DAVID V. GOLIATH: SLINGING A PUBLIC WELFARE STONE AT THE PORNOGRAPHIC PHILISTINE

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I. INTRODUCTION

Pornography use has exploded with the technological advancement of the Internet.[1] Once reserved for "steamy movie theaters in the company of raincoated men,"[2] modern viewership has easily hurdled the shadowy fringes of traditional yore and entered the casual Zeitgeist. Not only is pornography considered a mainstream commodity, in fact, but now – and perhaps *even if* the subject were still frowned upon – nothing more than a wireless connection and a personal computer can gain one entrance to thousands, if not millions, of pornographic expressions.

Before the expansion of the Internet, however, pornography use was in somewhat of a gray area when it came to its relative acceptance.[3] Potential inhibitors or intimidation factors were based on the distinct possibility for others to discover what was considered secretive and shame-worthy.[4] *What will they think?,* in other words, became the pre-Internet caution for these raincoated men. With the Internet and the accessibility therein, however, this cautionary factor quickly became moot if not uprooted altogether.

In addition to the ease the Internet created for privatized viewing, present consumers can now also find sexually exploitative images dominating other industries beyond the overtly erotic.

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[1] For a background on the beginning of the Internet juxtaposed with the rise of pornography access, see Catherina Hurlburt & Marian Wallace, *Pornography on the Internet: The Red-Light District of Cyberspace*, CONCERNED WOMEN FOR AMERICA (May 1, 1999), *available at* http://www.cwfa.org/articledisplay.asp?id=2001&department=CWA&categoryid=pornography ("Over two decades ago, the Internet started as a communication network for the U.S. Defense Department. It was built with a decentralized structure in order to survive a wartime attack […] The Internet can be divided into four general areas: e-mail (electronic mail), the World Wide Web, chat rooms and newsgroups. Since there is no single source at which material is categorized and regulated, it is difficult to block unacceptable material"). *See also* Zachary Britton, *SafetyNet* 12 (Eugene Or Ed., Harvest House Publishers 1998) (quoting Internet pioneer John Gilmore on Internet maneuverability: "The [N]et interprets censorship as damage and routes around it."). *See also* Daniel Pearl, *Government Tackles a Surge of Smut on the Internet*, WALL ST. J., Feb. 8, 1995, at B1 ("Thus, it has traditionally had no limits on expression, and commercial services linked to the Internet have shied away from policing their customers.")

[2] Holman W. Jenkins, Jr., *Porn Again? An Industry Fantasizes About Respect*, WALL. ST. J., Apr. 1, 1998, at A19. ("[O]ddly, the porn industry has blossomed because one can have access to pornography behind closed doors instead of shady movie theaters.")

[3] *See* Paul James Birch*, Pornography Use: Consequences and Cures*, MARRIAGE AND FAMILIES MAGAZINE (September 2002 edition) (noting the problem with viewing pornography is that it ultimately "causes more negative feelings (guilt, shame, etc.) and is [...] inadequate for relieving the cause of the negative feeling because we have not dealt with it [pornography use] directly"). *See also* A. Dean Byrd and Mark Chamberlain, *Willpower is Not Enough: Why We Don't Succeed at Change*, Salt Lake City: Deseret Book (1995)

[4] *See* Kristi Pikiewicz, PhD, *The Hidden Wisdom of Porn Addiction*, PSYCHOLOGY TODAY (September 9, 2013), available at http://www.psychologytoday.com/blog/meaningful-you/201309/the-hidden-wisdom-porn-addiction ("Compulsive use of porn keeps things stable, by providing an outlet for the addicted person while protecting the partner from looking within. In each case, something or someone "out there" is the magic bullet. One day pornography will be under control, and one day he (or she) will finally start "doing it right.")

Advertising for products as harmless as deodorant, for example, continue to sell suggestiveness over the product itself.[5] The commercialization of sex has not idled on unnoticed, with several critics believing it to be a strong indication the inevitable objectification of women (intrinsic in such methods) has become an acceptable byproduct to questionable economic gain.[6]

And these gains suggest an interesting – if not contradictory – picture for pornographers. In 2006, for example, the pornography industry saw worldwide revenues nearing ninety-seven billion dollars ($97,000,000,000.00) – then one of the largest thriving enterprises in the world.[7] Of that figure, twenty-eight percent of revenues came from China, fourteen from the United States, twenty-one percent from Japan and an astonishing twenty-seven percent from South Korea.[8] At the time, these figures meant the pornography industry was larger than the combined revenues of the top technology companies in the world. These included Microsoft, Google, Amazon, eBay, Yahoo, Apple, Netflix and EarthLink.[9]

After 2006, however, the continued advancements of the Internet created a type of carnal black-hole. Revenues all but disappeared while user activity largely continued unabated. As of 2013 pornography revenue became a fraction of what it was just seven years prior.[10] Yet somewhat against the common sentiment where profit margin indicates an underlying utility,

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[5] *See*, *e.g.*, Axe Body Spray Video, "*The Axe Effect – Billions*," *available at* https://www.youtube.com/watch?v=I9tWZB7OUSU (accessed August 2014)

[6] *See*, *e.g.*, Ariel Levy, *Female Chauvinist Pigs: Women and the Rise of Raunch Culture*, (Simon & Schuster Pub) (September 2005) (Levy describes this as "raunch culture," devoid of love and centered around a "commercial" enterprise. "It's not about what turns you on or what you like. It's what [they] can sell you")

[7] *See* Paul Wilborn, *San Fernando Valley's Porn Business Booms Despite Poor Economy*, Associated Press (Nov. 25, 2002), *available at* http://www.highbeam.com/doc/1P1-69858295.html. *See also* Women's Resources & Services, *Pornography*, Brigham Young Univ., *available at* https://wsr.byu.edu/pornographystats (accessed August 10, 2013)

[8] Family Safe Media, *Preserving Family Values in a Media Driven Society*, Pornography Statistics (2003-2007), *available at* http://www.familysafemedia.com/pornography_statistics.html ("Statistics are compiled from the credible sources mentioned [in the website]. In reality, statistics are hard to ascertain and may be estimated by local and regional worldwide sources: ABC, Associated Press, AsiaMedia, AVN, BBC, CATW, U.S. Census, Central Intelligence Agency, China Daily, Chosen.com, Comscore Media Metrix, Crimes Against Children, Eros, Forbes, Frankfurt Stock Exchange, Free Speech Coalition, Google, Harris Interactive, Hitwise, Hoover's, Japan Inc., Japan Review, Juniper Research, Kagan Research, ICMEC, Jan LaRue, The Miami Herald, MSN, Nielsen/NetRatings, The New York Times, Nordic Institute, PhysOrg.com, PornStudies, Pravda, Sarmatian Review, SEC filings, Secure Computing Corp., SMH, TopTenREVIEWS, Trellian, WICAT, Yahoo!, XBIZ")

[9] *Id*.

[10] *See* Tim Willingham, *The Stats on Internet Pornography*, Daily Infographic (January 4, 2013), *available at* http://dailyinfographic.com/the-stats-on-internet-pornography-infographic (citing worldwide revenue at $4.9bn)

pornography use is still consistently level despite this drop-off.[11] That means pornography may be one of the few industries that exists outside the rigors of supply and demand.

With the Internet such paradoxes are possible. Twelve percent of all Internet web pages are pornographic in nature.[12] Forty-million Americans are regular visitors to porn sites, with twenty-five percent of all search engine requests on any given day being pornographic in scope.[13] Alarmingly, 116,000 of these every day searches involve child pornography.[14] And because theInternet is somewhat synonymous with anonymity, even the most vile sex acts are now transmitted via the web with considerable immunity.[15] This too has not gone unnoticed.[16]

Economic gains. Vile sex acts. Virtual anonymity. Such items suggest pornography an easy concept to behold, licit or illicit that concept may be. To this day, however, the definition of pornography is as elusive as ever.[17] Ever compounding the elusiveness of that definition – should that definition find sunlight – is the secondary, but seemingly more important issue of whether such a definition has any actual world application.[18] As simplistic as it may or even should

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[11] *See Id*. According to research conducted by Willingham, every second in 2013 28,258 Internet users were viewing pornography. In 2006, where revenues were nearing roughly twenty-times the 2013 totals, *cf. supra* at note 7, use was approximately 29,000 views per second.

[12] *Id*. (At a minimum, at least 25,000,000 individual websites)

[13] *Id*. (68,000,000 searches/day. The top of which is the word "sex.")

[14] *Id*.

[15] Hurlburt & Wallace, *supra*, note 1 ("This new generation of pornography is more graphic than ever. With the technology of virtual reality, users can control sexual situations on their computer screens, undress images of women and use simulated sex toys on them. These advances further desensitize the user to harmful and violent situations.")

[16] In his book, *The Soul in Cyberspace*, Douglas Groothuis comments on the delusion of such anonymity as a mode of "self-deception" that drops to "new depths thanks to the online community ("This ease of access was sadly highlighted by the pseudonymous confessions of 'the Flogmaster' in Internet Underground. This man rejoiced in the opportunities cyberspace afforded him to engage in sadomasochistic fantasies: 'After years of guilty hiding I was now part of an anonymous society openly sharing interests and secrets that could not be expressed in any other forum.' Notice the strange wording he uses: 'anonymous society' that 'shares.' This poor soul is relieved that he can freely indulge his perverse desires without guilt; yet the only 'society' in which it can be done must be anonymous.") Douglas Groothuis, *The Soul in Cyberspace,* at 99 (Grand Rapids, MI ed., Baker Pub Group) (1997) (Arianna Huffington goes further, calling online pornography a "plague...far beyond indecency, descending into barbarism." *Id*, at 100. Such barbarism, Huffington observes, includes depictions of child molestation, bestiality, sadomasochism and how to find sexual enjoyment in killing children.) *Id*.

[17] *See*, *e.g*., James Lindgren, *Defining Pornography*, 141 Univ. of Penn. L. Re v. 4 (1993) (opening his Note with the telling question: "What is pornography or obscenity?")

[18] *Id*. at 1155 ("Despite much speculating about pornography definitions, there's been little empirical study of just how they work when applied to real texts.")

appear, legal scholars and critics alike have found such issues difficult if not impossible to shepherd.[19]

There's a reason to try, though. The undefined field of pornography is a realm within a realm within a realm. There is the First Amendment, bastion and rallying cry of a free people,[20] which contemplates speech and conduct of varying forms and fashion. Not all free people are so idealistic and, as if aware of such limitations in her interpretations, the Supreme Court has long held no right is completely unbridled.[21] Obscenity, as one such example, is not a constitutional form of speech and can therefore be strictly ascribed.

This raises the trickiest of questions: are pornography and obscenity one in the same? If they are, why is most pornography largely ignored by relevant enforcement agencies? If they are not, where is the line demarcating the two? And if such a line can be drawn, what is the proper end, if any at all, a state could (or reasonably should) pursue in response to the relationship that may arise between pornography and the *populi*?

If its likely an inverse relationship exists between the cultural burgeoning of pornography to that of the perceived societal consequences,[22] and a working definition for pornography is finally accepted, the question becomes more particularized. Does the federal or state government: 1. have power to address the consequences of pornography; and 2. if it does have that power, what competing interests undermine the execution of that power?

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[19] The most famous of this difficulty may be found memorialized by Justice John Stevens, who claimed he "knew not" what pornography was, only that he "knows [sic] it when [he] see[s] it." *Jacobellis v. Ohio*, 378 U.S. at 184 (1964).

[20] *See*, *e.g.*, the beautiful yet forceful language used by Justice Robert Jackson in *West Virginia State Board of Education, et al. v. Walter Barnette, et al.,* 319 U.S. 624, at 642 (1943), in knocking down a resolution calling for punishment if/when students refuse or fail to recite the pledge of allegiance ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.")

[21] *See*, *e.g.*, *Reynolds v. United States*, 98 U.S. 145 (1879) (The Supreme Court upheld a conviction of polygamy against a constitutional challenge asserting the fundamental right to practice religion permitted the Petitioner to marry multiple wives. The Court restricted two rights in this decision: the free exercise of religion and the fundamental right to marry.)

[22] For a varying discussion on pornography and its links to the aforementioned, *see* Kerby Anderson, *The Pornography Plague*, PROBE MINISTRIES (1997 Probe Ministries International), *available at* http://leaderu.com/orgs/probe/docs/pornplag.html. *See also* Dolf Zillman and Jennings Bryant, *Pornography, Sexual Callousness, and the Trivialization of Rape*, JOURNAL OF COMMUNICATIONS (1982); and Dolf Zillman*, Effects of Prolonged Consumption of Pornography* at 22-24 (June 1986). (This was a paper prepared for the Surgeon General's Workshop on Pornography and Public Health in Arlington, Va.)

The United States Constitution guards certain fundamental liberties from most kinds of regulatory efforts.[23] At the same time, a state has a duty to, *and for*, the good of its people, especially when compelling reasons exist to override these fundamental rights, privileges and choices.[24] This balancing act, when it comes to controversial issues of privilege and choice, has consistently put respective States' argument for the "greater good" at odds with the Constitution's guardianship of the individual.[25]

By way of example: obesity, smoking, and the use of trans-fat are all under heavy scrutiny per the state's watchful concern towards general health.[26] Yet pornography avoids such scrutiny even as its effects burgeon. Now, there are existing regulations aimed to curtail such primary effects arising from pornography, but more times than not such legislation turns out to be nothing more than avoidable paper tigers, creating the allusion of concern but lacking enforcement bite.[27]

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[23] *See*, *e.g.*, U.S. CONST. amend. I. through amend. X (commonly referred to as *The Bill of Rights*)

[24] The most prevalent of this kind of balancing act is found in certain states outlawing cigarette smoking in public places (and other tobacco-based products). Citing health concerns over air-quality and second-hand smoke, states and cities such as New York, Minnesota, and California have generally banned public smoking. In Minnesota, this legislation was named the Freedom to Breathe Act of 2007. Similarly, countries overseas also started adopting anti-smoking bans. In Ireland, Norway, and the United Kingdom there exists several limitations on smoking in public places. This kind of action in response to growing public health concerns is not limited to smoking; States have also started adopting legislation that make it unlawful for restaurants to use cooking oil containing trans fats. *See* Kate Stone Lombardi, *Does That Trans-Fat Ban Grease a Slippery Slope?*, NEW YORK TIMES (January 27, 2008) (In New York City, restaurants are fined if they are found to be using such oils). And with the rising crisis surrounding obesity in America, some legislature are suggesting drastic measures in light of drastic times; for example Mississippi is considering a measure that would ban restaurants from serving obese people (*Mississippi Law Would Ban Restaurants From Serving Fat People* (February 4, 2008), *available at* http://www.suntimes.com/news/nation/775974,fat020408.article)

[25] It seems the most famous of this type of situation would be the circumstances in which *Roe v. Wade*, 410 U.S. 113 (1973) was decided. Legalizing abortion by way of a constitutional freedom of "privacy" and a woman's right to choose, the Supreme Court overruled the state of Texas's legitimate interest in protecting "life" by way of their ati-abortion statutes. The test used in situations such as these has commonly been referred to as *strict scrutiny*. Originating in one of the most "famous footnotes" in Supreme Court history, the Court in *United States v. Carolene Products*, 304 U.S. 144 (1938) hinted that "[t]here may be narrower scope for operation of the presumption of constitutionality when *legislation appears on its face to be within a specific prohibition of the Constitution*, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth..." (Footnote #4). *See also Korematsu v. United State*s, 323 U.S. 214 (1944) for the first application of this test.

[26] *See supra*, at note 24.

[27] Consider certain provisions of the Child Online Protection Act of 1998 ("COPA") that were considered too broad and struck down by the Supreme Court. This is legislation dealing exclusively with protecting minors from sexual material on the Internet and yet the Supreme Court is constantly vigilant to pornography being viewed under the iron curtain of the First Amendment. *See*, *e.g.*, *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004) (in affirming a preliminary injunction, the Supreme Court held COPA was not the least restrictive means Congress could have used in protecting minors)

This can most clearly be seen by the Supreme Court's progression towards *Miller v. California*, the 1973 case that dealt specifically with obscenity and the First Amendment. Since *Miller*, pornography has become a cultural glacier slowly inching forward while changing the landscape beneath it. As obscenity? *Miller* was unclear on this point. With advancements in neuroscience and the proliferation of the Internet, it appears now, however, *Miller* is ripe for readdressing.

This Note will make the argument that pornography is afforded First Amendment protections far too broadly. Without the allusion of this protection, pornography regulation can therefore be enforced with strict rigidity in light of a growing concern for the public health and welfare.[28] Part I of this Note will underscore, by background exploration, the First Amendment protection to "expressive conduct" and "obscenity," illustrating how the production and use of pornography rest comfortably between the two – never fully enjoying First Amendment protection while at the same time never being subject to firm regulation lest a constitutional right be implicated. Part II will discuss public health law and state power, examining whether pornography should be considered an illicit good that is comparable to an addictive drug as defined by the Federal Food, Drug, and Cosmetic Act (in conjunction with the federal Comprehensive Drug Abuse Prevention and Control Act).[29] Part III will then elaborate on how public welfare regulations by way of Congress and/or local ordinances could chip away at pornography's protection and remove its loose First Amendment safeguard. Finally, Part IV will conclude on whether it's a feasible option in regulating pornography as an illicit drug under current Congressional Scheduling while addressing the cultural and economic concerns that may arise under such optioning.

I. PORNOGRAPHY'S PROTECTION IN THE FIRST AMENDMENT, AND THE COURT'S PROGRESSION TO AN "OBSCENITY"-STANDARD

> "The Court has worked hard to define obscenity and concededly has failed."
> -Justice Douglas, in dissent
> *Miller. v. California (1973)*

[28] The Court in *Miller* did hold that obscenity laws *can* be enforced against "hard-core pornography" (413 U.S. 15, at 28 (1973) (emphasis added)); however any and all federal obscenity laws are largely ignored and rarely enforced. The exception being those instances of Child Pornography under COPA, but even this is a rare exception.
[29] Pub. L. 75-717, at 21 U.S.C. § 301, *et seq*; Pub. L. 91-513, at 21 U.S.C. § 801, *et seq*., respectively.

A. Expressive Conduct, Context, and the Development of a Constitutional Standard Defining "Obscenity"

The First Amendment provides:

> Congress shall make no law respecting an establishment of 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.[30]

Respecting pornography, the freedom of speech clause found within the First Amendment has been broadly interpreted to encompass what has come to be known as "sexual expression."[31] Such expression has long been recognized as speech entitled to First Amendment protections,[32] so long as the conduct being expressed is "sufficiently imbued with elements of communication."[33]

The specific test used by the Supreme Court for expressive conduct, in light of the *sufficiency imbued*-requirement, is whether "an intent to convey a particularized message is present," in addition to a clear finding of likelihood that the expressed message be understood to those viewing it.[34] Admittedly, First Amendment jurisprudence is not so simple as to be decided by one general test. Thus, even when certain – i.e. sexual – conduct is found to be "expressive" for purposes of speech, courts will then have to decide whether the regulation of the same conduct is anyway related to the suppression of the expression involved.[35]

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[30] U.S. CONST. amend. I.

[31] For a varied discussion on obscenity, sexual expression, and the First Amendment, *see generally*, Amy Adler, *What's Left?: Hate Speech, Pornography, & the Problem of Artistic Expression*, 84 CAL. L. REV. 1499 (1996); Harry Clor, *Obscenity & the First Amendment*, 7 LOY. L.A. L. REV. 207 (1974); David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111 (1994); Ronald Collins & David Skover, *The Death of Discourse* (1996) at 139-200; Louis Henkin, *Morals & The Constitution: The Sin of Obscenity*, 63 COL. L. REV. 391 (1963); Steven Gey, *The Apologetics of Suppression: The Regulation as Act and Idea*, 86 MICH. L. REV. 1564 (1988); William Lockhard, *Escape from the Chill of Uncertainty: Explicit Sex & The First Amendment*, 9 GA. L. REV. 533 (1975); and, *inter alia*, Jeffery O. Sherman, *Love Speech: The Social Utility of Pornography*, 47 STAN. L. REV. 661 (1995)

[32] *See Texas v. Johnson*, 491 U.S. 397, 404 (1989) ("The First Amendment literally forbids the abridgement only of 'speech', but we have long recognized that its protection does not end at the spoken or written word.")

[33] *Spence v. Washington*, 418 U.S. 405, 409 (1974).

[34] *Id*., at 410, 411. Examples of this kind of protected conduct include activities such as burning a flag as a form of political protest (*Texas v. Johnson*), fashioning peace signs to the American flag (*Spence v. Washington*), and wearing black armbands to protest the Vietnam wars (*Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503, 504-05 (1969)).

[35] *Texas*, *supra* note 32, at 403.

Within this inquiry come two levels the courts explore in balancing expressive conduct against the suppressive regulations implemented to curb such conduct. If the suppression (read: regulation) is aimed at the "communicative impact" of the speech, courts deem these "content-based" restrictions and tend to send those regulations out to pasture.[36] If, on the other hand, an inquiry is formed and the regulation is aimed at the "noncommunicative impact" of the expressive conduct, courts deem these "content-neutral" infringements.[37]

For purpose of *this* inquiry and in service to brevity, pornography regulations have historically been held to be content-neutral suppressors, with a handful of courts upholding comparable regulations when pertaining to various zoning laws passed to avoid the "secondary effects" of what pornography and "adult" entertainment may carry into a community.[38]

1. *Brief European Context for Obscenity Regulation*

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[36] *See*, *e.g.*, *Reno v. American Civil Liberties Union*, 521 U.S. 844, at 872 (1997) (With respect to the Communications Indecency Act of "The vagueness of the CDA is a matter of special concern for two reasons. First, the CDA is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech. See*, e. g., Gentile* v. *State Bar of Nev.,* 501 U. S. 1030, 1048-1051 (1991). Second, the CDA is a criminal statute. In addition to the opprobrium and stigma of a criminal conviction, the CDA threatens violators with penalties including up to two years in prison for each act of violation. The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images. See, *e. g., Dombrowski* v. *Pfister,* 380 U. S. 479, 494 (1965). As a practical matter, this increased deterrent effect, coupled with the "risk of discriminatory enforcement" of vague regulations, poses greater First Amendment concerns than those implicated by the civil regulation reviewed in *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC,* 518 U. S. 727 (1996).")

[37] *See* Ofer Raban, *Content-Based, Secondary Effects, and Expressive Conduct: What in the World Do They Mean (and What Do They Mean to the United States Supreme Court)?*, 30 SETON HALL L. REV. 551, 554 (2000). *See also* Kevin Case, *"Lewd and Immoral": Nude Dancing, Sexual Expression, and the First Amendment*, 81 CHI. KENT. L. REV. 1185 (2006).

[38] The history of the "secondary effects" test had the Supreme Court originally considering city ordinances that attempted to confine adult motion picture theaters to a relatively limited area in *Young vs. American Mini Theaters*, 427 U.S. 50 (1976). In *Young*, the Court upheld a Detroit zoning ordinance that prohibited adult theaters from locating near residential areas or within 1,000 feet of any two other "regulated uses" (adult-oriented businesses). In a footnote of their holding, the Court considered the law a legitimate effort by the city "to preserve the character of its neighborhoods." Further, in *City of Renton vs. Playtime Theatres*, 475 U.S. 41 (1986), the Court found these "secondary effects" often associated with a concentration of adult-oriented businesses propagating prostitution, crime, and lowered property values (among other things). Since the law in *City of Renton* was "content-neutral" in the sense that it was not justified with reference to the content of the speech, the Court upheld the ordinance using something less than strict scrutiny. Lastly, in *Barnes vs. Glen Theater*, 501 U.S. 560 (1991) the Court took to considering public nudity as expressive conduct. There, a majority of the Court found the case as a First Amendment balancing-act, wherein five members of the Court (applying the O'Brien test articulated in the case *United States v. O'Brien*, 391 U.S. 367 (1968) (this case, over the now famous draft cards and the Vietnam War, began the inquiry to whether expressive conduct would be afforded First Amendment protection) concluded that the state's interest in protecting morality (four members) or preventing the harmful secondary effects of nude entertainment establishments (Souter) permitted Indiana to enforce its ban on public nudity. *See also City of Erie vs. Pap's A.M. and City of Los Angeles vs. Alameda Books*, 529 U.S. 277 (2000).

The basis for First Amendment protection (and interpretation) of sexual expression comes originally from initiatives to regulate sexual expression in Europe.[39] There, sexual explicit materials were generally permitted so long as the same materials did not inflict harm or create a harmful influence on or in children.[40] This was the general policy, anyway, until around the 16th century. Then, European countries started limiting what books were given to children,[41] and by the 18th century a perceived "childhood sexual innocence" swiftly led to a wave of strict anti-masturbation hysteria in Europe.[42] Concerns "with possible corruption of the young, along with urbanization, increased literacy, and anti-vice movements" were then stoked during the 19th century. Ultimately this led to "[a] political will for widespread suppression of sexual speech."[43]

2. *European Roots to the U.S. Tree*

The first federal law of the United States regulating "obscenity" was passed in 1842, authorizing the then Customs Service to seize and confiscate any materials or pictures categorized as "obscene or immoral."[44] At the time this was considered a questionable regulatory scheme, even with states having passed some of their own obscenity laws as far back as the 1820s,[45] since no definition for "obscene" or "immoral" was provided for by the scheme itself. Twenty years later, however, and after England fashioned herself a suitable standard via the case of *Hicklin v. Regina*, the United States would quickly gain her footing.

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[39] For a general understanding of the road to censorship in Europe, *see* Mette Newth, *The Long History of Censorship*, Beacon For Freedom of Expression (National Library of Norway 2010) *available at* http://www.beaconforfreedom.org/liste.html?tid=415&art_id=475

[40] *See Id*. (Noting "the postal service also played a crucial role as an instrument of censorship in many countries, particularly in times of war. The British Empire efficiently employed censorship of mail during the first half of the 20th century.")

[41] *Id*. ("Public libraries were expected to act as the benevolent guardians of literature, particularly books for young readers.")

[42] Philippe Ariès, *Centuries of Childhood* 103 (Bob Corbett ed., Vintage Press 1985) (1962) ("Certain pedagogues...refused to allow children to be given indecent books" which led to early attempts to censor sexually arousing art and literature). *See also* Paula Fass, *et al*., *Reinventing Childhood after World War II* xi (Univ. of Penn. Press (2012)) ("One of the revelations […] is the centrality of children and childhood to fundamental matters of law, social policy, politics and political symbolism, institutional life, and cultural production.")

[43] For an excellent discussion on this widespread suppression, see Marjorie Heins, *Not in Front of the Children: "Indecency," Censorship, and the Innocence of Youth* 18-26 (Hill & Wang) (2001).

[44] *Id*.

[45] *See* Brian Duignan, *The Judicial Branch of the Federal Government: Purpose, Process, and the People* 178 (Britannica Ed. Publishing (2010)).

Under the English common law famously created in *Hicklin*, any material that tended to "deprave and corrupt those whose minds are open to such immoral influences" was to be deemed "obscene" and could there a result be banned according to that basis.[46] At the time, this included many literary works since even isolated passages, taken out of context, *could be* immorally influencing to the most susceptible of society, such books were outlawed for nothing more than the effect *they might have*.

In the United States, this *Hicklin* "deprave and corrupt"-standard was legislatively contemplated in the Comstock Act,[47] a comprehensive federal initiative meant to curb pornography, contraception, and even educational materials shipped through the postal services.[48] The standard created by the English in *Hicklin,* legislatively contemplated by the United States with passage of the Comstock Act,[49] did eventually meet certain criticism for its broad scope and child-centric focus.[50] As Judge Learned Hand put it, Americans were being

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[46] *Regina v. Hicklin*, 3 Queens Bench 360, 362 (1868)

[47] An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use, c. 258, §2, 17 Stat. 598, 599 (1873) (carrying over some language from the 1865 Post Office Act, c. 89, §16, 13. Stat. 504, 507 (1865)). The federal obscenity law has been amended many times; it is now codified at 18 U.S.C. §1461. (18 U.S.C. §§ 1460-1470 is the section that "regulates" much of the adult hard-core pornography). The original law was named "Comstock" because the leading enforcer of this "deprave and corrupt"-standard was Anthony Comstock, a social activist who successfully persuaded Congress to expand the federal obscenity law. This law barred sending through the mail not only "any obscene, lewd, or lascivious book, pamphlet, picture, print, or other publication of vulgar and indecent character," but "any article or thing designed or intended for the prevention of contraception or procuring of abortion. *See also United States v. Bennett*, 24 F. Cas. 1093, at 1101-04 (Cir. Ct.S.D.N.Y. 1879); and Heins, *supra* note 43, at 32-33 ("Deputized as a special agent of the U.S. Post Office, Comstock, during his 40-year tenure as head of the New York Society for the Suppression of Vice, seized and destroyed thousands of books, magazines, illustrations, and contraceptive advertisements and devices. Arrests and prosecutions only occasionally led to appellate court decisions, and when they did, the courts generally followed the *Hicklin* definition of obscenity.").

[48] The prosecution of Ida Craddock comes to mind. On October 10th, 1902, Ms. Craddock was arrested by Comstock himself and prosecuted under the Comstock Act for sending her short pamphlet, *The Wedding Night*, through the mail. Her conviction led to a five-year sentence which is believed to have directly influenced Craddock's decision to commit suicide. *See also* Ira Craddock, *The Wedding Night*, (Zea Books 1902), available at http://www.idacraddock.com/wedding.htm; Clark Bell, Esq., *Medico-Legal Studies: Vol. VIII*, at 47-50 (Medico-Legal Journal 1906)

[49] Then judicially rubber-stamped by way of the Supreme Court in *Rosen v. United States*, 161 U.S. 29 (1896)

[50] See, e.g., *Walker* v. *Popenoe,* 80 U. S. App. D. C. 129, 149 F. 2d 511; *Parmelee v. United States,* 72 App. D. C. 203, 113 F. 2d 729; *United States v. Levine,* 83 F. 2d 156; *United States v. Dennett,* 39 F. 2d 564; *Khan* v. *Feist, Inc.,* 70 F. Supp. 450 aff'd, 165 F. 2d 188; *United States v. One Book Called "Ulysses,"* 5 F. Supp. 182, aff'd, 72 F. 2d 705; *American Civil Liberties Union v. Chicago,* 3 Ill. 2d 334, 121 N. E. 2d 585; *Commonwealth v. Isenstadt,* 318 Mass. 543, 62 N. E. 2d 840; *Missouri v. Becker,*364 Mo. 1079, 272 S. W. 2d 283; *Adams Theatre Co. v. Keenan,* 12 N. J. 267, 96 A. 2d 519; *Bantam Books, Inc. v. Melko,* 25 N. J. Super. 292, 96 A. 2d 47; *Commonwealth* v. *Gordon,* 66 Pa. D. & C. 101,aff'd *sub nom. Commonwealth* v. *Feigenbaum,* 166 Pa. Super. 120, 70 A. 2d 389; cf. *Roth* v.*Goldman,* 172 F. 2d 788, 794-795 (concurrence).

asked to "reduce [their] treatment of sex to the standards of a child's library in the supposed interest of a salacious few."[51] While Hand upheld the *Hicklin* test by decision in *United States v. Kennerly*, by the 1930s courts were routinely questioning whether *Hicklin* was guilty of ambiguity and overbreadth, with some even repudiating and directly overruling it.[52]

B. The Supreme Court's Role in Defining "Obscenity": Roth v. United States

The Supreme Court of the United States finally confronted the obscenity issue in the 1957 case of *Roth v. United States.* Writing for the Court and its 6-3 decision, Justice Brennan observed that sex is "a great and mysterious motive force in human life," "a subject of absorbing interest to mankind through the ages," but the *Hinklin* effort to curb obscenity may very well "encompass legitimate materials" conveying this force through speech and press.[53] Substituting a new standard to judge works which may be considered obscene, the Court held "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest" the new standard for First Amendment jurisprudence.[54] *Hicklin*'s susceptible person was out. *Roth*'s average person was in.

Ten years after *Roth*, the Supreme Court tested this new standard in *Memoirs v. Massachusetts*.[55] Narrowing *Roth*, a plurality of the Court held only material which is "patently offensive" and "utterly without redeeming social value" is susceptible to a finding of obscenity.[56] In other words, the core articulation of the *Roth* test, subsequently narrowed in *Memoirs*, required:

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[51] *United States v. Kennerley*, 209 Fed. Rep. 119, 121 (S.D.N.Y. 1913). *See also* David M. Rabban, *Free Speech in its Forgotten Years, 1870-1920* 146 (Cambridge Univ. Press) (1997).

[52] The criticism was really by way of a question, specifically *Hicklin's* underlying assumption: should the law's censorship be based on what society calls inappropriate to adolescents and children? For those that leaned against this underlying assumption *See United States v. Dennett*, 39 F.2d 564, 568 (2d Cir. 1930); and *United States v. One Book Called "Ulysses",* 5 F. Supp. 182, 183-85 (S.D.N.Y. 1933), (aff'd, *United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705, 706-07 (2d Cir. 1934)).

[53] *Roth v. United States*, 354 U.S. 476, 488 (1957).

[54] *Id*. at 483-87 (1957) (In fashioning this new test, Justice Brennan reaffirmed in *Roth* that obscenity was not protected by the First Amendment and thus upheld the convictions of Roth and Alberts for sending obscene material by post.)

[55] The full citation: *A Book Named 'John Cleland's Memoirs of a Women of Pleasure' v. Attorney General of the Commonwealth of Massachusetts*, 383 U.S. 413 (1963)

[56] *Id*. at 419

> (1)the dominant theme of the material taken as a whole appeals to a prurient interest in sex;
>
> (2) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and
>
> (3) the material is utterly without redeeming social value.[57]

Just like in *Roth*, though, no opinion in *Memoirs* could command a majority of the Court. As a result, the state of the law regarding obscenity remained somewhat opaque even with th[ese] articulated standard[s]. This brought about a time of not just uncertainty, but oddly unconventional fact-finding. With the Court unable to agree upon a satisfying standard, and the lower courts relying thereupon such ill formulations, the Justices were put in the awkward position of actually having to personally review almost every obscenity prosecution in the United States that snaked its way up for review. In other words, the Justices (and their clerks) actually gathered for weekly screenings of potentially "obscene" motion pictures in order to decide *Roth*'s application on a case-by-case basis.[58]

As a result of this individuated application and somewhat liberal definition, pornography and sexually-oriented publications multiplied.[59] While the sexual revolution of the sixties burgeoned, counter-pressure from conservative-minded crowds also fomented – particularly after the Court's decision in *Jacobellis v. Ohio* which expanded the second element of *Roth* and contextualized "contemporary community standards" to mean the "society at large," or nationally, instead of by state and/or local sensibilities.[60] Through expansion came limitation.

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[57] *Id*. at 418

[58] *See* Judith Silver, Esq. *"Movie Day at the Supreme Court; I Know It When I See It: A History of the Definition of Obscenity"* (2001), *available at* http://64.233.167.104/search?q=cache:7ml6m4ZGSbEJ:www.internet-law-library.com/pdf/Obscenity%2520Article.pdf+Roth+v.+United+States+Justices+viewing+pornography&hl=en&ct=clnk&cd=7&gl=us. *See also*, Bob Woodward & Scott Armstrong, *The Brethren: Inside the Supreme Court* (Simon & Schuster) (1979) (Woodward and Armstrong outlined the behind-the-scenes battle of the Supreme Court during the 1960's and 1970's and provides interesting context to the obscenity cases decided during that period, most important of which was *Miller v. California)*

[59] *See* Willingham, *supra* note 10.

[60] *Jacobellis v. Ohio,* 378 U.S. 184 (1964) ("It seems clear that in this passage Judge Hand was referring not to state and local "communities," but rather to "the community" in the sense of "society at large; . . . the public, or people in general." Thus, he recognized that under his standard the concept of obscenity would have "a varying meaning from time to time"—not from county to county, or town to town." (*Id*. at 193)).

This may have been the settled, albeit murky, law on obscenity – *Roth*; *Memoirs*; *Jacobellis* in all their glory– but for three subsequent events. In 1969, Chief Justice Earl Warren, part of the Court's liberal element, resigned and was replaced by a Nixon appointee, Warren Burger.[61] Then in 1971, another of the Court's liberal elements, Hugo Black, resigned and was replaced by a second Nixon appointee, conservative-minded and future Chief Justice, William Rehnquist.[62] Finally, in 1972, *certiorari* was granted by the Supreme Court in the obscenity prosecution making the underlying proceeding in *Miller v. California*.[63]

Following argument and reargument, "one of a group of "obscenity-pornography" cases being reviewed […] involving what Mr. Justice Harlan called "the intractable obscenity problem,"[64] the Justices in *Miller v. California* affirmed the holding in *Roth* that obscenity was not protected speech under the First Amendment,[65] disregarded portions of *Memoirs* and *Jacobellis,*[66] and created the now settled standard-of-law regarding what constitutes "obscenity" for materials outside of the folds of the First Amendment.[67] In so revamping *Roth*, the Court did acknowledge the inherent dangers in regulating expression and noted state statutes designed to obviate obscene materials must be carefully scrutinized.

To that end, the Court provided a new three-part test as a "basic guideline[]" to determine potential state offenses.[68] These guidelines suggest a finding of obscenity be predicated on:

> (1) The average person, applying contemporary community standards (not national standards, as some prior tests

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[61] *See* Silver, *supra* note 58, at 2.

[62] *Id*.

[63] *Miller v. California*, 413 U.S. 15 (1973). The Court granted Miller's appeal on the basis that he was prosecuted under California's definition of obscenity which borrowed from the Court's decisions in *Roth* and *Memoirs*, decisions the Supreme Court was intent on revisiting.

[64] *Id*., at 16.

[65] "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment." *Id*., at 23.

[66] "We do not adopt as a constitutional standard the "*utterly* without redeeming social value" test of *Memoirs* v. *Massachusetts,* 383 U. S., at 419; that concept has never commanded the adherence of more than three Justices at one time." *Id*., at 24-25. "[A]nd (c) hold that obscenity is to be determined by applying "contemporary community standards," […] not "national standards." *Id*., at 37.

[67] *See Id*., at 24.

[68] *Id*. ("A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.")

> required), finding that the work, taken as a whole, appeals to the prurient interest;
>
> (2) The work depicts or describes, in a patently offensive way, sexual conduct or excretory functions specifically defined by applicable state law; and
>
> (3) The work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[69]

Despite this majority ruling, there were still looming concerns from the bench that hadn't been fully addressed by *Miller*. Justice Brennan, previous author of the *Roth* test, had come to conclude (or realized a folly) that judicial efforts to articulate a definition of obscenity were doomed for failure for its insistence on using vague and ambiguous concepts.[70] In his words, "[the Court] ha[s] assumed that obscenity does exist, and that we 'know it when [we] see it' [*citation omitted*], [but] we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech."[71]

But Justice Brennan's about-face realization came too late.[72] While subsequently modified or clarified in some respects,[73] *Miller* remains good law to this day in guiding federal and state legislators.[74] Simply put, the reformulation espoused in *Miller* was an effort to fine-tune *Roth*

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[69] *Id*.

[70] *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, at 84 (1973) ("Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as "prurient interest," "patent offensiveness," "serious literary value," and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncrasies of the person defining them.")

[71] *Id*.

[72] "Our experience since *Roth* requires us not only to abandon the effort to pick out obscene materials on a case-by-case basis, but also to reconsider a fundamental postulate of *Roth:* that there exists a definable class of sexually oriented expression that may be totally suppressed by the Federal and State Governments. Assuming that such a class of expression does in fact exist, I am forced to conclude that the concept of "obscenity" cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a byproduct of the attempt to suppress unprotected speech, and to avoid very costly institutional harms." *Id*. at 103.

[73] *See*, *e.g.*, *Hamling v. United States*, 418 U.S. 87, 105 (1974); *Brockett v. Spokan Arcades Inc*., 472 U.S. 491 (1985); *Miskin v. New York*, 282 U.S. 502 (1966); Pinkus v. United States, 436 U.S. 293, 298-299 (1978); *Pope v. Illinois*, 481 U.S. 497 (1987); *See also New York v. Ferber*, 458 U.S. 747 (1982) (child pornography)

[74] *See, e.g*., New York Penal Law 235.00 ("The following definitions are applicable to sections 235.05, 235.10and 235.15: 1. "Obscene." Any material or performance is "obscene" if (a) the average person, applying contemporary

with the ultimate goal of clearing the First Amendment plash. But whatever problems were created subsequent to *Roth*, an entirely new set were thereafter created by *Miller*.

The use of a forum community contemplated in the first prong of *Miller*, by which "[a] juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes[...],"[75] carried with it all the possible change that comes with relying on the changing perspective of localized individuals. In other words, what was obscene in 1973 quickly could and did change just as the standards of time evolved and the "forum community" with it.

Moreover, while the first prong of *Miller* requires a local man's insight, the third then requires the same man to wear a second hat reserved for the oft relied-upon reasonable person.[76] Then compounding these vexations in the years to follow? The Internet.

In the decades since *Miller*, pornography moved from a highly profitable industry in the U.S.,[77] to one slightly less profitable but still wholly demanded.[78] Then there are other variables beyond economics, use, and a clear demarcation for what is obscenity; including, by no stretch irrelevant, the every four-to-eight year changing of the guard.[79] In effect the prosecution of pornography [as obscenity] is a legislative catch-22.[80] Further disrupting any kind of meaningful

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community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and (b) it depicts or describes in a patently offensive manner, actual or simulated: sexual intercourse, criminal sexual act, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.")

[75] *Hamling*, *supra* note 73, at 104-105.

[76] *See*, *e.g.*, *Pope*, *supra* note 73, at 501-502 ("Just as the ideas a work represents need not obtain majority approval to merit protection, neither, insofar as the First Amendment is concerned, does the value of the work vary from community to community based on the degree of local acceptance it has won. The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.")

[77] *See* Wilborn, *supra*, note 7.

[78] *See* Willingham, *supra* note 10.

[79] *See* Jason Krause, *The End of the Net Porn Wars* (Feb. 2008), ABA Online *available at* http://www.abajournal.com/magazine/article/the_end_of_the_net_porn_wars/ ("During the Clinton administration, the DOJ made a public decision to focus on child pornography cases. Trueman has said the Democratic administration "all but halted obscenity prosecutions.")

[80] Even with a ready example and the wiggle-room created in *Miller*, how to handle pornography-as-obscenity is at the whim of already overburdened prosecutors.

action against most forms of pornography is *Stanley v. Georgia*, a case decided several years before *Miller* but seemingly applicable just as readily.

In it, the Supreme Court held that pornography determined to be obscene may not be protected speech, but 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."[81] Combining these decisions, *Stanley* with *Miller*, one can safely conclude whatever pornography may constitute obscenity, owning either in the privacy of one's own home will protect against possible First Amendment infringements. With the Internet added in, one can also conclude obscenity prosecutions in the twenty-first century are the unicorns of adjudications: rarely seen if at all provable.[82]

II. STATE POWER UNDER THE TENTH AMENDMENT: THE LEGISLATIVE ABILITY TO POLICE THE GENERAL WELFARE OF ITS CITIZENS

A. Introduction to Police Power

The United States Constitution is comprised of a preamble, seven original articles, twenty-seven amendments, and a paragraph certifying its enactment by the constitutional convention. It is the basis for not only our system of government, but also the operation of its most important property: authority by checks and balances. Implicit to this balance, as well as the American concept of federalism, is the Tenth Amendment, which gives individual states the ability to use what has come to be called "police powers" in regulating and enforcing respective statutes within the confines of their borders. In essence, the Tenth Amendment serves the states

[81] *Stanley v. Georgia*, 394 U.S. 557, at 565 (1969)

[82] Notwithstanding Child Pornography prosecutions under COPA, *supra* at note 27. *See also* 18 U.S.C. § 2251 - Sexual Exploitation of Children (Production of child pornography); 18 U.S.C. § 2251A - Selling and Buying of Children; 18 U.S.C. § 2252 - Certain activities relating to material involving the sexual exploitation of minors (Possession, distribution and receipt of child pornography); 18 U.S.C. § 2252A - Certain activities relating to material constituting or containing child pornography); and 18 U.S.C. § 2260 - Production of sexually explicit depictions of a minor for importation into the United States

all powers that are not granted to the federal government through the Constitution.[83] The only exception being those powers the states are constitutionally forbidden from exercising.[84]

The development of these "police powers" – once derived from the common law principle of *sic utere tuo ut alienum non laedas* ('you should use what is yours so as not to harm what is others'),[85] now espoused by the current principle of *salus populi est suprema lex* ('the good of the public is the supreme law') – went from a time of broad general use to strict current application.[86] States grew comfortable deigning regulations they chose fit so long as the regulation was designed to promote the public safety, welfare, or morality.[87] However, as was soon found out, this power is at all times in flux, whether through public surveillance or judicial review.[88]

B. Public Health Laws and State Action

The history of the public health and welfare power of the government originally roots to the prevention and control of fast-acting communicable diseases.[89] This prevention, however, is

[83] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (U.S. CONST. amend. X.)

[84] For example, no State may enter into a treaty with a foreign government because such agreements are prohibited by the plain language of Article I, § 10, to U.S. CONST. ("No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.")

[85] *See* John Stuart Mill, *On Liberty* (John Gray ed., Oxford University Press) (1859) ("[T]he subject of this Essay is not the so-called Liberty of the Will, so unfortunately opposed to the misnamed doctrine of Philosophical Necessity; but Civil, or Social Liberty: *the nature and limits of the power which can be legitimately exercised by society over the individual*. (emphasis added)).

[86] *See* Robert Bork, *The Tempting of America: The Political Seduction of the Law* 254-55 (New York Free Press) (1990). According to Bork, state majorities can legitimately do anything not explicitly prohibited by the Constitution: outlaw birth control, for example, based solely on the fact that some people do not like the idea of others having sex for fun. *See also* Glenn Harlan Reynolds, *Sex, Lies and Jurisprudence: Robert Bork, Griswold, and the Philosophy of Original Understanding*, 24 GA. L. REV. 1045, 1096-1103 (1990).

[87] *See* Glenn H. Reynolds & David B. Kopel, *The Evolving Police Power: Some Observations for a New Century*, HASTINGS CONSTITUTIONAL LAW QUARTERLY at 511 (2000).

[88] The most scrutinized of state's police powers: those powers used for the good of the moral majority, the basis of which has constantly been overturned by the Supreme Court. *See*, *e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (Massachusetts law overturned that made it a felony for unmarried persons to buy contraceptives); *Roe v. Wade*, 410 U.S. 113 (1973) (famous Abortion-legalization and establishment of "Right to Privacy"); *Lawrence v. Texas*, 539 U.S. 558 (2003) (Overturned *Bowers v. Hardwick*, 478 U.S. 136 (1986) and made unconstitutional laws criminalizing sodomy (by way of Right to Privacy)).

[89] *See Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) (This was an early public health case where the Supreme Court held the state (of Massachusetts) may compel smallpox vaccinations pursuant to its police power).

not simply a local common law creation or remedy,[90] with general police power alluded to by the Supreme Court as early as 1824.[91] Nor is it a limited power, isolated strictly to the efforts of disease prevention. After *Gibbons v. Ogden (1824)*, for example, "cases generally stressed the ability of the states to act in order to protect health, while not denying that state action may be overridden by federal legislation authorized by any of Congress's enumerated powers."[92] In other words, states have always been granted severe leeway in regulating its borders when a health concern demands as much. Subject to federal preemption, but of course.[93]

1. The Supreme Court Further Shaping States' Role in Public Health Regulation

Understandably, the Supreme Court also retains an active role in shaping the breadth and width of how governments use their public health power. In what has come to be known as *The Slaughter-House Cases*, for instance, the same Court held "[t]he State may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society, but when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations."[94] In *Boston Beer Co. v. Massachusetts*, the Court held despite differing legal opinions on the breadth of the nature of the police power, "[t]here seems to be no doubt that it [police power] does extend to the protection of the lives, health and property of the citizens […]. They belong emphatically to that class of objects which demand the application of

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[90] In fact its origins can be traced to the Federalist Papers, which refers to these powers as being done according to the "domestic police" of the states. (A. Hamilton, "Federalist No. 17", in A. Hamilton, J. Madison, and J. Jay, *The Federalist Papers* 80-83 (Bantum Books 1982).

[91] *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824). Chief Justice Marshall, In upholding federal authority to regulate steamships crossing New York harbor, spoke of the powers of the state as including "that immense mass of legislation which embraces everything within the territory of the state, not surrendered to the general movement...Inspection laws, quarantine laws, health laws of every description...are components of this mass."

[92] Wendy E. Parmet, *After September 11: Rethinking Public Health Federalism*, 30 J.L. MED. & ETHICS 201, 202 (2002).

[93] "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Article VI, clause 2, U.S. CONST. See also *Altria Group v. Good*, 129 S.Ct. 538, at 543 (2008) ("Consistent with that command, we have long recognized that state laws that conflict with federal law are "without effect." *Maryland v. Louisiana*, 451 U. S. 725, 746 (1981).")

[94] *Slaughter-House Cases*, 83 U.S. 36, at 110 (1873). These cases were a consolidated appeal of three similar cases brought before the Supreme Court to test Section One of the Fourteenth Amendment.

the maxim, *salus populi suprema lex* [...]"[95] Thirty years later when a Massachusetts vaccination law was challenged for its constitutionality – the underlying law required all inhabitants to be vaccinated depending on the needs of the public at large – the Court then observed: "[a]lthough this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a State to enact quarantine laws and health laws of every description."[96]

C. Public Health and Federal Action

This police power, though constitutionally reserved for the States, is not in application limited to the same. It has been used, albeit sparingly, by the federal government when problematic circumstances requires it.[97] During the Civil War, for example, federal police power grew in light of the growing needs demanded by ailing soldiers.[98] This trend only continued through the twentieth century.

The New Deal paved the way for the Federal Security Agency, agency precursor to the current Department of Health and Human Services.[99] In the 1960s and 70s, the federal government's public health role then expanded somewhat irreversibly, with the first widespread national health insurance programs enacted.[100] Not long after, Congress continued to broaden its role in public health with such progressive laws as the National Environmental Policy Act,[101] a law requiring, among other items, proposed federal action take into consideration any environmental impacts, as well as the Occupational Health and Safety Act,[102] a comprehensive piece of legislation mandating hazard-reduced workplaces.

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[95] *Boston Beer Co. v. Massachusetts*, 97 U.S. 25, at 33 (1877).

[96] J*acobson v. Massachusetts*, 197 U.S. 11, at 25 (1905) ("But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good." *Id*. at 26.)

[97] In the early years of the United States, Congress created the United States Marine Hospital Services (now the Public Health Service) in 1798 to offer hospital care to sickened sailors.

[98] *See* L.O. Gostin, *Public Health Law: Power, Duty, and Restraint* 41 (University of California Press) (2000). During that period, Congress also created the Bureau of Chemistry, which eventually led to the creation of the Food and Drug Administration (FDA) in 1906

[99] *Id*.

[100] *See* 42 U.S.C. §§ 1396, *et seq*.; and 42 U.S.C. §§ 1395, *et seq*.

[101] 42 U.S.C. §§ 4321 through 4370

[102] 29 U.S.C. §§ 651, *et seq*.

Whatever may be said for initiatives such as these, it's evident the federal government now takes an active role in what would otherwise be limited to state action. More often this role is reactionary as required or prompted by crises.[103] After all, "when public health is thought to be at grave risk, the greater resources of the federal government are expected to be used either alone or, more often, in conjunction with the states."[104]

D. Constitutional Limitations

State or federal action in public health matters is not an unfettered power.[105] Generally speaking, if a state can show a reasonable basis for its use of police power designed to protect the public health and well-being, few constitutional challenges will survive against the use of that power. However, if the state action implicates a constitutionally protected liberty, the state – be that federal or otherwise – must show a compelling interest narrowly tailored to that end to overcome the strict scrutiny-standard the Supreme Court has come to use in matters with such competing interests.[106]

With continuing respect to pornography, that means strict regulation under the grand banner of public health *will* survive a First Amendment challenge if the harm surrounding pornography use – <u>if</u> traceable harm can be shown – is compelling enough in light of the settled law on state interests and her narrowing tailors.[107]

III. PORNOGRAPHIC HARM: HISTORICAL LOOKS AT PAST ATTEMPTS TO PROMPT <u>STATE ACTION TO THE PRESENT</u>

A. Congressional Response to Stanley v. Georgia: The Meese Report of 1970 (Hereinafter "Meese I")

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[103] *See* R. Roots, *Other Rising Legal Issues: A Muckraker's Aftermath: The Jungle of Meat-Packing Regulation After a Century*, 27 WM. MITCHELL L. REV 2413-33 (2001) (explaining the Food and Drug Administration ("FDA") was actually the result of public outcry following the publication of Upton Sinclair's, <u>The Jungle</u>).

[104] Parmet, *supra* note 99.

[105] *See, e.g., Lochner v. New York*, 198 U.S. 45, 58 (1905). The interesting twist to this opinion was that the Court invalidated a New York labor law, but did so under the express provision that such a law was not a state using its public health power.

[106] *See supra*, note 25.

[107] *See infra*, note 132.

Following *Stanley v. Georgia*, the Supreme Court decision that essentially rendered the privatized use of pornography a protected liberty,[108] Congress "authorized $2 million to fund a Presidential [Lyndon Johnson] Commission to study pornography in the United States and recommend what Congress should do about it."[109] With the subsequent findings, reported as Meese I, the Commission made the following recommendations regarding pornography:

> (1) A massive sex education campaign should be initiated, encompassing biological, social, psychological and religious information;[110]
>
> (2) There should be continued open discussion, based on facts, of issues relating to obscenity and pornography;[111]
>
> (3) Additional factual information should be developed through long-term research;[112]
>
> (4) Citizens should organize at local, regional, and national levels to aid the implementation of these recommendations.[113]

These findings, and with them their recommendations, were ultimately rejected by the Senate prior to any meaningful legislative action.[114] Thus and like many others before and after

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[108] "For reasons set forth below, we agree that the mere private possession of obscene matter cannot constitutionally be made a crime." *Stanley*, *supra* note 81, at 559.

[109] David M Edwards, *Politics and Pornography: A Comparison of the Findings of the President's Commission and the Meese Commission and the Resulting Response* (1992), *available at* http://home.earthlink.net/~durangodave/html/writing/Censorship.htm

[110] President's Comm. On The Att'y Gen., Report on Obscenity and Pornography 47-49 (U. S. Government Printing Office) (1970).

[111] *Id*.

[112] *Id*.

[113] *Id*.

[114] Eli M. Oboler, *The Politics of Pornography; A Librarian's Reaction to the US Senate's Rejection of the Report of the Commission on Obscenity and Pornography*, 95 Libr. J. 4225 (1970). On Oct. 13, 1970, just three weeks before a Congressional election, the Senate voted 60-5 (with 35 abstentions) to reject the findings and recommendations of the Commission on Obscenity and Pornography. Senator Mondale of Minnesota, one of the minority voters, said the lawmakers were trying to deal "with an issue that perhaps cannot be grappled with in light of the current temperament of this country."

it, Meese I became just another discarded report submitted to Congress. Until, that is, another changing of the guard with another set of priorities.[115]

B. Revisiting Congressional Action: The Meese Commission of 1980 (Hereinafter "Meese II")

At the request of recently elected Ronald Reagan, the Attorney General's Commission on Pornography was established under the authority of the Federal Advisory Committee Act of 1972.[116] Led by then Attorney General of the United States William French Smith, Meese II picked up seemingly right where Meese I left off.[117]

Its refreshed scope:

> [I]n this Report a reference to material as "pornographic" means only that the material is predominantly sexually explicit and intended primarily for the purpose of sexual arousal. Whether some or all of what qualifies as pornographic under this definition should be prohibited, or even condemned, is not a question that should be answered under the guise of definition.[118]

Meese II then went on to catalog the History of Pornography,[119] Constraints of the First Amendment,[120] The Market and The Industry,[121] and finally the Question of [Pornographic] Harm.[122] The central part of the mission was contemplated by the last of these section; to wit: whether pornography is a provable harm to society.[123] In this particular section, Meese II faced the constitutionally obvious: that material that may be provably harmful can still be lawfully

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[115] *See supra*, note 79.
[116] 5 U.S.C. App. 2, 86 Stat. 770 (1972) (as amended by 90 Stat. 1241, 1247) (1976)
[117] ATT'Y GEN'S COMM. ON PORNOGRAPHY, Part One *The Commission and its Mandate* 1.1 (U. S. Government Printing Office) (1986).
[118] *Id*., at Part One, *Defining Our Central Terms* 1.4.
[119] *Id*., at Part Two, *The History of Pornography* Ch. 2.
[120] *Id*., at Part Two, *The Constraints of the First Amendment* Ch. 3.
[121] *Id*., at Part Two, *The Market and the Industry* Ch. 4.
[122] *Id*., at Part Two, *The Question of Harm*, Ch.5.
[123] *Id*., at Ch 5.1 "Matters of Method", 5.1.1. "Harm and Regulation-The Scope of our Inquiry".

permitted and free from governmental coercion.[124] To preliminarily cover this hurdle, Meese II split the question of harm into a more manageable issue.[125]

Harm, the report observed, can be described as either being a primary or secondary result. To distinguish between the two, in pornographic contexts, required a determination on whether the harm is wrong in itself or is wrong based on where it will and may eventually lead to (i.e. consequential harm). Per Meese II:

> The analysis of the hypothesis that pornography causes harm must start with the identification of hypothesized harms, proceed to the determination of whether those hypothesized harms are indeed harmful, and then conclude with the examination of whether a causal link exists between the material and the harm. When the consequences of exposure to sexually explicit material are not harmful, or when there is no causal relationship between exposure to sexually explicit material and some harmful consequence, then we cannot say that the sexually explicit material is harmful. But if sexually explicit material of some variety is causally related to, or increases the incidence of, some behavior that is harmful, then it is safe to conclude that the material is harmful.[126]

In its investigation and findings, Meese II concluded that the most significant, traceable harm from pornography is its potential for, and in certain cases actual instances of, child abuse.[127]

Both reports – Meese I and Meese II – proceeded with what many would consider noble intentions. But interestingly enough, both reports altogether failed to meaningful address the mental harm continued exposure to pornographic harm may cause. Meese II relied on clinicians and testimonials laden in consequential aggression towards women,[128] but the real hurdle for both reports may have been the lack of technology available in the time both reports were commissioned.

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[124] *Id*. ("All of us, for example, feel that the inflammatory utterances of Nazis, the Ku Klux Klan, and racists of other varieties are harmful both to the individuals to whom their epithets are directed as well as to society as a whole. Yet all of us acknowledge and most of us support the fact that the harmful speeches of these people are nevertheless constitutionally protected.)

[125] *See Id*., at Ch 5.1.2 "What Counts as Harm?"

[126] *Id*., at Part Two, *The Question of Harm: What Counts as Harm* Ch. 5.1.2.

[127] *Id*., at Part Two, *The Question of Harm, Matters of Method: Our Conclusions of Harm* Ch. 5.1-5.2.

[128] *Id*., at Part Two, *The Question of Harm, Matters of Method: Our Conclusions of Harm* Ch. 5.1-5.2.

Meese II also had its fair share of comment and criticism after its release. The Congressional Research Service of the Library of Congress released a legal analysis of Meese II in October of 1986. According to the article, even if the Commission's conclusions – which even at the time were controversial and subject to substantial counterarguments – were treated as valid, "they do not appear to approach the Brandenburg incitement standard which must currently be met before constitutionally protected materials may be regulated."[129]

These final reports, issued in 1970 and 1986, respectively, uncovered a link between pornography and organized crime, the objectification of women to their male counterparts, and the sexual abuse children. However, the panel made clear that whatever harm may exist from viewing pornography, nothing in their findings conclusively linked pornography as the direct cause to that described harm.[130]

D. Post-Meese Study: The Psychopharmacology of Pictorial Pornography Restructuring Brain, Mind & Memory & Subverting Freedom of Speech[131]

Since then, as pornography production and use has soared, so too has technology. In that arena, emerging studies have attempted to fill in the gaps made by the two Meese inquiries. Simply put, modern brain mapping now suggests exposure to pornography has a measurable, organic effect on the brain in much the same ways addictive drugs have on the same.

Twenty-five years after Meese II, Dr. Judith Reisman attempted a new argument against pornography outside of the traditional obscenity route which had flummoxed so many of the scholars before her. Instead of treating pornography as a form of artistic or communicative expression, Reisman instead treated it as a measurable, causative agent. In doing so, she sought to chart the human brain's immediate response and arousal to pornographic stimuli. As a content

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[129] R.A. Reimer, *Legal Analysis of the Pornography Commission's July 1986 Final Report*, CONGRESSIONAL RESEARCH SERVICE REVIEW 11-13 (October 1986). *See also* Howard Fields, *LC Provides Legal Guidelines For Meese Commission Proposals*, PUB. WEEKLY at 20 (February 1987); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.")

[130] *See*, *e.g*, ATT'Y GEN'S COMM. ON PORNOGRAPHY (1986), Part Two, *The Question of Harm, Matters of Method: Our Conclusions of Harm* Ch. 5.2.3 ("We are again, along with the rest of society, unable to agree as to the extent to which making sex public and commercial should constitute a harm.")

[131] Judith A. Reisman, Ph.D. The Institute for Media Education, Copyright 2000.

analysis specialist, her stated goal was to uncover if, and then how, pornographic images interfere with cognitive functions; including, she opined, "rational thought and its expression in free speech."[132]

1. Neuropsychology and Psychopharamcology: How the Brain Works

Arguments causally linking the effects of pornography on a viewer's brain (and outputted behavior) are drawn from the fields of neuropsychology and psychopharmacology.[133] At the core of these disciplines is the scientifically accepted view describing the three main functions of the human brain. These functions are:

> 1) to be alert, awake, and aware of reality;
>
> 2) to collect and store environmental information; and
>
> 3) to monitor and correct our conduct for health and well being.[134]

In addition, scientific inquiry now suggest that emotion, awareness, memory and behavior are all interconnected in the structure of the brain.[135] For example, in states of sexual or fear arousal (which are integral to the pornographic psycho-pharmacological experience) "[humans] get an adrenaline rush, our pupils dilate, and our heart starts to race. That's adaptive, because it promotes the physiological responses."[136]

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[132] Judith A. Reisman, Ph.D, *The Psychopharmacology Restructuring Brain, Mind & Memory & Subverting Freedom of Speech* at 1, The Institute for Media Education (2000).

[133] Neuropsychology is an interdisciplinary branch of psychology and neuroscience that aims to understand how the structure and function of the brain relate to specific psychological processes and overt behaviors (*see* M.I. Posner & G.J. DiGirolamo, *Cognitive Neuroscience: Origins and Promise*, PSYCHOLOGICAL BULLETIN at 126:6, 873-889) (2000)). Psychopharmaclogy refers to the study of drug-induced changes in mood, sensation, thinking, and behavior (*see, e.g.*, J.S. Meyer & L.S. Quenzer, *Psychopharmacology: Drugs, the Brain and Behavior* (Sinauer Associates) (2004).

[134] A.R. Luria, Daniel Goleman & Richard Davidson, Eds., *Consciousness, Brain, States of Awareness, and Mysticism* 10 (Harper & Row Pub) (1979).

[135] See Elizabeth A. Phelps, *Human Emotion and Memory: Interactions of the Amygdala and Hippocampal Comlex*, NEUROBIOLOGY AT 18-202 (2004)

[136] Bill Moyers, *Healing and the Mind*, DOUBLEDAY at 215 (1993).

Neurologically, the more novel, bizarre, odd or grotesque an image is, the more likely it is that such images will create confusion, anxiety, and often fear in the brain.[137] Because of this novelty, bizarre stimuli are stored in the nervous system as a "mismatch of schema."[138] It is with the human need to know and understand one's surroundings when and where bizarre images challenge and attract the brain's function for attention and memory storage.[139]

2. *The Brain and Pornography Use*

Pornographic use makes this attraction all the more stimulating. It is largely treated as gospel by neurologists that the brain can only process a few of the millions of messages it receive each and every moment. With respect to the brain's first function,[140] the *law of strength* generally holds that the most intense arousal a brain experiences will then be "paper-clipped" to its source and emotion, and filed away in the brain's memory database.[141] Consider: where were you when 9/11 happened?[142]

Research by Gary Lynch of the University of California found that words *or* sight, libidinous or spiritual, can immediately alter brain structure. Per Lynch: "[I]n a matter of seconds, taking an incredibly modest signal, a word which is in your head as an electrical signal for no more than a few seconds can leave a trace that will last for years."[143] Even psychologists have observed large areas of uncommitted brain tissue can and will be molded to the demands of a particular environment.[144] To wit:

> The brain cannot distinguish real from false pictures. When nature gave man the prefrontal neocortex for anticipation and connected it with his cortical areas, she failed to provide

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[137] Reisman, *supra* note 132, at 4

[138] *Id*.

[139] *Id.*

[140] *See* Luria, *supra* note 134.

[141] Daniel Goleman, *Emotional Intelligence* 22, f.5 (Bantam Books) (1997).

[142] Assuming the Reader was alive and of sound mind during September 2001, most can articulate with specific detail where they were, with whom they were with, and what they were doing when the first and/or second plane struck the Twin Tower structures. Such was the bizarre novelty of a terrorist attack on the United States.

[143] Richard Restak, *The Brain: Learning & Memory*, CPB COLLECTION (WNET/New York) (1984). These are eight, one-hour, instructions on brain, mind, memory and behavior.

[144] *See*, *e.g*., Jane Healy, PhD., *Endangered Minds* (Simon and Schuster Pub) (1990); *See also* Jane Healy, *Minds at Risk,* THE WASH. POST at C5 (July 29, 1991).

> a radar antenna and viewing screen. Humans, like all animals, believe what the eyes see.[145]

Lynch describes this as biological evidence that learning involves a physical change in the circuitry of the brain: *e.g.*, the brain processes a visual image from a screen in 3/10ths of a second from the time the image flashes and the time its perceived. Any confusing image or experience is processed as a novelty and the brain's response to novelty is attention.[146] As a result, pornography is experienced as a provocative novelty almost always as an initial matter. Then once the brain adjusts to the provocative stimulus, the pornography user will have to ultimately substitute another and another and another to experience the thrill of the novelty all over again.[147]

In terms of psychopharmacology,[148] pornography use yields a flood of epinephrine (adrenaline), testosterone (an endogenous steroid), endorphins, oxytocin (a bonding peptide strongly associated with feelings of love), dopamine, serotonin, phenylethylamine and various other other stimulants.[149] Epinephrine alone gets the "vertebrate brain 'high' on its own self-produced morphine or heroin."[150] Added to this mix of chemicals is the procreative instinct pornography use also tickles; that being the biological and sexual need to respond to the external stimuli.[151] In essence, pornography is almost a perfect medium for vulnerable users to use to self-medicate. The flood of endogenous LSDs, of adrenaline and norepinephrine, in addition to the morphine-like neurochemicals released by the brain provides a chemical-*cum*-sexual "rush" analogous to the rush attained from using various street drugs.[152]

That rush – the sexual arousal of a person toward a real or media image – when experienced in the body as a *drug high* poses significant danger to those predisposed with delicate psyches. As Reisman warned, "such chemical flooding of the brain would too often

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[145] *Id*.

[146] See Eric G. Wilson, *Everyone Loves a Good Train Wreck: Why We Can't Look Away* (D&M Publishers, Inc.) (2010). In his book, Wilson posits we are attracted to the macabre and bizarre first, because we have treated death as something to be hidden away and second, because the biological inclination is to explore the unknown.

[147] Reisman, *supra* note 132, at 5.

[148] *See supra*, note 133.

[149] *See* Candace Pert, *Healing and the Mind*, Doubleday at 177 (1993)

[150] Sandra Ackerman, *Discovering the Brain*, The National Academies: Institute of Medicine 76-77 (National Academy Press) (1992).

[151] That is, engage in sexual intercourse or release.

[152] *See* Reisman, *supra* note 132, at 7.

override one's cognitive thought and interfere with rational decisions to protect themselves and others."[153] This may be an extreme theory, that pornography exposure may override cognitive thought, but such research and commentary may fill the holes left by Meese I and II.

In any event, the stakes are high. Pornography affects the human brain in a very real and traceable way. Since the brain believes what the eyes see, in 3/10ths of a second real, virtual, or pseudo- pornography can restructure the brain's mind and memory function.[154] In addition, the brain's internal drug store produces mood-altering psychotropic drugs when exposed to pornography. Even more alarming: the right hemisphere contains emotions such as fear, joy, anger, and lust. These instant reward-feelings are known to dominate the left hemisphere's cognitive functions of speech, rationality, and logic. This instant-over-the-delayed rewarding "further implicates pictorial pornography as causally changing the nature of the polity."[155] As Reisman concludes:

> The massive quantifiable increases and qualifiably more sadistic and barbaric kinds of sexual crime since 1950 supports the breeding of a sadistic, pedophile consciousness in pornography consumers. A picture is worth more than a thousand words[.][156]

Like the trajectory of Meese I and Meese II, these potentially culture-changing discoveries were ultimately brought to the attention of Congress.

E. Senate Committee Hearing on Pornography Addiction (2004)

In November of 2004, the Senate Committee on Commerce, Science and Transportation, by the subcommittee (hereinafter "committee") on Science, Technology, and Space,[157] took testimony from a witness list of renowned doctors and scientists under the hearing title, "The

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[153] *Id*., at 8.
[154] *See Id*.
[155] *Id.*
[156] *Id.*
[157] The U.S. Senate Committee on Commerce, Science, and Transportation is composed of 23 Senators under which the Committee is further composed of 7 Subcommittees. Together, this Committee oversees the vast range of issues under its jurisdiction. These issues range from communications, highways, aviation, rail, shipping, transportation security, merchant marine, the Coast Guard, oceans, fisheries, climate change, disasters, science, space, interstate commerce, tourism, consumer issues, economic development, technology, competitiveness, product safety, and insurance.

Science Behind Pornography Addiction."[158] During this hearing, the committee heard from Dr. Judith Reisman who restated much of the sentiment fore-detailed.[159] The committee also heard the findings of Dr. Mary Anne Layden, co-director of the Sexual Trauma and Psychopathology Program at the University of Pennsylvania's Center for Cognitive Therapy; of Dr. Jeffrey Satinover, a psychiatrist and adviser to the National Association for Research and Therapy of Homosexuality; and of Dr. James B. Weaver, Professor of Communication and Psychology, Department of Communication at Virginia Tech.

Senator Sam Brownback (R-Kansas) called the hearing the most disturbing one he'd ever seen in the Senate.[160] Brownback considered current pornography trends ubiquitous, compared markedly difference to when he was growing up and "some guy would sneak a magazine in somewhere and show some of us, but you had to find him at the right time."[161] Testimony taken contradicted this belief quite quick.

Among these were Layden's warning that pornography was the "most concerning thing to psychological health that [she] kn[ew] of existing today."[162] Satinover testified that "[p]ornography really does, unlike other addictions, biologically cause direct release of the most perfect addictive substance... that is, it causes masturbation, which causes release of the naturally occurring opioids. It does what heroin can't do, in effect."[163] Weaver introduced findings from a wide array of studies that linked pornography use to other damaging behavior, underlining the

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[158] U.S. Senate Committee on Commerce, Science, and Transportation Hearings (archived November 2004), *available at* http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=1343. *See also* Ryan Singel, *Internet Porn: Worse Than Crack*, WIRED MAGAZINE (November 19, 2004) (Commenting that the purpose of this hearing was unclear, since at the time there was no pending or proposed legislation dealing with pornography in or present before the Senate)

[159] In addition to espousing her findings, *supra* notes 132 onward, Reisman noted to the Senate subcommittee that with state-of-the-art brain scanning, studies should answer these questions [of pornographic harm/addiction] with hard, replicable data. "As with the tobacco suits," she testified, "these data could be helpful in litigation and in affecting legal change" [which could change the tort-landscape by allowing widespread litigation for harm caused by pornography use]. *See* Hearing, *supra* note 158.

[160] *See* Singel, *supra* note 158.

[161] *Cf.* with Singel, *supra* note 158. *See also* Jenkins, Jr. *supra* note 2.

[162] *Hearings*, *supra* note 158 (testimony of Mary Anne Layden) ("The Internet is a perfect drug delivery system because you are anonymous, aroused and have role models for these behaviors, [t]o have drug pumped into your house 24/7, free, and children know how to use it better than grown-ups know how to use it -- it's a perfect delivery system if we want to have a whole generation of young addicts who will never have the drug out of their mind.") *See also* Singel, *supra* at 158 (using Layden's testimony) ("[F]urther, pornography addicts have a more difficult time recovering from their addiction than cocaine addicts, since coke users can get the drug out of their system, but pornographic images stay in the brain forever.")

[163] *Id*.

previous concerns voiced in Meese(s) I and II. Taken together, "the research at hand establishes that prolonged consumption of pornography – a critical condition presumably underlying pornography addiction – is a significant contributing factor in the creation of perceptions, dispositions, and behaviors that reflect sexual callousness, the erosion of family values, and diminished sexual satisfaction."[164]

Like Meese I and II, opposition to this hearing soon followed. The major criticism was especially telling inasmuch as it remains still ripe for consideration: what is the difference between harm caused by pornography use (and the stimulation/dependency therein) with that of *actual* sex? Presumably, or so went and goes the criticism, the brain would react the same way in both situations in light of Reisman's conclusions.[165]

As each of the deponents concluded at the hearing, there is no general consensus among health professionals on the dangers of pornography;[166] only what is generally observable between pornography use, the brain, and the societal/biological effects of the correlated two.

IV. PROPOSITION: CLASSIFYING PORNOGRAPHY AS A "DRUG" OR "DEVICE"

A. Drug Defined

Title 21 of the United States Code provides the federal framework for the governance of food and drugs in the United States.[167] As part of Title 21, the federal Food, Drug, and Cosmetic Act of 1983 ("FDCA)[168] provides much of the authority to the U.S. Food and Drug Administration (FDA) in overseeing this governance. In that capacity, the FDCA defines a "drug" to be:

> (A) articles recognized in the official United States Pharmacopoeia, official

[164] *Id*.

[165] *See* Singel, *supra* note 158 (using Carol Queen, staff-sexologist for *Good Vibrations*, a San Francisco-based sex retailer, criticizing the methodology behind research showing that pornography stimulates the brain like drugs do, saying the research needs to take into account how sex itself stimulates the brain). For a scathing response to the panel's general testimony, *see also* Daniel Linz, *Response to Testimony before the United States Senate, Subcommittee on Science, Technology, and Space of the Committee on Commerce, Science and Transportation on The Science Behind Pornography Addiction* (2005), *available at* http://www.freespeechcoalition.com/dan_linz.htm

[166] *Id*.

[167] 21 U.S.C, *et seq*. (chapters 1 through 25)

[168] 21 U.S.C. §§ 301, *et seq*.

> Homoeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and
>
> (B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and
>
> (C) **articles** (other than food) **intended to affect the structure or any function of the body of man** or other animals; and
>
> (D) articles intended for use as a component of any article specified in clause (A), (B), or (C). A food or dietary supplement for which a claim, subject to sections 343 (r)(1)(B) and 343 (r)(3) of this title or sections 343 (r)(1)(B) and 343 (r)(5)(D) of this title, is made in accordance with the requirements of section 343 (r) of this title is not a drug solely because the label or the labeling contains such a claim. A food, dietary ingredient, or dietary supplement for which a truthful and not misleading statement is made in accordance with section 343 (r)(6) of this title is not a drug under clause (C) solely because the label or the labeling contains such a statement.[169]

Under the definition provided by 21 U.S.C. § 321(g)(1)(C), pornography may in fact fit within the parameters of the FDCA.

1. *Pornography as an Article*

The FFDCA lacks a definition for what Congress meant by "article" within the working parts of Title 21. It is a liberally used word, however,[170] and was most likely intended by Congress to mean the definition given it by the dictionary or related common workings. For fear

[169] 21 U.S.C § 321(g) (emphasis added)

[170] *See*, *e.g.*, 21 U.S.C §§ 321(f)(1), (f)(3), (g)(A), (g)(B), (g)(C), (g)(D), (i)(1)-(2), (n) (the use of the descriptor "article" is most prevalent in the definition section of the FDCA)

of entering a morphological abyss,[171] however, the word *article* will be treated as meaning "a particular item or thing."[172]

Within this definition, pornography – at least pornographic material contemplated by *Miller v. California* –[173] is a particular item or thing even if it can be used to apply to a general form of conduct or speech. But is it an item or thing also contemplated by the FDCA?

2. *Pornography Affects the Structure of the Brain*

According to Reisman's research, pornography as a good or item has the capacity to alter the brain by the brain's own responsive operations.[174] In addition to the fore-detailed, several studies have also unearthed the indirect and direct links between pornography and crime, the breakdown of social and familial mores, and, *inter alia*, pornography use and the inclination towards addiction.[175]

Of course, a distinction must be made: pornography itself is not the drug affecting the brain anymore than a baseball flying at one's face is the primary cause for the muscular-skeletal activity involved in dodging said baseball. The movement is the muscle; the ball merely a persuading element. In a similar fashion, it is the body's reaction to pornography that causes the release of these chemicals;[176] the same chemicals that Reisman, *et al*. believe to be addiction forming. Surely this is not what the FDCA was intended to cover: physiological reactions to external stimulants.

3. *Food and Drug Administration, et al. v. Brown & Williamson Tobacco Corp, et al.*[177]

The Supreme Court has already addressed potential FDA overreach under the authority granted it by the FDCA. Unlike pornography, however, the subject food or drug in this specific

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[171] *See*, *e.g.*, *Frigaliment Importing Co, Ltd. v. B.N.S. International Sales Corp*, 190 F. Supp. 116, 117 (1960) (Where the Southern District Court of New York had to address what appeared to be a seemingly innocuous task but ultimately ended in a convoluted decision which even went so far as to mine the German language for insight. As they framed the issue at the beginning of their decision: "what is chicken?")

[172] Black's Law Dictionary, 8th Edition: *article*, n.

[173] *See supra*, note 63.

[174] *See supra,* notes 132 through 148

[175] Go no further than Weaver's testimony, *supra* note 164.

[176] *See supra*, notes 140 through 152

[177] 529 U.S. 120 (2000)

case was an actual substance one physically imbibed into the body.[178] Concluding nicotine was a "drug" within the language of the FDCA, and that cigarettes the delivery system for this drug, the FDA promulgated a set or rules designed to limit the underage use of tobacco.[179]

Finding the intent of Congress in enacting the FDCA was not broad enough to permit the FDA to cover the tobacco industry, the Supreme Court further held even if the FDCA did permit such meddling, the FDA was also statutorily preempted from regulating the tobacco industry by virtue of post-FDCA legislation.[180] In other words, the FDA may have enumerated several legitimate bases in regulating tobacco,[181] but specific action by Congress on the same subject matter created "a distinct regulatory scheme for cigarettes and smokeless tobacco."[182] For that reason, the FDA attempted to promulgate rules it had no business promulgated.

Respecting pornography, Congress has legislatively addressed the issue of obscenity inasmuch as Title 18 of the United States Code criminalizes various forms of obscene materials and the methods used to deliver the same materials.[183] However, those criminal provisions do not actually implicate the rampant use of Internet pornography unless that pornography involves

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[178] *See Id*., at 125. ("This case involves one of the most troubling public health problems facing our Nation today: the thousands of premature deaths that occur each year because of tobacco use. In 1996, the Food and Drug Administration (FDA), after having expressly disavowed any such authority since its inception, asserted jurisdiction to regulate tobacco products.")

[179] See 61 Federal Register 44619 (1996) (Annex Nicotine in Cigarettes and Smokeless Tobacco Is a Drug and These Products Are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act Jurisdictional Determination)

[180] *See FDA, et al*., *supra* note 177, at 126. ("In this case, we believe that Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products. Such authority is inconsistent with the intent that Congress has expressed in the FDCA's overall regulatory scheme and in the tobacco-specific legislation that it has enacted subsequent to the FDCA. In light of this clear intent, the FDA's assertion of jurisdiction is impermissible.") *See also* Federal Cigarette Labeling and Advertising Act (FCLAA), Pub. L. 89-92, 79 Stat. 282; Public Health Cigarette Smoking Act of 1969, Pub. L. 91-222, 84 Stat. 87; Alcohol and Drug Abuse Amendments of 1983, Pub. L. 98-24, 97 Stat. 175; Comprehensive Smoking Education Act, Pub. L. 98-474, 98 Stat. 2200; Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. 99-252, 100 Stat. 30; Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, Pub. L. 102-321, § 202, 106 Stat. 394.

[181] *See Id*., at 134. ("In its rulemaking proceeding, the FDA quite exhaustively documented that "tobacco products are unsafe," "dangerous," and "cause great pain and suffering from illness." 61 Fed. Reg. 44412 (1996). It found that the consumption of tobacco products presents "extraordinary health risks," and that "tobacco use is the single leading cause of preventable death in the United States." *Id.,* at 44398. It stated that "[m]ore than 400,000 people die each year from tobacco related illnesses, such as cancer, respiratory illnesses, and heart disease, often suffering long and painful deaths," and that "[t]obacco alone kills more people each year in the United States than acquired immunodeficiency syndrome (AIDS), car accidents, alcohol, homicides, illegal drugs, suicides, and fires, combined." *Ibid.* Indeed, the FDA characterized smoking as "a pediatric disease," *id.,* at 44421, because "one out of every three young people who become regular smokers . . . will die prematurely as a result," *id.,* at 44399.")

[182] *Id*., at 155.

[183] *See supra*, note 82.

depictions of child sexual abuse.[184] It seems, then, FDA authority to regulate certain uses of pornography a possibility, no matter remote, under the FDCA in spite of the Supreme Court's finding in *Food and Drug Administration, v. Brown*.

Assuming such remote action legally possible *and* permissible, the government retains broad power when it comes to the drug trade.

B. State and Federal Government Regulation of Pharmaceutical Drug Use, Illicit Drug Use, and Possession

While issues of pornography's actual harm remains open to inquiry as has been discussed above, it is well settled exposure to pornography releases a flood of chemicals from the brain's internal pharmacy. Hypothetically, if these chemicals were procured outside the body – say, for example, bought from a dealer – most enforcement agencies would consider the same chemicals "drugs" under current enforcement definitions.[185]

Yet pornography has always been framed as an expression of speech and conduct, further times being described as harmless fun and victimless. Because of this framing, it has then been afforded vast protection even if that protection amounts to simply guardianship through omission.[186]

On both a state and federal level, there is broad regulatory power when it comes to the drug trade.[187] A state has the authority under the Tenth Amendment to regulate the sale of patent

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[184] *See* Department of Justice, *Child Exploitation & Obscenity Section*, available at http://www.justice.gov/criminal/ceos/citizensguide/citizensguide_obscenity.html ("Although the law does not criminalize the private possession of obscene matter, the act of receiving such matter could violate the statutes prohibiting the use of the U.S. Mails, common carriers, or interactive computer services for the purpose of transportation.")

[185] According to Black's Law Dictionary, 8th Edition: drug, n. 1. A substance intended for use in the diagnosis, cure, treatment, or prevention of disease. 2. A natural or synthetic substance that alters one's perception or consciousness; addictive drug. A drug (such as heroin or nicotine) that, usu. after repeated consumption, causes physical dependence and results in well-defined physiological symptoms upon withdrawal. *See also*, *supra*, note 169.

[186] *See* J. Matt Barber, *Hard-Core Pornography Isn't "Free Speech"* (January 18, 2008), *available at* http://www.renewamerica.us/columns/mbarber/080118 ("In recent years, the U.S. Department of Justice has paid only lip service to the enforcement of federal obscenity laws. In some instances, DOJ has gone after child pornographers and — in a scant few cases — has prosecuted purveyors of the most obscene and graphic adult pornography. But unfortunately, the government has been largely AWOL when it comes to enforcing an entire section of U.S. law, 18 U.S.C. §§ 1460-1470, which criminalizes much of the adult hard-core pornography that has saturated both the Internet and our communities.")

[187] A state legislature may, under the police power of public health, impose reasonable restrictions on the sale of drugs, provided the measures adopted have a tendency to protect the public welfare. In addition, the state has the right to regulate the administration of drugs. *See e.g.*: *Stewart v. Robertson*, 40 P.2d 979 (1935) (Arizona); *Ex Parte*

or proprietary medicines, in addition to harmless household or domestic remedies, provided it adopts such measures that have a tendency to protect the lives, health, safety, and welfare of its public.[188] In addition, the Supreme Court has conferred to state governments, in the regulation of drugs and health professions, an expansive police power to accommodate this end.[189]

More expansive is the grant of general power states have with regards to illegal drugs such as narcotics or – at least until recently – marijuana.[190] Both state and federal governments have codified statutes dealing with the use and possession of narcotics, the determination of which comes from the benchmark provided by the federal Comprehensive Drug Abuse Prevention and Control Act of 1970 ("CDAPCA").[191]

Title II within the CDAPCA is the legal basis by which Congress addresses the illicit drug trade. Under Title II, identified as the Controlled Substances Act ("CSA"),[192] the manufacturing, importation, possession, and distribution of certain drugs are strictly regulated by the federal government. Respecting preemption on the states, the CSA creates an important demarcation for purpose of their ongoing interest in the drug trade.

In short, state regulation begins where the CSA ends. So long as a drug trafficker/user is charged for a drug offense defined under one of the Schedules created by the CSA, state regulation is theoretically preempted if an action is brought by the United States.[193] In absence of

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Gray, 274 P. 974 (1929) (California); *People v. Baker*, 51 N.W.2d 240 (1952) (Michigan); *State v. Red Owl Stores, Inc.*, 115 N.W.2d 643 (1962) (Minnesota); *Pike v. Porter*, 253 P.2d 1055 (1952) (Montana); *Loblaw, Inc. v. New York State Bd. of Pharmacy*, 181 N.E.2d 621, 11 N.Y.2d 102 (1962) (New York); *State v. Combs*, 130 P.2d 947 (1942) (Oregon); *State v. Wood*, 215 N.W. 487 (1927) (South Dakota); *State v. Foutch*, 295 S.W. 469 (1927) (Tennessee); *State ex rel. Scott v. Conaty*, 187 S.E.2d 119 (1972) (West Virginia).

[188] *See State v. Wood*, 215 N.W. 487 (1927).

[189] *See, e.g., Whalen v. Roe*, 429 U.S. 589 (1977) (permitting the state of New York authority, under its general public health power, to record the names and addresses of all persons who have obtained certain drugs, regardless of the licit or illicit market for that drug)

[190] The 2012 legalization of marijuana in states of Washington and Colorado, for example, notwithstanding.

[191] Pub. L. No. 91-513, 84 Stat. 1236 (Oct. 27, 1970)

[192] *Id*. Codified at 21 U.S.C. § 801 *et seq*. The CSA is broken down into five official Schedules, I-V respectively. Each Schedule works as a test for each questioned drug. For example, to be a Schedule I drug, there must be a high potential for abuse with no accepted medicinal uses nor an accepted use under medical supervision. No prescriptions can be written under this Schedule, and the Drug Enforcement Agency and Department of Health and Human Services monitors and investigates uses under this Schedule. For those found guilty of trafficking drugs under this Schedule, even first-time offenders, life sentences can be dished out if multiple sales are involved. The most questionable drug under this Schedule is marijuana, as the FDA repeatedly refuses to accept any medicinal use for marijuana. Legally, the Supreme Court defers to Congress to regulate cannabis despite state governments that allow it. *See also Gonzalez v. Raich*, 545 U.S. 1 (2005)).

[193] *See supra*, note 93

federal action, most states have codified drug possession/use laws after the parameters set by the CSA and CDAPCA.[194]

1. *Proposed Placement of Pornography Under Schedule System of the CSA*

The CSA, an enormously important piece of legislation that implicates almost all legal frameworks that have anything to do with the regulation of drugs, could theoretically serve pornography regulation/enforcement on a state and local level assuming that the scientific findings previously discussed were able to classify pornography as a drug,[195] or a drug delivery device.[196] If so, the federal government would then have to designate that drug into a Schedule under the CSA.[197]

Schedule I placement requires a finding of: the drug's actual or relative potential for abuse;[198] scientific evidence of its pharmacological effects including whether the drug or substance has any acceptable medicinal uses;[199] and whether there is a lack of acceptable safety for use of the drug or other substance under medical supervision.[200]

Schedule II placement requires a showing the drug or other substance has a high potential for abuse;[201] The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions;[202] and a finding of

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[194] *See*, *e.g.*, the New Jersey Controlled Dangerous Substances Act, 24:21-1, *et seq*. The state of New Jersey defines "controlled substance" almost identical to the CSA's definition, *supra* note 192, as well as "drug" to the definition provided by the FDCA, *supra* note 168

[195] *See supra*, note 168

[196] *See supra*, note 167, at § 321(h). ("The term "device" (except when used in paragraph (n) of this section and in sections 301(i), 403(f), 502(c), and 602(c)) means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory, which is--

(1) recognized in the official National Formulary, or the United States Pharmacopeia, or any supplement to them, (2) intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals, or (3) intended to affect the structure or any function of the body of man or other animals, and which does not achieve its primary intended purposes through chemical action within or on the body of man or other animals and which is not dependent upon being metabolized for the achievement of its primary intended purposes.")

[197] See supra, note 192, at § 812(b)

[198] *Id*., at § 812(b)(1)(A)

[199] *Id*., at § 812(b)(1)(B)

[200] *Id*., at § 812(b)(1)(C)

[201] *Id*., at § 812(b)(2)(A)

[202] *Id*., at § 812(b)(2)(B)

abuse [of the drug or other substances] that may lead to severe psychological or physical dependence.[203]

Schedule III requires a showing the drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II;[204] the drug or other substance has a currently accepted medical use in treatment in the United States;[205] and abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.[206] Schedules IV and V follow this similar pattern in watered down-relation to Schedules I through III.[207]

Given the growing body of evidence of pornography's deleterious effects, it's possible a placement under Schedule I through V would not be entirely outside the scope of what the CSA contemplated. With the release of chemicals pornography exposure yields,[208] and the high potential for abuse pornography correlates to, a placement under Schedule I certainly seems within the realm of applications.[209]

2. *Public Health v. Obscenity*

If such placement possible, what then could the state do in light of its police power,[210] its duty to the public good,[211] and the provisions of the CSA when viewed under the obscenity blanket of the First Amendment? Using the Department of Justice's rubric for the CSA, combined with the research discussed above, pornography has been shown to have an actual potential for abuse,[212] along with emerging scientific evidence of its pharmacological effects.[213] If persuaded, the CSA would classify pornography as a Schedule I drug.

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[203] *Id*., at § 812(b)(2)(C)
[204] *Id*., at § 812(b)(3)(A)
[205] *Id*., at § 812(b)(3)(B)
[206] *Id*., at § 812(b)(3)(B)
[207] *See Id*., at § 812(b)(4) through (b)(5)(C).
[208] *See supra*, note 149. Epinephrine; Testosterone; Endorphin; Oxytocin; Dopamine; Serotonin; and Phenylathylamine, to name a few.
[209] *See*, *e.g.*, *supra*, note 192, at § 812(c)(10) *cf.* with *supra*, note 150. Heroin is a Schedule I drug.
[210] *See supra*, note 83-84
[211] *See supra*, note 85-86
[212] *See supra,* notes 131-164 and accompanying text
[213] *See supra*, note 149

With this classification, the obscenity issue becomes completely irrelevant. Justice Stevens may not know it when he sees it,[214] but the same limits do not apply to scientific findings.

VI. CONCLUSION

Some defend pornography as the mark of a society truly free.[215] Others are less absolute, finding pornography a therapeutic force capable of breaking down cultural and political barriers.[216] Whatever the ideological position, this much is clear: pornography has not only become an acceptable ebb-and-flowing economic force, but a cultural behemoth just as well. Consider: pornographic actors are now considered a staple of popular culture by all shapes and measures on par with Hollywood celebrities.[217] In some instances, the two even cross-over.[218] Such an industry has all the appearances of legitimacy.

Unfortunately, pornography use has also been linked to crime, child abuse, prostitution, and in some instances socio-pathic behavior.[219] This is nothing of a new observation, as both Meese I and Meese II found these indirect links (wary to term them "causal") during their respective analyses. But because no substantial scientific evidence existed at the time *Miller v. California* was decided,[220] or even when the CSA was enacted, pornography was never viewed as having the capacity for mental harm that it's currently being linked to.

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[214] *See supra*, note 19

[215] *See* Sarah Baxter and Richard Brooks, *Porn is Vital to Freedom, Says Rushdie*, The Times Online (August 8, 2004), *available at* http://www.timesonline.co.uk/tol/news/uk/article466971.ece (citing Salmon Rushdie, who argues that a free and civilized society should be judged by its willingness to accept pornography)

[216] *See* Wendy McElroy, *XXX: A Women's Right to Pornography* 129, (St. Martin's Press, New York)(1995). McElroy is an advocate of the Individualist Feminism movement which defends pornography on the basis it exemplifies a woman's ultimate choice and right to do as she may with her own body

[217] *See* Naomi Wolf, *The Porn Myth*, New York Magazine (Oct. 13, 2003), *available at* http://nymag.com/nymetro/news/trends/n_9437/ (*cf*. with McElroy, *supra* note 216).

[218] *See* Gossip Queen, *10 Porn Stars Turned Actors*, iDiva (April 14, 2014), *available at* http://idiva.com/photogallery-entertainment/10-porn-stars-turned-actors/29183/5 (Sylvester Stallone (crossed over from being an adult entertainer to mainstream film); Matt LeBlanc (the *Friends* star started as a porn-series actor in the early nineties); and even Kevin Costner filmed a pornographic movie early in his career)

[219] In an interview given to James Dobson just before he was executed in 1989, Ted Bundy confessed it was his addiction to hardcore pornography that fed his urge to kidnap, rape, and ultimately kill up to forty young women. *See* James Dobson, *Life on the Edge* (Word Publishing, Tennessee) (1995).

[220] *See supra*, note 63

This lack of scientific caution may have been the impetus for pornographic growth in the United States along with its constitutional jurisprudence. While obscenity may not be protected under the First Amendment, any regulation or prosecution questioning pornography *as* obscenity is done under the auspices of the First Amendment. To that end, strict scrutiny is a very hard standard to overcome for any moving party.[221]

If ever a truism is highlighted by pornography, however, it is that freedom in any application carries with it the undeniable possibility for danger. Nothing in the Constitution bestows with freedom an absolute freedom;[222] even speech is susceptible to slander; printed word to libel. In the same vein, even without the showings or suggestions of this Note, pornography is still susceptible to stiffer regulation by its very nature and the nature of the state. Obscenity regulation may be cloudy, but it's still there. In fact, hardcore pornography was expressly stated as being obscenity by the Supreme Court in *Miller*.[223] In other words, hard-core pornography is not protected speech as far as the First Amendment is concerned. By further exposing pornography's effect on the brain, then, pornographic regulation is cast into a wholly different light.

Since the protection of the public health is the highest duty a state has for its citizens, a product that jeopardizes the brain while providing what amounts to a temporary drug-*esque* high may be susceptible to strict regulation under the Tenth Amendment police power. By using the Schedule system provided by the CSA, not only could states theoreticall start enforcing and penalizing pornography production and use under potentially stiffer drug laws, but the federal government may get involved as well.

Under the research proffered, it would seem a reasonable argument may exist that pornography *could* be framed outside of the First Amendment and be cast into a more strictly enforced drug-light. As a hurdle, it would be the first such classification for purposes of the CSA; that is, a visual stimulus, not administered into the body under the conventional sense of the word, being classified as a drug. But if hardcore pornography is obscenity, and that obscenity

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[221] Laws decided under the standard of "strict scrutiny" survive about thirty percent of the time. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006). It's unclear what the percentage is with pornographic prosecutions.

[222] *See supra*, note 21

[223] *See supra*, note 63, at 29 ("[A] majority of this Court has agreed on concrete guidelines to isolate "hard core" pornography from expression protected by the First Amendment.")

is creating addiction in its users to the point of chemical dependency, then perhaps expressive conduct is no longer the appropriate lens to judge such things.