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## A Nation Scared: Children, Sex and the Denial of Humanity

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# A NATION SCARED: CHILDREN, SEX, AND THE DENIAL OF HUMANITY

A REVIEW ESSAY ON JUDITH LEVINE'S *HARMFUL TO MINORS:  
THE PERILS OF PROTECTING CHILDREN FROM SEX*

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## INTRODUCTION

I was five when I had my first orgasm. I recall having conversations with friends when I was no older than ten about that infamous “first

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\* J.D., *City University of New York School of Law*, 2004; B.A., *University of Missouri-Columbia*. I would like to thank Professor Ruthann Robson for her guidance, support, and editing assistance of this work and Dawn Barker for her helpful comments. I would also like to thank my parents, who trusted me with knowledge instead of hiding facts out of fear.

time” we were eagerly anticipating. I was fifteen when I first had sexual intercourse. My parents and school provided me with sex education, including instruction on prevention of pregnancy and disease. My upbringing was in a relatively mainstream, middle-class, midwestern household. I was raised Catholic. I have never been pregnant, and therefore have never had to consider having an abortion or a baby. I have never contracted a sexually transmitted disease. In light of my experience, I know that children and teenagers have sexual desires, and that they can and will experience sexual pleasure regardless of what laws are passed or limitations society places on them. For this reason, I am constantly amazed by attempts to treat minors as perfect, ignorant, naive angels who are free from fault and sexual desire. Similarly, laws that demonize minors astound me. Because minors exist within this dichotomy, the law serves as a breeding ground for perpetuating such a state.

In *Harmful To Minors: The Perils of Protecting Children from Sex*,<sup>1</sup> Judith Levine conducts an in-depth analysis of this perpetual conflicted state in which minors exist, and explores how attempts to keep them as angels actually creates the devils society hopes to erase.<sup>2</sup> This review essay will examine Levine’s book; a truly daring stance in the discussion about minors’ sexuality. In *Harmful To Minors*, Levine proclaims that minors are sexual beings and should be taught not only about sex, but also about respect for self, respect for others, safety, and pleasure.<sup>3</sup> Most controversially, she asserts that minors should be instructed about their own capacity for sexual pleasure.<sup>4</sup> Restrictions on this approach are largely due to a panic over minors and sexuality from ideas put forth by the religious right and sex-conservative feminists about the harm that may ensue if minors are exposed to sex “prematurely.”<sup>5</sup> Although Levine is not a legal scholar or lawyer, much of her argument explains how the law is used to govern the lives of minors out of fear, and operates to reinforce gender stereotypes in the next generation.<sup>6</sup> She first discusses what

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1. JUDITH LEVINE, *HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX* (University of Minnesota Press 2002).

2. See *id.* at xx-xxi (arguing that the sexual politics aimed at protecting children actually harms them).

3. See *id.* at 3-19 (arguing that the censorship of sexual information will not protect children and that, instead, children should be armed with knowledge).

4. See *id.* at 155-77 (discussing the sexual desires of minors).

5. See *id.* at 10-19 (noting the overzealous desire to keep all forms of sexuality out of minors’ reach through legal reforms even though, “[n]o law, no Internet filter, no vigilant parent will be able to keep tabs on every page and pixel that passes before a child’s eyes beyond the age of two”).

6. See, e.g., *id.* at 10-13, 15 (citing various laws and commissions that have

aspects of protection result in harm to minors.<sup>7</sup> Next, she talks about differing approaches that will leave minors with a positive sense of sexuality and may result in better social programs.<sup>8</sup>

This Review first presents an overview of *Harmful To Minors*.<sup>9</sup> The second section examines a short historical perspective of minors' sexuality in the United States.<sup>10</sup> The third section analyzes conflicting opinions in the debate over minors' sexuality.<sup>11</sup> The fourth section then examines existing laws in the context of contemporary opinions and their historical background.<sup>12</sup>

This Review then explores the effects of the law on specific issues raised by Levine, such as sexual abuse, sex education, and abortion. Current law and policies governing the sexuality of minors are examined in light of available statistical data and their proffered rationale.<sup>13</sup> Finally, this Review offers possible new approaches to sexuality in the United States.<sup>14</sup> It concludes that our current policy on minors' sexuality will lead to a society that is even more unwilling to accept sexuality as a normal part of life and will contribute to the oppression of women and sexual minorities.

#### I. IS SEX HARMFUL TO MINORS?

In *Harmful To Minors*, Levine focuses on the media and society's fears regarding minors' sexuality. "In America today," she writes, "it is nearly impossible to publish a book that says children and teenagers can have sexual pleasure and be safe too,"<sup>15</sup> referring to her own difficulty in finding a publisher for her book.<sup>16</sup> Society's fear often

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attempted to censor sexual information to keep minors uninformed).

7. See *generally id.* at 20-140 (outlining current practices that, in the name of "protection," are harmful to minors).

8. See *id.* at 141-217 (discussing possible adjustments to policy and thinking, which would help minors deal with their sexuality).

9. See *id.*; see *infra* Part I (outlining Levine's arguments and suggestions in *Harmful to Minors*).

10. See *infra* Part II.

11. See *infra* Part III.

12. See *infra* Part IV.

13. See *infra* Part V.

14. See *infra* Part VI.

15. LEVINE, *supra* note 1, at xix.

16. See *id.* (noting that the University of Minnesota Press published this book after many others had turned it down over a five-year period). After publication, the editors were forced to entertain an independent review as to how they came to the decision to publish the book in order to justify their decision and maintain credibility as a large, public institution. *Id.*; see also Press Release, University of Minnesota, University to Review Press Publishing Guidelines (Apr. 4, 2002) (discussing the controversy generated by the decision to publish Levine's book), *available at*

translates into a push for new regulatory schemes without looking at the reality of the situation, resulting in a legal system that unrealistically attempts to monitor all actions.<sup>17</sup>

The first section of Levine's book outlines the different ways in which sex is seen as innately harmful to minors.<sup>18</sup> She first discusses censorship, which is often the result of an obscenity standard that is stricter for minors than for adults,<sup>19</sup> because of the belief that minors are more easily harmed by "indecent" material.<sup>20</sup> She next addresses the ever-increasing fear of minors being sexually abused and kidnapped, or more specifically, being the victims of "pedophiles," which makes it seem as if children are at a very high risk of becoming victims and that every person needs to be suspected of being an offender.<sup>21</sup> This fear leads parents, the media, and even legislatures to react by trying to eradicate sex from the lives of minors, lest they be harmed by it.<sup>22</sup> In actuality, it may be just media frenzy.<sup>23</sup>

Levine then moves her discussion to "normative" standards for children's behavior, which she defines as behavior in which most children partake, but that makes many adults uncomfortable.<sup>24</sup> She

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[http://www1.umn.edu/urelate/newsservice/newsreleases/02\\_04bookresponse.html](http://www1.umn.edu/urelate/newsservice/newsreleases/02_04bookresponse.html)  
(last visited Sept. 20, 2004).

17. See LEVINE, *supra* note 1, at 3-19 (commenting on the ineffectiveness of dubbing certain measures harmful, leading to censorship and over-protectiveness).

18. See *id.* at 1-138 (referring to certain measures as "harmful protection").

19. See *Miller v. California*, 413 U.S. 15 (1973) (holding that for material to be considered obscene and therefore unworthy of First Amendment protection, it must be "patently offensive" and appeal only to "prurient interest"); *Ginsberg v. New York*, 390 U.S. 629 (1968) (creating a stricter standard for obscenity as applied to materials consumed by minors than the one enunciated in *Miller*). See generally John T. Mitchell, *An Exclusionary Rule Framework for Protecting Obscenity*, 10 J.L. & POL'Y 183 (1994) (arguing that some constitutionally protected speech will unavoidably be restricted when obscene speech is prohibited).

20. See LEVINE, *supra* note 1, at 10-11 (pointing out that this harm is not concrete). Levine states, "[a]s is true of every obscenity charge, the nature of the harm is not physical or even measurable, but metaphysical: the content may cause bad thoughts." *Id.*; see generally David Greene, Book Review, 10 B.U. PUB. INT. L.J. 360 (2001) (reviewing MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: "INDECENCY," CENSORSHIP, AND THE INNOCENCE OF YOUTH (2001)).

21. See LEVINE, *supra* note 1, at 20-44 (discussing sexual abuse by a stranger and not those incidents involving family members, who are most often the culprits). She offers several descriptions of pedophiles in the book, most of which are based on gross generalizations depicting the problem of child sexual abuse by strangers as more widespread, underground, and heinous than in reality. *Id.* at 22-23.

22. See *id.* at 22-24 (outlining the overreaction to pedophilia).

23. See *id.* (arguing that the media overreacts to the problem).

24. See *id.* at 55 (describing the existence of normal sexual behavior in children and their tendency to be forced to hide such behavior). Levine further explains that sex-play among children is so common that anthropologists have coined a term referring to it as "sexual rehearsal play." *Id.* at 58; see also CLELLAN FORD & FRANK BEACH, PATTERNS OF SEXUAL BEHAVIOR 188, 197 (1951) (noting in their study of various cultures around the globe that, "as long as the adult members of a society

states that a lack of information about these behaviors has caused hysteria among the public, which tends to label any physical contact minors may engage in as taboo.<sup>25</sup> Levine examines relationships between minors and those over eighteen in her next chapter, as she discusses the possibility of adolescents choosing to engage in sexual relationships with others.<sup>26</sup> Her focus is on age of consent and statutory rape laws.<sup>27</sup>

Levine then discusses the lack of sex education that so called “reforms” in the law have created.<sup>28</sup> She states that in today’s society, it seems that a bill is impassable if it does not send the clear message that, “a mutually faithful monogamous relationship in the context of marriage is the expected standard of human sexual activity.”<sup>29</sup> She argues that this is a result of the right wing’s preference to teach solely abstinence-only sex education.<sup>30</sup>

The next chapter, entitled “Compulsory Motherhood,” addresses the harm that restrictions on abortion, such as parental involvement

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permit them to do so, immature males and females engage in practically every type of sexual behavior found in grown men and women including oral-genital contact and attempted copulation”); ROBERT CROOKS & KARLA BAUR, *OUR SEXUALITY* 360-61 (6th ed. 1996) (explaining that many studies have shown that exhibitions of sexuality in children are what most people experience). This behavior may include self-stimulation and sex-play (such as exhibition and inspection of the genitals, “playing doctor,” or simulating intercourse by rubbing the genitals together) with friends or siblings of the same or opposite sex. *Id.* at 55. Most often, this play occurs between the ages of four and seven, but may occur as early as two or three. *Id.* at 383. In Alfred Kinsey’s studies of human sexual behavior in 1948 and 1953, he found that forty-five percent of women and fifty-seven percent of men reported having engaged in some sort of sex play with another child by the age of twelve. *Id.* When parents of six- and seven-year-old children were surveyed in 1980, it was found that seventy-six percent of the daughters and eighty-three percent of the sons had engaged in sex play with another child. In addition, sixty-one percent of college students in a 1989 survey reported such experiences by the age of thirteen. *Id.*

25. See LEVINE, *supra* note 1, at 56 (providing examples of the dramatic overreaction by the public to any type of touching). Levine describes the Department of Veterans Affairs study of mental health and legal professionals, noting that “they believed that parents who hugged a ten-year-old frequently, kissed a child on the lips, or appeared naked before a five-year-old were candidates for ‘professional intervention.’” *Id.*

26. See *id.* at 68-69 (examining statutory rape).

27. See *id.*

28. See *id.* at 90-116 (criticizing abstinence-until-marriage sex education).

29. *Id.* at 92.

30. See *id.* at 90-110 (outlining the reasons behind “no-sex” education). Abstinence-only sex education focuses solely on preventing people from having intercourse before marriage. Other beliefs that tend to go along with this model include the belief that if one waits to have sex, then every pregnancy will be wanted and that there is no need to worry about contraception or sexually transmitted disease. This stance also rejects discussions of sexual orientation—it only recognizes marriage as a heterosexual union. *Id.*

laws, create for minors.<sup>31</sup> Levine stresses that minors, who have no voice in our political and legal system, face particular risks when restrictions are placed against abortion, as those restrictions are tantamount to making pregnancy and motherhood punishments for sex.<sup>32</sup>

The last chapter in this section on harm discusses a need for and failure to address pleasure when referring to the sexuality of minors.<sup>33</sup> In particular, she points out society's limited definition of sex, which fails to address other sexual activities that have risks and benefits of which minors should be aware.<sup>34</sup>

In the next section, Levine explains differing approaches to accepting the sexuality of minors and, consequently, taking steps to educate them.<sup>35</sup> She addresses ways that may give minors the facts about sexuality, the need to break down definitions of gender that protect children from sex, and how touch is being removed from our society over a fear that all touching is sexual and, therefore, harmful. Additionally, she discusses concerns some may have about minors experiencing sexual pleasure in an era of AIDS and explains how it is still possible.

In the Epilogue, Levine points out that the poor are most negatively affected by growing health concerns.<sup>36</sup> These health and poverty problems persist in a society that claims to want to protect children, yet continues to support a system in which more and more of them go hungry, homeless, and without healthcare everyday.<sup>37</sup> Levine asserts that values regarding social programs and sexuality exist on the same

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31. *See id.* at 117-26.

32. *See id.* at 119 (arguing against limitations on abortion for minors).

33. *See id.* at 127-40 (describing society's treatment of sex as the "Expurgation of Pleasure").

34. *See id.* at 129-31 (addressing the problems with defining sex as intercourse alone). Levine states how even when sex is talked about in schools, the discussion is limited to penile-vaginal intercourse. *Id.* at 129. She stresses the need to expand the definition of sex to include oral and anal sex and petting, as well as discussion of masturbation. *Id.* at 129-31. The fear of doing so is exemplified by one parent stating, "We don't want to give children any more ideas than they already have." *Id.* at 129-30. Left out of the discussion are other practices that may be completely "hands off" or even hands-on, but safer than and possibly just as pleasurable as intercourse include "talking dirty on the phone or masturbating in front of a partner" and "reading erotica, fantasizing, role play, masks, and us[ing] . . . sex toys" as well as "erotic massage and body rubbing." *Id.* at 131.

35. *See id.* at 141-217 (advocating sexual education for minors).

36. *See id.* at 218-25 (noting that the problems facing minors need to be looked at beyond their exposure to sex, with "[p]overty [a]s the single greatest 'risk factor' for most every life-smashing condition a kid might be at risk for").

37. *See id.* at 219 (arguing that society's desire to "protect" children actually presents barriers to their development as healthy human beings).

continuum<sup>38</sup> and must be viewed in light of the fact that, “children who are treated with respect and appreciation, given space to think and helped to compromise, while also standing up for their beliefs, will do better in life.”<sup>39</sup> Changes in public policy and the law need to reflect these findings and be based on sound judgment, instead of reactions to fear or unexamined definitions of right and wrong.<sup>40</sup> Above all, she asserts that society needs to see minors as full citizens and provide them with the basic tools for survival, including tools in the area of sexuality.<sup>41</sup>

## II. HISTORY OF MINORS’ SEXUALITY IN THE UNITED STATES

John D’Emilio and Estelle B. Freedman, two of the top historians in the area of sexuality, state that “[s]ex is easily attached to other social concerns, especially those related to impurity and disorder, and it often evokes highly irrational responses.”<sup>42</sup> Minors’ premarital sexual experimentation, even before puberty, is not a new phenomenon; historically, society consistently has attempted to stymie it.<sup>43</sup>

In Colonial America, minors learned of sex and “normative” sexual practices primarily from within the family and the church.<sup>44</sup> Minors were taught that sex was exclusively for procreation and that it properly belonged in marriage only.<sup>45</sup> Because privacy was a rarity, it was not uncommon for very young children to learn about sex by observing it in the small houses that families shared.<sup>46</sup> Reports of childhood sexual behavior during this time came primarily from church leaders; therefore, these reports tended to restate church

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38. See *id.* at 220-21 (correlating societal reactions to child abuse and poverty with that of sexuality).

39. *Id.* at 218.

40. See *id.* at 220-23 (arguing that moral judgments, at least without a rational basis, should not affect public policy).

41. See *id.* at 223-25 (asserting that children need to be armed with knowledge of sex, not shielded from such knowledge).

42. JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 16 (2d ed. 1997).

43. See *id.* (noting that adverse reactions to minors’ sexual experimentation are not a contemporary phenomenon).

44. See *id.* at 16, 18-19 (noting that when the church taught about sex in this period, congregations learned that women should be blamed “for enticing men into sexual sin” and men were “considered more rational and better able to control their passions than women”).

45. See *id.* at 17-20 (outlining the nature of courtship).

46. See *id.* at 17 (explaining that many homes of that period were small, one-room dwellings, that exposed children to their parents’ sexual activities). In addition, some families shared beds at this point in history, and houses were so poorly constructed that even neighbors could have been able to peer into a home. *Id.*



teachings of repression of sexual desire until marriage.<sup>47</sup> However, some court records and personal diaries of young men paint a different picture.<sup>48</sup> While men were thought to be able to control their sexuality more than women, there was a noted permissiveness among the white males of the planter class with regard to female servants or slaves.<sup>49</sup> Moreover, it was not uncommon in this era for couples to experiment sexually, but not to have sexual intercourse, during courtship.<sup>50</sup>

In the eighteenth century, the practice of bundling began.<sup>51</sup> There was the expectation sexual intercourse would be prevented; however if the woman became pregnant, the couple would definitely get married.<sup>52</sup> In fact, pregnancy rates were as high as thirty percent among all brides in this era.<sup>53</sup> When premarital pregnancies occurred, the guilty couple was forced to confess their “sin” publicly to be allowed back into society.<sup>54</sup> The community was known to execute a sort of “morality patrol” and neighbors consistently involved themselves in the sexual affairs of each other.<sup>55</sup> It was also not uncommon for punishment to include whipping, fines, and public humiliation if someone was caught having extramarital sex or if a woman gave birth outside of marriage.<sup>56</sup>

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47. *See id.* at 20 (explaining the historical conception that marriage was the answer to sexual temptation).

48. *See id.* at 20-21 (revealing that diaries indicate that young men often masturbated to the point of ejaculation and felt great shame over doing so). The court records hold accounts of various sexual acts proscribed at the time involving both men and women. *Id.*

49. *See id.* at 19 (explaining that men in this social class were told to reserve their experimentation for marriage, but with a wink and nod were allowed to have sex with women of a lower social class).

50. *See id.* at 21 (noting that courting couples sometimes explored their sexuality in a barn or under a tree, often with the risk of being caught and chastised by the community).

51. *See id.* at 22 (explaining that bundling allowed a couple to spend the night together in preparation for marriage). The restriction placed on them was that they had to either sleep fully clothed, or a “bundling” board was placed between them with the thought that the couple would refrain from sexual experimentation. *Id.*

52. *See id.* (noting that marriage was the only recourse if a woman got pregnant).

53. *See id.* (revealing that ten percent of brides in New England and thirty percent in seventeenth century Chesapeake were pregnant). As long as a pregnancy occurred in anticipation of marriage, the couple could seek the community’s forgiveness. *Id.*

54. *See id.* at 23 (noting that the child of the chastised couple could not be baptized if the parents did not repent).

55. *See id.* at 29 (pointing out that “[a]mong Puritans, each community member had the responsibility for upholding the morality of all lest God punish the group as a whole”).

56. *See id.* at 22-23 (explaining that the punishment could be as severe as excommunication if a couple refused to confess).

In the Victorian era, or nineteenth century, society began to value sex for its pleasurable aspects, instead of simply as a route to reproduction.<sup>57</sup> This was apparent from the fact that each woman began to have fewer children throughout the century.<sup>58</sup> The societal purity movement also spurred a change in statutory rape laws, with an increase in the age of consent from as young as ten to between fourteen and eighteen.<sup>59</sup> Originally, this was done as a way to prevent men from forcing young women to enter the field of prostitution, as well as other forms of male sexual privilege.<sup>60</sup> It was also in this era that the practice of female genital mutilation (“FGM”) was used in the United States as a means of controlling female sexuality.<sup>61</sup>

A study of women born during the Victorian era revealed a “high correlation between lack of sexual instruction, distaste for sex, and unhappiness in marriage.”<sup>62</sup> This study also found that forty percent of women acknowledged masturbating during childhood or in the teen years and seven percent had engaged in premarital sex.<sup>63</sup> Among Victorian boys, a separate study showed that three-fifths had masturbated and one-third had engaged in premarital sex, mostly with prostitutes.<sup>64</sup> It was not until late in this century that homosexual relationships were identified and labeled.<sup>65</sup> Before this

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57. *See id.* at 56 (writing that “[a]lthough older patterns persisted in rural, immigrant, and working-class families, the reproductive moorings of sexual experience gradually gave way to a new constellation of meanings, in which love and intimacy became increasingly important”).

58. *See id.* at 58 (attributing the drop in the birth rate to the advent of “sex for pleasure”).

59. *See id.* at 153 (acknowledging that while the action did offer more protection to women of this era, it also limited their freedom of choice regarding sexuality).

60. *See id.* (noting that since sex with young women was illegal, regardless of consent, the statutory rape laws limited choices, especially for young working-class women).

61. *See id.* at 146 (noting that FGM was often practiced to keep a young girl or woman from masturbating, but also if she exhibited “sexual passion”). This practice took place in an era in which the male-dominated medical community utilized other invasive techniques, told women that education would limit their abilities to have children, and diagnosed women with mental disorders in an attempt to keep them in their subservient female role. *Id.*

62. *Id.* at 177 (citing KATHARINE B. DAVIS, *FACTORS IN THE SEX LIFE OF TWENTY-TWO HUNDRED WOMEN* (1929)). *See generally* CLELIA MOSHER, *THE MOSHER SURVEY: SEXUAL ATTITUDES OF FORTY-FIVE VICTORIAN WOMEN* (1980).

63. *See generally* DAVIS, *supra* note 62 (noting that women often explored their sexuality before marriage, despite societal pressures to the contrary).

64. *See* D’EMILIO & FREEDMAN, *supra* note 42, at 180 (finding that “on average, boys had received their ‘first striking and permanent’ impression of sex before the age of ten”).

65. *See id.* at 121 (tracing the stigma attached to the term “homosexuality” to medical writers who first used this term to describe same-sex relationships in the late nineteenth century).

time, same-sex relationships were thought to be limited to non-sexual friendships.<sup>66</sup>

The twentieth century brought changes in premarital sexual activity.<sup>67</sup> In the 1920s, the rate of premarital sex among young women rose to fifty percent.<sup>68</sup> This increase has been attributed to the advent of co-education in high schools, as well as the increased availability of privacy on un-chaperoned dates in cars.<sup>69</sup> There was also a “shift to city living” and freedom from the watchful eyes of parents.<sup>70</sup> Gendered norms made girls who engaged in sex “bad,” and sex increasingly became associated with the disrespect of women.<sup>71</sup> Even though sexual activity was on the rise, heterosexual intercourse occurred almost exclusively within a committed relationship.<sup>72</sup> Among homosexuals, independent living (primarily during times of war) provided an opportunity to live in sex-segregated environments and form intimate relationships with each other.<sup>73</sup>

A major development occurred between 1948 and 1953, when

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66. *See id.* (writing that “the terms ‘homosexuality’ and ‘heterosexuality’ do not apply to an era that had not yet articulated these distinctions” and giving the example that “a woman or man could write of affectionate desire for a loved one of the same gender without causing an eyebrow to be raised”).

67. *See id.* at 256 (observing that the contraceptive revolution allowed “[a]ctivity that provoked guilt in the 1920’s [to] become integrated by the 1960’s, [creating] a new code of sexual ethics that made it morally acceptable”).

68. *See id.* (attributing the rise in sexual activity to the newfound ability of boys and girls to mix in classes, extracurricular activities, and social spaces).

69. *See id.* at 257 (reporting that the separate spheres that young males and females used to occupy came together during this time, allowing for more interaction between the sexes). Cars became “an essential part of this heterosocial world,” allowing for greater freedom from parents and additional privacy never experienced by previous generations. *Id.*

70. *See id.* at 259-60 (noting that those who sought employment in cities could afford to buy cars and maintain apartments, which were common settings for sexual activity).

71. *See id.* at 262-63 (commenting that the breakdown of limits on sexuality brought with it a double-standard for women that still exists today). Girls were now the ones to set the limits, which boys tested, sometimes with aggression and force. Class differences were apparent within this double standard as boys did not intend to marry girls of a lower class and could therefore have sex with them. *Id.* As one college male in the 1950’s stated, “I felt that if I were sexual with someone, that indicated that I didn’t respect them. I could be sexual with someone I didn’t care for, but not with someone I did care for.” *Id.*

72. *See id.* (observing that while there was greater sexual activity among the youth of the 1920s, it rarely went past petting and kissing). Intercourse, though it did occur prior to nuptials, was still reserved for the person whom one intended to marry. *Id.*

73. *See id.* at 289-90 (noting that men often joined the service; women either did the same or moved to cities, where they attained employment and lived in boarding homes for females only). Some people knew they were attracted to members of their same sex and a homogenous environment allowed for initial experimentation. Others, who had never pinpointed their feelings, were finally able to give them meaning. *Id.*

Alfred Kinsey conducted the first and most widespread study on human sexual behavior.<sup>74</sup> With regard to the behaviors of men, this study found that almost all had engaged in masturbation and heterosexual petting, and that the proportion of those who had premarital intercourse was as high as ninety percent.<sup>75</sup> Among women, this study found that three-fifths engaged in masturbation, ninety percent in petting, and fifty percent in premarital intercourse.<sup>76</sup> Some of Kinsey's findings regarding male sexual response and experience with their own sex were particularly shocking to mainstream culture, because it was much more common than society had thought previously.<sup>77</sup> Kinsey's studies suggested "that cultural values surrounding sex needed revision to match the actual practices of Americans."<sup>78</sup>

The mid-1960s and beyond showed that the rate of female sexual behavior had risen to nearly match that of men.<sup>79</sup> The feminist and gay liberation movements of the 1970s also brought the reality of extra-marital sexuality into the spotlight.<sup>80</sup> In addition, the twentieth century provided a better statistical basis for sexual activities among young children.<sup>81</sup> Today, we know that about ninety percent of all adults will have sex prior to marriage, and that as much as ten percent of the population is homosexual.<sup>82</sup>

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74. See *id.* at 285-88 (stating that Kinsey's studies "proved shocking to traditional moralists").

75. See *id.* at 286 (citing Kinsey's finding that "[v]irtually all males had established a regular sexual outlet by the age of fifteen").

76. See *id.* (revealing that women were more sexually active than their public images would lead one to believe).

77. See *id.* at 291 (stating that Kinsey's studies, which revealed more about adult homosexual, including gay male, behavior "found that fifty percent acknowledged erotic responses to their own sex, over one-third had had a post-adolescent homosexual experience that resulted in orgasm, four percent were exclusively homosexual as adults, and one out of eight respondents were predominately homosexual for at least a three-year period").

78. *Id.* at 286.

79. See *id.* at 334 (attributing this increase to demographic change, shifts in attitudes, and eroticism in the public realm).

80. See *id.* at 325 (noting that the feminism and gay liberation movements were, "[e]ffective enough to challenge the hegemony of mid-twentieth-century orthodoxy, . . . succeed[ing] in removing some constraints on sexual expression and refashioning how many Americans looked upon sex").

81. See sources cited *supra* note 24 (illustrating statistical data gained during the twentieth century about minors sexuality, especially among young children).

82. See LEVINE, *supra* note 1, at 92 (using these statistics to highlight the disparity between actual sexual conduct and the comparatively inaccurate view of sexual relationships recognized by the law).

### III. CONFLICTING VIEWPOINTS

Contrary to what one might expect, the conflicting views over how to best address the issues surrounding minors and sex do not exist on polar opposite ends of the political spectrum.<sup>83</sup> Levine claims that most of the impetus to protect minors from sex came from two groups that usually work against each other: the religious right<sup>84</sup> and sex-conservative feminists.<sup>85</sup> These groups first joined together on the 1986 Meese Commission.<sup>86</sup>

Levine states that the religious right advocates marriage as the only acceptable realm for sexual expression, and that its beliefs tend to relegate women and children to a sexuality status different than that of men.<sup>87</sup> Levine claims that this belief re-enforces the shame that

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83. See *id.* at xxiii (observing the surprising alliance between sex-conservative feminists and the religious right).

84. See *id.* (observing that these groups support traditional notions of sexuality and education that promote abstinence until marriage). They are also usually anti-abortion, opposed to the use of contraception, and against homosexuality. *Id.* Some groups falling within this category are: Concerned Women for America, Eagle Forum, the Christian Coalition, and even a large proportion of the Republican Party. *Id.* Joycelyn Elders, the former Clinton Surgeon General who was fired after recommending that masturbation be taught as a normal part of life to children, spoke about the religious right in writing the Foreword to Levine's book. *Id.* at ix-xi. She stated that a valuable part of *Harmful To Minors* lies in the fact that it takes a critical look at how the religious right has influenced policy in this country. *Id.* at x. She refers to the religious right as, "people who have a love affair with the fetus, but won't take care of children once they are born." *Id.*

85. See PAT CALIFIA, PUBLIC SEX: THE CULTURE OF RADICAL SEX 95-100 (1986) (clarifying that this does not include all feminists or feminist groups, but includes only those who hold conservative beliefs about sexuality). Those that worked with the Meese Commission to censor pornography include famous feminist theorists and legal scholars: Andrea Dworkin, Catherine MacKinnon, and the group Women Against Pornography. *Id.*

86. See *id.* at 95 (explaining that the 1986 Meese Commission was a task force set-up by then Attorney General Edwin Meese). The Commission's purpose was to "overturn the 1970 Presidential Commission on Pornography's findings that there is no evidence of a link between sexually-explicit materials and delinquent or criminal behavior." *Id.*; see also Robin West, *The Feminist-Conservative Anti Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report*, 4 AM. B. FOUND. RES. J. 681, 684-93 (1987) (concluding that the message sent by the Commission's final report was far from feminist, though sex-conservative feminist groups assisted the Commission in exploring the link between pornography and "victims of pornography"). West states that the Commission's recommendations, which were justified under the guise of protecting women from violence after listening to personal stories, failed to consider stories of women who felt empowered by pornography. *Id.* West asserts that the Commission's recommendations were really about reinforcing a conservative sexist notion of female sexuality. *Id.* In addition, West contends that while pornography may be harmful to some, this harm lies solely "in its assaults on Victorian morality, family, marriage, and religious values" and that these assaults, to many, may comprise a "healthy attack on a stifling and oppressive societal denial of female sexuality" or a "rebellious response to a particularly vicious form of sexual repression." *Id.*

87. See LEVINE, *supra* note 1, at xxiii (stating that "the religious right brought to sexual politics the belief that women and children need special protection because

already surrounds issues of sexuality.<sup>88</sup> For example, the religious right supports abstinence-only sexuality education curricula, such as Sex Respect and Teen-Aid, which have been criticized for their fear and shame-based teachings.<sup>89</sup> The threat of AIDS introduced the fear of death as a consequence of sex, which increased the power of the religious right's message that the only safe sex is no sex.<sup>90</sup> In addition, its attempts to stop teen sex include working endlessly to make abortion inaccessible, if not illegal.<sup>91</sup> Overall, Levine's analysis of the religious right focuses on the direct impact that its beliefs about sexuality have had on the political realm, thereby influencing much legislation that harms minors.<sup>92</sup>

Many members of the religious right have responded to Levine's book by calling it "pro-pedophilia."<sup>93</sup> Certainly, survivors of abuse

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they are 'naturally' averse to sex of any kind").

88. See *id.* at 107 (claiming that abstinence-only education dismisses claims to gender equality and, instead, reinforces boys' "paternalistic obligation" to respect girls' purity); see also D'EMILIO & FREDMAN, *supra* note 42, at 262-63 (observing the differing standards of acceptable sexual behavior to which society holds boys as opposed to girls).

89. See LEVINE, *supra* note 1, at 115-16 (reporting such tactics as equating pregnancy out of wedlock with death); see also Arguments Against Abstinence Only Sex Education (citing a review by the Sex Information and Education Council of the United States (SIECUS) of "Choosing the Best," a sex education curricula promoted by the conservative right, which suggests washing genitals with Lysol after sex), at <http://www.redplanetsw.com/personal/loiosh/abstinence.html> (last visited Sept. 20, 2004).

90. See LEVINE, *supra* note 1, at 199 (reporting the failure of this tactic, since "sex continued more or less unabated").

91. See *id.* at 117-18 (citing legislation such as the Hyde Amendment, which prohibited federal Medicaid funding for abortion, parental involvement laws for minors who seek abortions, and abortion bans). In addition, some anti-abortion activists have relied on violence to make abortion inaccessible. Levine points out that, "[f]rom 1993 to 1997, the Justice Department recorded more than fifty bombings and arson attacks at abortion clinics, and from 1993 to 1999, seven people, including clinic workers and doctors, were killed by anti-abortion terrorism." The result was "a near-total public silence on the subject of abortion in the discourse of teen sex." *Id.*

92. See *id.* at x, xi, xxvi, 7 n.16, 48, 90-126, 231 (observing that the religious right sometimes invokes Biblical images to support its efforts to influence legislation).

93. See Joann Wypijewski, *The Wonder Years*, THE NATION, May 20, 2002 (enumerating a short list of such critics, including: right-wing talk-show host and author, Dr. Laura Slessinger; anti-pornography activist, Judith Reisman; Minnesota House Majority Leader (who later became a Republican contender for Governor), Tim Pawlenty; and Concerned Women for America Spokesperson, Robert Knight), available at <http://www.thenation.com/docprint.mhtml?i=20020520&s=wypijewski> (last visited Sept. 20, 2004); see also Paul Demko, *Burn This Book: The University of Minnesota Press, Author Judith Levine, and One Very Hot Topic*, CITY PAGES, Apr. 24, 2002 (book review) (quoting citizens' reactions received by the University of Minnesota after it published *Harmful To Minors*); Fox News, *Mainstream Book Advocating Adult-Child Sex Draws Howls of Protest*, Apr. 2, 2002 (book review) (reporting that Robert Knight, director of Concerned Women for America's Culture and Family Institute, called Levine's book "evil"), at <http://foxnews.com/story/0227/levine.php> (last visited June 22, 2004); Brent Morrison, *Harmful to Minors: New Book Defends Pedophilia*, THE BRENT MORRISON

and those close to them could be critical of her position after reading her chapter entitled “Manhunt,” which gives surprisingly low statistics for stranger sexual abuse.<sup>94</sup> However, Levine simply presents the facts while exposing policies and messages sent to society by legislatures and the media that are mostly based in fear and not in reality. Levine does not legitimize pedophilia, as many of her critics claim she does.<sup>95</sup> In fact, her critics’ reactions to the book help to strengthen Levine’s argument that the religious right tends to ignore statistical facts, instead keeping itself dedicated to forcing its own definitions of morality upon the rest of society.

While the religious right has involved itself in regulating sexuality, sex-conservative feminists have generally influenced policy through their concern for victims of sexual violence.<sup>96</sup> In their effort to hold accountable perpetrators of sexual abuse they have drawn more attention to some problems that much of society previously ignored.<sup>97</sup> However, another result of this is an increase in the unfounded fear

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COLUMN, Apr. 8, 2002 (book review) (characterizing Levine as “part of a slowly growing movement to legalize sex with and between children”), at [http://www.brentmorrison.com/020408Judith\\_Levine.htm](http://www.brentmorrison.com/020408Judith_Levine.htm) (last visited Sept. 20, 2004); Robert Stacy McCain, *Harmful To Minors – Statement by Robert Stacy McCain*, THE WASH. TIMES, Jan. 1, 2002 (book review) (summarizing criticisms of Levine’s book).

94. See LEVINE, *supra* note 1, at 24 (reporting that almost all children reported as kidnapped by a stranger were actually taken by parents involved in custody disputes or have either run away from home or were kicked out of the home). Levine points out that the actual chance of childhood abduction and murder by a stranger are “between 1 in 364,000 and . . . 1 in 1 million,” while “a child’s risk of dying in a car accident is twenty-five to seventy-five times greater.” *Id.*

95. See, e.g., Amy Benfer, *What’s So Bad About Good Sex*, SALON.COM, Apr. 19, 2002 (book review) (quoting Levine as saying, “no sane person would advocate pedophilia”), at [http://www.salon.com/mwt/feature/2002/04/19/levine\\_talks/](http://www.salon.com/mwt/feature/2002/04/19/levine_talks/) (last visited Sept. 20, 2004); Judith Levine, *Summer of Love: The Romance a Teenage Camper Couldn’t Have Today*, THE VILLAGE VOICE, Jul. 3-9, 2002 (recounting a non-sexual teenage experience), at <http://villagevoice.com/issues/0227/levine.php> (last visited Sept. 20, 2004); Liz Highleyman, *What Judith Levine Is Really Saying*, ALTERNET, Apr. 26, 2002 (book review) (shedding light on Levine’s true insights), at <http://www.alternet.org/story.html?StoryID=12960> (last visited June 22, 2004); Brian Robinson, *A Harmful Message? New Book on Child Sex Sparks Uproar*, ABC News (book review) (reporting that Levine had been called an evil accomplice to child molesters), at [http://abcnews.go.com/sections/us/DailyNews/childsex\\_book020405.html](http://abcnews.go.com/sections/us/DailyNews/childsex_book020405.html) (last visited Sept. 20, 2004).

96. See, e.g., CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987); ANDREA DWORKIN, *OUR BLOOD: PROPHECIES AND DISCOURSES ON SEXUAL POLITICS* (1976); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002) (reviewing how the women’s rights and other movements have influenced social policy).

97. See LEVINE, *supra* note 1, at xxiii (explaining how feminists, “exposed widespread rape and domestic sexual violence against women and children and initiated a new body of law that would punish the perpetrator and cease to blame the victim”).

that minors (particularly girls) are insufficiently protected.<sup>98</sup> Levine also states that sex-conservative feminists are responsible for the rise in “recovered memories.”<sup>99</sup> Because feminists ordinarily do not align themselves with members of the religious right, feminist involvement has helped to validate the claims of the right in mainstream culture.<sup>100</sup>

The concordance of these two factions has reinforced antiquated notions about sexuality and has increased harm to minors.<sup>101</sup> Leaders in the fight against pornography, such as Andrea Dworkin and Catherine MacKinnon along with the New York Women Against Pornography, assisted the 1986 Meese Commission in concluding that pornography was tantamount to violence against women without data to support such a statement.<sup>102</sup> Levine also claims that the convergence has skewed definitions of normative childhood behavior; this has increased concerns over touching between children and claims that there is an increasing trend of “children who molest.”<sup>103</sup>

In addition to the religious right and sex-conservative feminist, Levine discusses a mainstream view which acknowledges that most people will engage in sexual intercourse outside of marriage, and thus endeavors to educate them as to how best to protect themselves.<sup>104</sup> However, Levine purports that this middle group seems to have yielded to public pressure that apparently supports the right wing; as a result, there is no one left to advocate for the type of sex-education

98. See *id.* at 32 (observing how the media has sensationalized sex crimes against children, especially girls).

99. See *id.* (noting that “recovered memories” are defined as experiences one suddenly remembers in therapy while trying to discover the root of current problems). Today, there is much controversy over the legitimacy of these claims. *Id.*; see also Roger J.R. Levesque, *Prosecuting Sex Crimes Against Children: Time for “Outrageous” Proposals?*, 19 LAW & PSYCHOL. REV. 59, 61 n.6 (1995) (giving a brief overview of the controversy of recovered memories and listing resources on different sides of the argument).

100. See West, *supra* note 86, at 700-01 (cautioning that linking the arguments on the two sides could cause confusion about the underlying issues that primarily affect women, thereby undermining feminist beliefs).

101. See LEVINE, *supra* note 1, at xxiii (noting that although they have different agendas, these two movements joined together to articulate their fears about minors’ sexuality).

102. See *id.* at 38; see also CALIFIA, *supra* note 85, at 107 (chronicling the dissension among feminists as “antiporn activists,” such as Dworkin and MacKinnon, aligned against “sex positive feminists”).

103. See LEVINE, *supra* note 1, at 46, 48 (noting that normal childhood sexual behavior has become “pathologized” as a result, recounting the story of an eleven-year-old who was imprisoned in a sex-offender institution).

104. See *id.* at 92-94 (noting different groups working on policy related to the sexuality of minors, such as Planned Parenthood and the Sex Information and Education Council of the United States (“SIECUS”) and their failure to reject abstinence-only sex education).



that will give minors the full range of information that they need.<sup>105</sup> Sharon Thompson, who has written about the sexuality of teenage girls, has responded to setbacks in sex-education by stating, “We will look back at this time and indict the sex-education community as criminal. It’s like being in a nuclear power plant that has a leak, and not telling anybody.”<sup>106</sup>

While mainstream sexual and reproductive health advocacy groups have compromised their work in response to public pressure, Levine credits only those groups that unconditionally agree with her notions on minors’ sexuality.<sup>107</sup> Her view fails to recognize the immense amount of public and political pressure that advocacy groups repeatedly face.<sup>108</sup> For instance, she states that the pro-choice grassroots movement is dying without recognizing the existence of organizations that lobby for reproductive and sexual rights as well as provide services every day under the threat of violence.<sup>109</sup> Refusing to credit feminist groups for the good work they do not only ignores the realities of our culture (a central premise of one of Levine’s later chapters on teen sex),<sup>110</sup> but also widens the divide between groups

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105. See *id.* (observing that one of the byproducts of this includes the near-unanimous embrace of abstinence among legislatures, educators, and school boards).

106. See *id.* at 116 (exemplifying Sharon Thompson’s response to setbacks in sex-education); see also SHARON THOMPSON, *GOING ALL THE WAY: TEENAGE GIRLS’ TALES OF SEX, ROMANCE, AND PREGNANCY* (1995).

107. See LEVINE, *supra* note 1, at 92, 119 (criticizing the response in the areas of sex-education and abortion in particular).

108. See *id.* at 103, 119 (citing the ban on partial birth abortion as an example of political pressure influencing policy); Rigel C. Oliveri, *Crossing the Line: The Political and Moral Battle Over Late-Term Abortion*, 110 *YALE J.L. & FEMINISM* 397, 398 (1998) (examining proposed legislation, lobbying, and debate surrounding partial birth abortion and how the vastly different viewpoints make it difficult to view the issue rationally).

109. See LEVINE, *supra* note 1, at 103, 119 (simplifying abortion as a “normal” part of women’s lives and noting the failure of the pro-choice movement to overcome the “awfulization of abortion” that surrounds the debate). While abortion is a common phenomenon among women and a legitimate choice for any woman to make with regard to a pregnancy, it cannot be denied that women do not want to have abortions and eliminating the need for them would be ideal. The battles involving a minor’s right to abortion also reinforce the notion that the pro-choice movement is working hard to maintain the right to abortion. *Id.*; see also *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (striking down a Pennsylvania statute that required a married woman to provide a reason for her failure to provide notice to her husband); *Planned Parenthood v. Farmer*, 762 A.2d 620 (N.J. 2000) (finding a law that conditioned a minor’s right to obtain an abortion on parental notification unconstitutional).

110. See LEVINE, *supra* note 1, at 92 (pointing-out that only two of the many Planned Parenthood chapters throughout the United States were able to stand their liberal ground against sex-education reforms). These two are both in the New York City area. *Id.* It is not so easy for the groups in conservative states, such as mine (Missouri), who continue to work hard in the face of opposition, but can only go so far when the religious right controls the direction of the legislature by restricting funding necessary to provide services to those in need and insisting on bills that ultimately result in harm to women and minors. My stance comes mainly from

on the left to the benefit of the right.<sup>111</sup>

#### IV. LAWS THAT CONTROL THE SEXUALITY OF MINORS TODAY

The law is one area in which the mores and codes of society are written down to announce what is acceptable behavior and what is not.<sup>112</sup> One can easily find evidence of how minors are kept on a course deemed proper by societal standards in the laws passed by legislators and decisions by the various courts in our country.<sup>113</sup> Each of the following areas may not be addressed directly in *Harmful To Minors* from the legal perspective, but each is a clear attempt to regulate the sexuality of minors. These areas include obscenity, statutory rape laws, sex education curriculum, and limitations on the availability of abortion.

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working as a pro-choice lobbyist and organizer in a state with a very conservative, anti-choice and anti-family planning legislature. Now, living in New Jersey, with its relatively liberal legislature, it is easy to expect groups to stand up to political pressure when they know they will still receive state funding. There are examples of bills supporting the notions Levine covers in her book that are still being passed, possibly in a way that is not as bold-faced as *Harmful To Minors*, but it is still a step in the right direction. See, e.g., MO. ANN. STAT. § 170.015 (2002) (requiring schools that provide sex education to provide information that is “medically and factually accurate” and to include a discussion on contraceptives and sexually transmitted disease, as well as abstinence).

111. See *supra* notes 100-06 and accompanying text (observing that even the politically mainstream have subscribed to the right-wing’s point of view regarding sexuality among children).

112. See, e.g., Michael M. v. Superior Court, 450 U.S. 464 (1981) (affirming defendant’s conviction for statutory rape where the defendant was a male barely over the age of seventeen and the “victim” was a female under eighteen); Roe v. Wade, 410 U.S. 113 (1973) (upholding the right to abortion); Miller v. California, 413 U.S. 15 (1972) (holding that the standard for determining whether material was obscene was whether the average person, applying community standards, not national standards, would find that the work appealed to the prurient interest, whether the work depicted sexual conduct defined by state law, and whether the work lacked serious literary, artistic, or scientific value); Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending the right to use birth control to single people, in addition to married couples); Ginsberg v. New York, 390 U.S. 629 (1968) (upholding a broader definition of “obscenity” for minors than for adults); A Book Named ‘John Cleland’s Memoirs of a Woman of Pleasure’ v. Attorney General of Massachusetts, 383 U.S. 413 (1966) (finding that the questionable material had some literary value and was therefore not obscene); Ginzburg v. United States, 383 U.S. 463 (1966) (affirming convictions for distributing obscene materials where the defendants, themselves, proclaimed that the materials were “obscene”); Griswold v. Connecticut, 381 U.S. 479 (1965) (finding a right to privacy that included the right to use birth control); Roth v. United States, 354 U.S. 476, 487 (1957) (defining obscenity as “material which deals with sex in a manner appealing to prurient interest”); Butler v. Michigan, 352 U.S. 380 (1957) (finding it unconstitutional to prevent children from accessing a book merely because that book may have a “potentially deleterious effect”).

113. See cases cited *supra* note 112 (listing cases in which the Court determined which types of speech were “obscene” and which were constitutionally protected).

### A. *The Obscenity Standard*

The obscenity standard, as applied to minors, can be used to censor any information deemed indecent for them.<sup>114</sup> Development of the current law surrounding obscenity finds its origin in the many cases heard by the Supreme Court between 1957 and 1967.<sup>115</sup> Deciding these cases just after the time of Kinsey's studies, the Court had a new approach to judging potentially offensive material.<sup>116</sup> During this decade, the Warren Court struck down a Michigan obscenity ordinance by unequivocally stating that "sex and obscenity were not synonymous," and in the famous "Fanny Hill" case<sup>117</sup> held that a book could only be banned if it was "utterly without redeeming social value."<sup>118</sup> In 1972, *Miller v. California* set up a three-pronged test for obscenity.<sup>119</sup> Material that does not pass the *Miller* test receives no First Amendment free-speech protection.<sup>120</sup> Under *Miller*, such material must be "patently offensive" and appeal only to the "prurient interest."<sup>121</sup> These two prongs are defined according to local "community standards" and the material must fail to have "serious legal, artistic, political or scientific value."<sup>122</sup> The standard for minors was established in 1968 in *Ginsberg v. New York*, which prescribed a more inclusive definition of obscenity when evaluating material aimed at minors, as opposed to material meant for adult consumption.<sup>123</sup>

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114. See LEVINE, *supra* note 1, at 10 (citing the reasoning behind such laws is that "obscene" materials might breed bad thoughts, which could lead to bad acts).

115. See, e.g., *Ginzburg*, 383 U.S. at 463; *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure'*, 383 U.S. at 424; *Roth*, 354 U.S. at 476; *Butler*, 352 U.S. at 380.

116. See D'EMILIO & FREEDMAN, *supra* note 42, at 287 ("The Kinsey studies . . . shaped the context in which the Supreme Court responded to the obscenity issue."); see also *supra* notes 74-78 and accompanying text (recounting public reaction to the Kinsey studies).

117. See *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure'*, 383 U.S. at 424 (noting that "Fanny Hill" is the common name for the book named as a party in this case).

118. *Roth*, 354 U.S. at 487; *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure'*, 383 U.S. at 418; D'EMILIO & FREEDMAN, *supra* note 42, at 287 (observing that the Court subsequently cleared most every book it considered, finding none of them "obscene").

119. See *Miller*, 413 U.S. at 15 (finding that material which is obscene may be censored, as it is not worthy of First Amendment protection).

120. See *id.* at 25 (noting that obscene material could be censored).

121. See *id.* at 25-26 (outlining the first and second prongs of the obscenity test).

122. See *id.* at 24 (noting that the third prong of the obscenity test proves an exception for offensive material which nonetheless might be useful to society).

123. See *Ginsberg*, 390 U.S. at 669 (narrowing the obscenity test as outlined in *Miller*).

### B. Statutory Rape Laws

Similarly, statutory rape laws have gone through a dramatic development.<sup>124</sup> The Supreme Court in *Michael M. v. Superior Court of Sonoma County*, upheld gender-based classifications in statutory rape laws as permissible under the Equal Protection Clause of the Fourteenth Amendment if they “bear a fair and substantial relationship to legitimate state ends.”<sup>125</sup> However, since 1981, the definition of statutory rape in regulation by the states has expanded to include gender-neutral terms.<sup>126</sup> These laws are commonly on the books but not enforced, since prosecutors need the testimony of the “victim”—usually a consenting partner—to get a successful prosecution.<sup>127</sup> Today, there are increased moves to enforce these laws, even if younger partners are not willing to testify against their lovers.<sup>128</sup>

### C. Sex Education Curriculum

Because there is no federal mandate to teach sexuality education in schools, this area is primarily regulated by individual states.<sup>129</sup> There are, however, federal funds available for sex education; in fact, some of the greatest battles have been fought over such funding.<sup>130</sup> In 1981, Congress passed the Adolescent Family Life Act (“AFLA”), which provided federal funds to programs that were designed to

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124. See *supra* notes 59-60 and accompanying text (recounting the origin of these laws in the nineteenth century).

125. 450 U.S. 464, 469 (1981) (quoting *Reed v. Reed*, 404 U.S. 71, 75 (1971)).

126. See Susannah Miller, *The Overturning of Michael M.: Statutory Rape Law Becomes Gender-Neutral in California*, 5 UCLA WOMEN’S L.J. 289, 297 (1994) (analyzing the now gender-neutral California law and the inadequacy of this change to address feminist concerns).

127. See Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 779-80 (2000) (describing how victims may not want to assist prosecutors because they do not see themselves as victims and they want to protect their “abuser”).

128. See Amy Benfer, *Kiss & Tell: Prosecutors in California Are Asking the Professionals Who Treat Teenage Girls To Disregard the Confidentiality of Patients and Help Go After Statutory Rapists*, LEGAL AFF., Oct. 2002, at 35 (describing the situation of one girl who wrote a letter to the judge stating, “I could see [prosecuting him] if he actually raped me or wasn’t supporting us, . . . [b]ut it actually made the whole situation worse. Now my son doesn’t have a father and it’s put more stress on me because I’m trying to finish high school”).

129. See The Alan Guttmacher Institute, *State Policies in Brief: Sex and STD/HIV Education* (June 1, 2004) [hereinafter *State Policies*] (noting that in most states, public schools have some form of sex education), at [http://www.gi-usa.org/pubs/spib\\_SSEP.pdf](http://www.gi-usa.org/pubs/spib_SSEP.pdf) (last visited June 16, 2004).

130. See, e.g., Adolescent Family Life Act (“AFLA”), 42 U.S.C. § 300z (2004); see also Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”) of 1996, 42 U.S.C. § 906(a) (2004); Violence Against Women Act, 42 U.S.C. § 14016(a) (2004) (providing examples of recent legislation on this issue).

“promote self-discipline and other prudent approaches” to adolescent sex.<sup>131</sup> In other words, the purpose was to teach minors not to have sex.<sup>132</sup> In 1997, Congress passed additional conservative legislation through the attachment of restrictions onto welfare reform legislation that would give matching grants to programs teaching abstinence until marriage as the preferable behavior.<sup>133</sup> Thirty-eight states and the District of Columbia require education on HIV/AIDS, but only seventeen of those must cover information on prevention of pregnancy and disease by use of contraception.<sup>134</sup> No state requires that information on contraceptives be stressed in its program.<sup>135</sup> In addition, thirty-five states and the District of Columbia allow parents to remove their children from HIV/AIDS or sex education classes, and three states require parental consent to partake in HIV/AIDS or sex education classes.<sup>136</sup>

#### *D. Limitations on the Availability of Abortions*

The battleground over abortion involves great controversy, especially with regard to minors.<sup>137</sup> Abortion first became legal in 1973 with the decision in *Roe v. Wade*, which set up a trimester framework for restrictions on abortion.<sup>138</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey* is now the standard under which regulations pertaining to minors in particular are allowed.<sup>139</sup> The Supreme Court held in this case that forcing a minor to obtain the consent of one parent was constitutional, as long as there was a

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131. LEVINE, *supra* note 1, at 91 (explaining that the AFLA was the first federal law regarding the funding of sexuality education in schools); see Gary J. Simson & Erika A. Sussman, *Keeping the Sex in Sex Education: The First Amendment's Religion Clauses and the Sex Education Debate*, 9 S. CAL. REV. L. & WOMEN'S STUD. 265 (2000) (discussing the constitutionality of federally funded sex-education programs).

132. See LEVINE, *supra* note 1, at 94 (offering that the purpose of sex education is to teach young people that no sexual behavior is the currently approved sexual behavior before marriage).

133. See PRWORA, *supra* note 130.

134. See *State Policies*, *supra* note 129.

135. See *id.*

136. See *id.*

137. See LEVINE, *supra* note 1, at 117-26 (noting that most sex education classes do not teach children about abortion).

138. See 410 U.S. 113, 114 (1973) (stating that under *Roe*, regulation of abortion in the first trimester is not allowed at all, in the second trimester, abortion can be regulated as long as those regulations promote the health of the woman, and states may ban abortion in the third trimester in the interest of promoting fetal life, but there must be exceptions for the life and health of the woman).

139. See 505 U.S. 833, 844 (1992) (pointing to particular provisions of the Pennsylvania Abortion Control Act at issue in this case).

judicial bypass option in place.<sup>140</sup> Forty-four states have enacted parental involvement laws including some that require a minor to receive consent from both of her parents, seek judicial bypass, or travel to another state.<sup>141</sup> The newest threat comes from the Child Custody Protection Act (“CCPA”), which would make it a crime for any adult to transport a minor across state lines in order to circumvent her own state’s parental involvement laws.<sup>142</sup>

The support from Congress for laws that protect minors is encouraging because minors make up one of the most vulnerable groups in society.<sup>143</sup> Levine states that all a bill needs is the word “child” in it for members of Congress to jump on the bandwagon to support it.<sup>144</sup> Most of the support for these laws is meant to protect the interests of minors and prevent them from engaging in dangerous behaviors.<sup>145</sup> Initially, it appears that any attempt to protect minors would be good, and these actions could be seen as a sign of the democratic process at work, but one could also make the argument that there is a need to protect the minority from the tyranny of the majority.<sup>146</sup> Legislators often fail to challenge the substance of many bills out of fear that one could be labeled anti-child, thereby risking

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140. See *id.* at 833; see also Jennifer Blasdell, *Mother May I?: Ramifications for Parental Involvement Laws for Minors Seeking Abortion Services*, 10 AM. U. J. GENDER SOC. POL’Y & L. 287 (2002) (providing a general criticism of parental involvement laws); Planned Parenthood Federation of America, *Fact Sheet: Teenagers, Abortion, and Government Intrusion Laws* (Aug. 1999) (suggesting that the judicial bypass option still causes delays that can harm the health of the woman), at <http://www.plannedparenthood.org/library/ABORTION/laws.html> (last visited Sept. 20, 2004).

141. See NARAL Pro-Choice America & NARAL Pro-Choice America Foundation, *Who Decides? A State-by-State Report on the Status of Women’s Reproductive Rights* (2004) [hereinafter *Who Decides*] (listing states with parental involvement laws).

142. See LEVINE, *supra* note 1, at 125 (describing the hazards of the new law as harmful and dangerous since many young girls may resort to “back-alley abortions” to avoid telling their parents about their pregnancy); see, e.g., H.R. 1218, 106th Cong. (1999); S. 661, 106th Cong. (1999); H.R. 476, 107th Cong. (2001) (noting the elements of the CCPA).

143. See Jessica R. Arons, *Misconceived Laws: The Irrationality of Parental Involvement Requirements for Contraception*, 41 WM. & MARY L. REV. 1093, 1096 (2000) (stating that minors do not have the right to vote, they lack financial resources, and they cannot enter into a contract).

144. See LEVINE, *supra* note 1, at 38 (recounting how Congress enacted the Child Protection and Enforcement Act of 1988 because the words “child exploitation” were in it, although the law was directed to adult pornography).

145. See Arons, *supra* note 143, at 1096 (noting that in enacting these laws, the rights of minors are weighed against the interests of their parents and those of the state).

146. See William S. Geimer, *Juvenileness: A Single-Edged Constitutional Sword*, 22 GA. L. REV. 949 (1988) (indicating that the most apparent examples of a lack of power and influence among minors involve highly controversial topics, such as abortion).

political and social demise.<sup>147</sup> In addition, given the stigma of a lack of sexuality, and the fact that minors (those from birth to age eighteen) cannot be placed in a one size fits all category because of their differing mental capacities and developmental stages, many minors end up being punished for simply being the growing human beings they are. Such punishment is especially important to consider in light of the fact that minors have no political power in our country; they cannot vote to defend themselves, which basically translates into virtually no lobbying power as well.<sup>148</sup>

## V. THE LEGAL DENIAL OF MINORS' SEXUALITY

Many of these laws currently in force regarding minors can be looked at from three different perspectives, each with definite problems that result in harm to minors. First, these laws are created out of irrational fears that exist over minors and sexuality.<sup>149</sup> Second, such laws often reinforce outmoded gender stereotypes, thereby increasing risk-taking behavior.<sup>150</sup> Finally, these laws often keep minors in an angel/devil dichotomy that fails to recognize them as fully human.<sup>151</sup> This Review will discuss each of these perspectives in turn.

### A. Laws Based on Irrational Fears

Some laws react to the risks involved in sex in extraordinary ways, without statistical data for support.<sup>152</sup> Beliefs about these risks, compounded with the notion that minors are immune from

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147. See LEVINE, *supra* note 1, at 38 (suggesting that, due to the political pressure surrounding the area of sexuality, when Congress votes on issues involving minors, all of the legislators feel compelled to vote for bills that may not be in the best interests of our nation's young people).

148. *Contra* Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 MINN. L. REV. 1463, 1505-13 (1998) (suggesting that even if minors are not given the ability to vote, their parents should be given a voice to speak for them instead of society as a whole).

149. See *infra* notes 154-73 and accompanying text (discussing laws such as the Child Online Protection Act ("COPA"), the Communications Decency Act ("CDA"), and laws that punish normative childhood sexual behavior, such as statutory rape laws and sex-education laws).

150. See *infra* notes 174-203 and accompanying text (discussing laws such as statutory rape laws, sex-education laws, and parental involvement with a minor's right to abortion laws).

151. See *infra* notes 204-23 and accompanying text (discussing laws governing "children who molest," sex-education reforms, parental involvement with a minor's right to abortion laws, and the effect of sex-offender-registration, community notification, and murder laws on minors).

152. See *infra* notes 156-58 and accompanying text (suggesting that societal fears dictate laws as opposed to actual statistical data on sexual behavior).

sexuality,<sup>153</sup> may be explained by looking at a dominant theme throughout Levine's book in relation to American law today. The law purports that because sex is innately harmful to minors, we must prevent them from seeing it by passing obscenity and anti-pornography laws such as the Child Online Protection Act ("COPA") and the Communications Decency Act ("CDA").<sup>154</sup> Also, minors must not experience sex: therefore, we will overreact to normative childhood sexual behavior<sup>155</sup> and create victims with statutory rape laws.<sup>156</sup> Additionally, minors must not learn about sex, so funding will go only to abstinence until marriage sex-education programs,<sup>157</sup> and discussions of desire and pleasure will be barred.<sup>158</sup> Lastly, those who wish to "corrupt minors are everywhere and must be stopped with harsh penalties in order to keep our children innocent with sex-offender registration, community notification laws,<sup>159</sup> and statutory

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153. Cf. LEVINE, *supra* note 1, at 105-08 (claiming that too many teens are misguided into thinking that possessing sexuality is wrong).

154. See Communications Decency Act, 47 U.S.C. § 502(a)(1)(B) (imposing a fine of \$250,000 or a sentence of two years in jail on anyone who "by means of a telecommunications device knowingly (i) makes, creates, or solicits, and (ii) initiates the transmission of any . . . image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under [eighteen] years of age . . ."); see also LEVINE, *supra* note 1, at 11-12 (explaining that COPA also imposed a fine and jail sentence and was aimed at adult pornography sites that did not require a credit card number to enter the site). The court held both statutes to be violations of free speech as well as impossible with which to comply. Passing legislation such as COPA and CDA shows the federal legislature's intent to censor information given to minors, even though research indicates that it may be censorship that causes sexual deviance in adults. Levine cites many studies that show there is a correlation between a lack of exposure to sexually explicit materials as a minor and negative exhibitions of sexuality towards others as adults. Specifically, she includes studies that show that rapists have often been exposed to pornography less as children than those who do not grow up and commit rape. *Id.* at 232 n.30.

155. See LEVINE, *supra* note 1, at 51 (indicating that behavior generally considered not harmful to children and simply a part of curiosity or exploration is now being labeled abuse).

156. See *id.* at 71 (explaining that most statutory rape laws draw a bright line between who is an adult and who is a minor in order to protect those the state considers incompetent to make sexual decisions).

157. See *id.* at 97 (asserting that abstinence legislation was originally aimed at preventing teen sex altogether under the guise of assisting in the battle against teen pregnancy); see also 42 U.S.C.A. §§ 300-300(a)(8) (providing the text of Title X, the federal family planning program); Megan Weinstein, *The Teenage Pregnancy "Problem:" Welfare Reform and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 13 BERKELEY WOMEN'S L.J. 117 (1998) (discussing attempts to curb teen pregnancy and the subsequent effects on poor, young women).

158. See LEVINE, *supra* note 1, at 137 (stating that no sex education program discusses desire or pleasure, and the ignorance of these topics occurs not only in sex education classes but also in mainstream media and in the guarded words of health officials).

159. See *id.* at 26 (providing the following example: the fear that exists of former sex offenders—that they can never recover and will always seek to abuse—is almost completely false). Recidivism rates among sex offenders are as low as thirteen



rape laws.”<sup>160</sup>

This notion is paralleled with an explanation of the normal human reaction to fear.<sup>161</sup> It is not uncommon for human beings to react to scary incidents by letting fear control the capacity to think rationally.<sup>162</sup> Our ability to rationalize often conflicts with our emotions, and a common reaction, therefore, is to call for government regulation to assist in making the fear go away.<sup>163</sup> Cass R. Sunstein, in his review of Paul Slovic’s book, *The Perception of Risk*, addresses why this reaction happens and how it translates into policy

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percent, while the rate for the rest of the prison population is around seventy-four percent. If offenders receive treatment, the prognosis is even better. This fear may exist because of the inability to easily define who is a pedophile and who is not. *Id.* at 26. This fear results in laws that punish convicted offenders, long after their prison sentences end, through requirements of community notification and sex-offender registration. Experts working with sex-offenders warn that such policies might actually create more sex-offenders instead of protect minors. Robert Freeman-Longo, president of the Association for the Treatment of Sexual Abusers states, “You ban someone from the community, he has no friends, he feels bad about himself, and you reinforce the very problems that contribute to the sex abuse behavior in the first place.” *Id.* at 42-43. The overreaction has gone so far that currently, methods of entrapping potential offenders are being utilized that cost the government much in terms of time and resources, yet yield slight results because the problem is not very large. One such example was a government scheme developed under the guise of catching child pornographers and abusers that lasted for four years and involved “unnumbered Justice Department agents” and “thirty federally financed local task forces nationwide.” This “biggest success to date” by the federal government resulted in the shut down of one website which, in addition to adult porn, provided links to international websites containing images considered illegal child pornography under U.S. law. However, the website itself did not produce child pornography. The owners and one hundred subscribers to the website were arrested, but none were charged with the abuse of an actual child. *Id.* at 38-39; see also *Jacobson v. U.S.*, 503 U.S. 540 (1992) (overturning a man’s conviction by the Supreme Court because the government sent him child pornography in order to show he was “predisposed” to such a crime); Mona Lynch, *Pedophiles and Cyber-Predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation*, 27 LAW & SOC. INQUIRY 529 (2002) (discussing sex offender registration laws).

160. LEVINE, *supra* note 1, at 71-72, 81. Levine addresses the origins of statutory rape laws as a protection of a female’s virginity, considered at the time to be the property of her father. Today, statutory rape laws can be construed to be more about repressing female desire or, as Levine points out, also gay male behavior, which may be “feminized” by our culture. In addition, these laws are about parental control and parental denial of their children’s sexuality. The thinking behind these laws is that maybe minors think they want to be sexually active, when in actuality, they are too young to know that they do not want to engage in such behavior. *Id.*

161. *E.g.*, Erica Goode, *Rational and Irrational Fears Combine in Terrorism’s Wake*, N.Y. TIMES, Oct. 2, 2001 (explaining people’s reactions post September 11, 2001 and why these feelings occur), available at <http://nytimes.com/2001/10/02/health/psychology/02FEAR.html> (last visited Mar. 29, 2004).

162. See *id.* (noting people’s unwillingness to fly after the September 11, 2001 attacks).

163. See *id.* (stating that despite government efforts to ensure the safety of our country, many people do not feel safe).

and legal reforms.<sup>164</sup> He concentrates on what Slovic calls the “availability heuristic,” or common phenomenon, for people to perceive a higher degree of risk if a picture of that risk is readily available.<sup>165</sup>

This phenomenon may help explain why the high amount of publicity of such events as Megan Kanka’s rape and murder by a paroled sex-offender resulted in such a public outcry for reform.<sup>166</sup> The eventual result was “Megan’s Laws” designed to protect children from pedophiles when in actuality they have a much greater chance of harm from many other causes that deserve the attention of legislatures.<sup>167</sup> Another example of lawmaking based in fear is seen in sex education reforms.<sup>168</sup> There is much statistical data available to show that programs focusing only on abstinence are not effective in relaying their message.<sup>169</sup> In fact, “the National Institutes of Health concluded that legislation discouraging condom use on the ground that condoms are ineffective ‘places policy in direct conflict with science because it ignores overwhelming evidence.’”<sup>170</sup> Ultimately, Sunstein suggests that, while human emotion should not be ignored, more attention needs to be paid to real life facts in creating effective policy.<sup>171</sup>

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164. See Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119, 1127 (2002) (reviewing PAUL SLOVIC, *THE PERCEPTION OF RISK* (2000)) (theorizing that the very same people who are fearful of “highly publicized events” that have “statistically small risks” are the public officials who are responsible for our laws and policies).

165. See *id.* at 1124.

166. See LEVINE, *supra* note 1, at 24 (recognizing the rape and murder of Megan Kanka, which created enough impetus among the community to create “Megan’s Laws,” the sex-offender registration and community notification laws). Only “nine children under age twelve were the victims of similar crimes, out of over forty-five million in that age group.” *Id.*

167. See LEVINE, *supra* note 1, at 24 (explaining that a child is much more likely to die in a car accident than at the hands of a pedophile).

168. *E.g., id.* at 90-94 (noting the shift of focus on abstinence in sex education programs).

169. See *id.* at 257 nn.44-47 (referring to studies that show the ineffectiveness of abstinence-only education programs); see also Elizabeth Arndorfer, *Absent Abstinence Accountability*, 27 HASTINGS CONST. L.Q. 585 (2000) (discussing the lack of effectiveness of such programs).

170. Planned Parenthood Federation of America Fact Sheet, *Abstinence-Only Education: Why First Amendment Supporters Should Oppose It* (Sept. 2001), at <http://www.plannedparenthood.org/library/facts/AbstinenceOnly10-01.html> (last visited Sept. 20, 2004).

171. See Sunstein, *supra* note 164, at 1165 (emphasizing that “no evaluation or even account of consequence is value-free, but an understanding of the likely effects of regulation will often produce agreement from people with quite different values”).

*B. Laws that Reinforce Stereotypical Gender Norms*

These are laws that define the proper ways for girls and boys to act by strictly regulating the failure to adhere to the traits of ones prescribed gender.<sup>172</sup> Additionally, these laws provide the only acceptable roles for minors to understand and experience.<sup>173</sup> Levine points out that, “[r]esearch shows that strong belief in the ideologies of masculinity and femininity makes for bad and unsafe sexual relations.”<sup>174</sup> This ideal is taught through current methods of teaching about sex that fail to expand the definition of sex beyond intercourse and do not address issues of pleasure and desire in minors.<sup>175</sup> Levine states that it is extremely difficult to talk about these aspects that reside in all humans, and that to get public funding for research into teen desire could make one a child abuse suspect.<sup>176</sup>

The origin of statutory rape laws lies in their protection of a girl’s virginity, as it was considered to be the property of her father.<sup>177</sup> This notion relies on the antiquated belief that females do not desire sex, therefore to engage in it, they must be forced.<sup>178</sup> Recently, there has been a rise in cases against older women for having sex with younger men.<sup>179</sup> The message is now moving to clearly state that: “boys are expected to desire as little as girls.”<sup>180</sup>

Restrictions on a minor’s right to abortion through parental

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172. See LEVINE, *supra* note 1, at 155-56 (providing examples of what the expected standards are among girls and boys and how children transfer these gender roles to their notion of sex).

173. See *id.*

174. *Id.* at 157; see also Roger J.R. Levesque, *Dating Violence, Adolescents, and the Law*, 4 VA. J. SOC. POL’Y & L. 339, 347 (1997) (adding that men and women set themselves up for traumatic bonding by assuming dominant and submissive roles respectively); Gary W. Harper, *Contextual Factors that Perpetuate Statutory Rape: The Influence of Gender Roles, Sexual Socialization, and Sociocultural Factors*, 50 DEPAUL L. REV. 897, 900, 904 (2001) (suggesting that girls are vulnerable to coercive and exploitive sexual behavior by males who make them feel that they are acting appropriately for their gender role).

175. See LEVINE, *supra* note 1, at 158-59 (stating there has not been sufficient research into the origins of desire).

176. See *id.* at 134.

177. See *id.* at 71.

178. See *id.* at 72.

179. See Kate Sutherland, *From Jailbird To Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313, 319-22 (2002) (recognizing that there is a rise in cases where older women have become sexually involved with younger men); see also Matt Bean, *If Convicted, Friedman Not Alone Among Teachers*, Court TV (Aug. 27, 2001) (listing more specific examples of older female teachers having sex with younger male students), available at <http://www.courtvtv.com/archive/trials/friedman/otherteachers.html> (last visited Sept. 20, 2004).

180. LEVINE, *supra* note 1, at 129.

involvement laws are clearly hardened in sexist notions about the virtue of women because they only affect the female part of the population.<sup>181</sup> They, in part, exist to save teenagers from themselves or their supposed inability to make rational decisions, given their youth, but they are also excused as a way to encourage family communication.<sup>182</sup> In reality, minors usually involve their parents in the decision to have an abortion, particularly if they are young teens.<sup>183</sup> If they wish not to involve their parents, they usually have good reasons for doing so.<sup>184</sup> In addition, Levine points out that abortion restrictions and propaganda may spread beliefs in outmoded gender norms by, “reinforc[ing] the masculine pride of paternity and . . . belief[s] in paternal privilege.”<sup>185</sup>

Laws that fail to break down gender role stereotypes simply reinforce antiquated and offensive notions of what it is like to be a female or male.<sup>186</sup> Breaking down these stereotypes will help minors learn to deal with disappointment, real-world issues involving relationships, and may also assist minors in having realistic expectations.<sup>187</sup> Instead of teaching teens to adhere to false images, we should present sexuality to teens in more neutral terms.<sup>188</sup>

The perpetuation of gender stereotypes within the law is particularly blatant in the case of *Michael M.*<sup>189</sup> The Supreme Court decided that a law discriminating on the basis of gender by allowing

181. See Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 Nw. U. L. REV. 480 (1990) (discussing the sexist notions underlying abortion restrictions).

182. See LEVINE, *supra* note 1, at 124 (commenting that “parental notification statutes” are considered a tool of family communication).

183. See *id.*

184. See *id.* at 124 (explaining that many girls, “have already experienced violence at home and, when they tell [their parents about a pregnancy], are met with more [violence]”).

185. *Id.* at 122.

186. See, e.g., *id.* at 155-77 (explaining how gender stereotypes provide a safety net for children who are vulnerable to their “unknown sexual future,” but do not enrich children with the knowledge of desire).

187.

If sex educators and therapists could drop the bias that long-term commitment is the highest goal and the only context for sexual expression, they might be able to help youngsters (especially young girls, who are more burdened by romantic illusion) relish [teen] relationships, protect themselves while they last, and bounce back when they are over.

*Id.* at 167.

188. See generally *id.* at 160-77 (presenting the different benefits to teens who are taught to approach sexuality with an open and honest mind).

189. See *Michael M.*, 450 U.S. at 471; see also Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984) (analyzing *Michael M.* and statutory rape laws from a feminist perspective).

for the prosecution of males, but not females, for having sex with someone under the age of eighteen was constitutional because the law rested on biological differences between the sexes and was not invidious.<sup>190</sup> The decision was based on the State's justification of the law: to prevent sexual activity between minors and thereby to prevent teen pregnancy.<sup>191</sup> Females were perceived as being natural resisters to sex because they had the deterrent of pregnancy.<sup>192</sup> Men cannot become pregnant, therefore, the statute was put into place as "an additional deterrent for men" because "[n]o similar natural sanctions deter males" from having sex.<sup>193</sup> Not only did *Michael M.* ignore the fact that the female in the case was hit,<sup>194</sup> thereby creating a question of consent, but the court actually reinforced the antiquated notions of male as aggressor and female as resistor by using gender differences to justify what was seen as "protection" for girls.<sup>195</sup>

Levine states that "placing girls on a pedestal of purity is not the same as respect and only perpetuates the division of the female population into virgins and whores."<sup>196</sup> Society needs to embrace the fact that girls do not innately exist in such a dichotomy; that they can be intelligent and beautiful, as well as strong, sexy, and sexual.<sup>197</sup> Boys need to be taught about emotion and connecting with others, and the expectation that they are always sexually available should be discarded.<sup>198</sup> Levine adds, "homophobic restraints on masculine affection might also thwart boys' playfulness and tenderness in heterosexual sex—and that learning to express closeness openly could do the opposite."<sup>199</sup> All of these lessons, once learned, are brought into any form of adult relationship and advance the perpetuation of sexism and homophobia that is so widespread in our culture.<sup>200</sup>

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190. See *Michael M.*, 450 U.S. at 471 (stating Justice Rehnquist's belief that the fact that females can get pregnant creates disproportionately "profound physical, emotional, and psychological consequences" which are "particularly severe" when women are young, thereby necessitating protection from sex with this statute).

191. See *id.* at 470-71.

192. See *id.* at 473.

193. *Id.* at 473, 475.

194. See *id.* at 487 (indicating that the woman in this case was hit "two or three times" before she stopped resisting sex).

195. See generally Olsen, *supra* note 189 (examining the above concept and feminist responses to "protection").

196. LEVINE, *supra* note 1, at 171.

197. See, e.g., *id.* at 163 (stating specific examples in which mothers try to teach their daughters that a girl can be sexy and intelligent at the same time).

198. See, e.g., *id.* at 168-70 (explaining that society should recognize that boys are no more "sexual machines" than girls are "sexual doormats").

199. *Id.* at 174.

200. See *id.* at 174 (suggesting that boys' fear of showing affection towards one

When gender norms are broken down, neither females nor males are expected to fulfill a certain role and more egalitarian relationships may be sought.<sup>201</sup>

### C. Laws that Perpetuate an Angel/Devil Dichotomy

Many laws seem to say that minors are perfect angels who can do no harm and who need protection from the sexual world, but at the same time, must pay dearly if they dare to break the rules that have been instilled in them.<sup>202</sup> This entire discussion has addressed ways in which American society attempts to keep sex out of minors' lives with the goal of protecting them from unknown and risky forces.<sup>203</sup> However, when minors break out of the traditional notions of repression, their innocence is quickly discounted, and they are treated very severely; it is almost as if they should have known better.<sup>204</sup>

This is easy to see with the increase in punishments for minors accused of "molestation."<sup>205</sup> These are children who exhibit any behavior that adults deem "age-inappropriate" or sexual towards another child and has resulted in sexual harassment charges against eight-year-olds for passing affectionate notes in class or rape accusations towards young children for kissing people on the playground.<sup>206</sup> Also, when children are accused of this molestation, it

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another is because of homophobic conceptions that influence the way they treat members of the opposite sex).

201. See *id.* at 155-56 (arguing that children who adhere to strict gender roles enforced by other adults ultimately perpetuate those stereotypes well into their teens and adulthood).

202. *E.g., id.* at 158, 171 (relaying how gender roles have been broken down as more females and males listen to each other without attempting to place either gender in the permanent role of sexual "aggressor or resister").

203. See *id.* at 88 (describing the irony involved in legislating for the protection of minors by raising the age of consent for sexual contact, but then convicting minors as adults for crimes such as murder).

204. See *id.* at xxxi (relaying how "[c]urrent youth policy and parenting advice teeter between high-anxiety child protection and high-anger child punishment" in order to produce "decent" adults).

205. See *id.* at xxxi-xxxii (arguing that our society perceives children as innocent only until they overstep their boundaries); see, *e.g., id.* at 46 (recounting an example of how a nine-year old boy was considered a "budding sex offender").

206. See *id.* (summarizing such behavior to include "fondling, putting things inside genitals, or even flashing, mooning, or masturbating"); *id.* at 49 (referring to a sexual harassment charge against an acquaintance of Levine's daughter, which was entered into her elementary school record); *id.* at 47 (stating that a rape charge was brought against a ten-year-old in Massachusetts for grabbing two girls in a way that was deemed to be in a sexual manner, and also a rape conviction was brought against an eleven-year-old girl when police uncovered a "child sex ring" in Pennsylvania). While these behaviors are not appropriate because they involved a lack of consent from one party, they hardly deserve the punishment sought in each situation and might have been better avoided if respect in touching between children was taught. *Id.*

seems as if the intent has shifted from rehabilitation to outright punishment, subjecting them to similar treatment that adults receive: jail, inhumane therapeutic programs, and lifetime registration as a sex offender.<sup>207</sup> Many times, these children are treated harshly because it has simply become the “popular” thing to do.<sup>208</sup>

It is worse for girls who also face a virgin/whore dichotomy.<sup>209</sup> They are taught that as females, they should have few feelings of sexual desire.<sup>210</sup> If they do feel desire, they are not to act upon it.<sup>211</sup> If they do act on it and pregnancy results, they just have to deal with the consequences, because they did not follow orders, even though the orders left out basic, crucial information.<sup>212</sup> In regard to pregnancy, many state laws are contradictory in that they may force a teen to involve her parents in the decision to terminate her pregnancy under the guise of her supposed inability to handle the seriousness of this major life decision.<sup>213</sup> Ironically, these same laws allow her to get married or to become a single parent without parental permission.<sup>214</sup> In addition, even when female minors decide to willingly become

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207. See *id.* at 62-63 (comparing the “treatment” that children accused of sexual offenses receive to that which was subjected onto homosexuals in the 1950s and 1960s to cure them of being attracted to members of their same sex and left them with profound decreases in self-esteem, dignity, and no change in their attraction). The difference is that homosexuals are actually gays and lesbians; many of the boys in the offender programs may not actually be guilty of anything except normative behavior that bothers an adult. *Id.* at 64. The treatment may include requirements to report every incidence of sexual fantasy (“deviant” or not), masturbation, and sex act with another person, as well as forbidding all forms of touch, regardless of the presence or absence of a sexual nature. *Id.* at 62-63. In addition, the boys are not allowed contact with their “victims” or anyone victim aged. *Id.* at 63. “They were required to submit to random drug tests, avoid being alone, and inform potential romantic interests of licit age that they were sex offenders.” *Id.* They may even be subjected to “drama therapy” which may include simulations of anal rape while being shouted at by a therapist. *Id.*; see also Elizabeth Garfinkle, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 CAL. L. REV. 163 (2003) (criticizing the application of sex-offender registration laws to minors).

208. See Garfinkle, *supra* note 207 (referring to an exhibitor at a sex-abuse seminar who states that judges are less willing to send children to rehabilitation, and instead, send them directly to jail for sex offenses, the latter being a “better business decision”).

209. See *supra* note 71.

210. See *id.*

211. See *id.*

212. See *id.*; see also Levine, *supra* note 1, at xxxi-xxxii.

213. See Planned Parenthood Federation of America, *supra* note 140. For a discussion on the ability of adolescents to make informed decisions in health care, including abortion, see Jennifer L. Rosato, *Let's Get Real: Quilting a Principled Approach to Adolescent Empowerment in Health Care Decision-Making*, 51 DEPAUL L. REV. 769 (2002).

214. See generally Rosato, *supra* note 213.

mothers, they face large amounts of criticism and deamonization.<sup>215</sup>

Sexuality is not the only area of minors' lives governed in a dichotomous manner. Laws regarding serious felony crimes such as murder offer a perfect example.<sup>216</sup> For instance, an article from a Florida paper dated March 2, 2002 points to three separate cases in which minors, one only twelve years old, were convicted of murder and sentenced to lengthy jail sentences in adult prisons.<sup>217</sup> Levine also discusses an eleven-year-old being charged with murder as an adult in Chicago.<sup>218</sup> Overall, the dichotomy that minors are placed in leaves them without the tools required to assert the independence they will need as a normal part of human development.<sup>219</sup> Minors are told that they are too young, too ignorant, too innocent, but if they happen to mess up along the way, they will also not be forgiven.<sup>220</sup> While society obviously wants what is best for our youth, fear of change and chance often get in the way of truly making the intent a reality.<sup>221</sup>

## VI. MOVING FORWARD

Congressional aides working on abstinence-only sex education admitted to rumblings among the members that "there is little evidence . . . that any particular policy or program will reduce the frequency of non-marital births," but in actuality, solutions are very apparent.<sup>222</sup> Levine rebuffs the aides by giving statistical data about college scholarships, enrolling girls in sports programs, and

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215. See Elizabeth Hollenberg, *The Criminalization of Teenage Sex: Statutory Rape and the Politics of Teenage Motherhood*, 10 STAN. L. & POL'Y REV. 267 (1999) (discussing the dichotomy that pregnant teens are placed in when policy makers struggle to adequately define them as either victims or active evil-doers).

216. See LEVINE, *supra* note 1, at 88 (noting that some minors are treated as adults when they are accused of violent criminal acts such as murder).

217. See Amanda Riddle, *Reform Unlikely, Despite High-Profile Teen Murder Cases*, TAMPA TRIBUNE (Mar. 2, 2002), available at <http://www.angelfire.com/fl14/prison/flkids2.html> (last visited Jan. 13, 2003) (copy on file with author).

218. See LEVINE, *supra* note 1, at 88 (demonstrating that while society treats minors as immature regarding sexuality, they are treated as adults for other adult activity such as criminal acts).

219. See *id.* at xxxi-xxxv (inferring that children are so strictly protected that they are unable to act sexually or socially responsible).

220. See *id.*

221. See *id.* at 142 (stating that while parents believe they should discuss sex education at home, levels of discomfort and refusal to disclose all information hindered their efforts).

222. *Id.* at 102 (quoting Ron Haskins & Carol Statuto Bevan, *Implementing the Abstinence Education Provision of the Welfare Reform Legislation*, U.S. House of Representatives memo, Nov. 8, 1996, at 1).



comprehensive sex education.<sup>223</sup> To accomplish the goal of truly protecting minors, there is clearly a need to look at their sexuality in a new light.

One approach utilizes history and looks back to Native American tribes during the time when Europeans first arrived in this country.<sup>224</sup> Their culture did not contain shame regarding sexual issues and many of their practices were strongly associated with spirituality.<sup>225</sup> They were also very accepting of practices such as premarital sex and homosexuality.<sup>226</sup> As a result, they experienced very little sexual violence and very little prostitution, with rape being one of the few sexual acts that was forbidden by Native American culture.<sup>227</sup> People were provided with information, made decisions with respect for others, and were not judged by the community in the process.<sup>228</sup>

From Levine's perspective a change means giving minors the facts (the risks as well as benefits) about sex inside and outside the home,<sup>229</sup> expanding the definition of sex beyond intercourse,<sup>230</sup> breaking down traditional gender roles,<sup>231</sup> encouraging respectful

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223. See *id.* at 102-03 (arguing that studies have shown that there are, in fact policies and programs that will "reduce the frequency of nonmarital teen births").

224. See D'EMILIO & FREEDMAN, *supra* note 42, at 7-8 (revealing the differences between Native American and English perspectives towards sex).

225. *E.g., id.* at 7 (noting how Native Americans did not believe sex was sinful).

226. *E.g., id.* (stating that Native American tribes "accepted premarital intercourse, polygamy, or institutionalized homosexuality").

227. *E.g., id.* at 8 (explaining that there was a lack of sexual violence within Native American tribes because no one could "own another person's sexuality").

228. See *id.* at 7-8 (noting that the freedom to explore one's own sexuality made life choices such as marriage and who to sleep with easier as there was no stigma attached to experiencing many partners).

229. See LEVINE, *supra* note 1, at 142 (explaining while opinion polls show that most parents support sex education and believe that this is their job, most feel very uncomfortable broaching the subject with their children). Parental discomfort in discussing sex with their children is a worldwide phenomenon. Levine asserts that this is the reason why the education needs to be done outside the home. *Id.* She discusses a different approach in a village in Africa where "aunties" talk to minors about sexual issues and she presents positive alternatives available today, from sources such as the Internet, which bring about an air of sex-positivity; children are taught that sex is good and is to be done respectfully to the self and the partner. *Id.* at 141-48. She then moves on to discuss the fact that the definition of sex needs to be expanded to address practices beyond intercourse, with others or alone. *Id.* at 153. Keeping this information out of the hands of minors leaves them with little but what is unrealistically portrayed in Hollywood or other media about sex, thereby ultimately setting them up with expectations that are unreachable and making heartbreak inevitable. *Id.*

230. See *id.* at 194 (supporting teaching about "outercourse" defined as "the infinite collection of acts that can be done with the body to create sensual and sexual pleasure that do not include penetration," and masturbation to assist children in learning about safe ways to achieve pleasure in their lives); see also *supra* note 34 and accompanying text.

231. See LEVINE, *supra* note 1, at 155-56 (addressing the fact that often in our

touch,<sup>232</sup> keeping cultural contexts in mind,<sup>233</sup> and recognizing that sex is not the only risk factor for harm.<sup>234</sup> In addition, she considers alternative approaches from cultures that have shown great success in reducing teen pregnancy and sexually transmitted diseases.<sup>235</sup>

She primarily compares U.S. policy to that of Europe and finds that,

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culture, that which is feminine is rejected, and relates this to sexism as well as homophobia). Attempts to deviate from one's apparent biological sex is met with sharp criticism from peers. Levine writes, "If a girl is standoffish or proud, she is a 'bitch.' But if she talks too dirty or behaves too lasciviously, she's a 'slut' or a 'ho.' A boy who does the latter is admired as a 'player.'" *Id.* In addition, she talks about boys being taught to reject that which is feminine; traits such as "sensitivity, empathy, vulnerability" and boys that do not exhibit exclusively masculine traits are bullied by being referred to as "faggot." *Id.* at 156. Statistics show that adherence to the gender norms actually increases the chance that a person will engage in unsafe sexual behaviors, with the resulting consequences being an increase risk of violence in relationships, pregnancy, and disease. *Id.* at 157. She includes a gendered discussion of desire about norms that teach us that boys always want sex and should be ready for it and that girls do not and should be the resisters. *Id.* at 166. Each is left with a whole aspect of their humanity denied simply because of the genitals they have on their bodies; girls are not supposed to be sexual, boys not emotional. In reality, girls can enjoy sex and desire it, and boys can want closeness in a relationship. *Id.* at 170. Breaking down these stereotypes will help minors to learn to deal with disappointment, real-world issues involving relationships, and may assist them in having expectations that are realistic. *Id.* at 171.

232. *See id.* at 178-79 (stating that studies actually show that a lack of touch is what is harmful to individuals or society as a whole, maybe even resulting in premature death). Studies of populations from rhesus monkeys to orphaned babies show that a lack of touch can contribute to higher rates of violence in a society to death of the individual deprived of touch. Today, there are no-touch policies in schools and teachers, especially males, are afraid to be left alone with their students, lest they be accused of abuse. *Id.* at 181-82. Adults may inaccurately label all touch as sexual, which transfers the message to children that sex is the only way to give and receive affection. *Id.* at 191. She asserts that children should be brought up with a lot of touch in their lives, but with lessons that it must be done respectfully and with the consent of the other person. *Id.* at 182-83.

233. *See id.* at 201-02 (asserting that the way in which we approach handling sexuality today can be framed into two principles: "[Prevention] must recognize the urgency of the problem . . . both personal and structural, of the people it is targeting. And it must respect their social norms: their identities, values, and desires, expressed in the relationships between individuals and within communities.").

234. *See id.* at 203-10 (examining the widespread knowledge within the public health community that those who face the highest risk for AIDS are the same as those who face other public health concerns; they are the poorest in our nation and the ones most victimized by the inequalities presented through race, gender and class differences). She goes on to talk about some subcultures of the poor, including runaways, many of whom left home because it was unacceptable that they were homosexual. These minors may partake in "survival sex," or sex in trade for clothing, food, or shelter. *Id.* The same values of "just say no" can hardly be applied to these minors when their bodies are the only commodities they have to offer, and many have found comfort in even short relationships formed in this manner. *Id.* It is not the optimum way to live, but it recognizes the status of these minors where they are and gives them respect for their decisions instead of making a judgment call that cannot be understood by outsiders. *Id.*

235. *See, e.g., id.* at xxxii-xxxiii, 113 (noting that the Europeans' "generally more relaxed attitude" towards sex leads to a more healthy sexual expression of teens, lower pregnancy, and abortion rates).

while European teens initiate sex at about the same time as their American counterparts, they get pregnant and contract disease less often and have fewer abortions.<sup>236</sup> She credits their success with generally accepting attitudes about sex.<sup>237</sup> She gives particular attention to the Netherlands, where the rate of teen pregnancy is close to zero because of free contraception, widespread condom distribution, and comprehensive sexuality education.<sup>238</sup>

In addition, the Netherlands has established a policy recognizing the sexuality of its nation's young people.<sup>239</sup> In 1990, the Netherlands reduced its age of consent to twelve, with special consideration for those between the ages of twelve and sixteen.<sup>240</sup> Minors in this group are legally recognized as sexual beings, but if they feel they are being abused or exploited, they or their parents can bring this to the attention of the Council for the Protection of Children.<sup>241</sup> Parents may also go to this council to override their child's wishes to have sex, but they must have a substantial reason for doing so.<sup>242</sup> Therefore, minors in this country "over the age of twelve are [legally recognized as] sexual and potentially self-determining, and they remain weaker than adults, and should be protected accordingly, but not under the autonomous authority of parents."<sup>243</sup>

This approach also acknowledges the fact that people cannot be labeled as victims if they fail to identify themselves as such.<sup>244</sup> To paraphrase Robin West in her article about the 1986 Meese

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236. *See id.* at 113-14 (affirming that European teens have a more responsible attitude towards sex).

237. *See id.* at 113-14 (noting that adults in Europe accept sexual behavior in teens and believe it is normal).

238. *See id.* at 112 (remarking that "fewer than one percent of Dutch fifteen to seventeen year olds become pregnant each year").

239. *See id.* (describing how the Netherlands provides free contraception through the national health service and attempts to make condoms widely available).

240. *See id.* at 89 (suggesting that this was the best way to legitimize those over twelve as "sexual and potentially self-determining," with the consideration that twelve-to sixteen-year-olds deserved additional recourse "if they felt they were being coerced or exploited").

241. *See id.* (recognizing the need to have special consideration for those between the ages of twelve and sixteen).

242. *See id.* at 89 (detailing another safeguard meant to protect the best interests of the child).

243. *Id.*

244. *See id.* at 84-87 (explaining how some do not even consider themselves as victims and psychologists observe "that adults reactions even to certifiable sexual abuse can exacerbate the situation for the child"). University of Georgia social worker Allie Kirkpatrick found that fifty-five percent of her research subjects had had some sort of sexual experience before the age of fourteen. While seventeen percent believed the experience was abusive, and twenty-eight percent felt it was harmful, the majority found it to be pleasurable. *Id.* at 86.

Commission, some pornography was found to have victimized particular women, but to other women, it provided a means to sexual liberation.<sup>245</sup> Especially if the method of teaching about sex is done to promote respect and consent, the true problems that exist, such as gender inequity, will be addressed.<sup>246</sup> The Netherlands approach can apply to other areas as well where power imbalances result in legal problems.<sup>247</sup> The approach made those with greater power more responsible for their actions. Laws that recognize the humanity of us all are based on sound reason, not on denial or fear.<sup>248</sup>

#### CONCLUSION

I am not denying that new approaches may still cause concern along the way, but life is risky, and we can best prepare minors to responsibly approach their futures if we empower them with the necessary knowledge. At the end of the book, Levine declares, “young people can discover their sexual power without dominating or diminishing others; they can find romance without surrendering self-protection. They can arrive at the divine oblivion of sex consciously, with responsibility, forethought, and consent.”<sup>249</sup>

I understand the meaning behind Levine’s message. I believe that if I had grown up in a world that refused to live in denial I would have benefited to a greater extent than I already have. My fortune may partly be due to luck, but I cannot help but think it is because my parents and other adults around me made sure I knew I had a future. I was taught to think not if I wanted to go to college, but where I wanted to go to college. My family allowed me to participate in the world around me and to voice my opinion. Regarding sex, I had parents who provided me with accurate information and supported the use of contraception without question. And when my parents found out that I had sex, they did not ignore it or deny it, they asked me about it. They did not freak out, they made sure I was safe, and

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245. See West, *supra* note 86, at 694.

246. See LEVINE, *supra* note 1, at 82 (noting that laws often fail to address “the needs for love and guidance, economic autonomy, respect, social status, or sexual agency” and may lead to problems including, “age and gender inequalities that prevent . . . girls from negotiating equally with their partners over safe sex, pregnancy, or money and that render them vulnerable to domestic violence and abandonment”).

247. See *id.*; see also Jane E. Larson, “Women Understand So Little, They Call My Good Nature ‘Deceit’”: A Feminist Rethinking of Seduction, 93 COLUM. L. REV. 374 (1993) (calling for a tort theory of seduction).

248. See LEVINE, *supra* note 1, at 11-15 (detailing laws that have been passed to protect children from obscene images and language and questioning whether these laws were passed out of fear to protect children’s innocence).

249. *Id.* at 217.

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respected my decision. Did they like it? Probably not, but they were smart enough to know better than to denigrate me. My first sexual relationship provided some tough lessons, and when it ended it was very hard to get over, but I learned from my experience. I understood better what to look for in future relationships. I also acquired the knowledge that I can survive the loss of love and that my identity was not tied solely to approval from a partner. I am by no means perfect and do not have every answer with regard to romantic interactions, but my early experiences were integral in making me the person I am today, and I would not change a thing.