

Sex in Context:
The Constitution and Images

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Abstract:

This paper examines the changing context for sexual images and the details that give law meaning. The details are evident in Congressional efforts to regulate sex on the Internet and the Supreme Court's response as well as various contexts for encountering forbidden images from stag films and peep shows to the local public library and sex sites on the web. The paper is part of a larger project on seeing law and the idea of "Blind Justice." It was originally developed for an issue of Law, Text, Culture that was called "Trouble With Pictures" where the focus was on pictures we are not supposed to see.

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An article in *The New Yorker* recently observed that Hugh Hefner became rich by selling images of “the girl next door with her clothes off.”¹ His *Playboy* magazine has sold well for fifty years because it has been a relatively safe way to get a forbidden peek at women with their clothes off. While *The New Yorker* is not generally thought of as having the same appeal, the magazine ran a full page of *Playboy* nudes along with its story on Hefner. Although each picture was quite small, this mini-centerfold had a traditional appeal.² It was also pretty good evidence that sexual images are indeed ubiquitous in the West and that this ubiquity has changed the relationship between pornography and the law.³

In the past, pornographic images required immersion in an alien, sometimes threatening context, which highlighted the transgression associated with the forbidden images.⁴ Today images with no tease or ritualization of the disorderly prelude⁵ are at least as close as one’s desk and probably ones lap.⁶ Crude sexual images pop up without invitation and absent the contextual warnings of old. Even where they are sought, the meaning of revelry, the consequences of consumption are seldom clear.⁷ In this climate, it

¹ Joan Acocella, “The Girls Next Door: Life in the Centerfold,” *The New Yorker*, March 20, 2006, 144.

² A year before, the magazine, in a review by Francine Du Plessix Gray, lamented the demise of American striptease, noting that this form of burlesque may have been “killed off by the general pornification of society.”²

³ Pornographic or pornography is meant to refer to sex related material that is prohibited. Many other terms are used by the courts for similar material: such as sexually explicit, indecent. The vernacular has even more.

⁴ Dag Yngvesson, “Rated X - A Journey Through Porn” (2000). The pornographic film industry is centered in the San Fernando Valley of Southern California.

⁵ Gray, “Dirty Dancing,” 89.

⁶ The San Francisco chronicle reported a hearing on a proposed ban on private performances at strip clubs, week of August 6, 2006.

⁷ Nicholas Rose and Mariana Valverde, (1998) ‘Governed by Law?’ *Social & Legal Studies* 7/4 London: Sage Publications.

is not even always evident what it means to possess an image.⁸ The law, in this state, is without many of the important and instructive contextual clues that help to draw the lines on what is forbidden and what is not.⁹ Yet, as with other contemporary elements of legal authority its facelessness appears to suggest law continues to be a powerful force in social life. And, in the case of the forbidden images that deal with sex, the power of the law lurks with new significance just out of sight.

The Fine Grained Details

Life contains details that are the key to grasping the meaning, authority and significance of law in general, the First Amendment, and the limits on protections accorded to viewing sexual images. The detail adds up to a context in which we understand what it is acceptable to see. The context is how we know the part that constitutional law and enforcement plays in delineating legitimate viewing. Images appear in context and limits on what can be viewed have to be understood at least in part with reference to that context. The contextual details are a key to constitutional law and inquiry into the way that images in the purview of the First Amendment may be seen helps in understanding the constitutive character of stable legal systems.¹⁰

In this sense, or at least in a sense that is only a minor tangent, law is like the city. Real cities, we have recently been reminded, as we lament the passing of New Orleans,

⁸ Walter Benjamin's "Arcades Project" tells us of the importance of spaces as an aspect of material culture. Here spaces and law are discussed as aspects of identity, the constitution of identity.

⁹ This essay is planned as one of a series on the paradoxes of "blind justice". See *People v. Wayman*, 2008 WL 681337 (Illinois App. 5th Dist., March 10, 2008, #5-05-0559).

¹⁰ Stewart Macaulay, *Images of Law In Everyday Life: The Lessons of School, Entertainment, and Spectator Sports*, *Law and Society Review* (1987) 21:185.

contain “the small-grained details of everyday life.”¹¹ These have been built up over decades and they can’t be reproduced by even well planned suburbs and certainly not the cookie cutter housing and theme parks that are so common in the United States. It is not that a city can’t be reconstructed in a cookie cutter fashion but, as is the case with New Orleans, it is clear that a great deal will be lost. Law as it ordinarily operates has more in common with the odd building, seemingly ephemeral graffiti or incidental passing of a police cruiser than students of constitutional law are inclined to acknowledge. In the case of the First Amendment, what it means to “know something when we see it”¹² can be taken as a reference to the act of seeing in context with all the helpful clues that entails.

Like the shopping arcades of Paris for cultural theorist Walter Benjamin, the specifics that constitute law form structures and practices determining its reach and constituting its authority. British historian E. P. Thompson, writing in the 1960s about the details of medieval legal reality, offered a vivid picture of law. He saw it operating as both idea and reality. The “Foreword” to his *Whigs and Hunters* defined the dualism of law and transcended some of the relativism prevalent at the time.¹³ In spite of the rich context, the feudal authority, the brutal conditions of life, the law also existed in the mind as consciousness. In this formulation, and that of Douglas Hay, it was not the hangings that solidified law’s authority but the power to pardon, or imprison.¹⁴ One of the

¹¹ Nicolai Ouroussoff, writing about architectural choices in New Orleans after Hurricane Katrina, “Katrina’s Legacy: Theme Park or Cookie Cutter?” *The New York Times* B1 October 18, 2005.

¹² Justice Potter Stewart.

¹³ Thompson, E.P. *Whigs and Hunters: The Origin of the Black Act*. (New York: Pantheon, 1975).

¹⁴ Douglas Hay, *Albion’s Fatal Tree*. See also Ludwig Wittgenstein, *Philosophical Investigations* (New York: Macmillan Co., 1958); Peter Winch, *The Idea of a Social Science*; Charles Taylor, “Interpretation and the Sciences of Man.”

challenges that hasn't quite been met in the last four decades is the synthesis of detail or context and the more abstract dimensions of authority and obedience.¹⁵

In the context of constitutional law and the First Amendment, the details deserve more attention. In the public law part of contemporary political science we first saw the detail in society as "impact." This was the sometimes-puzzling attempt to find out if anyone cared what the Supreme Court had to say. Subsequently, the "law and society" approach, though it paid little attention to constitutional law, broadened consideration of the social dimensions of law, particularly lawyers, local courts and police. The growth of this academic movement paralleled a reemergence of interest in pornography as misogynous and, in this context, the local dimensions of pornography. So, while the Supreme Court was becoming somewhat less interested in the topic, local contexts from city halls to schools and colleges were attending to the "New Politics of Pornography".¹⁶

Academic and intellectual inquiry into the meaning of law in general parallels these reflections on the First Amendment. In the last fifty years there has been considerable flux. Gray, writing in *The New Yorker* about the 1950s, described striptease as a world with style, complexity and multiple meanings where women controlled male lust. A world on its way out, she notes.¹⁷ This was the period in which First Amendment protection emerged. The 60's, a period of liberation, were followed by the reactions of the Meese commission while the U.S. Supreme Court continued to expand constitutional

¹⁵ But see Pierre Bourdieu *Outline of a Theory of Practice* (Cambridge: Cambridge University Press, 1977); Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge: Harvard University Press, 1991); Lucy E. Salyer, (1991) "The Constitutive Nature of Law in American History," *Legal Studies Forum* XV: 61-64; Rosemary Coombe. "The Cultural Life of Things," *American University Journal of International Law and Policy* 70 (1995), 791.

¹⁶ Donald Downs, *The New Politics of Pornography* (Chicago: University of Chicago Press, 1989).

¹⁷ Gray, "Dirty Dancing," 87-89.

protection. The feminist attack on pornography in the 1980s incorporated an attack on liberalism and the idea that a façade of law could exist outside the sexual lives and social relations of men and women.¹⁸ That attack itself came under scrutiny from liberals in the academy and the legal profession and conservative capture of the government brought new legislation at the same time that the new digital technologies presented new contexts for viewing sexual images.

Distinctions drawn in society between art and pornography are associated with taste and ultimately reflect social class. In some circles, sexual commentary is open and images of the body that would be offensive or forbidden in other contexts are flaunted. *The New Yorker's* extensive review of *Playboy* centerfolds has been mentioned earlier and *The New York Times*, in an article on art revealing the body, articulated the aesthetic contention that defines one of the boundaries of acceptable images. Professor Lynda Nead, who co-edited the book *Law and the Image*, treats these cultural classifications that determine what is legitimate to see as resting "...largely on the judgments of men of taste."¹⁹ Her focus is Sir Kenneth Clark's book *The Nude: A Study of Ideal Art*²⁰ where the TV host and connoisseur writes that the function of the nude is to give man the opportunity to "feel like a god..." to be "close to divinity in those flashes of self-identification when, through our own bodies, we seem to be aware of a universal order."²¹ Its aspiration to perfection allows the "man of taste" to separate the naked from the nude. But, in her formulation, encountering the obscene presents challenges and art can't

¹⁸ Catharine MacKinnon, *Only Words*.

¹⁹ Lynda Nead, "Bodies in Judgment," in Douzinas and Nead, *Law and the Image* (University of Chicago Press, 1999) 224.

²⁰ (London: John Murray, 1956).

²¹ *Id.* at 357.

handle too much of it. For Clark, as discussed by Nead, these men of taste ultimately must manage arousal by controlling access to the public.

Obscenity prosecution is a concern for the public rather than the connoisseur.²² When Justice William Brennan outlined what would be protected under the First Amendment in the 1957 case, *Roth v. United States*, he suggested that art, politics and science would render the portrayal of sex protected speech and that which seemed simply to arouse would be unprotected.²³ In this foundational argument for modern constitutional law on pornography, the use to which an image is put, the context, became the basis for drawing the lines between the acceptable and the prohibited. Thus, the law operates without the burden of connoisseurship at the other end of the taste spectrum. With the widespread sexual images available on the Internet, the place and potential imposition of law has little to do with appreciation. Indeed, it is harder to appreciate itself.

Not Seeing in Law

For the British law professor Costas Douzinas and contributors to the collection he edited with Lynda Nead,²⁴ there is a split between law and the image in the modern state. For, roughly, the last 500 years, the authority of law has been abstracted from the details. In this framework, law draws its authority from the facelessness at the heart of state power. This is what Douzinas, in an essay on the power of what is not seen in law, refers to as the “anti-prosopon.” The “anti-prosopon,” or non-face of law²⁵ refers to the

²² Or, hopefully, the scholar.

²³ *Roth v. United States*, 354 U.S. 376 (1957).

²⁴ Costas Douzinas, “Prosopon and Antiprosopon: Prolegomena for a Legal Iconology,” *Law and the Image*.

²⁵ When I first encountered their book in a class I teach on the images of law, “Visualizing Justice”, it seemed over stated. It is challenging to talk about not seeing and that challenge continues throughout the collection. In Nead’s discussion of pornography there are other challenges, such as seeing the class dimensions constituting what is forbidden.

five hundred year old effort in the West to emphasize the abstract and non-visual dimensions of law. We are taught to turn away from the details to appreciate the abstractions that are conventionally associated with law. The traditional imagelessness of law lets it transcend reality. Indeed, in the guise of legal realism, the amorphous sense of law as words and concepts allow “it” to avoid attention to the social structures and institutions on which the authority of law depends.²⁶

The reality that is governed by the unseen is what the late British law professor H.L.A. Hart seemed to be after in proposing important “secondary rules” that would rescue positivism from meaningless abstractions and situate it more fully in experience.²⁷ Rather than obedience to the grand abstraction of “Law” we are obedient to intervening forces on a smaller scale that is more present in our lives. The police officer, of course, and the various ways we know we must treat him or her. In the guise of secondary rules, what we see as a “Stop” sign is red and octagonal and it radiates the authority of the police officer waiting to appear from nowhere.²⁸ Similarly the lawyer’s office with its visual display of legal authority in titles, on book shelves and in proximity to the court is a veritable smorgasbord of images that stem from the all-important “secondary rules”.

In another manifestation of realism, abstraction allows law to seem to be “all over”.²⁹ This profound insight, associated with a body of “Law and Society” scholarship, deserves serious attention. While it is slow to break the stranglehold that Supreme Court

²⁶ John Brigham and Christine B. Harrington (1989) "Realism and Its Consequences: An Inquiry into Contemporary Sociolegal Research," 17 *International Journal of the Sociology of Law* 41.

²⁷ *The Concept of Law* (Oxford: Oxford University Press, 1961). See also Nicola Lacey, *A Life of HLA Hart: The Nightmare and the Noble Dream* (Oxford: Oxford University Press, 2004).

²⁸ The seeming paradox (and annoyance) of the police officer hiding in order to enforce the law is actually consistent with the absent face of law.

²⁹ Austin Sarat, “...The Law is All Over’: Power, Resistance, and the Legal Consciousness of the Welfare Poor,” 2 *Yale Journal of Law & the Humanities* 343 (1988).

and constitutional law scholarship has on Political Science, its suggestion of the importance of focusing outside the courts is particularly exciting for scholars outside the legal profession. Law can operate on a pervasive realist foundation and even, in some senses be “all over” while still being authoritative, at least in part because it is faceless. Law is the absence of image in the very references to “law” as an eminent abstraction that animates prosecutions, judgments and punishments.

The tension between law and image is confronted here at the very point at which the law is under pressure to change and incorporate the image in the contemporary West. The image can be very present while getting all mixed up in the “complexity” of some post-modern commentary about law. Images are everywhere in the convoluted, hyper-realism of relativistic interpretivism, one of the poles in a movements that has its own positivistic divide. Relativistic interpretivism is consistent with the pluralism of American public policy where the work and the image of law’s authority are not without details. In fact pluralism revels in the details to herald the importance of interpretation while obfuscating the nature of laws authority.

Not seeing is what the law of forbidden images, of the obscene and the pornographic, is all about. What we are allowed to see is the subject of continuing Supreme Court litigation and law review analysis.³⁰ With *Stanley v. Georgia*,³¹ the home had been beyond the gaze of the law with regard to the obscene. In itself, the center of domestic life was a sanctuary, a space away. The wired home is no longer separate.³² With Internet access it has become connected to the digital world. While it has been clear about children and pornography, the law has become more abstract in the context of

³⁰ Martha McCarthy, Internet Censorship: Values in Conflict, 183 *Ed. Law Rep.* 299, 307 (2004).

³¹ *Stanley v. Georgia*, 394 U.S. 557 (1969).

³² See arrest of Mr. Grenier in Amherst for possession of pornography November 28, 2006.

digital communication and the Internet. In *US v. Thomas* (1996), an early computer pornography case from the 6th Circuit involving GIF files, the justices declined to accept the argument that the files were anything other than the images that they began with, before they were scanned, or ended with, after they were printed.³³ In general sexual images are not forbidden unless they involve children as performers or consumers.³⁴ But, context has become more important as it has become more confusing. Sexual images and performances may be regulated,³⁵ particularly when they involve media that may at times be assaultive.³⁶

In *Reno v. American Civil Liberties Union* (1997),³⁷ the Supreme Court invalidated the Communications Decency Act (CDA) of 1996³⁸ that had sought to protect minors from “patently offensive” and “indecent” communication on the Internet. The opinion by Justice Stevens spoke for essentially the entire Court. The only dissenting opinion, by Justice O’Connor, was partial, and only the former Chief Justice joined with her. While the Court decided on the vagueness of the legislation, they gave considerable attention to the nature of the Internet as it was developing in its infancy. In particular, the Court distinguished the Internet from radio. Although both were seen as easily accessed

³³ See also, *American Libraries Assn. v. Pataki*, 969 F. Supp. 160 (S.D. N.Y. 1997) in which the U.S. District Court for the Southern District of New York enjoined a New York State Statute providing for local pornography prosecution based on the Commerce Clause of the U.S. Constitution.

³⁴ *New York v. Ferber* 458 U.S.747 (1982); *Osborne v. Ohio* 495 U.S. 103 (1990).

³⁵ *Barnes v. Glen Theater, Inc.* 501 U.S. 560 (1991).

³⁶ E.g., *Cohen v. California*, 403 U.S. 15 (1971). Broadcast speech, because of the way it comes into one’s life and the access children have to it, has “the most limited First Amendment protection” of all forms of communication. On the radio and TV, non-obscene but indecent language may be curtailed. *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978).

³⁷ 521 U.S. 844 (1997).

³⁸ Title V of the Telecommunications Act.

by minors,³⁹ traditional regulation of radio focused on individual programs and monitoring by the FCC.⁴⁰ The Justices, writing early in the history of the Web, felt the discovery of sexually explicit material would seldom be accidental as it might be when walking into a room where the radio was on.

These details and how they played out in the regulation of pornography on the Internet were central to the debates over the Child Internet Pornography Act (CIPA) in 2000. Where the U.S. Congress had regulated access to the Internet in libraries receiving federal money, the libraries claimed that the regulation denied them their traditional responsibility for providing reading and research material. This professional resistance from librarians seems to be very different from what we would expect from the public.⁴¹ In some sense the regulation, which is largely hidden, and which would hide the images, is characteristic of law's operation.

But how is it that we miss the very important presence of the librarian in the regulation of access to the Internet?

When Congress passed and President Bill Clinton signed CIPA, they clearly had in mind not allowing kids to see pornography. The Supreme Court heard a challenge to the law in 2003. Solicitor General Theodore B. Olson, speaking for the government, defended the statute. He said that the issue before the Court was the same as the decisions libraries make about the selection of books. Paul M. Smith, who argued against the

³⁹ See also *U.S. v. Playboy* (2000) overturned a federal law that would have required cable TV operators to either completely scramble the signals for pay-porn channels or show the programs from 10 pm to 6 am.

⁴⁰ *FCC v. Pacifica Foundation*, 438 U. S. 726 (1978).

⁴¹ "Bad Attitudes: The Consequences of Survey Research for Constitutional Practice," *Review of Politics* (Fall 1991) 582-598.

legislation for the librarians, suggested the distinctive quality of the Internet.⁴² He asserted that by sheer magnitude the Internet was not like a collection of books and that filters excluded much more than pornographic material. The subtext was that the librarians could control their own space. Not only did many not see this argument because the Supreme Court prohibits cameras in its courtroom but the justices ruled in favor of filters and against seeing the offending images.

The ruling on the CIPA was grounded in federal funding to public libraries, particularly the Library Services and Technology Act.⁴³ Justices Rehnquist, O'Connor, Scalia and Thomas wrote an opinion and were joined in their holding that the CIPA is constitutional by Justices Kennedy and Breyer who indicated that part of the constitutionality of the act depended upon the ability to turn the blocking mechanisms off. This was the optimistic position taken by the American Library Association in response to the decision.

In the Chief Justice's opinion he says, "A library can set such software to block categories of material, such as "Pornography" and "Violence." The Chief Justice draws from the position taken by the Solicitor General during oral argument that the free speech issues are easily avoided because adult library patrons can ask to have the filters disabled or sites unblocked without even giving reasons. Justice Kennedy begins his concurrence with this same observation drawn from the government's position at Oral Argument. In the District Court opinion, which had struck down CIPA, public libraries were considered

⁴² It also drew from their distinctive professional opinion as articulated in the brief, Brief of Appellees American Library Association, et al. United States of America, et al., Appellants, v. American Library Association, Inc., et al., Appellees. On Appeal from the United States District Court for the Eastern District of Pennsylvania <http://www.ala.org/cipa/meritsbrief.pdf>.

⁴³ Enacted 1996, Reauthorized 2003.

public fora, like town squares or parks, where speech was protected most fully. They felt that asking to have the filters removed put patrons in potentially embarrassing situations, which was itself a deprivation of free expression. To the former Chief Justice, the risk of embarrassment was not something the Constitution protected against.

There is not much in any of the plurality opinions to address the technologies used to block the obscene and the pornographic. The most explicit formulation is from Justice Stevens in dissent where he speaks of the “key words” used in blocking software as being a relatively cumbersome methodology. He further presents the paradox, drawn from the District Court opinion, that the blocking is guided by key words while CIPA is concerned about images. Thus, one aspect of the decision seems to be a propensity in dissent to discuss the technology in detail and for the majority to gloss over it. The District Court opinion and the Stevens dissent also look extensively at alternative forms of regulation such as those described in detail below.

The Excess of Detail

An engaging discussion of law and images from an interpretivist perspective with some attention to the constitutive dimensions of sociological jurisprudence is that by Alison Young, a professor of Criminology at Melbourne University. In her book, *Judging the Image*, she offers “...a reading of the law/art relation that circumvents this central paradox and concentrates instead on what she characterizes as “...the embedded and enfolded relation of law and art.”⁴⁴ For Young, “...law finds its authority in a system of the imaginary.”⁴⁵ This perspective is in opposition to that of Douzinas and Nead.

⁴⁴ *Judging the Image: Art, Value, Law* (Routledge: London and New York, 2005), 16

⁴⁵ *Id.*, 15

Writing about graffiti, Young operates at the interstices of art and law. She presents graffiti from the perspective of these two worlds clashing. She writes of an arrest outside a Manhattan gallery showing the works of graffiti artists and notes “The very quality which writers identify as its merit is confirmation of its illegitimacy.”⁴⁶ All this is a little confusing. She provides little commentary on how law is constituted but in considerable attention to detail she chooses to emphasize instead the complexity caused by the analytical separation of law and art when it is not separated in life. The intellectually or rhetorically separated is joined in life. The graffiti artist is an outlaw. The intellectual is part of the state apparatus.

In the arrest, “...the bodies of artists are transformed into the bodies of criminals,”⁴⁷ we start with two bodies. But that can’t be true since the graffiti artist is part criminal. Interestingly, I suspect that it is not so easy to say the converse about the law. The police officers MAY see the graffiti artist or they may simply see the vandal. Clearly they see the perp hanging with the better classes but one can also presume, from the culture of Manhattan, that the police suspect the authority of those classes a good deal more than they puzzle over the clash of art and law in the body of the graffiti artist.

Pornography, like graffiti, is transgressive. Placed on the laptop or the desktop, it involves risk. Always the risk is much less obvious than the risk in the “old days.” This was the risk of hanging out in Red Light districts. The risk of getting mugged, arrested, infected or just embarrassed. But in avoiding pornography, very likely because it is “dirty” and tainted, Young contributes to our inability to see the “all over” quality of the

⁴⁶ Id., 74

⁴⁷ Young, 50. Being familiar with the intimate confessional mode that Young uses I must say I feel challenged in writing about her work since my perception is of a friend or colleague who is way too clever.

law. Foucault is one place scholars have looked for the last 20 years.⁴⁸ Even popular commentary takes this as a reasonable foundation.⁴⁹

Like Benjamin's Paris Arcades, the details that constitute law form a structure that might at first seem random or fluid but in the end we can learn to understand them as constitutive. Northeastern University law professor Karl Klare first illuminated the tradition of seeing law this way in contemporary sociolegal scholarship.⁵⁰ Later, scholars such as Robert Gordon, Alan Hunt and Lucy Salyer commented on this idea,⁵¹ at the same time that Klare and much of the Critical Legal Studies Movement adopted the relativism of the interpretivist critique.⁵²

That this sphere has become highly charged and partisan in the last decade is evident in a pair of cases dealing with former Attorney General John Ashcroft and federal anti-pornography legislation.⁵³ In the first case, *Ashcroft v. Free Speech Coalition* (2002), the Supreme Court addressed "virtual" child pornography as regulated by the Child Pornography Protection Act (CPPA) of 1996. By a 7-2 majority they held that a ban on virtual or computer-generated images was over broad and unconstitutional. In *Ashcroft v. ACLU* (2003), the justices laid the foundations for the now pervasive credit card checks in regulating children's access to pornography on the Internet. This regulatory mechanism is one of the most obvious interventions of law on the Web. The Court is split in these cases but there is also an evolution toward stricter regulation. This seems likely

⁴⁸ Michel Foucault, *The History of Sexuality* (New York: Vintage Books, 1990).

⁴⁹ Ken Johnson, "The Shock of the Body in Its Messy Corporality" *The New York Times*, July 7, 2006, 25.

⁵⁰ Karl Klare, "Law-Making As Praxis," 40 *Telos* (1979) 123.

⁵¹ Robert Gordon, Alan Hunt, Lucy Salyer.

⁵² Duncan Kennedy.

⁵³ *Ashcroft v. Free Speech Coalition* 535 US 564 (2002) and *Ashcroft v. American Civil Liberties Union* (2004) which upheld the Child Online Protection Act (COPA).

to be a result of greater conservative control over the judiciary along with the executive and the congress.

For Douzinas, “We are surrounded by laws but we do not know where the Law is.”⁵⁴ This is because, often, we can’t see it. For Young, we are surrounded by law, see it everywhere, and deny that it has authority except as background to the play of politics. For comedian Dave Chappelle, in a spectacular satire about sex on the Internet, we are surrounded by sex there.⁵⁵

Keeping an Eye Out

The physical space where law resides matters a good deal.⁵⁶ Since the advent of the Internet some notions of space are different and others are very much the same. Vivid virtual realities present new challenges while some very traditional physical aspects of space remain important. A few years ago, Nathan Rawding, a student at the University of Massachusetts, Amherst, decided to study the response of librarians to the Internet Protection Act, the legislation that required libraries receiving federal money to filter Internet access.⁵⁷ The act had been attacked as not comprehending the way the Internet worked and the way that it is different from a library. Rawding pointed that viewing the

⁵⁴ *Law and the Image*, 61.

⁵⁵ The sort of paradox that Chappelle calls our attention to in law is that what may not be seen by the ordinary citizen has to be seen by the law in order to make sure that seeing it can be forbidden.

⁵⁶ Scholars such as Richard Mohr and David Tait have helped us to understand the social dynamics of courtrooms by joining postmodern theory, semiotics and social science. Mohr has focused on such things as the relative height of the judicial bench in modern courts and what it says about the authority of the judge. Tait has looked at small claims courts with attention to the manner in which judicial authority is maintained where there is little in the way of professional distance. See also, M. Antoine Garapon, (1987) *L'Ane Portant des Reliques* (Paris: editions du Centurion, 1987).

⁵⁷ Nathan Rawding, “Library Filters and the Supreme Court,” UMass Honors Thesis, 2004. See also John Brigham and Nathan Rawding, “New Things and the Constitutional Order,” APSA 2003.

Internet in a public library was highly regulated by the physical space configuration in which access was provided. Thus, the architecture of libraries controlled the space in which all Internet sources, including porn, was to be viewed.

Stanford University law professor Lawrence Lessig's 1999 book *Code: and Other Law of Cyberspace*⁵⁸ makes a number of prescient observations.⁵⁹ They begin with the idea that the Internet has altered how space is constituted and what it means to publish or disseminate information.

"The tolled, single-purpose network of telephones was displaced by the untolled and multipurpose network of packet-switched data. And thus the old one-to-many architectures of publishing (television, radio, newspapers, books) were supplemented by a world where everyone could be a publisher."⁶⁰

As with the best of legal scholarship, Lessig's reformulation of publishing has implications for the legal ordering of that activity. He sees in the codes that drive the Internet a kind of constitution.⁶¹

"...[B]y "constitution"... I mean an *architecture* – not just a legal text but a way of life – that structures and constrains social and legal power, to the end of protecting fundamental *values* – principles and ideals that reach beyond the compromises of ordinary politics."⁶²

New ways of governance that determine the context for a great deal of what we see on the Internet are evident in the ways Google operates. In the way the search engine works lies much of the power of the company and ultimately the "law" that delineates the

⁵⁸ New York: Basic Books, 1999.

⁵⁹ He also makes a number of silly ones like about the potential catastrophe of Y2K.

⁶⁰ Lessig, 4. "We reject: kings, presidents and voting. We believe in: rough consensus and running code." From Paulina Borsook, "How Anarchy Works," *Wired* 110 (October 1995): 3.10 at <http://www.wired.com/wired/archive/3>.

⁶¹ As William Mitchell puts it, this code is cyberspace's "law." William J. Mitchell, *City of Bits: Space, Place, and the Infobahn* (Cambridge: MIT Press, 1996) 111. See also Ethan Katsh, "Software Worlds and the First Amendment: Virtual Doorkeepers in Cyberspace," *University of Chicago Legal Forum* (1996): 335. James Boyle, "Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors," *University of Cincinnati Law Review* 66 (1997): 177.

⁶² *Id.*, 5.

availability of expression.⁶³ Cofounders Sergey Brin and Larry Page, must negotiate the worldwide reach of the companies search engines.⁶⁴ Begun in 1998 with the message to “help computer users find exactly what they want on the Internet,” it was said to be simple and intuitive, shunning the “portal” model used by ecommerce at the time. In 2003 three, 4 out of 5 searches used Google.⁶⁵ The search engine, purity in its structure, avoids pop-ups and other bells and whistles including overly negative sites. But the constitution of physical space means that it needs to deal with the governments where it operates.⁶⁶ The distinctive feature of the Google response to these challenges is reliance on the motto, “Don’t be evil.” And evil, according to Google CEO Eric Schmidt “is what Sergey [Brin] says is evil.”

There are important reasons to look beyond the Supreme Court to places where we live and work for the meaning of the Constitution. A recent treatment of this issue is Grinnell College professor Ira Strauber’s book, *Neglected Policies*. According to Strauber, many of us are too devoted to “lawyerly methods and legal, political, and moral abstractions as they are ordinarily deployed in doctrinal analysis, jurisprudence, and legal philosophy.”⁶⁷ His approach “calls for commentary that mixes and merges these methods and abstractions with commonplace contingent and/or circumstantial social-fact, social-

⁶³ Id. at 134.

⁶⁴ Josh McHugh, *Wired*, 01/2003, 131-135.

⁶⁵ Id. McHugh describes Google as using “100 or so closely guarded algorithms to determine its search results.” “PageRank” is best known and it “allocates relevancy to a page according to the number and importance of pages linked to it.”

⁶⁶ Id. at 132. In May of 2002, Google took a text ad for the Body Shop off Google because the owner had called John Malkovich a “vomitous worm” in her blog. Google is also regularly attacked in google-watch.org and discussed in geek.com.

⁶⁷ In his Introduction he states that “that teachers and critics (primarily journalists and academics outside law school)” are “devoted to a complex group of intellectual and political ideas” which he calls “the ideology of involvement” and “intellectual jurisprudence”. Strauber, 2.

scientific, and consequentialist considerations.”⁶⁸ This he characterizes in terms of a “willingness to be situated ‘on the outside looking in’ on the law.”⁶⁹ This is the position we find ourselves in when law is considered in political science where, until recently, constitutional law was studied primarily by non-lawyers.

Increasingly, even lawyers are seeking to minimize control of the constitutional environment by the courts and their profession. Georgetown University law professor Mark Tushnet, for instance, characterizes institutions and principles in public life as constitutional when they provide “the structure within which ordinary political contention occurs”.⁷⁰ A constitutional order is one that has a “reasonably stable set of institutions” and “principles that guide those decisions.”⁷¹ These institutions and principles are evident in cultural practice. We can find them in judicial opinions but we also find them in oral argument and in the way institutions like libraries function.

The Supreme Court has treated the Internet as if it were an ordinary library and digital files as if they are ordinary pictures but those who use them know they are different. Sometimes, as when it operates in a library, the Internet may be subject to the very traditional constraints administered by the librarian. But, at other times and in other contexts, its capacities can make the digital world unique.

Images on the Lap(top)

Among the forbidden images I have seen, some were in a movie forty years ago in Santa Barbara, California. The place where I lived at college, a fraternity, was having a “stag night.” I had been sent, along with another fraternity member, to pick up the movie.

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ Tushnet, 1.

⁷¹ Id.

We drove from campus to an intersection at the edge of the city and pulled up next to a parked car. A reel of 16 mm film was handed to us, through the window. It was in a metal canister, about 3/4 of an inch thick and six inches in diameter. On it was written, in black marker, “The Poker Game”. From the moment we had gone to get the film this experience was characterized by the marks and features of the forbidden image. The movie, shown later that night, was in black and white and watched by fifty college men and women it was more transgressive than erotic.⁷² The transgressive dimension was part of the excitement.

The interest in forbidden images remains strong, especially, it seems, in males, but the context seems so different. A few months ago a friend was using her teenage son’s computer to transfer some photographs from the Internet and she discovered what she described as a large cache of sexually explicit pictures. The discovery seemed akin to a Mom finding a stack of *Playboy* magazine under the bed a generation or two ago or a crumpled snapshot a few years before that. But of course the pictures were more explicit. They existed on the screen but not as hard copies. And the existence of the Internet mooted, or at least circumscribed, the issue of where they came from.⁷³ The fact that they

⁷² The movie in question was pornographic in the early 1960s. Its possession we believed constituted a crime. We also knew that it was dangerous to possess it in some more general ways that have much to do with the social stigma. The movie would not be pornographic today although that is only part of the point of the reference to it here.

⁷³ Writing two decades ago, the satirist David Lodge described the irrelevance of the massive repositories of knowledge that characterize the university structure. He suggested that travel and improved communication would change the structure of authority. He was writing about the academy but what he described is as true for governments. “The day of the individual campus has passed. It belongs to an obsolete technology – railways and the printing press. David Lodge, *Small World* (England: Penguin Books, 1984) 43.

appeared out of the same cute iBook on which the boy did his homework only added to the confusion.⁷⁴

Representation of sexual images on the Internet is increasingly discussed in terms of the intimacy and sense of seduction that appears to be possible in this virtual medium where women are not simply naked but appear to be coaxed or seduced to reveal their bodies.⁷⁵ Political Science professor Lori Beth Way of California State University, Chico, who has consulted with the Department of Justice about sex industry recruiting on college campuses calls attention to the framing of images that gives them meaning. She is concerned about the context in which they are seen. What she calls, “the frame outside of the frame.” Because it is not constructed by the creator but is the material context in which the creation is presented.

Conservative control of the government leading to more vigorous anti-pornography prosecution is evident in a combined Department of Justice, Department of Homeland Security’s Immigration and Customs Enforcement crack-down on digital child pornography that began in the fall of 2003 and was announced in May of 2004.⁷⁶ The target was “peer to peer” networks, the mechanism for file sharing that it at the heart of some of the most dynamic uses of the Internet. In the press release the nexus between child pornography and Homeland Security is not clear but a significant enforcement effort, which began with 1,000 investigations, is being directed from the government and

⁷⁴ Reading the March 20, 2006 issue of *The New Yorker* on an airplane I was a little surprised to come upon the full page spread of *Playboy* centerfolds in the article by Joan Acocella “Six Decades of Playboy Centerfolds.” 144-149. It changed the dynamic of how I held the magazine.

⁷⁵ Lori Beth Way, “[O]ne of the things I spoke about is the inability for women to control how their images are portrayed. Many times what might be fairly unobjectionable images (e.g. a nude woman) is framed by incredibly degrading comments. Relatedly, terms like whore, bitch, slut are consistently used to refer to women. An Internet search for naked college women reveals fairly few hits but naked college whores or sluts produces thousands.” Email, Dec. 6, 2005

⁷⁶ DOJ press release May 14, 2004.

involves digital transmission of sexually explicit material. The government's announced quarry is pedophiles and the suggestion is that the Internet is their new superhighway.

With regard to the reach of law in the area of Internet pornography, little is confidently known. Some will imagine that there is no harm in seeing pornography but looking at it for a significant amount of time is what might get you in trouble. But, how much looking? A minute? Or is downloading required? Or saving? The warnings would suggest that you have to enter a web site to be guilty of the kind of engagement that spells legal trouble, but those warnings are on websites that promise the images are not children. Some, citing the case of Who guitarist Pete Townsend indicate that you can beat a pornography prosecution by arguing pure intent, like a crusade against child molestation. Socially that is a little hard to accept but legally, a jury would have to decide.⁷⁷

The Iconography of Nothing

Law professor Peter Goodrich, in an article from the collection *Law and the Image*, explains the significance of the absence in legal authority of images of law. He examines the painting "Edward VI and the Pope" which is by an unknown artist and is dated from 1570. In the painting a dying King Edward VI is surrounded by counselors including the Pope, a figure troublesome for the English monarchy at the time. In the picture there are a number of blank spaces that appear unfinished, as if the artist still had work to do. Some are framed as if they could be scrolls not yet filled in. In an analysis of the painting, Goodrich calls attention to the blank spaces, which he says are intentional

⁷⁷ Pornography prosecution, like that for any socially unacceptable behavior, may be quite damaging even without a conviction. The indictment of former *Newsday* publisher Robert Johnson for having child pornography on his computer was widely announced by the Internet news source *Findlaw* (<http://news.findlaw.com/hdocs/docs/chldprn/usjhnsn62805ind.pdf>).

representations of the authority of law as the absence of image. He argues that blank spaces or “nothing” is one of the aspects of law’s authority.

The absences described by Goodrich and evident in law as a blank check, a legal form or the judges chamber share family resemblances with the mysterious sense that law can not be seen in the story of Joseph K in *The Trial* by Franz Kafka.⁷⁸ But in Goodrich’s treatment the blank space that is at the heart of law’s authority is there to be filled in. On the web, we see the law’s warnings that stop access to web sites. Perhaps, like the keeper at the door in Kafka’s story the websites are guarded by the credit card as a key to access. My colleagues in Legal Studies at the University of Massachusetts relied on Kafka’s critique of law for more than a generation to build a legal studies program. The result is reaffirmation of the positivist framework rather than development of a constitutive perspective on law.⁷⁹ More appropriately, following the strong interpretivism that is in the constitutive tradition, I have suggested here that law is in the details.⁸⁰

Ultimately, the spaces that define law by what we cannot see have more in common with the new technologies identified by Marshall McLuhan and Lawrence Lessig. The Internet is full of images and arguments for the deployment of graphic images.⁸¹ The television that goes on and off in our bedroom bringing law into our most intimate spaces and the computers through which we do our work place the forbidden and ultimately the authority of law at our desks or in our laps. Jurisprudentially the significance of these non-traditional places of law is at least partly a function of past expectations.

⁷⁸ “The Iconography of Nothing,” in *Law and the Image*.

⁷⁹ John Bonsignore, et al *Before the Law* (Boston: Houghton-Mifflin, 1992).

⁸⁰ Taylor, “Interpretation...”; Wittgenstein, *Investigations*.

⁸¹ Jill Stanek, “A Case for the Use of Graphic Pictures,” July 3, 2002, www.priestsforlife.org/resources/abortionimages/stanekgraphics.html.

Goodrich's blank spaces of law are not so much absences as they are bounded and structured realms or aspects of ordinary life. They are before us and they wield authority because they are set up in the textures or details of life. Whether it be the fences that at the same time shield and delineate property boundaries, the designated spaces in a printed bank check or the blank monitor set up just in front of the librarian's desk, the spaces that may become full of necessarily bounded details of the law, images are more often than not the creatures of law.

The traditional places of law in America, its courthouses and lawyers offices, are no longer the pivotal places of law in the lives of her citizens. Courthouses are important to those who use them;⁸² but in most instances, law constitutes through being woven into our lives, by becoming the context in which we live. In the case of the Internet, and images that arouse, the signs are less clear about the capacity of the law to constitute our sense of what is forbidden and what is not. And while the lore is still that there is a sphere of privacy and particularly domestic sanctuary beyond the reach of the law the current climate of policy and law suggests otherwise. Just as the domestic is now widely understood as a sphere of violence the desktop and the home have become spheres of pornography. While we see much more, it also seems that the law on what we see is much less clear than it once was.⁸³

Forbidden images, once unambiguously associated with legal transgression and intensified as outside the law now flood ordinary private spaces. Without seeming to have much to do with the law they bring its potential for disruption into realms once private and domestic.

⁸² Barbara Yngvesson, *Virtuous Citizens, Disruptive Subjects* (New York: Routledge Press, 1993). See also Susan Silbey and Patricia Ewick, *The Common Places of Law*.

⁸³ Allen Feldman, "On Cultural Anesthesia: From Desert Storm to Rodney King," 21 *American Ethnologist* (1994) 404-418.