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PREFACE

Hugh Hefner's death last September left many pondering the legacy of the sexual revolution. What type of society had the *Playboy*-fueled project of sexual liberation created? The hurricane of sexual assault allegations that arose the following month—broadly characterized as the #MeToo movement—provided a dismal answer to that question. Tired of the harassment and misconduct of sexually entitled men, it seems women from Hollywood to Houston have finally had enough.

In the midst of this reassessment of sexual mores, the ubiquity of pornography and the objectifying habits of the mind that it creates cannot be ignored. Several state legislatures—including those in Florida, Kansas, Idaho, and Utah—have labeled unrestricted access to internet pornography a “public health crisis.” The call to ban pornography altogether even resounded across the pages of the *New York Times*.¹

The Articles selected for this Issue of the *Journal* charge headlong into this timely and long-overdue conversation. Professor Gerard V. Bradley surveys our pornified culture and calls for the establishment of a new federal commission to evaluate the effects of unrestricted pornography on our cultural well-being. Dr. David L. Tubbs and Jacqueline Smith explain why the Supreme Court's unstable obscenity jurisprudence undermines the rule of law, and debunk the constitutional mythology favoring pornographers. Finally, Professor Mary G. Leary reviews how courts distorted the Communications Decency Act so as to grant immunity to websites that advertise sex-trafficking victims. She also discusses the value and limitations of Congress's recently enacted FOSTA-SESTA legislation.

We are also privileged to present an important policy Essay on the matter of human trafficking that complements the themes raised in Professor Leary's Article. Assistant Attorney General Beth A. Williams outlines the Department of Justice's approach to combatting human trafficking, and identifies some the Department's most successful efforts.

1. Ross Douthat, Opinion, *Let's Ban Porn*, N.Y. TIMES (Feb. 10, 2018), <https://nyti.ms/2BIOrNY>.

Two special features in this Issue provide welcome respite from the difficult discussion of pornography and sex trafficking. First, this spring marks the fortieth anniversary of the founding of the *Harvard Journal of Law & Public Policy*. To celebrate the occasion, Former Senator and Secretary of Energy E. Spencer Abraham writes our Foreword, reflecting on his role as co-founder of the *Journal* and its continuing importance at this juncture in our nation's legal, political, and cultural history. Second, Former U.S. Solicitor General Paul D. Clement reviews *Scalia Speaks*, a delightful collection of the late Justice Scalia's speeches edited by his son Christopher J. Scalia and former law clerk Edward Whelan.

I am also pleased to present two Notes written by editors of the *Journal*. George Maliha studies the problem of noncompliant insanity in criminal law, and advocates a per se rule confining judicial inquiry to the narrow time frame immediately preceding the criminal act. Jennifer Barrow defends the constitutionality and statutory authorization of President Trump's "travel ban," but questions the wisdom of the policy as a vehicle for protecting persecuted religious minorities.

The editorial staff of the *Journal* deserve our sincere thanks for their tireless effort to bring this Issue to publication. I would like to extend warm congratulations to all of the editors who made this Issue possible. The conversation within the legal academy would be impoverished without the courage and conviction of these students, who have not shied away from addressing the pressing and controversial topics that only the *Harvard Journal of Law & Public Policy* seems willing to address.

Joshua J. Craddock
Editor-in-Chief

FOREWORD

A FOUNDER'S REFLECTION'S REFLECTIONS: THE *JOURNAL* AT FORTY YEARS

On the occasion of the *Harvard Journal of Law & Public Policy's* fortieth anniversary, it is fitting to provide a brief reflection on the *Journal's* history.

In the mid-1970s, the environment at Harvard Law School and other law schools was not friendly to conservatives. While there was an abundance of liberal publications on a variety of topics, neither Harvard nor any other major law school published a single conservative journal. Conservative academics had no outlet in which to publish their work. If law students wanted to develop their editing skills, their only option was to aid in preparing liberal scholarship. So, during the 1976–77 academic year, a handful of Harvard students decided to approach the Law School administration about founding a journal dedicated to publishing conservative and libertarian viewpoints on issues of law and public policy.

Unsurprisingly, we were met with resistance. The Law School leadership refused to grant us funding for our endeavor, claiming that the Law School only funded facially neutral publications. The many liberal law reviews associated with Harvard Law School at that time did not explicitly state their political viewpoints, and the Dean and other officials were apparently untroubled by the fact that they had not published any conservative articles in years.

Undaunted, we sought funding from outside sources. Though it was initially difficult to find donors, within a year we identified a benefactor who was willing to invest in the first issue of our new conservative publication.

That fall, a band of about ten students met with then-Dean Albert Sacks. Though he could not bar us from publishing our own independently funded journal, he initially refused us the use of the Harvard name in our title, claiming our publication might somehow injure the reputation of the Law School. We resisted and ultimately prevailed by pointing out that Harvard had never challenged the use of its name by other independent

efforts—including not only scholarly endeavors, but also restaurants and a liquor store.

The first volume of the *Harvard Journal of Law & Public Policy* was published in the spring of 1978 with only a handful of student editors on its masthead. Several hundred law libraries purchased subscriptions, and the *Journal* was on its feet. During Ronald Reagan's presidency, conservative campus publications gained traction. We found ourselves with more students willing to serve as editors, more writers contributing to the *Journal*, and a more receptive faculty.

In the spring of 1982, I received a call from Lee Liberman, a law student at the University of Chicago. She told me that she and conservative students at other law schools had founded several campus organizations dedicated to giving a platform to conservative and libertarian perspectives on legal issues. They planned to hold a national symposium and asked if the *Journal* would publish the proceedings. That fall, the *Harvard Journal of Law & Public Policy* published an issue covering the first national symposium of what would become the Federalist Society. The Federalist Society has been the closest ally of the *Journal* ever since. Today, a subscription to the *Journal* is a benefit of membership in the Federalist Society, helping to make it one of the five most widely circulated legal journals in the United States.¹

The *Harvard Journal of Law & Public Policy* has grown from a seed planted by a handful of students to the nation's leading conservative and libertarian legal journal. The writings of senators, leading academics, and jurists have filled its pages. Their arguments have shaped the law of the nation, having been cited by the Supreme Court, federal Courts of Appeals, and other federal and state courts more than 120 times.² One of the *Journal's* former editors,³ Neil M. Gorsuch, is now an Associate Justice of the United States Supreme Court.

1. *Journals and Publications*, HARV. L. SCH., <http://hls.harvard.edu/dept/dos/student-journals/journals-and-publications/> [https://perma.cc/2BPS-EL3K?type=image] (last visited Jan. 6, 2018).

2. *See* Cases Citing the *Harvard Journal of Law & Public Policy*, LEXISNEXIS, <https://advance.lexis.com/> [https://perma.cc/EXF9-NEDX] (last visited Jan. 6, 2018) (search "Harv. J.L. & Pub. Pol'y").

3. *See* 13 HARV. J.L. & PUB. POL'Y, at xi (1991).

It is tempting to think from the national successes of the *Journal* and the Federalist Society that conservative thought has established a secure foothold in legal scholarship and the academy, but the *Journal's* original mission of sustaining a viable alternative to uniformly liberal scholarship is as relevant today as it was in 1977. Throughout the nation, freedom of thought is increasingly under threat in academia from a new generation of students and faculty seemingly aghast that alternative viewpoints on social, political, economic, or cultural matters exist, and all too often dedicated to stifling the First Amendment rights of those who would voice opinions contrary to the reigning progressive campus orthodoxy.

These students and faculty see conservative arguments not as an intellectual challenge to their own beliefs that merit a thoughtful response, but as violent personal attacks against them. They have no interest in the university as a forum for debate and would, it seems, prefer to expel opposing viewpoints from our institutions of higher learning. They have sought to intimidate and silence conservative faculty, disinvite speakers invited by their universities, shout down administrators who have dared to stand up to them, and disrupt speaking events on campus—sometimes even resorting to physical violence. Insofar as they do respond to dissenting views, they do so by attempting to tar those who hold them with epithets like “bigot” and “racist” rather than engaging with the substance of the view.

In 1977 there were no conservative voices or publications on law school campuses, and to this day the *Journal* remains, as Steven Eberhard and I referred to it in its first volume, *vox clamantis in deserto*.⁴ It is the only right-of-center publication at Harvard Law School and the nation's only conservative student-edited law journal with a national readership. Even at forty years of age, the *Journal* serves as a critical bulwark against the threat of a uniform progressive ideology establishing total dominance over the legal academy. It will continue to do so far into the future.

A reflection on the fortieth anniversary of the *Journal* would not be complete without thanking a few of those who made its

4. E. Spencer Abraham & Steven J. Eberhard, Preface, 1 HARV. J.L. & PUB. POL'Y, at vii, viii (1978) (meaning “the voice of one crying out in the wilderness,” from *Isaiah* 40:3, *Matthew* 3:3, *Mark* 1:3, *Luke* 3:4, *John* 1:23 (Vulgate)).

success possible. Thank you to those first students who organized the *Journal*, met with the Harvard administration, and served on our first masthead. I wish also to express my gratitude to the generous individuals and foundations whose investments made the *Journal's* early volumes possible—with a special thanks to the late John McGoff, who sponsored our first volume. Thanks also to Clifford Taylor, former Chief Justice of the Michigan Supreme Court, who agreed to serve as our first advisor.

My thanks would be incomplete without a tribute to the *Journal's* Co-Founder and first Editor-in-Chief, Steven Eberhard. Steve was an exceptional student, a patriot, and a true friend. His untimely death robbed the conservative movement and the nation of a great man who would surely have been one of its most brilliant and courageous leaders.

Finally, I congratulate and thank this year's editors for your outstanding work in carrying the *Journal* into its fifth decade. Your efforts provide another generation of conservative law students the opportunity to hone their editorial skills and give a voice to the greatest conservative legal minds of our day. In today's climate, no less than ever, those voices are needed in the great debates of our nation's legal academies.

E. Spencer Abraham
Co-Founder

PROLEGOMENON ON PORNOGRAPHY

GERARD V. BRADLEY*

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I. REEVALUATING “PORNTOPIA”

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

* Professor of Law, University of Notre Dame; Director, Natural Law Institute at Notre Dame; Senior Fellow, Witherspoon Institute.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21. *Id.* at 10.

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

23. *See id.*

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

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

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

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

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

26. *See id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

45. McNair, *supra* note 43.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

53. *Id.*

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

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

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

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

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

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

56. See *infra* notes 108–10.

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

58. *Id.*

59. *Id.* at 225–26.

60. *Id.* at 226.

61. *Id.* at 226–27.

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

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

II. HISTORY

A. 1954

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

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

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

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

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

1. Concerns About Comics

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

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

64. *Id.* at 1–2.

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

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

67. *Id.* at 5.

68. *Id.*

69. *Id.*

70. *Id.* at 189.

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

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

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

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

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

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

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

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

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

76. *Id.*

77. *See id.*

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

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

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

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

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

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

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

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

80. *Id.* at 33.

81. *Id.* at 23.

82. *Id.* at 33.

83. *Id.*

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

85. *Id.*

86. *Id.*

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

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

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

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

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

89. *Id.* at 380.

90. *Id.* at 381–83.

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

95. *Id.*

96. *Id.*

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

98. See *id.* at 26.

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

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

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

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

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

100. *Id.*

101. *Id.* at 383–84.

102. *Id.* at 383.

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

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

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

B. 1970

Conceived during the 1967 “Summer of Love”¹⁰³ and midwifed by the Supreme Court’s pro-pornography decision in *Stanley v. Georgia*,¹⁰⁴ what came to be generally called the “President’s Commission on Obscenity and Pornography” was created by Congress on October 3, 1967 to address a “matter of national concern.”¹⁰⁵ President Lyndon B. Johnson appointed 18 members on January 2, 1968.¹⁰⁶ Among them was an academic constitutional lawyer, William Lockhart, as Chairman.¹⁰⁷

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

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

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

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

107. *Id.* at 16.

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

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

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

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

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

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

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

111. *Id.*

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

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

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

1. *The Commission's Findings and Legacy*

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

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

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

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

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

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

118. *Id.* at 14.

119. *Id.* at 19.

120. *Id.*

121. *Id.* at 120.

122. *Id.* at 115.

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

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

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

123. *Id.* at 77.

124. *Id.* at 9.

125. *Id.*

126. *Id.*

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

128. *Id.* at 1, 27.

129. *Id.* at 21.

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

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

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

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

130. *Id.* at 29.

131. *See id.* at 120.

132. *See id.* at 25.

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

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

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

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

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

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

135. *Id.* at 109.

136. *See id.* at 105.

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

138. *Id.* at 51.

139. *See id.* at 66.

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

2. Stanley's Influence

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

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

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

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

142. *Id.* at 558.

143. *Id.*

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

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

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

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

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

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

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

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

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

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

151. *Id.* (footnote omitted).

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

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

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

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

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

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

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

155. *See id.* at 31.

156. *Id.* at 30.

157. *Id.*

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

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

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

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

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

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

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

162. *Id.* at 63.

163. *Id.* at 57.

164. *Id.*

165. *Id.* at 58.

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

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

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

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

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

168. *Id.* at 60–61.

169. *Id.* at 61.

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

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

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

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

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

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

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

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

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

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

C. 1986

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

The 1986 Commission’s Final Report explained that it was, not a “reaction” to the 1970 work, but in conversation with it.¹⁸² At several critical junctures, however, the latter group expressly disagreed with, or at least offered judgments which superseded, the 1970 Commission’s Report.¹⁸³ Nonetheless, in a sharp departure from its predecessor’s recommendations, the Meese Commission strongly condemned as “undesirable” and “harm[ful]” exposing children even to the non-violent, non-degrading sexually explicit material which was abundant in 1970.¹⁸⁴ The 1986 Commission recognized that the “taboo” on

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

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

179. *Id.*

180. *Id.*

181. *Id.* at 216.

182. *Id.* at 225.

183. See, e.g., *id.* at 324, 595–96.

184. *Id.* at 344.

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

1. *A Changing Landscape*

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

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

185. *Id.* at 595, 646–47.

186. *Id.* at 277.

187. *Id.* at 226.

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

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

190. *Id.* at 277.

191. *See id.* at 461.

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

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

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

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

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

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

195. *Id.* at 331–32.

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

197. *Id.* at 210.

198. *Id.* at 212.

199. *Id.*

200. *Id.*

201. See Corliss, *supra* note 38.

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

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

2. *Means of Enforcement*

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

203. *See id.* at 335–47.

204. *See id.* at 346.

205. *Id.* at 75, 81, 441, 457–58.

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

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

208. *See id.* at 390.

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

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

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

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

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

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

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

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

214. *Id.*

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

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

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

218. See 19 C.F.R. § 162.6 (2017).

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

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

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

3. *The Legacy of the Meese Commission*

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

219. See 39 C.F.R. § 233.7 (2017).

220. See *supra* note 206.

221. See *id.*

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

223. *Id.* at 326.

224. See *id.* at 327.

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

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

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

225. *See id.* at 309–10.

226. *Id.* at 326.

227. *Id.*

228. *Id.* at 332–35.

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

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

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

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

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

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

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

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

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

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

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

237. See *id.* at 1441–44.

tions,²³⁸ the Commission imagined that the then-unimaginable would soon come true.

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

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

238. *See id.* at 226–27.

239. *See id.* at 269–73.

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

241. *Id.* at 24–33.

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

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

III. DYSTOPIC SEEDS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

252. *Id.*

253. *Id.* at 106–09.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

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

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

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

280. See *id.*

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

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

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

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

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

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

PORNOGRAPHY, THE RULE OF LAW, AND CONSTITUTIONAL MYTHOLOGY

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

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I. INSTABILITY IN THE LAW OF OBSCENITY

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

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

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

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

2. See *id.*

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

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

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

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

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

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

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

6. FULLER, *supra* note 4, 33–94.

7. *See id.*

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

9. *Id.*

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

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

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

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

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

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

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

13. *Id.* at 21.

14. *Id.* at 24.

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

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

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

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

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

17. See 413 U.S. at 27.

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

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

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

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

22. See *id.* at 297.

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

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

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

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

24. See *id.* at 643–46.

25. See *id.* at 635–39.

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

27. See *id.* at 731–32, 748–50.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. TRIUMPH OF A LIBERAL NARRATIVE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

50. See GURSTEIN, *supra* note 42.

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

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

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

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

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

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

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

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

56. See GURSTEIN, *supra* note 42.

III. JUSTIFICATIONS FOR REGULATION

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

A. Promoting Human Dignity

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. *Protecting the Private Realm of Life*

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

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

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

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

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

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

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

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

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

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

71. See *id.*

72. See *id.*

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

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

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

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

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

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

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

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

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

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

C. *Affirming Human Responsibility*

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

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

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

* * * * *

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

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

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

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

IV. A PIVOTAL RULING

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

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

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

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

79. See *infra* Part V.

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

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

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

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

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

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

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

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

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

85. See *Miller*, 413 U.S. at 27–28.

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

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

88. See *id.* at 24.

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

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

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

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

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

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

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

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

93. See *id.*

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

95. See *id.*

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

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

98. See *id.* at 106.

99. See *id.* at 93.

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

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

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

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

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

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

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

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

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

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

V. A COMPENDIUM OF MYTHS

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

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

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

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

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

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

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

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

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

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

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

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

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

109. See *id.* at 72.

110. See *id.*

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

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

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

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

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

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

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

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

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

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

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

117. *See id.*

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

119. Elliott, *supra* note 116.

120. Leo, *supra* note 118.

121. *Id.*

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

123. *Id.*

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

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

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

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

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

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

127. *Id.*

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

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

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

131. *Id.*

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

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

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

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

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

136. DiPasquale, *supra* note 133.

137. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

155. *See id.*

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

157. *See* 438 U.S. at 748–49.

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

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

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

158. *See id.* at 748.

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

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

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

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

163. *Id.* at 637.

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

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

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

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

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

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

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

166. *See Reno*, 521 U.S. at 865–66.

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

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

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

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

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

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

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

171. *See id.* at 807.

172. *Id.* at 812.

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

174. *Id.*

175. *Id.* at 662.

176. *Id.* at 660–61.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 878.

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

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

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

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

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

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

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

188. *See id.*

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

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

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

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

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

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

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

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

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

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

194. *See id.*

195. *See id.*

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

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

198. *Id.* at 416.

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

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

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

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

199. *Id.*

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

201. *See id.* at 447.

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

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

204. *See Black*, 538 U.S. at 359–60.

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

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

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

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

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

VI. CONCLUSION

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

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

206. *Id.* at 209.

207. *Id.* at 212.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

industry were indistinguishable from losing several large clothing factories.²²⁷

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

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

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

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

227. *See id.*

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

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

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

THE INDECENCY AND INJUSTICE OF SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

MARY GRAW LEARY*

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INTRODUCTION

The story of Section 230 of the Communications Decency Act (CDA)¹ is one of legislative action and inaction, justice and injustice, and the weighing of priorities and values. Its origin and entrenchment reveal a great deal about the values of the technology industry and the U.S. Congress. Passed in 1996, the CDA was an attempt by Congress to accommodate competing values and facilitate an uncertain but promising future digital world. Since that time, this digital world has changed drastically. Some argue that § 230 is in part responsible for the growth of the digital economy and the “Internet as we know it.” Others argue that the “Internet as we know it” is not what we want it to be, particularly when it comes to sex trafficking, pornography, child sex-abuse images, and exploitation. It is clear that, whatever § 230 did for the legitimate digital economy, it also did for the illicit digital economy.

1. 47 U.S.C. § 230 (2012).

Nowhere is this more apparent than in the world of sex trafficking. Since its recognition under federal law in 2000,² human trafficking has been identified as the fastest growing criminal enterprise in the world.³ The International Labour Organization released its Global Estimate on Modern Slavery and concluded that forty million people in the world are victims of modern slavery, including sexual slavery, and that women and girls comprise 99% of victims of forced sexual exploitation, with 25% of those victims being children.⁴ This growth, which has similar trends in the United States, is largely attributed to the use of the Internet to facilitate the sale of human beings, including children, for rape and sexual abuse. While exact numbers are difficult to ascertain, it is beyond dispute that the use of online advertising to facilitate sex trafficking is a significant factor in the increase of this form of victimization.⁵

Yet, when survivors⁶ or state prosecutors attempt to hold liable the very service providers who permit the advertising of sex-trafficking victims—including children—for sale in the largest market to buy human beings in the world, § 230 ties

2. See Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1466 (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

3. See *id.* § 102(b)(8).

4. See ALLIANCE 8.7, GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOR AND FORCED MARRIAGE 5, 39 (2017) (in partnership with the International Labour Office of the ILO).

5. See, e.g., STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 114TH CONG., BACKPAGE.COM'S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING 4–5 (2016); U.S. DEP'T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 10 (2016); MEREDITH DANK ET AL., URBAN INST., ESTIMATING THE SIZE AND STRUCTURE OF THE UNDERGROUND COMMERCIAL SEX ECONOMY IN EIGHT MAJOR US CITIES 237–38 (2014); DOMINIQUE ROE-SEPOWITZ ET AL., ARIZ. STATE UNIV., A SIX YEAR ANALYSIS OF SEX TRAFFICKERS OF MINORS 13, 42 (2017) (finding traffickers used online advertisements in nearly two-thirds of cases studied and that “Backpage.com being involved in cases of sex trafficking of minors is a constant theme in sex trafficking arrests”).

6. Legal literature, advocacy, and policy pieces use the terms “survivor” and “victim” interchangeably. This Article follows the pattern of the U.S. Council on Human Trafficking, a survivor advisory group to the White House on human trafficking, and utilizes both terms. See generally U.S. ADVISORY COUNCIL ON HUMAN TRAFFICKING, ANNUAL REPORT (2016). It is the view of the Author that regardless of the label, people who have lived through sex trafficking are survivors.

their hands.⁷ Defendant websites use § 230 as a sword and argue that it affords such sites immunity from liability, even if accused of participating in child sex trafficking. Despite consensus that § 230 was never designed to create such absolute immunity, courts have struggled to reconcile precedent from an earlier Internet era with the reality of slavery⁸ in the current Internet age. The result has been an inability of sex-trafficking victims and state prosecutors to proceed with cases against such businesses that knowingly facilitate sex trafficking.

Since the emergence of this unintended reality, many have called on Congress to update § 230 and address this problem. More recently, sex-trafficking survivors,⁹ all fifty state attor-

7. See generally *Stop Enabling Sex Traffickers Act of 2017: Hearing on S. 1693 Before the S. Comm. on Com., Sci. and Transp.*, 115th Cong. (2017) [hereinafter *Hearing on S. 1693*] (statement of Xavier Becerra, Att’y Gen. of California).

8. The label of human trafficking as modern-day slavery is well accepted with two American presidents, the Department of Justice, the United States Congress, the United Nations, the United States State Department, federal courts, and Pope Francis all invoking the term. See respectively, for example, Proclamation No. 9074, 3 C.F.R. 9074 (Dec. 31, 2012) (Proclamation by President Obama regarding National Slavery and Human Trafficking Prevention Month); President Barack Obama, Remarks by the President to the Clinton Global Initiative (Sept. 25, 2012) (transcript available at <https://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative> [<https://perma.cc/KE95-A8RP>]); President George W. Bush, Statement by His Excellency Mr. George W. Bush, President of the United States of America: Address to the United Nations General Assembly (Sept. 23, 2003) (transcript available at <http://www.un.org/webcast/ga/58/statements/usaeng030923.htm> [<http://perma.cc/6PU8-7BQ7>]); U.S. DEP’T OF JUSTICE, *Attorney General Alberto R. Gonzales Announces Creation of Human Trafficking Prosecution Unit Within the Civil Rights Division* (Jan. 31, 2007), http://www.justice.gov/archive/opa/pr/2007/January/07_crt_060.html [<http://perma.cc/RH99-BAUB>]; 22 U.S.C. § 7101(a), (b)(1); Ban Ki-Moon, *Secretary-General’s Message on the International Day for the Abolition of Slavery*, UNITED NATIONS (Dec. 2, 2013), <http://www.un.org/sg/statements/?nid=7321> [<http://perma.cc/6ATD-D7MJ>]; John Kerry, U.S. Sec’y of State, Remarks at the Annual Trafficking in Persons Report (June 19, 2013) (transcript available at <http://m.state.gov/md210911.htm> [<http://perma.cc/L64A-QN5U>]); Hillary Rodham Clinton, U.S. Sec’y of State, Remarks at Release of the Ninth Annual Trafficking in Persons Report (June 16, 2009) (transcript available at <http://m.state.gov/md124872.htm> [<http://perma.cc/2G32-VHTG>]); Pope Francis, Address to Congress (Sept. 24, 2015) (transcript available at https://www.washingtonpost.com/local/social-issues/transcript-pope-franciss-speech-to-congress/2015/09/24/6d7d7ac8-62bf-11e5-8e9e-dce8a2a2a679_story.html [<https://perma.cc/CME5-VGGE>]).

9. See generally LINDA SMITH ET AL., JOINT STATEMENT IN RESPONSE TO TECH INDUSTRY OBSTRUCTION OF SECTION 230 LEGISLATION, <https://sharedhope.org/wp-content/uploads/2017/08/Joint-Statement-in-Response-to-Tech-Industry-Obstruction-of-Section-230-Legislation-1.pdf> [<https://perma.cc/AR9F-3E8J>].

neys general,¹⁰ and a growing number of courts¹¹ have called on Congress to amend § 230 to restore it to its original purpose of providing limited, not nearly absolute, protections for interactive computer services. Congress has failed to act thusfar. Nevertheless, in 2017, two bills (one in each chamber) have been proposed to address this reality.

This Article examines the development of the jurisprudence regarding online advertising of sex-trafficking victims and juxtaposes the forces that created § 230 with those preventing its timely amendment. This Article argues that, although § 230 was never intended to create a regime of absolute immunity for defendant websites, a perverse interpretation of the non-sex-trafficking jurisprudence for § 230 has created a regime of de facto absolute immunity from civil liability or enforcement of state sex-trafficking laws. This phenomenon occurred despite the legislative intent behind § 230, and despite the Trafficking Victims Protection Act of 2000 (“TVPA”)¹² and its subsequent reauthorizations.¹³ Part I explains the impetus behind § 230, its history, and its text. Part II examines the rise in recognition of sex trafficking in both domestic and international law. It further summarizes the contours of sex trafficking in the modern world and the role online advertisement has played in its emergence. Part III analyzes the intersection of sex trafficking, the Internet, and § 230 and thoroughly assesses the development of jurisprudence culminating in the creation of a regime of de facto immunity. Part IV analyzes recent legislative efforts in both the House and Senate, arguing that the twenty-two-

10. See Letter from Nat’l Ass’n of Attorneys Gen. to Congress Regarding Amendment of Communications Decency Act (Aug. 16, 2017), available at <http://www.naag.org/assets/redesign/files/sign-on-letter/CDA%20Final%20Letter.pdf> [<https://perma.cc/5T2D-EGDY>].

11. See, e.g., *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 29 (1st Cir. 2016); *M.A. v. Vill. Voice Media Holdings*, 809 F. Supp. 2d 1041, 1058 (E.D. Mo. 2011).

12. Pub. L. No. 106-386, 114 Stat. 1466 (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

13. See Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227 (2015); William Wilberforce Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003); Trafficking Victims Protection Reauthorization Act of 2013, H.R. 898, 113th Cong. (1st Sess. 2013).

year-old statute must be amended to reflect current realities of both the Internet and sex trafficking. Furthermore, it asserts that such an amendment is necessary to return § 230 to its original purpose of protecting some Internet companies from specific types of liability, without creating absolute immunity.

I. SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

A. Historical Roots

In 1996 the Internet was in its infancy and Congress was struggling with the implications of its development. The Internet of 1996 is unrecognizable today.¹⁴ That “new” “dial up” Internet engine connected people through a novel and experimental “bulletin board” through which events could be organized.¹⁵ Newspapers were just considering having an online presence.¹⁶ “Google” was not a verb, and online research was described as “tough for the amateur researcher.”¹⁷ Congressional debate discussed floppy disk drives, usenet groups, and message boards over telephone lines.¹⁸ In this climate, Congress could not have imagined what the Internet would look like two decades into the twenty-first century.

Congress did, however, recognize a concern about online exploitation. Congress’s concern was not sex trafficking because such a term was not recognized at the time. Rather, Congress acknowledged and expressed concern about the potential of

14. See, e.g., Nicholas Carlson, *Presenting: This is What the Internet Looked Like in 1996*, BUS. INSIDER AU. (Apr. 15, 2014), <https://www.businessinsider.com.au/the-coolest-web-sites-from-1996-2014-4#-1> [<https://perma.cc/PVB3-N2W2>]; Farhad Manjoo, *Jurassic Web*, SLATE (Feb. 24, 2009), http://www.slate.com/articles/technology/technology/2009/02/jurassic_web.html [<https://perma.cc/B6U9-KDQS>].

15. See Joan E. Rigdon, *Internet’s Top Use: Information Bureau*, ASIAN WALL ST. J., Mar. 14, 1996, at 4.

16. See Peter H. Lewis, *The New York Times Introduces a Website*, N.Y. TIMES, Jan. 22, 1996, at D7.

17. Bart Ziegler, *The Internet – How Can I Find What I Am Looking For?*, ASIAN WALL ST. J., Dec. 9, 1996, at S10.

18. See, e.g., *Cyberporn and Children: The Scope of the Problem, the State of the Technology, and the Need for Congressional Action: Hearing on S. 892, a Bill to Amend Sec. 1464 of Title 18, U.S.C., To Punish Transmission by Computer of Indecent Material to Minors, before the S. Comm. on the Judiciary*, 104th Cong. 136, 161, 181 (1995).

the Internet to spread or expose children to obscene material.¹⁹ Section 230 was a component of a broader effort to limit access to explicit material through the Internet. The CDA intended to limit such access and was attached to Title V of the Telecommunications Act of 1996.²⁰ The CDA prohibited the knowing dissemination of obscene material to children, and sought to incentivize telecommunication companies to participate in blocking explicit material from reaching children.²¹ Section 230 was added to the CDA to protect tech companies. In *Reno v. ACLU*,²² the Supreme Court struck down as vague some of the more controversial criminal provisions of the CDA, such as the prohibition on the transmission of “indecent material.”²³ However, § 230 was not challenged, and this protection remains effective law to this day.²⁴ In fact, tech companies arguably achieved the best of both worlds. After *Reno*, much of the CDA that tech companies opposed was eliminated, but the provision that was designed to protect them remained. Thus, when the dust settled, tech companies enjoyed increased protections without the regulations.

The statute itself explicitly outlines the purposes of § 230. The text cannot be fully understood, however, without the context of its addition to the CDA. Because the CDA regulates the Internet, many tech companies opposed it in principle and fought it at every opportunity.²⁵ In this climate, a state court

19. See 141 CONG. REC. 15,503 (1995) (statement of Sen. Exon, author of the CDA) (“The fundamental purpose of the Communications Decency Act is to provide much needed protection for children.”).

20. Pub. L. No. 104-104, §§ 501-09, 551-52, 561, 110 Stat. 56, 133-37, 139-43 (1996) (codified in scattered sections of 47 U.S.C.).

21. See S. REP. NO. 104-23, at 59 (1995); see also *Reno v. ACLU*, 521 U.S. 844, 881 (1997).

22. 521 U.S. 844 (1997).

23. See *id.* at 849.

24. See *id.* at 862, 879.

25. See Robert Cannon, *The Legislative History of Senator Exon’s Communications Decency Act: Regulating Barbarians on the Information Superhighway*, FED. COMM’NS L.J. 51, 74 n.112 (1996); see also *Cyberporn and Children*, *supra* note 18, at 72-73; *Child Pornography on the Internet: Hearing on The “Protection of Children from Computer Pornography Act of 1995” Before the S. Comm. On the Judiciary, 104th Cong.* (1995) (testimony of Jerry Berman, Executive Director of the Center for Democracy and Technology); 141 CONG. REC. 19,883-84 (1995) (statement of Sen. Leahy, introducing the Report of Interactive Working Group on Parental Empowerment, Child Protection and Free Speech in Interactive Media); Carlin Meyer, *Reclaiming Sex*

decision caused Congress to respond to tech companies' concerns about regulation and liability.

In 1995, the New York Superior Court decided *Stratton Oakmont, Inc. v. Prodigy Services Co.*²⁶ Prodigy operated a bulletin board called "Money Talks," where members could post information about the financial world. Widely read in the financial sector, Prodigy held itself out as a "family-oriented" corporation that edited material placed on its bulletin boards that it considered inappropriate.²⁷ Stratton Oakmont sued Prodigy for libel for statements placed on the Money Talks bulletin board, and the state court found Prodigy responsible for that content in part because of its active role in screening out any material it found inappropriate.²⁸ Prodigy lost its protection as a mere distributor of third-party information. The court labeled it a publisher of the information and thus responsible for material it published. The court found Prodigy to be a publisher under state law because "it voluntarily deleted some messages . . . and was therefore legally responsible for the content of defamatory messages that it failed to delete."²⁹

Opponents of the CDA had already expressed the concern that if the CDA were interpreted broadly, service providers would be held criminally liable for providing minors with access to the Internet.³⁰ As the Fourth Circuit has observed, "Congress enacted § 230 to remove the disincentives to self-regulation created by the *Stratton Oakmont* decision."³¹ This case, and the concerns expressed by tech companies (including Prodigy), prompted Congress to add § 230 to the CDA.³² Just

from the Pornographers: Cybersexual Possibilities, 83 GEO. L.J. 1969, 1983 n.77 (1995) (commenting on impossibility of monitoring all transmissions over server computers).

26. No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. 1995), *superseded by statute*, Communications Decency Act of 1996, 47 U.S.C. § 230, *as recognized in* *Shiamilli v. Real Est. Grp. of New York, Inc.*, 952 N.E.2d 1011 (N.Y. 2011).

27. *Id.* at *2.

28. *Id.* at *4.

29. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008) (citing *Stratton*, 1995 WL 323710, at *4).

30. See *Child Pornography on the Internet*, *supra* note 26.

31. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

32. See *Roommates*, 521 F.3d at 1163. Congressman Christopher Cox, who would later become a paid lobbyist for the tech industry, cosponsored § 230 to protect companies "who take[] steps to screen indecency and offensive material for their

five weeks after the *Stratton Oakmont* decision, the text of what would become § 230 was introduced in the House.³³

B. Purpose

According to the Conference Report, “One of the specific purposes of [§ 230] is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers . . . as publishers or speakers of content that is not their own because they have restricted access to objectionable material.”³⁴ Congress, therefore, sought to address two goals with § 230. First, consistent with the CDA’s effort to protect children from access to obscene or explicit materials, Congress sought to “encourage telecommunications and information service providers to deploy new technologies and policies’ to block or filter offensive material.”³⁵ On the other hand, it did not want companies to over-screen, as Congress recognized the desire for the Internet to reach its full potential as “a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad of avenues for intellectual activity.”³⁶

The plain language of § 230 also provides insight into this dual purpose by outlining five separate policies of the United States as they existed in 1996. The first two speak to a preference for an Internet with little regulation:

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

customers.” 141 CONG. REC. 21,999 (1995). Ironically, although *Stratton Oakmont* won that defamation lawsuit, in 1999 its executives pled guilty to a seven-year scheme of stock manipulation and fraud. See Edward Wyatt, *Stratton Oakmont Executives Admit Stock Manipulation*, N.Y. TIMES, Sept. 24, 1999, at C3.

33. See H.R. 1978, 104th Cong. (1995).

34. H. REP. NO. 104-458, at 194 (1996) (Conf. Rep.).

35. Danielle Citron & Benjamin Wittes, *The Internet Won’t Break*, 86 FORDHAM L. REV. 401, 404 (2017) (quoting S. REP. NO. 104-23 (1995)).

36. *Zeran*, 129 F.3d at 330 (quoting 42 U.S.C. § 230(a)(3) (2012)); see also *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 824 (M.D. Tenn. 2013). The opposition to the CDA generally included a concern that the Internet would be stifled, that it would be impossible to monitor platforms, and that speech might be chilled due to over-screening. See, e.g., *Cyberporn and Children*, supra note 18, at 9, 14.

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation[.]³⁷

The remaining three, however, speak to Congress's equal goal of shielding children and others from explicit material and, more specifically, incentivizing technology companies to develop technology to block such material:

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.³⁸

Congress enacted § 230 believing that it was "devising a *limited* safe harbor from liability for online providers engaged in self-regulation."³⁹ Importantly, nothing in the language suggests Congress contemplated any sort of *absolute* immunity. To the contrary, Senator Grassley specifically rejected the views of "free-speech absolutists" who believe that "Congress has no role at all to play in protecting America's children"⁴⁰

C. Text

In recognition of its dual purpose, § 230(c) provides in relevant part:

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

37. 47 U.S.C. § 230(b)(1)–(2).

38. *Id.* § 230(b)(3)–(5).

39. Citron & Wittes, *supra* note 35, at 403 (emphasis added).

40. 142 CONG. REC. 1993 (1996) (statement of Sen. Grassley).

(2) Civil liability. No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).⁴¹

Section 230(c)(1) is the first source of protections for an interactive computer service.⁴² Under § 230(c)(1) an interactive computer service is protected from claims that it acted as a publisher or speaker of content created by a third party. That is to say, essential to the analysis of a claim against a service is whether the claim treats the provider as a publisher or speaker of another's words. If so, this law precludes such a cause of action. There is no indication in the text or legislative history of the CDA that an interactive computer service could be protected for content it created. Indeed, Congress defined an "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."⁴³ A party "can be both an interactive computer service and a content provider."⁴⁴ If the party is a content provider, then the plain language of the statute offers it no protection.

Second, § 230(c)(2) provides protection for a service provider who takes actions "in good faith to restrict access to or availability of material that the provider or user considers to be ob-

41. 47 U.S.C. § 230(c).

42. "The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2).

43. 47 U.S.C. § 230(f)(3).

44. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008).

scene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable” or provides access to technology to do the same.⁴⁵ Through this provision, “Congress sought to immunize the *removal* of user-generated content, not the *creation* of content.”⁴⁶

The final indication that Congress envisioned limited protection was its rather lengthy list of laws not affected by the protections included in § 230(c). Not only does the statute provide that “[n]othing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.”⁴⁷ The statute also does not “prevent any State from enforcing any State law that is consistent with this section.”⁴⁸ Finally, it has no effect on communications privacy law or intellectual property law.⁴⁹

These provisions reflect Congress’s attempt to strike a balance between limiting access to explicit material and incentivizing service providers to police their platforms and develop technologies that allow for screening. Congress sought to accomplish these goals by allowing the Internet to flourish with limited regulation. Congress expressly stated that that it is the policy of the United States “to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.”⁵⁰ That said, Congress appeared to recognize that unlimited tort-based lawsuits would threaten the then-fragile Internet and the

45. 47 U.S.C. § 230(c)(2).

46. *Roommates*, 521 F.3d at 1163.

47. 47 U.S.C. § 230(e)(1) (emphasis added). This was echoed even by opponents of the CDA who argued that child exploitation was already illegal under federal law. See, e.g., 141 CONG. REC. 27,969 (1995) (statement of Sen. Feingold); *Cyberporn and Children*, *supra* note 18, at 15.

48. 47 U.S.C. § 230(e)(3). This provision does, however, preclude liability imposed through a state law inconsistent with § 230. *Id.*

49. *Id.* § 230(e)(2), (4).

50. *Id.* § 230(b)(5).

“freedom of speech in the new and burgeoning Internet medium.”⁵¹

Although these two goals required some balancing, it is clear from the text and legislative history of § 230 that it was never intended to provide a form of absolute immunity for any and all actions taken by interactive computer services. Section 230 is not “a general prohibition of civil liability for web-site operators and other online content hosts.”⁵² Rather, Congress sought to provide limited protections for limited actions.

As this Article will discuss, the jurisprudence in this area as it relates to sex trafficking has come unmoored, suggesting a de facto absolute immunity from civil suit and state prosecution for partnering with human traffickers. Prior to analyzing this case law, it is necessary to understand the equally clear intent of Congress to eliminate sex trafficking.

II. THE EMERGENCE OF SEX TRAFFICKING AND CLEAR CONGRESSIONAL INTENT TO COMBAT IT

Noticeably absent from the list of offenses unaffected by § 230 are the human trafficking offenses present in federal criminal law and the laws of all fifty states. The reason for this is simple: the nation and the world did not codify human trafficking as a crime until four years after the passage of § 230.

A. *Sex Trafficking Legislation*

2000 was a watershed year for the law’s recognition of human trafficking generally and sex trafficking in particular. The world came together to draft the Protocol to Prevent, Suppress, and Punish the Trafficking in Persons Especially Women and Children (Palermo Protocol).⁵³ This document reflected the international community’s condemnation of human trafficking, and it included a comprehensive definition of human traffick-

51. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). Specifically, Congress was concerned that over-screening would lead to a decrease in the number or types of messages circulated. *Id.* at 331.

52. *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008).

53. This is one of three optional protocols to the United Nations Convention Against Transnational Organized Crime. *See* G.A. Res. 55/25, at 31 (Jan. 8, 2001).

ing. It further committed parties to create multidisciplinary laws to address labor and sex trafficking. The United States mirrored this growing recognition of human trafficking by passing the Trafficking Victims Protection Act of 2000 (TVPA),⁵⁴ which defined and prohibited severe forms of trafficking.

In its recognition of sex trafficking as a “severe form[] of trafficking,” Congress included lengthy findings, among which were the findings that human trafficking was “modern day slavery,” that it was “the fastest growing source of profits for organized criminal enterprises in the world,” and that its perpetrators perniciously “primarily target women and girls, who are disproportionately affected by poverty, the lack of access to education, chronic unemployment, discrimination, and the lack of economic opportunities.”⁵⁵ Congress explicitly acknowledged the importance of combatting this crime:

Trafficking in persons is a transnational crime with national implications. To deter international trafficking and bring its perpetrators to justice, nations including the United States must recognize that trafficking is a serious offense. This is done by prescribing appropriate punishment, giving priority to the prosecution of trafficking offenses, and protecting rather than punishing the victims of such offenses.⁵⁶

Importantly, Congress recognized in 2000 that existing legislation, which included the CDA, was “inadequate to deter trafficking and bring traffickers to justice, failing to reflect the gravity of the offenses involved.”⁵⁷

This direct language indicated Congress’s clear intent to radically affect and confront human trafficking.⁵⁸ The approach Congress advanced to combat human trafficking became known as the “Four P’s”: protection, prevention, prosecution, and partnership.⁵⁹ This comprehensive effort adopted a “vic-

54. Pub. L. No. 106-386, 114 Stat. 1466 (codified at 22 U.S.C. §§ 7101–7112 (2012)).

55. 22 U.S.C. § 7101(b)(1), (4), (8), (19) (2012).

56. *Id.* § 102(b)(24).

57. *Id.* § 102(b)(14).

58. *Id.*

59. See U.S. DEP’T OF STATE, 3 PS: PROSECUTION, PROTECTION, AND PREVENTION, <https://www.state.gov/j/tip/3p/> [<https://perma.cc/WHB4-BWJV>] (last visited Nov.

tim-centered approach” to combat trafficking. In the original TVPA, Congress recognized that human trafficking could not be eliminated solely through federal criminal law, but instead required diverse stakeholders to participate and support the rights of victims.⁶⁰ The hallmarks of this Congressional approach included a comprehensive methodology that encompassed not only criminal sanctions, but also civil lawsuits, recognition of the essential role of states in combatting human trafficking, and recognition of the need to provide victims and survivors with access to justice through civil private rights of action.⁶¹

This approach created a structure to revisit the legislation regularly through reauthorizations updating Congress’s legal framework as it continued to gain more knowledge about the many forms of human trafficking. Congress had a clear intent to pursue an aggressive approach to human trafficking in 2000, and its fidelity to this approach is evinced through its five reauthorizations.⁶²

1. *Definition of Sex Trafficking*

Sex trafficking includes the acts of one who “knowingly . . . recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person . . . to engage in a commercial sex act.”⁶³ To be convicted of such an offense, a defendant must use “force, fraud, or coercion . . . to cause the victim to engage in [the] commercial sex act,” or the victim must be under the age of eighteen.⁶⁴ It is also unlawful to benefit, “financially or by receiving anything of value, from participation” in a sex trafficking venture.⁶⁵ Therefore, if one engages in any of the above acts with a person who has been forced, defrauded or coerced into participating in a commercial sex act, or with a minor participating in a commer-

20, 2017); *see also* INT’L HUMAN TRAFFICKING INST., THE PROBLEM, <http://theiht.org/the-problem/> [<https://perma.cc/PJZ6-7JFB>] (last visited Nov. 20, 2017).

60. *See* 22 U.S.C. § 7101(b)(10).

61. *See, e.g.*, 146 CONG. REC. 16,705 (statement of Sen. Wellstone).

62. *See supra* note 13 for TVPA reauthorizations.

63. 18 U.S.C. § 1591(a) (2012).

64. *Id.*

65. *Id.*

cial sex act (regardless of coercion), one has committed the crime of sex trafficking. A commercial sex act includes “any sex act on account of which anything of value is given to or received by any person.”⁶⁶ These comprehensive definitions cover more than just traditional prostitution; they also include other methods of sexual exploitation. Similarly, they apply not only to pimps, but also to anyone who participates and benefits from such exploitation. Thus, it is clear that Congress intended a comprehensive attack on sex trafficking from the beginning.

2. *Multidisciplinary Approach with Emphasis on Victims*

Congress also recognized that sex trafficking could not be ended only through purely federal criminal law and found that a civil right of action is necessary to combat human trafficking. In 2003, Congress explicitly authorized a private right of action for sex-trafficking victims to enforce the criminal sex-trafficking laws, thus providing them with access to justice and also empowering them to participate in achieving the TVPA’s goals.⁶⁷ In 2015, Congress increased compensation and restitution for victims, reiterating the importance of victim access to funds to address the long-term harms caused by human trafficking.⁶⁸

In addition to adopting the victim-centered approach and the right of a federal civil enforcement action, Congress also recognized the need to combat sex trafficking at state and local levels of government. In 2005, Congress explicitly acknowledged the essential role of local law enforcement and prosecutors by adding a section to the TVPA entitled “Enhancing State and Local Efforts to Combat Trafficking in Persons.”⁶⁹ This section established grants to “establish, develop, expand, or strengthen pro-

66. 22 U.S.C. § 7102(4) (2012).

67. See 18 U.S.C. § 1595 (2012); see also, e.g., Kathleen Kim & Kusia Hreshchyn, *Human Trafficking Private Right of Action: Civil Rights for the Trafficked Person in the United States*, 16 HASTINGS WOMEN’S L.J. 1, 4 (2004) (recognizing that, because public enforcement lacks resources to enforce civil rights of human trafficking victims, including these private rights of actions in the trafficking statutes “is indicative that the state is willing to rely on private actors to enforce the civil rights of trafficked persons”).

68. See Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 105, 129 Stat. 236.

69. 34 U.S.C. § 20705 (2012)

grams . . . to investigate and prosecute acts of severe forms of trafficking in persons.”⁷⁰ In so doing, Congress required that such local entities embrace a multidisciplinary approach advocated by Congress.⁷¹ Indeed, the State Department’s most recent Trafficking in Persons Report recognized the critical role state and local prosecutions play in this effort, noting that most prosecutions of human trafficking are based on state laws.⁷²

For nearly the past two decades, congressional intent to combat sex trafficking has been unyielding and comprehensive. Congress is the architect of a multi-disciplinary approach that employs the use of a private right of action, a focus on victims, and state and local law enforcement to combat sex trafficking at all levels of society.

3. *Obstacle to Achieving the TVPA’s Goal to Ending Sex Trafficking*

Notwithstanding this comprehensive approach, sex trafficking appears to continue to thrive throughout the world and across the country. As a threshold matter, it must be noted that accurate numbers are difficult to ascertain due to the underground nature of sex trafficking, as well as the definitional variations among different studies. Nevertheless, global estimates confirm a trend of increasing numbers of trafficking victims.⁷³ There are 5.9 adult victims of modern slavery for every 1,000 adults in the world, and 4.4 child victims for every 1,000 children in the world.⁷⁴ Consistent with congressional findings in 2000, 99% of the victims that the International Labour Organization characterizes as “sex slaves” are women and girls.⁷⁵ Notwithstanding such estimates, the U.S. Department of State reported that in 2016 the legal systems of countries throughout the world only identified approximately 66,520 victims.⁷⁶

70. *Id.*

71. *See id.* § 20705(b).

72. *See* U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 416 (2017), <https://www.state.gov/documents/organization/271339.pdf> [<https://perma.cc/MXY7-PXUC>].

73. Forty million people were victims of modern slavery in the world in 2017. *See* ALLIANCE 8.7, *supra* note 4, at 5.

74. *Id.* at 24.

75. *Id.* at 39.

76. U.S. DEP’T OF STATE, *supra* note 72, at 34.

Moreover, these same governments identified only 14,897 prosecutions.⁷⁷

Similar trends exist in the United States. The Department of Justice only initiated a total of 241 federal human trafficking prosecutions in 2016, a decrease from 257 in 2015.⁷⁸ It charged 531 defendants, an increase from 377 the year before, and secured convictions against 439 traffickers, a significant increase from 297 convictions in 2015.⁷⁹ While these statistics suggest some improvement, there can be no dispute that these federal prosecutions in no way capture all the victims being sold into sex trafficking each day.

Although likely many reasons exist for this increase in sex trafficking, including simply an increased awareness of the crime, there is little doubt that much of this increase is due to the ease of selling children and adult victims of sex trafficking online. The National Center for Missing and Exploited Children (NCMEC) studied its reports of suspected child sex trafficking over a five-year period and found an 846% increase in reports of suspected child sex trafficking online.⁸⁰ NCMEC receives an average of 9,000–10,000 CyberTipline reports relating to child sex trafficking each year.⁸¹ Of those, 81% relate to child sex trafficking online.⁸² This crime often targets the most vulnerable in our society. A study of homeless children found that nearly one in five have been the victims of human trafficking.⁸³ This corroborates NCMEC's reporting that one in six runaways

77. *Id.*

78. *Id.*

79. *Id.*

80. *Human Trafficking Investigation: Hearing Before the S. Permanent Subcomm. on Investigations*, 114th Cong. 38–47 (2015) (statement of Yiota G. Souras, Senior Vice President and General Counsel, The National Center for Missing and Exploited Children).

81. *See Hearing on S. 1693, supra* note 7 (statement of Yiota G. Souras, Senior Vice President and General Counsel, The National Center for Missing and Exploited Children).

82. *Id.*

83. *See* LAURA T. MURPHY, LOYOLA UNIV. NEW ORLEANS, LABOR AND SEX TRAFFICKING AMONG HOMELESS YOUTH: A TEN-CITY STUDY EXECUTIVE SUMMARY 4 (2016), <https://covenanthousestudy.org/landing/trafficking/docs/Loyola-Research-Results.pdf> [https://perma.cc/6WKU-AGAK] (last visited Nov. 20, 2017).

reported to NCMEC were likely victims of sex trafficking.⁸⁴ These increasing trends of child sex trafficking seem to correlate with the increased use of the Internet to sell children. Of reports received by NCMEC to the CyberTipline from members of the public regarding suspected child sex trafficking, 73% related to ads on Backpage.⁸⁵ A Thorn study observed that 75% of sex-trafficking victims interviewed were advertised online.⁸⁶ California Attorney General Xavier Becerra testified before the Senate Committee on Commerce, Science, and Transportation that almost every sex-trafficking case in his office involves online marketing.⁸⁷ The consequence of this is significant, as online advertising is associated with an increase in the number of buyers per victim.⁸⁸

These numbers are supported by common sense experience in the business community. Successful businesses move online where they can access potential buyers quickly and at low cost. What the Internet economy has done for legitimate business, it has done exponentially for illicit businesses; it provides all the benefits of an online presence with the additional layer of anonymity. It is not surprising that these businesses have migrated to the Internet, because sex trafficking is not only a crime but also a highly lucrative business. As such, sex trafficking thrives in the ecosystem the Internet creates: low-cost, low-risk, and

84. See NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, CHILD SEX TRAFFICKING IN AMERICA: A GUIDE FOR PARENTS AND GUARDIANS 2 (2017), http://www.missingkids.com/content/dam/ncmec/en_us/Child_Sex_Trafficking_in_America_Parent_Guardian.pdf [<https://perma.cc/UL67-DCAW>].

85. See *Hearing on S. 1693*, *supra* note 7 (statement of Yiota G. Souras, Senior Vice President and General Counsel, The National Center for Missing and Exploited Children).

86. VANESSA BOUCHÉ, THORN, SURVIVOR INSIGHTS: THE ROLE OF TECHNOLOGY IN DOMESTIC MINOR SEX TRAFFICKING 38 (2018) [hereinafter BOUCHÉ, TECHNOLOGY IN DMST], https://271511qnwey246mkc1vzqg0-wpengine.netdna-ssl.com/wp-content/uploads/2018/01/Thorn_Survivor_Insights_012918.pdf [<https://perma.cc/FS66-ANN9>]. This is an increase from 63% reported in 2015. See VANESSA BOUCHÉ, THORN, A REPORT ON THE USE OF TECHNOLOGY TO RECRUIT, GROOM AND SELL DOMESTIC MINOR SEX TRAFFICKING VICTIMS 10 (2015), https://271511qnwey246mkc1vzqg0-wpengine.netdna-ssl.com/wp-content/uploads/2015/02/Survivor_Survey_r5.pdf [<https://perma.cc/X8D3-XQV9>].

87. See *Hearing on S. 1693*, *supra* note 7 (statement of Xavier Becerra, Att'y Gen. of California).

88. BOUCHÉ, TECHNOLOGY IN DMST, *supra* note 86, at 41.

high-profit.⁸⁹ Legal online advertising platforms provide traffickers and purchasers a highly convenient forum with limited public exposure.⁹⁰

III. SECTION 230 HAS THWARTED THE CONGRESSIONAL INTENT TO COMBAT HUMAN TRAFFICKING

One of the reasons sex trafficking has continued to grow, despite comprehensive legislative efforts to combat it, has been the growing use of the Internet to facilitate it through online advertising.⁹¹ Online advertising has been allowed to thrive due to both the case law that has emerged regarding § 230 and congressional inaction.

While headlines focus on Craigslist and Backpage, many other sites are eager to partner with sex traffickers to obtain a share of the multibillion-dollar industry.⁹² These include EscortAds.xxx, Erosads.com, EroticMugShots.com, among others.⁹³ The impunity for facilitating sex trafficking that the Internet offers goes beyond advertising to include so called “hobby boards,” where purchasers rate prostituted people and victims of trafficking as they would rate a restaurant on Yelp— except with graphic, vulgar, and violent detail.⁹⁴ The misinterpretation of the protections of § 230 and congressional inaction led to a stalemate. Congress’ noble and clear vision to combat online sex trafficking continues to be unrealized and traffickers continue to advertise, buy, and sell victims with impunity. It is important to examine how § 230 was turned on its head and how this section of the CDA, designed to help shield children from explicit material, has been distorted to allow companies to facilitate children becoming the explicit material.

89. See DANK, *supra* note 5, at 218; BOUCHÉ, TECHNOLOGY IN DMST, *supra* note 86, at 36.

90. BOUCHÉ, TECHNOLOGY IN DMST, *supra* note 86, at 40.

91. *Id.*

92. 161 CONG. REC. S1621 (daily ed. Mar. 18, 2015) (statement of Sen. Feinstein).

93. *Id.*

94. See Katherine Koster, *FBI & Local Police Seize Adult Entertainment Website “The Review Board,”* HUFFINGTON POST (Jan. 6, 2017), https://www.huffingtonpost.com/katherine-koster/fbi-local-police-seize-th_b_8927072.html [https://perma.cc/D7MN-K3RS].

A. *Courts Distorted § 230 and Created a Regime of De Facto Absolute Immunity, Contrary to Congressional Intent.*

While the intent of limited protections for limited actions was clear, since 1996 courts have interpreted § 230 significantly more broadly than the authors intended or than the words of the statute suggest.⁹⁵ Of the several hundred § 230 decisions in state and federal court since 1996, the vast majority have found websites immune from liability for events occurring on them.⁹⁶ Courts “have treated the relevant statutory language as creating a broad exemption from liability even when the substantive facts underlying a plaintiff’s claim are compelling.”⁹⁷

This state of affairs has real consequences for victims when the cases include sex trafficking. Additionally, it implicates other offenses such as stalking and nonconsensual pornography, which also occur online, sometimes due to the operators of websites.⁹⁸ Demonstrating that the defendant computer service is a “bad actor” does not provide for liability.⁹⁹ This “over-broad interpretation has left victims of online abuse with no leverage against site operators whose business models facilitate abuse.”¹⁰⁰ As Professor Citron and Mr. Wittes note, “Section 230 of the CDA was by no means meant to immunize services whose business is the active subversion of online decency—businesses that are not merely failing to take ‘Good Samaritan’ steps to protect users from online indecency but are actually being Bad Samaritans.”¹⁰¹

95. See Citron & Wittes, *supra* note 35, at 408 (“The broad construction of the CDA’s immunity provision adopted by the courts has produced an immunity from liability that is far more sweeping than anything the law’s words, context, and history support.”).

96. See, e.g., *Hill v. StubHub, Inc.*, 727 S.E.2d 550, (N.C. Ct. App. 2012). But see Jeffrey Kosseff, *The Gradual Erosion of the Law that Shaped the Internet*, 18 COLUM. SCI. & TECH. L. REV. 1 (2016) (noting that while § 230 remains a strong shield for tech companies, courts do not apply § 230 immunity as broadly as they once did).

97. *StubHub*, 727 S.E.2d at 561 (citing *M.A. v. Vill. Voice Media Holdings*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011)).

98. See *People v. Bollaert*, 203 Cal. Rptr. 3d 814, 835 (Ct. App. 2016).

99. *Doe v. Backpage.com, LLC*, 817 F.3d 12, 29 (1st Cir. 2016) (“Showing that a website operates through a meretricious business model is not enough to strip away those [CDA] protections.”).

100. Citron & Wittes, *supra* note 35, at 404.

101. *Id.* at 8.

To understand how the case law developed in the manner it did, one must first comprehend the state of the Internet at the time of the early decisions. In 1997, when cases first percolated through the court system, the Internet was in its infancy. The need to protect it as an unregulated bastion of freedom appeared more pressing. Not only could courts not imagine the Internet of today, but they also did not envision the exploitation today's Internet fuels through the three A's: anonymity, access, and affordability.¹⁰² More specifically, they could not imagine the level of human trafficking occurring online.

1. *Early CDA Non-Sex Trafficking Cases*

The initial cases did not involve sex trafficking, as it was an unrecognized form of victimization. Hence, the relevant baseline for jurisprudence was from a series of cases having nothing to do with either the typical sex-trafficking scenario or the scope of the problem.

*Zeran v. America Online, Inc.*¹⁰³ is one of the earliest cases to address § 230, and it began a string of broad interpretations. In this defamation case, the plaintiff argued that AOL unreasonably delayed the removal of defamatory messages, refused to issue a retraction, and failed to remove similar repeated posts.¹⁰⁴ This 1997 case focused on the legislative history calling for unfettered free speech on the Internet, but it ignored the language of the statute.¹⁰⁵ In granting AOL's motion for judgment on the pleadings, the Fourth Circuit concluded that § 230 barred any cause of action that would make "service providers liable for information originating with a third-party user."¹⁰⁶ The court based its decision on a desire to incentivize companies to self-regulate. It assumed that ruling the opposite way would expose service providers to liability if they knew of defamatory messages on their space, and that this, in turn, would incentivize them to be willfully ignorant and to cease policing

102. See Al Cooper, *Sexuality and the Internet: Surfing into the New Millennium*, 1 CYBERPSYCHOLOGY & BEHAV. 187, 187-93 (1998).

103. 129 F.3d 327 (4th Cir. 1997).

104. *Id.* at 328.

105. See Citron & Wittes, *supra* note 35, at 408.

106. *Zeran*, 129 F.3d at 330.

their space.¹⁰⁷ Because this was a defamation case, there was no need to balance these concerns with the CDA's other purpose—to limit explicit content. The court's failure to discuss this other goal created fertile ground for courts to maintain a singular focus on only one of § 230's two purposes.

Additionally, the court adopted a broad definition of publisher, finding the plaintiff's claims treated AOL as a publisher: "[L]awsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content—are barred."¹⁰⁸ The court further rejected the characterization of AOL as a distributor.¹⁰⁹

Another important early case was *Doe v. America Online, Inc.*,¹¹⁰ a Florida civil case in which the plaintiff accused AOL of knowingly distributing and allowing advertisements for child pornography, negligence, and a failure to respond to notification that its services were being utilized to distribute obscene material. Here, the plaintiff argued that AOL was not a publisher, but a distributor. The Florida court rejected that argument, extending *Zeran's* argument that websites are not distributors.¹¹¹

Doe v. America Online is important for what it did not say as much as for what it did say. Although the case involved allegations regarding child pornography, it did not rely heavily on the purposes of § 230 consistent with those priorities—such as protecting children from explicit material and exploitation. Instead, the court quoted *Zeran* heavily, and in so doing it helped perpetuate a broad definition of publisher and suggested that Congress favored freedom of the Internet above all other goals. Importantly, the Florida appellate court in *Doe v. America Online* also found that § 230 preempted state law civil claims.¹¹²

107. *Id.* at 333. The court was also concerned that policing the "sheer number" of postings on would "be an impossible burden" for an interactive computer service. *Id.*

108. *Id.* at 331.

109. *Id.* at 333.

110. 718 So. 2d 385 (Fla. Dist. Ct. App. 1998).

111. *Id.* at 388–89.

112. *Id.* at 389.

Over the next decade, case law was built on this idea of broad immunity, derived frequently from defamation cases.¹¹³ At the same time, the Internet was growing in strength, and explicit material was proliferating online. Not until 2008 did a published appellate opinion offer some reference to a limited immunity and hope for crime victims. In *Fair Housing Council of San Fernando Valley v. Roommates.com*,¹¹⁴ the plaintiffs sought to establish that Roommates.com was actually a content provider and, as such, could be held liable for questions asked that violated housing discrimination regulations. As a basis for this claim, plaintiffs noted that Roommates.com provided its users with a drop-down menu that users had to answer to access the service. According to the plaintiffs, this action required users to enter certain discriminatory information such as preferences for roommates of certain races or sexual orientations. As such, Roommates.com was a content provider.¹¹⁵ The court agreed.

Roommates provided some important additions to the jurisprudence. First, holding that Roommates.com was a content provider made it one of the few cases to find potential liability for a website. In so doing it recognized a website could be both an interactive computer service as well as a content provider, at least where the website helped to develop the information:¹¹⁶

If [a website] passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it creates itself, or is “responsible, in whole or in part” for creating or developing, the website is also a content provider.¹¹⁷

By focusing on the text of § 230, *Roommates* recognized that defendants were responsible “in part” for each profile on their

113. See, e.g., *Ezra v. Am. Online*, 206 F.3d 980 (10th Cir. 2000) (defamation); *Whitney Info. Network, Inc. v. Verio, Inc.*, No. 2:04CV462FTM29SPC, 2006 WL 66724 (M.D. Fla. Jan. 11, 2006); *Blumenthal v. Drudge*, 992 F. Supp. 44, 46 (D.D.C. 1998) (finding the *Drudge Report* immune from liability for story that plaintiff abused his wife); *Donato v. Moldow*, 865 A.2d 711 (N.J. Super. Ct. App. Div. 2005) (defamation). But see *Doe v. Am. Online, Inc.*, 783 So. 2d 1010 (Fla. 2001) (defendant granted immunity from negligence claim that it markets child pornography).

114. 521 F.3d 1157 (9th Cir. 2008).

115. *Id.* at 1164.

116. *Id.* at 1165.

117. *Id.* at 1162. See also *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 967–68 (N.D. Ill. 2009).

website even if the content was a collaborative effort between the website and the user.¹¹⁸ The Ninth Circuit also clarified the term “development” to include not merely augmenting the content generally but “materially contributing to its alleged unlawfulness.”¹¹⁹

Critically, *Roommates* also distinguished the typical content provider from the concerns in *Prodigy*. It noted that Prodigy was sued for removing some, but not enough, material from its sites. “Here Roommate is not being sued for removing some harmful messages while failing to remove others.”¹²⁰ Rather, it was being sued for causing illegal material to be displayed. The recognition of potential liability was not without limits: “The message to website operators is clear: if you don’t encourage illegal content . . . you will be immune.”¹²¹

While the early cases set the tone for this jurisprudence, a few, such as *Roommates*, were open to recognizing limitations. Importantly, the *Roommates* court understood the need to update legal reactions to problems. Specifically, it rejected to some extent the knee-jerk argument that § 230 immunity was necessary to buoy a fragile Internet:

The Internet is no longer a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws and regulations applicable to brick-and-mortar businesses. . . . [W]e must be careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability.¹²²

Therefore, *Roommates* offered an alternative path interpreting § 230 more in line with the text and original purpose of the CDA. However, when courts considered the sex-trafficking cases, they rejected that textual approach.

118. *Roommates*, 521 F.3d at 1166.

119. *Id.* at 1167–68. Even “encouraging” unlawful content may be enough to lose § 230 protection. *See id.* at 1171.

120. *Id.* at 1170.

121. *Id.* at 1175.

122. *Id.* at 1164 n.15.

2. Websites Block Civil Cases

By 2009, online advertising of sex trafficking was rampant, and it had transcended its earlier status as a nuisance. Internet advertisements allowed human traffickers to quickly sell victims to sex buyers in multiple cities.¹²³ The websites successfully argued that the early cases, which were decided before the advent of online sex trafficking, protected them from any liability. They argued that they were entitled to “broad[] immuni[ty]” for disseminating third-party content.¹²⁴

Frustrated with his inability to contain sex trafficking, Cook County Sheriff Thomas Dart sued a popular platform for such advertisements, Craigslist.com. His federal suit alleged a common law claim of public nuisance, utilizing as evidence Craigslist’s violation of local prostitution laws.¹²⁵ The District Court dismissed this diversity jurisdiction suit for a number of reasons. In so doing, the court reframed Dart’s argument, finding that he more accurately presented a “negligent publishing” claim, which § 230 precludes when it “derives from the defendant’s status or conduct as a ‘publisher or speaker.’”¹²⁶

In dismissing this cause of action, the trial court accepted the allegation that traffickers routinely flouted Craigslist’s guidelines and terms of use.¹²⁷ However, the court refused to allow the case to proceed and granted the motion for judgment on the pleadings.¹²⁸ Unlike in *Roommates*, where the defendants were responsible for the content and caused the illegal activity,¹²⁹ the court here found the defendants did not do so and,

123. See *Hearing on S. 1693*, *supra* note 7 (testimony of Yiota G. Souras, Senior Vice President and General Counsel, The National Center for Missing and Exploited Children).

124. See, e.g., *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 965 (N.D. Ill. 2009) (quoting Craigslist’s assertion that § 230(c)(1) “broadly immunizes providers of interactive computer services from liability for the dissemination of third-party content.”).

125. *Id.*

126. *Id.* at 967–98.

127. See *id.*

128. See *id.* at 970.

129. *Fair Hous. Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008).

therefore, could not be deemed responsible in whole or in part for the content of the ads.¹³⁰

A different approach was taken in federal court by a survivor of sex trafficking. As a fourteen-year-old runaway girl, M.A. was sexually trafficked.¹³¹ M.A.'s trafficker admitted to taking pornographic photographs of her, displaying her private body parts, and posting them on Backpage as advertisements to sell her for sexual services.¹³² Backpage profited from these advertisements.¹³³

M.A. sued Village Voice Media, the then-owners of Backpage, in federal court under the private right of action provided for victims of child pornography and sex trafficking.¹³⁴ She alleged, *inter alia*, that Backpage aided and abetted her trafficker in violating the child sex-trafficking laws, child pornography laws, and U.S. treaty obligations under the Optional Protocol of the Convention of the Rights of the Child Against the Sale of Children.¹³⁵

M.A. attempted to distinguish her claims from previous plaintiffs' efforts to hold interactive computer services liable. She did not base her allegations on the content of the advertisements, but instead concentrated on the website's role as a sex-trafficking facilitator.¹³⁶ She focused on Backpage's conduct in developing and posting the advertisements, instructing the trafficker on how to increase the impact of posted ads, and offering special ad placement.¹³⁷ The court accepted *Roommates'* holding that a website operator can be both a content provider and a service provider, and it found Backpage immune from liability.¹³⁸

This early sex-trafficking opinion refers back to the late 1990s' "broad immunity" language—a product of a time before

130. See *Dart*, 665 F. Supp. 2d at 969.

131. *M.A. v. Vill. Voice Media Holdings*, 809 F. Supp. 2d 1041, 1043 (E.D. Mo. 2011).

132. *Id.* at 1043, 1045.

133. *Id.*

134. See 18 U.S.C. § 1595 (2012); see also 18 U.S.C. § 2255 (2012).

135. *M.A.*, 809 F. Supp. 2d at 1045.

136. See *id.* at 1044–45.

137. *Id.* at 1044, 1048.

138. *Id.* at 1059.

the modern Internet, the conceptualization of human trafficking, and the unforeseen explosion of online sex trafficking.¹³⁹ Repeatedly citing to defamation cases,¹⁴⁰ which are clearly distinguishable from child trafficking cases, the court concluded that Congress chose a policy of “broad immunity” in all § 230 cases.¹⁴¹ The court recognized the inherent conflict in cases involving § 230 immunity and cases where individuals are directly harmed, noting that “[t]he legislative resolution of these issues will, indirectly, shape the content of communication over the Internet. For now . . . § 230 of the [CDA] errs on the side of robust communication, and prevents the plaintiffs from moving forward with their claims.”¹⁴² The court, relying on the early cases that did not deal with sex trafficking, asserted that Congress created a policy giving content providers near-absolute immunity.¹⁴³

The tone of this decision reflects the struggle of courts in trying to reconcile two separate congressional purposes. On the one hand, courts are trying to be attentive to § 230’s purpose. Congress clearly listed its dual purposes in § 230(a), and one of those purposes involves the protection of children.¹⁴⁴ Unfortunately, many early cases did not have to address child protection and only referred to the other purpose of § 230.¹⁴⁵ These cases mischaracterized the congressional purpose as one focused primarily on the goal of a free and unfettered Internet; the equally significant goal of protecting children and precluding the dissemination of explicit material was often ignored. As such, courts created an impression that the immunity provided was broader than intended and existed for only one purpose. On the other hand, courts must reconcile this with Congress’s unmistakable intent to combat sex trafficking, which it has demonstrated by authorizing civil enforcement actions and criminal laws that target sex traffickers. Congress intended to

139. *See id.* at 1051.

140. *See id.* at 1053.

141. *See id.* at 1051.

142. *Id.* at 1053 (alteration in original) (quoting *PatentWizard, Inc. v. Kinko’s Inc.*, 163 F. Supp. 2d 1069, 1071–72 (D. S.D. 2001)).

143. *Id.*

144. *See* 47 U.S.C. § 230(a) (2012).

145. *See id.*

disrupt the sex-trafficking business model at many different pressure points.

Unfortunately, when courts adjudicating sex-trafficking cases look to precedent for guidance, they inevitably find the older cases, which emphasize not the plain language of the statute but only a portion of the statute's findings. *M.A. v. Village Voice Media Holdings*¹⁴⁶ exemplifies this struggle. There, the court acknowledged M.A.'s characterization of immunity for a website "that solicits and facilitates illegal conduct" as "indefensible."¹⁴⁷ However, the opinion follows with the sentiment, "regardless of M.A.'s characterization of the policy choice of denying § 230 immunity in such circumstances as alleged as 'clear,' it nonetheless is a matter Congress has spoken on and is for Congress, not this Court, to revisit."¹⁴⁸ The opinion closes with the court underscoring this point and suggesting a frustration with reconciling these two pieces of legislation: "Congress has declared such websites to be immune from suits arising from such injuries. It is for Congress to change the policy that gave rise to such immunity."¹⁴⁹

Of course the problem with this analysis is that it is far from clear that Congress declared such websites to be immune from liability. Indeed, the word "immunity" is nowhere to be found in the statute.¹⁵⁰ The statute was designed to limit access to explicit material, not enable a website to successfully claim immunity when such an image appears on its platform and facilitates the actual trafficking of the person depicted. Yet, due to the language of early precedents from a different time regarding a different type of situation—murky defamation as opposed to clear child sex trafficking—the *M.A.* court adopted Backpage's argument that websites are immune even when facilitating sex trafficking.¹⁵¹

146. 809 F. Supp. 2d 1041, 1043 (E.D. Mo. 2011).

147. *Id.*

148. *Id.* at 1053.

149. *Id.* at 1058.

150. See *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d 714, 718 (Wash. 2015) (en banc) (Wiggins, J., concurring).

151. *M.A.*, 809 F. Supp. 2d at 1058.

It is essential to note that this case, like all those that courts dismissed, was dismissed pretrial on immunity grounds.¹⁵² That is to say, survivors as plaintiffs were denied an ability to get through the courthouse door. Importantly, they were also denied discovery to access the documents that would have demonstrated the extent to which these websites facilitated sex trafficking.

3. *Backpage Blocks State Regulation*

Having failed to successfully assert state law claims to impede online advertising of sex-trafficking victims for sale in *Dart v. Craigslist, Inc.*,¹⁵³ and then federal civil claims in *M.A.*, states and victims found their hands tied. In the wake of these thwarted efforts, a legally protected public market to buy and sell sex-trafficking victims arose. States next attempted to pass new laws prohibiting this business practice. The response from one online advertising company was swift and aggressive. At the time, Backpage was the second largest online advertising platform in the United States. Its revenue was estimated to be \$150 million dollars with much of that deriving from online “adult” advertisements.¹⁵⁴ And in *M.A.*, Backpage had successfully argued that it possessed broad immunity to advertise online for the sale of sex-trafficking victims under § 230.

In an effort to oppose open marketplaces where children were bought for sex, Washington, Tennessee, and New Jersey all passed legislation targeting online advertisements for prostituted persons as well as victims of sex trafficking.¹⁵⁵ The objective of these laws was to end the large marketplaces for online sex trafficking. These laws resulted from states’ growing frustration with their inability to combat this problem. For example, in *Backpage.com v. McKenna*,¹⁵⁶ Washington police identified a minor victim whose images repeatedly appeared in

152. *Id.* at 1059.

153. 665 F. Supp. 2d 961, 967–68 (N.D. Ill. 2009).

154. See 163 CONG. REC. S3977 (daily ed. July 13, 2017) (statement of Sen. Portman).

155. See N.J. STAT. ANN. § 2C:13-10(b)(1) (West 2013); TENN. CODE ANN. § 39-13-314 (WEST 2013); WASH. REV. CODE ANN. § 9.68A.101 (West 2017).

156. *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012).

Backpage's advertisements even after they notified the site.¹⁵⁷ Backpage initially removed the images but they continued to reappear.¹⁵⁸ The seemingly never-ending ability to advertise the same victim spurred these legislative responses.

Backpage successfully enjoined all of these laws from being enforced. Courts found that § 230(e)(3) expressly preempted state laws that were inconsistent with the immunity found therein.¹⁵⁹ Given that one of the purposes of the CDA is to protect children from exposure to explicit materials,¹⁶⁰ one could argue these laws were not inconsistent with the Act. However, *McKenna* found the criminalization of the knowing publishing or displaying of such ads was inconsistent with the CDA, because such criminalization incentivized service providers to not monitor the content that goes through their channels.¹⁶¹

This holding is mistaken. The CDA was clearly enacted to protect from liability an ISP who monitors for explicit material, but in good faith fails to capture everything, as the defendant did in *Prodigy*.¹⁶² The CDA was not intended to protect the company that monitors, discovers illegal content, profits from it, and allows it to spread on its platform.¹⁶³

The CDA made this original distinction in the policy section of § 230.¹⁶⁴ However, by the time of these three cases, Backpage and the courts heavily relied upon the early CDA cases that did not involve trafficking. *McKenna* accurately noted that a "majority of federal circuits have interpreted [§ 230] to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-

157. *Id.* at 1267–68.

158. *Id.* at 1268.

159. See *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 823 (M.D. Tenn. 2013); *Backpage.com, LLC v. Hoffman*, No. 13-cv-03952, 2013 WL 4502097, at *18 (D. N.J. Aug. 20, 2013); *McKenna*, 881 F. Supp. 2d at 1273.

160. 47 U.S.C. § 230(a) (2012).

161. *McKenna*, 881 F. Supp. 2d at 1273.

162. See generally *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063194, 1995 WL 323710 (N.Y. Sup. Ct. 1995).

163. *McKenna* also stated that liability upon notice would cause providers to abstain from self-regulation. 881 F. Supp. 2d at 1278. However, the Washington law would not create liability upon knowledge, but upon knowledge and failing to act and remove the illegal content. See WASH. REV. CODE ANN. § 9.68A.101 (West 2017). This is entirely different.

164. 47 U.S.C. § 230(a) (2012).

party user of the services.”¹⁶⁵ While statistically accurate, the assertion of such a broad rule was inconsistent with the intent of the limited protections of the CDA.

Although the constitutionality of these state laws is beyond the scope of this article, the CDA basis for the opinions illustrates its misconstruction. For example in *Backpage.com v. Cooper*,¹⁶⁶ apparently emboldened by the de facto immunity created for these companies in the online advertising arena, Backpage argued even further that the statute “is preempted by the CDA because § 230 of the CDA prohibits state laws from imposing liability on interactive computer services for third-party content, *even if the content is unlawful and the website had reason to know of the unlawfulness.*”¹⁶⁷ Such a position is ironic to say the least. These actors utilized the Good Samaritan provision of the section of the CDA entitled “Protection for Private Blocking and Screening or Offensive Material” to claim immunity for knowingly providing access to unlawful material.¹⁶⁸ Unfortunately, the courts allowed this distortion.¹⁶⁹

4. *Websites Block Efforts to Disrupt the Business Model of Advertising Sex-Trafficking Victims for Sale*

By 2015, the use of online advertisements to sell human trafficking victims, particularly child sex-trafficking victims, was expansive and significant. NCMEC found the increase in reports of child sex trafficking “directly correlated to the increased use of the Internet to sell children for sex.”¹⁷⁰ An Urban

165. *McKenna*, 881 F. Supp. 2d at 1273 (citing *Barnes v. Yahoo!*, 570 F.3d 1096, 1101–02 (9th Cir. 2009)) (first emphasis added).

166. *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013).

167. *Id.* at 821–22 (emphasis added). It should be noted the term “de facto absolute immunity” used throughout this article refers to immunity from civil liability and state prosecution of its sex-trafficking laws. While § 230 does allow for enforcement of federal criminal law, to date the Department of Justice has not prosecuted Backpage.com or similar sex trafficking websites.

168. See 47 U.S.C. § 230(c).

169. *Cooper*, 939 F. Supp. 2d at 822.

170. *Backpage.com’s Knowing Facilitation of Online Sex Trafficking: Hearing Before the Subcomm. on Investigations of the S. Comm. on Homeland Security & Governmental Affairs*, 115th Cong. (2017) [hereinafter *Backpage.com Hearing*] (statement of Sen. Rob Portman, Chairman, Subcomm. on Investigations) (quoting testimony of Yiota G. Souras, Senior Vice President and General Counsel, The National Center for Missing and Exploited Children).

Institute study of eight U.S. cities found that the market for commercial sex and the trafficking of children within it had expanded as a result of the Internet's rise as a new venue to buy and sell women and children for sex.¹⁷¹ Similarly, the Department of Justice found that there was an increase in the profitability of sex trafficking of children through the Internet, making it a more attractive venue for sex traffickers.¹⁷²

Notwithstanding the undeniable growth in online advertisements and its significant role in increasing sex trafficking, courts continued to deny these aforementioned efforts to civilly sue these companies. As discussed above, courts also rejected state-level legislative approaches. In fact, in 2013, forty-nine state attorneys general wrote to Congress demanding that it amend § 230 back to its original limited protection and allow states to enforce their own criminal laws:

The involvement of these advertising companies is not incidental—these companies have constructed their business models around income gained from participants in the sex trade. But, as it has most recently been interpreted, the Communications Decency Act of 1996 (“CDA”) prevents State and local law enforcement agencies from prosecuting these companies. This must change. The undersigned Attorneys General respectfully request that the U.S. Congress amend the CDA so that it restores to State and local authorities their traditional jurisdiction to investigate and prosecute those who promote prostitution and endanger our children.¹⁷³

171. DANK, *supra* note 5, at 237–38; BOUCHÉ, TECHNOLOGY IN DMST, *supra* note 86, at 38.

172. U.S. DEP'T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION & INTERDICTION: A REPORT TO CONGRESS (2010). This finding was repeated in the National Strategy Report of 2016, which found that sex traffickers were emboldened by technology including online advertising. U.S. DEP'T OF JUSTICE, *supra* note 5, at 91 (“Internet-based advertising platforms facilitate the commercial sexual exploitation of minors in cities and towns throughout the country.”). Backpage's monthly revenue from advertisements in the “adult” section was estimated to be \$9 million. *Backpage.com, LLC v. Dart*, 807 F.3d 229, 236 (7th Cir. 2015).

173. Letter from Nat'l Ass'n of Attorneys Gen. to Congress to Amend § 230 of the CDA (July 23, 2013), available at <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1465&context=historical> [<https://perma.cc/94DQ-PW34>]. All fifty state attorneys general renewed that request in 2017. See Letter from Nat'l Ass'n of Attorneys Gen. to Congress, *supra* note 10.

They, like so many others, recognized Backpage as the leading platform for these advertisements. Congress did not act on these requests.

With their hands tied, members of local legislatures and law enforcement experienced growing frustration regarding their inability to address these problems and enforce state anti-trafficking laws that have been recognized by the federal government as the primary legal weapon against sex trafficking.¹⁷⁴ Unable to sue civilly or utilize state laws, Sheriff Tom Dart took efforts to pressure different aspects of the business model.

On June 29, 2015, Dart sent a letter on official stationery to the Chief Executive Officers of MasterCard and Visa asking these companies to “immediately cease and desist” allowing their credit cards to process payments regarding Backpage.¹⁷⁵ Dart claimed he embarked on this campaign to stop the human trafficking facilitated in Backpage’s “adult” section.¹⁷⁶ Backpage responded with litigation, seeking a preliminary injunction against Dart.¹⁷⁷ Although the district court denied Backpage’s motion,¹⁷⁸ the Court of Appeals for the Seventh Circuit reversed.¹⁷⁹ The Circuit Court found that Sheriff Dart, “in his public capacity,” cannot “issue and publicize dire threats against credit card companies that process payments made through Backpage’s website, including threats of prosecution . . . in an effort to throttle Backpage.”¹⁸⁰ Although Visa filed an affidavit stating it did not feel threatened by Dart’s letter, the Court noted that a letter from a government official in his official capacity that, in its view, contained legal threats, was coercive.¹⁸¹

While the holding of the opinion is not surprising, the full-throated support for Backpage is worthy of note. Not only did Judge Posner characterize Dart’s actions as an effort to “throttle

174. U.S. DEP’T OF STATE, *supra* note 72, at 389.

175. Backpage.com, LLC v. Dart, 807 F.3d 229, 231 (7th Cir. 2015).

176. *Id.* at 230.

177. *Id.*

178. See Backpage.com, LLC v. Dart, 127 F. Supp. 3d 919, 927 (N.D. Ill. 2015), *rev’d*, Backpage.com, LLC v. Dart, 807 F.3d 229 (7th Cir. 2015).

179. *Dart*, 807 F.3d at 239.

180. *Id.* at 235.

181. *Id.* at 233, 236.

Backpage.com,”¹⁸² he also stated that “it is unclear that Backpage is engaged in illegal activity.”¹⁸³ This is a point that was disputed by forty-nine state attorneys general and seemingly rejected in *M.A.* despite that court’s interpretation of § 230 immunity as broad enough to cover illegal activity.¹⁸⁴ As will be discussed below, this seems to no longer be an open question. However, without being able to reach discovery, litigants have not been able to solidify their claims.

5. *State Civil Litigation Outside the Scope of § 230*

Having been blocked on every front in their attempts to hold online advertisers accountable for advertising children and human trafficking victims for sale, victims and state attorneys general found themselves unable to proceed past motions to dismiss to even get to the discovery that would substantiate their claims. Not only had efforts to sue in federal court failed, but also efforts to pass state laws had been stopped through litigation from the online advertisers, and efforts to disrupt the business model were enjoined. Plaintiffs then turned to state law claims for allegations based on state torts and not the online advertisements.

In Washington, one case, *J.S. v. Village Voice Media Holdings, LLC*,¹⁸⁵ survived a motion to dismiss and was allowed to proceed to discovery on track for trial. The reasons for this success are many. While the holding is an important departure from the previous jurisprudence, the analysis of the concurring opinion is perhaps more significant.

Plaintiffs, all minors, were advertised and sold for sex on Backpage and alleged in their lawsuit that Backpage knowingly helped their traffickers. Baruti Hopson prostituted J.S. and was convicted of rape, assault, and prostitution.¹⁸⁶ Plaintiffs alleged numerous state law claims including “negligence, outrage, sexual exploitation of children, ratification/vicarious liability, unjust enrichment, invasion of privacy, sexual assault and bat-

182. *Id.* at 235.

183. *Id.* at 233.

184. *M.A. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1053 (E.D. Mo. 2011).

185. 359 P.3d 714 (Wash. 2015) (en banc).

186. *Id.* at 716 n.1.

tery, and civil conspiracy.”¹⁸⁷ Backpage moved to dismiss the case, offering its traditional argument that § 230 provided it with such broad immunity that even if the plaintiffs were alleging acts beyond publishing third-party content, it would still be immune from liability.¹⁸⁸ Plaintiffs responded that Backpage received no immunity because its actions involved not simply publishing but also developing rules that were “designed to help pimps develop advertisements that can evade the unwanted attention of law enforcement, while still conveying the illegal message.”¹⁸⁹ The case survived a motion to dismiss on the trial level and the defendant moved for discretionary review by the Washington State Supreme Court. This Court held that the plaintiffs pleaded a case that survived the motion to dismiss and affirmed the trial court’s ruling.¹⁹⁰

Before analyzing the reasoning of the Washington Supreme Court, it is important to note that the case benefited from two distinctions from previous cases. First, the standard for a 12(b)(6) motion to dismiss in Washington is very high. As the state high court noted, “12(b)(6) motions should be granted ‘sparingly and with care’ and ‘only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.’”¹⁹¹ Furthermore, the court noted that “[d]ismissal under CR 12(b)(6) is appropriate only if ‘it appears beyond a reasonable doubt that no facts exist that would justify recovery.’”¹⁹²

In applying this standard, the majority concluded that the claims were permissible. The majority recognized that § 230(e) precluded state causes of action inconsistent with the CDA. Noting that the CDA allows litigation against content providers, the majority identified the issue as whether the allegations treated Backpage as an information content provider that was

187. *Id.* at 716.

188. *Id.* Backpage also removed the case to federal district court, which then remanded the claims to state court. *Id.* at 716, n.2.

189. *Id.* at 716.

190. *Id.* at 715–16.

191. *Id.* at 716 (quoting *Cutler v. Phillips Petrol Co.*, 881 P.2d 216, 219 (Wash. 1994) (en banc)).

192. *Id.* (quoting *In re C.M.F.*, 314 P.3d 1109 (Wash. 2013) (en banc)).

subject to state law liability.¹⁹³ Recognizing *Roommates'* conclusion that a website can be both a content provider and an interactive computer service, the majority concluded that many of the claims "alleged facts that, if proved true, would show that Backpage did more than simply maintain neutral policies prohibiting or limiting certain content."¹⁹⁴ The claims included allegations that Backpage developed content that is designed to allow pimps to traffic underage girls and evade law enforcement, that its posting rules are a fraud aimed to assist evading law enforcement, and that the content requirements are designed to allow pimps to traffic in sex to Backpage's profit.¹⁹⁵ As such, the majority found these allegations were consistent with *Roommates'* standard of contributing materially to illegality of the conduct, and thus survived a motion to dismiss.

While this majority holding is important, as it was the first court to allow a state claim to reach discovery, the more insightful aspect of the opinion arguably arose from the concurrence. The majority appeared to largely accept the conventional framework of § 230 but did not blindly follow these precedents when not on point with present sex-trafficking cases. Justice McCloud, writing in dissent, accepted the conventional view that § 230 provided broad immunity for Backpage even if these allegations were of illegal activity.¹⁹⁶

Justice Wiggins, writing in concurrence, fully supported the majority approach but wrote separately to clarify that plaintiffs' claims did not treat Backpage as a publisher or speaker and to vehemently reject Backpage and the dissent's view that § 230 provides immunity to such defendants.¹⁹⁷ The crux of his opinion states:

Subsection 230(c)(1) instead provides a narrower protection from liability: the plain language of the statute creates a defense when there is (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker of infor-

193. *Id.* at 717.

194. *See id.*

195. *See id.* at 718.

196. *See id.* at 724 (McCloud, J., dissenting).

197. *Id.* at 718 (Wiggins, J., concurring).

mation (3) that is provided by another information content provider.

Thus, when the cause of action does not treat an intermediary as a publisher or speaker, subsection 230(c)(1) cannot be read to protect that intermediary from liability.¹⁹⁸

For the first time in a sex-trafficking case, a judge did not blindly accept an online advertiser's claim of unbounded immunity, even for actions that are possibly criminal or outside the role of publisher. In so doing, Justice Wiggins first turned to the plain language of the statute, observing it does not recognize any immunity—even a limited one. He noted that the protections afforded interactive computer services are twofold. First, § 230(c)(1) “precludes treating an interactive computer service provider as publisher or speaker of information provided by another provider.”¹⁹⁹ Second, § 230(c)(2) provides that such a service provider cannot be liable for good faith action to restrict access to objectionable material or any action making available the technical means to restrict such access.²⁰⁰ Therefore, as long as a plaintiff does not treat the defendant as a publisher or a speaker, he can proceed with a cause of action.

Justice Wiggins even challenged the notion that such narrow statutory language created any form of immunity at all: “Backpage.com’s argument that section 230 ‘provides broad immunity to online service providers’ is wholly unsupported by the statute’s plain language—subsection 230(c) says nothing about ‘broad immunity.’”²⁰¹ In addition to invoking the plain language of § 230, Justice Wiggins also relied on the context in which it was passed. In so doing, Justice Wiggins resurrected the procedural history regarding protection of children long ignored. The concurrence went on to note:

The main purpose of subsection 230(c) is not to insulate providers from civil liability for objectionable content on their websites, but to protect providers from civil liability for limiting access to objectionable content. Ironically, the dissent

198. *Id.* at 718–19.

199. *Id.* at 719.

200. *See id.*

201. *Id.*

would turn section 230 upside down, insulating plaintiffs from expanding access to objectionable content.²⁰²

Indeed, some of the legislative history characterizes § 230 as a provision that “allows an on-line service to defend itself in court by showing a good-faith effort to lock out adult material.”²⁰³

Turning to the efforts by Backpage in this litigation, as well as those of Craigslist and Village Voice, Justice Wiggins noted the perversity of using § 230 to justify Backpage’s actions: “[I]t would be absurd to ignore [the language about good faith in 230(c)(2)] in order to protect the actions of Backpage.com, taken in bad faith, that have nothing to do with publishing or speaking another’s content.”²⁰⁴ Justice Wiggins stripped down the defendant’s argument and labeled it what Backpage was in fact demanding: absolute immunity. He correctly noted that the reading advocated by Backpage “would *absolutely immunize* providers who allow third parties freedom to post objectionable materials on the providers’ websites.”²⁰⁵

Justice Wiggins’ concurrence reveals Backpage’s claims for what they are: claims of absolute immunity from civil or state-law liability arising from a statute whose language and context do not indicate such an intent. But perhaps even more importantly, Justice Wiggins’ concurrence also chastises other courts for relying on the early § 230 cases to create *de facto* immunity.²⁰⁶ The concurrence noted that even the Ninth Circuit Court of Appeals had “retreated” from its early language of broad immunity to finding that no “general immunity” is present in the text’s language.²⁰⁷

J.S. is the only published case to have survived a motion to dismiss and to have been upheld by an appellate court.²⁰⁸ It

202. *Id.* at 720.

203. 141 CONG. REC. 15,106 (1995).

204. *J.S.*, 359 P.3d at 720.

205. *Id.* (emphasis added).

206. *Id.* at 721.

207. *See id.* at 721 (citing *Barnes v. Yahoo!*, 570 F.3d 1096, 1100 (9th Cir. 2009)).

208. As of this writing, a pending case in an Alabama state circuit court has denied a motion to dismiss without issuing an opinion and Backpage is appealing. *See K.R. v. Backpage.com, LLC*, No. 38-cv-17-900041 (Ala. Cir. Ct. 2017). A U.S. District Court in Florida has denied Backpage’s motion to stay discovery

was scheduled for trial in October 2017. However, after Senate subcommittee hearings on the CDA and on the night before a House Judiciary Committee hearing on the CDA, Backpage settled the case.²⁰⁹

6. Federal Sex Trafficking Civil Cases

Victims who had been similarly trafficked through the use of Backpage filed a federal lawsuit in the District of Massachusetts that was appealed to the Court of Appeals for the First Circuit.²¹⁰ Despite Congress's clear intent in 18 U.S.C. § 1595 to allow victims to sue traffickers, the plaintiffs in this lawsuit did not fare as well as those in Washington state court. Three Jane Doe plaintiffs alleged that they were trafficked and advertised on Backpage, resulting in the three being raped over 1,900 times in total. They sued, accusing Backpage of engaging in the trafficking of minors under 18 U.S.C. § 1591 and the parallel civil right of action in 18 U.S.C. § 1595. They also alleged the same claim under the Massachusetts Anti-Human Trafficking Victim Protection Act,²¹¹ violations of the Massachusetts Consumer Protection Act,²¹² and some intellectual property claims regarding their images. The district court granted Backpage's motion to dismiss.²¹³

On appeal, the First Circuit recognized that in the twenty-first century, courts need to address not only the intent of Congress in 1996 when it passed the CDA, but also the more recent intent of Congress when it passed the TVPRA, and the allowance for a private right of action for victims.²¹⁴ The plaintiffs' complaint went beyond alleging that Backpage published in-

pending its motion to dismiss on § 230 grounds. *See Fla. Abolitionist v. Backpage.com, LLC*, No. 6:17-cv-218-Orl-28TBS (M.D. Fla. Aug. 11, 2017).

209. *See Backpage.com settles suit by 3 Washington women who said they were sold for sex as teens*, SEATTLE TIMES (Oct. 3, 2017), <https://www.seattletimes.com/seattle-news/crime/backpage-com-settles-suit-by-3-washington-women-who-said-they-were-sold-for-sex-as-teens/> [<https://perma.cc/RWP2-AL5U>].

210. *See Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016).

211. MASS. GEN. LAWS ANN. ch. 265, § 50(a) (West 2017).

212. MASS. GEN. LAWS ANN. ch. 93A, § 2(a) (West 2017).

213. *Jane Doe No. 1*, 817 F.3d at 17.

214. *See* 18 U.S.C. § 1595 (2012). The Court noted, "These laudable legislative efforts do not fit together seamlessly, and this case reflects the tension between them." *Jane Doe No. 1*, 817 F.3d at 15.

appropriate advertisements; it also alleged that Backpage engaged in a campaign to distract attention from its active role in sex trafficking. These actions included, among other things, making false statements to NCMEC and law enforcement regarding its efforts to fight sex trafficking while, in fact, deliberately creating a website that facilitates sex trafficking.²¹⁵ Backpage allegedly did so by establishing payment structures through digital currency, stripping photographs uploaded in advertisements of metadata to prevent law enforcement discovering its location of origin, only charging a fee to “adult entertainment” advertisements, allowing traffickers to sponsor ads in the “escort” section of the platform, and similar actions.²¹⁶ Despite these claims being directly tied to legal causes of action outside the role of publisher, the First Circuit found them precluded by § 230.

Citing to the very early § 230 cases, the First Circuit adopted, without analysis, the preference “for broad construction” of the CDA.²¹⁷ Indeed, the court characterized this liberal construction as resulting in “a capacious conception of what it means to treat a website operator as the publisher or speaker of information provided by a third party.”²¹⁸ With that broad interpretation of the narrowly written CDA, the First Circuit then concluded that the plaintiffs’ claims under the TVPA were, in fact, ones that treated Backpage as a publisher.²¹⁹

Even if that were the case, in determining congressional intent, the First Circuit could have looked at the more recent pronouncement of congressional intent in the TVPA, which made sex trafficking a crime, prioritized prosecution, and provided victims the right to sue their traffickers and those who engage in a sex-trafficking enterprise with sex traffickers, and concluded that congressional intent was more recent and more clear with this legislation.²²⁰ However, citing back to the 1997 *Zeran* case and a 2007 First Circuit case addressing a financial bulletin board, it rejected Justice Wiggins’ concurrence in *J.S.* in

215. See *Jane Doe No. 1*, 817 F.3d at 16.

216. See *id.* at 16–17 & n.2.

217. *Id.* at 18–19.

218. *Id.* at 19.

219. See *id.* at 22.

220. See 18 U.S.C. §§ 1591, 1595 (2012).

a footnote and concluded that the alleged actions of Backpage were decisions of a publisher deciding what content to circulate and what to not.²²¹ Regarding the existence of the TVPRA claims, the First Circuit made a stunning statement of absolute immunity:

[E]ven if we assume, for argument's sake, that Backpage's conduct amounts to "participation in a [sex-trafficking] venture"—a phrase that no published opinion has yet interpreted—the TVPRA claims as pleaded premise that participation on Backpage's actions as a publisher or speaker of third-party content. The strictures of Section 230(c) foreclose such suits.²²²

Thus, the First Circuit expanded the concept of broad immunity from 1997 to include immunity for participating in a sex-trafficking venture. In so doing, it asserted that the basis of this immunity was a statute Congress enacted in part to protect children from exposure to explicit materials. No court has gone so far as to conclude that § 230 was designed for this form of absolute immunity—even for criminal sex trafficking. The regime of *de facto* absolute immunity was firmly entrenched through this holding.

The First Circuit did join the early *M.A.* case's chorus to amend the CDA and clarify the tension between the TVPA and the CDA. In so doing, however, the court referenced only one of the purposes of the CDA, ignoring its purpose to protect children from exposure to explicit material, by stating: "If the evils that the appellants have identified are deemed to outweigh the First Amendment values that drive the CDA, the remedy is through legislation, not through litigation."²²³

7. State Criminal Law Efforts

In the wake of these attempts to limit the sale of children online over the objection of the tech lobby, Congress passed the

221. See *Jane Doe No. 1*, 817 F.3d at 18–19, 21 n.5 (citing *Universal Comm'n Sys., Inc. v. Lycos, Inc.* 478 F.3d 413, 422 (1st Cir. 2007); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997); *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d 714 (Wash. 2015) (en banc)).

222. *Id.* at 21 (footnote omitted). It bears mentioning that "participation in a [sex trafficking] venture" is expressly criminalized by 18 U.S.C. § 1591(a)(2).

223. *Jane Doe No. 1*, 817 F.3d at 29.

SAVE Act which amended 18 U.S.C. § 1591 to include “advertising” among the actus rei that encompassed sex trafficking.²²⁴ As such, advertising a minor knowing she is a minor, to engage in a commercial sex act, as well as advertising a person one knows to be the victim of sex trafficking through force, fraud, or coercion is also illegal. Thus, federal prosecutors could prosecute the pimps who place ads online as human traffickers, as well as the advertisers who know the victims are minors or adult victims of sex trafficking.²²⁵ Emboldened by its successful elimination of three state laws seeking to make advertising illegal, Backpage sued the Department of Justice asserting a pre-enforcement First Amendment challenge to the Act.²²⁶ Indeed, Backpage referenced those prior efforts in its filings attempting to assert standing. However, the District Court granted the government’s motion to dismiss for lack of subject matter jurisdiction because Backpage didn’t and couldn’t claim that it was engaging in a course of conduct that both affected a constitutional interest and was proscribed by the SAVE Act or gave rise to a credible threat of prosecution.²²⁷ Notably, as of this writing, Backpage has not been charged under this section of the act.

Having been unable to proceed against Backpage through federal civil law, state civil laws, federal criminal laws, and the creation of state criminal law, state attorneys general struggled to find a way to combat companies like Backpage. In 2016, the California Attorney General took action not against Backpage itself, but against its owners: Carl Ferrer, Michael Lacey, and James Larkin. California arrested and criminally charged these men initially with conspiracy to pimp, pimping, and pimping of a minor for their roles in running Backpage.²²⁸ California alleged that defendants created and organized a website that al-

224. Stop Advertising Victims of Exploitation Act of 2015, Pub. L. No. 114-22, tit. I, § 118, 129 Stat. 247.

225. See *Backpage.com, LLC v. Lynch*, 216 F. Supp. 3d 96, 108 (D.D.C. 2016) (noting that “while it might be true that some Congressional members had Backpage.com in mind when enacting the SAVE Act, the statute is ‘aimed’ at individuals who knowingly advertise or benefit from advertising sex trafficking”).

226. See *id.* at 100.

227. See *id.* at 110.

228. *People v. Ferrer*, No. 16FE019224, 2016 WL 7237305 (Cal. Super. Ct. Dec. 9, 2016).

lows sex trafficking to take place “with the intent to derive support and maintenance” from the resulting prostitution, and that they derived that support from the advertisements they and others placed on EvilEmpire.com and BigCity.com.²²⁹ The defendants filed a demurrer, arguing that the CDA had such breadth of immunity that it even applied to state criminal charges of pimping.

The Superior Court granted defendants’ demurrer, but its discussion of the case law on the topic and the need for Congress to amend § 230 to reflect current times is instructive. First, the court recognized that the State had “a strong and legitimate interest in combating human trafficking by all available legal means. Moreover, any rational mind would concur that the selling of minors for the purpose of sex is particularly horrifying and the government has a right and a duty to protect these most vulnerable victims.”²³⁰ However, the court went on to note that this state interest can be overcome. Here, the court noted the origin of the CDA with the *Prodigy* case, and the reality that several courts had interpreted it broadly.²³¹ Tellingly, however, the court also noted, “Congress has had ample opportunity to statutorily modify the immunity provision if it disagrees with prevailing judicial application of this provision. Congress has not done so, and the current legal framework binds this Court.”²³²

Having expressed this reservation regarding the case law and congressional inaction, the court examined the People’s arguments that the CDA did not protect the defendants when they knowingly committed those crimes. The prosecution focused on its allegation that the defendants were collecting information put onto Backpage by third parties, and repackaging it to create a kind of dating site on BigCity.com as well as a phone directory on EvilEmpire.com.²³³ The prosecution analogized this to *People v. Bollaert*,²³⁴ in which the defendant was

229. *Id.* at *2.

230. *Id.* at *1.

231. *Id.*

232. *Id.*

233. *Id.* at *4–5.

234. 203 Cal. Rptr. 3d 814 (Cal. Ct. App. 2016).

convicted for creating a revenge pornography site where he encouraged people to post illegal information about others.²³⁵

However, the court rejected this analogy, noting that *Bollaert* required the third parties to post illegal information that violated another's privacy, but the defendants did not require such unlawful information.²³⁶ The court characterized this as simply reposting third-party information which was traditionally a publishing function protected by the CDA.²³⁷

Regarding the pimping charges, the court noted that the immunity of the CDA "has been extended by the courts to apply to functions traditionally associated with publishing decisions, such as accepting payment for services and editing."²³⁸ As such, the court found that the CDA as currently interpreted, protected the alleged action—as these charges were seeking to treat the defendants as publishers. It joined the First Circuit and the Middle District of Tennessee in asking Congress to clarify this conflict between the legitimate state interest to end sexual exploitation and congressional "foreclosure of prosecution" by stating, "Congress has spoken on this matter and it is for Congress, not this Court, to revisit."²³⁹

Not to be deterred, however, the State of California again sought criminal charges against these same defendants, this time alleging money laundering as well as pimping.²⁴⁰ Now, having twice had criminal allegations deemed to be protected by the CDA, the defendants argued that their immunity was "clear" and the charges were now in the category of "bad faith."²⁴¹ After rejecting the defendants' arguments to reassign the case to the previous judge who dismissed the original conduct, the court addressed defendants' claim that the First Amendment barred all charges. The court rejected this claim as to the money laundering charges, but accepted it as to the pimping charges, for many of the same reasons as the court

235. *Ferrer*, 2016 WL 7237305, at *5.

236. *Id.* at *5–6.

237. *Id.* at *7.

238. *Id.* at *10.

239. *Id.* at *11.

240. *People v. Ferrer*, No. 16FE024013, slip op. at 2 (Cal. Super. Ct. Aug. 23, 2017).

241. *Id.* at 3.

had done previously.²⁴² However, the court also relied heavily on the *Jane Doe* holding from the First Circuit to afford broad immunity to the alleged criminal activity of the defendants.²⁴³

B. Analysis of Case Law

Over the two decades since the passage of the CDA and eighteen years since the passage of the first TVPA, three questions emerge. First, how did the jurisprudence arrive at a position so diametrically opposed to the intent of these two pieces of legislation? Second, why has Congress failed to act to correct this problem? Third, what brought about and what is the significance of recent congressional activity?

1. Evolution of the Law

The arc of this jurisprudence is of concern. A common denominator through these years has been the strength of the tech industry in influencing congressional action and inaction.

In 1996, Congress was primarily concerned with the potential exposure of children to explicit material.²⁴⁴ This concern was prophetic, as the Internet has proven to be a bastion of pornography and its easy access to children is of real concern. Researcher Michael Seto has described the early and pervasive exposure to Internet pornography among children and youth as “the largest unregulated social experiment of all time,”²⁴⁵ and the effect this material is having on the juvenile brain is profound.²⁴⁶ Resistance from the tech industry to any sort of limit on such material was strong.²⁴⁷ Additionally, Congress intended to permit the Internet to develop with little regulation, in order for it to become a place of free speech. Consequently, Congress created the CDA, but also added to it § 230 to speak to these latter concerns. Specifically, in response to

242. *See id.* at 11.

243. *Id.* at 14–15, 18.

244. *Supra* note 20.

245. MARY AIKEN, *THE CYBER EFFECT* 16–17 (2016) (quoting Michael Seto).

246. *See generally* NORMAN DOIDGE, *THE BRAIN THAT CHANGES ITSELF: STORIES OF PERSONAL TRIUMPH FROM THE FRONTIERS OF BRAIN SCIENCE* (2007).

247. Parker Higgins, *The Web’s First Blackout Protest: The CDA, 20 Years Later*, ELECTRONIC FRONTIER FOUND. (Feb. 23, 2016), <https://www EFF.ORG/deeplinks/2016/02/webs-first-blackout-protest-cda-20-years-later> [<https://perma.cc/EN7A-QMN7>].

Prodigy, Congress sought to protect companies that were good Samaritans from being held liable for trying to limit access to explicit material.

Today the case law, with some exceptions, is anything but reflective of that purpose. Instead, a body of law has developed thwarting congressional intent. Not only are courts espousing “broad immunity” provided by the CDA, but they are even holding that websites that engage in criminal activity are immune from liability. They have done so notwithstanding that immunity is nowhere to be found in the plain language of § 230, and that absolute immunity was never the intent.²⁴⁸

Identifiable forces seem to be at play in this development. One is the finding of the early cases such as *Zeran* that the CDA provides “broad immunity” with scarcely a reference to the intent of Congress to limit access to explicit materials. Indeed, this is not surprising given that *Zeran* and many of the earlier cases were defamations cases—a chief concern of service providers. As such, it in some way makes sense that their reference to the other purposes of § 230 is limited.

However, two trends have occurred since those early cases. First, Congress declared sex trafficking a crime in 2000²⁴⁹ and created a private right of action as an essential enforcement tool in 2003.²⁵⁰ Congress went on to emphasize the importance of both the private right of civil suit for survivors of trafficking as well as the essential role state and local entities play in combatting what Congress has labeled “modern slavery.”²⁵¹

Secondly, sex trafficking has exploded in large part due to the Internet.²⁵² Once it became apparent that these websites offered a place where traffickers could actually advertise victims

248. See Citron & Wittes, *supra* note 36, at 408. See generally Fair Hous. Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157 (9th Cir. 2008).

249. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1466, 1487–88 (codified as amended in scattered sections of 8 and 22 U.S.C.).

250. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(a)(4)(A), 117 Stat. 2875, 2878 (codified at 18 U.S.C. § 1595).

251. See *supra* note 8.

252. Phone calls to the National Human Trafficking Hotline have increased steadily since its inception. See *Hotline Statistics*, NAT'L HUMAN TRAFFICKING HOTLINE (June 30, 2017), <https://humantraffickinghotline.org/states> [<https://perma.cc/45F4-786N>].

for sale with impunity, the problem only grew.²⁵³ While Craigslist and Backpage were and are the largest online sites, others, some even more egregious, have emerged.²⁵⁴ Additionally, related online websites have developed where purchasers rate their victims in the most egregious of terms—a veritable Yelp system to rate prostituted persons—many of whom are victims of trafficking.²⁵⁵

As a result, courts have struggled to reconcile these two manifestations of congressional intent. Yet when they turn to precedent for guidance, they are met with a series of pre-sex trafficking cases asserting a “broad immunity.” They are guided to this by litigants that argue for unprecedented immunity—immunity that would not be present if they were brick-and-mortar companies engaged in the exact same behaviors. Yet amici, many of whom are significantly funded by technological companies, also argue that this de facto absolute immunity applies to otherwise-criminal conduct.²⁵⁶ This is notwithstanding the fact that:

The [CDA] was not meant to create a lawless no-man’s-land on the Internet. The CDA instead prevents website hosts from being liable when they elect to block and screen offensive material, and it encourages the development of the In-

253. BOUCHÉ, TECHNOLOGY IN DMST, *supra* note 86, at 38.

254. *Id.*; see also Daniel Fisher, *Backpage Takes Heat, But Prostitution Ads Are Everywhere*, FORBES (Jan. 26, 2012), <https://www.forbes.com/sites/danielfisher/2012/01/26/backpages-takes-heat-for-prostitution-ads-that-are-everywhere/#60bb9223095f> [<https://perma.cc/RHE5-EMFM>]; *Human Trafficking Online: Cases and Patterns*, U. S. CAL. TECH. & HUMAN TRAFFICKING PROJECT (2011), https://technologyandtrafficking.usc.edu/report/human-trafficking-online-cases-patterns/#_ftn49 [<https://perma.cc/SE9Y-733D>]; Marissa Louie, *Craigslist Saga: The Great Migration of Sex Trafficking Ads*, HUFFINGTON POST (Jan. 13, 2011), https://www.huffingtonpost.com/marissa-louie/craigslist-saga-the-great_b_808314.html [<https://perma.cc/CA3S-GA9J>] (noting the top ten advertisement sites include Eros.com and TheEroticReview.com).

255. *E.g.*, Sasha Aslanian, *Battle against sex trafficking turns to prostitution review sites*, MARKETPLACE (Sept. 16, 2016), <https://www.marketplace.org/2016/09/16/world/battle-against-sex-trafficking-turns-prostitution-review-sites> [<https://perma.cc/MM2F-L28U>].

256. See Brief for Electronic Frontier Foundation & Center for Democracy and Technology as Amici Curiae Supporting Appellants at 8–10, *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d 714 (Wash. 2015) (en banc) (No. 90510-0), 2014 WL 4808971 at *7–9; see also CONSUMER WATCHDOG, *HOW GOOGLE’S BACKING OF BACKPAGE PROTECTS CHILD SEX TRAFFICKING* 21–25, 27, 32 (2017), <http://www.consumerwatchdog.org/resources/backpagereport.pdf> [<https://perma.cc/VXF3-4H4Y>].

ternet by not permitting courses of action, such as defamation, that would treat the web host as the publisher or speaker of objectionable material. Neither of these directives requires us to blindly accept the early premise of “broad immunity.”²⁵⁷

The judicial inability to keep § 230 tied to its original intent has added to confusion.

2. *Curious Record of Congressional Action and Inaction*

Given the growth of sex trafficking fueled by online advertising, the lack of congressional action is remarkable. This Article opened with a discussion of justice and injustice. It is here that comparison between congressional action in 1996 and 2017 is necessary.

In 1996 Congress sought to regulate aspects of the Internet related to explicit material, pornography, and children.²⁵⁸ In response to the opposition to the CDA by service providers and one arguably wrongly decided case, *Prodigy*, Congress included § 230 in the CDA. Congress made an effort to address a nascent Internet and a concern about explicit material. Congress, in 1996, responded to one bad case and the perceived need of corporate interests to enact § 230.

Until late 2017, Congress was unresponsive to several poorly decided cases and the actual needs of sex-trafficking survivors, yet it continued to be responsive to the corporate interests of the tech industry. By 2017, every other institution in society has called for an amendment to the CDA, including victims and survivors,²⁵⁹ survivor victims’ organizations,²⁶⁰ law enforcement,²⁶¹ all fifty state attorneys general,²⁶² and several courts. California courts have expressed reservation in dismissing criminal charges, and noted that Congress must act to clarify

257. *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d 714, 724 (Wash. 2015) (en banc) (Wiggins, J., concurring) (citation omitted).

258. See 141 CONG. REC. 3203 (1995) (statement by Sen. James Exon, referencing Sandy Rovner, *Molesting Children by Computer*, WASH. POST., Aug. 2, 1994, at Z15).

259. *Supra* note 9.

260. *Id.*

261. See *Groups in Support of Amending the Communications Decency Act*, NAT’L CTR. ON SEXUAL EXPLOITATION, <http://endsexualexploitation.org/cda/> [https://perma.cc/R8DA-VG76] (last visited Feb. 23, 2018).

262. Letter from Nat’l Ass’n of Attorneys Gen. to Congress, *supra* note 10.

the status of the law because it is functioning as a protection to human traffickers: “If and until Congress sees fit to amend the immunity law, the broad reach of § 230 of the Communications Decency Act even applies to those alleged to support the exploitation of others by human trafficking.”²⁶³ As far back as 2009, a U.S. district court sounded the alarm when dismissing an early sex-trafficking case, finding that “Congress has declared such websites to be immune from suits arising from such injuries. It is for Congress to change the policy that gave rise to such immunity.”²⁶⁴ The First Circuit directed survivors to pursue legislative change after expanding CDA protection to criminal activity.²⁶⁵

It is remarkable that the 1996 Congress, with little information on what the Internet would become, was willing to respond to the objections of one group and the decision of one court. Yet, when faced with a mountain of information—much of which is from the government itself—about the harm of these advertising sites, no congressional action occurred. In 2008, Congress enacted legislation demanding an annual report to Congress on efforts to combat child sexual exploitation. A “key finding” of the 2016 National Strategy was that “[w]ebsites like Backpage.com have emerged as a primary vehicle for the advertisement of children to engage in prostitution.”²⁶⁶ Yet, Congress has not amended the CDA to hold such websites accountable.

The numerous cases that have seemed to thwart the TVPA’s intent also did not spark Congress to set § 230 right. Instead,

263. *People v. Ferrer*, No. 16FE024013, slip op. at 18 (Cal. Super. Ct. Aug. 23, 2017); see also *People v. Ferrer*, No. 16FE019224, 2016 WL 7237305, at *11 (Cal. Super. Ct. Dec. 9, 2016). (“Congress has spoken on this matter and it is for Congress, not this Court to revisit.”).

264. *M.A. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1058 (E.D. Mo. 2011).

265. See *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 29 (1st Cir. 2016) (“The appellants’ core argument is that Backpage has tailored its website to make trafficking easier. . . . [A]ppellants have made a persuasive case for that proposition. But Congress did not sound an uncertain trumpet when it enacted the CDA, and it chose to grant broad protections to internet publishers. . . . If the evils that the appellants have identified are deemed to outweigh the First Amendment values that drive the CDA, the remedy is through legislation, not through litigation.”).

266. U.S. DEP’T OF JUSTICE, *supra* note 5, at 76.

Congress allowed the regime of de facto absolute immunity to thrive, causing courts to assert that § 230 even protects companies from allegations of criminal activity. This has continued even as courts ask Congress to clarify the state of the law. Observers have offered many explanations for why § 230 has not been amended. One is the power of the tech industry.²⁶⁷ The tech industry's resistance to amendment of § 230 is not surprising because it offers them a competitive advantage against brick-and-mortar competitors, as well as immunity for all their activities. Indeed, at the time of pending legislation, not only had the industry actively opposed the legislation, it was seeking similar immunity to be added into the NAFTA renegotiations.²⁶⁸

IV. FUTURE

A. *Recent Legislative Actions*

Starting in 2016, some movement in Congress occurred to address this narrow issue of de facto immunity for service providers that partnered with sex traffickers. This was due to a number of factors, the most pressing of which included revelations regarding the activities of one of the major online advertising sites, Backpage.

It is important to remember that when these entities successfully win a Rule 12(b)(6) motion, the case is dismissed prior to discovery. As a result, these defendants can successfully shield their illegal activity from scrutiny. Backpage's litigation and lobbying strategy included both denying the accusations and asserting that it was, in fact, helping to stop sex trafficking.²⁶⁹ The plaintiffs and state attorneys general were caught in an impossible situation: they could gather some information to form the basis of their allegations, but to truly obtain the doc-

267. E.g., Hany Farid, *Technology sector should not be shielding sex traffickers online*, HILL (Sept. 19, 2017), <http://thehill.com/opinion/technology/351315-technology-sector-should-not-be-shielding-sex-traffickers-online> [<https://perma.cc/8FA7-L2DR>].

268. Peter Mackay, *New NAFTA must not provide immunity for sex traffickers*, TORONTO STAR (Nov. 2, 2017), <https://www.thestar.com/opinion/commentary/2017/11/02/new-nafta-must-not-provide-immunity-for-sex-traffickers-mackay> [<https://perma.cc/CC57-ULBA>].

269. *Backpage.com Hearing*, *supra* note 170, at 1.

umentation of internal corporate workings needed to prove their arguments at trial, they needed to obtain discovery. Yet they were precluded from doing so, due to Backpage's successful efforts to have cases dismissed before discovery.

As early as 2011, Backpage's outsized role in sex trafficking had started to raise concerns. Forty-five state attorneys general authored a letter outlining several cases involving Backpage, labeling it a "hub" of sex trafficking and requesting documents regarding its business practices.²⁷⁰ In April 2015, the Senate Permanent Subcommittee on Investigations began an investigation into Internet sex trafficking.²⁷¹ As part of that investigation, the Subcommittee sought records and testimony from Backpage and its officers. Backpage refused to comply. Over several months, Backpage's non-compliance continued, culminating in Backpage's CEO, Carl Ferrer, failing to appear before Congress under order of a subpoena.²⁷² As a result, for only the fifth time in forty years, the United States Senate unanimously adopted a resolution directing Senate Legal Counsel to bring an action under 28 U.S.C. § 1365 in federal court to enforce its subpoena.²⁷³

Carl Ferrer and Backpage objected, asserting numerous First Amendment arguments in opposition to the subpoenas. The District Court for the District of Columbia rejected all of them. The court noted that Backpage had successfully invoked § 230 to avoid liability and that congressional interest in sex trafficking and in Backpage's procedures is legitimate.²⁷⁴ In so doing, the court made several important statements about the breadth of Ferrer's First Amendment claims:

270. Letter from the Nat'l Ass'n of Att'ys Gen. to Samuel Fifer, Esq., Counsel for Backpage.com LLC (Aug. 31, 2011), available at http://www.ct.gov/ag/lib/ag/press_releases/2011/083111backpageletter.pdf [<https://perma.cc/NRX9-CF7J>].

271. See Senate Permanent Subcomm. v. Ferrer, 199 F. Supp. 3d 125 (D.D.C. 2016), vacated as moot, 856 F.3d 1080 (D.C. Cir. 2017).

272. *Backpage.com Hearing*, supra note 168, at 12. For a comprehensive discussion of the machinations of negotiation, response, and non-compliance between the Subcommittee and Backpage.com, see *id.* at 10–16; *Senate Permanent Subcomm.*, 199 F. Supp. 3d at 128–33.

273. See *Backpage.com Hearing*, supra note 170, at 12; 162 CONG. REC. S1561 (daily ed. Mar. 17, 2016) (statement of Sen. Cornyn).

274. *Senate Permanent Subcomm.*, 199 F. Supp. 3d at 136 n.4.

The First Amendment does not give Mr. Ferrer an “unlimited license to talk” or to publish any content he chooses. The Supreme Court has consistently rejected [this view] throughout its history

. . . .

. . . [T]he Constitution also tells us that Mr. Ferrer cannot use the First Amendment as an omnipotent and unbreakable shield to prevent Congress from properly exercising its constitutional authority.²⁷⁵

After more extensive document review as the case went through the appellate courts, the Senate Subcommittee on Investigations finally issued its report.

The report’s title, “Backpage.com’s Knowing Facilitation of Online Sex Trafficking,”²⁷⁶ indicates its conclusion. The report finds that for years, Backpage had falsely and publicly denied that it was involved in any work with sex traffickers and had held itself out as a leader in protecting people from abuse.²⁷⁷ Indeed, this denial was in the face of allegations from Thomas Dart, J.S., Jane Doe, and M.A. The Senate Subcommittee found that “internal company documents obtained by the Subcommittee conclusively show that Backpage’s public defense is a fiction.”²⁷⁸ The Report goes on to make three main findings. First, Backpage knowingly concealed evidence of criminality by editing its advertisements and deleting some words to avoid law enforcement detection. Nevertheless, it still published the advertisement even though this filter “changed nothing about the true nature of the advertised transaction or real age of the person being sold for sex.”²⁷⁹ Second, Backpage knowingly facilitated child sex trafficking.²⁸⁰ Finally, Backpage misleadingly claimed that it was sold to a foreign entity when, in fact,

275. *Id.* at 139. The opinion went on to quote *Flytenow, Inc. v. FAA*, 808 F.3d 882, 894 (D.C. Cir. 2015) (“[T]he advertising of illegal activity has never been protected speech.”) and *Conant v. McCaffrey*, 172 F.R.D. 681, 698 (N.D. Cal. 1997) (“The First Amendment does not protect speech that is itself criminal because it is too intertwined with illegal activity.”). *See id.* at 140.

276. *Backpage.com Hearing*, *supra* note 170.

277. *See id.* at 1.

278. *See id.*

279. *Id.* at 2; *see also id.* at 17–36.

280. *See id.* at 3, 36–42.

through a series of shell corporations, Carl Ferrer, Michael Lacey, and James Larkin had remained its owners. These individuals structured the transactions to hide the fact that they retained ownership.²⁸¹

Despite the scathing nature of this report, Congress took no immediate action to amend the CDA. This was the case, even though a major reason this information did not come to light was Backpage's ability to use § 230 to prevent civil cases from reaching the discovery phase, and to enjoin state criminal laws aimed at such actions. In July 2017, however, a *Washington Post* investigation uncovered further evidence of Backpage partnering with a contractor in the Philippines to create content and facilitate prostitution, from which Backpage profits. The *Post* noted, "For years, Backpage executives have adamantly denied claims made by members of Congress, state attorneys general, law enforcement and sex-abuse victims that the site has facilitated prostitution and child sex trafficking."²⁸²

Then, in August of 2017, Senators Rob Portman and Richard Blumenthal introduced the Stop Enabling Sex Trafficking Act (SESTA) in the Senate.²⁸³ Earlier that year, Representative Ann Wagner introduced the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) in the House of Representatives.²⁸⁴ Both bills sought to address the actual problem raised by the courts: § 230 immunity.

These bills were originally met with staunch opposition. Google called SESTA "a disaster"²⁸⁵ and "a mistake of historic proportions,"²⁸⁶ and dispatched its top lobbyist, former Con-

281. *See id.* at 3, 42–48.

282. Tom Jackman & Jonathan O'Connell, *Backpage has always claimed it doesn't control sex-related ads. New documents show otherwise.*, WASH. POST (July 11, 2017), https://www.washingtonpost.com/local/public-safety/backpage-has-always-claimed-it-doesnt-control-sex-related-ads-new-documents-show-otherwise/2017/07/10/b3158ef6-553c-11e7-b38e-35fd8e0c288f_story.html [<https://perma.cc/E6ES-LBT8>].

283. S. 1693, 115th Cong. (2017).

284. H.R. 1865, 115th Cong. (2017).

285. Tom Jackman, *Internet companies drop opposition to bill targeting online sex trafficking*, WASH. POST (Nov. 7, 2017), <https://www.washingtonpost.com/news/true-crime/wp/2017/11/07/internet-companies-drop-opposition-to-bill-targeting-online-sex-trafficking/> [<https://perma.cc/5PRB-YUU4>].

286. Tom Jackman, *Tech companies push back as Congress tries to fight online sex trafficking*, WASH. POST (Sept. 18, 2017), <https://www.washingtonpost.com/news/>

gresswoman Susan Molinari, to lead the charge against the legislation.²⁸⁷

In the fall of 2017, however, tech companies such as Google, Facebook, and Twitter faced pressure from another front. It was revealed that their sites were used by the Russian government to spread disinformation and possibly affect the 2016 Presidential election.²⁸⁸ This revelation, combined with a discussion of the role of social media in inspiring white supremacy and violence, caused some to question the passivity with which tech companies approached third-party content.²⁸⁹ After the revelation of Russia's use of social media to influence the election, the Senate Judiciary Subcommittee on Crime and Terrorism held a hearing regarding this passivity. At the hearing, senators raised numerous questions about the need for government regulation because of those companies' failure to act.²⁹⁰

During this hearing, representatives from Google, Facebook, and Twitter repeatedly testified about the work they were doing to self-regulate, despite a growth in sex trafficking and dis-

true-crime/wp/2017/09/18/tech-companies-push-back-as-congress-tries-to-fight-online-sex-trafficking/?utm_term=.f6641d4c574c [https://perma.cc/WHQ3-2CPT].

287. See *id.*; see also Nicholas Kristof, *Google and Sex Traffickers Like Backpage.com*, N.Y. TIMES (Sept. 7, 2017), <https://www.nytimes.com/2017/09/07/opinion/google-backpagecom-sex-traffickers.html> [https://nyti.ms/2xRg2Cs].

288. See Nancy Scola & Ashley Gold, *Facebook, Twitter: Russian actors sought to undermine Trump after election*, POLITICO (Oct. 31, 2017), <https://www.politico.com/story/2017/10/31/facebook-twitter-post-election-russian-meddling-sought-to-undermine-trump-244380> [https://perma.cc/3WLA-WHBS].

289. Noah Kulwin, *Twitter is still trying and failing to solve its white supremacy problem*, VICE NEWS (Nov. 16, 2017), https://news.vice.com/en_us/article/gydda7/twitter-is-still-trying-and-failing-to-solve-its-white-supremacy-problem [https://perma.cc/273L-T9W3].

290. See *Extremist Content and Russian Disinformation Online: Working with Tech to Find Solutions: Hearing Before Subcomm. on Crime and Terrorism of the S. Comm. on the Judiciary*, 115th Cong. (2017) [hereinafter *Extremist Content Hearings*] (statements of Sen. Klobuchar, Member, S. Comm. on the Judiciary, on pending legislation and need for an "outside enforcer" and Sen. Graham, Member, S. Comm. on the Judiciary, contrasting regulation in broadcast media and the lack of regulation in social media), <https://www.judiciary.senate.gov/meetings/extremist-content-and-russian-disinformation-online-working-with-tech-to-find-solutions> [https://perma.cc/3TPZ-GAHY].

information.²⁹¹ They made similar claims to the Senate Select Committee on Intelligence the following day.²⁹² Some senators expressed frustration and skepticism.²⁹³ At least one senator, John Cornyn, expressly connected tech companies' inaction with their opposition to the legislation to amend the CDA.²⁹⁴

After two days of this testimony, the Internet Association reversed a months-long campaign and announced its support for an amended SESTA with newly drafted changes in its favor.²⁹⁵ The Internet Association is the trade association representing global Internet companies, though it is unclear how many of their members actually support the legislation or even if the Internet Association itself actually does.²⁹⁶

This tactical move should not have been surprising. Considering the scrutiny facing tech and its ability to lobby for even more concessions in this narrower version of SESTA, supporting SESTA was a small price to pay to be able to point to an

291. *See id.* (statements of Richard Salgado, Director of Law Enforcement and Information Security at Google, and Colin Stretch, Facebook Senior VP & General Counsel).

292. *See generally Social Media Influence in the 2016 Elections: Hearing Before S. Select Comm. on Intelligence*, 115th Cong. (2017), <https://www.intelligence.senate.gov/hearings/open-hearing-social-media-influence-2016-us-elections> [<https://perma.cc/A8DJ-VQHA>].

293. *See id.*

294. *See id.* (statements of Sen. Cornyn, Member, S. Select Comm. on Intelligence).

295. *Statement in Support of the Bipartisan Compromise to the Stop Enabling Sex Trafficking Act*, INTERNET ASS'N (Nov. 3, 2017), <https://internetassociation.org/statement-in-support-of-the-bipartisan-compromise-to-stop-enabling-sex-trafficking-act-sesta/> [<https://perma.cc/VE9H-SQYN>]. The Association's members, who are also members of NetChoice, include Facebook, Google, AOL, Airbnb, eBay, Expedia, and Lyft. *Compare Our Members*, INTERNET ASS'N, <https://internetassociation.org/our-members/> [<https://perma.cc/Z788-SZ86>] (last visited Nov. 21, 2017), *with Members Include*, NETCHOICE, <https://netchoice.org/> [<https://perma.cc/5U73-HU37>] (last visited Nov. 21, 2017). Additionally, 21st Century Fox, a NetChoice member, separately supported SESTA. *See Letter from Chip Smith to Sen. Rob Portman and Sen. Richard Blumenthal*, available at <https://www.scribd.com/document/358823893/091317-FOX-Section230> [<https://perma.cc/LTV8-BXHR>] (last visited Nov. 21, 2017).

296. The Internet Association claims to support SESTA. However, as discussed *infra*, the Association supported a substitute House FOSTA bill, which thwarted SESTA's objectives. *See Support for the "Allow States and Victims to Fight Online Sex Trafficking Act," U.S. HOUSE OF REPRESENTATIVES, JUDICIARY COMM.*, <https://judiciary.house.gov/allow-states-victims-fight-online-sex-trafficking-act-supporters/> [<https://perma.cc/8TPU-ATZB>] (last visited Feb. 24, 2018).

action for the common good. Notably, however, Google and Facebook did not vigorously support SESTA, and groups tied to Google and Facebook continued to oppose it.²⁹⁷

The Internet Association's one statement in public support of SESTA, however, was belied by tech's actions in the House regarding FOSTA.²⁹⁸ Initially, of the two bills, FOSTA was the more forceful, holding companies responsible for recklessly disregarding sex trafficking on their platforms. Therefore, it was unsurprising that the Internet Association claimed support for SESTA and not FOSTA after congressional scrutiny. However, some observers have speculated that this was a ruse, particularly because once SESTA gained traction in the Senate, tech moved its efforts to stop any amendment to the CDA to the House of Representatives.²⁹⁹

297. See CONSUMER WATCHDOG, *supra* note 256, at 21–25, 27, 32–33; *Congress Shouldn't Rush SESTA, Amendments to Section 230*, TECH FREEDOM (Sept. 11, 2017), <http://techfreedom.org/congress-shouldnt-rush-sesta-amendments-section-230/> [<https://perma.cc/2GLH-UWH2>]; Elliot Harmon, *Internet Association Endorses Internet Censorship Bill*, ELEC. FRONTIER FOUND. (Nov. 3, 2017), <https://www.eff.org/deeplinks/2017/11/internet-association-endorses-internet-censorship-bill> [<https://perma.cc/LG5G-74XF>]; see also Cecilia Kang, *Internet Giants Face New Political Resistance in Washington*, N.Y. TIMES (Sept. 20, 2017), <https://www.nytimes.com/2017/09/20/technology/internet-giants-face-new-political-resistance-in-washington.html> [<https://nyti.ms/2jLmKqG>].

298. The evidence that the tech industry has effectively controlled Congress through its massive lobbying power continues to mount. See, e.g., Farhad Manjoo, *Can Washington Stop Big Tech Companies? Don't Bet on It*, N.Y. TIMES (Oct. 25, 2017), <https://www.nytimes.com/2017/10/25/technology/regulating-tech-companies.html> [<https://perma.cc/Y5Y7-2Q7A>]; David Pridham, *How Google Tries to Buy Government*, FORBES (July 19, 2017), <https://www.forbes.com/sites/davidpridham/2017/07/19/how-google-tries-to-buy-government/> [<https://perma.cc/RW2R-AU6D>]; Olivia Solon & Sabrina Siddiqui, *Forget Wall Street — Silicon Valley is the New Political Power in Washington*, GUARDIAN (Sept. 5, 2017), <https://www.theguardian.com/technology/2017/sep/03/silicon-valley-politics-lobbying-washington> [<https://perma.cc/9DRM-C9H9>] (noting that Google, Facebook, Microsoft, Apple, and Amazon spent \$49 million in lobbying in 2016).

299. See Nitasha Tiku, *Are Tech Companies Trying to Derail the Sex Trafficking Bill?*, WIRED (Dec. 12, 2017), <https://www.wired.com/story/are-tech-companies-trying-to-derail-sex-trafficking-bill/> [<https://perma.cc/S734-NXSK>]. Indeed, following these events, not only did a new tech-written bill emerge from the House, Craigslist “hired prominent Washington D.C. law firm Sidley Austin to advocate on Capitol Hill against [SESTA].” Jon Gingerich, *Craigslist Calls on Lobbying Support to Fight Sex Trafficking Bill*, O'DWYERS (Dec. 18, 2017), <http://www.odwyerpr.com/story/public/9917/2017-12-18/craigslist-calls-lobbying-support-fight-sex-trafficking-bill.html> [<https://perma.cc/WK5K-E2JD>].

Tech companies opposed both SESTA and FOSTA when they were introduced, treating the bills as equally harmful to their business and unnecessary. In its original form, however, FOSTA was the more aggressive of the two as it included language regarding child pornography and proposed a lower *mens rea* standard of recklessness.³⁰⁰ This bill also directly amended § 230 to deny immunity from state and federal private rights of action as well as state sex-trafficking and child pornography criminal laws.³⁰¹ However, FOSTA changed significantly after SESTA gained momentum.

Within one week of the Internet Association publicly supporting the bill, the Senate Commerce Committee voted the SESTA substitute out of Committee. This event was unprecedented. For years victim and survivor groups had been unable to motivate Congress to clarify § 230. Now, for the first time, the Senate was questioning big tech's blanket immunity. While it at first appeared that tech organizations had bowed to pressure, it seems that they just moved the battleground to the House of Representatives. The day after SESTA passed the Senate Committee, Senator Ron Wyden, one of the original authors of § 230, put a hold on the bill, despite numerous survivors urging him not to do so.³⁰² In November, over thirty anti-trafficking organizations and advocates wrote a joint letter to members of the House objecting to efforts to propose a new FOSTA bill.³⁰³ Within weeks, the House Judiciary Committee proposed a new version of FOSTA over victims' and survivors' objections, and the new Goodlatte FOSTA substitute version was met with uproar from the victim community. This version no longer included a private right of action on the federal or the state level.³⁰⁴ Instead it was unresponsive to § 230 problems and created a new federal offense regarding prostitution.³⁰⁵

300. See H.R. 1865, 115th Cong. § 4 (as introduced in House, Apr. 3, 2017).

301. See H.R. 1865 §§ 3–4 (as introduced in House, Apr. 3, 2017).

302. See *World Without Exploitation*, MEDIUM (Nov. 28, 2017), <https://medium.com/world-without-exploitation/senator-wyden-survivors-urge-you-to-support-sesta-b6735afe47c7> [<https://perma.cc/B58B-FFAQ>].

303. See Tiku, *supra* note 299.

304. See H.R. 1865, 115th Cong. (as reported to House, Feb. 20, 2018).

305. See *id.* § 3.

The language of this new version can be traced back to an October 2017 House Judiciary Subcommittee on Crime, Terrorism, Homeland Security, and Investigations. The subcommittee held a hearing on FOSTA in which tech trade associations proposed this approach. At that hearing, one of the original authors of § 230, Chris Cox, testified as a witness.³⁰⁶ It is no surprise that as a representative from southern California, he worked with lawyers from Prodigy and AOL to create § 230 immunity. At the hearing on amending the CDA, Cox testified not in his capacity as a former congressman, but as a paid representative for NetChoice,³⁰⁷ a trade group of tech companies partially funded by Google.

Cox acknowledged that “Section 230 was never intended to provide legal protection to websites that promote sex trafficking,”³⁰⁸ that “in enacting Section 230, it was not [Congress’s] intent to create immunity for *criminal and tortious* activity on the internet,”³⁰⁹ and that Congress intended a federal policy “that is entirely consistent with robust enforcement of *state criminal and civil law*.”³¹⁰ This would seem to suggest that there was a willingness to amend § 230 to clarify those powers. However, the Cox-NetChoice proposal went out of its way to propose everything but amending § 230. Rather, the Cox-NetChoice proposal was to have Congress reaffirm that § 230 does not provide immunity for content creators.³¹¹ This was not

306. *Online Sex Trafficking and the Communications Decency Act: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Security, and Investigations of the H. Comm. of the Judiciary*, 115th Cong. (2017)) [hereinafter *Online Sex Trafficking Hearing*] (statement of Chris Cox, Outside Counsel, NetChoice), <https://judiciary.house.gov/wp-content/uploads/2017/09/Testimony-of-Chris-Cox-NetChoice.pdf> [https://perma.cc/UD82-LW55].

307. *Id.*; see also Tom Jackman, *House committee targets online sex trafficking by amending the Mann Act, puzzling advocates*, WASH. POST (Dec. 12, 2017), <https://www.washingtonpost.com/news/true-crime/wp/2017/12/12/house-committee-targets-online-sex-trafficking-by-amending-mann-act-puzzling-advocates/> [https://perma.cc/L8ES-GWAQ].

308. *Online Sex Trafficking Hearing*, *supra* note 306, at ii; see also *id.* at 1 (“It was equally intended to ensure that those who actually commit wrongs will be subject to prosecution by both civil and criminal law enforcement.”); *id.* at 3 (“[T]he investigation and prosecution of sex trafficking must not be impeded by federal law meant to protect the innocent and punish the guilty.”).

309. *Id.* at 7 (emphasis added).

310. *Id.* at 10 (emphasis added).

311. *Id.* at 11.

responsive to the articulated concerns regarding § 230. The Cox-NetChoice proposal then suggested creating a different federal crime attached to the Travel Act.³¹²

The Goodlatte substitute FOSTA mirrored the Cox-NetChoice proposal, except instead of amending the Travel Act, it amended the Mann Act and targeted prostitution.³¹³ In so doing, it removed any substantive amendment to § 230 for human trafficking civil suits, and only carved out the ability for states to prosecute under the new Mann Act statutes if they passed such a law on the state level. It did retain the ability of state prosecutors to prosecute violations of § 1591 on the state level. The House Judiciary Committee passed this out of committee notwithstanding opposition from all major national victim survivors groups and survivors, who noted that they publicly withdrew their support and asked the co-sponsors to do the same.³¹⁴

It bears noting that, notwithstanding critics commenting that these bills would alter the Internet, that view has been significantly rejected. Professor Citron and Mr. Wittes convincingly argue that amending the CDA “will not break” the Internet and that it is the natural historical cycle to have a new industry unregulated in its early years, after which the industry grows to a point that it needs some regulation.³¹⁵ Many tech companies, including Oracle, Walt Disney, Hewlett Packard, 21st Century Fox, IBM, and the Recording Industry Association of America,

312. *See id.* at 26–28.

313. *Compare id.*, with H.R. 1865 § 3 (as reported to House, Feb. 20, 2018).

314. *See* Mary Mazzio, *Anti-online sex trafficking bill gets crushed under Big Tech’s lobbying*, HILL (Dec. 17, 2017), <http://thehill.com/opinion/civil-rights/365295-anti-online-sex-trafficking-bill-gets-crushed-under-big-techs-lobbying> [<https://perma.cc/6KEV-JW8T>]; *see also* Jackman, *supra* note 307. The House Judiciary Committee highlighted the support of advocacy groups. *See Support for the “Allow States and Victims to Fight Online Sex Trafficking Act,” supra* note 296. Of those groups listed, only three are human trafficking organizations. Over thirty of the leading human trafficking organizations opposed this new bill. *See* Jackman, *supra* note 307; Tiku, *supra* note 299. Furthering speculation this was a legislative maneuver by tech, the Internet Association also announced support for this Goodlatte substitute FOSTA. *See Statement In Support Of Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA)*, INTERNET ASS’N (Dec. 11, 2017), <https://internetassociation.org/statement-support-allow-states-victims-fight-online-sex-trafficking-act-2017-fosta/> [<https://perma.cc/2U4D-T22N>].

315. *See generally* Citron & Wittes, *supra* note 35.

have come to support one or both bills.³¹⁶ Each bill was six pages or less and neither was radical. While at one time, the bills were similar, this legislative move by tech created two different bills, only one supported by victims and survivors. SESTA clarified § 230. FOSTA created a new prostitution-focused federal crime, but did not significantly alter § 230, thus allowing § 230 to remain an obstacle to victims' access to justice.

1. *Goodlatte Substitute FOSTA*

It appeared in February 2018 that the legislative effort to amend § 230 would fail. The Goodlatte Substitute FOSTA supported by tech companies seeking to preserve de facto absolute immunity was substantially different from SESTA in the Senate.

In its original form, FOSTA sought to accomplish the same goals as SESTA, but in a slightly more comprehensive manner. For example, it had a mens rea of recklessness.³¹⁷ Further, the original FOSTA recognized the connection between sex trafficking and child pornography, which is referred to as child sexual exploitation in the criminal code.³¹⁸ Child pornography constitutes a visual depiction of a child engaged in sexually explicit conduct.³¹⁹ Some of these advertisements meet the federal definition of child pornography, and the original FOSTA sought to disallow immunity for a site that knowingly or recklessly engages in such conduct.³²⁰ Additionally, the original FOSTA sought not only to allow state criminal law to be enforced, but also victim restitution under any state criminal statutes for sex trafficking and child pornography as well as a private right of action on both the state and federal levels.³²¹

316. See Press Release, Sen. Rob Portman & Sen. Richard Blumenthal, Senators Welcome Support from IBM for the Stop Enabling Sex Traffickers Act, <https://www.portman.senate.gov/public/index.cfm/press-releases?ID=3ACB83B3-06B2-40B5-84DB-BC16A3D3F765> [<https://perma.cc/VU4G-682E>] (last visited Nov. 11, 2017).

317. See H.R. 1865, 115th Cong. § 4 (as introduced in House, Apr. 3, 2017).

318. See *id.* § 3(a)(2) (as introduced in House, Apr. 3, 2017). These references were eliminated in the modified version of the bill.

319. 18 U.S.C. § 2256(8) (2012).

320. H.R. 1865 § 4(a)(2) (as introduced in House, Apr. 3, 2017).

321. *Id.*

However, the original FOSTA bore little resemblance to the Goodlatte substitute. SESTA and the original FOSTA were responsive to the problem identified by the courts, survivors, and state prosecutors: § 230 immunity. The Goodlatte FOSTA substitute follows the Cox-NetChoice proposal: it proposed a new criminal law having nothing to do with the § 230 immunity problem, it repeats the language of § 230, and it codifies some of the problematic case law that has precluded victim and survivor access to justice.

Central to the Goodlatte FOSTA substitute was the creation of a new crime: Promotion or Facilitation of Prostitution and Reckless Disregard of Sex Trafficking.³²² This section is non-responsive to the § 230 immunity issue. The problem regarding online advertising of trafficking victims has not been a lack of laws. For nearly two decades sex trafficking, conspiring to engage in sex trafficking, and facilitating sex trafficking have been illegal federally and today every state has sex-trafficking laws. The problem is that state prosecutors cannot utilize their laws because of § 230, and courts such as the First Circuit and California Superior Court have stated that until Congress amends § 230, websites seem to be immune from prosecution even if partnering with human traffickers. While there likely is value to a criminal charge for promoting prostitution, this has never been the problem at issue in the § 230 debate.

The proposed crime is an amendment to the Mann Act which addresses prostitution that involves interstate commerce.³²³ This makes it illegal to “use[] or operate[] a facility or means of interstate or foreign commerce or attempts to do so with the intent to promote or facilitate the prostitution of another.”³²⁴ The statute has an aggravated penalty if the offender promotes or facilitates the prostitution of five or more people or “acts in reckless disregard of the fact that such conduct contributed to sex trafficking in violation of 1591(a).”³²⁵

If the statute stopped with this provision, it could possibly have helped address the issue of prostitution websites that are

322. H.R. 1865 § 3 (as reported to House, Feb. 20, 2018).

323. See 18 U.S.C. §§ 2421–24 (2012).

324. H.R. 1865 § 3(a) (as reported to House, Feb. 20, 2018).

325. *Id.*

clearly related to sex trafficking. The Goodlatte Substitute FOSTA, however, required proof that a website *intentionally* facilitated prostitution. Intent requires the showing of purposeful or knowingly facilitating prostitution. As a result, the use of code language, innuendo, and ambiguity that is prevalent in these ads present similar challenges to prosecutors. Nonetheless, if the proposed new crime were simply these provisions, it could be another tool in the federal prosecutor's arsenal to fight prostitution, even though it does nothing to address the § 230 problem.

However, the proposal did not end there. In the section entitled "Civil Recovery" the proposal stated a victim of this new statute may recover damages in federal court.³²⁶ This seemed to allow a federal civil right of action, but the proposal was very deceptive. The next sentence gutted this intent by stating, "Consistent with section 230 [of the CDA,] a defendant may be held liable, under this subsection, where promotion or facilitation of prostitution activity *includes responsibility for the creation or development in whole or in part of the information or content provided.*"³²⁷ This language is exactly like the Cox-NetChoice proposal and was proposed precisely because it did not create a private right of action. It simply repeated the language of § 230, which has been interpreted to mean that a website is immune from prosecution or civil action unless it is a content creator. Most of the prior cases except *J.S.* have found that the allegations against such websites are precluded because "claims that a website facilitates illegal conduct through its posting rules necessarily treat the website as a publisher or speaker of content provided by third parties and, thus, are precluded by section 230(c)(1)."³²⁸

326. *Id.*

327. *Id.* (emphasis added).

328. *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 22 (1st Cir. 2016); *see also M.A. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1049–53 (E.D. Mo. 2011) (finding Backpage.com immune from suit because being a website operator who does make editorial decisions about the ads is not sufficient to be considered a content provider and "Congress . . . [has] provid[ed] immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others.") (quoting *Blumenthal v. Drudge*, 992 F. Supp. 44, 51–52 (D.D.C. 1998)).

Additionally, this version provided an affirmative defense if the defendant can establish by a preponderance of the evidence that prostitution is legal in the jurisdiction where the ad “was targeted.”³²⁹ Given the global nature of the Internet, this was a significant loophole. “Targeted” was undefined and could mean anywhere geographically close to such locations. It is legal to sell sex in Canada,³³⁰ parts of Mexico,³³¹ and certain counties in Nevada.³³² Furthermore, there are efforts to legalize prostitution in various states throughout the country, including in Washington, D.C., California and New Hampshire.³³³ With this broad affirmative defense, a website could simply assert it was “targeting” an audience in one of these locations and be exempt from suit in every state that borders Canada, Mexico, or Nevada. Similarly, with the term “targeted” undefined, it is unclear if that means the act would have to take place there, the prostituted person be located there, or if the potential purchaser be located there.

The Goodlatte FOSTA substitute referenced § 230 and allowed for state prosecution of violations of state sex-trafficking laws for conduct that would violate 18 U.S.C. § 1592(a).³³⁴ Thus, this version did allow states to prosecute websites under this

329. H.R. 1865 § 3(a) (as reported to House, Feb. 20, 2018).

330. See *Legalities of Prostitution*, EDMONTON POLICE SERV., <http://www.edmontonpolice.ca/CommunityPolicing/FamilyProtection/Prostitution/LegalitiesofProstitution.aspx> [<https://perma.cc/42WB-7MZJ>] (last visited Feb. 24, 2018).

331. See Ronald Weitzer, *Mexico’s State-Run Brothel Shows Us The Benefits Of Making Prostitution Legal*, BUS. INSIDER (Oct. 29, 2013), <http://www.businessinsider.com/galactic-zone-shows-why-we-should-legalize-prostitution-2013-10> [<https://perma.cc/M64W-7ZE8>].

332. See Michael Martinez, *What to know about Nevada’s legal brothels*, CNN (Oct. 19, 2016) <https://www.cnn.com/2015/10/14/us/lamar-odom-nevada-brothels/index.html> [<https://perma.cc/U6SZ-LAQE>].

333. See, e.g., Rachel Chason, *‘A mecca for prostitution’? A new bill proposes decriminalizing sex work in D.C.*, WASH. POST (Oct. 13, 2017), https://www.washingtonpost.com/local/dc-politics/a-mecca-for-prostitution-a-new-bill-proposes-decriminalizing-sex-work-in-dc/2017/10/13/18f3dd12-adf4-11e7-a908-a3470754bbb9_story.html [<https://perma.cc/QSE9-7XJF>]; Ethan DeWitt, *N.H. House votes to create commission studying decriminalizing sex work*, CONCORD MONITOR (Jan. 10, 2018), <http://www.concordmonitor.com/House-passes-bill-creating-study-commission-for-sex-work-legalization-14782126> [<https://perma.cc/LJ3G-CRjX>]; Chris Morris, *California Courts May Consider Legalizing Prostitution*, FORTUNE (Oct. 20, 2017), <http://fortune.com/2017/10/20/california-legal-prostitution/> [<https://perma.cc/C9Z5-8FBW>].

334. H.R. 1865 § 4 (as reported to House, Feb. 20, 2018).

provision. While it also allowed states to prosecute under state laws for conduct violating the proposed § 2421A, this could require states to pass a law substantially similar to this new statute. Given that it took over a decade for every state to pass a human trafficking law, this would be no small task. Moreover, just as tech companies have successfully fought and opposed the effort to pass state laws that prohibit facilitating online sex trafficking, they will fight such statutes in every state. Given that tech companies will be joined by those seeking to legalize prostitution, the chances of a state passing such a law appear to be low. Consequently, this provision offers little to the state attorneys general who have not endorsed this bill but who asked Congress to simply amend § 230 to include state human trafficking laws on the list of exemptions from § 230 immunity.

2. *SESTA*

The focus of SESTA is on the shortfalls of § 230 and the demand of courts for clarification, of survivors for access to justice, and of state prosecutors for the ability to enforce their own human trafficking laws. Its new focus is on amending § 230 to include sex trafficking as exempt from § 230 immunity.

Congress did not originally include sex trafficking because sex trafficking was not recognized as a federal crime until four years after the passage of the CDA. SESTA clarifies this by including the non-controversial statement that it is the policy of the United States to “ensure vigorous enforcement of Federal criminal and civil law relating to sex trafficking.”³³⁵ SESTA also provides for the CDA to not preclude a civil action brought under § 1595 for sex-trafficking offenses or any state law criminal prosecution for actions that would violate sex-trafficking laws.³³⁶ This provision would seem to resolve the ambiguity created by the First Circuit when it expanded § 230 immunity to preclude civil cases under § 1595. Therefore, under SESTA, victims have access to the private right of action in federal court created under § 1595, and state prosecutors have the abil-

335. S. 1693 § 3(a).

336. *Id.*

ity to enforce state sex-trafficking laws that cover behavior illegal under § 1591.

SESTA does not amend § 230 to allow for a private right of action on the state level. However, it does amend § 1595 to allow state attorneys general to sue a website in a federal court on behalf of citizens who have been threatened or adversely affected by a city's violation of § 1591.³³⁷ This provision appears to be modeled after the state enforcement provision of the Consumer Review Fairness Act.³³⁸ While not a private right of action for victims, it is an additional avenue to hold websites that facilitate sex trafficking accountable.

SESTA also responds to the First Circuit's concern that § 1591 does not define "participation in a venture." The revised Senate Bill defines "participation in a venture" as "knowingly assisting, supporting, or facilitating a violation of subsection (a)(1)."³³⁹

3. *Emergence of a FOSTA-SESTA Compromise*

With only one bill, SESTA, having the support of survivors, law enforcement, and the tech industry, it appeared Congress was in a logjam. When the Goodlatte Substitute FOSTA came to a floor vote, however, a significant amendment by Congresswoman Mimi Walters emerged. This amendment effectively preserved the positive components of SESTA, but added the new Mann Act crime that Congressman Goodlatte claimed essential to combatting online sex trafficking.³⁴⁰ This new House FOSTA eliminated the language that would have codified de facto absolute immunity, included the *federal* private right of action, and enabled enforcement of state sex-trafficking laws.³⁴¹ The legislation with the Walters amendments gained the backing of those who supported SESTA and was passed overwhelmingly in the House 388–25.³⁴² Having passed the House, this version went to the Senate for a vote.

337. *Id.* § 5.

338. *See* 15 U.S.C. § 45b(e) (2012).

339. S. 1693 § 4(2).

340. H.Amdt. 526 to H.R. 1865, available at <https://www.congress.gov/amendment/115th-congress/house-amendment/526/text> [<https://perma.cc/MFQ7-2JSJ>].

341. H.R. 1865 § 2 (as placed on Senate Calendar March 1, 2018).

342. 164 CONG. REC. H1318–19 (daily ed. Feb. 27, 2018).

This SESTA-FOSTA compromise states that § 230 “was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims.”³⁴³ It further states that clarification of § 230 of the Communications Act of 1934 is warranted to ensure that that section does not provide legal protection to such websites.³⁴⁴

The compromise includes the new Mann Act charge of promotion or facilitation of prostitution.³⁴⁵ Critically, however, the compromise explicitly eliminates § 230 immunity against civil claims under § 1595 for sex-trafficking violations and state criminal charges, if the conduct is an alleged violation of state sex-trafficking laws, the new promotion of prostitution provision, or other federal law.³⁴⁶ It also defines the term, “participation in a venture,” which is unlawful when the venture is sex trafficking, and which the First Circuit noted had not yet been defined. This is now defined to encompass “knowingly assisting, supporting, or facilitating sex trafficking.”³⁴⁷ The legislation also enables state attorneys general to bring a *parens patriae* civil suit against a website on behalf of state residents.³⁴⁸ Finally, the legislation includes a savings clause, ensuring that claims currently allowed under federal or state law, such as those in *J.S.*, remain permissible.³⁴⁹

On March 21, 2018, this compromise bill came to a vote in the Senate. *If* this compromise bill were accepted without change by the Senate the FOSTA-SESTA compromise would become law upon the President’s signature. Suddenly, amending § 230 was in reach.

Senator Ron Wyden, the same Senator who attempted to stop the bill by placing a hold on SESTA, made a last ditch ef-

343. H.R. 1865 § 2 (as placed on Senate Calendar March 1, 2018).

344. *Id.*

345. *Id.* § 3.

346. *Id.* § 4.

347. *Id.* § 5. The final bill also includes a requirement that the Government Accounting Office report to Congress three years after enactment data regarding civil actions and restitution. *Id.* § 8.

348. *Id.* § 6.

349. S. 1693 § 6; H.R. 1865 § 5.

fort to derail the legislation. This came in the form of two amendments. The first purported to provide additional funding to the Department of Justice to combat human trafficking. While this gesture may appear to represent an effort to stem sex trafficking, it was actually a transparent attempt to halt the bill. If the compromise bill was amended in any way, it would eventually be required to return to the House for a vote. The House would never have accepted such a spending increase, and the bill would have died. This amendment was resoundingly rejected by the Senate.³⁵⁰

Senator Wyden's second amendment tried to water down some of the provisions to protect interactive service providers.³⁵¹ After the defeat of his funding amendment, however, he withdrew this second amendment.³⁵² Still, he warned that he would "turn back to this topic in short order . . . for a vote at that time."³⁵³ Curiously, he stated that his reason for withdrawal was that his colleagues faced "so much political headwind" to vote against this version of an anti-trafficking bill.³⁵⁴ This is curious, because for many years Congress would not even entertain and changes to § 230 in light of tech opposition. For years, Congress ignored the pleas of sex-trafficking survivors and allied itself with the tech industry. The notion that politicians are beholden to survivors is belied by the near-decade wait to amend this law.

B. Consider the Big Picture

If it took over fifteen years for Congress to act regarding this specific, yet obvious, problem on the Internet, how much more time will it take for Congress to respond to the more fundamental problem of the CDA? Congress was correct about two facts in 1996: the Internet was a nascent industry, perhaps in need of some support to get off the ground, and its potential for distributing exploitative material was massive. Now the Internet is no longer nascent—it is as vital as a utility and as

350. See 164 CONG. REC. S1871 (daily ed. Mar. 21, 2018) (21–78).

351. S.Amdt. 2212 to H.R. 1865, available at <https://www.congress.gov/amendment/115th-congress/senate-amendment/2212?r=11> [<https://perma.cc/BBW6-G4UT>].

352. 164 CONG. REC. S1871 (daily ed. Mar. 21, 2018) (statement of Sen. Wyden).

353. *Id.*

354. *Id.*

powerful as a superstate. Rather than simply distributing exploitative material, it is exploitative itself. A massive exploitative industry is one perhaps in no need of special protections at all. Rather, the time has come to examine not *whether* the government should protect citizens from these powerful industries, but *how* it should do so. The current system of allowing online businesses to avoid responsibility for “either for what their users do or for the harm that their services can cause”³⁵⁵ must be reexamined.

V. CONCLUSION

History tells us that many industries in their infancy thrive with little regulation. When they reach a certain size and import to the citizenry, however, the government may need to regulate them for the sake of public health and safety. Railroads, utilities, and finance have all experienced this cycle.³⁵⁶ Congress must now consider the viability of a legal regime in which online companies profit from social ills and then claim immunity from criminal liability.

But that is a question for another day. The pressing problem facing society is the open market to sexually traffic the most vulnerable, and the de facto absolute immunity created by courts for the market operators. It appears that congressional action challenging this unintended immunity required significant pressure from victims, courts, and state officials. In the meantime, the victimized continued to be denied justice.

In 1996, Congress responded to one unpopular court decision by legislation to protect tech companies from a perceived threat. After years of online advertisements selling sex-trafficking victims and numerous other victims, court deci-

355. *Internet Firms' Legal Immunity is Under Threat*, ECONOMIST (Feb. 11, 2017), <https://www.economist.com/news/business/21716661-platforms-have-benefited-greatly-special-legal-and-regulatory-treatment-internet-firms> [<https://perma.cc/35FB-NSFM>].

356. See Citron & Wittes, *supra* note 36, at 422; see also *Extremist Content Hearings*, *supra* note 290 (statements of Sen. Graham, Member, S. Comm. on the Judiciary, and Michael Smith, Fellow at New America), <https://www.judiciary.senate.gov/meetings/extremist-content-and-russian-disinformation-online-working-with-tech-to-find-solutions> [<https://perma.cc/PQ59-7S99>]; *Internet Firms' Legal Immunity is Under Threat*, *supra* note 350.

sions, and state legislators calling for clarification of legislation, Congress failed to respond. Instead, it appeared to continue to protect the tech industry. Now, finally Congress has acted to close this legal loophole. The story for sex-trafficking survivors and their families was one of injustice; now it has become one of justice delayed. While the new legislation is a positive step, delayed justice is not without cost. The cost was borne by hundreds of trafficking victims, sold online and raped repeatedly while Congress failed to act.

EFFORTS TO STOP HUMAN TRAFFICKING

BETH A. WILLIAMS*

I'd like to thank the *Harvard Journal of Law & Public Policy* for hosting this conversation about human trafficking. I would like to address the issue on behalf of the Department of Justice, where I serve as the Assistant Attorney General leading the Office of Legal Policy (OLP). OLP is sometimes described as the think tank for the Department of Justice. Unlike almost all of the other attorneys across the Department, we do not handle cases or even directly oversee them. Instead, we are able to take a high-level view of what is happening across the Department and to synthesize those cases and initiatives and other activities into a coherent package for Department leadership on issues that are top priorities for them. That high-level view also gives us the perspective to develop new approaches—to identify new partnerships, both inside and outside of the government, that would be useful—and to propose new policy ideas that move the ball on Departmental priorities. Another part of my role is to help get the word out about what the Department is doing. And I have found that after speaking to stakeholders outside of the DOJ, and to the public, I often go back to my office with fresh perspectives and new ideas. That is why I am grateful to be a part of this conversation and to be invited to address this important matter.

Let me start by telling you a little bit about what human trafficking is and how it is criminalized under U.S. law. Under federal law, it is a crime to compel another person to provide labor, services, or commercial sex through prohibited means of coercion, and to exploit a minor for commercial sex.¹ This prohibited coercion can take a number of forms—not just physical force. It includes force or threats of force, but also threats of

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1. See 18 U.S.C. §§ 1589, 1591(a) (2012).

“serious harm,” defined to include “any harm, whether physical or non-physical, including psychological, financial, or reputational harm,” as long as it is sufficiently serious to compel a reasonable person in the victim’s situation.² It also includes “abuse or threatened abuse of law or legal process,”³ such as threats to have the victim arrested or deported. In other words, not every trafficking victim is forced to perform labor or engage in commercial sex at gunpoint. Many are subject to other, more subtle, but also coercive—and ultimately just as traumatizing—forms of compulsion. When a victim exploited for commercial sex is a minor, the coercion element drops out. Exploitation of a minor for commercial sex *is* human trafficking under U.S. law, regardless of whether any form of force, fraud, or coercion was used.⁴

Victims of human trafficking come from all backgrounds and walks of life. But traffickers most often prey on individuals who are poor, vulnerable, in an unsafe or unstable living situation, or are in search of a better or different life. Trafficking victims are often deceived by false promises of love, a good job, or a stable life and are lured or forced into situations where they are made to work under deplorable conditions with little or no pay—and with the threat of abuse constantly hanging over their heads. Victims of labor trafficking can be found in legal and illegal labor industries, including massage parlors, nail and hair salons, restaurants, hotels, factories, and farms. Some victims are hidden behind closed doors as they toil in domestic servitude in a home. Others are in plain view, and interact with people on a daily basis. Victims of sex trafficking may be exploited for commercial sex through street prostitution, illicit massage parlors, brothels, escort services, and online advertising hubs. Human trafficking occurs in communities all across the United States. Human trafficking has been likened to modern day slavery, and it is often happening right here in our own communities.

Just as there is no one type of trafficking victim, perpetrators of this crime also vary. Traffickers can be foreign nationals or U.S. citizens, family members, partners, acquaintances, or

2. *Id.* §§ 1589(c)(2), 1591(e)(4).

3. *Id.* §§ 1589(c)(1), 1591(e)(1).

4. *See id.* § 1591(a).

strangers. They can act alone or as part of an organized criminal enterprise. Most traffickers are men, but the United States has prosecuted cases against women traffickers. Traffickers can be pimps, gang members, diplomats, business owners, labor brokers, or farm, factory, or company owners. Trafficking is big business—the FBI has estimated that human trafficking is the third-largest criminal activity in the world, after drugs and counterfeiting.⁵

Trafficking in persons is an offense against human dignity. Trafficking victims are treated as commodities that can be bought, used, and sold—usually not just once, but over and over. Trafficking victims are denied their freedom and often are denied even basic human needs. They are forced to live at the mercy of their traffickers and frequently endure horrific psychological and physical abuse.

Now to directly address the topic at hand: how to stop human trafficking. I will say first that the Department of Justice *is fully committed* to stopping human trafficking, using every means at our disposal. Stopping human trafficking is a top priority for the Department, all the way up to the Attorney General. We are tackling this crime with our federal law enforcement tools, our partnerships with state and local and even foreign law enforcement, and our financial resources.

We fight trafficking first and foremost through our law enforcement capabilities, and through the courts. Our prosecutors are our best weapons against trafficking. The ninety-three United States Attorney's Offices across the country handle most of our prosecutions of human trafficking cases. Each U. S. Attorney's Office has designated a human trafficking coordinator and a Project Safe Childhood Coordinator, to facilitate the investigation and prosecution of human trafficking cases. An experienced sex-trafficking prosecutor from the local U.S. Attorney's Office here in Boston has joined us here today—Leah Foley. Last year, Leah obtained a guilty plea from a defendant who exploited several women—whom he met at a driving instruction class, outside a needle exchange location, and at a detox center—for commercial sex, using heroin, as well as actual

5. Amanda Walker-Rodriguez & Rodney Hill, *Human Sex Trafficking*, FBI LEGAL BULL. (Mar. 1, 2011), <https://leb.fbi.gov/articles/featured-articles/human-sex-trafficking> [<https://perma.cc/G3G7-GV4P>].

and threatened physical violence, to coerce them into prostituting for him.⁶ Many sex trafficking cases in this area have a close link to drug use and the drug trade, with traffickers targeting drug-addicted women and using drugs to keep them subservient. Leah, United States Attorney Andrew Lelling, and the team at the U.S. Attorney's Office, in conjunction with other partners through the Western Massachusetts Human Trafficking Working Group, are doing tremendous work rescuing victims and putting traffickers behind bars in the Boston area and beyond.

The Department also has specialized trafficking prosecutors working out of Main Justice in Washington, D.C., in both the Human Trafficking Prosecution Unit—which handles cases of forced labor or commercial sexual exploitation of adults—and the Child Exploitation and Obscenity Section, which handles sex trafficking of children. Both of those groups take their own cases and also work hand-in-hand with U.S. Attorney's Offices to investigate and prosecute human trafficking cases in their respective areas of expertise.

These prosecutors are busy. Last year alone, DOJ obtained convictions for nearly 500 defendants in sex and labor trafficking cases⁷—a Department record. The vast majority of those convictions were for sex trafficking offenses. Since the year 2000, the Department has obtained convictions for over 2500 defendants in cases involving forced labor, or adult or international sex trafficking.

We are pleased that Congress has just given our prosecutors another tool to use to go after traffickers. The Department supported the passage of legislation which, among other key changes, will empower DOJ prosecutors to pursue criminal charges against website operators who turn a blind eye to sex trafficking—including of children—happening on their sites.⁸

6. See *Burlington Man Sentenced For Sex Trafficking*, U.S. ATT'Y'S OFFICE FOR THE DIST. OF MASS., U.S. DEP'T OF JUST. (Oct. 20, 2017), <https://www.justice.gov/usao-ma/pr/burlington-man-sentenced-sex-trafficking> [<https://perma.cc/PFD7-9467>]; see also *United States v. Davis*, 241 F. Supp. 3d 261 (D. Mass. 2017).

7. See Jeff Sessions, *Attorney General Sessions Delivers Remarks at the Department of Justice's Human Trafficking Summit*, U.S. DEP'T OF JUST. (Feb. 2, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-department-justice-s-human-trafficking-summit> [<https://perma.cc/287E-KMKE>].

8. Stop Enabling Sex Traffickers Act of 2017, S. 1693, 115th Cong. (2018).

This bill passed the Senate overwhelmingly on March 21, 2018,⁹ and will now go to the President for his signature.

We at DOJ know that we can't do this work alone. Indictments don't present themselves, fully formed, to prosecutors. Our prosecution numbers reflect the coordinated efforts of dedicated law enforcement and other personnel across the federal government. For example, DOJ prosecutors get referrals from the Department of Labor's Wage and Hour Division, whose inspectors have been trained to identify signs of trafficking and to report them to us. We also get referrals from the Department of Homeland Security's investigative force.

And, of course, the FBI works hand-in-hand with DOJ prosecutors to identify and investigate cases. Through its Operation Cross Country, the FBI works with federal, state, and local law enforcement partners to rescue victims of sex trafficking and identify perpetrators. The most recent iteration of Operation Cross Country, which took place last October, "involved 55 FBI field offices and 78 FBI-led Child Exploitation Task Forces composed of more than 500 law enforcement agencies."¹⁰ Hundreds of law enforcement personnel worked together to perform "sting operations in hotels, casinos, truck stops, and through social media sites frequented by pimps . . . and their customers."¹¹ You might have read about this operation in the news: it freed eighty-four child victims of sex trafficking, including a three-month-old girl and her five-year-old sister who were rescued after a family friend agreed with an undercover officer to sell both children for sex for \$600.¹²

The DOJ has formalized some of our crucial—and highly effective—interagency partnerships through an initiative of which we are very proud: the Anti-Trafficking Coordination Team, or "ACTeam," Initiative. This project convenes interagency teams of federal prosecutors, agents, and other personnel from DOJ, FBI, DHS, and DOL, to develop high-impact human trafficking cases in specific districts that have applied and been selected for participation in the program. Participat-

9. See 164 CONG. REC. S1872 (daily ed. Mar. 21, 2018) (97–2).

10. *Operation Cross Country XI: Recovering Underage Victims of Sex Trafficking and Prostitution*, FBI (Oct. 18, 2017), <https://www.fbi.gov/news/stories/operation-cross-country-xi> [<https://perma.cc/L369-DUKA>].

11. *Id.*

12. *Id.*

ing districts receive advanced training and ongoing mentoring from Main Justice and other agency headquarters. The first phase of the ACTeam Initiative launched in 2011 in six districts. Those districts saw a 114% increase in human trafficking cases filed, a 119% increase in defendants charged, and an 86% increase in defendants convicted.¹³

Building on the success of ACTeam Phase I, the Department launched Phase II in 2016 in six new districts—including Portland, Maine, just up Route 1. Phase II will conclude this coming September, and we're looking forward to analyzing the results. We are confident that the program is continuing to make a difference.

Another important and effective partnership is called the U.S.-Mexico Bilateral Human Trafficking Enforcement Initiative. Through this program, DOJ, DHS, and Mexican law enforcement counterparts exchange leads, evidence, intelligence and strategic guidance to strengthen high-impact human trafficking investigations and prosecutions—working towards the goal of dismantling transnational organized trafficking networks operating across the U.S.-Mexico border. These efforts have resulted in successful prosecutions in both Mexico and the United States, including U.S. federal prosecutions of more than seventy defendants. In one recent case, DOJ secured convictions against eight members of a transnational organized criminal sex trafficking enterprise charged and apprehended through the Initiative.

Investigating cases and prosecuting criminals—often by working together with federal, state, local, and international partners—are the bread-and-butter of the Department of Justice. But the Department fights trafficking in another, very different, way as well: by putting enormous financial resources towards empowering organizations outside the federal government to contribute to the fight, too.

In fiscal year 2017, the Department directed \$45 million towards supporting programs that assist victims of human trafficking.¹⁴ That money had a number of uses. For example, near-

13. See *Anti-Trafficking Coordination Team (ACTeam) Initiative Fact Sheet*, U.S. DEP'T OF JUST. (May 19, 2015), <https://www.justice.gov/opa/file/623176/download> [<https://perma.cc/2DKH-RWBL>].

14. *Justice Department Invests More Than \$47 Million to Combat Human Trafficking and Assist Victims*, U.S. DEP'T OF JUSTICE (Sept. 29, 2017), <https://www.justice.gov/>

ly \$3 million funded training and support for law enforcement task forces¹⁵—training that we know has resulted in the identification and rescue of real victims, and the prosecution of their traffickers. Through an interagency agreement with the Department of Housing and Urban Development, over \$13 million funded a human trafficking housing partnership to address the housing needs of trafficking victims.¹⁶ And over \$11 million went to organizations that provide services to trafficking survivors, helping them find stability and peace.¹⁷ We are proud that this funding makes a real impact. For example, DOJ's Office for Victims of Crime service provider grantees reported 5655 open client cases from July 1, 2015 to June 30, 2016, including 3195 new clients.¹⁸

Those numbers represent thousands of real people who are victims of trafficking. DOJ funding provides them with help finding a safe place to live; help accessing education or job training to get their lives back on track; help from professional, trauma-trained counselors to come to terms with their experiences and to move beyond them. Funding these services supports our prosecutors by empowering victims to testify against their traffickers. But we also provide this funding to victims services providers because it's the right thing to do.

Stopping human trafficking is a very big goal—and it's one that the Department of Justice takes seriously. We plan to continue to do this work—to continue to find ways to be ever more effective, efficient, and creative in building cases, convicting traffickers, and doing our part to help victims recover—until we have won the fight against this profoundly dehumanizing crime. We are mindful of and grateful for the work that many others are doing to stop human trafficking as well. Together, we can take great strides to win this fight.

opa/pr/justice-department-invests-more-47-million-combat-human-trafficking-and-assist-victims [https://perma.cc/Q2TX-YBMY].

15. *Id.*

16. *Id.*

17. *Id.*

18. OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, NCJ No. 251074, TIMS SNAPSHOT REPORT: SERVICES FOR VICTIMS OF HUMAN TRAFFICKING (2016), available at <https://ovc.ncjrs.gov/humantrafficking/pdf/TIMS-Overall-508.pdf> [https://perma.cc/E7EG-VMGL].

BOOK REVIEW

SCALIA BEING SCALIA

SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED.
Antonin Scalia. Edited by Christopher J. Scalia & Edward Whelan.
Foreword by Ruth Bader Ginsburg. Crown Forum (2017).

PAUL D. CLEMENT*

INTRODUCTION

Scalia Speaks is a treasure. It collects and preserves Justice Scalia's voice, as captured in dozens of his speeches over the past three decades. The Justice was an inveterate traveler and lecturer. Although he often talked about the virtues of a "dead Constitution" over a living and evolving one, the range and sheer volume of speeches he gave is impressive. The Justice's youngest son, Christopher, and one of his early law clerks, Edward Whelan, have curated this selection from that considerable universe of material. Their editorial touch is deft and unobtrusive. Christopher introduces the volume by explaining the selection process and the challenge of reproducing the speeches of a gifted public speaker who often spoke from a combination of memory and the most skeletal of notes. The editors then trade off setting the stage—the who, where, when, and why—for each of the speeches. The volume features a foreword by Justice Ruth Bader Ginsburg that alone is worth the price of admission.

But the glory of this book lies in the words and insights in the collected speeches. Justice Scalia's legal opinions are rightly celebrated as models of judicial writing.¹ They are witty and

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1. Justice Elena Kagan, *In Memoriam: Justice Antonin Scalia*, 130 HARV. L. REV. 1, 5–9 (2016).

wise and filled with memorable prose.² The most memorable of those opinions are often dissents, especially lone dissents, such as his solo opinion in *Morrison v. Olson*.³ The reason the dissents are particularly memorable, as the Justice himself explains in one of the speeches in this volume, is that in a dissenting opinion a judge can speak his own mind in his own voice. There is no need to compromise or trim rhetorical sails to keep a majority or pick up a fifth vote. The speeches collected in *Scalia Speaks* share that quality and take it to the next level. In the speeches, there was no need to convince even a single colleague to join him in an argument or turn of phrase, and unlike the dissents, the Justice was free to pick the topic. To borrow the Justice's words, the speeches are "the *ne plus ultra*, the Napoleon Brandy, the Mahatma Gandhi, the Cellophane" of Scalia being Scalia.⁴ As a consequence, virtually every speech features an arresting phrase, a profound insight, and at least one laugh out loud line.

The speeches make for easy reading, but they offer important insights into law, life, and the perspective of this most consequential Associate Justice. While the editors group the speeches into topics—on living, on faith, on law, and so on—it is striking how many speeches on life include insights into the Justice's legal philosophy and how many speeches on law feature broader lessons for a life well lived. Fans of Justice Scalia will delight in this volume and in reading speeches that reflect his distinct approaches to everything from statutory construction to turkey hunting. But critics of his jurisprudence also will find the collected speeches useful for the sheer number of insights into how this influential and sometimes controversial Justice approached the law. Those who had the pleasure of hearing the Justice speak will be pleasantly surprised by how much of his distinct presentation style and personality jump off the page. But this collection may be even more valuable for those who missed out on that pleasure. For them, this volume represents a unique opportunity to hear from one of the most influential

2. Paul D. Clement, *Why We Read the Scalia Opinion First*, 101 JUDICATURE 52 (2017).

3. *Morrison v. Olson*, 487 U.S. 654, 697–734 (1988) (Scalia, J., dissenting).

4. *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 861 (1998) (Scalia, J., concurring) (footnote omitted).

jurists in his own words, his own voice, and on his own choice of topics. It is a treat.

I. GINSBURG SPEAKS

Scalia Speaks begins with a few words from Justice Ginsburg. Justice Ginsburg, of course, knew Justice Scalia exceptionally well, as their warm friendship began before the first of the collected speeches and endured throughout their shared tenures on the D.C. Circuit and the Supreme Court. Justice Ginsburg's unique vantage point positioned her well to assess and introduce the collected speeches. As she writes: "This collection of speeches and writings captures the mind, heart and faith of a Justice who has left an indelible stamp on the Supreme Court's jurisprudence and on the teaching and practice of law."⁵

The most valuable aspect of the foreword, however, is not its perspective on the speeches, as readers will assess those for themselves, but Justice Ginsburg's observations on her enduring friendship with Justice Scalia. In a reaction that foreshadowed their relationship on and off the bench, Justice Ginsburg explains that the first time she heard him speak—on an administrative law topic, what else—she thoroughly disagreed with him on the merits, "but his acumen, affability and high spirits captivated me."⁶ Justice Scalia, on the occasion of then-Judge Ginsburg's tenth year on the D.C. Circuit, noted that they "formed a very close friendship," and in light of their diametrically opposed view on a number of subjects, "one of us must be mistaken. Perhaps both."⁷

Justice Ginsburg details the many qualities she admired in Justice Scalia. "Most of all," his "rare talent for making the most sober judge smile."⁸ Justice Scalia perhaps got more than a smile out of then-Judge Ginsburg when he pointed out that "it is sometimes as hard to get her to stop laughing as it is to

5. Ruth Bader Ginsburg, *Foreword to SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED* at ix, xi (Christopher J. Scalia & Edward Whelan eds., 2017).

6. *Id.* at ix.

7. ANTONIN SCALIA, *SCALIA SPEAKS*, *supra* note 5, at 377.

8. Ginsburg, *supra* note 5.

get her to start.”⁹ Justice Ginsburg closes her foreword with the observation that if her friendship with Justice Scalia “encourages others to appreciate that some very good people have ideas with which we disagree, and that despite differences, people of goodwill can pull together for the well-being of the institutions we serve and our country, I will be overjoyed, as I am confident Justice Scalia would be.”¹⁰

II. SCALIA SPEAKS ON THE NON-LEGAL

The vast majority of the collected speeches in *Scalia Speaks* focus on topics that are not expressly legal. The breadth and sheer number of topics covered is striking. The Justice addresses everything from the “Italian View of the Irish,”¹¹ to “Games and Sports,”¹² to “The Holocaust.”¹³ But while the topics are varied, some issues plainly interested the Justice more than others. Certain topics and themes recur. Those recurring topics, in turn, are a fair reflection of his biography, his passions, and his influences.

The Justice’s New York roots, for example, are in full display in a number of speeches. His talk on “Games and Sports” is a celebration of the distinctly urban games of his childhood in Queens, such as stoop ball and street hockey.¹⁴ His reflections on “Courage” were delivered to his alma mater, Xavier High School, and underscore the enduring influence that unique institution—both Jesuit and military—had on the Justice.¹⁵ But while I had always thought of the Justice as a New Yorker, and a denizen of the federal government, I was struck by the degree to which he identified himself as a Virginian. He told an audience at the George Mason University Law School, which now bears his name, that “I am at heart a Virginian, and so especially pleased to be present at the dedication of this splendid new

9. SCALIA, *supra* note 5, at 377.

10. Ginsburg, *supra* note 5.

11. SCALIA, *supra* note 5, at 19.

12. *Id.* at 52.

13. *Id.* at 342.

14. *Id.* at 54–55.

15. *See id.* at 307–17.

law building for the commonwealth.”¹⁶ And his speech about George Washington delivered at Mount Vernon focused on “George Washington as a Virginian.”¹⁷

A number of the speeches focus on education in various forms. His George Mason speech addressed legal education,¹⁸ but the Justice also tackled civic education,¹⁹ college education,²⁰ and Catholic education.²¹ Justice Scalia was Professor Scalia (and the child of another Professor Scalia) long before he was Judge Scalia or Justice Scalia, and he never really stopped being Professor Scalia, as his innumerable visits to law schools attest. His deep-seated interest in and opinions about education are well illustrated in these speeches.

A full section of the book and at least six of the collected speeches are directed to topics of faith.²² Two speeches are directed to the intersection of law and faith—one on separation of church and state²³ and another on faith and judging.²⁴ But even more revealing are his talks that offer insights into his own faith, such as a talk on religious retreats that he gave to students at Georgetown (another Scalia alma mater) after they had returned from a retreat. In underscoring the value of retreats, the Justice observed: “In the Gospels, of course, Jesus is constantly going off all by himself; and he doubtless needed it less than we do.”²⁵

Each of these varied speeches is worth reading for its insights into the topic specifically addressed. For example, anyone engaged in legal writing for a living would be foolhardy not to read, and reread, the Justice’s short and insightful talk on “Writing Well.”²⁶ It is, not surprisingly, well written. While he acknowledged that there is such a thing as writing genius that

16. *Id.* at 84.

17. *Id.* at 350.

18. *Id.* at 84.

19. *Id.* at 64.

20. *Id.* at 76.

21. *Id.* at 124.

22. *See id.* at 105–54.

23. *Id.* at 134.

24. *Id.* at 148.

25. *Id.* at 145.

26. *Id.* at 57.

cannot be taught, his primary and reassuring lesson is that the difference between most writing and good writing is "time and sweat."²⁷ For the many who admire the Justice's accomplishments as a legal stylist, the admiration for his handiwork is amplified by knowing that it was the product of "time and sweat," as well as genius.

But while each speech is interesting in isolation, collectively these speeches throw substantial light on the influences that shaped the Justice's worldview and his approach to judging. For all his love of hunting and embrace of the wide expanses of rural America where the hunting is best, Justice Scalia remained a son of Queens and at home in northern Virginia. Although the Justice warned students about spending "too much of your time [taking] courses on Law and Ice Cream,"²⁸ and bemoaned "the gradual estrangement of the academy from practice,"²⁹ he never stopped teaching, and he wrote his opinions to be read by law professors and especially by law students. And while he insisted that there is no such thing as a Catholic judge,³⁰ one cannot read these speeches without being struck by the depth of the Justice's faith and its centrality to his life. Indeed, because the Justice worked hard to keep his own influences from surfacing expressly in his judicial opinions, these non-judicial works, where the Justice perceived no institutional pressure to keep his personal influences and views concealed, are that much more important in assembling a full view of the Justice.

III. SCALIA'S HEROES

Christopher Scalia makes clear in his introduction that, in culling the Justice's many speeches down to the forty speeches that made the final cut, the editors strove to avoid undue repetition. Despite those efforts, certain ideas and influences recur, sometimes surfacing in very different contexts. Two historical figures, in particular, populate the Justice's speeches with enough frequency that it is perhaps fair to conclude that the

27. *Id.* at 59.

28. *Id.* at 87.

29. *Id.*

30. *See id.* at 152.

two very different men ranked as heroes in the Justice's estimation.

The first is not surprising. The attraction to Saint Thomas More of a Catholic scholar and lawyer who had served in high public office is straightforward. In the Justice's case, though, the connection was more personal. In 1960, in the year immediately following law school, Justice Scalia and his new bride (another of the Justice's heroes, as the dedication of the book attests) traveled throughout Europe on an academic fellowship. While in London, they attended a production of Robert Bolt's then-new play, *A Man for All Seasons*. The play, both in its specific dialogue and general portrayal of Saint Thomas More had a profound effect on the Scalias.³¹ The young Professor Scalia reportedly closed many of his law school classes with a stirring passage from the play in which Saint Thomas More explains his dedication to the letter of the law. And in the collected speeches, the Justice invokes Saint Thomas More and the play while addressing a variety of topics and a variety of audiences. Everyone from lay audiences to fellow judges to graduating high school students was treated to a helping of More as portrayed by Bolt.

A speech that the Justice gave dozens of times, and which caused a minor stir when it first surfaced, was one in which the Justice embraced Saint Paul's admonition to be fools for Christ's sake.³² The Justice nicknamed this speech, "The Two Thomases," as he contrasted the world-wise Thomas Jefferson, who had the hubris to put together a substantially abridged version of the Gospels over a few spare evenings, and Saint Thomas More, who was beheaded over a dispute that seemed trivial to the worldly. As the Justice emphasized, "You will have missed the deep significance of More's martyrdom—and you will not understand why More is a particularly apt patron saint for lawyers, scholars, and intellectuals—unless you appreciate that the reason that he died was, in the view of almost

31. *Id.* at 107.

32. Jack W. Germond & Jules Witcover, *The Scalia speech: raw meat to the religious right*, BALT. SUN (Apr. 17, 1996), http://articles.baltimoresun.com/1996-04-17/news/1996108119_1_justice-antonin-scalia-judicial-independence-scalia-speech [<https://perma.cc/RRV4-JVQE>].

everyone at the time, a silly one.”³³ The Justice leaves no doubt as to which of these two Thomases he viewed as heroic.

The second hero that emerges from these speeches was more surprising, at least to me. Justice Scalia was deeply attached to the Constitution, especially its structural aspects. Although Justice Scalia would be the first to say that his job was to apply even exceptionally silly statutes and constitutional provisions as written, he confronted many more of the former than the latter and held the Constitution and its authors in high esteem. He likewise had great admiration for the Federalist Papers, imploring everyone to read them front cover to back and using the fact that very few law students have done so as a barometer of the sad state of civic education.³⁴ Thus, it would seem natural for the Justice to hold Hamilton and especially Madison in distinctly high regard. But the somewhat surprising hero of the Framing in Scalia’s eyes is none other than George Washington, his “favorite of the Founders—the one I would most have liked to meet.”³⁵

The Justice admits that Washington “was not a great intellect.”³⁶ The Justice freely conceded that Washington lacked the educational pedigree of many of his contemporaries at the Constitutional Convention, that his role in fashioning the specifics of the Constitution was minimal, and that he left no great collection of scholarly or political writings.³⁷ But three aspects of Washington’s legacy recur in the Justice’s speeches. First, Washington’s views on the role of religion in public life plainly struck a chord. More than once the Justice invoked Washington’s embrace of religion as a necessary ingredient of public virtue in his Farewell Address.³⁸ Second, and relatedly, the Justice plainly admired the spirit of religious tolerance reflected in Washington’s letter to the Hebrew Congregation in Newport, Rhode Island, which Justice Scalia references in multiple speeches.³⁹ There are certainly strains of the Justice’s own Es-

33. SCALIA, *supra* note 5, at 114.

34. *See id.* at 72.

35. *Id.* at 64.

36. *Id.*

37. *See id.*

38. *See, e.g., id.* at 70–71.

39. *See, e.g., id.* at 27.

tablishment Clause jurisprudence in Washington's views on religion. Third, and perhaps most obviously, there is Washington's character. In an admirably brief address to the graduating class at Langley High School in Virginia, Justice Scalia conceded that "I have no doubt, the likes of Jefferson and Hamilton could do intellectual cartwheels" around Washington.⁴⁰ But at the Constitutional Convention, "the unquestioned leader of this brilliant circle of men" was Washington, because of his character.⁴¹ "Washington was a man of honor, of constancy, or steady determination."⁴²

IV. SCALIA ON LAW

For all its variety, the compilation does not give short shrift to legal topics. Nearly a third of the collected speeches address legal subjects, and those speeches are some of the volume's longer entries.⁴³ For those familiar with the Justice's Supreme Court opinions, many of the topics will not surprise. Original meaning,⁴⁴ legislative history,⁴⁵ and the use of foreign law⁴⁶ are all issues that recur in the Justice's jurisprudence and in this volume. But there are two critical differences between the speeches and the Justice's treatment of comparable topics in judicial opinions.

First, many of the speeches were delivered to lay audiences. While the Justice certainly wanted his judicial opinions to be accessible to a broad audience, his primary intended audience was judges, lawyers, and especially law students.⁴⁷ In his speeches, by contrast, he aimed to bring his views concerning the First Amendment to undergraduates,⁴⁸ his crusade against the use of foreign law in constitutional interpretation to the

40. *Id.* at 328.

41. *Id.*

42. *Id.* at 65.

43. *Id.* at 155–304.

44. *Id.* at 180.

45. *Id.* at 234.

46. *Id.* at 250.

47. See Clement, *supra* note 2.

48. SCALIA, *supra* note 5, at 201.

American Enterprise Institute,⁴⁹ and his theory of the proper role of the judge to the University of Applied Sciences in Peru.⁵⁰ In attempting to persuade a lay audience on these issues, and to do so orally, Justice Scalia reduced his arguments to their essentials.

Second, and relatedly, these speeches address these issues in the abstract, shorn from the context of particular cases. While the Justice's criticisms of legislative history resurface in countless opinions, one would be hard pressed to identify a single opinion that comprehensively reflects his basic argument against legislative history. And that is to be expected. Opinions address the arguments of the parties and the *ratio decidendi* of competing opinions. And in Justice's Scalia's view, judicial opinions (like commencement speeches) generally should be concise. Thus, a majority opinion invoking a floor colloquy is likely to provoke an observation about the limits of floor debate. A use of post-enactment legislative history or the text of a failed bill would be met with observations about why such materials are particularly unreliable indicators of legislative intent. But no one opinion is likely to include the basic Scalia argument against legislative history soup to nuts. The speeches in this volume fill that gap.

One other aspect about the audiences for these speeches merits mention. Justice Scalia did not always, or even very often, tell his audiences what they wanted to hear. Rather than bring coals to Newcastle, Justice Scalia came to challenge his audience and to ask them to reconsider their preconceived notions. He told the Meese Justice Department why original intent, as opposed to original meaning, was a misnomer in describing an authentic method of constitutional interpretation.⁵¹ He told a group dedicated to shared American and European interests about the fundamental differences in American and European values.⁵² And, in one of his last speeches, he even managed to

49. *Id.* at 250.

50. *Id.* at 169.

51. *Id.* at 180.

52. *Id.* at 29.

tell an audience of Dominicans that Saint Thomas Aquinas was all wet when it came to the proper role of a judge.⁵³

V. A PEEK BEHIND THE CURTAIN

I clerked for the Justice during the Court's 1993 October Term, and by virtue of living and working in the Washington, D.C. area, stayed in reasonably close contact with the Justice thereafter. Justice Scalia was a valued friend and mentor. And, still, many of the speeches in this volume were a complete revelation to me. While I thought I followed the Justice and his public utterances relatively closely (at least in the pre-Twitter sense), I missed that he delivered the keynote at the centennial celebration of the Illinois Supreme Court building in Springfield,⁵⁴ or contributed to an Arts and American Society symposium at Julliard,⁵⁵ or commemorated victims of the Holocaust at the U.S. Capitol.⁵⁶ I had heard one or two of these speeches in person, and had read about a few others, but most of the speeches—some delivered to private groups, others delivered to audiences abroad—were completely new.

One notable exception was the Justice's 1994 speech on dissenting opinions delivered to the Supreme Court Historical Society and included in the "On Law" section of *Scalia Speaks*.⁵⁷ I was not only familiar with this speech, but I was in Chambers when the Justice crafted the speech and I provided some modest research help. The speech is a fascinating read. It is essentially an apologia for the dissenting opinion from one of the great practitioners of the art. In that regard it displays one of the virtues of many of the legal speeches in this volume. They provide a unique perspective; one of the Court's insiders commenting about the Court in the abstract, as if from the outside. No dissenting opinion is going to take the time or reflect the felt need to justify the very existence of dissenting opinions. But here, Justice Scalia considers the evolution of the dissenting opinion in the American system, from the seriatim opinions

53. *Id.* at 241.

54. *Id.* at 358.

55. *Id.* at 43.

56. *Id.* at 342.

57. *Id.* at 271.

inherited from Britain to the unanimity of the Marshall Court to modern practice, and the justifications for dissenting opinions in terms of both their internal effects on the Court and external effects on the law.

The speech is vintage Scalia. He starts out by defining what he means by dissenting opinions. He includes concurring opinions that reach the same result as the majority by different reasoning. "Legal opinions," he explains, "are important, after all, for the *reasons* they give, not the *results* they announce."⁵⁸ The latter could simply be pronounced in an order. But then in a line that is both classic Scalia and helps explain the passion and number of his dissents, the Justice makes clear his view: "An opinion that gets the *reasons* wrong gets *everything* wrong."⁵⁹ Then, after quoting T.S. Eliot on Saint Thomas a Becket, the Justice excludes from his definition "separate concurrences that are written only to say the same thing better than the court has done, or, worse still, to display the intensity of the concurring judge's feeling on the issue."⁶⁰ The Justice dismissed such concurrences "as an abuse, and their existence as one of the arguments against allowing any separate opinions at all."⁶¹

Having defined his terms and allowed for at least one argument against separate opinions, the Justice evaluates the various arguments pro and con and the various effects of dissenting opinions on the Court and the broader legal community. It is no great surprise that the great dissenter comes down in favor of dissenting opinions. But his reasons are revealing about how he conceived dissenting opinions and the way he went about writing them. One of my favorite aspects of the speech, then and now, was the Justice's recognition that majority opinions will be read even if they are poorly written because "what they say is authoritative; it is the law."⁶² Not so dissenting opinions. "They will not be cited, and will not be remembered, unless some quality of thought or of expression commends them to later generations."⁶³ It is hard not to conclude that the

58. *Id.*

59. *Id.*

60. *Id.* at 271.

61. *Id.*

62. *Id.* at 287.

63. *Id.*

Justice's awareness of this limitation of dissenting opinions helps explain why his are so darn readable and almost always reflect a "quality of thought or of expression" that "commends them to later generations."⁶⁴

The speech on dissents is not just vintage Scalia, but pure Scalia. Note that when I described my role in assisting the Justice with this speech, I did not say I helped him write it or provided him with a draft or did anything other than some minimal research. That is neither modesty nor a reflection that one of my fellow law clerks was pulling the laboring oar. It is the simple truth. I was the only law clerk assigned to help the Justice with this speech, and my role was truly minimal even compared to a judicial opinion. Justice Scalia was hardly reliant on his law clerks when it came to his judicial opinions. Reading even a handful of Scalia opinions across different Terms makes clear that the distinctive voice and unique ability to turn a phrase emanates from the Justice, not a series of law clerks. That said, he did ask his law clerks for drafts of opinions. As I have speculated elsewhere, he may have sought a draft only to avoid the trouble of formatting a new document on the computer.⁶⁵ But when it came to speeches, or at least this speech, he did not ask for a draft or almost anything else. He had a fully formed idea of what he wanted to say and then took the time to craft a speech that made the points in a voice that is entirely distinct and entirely him.

While my role in assisting with the speech was truly minuscule, the experience still stands out as one of the more striking memories of my clerkship even twenty-five years later. My principal memory is how Justice Scalia kept being drawn to the dissenting opinions of Justice Jackson again and again.⁶⁶ When the Justice began the speech, he had the intention of being relatively ecumenical in praising various of his predecessors for the quality of their dissenting opinions. And the speech does invoke examples from Justices Holmes,⁶⁷ Cardozo,⁶⁸ Black,⁶⁹ and

64. *Id.*

65. See *Supreme Court Bar Memorial for Justice Antonin Scalia*, C-SPAN (Nov. 4, 2016), <http://cs.pn/2Bb5m2a> [<https://perma.cc/3DY6-LJBS>] (statements of Paul D. Clement).

66. SCALIA, *supra* note 5, at 276–77, 288–90.

67. *Id.* at 282–83, 287–88.

both Justices Harlan.⁷⁰ But despite Justice Scalia's "original intent" to spread the praise and examples around, he kept on returning to the Jackson well. In the end, Justice Scalia gave up resistance and closed the speech with four straight Jackson dissents on everything from free speech to judicial activism to changing one's mind.⁷¹ The speech was a tour de force, but the most enduring memory of its preparation process was Justice Scalia's insuppressible admiration for Justice Jackson as a judicial stylist.

VI. FINAL THOUGHTS

I am hamstrung in judging the editorial decision making that went into selecting the speeches for this volume, as I do not know what did not make the cut. I can only hope that there is a sequel that allows readers to make robust arguments for what really belonged in the first volume. What I can say is that the material that made the first cut is essential reading.

Indeed, there are at least three reasons why the collected speeches are required reading for anyone, fan or foe, seeking to understand this most consequential of Associate Justices. First, the speeches on non-legal topics give the reader an appreciation for the Justice's passions and influences. The depth of his faith and New York roots, his vocation as a teacher, his self-identification as a Virginian, his admiration for More and Washington all come shining through.

Second, his legal speeches provide a more comprehensive argument for his deeply held positions on general matters of interpretation and methodology than a reader is likely to find in any one judicial opinion. While a reader could piece together the entirety of the Justice's argument against legislative history from a dozen dissents, it is far more efficient and rewarding to have the Justice present the argument comprehensively in a single sitting. And the legal speeches gave Justice Scalia the opportunity to address the phenomena of judging and opinion

68. *Id.* at 287.

69. *Id.* at 283.

70. *Id.* at 276, 278.

71. *Id.* at 288–90.

writing in the abstract, rather than in the context of particular cases. In those speeches, we have the ultimate insider looking at the Court and judging from the perspective of an outside observer.

Finally, these speeches reflect the Justice's own thinking on a topic of his own choosing. In his speech on dissents, Justice Scalia contrasted the freedom of a dissenting opinion favorably with the task of writing an opinion for the Court:

To be able to write an opinion solely for oneself, without the need to accommodate, to any degree whatever, the more-or-less differing views of one's colleagues; to address precisely the points of law that one considers important *and no others*; to express precisely the degree of quibble, or foreboding, or disbelief, or indignation that one believes the majority's disposition should engender—that is indeed an unparalleled pleasure.⁷²

But even a dissenting opinion is constrained by the issue before the Court and the arguments embraced by the majority opinion to which the dissent responds. Thus, for anyone who has ever taken pleasure in reading a Scalia dissent, *Scalia Speaks* is essential reading. The speeches are like the ultimate dissents on topics of the Justice's own choosing, unconstrained "to any degree whatever"⁷³ by a need to accommodate the limits of Article III jurisdiction or the wishes of even a single like-minded colleague. And they tend to come uniquely from the mind and pen of the Justice, with only the most minimal of interference or assistance from a law clerk. They are pure Scalia through and through and "that is indeed an unparalleled pleasure."⁷⁴

72. *Id.* at 286.

73. *Id.*

74. *Id.*

NONCOMPLIANT INSANITY: DOES IT FIT WITHIN INSANITY?

In 1973, Herb Mullin was convicted of murdering thirteen people in Santa Cruz County, California.¹ Before that fateful moment, Mullin had drifted between involuntary commitment, clinical improvement, noncompliance with medications, and release.² His vacillation between treatment compliance and noncompliance is sadly typical.³ Mullin—as far as we can tell—never realized that he was ill and often refused treatment.⁴ One author described Mullin as “refus[ing] to take medication because prophets of God did not need it. Even today he continues to refuse [medication], convinced nothing is wrong with him. He even wonders whether it was the [medication] he took during his initial hospitalization that *caused* his homicidal behavior.”⁵ Indeed, around half of people suffering from schizophre-

1. E. FULLER TORREY, *THE INSANITY OFFENSE: HOW AMERICA’S FAILURE TO TREAT THE SERIOUSLY MENTALLY ILL ENDANGERS ITS CITIZENS* 24–26 (2008).

2. *See id.* at 26–28.

3. *See, e.g.,* *Brown v. United States*, 682 A.2d 1131, 1133 (D.C. 1996) (“Between 1986 and 1991, Brown returned to the Hospital periodically for inpatient care, both voluntarily and involuntarily . . .”); *Durrence v. State*, 695 S.E.2d 227, 229 (Ga. 2010) (“Evidence showed he had a history of mental illness dating from August 2001 and had been admitted and released from Georgia Regional Hospital on two occasions.”); *State v. Blubaugh*, 491 P.2d 646, 647 (Wash. 1971) (“Defendant Blubaugh had a history of mental illness, having been civilly committed to Western State Hospital in 1965 . . . He was discharged in December, 1966. In March of 1968, . . . defendant went to the wife’s home and, in the presence of two of his children, killed a man who was living with the wife by shooting him six times.”); *id.* (“Defendant Rathbun also had a history of mental illness, and beginning in 1956 had been hospitalized as a paranoid schizophrenic on four separate occasions.”); *State v. Myers*, 222 S.E.2d 300, 303 (W. Va. 1976) (“The court refused to permit the doctor to testify as to information regarding the defendant which had come to him through various medical records regarding the defendant’s military service and resulting psychiatric difficulties.”) *overruled by* *State v. Guthrie*, 461 S.E.2d 163, 185 (W. Va. 1995).

4. TORREY, *supra* note 1, at 67 (“Herb Mullin is sincere in his beliefs about what happened and his own lack of personal responsibility for the crimes. . . . In relating these things, he did so without emotion, as if he were discussing what the prison serves for lunch. He has no more awareness of his illness now than he had thirty-five years ago.”).

5. *Id.* at 116–17.

nia do not realize that they are suffering from an illness and accordingly resist treatment.⁶

The question is what to do about that other half if they commit a crime—that is, those who realize that they have an illness yet still refuse treatment. A classic problem in nearly every introductory criminal law course is what to do with an epileptic defendant who fails to take his medication⁷ or a defendant who consumes a substance that predisposes him to commit a crime.⁸ The case of a schizophrenic defendant is slightly different.⁹ On the one hand, when defendants have insight into their disease and “voluntarily” choose not to take medication, allowing them to plead the insanity defense seems counterintuitive.¹⁰ Indeed, “there is no explicit fault category in the law that we could call something like ‘self-induced insanity’ or ‘voluntary insanity.’”¹¹ On the other hand, that same defendant is suffer-

6. Celso Arango & Xavier Amador, *Lessons Learned About Poor Insight*, 37 SCHIZOPHRENIA BULL. 27, 27 (2011).

7. See, e.g., *Smith v. Commonwealth*, 268 S.W.2d 937, 939 (Ky. 1954) (“Under our view of the case, and in the light of the authorities cited herein, the crucial question is whether Smith failed to do something which a reasonably prudent man would have done under the circumstances.” (citations omitted)); *People v. Decina*, 138 N.E.2d 799, 803–04 (N.Y. 1956) (“[T]his defendant knew he was subject to epileptic attacks and seizures that might strike at any time. . . . How can we say as a matter of law that this did not amount to culpable negligence . . . ?”).

8. See, e.g., *Commonwealth v. Campbell*, 284 A.2d 798, 801 (Pa. 1971) (In a murder committed while under the influence of LSD, “[t]he overwhelming view of our sister Courts and of jurisprudential thought in this Country today supports our decision, i. e., there should be no legal distinction between the voluntary use of drugs and the voluntary use of alcohol in determining criminal responsibility for a homicidal act.” (citations omitted)). See generally Paul H. Robinson, *Causing the Conditions of One’s Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1 (1985).

9. See Michael D. Slodov, Note, *Criminal Responsibility and the Noncompliant Psychiatric Offender: Risking Madness*, 40 CASE W. RES. L. REV. 271, 328 (1989) (“The role of noncompliance with psychiatric treatment as it affects criminal responsibility for a mentally ill criminal offender has been far too long overlooked as an avenue for imposing responsibility.”).

10. See CARL ELLIOTT, *THE RULES OF INSANITY: MORAL RESPONSIBILITY AND THE MENTALLY ILL OFFENDER* 27 (1996) (“The position here seems to be that a person is responsible for getting himself into a state where he does not know what will happen, regardless of what he actually does after that.”).

11. LAWRENCE P. TIFFANY & MARY TIFFANY, *THE LEGAL DEFENSE OF PATHOLOGICAL INTOXICATION: WITH RELATED ISSUES OF TEMPORARY AND SELF-INFLICTED INSANITY* 387 (1990).

ing from a psychosis *at the time of the crime*.¹² In essence, the question is how far back judicial inquiry should extend. Complicating this analysis is a growing body of research that suggests that psychiatric disease can affect many cognitive functions—even those not associated with delusions or psychoses.¹³

This Note seeks to explore the question of insanity caused by an omission, namely failure to take medication. Part I will briefly describe the problem of noncompliance and lack of insight¹⁴ in psychiatric illness, focusing on schizophrenia. Part II will look at the limited judicial interaction with this problem, starting with the recent case of *Commonwealth v. Shin*.¹⁵ Although there are few cases that attempt to grapple with the problem head-on, the rising awareness of mental illness¹⁶ and its potential effects on blameworthiness may soon change that. In any event, the issue lies under the surface in many cases.¹⁷ Part III will consider how far back the inquiry into insanity should extend. This Part will conclude that the mental processes surrounding noncompliance require further elucidation. Part IV, however, will try to solve—or at least re-channel—this empirical question by exploring potential analogies from other areas of criminal law. A conclusion will follow that argues that courts should maintain the status quo for now—and confine the insanity inquiry to the events directly surrounding the

12. See Zachary D. Torrey & Kenneth J. Weiss, *Medication noncompliance and criminal responsibility: Is the insanity defense legitimate?*, 40 J. PSYCHIATRY & L. 219, 221 (2012) (“[B]ut for the defendant’s medication lapse, perhaps there would have been no crime.”).

13. See generally Lei Wang & John G. Csernansky, *Recent Advances in Neuroimaging Biomarkers of Schizophrenia*, in SCHIZOPHRENIA: RECENT ADVANCES IN DIAGNOSIS AND TREATMENT 71 (Philip G. Janicak et al. eds., 2014) (collecting studies).

14. See *infra* notes 23–26 and accompanying text.

15. 16 N.E.3d 1122 (Mass. App. Ct. 2014).

16. Indeed, federal mental health policy has produced a lively debate in recent months. See, e.g., Benedict Carey & Sheri Fink, *Trump’s Pick for Mental Health ‘Czar’ Highlights Rift*, N.Y. TIMES (May 24, 2017), <https://www.nytimes.com/2017/05/24/health/mental-health-czar-elinore-mccance-katz.html> [https://perma.cc/8LYA-QRGB]; D.J. Jaffe, *The Way Forward on Federal Mental Health Policy*, NAT’L REV. (Dec. 18, 2017), <http://www.nationalreview.com/article/454702/federal-agencys-report-problem-serious-mental-illness-good-start> [https://perma.cc/5JFV-KC2K].

17. See *supra* note 3 and accompanying text.

crime. But, as the neuroscience around treatment compliance develops, courts may need to reexamine their approach.¹⁸

I. NONCOMPLIANCE AND LACK OF INSIGHT

The DSM-5¹⁹ defines schizophrenia by the following features:

- A. Two (or more) of the following, each present for a significant portion of time during a 1-month period (or less if successfully treated). At least one of these must be (1), (2), or (3):
 1. Delusions.
 2. Hallucinations.
 3. Disorganized speech (e.g., frequent derailment or incoherence).
 4. Grossly disorganized or catatonic behavior.
 5. Negative symptoms (i.e., diminished emotional expression or avolition).
- B. For a significant portion of the time since the onset of the disturbance, level of functioning in one or more major areas, such as work, interpersonal relations, or self-care, is markedly below the level achieved prior to the onset (or when the onset is in childhood or adolescence, there is failure to achieve expected level of interpersonal, academic, or occupational functioning).
- C. Continuous signs of the disturbance persist for at least 6 months. This 6-month period must include at least 1 month of symptoms (or less if successfully treated) that meet Criterion A (i.e., active-phase symptoms) and may include periods of prodromal or residual symptoms. During these prodromal or residual periods, the signs of

18. Cf. David B. Wexler, *Inducing Therapeutic Compliance through the Criminal Law*, in *ESSAYS IN THERAPEUTIC JURISPRUDENCE* 187, 193 (David B. Wexler & Bruce J. Winick eds., 1991) (“The omission problem is somewhat less easy to finesse when we shift our attention from the serotonin situation to, for example, those schizophrenic patients who have a history of violent behavior when they fail to take antipsychotic medication.”).

19. The Diagnostic and Statistical Manual of Mental Disorders (DSM) is used by psychiatric and psychological professionals—as well as courts—as a guide to assessing mental illness. See, e.g., *Hall v. Florida*, 134 S. Ct. 1986, 1990–91, 1994–95, 1998–99 (2014) (citing the DSM throughout the opinion).

the disturbance may be manifested by only negative symptoms or by two or more symptoms listed in Criterion A present in an attenuated form (e.g., odd beliefs, unusual perceptual experiences).

- D. Schizoaffective disorder and depressive or bipolar disorder with psychotic features have been ruled out because either 1) no major depressive or manic episodes have occurred concurrently with the active-phase symptoms, or 2) if mood episodes have occurred during active-phase symptoms, they have been present for a minority of the total duration of the active and residual periods of the illness.
- E. The disturbance is not attributable to the physiological effects of a substance (e.g., a drug of abuse, a medication) or another medical condition.
- F. If there is a history of autism spectrum disorder or a communication disorder of childhood onset, the additional diagnosis of schizophrenia is made only if prominent delusions or hallucinations, in addition to the other required symptoms of schizophrenia, are also present for at least 1 month (or less if successfully treated).²⁰

Many reviews of this debilitating psychiatric disorder have been published,²¹ but this section will concentrate on lack of insight into the disorder and the possibly related problem of noncompliance with medication. Although the term “insight” refers to several different pathologies in the disease, at its base, lack of insight refers to “reduced awareness of illness and functional impairment and of a need for treatment.”²² Lack of in-

20. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 99 (5th ed. 2013). The definition in DSM-IV-TR is not significantly different—at least with respect to the formal clinical criteria. See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 312 (rev. 4th ed., 2000).

21. For a sampling, see generally *Schizophrenia and Other Psychotic Disorders*, in 1 KAPLAN & SADOCK’S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1405 (Benjamin J. Sadock et al. eds., 10th ed. 2017) (various monographs by various authors on aspects of schizophrenia); Urs Heilbronner et al., *The Longitudinal Course of Schizophrenia Across the Lifespan: Clinical, Cognitive, and Neurobiological Aspects*, 24 HARV. REV. PSYCHIATRY 118 (2016); Michael J. Owen, Akira Sawa & Preben B. Mortensen, *Schizophrenia*, 388 LANCET 86 (2016).

22. Stephen Lewis, P. Rodrigo Escalona, & Samuel J. Keith, *Phenomenology of Schizophrenia*, in 1 KAPLAN & SADOCK’S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, *supra* note 21, at 1406, 1433.

sight is not unique to schizophrenia or even mental illness; many diseases have been associated with lack of awareness into that specific disease process.²³

Insight is not one-dimensional. In fact, even those who understand their disease in an academic way may not fully grasp the significance of their symptoms. For instance, one patient—who happened to be a clinical psychologist himself—explained his symptoms in a relatively detached way:

[C]oncerning my subsequent breakdowns, I notice in retrospect that each time I began to experience an episode, my mind would begin to behave in a particular manner. As I would go into psychosis I would begin to make connections that would lead my thought processes to come to conclusions that in retrospect were very strange. Since those early days I have come to understand that every few months my mind will start over-connecting concepts and ideas. At first this activity can be very interesting, but I have learned that if I allow this process to continue, I will soon be talking and acting in a manner that other persons may view as being problematic.²⁴

Many different types of insight can be defined. For example, one author has proposed dividing the concept into three groups: first, “awareness that one is suffering from a mental illness or condition,” second, “ability to relabel mental events such as hallucinations and delusions as pathological,” and

23. See Daniel C. Mograbi & Robin G. Morris, *Implicit awareness in anosognosia: Clinical observations, experimental evidence, and theoretical implications*, 4 COGNITIVE NEUROSCIENCE 181, 181 (2013) (“Unawareness of deficits caused by brain damage or neurodegeneration, termed anosognosia, has been demonstrated in a number of different neurological conditions, including in patients with hemiplegia, hemianopia, aphasia, and memory disorder.”); see also Terry E. Goldberg, Anthony David & James M. Gold, *Neurocognitive impairments in schizophrenia: their character and role in symptom formation*, in SCHIZOPHRENIA 142, 156 (Daniel R. Weinberger & Paul J. Harrison eds., 3d ed. 2011) (“Lack of insight is a hallmark of schizophrenia and has been considered to be relevant to cognition. Reasons for this include the analogy with neurological syndromes such as anosognosia, but also the intuition that cognitive processes, such as self-awareness and self-reflection, and judgments about the self are components of insight.”).

24. Frederick J. Frese, *Inside “Insight” – a personal perspective on insight in psychosis*, in INSIGHT AND PSYCHOSIS: AWARENESS OF ILLNESS IN SCHIZOPHRENIA AND RELATED DISORDERS 351, 355 (Xavier F. Amador & Anthony S. David eds., 2d ed. 2004).

third “[a]cceptance of the need for treatment.”²⁵ Other commentators have proposed further divisions to comport with clinical observations.²⁶ To be clear, however, a patient experiencing more insight into his condition is not always better; in fact, increased insight is associated with suicidal ideations, distress, and depression.²⁷

Unsurprisingly, the relationship between noncompliance and lack of insight is complex, and the factors overlying the relationship are not yet completely elucidated. Psychiatric medications produce several side effects that can discourage treatment even when a patient acknowledges his mental illness and need for treatment.²⁸ Several studies have nonetheless suggested that patients who have stopped taking their medications believe that they no longer need treatment.²⁹ Although the most severely ill do not acknowledge the schizophrenia diagnosis, many have some inkling of insight that they do have some mental illness—and at least connect taking medication to preventing recommitment.³⁰ These same studies have suggested a link between insight and medication compliance.³¹ Yet patients

25. Anthony S. David, *The clinical importance of insight: An overview*, in INSIGHT AND PSYCHOSIS, *supra* note 24, at 359, 360.

26. *See id.* at 360–61 (collecting examples).

27. Iain Kooyman & Elizabeth Walsh, *Societal outcomes in schizophrenia*, in SCHIZOPHRENIA, *supra* note 13, at 644, 651 (discussing the connection between insight and suicide); *see also* Michael Cooke et al., *Insight, distress and coping styles in schizophrenia*, 94 SCHIZOPHRENIA RES. 12, 20 (2007) (“The findings of this study support the position that possessing good insight, specifically in terms of being aware of having a mental illness and associated problems, is associated with greater distress in schizophrenia.”).

28. *See* John M. Kane & Christoph U. Correll, *Schizophrenia: Pharmacological Treatment*, in 1 KAPLAN & SADOCK’S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, *supra* note 21, at 1519, 1525–27; Joseph P. McEvoy, *The relationship between insight into psychosis and compliance with medications*, in INSIGHT AND PSYCHOSIS, *supra* note 24, at 311, 324 (summarizing studies); *see also* Floyd v. State, No. M2000-00318-CCA-R3-CD, 2000 WL 1879513, at *1 (Tenn. Crim. App. Dec. 28, 2000) (“The Appellant’s use of his medication was sporadic. He would often refuse to take the medication for ‘a week or two at a time.’ The Appellant’s refusals to be medicated coincided with his scheduled court appearances. *Additionally, due to the Appellant’s complaints of urinary retention, the medications were often changed.*” (emphasis added)).

29. *See* McEvoy, *The relationship between insight into psychosis and compliance with medications*, in INSIGHT AND PSYCHOSIS, *supra* note 24, at 311, 315–17 (summarizing studies).

30. *See id.* at 316–17 (summarizing studies).

31. *See id.* (summarizing studies).

who once actively³² refused medication were rated to have more severe symptoms even after they were on a stable treatment regimen.³³ Interestingly, these results do not mean that explaining mental illness to a patient increases compliance³⁴—although there are other important reasons to attempt to do so.

With the caveat that insight is a vague clinical term that may represent many pathways arising from many brain regions, neuroimaging studies have begun to shed some light on the phenomenon.³⁵ For instance, one study has found that tissue loss in the insula correlates with loss of insight into the condition.³⁶ More broadly, many studies have begun to link changes in neuroanatomy and brain structure to the cognitive symptoms of schizophrenia, even as it has become increasingly clear that schizophrenia is a global disorder of the brain that arises early in development.³⁷

32. The various studies define “active” refusal differently, but many require some sort of affirmative act besides not inquiring about medication when it does not appear. *See id.* at 317–18.

33. *See id.* (summarizing studies).

34. *See id.* at 326–27 (summarizing studies).

35. Cf. Lisa Feldman Barrett, *The Future of Psychology: Connecting Mind to Brain*, 4 PERSPS. PSYCHOL. SCI. 326, 329 (2009) (“This separation is guided by the neuropsychological assumption that psychological functions are localized to modules in particular brain areas In recent years, however, it has become clear (using multivariate voxel pattern analysis procedures) that the so-called noise carries meaningful psychological information, just as junk DNA is not junk at all. This turn of events makes brain mapping less like cartography (mapping stationary masses of land) and more like meteorology (mapping changing weather patterns or ‘brainstorms’).” (citations omitted)).

36. Lena Palaniyappan, Vijender Balain, & Peter F. Liddle, *The neuroanatomy of psychotic diathesis: A meta-analytic review*, 46 J. PSYCHIATRIC RES. 1249, 1254 (2012) (review of neuroanatomical correlates of clinical expression). *See generally* Laura A. Flashman & Robert M. Roth, *Neural correlates of unawareness of illness in psychosis*, in INSIGHT AND PSYCHOSIS, *supra* note 24, at 157.

37. *See, e.g.*, Sai Ma et al., *Modulations of functional connectivity in the healthy and schizophrenia groups during task and rest*, 62 NEUROIMAGE 1694, 1703 (2012) (“Significant differences between the [Healthy Control] and [Schizophrenia] groups are found, including a more random organization in schizophrenia.”); Paul E. Rasser et al., *Functional MRI BOLD response to Tower of London performance of first-episode schizophrenia patients using cortical pattern matching*, 26 NEUROIMAGE 941, 950 (2005) (“Our data also show a marked reduction of patients’ negative BOLD response in areas subserving sensory auditory information processing when performing a demanding visual planning/working memory task.” (authors discussing tentative results)); Hao-Yang Tan et al., *Dysfunctional Prefrontal Regional Specialization and Compensation in Schizophrenia*, 163 AM. J. PSYCHIATRY 1969, 1976 (2006) (“While high-performing comparison subjects optimally utilized the dorsal

Although much remains to be discovered, at the very least, emerging research into lack of insight in schizophrenia demonstrates that courts ought to treat mental illness quite differently than traditional physical illness. This research calls into doubt the equivalence between “physical” and mental illness that drives the thinking of many courts:

Persons in need of hospitalization for physical ailments are allowed the choice of whether to undergo hospitalization and treatment or not. *The same should be true of persons in need of treatment for mental illness unless the state can prove that the person is unable to make a decision about hospitalization because of the nature of his illness.* It is certainly true that many people, maybe most, could benefit from some sort of treatment at different periods in their lives. *However, it is not difficult to see that the rational choice in many instances would be to forego treatment, particularly if it carries with it the stigma of incarceration in a mental institution, with the difficulties of obtaining release, the curtailments of many rights, the interruption of job and family life, and the difficulties of attempting to obtain a job, drivers license, etc. upon release from the hospital.*³⁸

Nonetheless, courts have been called to deal with cases presenting defendants who argue that they know that medication noncompliance causes them to act inappropriately.

II. JUDICIAL APPROACH TO NONCOMPLIANCE

This section will consider how courts have dealt with defendants pleading insanity but asserting that they know they

prefrontal cortex, schizophrenia patients had greater ventral prefrontal cortex involvement. This compensatory ventral response may reflect loss of hierarchical functional specialization in the diseased prefrontal cortex, which may eventually fail to maintain cognitive performance.”). See generally Danielle S. Bassett et al., *Hierarchical Organization of Human Cortical Networks in Health and Schizophrenia*, 28 J. NEUROSCIENCE 9239 (2008); Emre Bora et al., *Neuroanatomical abnormalities in schizophrenia: A multimodal voxelwise meta-analysis and meta-regression analysis*, 127 SCHIZOPHRENIA RES. 46 (2011); Souhel Najjar & Daniel M. Pearlman, *Neuroinflammation and white matter pathology in schizophrenia: systemic review*, 161 SCHIZOPHRENIA RES. 102 (2015); Claire Scognamiglio & Josselin Houenou, *A meta-analysis of fMRI studies in healthy relatives of patients with schizophrenia*, 48 AUSTL. & N.Z. J. PSYCHIATRY 907 (2014).

38. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1094 (E.D. Wis. 1972) (emphasis added), *vacated on other grounds*, 414 U.S. 473 (1974) (per curiam).

ought to take their medication. Several courts have commented on a history of noncompliance with psychiatric treatment as a prelude to more severe psychotic breaks and, unfortunately, crimes.³⁹ Sometimes, exogenous factors prevent compliance; for instance, some defendants argue that the cost of treatment is prohibitive.⁴⁰ In the case of a patient-defendant who will not take his medication because of the disease, allowing insanity seems fairly clear. Indeed, in the context of a *Strickland*⁴¹ challenge for ineffective assistance of counsel, one court described the near necessity of pleading insanity in such a situation:

It seems to us that the defense of insanity caused by Mr. Hill's failure to continue taking anti-psychotic drugs was an obvious one. . . . The written report of the clinical psychologist who testified for the defense also comments that "[i]t is clear that [Mr. Hill] does much better on antipsychotic medication, but as is typical with paranoid schizophrenics, will

39. See, e.g., *United States v. Session*, No. CRIM. 04-783-01, 2006 WL 2381962, at *9 (E.D. Pa. Aug. 14, 2006) ("Indeed, Session's arrests for assault, kidnaping, and arson occurred during periods of time in which she was medically non-compliant, and Session admitted to becoming violent in the absence of prescription medication, recalling incidents in which she physically struck a nurse, a police officer, and her boyfriend." (citations omitted)); *Laudat v. Gov't of V.I.*, 48 V.I. 892, 897 (D.V.I. App. Div. 2007) (per curiam) ("Laudat's conduct would depend on whether he was actively hallucinating at the time; she noted, however, that Laudat asserted during his evaluation that he was 'not in control because [he was] not taking his medication' at the time of offenses." (citation omitted)); *Galloway v. State*, 938 N.E.2d 699, 707 (Ind. 2010) ("The court also found that the defendant's 'psychotic episodes increased in duration and frequency' and that he 'lacks insight into the need for his prescribed medication.' The court then found that the defendant had 'repeatedly discontinued medication because of side effect complaints and would self medicate' by abusing alcohol and illicit drugs." (citation omitted)); *State v. Junta*, 541 A.2d 284, 286 (N.J. Super. Ct. App. Div. 1988) ("However, the placement in the apartment complex was not the type of structured or supervised environment which had been recommended at the time he left Devereaux."); *State v. Claytor*, 574 N.E.2d 472, 482 (Ohio 1991) ("Appellant had stopped taking his medication and that practice, in the past, had led inexorably to a deterioration of appellant's stability, characterized by episodes of violent conduct leading, in turn, to hospitalization."); *State v. Collazo*, 967 A.2d 1106, 1109 (R.I. 2009) ("Doctor Stewart further detailed defendant's history of noncompliance with his prescribed medication and treatment, and his frequent self-medication with drugs and alcohol, which Dr. Stewart believed exacerbated his mental illness.").

40. See, e.g., *United States v. Burns*, 812 F. Supp. 190, 192 (D. Kan. 1993) ("The defendant testified that at the time of the episode leading to the indictment, he had ceased taking his medications because of the cost.").

41. *Strickland v. Washington*, 466 U.S. 688 (1984).

not take that medication unless forced to. Left in an unstructured situation, it is apparent that medication will be discontinued and the probability of a psychotic episode again becomes very high.”⁴²

Yet, courts have struggled with the situation of a defendant that appears to have some insight into the need for medication and has access to medication—but still refuses to comply. One pervasive problem is that courts tackling this issue have not cited one another. The remainder of this section will attempt to survey approaches to the question and put them in conversation with one another.

The Appeals Court of Massachusetts recently tackled this issue in *Commonwealth v. Shin*.⁴³ The victim boarded a crowded Boston T subway train during rush hour.⁴⁴ At another stop, the defendant boarded the train, “and he went to stand ‘very close’ to the victim, so close that he made her uncomfortable”⁴⁵ The defendant proceeded to touch the victim “between her legs on her upper thigh, within ‘two inches’ of her genital area.”⁴⁶ The victim verbally warned the defendant and pushed him away.⁴⁷ The victim then exited the train before her intended stop to get away from the defendant.⁴⁸ She reported the incident to transit police, who were able to determine the defendant’s identity using his fare card.⁴⁹ Transit officers went to the defendant’s home and verified the fare card information.⁵⁰ While traveling to the police station, “the defendant stated that ‘he did have a problem’ relating to the incident . . . and that he had medication but was not presently taking it.”⁵¹ The subsequent bench trial revealed the defendant’s history of schizophrenia and frotteurism,⁵² similar criminal acts, civil commit-

42. *Hill v. Lockhart*, 28 F.3d 832, 842 (8th Cir. 1994) (alterations in original).

43. 16 N.E.3d 1122 (Mass. App. Ct. 2014).

44. *Id.* at 1123.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 1123–24.

51. *Id.* at 1124.

52. “Frotteuristic disorder, or frotteurism, is a paraphilia in which a person is sexually aroused by the act or fantasy of making unwanted—and often unrecog-

ment, and noncompliance with medications.⁵³ The defense expert opined that the defendant's "ability to perceive reality is significantly impaired. When he willingly takes his medication his symptoms are muted although never in complete remission."⁵⁴

After hearing the evidence, the trial judge requested briefing on the question of "whether the defendant knew that his failure to take his medication would cause him to act in a manner that was against the law and, if so, whether that would permit a finding that he was criminally responsible."⁵⁵ The trial court then rejected the insanity defense and found the defendant criminally liable, concluding that the defendant had enough insight into his condition to know the consequences of not taking his medication:

[T]he defendant "was aware that if he failed to take his medication, it would result in this kind of behavior once again He has had enough contact with the court system and enough treatment by this doctor who testified and other doctors that make it very clear to him that he needs to take his medication or he would be right back where he started."⁵⁶

The Massachusetts Appeals Court reversed and ordered a new trial on grounds that the "judge erroneously took an additional step of inquiring whether the defendant's lack of criminal responsibility was caused by his failure to take prescribed medications."⁵⁷ From the facts provided, it was indeed unclear whether the defendant had taken his medications or even if he could obtain them.⁵⁸ Critically, the court attacked the Commonwealth's reasoning as allowing prosecutors to argue that any mentally ill defendant who had become noncompliant with medication was criminally responsible, negating legiti-

nized—physical contact with others while in public spaces." *Frotteurism*, UNIV. CAL. SANTA BARBARA (Apr. 3, 2014), <http://www.soc.ucsb.edu/sexinfo/article/frotteurism> [<https://perma.cc/9LZU-LKWR>].

53. *Shin*, 16 N.E.3d at 1124–26.

54. *Id.* at 1125.

55. *Id.* at 1126.

56. *Id.* (second alteration in original) (footnote omitted).

57. *Id.* at 1128.

58. *Id.* at 1129.

mate insanity defenses in many cases.⁵⁹ The appeals court thus wished to confine the insanity inquiry to the events surrounding the crime and not extend the timeline back.

In *United States v. Samuels*,⁶⁰ the Eighth Circuit focused on the moments surrounding the crime to assess the sufficiency of an insanity plea and used the defendant's extensive history of commitment and noncompliance to support overturning a jury conviction. The defendant had been accused of mailing a threatening letter to the President.⁶¹ At trial, the defendant produced witnesses who testified to his cycle of treatment, adverse life events, noncompliance, and illness exacerbation:

Typically, after he had been hospitalized and had taken medication long enough to stabilize his behavior and thought processes, he would become happier and hopeful of finding a steady job. However, when he was unable to find work he would begin to withdraw and stop taking his medication. At this point, [the defendant] would become hostile and exhibit paranoid schizophrenic behavior.⁶²

The Court of Appeals concentrated on the defendant's state of mind at the time of the offense and did not find the government's expert testimony, which was based on medical reports from a previous commitment, to counter the defendant's assertion of insanity.⁶³ As such, the Court of Appeals overturned the jury's guilty verdict and remanded for a new trial.⁶⁴

An unreported Ohio criminal case, *State v. McCleary*,⁶⁵ makes explicit the distinction between compliant and noncompliant defendants with which the *Samuels* and *Shin* courts were grappling. The defendant had an eleven-year history of schizophrenia and had been compliant with medication until a few days

59. *See id.* ("Finally, we note that the Commonwealth's argument, taken to its logical extreme, could be used to argue that every mentally ill defendant who had ever taken helpful medication in the past, but discontinued it, was criminally responsible.")

60. 801 F.2d 1052 (8th Cir. 1986).

61. *Id.* at 1053.

62. *Id.* at 1055.

63. *See id.* at 1056. The dissent in that case was willing to credit the jury's use of that testimony. *Id.* at 1057 (Bowman, J., dissenting).

64. *Id.* at 1057.

65. No. CR49471 (C.P. Cuyahoga Cty., Ohio Nov. 19, 1979), *rev'd*, No. CR42116 (Ohio Ct. App. 8th Dist. Nov. 20, 1980). The details of the case are described in Slodov, *supra* note 9, at 303–04.

before he disrobed in a city park and wrestled a handgun from a park ranger.⁶⁶ The trial court refused to find the defendant insane because “there is a distinction between insanity and insanity *that can be controlled*.”⁶⁷ The Ohio Court of Appeals reversed because the identification of a cause of the insanity “did not rebut the existence of [the defendant’s] mental disorder at the time of the offense.”⁶⁸

Analogously, the narrow inquiry into the time of the crime applies not only to the insanity defense but also to the assessment of mens rea in the context of mental illness. In *State v. Davis*,⁶⁹ the jury rejected the insanity defense and convicted the defendant for beating his roommate to death with a rifle barrel.⁷⁰ On appeal, the defendant argued that failure to take medication while mentally ill was negligent or reckless “when he knew or should have known that to do so would allow the symptoms of the disease to emerge.”⁷¹ The appeals court forcefully rejected the defendant’s theory because it tried to expand the timeline of the inquiry too much:

We reject this theory for the reason that the death was not caused by defendant’s failure to take medication. The death was caused by the defendant beating the victim on the head with the barrel of a rifle. It is this conduct which must be judged as reckless or negligent.⁷²

Interestingly, and perhaps in tension with its previous holding, the court implied that the jury might be able to factor the noncompliance into its determination of insanity:

66. *Id.* at 303.

67. *Id.* (emphasis added).

68. *Id.* at 304 (emphasis added).

69. 606 P.2d 671 (Or. Ct. App. 1980). It is important to note that intent and insanity are distinct concepts, though. *See, e.g., State v. Laible*, 1999 SD 58, ¶ 16, 594 N.W.2d 328, 333 (“At trial, several mental health experts explained the typical symptoms of defendant’s diagnosed mental illnesses, the force those illnesses had on his thought processes, the effect of his medication, and the consequence of not taking it. The court properly instructed on the definition of ‘depraved mind.’ Jurors were thus able to compare the expert testimony and the definition to determine the difference between actions evincing a depraved mind and those stemming strictly from defendant’s mental disorders. ‘Sanity and intent are distinct issues.’” (citation omitted)).

70. *Davis*, 606 P.2d at 672.

71. *Id.* at 672–73.

72. *Id.* at 673.

[The defendant's] decision, for whatever reason, to cease taking the prescribed medication may have precipitated a psychosis or a particular state of mind at the time the blows were intentionally inflicted. *From this the jury would be entitled to find he was suffering from a mental disease or defect excluding responsibility for the death*, or that he was suffering from an extreme emotional disturbance and thus guilty of manslaughter. The jury, after proper instruction, rejected both defenses.⁷³

In *State v. Brantley*,⁷⁴ a Louisiana appeals court deferred to the fact finder in determining whether noncompliance should negate an insanity defense. The defendant was charged with multiple counts of passing worthless checks.⁷⁵ At trial, the prosecution produced evidence of a cycle of commitment for manic⁷⁶ symptoms followed by noncompliance with treatment and bouncing checks.⁷⁷ A physician who had treated the de-

73. *Id.* (emphasis added).

74. 514 So. 2d 747 (La. Ct. App. 1987).

75. *Id.* at 748.

76. M. Varga et al., *Insight, symptoms and neurocognition in bipolar I patients*, 91 J. AFFECTIVE DISORDERS 1, 8 (2006) ("Thus, in support of earlier research, acute psychopathology does seem at least partially to have an effect on insight in bipolar disorder. An element of unawareness that is state dependent can be remediated by short-term inpatient treatment, medication adjustment and other interventions. However, our results do not suggest that lack of insight is only state dependent. Mild symptoms were also present during remission." (citation omitted)).

77. See *Brantley*, 514 So.2d at 748-49 ("The state also called as a witness Mrs. McKinney, Brantley's mother, who testified that since 1978 or 1979, he had been in constant trouble with bad checks. She testified, however, that her son had mental problems and was probably not aware that he had written the checks; at least he has always denied it when confronted."); *id.* at 749 ("The physicians advised that though manic depression is not curable, it may be kept in remission by the constant administration of lithium. Carl Gardner, a nurse who has recently treated Brantley, said that if Brantley could maintain a lithium level of .78 to 1.0, his behavior would be normal. The reports from Central State Hospital indicate that Brantley seemed well enough to be discharged within 60 days of admission, but by court order he was held until August 1981, approximately five and a half months."); *id.* ("In 1982, Brantley was again prosecuted for issuing worthless checks. He was jailed in March on two counts. In June, he was rushed to E.A. Conway Hospital in Monroe after an attempted suicide. Dr. Anderson, who treated him, noted complaints of severe headaches and hallucinations. He confirmed the diagnosis of manic depression but felt that it was in remission."); *id.* at 749-50 ("Upon release, Brantley again resumed writing bad checks. In March 1984, he admitted himself to Woodland Hills Hospital in West Monroe, where he was examined by Dr. Sherman, who found him to be in a 'hypomaniac' state, less severe than true mania. After a few days at Woodland Hills, Brantley checked out and

fendant offered an unsympathetic assessment of his culpability, claiming “that if a patient was in a manic state and wrote bad checks, and then admitted himself to a mental hospital, he was ‘quite possibly’ able to recognize that he was sick.”⁷⁸ The trial court convicted the defendant on several counts.⁷⁹ On appeal, after dismissing the defendant’s argument that he had proven insanity to any reasonable jury,⁸⁰ the court noted that a jury could reasonably vote guilty despite his mild mental illness and history of noncompliance:

The evidence would also support the further conclusion that even if Brantley’s conduct was somehow influenced by mild mania or a “hypomaniac” state, then this condition was brought on by his conscious choice not to take the medicine which keeps it under control. . . . If [the defendant] was able to make the conscious choice not to take the medicine, thereby allowing himself to lapse into a manic state which he knew would affect his criminal liability, then he should be accountable for his acts of general criminal intent, committed while in the voluntarily induced manic state.⁸¹

Although *Brantley* involved mental illness less severe than schizophrenia, in *Mitchell v. State*,⁸² a Georgia appeals court—considering a defendant suffering from schizophrenia—suggested that the noncompliance-insanity inquiry should be placed in the hands of the fact finder. After failing to take medication prescribed after an episode of involuntary commitment for schizophrenia, the defendant beat up his mother and threatened his sister.⁸³ At a trial for aggravated assault and making terroristic threats,⁸⁴ the jury, while in deliberation, “requested clarification on whether the failure to take medication . . . relates to the evaluation of that person’s sanity.”⁸⁵ The

immediately admitted himself to Brentwood in Shreveport. There he was examined by Dr. Richie, who had previously seen him in September 1980 and had issued the report that led to his first commitment.”)

78. *Id.* at 750.

79. *Id.* at 748.

80. *Id.* at 751.

81. *Id.*

82. 369 S.E.2d 487 (Ga. Ct. App. 1988).

83. *Id.* at 488–89.

84. *Id.* at 488.

85. *Id.* at 492.

trial court refused to give further instructions, "considering it one of the matters to be deliberated by the jury," and the appeals court affirmed the decision.⁸⁶

As courts have divided on how to treat the question of non-compliance-induced insanity, the question becomes what approach best comports with the purposes of the insanity defense. Doctrinally, insanity concentrates on the defendant's mental state at the time the crime was committed. The next section makes an initial theoretical inquiry into whether the time frame of insanity makes sense or should be expanded.

III. SCOPE OF INQUIRY INTO INSANITY

The insanity defense is caught in a set of conflicting, evolving purposes and policies. In his classic work on the defense, Abraham Goldstein summarized the situation well:

The insanity defense is caught in a cross-current of conflicting philosophies. Its roots are deep in a time when people spoke confidently of individual responsibility and of "blame," of the choice to do wrong. The emphasis was on the individual offender and the defense was seen as an instrument for separating the sick from the bad. It was not long, however, before ideas drawn from social utilitarianism took over the insanity defense. It was now feared that treating an offender as "sick" might weaken the deterrent effect of the criminal law.⁸⁷

These tensions within insanity doctrine lead to ambiguity in the doctrine. This section considers how noncompliance-induced insanity comports with the goals generally served by the insanity defense. This section is not meant to be a comprehensive review of insanity doctrine and theory. Many such reviews and commentaries already exist.⁸⁸ Instead, the discussion

86. *See id.* ("[W]e agree with the trial court that answering the particular inquiry in this case would have stepped over into the province of the jury.").

87. ABRAHAM S. GOLDSTEIN, *THE INSANITY DEFENSE* 211 (1967).

88. *See generally* Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 *UCLA L. REV.* 1511 (1992); Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 *S. CAL. L. REV.* 777 (1985); Stephen J. Morse, *From Sikora to Hendricks: Mental Disorder and Criminal Responsibility*, in *THE EVOLUTION OF MENTAL HEALTH LAW* 129 (Lynda E. Frost & Richard J. Bonnie eds., 2001); Michael L. Perlin, *The Insanity Defense: De-*

will focus on issues relevant in establishing how far back to inquire in determining insanity (the criminal action itself as opposed to the contributing noncompliance).

Time frames are critical to criminal law. Actions that appear justified at first glance take on a different tinge when the entire context is considered. Consider the example of a homicide by shooting. Looking only at the moment of the shooting provides limited information. Exploring what happened before is critical: the difference between manslaughter and premeditated, first-degree murder hinges on what the shooter was doing in the moments, days, or weeks before the fateful event.⁸⁹ Although the insanity defense has been expressed in several ways over the last century, the legal formulations seem to concentrate on the time of the crime⁹⁰—unlike other defenses or excuses.⁹¹ In fact, some courts have resisted expanding the time inquiry in insanity beyond the frame necessary for the expert to make the determination:

constructing the Myths and Reconstructing the Jurisprudence, in LAW, MENTAL HEALTH, AND MENTAL DISORDER 341 (Bruce D. Sales & Daniel W. Shuman eds., 1996); Charles E. Trant, *The American Military Insanity Defense: A Moral, Philosophical, and Legal Dilemma*, 99 MIL. L. REV. 1 (1983).

89. Thanks to M. Kyle Reynolds for the helpful example.

90. See, e.g., *Durham v. United States*, 214 F.2d 862, 875 (D.C. Cir. 1954) (“If you the jury believe beyond a reasonable doubt that the accused was not suffering from a diseased or defective mental condition *at the time he committed the criminal act charged*, you may find him guilty.” (emphasis added)), *overruled by* *United States v. Brawner*, 471 F.2d 969, 981 (D.C. Cir. 1972); *Parsons v. State*, 2 So. 854, 866 (Ala. 1887) (“If, by reason of the duress of such mental disease, he had so far lost the *power to choose* between the right and wrong, and to avoid doing the act in question, as that his free *agency was at the time destroyed . . .*” (second emphasis added)); *M’Naghten’s Case* (1843) 8 Eng. Rep. 718, 722 (H.L.) (“[I]t must be clearly proved that, *at the time of the committing of the act*, the party accused was labouring under such a defect of reason . . .” (emphasis added)); MODEL PENAL CODE § 4.01(1) (AM. LAW INST., Proposed Official Draft 1962) (“A person is not responsible for criminal conduct if *at the time of such conduct* as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.” (alterations in original)).

91. See, e.g., MODEL PENAL CODE § 2.09(2) (AM. LAW INST., Proposed Official Draft 1962) (duress) (“The defense provided by this Section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress.”); *id.* § 3.04(2)(b)(i) (self-defense) (“[T]he actor, with the purpose of causing death or serious bodily injury, provoked the use of force against himself in the same encounter . . .”).

We think it compatible with the philosophical basis of *M'Naghten* to accept the fact of a schizophrenic episode without inquiry into its etiology. If protection against further harm can reasonably be assured by measures appropriate for the sickness involved, it would comport with *M'Naghten* to deal with the threat in those terms.⁹²

Some courts, in fact, have still found insanity when confronted with evidence that a defendant was cognizant of his atypical mental illness in a lucid phase.⁹³ Although it is unclear whether the various formulations of the defense make any difference at all to jury deliberation,⁹⁴ this Part will attempt to place the theoretical underpinnings of insanity in conversation with time frames in criminal law.

The threshold question to ask is when criminal law can (or should) expand the time frame. Some commentators have argued that the time frame is an arbitrary choice, motivated by policy preferences.⁹⁵ Writing about several criminal law doctrines, including insanity, Professor Kelman argues:

92. *State v. Maik*, 287 A.2d 715, 722 (N.J. 1972) *overruled on other grounds by State v. Krol*, 344 A.2d 289 (N.J. 1975).

93. *See, e.g., Robey v. State*, 456 A.2d 953, 959 (Md. Ct. Spec. App. 1983) (The defense psychiatrist opined that “[a]t the time that this happened she lacked substantial capacity. At the time that this happened, now she knows. Immediately after it happened and it was stopped she knew, yes, that’s the problem.”).

94. Compare Caton F. Roberts & Stephen L. Golding, *The Social Construction of Criminal Responsibility and Insanity*, 15 L. & HUMAN BEHAV. 349, 372 (1991) (“The strongest predictors of verdicts in this study were not the design variables, but rather case construals and attitudes toward the insanity defense.”) with James R. P. Ogloff, *A Comparison of Insanity Defense Standards on Juror Decision Making*, 15 L. & HUMAN BEHAV. 509, 526 (1991) (“The findings presented may have important theoretical implications that provide some support for the contention that, for whatever reason, the particular insanity defense standards employed do not seem to strongly influence a juror’s decision making. Thus, any differences that exist between the ALI and *McNaughten* standard may be practically meaningless.”).

95. MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 93 (1987) (“But while we may understand *why* we use an ordinarily unprivileged *descriptive* discourse here (to preserve a distinct, *normatively* privileged discourse), we must recall that it is our simultaneous access to each discourse that makes the practice available.”); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 592–93 (1981) (“For example, I will show that issues of voluntariness of a defendant’s conduct can be resolved only *after* we have agreed, for reasons outside of our rational discourse, to include within the relevant time frame some obviously voluntary act that contributes to the ultimate harm. . . . [W]e neither frame time the same way in all criminal setting nor do we ever explain why we

These doctrines describe how certain blameworthy acts are in fact blameless because rooted in or determined by factors that preceded the criminal incident. The question, of course, is why the broad^[96] time frame is selected in these cases, while it continues to be excluded as methodologically inappropriate in most other cases *for no apparent reason*.⁹⁷

Others have countered that the choice is not arbitrary at all; criminal law merely looks to determine the time when mens rea and actus rea intersect—that is, when a defendant performs a voluntary act with the requisite intent.⁹⁸ In essence, there is no choice to be made because the inquiry is not about any time frame per se—it is about when the components of a crime come together.⁹⁹ For instance, when an epileptic defendant fails to take his medication and gets behind the wheel, at that moment, the defendant performs an act with the knowledge of inherent risk, so criminal liability attaches.

Regardless of how one resolves the time frame question, the inquiry helps animate the moral analysis of whether a defendant commits a crime *in* ignorance or *of* ignorance.¹⁰⁰ That is, did

use one time frame or another.”) [hereinafter Kelman, *Interpretive Construction in Criminal Law*].

96. Professor Kelman is arguing “broad” in the sense that the defense considers the medical history of the defendant. This distinction is less relevant to this paper. Cf. HERBERT FINGARETTE & ANN FINGARETTE HASSE, MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY 21 (1979) (“In contrast to all this, the insanity defense focuses interest squarely and for its own sake upon the individual character of the defendant’s mind: It is *necessary* to make a judgment that goes well beyond the facts related to this particular offense, a judgment about this particular person, the makeup of *his* mind and personality in its concrete individuality.” (footnote omitted)).

97. Kelman, *Interpretive Construction in Criminal Law*, *supra* note 94, at 611 (emphasis added).

98. See MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 36 (2d ed. 2010) (“If there is *any* point in time where the act and *mens rea* requirements are simultaneously satisfied, and from which the requisite causal relations exist to some legally prohibited state of affairs, then the defendant is *prima facie* liable. The presupposition of Kelman’s entire analysis is simply (and obviously) false.”).

99. See *id.* Cf. Robinson, *supra* note 8, at 31 (“Where the actor is not only culpable as to causing the defense conditions, but also has a culpable state of mind *as to causing himself to engage in the conduct constituting the offense*, the state should be punish him for causing the ultimate justified or excused conduct.”).

100. ELLIOTT, *supra* note 10, at 26–27; see also FINGARETTE & HASSE, MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY 43 (“The full and distinctive significance of this condition of irrationality, which makes ascriptions of localized error,

the defendant bring himself to be *in* the ignorant state when he committed the crime—or did he do something *of* which he had no understanding, through no fault of his own? The paradigmatic example is alcohol or drug-induced insanity: Few would argue that a non-alcoholic¹⁰¹ who imbibes too much and commits a crime should be acquitted or have recourse to insanity.¹⁰² That defendant committed a crime *in* ignorance but not *of* ignorance. There was a point in time when the defendant understood his actions and drank anyway. So, even though *at the moment of the crime*, the drunk defendant did not understand or control his acts (and thus was committing his actions *in* ignorance), there was a period of time when the defendant *did* understand—and this is what is punished.

Applying this paradigm to noncompliant insanity, it is unquestioned that at the moment of the crime, the defendant claiming insanity is *in* ignorance of this action. To determine if the defendant is acting *of* ignorance, it is critical to know what he was thinking when he stopped taking the medication (or whenever the defendant's mental processes were "clear"). Was there a conscious choice to become noncompliant—cognizant of the potential consequences? Or, was the noncompliance a flare up or manifestation of the illness—the same disease process that led to criminal actions? One commentator illustrates the potential jumps between noncompliance, belief formation, and criminal action in discussing a particularly tragic home invasion case:

There is, of course, no way to know for certain whether such an illness played any role in the genesis of this incident or in the confused beliefs that this leader espoused to his followers, such as a belief that the police were agents of Satan and that the Bible forbade the drinking of water. Some very tentative indications of his mental state at the time of the incident can be gained from the fact that over the course of the hostage ordeal his conversations with police and supposed

mistake, or ignorance pointless, has been lost from sight because the *words* of idioms have been suggestive of the legal language of 'ignorance.'").

101. The defendant suffering from alcoholism is a different story and will be discussed below in Section IV.A.

102. See ELLIOTT, *supra* note 10, at 27; see also Sections IV.B & IV.C. and accompanying notes.

friends became increasingly confused and disoriented and were finally reduced to sporadic shouts from the house.¹⁰³

Another issue overlaying this causal puzzle is that schizophrenia and other mental disorders make the defendant's testimony potentially unreliable. When the defendant says "I knew something bad was going to happen," the statement may simply not be true or might reflect the insight of a medicated state.

Because the study of insight in schizophrenia and other mental diseases has not yet provided good ways to ferret out this enigma in many defendants, the next section looks at potential analogies for thinking through whether the insanity defense ought to be available in the noncompliance situation. Other criminal law defenses—and the neuroscience underlying them—may provide useful guides to think about noncompliant insanity and provide different methods to probe into the context surrounding a crime.

IV. DOCTRINAL APPROACHES TO NONCOMPLIANCE

This part surveys different doctrines that may shed light on how to treat a noncompliant defendant pleading insanity. Section A will discuss defenses that surround addiction to alcohol and controlled substances, including "settled insanity." Section B will try to provide that fit in cases involving drug ingestion unmasking some sort of mental disease and insanity. Section C will look at self-defense (as a proxy for defenses that bring in the entire situation to analyze the crime). Section D will cover the "multiple personality" defense, whereby defendants attempt to argue that another "person" committed the crime in question. Section E will conclude with three defenses—automatism, amnesia, and duress—that appear to have some relevance to noncompliant insanity defense but do not add much to the inquiry.

103. Richard Sherlock, *Compliance and responsibility: new issues for the insanity defense*, 12 J. PSYCHIATRY & L. 483, 484 (1984).

A. *Defenses Related to Addiction*

It is axiomatic that voluntary alcohol intoxication is not a defense to a crime—and certainly not a complete defense to a crime.¹⁰⁴ Although this categorical position can produce odd results in certain instances,¹⁰⁵ this axiom is not controversial when the defendant is not addicted to the substance in question—that is, when the defendant is truly consuming the substance voluntarily. On the other hand, when the defendant is addicted, the term “voluntary” becomes more fraught. Indeed, crimes that punish mere addiction without an act violate the Eighth Amendment’s prohibition against cruel and unusual punishment,¹⁰⁶ and four members of the Warren Court were ready to declare chronic alcoholism a defense to at least minor offenses.¹⁰⁷ Decades of research has shown that the develop-

104. See *Hopt v. People*, 104 U.S. 631, 633–34 (1881); *Bennett v. State*, 257 S.W. 372, 374 (Ark. 1923) (rejecting a defense of alcohol intoxication for a general intent crime); R.W. Gascoyne, Annotation, *Modern status of the rules as to voluntary intoxication as defense to criminal charge*, 8 A.L.R.3d 1236 (1966) (“The rule that voluntary intoxication is not a general defense to a charge of crime based on acts committed while drunk is so universally accepted as not to require the citation of cases. Apparently no court has ever dissented from the proposition, and it is embodied in statutes in some jurisdictions.” (footnotes omitted)); see also MODEL PENAL CODE § 2.08 (AM. LAW INST., Proposed Official Draft 1962) (Intoxication).

105. Compare *Johnson v. Commonwealth*, 115 S.E. 673, 676–77 (Va. 1923) (defendant who took alcohol to alleviate a toothache cannot use his condition as an excuse), with *Burnett v. Commonwealth*, 284 S.W.2d 654, 658–59 (Ky. 1955) (defendant who took a narcotic for a toothache allowed a jury instruction to take into account his ignorance of the drug’s effects). However, some courts find no problem extending the categorical position to other drugs. See, e.g., *State v. Hall*, 214 N.W.2d 205, 207–08 (Iowa 1974) (collecting cases).

106. See *Robinson v. California*, 370 U.S. 660, 667 (1962) (“We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment. To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. *Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.*” (emphasis added)).

107. See *Powell v. Texas*, 392 U.S. 514, 569–70 (1968) (Fortas, J., dissenting) (“The findings in this case, read against the background of the medical and sociological data to which I have referred, compel the conclusion that the infliction upon appellant of a criminal penalty for being intoxicated in a public place would be ‘cruel and inhuman punishment’ within the prohibition of the Eighth Amendment. This conclusion follows because appellant is a ‘chronic alcoholic’ who, according to the trier of fact, cannot resist the ‘constant excessive consumption of alcohol’

ment of addiction, whether to alcohol or illicit drugs, leads to tangible changes in brain chemistry and circuitry that turn a pleasurable activity into an obligatory one.¹⁰⁸ The details vary with the substance,¹⁰⁹ but the 10%¹¹⁰ of people exposed to addictive drugs that will develop the most severe forms of addiction go through an “addiction pathway.”¹¹¹ Unfortunately, it is unclear which 10% of people will go through the pathway—though some environmental, epidemiological, and genetic factors have been implicated.¹¹² A recent review of addiction circuits in the brain summarized the transition from experimentation to addiction aptly:

Current evidence shows that most drugs of abuse exert their initial reinforcing effects by activating reward circuits in the brain and that, while initial drug experimentation is largely a voluntary behavior, continued drug use impairs brain function by interfering with the capacity to exert self-control over drug-taking behaviors and rendering the brain more sensitive to stress and negative moods.¹¹³

Of course, like all science, this “brain disease” model is not the only paradigm out there to explain current results, so there

and does not appear in public by his own volition but under a ‘compulsion’ which is part of his condition.”).

108. See Nora D. Volkow & Marisela Morales, *The Brain on Drugs: From Reward to Addiction*, 162 CELL 712, 715 (2015) (“The transition from controlled to compulsive drug taking has been associated with a shift in the involvement of striatal subregions (NAc), implicated in the rewarding response to drugs, to the dorsal striatum that is associated with habit formation.” (citation omitted)).

109. See, e.g., Irina N. Krasnova, Zuzana Justinova, & Jean Lud Cadet, *Methamphetamine addiction: involvement of CREB and neuroinflammatory signaling pathways*, 233 PSYCHOPHARMACOLOGY 1945, 1958 (2016) (“Cytokines and chemokines released by activated microglia appear to also play important roles in METH-induced neuronal injury and neuropsychiatric impairments, which include cognitive deficits, depression, and anxiety.” (citation omitted)).

110. See Nora D. Volkow, George F. Koob, & A. Thomas McLellan, *Neurobiologic Advances from the Brain Disease Model of Addiction*, 374 NEW ENGL. J. MED. 363, 367–68 (2016).

111. See *id.* at 365 fig.1.

112. See Louisa Degenhardt & Wayne Hall, *Extent of illicit drug use and dependence, and their contribution to the global burden of disease*, 379 LANCET 55, 58–60 (2012) (detailing risk factors and the natural history of the disease).

113. Volkow & Morales, *The Brain on Drugs: From Reward to Addiction*, 162 CELL at 712.

is dissent from this view.¹¹⁴ Nonetheless, the results of these studies do at least suggest that there is something “involuntary” about substance use once addiction sets.

Some courts have ignored this evidence. To be fair, some of this hostility has been driven by legislatures singling out alcohol for special treatment.¹¹⁵ One court, however, was particularly clear in highlighting other courts’ rejection of the science circa 1969:

The courts in considering the questions here discussed have taken little or no notice of modern medical attitudes toward alcoholism as a disease, but have usually assumed that the intoxication must be treated as voluntary for purposes of determining criminal guilt, no matter how compulsive the accused’s addiction to alcohol may have been.¹¹⁶

In contrast, some courts are willing to acknowledge that the disease of addiction can lead to dysfunctional behavior suffi-

114. See generally Wayne Hall, Adrian Carter, & Cynthia Forlini, *The brain disease model of addiction: is it supported by the evidence and has it delivered on its promises*, 2 LANCET PSYCHIATRY 105 (2015). For the rebuttal, see Nora D. Volkow & George Koob, *Brain disease model of addiction: why is it so controversial?*, 2 LANCET PSYCHIATRY 677 (2015).

115. See, e.g., *Jones v. State*, 648 P.2d 1251, 1255 (Okla. Crim. App. 1982) (“Therefore, in the area of voluntary intoxication we find that our statutes are controlling. The Oklahoma legislature has determined that voluntary intoxication should not completely relieve one of criminal responsibility. Any change in this public policy statement must come from that branch of government and not from the judiciary.”). But see *Commonwealth v. Wallace*, 439 N.E.2d 848, 850 (Mass. App. Ct. 1982) (“Although the circumstances of a person who drives after taking a prescription drug unaware of its possible effects differ significantly from those of a person forced to drive after having a potion rammed down his throat or after being tricked, such circumstances also differ substantially from those of a person who drives after voluntarily consuming alcohol or drugs whose effects are or should be known. The law recognizes the differences, and authorities have characterized as ‘involuntary intoxication by medicine’ the condition of a defendant who has taken prescribed drugs with severe unanticipated effects.” (footnote omitted)).

116. *Utsler v. State*, 171 N.W.2d 739, 741 (S.D. 1969) (quoting Gascoyne, *supra* note 104); see also *United States v. Lyons*, 731 F.2d 243, 252 (5th Cir. 1984) (en banc) (Rubin & Williams, JJ., concurring and dissenting) (“The contention he presents is that iatrogenic addiction stands on a different footing from voluntary addiction. Our opinion in *Bass* did not rely on the involuntariness of the defendant’s addiction. Because the extent of the mental incapacity represented by narcotics addiction is exactly the same whether voluntarily or involuntarily induced, we see no reason to create a distinction on that basis.”).

cient to trigger some defenses.¹¹⁷ And other courts countenance the sequelae of alcoholism—for instance, an alcohol-induced seizure¹¹⁸—as a defense. In a dramatic example of the latter, in *State v. Massey*,¹¹⁹ the Supreme Court of Kansas allowed the defendant to plead unconsciousness or automatism based on a seizure triggered by consuming alcohol.¹²⁰

Taking this line of reasoning further, some jurisdictions will consider alcoholism as a defense when it “produces a permanent and settled insanity distinct from the alcoholic compulsion itself that the law will accept it as an excuse.”¹²¹ So-called “settled insanity” is a condition of mental illness that arises from chronic abuse of many substances that cause an acute intoxication. This defense is in tension with the common law position that voluntary intoxication is no defense,¹²² for the line between voluntary intoxication and that voluntary intoxication becom-

117. See, e.g., *Green v. United States*, 383 F.2d 199, 201 (D.C. Cir. 1967) (Burger, J.); see also *Brinkley v. United States*, 498 F.2d 505, 511 (8th Cir. 1974).

118. See generally Matti Hillbom et al., *Seizures in alcohol-dependent patients: epidemiology, pathophysiology and management*, 17 CNS DRUGS 1013 (2003). The precise causation—that is, whether the alcohol itself or the withdrawal thereof induces the seizure—is unclear.

119. 747 P.2d 802 (Kan. 1987).

120. *Id.* at 808.

121. *Utsler*, 171 N.W.2d at 741 (quoting Gascoyne, *supra* note 104); see also *Perkins v. United States*, 228 F. 408, 416–17 (4th Cir. 1915) (“The distinction, thus broadly stated, between insanity produced by disease coming as an act of God and that produced by a man’s own voluntary act is not sound, for real mental disease amounting to insanity, as distinguished from ordinary intoxication, excuses, even when brought about by voluntary dissipation or other vice.”); *Parker v. State*, 254 A.2d 381, 388–89 (Md. Ct. Spec. App. 1969) (collecting cases). But see, e.g., *Bieber v. People*, 856 P.2d 811, 818 (Colo. 1993) (“Thus we determine that the ‘settled insanity’ doctrine conflicts with our present statutory scheme regarding insanity and self-induced intoxication. Naturally, the General Assembly, should it disagree with our interpretation, is free to adopt the ‘settled insanity’ doctrine through new legislation. Without such action, however, we cannot recognize ‘settled insanity’ as a valid defense.”).

122. See, e.g., *Bieber*, 856 P.2d at 816 (“We do not see any qualitative difference between a person who drinks or takes drugs knowing that he or she will be momentarily ‘mentally defective’ as an immediate result, and one who drinks or takes drugs knowing that he or she may be ‘mentally defective’ as an eventual, long-term result. In both cases, the person is aware of the possible consequences of his or her actions. We do not believe that in the latter case, such knowledge should be excused simply because the resulting affliction is more severe.”).

ing something else is quite blurry.¹²³ Indeed, “settled insanity” can be caused by repeated bouts of voluntary intoxication.¹²⁴ But, despite the doctrine’s logical flaws and consistency issues, courts have been willing to recognize it even when that line is not clear at all—and leave the issue to the jury. One early example, in the context of alcohol abuse, follows:

Although delirium tremens is the product of intemperance, and therefore in some sense is voluntarily brought on, yet it is distinguishable, and by the law is distinguished, from that madness which sometimes accompanies drunkenness. If a person suffering under delirium tremens is so far insane as I have described to be necessary to render him irresponsible, the law does not punish him for any crime he may commit. But if a person commits a crime under the immediate influence of liquor, and while intoxicated, the law does punish him, however mad he may have been. It is no excuse, but rather an aggravation of his offence, that he first deprived himself of his reason before he did the act.¹²⁵

Some courts have extended the defense to chronic consumption of substances triggering a sustained altered mental state. In *People v. Kelly*,¹²⁶ the California Supreme Court found that a defendant accused of attempted murder and related crimes after having stabbed her mother multiple times could plead insanity based on “using [mescaline and LSD] 50 to 100 times in

123. Cf. *TIFFANY & TIFFANY*, *supra* note 11, at 11 (“First, pathological intoxication should not be treated as voluntary intoxication in all cases because that tends to beg the question regarding voluntariness and because it is not intoxication in the usual sense in any event. We will discuss some cases in which the court essentially identifies drinking alcohol as the fault on the part of the actor. Thus, pathological intoxication, being triggered by consumption of alcohol, would never be a defense, and that seems wrong to us.”).

124. See, e.g., *State v. Kavanaugh*, 53 A. 335, 336 (Del. Ct. Gen. Sess. 1902) (“And just there we will say to you, in regard to persons afflicted with habitual or fixed insanity from long-continued habits of intoxication, that, although their madness caused thereby was at first contracted voluntarily, the person so affected will nevertheless be deemed irresponsible for criminal acts committed by him.”).

125. *United States v. McGlue*, 26 F. Cas. 1093, 1097 (C.C.D. Mass. 1851) (No. 15,679) (Curtis, Circuit Justice); see also *Choice v. Georgia*, 31 Ga. 424, 455 (1860) (“To illustrate this idea: If, by a long practice of intoxication, an *habitual* or *fixed* insanity is caused, or a permanent injury to the mind produced—although this madness was at first contracted voluntarily, yet the party is in the same situation in regard to responsibility for crime, as in a state of insanity caused by nature or accident.”).

126. 516 P.2d 875 (Cal. 1973).

the months leading up to the offense.”¹²⁷ The court stressed that “if defendant was insane at the time of the offense, it is immaterial that her insanity resulted from repeated voluntary intoxication, as long as her insanity was of a settled nature.”¹²⁸ The facts need not be so extreme. A particularly dramatic trip on LSD after several administrations over two weeks that resulted in the defendant stabbing his younger brother was sufficient to allow one court to remand for a trial to determine whether the insanity was settled.¹²⁹

In the context of noncompliant insanity, settled insanity helps answer the question of how to treat a defendant’s discontinuation of medication. On the background of mental illness that is difficult to treat in some cases,¹³⁰ settled insanity teaches that it is irrelevant whether the initial decision to stop medication was “voluntary,” “involuntary,” or something in-between. Indeed, considering that schizophrenia is not self-induced or does not have a “voluntary phase,” if courts are willing to brook “settled insanity,” they should be able to permit non-compliant insanity. Of course, one could counter that schizo-

127. *Id.* at 876–77, 882–83.

128. *Id.* at 883; see also *Porreca v. State*, 433 A.2d 1204, 1208 (Md. Ct. Spec. App. 1981) (“A distillation of the legal principles involved shows that, although we do not want a criminal to escape punishment by the simple expedient of getting drunk first, neither do we want to punish anyone who is legally insane, even though the cause of his insanity is a long-term use of drugs or alcohol.” (footnote omitted)); *Commonwealth v. Herd*, 604 N.E.2d 1294, 1299 (Mass. 1992) (“The weight of authority in this country recognizes an insanity defense that is based on a mental disease or defect produced by long-term substance abuse. We see no logical reason for rejecting a drug-induced mental disease or defect as a basis for the application of the *McHoul* test simply because the disease or defect is caused only by the drug ingestion. We are unwilling, in order to justify a homicide conviction, to permit the moral fault inherent in the unlawful consumption of drugs to substitute for the moral fault that is absent in one who lacks criminal responsibility.” (footnote omitted)).

129. See *People v. Conrad*, 385 N.W.2d 277, 277–78, 280–81 (Mich. Ct. App. 1986).

130. See Sarah D. Holder & Amelia Wayhs, *Schizophrenia*, 90 AM. FAMILY PHYSICIAN 775, 781 (2014) (“In the past, schizophrenia was viewed as a disease with a poor prognosis. Currently, the disease course and response to treatment are marked by heterogeneity; differences in treatment response, disease course, and prognosis are to be expected. Despite adequate treatment, one-third of patients will remain symptomatic. Although most patients need some form of support, most are able to live independently and actively participate in their lives.” (footnotes omitted)).

phrenia is often treatable,¹³¹ whereas settled insanity is sometimes not—at least in the short-term.¹³² Yet settled insanity is triggered by one's actions, whereas most are blameless for developing schizophrenia.¹³³ This would suggest that the insanity defense should be available *regardless of whether the noncompliance was voluntary in any sense that law finds cognizable*.

But the analogy breaks down on two grounds. First, the settled insanity cases require multiple triggers (for example, many instances of drug intake) whereas going off medication takes missing a single dose. Of course, missing a single dose does not

131. *But see* John Lally et al., *Treatment-resistant schizophrenia: current insights on the pharmacogenomics of antipsychotics*, 9 PHARMACOGENOMICS & PERSONALIZED MED. 117, 118 (2016) (“There are currently no evidence-based pharmacotherapies for the 30% of [treatment-resistant schizophrenia] patients who fail to respond to clozapine or those who discontinue clozapine due adverse events.” (footnotes omitted)).

132. *See, e.g.*, Henry D. Abraham & Andrew M. Aldridge, *Adverse consequences of lysergic acid diethylamide*, 88 ADDICTION 1327, 1329–31 (1993) (collecting studies describing “prolonged” psychosis after LSD use). Indeed, studies have linked marijuana with unmasking psychosis or schizophrenia earlier. *See, e.g.*, Cécile Henquet et al., *Prospective cohort study of cannabis use, predisposition for psychosis, and psychotic symptoms in young people*, 330 BR. MED. J. at 3 (2004) (online journal) (“Exposure to cannabis during adolescence and young adulthood increases the risk of psychotic symptoms later in life. The findings confirm earlier suggestions that this association is stronger for individuals with predisposition for psychosis and stronger for the more severe psychotic outcomes. Frequent use of cannabis was associated with higher levels of risk in a dose-response fashion. Associations were independent of other variables known to increase the risk for psychosis. Also, the effect of cannabis remained significant after we corrected for baseline use of other drugs, tobacco, and alcohol. Finally, the data did not support the self-medication hypothesis as baseline predisposition for psychosis did not significantly predict cannabis use at follow up.” (footnotes omitted)); Mohini Ranganathan, Patrick D. Skosnik, & Deepak Cyril D’Souza, *Marijuana and Madness: Associations Between Cannabinoids and Psychosis*, 79 BIOLOGICAL PSYCHIATRY 511, 512 (2016) (commentary) (“In conclusion, exposure to cannabinoids is associated with a range of psychosis outcomes.”). *But see, e.g.*, Ian Hamilton, *The need for health warnings about cannabis and psychosis*, 3 LANCET PSYCHIATRY 322, 322 (2016) (“We need to be cautious when calling for health warnings as Mathew Large does on the issue of cannabis and psychosis.”).

133. However, drug abuse can lead to earlier presentation of schizophrenia and other mental disorders. *See, e.g.*, Marc De Hert et al., *Effects of cannabis use on age at onset in schizophrenia and bipolar disorder*, 126 SCHIZOPHRENIA RES. 270, 274 (2011) (“The current results show that cannabis use is associated not only with a lower age at onset in schizophrenia patients but also in other disorders in which psychotic symptoms are highly prevalent such as bipolar disorder. This could indicate that cannabis use may unmask a pre-existing genetic liability that is partly shared between patients with schizophrenia and bipolar disorder, as suggested by recent evidence showing considerable genetic overlap.” (citation omitted)).

make a noncompliant patient, but missing one dose makes the patient more likely to miss the next.¹³⁴ The second issue is the act versus omission distinction. Settled insanity is produced by “taking” something; noncompliant insanity is caused by “not taking.” Perhaps the formal distinction should not matter, but the law does continue to treat acts and omissions differently¹³⁵—especially if there is no legal duty to take medication. Now, one may argue that because omissions do not lead to criminal liability when there is no duty to act, so too noncompliance-driven insanity should be excused. But many treated mentally-ill individuals have at least an inkling that their medication prevents them slipping back into an ill state.¹³⁶ The first time the defendant “decides” (though it is unclear if they voluntarily decide) to stop taking medication, a chain of events potentially leading to crime begins. Thus, the defendant could be just as responsible for this decision as he would be for any affirmative act. Considering cases of substance ingestion triggering mental illness helps provide some insight into these problems: one trigger (whether an act or an omission), one episode of insanity, one crime. The next section turns to that question.

B. *Unmasking Mental Illness and Insanity*

“Settled insanity” leaves open the question of whether a defendant can be exculpated if he consumes a substance that “unmasks” a latent mental illness, has an unexpected reaction, or is tricked into consuming a psychoactive drug. Assuming the court does not automatically equate psychoactive drugs with the particularly harsh treatment of alcohol,¹³⁷ it could conclude that a defendant has voluntarily consumed a substance but has not intended it to have a particular effect.

134. Cf. Michael Birnbaum & Zafar Sharif, *Medication adherence in schizophrenia: patient perspectives and the clinical utility of paliperidone ER*, 2 *PATIENT PREFERENCE & ADHERENCE* 233, 234 (2008) (“However, it has been demonstrated that even minor deviations from prescribed regimens can be associated with deleterious outcomes.”).

135. See generally Luis E. Chiesa, *Actmissions*, 116 *W. VA. L. REV.* 583 (2013).

136. See *supra* Part I.

137. See, e.g., *State v. Hall*, 214 N.W.2d 205, 211 (Iowa 1974) (LeGrand, J., dissenting) (“I cannot agree that drug intoxication should be treated the same as that resulting from the use of alcohol.”).

Although there is some disagreement on how to treat such a case,¹³⁸ some courts have been willing to allow insanity or some reduction of mens rea—if the defendant does not know that the substance unmasks the illness. Essentially, it is a “fool me once, shame on you; fool me twice, shame on me” type of situation. As the Massachusetts Supreme Judicial Court has explained, the defense “is not available to a defendant with a mental disease or defect who knows that his consumption of a substance will cause him to be substantially incapable of either appreciat-

138. Compare *People v. Penman*, 110 N.E. 894, 900 (Ill. 1915) (“The plaintiff in error attempted to prove that the man who gave him the tablets in Danville told him they were breath perfumers, but was not permitted to do so. The testimony should have been received. The defense of insanity was based upon the taking of those tablets, and whether the defendant took them voluntarily, knowing what they were, or involuntarily took cocaine, supposing it to be some innocent thing, was a question materially affecting his responsibility. It was proper to show what was said, in order to show that he was deceived into taking the tablets, supposing them to be innocent.”), and *People v. Kelley*, 176 N.W.2d 435, 441 (Mich. Ct. App. 1970) (“It was, therefore, incorrect to charge that intoxication would not be a defense if Kelley knew before he began to drink that if he became drunk he might commit ‘a crime’—any crime.”), with *Kane v. United States*, 399 F.2d 730, 736 (9th Cir. 1968) (“It is true that, because of pathological intoxication, it took less liquor to produce unsocial results than with one not so afflicted, and the unsocial results were more serious than in the case of normal intoxication. But still, the disability which he does acquire from drinking liquor was within his own control and cannot be classified as a mental illness excusing criminal responsibility.”), and *United States v. Hernandez*, 43 C.M.R. 59, 63 (C.M.A. 1970) (“Many persons with a low tolerance for alcohol have been held responsible for military offenses they committed while under alcoholic influence and without realizing their threshold of intoxication.”), and *Roberts v. People*, 19 Mich. 401, 422–23 (1870) (“But if he was ignorant that he had any such tendency to insanity, and had no reason from his past experience, or from information derived from others, to believe that such extraordinary effects were likely to result from the intoxication; then he ought not to be held responsible for such extraordinary effects; and so far as the jury should believe that his actions resulted from these, and not from the natural effects of drunkenness, or from previously formed intentions; the same degree of competency should be required to render him capable of entertaining, or responsible for the intent, as when the question is one of insanity alone, which I now proceed to consider.”), and *State v. Sette*, 611 A.2d 1129, 1138 (N.J. Super. Ct. App. Div. 1992) (“We conclude that the judge’s instructions were sound and that, where a defendant, as here, voluntarily ingests large amounts of illegal intoxicants and intentionally overdoses on legal drugs, he cannot assert that he unexpectedly reacted violently to those drugs due to an unknown, underlying pathological condition which afflicted him.”).

ing the wrongfulness of his conduct or conforming his conduct to the requirements of law (or both)."¹³⁹

In one particularly dramatic case, *People v. Low*,¹⁴⁰ the Colorado Supreme Court considered the case of a defendant who had been driven to "insanity" by overconsumption of cough drops.¹⁴¹ The defendant suffered from a cold approximately six months prior to the crime when he began to take a brand of cough drops that contained dextromethorphan.¹⁴² Following his illness, the defendant began abusing cough drops "as a partial substitute for chewing tobacco and in an effort to quit smoking."¹⁴³ During the twenty-four hours leading up to his crime, he did not sleep, and he consumed over 120 cough drops (approximately one gram of dextromethorphan).¹⁴⁴ His behavior accordingly became bizarre:

On the trip up the mountain road, the defendant became increasingly anxious and apprehensive, and had feelings of unreality. He began to notice that the trees surrounding the road had a particular type of bark that was "soft and unnatural." He was paranoid and questioned his stepson about what was occurring and why he was being "tricked." At approximately the halfway point to the camp, the defendant

139. *Commonwealth v. Ruddock*, 701 N.E.2d 300, 302 (Mass. 1998); see also *United States v. Santiago-Vargas*, 5 M.J. 41, 42-43 (C.M.A. 1978) ("[T]he appellant does not come within its scope because he knew that, when intoxicated, he behaved in a violent manner."); *Mullin v. State*, 425 So.2d 219, 220 (Fla. Dist. Ct. App. 1983) ("Additionally, we note no support for the lower court's exclusion of testimony regarding appellant's condition. Appellant's expert witness, a neurologist, was qualified to testify to the medical effects of sniffing glue and other hydrocarbons upon human behavior if he knew the effects. Appellant's testimony of his prior abuse, if relevant to the above medical opinion, would also be admissible to establish a voluntary intoxication defense to the specific intent crime."); *Commonwealth v. Brennan*, 504 N.E.2d 612, 616 (Mass. 1987) ("The court in [a previous Massachusetts case] suggested that if the jury finds that the defendant had a latent mental disease or defect which caused the defendant to lose the capacity to understand the wrongfulness of his conduct or to conform his conduct to the requirements of the law, lack of criminal responsibility is established even if voluntary consumption of alcohol activated the illness, unless he knew or had reason to know that the alcohol would activate the illness. We adopt that suggestion here." (citation omitted)).

140. 732 P.2d 622 (Colo. 1987).

141. *Id.* at 625-26.

142. *Id.* at 625

143. *Id.*

144. *Id.*

stopped his pickup truck. When Kim and Roller stopped their truck to make sure everything was all right, [the defendant] demanded that all of the individuals kneel in prayer with him. Kim testified that he had never known Low to be “a religious person,” but imagined that the beauty of the wilderness inspired Low to demand the prayer session. Upon concluding the prayer, Low insisted that Roller drive Shane to the campsite in Kim’s truck, and that Kim drive Low’s truck with Low as a passenger. Kim complied because Low appeared to be tired from his trip from Missouri. During the remainder of the ride to the campsite, the defendant speculated on whether he was alive or dead.¹⁴⁵

He then stabbed a member of his hunting party and attempted to stab himself.¹⁴⁶ At trial, the defense expert asserted that the dextromethorphan caused an “organic delusional syndrome” or “toxic psychosis.”¹⁴⁷ The trial court found that the prosecution failed to prove *mens rea*.¹⁴⁸ The appellate court considered whether the facts would fit a defense of involuntary intoxication.¹⁴⁹ The court defined the defense as “intoxication that is not self-induced, and by definition occurs when the defendant does not knowingly ingest an intoxicating substance, or ingests a substance not known to be an intoxicant.”¹⁵⁰

145. *Id.* at 624.

146. *See id.* at 625.

147. *Id.*; see also Barry K. Logan et al., *Dextromethorphan Abuse Leading to Assault, Suicide, or Homicide*, 57 J. FORENSIC SCI. 1388, 1388 (2012) (“There is a significant Internet drug subculture regarding the recreational use of dextromethorphan, discussing and promoting the intoxicating and hallucinogenic effects of the drug, including out-of-body experiences which can be achieved by increasing dose levels through four ‘plateaus’ to achieve the ultimate dissociative high.” (citation omitted)).

148. *Low*, 732 P.2d at 626.

149. *See id.* at 627. The court also opined on insanity and impaired mental condition. *See id.* at 627–30.

150. *Id.* at 627 (emphasis added) (citing COLO. REV. STAT. ANN. § 18-1-804 (West 2017)); see also *City of Minneapolis v. Altimus*, 238 N.W.2d 851, 858 (Minn. 1976) (“Involuntary intoxication, we note in summary, is a most unusual condition. The circumstances in which an instruction on the defense of involuntary intoxication will be appropriate will accordingly be very rare. We hold, nevertheless, that in the instant case such an instruction was necessary because defendant introduced evidence sufficient to raise the defense of temporary insanity due to involuntary intoxication. Defendant’s evidence indicated that at the time he committed the acts in question he was intoxicated and unaware of what he was doing due to an unusual and unexpected reaction to drugs prescribed by a physician. We further believe that failure to give an instruction on involuntary intoxication was prejudicial error in view of the finding of not guilty on the charge of simple assault, a

To be clear, the defense is not a license to excuse errors in drug ingestion. Accordingly, it requires more than the defendant's mere subjective belief about the nature and effects of the substance. Several jurisdictions have predicated the availability of the defense on whether a reasonable person could expect that a given drug (or its typical pairings) could produce the given effect. In *People v. Velez*,¹⁵¹ a California appellate court refused to permit an involuntary intoxication jury instruction to a defendant who had smoked a marijuana cigarette laced with PCP because a reasonable person should be aware that the drugs are often mixed.¹⁵² In contrast, courts have been more sympathetic to defendants that suffer from unexpected effects of prescription drugs,¹⁵³ though the success of the defense depends on the context of the prescription use.¹⁵⁴

finding which suggests very strongly that the jury believed defendant's evidence that the Valium was responsible for his behavior.").

151. 221 Cal. Rptr. 631 (Cal. Ct. App. 1985).

152. *See id.* at 637–38. The illegality of both drugs also influenced the court's thinking. *See id.* at 636 ("A plausible argument could be made that, as a matter of policy, defendant should not be wholly excused from criminal responsibility for harm caused others, and arising out of his consumption of an unlawful drug, on the ground that allowance of such an excuse would sanction consumption of unlawful drugs."). Similarly, a Pennsylvania appellate court refused to excuse an interaction between a benzodiazepine and alcohol. *See Commonwealth v. Todaro*, 446 A.2d 1305, 1308 (Pa. Super. Ct. 1982).

153. *See Perkins v. United States*, 228 F. 408, 415 (4th Cir. 1915) ("A patient is not presumed to know that a physician's prescription may produce a dangerous frenzy. But he is bound to take notice of the warning appearing on a prescription, and this obligation is, of course, stronger if he reads the prescription. If, for example, in this case, the prescription itself, or the realized effect of the first dose of the chloral, or both together, warned the defendant before he had lost control of himself that he might be thrown into an uncontrollable frenzy [sic], then he would be guilty of murder or manslaughter according to the view the jury might take of the circumstances."); *Crutchfield v. State*, 627 P.2d 196, 200 (Alaska 1980) ("The drug tranxene was given to Crutchfield by his physician. He had no notice that it was a drug whose use while driving was prohibited under [Alaska Law]. Moreover, he had no way of discovering the prohibited character of the drug until expert testimony at trial indicated that it had a composition similar to valium, a drug specifically prohibited by regulation. Under these circumstances, it appears that Crutchfield could not reasonably understand that his contemplated conduct was prohibited." (footnote omitted)); *Burnett v. Commonwealth*, 284 S.W.2d 654, 659 (Ky. 1955) ("If the jury shall believe from the evidence that when the defendant's automobile struck Mrs. Oakley Wells (if you shall believe from the evidence beyond a reasonable doubt that it did so), the defendant was under the influence of drugs taken under a physician's prescription to such an extent that he was incapacitated from exercising slight care in operating his automobile, and that he did

In considering the case of noncompliant insanity, the unmasked mental illness defense presents a simple question: did the defendant know what was going to happen when he stopped the medication? It is unclear how closely the defendant's accused criminal acts must be to previous off-medication behavior.¹⁵⁵ Nonetheless, this question goes to the issue of whether the defendant—while treated—believed that he suffered from some mental illness. Theoretically, looking at the defendant's medical records should easily determine this question. That is, while on treatment, did the patient demonstrate an understanding that he was ill and of the consequences of stopping treatment? Yet what a defendant said to his provider is relevant but not dispositive—even if the defendant had a regular physician or therapist. What is more relevant, and perhaps dispositive but very difficult to determine, is what the defendant was thinking when he stopped taking medication. Did his mental illness “flare” up and drive him towards noncompliance? Circumstantial evidence may provide some insight into that question, but in the end, the question is one of mental state that criminal law is left to infer.¹⁵⁶

The next section considers a criminal defense doctrine that looks at the situational context and circumstantial evidence: self-defense.

C. *Self-Defense*

Self-defense is situational. That is, self-defense requires the court and fact finder to assess the entire context of a situation. For example, the Model Penal Code (“MPC”) bars the defense when “the actor, with the purpose of causing death or serious

not know or have reasonable grounds to foresee in taking such drugs that his mental condition would become such as to render him incapable of exercising such care in driving the automobile on the street at the time and place and would thereby endanger the lives and safety of persons thereon, you will find the defendant not guilty.”).

154. See *Jones v. State*, 648 P.2d 1251, 1257 (Okla. Crim. App. 1982) (In a case of lorazepam mixing with alcohol, the appeals court deferred to the jury.).

155. Cf. *TIFFANY & TIFFANY*, *supra* note 11, at 467–72 (discussing ambiguity in case law).

156. See James A. Macleod, *Belief States in Criminal Law*, 68 OKLA. L. REV. 497, 498 (2016) (“The law often requires fact-finders to use circumstantial evidence to determine another’s mental state.”).

bodily injury, provoked the use of force against” himself.¹⁵⁷ Intoxication—discussed above in Section IV.A—also often negates the defense.¹⁵⁸

Applying this doctrine to the noncompliant insanity case would provide firm doctrinal support to extend the insanity inquiry to the moment of noncompliance, provided the causal link between noncompliance and the crime could be established. Like the first two analogies considered, the inquiry becomes one of gauging the mental state of a mental patient when he decides to stop taking medication. The holistic inquiry for the “unmasking insanity” cases once again becomes relevant. Hence, self-defense helps justify the move to expand the time frame but provides little guidance on how to analyze the additional information gained from considering the time course before the crime.

The next defense, multiple personality, assumes that the expanded timeframe is required and provides a rubric with which to analyze an individual who is passing from sanity to insanity and potentially back again.

D. The “Multiple Personality” Defense

Although there has been some debate about the prevalence of dissociative identity disorder (one subtype is popularly known as multiple personality disorder), there is increasing evidence that it does exist in a subset of traumatized patients.¹⁵⁹ Indeed, the connection between dissociative identity disorder

157. MODEL PENAL CODE § 3.04(2)(b)(i) (AM. LAW INST., Proposed Official Draft 1962).

158. See Robinson, *supra* note 8, at 7–8; see also State v. Coyle, 67 S.E. 2d 24, 27 (S.C. 1910) (“[V]oluntary intoxication is no excuse for crime . . .”).

159. See David Spiegel et al., *Dissociative Disorders in DSM-5*, 9 ANN. REVS. CLINICAL PSYCHOL. 299, 301 (2013) (“However, the persistence of solidly grounded clinical description and case series indicates that the disorder is more than an iatrogenic response to maladroitness therapeutic suggestion.” (citations omitted)); see also A.A.T. Simone Reinders, *Cross-examining dissociative identity disorder: Neuroimaging and etiology on trial*, 14 NEUROCASE 44, 50 (2008) (“How can it be determined whether the origin of the subject’s DID is traumagenic, iatrogenic or pseudogenetic? Is the disorder genuine, subconsciously simulated or consciously malingered?”). See generally Elyn R. Saks, *Multiple Personality Disorder and Criminal Responsibility*, 25 U.C. DAVIS L. REV. 383 (1992) (for a more theoretical discussion and survey of earlier psychiatric literature).

and schizophrenia is beginning to be elucidated.¹⁶⁰ The non-compliant insanity defendant could be analyzed using a two-personality approach. The “host” represents a patient in psychotic remission, compliant with treatment. The “alternate” appears when medication is discontinued—and is most likely to commit a crime.¹⁶¹

Courts have adopted three approaches in dealing with multiple personality defenses: (1) the unified approach, in which the court considers the whole person without acknowledging the alleged multiple personalities inhabiting the same body; (2) the host approach, which focuses on whether the “host” personality could control the “alternate” personality at the time of the crime; and (3) the alter or “alternate” approach, which focuses on whether the “alternate” personality in control at the time of crime is insane.¹⁶² The unified approach does not acknowledge the existence of mental illness, which is not a particularly defensible approach when the inquiry is not whether the defendant has a mental illness, but whether he should be responsible for triggering it.¹⁶³ The host and alter approaches are more promising.

The host approach is typified by *United States v. Denny-Shaffer*.¹⁶⁴ The defendant, accused of kidnapping a baby from a

160. See Brad Foote & Jane Park, *Dissociative Identity and Schizophrenia: Differential Diagnosis and Theoretical Issues*, 10 CURRENT PSYCHIATRY REPS. 217, 221 (2008) (“We have presented a brief overview of current research and theory about the relationship between DID and schizophrenia, which is currently an area of much interest due to the extensive symptom overlap noted previously, combined with the increasing recognition that trauma’s role in shaping psychotic illness may be much greater than previously thought.”).

161. To be clear, “[t]he weight of the evidence to date is that although a statistical relationship does exist between schizophrenia and violence, only a small proportion of societal violence can be attributed to persons with schizophrenia.” Elizabeth Walsh et al., *Violence and schizophrenia: examining the evidence*, 180 BRIT. J. PSYCHIATRY 490, 494 (2002).

162. See Juliette K. Orr, *Multiple Personality Disorder and The Criminal Court: A New Approach*, 28 SW. U. L. REV. 651, 655–59 (1999); see also Mary Eileen Crego, Note, *One Crime, Many Convicted: Dissociative Identity Disorder and The Exclusion of Expert Testimony in State v. Greene*, 75 WASH. L. REV. 911, 922–25 (2000). See generally Sabra McDonald Owens, Note, *The Multiple Personality Disorder (MPD) Defense*, 8 MD. J. CONTEMP. LEGAL ISSUES 237 (1997) (collecting cases).

163. See Orr, *supra* note 162, at 658 (“In focusing on the whole person, it completely ignores the fact that the defendant has a mental disorder.”).

164. 2 F.3d 999 (10th Cir. 1993).

hospital and transporting him over state lines,¹⁶⁵ attempted to plead insanity on the basis of multiple personalities.¹⁶⁶ The Court of Appeals held that the defendant had made a prima facie case for insanity—but that the focus should be on whether the “host” personality was aware of the offense and its wrongfulness.¹⁶⁷ Likewise, in the noncompliant insanity case, the question would be whether the defendant—in a medicated, “more sane” “host” state—understood the consequences of discontinuing medication. This could be a very fact-intensive and expert-heavy inquiry into the state of mind of a defendant.

In contrast, the alter approach would be simpler and would reduce to the approach of merely looking at the immediate time frame of the crime. In *State v. Rodrigues*,¹⁶⁸ the Supreme Court of Hawaii contended with a defendant who argued that he had sodomized and raped young girls while in another personality.¹⁶⁹ Although the court remanded for technical reasons, it directed that insanity be assessed at the time of the crime:

The cases dealing with [Multiple Personality Disorder] can be examined in a similar fashion as other defenses of insanity. If a lunatic has lucid intervals of understanding he shall answer for what he does in those intervals as if he had no deficiency. The law governs criminal accountability where at the time of the wrongful act the person had the mental capacity to distinguish between right and wrong or to conform his conduct to the requirements of the law. Since each personality may or may not be criminally responsible for its acts, each one must be examined under [Hawaii’s insanity standard at the time].¹⁷⁰

In the noncompliant insanity context, this approach comports well with the tact taken by the courts in *Shin*, *Samuels*, and *McCleary* as the focus is on the “alternate” or noncompliant personality in control at the time of the crime. Such an approach, however, ignores the “host” or “sane” personality’s

165. *Id.* at 1002.

166. *See id.* at 1012–17.

167. *See id.* at 1019 (“On the other hand, there is substantial evidence that raises an insanity defense for the defendant, viewed as the host personality, respecting such confining or holding the baby after the abduction.”).

168. 679 P.2d 615 (Haw. 1984).

169. *Id.* at 617–18.

170. *Id.* at 618.

role in triggering insanity—if indeed the medication-compliant patient had any control over stopping medication.

Although the multiple personality approach provides further support for expanding the timeframe of the insanity inquiry and bolsters considering what the “sane” or medication-compliant defendant does before going off medication, it leaves us with another problem: how much control the defendant in remission had over discontinuing medication. But this is an acceptable inquiry, because it is the same one that capped the theoretical discussion in Part III and many of the previous analogies considered. And at core, courts must confront this issue. Before turning to the conclusion, the next section will discuss some defenses that might superficially aid the inquiry but actually ask the same questions of other parts or do not add much to the analysis.

E. Less Useful Defenses

This section surveys some potential candidates for analogies that do not advance the inquiry.

At first, the little-used defenses of amnesia, automatism, and duress seem to shed light on the issue of noncompliant insanity. But they simply ask different questions—with equally difficult answers—of the same time frames that are considered above. Amnesia inquires whether the defendant remembers the events in question.¹⁷¹ The doctrine provides little insight into

171. The question in these cases is often whether the defendant is fit to stand trial if he cannot remember the events in question. *See, e.g.*, *United States v. Stevens*, 461 F.2d 317, 320 (7th Cir. 1972) (“We believe that the only theory by which the defendant could be found on this record to have been incompetent to stand trial would be that incompetence requires no more than the present inability to recall the events of one’s life during the period of the commission of a crime with which one is charged. Moreover, we do not believe that due process requires that every defendant who claims loss of memory go free without trial.”); *Wilson v. United States*, 391 F.2d 460, 463 (D.C. Cir. 1968) (Skelly Wright, J.) (“We agree with Judge McGuire’s general approach to assessing the question of competency. However, we remand to the trial judge for more extensive post-trial findings on the question of whether the appellant’s loss of memory did in fact deprive him of the fair trial and effective assistance of counsel to which the Fifth and Sixth Amendments entitle him.”); *United States v. Hearst*, 412 F. Supp. 858, 861 (N.D. Cal. 1975) (“But even if Dr. West is correct in his diagnosis that the defendant’s memory is so impaired as to prevent her from relating the events of her life during the period of the alleged commission of the crime, such amnesia would not alone constitute sufficient grounds for a finding of incompetency to stand trial.”);

whether to focus on the crime itself or the decisions surrounding noncompliance with medication and does not provide any easier inquiries into these events. Similarly, automatism or unconsciousness¹⁷² asks if the defendant had voluntary control over his actions, which is similar to the question posed in insanity cases.¹⁷³ Common law duress presents a similar problem (and recapitulates many of the same issues that were relevant in self-defense), for although it does consider actions before the criminal act, it provides little insight into whether internal mental illness is coercive.¹⁷⁴

Despite these doctrinal dead ends, courts and the criminal law must resolve cases that come in—even without a clear sci-

People v. Stahl, 2014 IL 115804, ¶ 27 (“The issue of whether a defendant’s amnesia as to the events surrounding the crime *per se* renders him unfit to stand trial is one of first impression before this court.”). However, sometimes amnesia is used to negate intent. *See, e.g.*, *Tatum v. United States*, 190 F.2d 612, 617 (D.C. Cir. 1951) (Bazelon, J.) (“We do not intend to characterize the case for the defense as either strong or weak. That is unnecessary, for ‘in criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. He is entitled to have such instructions even though the sole testimony in support of the defense is his own.’” (citation omitted)); *United States v. Marriott*, 15 C.M.R. 390, 392–93 (1954) (“Amnesia due to alcoholism is a possibility also relevant to the instant case—for it is admitted that the accused and his comrades were to some extent under the influence of intoxicating liquor.” (citation omitted)). *See generally* Note, *Amnesia: A Case Study in the Limits of Particular Justice*, 71 YALE L.J. 109 (1961).

172. *See, e.g.*, *People v. Grant*, 377 N.E.2d 4, 8 (Ill. 1978) (“A person in a state of automatism lacks the volition to control or prevent the involuntary acts. Such involuntary acts may include those committed during convulsions, sleep, unconsciousness, hypnosis or seizures.”). *See generally* Michael Corrado, *Automatism and The Theory of Action*, 39 EMORY L.J. 1191 (1990); Sanford J. Fox, *Physical Disorder, Consciousness, and Criminal Liability*, 63 COLUM. L. REV. 645 (1963); F.M. Kamm, *Action, Omission, and The Stringency of Duties*, 142 U. PA. L. REV. 1493 (1994); Kevin W. Saunders, *Voluntary Acts and The Criminal Law: Justifying Culpability Based on The Existence of Volition*, 49 U. PITT. L. REV. 443 (1988).

173. However, despite the similarity in the defenses for the purposes of this paper, they are distinct. *See, e.g.*, *State v. Caddell*, 215 S.E.2d 348, 360 (N.C. 1975) (“The defenses of insanity and unconsciousness are not the same in nature, for unconsciousness at the time of the alleged criminal act need not be the result of a disease or defect of the mind. As a consequence, the two defenses are not the same in effect, for a defendant found not guilty by reason of unconsciousness, as distinct from insanity, is not subject to commitment to a hospital for the mentally ill.”).

174. *See generally* Steven J. Mulroy, *The Duress Defense’s Uncharted Terrain: Applying it to Murder, Felony Murder, and The Mentally Retarded Defendant*, 43 SAN DIEGO L. REV. 159 (2006); L.I. Reiser, Annotation, *Coercion, compulsion, or duress as defense to criminal prosecution*, 40 A.L.R.2d 908 (1955).

entific understanding of the mental diseases from which defendants potentially suffer. The conclusion begins to sketch a way forward.

V. CONCLUSION

In considering how to treat noncompliant insanity, it is important to make an individualized assessment of each defendant. Because around 50% of schizophrenics lack insight into their disease, criminally punishing people for noncompliance *who do not know they have a mental disease* seems to punish those who neither deserve sanction nor will respond to it. Criminal commitment seems like the better way in those cases. But returning to the problem posed in the introduction of this paper, what to do about those with insight? After all, "insanity must be the result of circumstances beyond the control of the actor."¹⁷⁵ Again, the inquiry must be individualized as far as possible. The easiest—and rarest—case is the schizophrenic patient who understands that he is sick, requires treatment for that illness, and needs medication to ensure that he does not do anything dangerous. If some external factor (such as cost, work schedule, or distraction) is what stands between a patient and compliance, then how many excuses will the law allow in?¹⁷⁶ If some internal factor (for instance, exacerbation of the disease) is at issue, then the case for allowing insanity in becomes much stronger.

In the face of scientific and medical uncertainty, a *per se* rule that confines the inquiry to the events immediately surrounding the crime, and that does not encompass what happened

175. *United States v. Henderson*, 680 F.2d 659, 664 (9th Cir. 1982) (citing *United States v. Burnim*, 576 F.2d 236, 238 (9th Cir. 1978)).

176. *Cf. United States v. Alexander*, 471 F.2d 923, 968 (D.C. Cir. 1972) (McGowan, J., dissenting) ("Judge Bazelon also finds reversal to be compelled by reason of a statement made to the jury by the court in the course of its instructions. The bare words used are not a faulty statement of the law. They remind the jury that the issue before them for decision is not one of the shortcomings of society generally, but rather that of appellant Murdock's criminal responsibility for the illegal acts of which he had earlier been found guilty; and, the court added in the next breath, that issue turns on 'whether [appellant] had an abnormal condition of the mind that affected his emotional and behavioral processes at the time of the offense.' This last is, of course, an unexceptionable statement of what we have declared to be the law in this jurisdiction." (alterations in original)).

with medication—as adopted in *Shin*, *Samuels*, and *McCleary*—may be easier to administer and lead to fewer mistakes than an individualized, multi-factor approach for every defendant who makes it to trial.¹⁷⁷ Especially considering that a successful insanity defense leads to criminal commitment with potential treatment, it is not clear that defendants would attempt to game the system under a per se rule system (being committed to a criminal mental facility is not exactly a win for the defendant, though defendants may have individual preferences). Also, courts and the experts who inform them are not yet ready to opine on these individualized and complex issues.

This state of affairs is not unprecedented. Attempting to grapple with at least one physician's view of the world, one court, in 1965, cautioned that a particular scientific fad or idiosyncrasy need not leave an imprint on the law:

If the law were to accept [the defense expert's] medical doctrine as a basis for a finding of second rather than first degree murder, the legal doctrine of *mens rea* would all but disappear from the law. Applying [the defense expert's] theory to crimes requiring specific intent to commit, such as robbery, larceny, rape, etc., it is difficult to imagine an individual who perpetrated the deed as having the mental capacity in the criminal law sense to conceive the intent to commit it. Criminal responsibility, as society now knows it, would vanish from the scene, and some other basis for dealing with the offender would have to be found. At bottom, this would appear to be the ultimate aim of the psychodynamic psychiatrists.¹⁷⁸

That same court opted to consider the medical theory in the sentencing phase of the trial.¹⁷⁹ Although that option is open in the noncompliant insanity cases, that solution poses challenges.

177. Cf. ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 219 (2006) ("Most surprisingly, rules might sometimes reduce error on the part of lower-court judges even though rules are overinclusive and underinclusive relative to the rules' background justifications.").

178. *State v. Sikora*, 210 A.2d 193, 203 (N.J. 1965) (citation omitted).

179. *See id.* at 204 ("In the prosecution of accused for noncapital crimes similar use should be made of the type of medical opinion relied upon here. Under our present system, such psychiatric testimony properly serves a postconviction purpose. It may be included in the pre-sentence probation report or submitted to the sentencing judge in any other suitable fashion. If in his judgment and discretion it reveals limited criminal blameworthiness, such fact may be reflected in the sentence.").

It is simply no answer to say that which we do not consider in liability becomes yet another factor in sentencing. Such a dodge makes sentencing too multi-factorial and opens the way for arbitrariness to leak in. Although emergent theories may have a role initially in sentencing, there needs to be a reprocessing of the science and consideration of what can graduate from sentencing to liability—and what theories need to be consigned to the dustbin of history.¹⁸⁰

Indeed, these temporary resolutions ought not be permanent.¹⁸¹ As we learn more about schizophrenia and other mental diseases, it should become necessary to reexamine the per se rule. Perhaps the per se rule was right all along; or perhaps not. It is likely that courts will find some defendants who have the insight to understand that stopping antipsychotic medications, like discontinuing antiepileptic medications, can have dramatic consequences. Nonetheless, noncompliant insanity provides a fascinating and critical example of where neuroscience may soon be able to help inform the law—and will hopefully continue the conversation between the courts and experts in shaping the insanity defense.

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180. *Cf. Commonwealth v. Campbell*, 284 A.2d 798, 802 (Pa. 1971) (Pomeroy, J., concurring) (“I agree that, at this stage of our scientific knowledge, the appellant’s voluntary ingestion of hallucinogenic drugs, and his resultant disorientation, should be likened to voluntary intoxication and not to legal insanity. I thus concur in the opinion of the Court that the trial judge committed no error in so presenting the issue to the jury.”).

181. The Court has recognized that per se rules can be problematic—especially in neuroscience. *See Roper v. Simmons*, 543 U.S. 551, 588 (2005) (O’Connor, J., dissenting) (“Adolescents as a class are undoubtedly less mature, and therefore less culpable for their misconduct, than adults. But the Court has adduced no evidence impeaching the seemingly reasonable conclusion reached by many state legislatures: that at least some 17-year-old murderers are sufficiently mature to deserve the death penalty in an appropriate case. Nor has it been shown that capital sentencing juries are incapable of accurately assessing a youthful defendant’s maturity or of giving due weight to the mitigating characteristics associated with youth.”).

TRUMP'S TRAVEL BAN: LAWFUL BUT ILL-ADVISED

Waging relentless and barbaric genocide against minority religious groups in Syria and Iraq,¹ ISIS² has murdered,³ raped,⁴ and kidnapped⁵ Yazidis and Christians, among others. Almost

1. USCIRF in December 2015 and U.S. Secretary of State John Kerry in March 2016 declared that ISIS committed genocide against Yazidis, Christians, and Shi'a Muslims, and the U.S. Holocaust Memorial Museum (USHMM) reported in 2015 that ISIS conducted genocide in summer 2014 against Yazidis. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, ANNUAL REPORT 99–100 (2016), <http://www.uscirf.gov/sites/default/files/USCIRF%202016%20Annual%20Report.pdf> [<https://perma.cc/9S9U-KNEV>] [hereinafter *USCIRF REPORT 2016*].

2. The Author uses the recognizable acronym "ISIS" as an abbreviation for "The Islamic State of Iraq and Syria." See Helen Lock, *Isis vs Isil vs Islamic State: What do they mean—and why does it matter?*, INDEPENDENT (Sept. 14, 2014, 2:12 PM), <http://www.independent.co.uk/news/world/middle-east/isis-vs-isil-vs-islamic-state-what-is-in-a-name-9731894.html> [<https://perma.cc/QLQ8-FPZY>]. Yet no government has ever recognized ISIS as a state. See Richard Allen Greene & Nick Thompson, *ISIS: Everything you need to know about the group*, CNN (Aug. 11, 2016, 12:12 PM), <http://www.cnn.com/2015/01/14/world/isis-everything-you-need-to-know/index.html> [<https://perma.cc/TKX6-KBJ9>]. Moreover, according to the Islamic Society of Britain and the Association of Muslim Lawyers, ISIS "has no standing with faithful Muslims." Lock, *supra*. ISIS can also stand for "The Islamic State of Iraq and al Sham," with "al Sham" signifying the area ISIS seeks to control consisting of southern Turkey through Syria to Egypt (including Lebanon, Israel, the Palestinian territories and Jordan). *Id.* This area can also be referred to as "the Levant"—hence the "L" in ISIL, the acronym that was favored by the Obama administration. *Id.* In June 2014, ISIS publically stated that it wished to be referred to as IS (Islamic State). *Id.* The Author, having no desire to legitimize the imperialistic aspirations of this terrorist organization, continues to use the acronym, ISIS.

3. ISIS stoned, beheaded, and electrocuted members of religious minority groups. *USCIRF REPORT 2016, supra* note 1, at 100 (2016). USHMM reports that ISIS murdered 1562 Yazidis in the summer of 2014. *Id.* at 101. The United Nations reports 16 likely Yazidi mass graves near Sinjar. *Id.* The Iraqi Defense Minister reports ISIS murdering 2000 Iraqis in (Christian-populated) Ninevah Plains from January to August 2015. *Id.* ISIS (comprised of mostly Sunni Muslims) also mass-murdered Shi'a Muslims (the religious majority in Iraq) through bombings and targeted individual Sunni Muslims who disagree with its ideology. *Id.*

4. In August 2014, ISIS fighters kidnapped, raped, sold into sex-slavery, or killed thousands of Yazidi women, including pre-pubescent girls in Sinjar. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, ANNUAL REPORT 96–97 (2015), <http://www.uscirf.gov/sites/default/files/USCIRF%20Annual%20Report%202015%20%282%29.pdf> [<https://perma.cc/8FWW-3NG9>].

5. The United Nations Assistance Mission for Iraq (UNAMI) and the Office of the United Nations High Commissioner for Human Rights reported in January

90% of Iraq's Mandeian population has been killed or displaced, and only a fourth of the 1700-year-old Christian population remains.⁶ Citing religious persecution⁷ and security concerns presented by terrorist groups,⁸ in January 2017 President Trump issued the controversial Executive Order 13,769, "Protecting the Nation From Foreign Terrorist Entry Into the United States" (the "Original Order"). Section Three of the Original Order banned the entry of nationals from Iraq, Iran, Sudan, Libya, Somalia, Syria and Yemen for 90 days.⁹ In Section Five, the Original Order indefinitely postponed the admission of Syrian refugees,¹⁰ gave preference to "refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality,"¹¹ and suspended the Refugee Admissions Program for 120 days.¹²

2016 that since August 2014 ISIS kidnapped 5838 people (3192 women, 2646 men). *USCIRF REPORT 2016*, *supra* note 1, at 101.

6. *Id.* at 100.

7. Exec. Order No. 13,769 § 1, 82 Fed. Reg. 8977, 8977 (Jan. 27, 2017) (revoked & replaced with Exec. Order 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017)) ("[T]he United States should not admit those who engage in acts of bigotry or hatred (including . . . the persecution of those who practice religions different from their own) . . .").

8. *Id.* As of October 2017, ISIS has been removed from 87% of the territory it once held in Iraq and Syria. Susan Jones, *Military Spokesman: ISIS 'On the Verge of Devastating Defeat' in Iraq and Syria*, CNSNEWS.COM (Oct. 17, 2017), <https://www.cnsnews.com/news/article/susan-jones/military-spokesman-isis-verge-devastating-defeat-iraq-and-syria> [<https://perma.cc/E8QR-CRMW>].

9. *See* Exec. Order No. 13,769 § 3(c), 82 Fed. Reg. 8977, 8977 (Jan. 27, 2017) (revoked & replaced with Exec. Order 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017)); 8 U.S.C. § 1187(a)(12) (2016).

10. Exec. Order No. 13,769 § 5(c), 82 Fed. Reg. 8977, 8979 (Jan. 27, 2017) (revoked & replaced with Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017)).

11. *Id.* § 5(b) ("Upon the resumption of USRAP admissions, the Secretary of State, in consultation with the Secretary of Homeland Security, is further directed to make changes, to the extent permitted by law, to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality. Where necessary and appropriate, the Secretaries of State and Homeland Security shall recommend legislation to the President that would assist with such prioritization.")

12. *Id.* § 5(a). The Immigration and Nationality Act of 1965 establishes the criteria for asylum. The Act provides:

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the

The Original Order sparked debate over whether such provisions were within the statutory and constitutional authority of the President of the United States, and whether they violated the Establishment Clause of the First Amendment. A few days after President Trump signed the Original Order, the States of Washington and Minnesota challenged it in the United States District Court for the Western District of Washington.¹³ Judge James Robart ruled in favor of the challengers, and issued a nationwide injunction against enforcement of the Original Order.¹⁴ During the President's subsequent motion to stay in the Ninth Circuit, the parties put forward many of the best arguments for and against the Original Order's legality.¹⁵ Ultimately, however, the Ninth Circuit denied the motion to stay Judge Robart's ruling.¹⁶

President Trump rescinded and replaced the Original Order in March 2017.¹⁷ Executive Order 13,780 (the "Revised Order") kept the 90-day ban for six of the original countries, but removed Iraq;¹⁸ kept the 120-day suspension of refugees, but removed the indefinite ban on Syrian refugees;¹⁹ specified that

requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A) of this title.

Immigration and Nationality Act of 1965, 8 U.S.C. § 1158(b)(1)(A) (2012). The Act defines "refugee" as one "who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* § 1101(a)(42)(A). The burden of proof is on the applicant to demonstrate that "race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant." *Id.* § 1158(b)(1)(B). Asylum status confers a right to work in the United States, but not a permanent right to remain; it can also be revoked if conditions change in the refugee's country of origin eliminating his well-founded fear of persecution. *See* § 1151(c).

13. *Washington v. Trump*, No. C17-0141JLR, 2017 U.S. Dist. LEXIS 16012 at *2 (W.D. Wash. Feb. 3, 2017), *aff'd*, 847 F.3d 1151 (9th Cir.), *cert. denied*, *Golden v. Washington*, 138 S. Ct. 448.

14. *Id.* at *3, *10.

15. *See generally* *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017), *cert. denied*, *Golden v. Washington*, 138 S. Ct. 448.

16. *Id.* at 1156.

17. Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,212 (Mar. 9, 2017) (replacing the Original Order).

18. *Id.* § 1(f), (g), at 13,211–12.

19. *See id.* § 6(a), at 13,215.

the Revised Order is inapplicable to lawful permanent residents,²⁰ persons with valid visas on the effective date of the Original Order²¹ or the Revised Order,²² or refugees scheduled for travel to the United States before the effective date of the Revised Order;²³ authorized the Secretary of State and Secretary of Homeland Security to jointly make case-by-case exceptions to the refugee suspension²⁴ and consular officials to make exceptions to the travel restrictions;²⁵ and eliminated (but defended²⁶) the provision giving preference to members of minority religions.²⁷ In June 2017, the Supreme Court—taking up two new challenges to the Revised Order—ordered a partial stay, holding that the Revised Order could only be enforced against foreign nationals “who can[not] credibly claim a bona fide relationship with a person or entity in the United States.”²⁸

This Note will explore the contours of the debate over the validity of the Original Order, and argue that the Original Order was lawful, but a poor policy choice. The first part of this Note argues that the Original Order was within the lawful constitutional and statutory authority of the President of the United States and did not violate the Establishment Clause of the First Amendment. The second part of this Note, however, argues that giving preference to individual refugees on the condition that the “religion of the individual is a minority religion in the individual’s country of nationality” is a poor policy choice, reflecting an oversimplification of and common misconception of religious persecution. Determining whether a refugee has a suitable country of refuge closer to him than the United States, and prioritizing refugees accordingly, could be a more effective way of stopping religious persecution.

20. *Id.* § 3(b)(i), at 13,213.

21. *Id.* § 3(a)(ii).

22. *Id.* § 3(a)(iii).

23. *Id.* § 6(a), at 13,215.

24. *Id.* § 6(c), at 13,216.

25. *Id.* § 3(c), at 13,214.

26. *Id.* § 1(b)(iv), at 13,210.

27. *See id.* § 1(h)(i), at 13,212.

28. *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2089 (2017).

I. THE STATUTORY AND CONSTITUTIONAL AUTHORITY
FOR THE ORIGINAL ORDER

This part first provides an evaluation of who had standing to challenge the order. Next, it argues that the Immigration and Nationality Act provided statutory authority for the President's Order. This part concludes by explaining why the Original Order did not violate the Establishment Clause or the Religious Freedom Restoration Act.

A. *Standing*

A preliminary question is whether anyone had standing to challenge the constitutionality of the Original Order. The Ninth Circuit held that the States of Washington and Minnesota had standing to challenge the Original Order under third-party standing doctrine, because the Supreme Court has held that schools may vindicate the rights of their students²⁹ and no one has challenged that state universities are branches of the state.³⁰

This is problematic, however, because the doctrine presumes that the third party is vindicating rights that another party actually has. The Ninth Circuit cited precedent that the Fifth Amendment's Due Process Clause "appl[ies] to all 'persons' within the United States, including aliens," and "certain aliens attempting to reenter the United States after traveling abroad."³¹ Yet aliens seeking initial admission to the United States enjoy no constitutional rights regarding their application.³² In addition to aliens attempting to reenter, the court identified refugees and "applicants who have a relationship with a U.S. resident or an institution that might have rights of its own to assert" as potential groups on behalf of which the

29. *Washington v. Trump*, 847 F.3d 1151, 1160 (9th Cir. 2017) (first citing *Runyon v. McCrary*, 427 U.S. 160, 175 & n.13 (1976); then citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 536 (1925); then citing *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1487–88 (9th Cir. 1995); and then citing *Ohio Ass'n of Indep. Sch. v. Goff*, 92 F.3d 419, 422 (6th Cir. 1996)), *cert. denied*, *Golden v. Washington*, 138 S. Ct. 448.

30. *Id.* at 1159.

31. *Id.* at 1165 (first quoting *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); then citing *Landon v. Plasencia*, 459 U.S. 21, 33–34 (1982)).

32. *See Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

States could assert due process rights.³³ The Ninth Circuit reasoned that some of the foreign nationals prevented from entering the country will be barred from being students, faculty, or researchers at state universities, and that some will not be able to return if they leave.³⁴ Washington alleged that two prospective visiting scholars, three prospective employees, and two interns from countries covered by the Executive Order were unable to enter the United States.³⁵ The Ninth Circuit held that these injuries gave the States standing³⁶ without finding that any specific, university-affiliated, foreign national had been in the country previously, was a refugee, or had “a relationship with a U.S. resident or an institution that might have rights of its own to assert.”³⁷ The court merely asserted that “the existence of such persons is obvious.”³⁸

Reasoning that the universities have standing, because they are asserting the constitutional rights of people whose constitutional rights are based on their relationship with a university, which possesses its own constitutional rights, would be circular. As mentioned previously, aliens seeking initial admission have no recognized constitutional rights. Universities cannot assert the constitutional rights of people who have no constitutional rights. Thus, the finding of standing did not meet the standard the court itself gave.

B. *Statutory Authority*

Even if a plaintiff had standing to challenge the Original Order, it was nonetheless authorized by existing statutory law. The Constitution gives the President the authority to “take Care that the Laws be faithfully executed.”³⁹ The Original Order cited the Immigration and Nationality Act of 1952 for authority:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detri-

33. *Trump*, 847 F.3d at 1166.

34. *Id.* at 1161.

35. *Id.* at 1159–60.

36. *Id.* at 1161.

37. *Id.* at 1166.

38. *Id.*

39. U.S. CONST. art. II, § 3.

mental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.⁴⁰

The State of Washington, however, alleged that the Original Order violated Section 1152 of the Immigration and Nationality Act of 1965, which provides:

Except as specifically provided in paragraph (2) and in sections 101(a)(27), 201(b)(2)(A)(i), and 203 [8 U.S.C. §§ 1101(a)(27), 1151(b)(2)(A)(i), 1153], no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.⁴¹

It should be noted at the outset that this statute does not prohibit religious discrimination, so this is only a challenge to Section Three of the Original Order⁴² (barring entry based on nationality) and the portion of Section Five postponing indefinitely the admission of Syrian refugees.⁴³ The statute has no bearing on the portion of Section Five that gave preference to religious minorities.⁴⁴

Preliminarily, it is problematic that the States of Washington and Minnesota made a Section 1152 challenge on behalf of a state university's potential visiting scholars, faculty, researchers, employees, interns, and students. Section 1152 only prohibits discrimination in the issuance of immigration visas. It seems likely that most, if not all, of the foreign nationals in the categories represented by the states would be applying for non-immigration visas, such as student visas⁴⁵ or employment visas.⁴⁶

40. 8 U.S.C. § 1182(f) (2012).

41. *Id.* § 1152(a)(1)(A).

42. Exec. Order No. 13,769 § 3(c), 82 Fed. Reg. 8977, 8978 (Jan. 27, 2017) (revoked & replaced with Exec. Order 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017)).

43. *Id.* § 5(c), at 8979.

44. *Id.* § 5(b).

45. See *Students and Employment*, U.S. CITIZENSHIP & IMMIGRATION SERV., <https://www.uscis.gov/working-united-states/students-and-exchange-visitors/students-and-employment> [<https://perma.cc/4GF5-T5TA>] ("The F-1 Visa (Academic Student) allows you to enter the United States as a full-time student at an accredited college, university, seminary, conservatory, academic high school, ele-

In any event, historical practice,⁴⁷ statutory context, and the canons of construction all refute the states' argument. Historically, President Donald Trump is not the first United States president to stop all immigration from a particular country. Even after the passage of the Immigration and Nationality Act of 1965, President Jimmy Carter invalidated the visas of all Ira-

mentary school, or other academic institution or in a language training program. You must be enrolled in a program or course of study that culminates in a degree, diploma, or certificate and your school must be authorized by the U.S. government to accept international students."); *id.* (To qualify for the F-1 Visa: "You must be enrolled in an 'academic' educational program, a language-training program, or a vocational program. Your school must be approved by the Student and Exchange Visitors Program, Immigration & Customs Enforcement. You must be enrolled as a full-time student at the institution. You must be proficient in English or be enrolled in courses leading to English proficiency. You must have sufficient funds available for self-support during the entire proposed course of study. You must maintain a residence abroad which you have no intention of giving up.").

46. See *H-2B Temporary Non-Agricultural Workers*, U.S. CITIZENSHIP & IMMIGRATION SERV., <https://www.uscis.gov/working-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers> [<https://perma.cc/NTH6-2HQF>] ("The H-2B program allows U.S. employers or U.S. agents who meet specific regulatory requirements to bring foreign nationals to the United States to fill temporary non-agricultural jobs."); *O-1 Visa: Individuals with Extraordinary Ability or Achievement*, U.S. CITIZENSHIP & IMMIGRATION SERV., <https://www.uscis.gov/working-united-states/temporary-workers/o-1-visa-individuals-extraordinary-ability-or-achievement> [<https://perma.cc/NV8S-F83W>] ("The O-1 nonimmigrant visa is for the individual who possesses extraordinary ability in the sciences, arts, education, business, or athletics, or who has a demonstrated record of extraordinary achievement in the motion picture or television industry and has been recognized nationally or internationally for those achievements.").

47. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) ("The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II."); *cf.* THE FEDERALIST NO. 37, at 172 (James Madison) (Terence Ball ed., 2003) ("All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.").

nian citizens during the Iranian Hostage Crisis.⁴⁸ Similarly, President Ronald Reagan halted all immigration from Cuba, with certain exceptions for relatives of U.S. citizens and other preferred immigrants.⁴⁹

Other portions of the Immigration and Nationality Act of 1965 expressly discriminate on the basis of national origin, suggesting that not all such discrimination is verboten. Section 1187(a)(12)(A)(ii) excepts from a visa waiver program nationals of Iraq and Syria and nationals from other countries designated as areas of concern by administrative agencies.⁵⁰ In fact, the countries from which the Original Order temporarily banned entry are those countries “referred to in . . . 8 U.S.C. 1187(a)(12),” that is, in the Immigration and Nationality Act of 1965.⁵¹ Similarly, Section 1152(a)(2)(A) of the 1965 Act establishes quotas limiting the number of immigrants from each country.⁵² This treats foreign nationals differently based on their nationality. A potential immigrant from a country from which more people desire to immigrate to the United States (Mexico, for instance) has to wait much longer than an immigrant from a country from which fewer people are attempting to immigrate (Switzerland, for example).⁵³ A reading of Section 1182(f) of the Immigration and Nationality Act of 1965 that prohibited the Original Order would thus be inconsistent with Sections 1187(a)(12)(A)(ii) and 1152(a)(2)(A) of the same Act.

As the government noted in oral argument, a principle of statutory construction is that when two statutes potentially conflict, they should be interpreted in a way that gives effect to both statutes if possible.⁵⁴ A court can give effect to both immi-

48. Jimmy Carter, Sanctions Against Iran Remarks Announcing U.S. Actions, 1 PUB. PAPERS 611, 611–12 (Apr. 7, 1980), available at <http://www.presidency.ucsb.edu/ws/?pid=33233> [<https://perma.cc/KQ6K-SNVT>].

49. Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 26, 1986).

50. 8 U.S.C. § 1187(a)(12)(A)(ii) (2012).

51. Exec. Order No. 13,769 § 3(c) (Jan. 27, 2017) (revoked & replaced with Exec. Order 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017)).

52. 8 U.S.C. § 1152(a)(2)(A) (2012).

53. See Josh Blackman, *The Statutory Legality of Trump's Executive Order on Immigration: Part IV*, JOSH BLACKMAN'S BLOG (Feb. 11, 2017), <http://joshblackman.com/blog/2017/02/11/the-statutory-legality-of-trumps-executive-order-on-immigration-part-iv/> [<https://perma.cc/KPM7-F3FT>].

54. See Verbatim Report of Proceedings at 37, *Washington v. Trump*, No. C17-0141JLR, 2017 U.S. Dist. LEXIS 16012 (W.D. Wash. Feb. 3, 2017); see also THE FED-

gration statutes because Section 1152 of the Immigration and Nationality Act of 1965 bars discrimination in the issuance of visas,⁵⁵ whereas Section 1182 of the Immigration and Nationality Act of 1952 authorizes the President to bar entry of foreign nationals.⁵⁶ The issuance of visas and authorization of entry are distinct;⁵⁷ a foreign national in possession of a valid visa may still be denied entry to the United States if, for example, the foreign national showed symptoms of a communicable disease⁵⁸ or expressed an intention to violate the terms of his visa,⁵⁹ or if an inspector believed the foreign national attested to fraudulent information on his visa application.⁶⁰ Though the title of Section 3 of the Original Order is “Suspension of the Issuance of Visas . . .,” nothing in the Original Order or the Revised Order directs any action regarding visas. After the issuance of the Original Order, many visas were revoked, but the visas were revoked in accordance with a memorandum from the Deputy Assistant Secretary of State.⁶¹ Additionally, the Immigration and Nationality Act of 1965 only bars discrimination in the issuance of visas, not the revocation of visas.⁶² Moreover, Section 1152(a)(1)(B) contains an exception for procedures: “Nothing in this paragraph shall be construed to limit the authority of the Secretary of State to determine the proce-

ERALIST NO. 78, *supra* note 47, at 380 (Alexander Hamilton) (“So far as they [clashing statutes] can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done.”)

55. 8 U.S.C.S. § 1152 (a)(1)(A) (2012).

56. *Id.* § 1182(f).

57. See Josh Blackman, *The Statutory Legality of Trump’s Executive Order on Immigration*, JOSH BLACKMAN’S BLOG (Feb. 5, 2017), <http://joshblackman.com/blog/2017/02/05/the-statutory-legality-of-trumps-executive-order-on-immigration/> [<https://perma.cc/E8TU-U5QW>].

58. *Id.*

59. See, e.g., *Brumme v. INS*, 275 F. 3d 443, 445 (5th Cir. 2001) (holding that a German national with a non-immigrant visa who told an inspector that she intended to become an immigrant was subject to expedited removal.).

60. Josh Blackman, *The Statutory Legality of Trump’s Executive Order on Immigration: Part III*, JOSH BLACKMAN’S BLOG (Feb. 6, 2017), <http://joshblackman.com/blog/2017/02/06/the-statutory-legality-of-trumps-executive-order-on-immigration-part-iii/> [<https://perma.cc/7MVF-78EE>].

61. Memorandum from Edward J. Ramotowski, Deputy Assistant Sec’y of State, Bureau of Consular Affairs (Jan. 27, 2017), available at <https://www.politico.com/?id=00000159-f6bd-d173-a959-ffff671a0001> [<https://perma.cc/MCV3-UP4W>].

62. 8 U.S.C. § 1152 (a)(1)(A) (2012).

dures for the processing of immigrant visa applications”⁶³ This carve-out implies that procedures could discriminate by nationality.⁶⁴

The government also contended that the principle of constitutional avoidance⁶⁵ supported its argument that the Immigration and Nationality Act of 1965 does not limit the authority given to the President in the Immigration and Nationality Act of 1952.⁶⁶ The government explained that a reading of the Immigration and Nationality Act of 1965 that limits the President’s authority under the Immigration and Nationality Act of 1952 could impermissibly infringe the President’s constitutional authority⁶⁷ over “foreign affairs, national security, and immigration.”⁶⁸ An interpretation of the Act that would prohibit the Original Order would also prohibit the Executive from banning entry of persons from a country with which the United States was at war.⁶⁹

Such an interpretation might also violate the canon against absurdity. Under that doctrine, courts must avoid interpreting

63. *Id.* § 1152(a)(1)(B).

64. See Blackman, *supra* note 57.

65. See *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (“[I]t is a cardinal principle of statutory interpretation, however, that when an Act of Congress raises ‘a serious doubt’ as to its constitutionality, ‘this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.’” (alteration in original) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932))); *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 500 (1979) (“[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available.”); *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (“When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932))).

66. Verbatim Report, *supra* note 54.

67. *Id.*

68. Emergency Motion for Administrative Stay and Motion for Stay Pending Appeal at 4, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105) (citing *Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (“The exclusion of aliens is a fundamental act of sovereignty . . . inherent in the executive power to control the foreign affairs of the nation.”)).

69. *Id.* at 15.

statutes in a way that would “lead to ‘patently absurd consequences’ that ‘Congress could not *possibly* have intended.’”⁷⁰

Because a reading of the Immigration and Nationality Act of 1965 that would prohibit the Executive Order would be inconsistent with historical practice after the passage of the Act, invalidate other sections of the same Act, possibly unconstitutionally infringe upon presidential authority, and lead to the absurd result of the President being unable to ban enemy nationals, it is likely that the Immigration and Nationality Act of 1965 did not bar the Original Order.

C. Constitutional Authority

When evaluating the constitutionality of the Original Order, one should consider that the federal government is at the height of its powers when regulating its border;⁷¹ that courts traditionally give great deference to the political branches, and especially the executive, in the areas of immigration and national security;⁷² and that presidential power is at its zenith when acting in response to a clear grant of authority from Congress.⁷³ In light of such considerations, courts have held that the Search and Seizure Provision of the Fourth Amendment provides less protection when entering and departing the country.⁷⁴ By virtue of the principle of national sovereignty, the

70. *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) (citations omitted) (first quoting *United States v. Brown*, 333 U.S. 18, 27 (1948); then quoting *FBI v. Abramson*, 456 U.S. 615, 640 (1982) (O’Connor, J., dissenting)); *see also* *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486 (1868) (“All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence.”).

71. *See* *Chae Chan Ping v. United States*, 130 U.S. 581, 606–07 (1889) (“The power of the government to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments.”).

72. *See, e.g., Cardenas v. United States*, 826 F.3d 1164, 1169 (9th Cir. 2016); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–34 (2010).

73. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see also* *Zivotofsky, ex rel. Zivotofsky v. Kerry* (*Zivotofsky II*), 135 S. Ct. 2076, 2083–84 (2015).

74. *See, e.g., United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985) (holding that “the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect

government has substantial authority to regulate the nation's borders.⁷⁵

The State of Washington alleged that Sections Three (banning immigrants from the seven countries) and Five (giving preference to religious minorities) of the Original Order violated the Establishment Clause of the First Amendment, which "prohibits the federal government from officially preferring one religion over another."⁷⁶ Washington alleged that the Executive Order, "together with statements made by Defendants concerning their intent and application, are intended to disfavor Islam and favor Christianity."⁷⁷ Harvard Law School Professor Noah Feldman described the original Executive Order as "a shameful display of discrimination against people who are by legal definition innocent and in danger of their lives" and asserted that it "also violates the constitutional value of equal religious liberty."⁷⁸

The Original Order, however, was consistent with the Establishment Clause. The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"⁷⁹ In a previous challenge to the Original Order, the District of Massachusetts found that Section Five is "neutral with respect to religion," because it applies to all refugees, not just those from the seven Muslim-majority countries, and so it could give preference to Muslims being religiously persecuted in a country where Christians form the majority.⁸⁰ The language of the Original Order was not facially discriminatory as between religious groups; there is

that the traveler is smuggling contraband," as opposed to the more stringent probable cause standard when not at a border).

75. See *Pigg*, 130 U.S. at 607 ("The control of the people within its limits, and the right to expel from its territory persons who are dangerous to the peace of the State, are too clearly within the essential attributes of sovereignty to be seriously contested." (quoting Mr. Fish, Secretary of State under President Ulysses S. Grant)).

76. Complaint for Declaratory & Injunctive Relief at 9, *Washington v. Trump*, No. C17-014JLR (W.D. Wash. Jan. 30, 2017).

77. *Id.*

78. Noah Feldman, *Trump's Travel Ban Is an Attack on Religious Liberty*, BLOOMBERG VIEW (Jan. 30, 2017), <https://www.bloomberg.com/view/articles/2017-01-30/trump-s-travel-ban-is-an-attack-on-religious-liberty> [<https://perma.cc/XJQ5-XFEP>].

79. U.S. CONST. amend. I.

80. *Louhghalam v. Trump*, 230 F. Supp. 3d 26, 35 (D. Mass. 2017).

no mention of Christianity or Islam.⁸¹ The Ninth Circuit did not consider this fact dispositive. Instead, it considered campaign statements made by President Trump⁸² as evidence of intent, asserting that “[i]t is well established that evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims.”⁸³ But the Ninth Circuit’s citation of *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*⁸⁴ in support of this proposition is misleading. Even if the holding of *Lukumi*—a free exercise case—applies to the Establishment Clause, the portion of the opinion that explicitly considered evidence of legislators’ subjective motives only commanded a plurality.⁸⁵ The Ninth Circuit quoted from Part II-A-1 of the *Lukumi* opinion,⁸⁶ yet Section 1 arguably does not establish that legislators’ subjective motives should be taken into account. At least, that is how Chief Justice Rehnquist and Justice Scalia seem to have interpreted it: they joined Part II-A-1, but declined to join Part II-A-2, the portion of the opinion explicitly taking into consideration legislators’ subjective motives. Instead, Justice Scalia, joined by the Chief Justice wrote in a concurrence:

I do not join that section because it departs from the opinion’s general focus on the object of the *laws* at issue to consider the subjective motivation of the *lawmakers*, *i.e.*, whether the Hialeah City Council actually intended to disfavor the religion of Santeria. As I have noted elsewhere, it is virtually

81. Section Five does give preference to refugees who are being persecuted on the basis of religion, as opposed to alternative bases, which could be viewed as unconstitutional by those who consider the government favoring religion over non-religion to violate the First Amendment, but that is not what the state of Washington argued.

82. *Washington v. Trump*, 847 F.3d 1151, 1167–68 (9th Cir. 2017); *see also* Complaint for Declaratory & Injunctive Relief at 9, *Washington v. Trump*, No. C17-014JLR (W.D. Wash. Jan. 30, 2017) (alleging that the Executive Order, “together with statements made by Defendants concerning their intent and application, are intended to disfavor Islam and favor Christianity”).

83. *Trump*, 847 F.3d at 1169.

84. 508 U.S. 520 (1993).

85. *Id.* at 523, 540–42 (Part II-A-2).

86. *See Trump*, 847 F.3d at 1167 (“The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.”).

impossible to determine the singular "motive" of a collective legislative body.^[87]

Perhaps there are contexts in which determination of legislative motive *must* be undertaken. But I do not think that is true of analysis under the First Amendment (or the Fourteenth, to the extent it incorporates the First). The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted: "Congress shall make no law . . . prohibiting the free exercise [of religion] . . ." This does not put us in the business of invalidating laws by reason of the evil motives of their authors.⁸⁸

By joining Section 1 and not Section 2, Chief Justice Rehnquist and Justice Scalia seem to show that they have interpreted the "target[ing]" (from the quotation from Section 1) and "object"⁸⁹ to mean that the statute objectively targets the religion: that the object of the statute, in its effect, is the religion. Section 2, conversely, considers evidence that the officials subjectively intended to target the religion.

The Ninth Circuit also cited *Village of Arlington Heights v. Metropolitan Housing Development Corp.*⁹⁰ as an example in support of the proposition,⁹¹ but *Arlington Heights* was about racial discrimination, not the Establishment Clause. In his concurrence in *Lukumi*, Justice Scalia explained that legislative purpose is particularly irrelevant for the First Amendment, because the text refers to the effects of the laws enacted.⁹² The Ninth Circuit also cited *Larson v. Valente*,⁹³ a case in which the

87. It might arguably be easier to determine the intent of an individual President than the intent of a multifarious body such as a legislature. Yet, Justice Scalia notes that the problem with subjective intent is not just that it is hard to discern, but that it is constitutionally irrelevant: "Had the ordinances here been passed with no motive on the part of any councilman except the ardent desire to prevent cruelty to animals (as might in fact have been the case), they would nonetheless be invalid." *Lukumi*, 508 U.S. at 559 (Scalia, J., concurring).

88. *Id.* at 558 (Scalia, J., concurring).

89. *Id.* at 535.

90. 429 U.S. 252 (1977).

91. *Trump*, 847 F.3d at 1168.

92. *Lukumi*, 508 U.S. at 558 (Scalia, J., concurring) ("The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted . . .").

93. 456 U.S. 228 (1982).

Supreme Court considered legislative history in determining that a facially neutral statute violated the Establishment Clause.⁹⁴ But prior drafts of the statute, coupled with discussion in the legislative body,⁹⁵ are likely to be more indicative of intent than statements made by the President while he was campaigning,⁹⁶ because the drafts and discussion are undoubtedly related to the legislation, whereas the President's campaign statements regarding Muslims are not necessarily related to the Original Order. At the time of the drafting of the Original Order, the President may have already abandoned the ideas he had while campaigning, or may have intended to implement his intentions regarding Muslims in another way. Moreover, in the time period after *Larson*, the influence of Justice Scalia led the Supreme Court to place less reliance on legislative history and more reliance on the text of the statute itself.⁹⁷

The Ninth Circuit's assertion that "evidence of purpose" is considered in Establishment Clause claims appears not to have commanded a majority of the Justices of the Supreme Court in *Lukumi*. Yet, a majority of the Justices embraced the principle that the inquiry of whether a statute discriminates between religious groups, and thus is subject to strict scrutiny, includes analysis of both the statute's text and its effects.⁹⁸ Even consid-

94. See *Trump*, 847 F.3d at 1167.

95. See *Larson*, 456 U.S. at 254–55.

96. See Complaint for Declaratory & Injunctive Relief at 9, *Washington v. Trump*, No. C17-014JLR (W.D. Wash. Jan. 30, 2017).

97. See Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014) (noting the extraordinary influence of Justice Scalia, and quoting Justice Kagan as saying "we're all textualists now")); see also, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2503 (2015) (Scalia, J., dissenting) ("The purposes of a law must be 'collected chiefly from its words,' not 'from extrinsic circumstances.' Only by concentrating on the law's terms can a judge hope to uncover the scheme of the statute, rather than some other scheme that the judge thinks desirable." (quoting *Sturges v. Crowninshield*, 17 U.S. 122, 202 (1819) (Marshall, C.J.))). See generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 29–30 (Amy Gutmann ed., 1997) ("My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute's meaning. This was the traditional English, and the traditional American, practice.").

98. *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 535 (1993) ("Apart from the text, the effect of a law in its real operation is strong evidence of

ering the effects of Sections Three and Five of the Original Order, however, the Original Order did not “single[] out”⁹⁹ any particular religion as the ordinances singled out the Santeria religion in *Lukumi*. In *Lukumi*, the Court explained that the combination of ordinances were “gerrymandered” to affect almost exclusively the Santeria adherents.¹⁰⁰ Though the immigrants barred in Section Three of the order are those from Muslim-majority countries, Section Three temporarily bans all immigrants from those countries, thus affecting many non-Muslims as well. An argument could be made that like the combination of ordinances at issue in *Lukumi*, Section Three in combination with Section Five had the effect of targeting Muslims: Section Five effectively provided an exception for Christians, given their minority status in the banned countries. This is not the case, however, because Section Five would not have come into effect until the 90-day ban established by Section Three concluded.¹⁰¹ Additionally, as mentioned above, Section Three gave preference to all refugees, not just refugees from the banned countries, and Christians are not a minority religion in every country. Religiously persecuted Shi’a Muslims in a Sunni Muslim-majority country could have been given preference through Section Five. For these reasons, Sections Three and Five of the Original Order should not be considered discriminatory, and thus should not be subjected to strict scrutiny.

When a law is found to be non-discriminatory, the Supreme Court frequently invokes the *Lemon v. Kurtzman*¹⁰² test to determine if the statute violates the Establishment Clause. The *Lemon* test is not universally invoked by the Court in Establishment Clause cases,¹⁰³ and this Note does not endorse its

its object.”); *id.* at 558 (Scalia, J., concurring) (“The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted . . .”).

99. *Id.* at 559 (Scalia, J., concurring).

100. *Id.* at 535–36 (majority opinion).

101. Exec. Order No. 13,769 § 5, 82 Fed. Reg. 8979–80 (Jan. 27, 2017) (revoked & replaced with Exec. Order 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017)).

102. 403 U.S. 602 (1971). The test consists of three prongs: the government action must have a secular purpose, a secular effect, and must not create an excessive entanglement with religion.

103. Justice Scalia compared the *Lemon* test to a “ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeat-

use.¹⁰⁴ Nevertheless, even using the *Lemon* test, the Original Order does not violate the Establishment Clause under current precedent.

The first requirement of the *Lemon* test is that the government action have a secular purpose. The Original Order stated that its purpose was to “ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism,” and that “the United States should not admit those who engage in acts of bigotry or hatred (including ‘honor’ killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, or sexual orientation.”¹⁰⁵ That is consistent with the prohibition in the Immigration and Nationality Act against giving asylum to an “alien [who] ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹⁰⁶ The countries from which entry to the United States is banned are those “referred to in . . . 8 U.S.C. 1187(a)(12),”¹⁰⁷ which excepts nationals of certain countries which are “area[s] of concern” from a visa-waiver program.¹⁰⁸ Congress identifies Iraq and Syria as two of the countries and directs that nationals from other countries identified by certain administrative agencies are also excepted.¹⁰⁹ The cur-

edly killed and buried . . .” *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., dissenting). He continued:

It is there to scare us . . . when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it, when we wish to uphold a practice it forbids, we ignore it entirely.

Id. at 399 (citations omitted).

104. The *Lemon* test reflects a strict separationist or neutrality approach to the Establishment Clause, but the original meaning of the religion clauses is that the federal government should accommodate religion. See Gabriel A. Moens, *The Menace of Neutrality in Religion*, 2004 BYU L. REV. 535, 538 (“[T]he Founders aimed to protect religion from the state, not the state from religion . . .” (footnote omitted)).

105. Exec. Order No. 13,769 § 1, 82 Fed. Reg. 8977, 8977 (Jan. 27, 2017) (revoked & replaced with Exec. Order 13780, 82 Fed. Reg. 13,209 (Mar. 9, 2017)).

106. 8 U.S.C. § 1158(b)(2)(A)(i) (2012).

107. Exec. Order No. 13,769 § 3(c), 82 Fed. Reg. 8977, 8978 (revoked & replaced with Exec. Order 13780, 82 Fed. Reg. 13,209 (Mar. 9, 2017)).

108. 8 U.S.C. § 1187(a)(12)(A)(ii) (2012).

109. *Id.*

rent “areas of concern” were identified under the Obama administration.¹¹⁰ Prohibiting entry by nationals of countries designated as areas of concern could legitimately have the purpose designated in the Original Order of ensuring that people entering the United States “do not intend to harm Americans.”¹¹¹

The second requirement of the *Lemon* test requires that the government action have a secular effect—that “its principal or primary effect must be one that neither advances nor inhibits religion.”¹¹² The Supreme Court has recently used the symbolic endorsement test for this prong—whether the law gives the appearance of government endorsement of a particular religion or religion in general.¹¹³ This seems to be what Professor Feldman alluded to when writing, “Trump’s explanations reflect a symbolic preference for Christian refugees. This is analogous to declaring the U.S. a Christian country.”¹¹⁴ Professor Feldman cited an interview President Trump gave to Christian Broadcasting Network¹¹⁵ and one of President Trump’s Twitter

110. See Verbatim Report, *supra* note 54, at 27.

111. Exec. Order No. 13,769 § 1 (Jan. 27, 2017) (revoked & replaced with Exec. Order 13,780, 82 Fed. Reg. 13209 (Mar. 9, 2017)).

112. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (quoting *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968)).

113. See, e.g., *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990).

114. Feldman, *supra* note 78.

115. President Trump responded “Yes” to the interviewer’s question, “Persecuted Christians, we’ve talked about this, the refugees overseas. The refugee program, or the refugee changes you’re looking to make. As it relates to persecuted Christians, do you see them as kind of a priority here?” Interview by David Brody with Donald Trump, President of the United States, in Washington, D.C. (Jan. 27, 2017), <http://www1.cbn.com/thebrodyfile/archive/2017/01/27/brody-file-exclusive-president-trump-says-persecuted-christians-will-be-given-priority-as-refugees> [<https://perma.cc/8LLT-K5D8>] [hereinafter *Trump Interview*]. President Trump then added:

They’ve been horribly treated. Do you know if you were a Christian in Syria it was impossible, at least very tough to get into the United States? If you were a Muslim you could come in, but if you were a Christian, it was almost impossible and the reason that was so unfair, everybody was persecuted in all fairness, but they were chopping off the heads of everybody but more so the Christians. And I thought it was very, very unfair. So we are going to help them.

Id.

comments, “Christians in the Middle-East have been executed in large numbers. We cannot allow this horror to continue!”¹¹⁶

The introductory paragraph of this Note describes the situation of Christians and Yazidis in Iraq. Expressing horror at a formally declared genocide against a religious group and expressing a desire to stop it can hardly be characterized as a government endorsement of that religion.¹¹⁷ Indeed, a United Nations Convention to which the United States is a party provides, “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”¹¹⁸

Moreover, answering affirmatively that persecuted Christians are “kind of a priority”¹¹⁹ does not exclude the possibility of other religiously persecuted groups being prioritized as well, as the District Court of Massachusetts held Section Five of the Original Order could do: it prioritized *all* refugees persecuted for being religious minorities¹²⁰ and not just those from the Muslim-majority countries in Section Three.¹²¹ Section Three of the Original Order showed that the government is against religious persecution, and President Trump’s statements may indicate that the government opposes the genocide of Christians, but being opposed to genocide of minority Christian groups does not make the United States “a Christian country” or demonstrate a symbolic preference for Christianity.

116. Donald Trump (@realDonaldTrump), TWITTER (Jan. 29, 2017, 7:03 AM), <https://twitter.com/realDonaldTrump/status/825721153142521858> [<https://perma.cc/K9YV-QXE8>].

117. See, e.g., USCIRF REPORT 2016, *supra* note 1, at 100 (USCIRF in December 2015 and U.S. Secretary of State John Kerry in March 2016 declaring ISIS genocide against Yazidis, Christians, and Shi’a Muslims.).

118. No. 1021. United Nations Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 1021.

119. *Trump Interview*, *supra* note 115.

120. For instance, the Original Order could have been applied to prioritize the Rohingya Muslims being persecuted in Buddhist-majority Myanmar. See *Persecution of all Muslims in Myanmar on the rise, rights group says*, REUTERS (Sept. 4, 2017, 11:42 PM), <https://www.reuters.com/article/us-myanmar-rohingya-muslims/persecution-of-all-muslims-in-myanmar-on-the-rise-rights-group-says-idUSKCN1BG0AT> [<https://perma.cc/4LQB-KXGY>].

121. See *Louhghalam v. Trump*, 230 F. Supp. 3d 26, 35 (D. Mass. 2017).

Condemnation of the Holocaust¹²² did not make the United States “a Jewish country.” Nor are we “a Muslim country” because President Trump condemned the “[h]orrible and cowardly terrorist attack on innocent and defenseless worshipers in Egypt” on November 24, 2017.¹²³ The Original Order appeared to have a secular effect and did not appear to indicate a symbolic preference for any religious group.

The third requirement of the *Lemon* test is that the government action not create excessive entanglement with religion. In *Lemon*, a government action that required “comprehensive, discriminating, and continuing state surveillance” was found to violate the Establishment Clause.¹²⁴ Government implementation of Section Three involved no government entanglement with religion. The only involvement with religion required by Section Five was a determination of whether the applicant was requesting asylum for being persecuted for belonging to a religion that is a minority in his country. Determining whether an applicant is eligible for asylum already entails determining whether his claim that he is being religiously persecuted is valid. The only additional inquiry required by the Executive Order would have been whether the religion is a minority in his country of origin, which should have been quickly ascertainable and is not a rapidly changing situation. Thus, because it would not require “comprehensive, discriminating, and continuing state surveillance,”¹²⁵ the Original Order met the third prong of the *Lemon* test.

The Original Order did not violate any of three requirements of the *Lemon* test. However, as discussed previously, the Original Order would only be evaluated under the *Lemon* test if it were non-discriminatory. What if a court found the order to be discriminatory, or what if the President issued an Executive

122. See, e.g., Franklin Delano Roosevelt, The President Asks That Frontiers Be Opened to Victims of Nazi Oppression and Declares That War Criminals Will Be Tried and Punished, 13 PUB. PAPERS 103, 103–04 (Mar. 24, 1944), available at <http://www.historyplace.com/worldwar2/holocaust/h-roos-statement.htm> [https://perma.cc/JXM9-783G].

123. Donald Trump (@realDonaldTrump), TWITTER (Nov. 24, 2017, 10:27 AM), <https://twitter.com/realDonaldTrump/status/934080974773776384> [https://perma.cc/V7DF-WPYM].

124. *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971).

125. *Id.*

Order that explicitly prioritized Christian refugees? An order that explicitly prioritized Christian refugees would be facially discriminatory among religious groups. An order that is discriminatory is subject to strict scrutiny,¹²⁶ which requires that it be “closely fitted” to achieve a “compelling governmental interest.”¹²⁷ Preventing genocide could certainly be considered a “compelling government interest.” But a statute that prioritized Christian refugees could be considered under-inclusive, because other religious groups, such as Yazidis and Shi’a Muslims, have also officially been declared the objects of the genocide being carried out by ISIS.

Yet, there could be justification for prioritizing Christian refugees exclusively. Although religiously persecuted Muslims in the Middle East have many close countries where they could seek asylum, such as Saudi Arabia¹²⁸ and Jordan, Christians do not.¹²⁹ Additionally, Kurdish fighters from Turkey and Syria have assisted Yazidis in fleeing from Iraq to Turkey and Syria,¹³⁰ but no one is assisting the Christians.¹³¹

126. See *Larson v. Valente*, 456 U.S. 228, 246 (1982).

127. *Id.* at 247.

128. Though Saudi Arabia has a Sunni majority, the Crown Prince is “encourag[ing] a more moderate and tolerant” form of Islam. Elliot C. McLaughlin, *Saudi crown prince promises “a more moderate Islam,”* CNN (Oct. 25, 2017, 1:24 PM), <https://www.cnn.com/2017/10/24/middleeast/saudi-arabia-prince-more-moderate-islam/index.html>, [<https://perma.cc/4F2L-RG8U>]. The Crown Prince is also leading a coalition to combat terrorism, having been “galvanized” by the November 24, 2017 Egyptian mosque terror attack. *UPDATE 1-Egypt attack to spur on Saudi-backed Muslim military alliance - crown prince*, REUTERS (Nov. 26, 2017, 1:24 PM), <https://af.reuters.com/article/africaTech/idAFL8N1NW0AQ> [<https://perma.cc/US6D-ST94>].

129. Israel could be a possibility for Christian refugees, but it is plagued by security concerns, including the vandalism and burning of Christian churches by extremists. See Giles Fraser, *You’d think that Israel, of all places, would respect its refugees*, GUARDIAN (June 16, 2016, 12:27 PM), <https://www.theguardian.com/commentisfree/belief/2016/jun/16/you-d-think-that-israel-of-all-places-would-respect-its-refugees> [<https://perma.cc/R59P-GHDH>]. Cyprus could also be a possibility for Christian refugees, but admitting a large number of Christian refugees could possibly reignite the dormant conflict there between the Greek Orthodox Christians (78% of the current population) and the Sunni Muslim Turkomen (18% of the population). See Sewell Chan, *Cyprus: Why One of the World’s Most Intractable Conflicts Continues*, N.Y. TIMES (Nov. 7, 2016), <https://www.nytimes.com/2016/11/08/world/europe/cyprus-reunification-talks.html> [<https://nyti.ms/2klHO2e>].

130. Avi Asher-Schapiro, *Who Are the Yazidis, the Ancient, Persecuted Religious Minority Struggling to Survive in Iraq?*, NAT’L GEOGRAPHIC NEWS (Aug. 11, 2014),

The State of Washington also alleged that Section Three violated the Religious Freedom Restoration Act (RFRA),¹³² which “prohibits the federal government from substantially burdening the exercise of religion, even if the burden results from a rule of general applicability” unless the “application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”¹³³ Washington asserted that Section Three would “result in substantial burdens on the exercise of religion by non-citizen immigrants by, for example, preventing them from exercising their religion while in detention, returning to their religious communities in Washington, and/or taking upcoming, planned religious travel abroad.”¹³⁴

Yet no provision in Section Three mandated anything that would burden the religious exercise of detained persons, or even that anyone be detained in the first place. If university personnel were being detained (perhaps at airports) and not being permitted to practice their religion, that could be challenged, but that would not provide grounds to challenge the entirety of Section Three. Moreover, prisons satisfy RFRA and the Religious Land Use and Institutionalized Persons Act (RLUIPA) by allowing inmates to engage in their religious practices within the institution,¹³⁵ and those detained at air-

<http://news.nationalgeographic.com/news/2014/08/140809-iraq-yazidis-minority-isil-religion-history/> [<https://perma.cc/37QP-LHLP>].

131. See Eliza Griswold, *Is this the End of Christianity in the Middle East?*, N.Y. TIMES, July 22, 2015, (Magazine) <https://www.nytimes.com/2015/07/26/magazine/is-this-the-end-of-christianity-in-the-middle-east.html> [<https://nyti.ms/2k6ba4Q>] (“A week later, the Kurdish forces, known as the peshmerga, whom the Iraqi government had charged with defending Qaraqosh, retreated. (‘We didn’t have the weapons to stop them,’ Jabbar Yawar, the secretary general of the peshmerga, said later.) The city was defenseless; the Kurds had not allowed the people of the Nineveh Plain to arm themselves and had rounded up their weapons months earlier.”).

132. See Complaint for Declaratory & Injunctive Relief at 9, *Washington v. Trump*, No. C17-014JLR (W.D. Wash. Jan. 30, 2017).

133. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(a), 1(b) (2012).

134. Complaint for Declaratory & Injunctive Relief at 9, *Washington v. Trump*, No. C17-014JLR (W.D. Wash. Jan. 30, 2017).

135. See *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807 (8th Cir. 2008) (holding that the inmate did not present sufficient information for a reasonable fact-finder to conclude that the inmate’s ability to practice his religion was substantially bur-

ports could be likewise permitted to engage in religious practices for the duration of any detention.

In considering the allegations that the Original Order violated RFRA and the Free Exercise Clause, one of the difficulties was the confusion over to whom Section Three applies. Five days after the Executive Order was issued:

White House counsel issued a clarification to the Acting Secretary of State, the Attorney General and the Secretary of Homeland Security that Sections 3(c) (the 90-day suspension) and 3(e) (making a list of countries that did not comply with information production requirements from which to prohibit entry) do not apply to lawful permanent residents.¹³⁶

However, the Ninth Circuit did not find the clarification dispositive.¹³⁷ The court doubted whether counsel's guidance could supersede an Executive Order, because the White House counsel is not the President.¹³⁸ Additionally, the Ninth Circuit questioned whether the White House counsel, who is not considered part of the chain of command of the Executive Departments charged with enforcing the Original Order, could issue a binding clarification.¹³⁹ Moreover, because the government changed its position about lawful permanent residents since the issuance of the Original Order, the court suspected that the government could change its position again.¹⁴⁰

The rights of non-immigrant visaholders (and lawful permanent residents if the Original Order applies to them) to return to their religious communities and travel abroad for religious reasons could have been considered substantially burdened by Section Three. One potential mitigation of this burden is contained in the Revised Order, which directs:

dened where halal food was available in the cafeteria and available for purchase at the commissary).

136. Emergency Motion for Administrative Stay & Motion for Stay Pending Appeal at 4, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017).

137. *Washington v. Trump*, 847 F.3d 1151, 1165 (9th Cir. 2017).

138. *Id.* at 1165–66.

139. *Id.*

140. *Id.* The Revised Order, by contrast, explicitly states that it does not apply to lawful permanent residents. Exec. Order No. 13,780 § 3(b)(i), 82 Fed. Reg. 13,209, 13,213 (Mar. 9, 2017).

[A] consular officer, or, as appropriate, the Commissioner, U.S. Customs and Border Protection (CBP), or the Commissioner's delegee, may, in the consular officer's or the CBP official's discretion, decide on a case-by-case basis to authorize the issuance of a visa to, or to permit the entry of, a foreign national for whom entry is otherwise suspended if the foreign national has demonstrated to the officer's satisfaction that denying entry during the suspension period would cause undue hardship, and that his or her entry would not pose a threat to national security and would be in the national interest.¹⁴¹

Yet, the examples of circumstances that may justify case-by-case waivers make no mention of specifically burdening religious exercise.¹⁴² Even if the Original Order substantially burdened religious exercise, protecting the United States from terrorism would likely be considered a "compelling government interest."¹⁴³ The point of contention would likely be whether Section Three was "the least restrictive means of furthering" that interest. Considering the latitude allowed the Executive Branch in immigration and national security,¹⁴⁴ it is likely that the Original Order was "the least restrictive means," particularly because of the limited duration of the Original Order and because of its limitation to countries Congress and the prior Administration designated as areas of concern.

II. POLICY ANALYSIS OF THE ORIGINAL ORDER

Though the Original Order was lawful, it was a poor policy choice. The President's original Executive Order gave preference to religious minorities. But people are persecuted because of religion even in places where they are in the national majori-

141. *Id.* § 3(c), at 13,214.

142. *Id.* § 3(c)(i)–(ix), at 13,214–15.

143. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) ("Everyone agrees that the Government's interest in combating terrorism is an urgent objective of the highest order."); *Jifry v. FAA*, 370 F.3d 1174, 1183 (D.C. Cir. 2004) ("[N]o government interest is more compelling than the security of the Nation." (quoting *Haig v. Agee*, 453 U.S. 280, 307 (1981))).

144. See, e.g., *Humanitarian Law Project*, 561 U.S. at 33–34; *Cardenas v. United States*, 826 F.3d 1164, 1169 (9th Cir. 2016).

ty. In Iraq, the majority are Shi'a Muslims,¹⁴⁵ yet the Shi'a are being persecuted by Sunni-dominated ISIS. Historically, the largest concentration of the forty-five million Christians who have been killed for their faith since the time of Jesus was in the Soviet Union, with twenty-five million and eight million murdered in Russia and Ukraine, respectively.¹⁴⁶ This happened even though both countries were at least nominally predominantly Christian. More recently, large numbers of Christians have been killed for their faith in Christian-dominated Latin America and the Democratic Republic of Congo.¹⁴⁷ Though minority status can be an indicator of persecution, most Christians killed for their faith in the twentieth century were in Christian-majority countries.¹⁴⁸ As Americans, we may tend to forget that a minority can hold tyrannical sway over nominal majorities. It matters little whether a person being religiously persecuted is of a minority or the majority religion of his country; perhaps there is another criterion that would be relevant in determining which religiously persecuted refugees should be admitted to the United States.

Although the Geneva Convention does not establish a hard-and-fast rule that refugees must seek asylum in the nearest safe country, some of its provisions suggest such a principle. The Convention only prohibits nations from prosecuting refugees for violating immigration laws if those refugees come directly from the country from which they are fleeing.¹⁴⁹ Additionally, one of the exceptions to the prohibition of removing refugees is if the refugees are removed to a safe third country.¹⁵⁰

145. BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2003, <https://www.state.gov/j/drl/rls/irf/2003/24452.htm> [<https://perma.cc/2ACD-YC4N>].

146. JOHN L. ALLEN, JR., THE GLOBAL WAR ON CHRISTIANS: DISPATCHES FROM THE FRONT LINES OF ANTI-CHRISTIAN PERSECUTION 176 (2013).

147. A significant percentage of the average of 100,000 Christians killed every year over the past decade were killed in the predominantly Christian Democratic Republic of Congo. *Id.*

148. *See id.*

149. United Nations Convention Relating to the Status of Refugees, art. 31, July 28, 1951, 189 U.N.T.S. 150, available at <http://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html> [<https://perma.cc/XQM4-5K6V>].

150. *Id.* at art. 32.

Perhaps in prioritizing refugees the United States should consider what alternatives members of persecuted religious groups have other than coming to the United States. It would be an efficient use of resources to consider whether members of different religious groups have the ability to seek asylum in a country in the same region as their country of origin and prioritize our refugee admissions accordingly. As previously discussed, Yazidis and particularly Muslims in the Middle East may have more safe alternatives than Christians in the region. Perhaps diplomatic pressure could be exerted on the leadership of countries like Saudi Arabia and Jordan to encourage them to accept Muslim refugees. Although prioritizing adherents of the minority religions of a country makes little sense, prioritizing members of religious groups with no country of refuge near their home country would be a rational choice.

III. CONCLUSION

Though President Trump's Original Order was repealed and replaced, the new Revised Order poses many of the same questions regarding its legality as the original Order.¹⁵¹ This Note used the Original Order as a vehicle to examine some troubling areas of modern standing, statutory interpretation, and Establishment Clause jurisprudence. Although the President was executing lawful authority in the Original Order, its repeal—particularly the repeal of the provision granting preference to minority religions—can open the way for an asylum policy that could do more to stop genocide and other forms of severe religious persecution.

Jennifer Lee Barrow

151. Both the Original Order and the Revised Order face the same statutory questions, because they both implement a ninety-day travel ban for nationals of listed countries. There is also the question of whether the Revised Order violates RFRA. *See supra* Part I.