

ORIGINS OF OBSCENITY

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I

In ancient times, sexual explicitness in drama, poetry, art, and sculpture was not regulated by the state. In 3000 B.C., the Sumerians in the Tigris-Euphrates Valley of Mesopotamia accepted sex as a natural part of life. Terra cotta from this well-integrated civilization graphically depict vaginal intercourse, anal intercourse, prostitution, and same-sex sex.¹ Sumerian literature candidly portrayed human love as intimately connected to both sexual pleasure and procreation.² The Sumerians had no word for nudity, although they had a breathtaking number of terms for the sexual organs.³ Unlike the Romans and Greeks, who glorified the phallus, the Sumerians paid more attention to the female genitalia.⁴ In Sumerian poetry, the vulva is often equated with sweet foods,⁵ and later Babylonian love poetry was often highly erotic.⁶

Some 2500 years later, Greece punished seditious, blasphemous, and heretical expression, but it did not regulate expression on grounds of obscenity.⁷

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1. See ZAINAB BAHRANI, WOMEN OF BABYLON: GENDER AND REPRESENTATION IN MESOPOTAMIA 52–54, 52 plate 3, 54 plate 5 (2001).

2. Joan Goodnick Westenholz, *Love Lyrics in the Ancient Near East*, in IV CIVILIZATIONS OF THE ANCIENT NEAR EAST 2471, 2471–74 (Jack M. Sasson ed., 1995).

3. BAHRANI, *supra* note 1, at 44–45 (noting that at least five words existed to describe female genitalia). In addition, two Sumerian deities were goddesses of the female genitalia. *Id.* at 45.

4. *Id.* at 48–51.

5. *Id.* at 45 (citing royal love song, “And her vulva / is sweet like her chatter / and her beer is sweet!”) (internal citations omitted).

6. Consider the following example:

My vulva is wet, [my vulva is wet],

I, the queen of heaven, [my vulva is wet],

Let the man on top [put his hand] on my vulva,

Let the potent man [put his hand] on my vulva

Id. at 53.

7. See NORMAN ST. JOHN-STEVAS, OBSCENITY AND THE LAW 2 (1956) (“Erotic songs and poems were popular in ancient Greece and were an accepted part of the nation’s culture.”); Holt N. Parker, *Love’s Body Anatomized: The Ancient Erotic Handbooks and the Rhetoric of Sexuality, in PORNOGRAPHY AND REPRESENTATION IN GREECE AND ROME* 90, 91 [hereinafter PORNOGRAPHY AND REPRESENTATION] (Amy Richlin ed., Oxford Univ. Press 1992) (the Greeks and Romans did not have obscene content as a specific genre). This is not to suggest that there were never efforts to restrain such sexual explicitness. In the fourth century B.C., Plato advocated the expurgation of the *Odyssey* to make it more suitable for young readers. Specifically, he called for the deletion of

Greek artists in the early Classical period depicted explicit scenes of vaginal intercourse, anal intercourse, masturbation, and fellatio on vases and terra cotta,⁸ and Greek drama was often quite bawdy. For example, Æschylus, Sophocles, and Euripides all dealt candidly with same-sex sex,⁹ and Aristophanes portrayed sexuality in all its many forms.¹⁰ In fact, the very idea of censoring art, theater, song, or literature because it was improperly sexual would have seemed quite peculiar to the classical Greeks.¹¹

Similarly, Roman poetry and drama were filled with sexual innuendo, eroticism, and sensuality.¹² Any suggestion that the law should interfere with free sexual (as opposed to political) expression would have been met with scorn. This was not the role of the state. This is not to say that the Romans had no sense of impropriety or bad taste. To the contrary, they clearly believed that certain words (not dissimilar to our own) and subjects were out of place in some circumstances.¹³ But Rome's most famous poets spoke candidly of sexual matters.¹⁴ They wrote of licit and illicit love and of sexual antics of all kinds.

passages such as those describing the lust of Zeus for Hera, because they were "not conducive to self-restraint." PLATO, *THE REPUBLIC* 67 (Everyman 1935).

8. ST. JOHN-STEVAS, *supra* note 7, at 2. See also K.J. Dover, *Classical Greek Attitudes to Sexual Behavior*, in *WOMEN IN THE ANCIENT WORLD: THE ARETHUSA PAPERS* 144 (John Peradotto & J.P. Sullivan eds., 1984) [hereinafter *ARETHUSA PAPERS*]; Sheila McNally, *The Maenad in Early Greek Art*, in *ARETHUSA PAPERS*, *supra*, at 107, 108 (analyzing depictions of maenads in sexual scenes); Robert F. Sutton, Jr., *Pornography and Persuasion*, in *PORNOGRAPHY AND REPRESENTATION*, *supra* note 7, at 3, 3–35 (analyzing in detail sexual scenes on Greek vases in early Classical period).

9. See HANS LICHT, *SEXUAL LIFE IN ANCIENT GREECE* 150–52 (J.H. Freese trans., Lawrence H. Dawson ed., 1993) (providing examples of playwrights' works).

10. *Id.* at 142–48. See also Nancy Sorkin Rabinowitz, *Tragedy and the Politics of Containment*, in *PORNOGRAPHY AND REPRESENTATION*, *supra* note 7, at 36, 38, 46 (discussing portrayals of sexuality in Greek tragedy); ST. JOHN-STEVAS, *supra* note 7, at 2–3 (describing plays of Aristophanes).

11. There is ample evidence that Greece was very open to sexual expression. See Dover, *supra* note 8, at 144 (describing pagan societies as "less inhibited" than most Christians). Accordingly, the Greeks considered public nakedness and masturbation as part of the natural order. See VERN L. BULLOUGH, *SEXUAL VARIANCE IN SOCIETY AND HISTORY* 99–100 (1976) (describing Greek emphasis on physical male beauty and nakedness); LICHT, *supra* note 9, at 87–89 (discussing differing ideas in the ancient world about the acceptability of public nakedness; *id.* at 314–15 (discussing use of "self-satisfiers" for masturbation). See also GEORGE RYLEY SCOTT, "INTO WHOSE HANDS": AN EXAMINATION OF OBSCENE LIBEL IN ITS LEGAL, SOCIOLOGICAL AND LITERARY ASPECTS 17–18 (1945) (describing ancient societies' veneration of exterior sexual organs); H.A. Shapiro, *Leagros and Euphronius: Painting Pederasty in Athens*, in *GREEK LOVE RECONSIDERED* 12, 15 (Thomas K. Hubbard ed. 2000) (discussing the interplay of Greek sexual ideology and reality, as depicted on vases).

12. See ST. JOHN-STEVAS, *supra* note 7, at 3.

13. See *id.*

14. See, e.g., Marilyn B. Skinner, *Ego Mulier: The Construction of Male Sexuality in Catullus*, in *ROMAN SEXUALITIES* 129, 129–50 (Judith P. Hallett & Marilyn B. Skinner eds., 1997) (describing the works of poet C. Valerius Catullus); OTTO KIEFER, *SEXUAL LIFE IN ANCIENT ROME* 186–202 (1938) (same); AMY RICHLIN, *THE GARDEN OF PRIAPUS: SEXUALITY & AGGRESSION IN ROMAN HUMOR* 1–2 (1992). There were also negative representations of lesbianism in Roman literature. See Judith P. Hallett, *Female Homoeroticism and the Denial of Roman Reality in Latin*

Catullus could be quite crude, as when he responds to critics, “I will fuck you up the ass and make you go down on me,”¹⁵ whereas Virgil could write with painful intensity of Dido’s ill-fated love for Aeneas¹⁶ and Ovid could describe amorous relations with amused tenderness.¹⁷ Ovid wrote playfully—and brilliantly—about homosexuality, impotence, *ménages à trois*, and adultery, encouraging husbands not to fret over a wife’s infidelity. His *Art of Love* has been described as a “sophisticated manual of hedonism”¹⁸ designed to teach “the art of enjoying . . . a woman’s body as fully and delightfully as possible.”¹⁹

After Christianity became the predominant religion, censorship on religious grounds became much more prevalent, but for a thousand years, through the end of the Middle Ages, state censorship of expression because of its sexuality remained nonexistent. Although the Church changed fundamentally the prevailing view of sex—from something wholesome to something sinful—it did not enlist the state in a campaign to suppress erotic or scatological expression.

The most important form of sexual literature in the Middle Ages was the fabliau, a story form similar to the fable. A fabliau is a short tale, usually in verse, often dealing with sex. They were told repeatedly in taverns, around campfires, and in castles. The relationship between the lovers was usually “depicted as lust, and this lust is consummated in any of a variety of bizarre or acrobatic ways in order to amuse us.”²⁰ The formula of the fabliaux typically involved a man and a woman, not married to one another, and the woman’s husband, who was cuckolded, and “usually deserved to be.”²¹ The cast of characters included lusty monks, overprotective and gullible husbands, and

Literature, in *ROMAN SEXUALITIES*, *supra*, at 255, 255–73.

15. Catullus, *Poem 16* (Martha Nussbaum trans.) (previously unpublished) (on file with author).

16. IV THE AENEID OF VIRGIL 100 (Allen Mandelbaum trans., 1981) (especially lines 601–721).

17. See generally PUBLIUS OVIDIUS NASO, *OVID’S ART OF LOVE* (London, G. Gray 1776).

18. KIEFER, *supra* note 14, at 221.

19. *Id.* at 224. See also, e.g., OVID, *THE ART OF LOVE*, at Book II, Part 19 (A.S. Kline ed., 2001):

And was that what overjoyed you, lascivious girl,
 those conquering fingers approaching your body?
 Trust me, love’s pleasure’s not to be hurried,
 but to be felt enticingly with lingering delays.
 When you’ve reached the place, where a girl loves to be touched,
 don’t let modesty prevent you touching her.
 You’ll see her eyes flickering with tremulous brightness,
 as sunlight often flashes from running water.
 Moans and loving murmurs will arise,
 and sweet sighs, and playful and fitting words.

Id.

20. Sidney E. Berger, *Sex in the Literature of the Middle Ages: The Fabliaux*, in *SEXUAL PRACTICES AND THE MEDIEVAL CHURCH* 162, 162–63 (Vern L. Bullough & James Brundage eds., 1982).

21. *Id.* at 163.

oversexed and duplicitous wives, all of whom acted with flagrant disregard for the legal and moral implications of their acts. The fabliaux freely employed profanity, pornography, and scatology.²²

Giovanni Boccaccio's *Decameron*²³ and Geoffrey Chaucer's *Canterbury*

22. See Jürgen Beyer, *The Morality of the Amoral*, in THOMAS D. COOKE & BENJAMIN L. HONEYCUTT, *THE HUMOR OF THE FABLIAUX* 15, 32–33 (1974); BERGER, *supra* note 20, at 162–74; BARBARA W. TUCHMAN, *A DISTANT MIRROR: THE CALAMITOUS FOURTEENTH CENTURY* 62, 210–11 (1993).

A well-known fabliau, *The Priest Who Peeked*, written by Guérin in the early thirteenth century, involved “a peasant who had a fine wife.” Guérin, *The Priest Who Peeked*, in LARRY D. BENSON & THEODORE M. ANDERSSON, *THE LITERARY CONTEXT OF CHAUCER'S FABLIAUX* 269, 269 (1971). She was wise, courteous, well bred, and beautiful. The peasant loved her, but she loved a priest, to whom “she had given her heart completely.” *Id.* One day, the priest stopped by the peasant's house to visit his lover, but when he looked in the window he saw the peasant and his wife at table having dinner. *Id.* Straightaway, the priest shouted, “What are you doing there, good people?” *Id.* at 271. The peasant replied, “[W]e are eating,” and invited the priest to join them. *Id.* The priest accused him of lying, declaring, “[I]t seems to me you are screwing!” *Id.* The following ensued:

Said the priest, “I have no doubt about it;
You are screwing, for I see it clearly.
Now you are trying to trick me.
Come stand outside where I am,
And I will go sit in there,
Then you can see indeed
Whether I told the truth or lied.”
The peasant quickly jumped up,
Went to the door and unlocked it,
And the priest came in;
He locked the door with a bolt,
And then he did not waste his time;
He . . . pulled up [the wife's] dress
And then he did that thing
That women love more than anything;

. . .
And the peasant peeked
Through the door and saw clearly
His wife's arse uncovered
And the priest on top;
And he asked, “As God may save you,”
Said the peasant, “is this a joke?”
And the priest immediately
Answered, “What do you think?
Don't you see? I have sat down
To eat at this table.”

. . .
Thus was the peasant tricked,
And so deceived and befuddled
Both by the priest and his own weak wit
That he never felt any pain

Id. at 271, 273.

23. GIOVANNI BOCCACCIO, *THE DECAMERON* (Mark Musa & Peter Bodanella trans., 1982) (1353).

*Tales*²⁴ were two of the most ribald examples of the fabliau in the Middle Ages. Against the grim backdrop of the Plague, Boccaccio presents a merry group of seven ladies and three young men who gather at an elegant villa outside Naples to while away the time.²⁵ Each day for ten days each of the ten companions tells a story, so that *The Decameron* comprises a total of one hundred witty, tragic, heroic, and often licentious tales of the human condition. Roughly a third of the stories are bawdy in nature, dealing with such situations as adultery, incest, *ménages à trois*, sodomy, mistaken identity, homosexuality, masturbation, and, as was common in this era, the sexual misadventures of priests and nuns.²⁶

In *The Canterbury Tales*, written in the last quarter of the fourteenth century, Chaucer turns both the French fabliaux and *The Decameron* to his own ends. One of the greatest epic works of world literature, *The Canterbury Tales* tells of thirty pilgrims who journey from London to Canterbury to visit the shrine of Saint Thomas Becket. To pass the time, the pilgrims, from all layers of society, tell stories that are full of humor, shrewdness, insight, and silliness. They reveal much about human nature, including an openness of expression about sex. In *The Merchant's Tale*,²⁷ for example, two lovers have intercourse in a pear tree, while the wife's jealous and blind husband stands below with his hands open, innocently waiting for her to drop pears from the tree. In *The Reeve's Tale*,²⁸ a knight is humiliated by being duped into unknowingly kissing a lady's crotch, and two Cambridge students end up "swiving" a mother and daughter in the same room.²⁹

24. GEOFFREY CHAUCER, *THE CANTERBURY TALES* (Penguin Classics ed. 2005) (last quarter of fourteenth century).

25. BOCCACCIO, *supra* note 23, at 5–20.

26. In *Ninth Day, Second Story*, for example, a beautiful young nun, Isabetta, falls in love with a young man, and they arrange to meet secretly in her cell, "not once, but many times, to their mutual delight." One night, the other nuns see the young lover sneaking out of Isabetta's cell, and they resolve to keep watch and to tell the Abbess the next time he visits. Several nights later, the nuns spy the young man entering Isabetta's cell, and they knock loudly at the Abbess's door so she can catch Isabetta. Unbeknownst to the nuns, however, the Abbess has in her room a priest "whom she often had brought to her bedroom in a chest." Flustered by the racket, the Abbess dresses hurriedly, but puts on her head not her nun's veil, but the priest's pants. The nuns and the Abbess rush off to Isabetta's cell in such a fluster that no one notices the Abbess's headgear. After the Abbess finds Isabetta and her lover "in each other's arms," she scolds and vilifies Isabetta, accusing her of jeopardizing the good name of the convent and threatening her with terrible punishments.

Isabetta, however, notices what the Abbess has "on her head, with suspenders dangling on either side." As she smartly but politely calls attention to the sight and the Abbess realizes "she was equally guilty," the Abbess changes her tone, "concluding that it was impossible for people to defend themselves from the desires of the flesh" and that "everyone there should enjoy herself whenever possible, provided that it be done . . . discreetly." And thus "the Abbess went back to sleep with her priest, and Isabetta with her lover; and . . . the other nuns, without lovers, sought their solace secretly in the best way they knew how." BOCCACCIO, *supra* note 23, at 563–66.

27. CHAUCER, *supra* note 24, at 341–80.

28. *Id.* at 144–59.

29. Chaucer's *The Miller's Tale* is generally regarded as one of the finest examples of bawdy comedy ever written. John, a "vulgar" carpenter and a "wealthy lout," had "lately wed" Alison, a

"wild" eighteen year old with a body "slim and small" and a "lickerish eye." The old carpenter was furiously possessive of his young wife and "held her close in cage." Two young men vie for Alison's affections. Nicholas is a clever scholar with boundless charm; Absalom is an elegantly dressed young clerk who plays the violin and the guitar. Nicholas approaches Alison first, and after some passionate sweet talk Alison swears to "be at his command . . . as soon as opportunity she could spy." But she warns Nicholas that her husband "is so full of jealousy, unless you will await me secretly, I know I'm just as good as dead." Nicholas, "patting her about the loins a bit," assures her that he will arrange everything. Absalom then makes his own pitch to Alison, serenading her "as tremulously as a nightingale. But Alison is "enamoured so of Nicholas" that Absalom receives "naught for his labor but her scorn."

Nicholas then sets in play his scheme to be alone with Alison. He persuades John that "come Monday next" the world will be destroyed in a flood even "greater than Noah's flood." Nicholas advises the terrified carpenter that there is only one way for the three of them to survive: John must hang tree-high near his roof three "kneading tubs," in which they will spend the night of the storm. They will then float free the morning after. Nicholas warns John, however, that he must tell no one of the impending disaster and insists that for the plan to work each of them must remain silently in place throughout the entire night of the flood. On the night in question, John, Alison, and Nicholas climb to their respective tubs and, after John falls asleep, Alison and Nicholas creep down to enjoy in John's own bed a night of "revel" in a "joy that goes by many an alias."

But then, to their surprise, Absalom comes by the house to secretly woo Alison. She orders him to leave or "I'll stone you," but he persists, demanding a kiss. As Absalom leans into the window to receive his darling's kiss, Alison "put out her hole" and Absalom "kissed her naked arse." Immediately, the astute Absalom realizes that something is amiss, "for well he knew a woman has no beard." Absalom is incensed, Nicholas laughs wildly, and Alison is utterly delighted with herself, as she slams shut the window. (During all of this, remember, John is overhead, asleep in his tub.)

Absalom, who "vigorously rubbed and scrubbed his lips with dust, with sand, with straw, with cloth, with chips," swears his revenge. He goes to a blacksmith and borrows a hot branding iron, promising to "return it after just a bit." Returning to Alison's window, he promises her a ring if she will give him just one more kiss. At this point:

. . . Nicholas had risen for a piss,
 And thought that it would carry on the jape
 To have his arse kissed by this jack-a-nape.
 And so he opened window hastily,
 And put his arse out thereat, quietly,
 Over the buttocks, showing the whole bum;
 And thereto said this clerk, this Absalom,
 "O speak, sweet bird, I know not where thou art."
 . . . Nicholas just then let fly a fart
 As loud as it had been a thunder-clap,
 And well-nigh blinded Absalom, poor chap;
 But he was ready with his iron hot
 And Nicholas right in the arse he got, . . .
 And like one mad he started in to cry,
 "Help! Water! Water!" . . .

Nicholas's cry for "water" awakens old John, who assumes the flood is upon them. He slices the rope holding his tub to the tree, expecting it to float free, but instead it crashes to the ground, breaking his arm. At this commotion, all the neighbors gather, and the "clever" Nicholas and Alison explain to them that the old carpenter is "crazy." The townsfolk laugh at John's fantasy of the flood, and "he was held for mad by all the town." As Chaucer concludes, all three men have got their comeuppance. John's wife has been "fattered," despite "his watching and his jealousy." Absalom "has kissed her nether eye." And Nicholas "is branded on the butt." GEOFFREY CHAUCER, *The Miller*, in *THE CANTERBURY TALES* 93-110 (Franklin Library 1974).

II

It was not until Gutenberg invented the printing press in 1428 that it became possible to distribute literary works among the general populace.³⁰ Even then relatively few people could read. But as the power of publication began to be felt by those in authority, the crown took steps to limit the danger. In 1557, the Stationers' Company was incorporated by royal charter in England "for the protection of . . . readers of books."³¹ It was declared unlawful for any person to set up a printing press without a license from the Stationers' Company; the Company was empowered to seize and burn any book published without a license and to order the imprisonment of any person who published without its imprimatur.³² But in the sixteenth century the state had no interest in obscenity. It directed licensing only against sedition, blasphemy, and heresy.³³ Indeed, English did not even have a word for inappropriate sexual expression until the sixteenth century, and even then the word—"bawdy"—did not have a negative connotation.³⁴ Bawdy ballads, poems, and plays might have been "audacious," but they were not considered "a problem the state sought to suppress."³⁵

This indifference to sexually explicit expression reflected contemporary standards of taste. The Elizabethans were quite earthy and delighted in "coarse and robust humor."³⁶ Collections of bawdy riddles and jokes were popular,³⁷

30. FREDERICK F. SCHAUER, *THE LAW OF OBSCENITY* 2 (1976)

31. RICHARD FINDLATER, *BANNED! A REVIEW OF THEATRICAL CENSORSHIP IN BRITAIN* 17–19 (1967).

32. DAVID TRIBE, *QUESTIONS OF CENSORSHIP* 51–55 (1973).

33. See C.H. ROLPH, *BOOKS IN THE DOCK* 29–31 (1969) (describing licensing plans); SCHAUER, *supra* note 30, at 3; TRIBE, *supra* note 32, at 51–55 (1973); FINDLATER, *supra* note 31, at 10–35; ST. JOHN-STEVAS, *supra* note 7, at 9.

34. JOAN DEJEAN, *THE REINVENTION OF OBSCENITY: SEX, LIES AND TABLOIDS IN EARLY MODERN FRANCE* 8 (2002).

35. *Id.* at 7. See also SCHAUER, *supra* note 30, at 1–2; SCOTT, *supra* note 11, at 17–18; ST. JOHN-STEVAS, *supra* note 7, at 2–5.

The word "pornography" did not appear in the *Oxford English Dictionary* until 1857. The word emerged in French a little sooner. The word first surfaced first in Restif de la Bretonne's 1769 treatise *Le Pornographe* and was meant to refer to writing about prostitution. Lynn Hunt, *Introduction: Obscenity and the Origins of Modernity, 1500–1800*, in *THE INVENTION OF PORNOGRAPHY: OBSCENITY AND THE ORIGINS OF MODERNITY, 1500–1800*, at 9, 13 (Lynn Hunt ed., 1993).

36. ST. JOHN-STEVAS, *supra* note 7, at 10.

37. An early riddle, perhaps from the eleventh century, is illustrative:

A strange thing hangs by a man's thigh
Under its master's clothes. It is pierced in front,
is still and hard, has a good fixed place.
when the man lifts his own garment
up above the knee, he wishes to visit
with the head of this hanging instrument the familiar hole
which it, when of equal length, has often filled before.

The answer to the riddle is a . . . key. *ANGLO-SAXON RIDDLES*, No. 44, *quoted in* ST. JOHN-STEVAS, *supra* note 7, at 4.

and audiences enjoyed Shakespeare's sexual banter, illustrated in the play scene between Hamlet and Ophelia.³⁸ Thomas Nashe, one of Shakespeare's contemporaries, did battle with the Puritans in a series of bawdy and satirical works. He is credited with having coined the English word "dildo," a term that quickly caught on.³⁹

By the latter part of Elizabeth's reign, however, Puritanism began to play a larger role in English society. The Puritans demanded and eventually instituted a stricter set of sexual standards. In 1580, William Lambarde, a wealthy London jurist, drafted the first bill to restrain "licentious" and "hurtful" publications.⁴⁰ His bill, which was never presented to Parliament, would have prohibited the publication of poems, "books, pamphlets, ditties, songs and other works and writings" intended to promote the "art of making lascivious ungodly love."⁴¹ Lambarde explained that such a law was necessary because such publications triggered "the high displeasure of God"; caused "manifest injury" to "the godly-learned, whose praiseworthy . . . writings are therefore the less read and regarded"; encouraged "the intolerable corruption of common life and manners"; and squandered "the treasure of this realm."⁴² Lambarde's proposal reflected "the mounting uneasiness of the clerics at the rapid spread" of such material.⁴³

In 1596, John Whitgift, Archbishop of Canterbury, declared his intention to regulate:

divers copies books or pamphlets [which] have been latelie printed and putt to sale, some conteyning matter of Ribaldrie, some of superstition and some of flat heresie. By means whereof the simpler and least advised sorts of her majesties subjects are either allured to wantonness, corrupted in doctrine or in danger to be seduced from that dutifull obedience which they owe unto her highness.⁴⁴

On June 1, 1599, Whitgift and Richard Bancroft, the Bishop of London, ordered the Stationers Company to seize and burn a list of literary works by nearly a dozen of England's major writers, including Christopher Marlowe, John Marston, and Thomas Nashe.⁴⁵ The resulting bonfire at Stationers' Hall was so

38. On Shakespeare's portrayal of sex, see Phyllis Rackin, *Foreign Country: The Place of Women and Sexuality in Shakespeare's Historical World*, in *SEXUALITY, PROPERTY, AND CULTURE IN EARLY MODERN ENGLAND* (Richard Burt & John Michael Archer eds., 1994) [hereinafter *SEXUALITY, PROPERTY*].

39. See IAN FREDERICK MOULTON, *BEFORE PORNOGRAPHY: EROTIC WRITING IN EARLY MODERN ENGLAND 183-84* (2000).

40. ROLPH, *supra* note 33, at 31-32; ST. JOHN-STEVAS, *supra* note 7, at 11-12.

41. ROLPH, *supra* note 33, at 31.

42. *Id.*

43. *Id.* at 31-32.

44. MOULTON, *supra* note 39, at 103 (internal citations omitted).

45. Lynda E. Boose, *The 1599 Bishops' Ban, Elizabethan Pornography, and the Sexualization of the Jacobean Stage*, in *SEXUALITY, PROPERTY*, *supra* note 38, at 185.

effective that few copies of any of the banned texts survived.⁴⁶ The goal of this action was to prevent the contagion of certain ideas that might undermine “the entire social body.”⁴⁷

What, though, were these contagious ideas? Primarily, they were works deemed heretical or seditious, especially works that not only criticized the religious and political authorities, but also did so through the use of satire, which was found to be especially biting, demeaning, and effective. The censors were also inflamed by the “newly sexualized” tone with which many English authors were then experimenting.⁴⁸ This “salacious” style clearly incited “the condemnation of the moralists.”⁴⁹ Of the works burned in 1599, the most sexual and scatological in nature was John Marston’s *Scourge of Villanie*, which purported “to be an outraged attack on sexual writing spoken in the voice of the offended moralist.”⁵⁰

In 1662, Parliament enacted a new licensing act, which prohibited the publication of “any heretical, seditious, schismatical, or offensive books or pamphlets wherein any doctrine of opinion shall be asserted or maintained which is contrary to the Christian faith”⁵¹ The authorities were not concerned with obscenity, however, and in this era even the “bawdiest English playwrights” had free reign.⁵²

It was the introduction of Pietro Aretino’s writings into England in 1584 that sparked the advent of English pornography.⁵³ An Italian poet and satirist who was one of the most versatile writers of the sixteenth century, Aretino specialized in scandalmongering, vituperation, and the exposure of hypocrisy. His satirical poetry and polemical letters earned him the nickname “scourger of princes.”⁵⁴ His *Ragionamenti*,⁵⁵ written in or about 1535 in Venice, is a work of serious comedy that mocks the pretensions of Renaissance society.⁵⁶

Aretino’s work, particularly his creation of dialogues between an older, experienced woman and a younger, innocent one, became the model for seventeenth-century pornographic prose.⁵⁷ In addition to *Ragionamenti*, Aretino composed a series of sonnets, known as the *Sonnetti Lussuriosi*, to accompany erotic engravings depicting in a graphically explicit manner the various positions

46. *Id.*

47. *Id.* at 186.

48. *Id.* at 187.

49. *Id.*

50. *Id.* at 193.

51. ROLPH, *supra* note 33, at 36–37.

52. *Id.* at 37.

53. See Boose, *supra* note 45, at 194–95.

54. *Id.* at 194.

55. PIETRO ARETINO, *RAGIONAMENTO* (Paolo Procassoli ed. 1984) (1534).

56. See JAMES CLEUGH, *THE DIVINE ARETINO* (1966); MOULTON, *supra* note 39, at 120–35.

57. See Boose, *supra* note 45, at 194; HUNT, *supra* note 35, at 10.

for lovemaking.⁵⁸ In these sonnets, couples engage in both anal and vaginal intercourse, and several sonnets compare the relative merits of the two. Some of the women express a clear preference for being “buggered.”⁵⁹

III

The modern concept of obscenity finds its roots in the drunken antics of Sir Charles Sedley of Kent, one of the boon companions of Charles II.⁶⁰ Sedley was a fair poet and one of the most prominent rakes of his generation.⁶¹ One day in 1663, Sedley, Charles Sackville, and Sir Thomas Ogle enjoyed a lengthy bout of drinking at “The Cock,” a tavern near Covent Garden. Climbing to the balcony, they undressed and pantomimed a series of indecent proposals to the passing public. Sir Charles boasted loudly of a sexual prowess so extraordinary that he claimed it caused “all women to run after him.”⁶² The drunken trio climaxed their performance by urinating in bottles and throwing them at the crowd below. This infuriated their audience, which turned ugly and began stoning them until they fled the scene.⁶³

Sedley was arrested, tried, convicted, and:

finned 2000 mark, committed without bail for a week, and bound to his good behaviour for a year, on his confession of information against him, for shewing himself naked in a balkony, and throwing down bottles (pist in) *vi & armis* among the people in Convent Garden, *contrà pacem* and to the scandal of the Government.⁶⁴

This was a conviction for breach of the peace (*contrà pacem*) for causing the mob to become unruly, rather than for expression as such.⁶⁵

58. MOULTON, *supra* note 39, at 120–24.

59. HUNT, *supra* note 35, at 24–25; JULIE PEAKMAN, MIGHTY LEWD BOOKS: THE DEVELOPMENT OF PORNOGRAPHY IN EIGHTEENTH-CENTURY ENGLAND 15–22 (2003); Sonnet 2 illustrates the tone and nature of this work:

Stick your finger up my ass, old man,
Thrust *cazzo* [cock] in a little at a time,
Lift up my leg, maneuver well,
Now pound with all inhibitions gone.
I believe this is a tastier feast
Than eating garlic bread before a fire.
If you don't like the *potta* [cunt], try the back way:
A real man has got to be a buggerer.

MOULTON, *supra* note 39, at 125–26 (quoting I MODI: THE SIXTEEN PLEASURES: AN EROTIC ALBUM OF THE ITALIAN RENAISSANCE (Lynne Lawner ed. & trans., 1988)).

60. ALBERT B. GERBER, SEX, PORNOGRAPHY, AND JUSTICE 55 (1965).

61. See Leo M. Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40, 41–43 (1938); 8 THE CAMBRIDGE HISTORY OF ENGLISH LITERATURE 158 (1912).

62. Alpert, *supra* note 61, at 41–42.

63. *Id.* at 42.

64. The King v. Sedley, 1 Keble 620 (K.B.), 83 Eng. Rep. 1146, 1 Sid. 168, 82 Eng. Rep. 1036 (1663).

65. See ISABEL DRUMMOND, THE SEX PARADOX 285–86 (1956) (distinguishing between

Indeed, at this time, expression, however lascivious or pornographic, was still deemed outside the purview of the law, so long as it was not seditious, heretical, or blasphemous. It was not until 1708 that England experienced its first true obscenity prosecution.⁶⁶ In the intervening half-century, English theater and literature had become increasingly open in dealing with sex, in part as a reaction to many years of Puritanism. This led to the beginnings of a public demand for control over “pure” expressive obscenity. In 1696, the Lord Chamberlain instructed the censors to be “very careful in correcting all obscenities and other scandalous matters and such as any ways offend against ye laws of God and good manners or the known statutes of the kingdom.”⁶⁷ The following year, the Reverend Jeremy Collier published *A Short View of the Profaneness and Immorality of the English Stage*, which led to the creation of several societies for the censorship of immorality.⁶⁸

The first pure obscenity prosecution in Anglo-American history involved James Read, a printer, who was charged in 1708 with publishing *The Fifteen Plagues of a Maiden-Head*.⁶⁹ This work, a lengthy poem in fifteen parts, purportedly written by a woman about her own experience, relates the continuing frustration of a maiden who is desperate to lose her virginity:

But ah! tis my Misfortune not to meet
 With any Man that would my Passion greet,
 Till he with balmy Kisses stop'd my Breath,
 Than which one cannot die a better Death.
 O! stroke my Breasts, those Mountains of Delight,
 Your very Touch would fire an Anchorite;
 Next let your wanton Palm a little stray,
 And dip thy Fingers in the milky way:
 Then having raiz'd me, let me gently fall,
 Love's Trumpets found, so Mortal have at all.⁷⁰

...
 Poor Pris'ners may, I see, have Mercy shewn,
 And Shipwreck'd Men may sometimes have the Luck
 To see their dismal Tempests overblown,
 But I poor Virgin never shall be *Focked*.⁷¹

obscenity and *contrà pacem* conduct); GERBER, *supra* note 60, at 55 (noting the case's significance as “the first involving criminal obscenity under the common law”); ALEC CRAIG, SUPPRESSED BOOKS: A HISTORY OF THE CONCEPTION OF LITERARY OBSCENITY 23–24 (1963) (describing various accounts of the offense); SCHAUER, *supra* note 33, at 4 (noting the case's significance as the “first time that offensiveness to decency, apart from religious or political heresy, was an element of an offense against the state”). Samuel Pepys related the incident in his diary for July 1, 1663. See SAMUEL PEPYS, 2 DIARY OF SAMUEL PEPYS, at July 1, 1663 (2000).

66. PEAKMAN, *supra* note 59, at 39–40.

67. SCHAUER, *supra* note 30, at 4.

68. *Id.*; FINDLATER, *supra* note 31, at 33–34.

69. PEAKMAN, *supra* note 59, at 40.

70. *The Fifteen Plagues of a Maiden-Head* (1708), reprinted in GERBER, *supra* note 61, at 57.

...
 “My Breasts do heave, and languish do my Eyes,
 Panting’s my Heart, and trembling are my Thighs;
 I sigh, I wish, I pray, and seem to die,
 In one continu’d Fit of Ecstasy;
 Thus by my Looks may Man know what I mean,
 And how he easily may get between
 Those Quarters, where he may surprize a Fort,
 In which an Emperor may find such Sport. . . .”⁷²

The Queen’s Bench Court found that this publication created “no offense at common law.” As Justice Powell explained,

This is for printing bawdy stuff It is stuff not fit to be mentioned publicly [But there] is no law to punish it, I wish there were, but we cannot make law; it indeed tends to the corruption of good manners, but that is not sufficient for us to punish. . . . As to the case of *Sir Charles Sidley* [sic], there was something more in that case, than shewing his naked body in the balcony⁷³

The court therefore dismissed the indictment, holding that “writing an obscene book, as that intitled, *The Fifteen Plagues of a Maidenhead* is not indictable, but punishable only in the Spiritual Court.”⁷⁴ As the legal scholar Frederick Schauer has noted, “the *Read* case essentially put an end to obscenity prosecutions for 20 years.”⁷⁵

The law was finally used to punish an obscene publication in 1727, in the case of *The King v. Curll*.⁷⁶ The dispute involved Edward Curll, a fascinating rascal who is chiefly remembered today as a figure in Alexander Pope’s *Dunciad*.⁷⁷ Born in 1675, Curll came to London at the age of twenty. As early

71. *Id.* at 60.

72. *Id.* at 63.

73. *The Queen v. Read*, Fortesque’s Reports 98, 92 Eng. Rep. 777, 11 Mod. Rep. 142, 88 Eng. Rep. 953 (K.B. 1708).

74. *Id.* See also SCHAUER, *supra* note 33, at 5; CRAIG, *supra* note 65, at 25; PEAKMAN, *supra* note 59, at 39–40; PETER WAGNER, *EROS REVIVED: EROTICA OF THE ENLIGHTENMENT IN ENGLAND AND AMERICA* 152–55 (1988).

75. SCHAUER, *supra* note 33, at 5. See Richard R. Reynolds, *Our Misplaced Reliance on Early Obscenity Cases*, 61 A.B.A.J. 220, 221 (1973).

There was some ambiguity in the distinctions between blasphemy, heresy, and obscenity, causing some confusion about the state of law. In 1683, for example, John Wickens was sentenced to pay a small fine for publishing *The Whore’s Rhetorick*, but it was officially approved the following year. Joseph Streater and Benjamin Crayle were prosecuted for publishing *The School of Venus*, a translation of *L’Escole des Filles*, and were given minor fines. Streater and Crayle were prosecuted again in 1689 for publishing *Sodom: or The Quintessence of Debauchery*. Crayle was sentenced to prison, but released on condition of good behavior. See PEAKMAN, *supra* note 59, at 39–40.

76. 2 Stra. 788 (1727).

77. Pat Rogers & Paul Baines, *The Prosecutions of Edmund Curll, 1725–28*, 5 LIBRARY: THE TRANSACTIONS OF THE BIBLIOGRAPHICAL SOCIETY 176, 176 (2004).

as 1708, he was involved in a series of bitter controversies with rivals over his publication of *Charitable Surgeon*, a quack treatise on venereal disease.

Several years later, his unauthorized publication of some poems triggered a furious feud between Curll and Pope. Pope won one round of their battle by deceiving Curll into drinking an emetic in the guise of a friendly bottle of wine at the Swan Tavern on Fleet Street and then publishing a lampoon mocking Curll's suffering.⁷⁸ On another occasion, Pope accused Curll of converting to Judaism "out of an extraordinary desire of lucre" and allowing himself to be circumcised.⁷⁹

Curll was no slacker when it came to getting into trouble. After publishing an unauthorized version of the proceedings of the House of Lords, he was reprimanded by the Lord Chancellor.⁸⁰ In 1716, Curll published a funeral oration without the permission of the author, the head of Westminster School. He accepted an invitation to the school, thinking he was to be thanked, but when he arrived "he was forcibly undressed and birched like a schoolboy in the Dean's Yard."⁸¹

In the rumble-tumble world of eighteenth-century publishing, in which copyright was in its infancy, false title pages, piracy, plagiarism, and outright fraud were the order of the day. As the English historian Alec Craig has noted, "In this literary jungle, Curll was conspicuous as a beast of prey . . . whose daring and impudence were regarded with astonishment and . . . whose bawdiness upset the susceptibilities of a coarse age."⁸² In 1718, Daniel Defoe, the author of *Robinson Crusoe*, characterized Curll as "a contemptible Wretch" who was "debauched" and "odious."⁸³ Defoe coined the term "Curlicism" as a synonym for scurrilousness and literary indecency.⁸⁴ On the other hand, Curll had "taste, ability, and a genuine enthusiasm for literature and scholarship" and was "treated quite seriously by many reputable men of letters."⁸⁵

In 1724, Curll published *Venus in the Cloister or the Nun in her Smock*, an English translation of a French anti-Catholic tract written around 1682, probably by the Abbé Jean Barrin.⁸⁶ The book was first published in Paris, and Curll pirated a translation.⁸⁷ *Venus in the Cloister* begins with voyeurism, as the nun

78. RALPH STRAUS, *THE UNSPEAKABLE CURLL: BEING SOME ACCOUNT OF EDMUND CURLL BOOKSELLER; TO WHICH IS ADDED A FULL LIST OF HIS BOOKS 50-53* (1927).

79. *Id.* at 62.

80. *Id.* at 67.

81. *Id.* at 69-76.

82. CRAIG, *supra* note 65, at 26.

83. STRAUS, *supra* note 78, at 79.

84. *Id.* at 79-81.

85. See Daniel Defoe, *MIST'S WEEKLY J.* (1718); DAVID FOXON, *LIBERTINE LITERATURE IN ENGLAND 1600-1745*, at 14-15 (University Books 1965); Alpert, *supra* note 61, at 43-44.

86. GERBER, *supra* note 61, at 64-65; Alexander Petit, *Rex v. Curll: Pornography and Punishment in Court and on the Page*, 34 *STUDIES IN THE LITERARY IMAGINATION* 63 (2001); PEAKMAN, *supra* note 59, at 148-49.

87. GERBER, *supra* note 61, at 64-65.

Angelica spies through a keyhole as Sister Agnes masturbates. Later, Angelica watches as her own lover, a monk, has sex with another nun. More than fifty sex aids, such as the "instrument of glass," are used in the convent by everyone from the Abbess down to the youngest nun. Most of the story is in the form of a dialogue among the nuns:

ANGELIQUE: Oh! let me look at you uncovered. . . . Kneel down on the couch

AGNES: Well, have you gazed enough at the outrage of this innocent? Oh God! how you handle it! . . . What, you kiss it?

ANGELIQUE: . . . Ah! but you have this part well shaped! It has such a pallor and plumpness that it appears to be really brilliant! I notice too another spot which is no less well divided by nature. No, it is *nature itself*.

AGNES: Draw your hand, I beg you, away from that place, if you don't wish to cause an arousing that could not be easily put out. . . .

AGNES: [spanking Angelique] Do you know that this portion of you is growing ever more lovely? A certain fire animates it, conveying through the flesh a vermillion more pure and more radiant than all the scarlet of Spain. . . . I will never tire of looking at it. I see everything I desire right up to your naturehood. Why do you hide that part with your hand?

ANGELIQUE: Oh, dear, you can examine it as well as the rest. . . .

VIRGINIE: That's good! I see it, I feel it, I am overjoyed with it. But now it is my turn to frolic. . . . I have in front of me a little labyrinth of . . . coral and alabaster and in its windings my fingers go to do their duty and delight. By Venus! but it's narrow, erect, well placed, brisk, ticklish, and passionate! It moves by itself. . . . Already I feel there a soft wetness⁸⁸

Several months after he published *Venus in the Cloister*, Curll was indicted. He was undoubtedly surprised by this turn of events, because the same material had appeared in London thirty years earlier without exciting attention. In November 1725, he was tried before the King's Bench at Westminster Hall. His counsel argued that the *Read* decision had definitively established that the publication of an obscene work was not punishable under the common law. The Lord Chief Justice concluded that the matter required further argument, and ordered Curll released on bail.

Finally, in 1727, the court returned its judgment. The three justices were divided. Justice Fortescue voted to reaffirm *Read*, concluding that although the

88. *Id.* at 64–67. See also WAGNER, *supra* note 74, at 72–73, 229–31; PETER NAUMANN, *KEYHOLE UND CANDLE* 43–50 (1976).

publication of *Venus in the Cloister* “is a great offense,” there is no “law by which we can punish it.”⁸⁹ Justice Reynolds disagreed. He conceded that “there may be many instances where acts of immorality are of spiritual cognizance only,” but argued that this is not one of them.⁹⁰ In his view, Curll’s act was “surely worse” than Sedley’s, for Sedley had “only exposed himself to the people then present, who might choose whether they would look upon him or not; whereas this book goes all over the kingdom.”⁹¹ The deciding vote was cast by Justice Probyn, who opined that Curll’s publication was “punishable at common law, as an offense against the peace, in tending to weaken the bonds of civil society, virtue, and morality.”⁹² Upon his conviction, Curll was sentenced, fined, and ordered to stand one hour in the pillory.⁹³

Although *Curll* marked the first time an English court had sustained a conviction for obscenity, the prosecution was due less to the sexual nature of the material than to Curll’s “long-running battle with the authorities”⁹⁴ and his recent publication of several politically libelous works that had infuriated public officials.⁹⁵ Indeed, the only penalty meted out to Curll for publishing *Venus in the Cloister* was a modest fine.⁹⁶ The much more severe penalty of an hour in the pillory was the consequence of his contemporaneous conviction for publishing the politically libelous *Memoirs of John Ker*. Standing alone, it is unlikely that even *Venus in the Cloister* would have triggered a prosecution merely for its sexual content.⁹⁷

IV

Despite the favorable precedent of *Curll’s Case*, obscenity prosecutions remained extremely rare in England throughout the eighteenth century, despite a profusion of sexually explicit writings. For example, *The Toast*, a satirical work attributed to William King, published in 1736, was described “as one of the most obscene works ever printed” in England.⁹⁸ Although the book consisted of detailed descriptions of sexual acts and indecent depictions of the actions of a hermaphrodite, it was never banned or prosecuted.⁹⁹

89. Edward De Grazia, *CENSORSHIP LANDMARKS* 4 (1969).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 5; see also STRAUS, *supra* note 78, at 120–21 (describing the spectators’ reactions as Curll served his sentence). At the same time, Curll was convicted for publishing two other works, *A Treatise of the Use of Flogging in Venereal Affairs* and the *Memoirs of John Ker*. See STRAUS, *supra* note 78, at 121.

94. Rogers & Baines, *supra* note 85, at 189.

95. See PEAKMAN, *supra* note 59, at 39–40; SCHAUER, *supra* note 33, at 5–6.

96. STRAUS, *supra* note 78, at 120.

97. SCOTT, *supra* note 11, at 21–22, 83–84. See also CRAIG, *supra* note 65, at 29–32.

98. SCOTT, *supra* note 11, at 142.

99. *Id.*

English readers in the eighteenth century had ready access not only to pornographic works of fiction, like *The Toast*, but also to a constant stream of sexually explicit ballads, jokes, poems, ditties, law reports, whore catalogues, medical works, prints, and anti-Catholic and anti-government tracts. Although pornography initially served primarily as a form of entertainment and sexual stimulation, during the Enlightenment it gradually became an important "vehicle of protest against the authority of Church and State, and finally against middle-class morality."¹⁰⁰

Spurred on by advances in medicine, a popular interest in previously unexplored issues of human sexuality, and the opportunity to make a fast buck, English writers produced a slew of "sex-guides." The most successful of these, *Aristotle's Masterpiece*, went through some thirty editions between 1684 and 1790. Concocted mainly by hacks, the book's primary appeal was its eroticism.¹⁰¹ Other subjects that were especially popular in eighteenth-century "non-fiction" sexual literature included techniques of masturbation, dildos, and self-flagellation. Among the more famous examples of such titillating works were *Historia flagellantium*, first published in Paris in 1700 by the Abbé Jacques Boileau, which purported to be a historical survey of flagellation in nunneries and monasteries; *Monsieur Thing's Origin: or Seignor Dildo's Adventures in Britain*; and, most famously, *Onania, or The Heinous Sin of Self-Pollution, and All Its Frightful Consequences in Both Sexes, Considered*, published by the quack clergyman Balthazar Beckers in 1708, which popularized both a false connection between masturbation and venereal disease and the use of the word "onanism" based on an erroneous interpretation of the Old Testament.¹⁰²

As illustrated by *Venus in the Cloister*, many pornographic works of the seventeenth and eighteenth centuries were barely disguised anti-Catholic tracts.

100. WAGNER, *supra* note 74, at 6.

101. See ANGUS MCLAREN, *REPRODUCTIVE RITUALS: THE PERCEPTION OF FERTILITY IN ENGLAND FROM THE SIXTEENTH CENTURY TO THE NINETEENTH CENTURY* 19-21 (1984); Roy Porter, "The Secrets of Generation Display'd": *Aristotle's Master-piece in Eighteenth-Century England*, in 'TIS NATURE'S FAULT: UNAUTHORIZED SEXUALITY DURING THE ENLIGHTENMENT 1-15 (Robert Purks Maccubin ed., 1987); LAWRENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND, 1500-1800*, at 493-94 (1977); VERN L. BULLOUGH, *SEX, SOCIETY, AND HISTORY* 93-103 (1976).

102. The most salacious aspects of this work were contained in the purported letters to the author, which were included in later editions. Here is an example:

I began, Sir, the Folly at eleven Years of Age; was taught it by my Mother's Chamber-Maid, who lay with me from that Time all along till now, which is full seven Years, and so intimate were we in the Sin, that we took all Opportunities of committing it, and invented all the Ways we were capable of to heighten the Titillation, and gratify our sinful Lusts [Now,] for above half a Year past I have had a Swelling that thrust out from my Body, as big, and almost as hard, and as long or longer, than my Thumb, which inclines me to excessive lustful Desires, and from it there issue a Moisture or Slipperiness, to that Degree, that I am almost continually wet

ONANIA 319-20 (17th ed.), *quoted in* WAGNER, *supra* note 74, at 18. See generally WAGNER, *supra* note 74, at 8-29, 167-70; ROGER THOMPSON, *UNFIT FOR MODEST EARS: A STUDY OF PORNOGRAPHIC, OBSCENE AND BAWDY WORKS WRITTEN OR PUBLISHED IN ENGLAND IN THE SECOND-HALF OF THE SEVENTEENTH CENTURY* 164-66 (1979).

Typically set in monasteries or convents, these writings salaciously depicted the real or imagined sexual adventures of monks and nuns. This genre began on the continent, but after Henry VIII fell out with the Pope in 1534, the Catholic Church became fair game in England as well, and in the eighteenth century, “the peccadilloes of the Catholic clergy” became “the staple diet of bawdy satire.”¹⁰³

Because of the perceived threat posed by allegedly oversexed and predatory priests, English anti-Papist tracts often advocated the castration of the Catholic clergy. A 1700 pamphlet, *Reasons Humbly Offer'd for a Law to Enact the Castration of Popish Ecclesiastics*, accused priests of being particularly potent lovers because of their enforced celibacy.¹⁰⁴ They were seen as all too ready, willing, and able to serve as “pleasing Companions to insatiable Women,” who were “laden with divers Lusts.”¹⁰⁵ The priests threatened the manhood of Protestant men and triggered their “fears of cuckoldry.”¹⁰⁶

Gervaise de Latouche’s *History of Dom B*, published in English in 1743, described the hero’s nocturnal orgies with monks and nuns:

Sometimes I was put on a bench, completely naked; one Sister placed herself astride my throat in such a way that my chin was hidden in her pubic hair, another one put herself on my belly, a third one, who was on my thighs, tried to introduce my prick into her cunt; two others again were placed at my sides so that I could hold a cunt in each hand; and finally another one, who possessed the nicest breast, was at my head, and bending forward, she pushed my face between her bobbies; my thighs, my belly, my chest, my prick, everything was wet, I floated while fucking.¹⁰⁷

The theme of the Pope as a lecher was a frequent theme in anti-Catholic erotica, as illustrated by the anonymously authored *A Full and True Account of a Dreaded Fire that Lately Broke Out in the Pope’s Breeches*, which was published in 1713 and tells the story of a beautiful London courtesan who attracts the interest of the Pope in a private audience. In one scene, the Pope attempts to bugger the courtesan, explaining that “he seldom had of late, / Us’d his Key to ope fore-gate” When she inserts his “key” in her *other* “key-hole,” the Pope cries out, amazed, “The Key goes in most wondrous easy, / What is the Key-hole broke, or Greasy?”¹⁰⁸

Pornography was also used to pillory the nobility. In 1771, Théveneau de Morande, a French expatriate living in London, published *Le gazetier cuitassé*, which skewered Louis XV and his mistress, Madame Dubarry. Morande chronicled in exquisite detail Dubarry’s alleged lesbian relations with her maids, her

103. WAGNER, *supra* note 74, at 73.

104. PEAKMAN, *supra* note 59, at 134.

105. *Id.* (internal citations omitted).

106. *Id.*

107. WAGNER, *supra* note 74, at 236.

108. *Id.* at 75–76.

career as a prostitute, and her seduction by a monk. According to Morande, Dubarry perfumed the insides of her vagina in order to keep the King's attention. Marie-Antoinette suffered similar treatment. *L'orgie royale*, published in London in 1789, depicts Louis XVI asleep on a sofa while Marie-Antoinette has sex beside him with the Comte d'Artois and the Duchesse de Poignac.¹⁰⁹

V

One of the most important and most surprising literary developments of the mid-eighteenth century was the appearance of the novel. Early novels, including Daniel Defoe's *Moll Flanders* (1722), Samuel Richardson's *Clarissa* (1747–1748), Tobias Smollett's *The Adventures of Roderick Random* (1748), Henry Fielding's *Tom Jones* (1749), and Laurence Sterne's *Tristram Shandy* (1759–1767), dealt playfully with such themes as seduction, polyandry, adultery, voyeurism, incest, and fornication. Contemporary illustrations for these novels often emphasized the erotic facets of the works. By the mid-eighteenth century, one critic could complain that this new form of literature was marked by "extreme indecency" and undue emphasis on "fornication and adultery."¹¹⁰

The increasing popularity of sexuality in the novel coincided with a growing demand for realism and a new sense of worldliness. This shift was especially evident in France. LaMettrie and other Enlightenment philosophers maintained that happiness should be man's principal goal in life. This libertine philosophy, which influenced Diderot, Rousseau, and Hume, directly challenged the traditional Catholic proposition that sexual pleasure is immoral.¹¹¹

The foremost example of mid-eighteenth-century pornography was John Cleland's *Memoirs of a Woman of Pleasure*,¹¹² which came to be known by the name of its heroine, Fanny Hill.¹¹³ Cleland was a Scotsman born in 1709. He had served as a foot soldier and then as an administrator with the East India Company in Bombay before writing *Memoirs*, which was first published in England in 1748. *Memoirs* employs the familiar theme of the young country girl who comes to London and enjoys a series of amorous adventures involving masturbation, lesbianism, fetishism, group sex, sadomasochism, same-sex anal intercourse, and flagellation. The origins of *Memoirs* are obscure, but literary historians speculate that Cleland made a bet with friends that he could "write the 'dirtiest' book in the English language without using a single 'dirty' word."¹¹⁴

109. See Roy Porter, *Mixed Feelings: The Enlightenment and Sexuality in Eighteenth-Century Britain*, in *SEXUALITY IN EIGHTEENTH-CENTURY BRITAIN* 1, 8 (Paul-Gabriel Boucé ed., 1982); WAGNER, *supra* note 74, at 87–109, 248–55.

110. WAGNER, *supra* note 74, at 209. See also ST. JOHN-STEVAS, *supra* note 7, at 19–20.

111. See generally PETER BROOKS, *THE NOVEL OF WORLDLINESS: CRÉBILLON, MARIVAUX, LACLOS, STENDAHL* (1969); WAGNER, *supra* note 74, at 209–16.

112. JOHN CLELAND, *MEMOIRS OF A WOMAN OF PLEASURE* (Peter Sabor ed., Oxford Univ. Press 1999) (1748).

113. GERALD W. JOHNSON, *HOD-CARRIER* 67 (1964).

114. *Id.*; GERBER, *supra* note 61, at 89.

Memoirs has, indeed, been characterized “as perhaps the rankest pornography ever perpetuated by an English author having any claims to literary craftsmanship.”¹¹⁵

I lay then all tame and passive as she could wish, whilst her freedom, raised no other emotion but those of a strange, and till then unfelt pleasure: every part of me was open, and exposed to the licentious courses of her hands¹¹⁶

I stole my hand up my petty-coat, and with fingers all on fire, seized, and yet more inflamed that center of all my senses; my heart palpitated, as if it would force its way through my bosom: I breath’d with pain: I twisted my thighs, squeezed, and compress’d the lips of that virgin-slit, and . . . brought on at last the critical ecstasy, the melting flow, into which nature, spent with excess of pleasure, dissolves and dies away. . .
.117

When we had sufficiently graduated our advances towards the main point, by toying, kissing, clipping, feeling my breasts, now round and plump, feeling that part of me I might call a furnace-mouth, from the prodigious intense heat his fiery touches had rekindled there; my young sportsman . . . wantonly takes my hand, and carries it to that enormous machine of his, that stood with a stiffness! a hardness! an upward bent of erection . . . form’d a grand show. . . . Slipping then a pillow under me, that I might give him the fairest play, I guided . . . this furious battering-ram . . . to its proper mark, which lay as finely elevated as we could wish; my hips being borne up, and my thighs at their utmost extension¹¹⁸

. . . raising me on my knees, and making me kneel with them straddling wide, that tender part of me, naturally the province of pleasure, not pain, came in for its share of suffering, for now, eyeing it wistfully, he directed the rod so that the sharp ends of the twigs lighted there, so sensibly, that I could not help winching, and writhing my limbs with smart . . .¹¹⁹

Cleland was arraigned before the Privy Council for writing an obscene book. He pleaded poverty as an excuse. Such was the prevailing attitude of the time that the President of the Council, the Earl of Graville, resolved the prosecution by awarding Cleland a pension of £100 a year on condition that he not repeat the offense. *Memoirs* went on to become the most notorious and

115. SCOTT, *supra* note 11, at 145. See CRAIG, *supra* note 65, at 33–34; SCHAUER, *supra* note 33, at 6.

116. CLELAND, *supra* note 112, at 11.

117. *Id.* at 25.

118. *Id.* at 81–82.

119. *Id.* at 149.

successful pornographic work of the eighteenth century. Unfortunately for Cleland, he sold the copyright to *Memoirs* to a publisher for a mere £20. The publisher is reputed to have made a profit of £10,000 on the book.¹²⁰

In 1763, the radical agitator John Wilkes was charged (perhaps falsely) by his political enemies with writing *Essay on Woman*, a clever but indecent parody of Pope's *Essay on Man*. Wilkes was one of the most extraordinary men of his generation. Although cross-eyed and markedly ugly, women adored him. He once boasted, "If any man grant me ten minutes with his wife or mistress I can and will win the woman." Wilkes was a member of the infamous Medmenham monks, a secret society dedicated to group sexual satisfaction.

In addition to his sexual escapades, Wilkes actively supported the American colonies against the Crown. In 1762, Wilkes published a satirical piece in which he exposed corruption in the government and intimated the imbecility of George III. He was such an ardent opponent of George III that the King famously cursed him as "That Devil Wilkes."¹²¹ At one point, Madame Pompadour in Paris inquired of Wilkes, "How far does the liberty of the press extend in England?" He replied, "I do not know. I am trying to find out."¹²² Although Wilkes's constituents in Middlesex repeatedly elected him to the House of Commons, the House repeatedly refused to seat him.

Whether or not *Essay on Woman* was actually written by Wilkes, it certainly was laced with racy passages:

Awake, my Fanny, leave all meaner things;
This morn shall prove what rapture swiving brings!
Let us (since life can little more supply
Than just a few good fucks, and then we die) . . .
. . .
Together let us beat this evil field,
Try what the open, what the covert yield;
The latent tracts, the pleasing depths explore,
And my prick clapp'd where thousands were before.¹²³

120. Craig, *supra* note 65, at 33–34. See SCHAUER, *supra* note 33, at 6; Scott, *supra* note 11, at 143; JOHNSON, *supra* note 113, at 67; GERBER, *supra* note 61, at 89; LILLIAN FADERMAN, SURPASSING THE LOVE OF MEN: ROMANTIC FRIENDSHIP BETWEEN WOMEN FROM THE RENAISSANCE TO THE PRESENT 28 (1981); WAGNER, *supra* note 74, at 240–44; RANDOLPH TRUMBACH, *Erotic Fantasy and Male Libertinism in Enlightenment England*, in INVENTION OF PORNOGRAPHY, *supra* note 35, at 253–54.

Cleland's prosecution was probably pressed by Church authorities. The original edition of *Memoirs* clearly breached an eighteenth-century taboo: it included a scene in which Fanny witnessed homosexual anal intercourse. Even though Fanny responded to this act with indignation, it was this scene that was at the center of the controversy. Subsequent editions of *Memoirs* deleted the scene. TRUMBACH, *supra*, at 267–69; WAGNER, *supra* note 74, at 240–42.

121. Alpert, *supra* note 61, at 44.

122. *Id.*

123. GERBER, *supra* note 61, at 72.

With this work in hand, Wilkes's political opponents launched a vigorous campaign to rid themselves of him once and for all. Lord Sandwich went so far as to read the poem to the House of Lords, which resolved that it was "scandalous, obscene and impious"¹²⁴ and constituted "a gross profanation of many parts of the Holy Scriptures, and a most wicked and blasphemous attempt to ridicule and vilify the person of our Blessed Saviour."¹²⁵ The Lords ordered Wilkes arrested, but he escaped to the Continent and never answered the charges. *In absentia*, he was fined £300 and outlawed.¹²⁶

For more than a century after Sedley's antics on a Covent Garden balcony, English law yielded nothing at all definitive about the concept of literary obscenity. There was no definition of the concept, no rationale for its regulation, and only sporadic skirmishes over the issue. As one commentator described the situation, until the early nineteenth century the authorities "seem to have been doing little else than casual bloodletting[, and] the few shots fired [were] mostly blanks."¹²⁷

The historian Peter Wagner has aptly characterized the "age of Enlightenment" as "the age of Eros."¹²⁸ The proliferation of writing about sex in the eighteenth century led to "a sort of downward osmosis" through which an upper-class "libertine philosophy" was, at least for a time, dispersed and then absorbed by the larger culture.¹²⁹ By the 1780s, when the United States was contemplating its Constitution, London was awash with all sorts of sexually explicit material, including lewd novels, racy poems, bawdy songs, erotic prints, and licentious newspapers and magazines.¹³⁰ Throughout this era, neither influential citizens nor public authorities made any serious effort "to curb this sexual Eden,"¹³¹ though occasional prosecutions were brought when individual libel was involved or "when there were personal axes to grind, as in the prosecution of . . . Wilkes . . ."¹³²

It was against this English background that the United States enacted the First Amendment.

124. See Alpert, *supra* note 61, at 46.

125. ARTHUR CASH, JOHN WILKES: THE SCANDALOUS FATHER OF CIVIL LIBERTY 153 (2006). See also *The King v. John Wilkes*, 2 Wils. K.B. 151, 93 Eng. Rep. 737 (1764), 4 Burr. 2527, 98 Eng. Rep. 327 (1770); SCHAUER, *supra* note 30, at 6; CRAIG, *supra* note 65, at 34–35; SCOTT, *supra* note 11, at 83–88; GERBER, *supra* note 61, at 71–72; RAYMOND POSTGATE, THAT DEVIL WILKES (1930); WAGNER, *supra* note 74, at 54; Alpert, *supra* note 61, at 44–47.

126. See SCHAUER, *supra* note 33, at 6; CRAIG, *supra* note 65, at 34–35; SCOTT, *supra* note 11, at 83–88; GERBER, *supra* note 61, at 71–72; ARTHUR CASH, JOHN WILKES: THE SCANDALOUS FATHER OF CIVIL LIBERTY (2006); RAYMOND POSTGATE, THAT DEVIL WILKES (1930); WAGNER, *supra* note 74, at 54; Alpert, *supra* note 61, at 44–47.

127. ALPERT, *supra* note 61, at 47.

128. WAGNER, *supra* note 74, at 303.

129. *Id.* at 303.

130. See PEAKMAN, *supra* note 59, at 12, 22–24.

131. PORTER, *supra* note 109, at 13.

132. *Id.* at 14.

