz-cologne-2013-5> [<https://perma.cc/ZDD8-LNAD>].

129. See Susan Berfield & Lindsey Rupp, *The Aging of Abercrombie & Fitch: Behind the decline of Abercrombie & Fitch and the fall of its mastermind, Michael Jeffries*, BLOOMBERG BUSINESSWEEK (Jan. 22, 2015), <http://www.bloomberg.com/news/features/2015-01-22/the-aging-of-abercrombie-fitch-i58ltcqx> [<https://perma.cc/F6JK-SBA9>].

130. Alex Kuczynski, *Browsing Out Loud*, N.Y. TIMES (Dec. 8, 2005), <http://www.nytimes.com/2005/12/08/fashion/thursdaystyles/browsing-out-loud.html> [<https://perma.cc/64N9-JHKX>].

131. *Id.*

tising from 1997 to 2003 (with a brief revival thereafter). Sold shrink-wrapped in plastic and complete with warning label,¹³² *A&F Quarterly* was accused of “pedaling soft pornography to children.”¹³³ Photographs of nearly-naked models¹³⁴ were paired with graphic articles on sex and drinking.¹³⁵ The controversy peaked with the magazine’s Christmas Field Guide. The issue “feature[ed] naked or nearly naked young models in outdoor settings and offer[ed] advice on group masturbation, oral sex and orgies.”¹³⁶ One article asked, “Sex, as we know, can involve one or two, but what about even more?”¹³⁷ In the outcry following the release of the Christmas Field Guide, Abercrombie announced that it would no longer regularly publish *A&F*

132. See Cara DiPasquale, ‘Naughty and nice’: Abercrombie defends its ‘magalog,’ says it plans another issue, CHI. TRIB. (Dec. 3, 2003), http://articles.chicagotribune.com/2003-12-03/news/0312040023_1_fitch-store-hampton-carney-candace-corlett [<https://perma.cc/X5WF-GG5F>].

133. Ian Herbert & John Walsh, *Undressed for success: the store that discovered sex*, INDEPENDENT (Mar. 23, 2007), <http://www.independent.co.uk/news/uk/this-britain/undressed-for-success-the-store-that-discovered-sex-5332510.html> [<https://perma.cc/NY6L-HG3J>].

134. See David Carr & Tracie Rozhon, *Abercrombie & Fitch to End its Racy Magazine*, N.Y. TIMES (Dec. 10, 2003), <http://www.nytimes.com/2003/12/10/business/the-media-business-advertising-abcrombie-fitch-to-end-its-racy-magazine.html> [<https://perma.cc/D4ZV-TM55>] (“The magazine, which was produced in part by the fashion photographer Bruce Weber and the fashion advertising executive Sam Shahid generally used little in the way of clothing to pitch the apparel line. Rather, it depended on images of languid, barely clothed young models to portray the retailer as cutting edge and countercultural.”); see also DiPasquale, *supra* note 132 (“The publication’s nudity and editorial content have caused public outcry before, primarily because of page after page of topless women and bare-bottomed men. This year’s 280-page Christmas Field Guide features naked or nearly naked young models in outdoor settings . . .”).

135. See, e.g., Margaret Webb Pressler, *Basking in the Cross-Fire*, WASH. POST (July 30, 1998), <http://www.washingtonpost.com/archive/business/1998/07/30/basking-in-the-cross-fire/e5036af0-1bf1-4187-92aa-e65383b287f8/> [<https://perma.cc/TH5R-7PRP>] (describing the back-to-school issue of *A&F Quarterly*: “Drinking, sex, dragging—the message is, college has it all. The magazine includes a feature called ‘Drinking 101,’ with a pull-out game board and recipes for hard-liquor concoctions such as ‘Brain Hemorrhage’ and ‘Foreplay.’ The folks at Abercrombie offer helpful hints for ‘dorm room seduction’ such as ‘Briefs conceal your excitement better than boxers’ and, ‘Sex can work in a single bed. Just be creative.’ Images of fun include a centerfold of men streaking and women stuffed in two cars, apparently ready to race.”).

136. DiPasquale, *supra* note 133.

137. *Id.*

Quarterly.¹³⁸ Now, post-*A&F Quarterly* and decades of hypersexualized marketing, Abercrombie struggles to reinvent itself.¹³⁹ Only the coming years will demonstrate just how far the next Abercrombie will push social boundaries.

One need not look to the future, however, to see Justice Brennan's error regarding pornography. The evidence is overwhelming: without a regulatory framework and legal definitions, there is no reliable way to secure the legal interests of minors and unconsenting adults, especially when it comes to pornography in public space.

B. *Myth #2: The Framers Themselves Opposed All Restrictions on Freedom of Expression, and This Is What the First Amendment Requires Today, Namely, No Restrictions on Freedom of Speech or the Press*

One way to go beyond Justice Brennan's dissents in *Miller* and *Paris Adult Theatre* is to oppose *all* regulation of speech and press freedoms. Proponents of this view might even link it to the political philosophy of the Founding era and argue that the Framers themselves were of the same mindset. Although not patently absurd, this view is untenable.

Consider, for example, the free-speech "absolutism" of Justice Hugo Black, an inspiration to many libertarians and ACLU activists and a doctrine that predates the shift in Justice Brennan's thinking in *Miller* and *Paris Adult Theatre*. In several cases, Justice Black wrote that any attempt to regulate the written or spoken word was unconstitutional.¹⁴⁰ So he refused to spend time watching pornography with the other Justices, believing

138. See David Carr & Tracie Rozhon, *supra* note 134.

139. Interestingly, as a result, Abercrombie is in the midst of attempting a brand makeover without the "beefcake," in the wake of declining sales, Mike Jeffries' resignation, and various discrimination lawsuits. See Vanessa Friedman, *The Abercrombie & Fitch Makeover: A Review*, N.Y. TIMES (Apr. 27, 2015), <http://www.nytimes.com/2015/04/28/fashion/abercrombie-and-fitch-has-a-makeover.html> [<https://perma.cc/XB5L-6E3D>].

140. See *Miller v. California*, 413 U.S. 15, 28 (1973) (listing cases with dissenting and concurring opinions by Justice Black). See also HUGO BLACK, A CONSTITUTIONAL FAITH 45 (1968). Justice Black's views on the Free Speech Clause evolved, according to his obituary in the New York Times. See *Justice Black Dies at 85; Served on Court 34 Years*, N.Y. TIMES (Sept. 25, 1971), <http://www.nytimes.com/learning/general/onthisday/bday/0227.html> [<https://perma.cc/539Z-6YCS>].

that it always receives the protection of the First Amendment.¹⁴¹ And although the Amendment speaks only of “Congress” (and not state governments), Justice Black maintained that the Fourteenth Amendment made the provisions in the Bill of Rights binding on the States, a view later accepted by the Supreme Court.¹⁴²

Whatever the virtues of a simple principle, Justice Black’s “absolutism” went too far. Ronald Dworkin also flirted with this extreme view and once asserted: “[W]e are a liberal society committed to individual moral responsibility, and *any* censoring on grounds of content is inconsistent with that commitment.”¹⁴³

The problem with this view can be seen by considering other areas of the law. To accept this view would mean that legislators cannot criminalize libel, “fighting words,” “true threats,” or outright lies in the realm of commercial speech. These categories of speech deservedly lack constitutional protection. To borrow a phrase from Supreme Court Justice Robert H. Jackson, it is difficult to imagine a system of “ordered liberty” in the United States if communications of these kinds lie beyond prosecution and punishment, because they are invitations to social chaos.¹⁴⁴

Furthermore, to criminalize these categories of speech is wholly consistent with the Framers’ understanding of the freedom of speech and of the press. To the Framers, these freedoms meant “no prior restraint,” meaning that the government could not suppress a speech prior to its delivery or a text prior to its

141. See Letter from Justice Hugo Black to Justice John Marshall Harlan (Dec. 20, 1969) (on file with the Library of Congress, Justice William J. Brennan, Jr. Papers).

142. Among other cases, see Justice Black’s dissenting opinion in *Adamson v. California*, 332 U.S. 46, 68–123 (1947) (Black, J., dissenting) and his concurring opinion in *Duncan v. Louisiana*, 391 U.S. 145, 162–71 (1968) (Black, J., concurring).

143. DWORKIN, *supra* note 104, at 205. Notice that this statement seems inconsistent with Dworkin’s endorsement of Justice Brennan’s view on the legitimate social interests of minors and unconsenting adults. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73–113 (1973) (Brennan, J., dissenting).

144. On libel and group libel, see, respectively, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and *Beauharnais v. Illinois*, 343 U.S. 250 (1952); on false commercial speech, see *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136 (1994); on “true threats” and “fighting words,” respectively, see *Virginia v. Black*, 538 U.S. 343 (2003) and *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

publication or distribution.¹⁴⁵ But once something was spoken or printed, the author or speaker was accountable for his words and could be prosecuted for jeopardizing vital interests of society, as suggested by the examples in the previous paragraph. This was the common-law understanding of freedom of speech and the press, and the Framers collectively resisted James Madison's attempt to put a more libertarian account of those freedoms into the First Amendment.¹⁴⁶

Regarding obscenity, as the Court noted in *Roth*, the Anglo-American legal tradition has for centuries designated the production and distribution of certain materials dealing with sexual themes as unlawful.¹⁴⁷ As a category of unprotected expression, obscenity might be distinguished from libelous utterances, fighting words, and some forms of commercial speech because the social interests at stake in prohibiting obscenity and regulating indecency may lack the immediacy of the other categories. The social interests might be harder for some persons to recognize—but they are not obscure if the interests of minors and unconsenting adults are kept in mind.¹⁴⁸

In the nineteenth century, the legal standards for obscenity prosecutions acquired greater specificity on both sides of the Atlantic. Both Parliament and the legislatures of different

145. See DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS 2–3* (1997); see also JAMES R. STONER, JR., *COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM* 30–45 (2003).

146. See Letter from James Madison to Edward Everett (Aug. 28, 1830), in 9 *THE WRITINGS OF JAMES MADISON* 383 (Gaillard Hunt ed., 1900). Regarding freedom of speech and the press, an originalist would say that the existence of categories of “unprotected expression” shows that a constitutional provision without any apparent ambiguity (“Congress shall make no law . . .”) can and does have layers of meaning beneath the surface. For a twentieth-century case that reflects continued adherence to the common-law understanding of freedom of the press, see *Gitlow v. New York*, 268 U.S. 652 (1925), later overruled in *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

147. See *Roth v. United States*, 354 U.S. 476, 481–85 (1957) (“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 guaranties But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgement that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956.”).

148. See *supra* Parts II and IV.A.

American states wrote statutes to replace, modify, or amplify British common-law principles.¹⁴⁹ Thus, even if the obscenity standard has changed over time, we also see continuity and consistency inasmuch as obscene materials remain unprotected by the First Amendment.

C. *Myth #3: Since Its Rulings in Ginsberg, Miller, and Pacifica, the Supreme Court Continues to Recognize the “Compelling” Public Interest in the Emotional and Psychological Well-Being of Youths*

Because free-speech absolutism is an extreme view, persons who favor a more conventionally liberal constitutional standard for obscenity prosecutions are likely to shun Justice Black’s view. These persons might also say that the Supreme Court has done a satisfactory job of protecting children from pornography, pointing to cases such as *Ginsberg v. New York* as evidence.

As noted above, in *Ginsberg* the Court upheld a New York statute forbidding the sale of pornographic magazines to minors. With Justice Brennan writing for the majority, the Court ruled that the State of New York was permitted to employ “variable” concepts of obscenity—meaning different legal definitions of obscenity for minors and adults.¹⁵⁰ *Ginsberg* affirmed an important principle, but the practical significance of the case today is almost nil because of the surfeit of free pornography on the Internet. The practical import of *Ginsberg* has also been weakened by advertising campaigns like those launched by Calvin Klein and Abercrombie & Fitch and the deluge of soft pornography in popular entertainment.

Some might defend the Supreme Court by citing the “indecent” doctrine and a case such as *Pacifica*.¹⁵¹ Recall that in accepting the legitimacy of that doctrine, the Court ruled that the FCC could have subjected the Pacifica Foundation to sanctions because of a “patently offensive” radio broadcast in the middle of the day (when children were presumably part of the audi-

149. See the state cases cited in *Mutual Film Corp. v. Indus. Comm’n of Ohio*, 236 U.S. 230, 244 (1915).

150. See *Ginsberg v. New York*, 390 U.S. 629, 638 (1968).

151. See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

ence), involving words referring to excretory or sexual activities or sexual organs.¹⁵²

Today, however, the indecency doctrine fights for its life, and the Court has jettisoned the regulatory framework based on *Ginsberg*, *Miller*, and *Pacifica*. During the same time, the concept of “variable obscenity” has disappeared from constitutional discourse. These are remarkable developments, especially when one considers a case like *United States v. Playboy Entertainment Group, Inc.*¹⁵³ (discussed below).

When the Court decided *Pacifica*, Justice Brennan dissented. His dissent emphasized that the broadcasting of George Carlin’s “filthy words monologue” was not “an erotic appeal to the prurient interests of children.”¹⁵⁴ Justice Brennan’s dissent in *Pacifica* also curiously suggested that *Ginsberg* was somehow undermined by the Court’s ruling in *Miller*.¹⁵⁵

Justice Brennan’s ambivalence became the Court’s ambivalence, which soon gave way to institutional indifference. In the 1980s and 1990s, the Supreme Court considered various regulations on cable television and the Internet.¹⁵⁶ One initial worry expressed by the parties to the relevant litigation, and an impetus for regulation, was that these media would give minors easy access to “hard-core” pornography at home. That worry persists because of the massive growth of Internet pornography. Furthermore, as portable electronic devices have become both smaller and more popular, pornography appears in public space much more frequently, implicating interests of both minors and unconsenting adults.

In *Pacifica*, the indecency regulations in question were justified in part because of the special characteristics of “on-the-air broadcasting.”¹⁵⁷ More specifically, because the broadcast and telecommunications systems are scarce public resources, the FCC may regulate them, with considerations of “public inter-

152. *See id.* at 730, 735, 738, 743.

153. 529 U.S. 803, 809, 811 (2000).

154. *Id.* at 767 (Brennan, J., dissenting).

155. *See id.*

156. *See Reno v. ACLU*, 521 U.S. 844 (1997); *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994); *Wilkinson v. Jones*, 480 U.S. 926 (1987), *aff’g* 800 F.2d 989 (10th Cir. 1986).

157. *See* 438 U.S. at 748–49.

est, convenience, and necessity.”¹⁵⁸ Thus, network television must include a “family hour,” and radio and television are not supposed to broadcast indecent and obscene language.¹⁵⁹

The Court, however, has struck down similar regulations for both cable television and the Internet. In *Wilkinson v. Jones*,¹⁶⁰ it affirmed, without an opinion, a lower federal court’s invalidation of a Utah statute banning indecent sexual themes and images on cable telecasts.¹⁶¹ In *Turner Broadcasting System v. FCC*¹⁶² the Court rejected the FCC’s contention that “regulation of cable television should be analyzed under the same First Amendment standard that applies to the regulation of broadcast television.”¹⁶³ Because cable television is not a scarce public resource (like the broadcast system), and because an adult in a household must voluntarily subscribe to cable television (and certain “premium” channels), some would say that the only constitutional question is whether any cable programming violates the obscenity standard put forth in *Miller*. This position assumes that: (a) the parent(s) or guardian(s) in a household legally has or have the discretion to determine which cable television programs might be inappropriate for any minors living in that household; (b) the only cable television programs that will be seen in one’s home are programs that have actually been ordered; and (c) programs with objectionable or potentially objectionable sexual content will not appear in public space. The first assumption seems to recognize that as a practical matter a state can interfere with the child rearing that takes place at home only in extreme situations (for example, when there is evidence of or a strong suspicion of child abuse). But the second and third assumptions surely need to be questioned in view of both failures and innovations in technology.

Working with a similar or the same set of assumptions, the Court in *Reno v. ACLU*¹⁶⁴ invalidated the federal Communica-

158. *See id.* at 748.

159. *See FCC v. Fox Television Stations, Inc.*, 537 U.S. 239 (2012); *infra* note 218 and accompanying text.

160. 480 U.S. 926 (1987), *aff’d* 800 F.2d 989 (10th Cir. 1986).

161. *Jones v. Wilkinson*, 800 F.2d 989, 990–91 (10th Cir. 1986).

162. 512 U.S. 622 (1994).

163. *Id.* at 637.

164. 521 U.S. 844 (1997).

tions Decency Act of 1996, which made it a crime to knowingly send obscene or indecent messages to a minor over the Internet.¹⁶⁵ For the purposes of the Act, “indecent” had the same meaning as it did in *Pacifica*.¹⁶⁶

A thorough evaluation of all of the relevant cases involving regulations for cable television and the Internet is beyond the scope of this Article. Since 1978 when *Pacifica* was decided, the most important regulations have been struck down, including two reasonable compromises discussed below. Those who oppose such regulations have seen the Court’s decisions as major victories for “free speech.”¹⁶⁷

Yet a little candor is in order. In numerous cases since the 1960s, the Court has referred to the protection of the emotional and psychological well-being of children as a “compelling” public interest.¹⁶⁸ But when that interest is pitted against the free-speech rights of adults who want to see, show, or distribute pornography, the Court nearly always sides with the pornographers and those who patronize them. With few rulings to match its lofty rhetoric, the Court’s pronouncements on the importance of shielding minors from pornography should be seen as essentially meaningless platitudes. They are a new form of boilerplate in American law.

D. *Myth #4: Regulatory “Burdens” on the Exercise of the Freedom of Speech and of the Press Are Constitutionally Indistinguishable from Flat Prohibitions on Speech and Press*

In surprising and discouraging ways, some jurists see modest burdens on the exercise of certain freedom as indistinguish-

165. Communications Decency Act of 1996, Pub. L. No. 104-104, tit. V, 110 Stat. 133, *invalidated by* *Reno v. ACLU*, 521 U.S. 844 (1997).

166. *See Reno*, 521 U.S. at 865–66.

167. *See generally* Robert Corn-Revere, *Can Broadcast Indecency Regulations Be Extended to Cable Television and Satellite Radio?*, 30 S. ILL. U. L.J. 243 (2006). Today, some civil libertarians might favor a broader reading of *Stanley v. Georgia*, 394 U.S. 557 (1969), and argue that no regulations on cable television program are valid if these programs are watched in the privacy of one’s home. For a counterargument, *see infra* Part VI.

168. *See, e.g., Ashcroft v. ACLU*, 542 U.S. 656, 675 (2004) (Stevens, J., concurring); *Ashcroft v. Free Speech Coal.*, 534 U.S. 234, 263 (2002) (O’Connor, J., concurring); *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 809, 811 (2000); *Reno*, 521 U.S. at 875; *Ginsberg v. New York*, 390 U.S. 629 (1968); *see also Denver Area Educ. Television Consortium v. FCC*, 518 U.S. 727, 755 (1996).

able from outright bans. Justice Anthony Kennedy expressed this view in his majority opinion in *Playboy Entertainment*, where the Court considered the constitutionality of Section 505 of the Telecommunications Act of 1996. One purpose of the law was to prevent children from hearing sexually explicit sounds or seeing sexually explicit images because of signal bleed, which occurs when a cable subscriber can see or hear content on channels that he or she has not in fact ordered.¹⁶⁹

The law required cable programmers to limit programming on sexually explicit channels to the hours between 10 p.m. and 6 a.m., thereby creating a “safe harbor” period for unsupervised minors during the rest of the day.¹⁷⁰ Adults who wanted to view such programs during the day could record them at night and watch them later. Playboy Entertainment Group challenged the constitutionality of this provision, arguing that the burden it placed on the adult consumer amounted to a prohibition of speech.¹⁷¹ The Court agreed, with Justice Kennedy holding that the difference between burdens and bans “is but a matter of degree.”¹⁷²

The Court ruled similarly in *Ashcroft v. ACLU*,¹⁷³ when it considered the constitutionality of a key provision of the Child Online Protection Act. The statute imposed a fine and incarceration on people who, for commercial aims, knowingly posted sexually explicit material on the Internet that was “harmful to minors.”¹⁷⁴ As an affirmative defense, the Act allowed those posting such content to limit access to it by requiring the use of a credit card.¹⁷⁵ But the Court, in reviewing an injunction issued by the Third Circuit, declared that this requirement was too much of a burden on free speech.¹⁷⁶ A modest burden on

169. *Playboy Entm't*, 529 U.S. at 806. To judge from the FCC's website, signal bleed is still a problem for some Americans who subscribe to cable television. See *Consumer Guide: How to Prevent Viewing of Scrambled Cable TV Programs* (“Signal Bleed”), FCC (Nov. 7, 2015), <https://transition.fcc.gov/cgb/consumerfacts/objectionabletv.pdf> [<https://perma.cc/U6C9-6648>].

170. *Playboy Entm't*, 529 U.S. at 806–07.

171. *See id.* at 807.

172. *Id.* at 812.

173. 542 U.S. 656 (2004).

174. *Id.*

175. *Id.* at 662.

176. *Id.* at 660–61.

those seeking to access on-line pornography was once again treated as a flat prohibition. The Third Circuit later struck down the law and the Supreme Court declined to review the decision.¹⁷⁷

Equating such regulatory burdens with outright bans ignores both common sense and more established legal principles. Dissenting in *Playboy Entertainment*, Justice Stephen Breyer noted that the Court has often upheld laws that burden access to speech through geographical or temporal zoning and “time, place, or manner” regulations.¹⁷⁸

Such regulations are so familiar that many persons may be unaware of them. Towns and cities can require “adult” entertainment to be located away from schools, houses of worship, and historic districts.¹⁷⁹ Speech regulations may govern public and academic lectures, ensuring that a speaker will not be shouted down during a lecture and requiring questions and criticisms to be voiced in a designated slot.¹⁸⁰ Finally, free political speech is consistent with regulations that forbid sound-trucks from operating in the dead of night.¹⁸¹

Regulatory burdens, then, do not normally constitute bans when it comes to regulating pornography. For judges, lawyers, and Supreme Court justices to think otherwise is deeply regrettable.

Dissenting in both *Playboy Entertainment* and *Ashcroft*, Justice Breyer affirmed the value of the regulations in question. Their importance was underscored by noting the high percentage of American children growing up in single-parent households,

177. *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 555 U.S. 1137 (2009). In Spring 2016, former Prime Minister David Cameron’s government proposed legislation for the United Kingdom very similar to the Child Online Protection Act. See Burgess & Clark, *supra* note 67; Luscombe, *supra* note 45. For a fuller discussion of *Playboy Entertainment* and *Ashcroft v. ACLU*, see TUBBS, *supra* note 51, at 168–75.

178. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 845–47 (2000) (Breyer, J., dissenting).

179. See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

180. See *University of Wisconsin System Board of Regents’ 2015 Statement Reiterating the Board’s Commitment to Academic Freedom and Affirming its Commitment to Freedom of Expression*, PROFS (Dec. 11, 2015), <https://profs.wisc.edu/wp-content/uploads/2015/12/BoR-Academic-Freedom.pdf> [<https://perma.cc/3QYJ-9KZV>].

181. For a clear statement, see *Kovacs v. Cooper*, 336 U.S. 77 (1949).

leaving millions of teenagers and preteens at home after school without adult supervision.¹⁸² Justice Breyer's commendable realism cannot be found in the majority opinions in these two cases, each written by Justice Kennedy. The majority opinion in each case treated minors as essentially indistinguishable from adults, implicitly relying on a familiar rhetorical strategy in public debates about pornography, the contours of which are evident in the next myth below.

E. *Myth #5: Laws Establishing a Minimum Age to View Pornography Are Arbitrary and Indefensible*

Some scholars, judges, and activists object to laws that deny minors access to pornography. This is the view of ACLU attorney Marjorie Heins in *Not in Front of the Children*,¹⁸³ with some elements of her argument found in Supreme Court decisions such as *Reno v. ACLU* (discussed above)¹⁸⁴ and Justice Brennan's dissent in *Pacifica Foundation*.¹⁸⁵

Heins extrapolates from the Supreme Court's ruling in *Planned Parenthood of Central Missouri v. Danforth*,¹⁸⁶ where the Court extended abortion rights to minors without requiring parental consent. She argues that even if there are meaningful legal differences between minors and adults, "more thoughtful and finely calibrated judgments" about those differences are

182. *Playboy Entm't*, 529 U.S. at 842 (Breyer, J., dissenting).

183. See generally MARJORIE HEINS, *NOT IN FRONT OF THE CHILDREN: "INDECENCY," CENSORSHIP, AND THE INNOCENCE OF YOUTH* (2001).

184. See *Reno v. ACLU*, 521 U.S. 844 (1997). In overturning the federal Communications Decency Act of 1996, which made it a crime to knowingly send obscene or indecent messages to a minor over the Internet, the Court considered the situation of a seventeen-year-old minor, similar to the so-called "mature teenager" argument offered by Heins:

For the purposes of our decision, we need neither accept nor reject the Government's submission that the First Amendment does not forbid a blanket prohibition on all "indecent" and "patently offensive" messages communicated to a 17-year-old no matter how much value the message may contain and regardless of parental approval. It is at least clear that the strength of the Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute.

Id. at 878.

185. See *FCC v. Pacifica Found.*, 438 U.S. 726, 762-77 (Brennan, J., dissenting) (arguing that the law should not prohibit all minors from accessing obscene or offensive materials).

186. 428 U.S. 52 (1976).

warranted with respect to the First Amendment.¹⁸⁷ Regulations that do not consider “age- and maturity-based distinctions” overlook mature teenagers who have the intellectual and emotional maturity of adults and lump all minors together.¹⁸⁸ Because of this tendency, the law should not prohibit all minors from accessing pornography.¹⁸⁹

The “mature teenager” argument suffers from two glaring weaknesses. First, it leaves no room to criticize child pornography. If mature teens are indistinguishable from adults and should be allowed to view pornography, then they presumably should also be allowed to appear in it.¹⁹⁰ This conclusion is both unsettling and absurd, and it is telling that Heins does not specify an “absolute minimum” age for viewing pornography.

Second, the argument fails to appreciate how law ordinarily functions. As it classifies persons and conduct, the law creates legal categories and imposes uniform standards within a category. Setting a minimum level of maturity for persons to drive a car and linking that maturity level with a specified age is not unjust simply because a highly mature teen cannot apply for a driver’s license until reaching the designated age. The law creates general standards, not tailored exceptions.¹⁹¹ The same logic applies to laws that specify the ages at which younger persons may enlist in the military, consume alcohol, or bind themselves by contracts.

Would Heins argue that “mature teenagers” should be allowed to enlist in the military before the age of eighteen?

187. HEINS, *supra* note 183, at 259.

188. *See id.*

189. Key elements of Heins’ argument are found in Justice Brennan’s dissent in *Pacifica*. According to a study completed at the University of Bristol in the United Kingdom from 2013 to 2015, nearly forty percent of British boys aged fourteen to seventeen regularly watch Internet pornography. Luscombe, *supra* note 45. A study undertaken by a researcher at New York University revealed that nearly half of the 487 men surveyed were exposed to pornography as a preteen. *Id.*

190. *See Osborne v. Ohio*, 495 U.S. 103 (1990); *New York v. Ferber*, 458 U.S. 747 (1982).

191. *See Eisenstadt v. Baird*, 405 U.S. 438, 465–72 (1972) (Burger, C.J., dissenting).

Would she permit children to be soldiers?¹⁹² Both seem doubtful.

F. *Myth #6: The Legal Expectation of "Self-Censorship" Is Always Bad and an Unreasonable Burden on Citizens*

Contrary to what Justice Brennan suggested in his dissent in *Paris Adult Theatre*, a form of self-censorship was long considered an element of law-abiding citizenship. And it still is—in at least one other area of First Amendment law.

Recall that Justice Brennan worried about the “chilling effect” of all legal definitions of “obscenity” or the “obscene.”¹⁹³ He held that such definitions always contain some ambiguities, and those ambiguities made it difficult or impossible for persons exploring different aspects of human sexuality through pornography to know whether they were violating the relevant law(s).¹⁹⁴ On these grounds, he held that lawmakers should stop trying to find or formulate a satisfactory definition because their efforts will never succeed.¹⁹⁵ He also held that judges should regard such attempts as constitutionally illegitimate.¹⁹⁶

Brennan’s error here rests on an idiosyncratic and mistaken understanding of the way that the law of obscenity has operated in American history. In *United States v. Harmon*,¹⁹⁷ an important nineteenth-century case, a federal district court assessed the constitutionality of a law making it a crime to send obscene materials through the mail. The judge cautioned that it is a “radical misconception” to suppose that a person “may print and publish . . . any matter, whatever the substance or language, without accountability to law.”¹⁹⁸ He also insisted

192. For first-person accounts of life as a child soldier, see generally ISHMAEL BEAH, *A LONG WAY GONE: MEMOIRS OF A BOY SOLDIER* (2008) and ROMEO DALLAIRE, *THEY FIGHT LIKE SOLDIERS, THEY DIE LIKE CHILDREN* (2010).

193. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 84 (1973) (Brennan, J., dissenting).

194. *See id.*

195. *See id.*

196. *See id.* STONE, *supra* note 112, at 267, clearly accepts Brennan’s view that every attempt to define “obscene” or “obscenity” will be unsuccessful because of ambiguities.

197. 45 F. 414 (D. Kan. 1891).

198. *Id.* at 416.

that citizens must acknowledge legal boundaries, beyond which one “outrages the common sense of decency, or endangers the public safety.”¹⁹⁹ Crucially, it is up to men and women to know where those boundaries lie and respect them. And respecting the boundaries means staying some distance away from them.

The soundness of these principles can be seen by considering the constitutional standards relating to political speech, “fighting words,” and “true threats.” In a series of cases, the Supreme Court has acknowledged that there are and must be some limits to political speech. Those limits are reflected in *Brandenburg v. Ohio*,²⁰⁰ in which the Court ruled that political speech advocating “imminent lawless action” when there is a likelihood of such lawless action occurring is unprotected by the First Amendment.²⁰¹ The Court has also ruled that “fighting words” and “true threats” are unprotected by the Free Speech and Free Press Clauses.²⁰²

The Court’s acknowledgment of these necessary limits should provoke reflection on the operation of laws prohibiting “fighting words,” “true threats,” and certain kinds of political speech that include advocacy of violence. Someone whose speech might lead towards the advocacy of “imminent lawless action” may need to censor himself or herself and choose alternative words in view of the *Brandenburg* standard.²⁰³ Similar considerations might apply to hostile or aggressive language spoken against an individual or a group, especially if the words might be regarded by others as “fighting words” or a veritable threat against that individual or group.²⁰⁴

In these examples, the subjective intent of the speaker is not dispositive. Furthermore, the self-censorship that a speaker exercises may reflect an awareness of the need to stay away from fighting words or true threats—that is, to respect the statutory

199. *Id.*

200. 395 U.S. 444 (1969).

201. *See id.* at 447.

202. *See Virginia v. Black*, 538 U.S. 343, 359 (2003); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

203. *See Brandenburg*, 395 U.S. at 447.

204. *See Black*, 538 U.S. at 359–60.

and constitutional boundaries by keeping a healthy distance from them and not getting too close.

Justice Brennan's dissent in *Paris Adult Theatre* misses all of this, and considerations like these were a crucial dimension of obscenity law for most of American history. Perhaps Justice Brennan thought that there was something morally intolerable about asking or expecting artists (or aspiring artists) to exercise self-censorship. In this expectation, he is not alone.

Consider Ray Bradbury's famous "Coda" to his novel *Fahrenheit 451*.²⁰⁵ Recalling the many times that people had asked him to delete words from his novels or add female roles to his plays, he charged: "There is more than one way to burn a book."²⁰⁶ He insisted on his right to write whatever he wanted: "It's my game. I pitch, I hit, I catch. I run the bases."²⁰⁷

As an assertion of artistic independence, this is satisfactory. But the statement is misleading if it leads someone to conclude that real writers and real artists do not censor themselves. Indeed, they censor themselves every time they revise a sentence or paragraph or change some detail in a painting, sculpture, or musical composition. In other words, a kind of self-censorship is essential to the demands of art.

The larger point here remains. Different kinds of self-censorship are sometimes legally and constitutionally required, and the requirement is not unreasonable. The Justice Brennan who wrote the majority opinion in *Roth* would have agreed.

VI. CONCLUSION

At this point, it should be clear why the regulatory framework based on *Miller*, *Ginsberg*, and *Pacifica* did not lead to a more effective regulation of pornography. The majority opinion in *Miller* presupposed the existence of both "private space" and "public space," a distinction found in previous cases,²⁰⁸ and Justice Brennan's dissents in *Miller* and *Paris Adult Theatre*

205. See RAY BRADBURY, *FAHRENHEIT 451*, at 208–12 (Simon & Schuster 2013) (1953).

206. *Id.* at 209.

207. *Id.* at 212.

208. See, e.g., *Stanley v. Georgia*, 394 U.S. 557 (1969).

did not deny the validity of the distinction.²⁰⁹ Being able to distinguish “private space” from “public space” allowed the Court in *Pacifica* to apply a more restrictive standard to “public space.”²¹⁰ Hence the emergence of the “indecent” standard in constitutional law.²¹¹

But as shown above, the Court has silently abandoned the regulatory scheme put forth in the three cases just mentioned. This development coincided with the rise of a series of myths about the Constitution and the regulation of pornography, and both developments call into question the Court’s fidelity to the rule of law in this area. The absence of a regulatory framework has also meant that millions of minors have been exposed to pornographic stimuli that are, by the Court’s own account, inappropriate for them. The Court has also disparaged the legal interests of “unconsenting adults”—women and men who do not want to see pornography in either public or private space.

Besides abandoning a regulatory framework, the Court in other rulings made it virtually certain that large numbers of adults will be desensitized to the problem of keeping sexually inappropriate images out of public spaces. The root of this problem, somewhat paradoxically, goes back to the Court’s ruling in *Stanley v. Georgia* and its view that simply possessing obscene materials in the home cannot be criminalized.²¹² To this day, the ruling seems hard to justify—illegal items or unlawful behaviors do not typically become legal simply because they are kept at home or take place at home. Furthermore, the absence of any meaningful regulations on pornography transmitted to homes through cable television or the Internet means that a very large number of Americans now watch pornography with sexual content that was unimaginable to persons living twenty-five years ago.

Adults who indulge in pornography at home have an almost unfettered freedom, and exercising that freedom has ramifica-

209. See *Miller v. California*, 413 U.S. 15, 47 (1973) (Brennan, J., dissenting); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73–114 (1973) (Brennan, J., dissenting).

210. See *FCC v. Pacifica Found.*, 438 U.S. 726, 744–49 (1978).

211. The similarities between “indecent” (as seen in *Pacifica*) and the idea of “variable” concepts of obscenity (as formulated in *Ginsberg v. New York*) are apparent.

212. See *Stanley*, 394 U.S. at 568.

tions. As *Playboy Entertainment* and *Ashcroft v. ACLU* show, these adults are not required to sacrifice any of their conveniences, regardless of the importance of the social interests. How likely is it, then, that such adults will recognize and affirm the need for limits on what can be displayed in public space? Those who routinely watch hard-core pornography (in the contemporary sense of that adjective) are generally not going to be perturbed when they see different kinds of soft pornography and indecency in public spaces; they will regard those images as “tame.” But this means that adults who have no interest in pornography are going to see the steady degradation of public spaces.²¹³

Notice that the predictability associated with the rule of law is wanting here. The regulations governing sexually oriented materials in public space “on the books” in various jurisdictions are being steadily undermined by this state of affairs. And even if a public outcry occasionally leads to an acknowledgement that standards of public decency have been violated—which occurred with the advertising campaigns of both Calvin Klein and Abercrombie & Fitch—the fate of those standards should not depend solely on whether there is such an outcry. Citizens in a society that purports to honor the rule of law expect law to play a large role in the maintenance and preservation of those public standards.

213. The psychology of the adult who regularly views cyberpornography at home may have another, even more disturbing side. If the only legal duty imposed on these persons is to avoid viewing child pornography, one wonders how secure that prohibition is going to be tomorrow, in view of increased public access to the “dark web.” See generally JAMIE BARTLETT, *THE DARK NET: INSIDE THE DIGITAL UNDERWORLD* (2015):

[T]he dark net refers to the encrypted world of Tor Hidden Services, where [Internet] users cannot be traced, and cannot be identified. For others, it is those sites not indexed by conventional search engines: an unknowable realm of password-protected pages, unlinked websites, and hidden content accessible only to those in the know It has also become a catchall term for the myriad shocking, disturbing, and controversial corners of the net

Id. at 5. Bartlett’s account of child pornography on the “dark net” is found in chapter four of his book, where he tracks the descent of one middle-aged man, an aficionado of cyberpornography who continually wants to cross new borders. His slippery descent into child pornography is related to its easy accessibility—a mere “three clicks”—after entering the dark web. See *id.* at 110–34.

In recent years, the “sexting” phenomenon has presented even more problems, leading attorneys, parents, and thoughtful citizens to ask whether adolescents should be prosecuted for disseminating child pornography or (in some circumstances) violating standards of public decency. This Article does not take a position on the former question, but “sexting” provides even more evidence of the ways in which American society has become, in Pamela Paul’s term, “pornified.”²¹⁴ The great portability of cell phones has surely facilitated this, but “sexting” as a phenomenon also attests to the nation’s lack of a meaningful regulatory framework for pornography.²¹⁵

A skeptical reader might still ask: who can say what is “inappropriate” for minors? Who can even define “pornography” or “obscenity”? With respect to pornography, Justice Potter Stewart famously quipped that “I know it when I see it”²¹⁶—suggesting that definitions are entirely subjective.

But such skepticism goes too far. Even Justice Brennan acknowledged the legitimacy of the interests under discussion here in his dissents in *Miller* and *Paris Adult Theatre*. And precisely because he recognized their legitimacy, the Supreme Court should see the need for legal definitions relating to the constitutional standards for obscenity and indecency. As this

214. See PAUL, *supra* note 102, at 5.

215. Sexting as a social phenomenon also illustrates the cultural influence of those arguments about “mature teenagers” and pornography. But the irony here should not be missed. Sometimes, the person who argues that teenagers should be recognized as “autonomous” with respect to their sexuality will, in other contexts, characterize teens as morally, emotionally, and psychologically underdeveloped and therefore impressionable and highly susceptible to “peer pressure.” See TUBBS, *supra* note 51, at 139–96. The opinions of Justice Kennedy further illustrate this point. See *Roper v. Simmons*, 543 U.S. 551 (2005); *Ashcroft v. ACLU*, 542 U.S. 656 (2004); *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803 (2000); and *Lee v. Weisman*, 505 U.S. 577 (1992). On the social and legal aspects of “sexting,” see Antonio M. Haynes, *The Age of Consent: When Is Sexting No Longer Speech “Integral to Criminal Conduct”?*, 97 CORNELL L. REV. 369 (2012); Carissa Byrne Hessick, *The Limits of Child Pornography*, 89 IND. L.J. 1437 (2014); Sarah Wastler, *The Harm in “Sexting”?*, 33 HARV. J.L. & GENDER 687 (2010) (analyzing the constitutionality of child pornography statutes that prohibit the voluntary production, possession, and dissemination of sexually explicit images by teenagers); and Rachelle Blidner, *Four Illinois high school students face charges in sexting scandal*, N.Y. DAILY NEWS (Mar. 17, 2015), <http://www.nydailynews.com/news/crime/4-illinois-high-school-students-face-charges-sexts-article-1.2151909> [<https://perma.cc/UML8-BERD>].

216. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

Article has argued, *only through legal definitions can such important social and individual interests be duly recognized and secured.*²¹⁷

Even a liberal who favors no regulation of pornography when it is restricted to truly private space should still see the need for legal definitions and standards because of the need to distinguish private space from public space. Failure to recognize this need continues to mar some otherwise thoughtful assessments of pornography in contemporary society. One standard must establish what kinds of images and stimuli (visual and auditory) must be kept out of public space; another must establish what is inappropriate and harmful for children and adolescents.²¹⁸

The failure of so many intelligent people to see the need for legal definitions is striking. In other policy debates—the debate about torture, for example—the situation is very different. Clear-thinking participants in this debate know that although disagreements might exist about the adequacy of different definitions of torture (and whether, for instance, “waterboarding” is torture), the need for legal definitions is essential. Something similar could be said about slavery. The eminent historian David Brion Davis has stressed the challenge and urgency of “finding a workable definition of slavery” because of the “di-

217. In *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012), the Supreme Court declined to reconsider *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), while ruling that the Commission failed to fairly notify Fox or ABC before certain broadcasts that “fleeting expletives and momentary nudity could be found actionably indecent.” *Fox*, 567 U.S. at 258. The entertainment industry’s long-standing opposition to *Pacifica* is hardly a secret, but if at some point the Court is inclined to formally overrule it, the Court would do well to ask what it means for a society to have *no* legal standard of indecency that applies to minors. For many Americans, the absence of such a standard would signify a new level of cultural degradation, as if the nation were unwilling to exercise the necessary self-restraint to promote time-honored social interests, at least some of which even Justices Brennan and Douglas recognized as legitimate.

218. See David Denby, *Sex and Sexier*, *NEW YORKER* (May 2, 2016), <https://www.newyorker.com/magazine/2016/05/02/what-the-hays-code-did-for-women> [<https://perma.cc/9NW4-L6E6>], which discusses the surprisingly positive effects on filmmaking during the years when writers, directors, and producers had to work within the framework established by the Hays Code, which was in effect from 1930 to 1968. But Denby fails to see the need for legal definitions to protect interests of both minors and unconsenting adults, believing that the only law that remains necessary today in this area is the prohibition of child pornography.

versity of historical examples.”²¹⁹ And if one takes account of worldwide sexual trafficking, it is clear that the matter is not merely of historical interest. As the title of a recent article asks, “From sex trafficking to forced labor, what is modern slavery?”²²⁰

As a way of underscoring the problem of today’s regnant skepticism regarding pornography, the reader is now asked, as a concluding exercise, to consider two theses, which aim to distill the central themes of this Article.

First, regardless of the strength of a nation’s commitment to personal liberty for adults, there are certain stimuli from which young persons should be spared exposure. If there are any perennial themes and principles in the history of legal and political philosophy, this is one of them, with both Plato and Aristotle and other canonical thinkers seeing the urgency of this matter.²²¹ The great liberal John Stuart Mill also sees it.²²² Persons might disagree about what the law can realistically target and achieve (especially in present circumstances), but the broader point remains. It is a gross error—*pace* Justice Douglas, who dissented in *Miller*—to suppose that the law cannot or should not support conscientious parents in their efforts to minimize their children’s exposure to pornography.²²³

Second, if individual rights for adults mean anything, the adult who has no desire to see or watch pornography should

219. DAVID BRION DAVIS, *INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD* 5, 27 (2006).

220. *From sex trafficking to forced labor, what is modern slavery?*, REUTERS (May 31, 2016), <http://www.reuters.com/article/us-slavery-index-idUSKCN0YM1Z> [<https://perma.cc/2T9C-2HP3>].

221. See PLATO, *THE REPUBLIC* bks. II, IV–V; ARISTOTLE, *NICOMACHEAN ETHICS* bks. I–II. See also G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* § 175 (T.M. Knox trans., 1st ed. 1952).

222. In *ON LIBERTY*, *supra* note 39, at 37, Mill expressly says that the principles he is presenting apply only to adults.

223. In *NOT IN FRONT OF THE CHILDREN*, *supra* note 183, at 256, Marjorie Heins scores some easy debating points by characterizing Plato’s *Republic* as a canonical text for the Tribe of Illiberalism. But Heins fails to appreciate the genius of this work, which derives more from the questions it poses than any recommendations it puts forth. With respect to children, Plato forces his readers to think about how much freedom a society can and should extend to young persons, because their freedoms must in some ways be limited. The limitations on their freedom stem from their status as persons who are still developing in various ways (for example, morally, intellectually, psychologically, and physically).

not be exposed to it and should not be expected to avert his eyes regularly as a way of avoiding it. If one isn't looking for pornography, one shouldn't be seeing it. An adult's desire to avoid seeing pornography is qualitatively different from the desire to avoid other things lacking sexual content that are sometimes scorned or disdained, such as kitsch or crassly commercial things. This is because pornography involves the private realm of life, a realm that seemingly every human being invests with meaning as the locus of so much intimacy.²²⁴

Some might suppose that the Court's abandonment of the regulatory scheme summarized above occurred because of the technologies that have made pornography highly portable. Greater portability of pornography and the greater mobility of persons are facts, but the regulatory framework described above did not become "unworkable" simply because a portable DVD or a computing tablet now allows someone to watch pornography on a subway train or in the backseat of a convertible. Recall, for example, the popularity of portable radios when *Pacifica* was decided in 1978.

Moreover, the boundaries separating "private" and "public" are not as vague as people sometimes suggest. Private space is principally (though not exclusively) space in one's domicile or place of legal residence. The greater scope for regulation of pornography in public space can be understood by reflecting on laws prohibiting "indecent exposure" in public. Our society does not accommodate the desires and impulses of exhibitionists, so persons living today should not be required to accept pornography in public spaces.²²⁵

224. In the "Foreword" to Harry Clor's *OBSCENITY AND PUBLIC MORALITY*, *supra* note 42, at xi, C. Herman Pritchett asserts that the essence of obscenity is "making public that which is private." Based on the Court's ruling in *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728 (1970), and what the Court said about the importance of privacy and the special status of the home in *Stanley v. Georgia*, 394 U.S. 557 (1969), the Court's ruling in *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803 (2000), the "signal-bleed case," is particularly distressing, even if one were to bracket the interests of minors and focus exclusively on those of unconsenting adults.

225. Cf. Clor, *supra* note 59, at 38. Laws against exhibitionism or indecent exposure serve as a useful reference point for discussions about pornography in public space. One could play the parlor game of radical skepticism about the legal meaning of "exhibitionism" and "indecent exposure," but at some point, common sense will prevail in a community. But if skepticism has some limits here, why does a seemingly limitless skepticism about what constitutes "pornography" still reign

The greater portability of pornography may provide a reason for adding new laws for a more effective regulation, and the regulatory scheme described above could still prove workable. The principal obstacles are those rulings that have undone key elements of the regulatory framework—cases such as *United States v. Playboy Entertainment Group, Inc.*, and *Ashcroft v. ACLU*, discussed in the previous section. One hope for a more effective regulation of pornography would be for the Court to reconsider the rulings in the two cases just listed and to affirm (once again) that constitutionally protected rights often require regulation. The holding in *Stanley v. Georgia* is also more problematic than ever before because of the close proximity of child pornography (a mere “three clicks”) on the “dark web.” For that reason alone, the Court should be willing to reconsider *Stanley*.

On the possibility of a more effective regulation of pornography in the future, one must again mention the commercial interests. The amount of money now involved in pornography is staggering and has made the industry a Goliath. That some economists and public officials now regard the pornography industry as an “unexceptional” part of the economy attests to a sweeping transformation in American society. In a *Los Angeles Times* article published in 2014, economists estimated that in the previous decade the pornography industry employed between 10,000 and 20,000 persons in southern California and had sales of roughly four billion dollars.²²⁶ And when an HIV scare led many involved in the business to relocate to Nevada and Eastern Europe, public officials lamented the increase in the state’s unemployment rate, as if “losing” the pornography

today? At a minimum, pornographic images should be understood as visual images that capture different aspects of human sexuality and for different reasons (relating to the domain of public space and the legal interests of minors and unconsenting adults) require legal regulation. On the “public space” in public libraries as a ground for regulating pornography, see the Court’s ruling in *United States v. Am. Library Ass’n*, 539 U.S. 194, 199 (2003) (upholding a statute forbidding public libraries from receiving federal assistance for Internet access on public computers unless a library has installed filtering software to block obscene and pornographic images and materials).

226. See Richard Verrier, *Porn production plummets in Los Angeles*, L.A. TIMES (Aug. 6, 2014), <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-onlocation-la-porn-industry-20140806-story.html> [<https://perma.cc/RH6R-B4HW>].

industry were indistinguishable from losing several large clothing factories.²²⁷

It is true that economic considerations can *sometimes* contribute to a more effective regulation of pornography. Former New York City Mayor Rudolph Giuliani's campaign to "clean up" Times Square in mid-town Manhattan as a way of attracting more tourists there illustrates this point. It is important to acknowledge this victory, but it must be kept in perspective. Mayor Giuliani's achievement was unusual, and roughly twenty years later, some still oppose it.²²⁸

As pornography has proliferated, public sentiment towards it has changed, and in some sectors of the population, it is openly celebrated. But it remains a poison for liberal democracy: undermining human dignity and mutual respect among its citizens, sexualizing children and adolescents in myriad ways, and leading some adolescents and adults into desperately compulsive behavior. For the republic as a whole, pornography may not be lethal, but it is still a poison.

Anyone who doubts this should reflect on the decision of Nordic Choice Hotels to stop offering pay-per-view pornography. In the contemporary Western world, the firm's decision is unintelligible without the assumption that there is something disreputable and morally problematic about pornography, and that making money from it, even as a "middle man," is a squalid business.²²⁹

To say that the changes in public sentiment towards pornography can ultimately be attributed to the Supreme Court seems fair. Such a criticism attests to the enormous role now played by the Court in American life. The criticism also attests to some of the unattractive consequences that may ensue when the

227. *See id.*

228. *See* Noah Remnick, *Court Rejects City's Efforts to Restrict Sex Shops*, N.Y. TIMES (July 23, 2015), <https://www.nytimes.com/2015/07/23/nyregion/court-rejects-new-york-citys-efforts-to-restrict-sex-shops.html> [<https://perma.cc/X2QF-TU78>].

229. In August 2015, Hilton Hotels announced that it too would no longer offer pay-per-view pornography, but the management was vague about its reasons behind this decision. The statement from Hilton Worldwide said that this kind of entertainment is not "in keeping with our company's vision and goals moving forward." *See Update: Hilton Worldwide Removed from Dirty Dozen List*, NAT'L CTR. ON SEXUAL EXPLOITATION, <http://endsexualexploitation.org/Hilton> [<https://perma.cc/K9PF-NLW7>] (last visited Feb. 22, 2018).

Court loses sight of what the rule of law requires and countenances the efforts of those waging war on the precious boundaries that demarcate private space from public space and that help to promote the dignity of private life.