

The Concept of Public Morality

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Public morality, like public health and safety, is a concern that goes beyond considerations of law and public policy. Public morals are affected, for good or ill, by the activities of private (in the sense of “non-governmental”) parties, and such parties have obligations in respect to it. The acts of private parties—indeed, sometimes even the apparently private acts of private parties—can and do have public consequences. And choices to do things that one knows will bring about of these consequences, whether directly or indirectly (in any of the relevant senses of “directly” and “indirectly”) are governed by moral norms, including, above all, norms of justice. Such norms will often constitute conclusive reasons for private parties not to bring about harmful public consequences.

Let us for just a moment lay aside the issue of public morality and focus instead on matters of public health and safety. Even apart from laws prohibiting the creation of fire hazards, for example, individuals have an obligation to avoid placing persons and property in jeopardy of fire. Similarly, even apart from legal liability in tort for unreasonably subjecting people to toxic pollutants, companies are under an obligation in justice to avoid freely spewing forth, say, carcinogenic smoke from their facilities. Concerns for public health and safety are, to be sure, justificatory grounds of criminal and civil laws; but they also ground moral obligations that obtain even apart from laws or in their absence.

What is true of public health and safety is equally true of public morals. Take, as an example, the problem of pornography. Material designed to appeal to the prurient interest in sex

by arousing carnal desire unintegrated with the procreative and unitive goods of marriage, where it flourishes, damages a community's moral ecology in ways analogous to those in which carcinogenic smoke spewing from a factory's stacks damages the community's physical ecology.

The central harm of pornography is not, as some people—especially some American judges—seem to suppose, that it shocks and offends people, any more than the central harm of carcinogenic smoke is that it smells bad. Rather, the central harm of pornography is moral harm—harm to character, and thus to the human goods and institutions, such as the good and institution of marriage, that are preserved and advanced by the disposition to act uprightly, and damaged and defiled by a contrary disposition, in respect to them. So the analogy is with the harmful impact of carcinogenic pollutants on the physical health of people subjected to them. And just as companies have an obligation in justice quite apart from considerations of legal liability to avoid damaging people's health by polluting the air, so too people have an obligation in justice even apart from legal prohibition to avoid harming people's character (and the goods and institutions that depend on widespread good character) by disseminating and making available to them pornographic materials.

Of course, an objection will immediately be raised. Pornography, it will be said, is quite unlike toxic environmental pollutants, even if it is true that pornography is morally bad in the way I have asserted. The difference is that members of a community *cannot* avoid breathing carcinogens that are spewed forth by a factory's smokestacks (except by leaving town); but they *can* avoid the morally harmful effects of pornography simply by declining to purchase and look at it. So, the argument goes, environmental polluters *really* do an injustice in spewing carcinogenic and other toxic pollutants into the air; pornographers, however, do no injustice to those who, after all, freely choose to subject themselves to their offerings. (This

counterargument is ordinarily raised in connection with the question whether *laws* against pornography are justified, but I'm considering it here simply on its own merits and, for the moment, apart from questions of legal regulation.)

I don't think this counterargument works. First of all, it can be, and often is, unjust to subject people to powerful temptations to do things that are harmful to them, morally or otherwise, and whether or not they are cognizant of the harm. Second, and more importantly, the accumulation of private decisions to use pornography, as it impacts those who choose to use it, affects—sometimes profoundly—the community as a whole. For example, where pornography flourishes, as it does in our own culture, it erodes important shared public understandings of sexuality and sexual morality on which the health of the institutions of marriage and family life in any culture vitally depend. This is a classic case in which the accumulation of apparently private choices of private parties has big public consequences.

So, the pornographer, though a private party, fails in respect of his duties in justice to public morality, just as the environmental polluter—ordinarily motivated by the same consideration, that is, money—fails in respect of his duties to public health. And pornographers are not alone among the private parties whose unjust actions damage public morality: people who write and pose for pornographic publications and films, people who distribute pornography and make it available in newsstands, bookstores, theatres, and video shops, and, notably, people who purchase pornography (thus sustaining the industries that produce and disseminate it), and even those who in non-commercial contexts circulate it to friends, fellow workers, etc.

Well, there is much more to be said about pornography and public morality, and I will say a little more later in relation to a particular species of liberal argument against public morals legislation. I introduce the subject here only for purposes of illustrating the first point I wanted

to make: namely, that public morality is not simply an issue about what laws we should have. Nor is it a concern that has no bearing on the moral deliberations and obligations of private parties, as opposed to public officials. The common good of public morality, that is, the good of a healthy moral ecology, generates obligations in justice for all of us, just as do the common goods of public health and safety.

Now let me make a second point, namely, that law and government play a secondary (or “subsidiary) role in upholding public morality. The primary role is played by families, churches, organizations such as the Boy Scouts, and other institutions that, by working closely with individuals, inculcate an understanding of morality and promote virtue. Despite the fact that public morality is a public good, its maintenance depends far more on contributions of private institutions than on those of law and government. Where families, churches, and other so-called institutions of “civil society” fail (or are unable) to play their parts, laws will hardly suffice to preserve public morals. Ordinarily, at least, law’s role is to *support*, families, churches, and the like. And, of course, law goes wrong when it displaces these institutions and usurps their authority. At the same time, the role of law in upholding public morality is undermined by families, churches, and other institutions who abdicate their responsibilities or, even worse, promote false and morally destructive practices.

Consider the current turmoil over marriage. If, as I believe, the good of marriage and its institutional integrity in our society depend on a firm understanding of, and public commitment to, marriage as a sexual union of one man and one woman, then a threat to marriage can come either from bad public policy or the misguided actions of key nongovernmental associations (or both). On the one hand, law and public policy, in the name of a false neutrality, could undermine marriage by authorizing as marriages or their equivalent intrinsically non-marital (e.g., same-sex

or polygamous) sexual relationships. In so doing, law and policy would make it immeasurably more difficult for families, churches, and other institutions of civil society to fulfill their primary role in upholding public morals in respect to marriage. On the other hand, even where the law maintains a sound doctrine of marriage, the institutional integrity of marriage could be gravely damaged by, for example, churches that, in the name of whatever moral or theological principle, bless same sex or polygamous unions, or companies that treat employees nonmarital sexual partners as “spouses.”

Of course, the validity of what I am saying about marriage *per se* entirely depends on whether I am right about its true nature. However, my point about public morality holds even if I’m wrong about marriage. Suppose I *am* wrong. Suppose that the true understanding of marriage extends to a range of possibilities including same-sex and polygamous relationships, and that it is mere bigotry that stands in the way of my perceiving this truth. In that case, public morals regarding marriage can be damaged either by laws unreasonably restricting marriage (as did anti-miscegenation laws that both reflected and reinforced racism in an earlier day) or by churches whose theologies and disciplines pertaining to marriage embody and promote bigotry.

Well, that is the sum and substance of what I have to say here about the obligations in justice of private parties to avoid damaging public morality and the primary role and responsibility of nongovernmental institutions in inculcating virtue and, thus, upholding public morals. I hope that what I’ve said helps to elucidate the concept of public morality by detaching it from the question of law’s part in protecting it. Now, however, I want to turn to that much debated question.

As traditionally conceived, the “police powers” of government extend to the protection and advancement of public health, safety, *and morals*. What is the nature of the power of

government to protect public morality? What is its justification? What is its scope and what are its limits?

One way of understanding “public morality” is simply as morality—the moral uprightness of individual people and the associations they form—considered insofar as it is a public good. But morality of what sort? Political morality, that is, the principles and norms of right and wrong as they pertain to the establishment of a system of government and to the government’s actions, is, in a rather obvious sense, a public good. It is certainly for the common good—indeed, it is a strict requirement of the common good of political society—that a just system of government be established and maintained and that the government act justly. But political morality is not what the government upholds—it is not the public good for whose sake a government of general jurisdiction acts—when it successfully exercises its police power to protect public morality. Public morals legislation does not regulate the government or governmental actors, as such. Rather, it regulates the behavior of individuals—citizens and those residing permanently or temporarily within the government’s jurisdiction. It limits *their* choices and behaviors. But, insofar as these are private (that is to say, non-governmental) actors, in what sense do these regulations protect a public good?

As we have seen, public morals laws, like health and safety regulations, regulate private conduct insofar as it harms, or threatens to harm, the public interest. Now, here it is important to avoid confusion. Sometimes, the term “private,” when used to describe or classify conduct, is meant to indicate conduct that does not bear on the public interest, or which is not legitimately subject to government prohibition or restriction even if it does affect the public interest. The term thus figures in accounts of, or arguments about, political morality. Typically, it is invoked as part of a claim about the alleged injustice of certain acts of government that, say, violate the

right of the individual against certain forms of regulation—including morals laws. Such laws, it is commonly asserted, violate citizens’ “constitutional liberty,” or “right to privacy,” or “right to moral independence,” or what have you. Obviously, this is not how I am here using the term. Rather, I use it to refer to conduct by individuals or groups acting as private parties, as opposed to those exercising the power of the state.

Now this is not to suggest that the actions of governments cannot harm public morality. Nothing could be further from the truth. And I have in mind here not merely the failure of government prudently to act where it can to protect public morality against the damaging acts of private parties. That is certainly one thing. Another thing, however, is government action that itself positively undermines public morals by, for example, encouraging and facilitating immoral acts by private citizens. If prostitution, for example, is, as I believe it to be, a wicked practice, then local governments in the Netherlands undermine public morality by (assuming, as I do with the greatest caution, that the *New York Times* is to be believed) providing free prostitutes to physically disabled (though evidently not too physically disabled) men (and, I have no doubt, women) who request them. But, of course, no government is going to legislate against its own bad moral judgments. However bizarre the Dutch policy, it would be even more peculiar to find the Dutch government enacting morals legislation to prohibit the Dutch government from providing prostitutes (though there wouldn’t be anything odd about the people of the Netherlands, were they so inclined, constitutionally prohibiting their government from getting up to such shenanigans). If the Dutch government saw the thing rightly from the moral point of view, there would be no need for legislation; it would simply discontinue the policy of providing prostitutes.

Staying with the example of prostitution—a classic subject of morals laws—let us think further about what public good is damaged, what public harm is done, by the provision of prostitutes, whether by governments in the grip of sexual liberationist ideology or private businessmen motivated by greed.

Assuming, again, that prostitution is indeed immoral, then the availability of prostitutes is going to facilitate immoral acts by individuals—prostitutes and their customers. Of course, the commercial sex acts will likely take place in “private,” that is, behind closed doors, and it could be the case that there is no highly visible publicizing of the prostitutes’ availability (though unless there is some way of getting the word out publicly, there won’t be much work for the prostitutes). Still, *public* interests are damaged. The public has an interest in men not engaging prostitutes: for when they do, they damage their own characters; they render themselves less solid and reliable as husbands and fathers; they weaken their marriages and their ability to enter into good marriages and authentically model for others (including their children) the virtue of chastity on which the integrity of marriages and of marriage as an institution in any given society depends; they set bad examples for others. In short, they damage what I have referred to as the community’s “moral ecology”—an ecology as vital to the community’s well-being, and, as such, as integral to the public interest, as the physical ecology which is protected by, for example, environmental laws enacted pursuant to the police powers to protect public health.

Now, the question arises as to the scope of the police power to protect public morality. Much of what I’ve said about the harm of prostitution applies equally to fornication and adultery. And, to be sure, public morals legislation has traditionally forbidden these vices, just as it has forbidden prostitution. However, some people argue that while the legal prohibition of prostitution is legitimately within the scope of the police powers, the prohibition of fornication

and adultery are not. The latter vices, however wicked and destructive of important public interests, are truly private, at least insofar as they are engaged in by consenting adults.

Apparently, the view is that it is the commercial aspect of prostitution that makes the immoral acts of consenting adults in this case an issue of *public*, as opposed to purely *private*, morality.

It is, of course, true that prostitutes and their pimps are inviting and doing business with “the public” in a way that ordinary fornicators and adulterers are not. And I can certainly see how this distinction could be relevant to the prudential reasoning of legislators considering enactment or repeal of legal prohibitions of non-commercial sexual vice. What I cannot see, however, is the ground for claiming *that a strict principle of justice* excludes the criminal prohibition of non-commercial sexual vice. The reasons for prohibition—namely the protection a community’s moral ecology against the corrosive effects on marriage and family life of vices such as fornication and adultery—may be defeated by competing prudential considerations; but where they are not defeated by such considerations, no principle of justice of which I am aware provides a trumping reason.

Needless to say, a great many people believe the contrary. Some doubt that there is anything morally wrong with any form of sex act between consenting adults. Where there is no coercion or, perhaps, dishonesty involved, they find nothing morally objectionable against prostitution, much less adultery and fornication. If such acts tend to undermine the institutions of marriage and the family, as these institutions are traditionally understood, then so much the worse for these institutions. These institutions are, in any event, in need of transformation, partisans of sexual liberation insist, in light of a new, “uninhibited,” more “enlightened” and “inclusive” morality. Well, perhaps you will excuse my ignoring people who see things this way for present purposes. If they are correct, then traditional public morals legislation, at least

insofar as it pertains to what has been considered sexual vice, is misguided at its root. And the reason for not enforcing by law traditional concepts of sexual morality is that these concepts are themselves unsound. Of course, I think people who suppose that prostitution, adultery, fornication, and the like are morally innocent are profoundly mistaken, and I have set forth my reasons for so thinking at great length in various publications.* I won't repeat my arguments here.

The more interesting moral criticisms of the criminal prohibition of vices like adultery and fornication come from people who agree, or are, at least, willing to grant for the sake of argument, that these are in fact vices. The most familiar form of argument along these lines appeals to the idea of a basic individual moral right to "autonomy," "privacy," "moral independence," or what have you. Why is it allegedly wrong to criminalize fornication? Because, it is asserted, people have a right to fornicate—a "moral right to do wrong." Perhaps this is because fornication is a "private" matter. The trouble here, though, is that fornication is one of those vices that, when widely practiced, tolerated, and, inevitably, accepted, has very big and very public consequences—consequences that provide a perfectly intelligible reason for legal proscription, or, short of that, non-coercive public efforts to discourage it.

To his credit, Ronald Dworkin candidly acknowledges that apparently private vices—including vices, such as pornography, to which he believes people have a moral right—can and do damage the public interest. And Dworkin does not propose to derive rights to such vices from a general right to liberty or autonomy. He doesn't believe in any such general right.

Government restricts liberty and autonomy all the time without touching upon, much less

* See *In Defense of Natural Law*, chs. 8, 9, 15, and 16. See also John Finnis, "Law, Morality, and 'Sexual Orientation,'" *Notre Dame Law Review*, Vol. 69 (1994) and "The Good of Marriage and the Morality of Sexual Relations," *American Journal of Jurisprudence*, Vol. 42 (1997).

violating, anybody's rights. For Dworkin, it is a basic right to equality—a right of individuals to be treated by government with equal concern and respect—that grounds a right of moral independence that provides the principled, moral reason for government to refrain from criminalizing pornography (or, a Dworkinian might easily argue, adultery, fornication, even prostitution) despite its harm to the public interest.*

Dworkin maintains that government violates the basic right to equal concern and respect when it restricts liberty on the ground that one citizen's conception of what makes for or detracts from a valuable and morally worthy way of life is superior to another citizens' conception. For example, in forbidding pornography, the government limits Larry Flynt's liberty—unjustly, by hypothesis—on the ground that Billy Graham's view of whether pornography is wicked or harmless is the correct one. Of course, Dworkin does not claim that the government's error is in supposing that there *is* a right answer to the moral question of pornography, or even that it is Graham, rather than Flynt, who has the right answer. Indeed, he candidly—and rightly—concedes that pornography, where it is permitted to flourish, makes the community worse off in very concrete moral respects, namely, it

sharply limit[s] the ability of individuals consciously and reflectively to influence the conditions of their own and their children's development. It ... limit[s] their ability to bring about the cultural structure that they think best, a structure in which sexual experience in general has dignity and beauty, without which their own and their families' experience are likely to have these qualities in less degree
(*A Matter of Principle*, p. 349)

* Dworkin sets forth his view most fully in "Do We Have a Right to Pornography?," in *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985).

As I say, Dworkin is right to concede what he concedes about the way in which pornography (and we might add other forms of sexual vice) damages the community's moral ecology—and thus the public interest. The trouble is that, having made these concessions, his argument from the principle of equality falls apart. The basic problem is that legislators and other officials who act on the proposition that pornography, for example, is damaging to the community in the way Dworkin concedes it is, are not judging between Larry Flynt and Billy Graham, or even the moral convictions of Larry Flynt and Billy Graham, *inasmuch as they are Flynt's and Graham's*. They are acting, assuming (as Dworkin does) that they are responsible, conscientious officials, on *their* best judgment as to whether and how pornography is bad. They are not banning pornography because *Flynt is for it and/or Graham is against it*. Nor does Dworkin imagine that that is *why* they are banning it. As he is perfectly aware, the fact that the judgment that pornography is morally bad and destructive of the common good is Graham's (or Dworkin's or mine) is of *no particular relevance* to the officials' deliberations. They are interested in reasons and arguments—not individuals. In judging the anti-pornography view to be sound and the pro-pornography view to be unsound, they are, to be sure, treating *positions* as other than equal (and inasmuch as these positions are held by people, one might say, at some small risk of misleading, that they are treating *different people's positions* unequally). But insofar as it is the *positions* as such being judged, they are in no way treating *people—including the people holding the positions*—unequally. So, although I agree with Dworkin that government has an obligation in justice to treat those under its authority with equal concern and respect, I find no violation of this principle in laws against pornography, prostitution, adultery, fornication, and the like.

In his recent work, John Finnis has proposed a principled moral limit to the authority of the state to enforce morality.* Finnis's argument is far less sweeping in its scope than Dworkin's, and he entirely eschews the anti-perfectionism that Dworkin's thought shares with other orthodox liberal approaches to the question. It does not appeal to alleged rights to privacy, autonomy, liberty, or moral independence, as grounds for limitation on governmental authority to criminalize immoral behavior; and only in the most highly attenuated and strictly limited sense can it be said to license a moral right to do moral wrong, that is, a right to be free of governmental interference with the strictly private immoral acts of consenting adults. Nothing in Finnis's argument implies or entails the "expressive individualism," and accompanying elements of relativism, characteristic of liberal political theories.

The premise of Finnis's argument is that the common good of the political community is, fundamentally, an instrumental, rather than an intrinsic, constitutive, and, as such, basic, human good. This is not to suggest that the political common good is unimportant or dispensable. On the contrary, Finnis recognizes that care of the political common good is profoundly important to the well-being of human persons and the associations they form—including associations, such as the family and church, whose common good is itself intrinsic and *not* merely instrumental. Moreover, the political common good is "great and godlike," to quote Aristotle, in its profoundly ambitious range, which is, Finnis says, "to secure the whole ensemble of . . . conditions to favour, facilitate, and foster the realization by each individual of his or her personal development" (Finnis, "Is Natural Law Theory Compatible with Limited Government?," in Robert P. George, ed. *Natural Law, Liberalism, and Morality*, p. 5). Thus, political authority legitimately extends even to the regulation, within limits, "of friendships, marriage, families, and

* See for example, John Finnis, "Is Natural Law Theory Compatible with Limited Government?," in Robert P. George (ed.), *Natural Law, Liberalism, and Morality* (Oxford: Clarendon Press, 1996).

religious associations, as well as all the many organizations and associations which, like the state itself, have only an instrumental common good” (ibid.).

Still, inasmuch as the political common good *is* an instrumental good, Finnis argues, political authority is limited by the inherent limits of its general justifying aim: viz., to secure the social conditions of the well-being of individuals and their communities. So, he quotes from the teaching of the Second Vatican Council which, in its Declaration on Religious Freedom (*Dignitatis Humanae*), clearly affirm the instrumental quality of the political common good. Speaking of restrictions on religious liberty, the Declaration proposes that such restrictions are justified where required “for [1] the effective protection of the rights of all citizens and of their peaceful coexistence, [2] a sufficient care for the authentic public peace of an ordered common life in true justice, and [3] a proper upholding of public morality.”

Now, as Finnis says, the Council’s idea of public morality is precisely the preservation of a social environment conducive to virtue and inhospitable to at least the grosser forms of vice. This is not to say, however, that government may legitimately promote virtue and repress vice, *as such*, that is, *just for their own sakes*, at least via coercive means. Finnis does not claim that the Council expressly rules this sort of legal moralism and paternalism out of bounds; his claim is merely that “government is precisely not presented here as dedicated to the coercive promotion of virtue and the repression of vice, as such” (ibid., p. 6). I’m not sure whether the term “precisely” in Finnis’s remark is doing any real work. Perhaps it is meant to suggest that the Council really did face the issue more or less squarely and come down the way Finnis thinks we should come down once we’ve taken on board the implications for the scope of political authority of the fact that the common good of political society is an instrumental, rather than intrinsic, good. In any event, the key thing is that Finnis thinks that, having taken on board this fact, we

should see that law and the state exceed their just authority—thus violating a principle of justice—when they go beyond the protection of the public moral environment and criminalize “even secret and truly consensual adult acts of vice” (ibid., p. 8).

I disagree. Let me note, however, that the difference between Finnis and me, as a practical matter, is quite small. First of all, even in the absence of a principled limit to the authority of the state to enforce true moral obligations along the lines of the one Finnis proposes, it seems to me that there are often compelling prudential reasons for law to tolerate vices, lest efforts to eradicate them produce worse evils still. (This is Aquinas’s position in *Summa Theologiae* I-II, q. 96, a. 1, and one that I have endorsed in all of my writings on the subject.) Second, Finnis’s position is hardly a liberal, much less a strictly libertarian, one. Unlike, say Dworkin and other mainstream liberal political theorists, Finnis goes so far as to say that “the political community’s rationale requires that its public managing structure, the state, should deliberately and publicly identify, encourage, facilitate, and support the truly worthwhile (including moral virtue), should deliberately and publicly identify, discourage and hinder the harmful and evil, and should by its criminal prohibitions and sanctions (as well as its other laws and policies) assist people with parental responsibilities to educate children and young people in virtue and to discourage their vices” (ibid.). Moreover, virtually the entire range of traditional morals legislation can and would be justified on grounds that fit well within Finnis’s conception of the scope of the police power to uphold public morals. Laws against intrinsic evils such as prostitution, pornography, drug abuse, and the like, as well as those regulating gambling, alcohol, etc., are justified, in part, by a concern to protect the public environment in ways that Finnis’s approach to the question does not exclude in principle.

On the subject of moral paternalism, on which we disagree, I suspect that the difference between Finnis' position and mine is narrow. He would exclude *in principle*, and I would not, laws against "private" (e.g., non-commercial) fornication, adultery, and sodomy. But where he would permit regulation, as in prohibiting prostitution, shutting down bathhouses, criminalizing the sale illicit drugs, etc., I suspect he would see any good paternalistic side effects of such state action as welcome. In other words, if I'm right, Finnis would not see paternalism as a valid justification for criminalization of a vice; but where criminalization is justified for other reasons, he would welcome good paternalistic consequences and would believe the state to be acting within its rightful authority in structuring its laws and activities to produce such consequences where possible. (What I have in mind here is analogous to the way in which some non-retributive goals of punishment systems—such as deterrence and rehabilitation—are welcome, and may rightly be sought, though, by themselves, they do not justify punishment, nor are they its central purpose.)

Why, then, do I resist Finnis's argument on the basic point? Two reasons: First, it doesn't follow, or so it seems to me, from the instrumental nature of the political common good that moral paternalism, where it can be effective, is beyond the scope of that good. Second, I think that the concept of truly secret vices is, when it comes to laws such as those pertaining to fornication, adultery, and sodomy, a very slippery and unsatisfactory one. "Secret" vices have a way of not staying secret. There may be good prudential reasons not to attack them with the full force of the law—and even where the law is employed, authorities should be careful not to employ excessive zeal in enforcing it—but that is not to say that, *as a matter of principle*, the law may not forbid them.