

2006

Is Minnesota Progressive - A Focus on Sexually Oriented Expression Minnesota Progressive

Nadine Strossen

New York Law School

Follow this and additional works at: http://digitalcommons.nyls.edu/fac_articles_chapters

Recommended Citation

33 Wm. Mitchell L. Rev. 51 (2006-2007)

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.

“IS MINNESOTA PROGRESSIVE?” A FOCUS ON SEXUALLY ORIENTED EXPRESSION[†]

By Nadine Strossen^{††}

I. INTRODUCTION AND OVERVIEW	54
A. <i>Inherent Subjectivity in Defining “Progressive,” Including in This Context</i>	54

† This article is dedicated to Don and Arvonne Fraser, lifelong champions of progressive values, including free speech and women’s rights, in their home state of Minnesota, as well as nationally and internationally.

†† Professor of Law, New York Law School; President, American Civil Liberties Union. For research assistance with this article, I gratefully acknowledge: my Chief Aide, Steven Cunningham (NYLS ‘99); my Assistant, Danica Rue (NYLS ‘09); my Research Assistants Jackie Ferrari (NYLS ‘08) and Trisha Olson (NYLS ‘08); and *William Mitchell Law Review* Staff Members: Stephanie Friedland (WMCL ‘07), Monica Kelley (WMCL ‘07), and Michael Neaton (WMCL ‘07). They, along with others of the *William Mitchell Law Review*, deserve much of the credit, as well as the responsibility, for many of the footnotes.

For his helpful comments on a draft of this article, I thank Minneapolis attorney Randall Tigue, a nationally prominent First Amendment expert, who was directly involved in many of the cases and controversies that this article describes.

I was delighted to accept the invitation to write this article not only because of my longstanding academic and activist interests in the constitutional and policy issues concerning sexual expression and feminism, but also given my close ties to Minnesota. I grew up mostly in Hopkins, having graduated from Hopkins High School in 1968. Although I went to college and law school outside Minnesota, and my family had also moved away in 1968, I decided to return to Minnesota on my own following my law school graduation in 1975. I served as a law clerk for Justice John J. Todd of the Minnesota Supreme Court in 1975–76. I then became an associate at the Minneapolis law firm of Lindquist & Vennum, where one of the clients I helped to represent was the National Football League Players Association; in that capacity I first met Alan Page, who was then not only an NFLPA leader and professional football star, but also a law student. Before becoming a Justice on the Minnesota Supreme Court, Alan Page joined Lindquist & Vennum, where he occupied the office I had vacated to move to New York City in 1978 for what I considered a temporary experiment with living in “The Big Apple.” Although my experiment with living in NYC is still continuing successfully, I will always miss Minnesota.

I have the greatest respect for the government officials, judges, lawyers, and others in Minnesota with whom it was my privilege to work at the outset of my legal career. I hope and trust that this piece’s constructive criticism of certain government actions and judicial rulings in my former home state will be accepted in the respectful spirit in which it is offered.

B.	<i>Overview of Minnesota's Measures Censoring Sexual Expression During the Past Quarter-Century</i>	56
C.	<i>Outline of the Remainder of the Article</i>	58
II.	CENSORSHIP OF SEXUAL EXPRESSION IS REGRESSIVE, NOT PROGRESSIVE	59
A.	<i>Freedom of Expression Is an Essential Bedrock for Equality</i>	59
B.	<i>Censorship of Sexual Expression Undermines Women's Equality</i>	60
1.	<i>List of Reasons for This Conclusion</i>	60
2.	<i>Censorship of Sexual Expression Has Particularly Harmed Women and Advocates of Women's Rights, Including Reproductive Freedom</i>	61
a.	<i>This Pattern Is Consistent with the Analysis of the Pro-Censorship Feminists Themselves</i>	61
b.	<i>This Pattern Has Continued in Cyberspace</i>	63
c.	<i>This Pattern also Pertains to the Sole MacDworkin-Style Law that Is Currently in Force</i>	66
C.	<i>Censorship of Sexual Expression also Undermines Equality for Sexual-Orientation Minorities</i>	67
D.	<i>Restricting Sexual Expression Undermines Human Rights More Broadly</i>	72
1.	<i>Measures Targeting Sexual Expression Have Consistently Been Used to Suppress Political Dissent</i>	72
2.	<i>Obscenity Laws Have Been Used to Target Expression of Minority Speakers and Dissident Ideas</i>	74
3.	<i>The Minneapolis Anti-Pornography Ordinance also Would Have Authorized the Targeting of Minority Speakers and Dissident Ideas</i>	76
4.	<i>Freedom of Sexual Speech Is an Integral Aspect of Equality and Human Rights</i>	77
III.	THE DEVELOPMENT AND INITIAL ENACTMENT OF THE MACKINNON/DWORKIN MODEL "FEMINIST ANTI-PORNOGRAPHY LAW" IN MINNEAPOLIS, 1983–1984	78
A.	<i>The Model Law's Debut in—and Dissemination from—Minneapolis</i>	78
1.	<i>The Beginnings of the Feminist Anti-Pornography, Pro-Censorship Movement</i>	78
2.	<i>The History of the Efforts to Enact the MacDworkin Model Anti-Pornography Law in Minneapolis</i>	79
3.	<i>The Ongoing Censorial Impact of the Minneapolis Proceedings, Both in Minnesota and Beyond</i>	82

4. <i>An Asserted "Civil Rights Approach" that Is Opposed by the Minneapolis Civil Rights Commission</i>	83
5. <i>Summary of the Law's Speech-Repressive Provisions</i>	84
B. <i>The Model Law's Anti-Progressive Nature Is Underscored in Indianapolis</i>	87
C. <i>The Courts' Verdict on the Law: Unconstitutional and Unwise in Terms of Women's Rights</i>	89
D. <i>The More Recent Feminist/Progressive Consensus: Counter to the MacDworkinite Law</i>	91
IV. SUBSEQUENT LEGAL DEVELOPMENTS IN MINNESOTA ALSO RESTRICT FREEDOM OF SEXUAL EXPRESSION	94
A. <i>Minnesota Officials Have Broadly Construed the U.S. Supreme Court's Precedents that Permit Restrictions on Sexual Expression</i>	94
B. <i>The Minnesota Supreme Court Has Declined to Enforce the State Constitution's Broadly Phrased Free Speech Guarantee as Extending to Sexual Expression</i>	99
C. <i>In This Area, Minnesota Is Less Progressive than Other States, Which Afford More Protection to Sexual Expression</i> ...	103
V. CONCLUSION	106
APPENDIX.....	108

My ancestors were Puritans from England, [who] arrived here in 1648 in the hope of finding greater restrictions than were permissible under English law at the time.

GARRISON KEILLOR, Minnesota writer and radio producer/performer, 1990¹

[T]he highly charged context of an obscenity trial may encourage puritanical . . . views to prevail Unproveable aesthetic and moral assumptions may guide personal decisions, but they should not, even if embraced by the majority, justify regulation of others' conduct. Yet an obscenity trial . . . requires jurors to rely on their moral assumptions.

ROLAND AMUNDSON, Minnesota Court of Appeals

1. *National Endowment for the Arts Grant Funding and Restrictions: Testimony before Senate Subcommittee on Education, Arts and Humanities*, 101st Cong. (1990) (statement of Garrison Keillor), in *CULTURE WARS: DOCUMENTS FROM THE RECENT CONTROVERSIES IN THE ARTS* 159 (Richard Bolton, ed. 1992).

Judge, 1991²

When I look at this [Minneapolis anti-pornography] ordinance in relation to the history of women, I am concerned [about] what it does for feminism and what it does for the fight for human rights. The status of women is better in open societies than in closed, restrictive societies.

KATHY O'BRIEN, Minneapolis City Council Member, 1983³

In this opinion, the majority [of the Minnesota Supreme Court] adopts a test for limiting free speech [for nude dancing] which is a staggering departure from our history of providing significant protection of individual rights under the state constitution. To reach this result, the majority . . . substitutes its own moral judgment for legal or constitutional analysis.

SANDRA GARDEBRING, Minnesota Supreme Court Justice, 1994⁴

I. INTRODUCTION AND OVERVIEW

A. *Inherent Subjectivity in Defining "Progressive," Including in This Context*

The specific topic the editors have asked me to address—whether Minnesota policies governing sexual expression are progressive—exemplifies the inherent ambiguity in this Issue's key term, "progressive." It seems impossible, or at least extremely difficult, to define this term objectively. After all, it is a variation on

2. *State v. Davidson*, 471 N.W.2d 691, 703 (Minn. Ct. App. 1991) (Amundson, J., concurring specially), *rev'd*, 481 N.W.2d 51 (Minn. 1992). The Minnesota Supreme Court unanimously upheld Minnesota's law criminalizing obscenity under the state constitution, rejecting several independently sufficient state constitutional arguments. 481 N.W.2d at 55–60.

3. Paul Brest & Ann Vandenberg, *Essay: Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607, 642 (1987) (quoting Kathy O'Brien).

4. *Knudson v. City of Coates*, 519 N.W.2d 166, 170 (Minn. 1994) (Gardebring, J., concurring in part, dissenting in part) (dissenting opinion of Justice Gardebring joined by two other Justices, making the ruling 4–3).

the word “progress,” which inevitably reflects subjective perceptions and values.⁵ Often, what one person would view, on balance, as “progress,” another would view as the opposite. For example, consider the currently raging worldwide debates about development and globalization. Likewise, even among individuals and groups who share certain general goals that they would all consider “progressive”—such as fostering equality, safety, and dignity for women—there are dramatic disagreements about whether specific policies actually promote those goals or inhibit them. In particular, equally ardent feminists have strongly disagreed about whether freedom of sexual expression advances or hinders our shared progressive goals.⁶

Along with many other women’s rights advocates, I believe that all censorship of sexual expression is antithetical to many crucial progressive goals, including not only women’s rights, but also the interrelated goals of reproductive freedom and equality for sexual-orientation minorities. I support this conclusion by using actual experience under all such censorial measures, including those advocated by progressive reformers in the sincere belief that they would advance progressive goals, including women’s rights.

As I will explain in this article, the many measures suppressing sexual expression that Minnesota has promoted and adopted during the past quarter-century—from my anti-censorship, feminist perspective—are anti-progressive. However, I also recognize that other sincere advocates of progressive goals would make exactly the opposite claim; they would hail Minnesota as progressive precisely because of these censorial measures.

In this Introduction, I will summarize Minnesota’s censorship policies concerning sexual expression since the early 1980s, and the reasons why I and many other feminists, as well as advocates of reproductive freedom, lesbian/gay rights, and civil libertarians, consider these policies to be regressive. The statements quoted above, from several Minnesotans who have played leading roles in these censorship battles, illustrate the broad history of these repressive measures.

5. See, e.g., AMERICAN HERITAGE DICTIONARY 1401 (4th ed. 2000) (defining the noun “progressive” as “a person who actively favors or strives for progress toward better conditions”); Definition for “progressive,” <http://dictionary.reference.com/browse/progressive> (defining “progressive” as “promoting or favoring progress toward better conditions”) (last visited Oct. 18, 2006).

6. See NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN’S RIGHTS (N.Y. Univ. Press 2000) (1995).

B. Overview of Minnesota's Measures Censoring Sexual Expression During the Past Quarter-Century

Of greatest significance, Minnesota was the scene of the first so-called "feminist anti-pornography law" passed by any legislative body.⁷ I put this law's label in quotation marks to underscore the misleading and ambiguous nature of its two key terms. First, the term "feminist" is misleading, because many feminists strongly opposed all such laws, specifically on the ground that they would do more harm than good for women's rights.

Second, the term "pornography" is ambiguous, having various denotations and connotations. According to its dictionary definition, this word denotes any sexual expression—i.e., any words or images—intended to provoke sexual arousal or desire.⁸ In contrast, the laws in question expressly attached a new definition to the term "pornography," to encompass any sexually explicit expression that is "subordinating," "dehumanizing," or "degrading" toward women.⁹ The purpose and effect of these laws was to expand the traditional concept of "obscenity"—the relatively narrow category of sexually oriented expression that the U.S. Supreme Court has held to be unprotected by the free speech guarantee in the U.S. Constitution.¹⁰

Throughout the remainder of this article, I will use the term "pornography" to refer to any sexual expression that its critics target for repression because of any alleged adverse impact resulting from its display or viewing. As such, the term encompasses both the traditional legal concept of "obscenity"—sexual expression that is "patently offensive" to moral values in the local community¹¹—and the concept of "pornography" that certain feminists target as sexual expression that is "degrading" to

7. For a detailed description of the events leading up to the enactment of this law, as well as its aftermath, see Brest & Vandenberg, *supra* note 3. Although this self-styled "essay" does not undertake a critical analysis of the law, it sets out many of the pertinent facts, including the arguments the law's proponents and opponents made.

8. See, e.g., MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 966 (11th ed. 2003) (defining "pornography" as "a depiction of erotic behavior (as in writing or painting) designed to cause sexual excitement").

9. MINNEAPOLIS, MINN., PROPOSED ORDINANCE 83-Or-323 § 3 (1983) (vetoed by Mayor Donald M. Fraser Jan. 1, 1984 [hereinafter 1983 ORDINANCE]). The ordinance is attached as an Appendix to this article.

10. See STROSSEN, *supra* note 6, at 52–53 (explaining the development of the Supreme Court's definition of unprotected "obscenity").

11. See *Miller v. California*, 413 U.S. 15, 30 (1973).

women.¹²

In 1983, two University of Minnesota faculty members, law professor Catharine MacKinnon¹³ and writer Andrea Dworkin, drafted a model law that embodied the broad new concept of constitutionally unprotected sexual expression supported by certain feminists.¹⁴ The Minneapolis City Council passed this model law in 1983,¹⁵ and again in a modified form in 1984.¹⁶ Although neither such “MacDworkinite” law went into effect in Minneapolis—thanks to courageous vetoes by Mayor Donald M. Fraser¹⁷—they served as models to other jurisdictions in the U.S. and abroad, which copied them.¹⁸ These laws are so vague and sweeping that they endanger all expression with any sexual content, including expression that is especially valuable to women, sexual-orientation minorities, and advocates of their rights.¹⁹ Accordingly,

12. I am not discussing the sharply distinguishable concept of child pornography—sexually explicit expression made with child performers, and which is targeted for repression because of the adverse impact on such performers that results from the production process. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (holding the ban on “virtual child pornography” to be unconstitutionally overbroad as it did not fall under the definition of either “child pornography” or “obscenity” and it restricted a substantial amount of protected speech).

13. MacKinnon grew up in Minnesota. See Brest & Vandenberg, *supra* note 3, at 613.

14. *Id.* See also *Minneapolis Asked to Attack Pornography as Rights Issue*, N.Y. TIMES, Dec. 18, 1983, at 1–44 [hereinafter *Minneapolis Asked to Attack Pornography*] (noting that Dworkin and MacKinnon testified before a City Council committee against a zoning proposal to remove sexually oriented businesses from certain neighborhoods, outlining their alternative approach, and persuading Council members to “prevail[] upon the City Attorney’s office to hire [Dworkin and MacKinnon] as consultants to draw up [the proposed ordinance] and organize hearings”).

15. See *Minneapolis Gets Rights Law to Ban Pornography*, at 1–24 N.Y. TIMES, Dec. 31, 1983.

16. See *Council Delays Act on Obscene Materials*, LEXINGTON HERALD-LEADER (Ky.), July 14, 1984, at A3.

17. See *Minneapolis Mayor Vetoes Plan Defining Pornography as Sex Bias*, N.Y. TIMES, Jan. 6, 1984, at A11 (quoting Fraser as saying, “I am unwilling to push onto the courts something which I believe in my own heart may express inappropriate public policy, simply because it would be expedient to do so, and rely on the courts to defend our rights”). See also Brest & Vandenberg, *supra* note 3, at 645 (referring to a CITY PAGES column praising Fraser’s political courage and saying “Fraser was putting his career on the line by vetoing the law”; also referring to an article in ST. PAUL PIONEER PRESS noting “how easy it would have been for Fraser to sign the bill, appealing to the mass of voters who opposed pornography and passing the constitutional issues to the courts”).

18. See STROSSEN, *supra* note 6, at 77.

19. See *infra* Part III.C.

Minnesota earned a spot on the world map as a laboratory that developed expansive new concepts of government's censorial powers, as well as the place that exported these regressive concepts.

Even though the open-ended MacDworkin concept of illegal sexual expression failed to take root in Minnesota due to the mayoral vetoes, the state's subsequent record regarding sexual expression continues to be far from progressive in two major respects. First, many Minnesota officials, including judges, have broadly construed some of the U.S. Supreme Court's controversial precedents in this area. These precedents, read into the U.S. Constitution's unqualified free speech, guarantee unwritten exceptions concerning certain sexual expression. Therefore, these Minnesota officials have taken maximum advantage of the Supreme Court's anti-progressive, speech-restricting rulings regarding sexual expression.²⁰ Second, the Minnesota Supreme Court has declined to interpret the Minnesota Constitution's broadly phrased free speech guarantee²¹ as fully extending to sexual expression. This decision stands even though that state constitutional guarantee, in contrast with its federal counterpart, expressly protects freedom of expression "on all subjects."²²

C. Outline of the Remainder of the Article

Part II of this article summarizes my reasons for concluding that any measure restricting sexual expression is the opposite of "progressive"—concerning not only gender equality and equity, but also other important progressive goals. Part III discusses the MacDworkinite anti-pornography law, which the Minneapolis City Council passed twice. Finally, Part IV outlines subsequent developments in Minnesota law that continue to undermine freedom for sexual expression, thereby further undermining progressive goals.

20. See *infra* Part IV.A.

21. MINN. CONST. art. I, § 3 ("The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such rights.").

22. See *infra* Part IV.B.

II. CENSORSHIP OF SEXUAL EXPRESSION IS REGRESSIVE, NOT PROGRESSIVE

A. *Freedom of Expression Is an Essential Bedrock for Equality*

The arguments about the relationship between freedom of sexual expression and women's rights are part of a broader debate that was emerging among lawyers and others during the last two decades of the twentieth century. Are freedom and equality mutually reinforcing goals or are they inherently incompatible with each other?²³ Those who advocated the latter position argued in various contexts that society should weaken traditional free speech protection in favor of egalitarian goals, such as women's rights, equality for racial and other minority groups, and equality of access to the political process for non-wealthy individuals. Again, this general debate underscores the inherent subjectivity of the term "progressive." If you believe that freedom of speech promotes inequality, then censorship becomes a progressive goal. However, if you share my belief that freedom of speech is the essential bedrock for equality, then censorship is anti-progressive.

In previous publications, I have demonstrated that, overall, freedom and equality are mutually reinforcing, rather than antagonistic goals.²⁴ Moreover, I have demonstrated that particular free speech restrictions, which some advocate as allegedly advancing equality, will in fact do the opposite. This is true, for example, of restrictions on the MacDworkin concept of "pornography"—sexually oriented expression that depicts "subordinating" views of women;²⁵ restrictions on "hate speech" that reflect stereotypes or bias about minority groups;²⁶ and restrictions on the amount of money that groups or individuals may spend to express views about electoral candidates or issues.²⁷ The

23. See Carl Wilson, *Northern Closure*, THE NATION, Dec. 27, 1993, at 788 (discussing the negative impacts on sexual and socio-economic equality resulting from increased censorship efforts concerning pornography by Canadian Customs and Parliament).

24. See, e.g., Nadine Strossen, *In the Defense of Freedom and Equality: The American Civil Liberties Union Past, Present, and Future*, 29 HARV. C.R.-C.L. L. REV. 143, 149-52 (1994) (discussing the integral interrelationship between freedom and equality).

25. See, e.g., STROSSEN, *supra* note 6, at 59.

26. See, e.g., Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484 (1990).

27. See, e.g., Nadine Strossen, *A Comment on Redish and Kaludis's The Right of*

next section summarizes the major reasons underlying the conclusion that censoring pornography inhibits not only women's rights, but also closely interconnected progressive concerns including reproductive freedom, lesbian, gay, bisexual, transgender (LGBT) rights, and human rights in general.

B. Censorship of Sexual Expression Undermines Women's Equality

The list below sets out specific reasons, contrary to the claims of the MacDworkinite feminists, which illustrate why suppressing pornography actually undermines the critically important goals of reducing discrimination and violence against women. I will elaborate briefly on some of these reasons in the next subsection.

1. List of Reasons for This Conclusion

- Censoring pornography would suppress many works that are especially valuable to women and feminists.²⁸
- Enforcing any pornography censorship scheme would discriminate against the least popular, least powerful groups in our society, including feminists and lesbians.²⁹
- It would perpetuate demeaning stereotypes about women, including that sex is bad for us.³⁰
- It would perpetuate the disempowering notion that women are essentially victims.³¹
- It would divert resources from constructive approaches to countering discrimination and violence against women.³²
- It would harm women who voluntarily work in the sex industry.³³

Expressive Access in First Amendment Theory, 93 NW. U. L. REV. 1135 (1999) (arguing that campaign finance restrictions undermine access to the political system, as well as freedom of speech).

28. See STROSSEN, *supra* note 6, at 199–215.

29. See *id.* at 167–70.

30. See *id.* at 107–18.

31. See *id.* at 247–56.

32. See *id.* at 266–79.

33. See *id.* at 179–98.

- It would harm women's efforts to develop their own sexuality.³⁴
- It would strengthen the power of the right wing, whose patriarchal agenda would curtail women's rights.³⁵
- Finally, by undermining free speech, censorship would deprive feminists of a powerful tool for advancing women's equality.³⁶

2. *Censorship of Sexual Expression Has Particularly Harmed Women and Advocates of Women's Rights, Including Reproductive Freedom*

a. *This Pattern Is Consistent with the Analysis of the Pro-Censorship Feminists Themselves*

Just as free speech has always been the strongest weapon to advance equal rights causes, censorship has always been the strongest weapon to thwart them. Ironically, the explanation for this pattern lies in the very analysis of those feminists who want to curb pornography. They contend that women are relatively disempowered and marginalized.³⁷ I agree with that analysis, and possess a deep commitment to solving this problem. However, I strongly disagree that censorship is a solution. To the contrary, precisely because women are relatively powerless, it makes no sense to hand the current power structure yet another tool that it can use to further suppress them—in both senses of the word “suppress.” Consistent with the analysis of the censorship advocates themselves, the government will inevitably wield this tool, along with others, to the particular disadvantage of already disempowered groups.³⁸ The enforcement record of all censorship measures, around the world, and throughout history, confirms this conclusion.

The pattern of disproportionately targeting disempowered groups under censorship measures extends even to measures that

34. See *id.* at 161–78.

35. See *id.* at 217–29.

36. See *id.* at 30–32.

37. See, e.g., Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 1985 HARV. WOMEN'S L.J. 1, 20–21 (1985).

38. See STROSSEN, *supra* note 6, at 236–39.

their drafters claim they designed for those groups' benefit. Two examples clearly illustrate this: the enforcement record in the one country that has embraced the MacDworkin concept of illegal pornography, on the rationale that it would benefit women,³⁹ and the enforcement record of the many measures barring hate speech, on the rationale that they would benefit minority groups.⁴⁰

Governments have consistently used all forms of censorship to suppress speech by, about, and for women. Here, the particularly pertinent ones are laws permitting the suppression of sexually oriented expression, which lawmakers have often used to suppress information essential for women's rights, including reproductive freedom. In the United States, the government has consistently used anti-obscenity laws to suppress information about contraception and abortion. For example, the government used the first federal anti-obscenity statute in this country, the 1873 "Comstock Law," to repeatedly prosecute pioneering feminists and birth control advocates early in the twentieth century.⁴¹ Its targets included Margaret Sanger, the founder of Planned Parenthood.⁴²

Sanger also had the dubious distinction of being one of the first victims of a new form of censorship, applied to the newly established medium of cinema. The Supreme Court had ruled in 1915 that movies were not protected "speech" under the First Amendment.⁴³ One of the first films banned under that decision was "Birth Control," a 1917 picture produced by and featuring Margaret Sanger.⁴⁴ The banning of films concerning birth control and other sexually oriented subjects of particular interest to feminists continued in the United States into the second half of the twentieth century. UCLA Law Professor Kenneth Karst stressed this fact when he urged pro-censorship feminists to think twice about arguing that pornography should not be constitutionally protected speech.⁴⁵ Until the 1950s, he noted, censors routinely banned films that dealt with birth control, pregnancy, abortion, non-marital

39. See *infra*, Part II.B.2.c.

40. See STROSSEN, *supra* note 6, at 221-24, 229-32, 235-36.

41. See Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741, 748-49 (1992).

42. See *id.* at 766-67.

43. *Mut. Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230 (1915), *overruled* by *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

44. See *Message Photo-Play Co. v. Bell*, 166 N.Y.S. 338 (N.Y. App. Div. 1917).

45. Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 136-42 (1990).

children, prostitution, and divorce.⁴⁶

b. This Pattern Has Continued in Cyberspace

The most recent laws that target sexual expression—those passed in the mid-1990s to regulate cyberspace—underscore the consistent pattern throughout history that such laws, no matter how well-intended, have a disproportionate adverse impact on the progressive cause of women's rights, as well as the interrelated progressive causes of reproductive freedom and rights for sexual-orientation minorities. In the ACLU's many lawsuits that have successfully challenged cybercensorship laws as violating the First Amendment, the courts have concurred that prime targets of all these laws include expression concerning women's sexual and reproductive health and options, as well as expression concerning LGBT sexuality.⁴⁷ The ACLU's clients in these cybercensorship cases show that, sadly, this fact is true.

I find it particularly striking, for instance, that one of our clients in the groundbreaking case of *Reno v. ACLU*⁴⁸—the Supreme Court's first ruling concerning the First Amendment in cyberspace, issued in 1997—was Planned Parenthood Federation of America. During the ACLU's first decade of existence, one of our clients was Planned Parenthood's Founding Mother, Margaret Sanger. As I noted above, the federal government repeatedly harassed and prosecuted her under the Victorian-era Comstock Law, which criminalized the information she conveyed about women's reproductive health options. Sadly, more than three quarters of a century later, we had to defend the organization that Sanger founded against the Internet era's first federal cybercensorship law, which criminalized the very same information. Just as the government censored Sanger herself when she conveyed birth control information via film, the organization she founded faced censorship for conveying the same information through this generation's technological wonder, the Internet.

Consider a few of the other ACLU clients whose freedom of expression cybercensorship laws jeopardize:⁴⁹

46. *Id.* at 129.

47. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 871 (1997).

48. 521 U.S. 844 (1997).

49. *See generally* American Civil Liberties Union, Free Speech: Internet Censorship Press Releases, <http://www.aclu.org/freespeech/internet/index.html> (last visited October 18, 2006).

- The American Association of University Women: Maryland, which promotes equity, education, self-development over the life span, and positive societal change for all women and girls. It also works to remove barriers and develop opportunities that enable women and girls to reach their full potential;
- Books for Gay and Lesbian Teens/Youth Page, a website operated by a high school student listing books that may be of interest to gay and lesbian youth;
- Critical Path AIDS Project, an AIDS treatment and prevention information project that offers AIDS treatment and safer sex information specifically geared toward young people;
- Full Circle Books, one of the oldest and largest feminist bookstores in North America;
- Human Rights Watch, the largest U.S.-based international human rights organization, which documents and challenges human rights abuses around the world, many of which involve sexual abuse against women;
- Obgyn.net, a comprehensive online resource center for obstetricians, gynecologists, and the women they serve, offering up-to-the-minute information, clinical reference collections, and discussion forums;
- *Philadelphia Gay News*, an award-winning weekly publication;
- PlanetOut, a website serving as an online community for gay, lesbian, bisexual, and transgendered people, and as a valuable resource for “closeted” people who do not voluntarily disclose their sexual orientation due to fear of others’ reactions;
- Queer Resources Directory, one of the largest online distributors of gay, lesbian, and bisexual resources on the Internet;

- *Riotgrrl*, a magazine aimed at young feminists;
- The Safer Sex Page, which maintains a large archive of information about minimizing the risks of sexually transmitted diseases;
- *Salòn Magazine*, a leading general-interest online magazine, whose feature articles address sexuality, among other topics, and which also includes a regular column entitled “Sexpert Opinion” by feminist author and sex therapist Susie Bright;
- Sexual Health Network, which provides information about sexuality geared toward individuals with disabilities, including articles on erectile dysfunction, the use of sex toys, and sexual surrogacy as a form of sexual therapy;
- Stop Prisoner Rape, which is dedicated to combating sexual abuse in our nation’s prisons, including abuse among the fastest growing segment of our nation’s prison population—women;⁵⁰
- Jeff Walsh, editor of *Oasis Magazine*, a monthly online magazine for lesbian, gay, bisexual, and questioning youth that includes news, reviews, and safer sex advice columns written by and for gay and lesbian youth.

Again, the courts acknowledge that the online expression of these individuals and organizations is subject to prosecution under various laws targeting “cyberporn,” even though that expression has serious value. That expression has particular value for the causes of women’s rights, reproductive freedom, and LGBT rights. Thus, in cyberspace, as in other media, defending freedom of sexual expression continues to be especially important for advocates of women’s rights, as well as advocates of equality rights more broadly.

50. See, e.g., *Number of Women in Prisons is on Rise*, N.Y. TIMES, Oct. 24, 2005, at A18; Maureen Buell, *Women in Contact with the Criminal Justice System have Specific Needs*, CORRECTIONS TODAY, Dec. 2005, at 28 (2005).

c. This Pattern also Pertains to the Sole MacDworkin-Style Law that Is Currently in Force

We now have actual experience with a feminist-style anti-pornography law in one country: Canada. In 1992, the Canadian Supreme Court incorporated the MacDworkinite feminists' definition of illegal pornography into Canada's obscenity law. In *Butler v. The Queen*,⁵¹ the court held that Canada's obscenity law would bar sexual materials considered "degrading" or "dehumanizing" to women.⁵² In short, almost a decade after the Minneapolis City Council adopted the Dworkin-MacKinnon model law, Canadian law embraced the same concept. Therefore, the experience in Canada illustrates what would have happened in Minneapolis were it not for Mayor Fraser's principled vetoes. The results are far from "progressive."

Alas for women, the *Butler* regime's enforcement record followed the familiar pattern that characterizes the enforcement of all measures targeting sexual expression. It harmed the very groups and causes it intended to help. Canada's new censorship regime specifically victimizes the writings and bookstores of women, feminists, lesbians, and gay men.⁵³

The Women's Legal Education and Action Fund (LEAF), a Canadian anti-pornography organization that MacKinnon co-founded, spearheaded the *Butler* ruling. Although LEAF, along with Dworkin and MacKinnon, initially hailed *Butler* as a great triumph for women's rights,⁵⁴ the organization soon repudiated this alleged victory. In 1993 LEAF leaders and anti-censorship activists in Canada issued a joint news release that condemned the methods authorities were using to enforce *Butler*, saying that the government employed these techniques "to harass and intimidate lesbians and gays" as well as "bookstores, artists, AIDS

51. *Butler v. The Queen*, [1992] S.C.R. 452.

52. *Id.*

53. STROSSEN, *supra* note 6, at 281 (citing *Canada Customs Hits Feminist Stores and Others*, FEMINIST BOOKSTORE NEWS, MAR.-APR. 1993, at 21).

54. See Tim Kingston, *Canada's New Porn Wars: 'Little Sister' Gay/Lesbian Bookstore Battles Canadian Customs*, S. F. BAY TIMES, November 4, 1993, at 4 (quoting Andrea Dworkin as saying that "[t]he *Butler* decision is probably the best articulation of how pornography, and what kinds of pornography, hurt the civil status and civil rights of women"); STROSSEN, *supra* note 6, at 230 (quoting Elaine Carol, in *Feminism and Censorship* (transcript available from the Canadian Broadcasting Company) (Toronto: CBC Radio Works, 1993)).

organizations, sex trade workers, and safe sex educators.”⁵⁵

Within the first two-and-a-half years after the *Butler* decision, Canadian Customs officials had confiscated or detained materials from well over half of all Canadian feminist bookstores on the ground that these materials satisfied the criteria in *Butler* of being “degrading” or “dehumanizing” to women.⁵⁶ Because the rationale asserted in *Butler* is to protect women from works that harm them, it is hard to understand how these seized feminist writings would satisfy the *Butler* standards. Ironically, officials have also suppressed some feminist material under *Butler* on the ground that it is allegedly degrading and harmful not to women, but rather to men.⁵⁷ In the ultimate irony, Andrea Dworkin herself had written two of the earliest books that Canadian Customs seized on the authority of *Butler* at the U.S.-Canada border!⁵⁸ According to Canadian Customs officials, Dworkin’s anti-pornography tracts illegally “eroticized pain and bondage.”⁵⁹

C. Censorship of Sexual Expression also Undermines Equality for Sexual-Orientation Minorities

As former Stanford Law School Dean Kathleen Sullivan wrote, “In a world where sodomy may still be made a crime, gay pornography is the samizdat [clandestine copying and distribution of government-suppressed literature] of the oppressed.”⁶⁰ In light

55. See STROSSEN, *supra* note 6, at 241 (citing News Release, Women’s Legal Education and Action Fund (LEAF), Historic Gathering Condemns Targeting of Lesbian and Gay Materials and Sex Trade Workers, (June 21, 1993)) [hereinafter Historic Gathering].

56. STROSSEN, *supra* note 6, at 231 (citing *Canada Customs Hits Feminist Stores and Others*, FEMINIST BOOKSTORE NEWS, MAR.–APR. 1993, at 22).

57. See, e.g., *id.* at 236 (citing *Canada Customs Hits Feminist Stores and Others*, FEMINIST BOOKSTORE NEWS, MAR.–APR. 1993, at 21). Canadian Customs seized a book entitled WEENIE TOONS: WOMEN ARTISTS MOCK COCKS, on the ground that it was degrading to the penis. *Id.* See also Bill Redden, *O for Christ’s Sake Canada*, PDXS (Portland), Aug. 30–Sept. 12, 1993, at 3 (discussing the banning of books featuring the cartoon character Lesbian Hothead Paisan, a “lesbian hothead terrorist,” who attacks certain men).

58. See Pierre Berton, *How Otto Jelinek Guards Our Morals*, TORONTO STAR, May 29, 1993, at H3. See also Albert Nerenberg, *Fear Not, Brave Canadian, Customs Stands on Guard for Thee*, GAZETTE (Montréal), Jan. 22, 1993, at A2 (reporting that the two books seized were ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1981), and ANDREA DWORKIN, *WOMAN HATING* (1974)).

59. Sarah Scott, *Porn Police: Who Decides What to Ban at the Border?*, GAZETTE (Montréal), Apr. 14, 1993, at A1.

60. Kathleen Sullivan, *The First Amendment Wars*, NEW REPUBLIC, Sept. 28, 1992, at 35, 39.

of the longstanding and ongoing legal and societal discrimination that lesbians and gay men face, materials depicting and exploring their sexuality are especially important, serving to educate, liberate, and empower. Yet precisely because of the second-class legal and social status of LGBT individuals, expression about them is especially vulnerable to censorship. The experience under recently enacted cybercensorship laws corroborates that conclusion, as discussed above, and that conclusion also applies under MacDworkin-style laws, despite their allegedly egalitarian rationale.

No wonder one of the most outspoken critics of the Minneapolis anti-pornography ordinance was Tim Campbell, the editor of the local gay-lesbian community weekly *GLC Voice*.⁶¹ Back in the early 1980s, when this ordinance was under consideration, the legal rights and societal status of LGBT individuals were even more tenuous than they are now, so this censorial measure would have been an especially severe setback to the LGBT rights cause. Decrying the ordinance's sweeping breadth, Campbell warned:

I defy the [Minneapolis] city council members to . . . write a three-sentence story involving a woman and sex that would pass the test of this ordinance. . . . It is un-American, it is fascist, it is antisexual. . . . The only love story you could write now is Jack met Jill . . . and neither one pursued the other and they lived happily ever after.⁶²

One witness who testified against the Minneapolis ordinance observed that the "movement against pornographic bookstores has had a terrible effect on the gay community," leading to police brutality and the arrests of gay men.⁶³ Another witness emphasized the importance of adult bookstores as meeting places for gay men and "as a place to be sexual together."⁶⁴

61. See Brest & Vandenberg, *supra* note 3, at 646 (referencing a column in the Twin Cities weekly, *CITY PAGES*, as stating that "among citizens' groups . . . only the [Minnesota Civil Liberties Union] and gay male press had come out strongly against the ordinance").

62. JAMES R. PETERSEN, *CENTURY OF SEX: PLAYBOY'S HISTORY OF THE SEXUAL REVOLUTION* 407 (Hugh M. Hefner ed. 1999). Some members of the LGBT community supported the ordinance, just as some members of the feminist community did. Indeed, the deciding vote in favor of the 1984 version of the ordinance was cast by Brian Coyle, the first openly gay member of the City Council. (The author is grateful to Minneapolis attorney Randall Tigue for having brought the preceding point to her attention.) Nonetheless, the law's strongest opponents were LGBT spokespeople, along with civil libertarians. See Brest & Vandenberg, *supra* note 3, at 646.

63. See Brest & Vandenberg, *supra* note 3, at 629.

64. *Id.*

If the MacDworkinite feminists had their way, sexually oriented expression would be equally unattainable for women and men, for gays and straights. Those concerned about LGBT rights should not delude themselves that the feminist anti-pornography juggernaut would not ride roughshod over their preferred sexual materials, along with those of everyone else. Such an exemption is available neither in theory nor in practice.

In theory, the feminist anti-pornography activists have made clear that homosexual, as well as heterosexual, materials are equally subject to censorship. The MacDworkin model law, which the Minneapolis City Council passed, permits the suppression of any sexually oriented expression regardless of the genders or the sexual orientations of the individuals depicted.⁶⁵ A leading gay activist and writer, John Preston, drawing on his experience in Minneapolis during the early 1970s when he was director of the Gay House, Inc., underscored this law's intended antipathy toward gay sexual expression:

Dworkin used to run a lesbian discussion group in the center. One of her favorite antics . . . was to deface any poster or other material that promoted male homosexuality. "THIS OPPRESSES WOMEN!" she'd write all over the place. . . . I've come to understand that it's the expression of *any* male sexuality that she feels fuels the oppression of women in our society. That makes gay men not allies, but a big part of the problem.⁶⁶

Responding to the gay male critics of the proposed Minneapolis ordinance, MacKinnon maintained that "the gay male community perceives a stake in male supremacy, that is in some ways even greater than that of straight men. . . . Instead of making a common cause to fight what is a common oppression, they take

65. To be sure, the ordinance began its definition of the targeted "pornography" as "the sexually explicit subordination of women." MINNEAPOLIS, MINN., PROPOSED ORDINANCE 84-Or-132, § 2 (1984) (vetoed by Mayor Donald M. Fraser July 13, 1984) (amending section 139.20 of the MINNEAPOLIS CODE OF ORDINANCES (relating to civil rights) to include a new subsection (gg); the language is from subdivision (1) of the new subsection) [hereinafter 1984 ORDINANCE]. However, the ordinance also extended that term to "the use of men, children, or transsexuals in the place of women." *Id.* (subdivision (2) of the new subsection (gg)). Moreover, its provision allowing civil actions against anyone "trafficking in pornography" provided that "[a]ny man or transsexual who alleges injury by pornography in the way women are injured by it shall also have a cause of action." *Id.* (amending section 139.40 by adding new subsection (m)).

66. John Preston, *Whose Free Speech?*, BOSTON PHOENIX, Oct. 8, 1993, at sec. 1.

essentially a suicidal and self-destructive stance in favor of the existing structure."⁶⁷ A supporter of the Minneapolis ordinance, defending its application to gay bookstores, said: "Gay male pornography . . . [is] no exception: that which is fucked . . . is that which is female."⁶⁸

Further demonstrating her equal-opportunity condemnation of all sexual expression, Dworkin also denounced lesbian pornography as an expression of self-hatred.⁶⁹ Other anti-pornography feminists have echoed this view. For example, Norma Ramos, general counsel for Women Against Pornography, said in a 1994 *Ms.* magazine symposium: "[T]here's no distinction between what lesbian pornographers are doing and what these women who are fronting for the [mainstream] pornography industry are doing. . . . They may package it as art, or say that they are introducing a new vision. But it is sexual exploitation."⁷⁰ Likewise, the organization Dykes Against Porn, which has chapters in cities around the country, has stated that "[i]t was formed because of the need that many saw to fight pornography in the lesbian community, as well as heterosexual male porn."⁷¹ Anti-pornography feminists have repeatedly attacked *On Our Backs*, a lesbian erotic magazine published in San Francisco.⁷²

Another factor is even more significant than the pornophobic feminists' nondiscriminatory denunciations of homosexual and heterosexual sexual expression. Government officials and legal systems that reflect society's pervasive homophobia and heterosexism would enforce any censorship measures. Thus, it is not surprising that under the first feminist anti-pornography scheme to go into operation, in Canada, lesbian and gay erotica has withstood the worst of the censorship.

As noted above, even LEAF, the MacDworkinite anti-pornography group that initially championed the *Butler* ruling, shortly thereafter acknowledged that it had been used "to harass and intimidate lesbians and gays."⁷³ As one LEAF lawyer observed,

67. See Brest & Vandenberg, *supra* note 3, at 641.

68. *Id.*

69. Kingston, *supra* note 54, at 6.

70. Symposium, *Where Do We Stand On Pornography?*, *MS.*, Jan.-Feb. 1994, at 32, 39.

71. See STROSSEN, *supra* note 6, at 169 (citing Caitlin Sullivan, *Bookstores Vandalized over "Lesbian Porn" Issue*, *SEATTLE GAY NEWS*, July 9, 1993).

72. See *id.*

73. See Historic Gathering, *supra* note 55.

too many Canadian judges and other officials who enforce *Butler*, reflecting the persistent homophobia on both sides of the border, believe that all homoerotic expression is “degrading.”⁷⁴ Government officials have so systematically harassed Canada’s lesbian and gay bookstores that, according to Bruce Walsh of the Canadian anti-censorship coalition Censorstop, “every gay bookstore in this country has attempted to sell their bookstores, but nobody wants to buy them.”⁷⁵

One of Canada’s LGBT bookstores, Little Sisters Bookstore in Vancouver, actually brought a lawsuit against the government,⁷⁶ arguing that the post-*Butler* censorship regime violated not only freedom of speech, but also equality, under Canada’s Charter of Rights and Freedoms.⁷⁷ Although the Canadian Supreme Court unanimously recognized that Canadian officials were using their purported authority under *Butler* to harass Little Sisters and other LGBT bookstores, the majority refused to alter *Butler*.⁷⁸ This was particularly ironic, because LEAF—the prime proponents of *Butler*—had filed a brief in the Little Sisters case, effectively “confessing error” and acknowledging that the censorial regime under *Butler* was, after all, *not* good for (at least) those women and feminists who happen to be lesbian.⁷⁹ The Canadian high court did not accept LEAF’s invitation to carve out an exception to *Butler* solely for sexually explicit expression involving lesbians—an understandable stance, in light of the principled and pragmatic difficulties that such an exception would entail.⁸⁰ Instead, the

74. See Karen Busby, *LEAF and Pornography: Litigating on Equality and Sexual Representations*, 9 CANADIAN J. L. & SOC’Y 165, 185 (1994).

75. Redden, *supra* note 57, at 4.

76. See Margaret Wente, *Counterpoint: Bad Porn, Good Porn, Little Sisters*, GLOBE AND MAIL (Toronto), Mar. 16, 2000, at A15 (commenting that the case should be called “Little Sisters v. Big Sister . . . because the anti-porn feminists are a big part of Little Sisters’ problem”).

77. See Caroline Alphonso & Kirk Makin, *Gay-Book Sellers Win Supreme Court Case*, GLOBE AND MAIL (Toronto), Dec. 16, 2000, at A1.

78. See *Little Sisters Book & Art Emporium v. Canada*, [2000] S.C.R. 1120.

79. See Kirk Makin, *Judging the Charter: Part 2; “This case . . . is out of control,”* GLOBE AND MAIL (Toronto), Apr. 8, 2002, at A6 (noting that LEAF’s brief “defly argued that lesbians were a distinct minority whose self-identity was based partly in possessing their own, unique brand of sexual material—material that may include portrayals of violence or degradation”). Moreover, the article quoted a civil liberties lawyer critical of the *Butler* and *Little Sisters* rulings as saying “that in response to LEAF’s tacit admission that it ‘had led the court a bit astray’ in *Butler*, the judges effectively thundered back: ‘What do you mean! You told us it was a great idea!’” *Id.*

80. See Wente, *supra* note 76. The article noted that, according to LEAF’s

Canadian Supreme Court expressly reaffirmed that “non-violent degradation” of women is criminally punishable, no matter how consensual, pleasurable, and otherwise positive such expression might be for any of its female producers and/or consumers, of any sexual orientation.⁸¹

In addition to the direct government censorship of lesbian and gay expression under *Butler*, the decision has also incited massive self-censorship. In an effort to forestall costly customs seizures, police raids, and court battles, bookstore owners avoid ordering periodicals whose previous issues have been confiscated. As a result, the lesbian erotic magazines *Bad Attitude* and *On Our Backs* “have effectively been banned in Canada,” according to Janine Fuller, manager of Little Sisters.⁸² Likewise, to avoid incurring the wrath of Canadian Customs, Oxford University Press refused to distribute in Canada the book *Gay Ideas: Outing and Other Controversies* by philosopher Richard Mohr.⁸³

D. Restricting Sexual Expression Undermines Human Rights More Broadly

1. Measures Targeting Sexual Expression Have Consistently Been Used to Suppress Political Dissent

I will now discuss one final example of the adverse impacts on progressive equality goals that result from censoring what pro-

argument, the very same image should be deemed either

[a] patriarchal example of pornographic misogyny that dehumanizes and degrades women and will probably lead to our further victimization by the men who view this filth . . . [o]r a healthy exploration of sex that is vital to gay and lesbian identity, dignity, self-worth, community formation, health and education,” depending on who “made, . . . sold, . . . and bought [the image].”

Id.

81. *Little Sisters Book & Art Emporium v. Canada*, [2000] S.C.R. 1120, ¶ 60. (“Portrayal of a dominatrix engaged in the non-violent degradation of an ostensibly willing sex slave is no less dehumanizing if the victim happens to be of the same sex, and no less . . . harmful in its reassurance to the viewer that the victim finds such conduct both normal and pleasurable.”)

82. See STROSSEN, *supra* note 6, at 244 (quoting Human Rights Watch Free Expression Project, *A Ruling Inspired by U.S. Anti-Pornography Activists Is Used to Restrict Lesbian and Gay Publications in Canada*, Feb. 1994, at 9).

83. See *id.* at 240 (quoting Human Rights Watch Free Expression Project, *A Ruling Inspired by U.S. Anti-Pornography Activists Is Used to Restrict Lesbian and Gay Publications in Canada*, Feb. 1994, at 8–9).

ensorship feminists denounce as “pornography.” Because sexual expression is an integral aspect of human freedom, governments that repress human rights in general have always suppressed sexual speech. Correspondingly, laws against sexual speech have always targeted views that challenge the prevailing political, religious, cultural, or social orthodoxy.⁸⁴

Sexually explicit speech has been banned by most repressive regimes, including Communism in the former Soviet Union, Eastern bloc countries, and China; apartheid in South Africa; and fascist or clerical dictatorships in Chile, Iran, and Iraq. Conversely, recent studies of Russia have correlated improvements in human rights, including women’s rights, with the rise of free sexual expression. Writer Pete Hamill explains the connection:

Recent history teaches us that most tyrannies have a puritanical nature. The sexual restrictions of Stalin’s Soviet Union, Hitler’s Germany and Mao’s China would have gladdened the hearts of those Americans who fear sexual images and literature. Their ironfisted Puritanism wasn’t motivated by a need to erase inequality. They wanted to smother the personal chaos that can accompany sexual freedom and subordinate it to the granite face of the state. Every tyrant knows that if he can control human sexuality, he can control life.⁸⁵

In places where real pornography—sexually explicit expression—is conspicuously absent, tellingly, political dissent is labeled as such. The Communist government of the former Soviet Union suppressed political dissidents under obscenity laws. In 1987, when the Chinese Communist government dramatically increased its censorship of books and magazines with Western political and literary messages, it condemned them as “obscene,” “pornographic,” and “bawdy.” The white supremacist South African government banned black writing as “pornographically immoral.” In Nazi Germany and the former Soviet Union, Jewish writings were reviled as “pornographic.”⁸⁶

Even societies that generally respect human rights, including free speech, tend to use the terms “obscenity” and “pornography” as epithets to stigmatize expression that is politically or socially

84. See STROSSEN, *supra* note 6, at 218–19.

85. STROSSEN, *supra* note 6, at 219 (citing Pete Hamill, *Woman on the Verge of a Legal Breakdown*, PLAYBOY, Jan. 1993, at 189).

86. See Alan Dershowitz, *What is Porn?*, 72 A.B.A. J. 36, 36 (1986). See also STROSSEN, *supra* note 6, at 219.

unpopular. Courts have often enforced obscenity laws against individuals who have expressed disfavored ideas about political or religious subjects. In the eighteenth century, the Tory government brought one of the earliest British obscenity prosecutions to imprison its leading Whig opponent, John Wilkes. In early American history, anti-obscenity laws targeted speech that was offensive to the prevailing religious orthodoxy.⁸⁷

2. Obscenity Laws Have Been Used to Target Expression of Minority Speakers and Dissident Ideas

The pattern holds today. Obscenity laws in the United States regularly have been used to suppress expression by individuals who are relatively unpopular or disempowered, whether because of their ideas or because of their membership in particular societal groups. Recent major obscenity prosecutions have targeted expressions by or about members of groups that are powerless and unpopular, including rap music of young African-American men and homoerotic photographs and other works by gay and lesbian artists. Likewise, the National Endowment for the Arts (NEA) has been subject to many political attacks for its funding of art exploring feminist or homoerotic themes.⁸⁸ A federal district court judge recognized this point in the “NEA Four” case, in which the ACLU represented four artists whose NEA grants were cut off because of their works’ controversial political and sexual themes. He wrote, “The NEA has been the target of congressional critics . . . for funding works . . . that express women’s anger over male dominance in the realm of sexuality or which endorse equal legitimacy for homosexual and heterosexual practices.”⁸⁹

One fairly recent high-profile obscenity prosecution vividly displayed the characteristic hallmarks of such prosecutions—specifically, the targeting of expression with an unpopular political message and the persecution of gays and lesbians. During the

87. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12–16 (3d ed. 2003).

88. See STROSSEN, *supra* note 6, at 20, 37, 55, 101–02, 104–05, 156 (summarizing recent right-wing attacks on the National Endowment for the Arts, which criticized NEA grants as being “inconsistent with ‘traditional family values’”). Senator Jesse Helms attacked the funding of Robert Mapplethorpe’s photographs, saying “[t]here is a big difference between ‘The Merchant of Venice’ and a photograph of two males of different races on a marble table top.” *Id.* at 55.

89. *Finley v. Nat’l Endowment for the Arts*, 795 F. Supp. 1457, 1461 (C.D. Cal. 1992), *rev’d*, 524 U.S. 569 (1998).

summer of 1994, the City of Cincinnati brought obscenity charges against a gay and lesbian bookstore, the Pink Pyramid, and its owner, manager, and clerk.⁹⁰ These individuals, who were arrested and handcuffed, faced sentences of up to six months imprisonment and fines of up to \$1,000. Their "crime"? They had rented out a video of the film *Salò, 120 Days of Sodom*, by Pier Paolo Pasolini, a world-renowned Italian filmmaker, novelist, and poet. The film's sexual-political subject is the dark aspect of sexuality that had served Italian fascism. According to film critic Peter Bondanella, *Salò* "is a desperate . . . attack against . . . a society dominated by manipulative and sadistic power."⁹¹

Just as the allegedly obscene video itself had a deeply political message, so too did the charges against those who rented it out. The city announced these prosecutions on the opening day of a federal lawsuit that the ACLU and Lambda Legal Defense & Education Fund brought, challenging a referendum that had overturned gay and lesbian civil rights legislation.⁹² As the National Coalition Against Censorship commented: "At best, the timing suggests indifference to the possibility that these prosecutions would exacerbate already existing prejudices and intolerance."⁹³ At worst, given the frivolous nature of obscenity charges based on a film of such indisputably serious value, the prosecution was a calculated act of harassment. Accordingly, the ACLU filed a brief on behalf of an impressive array of individuals and organizations from the worlds of film, art, and academia, urging the court to

90. *City of Cincinnati v. Pink Pyramid*, 1995 WL 610709, *1 (Ohio Ct. App. Oct. 18, 1995).

91. STROSSEN, *supra* note 6, at 105 (citing Letter from Jeremiah Gutman, Jo List Levinson, & Leanne Katz to Terence Cosgrove, Cincinnati Prosecutor (July 27, 1994)).

92. *See Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417 (S.D. Ohio 1994), *rev'd*, 54 F.3d 261 (6th Cir. 1995). The plaintiff challenged the city charter amendment "bar[ring] [the] City Council and city administration from enacting any legislation or policy on behalf of gays, lesbians and bisexuals including anti-discrimination legislation." *Id.* at 445. The lower court ruled that the amendment was unconstitutional. *Id.* at 444. The Sixth Circuit reversed the lower court's ruling and, in turn, the Supreme Court vacated that ruling. *See Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 518 U.S. 1001 (1996). On remand, the Sixth Circuit reaffirmed its previous ruling. *See Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997).

93. STROSSEN, *supra* note 6, at 105 (citing Letter from Jeremiah Gutman, Jo List Levinson, & Leanne Katz to Terence Cosgrove, Cincinnati Prosecutor (July 27, 1994)).

dismiss these charges before subjecting the defendants to a pointless and chilling criminal trial.⁹⁴ The judge rejected this argument.⁹⁵

3. The Minneapolis Anti-Pornography Ordinance also Would Have Authorized the Targeting of Minority Speakers and Dissident Ideas

Cincinnati has been dubbed "Censor-nati"⁹⁶ in light of its cultural and political conservatism and its associated strict enforcement of anti-obscenity laws. Moreover, Cincinnati targeted *Salò* under a traditional anti-obscenity law, which is aimed at upholding local community moral values. Accordingly, one might contend that this outcome would not occur in such a relatively progressive venue as Minneapolis, under the "civil rights approach" of the MacDworkinite anti-pornography law, designed to promote women's rights. As Dworkin herself explicitly confirmed, unfortunately, any such purported distinction is illusory.

While the Minneapolis City Council was debating the ordinance, the Twin Cities weekly *City Pages* interviewed Dworkin and MacKinnon about the ordinance's scope from their perspective as its authors. Strikingly, more than a decade before Cincinnati actually prosecuted a lesbian/gay bookstore for renting *Salò*, Dworkin, on her own initiative, cited it as an example of a work that, despite its artistic value, would still be subject to suppression under the law that she and MacKinnon had co-authored. When the *City Pages* interviewer asked Dworkin and MacKinnon whether another artistically acclaimed, sexually explicit film (*Susanna* by Luis Bunuel) would be covered by their proposed Minneapolis ordinance, Dworkin responded:

I haven't seen that, but I do want to say that sometimes an artist, who is recognized as such, makes a piece of

94. Brief for Film Society of Lincoln Center, et al. as Amici Curiae Supporting Defendants' Motions to Dismiss, *City of Cincinnati v. Pink Pyramid*, No. 94CRB021245 (Hamilton County Mun. Ct. Nov. 3, 1994).

95. *City of Cincinnati v. Pink Pyramid*, No. 94CRB021245 (Hamilton County Mun. Ct. Nov. 3, 1994). However, the judge subsequently granted a motion to dismiss the indictment on another ground: that the city had seized the videotape in violation of the Fourth Amendment. *Id.* The Court of Appeals of Ohio reversed that decision in *State v. Pink Pyramid*, No. C-940930, 1995 WL 610709 (Ohio Ct. App. Oct. 18, 1995), and the case eventually settled with The Pink Pyramid paying a \$500 fine. Dan Horn, *Sex Case Settled; Bookstore Fined in Plea Bargain*, CINCINNATI POST, Aug. 2, 1996, at 14A.

96. See, e.g., WELCOME TO CENSORNATI (Independent film 1990).

pornography. And if that film is a piece of pornography according to this definition [in the ordinance], it would be subject to suit, and I think that's all right. *And I give as an example of that Pasolini's Salò.*⁹⁷

In that same interview, Dworkin elaborated on the reason why—in contrast to the concept of obscenity that the Supreme Court has carved out of the First Amendment—the MacDworkin ordinance deliberately contains no exception for works with serious artistic value (or other serious value): “The subordination of women is a pretty universal fact, certainly in Western culture. Artists contribute to that. Male artists are notorious not only for their own personal domination of women but for the fact they glory artistically in the domination of women.”⁹⁸

4. *Freedom of Sexual Speech Is an Integral Aspect of Equality and Human Rights*

The historical and ongoing enforcement record of laws against sexual speech make clear that what is at stake is more than freedom of sexual expression, important as that is. Even beyond that, the freedom to produce or consume anything called “pornography” is an essential aspect of the freedom to defy prevailing political and social mores. Just as gay pornography is the samizdat of individuals who are oppressed or dissident sexually—to quote again the words of former Stanford Law School Dean Kathleen Sullivan⁹⁹—pornography in general is the samizdat of those who are oppressed or dissident in any respect. UCLA Law Professor Kenneth Karst provides intriguing insights into the link between sexual freedom, including free sexual expression, and freedom from discrimination:

The suppression of Unreason is rooted in the same fears that produce group subordination: men's fear of the feminine, whites' fear of blackness, heterosexuals' anxiety about sexual orientation. Historically, all these fears have been closely connected with the fear of sexuality. It is no accident that the 1960s, a period of sexual “revolution,” also saw the acceleration of three movements that sought major redefinitions of America's social boundaries: the civil rights movement, the gay liberation movement, and

97. Brest & Vandenberg, *supra* note 3, at 636 (emphasis added).

98. *Id.*

99. See Sullivan, *supra* note 60.

the women's movement.¹⁰⁰

For the reasons Professor Karst articulates, free sexual expression is intimately connected with equality—hardly at odds with it, as argued by the anti-pornography feminists. Indeed, free sexual expression is an integral aspect of all human freedom, even beyond freedom from discrimination. This vital interconnection was eloquently stated by Dr. Gary Mongiovi, who teaches at St. John's University in New York:

Sexual expression is perhaps the most fundamental manifestation of human individuality. Erotic material is subversive in the sense that it celebrates, and appeals to, the most uniquely personal aspects of an individual's emotional life. Thus, to allow freedom of expression and freedom of thought in this realm is to . . . promote diversity and nonconformist behavior in general. . . . It is no coincidence that one of the first consequences of democratization and political liberalization in the former Soviet Union, Eastern Europe and China was a small explosion of erotic publications. . . . Suppression of pornography is not just a free-speech issue: Attempts to stifle sexual expression are part of a larger agenda directed at the suppression of human freedom and individuality more generally.¹⁰¹

III. THE DEVELOPMENT AND INITIAL ENACTMENT OF THE MACKINNON/DWORKIN MODEL "FEMINIST ANTI-PORNOGRAPHY LAW" IN MINNEAPOLIS, 1983–1984

A. *The Model Law's Debut in—and Dissemination from—Minneapolis*

1. *The Beginnings of the Feminist Anti-Pornography, Pro-Censorship Movement*

In its initial phase in the late 1970s, the feminist critique of sexist, violent imagery in sexual expression was simply a part of a broader critique of sexist, violent imagery throughout our culture and media. The goal was only to mobilize public opinion to persuade the media to revamp their depictions; the feminist

100. See Karst, *supra* note 45, at 103–04.

101. Gary Mongiovi, Ph.D., Letters to the Editor, CIVIL LIBERTIES, Spring/Summer 1991, at 2.

cultural and media critics expressly rejected any legal restrictions or sanctions on expression. In 1979, Women Against Pornography (WAP) was formed in New York. Although WAP advocated education about and protest against sexist, violent pornography, it expressly disavowed censorship, proclaiming: "We . . . are not carving out any new exceptions to the First Amendment."¹⁰²

By the early 1980s, though, a growing faction of feminists began to focus on pornography to the exclusion of other forms of expression that conveyed sexist or violent images, and also began to call for legal restrictions on it. These developments were described as follows by Columbia University professor Carole Vance, who from the beginning has been a leader of the feminist anti-censorship movement:

Initially, most feminists could certainly agree with the contention that pornography was often sexist; but before long it became clear that the claims and characterizations of the anti-porn groups and leaders were becoming grandiose and overstated. . . . Sexism in . . . sexually explicit material was apparently worse than sexism anywhere else. According to its critics, pornography was now the central engine of women's oppression, the major socializer of men, the chief agent of violence against women.¹⁰³

2. *The History of the Efforts to Enact the MacDworkin Model Anti-Pornography Law in Minneapolis*

As noted above, in 1983 Andrea Dworkin and Catharine MacKinnon, at the behest of some members of the Minneapolis City Council, drafted a model anti-pornography law and organized and conducted¹⁰⁴ hearings on the law that were expressly designed to "show how pornography adversely affects women and is part of women's socially subordinate status."¹⁰⁵ These hearings, which

102. See Nan D. Hunter, *The Pornography Debate in Context: A Chronology of Sexuality, Media, & Violence Issues in Feminism*, in CAUGHT LOOKING 28 (Kate Ellis et al. eds. 1988).

103. See STROSSEN, *supra* note 6, at 74 (quoting Carol Vance, in *Feminism and Censorship* (transcript available from the Canadian Broadcasting Company (Toronto: CBC Radio Works, 1993))).

104. See Brest & Vandenberg, *supra* note 3, at 621 (noting that "[i]n a quite unusual procedure," the City Council member who chaired the Government Operations Committee before which the hearings took place, "asked MacKinnon and Dworkin to conduct questioning").

105. *Id.* at 617, 629 (quoting from the consulting contract pursuant to which

garnered nationwide attention,¹⁰⁶ consisted largely of anecdotal testimony by women who maintained that pornography had adversely affected them.¹⁰⁷

Promptly following these admittedly one-sided hearings,¹⁰⁸ the Council voted 7–6 in December 1983 to enact the ordinance, without awaiting input from the various city agencies that had requested a more deliberative consideration process: the City Attorney's office, the Civil Rights Commission, and the Library Board.¹⁰⁹ Following Mayor Fraser's veto on the ground that the ordinance violated the First Amendment,¹¹⁰ and following the January 1, 1984 change in the Council's composition as a result of the November 1983 elections, the reconstituted Council and other city agencies pursued further deliberations. Although different members occupied five of the thirteen Council positions, in July 1984, the Council again voted 7–6 in favor of a slightly revised version of the MacDworkin model law. Mayor Fraser again vetoed the law.¹¹¹

In light of my perspective that this law was neither progressive nor pro-women's rights, it is significant that Mayor Fraser¹¹² was a

Minneapolis engaged Dworkin and MacKinnon).

106. See *Minneapolis Asked to Attack Pornography*, *supra* note 14.

107. See Brest & Vandenberg, *supra* note 3, at 624–28.

108. See *id.* at 628. In response to Council Member Kathy O'Brien's characterization of the hearings as one-sided, MacKinnon responded: "Saying that a body of research is open to an interpretation to which it is not open is not professional. . . . Andrea Dworkin and I did not waste the City Council's resources with outdated and irrelevant data and investigations. In this situation, the truth apparently is a side." *Id.*

109. *Id.* at 644–45.

110. See *Minneapolis Mayor Vetoes Plan Defining Pornography as Sex Bias*, N.Y. TIMES, Jan. 6, 1984, at A11 ([Fraser:] "The definition of pornography in the ordinance is so broad and so vague as to make it impossible for a book seller, movie theater operator or museum director to adjust his or her conduct in order to keep from running afoul of its proscriptions.").

111. See *Demonstration Hits Decision on Obscenity Law*, WASH. POST, July 14, 1984, at A6.

112. Mayor Donald M. Fraser, born in Minneapolis, received his undergraduate and law degrees from the University of Minnesota. He was admitted to the bar in 1948 and actively practiced law until 1962. Mr. Fraser served in the Minnesota Senate from 1954 until 1962, when he was elected to the United States House of Representatives. He served there from 1963 to 1979. In 1979, he was elected Mayor of Minneapolis. Mr. Fraser was re-elected three times, becoming the longest serving mayor in Minneapolis history. He left that office at the end of 1993. See Biographical Directory of the United States Congress, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=F000350> (last visited Nov. 19, 2006); Mayor's Office, City of Minneapolis, Past and Present Mayors of

progressive Democrat who had championed women's rights throughout his distinguished government career. Moreover, his wife, Arvonne Fraser,¹¹³ a longtime, internationally recognized, leader of the women's right movement, opposed the ordinance as inimical to women's rights.¹¹⁴ Also noteworthy are the gender and party line-ups in the City Council votes. In both 1983¹¹⁵ and 1984,¹¹⁶ a majority of the Council's male members supported the law, and in 1983, a majority of the Council's Republican members supported it.¹¹⁷ In contrast, in 1984, the majority of the female Council members voted against the law,¹¹⁸ while in 1983, half of them did so.¹¹⁹ In 1983, half the Democratic Council members

Minneapolis, <http://www.ci.minneapolis.mn.us/mayor/office/all-mayors.asp> (last visited Nov. 18, 2006).

113. Arvonne Fraser is a senior fellow emerita of the Hubert H. Humphrey Institute of Public Affairs at the University of Minnesota, where she co-founded the Institute's Center on Women and Public Policy. Fraser also served as ambassador to the U.N. Commission on the Status of Women, director of the International Women's Rights Action Watch, and coordinator of the Office of Women in Development at the U.S. Agency for International Development. As director of the International Women's Rights Action Watch, she helped to publish "shadow reports" on countries that had ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), in order to publicize the CEDAW and to provide accurate information about the status of women. See Elizabeth Noll, *Arvonne Fraser: the Seeds of the International Women's Movement*, MINN. WOMEN'S PRESS, Dec. 29, 2004, <http://www.womenspress.com/main.asp?Search=1&ArticleID=830&SectionID=3&SubSectionID=29&S=1> (last visited Nov. 2, 2006).

114. See Brest & Vandenberg, *supra* note 3, at 639 (noting that "Arvonne Fraser, a feminist scholar at the Hubert Humphrey Institute . . . described the ordinance as a step backwards because it treats women as dependents, as a victimized class that must be protected").

115. The following four male members voted in favor of the 1983 law: Walter Dzeidzic, Walter H. Rockenstein II, Tony Scallen, and Van White. The following three male members voted against the 1983 law: Patrick Daugherty, Mark Kaplan, and Dennis Schulstad. 1983 ORDINANCE, *supra* note 9 (Record of Council Vote).

116. The following four male members voted in favor of the 1984 law: Brian Coyle, Walter Dzeidzic, Tony Scallen, and Van White. The following two male members voted against the 1984 law: Steve Cramer and Dennis Schulstad. 1984 ORDINANCE, *supra* note 65 (Record of Council Vote).

117. The following three Republican members voted in favor of the 1983 law: Sally Howard, Walter H. Rockenstein II, and Dennis Schulstad. The following two Republican members voted against the 1983 law: Barbara Carlson and Dennis Schulstad. 1983 ORDINANCE, *supra* note 9 (Record of Council Vote).

118. The following four female members voted against the 1984 law: Barbara Carlson, Joan Niewmiec, Kathy O'Brien, and Alice Rainville. The following three female members voted for the 1984 law: Sharon Sayles Belton, Sandra Hilary, and Charlee Hoyt. 1984 ORDINANCE, *supra* note 65 (Record of Council Vote).

119. The following three female members voted against the 1983 law: Barbara Carlson, Kathy O'Brien, and Alice Rainville. The following three female members voted for the 1983 law: Charlee Hoyt, Sally Howard, and Jacquelin Slater. 1983

voted against the law,¹²⁰ and in 1984, almost half of the Democratic members voted against the watered-down version of the law.¹²¹

3. *The Ongoing Censorial Impact of the Minneapolis Proceedings, Both in Minnesota and Beyond*

Although the MacDworkin model law never went into effect in Minneapolis, it still had a major effect in stimulating the consideration of similar laws in many jurisdictions around the United States and beyond. Likewise, feminist advocates of suppressing pornography have frequently cited the testimony of self-described “pornography victims” during the hearings on the proposed Minneapolis ordinance.¹²² Moreover, according to those who were engaged in these debates, the high-profile, high-pressure anti-pornography crusade led to much self-censorship in Minneapolis, including on the part of members of the feminist and LGBT communities.¹²³ Accordingly, while this episode did not result in the draconian suppression in Minneapolis that would have followed from the ordinance’s actual enactment there, it did nonetheless lead to substantial suppression, both in Minnesota itself and far beyond.

ORDINANCE, *supra* note 9 (Record of Council Vote).

120. The following four Democratic members voted against the 1983 law: Patrick Daugherty, Mark Kaplan, Kathy O’Brien, and Alice Rainville. The following four Democratic members voted for the 1983 law: Walter Dzeidzic, Tony Scallen, Jacquelin Slater, and Van White. *Id.*

121. The following four Democratic members voted against the 1984 law: Steve Cramer, Joan Niemiec, Kathy O’Brien, and Alice Rainville. The following six Democratic members voted for the 1984 law: Brian Coyle, Sharon Sayles Belton, Walter Dzeidzic, Sandra Hilary, Tony Scallen, and Van White. 1984 ORDINANCE, *supra* note 65 (Record of Council Vote).

122. See, e.g., Diana E.H. Russell, Professor Emerita of Sociology, Against Pornography: The Evidence of Harm, Address Before the 7th International Congress on Women (June 25, 1999), *available at* http://www.skknuit.no/WW99/papers/Russell_Diana_E_H.pdf, at 16–20 (last visited Oct. 14, 2006); Gloria Steinem, Book review of IN HARM’S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS (Catharine A. MacKinnon & Andrea Dworkin eds. 1998), Harvard University Press Publication Reviews, <http://www.hup.harvard.edu/catalog/MACHAR.html?show=reviews> (last visited Oct. 14, 2006) (“In the words of real experience and personal testimony, *In Harm’s Way* shows that pornography is to females what Nazi literature is to Jews and Klan propaganda is to Blacks. Whether or not all such hate literature is protected by the First Amendment, all must be rejected if we are to live together with dignity and safety.”).

123. See Brest & Vandenberg, *supra* note 3, at 629 (quoting a witness stating that the Minneapolis “movement against pornographic bookstores has had a terrible effect on the gay community”).

Indeed, one can fairly conclude that these widely publicized, dramatic proceedings in Minneapolis have continued to play at least some role in fueling all subsequent measures targeting sexual expression, even those that different proponents advocate. For example, the Meese Pornography Commission, with its traditional, conservative membership and agenda, co-opted the MacDworkinite rhetoric that had been developed in Minneapolis as a purported justification for stepped-up enforcement of traditional anti-obscenity laws.¹²⁴

Furthermore, in Minnesota itself, in 1994, the state supreme court *sua sponte* cited concerns for protecting women against sexual harassment as an ostensible justification for city laws barring non-obscene sexually explicit expression among consenting adults, even when the municipal officials who defended the laws did not invoke that asserted rationale.¹²⁵ There was no evidence that government officials who enacted the law considered any such potential adverse effect,¹²⁶ let alone any evidence that there was any such actual effect. Accordingly, the Minnesota Supreme Court Justices apparently were taking “judicial notice”¹²⁷ of the purported causal connection between lawful sexual expression and unlawful sexist conduct, which the Minneapolis hearings had sought to substantiate.¹²⁸

4. *An Asserted “Civil Rights Approach” that Is Opposed by the Minneapolis Civil Rights Commission*

Defining pornography as a form of sex discrimination,” the MacDworkin model law that the Minneapolis City Council adopted

124. See STROSSEN, *supra* note 6, at 82.

125. See Knudtson v. City of Coates, 519 N.W.2d 166, 169 (Minn. 1994) (upholding two ordinances outlawing nude dancing in bars, even while recognizing that nude dancing is expression protected under federal and state constitutional free speech guarantees, and even though there was no record of any associated negative effect, by speculating that “the City Council may have felt” that this “adult entertainment could . . . be construed as a subliminal endorsement for unlawful sexual harassment”).

126. Indeed, in 1963, when the ordinance was adopted, the concept of sexual harassment had not even been articulated by feminists such as Catharine MacKinnon, who later, commendably, spearheaded efforts to acknowledge it as a form of unlawful gender discrimination. For a more extended discussion of this issue, see *infra* text accompanying notes 190–195.

127. FED. R. EVID. 201; MINN. R. EVID. 201.

128. Knudtson, 519 N.W.2d at 173 (Gardebring, J., concurring in part, dissenting in part).

was hailed by its proponents as embodying a civil rights approach to the issue.¹²⁹ However, the City Council did not consult the Minneapolis Civil Rights Commission before adopting the law, and some members of the Commission expressed “fear that under the measure they would be forced into the role of censors.”¹³⁰ At the hearings on the proposed law, the Chairman, as well as other members of the Civil Rights Commission, raised “some very serious questions” and reservations they had about the ordinance, including the fact that its gender-specific definition of pornography was itself discriminatory.¹³¹ Moreover, after efforts began in 1984 to reintroduce this purported civil rights law in a revised form, the Commission did undertake its own study. As a result, it officially opposed the law not only because the “commissioners would be required to act as censors,” but also because it would divert the Commission’s resources “to the detriment of existing protected classes” under longstanding anti-discrimination laws.¹³²

5. *Summary of the Law’s Speech-Repressive Provisions*¹³³

The law authorized civil lawsuits for damages and injunctive relief for four offenses: “trafficking in pornography,” “coercion into pornography,” “forcing pornography on a person,” and “assault or physical attack due to pornography.” All four offenses are linked by the common, and hopelessly vague, definition of pornography as “graphic sexually explicit subordination of women through pictures and/or words.” The definition also lists eight additional criteria purporting to give further specificity to the central notion of “subordination,” but these just compound its inherent, intractably vague, and subjective nature:

- women are presented as dehumanized sexual objects, things or commodities; or

129. Brest & Vandenberg, *supra* note 3, at 619.

130. See *Minneapolis Asked to Attack Pornography*, *supra* note 14.

131. Brest & Vandenberg, *supra* note 3, at 634. The authors also noted that, while “the ordinance acknowledged the possibility that men . . . also could be injured by pornography, [it] emphasized that all women are.” *Id.* at 620. See also 1984 ORDINANCE *supra* note 65, § 2 (law’s provisions extend its reach to “men, children, or transsexuals,” despite its focus on women).

132. Brest & Vandenberg, *supra* note 3, at 653.

133. The ordinance that the Minneapolis City Council passed in 1983 is annexed as an Appendix to this article.

- women are presented as sexual objects who enjoy humiliation or pain; or
- women are presented as sexual objects experiencing sexual pleasure in rape, incest, or other sexual assault; or
- women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or
- women are presented in postures or positions of sexual submission, servility, or display; or
- women's body parts—including but not limited to vaginas, breasts and buttocks—are exhibited such that women are reduced to those parts; or
- women are presented being penetrated by objects or animals; or
- women are presented in scenarios of degradation, humiliation, injury, torture, shown as filthy or inferior, bleeding, bruised or hurt in a context that makes these conditions sexual.¹³⁴

Beyond the model law's pervasive chill—if not deep freeze—of free speech that results from its ambiguous “definition” of pornography, each of the specific offenses that it creates also raise philosophical, practical, and constitutional problems of their own. The prohibition on “coercion into pornography”¹³⁵ reflects an all-encompassing concept of coercion, effectively decreeing that no woman may ever volunteer or consent to perform in sexually explicit productions, and thus treating women like children.¹³⁶ The

134. 1983 ORDINANCE, *supra* note 9, § 3. See also *An Excerpt from Model Antipornography Civil Rights Ordinance*, Ms. (Jan./Feb. 1994), available at <http://www.nostatusquo.com/ACLU/dworkin/OrdinanceModelExcerpt.html> (last visited Nov. 16, 2006) (for additional language from the model ordinance not included in the Minneapolis proposed ordinances). Some versions of the MacDworkin law include a ninth criterion, that “women are presented as whores by nature.” See 1983 ORDINANCE, *supra* note 9, § 3(gg)(1)(vii).

135. *Id.* § 4(m).

136. The draft Minneapolis Ordinance by Catharine MacKinnon and Andrea Dworkin stated: “Children are incapable of consenting to engage in pornographic conduct, even absent physical coercion, and therefore require special protection.

prohibition on "forcing pornography on a person" reflects a similarly sweeping concept of force.¹³⁷ In addition, this section of the model law purports to limit sexual expression not only in settings such as "a home" or "a place of employment [or] education," where important privacy and equality rights may limit free speech rights, but also "in any public place,"¹³⁸ where free expression must receive its maximum protection.¹³⁹ The cause of action for "assault or physical attack due to pornography"¹⁴⁰ effectively makes anyone who participates in producing or distributing a sexually explicit work responsible for any assault that might be committed by any individual who happened to see that work. It thus deters the production or distribution of any sexually oriented materials, while displacing legal and moral responsibility from the actual assailant.¹⁴¹

The section of the law that proscribes "trafficking in pornography" is the most frontal attack on constitutional freedoms, because it essentially makes it illegal "to produce, sell, exhibit, or distribute" the targeted sexual speech, decreeing that it constitutes "discrimination against women."¹⁴² This "trafficking" proscription is essentially old-fashioned, moralistic prior restraint dressed in the modern, progressive garb of a private anti-discrimination action, an "empress's new clothes." It can be enforced not only by "any woman . . . acting against the subordination of women,"¹⁴³ but also by "[a]ny man or transsexual who alleges injury by pornography in the way women are injured by it."¹⁴⁴ In short, despite the law's verbose rhetoric, its actual operational effect can be simply summarized: it empowers anyone to halt any production or distribution of sexual materials.¹⁴⁵ Even libraries, including college and university libraries, may be sued under this breathtakingly

By the same token, the physical and psychological well-being of women ought to be afforded comparable protection." Wendy McElroy, *The Unholy Alliance*, LIBERTY, Feb. 1993, at 56. See also STROSSEN, *supra* note 6, at 179-98.

137. 1984 ORDINANCE, *supra* note 9, § 4(n) (1983).

138. *Id.*

139. See STROSSEN, *supra* note 6, at 69-72.

140. 1983 ORDINANCE, *supra* note 9, § 4(o).

141. See STROSSEN, *supra* note 6, at 268-73.

142. 1984 ORDINANCE, *supra* note 65, § 3(m).

143. *Id.*

144. *Id.*

145. See David Shaffer, *Landmark Porn Bill Approved*, PHILA. INQUIRER, Dec. 31, 1983, at A3 ("MacKinnon . . . said even the sale of *Playboy* magazine could be affected by the ordinance because of the way the magazine portrays women.").

broad provision.¹⁴⁶

B. The Model Law's Anti-Progressive Nature Is Underscored in Indianapolis

The repressive reality underlying the feminist facade of the MacDworkin law that the Minneapolis City Council had initially adopted in 1983 became even more dramatically apparent in 1984 (in an appropriately Orwellian twist) when that same law was enacted in Indianapolis with the solid support of conservative Republican politicians and right-wing groups that had consistently opposed women's rights. One leading supporter, Baptist minister Greg Dixon, had been an official in the Rev. Jerry Falwell's Moral Majority organization.¹⁴⁷ Every Democratic member of the Indianapolis City Council voted against the law, while every Republican member voted for it.¹⁴⁸

This ostensibly feminist law received no support from local feminist groups; to the contrary, the local chapter of the National Organization for Women (NOW) opposed it. In contrast, the law was endorsed by the prominent anti-feminist Phyllis Schlafly, best known for her campaigns against reproductive freedom and against the proposed Equal Rights Amendment (ERA) to the U.S. Constitution, which would prohibit gender-based discrimination.¹⁴⁹ One of Catharine MacKinnon's allies in securing the law's passage was a conservative Republican woman who had been a leader of the Stop ERA movement, former Indianapolis City Council member Beulah Coughenour.¹⁵⁰

Testifying in support of her anti-pornography law before the Indianapolis City Council, MacKinnon described Indianapolis as "a place that takes seriously the rights of women and the rights of all people."¹⁵¹ This description came as a shock to the Indiana women who had lobbied unsuccessfully for the ERA, as well as to the gay men whom the Indianapolis police had beaten only weeks before MacKinnon's testimony, in an ugly episode that happened to be

146. 1984 ORDINANCE, *supra* note 65, § 3(m)(1).

147. See Lisa Duggan, *Censorship in the Name of Feminism*, in *CAUGHT LOOKING* 67 (Kate Ellis et al. eds. 1988).

148. *Id.*

149. Kathleen Currie & Art Levine, *Whip Me, Beat Me, and While You're at It, Cancel My N.O.W. Membership: Feminists War Against Each Other Over Pornography*, *WASH. MONTHLY*, June 1987, at 17.

150. *Id.*

151. See Duggan, *supra* note 147, at 65.

caught on videotape.

Sheila Suess Kennedy, a Republican feminist attorney also excoriated MacKinnon's misappropriation of the feminist mantle. Notably, MacKinnon's anti-pornography ally Coughenor had attacked Kennedy in a 1980 political campaign specifically because of Kennedy's pro-ERA and other feminist positions. Kennedy stated in her written testimony to the Indianapolis City Council: "As a woman who has been publicly supportive of equal rights for women, I frankly find it offensive when an attempt to regulate expression is cloaked in the rhetoric of feminism. Many supporters of this proposal have been conspicuously indifferent to previous attempts to gain equal rights for women."¹⁵² Likewise, Kathy Sarris, president of an Indiana lesbian and gay rights organization, asked: "It has not occurred to Mayor Hudnut to put women in leadership positions in city-county government; why is he now so concerned with the subordination of women in pornography?"¹⁵³

The foregoing key aspects of the Indianapolis situation—MacKinnon's unholy alliance with opponents of women's rights, and her disregard for both the local political reality and the views of local feminist leaders—presaged an ongoing pattern in the feminist anti-pornography movement. This pattern includes that movement's support of the 1986 Meese Pornography Commission, which right-wing opponents of women's rights dominated, and its support for the 1992 Canadian Supreme Court decision upholding the MacDworkin concept of illegal "pornography" under Canadian law, which has wreaked havoc on feminist bookstores and lesbian literature. Indeed, tellingly, the local leaders of the 1983–84 Minneapolis anti-pornography campaign expressly hailed the Meese Pornography Commission report,¹⁵⁴ thus expressly distancing themselves from the many strong critics of that report, including most feminists, LGBT activists, and other progressives.¹⁵⁵

In all of these contexts, the proponents of the feminist pro-censorship laws that were launched in Minneapolis in 1983 have

152. *Id.*

153. *Id.*

154. See Bruce Benidt, *Leaders of City Pornography Fight Encouraged*, STAR TRIB. (Minneapolis), May 15, 1986, at B1.

155. See, e.g., *id.* (quoting Tim Campbell, publisher of the *GLC Voice*, a gay newspaper in Minneapolis, and also William Lockhart, former University of Minnesota Law School Dean, who chaired an earlier national commission on the same subject, which advocated decriminalizing all sexual expression for consenting adults).

repeatedly overlooked the actual concerns of the real women whom these laws most directly affect. These tendencies are at best politically naive and at worst cynically opportunistic.

C. The Courts' Verdict on the Law: Unconstitutional and Unwise in Terms of Women's Rights

Approximately one hour after Mayor William Hudnut (a conservative Republican) signed the Indianapolis version of the Dworkin-MacKinnon law, a coalition of booksellers, publishers, and others involved in creating, distributing, and reading or viewing the massive materials that the law endangered challenged it in federal court. This coalition argued, and in the case *American Booksellers Association v. Hudnut*,¹⁵⁶ the courts agreed, that the MacDworkinite anti-pornography law violated the First Amendment's free speech guarantee. The federal trial court judge in *Hudnut* struck down the law; the U.S. Supreme Court in turn affirmed. Indeed, the law so plainly violated fundamental free speech principles that the Supreme Court affirmed the Seventh Circuit's holding through a procedure called "summary affirmance," under which the Court did not even receive briefs, hear oral arguments, or issue an opinion.

The Seventh Circuit's ruling stressed that, by singling out only depictions or descriptions that subordinate women, the MacDworkinite anti-pornography law violates the cardinal free speech principle of "content neutrality" or "viewpoint neutrality," which means that government may never censor speech just because any listener—or, indeed, the majority of the community—disapproves of its message.¹⁵⁷ In an opinion by Judge Frank Easterbrook, who had been a prominent University of Chicago Law School professor before his judicial appointment, the court explained:

The ordinance discriminates on the ground of the content of the speech. Speech treating women in the approved way—in sexual encounters "premised on equality"—is lawful no matter how sexually explicit. Speech treating women in the disapproved way—as submissive in matters sexual or as enjoying humiliation—is unlawful no matter how significant the literary, artistic,

156. *Am. Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

157. *See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989).

or political qualities of the work taken as a whole. The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents.¹⁵⁸

Both the American Civil Liberties Union and the Feminist Anti-Censorship Taskforce (FACT) filed briefs in the *Hudnut* case arguing that the MacDworkinite anti-pornography law violated women's constitutional equality rights, as well as free speech rights.¹⁵⁹ Because the trial and appellate courts invalidated the law on First Amendment grounds, they did not need to resolve the equality issue. Nevertheless, the opinion of the trial judge—who happened to be a woman, Sara Evans Barker—did note one of the reasons why this law actually undermines women's equality, far from promoting it. Judge Barker observed:

It ought to be remembered by . . . all . . . who would support such a legislative initiative that, in terms of altering sociological patterns, much as alteration may be necessary and desirable, free speech, rather than being the enemy, is a long-tested and worthy ally. To deny free speech in order to engineer social change in the name of accomplishing a greater good for one sector of our society erodes the freedoms of all and . . . threatens tyranny and injustice for those subjected to the rule of such laws.¹⁶⁰

Although MacKinnon has decried the *Hudnut* decision as "the *Dred Scott* of the women's movement,"¹⁶¹ referring to the Supreme Court's justly maligned 1856 decision upholding slavery,¹⁶² *Hudnut* is in fact more like the *Brown v. Board of Education*¹⁶³ of the women's rights movement. Just as *Brown* recognized that racially separate schools are inherently unequal, *Hudnut* recognized that any separate concept of free speech for expression by or about women or sexuality is also inherently unequal.

The Supreme Court's 1986 summary affirmance in the *Hudnut* case seemed to seal the constitutional doom of any attempt to embody the feminist anti-pornography, pro-censorship analysis in law. Following *Hudnut*, a federal court struck down another

158. *Hudnut*, 771 F.2d at 325 (citations omitted).

159. See STROSSEN, *supra* note 6, at 80.

160. *Hudnut*, 598 F. Supp. at 1337.

161. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 213 (1987).

162. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

163. 347 U.S. 483 (1954).

version of the MacDworkin model law, enacted by voter referendum in Bellingham, Washington in 1988, and promptly challenged by the ACLU.¹⁶⁴ Likewise, in 1989, the U.S. Court of Appeals for the Ninth Circuit rejected Andrea Dworkin's argument (in her lawsuit against *Hustler* magazine, regarding unflattering statements it had published about her) that it should hold that the MacDworkinite concept of pornography was outside the Constitution's free speech protection; the court dismissed this argument as "contrary to fundamental First Amendment principles."¹⁶⁵

D. The More Recent Feminist/Progressive Consensus: Counter to the MacDworkinite Law

Since the Minneapolis City Council's adoption of the MacDworkinite anti-pornography law a generation ago, the pro-censorship feminist faction has faded from public prominence, almost to the vanishing point. A confluence of law and culture has repudiated this censorial approach and recognized its regressive effects, no matter how progressive some proponents intended it to be. This pro-sexual-speech stance is especially prominent among younger women and feminists, indicating that it is likely the wave of the future.¹⁶⁶

Journalists have chronicled the rise of a new breed of

164. *Vill. Books v. City of Bellingham*, No. C88-1470D (W.D. Wash. Feb. 9, 1989).

165. *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1199 (9th Cir. 1989). Interestingly, a female judge, Cynthia Holcomb Hall, wrote the opinion. *Id.* at 1190.

166. See, e.g., Jodi Rudoren, *The Student Body*, N.Y. TIMES, Apr. 23, 2006, at A4. The article further notes how college "[s]tudent editors, administrators and experts on adolescent sexuality" see the recent appearance of campus sex magazines and sex columnists in campus newspapers as reflecting the fact that "many feminists are adopting a 'sex-positive' approach that views pornography as expression, not exploitation." *Id.* The article quotes Pamela Paul, author of a 2005 book critical of pornography, as saying, "[c]ollege women have really bought into both the pornography industry's way of spinning porn—this is hip, sexy, harmless entertainment and women should really get in on it—and the new academic perspective on pornography—as long as we own our sexuality and it's our choice, then, great, more power to us." *Id.* See also Wenthe, *supra* note 76 ("A great many [feminists] (especially younger ones) are pro-sex and anti-censorship. They think the logic of [the MacDworkinite anti-pornography measures] is not progressive and liberal, but repressive and reactionary. . . . [O]ne young feminist [stated]: 'The real problem is the patriarchal repression of our freedom to express our sexuality.'")

feminists, increasingly prominent both in women's studies programs and in academia more generally—former strongholds of the feminist pro-censorship camp¹⁶⁷—as well as on the wider cultural scene, who hardly eschew sexual expression. To the contrary, these female, feminist scholars, artists, and activists not only defend sexual expression against repression, but they proactively celebrate and even create it.¹⁶⁸

One manifestation of this new feminist movement for freedom of sexual expression, underscoring the regressive nature of the position that the Minneapolis City Council adopted in 1983–84, is the nationwide success of Eve Ensler's award-winning play, *The Vagina Monologues*.¹⁶⁹ Its graphic treatment of not only female sexual organs, but also female sexual pleasure, extends beyond simulation to stimulation. In short, it satisfies the dictionary denotation of "pornography" as sexually arousing expression. As one (male) reviewer observed:

All around the country, men are dialing those 900 numbers and paying several bucks a minute for this kind of performance. And the show has the feel of male pornography, from the stupid puns on the posters ("Think Outside the Box"), to the structure (a series of unrelated sexual encounters), to the worldview (women want to have sex all the time), to the underlying message of each episode (great sex is possible between people who have absolutely no emotional commitment to each other).¹⁷⁰

The Vagina Monologues has been attacked by a conservative taxpayers' group that objected to its performances at state colleges and universities.¹⁷¹ That it would be criticized by cultural and religious conservatives is not surprising. After all, it celebrates not only women's sexuality, but also women's freedom to explore and enjoy that sexuality outside the "traditional nuclear family." What

167. See STROSSEN, *supra* note 6, at xxxi–xxxvii, 26–29, 88–90 (discussing campus incidents involving the suppression of expression viewed as inconsistent with the views of pro-censorship feminists).

168. See STROSSEN, *supra* note 6, at xxix n.53.

169. *Id.* On a personal note, I want to mention that, at the invitation of Eve Ensler, I had the honor of guest-starring in this powerful play for one week at the National Theatre in Washington, D.C. in October, 2001. See Nelson Pressley, "Vagina Monologues" at the National: *The Privates Go Public*, WASH. POST, Oct.19, 2001, at C5.

170. STROSSEN, *supra* note 6, at xxix n.55.

171. *Id.* n.56.

is surprising, though, is that this work has escaped the wrath of anti-porn feminists. To the contrary, it has been produced and attended all over the country, including on hundreds of campuses, with the strong support of the feminist community.

I doubt this could have happened in the heyday of MacDworkinism; pro-censorship feminists likely would have tried to block the production or would have attended it only to picket and protest. Recall that the Dworkin-MacKinnon model anti-pornography law, as adopted by the Minneapolis City Council, condemns any sexually explicit material in which "women's body parts—including . . . vaginas . . . — are exhibited such that women are reduced to those parts."¹⁷² A recurrent theme in *The Vagina Monologues* is precisely that women do or should see themselves as their sexual body parts. The author and the female actors clearly intend this process of sexual self-discovery to serve an expansive function, opening women up to new pleasures, possibilities, and powers. Yet, viewed through the anti-porn prism, some could attack the work as reductionist.

The play's theme, which condemns sexual force and violence, does not save it from pro-censorship feminists. On the contrary, the Dworkin-MacKinnon model law, as adopted in Minneapolis, expressly proscribes descriptions or depictions in which "women are presented in scenarios of degradation, injury, abasement, torture, shown as . . . bleeding, bruised, or hurt in a context that makes these conditions sexual."¹⁷³ One of the most powerful, vivid monologues in *The Vagina Monologues* was a Bosnian Muslim woman graphically recounting—and vividly reliving—the savage gang rapes and other forms of sexual torture and disfigurement she endured during the Balkan conflict. Yet, in a 1993 *Ms. Magazine* cover story, Catharine MacKinnon denounced descriptions or depictions of the mass rapes in the Balkans as themselves pornographic.¹⁷⁴

In sum, looked at through the vantage point of contemporary feminism, as well as the enduring constitutional principles that the courts enforced in striking down Indianapolis's version of the MacDworkin-style law that the Minneapolis City Council adopted, that law's counter-progressive nature looms large and clear. After all, how many feminists or other progressives today will argue that

172. 1983 ORDINANCE, *supra* note 9, § 3.

173. *Id.*

174. STROSSEN, *supra* note 6, at xxx n.59 (citing to Catharine MacKinnon, *Turning Rape into Pornography: Postmodern Genocide*, MS., July/Aug. 1993, at 24–30).

censoring *The Vagina Monologues*, or bankrupting Eve Ensler¹⁷⁵—results that are clearly warranted under that law—is a “progressive” outcome?

IV. SUBSEQUENT LEGAL DEVELOPMENTS IN MINNESOTA ALSO RESTRICT FREEDOM OF SEXUAL EXPRESSION

After Minnesota played its historic role in the MacDworkinite efforts to expand the government’s censorial power over sexual expression, Minnesota has not again hosted further such efforts. In other words, since then, Minnesota officials have not taken steps to decrease legal protection for sexual expression below the federal constitutional floor set by the U.S. Supreme Court. From my progressive, feminist, civil libertarian perspective, that is the good news. On the other hand, the bad news is that recent efforts in Minnesota to reduce government censorial power over sexual expression also have failed. In other words, Minnesota officials have not taken steps to increase legal protection for sexual expression above the federal constitutional threshold set by the U.S. Supreme Court. In that noteworthy respect, Minnesota is less progressive than a number of other states, which have afforded greater protection to sexual expression under their state laws and/or state constitutions.

A. *Minnesota Officials Have Broadly Construed the U.S. Supreme Court’s Precedents that Permit Restrictions on Sexual Expression*

Local governments throughout Minnesota have aggressively passed laws imposing various kinds of restrictions on sexual expression,¹⁷⁶ arguing for broad interpretations of U.S. Supreme

175. See, e.g., Charles Isherwood, *Theater; A Play of Ideas Can Make a Difference*, N.Y. TIMES, Sept. 3, 2006, at 26 (noting “the annual ‘V-Day’ benefits [*The Vagina Monologues*] . . . have raised more than \$40 million for local charities”); *Anatomy of a Drama Past Its Sell-By Date*, IRISH INDEPENDENT (Dublin), Mar. 4, 2006 (“Thanks to the campaigning efforts of Eve Ensler, its writer, the Monologues have raised more than \$25 million for charities that combat violence against women.”).

176. See, e.g., Janna Goerd, *Cities Make Zoning Laws Their Weapon of Choice to Restrict Businesses*, DULUTH NEWS TRIB. (Minn.), May 29, 2005, at 8A; Robert Ingrassia, *Council Approves Sex-Shop Moratorium*, ST. PAUL PIONEER PRESS (Minn.), May 20, 2004, at 2B; Richard Meryhew, *Neighbors Applaud Closing of Strip Club*, STAR TRIB. (Minneapolis), Aug. 17, 2002, at 1B; Rachel E. Stassen-Berger, *Library Porn Goes Beyond Free Speech*, ST. PAUL PIONEER PRESS (Minn.), May 8, 2000, at 1B (noting lawyer representing librarians working at Minneapolis Public Library filed complaint with U.S. Equal Employment Opportunity Commission, contending

Court decisions that sanctioned certain restrictions.¹⁷⁷ Those Supreme Court decisions were often narrowly decided, with persuasive dissenting opinions.¹⁷⁸ Further, they have been widely criticized by constitutional scholars and civil libertarians as unduly expanding the government's censorial power.¹⁷⁹ Nonetheless, many Minnesota officials,¹⁸⁰ including many judges,¹⁸¹ have

that "the library's policy of allowing patrons free and completely open access to the Internet creates a hostile work environment for library's workers"); Noam Levey, *Sex Shop Zoning Drafted*, DULUTH NEWS TRIB. (Minn.), May 3, 1998, at 1A; David Hawley, *Ramsey's Anti-Porn Law Challenged in Federal Court*, ST. PAUL PIONEER PRESS (Minn.), May 9, 1990, at 4D; Bob von Sternberg, *Attorney General Circulates Manual on How to Fight Porn*, STAR TRIB. (Minneapolis), June 7, 1989, at 8D; Kevin Diaz, *Zoning Ordinance for Sex-Oriented Films Struck Down*, STAR TRIB. (Minneapolis), May 23, 1989, at 1A; Aron Kahn & James Lileks, *Banned in Minnesota?*, ST. PAUL PIONEER PRESS (Minn.), May 29, 1988, at 1E; Don Ahern, *Council Toughens Porn Law; St. Paul Ordinance Scatters Businesses*, ST. PAUL PIONEER PRESS (Minn.), May 20, 1988, at 1A.

177. See generally, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES, § 11.3.4 (2006).

178. See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 587-96 (1991) (5-4 decision, with no majority opinion) (White, J., dissenting) (dissenters concluding that First Amendment prohibits outlawing nude dancing); *City of Renton v. Playtime Theaters*, 475 U.S. 41, 55 (1986) (7-2 decision) (Brennan, J., dissenting) (dissenters rejecting majority's deferential review of zoning regulations targeting sexually oriented businesses); *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 113 (1973) (5-4 decision) (Brennan, J., dissenting) (dissenters maintaining that there should be no obscenity exception to First Amendment's free speech guarantee).

179. For example, even the Meese Pornography Commission, which advocated increased enforcement of anti-obscenity laws, was forced to recognize that "the bulk of scholarly commentary" has criticized the Supreme Court's decisions in this area as inconsistent with the First Amendment. 1986 ATT'Y GEN. COMM'N ON PORNOGRAPHY FINAL REPORT pt. 2, at 251 (1986).

180. There are notable exceptions, including: the six members of the thirteen-member Minneapolis City Council who voted against the MacDworkinite anti-pornography ordinance in 1983; the six Minneapolis City Council members who voted against it in 1984 (including three of the newest members who took office in January 1984); and Minneapolis Mayor Donald Fraser, who twice vetoed it. See 1984 ORDINANCE, *supra* note 65 (Record of Council Vote); 1983 ORDINANCE, *supra* note 9 (Record of Council Vote). For another example of a Minnesota official who likewise adhered to principle to defend freedom for sexual expression, despite its political unpopularity, see Brian Bonner, *Anti-Obscenity Ordinance Vetoed by Scheibel*, ST. PAUL PIONEER PRESS (Minn.), Feb. 1, 1991, at 1B (quoting St. Paul Mayor Jim Scheibel explaining his veto of an ordinance that "sought to keep sexually 'harmful' materials away from minors in stores," because of "serious . . . issues involving free speech . . . , the limits and burdens placed on booksellers, and the chilling effect of legislative restrictions that are uncertain until a jury makes a determination").

181. See, e.g., *City of Elko v. Abed*, 677 N.W.2d 455 (Minn. Ct. App. 2004); *State v. Duncan*, 605 N.W.2d 745 (Minn. Ct. App. 2000); *City of Crystal v. Fantasy House, Inc.*, 569 N.W.2d 225 (Minn. Ct. App. 1997); *City of Ramsey v. Holmberg*,

expansively interpreted those decisions as warranting measures to suppress sexual expression that at least push, if not exceed, the boundaries of the U.S. Supreme Court's authorization.

For example, several opinions of the U.S. Supreme Court (two of which were plurality opinions), over strong dissents, have upheld zoning regulations that target businesses engaging in constitutionally protected (*i.e.*, non-obscene) sexually oriented expression—such as adult bookstores, video stores, or bars featuring nude dancing—on the rationale that these laws were not really directly aimed at the expressive content. Rather, these opinions maintained that the suppressive laws were aimed at the “secondary effects” of the targeted sexual expression, such as decreased property values or increased crime.¹⁸² Dissenting Supreme Court Justices, as well as other critics, have assailed this “secondary effects” rationale as a legal fiction, which endangers freedom of expression generally, even beyond sexual expression.¹⁸³

Nonetheless, the Minnesota Supreme Court extended the rationale underlying these much-criticized U.S. Supreme Court opinions even further, permitting even more regulation of sexual expression, with even less evidence of any motivation other than dislike of the expression by government officials and community members, thus violating the core “content neutrality” concept

548 N.W.2d 302 (Minn. Ct. App. 1996); *State v. Holmberg*, 545 N.W.2d 65 (Minn. Ct. App. 1996); *Jacobson v. County of Goodhue*, 539 N.W.2d 623 (Minn. Ct. App. 1995). *But see* *Koppinger v. City of Fairmont*, 311 Minn. 186, 248 N.W.2d 708 (1976) (invalidating city's nudity ordinance, which applied to all public dancing places and places where tobacco was sold, as facially overbroad); *City of Rochester v. Carlson*, 294 Minn. 417, 202 N.W.2d 632 (1972) (holding that where the trial court correctly found as matter of law that magazines were not obscene, it was error to submit the issue of pandering to the jury); *State v. Botsford*, 630 N.W.2d 11 (Minn. Ct. App. 2001) (striking down as overbroad ordinance outlawing, but failing to define, “other sexual conduct,” and holding that for night club dancer to be convicted under “indecent conduct” ordinance, government would have to prove that ordinance satisfied U.S. Supreme Court's standards for obscenity).

182. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 295–96 (2000) (plurality opinion); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582–87 (1991) (plurality opinion).

183. *City of Erie*, 529 U.S. at 319 (Stevens, J., dissenting) (“The Court relies on the so-called ‘secondary effects’ test to defend the ordinance. The present use of that rationale, however, finds no support whatsoever in our precedents. Never before have we approved the use of that doctrine to justify a total ban on protected First Amendment expression. On the contrary, we have been quite clear that the doctrine would not support that end.”); *Barnes*, 501 U.S. at 594 (White, J., dissenting) (“If the state is genuinely concerned with prostitution and associated evils, . . . it can adopt restrictions that do not interfere with the expressiveness of nonobscene nude dancing performances.”).

underlying constitutional protection for free speech. In the 1994 case, *Knudtson v. City of Coates*, the Minnesota high court upheld two city ordinances that outlawed nude barroom dancing although there was no evidence whatsoever that the local officials had even purported to base the laws on any alleged secondary effects, much less any evidence that there actually were any such effects.¹⁸⁴ To the contrary, city officials admittedly enacted the laws because of community complaints about the dancing itself, and not because of any alleged secondary effects.¹⁸⁵

In short, the Minnesota Supreme Court went significantly further than the U.S. Supreme Court had done in denying constitutional protection for this kind of sexually suggestive expression. Several members of the U.S. Supreme Court, in several contested opinions (including opinions that did not garner majority votes), had deferred to local officials' assertions of concerns about alleged secondary effects, without probing whether those concerns actually motivated the speech-restrictive laws, or whether such concerns were substantiated by evidence of adverse secondary effects. In contrast, a majority of the Minnesota Supreme Court itself concocted a speculative secondary effects rationale for the laws it upheld in *Knudtson*, contrary to the record evidence that the local officials did not even invoke such a rationale. This approach went beyond the undue deference shown by several U.S. Supreme Court Justices—always short of a majority—to what has been called “pretextual jurisprudence.”¹⁸⁶

To illustrate the extent to which the *Knudtson* majority was willing to engage in speculation and fabrication in order to allow suppression of the nude dancing at issue, consider the following, patently speculative language from its opinion:

[T]he City Council may have felt the particular combination of liquor, nudity, and sex, while it might be

184. *Knudtson v. City of Coates*, 519 N.W.2d 166, 168 (Minn. 1994) (“[N]o evidence was presented . . . showing any increase in crime . . . as a result of the nude dancing . . . , nor was any evidence presented that dancers mingle with patrons or that any ‘sexual improprieties’ had occurred.”).

185. *Id.* at 173–74 (Gardebring, J., concurring in part, dissenting in part) (“An examination of the text of the ordinances and the history of their adoption reveals that their enunciated purpose was to suppress expressive conduct.”).

186. See e.g. Michael Perlin, “Half-Wracked Prejudice Leaped Forth”: *Sanism, Pretextuality, and Why and How Mental Disability Law Developed as it Did*, 10 J. CONTEMP. LEGAL ISSUES 3 (1999); Michael Perlin, “There’s No Success Like Failure/And Failure’s No Success At All”: *Exposing the Pretextuality of Kansas v. Hendricks*, 92 NW. U. L. REV. 1247 (1998).

viewed as adult entertainment, could also be construed as a subliminal endorsement for unlawful sexual harassment.¹⁸⁷

This cited justification for upholding the challenged law suffers from at least three fatal flaws: one factual, one legal, and one a matter of mixed law and fact. As a factual matter, this purported description of the dancing is inaccurate insofar as it suggests that it involved any element of "sex" other than the nudity itself. As a legal matter, any alleged "subliminal endorsement" of illegal conduct conveyed by any expressive activity—as the Minnesota Supreme Court unanimously recognized the challenged dancing to be¹⁸⁸—cannot be outlawed or punished consistent with the First Amendment. To the contrary, the U.S. Supreme Court has repeatedly ruled that even explicit advocacy of illegal conduct is protected expression under the First Amendment; any expression that allegedly induces unlawful conduct can be punished only if it rises to the level of intentional incitement of imminent lawless conduct that is in fact likely to occur.¹⁸⁹

Finally, the court's twofold surmise that "the City Council *may* have felt" that the erotic dancing "*could* . . . be construed as a subliminal endorsement for unlawful sexual harassment"¹⁹⁰ is flawed because sexual harassment was not unlawful when the City Council adopted the challenged ordinances, in 1978. At that time, Minnesota law did not recognize anything "unlawful" about "sexual harassment"—a concept that had not yet been fully articulated even by feminist legal theorists, much less adopted by policy makers. Catharine MacKinnon's 1979 book *Sexual Harassment of Working Women: A Case of Sex Discrimination*¹⁹¹ is widely credited with having pioneered the notion that sexual harassment constitutes a form of gender-based employment discrimination. The U.S. Supreme Court did not adopt this notion until 1986.¹⁹² In Minnesota, the state supreme court did not recognize sexual harassment as a tort until 1980,¹⁹³ and the state legislature did not

187. *Knudtson*, 519 N.W.2d at 169.

188. *Id.*

189. *See* *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

190. *Knudtson*, 519 N.W.2d at 169 (emphasis added).

191. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979)

192. *See* *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

193. *See* *Cont'l Can Co. v. State*, 297 N.W.2d 241 (Minn. 1980).

add it to the Minnesota Human Rights Act until 1982.¹⁹⁴ As summarized by Minneapolis attorney Randy Tigie, who brought this noteworthy point to my attention: “Thus, not only is there no record [in the *Knudtson* case] that the City Council affirmatively considered ‘unlawful sexual harassment’; such a consideration was a practical impossibility [when the ordinance was adopted], given the state of the law.”¹⁹⁵

The Minnesota Supreme Court’s majority opinion in *Knudtson* was forced to recognize, consistent with U.S. Supreme Court rulings, that nude barroom dancing is constitutionally protected expression under both the First Amendment to the U.S. Constitution¹⁹⁶ and the free speech guarantee in the Minnesota Constitution.¹⁹⁷ Therefore, by hypothesizing possible “justifications” for barring such expression, absent any supporting evidence,¹⁹⁸ the majority endangered freedom of expression in general.¹⁹⁹ As Justice Gardebring noted in her dissent, the majority’s rationale “could be read to allow the most blatant forms of political censorship.”²⁰⁰

B. The Minnesota Supreme Court Has Declined to Enforce the State Constitution’s Broadly Phrased Free Speech Guarantee as Extending to Sexual Expression

The Minnesota Supreme Court has interpreted various provisions in the Minnesota Constitution as affording more protection for individual rights than the U.S. Supreme Court has held to be protected by counterpart provisions in the U.S.

194. See MINN. STAT. § 363A.08 (2004).

195. Email from Randall D.B. Tigie (August 30, 2006) (on file with *William Mitchell Law Review*).

196. See *Knudtson v. City of Coates*, 519 N.W.2d 166, 169 (Minn. 1994).

197. See *id.* at 168. Significantly, the *Knudtson* court held “that the state’s power to regulate the sale of liquor under the Twenty-First Amendment does not limit the free speech protections of our state constitution.” *Id.* Accordingly, the government has no additional power to regulate sexual (or other) expression in bars or other venues where liquor is sold beyond its power to regulate expression generally.

198. *Id.* (surmising that the city government “evidently found” or “may have felt” that certain negative effects would result from the nude dancing).

199. See *id.* at 172 (Gardebring, J., concurring in part, dissenting in part) (“[U]se of these ‘interests’ [that the majority posited in support of the ordinances] to support a restriction on protected speech, even speech only marginally protected, will wreak havoc with our free speech jurisprudence.”).

200. *Id.*

Constitution.²⁰¹ Like other state court judges, Minnesota judges have based such progressive, rights-protective holdings on distinctive language in the state constitution and/or on distinctive state history.²⁰²

As noted above, Minnesota's constitutional free speech guarantee, in contrast with its counterpart in the First Amendment to the U.S. Constitution, explicitly protects free expression "on all subjects."²⁰³ This distinctive constitutional language would certainly support a strong argument that the Minnesota Constitution protects freedom for sexual expression to the same extent as expression about any other subject.

The language of Minnesota's free speech provision is distinguishable from that of the U.S. Constitution's Free Speech Clause in one other respect, which also weighs in favor of its application to sexual expression: it protects "[t]he liberty of . . . all persons" to "freely speak, write and publish their *sentiments* on all subjects."²⁰⁴ The term "sentiments" generally refers to feelings, as well as ideas.²⁰⁵ This is significant because one argument, offered in support of inferring a First Amendment exception for sexually oriented expression, is that such expression appeals to feelings or emotions, rather than ideas or thoughts.²⁰⁶ As I have explained

201. See *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990) (religious liberty); *State v. Fuller*, 374 N.W.2d 722, 726 (Minn. 1985) (double jeopardy); *Wegan v. Vill. of Lexington*, 309 N.W.2d 273, 281 n.14 (Minn. 1981) (equal protection); *O'Connor v. Johnson*, 287 N.W.2d 400, 405 (Minn. 1979) (rights of criminally accused).

202. See, e.g., Jim Rossi, *The Puzzle of State Constitutions*, 54 BUFF. L. REV. 211, 217-18 (2006) (explaining that many state constitutions reflect the unique character of the particular state); Jonathan Edelstein, *Life After Brown: The Future of State Constitutional Tort Actions in New York*, 42 N.Y.L. SCH. L. REV. 447, 500 n.266 (1998) (discussing proposed New York test allowing incorporation of "distinctive attitudes of the State citizenry" in determining whether or not to interpret the state constitution differently from the federal constitution).

203. MINN. CONST. art. I, § 3 provides: "The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such rights." In contrast, the pertinent portion of the First Amendment to the U.S. Constitution provides: "Congress shall make no law. . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I.

204. MINN. CONST. art. I, § 3 (emphasis added).

205. See, e.g., MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1134 (11th ed. 2003) (defining "sentiment" as "an attitude, thought, or judgment prompted by feeling"); Definition for "sentiment," <http://dictionary.reference.com/browse/sentiment> (defining "sentiment" as "a thought, view, or attitude, especially one based mainly on emotion instead of reason") (last visited Oct. 12, 2006).

206. See, e.g., Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321

elsewhere, this argument is not a persuasive ground for the obscenity exception to the First Amendment's Free Speech Clause.²⁰⁷ *A fortiori*, this argument is not a persuasive ground for such an exception to Minnesota's counterpart, since the latter expressly extends to "sentiments."

Yet another distinctive provision in the Minnesota Constitution reinforces the conclusion that Minnesota's free speech guarantee should apply foursquare to sexual expression. The state constitutional provision guaranteeing freedom of religion and conscience expressly qualifies that guarantee by stating that it "shall not be construed as to excuse acts of licentiousness."²⁰⁸ In sharp contrast, the Minnesota Constitution's free speech guarantee contains no such exception, thereby indicating the framers' intent that it *shall* be construed to encompass expression and expressive conduct that are "licentious" or sexually oriented.²⁰⁹

In its important 1993 ruling in *Knudtson v. City of Coates*, the Minnesota Court of Appeals suggested that the Minnesota Constitution's free speech guarantee extends more protection to sexually oriented expression than the U.S. Supreme Court extends to such expression under the federal Constitution.²¹⁰ Accordingly, and also because it strictly construed U.S. Supreme Court decisions permitting some restrictions on sexually oriented expression,²¹¹ the Minnesota Court of Appeals invalidated restrictions on nude dancing at licensed liquor establishments.

Moreover, in *State v. Davidson*, a significant 1991 ruling, the Minnesota Court of Appeals struck down the state anti-obscenity statute.²¹² Because the court held that this statute violated Minnesota's constitutional due process guarantee, it did not reach the issue of whether the statute also violated Minnesota's

(1992).

207. See STROSSEN, *supra* note 6, at 50.

208. MINN. CONST. art I, § 16.

209. See, e.g., MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 717 (11th ed. 2003) (defining "licentious" as "1. lacking legal or moral restraints; *especially*: disregarding sexual restraints").

210. *Knudtson v. City of Coates*, 506 N.W.2d 29, 32 (Minn. Ct. App. 1993) (rejecting holdings of other state courts that "have concluded that the scope of free expression guarantees in state constitutions is no broader than First Amendment protections"), *rev'd*, *Knudtson v. City of Coates*, 519 N.W.2d 166 (Minn. 1994).

211. *Id.* at 33.

212. *State v. Davidson*, 471 N.W.2d 691 (Minn. Ct. App. 1991), *rev'd*, 481 N.W.2d 51 (Minn. 1992).

constitutional free speech guarantee.²¹³ Specifically, the court concluded that the statute's definition of obscenity does not afford adequate notice of what expression it outlaws because it turns on "community standards," an inherently vague and subjective concept.²¹⁴

In contrast with the Minnesota Court of Appeals' progressive rulings that enforced the state constitutional free speech and due process guarantees to protect sexual expression for consenting adults, the Minnesota Supreme Court has failed to issue similar rulings. To the contrary, the state supreme court reversed both Minnesota Court of Appeals rulings on point, and in the process adopted a constricted view of the state constitution's free speech guarantee, which endangers other (non-sexual) expression, as well as state constitutional rights more generally.²¹⁵ The most recent such ruling, in the 1994 *Knudtson* case, was a closely divided 4-3 vote, provoking "an unusually inflammatory dissent."²¹⁶

One problematic aspect of the Minnesota Supreme Court's *Knudtson* ruling is that it permitted the suppression of the sexual expression at issue, nude barroom dancing, even absent any evidence of any associated criminal or other harmful activity.²¹⁷ Instead, the majority simply speculated that the government officials "may have" concluded that this admittedly expressive conduct was objectionable for other reasons, such as being "offensive to community standards" or "convey[ing] a message to

213. *Id.* at 696.

214. *Id.* at 696-700.

215. See Mark D. Salsbury, *Questions of Vagueness and State Constitutional Legitimacy: The State Constitutional Challenge to Minnesota's Obscenity Statute: State v. Davidson*, 481 N.W.2d 51 (Minn.1992), 16 HAMLINE L. REV. 281, 317-18 (1992) (criticizing the Minnesota Supreme Court for failing to "reject the increasingly unpopular approach to obscenity regulation" and "failing to justify its decision," thereby undermining "the legitimacy" and "vitality of Minnesota constitutional analysis").

216. Dennis Cassano, *Court Allows Cities to Ban Nude Dancing in Bars*, STAR TRIB. (Minneapolis), July 2, 1994, at A1. See also *Knudtson*, 519 N.W.2d at 172 (Gardebring, J., concurring in part, dissenting in part) ("The majority . . . has abandoned a worthy history of providing significant protection for individual rights under the state's constitution and approved an unprecedented and frightening approach to free speech analysis."). Justice Gardebring's dissent expresses fear that the majority's approach will "make the Minnesota Constitution largely irrelevant to the ongoing debate on the parameters of free speech in this country." *Id.*

217. *Knudtson*, 519 N.W.2d at 169 ("The sparse record does not show that nude dancing . . . has resulted in any incitement to criminal activity, so in that sense the public safety is not implicated.").

the children and teenagers of the community that this activity was socially and morally acceptable.”²¹⁸ As explained above, this rationale apparently goes beyond the “secondary effects” theory that U.S. Supreme Court pluralities have asserted to justify bans on nude barroom dancing under the U.S. Constitution.

In addition to narrowly construing the federal free speech guarantee, the *Knudtson* ruling also construed the state free speech guarantee at least as narrowly, if not more narrowly. As Justice Sandra Gardebring noted in her forceful dissent, the majority apparently held, for the first time, “that our state constitution’s free speech protections are narrower than [those] provided by the First Amendment of the federal constitution.”²¹⁹ As she also explained, casualties include not only nude dancing and other sexually oriented expression, but also many kinds of unpopular but constitutionally protected expression, from flag burning to hate speech.²²⁰

C. In This Area, Minnesota Is Less Progressive than Other States, Which Afford More Protection to Sexual Expression

Minnesota falls behind other states where either the lawmakers or the courts have chosen to respect the rights of adults to make their own choices in the realm of sexual expression, free from government censorship. In short, in these other states, in contrast to Minnesota, adults enjoy the same rights concerning sexual expression as they do concerning other (i.e., non-sexual) expression. For example, a number of state legislatures simply have not passed laws that single out certain sexual expression for criminalization as “obscene.”²²¹ Likewise, some state supreme

218. *Id.*

219. *Id.* at 171 (Gardebring, J., concurring in part, dissenting in part).

220. *Id.* at 172–73 (noting that “the free speech protections in our state and federal constitutions are never more important than when unpopular speech is at issue”).

221. The following six states do not have statutes outlawing the distribution or display of obscene materials to adults: Alaska, Maine, New Mexico, South Dakota, Vermont, and West Virginia. The remaining states do criminalize obscenity. *See* ALA. CODE § 13A-12-200.2 (LexisNexis 2005); ARIZ. REV. STAT. ANN. § 13-3502 (2001); ARK. CODE ANN. § 5-68-201 (2005); CAL. PENAL CODE § 311.2 (West 1999); COLO. REV. STAT. ANN. § 18-7-102 (West 2004); CONN. GEN. STAT. ANN. § 53a-194 (West 2001); DEL. CODE ANN. tit. 11, § 1361 (2001); D.C. CODE ANN. § 22-2201 (LexisNexis 2001); FLA. STAT. ANN. § 847.011 (West 2000); GA. CODE ANN. § 16-12-80 (2003); HAW. REV. STAT. ANN. § 712-1211 (LexisNexis 2003); IDAHO CODE ANN. § 18-4103 (2004); 720 ILL. COMP. STAT. ANN. 5/11-20 (West 2002); IND. CODE ANN. §

courts have interpreted their state constitutional guarantees of free speech, privacy, and/or due process as barring any such criminalization.²²² As yet another example, some state supreme courts have interpreted their state constitutional free speech guarantees as extending protection to nude dancing in bars or other venues open only to consenting adults.²²³

The approach of Oregon's Supreme Court provides an especially pertinent contrast to the Minnesota Supreme Court's approach. Almost two decades ago, the Oregon Supreme Court unanimously held, in *State v. Henry*, that there is no obscenity

35-49-3-1 (West 2004); IOWA CODE ANN. § 728.4 (West 2003); KAN. STAT. ANN. § 21-4301 (1995); KY. REV. STAT. ANN. § 531.020 (LexisNexis 1996); LA. REV. STAT. ANN. § 14:106 (2004); MD. CODE ANN., CRIM. LAW § 11-202 (LexisNexis 2002); MASS. GEN. LAWS ANN. ch. 272, § 29 (West 2000); MICH. COMP. LAWS ANN. § 752.365 (West 2004); MINN. STAT. § 617.241 (2004); MISS. CODE ANN. § 97-29-101 (2006); MO. ANN. STAT. § 573.020 (West 2003); MONT. CODE ANN. § 45-8-201 (2006); NEB. REV. STAT. ANN. § 28-813 (LexisNexis 2003); NEV. REV. STAT. ANN. § 201.249 (LexisNexis 2006); N.H. REV. STAT. ANN. § 650:2 (LexisNexis 1996); N.J. STAT. ANN. § 2C:34-2 (West 2005); N.Y. PENAL LAW § 235.07 (McKinney 2000); N.C. GEN. STAT. § 14-190.1 (2005); N.D. CENT. CODE § 12.1-27.1-01 (1997); OHIO REV. CODE ANN. § 2907.32 (West 1997); OKLA. STAT. ANN. tit. 21, § 1040.8 (West 2002 & Supp. 2006-2007); OR. REV. STAT. ANN. § 167.087 (West 2003); 18 PA. CONS. STAT. ANN. § 5903 (West 2000); R.I. GEN. LAWS § 11-31-1 (2002); S.C. CODE ANN. § 16-15-305 (2003); TENN. CODE ANN. § 39-17-902 (2003); TEX. PENAL CODE ANN. § 43.22 (Vernon 2003); UTAH CODE ANN. § 76-10-1204 (2003); VA. CODE ANN. § 18.2-374 (2004); WASH. REV. CODE ANN. § 9.68.130 (West 2003); WASH. REV. CODE ANN. § 9.68.140 (West 2003); WIS. STAT. ANN. § 944.21 (West 2005); WYO. STAT. ANN. § 6-4-302 (2005).

222. See *State v. Kam*, 748 P.2d 372, 379 (Haw. 1988) (holding that statute prohibiting promotion of pornographic adult magazines infringed on customers' right to privacy under State Constitution); *State v. Henry*, 732 P.2d 9 (Or. 1987) (holding that the state constitution's free speech guarantee extends to sexual expression that would be considered "obscene," and hence unprotected under U.S. Constitution, according to U.S. Supreme Court precedent); *Id.* at 10 (noting that Oregon Court of Appeals had struck down state obscenity statute as unconstitutionally vague, hence violating state due process guarantee, and stating that "we do not disagree," although also holding that statute violates Oregon's free speech provision). See also *People v. Ford*, 773 P.2d 1059, 1070 (Colo. 1989) (Erickson, J., concurring in the result only) (concluding that there is no obscenity exception to state constitutional free speech guarantee); *State v. Marshall*, 859 S.W.2d 289, 295 (Tenn. 1993) (Reid, C.J., concurring in part and dissenting in part) (concluding that there is no obscenity exception to state constitutional free speech guarantee).

223. See, e.g., *Commonwealth v. Sees*, 373 N.E.2d 1151 (Mass. 1978); *Bellanca v. New York State Liquor Auth.*, 429 N.E.2d 765, 768 (N.Y. 1981), *cert. denied*, 456 U.S. 1006 (N.Y. 1982); *State v. Ciancanelli*, 121 P.3d 613 (Or. 2005); *City of Nyssa v. Dufloth*, 121 P.3d 639 (Or. 2005); *Pap's A.M. v. City of Erie*, 812 A.2d 591 (Pa. 2002).

exception to the Oregon constitution's free speech guarantee.²²⁴ That decision is especially relevant to Minnesota state constitutional law because it was based on Oregon's state constitutional language and history, which are analogous to Minnesota's constitutional language and history.

First, the Oregon Supreme Court stressed that Oregon's free speech provision expressly applies to expression "on any subject whatever,"²²⁵ virtually the same phrase that appears in Minnesota's constitution.²²⁶ Second, the Oregon Supreme Court relied on the territorial obscenity law that existed at the time its state constitution was adopted, "which contained no definition of 'obscene' and which was directed primarily to the protection of youth," and therefore "certainly does not constitute any well-established historical exception to freedom of expression" for consenting adults.²²⁷ Again, the Minnesota situation is parallel; Minnesota's territorial anti-obscenity law, in force at the time the Minnesota state constitution was adopted, "was virtually identical to Oregon's territorial law."²²⁸ For these reasons, the following declaration by the Oregon court in *Henry* could have been fully applicable to Minnesota constitutional law too:

We hold that characterizing expression as "obscenity" under any definition . . . does not deprive it of protection under the Oregon Constitution. Obscene . . . forms of communication are "speech" nonetheless. . . . "[O]bscene" expression cannot be restricted [because] it is speech that does not fall within any historical exception to the plain wording of the Oregon Constitution that "no law shall be passed restraining . . . expression . . . freely on any subject whatsoever."²²⁹

By failing to enforce the Minnesota Constitution's broad free speech guarantee as written, and by allowing censorship of sexually

224. 732 P.2d 9 (Or. 1987).

225. *Id.* at 10.

226. The Minnesota Constitution protects expression "on all subjects." MINN. CONST. art I, § 3.

227. *Henry*, 732 P.2d at 16.

228. See *State v. Davidson*, 471 N.W.2d 691, 695 (Minn. Ct. App. 1991) (quoting appellant's brief), *rev'd*, 481 N.W.2d 51 (Minn. 1992).

229. *Henry*, 732 P.2d at 17 (criticizing U.S. Supreme Court's exception to First Amendment for obscenity, defined according to contemporary community standards, because "the very purpose of the First Amendment is to protect expression which fails to conform to community standards") (quoting *State v. Tidyman*, 568 P.2d 666 (Or. Ct. App. 1977), *rev. denied*, 280 Or. 683 (1977)).

oriented expression because it is deemed contrary to the majority of the community's mores, too many Minnesota judges and lawmakers earn criticism similar to that voiced by former Tennessee Supreme Court Chief Justice Lyle Reid. In dissenting from a similar ruling by the majority of that state high court, then-Chief Justice Reid stated:

And, so, the right most essential to personal dignity and democratic government, the freedom of expression, is handed into the willing grasp of the censor. That arbiter of truth can by mere declaration, upon the claim of morality and taste, abolish what has been conceived to be a constitutional right.²³⁰

V. CONCLUSION

Suppressing sexual expression counters multiple progressive goals, including individual liberty—the right of mature, mentally competent individuals to make their own choices concerning what expressive material they create or view—as well as reproductive autonomy and equality before the law, regardless of such factors as gender or sexual orientation.

In the past quarter century, too many Minnesota laws, court rulings, and official enforcement actions have strongly suppressed sexual expression. Minnesota judges and other officials have broadly construed U.S. Supreme Court decisions that permit regulation of sexual expression under the First Amendment to the U.S. Constitution. Moreover, in actions that garnered nationwide attention, the Minneapolis City Council twice passed anti-pornography ordinances, based on a model law drafted by anti-pornography, pro-censorship feminists Andrea Dworkin and Catharine MacKinnon. Thanks to the principled vetoes of Mayor Donald Fraser, those Minneapolis ordinances never went into effect. But when the same kind of measure was enacted in Indianapolis, all the courts that ruled on it, including the U.S. Supreme Court, held that it violated fundamental free speech principles. The admittedly one-sided hearings before the Minneapolis City Council that Catharine MacKinnon organized, at the Council's behest, to muster support for the law, have fueled similar speech-restrictive measures elsewhere.

230. *State v. Marshall*, 859 S.W.2d 289, 295 (Tenn. 1993) (Reid, C.J., joined by Daughtrey, J., concurring and dissenting).

In contrast to Minnesota's censorious record concerning sexual expression, lawmakers in half a dozen other states have chosen to fully respect the right of adults to view whatever sexual expression they choose, without government interference. Moreover, courts in several other states have construed their state constitutions as granting significantly more protection for sexual expression than the U.S. Supreme Court has found under the First Amendment to the U.S. Constitution.

Minnesota's state constitutional free speech guarantee is written in notably broader language than the First Amendment. Moreover, Minnesota's distinctive history suggests that the framers of the state free speech guarantee did not intend government to have the power to suppress sexual expression. Nonetheless, the Minnesota Supreme Court has read into that broad language an unstated exception for sexual expression.

For all of the foregoing reasons, when it comes to sexual expression, Minnesota law is hardly progressive. To the contrary, it is regressive and repressive, consistent with Garrison Keillor's quip quoted at the outset of this article.

If Minnesota is to live up to its progressive reputation in this crucial area, more officials and judges must follow in the footsteps of the brave Minnesotans who have stood up against censorship of sexual expression, many of whom are noted and quoted in this article. Accordingly, this article generally is dedicated to all of the Minnesota officials and citizens who have defended free speech in the past, as well as to all who will do so in the future. In particular, though, it is dedicated to two longtime progressive leaders who have been extremely influential in their home state of Minnesota, and whose positive, progressive impact—including on free speech and women's rights—has extended nationwide and beyond: Don and Arvonne Fraser.

APPENDIX

MINNEAPOLIS, MINN., PROPOSED ORDINANCE 83-Or-323 (1983)
(vetoed by Mayor Fraser Jan. 1, 1984)

AN ORDINANCE OF THE CITY OF MINNEAPOLIS

Amending Title 7, Chapter 139 of the Minneapolis Code
of Ordinances relating to Civil Rights: In General.

The City Council of the City of Minneapolis do ordain as
follows:

Section 1. That Section 139.10 of the above-entitled
ordinance be amended to read as follows:

139.10 Findings, declaration of policy and purpose.

(a) Findings. The council finds that discrimination in employment, labor union membership, housing accommodations, property rights, education, public accommodations and public services based on race, color, creed, religion, ancestry, national origin, sex, including sexual harassment AND PORNOGRAPHY, affectional preference, disability, age, marital status, or status with regard to public assistance or in housing accommodations based on familial status adversely affects the health, welfare, peace and safety of the community. Such discriminatory practices degrade individuals, foster intolerance and hate, and create and intensify unemployment, sub-standard housing, under-education, ill health, lawlessness and poverty, thereby injuring the public welfare.

(1) SPECIAL FINDINGS ON PORNOGRAPHY: THE COUNCIL FINDS THAT PORNOGRAPHY IS CENTRAL IN CREATING AND MAINTAINING THE CIVIL INEQUALITY OF THE SEXES. PORNOGRAPHY IS A SYSTEMATIC PRACTICE OF EXPLOITATION AND SUBORDINATION BASED ON SEX WHICH DIFFERENTIALLY HARMS WOMEN. THE BIGOTRY AND CONTEMPT IT

PROMOTES, WITH THE ACTS OF AGGRESSION IT FOSTERS, HARM WOMEN'S OPPORTUNITIES FOR EQUALITY OF RIGHTS IN EMPLOYMENT, EDUCATION, PROPERTY RIGHTS, PUBLIC ACCOMMODATIONS AND PUBLIC SERVICES; CREATE PUBLIC HARASSMENT AND PRIVATE DENIGRATION; PROMOTE INJURY AND DEGRADATION SUCH AS RAPE, BATTERY AND PROSTITUTION AND INHIBIT JUST ENFORCEMENT OF LAWS AGAINST THESE ACTS; CONTRIBUTE SIGNIFICANTLY TO RESTRICTING WOMEN FROM FULL EXERCISE OF CITIZENSHIP AND PARTICIPATION IN PUBLIC LIFE, INCLUDING IN NEIGHBORHOODS; DAMAGE RELATIONS BETWEEN THE SEXES; AND UNDERMINE WOMEN'S EQUAL EXERCISE OF RIGHTS TO SPEECH AND ACTION GUARANTEED TO ALL CITIZENS UNDER THE CONSTITUTIONS AND LAWS OF THE UNITED STATES AND THE STATE OF MINNESOTA.

(b) Declaration of policy and purpose. It is the public policy of the City of Minneapolis and the purpose of this title:

(1) To recognize and declare that the opportunity to obtain employment, labor union membership, housing accommodations, property rights, education, public accommodations and public services without discrimination based on race, color, creed, religion, ancestry, national origin, sex, including sexual harassment AND PORNOGRAPHY, affectional preference, disability, age, marital status, or status with regard to public assistance or to obtain housing accommodations without discrimination based on familial status is a civil right;

(2) To prevent and prohibit all discriminatory practices based on race, color, creed, religion, ancestry, national origin, sex, including sexual harassment AND PORNOGRAPHY, affectional preference, disability, age, marital status, or status with regard to public assistance with respect to employment, labor union membership, housing accommodations, property rights, education, public accommodations or public services;

(3) To prevent and prohibit all discriminatory practices based on familial status with respect to housing accommodations;

(4) TO PREVENT AND PROHIBIT ALL DISCRIMINATORY PRACTICES OF SEXUAL SUBORDINATION OR INEQUALITY THROUGH PORNOGRAPHY;

(5) To protect all persons from unfounded charges of discriminatory practices;

(6) To eliminate existing and the development of any ghettos in the community; and

(7) To effectuate the foregoing policy by means of public information and education, mediation and conciliation, and enforcement.

Section 3. That Section 139.20 of the above-entitled ordinance be amended by adding thereto a new subsection (gg) to read as follows:

(gg) Pornography. Pornography is a form of discrimination on the basis of sex.

(1) Pornography is the sexually explicit subordination of women, graphically depicted, whether in pictures or in words, that also includes one or more of the following:

(i) women are presented dehumanized as sexual objects, things or commodities; or

(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

(v) women are presented in postures of sexual submission; or

(vi) women's body parts – including but not limited to vaginas, breasts, and 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, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.

(2) The use of men, children, or transsexuals in the place of women in (1) (i–ix) above is pornography for purposes of subsections (l) – (p) of this statute.

Section 4. That section 139.40 of the above-mentioned ordinance be amended by adding thereto new subsections (l), (m), (n), (o), (p), (q), (r) and (s) to read as follows:

(l) Discrimination by trafficking in pornography. The production, sale, exhibition, or distribution of pornography is discrimination against women by means of trafficking in pornography:

(1) City, state, and federally funded public libraries or private and public university and college libraries in which pornography is available for study, including on open shelves, shall not be construed to be trafficking in pornography but special display presentations of pornography in said places is sex discrimination.

(2) The formation of private clubs or associations for purposes of trafficking in pornography is illegal and shall be considered a conspiracy to violate the civil rights of women.

(3) Any woman has a cause of action hereunder as a woman acting against the subordination of women. Any man or transsexual who alleges injury by pornography in the way women are injured by it shall also have a cause of action.

(m) Coercion into pornographic performances. Any person, including transsexual, who is coerced, intimidated, or fraudulently induced (hereafter “coerced”) into performing for pornography shall have a cause of action against the maker(s), seller(s), exhibitor(s) or distributor(s) of said pornography for damages and for the elimination of the products of the performance(s) from the public view.

(1) Limitation of action. This claim shall not expire before five years have elapsed from the date of the

coerced performance(s) or from the last appearance or sale of any product of the performance(s), whichever date is later;

(2) Proof of one or more of the following facts or conditions shall not, without more, negate a finding of coercion;

- (i) that the person is a woman; or
- (ii) that the person is or has been a prostitute; or
- (iii) that the person has attained the age of majority; or
- (iv) that the person is connected by blood or marriage to anyone involved in or related to the making of the pornography; or
- (v) that the person has previously had, or been thought to have had, sexual relations with anyone, including anyone involved in or related to the making of the pornography; or
- (vi) that the person has previously posed for sexually explicit pictures for or with anyone, including anyone involved in or related to the making of the pornography at issue; or
- (vii) that anyone else, including a spouse or other relative, has given permission on the person's behalf; or
- (viii) that the person actually consented to a use of the performance that is changed into pornography; or
- (ix) that the person knew that the purpose of the acts or events in question was to make pornography; or
- (x) that the person showed no resistance or appeared to cooperate actively in the photographic sessions or in the sexual events that produced the pornography; or
- (xi) that the person signed a contract, or made statements affirming a willingness to cooperate in the production of pornography; or
- (xii) that no physical force, threats, or weapons were used in the making of the pornography; or
- (xiii) that the person was paid or otherwise

compensated.

(n) Forcing pornography on a person. Any woman, man, child, or transsexual who has pornography forced on him/her in any place of employment, in education, in a home, or in any public place has a cause of action against the perpetrator and/or institution.

(o) Assault or physical attack due to pornography. Any woman, man, child, or transsexual who is assaulted, physically attacked or injured in a way that is directly caused by specific pornography has a claim for damages against the perpetrator, the maker(s), distributor(s), seller(s), and/or exhibitor(s), and for an injunction against the specific pornography's further exhibition, distribution, or sale. No damages shall be assessed (A) against maker(s) for pornography made, (B) against distributor(s) for pornography distributed, (C) against seller(s) for pornography sold, or (D) against exhibitors for pornography exhibited prior to the enforcement date of this act.

(p) Defenses. Where the materials which are the subject matter of a cause of action under subsections (l), (m), (n), or (o) of this section are pornography, it shall not be a defense that the defendants did not know or intend that the materials were pornography or sex discrimination.

(q) Severability. Should any part(s) of this ordinance be found legally invalid, the remaining part(s) remain valid.

(r) Subsections (l), (m), (n), and (o) of this section are exceptions to the second clause of Section 141.90 of this title.

(s) Effective date. Enforcement of this ordinance of December 30, 1983, shall be suspended until July 1, 1984 ("enforcement date") to facilitate training, education, voluntary compliance, and implementation taking into consideration the opinions of the City Attorney and the Civil Rights Commission. No liability shall attach under (l) or as specifically provided in the second sentence of (o) until the enforcement date. Liability under all other sections of this act shall attach as of December 30, 1983.

Amending Title 7, Chapter 141 of the Minneapolis Code of Ordinances relating to Civil Rights: Administration and Enforcement.

The City Council of the City of Minneapolis do ordain as follows:

Section 1. That Section 141.50 (1) of the above-entitled ordinance be amended by adding thereto a new subsection (3) to read as follows:

(3) Pornography: The hearing committee or court may order relief, including the removal of violative material, permanent injunction against the sale, exhibition or distribution of violative material, or any other relief deemed just and equitable, including reasonable attorney's fees.

Section 2. That Section 141.60 of the above-entitled ordinance be amended as follows:

141.60 Civil action, judicial review and enforcement.

(a) Civil actions.

(1) AN INDIVIDUAL ALLEGING A VIOLATION OF THIS ORDINANCE MAY BRING A CIVIL ACTION DIRECTLY IN COURT.

(2) A complaint may bring a civil action at the following times:

(i) Within forty-five (45) days after the director, a review committee or a hearing committee has dismissed a complaint for reasons other than conciliation agreement to which the complainant is a signator; or

(ii) After forty-five (45) days from the filing of a verified complaint if a hearing has not been held pursuant to section 141.50 or the department has not entered into a conciliation agreement to which the complainant is a signator. The complainant shall notify the department of his/her intention to bring a civil action, which shall be commenced within ninety (90) days of giving the notice. A complainant bringing a civil action shall mail, by registered or certified mail, a copy of the summons and complaint to the department and upon receipt of same, the director shall terminate all proceedings before the department relating to the complaint and shall dismiss the complaint.

No complaint shall be filed or reinstituted with the department after a civil action relating to the same unfair discriminatory practice has been brought unless the civil action has been dismissed without prejudice.

GOVT OPS – Your Committee, to whom was referred ordinances amending Title 7 of the Minneapolis Code of Ordinances, to add pornography as discrimination against women and provide just and equitable relief upon finding of discrimination by hearing committee of the Civil Rights Commission, and having held public hearings thereon, recommends that the following ordinances be given their second readings for amendment and passage:

- a. Ordinance amending Chap 139 relating to Civil Rights: In General;
- b. Ordinance amending Chap 141 relating to Civil Rights: Administration and Enforcement.

MINNEAPOLIS, MINN., PROPOSED ORDINANCE 83-Or-323 (1983) (Vetoed by Mayor Fraser on Jan. 1, 1984).
