ALL PORN ALL THE TIME*

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I want to begin this symposium by making a controversial assertion: In the escalating war against pornography, pornography has already won. I make this claim not to take a side in the porn wars, but rather to observe, bluntly, the new world in which we live.

Because of shifts in our culture and, most prominently, shifts in technology—the subject of this conference—pornography has been transformed. Once a widespread but sequestered industry, pornography is now ubiquitous in our society in a way that would have been unimaginable twenty years ago. Teen girls now clamor to be porn stars, while media outlets like MTV and VH1 feature porn stars like Ron Jeremy as pundits.[1] Porn star Jenna Jameson wrote a *New York Times* bestseller.[2] Large corporations, such as Marriott and AT&T are now porn distributors.[3] So changed are our cultural standards governing display that much of what we take for granted on television or in advertisements would have been considered pornographic just two decades ago.[4] Pornography is so commonplace that for many it is merely an annoyance—more spam to clear out of our email inboxes each morning. Porn, at least soft-core porn, is arguably now at the heart of mainstream culture.[5] These changes are so dramatic that I

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1. For example, Ron Jeremy appeared on the cast of VH1's The Surreal Life Fame Games: Surreal Sex. *See* http://www.vh1.com/shows/dyn/surreal_life_fame_games/106207/episode.jhtml (scroll down to "Video" and follow "Surreal Life Fame Games: Surreal Sex" hyperlink) (last visited Feb. 5, 2007). MTV's website offers a mainpage featuring Ron Jeremy. http://www.mtv.com/#/movies/person/84815/personmain.jhtml.

2. JENNA JAMESON, HOW TO MAKE LOVE LIKE A PORN STAR: A CAUTIONARY TALE (2004).

3. Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1657 (2005). The *New York Times* estimated in 2001 that porn was at least a 10 billion dollar industry. Frank Rich, *Naked Capitalists*, N.Y. TIMES, May 20, 2001, Mag., at 50. For a comprehensive account of the rise of the porn industry, see FREDERICK S. LANE III, OBSCENE PROFITS: THE ENTREPRENEURS OF PORNOGRAPHY IN THE CYBER AGE (2000).

4. *See, e.g.*, Don Aucoin, *The Pornification Of America*, BOSTON GLOBE, Jan. 24, 2006, at C1 ("Not too long ago, pornography was a furtive profession, its products created and consumed in the shadows. But it has steadily elbowed its way into the limelight, with . . . aspects of the porn sensibility now inform[ing] movies, music videos, fashion, magazines, and celebrity culture.")

5. In fact, I have argued that something more surprising has happened—a soft-core version of child pornography has also become mainstream in our culture. *See* Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209 (2001); Audio tape: N.Y.U. Review of Law & Social Change Colloquium, Problems of Censorship in a New Technological Age, Apr. 3, 2006 (on file with the N.Y.U. Review of Law & Social Change) (remarks of Amy Adler).

would argue the war on pornography has come to resemble the war on drugs, a war that (at least for now) seems as if it cannot be won.[6]

Why has pornography become so central to our culture? This question could itself be the subject of a conference. There are a number of significant factors, including changes in social norms governing sexuality, and the saturation of mass media, advertising, and communications with photographic images. Yet it seems arguable that the most prominent factor driving this shift toward the mainstreaming of porn has been technological innovation. The rise of the internet and the development of other new technologies, such as digital cameras, internet relay chats, and peer-to-peer networking, have changed the playing field. These innovations have dramatically lowered the cost of production and distribution for pornography while, at the same time, making it easier for producers and distributors to avoid detection.[7] Pornography has the force of technology on its side.

I think it is time to reassess pornography in light of its newfound cultural dominance. This symposium therefore comes at a moment of great opportunity. What does this change in the cultural landscape mean for legal regulation?

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The three panels in the symposium (and the essays that follow) focus on the three significant fronts in the war on pornography: attempts to restrict the online environment in the name of protecting minors; the battle against child pornography; and the ongoing, and indeed escalating, prosecution of obscenity. Each of these areas deserves to be treated in depth, as the following essays do. In these remarks, however, rather than looking at each doctrinal area in isolation, I sug-

6. *See, e.g.*, Eugene Volokh, *Obscenity Crackdown—What Will the Next Step Be?*, TECHKNOWLEDGE, Apr. 12, 2004, http://www.cato.org/tech/tk/040412-tk.html (arguing that we are unable to censor porn at least within current constitutional confines). Volokh also emphasizes the international aspect of pornography. *Id.* This globalization of the porn market, of course, has been enabled by technological innovation.

In this regard, it is worth noting the absence of any panel in this symposium addressing the feminist anti-pornography movement. While we can still debate the wisdom of the feminist anti-pornography position, I think all would agree that as a practical matter, the movement has lost its battle against pornography.

7. *See e.g.*, United States v. Williams, 444 F.3d 1286, 1290 (11th Cir. 2006) ("Regulation [of child pornography] is made difficult . . . by the vast and sheltering landscape of cyberspace."). *See also* Adam Walsh Child Protection and Safety Act of 2006 § 501(1)(C), 18 U.S.C. § 2251(1)(C) (2007 Supp.) ("The advent of the Internet has greatly increased the ease of transporting, distributing, receiving, and advertising child pornography in interstate commerce. The advent of digital cameras and digital video cameras, as well as videotape cameras, has greatly increased the ease of producing child pornography."). In a recent *New York Times* article, an investigative reporter described the labyrinthine system constructed to shield the origins of a pornographic website: "Payments through Western Union were processed through Ukraine. An administrative e-mail address suggested the company was based in Russia. Using a commercial software program, The Times traced messages . . . back to servers in Germany" and then to a company serving as an anonymous front. Kurt Eichenwald, *With Child Sex Sites on the Run, Nearly Nude Photos Hit the Web*, N.Y. TIMES, Aug. 20, 2006, at A1.

gest that we look at them together against the larger backdrop I have just painted. Picture these three doctrines as alternate weapons in the government's arsenal as it fights the larger war against pornography. Although these doctrines are indeed quite distinct from one another, the perspective I advocate reveals the porous nature of doctrinal boundaries in actual practice.

As I will show, this perspective will help to illuminate otherwise puzzling developments in obscenity law. Ten years ago, obscenity law seemed to be in its death throes, a doctrine largely abandoned by prosecutors. Yet like a phoenix from the ashes, obscenity law has begun to stage a dramatic and surprising comeback. I submit that its resurgence can only be fully understood by viewing obscenity law as merely one of the three fronts in the larger war against pornography. Ultimately, this broader perspective not only sheds light on changes within obscenity law, but also suggests a more complex take on each battleline in the government's campaign against pornography: free speech victories in one area may signal defeats in another.

In the following remarks, I describe the major doctrinal areas that are the focus of the essays in this symposium. I then tell the narrative of obscenity law's fall and subsequent rise to make an argument for viewing the three doctrines collectively as related weapons in the government's losing war against pornography. Part I sets forth an overview of the three major doctrines. Part II looks specifically at the puzzle of obscenity law's decline and resurgence. Part III sketches out a possible solution to the puzzle of obscenity law's revival. Here I suggest that by viewing the separate doctrinal areas that this volume addresses as part of a larger interlocking system, we can gain new insight into obscenity law's revival. Specifically, I argue that government defeats (usually at the hand of the Supreme Court) in other doctrinal areas have led to obscenity law's return.

I.
THE DISCRETE DOCTRINAL BATTLES

The first panel—"Internet Pornography and Technology: Is Filtering the Solution?"—addresses attempts to regulate internet pornography because of fears about its effects on children. Congress has been attempting to regulate online pornography based on this model for the last ten years, but has been repeatedly thwarted by the Supreme Court over concerns about the threat that such regulation poses to protected speech. In 1996, Congress passed the Communications Decency Act (CDA),[8] which criminalized indecent and patently offensive online communications; the Court struck down the CDA's major provisions on constitutional grounds in 1997.[9] In response to this defeat, Congress in 1998 passed

8. Pub. L. No. 104-104, 110 Stat. 133 (1996) (codified as amended at 47 U.S.C. § 223 (2000)). The CDA, inter alia, prohibited the knowing transmission of obscene or indecent messages to any recipient under 18 years of age. *Id.* at § 502(d), 42 U.S.C. § 223(d).

9. The Court held the CDA unconstitutional because it was not narrowly tailored to serve a compelling governmental interest and because less restrictive alternatives were available. Reno v.

the Child Online Protection Act (COPA).[10] COPA was premised on the notion that some speech, even if it is constitutionally acceptable for adults to view, may be regulated because it is "harmful to minors."[11] COPA's constitutionality was the subject of litigation for almost nine years. The Supreme Court evaluated it twice. In *Ashcroft v. ACLU I*,[12] the Court issued a narrow ruling: although it rejected the Third Circuit's holding that COPA was overbroad because it relied on "contemporary community standards"[13] in evaluating speech, the Supreme Court nonetheless remanded the case for further assessment of COPA's First Amendment validity.[14] Two years later, in *Ashcroft v. ACLU II*,[15] the Court found that private filtering technology might more effectively protect minors than Congress's proposed regulatory scheme would, and with less threat to free speech.[16] The district court, on remand, finally issued a permanent injunction against COPA this year.[17]

The second weapon in the government's arsenal is the law of child pornography. Though extremely powerful and extremely focused,[18] this weapon is lim-

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American Civil Liberties Union, 521 U.S. 844, 864–70 (1997).

10. Pub. L. No. 105-277, 112 Stat. 2681-736 (1998) (codified as amended at 47 U.S.C. § 231 (2000)).

11. COPA defines "material that is harmful to minors" as:

> any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—
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> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
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> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
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> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Id. § 231(e)(6). For an excellent discussion of the concept of "harmful to minors", see generally MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: "INDECENCY," CENSORSHIP, AND THE INNOCENCE OF YOUTH (2001).

12. Ashcroft v. American Civil Liberties Union (Ashcroft v. ACLU I), 535 U.S. 564 (2002).

13. *See* American Civil Liberties Union v. Reno, 217 F.3d 162, 173–80 (3d Cir. 2000).

14. 535 U.S. at 584–86 (finding COPA's use of community standards to identify material that is harmful to minors does not render statute facially overbroad; remanding for further analysis of other overbreadth and vagueness issues).

15. Ashcroft v. American Civil Liberties Union (Ashcroft v. ACLU II), 542 U.S. 656 (2004).

16. *Id.* at 666–69 (upholding preliminary injunction against enforcement of COPA and remanding case).

17. American Civil Liberties Union v. Gonzales, 478 F. Supp. 2d 775 (E.D. Pa. 2007). In contrast to the CDA and COPA, Congress has had success using the "harmful to minors" rationale to impose filters on public libraries' internet access. In 2003, the Supreme Court upheld the Children's Internet Protection Act ("CIPA"), Pub. L. 106-554 §§ 1711–41, 114 Stat. 2763A-337–2763A-352 (2000), codified as amended at scattered sections of 20 and 47 U.S.C. (2000), which forbids public libraries to receive federal assistance for Internet access unless they install software to block obscene or pornographic images and to prevent minors from accessing material harmful to minors. United States v. Am. Library Ass'n., Inc., 539 U.S. 194 (2003).

18. For a discussion of child pornography law's power as compared to obscenity law, *see* Adler,

ited in at least two important ways. First, it criminalizes only those pornographic visual images made using actual children; Congress had tried to go further, criminalizing under the rubric of child pornography wholly virtual images depicting child sexual conduct,[19] but the Supreme Court rejected that legislation in 2002.[20] Second, child pornography law is limited in the sense that it now fights on a vastly changed battlefield. Developed prior to the digital revolution, child pornography law is now arguably outmatched by the new ease of pornographic production and distribution brought about by technological innovation. In recent years, the federal government has portrayed child pornography in the age of the internet as if it were a multi-headed hydra: so wily and aggressive are child pornography producers and so deviant and demanding are the consumers that as soon as the government cuts off one head, more rise up to take its place, aided and abetted by technology. For example, speaking in April of 2006, Attorney General Alberto Gonzales called child pornography a growing "epidemic" and used surprisingly graphic and dramatic language to describe the increasingly hard-core material now available.[21] Of course, claims about the changing nature of child pornography are difficult to verify for a number of reasons: above all, it is extremely hard, if not impossible, to measure accurately the online environment;[22] in addition, no one outside of government can fully assess these claims because child pornography law prohibits researchers, academics, or anyone outside of law enforcement from looking at child pornography. Even though it is

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The Perverse Law of Child Pornography, *supra* note 5.

19. Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121 (codified as amended at 18 U.S.C. §§ 2251–2252A, 2256, 42 U.S.C. §§ 2000aa(a)(1), (b)(1) (2000)).

20. Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (striking down Child Pornography Prevention Act on overbreadth grounds).

21. Gonzales said: "I have seen pictures of older men forcing naked young girls to have anal sex. There are videos on the Internet of very young daughters forced to have intercourse and oral sex with their fathers. . . . There are images of graphic sexual and physical abuse of innocent children, even babies." Quoted in Terry Freidan, *Gonzales Gives Child Porn 'wake-up call'*, CNN.COM, Apr. 20, 2006 *available at* http://www.cnn.com/2006/LAW/04/20/gonzales.porn/.

22. *See* EVA J. KLAIN, HEATHER J. DAVIES, MOLLY A. HICKS, AM. BAR ASS'N CTR. ON CHILDREN & THE LAW, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, CHILD PORNOGRAPHY: THE CRIMINAL-JUSTICE-SYSTEM RESPONSE 3 (Alexandria, Virginia: National Center for Missing & Exploited Children, March 2001) ("Accurate estimates are difficult because no valid and reliable methodology has been devised to measure the amount of child pornography especially on the Internet."). *See also* JANIS WOLAK, KIMBERLY MITCHELL & DAVID FINKELHOR, CRIMES AGAINST CHILDREN RESEARCH CTR., INTERNET SEX CRIMES AGAINST MINORS: THE RESPONSE OF LAW ENFORCEMENT 3 (2003) ("Because Internet sex crimes against minors are a recent phenomenon, data about them have not been gathered in a national study."). *Cf.* Jason McLure, *Numbers Game: Gonzales Launches DOJ Project Safe Childhood With Mysterious Figure*, LEGAL TIMES ONLINE, May 22, 2006, http://www.law.com/jsp/dc/PubArticleDC.jsp?id=1147770329023 (reporting that Attorney General Alberto Gonzales's estimate that at any given time, 50,000 predators are on the Internet prowling for children appears to be drawn from media reports that were not based on any available research). *But see Indecent Exposure: Oversight of DOJ's Efforts to Protect Pornography's Victims: Before the S. Comm. on the Judiciary*, 108th Cong. (Oct. 15, 2003) (statement of John G. Malcolm, Deputy Assistant Attorney General, Criminal Division, Dep't of Justice) (citing a "recent study by the National Society for the Prevention of Cruelty to Children [that] indicates that approximately 20,000 images of child pornography are posted on the Internet every week.").

hard to evaluate these claims, it still seems evident that dramatically lowered costs of production and distribution, coupled with technological advances that make it easier to evade detection, have strengthened the hand of child pornographers.

Finally, there is obscenity law, the subject of the third panel. Obscenity law represents the oldest of the three weapons in the government's arsenal. Although federal obscenity law dates to the mid-nineteenth century, it wasn't until 1957 that the Supreme Court first held that a category of expression called "obscenity" lacked First Amendment protection.[23] Over the following sixteen years, the Court fought bitterly about obscenity doctrine.[24] In 1973, over vigorous dissent, five members of the Court finally arrived at a standard definition of the term "obscene" that has remained consistent to this day.[25] Although the doctrine is settled, obscenity law has continued to provoke scathing criticism from legal scholars.[26] As I will explore below, the doctrine began to fall into relative disuse in the 1990s.[27] Yet it has now staged a major comeback and has become a "top priority" for the FBI and the Department of Justice.[28] I think that its resurgence can only be fully understood by considering it in the context of the challenges and defeats that the government has faced in the previous two areas I have just described.

In the following Part, I address the decline and subsequent resurgence of obscenity law. In Part III, I offer a new account of this trajectory by assessing obscenity in the context of the overall battle against the changed world of pornography.

II
THE FALL AND RISE OF OBSCENITY LAW

Why was obscenity law all but dead? As I argue below, there are at least

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23. Roth v. Unites States, 354 U.S. 476, 485 (1957).

24. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 80–83 (1973) (Brennan, J., dissenting) (summarizing the history of the Court's struggle).

25. Miller v. California, 413 U.S. 15 (1973). By the time of the Miller decision, the Court was bitterly divided. *See id.* at 37–47 (Douglas, J., dissenting). Nonetheless, the Miller majority set forth a three-part test for determining whether a given work should be labeled "obscene":

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

Id. at 24 (citations omitted). In *Pope v. Illinois*, 481 U.S. 497 (1987), the Court clarified that Miller's third prong should be evaluated by a reasonable person standard. *Id.* at 501.

26. For a sample of the vast scholarly literature critical of obscenity law, see *infra* note 42. *Cf. Pope*, 481 U.S. at 504–05 (Scalia, J., concurring) (questioning the underpinnings of obscenity law's exception for serious artistic value and calling for a reexamination of Miller).

27. *Infra* notes 29–59 and accompanying text.

28. *See infra* note 60 and accompanying text.

three reasons. First, it became a lower priority for prosecutors in comparison to what was seen as the more pressing problem of child pornography. Second, obscenity cases became harder to prosecute successfully. And third, obscenity, in a number of senses, presented an embarrassment to the courts and the legal system. Yet in spite of these strikes against obscenity law, it has begun to stage a remarkable comeback.

A. Limited Resources and the Problem of Child Pornography

Obscenity prosecutions were all but abandoned, in large part because child pornography was viewed as the far more pressing problem. Under the Clinton administration, the Child Exploitation and Obscenity Unit of the Department of Justice had (reasonably in my opinion) focused its limited resources on child pornography.[29] While the policy was not explicitly announced, the statistics are clear. In the period from 1992 to 2000, federal prosecutions of child pornography increased more than fivefold, from 104 to 563 per year.[30] In contrast, federal prosecutions of obscenity fell by more than half in the same period, from 44 cases in 1992, to 20 in 2000.[31] Another statistic reveals that the number of federal convictions for child pornography more than tripled from 1997 to 2004.[32] The conservative antipornography group Morality in Media charges that "[d]uring the first six years of the Clinton administration, federal obscenity law enforcement declined by over eighty percent."[33]

B. Prosecution Problems

Another reason that obscenity law was all but abandoned was that pornography's increased cultural presence posed difficulties for prosecutors. The government in an obscenity case must prove that the material exceeds contemporary community standards.[34] Given how far those standards have been stretched by the onslaught of pornography in the last few decades, and given that they are still constantly stretching, this is a difficult and unpredictable standard to meet. In short, with the sea of pornography in which we now live, it is increasingly hard

29. The Clinton administration policy was not explicitly announced, but was clear in the pattern of prosecutions. It was widely maligned by conservative anti-pornography groups and legislators. *See House Subcommittee Criticizes DOJ for Not Prosecuting Internet Obscenity*, TECH L.J., May 24, 2000, http://www.techlawjournal.com/crime/20000524.htm.

30. U.S. DEP'T OF JUSTICE, OFFICE OF ATTORNEY GENERAL, REVIEW OF CHILD PORNOGRAPHY AND OBSCENITY CRIME, REPORT NUMBER I-2001-02, tbl.1, July 19, 2001, http://www.usdoj.gov/oig/reports/plus/e0107/results.htm.

31. *Id.* tbl.6.

32. Protecting Children on the Internet: Hearing Before the S. Comm. on Commerce, Science, and Transportation, 109th Cong. 109-606, at 12 (2006) (statement of Laura H. Parsky, Deputy Asst. Attorney General, Criminal Division, Dep't of Justice).

33. Robert Peters, Clinton's Hardcore Porn Legacy, Morality In Media, Inc., http://www.moralityinmedia.org/index.htm?obscenityEnforcement/clinton porn.htm (last visited Nov. 30, 2007).

34. Miller v. California, 413 U.S. 15, 24 (1973). *See supra* note 25.

for prosecutors to know that they will get a conviction.

The Supreme Court's decision in the 2000 case *United States v. Playboy Entertainment Group*[35] provides a striking illustration of the mainstreaming of pornography and the challenge that this phenomenon might pose to prosecutors seeking obscenity convictions. In *Playboy*, the Court considered a telecommunications case involving restrictions on cable television channels that were "primarily dedicated to sexually-oriented programming."[36] In spite of the sexually explicit nature of the material, a majority of the Supreme Court accepted without question the litigants' agreement that the material at issue was not obscene. In dissent, Justice Scalia termed the assumption that this material was not obscene "highly fanciful"[37] and proceeded to quote Playboy's own description of the content of some of the programming as "female masturbation/external," "girl/girl sex," and "oral sex/cunnilingus."[38] The other Justices's ready acceptance of the agreement that such material was not obscene suggests the difficulty that prosecutors now face. It seems that a great deal of pornography would not strike the Justices themselves as legally obscene.[39]

C. The Embarrassing Law of Obscenity

Finally, prosecutors abandoned obscenity law because it presented a mix of vexing institutional and doctrinal problems. Perhaps Professor Harry Kalven put it best when he wrote that obscenity "seem[ed] like an invention of the Devil designed to embarrass and unhinge the legal system."[40]

Part of the problem is that obscenity law presented a daunting doctrinal challenge that many critics (myself included)[41] believe the Court could not resolve.[42] Obscenity law required the Court to define what one Justice acknowl-

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35. United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000) (invalidating under the First Amendment Section 505 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 136, 47 U.S.C. § 561 (1994 ed., Supp. III)).

36. *Id.* at 806 (quoting 47 U.S.C. § 561(a) (1994 ed., Supp. III)).

37. *Id.* at 831 (Scalia, J., dissenting).

38. *Id.* at 834 (Scalia, J., dissenting).

39. *See infra* notes 60–65 and accompanying text for discussion of recent prosecutorial strategy of going after extremely hard-core pornography. This strategy emerged no doubt as a way to overcome the problems documented above.

The individual views of the Justices themselves as to whether material is "obscene" is of paramount importance because of the inherent subjectivity of defining obscenity. As Justice Brennan wrote, "one cannot say with certainty that material is obscene until at least five members of this Court . . . have pronounced it so." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 92–93 (1973) (Brennan, J., dissenting).

40. HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 34 (1988).

41. Amy M. Adler, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359 (1990).

42. In addition to the definitional difficulties I detail here, obscenity presented a doctrinal embarrassment to the Court because, as some have argued, it was difficult to articulate a constitutionally satisfactory rationale for excluding obscenity from the protection of the First Amendment in the first instance. For critiques of the Court's rationale for excluding obscenity from First Amendment protection, *see, e.g.*, David A.J. Richards, *Free Speech And Obscenity Law: Toward a Moral The-*

edged in fact "may be indefinable."[43] The 1957 Supreme Court proclamation that a sector of speech defined as "obscenity" fell outside of the constitutional protection of the First Amendment necessarily made the definition of "obscenity" a matter of constitutional law.[44] Yet the determination of these boundaries proved agonizing for the Court. Angst is palpable in the cases: Chief Justice Burger referred to the "tortured history" of the Court's obscenity cases.[45] Justice Harlan, terming the obscenity problem "intractable,"[46] observed that it had "produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication."[47] It was the intense difficulty of defining obscenity that led Justice Brennan, the original architect of the Court's obscenity jurisprudence, to turn his back on his own creation. After sixteen years of obscenity cases, he concluded that the original goal of obscenity law was unachievable—it was impossible to prohibit obscenity while protecting valuable speech.[48]

Obscenity law was also an embarrassment because of its record of cultural

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ory of the First Amendment, 123 U. PA. L. REV. 45, 78–81 (1974) (arguing that obscenity doctrine presupposes that the obscene nature of the speech does not contribute to its meaning and that, as a result, the Court judges speech by "standards of value from majority moral attitudes" in clear violation of First Amendment principles); Steven Gey, *The Apologetics Of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564 (1988) (vigorously condemning foundations of First Amendment theories that permit regulation on the basis of moral certainty); Koppelman, *supra* note 3, at 1637 (noting the peculiarity of obscenity law, which regulates based on intrinsic evil of content, not harm to third-parties).

A recent obscenity litigation raised the question of the doctrine's constitutional legitimacy in the wake of the Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating a statute that criminalized homosexual sodomy), with that cases's emphasis on individual autonomy in sexual matters. Dissenting in *Lawrence*, Justice Scalia argued that the majority's holding "effectively decrees the end of all morals legislation." *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting). Recently, a district court took Scalia up on his prediction, citing *Lawrence* to strike down federal obscenity law as applied to an online purveyor of particularly hard-core pornography. The court held that after *Lawrence*, the government could no longer rely on the advancement of a moral code as a legitimate state interest to impede private adult consensual sexual conduct. United States v. Extreme Assocs., Inc., 352 F. Supp. 2d 578, 591, 593 (W.D. Pa. 2005), *rev'd*, 431 F.3d 150 (3d Cir. 2005), *cert. denied*, 126 S.Ct. 2048 (2006). Though it was reversed on appeal, the district court cited an array of law review articles assertedly supporting its position on the implications of *Lawrence* for morals-based obscenity law. 352 F. Supp. 2d at 590–91.

43. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Summing up the Court's frustrating task, Justice Stewart wrote that although it may be impossible to define hard-core pornography, "I know it when I see it." *Id.* (Stewart, J., concurring).

44. Roth v. United States 354 U.S. 476, 485 (1957). *See also supra* note 23 and accompanying text.

45. Miller v. California, 413 U.S. 15, 20 (1973).

46. Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 704 (1968) (Harlan, J., concurring and dissenting).

47. *Id.* at 704–05 (Harlan, J., concurring and dissenting). As evidence, Justice Harlan lists thirteen obscenity cases since Roth containing fifty-five discrete opinions. *Id.* at 705 n.1

48. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73–74 (1973) (Brennan, J., dissenting). Justice Brennan explained the "vagueness-related difficulties" of the Miller standard: it fails to provide adequate notice, will chill protected speech, and will mire courts in case-by-case litigation. *Id.* at 99–101.

failures. In its first obscenity decision in 1957,[49] *Roth v. United States*, the Supreme Court self-consciously entered an arena marked by a history of philistinism. Prior to the Court's intervention, lower courts had overseen the suppression (and, later, the eventual freeing) of great works of literature, such as James Joyce's *Ulysses*.[50] Writing his concurrence in *Roth*, Chief Justice Warren raised the specter of obscenity law's suppression of significant cultural works.[51] The Court attempted to avoid repeating what Warren called "[m]istakes of the past."[52] It did so by explicitly crafting its definition of "obscenity" to protect material that possesses "serious literary [or] artistic . . . value."[53] But as I have argued elsewhere, this formulation is insufficient to protect a significant amount of cultural expression.[54] The prominent 1990 obscenity prosecution of the Cincinnati Center for Contemporary Art for displaying the photographs of Robert Mapplethorpe added to the list of obscenity law's embarrassing episodes, and confirmed that modern obscenity law is still an enemy of culture in spite of the Court's efforts. Although the Mapplethorpe case ended in an acquittal, the very fact that a prosecution went forward against a major American artist's work is evidence that something is amiss in obscenity law. It shows that the Court was wrong to assume that it could prohibit "obscenity" yet protect works of cultural importance: obscenity law will always threaten some sector of literary and artistic expression.[55]

Finally obscenity law presented an embarrassment in the most direct of ways: it required the Justices to enter what Justice Harlan described as the "absurd business of perusing and viewing the miserable stuff that pours into the Court."[56] As Justice Brennan observed, the uncertainty of obscenity jurisprudence necessarily meant that the Court had to observe firsthand the materials

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49. Roth v. United States, 354 U.S. 476 (1957). *See supra* text accompanying note 23. Prior to *Roth*, the Court had heard an obscenity case but split four-to-four. The result was to affirm a state court obscenity judgment against noted critic Edmund Wilson's novel, *Memoirs of Hecate County*. Doubleday & Co. v. New York, 335 U.S. 848 (1948). Thus the Court was itself implicated in this history of failure. It had failed to protect a novel by one of the most prominent cultural critics of the day.

50. *See* United States v. One Book Called "Ulysses," 5 F. Supp. 182 (S.D.N.Y. 1933) (allowing the entry of Ulysses into the United States).

51. The Chief Justice wrote:

> The history of the application of laws designed to suppress the obscene demonstrates convincingly that the power of government can be invoked under them against great art or literature, scientific treatises, or works exciting social controversy. Mistakes of the past prove that there is a strong countervailing interest to be considered in the freedoms guaranteed by the First and Fourteenth Amendments.

Roth v. United States, 354 U.S. 476, 495 (1957) (Warren, C.J., concurring in result). *Cf.* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 178–79 (1982) (noting obscenity regulation's history of plain errors in banning what we now consider great works of art).

52. *Roth*, 354 U.S. at 495 (Warren, C.J., concurring in result).

53. Miller v. California, 413 U.S. 15, 24 (1973).

54. *See generally* Adler, *Post-Modern Art and the Death of Obscenity Law*, *supra* note 41.

55. *See generally id.*

56. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 707 (Harlan, J., concurring and dissenting).

in question. He wrote, "one cannot say with certainty that material is obscene until at least five members of this Court . . . have pronounced it so[,]" thus leaving the Justices "compelled to view it before passing on its obscenity."[57] The cases seemed to debase the Court. Obscenity jurisprudence did not emerge from on high; indeed, the Justices literally screened dirty films in the basement.[58] Now the dirty work has fallen to lower court judges and juries who are "compelled" to view the more extreme, often scatological, hard-core pornography that the government has begun to pursue in obscenity cases.[59]

D. The Return of Obscenity Law

Given all these strikes against obscenity law, given that it had been all but abandoned by the federal government, it is quite surprising to observe the newfound vigor in the war on obscenity. The Gonzales Justice Department emphasized that obscenity was "one of [its] top priorities."[60] There is a new push for prosecution. Indeed, the FBI recently created a task force devoted specifically to adult obscenity, diverting "eight agents, a supervisor and assorted support staff" to the project full time.[61] Reacting to the creation of the new squad, one disgruntled FBI officer commented on condition of anonymity, "I guess this means we've won the war on terror."[62] A surge of recent indictments and prosecutions shows the new strategy is taking effect,[63] and attests to the fact that the war on

57. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 92–93 (1973) (Brennan, J., dissenting).

58. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 198–99 (1979). *Cf.* Adler, *The Perverse Law of Child Pornography*, *supra* note 5, at 267 (analyzing the anxiety expressed in early twentieth century state court decisions about the contaminating effect of describing the obscenity at issue).

59. *Infra* note 63 (describing prosecutions of extremely hard-core targets).

60. Barton Gellman, *Recruits Sought for Porn Squad*, WASH. POST, Sept. 20, 2005, at A21. *See also* Alberto R. Gonzales, Prepared Remarks at the U.S. Attorney's Conference (April 21, 2005) (transcript available at http://www.usdoj.gov/ag/speeches/2005/042105usattorneysconference.htm) ("I've made it clear that I intend to aggressively combat the purveyors of obscene materials.").

61. Gellman, *supra* note 60.

62. *Id.* Nonetheless, the DOJ press secretary, Brian Roehrkausse, insisted that the war on terror is the "top priority." *Id.*

63. For examples of some recent obscenity prosecutions, *see* United States v. Coil, 442 F.3d 912 (5th Cir. 2006) (affirming the defendant's conviction for transportation of obscene materials); United States v. Extreme Assocs., Inc., 431 F.3d 150 (3d Cir. 2005) *cert. denied*, 126 S.Ct. 2048 (2006); United States v. Ragsdale, 426 F.3d 765 (5th Cir. 2005) (affirming website owners' convictions); Carter v. MGA, Inc., 189 F.App'x 893 (11th Cir. 2006). *See also* United States v. Gartman, 2005 U.S. Dist. LEXIS 1501(N.D. Tex. 2005) (denying defendant's motion to reconsider in light of trial court's ruling in *Extreme Associates* case).

In addition to these reported decisions, there have been numerous other obscenity indictments, convictions, or plea bargains. For example, since the push began, six defendants in three different cases have been convicted on obscenity charges in the Northern District of Texas. Most recently, two defendants were convicted for selling obscene videos on the Internet on a site called "forbiddenvideos.com." Press Release, U.S. Dep't of Justice, Federal Jury Convicts Two Men in Texas on Distribution of Obscene Material Charges (Mar. 13, 2006), *available at* www.usdoj.gov/criminal/press_room/press_releases/2006_4526_ceosGartman.pdf. In another case in the Northern District of Texas, a Colorado resident named Edward Wedelstedt pleaded

obscenity is more than mere political rhetoric. Further, although the government began its renewed attacks on obscenity by targeting hard-core defendants on the fringes of the pornography industry,[64] some recent indictments suggest that prosecutors have now become emboldened enough to take on milder, less extreme purveyors.[65]

III.
VIEWING THE PARTS AS A WHOLE: LEGAL DOCTRINES AS WEAPONS IN THE BATTLE AGAINST PORNOGRAPHY

Why has obscenity law returned as one of the key weapons in the war on pornography? In spite of the changed cultural landscape in which we live, legal actors have fallen back on the most dated and problematic of their weapons to fight this new war. They have turned to obscenity law, a doctrine so old and creaky that it had slipped into relative disuse.

The mystery of obscenity law's revival only deepens when we consider another factor. The doctrine seems disconnected from the primary justification usually invoked in calls for censorship: the protection of children. Indeed, the rhetoric surrounding censorship proposals these days focuses insistently on pornography's threat to children—through either children's access to materials in the online environment, or the direct abuse of children in the production of child pornography. The "harmful to minors" doctrine used by Congress in COPA, for example, seems a far more straightforward way to get at the problem than obscenity law is. Child pornography law also addresses these concerns directly.

In short, given all that's wrong with obscenity law, its resurgence is quite

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guilty to distributing obscene material for operating a chain of adult video stores across Texas. Tim Wyatt, *Porn Mogul Lose Texas Bookstores in Plea Bargain*, DALLAS MORNING NEWS, Nov. 4, 2005, at 1B. In 2005, a federal grand jury in Phoenix, Arizona handed down the first indictment for obscene spamming. Press Release, U.S. Dep't of Justice, Three Defendants Indicted, Fourth Pleads Guilty in Takedown of Major International Spam Operation, (Aug. 25, 2005), *available at* http://www.usdoj.gov/opa/pr/2005/August/05_crm_431.htm. Also in Phoenix, a California film production company and an Arizona video distributor and retailer, along with three individuals who owned the businesses, were indicted by a federal grand jury on obscenity charges for selling DVDs over the Internet. Press Release, U.S. Dep't of Justice, Federal Grand Jury Charges Arizona and California Companies and Their Owners With Obscenity Violations (June 1, 2006), *available at* http://www.usdoj.gov/opa/pr/2006/June/06_crm_343.html. In September of 2006, the United States arrested a Brazilian national in Orlando, Florida on charges of conspiracy to distribute obscene matters. Press Release, U.S. Dep't of Justice, Foreign Operator of Obscene Web Sites Arrested on Federal Obscenity Charges, (Sept. 7, 2006), *available at* http://www.usdoj.gov/opa/pr/2006/September/06_crm_599.html.

64. For example, one of the most high profile recent targets was Extreme Associates, a website that billed itself (possibly truthfully based on descriptions I have read) as the "Hardest Hard Core on the Web." Jake Tapper, *Politics of Porn: Justice Department Launches Long-Anticipated War on Obscenity*, NEWS BLOG, Aug. 29, 2003, http://stevegilliard.blogspot.com/2003/08/politics-of-porn-justice-department.html. For a brief discussion of the Extreme Associates case, *see supra* note 61.

65. Randy Dotinga, *Porn Webmasters Bush-Whacked?*, WIRED NEWS, June 13, 2006, http://www.wired.com/news/culture/sex/0,71134-0.html.

puzzling, particularly when looked at in doctrinal isolation. I submit that the revival of obscenity law becomes much more understandable when viewed in the context of the other two topics for this symposium—child pornography law and the doctrine of "harmful to minors"—and against the backdrop that I sketched of a porn-saturated society.[66]

Consider the political pressure produced by the dramatic and rapid mainstreaming of pornography in our culture. As with any dramatic cultural shift, the change toward an all porn all the time society means that there are powerful interest groups who are pressuring legal actors to combat this newfound state of affairs. As evidence of the political pressure surrounding the issue, consider the extraordinary number of pornography-related bills under consideration in Congress as of this writing. Almost all of them focus on technology and children.[67]

Yet as the pressure to "do something" about pornography mounts, prosecu-

66. *Supra* notes 1–6 and accompanying text.

67. A 2006 appropriations bill on the Senate's Legislative Calendar contained a provision increasing the fines levied on internet service providers who fail to report child pornography of which they become aware, and a provision requiring warning labels on the first page of web sites containing sexually explicit material. H.R. 5672, 109th Cong. § 533 (2006).

A bill amending the Communications Act of 1934 to require schools and libraries that receive universal service support to prohibit access to social networking sites such as myspace.com was passed by the House but died in the Senate Committee on Commerce, Science, and Transportation. H.R. 5319, 109th Cong. (2006).

Also in the Senate Committee on Commerce, Science, and Transportation was a bill tightening the regulation of obscene and indecent material on broadcast networks, S. 616, 109th Cong. §§ 5-6 (2006), and the Cyber Safety for Kids Act of 2006, which would have established a domain name to designate material that is harmful to minors (for example, ".xxx"), S. 2426, 109th Cong. § 2 (2006).

The Internet SAFETY (Stop Adults Facilitating the Exploitation of Youth) Act of 2006, S. 3499, 109th Cong. § 2 (2006), H.R. 5749, 109th Cong. § 2 (2006), was introduced in both the House and the Senate and referred to their respective Committees on the Judiciary. It contained such proposals as penalties for the "financial facilitation of access to child pornography," S. 3499 § 2, H.R. 5749, § 2; penalties for engaging in a "child pornography enterprise," S. 3499 § 3, H.R. 5749 § 3 (a child pornography enterprise is defined as a series of two or more felony violations committed in concert with three or more other persons); and making child pornography offenses into predicates for a RICO offense, S. 3499 § 8.

The House Committee on the Judiciary also had on its slate legislation that would establish a specific prohibition on pornography depicting prepubescent children, H.R. 5944, 109th Cong. § 2 (2006); that would prohibit the display of child pornography or obscenity to anyone under sixteen with the intent of facilitating a sexual offense against a minor, *id.* at § 3; that would penalize those who place sexually explicit photographs of a person on the Internet without that person's permission, H.R. 1189, 109th Cong. (2006); that would prohibit the production and sale of exploitative child modeling images, H.R. 1142, 109th Cong. § 3 (2006) (defining "exploitative child modeling" as images of a "child under 17 years old for financial gain without the purpose of marketing a product or service besides the image of the child" itself, but excluding images that have "serious literary, artistic, political, or scientific value"); and that would strip all federal courts (including the Supreme Court) of appellate jurisdiction over questions of the validity of state pornography laws under the First Amendment, H.R. 5528, 109th Cong. § 2 (2006).

Finally, proposals to increase the penalties for the production of child pornography are common. *See, e.g.*, H.R. 2318, 109th Cong. § 2(b) (2006); S. 3499, 109th Cong. § 5 (2006); S. 3432, 109th Cong. § 6 (2006).

tors charged with carrying out the objectives of these new bills face the limitations of more modern weaponry. As they fight this losing war and watch their newer weapons failing (often at the hands of the Supreme Court), prosecutors have looked deep in their arsenal to see if they've got other options. And thus they fall back on obscenity law. It might be old and out-of-date, but it is powerful and it is constitutionally sound according to the Supreme Court.

Thus one way to understand the revival of obscenity law is that it is being redeployed to make up for limitations and defeats in the realms of child pornography law and the doctrine of "harmful to minors."[68] The story of the "Protect Act" (Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003)[69] provides one salient example of this theme. In 2002, the Supreme Court struck down the Child Pornography Prevention Act of 1996 (CPPA), Congress's attempt to ban "virtual" child pornography under the rubric of child pornography law.[70] Once Congress lost its bid to use child pornography law to criminalize virtual images of child sexual conduct, what was left? Obscenity law. Thus the PROTECT Act explicitly invoked obscenity law as the method to restrict virtual child pornography in the wake of the Court's decision.[71] In this way, the First Amendment victory over the attempt to expand child pornography laws became less clear cut; it simply led to an alternate approach to the problem through obscenity law.

The limits of child pornography law also help to explain a significant and highly unusual new obscenity indictment handed down in Pittsburgh in September of 2006.[72] This prosecution is remarkable because it represents a break with longstanding obscenity law tradition: for at least twenty years, probably longer, federal prosecutors have not prosecuted purely textual material in obscenity cases, focusing exclusively on obscene images.[73] The famed 1986 Attorney

68. The specter of child pornography, one of the most dreaded of crimes, haunts other doctrinal realms in addition to obscenity. It also drives the attempt to regulate pornography that is harmful to minors, the issue that Congress keeps pressing and the Supreme Court keeps rejecting. The fear is that as children increasingly become consumers of pornography, they will be consumed by it. Exposure to adult material will make them more vulnerable to participating in child pornography. The pornographic landscape will normalize their behavior.

69. Pub. L. No. 108-21, § 504, 117 Stat. 650, 678 (2003) (regarding "Obscene Child Pornography").

70. Pub. L. No. 104-208, § 121, *invalidated by*, Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002). *See supra* notes 19–20 and accompanying text.

71. PROTECT Act § 504. *See also* 149 CONG. REC. S2549, 2576–77, (daily ed. Feb. 24, 2003) (statement of Sen. Leahy) (describing passage of the PROTECT Act as response to constitutional defeat of CPPA). Of course it should have gone without saying that virtual child pornography would have been subject to obscenity law regardless of the explicit invocation of obscenity law in the Act. Obscenity law, unlike child pornography law, makes no distinction between real and fictional material and pays no attention to the method of creating the image.

72. Darklady, *Child Torture Sex Stories Earn PA Woman Federal Obscenity Charges*, YNOT, Sept. 27, 2006, http://www.ynot.com/modules.php?op=modload&name=News&file=news_article&sid=16172&mode=thread&order=0&thold=0 (describing prosecution of purely textual website).

73. *But cf.* United States v. Eckhardt, 446 F.3d 938, 942–44 (11th Cir. 2006) (finding mere words—e.g., "Hey Sue, why don't you take one of them fuckin' school buses . . . and use it like a

General's Commission on Pornography noted and encouraged this trend, pointing to the Supreme Court's 1973 acknowledgement of the "special prominence of the printed word," as compared to images, in free speech law.[74] The Commission observed that "[t]here is for all practical purposes, no prosecution of [purely textual] materials now."[75]

In my view, the decision to break with this long tradition and bring the first obscenity prosecution in decades against purely textual material can be explained at least in part by looking at the limits of child pornography law. The website facing indictments in this case did not publish just any kind of sexual materials; rather it published verbal descriptions of violent and graphic sexual attacks on children. Clearly the material raised concerns about the sexual depiction of minors, an area that would lead one to consider child pornography law. Yet since the material was textual rather than visual, child pornography law did not apply; obscenity law was left to fill the gap. Thus, the limitations of child pornography law shed light on the prosecutors' highly unusual decision.

Obscenity law also compensates for failures in the other front against pornography: the attempt to shield minors from online pornography. Reconsider the narrative I told earlier about Congress's struggles with the Court in this area. In response to mounting pressure to do something about children's easy access to online pornography, Congress has passed two major statutes, the CDA and COPA. Yet, as described above, the Court has repeatedly stood in Congress's way.[76] Justice Breyer has described COPA, recently invalidated by a district court, as the culmination of "eight years of legislative effort, two statutes, and three Supreme Court cases."[77] In dissent in *Ashcroft v. ACLU II*, Breyer warned that the Court's decision "remove[d] an important weapon from the prosecutorial arsenal";[78] in his view, the Court left prosecutors no choice but to revert to the "all-or-nothing" method of obscenity law as a way to fight online pornography.[79]

In this sense, the three doctrinal areas under consideration today function as parts of an interlocking hydraulic system. Each one is exquisitely sensitive to

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fuckin' dildo and stick 'em up your cunt"—to be criminally obscene in the context of phone harassment statute, The Communications Decency Act, 47 U.S.C. § 223(a)(1)(C)).

74. ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 381–82 (1986) [hereinafter COMMISSION ON PORN] (citing Kaplan v. California, 413 U.S. 115 (1973)). Kaplan states: "A book [as opposed to pictures] seems to have a different and preferred place in our hierarchy of values, and so it should be." 413 U.S. at 119.

75. COMMISSION ON PORN, *supra* note 74, at 384. Because they found no practical impediment to speech, the Commission discouraged explicitly eliminating the possibility of purely textual prosecutions in cases in which "the material is either targeted at an audience of children or when its content involves child molestation or any form of sexual activity with children." *Id.* at 383.

76. *See supra* notes 8–17 and accompanying text.

77. Ashcroft v. ACLU II, 542 U.S. 656, 689 (2004) (Breyer, J., dissenting). In this most recent COPA case, the Court upheld the preliminary injunction against the statute while remanding to the district court, which granted a permanent injunction. American Civil Liberties Union v. Gonzales, 478 F. Supp. 2d 775 (E.D. Pa. 2007). *See supra* note 17 and accompanying text.

78. *Ashcroft v. ACLU II*, 542 U.S. at 691.

79. *Id.*

changes in the other. As child pornography and "harmful to minors" proposals face limitations, obscenity law becomes the part that bears the pressure.[80]

But once we take this perspective, the question of how to evaluate any particular battle in the war on pornography becomes more complex. Some of the most prominent cases in recent years, such as the Court's latest COPA decision, or its rejection of the Child Pornography Prevention Act, have been hailed as major victories for free speech. Yet within the narrative I have set forth, these victories might be pyrrhic ones. They have fueled the revival of obscenity law. And so the pressing issue becomes: which is preferable from a free speech perspective—the measures that the Court has blocked, or obscenity law? Justice Breyer argued that obscenity law would be the harsher regime and that the Court's blocking of COPA would ultimately endanger free speech.[81] I don't know whether he's right that obscenity law is the harsher of the regimes. But I do think he's right to see that in the war on pornography, the government is not going to lay down its arms. The question for free speech advocates should be: which government weapon do you want to defend against?

80. There are further ways in which viewing discrete doctrinal areas as part of a larger system illuminates the current landscape. For example, Congress has recently expanded child pornography law in ways that seem to target adult pornographers—it has significantly increased the recordkeeping requirements imposed on adult pornographers to ensure that they don't use underage performers. Adam Walsh Child Protection and Safety Act of 2006, §§ 502–3, 18 U.S.C. §2257 (Supp. 2007). This is an urgent goal, but because it requires elaborate and expensive recordkeeping at risk of criminal penalty, it significantly burdens adult pornographers. Could the expanded requirements be driven not simply by the desire to thwart companies from exploiting children, but also to leverage child pornography law—the most agreed-upon form of censorship—against adult pornography? If so, this is another example of how a weapon from one doctrine has been redeployed in fighting pornography.

81. *Ashcroft v. ACLU II*, 542 U.S. at 691.