

Pornography: Social Science, Legal, and Clinical Perspectives

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Pornography and the First Amendment: What Does the Social Science Research Say?

Edward Donnerstein*

Some of the recent major findings in the area of pornography, in particular areas of aggressive pornography, are relevant, particularly to those of you who are trial judges, because they deal with effects of sexually violent material on jury decision making in rape trials.

Initially, I would like to mention one book which I think is quite helpful, by Neil Malamuth and myself, called *Pornography and Sexual Aggression*,¹ which deals with most of the current experimental research on the effects of pornography, in this country and abroad. A number of chapters deal with cross-cultural research on the effects of pornography and mass media violence. The book also includes some very interesting cross-national studies by Larry Baron and Murray Straus dealing with the availability of certain types of pornographic magazines and the incidents of rape

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1. *Pornography and Sexual Aggression* (Neil Malamuth & Edward Donnerstein eds. 1984).

on a state by state basis.² Most significant, however, are two chapters dealing with legal issues, written by a lawyer and a psychologist. One chapter deals with constitutional law³ and the other with tort liability.⁴

Those of us who do research in the area of sexual violence look at different types of sexually violent material. The first type of material is called aggressive or violent pornography. It has received the most research and is the subject of little academic dispute since it has the most consistent and reliable research findings. To put it into context, this material is considered X-rated, which may connote certain meanings. It also contains various forms of aggression, including many rape scenes, primarily against women.

Sometimes the aggression is quite graphic and violent, but what is particularly interesting about violent pornography is something we call a theme of, for lack of a better word, enjoyment. This means that whenever a woman is raped, sexually assaulted, or aggressed against in some manner, one can rest assured that by the end of the film, she will be turned on and find some type of pleasure and enjoyment from this violence.

The message that violent acts are pleasurable for women is very common in this type of material. One should recognize, however, that it is quite pervasive throughout the media. This is exemplified by an advertisement in *Time* magazine for "A Death in California," a television show with Sam Elliot and Cheryl Ladd.⁵ The headlines and promos were "he raped her, he killed her fiancée, but she loved him." That message comes out a great deal in the media but is even more prominent in violent pornography.

I would like to discuss some of the effects of this especially violent material. In the last few years researchers have focused upon three or four areas dealing with exposure to these types of images. One area concerns sexual arousal.

The research on convicted rapists has shown that they find violent forms of pornography sexually arousing.⁶ For many rapists these types of materials are more sexually arousing than depic-

2. Larry Baron & Murray A. Straus, *Sexual Stratification, Pornography, and Rape in the United States*, in *Pornography and Sexual Aggression*, *supra* note 1, at 186.

3. See Steven Penrod & Daniel Linz, *Using Psychological Research on Violent Pornography to Inform Legal Change*, in *Pornography and Sexual Aggression*, *supra* note 1, at 247.

4. See Daniel Linz, Charles W. Turner, Bradford W. Hesse & Steven Penrod, *Bases of Liability for Injuries Produced by Media Portrayals of Violent Pornography*, in *Pornography and Sexual Aggression*, *supra* note 1, at 277.

5. *Time*, May 13, 1985, at 11.

6. Gene G. Abel, David H. Harlow, Edward B. Blanchard & Donald Guild, *The*

tions of mutually consenting adult heterosexual activity. In fact, some research indicates that a rapist's level of violent and sadistic behavior can be determined by his degree of sexual arousal upon viewing sexually violent images.⁷

For many years it was assumed that only men who commit sexual crimes found such images sexually arousing. Recent research by Neil Malamuth and others indicates that even "normal" males are aroused by images of rape, particularly where the victim becomes aroused or finds pleasure.⁸ Significantly, many males in the "normal" population find these images more sexually arousing than explicit images of mutually consenting sex. Additional research indicates that males who believe in the use of sexual force and who state they might commit rape if not caught find rape images more arousing, be it a mythical depiction where the woman finds pleasure, or a realistic rape.⁹ What is important is that sexual arousal as a response to depictions of violence against women tends to be a fairly good predictor of attitudes about rape and, at least in laboratory situations, aggressive behavior against women.

Another series of studies done by Neil Malamuth and others show that exposure to these types of images affect a whole set of attitudes about women and rape.¹⁰ One finding is that male subjects briefly exposed to sexually violent material, particularly to material which maintains and reinforces stereotypes about rape, will be less sensitive to real rape victims.¹¹ For instance, if subjects read a story, see an X-rated film of a woman being raped, and then listen to a real rape victim talk about her experience, the male subjects will see less pain, less suffering, more responsibility on her part, and less credibility.¹² In other words, they begin to become somewhat desensitized and calloused regarding rape. One also finds increased acceptance of stereotypes and myths about rape.¹³

No researcher suggests these men are going to commit rape, but only that these individuals are willing to say they might com-

Components of Rapists' Sexual Arousal, 34 Arch. Gen. Psychiatry 895-903 (1977) [hereinafter cited as Abel].

7. *Id.*

8. Neil Malamuth, *Aggression Against Women: Cultural and Individual Causes*, in *Pornography and Sexual Aggression*, *supra* note 1, at 28-47.

9. *Id.* at 25.

10. *Id.* at 32-38.

11. *Id.* at 33.

12. *Id.*

13. Neil M. Malamuth & Edward Donnerstein, *The Effects of Aggressive-Pornographic Mass Media Stimuli*, in 15 *Advances in Experimental Social Psychology* 103, 113-15 (Leonard Berkowitz ed. 1982).

mit rape. Even the "liberalized" male college students, after exposure to this type of material, show an increased willingness to say they might commit rape if not caught.¹⁴ Many of these students report the use of force, particularly in dating situations.¹⁵

The studies on rape fantasy are also revealing. Two or three hours after exposure to these types of images, male subjects report that fantasizing about raping a woman is sexually arousing.¹⁶

In this light, it should be mentioned that researchers in this area employ Martha Burt's rape myth acceptance scale.¹⁷ Some myths included are that women falsely report rape, that they have a need to call attention to themselves, and that women have an unconscious wish to be raped and therefore set up a situation in which they are likely to be attacked. Again, the research shows an increase in the acceptance of these myths after exposure to violent forms of pornography.¹⁸

One question which follows is whether it is the sexual content or the violent content of the material which produces these attitudes and fantasies. My research suggests it is primarily the violent content.¹⁹ A number of studies have found that if the sexual content is removed, leaving just the violence, violence which could be rated R or PG-13, the results are similar to those previously described.²⁰

Finally, one should mention some newer research dealing with R-rated materials called sex and violence juxtapositions or combinations. These materials are primarily available to and consumed by young adolescents. The R-rated films are the most popular types viewed by this particular group. These films, traditionally called slasher films, are far more graphically violent than most X-rated material. Women are decapitated and mutilated in fairly graphic ways. There is very little which cannot be simulated in a film today.

Women are the primary targets. Men are killed, but most of the gratuitous violence is against women. What is of interest to researchers is that the violence against women in these films occurs within some type of sexual context. When men are killed, they

14. *Id.*

15. *Id.*

16. *Id.*

17. Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 *Journal of Personality & Soc. Psychology* 217-30 (1980).

18. Malamuth & Donnerstein, *supra* note 13, at 103-36.

19. Edward Donnerstein, *Pornography: Its Effect on Violence Against Women*, in *Pornography and Sexual Aggression*, *supra* note 1, at 53-81.

20. *Id.* at 71-81.

are in "full tuxedo" as it has once been said. When women are killed, it is in the shower, in the bathtub, in the act of making love. For that young adolescent male there is some sexual overtone juxtaposed with some fairly graphic violence.

The newer research has focused upon the process of desensitization. Subjects are continually exposed to this material (though sometimes only four hours per week produces dramatic effects). Initially, when one is exposed to images of women being brutally raped and decapitated, one is bothered, anxious, and depressed. With repeated exposure, one is less and less bothered. In fact, not only does the anxiety and depression lessen but one begins to enjoy these types of images. And with repeated exposure one begins to see less and less violence in this material.²¹

[*Editor's note:* At this point, Dr. Donnerstein showed a sequence from the film, *The Tool Box Murders*. In the film, a woman is in the bathtub massaging herself. A beautiful, country-western song, *Pretty Lady*, is playing in the background. In two minutes, the psychotic killer breaks in to the woman's house. The woman notices him, and he is carrying a power nail gun—the gun drives nails through walls. The music stops. He chases her around the room. He shoots her through the stomach with the nail gun. She falls across a chair. He then comes up to her while the song *Pretty Lady* again starts playing. He puts the nail gun to her forehead and blows her brains out. The film is R-rated.]

The question which follows is what happens when one leaves the theater and confronts a real victim of violence after all of this "fantasy" violence? In one study, subjects review this material over a one- or two-week period.²² Two days later, at the University of Wisconsin Law School, they sit in a courtroom and watch a reenactment of a rape trial, a trial they believe actually occurred. During the trial the researchers pass out a picture of the rape victim as a physician testifies. This is done to realistically simulate a true rape trial. Their perceptions of a real victim of violence are observed. The study tries to measure what the subjects perceive to be the extent of injury done to the woman.

The basic finding is that, over time, subjects become less depressed and less anxious as they view this material. They see less violence and find the material less offensive. They also find the material less and less degrading to women. And there is some in-

21. Daniel Linz, Edward Donnerstein & Steven Penrod, *The Effects of Multiple Exposure to Filmed Violence Against Women*, 34 *Journal of Communication* 130, 134-47 (1984).

22. Daniel Linz, *Sexual Violence in the Media: Effects on Male Viewers and Implications for Society*, PhD Dissertation, University of Wisconsin-Madison (1985).

dication they begin to enjoy these types of images.²³

Most important, those who have seen this type of "fantasy" violence see about half the amount of injury to the rape victim as subjects who have not seen this type of material.²⁴ The victim is also considered to be more worthless as an individual.²⁵ In other studies, the victim is seen as less credible, more responsible for the rape.²⁶ These same types of effects are found with X-rated violent material.²⁷ The effects are much stronger in males predisposed to aggression or males considered to be high in psychoticism.²⁸

One should note that the type of material presented here is readily available to any male due to technological advances, VCRs, and cable. Given these advances, *The Tool Box Murders* becomes for a young adolescent male perhaps his first introduction to anything dealing with a naked woman. These are going to become his masturbatory fantasies. One does not have to be a social science researcher to think of some of the resulting implications.

Clinical Perspectives on the Relationship Between Pornography and Sexual Violence

Cheryl A. Champion*

I am currently employed by Human Services, Inc. in Washington County, Minnesota. Human Services, Inc. is a private non-profit organization which receives funding from the state of Minnesota. As part of the sexual abuse intervention and treatment unit, my colleagues and I are responsible for a multifaceted program. We provide twenty-four hour crisis intervention, advocacy, therapy, and support counseling for victims and their families. In addition, we provide psychological evaluation and treatment for both adult and juvenile offenders. The third component of our organization is a treatment program for families involved in the behavior of incest.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

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The state of Minnesota has a national reputation for its approach to working with victims and perpetrators. Funding for both types of programs comes from the Minnesota Department of Corrections, as mandated by the legislature in 1975. Our program for victims, in which victims receive services for trauma and compensation for any loss, has become a model across the nation.

Likewise, the Minnesota system of providing intensive treatment for offenders, in addition to incarceration, is a novel approach toward rehabilitation. As one of our sex offenders recently commented, "Putting a dirty rag in a closet for ten years and then unlocking the door at the end of that time and expecting it to be clean is a mistake." We attempt to rehabilitate sexual offenders using intensive psychodynamic therapy for cognitive behavior change and psychological insight into the dynamics of the crime. Minnesota has several programs for the treatment of offenders, including outpatient treatment facilities for both adults and juveniles, and locked inpatient facilities for more dangerous offenders who cannot live in a community during their treatment. Both our men's and women's correctional institutions have their own sex offender treatment programs. Inmates can voluntarily apply to receive treatment while they serve their prison time.

Several things are clear from our work with offenders. First of all, not every offender makes use of pornography. In fact, the majority of our offenders are very rigid, controlled, and incredibly shameful about sex. They have not made use of sex education materials or sexually explicit materials and are very offended by the idea of pornography. A conservative estimate would be that only forty percent of our clinical cases involve perpetrators who use pornography in some manner.

The behavioral impact of pornography can be summarized as follows. Concerning juvenile offenders, those who are exposed to and involved with pornography often begin at a very early age, earlier than other adolescents in our regular clinical population. Among those adolescent offenders, their secretive collections are significantly higher than those we find in other clinical populations of adolescents. When more appropriate sex education materials are made available, most of our juvenile offenders do not seem to want pornographic material.

Now, speaking only about the adult offenders who are involved with pornography, the question becomes: would they have chosen violent sexual acting out as opposed to other kinds of acting out without the influence of pornography? The question is always, why a rapist and not an axe murderer? If more appropriate

erotic or sex education material were made available, would these offenders make use of those materials? As Dr. Donnerstein noted, adult sex offenders seem predisposed to violent behavior in psychological testing. When you look at the entertainment these people prefer, it is often the most violent kinds of movies. When you look at their reading material, it is the same. I again have to concur that it is the violence that is attractive to these people.

Many of the facilities in the state struggle with limiting the access of offenders and perpetrators to this sort of material. Until the fantasy behavior is under control, even ordinary and appropriate materials, such as sex education books, even children's underwear ads in catalogs, can be misused. This raises a rather difficult issue when people are incarcerated. The Civil Liberties Union guards the civil rights of prisoners to insure they receive their mail and have access to reading materials. A related issue concerns prisoners' access to entertainment, for example television, rented films, or videos. There are some difficult issues to balance regarding civil liberties of those people incarcerated and insuring the safety of the staff and other inmates. For instance, films about prison riots or about raping guards in prisons could be considered to have explosive content. For those of us who provide sex offender treatment within the correctional institutions, many of these issues are unresolved as yet and require a good deal more contemplation on the part of experts.

When pornography is a part of a sex offender's life, the relationship has a very compulsive and obsessive quality to it. These individuals have an active fantasy life involving the use of pornographic materials for masturbation, fantasy contemplation, and actual acting out of their scenarios on their victims. When offenders are involved with pornography, we use it as a tool for redefining their sexual behavior and orientation. It is clear to us that it does influence behavior. Sexual gratification from pornography is a strong reinforcer. We have created the phrase "masturbatory conditioning." If the offender masturbates to pictures of women being raped, murdered, and sexually assaulted, then even when he is sexual with a partner in a nonviolent manner, in order to get "turned on" and to complete the sex act through climax, his mind must still think about rape and sexual assault. We try to redirect the fantasy and masturbation to more appropriate, less violent scenarios.

One of the underlying philosophical tenets of our outpatient program is that all offenders in treatment must clean out their homes, garages, cars, and offices of pornographic material. We are

quite clear about not rationalizing the content. Everything must go—pinups, books, magazines, television cassettes, and films. Offenders must also contract with us not to use pornography during their treatment. There is an active discussion in groups about the inappropriate nature of pornographic material.

One of the things we notice is that pornography takes over the lives of our offenders to the exclusion of any other entertainment material. Some of our offenders have garages and basements so full that they can be used for nothing but storage of pornographic materials. It is a relief, in fact a validating statement to the families of these offenders, when we encourage them to dispose of these collections. In some ways their families have suspected all along that the pornography had some connection to their sexual behavior.

I would also like to speak here for a moment about the impact of pornography upon the victims' lives. It is not uncommon for our clients to speak of the pornography involved in their assaults when giving testimony in court or in processing the incidents in their therapy. I have a selection of several cases to illustrate this point.

The first is a case of rape and torture of a young wife by her husband. The husband was an avid consumer of sadomasochistic and bondage pornography who created a complete torture chamber in their basement. The young wife, very uneducated about sexual behavior, went along with it up until the birth of their first child. The reason she sought assistance was that often her husband would leave her trussed up in some of the bondage equipment long past the feeding schedule for the infant, and she was concerned about the health of the infant.

The second example is one in which two adolescent girls were kidnapped by a transvestite assailant with a great deal of gender confusion. The assailant terrified the girls by appearing before them first as a man and then as a woman during various stages of the assault. Part of the abuse involved his forcing the two adolescent girls to be sexual with each other in a lesbian relationship that he had them recreate from a pornographic magazine.

The third example is a gang rape of a juvenile girl by six adolescent boys who used a pornographic magazine's pictorial and editorial layout to recreate a rape in the woods outside of their housing development.

In many of our incest families, the perpetrators use pornography as tools or guides in order to initiate their family members into sexual behavior. Manuals and books that speak of father-

daughter love, father-son sex, or family love have been used to rationalize and validate this kind of behavior.

Many of our child molesters, both juvenile and adults, have utilized both adult and child pornography as a way to initiate their victims into the sexual behavior as well as a tool or guide for the sexual behavior of child molesting. Many of our victims blame themselves and feel a great deal of culpability because they believed the original depiction from pornography as being normal behavior between adults and children. In addition, many sex offenders have vast collections of self-made pornography detailing who their victims were and the acts they committed. This is a particularly traumatic issue for many of the victims we treat. It is a source of extreme shame and embarrassment for the victims that pictures of the activity between themselves and the offender exist. We may not have all those pictures, copies of the pictures may have been sold or traded to other collectors, or we may not have found the entire collection. These collections are cataloged at the Bureau of Criminal Apprehension and continue to exist long past the time when the crime has been reported and handled in the court. To complete treatment, the victim must put the crime into the past. This is impossible, however, when existing photographs continue to preserve the crime as a reality in the present.

Fantasy is the key to translating pornography to reality. Therefore, the question becomes, how do we test consumers of pornography for their ability to separate reality from fantasy? Rape fantasies and their prevalence among both men and women have been documented by researchers and raise a very important question. Would these fantasies be so prevalent in our society if the materials for formulating rape fantasies had not already been there in the literature? Recent research by my colleague, Dr. Donnerstein, indicates that a large percentage of the male population has a propensity to rape. Important inhibitors to acting out this propensity are social controls such as the possibility of being caught and apprehended, social norms that define rape as unacceptable behavior, and, the crucial inhibitor, conscience.

I would like to present a theory one of my colleagues has formulated for how pornography may be translated into "acting-out behavior," as we call it in the psychology field. The first precondition is that pornography fosters violent fantasies and desires in people who view it. Such pornography conveys the message that many ordinary people commit such crimes, and that when they do, they experience no remorse.

The second precondition is that pornography plays a role in

overcoming internal barriers against acting out such desires. Pornography inhibits the conscience. If a man can persuade himself that real women, like the women portrayed in pornography, really like being raped (that they do not really mean "no" when they say it), what reason is there for guilt?

The third precondition is that pornography erodes external barriers by contributing to cultural support for rape. Consumers of pornography may come to believe that rape is not a breach of norms. By making rape appear easy to accomplish and easy to get away with, pornography may change the fear of being caught.

The fourth precondition is that pornography melds sexuality with violence. The laws of conditioning suggest that when people are aroused by watching sex and violence together it becomes difficult to separate the two.

There are also some preconditions that we think apply to victims. A fifth precondition comes from psychological research and our work with victims that show pain contributes to undermining some women's assertiveness about what sexual acts they would engage in or resist. Encouragement of the use of violence or pain as a way to overcome the resistance of victims is a prevalent scene in pornography.

A sixth precondition also pertains to victims. The effect of the portrayal of women and children as victims in pornography may so undermine women's and children's self-esteem that they are less able to resist this sexually coercive behavior when it is forced upon them by family members, significant others, or strangers.

In closing, I want to commend you for addressing this difficult issue. It is vital that you hear the testimony of experts such as ourselves. You have been selected to represent the community and its standards, to see that justice is provided, and that the dignity and safety of each citizen in the community is preserved. I am proud of Minnesota for being the first community in the United States to encourage an open dialogue about the issue of pornography, prohibitive legislation, and censorship. It is important that forums such as this one continue at all levels, not only for judges, psychologists, and professionals, but for all the public as well. The debate about pornography is one that must take place in the open, so that people come to understand the effects that pornography has on each individual in society.

Notes on Pornography and the First Amendment

Cass R. Sunstein*

Efforts to regulate pornography²⁹ have met with considerable resistance in the legal community.³⁰ That resistance is based on general principles of free expression which do and should command widespread support. The goal of this presentation is to set out a few reasons why the application of those principles to at least some categories of pornographic materials seems to me ill-conceived.

It will be useful to begin by describing the law with respect to sexually explicit materials, most of which derives from *Miller v. California*,³¹ decided in the early 1970's. Under the Supreme Court's decision in *Miller*, obscenity may be suppressed if (a) under contemporary community standards, the average person would find that the work, taken as a whole, appeals to the prurient interest, (b) the work depicts sexual conduct specifically defined by state law, and does so "in a patently offensive way," and (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.³² *Miller* sets out the basic constitutional standards for regulation of sexually explicit materials, though other cases have some relevance as well.³³

One decision rendered after *Miller* carries implications that may turn out to be important. In *New York v. Ferber*,³⁴ involving child pornography, the Court held that the state could regulate the distribution of some materials that did not fall within *Miller*.³⁵ The Court reasoned that the materials in question involved harms the state had a right to prevent—the use of children in pornography—and that the state could, consistent with the first amend-

* The reader is asked to give the normal indulgence for an essay based on a transcript of oral remarks. A more elaborate treatment of this subject is Cass Sunstein, *Pornography and the First Amendment*, 1986 Duke L.J. (forthcoming). I am grateful to Suzanna Sherry, Geoffrey R. Stone, and David A. Strauss for valuable comments on an earlier draft.

29. For purposes of the present discussion it is unnecessary to attempt to define the term with precision; I refer generally to sexually explicit materials that produce the various harms described *infra*.

30. See Geoffrey R. Stone, *Antipornography Legislation as Viewpoint Discrimination*, 9 Harv. J.L. & Pub. Pol'y 701 (1986).

31. 413 U.S. 15 (1973).

32. *Id.* at 24.

33. See, e.g., *Brockett v. Spokane Arcades, Inc.*, 105 S. Ct. 2794 (1985); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

34. 458 U.S. 747 (1982).

35. *Id.* at 753-54.

ment, attempt to stop those harms by banning the sale and distribution of the material. A more direct action by the state, in the form of a prohibition of use of the children without attacking the speech directly, would be less effective; enforcement of the underlying prohibition would be possible only with an effort to undermine the profit motive that generates child pornography in the first place.

Because they allow government to suppress speech on the basis of its content, both *Miller* and *Ferber* might be thought to strike discordant notes in the law of the first amendment. Moreover, their precise bearing on recent efforts to regulate pornography is far from clear. The *Miller* test allows suppression of a large amount of pornographic material; but because its thrust was to define some forms of expression as "not speech" rather than to point to the harms produced by such expression, it covers both more and less than would a gender- and harm-based approach to this issue. *Miller*, in short, allows regulation of some speech that causes few or none of the relevant harms, and may forbid regulation of some speech that produces all of them. At this stage it will be useful to set out a quite straightforward, two-step argument for regulating at least some pornographic materials. The argument, based on conventional first amendment standards, is designed both to explain the roots of current doctrine and to suggest how other sorts of regulations of pornography might be justified.

The first point is that much pornographic material, as I understand it here, lies far from the center of the first amendment concern, however that center is defined. Under current doctrine, and under any sensible system of free expression, speech that lies at the periphery of constitutional concern may be regulated on the basis of a lesser showing of government interest than speech that lies at the "core." To say this is hardly to say that the definition of the core and the periphery will be simple. Under any standard, however, at least some pornographic materials will be easily classified. Some such materials, in purpose and effect, promote sexual arousal rather than deliberation on public or private issues—the central point in *Miller*—and thus these materials have little to do with first amendment purposes as they have traditionally been understood. Such materials are analytically like a whip, or a prostitute, and not analytically like speech; they do not appeal in any sense to the deliberative capacity of the community.³⁶

36. See Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 Geo. L.J. 899, 926, 928 (1979).

This conclusion does not mean that pornographic materials are entirely without first amendment protection. But one need not subscribe in all respects to a Meiklejohnian conception of the first amendment³⁷ in order to conclude that speech relating to public affairs is entitled to special protection against government control. Expression that amounts to "words" is not, by virtue of that fact, always immune from regulation unless government is able to show an overwhelmingly powerful justification. Consider, for example, commercial speech, laws prohibiting conspiracies (which are after all words), laws prohibiting bribes, threats, and so forth. All of these forms of speech are not treated analytically like speech that falls within the core of the first amendment, because they have little or nothing to do with deliberative processes on the part of the community.

I do not suggest that this argument is airtight, that it will not leave hard intermediate cases, or that it is, standing by itself, a sufficient reason for regulation of some or all categories of pornography. A particular difficulty here is that separation of the emotive and cognitive, or nondeliberative and deliberative, aspects of speech is difficult, and indeed it is something courts should generally avoid. The notion that speech that appeals to "reason" is especially valuable, and that speech that appeals to "emotion" is not, depends on a highly controversial process of categorization. It may be doubted that the two can sensibly be separated, and certainly speech that does both is not, by virtue of that fact, entitled to less than full first amendment protection. The problem of line drawing is formidable and might lend itself to abuse. There are also risks in concluding that some categories of speech are of "low value."

I cannot untangle all of these problems here. It cannot be correct, however, to say that the same standards should govern pornography as are applicable to the political speeches of, for example, Martin Luther King or Jerry Falwell. One would be hard-pressed to defend a first amendment doctrine that would impose the same burden of justification on the government for regulation of all categories of speech. This proposition—that the burden on government is different depending on the nature of the speech—is of course quite familiar, indeed firmly entrenched, in first amendment law.³⁸ Once that step is taken, at least some pornographic

37. See generally Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948) (freedom of speech is a means of promoting self-government).

38. See generally Stone, Seidman, Sunstein & Tushnet, *Constitutional Law* ch. 7 (forthcoming 1986) (discussing categories of "low value" speech).

material may be regulated on the basis of a lesser showing of harm.

Even if the "low value" argument is accepted and found applicable to pornography, the argument does not in itself justify regulation of words which are after all entitled to first amendment protection. The arguments for regulation of pornography, however, turn out to be surprisingly powerful. The most persuasive arguments do not stress the offensive character of sexually explicit material or its effects on the "environment"—the features emphasized by the Court in the *Miller* case. Instead the arguments stress three different points.

First, there is a causal connection between pornography and violence against women.³⁹ The extent of the effect and the precise correlation between exposure to pornographic and sexual violence are sharply disputed. But there can be no doubt that pornography does increase the incidence of sexual violence against women. To be sure, most men will not commit rape "as a result of" pornography, and most rapes would occur without pornography; but a reading of the literature suggests that pornography significantly increases the aggregate level of sexual violence. The first justification for regulation thus stems from discernible harms whose extent is uncertain but whose existence is undeniable.

Second, the existence of the pornography market produces a number of harms to models and actresses. Some women are coerced into pornography. Others are abused and mistreated, often in grotesque ways, once they have entered the pornography "market." A less restrictive alternative to regulation would be to ban the coercion or mistreatment, as indeed current law does. Such an alternative would also be far less effective. The most effective way to eliminate the practice is to eliminate or reduce the financial benefits—a point the Supreme Court recognized, albeit in a somewhat different context, in the *Ferber* case.

Third, and more generally, pornography reflects and promotes attitudes toward women that are degrading and dehumanizing and that result in a variety of forms of illegal conduct. Pornography portrays women as enjoying being abused, beaten, and raped. The pornography industry is an important conditioning factor for both men and women, a factor that has significant consequences for the existence of equality between men and women. To be sure, it is as much a symptom as a cause, but it is a cause as well. This effect is sometimes thought to argue against rather

39. See generally Pornography and Sexual Aggression, *supra* note 1 (collecting studies on causal relationship).

than in favor of regulation, for it suggests that pornography influences social attitudes. As argued in more detail below, however, such effects are usually a by-product rather than a purpose of pornography, and in any event the effects are achieved through non-deliberative means, a fact that bears significantly on the constitutional issue.

The second prong of the argument for regulation is thus that some forms of pornography produce considerable harm, and it is possible for government to be quite concrete about the nature of that harm. Because the burden of justification on the government ought to be more lenient in light of the nature of the speech, the constitutional case for regulation is quite powerful. I emphasize that I am not talking here about the precise scope of any regulation of pornography, but instead suggesting that, in light of widely accepted first amendment doctrine, efforts to deal with the problem should not pose insuperable first amendment difficulties.

There are two categories of objections to this argument for regulation. The first was set out by the United States Court of Appeals for the Seventh Circuit—the only court to have dealt with the subject⁴⁰—in a decision recently affirmed summarily by the Supreme Court.⁴¹ The court reasoned that an argument that would regulate pornographic materials by reference to the three harms referred to above is worse, rather than better, than the *Miller* standard. Indeed, it would be worse than *Miller* even if the category of speech suppressed turned out to be narrower than the category that can be suppressed under *Miller*. According to the court, a statute that imposed sanctions on a subcategory of *Miller* speech, defined by reference to these harms, would be unconstitutional even under *Miller*.⁴²

At first glance that proposition seems quite mysterious, but the basic approach is conventional within first amendment doctrine. Regulation of speech is most troublesome—under doctrine which should command widespread support—if it is based on government's disapproval of the viewpoint in question. If the state enacts a law to the effect that no one may speak favorably about Republicans on billboards, it is acting more unconstitutionally than if it passes a law forbidding anyone to say anything on billboards. This conclusion holds even though the second regulation eliminates "more" speech. The first measure is more troublesome because it is based on government antipathy to viewpoint, a partic-

40. See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985).

41. *American Booksellers Ass'n v. Hudnut*, 106 S. Ct. 1172 (1986).

42. 771 F.2d at 323.

ularly severe first amendment evil.⁴³

The reasoning of the court of appeals was that regulation of pornography that draws lines on the basis of harms to women amounts to discrimination on the basis of viewpoint. Such regulation is therefore, in the court's words, "thought control,"⁴⁴ for it is constructing a socially approved view of the relations between men and women and imposing that approved view through law. People with the approved view can speak; people with the disapproved view cannot; and that, in the court's view, is what the first amendment centrally prohibits.

The initial response to this argument is straightforward: an anti-pornography law that derives from the various harms identified above is not viewpoint-based in the same sense as the anti-Republican billboard regulation. The legislature is not aiming at ideas but instead at concrete harms. It is, in this sense, a mistake to treat a law aimed at pornography because of new findings of harm as if it were a law sanctioning a particular view about the appropriate role of men and women. A regulation based straightforwardly on viewpoint would not be difficult to imagine. Such a law might say, for example, that anyone critical of the Equal Rights Amendment cannot offer his or her critique if the critique is founded on the proposition that women should be subordinate to men. Alternatively, it might forbid all artistic expression, whether or not sexually explicit, that portrays women as subordinate to men. That is not the sort of law that would derive from the harms described above.

A rejoinder would point out that the line between aiming at ideas on the one hand and at harms on the other is thin.⁴⁵ Indeed, some statutes ordinarily thought to be based on viewpoint might be explained, by their defenders, as based on harm. A statute that forbids speech unfavorable to government in times of war is justified on the basis of the harms that flow from such speech; in this sense, it is said by its defenders to be viewpoint-neutral. The fact that viewpoint-based statutes can be defended in terms of harms raises a difficult and largely unexplored problem in first amendment theory. The ordinary categories of viewpoint-neutral and viewpoint-based regulations turn out to be less obviously defensi-

43. See generally Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189 (1983) (discussing reasons for judicial skepticism about viewpoint-based regulations).

44. 771 F.2d at 328.

45. See generally Stone, *supra* note 30 (arguing that anti-pornography legislation is viewpoint-based notwithstanding relevant harms).

ble when measures that fall within the latter category turn out to be not based straightforwardly on viewpoint at all.

I cannot sort out this problem in these brief remarks. It may help to suggest that the ordinary hostility to viewpoint-based regulation derives in part from a suspicion of any effort by the government to prevent speech on the ground that it might persuade people to engage in a particular course of conduct. The remedy for efforts at persuasion is not to prevent the speech, but to counter it with "more speech"⁴⁶ and to attack unlawful conduct directly. To be sure, regulation we ordinarily treat as viewpoint-based may be defended by reference to harms, but it is entitled to special judicial hostility because it attempts to bypass deliberative processes of the public and to control those processes by a constitutionally impermissible means. Consider, for example, a law forbidding criticism of government during times of war; the risk about which government is concerned stems from fear that people may be persuaded. That risk, deriving from the possibility of persuasion by argument, is one to be countered by more speech and by direct control of unlawful conduct.

By contrast, pornography regulation need not be seen as viewpoint-based in the relevant sense. It does not, by hypothesis, interfere with speech that appeals to deliberative processes but instead with speech that aims at something else altogether. And the point is unaffected by the fact that pornography does in a sense "persuade"; it does so in ways that, again by hypothesis, have nothing to do with deliberation. The evils posed by viewpoint regulation—government circumvention of ordinary deliberative processes—are thus not present. The proper analogies here include bribes and threats, which are, in a sense, viewpoint-based, but are not treated as such because deliberation is not involved. Indeed, the law of the first amendment contains several categories of viewpoint regulation that are not "seen" as such because of the nature of the regulation and the harms involved. Consider regulation of labor speech, commercial speech, and even obscenity. Whether a regulation is impermissibly viewpoint-based thus turns on point of view. The constitutional outcome should depend on the process by which the message is communicated, the centrality of the speech to the first amendment, the existence of genuine harms, and the likelihood that the harms will be remedied by reg-

46. This is, of course, a reference to Justice Brandeis's suggestion that "more speech, not enforced silence" is the remedy for speech that may bring about harmful consequences. See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

ulation. On all of these counts, antipornography regulation should be permissible.

The court of appeals in the Indianapolis case⁴⁷ held that it need not explore the "low value/high value" issue because a harm-based approach to pornography is actually based on viewpoint.⁴⁸ But that approach seems to have it backwards: whether the approach should be treated as viewpoint-based turns out to depend on whether the speech in question is, in a sense,⁴⁹ high-value. To say all this is to outline very briefly what will in all likelihood turn out to be a complex argument. But it should suffice to show that it is too facile to think that any approach to pornography of the sort advocated here must be invalidated on grounds of viewpoint discrimination.

The second argument against that approach points to the overbreadth of regulations that might result from basing laws on the three harms to which I have referred. Overbreadth is, of course, a technical term in first amendment doctrine; the concern is that in the course of regulating unprotected speech, government may in the process censor speech that is not subject to control.

The problem of overbreadth⁵⁰ stems from the ordinary limitations of written texts, which will quite generally catch some conduct that the lawmaker would prefer not to regulate. Many laws are, by virtue of their text, applicable to conduct that the legislature did not want to reach. The conclusion applies to regulation of speech. The *Miller* standard itself, for example, could be interpreted by some to regulate speech that the Supreme Court did not want to cover; that is one reason why there have been many cases after *Miller*. Indeed, in light of the limitations of written words, there is a risk of overbreadth in any civil or criminal regulation. But that risk is hardly sufficient to justify doing nothing about a significant problem. For this reason overbreadth arguments are always important, and sometimes dispositive, but rarely sufficient to justify a decision not to act to control a serious problem. And in considering the question of definition, it is important to keep in mind that the fact that a prohibition might have troublesome or

47. *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985).

48. *Id.* at 334.

49. The qualification is necessary because various imaginable regulations might aim at viewpoint within the category of low-value speech. Imagine a statute saying that pornographic materials in favor of Democrats are permissible, but those in favor of Republicans are not. The problem with such measures is that like ordinary viewpoint-based regulations, they are designed to and do in fact skew deliberative processes, an impermissible first amendment goal.

50. I emphasize problems of overbreadth rather than vagueness here. The two points are related, and the vagueness difficulty is subject to an analogous response.

unacceptable applications is not ordinarily thought to be a reason not to have a prohibition at all. These considerations are reflected in the Supreme Court's recent narrowing of the overbreadth doctrine.⁵¹

The more specific point is that it should be possible to draft a law whose coverage would be targeted to the sorts of harms that justify an antipornography law. Under the first amendment, it is properly necessary to do this sort of precise targeting. The first point here is that one can be clear about the category of regulated speech if one focuses on both the harms produced by pornographic materials and the basic rationale for regulation. In the event this should prove insufficient, let me mention, without necessarily endorsing, three ways of limiting antipornography laws that are targeted to the harms identified above. And it is important to emphasize that I am not attempting to set out a statute with precisely the right degree of breadth and clarity, but instead to suggest that the justifications for regulation of pornography are sufficient to support regulation of at least some pornography, and that a focus on those justifications is the most useful way to approach the constitutional problem.

First, the definition might point to the work "considered as a whole." It may be, for example, that the material in question will contain scenes falling within the prohibited class, but that on balance it poses little or nothing in the way of those harms. Second, the definition might be narrowed to exclude from its coverage works with serious literary, artistic, or other value. Third, some distinction might be drawn between visual media, particularly films—which in all likelihood pose special harms in terms of the underlying justifications for regulation—and written work. All three ways of narrowing the regulation would have vices as well as virtues: they may allow evasion; and they may permit materials to escape regulation that pose one or more of the evils pointed to above. But they support the conclusion that it is possible to draft a law that is not overbroad within the meaning of the first amendment.

In the final analysis, objections to regulation of pornography tend to come in one of two categories. The first is that the speech at issue—and again I am defining it quite narrowly—is independently worthy of first amendment protection and should not be suppressed. I believe that this objection, which is in fact rarely offered, is not powerful. The speech of which we are speaking (1) by hypothesis causes significant harms and (2) is far from the central

51. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

concerns of the first amendment. Indeed, a large part of that speech is already subject to ban—though, strikingly, it is infrequently banned in practice—under the current law of obscenity. If pornographic materials were prohibited, it is doubtful that the prohibition, standing alone, would pose any threat to the principles underlying a properly functioning system of free expression.

The second objection is a conventional one in first amendment debate. The concern is that if one allows a particular category of speech to be regulated, it will be difficult or impossible to draw lines, and the result will be a body of doctrine much less protective of speech than one would prefer. It is impossible, some will argue, to generate limiting principles that can confine the reach of a harm-based approach to speech.

In this context, however, that argument is misplaced. A quick albeit partial answer would point to the experience of other countries that have allowed regulation of some categories of pornography without endangering general principles of freedom of expression. Indeed, for most of the history of the United States, some such regulation has been permitted without seriously risking first amendment rights. The current prohibition of obscenity, of fighting words, of some kinds of commercial speech, and of libelous statements has not produced significant threats to the first amendment or its underlying purposes. The argument outlined above is designed to justify regulation of pornography without at the same time allowing control of other forms of speech, and it is hard to see what other categories of expression could be regulated as a result. One may sometimes have a hard time in drawing lines, but I am quite doubtful that greater regulation of pornography, and recognition of pornography as a form of sex discrimination, would lead to troublesome inroads on a well-functioning system of free expression.

I conclude with one further point. American constitutional law is rightly hostile to censorship. Ordinarily the remedy for the harms produced by speech is, as Justice Brandeis had it, "more speech, not enforced silence."⁵² And it is no light thing to add a new category of unprotected speech or to increase (at least in some respects) the size of an existing category—especially where the breadth of the addition is uncertain. Freedom of speech, conventionally understood, has of course been an important contributor to unpopular causes, including those favoring women.

The first amendment concerns have made many resistant to assimilating the new arguments against pornography into constitu-

52. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

tional law. But the burden of this discussion has been that the resistance depends on a simultaneous undervaluing of the harms produced by pornography and an overvaluing of the risks produced by some inevitable definitional vagueness.

Pornography as Sex Discrimination

Catharine A. MacKinnon*

Over time, this government has tried various approaches to the problem of pornography. The 1970 president's commission found that, although pornography may outrage sensibilities and offend tastes and morals, it was harmless.⁵³ In the face of these findings, the Supreme Court nonetheless decided that when materials violate community standards, appeal to the prurient interest, are patently offensive, and are otherwise worthless, they may be prohibited as obscenity.⁵⁴ State and local legislatures have tried confining obscenity by zoning it,⁵⁵ defining it as a moral nuisance,⁵⁶ hiding it behind opaque covers in secret rooms,⁵⁷ or by paying the pornographers to get out of town.⁵⁸

Despite these attempts, the pornography industry has flourished. I think that obscenity law may be part of the reason why. In order to find that something appeals to the prurient interest, for example, a finder of fact must admit to arousal by the material. The more violent the material, the less likely this becomes, because people do not tend to want to admit publicly that they are sexually aroused by violent materials. Similarly, to be patently offended by materials, it is necessary to not be desensitized to them. People are neither aroused nor offended by materials to which they are desensitized, so that the more pornography one sees, the less offensive it becomes. Taken together, the tests of prurient interest and patent offensiveness have a built-in bind. Finders of

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53. The Report of the Commission on Obscenity and Pornography (1970).

54. *Miller v. California*, 413 U.S. 15, 24 (1973).

55. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). An example enunciated after this speech was delivered is *City of Renton v. Playtime Theatres, Inc.*, 106 S. Ct. 925 (1986), which permitted a zoning scheme that banished adult theatres to industrial areas.

56. *Brockett v. Spokane Arcades, Inc.*, 105 S. Ct. 2794 (1985).

57. *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985).

58. St. Paul, Minnesota, is an example.

fact are required to admit both that the materials arouse them sexually and that the materials offend them patently. That which turns them on, they must also reject as revolting. This may begin to clarify why pornography is perhaps the last thing obscenity law has been used to address.

Perhaps an even more fundamental problem is that pornography is so profitable—sexually to its users and financially to its pushers—that it effectively sets community standards. The more pornography exists in a community, the more likely it is that community standards will *de facto* come to correspond to it. As Ed Donnerstein's data and discussion showed,⁵⁹ consumer preferences escalate toward the more violent materials—a dynamic which means that new markets, hence greater profits, are created through creating community standards that tolerate more and more violating materials.

Primarily, though, pornography has been allowed to flourish because its real harm has been legally and socially obscured. I mean the violation of women and children that is essential to its making and inevitable through its use. This harm *could* be overlooked, and *has* been overlooked, because the pornographers, who are pimps, take people who are already powerless, who begin socially powerless—the poor, the young, the innocent, the used, the already used up, the desperate, the female—and deepen their invisibility and their silence. Pornography deepens their invisibility and their silence through making their subjection the sexually enjoyable, the sexually enjoyed, sex itself. Women are coerced to perform for pornography and are made to act as if they are enjoying themselves.⁶⁰ This pornography then is forced on women who are forced to act it out, to correspond to the way the pornography uses and presents the women in it. It then becomes possible to point to the world pornography has created and say that it truthfully expresses women's nature, because it corresponds to their reality. This process has succeeded in making the victims of pornography so invisible as victims that through years of inquiry, including the 1970 commission, the only harm this government

59. Professor Donnerstein presented his data prior to my discussion. A particularly lucid presentation of his results to that date can be found in *Public Hearings on Ordinances to Add Pornography as Discrimination Against Women: Before the Minneapolis City Council Gov't Operations Comm.*, 1st Sess. 4-12 (Dec. 12, 1983) (on file with *Law & Inequality Journal*) [hereinafter the entire volume is cited as *Hearings*]. See also Donnerstein, *supra* note 19.

60. Linda Lovelace, Ordeal (1980); Michael A. Gershel, *Evaluating a Proposed Civil Rights Approach to Pornography: Legal Analysis as if Women Mattered*, 11 Wm. Mitchell L. Rev. 41, 55 (1985); Margaret Baldwin, *The Sexuality of Inequality: The Minneapolis Pornography Ordinance*, 2 Law & Inequality 629, 636-37 (1984).

could see was sex it disapproved of seeing, rather than its most powerless citizens being hurt. Pornography has made its victims so silent that until the hearings on the proposed civil rights anti-pornography ordinance in Minneapolis in December of 1983, no official body heard them scream, far less speak.⁶¹

The United States Supreme Court recently admitted that the obscenity doctrine had missed something, someone actually, for whose injuries the law had therefore been inadequate. When it recognized in the *Ferber*⁶² case that child pornography is a form of child abuse—over the opposition of the ACLU, I might add—and whether or not the materials are obscene is beside the point, the Court found that pornography made using children could be criminally banned consistent with the first amendment. With many others, Andrea Dworkin and I have been working to expose the specific atrocities to women that have also been hidden, and for which existing law remains inadequate. These abuses were documented here in Minneapolis in December, 1983, for the first time in the history of the world to our knowledge—which is an appalling fact in itself. The abuses that were spoken in public include coercion to perform for pornography,⁶³ the pervasive forcing of pornography on individuals,⁶⁴ assaults directly caused by specific pornography,⁶⁵ and the targeting for rape,⁶⁶ battery,⁶⁷ sexual harassment,⁶⁸ sexual abuse as children,⁶⁹ forced prostitution,⁷⁰ and the civil denigration and inferiority characteristic of a second class civil status that is endemic to this traffic in female sexual slavery.⁷¹

Pornography makes women what Andrea Dworkin has called "the sexual disappeared of this society."⁷² Because these injuries

61. *Hearings, supra* note 59; see Baldwin, *supra* note 60; Catharine MacKinnon, *Pornography, Civil Rights, and Speech*, 20 Harv. C.R.-C.L. L. Rev. 1, 22-60 (1985).

62. *New York v. Ferber*, 458 U.S. 742 (1982).

63. *Hearings, supra* note 59, 2d Sess., at 40.

64. *Id.*, 1st Sess., at 13-17.

65. *Id.*, 2d Sess., at 37-39.

66. Diana Russell later documented a rate of 16,000 rapes per million women that the victims attributed directly to pornography. Diana Russell, *The Impact of Pornography on Women* (testimony prepared for the Attorney General's Comm'n on Pornography Hearings, Houston, Texas, Sept. 11, 1985). See also MacKinnon, *supra* note 61, at 12 n.20.

67. *Hearings, supra* note 59, 3d Sess., at 65-66.

68. *Id.*, 2d Sess., at 50-54.

69. *Id.* at 39-40.

70. *Id.*, 1st Sess., at 13-17.

71. *Hearings, supra* note 59. Kathleen Barry describes the larger context in which women are trapped into selling their sexuality for survival in *Female Sexual Slavery* (1979).

72. *Effect of Pornography on Women and Children: Hearings Before the Sub-*

are disproportionally inflicted on women; because they are inflicted on everyone who is victimized by them on the basis of their sex; because virtually nothing is being done about it; and because women matter—this seems to be the real sticking point—we proposed a new approach: that pornography be civilly actionable by its victims as sex discrimination and recognized as a violation of human rights.

I first want to discuss the harm of pornography, then the appropriateness of our approach to that harm, and finally, briefly, the first amendment issues. I will begin with an analysis of the evidence showing how the ordinances we conceived and drafted respond to the evidence and the injuries in a way existing law does not.

The harm of pornography begins with the women in it. In pornography, you see women being bound, battered, tortured, humiliated, and sometimes killed—or merely taken and used. For every act you see in the visual materials, a woman actually had to be tied or cut or burned or gagged or whipped or chained, hung from a meat hook or from trees by ropes, as in *Penthouse*, December, 1984, urinated on or defecated on, forced to eat excrement, penetrated by eels or rats or knives or pistols, raped deep in the throat with penises, smeared with blood, mud, feces, and ejaculate.⁷³ Or merely—and this includes the glossy legitimate men's entertainment magazines—taken through every available orifice or posed, presented, displayed as though that were her fondest wish in life. Penis into vagina intercourse, by the way, is a minority theme.

Pornography sexualizes women's inequality. It makes the inequality of women sexy. It sexualizes, most broadly speaking, dominance and submission. Every kind of woman is used, each one's particular inequalities exploited as deemed sexually exciting.

Asian women are bound so they are not recognizably human, so inert they could be dead. Black women play plantation, struggling against their bonds. Jewish women orgasm in reenactments of Auschwitz. Pregnant women and nursing mothers are accessible, displayed. Women are played across hoods of cars, trussed

comm. on Juvenile Justice of the Comm. on the Judiciary, 98th Cong., 2d Sess. 227-55 (1984) (testimony of Andrea Dworkin).

73. Such materials are readily available at any pornography store. Some materials in which women are treated in these ways are on file with Organizing Against Pornography/A Resource Center for Education and Action, Minneapolis, MN. They include: *Black Tit and Body Torture*; *Chair Bondage*; *Hard Boss*; *Hard Leather*; *Penthouse* 119-27 (Dec. 1984); *Slave Auction*; and *Tit Torture Photos*. Most pornography contains no page numbers, volume numbers, or dates.

like dead prey. Amputees and other disabled or ill women's injuries or wounds or stumps are proffered as sexual fetishes. Retarded girls are gratifyingly compliant. Adult women are infantilized as children, children are adult women, interchangeably fusing vulnerability with the sluttish eagerness said to be natural to women of all ages, beginning at age one. So-called lesbians, actually women sexually arranged with other women for the purpose of being watched and claimed, are bought and sold with the rest.

The point is, because the profit from these mass violations counts and women do not, because these materials are valued and women are not, because the pornographers have credibility and rights and powerful friends to front for their interests and women do not, the products of these acts are protected and women are not. So these things are done so that pornography can be made of them. All of you who have been looking for a "direct causal link" between pornography and harm might consider this one.

The pornography industry is largely an organized crime industry in which overt force is standard practice. Yet the question persists, are these women there because they like it. Pimps are known for their violence, yet the question persists, are these women there as an expression of pure freedom. In a society whose opportunities for women are so limited that prostitution is many women's best economic option, even when explicit violence is not used, as often it is,⁷⁴ the compulsion of poverty, of drugs, of the street, of foreclosed alternatives, or of fear of retribution for non-cooperation can be enforcement enough.⁷⁵

Every act that is exacted from the women in the pornography, who are typically made to act as though they are enjoying themselves, is acted out on yet more women integral to the pornography's consumption. Such women are given no choice about seeing the pornography or about performing the sex. The pornography is forced on them to destroy their self-respect and their resistance to sexual aggression, to terrorize them into compliance or silence as a sex act in itself, or to instruct and season them for exact replication of the scripts and postures and scenes. Our testimony shows that rapes are thereby stimulated, inspired, fantasized, planned, and actualized.⁷⁶ We have women held down while the pornography is held up; women turned over as the pages are turned over.

74. See *Hearings*, *supra* note 59, 2d Sess., at 46-49.

75. See *id.*, 1st Sess., at 13-17.

76. See *generally id.*, 2d Sess., at 37-52, 58-59, 65-66.

The evidence is consistent across social studies,⁷⁷ clinicians who work with victims and perpetrators,⁷⁸ battered women's shelters,⁷⁹ rape crisis centers,⁸⁰ groups of former and current prostitutes,⁸¹ incest survivors and their therapists,⁸² court cases,⁸³ and police.⁸⁴ The most direct evidence, typically given the low value of those who provide it, comes from the victims themselves, used on one end of pornography or the other. This evidence, together with the laboratory tests in controlled experiments on what are termed non-predisposed normals (meaning men) and some recent correlational results, support the conclusion that exposure to pornography increases attitudes and behaviors of aggression and discrimination, specifically by men against women.⁸⁵ This conclusion is particularly supported by this evidence if you see that administering electric shock is a behavior, and if you see that not seeing an account of a rape is an account of a rape, is a form of discrimination. The increment of increase in aggression due to exposure varies according to the type of pornography, but it varies only in degree.

I think these results occur because sex and violence are inextricably interwoven in the harm of pornography. They are interwoven in the material itself. Pornography makes sex into a violation and makes rape and torture and intrusion into sex. The sex and the violence are interwoven on every other level of the pornography's social existence as well. Over time and exposure, many viewers respond sexually to violence against women whether it is presented in a sexualized context or not.⁸⁶ It therefore is sex, behaviorally speaking. Too, violence is used to coerce women to perform for materials that *show* violence, but violence is

77. See Pornography and Sexual Aggression, *supra* note 1.

78. *Hearings*, *supra* note 59, 3d Sess., at 72-73 (testimony of Daryl Dahlheimer, psychotherapist).

79. *Id.* at 67-71 (testimony of Wanda Richardson, Harriet Tubman Women's Shelter and Sharon Rice Vaughn, Minnesota Coalition for Battered Women).

80. *Id.* at 71 (testimony of Barbara Chester, Director of the Rape and Sexual Assault Center).

81. *Id.* at 83-85 (testimony of Sue Santa, Minneapolis Youth Division).

82. *Id.* at 74-76 (testimony of Cheryl Champion, Washington County Human Services, Inc.).

83. See MacKinnon, *supra* note 61, at 46-50 nn. 107-08.

84. *Id.* at 63-65 (testimony of Bill Neiman, Assistant County Attorney, Hennepin County Attorney's Office); see generally Ann Jones, *A Little Knowledge*, in *Take Back the Night: Women on Pornography* 179, 181 (Laura Lederer ed. 1980).

85. See generally Donnerstein, *supra* note 19; MacKinnon, *supra* note 61, at 52-53 nn. 116-18 (collecting studies).

86. Professor Donnerstein told me in conversation that it was proving impossible to make a film for laboratory purposes of *only* violence against women in which a significant number of subjects did not see sex.

also used to coerce women to perform for materials which are sexually explicit, are subordinating, but do *not* show the violence it took to make them.⁸⁷ The violence that is recognized as violence occurs off screen, except perhaps for the bruises the make-up fails to cover. Women are also forceably compelled to consume pornography until they acquiesce without further complaint or resistance in sex that violates their personal dignity, their desires, their bodies, not to mention their sexual preferences, without the need for further violence.

Pornography is an icon of male supremacy, the fusion of those twin icons, sex and speech. Thus legitimized, it neither appears nor needs to be violent at all times. Subjection is always violating, but it is not always violent; even less often it is perceived as such.

Further effects of exposure to pornography include the trivialization and objectification of women, increased acceptance of rape myths, desensitization to sexual force, and spontaneous rape-fantasy generation.⁸⁸ These are the so-called attitudes, so far from being considered violence to some that they are not even considered behavior. Sexual arousal is the only thing that does not seem to desensitize, so long as the materials escalate, yet nobody seems very sure whether it is an attitude or a behavior. But the only thing we cannot yet predict with exactness, although some of our colleagues are working on it, is which individual woman will be next on which individual man's list and for what specific expression of his escalated misogyny. We do know that such acts will occur. We do know that these materials, through the arousal they *do* cause, will contribute to these acts of misogyny, causally to many. We also know that the more pornography is consumed in the society, the less harmful these acts will socially be perceived as being. We also know that such acts will typically occur in contexts traditionally regarded as consensual, if not intimate, giving the aura of consent to the acts themselves: in marriages and families, on dates, among acquaintances, on the job, in churches, in schools, in doctors' offices, in prostitution. Rarely between strangers. Almost always between women and men.

On the basis of this analysis of its social reality, we have concluded that pornography, not alone but crucially, institutionalizes a subhuman victimized second class status for women in particular. If a person can be denigrated, and doing that is defended and

87. See, *i.e.*, Lovelace, *supra* note 60.

88. See Pornography and Sexual Aggression, *supra* note 1; *Hearings. supra* note 59, 1st Sess., at 4-12 (testimony of Dr. Donnerstein); see also *supra* note 85.

legalized as freedom; if one can be tortured and the enjoyment of watching it is considered entertainment protected by the Constitution; if the pleasure that other people derive from one's pain is the measure of one's social worth, one isn't worth much, socially speaking.

Our legal argument is simple: tolerance of such practices is inconsistent with any serious mandate of equality and with the reasons speech is protected. The civil rights approach to pornography is based on the notion that this remains true even when the means are words and pictures, the enjoyment and pleasure are sexual and economic, and even when—again, this seems to be the difficult part—the victims are women.

Based on empirical investigation of the materials actually available now in this country that do this damage, our law defines pornography as the graphic sexually explicit subordination of women through pictures and words that also includes women being sexually used and abused, for example being dehumanized as sexual objects who enjoy pain, humiliation or rape, bound, mutilated, bruised, dismembered, in postures of servility or submission or display, or penetrated by objects or animals. Men, children, or transsexuals, all of whom are sometimes violated in these same ways in and through pornography, can sue for similar treatment.⁸⁹

The term sexually explicit is an existing legal term that also has a popular meaning. Sexually explicit means explicitly showing sex. It was difficult to find an adult who had any problem knowing what that meant until we used it in our law. As a matter of fact, it is typically used to clarify the meaning of *other* words that are considered ambiguous or problematic, like prurient.

A subordinate is the opposite of an equal. The term subordination refers to an active practice of making a person unequal. Teacher/student, employer/employee, guard/prisoner are all unequal relationships. The idea of the law of sex equality is that man/woman not be such a relationship. The verb to subordinate refers to the active processes of enforcement of second class status. The word has long been used to analyze race relations under white supremacy. Again, the only problem in identifying it appears to arise when we apply it to the situation of women in pornography. I think this is a problem of the pervasiveness of the subordination of women, specifically of the sexualization of women's subordination, so that a woman being subordinated comes to be perceived as just who women are and as just what sex is. But this invisibility

89. Indianapolis, Ind., City-County General Ordinance 35 (June 11, 1984) (amending ch. 16 of the Code of Indianapolis and Marion County).

makes the harm more, not less. As the difficulty of perceiving the harm increases, so also can the severity.

Subordination can include objectification: making a person into a thing. It can include hierarchy: having made a person into a thing, you make them less than you, lower than you. It can include forced submission: after making a person a thing and lower and less than you, they better do what you tell them to do. At its extreme, subordination includes violence. All are fundamental to, and typical in, pornography.⁹⁰

Now presumably it is obvious that this is not the obscenity test. To be pornography, materials must be graphic and sexually explicit and subordinate women and also include at least one of the concrete list of particulars that are stated in the ordinance. If materials fit this definition they do this harm.

Just the fact that they exist, however, does not make them actionable. Only alleged victims of specific activities of coercion into pornography, of forcing pornography on a person, of assault caused by specific pornography, and of trafficking—which is production, sale, exhibition, or distribution of provable subordination—can sue. Some people believe that most if not all of these acts are already illegal. No existing law adequately reaches the materials which provide the incentive, the actualization, and the realization of these harms. And so long as the materials are protected and profitable, as they *are*, it will be effectively impossible to reach any of the included acts. As things stand, all you have to be able to do is to *do* them, to get away with them.

There is also a built-in perversity in enforcing existing criminal laws while leaving the materials untouched. Not only does it require that the acts *already be done* before anything can be done about them; it provides an incentive to murder. Pornography is already an incentive to rape a woman and run. But the more likely it is that the perpetrator will be criminally prosecuted, the greater incentive there is to do away with the evidence. Another prostitute O.D.'d in an alley, so what. Also, murdering women for the camera creates snuff films, which actually show women and children being murdered,⁹¹ a very profitable form of pornography, which also ensures that the victim is not a witness. This is one

90. This discussion is taken directly from Andrea Dworkin's lucid conceptualization of subordination in Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 Harv. Women's L.J. 1 (1985).

91. See, i.e., *Two Accused of Murder in Snuff Film*, Oakland Tribune, Aug. 6, 1983, at A6, col. 1 (two teenage girls reported murdered in the making of a pornographic movie).

reason why it is so important that women *other* than those in the pornography can also bring civil claims.

Privacy law, in theory, could reach some of these materials. Of course, it doesn't reach the abusive acts, and not all states have such laws. Attempts by individual women to restrict materials that use their image without their permission have proven especially unhelpful in seeking relief for *sexual* invasion of privacy through media.⁹² Also consider that lynching, for instance, was assault and battery or murder. But it did not begin to be effectively addressed as a practical matter until those organizations which practiced it as concerted racism were held accountable under federal civil rights law. Sexual harassment could also have been a tort, a contract violation, or a criminal battery; some sexual harassment includes rape. But it wasn't until sexual harassment was recognized as sex discrimination that something began to be done about it. Existing law exists, and so does pornography, with its entire range of abuse. To rely on existing law is to display a peculiar complacency in the face of human suffering, since the legal status quo has rather obviously permitted the suffering which constitutes the social status quo.

Now I will discuss the first amendment issues briefly. Pornography as defined in our law undermines sex equality—a compelling state interest and a legitimate concern of government—by harming people, differentially women. Under current first amendment law, exceptions are recognized. Speech interests are sometimes outweighed by other interests. The most common reason is harm. Compared with existing exceptions and counterbalances to the first amendment, the harm that this law recognizes meets a higher standard than any of them have met or have been required to meet, from the weakest to the strongest.

This is not a group libel law. There is a direct rather than conjectured connection between the status and treatment of those who could act under our law and the materials it covers. But, however tenuously, group libel laws are constitutional. This is not an obscenity law, but obscenity, on no showing of harm at all, is considered not speech, hence unprotected by the first amendment. This is not a libel law, either. It does recognize, however, that the words themselves can constitute harm, and laws against both libel and invasions of privacy are both only words and are constitutionally permitted, in some tension with the first amendment. Women

92. Ruth Colker shows the inadequacy of the current law of privacy in this context in her, *Pornography And Privacy: Towards The Development Of A Group Based Theory For Sex Based Intrusions Of Privacy*, 1 *Law & Inequality* 191 (1983).

are not children, but on the basis of an assumption that children in pornography are there by force, and get hurt by being paraded having sex in public, criminal bans on its production and distribution are constitutional. Our law does not strictly arise under any prior recognized theory, but each of the theories I have mentioned evidences concerns, sensitivities, and policies that provide the reason why the first amendment has been outweighed in each case. Those same concerns, sensitivities, and policies, the civil rights approach shares.

To put it briefly, expressive values have been qualified when the people hurt are real and when the interests matter: in the interests of unwilling viewers, captive audiences, young children, beleaguered neighborhoods (that means property values), for comfort and convenience, and to avoid that recently discovered atrocity, "visual blight."⁹³ If speech interests can become comparatively less valued for constitutional purposes when the materials are false, obscene, indecent, lewd, racist, provocative, dangerous, coercive, threatening, intrusive, inconvenient, or inaesthetic, we believe they should be able to be civilly actionable when they can be proven to be coerced, assaultive, and discriminatory.

Coercion, force, assault, and trafficking are not ideas. Coercion is not a fantasy, force is not a representation, an assault is not a symbol, and trafficking subordination is not advocacy. Pornography is at the center of a cycle of abuse that cannot be reached or stopped without reaching and stopping the pornography that is its incentive, product, stimulus, and realization.

So far, the courts that have looked at this law have found it unconstitutional. Judge Sarah Evans Barker, accepting the findings of harm, found that most women seem able to avoid being coerced into pornography, and since it fits within no recognized exception, it was not allowed.⁹⁴ Perhaps most women can avoid sexual harassment; perhaps most people can even avoid murder. There are still laws against them. Judge Frank Easterbrook of the Seventh Circuit affirmed. He, too, accepted that pornography does harm, but said that the more harm, the more protection. "We," referent unspecified, must accept that harm as the price of the free market of ideas, even if it leads to genocide.⁹⁵

I used to think the Supreme Court case on this ordinance would be the Plessy against Ferguson of the pornography issue:

93. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 104 S. Ct. 2118, 2132 (1984). The legal argument made here is discussed and documented more fully in MacKinnon, *supra* note 61.

94. *American Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984).

95. *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985).

separate but equal is equal.⁹⁶ Now I think perhaps that was optimistic. We may be facing something more like the Dred Scott⁹⁷ of this issue. The *Plessy* version would have been: it's fine to treat women as inferior because really they are different. But we may be facing a prior issue, the abolitionist issue, an institution under which some people can be bought and sold, are not to be able to sue for it, and that defines the meaning of their freedom under the Constitution.⁹⁸

The bottom line of all the resistance we encounter to this law is that a lot of people, people who matter, enjoy pornography. That is why they defend it. That is also why there is so much hysteria and distortion over the civil rights approach. The worry is not that it would misfire, but that it would fire at all. The fear is, it would work.

The fact that some people like pornography does not mean it does not hurt other people. As in any instance of a conflict of rights, the side you take is a choice. We know that so long as pornography exists as it does now, women and children will be used and abused to make it, as they are now. And it will be used to abuse them, as it is now. The question is, whether we are willing to wait for each act of victimization that we know will occur to occur, relying on existing law to clean up after the pornographers—one mind, one body, one devastated life at a time—and never notice the gender of the bodies, never notice that the victimization is centrally actualized through pictures and words, and never notice that we encounter the pornography in the attitudes of many of the police, in the values underlying the laws, on our juries, in our courts every time we try to prove that a woman has been hurt. It tells us how much we are worth, that something few people have much good to say about, is more important than we are.

I hope you will see our law in your court some day. I hope you will see it in a real case in which a real woman who has been hurt is *fighting for her life* against real pornographers who are fighting to keep us all subjected in the name of freedom. And I hope that you will recognize, if such a case comes before you, that even in the law, something is sometimes done for the first time.

96. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

97. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

98. On February 24, 1986, true to this prediction, the United States Supreme Court summarily affirmed the Seventh Circuit's opinion, 106 S. Ct. 1172 (1986) on a 28 U.S.C. § 1254(2) direct appeal, without argument, opinion, or citation—suggesting, *inter alia*, that power is not having to give reasons.

