

1987

Convergence of Feminist and Civil Liberties Principles in the Pornography Debate, The Book Review

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Recommended Citation

62 N.Y.U. L. Rev. 201 (April 1987)

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BOOK REVIEW

THE CONVERGENCE OF FEMINIST AND CIVIL LIBERTIES PRINCIPLES IN THE PORNOGRAPHY DEBATE

WOMEN AGAINST CENSORSHIP. Edited by Varda Burstyn. Vancouver, B.C.: Douglas & McIntyre Ltd. 1985. Pp. vii, 210.

Reviewed by NADINE STROSSEN*

INTRODUCTION

According to its editor, the aim of *Women Against Censorship*,¹ a provocative collection of essays by leading North American feminist writers and activists,² is to show that “for women freedom lies not in accepting censorship [of pornography], but in repudiating it.”³ In pursuing this aim, the book effectively attacks two shibboleths concerning the recently burgeoning public debate about pornography: “that all feminists have a uniform assessment of pornography and uniformly advocate its

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¹ *Women Against Censorship* (V. Burstyn ed. 1985).

² The contributors include artists, teachers, journalists, lawyers, and scholars who have been active in the feminist movement. See *id.* at 209-10. Varda Burstyn describes herself as a writer on political and cultural issues, a teacher of film studies, a video producer, and a radio broadcaster, who has been involved in the women's movement since 1967. *Id.* at 209. Reflecting the activist orientation of their authors, the essays are “not academic pieces,” but rather “documents of struggle—partisan, passionate, committed.” Burstyn, Introduction to *Women Against Censorship* 12 (V. Burstyn ed. 1985).

Notwithstanding the nonscholarly tone and anecdotal content of many essays in the book, the major points they make withstand more rigorous analysis, as indicated in this Essay. These pieces constitute a valuable response to feminist pro-censorship writings precisely because so many of them also do not employ traditional scholarly rhetoric or analysis, but are rather “chronicles of real events and experiences by women involved in the process they describe.” *Id.* (describing contributions to *Women Against Censorship*). See, e.g., A. Dworkin, *Pornography: Men Possessing Women* (1981); Fritz, *Pornography as Gynocidal Propaganda*, 8 N.Y.U. Rev. L. & Soc. Change 219 (1978-1979); MacKinnon, *Pornography, Civil Rights and Speech*, 20 Harv. C.R.-C.L. L. Rev. 1 (1985).

³ Burstyn, *supra* note 2, at 3.

“censorship”;⁴ and that, in consequence, the pornography debate pits feminists, who view pornography as a principal cause of sex discrimination and violence against women, against civil libertarians, who view it as protected free speech.⁵ These false assumptions have been perpetuated by the leaders of the feminist procensorship movement.⁶ Further, the arrogation by procensorship feminists of the right to define “the” feminist view of pornography is paralleled by their arrogation of the right to define what sexual behavior and imagery is acceptable from “the” feminist viewpoint.⁷ Thus, contemporary feminist advocates of censorship, similar to other advocates of censorship throughout history, seek to impose their views not only on what others should read, but also on how others should behave.⁸

Women Against Censorship demonstrates the falseness of the purported dichotomy between feminist and civil libertarian principles and shows how censorship and other governmental regulations of pornography would violate both sets of principles.⁹ As June Callwood explains: “Feminism and civil liberties are inextricable. The goal of both is a soci-

⁴ Id. at 2. Feminists who oppose censorship have been systematically ignored by both the media and politicians. See e.g., Burstyn, *Political Precedents and Moral Crusades: Women, Sex and the State*, in *Women Against Censorship* 4, 26 (V. Burstyn ed. 1985).

⁵ See, e.g., Lerman, *Preface to Colloquium, Violent Pornography: Degradation of Women Versus Right of Free Speech*, 8 N.Y.U. Rev. L. & Soc. Change 181, 184 (1978-1979) (“Although some speakers [at colloquium] bridged the gap between the feminists and the civil libertarians, there was a general failure of communication.”). This often overblown conflict is accentuated by the use of the terms “feminists” and “civil libertarians” as if they were mutually exclusive. Many individuals, including the author of this Essay, reasonably consider themselves to be described accurately by both terms. To make the point, this Essay hereafter will avoid the nouns “feminist” and “civil libertarian” and instead will refer to feminist “principles” and civil liberties “principles.”

⁶ See, e.g., 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”); 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)). See also Jacobs, *Patterns of Violence: A Feminist Perspective on the Regulation of Pornography*, 7 Harv. Women’s L.J. 5, 23 (1984) (“[F]eminists . . . reject the liberal view that all pornography should be free from restriction and censorship . . .”).

⁷ See note 26 *infra*; text accompanying notes 75-77, 88-95 *infra*.

⁸ See Burstyn, *Political Precedents and Moral Crusades: Women, Sex and the State*, in *Women Against Censorship* 4, 12 (V. Burstyn ed. 1985) (in late nineteenth century many feminists joined with other groups to organize “Social Purity” movement to press for legislation that would enforce their views of acceptable sexual behavior).

⁹ For Varda Burstyn’s view of feminism, see Burstyn, *supra* note 8, at 23 (“Because of the far-reaching implications of feminism, the basic principles of the women’s movement—equality in social standing, opportunity and remuneration, a change in the antagonistic relations between the sexes—have come to embody the aspirations of great numbers of women and men for a better life for all.”).

ety in which individuals are treated justly. Civil libertarians who oppose censorship are fighting on behalf of feminists, not against them."¹⁰ The book thereby makes a significant contribution to the ongoing public discussion about the causes, effects, and potential control of pornography.

The feminist antipornography and procensorship movement, which has been gaining substantial influence during the past decade,¹¹ suffered a legal setback in 1986. The Supreme Court, in *Hudnut v. American Booksellers Association*,¹² summarily affirmed lower court rulings invalidating an Indianapolis ordinance that was based upon model legislation drafted by feminist procensorship leaders Andrea Dworkin and Catharine MacKinnon. Reflecting the authors' view that pornography is "[c]entral to the institutionalization of male dominance,"¹³ this legislation aimed to prohibit pornography as "a practice of discrimination on the basis of sex."¹⁴ Notwithstanding the Supreme Court's decision in *Hudnut*, the movement to censor pornography—including its feminist component—remains active and influential.¹⁵ In fact, this movement recently was fueled by the report of the so-called Meese Commission,¹⁶ which recommended numerous governmental measures to curb pornography,¹⁷ and

¹⁰ Callwood, *Feminist Debates and Civil Liberties*, in *Women Against Censorship* 121, 129 (V. Burstyn ed. 1985).

¹¹ See Snitow, *Retrenchment Versus Transformation: The Politics of the Antipornography Movement*, in *Women Against Censorship* 107, 110-13 (V. Burstyn ed. 1985).

¹² 106 S. Ct. 1172 (1986), aff'g 771 F.2d 323 (7th Cir. 1985), aff'g 598 F. Supp. 1316 (D. Ind. 1984).

¹³ MacKinnon, *supra* note 6, at 321.

¹⁴ MacKinnon, *supra* note 2, at 27. For excerpts from the version of the model legislation adopted by the Indianapolis City Council, Indianapolis, Ind., Code § 16-3(q)(1984), see *Women Against Censorship*, *supra* note 1, app. at 206-08. Concerning the widespread influence of this model law, see Duggan, Hunter & Vance, *False Promises: Feminist Antipornography Legislation in the U.S.*, in *Women Against Censorship* 130 (V. Burstyn ed. 1985) ("Other versions of the legislation are being considered in numerous cities, and Pennsylvania Senator Arlen Specter has introduced legislation modeled on parts of the Dworkin-MacKinnon bill in the U.S. Congress.").

¹⁵ See, e.g., Shenon, *A Second Opinion on Pornography's Impact*, N.Y. Times, May 18, 1986, at A8; *Voters in Maine Defeat Anti-Obscenity Plan*, N.Y. Times, June 11, 1986, at A32.

The scholarly debate concerning the feminist critique of pornography, and its relationship to free speech values, has also continued to flourish after the Supreme Court's decision in *Hudnut*. See, e.g., Branit, *Reconciling Free Speech and Equality: What Justifies Censorship?*, 9 Harv. J.L. & Pub. Pol'y 429 (1986) (opposing censorship); Stone, *Anti-pornography Legislation as Viewpoint-Discrimination*, 9 Harv. J.L. & Pub. Pol'y 461 (1986) (same); Sunstein, *Pornography and the First Amendment*, 1986 Duke L.J. 589 (supporting censorship); see also Brest & Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 Stan. L. Rev. 607 (1987) (presenting actions taken and arguments made concerning one city's consideration of Dworkin-MacKinnon legislation).

¹⁶ Attorney Gen.'s Comm'n on Pornography, U.S. Dep't of Justice, Final Report (1986) [hereinafter *Meese Commission Report*].

¹⁷ On October 22, 1986, Attorney General Meese announced plans to begin implementing the recommendations contained in the Meese Commission Report. These plans included the creation of a "Center for Obscenity Prosecution" in the Justice Department and the desig-

which endorsed some of the central views reflected in the Dworkin-MacKinnon model law.¹⁸

Given the continued vitality of the procensorship movement, an accurate understanding of the full range of feminist views on pornography, and of the overlap between many such views and civil liberties principles, is of ongoing importance to the women's rights cause. In the current political and legal milieu, in which the women's rights movement is embattled on many important fronts, internal struggles and alliances with nonfeminists on the pornography question make the movement vulnerable to a "divide and conquer" strategy.¹⁹ As Varda Burstyn observes: "The convergence between conservatism and important sectors of feminism [concerning the pornography issue] has offered politicians and bureaucrats a wonderful opportunity to undermine feminism while appearing its champions."²⁰

Part I of this Essay demonstrates that, notwithstanding exaggerated accounts of conflict, there are broad areas of consensus among proponents of both feminist and civil liberties principles on significant issues in the pornography debate. Part II shows why censorship would be as inimical to fundamental feminist principles as it would be to essential civil liberties precepts. Part III demonstrates that, in terms of feminist and civil liberties values, the costs of censorship would not be offset by any substantial resulting benefits. In particular, Part III discusses the lack of evidence that censoring pornography would reduce discrimination or violence against women. Finally, Part IV outlines some alternative measures for combating discrimination and violence against women that are consistent with feminist and civil liberties principles.

nation of a "taskforce" of attorneys to coordinate antipornography efforts among the FBI, Postal Service, Customs Service, and United States Attorneys' offices. Mr. Meese also announced that a legislative package embodying the Commission's proposals would be introduced in Congress. See *N.Y. Times*, Oct. 23, 1986, at A1.

¹⁸ See, e.g., Meese Commission Report, *supra* note 16, 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," that "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).

¹⁹ See Snitow, *supra* note 11, at 114 (stating that feminist pornography debate "has led to scapegoating inside the women's movement").

²⁰ Burstyn, *supra* note 8, at 25. Similarly, writing before the Meese Commission issued its report, Burstyn predicted that it would "manipulate feminist concerns to provide cover for an anti-feminist agenda." *Id.* at 26. In the same vein, another contributor to *Women Against Censorship*, Lisa Steele, notes that many politicians rationalize their failure to support such fundamental feminist goals as reproductive rights and equal pay by citing their support of censorship. Steele, *A Capital Idea: Gendering in the Mass Media*, in *Women Against Censorship* 58, 61 (V. Burstyn ed. 1985). In Steele's apt phrase, "Censorship is the cheapest item on the shopping list of the women's movement." *Id.* at 61.

I

NONCENSORSHIP ASPECTS OF THE PORNOGRAPHY DEBATE:
BROAD CONSENSUS AMONG ADVOCATES OF
FEMINIST AND CIVIL LIBERTIES
PRINCIPLES

The significant areas of agreement among proponents of feminist principles and civil liberties principles concerning pornography can be clarified by examining individually the various issues entailed in that debate. Whether censorship is a principled or effective response to pornography is only one of the relevant issues. Whether pornography serves any beneficial purpose, whether it contains any positive imagery, and whether there are other ways to address the perceived problems associated with pornography are all pertinent issues as well. The common failure to consider these issues separately generates confusion and exaggerates the disagreements among advocates of feminist and civil liberties precepts.

First, there is a broad consensus among those who have studied it that much sexually explicit speech that is commonly labeled "pornography" serves a variety of positive purposes. For example, 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."²¹ Popular sex manuals have recommended pornography as an aphrodisiac,²² and there is widespread belief that it can improve the sex lives of some couples.²³ Furthermore, some clinical²⁴ and cross-cultural²⁵ evidence suggests that the use of pornography might even reduce

²¹ See Meese Commission Report, *supra* note 16, 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.*

²² See, e.g., *The Joy of Sex* 208-09 (A. Comfort ed. 1972).

²³ 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 76-77* (July 1986) [hereinafter *ACLU Report*].

A commission that reported to the President on pornography in 1970 found that the regular adult consumers of pornography represent a cross-section of the population. Professional people, persons active in their communities, happily married couples, and highly educated persons are as represented as all other social categories. See Commission on Obscenity and Pornography, Report 128-34 (1970) [hereinafter 1970 Commission Report].

²⁴ See E. Donnerstein, *Erotica and Human Aggression* 127-28 (1984) ("[A] good amount of research [since 1971] strongly supports the position that exposure to certain types of erotica can actually reduce aggressive responses in people who are predisposed to aggress."). Professor Donnerstein's research is often cited (not necessarily correctly, see text accompanying notes 145-57 *infra*) by advocates of censoring pornography.

²⁵ See *ACLU Report*, *supra* note 23, at 67, 78-81. For example, data indicate that sex crimes decreased in Denmark after pornography was legalized there in the 1960s, and further

the likelihood that certain individuals will engage in antisocial activity, including violence against women.

Moreover, although some pornography contains negative imagery, including violence toward women,²⁶ pornography also contains numerous positive images. In her contribution to *Women Against Censorship*, Ann Snitow describes some of the diverse 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.

that there are correlations between the increased availability of "hardcore" pornography in Denmark and West Germany and a decrease in sex offenses against children in both countries. Kutchinsky, *Pornography and Its Effects in Denmark and the United States: A Rejoinder and Beyond*, 8 *Comp. Soc. Res.* 301, 319-21 (1985); Kutchinsky, *The Effect of Easy Availability of Pornography on the Incidence of Sex Crimes: The Danish Experience*, 29 *J. Soc. Issues* 163 (1973); Kutchinsky, *Towards an Explanation of the Decrease in Registered Sex Crime in Copenhagen*, in 7 *Technical Report of the U.S. Comm'n on Obscenity & Pornography* 263 (1971). For similar data from Japan, see Abramson & Hayashi, *Pornography in Japan: Cross-Cultural and Theoretical Considerations*, in *Pornography and Sexual Aggression* 173 (N. Malamuth & E. Donnerstein eds. 1984). It should be noted that the data described above, as is true of all existing data showing the relationship between the availability of pornography and actual antisocial behavior, demonstrate only correlations and not causation.

Some other studies report a positive correlation between the availability of pornography and the level of crime, but also provide no evidence as to any causal relationship. See Baron & Straus, *Sexual Stratification, Pornography, and Rape in the United States*, in *Pornography and Sexual Aggression* 185, 195-98 (N. Malamuth & E. Donnerstein eds. 1984) (reporting correlation between circulation rates of popular men's sex magazines and rate of reported rape in United States); Court, *Pornography and Sex Crimes: A Re-Evaluation in the Light of Recent Trends Around the World*, 5 *Int'l J. Crim. & Penology* 129 (1977).

²⁶ Pro-censorship feminists see violent pornography as unmitigated antifemale propaganda. See, e.g., S. Brownmiller, *Against Our Will: Men, Women and Rape* 394 (1975) (calling pornography "the undiluted essence of antifemale propaganda"); Dworkin, *supra* note 6, at 217 ("Pornography is the propaganda of sexual fascism [and] of sexual terrorism."); Fritz, *supra* note 2, at 220 ("[P]ornography is nothing less than genocidal propaganda."); Longino, *Pornography, Oppression, and Freedom: A Closer Look*, in *Take Back the Night: Women on Pornography* 40 (L. Lederer ed. 1980) ("Pornography is the vehicle for the dissemination of a deep and vicious lie about women.").

Even violent pornography, however, may convey something other than antifemale propaganda. See *Panel Discussion: Effects of Violent Pornography*, 8 *N.Y.U. Rev. L. & Soc. Change* 225, 237 (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.

Hostility haunts the genre, but as part of a psychodrama in which . . . [m]other is the ultimate spectre and women, too, have moments of glee when she is symbolically brought low.

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. . . .²⁷

Pornographic imagery also contains many elements that are harmonious with feminist values. For example, as another contributor to *Women Against Censorship*, Nan Hunter, noted elsewhere, pornography "may convey the message that sexuality need not be tied to reproduction, men or domesticity."²⁸ In fact, one of the reasons censoring pornography

²⁷ Snitow, *supra* note 11, at 115-16; see also Kostash, *Second Thoughts*, in *Women Against Censorship* 32, 37 (V. Burstyn ed. 1985). ("[U]ntil 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.")

For a compelling statement of additional positive aspects of pornographic imagery, see Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. Pa. L. Rev. 45, 81 (1974).

[P]ornography can be seen as the unique medium of a vision of sexuality, a "pornotopia"—a view of sensual delight in the erotic celebration of the body, a concept of easy freedom without consequences, a fantasy of timelessly repetitive indulgence. In opposition to the Victorian view that narrowly defines proper sexual function in a rigid way that is analogous to ideas of excremental regularity and moderation, pornography builds a model of plastic variety and joyful excess in sexuality. In opposition to the sorrowing Catholic dismissal of sexuality as an unfortunate and spiritually superficial concomitant of propagation, pornography affords the alternative idea of the independent status of sexuality as a profound and shattering ecstasy.

Id.

²⁸ The quoted statement appeared in a brief Nan Hunter co-authored with Professor Sylvia Law of New York University School of Law. *Brief Amici Curiae of Feminist Anti-Censorship Taskforce* at 30, *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (No. 84-3147), *aff'd*, 106 S. Ct. 1172 (1986) [hereinafter *FACT Brief*]. Other profeminist aspects of pornography are noted in the essay in *Women Against Censorship* that Hunter co-authored.

[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.

Duggan, Hunter & Vance, *supra* note 14, at 145; see also Diamond, *Pornography: Image and Reality*, in *Women Against Censorship* 40, 40 (V. Burstyn ed. 1985) ("[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, now, debate."). Even pornography depicting vio-

would offend feminist values is that it would suppress these empowering images.

Perhaps because of these positive and profeminist aspects of much pornography, supporters of feminist principles who advocate censorship or other governmental regulation do so only with respect to a relatively limited category of pornography: namely, that which depicts the sexual subordination of women.²⁹ Although many supporters of both feminist and civil liberties principles believe that even this limited subset of pornography should not be regulated or censored,³⁰ many simultaneously recognize that “[s]peech which . . . depicts the sexual subordination or humiliation of any person or group is extremely offensive.”³¹ Accordingly, adherents of both feminist and civil liberties principles support nongovernmental efforts to counter pornography that depicts sexual subordination.³² For example, expressing both feminist and civil liberties concerns, Sara Diamond writes: “Community picket lines and sit-ins aimed at porn outlets can be effective, but only if we are careful about who we ally ourselves with and channel our anger, not calling for state censorship, but for consumers and communities to take responsibility for the images that they accept.”³³ The feminist antipornography movement already has made significant progress toward countering pornographic

lence against women can convey messages affirming women’s equality and otherwise consistent with feminist principles. See note 26 *supra*; note 92 and accompanying text *infra*.

²⁹ See Dworkin, *Against the Male Flood: Censorship, Pornography and Equality*, 8 *Harv. Women’s L.J.* 1, 13-17 (1985); MacKinnon, *supra* note 2, at 22 (“Obscenity as such probably does little harm.”); see also Steinem, *Erotica and Pornography: A Clear and Present Difference*, *Ms.*, Nov. 1978, at 53 (describing “erotica” as depiction of mutually pleasurable, voluntary sexual expression and “pornography” as depiction of sex being used to create or enforce some inequality).

For the definition of that “pornography” subject to regulation or proscription under the Dworkin-MacKinnon model legislation, see note 64 and accompanying text *infra*. This definition is both broad in conception and difficult to limit in application. See text accompanying notes 65-75, 80-87 *infra*. Nevertheless, it is clear that the definition’s framers intended it to describe a subset of all speech commonly regarded as obscenity or pornography.

³⁰ Under this view, the offensive nature of any speech, including degrading pornography, cannot justify its censorship. See text accompanying notes 51-52 *infra*.

³¹ Brief of the American Civil Liberties Union and the Indiana Civil Liberties Union *Amici Curiae* 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*, 106 S. Ct. 1172 (1986) [hereinafter *ACLU Brief*].

³² For a discussion of non-governmental strategies to counter pornography that are consistent with feminist and civil libertarian values and goals, see note 34 *infra*; text accompanying notes 160-70 *infra*.

³³ Diamond, *supra* note 28, at 53; see also Kaminer, *A Woman’s Guide to Pornography and the Law*, *The Nation*, June 21, 1980, at 754, 756 (“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.”).

images of sexual subordination³⁴ by using the constitutionally appropriate³⁵ antidote to any objectionable speech: more speech rebutting it.

There is a further consensus among proponents of feminist and civil liberties principles that private antipornography efforts should be buttressed by government action to combat the various types of harmful conduct that some contend are caused or aggravated by pornography. For example, the American Civil Liberties Union endorses the following measures:

[e]nforcement of criminal laws regarding assault, coerced sex, kidnapping and trespassing; strengthening of the rape laws including elimination of the "spousal rape" exception, under which husbands may not be prosecuted for raping their wives; enforcement of . . . sex discrimination laws . . . [and bringing of] tort[] or contract claims [by victims of sexual offenses].³⁶

In fact, adherents of civil liberties and feminist values generally support in principle (if not in the particulars of implementation³⁷) two of

³⁴ See ACLU Brief, *supra* note 31, at 1 ("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 antipornography ordinance contribute to public understanding of the need to eradicate sex discrimination and violence against women from American life."); Jacobs, *supra* note 6, at 43 (noting that national groups that have organized protests and other private action against pornography include Women Against Pornography, Women Against Violence in Pornography and Media, Feminists Against Pornography, and Women Against Violence Against Women). For an example of the successful use of one private antipornography tactic, see Penrod & Linz, *Using Psychological Research on Violent Pornography to Inform Social Change*, in *Pornography and Sexual Aggression* 247, 271-72 (N. Malamuth & E. Donnerstein eds. 1984). In response to a threat by Women Against Violence Against Women, Warner Communications immediately removed a billboard portraying a bound and bruised woman with the caption "I'm Black and Blue from the Rolling Stones—and I Love It," and further agreed to stop using images of violence against women in its advertisements. *Id.*

³⁵ See text accompanying note 158 *infra*.

³⁶ American Civil Liberties Union, *Policy Guide* 8-9 (rev. ed. June 1986) [hereinafter *ACLU Policy Guide*] (on file at New York University Law Review) (Policy No. 4(f), adopted 1985).

³⁷ Notwithstanding the theoretical compatibility of laws penalizing these criminal activities with feminist and civil liberties principles, the particular way in which the Dworkin-MacKinnon law is framed raises serious problems with respect to both sets of principles. For discussion of some conflicts between feminist principles and the particular provisions of the Dworkin-MacKinnon law, see text accompanying notes 43-46, 54, 59-61, 71-109 *infra*. For discussion of some of the ways in which these provisions conflict with civil liberties principles, see text accompanying notes 43-46, 51-53, 58, 158-59 *infra*.

Furthermore, the Dworkin-MacKinnon law's definition of "pornography," which is constitutionally defective, is incorporated within all of its operative provisions. Therefore, all such provisions—including the ones concerning the coerced performance for or viewing of pornography—are equally defective. This is precisely what the Seventh Circuit ruled in holding the entire Indianapolis ordinance unconstitutional. See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 332-33 (7th Cir. 1985), *aff'd*, 106 S. Ct. 1172 (1986) (stating that law's non-censorship provisions might be constitutionally salvageable but would require complete rewriting because its definition of "pornography" is "defective root and branch").

the four operative provisions in the Dworkin-MacKinnon model anti-pornography legislation: those that prohibit coercing women either to pose for pornographic pictures³⁸ or to view pornographic material.³⁹

First, to coerce anyone to pose for any photograph or movie, including a pornographic one, transgresses not only feminist⁴⁰ and civil liberties⁴¹ values, but also current legal norms.⁴² However, before allowing legal redress to someone who was allegedly coerced to pose under current legal norms, a court would have to find that the situation really did involve coercion rather than voluntary choice. The paternalistic notion that women can never freely consent to pose for sexually explicit pictures or films, which appears to underlie the Dworkin-MacKinnon formulation of the coerced posing cause of action,⁴³ contravenes feminist and

³⁸ The relevant portion of the model law provides: "It shall be sex discrimination to coerce, intimidate, or fraudulently induce . . . any person . . . into performing for pornography." Dworkin, *supra* note 29, at 25.

³⁹ The relevant portion of the model law provides: "It shall be sex discrimination to force pornography on a person . . . in any place of employment, education, home, or public place." *Id.* at 26-27.

⁴⁰ Such coercion violates core feminist values affirming individual autonomy. See Goldman, *The Traffic in Women*, in *Feminism: The Essential Historical Writings* 308 (M. Schneider ed. 1972) (basic to feminist principles is "passionate belief in individual freedom" and "the right of women to live as free and equal human beings"); see also S. de Beauvoir, *The Second Sex* 473-79 (1968); B. Friedan, *The Feminine Mystique* 62-95 (1963).

⁴¹ Such coercion violates core civil liberties values opposing involuntary servitude and affirming individual autonomy and privacy. See, e.g., ACLU Policy Guide, *supra* note 36, at 431 (Policy No. 401(e)(2), adopted 1973) ("The ACLU . . . favors ratification by the United States of . . . the International Labor Organization Resolution of [sic] Forced Labor (1957)"); *id.* at 349 (Policy No. 264, adopted 1975) ("The right of individual privacy . . . extends to sexual conduct of *consenting* adults." (emphasis added)).

⁴² See Duggan, Hunter & Vance, *supra* note 14, at 147.

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. 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 Prosser, *Privacy*, 48 Calif. 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 pornographic magazine wrongfully used nude photographs of her). If broadly construed, these causes of action could transgress free speech values. However, as the ACLU recognizes, under certain relatively narrow circumstances, the false light and wrongful appropriation actions may be maintained consistent with civil liberties principles. See ACLU Policy Guide, *supra* note 36, at 12-13 (Policy No. 6(a), adopted 1983).

⁴³ The Dworkin-MacKinnon model law in effect creates a presumption that a woman was coerced to pose for a pornographic work by providing that proof of any of the following shall not negate a finding of coercion:

civil liberties tenets. Some women who were previously pornographic models have said that they were coerced to perform through physical violence.⁴⁴ However, others declare that they and their colleagues perform voluntarily,⁴⁵ and indeed assert their constitutional right to do so.⁴⁶

Similarly, coerced viewing of any material is inconsistent with feminist and civil liberties principles and current legal standards. Thus, where viewers are part of a captive audience, because they must be in a public place to pursue important personal goals, such as employment or education, their privacy interests in avoiding offensive speech may outweigh the countervailing free speech interests.⁴⁷ At least where offensive

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.

Dworkin, *supra* note 29, at 26-27.

According to some proponents of feminist and civil liberties principles, the foregoing provision goes beyond protecting against actual coercion and instead "functions to make all women incompetent to enter into legally binding contracts for the production of sexually explicit material." FACT Brief, *supra* note 28, at 41. Therefore, they reason, enforcement of this portion of the model ordinance would worsen rather than improve the working conditions of pornography models. *Id.*; see Duggan, Hunter & Vance, *supra* note 14, at 148. In fact, the City of Indianapolis's brief in federal district court analogized women to children and contended that both should be deemed incapable of consenting to pose for pornography. *Id.*; cf. MacKinnon, *supra* note 2, at 15 (analogizing women to children and prisoners).

⁴⁴ See, e.g., L. Lovelace & M. McGrady, *Ordeal* (1980).

⁴⁵ 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 pornographic films testifying that she had "never met one woman who was coerced . . . into participating").

⁴⁶ 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." (emphasis in original) (quoting pornographic film model)).

⁴⁷ See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (upholding prohibition of political advertisements in city-owned buses partly "to minimize . . . the risk of imposing [ideas] upon a captive audience"); see also *id.* at 307 (Douglas, J., concurring) (noting that commuters were present as matter of "practical necessity"). Although the Supreme Court has not had occasion to define the outer bounds of the captive audience concept, the lower federal courts and scholarly commentators have concluded that members of an audience should be deemed captive whenever they cannot leave without incurring a substantial burden, or are in a place where they have a right or privilege to remain. See, e.g., *International Soc'y for Krishna Consciousness v. McAvey*, 450 F. Supp. 1265, 1270 (S.D.N.Y. 1978); L. Tribe, *American Constitutional Law* § 12-19, at 678 n.13 (1978); Comment, "I'll Defend to the Death Your Right to Say it . . . But not to Me"—The Captive Audience Corollary to the First Amendment, 1983 S. Ill. Univ. L.J. 211, 220.

For discussion of balancing of free speech and privacy interests in a captive audience context, see L. Tribe, *supra*, at 677 & n.13; Black, *He Cannot Choose but Hear: The Plight of the Captive Auditor*, 53 *Colum. L. Rev.* 960 (1953); Haiman, *Speech v. Privacy: Is There a*

speech is intentionally directed at an individual for purposes of harassment, feminist principles, civil liberties principles,⁴⁸ and current law⁴⁹ converge to support a remedy. Likewise, feminist principles, civil liberties principles, and current law all would protect against the invasion of privacy that would result from forced exposure to pornography in the home.⁵⁰

Before allowing legal redress, however, it would have to be proven that the situation did in fact involve forced exposure and not exposure that could have been avoided.⁵¹ Free speech values generally require

Right Not to be Spoken To?, 67 Nw. U.L. Rev. 153 (1972). The Supreme Court has cautioned that every case "pitting the First Amendment rights of speakers against the privacy rights of [others] ultimately must depend on its own specific facts." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208-09 (1975). This "delicate balancing" is required because "'the interests on both sides are plainly rooted in the traditions and significant concerns of our society.'" *Id.* at 208-09 (quoting *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975)).

⁴⁸ In addition to violating privacy interests, such displays also undermine civil liberties and feminist interests in eliminating sex discrimination in employment and education. See, e.g., ACLU Policy Guide, *supra* note 36, at 400 (Policy No. 316, adopted 1984) (stating that imposition of adverse job-related consequences because of employee's response to unwelcome sexual expression amounts to harassment and discrimination).

⁴⁹ The Civil Rights Act of 1964, Title VII, §§ 701-718, 42 U.S.C. §§ 2000e to 2000e-17 (1982), long has been interpreted as protecting employees against racist displays intended to create an offensive or hostile work environment. See, e.g., *Snell v. Suffolk County*, 782 F.2d 1094, 1102-03 (2d Cir. 1986). Therefore, if employers or co-workers confront a woman with pornography in an effort to poison her work atmosphere or to harass her, Title VII should afford relief. Title VII bars the creation of an offensive work environment through sexual harassment regardless of whether the employee suffers tangible negative effects. *Meritor Sav. Bank v. Vinson*, 106 S. Ct. 2399, 2405-06 (1986). Sexual harassment claims involving pornography have been sustained where the pornography was intentionally used to harass a particular employee. See, e.g., *Arnold v. City of Seminole*, 614 F. Supp. 853, 858, 868-69 (E.D. Okla. 1985). However, the mere display of pornographic pictures in workplaces has been held not to constitute sexual harassment. See, e.g., *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 433 (E.D. Mich. 1984).

⁵⁰ In *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970), the Supreme Court upheld a federal statute that allowed individuals to remove their names from mailing lists and stop all future mailings to their homes of "matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative." *Id.* at 730 (quoting Postal Revenue and Federal Salary Act of 1967 § 301(a), 39 U.S.C. § 4009(a) (1982)).

Although, as the Court held in *Rowan*, a state may permit individuals to choose not to receive certain types of speech in their homes, the government may not make this choice for them. *Bolger v. Youngs Drug Prods.*, 463 U.S. 60 (1983) (government may not prohibit mailing of sexually explicit advertisements, although some recipients might find them offensive). Because the Dworkin-MacKinnon model legislation does not define the term "coercion," it raises the risk that the government could act as censor in the manner prohibited by *Bolger*. See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 333 (7th Cir. 1985), *aff'd*, 106 S. Ct. 1172 (1986).

⁵¹ See, e.g., *Cohen v. California*, 403 U.S. 15, 21 (1971) (finding that first amendment was violated by defendant's conviction for holding jacket with words "Fuck the Draft" in courthouse corridor and that first amendment interests were not overcome by interests in protecting any passersby who might find these words offensive, because they could have averted their eyes from the jacket).

anyone confronted with an offensive image in a public place to bear the burden of avoiding it by averting his or her eyes.⁵² The Dworkin-MacKinnon legislation jeopardizes these free speech principles because it broadly proscribes forced exposure to pornography "in *any* place of employment, education, home, or public place" without imposing a limiting definition upon the concept of "force."⁵³ This section of the model law apparently reflects the same type of paternalistic assumptions that underlie its provision proscribing forced modeling for pornography, and thus collides with feminist and civil liberties principles for this additional reason.⁵⁴

The two provisions of the Dworkin-MacKinnon legislation regarding coerced posing or viewing are not targeted at the legitimate feminist and civil libertarian concerns with preventing coercion. Not only are they overinclusive, purporting to extend remedies to women who were not in fact forced, but as measures ostensibly aimed at actual coercion, these provisions are also fatally underinclusive. They afford no remedy to women who were in fact forced to pose for or view any material other than the particular subset of sexually explicit material that the ordinance labels "pornography."⁵⁵

As the foregoing portion of this Essay has demonstrated, proponents of feminist and civil liberties principles broadly agree on certain important points concerning the consequences and control of pornography, including some types of governmental regulations. There are, however, two types of governmental measures to control pornography that some proponents of feminist principles advocate, but that, in the final analysis, actually conflict with feminist and civil liberties values. These measures are exemplified by the two remaining operative provisions of the Dworkin-MacKinnon model legislation. One of these measures, censorship, has provoked the greatest controversy among advocates of feminist and civil liberties precepts and will be discussed separately in Part II.⁵⁶

The other measure, although in theory repugnant to both civil liberties and feminist tenets, in practice would probably have limited impact. Specifically, the model legislation provides that if any physical assault "is directly caused by specific pornography," then the "maker(s), distributor(s), seller(s), and/or exhibitor(s) may . . . be sued for damages and for an injunction against the specific pornography's further exhibition, distri-

⁵² See *id.*; *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-11 (1975).

⁵³ Dworkin, *supra* note 29, at 26-27 (emphasis added).

⁵⁴ See text accompanying notes 43-46 *supra*; see also Duggan, Hunter & Vance, *supra* note 14, at 148-50.

⁵⁵ For a definition of "pornography" for the purposes of the model legislation, see note 64 *infra*.

⁵⁶ See text accompanying notes 63-126 *infra*.

bution or sale.”⁵⁷ By making producers or distributors of a work liable for harmful conduct it might inspire in some viewer, this legislation would lead to pervasive self-censorship, which would be as inimical to free speech values as direct censorship imposed by the government.⁵⁸ As noted by several essays in *Women Against Censorship*, this type of legislation would also damage feminist values,⁵⁹ because speech promoting such values would be a prime target for self-censorship.⁶⁰

⁵⁷ Dworkin, *supra* note 29, at 27.

⁵⁸ See Lynn, “Civil Rights” Ordinances and the Attorney General’s Commission: New Developments in Pornography Regulation, 21 Harv. C.R.-C.L. L. Rev. 27, 88-89 (1986).

If the measure of permissible suppression becomes what one or two people might do in response to particular speech, we will all be reduced to sitting in darkened rooms in order to prevent sexual (or other) images from crossing the eyes or mind of someone who could react in an antisocial manner. The fundamental argument is not about sexual imagery; it is whether we can afford to curtail speech because of its overt effect on a few people.

Id.

⁵⁹ See, e.g., Duggan, Hunter & Vance, *supra* note 14, at 150.

[Adoption of such a cause of action] would mean, for example, that the producer of the TV Movie *The Burning Bed*, which told the true story of a battered wife who set fire to her sleeping husband, could be sued if a woman who saw the film killed her husband in a similar way. The result, of course, would be the end of films depicting real violence in the lives of women.

Id. Lynn reports that *The Burning Bed* has led to at least two incidents of male violence against females. Lynn, *supra* note 58, at 88. Lynn also points out how the “direct causation” remedy in the Dworkin-MacKinnon model law would lead to regulation or censorship of feminist literature more generally, even beyond the specific subset of feminist literature depicting violence against women.

[I]t is argued in some feminist theories that violent pornography, and even the rise of sexual assaults, is a misogynist response to the challenge of the women’s movement. If a piece of feminist literature led even one man to respond with violence, should it too be regulated, under a theory that it caused him to feel threatened and triggered him to act out his aggression?

Id. at 87-88 (citation omitted).

In her concluding essay in *Women Against Censorship*, Varda Burstyn notes more adverse consequences for feminism of a measure imposing liability on producers or distributors of pornography. “[S]uch an approach sets a precedent that could result in descriptions and depictions of acts—of birth control, of abortion, of extra- or premarital sex, of lesbian sex, for example—being used to penalize those who have expressed their opinions and/or desires.” Burstyn, *Beyond Despair: Positive Strategies*, in *Women Against Censorship* 152, 161 (V. Burstyn ed. 1985).

⁶⁰ Precisely because of the draconian self-censorship that would follow, established legal precedents hold that the first amendment forbids making creators or distributors of works accountable for all actions that might, to some extent, be caused by the works. Rather, the creators and purveyors of speech may be held accountable for ensuing conduct, and the speech itself may be regulated in order to avert such conduct, only if there is both an element of intent and a close nexus between the speech and conduct that would have serious adverse consequences. See note 159 *infra*.

This general principle of free speech jurisprudence has been adopted specifically in the context of sexually explicit speech. See *Roth v. United States*, 354 U.S. 476, 488-89 (1957) (rejecting notion that sexually oriented speech could be regulated in light of its potential effect upon the most suggestible person who might see it); see also *Memoirs v. Massachusetts*, 383

This cause of action is inconsistent with feminist and civil liberties values for the additional reason that it dilutes the accountability of individuals who commit violent crimes against women by displacing some of it onto words and images or onto those who create or distribute them. Referring to Suffolk County, New York, where a version of the Dworkin-MacKinnon model law was being considered, Lisa Duggan, a contributor to *Women Against Censorship*, wrote: “[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!’”⁶¹

Notwithstanding the fundamental problems, in principle, with this section of the Dworkin-MacKinnon model law, it should be noted that any assault victim would probably find it hard to show the “direct” causal nexus between her assault and a specific pornographic work that is a prerequisite for recovery under the section.⁶²

II

CENSORSHIP OF PORNOGRAPHY WILL ENDANGER BOTH FEMINIST AND CIVIL LIBERTIES PRINCIPLES

The remaining provision of the Dworkin-MacKinnon legislation, which calls for censoring pornography,⁶³ provokes the greatest disagreement among proponents of feminist and civil liberties principles. The “pornography” subject to censorship under the Dworkin-MacKinnon law is defined as any “sexually explicit subordination of women through

U.S. 413, 432 (1966) (Douglas, J., concurring) (“The First Amendment demands more than a horrible example or two of the perpetrator of a crime of sexual violence, in whose pocket is found a pornographic book, before it allows the Nation to be saddled with a regime of censorship.”).

⁶¹ Quoted in Blakely, *Is One Woman’s Sexuality Another Woman’s Pornography?*, Ms., Apr. 1985, at 37, 47 (emphasis in original); see also FACT brief, supra note 28, at 49-50.

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

Id. (citation omitted).

⁶² Many cases have held that plaintiffs failed to show a sufficiently direct causal connection between media imagery and a third person’s allegedly imitative behavior to permit plaintiffs to hold the media accountable for the third person’s behavior consistent with the first amendment. See, e.g., *American Booksellers Ass’n v. Hudnut*, 771 F.2d 325, 333 & n.4 (7th Cir. 1985) (“The constitutional requirements for a valid recovery for assault caused by speech might . . . be too rigorous for any plaintiff to meet.”), aff’d, 106 S. Ct. 1172 (1986); cases cited in Lynn, supra note 58, at 90-92.

⁶³ See Dworkin, supra note 29, at 26 (stating that model provision would make it illegal “to produce, sell, exhibit, or distribute pornography”).

pictures and/or words" that also conforms to at least one of nine criteria such as "women are presented dehumanized as sexual objects, things or commodities," or "women are presented in postures or positions of sexual submission, servility, or display."⁶⁴ The model law's broad, vague definition of proscribed works⁶⁵ violates both feminist and civil liberties principles⁶⁶ by endangering much valuable literature, art, and scholarly material, including many feminist works.⁶⁷ The breadth of the Dworkin-MacKinnon legislation is not just the accidental product of poor draft-

⁶⁴ See *id.* at 25. 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. This definition of "pornography" applies to all of the law's operative provisions, not just the censorship section.

⁶⁵ The Dworkin-MacKinnon censorship legislation transgresses feminist and civil liberties values for reasons transcending this legislation's particular definition of pornography, problematic as that is. For example, analysis of a recent proposal to censor a more narrowly defined class of pornography demonstrates that even this narrower antipornography legislation violates both feminist and civil liberties principles. See text accompanying notes 110-26 *infra*.

⁶⁶ That any censorship scheme is inimical to fundamental civil liberties principles protecting freedom of expression is a familiar theme, which has been widely discussed. See, e.g., L. Tribe, *supra* note 47, § 12-16, at 665-70. This general theme has been extensively explored in the context of the Dworkin-MacKinnon proposal. See, e.g., ACLU Brief, *supra* note 31; Emerson, *Pornography and the First Amendment: A Reply to Professor MacKinnon*, 3 Yale L. & Pol'y Rev. 130 (1984); Lynn, *supra* note 58; Neier, *Expurgating the First Amendment*, *The Nation*, June 21, 1980, at 750; Tigie, *Civil Rights and Censorship—Incompatible Bedfellows*, 11 Wm. Mitchell L. Rev. 81 (1985).

For discussion of some of the free speech principles violated by the Dworkin-MacKinnon model legislation see text accompanying notes 51-53 *supra* and 158-59 *infra*. As does *Women Against Censorship*, however, this Part emphasizes the less widely discussed feminist principles, rather than the more familiar free speech principles, that militate against censoring pornography.

⁶⁷ This danger is effectively illustrated by the appendix to the ACLU's trial court brief in *American Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316 (D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 106 S. Ct. 1172 (1986), which compiled a "brief sampling of materials which the ordinance on its face appears to proscribe." ACLU Brief, *supra* note 31, app. at 1a.

[T]he ordinance would deter the distribution of much . . . erotic literature of considerable literary or historic value. In addition, works of fiction from authors such as Aristophanes, Shakespeare, Fielding and Mailer include sexually explicit material in which women are arguably presented "as sexual objects for domination, conquest, exploitation [or] possession . . ." [Hence, all of these works would be jeopardized under the ordinance.]

The visual arts would be similarly affected. Erotic images occupy a prominent place in the Western artistic tradition, from paleolithic cave-drawing to contemporary

ing. To the contrary, the scope of the model statute accurately reflects its drafters' views⁶⁸ about the scope of the underlying problem⁶⁹ and its appropriate solution.⁷⁰

As noted by several contributors to *Women Against Censorship*, the traditional stereotypes reflected in the feminist antipornography, procensorship position ultimately rest upon the "very traditional concern that explicit sexuality *itself* constitutes the degradation of women."⁷¹ Conse-

painting and sculpture. . . . Not even religious imagery—often sexually explicit—would be immune.

. . . .

[T]he ordinance would prohibit much clinical sexual literature, from medical texts and scholarly studies to popularized works of sociology and self-help. Since the sexual subordination of women is a historical reality, the ordinance would be likely to deter much historical or anthropological work graphically describing such perspectives or practices. Much post-Freudian psychological as well as prominent philosophical literature involves the notion of sexual objectification [and would therefore be endangered under the ordinance].

. . . .

Ironically, much overtly feminist scholarly material designed to address the same concerns prompting the [ordinance] would appear to 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 Brownmiller's *Against Our Will: Men, Women & Rape*; and psychiatric literature describing sexual pathologies and therapeutic modalities. Indeed, *Pornography: Men Possessing Women*, a work of 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.

Id. at 1a-8a (footnotes omitted); see also Callwood, *supra* note 10, at 127 ("[L]aws meant to catch pornography that shows the mutilation of women could also be applied to war coverage on the news.").

⁶⁸ For statements of these views, see Dworkin, *supra* note 29; MacKinnon, *supra* note 2; MacKinnon, *supra* note 6.

⁶⁹ See Emerson, *supra* note 66, at 132.

As Professor MacKinnon emphasizes, male domination has deep, pervasive and long-existing roots in our society, and 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 governmental suppression of sexual expression that contributes to female subordination, then the net of restraint has to be cast on a nearly limitless scale. Even the attempt to narrow a proscribed area to depiction of sexual activities involving violence would outlaw a substantial portion of the world's literature.

Id.

⁷⁰ Burstyn and other contributors to *Women Against Censorship* argue that there 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.

Burstyn, *supra* note 8, at 25-26.

⁷¹ Carole Vance, quoted in Blakely, *supra* note 61, at 40 (emphasis in original); see also Duggan, Hunter & Vance, *supra* note 14, at 142-43.

quently, the feminist procensorship movement targets the same type of speech that has been “the traditional target of obscenity law: sexually explicit material.”⁷² Because of its focus on sexually explicit speech, the Dworkin-MacKinnon model law is both overinclusive and underinclusive with respect to its avowed goals of reducing sex discrimination and violence against women.

Even if there were, *arguendo*, a causal relationship between imagery and attitudes or action,⁷³ the law would remain fatally overinclusive because it curbs much sexually explicit speech that can reasonably be perceived as neither sexist nor violent.⁷⁴ As observed by contributors to *Women Against Censorship*, the law’s wide suppression of sexually explicit imagery, beyond that which is overtly sexist or violent, ultimately reflects the view that, for women, all heterosexual sex (as well as much homosexual sex) is inherently sexist.⁷⁵ To emphasize that the feminist procensorship position rests upon traditional, stereotypical views disapproving sex and denying women’s sexuality, anticensorship proponents of feminist and civil liberties principles have characterized their own views as “pro-sex.”⁷⁶ The basic contours of these opposing “anti-sex” and “pro-sex” positions—which are linked, respectively, to the pro- and anticensorship positions—are delineated by Duggan, Hunter, and Vance as follows:

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

Embedded in this [feminist procensorship] 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.

Id.

⁷² Duggan, Hunter & Vance, *supra* note 14, at 143.

⁷³ See text accompanying notes 134-55 *infra* (discussing lack of evidence to support this purported causal connection).

⁷⁴ Even worse, the law could be used to suppress sexually explicit speech that conveys messages opposing sex discrimination and violence against women and promoting feminist and civil liberties values. See, e.g., Burstyn, *supra* note 59, at 160; text accompanying note 28 *supra* and 84, 88-93 *infra*.

⁷⁵ See, e.g., Duggan, Hunter & Vance, *supra* note 14, at 139; Snitow, *supra* note 11, at 118.

⁷⁶ See, e.g., Ehrenreich, *What Is This Thing Called Sex?*, *The Nation*, Sept. 24, 1983, at 245. For collections of “pro-sex” writings, see *Pleasure and Danger: Exploring Female Sexuality* (C. Vance ed. 1984); *Powers of Desire* (A. Snitow, C. Stansell & S. Thompson eds. 1983).

decisions and act on them, and who desire, seek out and enjoy sexuality.⁷⁷

The law's focus on sexually explicit speech makes it under- as well as overinclusive. Several essays in *Women Against Censorship* describe the imagery of sexism and violence that permeates our culture through vehicles including advertising, television, movies, and popular fiction, but that would not be affected by the ordinance.⁷⁸ In order to advance its asserted goal of eradicating sexist and violent imagery, the ordinance would have to address these everyday examples of such imagery, as well as those contained in the particular type of pornography with which it is exclusively concerned.⁷⁹

One could argue that the model law's overbreadth could be ameliorated by a narrow statutory construction. In reviewing the Indianapolis version of the law, the Seventh Circuit Court of Appeals gave serious consideration to this approach. However, after separately addressing the potential salvageability of each operative provision,⁸⁰ the Seventh Circuit concluded that "[n]o amount of struggle with particular words and phrases in this ordinance can leave anything in effect."⁸¹ This conclusion followed from the court's determination that the law's definition of pornography was "defective root and branch."⁸²

Even assuming that the Dworkin-MacKinnon legislation could in theory be construed narrowly, there is no way to ensure that such a limiting construction would actually occur. The interpretation and applica-

⁷⁷ Duggan, Hunter & Vance, *supra* note 14, at 151. The "anti-sex" position essentially posits a mutual inconsistency between a woman's freedom and her participation in sexual relations with men. To the contrary, the "pro-sex" position views these phenomena as mutually reinforcing. See, e.g., Snitow, *supra* note 11, at 120. ("Ti Grace Atkinson says, 'I do not know any feminist worthy of that name who, if forced to choose between freedom and sex, would choose sex.' While women are forced to make such a choice we cannot consider ourselves free."); see also Burstyn *supra* note 59, at 180 (describing twin goals of those who support feminist principles as "freedom for women and sexual joy for all").

⁷⁸ See, e.g., Steele, *supra* note 20, at 60-74. 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.

⁷⁹ This observation should not be construed as an endorsement of any such broader regulation. To the contrary, many of the flaws in the Dworkin-MacKinnon scheme would be magnified by extending it to a wider range of materials.

⁸⁰ See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 332-34 (7th Cir. 1983), *aff'd*, 106 S. Ct. 1172 (1986).

⁸¹ *Id.* at 334.

⁸² *Id.* at 332.

tion of the statute could not be reserved to individuals espousing feminist and civil liberties views. Anyone could invoke the legislation, and its broad terms necessarily confer wide interpretive discretion upon any government official or judge who applies it. The broad room this legislation gives to government officials for implementing their personal value judgments about sexuality means that there is no way to prevent individuals, government enforcement agencies, or courts from following antifeminist, anti-civil-libertarian views in interpreting and applying it. Several essays in *Women Against Censorship* highlight this danger by showing how censorship laws have been used to promote antifeminist views regarding sexuality.⁸³ Indeed, as noted in the essay by filmmaker Anna Gronau, the works of feminist artists are particularly vulnerable to censorship under laws modeled on the Dworkin-MacKinnon legislation because it should be more important for them to explore the psychological and social links between sex and violence.⁸⁴

The essay by Lisa Duggan, Nan Hunter, and Carole Vance illustrates how this legislation can be used to censor works produced and valued by the very feminists who supported it. For example, they recount that in Suffolk County, New York, a version of the Dworkin-MacKinnon legislation was "put forward by a conservative, anti-ERA male legislator who wished to 'restore ladies to what they used to be,' " and its supporters claimed that pornography causes " 'sodomy' and 'disruption' of the family unit"⁸⁵ The proponents of this Suffolk County antipornography measure typify the many government officials and private citizens who oppose pornography not because they associate it with sex discrimination, but rather because they associate it with other phenomena that they do oppose: homosexuality, interracial sex, divorce,

⁸³ For example, Lynn King's essay in *Women Against Censorship* shows that, while asserting the purpose of protecting women, the influential Ontario Board of Censors 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." King, *Censorship and Law Reforms: Will Changing the Laws Mean a Change for the Better?*, in *Women Against Censorship* 79, 80-81 (V. Burstyn ed. 1985). In fact, the Board recently censored a profeminist film. *Id.* at 84; see also Kostash, *Second Thoughts*, in *Women Against Censorship* 32, 38 (V. Burstyn ed. 1985) (noting 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 sexually explicit cartoon in same magazine that depicted violence against a woman).

⁸⁴ See Gronau, *Women and Images: Toward a Feminist Analysis of Censorship*, in *Women Against Censorship* 91, 97 (V. Burstyn ed. 1985) ("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.")

⁸⁵ Duggan, Hunter & Vance, *supra* note 14, at 133. Further, the only feminists to make public statements about the Indianapolis ordinance opposed it; all Republican city-county council members supported the ordinance, while all Democratic members opposed it. *Id.* at 132-33.

birth control, abortion, and the breakdown of the traditional family.⁸⁶ It is therefore not surprising that this group of pornography opponents would utilize the broad interpretive discretion that the Dworkin-MacKinnon legislation affords them to construe it in ways antithetical to feminist and civil liberties principles.⁸⁷

Further, as noted by several contributors to *Women Against Censorship*, among the feminist imagery that would be jeopardized by the Dworkin-MacKinnon law, lesbian imagery would be especially endangered.⁸⁸ Because it outlaws images of "subordination" or "degradation,"⁸⁹ without defining those terms, the ordinance empowers judges and other government officials who believe that these pejorative labels apply to homosexual sex to censor depictions of lesbian sexuality.⁹⁰

In fact, images of many types of sexual behavior in which individuals adhering to feminist values could well choose to engage might be suppressed under the "subordination" rubric.⁹¹ Moreover, even if someone

⁸⁶ Id.; see also Burstyn, *supra* note 8, at 16-17.

The philosophy underlying the conservative evaluation of sexually explicit material is rooted firmly in a harsh interpretation of biblical ideas, [one] that defines sexuality . . . as a *problem*: a dangerous, corrupting force that must be contained within the framework of marriage. . . .

The religious myths that sustain these views come from the old, patriarchal Judeo-Christian beliefs about the relative merit and place of the sexes

[T]hese ideas reflect a profound rejection and fear of women's autonomy and a consequent degradation of women's sexuality. . . . But pornography, virtually by definition, shows sex outside of the monogamous marriage framework . . . and advocates sex for every reason but procreation. Consequently, for conservatives, pornography, like prostitution, is an agent of corruption, subverting the nuclear family and the patriarchal authority based in it

Id. (emphasis in original).

⁸⁷ Drawing on the history of the "first wave" of feminism in the nineteenth century, Burstyn's opening essay cautions that "alliances with non- and antifeminist forces are dangerous, even when there is apparent agreement on goals," Burstyn, *supra* note 8, at 14-15, and notes that "today's trends threaten to replicate the treacherous alliances that brought about the misguided use of state machinery to regulate sexual life during the nineteenth century," *id.* at 22.

⁸⁸ See, e.g., King, *supra* note 83, at 87 (predicting that judges would be likely to find lesbian images "degrading," and perhaps even "coercive"); Valverde & Weir, Thrills, Chills and the "Lesbian Threat" or, The Media, the State and Women's Sexuality, in *Women Against Censorship* 99, 105 (V. Burstyn ed. 1985) (citing examples of judicial suppression of homosexual images).

⁸⁹ The model law defines "pornography," in part, as "the graphic sexually explicit *subordination* of women through pictures and/or words that also includes . . . scenarios of *degradation*." Dworkin, *supra* note 29, at 25 (emphasis added).

⁹⁰ Words and images depicting other sexual acts commonly perceived as aberrant would also be prime targets under Dworkin-MacKinnon-type laws. See, e.g., Duggan, Hunter & Vance, *supra* note 14, at 140 ("This legislation would virtually eliminate all [sado-masochistic] pornography . . . thereby attacking a sexual minority while masquerading as an attempt to end violence against women.").

⁹¹ See *id.*

To some, *any* graphic sexual act violates women's dignity and therefore subordinates them. To others, consensual heterosexual lovemaking within the boundaries of procrea-

might choose not actually to participate in certain sexual conduct, she could still choose to see depictions of it and find them a source of pleasure. As Sara Diamond's essay in *Women Against Censorship* points out, even scenes of ravishment, which could clearly be described as showing a woman's "subordination," may nevertheless be viewed by some women as conveying certain ideas that are consistent with feminist values.⁹² Therefore, to impose some women's or judges' views that these scenes should be banned would deprive other women of sexually stimulating and liberating imagery. In Diamond's words, "one woman's porn is another's erotic art."⁹³

By empowering individuals and government officials who enforce the law to impose their views of which sexual depictions entail "subordination" or "degradation," the ordinance denies the inherently personal, individualized nature of choices about which sexual behavior or imagery is pleasurable.⁹⁴ It thus in effect "demand[s] that [women's] fantasies conform to an abstract ideal of politically correct sex."⁹⁵ Regardless of whether that "ideal" sexuality is defined by a judge who interprets the ordinance, or by the ordinance's authors,⁹⁶ or by anyone else, to impose it on other persons would be repugnant to the overarching ideals of individual privacy and autonomy that are broadly shared by proponents of feminist and civil liberties values.

tion 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.

Id. (emphasis in original).

⁹² See Diamond, *supra* note 28, at 51.

[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.

Id.; see also Willis, *Feminism, Moralism, and Pornography*, in *Powers of Desire: The Politics of Sexuality* 460, 464 (A. Snitow, C. Stansell & S. Thompson eds. 1983); note 26 *supra* (statement of Professor Richards).

⁹³ Diamond, *supra* note 28, at 55.

⁹⁴ See Richards, *supra* note 27, at 82.

⁹⁵ Diamond, *supra* note 28, at 55.

⁹⁶ At least one of the authors of the model ordinance apparently regards sex with multiple partners, group sex, and oral sex as subordinating women. See Duggan, Hunter & Vance, *supra* note 14, at 138-39; see also id. at 143 ("[A]dvocates of the ordinance effectively assume that women have been so conditioned by the pornographic world view that if their own experiences of the sexual acts identified in the definition are not subordinating, then they must simply be victims of false consciousness."). Moreover, the ordinance ultimately reflects the view that all heterosexual sex subordinates women. See notes 75-77 and accompanying text *supra*. In contrast, government officials charged with implementing the law might well believe that all homosexual sex subordinates women. See notes 88-90 and accompanying text *supra*.

The Dworkin-MacKinnon model legislation subverts feminist values not only because government officials could interpret it to do so, but also, more fundamentally, because of its plain terms and intent. The legislation's language, consistent with the intent of its authors and supporters, actually reinforces negative, sexist stereotypes about women and men.⁹⁷ This argument was asserted in an amicus brief submitted in the Indianapolis case by The Feminist Anti-Censorship Taskforce (FACT). FACT is a group of individuals actively supporting feminist and civil liberties principles.⁹⁸ FACT's brief showed how the ordinance not only failed to promote its asserted purpose of countering sex discrimination, but, even worse, actually perpetuated sex discrimination. Accordingly, FACT urged the court to hold the ordinance unconstitutionally discriminatory on the basis of sex.⁹⁹ The brief argued that the assumptions underlying the ordinance "reinforce and perpetuate central sexist stereotypes; they weaken, rather than enhance, women's struggles to free themselves from archaic notions of gender roles. . . . In treating women as a special class, [the ordinance] repeats the errors of earlier protectionist legislation which gave women no significant benefits and denied their equality."¹⁰⁰

Various pieces in *Women Against Censorship* show that the Dworkin-MacKinnon model legislation undermines feminist goals in other significant respects, in addition to perpetuating sexist stereotypes and

⁹⁷ See, e.g., Snitow, *supra* note 11, at 118.

We do particular injury to feminist work by conflating sex with violence. This is to cede precious territory to the political opponents of feminism. . . . This is to deny women any agency at all in the long history of heterosexuality.

It is hard to imagine good organizing that can emerge from this insulting presumption.

Id.; see also Duggan, Hunter & Vance, *supra* note 14, at 142-43, 148, 151.

⁹⁸ FACT Brief, *supra* note 28, at xii. One of the two co-authors of the FACT brief, Nan Hunter, is a contributor to *Women Against Censorship*. See Duggan, Hunter & Vance, *supra* note 14. 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 Harvard Law School who has authored works urging reform of laws governing rape and other violent crimes against women; 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* and *The Prostitution Papers*; 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*; Susan Schechter, a leading author and consultant in the battered women's movement; Alix Kates Shulman, author of feminist novels, biographies, stories, and essays; and Wendy Webster Williams, a professor at Georgetown University Law Center who was a founding partner of Equal Rights Advocates. FACT Brief, *supra* note 28, at xii-xix. The author of this Essay also joined in the FACT brief. *Id.* at xviii.

⁹⁹ E.g., FACT Brief, *supra* note 28, at 33.

¹⁰⁰ *Id.*

deflecting concern from sexist and violent imagery that is not sexually explicit. For example, by asserting that pornography is a central cause of sex discrimination, this legislation diverts attention and efforts from the most significant causes of sex discrimination.¹⁰¹ Feminist scholars have identified the following as far more profound sources of women's oppression:

sex segregated wage 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 female responsibility; barriers to reproductive freedom; and discrimination and segregation in education and athletics.¹⁰²

Similarly, by blaming pornography for violence against women, the legislation deflects attention and resources from the numerous, complex causes of such violence¹⁰³ and undermines law enforcement efforts to apprehend and prosecute individuals who actually commit violent crimes against women.¹⁰⁴

Further, as even procensorship feminists acknowledge,¹⁰⁵ government regulation would probably only drive pornography underground, enhancing its appeal.¹⁰⁶ And, to the extent that censorship would make pornographic images less visible, the protest against sexism would be weakened. As Anna Gronau explains:

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

¹⁰¹ See, e.g., Burstyn, *supra* note 8, at 26-27; Diamond, *supra* note 28, at 52; Duggan, Hunter & Vance, *supra* note 14, at 144; Gronau, *supra* note 84, at 97-98; Kostash, *supra* note 27, at 35; Steele, *supra* note 20, at 6.

¹⁰² FACT Brief, *supra* note 28, at 35-36 (citations omitted).

¹⁰³ Preface to *Pornography and Sexual Aggression* at xvii (E. Donnerstein & N. Malamuth eds. 1984) ("[T]he obvious fact [is] that, if certain types of pornography are found to cause sexual aggression, there are clearly many other causal factors that may be at least as important or even more so."). Ironically, some research indicates that one of these many causal factors may be the improving legal and economic status of women. See, e.g., Baron & Straus, *Sexual Stratification, Pornography, and Rape*, in *Pornography and Sexual Aggression* 185, 205-06 (E. Donnerstein & N. Malamuth eds. 1984). Presumably, most proponents of feminist values would resist any effort to curb advances in women's status on the rationale that they contribute to antifemale violence, because these advances also have positive, profeminist effects. But the same could be said of pornography. See text accompanying notes 24-28, 92-93 *supra*.

¹⁰⁴ See note 61 *supra*.

¹⁰⁵ See Callwood, *supra* note 10, at 123 (arguing that most procensorship feminists see chief benefit of censoring pornography as symbolic, recognizing that pornography would continue to flourish underground).

¹⁰⁶ See, e.g., Gronau, *supra* note 84, at 93-94. Some social science research also indicates that when someone who watches erotic films realizes that they have been censored, his aggressive responses tend to be increased. See note 128 *infra*.

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.¹⁰⁷

There is yet another significant respect in which feminist principles would be subverted by laws censoring pornography. Advocates of social change, including advocates of feminist principles, have a special stake in preserving our system of free expression from the substantial erosion it would suffer under any censorship scheme.¹⁰⁸ This point was made eloquently by Wendy Kaminer, an activist in the movement fighting violence against women.

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.¹⁰⁹

The violations of civil liberties and feminist principles that characterize the Dworkin-MacKinnon censorship scheme are not peculiar to that particular proposal, but inhere in the generic concept of censoring pornography in order to "protect" women.¹¹⁰ Accordingly, a variation on the Dworkin-MacKinnon theme recently advanced by Professor Cass

¹⁰⁷ Gronau, *supra* note 84, at 96. See generally Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of Cohen v. California*, 1980 Duke L.J. 283, 301-03 (1980) ("[T]he most highly offensive forms of expression communicate an important truth about the offensiveness of the speaker's message [and therefore should be included in] the marketplace of ideas because they help [it] reject false, ugly ideas by revealing them for what they are.").

¹⁰⁸ Precisely this point was made by both judges who wrote the opinions holding the Indianapolis ordinance unconstitutional. See *American Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316, 1337 (D. Ind. 1984) (Barker, J.), *aff'd*, 771 F.2d 323 (7th Cir. 1983) (Easterbrook, J.), *aff'd*, 106 S. Ct. 1172 (1986).

Historically, the suppression of free speech has been a major tactic of the antifeminist movement. From 1873 until 1971, the Comstock Act, 18 U.S.C. §§ 1461, 1462 (1982) & 19 U.S.C. § 1305 (1982 & Supp. II 1984), was used to suppress information about contraception and abortion, see, e.g., *United States v. One Book, Entitled "Contraceptions"*, 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).

More recently, repeated attempts have been made to ban the feminist magazine *Ms.* from high school libraries. See, e.g., *Salvail v. Nashua*, 469 F. Supp. 1269 (D.N.H. 1979).

¹⁰⁹ Kaminer, *supra* note 33, at 756.

¹¹⁰ See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) ("[I]f the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."); *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion) ("Traditionally, [sex] discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage.").

Sunstein¹¹¹ is subject to essentially the same criticisms as the Dworkin-MacKinnon model itself.

Sunstein suggests that antipornography legislation should be limited to materials that “sexualize violence against women,” are “devoid of serious social value,” and contain some visual elements. He also proposes that any work should be “taken as a whole” to determine whether it conforms to these criteria.¹¹² However, Sunstein does not offer a convincing argument that regulating even this theoretically smaller category of sexually explicit speech¹¹³ is consistent with civil liberties¹¹⁴ or feminist principles. With respect to feminist principles, he apparently accepts the Dworkin-MacKinnon view of pornography as the only feminist view. Although the Sunstein piece cites an otherwise impressive array of works from various disciplines and perspectives, it omits *any* reference to the feminist “pro-sex” literature and other related writings about the positive aspects of pornography.¹¹⁵

Sunstein’s flawed rationales for justifying censorship stem from his acceptance of the Dworkin-MacKinnon view about the nature and effects of pornography. He categorizes pornography as “low value” speech,¹¹⁶ ignoring the important messages such speech conveys concerning a range of philosophical, political, and even profeminist themes.¹¹⁷ He argues that censoring pornography will reduce sexual violence against women,¹¹⁸ notwithstanding the dearth of evidence to support a causal

¹¹¹ See Sunstein, *supra* note 15.

¹¹² *Id.* at 592, 624-25.

¹¹³ In practice, the Sunstein model is necessarily over- and underinclusive for the same reasons that the Dworkin-MacKinnon model is—namely, that “pornography” cannot be defined with the requisite objectivity or specificity to ensure a narrow application consistent with feminist and civil liberties concerns. See text accompanying notes 65-75, 80-87 *supra*.

¹¹⁴ Sunstein acknowledges that “dangers [are] posed by generating a somewhat different category of regulable speech bound to have some definitional vagueness.” Sunstein, *supra* note 15, at 627. He contends, however, that this danger has been exaggerated because his proposed new type of content or viewpoint based regulation is analogous to other such regulations that the Supreme Court has upheld. See *id.* at 609-17, 627. One problem with this argument is that the decisions upholding analogous regulations upon which Sunstein relies are themselves troublesome, from a civil liberties perspective, and therefore should be strictly limited. See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (government may prohibit employers from making unfavorable statements about effects of unionization during certain period before union elections if statements might be interpreted as threats). Sunstein himself acknowledges the forceful criticisms that have been leveled at *Gissel* and related decisions curtailing speech in the labor relations context. See Sunstein, *supra* note 15, at 614 n.145.

¹¹⁵ See text accompanying notes 76-77 *supra*.

¹¹⁶ Sunstein, *supra* note 15, at 602-08, 617.

¹¹⁷ *American Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 331 (7th Cir. 1985), *aff’d*, 106 S. Ct. 1172 (1986) (noting political significance ascribed to pornography by pro-censorship statute); see text accompanying notes 21-28 *supra*.

¹¹⁸ Sunstein, *supra* note 15, at 616.

connection between exposure to pornography and such violence.¹¹⁹ Moreover, he asserts that the harm allegedly produced by pornography cannot be adequately countered by more speech,¹²⁰ despite persuasive evidence to the contrary.¹²¹

Sunstein concludes that "the pornography industry is so well financed, and has such power to condition men and women, that it has the effect of silencing the antipornography cause in particular and women in general."¹²² However, there is scant evidence that the pornography industry does in fact possess this asserted power. To the contrary, both champions of the antipornography cause and women in general not only have vigorously exercised their free speech rights, but also have had some palpable impact on public perceptions and public policy in consequence.¹²³ Moreover, far from stimulating free speech by women, feminists, and antipornography activists, the suppression of pornography could well have the opposite effect.¹²⁴ Contrary to Sunstein's hypothesis that protecting free speech entrenches the status quo,¹²⁵ free speech principles have consistently been invoked to amplify the voices of those who challenge the status quo, including advocates of feminist principles.¹²⁶

III

THERE IS NO EVIDENCE THAT CENSORSHIP OF PORNOGRAPHY WOULD REDUCE SEXISM OR VIOLENCE AGAINST WOMEN

The feminists who advocate censoring pornography rest their case on the assumption that such censorship would reduce sexism and violence against women.¹²⁷ This assumption in turn reflects two others, both highly questionable: that there is a causal nexus between exposure

¹¹⁹ See text accompanying notes 134-55 *infra*.

¹²⁰ Sunstein, *supra* note 15, at 617.

¹²¹ See text accompanying notes 34-35 *supra* and 156-57 *infra*.

¹²² Sunstein, *supra* note 15, at 618. Sunstein advances this argument despite his concession that, in general, "inquiries into substantive powerlessness should not be used to defend restrictions on expression." *Id.* at 623.

¹²³ See text accompanying notes 11, 18, 34-35 *supra*. Indeed, Sunstein's assertion that the antipornography cause has been silenced is belied by, among other things, the outpouring of writings about that cause in various types of publications, including respected law journals such as the one in which Sunstein's own piece was published. See note 15 *supra*.

¹²⁴ See text accompanying note 107 *supra*.

¹²⁵ See Sunstein, *supra* note 15, at 620.

¹²⁶ See text accompanying notes 108-109 *supra*.

¹²⁷ A widely quoted formulation of this view is Robin Morgan's statement that "[p]ornography is the theory and rape the practice." R. Morgan, *Going Too Far* 163 (1978).

to pornography and misogynist attitudes and behavior; and that censorship would significantly reduce exposure to pornography.¹²⁸

According to censorship advocates, the asserted causal nexus between pornography and sexism is allegedly demonstrated by certain social science data.¹²⁹ However, as noted above, the causes of sex discrimination and violence against women are numerous and complex.¹³⁰ Further, even assuming that one such cause were exposure to sexist or violent images, pornography constitutes only a small subset of the sexist and violent imagery that pervades our culture.¹³¹

For the foregoing reasons, the censorship of pornography would be an ineffective means of countering misogynist attitudes or behavior. It would address neither most sexist, violent imagery, nor the numerous causes of sexism and violence against women that are independent of images. Therefore, even assuming some causal link between pornography and these phenomena, the necessarily insignificant contribution censorship might make to reducing them¹³² would probably not outweigh the substantial damage censorship would do to feminist and civil liberties principles. Moreover, the lack of actual evidence to substantiate the alleged causal link reinforces the conclusion that the purported benefits of censorship would not offset its adverse impact.¹³³

The relatively few social science studies concerning the alleged causal nexus between pornography and sexist or violent attitudes or behavior are described and analyzed by York University anthropology professor Thelma McCormack in a useful appendix to *Women Against Censorship*.¹³⁴ These studies recently have been subject to much analysis,¹³⁵ especially because they were invoked by the widely publicized

¹²⁸ Not only is it dubious that censorship would substantially reduce the audience for pornography, as opposed to forcing it underground, but, even worse, some evidence suggests that the viewer's aggressive response to an erotic film may be increased by his awareness that the film has been censored. See Brock, *Erotic Materials: A Commodity Theory Analysis of Availability and Desirability*, in 7 Technical Report of the U.S. Comm'n on Obscenity & Pornography 13-17 (1971); Tannenbaum, *Emotional Arousal As a Mediator of Communication Effects*, in 8 Technical Report of the U.S. Comm'n on Obscenity & Pornography 326-56 (1971); Worchel & Arnold, *Effects of Censorship and Attractiveness of the Censor on Attitudinal Change*, 9 J. Experimental Soc. Psychology 365 (1973).

¹²⁹ See, e.g., MacKinnon, *supra* note 2, at 52-56.

¹³⁰ See notes 59, 102-103 and accompanying text *supra*.

¹³¹ See text accompanying note 78 *supra*.

¹³² Contributors to *Women Against Censorship* note that "even if porn were to miraculously disappear, violence against women would continue as long as other oppressive structures remained in place." Diamond, *supra* note 28, at 49; accord Snitow, *supra* note 11, at 117.

¹³³ See text accompanying notes 63-126 *supra*.

¹³⁴ See McCormack, *Making Sense of Research on Pornography*, in *Women Against Censorship*, app. 183-205 (V. Burstyn ed. 1985).

¹³⁵ See, e.g., *id.*; FACT Brief, *supra* note 28, at 18-27; Lynn, *supra* note 58, at 65-73; Richards, *Pornography Commissions and the First Amendment: On Constitutional Values and*

Meese Commission Report.¹³⁶ This Essay will not rehash the substantial body of literature evaluating the relevant social science data. Rather, it will briefly outline some of the major criticisms that have been leveled at assertions that these data support a causal link between being exposed to pornography and holding negative attitudes toward, or committing violence against, women.

Professor McCormack's comprehensive review of the relevant research results summarizes what those data show about the social effects of pornography.

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 sharp evidence that sex patterns, once established, are as difficult to change as any

Constitutional Facts, 39 Me. L. Rev. (forthcoming 1987); ACLU Report, *supra* note 23, at 75-88.

For example, the Lynn piece, *supra* note 58, notes numerous reasons why censorship of pornography is not justified by the experimental findings reported by Professors Edward Donnerstein and Neil Malamuth, data frequently invoked by proponents of Dworkin-MacKinnon-type laws. See, e.g., MacKinnon, *supra* note 2, at 52-56. The male subjects in these experiments manifested increased negative and aggressive attitudes toward women after seeing films containing violent sexual imagery.

Lynn pointed to the following reasons that the Donnerstein and Malamuth studies have limited implications for social policy generally and do not support the censorship of pornography in particular: the studies show "only correlation, not causation"; the experimental population samples were "extraordinarily small"; "such studies may be missing a crucial variable" by not examining the subjects' feelings about sexuality based on their past development and experience, Lynn, *supra* note 58, at 66; "the duration of the reported effects is unknown," *id.* at 67; the films involved in the studies, which depicted violent rape only, differed from most pornographic films actually shown in the real world, therefore exacerbating the omnipresent problems with extrapolating projections from results obtained in artificial laboratory settings, *id.* at 67-68; the level of aggression displayed in these studies may well exceed the level that would be manifested outside the laboratory setting because aggression is allowed or even encouraged by the researcher in the laboratory, and the disinhibitory incentives that would operate in the real world are absent, *id.* at 68; the studies do not show that men are induced to commit sexual aggression by seeing depictions of it, *id.* at 69; and negative attitudes following exposure to pornography during the experiments "can be combatted through the [subsequent] presentation of alternative ideas," *id.*; see also text accompanying notes 145-57 *infra* (noting that Donnerstein and Malamuth themselves criticize use of their research to justify censoring pornography).

¹³⁶ See Meese Commission Report, *supra* note 16, at 324-29.

other social habits, and, in addition, there are strong inhibiting factors that intervene to keep our responses within the cultural norms.¹³⁷

The most recent thorough assessment of the pertinent social science data was commissioned by the 1985 Fraser Commission in Canada.¹³⁸ This review concluded that much of the research was conceptually flawed and that, taken as a whole, the results were inconclusive.¹³⁹ Similarly, based on their own surveys of the social science data, previous governmental commissions on pornography concluded that there was no significant causal connection between the use of pornography and violence against women.¹⁴⁰

Even the recent Meese Commission Report, which endorsed more regulation of sexually explicit speech than previous governmental commissions, 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.¹⁴¹ The Meese Commission Report further acknowledged that "[t]he contribution of pornography to sexual deviance remains very much an open question."¹⁴² And to the extent that the Meese Commission Report did purport to find some causal link between pornography and antisocial attitudes or conduct,¹⁴³ these findings have been subject to harsh criticism.¹⁴⁴ In particular, three of the foremost researchers in the area, Professors Edward Donnerstein, Daniel Linz, and Neil Malamuth, have disputed these findings.¹⁴⁵

¹³⁷ McCormack, *supra* note 134, at 198.

¹³⁸ Meese Commission Report, *supra* note 16, at 909 (citing McKay & Dolf, *The Impact of Pornography: An Analysis of Research and Summary of Findings*, in Report of the Special Committee on Pornography and Prostitution (1985)).

¹³⁹ See Meese Commission Report, *supra* note 16, at 909-10.

¹⁴⁰ See 1970 Commission Report, *supra* note 23, at 227-43.

¹⁴¹ See Meese Commission Report, *supra* note 16, at 315-20.

¹⁴² *Id.* at 975; see also *id.* at 312-13 (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 control").

¹⁴³ See *id.* at 324-27.

¹⁴⁴ See Hertzberg, *Big Boobs*, *The New Republic*, July 14 & 21, 1986, at 21-24; Lynn, *supra* note 58, at 65-73; Richards, *supra* note 27, at 44-45; ACLU Report, *supra* note 23, at 64-80; see also J. Becker & E. Levine, Statement 4 (1984) (unpublished statement by members of Meese Commission on file at New York University Law Review) ("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.")

¹⁴⁵ See Donnerstein & Linz, *The Question of Pornography*, *Psychology Today*, Dec. 1986, at 56-59.

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 appar-

Although their experiments are cited by advocates of censorship (including the Meese Commission),¹⁴⁶ Professors Donnerstein, Linz, and Malamuth interpret their research differently.¹⁴⁷ They stress that their data show at most that exposure to aggressive or *violent* pornography¹⁴⁸ may lead to short-term attitudinal changes,¹⁴⁹ which are readily dispelled by exposure to other material,¹⁵⁰ and that the data provide no evidence

ently 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. at 56; see also Researchers Dispute Pornography Report on Its Use of Data, N.Y. Times, May 17, 1986, at A1.

¹⁴⁶ See, e.g., Meese Commission Report, *supra* note 16, at 324-29; Jacobs, *supra* note 6, at 10-11; MacKinnon, *supra* note 2, at 52 n.116, 55.

¹⁴⁷ See note 145 *supra*; note 154 *infra*. Nor are they the only researchers who believe their findings have been misinterpreted. The Baron and Straus correlational study, see Baron & Straus, *supra* note 25, for example, is widely relied on by advocates of censorship, see, e.g., Meese Commission Report, *supra* note 16, at 324-29; MacKinnon, *supra* note 2, at 51 n.113. However, Professor Murray Straus himself has stated that his research does not support censorship. See J. Becker & E. Levine, *supra* note 144, 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 has been 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 on sex in the media."

Id.; see also Donnerstein & Linz, *supra* note 145, at 56-59 (summarizing specific criticisms of Meese Commission's misinterpretations of social science data, including Donnerstein and Linz's own research findings).

What we have is a picture of violent pornography that is somewhat different from that drawn by the commission. We do not, as yet, know if the detrimental effects of watching pornography are long-lived or only fleeting. We do know that it is specifically the pornographic materials that depict women "enjoying" rape that are especially damaging, but it remains unclear whether all men are affected equally even by these bizarre scripts. 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.

¹⁴⁸ These terms refer to "portrayals in which physical force is either used or threatened to coerce a woman to engage in sexual acts (e.g., rape)." Malamuth, *Aggression Against Women: Cultural and Individual Causes*, in *Pornography and Sexual Aggression* 19, 29 (E. Donnerstein & N. Malamuth eds. 1984).

¹⁴⁹ See Donnerstein & Linz, *supra* note 145, 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.").

¹⁵⁰ See text accompanying note 157 *infra*.

that exposure to violent pornography increases the probability that the reader or viewer will actually commit harmful acts.¹⁵¹ Moreover, Professors Donnerstein, Linz, and Malamuth have emphasized that prohibiting *sexually* explicit imagery misses the core of the problem, because the temporary attitudinal changes that did occur in limited experimental populations¹⁵² were linked more closely to the violence than to the sex in the violent pornography at issue.¹⁵³ These social scientists have accordingly suggested that, if any images are to be suppressed in an effort to combat such short-term attitudinal changes,¹⁵⁴ it would be more appropriate to target the numerous images of violence against women that pervade the nonpornographic media.¹⁵⁵

The research of Professors Donnerstein and Malamuth has further suggested that, even if images of violence against women foster negative attitudes toward women, censorship still would not be a rational strategy for combating such attitudes. That conclusion follows from the effectiveness of postexperimental debriefing sessions, in which subjects' negative attitudes were reduced after receiving information about violence against women. Moreover, this combined exposure to pornography and information apparently reduced negative attitudes even more effectively than exposure to the information alone would have done.¹⁵⁶ Consequently,

¹⁵¹ See Donnerstein & Linz, *supra* note 145, at 58; see also note 135 *supra* (discussing why social science data do not establish causal link between pornography and actual harmful behavior).

¹⁵² See note 135 *supra*.

¹⁵³ Referring to a study they had conducted with Professor Berkowitz, as well as a study by Professors Malamuth and Check, Professors Donnerstein and Linz 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 145, at 59; accord H. Eysenk & D. Nias, *Sex, Violence and the Media* (1978).

¹⁵⁴ This is not to imply that any of these researchers has endorsed the censorship of any type of imagery. See, e.g., Malamuth, *supra* note 148, at 41 (disclaiming any intent to endorse censorship or any other strategy for inducing changes in media content).

¹⁵⁵ See Donnerstein & Linz, in *Pornography: Love or Death?*, *Film Comment*, Dec. 1984, at 29, 35 ("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' . . ."); Malamuth & 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.").

¹⁵⁶ See, e.g., Malamuth & Donnerstein, *The Effects of Aggressive-Pornographic Mass Media Stimuli*, in *15 Advances in Experimental Psychology* 103, 129 (1982). These results strengthen the contention of anticensorship feminists that a more effective way to combat sexist attitudes is speech challenging those attitudes. Cf. Stone, *supra* note 15, at 480.

Our acceptance of racist expression has changed radically in recent years without the aid of government suppression. Individuals who once found the characterization in "Amos

the research indicates that education is more effective than censorship for countering misogynistic stereotypes.¹⁵⁷

Thus, the harmful effects of pornographic speech are best eliminated by "more speech." In that case, censorship is intolerable.¹⁵⁸ The speculative possibility that exposure to violent pornography might cause aggressive attitudes that will not be corrected through more speech is too negligible a benefit to outweigh the substantial costs censorship would impose on feminist and civil liberties principles.¹⁵⁹ Any potential harm must instead be addressed by measures that are consistent with feminist and civil liberties principles.

IV

NONCENSORSHIP STRATEGIES FOR REDUCING SEXISM AND VIOLENCE AGAINST WOMEN, CONSISTENT WITH BOTH FEMINIST AND CIVIL LIBERTIES PRINCIPLES

A major unifying theme of the various essays in *Women Against Censorship* is that, rather than advocating censorship of pornography, with censorship's adverse effects upon feminist and civil libertarian principles, those who support the underlying goals of the feminist movement to censor pornography—namely, the elimination of sex discrimination and violence against women—should instead pursue those goals through means consistent with feminist and civil liberties principles. In the realm

and Andy" amusing would now be shocked to see their children amused by such fare. A similar change is possible with respect to pornography.

Id.

¹⁵⁷ See, e.g., Donnerstein & Linz, *supra* note 155, at 35; Malamuth, *supra* note 148, at 45-47.

¹⁵⁸ For the seminal enunciation of this principle, see *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). For an example of a more recent case applying the concept, see *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978) (holding unconstitutional city's denial of permit to Nazis seeking to march in Skokie, Illinois). Opportunity to respond is not required for a suppression of speech to be held unconstitutional. *Mills v. Alabama*, 384 U.S. 214, 219-20 (1966) (finding first amendment violated by statute prohibiting editorials on election day). An opportunity for more speech simply strengthens the case against suppression.

¹⁵⁹ Even if the social science data could establish that pornography has a general tendency to foster negative attitudes or behavior, that still would not justify censorship. All but the blandest speech could be said to have such general "bad tendencies" in terms of its potential impact upon its audience. Protection of free expression would consequently be eviscerated if this constituted a sufficient justification for censorship. Accordingly, as a precondition for suppressing any speech because of its alleged impact on its audience, first amendment doctrine demands a close causal connection between the speech and a grave social harm, as well as intent to cause such harm on the speaker's part. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (reversing conviction of Ku Klux Klan members and expressly rejecting argument that abstract advocacy of violence could be punished or suppressed because of general tendency to lead to violence).

of imagery, several essays in the book stress that, rather than seeking to suppress sexually explicit imagery that might convey negative views of women, proponents of feminist and civil liberties principles should instead concentrate on creating and distributing images that convey positive views of women. Sara Diamond, for example, urges feminists to spend their time and energy “seeking resources to allow women to flood the market with feminist productions . . . [because] [w]idely distributed feminist imagery would be a provocative and active contradiction to the sexist imagery of all the current mass media.”¹⁶⁰ In a similar vein, several essays suggest that advocates of feminist and civil libertarian values should encourage governmental measures that would assist small-scale publishing houses and other potential distributors of “prowoman and sex positive” imagery,¹⁶¹ rather than governmental regulation or prohibition of pornographic images.

Moving beyond the realm of images, contributors to *Women Against Censorship* propose measures that would deal directly with the harms allegedly caused or exacerbated by pornographic images. For example, they urge invigorated enforcement of already existing laws penalizing coercion, sexual harassment, assault, rape, and economic exploitation.¹⁶² Furthermore, they urge enactment of new laws to ensure job safety for women who choose to become models for pornographic works.¹⁶³

Finally, in her closing essay in *Women Against Censorship*, which is appropriately entitled “Beyond Despair: Positive Strategies,” Varda Burstyn sets out a comprehensive list of alternatives designed to decrease sex discrimination and violence against women. She classifies these measures into the following methods or areas for change: “The Legal Front”;¹⁶⁴ “Protest and Direct Action”;¹⁶⁵ “Alternatives to Pornogra-

¹⁶⁰ Diamond, *supra* note 28, at 53; accord Burstyn, *supra* note 59, at 165; Steele, *supra* note 20, at 59, 74-76; Valverde & Weir, *supra* note 88, at 105.

¹⁶¹ Diamond, *supra* note 28, at 57; see also Burstyn, *supra* note 59, at 165 (urging that taxes on commercial media be used to help finance noncommercial undertakings); Steele, *supra* note 20, at 74 (citing recommendation by Canada’s National Action Committee on the Status of Women that the government establish a women’s television network); *id.* at 75 (stating that supporters of feminist goals should seek governmental measures assisting small publishing houses, including favorable postal and tax rates).

¹⁶² See, e.g., Burstyn, *supra* note 59, at 160-61.

¹⁶³ See, e.g., *id.* at 167 (arguing that feminist approach to needs of “sex-workers” should seek both to improve quality of their present working lives and to create meaningful alternatives to sex-work); Duggan, Hunter & Vance, *supra* note 14, at 148 (asserting that laws based upon Dworkin-MacKinnon proposal would drive pornography industry underground, making it more difficult to regulate for purposes of protecting models).

¹⁶⁴ Burstyn, *supra* note 59, at 158-61.

¹⁶⁵ *Id.* at 161. For examples of potential tactics in this category, see Morgan, *How to Run Pornographers Out of Town and Preserve the First Amendment*, Ms., Nov. 1978, at 55, 78-80 (recommending boycotting products advertised in ways that demean women, picketing pornography shops and confronting their customers, urging magazines and newspapers not to

phy";¹⁶⁶ "The Sex Industry";¹⁶⁷ "Economic Independence for Women and Youth";¹⁶⁸ "Reproductive and Erotic Rights for Women and Sexual Minorities";¹⁶⁹ and "Sexual Rights for Children and Youth."¹⁷⁰ Burstyn acknowledges that the proposals she outlines "are not easy or cheap to implement,"¹⁷¹ but she offers this explanation:

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 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 insure that we will have a future.¹⁷²

CONCLUSION

Although the contributors to *Women Against Censorship* represent a range of backgrounds and approaches, they are unanimous in recognizing that censorship of pornography would significantly damage both feminist and civil libertarian principles without securing any substantial countervailing gains in terms of reduced discrimination or violence against women. On the contrary, they show that censorship would perpetuate the underlying causes of sexism. These essays constitute a powerful collective endorsement of the notion that, in the editor's apt phrase, censorship would obstruct rather than open "the road to freedom for women and sexual joy for all."¹⁷³

include pornographic advertising, attempting to expose those who profit from pornography, and urging public officials to refrain from cooperating with pornographic publications); note 34 *supra* (discussing antipornography strategies that individuals and organizations have actually utilized).

¹⁶⁶ Burstyn, *supra* note 59, at 161-66.

¹⁶⁷ *Id.* at 166-69.

¹⁶⁸ *Id.* at 169-71.

¹⁶⁹ *Id.* at 171-73.

¹⁷⁰ *Id.* at 173-78.

¹⁷¹ *Id.* at 178.

¹⁷² *Id.* at 179.

¹⁷³ *Id.* at 180.

