



## A Feminist Critique of "the" Feminist Critique of Pornography

Nadine Strossen

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# ESSAY

## A FEMINIST CRITIQUE OF "THE" FEMINIST CRITIQUE OF PORNOGRAPHY<sup>1</sup>

*Nadine Strossen*<sup>2</sup>

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<sup>1</sup> See Catharine A. MacKinnon, Not a Moral Issue, 2 Yale L. & Pol'y Rev. 321, 325 (1984) ("Pornography, in the feminist view, is a form of forced sex, . . . an institution of gender inequality." (emphasis added)).

<sup>2</sup> Professor of Law, New York Law School; President, American Civil Liberties Union; A.B. 1972, Harvard-Radcliffe College; J.D. 1975, Harvard Law School. Professor Strossen is a founding member of Feminists for Free Expression, see infra text accompanying notes 35-37, and a member of the National Coalition Against Censorship's Working Group on Women, Censorship & "Pornography," see infra text accompanying note 41.

This paper grew out of a lecture that Professor Strossen delivered at the University of Virginia School of Law in September 1992. Some passages are drawn from Nadine Strossen, *The Convergence of Feminist and Civil Liberties Principles in the Pornography Debate*, 62 N.Y.U. L. Rev. 201 (1987) (reviewing *Women Against Censorship* (Varda Burstyn ed., 1985)). The author thanks Carolyn Richmond for having provided the "lioness' share" of the research assistance. For additional such assistance, she thanks Dennis Cauchon, Jon Cummings, Marjorie Heins, Jennifer Lopes, Thelma McCormack, Nancy Meyers, William Mills, Joseph Molinari, Robert Peck, Catherine Siemann, and Phillip Stillman. She is especially grateful to Leanne Katz, Carlin Meyer, and Marcia Pally for the benefit of their thinking and writing on the issues discussed. Last, but far from least, she thanks the New York Law School administration for its generous support of her research and writing.

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*The radical message of feminism is the recognition that equality is not just a measure of equalization or fairness, . . . but . . . part of a larger struggle for social change. . . . Equal pay for work of equal value is no more or less important than the right of women to explore the range and depths of human experience, the diverse models of human relations as well as the psychological limits and beyond of acceptable behavior. If we are ever to find our own identity and give equality a social meaning, there is a process of cognitive reflection and emotional insight; we must be free to think about saints and sinners, . . . slavery and freedom, deviants and conformists, sadists and martyrs, Mother Teresa and Madonna.*

*State censorship denies us that experience . . . .*<sup>3</sup>

— Thelma McCormack

*Sexual expression is perhaps the most fundamental manifestation of human individuality. Erotic material is subversive in the sense that it celebrates, and appeals to, the most uniquely personal aspects of an individual's emotional life. Thus, to allow freedom of expression and freedom of thought in this realm is to . . . promote diversity and non-conformist behavior in general . . . .*

*It is no coincidence that one of the first consequences of democratization and political liberalization in the former Soviet Union, Eastern Europe and China was a small explosion of erotic publications.*

*Suppression of pornography is not just a free-speech issue: Attempts to stifle sexual expression are part of a larger agenda directed at the suppression of human freedom and individuality more generally.*<sup>4</sup>

— Gary Mongiovi

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<sup>3</sup> Thelma McCormack, *If Pornography is the Theory, Is Inequality the Practice?* 12 (Nov. 1992) (unpublished paper delivered at public forum held in York, Canada, Refusing Censorship: Feminists and Activists Fight Back) (on file with the Virginia Law Review Association).

<sup>4</sup> Letter to the Editor, *Civil Liberties*, Spring/Summer 1991, p. 2, from Gary Mongiovi, Ph.D., an economist who teaches at St. John's University.

## INTRODUCTION: THE FEMINIST ANTI-CENSORSHIP MOVEMENT

OVER the past decade, some feminists—led by Andrea Dworkin<sup>5</sup> and Catharine MacKinnon<sup>6</sup>—have had great influence in advancing the theory that certain sexually oriented speech should be regulated because it “subordinates”<sup>7</sup> women.<sup>8</sup> They have labeled this subset of sexually explicit speech “pornography” to distinguish it from the separate subset of sexually explicit speech that the Supreme Court has defined as proscribable “obscenity.”<sup>9</sup> This Essay counters the Dworkin-MacKinnon pro-censorship position with an argument grounded in feminist principles and concerns. It refers to objections that are based on traditional free speech principles only in passing.

The term “pornography” is so vague, subjective, and expansive that it could apply to all sexually oriented speech. Even the so-called “Meese Pornography Commission,”<sup>10</sup> which advocated strict govern-

<sup>5</sup> See, e.g., Andrea Dworkin, *Pornography: Men Possessing Women* (1981).

<sup>6</sup> See, e.g., Catharine MacKinnon, *Pornography, Civil Rights, and Speech*, 20 *Harv. C.R.-C.L. L. Rev.* 1 (1985).

<sup>7</sup> See Andrea Dworkin, *Against the Male Flood: Censorship, Pornography and Equality*, 8 *Harv. Women's L.J.* 1, 25 (1985).

<sup>8</sup> The model anti-“pornography” law drafted by Dworkin and MacKinnon defines proscribable “pornography” as any “graphic sexually explicit subordination of women through pictures and/or words” that also conforms to at least one of nine criteria, such as “women are presented dehumanized as sexual objects” or “women are presented in postures or positions of sexual submission, servility, or display.” *Id.* The other criteria are:

- (ii) women are presented as sexual objects who enjoy pain or humiliation; or
- (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or
- (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or . . .
- (vi) women's body parts—including but not limited to vaginas, breasts or buttocks—are exhibited such that women are reduced to those parts; or
- (vii) women are presented as whores by nature; or
- (viii) women are presented being penetrated by objects or animals; or
- (ix) women are presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.

*Id.*

<sup>9</sup> See *Miller v. California*, 413 U.S. 15, 24 (1973) (setting forth a tripartite test for proscribable “obscenity”: the “‘average person, applying contemporary community standards,’ would find that the work, taken as a whole, appeals to the prurient interest . . . ; the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value”) (citations omitted).

<sup>10</sup> The Commission's official title was Attorney General's Commission on Pornography. See U.S. Dep't. of Justice, Att'y Gen. Comm'n on Pornography, *Final Report* (1986) [hereinafter *Meese Comm'n Report*].

ment controls over "pornography," acknowledged that the term essentially means any sexually explicit speech that the person using the term dislikes.<sup>11</sup> Similarly, reading Walter Kendrick's comprehensive study of the subject suggests that while the term "pornography" has had differing definitions, throughout modern culture it consistently has been applied to whatever representations a particular dominant class or group does not want in the hands of another, less dominant class or group.<sup>12</sup>

"Pornography" is not a legally recognized term of art. The only category of sexually oriented expression that the Supreme Court has even attempted to define, for purposes of holding it to lack constitutional protection, is "obscenity." Some Justices have argued forcefully that the definition of "obscenity" is constitutionally flawed because it is so vague and subjective.<sup>13</sup> The term "pornography" is yet more flawed. Indeed, the Court has not even attempted to define it as a constitutional term of art.<sup>14</sup>

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<sup>11</sup> Id. at 227. See also Judith Becker & Ellen Levine, Paper Presented to a Meeting of the National Coalition Against Censorship: A Statement by Dr. Judith Becker and Ellen Levine 6-7 (June 17, 1986) (unpublished paper on file with the Virginia Law Review Association) (providing objections to the Meese Comm'n Report by two dissenting members of the Commission) (stating that "although the Commission struggled mightily to agree on definitions of such basic terms as pornography . . . it never did so"); id. at 3 ("The very word pornography, with its negative connotation, imposes impediments to an open-minded and objective investigation.").

<sup>12</sup> Walter Kendrick, *The Secret Museum: Pornography in Modern Culture* (1987).

<sup>13</sup> See *Pope v. Illinois*, 481 U.S. 497, 517 (1987) (Stevens, J., dissenting, joined by Marshall & Brennan, JJ., in relevant part) (arguing that the vagueness inherent in criminal obscenity statutes renders them constitutionally flawed); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 83-85 (1973) (Brennan, J., dissenting, joined by Stewart & Marshall, JJ.) (stating the Court has "failed to formulate a standard that sharply distinguishes protected from unprotected speech. . . ." Id. at 83).

Probably the best illustration of the intractable vagueness of the Court's various attempts to define a category of constitutionally unprotected sexually explicit speech is Justice Potter Stewart's well-known statement: "I shall not today attempt further to define [hard-core pornography] . . . ; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it. . . ." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (concurring opinion).

<sup>14</sup> The only Supreme Court opinions that are even indirectly relevant are *New York v. Ferber*, 458 U.S. 747 (1982), and *Osborne v. Ohio*, 495 U.S. 103 (1990), which upheld state statutes regulating child pornography. Both state statutes defined child pornography relatively restrictively, as encompassing photographs or films of actual children engaging in sexual activities, see *Ferber*, 458 U.S. at 750-51, or in a state of nudity, see *Osborne*, 495 U.S. at 106-07. The Supreme Court did not itself define a constitutionally unprotected category of "child pornography."

Because I am offering a feminist<sup>15</sup> critique of the efforts by the Dworkin-MacKinnon faction of feminism to regulate the expression they label “pornography,” I use the term as they do, which is to refer to sexually explicit speech that allegedly “subordinates” women.<sup>16</sup> I emphasize that such speech “*allegedly*” is subordinating, because that subjective characterization is one with which many women, feminists, authors, and artists disagree.<sup>17</sup> To highlight the problematic nature of the term “pornography,” I put it in quotation marks throughout this Essay.

The Supreme Court has held that, as defined by the Dworkin-MacKinnon analysis, “pornography” is constitutionally protected. It summarily affirmed the U.S. Court of Appeals for the Seventh Circuit in *American Booksellers Association v. Hudnut*.<sup>18</sup> The Seventh Circuit had invalidated an Indianapolis ordinance that treated the production or distribution of “pornography” as a violation of women’s civil rights. The ordinance was based on a model law drafted by Dworkin and MacKinnon. In striking down the ordinance, the Seventh Circuit relied on the “bedrock” First Amendment principle of “viewpoint neutrality.” The Supreme Court recently reaffirmed this principle in upholding the right to burn the U.S. flag in political protest: “[T]he

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<sup>15</sup> I use the term “feminism” to refer to the general principle that individual liberty and equality rights should extend fully to women as well as men. See *Feminism: The Essential Historical Writings* 308 (Miriam Schneir ed., 1972) (describing Emma Goldman’s view that basic to feminist principles is a “passionate belief in individual freedom” and “the right of women to live as free and equal human beings”). This view is also associated with other landmark feminist works, such as Simone de Beauvoir, *The Second Sex* (H.M. Parshley ed. & trans., 1953) and Betty Friedan, *The Feminine Mystique* (1963); see also Varda Burstyn, *Political Precedents and Moral Crusades: Women, Sex and the State*, in *Women Against Censorship* 4, 23 (Varda Burstyn ed., 1985) (asserting that “the basic principles of the women’s movement” include “equality in social standing, opportunity and remuneration”); June Callwood, *Feminist Debates and Civil Liberties*, in *Women Against Censorship*, supra, at 121, 129 (asserting that “[t]he goal of [feminism] is a society in which individuals are treated justly”); Joan Kennedy Taylor, *Reclaiming the Mainstream* 9-14 (1992) (arguing for an individualist understanding of feminism).

<sup>16</sup> See supra notes 7-8.

<sup>17</sup> See infra text accompanying notes 33-34.

<sup>18</sup> 475 U.S. 1001 (1986), aff’g 771 F.2d 323 (7th Cir. 1985), aff’g 598 F. Supp. 1316 (D. Ind. 1984). Another federal court also struck down a law based on the Dworkin-MacKinnon model legislation, which was enacted by voter referendum in Bellingham, Washington, in 1988. See *Porn Ordinance Faces Challenge*, Chi. Trib., Dec. 18, 1988, at § 6, 7 (noting ACLU’s challenge to the law). This decision is not officially reported. See *Village Books et al. v. City of Bellingham*, C88-1470D (W.D. Wash.) (granting summary judgment for plaintiffs and invalidating ordinance).



government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>19</sup> In an opinion by Judge Frank Easterbrook, the Seventh Circuit reasoned:

The ordinance discriminates on the ground of the content of the speech. Speech treating women in the approved way—in sexual encounters “premised on equality”—is lawful no matter how sexually explicit. Speech treating women in the disapproved way—as submissive in matters sexual or as enjoying humiliation—is unlawful no matter how significant the literary, artistic, or political qualities of the work taken as a whole. The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents.<sup>20</sup>

While the federal district court opinion that initially held the Indianapolis ordinance unconstitutional was likewise based on classic free speech principles,<sup>21</sup> it is noteworthy that the female judge who authored that opinion, Sara Evans Barker, also stressed a feminist objection to the ordinance’s censorship approach. Specifically, Judge Barker emphasized that advocates of women’s rights have far more to lose than to gain from the suppression of expression:

It ought to be remembered by . . . all . . . who would support such a legislative initiative that, in terms of altering sociological patterns, much as alteration may be necessary and desirable, free speech, rather than being the enemy, is a long-tested and worthy ally.<sup>22</sup>

This Essay focuses on the kind of objection to the pro-censorship approach to “pornography,” advocated by some feminists, that Judge Barker expressed—namely, an objection that is itself grounded in feminist principles and concerns. I consider Judge Easterbrook’s con-

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<sup>19</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

<sup>20</sup> *Hudnut*, 771 F.2d at 325 (citation omitted); accord, *id.* at 327-28.

<sup>21</sup> *American Booksellers Ass’n. v. Hudnut*, 598 F. Supp. 1316, 1336-40 (D. Ind. 1984) (ruling that, as a regulation of speech, the ordinance is unconstitutional because it does not advance a sufficiently compelling government interest; also concluding that the ordinance is unconstitutionally vague and establishes an unconstitutional prior restraint on speech).

<sup>22</sup> *Id.* at 1337. The same point was underscored in Judge Easterbrook’s opinion:

Free speech has been on balance an ally of those seeking change. Governments that want stasis start by restricting speech. . . . Change in any complex system ultimately depends on the ability of outsiders to challenge accepted views and the reigning institutions. Without a strong guarantee of freedom of speech, there is no effective right to challenge what is.

771 F.2d at 332; see also *infra* text accompanying notes 270-80.

cern—one rooted in traditional free speech principles—only in passing.

My analysis thus attempts to correct an imbalance existing in both the popular perception and the legal discussion of the “pornography” issue. Encouraged by oversimplified, extremist, divisive pronouncements by feminist pro-censorship leaders,<sup>23</sup> there is a widespread misperception that if you are a feminist—or a woman—you must view “pornography” as misogynistic and “detrimental” to women.<sup>24</sup> And you must favor censoring it.<sup>25</sup>

The majority of the law journal publications concerning this issue since 1980 have supported the Dworkin-MacKinnon analysis and endorsed censorship.<sup>26</sup> With only two exceptions, the law review pub-

<sup>23</sup> See, e.g., MacKinnon, *supra* note 1, at 325 (“Pornography, in the feminist view, is a form of forced sex, a practice of sexual politics, an institution of gender inequality.”); Andrea Dworkin, *Pornography: The New Terrorism*, 8 N.Y.U. Rev. L. & Soc. Change 215, 217, 218 (1978-1979) (denouncing defenders of free speech principles as “politically self-righteous fellow travelers of the pornographers” and asserting that “[t]he concept of ‘civil liberties’ in this country has not ever, and does not now, embody principles and behaviors that respect the sexual rights of women”); see also Pete Hamill, *Woman on the Verge of a Legal Breakdown*, *Playboy*, Jan. 1993, at 186 (quoting MacKinnon as comparing feminist anti-censorship advocates to “house niggers who sided with the masters” and as stating, “The labor movement had its scabs, the slavery movement had its Uncle Toms, and we have FACT” referring to the Feminist Anti-Censorship Taskforce, see *infra* text accompanying notes 30-34).

<sup>24</sup> See, e.g., Isabel Wilkerson, *Foes of Pornography and Bigotry Join Forces*, *N.Y. Times*, Mar. 12, 1993, at B16 (claiming that “virtually all feminists agree that pornography is detrimental to women”).

<sup>25</sup> See, e.g., Varda Burstyn, *Political Precedents and Moral Crusades: Women, Sex and the State*, in *Women Against Censorship*, *supra* note 15, at 4, 26 (stating that feminists who oppose censorship of “pornography” have been systematically ignored by both the media and politicians).

<sup>26</sup> Law review publications examining the Dworkin-MacKinnon approach to “pornography” were located pursuant to the following search request, conducted April 22, 1993, on both LEXIS and Westlaw: “porn! w/n 20 censor! and date aft 1980.” These searches yielded 141 articles, notes, and comments (book reviews and book review essays were not included) by authors other than Andrea Dworkin and Catharine MacKinnon. Of those 141, 30 focused on the “pornography” controversy (the remaining 111 contained only short, passing references to this controversy, and therefore were not included in the literature survey). Additionally, eight other relevant publications were located through footnote references in writings that had been identified through the LEXIS and Westlaw searches, bringing the total number of pieces reviewed to 38.

Of the 38 relevant pieces reviewed and classified as to their positions on the Dworkin-MacKinnon approach to “pornography,” 18 endorsed that approach, 17 opposed it, and three took no position on it. Thus, even excluding the works of Dworkin and MacKinnon themselves, a majority of relevant law review writings subscribed to their theories on “pornography.” Copies of the computer print-outs of these searches, as well as a

lications that disagree with the Dworkin-MacKinnon analysis have been grounded in First Amendment principles, rather than in feminist values.<sup>27</sup> In other words, with only two exceptions, all of the law review publications that address the "pornography" issue from a feminist perspective endorse censorship.<sup>28</sup> Consequently, even the substantial law review literature that refutes the Dworkin-MacKinnon analysis still does not counter the misperception that feminist values necessarily weigh in favor of censoring "pornography." Moreover, some prominent law schools recently have reinforced this misperception by sponsoring conferences that are heavily, if not exclusively, oriented toward the feminist pro-censorship view.<sup>29</sup>

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memorandum categorizing the listed works, are on file with the Virginia Law Review Association.

<sup>27</sup> Of the 17 law review publications that opposed the Dworkin-MacKinnon approach to "pornography," see *supra* note 26, sixteen were based on classic free speech analysis and only one on feminist analysis. The single anti-censorship article reflecting a feminist viewpoint that the systematic literature survey disclosed, as of April 22, 1993, was Mary C. Dunlap, *Sexual Speech and the State: Putting Pornography in its Place*, 17 *Golden Gate U. L. Rev.* 359 (1987).

In addition, subsequent to that survey I became aware of a second, recently published article that criticizes the Dworkin-MacKinnon analysis on feminist grounds: Jeanne L. Schroeder, *The Taming of the Shrew: The Liberal Attempt to Mainstream Radical Feminist Theory*, 5 *Yale J. Law & Feminism* 123 (1992). Subsequent to the April survey, I have become aware of additional, recently published law review pieces that support the Dworkin/MacKinnon analysis, so that perspective apparently continues to predominate in the law journals.

For a sample of the law review writings that reject "pornography" censorship on free speech grounds, see e.g., James R. Branit, *Reconciling Free Speech and Equality: What Justifies Censorship?*, 9 *Harv. J.L. & Pub. Pol'y* 429 (1986); Paul Chevigny, *Pornography and Cognition: A Reply to Cass Sunstein*, 1989 *Duke L.J.* 420; Thomas I. Emerson, *Pornography and the First Amendment: A Reply to Professor MacKinnon*, 3 *Yale L. & Pol'y Rev.* 130 (1984); Barry W. Lynn, "Civil Rights" Ordinances and the Attorney General's Commission: New Developments in Pornography Regulation, 21 *Harv. C.R.-C.L. L. Rev.* 27 (1986); Geoffrey R. Stone, *Comment, Anti-pornography Legislation as Viewpoint-Discrimination*, 9 *Harv. J.L. & Pub. Pol'y* 461 (1986); Randall D.B. Tigue, *Civil Rights and Censorship—Incompatible Bedfellows*, 11 *Wm. Mitchell L. Rev.* 81 (1985).

<sup>28</sup> Of the 20 such articles authored by individuals other than Andrea Dworkin or Catharine MacKinnon themselves, 18 support censorship. See *supra* notes 26-27. Obviously, if Dworkin's and MacKinnon's own writings were also considered, the balance would be even more skewed toward the pro-censorship position. At the time of writing the present paper, I am aware of two works in progress that, like the instant article, critically assess the Dworkin-MacKinnon position specifically from a feminist perspective. One is an article in progress by New York Law School Professor Carlin Meyer, with the working title *Sex, Censorship, and Women's Liberation*, and the other is a forthcoming symposium issue in the *New York Law School Law Review*, based on a conference sponsored by the National Coalition Against Censorship's Working Group on Women, Censorship, and "Pornography."

<sup>29</sup> Indeed, these conferences largely overlooked even the classic free speech principles that are violated by censoring "pornography" or other speech alleged to "subordinate" women,

The public and the legal profession must be made aware that many prominent feminist scholars, activists, and artists object to censoring “pornography” on feminist grounds.<sup>30</sup> The Feminist Anti-Censorship Taskforce, or “FACT,” founded in 1984, was the first group to make this argument.<sup>31</sup> FACT filed an amicus curiae brief in the *Hudnut* case in 1985, arguing that the Dworkin-MacKinnon ordinance was unconstitutional on gender equality grounds.<sup>32</sup> FACT argued that, while the ordinance purported to promote women’s equal rights, it actually undermined those rights. FACT also published a collection of erotic photographs and drawings, with accompanying essays, entitled *Caught Looking*.<sup>33</sup> Since the illustrations were selected by the female, feminist editors, this volume was designed to demonstrate that women and feminists may find sensual pleasure, as well as positive affirmations of their individuality, freedom, and equality, in sexually explicit imagery—including sexually explicit imagery that other women and feminists may find nonpleasurable, or even “subordinating.”<sup>34</sup>

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including speech advocating decriminalization of prostitution and sexist “hate speech.” See, e.g., Ken Myers, *Porn Fight*, Nat’l L.J., Dec. 14, 1992, at 4; Tamar Lewin, *Furor on Exhibit at Law School Splits Feminists*, N.Y. Times, Nov. 13, 1992, at B16; Wilkerson, *supra* note 24.

<sup>30</sup> See also *infra* text accompanying notes 118-21 (describing feminist opposition to censoring “pornography” in Great Britain and Canada).

<sup>31</sup> See Karen J. Winkler, *Research on Pornography Gains Respectability*, Chron. of Higher Educ., June 14, 1989, at A4, A8 (describing FACT’s founders as including “many . . . leaders of feminist studies in academe”).

<sup>32</sup> See Nan D. Hunter & Sylvia A. Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce, et al., reprinted in American Booksellers Ass’n v. Hudnut*, 21 U. Mich. J.L. Ref. 69 (1987-1988) [hereinafter FACT Brief]. The FACT brief was joined by the Women’s Legal Defense Fund and numerous writers and activists on behalf of women’s rights, including: Betty Brooks, the Director of the Southern California Rape Hotline Alliance and the founder of Women Against Sexual Abuse; Susan Estrich, a professor at the University of Southern California Law Center who is an expert on rape law; Betty Friedan, the founding president of the National Organization for Women and a founding member of the National Women’s Political Caucus; Joan Howarth, an attorney who helped to establish Women Against Violence Against Women; Kate Millett, author of leading feminist works, including *Sexual Politics* (1980); Adrienne Rich, a widely known lesbian feminist poet; Sue Deller Ross, a professor at Georgetown University Law Center, who co-authored *Sex Discrimination and the Law: Causes and Remedies* (1983); Susan Schechter, a leading author and consultant in the battered women’s movement; Alix Kates Shulman, feminist author; and Wendy Webster Williams, a professor at Georgetown University Law Center who was a founding partner of Equal Rights Advocates. The author of this article also joined in the FACT brief.

<sup>33</sup> *Caught Looking: Feminism, Pornography & Censorship* (Kate Ellis, Beth Jaker, Nan D. Hunter, Barbara O’Dair & Abby Tallmer eds., 1992).

<sup>34</sup> See *infra* text accompanying notes 124-44.

Feminists for Free Expression ("FFE") are feminists opposing censorship of sexually explicit work who organized in January 1992 to oppose the proposed (and misnamed) "Pornography Victims' Compensation Act" ("PVCA"),<sup>35</sup> then pending before the Senate Judiciary Committee. This bill, which was premised on the Dworkin-MacKinnon theory that "pornography" causes men to sexually assault women, was considered likely to sail through the Judiciary Committee in late 1991 or early 1992 because the Committee members believed that "women want it." Having angered and alienated many women by their handling of Anita Hill's accusations against Clarence Thomas, members of that Committee were understandably interested in restoring women voters' confidence in them.<sup>36</sup>

The following facts indicate how mistaken the Committee members were. First, by collecting signatures of many prominent women authors, artists, scholars, and activists, FFE quickly dispelled the misimpression that women's confidence could be gained through supporting the PVCA.<sup>37</sup> In addition to FACT and FFE, other women's organizations opposed the PVCA, including the two largest chapters of the National Organization for Women ("NOW"), those in New York and California.<sup>38</sup> Although the Senate Judiciary Committee ultimately reported the PVCA out of committee favorably, it did so only by a closely divided 7-6 vote and with a strong minority report.<sup>39</sup>

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<sup>35</sup> S. 1521, 102d Cong., 1st Sess. (1991).

<sup>36</sup> See Maureen Dezell, *Bundy's Revenge: How to Sue Playboy*, New Republic, Mar. 9, 1992, at 15, 16 (noting that since PVCA supporters say "their main goal is to stop violence against women," it will be difficult to oppose, "particularly for Judiciary Committee liberals still reeling from charges of insensitivity to women's issues from the Thomas/Hill hearings . . .").

<sup>37</sup> See Blair Kamin, *Despite Brouhahas, NEA Goes On*, Chi. Trib., Mar. 5, 1992, at 11B (quoting FFE letter to Senator Biden opposing PVCA); Marcia Pally, *Feminists Say it in Ink*, Newsday (city edition), Mar. 18, 1992, at 79; see also Ronald Dworkin, *Make No Law: The Sullivan Case and the First Amendment* by Anthony Lewis, N.Y. Rev. of Books, June 11, 1992, at 55, 61 (reviewing Anthony Lewis, *Make No Law* (1991)); Ad Hoc Committee of Feminists for Free Expression, letter to the Senate Judiciary Committee, February 14, 1992, reprinted as Appendix to this Article [hereinafter FFE Letter]; John Elson, *Passions Over Pornography*, Time, Mar. 30, 1992, at 52, 53 (quoting FFE Letter).

<sup>38</sup> Senate Comm. on the Judiciary, *Pornography Victims Compensation Act of 1992*, S. Rep. No. 102-372, 102d Cong., 2d Sess. (1992); see also John Aloysius Farrell, *Kennedy Takes Side of First Amendment*, Boston Globe, July 4, 1992, at 3.

<sup>39</sup> See 1992 Mead Data Central, *Bill Tracking Report*, U.S. Senate 1991 S. 1521, available in LEXIS, Genfed library, BLT102 file.

The full Senate failed to act on the bill before the end of the 1992 session.<sup>40</sup>

In 1992 the National Coalition Against Censorship—a coalition of more than forty education, labor, artistic, public interest, religious, professional, and civil rights organizations—established a “Working Group on Women, Censorship, and ‘Pornography.’” The group includes leading feminist scholars from many disciplines—health professionals, writers, artists, attorneys, and activists—all of whom “are angry at suggestions that censorship is the remedy for violence against women and that those who oppose censorship are indifferent to such violence.”<sup>41</sup>

Thus, many women who champion feminist values oppose the censorship of “pornography” specifically because they regard such censorship as undermining those values. This Essay systematically develops the arguments of the feminist anti-censorship position. Part I explains how the pro-censorship position has continued to be influential, and therefore why the controversy about censoring “pornography” is still an important issue. Part II clarifies the points of agreement and disagreement between pro- and anti-censorship feminists. Part III, the central section of this Essay, discusses the following important reasons for concluding that women’s rights are disserved by censoring “pornography”:

1. Any censorship scheme would inevitably encompass many works that are especially valuable to feminists;
2. Any such scheme would be enforced in a way that discriminates against the least popular, least powerful groups in our society, including feminists and lesbians;
3. Censorship perpetuates demeaning stereotypes about women, including that sex is bad for us;
4. Censorship perpetuates the disempowering notion that women are essentially victims;

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<sup>40</sup> See Letter from Marilyn Fitterman, President, NOW-NYS, to members of the Senate Judiciary Committee (July 31, 1992) (on file with the Virginia Law Review Association); Letter from Linda Joplin, State Coordinator, Cal-NOW, to Senator Edward M. Kennedy, Senate Judiciary Committee (Feb. 4, 1992) (on file with the Virginia Law Review Association). Other NOW chapters also opposed the PVCA. See Letter from Barbara Knutson, President, NOW-Vermont, to Senator Biden and the Senate Judiciary Committee (Mar. 11, 1992) (on file with the Virginia Law Review Association).

<sup>41</sup> Leanne Katz, *Same Old Censorship*, 1 *Censorship News*, Issue No. 47, at 3 (1993) (on file with the Virginia Law Review Association).

5. Censorship distracts from constructive approaches to countering anti-female discrimination and violence;
6. Censorship would harm women who voluntarily work in the sex industry;
7. Censorship would harm women's efforts to develop their own sexuality;
8. Censorship would strengthen the power of the religious right, whose patriarchal agenda would curtail women's rights.
9. By undermining free speech, censorship deprives feminists of a powerful tool for advancing women's equality; and
10. Sexual freedom, and freedom for sexually explicit expression, are essential aspects of human freedom; denying these specific freedoms undermines human rights more broadly.

In contrast to these significant costs that any "pornography" censorship scheme would impose on feminist goals, pro-censorship feminists rely on only one asserted benefit of such a scheme: that it would reduce discrimination and violence against women. As Part IV of this Essay shows, however, this purported benefit is at best merely speculative. At worst, censoring "pornography" might well increase misogynistic discrimination and violence in some instances. Thus, from a feminist perspective, the substantial negative effects of censoring "pornography" are not offset by any substantial benefits.

Since the goals of reducing anti-female discrimination and violence are so important, some feminists might be tempted to conclude that censorship would be justified by even a speculative possibility that it might advance these goals. Such a conclusion would be unwarranted, though, because it would ignore censorship's countervailing adverse impact on those same goals.

This point is highlighted by considering factors other than "pornography" that allegedly contribute to misogynistic discrimination and violence: women's improving legal and economic status, women's expanding sexual options, and the associated rise of the women's movement.<sup>42</sup> Some research indicates that these advances in women's

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<sup>42</sup> See Susan Faludi, *Backlash: The Undeclared War Against American Women* 40-41, 65 (1991) (citing evidence that women's increased employment outside the home has led to anxiety, depression, and loss of self-esteem among men, in turn causing "backlash" against the movement for women's equality).

rights may cause some male sexual aggression against women.<sup>43</sup> Similarly, some feminist theorists and other scholars maintain that the increase in sexual assaults<sup>44</sup> (as well as the consumption of misogynistic “pornography”<sup>45</sup>) is a misogynist response to the challenge of the women’s movement. Indeed, Andrea Dworkin herself has asserted this causal connection.<sup>46</sup>

Presumably, Dworkin, as well as most other feminists, would resist any effort to curb advances in women’s rights or in the women’s movement, even if that effort were premised on the rationale that such advances contribute to anti-female violence. Dworkin and most feminists would no doubt oppose such steps because they would undermine feminist goals. But the same is true of censoring “pornography.” Accordingly, feminists should likewise resist any effort to censor it on the rationale that it may contribute to anti-female violence.

The central point of this Essay is that censoring “pornography” would undermine, rather than further, women’s rights. Before treating that point, however, I address two threshold matters. First, I explain how the Dworkin-MacKinnon view has continued to be influential, and why, therefore, the controversy among feminists about censoring “pornography” is still an important issue despite the Supreme Court’s summary rejection of the Dworkin-MacKinnon approach in *Hudnut*. Second, this Essay clarifies the points of agreement and disagreement between pro- and anti-censorship feminists.

<sup>43</sup> See, e.g., Larry Baron & Murray A. Straus, *Sexual Stratification, Pornography, and Rape in the United States*, in *Pornography and Sexual Aggression* 185, 205-06 (Neil M. Malamuth & Edward Donnerstein eds., 1984).

<sup>44</sup> See Faludi, *supra* note 42, at xxi (asserting that the signs of backlash include a “sharp increase in rape” and “the rise in pornography that depicts extreme violence against women”).

<sup>45</sup> See Jeffrey Weeks, *Sexuality and Its Discontents* 233 (1986); Alan Soble, *Pornography: Marxism, Feminism, and the Future of Sexuality* 82 (1986) (stating that “pornography is . . . not so much an expression of male power as it is an expression of their lack of power”); *id.* at 84 (stating that “pornography” represents an “attempt to gain a sense of sexual control in the realm of fantasy [which is] an admission of defeat, a resignation to the way the women’s movement has changed the world”); Naomi Wolf, *The Beauty Myth* (1991) (contending that we are in the midst of a violent backlash against women in which “pornography” has become the main media category).

<sup>46</sup> See Andrea Dworkin, *Why So-Called Radical Men Love and Need Pornography*, in *Take Back the Night* 148, 153 (Laura Lederer ed., 1980).



## I. THE FEMINIST PRO-CENSORSHIP FACTION IS STILL INFLUENTIAL

Despite the Supreme Court's summary affirmance of the Seventh Circuit's ruling that the Dworkin-MacKinnon ordinance violates central free speech tenets,<sup>47</sup> the movement among some feminists to censor "pornography" is still influential in several significant respects.

### A. *Public Opinion*

Despite its judicial rejection, the Dworkin-MacKinnon approach to "pornography" still seems to have enormous appeal to many feminists and liberals, and it is still exerting a significant impact on public opinion.<sup>48</sup> Many media statements perpetuate the common misperception that all feminists consider "pornography" harmful and want it to be censored.<sup>49</sup> As one writer observed, "Feminists who oppose censorship of pornography have been systematically ignored by both the media and politicians."<sup>50</sup>

### B. *(Mis)alliance with Conservative Censorship Advocates*

The persistent conservative sentiment in favor of censoring sexually explicit work, which was the impetus behind the Meese Pornography Commission, has also fueled the feminist censorship movement. Conservative anti-pornography crusaders such as Ed Meese, Phyllis Schlafly, and Donald Wildmon on one level seek to distance themselves from what they describe as "radical feminists," and feminists likewise seek distance from these conservatives. Yet, paradoxically,

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<sup>47</sup> *Hudnut v. American Booksellers Ass'n*, 475 U.S. 1001 (1986).

<sup>48</sup> See *supra* text accompanying notes 23-29; see also Chris Bearchell, *Gay Porn is Getting Skinned Alive*, *Toronto Star*, Jan. 15, 1993, at A23 (reporting that "porn . . . is believed by the Canadian public to cause harm (due partly to the effectiveness of the anti-porn propaganda campaign carried on by MacKinnon [sic], Dworkin and their allies.)"); James R. Peterson, *Catharine MacKinnon: Again*, *Playboy*, Aug. 1992, at 37.

Catharine MacKinnon is on a roll. A cover story in *The New York Times Sunday Magazine* coincided with the Thomas confirmation debacle. Suddenly she is everywhere, identified as "a national expert on sexual abuse," "a brilliant political strategist" or "the Meese Commission's favorite feminist." Peter Jennings anointed her as "the country's most prominent legal theorist on behalf of women, whose dedication to laws which serve men and women equally has made it better."

*Id.* at 38.

<sup>49</sup> See, e.g., Wilkerson, *supra* note 24.

<sup>50</sup> Burstyn, *supra* note 25, at 26.

the conservative right and the pro-censorship feminists reinforce each other's mutual pursuit of largely overlapping goals concerning sexually explicit speech.<sup>51</sup>

An example from 1992 demonstrates this mutuality of interest. The National Coalition Against Pornography undertook a well-publicized campaign under the slogan "Enough is Enough." The program's leaders were mostly conservative women with ties to right-wing organizations such as Phyllis Schlafly's Eagle Forum and Beverly LaHaye's Concerned Women for America. Nevertheless, the group's promotional materials, such as billboards, prominently featured quotes from Andrea Dworkin.<sup>52</sup> To give another example, in Suffolk County, New York, a version of the Dworkin-MacKinnon legislation was "put forward by a conservative, anti-ERA male legislator who wishe[d] to 'restore ladies to what they used to be,'"<sup>53</sup> and whose supporters claimed that pornography causes "'sodomy' and 'disruption' of the family unit . . . ."<sup>54</sup>

As the preceding examples indicate, conservative anti-"pornography" activists have furthered their agendas by utilizing the Dworkin-MacKinnon rhetoric, decrying "pornography" not only as bad for the immortal soul, but also as bad for mortal women.<sup>55</sup> Varda Burstyn, a

<sup>51</sup> See Jean Bethke Elshtain, *The New Porn Wars*, *New Republic*, June 25, 1984, at 15.

Feminist antipornographers vehemently deny any mutual interest with conservative campaigners. In their view, . . . conservative groups have the heaviest interest of all in maintaining male dominance . . . . But if, as feminists claim, the explicit intent of pornography is to keep women in a subordinate position . . . , it is hard to figure out why "right-wing men" wouldn't implicitly or explicitly favor pornography. . . . Despite disavowals from both sides, the right-wing and radical feminist efforts do converge. The rationale may differ, but the ends sought—the elimination of pornography as defined by each group—are identical.

*Id.* at 17.

The mutually reinforcing relationship between the Dworkin-MacKinnon attacks on "pornography" and those of the right wing lead to one of the respects in which the feminist pro-censorship movement undermines women's rights: it strengthens the religious right, with its anti-feminist agenda. This phenomenon is discussed *infra* text accompanying notes 252-58.

<sup>52</sup> See Flier from the Women's "Enough is Enough" Campaign (on file with the Virginia Law Review Association) (advertising a kit for creating an anti-"pornography" billboard).

<sup>53</sup> See Lisa Duggan, Nan Hunter & Carole S. Vance, *False Promises: Feminist Antipornography Legislation in the U.S.*, *in Women Against Censorship*, *supra* note 15, at 130, 133.

<sup>54</sup> *Id.*

<sup>55</sup> See, e.g., Meese Comm'n Report, *supra* note 10, at 329-35 (concluding that most "pornography" depicts women in positions of "degradation, domination, subordination, and humiliation" and as "existing solely for the sexual satisfaction of others"; also concluding that

feminist writer who opposes censorship, noted how conservatives have thus been able to “manipulate feminist concerns to provide cover for an antifeminist agenda.”<sup>56</sup> Carol Vance noted the use of such tactics: “[i]f the Meese commission gets its way, it will be because it has launched a novel propaganda offensive that superficially uses the rhetoric of social science and feminism . . . to disguise the traditional right-wing moral agenda.”<sup>57</sup>

In short, the feminist pro-censorship faction has been kept alive by—and has in turn given vitality to—the traditional, conservative, religiously oriented anti-“pornography” movement.

### C. Governmental Assaults on Sexually Explicit Speech

The conservative censorship forces have had the necessary political power during the last decade to implement their views—and, indirectly, those of their pro-censorship feminist supporters—through increased governmental efforts to curtail or punish sexually explicit speech. These governmental efforts include the use of indirect pressure, such as cut-offs of government funding,<sup>58</sup> as well as direct criminal law enforcement.

A prime example of increased law enforcement efforts directed against sexually explicit speech, which has benefited from a major allocation of public resources, is the formation of the Justice Department’s Obscenity Unit.<sup>59</sup> Local governments also have recently

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“substantial exposure” to this material “is likely to increase the extent to which those exposed” will hold certain negative attitudes toward women, and that exposure to this material bears some causal relationship to sexual violence and sex discrimination against women); see also Carole S. Vance, *Porn in the USA: The Meese Commission on the Road*, *The Nation*, Aug. 2, 1986, at 65, 79 (stating that while the Meese Commission “happily assimilated the rhetoric of antipornography feminists, it decisively rejected their remedies”).

<sup>56</sup> Varda Burstyn, *Political Precedents and Moral Crusades: Women, Sex and the State*, in *Women Against Censorship*, supra note 15, at 4, 26. Burstyn also notes that “[t]he convergence between conservatism and important sectors of feminism concerning “pornography”] has offered politicians and bureaucrats a wonderful opportunity to undermine feminism while appearing its champions.” *Id.* at 25.

<sup>57</sup> Vance, supra note 55, at 65.

<sup>58</sup> See Patti Hartigan, *NEA Head Strives for Consensus*, *Boston Globe*, May 10, 1992, at 81, 82 (stating that conservatives in Congress have “repeatedly tried to slap the NEA with content restrictions”); see also *Performance Art Goes to Court*, *Wash. Times*, June 14, 1992, at B2.

<sup>59</sup> *ACLU Arts Censorship Project, Above the Law: The Justice Department’s War Against the First Amendment 5* (Dec. 1988) (policy report, on file with the Virginia Law Review Association).

enacted statutes designed to impose additional restrictions on sexually oriented expression even beyond the category of obscenity.<sup>60</sup> This burst of law enforcement activity has taken its toll not only on the creators and distributors whose works have been directly targeted, but also on others. Would-be creators and distributors of sexually explicit work are certain to be dissuaded from their creation because of these laws.

The government has used other pressure tactics against sexually explicit speech as well. The most prominent example of these are the funding cutbacks by the National Endowment for the Arts ("NEA"). These cutbacks were sparked by right-wing attacks against grants that Robert Mapplethorpe used, in part, to create homoerotic photographs.<sup>61</sup> During his 1992 presidential primary campaign, Pat Buchanan ran televised advertisements attacking the Bush NEA for having funded "pornographic and blasphemous art,"<sup>62</sup> including a documentary film about gay African-American men entitled "Tongues Untied." In response, President Bush fired then-NEA Chairman John Frohnmayer.<sup>63</sup> During hearings before the House Appropriations Subcommittee, in which the NEA's budget originates, Frohnmayer's successor, Anne-Imelda Radice, pledged that she would veto grants for sexually explicit art.<sup>64</sup> She honored that pledge.<sup>65</sup> Accordingly, the artistic talent in the United States is suf-

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<sup>60</sup> See Glen Hirshberg, *Erotic Music Wins*, *Seattle Weekly*, Nov. 4, 1992, at 33 (reporting that the Washington State Court of Appeals held unconstitutional a statute known as House Bill 2554, 1992 Wa. Laws 5 (amending Wash. Rev. Code §§ 9.68.050, 9.69.060, 9.68.070, and 9.68.090), that restricted minors' access to "erotic" music); see also Patrick MacDonald, *Flop Goes Against Grunge Grain*, *Seattle Times*, May 15, 1992, at 6.

<sup>61</sup> See, e.g., Mike McManus, *Controversy Continues over NEA Grant to Artist*, *Durham Morning Herald*, Apr. 1, 1990, at C9 (criticizing the NEA for funding controversial projects like the Mapplethorpe exhibit).

<sup>62</sup> See *Clinton Denies New Impropriety Charge*, *USA Today*, Mar. 24, 1992, at 4A.

<sup>63</sup> See Patti Hartigan, *Former NEA Chairman Rips Bush at MIT*, *Boston Globe*, Oct. 30, 1992, at 29.

<sup>64</sup> See *New Strictures on Arts*, *Atlanta Jour./Const.*, May 6, 1992, at D3; Blair Kamin, *In First Week, Acting Chairwoman Starts Steering NEA to the Right*, *Chi. Trib.*, May 10, 1992, § 5, at 3.

<sup>65</sup> See *2d Arts Panel Protests Cancellation of Awards*, *N.Y. Times*, May 21, 1992, at C19 (reporting that Radice had rejected positive award recommendations for two shows that included sexual images); see also Joyce Price, *Groups Keep Eye on NEA: Right Opposes Clinton on Arts*, *Wash. Times*, Nov. 27, 1992, at A4 (reporting that Radice turned down grants for three homosexual film festivals).

fering from reduced support, and in consequence is "inadequately evaluated, published, produced, [and] disseminated . . . ."<sup>66</sup>

President Clinton has expressed opposition to conditioning NEA grants on criteria unrelated to artistic merit, and has vowed to depoliticize the agency.<sup>67</sup> However, on March 29, 1993, the Clinton Justice Department filed a brief supporting the NEA's constitutional power to impose a "decency" standard on the content of all funded projects.<sup>68</sup> As noted by an attorney for NEA grant applicants whose applications had been denied under this standard, the Clinton administration's position in this brief is "indistinguishable from the arguments by the Bush [a]dministration."<sup>69</sup>

Regardless of whether the Clinton administration continues to advocate content-based restrictions on NEA grants, influential members of Congress will likely continue to do so.<sup>70</sup> Moreover, even absent future attempts to impose limitations on NEA grantees, the persistent criticism of certain controversial NEA grants in the past has already created a chilly artistic climate that probably cannot quickly be changed.<sup>71</sup>

It is not clear whether Andrea Dworkin or Catharine MacKinnon would classify homoerotic photographs or films as "pornography." Although their model law defines "pornography" as the "sexually explicit subordination of *women* through pictures and/or words,"<sup>72</sup> it expressly stipulates that even images of men could be interpreted as portraying the subordination of women.<sup>73</sup> Even if Dworkin and

<sup>66</sup> Robert Brustein, *The War on the Arts*, *New Republic*, Sept. 7, 1992, at 35.

<sup>67</sup> See Price, *supra* note 65, at A4; Karen Lipson, *Tentative Times for the NEA*, *Newsday* (city edition), Feb. 8, 1993, at 45; Jac Venza, *Clinton Bodes Well for the Arts*, *L.A. Times*, Jan. 4, 1993, at F3 (reporting that as governor of Arkansas, Bill Clinton actively supported the arts).

<sup>68</sup> See Barbara Isenberg & Ronald J. Ostrow, *Appeal in NEA Case Criticized*, *L.A. Times*, Apr. 8, 1993, at B8; Jacqueline Trescott, "Decency" Standard Ruling: Justice Dep't Appeals Ban on Requirement, *Wash. Post*, Apr. 8, 1993, at D2.

<sup>69</sup> See Isenberg & Ostrow, *supra* note 68, at B11.

<sup>70</sup> See Lipson, *supra* note 67, at 45.

<sup>71</sup> See Robin Cembalest, *Clinton and the Arts: "He Never Stops Learning," ARTnews*, Jan. 1993, at 122, 125 (predicting that fundamentalists' attacks on the arts will persist despite Clinton's election).

<sup>72</sup> See Dworkin, *supra* note 7, at 25 (emphasis added).

<sup>73</sup> See *id.* (asserting that "[t]he use of men, children, or transsexuals in the place of women . . . is pornography for purposes of this law"); see also Andrea Dworkin, *Pornography: Men Possessing Women* 23 (1981) (asserting that "[f]ucking requires that the male act on one who has less power. . . . [T]he one who is fucked is stigmatized as feminine during the act even

MacKinnon would not label Mapplethorpe's photographs or "Tongues Untied" as "pornography," many of those who hold governmental power, including the power of the NEA purse-strings, do.<sup>74</sup> Therefore, the recent attacks on the sexually oriented art previously funded by the NEA have built upon, and in turn have shored up, the feminist censorship movement.

The attacks on the NEA's funding of Robert Mapplethorpe's photographs and "Tongues Untied" illustrate an important pattern that has characterized recent NEA funding cutbacks, as well as congressional attacks on NEA grants, for sexually explicit works more generally. They have consistently targeted works that are by or about gay men, lesbians, and feminists.<sup>75</sup> These actual and threatened cutbacks thus demonstrate a major danger of any government restrictions on free expression: they will be enforced against the ideas and expressions that are least popular to the community at large and to the political establishment. Unfortunately, in many communities and political bodies such unpopular themes include feminism<sup>76</sup> and homosexuality<sup>77</sup>. As I discuss in detail below, actual experience with a Dworkin-MacKinnon-type censorship law that the Canadian Supreme Court approved in 1992 demonstrates that censors' general proclivity to tar-

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when not anatomically female." This statement sounds alarmingly similar to certain homophobic rhetoric.).

<sup>74</sup> See *supra* notes 61-66. See also Kamin, *supra* note 37, at § 5, 11B (reporting that Pat Buchanan called Mapplethorpe's art "pornographic" while campaigning in the Georgia primary).

<sup>75</sup> See *Finley v. NEA*, 795 F. Supp. 1457, 1461 (C.D. Cal. 1992) (noting that "[a]t least since 1989 . . . the NEA has been the target of congressional critics . . . for funding works . . . that express women's anger over male dominance in the realm of sexuality or which endorse equal legitimacy for homosexual and heterosexual practices"); Decency Rule in NEA Policy Deemed Illegal, *Hous. Chron.*, June 10, 1993, at 6 (reporting that all of the artists whose grants were withdrawn by the NEA were gay, except Karen Finley); Blair Kamin, Arts Agency's "Decency" Code Quashed in L.A., *Chi. Trib.*, June 10, 1992, § 1, at 12 (reporting that Finley's work focused on the debasement of women, while the work of the other artists whose NEA grants were withdrawn focused on masturbation or lesbian and gay issues); Gara LaMarche & William Rubenstein, *Censoring Gay Expression: The Love that Dare Not Speak*, *Nation*, Nov. 5, 1990, at 524 (stating that "all N.E.A. grant recipients must sign an oath declaring, among other things, that their art is free of homoeroticism").

<sup>76</sup> Faludi, *supra* note 42, at 46.

<sup>77</sup> Homoerotic expression falls in that category. See Michael Prowse, *Pornography Under Fire*, *Financial Times Limited*, Apr. 28, 1989, at 25 (reporting survey evidence that "74 percent of people think homosexual relationships are always or mostly wrong").

get feminist and homosexual expression holds true under that type of censorship regime.<sup>78</sup>

#### D. Governmental Initiatives against "Pornography"

In addition to the foregoing government measures that indirectly reflect and advance the views of feminist censorship advocates, these advocates also have continued to exert influence through legislative proposals that would implement their views directly. One such direct measure is the Pornography Victims' Compensation Act, described above.<sup>79</sup> Another is a recently proposed Massachusetts statute, which was essentially identical to the Indianapolis ordinance invalidated in *Hudnut*.<sup>80</sup>

In the wake of a 1992 Canadian Supreme Court decision endorsing the Dworkin-MacKinnon approach to "pornography,"<sup>81</sup> Catharine MacKinnon predicted that Congress would soon consider several pieces of legislation also reflecting this analysis.<sup>82</sup> While none of these measures would survive constitutional challenges so long as the Supreme Court continues to uphold the *Hudnut* ruling, some leading constitutional theorists predict that the Court will reverse its *Hudnut* position.<sup>83</sup> Their prediction is supported by the fact that the current Supreme Court, consistent with previous courts, treats sexually oriented expression as less worthy of constitutional protection than expression dealing with other themes.<sup>84</sup> In its most recent ruling in that area, *Barnes v. Glen Theatre, Inc.*,<sup>85</sup> the Court held that nude

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<sup>78</sup> See *infra* text accompanying notes 118-21.

<sup>79</sup> See *supra* notes 35-39.

<sup>80</sup> See Wendy Kaminer, *A Woman's Guide to Pornography and the Law*, *Nation*, June 21, 1980, at 110; Ronald K.L. Collins & David M. Skover, *Art vs. Obscenity—Drawing Distinctions*, *Christian Sci. Monitor*, Apr. 6, 1992, at 13.

<sup>81</sup> See *infra* text accompanying note 118.

<sup>82</sup> See Tamar Lewin, *Canada Court Says Pornography Harms Women*, *N.Y. Times*, Feb. 28, 1992, at B7.

<sup>83</sup> See Fred Strebeigh, *Defining Law on the Feminist Frontier*, *N.Y. Times Mag.*, Oct. 6, 1991, at 28, 56 ("[A] few leading constitutional theorists now predict that, within a decade, she [MacKinnon] will have carved out a new exception in constitutional protection of speech.").

<sup>84</sup> See, e.g., *Miller v. California*, 413 U.S. 15 (1973) (holding obscenity unprotected by First Amendment); *New York v. Ferber*, 458 U.S. 747 (1982) (upholding statute regulating child pornography); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (same); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (upholding zoning law restricting location of adult motion picture theaters); *Osborne v. Ohio*, 495 U.S. 103 (1990) (upholding statute regulating child pornography).

<sup>85</sup> 111 S. Ct. 2456 (1991).

dancing constitutes expression within the First Amendment's ambit, recognizing that such dancing has conveyed important messages of eroticism and sensuality throughout history and around the world.<sup>86</sup> Nonetheless, the Court upheld a complete ban on such expression, under circumstances when it would not ban other, nonsexual forms of expression. The decision upheld the ban on nude dancing even though there was no evidence that such dancing—performed only by consenting adults for consenting adults—had any adverse impact on either the participants or the surrounding community.<sup>87</sup>

Three Justices explicitly held that nude dancing could be prohibited merely because the majority of the community found it morally offensive.<sup>88</sup> In the previous year, though, the Court had struck down a statutory ban on burning the U.S. flag, explaining that it is a “bedrock principle” of U.S. law that the government may not censor speech merely because a majority of the community finds it offensive.<sup>89</sup> As the Court's nude dancing decision demonstrates, this “bedrock principle” is apparently far less solid for sexually oriented expression than for other expression.

The Court's unprotective stance toward sexually oriented expression may afford inroads into the First Amendment for future laws embodying the Dworkin-MacKinnon theory of “pornography.” Another potential route toward diminished First Amendment protection for “pornography” may result from the Court's unanimous holding in the “hate crimes” case, *Wisconsin v. Mitchell*, on June 11, 1993.<sup>90</sup> In rejecting a First Amendment challenge to state laws that increase penalties for crimes whose victims are selected on the basis of racial or other invidious discrimination, the Court stressed that such laws punish conduct, rather than speech,<sup>91</sup> and that the targeted con-

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<sup>86</sup> See *id.* at 2460.

<sup>87</sup> See *id.* at 2469 (Souter, J., concurring in the judgment) (recognizing that state did not seek to justify its law on evidence that nude dancing caused prostitution, sexual assault, other criminal activity, or any other adverse “secondary effect”).

<sup>88</sup> See *id.* at 2462 (plurality opinion, authored by Chief Justice Rehnquist and joined by Justices O'Connor and Kennedy) (holding that a statute prohibiting public nudity, as applied to prohibit nude dancing in establishments accessible only to paying adults, was justified by a generalized “government interest in protecting order and morality,” although there was no evidence that such dancing adversely affected order or morality).

<sup>89</sup> *U.S. v. Eichman*, 496 U.S. 310, 318-19 (1990) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

<sup>90</sup> 61 U.S.L.W. 4575 (June 11, 1993).

<sup>91</sup> *Id.* at 4577-78.



duct is “likely to . . . inflict distinct emotional harms on [its] victims.”<sup>92</sup> While civil libertarians sharply distinguish between *crimes* that reflect discriminatory views and *expression* that reflects such views,<sup>93</sup> Dworkin, MacKinnon, and their followers reject this distinction. They argue that “pornography” constitutes an *act* of misogynistic violence and discrimination.<sup>94</sup> Thus, under their analysis, the *Mitchell* Court’s rationale might well justify restricting what they view as the “hate crime” of pornography.

### E. Sexual Harassment Law

The Dworkin-MacKinnon view of “pornography” as harmful to women has influenced the law concerning sexual harassment in the workplace.<sup>95</sup> Women workers have argued that sexually explicit expression contributes to, or itself constitutes, prohibited sexual harassment. Accordingly, they have sought court orders limiting the display of sexually explicit materials. To date, the only judicial opinion directly addressing allegations that sexually explicit pictures in the workplace constitute prohibited sexual harassment is *Robinson v. Jacksonville Shipyards, Inc.*<sup>96</sup>

Plaintiff Lois Robinson was “one of a very small number of female skilled craftworkers employed” at the Shipyards.<sup>97</sup> Her allegations of sexual harassment centered around “the presence in the workplace of pictures of women in various stages of undress and in sexually suggestive or submissive poses.”<sup>98</sup> Although some evidence indicated that, on several occasions, sexually suggestive pictures were directed at Robinson herself, most of the complained-of images were not directly

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<sup>92</sup> *Id.* at 4578.

<sup>93</sup> See Brief Amicus Curiae of the American Civil Liberties Union in Support of Petitioner at 15-16, *Wisconsin v. Mitchell* (No. 92-515) (on file with the Virginia Law Review Association).

<sup>94</sup> See, e.g., MacKinnon, *supra* note 1, at 325 (asserting that “[p]ornography . . . is a form of forced sex, a practice of sexual politics, an institution of gender inequality”).

<sup>95</sup> For a discussion of free speech issues raised by workplace sexual harassment claims, see Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment—Avoiding a Collision*, 37 *Vill. L. Rev.* 757 (1992).

<sup>96</sup> 760 F. Supp. 1486 (M.D. Fla. 1991).

<sup>97</sup> *Id.* at 1491.

<sup>98</sup> *Id.* at 1490. Robinson also complained of “remarks by male employees and supervisors which demean women.” *Id.*

targeted at her.<sup>99</sup> Nevertheless, they constituted the primary evidence upon which the district court relied in finding liability.<sup>100</sup>

The judge did not limit his remedial order to prohibiting employees from forcing unwanted sexually explicit images upon Robinson or other female employees. Rather, it broadly purged all “sexually suggestive” images—a category defined in sweeping terms<sup>101</sup>—from the workplace. The order not only prohibited employees from displaying any “sexually suggestive” materials in public workplace areas, but it also barred them from possessing, looking at, and displaying such materials in their own private workspaces at any time.<sup>102</sup> The judge’s rationale for this expansive order was that sexually suggestive images of women undermine their equality, and thus lead to violations of Title VII’s prohibition on employment discrimination.<sup>103</sup> The Dworkin-MacKinnon analysis of “pornography” seems to have influenced the judge’s view on this point.<sup>104</sup>

Sweeping as the *Robinson* order was in banning all sexually suggestive images from the workplace, plaintiffs are seeking an even more sweeping ban on such imagery in a series of cases pending before a

<sup>99</sup> See *id.* at 1496-99.

<sup>100</sup> *Id.* at 1522-32.

<sup>101</sup> See the employer’s “Statement of Prohibited Conduct” under its sexual harassment policy. *Id.* at 1542 app. According to the statement:

A picture will be presumed to be sexually suggestive if it depicts a person of either sex who is not fully clothed or in clothes that are not suited to or ordinarily accepted for the accomplishment of routine work in and around the shipyard and who is posed for the obvious purpose of displaying or drawing attention to private portions of his or her body.

*Id.*

<sup>102</sup> *Id.*

<sup>103</sup> The judge quoted the following with approval:

“Pornography on an employer’s wall or desk communicates a message about the way he views women . . . . [I]t may communicate that women should be the objects of sexual aggression, that they are submissive slaves to male desires, or that their most salient and desirable attributes are sexual. Any of these images may communicate to male coworkers that it is acceptable to view women in a predominately sexual way. All of the views to some extent detract from the image most women in the workplace would like to project: that of the professional, credible coworker.”

*Id.* at 1526 (quoting Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 *Vand. L. Rev.* 1183, 1212 n.118 (1989)).

<sup>104</sup> See *id.* (“If the pervasiveness of an abuse makes it nonactionable, no inequality sufficiently institutionalized to merit a law against it would be actionable.”) (quoting Catharine MacKinnon, *Feminism Unmodified* 115 (1987)).

state trial court in Minnesota.<sup>105</sup> Female employees of The Stroh Brewery Co. in St. Paul, Minnesota have charged that a television advertisement for Old Milwaukee beer (which is produced by Stroh Brewery) contributes to sexual harassment in the brewery, and therefore should be banned from the air.<sup>106</sup> The advertisement depicts a group of men on a fishing trip who fantasize that Old Milwaukee beer is delivered to them by the "Swedish Bikini Team," a group of bikini-clad women. At the time of writing, this case had not yet proceeded to trial nor resulted in any judicial ruling on the merits.

The plaintiffs allege that they were repeatedly subjected to targeted, unwanted physical contacts and other sexual advances at the brewery.<sup>107</sup> If the plaintiffs can substantiate these allegations, they should establish liability and secure a remedial order prohibiting any further harassment in the workplace itself. However, the remedial order could not properly extend to the company's television advertisement. As commercial speech, the advertisement is within the scope of First Amendment protection.<sup>108</sup>

The plaintiffs argue that the beer advertisement contributes to a climate at the brewery in which sexual harassment is tolerated.<sup>109</sup> This attenuated, speculative causal connection between the complained-of speech and antisocial conduct is too remote to justify suppressing the speech. As the Supreme Court has repeatedly held,

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<sup>105</sup> See *Additional Sexual Harassment Suits Filed Against the Stroh Brewery Co.*, Daily Lab. Rep. (BNA) at A-8 (Jan. 29, 1992).

<sup>106</sup> See Arthur S. Hayes, *Stroh's Case Pits Feminists Against ACLU*, Wall St. J., Nov. 14, 1991, at B6; Henry J. Reske, *Stroh's Ads Targeted*, A.B.A. J., Feb. 1992, at 20 (reporting that the plaintiffs' attorney believes Stroh's is "harassing [plaintiffs] with [its] own advertising. . . . [T]he women viewed the advertising as a company endorsement of harassment and . . . the men used it as a weapon").

<sup>107</sup> *Additional Sexual Harassment Suits Filed Against the Stroh Brewery Co.*, supra note 105, at A-8; Reske, supra note 106, at 20 (stating that plaintiffs' allegations include "being subjected to obscene and sexist comments, pornographic magazines and posters, slaps on the buttocks by male employees, and male co-workers following them home").

<sup>108</sup> See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (holding ban on attorney's use of illustrations in advertising unconstitutional); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (holding city's general ban on signs carrying noncommercial advertising unconstitutional); *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (holding regulation on utility advertising unconstitutional); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (holding statute restricting pharmaceutical advertising unconstitutional).

<sup>109</sup> See Stuart Elliott, *Suit Over Sex in Beer Ads Comes as Genre Changes*, N.Y. Times, Nov. 12, 1991, at D22.

speech may only be restricted if it causes actual or imminent harm—that is, if it creates a “clear and present danger” of violence or illegality. For example, the Court has held that advocacy of illegal conduct may not be prohibited on the theory that it might result in such illegal conduct; only intentional incitement of illegal activity, which will imminently cause such activity, may be proscribed.<sup>110</sup>

The plaintiffs’ argument that Stroh’s television advertisements should be suppressed because they might lead to harassment at Stroh’s brewery attempts to revive the discredited “bad tendency” test under which the Supreme Court condoned censorship earlier in this century.<sup>111</sup> For example, in decisions that it has subsequently overturned, the Supreme Court sustained convictions of individuals who criticized the United States’ role in World War I on the theory that such criticism might undermine national security.<sup>112</sup> In contrast, at least since its 1969 decision in *Brandenburg v. Ohio*,<sup>113</sup> the Supreme Court consistently has insisted that speech may be suppressed only when there is a very close causal connection between speech and any harm it will allegedly cause.

The plaintiffs’ archaic argument in the *Stroh Brewery* case resonates with an essential tenet of the feminist pro-censorship movement, as well as with the now rejected “bad tendency” argument. The World War I-era view held that an alleged but unsubstantiated connection between speech and some societal danger was sufficient to punish controversial or unpopular speech. Likewise, according to feminists in the pro-censorship faction, there is no need to demonstrate that expo-

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<sup>110</sup> See, e.g., Laurence H. Tribe, *American Constitutional Law* § 12-9, at 841 (2d ed. 1988).

<sup>111</sup> See Edward J. Bloustein, *Criminal Attempts and the “Clear and Present Danger” Theory of the First Amendment*, 74 *Cornell L. Rev.* 1118, 1130 (1989) (recounting that in cases decided in the 1920s and 1930s, “the mere ‘bad tendency’ of offending speech, however remote the consequences, was considered a sufficient constitutional basis for its limitation”).

<sup>112</sup> See, e.g., *Gitlow v. New York*, 268 U.S. 652 (1925) (upholding conviction for distributing communist leaflet under statute proscribing any person from advocating the overthrow of the government); *Abrams v. United States*, 250 U.S. 616 (1919) (holding that speech calling for a general strike by ammunition factory workers during World War I was a threat to national security); *Debs v. United States*, 249 U.S. 211 (1919) (holding that speech supporting socialism could be regulated to protect the nation from internal strife); *Frohwerk v. United States*, 249 U.S. 204 (1919) (upholding statute enacted to regulate speech that was seen as a threat to national security).

<sup>113</sup> 395 U.S. 444, 447 (1969) (stating that for speech to be proscribed, it must be shown that the speech is an intentional incitement of “imminent lawless action and is likely . . . to produce such action”).

sure to “pornography” leads to discriminatory or violent acts; they deem mere “intuition” about the alleged causal connection sufficient.<sup>114</sup> Moreover, the Canadian Supreme Court expressly adopted this aspect of the Dworkin-MacKinnon approach, along with other aspects. It explicitly held that “degrading” or “dehumanizing” material could be proscribed without proof that it causes actual harm.<sup>115</sup> As one journalist observed:

The Supreme Court of Canada was very clear that it arrived at its conclusions in the Butler case not because porn is proven to cause harm, but because it is believed by the Canadian public to cause harm (due partly to the effectiveness of the anti-porn propaganda campaign carried on by MacKinnon [sic], Dworkin and their allies).<sup>116</sup>

### *F. Impact in Other Countries*

Another indication of the continuing influence of the Dworkin-MacKinnon approach to “pornography” is its impact in other countries. Most importantly, as indicated above,<sup>117</sup> the Canadian Supreme Court in 1992 essentially rewrote that country’s obscenity statute to outlaw materials that are “degrading” or “dehumanizing” to women, and held that this law does not violate Canada’s counterpart of our constitutional free speech guarantee.<sup>118</sup>

It should be noted, though, that just as the feminist pro-censorship view has been asserted in other countries, so too has the feminist anti-

<sup>114</sup> According to one report:

MacKinnon has insisted for years that there is a direct connection between pornography . . . and assaults on women. Yet the most comprehensive current study of all available sources—Marcia Pally’s “Sense and Censorship: The Vanity of Bonfires”. . .—convincingly disproves MacKinnon’s claim. But many women believe her on faith—and anger.

Nat Hentoff, *Pornography War Among Feminists: Do Women Need State Protection from Sexually Explicit Materials?*, Wash. Post, Apr. 4, 1992, at A23:

<sup>115</sup> *Butler v. the Queen*, 1 S.C.R. 452, 505 (1992) (Can.) (stating that “[i]t might be suggested that proof of actual harm should be required. . . . [I]t is sufficient . . . for Parliament to have a reasonable basis for concluding that harm will result and this requirement does not demand actual proof of harm”).

<sup>116</sup> Bearchell, *supra* note 48, at A23.

<sup>117</sup> See text accompanying notes 78, 116.

<sup>118</sup> *Butler*, 1 S.C.R. at 478-79 (construing statutory requirement that obscenity involve “the undue exploitation of sex” as being satisfied by “degrading or dehumanizing” depictions of sex, because “a substantial body of opinion . . . holds that the portrayal of persons being subjected to degrading or dehumanizing sexual treatment results in harm, particularly to women . . .”).

ensorship view. For example, in Great Britain there is a feminist anti-censorship organization called "Feminists Against Censorship," or "FAC," which is similar to the U.S.-based FACT and FFE.<sup>119</sup> Among other activities, FAC members recently have published three books challenging the feminist pro-censorship faction's perspective.<sup>120</sup> Likewise, Canadian feminist anti-censorship activists published a collection of their essays in 1985, entitled *Women Against Censorship*.<sup>121</sup>

## II. POINTS OF AGREEMENT AND DISAGREEMENT AMONG PRO- AND ANTI-CENSORSHIP FEMINISTS

Important as it is to understand the critical differences among feminists in terms of their attitudes toward "pornography"—and to underscore that many feminists vigorously oppose censorship—it is also important that these differences not be exaggerated, as they sometimes are. In fact, there is substantial common ground among pro- and anti-censorship feminists. Understanding the agreements between these groups helps to sharpen the focus on their disagreements.

### *A. Educational Aspects of the Anti-"Pornography" Movement*

There is a consensus that some sexually explicit speech may convey views of women that are antithetical to gender equality. By heightening public awareness of this dimension of some forms of sexually oriented speech, the feminist anti-"pornography" movement has had a valuable educational impact. The American Civil Liberties Union's brief in the *Hudnut* case lauded Dworkin, MacKinnon and their followers for this contribution: "By emphasizing the degree to which sexually explicit speech glorifying humiliation and violence is fundamentally inconsistent with our national commitment to equality, proponents of the Indianapolis ordinance contribute to public

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<sup>119</sup> See Elizabeth Wilson, Books: Porn Again, *Guardian*, Jan. 5, 1993, at 8.

<sup>120</sup> See *Bad Girls and Dirty Pictures* (Alison Assister & Avedon Carol eds., 1993); *Sex Exposed* (Lynne Segal & Mary McIntosh eds., 1992); *Pornography & Feminism: The Case Against Censorship* (Gilliam Rodgeron & Elizabeth Wilson eds. 1991).

<sup>121</sup> *Women Against Censorship*, supra note 15. More recently, Canadian anti-censorship feminists held a public forum entitled *Refusing Censorship: Feminists and Activists Fight Back* on November 7-8, 1992, at York University.

understanding of the need to eradicate sex discrimination and violence against women from American life."<sup>122</sup>

What does distinguish the pro-censorship faction from other feminists, however, is the former's insistence that *all* "pornography" conveys misogynistic messages to *all* viewers—or at least to all male viewers.<sup>123</sup> In contrast, many other feminists view much "pornography" as conveying at worst ambiguous, and at best positive, messages to many viewers.

### 1. *Ambiguous Aspects of "Pornographic" Imagery*

Like all visual and verbal representations, "pornographic" images and words convey different messages to each viewer or reader, depending on his or her own subjective interpretations and responses. The concept that no text or image has any "objective," fixed meaning, but rather has a different meaning for each member of its audience, is an integral aspect of the "post-structuralist" or "deconstructionist" movements that have been so influential in the humanities and social sciences in recent years.<sup>124</sup> As noted by Professor Thelma McCormack, director of the Centre for Feminist Research at York University, under the influence of post-structuralism, "pornography began to slip quietly away as a younger generation of feminist literary critics deconstructed it, scooping out its literal meanings and leaving behind an empty shell with no fixed meaning."<sup>125</sup>

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<sup>122</sup> Brief Amici Curiae of the American Civil Liberties Union, the Indiana Civil Liberties Union, and the American Civil Liberties Union of Illinois at 1, *American Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316 (D. Ind. 1984) (No. IP 84-791C), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) [hereinafter *ACLU Brief*] (on file with the Virginia Law Review Association).

<sup>123</sup> See generally Susan Brownmiller, *Against Our Will: Men, Women and Rape* 394 (1975) (calling pornography "the undiluted essence of anti-female propaganda"); Dworkin, *supra* note 23, at 217 (stating "pornography is the propaganda of sexual fascism [and] of sexual terrorism"); Dworkin, *supra* note 7, at 15 ("Pornography is the material means of sexualizing inequality; and that is why pornography is a central practice in the subordination of women."); Leah Fritz, *Pornography as Gynocidal Propaganda*, 8 N.Y.U. Rev. L. & Soc. Change 219, 220 (1978-79) ("Pornography is nothing less than genocidal propaganda"); Helen E. Longino, *Pornography, Oppression, and Freedom: A Closer Look*, in *Take Back the Night: Women on Pornography* 40, 48 (Laura Lederer ed., 1980) ("Pornography is the vehicle for the dissemination of a deep and vicious lie about women.").

<sup>124</sup> See, e.g., Jacques Derrida, *Margins of Philosophy* (1972).

<sup>125</sup> McCormack, *supra* note 3, at 32; see also Winkler, *supra* note 31, at A8 ("Feminist scholars are . . . drawing on . . . 'poststructuralism' . . . to challenge the idea that pornography reflects real life. Poststructuralist thought maintains that language and images never mean

By insisting that “pornography” instills misogynistic attitudes, or even behavior, in viewers—or at least male viewers—the feminist pro-censorship faction ignores the subjective, complex nature of the interactions between an individual and a text or an image. This reductionist approach denies the existence of ambiguity, subtlety, and irony. It overlooks the boundary between fantasy, imagination, and ideas, on the one hand, and behavior on the other.<sup>126</sup> Ultimately, it denies individual autonomy, assuming that at least some viewers of “pornography” will automatically react to it in a simplistic, “monkey-see, monkey-do” fashion.

In the words of Professor McCormack, pro-censorship feminists “reject the distinction between thought and deed which is both the cornerstone of liberal democracy and the foundation of a humanistic model of human nature.”<sup>127</sup> She explains:

Typically, [Dworkin and MacKinnon] disregard the work of social psychologists for whom the relationship between attitudes and behavior, between what we think and what we do is the problematic. According to social psychologists, the relationship is . . . largely indeterminate; there is no way of specifying what the behavioral outcomes are of specific attitudes, especially when we live in a world of contradictory messages. . . .

. . . Our distinctively human capacity is to think, select, interpret and reinterpret content, to read texts on different levels and in different ways. The result is a broad spectrum of possible attitudes which loop back to shape how we read future texts. . . .

Thus, when Dworkin/MacKinnon collapse the distinction between dream and deed, fantasy and act, thought and behavior they construct a Skinnerian model of human nature which, in turn, justifies an elaborate system of social control . . . .<sup>128</sup>

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what they seem to mean, and that motivation is never straightforward.”). For examples of feminist literary scholars’ analysis of sexually explicit imagery and texts, see Kate Ellis, *Stories Without Endings: Deconstructive Theory and Political Practice*, *Socialist Review*, April-June 1989, at 37; T. Drorah Setel, *Prophets and Pornography: Female Sexual Imagery in Hosea*, in *Feminist Interpretation of the Bible* 87 (Letty M. Russell ed., 1985).

<sup>126</sup> See, e.g., Hamill, *supra* note 23, at 189 (observing the following: “In a way, the work of MacKinnon and Dworkin is some of the saddest writing I’ve ever read. . . . There is no fantasy or magic”).

<sup>127</sup> McCormack, *supra* note 3, at 22.

<sup>128</sup> *Id.*



The individualized interaction that viewers have with imagery and words in general certainly exists when the imagery and words concern sexual themes in particular. Just as sexuality and sexual relationships are themselves inherently individualized, tied to the most intimate, personal aspects of each person's psyche and life, one's interpretations of and reactions to sexually explicit expression are also uniquely subjective and individualized.<sup>129</sup> "Pornography" that one woman views as misogynistic may be viewed by another as reaffirming her desires and her equality. Even scenes of ravishment, which could well be viewed as showing a woman's "subordination," may nevertheless be viewed by some feminist women as sexually pleasurable and liberating.<sup>130</sup>

Despite its extremist rhetoric denouncing the inherent dangers caused by exposure to "pornography," the feminist pro-censorship faction must recognize that at least one group of individuals may survive such exposure without any adverse impact on attitudes and behavior toward women—namely, themselves! Probably very few men have examined the volume of violent, misogynistic "pornography" with the attention that Dworkin, MacKinnon, and other pro-censorship advocates have lavished upon it. Nevertheless, these pro-censorship advocates still maintain respect for women's equality—at least as they conceptualize it<sup>131</sup>—and safety. Their proposed censorship regime thus is predicated on a double standard: that they and their allies can withstand the allegedly pernicious influence of exposure to "pornography," but others cannot.<sup>132</sup>

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<sup>129</sup> For example, consider the following:

To some, *any* graphic sexual act violates women's dignity and therefore subordinates them. To others, consensual heterosexual lovemaking within the boundaries of procreation and marriage is acceptable, but heterosexual acts that do not have reproduction as their aim lower women's status and hence subordinate them. Still others accept a wide range of nonprocreative, perhaps even nonmarital, heterosexuality but draw the line at lesbian sex, which they view as degrading.

Duggan et al., *supra* note 53, at 140.

Dworkin and MacKinnon both have argued that heterosexual sex is inherently subordinating to women. See *infra* note 192.

<sup>130</sup> See Nancy Friday, *Women on Top* 4-5 (1991); Sara Diamond, *Pornography: Image and Reality in Women Against Censorship*, *supra* note 15, at 40, 51; *infra* note 144 and accompanying text.

<sup>131</sup> Other feminists offer forceful arguments that the Dworkin-MacKinnon approach to "pornography" actually undermines women's rights and interests. See *infra* Part III.

<sup>132</sup> Pete Hamill sharply criticized this flaw in the feminist pro-censorship analysis as follows:

## 2. *Positive Aspects of "Pornographic" Imagery*

For the reasons just discussed, "pornography" is at worst ambiguous because it conveys many complex and varied messages to, and provokes many complex and varied reactions in, different viewers. The simplistic stance of Dworkin, MacKinnon, and others that "pornography" conveys unrelentingly negative messages also overlooks the many positive aspects of "pornography" that are cited by other feminists, as well as experts in health, sexuality, and related fields.

Even the Meese Commission acknowledged that "[t]here are . . . two areas in which sexually explicit materials have been used for positive ends: the treatment of sexual dysfunctions and the diagnosis and treatment of some paraphilias."<sup>133</sup> Popular sex manuals have recommended "pornography" as an aphrodisiac,<sup>134</sup> and there is widespread belief that it can improve the sex lives of some couples.<sup>135</sup> Furthermore, some clinical<sup>136</sup> and cross-cultural evidence<sup>137</sup> suggests that the

[T]here is an absurd assumption behind the suppressionist argument: that men are a kind of collective tabula rasa on which the pornographers make their indelible marks. . . .

One minor problem with this theory of human behavior concerns MacKinnon and Dworkin. They've obviously pored over more pornography than the ordinary man sees in a lifetime. . . . If human beings are so weak and pornography so powerful, why aren't MacKinnon and Dworkin playing the Krafft-Ebing Music Hall with the rest of the perverts? There are two possible answers. The first is that MacKinnon and Dworkin (and other researchers for the New Victorians) are morally superior to all men and most women and are thus beyond contamination. The second is more likely: The material is so vile that it is a psychological turnoff to all human beings except those with a preexisting condition.

Hamill, *supra* note 23, at 188. This double standard is apparently typical among censorship advocates. Although the use of "pornography" is widespread among all sectors of the population, surveys indicate that people are still ambivalent about it; while they believe it is not harmful to themselves, they believe it is harmful to others. Thelma McCormack, *Making Sense of Research on Pornography*, in *Women Against Censorship*, *supra* note 15, at 181 app.

<sup>133</sup> Meese Comm'n Report, *supra* note 10, at 1028. Moreover, the Meese Commission recognized that "pornography" might have other "beneficial effects," including providing entertainment, relieving people of the impulse to commit crimes, and improving marital relations by teaching about sexual techniques. *Id.*

<sup>134</sup> See, e.g., *The Joy of Sex* 208-09 (Alex Comfort ed., 1972).

<sup>135</sup> See American Civil Liberties Union, *Polluting the Censorship Debate: A Summary and Critique of the Final Report of the Attorney General's Commission on Pornography* 77 (1986) (on file with the Virginia Law Review Association); see also Commission on Obscenity and Pornography, Report 128-34 (1970) (reporting that regular adult consumers of "pornography" include heterosexual couples).

<sup>136</sup> See *infra* text accompanying notes 298-329.

<sup>137</sup> See *infra* text accompanying notes 334-41.

use of "pornography" might even reduce the likelihood that certain individuals will engage in antisocial activity, including violence against women.

Moreover, although some "pornography" contains negative imagery about women, including violence toward women, "pornography" also contains numerous positive images. Several anthologies of feminist writings illuminate the range of such positive images specifically from the viewpoints of women and feminists.<sup>138</sup> Feminist writer Ann Snitow describes some of these positive facets of "pornographic" imagery:

Pornography sometimes includes elements of play, as if the fear women feel toward men had evaporated and women were relaxed and willing at last. Such a fantasy—sexual revolution as *fait accompli*— . . . can . . . be wishful, eager and utopian.

Porn can depict thrilling (as opposed to threatening) danger. . . . [S]ome of its manic quality . . . seems propelled by fear and joy about breaching the always uncertain boundaries of flesh and personality.

. . . .

Some pornography is defiant and thumbs a nose at death, at the limitations of the body and nature . . . .

Porn offers . . . a private path to arousal, an arousal that may be all too easily routed by fear or shame.

. . . .

[P]ornography also flouts authority, which no doubt in part explains its appeal to young boys. Certainly . . . porn remains one of their few sources of sexual information . . . .<sup>139</sup>

"Pornography" also contains many elements that are harmonious with feminist values. As the FACT brief noted in the *Hudnut* case, "pornography" "may convey the message that sexuality need not be

<sup>138</sup> See Powers of Desire: The Politics of Sexuality (Ann Snitow, Christine Stansell & Sharon Thompson eds., 1983); Women Against Censorship, *supra* note 15; Caught Looking, *supra* note 33; Pleasure and Danger: Exploring Female Sexuality (Carol S. Vance ed., 1984).

<sup>139</sup> Ann Snitow, Retrenchment Versus Transformation: The Politics of the Antipornography Movement, *in* Women Against Censorship, *supra* note 15 at 107, 115-16; see also Myrna Kostash, Second Thoughts, *in* Women Against Censorship, *supra* note 15, at 32, 37 (stating that "until there is a revolution in the institutions that regulate sexual relations—the family, the school, the workplace—perhaps the pornographic fantasy is one of the few ways that women and men, captives together of those institutions, victims alike of their alienating procedures, are permitted connection").

tied to reproduction, men or domesticity.”<sup>140</sup> Indeed, as feminist Sara Diamond has noted, “[F]eminism and porn have something in common. Both insist that women are sexual beings. Both have made sex an experience open to public examination and . . . debate.”<sup>141</sup>

In response to the charge by pro-censorship feminists that “pornography” exploits women, Ann Snitow argues that while “pornography” is exploitative, in a broader sense it is ultimately liberating to women. She explains that the subversive quality of “pornography” challenges the entire status quo, including social structures that inhibit women’s freedom:

Though pornography’s critics are right—pornography *is* exploitation—it is exploitation of *everything*. Promiscuity by definition is a breakdown of barriers. . . .

It is a fantasy of an extreme state in which all social constraints are overwhelmed by a flood of sexual energy. Think, for example, of all the pornography about servants fucking mistresses, old men fucking young girls, guardians fucking wards. Class, age, custom—all are deliciously sacrificed, dissolved by sex.<sup>142</sup>

Even violent “pornography,”<sup>143</sup> including that depicting or describing scenes of ravishment, may convey liberating messages to feminist

<sup>140</sup> FACT Brief, *supra* note 32, at 121. For other pro-feminist aspects of “pornography,” see Duggan et al., *supra* note 53:

[P]ornography has served to flout conventional sexual mores, to ridicule sexual hypocrisy and to underscore the importance of sexual needs. Pornography carries many messages other than woman-hating: it advocates sexual adventure, sex outside of marriage, sex for no reason other than pleasure, casual sex, anonymous sex, group sex, voyeuristic sex, illegal sex, public sex. Some of these ideas appeal to women reading or seeing pornography, who may interpret some images as legitimating their own sense of sexual urgency or desire to be sexually aggressive.

*Id.* at 145.

<sup>141</sup> Diamond, *supra* note 130, at 40.

<sup>142</sup> Ann Barr Snitow, *Mass Market Romance: Pornography for Women is Different*, in *Powers of Desire*, *supra* note 138, at 245, 256.

<sup>143</sup> See Panel Discussion: Effects of Violent Pornography, 8 N.Y.U. Rev. L. & Soc. Change 225 (1978-1979) (statement of Professor David Richards).

Susan Sontag has noted that violent pornography expresses something about the sometimes extreme nature of sexual ecstasy and the fantasies we experience in having sex. It enables some of us more frankly to acknowledge and deal with the integrity of our sexual selves, not in terms of some puritan model of proper sexual life, but in terms of unique selves and life histories.

*Id.* at 237.

women. For example, feminist artist and writer Sara Diamond has noted:

[M]any women . . . fantasize about being ravished. It is not surprising that women daydream about being uncontrollably desired in a culture in which our value as human beings is based on our attractiveness, and in which we are constantly prevented from acting out our desires. If we fantasize a partner taking complete control of a sexual encounter, then we are absolved from responsibility for our abandoned behavior. In this way we can mentally break sexual taboos that still remain in place in practice.<sup>144</sup>

### B. *Anti-“Pornography” Strategies Based on Private Persuasion*

Even though anti-censorship feminists do not view “pornography” as monochromatically antithetical to women’s rights, they still agree that those who do view “pornography” this way—or who object to it for any other reasons—may avail themselves of the traditional antidote to any speech with which one disagrees in this free society: counterspeech.<sup>145</sup> Thus, even—indeed, especially—those of us who defend free speech rights concerning “pornography” agree that individuals may raise their voices to protest “pornography,” and may seek to persuade their sister-citizens not to produce, pose for, sell, buy, or look at “pornography.” In contrast, though, we resist any efforts, through governmental fiat, to remove these choices. *Private*

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<sup>144</sup> Diamond, *supra* note 130, at 51. A similar point has been made by author Nancy Friday, who has published three collections of women’s sexual fantasies, and who has collected thousands of such fantasies, from interviews and letters. She writes:

The most popular guilt-avoiding device [in these fantasies] was the so-called rape fantasy—“so-called” because no rape, bodily harm, or humiliation took place in the fantasy. It simply had to be understood that what went on was against the woman’s will. Saying she was “raped” was the most expedient way of getting past the big No to sex that had been imprinted on her mind since early childhood.

Friday, *supra* note 130, at 16-17.

<sup>145</sup> For classic expressions of this central tenet of American free speech jurisprudence, see *Abrams v. United States*, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting) (“Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, ‘Congress shall make no law . . . abridging the freedom of speech.’”); *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.”).

*persuasion* embodies and promotes essential human rights values, whereas *governmental coercion* is antithetical to them.

The crucial distinction between nongovernmental and governmental efforts to curtail the production and consumption of “pornography” has been emphasized by anti-censorship feminists, including some who are critical of “pornography.” One such feminist is Wendy Kaminer, an attorney and writer who has been active in the feminist movement protesting violence against women. Kaminer was formerly associated with Women Against Pornography (“WAP”), but has since rejected WAP’s pro-censorship stance. She has explained her position as follows: “The feminist movement against pornography must remain an antidefamation movement, involved in education, consciousness-raising and the development of private strategies against the [‘pornography’] industry.”<sup>146</sup> In the same vein, Sara Diamond writes: “Community picket lines and sit-ins aimed at porn outlets can be effective, but only if we . . . channel our anger, not calling for state censorship, but for consumers and communities to take responsibility for the images that they accept.”<sup>147</sup>

Ironically, while pro-censorship feminists do advocate governmental suppression of “pornography,” they themselves have graphically demonstrated how effective the “more speech” approach is. By denouncing the misogynist messages conveyed by some “pornography,” they have countered misogynistic attitudes and behavior.

Even more ironically, an essential element of the anti-pornography feminists’ message is conveyed by publicly displaying sexually explicit work that is graphic, violent, and misogynistic. For example, Women Against Pornography (“WAP”) has compiled a slide show of such images, which its members regularly exhibit.<sup>148</sup> WAP members also regularly lead interested observers on tours of “adult” bookstores, where they can look at sexually explicit pictures and magazines, including those that WAP deems “pornographic.”<sup>149</sup> Similarly, an

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<sup>146</sup> See Kaminer, *supra* note 80, at 756.

<sup>147</sup> Diamond, *supra* note 130, at 53.

<sup>148</sup> See John Leo, *Swimsuits Galore, But No Jolts*, U.S. News & World Rep., Mar. 1, 1993, at 17, 18.

<sup>149</sup> See Katherine Currie & Art Levine, *Whip Me, Beat Me, and While You’re at It Cancel my NOW Membership*, Wash. Monthly, June 1987, at 17; Michelle Green, *The Shame of America*, Time, June 30, 1986, at 28; Robert Scheer, *Inside the Meese Commission*, Playboy, Aug. 1986, at 60.

organization called Feminists Fighting Pornography (“FFP”) maintains tables on sidewalks and in other public areas on which its members display examples of “pornography” that they view as particularly misogynistic.<sup>150</sup>

This irony was especially sharp during an incident that occurred in New York City several years ago. When Feminists Fighting Pornography was ordered to remove its display of “pornography” from Grand Central Terminal, on the ground that such material was “distasteful,” this anti-“pornography” group promptly sought the assistance of the New York Civil Liberties Union! FFP asked the Civil Liberties Union to champion its free speech right to display “pornography,” although its purpose for the display was to persuade viewers that “pornography” should not be protected free speech!<sup>151</sup>

### C. *Punishment of Violent or Discriminatory Conduct*

Another area of consensus in the feminist “pornography” debate is that government should combat the harmful *conduct* that some contend is caused or aggravated by “pornography.” In these situations, as always, it is the illegal conduct that should be punished, rather than the speech; the speech should not be the scapegoat. Regardless of any role that “pornography” may or may not play in connection with discriminatory or violent conduct toward women,<sup>152</sup> that conduct itself should be punished. The American Civil Liberties Union advocates the following mechanisms for sanctioning such conduct: “Enforcement of criminal laws regarding assault, coerced sex, kidnapping and trespassing; strengthening of rape laws, including elimination of the ‘spousal rape’ exception under which husbands may not be

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<sup>150</sup> See Marcia Pally, *Women in Flames*, Village Voice, May 8, 1984, at 23.

<sup>151</sup> The NYCLU did defend FFP’s First Amendment rights, and did so successfully. Telephone Interview with Arthur Eisenberg, Legal Director of the NYCLU (Feb. 17, 1993); see also Letter from Page Mellish, FFP, to Arthur Eisenberg, Legal Director, NYCLU (undated) (on file with the Virginia Law Review Association); Pat Sims, *Porn Censurers Get Censored*, Nat’l L.J., May 15, 1989, at 43 (describing FFP members’ arrests for publicly displaying what they call “torture porn,” pictures from hard-core magazines depicting women victimized by brutal sex).

<sup>152</sup> See *infra* text accompanying notes 298-344 (explaining that the alleged causal connection between exposure to “pornography” and sexually discriminatory or violent conduct is merely speculative).

prosecuted for raping their wives; [and] enforcement of . . . sex discrimination laws . . . .”<sup>153</sup>

#### D. Posing for “Pornography”

##### 1. Coerced Posing

It is clearly illegal to coerce anyone to pose for a “pornographic” picture, just as it is illegal to coerce anyone to pose for any picture.<sup>154</sup> On that point, the pro- and anti-censorship feminists are united. What sharply divides them, though, is the scope of the “coercion” concept in this context.

The Dworkin-MacKinnon approach conclusively presumes that women, like children, are inherently incapable of giving truly voluntary, informed consent to pose for sexually explicit pictures.<sup>155</sup> This

<sup>153</sup> American Civil Liberties Union, Policy Guide, Policy No. 4(f), at 8-9 (rev. ed. 1993) (on file with the Virginia Law Review Association) [hereinafter ACLU Policy Guide]; see also *infra* note 215.

<sup>154</sup> See Duggan et al., *supra* note 53.

Existing law already penalizes physical assault, including when it is associated with pornography. Defenders of the [Dworkin-MacKinnon] laws often cite the example of models who have been raped or otherwise harmed while in the process of making pornographic images. But victims of this type of attack can already sue or prosecute those responsible. . . . [Additionally], existing U.S. law already provides remedies for fraud or contracts of duress . . . .

*Id.* at 147.

In addition, privacy-related torts recognized in many states could provide legal recourse for women who have been physically or psychologically coerced into posing for pornography. See generally William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 392-401 (1960) (discussing torts of public disclosure of private facts and public portrayal in a false light). The tort of wrongful appropriation might also apply. See *Clark v. Celeb Publishing, Inc.*, 530 F. Supp. 979, 982-83 (S.D.N.Y. 1981) (awarding damages to model for emotional distress on misappropriation theory, where sexually oriented magazine wrongfully used nude photographs of her).

If broadly construed, these privacy causes of action could transgress free speech values. However, under certain circumstances, they may be maintained consistent with free speech principles. See ACLU Policy Guide, *supra* note 153, Policy No. 6(d), at 12-13.

<sup>155</sup> The model “anti-pornography” law drafted by Dworkin and MacKinnon provides that proof of any of the following shall not negate a finding of coercion:

that the [allegedly coerced] person actually consented to a use of the performance that is changed into pornography; or . . . that the person knew that the purpose of the acts or events in question was to make pornography; or . . . that the person showed no resistance or appeared to cooperate actively in the photographic sessions or in the events that produced the pornography; or . . . that the person signed a contract, or made statements affirming a willingness to cooperate in the production of pornography; or . . . that no physical force, threats, or weapons were used in the making of the pornography; or . . . that the person was paid or otherwise compensated.



presumption's paternalistic—or, perhaps the more accurate word is “maternalistic”—attitude toward women exemplifies the insultingly patronizing view that pervades the pro-censorship feminist critique of “pornography.”<sup>156</sup> Indeed, Catharine MacKinnon<sup>157</sup> and other supporters of the Dworkin-MacKinnon anti-pornography law<sup>158</sup> have expressly analogized women to children, arguing that both groups should be deemed unable to make certain fundamental choices for themselves.

## 2. *Consensual Posing*

The pro-censorship feminists' equation of women and children is antithetical to the fundamental feminist tenet that the law should recognize women as full and equal citizens. Some women who were previously models for sexually oriented publications or films have said that they were coerced to perform through physical violence.<sup>159</sup> Others, however, declare that they and their colleagues perform voluntarily,<sup>160</sup> and indeed assert their constitutional right to do so.<sup>161</sup> To dismiss their choices as tantamount to those of children, as the feminist censorship proponents do, not only denies the equality of these individual women,<sup>162</sup> but also deeply undermines the cause of

Dworkin, *supra* note 7, at 26.

As anti-censorship feminists have noted, this provision “functions to make all women incompetent to enter into legally binding contracts for the production of sexually explicit material.” FACT Brief, *supra* note 32, at 128. Therefore, it would deprive women who pose for sexually explicit photographs or films of a job option they have freely selected. See Duggan et al., *supra* note 53, at 148; *infra* text accompanying notes 237-43.

<sup>156</sup> See *infra* text accompanying notes 252-58.

<sup>157</sup> See Hamill, *supra* note 23, at 186 (quoting MacKinnon as stating, “Some of the same reasons children are granted some specific legal avenue for redress . . . also hold true for the social position of women compared to men.”).

<sup>158</sup> In its federal district court brief in the *Hudnut* case, the City of Indianapolis compared women to children and argued that both should be deemed incapable of consenting to pose for pornography. See Duggan et al., *supra* note 53, at 147-48.

<sup>159</sup> See, e.g., Linda Lovelace & Mike McGrady, *Ordeal* (1980).

<sup>160</sup> See *Effect of Pornography on Women and Children: Hearings Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. 317* (1984) (testimony of Veronica Vera, actress in and maker of sexually explicit films, testifying that she had “never met a woman who was coerced . . . into participating”).

<sup>161</sup> See *The War Against Pornography*, *Newsweek*, Mar. 18, 1985, at 58, 66 (“For them to tell me I can’t make films about naked men and women making love is a grotesque violation of *my* civil rights.”) (quoting an actress who appears in sexually explicit films).

<sup>162</sup> For a discussion of the adverse impact that Dworkin-MacKinnon-type laws would have on sex industry workers, see *infra* text accompanying notes 238-44.

women's equality more generally. Wendy McElroy recently assailed this anti-feminist aspect of the Dworkin-MacKinnon position:

Anti-pornography feminists label [women who work in pornography] as "psychologically sick" because they have made non-feminist choices. These women are called "victims" of their culture. But radical feminists were raised in the same culture. Presumably, these "enlightened" women wish us to believe that their choices are based on reason and knowledge; somehow, they have risen above the culture in which they were raised. They are unwilling, however, to grant such a courteous assumption to any woman who disagrees with them. . . . If a women [sic] enjoys consuming pornography, it is not because she comes from another background, has a different emotional make-up or has reasoned from different facts. No: it is because she is mentally incompetent. Like any three year old, she is unable to give informed consent regarding her own body. The touchstone principle of feminism used to be, "a woman's body, a woman's right." Regarding date rape, feminists still declare, "No means no." The logical corollary of this is "yes means yes." Now, modern feminists are declaring that "yes" means nothing. It is difficult to believe that any form of pornography could be more degrading to women than this attitude.<sup>163</sup>

The 1992 Canadian Supreme Court decision that adopted Dworkin and MacKinnon's general analysis of "pornography" also adopted their specific position that a woman's consent to perform for "pornographic" photographs or films cannot prevent the work from being classified as "degrading" or "dehumanizing."<sup>164</sup> To the contrary, in an Orwellian turn, the court "reasoned" that a woman's consent may well "make[ ] the depicted acts even more degrading or dehumanizing."<sup>165</sup>

But what could be more degrading or dehumanizing to women than the Dworkin-MacKinnon view that women are incapable of giving meaningful consent to pose for "pornographic" depictions, and that if they seek to do so, they are "degrading" or "dehumanizing" themselves? This argument from false consciousness not only demeans the women who voluntarily participate in the sex indus-

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<sup>163</sup> Wendy McElroy, "The Unholy Alliance," *Liberty*, Feb. 1993, at 53, 56.

<sup>164</sup> See *Butler v. The Queen*, 1 S.C.R. 452, 479 (1992) (Can.) ("Consent cannot save materials that otherwise contain degrading or dehumanizing scenes.")

<sup>165</sup> *Id.*

try,<sup>166</sup> but ultimately it demeans and infantilizes all women. In accepting the Dworkin-MacKinnon theory that a woman's *consent* to perform for "pornography" should be given no legal effect, the Canadian Supreme Court was showing precisely the same disregard for women's autonomy and dignity as previous courts have shown when they ruled that a woman's *nonconsent* to sexual intercourse should be given no legal effect; the two are flip sides of the same devalued coin.<sup>167</sup>

The Dworkin-MacKinnon presumption that women are incapable of giving meaningful consent to participate in producing "pornographic" materials, and that women who choose to pose for such materials are victims of false consciousness, is one respect in which their analysis is directly antagonistic to women's rights. The next Section develops this broader theme. It shows that, for many reasons, censoring "pornography" undermines women's autonomy, liberty, and equality.

### III. CENSORING "PORNOGRAPHY" WOULD UNDERMINE WOMEN'S RIGHTS AND INTERESTS

This Section elaborates upon ten major ways in which censoring "pornography" would have an adverse impact upon women's rights and interests. Pro-censorship feminists argue in rebuttal that censoring "pornography" would have the positive result of reducing discrimination or violence against women. However, as the next section shows, their argument is speculative at best.<sup>168</sup> Indeed, evidence suggests that in some instances censoring "pornography" could well increase anti-female discrimination and violence.<sup>169</sup> Accordingly, on balance, censoring "pornography" would do more harm than good to the women's rights movement.

The principal negative effects that censoring "pornography" would have upon feminist values, which this Section discusses, are the following:

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<sup>166</sup> See *supra* notes 160-61; *infra* text accompanying notes 237-44.

<sup>167</sup> See McCormack, *supra* note 3, at 7 ("[T]he Court disbelieves women when they give their consent in a fictional context and disbelieves them when they say they did not give their consent in a rape case.").

<sup>168</sup> See *infra* text accompanying notes 298-344.

<sup>169</sup> See *infra* text accompanying notes 262-63.

1. Any censorship scheme would inevitably encompass many works that are especially valuable to feminists.
2. Any censorship scheme would be enforced in a way that would discriminate against the least popular, least powerful groups in our society, including feminists and lesbians.
3. Censorship is paternalistic, perpetuating demeaning stereotypes about women, including that sex is bad for us.
4. Censorship perpetuates the disempowering notion that women are essentially victims.
5. Censorship distracts from constructive approaches to countering anti-female discrimination and violence.
6. Censorship would harm women who make their living in the sex industry.
7. Censorship would harm women's efforts to develop their own sexualities.
8. Censorship would strengthen the power of the religious right, whose patriarchal agenda would curtail women's rights.
9. By undermining free speech, censorship would deprive feminists of a powerful tool for advancing women's equality.
10. Sexual freedom, and freedom for sexually explicit expression, are essential aspects of human freedom; denying these specific freedoms undermines human rights more broadly.

*A. Any Censorship Scheme Would Inevitably Encompass Many Works that Are Especially Valuable to Feminists*

The ACLU's brief in *Hudnut* noted the adverse impact of "pornography" censorship on feminist concerns. It explained that the Dworkin-MacKinnon model law, by proscribing sexually explicit depictions of women's "subordination," outlawed not only many valuable works of art and literature in general, but also many such works that are particularly important to women and feminists:

Ironically, much overtly feminist scholarly material designed to address the same concerns prompting the [ordinance] would fall within [its] sweeping definition of pornography. Prominent examples include Kate Millet's *The Basement*, a graphic chronicle of sexual torture; . . . works on rape, wife beating and domestic violence; court testimony and photographic evidence in rape and sexual assault cases; works like [Susan] Brownmiller's *Against Our Will: Men, Women and Rape*; and psychiatric literature describing sexual pathologies and

therapeutic modalities. Indeed, *Pornography: Men Possessing Women*, a work by Andrea Dworkin, one of the ordinance's original drafters, contains . . . so many . . . passages graphically depicting the explicit sexual subordination of women that it could easily be pornographic under the ordinance.<sup>170</sup>

I have been told that Andrea Dworkin acknowledges that much of her own work would be censored under her model law,<sup>171</sup> but that she considers this "a price worth paying" for the power to censor other works that would also be viewed as "pornography." Even assuming that Andrea Dworkin or other advocates of censoring "pornography" do in fact take this position, they certainly do not speak for all feminists on this point. Many may well believe that works such as Dworkin's, by depicting and deploring violence and discrimination against women, make invaluable contributions to redressing those problems.

The sweeping breadth of the Dworkin-MacKinnon model anti-"pornography" law is not the accidental result of poor drafting. To the contrary, their proposed law well reflects their view of the problem, and hence of its solution. In an exchange with Catharine MacKinnon, Professor Thomas Emerson made this point, as follows:

As Professor MacKinnon emphasizes, male domination has deep, pervasive and ancient roots in our society, so it is not surprising that our literature, art, entertainment and commercial practices are permeated by attitudes and behavior that create and reflect the inferior status of women. If the answer to the problem, as Professor MacKinnon describes it, is government suppression of sexual expression that contributes to female subordination, then the net of restraint must be cast on a nearly limitless scale. Even narrowing the proscribed area to depictions of sexual activities involving violence would outlaw a large segment of the world's literature and art.<sup>172</sup>

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<sup>170</sup> ACLU Brief, *supra* note 122, at 8a (footnotes omitted).

<sup>171</sup> In fact, after the 1992 Canadian Supreme Court decision that adopted the Dworkin-MacKinnon analysis of "pornography," Canadian customs officials confiscated two books written by Dworkin. See *infra* text accompanying notes 182-89.

<sup>172</sup> See Emerson, *supra* note 27, at 132.

*B. Any Censorship Scheme Would Be Enforced in a Way That Discriminate Against the Least Popular, Least Powerful Groups in Our Society, Including Feminists and Lesbians*

Vague censorship laws always rebound against the groups that hope to be “protected” by them. This is because such laws are enforced by the very power structure against which the disempowered censorship advocates seek protection. Given that the laws’ vague and open-ended terms require the enforcing authorities to make subjective, discretionary judgments, it should not be surprising that these judgments are unsympathetic to the disempowered and marginalized.

The phenomenon of disempowered groups being disproportionately targeted under censorship schemes that are designed for their benefit is vividly illustrated, for example, by the enforcement record of laws against “hate speech”—i.e., speech that expresses racial, religious, sexist, and other forms of invidious discrimination. In the U.S., recently implemented campus hate speech codes consistently have been used disproportionately to punish the speech of the very racial minority groups whose interests, according to the code proponents, should have been advanced by such codes.<sup>173</sup>

This recent American campus experience typifies a more long-term, worldwide pattern.<sup>174</sup> Censorship laws intended to “protect” minority groups have been enforced in a manner that penalizes disproportionately the speech of those very groups. This longstanding global pattern was documented in a 1992 book published in Great Britain by Article XIX, the International Centre Against Censorship, and the Human Rights Centre at the University of Essex. Drawing upon analyses of the experience in fourteen different countries, with various laws punishing racist and other hate speech, the book shows that such laws consistently have been used to suppress expression by members of racial and other minority groups. The book’s editor, who is Article XIX’s legal director, described this pattern:

The flagrant abuse of laws which restrict hate speech by the authorities . . . provides the most troubling indictment of such laws. Thus, the laws in Sri Lanka and South Africa have been used almost exclusively against the oppressed and politically weakest communities. . . .

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<sup>173</sup> See Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 Duke L.J. 484, 556-58 (1990).

<sup>174</sup> See *id.* at 556-57.

Selective or lax enforcement by the authorities, including in the UK, Israel and the former Soviet Union, allows governments to compromise the right of dissent and inevitably leads to disaffection and feelings of alienation among minority groups.<sup>175</sup>

Censorship of “pornography,” defined by Dworkin and MacKinnon as the sexually explicit depiction of women’s “subordination,” necessarily vests in government officials the power to impose on others their views about what forms of sexuality are politically or morally correct. The criteria for assessing “subordination” under the Dworkin-MacKinnon model statute accentuate the problem of vesting open-ended, discretionary power in enforcing authorities. These vague criteria are merely invitations for subjective, value-laden interpretations.<sup>176</sup>

Because of the inherently subjective nature of determinations as to which sexually explicit imagery is pleasurable or otherwise positive,<sup>177</sup> it is antithetical to feminism to impose censorship schemes that deprive individual women (and men) of the right to make these determinations for themselves. As Feminists for Free Expression stated in its letter to the Senate Judiciary Committee opposing the Pornography Victims’ Compensation Act:

It is no goal of feminism to restrict individual choices or stamp out sexual imagery. Though some women and men may have this on their platform, they represent only themselves. Women are as varied as any citizens of a democracy; there is no agreement or feminist code as to what images are distasteful or even sexist. It is the right and responsibility of each woman to read, view or produce the sexual material she chooses without the intervention of the state “for her own good.” We believe genuine feminism encourages individuals to

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<sup>175</sup> Sandra Coliver, *Hate Speech Laws: Do They Work?*, in *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination* 373-74 (Sandra Coliver ed., 1992); see also Kevin Boyle, *Overview of a Dilemma: Censorship Versus Racism*, in *Striking a Balance*, supra, at 3 (“The South African laws against racial hatred were used systematically against the victims of its racist policies. In Eastern Europe and the former Soviet Union laws against defamation and insult were vehicles for the persecution of critics who were often also victims of state-tolerated or sponsored anti-Semitism.”).

<sup>176</sup> For the precise criteria of the model law, see supra note 7. The problematic criteria include the following: “women are presented dehumanized as sexual objects”; “women are presented in postures or positions of sexual submission . . . or display”; “women’s body parts . . . are exhibited such that women are reduced to those parts”; “women are presented in scenarios of degradation”; and “[women are] shown as . . . inferior.”

<sup>177</sup> See supra text accompanying notes 133-44.

make these choices for themselves. This is the great benefit of being feminists in a free society.<sup>178</sup>

Even beyond the significant danger that censoring “pornography” poses to individual sexual choices in general, such censorship poses a special threat to any sexual expression that society views as unconventional. Censors would likely target “pornography” that conveys pro-feminist or pro-lesbian themes, because of its inconsistency with “traditional family values” or conventional morality.<sup>179</sup> For example, “pornography” “may convey the message that sexuality need not be tied to reproduction, men, or domesticity.”<sup>180</sup> It may extol sex for no reason other than pleasure, sex without commitment, and sexual adventure.

Years ago, feminist writer Erica Jong predicted that the enforcement of any “pornography” censorship scheme would probably target expression by and about feminists and others who challenge prevailing cultural norms, such as gay men and lesbians: “Despite the ugliness of a lot of pornography, . . . I believe that censorship only springs back against the givers of culture—against authors, artists, and feminists, against anybody who wants to change society. Should censorship be imposed . . . feminists would be the first to suffer.”<sup>181</sup>

Jong’s predictions came to pass in Canada, after the 1992 Canadian Supreme Court decision referred to above, which empowered the government to prosecute sexually explicit expression that is “degrading” or “dehumanizing” to women.<sup>182</sup> One of the first targets of the new law was a lesbian and gay bookstore, Glad Day Bookstore, and a magazine produced by lesbians for lesbians.<sup>183</sup> Not surprisingly, the police, prosecutors, and other government officials viewed this lesbian imagery as degrading.<sup>184</sup> They did not so view violent, misogynistic

<sup>178</sup> See FFE Letter, *infra* Appendix.

<sup>179</sup> See *supra* notes 75-77 (giving references to surveys regarding negative public attitudes toward feminism and homosexuality).

<sup>180</sup> FACT Brief, *supra* note 32, at 121.

<sup>181</sup> Mary Kay Blakely, *Is One Woman’s Sexuality Another Woman’s Pornography?*, Ms., Apr. 1985, at 37, 38 (quoting Erica Jong).

<sup>182</sup> See *supra* text accompanying note 164.

<sup>183</sup> See Chris Bearchell, *Gay Porn is Getting Skinned Alive*, Toronto Star, Jan. 15, 1993, at A23.

<sup>184</sup> See Prowse, *supra* note 77, at 25 (reporting that public opinion surveys reveal negative attitudes toward homosexuality).



imagery. Other actions on the part of Canadian authorities that hold censorship power reflect similar attitudes.<sup>185</sup>

Canada's gay and lesbian bookstores have been so conspicuously singled out under the new Canadian law that one of them initiated a lawsuit claiming that it had been subjected to governmental harassment.<sup>186</sup> After the lawsuit was instituted—and, some critics charge, specifically to blunt its allegations—Canadian officials broadened their enforcement efforts to include university bookstores and radical bookstores. CensorStop, a Canadian anti-censorship coalition, has charged that the officials are “really interested in controlling radical dissent.”<sup>187</sup> Whether or not this charge is actually justified, it is indisputable that the Canadian Supreme Court's adoption of the Dworkin-MacKinnon approach has given government officials a broad, discretionary weapon with which they could target radical dissent, should they so choose.

The Canadian experience has proven the sadly prophetic nature of Erica Jong's warnings in a particularly ironic development. Pursuant to their new-found authority to interdict at the border material that is “degrading” or “dehumanizing” to women, Canadian customs officials have confiscated several feminist works that Canadian bookstores sought to import from the United States, including two books that were written by Andrea Dworkin herself!<sup>188</sup> The irony of this predictable development was underscored by the following newspaper account:

In January [1993], [Canadian] Customs seized several books ordered by a Montreal bookstore. . . . Bookseller Stephane Gelinas got a Customs notice saying that the books . . . were obscene because they eroticized pain and bondage.

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<sup>185</sup> See Lynn King, *Censorship and Law Reform: Will Changing the Laws Mean a Change for the Better?*, in *Women Against Censorship*, supra note 15, at 79, 80-81 (stating that the Ontario Board of Censors, while asserting the purpose of protecting women, has exercised its discretionary power “not [to] eliminat[e] misogynist images but mainly [to] ensur[e] that explicit sexuality is avoided and traditional values upheld”); id. at 84 (stating that the Ontario Board of Censors censored a pro-feminist film); see also Kostash, supra note 139 (stating that although Canadian customs officers found reproductions of sexually explicit art in *Penthouse Magazine* obscene, they did not make the same finding with respect to a sexually explicit cartoon in the same magazine that depicted violence against a woman).

<sup>186</sup> See Pierre Berton, *How Otto Jelinek Guards Our Morals*, *Toronto Star*, May 29, 1993, at H3.

<sup>187</sup> Id.

<sup>188</sup> Id.

Gelinas had to laugh: . . . two [of the seized] books were written by prominent U.S. feminist Andrea Dworkin, who thinks pornography should be banned because it's hate literature against women.<sup>189</sup>

*C. Censorship is Paternalistic, Perpetuating Demeaning Stereotypes about Women, Including that Sex is Bad for Us*

Ironically, the Dworkin-MacKinnon effort to extirpate sexually explicit expression that, in their view, perpetuates demeaning stereotypes about women, itself perpetuates such demeaning stereotypes. One subordinating stereotype that is central to the feminist censorship movement is that sex is inherently degrading to women.

To emphasize that the feminist pro-censorship position rests upon traditional, stereotypical views disapproving sex and denying women's sexuality, anti-censorship feminists have characterized their own views as "pro-sex."<sup>190</sup> The basic contours of these opposing "anti-sex" and "pro-sex" positions—which are linked, respectively, to the pro- and anti-censorship positions—are delineated by three feminist scholars and activists as follows:

Embedded in [the feminist pro-censorship] view are several . . . familiar themes: that sex is degrading to women, but not to men; that men are raving beasts; that sex is dangerous for women; that sexuality is male, not female; that women are victims, not sexual actors; that men inflict "it" on women; that penetration is submission; that heterosexual sexuality, rather than the institution of heterosexuality, is sexist.

. . . It's ironic that a feminist position on pornography incorporates most of the myths about sexuality that feminism has struggled to displace.

. . . Underlying virtually every section of the [Dworkin-MacKinnon model law] there is an assumption that sexuality is a realm of unremitting, unequal victimization for women. . . . But this analysis is

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<sup>189</sup> Sarah Scott, *Porn Police: Who Decides What to Ban at the Border?*, *Gazette* (Montreal), Apr. 14, 1993, at A1; see also Albert Nerenberg, *Fear Not, Brave Canadian, Customs Stands on Guard for Thee*, *Gazette* (Montreal), Jan. 22, 1993, at A2 (reporting that the two books by Dworkin that were seized were *Pornography: Men Possessing Women* and *Women Hating*).

<sup>190</sup> See, e.g., Barbara Ehrenreich, *What Is This Thing Called Sex?*, *The Nation*, Sept. 24, 1983, at 245 (reviewing *Powers of Desire: The Politics of Sexuality* (Ann Snitow, Christine Stansell & Sharon Thompson eds., 1983)). For collections of "pro-sex" writings, see *Pleasure and Danger: Exploring Female Sexuality* (Carole S. Vance ed., 1984); *Powers of Desire: The Politics of Sexuality* (Ann Snitow, Christine Stansell & Sharon Thompson eds., 1983).

not the only feminist perspective on sexuality. Feminist theorists have also argued that the sexual terrain, however power-laden, is actively contested. Women are agents, and not merely victims, who make decisions and act on them, and who desire, seek out and enjoy sexuality.<sup>191</sup>

The “anti-sex” position of the pro-censorship feminists essentially posits a mutual inconsistency between a woman’s freedom and her participation in sexual relations with men. For example, both Dworkin and MacKinnon have argued that, in light of society’s pervasive sexism, women cannot freely consent to sexual relations with men. Dworkin makes this point in the most dramatic and extreme terms in her book *Intercourse*, which equates *all* heterosexual intercourse with rape.<sup>192</sup>

In contrast to the “anti-sex,” pro-censorship view that women’s freedom is undermined by their sexual relations with men, the “pro-sex,” anti-censorship position regards these phenomena as mutually reinforcing. Anti-censorship, “pro-sex” feminist Ann Snitow captured this contrast well:

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<sup>191</sup> Duggan et al., *supra* note 53, at 142-43, 151.

<sup>192</sup> Andrea Dworkin, *Intercourse* 137 (1987) (stating that “intercourse remains a means or the means of physiologically making a woman inferior”); see also Andrea Dworkin, *Pornography: Men Possessing Women* 23 (1981) (stating that “fucking is an act of possession—simultaneously an act of ownership, taking, force; it is conquering; it expresses in intimacy power over and against. . . . Fucking requires that the male act on one who has less power. . . . [T]he one who is fucked is stigmatized as feminine during the act even when not anatomically female.”); Hamill, *supra* note 23, at 138, 187 (stating that according to Dworkin, women who say they enjoy heterosexual lovemaking are “collaborators, more base in their collaboration than other collaborators have ever been, experiencing pleasure in their own inferiority, calling intercourse freedom”); Catharine A. MacKinnon, *Sexuality, Pornography, and Method: “Pleasure Under Patriarchy,” in Feminism and Political Theory* 207, 211 (Cass R. Sunstein ed., 1990) (stating that “submission eroticized defines [sexuality’s] femininity”); Clare McHugh, *In Feminist Abortion Book Squall, Bigfoot Dworkin Stops the Press*, N.Y. Observer, Oct. 26, 1992, at 1 (“In her 1989 book [Letters From a War Zone], Dworkin memorably defined heterosexual relations: ‘One of the differences between marriage and prostitution is that in marriage you only have to make a deal with one man’ and ‘Romance . . . is rape embellished with meaningful looks.’”); James R. Petersen, *Catharine MacKinnon: Again*, *Playboy*, Aug. 1992, at 37, 38-39 (providing the following quotes from MacKinnon about sexual intercourse: “If there is no inequality, no violation, no dominance, no force, there is no sexual arousal.”; “Women share . . . degradation in intimacy.”; “If you feel that you are going to be raped when you say no, how do you know that you really want . . . sex when you say yes?”; “[T]hey just want to hurt us, dominate us and control us, and that is fucking us”; “To be about to be raped is to be gender female in the process of going about life as usual.”). See also *infra* text accompanying note 205.

Ti Grace Atkinson [a pro-censorship, “anti-sex” feminist] says, “I do not know any feminist worthy of that name who, if forced to choose between freedom and sex, would choose sex.” [But] [w]hile women are forced to make such a choice we cannot consider ourselves free.<sup>193</sup>

The FACT brief in the *Hudnut* case stressed that the Dworkin-MacKinnon law perpetuates archaic, disempowering stereotypes about women and sexuality:

The challenged ordinance posits a great chasm—a categorical difference—between the make-up and needs of men and of women. . . . [It] presumes women as a class (and only women) are subordinated by virtually any sexually explicit image. It presumes women as a class (and only women) are incapable of making a binding agreement to participate in the creation of sexually explicit material. And it presumes men as a class (and only men) are conditioned by sexually explicit depictions to commit acts of aggression and to believe misogynist myths.<sup>194</sup>

The feminist pro-censorship movement inverts central tenets of the feminism of the 1960s and 1970s, which criticized the idea that sex degrades women as reflecting patriarchal, subordinating stereotypes. Like labor laws that many states passed in the early twentieth century, to “protect” women in the workplace,<sup>195</sup> censorship of “pornography” also aims to shelter women from our presumed innate vulnerability. As the Supreme Court said in a 1973 decision upholding women’s equality rights, such “protective” legislation reflected attitudes of “romantic paternalism” that, in practical effect, “put women, not on a pedestal, but in a cage.”<sup>196</sup>

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<sup>193</sup> Ann Snitow, *Retrenchment Versus Transformation: The Politics of the Antipornography Movement*, in *Women Against Censorship*, supra note 15, at 107, 120; see also Burstyn, supra note 25, at 180 (describing as the twin goals of feminism “freedom for women and sexual joy for all”).

<sup>194</sup> FACT Brief, supra note 32, at 33.

<sup>195</sup> See Judith A. Baer, *The Chains of Protection: The Judicial Response to Women’s Labor Legislation 29-33* (1978); Alice Kessler-Harris, *Out to Work: A History of Wage-Earning Women in the United States 181-89* (1982); *Women’s Work, Men’s Work: Sex Segregation on the Job 45* (Barbara F. Reskin & Heidi I. Hartmann eds., 1986).

<sup>196</sup> *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion). For example, regarding the adverse impact of one type of “protective” legislation, laws requiring eight-hour work days for women (but not for men), see Barbara Allen Babcock et al., *Sex Discrimination and the Law: Causes and Remedies* 36, 48, 267-68, 272-77 (1975); Elisabeth M. Landes, *The Effect of State Maximum-Hours Laws on the Employment of Women in 1920*, 88 J. Pol. Econ. 476 (1980) (arguing that these laws resulted in a loss of jobs for women in gender-integrated

A feminist legal scholar and historian has shown that the misogynistic stereotypes that contemporary pro-censorship feminists perpetuate by advocating censorship (as well as other "special" treatment of women) have even deeper historical roots than the early twentieth century "protective" labor legislation. She wrote:

When I first read Robin West's essay ["Jurisprudence and Gender"], I felt within me an undeniable resonance. Yet the "radical" theories she described did not accurately represent my own experiences or my observations of the men and women that I knew. . . .

It was only after rereading certain historical works . . . that I realized *why* these theories seemed so elemental to me. They were eerily reminiscent of the theories of sexuality and female personality of my Roman Catholic upbringing. . . . My experience was not the recognition of a dimly perceived truth, but the imperfect recollection of lies told to me in my childhood, which I since have consciously tried to forget.<sup>197</sup>

Because the Dworkin-MacKinnon views of women's sexuality and women's sex roles dovetail with traditional, religiously rooted views, feminist writer and activist Marcia Pally calls Dworkin, MacKinnon, and their supporters "right wing feminists" and compares them to the religious right:

Both groups propose that ridding society of sexual words and images will reduce rape, incest and battery. Right wing feminists would add sexual harassment to the list; religious fundamentalists would add interracial sex, homosexuality, AIDS and feminism.<sup>198</sup>

A recent article by Cathy Young also points out the "uncanny resemblance" between the religious right and pro-censorship feminists concerning sex, stressing that both camps see women as inevitable victims in terms of sex.<sup>199</sup> For example, Young compares the following two explorations of this theme from conservative writer Maggie Gallagher and Andrea Dworkin. In *Enemies of Eros*, Gallagher wrote:

jobs, probable wage depression for women in gender-segregated jobs, and a net loss of employment for immigrant women).

<sup>197</sup> Jeanne L. Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence*, 75 Iowa L. Rev. 1135, 1136 (1990).

<sup>198</sup> Marcia Pally, *The Soothing Appeal of Censorship*, 1993 *Writer's Yearbook* 80, 80 (on file with the Virginia Law Review Association); see also Hamill, *supra* note 23, at 138 (labeling Dworkin, MacKinnon, and their supporters "the New Victorians").

<sup>199</sup> See Cathy Young, *Victimhood is Powerful, Reason*, Oct. 1992, at 18, 21.

A man exploits a woman every time he uses her body for sexual pleasure while he is unwilling to accept the full burden of paternity. . . . That is to say, single men (and frequently married men) exploit women almost every time they make love. [The woman] may consent fully, knowledgeably, enthusiastically to her exploitation. That does not change the nature of the transaction.<sup>200</sup>

As Young noted, this statement by Gallagher, who is generally described as a right-wing anti-feminist,<sup>201</sup> bears an “uncanny resemblance”<sup>202</sup> to many statements by Dworkin, who is generally described as a “radical” or “left-wing” feminist.<sup>203</sup> The following example of Dworkin’s views underscores the accuracy both of Young’s comparison between Gallagher and Dworkin, and of Pally’s labeling Dworkin as “right-wing”:<sup>204</sup>

Physically the woman in intercourse is a space invaded, a literal territory occupied literally; occupied even if there has been no resistance; even if the occupied person said, “Yes, please, yes hurry, yes more.”<sup>205</sup>

#### *D. Censorship Perpetuates the Disempowering Notion that Women Are Essentially Victims*

Just as the pro-censorship movement views women as inevitably being victims in sexual matters, that movement also perpetuates the stereotype that women are victims in a more general sense. For example, feminist law professor Carlin Meyer has noted the pro-censorship feminists’ “general tendency to view women as actually, not merely portrayed as, submissive—as acted upon rather than acting; as objects

<sup>200</sup> Id. (quoting Maggie Gallagher, *Enemies of Eros* 260-61 (1990)).

<sup>201</sup> Id.

<sup>202</sup> Id. at 21.

<sup>203</sup> See Clare McHugh, *Not All Foes of A.C.L.U. Are on the Political Right*, N.Y. Observer, June 25, 1990, at 1 (describing Andrea Dworkin as a “radical feminist” and a “left-wing critic” of the ACLU).

<sup>204</sup> See Pally, *supra* note 198, at 3. In the same vein, writer Pete Hamill has labeled Dworkin, MacKinnon, and their pro-censorship followers “the New Victorians,” explaining: [Their] vision is descended from a basic Victorian assumption: All men are beasts and all women are innocents. Women fall into vice or degradation only at the hands of cruel, unscrupulous, power-obsessed men. They have no free will and never choose their own loss of grace.

Hamill, *supra* note 23, at 186.

<sup>205</sup> Young, *supra* note 199, at 21 (quoting Andrea Dworkin, *Intercourse* 133 (1987)).

of male will rather than subjects able to challenge or change cultural norms."<sup>206</sup>

As Cathy Young has observed, it is considered strategically advantageous from some perspectives to depict women as victims: "Victimhood is [p]owerful. Both feminists and antifeminists see advantages in keeping women down."<sup>207</sup>

On the other hand, though, growing numbers of feminists are recognizing that purveying the view of women as victims can backfire against gender equality.<sup>208</sup> This increasing realization was described by a female journalist as follows:

On issues from domestic violence to pornography, feminists are rethinking their emphasis on women as victims—and looking for new legal and political approaches to enable women to force social change. Fifteen years ago, Elizabeth Schneider helped develop the legal argument that battered women who killed husbands who had abused them for years were the victims, not the aggressors. Now she worries [that] battered women are victims of their victim status. [She said:] "Courts and society have glommed onto the victim image. . . . But it's a two-edged sword. Many battered women lose custody of their children because judges see them as helpless, paralyzed victims who can't manage daily life. And if a woman seems too capable, too much in charge of her life to fit the victim image, she may not be believed."<sup>209</sup>

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<sup>206</sup> Carlin Meyer, *Sex, Censorship, and Women's Liberation* 13-14 n.25 (unpublished manuscript on file with the Virginia Law Review Association).

<sup>207</sup> Young, *supra* note 199, at 18.

<sup>208</sup> See, e.g., Katie Roiphe, *Date Rape's Other Victim*, *N.Y. Times Mag.*, June 13, 1993, at 26 (criticizing expansive definitions of rape among many feminists, as including consensual sex induced by emotional pressure, for reinforcing traditional, ultimately anti-feminist, notions about women's equality and sexuality).

[The concept that rape includes all sexual encounters lacking "active consent"] cloaks retrograde assumptions about the way men and women experience sex. The idea that only an explicit yes means yes proposes that, like children, women have trouble communicating what they want. . . .

By viewing rape as encompassing more than the use or threat of physical violence to coerce someone into sex, rape-crisis feminists reinforce traditional views about the fragility of the female body and will. . . . The suggestion lurking beneath this definition of rape [as including "verbal coercion"] is that men are not just physically but also intellectually and emotionally more powerful than women.

*Id.* at 30; see also *id.* at 68 (stating that "[i]t is the passive sexual role that threatens us still, and it is the denial of female sexual agency that threatens to propel us backward").

<sup>209</sup> Tamar Lewin, *Feminists Wonder if It Was Progress to Become "Victims,"* *N.Y. Times*, May 10, 1992, at D6; see also McCormack, *supra* note 3.

*E. Censorship Distracts from Constructive Approaches to Reducing Discrimination and Violence against Women*

Like all censorship schemes, the feminist proposal to censor “pornography” diverts attention and resources from constructive, meaningful steps to address the societal problem at which the censorship is aimed—in this case, discrimination and violence against women. Feminist advocates of censoring “pornography”—along with feminist opponents of such censorship—are concerned about the very real, very disturbing societal problems of discrimination and violence against women. The focus on censoring “pornography,” though, diverts attention from the root causes of discrimination and violence against women—of which violent, misogynistic “pornography” is merely one symptom—and from actual acts of discrimination and violence.

For those with a more complex analysis of the manifold causes and reflections of women’s inferior societal status, the Dworkin-MacKinnon focus on “pornography” is at best myopic, and at worst blinding. As Canadian feminist Varda Burstyn has written:

[T]here has been, among the antipornography feminists, a series of subtle shifts in ideas about the forms and causes of women’s oppression. From an appreciation of the multidimensional reality of masculine dominance, vocal feminists have been increasingly narrowing their focus to one dimension: . . . pornography. Women’s attention has been diverted from the causes to the depictions of their oppression.<sup>210</sup>

The Dworkin-MacKinnon tunnel-visioned focus on “pornography” overlooks the many complex factors that contribute to sexism and violence against women in our society. As Professor Meyer observes:

It seems implausible, to say the least, that pornography is more centrally responsible either for rendering erotic or for making possible the actualization of male violence against women than are the ideologies and practices of religion, law, and science. These institutions far

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[W]e can see, among feminists, a shift from the politics of liberation to the politics of revenge, from the politics of empowerment to the politics of protection, from the politics of androgyny to the politics of essentialism, from regarding women as agentic to regarding women as vulnerable and passive.

Id. at 31.

<sup>210</sup> Varda Burstyn, *Political Precedents and Moral Crusades: Women, Sex and the State*, in *Women Against Censorship*, supra note 15, at 4, 25-26.



more deeply and pervasively undergird male domination of women.<sup>211</sup>

Furthermore, she notes, the Dworkin-MacKinnon focus on “pornography” as a central cause of sexism and violence also “under-emphasize[s] . . . institutions and practices—such as sports and militarism—in which male bonding in physically aggressive pursuits seems inevitably to spill into an erotica which ultimately targets women.”<sup>212</sup>

Proponents of censorship in all contexts have designed their censorship regimes to advance some important societal goal. In operation, though, censorship always is at best ineffective and at worst counter-productive in terms of actually advancing that goal. The reason is that, by focusing on expressions of the problem, censorship targets symptoms rather than causes; it does not address either the problem’s root causes or its actual manifestations. Consequently, censorship distracts from more constructive, more effective approaches.

### *1. Distraction from Real Causes of and Solutions to Gender Inequality*

Many Senators who supported the Pornography Victims’ Compensation Act, allegedly as a means to assist women, have not supported various constructive measures that would actually counter discrimination against women, including: the Family and Medical Leave Act;<sup>213</sup> government-funded day care; elimination of the damage cap on gender-based employment discrimination lawsuits; legislation to lift the “gag rule,” which prohibited the provision of information about abortion at federally funded family planning clinics; and government funding for abortions for poor women, under programs that subsidize poor women’s pregnancy and childbirth expenses.<sup>214</sup>

<sup>211</sup> Meyer, *supra* note 206, at 22-23.

<sup>212</sup> *Id.* at 32.

<sup>213</sup> Pub. L. No. 103-3, 107 Stat. 6 (Feb. 5, 1993).

<sup>214</sup> See Carole S. Vance, *New Threat to Sexual Expression: The Pornography Victims’ Compensation Act*, SIECUS Report, Feb./Mar. 1992.

The legislative records of conservative Republicans, such as [PVCA] cosponsors Senators Strom Thurmond (R-SC), Mitch McConnell (R-KY) and Charles Grassley (R-IA), show minimal support for initiatives that empower women or attack inequality. Their interest in women’s victimization is piqued, it seems, only when female “victims of pornography” can be used as a rationale to curtail sexually explicit speech.

*Id.* at 20, 21.

By asserting that “pornography” is a central cause—or even *the* central cause—of sex discrimination, pro-censorship feminists deflect energy and attention from the factors that feminist scholars and the U.S. Commission on Civil Rights have found to be the most significant causes of such discrimination: sex-segregated labor markets; systematic devaluation of work traditionally done by women; sexist concepts of marriage and family; inadequate income-maintenance programs for women unable to find wage work; lack of day care services and the premise that child care is an exclusively or largely female responsibility; barriers to reproductive freedom; and discrimination and segregation in education.<sup>215</sup>

Feminist sociologist Thelma McCormack has strongly denounced “the uninformed claim that pornography is in any way a factor” in causing gender inequality.<sup>216</sup> She derides this view as “an insult to social scientists and the broader intellectual community for whom structural equality is the crux of social justice and [who] have laboured to develop the knowledge that would clarify and deepen our understanding of it.”<sup>217</sup>

Professor McCormack has aptly described how those feminists who seek to censor “pornography” are mischanneling their energies. Rather than fighting the “*degradation*” of women that they see in “pornography,” she urges those who want to advance women’s equal-

<sup>215</sup> See FACT Brief, *supra* note 32, at 134-35. See American Civil Liberties Union, *Restoring Civil Liberties: A Blueprint for Action for the Clinton Administration* 66 (1992).

In the late 20th century, women in the United States are still second-class citizens in virtually all aspects of economic and public life. To end this second-class status, and to reach the ultimate goal of complete elimination of all barriers to women’s full economic, social and political equality, requires our society’s total commitment and concentrated effort.

. . . . All forms of employment discrimination against women must be eliminated, including pervasive wage discrimination, widespread occupational segregation, the “glass ceiling” on advancement, discrimination on the basis of pregnancy and childbearing capacity, rampant sexual harassment and all other forms of discrimination against women in the workplace.

All forms of discrimination against girls and young women in education must be eradicated at all levels. Women, especially poor women, must have equal access to affordable housing, food, health care, education, job training, child care, child support enforcement and other essential services.

*Id.*; see also Staff of U.S. Comm’n on Civil Rights, *Women and Poverty* (June 1974); Staff of U.S. Comm’n on Civil Rights, *Women Still in Poverty* (July 1979); U.S. Comm’n on Civil Rights, *Child Care and Equal Opportunity for Women* (June 1981).

<sup>216</sup> McCormack, *supra* note 3, at 43.

<sup>217</sup> *Id.*

ity to fight instead against the “*devaluation*” of women that permeates our mainstream culture.<sup>218</sup> She explains: “Devaluation means that if, by some strange set of circumstances, we could eliminate all forms of pornography . . . [women] would still be under-represented politically, and would still be culturally marginalized. The prohibition of obscenity . . . accomplishes nothing in the struggle for equality because it confuses symbolic degradation with instrumental devaluation.”<sup>219</sup>

## 2. *Distraction from Real Causes of and Solutions to Misogynistic Violence*

Just as the focus on “pornography” distracts from the real causes of gender discrimination, it also distracts from the real causes of anti-female violence. A comprehensive analysis of the literature on this issue concluded:

Leading feminists and the U.S. Commission on Civil Rights suggest that violence against women begins with educational and economic discrimination . . . . Men learn to consider women burdens, stiflers and drags on their freedom. Women, in turn, do not have the economic independence and access to day care that would enable them to leave abusive settings. Feminists also suggest that violence begins with the infantilization of women so that men hold them in contempt and see them as easily dismissed or lampooned and ready targets for anger.<sup>220</sup>

By arguing that exposure to “pornography” causes violent crimes against women, pro-censorship feminists dilute the accountability of men who commit these crimes by displacing some of it onto words and images, or those who create or distribute them. Referring to Suffolk County, New York, where a version of the Dworkin-MacKinnon model law was being considered, a feminist writer observed: “[T]he right-wing men were lining up out in Suffolk to say, ‘Hey, we like this idea. *Pornography* causes violence against women, not men!’ ”<sup>221</sup>

<sup>218</sup> *Id.* at 26-27.

<sup>219</sup> *Id.* at 26; see also *infra* text accompanying notes 286-90.

<sup>220</sup> Marcia Pally, *Sense and Censorship: The Vanity of Bonfires* 14 (1991) [hereinafter *Sense and Censorship*].

<sup>221</sup> See Lisa Duggan, *The Danger of Coalitions, Ms.*, Apr. 1985, at 47; see also FACT Brief, *supra* note 32.

Women Against Pornography describe[s] as victims of pornography married women coerced to perform sexual acts depicted in pornographic works, working women harassed on the job with pornographic images, and children who have pornography

The Senate Judiciary Committee's Minority Report on the Pornography Victims' Compensation Act emphasized that "pornography" censorship displaces responsibility from actual rapists and others who assault women. The committee members who opposed the PVCA explained that "the bill sends the wrong message to sex offenders. . . . Criminal defendants could use [this] to assert impaired or diminished capacity, available in many States as a defense to specific intent crimes such as rape."<sup>222</sup>

For the same reason, feminist law professor Nan Hunter suggests that, to convey its actual impact, the PVCA should be renamed the "Rapists' Exculpation Act."<sup>223</sup> As she explained, the Act's "porn-made-me-do-it" approach would severely set back the women's movement's efforts to ensure that our criminal justice system vigorously enforces laws criminalizing sexual assaults. Instead, it would again allow defenses to such crimes that are not allowed for other crimes:

Even in the most extreme cases, where materials can be construed as providing literal "how to" guidance in how to commit a crime [other than sexual assault], these materials have been treated as *evidence* of the *individual's* guilt, not as exculpation. To allow such a defense in a rape simply perpetuates the tradition of treating this crime as uniquely sympathetic and distinctively open to claims of extenuating circumstances that absolve the rapist.<sup>224</sup>

One response to the foregoing point might be that exposure to "pornography" should in fact be treated the same as exposure to any other kind of material, and that *all* such exposure should be consid-

forced on them during acts of child abuse . . . Each of these examples describes victims of violence and coercion, not of images. The acts are wrong, whether or not the perpetrator refers to an image. The most wholesome sex education materials, if shown to a young child . . . could be used in a viciously harmful way. The law should punish the abuser, not the image.

FACT Brief at 134.

<sup>222</sup> S. Rep. No. 372, 102d Cong., 2d Sess. 34 (1992).

<sup>223</sup> Nan D. Hunter, S. 1521: A Rapist's Exculpation Act? 1 (1992) (unpublished manuscript, on file with the Virginia Law Review Association).

<sup>224</sup> *Id.* at 14 (citations omitted). To show the general unavailability of even "how-to" materials as exculpatory factors, Hunter cites *State v. Austin*, Nos. CA-2674 & CA-2677, 1989 WL 123302 at \*1 (Ohio Ct. App. Oct. 12, 1989) (where defendant was charged with blowing up a pick-up truck and killing his brother-in-law, defendant's access to a manual that explained how to construct explosive booby traps was used to buttress the case against him), and *People v. Hanei*, 403 N.E.2d 16 (Ill. App. Ct. 1980) (where defendant's possession of book showing how to commit murder with the drug thallium was considered evidence that he was guilty of poisoning his father with that drug).

ered exculpatory evidence for defendants whose misconduct was allegedly triggered thereby. While this approach would certainly solve the problem of treating "pornography" and rape differently from all other materials and misconduct, it would create an even greater problem. Under such an approach, all criminals and tortfeasors could avoid liability for their misdeeds, and writers could potentially be deemed responsible for such misconduct. Feminist writers themselves could be held accountable for harm allegedly caused by their writings. As writer Pete Hamill explained: "The legal theory that endorses pornography-made-me-do-it, if accepted, would have no limits. Someone could claim that his family was destroyed as the result of published feminist theories attacking the family, and that feminist writers and their publishers must pay for the damage."<sup>225</sup>

Criminal defendants already have sought to reduce their punishments by relying on the Dworkin-MacKinnon analysis of "pornography." For example, a defendant who was convicted of a brutal rape and murder challenged the trial judge's imposition of the death penalty on the ground that the judge had failed to consider his extensive viewing of rape "pornography" and snuff films to be mitigating circumstances.<sup>226</sup> The defendant had argued that such viewing is akin to intoxication or mental disease or defect, rendering him unable to appreciate the criminality of his conduct. In rejecting this contention, the U.S. Court of Appeals for the Seventh Circuit stressed that such arguments would prevent the punishment of rapists and others who commit violence against women.<sup>227</sup>

In displacing responsibility from the men who commit violence against women onto some external factor, the current feminist censorship movement parallels an earlier feminist faction. As feminist law professor Nan Hunter notes, to single out "pornography" as women's archenemy is to:

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<sup>225</sup> Hamill, *supra* note 23, at 188.

<sup>226</sup> *Schiro v. Clark*, 963 F.2d 962, 972 (7th Cir. 1992).

<sup>227</sup> *Id.* ("Under [defendant's] theory pornography would constitute a legal excuse to violence against women."). For another example of a criminal defendant's attempted reliance on a "porn-made-me-do-it" defense, see *Commonwealth v. Mignogna*, 585 A.2d 1, 10 (Pa. Super. Ct. 1990) (noting that defendant claimed that he should not be held responsible for raping and killing two teenage girls because he became emotionally unstable as a result of being exposed to "pornography" at a store he had visited two or three times).

repeat[ ] the mistake of some of our foremothers, the leaders of the women's temperance movement who sought a ban on alcohol. Those women believed that alcohol caused much of men's violence against women, particularly domestic violence. . . . But we have learned from the work of anti-violence groups that alcohol is not the *cause* of violence against women; it is the *excuse* for it. The same is true of pornography.<sup>228</sup>

Those who are committed to assisting victims of misogynistic violence—rather than to treating their assailants as “victims” of “pornography”<sup>229</sup>—advocate constructive alternative measures in place of demonizing “pornography.” Dr. Judith Becker, a professor of psychiatry and psychology who has extensive research and clinical experience in studying sexual abuse and sexual assault, has consistently opposed efforts to restrict “pornography.” Instead, she advocates “government funding for services for the victims of sexual assault and abuse, as well as funding of research to discover the causes and prevention of sexual violence.”<sup>230</sup>

### 3. “*Blaming the Book*” and “*Blaming the Victim*”

Censorship's “blame-the-book” attitude closely parallels a “blame-the-victim” attitude that has characterized some perceptions of female victims of sexual assault, and that until recently was enshrined in American law. While the assaulted woman herself used to be blamed for the assault if, for example, her skirt was “too short” or her sweater was “too tight,”<sup>231</sup> now it is the woman who poses for a sexually suggestive photograph or film who is blamed.<sup>232</sup>

<sup>228</sup> Hunter, *supra* note 223, at 10-11; see also *infra* text accompanying note 254.

<sup>229</sup> *Id.* at 13 (stating that “perhaps the biggest beneficiaries of this ‘pornography victims compensation act’ will be the newest ‘victims’—men who commit rape and assault”)

<sup>230</sup> Letter from Dr. Judith V. Becker, Professor of Psychiatry and Psychology, to Senator Hank Brown 1-2 (Apr. 3, 1992) (on file with the Virginia Law Review Association); see also Varda Burstyn, *Beyond Despair: Positive Strategies, in Women Against Censorship*, *supra* note 15, at 152 (describing non-censorship measures designed to decrease discrimination and violence against women); text accompanying note 153 (describing the ACLU policy that advocates measures to counter violence against women).

<sup>231</sup> See generally Susan Estrich, *Rape*, 95 *Yale L.J.* 1087, 1173-74 (1986) (discussing consideration by juries of victims' “contributory behavior”).

<sup>232</sup> See *Sense and Censorship*, *supra* note 220, at 31 (stating that “according to antipornography logic, it is still the woman's fault—[i]f not the woman in the room, then the woman on the screen, calendar or wall”); see also Hunter, *supra* note 223.

If we accept the “pornography made me do it” premise, we are once again saying that the rapist is not culpable. . . . If porn arouses and arousal causes rape, then any agent

What "blaming the book" and "blaming the victim" have in common is the creation of a scapegoat. They divert attention away from the real problem, which is the men who discriminate or commit violence against women, and they ignore the real solution, which is the imposition of measures to prevent and punish such actions.<sup>233</sup>

The appeal of any censorship movement, including the one directed at "pornography," is understandable insofar as it appears to offer a simple "solution" to complex, troubling societal problems. Citizens who are concerned about such problems are attracted to measures that promise a "quick fix," and politicians likewise are inclined to endorse such popular approaches, especially because censorship is a relatively inexpensive strategy. In contrast, measures that are designed to redress the root causes of these complex societal problems are not only more complex themselves, but also less dramatic and more expensive than censorship. As one feminist opponent of censorship aptly noted, "[C]ensorship is the cheapest item on the shopping list of the women's movement."<sup>234</sup>

Accordingly, for feminists frustrated by the intractability of gender-biased attitudes and institutions, the scapegoating of "pornography" provides a refreshingly simple target.<sup>235</sup> Marcia Pally observed, "Sus-

of arousal becomes culpable. . . . [W]e will have re-opened the door to the accusation that a woman can cause her own rape.

Id. at 19.

<sup>233</sup> The connection between the traditional right-wing and right-wing feminists, see *supra* text accompanying notes 51-57, is also apparent in this context. In the spring of 1992, then-Vice President Dan Quayle criticized the title character of the television show "Murphy Brown" for choosing to become a single mother. He said the character had contributed to an erosion of "family values," which he said was to blame for the rioting that had recently occurred in Los Angeles. See Neil A. Lewis, *The 1992 Campaign: Candidate's Wife; Back to College for an Image Makeover*, N.Y. Times, May 30, 1992, at A9. Thus Quayle, a spokesman of the traditionalist right wing, scapegoated a woman depicted in a television program. This scapegoating is reminiscent of the right-wing feminists' scapegoating of the women depicted in pictures and films: both factions blame the woman on the screen (or on the page) for causing violence.

<sup>234</sup> Lisa Steele, *A Capital Idea: Gendering in the Mass Media*, in *Women Against Censorship*, *supra* note 15, at 58, 61 (noting that many politicians fail to support such basic feminist goals as reproductive rights and equal pay, but try to demonstrate "concern" for such issues by supporting censorship of "pornography").

<sup>235</sup> Marcia Pally, *X-Rated Feminism: Ban Sexism, Not Pornography*, *The Nation*, June 29, 1985, at 794, 795; see also Burstyn, *supra* note 230.

Feminists who oppose censorship—a strategy that takes little time or reflection to expound—do not have another slogan, another quick solution, another panacea to offer in its place. We do have a comprehensive list of tasks we must carry out to bring sexism

picion of sex is the universal culprit and the oldest quick fix in the western tradition."<sup>236</sup>

Alas for those of us who would like nothing better than to find a simple, fast route to gender equality, censoring "pornography" is instead a detour or a dead end. Members of the 1970 Presidential Commission on Obscenity and Pornography recognized this dilemma, finding no credible evidence of a causal connection between sexually explicit expression and actual crimes:

We would have welcomed evidence relating exposure to erotica to delinquency, crime and anti-social behavior, for if such evidence existed we might have a simple solution to some of our most urgent problems. However, this is not only to deny the facts, but also to delude the public by offering a spurious and simplistic answer to highly complex problems.<sup>237</sup>

#### *F. Censorship Would Harm Women Who Make a Living in the Sex Industry*

The Dworkin-MacKinnon approach to sexually oriented expression would undermine the interests of women who choose to make their living in the sex industry in several respects. Most obviously, by seeking to ban major aspects of this industry, the Dworkin-MacKinnon regime would deprive women of an option that many now affirm they have freely chosen.<sup>238</sup>

Moreover, as even feminist censorship advocates recognize, the practical impact of their approach would not be to prevent the production of sexually explicit expression altogether, but rather simply to

and violence to an end. Working on any one of these is more helpful—immediately, not in the distant future—than supporting censorship of any kind today, for these tasks get at the structural basis of sexism and violence, and thus ensure that we will have a future.

Id. at 179.

<sup>236</sup> Pally, *supra* note 198, at 24; see also Carole Vance, *supra* note 214.

The [PVCA] shifts responsibility for sex crimes from the perpetrator to third parties in a manner we would find improper and ludicrous for any non-sexual crime. . . . That this bill could seem even momentarily plausible to the Senate Judiciary Committee suggests something about the exceptional and demonized status of sexuality and sexual speech in our culture.

Id. at 20.

<sup>237</sup> Commission on Obscenity and Pornography, Report (1970). For more information about this Commission, as well as other governmental commissions studying sexually explicit speech, see *infra* note 302.

<sup>238</sup> See *supra* text accompanying notes 160-67.



drive that production underground.<sup>239</sup> In consequence, the women who participate in producing sexually oriented materials would be more subject to exploitation and less amenable to legal protection. The Dworkin-MacKinnon approach also deprives women who pose for sexually explicit works of an important tool for guarding their economic and other interests because it deems women incompetent to enter into legally binding contracts regarding the production of such works.<sup>240</sup>

In contrast, under a non-censorship regime, individual women, or organized groups of women, could seek improved compensation and other working conditions, to protect their health, safety, and welfare, through contractual negotiations.<sup>241</sup> Additionally, governmental regulation could provide these protections for sex industry workers.

For the foregoing reasons, it is not surprising that virtually all of the organized workers in sex trades have opposed schemes to censor "pornography."<sup>242</sup> It is also not surprising that sex industry workers widely perceive the feminist anti-"pornography" movement as censoring their occupational choices and undermining their interests both in making such choices and in improving their terms and conditions of employment.<sup>243</sup> As stated by Dr. Leonore Tiefer, a professor of psychology who specializes in clinical and research work on sexuality: "These women have appealed to feminists for support, not rejection. . . . Sex industry workers, like all women, are striving for

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<sup>239</sup> See *infra* text accompanying notes 291-93.

<sup>240</sup> See *supra* notes 166-67.

<sup>241</sup> See Charles I. Nero, *Free Speech or Hate Speech: Pornography and Its Means of Production*, 2 *Law & Sexuality* 3, 6 (1992).

[M]aking pictorial pornography illegal may actually hurt the performers and models who make a living in it. British psychologist Lynne Segal notes that "sex workers themselves have almost always objected to others' attempts to save them from such forms of 'exploitation,' knowing full well that the economic alternatives open to them are likely to be no less, indeed perhaps a very great deal more, exploitative." African-American porno actress Angel Kelly made the point that making pornography illegal hurts the performers [because it] prevents the workers from demanding better wages and working conditions. Also, the [Meese Pornography Commission Report] included statements from sex workers that coercive practices most often happen in "home-made, noncommercial" pornography.

*Id.* (citations omitted).

<sup>242</sup> *Good Girls/Bad Girls: Feminists and Sex Trade Workers Face to Face* 79-144 (Laurie Bell ed., 1987).

<sup>243</sup> *Id.*

economic survival and a decent life, and if feminism means anything it means sisterhood and solidarity with these women."<sup>244</sup>

*G. Censorship Would Harm Women's Efforts to Develop Their Own Sexuality*

As each successive wave of the women's movement has recognized, sexual liberation is an essential aspect of what has been called "women's liberation." Feminist law professor Carlin Meyer explains that the Dworkin-MacKinnon analysis strongly supports the conclusion that gender equality and sexual freedom are closely interconnected:

If [feminist advocates of censoring "pornography"] are right that sex is central to patriarchal control of women, then freedom to explore it is crucial to women's ability to achieve change. Precisely to the extent that sexuality has historically been a crucial site of repression and oppression for women, it is critically important to women's liberation.<sup>245</sup>

Conversely, throughout history, opponents of women's rights have sought to limit the production and dissemination of information about women's sexuality.<sup>246</sup> By censoring sexually explicit words and imagery, the Dworkin-MacKinnon movement shores up the efforts of its right-wing allies to deprive women of information important to developing their own sense of sexual and gender-role identity. On an even more basic level, such censorship schemes would deprive women of vital information concerning sexuality and health. Accordingly, feminist anthropologist Carole Vance predicted that if the Pornography Victims' Compensation Act were adopted, conservatives would utilize it to target sexuality educators, sexologists, and HIV/AIDS educators.<sup>247</sup>

Dr. Leonore Tiefer, who believes that "women are in more danger from the repression of sexually explicit materials than from their expression,"<sup>248</sup> grounds that conclusion in large part on the fact that

<sup>244</sup> Leonore Tiefer, *On Censorship and Women*, *American Theatre*, Jan. 1991, at 50, 51.

<sup>245</sup> Meyer, *supra* note 206, at 156.

<sup>246</sup> See *infra* text accompanying notes 270-80.

<sup>247</sup> See Vance, *supra* note 214, at 21.

<sup>248</sup> Tiefer, *supra* note 244, at 50.

such materials are especially important for women's "struggl[e] to develop their own sexualities . . . ." <sup>249</sup> She explains:

We need the freedom for new female sexual visions to inspire our minds and practices away from the ruts worn by centuries of religious inhibition, fear of pregnancy and disease, compulsory heterosexuality, lies and ignorance of all kinds.

. . . Female sexuality is a joke without freely available information and ideas. <sup>250</sup>

Censoring "pornography" would also stultify discussions and explorations of female sexuality by women, <sup>251</sup> including by female artists. As one woman artist stated: "Censorship can only accentuate the taboos that already surround women's open exploration of their sexuality. There are too many other obstacles now in place to women becoming artists or writers, or even speaking out publicly, without inviting the judicial control of censorship." <sup>252</sup>

#### *H. Censorship Would Strengthen the Religious Right, Whose Patriarchal Agenda Would Curtail Women's Rights*

As discussed above, the traditional, right-wing groups that have exercised much political power since 1980 have lent that strength to the feminist pro-censorship faction by using its rhetoric in an attempt to justify various censorship measures. <sup>253</sup> The feminist and right-wing advocates of censoring "pornography" have a symbiotic relationship. Thus, just as the right-wing activists have reinforced the influence of the pro-censorship feminists, so too, the pro-censorship feminists have strengthened the political power of the religious right.

History teaches that such a symbiotic relationship between those who view themselves as social reformers and those with more traditional values redounds to the reformers' disadvantage. Professor Wal-

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*; see also Sallie Tisdale, *Talk Dirty to Me: A Woman's Taste for Pornography*, *Harpers Mag.*, Feb. 1992, at 37, 39 ("For young women, porn may be important not so much because of its information about sex, but because it is about sexual parameters, the bounds of the normal, and provides not only only reassurance but permission to *be* sexual.").

<sup>251</sup> See Winkler, *supra* note 31, at A8 (quoting Carole Vance as stating, "Women have only recently been allowed to talk about their own sexuality. The anti-pornography crusade silences them, as well as men.").

<sup>252</sup> Anna Gronau, *Women and Images: Toward a Feminist Analysis of Censorship*, in *Women Against Censorship*, *supra* note 3, at 91, 97; see also *supra* text accompanying note 3.

<sup>253</sup> See *supra* text accompanying notes 51-57.

ter Kendrick concludes his powerful study of "pornography" in modern culture with the following lament about the failure of current feminist censorship advocates to heed these historical lessons:

The most dismaying aspect of the feminist antipornography campaign is its exact resemblance to every such effort that preceded it, from . . . that of Comstock and all the Societies for the Suppression of Vice, to the modern vigilantism of Leagues and Legions of Decency. . . . If the twisted history of "pornography" shows nothing else, it shows that forgetfulness of history is the chief weapon in the armory of those who would forbid us to see and know.<sup>254</sup>

The Dworkin-MacKinnon faction has ignored the specific lesson from this history: that when women's rights advocates form alliances with conservatives over such issues as "pornography" or "temperance," they promote the conservatives' anti-feminist goals, relegating women to traditional sexual and gender roles.<sup>255</sup> Feminist historian Judith Walkowitz drew this conclusion. She wrote an award-winning book about such a misalliance between feminists and traditionalists in late nineteenth century England,<sup>256</sup> when both groups sought to protect young girls from prostitution. Warning contemporary feminists to be wary of repeating their foremothers' mistakes, Walkowitz stressed that the earlier feminists' "efforts were ultimately taken over by a repressive coalition that passed sweeping sexual legislation that repressed women. That provides a lesson for politics today."<sup>257</sup>

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<sup>254</sup> Walter Kendrick, *The Secret Museum: Pornography in Modern Culture* 239 (1987).

<sup>255</sup> See Leonore Tiefer, "Freedom's Not a Dirty Word: Some Harms *To Women* of Restrictions on Sexually Related Expression," Address Delivered at the National Coalition Against Censorship Meeting 5-7 (May 17, 1990) (manuscript on file with the Virginia Law Review Association); accord Burstyn, *supra* note 210, at 25 ("The convergence between conservatism and important sectors of feminism [concerning 'pornography'] has offered politicians and bureaucrats a wonderful opportunity to undermine feminism while appearing its champions.").

<sup>256</sup> Judith R. Walkowitz, *Prostitution and Victorian Society: Women, Class and the State* (1980).

<sup>257</sup> See Winkler, *supra* note 31, at A8; see also Tiefer, *supra* note 255 (commenting on the historical incidents described by Walkowitz, *supra* note 256, at 246-56).

Once the tide of sexual repression gets rolling, it taps historic wellsprings of anxiety and ignorance, and sweeps all sexual and gender progress before it. Feminists ended up with a social purity movement that burned Zola and Balzac as obscene, that attacked music halls and nude painting, that suppressed birth control literature, that eliminated women's local control of prostitution and created a system of male-run brothels in the cities, and that affirmed the doctrine of female passionlessness and male lust that endures [un]til today.

The historic pattern described by Professors Kendrick and Walkowitz already has repeated itself during the past decade. As discussed above, the Dworkin-MacKinnon movement has provided rhetoric and supporters that right-wing groups have effectively used to enhance their own influence, which is then exerted to undermine the women's rights movement.<sup>258</sup> As Professor Meyer has concluded:

[The Dworkin-MacKinnon] strategy significantly empowers conservative governmental and private sector groups who seek to control women's bodies and sexuality. . . . Indeed, . . . it has already increased censorship in ways detrimental to women, both by directly strengthening conservative pro-censorship forces and by fostering the twin notions that sexuality and sexual display are dangerous and evil, and that socio-sexual problems can be cured by quick-fix, law and order approaches.<sup>259</sup>

*I. By Undermining Free Speech, Censorship Would Deprive Feminists of a Powerful Tool for Advancing Women's Equality*

Because free speech is a powerful tool for advancing women's equality, and because censorship consistently has been used to undermine women's rights, advocates of such rights have far more to lose than to gain from any censorship scheme. For example, free speech has proven to be an effective ally even of feminism's anti-"pornography" faction; they and others have successfully used "pornography" itself, as well as other expression, to counter misogynistic attitudes.

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Id. at 7.

<sup>258</sup> See *supra* text accompanying notes 51-57.

<sup>259</sup> Meyer, *supra* note 206, at 110; see also Tiefer, *supra* note 255.

[S]uppressing male pornography and explicit sexual materials will harm women by strengthening the power of proponents of the religious Right, whose patriarchal agenda is to enforce traditional sexual values and gender roles across the board, and who claim every victory against "smut" . . . as a victory for "family values" . . . . And every victory for the religious Right harms feminism. Their agenda remains the same whatever they call it—barefoot and pregnant in the kitchen; returning women to the years before the women's movement demanded and won the right to abortion, contraception, mandatory sex education, equal opportunities in education . . . , accessible day care, women's health centers, . . . .

Tiefer, *supra* note 255, at 51.

### 1. *Anti-“Pornography” Movement’s Use of “Pornography”*

I have already noted one positive impact of free speech in the women’s rights context: the fact that anti-“pornography” activists have effectively utilized their free speech rights—including, specifically, the right to display “pornography”—to galvanize public concern about the ongoing problems of anti-female discrimination and violence, and to heighten public awareness that some sexually oriented expression may convey misogynistic messages.<sup>260</sup> To the extent that censorship would make such images less visible, the protest against sexism would be weakened. As feminist filmmaker Anna Gronau explained:

The recent rise of violent pornography has coincided with increased power on the part of women. Censoring this material, I believe, only abets those who seek a return to the former distribution of power, for such action will remove the public proof that violence and other wrongs against women continue to exist in society. We may, once again begin to doubt our perceptions; censorship seeks to hide the evidence of sexism, silencing those who try to confront it.<sup>261</sup>

### 2. *Effect of Debriefings in Laboratory Studies Regarding the Impact of Exposure to “Pornography”*

The social science studies as to whether there is any causal connection between exposure to “pornography” and the commission of actual violence against real women demonstrate another positive impact of free speech protection specifically for “pornography.” Extensive and widely cited experiments by Edward Donnerstein and other researchers involved intensively exposing male college students to violent, misogynistic, sexually oriented films, depicting women as welcoming rape. Shortly after this concentrated exposure, the experimental subjects temporarily revealed attitudinal changes that made them more receptive to adverse stereotyping of women, including the “rape myth” that women really want to be raped.<sup>262</sup> However, when

<sup>260</sup> See *supra* text accompanying notes 148-50.

<sup>261</sup> Gronau, *supra* note 252, at 96.

<sup>262</sup> Edward Donnerstein, Daniel Linz & Steven Penrod, *The Question of Pornography: Research Findings and Policy Implications* 180-85 (1987). It should be stressed that these data show at most that exposure to aggressive or violent sexually explicit images may lead to short-term attitudinal changes and provide no evidence that exposure to such images increases the probability that the viewer will actually commit harmful *acts*.

the researchers followed the massive exposure to these violent, misogynistic films with debriefing sessions in which the college men were exposed to materials dispelling the rape myth,<sup>263</sup> the net impact of their exposure to the full range of expression (both the violent, misogynistic films and the pro-feminist material) was striking—the college men had more positive, less discriminatory, and less stereotyped attitudes toward women than they had before the experiment. Moreover, the combined exposure to misogynistic and feminist materials reduced negative attitudes even more effectively than exposure to the latter alone.<sup>264</sup>

The efficacy of “counterspeech” to mitigate the temporary attitudinal impact of exposure to violent “pornography” has been demonstrated by several studies.<sup>265</sup> In fact, the Surgeon General’s Report that was specifically requested by the Meese Pornography Commission<sup>266</sup> recognized that such educational strategies could effectively counteract any negative attitudinal impact that viewing violent “pornography” might temporarily have.<sup>267</sup>

The foregoing experience in the “pornography” context is completely consistent with a central tenet of U.S. free speech jurisprudence: that the appropriate antidote to speech with which we disagree, or which offends us, is more speech.<sup>268</sup> Consistent with this general premise and with his own experimental findings, Professor

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<sup>263</sup> *Id.* at 180-85.

<sup>264</sup> See, e.g., Neil Malamuth & Edward I. Donnerstein, *The Effects of Aggressive-Pornographic Mass Media Stimuli*, in *15 Advances in Experimental Psychology* 103, 129 (1982); Donnerstein, *supra* note 262, at 180-85.

<sup>265</sup> See Marcia Pally, *Sense and Censorship: The Vanity of Bonfires: Resource Materials on Sexually Explicit Material, Violent Material and Censorship: Research and Public Policy Implications* 34-36 (1991) [hereinafter *Resource Materials*].

<sup>266</sup> See *id.* at 13.

<sup>267</sup> For example, Marcia Pally states:

Several studies have shown that presentations outlining the ways that violent sexual material can foster or reinforce incorrect beliefs or negative attitudes have been able to prevent the expected results of exposure. In other words, educating people about the possible effects of exposure, in conjunction with exposure, appears to reduce or eliminate the shifts in attitudes that are usually seen after exposure.

*Id.* at 34 (citing the Report of the Surgeon General’s Workshop on Pornography and Public Health, 50 (1986)).

<sup>268</sup> For classic expressions of this central tenet of U.S. free speech jurisprudence, see *supra* note 145.

Donnerstein has concluded, "Censorship [of "pornography"] is not the solution. Education, however, is a viable alternative."<sup>269</sup>

3. *Free Speech Consistently Has Been an Important Ally of the Women's Rights Movement; Censorship Consistently Has Been Its Enemy*

There is a broader reason why free speech is especially precious to feminists: as Judge Sara Evans Barker stressed in *Hudnut*,<sup>270</sup> and as Professor Thelma McCormack stressed in this Essay's opening quotation,<sup>271</sup> feminists, like all who seek social change and equality, are especially dependent on free expression. Conversely, those who seek to repress women's rights consistently have used censorship as *their* tool. This has been true from the nineteenth-century Comstock Act,<sup>272</sup> which banned the distribution of information about birth control, to the recently revoked "gag rule," which banned the dissemination of information about abortion at federally funded family planning clinics.<sup>273</sup>

Significantly, these censorship efforts often have linked the suppression of sexually oriented material with the suppression of material important to women's rights—namely, information regarding women's health and reproductive freedom. For example, the Comstock Act banned both sexually oriented material and material related to contraception or abortion.<sup>274</sup> Accordingly, the writings of feminist and birth control advocate Margaret Sanger were banned under that

<sup>269</sup> Edward I. Donnerstein & Daniel G. Linz, *Debate on Pornography*, Film Comment, Dec. 1984, 34, 35.

<sup>270</sup> See supra note 22 and accompanying text.

<sup>271</sup> See supra text accompanying note 3.

<sup>272</sup> 18 U.S.C. §§ 1461, 1462 (1982) & 19 U.S.C. § 1305 (1982 & Supp. II 1984). The Act's official title was "An Act for the Suppression of Trade in, and Circulation of, [O]bscene Literature and Articles of [I]mmoral Use." 17 Stat. 598 (1873). In effect from 1873 until 1971, the Act was used to suppress information about contraception and abortion. See, e.g., *United States v. One Book, Entitled "Contraception,"* 51 F.2d 525 (S.D.N.Y. 1931); *United States v. One Obscene Book Entitled "Married Love,"* 48 F.2d 821 (S.D.N.Y. 1931).

<sup>273</sup> Regulations of the Department of Health and Human Services, 42 C.F.R. §§ 59.8, 59.10 (1992) (suspended by 58 Fed. Reg. 7462 (1993); repealed by 58 Fed. Reg. 7455, (1993)). The "gag rule," imposed in 1988, was repealed by President Clinton on January 22, 1993. See 58 Fed. Reg. 7455 (1993); Robin Toner, *Settling in: Easing Abortion Policy*, N.Y. Times, Jan. 23, 1993, at A1.

<sup>274</sup> The statute provided:

No obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or any article or thing designed or intended for the



law as "obscene." Sanger's campaign to convey accurate sexual information began in 1912 with two articles in a New York City newspaper. The first, entitled "What Every Mother Should Know," ran without incident, but the Post Office barred the second, "What Every Girl Should Know." It contained no information on birth control, but postal officials were offended by Margaret Sanger's explanation of venereal disease and her use of words such as "gonorrhoea" and "syphilis." Consequently, the newspaper's next issue contained the following announcement: "What Every Girl Should Know: 'NOTHING!' By order of the Post Office Department.'" <sup>275</sup>

The use of censorship laws aimed at sexually explicit expression to stifle information about women's sexuality, women's health, and women's reproductive choices has continued to the present day. In addition to the "gag rule's" censorship of accurate information about abortion, <sup>276</sup> frequent targets of censorship efforts include such feminist health guides as *Our Bodies, Our Selves*. <sup>277</sup>

Ominously, Andrea Dworkin herself recently has sought to prevent the publication, distribution, and sale of a book about women's reproductive health, which was authored by two feminists, because she disagreed with one point they made. <sup>278</sup> Likewise, in the fall of 1992, students at the University of Michigan Law School, where Catharine MacKinnon teaches, removed an exhibit of works by seven feminist artists, five of whom were female, because Dworkin-MacKinnon followers objected to the perspectives that at least one of these works

prevention of conception or procuring of abortion, nor any article or thing intended or adapted for any indecent or immoral use or nature . . . shall be carried in the mail . . . 18 U.S.C.S. § 1461 (1993). Each violation of the law could be punished through a fine of \$100 to \$5,000 or through imprisonment at hard labor for one to ten years. *Id.*

<sup>275</sup> See Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 *Wm. & Mary L. Rev.* 741, 766 (1992) (citing David M. Kennedy, *Birth Control in America: The Career of Margaret Sanger* 16 (1970)).

<sup>276</sup> See *supra* text accompanying note 273.

<sup>277</sup> See also *Salvail v. Nashua Bd. of Ed.*, 469 F. Supp. 1269, 1275-76 (D.N.H. 1979) (holding that the removal of *Ms.* magazine from a high school library violated the First Amendment). Similarly, Carole Vance has predicted that if the Pornography Victims' Compensation Act were to become law, conservatives would attempt to make its major targets sexuality educators, sexologists, and HIV/AIDS educators. Vance, *supra* note 214, at 21.

<sup>278</sup> See McHugh, *supra* note 192, at 1 ("That the radical anti-pornography crusader and novelist would interfere with the publishing of a book written by fellow travelers in the feminist movement—and yet not contact the authors to discuss her objections directly—strikes some women's rights advocates as, well, misogynist.").

conveyed about prostitution and “pornography.”<sup>279</sup> These episodes vividly demonstrate that Dworkin-MacKinnon style censorship laws, along with their predecessors, would likely be wielded to suppress vital information about women’s health, women’s reproduction, and women’s sexuality.<sup>280</sup>

*J. Freedom for Sexually Explicit Expression Is an Essential Aspect of Human Freedom; Restricting It Undermines Human Rights More Broadly*

What is at issue in the effort to defend freedom for those who choose to create, pose for, or view “pornography” is not only freedom for this particular type of expression, but also freedom of expression in general. Ultimately, though, the stakes are even higher. As compellingly explained by the statement of Gary Mongiovi at the outset of this Essay,<sup>281</sup> sexual expression is an integral aspect of human freedom more broadly. Accordingly, as he reminds us, “[a]ttempts to stifle sexual expression are part of a larger agenda directed at the suppression of human freedom and individuality more generally.”<sup>282</sup>

Throughout history, down to the present day, the suppression of sexually explicit speech characterizes regimes that repress human rights in general. As writer Pete Hamill commented:

Recent history teaches us that most tyrannies have a puritanical nature. The sexual restrictions of Stalin’s Soviet Union, Hitler’s Germany and Mao’s China would have gladdened the hearts of those Americans who fear sexual images and literature. Their ironfisted

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<sup>279</sup> See Lewin, *supra* note 29, at B16. The extent of Dworkin’s and MacKinnon’s roles in the removal is not clear, but it is known that they conferred with the students and that MacKinnon originally conveyed the complaint about the exhibit to the students. Conversation with Marjorie Heins, Director, ACLU Arts Censorship Project, Apr. 23, 1993. Heins represented the artists in this case, who negotiated an agreement with the University of Michigan Law School under which the exhibit will be reinstated. Rosalva Hernandez, U-M Agrees to Permit Art Exhibit on Prostitution, *Detroit News*, Mar. 18, 1993, at 3B.

<sup>280</sup> See Lewin, *supra* note 29, at B16 (quoting Marjorie Heins, director of the ACLU’s Arts Censorship Project, as stating that the removal of the art exhibit at the University of Michigan Law School “is a perfect example of how the MacKinnon crusade hurts women”); Hernandez, *supra* note 279, at 3B (quoting Veronica Vera, an artist whose videotape was among the removed works, as stating that “she made the tape to show anti-pornography laws do more to violate women’s rights than actual pornography because they stifle the voice of those who view sexually explicit material as liberating”).

<sup>281</sup> See *supra* text accompanying note 4.

<sup>282</sup> Mongiovi, *supra* note 4.

puritanism wasn't motivated by a need to erase sexual inequality. They wanted to smother the personal chaos that can accompany sexual freedom and subordinate it to the granite face of the state. Every tyrant knows that if he can control human sexuality, he can control life.<sup>283</sup>

Like all groups who seek equal rights and freedoms, women and feminists have an especially important stake in securing human rights in general. Therefore, they should be especially reluctant to hand over to government what history has proven to be an important tool for repressing human rights: the power to censor sexually explicit speech. Given the pro-censorship feminists' powerful critique of the patriarchal nature of government power,<sup>284</sup> it is especially ironic—and tragically misguided—that their censorship scheme would augment that very power.<sup>285</sup>

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<sup>283</sup> Hamill, *supra* note 23, at 189.

<sup>284</sup> See, e.g., Andrea Dworkin, *Our Blood: Prophecies and Discourses on Sexual Politics* 20 (1976).

Under patriarchy, no woman is safe to live her life, or to love, or to mother children. Under patriarchy, every woman is a victim, past, present and future. Under patriarchy, every woman's daughter is a victim, past, present, and future. Under patriarchy, every woman's son is her potential betrayer and also the inevitable rapist or exploiter of another woman.

*Id.*

<sup>285</sup> See McCormack, *supra* note 3, at 41.

[The feminist pro-censorship movement] puts a feminist gloss on what is fundamentally anti-feminist; that is, a form of oppression by the patriarchal state. Ultimately, it disempowers us or makes it that much more difficult to achieve the level of awareness, security and self-esteem that ensure a truly authentic empowerment.

*Id.*; see also McElroy, *supra* note 163, at 57.

The final irony [regarding the feminist pro-censorship faction] is that it is the state—not free speech—that has been the oppressor of women. It was the state, not pornography, that burned women as witches. It was 18th and 19th century law, not pornography, that defined women as chattel. 19th century laws allowed men to commit wayward women to insane asylums, to claim their wives' earnings, and to beat them with impunity. 20th century laws refuse to recognize rape within marriage and sentence the sexes differently for the same crime. It is the state, not pornography, that has raised barriers against women. It is censorship, not freedom, that will keep the walls intact.

*Id.*

#### IV. THE ARGUMENT THAT CENSORING "PORNOGRAPHY" WOULD REDUCE DISCRIMINATION OR VIOLENCE AGAINST WOMEN IS SPECULATIVE AT BEST

The feminists who advocate censoring "pornography" rest their case on the assumption that such censorship would reduce sexism and violence against women.<sup>286</sup> This assumption in turn reflects three others, all highly questionable: that exposure to sexist, violent imagery leads to sexist, violent behavior; that the effective suppression of "pornography" would significantly reduce exposure to sexist, violent imagery; and that censorship effectively would suppress "pornography," significantly reducing its availability and impact.

The only one of these assumptions that has received substantial attention is the first. As is discussed below, there is no credible evidence to bear it out. Moreover, even assuming for the sake of argument that exposure to sexist, violent imagery *does* lead to sexist, violent behavior, it still would not follow that censoring "pornography" would reduce sexism and violence, due to the flaws in the remaining two assumptions. First, even if "pornography" could effectively be suppressed, the sexist, violent imagery that pervades the mainstream media would remain untouched. Therefore, if exposure to such materials did indeed cause violence and sexism, the problem would still remain with us. Second, no censorship regime could effectively suppress "pornography" in any event.

Before turning to the single assumption that has been the focus of scholarly attention—the assumed causal relationship between exposure to sexist, violent imagery and sexist, violent behavior—I will explain the flaws that mar the other two, largely unexamined, assumptions underlying the Dworkin-MacKinnon analysis.

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<sup>286</sup> A widely quoted formulation of this view is Robin Morgan's statement that "[p]ornography is the theory, and rape the practice." Robin Morgan, *Going Too Far: The Personal Chronicle of a Feminist* 169 (1977).

A. *The Flawed Assumption that the Effective Suppression of "Pornography" Would Significantly Reduce Exposure to Sexist, Violent Imagery*

"Pornography" constitutes only a small subset of the sexist or violent imagery that saturates our culture.<sup>287</sup> Based on her comprehensive survey of the views of women's sexuality and women's roles that are purveyed in non-"pornographic" media, Professor Meyer concludes that the mainstream media have a far greater impact in shaping these views than does "pornography."<sup>288</sup>

Other scholars have reached the same conclusion. Professor Thelma McCormack has concluded that "the enemy of women's equality is our mainstream culture with its images of women as family-centered,"<sup>289</sup> rather than the "pornographic" imagery of women. And social science researchers have found that acceptance of the "rape myth" and other misogynistic attitudes concerning women and violence "are just as likely to result from exposure to many types of mass media—from soap operas to popular commercially released

<sup>287</sup> See, e.g., Steele, *supra* note 234, at 58-74. In comparing an advertisement for dishwashing detergent with one that displayed stereo equipment on the reclining body of a bikini-clad woman, Steele notes:

Ads for dishwashing detergents . . . are aimed at the female consumer; sexuality is seldom enlisted in the service of selling these products, which involve domestic labor. Here, the image of the "ordinary woman," sans bikini, is used to conjure up the right feeling in the potential consumer. Is one of these views of Woman more false than the other? More damaging?

*Id.* at 64.

<sup>288</sup> Meyer, *supra* note 206, at 42-43.

Today, mainstream television, film, advertising, music, art, and popular (including religious) literature are the primary propagators of Western views of sexuality and sex roles. Not only do we read, see and experience their language and imagery more often and at earlier ages than we do most explicit sexual representation, but precisely because mainstream imagery is ordinary and everyday, it more powerfully convinces us that it depicts the world as it is or ought to be.

*Id.*; see also *id.* at 49 ("[G]iven their vast and susceptible audience, and the enhancement of rhythmic sound tracks, [music videos] are far more influential than most pornography.").

<sup>289</sup> McCormack, *supra* note 3, at 9. According to McCormack:

Surveys and public opinion studies confirm the connection between gender-role traditionalism and an acceptance or belief in the normality of a stratified social system. The more traditional a person's views are about women, the more likely he or she is to accept inequality as inevitable, functional, natural, desirable and immutable. In short, if any image of woman can be said to influence our thinking about gender equality, it is the domestic woman not the Dionysian one.

*Id.* at 25.

films”—as from even intense exposure to violent, misogynistic “pornography.”<sup>290</sup>

In light of the pervasive, powerful presence of sexist and violent imagery in our mainstream media, even assuming that censorship would effectively eliminate “pornography”—a second assumption underlying the feminist pro-censorship position—other sexist and violent images would continue to permeate our culture and media.<sup>291</sup>

*B. The Flawed Assumption that Censorship Would Effectively Suppress “Pornography”*

A second assumption underlying the conclusion that censoring “pornography” would reduce violence and discrimination against women—that censorship would significantly reduce access to, and the impact of, “pornography”—is as flawed as the other such assumptions. It disregards evidence, which even pro-censorship feminists acknowledge,<sup>292</sup> that censorship would probably just drive “pornography” underground.<sup>293</sup> Indeed, as recently as 1983, even Catharine MacKinnon herself recognized that “pornography” “cannot be reformed or suppressed or banned.”<sup>294</sup> The assumption that censorship would substantially reduce the availability or impact of “pornography” also overlooks evidence that censorship makes some viewers more desirous of “pornography” and more receptive to its imagery.<sup>295</sup>

<sup>290</sup> Donnerstein et al., *supra* note 262, at 107.

<sup>291</sup> This observation should not be construed as an endorsement of censoring additional sexist or violent imagery beyond that encompassed by the Dworkin-MacKinnon concept of “pornography.” To the contrary, the flaws in the Dworkin-MacKinnon approach would be magnified by extending it to a wider range of materials.

<sup>292</sup> See June Callwood, *Feminist Debates and Civil Liberties, in Women Against Censorship*, *supra* note 15, at 121, 123 (arguing that most pro-censorship feminists see the chief benefit of censorship as symbolic and recognize that “pornography” would continue to flourish underground).

<sup>293</sup> See, e.g., Gronau, *supra* note 252, at 93-94; see also Harrell R. Rodgers, Jr., *Censorship Campaigns in Eighteen Cities*, 2 *Am. Pol. Q.* 371, 380-84 (1974) (concluding that in both the long and short run, censorship campaigns have little or no effect on the availability of erotica at newsstands).

<sup>294</sup> Catharine MacKinnon, *Feminism Unmodified* 146 (1987). Accordingly, MacKinnon then argued that anti-“pornography” activists should seek to change the content of “pornography.”

<sup>295</sup> See Timothy C. Brock, *Erotic Materials: A Commodity Theory Analysis of Availability and Desirability*, in 6 *Technical Report of the U.S. Comm’n on Obscenity & Pornography* 131-37 (1971) (suggesting that censorship may increase desirability and impact of “pornography”); Percy H. Tannenbaum, *Emotional Arousal As a Mediator of Communication Effects*, in 8

Before examining the last assumption underlying the feminist pro-censorship position, it would be useful to summarize the preceding analysis of the other two such assumptions. This analysis demonstrated that censoring "pornography" would not effectively counter misogynist attitudes or behavior for two reasons. First, it would not even attempt to address most sexist, violent imagery.<sup>296</sup> Moreover, censorship would eliminate neither the audience for "pornography" nor any adverse impact that "pornography" might have upon its audience. To the contrary, censorship would simply force that audience underground, thereby perhaps augmenting the effect that the materials may have on it.<sup>297</sup>

It follows that, even assuming for the sake of argument that there is some causal link between "pornography" and anti-female discrimination and violence, the necessarily insignificant contribution that censorship might make to reducing them would not outweigh the substantial damage censorship would do to feminist goals, as elaborated in Part III of this Essay. This conclusion—that the costs of "pornography" censorship outweigh its putative benefits, in terms of women's rights—is reinforced by the lack of actual evidence to substantiate the alleged causal link.

### *C. The Flawed Assumption that Exposure to Sexist, Violent Imagery Leads to Sexist, Violent Behavior*

#### *1. Laboratory Research Data*

The most comprehensive, recent review of the social science data on this issue is contained in Marcia Pally's 1991 publication, *Sense*

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Technical Report of the U.S. Comm'n on Obscenity & Pornography 353 (1971) (suggesting that a viewer's awareness that parts of a film have been censored may lead to frustration and subsequent aggressive behavior); Stephen Worchel & Susan E. Arnold, Effects of Censorship and Attractiveness of the Censor on Attitudinal Change, 9 J. Experimental Soc. Psychol. 365 (1973) (interpreting research data to suggest that censorship both increases an audience's desire to obtain censored material and disposes the audience to be more receptive to the censored expression).

<sup>296</sup> See *supra* text accompanying notes 287-91. Nor should it be forgotten that any censorship scheme completely overlooks the numerous causes of sexism and violence against women that are wholly independent of any media-based images. See *supra* text accompanying notes 210-30.

<sup>297</sup> See *supra* text accompanying notes 295-95.

*and Censorship: The Vanity of Bonfires*.<sup>298</sup> This valuable compendium concludes: "Almost no legitimate researcher now gives credence to the notion that nonviolent sexual material causes anything but sticky paper. They have uncovered no substantive link between sex crimes and sexual images . . . ." <sup>299</sup> Similarly, Pally's companion volume, *Resource Materials on Sexually Explicit Material, Violent Material and Censorship*, concludes: "The data suggest that banning or restricting sexual material . . . will not reduce violence or sexual . . . abuses, which have their sources in entrenched, complex social structures."<sup>300</sup>

York University sociology professor Thelma McCormack conducted another thorough survey of the relevant social science data in 1985. Her synthesis accords with Pally's:

Studies of sex offenders provide no basis for establishing a connection between pornography and rape.

Explicit depictions of sexual activity, coercive or not, can induce states of sex arousal and sexual fantasies in both men and women. The fantasy may act as a substitute for an overt sexual act; it may act as an enhancement of sexual activity; it may lead to sexual activity. All of these responses have been documented. Sexual fantasy, then, is a poor predictor of behavior . . . .

There is no systematic evidence that people copy what they see or read about in pornography. On the contrary, there is strong evidence that sex patterns, once established, are as difficult to change as any other social habits, and, in addition, there are strong inhibiting factors that intervene to keep our responses within the cultural norms.<sup>301</sup>

This Essay does not retread the ground thoroughly explored by Pally, McCormack, and others who have surveyed the social science literature. Instead, it summarizes the results of research that has found no causal link between exposure to "pornography" and the commission of violent or discriminatory acts against women.

<sup>298</sup> See *Sense and Censorship*, supra note 220; see Hentoff, supra note 114 (describing *Sense and Censorship* as "the most comprehensive current study of all available sources" regarding the asserted "connection between pornography . . . and assaults on women").

<sup>299</sup> *Sense and Censorship*, supra note 220, at 21.

<sup>300</sup> *Resource Materials*, supra note 265, at 10.

<sup>301</sup> Thelma McCormack, *Making Sense of Research on Pornography*, in *Women Against Censorship*, supra note 15, at 198.



Even the Meese Commission Report, which advocated more restrictions on sexually explicit speech than other governmental commissions have,<sup>302</sup> recognized that much of the data cited to support an alleged causal relationship between "pornography" and sexual violence does not in fact show such a connection.<sup>303</sup> The Meese Commission Report further acknowledged that "[t]he contribution of pornography to sexual deviance remains an open question."<sup>304</sup>

To the extent that the Meese Commission Report did purport to find some causal connection between "pornography" and anti-social attitudes or conduct,<sup>305</sup> these findings have been subject to harsh criticism.<sup>306</sup> Two of the harshest critics were two female members of the Commission, one of whom is a psychiatrist and psychologist with extensive research and clinical experience with sexual assault.<sup>307</sup> In

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<sup>302</sup> For example, the President's Commission on Obscenity and Pornography, which studied this issue between 1968 and 1970, recommended no restrictions on sexually explicit materials because there is "no reliable evidence . . . that exposure to sexual materials plays a significant role in the causation of delinquent or criminal sexual behavior among youth or adults." Resource Materials, *supra* note 265, at 11 (citing Report of the President's Commission on Obscenity and Pornography, 1970 at 139); see Paul Brest & Ann Vandenberg, Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis, 39 Stan. L. Rev. 607, 610-11 (1987) ("In 1970, after a four-year study, the United States Commission on Obscenity and Pornography concluded that obscenity was harmless, and recommended its deregulation for consenting adults.").

Similar conclusions were reached by the more recent studies conducted by the Canadian Department of Justice in 1986 and the British Inquiry into Obscenity and Film Censorship in 1979. See Resource Materials, *supra* note 265, at 19 (citing The Impact of Pornography: An Analysis of Research and Summary of Findings (known as the 1984 Fraser Committee Report in Canada), *in* Working Papers on Pornography and Prostitution (1984); The British Inquiry into Obscenity and Film Censorship (Williams Committee) (1979)).

A New Zealand committee on pornography was the first "in the common-law world that has enthusiastically adopted" the Dworkin-MacKinnon perspective. See Charlotte L. Bynum, Feminism and Pornography: A New Zealand Perspective, 65 Tul. L. Rev. 1131, 1132-34 (1991).

<sup>303</sup> See Meese Comm'n Report, *supra* note 10, at 315-20.

<sup>304</sup> *Id.* at 975; see also *id.* at 313 (discounting witnesses' allegations that exposure to "pornography" had induced them to commit sex crimes because of "tendency of people to externalize their own problems by looking too easily for some external source beyond their own control").

<sup>305</sup> See *Id.* at 324-27.

<sup>306</sup> See Lynn, *supra* note 27, at 65-73; David A.J. Richards, Pornography Commissions and the First Amendment: On Constitutional Values and Constitutional Facts, 39 Me. L. Rev. 275, 277, 303-05 (1987); Hendrik Hertzberg, Big Boobs, New Republic, July 14 & 21, 1986, at 21-24.

<sup>307</sup> See Judith Becker & Ellen Levine, Paper Presented to a Meeting of the National Coalition Against Censorship: A Statement by Dr. Judith Becker and Ellen Levine 4 (June 17,

their formal dissent from the Commission's report, Commissioners Judith Becker and Ellen Levine concluded:

[T]he social science research has not been designed to evaluate the relationship between exposure to pornography and the commission of sexual crimes; therefore efforts to tease the current data into proof of a casual [sic] link between these acts simply cannot be accepted. Furthermore, social science does not speak to harm . . . .<sup>308</sup>

Three of the foremost researchers in the area, Professors Edward Donnerstein, Daniel Linz, and Steven Penrod, also have sharply disputed the Meese Commission's findings about a purported causal relationship between exposure to "pornography" and violence against women.<sup>309</sup> Although their experiments are cited by the Meese Commission<sup>310</sup> (and other advocates of censorship),<sup>311</sup> Professors Donner-

1986) (unpublished paper on file with the Virginia Law Review Association) (providing objections to the Meese Comm'n Report by two dissenting members of the Commission).

The idea that eleven individuals studying in their spare time could complete a comprehensive report on so complex a matter in so constricted a timeframe is simply unrealistic. No self-respecting investigator would accept conclusions based on such a study. . . .

Id.

<sup>308</sup> Id. at 10-11; see also id. at 15.

Even [regarding sexually violent material that is unquestionably obscene], . . . social science research does not claim a causal link.

The social science data, however, provides even less basis for the claim of a causal link between non-violent degrading and humiliating pornography and sexual violence.

Id.

<sup>309</sup> See Edward I. Donnerstein & Daniel G. Linz, *The Question of Pornography: It is not Sex, but Violence, that is an Obscenity in our Society*, *Psych. Today*, Dec. 1986, at 56.

As social scientists and two of the researchers whose work was cited throughout the [Meese Commission Report], we feel it necessary to point out that the report fell short of our expectations in several important respects. First, there are factual problems with the report, representing serious errors of commission. Several of the contentions made in its pages cannot be supported by empirical evidence. Some commission members apparently did not understand or chose not to heed some of the fundamental assumptions in the social science research on pornography. Second, and perhaps more importantly, the commission members have committed a serious error of omission. The single most important problem in the media today, as clearly indicated by social science research, is not pornography but violence.

Id.; see also Daniel Coleman, *Researchers Dispute Pornography Report on Its Use of Data*, *N.Y. Times*, May 17, 1986, at A1; Daniel Linz, Steven Penrod & Edward Donnerstein, *The Attorney General's Commission on Pornography: The Gap Between "Findings" and "Facts,"* 1987 *Am. B. Found. Res. J.* 713.

<sup>310</sup> See Meese Comm'n Report, *supra* note 10, at 324-29.

<sup>311</sup> See, e.g., Caryn Jacobs, *Patterns of Violence: A Feminist Perspective on the Regulation of Pornography*, 7 *Harv. Women's L.J.* 5, 10-11 (1984); MacKinnon, *supra* note 6, at 52 n.116.

stein, Linz and Penrod interpret their own research (as well as that of other social scientists) differently. Accordingly, they have criticized the Commission for its misuse of the social science data.<sup>312</sup> These social scientists stress that their data show at most that exposure to *aggressive or violent* sexually explicit images<sup>313</sup> may lead to short-term *attitudinal* changes,<sup>314</sup> which are readily dispelled by exposure to other material.<sup>315</sup> They further stress that the data provide no evidence that exposure to violent sexually explicit images increases the probability that the viewer will actually commit harmful *acts*.<sup>316</sup>

Moreover, Professors Donnerstein, Linz, Penrod, and other researchers have emphasized that prohibiting sexually explicit imagery misses the core of the problem, because the temporary attitudinal changes that did occur in limited experimental populations were

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<sup>312</sup> See Donnerstein & Linz, *supra* note 309, at 58 (summarizing specific respects in which the Meese Commission misinterpreted social science data, including their own research findings).

We do not, as yet, know if the detrimental effects of watching pornography are long-lived or only fleeting. . . . [I]t remains unclear whether all men are affected equally even by . . . bizarre scripts [that depict women "enjoying" rape]. Finally, it remains to be seen whether changes in attitudes about women and rape revealed in relatively small-scale tests have any applicability to rape and aggression in the real world.

. . . The commission members were obviously aware of these issues. In fact, these conclusions, well-grounded in scientific research, are briefly summarized deep within their report, which makes it even more perplexing that they ignore the data in making their 92 recommendations.

*Id.*; see also Linz, Penrod & Donnerstein, *supra* note 309, at 723 (finding the Commission's conclusions unsupported by evidence from studies).

Likewise, Professor Murray Straus, whose correlational studies were cited by the Meese Commission Report, also has protested the Report's misuse of his research. See *infra* text accompanying note 333.

<sup>313</sup> According to one author, "these are portrayals in which physical force is either used or threatened to coerce a woman to engage in sexual acts (e.g., rape)." Neil Malamuth, "Aggression Against Women: Cultural and Individual Causes," in *Pornography and Sexual Aggression* 19, 29 (Edward Donnerstein & Neil M. Malamuth eds., 1984). See Linz, Penrod & Donnerstein, *supra* note 309, at 719 (describing the typical study, in which men are exposed to depictions that show the female victim reacting in a positive fashion to her violent mistreatment).

<sup>314</sup> See Donnerstein & Linz, *supra* note 309, at 57 ("For the moment, . . . we do not know if repeated exposure [to "pornography"] has a cumulative effect or if such effects are only temporary. But the evidence, such as it is, points toward the latter conclusion.").

<sup>315</sup> See *supra* text accompanying notes 262-64; Linz, Penrod & Donnerstein, *supra* note 309, at 731-36.

<sup>316</sup> See Donnerstein & Linz, *supra* note 309, at 58; Linz, Penrod & Donnerstein, *supra* note 309, at 721-23. See also Lynn, *supra* note 27, at 66-69 (noting reasons why Donnerstein's and Malamuth's studies do not afford support for censoring "pornography").

linked to the violence, rather than to the sex, in the violent sexually oriented works at issue.<sup>317</sup> For example, in a recent book that exhaustively examines dozens of studies in this area, Professors Donnerstein, Linz, and Penrod conclude that social science research does not establish a causal link between nonviolent sexually explicit materials and negative attitudes,<sup>318</sup> let alone aggressive behavior,<sup>319</sup> toward women. Conversely, when exposed to violent but nonsexual films, the experimental subjects exhibited the same attitudinal and behavioral responses that they showed when exposed to violent, sexually explicit films.<sup>320</sup>

In light of the foregoing evidence that any impact of violent, sexually explicit films is probably attributable to the violence rather than the sex, leading social science researchers have made the following suggestion: if any images are to be suppressed, it would be more appropriate to target the numerous nonsexually explicit images of violence against women that pervade the media, rather than any sexually

<sup>317</sup> Professor Donnerstein and Dr. Linz, referring to a study they had conducted with Professor Berkowitz and a study by Professors Malamuth and Check, explained:

Taken together, these studies strongly suggest that violence against women need not occur in a pornographic or sexually explicit context to have a negative effect upon viewer attitudes and behavior. But even more importantly, it must be concluded that violent images, rather than sexual ones, are most responsible for people's attitudes about women and rape.

Donnerstein & Linz, *supra* note 309, at 59; accord H.J. Eysenk & D.K.B. Nias, *Sex, Violence and the Media* (1978).

<sup>318</sup> See Donnerstein, Linz & Penrod, *supra* note 262, at 79.

. . . [S]ubjects exhibited no significant increases in the tendency to (1) hold calloused attitudes about rape, (2) view women as sexual objects, (3) judge the victim of a reenacted rape trial as more responsible for her own assault, or (4) view the defendant as less responsible for the victim's assault.

*Id.*

<sup>319</sup> See *id.* at 72.

Even under conditions where we might have expected aggression by men against women to occur, it did not. For example, when men were angered and exposed to highly arousing pornography, their aggression did not increase. When they were angered, shown arousing pornography, and exposed to an aggressive male model, their aggression did not increase. Even subjects specially selected for their traditional sex-role attitudes who were angered and exposed to highly arousing pornography did not increase their aggression toward women. Even 4 weeks of exposure to pornography failed to elicit aggression against women in angered males.

*Id.*

<sup>320</sup> *Id.* at 134-36; Linz, Penrod & Donnerstein, *supra* note 309, at 719-20 (finding that violent depictions need not be sexually explicit to have a negative impact).

oriented images.<sup>321</sup> None of these researchers, however, has endorsed the censorship of *any* images.<sup>322</sup> To the contrary, they reject the conclusion that there are causal links even between violent “pornography” and sexually aggressive behavior.<sup>323</sup> As Professors Donnerstein, Linz and Penrod observed in their comprehensive survey of the research findings:

[T]he effects from exposure to aggressive pornography may be dependent upon an individual’s initial attitudes about rape and other forms of violence against women. This may indicate that exposure to aggressive pornography is not “causing” calloused attitudes about rape, but rather reinforcing and strengthening already existing beliefs and values.<sup>324</sup>

Since the Dworkin-MacKinnon censorship proposals are aimed at sexually explicit material that allegedly is “degrading” to women,<sup>325</sup> it is especially noteworthy that research data show no link between exposure to nonviolent, “degrading,” sexually explicit material and sexual aggression.<sup>326</sup> For example, at hearings before the New Zealand Indecent Publications Tribunal in 1990, Professor Donnerstein testified that the research literature did not establish a causal connection between exposure to “degrading” pornography and antisocial behavior.<sup>327</sup> Moreover, several other studies over the last two decades have shown that exposure to nonviolent sexually explicit expression actually *reduces* aggression in laboratory settings.<sup>328</sup>

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<sup>321</sup> See Edward Donnerstein & Daniel Linz, *in* *Pornography: Love or Death?*, Film Comment, Dec. 1984, at 29, 36 (“Images [of violence against women] outside of the pornographic . . . market may in fact be of more concern, since they are imbued with a certain ‘legitimacy’ . . . .”); Neil Malamuth & Jan Lindstrom, *in* *Pornography: Love or Death?*, Film Comment, Dec. 1984, at 29, 40 (“Attempts to alter the content of mass media . . . can not be limited to pornography, since research has documented similar effects from mainstream movies.”).

<sup>322</sup> See, e.g., Malamuth, *supra* note 313, at 41 (disclaiming any intent to endorse censorship or any other strategy for inducing changes in media content); Donnerstein, Linz & Penrod, *supra* note 262, at 172 (stating that “pornography” research does not justify censorship).

<sup>323</sup> See Resource Materials, *supra* note 265, at 18 (citing the 1990 report of Donnerstein and Linz to the New Zealand government).

<sup>324</sup> Donnerstein, Linz & Penrod, *supra* note 262, at 103.

<sup>325</sup> See Dworkin, *supra* note 7, at ix (stating that the Dworkin-MacKinnon model law prohibits material in which “women are presented in scenarios of degradation”).

<sup>326</sup> See Resource Materials, *supra* note 265, at 24-27.

<sup>327</sup> *Id.* at 25.

<sup>328</sup> See *id.* at 25, 28.

Likewise, research does not establish an adverse effect from exposure to sexually explicit, "degrading" materials in terms of women's self-esteem. For example, "Dr. Carol Krafka found that women who were exposed even to sexually degrading materials did not engage in more sex role stereotyping, experience lower self-esteem, have less satisfaction with body image, hold more negative beliefs about rape or show greater acceptance of violence against women."<sup>329</sup>

## 2. *Correlational Data*

Just as social scientists have complained that the Meese Commission misinterpreted their laboratory studies about the putative relationship between "pornography" and anti-female violence,<sup>330</sup> so too, another social scientist has complained that the Commission misinterpreted his correlational studies in this area. The Meese Commission<sup>331</sup> (as well as other proponents of censorship)<sup>332</sup> relied on Professor Murray Straus' correlational studies between the availability of "pornography" and the prevalence of sexual assaults against women to "justify" their conclusions that exposure to "pornography" leads to sexual assaults. But, as Professor Straus wrote the Commission, "I do not believe that [my] research demonstrates that pornography causes rape."<sup>333</sup>

The visibility of both sexually oriented expression and violence against women in the United States might create the impression that there may be a causal link between the two. Of course, though, the

<sup>329</sup> Resource Materials, *supra* note 265, at 29 (citing Carol Krafka, *Sexually Explicit, Sexually Violent, and Violent Media: Effects of Multiple Naturalistic Exposures and Debriefing on Female Viewers* (1985) (unpublished doctoral dissertation, University of Wisconsin).

<sup>330</sup> See *supra* text accompanying notes 306-16.

<sup>331</sup> See Meese Comm'n Report, *supra* note 10, at 324-29.

<sup>332</sup> See, e.g., Jacobs, *supra* note 311, at 10-11; MacKinnon, *supra* note 6, at 52 n.116, 55.

<sup>333</sup> See Becker & Levine, *supra* note 307, at 12-13.

In documents attached to the main report mention has been made of a possible relationship between circulation rates of pornographic magazines and sex crime rates. One of the authors of the study on which the Commission has based its conclusions, Murray Straus, has written to explain his own research, which he suggested was being misinterpreted. "I do not believe that this research demonstrates that pornography causes rape. . . . In general the scientific evidence clearly indicates that if one is concerned with the effects of media on rape, the problem lies in the prevalence of violence in the media, not of sex in the media."

correlation of two phenomena does not prove that one causes the other.<sup>334</sup>

In any event, the experiences in other countries, where there is not even any correlation between the availability of "pornography" and the prevalence of discrimination or violence against women, belies the conclusion that there is any causal relationship between them. On the one hand, violence and discrimination against women are common in countries where no sexually oriented material is permitted, including Saudi Arabia, Iran, and China (where the sale and distribution of "pornography" is now a capital offense).<sup>335</sup> On the other hand, violence against women is uncommon in countries where such material is readily available, such as Denmark, Germany, and Japan.<sup>336</sup>

Moreover, patterns in other countries show no correlation between increased availability of sexually explicit materials and increased violence against women. After Denmark lifted its restrictions on such materials, there was a decrease in sex crimes.<sup>337</sup> Likewise, in West Germany, rape rates declined slightly since bans on "pornography" were lifted in 1973, despite a rise in almost every other type of violent crime.<sup>338</sup> In one decade, there was a much greater increase in rape rates in Singapore, which tightly restricts sexually oriented expression, than in Sweden, which has no such restrictions.<sup>339</sup> In Japan, with easily accessible sexually explicit materials stressing themes of bondage, violence, and rape, there was a 45% decrease in rape rates during the same decade.<sup>340</sup> Moreover, Japan reports 2.4 rapes per 100,000 people, compared with 34.5 in the U.S.<sup>341</sup>

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<sup>334</sup> For a trenchant formulation of this basic logical principle, see Ellen Willis, *An Unholy Alliance*, *Newsday*, Feb. 25, 1992, at 78 ("Anti-porn activists cite cases of sexual killers who were also users of pornography, but this is no more logical than arguing that marriage causes rape because some rapists are married.").

<sup>335</sup> *Sense and Censorship*, *supra* note 220, at 11-12.

<sup>336</sup> See *Resource Materials*, *supra* note 265, at 42-43.

<sup>337</sup> See Donnerstein, Linz & Penrod, *supra* note 262, at 61-62; Berl Kutchinsky, *The Effect of Easy Availability of Pornography on the Incidence of Sex Crimes: The Danish Experience*, 29 *J. Soc. Issues* 163 (1973); Berl Kutchinsky, *Pornography and its Effects in Denmark and the United States: A Rejoinder and Beyond*, 8 *Comp. Soc. Res.* 301, 319-21 (1985).

<sup>338</sup> See *Resource Materials*, *supra* note 265, at 43.

<sup>339</sup> *The Question of Pornography*, *supra* note 262, at 64.

<sup>340</sup> *Id.*; Paul R. Abramson & Haruo Hayashi, *Pornography in Japan: Cross-Cultural and Theoretical Considerations*, in *Pornography and Sexual Aggression* 173, 178, 181 (Neil M. Malamuth & Edward Donnerstein eds., 1984).

<sup>341</sup> *Id.* at 180-81.

Although correlation does not prove causation, it is nevertheless interesting that there may be an inverse relationship between exposure to sexually explicit expression and actual violence. For example, Professor Donnerstein has written: "A good amount of research strongly supports the position that exposure to erotica can reduce aggressive responses in people who are predisposed to aggress."<sup>342</sup> Similarly, Dr. John Money of Johns Hopkins Medical School, a leading expert on sexual violence, has noted that most people with criminal sexualities were raised with strict, anti-sexual, repressive attitudes. He predicts that the "current repressive attitudes toward sex will breed an ever-widening epidemic of aberrant sexual behavior."<sup>343</sup>

One of the most intriguing correlational studies in this area, conducted by Professor Larry Baron in 1990, found a positive correlation between the circulation rates of sexually oriented magazines and gender equality.<sup>344</sup> These findings suggest that both sexually explicit material and gender equality may flourish in politically tolerant areas where there are fewer restrictions on speech. They reinforce the argument that free speech, far from being the enemy of women's rights as posited by the Dworkin-MacKinnon school, goes hand in hand with women's rights.

To summarize the findings from the empirical data: because evidence indicates that the potentially harmful effects of exposure to certain "pornographic" speech are best countered by "more speech," censorship is intolerable. The speculative possibility that intensive exposure to violent "pornography" might promote aggressive attitudes that might not be corrected through more speech is too negligible a benefit to outweigh the substantial costs that censorship would impose on feminist goals.

### CONCLUSION

In light of the numerous adverse effects that censoring "pornography" would have on women's rights and interests, those who advocate such censorship ostensibly on feminist rationales have a heavy burden of proof indeed. The only alleged justification they offer is the claim

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<sup>342</sup> Edward Donnerstein, *Erotica and Human Aggression* 127-28 (1984).

<sup>343</sup> Jane Brody, *Scientists Trace Aberrant Sexuality*, N.Y. Times, Jan. 23, 1990, at C1, C6.

<sup>344</sup> Larry Baron, *Pornography and Gender Equality: An Empirical Analysis*, 27 J. of Sex Res. 363 (1990).



that censoring “pornography” will reduce violence and discrimination against women. This claim rests on three assumptions, all of which must be established to substantiate the asserted justification: 1) that the effective suppression of “pornography” would significantly reduce exposure to sexist, violent imagery; 2) that censorship would effectively suppress “pornography”; and 3) that exposure to sexist, violent imagery leads to sexist, violent behavior. In fact, each of these assumptions is fatally flawed.

First, given the pervasive presence of sexist, violent imagery in mainstream American culture, most such imagery would remain intact, even if “pornography” could be effectively suppressed. Moreover, because the mainstream imagery is viewed by far more people than is “pornography,” and because it has the stamp of legitimacy, it has a greater impact on people’s attitudes. Therefore, if it is true—as the feminist censorship advocates assert—that exposure to sexist, violent imagery leads to sexist, violent, conduct, such conduct would still be triggered, even if “pornography” could be effectively suppressed.

Second, “pornography” could not be effectively suppressed in any event. As feminist censorship advocates themselves have recognized, any censorship regime would simply drive “pornography” underground, where it might well exercise a more potent influence on its viewers.

For the foregoing reasons, even assuming for the sake of argument that exposure to sexist, violent imagery caused anti-female discrimination and violence, censoring “pornography” would make, at best, an insignificant contribution to reducing these problems. At worst, censorship could actually aggravate these problems, since some evidence indicates that censorship could augment any aggressive responses that some viewers might have to “pornography.” The conclusion that the costs of “pornography” censorship outweigh its putative benefits, in terms of women’s rights, is reinforced by the lack of evidence to substantiate the alleged causal link between exposure to “pornography” and misogynistic discrimination or violence.

The speculative, attenuated benefits of censoring “pornography,” in terms of reducing violence and discrimination against women, are far outweighed by the substantial, demonstrable costs of such a censorship regime in terms of women’s rights. Throughout history, to the present day, censorial power has consistently been used to stifle women’s sexuality, women’s expression, and women’s full and equal

participation in our society. This pattern characterizes even—indeed, especially—censorial power that is wielded for the alleged purpose of “protecting” women.

As is true for all relatively disempowered groups, women have a special stake in preserving our system of free expression. For those women who find certain “pornographic” imagery troubling, their most effective weapon is to raise their voices and say so. Moreover, as illustrated by the tactics of various feminist anti-“pornography” groups, one essential component of their message is the very “pornographic” imagery they decry. By effectively using such imagery not to promote women’s “subordination,” but rather, to rally public outrage against misogynistic violence and discrimination, these activists illustrate why feminists should defend freedom of speech even for expression they find abhorrent.

As *Feminists Fighting Pornography*,<sup>345</sup> the Glad Day Bookstore,<sup>346</sup> and even Andrea Dworkin herself<sup>347</sup> recently have experienced, when the government suppressed their feminist, lesbian, and anti-“pornography” expressions, government power to censor “pornography” would predictably be unleashed against feminist messages and perspectives. The power the government would assume in censoring “pornography” would pose a far greater threat to women’s rights than the alleged power of “pornography” itself.<sup>348</sup> In the memorable words of journalist Ellen Willis, “How long will it take oppressed groups to learn that if we give the state enough rope, it will end up around our necks?”<sup>349</sup>

<sup>345</sup> See *supra* text accompanying note 151.

<sup>346</sup> See *supra* text accompanying notes 182-83.

<sup>347</sup> See *supra* text accompanying notes 188-89.

<sup>348</sup> This point has been made forcefully by Wendy Kaminer, a feminist writer and anti-“pornography” activist who nevertheless opposes government censorship of “pornography.” See, e.g., Kaminer, *supra* note 80, at 754, 756.

Legislative or judicial control of pornography is simply not possible without breaking down the legal principles and procedures that are essential to our own right to speak and, ultimately, our freedom to control our own lives. We must continue to organize against pornography and the degradation and abuse of women, but we cannot ask the government to take up our struggle for us. The power it would assume in order to do so would be far more dangerous to us all than the “power” of pornography.

*Id.*

<sup>349</sup> Ellen Willis, *supra* note 334, at 78.

## APPENDIX

*Letter from the Ad Hoc Committee of Feminists for Free Expression  
to the Members of the Senate Judiciary Committee,  
Feb. 14, 1992*<sup>350</sup>

To the members of the Senate Judiciary Committee:

We the undersigned women, write to oppose the misnamed Pornography Victims Compensation Act, S. 1521. Supposedly an aid to victims of violent crimes, it scapegoats speech as a substitute for action against violence. Rape, battery, and child molestation are violent crimes that this nation should take every measure to eliminate. But S. 1521 will do crime victims more harm than good.

The premise of S. 1521—that violence is “caused” by words and images—is false. Violence against women and children flourished for thousands of years before the printing press and motion picture, and continues today in countries like Saudi Arabia and Iran, where no commercial sexual material is available. Correlation studies, in this country, Europe and Asia, find *no* rise in sexual violence with the availability of sexual material. No reputable research shows a causal link between “obscenity” or “child pornography” and violence.

S. 1521 damages crime victims by diverting attention from the substantive triggers to violence. Violence is caused by deeply-rooted, economic, family, psychological and political factors, and it is these that need addressing. Do so and you will gain the confidence and votes of millions of American women and men.

S. 1521 is a logical and legal muddle. It reinforces the “porn made me do it” excuse for rapists and batterers. This country does not accept get-off-the hook reasoning for other crimes; we should not accept it for crimes most often committed against women. S. 1521 does not even require a criminal conviction before a victim of violence may sue a bookseller or distributor for supposed causality. Criminals may go free, perhaps to rape again, while booksellers are punished.

Other confusions of S. 1521 present themselves. If a book is judged obscene in Louisville, Kentucky, it can be deemed a cause of a crime. The same book, judged not obscene in the nearby city of Lexington, cannot be the cause of a crime. Further, if Congress is certain that books and videos cause crime, why blame only books or videos on

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<sup>350</sup> On file with the Virginia Law Review Association.

sexual themes? Why not blame the Bible, which scores of people every year cite as justification for abuse and murder? John List, who was discovered by the police two years ago after killing his mother, wife and three children for “religious” reasons, is only one of the more notorious examples.

S. 1521 is book banning by bankruptcy. It will suppress *across the nation* sexual material that may be offensive to some people in some communities. S. 1521 makes it easy to bring frequent suits for unlimited money damages against booksellers, publishers and distributors. Even if material is judged not obscene and not a cause of crime, legal costs will be ruinous to book, art and movie makers.

The most likely outcome of S. 1521 is that crime victims will in no way benefit while producers and distributors are put out of business. And the threat of court suits will create a chilling effect as all those engaged in free speech, in an effort to avoid the risk of liability, self-censor much material that is legal and valuable, and should be available to citizens in a democratic society.

Feminist women are especially keen to the harms of censorship, legislative or monetary. Historically, information about sex, sexual orientation, reproduction and birth control has been banned under the guise of “morality” and the “protection” of women. Such restrictions have never reduced violence. Instead, they have led to the jailing of birth control advocate Margaret Sanger, and the suppression of important works, from *Our Bodies, Ourselves* to novels such as *Ulysses*, *The Well of Loneliness* and *Lady Chatterley’s Lover*, to the feminist plays of Karen Finley and Holly Hughes.

Women do not require “protection” from explicit sexual materials. It is no goal of feminism to restrict individual choices or stamp out sexual imagery. Though some women and men may have this on their platform, they represent only themselves. Women are as varied as any citizens of a democracy; there is no agreement or feminist code as to what images are distasteful or even sexist. It is the right and responsibility of each woman to read, view or produce the sexual material she chooses without the intervention of the state “for her own good.” We believe genuine feminism encourages individuals to make these choices for themselves. This is the great benefit of being feminists in a free society.

We urge you to give S. 1521 the speedy death it deserves and turn your attention to constructive measures that will reduce violence and bring us all a more just and feminist future.

Sincerely,

(organizations noted for identification only)

[signed]<sup>351</sup>

Betty Friedan

Nora Ephron, author

Mary Gordon, author

Judy Blume, author

Jamaica Kincaid, author

Erica Jong, author

Susan Isaacs, author and screenwriter

Adrienne Rich, poet and writer

Katha Pollitt, author, educator and editor

Karen DeCrow, past president, National Organization for Women

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<sup>351</sup> In addition to the signers listed, 172 other feminist women signed the letter.