FIGHTING THE PORNIFICATION OF AMERICA BY ENFORCING OBSCENITY LAWS

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INTRODUCTION

Simply put, we know more than ever how illegal adult obscenity contributes to violence against women, addiction, harm to children, and sex trafficking. This material harms individuals, families, and communities and the problems are only getting worse. As you know, adult obscenity is not protected by the First Amendment. Congress has for decades passed laws seeking to curb the production and distribution of obscene pornography, including on the Internet. A consistent and strong commitment to enforcing these laws can have a significant impact.

In 2001, Esquire magazine described “the pornographication of the American girl” in its profile of a former pornographer. Four years later, author Pamela Paul testified before the U.S. Senate Judiciary Subcommittee on the Constitution about how our lives, relationships, and families have become “pornified,” a term that became the title of her recently published book.

1. United States Senator (R-Utah). J.D., University of Pittsburgh School of Law (1962); B.A., Brigham Young University (1959). Senator Hatch is currently the Ranking Member of the U.S. Senate Finance Committee and is a past Chairman of the Senate Judiciary Committee and the Senate Health, Education, Labor, and Pensions Committee.


4. Pamela Paul, Pornified: How Pornography is Transforming Our Lives,
recently, the *Boston Globe* described the “pornification of America” this way:

> Not too long ago, pornography was a furtive profession—its products created and consumed in the shadows. . . . What is new and troubling, critics suggest, is that the porn aesthetic has become so pervasive that it now serves as a kind of sensory wallpaper, something that many people don’t even notice anymore.5

Some say that because of shifts in culture and technology, “pornography has already won.”6

> Sadly, pornography “is so commonplace that for many it is merely an annoyance.”7 It may indeed be “the new metaphor” and “the new universally shared experience.”8 But pornography is not simply a matter of taste; it is a matter of harm that is magnified because today’s pornography is more extreme and more readily available than ever. Limiting its negative impact on individuals, families, and communities requires a comprehensive approach. This article focuses on something that both federal and state government can do as part of the solution. Government can enforce existing laws that prohibit obscenity, a defined category of pornography that is not protected by the Constitution.

> These laws have not been seriously enforced for a long time. The 1986 Attorney General’s Commission on Obscenity and Pornography noted that, “with few exceptions the obscenity laws that are on the books go unenforced.”9 During the Clinton administration, federal prosecutions fell by more than half, with only twenty cases in the year 2000.10 The National Research Council of the National Academy of Sciences noted in 2002 that, “obscenity prosecutions have been relatively rare.”11 In April 2011, a bipartisan group of forty-one Senators joined me on a letter to Attorney General Eric Holder urging stronger enforcement of federal obscenity laws.12 A few weeks later, he told the Senate

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7. Id.
10. Adler, *supra* note 6, at 702.
12. This was not the first time that I had raised this issue with Justice Department officials of both political parties. See Oversight of the U.S. Justice Department, Hearing Before the S. Comm. on the Judiciary, 111th Cong. 14-15 (2010) [hereinafter Holder Hearing]; Confirmation Hearings on Federal Appointments: Hearing on the Appointment of
Judiciary Committee that “since we have been in office, seven obscenity cases have been brought that have involved only adult pornography.” The excerpt from our letter to Attorney General Holder quoted at the beginning of this Article captures the case for such enforcement. These laws should be enforced because this illegal material is harmful.

I. Adult Obscenity is Illegal

The First Amendment prohibits Congress from making any law “abridging the freedom of speech.” This guarantee was the first clause of the Bill of Rights that the Supreme Court applied to state and local governments. In Roth v. United States, the Supreme Court cited cases dating back to 1877 to show that “this Court has always assumed that obscenity is not protected by the freedoms of speech and press.” The Court thus held in Roth that “obscenity is not expression protected by the First Amendment” and has reaffirmed this principle many times.


16. 354 U.S. 476, 481 (1957). In Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942), for example, the Supreme Court held:
There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality (footnotes omitted).
18. See, e.g., United States v. Williams, 553 U.S. 285, 288 (2008) (“We have long held that obscene speech—sexually explicit material that violates fundamental notions of decency—is not protected by the First Amendment.”); Paris Adult Theater I v. Slaton, 413 U.S. 49, 54 (1973) (“This Court has consistently held that obscene material is not protected by the First Amendment.”); Miller v. California, 413 U.S. 15, 23 (1973) (“This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.”); Jacobellis v. Ohio, 378 U.S. 184, 186-87 (1964); Smith v. California, 361 U.S. 147, 152 (1959). The Court has held that while the First Amendment protects possession of obscenity in the home, Stanley v. Georgia, 394 U.S. 557 (1969), it does not protect providing or obtaining obscenity. See United States v. Reindel, 402 U.S. 351 (1971); see also United States v. 12 200-Ft. Reels of Super 8mm Film, 413 U.S. 123 (1973). This distinction “reflects no more than . . . the law’s ‘solicitude to protect the privacies of the life
A content-based restriction on expression that is protected by the First Amendment is “presumptively invalid.” Rebutting that presumption requires the government to prove that the regulation is “the least restrictive means” to achieve “a compelling interest.” Since it lacks First Amendment protection, obscenity may be restricted or prohibited altogether without meeting this demanding legal standard. This difference makes identifying the category of obscenity especially important.

“Obscenity can . . . manifest itself in conduct, in the pictorial representation of conduct, or in the written and oral description of conduct.” The substance of obscenity, however, is harder to define than its form. Discussion or analysis of obscenity often lacks clarity because it is insufficiently distinguished from broader categories such as sexually explicit material, pornography, or indecency. These may be interchangeable in the eye of the casual beholder, but they are very different in the eyes of the law. Obscenity is a narrow category of material that has been defined by the Supreme Court and that government has maximum ability to prevent.

The common law definition of obscenity, articulated in Roth, was drawn from a famous 1868 English case Regina v. Hicklin. Material that tended to “deprave and corrupt those whose minds are open to such immoral influences” was deemed obscene and could be banned. This definition turned out to be very broad because it “allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons.” In Roth, the Supreme Court began developing a narrower definition of obscenity by endorsing the following test: “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.” This material, the Court said, is “utterly without redeeming social importance.” As the focus thus shifted from the common law to constitutional law, the definition of obscenity shifted from its effect to its content.

In Jacobellis v. Ohio, the Court used the Roth definition to reverse an obscenity conviction but the 6-3 judgment did not produce a majority opinion.

within (the home).’” 413 U.S. at 127 (quoting Poe v. Ullman, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting)).
26. Id. at 489.
27. Id. at 484.
Two concurring Justices argued that despite Roth’s reference to community standards, “the constitutional status of an allegedly obscene work must be determined on the basis of a national standard.”

Two dissenting Justices argued the opposite, “that when the Court said in Roth that obscenity is to be defined by reference to ‘community standards,’ it means community standards - not a national standard as is sometimes argued.” And in a separate concurring opinion, Justice Potter Stewart famously noted that “criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . .”

Two years later, in Memoirs v. Massachusetts, the Court again voted 6-3 to reverse an obscenity conviction and again failed to produce a majority opinion. Three Justices argued that each element in the Roth definition must be applied independently: the dominant theme taken as a whole must appeal to a prurient interest in sex, the material must be patently offensive measured by contemporary community standards, and the material must be “utterly without redeeming social value.” The Court would later describe this as “veer[ing] sharply away from the Roth concept” and a “drastically altered test” because it required prosecutors to “prove a negative, i.e., that the material was ‘utterly without redeeming social value’—a burden virtually impossible to discharge under our criminal standards of proof.”

A majority of Justices finally agreed on a definition of obscenity in the Court’s 1973 decision in Miller v. California. This refined three-part test asks:

(a) Whether the “average person applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

This decision is important for several reasons. First, it reaffirmed as “categorically settled” that obscenity is not protected by the First
Amendment. Second, it was the first time since Roth that a majority of the Court agreed on a definition of obscenity. Third, it confines elements from Roth such as average person, community standards, dominant theme, and prurient interest to depictions of sexual conduct defined in statute. Fourth, it modifies the “utterly without redeeming social value” to the more practical and usable third prong of “lacking serious literary, artistic, political, or scientific value.” Fifth, admitting that this “may not be an easy road, free from difficulty,” the Court rejected both “an absolutist, ‘anything goes’ view of the First Amendment” and “arbitrarily depriving the States of a power reserved to them under the Constitution . . . which they have enjoyed and exercised continuously from before the adoption of the First Amendment to this day.”

Finally, the Court rejected that “there are, or should or can be, fixed, uniform national standards of precisely what appeals to the ‘prurient interest’ or is ‘patently offensive.’” This is a question of fact, and requiring “a State to structure obscenity proceedings around evidence of a national ‘community standard’ would be an exercise in futility.”

Supreme Court decisions have also shaped application of this definition. In Hamling v. United States, for example, the Supreme Court held that the “community” referenced in the Miller definition does not necessarily refer to a “precise geographic area.” And in Pope v. Illinois, the Supreme Court clarified that “the first and second prongs of the Miller test . . . are issues of fact for the jury to determine applying contemporary community standards.” The third prong, however, asks “whether a reasonable person would find such value

38. Id. at 23.
39. Id. at 29 (“But today, for the first time since Roth was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate ‘hard core’ pornography from expression protected by the First Amendment.”).
40. The Supreme Court has refused to broaden the category of obscenity to include violent as well as sexual material. In United States v. Stevens, 130 S. Ct. 1577 (2010), for example, the Court refused to add depictions of animal cruelty to the list of speech categories that lack First Amendment protection. And in Brown v. Entertainment Merchants Ass’n, the Court held that “the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of ‘sexual conduct.’” 131 S. Ct. 2729, 2736 (2011).
42. Id.
43. Id. at 30.
44. Id. at 33 (“People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.”).
45. 418 U.S. 87, 105 (1974). As the Internet increasingly becomes the medium by which sexually explicit material of all kinds is disseminated, this issue of the relevant community for purposes of obscenity analysis will become more important and complex. See, e.g., Ashcroft v. ACLU, 535 U.S. 564, 585 (2002) (noting that the use of community standards to identify online material that is harmful to minors “does not by itself render the statute substantially overbroad for the purposes of the First Amendment”).
Obscenity, then, is a narrow category of sexually explicit material that is so extreme and lacking in basic value that society is better off without it. Since the First Amendment does not protect obscenity, society certainly can do something about it. Enforcing laws prohibiting obscenity establishes at least the outer boundary of what the law will allow.

II. Adult Obscenity is Harmful

“Obscenity apparently is unique in being the only type of speech to which the Supreme Court has denied First Amendment protection without regard to whether it can cause harm.”48 It is true that, in moving from the common law definition in *Hicklin* to the constitutional law definition since *Roth*, the Supreme Court defines obscenity essentially in terms of its content rather than explicitly in terms of its effect. But a content-based exception to the First Amendment would be unusual, and the case for enforcing laws against material with such content would be weak, if that content were entirely benign and has no effect of any kind on anyone.49 Obscenity, however, is hardly benign and a fuller understanding of the harms associated with obscenity should motivate enforcing laws prohibiting it.50

1. Harm to Communities

The first two prongs of the *Miller* definition itself suggest the negative nature of obscenity. Violating community standards by both appealing to a prurient, or a “shameful or morbid,”51 interest in sex and portraying sexual conduct in a patently offensive way harm the community. In *Paris Adult Theatre I v. Slaton*, decided the same day as *Miller*, the Court recognized multiple “legitimate state interests in stemming the tide of commercialized obscenity.”52 These include “the interest of the public in the quality of life and

47. Id. at 500-01.
50. It is beyond the scope of this article to analyze all of the evidentiary issues regarding sexually explicit material in general, or obscenity in particular. Nor is it necessarily possible to distinguish between harms associated with legal pornography and those associated only with illegal obscenity. Because obscenity is the most extreme or graphic form of pornography, however, it is safe to assume that harms or effects associated with pornography generally are associated at least as much with obscenity.
52. 413 U.S. 49, 57 (1973).
the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself.”

Courts have recognized such “negative secondary effects” as legitimate even when a case does not involve obscenity. In Renton v. Playtime Theatres, Inc., for example, the Court upheld a city ordinance prohibiting adult theaters from locating within 1000 feet of residential areas, churches, parks, or schools. The Court recognized that the ordinance was content-neutral and was justified by the intention to “prevent crime, protect the city’s retail trade, maintain property values, and generally ‘protect[t] and preserv[e] the quality of [the city’s] neighborhoods, commercial districts, and the quality of urban life.’” And in Los Angeles v. Alameda Books, Inc., the Court upheld an ordinance prohibiting more than one adult entertainment business in the same building. A four-Justice plurality opinion held that “a substantial, independent governmental interest” such as reducing crime or maintaining property values can justify such regulations.

2. Harm to Individuals

Pornography and obscenity can also harm individuals. The common law Hicklin definition was focused explicitly on obscenity’s corrupting or immoral influence on individuals. But even as the Supreme Court revised the definition of obscenity, it retained at least some recognition of individualized impact. Under both Roth and Miller, material must appeal to an individual’s prurient interest in sex. The Court affirmed in Miller that material “will be judged by its impact on an average person.” One scholar writes that “at the forefront of the Court’s concern seems to be the notion of moral corruption of the consumers of pornography and resultant moral harm to the community as a whole.” And since obscenity lacks First Amendment protection, legislatures and prosecutors certainly must take seriously the harms associated with it when

53. Id. at 57-58.
56. Id. at 48.
57. Alameda Books, 535 U.S. at 438. The Supreme Court has held that “the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the primary effects of protected speech.” United States v. Playboy Entn’t Grp., 529 U.S. 803, 815 (2000). Obscenity, however, is not protected speech. This brief discussion of secondary effects helps establish the broad range of negative effects associated with pornography in American society.
58. See Roth, 354 U.S. at 487 n.20.
making and enforcing the law.

Some might argue that, at least with regard to individuals, the Supreme Court’s decision in Lawrence v. Texas\(^6\) negates moral consideration as a legitimate basis for enacting or enforcing obscenity legislation. In Lawrence, the Court declared unconstitutional a state law prohibiting “deviate sexual intercourse with another individual of the same sex.”\(^6\) The Court considered engaging in this conduct to be—if not an explicit constitutional right—at least part of the “liberty protected by the Constitution.”\(^6\) In dissent, Justice Antonin Scalia wrote that many laws based on moral considerations, including prohibitions on obscenity, are “called into question by today’s decision.”\(^6\) Lawrence, however, involved private conduct by adults rather than commercial material disseminated publicly. In addition, the Court held that moral disapproval “of a group” cannot “by itself” be a rational basis sufficient to justify a statute under the Equal Protection Clause. Laws prohibiting obscenity target expression rather than people, expression that has no constitutional protection because it independently meets the definition in Miller.\(^6\)

These important distinctions mean that public, if not private, morality remains a legitimate basis for prohibiting obscenity. The Supreme Court recognized in 1942 that preventing obscene speech to further “the social interest in order and morality” had “never been thought to raise any Constitutional problem.”\(^6\) The Court’s later discussion of negative secondary effects easily incorporates broad notions of public morality within categories such as “the total community environment”\(^6\) or the “quality” of a city’s neighborhoods.\(^6\)

Public morality, however, is only one reason for enforcing obscenity laws. The debate continues about whether sexually explicit material is merely distasteful, or actually harmful to individuals. Two prominent federal commissions demonstrate that definition, assumptions, research methods, and concepts of harm and evidence can significantly influence conclusions in this area. Not surprisingly, opponents of obscenity laws highlight one, while supporters highlight the other.

The 1970 President’s Commission on Obscenity and Pornography did its work before the Supreme Court’s Miller decision defining obscenity, and before even VHS technology had been invented. It had two years to fulfill its mandate, funded original social science and survey research, received no

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62. Id. at 563.
63. Id. at 567.
64. Id. at 590 (Scalia, J., dissenting).
It made no attempt to analyze or categorize available sexually explicit material, but examined the entire range of what it called “erotic stimuli” or “explicit sexual material.” It considered only scientific evidence such as “empirical studies conducted recently by psychiatrists, psychologists, and sociologists” and its concept of harm was limited to the causation of “delinquent or criminal behavior.”

With these parameters, it is not surprising that the 1970 Commission “found no evidence that exposure to or use of explicit sexual materials play a significant role in the causation of social or individual harms such as crime, delinquency, sexual or nonsexual deviancy or severe emotional disturbances . . . [E]xposure to sexually explicit materials has no harmful causal role in these areas.” This conclusion holds for “youth or adults.” As a result, it recommended that “federal, state, and local legislation prohibiting the sale, exhibition, or distribution of sexual materials to consenting adults should be repealed.” This recommendation applied to “the entire range of explicit sexual depictions” including “the most explicit depictions, or what is often referred to as ‘hard-core pornography.’”

In contrast, the 1986 Attorney General’s Commission on Pornography did its work after Miller but before DVD technology had been invented. It had one year to fulfill a substantially similar mandate, reviewed existing research, received witness testimony and met in public hearings. Its report included an

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71. As the 1986 Commission noted, a “major flaw in the 1970 studies” was “the absence of any investigation of the effects of violent pornography.” 1986 Report, supra note 9, at 905.
73. 1970 Report, supra note 69, at 27.
74. Id. at 52.
75. Id. at 53.
76. Id. at 51.
extensive content review and categorized material using a four-part typology. It rejected an “unduly narrow conception of harm,” considering harms that might lack “scientific measurability,” and “looked at a wide range of types of evidence.” The 1986 Commission also considered effects on non-criminal behavior such as sexual aggression and on attitudes that contribute to or influence behavior.

The 1986 Commission found a “causal relationship” between exposure to sexually violent material and both attitude changes and “aggressive behavior towards women.” It found differing kinds of relationships between the different categories of material it studied and the different harms it had identified. The 1986 Commission, however, limited its legislative recommendations only to material that met the legal definition of obscenity.

The broader approach of the 1986 Commission seems to have influenced much of the subsequent work in this area. The 1986 Surgeon General’s Workshop on Pornography and Public Health, for example, produced several consensus statements by the participants. These include that “there appears to be a convincingly clear picture of attitudes towards the acceptability of sexual coercion being substantially altered by exposure to particular types of violent pornography.” The “increasing opportunities for children to see and hear pornographic images” led two researchers to study this area in 1999. They found that “sexually reactive behaviors . . . were most apt to be displayed not by children who had been sexually abused but by those who had been exposed to pornography.” The increasing opportunities to which they referred were from cable television; the stakes have been raised exponentially since then with the ubiquitous presence of the Internet.

In 2003, I chaired a hearing of the U.S. Senate Committee on the Judiciary regarding efforts by the Department of Justice to protect the victims of

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79. Id. at 1499-502.  
80. Id. at 320-49. These four categories were sexually violent materials, nonviolent degrading materials, non-violent and non-degrading materials, and materials containing nudity.  
81. Id. at 302.  
82. Id. at 303.  
83. Id. at 312.  
84. The 1986 Report also included an entire chapter titled “The Question of Harm,” which discussed issues such as what constitutes primary and secondary harms, standards of proof, and varieties of evidence. Id. at 299-322.  
85. Id. at 324.  
88. Id. at 237.
pornography. In my opening statement, I noted that harm from pornography is “getting worse with the advent of the Internet” and will continue its trajectory “unless we have aggressive law enforcement.” On November 22, 2003, at my request, the Senate adopted by unanimous consent Senate Concurrent Resolution 77 “expressing the sense of Congress supporting vigorous enforcement of the Federal obscenity laws.” The resolution identified several “legitimate governmental interests at stake in stemming the tide of obscene materials.” These include protecting the quality of community life, public safety, a decent society, the social interest in order and morality, and family life.

In 2004, the U.S. Senate Committee on Commerce, Science & Transportation held a hearing titled “The Science Behind Pornography Addiction.” Dr. Mary Anne Layden, Director of the Sexual Trauma and Psychopathology Program at the University of Pennsylvania, testified:

Pornography, by its very nature, is an equal opportunity toxin. It damages the viewer, the performer, and the spouses and the children of the viewers and the performers. It is toxic mis-education about sex and relationships. It is more toxic the more you consume, the “harder” the variety you consume and the younger and more vulnerable the consumer. The damage is both in the area of beliefs and behaviors.

In 2005, the Subcommittee on the Constitution, Civil Rights and Property Rights of the U.S. Senate Committee on the Judiciary held a hearing titled “Why the Government Should Care About Pornography.” Researcher and family therapist Dr. Jill Manning focused on the “systemic effects of Internet pornography” drawn from “peer-reviewed findings in published journal articles.” These effects include increased risk of marital separation and divorce, increasing compulsive and addictive sexual behavior, decreasing parental time and attention toward children, and earlier onset of sexual behavior in children.

90. Id. at 215 (opening statement of Sen. Orrin G. Hatch, Chairman, S. Comm. on the Judiciary).
92. Id.
93. Id.
96. Id. at 12.
97. Id. at 12-13.
Dr. Patrick Fagan has reviewed the effects of pornography on the family and the individual, concluding that it “distorts an individual’s concept of sexual relations by objectifying them, which, in turn, alters both sexual attitudes and behavior. It is a major threat to marriage, to family, to children, and to individual happiness.”98 Elizabeth Dionne writes that there are literally “hundreds of peer-reviewed, social science studies published in reputable academic journals that outline the negative impacts of pornography on attitudes and behavior.”99

“Fueled by a combination of access, anonymity, and affordability, online porn has catapulted overall pornography consumption – bringing in new viewers, encouraging more use from existing fans and escalating consumers from soft-core to harder-core material.”100 The Witherspoon Institute and the Institute for Psychological Sciences began in 2008 to examine the social costs of pornography, with particular focus on the Internet. Its published report was signed by more than fifty scholars in fields as varied as pediatrics, law, philosophy, human development, ethics, sociology, neuroscience, women’s studies, psychiatry, history, physiology, and psychology. Its findings are that:

“Unlike at any other time in history, pornography is now available and consumed widely in our society, due in large part to the internet.”101

“There is abundant empirical evidence that this pornography is qualitatively different from any that has gone before, in several ways: its ubiquity, the use of increasingly realistic streaming images, and the increasingly ‘hard-core’ character of what is consumed.”102

“Today’s consumption of internet pornography can harm women in particular.”103

“Today’s consumption of internet pornography can harm children in particular.”104

“Today’s consumption of internet pornography can harm people not immediately connected to consumers of pornography.”105

“The consumption of internet pornography can harm its consumers.”106

“Pornography consumption is philosophically and morally problematic.”107

99. Dionne, supra note 65, at 630.
102. Id. at 17.
103. Id. at 23.
104. Id. at 27.
105. Id. at 33.
106. Id. at 37.
“The fact that not everyone is harmed by pornography does not entail that pornography should not be regulated.”

Such findings and conclusions might not be enough to prohibit legal pornography, but they are more than enough to prohibit illegal obscenity and to enforce that prohibition. In Ginsberg v. New York, the Supreme Court observed: “[O]bscenity is not protected expression and may be suppressed without a showing of the circumstances which lie behind the phrase ‘clear and present danger’ in its application to protected speech. . . . We do not demand of legislatures ‘scientifically certain criteria of legislation.’” Similarly, in Paris the Supreme Court rejected the argument that there must be “scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women or their society.” Rather, obscenity laws can be based on an “unprovable assumption” that “commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior.” Effects, the Court said, “may be intangible and indistinct, but they are nonetheless real.”

3. Obscenity and Other Social Problems

A third category of harm comes from the relationship between sexually explicit material and other problems such as domestic violence and sex trafficking. A University of Arkansas researcher found that pornography “decreases empathy for victims of sexual violence” and “increases sexually imposing behaviors.” A 2010 analysis found “a significant overall relationship between pornography consumption and attitudes supporting violence against women in nonexperimental studies.”

107. Id. at 41.
108. Id. at 45.
110. Id. at 60.
111. Id. at 63.
112. Id. at 63. When the Court recently held that obscenity is limited to sexual depictions, it applied strict scrutiny to a California law prohibiting the sale of violent video games to minors. Studies showing correlation but not causation did not meet this standard. Brown v. Entm't Merchs. Ass'n, 131 S.Ct. 2729, 2739 (2011). This level of proof is not required to justify restrictions on material, such as obscenity, that is not protected by the First Amendment.
114. Id. at 12.
Laura Lederer, former Senior Advisor on Trafficking in Persons at the State Department, spoke on this topic at a briefing for members of Congress in their staff on June 15, 2010. She summarized the “numerous links between sex trafficking and pornography” this way: some types of pornography actually are sex trafficking because they involve force, fraud, or coercion; some perpetrators are trafficking or exploiting women and record the acts they perform; pornography “is used in sex trafficking and the sex industry to train women and children what to do”; pornography provides rationalizations for exploiters.\textsuperscript{116}

III. ADULT OBSCENITY SHOULD BE PROSECUTED THE RIGHT WAY

“Federal law contains no outright ban on all obscenity; it leaves this to state law.”\textsuperscript{117} Federal statutes, however, do prohibit obscenity in contexts that are under federal jurisdiction. These include selling obscenity “on any land or building . . . used or under the control” of the United States,\textsuperscript{118} knowingly sending obscenity through the mail,\textsuperscript{119} importing or transporting obscenity,\textsuperscript{120} uttering obscenity on the radio\textsuperscript{121} or on cable or subscription television,\textsuperscript{122} producing or distributing obscenity through interstate commerce,\textsuperscript{123} and using the mail or interstate commerce knowingly to send obscenity to a minor.\textsuperscript{124} The Supreme Court has held that federal obscenity statutes incorporate the definition of obscenity drawn from its precedents.\textsuperscript{125}

There exists ample, and growing, evidence of the harms of sexually explicit material to communities, individuals, and society and these harms are likely magnified where more extreme material such as obscenity is involved. The lack of First Amendment protection for obscenity means, therefore, that the most harmful material can be subject to the greatest restrictions.


\textsuperscript{117} Cohen, supra note 51, at 11.


\textsuperscript{125} See United States v. 12 200-Ft. Reels of Film, 413 U.S. 123, 129-30 (1973) (“We have today arrived at standard for testing the constitutionality of state legislation regulating obscenity . . . . These standards are applicable to federal legislation.”); Hamling v. United States, 418 U.S. 87, 105 (1974).
To that end, and because there had been so few obscenity prosecutions for so long, the Justice Department in 2005 created the Obscenity Prosecution Task Force “dedicated exclusively to the investigation and prosecution of obscenity cases.”126 Prosecutions, however, continued to target only the most extreme forms of obscenity, material that is neither widely produced nor consumed. This is material that would be obscene anywhere in America because it easily appears outside any community’s standard. Prosecutions of this material, however, may virtually guarantee convictions but have little impact on the obscenity industry.127 The obscenity industry considers the line of legality to be drawn by prosecutors, not by legislators. They do not care whether material is illegal, but only whether it will be prosecuted. As such, effective enforcement requires not only prosecuting more cases, but prosecuting the right cases in the right way. I have repeatedly raised this issue of enforcement strategy in hearings,128 urging the Justice Department to target what might be called more “mainstream” obscenity in order to have a greater impact on what is produced and, therefore, on what is consumed.

Another important reason consistently to enforce obscenity laws is that such enforcement itself helps clarify the community standards that define obscenity. During the 2003 Senate Judiciary Committee hearing that I chaired, U.S. Attorney Mary Beth Buchanan explained that members of a jury “are going to be very uncertain as to what the community’s standards are today.”129 The lack of prosecutions, she said, means that “so much material has been available to the public and I think that it has desensitized the public. People don’t necessarily understand the fact that certain things have not been prosecuted doesn’t mean that they’re not illegal.”130 Bruce Taylor, a former state and federal obscenity prosecutor and then President of the National Law Center for Children and Families, agreed that juries “have forgotten that obscenity is a crime because there have not been cases.”131 Steve Takeshita, the officer in charge of the Pornography Unit of the Los Angeles Police Department who had investigated obscenity for nearly two decades, also testified that a “hiatus in federal prosecution of obscenity has brought forth the courage in the adult industry to produce this extreme sexually explicit

126. Press Release, Department of Justice, Obscenity Prosecution Task Force Established to Investigate, Prosecute Purveyors of Obscene Materials (May 5, 2005), http://www.justice.gov/opa/pr/2005/May/05_crm_242.htm. In his appearance before the Senate Judiciary Committee on May 4, 2011, Attorney General Holder acknowledged that this task force was being folded back into the Child Exploitation and Obscenity Section.

127. See Joe Mozingo, Obscenity Task Force’s Aim Disputed, L.A. TIMES, Oct. 9, 2007, at B1 (“[The Department of Justice’s Obscenity Prosecution Task Force] has brought fewer than two dozen adult obscenity cases since the task force began. All are at the edge of the erotica spectrum, often depicting violence or defecation.”).


129. Internet Pornography Hearings, supra note 89, at 230.

130. Id.

131. Id. at 233.
Finally, the rapid development of technology and its ability to make pornography and obscenity more ubiquitous should make enforcement more urgent. In 1985, the Child and Family Protection Institute (CFPI) published an extensive review of the existing evidence for pornography’s effects on individuals, families, and communities. It recommended that “[n]ew legislation is needed in some areas where new technology has made new forms of pornography available.” The next year, the 1986 Commission noted the “enormous technological changes that have affected the transmission of sounds, words, and images” but concluded that “the laws are there for those areas that choose the course of vigorous enforcement.” If the technological distance between films and VHS is enormous, the distance from there to the Internet is difficult adequately to describe. Congress has tried several times, but with limited success in the courts, legislatively to regulate sexually explicit material, including obscenity, on the Internet. When the 1970 Commission did its work, individuals had to go to pornography to consume it. Today, pornography comes to individuals, often without their consent, and can be accessed entirely in private, or even on the go.

IV. CONCLUSION

In Paris, the Supreme Court concluded:

The sum of experience, including that of the past two decades, affords 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. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.

132. Id. at 238.
134. Id. at 31.
135. 1986 REPORT, supra note 9, at 225.
136. Id. at 365.
138. One study found that forty-two percent of youth Internet users were exposed to online pornography, and for two-thirds of them the exposure was unwanted. See Janis Wolak, Kimberly Mitchell, & David Finkelhorn, Unwanted and Wanted Exposure to Online Pornography in a National Sample of Youth Internet Users, 119 PEDIATRICS 247 (2005).
That was in 1973, and today there exists much more evidence that pornography and obscenity harm communities, individuals, and society.

On May 4, 2011, Attorney General Holder appeared before the Senate Judiciary Committee, shortly after receiving the letter quoted at the top of this article. In response to my questions, he agreed that hard-core pornography harms individuals, families, and communities; is associated with sex trafficking; and normalizes sexual harm to children. He was right, and it is time to enforce the law.

140. See Holder Hearing, supra note 13, at 14.