

# PROLEGOMENON ON PORNOGRAPHY

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## I. REEVALUATING “PORNTOPIA”

It is no longer surprising to walk along a bookstore aisle and see volumes, not *of* pornography, but *about* pornography. It is still a bit jarring, though, to encounter seriatim the likes of *Pornified*,<sup>1</sup> *Pornification*,<sup>2</sup> *Pornland*,<sup>3</sup> *Porn.com*,<sup>4</sup> *The Porning of America*,<sup>5</sup> *The Pornography Industry*,<sup>6</sup> and (simply) *Pornography*.<sup>7</sup>

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1. PAMELA PAUL, *PORNIIFIED: HOW PORNOGRAPHY IS DAMAGING OUR LIVES, OUR RELATIONSHIPS, AND OUR FAMILIES* (2005).

2. *PORNIFICATION: SEX AND SEXUALITY IN MEDIA AND CULTURE* (Susanna Paasonen et al. eds., 2007).

3. GAIL DINES, *PORNLAND: HOW PORN HAS HIJACKED OUR SEXUALITY* (2010).

4. *PORN.COM: MAKING SENSE OF ONLINE PORNOGRAPHY* (Feona Attwood ed., 2010).

5. CARMINE SARRACINO & KEVIN M. SCOTT, *THE PORNING OF AMERICA: THE RISE OF PORN CULTURE, WHAT IT MEANS, AND WHERE WE GO FROM HERE* (2008).

There is even an interdisciplinary scholarly journal dedicated to *Porn Studies*.<sup>8</sup> In its 2014 inaugural issue the editors claimed that it “garnered more news interest prior to its launch than most academic publications receive over decades.”<sup>9</sup>

These titles indicate the *ubiquity* of pornography. The range of data supporting that proposition is stunning. For example: up to one-quarter of all search engine requests relate to pornography;<sup>10</sup> pornography sites attract more traffic monthly than Amazon, Netflix, and Twitter combined;<sup>11</sup> and a 2017 survey by a University of Texas research team found that forty-three percent of men intentionally accessed pornography within the previous week.<sup>12</sup> Estimates of the annual revenue of the pornography industry in the United States hover around ten billion dollars—and that takes into account that much online pornography is either pirated or free.<sup>13</sup> Then again, perhaps the

6. SHIRA TARRANT, *THE PORNOGRAPHY INDUSTRY: WHAT EVERYONE NEEDS TO KNOW* (2016).

7. REBECCA SULLIVAN & ALAN MCKEE, *PORNOGRAPHY: STRUCTURES, AGENCY AND PERFORMANCE* (2015).

8. See Alexis C. Madrigal, *Why It's Time for the Journal of Porn Studies*, ATLANTIC (Mar. 21, 2014), <https://www.theatlantic.com/technology/archive/2014/03/why-its-time-for-the-journal-of-em-porn-studies-em/284576/> [<https://perma.cc/M3NV-RZ62>].

9. Feona Attwood & Clarissa Smith, *Porn Studies: An Introduction*, 1 PORN STUD. 1, 1 (2014). The editors are Feona Attwood and Clarissa Smith. Smith questions the analytical usefulness of the term “pornification” (and cognates) in *Pornographication: A Discourse for All Seasons*, 6 INT’L J. MEDIA & CULTURAL POL. 103, 103–04 (2010). She does not dispute, however, either the ubiquity or the “mainstreaming” of pornography. See *id.* at 103.

10. See Susanna Paasonen, *Online Pornography: Ubiquitous and Effaced*, in THE HANDBOOK OF INTERNET STUDIES 424, 425 (Robert Burnett et al. eds., 2011).

11. See Antonia Molloy, *Porn Studies Journal Publishes Its First Issue*, INDEPENDENT (Mar. 22, 2014), <http://www.independent.co.uk/news/uk/home-news/porn-studies-journal-publishes-its-first-issue-9209885.html> [<https://perma.cc/CZ2R-TPKZ>]; see also Alexis Kleinman, *Porn Sites Get More Visitors Each Month Than Netflix, Amazon and Twitter Combined*, HUFFINGTON POST (May 4, 2013), [https://www.huffingtonpost.com/2013/05/03/internet-porn-stats\\_n\\_3187682.html](https://www.huffingtonpost.com/2013/05/03/internet-porn-stats_n_3187682.html) [<https://perma.cc/ZN8N-B5QL>].

12. See MARK REGNERUS, *CHEAP SEX: THE TRANSFORMATION OF MEN, MARRIAGE AND MONOGAMY* 114 (2017). This is compared to just nine percent of women who accessed intentionally in the previous week, indicating one of the many ways in which pornography use (and content) is gendered. See *id.*

13. See *Things Are Looking Up in America's Porn Industry*, NBC NEWS (Jan. 20, 2015), <https://www.nbcnews.com/business/business-news/things-are-looking-americas-porn-industry-n289431> [<https://perma.cc/J4SB-GRTE>]; Neal Karlinsky & Arash Ghadishah, *Porn in the Digital Age: Why Pay?*, ABC NEWS (Feb. 11, 2011), <http://www.abcnews.com>

ubiquity of pornography is one of the few propositions which law-review student editors would agree requires no supporting citation.

These titles also point to something more remarkable, and more important, about pornography, namely, its *mainstreaming*. What could also be called (with some caution) pornography's *normalization*, is comprised of two interrelated developments. One is the widespread acceptance of an increasingly bizarre pornographic *oeuvre*<sup>14</sup> as indelible background wall paper, as a constant—if worrying—presence in our society. This is not just ubiquity. It is resignation, or learning to live with pornography. For some it is more. Brian McNair's *Porno? Chic!* explores the "process whereby the once heavily stigmatised and marginalised cultural form we call pornography has become not only more plentiful, and more visible, but also fashionable."<sup>15</sup>

The other development is how pornography influences the non-pornographic. As one pair of clinical psychologists put it: "What happens on the screen may implicate life off of it."<sup>16</sup> The authors of *The Porning of America* wrote that pornography "has so thoroughly been absorbed into every aspect of our everyday lives" that "it has almost ceased to exist as something separate from the mainstream culture."<sup>17</sup> Though I think that they overstate the matter, these authors express the truth that pornography is now a force in enough persons' lives that it affects the social customs, expectations, and prospects of nearly everyone in or looking for a romantic relationship, including those who have no traffic with pornography.<sup>18</sup> Pornography's ubiquity

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go.com/nightline/porn-industry-struggles-free-content-piracy/story?id=9795710 [https://perma.cc/W2E8-VY4E].

14. See DINES, *supra* note 3, at xxii for a brief PG-13 rated description of "gonzo" pornography.

15. BRIAN MCNAIR, *PORNO? CHIC!: HOW PORNOGRAPHY CHANGED THE WORLD AND MADE IT A BETTER PLACE* 3 (2013).

16. Chyng Sun et al., *Pornography and the Male Sexual Script: An Analysis of Consumption and Sexual Relations*, 45 *ARCHIVES SEXUAL BEHAV.* 983, 992 (2014).

17. SARACCINO & SCOTT, *supra* note 5, at x.

18. "Women who have no interest or experience with pornography—but are seeking a committed relationship—can be harmed by porn's effects on the mating market if enough men retreat from it because they have decided that porn is 'good enough.'" REGNERUS, *supra* note 12, at 129. Some additional men may remove themselves from the "market" for romantic relationships because they think that

and its acceptance have combined to shape cultural expectations of sex and sexual relationships, to shape our social opportunities, choices, and commitments—and thus to shape *us*.

“Pornotopia” is an apt description of our peculiarly sexualized culture. Although it could be imagined by anyone today who logs onto the Internet and who knows the meaning of the word “utopia,” Steven Marcus presciently coined the term in 1966 when he described the hidden pornographic world of “The Other Victorians.”<sup>19</sup> Four decades later Rick Poyner used the word (with an appropriate nod to Marcus) in his own book *Designing Pornotopia*, denoting a fantastic (or fantasy) society come nearly true.<sup>20</sup> Poyner correctly observed that Marcus could never have foreseen how technology was “mak[ing] pornographic images available to anyone at any time.”<sup>21</sup>

But “pornotopia” is ambiguous. It is easy to see that pornography is flourishing. The question is whether we are.

It is a question many people are asking. Pornography is “unique among sexual behaviors today,” wrote Mark Regnerus in his important 2017 book, *Cheap Sex*, “in that segments of both Left and Right are now openly expressing concern about it.”<sup>22</sup> Regnerus catalogs worries that range far beyond traditionalists’ objection that pornography is disintegrative of moral character, and some feminists’ assertion that pornography is incorrigibly misogynistic.<sup>23</sup> In 2010 scholars from fields as diverse as clinical psychology, law, economics, neuroscience, marriage counseling, psychotherapy, and politics brought out a volume—*The Social Costs of Pornography*—detailing some of these concerns.<sup>24</sup>

Popular majorities share them. Two recent studies, one by the Austin Institute and another by a Pew research arm, report

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their pornography use makes them uninviting or unworthy prospective partners. *Id.* at 130–31.

19. STEVEN MARCUS, *THE OTHER VICTORIANS: A STUDY OF SEXUALITY AND PORNOGRAPHY IN MID-NINETEENTH-CENTURY ENGLAND* 268 (1966).

20. RICK POYNER, *DESIGNING PORNOTOPIA: TRAVELS IN VISUAL CULTURE* 9 (2006).

21. *Id.* at 10.

22. REGNERUS, *supra* note 12, at 113.

23. *See id.*

24. *See generally* *THE SOCIAL COSTS OF PORNOGRAPHY: A COLLECTION OF PAPERS* (James R. Stoner, Jr. & Donna M. Hughes eds., 2010).

similar statistics: roughly two-thirds of Americans regard pornography consumption as immoral.<sup>25</sup> Fewer than three in ten think that consuming pornography is morally acceptable.<sup>26</sup> These figures do not precisely confirm that there are grave social costs of pornography, or that these effects call for a governmental response. But a deeper dive into these data shows that the salient “immorality” of pornography is not what it once would have been thought to be, which was a semi-paternalistic worry about masturbation and sexual disorder within the consumer’s psyche and soul.<sup>27</sup> The main worry now is social and cultural, and it encompasses the well-being of people who do not themselves engage pornography.

That people think these social effects are beyond the capacity of the private sphere to cure is confirmed by another statistical finding: according to one survey only thirty-nine percent of the American people oppose *legal* restrictions on pornography.<sup>28</sup> According to another, eighty-one percent believe federal laws against Internet obscenity should be vigorously enforced.<sup>29</sup> These findings acquire greater cogency when mapped over the statistics of intentional pornography access, for that composite indicates that many of those who disapprove of pornography and who support legal restrictions on it, regularly use it.

The disquiet and these felt social costs owe much to the *quality* (if you will) as well as to the *quantity* of pornography today. Digitalized pornography is not just a more efficient delivery system of the pornography we remember, perhaps, from our youth. Consuming it is not just like gazing at a centerfold (or

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25. See PUB. RELIGION RESEARCH INST., A SHIFTING LANDSCAPE: A DECADE OF CHANGE IN AMERICAN ATTITUDES ABOUT SAME-SEX MARRIAGE AND LGBT ISSUES 42 (2014).

26. *See id.*

27. The linchpin of the legal test for “obscenity” between the mid-nineteenth and mid-twentieth centuries was established in *Regina v. Hicklin*, [1868] LR 3 QB 360 (Eng.), in 1868. It focused upon the “tendency” of the material “to deprave and corrupt” the most susceptible viewer. *Id.*

28. See Emma Green, *Most People Think Watching Porn Is Morally Wrong*, ATLANTIC (Mar. 6, 2014), <https://www.theatlantic.com/politics/archive/2014/03/most-people-think-watching-porn-is-morally-wrong/284240/> [https://perma.cc/ZU7C-AS4G].

29. See *Americans Still Want Federal Obscenity Laws Enforced Against Hardcore Internet Pornography, According to Poll Results*, MORALITY MEDIA (Mar. 18, 2004), [http://66.210.33.157/mim/full\\_article.php?article\\_no=124](http://66.210.33.157/mim/full_article.php?article_no=124) [https://perma.cc/BT6V-EBA8].

even a lot of centerfolds). Engaging with digital pornography is a new kind of sexual experience, one which is in some ways radically discontinuous with, say, going to a XXX movie. But neither is it a sexual relationship with another person. Digital pornography “replaces sex (for some), augments it (for others), and alters real sexual connection with real persons. It has changed sex and altered relationships in ways that iTunes has not changed music.”<sup>30</sup>

Digitalization is not, however, a sufficient explanation for “pornotopia,” as if our “pornified” society were an implication of the microchip or the unavoidable entailment of putting a smart phone in everybody’s palm. No culture is enslaved to technology or marches in lockstep to it. A particular, and particularly hospitable, cultural setting is another essential component of “pornotopia.” No doubt the pornography industry seeks and shapes a suitable host culture, bending the status quo to its own peculiar ends. But culture always remains a more or less autonomous expression of a society’s understanding of, and its moral judgments about (in this case) sexual matters. Maybe (as Gail Dines suggests in the sub-title of her *Pornland*) “porn has hijacked our sexuality.”<sup>31</sup> But that does not mean that, if properly informed and motivated, we cannot take it back.

The stubborn independence of culture from technology is evidenced by the majorities of Americans who call for some legal regulation of pornography despite being awash in it. The autonomy of culture is also clear from our country’s criminal prohibitions on even at-home possession of child pornography, notwithstanding that technology enables *its* production and distribution just as it does pornography portraying adults. There is nothing inevitable or naturally necessary about banning child pornography.<sup>32</sup> Many societies have tolerated adult

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30. REGNERUS, *supra* note 12, at 108.

31. See generally DINES, *supra* note 3.

32. See, e.g., IAN O’DONNELL & CLAIRE MILNER, CHILD PORNOGRAPHY: CRIME, COMPUTERS, AND SOCIETY 18 (2007) (noting that the production of child pornography was legal in Sweden in the 1970s); Joanna R. Lampe, Note, *A Victimless Sex Crime: The Case for Decriminalizing Consensual Teen Sexting*, 46 U. MICH. J.L. REFORM 703, 736 (2013) (“Consensual sexting should be dealt with in a manner that respects teenagers’ legal rights to free speech and privacy.”).

sexual access to children.<sup>33</sup> A few have celebrated it.<sup>34</sup> And one need only think back twenty-five or so years to see how our own society might have taken a more benign view of the sexual display of children for the pleasure of adults.<sup>35</sup> Even now that appetite is a matter of legal indifference: according to the Supreme Court, the cognizable harm in child pornography is the abuse incident to its production and not adults' interest in viewing it.<sup>36</sup> Unfettered adult access to "virtual" child pornography or to pornography featuring adults who look like children, remains constitutionally protected.<sup>37</sup>

Our cultural and legal norms paved the road to "pornotopia." They could be changed to lead us out. We are heirs to a cultural mainstream of thought that sprang up in the late 1960s, which regarded pornography as harmless entertainment for those who had a taste for it.<sup>38</sup> Criticism of pornography was thus implicitly reduced to an expression of a subjective, usually emotional, aversion to it ("disgust" or "offense").<sup>39</sup> We settled upon a regime in which the only legitimate public interests about pornography had to do with keeping public spaces reasonably free of lewd images, and limiting the anti-social conse-

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33. See, e.g., GREGORY PFLUGFELDER, *CARTOGRAPHIES OF DESIRE: MALE-MALE SEXUALITY IN JAPANESE DISCOURSE, 1600–1950* 30–31 (1997) (discussing the historical Japanese practice of "shudo").

34. See, e.g., DOYNE DAWSON, *CITIES OF THE GODS: COMMUNIST UTOPIAS IN GREEK THOUGHT* 193 (1992) (describing "pαιderastia" as "the principal cultural model for free relationship between citizens").

35. See John C. Scheller, *PC Peep Show: Computers, Privacy, and Child Pornography*, 27 J. MARSHALL L. REV. 989, 1001 n.90 (1994) ("Some groups argue that restraints against child pornography are restraints against individuals' First Amendment rights . . . . The ACLU contends that although child pornography is illegal, prosecution of child pornographers and pedophiles is unconstitutional if speech is the vehicle upon which the prosecution is based.").

36. See *New York v. Ferber*, 458 U.S. 747, 758–59 (1982).

37. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 256 (2002).

38. See Richard Corliss, *That Old Feeling: When Porno Was Chic*, TIME (Mar. 29, 2005), <http://content.time.com/time/arts/article/0,8599,1043267,00.html> [<https://perma.cc/T2EN-2B9M>].

39. See, e.g., Lisa Myers, *The Pornification of Popular Culture: The Normalization of Sex through Popular Music and Social Media*, MOVABLE TYPE (2014), <https://movabletypeuva.com/the-pornification-of-popular-culture/> [<https://perma.cc/6XGQ-UWKE>].

quences of pornography use—most notably, sex crimes.<sup>40</sup> Now we know that pornography does not lead to rape.<sup>41</sup> The Internet has largely privatized the consumption of pornography, which is transmitted invisibly. But we are awash in pornography, and feel its harmful effects every day.<sup>42</sup> The old regime has failed. What then should be done?

The disintegration of a shared public morality which judges pornography to be shameful, corrupting, and “dirty” has not only opened the floodgates. It has also had vertiginous effects upon pornography’s content.<sup>43</sup> Pornography is of course meant to arouse; that is what makes it pornographic.<sup>44</sup> Its appeal has always lain, too, in its transgressive quality. Brian McNair, who maintains that pornography makes the world a better place, argues that it always “works in the same way, no matter by whom and for whom it is made, representing desires and activities which are in some sense taboo . . . .”<sup>45</sup>

Today there are few taboos upon the sort of sex that one may enjoy on a consensual basis, and none (apart from child pornography) on what happens in cyberspace.<sup>46</sup> As the common spaces where public morals used to intersect with pornography have been superseded by the cloud and the laptop, the content

40. See Tim Rymel, *Does Pornography Lead to Sexual Assault?*, HUFFINGTON POST (Aug. 26, 2016), [https://www.huffingtonpost.com/entry/does-pornography-lead-to-sexual-assault\\_us\\_57c0876ae4b0b01630de8c93](https://www.huffingtonpost.com/entry/does-pornography-lead-to-sexual-assault_us_57c0876ae4b0b01630de8c93) [<https://perma.cc/Z8XH-VMUU>].

41. See Christopher J. Ferguson & Richard D. Hartley, *The pleasure is momentary . . . the expense damnable? The influence of pornography on rape and sexual assault*, 14 *AGGRESSION & VIOLENT BEHAV.* 323, 328 (2009) (“Considered together, the available data about pornography consumption and rape rates in the United States seem to rule out a causal relationship, at least with respect to pornography availability causing an increase in the incidence of rape.”).

42. See generally THE SOCIAL COSTS OF PORNOGRAPHY, *supra* note 24.

43. See Brian McNair, Lecture on Sex and the Cinema, [http://www.uio.no/studier/emner/hf/imk/MEVIT2336/v08/undervisningsmateriale/mcnair\\_sex\\_cinema\\_2.pdf](http://www.uio.no/studier/emner/hf/imk/MEVIT2336/v08/undervisningsmateriale/mcnair_sex_cinema_2.pdf) [<https://perma.cc/HUJ9-QSE9>].

44. A common working definition of pornography, employed very widely throughout the research literature and which suffices for present purposes, would be: sexually explicit visual material (photos, videos, and so on) which is intended to arouse. See, e.g., Caroline West, *Pornography and Censorship*, STAN. ENCYC. PHIL. (Oct. 1, 2012), <https://plato.stanford.edu/entries/pornography-censorship/> [<https://perma.cc/UW6K-M4HB>] (“Pornography is any material (either pictures or words) that is *sexually explicit*.”).

45. McNair, *supra* note 43.

46. See DINES, *supra* note 3, at ix.

of pornography is no longer in a dialectic with the respectable: "transgression" makes no sense without a clear and shared boundary of propriety to flout. The perennial interplay between respectable and underground, between mainstream and marginal, between conventional and *avant garde*, which used to shape pornography, is gone.

The effects of this devolution include an online bacchanalia that would make a libertine blush. Mark Dery argues that "online pornographers aim to grab users 'by their eyeballs' by showing them images amazing in their novelty, eccentricity, or extremity in order to mark themselves apart from what is already familiar."<sup>47</sup> Another scholar observes:

Online porn has meant unprecedented visibility of sexual subcultures, diverse sexual preferences, niches, and tastes. European scholars in particular have discussed this proliferation under the term *netporn*, denoting "alternative body type tolerance and amorphous queer sexuality, interesting art works and writerly blogosphere, visions of grotesque sex and warpunk activism."<sup>48</sup>

Debates about pornography have always included arguments about its "effects."<sup>49</sup> Now we can gauge the effects of specifically *computerized* pornography. These novel effects include scientific research showing that digitalized pornography affects the brain and nervous system in harmful ways that no centerfold ever could.<sup>50</sup> Accessing pornography online makes interactive and directive engagement with it possible, so that the consumer is no longer limited to staring at a two-dimensional representation of a stranger in the nude. The action now is more adventurous. The consumer's involvement is more intimate and directive. What he does lies somewhere between looking at a centerfold and actually having sex. But where in between? How shall this nether-act be described and morally evaluated? For a married man, is masturbating while in conversation with and directing the like act of a web-cam equipped cheerleader adulterous? If it is not, it is at least an act

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47. Paasonen, *supra* note 10, at 428.

48. *Id.* at 427 (citation omitted).

49. See Attwood & Smith, *supra* note 9, at 2.

50. See *infra* pp. 470–71; see also Donald Hilton & Clark Watts, *Pornography Addiction: A Neuroscience Perspective*, 2 SURGICAL NEUROLOGY INT'L 19, 19 (2011).

of spousal infidelity. But which act? What exactly should this sort of betrayal be called? How should our culture and our law judge a woman who divorces her spouse for his regular resort to such outlets?

A spectacular effect of digitalized pornography is that it introduces some *sui generis* sexual acts into human experience. "Pornotopia" breeds the need for a new conceptual apparatus, a revised vocabulary, and an adapted moral calculus, to take account of hitherto unavailable if not unimaginable acts, such as Internet marital infidelity. We have coined a term for this new, in-between genre: "cybersexual behavior." But we will have to sub-divide that expanse, and evaluate each new sector and plot.

This much at least is clear: "pornotopia" is an unprecedented social condition and its effects upon us are still unfolding. The editors of *Porn Studies* wrote that pornography "is becoming an important part of increasing numbers of people's lives, although what that means to them is something we still know very little about."<sup>51</sup> Gail Dines maintains that we don't know "the consequences of [pornography's] saturation of our culture."<sup>52</sup> She adds that "[o]ne thing is certain: we are in the midst of a massive social experiment, only the laboratory here is our world and the effects will be played out on people who never agreed to participate."<sup>53</sup>

Thrice in my lifetime the United States has faced up to pornography's challenge to our culture and to our most important human relationships. These episodes occurred at regular sixteen-year intervals: 1954, 1970, and 1986. The first and the third were occasioned by what were believed to be the serious social repercussions of technological innovation. The 1954 Senate Committee was primarily concerned about juvenile delinquency and its possible cause by some modern mass media, especially salacious comic books.<sup>54</sup> The 1970 Presidential Commission was not prompted by technological revolution, but mainly by a cultural and moral one, what we call the "Sexual Revolu-

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51. Attwood & Smith, *supra* note 9, at 2.

52. DINES, *supra* note 3, at ix.

53. *Id.*

54. See S. REP. No. 62, at 1-2 (1955).

tion." Those commissioners wondered whether pornography should be relieved of the opprobrium it had endured from time out of mind.<sup>55</sup> They answered yes, an answer which was subsequently rejected by all three branches of the federal government.<sup>56</sup>

The 1986 investigative body, commonly known as the "Meese Commission," could barely glimpse the computer age. But its members nonetheless saw that, in the sixteen years since the last national investigation of pornography, "the world has seen enormous technological changes that have affected the transmission of sounds, words, and images."<sup>57</sup> American society had been affected by innovations such as "cable television, satellite communication, video tape recording, the computer, and competition in the telecommunications industry."<sup>58</sup> "It would be surprising to discover that these technological developments have had no effect on the production, distribution, and availability of pornography, and we have not been surprised."<sup>59</sup>

Today we are called upon to face the social effects wrought by a seismic combination of *both* technological *and* cultural revolution. The Meese Commission concluded that technological developments made the 1970 analysis "starkly obsolete."<sup>60</sup> These same Commissioners warned, however, that "[a]s we in 1986 reexamine what was done in 1970, so too do we expect that in 2002 our work will similarly be reexamined."<sup>61</sup>

This Article is meant to stimulate precisely that overdue "reexamination." The United States should constitute a Commission charged with investigating and describing the present, and probable future, harmful effects of today's unregulated market for pornography upon the well-being of the American people. Publication of these findings would straightaway more adequately illumine for anyone engaging with pornography

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55. See Act of Oct. 3, 1967, Pub. L. No. 90-100, § 1, 81 Stat. 253, 253 (1967).

56. See *infra* notes 108–10.

57. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY: FINAL REPORT 225 (1986) [hereinafter *Meese Report*].

58. *Id.*

59. *Id.* at 225–26.

60. *Id.* at 226.

61. *Id.* at 226–27.

just what he or she is choosing to do. The Commission could help inform any participant's choice to make, transmit, or consume pornography by identifying the general effects—both upstream and downstream—of that choice. Since justice pertains to each and every choice one makes that affects the well-being of other people, the Commission would highlight that engaging with pornography, even in the privacy of one's bedroom, is a matter of social justice.

Finally, the Commission should be charged with recommending what public authorities should do about those injustices and about public morality as it pertains to pornography.<sup>62</sup> These recommendations should include the lineaments of a partnership between government bodies and the whole array of civil society groups, as well as conscientious citizens, to protect society from pornography's harms, and to reduce its footprint in our common life.

## II. HISTORY

### A. 1954

The Senate Resolution that established the 1954 Subcommittee to Investigate Juvenile Delinquency charged it with studying the "extent and character" of "juvenile delinquency," as well as "its causes and contributing factors."<sup>63</sup> The Subcommittee soon identified the "mass media"—especially comic books,

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62. Child pornography is a remarkable example of how an injustice—abuse of a minor at the production stage—can reverberate throughout a distribution and consumption system, so much so that the injustice is legally deemed to be the responsibility of *anyone* downstream. The criminal law holds the consumer responsible for that abuse, no matter how remote in space and time production might be from consumption. In every case the law considers the downstream viewing to be an aggravation of the original abuse, and a systemic encouragement of future similar acts. See *Osborne v. Ohio*, 495 U.S. 103, 109 (1990); *New York v. Ferber*, 458 U.S. 747, 764 (1982). In *Paroline v. United States*, the Supreme Court modified a lower court ruling which, following a Congressional mandate, held a downstream viewer responsible for restitution in an amount equal to the child-victim's damages *in toto*. 134 S. Ct. 1710, 1718 (2014). The high Court determined that viewers *were* civilly liable, but only for losses proximately caused by their viewing. *Id.* at 1727.

63. S. REP. NO. 62, at 1 (1955).

but also radio, television, and motion pictures—as the leading cause of an alarming rise in teenage rebelliousness.<sup>64</sup>

From the vantage point of our “pornified” culture it is tempting to dismiss these concerns as overwrought. We tend to think of the 1950s as square. Compared to today, they were. Suspect media back then were also—in contrast to what teens regularly access online today—tame. This temptation becomes stronger because, when we think of comic books, we think of “Archie” and “Superman.” But materials “tame” in comparison with online pornography today might still be lewd and corrosive. In fact, the anodyne comics series of our own youth are a direct result of the Subcommittee’s investigation and the felt cultural crisis to which it responded.<sup>65</sup> Before then it was quite a different story.

### 1. Concerns About Comics

Comic books in 1954 were full of lurid drawings and laden with anti-social messages.<sup>66</sup> Publishers then put out over six hundred comics titles weekly.<sup>67</sup> Total weekly sales were somewhere between eighty and one hundred million copies.<sup>68</sup> Each of those copies was passed along to several readers.<sup>69</sup> By 1952 nearly a third of all these titles were “horror” tales.<sup>70</sup> Most of the rest were devoted to crime.<sup>71</sup> The stories were typically shocking. The art was often salacious.

The 1954 Committee was keenly aware of the epochal quality of its work.<sup>72</sup> One reason was the tidal wave of comic books and their troubling content.<sup>73</sup> Another was the perceived crisis of rebellious attitudes and beliefs among America’s teens, which festered within a distinctive youth culture and which

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64. *Id.* at 1–2.

65. *See, e.g.*, Louis Menand, *The Horror*, *NEW YORKER* (Mar. 31, 2008), <https://www.newyorker.com/magazine/2008/03/31/the-horror> [<https://perma.cc/EYZ8-TWF4>].

66. *See* DAVID HAJDU, *THE TEN-CENT PLAGUE: THE GREAT COMIC-BOOK SCARE AND HOW IT CHANGED AMERICA* 6 (2008).

67. *Id.* at 5.

68. *Id.*

69. *Id.*

70. *Id.* at 189.

71. *See, e.g.*, HAJDU, *supra* note 66, at 114; Menand, *supra* note 65, at 125.

72. *See generally* S. REP. NO. 84-62 (1955).

73. *See id.* at 2, 7.

had led to a dramatic increase in juvenile delinquent acts.<sup>74</sup> Another reason was, as the Committee declared, that “[o]ne of the most significant changes of the past quarter century has been the wide diffusion of the printed word . . . plus the phenomenal growth of radio and television audiences.”<sup>75</sup> “The child today . . . is constantly exposed to sights and sounds of a kind and quality undreamed of in previous generations.”<sup>76</sup>

A long historical process of teens’ emancipation from socialization by the more traditional forces of family, church, and neighborhood might have been interrupted by the Depression and then World War II. But post-war teens were in any event the first generation of American youth to come of age immersed in mass media.<sup>77</sup> They also had, due to prevailing prosperity and the unprecedented postponement of their entry into the adult workforce by attendance at high school and college, the time to enjoy mass media and to be affected by it.<sup>78</sup> Kids could often afford to spend a dime on a horror or crime comic, featuring a pointy-breasted woman in the grips of a sociopathic alien or a sex-crazed killer. Parents saw the painful truth that a social environment dominated by peers and influenced by profit-seeking media powerfully shaped their kids’ personalities and beliefs.

Some of the normative or prescriptive questions facing the 1954 Committee have little traction upon our situation. But the main question surely does: how government actors constrained by the First Amendment can still somehow counter the corrupting cultural effects of mass media, particularly upon children.

The 1954 Committee’s response is instructive in three ways. First, Committee members said that the “Nation cannot afford the calculated risk involved in the continued mass dissemination of crime and horror comic books to children.”<sup>79</sup> They recommended “eliminat[ion]” not only of “that which can be

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74. See HAJDU, *supra* note 66, at 83–85.

75. S. REP. NO. 84-62, at 2.

76. *Id.*

77. *See id.*

78. *See generally* U.S. DEP’T OF EDUC., 120 YEARS OF AMERICAN EDUCATION: A STATISTICAL PORTRAIT (1993).

79. S. REP. NO. 84-62, at 23.

proved beyond doubt to demoralize youth. Rather the aim should be to eliminate all materials that potentially exert detrimental effects."<sup>80</sup> Thus, the character of young people was a vital *public* concern.

Second, the Committee "flatly reject[ed] all suggestions of governmental censorship as being totally out of keeping with our basic American concepts of a free press operating in a free land for a free people."<sup>81</sup> Thus, any solution to the degrading effects of mass media on youth had to respect our time-honored civil liberties.

Lastly, the Committee asserted that the responsibility for reform lies chiefly with parents, publishers, and citizens' groups to maintain standards of "decency."<sup>82</sup> Thus, the Committee reminded the nation that "public morality" is not co-terminus with *government-imposed* morality. Government's authority to shape our culture and our children is important but limited, and secondary to that of parents and other institutions of civil society.<sup>83</sup>

The immediate effect of the 1954 Committee's work was a thorough reform of the comics industry. A dozen or so states passed laws limiting comic book sales.<sup>84</sup> But the reform was chiefly accomplished by the formation of an industry group, the Comics Magazine Association of America, which promptly enacted a standards code. The Code stipulated, for example, that female characters be drawn without "exaggeration of any physical qualities," that no scenes of horror, bloodshed, depravity, lust, or mayhem be depicted, and that the "sanctity of marriage" and the "value of the home" would always be preserved.<sup>85</sup> Most comics went out of business.<sup>86</sup>

## 2. *Butler's Book and the Supreme Court as Obscenity Arbiter*

The 1954 Committee's work and its aftermath constitutes the larger part of the 1950s legacy as it pertains to the challenges of

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80. *Id.* at 33.

81. *Id.* at 23.

82. *Id.* at 33.

83. *Id.*

84. Menand, *supra* note 65, at 126.

85. *Id.*

86. *Id.*

pornography. But it needs to be supplemented by a look at a neglected 1957 Supreme Court obscenity case.

In June 1957 the Supreme Court established for the first time a constitutional test for that “obscenity” which was categorically excluded from First Amendment protection. That case was *Roth v. United States*.<sup>87</sup> Earlier in 1957 the Court handed down *Butler v. Michigan*,<sup>88</sup> which established no test for “obscenity” or for anything else. *Butler* instead established the Court as final arbiter of a question implicated in the 1954 Committee hearings, a question at or near the center of any serious inquiry (including ours) into public policy about pornography. That question is: how far should the law constrain those whom it judges to be capable of deciding on pornography access for themselves (basically, adults), so that those whom the law judges to be *incapable* (basically, minors) are effectively protected from corruption?

Adults had little interest in reading the comic books which troubled the 1954 Committee. Not so in *Butler*, which involved a novel of some literary merit. Mr. Butler was convicted in a Michigan court for violating a law against distributing material “tending to the corruption of the morals of youth.”<sup>89</sup> He sold a copy of John Griffin’s *The Devil Rides Outside* to an undercover police officer.<sup>90</sup> Curiously—and, as far as I can tell, uniquely, in Supreme Court cases concerning “obscenity”—the Court’s opinion in *Butler* contains no mention whatsoever of the publication at issue, its allegedly obscene characteristics, or of the proceedings below.<sup>91</sup>

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87. 354 U.S. 476 (1957). The companion case was *Alberts v. California*.

88. 352 U.S. 380 (1957).

89. *Id.* at 380.

90. *Id.* at 381–83.

91. Butler’s attorneys described the novel in their Brief:

‘The Devil Rides Outside’ is a story written in diary form and in the first-person singular. The name of the protagonist is never disclosed although it is apparent that he is a young American musician. The title emanates from an old French proverb to the effect that the devil rides outside monastery walls and the book is divided into two parts, the cloister within, and the devil without. The first part is prefaced by a quotation from the eminent poet Gerard Manley Hopkins emphasizing man’s bewilderment that sin and depravity should be inherent in his nature. The second portion of the book is introduced by a quotation from St.

According to testimony credited by the trial court (whose opinion was appended to Butler's brief), the question was whether a few isolated steamy passages were *gratuitous*.<sup>92</sup> The

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Augustine which considers the incomplete nature of man's control over sin and temptation.

The book traces the protagonist's growth in the religiously centered life of a Benedictine cloister in southern France and at the same time gives a rather complete and bitter picture of the small-town bourgeois life in the village outside of the monastery walls. It starts with his arrival at the monastery to study Gregorian chants and on the way from the village to the monastery, the bawdy taxicab driver, Salesky, tries to interest him in having one of the girls in the town. However, Salesky's services are refused and the protagonist commences living at the Benedictine monastery intending to return to Paris to take up again with his mistress there. The protagonist, strangely enough, becomes deeply attached to monastic life and ultimately embraces a deep religious faith. He cannot leave, despite bouts with fever and the unendurable cold. Weakened by the pitiful food and the hard life, he goes to live in the village to recover his health while continuing at the monastery his devotions during the day and his study of the manuscripts. He changes from a selfish and arrogant person to one who is seeking wisdom and peace and in the course of his sojourn he becomes tremendously impressed with his father-confessor and with a visiting physician, named Castelar, who apparently symbolizes the happy combination of godliness and manliness in the lay world.

Brief for the Appellant at 3-5, *Butler v. Michigan*, 352 U.S. 380 (1957) (No. 16), 1956 WL 88994 (citations omitted). The crucial part of that description:

In the period when [the protagonist] is learning to conquer his lusts, he has some earthy and realistically described experiences with women and he struggles to rid himself of these physical demands and bodily passions. He finally wins out over his baser self by rejecting Madame Renée, his housekeeper and the village's leading matron whose beauty and powerful pride almost engulf him. The book closes with a foreshadowing of his return to the monastic cell after he has won through to sanctity.

*Id.*

92. How steamy were they? One of the prosecution's expert witnesses was Mildred Seitz, a Detroit housewife who did some substitute teaching of literature in city schools. She was also President of the National Council of Catholic Women. Mrs. Seitz testified that, upon receipt and reading of some of the lurid excerpts, "thinking about these incidents was so stimulating that I could scarcely remember the serious tone of the book." *Id.* at 21. The rest of the parade of experts was right out of central casting. The defendant called some college professors and testified himself to his artistic vision. Besides Mrs. Seitz, the state called another housewife, one professor, and a priest, minister, and rabbi. *See id.* This array of experts was a set piece, in that it was replicated in many other obscenity prosecutions involving the printed word (and there were many of them between 1945 and 1960 or so). It amounted to a contest between pastor and professor, not for the general cultural

prosecutor's witnesses opined that redacting the hot passages would not have subtracted one bit from the novel's admitted literary merits. The *Butler* trial court concluded: "There is little question . . . that the author, with his beautiful command of the English language, could have portrayed to the reader the conflict within [the protagonist], without setting forth in detail the intimate acts and lustful feelings in obscene, immoral, lewd and lascivious language."<sup>93</sup>

Justice Felix Frankfurter wrote the opinion for a unanimous Supreme Court reversing Butler's conviction. He recognized that Butler had been convicted for making generally available a book which the trial judge found (now Frankfurter's phrase) "to have a potentially deleterious influence upon youth."<sup>94</sup> The Court said that "[t]he State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare."<sup>95</sup> But "quarantine" was scarcely an apt description. Michigan's adult population could obtain many publications which "tend[ed] to the corruption" of children.<sup>96</sup> *The Devil Rides Outside* was on the shelf at the Detroit Public Library, albeit restricted to adult readers.<sup>97</sup> Even according to the trial judge, a slightly expurgated version could have been sold to anyone.<sup>98</sup>

The *Butler* Court nonetheless concluded that Michigan would "reduce the adult population of Michigan to reading

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hegemony which organized religion would maintain into the mid-1960s, but for hearts and minds of judges in cases like *Butler*. The professors won that battle.

93. Note that the linchpin notion in the law of "obscenity" up to *Butler* was *Hicklin's* "tendency to corrupt." This norm extended to written as well as graphic material, and had what we might call an ideological element: presentations which appealed to the mind and not to the passions could be "obscene" if it tended to undermine the moral convictions of the most susceptible. Even an orderly exposition of ideas or decent literature could be "obscene" if it tended to weaken a susceptible reader's moral fiber. Hence *Lady Chatterly's Lover* could be adjudicated "obscene" (as it was by some courts) for presenting adultery in an attractive light. Graphic accounts of steamy love were not necessary to such a finding.

94. *Butler*, 352 U.S. at 383.

95. *Id.*

96. *Id.*

97. See Brief for the Appellant at 7-8, *Butler v. Michigan* 352 U.S. 380 (1957) (No. 16), 1956 WL 88994.

98. See *id.* at 26.

only what is fit for children."<sup>99</sup> This would be, Justice Frankfurter declared, "to burn the house to roast the pig."<sup>100</sup> Thus did Michigan "arbitrarily curtail[] one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society."<sup>101</sup>

"Arbitrarily"? Or was Michigan's a *reasonable choice*, albeit not the one which Justice Frankfurter himself would have made? And could a "free society" nonetheless more creatively, and productively, balance its commitments to both adult maturity and youth innocence?

Michigan acted in good faith for a legitimate reason—protecting the character of children. The Court admitted as much.<sup>102</sup> So Michigan did not act "arbitrarily," in the basic sense of the term: for no legitimate reason, or out of emotion or bias. The question presented in *Butler* seems, then, to be one of reasoned choice in light of all the relevant values and interests, a process today often called "balancing." Any reasoned answer would depend strategically upon moral truths about which virtues children should possess, and which attitudes it would be better they did not. Any reasonable answer to the question of restraint by the mature for the sake of protecting the immature would also depend heavily upon contingent circumstances of many sorts, including: the moral maturity and resiliency of the children at hand; other sources of wholesome educational influences upon them; and the exact configuration of denial and opportunity which any such answer portends for both the strong and the weak.

The most critical factor in these decisions will often be how much genuine value the suspect materials actually have for those "rugged" enough to be edified by them. Ready access to pretty good books (such as *The Devil Rides Outside*) has a substantial claim upon anyone's conscientious deliberations about

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99. *Butler*, 352 U.S. at 383.

100. *Id.*

101. *Id.* at 383–84.

102. *Id.* at 383.

what, all things considered, best serves the common good. Ready access to “gonzo” pornography is a different matter.

No matter which answer a society adopts, it is going to be exercising genuine *choice* in doing so. In so choosing, any society will be deciding the sort of society it shall be—as one which is supremely devoted to the well-being of children or to the adult satisfactions, or one somewhere in-between. Each choice could be guided by reason and grounded in evidence. None would be required by reason, and none would be obviously the “best” choice, so that all others could be deemed colloquially (not literally) “arbitrary.”

The Michigan trial court’s attempt to edit Griffin’s book was, to be sure, risky. But it nonetheless was a good-faith attempt to execute the “balancing” test in a way fair to all and respectful of all the pertinent values. The Supreme Court evinced little interest in this, or any other alternative to its own flip judgment. Justice Frankfurter compounded the effects of these lacunae and evasions in his opinion by introducing hyperbole and a clever aphorism about incinerating a dwelling. The Court appears to have substituted dogmatism for reasoned analysis.

#### B. 1970

Conceived during the 1967 “Summer of Love”<sup>103</sup> and midwifed by the Supreme Court’s pro-pornography decision in *Stanley v. Georgia*,<sup>104</sup> what came to be generally called the “President’s Commission on Obscenity and Pornography” was created by Congress on October 3, 1967 to address a “matter of national concern.”<sup>105</sup> President Lyndon B. Johnson appointed 18 members on January 2, 1968.<sup>106</sup> Among them was an academic constitutional lawyer, William Lockhart, as Chairman.<sup>107</sup>

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103. See generally *To Create a Commission on Noxious and Obscene Matters and Materials: Hearings on H.R.7465 Before the Select Subcommittee on Education of the Committee on Education and Labor, House of Representatives, 89th Cong.* (1965). The House Select Subcommittee on Education and Labor held hearings on the creation of an “obscene materials” commission in September 1965.

104. 394 U.S. 557, 568 (1969).

105. Act of Oct. 3, 1967, Pub. L. No. 90-100, 81 Stat. 253, 255 (1967) (creating a commission to be known as the Commission on Obscenity and Pornography).

106. COMM’N ON OBSCENITY & PORNOGRAPHY, PROGRESS REPORT 8 (1969), available at <https://catalog.hathitrust.org/Record/010368306>.

107. *Id.* at 16.

The Commission's 1970 Report is remarkable for its extraordinarily benign view of pornography and for the liberality of its legal recommendations. It is just as remarkable that it was immediately repudiated by Congress,<sup>108</sup> the President,<sup>109</sup> and in 1973 by the Supreme Court.<sup>110</sup>

The enduring legacy of this five-year episode includes some eminently defensible constitutional touchstones, such as the three-part definition of "obscenity" (from *Miller v. California*,<sup>111</sup> which remains the law to this minute), and some of the anti-paternalistic portions of *Stanley*.<sup>112</sup> This legacy also includes the widespread *rejection* of the Commission's reduction of the social question about pornography to supply and demand, that is, to devising a market in which those who want it get all they want and those who do not want it get none.<sup>113</sup> By and large, however, this spirited societal debate about pornography left us with the most unhelpful elements of both the Commission's permissiveness and the conservative reaction to it.

For example, we have inherited the views that pornography itself is harmless entertainment for those who like it, and that the public interest touching pornography is limited to policing public spaces and combatting the injustices, if any, caused downstream by pornography use. Chief among these effects would be sex crimes.

Now pornography leaps over the commons directly into everyone's smart device. There is no convincing evidence that

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108. See *Senate Votes, 60 to 5, to Reject And Censure Obscenity Report*, N.Y. TIMES, Oct. 14, 1970, at 30. The 60–5 vote included 24 abstentions.

109. See Richard Nixon, Statement about the Report of the Commission on Obscenity and Pornography, 1970 PUB. PAPERS 940, 941 (Oct. 24, 1970).

110. See *Miller v. California*, 413 U.S. 15, 21 (1973). The Court adjusted the three-part definition of "obscenity" inherited from *Roth* in several ways, all of which made it more feasible to prosecute what was then being called "hard-core" pornography. The hugely profitable 1972 release *Deep Throat* was the prime example of hard-core, and it was surely on the *Miller* Justices' minds.

111. *Id.*

112. See *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.").

113. See, e.g., *Consultation on protecting children from internet porn*, BBC NEWS (May 4, 2012), <http://www.bbc.com/news/uk-17951067> [<https://perma.cc/8ZEJ-LCHA>].

pornography use leads to rape or other sex crimes.<sup>114</sup> Now pornography has been privatized. Yet the culture is in a calamitous condition because of it. We inherited no conceptual apparatus which makes sense of this, our condition.

### 1. *The Commission's Findings and Legacy*

The 1970 Commission's assignment included studying the "nature and volume" of traffic in obscene and pornographic materials.<sup>115</sup> In their Report, the Commission members dutifully unpacked and catalogued the sexual materials which Americans "experience[d]."<sup>116</sup> They divided all the mass market, sexually themed magazines into four content-defined groups.<sup>117</sup> These were: "confession" papers focused on the sexual problems of young women; "barber shop" magazines which "primarily feature 'action' stories, some of which are sex-oriented"; "men's sophisticates" (such as *Esquire*) showing partially nude females; and *Playboy*, with its (then) unique nude centerfold.<sup>118</sup>

Which sorts of sex acts did these media feature? The Commissioners described a world eons removed from ours. The Report said that these media very largely contained "portrayals of sex that conform to general cultural norms."<sup>119</sup> "[D]epictions of sadomasochistic sexual activity" were the "least common" experience.<sup>120</sup> "Portrayals of combinations of sex and violence" were largely absent.<sup>121</sup> The "taboo against pedophilia . . . remained almost inviolate."<sup>122</sup>

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114. See Brian McNair, *Rethinking the effects paradigm in porn studies*, 1 PORN STUD. 161, 162 ("The lack of convincing evidence for claims about porn's effects is also a feature of anti-porn academic discourse, which tends to draw on personal anecdote and secondary sources, and to be framed by the analysts' own, subjective readings of what pornography means to its male and female consumers (regardless of what the consumers themselves think).")

115. Act of Oct. 3, 1967, Pub. L. No. 90-100, 81 Stat. 253, 254 (1967).

116. See COMM'N ON OBSCENITY & PORNOGRAPHY, THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 19 (1970).

117. See *id.* at 13-14.

118. *Id.* at 14.

119. *Id.* at 19.

120. *Id.*

121. *Id.* at 120.

122. *Id.* at 115.

The Commission reported that the “sexual content” of “general release” films had “accelerated” in the last two years.<sup>123</sup> Thematic matters which were dealt with until recently “discretely” — adultery, homosexuality, abortion, orgies — “are now presented quite explicitly.”<sup>124</sup> The norm which called for “‘just retribution’ for sexual misdeeds” was no longer a requirement.<sup>125</sup> These treatments did not typically involve explicit visuals. Only “a few general release films have shown both sexes totally nude (genitalia).”<sup>126</sup> Even the “exploitation films” which exuberantly embraced female nudity and which were directed at the male heterosexual market did not show intercourse, which was “only strongly implied or simulated.”<sup>127</sup>

What harmful effects of this pornography did the Commission identify? *None whatsoever.*

The Commission found no “causal relationship” between use of pornography and specified harms, including downstream anti-social acts.<sup>128</sup> Most startlingly, the Commission made the same finding for child users. “[E]xposure to explicit sexual materials in adolescence is widespread and occurs in a group of peers of the same sex or in a group involving several members of each sex. The experience seems to be more a social than a sexual one.”<sup>129</sup> The Commission members were convinced by experts — namely, “[a] large majority of sex educators and counselors” — “that most adolescents are interested in explicit sexual materials . . . [out of] natural curiosity about sex. They

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123. *Id.* at 77.

124. *Id.* at 9.

125. *Id.*

126. *Id.*

127. *Id.* at 10. One reason why teenage boys would have taken to pornography in this way is precisely that it was denied to them by the adult world, and branded across society as “dirty.” Not only was any access to, say, *Playboy*, an accomplishment to be shared wherever possible, it was also an occasion for all concerned to be naughty. Discovering pictures of naked women was a rite of passage. But the Commission entertained a fallacy by supposing that this social-sexual aspect would carry over to an environment in which, because pornography was normalized following the Commission’s suggestion, access to it was no longer difficult or remarkable.

128. *Id.* at 1, 27.

129. *Id.* at 21.

also feel that if adolescents had access to . . . appropriate sex education, their interest in pornography would be reduced."<sup>130</sup>

These findings about children and pornography are intrinsically naïve (as if teenage boys were really interested in clinical information about sex rather than titillation). But they rang true enough to many near the end of the 1960s, when, perhaps thinking of cultural conditions like those in Michigan when *Butler* was decided, it could still seem that teens were shielded by adults from anything like frank exploration of the facts of life. Candid discussion and a bit more exposure to some sexy phonographs might seem, to some, to be a step in the right direction. But the Commission's judgment about pornography and youth is deeply flawed, and useless to us. For it presupposed a fixed human sexuality which, even if it was not plainly false back when the *Playboy* centerfold was the outer limit of pornography, is surely inoperative in our digitalized world.

That presupposition was that the appetite of pornography was narrow and shallow. It was "narrow" in the sense that (as the Commission's survey of extant materials found) the apogee of pornography was (simply) the nude woman,<sup>131</sup> and "shallow" in that the power of pornography to retain interest was very limited.<sup>132</sup> It was even fashionable in those years to declare that pornography was boring.<sup>133</sup> Pornography was at worst an aid to masturbation, and there was an end to it. Pornography did not shape people, their sexual relationships, or the culture. And the masturbation was inevitable, anyway.

Digitalized pornography works nothing like this. Masturbation is still in the picture. But online pornography sets up a powerful triangular dynamic among the viewer's conscious

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130. *Id.* at 29.

131. *See id.* at 120.

132. *See id.* at 25.

133. Stanley Kramer said that he thought the *Miller* decision was unnecessary as a curb to pornography. "The cultural upheaval is now beginning to right itself and porno is receding on its own; people are getting tired of it." Tom Shales, *From 'Chaos' To 'No Effect'*, WASH. POST, June 22, 1973, at B1. The sad thing about exciting subject matter is that it is always a victim of the law of diminishing returns. "One way to kill pornography, as Denmark knows, is to let it flourish," said Anthony Burgess, author of *A Clockwork Orange*. Anthony Burgess, *Pornography: 'The moral question is nonsense': For permissiveness, with misgivings*, N.Y. TIMES, July 1, 1973, § 6 (Magazine), at 19, 20.

choices (clicking away), his subconscious, and the kaleidoscope of images at his fingertips and on the screen. This complex interaction breeds an increasingly idiosyncratic, even solipsistic, sexuality. Psychoanalyst Norman Doidge describes online pornography's ability to create "new fantasies out of aspects of sexuality that have been outside the surfer's conscious awareness, bringing these elements together to form new networks," which networks are triggered by porn sites' capacity to "generate catalogs of common kinks and mix them together in images."<sup>134</sup> Doidge writes that:

[S]ooner or later the [Internet] surfer finds a killer combination that presses a number of his sexual buttons at once. Then he reinforces the network by viewing the images repeatedly, masturbating, releasing dopamine and strengthening these networks. He has created a kind of 'neosexuality,' a rebuilt libido that has strong roots in his buried sexual tendencies.<sup>135</sup>

And it lasts: online pornography viewers report *hours* of continuous trolling and clicking.<sup>136</sup> No one looked at *Playboy* for nearly that long.

Given the roseate picture it drew for itself, it is unsurprising that the 1970 Commission concluded there was "no warrant for continued government interference with the full freedom of adults to read, obtain or view whatever such material they wish."<sup>137</sup> The Commission recommended that "federal, state, and local legislation prohibiting the sale, exhibition, or distribution of sexual materials to consenting adults should be repealed."<sup>138</sup> Justifying it as a help to parents who looked askance at pornography, the Commission recommended a *misdemeanor* offense for knowingly selling or displaying pornography to minors.<sup>139</sup> But note well: the "harm" in this crime is not to the minor exposed (for the Commission did not believe there was

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134. NORMAN DOIDGE, *THE BRAIN THAT CHANGES ITSELF: STORIES OF PERSONAL TRIUMPH FROM THE FRONTIERS OF BRAIN SCIENCE* 111–12 (2007).

135. *Id.* at 109.

136. *See id.* at 105.

137. *COMM'N ON OBSCENITY & PORNOGRAPHY*, *supra* note 116, at 52.

138. *Id.* at 51.

139. *See id.* at 66.

any such harm). It is to the parents' whose authority over their children is disturbed.<sup>140</sup>

## 2. Stanley's Influence

The Commissioners' optimism and libertarianism reflect the Supreme Court's contemporaneous decision in *Stanley v. Georgia*.<sup>141</sup> In that case, police officers executing a search warrant for gambling paraphernalia instead found what the Court, speaking through Justice Marshall, coyly described as "three reels of eight-millimeter film."<sup>142</sup> In truth and as the opinions below made unmistakably clear, these were three hard-core stag films. The high Court reversed Stanley's state-court conviction for "knowing possession" of "obscene matter."<sup>143</sup>

Counsel Paul Bender wrote an essay for the Commissioners specifically about the implications of *Stanley* for their work.<sup>144</sup> The Commission's Report shows the effects of *Stanley* and Bender's report.<sup>145</sup> In his published postmortems, Chair Lockhart spoke of the Commission's work in terms indistinguishable from *Stanley*.<sup>146</sup> It is noteworthy then, that although the Court has never overruled *Stanley's* holding against making home possession of pornography (without any evidence of an intent to distribute) a crime, most of what the Court said in support thereof was repudiated four years later in the twin decisions of *Miller v. California*<sup>147</sup> and *Paris Adult Theater I v. Slaton*.<sup>148</sup>

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140. See, e.g., Carol Gilligan et al., *Moral Reasoning about Sexual Dilemmas: The Development of an Interview and Scoring System*, in 1 TECHNICAL REPORT OF THE COMM'N ON OBSCENITY AND PORNOGRAPHY 141, 161 (1971).

141. 394 U.S. 557 (1969).

142. *Id.* at 558.

143. *Id.*

144. See Paul Bender, *Implications of Stanley v. Georgia*, in 2 TECHNICAL REPORT OF THE COMM'N ON OBSCENITY AND PORNOGRAPHY 28, 28-36 (1971).

145. See, e.g., COMM'N ON OBSCENITY & PORNOGRAPHY, *supra* note 116, at 52-53.

146. See, e.g., William B. Lockhart, *The Findings and Recommendations of the Commission on Obscenity and Pornography: A Case Study of the Role of Social Science in Formulating Public Policy*, 24 OKLA. L. REV. 209, 220 (1971).

147. See 413 U.S. 15, 24-26 (1973).

148. See 413 U.S. 49, 66-69 (1973). A disciplined, persuasive opinion could have been written for the *Stanley* Court. It would have been rooted mainly in the value of home privacy, buttressed by a subtler use of our anti-paternalist tradition than Justice Marshall's. That opinion might not have helped Mr. Stanley, where the

First, the *Stanley* Court stated how human well-being had cognitive, religious, and emotional aspects.<sup>149</sup> Then the Court asserted an intimate connection between this account of flourishing and the materials seized; indeed, the Court's language here would make one think that Mr. Stanley had been watching *A Man for All Seasons* rather than stag films.<sup>150</sup> The Court then cut diagonally across this terrain, and advanced a point about an extravagant, inapposite state paternalism: Georgia was trying "to control the moral content of a person's thoughts."<sup>151</sup> The Court pivoted next to consider the case as one not about human well-being and pornography, but about the limits of the state's coercive jurisdiction, either with regard specifically to criminal law or to home searches, or both.<sup>152</sup> The Justices concluded their discussion by saying that pornography was edifying to a down-market clientele, or that it happened to be disdained by a "majority," as if the nub of it were about state discrimination against blue-collar pleasures.<sup>153</sup>

The Commission's constitutional lawyer Paul Bender advised its members that *Stanley* reversed years of precedents.<sup>154</sup> He opined that "obscenity" was now protected speech under

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police were searching for evidence of bookmaking. But it would not have misled the Commission as seriously as Justice Marshall's actual opinion did.

149. See 394 U.S. 557, 564 (1969) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)) ("The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.")

150. See *id.* at 565 (finding Stanley "is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home").

151. *Id.* (footnote omitted).

152. See *id.* ("[W]e think that mere categorization of these films as 'obscene' is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home.")

153. *Id.* at 566 (quoting *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 688–89 (1959) (The Constitution's "guarantee is not confined to the expression of ideas that are conventional or shared by a majority . . . In the realm of ideas, it protects expression which is eloquent no less than that which is unconvincing."))

154. See Bender, *supra* note 144, at 30.

the First Amendment.<sup>155</sup> He wrote that the Court determined that any line between the kind of speech that the First Amendment was centrally concerned with—the transmission of ideas and information relevant to public matters—and “mere entertainment” (such as pornography) was too thin, and too variable, to successfully be maintained.<sup>156</sup> “[It] must be concluded that the prospects for a successful obscenity action . . . are extremely dismal.”<sup>157</sup>

The takeaways from the President’s Commission and from *Stanley* included this meta-ethical claim: neither public authorities nor popular majorities (nor anyone, by implication) could say that pornography was *objectively* detrimental to anyone. It was all a matter of taste and preference, finally to be arbitrated where such matters could only be settled: in the mind of the individual consumer. This determination implied, or at least strongly suggested, that campaigns to regulate pornography would have to be founded on distinctively *public* grounds which skirt free of an adverse moral judgment of pornography. These grounds would be uncontroversial harms (including sex crimes) allegedly caused by pornography, and the pollution of public spaces by lewd evidence of pornography.<sup>158</sup>

President Richard Nixon rejected the Commission’s findings and recommendations as “morally bankrupt,” and a harbinger of “anarchy” in other areas of our common life.<sup>159</sup> The Supreme Court soon did too, though implicitly, and in more guarded language.

The Court in 1973 rejected the proposition that the only constitutionally permissible basis for public interference with the distribution and exhibition of pornography was the distinction between the willing and the unwilling, including juveniles who acted (so to speak) by and through their parents.<sup>160</sup> The Court

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155. *See id.* at 31.

156. *Id.* at 30.

157. *Id.*

158. *See* Act of Oct. 3, 1967, Pub. L. No. 90-100, 81 Stat. 253 (1967). The Commission’s legislative charter had come close to setting these ground rules, for it charged that body to “study the effects” of pornography upon the public and particularly minors, and “its relationship to crime and other antisocial behavior.” *Id.*

159. Nixon, *supra* note 109, at 940–41.

160. *See* *Miller v. California*, 413 U.S. 15, 18–20 (1973).

in both *Miller* and *Slaton* (decided the same day) clearly wanted to say that pornography somehow affected all of us. And it did say it: legitimate state interests included the “quality of life and total community environment.”<sup>161</sup> The Court at one juncture came very close to expressing the heart of the matter, in terms which could be transported to today with little loss of cogency: “The sum of experience, including the last two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.”<sup>162</sup> But this promising line was not developed further by the Court in 1973, or at any time thereafter. It was never integrated into a whole-orbed account of pornography’s harms, and was stillborn in constitutional law.

Instead the Court identified public interests with public spaces. “In particular, we hold that there are legitimate state interests in stemming the tide of commercialized obscenity.”<sup>163</sup> The relevant sphere of interest was “local commerce and . . . all places of public accommodation.”<sup>164</sup> Those “interests” were said to be “the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself” — all on the view that there is an “arguable correlation between obscene material and crime.”<sup>165</sup> The Court then turned to what it described as “one problem of large proportions aptly described by Professor Bickel: . . . ‘the tone of the society, the mode or . . . the style and quality of life.’”<sup>166</sup> But even Professor Bickel located the sphere of regulation in the “market” and “public places.”<sup>167</sup>

The Court conceded that “there is no conclusive proof of a connection between antisocial behavior and obscene materi-

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161. *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 58 (1973).

162. *Id.* at 63.

163. *Id.* at 57.

164. *Id.*

165. *Id.* at 58.

166. *Id.* at 59 (quoting Alexander Bickel, *Dissenting and Concurring Opinions*, 22 *PUB. INTEREST* 25, 25–26 (1971)).

167. *Id.* The Court consistently spoke of regulations of the commons throughout the opinion: “the public street,” a “bar or a ‘live’ theater stage,” and “Times Square.” *Id.* at 67.

al.”<sup>168</sup> The Constitution did not prohibit Georgia (or any other state) from acting on what the Court called “unprovable assumptions” about the connection.<sup>169</sup> The Court adduced several examples of legislation founded upon such “unprovable assumptions,” including: “imponderable aesthetic assumptions” presupposed by environmental regulations to preserve national parks, and the “unprovable assumption that a complete education requires the reading of certain books.”<sup>170</sup> This whole accounting of constitutionally cognizable reasons for public regulation of pornography could be whittled down to seeing to more family-friendly streets and storefronts, and rumors of crimes.

One pungent expression of where this left traditionalists who could not, or would not, think themselves out of the impoverished vocabulary and conceptual apparatus of *Stanley* and the Commission was Attorney General John Mitchell’s reason for rejecting the Commission Report: “pornography should be banned even if it is not harmful.”<sup>171</sup>

The *Miller* three-part test does not establish that there is anything wrong with “obscenity” either. Nor does it call for, much less does it require, that any “obscene” act or work be prosecuted or legally discouraged in any way; it simply clears one set of constitutional obstacles to doing so out of the way. The *Miller* Court clarified a *concept*—“obscenity”—which the Framers bequeathed to us as an exception to First Amendment pro-

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168. *Id.* at 60–61.

169. *Id.* at 61.

170. *Id.* at 62–63. A prosaic expression of this gap between pornography and anti-social sexual conduct, especially including sex crimes, was that by the manager of the Ritz Adult Movie Theater in northern Times Square. He was arrested 41 times for showing “obscene” movies between 1968 and 1973. Then he was quoted to the following effect: “you go to see a comedy, you don’t come out as a comedian; you go to see an opera, you don’t come out as a musician; you go to a pornographic movie, you don’t come out a rapist.” Robert D. McFadden, *Tougher Smut Laws Foreseen in City Area*, N.Y. TIMES, June 23, 1973, at 14.

171. Christopher Lyden, *Doubts on SST Rising in Senate*, N.Y. TIMES, Aug. 26, 1970, at 26. Even those more permissive than Mitchell were hampered by the available terminology and patterns of thought. Lockhart, for example, wrote after the Commission completed its work that, not only that adults should be able to read or look at what they wish, but that government should not attempt to “control morality”—whatever that might mean. See Lockhart, *supra* note 146, at 218–19.

tection of “speech.”<sup>172</sup> But what the First Amendment does not protect is not perforce evil or harmful. It is just unprotected, by dint of a historical fact about the Founders’ thinking.

When one then looks at the moral bases on offer in Supreme Court decisions from 1957 on through today regulating “obscenity,” moreover, one finds no adverse moral judgment of it at all.<sup>173</sup> One finds instead three ancillary problems in the neighborhood. These are: *indecenty* (exposing to the public what is supposed to be private);<sup>174</sup> *offense* taken by passersby (which is a fact about the viewer and not a critical moral judgment at all);<sup>175</sup> and *harmful secondary effects*, such as the allegation that adult bookstores breed nearby prostitution, sexual assault, and other criminal activity.<sup>176</sup> Nothing in these concerns presupposes or tends to lead to the conclusion that there is anything really wrong with obscenity as such.<sup>177</sup>

172. See *Miller v. California*, 413 U.S. 15, 20 (1973).

173. Both *Roth* and *Miller* included the term “prurient” in its test for or definition of “obscenity.” See *Miller*, 413 U.S. at 24; *Roth v. United States*, 354 U.S. 487 (1957). While “obscenity” refers to the tendency of material “to stir the sex impulses or to lead to sexually impure and lustful thoughts,” *United States v. One Book Called “Ulysses,”* 5 F. Supp. 182, 184 (S.D.N.Y. 1933), “prurience” concerns arousal, not contemplation — appeal to the passions, not to the intellect. The consumer of “obscenity” sought (in Justice Brennan’s phrase) “titillation, not . . . saving intellectual content.” *Ginzburg v. United States*, 383 U.S. 463, 470 (1966). The synonyms for “prurient” and paraphrases of it offered by the Court include: “lustful thoughts” and “lascivious longings,” *Roth*, 354 U.S. at 487 n. 20, and “erotically arousing” material providing “sexual stimulation,” *Ginzburg*, 383 U.S. at 470–71. The core concern involves sexual feeling unintegrated into any morally upright sexual act. There are sound arguments that deliberately arousing oneself in such isolated circumstances is immoral. The Court never made them or referenced any.

174. See, e.g., *Miller*, 413 U.S. at 45. See generally Haven G. Ward, *Indecency, Pornography, and the Protection of Children*, 6 GEO. J. GENDER & L. 315, 319–25 (2005).

175. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57–58 (1973); *Miller*, 413 U.S. at 28.

176. See, e.g., *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976). See generally John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 291–338, (2009).

177. The internal memos and private correspondence of the Justices teem with references to the “intractable” obscenity problem, so much so that they certainly possessed institutional and lawyerly-craft reasons to want to rid themselves of the whole burden. Justice Harlan wrote just months before his death that “the obscenity problem [was] almost intractable, and that its ultimate solution must be found in a renaissance of societal values.” TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT 220 (1992) (alteration in original). One solution in Justice Harlan’s case was to limit the constitutional scope of

## C. 1986

The “Attorney General’s Commission on Pornography” was established on February 22, 1985 pursuant to the Federal Advisory Committee Act by William French Smith,<sup>178</sup> soon to be succeeded as United States Attorney General by Edwin Meese.<sup>179</sup> The Commission’s charge was to study the dimensions of the pornography problem and to make suitable recommendations for more effective enforcement.<sup>180</sup> The Commission was also to review “the available empirical evidence on the relationship between exposure to pornographic materials and anti-social behavior.”<sup>181</sup>

The 1986 Commission’s Final Report explained that it was, not a “reaction” to the 1970 work, but in conversation with it.<sup>182</sup> At several critical junctures, however, the latter group expressly disagreed with, or at least offered judgments which superseded, the 1970 Commission’s Report.<sup>183</sup> Nonetheless, in a sharp departure from its predecessor’s recommendations, the Meese Commission strongly condemned as “undesirable” and “harm[ful]” exposing children even to the non-violent, non-degrading sexually explicit material which was abundant in 1970.<sup>184</sup> The 1986 Commission recognized that the “taboo” on

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regulation to “hard-core” pornography, which Justice Brennan—here echoing Justice Stewart’s immortal confession from *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)—conceded he could scarcely define, but which he had “no trouble at all recognizing it when I see it.” YARBROUGH, *supra* at 217. Justice Hugo Black sought and found a certain clarity: “Censorship is the deadly enemy of freedom and progress,” Justice Black wrote, and “[t]he plain language of the Constitution forbids it.” ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 491 (1997). Justice Black maintained that the Court was a “most inappropriate” body to exercise censorship powers, being neither competent by training nor able to escape (in his judgment) basing any such determination upon a “purely personal” “standard of what is immoral.” *Id.* at 553. Justice William Douglas expressed a more atavistic explanation: the Justices could not agree, Justice Douglas said, on anything more precise than Stewart’s confession because “[t]he legal test . . . is whether the material arouses a prurient response in the beholder. The older we get the freer the speech.” *Id.* at 554.

178. See *Meese Report*, *supra* note 57, at 215.

179. *Id.*

180. *Id.*

181. *Id.* at 216.

182. *Id.* at 225.

183. See, e.g., *id.* at 324, 595–96.

184. *Id.* at 344.

child pornography had been broken, and recommended vigorous prosecution of those who made and accessed it.<sup>185</sup> And in 1986 they rejected altogether the 1970 roseate estimate of pornography.<sup>186</sup>

### 1. *A Changing Landscape*

The Meese Commission recognized that it “confront[ed] a different world than that confronted by the 1970 Commission.”<sup>187</sup> Besides the manifold technological changes already noted here,<sup>188</sup> there had been “numerous changes in the social, political, legal, cultural, and religious portrait of the United States.”<sup>189</sup> The Commissioners observed that “[m]ore than in 1957, when the law of obscenity became inextricably part of the constitutional law, more than in 1970, when the President’s Commission on Obscenity and Pornography issued its report, . . . we live in a society unquestionably pervaded by sexual explicitness.”<sup>190</sup>

Not only had popular mores changed,<sup>191</sup> pornography had changed with them (and no doubt had also partly caused the shift in popular culture).<sup>192</sup> What had been little more than a footnote to the content catalogue in the 1970 Report was now featured in the text of the 1986 document.<sup>193</sup> “Sexually violent material”—mainly movies showing sadomasochistic sex, “‘slasher’ films,” “and rape myth” videos—was “increasingly,” the Meese Commission said, “the most prevalent form[] of

185. *Id.* at 595, 646–47.

186. *Id.* at 277.

187. *Id.* at 226.

188. *See e.g., supra* pp. 452–53 and *infra* pp. 483, 488–90.

189. *Meese Report, supra* note 57, at 226.

190. *Id.* at 277.

191. *See id.* at 461.

192. One exception was the mass circulation skin magazines. They were still pretty much your daddy’s *Playboy*, supplemented by the likes of *Oui*, *Penthouse*, *High Society* and Larry Flynt’s *Hustler*. These “girlie” magazines had gone all the way with female nudity. Some portrayed sexual acts. All competed for celebrity nudes. But that was it. In 1973 *Playgirl* appeared, a feminist-inspired response to the girlie magazines that followed a wildly popular 1972 issue of *Cosmopolitan* featuring a strategically covered nude Burt Reynolds. *See Burt Reynolds Nude: 10 Facts About the Cosmo Centrefold*, BBC MAGAZINE (April 30, 2012), <http://www.bbc.com/news/magazine-17896980> [<https://perma.cc/6SX8-BZA>].

193. *Meese Report, supra* note 57, at 323.

pornography.”<sup>194</sup> “[F]orms of degradation represent the largest predominant proportion of commercially available pornography.”<sup>195</sup>

*Deep Throat* had become the first cross-over hard-core hit ever (it was released in June 1972).<sup>196</sup> One film historian writes that “[i]t is hard to imagine another 1972 release besides *The Godfather* that had wider name recognition.”<sup>197</sup> Explicit and relentlessly sexual movies such as *The Devil in Miss Jones* and *Behind the Green Door* (and *Deep Throat*) were no longer culturally marginal. On the contrary: *Miss Jones* ranked as the seventh highest grossing film of 1973,<sup>198</sup> notwithstanding that it was banned from many major markets by legal action.<sup>199</sup> *Deep Throat* ranked eleventh.<sup>200</sup> Yet it was the bellwether of a cultural shift, in two ways. One was that *Deep Throat* pioneered a new genre. It had the sex appeal of a stag film along with a story and characters and, even, some genuine wit. Second, *Deep Throat* attracted such a broad paying audience that it became respectable, even chic, to say that one had seen it. Comedians Bob Hope and Johnny Carson even made jokes about it on broadcast television.<sup>201</sup> *Deep Throat* thus blazed a path for pornography of a certain sort to the mainstream.

The quantity of “‘pure’ sex” pornography—which had been the sum and substance of pornography, circa 1970—was “quite small in terms of currently available materials.”<sup>202</sup> The Meese Commission Final Report contains a very useful account of the debate within the Commission about the possibility and nature of other sorts of harms promoted by “pure” sex pornography,

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194. *Id.* at 323–27. The Meese Commission described the “rape myth” as the “pervasive and profoundly harmful” attitude that “women enjoy being coerced into sexual activity, they enjoy being physically hurt in sexual context, and that as a result a man who forces himself on a woman sexually is in fact merely acceding to the ‘real’ wishes of the woman, regardless of the extent to which she seems to be resisting.” *Id.* at 327.

195. *Id.* at 331–32.

196. See JON LEWIS, HOLLYWOOD V. HARDCORE: HOW THE STRUGGLE OVER CENSORSHIP SAVED THE MODERN FILM INDUSTRY 208 (2000).

197. *Id.* at 210.

198. *Id.* at 212.

199. *Id.*

200. *Id.*

201. See Corliss, *supra* note 38.

202. Meese Report, *supra* note 57, at 334–36.

focusing especially upon various attitudinal changes toward the morality of non-marital sex acts.<sup>203</sup> This discussion did not mature, however, into a consensus for ameliorative or regulatory action, save that children should generally be shielded from “pure” sex pornography.<sup>204</sup>

## 2. *Means of Enforcement*

Several of the Commission’s law enforcement recommendations—and there were, all together, many—pertained to XXX stores and theaters, such as those which populated Times Square in the 1980s.<sup>205</sup> Policing all those “big boxes” was difficult. Doing so with some effect was feasible, however, and conceptually it was simple.<sup>206</sup> Taking care of the common good meant patrolling the commons. Mainstays of this regimen included zoning adult outlets to keep them far away from residential areas;<sup>207</sup> regulating signage to avoid scandal to passers-by;<sup>208</sup> and by sending in an undercover officer to ferret out prostitution.<sup>209</sup> Back when there were many adult bookstores and movie houses in any city, the police kept proprietors on their toes, too, by enforcing laws against admission of minors.<sup>210</sup> There is little of this left to be done. Apart from the stray sex boutique, the only establishments which have survived competition from the Internet are the live shows in “Gen-

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203. *See id.* at 335–47.

204. *See id.* at 346.

205. *Id.* at 75, 81, 441, 457–58.

206. My own experience as a Manhattan prosecutor in the 1980s included several cases in which a plainclothes police officer walked into a Times Square outlet, purchased a video, and brought it downtown for viewing by a judge. After the judge deemed it “obscene”, the same officer walked back into the store and arrested the clerk who sold him the video. I would thereafter dutifully charge the clerk with a misdemeanor, and he would just as dutifully plead guilty.

207. *See Meese Report, supra* note 57, at 386.

208. *See id.* at 390.

209. *See, e.g., Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 698–99 (1986) (discussing an investigation into an adult bookstore wherein an undercover deputy uncovered patterns of prostitution occurring in the adult bookstore).

210. *See, e.g., Allied Artists Pictures Corp. v. Alford*, 410 F. Supp. 1348, 1352 (W.D. Tenn. 1976) (discussing ordinances prohibiting admission of minors for films involving mature content and how Memphis police enforced such ordinances).

lemen's Clubs" and their down-market kin.<sup>211</sup> But stripteases and nude dancing are not legally "obscene"—they cannot (as such) be prohibited.<sup>212</sup> The remaining police task in these clubs is to be sure that the shows do not involve prostitution on the side.

The 1970 Commission observed that the "majority of theaters exhibiting exploitation films are old, run-down, and located in decaying downtown areas."<sup>213</sup> There was an emerging trend, though, toward opening new theaters in the suburbs.<sup>214</sup> By the mid-1970's this trend had matured. Now all these theaters are located in the memory. They have gone the way of peep shows and dirty book stores, all swept away by the Internet.

Another set of formerly effective police actions consisted of huge seizures at choke points along the distribution chain between production (in one of a few domestic locales, or in one of a few overseas jurisdictions) and distribution to the consumer.<sup>215</sup> At ports of entry or in the main post office, large stashes of "obscene" matter—reels of film or reams of magazines—came into police hands, soon to be destroyed.<sup>216</sup> Even where no prosecution ensued, depressed supply inevitably pushed down consumption a bit and reinforced the stigmatization of the material as "dirty."<sup>217</sup> These enforcement actions were largely unencumbered by constitutional search and seizure guarantees: customs inspectors had a free hand (then as now) to rifle through imports and even arriving travelers' luggage.<sup>218</sup> Postal

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211. See JANE JUFFER, *AT HOME WITH PORNOGRAPHY: WOMEN, SEXUALITY, AND EVERYDAY LIFE* 42–43 (1998).

212. See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (plurality opinion).

213. *COMM'N ON OBSCENITY & PORNOGRAPHY*, *supra* note 116, at 10.

214. *Id.*

215. See, e.g., Caryle Murphy, *Federal Pornography Probe Launched*, *WASH. POST* (Nov. 29, 1986), [http://www.washingtonpost.com/archive/local/1986/11/29/federal-pornography-probe-launched/6d7a6971-e94f-4288-b6b8-76beda7d29fa/?utm\\_term=.ca4974450517](http://www.washingtonpost.com/archive/local/1986/11/29/federal-pornography-probe-launched/6d7a6971-e94f-4288-b6b8-76beda7d29fa/?utm_term=.ca4974450517) [<https://perma.cc/3KR4-QUEU>].

216. See, e.g., *United States v. Various Articles of Obscene Merch.*, 411 F. Supp. 1328 (S.D.N.Y. 1976) (involving confiscation of obscene materials by United States customs officers); *Monart, Inc. v. Christenberry*, 168 F. Supp. 654 (S.D.N.Y. 1958) (denying a motion to enjoin destruction of obscene materials seized by Postmaster).

217. See, e.g., GEORGINA VOSS, *STIGMA AND THE SHAPING OF THE PORNOGRAPHY INDUSTRY* 9–11 (2015).

218. See 19 C.F.R. § 162.6 (2017).

inspectors had similar authority.<sup>219</sup> Even downtown retail outlets could be policed with little complication. Any plainclothes officer could walk in and purchase a copy of the suspect film or book and quickly display it to a local magistrate.<sup>220</sup> Once that neutral arbiter declared it to be “obscene,” police raids on locations of remaining stock of the item—in the initial target store or anywhere else it was sold—could proceed.<sup>221</sup>

Policing cyberspace is much more complex and subtle than patrolling Times Square was. It is impossible to seize what is digitalized, and this material can never be effectively destroyed. The number of potential hard copies is infinite. Users do not congregate at determinate public venues and producers are scattered across the globe. Now the closest thing to a natural choke point (the function previously performed by ports and post offices) is the Internet Service Provider.

It is perhaps surprising that, as far back as the Meese Commission, criminal prosecutions for distribution of adult obscenity had already become rare, and sentences (where convictions were obtained) were exceedingly light.<sup>222</sup> What the Commission then described as “striking underenforcement” of state laws against obscenity has not been reversed. Now, not only possession but also the distribution of material which is unquestionably obscene (in the *Miller* sense of that term) has been effectively decriminalized.

### 3. *The Legacy of the Meese Commission*

The Meese Final Report anticipates the key to what today’s research into pornography shows, namely (as they wrote in 1986): “The evidence says simply that the images that people are exposed to bears a causal relationship to their behavior.”<sup>223</sup> The Commissioners saw that one set of effects had to with broad “attitudinal” (what we would probably call cultural) changes, including a corrosion of traditional attitudes toward marriage, family, and sex.<sup>224</sup> They rightly judged that proving a

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219. See 39 C.F.R. § 233.7 (2017).

220. See *supra* note 206.

221. See *id.*

222. See *Meese Report*, *supra* note 57, at 367.

223. *Id.* at 326.

224. See *id.* at 327.

direct, or exclusive, causal relationship between pornography and culture was difficult at best.<sup>225</sup>

The Meese Commissioners were hampered in their investigation into effects by the paradigm they inherited. They were thinking mainly about the prevalence of copy-cat sex crimes, where a particular rapist or child molester was moved to act by his personal involvement with pornography of that sort. The Commission judged, for example, that “the available evidence strongly supports the hypothesis that substantial exposure to sexually violent materials . . . bears a causal relationship to antisocial acts of sexual violence and, for some subgroups, possibly to unlawful acts of sexual violence.”<sup>226</sup> The Commissioners reported that they reached this conclusion “unanimously and confidently.”<sup>227</sup> For pornography which was “degrading” but not violent, they judged, with considerably less confidence, that “substantial exposure” to these materials bears a causal relationship to what the Report describes as misogynistic attitudes toward women.<sup>228</sup>

No doubt pornography is as sexist and misogynistic today as it was in 1986; in fact, it is even more so.<sup>229</sup> There is, too, enough of the copy-cat phenomenon to cause broad social concern.<sup>230</sup> But it is undeniable that we are awash in a sea of pornography as never before, and yet there is no corresponding rise in the rates of sex offenses.<sup>231</sup> There is, to be sure, a huge upsurge in anti-social acts of certain types: that is the whole message of those (such as Gail Dines) who write about how porn “ha[s] hijacked our sexuality.”<sup>232</sup> But these anti-social acts are not the crimes, or even the injustices, that the Meese Commission had in mind. It tied violent and degrading pornography to changes

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225. *See id.* at 309–10.

226. *Id.* at 326.

227. *Id.*

228. *Id.* at 332–35.

229. *See DINES, supra* note 3, at xiii.

230. *See, e.g.,* John D. Foubert et al., *Pornography Viewing Among Fraternity Men: Effects on Bystander Intervention, Rape Myth Acceptance and Behavioral Intent to Commit Sexual Assault*, 18 *SEXUAL ADDICTION & COMPULSIVITY* 212 (2011).

231. *See* MICHAEL PLANTY ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ NO. 240655, *FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010*, at 1 (2013).

232. *See DINES, supra* note 3, at xiii.

in *viewers'* conduct toward women, which culminated in either sexual aggression toward them (in the case of violent pornography) and tolerance or indifference to the subjugation and even rape of women (in the case of degrading, non-violent pornography).<sup>233</sup> Whether these links are now present is uncertain.

In any event, the focal points now are different. Although most American men, and many American women, are at least occasional viewers of pornography,<sup>234</sup> and often their viewing more or less directly harms their relationships,<sup>235</sup> the crucial effects now are mediated to everyone. The central concern now is how ubiquitous pornography has radically altered the content and patterns of consensual sexual relationships, and beyond that, our whole culture of sex and sexual engagement. It is not now that pornography breeds injustice. It is more that our "pornified" culture is a huge, and insidious, impediment to our efforts to live decently, and well.

The great challenge is what to do about it. And here not even the clear-eyed and courageous work of the Meese Commission provides much guidance. For one thing, the home video market was in its infancy in 1986. The Final Report briefly reported on another novelty: "personal home computer[s]." <sup>236</sup> There were few of them. Some sexually oriented services were available on them, which the Commission dutifully catalogued.<sup>237</sup> No pornographic video images whatsoever could be downloaded. The Meese Commission saw the precursors, if you will, of today's online pornography. But the Commission saw so few of these precursors, and so dimly as through a glass darkly, that it is better to say that it could not imagine today's "pornotopia." Or, perhaps it is best to say that, with its warning about the looming obsolescence of its own recommenda-

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233. See *Meese Report*, *supra* note 57, at 324, 332.

234. See REGNERUS, *supra* note 12, at 114.

235. See, e.g., Nathaniel M. Lambert et al., *A Love That Doesn't Last: Pornography Consumption and Weakened Commitment to One's Romantic Partner*, 31 J. SOC. & CLINICAL PSYCHOL. 410, 428 (2012).

236. See *Meese Report*, *supra* note 57, at 1437.

237. See *id.* at 1441–44.

tions,<sup>238</sup> the Commission imagined that the then-unimaginable would soon come true.

The Meese Commission's perceptive Report contains many of the sound elements of our inherited conceptual apparatus, vocabulary, moral framework, and legal toolkit pertaining to pornography. There are several others, not least an aversion to censorship which is hard-wired into our country's DNA, a wariness itself nested within a tradition of anti-paternalistic political morality.<sup>239</sup> But even that tradition operates within the larger framework reflected in the 1954 Committee findings.<sup>240</sup> There, the Senators rightly stressed that the cultural environment in which our children come to maturity is a key aspect of the political common good, even as it recognized that government's care for that environment is secondary, and subsidiary, to the primary duties born by parents and civil society institutions.<sup>241</sup> Finally, the Supreme Court found no problem in utilizing a three-part test for "obscene" pornography which lies entirely outside First Amendment protection,<sup>242</sup> so long as that conceptual clarification is supplemented by a robust account of the harms which pornography visits upon persons, and on the people. These touchstones should guide the work of the new pornography Commission that we need.

When one comes closer to where these broader principles have been made operational, and thus to the more strategic and tactical practical judgments about pornography which we have inherited from the last several decades, the accounting is much more sobering. Most of this legacy is either inapposite to pornography today, or is simply obsolete. We remain largely enmeshed in a benign master narrative about pornography: it is each one's business to get involved or not, and there is little to say of an objective nature beyond that about the right and the wrong of it. The whole enterprise is presumed (or deemed, or claimed) to be marked by effective consent of those who get involved, and to be little or none of anyone else's business. Conservative regulatory efforts have focused upon the com-

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238. *See id.* at 226–27.

239. *See id.* at 269–73.

240. *See generally* S. REP. No. 84-62 (1955).

241. *Id.* at 24–33.

242. *Miller v. California*, 413 U.S. 15, 23–24, 29 (1973).

mons and on the alleged downstream “anti-social” effects of pornography epitomized by sex crimes.<sup>243</sup> These efforts have run their course. Within this inherited viewpoint, the reality that pornography is both privately consumed and publicly dominant would be almost unfathomable. And that it would be seriously harmful yet not productive of crimes, nearly unintelligible. It seems we need a fresh start.

### III. DYSTOPIC SEEDS

Or maybe not. One obvious possibility is to stay the course. Someone might argue that the present voluntaristic regime, in which the goal of public policy is to arrange things so that pornography is available on demand to those who want it and does not intrude upon those who do not, is not broken enough to fix it. Or to replace it. This position recognizes that pornography should be kept away from children. This objector could also concede that public policy is only roughly successful in achieving these goals. But, he or she would maintain, reforms should be guided by these twin, interrelated goals.

Of course, the entire set of facts and claims related in the opening pages of this article about our “pornified” culture would, even if only partly true, refute this position. According to those quoted here earlier (a group which includes some who are wary of or opposed to “pornotopia,” as well as some who celebrate it), our common culture has been decisively shaped by pornography, and so therefore have we. It is not that those quoted here dispute the importance of at least protecting the unwilling from exposure to pornography. But one could readily infer from that introductory picture (again, even if just accurate up to a point) that limiting our collective attention to such an aspiration is to ignore the elephant in the front room.

The objector’s proposal is also naïve in two ways, both illustrated by our consideration of the *Butler* case.<sup>244</sup> It is naïve, first, to think that the described goal (access on demand; no involuntary exposure) is achievable. The two aims are, in our online world, in a tense competition with each other: hit the gas to en-

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243. See *supra* text accompanying notes 227–29.

244. See *supra* Section II.A.2.

sure access and it is statistically certain that involuntary bleed will increase. And vice versa. It is naïve then, second, to imagine that there could be a technical or algorithmic solution to what is fundamentally a society-defining *choice*.

The dynamics of online pornography simply do not respect the line between the willing and the unwilling, including those unwilling who are children. It cannot be made to do so without a wholesale revision of our thinking about pornography and our societal response to it—which is precisely what the objection is an objection to.

Let me explain, starting with the putatively “willing.” It is a postulate, not a truth, about pornography today that the women who, for example, submit to multiple, simultaneous male penetration, and who wince and groan in pain throughout the ordeal, are really enjoying it. The reason for this “consent” hypothesis is that even the most dedicated pornography consumers do not want to think of themselves as masturbating witnesses to rape and sexual abuse. Nonetheless, a significant number of those who appear in pornography today are trafficked women and children, who are more or less forced into performing.<sup>245</sup>

Besides this pool of semi-professional performers, there are now countless amateur producers, directors, and participants in online pornography. Many are teens. “Sexting”—the sending of arousing and often nude images to significant others—is a kind of amateur pornography. Occasionally the amateur is literally forced to perform, perhaps by male acquaintances who threaten to disclose other embarrassing information or photos of her if she does not cooperate. But one common reason for these *ad hoc* productions is felt social pressure. And, once the images are transmitted, the “sexting” teen loses all power of consent over their circulation to the entire world.

An extraordinary example involves actress Jennifer Lawrence. Nude photos of her streaked across the Internet in 2014,

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245. See Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 VAND. J. ENT. & TECH. L. 799, 817–18 (2008); see also U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 32 (2017), <https://www.state.gov/documents/organization/271339.pdf> [<https://perma.cc/8E5U-GZAK>].

for which a hacker has since been convicted.<sup>246</sup> Lawrence said that the photos were meant for her then-boyfriend, Nicholas Holt. “It was long distance, and either your boyfriend is going to look at porn or he’s going to look at you.”<sup>247</sup> Even where such intimate images do not go viral, they can be used to coerce a regretful amateur because she knows that they might. Hence, the rise of “revenge porn,” and a corresponding lawyer’s specialty.<sup>248</sup>

It is easy to see that a “pornified” culture plays a causal role in this sad syndrome. Indeed, digitalization makes it *possible*. As J. Coopersmith wrote in 2007: “[T]his technology can be seen as liberating and empowering, allowing individuals to actively create their own pornography, not just passively consume the work of someone else.”<sup>249</sup> Yes, but there are serious collateral risks and foreseeable side effects, too.

Let us turn now to the consumer side, recognizing that our understanding of “consumer” is complicated by the viewer’s standing opportunity to also produce and distribute pornography. The notion of consumer is also destabilized by digitalization’s effacement of the fission which allows pornography to emerge into human experience as distinct subject matter—namely, the divide between representation and reality. The word’s etymological roots involve a combination of “prostitute” and “writing.”<sup>250</sup> At some risk of gilding the tawdry, our whole tradition of thinking about pornography supposes the interposition of a presenter—an artist—between the viewer

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246. See Tufayel Ahmed, *Jennifer Lawrence’s Nude Photo Hacker Sentenced to Nine Months in Prison*, NEWSWEEK (Jan. 25, 2017), <http://www.newsweek.com/jennifer-lawrence-nude-photo-hacker-sentenced-9-months-jail-547911> [<https://perma.cc/Q68A-DD65>].

247. See Cavan Sieczkowski, *Jennifer Lawrence Says Nude Photo Hack Was A ‘Sex Crime’ In Vanity Fair Interview*, HUFFINGTON POST (Oct. 07, 2014), [https://www.huffingtonpost.com/2014/10/07/jennifer-lawrence-nude-photo-hack-vanity-fair\\_n\\_5945150.html](https://www.huffingtonpost.com/2014/10/07/jennifer-lawrence-nude-photo-hack-vanity-fair_n_5945150.html) [<https://perma.cc/69WQ-6DS9>].

248. See Matthew Goldstein, *Law Firm Founds Project to Fight ‘Revenge Porn’*, N.Y. TIMES (Jan. 29, 2015), [https://dealbook.nytimes.com/2015/01/29/law-firm-founds-project-to-fight-revenge-porn/?\\_r=0](https://dealbook.nytimes.com/2015/01/29/law-firm-founds-project-to-fight-revenge-porn/?_r=0) [<https://nyti.ms/2jzDpvF>].

249. Jonathan Coopersmith, *Does Your Mother Know What You Really Do? The Changing Nature and Image of Computer-Based Pornography*, 22 HIST. & TECH. 1, 11 (2006).

250. *Pornographer*, OXFORD DICTIONARY OF ENGLISH ETYMOLOGY (C.T. Onions ed. 1966).

and the imaginings depicted in the art. Pornography is that art. It supposes that the sexual behavior depicted is not real. It is the construct of an artistic vision. The prevailing morality, if not criminal law, would prohibit actually engaging in the sexual behavior depicted. But now the “consumer” does not so much contemplate another’s art as he engages in something more like real sex, albeit mediated by modern technology.

Modern technology also enables the scientific study of how technological sex affects us, and of the prospects for genuine consent to consuming pornography. In his 2007 book *The Brain That Changes Itself*, Norman Doidge explores at length the concept of neuroplasticity as it pertains to online pornography.<sup>251</sup> Doidge takes over and develops the established finding that the brain continually re-shapes and re-wires itself as a result of certain regularly repeated actions.<sup>252</sup> Doidge shows how the continued release of dopamine in the brain as a response to the excitement of watching online pornography *changes* the brain.<sup>253</sup> Doidge concludes that “[p]ornography, delivered by high-speed Internet connections, satisfies every one of the prerequisites for neuroplastic change.”<sup>254</sup> He affirms in effect what we have known at least since the 1954 Committee hearings: sexual tastes and appetites are influenced by culture and experience.

This phenomenon so far considered raises questions about just *what* it is that an online pornography viewer is—and is not—making an informed choice to do: does anyone going online agree to be mutated in the process? Another question in many cases is how much of a *choice* it really is. Neuroplasticity raises the lively prospect of a compulsion, if not an addiction,

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251. DOIDGE, *supra* note 134, at 102–09.

252. *Id.*

253. *Id.* at 106–09.

254. *Id.* at 102. If something like this notion of plasticity and the social mortgage of our sexual taste and appetites is not true, then we would have a very difficult time explaining how, by everyone’s account, the content of online pornography has careened into hardcore scenarios and fetishistic minutiae in the space of just a few years. Indeed, if human sexuality were more fixed and hardwired, then pornography might be a more or less constant feature of social life, but the quantity and quality of it would scarcely change. But no one at all denies that it has *exploded*.

to internet pornography.<sup>255</sup> The American Psychiatric Association recognizes that *behaviors*, as well as substances, can be addictive.<sup>256</sup> Now that the authors of the standard reference (*Diagnostic and Statistical Manual*, or *DSM*) have identified Internet Gaming Disorder as a “condition for further study,”<sup>257</sup> the groundwork for identifying Internet pornography disorder as a subset of behavioral addictions is already in place.

It is surely not the case that most, or even very many, regular users of pornography are addicted to it, or even under significant compulsion.<sup>258</sup> But a non-negligible percentage are, or are at serious risk of becoming, addicted.<sup>259</sup> Ex ante no user knows what his particular risk factors are. Most will not give it a thought. Internet pornography providers are not likely candidates to fill in the information gap with adequate warnings and recommendations. Managing this risk devolves into, in some important sense, a social responsibility.

The stakes have been raised by a recent seismic shift in the way that our culture valorizes sexual satisfaction and sexual identity. This remarkable development both explains and reflects “pornotopia.” At first glance this cultural shift might also seem to justify “pornotopia,” as if the importance of individual sexual autonomy calls for easy access to pornography’s unlimited menu of possibilities. In fact, the leading justification on offer from those who try to justify “pornotopia” is its transgressive wallop, which breaks down—they allege—any rem-

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255. See Todd Love et al., *Neuroscience of Internet Pornography Addiction: A Review and Update*, 5 BEHAV. SCI. 388, 407–08 (2015).

256. See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 481 (5th ed. 2013).

257. *Id.* at 795. The description of Gaming Disorder tracks the accounts provided by Doidge and others. The American Psychiatric Association declared that Internet pornography was not “analogous” to Gaming Disorder, *id.* at 797–98, a decision which was described by reviewers as “inconsistent with existing and emerging scientific evidence,” Love, *supra* note 255, at 390.

258. See Nicole Prause et al., *Modulation of Late Positive Potentials by Sexual Images in Problem Users and Controls Inconsistent with “Porn Addiction”*, 109 BIOLOGICAL PSYCHOL. 192 (2015) (showing tentatively that pornography does not elicit normal addiction reactions of human brains like other addictive substances do).

259. See Kirsten Weir, *Is Pornography Addictive?*, AM. PSYCHOL. ASS’N (Apr. 2014), <http://www.apa.org/monitor/2014/04/pornography.aspx> [https://perma.cc/4666-5EJL] (“Various international studies have put porn consumption rates at 50 percent to 99 percent among men, and 30 percent to 86 percent among women.”).

nants of traditional sexual morality and all other norms about who one should, or should not, be, sexually speaking.<sup>260</sup> Pornography makes the world a better place because it is a medium for each one's exploration of possible sexual identities.<sup>261</sup>

But many careful observers, including some who share the same ideals about sexual individuality and autonomy as those who defend pornography, worry that pornography has precisely the opposite effect. They argue that "pornotopia" breeds a master narrative sexual script. In it the male is dominant, the female is submissive, and their sexual congress is entirely for the male's satisfaction.<sup>262</sup>

British writer Sean Thomas described in the London *Spectator* his porn-induced descent into depths of himself beyond his awareness:

My interest in spanking got me speculating: what other kinks was I harboring? What other secret and rewarding corners lurked in my sexuality that I would now be able to investigate in the privacy of my flat? Plenty, as it turned out . . . . [Thomas describes, in graphic detail, bizarre kinks that he discovered and found arousing.] *The Net had, in other words, revealed to me that I had an unquantifiable variety of sexual fantasies and quirks and that the process of satisfying these desires online only led to the generation of more interest.*<sup>263</sup>

Is Sean Thomas's sexuality *his*? He did not consciously choose it, and would not have discovered it but for the whimsy of his Internet surfing. The quotient of true choice in Internet explorations is diminished, too, because the viewer does not initiate each successive encounter. Pornography sites commonly use pop-ups and force-forward viewers to new pages, even if the viewer is seeking to leave.

Sean Thomas's recollection is an apt (if most colorfully related) example of the basic ideal which apologists for "pornoto-

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260. See, e.g., Marlene Wasserman, *Positive, Powerful Pornography*, 28 AGENDA 58, 64 (1996) (arguing that women should be more involved in pornography distribution to ensure a variety of sexual experiences are portrayed therein).

261. MCNAIR, *supra* note 15, at 10–11 (arguing that porn reveals "marginalised or suppressed [sic] sexual identities").

262. See generally DINES, *supra* note 3.

263. Sean Thomas, *Self Abuse*, SPECTATOR (June 28, 2003), <https://www.spectator.co.uk/2003/06/self-abuse/> [<https://perma.cc/E4RK-XVFA>] (emphasis added).

pia" say it promotes: excavation of a deeply subjective, individuated sexuality like none other's, a true picture of the real *me* (or you), deep down beneath social norms and stereotypes. But Thomas's experience and the research of Norman Doidge raise a significant question about the authenticity of any such discoveries. One does not have to be a Freudian to suspect that what pornography pulls to the surface is not some atavistic, real *me* (or you), but rather a jumble of imprints and combinations that one's environment and life with others have put there.

The etiology of sexual "identity" aside, it is apparent that Sean Thomas and the ideal that he awkwardly personifies leads to an extraordinary solipsism, which—according to an exploding body of clinical and statistical evidence—greatly impedes sexually reconnecting with real people, including one's spouse.<sup>264</sup> "Results showed the more pornography a man watches, the more likely he was to use it during sex, request particular pornographic sex acts of his partner, deliberately conjure images of pornography during sex to maintain arousal, and have concerns over his own sexual performance and body image."<sup>265</sup>

The gendered adjectives and pronouns in almost all this research are no accident. Nor is it a politically incorrect convention. For the social scientific evidence about frequency of masturbation and pornography use,<sup>266</sup> the number of sexual partners,<sup>267</sup> as well as more qualitative research into the nature of male and female sex drive and their preferred place of sex

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264. See Sun et al., *supra* note 16, at 984.

265. See *id.* at 983; see also DINES *supra* note 3.

266. "[A]lthough overall pornography and masturbation self-reports are notably lower for women than for men, the effect of pornography on masturbation seems comparable for women and men." Regnerus, *supra* note 12, at 140. Another researcher reviewed a wide range of literature, reported that "most psychological sex differences—in personality, sexuality, attitudes, and cognitive abilities—are conspicuously *larger* in cultures with more egalitarian sex role socialization and greater sociopolitical gender equity." David P. Schmitt, *The Evolution of Culturally Variable Sex Differences*, in THE EVOLUTION OF SEXUALITY 221, 222 (Todd K. Shackelford & Randal D. Hansen eds., 2015).

267. See, e.g., Norman R. Brown & Robert C. Sinclair, *Estimating Number of Lifetime Partners: Men and Women Do It Differently*, 36 J. SEX RES., 292, 292 (2010) <http://dx.doi.org/10.1080/00224499909551999> [<https://perma.cc/7KHR-Z6P2>] (analyzing why men tend to report more sexual activity than women).

within the overall pattern of the relationship,<sup>268</sup> confirms that nature, and not just nurture or socialization, explains the differences between men and women that almost anyone who dated observed from the get-go. That the paraphilia listed in the DSM are, with the partial exception of sadomasochism, almost entirely male phenomena, is further evidence.<sup>269</sup> The prevailing free market in pornography enlarges and aggravates this natural gap between the sexes. Plainly put: turn a population loose to access pornography, and women evince no more than moderate, intermittent interest. Men act like men, and become more so. "Pornotopia" drives men and women apart.

The sex-differential, which is turbo-charged by pornography, is irrelevant to same-sex relationships. Additionally, it is not disruptive of transient, more sex-focused heterosexual relationships, for they are fleeting and the parties to them are geared to walk away if the net sexual satisfaction dips below zero. The impact is obviously felt by heterosexual couples who are trying to make their relationships stick. The evidence of this stress upon married couples is especially alarming, leading to family turmoil and, often, breakdown. The woman "cuckolded" by online pornography and her children suffer from pornography they never invited into their lives. Even in relationships which endure the stress introduced by the man's pornography use, the achievement of a genuine mutuality, reciprocity, and equality across the whole of the life together is adversely impacted.<sup>270</sup>

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268. See Regnerus, *supra* note 12, at 22–23. Regnerus cites extensive research on this question, including Roy F. Baumeister et al., *Is there a Gender Difference in Strength of Sex Drive? Theoretical Views, Conceptual Distinctions, and a Review of Relevant Evidence*, 5 PERSONALITY & SOC. PSYCHOL. REV. 242, 242–73 (2001); E. Sandra Byers & Adrienne Wang, *Understanding Sexuality in Close Relationships from the Social Exchange Perspective*, in THE HANDBOOK OF SEXUALITY IN CLOSE RELATIONSHIPS 203, 203–34 (John H. Harvey et al. eds., 2004); Andrew Galperin et al., *Sexual Regret: Evidence for Evolved Sex Differences*, 42 ARCHIVES SEXUAL BEHAV. 1145–61 (2013); Letitia Anne Peplau, *Human Sexuality: How do Men and Women Differ?*, 12 CURRENT DIRECTIONS PSYCHOL. SCI. 37, 37–40 (2003); Pamela C. Regan & Leah Atkins, *Sex Differences and Similarities in Frequency and Intensity of Sexual Desire*, 34 SOC. BEHAV. & PERSONALITY 95, 95–102 (2006).

269. See AM. PSYCHIATRIC ASS'N, *supra* note 256, at 685–705.

270. Much of what I have tried to express in the last few paragraphs has been well said by another scholar:

The same market features that contribute to the explosion in adult usage—the affordable and anonymous private access to unlimited amounts of pornography—portend considerable intrusion of pornography upon the unwilling.<sup>271</sup> More alarmingly, seventy percent of America’s *children* aged fifteen to seventeen report viewing online pornography.<sup>272</sup> The average age of first exposure to adult material is eleven.<sup>273</sup> For *them* what happens on the screen has consequences off of it. “Research shows that increased pornography exposure is associated with earlier and/or quicker onset of sexual activity, more permissive attitudes toward casual sex, and a higher likelihood of engaging in risky sexual behaviors such as anal sex, sex with multiple partners, and using drugs or alcohol during sex.”<sup>274</sup>

Juvenile access to online pornography is almost by definition unsupervised; if adults were nearby, one would expect (at least reasonably hope) that the juvenile’s access would be terminated. For that reason and because the internet is so much like an open access, toll-free highway, there are many forms of serious and often criminal collateral damage inflicted upon those—children and teens—who are by law incapable of effective consent: cyber-bullying, sexual harassment, online solicitation, sexting, and “revenge porn.”

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Now if it is the case that sexuality is a powerful force which only with some difficulty, and always precariously, can be integrated with other aspects of human personality and well-being . . . and if it is further the case that human sexual psychology has a bias toward regarding other persons as bodily objects of desire and potential sexual release and gratification, and as mere items in an erotically flavoured classification (e.g. “women”), rather than as full persons with personal and individual sensitivities, restraints, and life-plans, then there is reason for fostering a milieu in which children can be brought up (and parents assisted rather than hindered in bringing them up) so that they are relatively free from inward subjection to an egoistic, impulsive, or depersonalized sexuality.

JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 217 (2011).

271. See *THE SOCIAL COSTS OF PORNOGRAPHY*, *supra* note 24.

272. See GERHARD FALK & URSULA FALK, *YOUTH CULTURE AND THE GENERATION GAP* 130 (2005).

273. See Jane Randel & Amy Sánchez, *Parenting in the Digital Age of Pornography*, *HUFFINGTON POST* (Feb. 26, 2016), [https://www.huffingtonpost.com/jane-randel/parenting-in-the-digital-age-of-pornography\\_b\\_9301802.html](https://www.huffingtonpost.com/jane-randel/parenting-in-the-digital-age-of-pornography_b_9301802.html) [<https://perma.cc/8UU4-QY6U>].

274. Sun et al., *supra* note 16, at 983–84.

Our society's increasing emphasis upon autonomous sexual identity and experience has penetrated youth culture. Many adults and even some institutions actively promote acceptance of what a child says about his or her sexual identity as *prima facie* authentic, and therefore deserving of adult respect.<sup>275</sup> (The societal debate about transgender children is one example.<sup>276</sup>) Combined with adolescents' natural curiosity about all things sexual, and with the allure of misbehaving online with ones' peers, easy access to digitalized pornography makes for a perfect storm of childhood trauma. For all the scientific evidence shows that children's brains are most especially malleable, and subject to formation by intense experiences epitomized by sexual excitement.<sup>277</sup> Even if, for a very few, this aspect of "pornotopia" realizes the hazy dream that children be sexually educated by "harmless" pornography,<sup>278</sup> no one should mistake the effects for products of anything like genuine consent.

Of course, the truth is rather that, unless adults are willing to make dramatic changes to their own moral and legal rules about pornography, if for no other reason than for the sake of our children, we are playing a game of Russian roulette with the formation and education of our children when it comes to one of the most precious parts of their lives.

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275. See, e.g., Richard A. Friedman, *How Changeable is Gender?*, N.Y. TIMES (Aug. 22 2015), [https://www.nytimes.com/2015/08/23/opinion/sunday/richard-a-friedman-how-changeable-is-gender.html?\\_r=0](https://www.nytimes.com/2015/08/23/opinion/sunday/richard-a-friedman-how-changeable-is-gender.html?_r=0) [<https://nyti.ms/2jCHTS8>]; Lisa Rein, *Transgender People Should Use Bathroom of Gender They Identify as*, U.S. URGES, WASH. POST (June 9, 2015), <https://www.washingtonpost.com/news/federal-eye/wp/2015/06/09/transgender-people-should-use-bathroom-of-gender-they-identify-as-u-s-urges> [<https://perma.cc/4DM3-SYWJ>].

276. See, e.g., Katie Morley, *Rise in Legal Battles Over Transgender Children's Rights*, TELEGRAPH (Oct. 23, 2016), <http://www.telegraph.co.uk/news/2016/10/23/rise-in-legal-battles-over-transgender-childrens-rights/> [<https://perma.cc/3JMY-GQLY>].

277. See, e.g., Rhoshel K. Lenroot & Jay N Giedd, *Brain development in children and adolescents: Insights from anatomical magnetic resonance imaging*, 30 NEUROSCI. & BIOBEHAV. REV. 718, 719–29 (2006) (reporting on the plasticity of the child and adolescent brain); Sandra Twardosz, *Effects of Experience on the Brain: The Role of Neuroscience in Early Development and Education*, 23 EARLY EDUC. & DEV. 96, 96–105 (2012) (discussing brain plasticity and the formational effects of intense experiences).

278. W. Cody Wilson & Sylvia Jacobs, *Pornography and Youth: A Survey of Sex Educators and Counselors*, 5 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 369, 374 (1971); see also Maggie Jones, *What Teenagers Are Learning From Online Porn*, N.Y. TIMES (Feb. 7, 2018), <https://nyti.ms/2BINfoV>.

## IV. CONCLUSION

The behavior characteristic of pornography—on the production and consumption sides, respectively—is comprised of the diagnosable paraphilias of exhibitionism and voyeurism.<sup>279</sup> Many of the specific acts portrayed, such as sadomasochistic domination and fetishism, are paraphilias too.<sup>280</sup> Our pornified society suffers from a psycho-sexual disorder.

Nevertheless, this is neither the place nor the occasion to exhaustively catalog the harmful social effects of unimpeded pornography, as it is today, by any socially authoritative stigma or measurable political and legal regulations. Nor is there a need to try. For the argument of this Article is not that these effects demonstrably require some particular social adjustment, or call clearly for this or that legal response. It is rather that there are enough data and well-founded worries about pornography to warrant commissioning the study required to actually catalog and classify those effects—and to see what should be done about them. It has been twice as long since the last such body issued its report as it was between that one and its predecessors. Yet there has been more technological and social change in the last decade or so than there was in the fifty years before that.

It is not going to be light work. The commission would be charged with answering a nearly paradigmatic question about public morality and its wise enforcement when the phrase “public morality” has lost its traction on many persons’ consciences. The leading non-governmental custodians thereof—the churches—have lost much of their cultural and moral authority.<sup>281</sup> What might loosely be described as “tradition-

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279. See AM. PSYCHIATRIC ASS’N, *supra* note 256, at 685–705.

280. See *id.*

281. See, e.g., PEW FORUM ON RELIGION & PUB. LIFE, “NONES” ON THE RISE: ONE-IN-FIVE ADULTS HAVE NO RELIGIOUS AFFILIATION (Oct. 9, 2012) (showing that a declining number of adults recognize religious authority). The scandal of sexual abuse *within* churches has also tested and diminished their moral authority to speak on such matters. See Roland Flamini, *Crisis in the Catholic Church*, 5 CQ GLOBAL RESEARCHER 3 (Jan. 1, 2011), <http://library.cqpress.com/cqresearcher/getpdf.php?id=cqrglobal2011010000> [<https://perma.cc/JL8N-FWKA>] (“Child abuse occurs in many institutions where children are supervised, and most, in fact, occurs within the home. But the fact that it was perpetrated by men of God who were then protected by the Catholic hierarchy has

mind ed” civic groups have been unfortunately pigeon-holed as reactionary.<sup>282</sup> One reason for both these conditions is that promoters of sexual license, including many judges and political leaders, have long maligned opposition to their agenda as either religious or emotional, or both.<sup>283</sup> The evanescent public traces of online pornography mean that neighbors and local civic groups can scarcely gain traction on the flow of pornography into their midst. The pornography industry will fight hard against any attempt to air its dirty secrets, and to hold it accountable for all the harm it causes. Socially embedded rationalizations and out-of-date tropes will make that fight all the more intense.

Our prospective commissioners will have to think and act creatively as they grapple with an unprecedented vortex of social problems, working within a heated political environment. They will need insight, courage, and a deep aversion to dogmatism of every stripe, if they are to have a chance of successfully completing the work entrusted to them.

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damaged the church’s moral authority, alienated many Catholics and put its clergy on the defensive—from the pope himself to the most junior village priest.”).

282. See, e.g., William C. Schambra, *Local Groups are the Key to America’s Civic Renewal*, BROOKINGS INST. (Sept. 1, 1997) <https://www.brookings.edu/articles/local-groups-are-the-key-to-americas-civic-renewal/> [https://perma.cc/8V37-MT35] (lamenting the unflattering labels traditionalist organizations have received).

283. See, e.g., Editorial, *In Indiana, Using Religion as a Cover for Bigotry*, N.Y. TIMES (Mar. 31, 2015), <https://nyti.ms/2m5Ubop>.