

NO COUNTRY FOR PURE MEN: AMERICA'S HARDCORE PORNOGRAPHY PROBLEM

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Porn is free because you pay with your soul.

–Unknown

I. INTRODUCTION

Hardcore pornography is so deeply ingrained in American culture that scholars have labeled America the “Porntopia.”¹ The days of stealing and stashing dad’s *Playboy* magazines have been left in the dust. The most popular pornographic websites all finance, create, and distribute products aimed at maximizing the sexual arousal of viewers.² The videos last anywhere from a few seconds to a few hours and prominently display the actors performing sex acts.³

The porn industry’s annual revenue is over \$100 billion.⁴ Pornhub alone, ranked as the fourth most visited website in the United States, trails only Google, YouTube, and Facebook.⁵ In 2023, Pornhub was visited more than

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1. Gerard V. Bradley, *Prolegomenon on Pornography*, HARV. J. OF L. & PUB. POL’Y. 443, 450 (2018).

2. ‘A Lot of It Is Actually Just Abuse’: *Young People and Pornography*, CHILD.’S COMM’R FOR ENG. 1, 10 (Jan. 31, 2023), <https://assets.childrenscommissioner.gov.uk/wpuploads/2023/02/cc-a-lot-of-it-is-actually-just-abuse-young-people-and-pornography-updated.pdf>.

3. *Id.* at 13. See also Alan McKee et al., *An Interdisciplinary Definition of Pornography: Results from a Global Delphi Panel*, ARCHIVES OF SEXUAL BEHAV., (Oct. 31, 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7058557/>.

4. *Porn Industry Revenue - Numbers & Stats*, BEDBIBLE RSCH. CTR. (May 3, 2023), <https://bedbible.com/porn-industry-revenue-statistics/>.

5. Samantha Smith & Jamie LeSueur, *Pornography Use Among Young Adults in the United States*, BALLARD BRIEF, <https://ballardbrief.byu.edu/issue-briefs/pornography-use-among-young-adults-in-the-united-states> (last visited Oct. 24, 2024).

Instagram, Netflix, Pinterest, and TikTok combined.⁶ In 2019, Pornhub amassed-- 42 billion visits,⁷ that is 115 million visits a day, 80,000 visits per minute.⁸ Studies reveal that one in three Americans seek out porn monthly, and over half of the population has viewed porn at least once.⁹ Most people access pornography by either phone or computer.¹⁰ According to one study, 93% of boys and 62% of girls were exposed to internet pornography during their teenage years.¹¹ Another study found that the average age at which a person is first exposed to internet pornography is twelve years old.¹² This report also revealed that children as young as ten years old had been exposed to internet pornography.¹³ Porn consumers also face a high risk of addiction,¹⁴ comparable with consumers of crack cocaine.¹⁵ Unsurprisingly, pornography can severely and detrimentally affect the brain.¹⁶ Pornography use is linked to anxiety, stress, and depression among college-aged individuals¹⁷ and is closely linked to impotence.¹⁸

Most worrisome is many researchers have found a link between the consumption of pornography and violence.¹⁹ One study found that 88% of internet pornography videos contain a form of violence.²⁰ There is a consensus among psychologists that, at the very least, the constant

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *New Report Reveals Truths About How Teens Engage with Pornography*, COMMON SENSE MEDIA (Jan. 10, 2023), <https://www.commonsensemedia.org/press-releases/new-report-reveals-truths-about-how-teens-engage-with-pornography#:~:text=The%20report%27s%20key%20findings%20highlight,first%20viewing%20pornography%20is%2012>.

13. *Id.*

14. Smith & LeSueur, *supra* note 5. See also Andrew Court, *Remote Amazon Tribe Finally Connects to Internet—Only to Wind up Hooked on Porn, Social Media*, N.Y. POST (June 4, 2024, 1:19 PM), <https://nypost.com/2024/06/04/lifestyle/remote-amazon-tribe-connects-to-elon-musks-starlink-internet-service-become-hooked-on-porn-social-media/>.

15. GARY WILSON, *YOUR BRAIN ON PORN: INTERNET PORNOGRAPHY AND THE EMERGING SCIENCE OF ADDICTION* 77 (2015).

16. See *id.* at 78-84.

17. Smith & LeSueur, *supra* note 5.

18. Beth Levine, *Pornography Habit Is Linked to Erectile Dysfunction, Research Suggests*, EVERYDAY HEALTH (July 22, 2020), <https://www.everydayhealth.com/erectile-dysfunction/pornography-habit-is-linked-to-erectile-dysfunction-research-suggests/>.

19. Smith & LeSueur, *supra* note 5.

20. *Id.*

viewership of women in a role that is subservient, objectified, and subject to violence desensitizes men and makes a man more likely to accept these ideas as normal.²¹ Ted Bundy, an infamous rapist and murderer of young women, declared that pornography was at the core of his perverse crimes.²² Interestingly, he also stated that most sex offenders imprisoned with him consumed pornography.²³ But pornography is not just prevalent among the most heinous criminals. Researchers have found that pornography has had a catastrophic impact on married men and women.²⁴ Whether analyzed from a Catholic or secular perspective, pornography use is extremely detrimental to the individual and to the greater society. Given its widespread accessibility and the rate at which it is consumed, this issue needs to be addressed immediately to protect the minds, bodies, and souls of the American people.

II. BACKGROUND

Obscenity is a category of speech that is unprotected under the First Amendment.²⁵ Additionally, obscenity and hardcore pornography are spoken of synonymously.²⁶ The core problem with the Supreme Court's obscenity jurisprudence is a rejection of the traditional common law approach to defining obscenity.²⁷ Even worse, the Court's replacement is based on a utilitarian theory that has decayed into utter libertarianism.²⁸ The Court's justification is an evolution of understanding the First Amendment, which was trailblazed by Justice Oliver Wendell Holmes. The truth is, Justice Holmes's "fire in a crowded theatre" anecdote obfuscates his revolutionary jurisprudential approach to the First Amendment and presumes the constitutionality of *all* speech unless it presents a "clear and present"

21. *Id.*

22. Luke Gibbons, *Serial Killer Ted Bundy Describes the Dangers of Pornography*, CBN (Oct. 31, 2018), <https://www2.cbn.com/news/us/serial-killer-ted-bundy-describes-dangers-pornography>.

23. *Id.*

24. Kevin B. Skinner, *Is Porn Really Destroying 500,000 Marriages Annually?* PSYCH. TODAY (Dec. 12, 2011), <https://www.psychologytoday.com/us/blog/inside-porn-addiction/201112/is-porn-really-destroying-500000-marriages-annually>.

25. *Miller v. California*, 413 U.S. 15, 20-21, 23 (1973); *see also* U.S. CONST. amend. I.

26. *Miller*, 413 U.S. at 29.

27. *Id.* at 36.

28. Alan Charles Kors, *Freedom of Speech*, CATO INST. (Aug. 15, 2008), <https://www.libertarianism.org/topics/freedom-speech>.

danger.²⁹ The Holmesian approach is wholly inconsistent with the Framers' intention and understanding of the First Amendment.³⁰

Furthermore, the Holmesian approach rejects a natural law understanding of speech.³¹ A natural law understanding of obscenity is especially important when considering pornography because of the inextricable and fundamental role that sexual appetites have in our human nature.³² According to Saint Thomas Aquinas, a human law is only consistent with the natural law when it is an ordinance of reason promulgated by a legitimate authority and for the common good.³³ The Court's understanding of the common good is based on the libertarian "privacy theory," which has placed far too much value on unfettered liberty in the home.³⁴ Conversely, the natural law understanding of the common good places the virtue and purity of its citizens above their unfettered liberty.³⁵

This Note gives an overview of obscenity case law so that the problem of hardcore internet pornography can be addressed and solved. Part III of this Note addresses definitional obscenity, the Court's utilitarian approach, and a suggested approach. Part IV refines the understanding of definitional obscenity by providing alternative ways in which sexually explicit materials can be regulated. Part V addresses the practicality of the Court's approach. Part VI connects all of these concepts to obscenity cases where sexually explicit materials are distributed through a technological medium.

29. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

30. See Phillip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 *YALE L.J.* 907 (1993) (observing that the Framers' understanding of the First Amendment was cohesive with the natural rights of man derived from and limited by the natural law).

31. *Id.*

32. See JOHN PAUL II, *MAN AND WOMAN HE CREATED THEM: A THEOLOGY OF THE BODY* 220-307 (Michael Waldstein trans., Pauline Books & Media 2d ed. 2006); see also *Bostock v. Clayton Cnty.*, 590 U.S. 644, 660-61 (2020) (reasoning that discrimination of transgenders and homosexuals is included in the meaning of sex discrimination because one's sexuality is "inextricably" linked to one's sex).

33. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, PT. II, Q. 90, ART. 4 (Fathers of the Eng. Dominican Province trans., 1920) [hereinafter *SUMMA THEOLOGICA*]. see J. BUDZISZEWSKI, *COMMENTARY ON THOMAS AQUINAS'S TREATISE ON LAW 5-57* (Cambridge Univ. Press) (2014).

34. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (using a privacy theory as justification for holding that criminal sanctions of possession of hardcore pornography in the home are unconstitutional); see also David M. Rabban, *The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History*, 45 *STAN. L. REV.* 47, 50 (1992) (asserting that scholars like Zechariah Chafee are responsible for "glossing over" the free speech precedents in Justice Holmes's approach and replacing them with libertarian ideals).

35. BUDZISZEWSKI, *supra* note 33.

III. DEFINITIONAL OBSCENITY

America's hardcore porn problem begins with the *Roth-Miller* approach to obscenity. The *Roth-Miller* approach is a test for definitional obscenity that is inconsistent with the traditional common law approach. The traditional approach was first crafted in *Regina v. Hicklin*.³⁶ *Hicklin* reflects a test that is consistent with the *purpose* of obscenity laws, that is, to protect the common good³⁷ of the citizens by proscribing material that tends to corrupt or degrade the most vulnerable in society.³⁸ The *Roth-Miller* test is emblematic of a modern American jurisprudence that has overwhelmingly embraced utilitarian principles as the basis of its laws.³⁹ But obscenity regulations are inextricably linked to the natural law in regard to their purpose. Subsequently, natural law principles are necessary to successful regulation of hardcore pornography. In other words, under the *Hicklin* approach, obscenity is clearly identified and classified as an enemy of the common good; under the *Roth-Miller* approach, obscenity is a plastic concept that can be molded to the desires of the most depraved individual.⁴⁰

A. *Hicklin* to *Roth*

Roth begins with a historical overview of obscenity law that confidently emphasizes that obscene materials have no place in society and are outside the purview of First Amendment protections.⁴¹ But the Court failed to look to the wisdom of the history it cited.⁴² Instead, the Court capitulated to the

36. R v. Hicklin (1868) 3 LRQB 360 at 371 (Eng.).

37. BUDZISZEWSKI, *supra* note 33, at 27-39. Thomas Aquinas's understanding of the common good was not as an aggregate of private goods but rather a common human flourishing in virtue and goodness. *Miller* and its progeny reflect a contrary conception of the common good; one in which each person's personal pleasure is sought to be maximized and aggregated.

38. R v. Hicklin (1868) 3 LRQB 360 at 371 (Eng.).

39. David A.J. Richards, *Constitutional Legitimacy, The Principle of Free Speech, and the Politics of Identity*, 74 CHI.-KENT L. REV. 779, 789-91 (1999) (finding that modern models of free speech are grounded in libertarianism or perfectionism).

40. *Miller v. California*, 413 U.S. 15, 33-34 (1973).

41. *Roth v. United States*, 354 U.S. 476, 481-85 (1957).

42. See Hamburger, *supra* note 30 (the Founding Fathers understood the First Amendment to be restrained by the natural law; thus, natural rights like freedom of speech only went as far as the natural law allowed. Ultimately, this framework rejects obscenity as protected speech because it conflicts with the common good by corrupting and degrading the human person).

Sexual Revolution⁴³ and embraced utilitarian harm theory principles.⁴⁴ On these principles, the Court explicitly rejected the traditional natural law approach set forth in *Hicklin*.⁴⁵

Rather, the Court radically changed the working definition of obscenity. First, the Court limited the scope of obscenity to the prurient.⁴⁶ Second, the Court decided that the prurient interest must be the dominant theme of the material.⁴⁷ Third, the Court held that the question of whether the dominant theme of the material is prurient is to be judged by the average person.⁴⁸ Fourth, the Court held that the average person will apply contemporary community standards.⁴⁹ The changes made are severe and emblematic of a radically new understanding of obscenity and the common good.⁵⁰ The Court created a test that presumes *all* materials to be protected unless the requisite elements are met.⁵¹ This is incongruent with the Constitutional Framers' approach to speech,⁵² the traditional obscenity test,⁵³ and the natural law.⁵⁴

43. *Miller*, 413 U.S. at 24. *See also* *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (using a privacy theory to strike down Connecticut's long-standing contraception ban).

44. *See* David Brink, *Mill's Moral and Political Philosophy*, in STAN. ENCYCLOPEDIA OF PHIL. (Aug. 22, 2022), <https://plato.stanford.edu/archives/fall2022/entries/mill-moral-political/> (statement of John Stuart Mill) (“[A]ctions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness”) (understanding “happiness” as a *personal* kind of pleasure) (contrasting the Founding Fathers’ “pursuit of happiness” as a common flourishing of man). *Cf.* CARLI N. CONKLIN, *THE PURSUIT OF HAPPINESS* 127 (2019) (contrasting this traditional pursuit of common flourishing purported by the Founders with the pursuit of pleasure that is found in the Court’s approach in *Miller*).

45. *Roth*, 354 U.S. at 488-89.

46. *Id.* at 487-88 n.20 (defining prurient interest as “material having a tendency to incite lustful thoughts”).

47. *Id.* at 489.

48. *Id.* at 489-90.

49. *Id.*

50. Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J. OF L. & PUB. POL’Y. 103, 109 (2022) (asserting that contemporaries have misconstrued the common good as a subjective and pluralistic concept when the common good is traditionally an objective and unitary concept).

51. *Miller v. California*, 413 U.S. 15, 24 (1973). Obscenity is unprotected speech, but the Court’s test is wholly irreverent to this principle. The test presumes that dominantly prurient materials are protected and forces the government to show that the speech seriously lacks value to prove obscenity. Contrast the *Hybrid Test* that presumes that dominantly prurient materials are not protected but may *become* protected if the defendant can show that the materials have serious value.

52. Hamburger, *supra* note 30.

53. *R v. Hicklin* (1868) 3 LRQB 360 at 371 (Eng.).

54. BUDZISZEWSKI, *supra* note 33.

The Court provides a test that only allows the proscription of materials that, taken as a whole, are sexually arousing to the average person.⁵⁵ This should have been a big enough change from *Hicklin* to guard from the “chilling of speech.”⁵⁶ But the Court takes an even larger leap with its contemporary standard caveat.⁵⁷ Effectively, these elements create a liberalization of the culture, a barrierless mudslide of community standards toward the obscene. The test allows protection for empirically obscene materials. These empirically obscene materials then become produced, normalized, and accepted. Because these materials become accepted, community standards then become more liberal, and people accept more extreme and deviant materials.⁵⁸ Then, in future cases, jurors responsible for determining obscenity must judge by the “same” contemporary standards that have already spiraled toward the obscene. The *Roth* approach begs for an exponential increase in both the amount of sexually explicit materials produced and the intensity of the content of those materials. Certainly, that change has been reflected in the sixty-seven years since *Roth* was decided.⁵⁹

Unsurprisingly, Justice Brennan, who wrote for the majority in *Roth*, found obscenity impossible to define less than twenty years later.⁶⁰ The Court embraced a utilitarian test to regulate a class of materials that can only be understood through the natural law.⁶¹ Thus, the Court has created a major problem in defining and determining whether materials are obscene.⁶² Because the Court cannot determine obscenity under its *own test*, the need to change the approach is apparent.⁶³ The *Hicklin* approach, or a modern approach consistent with the natural law principles necessary for obscenity

55. *Roth v. United States*, 354 U.S. 476, 490 (1957).

56. *See Broadrick v. Oklahoma*, 413 U.S. 601, 630 (1973) (Brennan, J., dissenting) (explaining the Court is often concerned with the chilling of speech by government legislation).

57. *Roth*, 354 U.S. at 489.

58. *See generally* James Q. Wilson & George L. Kelling, *Broken Windows*, ATL. MONTHLY, Mar. 1982, at 29 <https://cdn.theatlantic.com/media/archives/1982/03/249-3/132638105.pdf> (stating that the relationship between “disorder and crime” is a close one and law enforcement needs to prevent community standards from snowballing).

59. ‘A Lot of It Is Actually Just Abuse’: *Young People and Pornography*, *supra* note 2, at 13.

60. Gerald M. Rosberg, *Justice Brennan and the Law of Obscenity*, 11 PACE L. REV. 455, 462 (1991). <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1543&context=plr>.

61. ROBERT P. GEORGE, MAKING MEN MORAL 99-101 (1993).

62. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 81 (1973) (Brennan, J., dissenting).

63. *See Jacobellis v. Ohio*, 378 U.S. 184, 196 (1964) (Potter, J., concurring) (“I shall not today attempt further to define [obscenity]. . . . But I know it when I see it” is an accurate description of the difficulty Justices have in defining obscenity).

regulation will properly order the law toward the correct end⁶⁴ of increasing the virtue, purity, productivity, and happiness of Americans.⁶⁵

B. *Roth to Miller*

The Court in *Miller v. California* established the current test for definitional obscenity starting with the formulation espoused in *Roth*.⁶⁶ The *Miller* Court also drew from *Memoirs v. Massachusetts*⁶⁷ and other cases⁶⁸ to solidify its approach to definitional obscenity.⁶⁹ But these cases used *Roth* as the fundamental test for obscenity,⁷⁰ so by incorporating *Roth* and its progeny, the *Miller* Court also incorporated a rejection of *Hicklin* and the natural law principles it embodied.

The first important holding in *Miller* is a clarification of the *Roth* approach.⁷¹ The *Miller* Court held that there is no *national* contemporary standard of a dominantly prurient work.⁷² Furthermore, the *Miller* Court added that obscene material must seriously lack societal value, and the work must contain “patently offensive . . . sexual conduct specifically defined by the applicable state law.”⁷³ These elements are all to be judged by the average person⁷⁴ unlike the *Hicklin* approach that judges from the perspective of the most vulnerable person.⁷⁵ The *Miller* Court maintained that hardcore pornography is synonymous with obscenity.⁷⁶ Although it

64. SUMMA THEOLOGICA, *supra* note 33, Pt. II, Q. 94, Art. 2.

65. See BUDZISZEWSKI, *supra* note 33, at 27-39 (arguing that Aquinas believed that the law subordinates man to reason and helps him grow in virtue).

66. *Miller v. California*, 413 U.S. 15, 29-30 (1973).

67. *Id.* at 20.

68. *Id.* at 22 (citing *Kois v. Wisconsin*, 408 U.S. 229 (1972); *United States v. Reidel*, 402 U.S. 351, 354 (1971); and *Roth v. United States*, 354 U.S. 476 (1957)).

69. *Id.* at 24. “A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”

70. See *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Att’y Gen. of Mass.*, 383 U.S. 413, 418 (1966); *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972).

71. *Miller*, 413 U.S. at 29.

72. *Id.*

73. *Id.* at 24.

74. *Id.*

75. *R v. Hicklin* (1868) 3 LRQB 360 at 370-73 (Eng.).

76. *Miller*, 413 U.S. at 28.

suggested some statutes that would be constitutional,⁷⁷ the Court failed to define hardcore pornography in any meaningful way.⁷⁸

Again, the Court's inability or unwillingness to define obscenity more clearly has made obscenity meaningless. Thus, in the wake of *Miller*, legislators must use *Miller*'s exact language or risk getting struck down on overbreadth grounds.⁷⁹ So, while legislators are restricted in their ability to proscribe moral depravity, pornographers and porn viewers are liberated under this unrestrictive approach to hardcore pornography.⁸⁰ The *Miller* approach allows pornographers to produce, distribute, and sell almost any sexual desire and to exploit human sexuality in the process.⁸¹ Thus, the *Miller* Court continued to deviate from the natural law and accepted utilitarian principles as the justification of obscenity laws. Utilitarians are concerned with minimizing harm, but they are also concerned with balancing pros and cons.⁸² Clearly, utilitarian grounds were the basis for the decision in *Miller*, which attempted to minimize the harm (obscene materials) by balancing the value of constitutionally protected speech. But the true purpose of obscenity law is to help those under the law grow in virtue.⁸³ The *Miller* Court put forth a utilitarian test that attempts to balance interests, but by attempting to balance the interest of free speech directly against the interest of a virtuous citizenry, the Court neglected to properly order these goods.⁸⁴

77. *Id.* at 24. The Court's suggested statutory language is: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

78. *Id.* at 29. The Court finds it unreasonable to expect that standards of pornography can be defined, "even assuming the prerequisite consensus exists."

79. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 254-55 (2002).

80. *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 835 (2000) (Scalia, J., dissenting) ("It is not only children who can be protected from occasional uninvited exposure to what appellee calls 'adult-oriented programming'; we all can be.").

81. *Porn Industry Revenue - Numbers & Stats*, *supra* note 4.

82. Brink, *supra* Note 44.

83. See BUDZISZEWSKI, *supra* note 33, at 27-39.

84. SUMMA THEOLOGICA, *supra* note 33, Pt. II, Q. 94, Art. 2. Man has a natural inclination to know the truth about God and to live in a society. By reason, man orders a society to promote natural law. It is unreasonable to consider prurient materials as having the same value as all speech because prurient materials are contrary to man's nature; thus, the natural law requires a test that properly orders these goods. See also SUMMA THEOLOGICA, *supra* note 33, Pt. II, Q. 71, Art. 2. The *Miller test* attempts to balance the preservation of virtue with the promotion of art, science, and literature. However, these goods (or ends) should not be balanced against each other directly. The preservation of virtue should be preferred or prioritized, but free speech should not be neglected. The *Hybrid Test* prioritizes the promotion of virtue (through proscription of prurient materials) over the promotion of art, science, and literature. The *Hybrid Test* requires the fact finder to make two *separate* determinations. First, whether the

The *Miller* Court ignored the reality that obscenity laws aim to preserve the end of a virtuous population over the end of free speech.⁸⁵ As a result, the Court prioritized men and women “getting their rocks off” rather than the dignity of the human flesh.⁸⁶ Conversely, the *Hicklin* approach has the natural law at its core because it requires the fact finder to make a moral determination as to the depravity of the material.⁸⁷ This depravity is not balanced against the artistic or scientific value of the material because the end of a virtuous citizenry is categorically more important.⁸⁸

American legislators have been persistent in their attempts to exercise their paternalistic powers and promote the morality of their citizens⁸⁹ even with a Court that has consistently interfered with this traditional and compelling interest.⁹⁰ The Court’s approach to obscenity determinations has proved outdated and unworkable. The Court simply cannot define obscenity properly. This Note provides a test that embraces the natural law tradition while maintaining respect for speech that has social value. The test is as follows: a material is presumed to be obscene when the average person, applying reasonable standards of decency, finds that the work dominantly appeals to the prurient interest and tends to corrupt or degrade the most vulnerable people in society. This presumption can be overcome by proof that the work has serious social value. Because this approach draws from both the traditional natural law approach and the modern American approach, it will hereinafter be referred to as the *Hybrid Test*.

Indeed, *Hicklin* is conservative and restrictive, but *Miller* is liberal and unrestrictive. The *Hybrid Test* represents a middle ground. The *Hybrid Test* recognizes that overwhelmingly sexual materials that tend to corrupt individuals should be presumed as unprotected speech. The *Hybrid Test* also recognizes the importance of protecting materials that are offensive and

material is dominantly prurient. Second, whether the material has serious artistic, scientific, or literary value. The separation of these determinations is cohesive with the natural law principle of the ordering of goods; thus, it will lead to more fluid determinations by the fact finder. Whereas the *Miller test* neglects this principle and forces the fact finder to do the impossible: balance these goods against each other.

85. *Id.*; *Miller v. California*, 413 U.S. 15, 29 (1973) (although the *Miller* Court does not explicitly order these interests, it does reaffirm that hardcore pornography is unprotected by the First Amendment, thus, implicitly ordering the end of a virtuous citizenry over free speech).

86. JOHN PAUL II, *supra* note 32. *See also* CATECHISM of the Catholic Church ¶¶ 1643-1648 (2d ed. 1997).

87. *R v. Hicklin* (1868) 3 LRQB 360 at 370-73 (Eng.).

88. SUMMA THEOLOGICA, *supra* note 33, Pt. II, Q. 71, Art. 2, Pt. II, Q. 94, Art. 2.

89. GEORGE, *supra* note 61, at 100-01.

90. *See Reno v. ACLU*, 521 U.S. 844, 869-70 (1997).

unpopular; accordingly, it allows for the presumption to be overcome by proof of serious social value. The presumption is justified by the natural law approach to the common good, which places the virtue and flourishing of its citizens above all else.⁹¹ But the *Hybrid Test* also recognizes that some works may provide serious social value through the use of sexual appeal.⁹² Effectively, the *Hybrid Test* puts the burden on the pornographer to prove the value in his speech which is essential to combatting America's hardcore porn problem.⁹³ Pornhub's library can no longer be presumed to be constitutional speech if America wants to preserve the virtue of its young men and women.⁹⁴ The *Hybrid Test* would likely leave the contents of Pornhub and other commercial porn sites⁹⁵ unprotected by the First Amendment without condemning vast amounts of artistic and scientific materials to the same fate. Thus, the *Hybrid Test* is the most viable solution. *Miller* affirmatively declares that hardcore pornography is outside the protections of the First Amendment,⁹⁶ but *Miller* does not properly lay forth a test that can address this problem, which has caused hardcore pornography to become more prevalent and more deviant.

IV. ALTERNATIVE CONSIDERATIONS

The framework of obscenity case law is confusing and elusive. Even before the internet, hardcore pornography was hard for courts to define and even harder for legislators to regulate.⁹⁷ But defining obscenity under *Miller* is not the only problem with a utilitarian-libertarian legal theory. On this theory, the Court finds the distribution of hardcore pornography

91. GEORGE, *supra* note 61, at 99-101.

92. See *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. Att'y Gen. of Mass, 383 U.S. 413, 418-19 (1966) (applying the "utterly without redeeming social value" test).

93. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 81 (1973) (Brennan, J., dissenting).

94. GEORGE, *supra* note 61, at 99-101 (explaining that the Western tradition uses law to help people "make themselves moral"); *Harms of Pornography*, CTR. FOR ARIZ.POL. (Nov. 25, 2019), <https://www.azpolicy.org/policy-page/harms-of-pornography/>; Sensus Fidelium, *7 Deadly Sins: Lust ~ Fr Ripperger*, YOUTUBE (Nov. 15, 2013), https://youtu.be/w_UWskdcsyg?si=OwouzaBGssvAHeTA (discussing how lust and pornography affect virtue and the order of society).

95. See generally FARAZ AHMED ET AL., *THE INTERNET IS FOR PORN: MEASUREMENT AND ANALYSIS OF ONLINE ADULT TRAFFIC* (2016).

96. *Miller v. California*, 413 U.S. 15, 28 (1973).

97. Rosberg, *supra* note 60, at 462; *Pope v. Illinois*, 481 U.S. 497, 504-05 (1987) (Scalia, J., concurring) (discussing the difficulty in litigating the value of art); *Ward v. Illinois*, 431 U.S. 767, 780-82 (1977) (Stevens, J., dissenting) (revealing the Court's inconsistency in the application of the second element of the *Miller* test).

unconstitutional but the possession of the same materials constitutional.⁹⁸ This has undermined the government's authority to regulate morality, and the internet has not made the government's job any easier.⁹⁹ After discussing alternative considerations to defining obscenity under *Miller*, Part V will discuss the possession paradigm.

A. *Scienter and National Standards*

When deciding if an individual has distributed hardcore pornography, there are three other useful components in addition to *Miller*. The first is straightforward, although not explicitly mentioned in the *Miller* test, the *Miller* Court recognizes that for an individual to be found guilty of distribution of obscene materials, the person had to have known or should have known of the material's obscene content.¹⁰⁰ Because obscenity laws are criminal, this scienter requirement is nothing more than the requisite mens rea of the crime.¹⁰¹ Traditionally, booksellers and their employees could not claim mistake of fact to an obscene book they sold.¹⁰² This makes sense because even if the person who physically sold the book was unaware of the obscene content, *the person should have known* and thus satisfy the requisite mens rea for conviction. Hardcore pornography posted on social media goes through a website and an internet provider who have likely not viewed the material. Should the website and internet provider have known about the obscenity of the material?

The next important consideration is the standard by which obscenity should be judged. This Note has already briefly addressed the problem with "contemporary standards," especially in conjunction with the other elements of the *Miller* test. There is also an important "national standard"¹⁰³ consideration. *Miller* held that there is no national standard of contemporary community standards.¹⁰⁴ In this regard, obscenity is unique compared to other unprotected categories of speech. Fighting words, true threats, and

98. See *infra* Section V.B.

99. ABHILASH NAIR, THE REGULATION OF INTERNET PORNOGRAPHY: ISSUES AND CHALLENGES 1 (2019).

100. *Miller*, 413 U.S. at 28.

101. *Smith v. California*, 361 U.S. 147, 153 (1959).

102. *Id.*

103. *Miller*, 413 U.S. at 29.

104. *Id.*

incitements have no such restriction on their enforcement,¹⁰⁵ although the standards of these categories of speech may differ from “Maine” to “Mississippi.”¹⁰⁶ Additionally, the *Miller* Court suggested viable statutory language for legislators.¹⁰⁷ These viable regulations represent the lowest common denominator for obscene works. How can this be considered anything but a national standard? With the evolution of the internet, jurisdictional borders have been destroyed and local community standards eradicated.¹⁰⁸ The universality of the problem presented by hardcore internet pornography likely requires a national standard in its resolution.¹⁰⁹

B. *Pandering Principle*

In between the *Roth* and *Miller* decisions, the Court developed an important principle that contextualizes definitional obscenity. In *Ginzburg v. United States*, the Court held that in close cases of obscenity determinations, the context and the circumstances of the situation may allow a certain material to be classified as obscene, despite its content being non-obscene (“Pandering Principle”).¹¹⁰ This was the case in *Ginzburg*, where the defendant advertised three separate magazines for their salacious appeal.¹¹¹ Additionally, the appellant’s marketing campaign was so large that his local post office could not handle the volume.¹¹² Taking these circumstances into account, and in conjunction with the content of the materials, the Court upheld the appellant’s conviction for distribution of obscene materials.¹¹³

105. Michael J. Mannheimer, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527, 1544 (1993) (explaining the standard for fighting words); Jennifer Elrod, *Expressive Activity, True Threats, and the First Amendment*, 36 CONN. L. REV. 541, 554 (2004) (explaining the standard for true threat); Anna Rhoads, *Incitement and Social Media-Algorithmic Speech: Redefining Brandenburg for a Different Kind of Speech*, 64 WM. & MARY L. REV. 525, 535-37 (2022) (explaining the standard for incitement).

106. *Miller*, 413 U.S. at 31.

107. *Id.* at 24.

108. NAIR, *supra* note 99, at 17-20.

109. Matthew Dawson, *The Intractable Obscenity Problem 2.0: The Emerging Circuit Split Over the Constitutionality of “Local Community Standards” Online*, 60 CATH. U. L. REV. 719, 723-25 (2011) (describing the different approaches to community standards in obscenity law).

110. *Ginzburg v. United States*, 383 U.S. 463, 474 (1966).

111. *Id.* at 466-67.

112. *Id.* at 467-68.

113. *Id.* at 474-76. *See also* *Hamling v. United States*, 418 U.S. 87, 130 (1974) (holding that *Ginzburg* was still good law after *Miller* and upholding a conviction that used the Pandering Principle in determining the obscenity of a sexually explicit pamphlet that was distributed by the mail).

The Court reasoned that the Pandering Principle was necessary to prevent the exploitation of the human “erotic interest.”¹¹⁴ In other words, the appellant marketed materials solely on the “sexual stimulation” they would bring,¹¹⁵ and the commodification of the human sexual appetite can be determinative in obscenity cases.¹¹⁶ This holding represents the Court’s willingness to use natural law principles in utilitarian terms when dealing with obscenity cases. The commodification of sex (all pornography) violates the common good by materializing, objectifying, and disordering human sexuality toward the wrong end.¹¹⁷ That is where the Pandering Principle gets its justification. In *Ginzburg*, the Court dances around this justification, but because the natural law is inextricably linked to obscenity regulation, so too do natural law principles shine forth when the Court makes an equitable obscenity ruling. Through reason, there is an innate injustice that humans can discern when base desires of sexuality are exploited through advertising and marketing.¹¹⁸ But because the Pandering Principle is a natural law principle living in the world of utilitarian-libertarian obscenity jurisprudence, it has found very little traction.¹¹⁹ But the Pandering Principle should not be forgotten as it could be useful in combatting the internet’s hardcore pornography industry, which markets its videos in an extremely exploitative way.¹²⁰

114. *Ginzburg*, 383 U.S. at 467, 470-71.

115. *Id.* at 471.

116. *Id.*

117. JOHN PAUL II, *supra* note 32 (reasoning that the proper end of the human body is union to a spouse through marriage and ultimately union with God in the resurrected body). *See also* CATECHISM of the Catholic Church, *supra* note 86, ¶ 1602.

118. Junk food companies similarly exploit human “appetites” through advertising. *See* Monique Potvin Kent, *How Junk Food Marketers Exploit Children’s Impact on Family Food Choices*, KEVINMD (Aug. 5, 2023), <https://www.kevinmd.com/2023/08/how-junk-food-marketers-exploit-childrens-impact-on-family-food-choices.html>.

119. *But see* *Splawn v. California*, 431 U.S. 595, 612 (1977) (upholding defendant’s conviction on a Pandering Principle theory).

120. *See* Andy Newman, *Al Goldstein, a Publisher Who Took the Romance Out of Sex, Dies at 77*, N.Y. TIMES (Dec. 19, 2013), <https://www.nytimes.com/2013/12/20/nyregion/al-goldstein-pioneering-pornographer-dies-at-77.html>; Jake Roberson, *The Pornography Industry’s Aggressive Marketing Tactics, Explained*, NAT’L. CTR. ON SEXUAL EXPLOITATION (Mar. 14, 2020), <https://endsexualexploitation.org/articles/the-pornography-industrys-aggressive-marketing-tactics-explained/>.

C. Secondary Effects Doctrine

Another important development in the Court's obscenity case law is the secondary effects doctrine.¹²¹ Like *Ginzburg*, in *Renton v. Playtime Theatres*, the Court dealt with materials that were not definitionally obscene under the *Miller-Roth* approach.¹²² In *Renton*, the Court upheld two zoning ordinances.¹²³ The first prohibited any business with the primary purpose of displaying sexually explicit materials, and the second prohibited any "adult motion picture theater from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, or park . . . [or] school." Furthermore, in *Renton*, the Court affirmed the district court's finding that the fundamental motivation for the zoning ordinances was the secondary effects that would be caused by adult theatres in these locations.¹²⁴ Thus, the appellate court was incorrect in striking down the ordinance, even if suppressing speech was a motivating factor for the legislators who drew up the ordinances.¹²⁵ The Court stated that "[t]he ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally '[protect] and [preserve] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views."¹²⁶

In *Renton*, the Court recognized with "high respect," the government's compelling interest in preserving the quality of life of its citizens.¹²⁷ Of course, this compelling interest is more attenuated when applied to internet pornography laws instead of zoning ordinances, but the principles of the secondary effects doctrine are still relevant, and the government's interest is certainly still compelling when regulating hardcore internet pornography.¹²⁸ *Renton* affirms the compelling and legitimate interest that legislators have in restricting the display of sexual materials explicitly to preserve the *common good* of their constituents.¹²⁹ The secondary effects doctrine may provide a means by which legislators can regulate internet pornography. The key take

121. *Renton v. Playtime Theatres Inc.*, 475 U.S. 41, 47-49 (1986).

122. *Id.* at 47-48; *Ginzburg v. United States*, 383 U.S. 463, 474-75 (1966).

123. *Renton*, 475 U.S. at 43, 55.

124. *Id.* at 47.

125. *Id.*

126. *Id.* at 48.

127. *Id.* at 50 (quoting *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71) (1976)).

128. *Smith & LeSueur*, *supra* note 5.

129. *Renton*, 475 U.S. at 48.

away from *Renton* is the Court does not require legislators to have overwhelming proof of the secondary effects caused by sexually explicit movie theatres. Rather, it was enough for legislators to rely on “detailed findings” of another city and “whatever evidence [the City of Renton] . . . reasonably believed to be relevant to the problem [it] address[ed].”¹³⁰ This same logic should be applied to pornographic websites like Pornhub.

V. PRACTICALITY UNDER *MILLER*

This Note has argued that there are key theoretical and jurisprudential problems in the Court’s approach to defining obscenity. Because obscenity is a legal concept that is inseparable from moral principles,¹³¹ the approach to defining obscenity cannot be grounded in utilitarianism or libertarianism.¹³² Rather, an approach to obscenity must be rooted in natural law principles to be effective. By embracing a utilitarian approach to a field that is inseparable from the natural law, the Court has created a confusing landscape of obscenity case law. This Note will now shift its focus away from the theoretical and explore the practical problems of obscenity regulation under *Miller* and other obscenity case law. The purpose of this Note is to address the problems of hardcore internet pornography because the medium of the internet poses unique challenges in obscenity regulations. Exploring the practical problems of obscenity regulation *before* the invention of the internet will provide important context.

A. Porn Prosecutions

Despite the obstacles presented by *Miller*, the government has continued to pursue its interest in protecting the common good by prosecuting those who distribute hardcore pornography. But twenty-first century obscenity prosecutions have a common theme: only the most egregious and deviant hardcore pornography merits prosecution. The following cases are not

130. *Id.* at 931; *but see* *Schenck v. United States*, 249 U.S. 47, 49 (1919) (asserting there needs to be a clear and present danger to regulate speech).

131. *See generally* JOHN PAUL II, *supra* note 32 (“The human body . . . is not only a source of fruitfulness, that is, of procreation, but has ‘from the beginning’ a spousal character, that is, it has the power to express the love by which the human person becomes a gift, thus fulfilling the deep meaning of his or her being or existence.”) (under *Miller*, obscenity laws pertain to the morality of the body in a unique way because they proscribe pornography that is “prurient” and “patently offensive.” *Miller v. California*, 413 U.S. 15, 24 (1973)).

132. Kors, *supra* note 28.

exhaustive, but merely instructive on this point. These cases also show that hardcore porn prosecutions are not obsolete; prosecutors still pursue hardcore pornography convictions, and juries still convict perpetrators.

In *United States v. Ragsdale*, a husband and wife were convicted of distributing obscene materials, including two violent foreign films entitled “Brutally Raped 5” and “Real Rape 1.”¹³³ The jury convicted the Ragsdales after only five hours of deliberation.¹³⁴ Garry Ragsdale was sentenced to thirty-three months in prison and his wife Tamara was sentenced to thirty months in prison.¹³⁵ One notable aspect of this case is that the investigation began five years before the conviction.¹³⁶ After an anonymous tip led the FBI to get a search warrant for the Ragsdales’ home, the FBI executed the warrant and brought charges under state obscenity laws.¹³⁷ But the charges were later dropped, and it then took five years for the FBI to indict the Ragsdales.¹³⁸

In 2007, cousins Sami and Michael Harb were each charged with three counts of selling obscene materials, including one movie showing sexual acts with women dressed to look underage.¹³⁹ The cousins operated a business called “Movies by Mail,” and it was through this business that they were caught selling the obscene materials to an undercover investigator.¹⁴⁰ Each of the cousins pled guilty to one count of selling obscene material and were each sentenced to one year and one day in federal prison.¹⁴¹

In *United States v. Kilbride*, James Schaffer and Jeffrey Kilbride operated an unsolicited bulk email company that used a series of offshore servers and corporations.¹⁴² The company sent spam emails containing advertisements that included “sexually explicit images.”¹⁴³ In August 2005, Kilbride and Schaffer were indicted under multiple federal laws, including email fraud, conspiracy to commit money laundering, and transportation of

133. *United States v. Ragsdale*, 426 F.3d 765, 768 (5th Cir. 2005).

134. *Id.* at 770.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. Grant Gross, *Web-Based Business Charged with Distributing Obscenity*, WASH. POST (June 15, 2007), <https://www.washingtonpost.com/wp-dyn/content/article/2007/06/15/AR2007061501297.html>.

140. *Id.*

141. Emiley Morgan, *Men Ordered to Prison for Selling Obscene Films*, DESERETNEWS (Nov. 21, 2009), <https://www.deseret.com/2009/11/21/20353863/men-ordered-to-prison-for-selling-obscene-films/>.

142. *United States v. Kilbride*, 584 F.3d 1240, 1244 (9th Cir. 2009).

143. *Id.*

obscenity.¹⁴⁴ Schaffer was sentenced to sixty-three months in federal prison, and Kilbride was sentenced to seventy-eight months.¹⁴⁵ The most notable aspect of Kilbride's appeal is that the appellate court applied a national community standard to the internet when analyzing Kilbride's obscenity conviction.¹⁴⁶ This is an extremely important development in obscenity case law and is cause for hope that hardcore pornography can and will be removed from the internet in the years to come.

B. *Porn Possession*

Clearly, *Miller-Roth* made the distribution of hardcore pornography much more difficult to regulate. The Court has made the regulation of hardcore pornography even more difficult by holding that a person cannot be convicted for the possession of hardcore pornography.¹⁴⁷ Thus, the government's "compelling interest" in regulating the *distribution* of obscenity is undermined because hardcore pornography is contraband for the seller but not the buyer. Furthermore, simple possession laws are a fundamental part of regulating the sale of an illegal product.¹⁴⁸

The porn possession paradigm brings to light yet another fundamental problem with a utilitarian approach to obscenity. Obscenity regulations are aimed at preserving the common good, and the common good is the collective flourishing of the community.¹⁴⁹ The Court's utilitarian approach in *Stanley* addresses the common good as an aggregate of individuals.¹⁵⁰ Implicitly integrating the aggregation and harm principles of utilitarianism, the Court finds grounds to distinguish between the public and private use of hardcore pornography.¹⁵¹ The *Stanley* Court emphasized a person's right to "information and ideas . . . regardless of their social worth."¹⁵² Unsurprisingly, the Court does not explain what kind of information and

144. *Id.* at 1245.

145. *Id.*

146. *Id.* at 1250.

147. *Stanley v. Georgia*, 394 U.S. 557, 560 (1969).

148. NAIR, *supra* note 99, at 61.

149. See BUDZISZEWSKI, *supra* note 33.

150. *Id.*

151. *Stanley*, 394 U.S. at 561.

152. *Id.* at 564.

ideas are contained in the hardcore pornography that the appellant was viewing.¹⁵³

Indeed, under the Court's test, hardcore pornography seriously lacks social value.¹⁵⁴ Thus, the Court's reasoning in *Stanley* is dependent on the appellant viewing the hardcore pornography in his home. The Court unabashedly states that "[i]f 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."¹⁵⁵ With this holding, the Court undermined Georgia's compelling interest in protecting the common good of its state. Furthermore, the Court strayed further from the truth and purpose of obscenity laws, which aim to promote the common good through a pure and virtuous citizenry.¹⁵⁶ Obviously, this holding also lessens the motivation of legislators and prosecutors to create and enforce obscenity statutes. The internet has accelerated these problems perpetuated by *Stanley* because the internet has made hardcore pornography so accessible, and the corruption and degradation of the viewers (possessors) of hardcore internet porn has become painstakingly obvious.¹⁵⁷ The internet has also significantly blurred the lines between possession and distribution,¹⁵⁸ which makes the enforcement of obscenity laws much more difficult than at the time of the *Stanley* decision.

C. *Variable Obscenity*

Another important component of obscenity case law is variable obscenity. The two ways that variable standards for obscenity are implicated are: (1) Virtue Variability and (2) Age Variability.

1. *Virtue Variability*

Virtue variable cases shine a light on the Court's underlying problem of not providing a clear definition of obscenity. Virtue variable obscenity involves a determination of a material as obscene based on an alternative moral standard. For example, the Court allows obscenity to be judged by the

153. RICHARD F. HIXSON, *PORNOGRAPHY AND THE JUSTICES*, at xi (1996).

154. *Miller v. California*, 413 U.S. 15, 37 (1973).

155. *Stanley*, 394 U.S. at 565.

156. *See supra* Section III.B.

157. *See Bradley, supra* note 1.

158. NAIR, *supra* note 99, at 49-58.

standard of deviancy.¹⁵⁹ In *Mishkin v. New York*, Justice Brennan, writing for the majority upheld the conviction of a man who distributed materials depicting “flagellation, fetishism, and lesbianism” because the material was “designed for and primarily disseminated towards a clearly defined deviant sexual group.”¹⁶⁰ *Mishkin*, like *Ginzburg*, reflects the Court’s willingness to “adjust the prurient appeal requirement” in light of certain “social realities.”¹⁶¹

While this variable approach does help the government pursue the common good of its citizens through the regulation of deviant pornography, the variable approach has become less clear and less useful considering the high level of deviancy the *Miller* test allows for in constitutionally protected materials.¹⁶² The contemporary standard component of the *Miller* test has blurred the lines among indecent, obscene, and deviant materials. Deviant materials have become normalized and accepted¹⁶³ because of the lines that *Miller* blurred. Nowadays, the internet contributes greatly to this line-blurring process as well.¹⁶⁴ So, while Virtue Variability does reflect the natural law in the pursuit of the common good, the principle is unworkable and irrelevant due to the fundamentally libertarian approach to definitional obscenity and the “pornification”¹⁶⁵ of society through the internet.

2. Age Variability

Age variability means that the government may have different obscenity standards for children and adults.¹⁶⁶ Of course, the standard for children must still be consistent with *Miller*. But the standard for children must also be consistent with the vague rule set forth in *Butler v. Michigan*.¹⁶⁷ The

159. *Mishkin v. New York*, 383 U.S. 502, 508 (1966).

160. *Id.* at 507.

161. *Id.* at 509.

162. *Miller v. California*, 413 U.S. 15, 37 (1973). Both *Mishkin* and *Ginzburg* were decided before *Miller*. *Miller* added an element that confuses the issue and implies that otherwise obscene material can have meritorious value. But avoiding works that corrupt or degrade (prurient interest) cannot be weighed against their societal value. Its societal value does not matter as art, or science, or anything else if it corrupts one’s mind and body.

163. ‘A Lot of It Is Actually Just Abuse’: *Young People and Pornography*, *supra* note 2, at 13.

164. NAIR, *supra* note 99, at 49-58.

165. Bradley, *supra* note 1, at 448 n.9 (quoting Clarissa Smith, *Pornographication: A Discourse for All Seasons*, 6 INT’L J. MEDIA & CULTURAL POL. 103, 103-04 (2010)).

166. *Ginsberg v. New York*, 390 U.S. 629, 640-42 (1968).

167. *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957).

dichotomy is that the government cannot “reduce the adult population to only materials that are fit for children,”¹⁶⁸ but the government can require that materials obscene to children, but constitutionally protected for adults, be isolated from children.¹⁶⁹

For example, in *Ginsberg v. New York*, the Court upheld a conviction under a New York statute that proscribed the distribution of obscene materials to minors.¹⁷⁰ The appellant and his wife operated a stationary store that sold girlie magazines.¹⁷¹ These magazines were not obscene to adults but were obscene to children.¹⁷² The appellant sold a copy of a variably obscene magazine to a sixteen-year-old on two separate occasions and was subsequently arrested and convicted under the New York statute.¹⁷³ The Court reasoned that stocking magazines on shelves and only selling them to adults was sufficient to overcome the rule outlined in *Butler*.¹⁷⁴ But on the internet, there is no store clerk to prevent the sale of dirty magazines to children. Instead, the intermediaries between child and hardcore pornography are massive tech companies and internet providers.¹⁷⁵ Internet providers have shown their willingness to comply with countries that have promulgated internet pornography regulations.¹⁷⁶ For America to solve its hardcore pornography problem, it must work closely with the intermediaries who have the means to prevent children from viewing obscene materials.

VI. TECHNOLOGY AND HARDCORE PORNOGRAPHY

So far, this Note has shown the problems with defining and regulating hardcore pornography on a utilitarian or libertarian legal theory. Furthermore, this Note has argued that obscenity is inextricably linked to natural law principles, and thus, to solve these problems, a return to natural law principles is necessary. This Note will now explore the key obscenity

168. *Id.*

169. *Ginsberg*, 390 U.S. at 636.

170. *Id.* at 631-33.

171. *Id.* at 631.

172. *Id.* at 632-34.

173. *Id.* at 631.

174. *Id.* at 634-35.

175. Alexandra Twin, *Internet Service Provider (ISP): What They Do and Examples*, INVESTOPEDIA (June 19, 2024), <https://www.investopedia.com/terms/i/isp.asp>; Allison Morrow, *Big Tech's Grip on Social Media is a Growing Problem*, CNN (Apr. 9, 2024), <https://www.cnn.com/2024/04/09/tech/meta-social-media-nightcap/index.html>.

176. NAIR, *supra* note 99, at 104-06, 189.

cases that have to do with technology. The prevalence of hardcore internet pornography in the culture and minds of Americans is striking.¹⁷⁷ The subsequent cases illuminate the incongruence of the Court's legal theory with the purpose of obscenity regulations. The holdings of most of these cases turn on the Court's statutory interpretation doctrines—namely, overbreadth and vagueness. These doctrines are built into the *Miller* test, which has empowered the Court to strike down important statutes to serve the Court's legal theories, rather than the common good of the American people.

A. Broadcasting

*FCC v. Pacifica*¹⁷⁸ best presents the libertarian problem ushered in by *Stanley*. *Pacifica*, which dealt with censorship via a radio broadcast, further develops the private versus public speech dichotomy.¹⁷⁹ Thus, *Pacifica* is a key case because it strikes a hard line between broadcast media (radio and television) and other media.¹⁸⁰ The Court reasoned that broadcast media can be censored more broadly because the *listener* or *viewer* is at a much higher risk of inadvertently receiving an obscene message.¹⁸¹ Interestingly, the content at issue in *Pacifica* was not deemed to be obscene, and yet, the Court held that the FCC's censorship of the content was constitutional.¹⁸² In fact, the FCC censored the famous comedian and satirist George Carlin and his famous bit the "Filthy Words."¹⁸³ The FCC Commission reviewed the bit because of only one complaint and determined that it violated a statute that banned "obscene, indecent, and lewd" speech over the radio airwaves.¹⁸⁴ Notably, the Court held that the FCC was not subject to the overbreadth and vagueness doctrines because of the deeply ingrained and grammatically clear understanding of the statute's language.¹⁸⁵ The Court in *Pacifica* interpreted the statute of the FCC—an executive agency—with total deference toward their interest in censoring a comedian whose bit reached the unwilling ears of

177. Bradley, *supra* note 1.

178. *FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1978).

179. *Id.* at 746-51.

180. *Id.* at 748.

181. *Id.*

182. *Id.* at 750-51.

183. *Id.* at 729-32.

184. *Id.*

185. *Id.* at 741.

one child. The Court is unwilling to approach the statutes of Congress—the nationally elected legislative branch—with anywhere near this level of deference.¹⁸⁶

The *Stanley-Pacifica* line of reasoning is the basis for the Court's holding in *Sable Communications of Cal. v. FCC*.¹⁸⁷ *Sable* dealt with a statute that banned “obscene or indecent” interstate commercial telephone messages.¹⁸⁸ The purpose of the statute was to prevent children from making sexually explicit phone calls through commercial phone sex companies.¹⁸⁹ Thus, the statute required the FCC to promulgate regulations to phone providers, which required the screening and blocking of phone calls from children.¹⁹⁰ The FCC promulgated two defenses: the phone sex lines would not have to completely screen or block all calls from children if it required payment by credit card or if it operated only between the hours of 9:00 p.m. and 8:00 a.m.¹⁹¹ The FCC then replaced the time restriction defense with an age verification defense.¹⁹² The Court found that the government did not use the least restrictive means to accomplish its ends; thus, it held the regulations to be unconstitutionally overbroad.¹⁹³

The Court distinguished this case from *Pacifica* because, according to the Court, the objective of the government regulation in *Pacifica* was more reasonable.¹⁹⁴ In other words, the Court brought their libertarian thesis to completion: the satirist bears the burden of being censored on the radio because listeners may incidentally “enlarge” their “vocabulary,”¹⁹⁵ but the parent bears the burden of preventing their child from making sexually explicit phone calls through a national company. Clearly, the Court has lost sight of the common good in its obscenity case law and is willing to allow sexual depravity and moral corruption of children to protect the interests of pornographers.

186. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 240 (2002).

187. *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115 (1989).

188. *Id.* at 118.

189. *Id.* at 119-20.

190. *Id.* at 120.

191. *Id.* at 121.

192. *Id.*

193. *Id.* at 131.

194. *Id.* at 127.

195. *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978).

Furthermore, *United States v. Playboy Ent. Grp.* proves that the Court is simply disingenuous in its obscenity jurisprudence.¹⁹⁶ This case involved broadcast television, but the Court used overbreadth and vagueness as a means to allow sexually explicit material free reign over American airwaves.¹⁹⁷ In *Playboy*, the Court dealt with a statute that required cable television broadcasters to implement a time restriction on channels that broadcasted sexually explicit material.¹⁹⁸ The purpose of the statute was to protect children from incidentally viewing these materials.¹⁹⁹

The Court held that the statute was too broad and did not accomplish its compelling interest by the least restrictive means.²⁰⁰ The Court reasoned that rather than prevent *Playboy* from running their programs from 10:00 a.m. through 6:00 p.m., a “better” way to protect children from incidentally viewing pornography is to require each cable purchasing household to reach out to the cable provider and request that they block signal bleed of sexually explicit channels.²⁰¹ *Playboy*’s holding represents one of the fundamental problems with *Miller* and the Court’s libertarian approach to sexually explicit materials. Because *Playboy*’s content was not obscene under *Miller*, adults have an unfettered right to view it in their homes. The Court continues to assert that Congress has a compelling interest in protecting children from these same sexually explicit materials, and yet, the Court is willing to put the interests of the depraved pornographer above the interests of the innocent child.

B. Internet

Similarly, the Court has used overbreadth and vagueness to strike down statutes that protect children using the internet.²⁰² *Reno v. ACLU* is the clearest example. In *Reno*, the Court struck down a statute that prevented the dissemination of indecent speech to minors via the internet.²⁰³ Written twenty-seven years ago, the opinion is clearly outdated beginning with an

196. *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 806 (2000).

197. *Id.* at 814-16.

198. *Id.* at 806.

199. *Id.* at 815-17.

200. *Id.* at 823-25.

201. *Id.* at 823-27.

202. *Reno v. ACLU*, 521 U.S. 844, 862 (1997); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002).

203. *Reno*, 521 U.S. at 864.

extensive description of the internet and how it functions.²⁰⁴ The internet has made numerous technological advancements since the *Reno* decision.²⁰⁵ Importantly, the Court began its analysis by distinguishing the internet from broadcast media because the use of the internet requires a “series of affirmative steps” and a certain level of “sophistication” and deliberation.²⁰⁶ While this may have been true in 1997, the current reality is that children can easily and accidentally see hardcore pornography by passively scrolling on social media or by using the wrong search term on Google.²⁰⁷

Nonetheless, because accessing sexually explicit material on the internet requires “affirmative steps,” that means the Court requires Congress to put the burden on the parent, not the pornographer, to prevent child access. Otherwise, the Court reasons, Congress would be limiting its population to viewing only what is fit for children.²⁰⁸ Thus, the Court struck down the statute because the regulation of “indecent” materials via the internet is constitutionally overbroad. In the context of *Miller*, in which very little is considered hardcore pornography, this creates a devastating problem in which children have easy access to sexually explicit pornography via the internet. Under *Miller*, hardcore pornography enforcement has been limited to only the most deviant materials.²⁰⁹ And, the contemporary standards caveat causes even the most deviant materials to become more accepted under the law. So, adults are free to access salacious pornographic materials as long as they are in private, but Congress does not have the means to prevent children from viewing these materials.²¹⁰ Thus, the government’s interest in preserving the decency, purity, and virtue of its children takes a back seat to the “freedom” of adults to have more fun while they are masturbating. Problems with regulating sexual morality deal so fundamentally with human nature that a return to natural law is required so that the government can properly regulate sexually explicit materials *for the common good* of children and of the nation.

Ashcroft v. Free Speech Coalition and *United States v. Stevens* present the same need for a natural law solution. At issue in both these cases were federal regulations of specific deviant materials that Congress determined to

204. *Id.* at 849-53.

205. ‘A Lot of It Is Actually Just Abuse’: *Young People and Pornography*, *supra* note 2, at 14.

206. *Reno*, 521 U.S. at 854.

207. ‘A Lot of It Is Actually Just Abuse’: *Young People and Pornography*, *supra* note 2, at 14.

208. *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

209. *United States v. Ragsdale*, 426 F.3d 765, 779 (5th Cir. 2005).

210. *See Stanley v. Georgia*, 394 U.S. 557, 566 (1969).

be harmful. In *Stevens*, the Court analyzed 18 U.S.C. § 48.²¹¹ The statute proscribed the creation, sale, or possession of animal cruelty if done for commercial gain and provided an exception if the materials had serious social value.²¹² Congress was trying to prevent the distribution of “crush videos,” materials that sexually fetishize animal cruelty.²¹³ “Crush videos” depict women “slowly crushing animals to death” while speaking to the animals like a dominatrix, causing the animals great pain in the process.²¹⁴ Under *Miller*, these videos are not even close to obscene. But § 48 was enacted both to protect animals and to prevent the deviant sexual immorality that is associated with producing or watching a “crush video.”²¹⁵ *Miller* and its progeny prevent Congress from taking this paternalistic stance and using the law to help promote virtue and purity in its people. Thus, despite the compelling interest of the government to prevent this kind of animal cruelty, the Court found § 48 to be unconstitutionally overbroad because of the great gravity of materials within its reach.²¹⁶

In *Ashcroft*, the Court struck down § 2251 of the Child Pornography Prevention Act.²¹⁷ Section 2251 prohibited child pornography that did not “depict an actual child.”²¹⁸ The Court relied on its decision in *New York v. Ferber*, where the Court held that child pornography is not constitutionally protected speech because it inherently involves the abuse of children.²¹⁹ Therefore, § 2251 was overbroad because animated child porn and child porn with adult actors who look like children do not inherently involve the abuse of children.²²⁰ While *Ferber* certainly came to the correct holding, its reasoning is utilitarian. Thus, it gave the Court in *Ashcroft* the basis it needed for an overbreadth ruling because the government could not prove a close enough connection between the viewing of virtual child porn and harmful conduct it may cause.²²¹ But any form of child pornography will degrade and

211. *United States v. Stevens*, 559 U.S. 460, 464 (2010).

212. *Id.* at 464-65.

213. *Id.* at 465.

214. *Id.* at 465-66.

215. *Id.*

216. *Id.* at 481-82.

217. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 258 (2002).

218. *Id.*

219. *New York v. Ferber*, 458 U.S. 747, 771 (1982).

220. *Ashcroft*, 535 U.S. at 256.

221. *Id.*

corrupt its *viewer, producer, and distributor* because child pornography is immoral.

The Court's emphatic assertion that it has not held that "child pornography is without value"²²² is a concerning example of the jurisprudential chains of libertarianism that the Court has bound itself with. A natural law approach is needed to protect the morality of the American Nation by making *all* child pornography unprotected. The *Hybrid Test* would certainly accomplish this objective.

C. *Solutions and Suggestions*

America has a horrible hardcore porn problem. American companies are by far the largest commercial producers and distributors of pornography throughout the world.²²³ The internet greatly exacerbates the problem for Americans who do not want to see pornography.²²⁴ Furthermore, America's internet porn industry has made the regulation and outlaw of pornography in other nations impracticable.²²⁵

The first solution is to reverse *Stanley* and criminalize porn possession. There is simply no constitutional theory that can reconcile a felony for the distribution of hardcore pornography turning into complete immunity from prosecution when it crosses through the front door. And, as a practical matter, possession laws are indispensable to prevention of distribution because they criminalize the distributors' market.²²⁶

The second solution was offered in Part III: overrule *Miller* and change the test for obscenity to the *Hybrid Test*. The *Hybrid Test* creates a presumption that a work is obscene when the average person, applying reasonable standards of decency, finds that the work dominantly appeals to the prurient interest and tends to corrupt or degrade the most vulnerable people in society. Jurors should make this determination considering the totality of the circumstances, including the content of the material; the price of the material; the degree of exploitation in the production of the material;

222. *Id.* at 251.

223. *Pornography*, ENOUGH IS ENOUGH, https://www.enough.org/stats_porn_industry (last visited Mar. 19, 2024).

224. Chaitra Anand, *15 Countries That Supply Maximum Pornography Online: How Much Does India Contribute?*, YAHOO FIN. (Aug. 10, 2021), <https://sg.finance.yahoo.com/news/10-countries-that-produce-maximum-pornography-is-india-on-this-list-142504991-142504279.html>.

225. NAIR, *supra* note 99, at 7.

226. *Id.*

and the degree of exploitation in the distribution of the material. The presumption can be overcome by the defendant if he shows that the work has serious social value. The purpose of this test is to preserve constitutional speech while making the common forms of internet pornography found on Pornhub and other popular porn sites unprotected.

The *Hybrid Test* is cohesive with Saint Thomas's Natural Law foundation.²²⁷ Furthermore, the *Hybrid Test* does not offend traditional constitutional principles because it does not reduce the adult population to what is fit for a child or restrict speech that has societal value.²²⁸ For example, a jury could likely find the book *Fifty Shades of Grey* to have a dominantly prurient appeal and a tendency to corrupt. The book would then be found obscene unless the defendant proves its artistic merit. That question would be left to the jury. This Note has chosen to refrain from suggesting a national versus local standard for the elements of the *Hybrid Test* because that question would require its own Article. Regardless, the *Hybrid Test* would be more effective in regulating the hardcore pornography that *Miller* tried and failed to keep unprotected.

Lastly, carefully drafted age verification statutes have proven effective in restricting children from viewing obscene materials.²²⁹ Utah, Texas, Montana, Louisiana, North Carolina, and Mississippi have all passed legislation requiring pornography websites like Pornhub to use age verification technology.²³⁰ The efficacy of these statutes in preventing children from viewing hardcore pornography has led even more states to propose age verification statutes.²³¹ The Texas age verification statute was so effective that Pornhub has pulled its services out of Texas entirely.²³² There is certainly a compelling interest in protecting children from viewing the contents of Pornhub, and age verification statutes are proving to be an

227. See generally BUDZISZEWSKI, *supra* note 33.

228. *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957).

229. Katherine Fung, *Pornhub Blocks Texas Users over Fight with Greg Abbott*, NEWSWEEK (Mar. 14, 2024), <https://www.newsweek.com/pornhub-blocks-texas-users-over-fight-greg-abbott-1879428>.

230. UTAH CODE ANN. § 78B-3-1002 (LexisNexis 2024); TEX. CIV. PRAC. & REM. CODE ANN. § 129B.002 (West 2023); MONT. CODE ANN. § 20-14-159 (2023); LA. STAT. ANN. § 51:2121 (2024); MISS. CODE ANN. § 11-77-5 (2024); N.C. GEN. STAT. § 66-501; see also Transcript of Oral Argument at 110-11, *Free Speech Coal., Inc. v. Paxton*, 220 145 S.Ct 767 (2024) (No. 23-1122) (indicating confusion about the level of scrutiny that should be applied to the age verification laws).

231. Sam Sachs, *Florida Lawmaker Coming After Internet Porn, Introduces Age Verification Bill*, WFLA (Mar. 22, 2023), <https://www.wfla.com/news/politics/florida-lawmaker-coming-after-internet-porn-introduces-age-verification-bill/>.

232. Fung, *supra* note 229.

effective and narrowly tailored way to achieve this interest despite the Court's holding in *Butler*. But *Miller* is still ineffective as an obscenity standard for adults, to which I have proposed the *Hybrid Test* as a viable solution. One thing is clear, no matter what direction the Court's obscenity jurisprudence takes in the future: the *Miller* approach is unworkable in solving America's hardcore porn problem.

VII. CONCLUSION

The purpose of this Note is to entertain a practical solution to a very real problem that internet pornography poses to the American people. The internet has functioned as gasoline poured on the jurisprudential fire the Court started in the mid-twentieth century. If the Court continues down this path of a utilitarian-libertarianism approach to speech, there is a real threat that the government will lose *all* ability to regulate morality. In the *Politics*, Aristotle observed that "virtue must be the care of the state," and that without this end, "law is only a convention."²³³ He goes on to say that the fundamental meaning of a state is "a community of families and aggregations of families in well-being, for the sake of a perfect and self-sufficing life."²³⁴ In the fifty years since the *Miller* decision, America has seen major changes in technology and morality.²³⁵ The Court should embody these basic principles and allow the government to promote the virtue and flourishing of its people.

The Court's numerous obscenity holdings are representative of an unwillingness to promote the purity and virtue of Americans. The Court's unnatural legal theories have justified irreconcilable decisions like *Stanley* and *Miller*. The severe threat that hardcore internet pornography creates for Americans cannot be solved under the Court's current approach and must be replaced by an approach attuned to natural law. The Court's jurisprudence pursues attenuated ideals like "pure freedom of speech" and a "right to privacy." But the pursuit of ideals cannot take precedence over the pursuit of happiness.²³⁶

233. ARISTOTLE, *POLITICS* bk. III, at 143 (Benjamin Jowett trans., Random House 1943) (c. 350 B.C.).

234. *Id.* at 144.

235. Bradley, *supra* note 1.

236. BUDZISZEWSKI, *supra* note 33; ARISTOTLE, *supra* note 233; CONKLIN, *supra* note 42.