

SEX AND THE FIRST AMENDMENT: THE LONG AND WINDING HISTORY OF OBSCENITY LAW

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I am honored to have the opportunity to deliver the keynote address at this extraordinary symposium.¹ I will focus my remarks on the issue of sexual expression and, in particular, the issue of obscenity. I settled on this focus both because the issue itself is a fascinating one, especially in its evolution over time, and because it involves both the speech and religion facets of the First Amendment. Indeed, although the Supreme Court has declined to consider whether the predominantly religious motivation for laws against obscenity implicates the Establishment Clause, there can be no doubt that the primary impetus for restrictions on sexual expression is deeply rooted in religious belief. And with that understanding in mind, I will begin at the beginning.

I. SEX REGULATION BEFORE THE COMSTOCK ERA

In the ancient world, that is, the world of Greece and Rome, sex was generally thought of as a natural and positive part of human experience. Those societies did not see sex as bound up with questions of sin, shame, or religion. Thus, neither the ancient Greeks nor the Romans had any concept of “obscenity.” Greek and Roman literature and imagery routinely depicted sex quite explicitly and in all of its various forms. Any suggestion that the law should interfere with free sexual expression in this era would have been met with scorn. Although ancient Greece and Rome punished seditious, blasphemous, and heretical expression, they did not punish sexual expression because it was “obscene,” a concept that simply did not then exist.²

Although the attitude towards sex in Western culture changed radically with the advent of Christianity, for most of Western history neither the Church nor the state censored sexual expression because it was thought to be obscene. Indeed, through the Middle Ages, the Renaissance, and the era of the

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¹ Professor Stone originally presented a version of this Article on November 16, 2018 as the keynote speech for the First Amendment Law Review Symposium “Sex and the First Amendment.”

² See GEOFFREY R. STONE, *SEX AND THE CONSTITUTION: SEX, RELIGION AND LAW FROM AMERICA'S ORIGINS TO THE TWENTY-FIRST CENTURY* 5, 11 (2017).

Enlightenment, sexual expression and imagery were common, widespread, legal, and quite explicit, and this was true in the American colonies, as well as in England.³

In the eighteenth century, bookstores in the American colonies carried an extraordinary array of erotica, ranging from Boccaccio's *Decameron*⁴ to such explicitly sexual works as *Venus in the Cloister*,⁵ *The Politick Whore*,⁶ and *Letters of an Italian Nun and an English Gentleman*,⁷ and there were no statutes forbidding obscenity during the entire colonial era. To the contrary, throughout this period, the distribution, exhibition, and possession of pornographic material was simply not thought to be any of the state's business.⁸

The first obscenity prosecution in the United States did not occur until 1815, at the height of the evangelical explosion of the Second Great Awakening, which triggered a nationwide effort to transform American law and politics through the lens of evangelical Christianity. Arguing that only Christianity could save America from sin and desolation, the moral militia of the Second Great Awakening sought to mold the law to fit their understanding of Christian doctrine. This included concerted efforts to ban Sunday mail delivery, increase blasphemy prosecutions, prohibit alcohol, and condemn "sinful lust." Indeed, Evangelical Christians, whose religious moralism condemned sexual expression as sinful, declared war against the "sins of the flesh."⁹

It was in this spirit that the United States experienced its first obscenity prosecution in 1815, when Philadelphia tavern owner Jesse Sharpless was charged with exhibiting for a fee an image of "a man in an obscene, impudent, and indecent posture with a woman."¹⁰ The Pennsylvania Supreme Court held that because exposure to such "lascivious" images could corrupt the morals of young people by "inflaming their passions," it was a fit subject for criminal prosecution.¹¹ Several years later, the Supreme Judicial Court of Massachusetts held that Peter Holmes could be punished for publishing what it termed "a

³ See *id.* at 55–64.

⁴ GIOVANNI BOCCACCIO, *DECAMERON* (Jonathan Usher ed., Guido Waldman trans., Oxford Univ. Press 2008) (1353).

⁵ ABBÉ DU PRAT, *VENUS IN THE CLOISTER, OR, THE NUN IN A CHEMISE* (Andrew Brown trans., Hesperus Press 2012) (1683).

⁶ *THE LONDON JILT; OR, THE POLITICK WHORE* (Charles H. Hinnant ed., Broadview Press 2008) (1683).

⁷ JEAN JACQUES ROUSSEAU, *LETTERS OF AN ITALIAN NUN AND AN ENGLISH GENTLEMAN* (1817).

⁸ See STONE, *supra* note 2, at 83–87.

⁹ See *id.* at 132.

¹⁰ See *Pennsylvania v. Sharpless*, 2 Serg. & Rawle. 91, 92, 94 (Pa. 1815).

¹¹ *Id.* at 102.

lewd and obscene” book—John Cleland’s *Memoirs of a Woman of Pleasure*—otherwise known as *Fanny Hill*.¹²

Such prosecutions were rare, however, and by the 1840s, as the Second Great Awakening waned, there was once again an upsurge in the availability of pornography. As industrialization and urbanization transformed the nature of cities, New York came to be known as the “carnal showcase of the Western world.” Daguerreotypes (an early form of photographs first introduced in the 1830s) of women in various stages of undress could be purchased from pushcart vendors who plied the city’s streets, and weekly newspapers like the *Flash*, the *Rake*, and the *Libertine* celebrated sexual freedom. By the end of the Civil War, a new breed of “concert saloons” began presenting live nude entertainment that combined the services of the bar, the theater, and the brothel. These new entertainments placed sex into the forefront of American society as never before.¹³

II. THE COMSTOCK ERA

Not everyone was cheering. In the years after the Civil War, the Young Men’s Christian Association (YMCA), which had been established by a group of ministers and righteous businessmen in the 1840s to give God-fearing young men a place for proper leisure activities outside of what they described as the “moral Maelstrom” of America’s cities, launched a comprehensive study to document the state of vice in New York City.¹⁴ The study detailed the existence of sexual materials so lurid that some members of the YMCA executive board could not believe they existed. Because New York still had no statute forbidding the distribution of obscenity, the YMCA board drew up proposed legislation to address the issue.

In 1868, after an aggressive lobbying campaign, the YMCA got its bill through the New York legislature. The new law made it a crime for any person to sell or give away any “obscene and indecent” book, pamphlet, drawing, painting, or photograph.” Having secured the enactment of this legislation, though, the YMCA board feared that law enforcement officials, who had more pressing priorities, would not devote sufficient resources to suppress the burgeoning market for indecent materials. The board therefore decided that extralegal methods were necessary to achieve the organization’s goals. The board

¹² See *Commonwealth v. Holmes*, 17 Mass. 336, 336 (1821).

¹³ See STONE, *supra* note 2, at 154–56.

¹⁴ *Id.* at 156.

thus established its own private task force to ensure the vigorous implementation of its hard-won statute.¹⁵

The YMCA's chief inspector in this campaign, Anthony Comstock, would dominate the national debate over obscenity for the next four decades. Based on an unwavering conviction that the devil's temptations were omnipresent, Comstock believed to his very core that abstinence from all impure thoughts and behaviors was the only faithful path to righteousness. The leaders of the YMCA were so impressed with Comstock's energy, enthusiasm, effectiveness, and religious zeal that they offered him a full-time job. He stepped easily into his new role.

After organizing his squad, which he named the "Committee for the Suppression of Vice," Comstock led several successful raids on local publishers, but soon realized that to make a truly major impact he needed national legislation. With the backing of the YMCA, Comstock journeyed to Washington to lobby for a federal law. Comstock warned Congress that obscenity was a "hydra-headed monster" that required a potent legislative weapon.¹⁶ On March 3, 1873, President Ulysses Grant signed into law the "Act for the Suppression of Trade in, and Circulation of, Obscene Literatures and Articles of Immoral Use."¹⁷ The new legislation established a broad ban on all items that could be deemed "obscene, lewd, lascivious, or filthy," but it did not define those terms.¹⁸ The law authorized severe penalties, including hard labor, and it empowered the Post Office to censor and to confiscate any objectionable material. Comstock was appointed a special postal agent and, fittingly, the law came to be known as the Comstock Act.

In his writings and public lectures, Comstock passionately affirmed the sacredness of his mission. In his 1880 book *Frauds Exposed*, Comstock asserted that "lust defiles the body, debauches the imagination, corrupts the mind, . . . and damns the soul."¹⁹ Comstock aggressively led the national campaign to suppress obscenity from 1873 until just before his death in 1915. During this era, even a single phrase, passage, or image involving sex was sufficient to warrant a criminal conviction. Material was deemed obscene if it had even the potential to corrupt an impressionable adolescent. This standard effectively limited adults to only those materials that

¹⁵ See *id.* at 156–57.

¹⁶ ANTHONY COMSTOCK, *FRAUDS EXPOSED: OR, HOW THE PEOPLE ARE DECEIVED AND ROBBED, AND YOUTH CORRUPTED* 8 (New York, J.H. Brown 1880).

¹⁷ Comstock Act, 42 Cong., Ch. 258, 17 Stat. 598 (1873).

¹⁸ *Id.*

¹⁹ COMSTOCK, *supra* note 16, at 416.

were deemed appropriate for children. For all practical purposes, any reference to sex in this era was unlawful.²⁰

Just how far enforcement of the Comstock Act reached in this era is illustrated by the prosecution of Moses Harman, who published a letter to the editor in his journal in which the author of the letter related the true story of a wife who, after undergoing a difficult birth, had not yet healed sufficiently to resume intercourse. Her husband forced himself on her anyway, causing her death. The author of letter asked: “Can there be legal rape? Did the man rape his wife? . . . If a man stabs his wife to death with a knife, does not the law hold him for murder? If he murders her with his penis, what does the law do?”²¹ For publishing this letter, Harman was prosecuted and convicted for violating the Comstock Act. The court explained that Harman was guilty because the mere recitation of this story would shock “the common sense of decency and modesty.”²²

By the early twentieth-century, though, the power of the nineteenth-century anti-obscenity societies began to wane, and with changing social mores courts began to embrace less speech-restrictive interpretations of the nineteenth-century obscenity laws. In 1913, in *United States v. Kennerly*,²³ for example, Judge Learned Hand maintained that few people would be “content to reduce our treatment of sex to the standard of a child’s library.” He therefore maintained that the word “obscene” should be defined in terms of “the present critical point in the compromise between candor and shame at which the community may have arrived here and now.”

III. DIFFICULTY DEFINING OBSCENITY

Over the next several decades, though, courts struggled to give some clear, consistent, and coherent meaning to the legal concept of “obscenity.” In 1930, for example, taking a position quite different from the one advanced by Learned Hand, the Supreme Judicial Court of Massachusetts held that Theodore Dreiser’s acclaimed masterpiece *An American Tragedy* was obscene because it included a scene in which the main character visits a house of prostitution and another in which the

²⁰ See STONE, *supra* note 2, at 160–62. For a lively account of the life and times of Anthony Comstock, see AMY WERBEL, *LUST ON TRIAL: CENSORSHIP AND THE RISE OF AMERICAN OBSCENITY IN THE AGE OF ANTHONY COMSTOCK* (2018).

²¹ Hal D. Sears, *The Sex Radicals in High Victorian America*, 48 VA. Q. REV. 377, 384 (1972), *quoted in* STONE, *supra* note 2, at 163.

²² *United States v. Harmon*, 45 F. 414, 418 (D. Kan. 1891), *rev’d*, 50 F. 921 (C.C.D. Kan. 1892). See STONE, *supra* note 2, at 163–64.

²³ 209 F. 119, 121 (S.D.N.Y. 1913).

main character and his pregnant girlfriend attempt to secure an abortion.²⁴

Throughout this era, it was universally assumed that, whatever obscenity was, it was not protected by the First Amendment. Indeed, the Supreme Court in these years simply took it for granted that “obscenity” was not within the “freedom of speech, or of the press” guaranteed by the Constitution. But that issue remained unresolved until 1957, when the Supreme Court finally addressed the question in *Roth v. United States*.²⁵

In an opinion by Justice William J. Brennan, Jr., the Court accepted the conventional wisdom that something called “obscenity” is not protected by the First Amendment. Noting that sex “has indisputably been a subject of absorbing interest to mankind through the ages,” the Court held that the First Amendment permits the government to censor sexual expression only if the material, judged as a whole, appeals primarily to the prurient interest in sex, is patently offensive to contemporary community standards, and lacks any redeeming social value. In so doing, the Court sharply narrowed the constitutionally permissible scope of what could be deemed “obscene.”²⁶

This led to a significant upsurge in the availability of sexual expression, including a growing proliferation of sexually-oriented magazines, books, and movies. Moreover, in the years after *Roth*, attitudes in the United States toward sexual expression began to change dramatically. The Victorian prudery that had previously carried the day was pushed aside by the dawning of the sexual revolution in the 1960s. With the advent of the pill, women’s liberation, and the publication of such works as Helen Gurley Brown’s *Sex and the Single Girl* and Dr. David Reuben’s *Everything You Always Wanted to Know About Sex* (*But Were Afraid to Ask)*, sexual freedom and sexual explicitness began to reshape American culture. By the late 1960s, full-frontal male and female nudity appeared in the movie *Medium Cool*, the X-rated *Midnight Cowboy*, which featured both nudity and strong sexual content, won the Oscar for Best Picture, and the much more explicit Swedish import *I Am Curious (Yellow)* played to packed houses in cities across the nation. In short, the nation had finally gotten back to what was both legal and commonplace in the eighteenth century.

²⁴ *Commonwealth v. Friede*, 171 N.E. 472 (Mass. 1930).

²⁵ 354 U.S. 476 (1957).

²⁶ *Id.* at 486–87.

In the meantime, though, the Court struggled with the precise definition of obscenity. In *Redrup v. New York*,²⁷ for example, the Court overturned obscenity convictions in three cases arising out of the sale of sexually explicit paperback books and magazines carrying such names as *Lust Pool*, *Shame Agent*, and *Swank*. In a brief, unsigned opinion, the majority of the Court (with each justice applying his own definition of obscenity) announced that the materials were not obscene.

The Court's inability to articulate a clear definition of obscenity led to an era of chaos and confusion. Indeed, because the Court could not agree on a definition of "obscenity," the justices felt the responsibility to review every obscenity conviction in the nation in order to determine for themselves whether the work at issue was or was not obscene.

Each year, the justices and their clerks had to gather in one of the Court's conference rooms to watch the movies that were at issue in pending obscenity cases. Justices Douglas and Black never went, because in their view there was no such thing as obscenity. At one point, Black quipped, "[i]f I want to go see [a dirty] film, I should pay my money."²⁸ In his final years on the Court, when Justice Harlan was losing his eyesight, his law clerks or a fellow justice had to describe to him in detail the action on the screen. This was, to say the least, awkward. There were moments of levity, however, mixed in with the misery of having to spend hours at this task. The law clerks, for example, frequently mocked Justice Potter Stewart's definition of obscenity, shouted out raucously in the darkened room: "That's it, that's it. I know it when I see it."²⁹

In the meantime, Congress, concerned about the growing proliferation of sexually-explicit material, authorized President Lyndon Johnson to appoint a special blue-ribbon Commission on Obscenity and Pornography to determine whether exposure to sexually-explicit material caused "antisocial behavior." After two years of comprehensive research and study, the Commission's report, issued in 1970, found that eighty-five percent of adult men and seventy percent of adult women had seen explicit sexual material in recent years and that more than seventy percent of minors had been exposed to such images by the time they had reached age of eighteen. The Commission reported that most people said that their exposure to such material affected them more positively than negatively, and that most experts found that the exposure

²⁷ 386 U.S. 767 (1967).

²⁸ BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 239 (1979)

²⁹ *Id.*

to sexually-explicit material did not have harmful effects on either adults or adolescents.³⁰ In light of these findings, the Commission concluded that there was not sufficient justification to forbid “the consensual distribution of sexual materials to adults.”³¹

The Commission’s report triggered a firestorm of criticism. Charles H. Keating, Jr., for example, the head of Citizens for Decent Literature, characterized the Commission’s recommendations as “shocking and anarchistic.” Keating declared that “[f]or those who believe in God, . . . no argument against pornography should be necessary.”³² By the time the Commission completed its report, Richard Nixon had succeeded Lyndon Johnson in the White House, and a great many Americans, especially those in the so-called “Silent Majority,” were appalled by what they saw as the rampant immorality of the “sexual revolution” of the 1960s. Nixon repudiated what he decried as the Report’s “morally bankrupt conclusions” and proclaimed that “so long as I am in the White House, there will be no relaxation of the national effort to . . . eliminate smut from our national life.”³³

Soon after he assumed the presidency, Nixon had the opportunity to appoint four justices to the Supreme Court, dramatically changing the overall makeup of the Court. The new Chief Justice, Warren Burger, loathed pornography. At one point, he observed that obscenity is “like filth in the streets that should be cleaned up and deposited in dumps.”³⁴ He could hardly wait for the newly-constituted Burger Court to get its hands on the obscenity issue.³⁵

IV. SEX REGULATION POST-*MILLER* AND THE UPHILL BATTLE AGAINST NEW TECHNOLOGIES

On June 21, 1973, the Supreme Court handed down its decisions in two landmark obscenity cases: *Miller v. California*³⁶

³⁰ See COMMISSION ON OBSCENITY AND PORNOGRAPHY, 91ST CONG., THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY (U.S. Gov’t Printing Office 1970).

³¹ *Id.* at 41–42.

³² *Id.* at 578, 580–82 (statement of Charles H. Keating, Jr., Commissioner).

³³ RICHARD M. NIXON, *Statement About the Report of the Commission on Obscenity and Pornography* (Oct. 20, 1970), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD M. NIXON, 1970 940 (1971); see also MICHAEL J. GRAETZ & LINDA GREENHOUSE, *THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT* 195 (2016).

³⁴ See STONE, *supra* note 2, at 288.

³⁵ WOODWARD & ARMSTRONG, *supra* note 28, at 233, 236, 295; STONE, *supra* note 2, at 288.

³⁶ 413 U.S. 15 (1973).

and *Paris Adult Theatre I v. Slaton*.³⁷ With evident relish, Burger delivered the opinion of the Court in both cases, with Justices Douglas, Brennan, Stewart, and Marshall dissenting. Burger offered a new definition of obscenity: to find that any particular work is “obscene,” a court must conclude that the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; that the work depicts or describes sexual conduct in a patently offensive manner; and that the work, taken as a whole, lacks “serious literary, artistic, political, or scientific value.”³⁸

The third prong of Burger’s test was critical, because his new definition of obscenity expressly jettisoned the *utterly without redeeming* social value test and held that a work now could be deemed obscene unless it had *serious* social value. With this profound change in the law, it seemed that America was headed into a new Victorian era with respect to sexual expression. It was Warren Burger’s hope that his opinions in *Miller* and *Paris Adult Theater* would reverse the tide of sexually explicit material in the United States.

But this was not to be. The social changes unleashed in the 1960s and 1970s, shifting cultural values, and the advent of new technologies—including VHS, DVD, cable television, and the Internet—simply overwhelmed the capacity of the law to constrain sexual expression. As the flood of sexual material outpaced the capacity of prosecutors to respond, community standards soon became more tolerant of what would once have been regarded as “patently offensive” depictions of sex, and the real-world definition of obscenity shrank down to a small fraction of what had once been thought to be obscene. And as the category of sexual expression that could satisfy even the new *Miller* standard narrowed, so that only the very hardest of what had once been thought to be hard-core pornography could warrant conviction, it became less sensible for government officials to expend scarce prosecutorial resources on what increasingly came to be seen as an essentially futile effort to suppress the market for such expression.

When George W. Bush assumed the presidency in 2001, many of his supporters hoped for a resurgence of obscenity prosecutions. Bush stood, after all, for a return to traditional American values. Living up to that promise, Attorney General John Ashcroft proudly declared in 2002 that “[t]he Department of Justice is committed unequivocally to the task of prosecuting obscenity.” But despite the assurances of President Bush and Attorney General Ashcroft, the Department of Justice filed

³⁷ 413 U.S. 49 (1973).

³⁸ *Miller*, 413 U.S. at 24 (emphasis added).

fewer than ten adult obscenity prosecutions between 2001 and 2005. Conservative religious organizations were outraged. But if the government was going to bring cases it could actually win, it had no choice but to go after the most extreme fare, such as videos in which men urinate in a woman's mouth, women have sex with horses, and women and men engage in violent sado-masochistic behavior.³⁹

In a world of limited prosecutorial resources and changing social mores, as much as some people wanted to turn back the clock to the "good old days" when *Lady Chatterley's Lover*, *Playboy*, and *Deep Throat* were thought to be obscene, those days were long gone. Technology had changed, society had changed, cultural values had changed and, as a result, the law had changed. By the early years of twenty-first century, given the pervasiveness of sexually explicit pornography on the Internet and elsewhere in society, we had for all practical purposes reached the end of obscenity. As Robert Peters, the president of Morality in Media, a religious organization established to combat pornography, reluctantly conceded, "[t]he war is over and we have lost."⁴⁰

The practical reality is that today, with the mere click of a button, search engines will instantaneously find virtually limitless websites that offer access to graphically explicit videos of masturbation, anal sex, oral sex, bondage, sadomasochism, and literally anything else the mind can imagine. Whether this is good, bad, or indifferent is at this point largely irrelevant. The law has simply been overwhelmed by technology and by changing social mores. The challenge for the future is no longer how to *ban* such material, but how to deal with its existence.

So, where does this leave us? Compared to the 1950s, when any depiction of sex in books, movies, or magazines was tightly constrained, we are now inundated with all sorts of sexually explicit material. We have gone from a world in which an airbrushed photograph of a partially naked woman was forbidden even to consenting adults, to one in which consenting adults can see pretty much anything and everything they can possibly imagine on the Internet.

The restrictions that now exist are quite specific and limited. First, there remains a strong presumption in favor of protecting unconsenting adults and children when they are out in public. Second, the government can constitutionally prohibit the sale or exhibition to children of material that is obscene for

³⁹ See STONE, *supra* note 2, at 303–06.

⁴⁰ Robert D. Richards & Clay Calvert, *The 2008 Federal Obscenity Conviction of Paul Little and What It Reveals About Obscenity Law and Prosecutions*, 11 VAND. J. ENT. & TECH. L. 543, 580 (2007), *quoted in* STONE, *supra* note 2, at 308.

minors, but only if it can do so without significantly interfering with the rights of adults. Third, the government can constitutionally prohibit the production, distribution, and possession of child pornography (that is, sexual images and videos made with real children). Beyond that, though, there are effectively no limits on what consenting adults can see.⁴¹

V. THE FUTURE OF SEX AND THE FIRST AMENDMENT

Has this triumph of free speech—and the consequent rejection of Comstockery—been good for the nation? On the one hand, a fundamental precept of American constitutional law is that, all things considered, the freedom of speech is a positive good. As a matter of first principles, the Constitution denies government the authority to decide for the American people what speech—what ideas, what values, what facts, what opinions, what images—they will be allowed to express or consider or hear or view.

But what of the consequences of greater freedom of sexual expression? Are they good or bad? On one side of this question there is, of course, the principle of freedom of speech. In some sense, in terms of individual liberty, the more freedom of expression, the better. But freedom of expression is not merely a principle. It has consequences. The greater availability of sexual expression, for example, enhances the ability of individuals to understand and to satisfy their own sexual needs and desires; gives them a much richer exposure to unconventional forms of artistic excellence; entertains, amuses, enlightens, and excites; and enables individuals to learn more about sex and its many varied possibilities. All of this, in varying degrees, captures at least some of the potential individual and social benefits of a much broader freedom of sexual expression.

What, though, of the other side of the question? What are the negative consequences of greater freedom of sexual expression? Those who are appalled by the current freedom of sexual expression insist that this state of affairs harms adults, children, families, and society in general. These harms, they insist, go well beyond the bare proposition that sexual explicitness is immoral.

Some researchers suggest, for example, that the increasing availability of sexual expression has negative as well as positive consequences. Although the findings are tentative, and although exposure to such expression does not affect all individuals in the same way, several significant harms are said

⁴¹ For discussion of these issues, see STONE, *supra* note 2, at 313–34.

to be associated with the current availability of sexual expression. There is evidence, for example, that continued exposure to sexual imagery can cause in some users compulsive and obsessive behaviors that resemble behavioral addiction.⁴² Other researchers assert that the proliferation of certain kinds of sexual messages and imagery can cause particular harm to women by shaping cultural expectations about female sexual behavior in ways that enshrine relationships based on disrespect and abuse.⁴³

And, of course, there is the alleged harm to children. There is no doubt that minors are far more likely to encounter sexually explicit images today than ever before in American history. One study found that twenty-three percent of minors who came across such material on the Internet were “extremely” or “very upset” by the incident. Research also suggests that both adolescent boys and girls who regularly view such material online are more inclined to view women as sexual objects. Indeed, this might have triggered some of the apparent increase in recent years in sexual harassment and sexual assault on college campuses.⁴⁴

What are we to make of these concerns? The first and perhaps most important point is that free speech *always* comes at a cost. Speech that questions the wisdom of fighting a war may cause soldiers to desert. Speech that defends the morality of abortion may encourage women to engage in what others regard as immoral “baby-killing.” Religious condemnation of homosexuality can incite prejudice, discrimination, and violence against gays and lesbians, and can inflict serious emotional harm on minors who have discovered themselves to be homosexual. The central insight of the First Amendment, though, is that speech cannot constitutionally be censored merely because it might have harmful consequences.

This does not mean that we cannot mitigate what we perceive to be the negative consequences of sexually-explicit expression. To the extent that critics see sexually-explicit speech as akin to cigarettes, alcohol, and gambling in its capacity to overwhelm the individual’s will, the proper response

⁴² See MARY EBERSTADT & MARY ANNE LAYDEN, THE SOCIAL COSTS OF PORNOGRAPHY: A STATEMENT OF FINDINGS AND RECOMMENDATIONS 17–18 (Witherspoon Institute 2010); Alvin Cooper et al., *Sexuality on the Internet*, 30 PROF. PSYCHOL. 154 (1999).

⁴³ See EBERSTADT & LAYDEN, *supra* note 42, at 23–25; Jill C. Manning, *The Impact of Internet Pornography on Marriage and the Family*, 13 SEXUAL ADDICTION & COMPULSIVITY 131 (2006).

⁴⁴ See EBERSTADT & LAYDEN, *supra* note 42, at 31; Manning, *supra* note 43, at 106–07; NATIONAL CENTER ON ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIVERSITY, NATIONAL SURVEY OF AMERICAN ATTITUDES ON SUBSTANCE ABUSE IX: TEEN DATING PRACTICES AND SEXUAL ACTIVITY 6 (2004).

is to warn people about the dangers of abuse and to help those who succumb to temptation.

To the extent that they fear that such expression can warp people's values, the proper response is to educate them about the "right" values and expectations. Of course, there is no guarantee that such efforts will carry the day. In the end, some of us will simply disagree with what others believe to be the "right" values to live by. In a free society, that is our right.

The issue is more complicated with respect to children because they do not have the same capacity to make responsible judgments for themselves about right and wrong. In part for that reason, the Court has continued to adhere to the doctrine that some sexually-explicit material is obscene for children, even though it is constitutionally protected for adults. In practical effect, though, it is difficult, if not impossible, to shield children in today's world from exposure to sexually-explicit expression.

The primary remedy therefore rests largely in the hands of parents. By using filters on home computers, by speaking with their children about the possibility that they might encounter sexually-explicit expression, by talking with them after they do encounter such material, by guiding them in what they believe to be "best" ways to think about intimacy and sex, and by educating themselves about the best ways to manage their parental responsibilities, parents can create a reasonably safe environment for their children. In truth, this is no different from the trust we place in parents more generally. In everything from crossing streets to playing near the water to choosing friends to walking alone at night to eating right to smoking and drinking and drugs, we rely upon parents to protect their children from harm. The same is true today in terms of protecting children from the harm caused by exposure to sexually-explicit expression.

Perhaps ironically, we are where we are today not because citizens intentionally voted to make the most extreme forms of sexual material legal, not because judges intentionally held that the Constitution should protect the most extreme forms of such material, but because technology overwhelmed the capacity of the law to constrain the availability of such material. The challenge for the future is to make the best of it.