IN THE EYE OF THE BEHOLDER: A COMPARATIVE STUDY OF PUBLIC MORALITY AND FREE SPEECH ACROSS THE PACIFIC

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Abstract

Most modern democracies have embraced some concept of freedom of expression in their system of jurisprudence. This right is not unfettered and the tension between free speech and societal norms is an ongoing legal question. Both Korean and American Courts have addressed the issue of what to do about expressions of sexuality and their place in the public square. However the two countries have different views as to what is obscene, and what to do about such material. These differences arise from different perceptions as to the natural order and what place government should play in people's lives. These differences drive two of the world's post-industrial democracies to travel parallel but separate legal paths.

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INTRODUCTION

Some would argue that ever since Eve decided to take the first bite of the apple, people have been uncomfortable with their sexuality. Certainly, every culture has developed social taboos surrounding procreation. Democratic societies also believe in the right of people to express themselves. However, this right has to be balanced against society's ideas about human sexuality. How does Korea's approach differ from America's? Many brush over the differences with some vague reference to *east versus west*; that "free speech" is an occidental concept inapplicable to oriental cultures. A close look at court decisions ruling on the propriety of sexually orientated materials will reveal that both cultures balance free speech against a sense of public morality. The real difference lies in how each see the purpose of free speech and the benefit to be achieved by restricting it.

This article will describe each culture's attempt to regulate expression and their justification for restricting expression. Our analysis will start with a review of the pertinent case history from each country, followed with a comparison of the methodologies that the United States and Korea use to determine what sort of expression is beyond the pale of decency. The paper will then explore the reasons for their different perspectives on morality and government action. In conclusion, we will preview pending decisions that may provide insight into an evolving concept of decency.

I. GUARANTEES OF FREEDOM OF EXPRESSION

The Korean Constitution notes that "all citizens shall enjoy the freedom of speech and the press and the freedom of assembly and association."[1] On its face, this article is similar to the First Amendment of the U.S. Constitution. However, the Korean Constitution modifies this seemingly absolute protection, by noting, that "neither speech nor the press shall violate the honor or rights of other persons *nor undermine public morals or social ethics.*"[2] While freedom of speech and the press is guaranteed in the Korean Constitution, Korean legal theory gives great deference to the concept of the *public good*.

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble."[3] This wording has been interpreted as creating a near absolute protection for

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[1] Daehanminkuk Hunbeob (대한민국 헌법) [Hunbeob] [Constitution] art. 21(1).

[2] *Id.* art. 21(4).

[3] U.S. Const. amend. I, § 1.

speech.[4] Still, in a few limited cases, speech is prohibited when a compelling government interest has been found. While depictions or descriptions of violence are protected speech, fighting words,[5] threats,[6] or speech that imminently incites illegal activity,[7] fall outside the purview of the First Amendment altogether. The common theme among these cases is that the nature of the speech at issue constitutes a grave threat to the physical well-being of human beings.

II. JUDICIAL DECISIONS ON OBSCENITY

A. Korea

In the 1970s the Supreme Court of the Republic of Korea (ROK) started to review criminal convictions for publication of materials with sexual content. It ruled in a case involving a painting by the Spanish artist Francisco de Goya (*Nude Maja*) which the defendant had appropriated for commercial purposes (matchbox advertising). Instead of being prosecuted for misappropriation of copyrighted material, he was convicted of peddling obscene material. The Supreme Court affirmed the obscenity conviction.[8] In the decision, the Court cited two factors that are stilled touched on by Korean courts: (1) the subject work could arouse viewer's sexual desires and (2) such desires could pervert reality for normal people thus damaging social custom. While the court distinguished material used for artistic and educational purposes, from those used for purely commercial purposes, even so-called works of art can be obscene when used for commercial purposes.[9]

Five years later, the Supreme Court reversed an obscenity conviction involving a literary work called *Revolting Slaves*.[10] The Court maintained its

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[4] Speech itself can be an intricate part of a crime. The law has long recognized that the inclusion of verbal or written components as part of the commission of an inchoate crime, like conspiracy, extortion or attempt, does not immunize a defendant from prosecution. The Supreme Court of the U.S. reaffirmed in United States v. Williams, 553 U.S. 285 (2008) (citing Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relation, 413 U.S. 376, 388), that "offers to engage in illegal transactions are categorically excluded from First Amendment protection."

[5] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[6] Watts v. United States, 394 U.S. 705 (1969).

[7] Brandenburg v. Ohio, 395 U.S. 444 (1969).

[8] Shin Sang Cheol (신상철) v. State, Supreme Court [S. Ct.] 70To1879, Oct. 30, 1970.

[9] *Id.*

[10] Yum Jae Man (염재만) v. State, Supreme Court [S. Ct.] 74To976, Dec. 9, 1975, (530 Beobwon kongbo (법원 공보) [Official Gazette of Supreme Court Decisions] 8901 (Feb. 15, 1976)).

previous position that public expressions of sexual desire were harmful to social order. However, the court ruled that the novel's depiction of sex was not explicit enough as to *excessively* arouse sexual desire or to do *considerable* harm to normal sexual desires. In the book, the main character resisted carnal desires and therefore set a good example. This case shows the Court's inclination to consider, at least in the case of literature, the work in its entirety. More importantly, the Court expressed its prerogative to judge the appropriateness of the message conveyed by the material and not just the depiction.

It would be more than a decade before the Supreme Court would revisit the issue. In 1991, the Supreme Court reviewed a conviction of a magazine publisher for publishing illustrated articles describing sexual techniques.[11] While none of the pictures showed actual genitalia, pictures showing people apparently engaging in sexual acts were deemed explicit enough to arouse a reader's prurient interest and have a corrupting influence. The fact that the magazine was titled *Married Life* still did not frame the sexual content in the proper setting. One must wonder whether the fact that the specific intent of the magazine was to illustrate sexual techniques influenced the Court.

Another popular work was reviewed the next year, when Korean University professor Kwang Su Ma was convicted pursuant to Articles 243 and 244 of the ROK criminal code for publication of his novel *Happy Sara*. The novel's protagonist frequent sexual encounters with both men and women caused quite a stir in Korea at the time of its publication. The Supreme Court upheld the writer's conviction, reaffirming that obscenity is damaging to sexual desire.[12] The Court expanded on its definition of obscenity stating it was whatever arouses sexual desire and shame of *ordinary people* in light of *current sound common* ideas. The Court outlined a set of factors to consider in deciding whether material was obscene: (1) whether the description of sexual behavior was explicit and specific; (2) the ratio of sexual descriptions to nonsexual matters; (3) the relationship between the sexual description and the author's overall theme for the work; (4) the organization or plot of the book; (5) the extent to which the literary, artistic, or philosophical value of the work mitigates sexual content; and (6) the tendency of the work as a whole to arouse prurient interest.[13] These factors should be considered in determining whether the material aroused *shameful sexual desires*[14] that were injurious to

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[11] Lee Geun Suk (이근석) v. State, Supreme Court [S. Ct.] 91To1550, Sept. 10, 1991, (907 Beobwon Kongbo (법원 공보) [Official Gazette of Supreme Court Decisions] 2563 (Nov. 1, 1991)).

[12] Ma Kwang Su (마광수) v. State, Supreme Court [S. Ct.] 94To2413, June 16, 1995, (997 Beobwon kongbo (법원 공보) [Official Gazette of Supreme Court Decisions] 2673 (June 16, 1995)).

[13] *Id.* at 2674.

[14] While the Court indicates that the overriding consideration would be whether the depiction aroused prurient interest, it was not all clear what sexual interest would be considered prurient.

public morals. Using these factors the Court found that *the frequent and deviant nature* of the protagonist's sexual encounters, *and the light in which they were portrayed*, overrode any possible academic merit the work might hold.[15]

While *Happy Sara* dealt with literature, a companion case dealt with obscene pictures. That case dealt with three collections of photographs: a collection of nude photos of a Japanese actress; a collection of semi-nude photographs of a Korean actress; and a collection of photographs of Western celebrities.[16] The court found only the photos of the Western women aroused prurient interest. Even though the nude photos of the Japanese actress showed the pubic area, they were found to have artistic merit. In these cases, the Court focused on the portrayals of the women in the pictures. The pictures of Western women were supposed to show them in a sense of sexual arousal or satisfaction, while the other collections gave no indication of such arousal. Possibly the Court felt that celebrity status of Western women would have a greater corrupting influence on the social morals.

Protecting minors from sexual expression is a great concern in Korea and has been the subject of a great deal of legislation. In 1997, after receiving criticism for enacting inconsistent laws concerning minors' access to sexually explicit materials, the legislature enacted the *Juvenile Protection Act* ("JPA").[17] The JPA regulates all kinds of media that could be deemed harmful to juveniles. It was enacted to examine depiction of sexual desire in various media outlets that could be considered abnormal or undesirable for juveniles. The JPA preempted all similar statutes and imposed criminal penalties for publication of materials harmful to juveniles. Furthermore, penalties under the statute are generally harsher than those of previous obscenity-related statutes. Sexual expression, according to the JPA, should be relentlessly suppressed if it could possibly "stimulate [the] sexual desire of juveniles."[18] Under the statute, the *Juvenile Protection Committee* ("JPC") determines harmful materials for juveniles. The JPC consists of at least twelve individuals, one of whom is a chairperson appointed by the President of Korea. Other members are appointed or commissioned by the President upon the proposal of the Prime Minister after recommendation by the Chairman. The power of the JPC is vast. It is entitled to review any matter related to the distribution of

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[15] As a postscript, Professor Ma returned to teaching at Yonsei University in Seoul, but not without controversy. He was suspended in 2006 for plagiarizing a student's work. Then in 2007, he was fined 2 million won for posting his novel *Happy Sara* on his blog. However, he still discuses sex in public forums and his classes remain popular. *See* Ba Ji-sook, *Prof. Ma Kwang-soo Resumes Teaching Career*, Korean Times, Nov. 6, 2007, http://www.koreatimes.co.kr/www/news/special/2010/10/178_4486.html.

[16] *Yum Jae Man*, 74To976.

[17] Chŏngsonyŏn bohobeob (청소년 보호법) [Juvenile Protection Act], Act No. 5297, Mar. 7, 1997, *translated in* Statutes of the Republic of Korea 19, 1001 (Korea Legislation Res. Inst. 1997 & Supp. 34).

[18] *Id.*

materials deemed harmful to juveniles. The JPC may order a citizen to remove the harmful materials or take other corrective measures. It also has the authority to "rate ... media materials [by considering] the degree of their harmfulness to juveniles, the age of juveniles utilizing them, their characteristics and hours, and places of their utilization into account."[19]

The ROK Constitutional Court, which is empowered to determine the constitutionality of legislation, found the JPA a legitimate exercise of governmental power to protect minors from corrupting influences. However, the provisions criminalizing actions must be free of ambiguity in the description of the elements of a crime. Otherwise citizens would be unable to tell what activities are prohibited, and whether an activity constitutes a crime would be largely dependent on the arbitrary interpretation of a judge. In the instance case, the Court found the legislation's definition of "unwholesome comics" as those "that may contribute to causing obscene or cruel behavior of minors" was too broad, as the term "cruel" had not been subject to judicial interpretation and was too vague to provide guidance to the general public.[20] Further the definition of "unwholesome comics" used in Article 2-2, namely, "that could instigate minors to commit a crime," is not specific enough to determine whether it would be applied to punish publication of only those comics that actually lead to "the commitment of a crime, knowingly or recklessly" or that led to activities without any consideration of the intention of the wrongdoer. It was also unclear whether the provision would be applied to prosecute the publication of comics that actually bring about any attempts at a crime, or only successful completion of a crime. The instant provision use of ambiguous and abstract concepts, that meaning could not be clarified without a judge's supplementary interpretation, unconstitutionally left it to the discretion of the enforcement agencies whether to enforce the law in particular cases.

In an accompanying case, the Court reviewed the *Telecommunications Business Act*.[21] Under this Act, the Minister of Information and Communication could order Internet service providers (ISPs) to not carry content that could potentially hurt social order or public norms. The Act further provided that noncompliant ISPs would face imprisonment for not more than two years, or a fine not exceeding twenty million won. The Constitutional Court found this Act unconstitutionally vague and overbroad. It distinguished *obscenity* (unprotected) from *indecency* (protected), defining the former as material that only appeals to prurient interests and that, taken as a whole, possesses no literary, artistic, scientific or political value. It defined

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[19] *Id.*

[20] *Punishment of Distribution of Unwholesome Comics Case*, Constitutional Court [Const. Ct.], 99Hun-Ka8, Feb. 28, 2002 (14-1 KCCR 87) *citing* (93Hun-Ka4, July 29, 1994 (6-2 KCCR 15, 32); 97Hun-Ba68, May 28, 1998 (10-1 KCCR 640, 655)) (The principle *nulla poena sine loge* prohibits arbitrary discretion in the courts).

[21] Chŏngi tongshin saŏpbeob (전기통신사업법) [Telecommunications Business Act], Act No. 8867, Feb. 29, 2008.

indecency as "vulgar and coarse expression," but not hardcore pornography. Protection of minors from indecent expression should not justify denying adults all access to constitutionally protected non-obscene material. [22]

However, while not allowing total prohibition of materials, the Court has been willing to allow a great deal of regulation of sexual content. Two years later the Constitutional Court considered another regulation limiting access to the internet, especially as it applies to minor.[23] The Court reviewed relevant provisions of the *Act on Promotion of Information and Communications Network Utilization and Information Protection*[24] and the enforcement policies of the Ministry of Information and Communication. The pertinent provisions enabled Internet filtering by requiring Internet providers to mark sites harmful to minors. If a web site or directory was determined to have data harmful to minors, this electronic indication would be noted by filtering software and the offending page would not appear on the screen. If no filtering software was installed, then the indication would have no effect on viewing.

The complainant in this case operated a website concerning homosexuality. The *Information and Communications Ethics Committee* (ICEC) determined this site's content to be harmful to minors. The Committee notified the complainant that he should mark the "electronic indication" and that criminal sanctions might be imposed for failure to do so. The complainant subsequently filed a constitutional complaint, claiming that his freedom of expression was violated by the above legal provisions enabling Internet filtering, in that they constituted a prior restraint on speech by the government. The Court considered whether the electronic marking was an excessive restriction under Section 2 of Article 37 of the Constitution. In reaching its decision, the Court balanced free speech against society's interest in the protection of minors. The Court noted that the Internet poses special problems in trying to protect minors. The Court held that the present regulatory scheme was an effective and appropriate means to protect minors with *de minimus* impact on the applicant's right of expression. The Court noted that while there were other means to block information from minors, they all posed their own problems such as identity theft or inordinate cost to website operators. Importantly, marking the web sites did nothing to limit what information appears on the web site. Finally, the Court noted that the

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[22] *Ban on Improper Communication on the Internet Case*, Constitutional Court [Const. Ct.], 99Hun-Ma480, June 27, 2002, (14-1 KCCR 616).

[23] *Internet Filtering for Protection of Minors*, Constitutional Court [Const. Ct.], 2001Hun-Ma894, Jan. 29, 2004, (16-1 KCCR 114).

[24] Chŏ bo tongshinmang yiyong chokjin mit chŏngbo boho dŭng'e kwanhan beobyul (정보 통신망 이용 촉진 및 정보 보호 등에 관한 법률) [Act on Promotion of Information and Communications Network Utilization and Information Protection, etc.], *amended by* Act No. 7812, Dec. 30, 2005. (This provision was deleted and moved into the Act on Promotion of Information and Communication Network Utilization and Information Protection when the latter act was deleted on January 16, 2001).

blocking of the web site only occurred if parents chose to install the filtering software.[25]

Finally in a decision delivered in 2007, the Court reviewed a ruling under the *Ordinance of the Act on Promotion of Utilization of Information and Communication Network* which compelled webmasters to use PICS (Platform for Internet Content Selection) to label content designated harmful by the ICEC. Pursuant to its authority under the *Protection of Youth Act*, the ICEC decided to classify gay and lesbian content as "harmful to youth." Specifically, ICEC has designated www.exzone.com harmful on the grounds that it encouraged homosexuality and carried obscene information. The operator of the site and a federation of fifteen gay rights associations filed a suit against the government in January 2002 stating that the law violated the constitutional right to free speech. The Korean Supreme Court ruled that while opinions on homosexuality vary wildly, the Act's prohibition against the promotion of homosexuality was not unconstitutional on its face.[26] Therefore the ICEC's decision to label certain homosexual sites as harmful to youth was within its discretion to provide for the safety of minors.[27]

A review of legal decisions reveals that Korean jurisprudence has asserted the ultimate authority to make moral judgments. The ROK Supreme Court reaffirmed a clear delineation of law in its decision in 2008, when it stated a "court should be the entity to determine ultimately the meaning of 'lewdness' as well as whether a certain expression is lewd or not."[28] Korean courts accept Confucian views of sexual morality, and are willing to carry out the Constitutional mandate to protect the moral health of the nation. The first determination is always whether the questioned material perverts the normal views of members of the community. If the material is believed to arouse shameful sexual desires, then the court will further inquire as to whether other qualities such as literary value outweigh the shameful aspects. When left to their own devices they have sounded a fairly traditional note. However they have acknowledged views on sexuality can change over time. While they allow the government leeway in setting their policies concerning ethics, they do expect them to clearly and specifically state what those policies are. Additionally in protecting specific sectors of the community (minors), they cannot also trample on

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[25] *Id.*

[26] *Confirmation of Invalidation of a Disposition which determines and publicly announces Media Materials as Harmful to Juveniles*, Constitutional Court [Const. Ct.], 2004Du619, June 14, 2007.

[27] This decision became an academic exercise when in 2003, the Korean National Youth Protection Committee removed homosexuality from the categories of "harmful and obscene." The reversal came in response to a Korean National Human Rights Protection Committee resolution finding that classifying homosexual content as harmful and obscene is an unconstitutional restriction on individuals' rights of expression and pursuit of happiness.

[28] *Violation of the Act on Promotion of Information and Communications Network Utilization and Information Protection*, Supreme Court [S.Ct.], 2006Do3558, Mar. 13, 2008.

the rights the general public and must tailor their prohibitions to be no broader than necessary to meet their legitimate goals.

B. United States

The American courts have had no easier time than Korea in trying to describe what is, and is not, beyond the pale of acceptable sexual expression. In 1964, Justice Potter Stewart tried to explain "hard-core" pornography, or what is obscene, by saying, "I shall not today attempt further to define the kinds of material I understand to be embraced ... [b]ut I know it when I see it."[29] This oft-repeated quote summarizes the irony and difficulty in trying to define obscenity. For at least fifty years, the Supreme Court has been struggling with defining what it is, when they see it.

In *Roth v. United States*,[30] the Supreme Court sustained a conviction under a federal statute punishing the mailing of "obscene, lewd, lascivious or filthy..." materials. The Court rejected the claim that obscene materials were protected by the First Amendment. Five Justices joined in the opinion stating:

> 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. *These include the lewd and obscene.... It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality...* We hold that obscenity is not within the area of constitutionally protected speech or press.[31]

Nine years later, in the case of *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Com. of Mass.*,[32] the Court veered sharply away from *Roth* and articulated a new test of obscenity. The plurality held that the Government must established three elements: the dominant theme of the material taken as a whole appeals to a prurient interest in sex; the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and the material is *utterly* without redeeming social value."[33]

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[29] Jacobellis v. Ohio, 378 U.S. 184 (1964).

[30] 354 U.S. 476 (1957).

[31] *Roth*, 354 U.S. at 493.

[32] 383 U.S. 413 (1966).

[33] *Id.* at 430.

Five years later, the Court had an opportunity to further refine its analysis in its landmark decision *Miller v. California*.[34] A five-judge majority basically affirmed the Court earlier decision in *Memoirs* but with some modification and limitation.[35] The Court said that assessment of the material in question must consider:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[36]

The first prong of the test identifies who and what is to be analyzed. It focuses on the impact of the material and not on the intent of the maker. Whether the material appeals to prurient interest is to be assessed in its entirety and not on the basis of incidental themes or isolated passages or sequences. Further what is prurient is considered from the perspective of the average person with an average and normal attitude and interest in sex. This "average person" is not set in stone, but an evolving standard as customs change and the community as a whole may find acceptable that which was formerly unacceptable. This average person is not some abstract concept but the real life members of the jury who determine what is accepted in the *local* community. The court rejected the idea that there should be a national standard for obscenity. "To require a State to structure obscenity proceedings around evidence of a national "community standard" would be an exercise in futility."[37] In addition to considering the average or normal person, the prurient appeal requirement may also be assessed in terms of the sexual interest of a clearly defined deviant sexual group if the material was intended to appeal to the prurient interest of such a group, for example, homosexuals.

The second prong addresses whether the offending material depicts or describes, in a *patently offensive* way. The sexual conduct must be specifically defined by the applicable state law, such as ultimate sexual acts, normal or perverted, actual or simulated; masturbation; excretory functions; or lewd exhibition of the genitals.[38] "Patently offensive" is determined by contemporary community standards; that is, whether it so exceeds the generally accepted limits of candor as to be clearly offensive.

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[34] Miller v. California, 413 U.S. 15 (1973).

[35] The Court in *Miller* upheld the conviction under the California statute stating that the law had incorporated the *Memoirs* test and therefore was constitutionally valid.

[36] *Miller*, 413 U.S. at 22.

[37] *Id.* at 26.

[38] *Id.* at 29.

The final criterion in determining obscenity is whether the material, taken as a whole, lacks *serious* literary, artistic, political or scientific value. An item may have serious value in one or more of these areas even though it portrays explicit sexual conduct. This was a step back from the Court's decision in *Memoirs* which stated that material was only obscene if it was utterly devoid of value. Under *Miller*, the fact that something has some academic merit does not preclude a finding of obscenity.[39]

All three prongs must be met before the material is found to be obscene. If any one of the elements is not proved, the material is not obscene within the meaning of the First Amendment. Only in a very limited number of cases has the Court found a particular kind of sexual expression outside the umbrella of the First Amendment regardless of this test. Only in the case of child pornography, has a whole category of speech been ruled outside the First Amendment. In *Feber v. New York*, [40] the Court considered the constitutionality of a New York criminal statute that prohibited persons from knowingly promoting sexual performances by children under the age of 16 by distributing material that depicted such performances. The Supreme Court upheld the constitutionality of the statute holding that child pornography, whether obscene or not, is outside the First Amendment. The Court found the State has a compelling interest in safeguarding the physical and psychological well-being of minors.[41] Child pornography is intrinsically related to the sexual abuse of children in that the sexual abuse is for the purpose of making the film. It results in a permanent record of the child's conduct and invades his privacy by circulating the film. The only practical way to stop the abuse is to remove the economic motive by banning the films. Any material that would be prohibited under the category of child pornography would be of *de minimus* value.[42]

Subsequently, the Court limited its decision and reaffirmed the principle that the message communicated by the expression is always constitutionally protected. In *Ashcroft v. The Free Speech Coalition*, the Court distinguished virtual child pornography from actual child pornography.[43] The defendants made films using adults to portray minors engaging in sexual activities or computer-generated graphics to simulate minors having sex. A visual portrayal of children engaging in sex cannot be prohibited if it does not involved real children.[44] The idea of having sex with children cannot be barred from the

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[39] Pope et al. v. Illinois, 481 U.S. 497 (1987).

[40] 458 U.S. 747 (1982).

[41] While courts in the U.S. do not discuss whether content is "injurious to the public morals," it does discuss "a compelling state interest." While there are similarities between the two concepts, we will see that the U.S. standard is much more limited.

[42] *Id.* at 760–62.

[43] Ashcroft v. The Free Speech Coalition, 535 U.S. 234 (2002).

[44] Williams v. United States, 553 U.S. 285 (2008).

public forum. The Court rejected the government's argument that "virtual child" pornography encourages pedophiles to abuse children. This argument is the intellectual equivalent of a claim that *Romeo and Juliet* encourages teenagers to kill themselves and should be banned from high school reading lists. More people would find greater social value in *Romeo and Juliet* than in "virtual child" pornography, but if there is some social or artistic value to a piece of work, it should be protected under the freedom of speech clause of the First Amendment.

As the media of choice, the Internet has become the new battlefield for free speech. The Supreme Court has reviewed the constitutionality of legislation regulating the Internet. In 1996, Congress passed the *Communications Decency Act* ("CDA").[45] The CDA was an attempt to protect minors from explicit material on the Internet by criminalizing the knowing transmission of "obscene or indecent" messages to any recipient under 18. In *Reno v. ACLU*,[46] the Supreme Court unanimously declared the Internet to be a free speech zone, deserving of at least as much First Amendment protection as that afforded to books, newspapers and magazines. The government, the Court said, can no more restrict a person's access to words or images on the Internet than it could be allowed to snatch a book out of a reader's hands in the library, or cover over a statue of a nude in a museum. The Court further found that Congress has casted its net too far in trying to protect children. Justice Stevens wrote:

> We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.....It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults. As we have explained, the Government may not reduce the adult population ... to ... only what is fit for children. [47]

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[45] 47 U.S.C. §223 (1996).

[46] 521 U.S. 844 (1997).

[47] *Id.* at 862.

After *Reno,* Congress again attempted to criminalize the dissemination of pornographic materials by passing the *Child Online Protection Act* (COPA).[48] COPA provides for civil and criminal penalties for anyone who knowingly posts material that is harmful to minors on the Web for commercial purposes. "Harmful to minors" was described using the language of the *Miller* test, but specifically applied the standard "with respect to minors (i.e. individuals under 17)."[49] Review of this statute worked its' way up and down the Federal Courts long enough to name three different Attorney Generals as defendants.[50] It ended with the Supreme Court denying a final government request for certiorari of the Third Circuit's affirmation of the District Court's preliminary injunction of COPA. Along the way, the case was twice argued before the Supreme Court. The Court elaborated on it's the standard of review for content-based restrictions on speech.

> In considering this question, a court assumes that certain protected speech may be regulated, and then asks *what is the least restrictive alternative that can be used to achieve that goal* (emphasis added). The purpose of the test is not to consider whether the challenged restriction has some effect in achieving Congress' goal, regardless of the restriction it imposes. The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to assure that legitimate speech is not chilled or punished. For that reason, the test does not begin with the status quo of existing regulations, then ask whether the challenged restriction has some additional ability to achieve Congress' legitimate interest. Any restriction on speech could be justified under that analysis. Instead, the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.[51]

The Court found Congress' approach was not the least restrictive means. The Court noted that filtering software was available to parents that empowered them with the ability to set parameters for their children's access to the Internet without any interference from Congress. Absent a showing that the proposed less restrictive alternative would not be as effective, the Court concluded, the more restrictive option preferred by Congress could not survive strict scrutiny.[52]

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[48] 47 U.S.C. §230 (2006).

[49] 47 U.S.C. §231(a)(2).

[50] ACLU et al. v. Mukasey, 534 F.3d 181 (3d Cir. 2008).

[51] *Id.* at 1705.

[52] While courts prohibit the government from taking steps to block information that might be considered objectionable, there is no restriction on private providers of

These decisions must be contrasted with *United States v. American Library Assoc, Inc.*[53] To address the problems associated with the availability of Internet pornography in public libraries, Congress enacted the *Children's Internet Protection Act* (CIPA).[54] Under the CIPA, a public library may not receive federal assistance to provide Internet access unless it has a policy of Internet safety for minors that includes technology that protects against access by all persons to visual depictions that constitute obscenity or child pornography, and that protects against access by minors to visual depictions that are harmful to minors.[55] The first two categories (obscenity and child pornography) are clearly outside First Amendment protection, but the third is not. The lower court found CIPA facially invalid on the ground that it induces public libraries to violate patrons' First Amendment rights. The Court reversed, finding that public libraries were not a public forum for purpose of the First Amendment, where everyone is free to come and express themselves. It reasoned that the government has latitude in deciding what activities to fund and what information to make available to patrons. The decision was similar to a library choosing not to stock Playboy as one of their magazines.[56] Further, the Court was mindful to point out that no library was required to take the federal funds and could chose to simply forgo filters. Finally, the Court pointed out that the library was not really barring access to any constitutionally protected material, as the CIPA allowed any patron to request that library officials disable the filter so she could view blocked material.

Is *American Library Assn.* an anomaly? The decisions are consistent in that the Court defers to the individual's ability to choose what information she wants to avail herself of. While denying there was any free speech interest at stake in public libraries, the Court seemed influenced by the ability of the patron to request the library disable the filters. The legislative measures which the Justices are willing to bless allow citizens to protect themselves from unwanted intrusions from lewd (but constitutional) materials, especially in public places where they are more likely to be exposed to unwanted intrusions. The Court reasons that the individual has a right to choose what

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internet services from blocking information it deems impermissible. 47 U.S.C. § 230 (2006). Protection for private blocking and screening of offensive material provides that no provider of an interactive computer service shall be held liable for blocking or restricting access to or availability of material that the provider considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.

[53] 539 U.S. 194 (2003).

[54] Pub. L. 106-554, 114 Stat. 2763(2000).

[55] *American Library Assn., Inc.*, 539 U.S. at 198.

[56] Some have pointed out that there is a great distinction between a library choosing not to buy a book and taking steps to affirmatively block material that would otherwise come into the library.

expressions they wish to avail themselves, but should also be able to choose what ideas they don't wish to avail themselves.

This reasoning has allowed the government to channel but not bar indecent speech. Therefore, the Federal Communication Commission can create time and manner restrictions for over-the-air broadcast[57] which would not be constitutional for cable TV, as the latter is invited into the home, while the former invades like an unwanted relative. Public authorities may also adopt reasonable time, place, and manner restrictions on sexually explicit advertisement. Thus town authorities may not be able to ban an adult bookstore, but they may require (through zoning laws) that it be located out near the highway.[58] They may also require that its signage not be lurid (lest passing children and uninterested adults be accosted against their will by salacious images). In the Court's eyes, such restrictions are the only effective defense against unwanted intrusions on the public.

How far can the government go in restricting legal indecent expression?[59] In *FCC v. Fox Television Stations, et al.*,[60] the Supreme Court upheld the government's power under existing law to regulate the use on radio and TV of four-letter words that are considered indecent — but left open the question of whether this ban might violate the First Amendment, at least in some situations. Presently, the Supreme Court is expected to take the next step toward clarifying the government's power to control "indecency" by moving from swear words to a "wardrobe malfunction" that briefly exposed a female performer's breast.

FCC v. FOX Television Stations,[61] the latest FCC challenge unfolding at the U.S. Supreme Court, pits the agency's regulation of constitutionally protected *indecency or the patently offensive* up against the First and Fifth Amendments. The case actually is two in one, involving broadcasts by Fox and ABC. The Fox case began in 2002 and 2003, when the network aired the

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[57] FCC v. Pacifica, 438 U.S. 726 (1978).

[58] Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986).

[59] The FCC definition of "indecent" is both amorphous and complex. Originally the FCC defined it as expression that referred to material about procreation and excrement that was offensive and of no social value (but did not appeal to prurient interest). It attempted to clarify its standards by creating a list of prohibited words (also known as George Carlin's seven dirty words). Ultimately the FCC adopted a more generic standard. The FCC considers a broadcast to be indecent if it contains "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." The FCC considers a broadcast to be indecent if it contains "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." This is measured by the explicitness of the material, its purpose and the length of time the material is dwelt on.

[60] 129 S. Ct. 1800 (2009).

[61] FCC v. Fox Televisions Stations, 567 U.S. ____, 132 S.Ct. 2307 (2012).

Billboard Music Awards. At the 2002 show, Cher received an achievement award, and in her acceptance speech she dismissed her critics, saying, "Fuck 'em." At the 2003 show, Nicole Richie, in an exchange with Paris Hilton, said, "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple."[62] The FCC issued an order concluding that stations could be held responsible for these spontaneous expletives but imposed no fines. The next year (2006) the FCC held ABC stations liable for fleeting views of bums and buttocks on the TV show *NYPD Blue* and imposed a $27,500 fine on some affiliates. The fines were vacated by the Second Circuit. These two cases are consolidated and set before the Supreme Court for argument later this year. A decision will test the limits of the FCC to regulate constitutionally protected speech previously address in *Pacifica*.[63]

A review of all these decisions makes certain principles evident:

1) The government can have no compelling interest in privileging particular subclasses of core protected speech. The mere interest in furthering a subset of speech without more cannot justify a content-based preference for speech.[64] Content-based restrictions on speech are presumed to be unconstitutional,[65] and the government bears the burden of showing their constitutionality.[66]
2) Avoidance of offense and restriction of bad ideas are not compelling interests by themselves. The government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.[67]
3) If the State does have a compelling interesting in controlling speech it must narrowly tailor a restriction on speech and apply it in all situations.

III. COMPARISON OF JUDICIAL APPROACHES

American and Korean courts are faced with the same task; how do we reconcile our ideas of freedom of expression with our feelings about human

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[62] Jonathan Peters, *Changing Media Landscape Could Topple FCC's Indecency Rules*, PBS.ORG (November 30, 2011), http://www.pbs.org/mediashift/2011/11/changing-media-landscape-could-topple-fccs-indecency-rules334.html (last visited Dec. 6, 2011).

[63] *FCC v. Fox Television Stations*, The Oyez Project at IIT Chicago-Kent College of Law,http://www.oyez.org/cases/2010-2019/2011/2011_10_1293 (last visited November 28, 2013).

[64] Carey v. Brown, 447 U.S. 455 (1980).

[65] R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377 (1992).

[66] United States v. Playboy Entertainment Grp., 529 U.S. 803 (2000).

[67] Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991) (quoting Texas v. Johnson, 491 U.S. 397 (1989)).

sexuality? Because of our difficulty in articulating (in Korean or English) why we feel the way we do about our most basic urges, our courts provide examples and articulate standards based on their interpretation of the law. But the real rationale for their reasoning may lie deep in our subconscious where logic and language cannot go. How we feel about sex motivates how we approach expressions of our sexuality as a society.

While American courts follow the common law tradition of case law precedent, written laws are the primary source of law in Korea.[68] However while court precedents are not binding on subsequent courts, in practice the decisions of the Supreme Court of Korea have strong precedential value, and the Korean legal concept of *Chojong Songhon* is similar to the Western concept of *stare decisis*. Moreover, the Korean Constitutional Court has the power to determine the constitutionality of statutes and nullify those found to be unconstitutional.[69] When Korean and American courts review their legislature's attempts to regulate speech, they each analyze whether the regulation is the most efficient means of regulation (though the standard of review may differ). The Korean Constitutional Court actually quoted the American Supreme Court's decision in *Butler v. Michigan*[70] to warn legislatures against overreaching in attempting to protect minors by advising lawmakers "Don't burn the house to roast the pig."[71] This has lead the courts of each country to censor the legislature for a lack of specificity in describing prohibited conduct, stating such vagueness leads to self-censorship.[72]

In their analysis, both systems have struggled to explain what is meant by the term "obscenity." To find a clear answer the courts have looked to each other's case law to help pin down this opaque concept. In analyzing the *Act on Promotion of Information and Communication Network Utilization and Information Protection*'s prohibition of "lascivious" materials, the Korean Constitutional Court gave this explanation.

> The concept of "obscenity" in the Provision is "obscenity" in the strict sense of the term — indecent and blunt sexual expression that distorts human dignity or personality, that solely appeals to sexual interest, and that overall has no literary, artistic, scientific or political values. In this context, such obscene expressions are sexual expressions similar to or more harmful than "obscenity" not considered by the U.S.

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[68] *See* http://english.ccourt.go.kr (under the Jurisdiction section on the website of Constitutional Court of Korea) (last visited June 23, 2011).

[69] Chongko Choi, *Traditional Legal thoughts in Korea*, 2 Journal of Korean Law no. 3, 2003 at 84–86.

[70] 352 U.S. 380, 383 (1957).

[71] *Ban on Improper Communication on the Internet Case*, Constitutional Court [Const. Ct.], 99Hun-Ma480, June 27, 2002, (14-1 KCCR 616).

[72] *Id.*

> Supreme Court to be part of rights protected under the First Amendment to the U.S. Constitution or "hardcore pornography" defined in the German criminal law. Therefore, obscene expressions in their strict sense exceeds the limitation allowed by Article 21 Section 4 of the Constitution and therefore are not protected by Article 21 Section 1 of the Constitution that ensures freedom of speech and press.[73]

The legal systems try to make this determination by looking at the material as a whole and not isolated words or sections. But what they see when they engage in their review can vary greatly. This deviation is not only due to different legal traditions, but also the world views encapsulated in their distinct languages. The concept of "obscenity" was adopted from Western jurisprudence, with the Korean using the term of art 음란한. This term is sometimes explained as 호색의 meaning *causing sexual humiliation*. The complexity of each language ensures that the abstract concepts that the courts try to define may not have a correlating image in the psyche of the other language. It is hard enough for us to explain "lewdness" and "prurient" in our own words, let alone another's.

Any person who has had the opportunity to watch both American and Korean television knows what is thought to be "offensive" varies between cultures.[74] In *The Brethren*[75] the author revealed how law clerks who drafted the Justices' opinions created a short hand for how their bosses decided if material was offensive. Justice Byron White's definition was the strictest with no erect penises, no intercourse, fellatio or sodomy. Justice Brennan's was willing to accept penetration as long as the pictures passed what his clerks referred to as the 'limp dick' standard; oral sex was tolerable if there was no erection. Justice Stewart's used the "Casablanca Test." While stationed in Casablanca as a Navy lieutenant in World War II, Stewart had seen his men bring back locally produced pornography. He knew the difference between that hardest of hard core and much of what came to the Court.[76] One wonders if Korean Judges have their own list of no-nos.

Certainly what is thought to be prurient varies between the two cultures, or at least in a legal sense. American and Korean courts have both indicated that appeals to the prurient interest means that which appeals to "shameful or morbid interests" in sex. But in describing morbid interest, the U.S. Supreme Court states it does not include material that incites normal lust.[77] However, the language used at times by the Korean courts in cases such as *Happy Sara*

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[73] *Ban on Internet Distribution of Obscene Materials Case*, Constitutional Court [Const. Ct.], 2006Hun-Ba109, May 28, 2009.

[74] For example, Americans are much more offended by bare breast than Koreans.

[75] Bob Woodward & Scott Armstrong, The Brethren 193-200 (1979).

[76] The case gave rise to his famous quip "I know it when I see it."

[77] Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985).

would lead to the conclusion that any sort of depiction that would cause sexual arousal may be deemed prurient. The test laid down in *Sara* was whether the material stimulates sexual desire.[78] This line of reasoning is embodied in the JPA which states that sexual expression should be relentlessly suppressed if it could possibly "stimulate [the] sexual desire of juveniles."[79] This view seems in line with Buddhist tradition, claimed by forty-seven percent of Koreans, which teaches adherents that sexual desires (but not sexual activity), like all other desires, should be transcended.

To analyze materials, Korean and American courts each created a three-prong test. However, Korean courts first asked if the depiction would cause some type of sexual arousal. If they determine the material arouses lust, then the court must balance this factor with the other two prongs to see if the work can still pass constitutional muster. However, the American test laid out in *Miller* [80] is not a balancing test. For material to be determined unconstitutionally obscene in the United States, all three prongs of the test must be proven. For example, a work could be found to be patently offensive and appeal to prurient interest. If it still had serious literary value, then the First Amendment would protect the work. By the same token, a work could appeal to prurient interest but not be patently offensive, and still pass constitutional muster.

The analysis also differs in scope. American courts differ from Korean in what type of expression is open to regulation. The Korean Supreme Court considers any expression of human sexuality that might impact on good public morals subject to regulation. Section 21(4) of the Korean Constitution restricts speech that can harm "social ethics." Recent court cases make clear that it would apply equally to depictions of sexual activities **and** messages about the *appropriateness* of certain sexual activities or relationships. However, American courts will only suppress graphic depictions that are patently offensive. They will not suppress an expression of an opinion that the conduct is either good or evil, or whether such lifestyles should or should not be pursued. No matter how strange or out of the mainstream the conduct might seem, American courts will not pass judgment. The First Amendment's purpose was "to assure unfettered interchange of ideas" because "all ideas having even the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of the guarantees."[81] American courts do not want to be put in the position of determining the moral health of the nation. It is concerned with the fairness of the limitation on expression as opposed to any speculation about the impact of the message on the psyche of society. The Court sees the real harm to society moral health to be the government

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[78] *Ma Kwang Su*, 94To2413 at 2674.

[79] Juvenile Protection Act, *supra* note 18, art. 10(1).

[80] Miller v. California, 413 U.S. 15 (1973).

[81] *Roth*, at 489.

regulation's chilling effect on speech. "The ideas that a work represents need not obtain majority approval to merit protection."[82] Contrast this view with the position of the Korean Constitutional Court that there are some expressions, the harm of which cannot be cured through open discussion, or which will bring about too severe harm for the government to stay outside."[83]

We can see these attitudes reflected in judicial outcomes. In *Happy Sara*[84] the Korean Supreme Court specifically looked at the author's lack of condemnation of the protagonist's bohemian lifestyle as a factor in determining that the material was detrimental to public morals. Alternatively in *Revolting Slave*,[85] the Korean Supreme Court cited the moral choices of the characters as a factor in its deliberations. But in America, we see the Supreme Court drawing a distinction between the materials in *Feber*[86] and *Ashcroft* even though they communicate the same message as to pedophilia.[87] These two cases both portrayed minors engaging in sexual activity, but only in the case of using actual minors (*Feber*) did the Court withhold First Amendment protection. Government cannot suppress discussion of minors engaging in sexual activity or depictions of such conduct that did not involve real minors unless it is obscene. Just because the public might be greatly offended by the promotion of the idea of child sex does not justify its suppression.[88]

Brand new legislation shows Korea following an opposing viewpoint. Discussion of minors having sex CAN be suppressed, or at least any portrayal of such acts. In a recent article, Professor Kyun Sin Park of Korea University rails against a new Korean law which he argues falls prey to the same kind of thought-crime prosecution found in the movie "Minority Report."[89] The new law makes it a crime to produce works featuring sexual acts of "creations or persons who can be perceived as minors," punishing creation or distribution of such work with up to 3 years confinement. [90] The law treats imaginary sex with an imaginary, non-existent child the same as sex with a real child. A cartoonist who authors a work and has a child protagonist in it engage in sex and a person who records a real child's sexual act are viewed the same. It also treats adult portrayals of underage sex as criminal. In all, 2,224 people were

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[82] *Pope et al.*, 481 U.S. at 500.

[83] Constitutional Court [Const. Ct.], 95HunGa16, Apr. 30, 1998, (10-1 KCCR 327).

[84] *Ma Kwang Su*, 94To2413 at 2692.

[85] *Yum Jae Man*, 74To 976 at 988.

[86] 458 U.S. 747 (1982).

[87] 535 U.S. 234 (2002).

[88] *Id.* at 245.

[89] Kyun Sin Park, *The World of 'Minority Report' Lived in South Korea*, (July 8, 2013), *available at* http://www.jfsribbon.org/2013/07/the-world-of-minority-report-lived-in.html.

[90] *Id.* at fn. 2 citing *The Children and Youth Protection Act.*

caught uploading Japanese adult videos featuring adult actors in juvenile's "costume play", e.g., wearing school uniforms.[91] However, Park reports that in May, 2013, Judge Byun Min-Sun filed a request for the constitutional review of the Child and Minors Sex Protection Act, resulting in one of the videos featuring school-uniforms had been cleared of the child pornography label.

Finally, the American system leaves the question of what is obscene in the hands of the people and not to the discretion of judges. In Korea, the judge alone must act as both fact finder and decision maker because obscenity is a normative concept.[92] Judges have full authority to determine what constitutes the prevailing ideas of the culture, without taking evidence of the predominant public attitudes towards sex.[93] However in America, the obscenity determination is a question of fact for the jury, to be judged in light of its understanding of contemporary community standards.[94] No expert testimony is allowed. Expert testimony does not aid jurors because the material itself is "the best evidence of what they represent."[95] As pointed out in *Miller*, America has no general standard of obscenity. Each juror applying his own experience is the final arbitrator of what are the local standards of decency.

> Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable "national standards" when attempting to determine whether certain materials are obscene as a matter of fact. It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.... We hold that the requirement that the jury evaluate the materials with reference to "contemporary standards of the State of California" serves this protective purpose and is constitutionally adequate.[96]

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[91] *Id.*

[92] Cho Dong Su (조동수) v. State, Supreme Court [S. Ct.], 94To2266, Mar. 15, 1995, (988 Beobwon kongbo (법원 공보) [Official Gazette of Supreme Court Decisions] 1367 (Feb. 10, 1995)).

[93] *Id.*

[94] Smith v. United States, 431 U.S. 291 (1977).

[95] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56, 56 n.6 (1973).

[96] *Miller*, 413 U.S. at 34.

So, while an American court may overturn a statute it finds to be overbroad or vague, it would be hard pressed to overturn the factual finding of a jury that an expression of human sexuality was obscene.[97] In an odd twist, we find that some Korean commentators criticize allowing judges to make decisions about what is obscene.[98] The reason appears to be that many of them are "reformers" and, therefore, tend to be more conservative than the general public. Meanwhile, Americans also fear leaving the decision in the hands of a judge, because it is believed that many of them are "reformers" and, therefore, are more liberal than the general public.

An interesting comparison is how both systems have dealt with sexually explicit material in cyberspace. They agree that while protecting minors is a laudable goal, it is not a valid reason for barring adult's access to constitutionally protected material. They also agree that technology that blocks outlets on the virtual highway (i.e. software filters) is an acceptable compromise; possibly because jurists from both countries have been willing to accept the not-perfect-but-the-best-we-can-do solution for issues raised by this new media. Any potential filter blocks a great deal of constitutional material. But the fact that patrons choose whether to avail themselves of the filtering technology seems appealing to all the Justices. Everyone has a right not to hear ideas.

But how the two countries went about implementing software filters presented the courts with different questions. In considering the constitutionality of the *2001 Ordinance of the Act on Promotion of Utilization of Information and Communication Network*, the Korean Constitutional Court considered the government's creation of an entity which would be empowered to tag websites they found to be inappropriate for minors. If a website was determined to be inappropriate for minors, then the operator of the website was required to "tag" the website. The tags would be recognized by filters and block the site. But it was the government who initiated a review of the Web and empowered itself to determine what websites should or should not be tagged. On the other side of the Pacific, the US Government made no similar effort to determine which websites were objectionable. It left the task to the

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[97] While it is rare, a jury does find a work of art to fail the Miller test and be considered obscene. On January 16, 2013, in a U.S. District Court, Ira Issac a film producer and self-proclaimed champion of free speech, was sentenced to four years confinement for making and marketing materials that the jury found to be "obscene" (in less than two hours of deliberations). The jury watched several full length videos showing females engaging in sex acts involving human bodily waste and in other instances engaged in sex acts with animals. At this point in American cultural evolution, Hustler and Larry Flynn is not obscene but Ira Issac is. An appeal is pending. *See Ira Isaacs Sentenced to 48 Months In Prison In Los Angeles Adult Obscenity Case*, NEWSROOM MAGAZINE (Jan. 17, 2013), available at http://newsroom-magazine.com/2013/executive-branch/justice-department/ira-issacs-sentenced-to-48-months-on-pandering-obscene-videos/.

[98] Jaewon Moon, *Obscenity Laws in a Paternalistic Society: The Korean Experience*, 2 Wash. U. Glob. Stud. L. Rev. 353 (2003).

local library to determine what was harmful, allowing the marketplace to empower citizens to make their own determinations.

Does the divergence in approaches to using filters reflect some deep philosophical difference between the two cultures or just random choice? The following discussion will try to address this question. Ultimately, we are left to speculate on how American courts would view the Korean government's attempt to protect minors, and whether they would allow an unelected commission of government bureaucrats to determine what websites are harmful to minors.

IV. COMPARISON OF LEGAL PHILOSOPHY

American and Korean legal traditions have evolved different world views that prize different values and priorities. Many commentators simply attributed the difference to Korea's Confucian tradition's uneasiness with sexual expression. But this broad brushstroke misses much more nuanced distinctions rooted in different points of view about man and his place in the universe. These differences grow out of Korean and American history, and how each culture wrestles with questions such as the nature of the self, our origins and destiny.

Though it may have been historical happenstance that Confucianism came to dominate this mountainous peninsula, Korea's geographic seclusion lent itself to traditional Confucian values of uniformity. Even as it rushes to take its place as a global player, Korea is still a homogenous culture. All Koreans speak one language, use a unique and indigenously developed alphabet, and belong to the same racial stock (Altaic). Most young Koreans receive a similar primary and secondary education using similar textbooks and methodology.[99] Its relatively small size allows Koreans to maintain the close family relationships so valued in Confucian culture. There is a felt identity among the populace of being Korean. Orthodoxy is a virtue, as throughout their history Korea has fended off a series of invaders, all ripping at what was Korean culture. Koreans have been willing to sacrifice a great deal for the sake of harmony and put great importance on cooperation, consensus, and social solidarity.

We see this sense of unity reflected in how Koreans speak. The family name is placed before one's given name. While Americans love to call people by their first name or even first syllable, Koreans remain largely as "people with no names." Typically Koreans address people by their family name with some socially acceptable title and thereby hide their given names, like President Kim, Professor Lee, Doctor Park, or simply Mr. Chung or Miss Choi. A woman with a child named Kildong would be addressed as "Kildong's mom."

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[99] Byung-Sun Oh, *Cultural Values and Human Rights: the Korean Perspective*, FOCUS Vol. 11 (March 1998), *available at* http://www.hurights.or.jp/archives/focus/section2/1998/03/cultural-values-and-human-rights-the-korean-perspective.html.

A typical mailing address in America takes the form of "John Doe, 123 Main Street, City, State." In Korea, this pattern is reversed to "State, City, Main Street 123, Doe John." Individuals represent not themselves but the group they belong to.[100] So, "I" is just part of "We." This may explain, at least in part, why Korean language does not strictly distinguish singular and plural forms. The "me vs. us" contrast can also be seen in the different usage of possessive pronouns between the two cultures. Americans use the word "my" when they refer to anything they have a personal, individual relationship with. The school I go to is "my" school, the company I work for is "my" company, and the country I live in is "my" country. However, in all these cases Koreans use "oorie," which is the Korean counterpart of "our." In Korea the possessive pronoun "my" is reserved for only those things that I have sole possession.[101] But then, Koreans even refer to their own spouses as "oorie" wife and "oorie" husband. In Korea when a thing is different from the rest of the group it belongs to, it is often regarded as wrong. In fact, the Korean word "tul-lee-dah" that is equivalent to "different" in English also means "wrong."[102]

The American landscape offered another scenario. In principle, the upstart colonies were conceived as a place where no one person would dominate and all theoretically would be welcomed. While at times portrayed as a melting pot, a patchwork quilt might be a more apt description of the American experience, made up of many different languages, races and cultures. Maintaining one's cultural heritage has always been part of what it means to be an American. If nothing else, such diversity results in more varied views on sex. American courts are always mindful to refer to "local" standards of obscenity. They acknowledge there is no one American point of view.[103] While law professors across the nation ask their classes if "it" will play in Peoria, the Midwestern city does not speak for Las Vegas, Miami or Maine.

America has served as a refuge for numerous groups seeking a home where they could realize their beliefs. The groups sometimes mixed with others, and sometimes chose to isolate themselves. But America did not only offer the opportunity to follow traditions. It also offered the freedom to remake traditions into something new. The great Western expanse provided an out for people who were dissatisfied with their government or community. Americans could reject the established view and create their own perspectives on America. Being American takes on many different meanings and perspectives. In Seoul, judicial deliberations instinctively focus on discerning what is the Korean way; what is the Korean answer to the present question. In

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[100] S.J. Chang, *When Korea Met America*, In Our Times Series, http://www.phy.duke.edu/~myhan/ot2-sj.html (last visited Mar. 7, 2010).

[101] *Id.*

[102] *Id.*

[103] *Miller*, 413 U.S. at 2618, 2619. (It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York.)

the District of Columbia, the Justices of the Supreme Court do not feel bound by any such shared homogeneity in trying to apply the Constitution to the parameters of a particular case. Each Justice carries his own individual view of justice, forged in his homes and communities which he brings to the table.

From the very conception of their analysis, the two systems consider different questions. Korean jurisprudence has a community-based perspective emphasizing individual sacrifice for the sake of societal harmony. Contrast this view to the American attitude which emphasizes the place of the individual. It may have been summarized best in the words of John Kennedy who once observed: "The rights of every man are diminished when the rights of one man are threatened."[104] A Korean court asks what is in the best interest of all, while an American court thinks of what boundaries may be put on the individual. One court instinctively moves in the direction of the group; the other instinctively moves in the direction of the one.

Korea and the United States have dramatically different attitudes towards the idea of public morals. With a common heritage and commonly held beliefs, it is not surprising that Ethics is taught as part of the basic education in Korea. The second article of the *Education Law of the Republic of Korea*, provides that "[E]ducation shall aim to enable every citizen to lead a life worthy of humankind and contribute to the development of a democratic state and the realization of an ideal of human co-prosperity by ensuring that one builds character and is equipped with independent abilities for living and necessary qualities as a democratic citizen under the humanitarian ideal."[105] America has resisted establishment of any type of state morality or ethics as much as it has rejected a state church. Americans tend to be traditional in their moral thinking. However, there are a great number of traditions that must exist side by side that profess many different beliefs about right and wrong. Fresh infusions of beliefs into American life have brought with them new challenges to preserving national unity in the face of spiritual diversity.

This governmental deference to diversity is not pegged to a group right, but an *individual* right. When it comes to right and wrong, the view of the one is equal to that of the many. American schools would find it difficult to find any agreement on what is a life worthy of humankind. The Supreme Court has always struggled to separate some kind of traditional moral truths necessary for the functioning of free society as separate and distinct from religious beliefs. However, they have never been able to articulate these beliefs beyond vague references to the core ideas incorporated in the Ten Commandments or reference to traditional values.[106] While commentators and politicians make a great to do about "American values," the term is so ambiguous as to say nothing at all. In essence, such talk has become nothing more than a rhetorical

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[104] John Kennedy, *Address on Civil Rights* (June 11, 1963), *available at* http://millercenter.org/scripps/archive/speeches/detail/3375.

[105] Chongko Choi, *Legal Philosophy and Theory in Korea: A Survey*, 32 Seoul Law Journal (Pophak), no. 3-4, 1991 at 61.

[106] Lemon v. Kurtzman, 403 U.S. 602 (1971).

tool used to validate a political agenda. One would be hard pressed to identify any standard that is generally accepted by all Americans. Much of Western history since the Middle Ages has been a litany of wars being fought to establish the dominance of one set of beliefs over another. The memories of this strife scarred every corner of Europe. No sect was spared from the devastation of these "holy" wars. The wars of old faiths were replaced with new wars over a variety of "isms". Those trying to escape that carnage settled on the North American continent. While this history drove Europe to be secular to the point of being anti-religious, Americans took a different path. Americans remain a reverent people who desire the opportunity to practice their beliefs. From the time of the Puritans and the *Mayflower Compact*, the founding communities were made on the basis of religious covenants.[107] But the diversity of opinion concerning beliefs made early patriots mutually wary of establishing any state-enforced morality. Everyone at some time had experienced the misfortune of being the minority at the mercy of the majority. So while Americans believe in morality, they are uncomfortable with attempts to legislate morality.

Each country's view of social morality closely tracks their view of government. Korean concepts of jurisprudence (*Kulak*) did not develop as a distinct area of study and lacks concrete jurisprudential concepts and methodology.[108] In the Confucian view, the primary objective of government and the law is to make the people *good*. Law is a way to create virtuous citizens and institutions that will keep society in harmony with the universe. "He who exercises government by means of his virtue may be compared to the north polar star, which keeps its place and all the stars turn towards it."[109] In his vision, the leader of the people represents the highest virtue. He is honest, benign, fair, modest, and takes the job of ruling his people very seriously. As such, he promotes only those who have demonstrated similar qualities and teaches others how to build better character through learning and moral education. This is the function of government. "If they (the people) be led by virtue, and uniformity sought to be given them by the rules of propriety, they will have the sense of shame, and moreover will become good."[110] In Confucian commentary on government, the "sense of shame" is essential to good government.[111] These ideals lead to the Korean ideal of *Hongik Ingan*, a type of

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[107] Penned in 1620 as the early English settlers arrived in the New World, the *Mayflower Compact* made explicit the basic socio-political positions for newly established communities. Speaking of forming a covenant to "combine ourselves into a civil Body Politic," those arriving on the *Mayflower* immediately identified a close and ineliminable connection between individuals and their community. This sentiment was echoed in founding documents of other colonies, such as the Fundamental Orders of Connecticut (1639) and the Massachusetts Body of Liberties (1641).

[108] Choi, *supra* note 102.

[109] Jenco Leigh, The Analects of Confucius Book 2 Ch. 1, (2007).

[110] *Id.*

[111] *Id.*

Platonic philosopher king who fulfills a life of doing *good* for others. The King uses his judgment for the betterment of the society.

Americans have a general distrust of government, and especially of any supposed expert who knows what is best for the rest of us. As once quipped by political analyst William Buckley, "I would rather be governed by the first two thousand people in the Boston telephone directory than by the faculty of Harvard University."[112] America was founded by people running away from government. Many times the government was the symbol of oppression to their faith and stood in opposition to the "good." It is not the natural order which gives credence to the law, but the consent of the participants who are looking for some degree of security—security not only from external threats but from the government itself. Americans vary in their comfort zone about their sexuality, but they would feel much more uncomfortable about a nameless government bureaucrat making decisions about what is a commonly held belief, or what qualities are necessary for a democratic citizen.

These attitudes reflect how each culture sees the world and man's place in it. Differences in Western and Eastern views of reality reach down even to our perception of time. In general, the Occidental concept of time is linear, with a beginning and an end, while Oriental cultures influenced by Buddhist thought have a concept that regards time as cyclical and in some sense illusory. These views have been discussed at length many times before and in greater detail than could be hoped for here. Suffice it say that for the West, change is not illusory and time is moving toward a finale. Harmony is not attainable in time as change is the only constant. While the Korean sense of time points towards holding onto the values of a Golden Age, Western vision focuses on some undetermined goal line. Whereas Koreans view such conflict as a threat to the natural order, they view progress as achieved through the conflict of competing values clashing against each other in the marketplace of ideas,

Traditionally Korean thought has seen the world as an orderly place (*Jaese Lihwa*), with Humanity as an integral part of the natural order.[113] Ethical and moral norms are as determinable as any aspect of the physical world. This order applies to all social matters including sexual relations. Whatever individual right citizens hold is inherent in the concept of them as a social being in a moral universe. This Eastern view of man is in stark contrast to assumptions underlying the American ethos. The focus is not on one's place in the natural order, but in one's relationship with a greater entity outside the natural order. The authors of the *Declaration of Independence* believed that the individual has rights because he is "endowed by his Creator" with these rights. It was not one's relation with others that is the basis of human existence, but one's personal relation with her creator.

American individualism must be understood as the culmination of earlier intellectual trends. While Newton revolutionized our thinking about the

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[112] Meet the Press (1965), as quoted in Ralph Keyes, The Quote Verifier: Who Said What, Where, and When 82 (2006).

[113] Choi, *supra* note 70, at 82.

physical world, the Reformation changed Western thinking about the moral order. Martin Luther removed the middle man and made the flock responsible directly to God through the Bible. The individual found the word of God in the bible not in a dogma enforced by either church or state. Direct reference to the Bible placed the individual at the center as the final arbitrator of faith. "The Reformation created an egalitarian validation of any individual's ability to interpret Scripture and relate to God."[114]

In the seventeenth century, the individualism implicit in religious pluralism would become more pronounced. John Locke proposed liberty of individual conscience. For Locke, the role of the magistrate should be confined to the maintenance of public tranquility and the defense of individual rights rather than the care of the soul. In his *Letter concerning Toleration* (1690), Locke presented a vision of the church as a purely voluntary association where a believer was free, according to conscience, to enter or leave at will. Locke crystallized a key Reformation shift: the idea that one's religious confession is a matter of individual choice rather than institutional imposition. Consequently, what is the "good" social order is also left to individual discretion.

One may argue this analysis is too sweeping and will point to exceptions that prove the rule. It is always hard to hit a moving target. But anyone who has spent time in both countries will find there is a different intestinal reaction to what happens in the public square. While the majority of Koreans are now Christian, old ways die hard. Traditionally Korean cosmetology did not allow for appeal to any ultimate reality beyond the here and now. The chosen discerned what was right for everyone in the community. The State is the ultimate arbitrator of the moral order. Americans lack confidence in their officials to discern between good and bad. The government does not preserve cosmic harmony but only civil peace. Rightly or not, Americans believe that there is another reality beyond this life and we will answer to God, not to the government. This reality ultimately places responsibility for moral choice with the individual. The Korean "our" mindset deemphasizes personal responsibility and initiative — a mindset which always poses the risk of losing face. American courts seem preoccupied with allowing people to make fools of themselves. Neither viewpoint seems to provide a satisfactory or consistent guide light as we wade through a sea of erotica.

CONCLUSION

What is the future of public morality in the law? In the United States, recent decisions draw into question the concept of morality as a basis for law. In *Lawrence v. Texas*,[115] the Court found that voluntary sexual conduct between

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[114] Cary J. Nederman, New Dictionary of the History of Ideas, Vol. 3 (2005), *available at* http://www.omnilogos.com/2012/05/31/individualism/ (last visited Nov. 16, 2012).

[115] Lawrence v. Texas, 539 U.S. 558 (2003).

adults was beyond the reach of government regulation. The majority's decision found that intimate, consensual conduct was part of the liberty protected by the substantive component of the Fourteenth Amendment's due process protection, and the right to liberty under the Due Process Clause includes the right to engage in sexual conduct without the intervention of the government. The majority concurred in Justice O'Connor's position that "[m]oral disapproval of the majority cannot be a legitimate governmental interest."[116] As pointed out by Justice Scalia in his dissent, the consequence of this reversal is unavoidable:

> The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable," *Bowers*, *supra*, at 196 — the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this *was* a legitimate state interest. The Court today reaches the opposite conclusion. The Texas statute, it says, "furthers *no legitimate state interest* which can justify its intrusion into the personal and private life of the individual," *ante*, at 18 (*emphasis added*). The Court embraces instead *Justice Stevens'* declaration in his *Bowers* dissent, 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," *ante*, at 17. This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review.[117]

In Scalia's estimation, the state no longer has a legitimate interest in the moral—and certainly not the sexual—lives of its citizens.

Justice Scalia's hypothesis was tested in *United States v. Stevens*.[118] The case dealt with films catering to sexual fetishes involving animal cruelty. A federal statute made it a crime to possess or sell any depictions of animal cruelty where the underlying conduct depicted is illegal. Mr. Stevens was convicted under the law for selling three videos of dog fights, but the conviction was overturned by the Third Circuit which found the law unconstitutional. Much of the argument centered on the poor wording of the statute and its application. However, Justice Alito did raise the issue of whether a particular expression can be prohibited because such conduct is seen as immoral. He

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[116] *Id.* at 573 (O'Connor, J., concurring) (citing Romer v. Evans, 517 U.S. 620, 634–35 (1996)).

[117] *Id.* at 586 (Scalia, J., dissenting).

[118] United States v. Stevens, 559 U.S. 460 (2010).

asked whether the government could legislate against any type of offensive opinion even hypothesizing a "Human Sacrifice Channel." The attorney for the defendant struggled for some time with the question but eventually answered in the negative and explained that just because something is repulsive, the government may not regulate speech unless it falls under one of the other categories of speech that are already unprotected.[119]

On April 20, 2010, the Court rendered an 8 to 1 decision that the federal law banning audio and video recordings of animal cruelty was unconstitutional. The Court declined to "carve out" an animal cruelty exception (similar to the child pornography exception) to obscenity analysis under the First Amendment. Writing for the Court, Chief Justice Roberts indicated that in the past the Court had held the First Amendment does not protect certain categories of speech but that does not mean that the Court has freewheeling authority to declare new categories of speech outside the scope of the First Amendment. In this case Congress used language of such alarming breadth that the statute would make it a crime to sell hunting videos in the District of Columbia, where hunting is illegal. The Court also said that the various exceptions Congress wrote into the law for *serious* scientific, journalistic or artistic work could not save the statute.[120] The Court declined to say whether Congress could write a statute that would be sufficiently targeted at crush videos to pass constitutional muster.

More importantly, the Court rejected the Government's argument that it should balance the value of the speech against the harm to society as a whole. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. It is not the job of the Court to diagnose the health of the nation's moral psyche. To do so would violate the basic concept of free speech in the Constitution. The tone of the decision expresses the distinctively American distrust towards its Government and the belief that it will act benevolently regarding prosecutorial discretion:

> Not to worry, the Government says: The Executive Branch construes §48 to reach only "extreme" cruelty, *Brief for United States* 8, and it "neither has brought nor will bring a prosecution for anything less," The Government hits this theme hard, invoking its prosecutorial discretion several times. *But the First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige* (*emphasis added*). We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly. This prosecution is itself evidence of the danger

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[119] *Dogfight Video Test the limits of Free Speech: Oral Argument of Stevens*, PBS New Hour (Oct. 6, 2000), http://www.pbs.org/newshour/bb/law/july-dec09/scotus_10-06.html.

[120] *Stevens*, 559 U.S. 460.

> in putting faith in government representations of prosecutorial restraint. When this legislation was enacted, the Executive Branch announced that it would interpret §48 as covering only depictions "of wanton cruelty to animals designed to appeal to a prurient interest in sex." No one suggests that the videos in this case fit that description.[121]

Some might assert that America's mistrust of handing over our welfare to the government is the paranoid psyche of the rabble. Others would argue that this strain of self-reliant individuality reaches to the core of America's intellectual ethos.

Scholars assert that Korea has legalized morals more than any country in East Asia.[122] Many believe that Korean laws regulating morality are needed; while others have noted that these laws should be discarded as archaic vestiges of the past. Whatever the answer is, the solution will be uniquely Korean. However, this solution will come in a Korea which is becoming more multi-ethnic and has many of its citizens spending some time abroad. Western concepts will be indigenized and married with Korea's Confucian traditions. The pace of globalization means that the changes that occurred over centuries in the West will happen in little more than several generations in the Hermit Kingdom. What is thought to be a life worth living will change over time. While only a few years ago homosexuality was a threat to moral order in Korea, it is now magically transformed and equated to a question of human dignity.

Whatever generalities are drawn here, the reality in both America and Korea is that intellectual consistency on this topic is sacrificed on the altar of politics. Prosecutors interested in advancing their own careers cherry pick their outrage to curry favor with the public. Lady Justice becomes a character in the theater of the absurd. In America we find the FCC determining that Private Ryan can say "fuck" but Bono can't.[123] At the same time it is difficult to reconcile the decision of the Korean Supreme Court with what is seen on TV nightly. Korean courts may find publications that provide instructions on

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[121] *Id.* at 1593.

[122] Chongko Choi, *Confucianism and Law in Korea*, 37 Seoul Law Journal (Pophak), no. 2, 1991 at 115.

[123] In 2004 the FCC ruled that the rock star Bono's exclamation, "this is really fucking brilliant!" at a Golden Globes Award ceremony violated the agency's rule against indecency, even though previously it had said that a "fleeting expletive" on radio or broadcast television would not be punished. The next year, the FCC backed off when it gave a pass to director Steven Spielberg's patriotic film *Saving Private Ryan* despite pervasive expletives. Although even one expletive is presumptively indecent, the FCC commissioners said, in the case of *Saving Private Ryan* the rough language was necessary to the film's artistic purpose. However, the commissioners would not accord the same artistic deference to director Ken Burn's documentary on the blues.

various sexual techniques for married couples to be obscene,[124] while one can readily find such instructional videos on Korean cable TV with naked actors simulating a variety of sex acts.[125] In the future, the law in this area may not be driven forward so much by public opinion and legal decisions, as by advances in technology. Oliver Wendell Holmes, Jr. wrote that "the tendency of the law everywhere is to transcend moral and reach external standards."[126] The global nature of the Internet has muddied domestic standards of public morality. How can parochial views of morality be applied to a technology which brings the whole world together in one place? The barriers to prosecution mounted by national borders not recognized by the Internet make many of the determinations of national courts meaningless. If nothing else, regulation becomes more nuanced.[127]

The Internet has made it nearly impossible to control the public's access to anything they are interested in, prurient or not. Before the Internet, protecting communities from sexually explicit materials consisted of closing down adult bookstores and theaters that were in plain view of unintended viewers. In the Internet age, such materials lie in the private domain of the consumer sitting at his terminal. The Internet has revolutionized communication because it allows for anonymous interaction between users. Anyone can publish content anonymously and leave no paper trail for others to identify the author. On the Internet, identities are fluid; men can be women and children can be adults. Whether society has an interest in protecting their minors from videos of Philippine donkey shows, it may be beyond our ability to control.

It is impossible to know how the Courts will respond to emerging questions such as revenge porn or advances in computer graphics that make it difficult to discern between art and reality. History suggests that Korea's decisions will be influenced by what they think the Government should do for the people, while American Courts will focus on people's ability to shield themselves from what they disapprove. With their own distinctive approach, each will have to face new issues pertaining to what is expressed in the town square, virtual or otherwise.

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[124] *Yum Jae Man*, 74To976.

[125] *Sex Lesson 10 Best*, Real TV (viewed on Feb. 28 2010).

[126] Oliver Wendell Holmes, Fraud, Malice, and Intent—The Theory of Torts, in The Common Law (1881), *in* The Collected Works of Justice Holmes, Vol. 3 at 184 (Sheldon M. Novick ed., 1995).

[127] *Yahoo* search engine and *Flickr* photo-sharing site (owned by Yahoo) altered their sites earlier this month to prevent users in Korea from switching off the safe-search facility. *See* Gethin Chamberlain, *No internet sex please, we're Indian*, The Guardian, Dec. 27, 2009, *available at* http://www.guardian.co.uk/technology/2009/dec/28/sex-internet-india-law (last visited Jan. 10, 2010).