Combating Obscenity on the Internet:
A Legal and Legislative Path Forward

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Introduction

While attempting to define obscenity Justice Potter Stewart famously quipped: "I know it when I see it."[1] With the advent of the internet and the rise of online pornography many people today have certainly seen it, but has the internet changed what we know about it and how we should treat it? More importantly, can obscene content still be prosecuted even if it's found on the internet? This paper will (i) examine current law and explain why it is, for the most part, ill-equipped to confront obscene content on the internet; (ii) suggest ways to strengthen prosecutions under current law; and (iii) put forward ideas for legislative reform—some of which stays within current Supreme Court precedent and some aim to challenge it.

An Overview of Obscenity Law and the Internet

Obscenity is unprotected by the First Amendment, and violations of obscenity laws can, and to this day do, result in criminal prosecution. In *Miller v. California*, the Supreme Court laid out the current test to apply for determining whether or not content is obscene:

> (1) Whether the "average person applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[2]

In order to be constitutional, every state and federal obscenity prosecution must comport with this three-pronged test enumerated in *Miller*. At the federal level, Congress has already passed multiple obscenity statutes that satis-

1 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).
2 413 U.S. 15, 24 (1973).

fy *Miller*, which can currently be used for criminal prosecutions. Of these, two federal statutes[3] could be used to prosecute obscenity online—and one federal statute covers broadcast and radio transmission. But, these statutes on their own can only have a limited effect because (i) obscenity is a narrow legal category that under Supreme Court precedent must be defined by local standards and (ii) Section 230 of the Communications Decency Act, 47 U.S.C. § 230 provides legal protection to most websites and services that offer obscene content.

18 U.S.C § 1464 – Broadcasting Obscene, Indecent, and Profane Content

> "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."[4]

This provision prohibits the transmission of obscene content over radio and broadcast media, such as television and radio.[5] It also prohibits transmission of "indecent" content, which has a broader scope.[6] The Supreme Court in *Pacifica* famously upheld the Federal Communications Commission's enforcement proceeding pursuant to this provision against a public radio's transmission of George Carlin's famous "Seven Dirty Words" monologue. The monologue was not obscene, but the Court upheld the FCC action, reasoning that because "broadcast media [has] established a uniquely pervasive presence in the lives of all Americans" the government has a unique interest in regulating this content due to how it "confronts the citizen, not only in public, but also in the privacy of the home."[7]

The *Pacifica* case led the FCC to create, pursuant to section 1464, a concept of "indecent" material—which is broader than the *Miller* obscenity standard. The FCC to this day enforces this standard on broadcast radio and television. Under the FCC's definition, indecent material "must describe or depict sexual or excretory organs or activities" in a manner that is "patently offensive as measured by contemporary community standards for the broadcast medium."

By its terms, however, section 1464 does not apply to the internet. It is discussed because under its authority, the FCC, with the blessing of the Supreme Court in *Pacifica*, expanded the scope of obscenity to the broader "indecency" standard. As discussed below, the Court has hesitated to expand online prohibitions beyond obscenity. But, it might reconsider its decisions and could rely on the precedent of 18 U.S.C. § 1464.

18 U.S.C § 1462 – Importation or Transportation of Obscene Matters

> "Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier or interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934)[8], for carriage in interstate or foreign commerce—(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or (b) any obscene, lewd, lascivious, or filthy

3 In addition, 47 U.S.C. § 223 limits transmission on phone lines ("telecommunications") of obscene material "with intent to abuse, threaten, or harass another person." 47 U.S.C. § 223(1)(A)(ii). It also prohibits transmission of obscene material "knowing that the recipient of the communication is under 18 years of age." 47 U.S.C. § 223(1)(B)(ii). These statutes have never been successfully challenged on constitutional grounds, but their narrow focus probably make them inapt for internet prosecutions.

4 18 U.S.C § 1464.

5 *See*, e.g., Tallman v. United States, 465 F.2d 282, 285 (7th Cir. 1972).

6 The provision prohibits transmission of "any obscene, indecent, or profane language by means of radio communication." 47 U.S.C. § 1464.

7 F.C.C. v. Pacifica Foundation, 438 U.S. 726, 748 (1978).

8 The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet and such systems operated or services offered by libraries or educational institutions.

> phonograph recording, electrical transcription, or other article or thing capable of producing sound;" … Whoever knowingly takes or receives, from such express company or other common carrier or interactive computer service (as defined in section 230(e)(2) 1 of the Communications Act of 1934) any matter or thing the carriage or importation of which is herein made unlawful—Shall be fined under this title or imprisoned not more than five years, or both, for the first such offense and shall be fined under this title or imprisoned not more than ten years, or both, for each such offense thereafter."[9]

Section 1462, on the other hand, does apply to the internet and specifically prohibits the use of interactive computer services to transport obscene material through interstate commerce—as well as prohibiting knowingly taking or receiving such material from an interactive computer service. Individuals have been prosecuted under this statute for electronically forwarding content from obscene websites[10] to other people and receiving obscene material.[11]

Although a potentially powerful tool for prosecuting the spread of obscenity, it doesn't adequately address the role of interactive computer services themselves. Because the statute concerns the transportation of obscene content by an individual through an interactive computer service, it is questionable whether a platform merely providing access to (or hosting) obscene material or an internet service provider providing access to an obscene website—without more—would be enough to sweep this conduct into the statute. Further, section 230 would likely protect broadband providers, as well as interactive websites from obscenity liability.[12]

On the other hand, websites that obtain obscene images through the internet would likely face a significant risk because section 1462 also prohibits *taking* or *receiving* obscene material. And, circumstantial evidence may be used to prove that pornography was obtained through the internet.[13] But, we could find no prosecutions of websites under this section.

<u>18 U.S.C § 1465 – Production and Transportation of Obscene Materials for Sale or Distribution</u>

> "Whoever knowingly produces with the intent to transport, distribute, or transmit in interstate or foreign commerce, or whoever knowingly transports or travels in, or uses a facility or means of, interstate or foreign commerce or an interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934) in or affecting such commerce, for the purpose of sale or distribution of any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined under this title or imprisoned not more than five years, or both."[14]

Section 1465 also applies to the internet and prohibits the use of interactive computer services to produce and transmit obscene content for commercial sale or distribution. Individuals have been prosecuted under this statute for creating obscene content and then making it available on websites for commercial purposes.[15] For this reason, this statute is currently the best avenue for bringing federal obscenity prosecutions against internet service providers.

There are of course also numerous state obscenity laws.[16] And, as discussed below, prosecutors can use these

9 18. U.S.C. § 1462

10 *See* U.S. v. McCoy, 937 F.Supp.2d 1374 (2013).

11 United States v. Dodds, 347 F.3d 893, 895 (11th Cir. 2003)

12 *See* Backpage.com, LLC v. McKenna, 881 F. Supp. 2d 1262, 1273 (W.D. Wash. 2012).

13 United States v. Hersh, 297 F.3d 1233, 1254 n. 31 (11th Cir. 2002).

14 18. U.S.C. § 1465

15 United States v. Dodds, 347 F.3d 893, 900 (11th Cir. 2003); U.S. v. Thomas, 74 F.3d 701 (6th Cir. 1996); U.S. v. Stagliano, 693 F.Supp.2d 25 (D.D.C. 2010).

16 Jennifer M. Kinsley, *The Myth of Obsolete Obscenity*, 33 Cardozo Arts & Ent. L.J. 607, 609 (2015)

to bring state obscenity actions against internet companies. However, they too must adhere to the limitations set forth in *Miller* and *Reno* and must contend with the protections section 230 provides.

Challenges in Bringing Obscenity Prosecutions

With the ever-evolving nature of technology, online obscenity presents novel legal issues that the courts have been slow to grapple with. For this reason, there are four main challenges that any attempt to prosecute or regulate obscenity on the internet faces.

Challenge One: The Narrowness of the Obscenity Standard

The first challenge is that the *Miller* standard only applies to the most explicit portrayals of sexual activity. And community standards determine the level of explicitness at which particular content is obscene. This means that likely in most every community in the country merely depicting nudity or even sexual content in a somewhat discrete way would not constitute actionable obscenity.

Challenge Two: Community vs. National Standards

The second challenge is determining how the *Miller* test applies when dealing with obscene content on the internet. Traditionally, under *Miller*, when an obscenity prosecution is brought the jury is tasked with determining whether the content in question violates its communities' contemporary moral standards. This local "community" standard allows for easier prosecutions of obscenity brought within more conservative parts of the country.

There is currently a split among the United States Courts of Appeals on the meaning of the *Miller* community standard on the internet. The Ninth Circuit has held that for content on the internet the "community" standard is inapplicable, and that a "national" standard is instead required.[17] Under this view, because content on the internet can reach every corner of the country it should not be judged by the standards of a particular community, but by the standards of the nation as a whole. With the growing normalization of pornography in many parts of the country, the Ninth Circuit's ruling makes bringing obscenity prosecutions much harder since the standard applied to the content will default to the lowest common denominator. Fortunately, the Ninth Circuit's "national" standard is an outlier, and other Circuits have held that the traditional *Miller* test still applies when dealing with obscene content on the internet.[18] This challenge of varying standards also highlights why establishing a federal definition of obscenity, a definition with real teeth, to replace *Miller* would help provide clarity on what qualifies as obscene and make it easier to bring obscenity prosecutions against internet companies.

Challenge Three: Defenses to Obscenity Prosecutions

The third challenge is that even if the community standards approach applies within your jurisdiction, the jury must use an objective test for the third *Miller* factor to determine whether "a reasonable person" would find that the content in question "lacks serious literary, artistic, political, or scientific value."[19] This means that the jury must look past its own community and analyze broader societal views on whether the content has any redeeming value. An example of how this inquiry makes obscenity hard to demonstrate in courts is the famous *Mapplethorpe* obscenity trial. In this case, the jury found that images displayed in an art gallery (which were ostensibly obscene)

17 *See* U.S. v. Kilbride, 584 F.3d 1240 (9th Cir. 2009).

18 *See* U.S. v. Little, 365 F'Appx 159, 164 (11th Cir. 2010) (using the community standard and "declin[ing] to follow the reasoning of *Kilbride*"); U.S. v. Extreme Associates, Inc., 431 F.3d 150, 161 (3rd Cir. 2005) (noting that the Supreme Court "has not suggested that obscenity law does not apply to the internet or even that a new analytical path is necessary in internet cases"); U.S. v. Kirkpatrick, 662 F'Appx 237 (5th Cir. 2016).

19 Pope v. Illinois, 481 U.S. 497, 500 (1987).

had artistic value sufficient enough to defend against prosecution when presented with "expert testimony" from artists and academics.[20] This highlights the challenges in bringing obscenity prosecutions against content on the internet to overcome this defense of "artistic value." With the modern rise of online pornography, obscene content has become so common to the average individual that depending on the composition of the jury, only the most gratuitous content may successfully be prosecuted.

Challenge Four: Statutes are Vague, Overinclusive, or not Narrowly Tailored

The final challenge is that statutes designed to regulate obscenity on the internet have found mixed success in passing constitutional muster. A few reoccurring issues have arisen, and carefully drafting statutes can help avoid them in the future. First, statutes that are too vague—especially when used for criminal prosecutions—have been held to be unconstitutional. The Supreme Court struck down portions of the Communications Decency Act (CDA) because, among other things, the statutory language used was vague and swept in protected, as well as unprotected, speech.[21] The simplest way to avoid challenges for vagueness is to draft statutory language that mirrors and replicates the standard laid out in *Miller*. Although doing this would limit the content that can be regulated, until a new obscenity standard is laid out—like the one being proposed by Senator Lee to create a federal definition of obscenity that challenges *Miller* (discussed below)—this will be essential.

Second, statutes that are overly inclusive have also been held to be unconstitutional. This exact flaw led the Court to strike down portions of the Child Online Protection Act (COPA) of 1998, which attempted to protect minors from obscene content on the internet. COPA was held to be over inclusive because it prohibited "a vast array of speech that is clearly protected for adults."[22] Similarly, another flaw of the CDA was that it targeted both commercial and non-commercial speech, and so was also found to be over inclusive.[23] The best way to avoid this problem is to specifically regulate commercial pornographers. The Court has left open the possibility that "regulating some portions of the internet—such as commercial Web sites—differently from others" may be permissible.[24] This leaves an avenue open for more stringently regulating commercial pornography websites.

Lastly, statutes that are not narrowly tailored and leave reasonable alternatives available will also result in the statute being deemed unconstitutional. Content on the internet raises special concerns in this regard due to modern technology allowing individuals to filter and control content from the users' end. This has led courts to question whether this sort of technology is a less restrictive alternative.[25] This issue has not yet been definitively resolved by the courts. But there are compelling arguments that given how easy it is to access online pornography, placing the burden on parents to try and control the content their children see is unreasonable—if not futile in today's age.

Legal Strategies for Successful Prosecutions

Obscenity Law Suits in Conservative Communities. Despite these challenges, the single most effective legal strategy to combat online obscenity is to promote and bring more obscenity cases in conservative parts of the country. One potential advantage of obscene content on the internet, is that because it is transmitted and accessed across the country, prosecutions can essentially be brought in any jurisdiction. This, combined with the fact that the vast ma-

20 *See* Marc Mezibov, *The Mapplethorpe Obscenity Trial*, 18 Litig. 12 (1991).

21 *See* Reno v. ACLU, 521 U.S. 844, 878 (1997) (language like "indecent" is too vague and sweeps in content that is pornographic as well as non-pornographic).

22 ACLU v. Ashcroft, 322 F.3d 240, 268 (3rd Cir. 2003).

23 *See id.* at 877 (the Act was "not limited to commercial speech or commercial entities" as "[i]ts open-ended prohibitions embrace all nonprofit entities and individuals posting indecent messages").

24 *Reno*, 521 U.S. at 879.

25 ACLU v. Gonzales, 478 F.Supp.2d 775, 789 (E.D. Penn. 2007).

jority of jurisdictions apply the "community" standards approach, creates a potential avenue for success. Indicative of this, 90% of state and local obscenity prosecutions have been brought in Red States, compared to just 8% in Blue States.[26] Federal and local prosecutors could be more aggressive in bringing obscenity cases against internet companies in conservative districts for violating federal (and/or local) obscenity laws by transmitting obscenity into that given district.

A successful strategy that the Department of Justice's obscenity task force employed historically for federal prosecutions against obscenity online was picking trial venues in areas of the country where the local obscenity standards are quite conservative. Federal prosecutors could reinvigorate this strategy and be more aggressive in bringing obscenity cases against online websites in conservative areas of the country, like Utah, for example, even if the obscenity is largely distributed in say, Nevada and New York.

In addition, the use of charge stacking can be a useful strategy in prosecutions, especially for local and state prosecutors in areas with less conservative obscenity laws on the books. Charge stacking means that obscenity charges are brought concurrently with more serious charges. Since obscenity cases are difficult to win by themselves, having to pass the three tests of *Miller*, bringing them along with other charges alleviates the pressures that a risk-adverse prosecutor may feel about losing a case. Doing so also presents a lower-risk opportunity for prosecutors to become more comfortable with handling obscenity cases, as they are not commonly handled.

In a similar vein, the use of obscenity as a predicate offense under RICO statutes is an especially useful strategy for targeting commercial pornographic websites. The Supreme Court has upheld the use of obscenity as a predicate offense, and presents an opportunity for both state and federal RICO statutes to be levied against commercial pornographers.[27]

While obscenity suits are winnable, there are reasons why so few have been brought against internet companies. The suits must be brought against the website content providers themselves. In contrast, internet service providers and social media platforms both enjoy immunity from suit for all content they carry or host, respectively, under the Communications Decency Act of 1996, 47 U.S.C. § 230(c)(1). Dragging out-of-state websites (those not domiciled in the state where the court sits) into court via internet jurisdiction is feasible but can be complicated. [28]Furthermore, prosecutors have to provide evidence that a website transmitted obscenity into a given geographic area (a locality or state), which requires computer forensics. And lastly, it is very challenging for prosecutions to pass all three *Miller* tests.

Bring Lawsuits to End Copyright Protection for Pornography. It remains unsettled in many circuits whether pornography is in fact entitled to protection against copyright infringement. The Constitution gives power for creating patent and copyright law to Congress in order "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[29] It is far from clear that obscene or even indecent material, as described by Federal Communications Commission (FCC) regulation, should receive copyright protection. Eliminating such protection would greatly hurt the commercial porn industry, although concededly maybe less so in its current iteration—the peer-to-peer model of "OnlyFans." Given the shaky constitutional grounds for copyright protection for obscenity, courts have been hesitant to extend copyright protection to obscenity. While the Fifth and Ninth Circuits have so extended protection, other courts have been far more hesitant. Indeed, copyright protection in the United States was "effectively unavailable for pornography" until the landmark decision by the Fifth Circuit which held that the Copyright Act neither explicitly nor implicitly prohibits protection of "obscene materials," such as the films at issue there, and rejecting the defendant's

26 *See* Todd Lochner & Dorie Apollonio, *Karma Police: Prosecutorial Strategies in Obscenity Cases and the Broader Culture War*, Syracuse Journal of Law and Civil Engagement 10 (2014).

27 *See* Fort Wayne Book, Inc. v. Indiana, 489 U.S. 46 (1989) (upholding the use of obscenity as a predicate offense under a state RICO statute).

28 *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1122–23 (W.D. Pa. 1997).

29 U.S. Const. Article, Section 8, Clause 8.

affirmative defense of "unclean hands."[30] While some Circuits followed the Fifth Circuit,[31] many courts have not.[32]

The tenuousness of copyright protection of obscenity leaves open the possibility for some type of innovative lawsuit in a friendly jurisdiction to declare obscene content unprotected by copyright. This would not be a trivial suit to bring, as it would involve representing an entity that distributes without authorization obscene material—or possibly, and less unpalatably, an entity that claims an intention to do so. However, if a suitable plaintiff could be found, a suit challenging the copyright protection of obscene materials would be a gut punch to the pornography industry. Alternatively, Congress could decide to remove copyright protection for obscene as well as indecent material.

Policy Strategies

As described above, the narrowness of the legal definition of obscenity and the roadblocks Congress and courts have placed in the way of successful prosecution have led to relatively few prosecutions, and fewer still successful cases, against obscenity on the internet—resulting in pornography proliferating throughout society. The restrictive legal precedents also have limited stronger policy options against obscenity. There are, however, policy changes that could be made. These can be grouped into two categories: (1) options for legislative action within existing Supreme Court precedent, and (2) options to challenge and change existing Supreme Court precedent.

1. Federal and State Legislative Reform Within Existing Precedent

Section 230 Reform and the Comstock Act for the internet. The first reform that would aid in regulating internet service providers and help prosecute the transmission of obscene content would be a Comstock Act designed for the internet. The original Comstock Act of 1873 prohibited a vast array of indecent materials from being sent through the mail. Though portions of the Act relating to contraception and abortion have been struck down as unconstitutional, the provisions relating to obscenity are still intact. These provisions have largely been codified by 18 U.S.C. § 1461, which currently prohibits the use of the Post Office to mail obscene materials. As internet service providers, as well as interactive computer services operate, in many ways, as a more technologically advanced Post Office—allowing individuals to instantly transmit materials to one another—extending regulations on this basis could prove to be a viable route. In addition, if these prohibitions are extended to internet service providers and interactive computer services, 39 U.S.C. § 3008, provides a framework for how individuals could personally enforce these prohibitions.

Section 3008 provides that any person who mails any advertisement "which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postal Service to refrain from further mailings of such materials to designated addresses thereof." If the sender of the obscene material

30 Mitchell Brothers Film Group v. Cinema Adult Theater, 604 F.2d 852, 854–55, 858 (5th Cir.1979).

31 *See e.g.*, Jartech, Inc. v. Clancy, 666 F.2d 403, 406 (9th Cir.1982) (stating, in the context of copyright infringement of a pornographic film, that "[p]ragmatism further compels a rejection of an obscenity defense" because "obscenity is a community standard which may vary to the extent that controls thereof may be dropped by a state altogether")

32 *See* Strike 3 Holdings, LLC v. Doe, 351 F. Supp. 3d 160, 165 n.5 (D.D.C. 2018) ("The Court notes it is unsettled in many circuits--including this one--whether pornography is in fact entitled to protection against copyright infringement."), *rev'd* 964 F.3d 1203 (D.C. Cir. 2020); Next Phase Distrib., Inc. v. Does 1-27, 284 F.R.D. 165, 171 (S.D.N.Y. 2012) ("[I]f the Motion Picture is considered obscene, it may not be eligible for copyright protection .... [S]ince the *Mitchell Bros.* decision, judges across the country and within this district have reached different conclusions on this issue.") Liberty Media Holdings, LLC v. Swarm Sharing Hash File, 821 F. Supp. 2d 444, 447n.2 (D. Mass. 2011) ("Notably, it is a matter of first impression in the First Circuit, and indeed is unsettled in many circuits, whether pornography is in fact entitled to protection against copyright infringement."); Devils Films, Inc. v. Nectar Video, 29 F.Supp.2d 174, 175–77 (S.D.N.Y.1998) (refusing to exercise its equitable powers to issue a preliminary injunction against infringement of pornographic films and "commit the resources of the United States Marshal's Service to support the operation of plaintiff's pornography business," holding that the films were "obscene" and illegally distributed through interstate commerce).

persists, the Postal Office can refer them to the Attorney General, who is then authorized to initiate proceedings within the District Courts. This framework applied to the internet would allow individuals to control the content that is being sent to their screens, into their homes, and would allow them to seek enforcement against internet service providers who continue to transmit obscene materials to their household.

Currently, broadband service providers and online platforms face no liability whatsoever because Section 230(c)(1) of the Communications Decency Act, 47 U.S.C. § 230(c)(1), shields them from any liability from carrying unlawful content. An updated Comstock Act could override any immunity section 230 provides with a "notwithstanding any other provision in the United States Code" phrase. Alternatively, section 230 could be reformed to condition its liability protection upon a platform taking down unlawful, obscene content (a "Bad Samaritan" carveout).[33]

Copyright Protection. As mentioned above, Congress could eliminate copyright protection for obscene material. This would not face any constitutional objection as obscene material receives no First Amendment protection. Congress could also remove any copyright protection for indecent material as defined by FCC regulation. A court would likely uphold a legislative judgment that indecent material fails to "[t]o promote the progress of science and useful arts."

On the other hand, there probably is a limit on how much undesirable content Congress could remove from copyright protection. Recent cases striking down the disparagement clause in trademark law[34] suggest that the First Amendment limits federal government's discretion in giving out intellectual property rights. Removing copyright protection for indecent material would present some risk of being struck down and that risk would increase if Congress were to further enlarge the scope of any copyright-stripping statute.

Right-of-Publicity Laws. States, most prominently California and Indiana, have statutes that extend rights of publicity over one's identity, including one's physical appearance or attributes. These statutes give individuals legal redress for when a defendant uses an individual's identity, appropriating his or her name or likeness to the defendant's advantage, commercially or otherwise, without the individual's consent; and in a manner that results in injury to the individual.

Movie stars and other celebrities typically use this right to prevent unauthorized use of their images or identity in unauthorized advertisements or other instances of unconsented appropriations. However, in the internet age, the law has expanded to include normal people's images. For instance, in *Gabiola v. Sarid*, plaintiffs sued "Mugshots.com," a website that posted individuals' mugshot photographs.[35] Mugshots.com linked to another website, owned by the same firm, that provided a removal service.[36] Plaintiffs alleged that the use of their image in the mugshot constituted an infringement of their rights of publicity. The court ruled that plaintiffs' "allegations support an inference that everything, including the articles on Mugshots.com are click-bait to increase consumers and to embarrass the profiled arrestees and in turn to drive revenue to the removal service."[37] Similarly, courts have upheld right of publicity actions against social media firms for using personal profile information. In *Fraley v. Facebook*, Inc., a federal court ruled that the right of publicity could prevent Facebook from reproducing users' "likes" and "endorsements."[38]

States (or the federal government) could pass statutes giving people a right of publicity in their naked bodies—and place very burdensome limits on alienating that right, perhaps prohibiting its permanent alienation or ex-

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33 *See* Department of Justice, *Section 230 — Nurturing Innovation or Fostering Unaccountability? Key Takeaways and Recommendations*, (June 2020), available at: https://tinyurl.com/3u2rz7ku.

34 Matal v. Tam, 137 S. Ct. 1744, 1753 (2017) (holding unconstitutional a provision of the Lanham Act that "prohibits the registration of a trademark "which may disparage ... persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.").

35 Gabiola v. Sarid, No. 16-cv-02076, 2017 WL 4264000, at *2 (N.D. Ill. Sept. 26, 2017).

36 *Id.*

37 *Id.* at *6

38 Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 798–800 (N.D. Cal. 2011).

tending permanent rights of recission. Thus, a porn actress could not permanently sign away her rights to control images of her naked body to a porn company—but rather its right to distribute the movies in which she appears would be dependent upon her monthly approval. In addition, publicity rights can protect victims of revenge porn and other unauthorized, nonconsensual naked images or media by giving them a means of legal recourse. These types of images have emerged from locker rooms, hospitals, and many other situations in which privacy torts or other remedies are inapplicable or impracticable.[39]

Obscenity Class Actions. Finally, the federal or state government could allow for private causes of action and class actions to bring obscenity charges and include presumed civil damages. Rather than make obscenity cases simply a matter for prosecutors, these causes of action would give broader incentives to bring legal action.

2. Legislative Reform to Challenge Existing Supreme Court Precedent

Transmission of Obscene Materials to Minors. In *Reno v. ACLU*,[40] the Supreme Court, reviewing portions of the 1996 Communications Decency Act (CDA), ruled unconstitutional government restrictions on the "knowing transmission of obscene or indecent messages to any recipient under 18 years of age" or the "knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age."

Unfortunately, the CDA, at least the part restricting transmission of obscene, indecent, and offensive materials to minors, was drafted poorly—so poorly that the cynic might see it as a deliberate legislative effort to pass an unconstitutional law, lest the nascent internet industries would be saddled with having to follow obscenity laws.

But, Congress could try again to restrict the transmission of obscene material to minors – especially in light of how much the internet has changed since 1996. The Supreme Court in *Reno* found the term "indecency" vague as it was not defined. And, it found "patently offensive" outside of the *Miller* obscenity definition and therefore even vaguer. A better drafted law would limit the scope of unlawful transmission to obscene material (and not include indecency)—as described supra in the discussion of an internet Comstock Act. (Congress could also pass a severable provision—or even a separate statute—to prohibit the transmission of indecent material as well, explicitly relying on the FCC's definition).

There is a possibility that the Court would reconsider its decision. *Reno* rests on several factual predicates which from the vantage of twenty years seem quaint—if not tragically wrong. To take one example, in distinguishing the case from *Pacifica*, which allowed regulation of indecent broadcast material to protect children, the Court found that "the internet is not as 'invasive' as radio or television. . . . [and] that [c]ommunications over the internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content by accident. . . .[and] odds are slim that a user would come across a sexually explicit sight by accident."[41] Given that *Reno* rested on these now obviously faulty factual predicates, a challenge to the case may succeed.

Age Verification for Websites Offering Obscene Material. Congress tried again at regulating internet pornography with the Child Online Protection Act (COPA).[42] It required age verification for minors visiting sites with material "harmful to children." In *Ashcroft v. ACLU*,[43] the Court struck down the restrictions as unconstitutional. The Court found that "filters are more effective than age-verification requirements," so it struck down the law, which required sites with material "harmful to children" to obtain age verification.[44] However, given the manifest failure of filters

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39 Adam Candeub, *Nakedness and Publicity*, 104 Iowa L. Rev. 1747, 1752 (2019)

40 521 U.S. 844 (1997).

41 Reno, 521 U.S. at 869.

42 Pub. L. No. 105–277, 112 Stat. 2681–736 (1998) (codified at 47 U.S.C. § 231 (2000)).

43 542 U.S. 656, 668 (2004).

44 COPA used a definition of "harmful to children" that seemed quite similar to the Miller obscenity and the FCC's indecency definitions: "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene

to date—and the changed technology of smartphones, the Supreme Court could change their minds on this.

Congress, or for that matter, state legislatures could pass laws to require interactive computer services in the regular business of creating or hosting obscene content, child pornography, or other content harmful to minors to operate age-verification measures on their platforms or websites to ensure that any users of the platform are not minors. (State laws would be limited to verifying traffic emanating or directed to individuals within State borders.) Such a law could: (1) require such interactive computer services to adopt age-verification measures that independently verify that the user of a covered platform is not a minor, i.e. It would not be sufficient for someone to type in a birth date—verification would require a website to use other means to confirm a user is not a minor; (2) permit interactive computer services to choose the best verification measure for their service that ensures independent verification. Such verification measures could include adult identification numbers, credit card numbers, bank account payment, a driver's license, or another identification mechanism. The law could also (3) impose a civil penalty for any violation of the law, and each day of the violation could constitute a separate violation of the law. It could also include a (4) private cause of action or even a class action as an enforcement mechanism where, for example, parents could sue for damages for the exposure of their children to dangerous material. Senator Lee has introduced an age-verification bill at the federal level called the SCREEN Act[45] and Louisiana passed an age-verification bill into law this past year.[46]

A Federal Definition of Obscenity. Congress could pass a law to establish a federal definition of obscenity to directly challenge the Miller standard which relies on local community standards (prong 1) and applicable state laws (prong 2). Having obscenity defined and enforced by local standards and state laws worked fine when pornography was largely sold in brick and mortar stores, but now in the era of the internet, obscenity is mainly (and widely) distributed online, which makes it challenging to bring obscenity prosecutions against national internet companies, as noted above.

Senator Lee has introduced a bill to create a national definition of obscenity as a solution to directly challenge and replace the tests of Miller, called the Interstate Obscenity Definition Act (IODA). The bill would resolve the issues of what obscenity standards to apply to the internet and the conflict between the prongs of Miller by inserting a clarifying definition of what constitutes obscenity into the Communications Act of 1934, as follows: "Obscenity" is content that:

> (1) taken as a whole, appeals to the prurient interest in nudity, sex, or excretion, (2) depicts, describes or represents actual or simulated sexual acts with the objective intent to arouse, titillate, or gratify the sexual desires of a person, and, (3) taken as a whole, lacks serious literary, artistic, political, or scientific value.[47]

By inserting it into the Communications Act, the definition would only apply to images, videos, etc. that are shared on mediums of interstate telecommunications regulated by the FCC—cable, internet, broadcast TV, etc. A federal

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or that—

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." § 231(e)(6); *see* Ashcroft v. Am. C.L. Union, 542 U.S. 656, 661–62 (2004).

45 Shielding Children's Retinas from Egregious Exposure on the Net Act (SCREEN Act), S._, 117th Congress, 2022, accessed at: https://tinyurl.com/3vde84yd.

46 Louisiana 2022 Regular Session: Act No. 440, House Bill No. 142,
Accessed at: https://tinyurl.com/mu2vh98v.

47 Interstate Obscenity Definition Act, S._, 117th Congress, 2022, accessed at: https://tinyurl.com/54cduz96

definition to replace *Miller* would empower prosecutors (state or federal prosecutors can bring actions for violations of federal law) to bring more obscenity cases against internet companies.

Conclusion

Obscenity has never been more prolific in our society than it is now due to the internet. But online obscenity has presented novel legal issues that the courts have been slow to grapple with. Enforcement has not been able to keep up with the sheer volume of obscenity online because of the narrowness of the legal definition of obscenity and roadblocks Congress and courts have placed in the way of successful prosecution. However, prosecution strategies like bringing cases in more conservative areas of the country, using charge stacking, bringing obscenity as a predicate offense under RICO statutes, or even bringing lawsuits to try to end copyright protection for pornography can help prosecutors be more aggressive and successful in prosecuting obscenity. There is also a need for changes in policy to enable more obscenity prosecutions.

While the restrictive legal precedents of *Reno v. ACLU*, *Ashcroft v. ACLU*, and *Miller* have limited stronger policy options to date against obscenity, there are still some creative solutions that can be made within these existing precedents, like designing a Comstock Act for the internet, reforming Section 230, eliminating copyright protection for obscene material, creating a right of publicity for a person's naked body, and/or allowing for class and private causes of action against obscenity. Congress could also step up and enact bolder policy solutions to directly challenge these precedents, like attempting again to restrict the transmission of obscene material to minors, enacting age-verification laws for pornographic websites, or even creating a federal definition of obscenity to replace the Miller standard. The current amount of and access to online obscenity today is a dire situation, especially for our children. Stronger laws and prosecutions against obscenity are needed.