

Freedom, Virtue, and the Politics of Regulating Pornography

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The politics of regulating pornography in the United States is, like so much else in America, complicated by our constitutionalism. Ours is not a parliamentary democracy where a policy decided upon by the cabinet is made into law, though even that would be complicated to analyze, involving a fluid mix of ideas, interests, press, and personalities in the formation of the policy, however straightforward its enactment. All these elements are at play in the American context, too, of course, but the constitutional structure of our institutions and the judicial enforcement of constitutional rights add dimensions to the matrix. In the first place, federalism means that policies that touch upon both state and national interests involve governmental institutions at both levels, often in interlocking ways. The regulation of pornography originally fell within what was known as the police power of the states – that is, the general power of government to regulate society to protect health, safety, and morals, with education sometimes also mentioned – and thus would involve the federal government only indirectly, through its power to regulate commerce or to deliver the mail. But in the second place, since the middle of the twentieth century, the freedom of speech and press clauses of the First Amendment have

been interpreted to protect communication that the law once suppressed as obscene or pornographic, so that, thanks to the doctrine of “incorporation” which applies the First Amendment to the states, the federal courts have become in many instances the final arbiters of what is and what is not allowed in the control of pornography throughout the land. As scholars increasingly agree, the role of courts in establishing constitutional limits should be analyzed as involving not mere abstract doctrine but what is now called constitutional politics. Any account of policy-making in an area that in some way touches constitutional issues – and many areas of public policy do, certainly the one we are considering here – has to include the courts as players, but also recognize that, though they often hold the trump, they do not hold all the cards.

In this overview of the politics of pornography and its regulation, I will begin by discussing American policy in this area over the course of the last century and a half, as well as the technological developments that have made pornography a moving target and its regulation a repeated challenge, adding a quick review of First Amendment constitutional law. Then I will outline the various ideas and interests that have influenced the development of pornography regulation in recent years. Next I will turn to examine an innovative but ultimately unsuccessful attempt in the 1980s to develop a new rationale in favor of regulation, a new mode of regulating, and a new coalition of support, drawing on Donald Downs’ study, *The New Politics of Pornography*. In conclusion I will consider what lessons might be learned from this experience for the issue of regulating pornography in the age of the internet and in the light of advanced scientific understanding of pornography’s social costs.

REGULATION OF PORNOGRAPHY

The term “pornography” in English has been dated only to the mid-nineteenth century, when it seems to have been borrowed from the French or coined from the ancient Greek, meaning, literally, “writing (or drawing) about prostitutes.”¹ “Obscenity” is an older English word, taken from the Latin, where it meant more or less the same as it did for us, at least before the federal courts seized the word: “offensive, foul, loathsome, disgusting.”² Known in the West from the ancient world through the poetry of Ovid and Juvenal among others, and rediscovered in pictorial form with the excavation of Pompey as well as access to some ancient Eastern texts, the artistic rendition of human sexuality seems to have been a preserve of the upper classes, controlled, if at all, by Church scrutiny or social disapproval but not subject to temporal law nor at any rate to recorded legal action. A common law prosecution for obscenity first appears in England in the early eighteenth century, and only Lord Campbell’s Act (the Obscene Publications Act) of 1857 gave statutory authority from Parliament to magistrates who would destroy obscenity in print.³ Though distribution of obscene materials was contrary to common law and sometimes to statutes in the states since colonial times, the first federal prohibition came in the Tariff Act of 1842, which forbade importation of “all indecent and obscene prints, paintings, lithographs, engravings, and transparencies,” broadened in 1856 to include the new technology of photographs. As a result of an apparent growth in domestic traffic to meet demand of the troops in the Civil War and at the request of the Post Office, Congress in 1865 made it a misdemeanor to “knowingly” mail any “publication of a vulgar and indecent character.” Eight years later, at the instigation of Civil War veteran and recent founder of the New York Society for the Suppression of Vice Anthony Comstock, Congress extended the

¹ Walter Kendrick, *The Secret Museum: Pornography in Modern Culture* (Berkeley: University of California Press, 1987), ch.1 ; *Oxford English Dictionary*, “Pornography”

² *Webster’s New International Dictionary*, 2d ed., “Obscene”

³ H. Montgomery Hyde, *A History of Pornography* (New York: Farrar, Straus and Giroux, 1964), p. 12.

prohibition to include mailing information about abortion and artificial birth control (activities which were illegal in the states), punished receiving obscene mail as well as sending it, multiplied the maximum fine by a factor of ten to \$5000, added the possibility of imprisonment, allowed penalties to be doubled for repeat offenders, and strengthened the enforcement powers of federal judges. A petition effort to repeal the statute a few years later was rebuffed, and by the 1880s Comstock himself had been appointed special agent in charge of its enforcement by the Postmaster General, though for most of his career he was paid by his Society, itself funded by leading businessmen in New York.⁴

If passage of the Comstock Act might be seen as the result of the rise of the technology of mass printing and efficient dissemination, subsequent legislation responded to new technologies in turn. Motion pictures brought forth numerous state boards responsible for film censorship, upheld by the U.S. Supreme Court against a First Amendment challenge in 1915.⁵ The movie industry successfully headed off an outcry for federal regulation in the 1920s by hiring Postmaster General William Harrison Hays as their public relations agent, and he oversaw the development of a system of self-enforced standards, codified in 1934 and applied to almost every movie distributed in the United States for over twenty years, that renounced nudity and the favorable depiction of immorality in American-made films, a system that gradually eroded in the 1950s and 1960s to be replaced by the current rating system, still a self-imposed industry standard rather than a government regulation or law.⁶ Radio communication was, by contrast, treated thus by the Communications Act of 1934:

⁴ Gaines M. Foster, *Moral Reconstruction: Christian Lobbyists and the Federal Legislation of Morality, 1865-1920* (Chapel Hill: University of North Carolina Press, 2002), pp. 13, 48, 52, 54.

⁵ *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230 (1915).

⁶ An excellent compilation of the Hays Code, including its various amendments over the years, can be found online at <http://productioncode.dhwritings.com/index.php>

SEC. 326. Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.⁷

Contradictory as these two clauses might seem to modern ears, the law actually followed the old common law pattern for print media, which forbade prior restraint but allowed subsequent legal consequences for forbidden publication; in fact, the Federal Communications Commission was given explicit power to suspend the licenses of broadcasters who allowed obscene or profane speech on the air. Television, when it came along, was regulated by the same commission under the same act. By the time cable television fell under FCC regulation, the Supreme Court had become involved in the definition of obscenity, and the same is true of the regulatory situation at the emergence of the internet. Congress included in the Federal Communications Act of 1996 an Internet Decency Act, which forbade dissemination of indecent and patently offensive materials to minors, but the act was struck within the year by the Supreme Court as overbroad for having penalized constitutionally protected expression over the internet for fear that it might fall before the unsupervised eyes of the young without considering less restrictive means to protect the young by limiting their online access to inappropriate websites.

The Court's introduction of a constitutional dimension to obscenity law was signaled in 1952 in the case of *Joseph Burstyn, Inc. v. Wilson*, which reversed the exclusion of motion pictures from First Amendment scrutiny, and it began in earnest with the case of *Roth v. United*

⁷Federal Communications Act of 1934, Public Law No. 416, June 19, 1934, 73d Congress, available online at <http://www.criminalgovernment.com/docs/61StatL101/ComAct34.html>

States in 1957, which introduced a decade and a half of legal upheaval before the settlement of a standard in the 1973 case of *Miller v. California*.⁸ *Roth*, which involved a prosecution under the old Comstock Law, reaffirmed the previous doctrine of the Court that obscenity was outside the protection of the First Amendment, but it began a process of reinterpreting the term *obscenity* that soon gave full constitutional protection to materials that had long been forbidden by statute. Obvious in the background to *Roth* were changing social practice and public opinion: The phenomenal success of *Playboy* magazine immediately upon its appearance in 1953 and the government's decision not to pursue it as obscene raised the question what the legal standard was, statutory law not having been altered, and the Court decided to clarify the matter by invoking the Constitution. Distinguishing the portrayal of sex from obscenity, as the Comstock Law for mail and the voluntary Hays Code for movies did not, and rejecting the old British standard from an 1868 case that treated as suppressible anything that might corrupt the vulnerable, the *Roth* Court announced the following test: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." By the time of the *Miller* case, the various elements of this test had been disaggregated, other dicta in the *Roth* opinion had been litigated, and the locus of decision apparently clarified: To qualify as obscene and thus unprotected, the material had to appeal to prurience, had to depict "in a patently offensive way, sexual conduct specifically defined by applicable state law," and had to lack "serious literary, artistic, political, or scientific value" when taken as a whole. While determining what constitutes prurience and patent offensiveness in particular cases was left to juries, states were thus instructed to rewrite their laws to specifically define – usually in language that would itself previously have been

⁸ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Roth v. United States*, 354 U.S. 476 (1957); *Miller v. California*, 413 U.S. 15 (1973).

suppressible – precisely what body parts in what positions doing what could not be shown, while judges, thanks to the “serious value” “prong” of the test and the restriction of the prurience “prong” to the dominant theme of the whole work, not isolated passages or moments, were left as guardians of science and literature against whatever will to “Comstockery” might still remain in the people at large.

Miller seemed at the time to be a compromise opinion – its “serious value” standard was a retreat from the “utterly without redeeming social value” standard floated in an earlier case, and it was presumed that juries could enforce local mores – but in practice its chief effect was probably in forcing the precise definition of excludable images; commentators typically opined that *Miller* left “hard-core” pornography unprotected, while taking “soft-core” under the mantle of the Constitution. The First Amendment having been firmly set as the dominant regulatory limit and so a presumption against regulation of pornography having been established, legislative attention turned to regulations of “time, place, and manner,” which in other realms of First Amendment jurisprudence had been upheld even for protected speech. One approach to pornography regulation that the Court allowed in the post-*Miller* years involved zoning and acknowledgment of a grey area of “indecent” expression between the obscene which was unprotected and expression that which was fully protected; jurisdictions could cluster indecent businesses in “red light districts,” or alternatively, scatter them apart, while the FCC was permitted to confine “dirty words” on radio or nudity on cable television to late night hours, to protect children’s ears and eyes.⁹ As noted above, the internet – which puts an “adult bookstore” in every home at any hour of every day – quickly led the Court to show the limits of both the physical and the broadcast zoning exception. Child pornography itself was ruled unprotected in

⁹ See *Young v. American Mini-Theatres*, 427 U.S. 50 (1976); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *FCC v. Pacifica*, 438 U.S. 726 (1978).

any venue, because its initial production necessarily involved child abuse, but again technology outstripped the lawyers: Faced with computer-generated images of children in pornography, the Court found its rationale undercut and disallowed regulation.¹⁰

FOUR WAYS OF SEEING PORNOGRAPHY

What are the interests and ideas that drive efforts to regulate and prevent the regulation of pornography? The interests, I suppose, are at once more immediate and more amorphous than in most other areas of policy-making. Obviously those who profit from making and selling pornography would favor its deregulation and have benefited enormously from that over recent decades; they are hampered politically only to the extent that some shame still attaches to the industry, but some of the most shameless – think of Larry Flynt, who brought down a Speaker-elect of the House of Representatives – have turned even this to political advantage. Their customers likewise might be presumed to support deregulation, though again, to the extent that shame still operates, they are likely to want to cover their preference with a principle or express it only in the privacy of a voting booth. Those whose interests are most directly on the other side – women exploited in the making of pornography, children who deserve a decent environment in which to mature – will generally need to rely for protection on others whose concern is moral or even moralistic, on parents or others who care for the character of a community and its denizens, and maybe also those of aesthetic sensibility who recognize that redefining obscenity in law does not make the “offensive, foul, filthy, and disgusting” inoffensive or clean. To be sure, there can be all sorts of complexities in the analysis of interests; for example, in Antebellum America, attempts at federal regulation of morality were typically rebuffed by defenders of slavery, who

¹⁰ Cf. *New York v. Ferber*, 458 U.S. 747 (1982), with *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

feared a precedent for interference with their own domestic practices, while in the aftermath of the Civil War, Abolitionist success propelled Christian moralists of many kinds. Still, whether because they drive action or mask interests, political ideas are critical to understand if one is to grasp what lies behind public policy. In the modern regulation of pornography, there are at least four distinct sets of ideas to consider.

CHRISTIAN MORALISM. First, there are the Christian moralists, responsible for the traditional suppression of obscenity and, as in the case of Comstock, motive forces behind new statutes and policies. It bears repeating that traditional Christian sexual morality is strict and simple: sex is licit only within marriage, marriage is intended to be for life, and every act of marital intimacy is to be open to procreation, permitting no artificial contraception and frowning on sexual practices that are not procreative in type. Although the Protestant Reformation brought an acceptance in some denominations of divorce and remarriage in certain limited circumstances, other deviation in Christian moral doctrine is recent, beginning with the allowance of contraception in hardship cases by the Church of England in 1930. Since Christ himself had said in the Sermon on the Mount that “every one who looks at a woman lustfully has already committed adultery with her in his heart,”¹¹ it is evident to Christians that pornography is sinful in itself; the poetry of love merits its own book in the Old Testament, *The Song of Solomon*, which is undeniably erotic in its imagery, however allegorical its interpretation, but the Christian is instructed to live chastely, inside marriage and out-.

Comstock spends little time elaborating on Christian teaching concerning these fundamentals, but he clearly draws his inspiration from a Christian sensibility. He writes about obscene publications:

¹¹ Matthew 5:28 [*The Holy Bible*, Revised Standard Version, Catholic Edition (San Francisco: Ignatius Press, 1965)].

The effect of this cursed business on our youth and society, no pen can describe. It breeds lust. Lust defiles the body, debauches the imagination, corrupts the mind, deadens the will, destroys the memory, sears the conscience, hardens the heart, and damns the soul. It unnerves the arm, and steals away the elastic step. It robs the soul of manly virtues, and imprints upon the mind of the youth, visions that throughout life curse the man or woman. Like a panorama, the imagination seems to keep this hated thing before the mind, until it wears its way deeper and deeper, plunging the victim into practices that he loathes.¹²

He is confident in his knowledge of right and wrong on these matters, indignant at those who engage in wrong-doing and at the “liberals” who apologize for them, and confident in his ability to employ the force and moral force of government to fight sexual vice. Though a reformer, Comstock’s work is not like the abolitionists’ in imagining a transformed society; vice might be suppressed, but I don’t believe he ever supposed it can be eliminated. His is the language of vigilance, appealing to a consensus among the righteous – and finding it widespread in Protestant America, even in the midst of demographic and social change.

Neither in temperament nor in occupation is there anything Catholic about Anthony Comstock. The Christian reformers with whom he was often associated were all Protestants, and sometimes, especially in their signature campaign against the moral evils associated with drink, not a little anti-Catholicism was implicit or even explicit in their rhetoric; the Comstock Law passed in “hot haste” thanks to the patronage of House Speaker James G. Blaine, probably the most influential anti-Catholic politician of the age.¹³ It is particularly interesting, then, that moral control of motion pictures in the early twentieth century was arranged with important

¹² Anthony Comstock, *Frauds Exposed, or How the People Are Deceived and Robbed, and Youth Corrupted* (New York: J.H. Brown, c. 1880), p. 416.

¹³ Forster, *Moral Reconstruction*, pp. 52-53.

Catholic participation, evident in the clear Catholic influence on the Hays Code itself, prompted by the formation of a Catholic Legion of Decency and drafted by Fr. Daniel Lord, S.J., professor of dramatics at St. Louis University and editor of a widely circulated publication for Catholic youth. That “code” included not only a list of rules covering numerous matters beyond obscenity, but also a list of reasons underlying them, as can be gleaned from this excerpt:

III. Law, natural or human, shall not be ridiculed, nor shall sympathy be created for its violation. By *natural law* is understood the law which is written in the hearts of all mankind, the great underlying principles of right and justice dictated by conscience. By *human law* is understood the law written by civilized nations.

Here are the reasons given for the rules about the depiction of sex:

Out of regard for the sanctity of marriage and the home, the triangle, that is, love of a third party by one already married, needs careful handling. The treatment should not throw sympathy against marriage as an institution. *Scenes of passion* must be treated with an honest acknowledgment of human nature and its normal reactions. Many scenes cannot be presented without arousing dangerous emotions on the part of the immature, the young, the criminal classes.

There follows a recommendation that even pure love not be shown in all its facts, and as for impure love, “the love which society has always regarded as wrong and which has been banned by divine law,” it must not be shown as attractive, laughable, arousing “morbid curiosity,” or permissible. As even these brief excerpts make clear, the code did not merely prevent egregious harm but instead attempted positive moral instruction. The prohibition of vulgarity, obscenity,

and profanity is thought not to even need reasons beyond the mere statement of the rules forbidding them.¹⁴

LIBERALISM. A second group of ideas can rightly be clustered under the name Comstock already gives them, *liberal*. Beginning in earnest in mid-nineteenth century England and captured in such works as John Stuart Mill's *On Liberty*, liberalism would limit government regulation to "other-regarding" actions and leave individuals as masters of their personal moral opinions and behavior. Although their precise claims were often expressed in muted form in environments where Christian moralism was widely and deeply influential, liberals held sexual morality to be a private matter and thus called into question social and legal practices that restricted sex to marriage. Moreover, as in Mill's celebrated tract, they made freedom of speech an independent value and thus found censorship of sexual material doubly offensive: for imposing upon free expression, and for squelching sexual freedom. Although the theories of European authors such as Friedrich Nietzsche and Sigmund Freud undercut the ideal of the rational person celebrated by the early liberals, the publication and dissemination of their works served the liberal argument: their circulation must be allowed for the sake of human freedom, and the sexual knowledge they meant to convey was portrayed as addressing the longing for human happiness. Modernist authors such as George Bernard Shaw, James Joyce, and D.H. Lawrence produced works that attracted the censors' wrath and the critics' acclaim. At the very moment when self-censorship of the film industry was taking place over liberal protest, federal judges began to allow admired literary work to be free from the censors' strictures. The duty of

¹⁴ Gregory D. Black, *Hollywood Censored: Morality Codes, Catholics, and the Movies* (Cambridge: Cambridge University Press, 1994), esp. ch. 2, p. 34 ff., and Appendix A, pp. 305, 307. Numerous recent books detail aspects of the code and the controversy around it, including Thomas Doherty, *Hollywood's Censor: Joseph I. Breen and the Production Code Administration* (New York: Columbia University Press, 2007), and Laura Wittern-Keller, *Freedom of the Screen: Legal Challenges to State Film Censorship, 1915-1981* (Lexington: University Press of Kentucky, 2008).

society to prevent harmful speech eventually fell before the liberals' confidence that censorship was generally, maybe always, more harmful than any speech itself could be. The commonsense observation that the allure of vice is often enhanced by its suppression – and the observed success of literary productions known to have attracted censorial interest, because of that interest – seemed to confirm the liberals' argument in favor of free expression: Even if censorship was not wrong in principle, it was futile in practice, so prudence confirmed what prurience sought, the abandonment of restrictions on what could be read and seen.¹⁵

Actually, the case for censorship had usually depended on assumptions of social inequality, and these played themselves out in America in a curious way. When obscene material was available only to the wealthy or the privileged, it was thought unnecessary to restrain it by law; precisely as technology equalized the access of social classes to obscenity, the call for regulation had been raised. This is exemplified by the different treatment accorded movies and literature in the 1930s. As mass entertainment, movies were especially dangerous in their potential effects and so in their potential to corrupt; literature took effort and so could be granted wider liberty, its tendency to corrupt being outweighed by its promise to uplift. But precisely the more sophisticated, literary classes were likely to take an interest not only in literature but in constitutional law, and to understand its political potential. First in the doctrine of speech, then in the doctrine of sexual license, dubbed “privacy,” courts began to enforce as constitutional commands the liberal ideals of personal freedom. Defended as responses to social evolution, they effectively closed avenues of social development: After all, when a policy has been declared unconstitutional, legislative power is constrained and all subsequent political action has to take into its calculations the potential cost of lawsuits and the likelihood of their

¹⁵ For a typical “Whig” account of the rise of liberal ideas on sexuality and its portrayal, see Hyde, *A History of Pornography*; for a typical account of the rise of liberalism in First Amendment law, see Thomas I. Emerson, *The System of Freedom of Expression* (New York: Vintage Books, 1971).

failure. Liberalism not only succeeded in winning over the most sophisticated social classes, but it entrenched their authority over what was permissible. Moreover, since liberalism came for similar reasons to dominate the academy and the press, today it takes a bold effort at recovery in academic discourse even to formulate reasons why anyone ever thought otherwise. As actions follow thoughts, so the case for freedom of thought brought in its train the case for freedom of action. And the dynamic proceeded even as the character of liberalism itself morphed: Freedom of speech, originally celebrated as the avenue to truth, came to be seen as the only plausible position in a climate of pervasive skepticism, while sexual freedom, originally presented as nature's rebellion against the strictures of convention, came to seem all the more cogent as the authority of natural standards was increasingly subjected to doubt.

NEO-CONSERVATISM. As Supreme Court doctrine enforced permissiveness in the 1960s and as liberalism grew increasingly relativistic in demeanor, a secular case for censorship was made by several scholars who are best described as neo-conservatives. They accepted the premises of liberal democracy as the practical basis of what they called the American regime, but they questioned whether the constitutional republic could thrive if the polity showed no concern whatsoever for the character of its citizens. Though students of classical political philosophy, they did not suggest restoring virtue rather than liberty as the end of political life in modern America, but they did argue that a free society depends upon a certain virtue in its citizens and to that extent adopted the language of classical republicanism. They found the recent involvement of the Supreme Court in enforcing a liberal or rather libertarian doctrine of free speech that effectively removed all censorship of obscenity to be doubly problematic in relation to citizen virtue: It permitted material that tended to corrupt those who needed instruction in noble deeds, not base ones, and it took from the people the decision about how to preserve their own liberty

and virtue. The neo-conservative defense of obscenity was a sophisticated one: Walter Berns, for example, concludes his essay by explaining the value of the obscene in great art, citing as an example Edmund's "stand up for bastards!" speech in Shakespeare's *King Lear*, showing how artistic use of obscenity serves to ennoble and asserting that art itself thrives in an atmosphere of partial censorship more readily than in a world where everything is permitted and no one publicly cares to distinguish art from trash.¹⁶ Berns is no Comstock who would brag how many trainloads of smut he had captured and destroyed; it is enough for him that it be returned under the counter or behind a screen.

FEMINISM. The fourth set of ideas concerning pornography and censorship belongs to modern feminism; pornography is defined as writings or images that depict the sexual subordination of women. While perhaps most feminists would accept that definition as far as it goes, it should be pointed out immediately that not all scholars who describe themselves as feminists would agree that such pornography ought to be suppressed; in fact, volumes were produced opposing the movement among some feminists to penalize pornography, and those on both sides of the issue would agree that liberalization of speech about sexuality in the twentieth century was critical to the emergence of the more radical forms of feminism in the latter decades of that century.¹⁷ Andrea Dworkin and some others drew a distinction between pornography and erotica, rejecting only the former; Catharine MacKinnon drew a parallel between feminism and Marxism, with liberalism serving similarly as a stage in development that needed to be put behind.¹⁸ Even those who favored use of the law to suppress pornography there was little enthusiasm for censorship itself; indeed, to Susan Griffin, the censor is like the pornographer he

¹⁶ Walter Berns, "Beyond the (Garbage) Pale, or Democracy, Censorship, and the Arts," in Harry M. Clor, ed., *Censorship and Freedom of Expression: Essays on Obscenity and Law* (Chicago: Rand McNally, 1971).

¹⁷ See Drucilla Cornell, ed., *Feminism and Pornography* (Oxford: Oxford University Press, 2000).

¹⁸ Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987).

torments in that the aim of both is the silencing of women.¹⁹ Nevertheless, drawing on a model of civil rights, law could be used to effect change, restricting liberty of expression in the name of equality of rights. And the target was clearly defined as pornography, not obscenity, the depiction of women as sexual objects or sexual slaves, not portrayal of the filthy or disgusting. The aim was not to restore an old regime which was part and parcel of the problem, but instead to initiate the new.

Now, listing these four categories of ideas is not to suggest that individuals subscribed in large numbers only to one or another of the categories, nor to deny that, as I wrote above, there can be complex mix of ideas and interests. I just mentioned that feminism, though critical of liberalism, in fact depended on liberal freedom for its own emergence and growth. Likewise, neo-conservatives, though friendly to censorship of obscenity in the 1970s and 80s, developed a wary eye once they found themselves on the receiving end of censoriousness in the age of “political correctness,” even if the pressure on speech was largely social, at least outside of academic institutions and their arcane rules. Moreover, there might be emerging ideas and constituencies endorsing them that will influence the debate in ways that are impossible to ignore in any political calculation; candidates include the Catholic discourse that is developing in response to Pope John Paul II’s *Theology of the Body*, or notions of gay sexuality that cannot be adequately fit into the category of liberalism, even in its more radically libertarian form. Still, I propose the four categories of Christian moralism, liberalism, neo-conservatism, and feminism as a useful heuristic. The test is in what they can explain.

FEMINIST ANTI-PORNOGRAPHY ORDINANCES: THE POLIS IN THE EIGHTIES

¹⁹ Susan Griffin, *Pornography and Silence: Culture’s Revenge Against Nature* (New York: Harper & Row, 1981).

In 1983 and 1984, city councils in two Midwestern cities considered and passed a new kind of anti-obscenity ordinance. Based on a theory proposed by feminist legal scholar Catharine MacKinnon and involving Professor MacKinnon in hearings in both instances, the cities sought to redefine pornography as the depiction of sexual violence against women, hence as discrimination, and to penalize it on the model of civil rights legislation, allowing citizen complaints and suits directed against those who engage in sexual violence either in making pornography or after watching it or against those who traffic in pornography and thereby, in the theory of the ordinances, discriminate against women. Professor MacKinnon aimed in her draft legislation – she had been teaching a course at the University of Minnesota law school at the time, and apparently some of the impetus for the proposed ordinance came from her students – to apply to pornography the theory of treating sexual harassment in the workplace as a form of sex discrimination, which was simultaneously working its way through the courts and is now established as law.²⁰ In the Minneapolis ordinance, pornography was defined as “the sexually explicit subordination of women, graphically or in words,” followed by a list of nine offensive depictions, some explicit in the mode prescribed in *Miller v. California* (e.g., “women are presented as sexual objects who experience sexual pleasure in being raped”), some more general (e.g., “women are presented as sexual objects, things, or commodities,” or “women are presented as whores by nature”); the Indianapolis version included only the five explicit depictions. Notably missing from the ordinance was any mention of prurience or immorality, nor was there restriction of the offense to the dominant theme of the work taken as a whole. The Supreme

²⁰ See *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); “Facts About Sexual Harassment,” U.S. Equal Employment Opportunity Commission, <http://www.eeoc.gov/facts/fs-sex.html>.

Court's obscenity doctrine, in other words, was replaced by what proponents thought a superior approach.²¹

The politics of the ordinances involved an alliance of feminists and conservatives. In Minneapolis, the key figure was an experienced Republican councilwoman and Reagan supporter who worked closely with Prof. MacKinnon and took the lead in seeing the ordinance through the council; in Indianapolis, a town that had long had active groups favoring the suppression of obscenity, some of whom had grown frustrated by recent Supreme Court jurisprudence, many Republicans supported the ordinance, including the progressive Republican mayor. In both cities, testimony before the council or its committees was dramatic and controversial, with open testimony of sexual abuse that was relatively unprecedented at the time. In both cities there was both support and opposition for the ordinance among Democrats; Donald Fraser, the Democratic mayor of Minneapolis, vetoed the ordinance, convinced of its unconstitutionality, and later vetoed a revised version that was passed the following spring. In Indianapolis Mayor William Hudnut signed the act into law, only to find himself named in a lawsuit that led to its being overturned in federal district court, with the Sixth Circuit Court of Appeals affirming, in an opinion by Judge Frank Easterbrook, a prominent Reagan appointee, and the Supreme Court declining to hear the case. Easterbrook's opinion noted that the ordinance eschewed the Supreme Court's definition of obscenity, which meant that the material in question had to be considered by the court as protected speech. While not denying – indeed, precisely because he admitted – the power of the argument about the meaning of pornography as subordinating women, Easterbrook found the statute to aim at “thought control,” adding that

²¹ See Donald Alexander Downs, *The New Politics of Pornography* (Chicago: University of Chicago Press, 1989); the ordinances are described on pp. 44 and 114-115, respectively. My discussion of the Minneapolis and Indianapolis cases draws heavily on Downs' extensive case studies.

neither Homer's *Iliad* nor Joyce's *Ulysses* were outside the terms of the act, concluding as follows:

Any rationale we could imagine in support of this ordinance could not be limited to sex discrimination. Free speech has been on balance an ally of those seeking change.

Governments that want stasis start by restricting speech. Culture is a powerful force of continuity; Indianapolis paints pornography as part of the culture of power. Change in any complex system ultimately depends on the ability of outsiders to challenge accepted views and the reigning institutions. Without a strong guarantee of freedom of speech, there is no effective right to challenge what is.²²

The feminist theory and ordinance captured national attention, and the testimony of the women, controversial in each city, nevertheless seems to have made a lasting impression on those who heard it, but neither ordinance became law, in both cases because of constitutional concerns anchored in liberal jurisprudence: Both the mayor of Minneapolis and the federal courts found that the punishment of pornography as discrimination ran afoul of the First Amendment as protected speech, not suppressible harm. In the court case, the fact of harm was not denied, but concern for free speech was treated as trump. The passage of the ordinances in the councils and the interest taken in them nationally indicated the possibility of a feminist-conservative coalition on the issue, and in fact in 1986 the federal Meese Commission not only revised the 1970 findings on the basis of new social science evidence, but also incorporated the feminist perspective on pornography as discriminatory against women. At the same time, the repudiation of both ordinances on constitutional grounds seems to have caught some conservatives by surprise, indicating, Professor Downs thinks, either their naivety or their desperation in grasping

²² *American Booksellers Ass'n v. Hudnut*, 771 F. 2d 323 (1985), at 332.

at a radically untested approach in the face of liberal legal entrenchment. If the feminists pressed for the ordinances only to gain national attention and thereby have some influence on the long-term debate, their strategy was probably successful; if they sought to change the regulation of pornography in the actual cities for the present, they seem to have been naïve about the willingness of the courts to radically shift established (even recently established) doctrine. Their initial success in local government suggests the possibility of anchoring the regulation of pornography in affected communities; after all, *Miller* had seemed to vindicate “community standards,” and the zoning cases suggested the value of local government, too. But the liberalism now accepted as national doctrine of constitutional scope undercut the efforts at the local level to address the moral concerns of actual citizens willing to come forward and admit of having suffered genuine harm. And the entrenchment of that liberalism in constitutional doctrine changes the whole character of the politics, for it raises formidable barriers in front of those on the other side of the issue, who could see all their efforts brought to naught by judicial annulment, and at the very least are faced with enormous legal expense to match expected legal challenge. Indeed, probably one thought behind the feminist proposal to treat pornography as discrimination was to meet constitutional trump with constitutional trump, since the vindication of civil rights is ordinarily the only goal besides urgent needs for security that can win at law over civil liberties.

CONCLUSION

Much has happened since the 1980s, of course, both in terms of the issues faced and in terms of public opinion. As noted above and is apparent to all, the easy availability of pornography on the internet facilitates access and thus, as might be expected, increases its use.

Moreover, as other contributors to the conference make plain, we know even more than before about the harm that pornography does, even if the full extent of that harm is difficult to measure. At the same time, social attitudes seem to have become more permissive, probably of the depiction of sex – witness, in Cincinnati, a city declared as recently as 1985 the “Anti-Porn Capital of America,” the 1990 jury acquittal of those responsible for an exhibit of the sexually explicit and homoerotic photographs of Robert Mapplethorpe²³ – and certainly of public talk about sex, a fact that became excruciatingly evident in the explicitness of media coverage of the events that led to the impeachment of President Bill Clinton later in the decade, and of course is evident to all who remember a previous era (and is probably an invisible fact to the young, who do not). As in so many other areas of life, we have conducted a vast social experiment, in this case, an experiment in a sex-saturated society, and the conditions that promoted the experiment now obstruct any effort to respond to its results.

My first conclusion, then, is a need for caution in any regulatory attempt, lest the effort backfire and future efforts become all the more difficult. The division in ideas and interests suggests that any regulatory effort is going to depend on a coalition whose partners are often at odds, even or especially on related issues. It will require a sort of negotiation to find common ground. For example, neo-conservatives still feel strongly about the character of the citizenry and the need for fostering sexual self-restraint, but now they also are vigilant against politically motivated suppression of speech, finding themselves already – or imagining themselves potentially – vulnerable to attack by majority opinion. Likewise, Christian moralists and feminists might agree on the need to protect women from pornographic assault, but they often have fundamentally different expectations of the protectors and the protected. Conversely,

²³ The epithet is recorded in Downs, *The New Politics of Pornography*, p. 28; on the acquittal, see Isabel Wilkerson, “Cincinnati Jury Acquits Museum in Mapplethorpe Obscenity Case,” *New York Times*, October 6, 1990 [<http://query.nytimes.com/gst/fullpage.html?res=9C0CEFD113DF935A35753C1A966958260>].

liberalism is unlikely to be defeated if attacked head-on, whether by challenging federal jurisprudence or by ignoring widespread public sentiment in favor of expressive freedom – but it may be vulnerable to regulations that address aspects of the problem from an angle liberals might otherwise endorse, for example, focusing on regulation of commercial speech. Partly this is a plea to recognize constitutional politics: the costs of taking on the federal courts is very high, and appeals that call for the overturning of established doctrine are not apt to succeed unless well prepared, for the Supreme Court rarely reverses its decisions outright, but often allows them to be chipped away at step by step. Partly it is counsel to remember public opinion, which needs to be well-formed, at both the elite level and at the level of the ordinary citizen.

Second, it is important to be clear about what is really new and what is perennial. The oldest story in pornography and its regulation is, paradoxically, the challenge of new technology. Sure, the internet makes access to pornography much easier, but so did mass printing, movies, and video-cassettes. Innovative responses might soon enough be antiquated, but sometimes they have success: The move toward zoning had genuine importance in constitutional doctrine and real effect in breaking up porn zones – for example, Times Square in New York – and that suggests to me that creative thinking might be possible. Rather than seeking to suppress what the courts are determined to protect, perhaps it is possible legally to reduce or eliminate its profitability, for example, by adjustments to copyright protection for obscene materials and maybe even for the indecent.

Finally, since public opinion is so crucial in all matters of morals – indeed, it is almost all that is at stake, since the complete suppression of vice is impossible – it is critical to consider what can be done, with or without the law, to restore to pornography its bad name. Here I want to suggest the importance of the way we use language and countenance its use, and what I want

to recommend is not a return to Comstockian prudery but a deliberate restoration of modesty in talking about sexual things. This can be done playfully and ironically – a teacher can tell you that you’ll get a good laugh if you dance around a sexual reference with a surprising circumlocution before a class of modern students who expect explicitness – and it can also be done seriously, by sacrificing a need to know or say explicit details of sexual scandal for the sake of preserving decorum. A lack of modesty in describing the sexual things tends to erase the distinction between human beings and animals, to treat ourselves as only bodies, not persons. By contrast, the antiquated social practice in pre-Oprah America of never publicly discussing sexuality also disregarded the specific character of human beings, for the sexual act is also animalistic if mute in its anticipation and in its aftermath, if its role in a complete human life cannot be explained. To acknowledge the political difficulty of the situation of those who would protect against pornography is to introduce a certain modesty into the discussion of what ought to be done. But the restoration of modesty, not to say awe, in the face of sexual passion and power is already a healthy first step.