

True North and the Magnetic Declination in Alberto Gonzales's Moral Compass.

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Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. . . Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.

Lawrence v. Texas, 539 U.S. 558, 563, June 23, 2003.

The mama pajama rolled out of bed, and she ran to the police station
When the papa found out, he began to shout, and he started the investigation
It's against the law, it was against the law
What the mama saw, it was against the law.

Me and Julio Down at the School Yard, Copyright Paul Simon, 1971

From even before the start, the tenure of Alberto Gonzales as Attorney General of the United States was - and continues to be - rapidly propelled into the legal thicket of obscenity in a way never seen before.

In the course of Alberto Gonzales's nomination hearing before the United States Senate Judiciary Committee on January 6, 2005, Senator Michael DeWine of Ohio asked Gonzales what he'd like to be remembered for at the end of his captaincy of the Justice Department. Mr. Gonzales mentioned six particular goals without any hesitation or prompting questions. Number six was "Obscenity"; The AG-to be explained, "I think obscenity is something else that very much concerns me. I've got two young sons, and it really bothers me about how easy it is to have access to pornography". Was the future Attorney General suggesting that the nature of what adults should be able to see in our society should be judged by what may be harmful to young children? Will he, as Attorney General, draw a line in the sand when exercising discretion over *criminal obscenity* prosecution -at the point of inappropriateness for his two sons? Though the statement is ambiguous, I trust that he did not intend to express such a Mullah-like sentiment in the halls of Congress. The Supreme Court handled that issue forty-eight years ago when it struck down a Michigan law that criminalized the sale *to adults* of

materials that had a tendency to corrupt youth. In *Butler v. Michigan*, 352 U.S. 380, 383 (1957), Justice Felix Frankfurter wrote: “The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig”. In charity to Mr. Gonzales, it is possible that the excitement of the moment may have blurred in his mind the important constitutional difference between criminal obscenity and the dissemination to minors of explicit materials that may harm them; As Attorney General, he will need to understand the distinction and recognize it in charging decisions; It is possible that he wasn’t talking about the criminal offense of Obscenity at all in these remarks, but of a goal to find a practical and legal scheme to shield children and unwilling adults from exposure to explicit materials while respecting the First Amendment right of willing adults. Maybe.

Fourteen days later, on January 20 at Pittsburgh, US District Judge Gary Lancaster declared the federal obscenity statutes, Title 18 United States Code Sections 1461, 1462, and 1465 to be unconstitutional — at least as applied to the activities of Extreme Associates, Inc., Robert Zicari, and Janet Romano in shipping obscene material by mail-order and in selling access in a pay website. (The defendants did not dispute that the content was obscene for the purposes of their motion to dismiss.) Because “federal obscenity statutes place a burden on the exercise of the fundamental rights of liberty, privacy and speech”, Judge Lancaster applied the most demanding test to assess the constitutionality of the obscenity statutes - the so-called “strict scrutiny test” which assumes that the law is *invalid* until the government establishes its ample justification by 1) identifying a compelling governmental interest served by the law and 2) demonstrating that the statute’s reach is narrowly limited in advancing that compelling interest to avoid intrusion into unnecessary or unrelated matters. Applying strict scrutiny analysis, two cases formed the foundation of Judge Lancaster’s decision. He read the US Supreme Court, in overturning the Texas sodomy statute in *Lawrence v. Texas*, 539 U.S. 558 (2003) to say that “public morality is not a legitimate state interest sufficient to justify infringing on adult, private, consensual, sexual conduct even if that conduct is deemed offensive to the general public’s sense of morality”. Judge Lancaster also based his conclusion on *Stanley v. Georgia*, 394 U.S. 557, 564-6 (1969), citing a passage in *Stanley* affirming that the very essence of the First Amendment rejects the idea that government has the power to control what we read and watch: “To permit the government to do so would support the ‘... assertion that the State has the right to control the moral content of a person’s thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment’”. Judge Lancaster held that the commendable goal of “protecting the kids” did not act to justify *any and all* legislation which might serve that end, without regard to the burden it would place on the fundamental liberty, privacy, and speech rights of willing grown-ups. In that respect, in dismissing the Indictment, he sounds pretty much like Justice Frankfurter, nearly fifty years earlier, in *Butler v. Michigan*, reversing Mr. Butler’s conviction for selling a book - that might have hurt kids - to a grown up.

And so, when, twenty-five days later, on February 14, 2005, Alberto Gonzales was sworn in as the eightieth Attorney General of the United States, he faced an

immediate and urgent decision as to whether the government should appeal from the decision in *Extreme Associates* and risk losing the obscenity statutes nationwide or sit this one out. Two days later, on February 16, the Justice Department filed its notice of appeal from Judge Lancaster's dismissal of the Indictment. "The Department of Justice places a premium on the First Amendment right to free speech, but certain activities do not fall within those protections, such as selling or distributing obscene materials," Attorney General Alberto Gonzales proclaimed in a written statement. "The Department of Justice remains strongly committed to the investigation and prosecution of adult obscenity cases." His Justice Department places merely a "premium" on liberty of expression? I remain of the impression -as a former officer of the United States myself - that each of the officers of the Justice Department, including its chief, are *sworn to uphold* the Constitution at all times in public office. Including its First Amendment and its Right to Privacy. That makes the defense of free expression and privacy a *duty* of an officer rather than a "premium" of a Department. Perhaps that is what the Attorney General meant to say as he filed an appeal from a decision that broadly asserted a constitutional zone of privacy that protects our private lives from government intrusion. Maybe.

Fourteen days later, on February 28, 2005, the Attorney General spoke at the Hoover Institute and laid out a vision of his term: "Another area where I will continue to advance the cause of justice and human dignity is in the aggressive prosecution of purveyors of obscene materials. I am strongly committed to ensuring the right of free speech; the right of ordinary citizens and of the press to speak out and to express their views and ideas is one of the greatest strengths of our form of government, but obscene materials are not protected by the First Amendment, and I am committed to prosecuting these crimes aggressively."

Very quietly, a short time later, a publication named "DOJ Obscenity Prosecution News" made its appearance on the US DOJ Criminal Division web page, ominously describing itself as "Spring 2005, Volume I, Issue 1" of a new periodical edited by Bruce Taylor and apparently dedicated to chronicling a new wave of adult obscenity prosecution. It may be found where it is discretely hosted, at <http://www.usdoj.gov/criminal/obs032604.pdf>

Judge Lancaster was widely denounced by the so-called Moral Right as a judicial activist; He was accused of inventing new rights and of advancing his personal philosophies under camouflage of the Constitution. On March 16 Senator Brownback's Subcommittee on the Constitution, Civil Rights and Property Rights of the U.S. Senate Committee on Judiciary held a hearing in reaction to the decision in *Extreme Associates*. Senator Brownback first ridiculed the reasoning of Judge Lancaster's decision by observing: "Judge Lancaster cobbled together hand-picked strands of 14th Amendment substantive due process, decisions from *Roe*, *Lawrence* and others and ruled that the statutes at issue violated an unwritten constitutional right to sexual privacy." Senator Brownback expressed notable concern because data shows that now than 50% of hotel room pay per view video rentals are now pornographic. He then noted that the Justice Department had taken its appeal, he quoted the Attorney General's remarks before the

Hoover Institute, and then put on a show of hand-picked “experts” on obscenity while refusing the request of the Free Speech Coalition to provide testimony.

On May 3, 2005, Attorney General Gonzales spoke to a group of prosecutors and law enforcement officers at a conference in Gaitlinburg, Tennessee and he significantly addressed adult obscenity, listing the prosecution of obscenity *second* among his goals as Attorney General:

From street corners to websites, obscenity and child pornography rip at the heart of our moral values and too easily corrupt our communities. I've made it clear that I intend to aggressively combat the purveyors of obscene materials. . . Enforcement is absolutely necessary if we are going to protect citizens and children from exposure to obscene materials. . . I have directed Department officials to carefully review federal laws to determine how we can further strengthen our hand in prosecuting obscenity. Our goal is to assess all the law enforcement methods we use—and identify the tools we may still need—to more effectively investigate and prosecute these crimes.

Attorney General Gonzales addressed moral values and corruption of communities as though *Stanley* and *Lawrence* did not exist within his universe, as though their understanding of the right to privacy was not part of the Constitution he is sworn to uphold - as though he rights of individuals to read and watch what they chose was simply not a part of his calculus.

Two days later, on May 5, the Chief of the DOJ Criminal Division announced the formation of an obscenity prosecution task force composed of CEOS trial attorneys and dedicated exclusively to the prosecution of adult obscenity. Counsel to the task force is Bruce Taylor; The task force will obtain assistance from the Organized Crime, Computer Crime, and the Assets Forfeiture units. The Chief explained that the global traffic in obscenity required a specialized response in the computer age. He pledged to enforce “the laws on the books”.

In Gaitlinburg, the Attorney General observed that obscene materials rip at the heart of “our” moral values. There are those of us who think that individual liberty is a moral value, too. In fact, our ancestors chose to put the word “Liberty” on all American coins. They might have chosen “Decency” or “Moral Order” or “Law and Order” or even “United We Stand”, but they chose Liberty. And so, half a century after the defeat of Nazism and Fascism, a decade after the collapse of Soviet Communism, the eternal battle between collectivism and individual rights rages again, this time on our own shores, with a Republican administration as the surprising champion of collectivist values. As this article is written, the Red Chinese prosecutors are preparing their prosecution China's first Internet sex crime trial, which authorities call the 99BBS case, is scheduled to begin May 11. The case involves 12 suspects arrested around the country in 2004, after authorities pursued them for over a month and finally forced them to close down their websites, according to the Chinese news agency Xinhua.

It is easy for me to remember when, as a young child in Catholic grade schools, I would look forward to the monthly “Treasure Chest” comic book that serially dramatized the life and persecution of Maryknoll Missionary Bishop James Walsh in Red China, whose crime it was to corrupt the Chinese youth by seducing them into Christianity, and whose punishment was cruel imprisonment by the authorities and presumably the forfeiture of all of his corrupting Catholic materials. Yes, I can remember the Public Service spots for Radio Free Europe that distinguished our freedom to listen to whatever we wished from the Russians who jammed our broadcasts to keep the truth from their people. I really do suppose that the jailers of Father Walsh and the jamming technicians in Russia justified themselves, too, by a belief that they were preventing the corruption of the moral values of the community.

Now that he has written his biography, it may be obvious that the only thing that Bob Dylan and I have in common is that Barry Goldwater, U.S. Senator from Arizona, a Republican champion of individual liberty, was our mutual hero. Bob Dylan had the sense to keep quiet about it and was far more popular with the girls. In time, I raised my right hand in 1972 while battle raged in the Republic of Vietnam, and I began an association with the United States Army that began with an Army ROTC Scholarship and ended eleven years later after four years as a decorated JAG Captain, including three years’ service on what we used to call Freedom’s Frontier, the Federal Republic of Germany. It was a service I entered into because I thought I heard the call of principle: The future of human liberty was at stake in the Cold War, and the survival individual rights against the collectivist threat demanded that many of us make sacrifices so that the candle of freedom might not be extinguished forever.

I attended the US Army Judge Advocate General’s School on the campus of the University of Virginia and I learned enough there about the law of war and the Geneva Conventions to later teach the subject in NCO academies and training for combat soldiers. That’s why it was that, during Alberto Gonzales’s nomination proceedings, I was especially interested in a certain memorandum he signed on January 25, 2002 as Counsel to the President, for the ostensible purpose of advising President Bush about his “options” regarding whether to reconsider his decision denying members of the Taliban and el Qaeda treatment as prisoners of war under the Geneva Convention III on the Treatment of Prisoners of War. Collin Powell’s State Department had asked for reconsideration of the President’s decision to deny POW status to captured Taliban and El Qaeda soldiers.

A fair and dispassionate reading of the Memorandum leads to the probable conclusion that it was a “hack job” designed to buttress a previous decision and to protect the President rather than an objective and careful analysis of the legal issues for his consideration. The memorandum contains not one textual reference to the language of the Treaty. (You will remember that our constitution includes treaties made by our government as the law of the land.). While Gonzales writes at great length about the relationship of the insurgent groups to recognized nations and anticipates that the troops of “failed states” should not be protected under the treaty, he wholly ignored the plain text of Article IV, which extends protection to members of “organized resistance

movements” under the circumstances there described. More importantly, the fundamental point of the President’s decision was the issue of whether any hearings or case-by-case assessment was necessary before a decision was made to grant or deny POW status to captured individuals. The desired result was to assert that the treaty did not apply in bulk to the Taliban and el Qaeda and deny individuals a case by case review of their status under the Treaty; The President was simply not advised by Mr. Gonzales of the plain text of the Treaty, at Article V., which directly addresses how such issues should be addressed:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

I think that it is plain enough that the Treaty, Law of the Land in the U.S. under Article VI. of the Constitution, calls for a tribunal to decide the issue rather than a commander in chief, and insists that POW status be afforded the captured until such a tribunal is held. Alberto Gonzales simply failed to tell that to the President.

By all accounts, Mr. Gonzales is a very smart man and a lawyer of some considerable distinction; He served several years on the Texas Supreme court. It is not reasonable to believe that Mr. Gonzales did not know what the Treaty actually said nor that it was the Law of the Land under the Constitution. It is for that reason that I am compelled to the conclusion that the omission was intended by him to serve a purpose.

A careful reading of Mr. Gonzales’s numerous accomplishments suggests that he is savvy and smart in a very practical and pragmatic sense that has led to his meteoric ascent to the high corridors of power and influence. His relationship with the President and his easiness in the political arena seem to be at the core. A careful reading of his recent history as White House Counsel suggests that in important issues clearly within the moral sphere, he has pragmatically acceded to the erosion of those traditional American moral values against torture and mistreatment of those subject to our control that have distinguished this nation among all others and which have offered hope to numerous millions of suffering people. In some significant measure, he is one of those who have participated in extinguishing the beacon of hope and the diminishment of American integrity in human rights. The America which has accepted transparent shopping bags and torture is, in some important moral sense, a different America than that which put the word “Liberty” on coins, and it can be argued plausibly that the America we knew and served has lost its soul under this administration.

This is not to suggest that Mr. Gonzales is not a principled and sometimes idealistic lawyer. His early career especially gives witness to his dedication to the principle that the poor and disadvantaged should have decent access to effective legal services, and he has received substantial recognition for these contributions and others. In a time when many young conservatives and Republicans were dodging military

service, Gonzales served two years as an enlisted man in the Air Force and then applied for admission and was appointed to the Air Force Academy, which he attended for two years. This is not the kind of decision generally made by the unprincipled and avaricious.

The issue is rather whether his moral compass is askew and needs correction. There is a difference (most of the time) between True North and Magnetic North. Mr. Gonzales is no longer just George Bush's lawyer, no longer the President's lawyer, but the office he holds suggests that he is now the lawyer for the American people. A compass inevitably points to Magnetic North, a point irregularly fluctuating somewhere between Canada and Greenland, while True North is a point about which the planet rotates once in a day, which changes by precession only over thousands of years. In some places in the 48 contiguous states, the difference is as much as 21°. Because of that difference, maps and charts for navigation provide a correction factor called a Magnetic Declination. My sense is that the Attorney General's moral compass is pointing roughly ninety degrees from True North, directly to the right most of the time, but it has a habit of directly pointing to the President whenever he is in the vicinity.

The direction of True North in the tradition of our Constitution - and in the articulations of the Republican Party - and under the shared morality of a free and diverse people - has been toward the increase of individual, personal liberty to the maximum extent possible consistent with a reasonable degree of social function. I would remind the Attorney General that the immigrants arriving by ship in New York harbor did not look up to the Statue of Decency; They saw the Statue of Liberty, and if co-existing with some indecency was the price of breathing free air, it was a choice they were generally delighted to elect.

If our nation and our communities can be said to have moral values, it is because they exist in the people and arise from them. A morality which is forced upon neighbor by neighbor or imposed from above is no morality at all; the application of pressure to conform does not result in virtue.

Notions of morality change over time like Magnetic North's relationship to True North, and it is obvious that sexual morality has markedly changed over the past fifty years. In listening to Senator Brownback - and indeed to Attorney General Gonzales's recent pronouncements, it is easy to visualize a conservative cadre trying desperately to hold the pendulum back from its natural swing. Especially to those of us involved in one way or another with the online adult industry, it is obvious that broad and diverse segments of the American people - extending through all races, religions, ages, and economic and educational levels - seek and obtain sexual fantasy entertainment through explicit pornography. To hear two of Senator Brownback's witnesses tell the story, to hear Bruce Taylor tell the tale, one would imagine the customers of the adult internet to be a small number of thrill seekers and a larger number of pitifully addicted perverts. Such an assessment of the situation belies the Senator's own numbers: More than fifty percent of pay per view in American hotels is hardcore. The reality they refuse to accept is that mainstream American moral values about candor in the depiction of sex have changed beyond their power to imagine.

Tens of millions of Americans regularly and routinely consume erotic online materials. Because so much material is available *free*, it would be impossible to learn exactly how much is downloaded every day. *Stanley* made it clear that the government had no power to criminally punish the private possession of pornography made exclusively with adult performers— even obscene pornography – in the home for personal consumption. Accordingly, unlike drugs, unlike child pornography, explicit adult materials are not per se contraband, even if they are obscene.

The government has attempted for some decades, with mixed results, to end the drug trade with a two pronged attack that seeks both the distributor and the consumer, believing that effects on demand may help reduce the traffic in drugs. A demand-side approach is unlikely to work regarding obscene materials because of *Stanley*. Moreover, unlike drugs, the market demand for the product - to the extent that it is part of ascertaining contemporary community standards - is a mitigating factor in determining *whether the material is illegal to distribute* under existing law. Should significant prosecutions start, in the period of time before the inevitable, significant defense victories in American courts, much of American online porn is likely to become effectively outsourced to supply the demand of the American market. It is unimaginable that our government would or could exert the kind of chokepoint stranglehold over the Internet in the U.S. that Red China exerts over foreign websites, and that suggests the likelihood of transborder permeability of content for the foreseeable future. The concentration of adult webmasters and content producers on foreign shores will simply make it more difficult for the Justice Department to enforce Section 2257 and to effectively prosecute the most extreme genres. There is much for the DOJ task force to consider before any wave of prosecution commences.

A close reading of the Attorney General's remarks in Gaitlinburg would suggest that, at the present time, he has directed study and consultation about the issue of obscenity, and not the kind of precipitous action that, surely, some around him are requesting or demanding. That's a smart move. He also now needs to hear the same guidance now that I received at the start of Navigation and Orienteering training at Fort Riley and which he, too, surely heard in the Air Force: "First, orient your compass".

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