THE NEW ATLANTIS
A JOURNAL OF TECHNOLOGY & SOCIETY

Analysis

Pornography and the Internet

Can society set ethical, legal, or cultural limits on pornography in the age of the Internet? And is this a reasonable or misguided aspiration? In light of the Supreme Court's end-of-term decision on legislation aiming to regulate Internet pornography, The New Atlantis *asked legal scholar* Jeffrey Rosen *and theologian* David B. Hart *to comment.*

The End of Obscenity

Jeffrey Rosen

This June, in *Ashcroft v. ACLU II*, the Supreme Court called into question the constitutionality of the Child Online Protection Act (COPA). This was the Court's third encounter with congressional attempts to regulate Internet pornography, and COPA represented Congress's latest effort to address judicial objections raised to an earlier version of the law. As written, COPA imposed up to six months in prison and a $50,000 fine on those who posted online, for commercial purposes, obscene material that is "harmful to minors." The law explicitly protected Internet publishers from liability if they attempted to prevent underage access by requiring the use of a credit card or "any other reasonable measures that are feasible under available technology." But in *Ashcroft v. ACLU II*, the five-to-four majority expressed skepticism about Congress's solution, arguing that alternative technologies might more effectively protect minors from Internet pornography without forcing adults to identify themselves. They sent the case back to the lower court with instructions to hold hearings about whether Internet filtering, blocking software, and other technologies might be less threatening to free speech.

Civil libertarians, liberals, and libertarian conservatives hailed the *Ashcroft* decision, but their celebrations were premature. In each of its three decisions about Internet pornography, the Supreme Court has focused on the peripheral question of whether there are effective technologies for restricting underage access to obscenity. But the justices have so far dodged the more fundamental question: Is there a coherent category

of speech on the Internet that can be regulated as obscene? For it is increasingly obvious, as lower courts have recognized, that the exploding demand for Internet pornography and the impossibility of restricting it to any geographic area makes the Supreme Court's traditional tests for defining obscenity incoherent. Rather than encouraging Congress to search for more effective technologies for controlling obscene speech, the Court will eventually have to recognize that the effort to regulate obscenity has been doomed by culture, by technology, and by the Court's own increasingly expansive embrace of individual autonomy as the highest good.

Congress's first attempt to regulate Internet pornography was the Communications Decency Act of 1996 (CDA), which prohibited the knowing transmission of obscene or indecent messages over the Internet to any recipient under 18 years old. The CDA exempted those who attempted in good faith to restrict underage access, such as websites that required the use of a verified credit card or adult access code. But in 1997, the Supreme Court struck down the CDA in *Reno v. ACLU*. The Court held that Congress, in its eagerness to protect children, had restricted speech that adults had a constitutional right to receive, because "existing technology" did not provide any effective way for purveyors of pornography to prevent minors from accessing indecent communications without also denying access to pornography-seeking adults. The Court also chastised Congress for failing to define the terms "indecent" and "patently offensive," thereby proscribing "large amounts of non-pornographic material with serious educational or other value," including discussions of artistic nudes or the risqué card catalogue of the Carnegie Library.

In response to *Reno*, Congress went back to the drawing board. In the Child Online Protection Act, it tried to refine the definition of material harmful to minors along the lines that the Court had suggested. To protect private users of e-mail or users of public resources like the Carnegie Library, it targeted only communications made for "commercial purposes." And instead of prohibiting "indecent and patently offensive communications," it identified a narrower category of "material that is harmful to minors":

> any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene 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.

This wording was adapted from the Supreme Court's notorious three-pronged test for obscenity, set forth in *Miller v. California* (1973). Even in 1973, the *Miller* test was hard to fathom. As Martha Nussbaum notes in her recent book *Hiding from Humanity: Disgust, Shame and the Law*, Chief Justice Burger conflated two ideas—the obscene and the pornographic. In a footnote, he discussed the etymology of "obscene" from the Latin *caenum*, for filth, and cited the *Oxford English Dictionary*'s definition of "obscene" as "offensive to the senses, or to taste or refinement, disgusting, repulsive, filthy, foul, abominable, loathsome." But he went on to note that the materials at issue in *Miller* are "more accurately defined as "pornography," whose etymology derives from the Greek term for "harlot," and which Webster's dictionary defines as "a depiction of licentiousness or lewdness; a portrayal of erotic behavior designed to cause sexual excitement." Burger's odd conflation of the obscene and the pornographic resulted in a definition of obscenity that required the material to be both patently offensive and appealing to the prurient interest. This meant, as Kathleen Sullivan of Stanford Law School has observed, that the material had to "turn you on and gross you out" at the same time.

In 1973, at the dawn of the explosion of commercial pornography, there were at least the remnants of a practical consensus about what kind of material could be banned as obscene and what kind of material could be restricted as harmful to minors. Hard-core material could be banned as obscene and soft-core magazines could be limited to adults in order to avoid harm to minors. By the early 1980s, however, this practical consensus had already broken down. In light of the proliferation of hard-core movies and magazines, a federal court held ten years after *Miller* that "detailed portrayals of genitalia, sexual intercourse, fellatio, and masturbation" are not obscene "in light of community standards prevailing in New York City."

Chief Justice Burger had also argued in *Miller* that community standards should be defined locally rather than nationally, in order to avoid imposing on "Las Vegas or New York City" the standards of the people of "Maine or Mississippi." But as the distribution of pornography became increasingly nationalized with the advent of the video cassette recorder, the attempt to define obscenity with reference to local community standards confounded lower courts. In a 1985 case called *Brockett v. Spokane Arcades, Inc.*, the Supreme Court tried to clarify the question of what qualifies as an "appeal to the prurient interest" by distinguishing "a good, old fashioned, healthy interest in sex," which should be protected, from "a shameful or morbid interest in nudity, sex, or excretion," which could be banned. (Wasn't an old fashioned interest in sex supposed to be shameful?) But the attempt to distinguish between "normal" and "shameful" hard-core material only confused matters further—once the distinction between hard- and soft-core sex was abandoned, no jury could predict what community standards required. The Court even suggested that in evaluating material targeted at "deviant" groups, jurors might need the help of expert testimony, since they couldn't rely on their own sexual responses.

Because of the complexity of applying community standards in an age when community standards were breaking down, the *Miller* test seemed moribund in practice by the early 1990s, despite a few failed attempts to ban the work of Robert Mapplethorpe and other salacious artists. With the arrival of the Internet, purveyors of pornography couldn't restrict the destination of their wares even if they wanted to. For this reason, lower courts evaluating the new COPA held that the community standards test was too vague to be applied to the World Wide Web, since it might allow the most censorious communities to set the standards for everyone else.

But the lower court's finding didn't daunt the Supreme Court. In its second encounter with Internet pornography in *Ashcroft v. ACLU I* (2002), the high court argued that community standards for identifying obscene speech on the Internet should be national rather than local. Five justices—Clarence Thomas, William H. Rehnquist, Antonin Scalia, Sandra Day O'Connor, and Stephen Breyer—seemed unconcerned that juries in different parts of the country might interpret community standards differently. In separate statements, Justices Breyer and O'Connor emphasized that Congress, in passing COPA, intended to adopt a national stan-

dard for identifying material on the Internet that is harmful to minors. If the nation agreed about the nature of such material, Breyer emphasized, then there was nothing wrong with criminally prosecuting it or restricting it across the board.

But neither Breyer nor O'Connor provided any specific guidance for what sort of material they thought (or Congress believed) might violate national standards against obscenity. And they did not confront the awkward fact that the idea of a national consensus about obscenity is a fantasy. In 2001, for example, Frank Rich reported in *The New York Times Magazine* that the American pornography industry—much of it hard-core—generated at least $10 billion per year in revenues for more than 70,000 websites, pornography networks, pay-per-view and rental movies, cable and satellite television, and magazine publishers. Indeed, three years ago, when a local video retailer in Utah was prosecuted for peddling hard-core pornography, he successfully argued that his products were consistent with what his neighbors were watching on pay-per-view: in an age of nationally distributed hotel pornography, there was little difference between the consumption habits of hotel guests in Salt Lake City or Las Vegas. Pornography is everywhere, suggesting that there is no national consensus against it and no vast disparity from one locale to another.

On the Internet, pornography consumption statistics are even starker. According to the Internet Filter Review, an industry group advocating pornography filtering, Internet pornography now accounts for $2.5 billion of the $57 billion worldwide pornography market. The Review estimates that in 2003 there were 4.2 million pornography Web sites—12 percent of the global total—allowing access to 72 million worldwide visitors every year, with 40 million of them Americans. One fourth of the search engine requests every day (68 million) are for pornographic material. And according to the Employment Law Alliance, nearly a quarter of Americans polled this year said they or their colleagues use computers at work to engage in sexually explicit online activity, from visiting X-rated websites to joining explicit chat rooms. Most of these lascivious Internet users, of course, are men: according to Hitwise, men make up 65 percent of visitors to X-rated sites in the U.S., spending an average of five minutes during each session. Moreover, 15 percent of teens (ages 12 to 17) and 25 percent of older boys (ages 15 to 17) have lied about their age to access an Internet site, according to the Pew research center. And although there are global variations in the consumption of Internet pornography—

steamy Spain leads the pack with 40 percent of users visiting an adult site, compared with only 25 percent of British users and 19 percent of Swedes—there is no country in which consumption of hard-core pornography could plausibly be said to be "patently offensive" to the average person by applying contemporary community standards.

The enforcement of obscenity laws has always depended on a social consensus about what is obscene. And now that this social consensus has collapsed, any attempt to resurrect the informal definition on which American obscenity law has long relied—namely, that hard-core material could be banned and soft-core material had to be protected, except for minors—is an exercise in futility. Ever since hard-core pornography became a multi-billion dollar industry, the idea that it clearly violates national community standards is a hypocrisy that can no longer be sustained in light of clickstream data and consumption statistics. And any attempt to suppress fringe subsets of hard-core material seems to miss the point: How can a particular fetish be singled out as especially shameful in a world where anything goes? For this reason, Justice John Paul Stevens is right to argue, in his concurring opinion in *Ashcroft II*, that the Court should get out of the business of allowing criminal prosecution for sexually explicit speech. As the justice put it:

> COPA's criminal penalties are … strong medicine for the ill that the statute seeks to remedy. To be sure, our cases have recognized a compelling interest in protecting minors from exposure to sexually explicit materials.… As a parent, grandparent, and great-grandparent, I endorse that goal without reservation. As a judge, however, I must confess to a growing sense of unease when the interest in protecting children from prurient materials is invoked as a justification for using criminal regulation of speech as a substitute for, or a simple backup to, adult oversight of children's viewing habits.

But there is an additional reason that the Court will feel pressure to reexamine its obscenity jurisprudence. In *Lawrence v. Texas*, the case that invalidated American sodomy laws last June, Justice Anthony Kennedy embraced a sweeping vision of sexual autonomy that seemed to spell the end of morals legislation. Quoting his own paean to liberty in *Casey v. Planned Parenthood*, the case that reaffirmed *Roe v. Wade* in 1992, he declared: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Liberty, Kennedy added, "gives substantial protection to adult per-

sons in deciding how to conduct their private lives in matters pertaining to sex." He noted that the state should not attempt to define the boundaries of sexual choices "absent injury to a person or abuse of an institution the law protects." He quoted with approval Justice Steven's proposition from his dissenting opinion in *Bowers v. Hardwick*: "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." In response, Justice Scalia was quick to declare that "this effectively decrees the end of all morals legislation." If "the promotion of majoritarian sexual morality is not even a legitimate state interest," Scalia lamented, then presumably "criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity" would have to fall as well.

In fact, laws against bigamy, adultery, and adult incest might be defended in the interest of preventing harm to others. And the Court has made clear that the state isn't powerless to protect vulnerable minors as long as it doesn't impinge on the free speech rights of adults: child pornography can and should be prosecuted, and panderers who attempt to sell pornography directly to children can be regulated as well. But obscenity laws rest on no other foundation than (presumed) majoritarian disapproval of the sexual tastes and preferences of individuals in private. As a doctrinal matter, I don't find the Court's attempt to constitutionalize John Stuart Mill's harm principle (which holds that private behavior cannot be regulated absent harm to others) especially convincing. But now that a majority of the Court has embraced it in principle, the foundations of its obscenity jurisprudence are on extremely shaky ground. The community standards approach—whether defined at the national or local level—rested on Lord Devlin's traditional vision of the relationship between moral disapproval and the law. "A common morality is part of the bondage" that holds society together in "invisible bonds of common thought," Devlin wrote. He argued that it is "no more possible to define a sphere of private morality than it is to define one of private subversive activity," and that "there can be no theoretical limits to legislation against immorality."

But this is precisely the vision that the Supreme Court has now rejected. Now that moral disapprobation is not considered a constitutionally rational reason for restricting behavior, no definition of obscenity that relied on communal disapproval could easily pass constitutional scrutiny, unless one could demonstrate a clear harm to others. There may be some

hard questions on the margins about whether harm to others should be defined broadly or narrowly—what about incest between consenting adults using birth control, for example—but on the central question of whether moral disapproval alone can justify criminal punishment, the battle may soon be over.

Helping parents protect their children from Internet pornography remains a serious national problem, and Congress is not powerless to address it. Just as it has denied funding to libraries that fail to adopt filtering software, so it could create financial incentives for Internet service providers to provide and refine filtering mechanisms as well. But the attempt to define and punish a category of speech as obscene is an atavistic vestige from a distant era. For better or worse, the Court should get out of the attempt to define obscenity, where it has largely embarrassed itself rather than shielding the rest of us from embarrassment.

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