The Moral Bases for Legal Regulation of Pornography

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Although we are accustomed to think that pornography is completely "free" and unregulated, it is regulated quite intensively — but many regulations have nothing to do with the lurid nature of the material. It is regulated, under various non-moral descriptions and for diverse, non-moral reasons. A pornographic book is subject to copyright and commercial laws. A pornographic movie theater must conform to fire safety and construction codes. A pornographic stage show must meet legal standards for employment. In some places bordellos are regulated for sanitary and commercial purposes.

I put these sorts of regulations aside. Here I am interested in the legal regulation of pornography as a special sort of printed or visual material that seeks to sexually stimulate the viewer.

Pornography as such is an elusive legal concept. Supreme Court Justice Potter Stewart famously confessed in a 1964 concurrence that he could not define "pornography," not even the "hard-core" kind. He insisted nonetheless that he "knew it when he saw it."[1] Call this the conceptual vagueness of pornography. But vagueness is not a problem so long as precision is neither needed nor demanded. And for a very long time American law did not demand it. Our laws up to the 1960s typically banned "filthy," "lewd," "indecent," and "immoral" material, and provided no further definition of these terms.[2]

There was, it is true, more consensus about moral norms in those days than there is now. But there was disagreement then, too. There has always been lively disagreement about how far legal restrictions of sexually explicit material should go, lest mature but nonetheless valuable books, magazines, and movies be censored.

[1] *Jacobellis v. Ohio,* 378 U.S. 184, 197 (1964).
[2] *Roth v. United States*, 354 U.S. 476 (1957).

The difference between today and back in the day lies as much in the law as it does in the culture. The difference-that-law-has-made arises from an important value choice made by our legal elites, particularly judges and professors, starting about fifty years ago. Before then, the law's overriding commitment was to protecting the moral character of the weaker among us, including but not limited to minors, against corruption.[3] With that end in view, our law in effect warned any writer or performer who ventured near the casually drawn forbidden zone — demarcated as "filthy" or ""lascivious" — that he took his chances.

The thought was this: someone who flitted so near the flame of lust was probably not doing anyone any genuine good, and he was tempting many people by exposing them to materials they were too morally weak to resist. In the law's eyes, this writer or performer was not a misunderstood *artiste,* or a member of an oppressed moral minority. He was a misguided adventurer, even an immoral tempter. He was, from the moral point of view, a misanthrope. Scaring him off the margins of decency in order to help the morally weak, even if doing so meant using "vague" legal terms, served the common good.

Our law started to make a Copernican revolution in 1957, in the leading case of *Roth v. United States.* It was the first time the Supreme Court sought to provide a concrete definition of obscenity. The Court rejected the common law test for obscenity, derived from the English case *Regina v. Hicklin* in 1868, that "allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons."[4] In its place, the Court applied a community standards test: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[5]

The law's overriding concern then began to be, and since has surely become, the author's or performer's putative rights and not the consumer's moral well-being. *Roth* inverted the law's traditional moral preference for protecting the character of the easily tempted, even at the expense of censoring material with some genuine literary or social value. It established

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[4] *Roth,* 488-89.
[5] *Roth,* 489.

that "[a]ll ideas having even the slightest redeeming social importance" were fully protected by the First Amendment.[6] So long as salacious material was surrounded by with some sort of intellectual content it enjoyed constitutional protection. Before long *Roth's* thin tether to "social" values gave way to the prevailing emphasis upon the writer's or performer's "freedom of expression."

The countervailing public interest is almost always called "public morality." The legal regulation of pornography today takes place at the intersection of something called *public morality* and the emergent colossus *freedom of expression.* The "freedom of opinion and expression" affirmed in the Universal Declaration of Human Rights is limited in its "exercise" by the "just requirements of morality, public order, and the general welfare."[7] The European Convention for the Protection of Human Rights and Fundamental Freedoms says that "[e]veryone has the right to freedom of expression," but that this right may be subject to limits derived from "the prevention of disorder or crime" and "the protection of health or morals," among other reasons.[8] The universal right to *religious* liberty — or "religious expression" if you prefer — affirmed by Vatican II in *Dignitatis Humanae*, its Declaration on Religious Freedom, is limited by the responsibility of civil authority for the "proper guardianship of public morality."[9] Our Supreme Court has affirmed that freedom of expression is limited by "the right of the Nation and the States to maintain a decent society."[10]

But what is this public morality*?* Its stable definition has been a challenge to our law, but not because it is inherently vague, as is the case with pornography. It has instead been regularly confused with other bases for the legal regulation of pornography, and in particular with arguments from public decency, consent, the combating of injustices, the combating of

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[6] *Roth,* 484.
[7] United Nations, "Universal Declaration of Human Rights," 10 December 1948, Articles 19 and 29, www.un.org/en/documents/udhr,(Accessed 17 February 2010).
[8] Counsel of Europe, "European Convention for the Protection of Human Rights and Fundamental Freedoms," 1 November 1998, Article 10http://conventions.coe.int/treaty/EN/Treaties/html/005.htm,(Accessed 17 February 2010).
[9] "Dignitatis Humanae," 7 December 1965, section 7, http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html, (Accessed 17 February 2010).
[10] *Jacobellis v. Ohio,* 378 U.S. 184, 199 (1964)

the particular injustice to children of child pornography, and judicial adherence to rules already laid down.

These bases can be combined into a productive working alliance with public morality, all the better together to serve the common good. At root, though, they are unrelated to public morality, and they cannot do the job that needs to be done all by themselves. Yet they ever threaten totally to eclipse the concept of public morality.

In Part I of this essay I describe these surrogates for public morality as moral bases for regulating pornography. In Part II I take up another basis, not quite moral but not altogether amoral: inherited constitutional doctrine. These two parts reveal this unfortunate fact: American constitutional law does not possess any concept or definition of what's *harmful* about pornography — even about the hard-core pornography or "obscenity," which still enjoys *no* First Amendment protection. Part III considers more specifically the concept of "public morality", and argues that it includes what is more commonly called "culture", the broader patterns of belief and action which constitute our social world. The law has an important but usually secondary role in making this culture a morally healthy influence upon our lives. Part IV is more prescriptive than all the preceding parts. It contains a legal strategy for morally stigmatizing the transmission and the consumption of obscene materials.

Part I

The first entangling alliance of public morality is with *public decency*. Public decency laws protect the sensibilities of persons who are involuntarily exposed to acts which should be performed in private. Restricted "indecent" acts include urinating in public, excessive public displays of affection (even by married couples), nude sunbathing, and loud parties. None of these acts is in itself immoral. Some are positively good. None is pornographic in any familiar sense of that term.

Now, it is true that *feelings* help to clarify what both public decency laws and public morality laws are for. But they are different feelings. Indecency tends to induce revulsion or disgust. Pornography is defined by its tendency to excite *lust* — sexual arousal apart from any

genuine interpersonal act of a sexual kind. Because "indecent" acts performed in private cannot give offense, they should not be regulated to promote public decency. Pornography is a different matter.

The second entangling alliance is with *consent*. Consent laws protect everyone's choices and tastes as they bear upon erotic materials. In canonical form, this basis of regulation could be stated as: "The state has constitutional power to protect unwilling adults from being exposed to pornography." Or, as a reworking of the first entangling alliance: "People should be protected — within limits — against the *uninvited* intrusion (and consequent disgust) of erotic imagery."

Thus an "adult emporium" may not be closed by the police as a menace to morals. But the police may and should see to it that the emporium's pleasures are limited to those, and only to those, adults who really go for that sort of thing. The law may and should require that advertising be discrete, that signage be bland, and that entrances be clearly marked, so that anyone who enters knows what to expect. None of these regulations need presuppose that the act or material at issue is genuinely immoral, or that the experience willing customers seek is harmful to them.

The question about this regulatory authority is not its legitimacy, for every member of the Supreme Court and virtually all the commentators affirm it. The question is whether it marks the outer limit of state authority to limit pornography. Is the state's interest in regulating pornography *exhausted* once it is ascertained that those indulging are, indeed, consenting adults? The Supreme Court seemed to adopt this idea in *Stanley v. Georgia,* a 1969 case that immunized possession of "obscene" materials *in the home*, even though "obscene" materials had always been deemed to be altogether outside the First Amendment's protections.[11] *Stanley* still stands as a valid precedent, and I shall have more to say about it in due course. But its inchoate proposal to make consent the limiting principle of state regulation was soon rejected by a Court populated with the nominees of Richard Nixon.[12] I say more

[11] *Stanley v. Georgia*, 394 U.S. 557, 568 (1969).
[12] *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 (1973); *Miller v. California*, 413 U.S. 15, 24 (1973).

about that rejection in Part III.

The third entangling alliance with public morality is the everyday warrant that our public authorities possess to combat injustices. Though I think that it is dogmatic to hold *ex ante* that pornography is, at worst, a "victimless" immorality, it is nonetheless the fashion to treat it just that way. So, when jurists and commentators refer to "injustices" and "pornography" in the same sentence, they mean something other than the injustice of manipulating other people's passions and corrupting their character for financial gain or to satisfy one's own passion for exhibitionism.

What today's legal thinkers mean is illustrated by Justice David Souter's concurring opinion in *Barnes v. Glen Theatre* (1991).[13] That decision upheld an Indiana law that banned nude bar-room dancing (in the event, in South Bend's Kitt Kat Lounge). The complaining dancers said that their "erotic message" was stifled by G-strings and pasties; the Court decided that they would have to send their message with some "opaque" covering.

Justice Souter supplied the necessary fifth vote. The decision rested, he said, "not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments." These statistically predictable "secondary effects" included "prostitution, sexual assault, and other criminal activity," all of which the state rightly sought to suppress.[14] Though these "secondary" acts are all (more or less) obviously immoral, and though they are all (by some metric) correlated with nude dancing, *nothing* in Justice Souter's position implies or entails that nude dancing is itself morally dubious. Indeed, he makes explicit that he does *not* adopt any such premise.

The content and interlocking character of the three lines of regulatory authority is reflected in Justice Antonin Scalia's cogent argument in favor of the law. While the dissent "confidently asserts...that the purpose of restricting nudity in public places in general is to protect non-consenting parties from offense," he notes that

[13] *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, (1991).
[14] *Barnes*, 582.

there is no basis for thinking that our society has ever shared that Thoreauvian "you may do what you like so long as it does not injure someone else" beau ideal — much less for thinking that it was written into the Constitution. The purpose of Indiana's nudity law would be violated, I think, if 60,000 fully consenting adults crowded into the Hoosier Dome to display their genitals to one another, even if there were not an offended innocent in the crowd. ... In American society, such prohibitions have included, for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy. … [T]here is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate "morality."[15]

The fourth entangling alliance is a variant of the third, covering the very particular injustice of child pornography. The law's treatment of kiddie porn is quite different from its handling of the adult variety, in two ways. First, the Supreme Court in *Osborne v. Ohio* (1990) held that neither the First Amendment nor any other constitutional provision precluded criminalizing the possession of "child pornography" anywhere.[16] So, the *Stanley* case still protects someone's possession of adult-themed obscenity at home, but our laws about child pornography extend all the way to possession in one's abode, even to the hard drive of one's personal computer. Second, child pornography need not be "obscene" according to the prevailing grown-ups' test; it is illegal even if it only includes images of children that, were they portrayals of adults, would be protected by the First Amendment.

The Court's stated reason for this large authority to combat child pornography has nothing to do with public morality, even though there is a strong social consensus that child pornography is morally degenerate and should be banned for that reason alone.[17] The reason

[15] *Barnes*, 574-75.
[16] *Osborne v. Ohio*, 495 U.S. 103 (1990).
[17] Oliver Lewis, "Fear Of Online Crime," Pew Internet, 2 April 2001, http://ww.pewinternet.org/Press-Releases/2001/Fear-Of-Online-Crime.aspx, (Accessed 17 February 2010). "Americans are deeply worried about

proffered by the *Osborne* Court was to protect the "victims of child pornography." These "victims" were not children in general, whom, one could reasonably argue, were put at greater risk of being viewed as objects of sexual desire and satisfaction. Nor were they the sometimes hapless and invariably diminished consumers (usually adults) of child pornography. The Court's "victims" were exclusively the children depicted in the materials. The stated reason for the sweeping *Osborne* authority was the "hope to destroy a market for the exploitative use of children" in *making* kiddie porn.[18]

This rationale was recently confirmed by seven members of the Court. In *U.S. v. Williams,* decided in June of 2008*,* they wrote that "[c]hild pornography harms and debases the most defenseless of our citizens."[19] That case made explicit a certain implication of *Osborne* express: *only* material "depicting *actual* children engaged in sexually explicit conduct" counts as "child pornography." *Only* that material — and not sexually explicit material with adult actors who look like children or life-like "virtual" children — involves the exploitation of society's "defenseless." The state's authority to combat "child pornography" has nothing to do with sexual perversion or lust or age-inappropriate attractions or even with the possible stimulation of sexual predators to act. The rationale would apply equally to a total ban on possession of snuff movies, which have nothing to do with sexual immorality. *Osborne* is about child labor practices.

Part II

There is a fifth line of authority for the legal regulation of pornography entangled with public morality. This one has moral underpinnings, but is not itself a principle of political morality, public policy, or even an aspect of the common good. It is a matter of following *authority,* of judicial adherence to the rules laid down.

In 1957 the Supreme Court, in the case of *Roth v. United States,* looked back at the

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criminal activity on the Internet, and their revulsion at child pornography is by far their biggest fear. Some 92% of Americans say they are concerned about child pornography on the Internet and 50% of Americans cite child porn as the single most heinous crime that takes place online."

[18] *Osborne v. Ohio*, 495 U.S. 103, 109 (1990).

constitutional tradition. The Court observed that there are "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[20] "Obscenity" was one such category: "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."[21] The Court then articulated a test for what counts as obscenity. That test persists, in slightly modified form, to this day.

Roth and *Butler v. Michigan*, both decided on the same day, departed from the ancient doctrine laid down in 1868 by the King's Bench in *Regina v. Hicklin*. In that famous English decision, Lord Chief Justice Cockburn defined the test of "obscenity" as "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[22] As the Supreme Court phrased it in the *Roth* case*, Hicklin* "allowed material to be judged by the effect of an isolated excerpt upon particularly susceptible persons."[23]

This standard was judged in *Roth* to be "unconstitutionally restrictive of the freedoms of speech and press" because it "might well encompass material legitimately treating with sex."[24] In *Butler*, Justice Felix Frankfurter, writing for the Court, described the state's use of *Hicklin* as "quarantining the general reading public against books not too rugged for grown men and women."[25] The challenged law, Frankfurter said, reduces "the adult population of Michigan to reading only what is fit for children. …Surely this is to burn the house to roast the pig."[26]

Fair enough. It appears (to me, at least) that the Court in 1957 was guided, not by any desire to free up smut peddlers, but to save passably good literature form the heavy hand of blue-nosed censors. Through the mid-1960's, the justices were animated by that intention,

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[19] *United States. v. Williams*, _ U.S. _, 128 S.Ct. 1830, 1846 (2008).
[20] *Roth v. United States*, 354 U.S. 476, 485 (1957).
[21] *Roth v. United States*, 354 U.S. 476, 484 (1957).
[22] *Butler v. Michigan*, 352 U.S. 380, 381 (1957).
[23] *Butler*, 488 -89.
[24] *Butler*, 488-89.
[25] *Butler*, 383.
[26] *Butler*, 383.

supplemented by the conscious desire to protect materials that dealt, even in a frank and visually explicit but non-pornographic way, with sex. Then, in 1966, in *Memoirs v. Massachusetts*, the Court made what *Roth* declared to be a *reason* obscenity lacked constitutional protection — it was "utterly without redeeming social value" — part of the *test* for obscenity. The case, which concerned the eighteenth century novel *Fanny Hill*, thus burdened public authorities with proving an almost impossible negative.

Now, here is the regnant "test" for obscenity as it was as articulated in the 1973 decision *Miller v. California*: only those works are obscene "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."[27] *Miller* expressly limited the "obscenity" to "works which depict or describe *sexual* conduct" (emphasis added). It also revised the third part of the *Roth test,* as *it* had been modified in the *Memoirs*.

Roth, Miller, and their progeny set a boundary between "free expression" and prohibitable "obscenity." Beyond that boundary no public official may go.[28] Within the universe populated by works that satisfy the *Miller* test, public officials *may* regulate. And since 1957 the Supreme Court has consistently, though with the notable exception of *Stanley v. Georgia*, stood by this boundary line.

It is important to note that the *Miller* standard by itself does not call for, much less ensure, that any "obscene" act or work will be prosecuted or legally hampered in any other way. No lawmaker or executive official — state, federal, local — is *required* by *Roth, Miller*, or any other case or constitutional provision to clamp down on even the grossest immorality. One might say that persons and the people have a natural moral right to live in a decent society. But that right is not constitutionally enforceable. In other words, the constitutional standard I have described here distinguishes material which public officials *may* but do not have to prohibit.

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[27] *Miller v. California*, 413 U.S. 15, 24 (1973).

[28] For the sake of public morality, that is. As we saw in the opening paragraph, all sorts of pornographic conduct and works are regulated for non-moral reasons.

My judgment is that, if the legacy of our constitutional tradition was not that obscenity lacked First Amendment protection, it is doubtful that the Court at any time since 1957 would have minted such a doctrine. I say so largely because the Court in fifty years since has not produced a cogent moral justification for it; that is, the Court has *not* articulated much less defended any claim about what is wrong with obscenity.

The Burger Court in 1973 took a strong stand, to be sure, *against* reducing public morality to the four entangling strands described in Part I of this essay. The 1973 cases express well *what* public morality really is. In them the Court no doubt meant to permit communities (towns, cities, states) that wanted to rid themselves of obscenity to do so. The Court rulings since 1957 are nonetheless suffused with high hosannas to the inestimable role which "freedom of expression" plays in the good life of man and in a democracy. There is no corresponding testimony to the moral harm which obscenity visits upon its consumers, harm which does not discriminate between willing and unwilling users. There is no parallel witness to the inestimable role which a decent regard for public morality plays in the good life of man, and of his democracy.

Part III

The four lines of lawmaking authority described in Part I are all sound, valid, true. All have an important role to play in regulating pornography. But *public morality* is more than the sum of these four parts. But without any concept of what is wrong with obscene material, this important authority is severely hampered. This whole complex of ideas is missing a central element: a sound concept of "public morality."

Public morality is an overarching collective or common good, maintainable by public authority. It is a centripetal force which depends for its meaning and justification upon no one's unwilling participation or upon anyone's insulted sensibilities. Everyone may justly be made to conform to its legally stipulated requirements; no one may rightly claim to owe no obligation to society's shared moral ecology.

As Alexander Bickel, one of America's greatest constitutional scholars, wrote, in words

adopted by the Supreme Court in 1973: "Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which in truth we cannot), what is commonly heard and done intrudes upon us all, want it or not."[29] Or as Justice Scalia wrote in the 1991 Kitty Kat Lounge case: "[o]ur society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, '*contra bonos mores*,' i.e., immoral."

Neither Bickel nor the Burger Court justices who relied upon him nor Justice Scalia used the word *culture*. But that is exactly what they were all talking about. C*ulture* is a human production. It consists of what people do and say, congealed over time into a stable set of social practices. Culture is the collective and settled projection of meaning, including what it means to be a decent human being and how a decent human being conducts himself or herself, sexually speaking. Culture nonetheless confronts each one of us as a massive objective reality, a formative influence we cannot escape, and which we cannot call into being according to our lights.

We possess, as it were, a common life which contributes in ways known and yet to be understood to my identity and to yours. Our personalities and our characters are not reducible to those features or traits which we acquire in voluntary transactions. We are not the authors of *all* that we think and believe. "To each his own thing" is an intrinsically naive and empirically unavailable proposal by which to settle the meaning and scope of public morality. We are all, to some significant extent, the products of our culture.

The civil law plays an important, but secondary, role in making this inescapably common force a wholesome one.[30] A sound understanding of public morality does not involve straightforward moral paternalism, even where restrictive laws are enforced against persons who dissent from the law's moral judgments. Paternalism is coercion of an individual for the sake of that individual's moral improvement. Public morality involves the maintenance of a morally wholesome public realm. Just as in order to stabilize prices, Congress forbids farmers

[29] Alexander Bickel, "The Public Interest," *National Affairs* 22 (Winter 1971): 25-26; quoted in *Paris Adult Theater v. Slaton*).

[30] Robert George, *Making Men Moral* (Oxford: Clarendon Press, 1993).

to grow certain crops even for home consumption, so too might the law prohibit private possession of all pornographic material to suppress that market. That may have the effect, by helping to break someone's habitual use of it, but that benefit is, or at least should be, a welcome side effect of laws justified on other grounds.

Public morality presupposes that the state is competent to make sound moral judgments about sexual conduct, and to act on the basis of those judgments. The relevant moral judgment is that pornography morally harms the people who consume it because (a further moral judgment) lustful feelings which are unconnected to any morally upright relationship are subversive of good character. These judgment could of course be mistaken. But they do not depend for their validity upon any consumer's agreement with it, at least no more than do the validity of the state's judgments that prostitution and drug use are wrong and for that reason made crimes, regardless of consumer preferences.

But this public morality is fragile. It depends upon there being an objective right and wrong, which judgment would have to be nested within a larger web of moral judgments. The problem is that our constitutional law is now tilted towards a minority-veto: if material has *any* serious value to anyone it is immune to legal regulation. One standing threat to any adequate state power to protect public morality is therefore the unavailability of such objective moral judgments. The threat is real. Our constitutional law has flirted with a perilous moral subjectivism for several decades; indeed, *Stanley* nearly consummated the affair.

Let me start with an *avant garde* expression of this acidic agent. It is an excerpt from Justice Douglas's dissenting opinion in the *Ginzburg* case *(*1966), in which the Supreme Court affirmed the conviction of a New York publisher for "pandering" *Eros* magazine.[31] The important point of law established there is that, in the case of a publication hovering on the border of obscenity, the fact that it was marketed as sure to titillate ("pandered") could tip the scales of judgment against it.

In *Ginzburg*, Douglas took an extreme view of what democracy entails and advocated what sociologists call a "bottom up" theory of obscenity; in short, he was an egalitarian on

[31] *Ginzburg v. United States*, 383 U.S. 463 (1966).

steroids. But reader be warned: do not scoff or giggle and be done with it. For Douglas's oration is *not* a period piece. It is not a daguerreotype of the Age of Aquarius. It is not the curious product of Justice Douglas's (admittedly) fertile imagination. (He famously loved the ladies.) It is instead a colorful anticipation of what has become a constitutional principle. He began by noting that "Some of the tracts for which these publishers go to prison concern normal sex, some homosexuality, some the masochistic yearning that is probably present in everyone and dominant in some." Masochism, he continued,

> *is a desire to be punished or subdued. In the broad frame of reference, the desire may be expressed in the longing to be whipped and lashed, bound and gagged, and cruelly treated. Why is it unlawful to cater to the needs of this group? They are, to be sure, somewhat off-beat, nonconformist, and odd. But we are not in the realm of criminal conduct, only ideas and tastes. Some like Chopin, others like "rock and roll." Some are "normal," some are masochistic, some deviant in other respects, such as the homosexual.*

Why, Douglas asked, are these groups to be denied the freedom of the press and expression denied them and to communicate in symbolisms important to them everyone else enjoys?

> *When the Court today speaks of "social value," does it mean a "value" to the majority? Why is not a minority "value" cognizable? The masochistic group is one; the deviant group is another. Is it not important that members of those groups communicate with each other? Why is communication by the "written word" forbidden? If we were wise enough, we might know that communication may have greater therapeutical value than any sermon that those of the "normal" community can ever offer. But if the communication is of value to the masochistic community or to others of the deviant community, how can it be said to be "utterly without redeeming social importance"?*

"Redeeming" to whom? "Importance" to whom?[32]

Douglas gave voice to a profound moral subjectivism: at least when it comes to sexual satisfaction, whatever works for the individual is *perforce* morally acceptable for that individual. There is neither "right" nor "wrong" beyond individual preference, at least so long as one does not conscript an unwilling other into one's sexual fantasy. From the viewpoint of public authority, there is no practical difference between holding that morality is individuated and saying that (unless a non-consenting party enters the picture) there is no morality at all. This nihilism is a standing mortal threat to legal regulation of pornography for the sake of public morality.

How so?

Moral subjectivism is a mortal threat because it grossly inflates the scope and presumptive legitimacy of "expression." As Douglas suggests, "freedom of expression" extends effortlessly to whatever individuals and non-government groups *want* to say or otherwise "express" through spoken or written word, by other communicative conduct, and by symbolic representations (art). Thus a gyrating pole dancer who aims to excite customers enough to part with their money is an "artist".

This sort of subjectivism is a mortal threat also because it explodes the concept of public morality. Where no negative, objective moral judgment that a sexual act (sado-masochism, for example) is wrong, an aspiring legal regulator could not judge any work genuinely harmful. Without such judgments, a proposed morals law is nothing more than the imposition of a majority's preferences upon an unfairly maligned minority, which simply prefers different but equally valid things. Because no objective moral judgment is possible, there is no possibility of a genuine *common good* to which all members of society could, in justice, be made to contribute. There can only be — as Douglas suggests — aggregations (larger and smaller) of individuals who happen to share the same interest or taste, some for marriage and some for bondage.

[32] *Ginzburg*, 489-90.

I counseled against scoffing at Douglas' essay. The reason is that events made him a prophet. I am not here referring to the bacchanal turn of our culture since 1966, which he may have anticipated and which he surely welcomed. I refer to our constitutional law, where an acidic nihilism has come (probably to Douglas' surprise, if there are indeed surprises in the hereafter) to define "freedom of expression." This development was succinctly captured in the June 2008 child pornography case, *U.S. v. Williams*, by dissenting Justices Souter and Ginsburg: "True, what will be lost is short on merit, but intrinsic value is not the reason for protecting unpopular expression."[33] The judgment that some "expression" qualifies for constitutional protection does *not* include a moral evaluative criterion of any kind.

Part IV

> *It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a qui tam action, or by an injunction, or by some or all of these remedies in combination, is a matter within the legislature's range of choice. If New York chooses to subject persons who disseminate obscene "literature" to criminal prosecution and also to deal with such books as deodands of old, or both, with due regard, of course, to appropriate opportunities for the trial of the underlying issue, it is not for us to gainsay its selection of remedies.*[34]
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> — *Kingsley Books v. Brown*

Kingsley Books, decided the same day as *Roth*, is still good law: legal regulation of pornography is *not* limited to what can be accomplished by and through criminal prosecution. This is good news, because one can now expect scant return on criminal prosecutions. The reasons they are nearly obsolete have little to do with the legal changes we've examined and almost everything to do with technological and cultural developments over the last decade,

[33] *United States v. Williams,* _ U.S. _, 128 S. Ct. 1830, 1854 (2008).
[34] *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441 (1957).

especially the Internet. Legal regulation of pornography today must chart a distinctive course. In brief conclusion, I shall describe the legal situation today, and then suggest three steps to develop more creative and effective civil policies to regulate pornography.

The legal rules governing prosecutions have undergone little relevant change since 1957. Police officers' access to evidence (such as porn DVDs and the like) is limited, as it has always been, by restrictive rules governing search and seizure; for example, by the Fourth Amendment's requirement of judicial approval of warrants based upon probable cause, which often required judges to view a purloined copy of the suspect film or book before signing the warrant. Convictions have always depended upon the unanimous verdict of twelve jurors on evidence beyond a reasonable doubt. The constitutional doctrines of vagueness (rooted in Due Process) and overbreadth (a First Amendment test) have long placed the burden of clearly distinguishing obscenity from mere pornography on the state, not on the defendant. There are and have always been a very limited number of public prosecutors. They have long had a monopoly on initiating criminal cases, and many other pressing demands upon their attention. Never did they mount a numerically impressive number of criminal cases against pornographers.

One possible change that has only made such prosecutions even more difficult is that, given the widespread and largely shameless use of pornography today, jurors may hesitate now as they never did before to return guilty verdicts against even those who sell obscene materials, so long as the material was traded between consenting adult users. (Child pornography cases are another matter.) But this is simply to say that *cultural* changes can affect jurors' decisions. Jury nullification would be further encouraged by the use of enforcement techniques which intruded upon the home, or which interfered with the lawful use of the Internet. But this is simply to say that evolving notions of privacy and technological change can affect criminal trials.

On the demand side, it has been the case for forty years that at-home consumers of material which meets the *Miller* test for "obscenity" cannot be prosecuted. That is the legacy of the *Stanley* case (1969). This odd decision did not, however, extinguish "demand-side"

prosecutions altogether. In 1969, pornography consumers could not be couch potatoes. They had to go to a disreputable theater or, at least, to a stag party to see a porn-film. They had to find a seedy bookstore in Times Square to acquire the latest skin magazine. Even where no police lurked, exposure and shame were constant menaces. (Recall the scene in Woody Allen's *Bananas,* where an embarrassed Fielding Melish used *Time* and *Newsweek* to conceal his copy of *Orgasm* from the other customers.) Now would-be consumers can find everything they want at home, on the Internet of even Facebook. *Stanley* is thus a real roadblock to demand-side prosecutions: one's home may now be one's porn-castle.

On the supply side, police authorities (including postal inspectors and customs officials) could until relatively recently target certain specific areas and persons for supply-side prosecution, and have an appreciable impact upon supply if they succeeded. (Indeed, to an extent few yet appreciate, this country's porn industry was, until the 1980s, very much controlled by organized crime families.) Bookstores, movie theaters, and warehouses could all be closed down; materials from overseas distributors could be stopped at customs. Now it is all quite different. There are no choke points of entry to be watched, no consortium of powerful producers or distributors to break up, few places of public amusement to padlock. Instead, entry costs for production are minimal — anyone can post an obscene video on a website. Overseas distributors of Internet porn are beyond the reach of our law.

The take-away from all these considerations is this: public authority is not any time soon going to attempt to prosecute more than a tiny fraction of the vast universe of obscenity cases, not nearly enough for the occasional conviction to deter other users.

But these limitations on potential criminal law enforcement are not the death knell for the possibility of reducing pornography through the criminal law. Any conduct defined as a crime is usually thereby morally stigmatized, and — even if the cases are rarely prosecuted — that stigmatization sometimes stimulates social and cultural disapproval. During the last generation the criminal law's crackdown on drunk driving has, in my judgment, instigated and not just reflected the cultural marginalization of a practice that was not long ago winked at. Viewed as a percentage of real-world occurrences, prosecutions for recreational drug

consumption are rare. But the presence of the pertinent criminal laws on the books nonetheless reinforces the social message that doing drugs is bad for you. And these criminal laws make possible the many collateral legal and social sanctions for drug use, such as questions about it on government job applications and the "zero-tolerance" policies of schools.

The law's contribution to public morality has nonetheless always been secondary to that of cultural authorities and popular mores. The law has an important but subsidiary role in culturally marginalizing pornography. It is time for more creative civil — that is, non-criminal — legal policies designed to do just that.

This new strategy would rely upon a proliferation of non-governmental *initiators* and *initiatives* to combat pornography by morally stigmatizing it. These proposed legal tools would not traffic in the strict standards of proof in criminal proceedings, nor would they depend upon police methods of obtaining evidence. They would shift the burden of vagueness — the grey area of uncertain definition at the border of soft- and hard-core pornography — to enforcement targets and away from those seeking to protect public morality. One might compare this allocation of the risk of uncertain application of law to that encountered in cases of alleged sexual harassment. To be sure that they do not incur the costs of a successful action for harassment, many institutions in our society impose a "risk management" perimeter around possibly suspect conduct. Thus the birth of house rules against coarse or suggestive language and unwanted gestures and the like. Finally, this new strategy does not depend for its success upon any change in the present First Amendment landscape, including the unfortunate and anomalous *Stanley* holding.

Here are three proposals, broadly described.

First, call upon legislatures to create a new private (civil, not criminal) right of action, called the "negligent exposure of a minor or an unwilling adult to obscene" materials. This civil action would expand and toughen the reach of existing criminal laws against endangering the moral welfare of minors and perhaps of civil suits to recover for emotional offense to adults. The proposed cause of action would be provable by a preponderance of the evidence and would — because of the inherent difficulty of calculating a money award adequate to making a

plaintiff “whole” — have to carry stipulated damages *_at least_ a five-figure award* sufficient to deter such misconduct.

This new legal provision could stipulate further that a “pattern” of such negligence consisting of two or more specific acts or omissions which meet the definition of the civil wrong would result in the kind of catastrophic damages presently recoverable under RICO. The effect of this new law could be expanded by adapting the British definition of obscenity to serve as a pleading and proof requirement: any material that appeals predominantly to the prurient interest and is patently offensive. That this provisionally obscene matter possessed serious value would be provable by the accused as an affirmative defense. Because we would not be dealing here with a criminal offense, it might be possible to adopt this approach without having to persuade the Supreme Court to change the meaning of *Miller.*

Second, as an exercise of the its spending power Congress or a particular state could make a condition of *any* money grant that the grantees enact, publish, and enforce policies governing the use of any computers under the recipient’s control, which policies effectively eliminate the use of grantee’s facilities to visit obscene websites, to receive obscene messages and images, and to prevent their use in any other way to connect to obscenity. The recipients would have to impose effective penalties for any violation of these policies. They would be further advised that their workplace is subject to unannounced inspections, and that their policies and procedures will be regularly audited. The penalty for institutional failure to comply would be revocation of the grant.

Third, individuals who seek government employment for which moral character is especially relevant — say, as a federal prosecutor or a public school teacher — could be required to pledge that they will not knowingly visit an obscene website or download obscene materials during the time they are employed in the character-sensitive job. The longstanding legal definition of that obscenity which has never been accorded First Amendment protection could be included within the job description as constituting the forbidden or no-fly zones. After a while, the requirement could be expanded to include additional positions and an affirmation that one has not visited such a site in, say, the preceding year.

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