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Moral Principles Governing Legal Regulation of Pornography
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I

Many legal regulations of pornography have nothing to do with pornography.

Pornography is regulated, sometimes intensively, under various, non-moral descriptions for diverse, non-moral reasons. A pornographic *book* is subject to copyright and commercial laws. A porno-movie *theater* must conform to fire safety and construction codes. Internet and satellite television pornography is very largely unregulated – just as everything else traveling those media is. For that matter, in Nevada (and in some foreign countries) bordellos are regulated for sanitary and commercial purposes, but not for moral reasons.

I put these sorts of regulations aside. Here I am interested in the legal regulation of pornography *just as such*.

Pornography just as such, however, is an elusive legal concept. Justice Potter Stewart once famously confessed that he could not define “pornography”, even just the “hard-core” kind. He insisted nonetheless that he “knew it when he saw it”. Call this (if you like) conceptual *vagueness*. But vagueness is no problem so long as precision is not demanded. For a very long time our law made no such demands: “filthy”, “lewd”, “indecent” and “immoral” material – without more – was banned. There was, it is true, more consensus about moral norms in those days than there is now. But there was disagreement then, too. There is also more agreement today than our law reflects. If the matter of child pornography, for example, were left to the

people, they would make quick work of banning it altogether. Our constitutional law that complicates the picture.

The difference between today and back in the day lies as much, in other words, in law as it does in culture. The difference-that-law-makes arises from an important value choice made by our legal elites – judges and professors – starting about fifty years ago. Before then, the law’s overriding commitment was protecting the morally vulnerable among us – including but not limited to minors – against corruption. Any writer or performer who ventured near the casually drawn forbidden zone (“filthy” or “lascivious”) was on notice that he took his chances. The thought was: anyone flitting near the flame of lust was doing no one any genuine good. In the law’s eyes, this chancer was not a misunderstood *artiste*, or member of an oppressed moral minority. He was a misguided adventurer, even an immoral tempter. He was a misanthrope. Scaring him off the margins of decency (with “vague” legal terms) in order to help the morally weak served the common good.

Our law started its Copernican in 1957, in the leading case of *Roth v. United States*. The law’s overriding concern then began to be, and since has surely become, the author’s or performer’s freedom, not the consumer’s moral well-being. This turn brought with it another reason why *pornography* is an elusive concept: the arguments *against* its legal regulation sought to erase the concept altogether. These arguments hitched the regulatory fortunes of, say, John Cleland’s *Memoirs of a Woman of Pleasure* – better known as *Fanny Hill* – to that of *Great Expectations*, and, say, *Deep Throat’s* to those of *Jaws* --- then to determine their common fate under the more felicitous, commodious heading, “freedom of expression”.

These arguments succeeded.

And so 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 Article 19 of the Universal Declaration of Human Rights is limited in its “exercise” [Art. 29] by the “just requirements of morality”. The European Convention for the Protection of human rights says that “[e]veryone has the right to freedom of expression...subject to” limits derived from “the protection of health or morals”. [Art. 10] The universal right to *religious* liberty – or “expression” if you will – affirmed by Vatican II is limited by the responsibility of civil authority to “protect public morality”. The American Supreme Court has affirmed that freedom of expression is limited by “the right of the Nation and the States to maintain a decent society”. (*Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964))

But what is this *public morality*? It too is an elusive concept. Its slipperiness does not owe to inherent vagueness so much as to its confusion with nearby, distinguishable bases for legal regulation of pornography. These strands can be woven 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 needs to be done all by themselves. Yet they ever threaten to totally eclipse the concept of *public morality*.

The first entangling alliance is with *public decency*. Public decency laws overlap laws which (more exactly speaking) protect public morality. But they do not overlap entirely, and the two underlying rationales, or points, are quite different. Public decency laws protect the sensibilities of persons who come across certain 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.

Feelings of revulsion or disgust are essential to grasping what “indecent” connotes, pornography is defined by a tendency to excite *lust*. And because “indecent” acts performed in private cannot give offense, they cannot – so long as done privately – be regulated to promote public decency.

The second line of justification is, perhaps, a corollary of the first. The moral touchstone of regulation here is *consent*; more precisely, it is the fair and equal (as far as possible) protection of everyone’s choices and tastes as they bear upon sensitive and, especially, erotic materials. In canonical form this basis of regulation could be summarized stated as: “the state has constitutional power to protect unwilling adults and minors pornography”. Or, as a reworking of the first entangling strand: “people should be protected – within limits – against the *uninvited* intrusion (and consequent disgust) of erotic imagery”. So an “adult emporium” may not be closed by the police for the public menace to morals that it truly is. But the may and should see to it that its pleasures are limited to those, and only those, those adults who go for that sort of thing. So the law may and should require that advertising be discrete, that signage be bland, and that entrances be clearly marked, so that anyone who chooses to enter knows what to expect.

The question about this strand of regulatory authority is not its legitimacy; every member of the Court and every responsible commentator affirms 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 answer in our constitutional order is, no. The Supreme Court *adopted* the “consenting adults” matrix for legal regulation of pornography in *Stanley v. Georgia*, a 1969 case which 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. *Stanley* is still good (that is, operative) law, and I shall have more to say about it in due course. But its extension to the *outer limit* of public morality – no doubt where the Stanley Court was headed – was short-circuited by several Justices' resignations, and their replacement by nominees of Richard Nixon.

The third strand of regulatory authority (entangled with public morality) is the everyday public warrant to combat injustices. Now, there is no sufficient reason *ex ante* to think that pornography has no victims, that it is innocent of injustice. It is nonetheless the fashion to treat it as (at most) a "victimless immorality". So, when jurists and commentators today refer to "injustices" and "pornography" in the same sentence, they mean something other than the injustice of manipulating another's passions and corrupting their character for financial gain or to satisfy one's own passion for exhibitionism. And even if it is not unfair, it is still unjust to lead another person – however "willing" – into performing immoral acts (such as prostitution or masturbation).

What today's legal thinkers mean instead is illustrated by Justice Souter's concurring opinion in *Barnes v. Glen Theatre* (1991). That decision upheld an Indiana law which 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 minimal "opaque" covering. Justice Souter supplied the necessary fifth vote. It 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 “secondary effects” included “preventing prostitution, sexual assault, and other criminal activity”.¹

The fourth entangled strand is a variant of the third, a particular “injustice” based ground for regulating pornography – in this instance, “child pornography”. The Supreme Court in *Osborne v. Ohio* (1991) held that neither the First Amendment nor any other constitutional provision precluded criminalizing possession, even in one’s home, of “child pornography”. Note well: this “child pornography” need not be “obscene” according to the prevailing grown-ups’ test; it includes images of children which, 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 (as I have already suggested) there *is* a strong social consensus that child pornography is morally degenerate and should be banned. The

¹ The content and interlocking character of these three lines of regulatory authority is reflected in Justice Scalia’s cogent argument in favor of the Indiana pasty-and-G-string law:

The dissent [by Justices White, Blackmun, Stevens, Marshall] confidently asserts... that the purpose of restricting nudity in public places in general is to protect nonconsenting parties from offense; and argues that, since only consenting, admission-paying patrons see respondents dance, that purpose cannot apply, and the only remaining purpose must relate to the communicative elements of the performance. Perhaps the dissenters believe that "offense to others" ought to be the only reason for restricting nudity in public places generally, but 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. While there may be great diversity of view on whether various of these prohibitions should exist (though I have found few ready to abandon, in principle, all of them) there is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate "morality."

reason proffered by the *Osborn* Court was to protect the “victims of child pornography”. These “victims” were not children in general, who 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 instead, and 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”.

This rationale was confirmed by seven members of the Court just months ago. In *U.S. v. Williams*, decided in June of 2008, they wrote: “Child pornography harms and debases the most defenseless of our citizens”. 128 S. Ct at 1846 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 neither sexually explicit material with adult actors who look like children, nor material which relies upon life-like “virtual” children -- involves the exploitation of society’s “defenseless”. This implication (now made explicit) itself implies that 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 proffered rationale would apply equally to a total ban on possession of snuff movies (which have nothing to do with sexual immorality). *Osborne* is, it seems too, as much about child labor practices as it is about sex.

These four lines of lawmaking authority 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. It transcends these four bases for legal action. Public morality is an overarching collective or common good maintained 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 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." (A. Bickel, *The Public Interest* 25 -26 (Winter 1971), quoted in *Paris Adult Theater v. Slaton*). 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 Alexander Bickel nor the Court which relied upon him – nor Justice Scalia – used the word *culture*. But that is exactly what they were all talking about. We possess, as it were, a common life which is not reducible to voluntary transactions, which implies that we are *not* the authors of all that we do, and that "to each his own thing" is an intrinsically naive and empirically unavailable proposal by which to settle the meaning and scope of public morality. This *culture* is a human production. It consists of what people do and say ("heard and done"). It 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* is a formidable human artifact. 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. Any one of us may wish to live (and to have our children live) in a

culture which makes chaste courtship and faithful life-long marriage ore or less freely available for choice. But we do not live in such a culture. Some of us wish we lived in a culture in which the Gospel and the demands of discipleship could make sense to our children. But we don't.

The civil law plays an important, but secondary, role in making this inescapably common force, which powerfully shapes our lives and our choices, a wholesome one. Why? How are people's opportunities for genuine flourishing affected by matters so mundane as, for example, what the civil law says about marriage? After all, the law does not "impose" its definition of marriage on anyone. Does it really matter so much what the law says, or does not say, about what counts as a family?

It does. When it comes to law and marriage and, thus, to the normative context for sexual activity, the law really does have a trickle-down effect. The "marriage" available in any society is powerfully formed by the culture, which is itself powerfully shaped by law. As Oxford legal philosopher Joseph Raz has written, "monogamy, assuming that it is the only valuable form of marriage, cannot be practiced by an individual. It requires a culture which recognizes it, and which supports it through the public's attitude and through its formal institutions." A degraded culture and misguided law conspire to deprive people of the opportunity to choose (real) marriage where, for example, wives are treated (culturally and legally as little more than chattel. In this situation, where true equality and mutuality between spouses is unimaginable because of false beliefs about the inferior nature of women, marriage as a two-in-one flesh communion is simply not available as a choice.

Now, Raz does not suppose that, in a culture whose law and public morality do not support monogamy, someone who happens to believe in it will be unable to restrict himself to

having one wife or will be required to take additional wives. The point, as expressed by Princeton's Robert George, is rather that

even if monogamy is a key element of a sound understanding of marriage, large numbers of people will fail to understand that or why that is the case—and will therefore fail to grasp the value of monogamy and the intelligible point of practicing it—unless they are assisted by a culture which supports monogamous marriage.

Public morality properly understood 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 – understood basically as sexually explicit material which is intended to excite lust – is morally harmful to people, because (a further moral judgment) sexual feelings of that sort should be confined to proper interpersonal relations. Pornography is bad because it causes disintegrated sexual feelings and desires, and leads straightaway in all too many cases to their morally illicit satisfaction. Habitual use of pornography leads to a kind of arrested psycho-sexual development which handicaps the user's capacity for morally upright sexual acts within marriage. In some cases, addiction to pornography makes such acts impossible.

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. A law against possessing pornography may have that effect, by helping to break someone's habitual use of it. That benefit is, or at least should be, a welcome side effect of laws justified on other grounds, namely: the maintenance of a morally wholesome public realm. Just as our laws prohibit at-home possession of drugs and of child pornography in order to suppress the market

for those pleasures altogether, and just as Congress forbids farmers to grow certain crops (or certain quantities of them), even for home consumption, in order to stabilize prices, so too might the law prohibit private possession of all pornographic material to suppress that market too.

But this *public morality* is fragile. Mortally threatening its stability in our day is a burgeoning conception of “freedom of expression”, one mid-wifed and nourished by a corrosive moral subjectivism. Let me start with a *avant garde* expression of this acidic agent. It is an excerpt from Justice William Douglas’s dissenting opinion in the *Ginsburg* case (1966), in which the Supreme Court affirmed the conviction of a New York publisher for “pandering” *Eros* magazine. (The important point of law established there is that, in 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 towards the forbidden zone.) Now, one could say that in *Ginsburg* Douglas took an extreme view of what democracy entails or that he advocated what sociologists call a “bottom up” (no pun) theory of “obscenity”; in short, that he was an egalitarian on 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. (Douglas famously loved the ladies.) It is

instead a colorful anticipation of what has become a constitutional principle:

“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 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. [Footnote omitted] 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. Another group also represented here translates mundane articles into sexual symbols. This group, like those embracing masochism, are anathema to the so-called stable majority. But why is freedom of the press and expression denied them? Are they to be barred from communicating in symbolisms important to them? 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?

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. There is, rather, a pattern of stimulus and response; attraction, desire, release. From the viewpoint of public authority, there is no practical difference between holding that morality is individuated and saying that there is no morality at all (unless or until a non-consenting party enters the picture). This nihilism is a standing mortal threat to legal regulation of pornography for the sake of public morality.

How so?

Nihilism is a mortal threat because it grossly inflates the scope and presumptive legitimacy of “expression”. As Justice Douglas suggests, “freedom of expression” then extends effortlessly to whatever individuals and non-government groups *want* to say, or otherwise “express” through spoken or written word, through other communicative conduct, and through symbolic representations -- art. Each person possesses a *prima facie* right to speak – to “express” herself – as she pleases. Authority over what is “expressed” is thus radically diffuse; this “freedom” is a powerful centrifugal force.

Nihilism is a mortal threat also because it explodes the concept of public morality. In a nihilist understanding of the so-called problem of pornography, a regulator could not achieve any judgment that a certain work was genuinely harmful.. Where no negative, objective moral judgment that, for example, sado-masochism is wrong is available, it is a straight path to the

world of William O. Douglas. Without the possibility of such judgments, it is impossible to describe a proposed morals law as anything more than the imposition of a majority's preferences upon an unfairly maligned minority. And so Douglas describes the case. 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.

I counseled earlier 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 surprises in the hereafter) to define "freedom of expression". This development was succinctly captured in a June 2008 child pornography case (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". [*U.S. v. Williams*, _ U.S. _, 128 S. Ct. 1830, 1854.] The judgement that some "expression" qualifies for constitutional protection does *not* include a moral evaluative criterion of any kind. As the Supreme Court declared in 1992: "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" .

This "Mystery Passage" was at the heart of the Court's more recent decision to strike down an anti-sodomy law in *Lawrence v. Texas* (2003). The holding and the reasoning of *Lawrence* are vintage Douglas. The *Lawrence* Court said that "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”. Justice Kennedy noted the “powerful voices” through the centuries which condemned homosexual conduct as immoral. But, he added, “these convictions” – that is, the judgment that homosexual relations are morally wrong – do not answer the question presented for the state lacks power to “impose” these convictions upon the whole society.

Kennedy relied upon what he called “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex”. The case involved, he said, no minors and no unwilling observers. It involved “two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle” – and doing so could not be made a *crime*. The “stigma” associated with a criminal conviction, and the “invitation to subject homosexual persons to discrimination both in the public and the private spheres” which simply *making* a sodomy a crime, were key parts of his reasoning. The central message is of *Lawrence* is, apparently, that private sexual satisfaction by and between adults is beyond moral evaluation by the law. The message is surely that no such judgments could *never* form the basis of a constitutionally valid criminal law (at least).

Then Justice Kennedy, writing for a majority of the Court, added another layer of meaning and thus constitutional protection. It was not just that these two men (as it were) had to be left *alone*. They were “entitled to respect for their private lives”; making a crime of their consensual conduct “demean[ed] their existence”. In fact, and when it came to choices about sexual satisfaction – its form, and with whom, within or without marriage and even in connection with rearing children – homosexuals have the same constitutional liberty to seek to define

themselves in autonomous fashion as fo heterosexuals. When all was said and done, Justice Kennedy could not decide whether *Lawrence* whether he wanted a sex toy or gay marriage.

There is now to be considered a fifth line of authority for legal regulation of pornography. This one has moral underpinnings. But it 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 and hewed closely to the constitutional tradition. The *Roth* 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”. “Obscenity” was one such category: “implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance”. The *Roth* 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* (decided the same day) departed from the ancient doctrine laid down by the King’s Bench in *Regina v. Hicklin*,. (1868). In that famous English decision Lord Chief Justice Cockburn defined “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”. 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”. [354 U.S 488 - 89] 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”. [Id.] In *Butler* Justice 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 in order to shield juvenile innocence promotes the general welfare”. The effect of the challenged law, Frankfurter added, “is to reduce the adult population of Michigan to reading only what is fit for children”. “Surely this is to burn the house to roast the pig”.

Fair enough. It surely 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 from the heavy hand of blue-nosed censors. Through the mid-1960's, the Justices were animated by that intention, supplemented by the conscious desire to protect materials which dealt, even in a frank and visually explicit but non-pornographic way, with sex. Only in the 1969 *Stanley v. Georgia* decision does it reliably appear that a majority of Justices bought into Douglas' porn-o-rama. And the Burger Court soon isolated *Stanley*.

Here is the regnant “test” for “obscenity”, as it was articulated in the 1973 decision in *Miller v. California*: “obscenity” is limited those “works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way and which, taken as a whole, do not have serious literary, artistic, political, or scientific value”. 413 U.S. 24. *Miller* expressly limited the “obscenity” to “works which depict or describe *sexual* conduct”. [emphasis added] *Miller* also revised the third part of the *Roth test*, as it had been modified in the 1966 *Fanny Hill* case. That case had made what *Roth* declared to be a *reason* why “obscenity” lacked constitutional protection – it was “utterly without redeeming social value” – part of the *test* for “obscenity”. *Fanny Hill* thus burdened public authorities with proving an almost impossible negative.

It is important to note that the *Miller* standard by itself does not call for, much less assure, 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. Persons and the people have a natural moral right (one might say) to live in a decent society. But that right is not constitutionally enforceable. *Roth*, *Miller* and progeny set a boundary between “free expression” and prohibitable “obscenity”. Beyond that boundary – that is, towards works which, for example, are not “predominantly” prurient – no public official *may* go.² Within the universe populated by works which satisfy the *Miller* test, public officials *may* regulate. And since 1957 the Supreme Court has consistently (with the notable exception of *Stanley v. Georgia*) stood by this boundary line.

My judgment is that, if the legacy of our constitutional tradition was not that “obscenity” – understood by the Court to denote “hard-core pornography” – 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. The Burger Court in 1973 took a strong stand, to be sure, *against* reducing of public morality to the four entangling strands. These 1973 cases express well *what* public morality really is. In them the Court no doubt meant to permit communities (towns, cities, states) which wanted to rid themselves of “obscenity”, to do so. Even so, the Court rulings since 1957 are suffused with high hosannas to the inestimable role which “freedom of expression” plays in the good life of man and in his – *our* – democracy. There is no corresponding testimony

² 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.

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.

II

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. [citation omitted]. 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. *Kingsley Books v. Brown*, 354 U.S. 437,441 (1957) (decided the same day as *Roth*.)

Kingsley Books 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. For although the cases so far considered were almost all criminal prosecutions, we can *now* expect little return on any such investment of regulatory resources – even assuming that past investments were profitable. The reasons why prosecutions are nearly obsolete have little to do with legal changes; they have almost everything to do with technological and cultural developments over the last decade, especially the Internet. Legal regulation of pornography *today* must chart a distinctive course. In brief conclusion, I shall suggest three steps on that path.

The legal rules governing prosecutions have undergone little relevant change since 1957. Access to evidence has long been hindered by the law of 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 barriers to conviction are even higher than that, because 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 relevant change may be that, given the widespread and largely shameless use of pornography today, jurors would hesitate now as they did never before to return guilty verdicts, so long as adult material was traded between or among consenting adult users. (Child pornography cases are another matter.) But this is simply to say that *cultural* changes can affect criminal trials. (Yes, they can, and do.) 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. (Again, they can, and do.)

Now, it has been the case for forty years that at-home consumers of hard-core pornography – material which meets the *Miller* test for “obscenity” – cannot be prosecuted. That is the legacy of the derelict but still operative *Stanley* decision (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 for the latest printed trash. 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 adjacent customers.) Today, however, *Stanley* is a real roadblock to demand-side "obscenity" prosecutions: one's home is, now, one's ponocopia..

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 1980's, very much controlled by organized crime families.) Bookstores, movie theaters, and warehouses could all be closed down; even overseas distributors had to somehow get their wares through customs at select ports. 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 YouTube). 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 universe of "obscenity" cases, not nearly enough for the occasional conviction to deter other users. Even young men addicted to Internet porn could reasonably conclude that they will sooner be struck by lightning than they will be arrested.

Because we are awash in stealth porn, any further discussion of the limits of criminal law enforcement may appear to be dispensable. Not quite; further discussion of criminal law

enforcement through police search and seizure activity and on through indictment, trial, and conviction could indeed be skipped. But that does not mean that the criminal law is useless. Not at all. The *Lawrence* Court got that much right: any conduct defined as a crime is thereby stigmatized, and that stigmatization may lead to further social and cultural isolation. Even if it does not, defining conduct as a crime allows that conduct to serve as a premise in arguments favoring further legal restrictions on the activities (and privileges and opportunities) of those who engage in it.

For example: one effect of the state criminal laws invalidated in *Lawrence* did not depend upon their *ever* being enforced was the roadblock they created to same-sex “marriage” and to adoption by same-sex couples: it could scarcely be argued that such couples had a constitutional right to marriage or to adopt so long as they were engaged in a criminal sexual relationship. No more successfully could they argue that their sexual orientation was a “suspect class” like race and ethnicity, such that almost never could it be a legitimate legal distinction, so long as sodomy was a crime. Given that state criminal laws against sodomy have very rarely – almost never – been enforced for decades (the arrest in *Lawrence* was the result of police home entries caused by reports that *other* criminal activity, as was the arrest in the sodomy case – *Bowers v. Hardwick* – which *Lawrence* overturned), this moral place-holding function was the *principal* reason for those criminal laws.

These limitations of criminal law enforcement light the way, fortunately, for a legal strategy which could both dramatically reduce the consumption of pornography and go far to stigmatize the remainder. This strategy would rely upon a proliferation of non-governmental *initiators* and *initiatives* to combat pornography. These new 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 unkempt 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.

Even if the three initiatives below do not appeal, the preceding recommendations for them should still be taken as criteria for *any* successful strategy.

The three initiatives:

1. 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, 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 sufficient to deter such misconduct. That amount need not be settled here, but it would have to be *at least* a five-figure award to adequately deter. A variant or aggravated caliber of this action 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 which (in short) appeals predominantly to the prurient interest and which is patently offensive would be deemed “obscene”. 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*.

2. Individuals who seek certain government benefits and privileges (such as guaranteed student loans) or who apply for many government positions (including all law enforcement and teaching jobs) could be required by the protocols of the subject program to certify on pain of penalty for perjury that he or she has not visited an “obscene” website or downloaded on the Internet “obscene” materials in (pick a time frame) the last year, or two, or three. There would be no need here to retool the definition of “obscenity”; applicants would presumably be careful to steer a wide berth and be sure that, if they affirm, they have steered clear of any site which was *arguably* “obscene”.³

³ One suggestion that such policies may not be considered overly intrusive comes from the incoming Obama Administration. In a not-disapproving account published November 13 the NYT (page A1) reported on the questionnaire which any aspirant for a high level political appointment in the Obama Administration was required to submit. “They must include any e-mail that might embarrass the President” as well as blog posts and links to their Facebook pages. “Please list all aliases or ‘handles’ you have used to communicate on the Internet”. This could have some of the same effects that “nannygate” (Kimba Wood’s and Zoe Baird’s derailed nominations to be Attorney-General for Clinton) has had: a certain class of folks now scrupulously observe the legal rules governing employment and withholding. “If you keep or

3. As an exercise of the federal spending power (and cognate authority in the states) Congress could make it a condition of any federal grant to another government entity or non-government institution that they – the grantees – enact, publish and enforce policies governing the use of any computers under the recipient’s control, which policies *effectively* eliminates the use of grantees facilities to visit “obscene” websites, to receive (invited, at least) “obscene” messages and images, and to prevent their use in any other way for the purpose of connecting to “obscenity”. These grant recipients would have to further agree to impose effective penalties for any violation of these protocols. Grantees 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.

have ever kept a diary that contains anything that could...be a possible source of embarrassment to yo, please describe.” (Is there any other kind of diary?) And the catch-all: “Please provide any other information, including information about other members of your family, that could...be a possible source of embarrassment to you, your family, or the president-elect”.