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Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights (2024)

Nadine Strossen

DEFENDING PORNOGRAPHY

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NADINE STROSSEN

WITH A NEW PREFACE

DEFENDING PORNOGRAPHY

Second Child Coming, copyright © 1998 by Saelon Renkes. This hand-painted photograph is posted on the website of Art on the Net, a plaintiff in three ACLU lawsuits challenging state cybercensorship laws (in Michigan, New Mexico, and New York) that endangered all online nudity, even in fine art.

DEFENDING PORNOGRAPHY

Free Speech, Sex, and the Fight for Women's Rights

NADINE STROSSEN

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Preface to the 2024 Edition

I'm afraid this book will always be timely. . . . [T]he urge to censor . . . seems to come as naturally to people as the diverse sexual desires censors condemn.

—Wendy Kaminer,
Foreword to the Second Edition
of *Defending Pornography* (2000)

During the first half of the 2022–23 school year . . . books [in public school libraries or classrooms] are more frequently labeled "pornographic" or "indecent" [by] . . . activists and politicians to justify removing books that do not remotely fit the well-established legal and colloquial definitions of "pornography." Rhetoric about "porn in schools" has also been advanced as justification for . . . new state laws, some of which would bar any books with sexual content [including] . . . health-related content. . . . Overwhelmingly, book banners continue to target stories by and about people of color and LGBTQ+ individuals.

—PEN America,
2023 Banned Books Update (2023)

The limitations on free speech caused by FOSTA [a 2018 federal statute, the "Fight Online Sex Trafficking Act"] have essentially censored harm reduction and safety information sharing, removed tools that sex workers used to keep themselves and others safe, and interrupted organizing and legislative endeavors to . . . enhance the wellbeing of sex

> workers and trafficking survivors alike. [FOSTA] has had a devastating impact on already marginalized and vulnerable communities.
>
> —Brief filed by Decriminalize Sex Work et al., in constitutional challenge to FOSTA (2022)

> FOSTA's . . . censorial effect has resulted in the removal [from online platforms] of speech created by LGBTQ+ people and discussions of sexuality and gender identity. This is the continuation of a long history of the silencing and oppression of LGBTQ+ people through vague and overbroad laws.
>
> —Brief filed by Transgender Law Center, in constitutional challenge to FOSTA (2022)

PEN America's recent statement on banned books and the two constitutional challenges to FOSTA by Decriminalize Sex Work[1] and the Transgender Law Center[2] illustrate the enduring nature of the problems that *Defending Pornography* chronicled. Today, measures censoring sexual expression continue to abound from across the ideological spectrum, not only violating free speech rights but also undermining the health and safety of women, LGBTQ+ people, young people, and others who are the avowed beneficiaries of such censorship. Alas, Wendy Kaminer's prediction that *Defending Pornography* "will always be timely" has proven prescient. In this new preface, I will flag its major themes and trace their resonance throughout the three decades since I wrote it, noting some of the multifarious, ideologically diverse attacks on sexual expression that have prevailed when each reissue went to press (1994, 1999, and 2023).

Defending Pornography, 1995

I wrote *Defending Pornography* to present the feminist case against the then-widespread view, originated by writer Andrea Dworkin and law professor Catharine MacKinnon, that "pornography"—which they

defined as sexual expression that is "subordinating" to women—should be suppressed because it causes discrimination and violence against women. In contrast with this strain of so-called "radical" feminism, anti-censorship feminists espoused classical liberal values of free speech and equality; we maintained that censoring sexual expression, no matter how well-intended, would do more harm than good for women's rights and safety. As *Defending Pornography* explained, the term "radical" is inaccurate, since the pro-censorship feminists' views were conservative in key respects, even reactionary; accordingly, I will continue to put the term in quotation marks.

To be sure, liberal free speech principles would permit the government to restrict sexual expression—along with other forms of expression—if it could show that the expression directly, imminently caused or threatened great harm, such as discrimination or violence against women, and that the restriction was necessary to avert the harm. Despite substantial analysis of any potential causal connection between sexual expression and harm by relevant experts, however, the evidence fails to show any such causal link.

The lack of evidence substantiating any harmful impact of sexual expression, which *Defending Pornography* discussed in detail, was reaffirmed by a federal judge just before this preface went to print. On August 31, 2023, US District Judge David Alan Ezra issued a preliminary injunction against a Texas law requiring age verification to access sexual expression content online. The law's stated aim was to protect children from the alleged adverse impacts of such expression; the judge ruled that the law violates the First Amendment. Considering the evidence in the most favorable light from the government's perspective, Judge Ezra explained that "the relevant science shows, at best, substantial disagreement amongst physicians and psychologists regarding the effects of pornography."[3] He cited a 2022 study of anti-pornography advocacy from 1984 to 2018, which concluded that "the anti-pornography movement is growing 'more connected to religious conservatism than views about scientific authority.'"[4] Moreover, just as *Defending Pornography* quoted some feminist scholars who explicated pornography's positive impacts specifically for women, Judge Ezra quoted recent feminist scholarship in the same vein.[5]

Definitions and Legal Concepts

"Pornography" has no specific legal meaning, because the Supreme Court has never defined a category of sexual speech in order to restrict its use under the First Amendment. In contrast, the Supreme Court has held that "child pornography"—sexually explicit photographs or films of actual minors—is constitutionally unprotected because of its inherent exploitation of the minors who are (ab)used in the production process. A typical dictionary definition of "pornography" (from Dictionary.com) is "sexually explicit [expression] whose purpose is to elicit sexual arousal."

The only subset of sexual expression that is constitutionally unprotected because of what it depicts or describes—in contrast with child pornography, which is constitutionally unprotected because of the minors who were (ab)used to produce it—is labeled "obscenity." To restrict a book or other expressive work as "obscene," the government must show that it satisfies all elements of a multi-pronged Supreme Court definition. Among other things, the government must show that, when considered as a whole, the work lacks "serious literary, artistic, political, or scientific value."[6] Importantly, the work's value is assessed under national standards, not those of any local community, thus shielding sexual expression from adverse judgments by particular communities with relatively intolerant perspectives about such expression.

In sum, almost all sexual expression—including almost all such expression that satisfies any definition of pornography—is constitutionally protected. Explaining that "[t]he portrayal of sex . . . is not itself sufficient reason to deny material . . . constitutional protection," the Supreme Court has observed that "[s]ex, a great and mysterious motive force in human life, . . . is one of the vital problems of human interest and public concern."[7]

Dictionary and legal definitions aside, the term "pornography" in everyday speech generally has negative connotations, so that people of varying viewpoints apply it to whatever sexual expression they personally dislike. Correspondingly, politicians regularly invoke the term to designate whatever sexual expression they seek to suppress. As one wit put it: "What turns *me* on is 'erotica,' but what turns *you* on is 'pornography.'"

The inherent ambiguity of the term "pornography," and the resulting reality that any restriction on it relies on the enforcing authority's subjective viewpoint, is exemplified by what is probably the most famous description of that term: former Supreme Court Justice Potter Stewart's much-quoted statement that "I [can] not . . . define [it] . . . .[b]ut I know it when I see it."[8] The problem is that every one of us sees a different "it," thus endangering essentially all sexual expression.

The Distinctive Feminist Anti-Censorship Perspective

Traditionally, anti-censorship arguments against pornography restrictions—including the "radical" feminist laws—have been based on First Amendment principles, which do indeed invalidate such laws, as reviewing courts have consistently ruled. Among other First Amendment flaws, these laws violate the "bedrock"[9] legal principle of "viewpoint neutrality": that the government may neither favor nor disfavor speech based on its views or ideas. Directly flouting this principle, the Dworkin-MacKinnon concept of "illegal pornography" explicitly singles out sexual expression because of its "subordinating" view toward women.

The fact that the "radical" feminist anti-pornography laws blatantly violated the First Amendment fed a misconception that these feminists purveyed: that there is an inevitable clash between free speech and gender equality, and hence, supporters of women's rights must endorse the censorial measures. Feminists who supported censorship attacked those of us in the anti-censorship camp, calling us "scabs," "Uncle Toms,"[10] and even accusing us of not being authentic women. For example, one leader of a feminist pro-censorship group called me an "honorary man."[11]

At the same time that these debates about sexual expression were raging among feminists, we saw similar, burgeoning debates in the broader context of "hate speech"—speech conveying hateful or discriminatory ideas about members of historically marginalized groups. Between 1982 and 1990, three law professors wrote influential law review articles supporting hate speech restrictions on campus and beyond, premised on the same broad claim that the pro-censorship feminists made: that free speech and equality principles necessarily conflict with each

other.[12] Indeed, the "radical" feminist concept of pornography constituted a specific type of hate speech: sexual expression that conveyed hateful or discriminatory views about women.

In response to these increasingly prevalent perspectives about the negative interrelationship between free speech and gender equality (as well as equality more generally), anti-censorship feminists raised counterarguments that were expressly grounded on concerns of gender equality: that the censorial schemes, far from promoting women's equality and safety, would actually undermine them. For example, in 1992, the National Organization for Women (NOW) of New York State declared: "Censorship has been, throughout history, the single most widely used patriarchal tool for 'protecting' women—from birth control, abortion, sexual satisfaction and non-heterosexual relationships. Without free speech we can have no feminist movement."[13]

In a 1992 essay in *The Nation*, renowned Harvard professor Henry Louis Gates, Jr. praised the "distinctive feminist contribution" that anti-censorship feminists made to debates about sexual expression. He wrote: "The strain of anti-pornologism is hardly what's distinctive about feminism; whereas anti-anti-pornology—the critique of the anti-porn movement on grounds other than constitutional formalism or First Amendment pietism—is a distinctive feminist contribution."[14] Given the importance of the specifically feminist anti-censorship perspective, I was delighted to have the opportunity to write *Defending Pornography*, to present to a broader audience the arguments that I, along with many other anti-censorship feminists, had been raising in other forums, including scholarly articles and legal briefs.

Defending Pornography, 2000

The book was reissued only five years later, highlighting the widespread arrival of the internet as urgent, and hotly contested, new terrain for government censorship. Both new elements of the second edition—Wendy Kaminer's foreword and my new introduction—focused on this theme. As the internet became more widely accessible after the World Wide Web was launched into the public domain in 1993, sexual expression faced increasingly severe attacks from across the ideological

spectrum. Public awareness of the internet added fuel to these raging censorial fires.

As *Defending Pornography* described, starting in the late 1970s and continuing throughout the 1980s and beyond, an unprecedented, yet influential, coalition formed between anti-pornography "radical" feminists and Christian and Republican conservatives. While the first group attacked sexual expression that they considered inconsistent with their feminist values, the latter attacked sexual expression that, in their view, undermined traditional family values. Their dramatically different views about which sexual expression posed particular dangers notwithstanding, the two factions repeatedly teamed up to support various censorial initiatives, including those recommended by the 1986 report of the Meese Pornography Commission, spearheaded by President Ronald Reagan's attorney general Ed Meese. From 1991 to 1993, responsive to pressures from these vocal anti-pornography advocates on both ends of the ideological spectrum, Congress considered enacting a Dworkin-MacKinnon-style law, which had significant bipartisan support.

Given this broad cross-partisan support for censoring sexual expression at the time that the internet burst upon public, press, and political radars, both factions unsurprisingly greeted fears about "cyberporn" in particular. The result was the 1996 Communications Decency Act (CDA), a sweeping federal legislation restricting online sexual expression, as well as multiple similar state laws and local regulations. These measures were passed by overwhelming bipartisan majorities. In light of these developments, I welcomed the opportunity to write a new introduction to *Defending Pornography*, explaining why the censorship of online sexual expression was as dangerous for women's rights—and LGBTQ+ rights—as the censorship of sexual expression had always been in any other media.

The CDA's threat to historically disempowered sexual and gender identities was highlighted by the roster of clients in the successful American Civil Liberties Union (ACLU) First Amendment challenge to the CDA provisions outlawing "indecent" or "patently offensive" online expression, which the Supreme Court unanimously struck down in a landmark 1997 decision.[15] These clients, whose expression would have been suppressed under the CDA, included important organizations

advancing women's rights, as well as reproductive freedom and LGBTQ+ rights. They joined the many mainstream free speech-oriented organizations that also challenged the law, such as the American Booksellers Association and the American Library Association.

To illustrate the CDA's adverse impact on expression of particular importance for women, thus continuing the historic pattern of all laws censoring sexual expression, I will cite one passage from the second edition introduction. It refers to the 1873 Comstock Act, initiated by the controversial "anti-vice" crusader Anthony Comstock. In the same phrase, the Act outlaws both "obscene, lewd, or lascivious" materials, and "any article . . . intended for the prevention of conception or procuring of abortion," as well as "any . . . information" about any of the prohibited materials. The law thus expressly conflates expression about contraception and abortion with other expression outlawed as "obscene," and moreover equates expression about contraception and abortion with contraceptives and abortifacients. The introduction explained the links between the Comstock Act and the CDA:

> As *Defending Pornography* recounts, during the ACLU's first decade of our existence, one of our clients was Margaret Sanger. She was repeatedly harassed and prosecuted under the Victorian-era Comstock Act, the first federal anti-obscenity law, which criminalized the information she conveyed about women's reproductive health and options. Sadly, more than three-quarters of a century later, we had to defend the organization that Sanger founded [Planned Parenthood] against the Internet era's first federal cybercensorship law, which criminalized the very same information.[16]

Even more sadly, this passage from *Defending Pornography*'s second edition is still pertinent. In 2023, the 1873 Comstock Act—which is still on the books—has been continuously wielded in multiple courts to further curb women's reproductive options, already severely diminished by the Supreme Court's 2022 *Dobbs* decision overturning *Roe v. Wade*.[17] This nineteenth-century law has been invoked to curb women's access to mifepristone, which the Food and Drug Administration (FDA) approved in 2000 for use in terminating a pregnancy during its early

stages. In February 2023, twenty Republican lawmakers cited the Act in letters to CVS and Walgreens pharmacies, threatening them with legal action if they distributed mifepristone.[18] And in April 2023, a federal judge in Texas ordered a hold on the FDA's approval of mifepristone, citing the Comstock Act in his opinion.[19]

Just as the Comstock Act equated the distribution of contraceptives and abortifacients with the distribution of information about them, we are now witnessing the same false, dangerous equation between conduct and expression. Shortly after the *Dobbs* decision, the National Right to Life Committee circulated a model state statute, which included bans on certain expression about abortion on the rationale that it could "aid and abet" illegal abortions.[20]

Restricting speech on the rationale that it is tantamount to illegal conduct is a tactic that has also been deployed by advocates with very different perspectives about abortion and other issues relating to sex and gender. As this new preface discusses, some feminists have supported restrictions on wide-ranging expression—such as classroom discussions of rape and LGBTQ+ rights—on the grounds that it is tantamount to illegal discrimination or even violence. This issue illustrates why all people who depend on robust free speech to advocate their causes—including women, feminists, LGBTQ+ individuals, and reproductive rights activists—have a special stake in resisting speech-suppressive tactics, even when the immediate result might accord with their policy goals. Given the deep societal division around issues concerning sex and gender, and the shifting political winds, a speech-suppressive measure that in a certain community at a certain time might aid supporters of a particular cause will, in another community or at another time, aid opponents of that very same cause.

Defending Pornography, 2024

When NYU Press expressed interest in publishing a new preface for another reissue of *Defending Pornography*, I was forced to acknowledge the book's ongoing timeliness, consistent with Wendy Kaminer's 2000 prediction.

Recent Assaults on Sexual Expression

To illustrate the ongoing efforts to censor sexual expression since this book's prior reissue, I will list some additional examples, beyond those I have already noted. In most of these situations, the stigmatizing term pornography has been deployed against the targeted material to convey the view that it lacks value and, even worse, is harmful to individuals and society. Following the pattern of earlier eras, some of these censorial efforts are supported mostly by people on the left, others supported mostly by people on the right, and still others receiving broad support from across the political spectrum.

- In addition to suppressing sexual expression in public and school libraries, some state legislation has also suppressed such expression in bookstores. For example, a 2022 Arkansas law made it a crime for a bookseller or a library to make any books "available" to minors that could be deemed "harmful" to them. Given the law's severe penalties, it was clearly designed to deter booksellers and librarians from making any books with any sexual content available to minors. As a practical matter, considering the difficulties of enforcing such restrictions to minors only, these laws will also impede adults' access to the same material.
- A 2023 Arkansas statute empowers anyone who claims to be "affected by" any material in a library's collection to "challenge the appropriateness" of such material, without defining "appropriateness." The executive director of the Garland County, Arkansas Library reported that, pursuant to this sweeping provision, his library had received a "blanket request" to remove "all materials with LGBTQ+ characters."[21]
- Even mere nudity has been the basis for removing books and artworks from public schools and other public settings, even when the nudity is a minor element of the work and the work has serious value. Perhaps the most notorious case in point is Art Spiegelman's Pulitzer Prize-winning graphic novel *Maus*, which depicts the horrors of the Holocaust. *Maus* has been repeatedly removed from public schools due to one small cartoon drawing of a naked woman in a bathtub, in which her breasts and legs are visible

above the water. This drawing depicts Spiegelman's mother after she had committed suicide.

- In July 2023, the US House of Representatives passed a proposal to block military schools from purchasing or having "pornographic and radical gender ideology books" in their libraries.[22]
- Legislation in multiple states have banned "drag" performances, using broad, vague language that encompasses any cross-dressing, even without sexual connotations. These laws therefore endanger wide-ranging artistic expression, including, for example, the plays of William Shakespeare. As author Charles P. Pierce commented in a 2023 essay, "Shakespeare is just collateral damage for transphobic laws against drag shows."[23]
- Multiple state laws have imposed age verification requirements for accessing online sites with sexual content. Because these measures invade privacy, they deter adults, as well as minors, from accessing constitutionally protected expression. In his 2023 decision striking down Texas's age verification law, federal judge David Alan Ezra explained that the law's deterrent effect "is particularly acute because access to sexual material could reveal intimate desires and preferences." Noting that Texas still has not repealed its criminal "anti-sodomy" law, despite the Supreme Court's 2003 decision invalidating it, Judge Ezra concluded: "Given Texas's ongoing criminalization of homosexual intercourse, it is apparent that people who wish to view homosexual material will be profoundly chilled from doing so if they must first affirmatively identify themselves to the state."[24]
- Overly broad concepts of punishable sexual harassment have been enforced either formally, through means such as campus regulations, or informally, through campaigns such as the #MeToo movement. As *Defending Pornography* stressed, sexual harassment is indeed a type of illegal sex discrimination, but the key goal of countering such discrimination is undermined by falsely equating sex*ual* expression with sex*ist* conduct.

This double distortion wrongly conflates not only expression with conduct, but also sexuality with sexism, despite the Supreme Court's clear warning to the contrary. In a unanimous 1998 decision (which

was joined by the Court's two female justices at the time, Sandra Day O'Connor and Ruth Bader Ginsburg), the Court explained that Title VII, the federal statute that outlaws gender-based discrimination in the workplace, "does not prohibit all verbal or physical harassment in the workplace," but only such harassment that constitutes "*discriminat[ion]* . . . because of . . . sex." The Court stressed that even harassing expression doesn't "automatically" constitute "discrimination because of sex merely because the words used have sexual content or connotations."[25] On campus, though, it is precisely this wrongheaded equation between sexually themed words and sex discrimination that has instigated sexual harassment investigations and even punishments—including of women and feminist faculty members—simply for their nonviolent expression about sex or gender with which complainants disagree.

Likewise, some participants in the #MeToo movement have failed to sufficiently distinguish those convicted of serial rape (such as Harvey Weinstein) from those accused of misogynistic or insensitive expression (such as Al Franken), and have accordingly subjected the latter to disproportionately harsh punishment. In 2018, one hundred prominent French women, including the film star Catherine Deneuve, published a column in the leading French newspaper *Le Monde*, complaining that the #MeToo movement and its French counterpart "put on exactly the same level as sexual aggressors" men whose "only wrong was to have . . . talked about 'intimate' things at a professional dinner or sent messages with sexual connotations to women in whom the attraction was not reciprocated." This letter also complained that #MeToo violated the free speech rights not only of men who had allegedly engaged in inappropriate sexual expression, but also women who critiqued such excesses. It stated:

> Following the Weinstein affair, there was a legitimate awareness of sexual violence against women, especially in the workplace, where some men abuse their power. It was necessary. But this freedom of speech today turns into its opposite: we are told to speak properly, to silence what is upsetting, and those who refuse to comply . . . are regarded as traitors, accomplices![26]

The Enduring, Expanding Influence of the Feminist Anti-Pornography Ideology

In light of the persistent and ever-expanding efforts to censor sexual expression in this new millennium, the remainder of this preface offers some observations about the ongoing relevance of several key themes in *Defending Pornography*. Although the courts swiftly struck it down as a violation of core First Amendment principles,[27] the Dworkin-MacKinnon model anti-pornography law has had an abiding and even increasing cultural impact as a worldview; it has continued to foster speech-suppressive attitudes and actions toward many types of controversial expression, in addition to sexual expression. This preface concludes by noting some encouraging countercurrents.

Just as the "radical" feminist movement to censor certain sexual expression fueled the general movement to censor hate speech more broadly, it also pioneered several interrelated ideas that have now become widely accepted, far beyond the pornography context, with ongoing impacts to speech suppression. At the time, these ideas were generally viewed as extreme and even as hyperbolic rhetoric, but more recently they have influenced important policy decisions, including not to permit certain people to speak on campus, and not to permit certain ideas or sexual identities to be discussed in classrooms. As is true for the feminist anti-pornography perspective in general, these ideas actually undermine women's and LGBTQ+ people's rights and safety, far from advancing them.

Dangerous Blurrings of Key Distinctions . . .

. . . Between Words and Violence, and Between Intentional and Unintentional acts

The then-novel ideas that the feminist pro-censorship movement launched have increasingly influenced policies regarding not only sexual expression, but also other controversial expression. Examples include the following: that women should be shielded from sexually

themed expression that makes them "uncomfortable"; that words have the potential to not only lead to violence and other harm, but also that words themselves can *be* harmful and violent; and that a speaker's intent is irrelevant, so that even campus speech with an important educational purpose may be proscribed or punished if it makes a member of the campus community "uncomfortable."

. . . Between Rape and Expression about It

Detrimental to women's rights and safety, pro-censorship feminists have discounted—if not outright denied—distinctions between actual rape and depictions or descriptions of rape. These same groups advance interrelated arguments that women should be shielded from any expression about rape on the theory that it causes them "discomfort" and "harm."

In more recent years, this elision between expression about rape and actual rape has become increasingly accepted—including at law schools, where one would expect students and faculty members to sharply distinguish any illegal act from expression that describes or depicts it. The introduction to the second edition of *Defending Pornography* described a then-novel situation (arising in 1999), in which a prominent Columbia Law School professor faced serious sexual harassment accusations for including a question about sexual violence (based on actual cases that had been discussed in class) on the take-home final exam in his criminal law course.

Unfortunately, that Columbia incident is no longer novel. It is now all too common for law students and faculty members to deem academic discussions about sexual violence sufficiently harmful enough to outweigh the benefits of educating future lawyers and policymakers so that they can effectively defend and protect against sexual violence. As Harvard Law Professor Jeannie Suk Gersen explained in a 2014 *New Yorker* article, many female law students have objected to studying cases about rape and other sexual assault in their criminal law courses on the grounds that reading about and discussing the crime "might be traumatic." Gersen pointed out that many criminal law professors are even declining to cover this important topic, for fear of being accused of (unintentionally) harming some students. In a nod toward

the sustained impact that the pro-censorship feminists have had on our culture, Gersen observed: "[M]any students and teachers appear to be absorbing a cultural signal that . . . discussion of sexual misconduct . . . [creates] the risk . . . of a traumatic injury analogous to sexual assault itself."

Gersen concludes that the removal of sexual assault cases from a student's legal education "would be a tremendous loss—above all to victims of sexual assault."[28] For many of us older feminists, this is a bitterly ironic development, since the important topic of rape and sexual violence has too often been excluded from criminal law courses, reduced instead to a "women's issue," deemed of insufficient general interest. It was thanks to advocacy by the growing numbers of women law students and faculty members, starting in the 1970's (of whom I was one), that the law of sexual violence was recognized as eminently deserving of study—not least to spur efforts to reform the law to facilitate fair prosecutions—equipping lawyers to effectively pursue such prosecutions.

. . . Between Sexual Expression and Sexist Conduct

Defending Pornography contains one of the earliest discussions of the conflation of these issues. It bears repeating that, although sexual harassment does constitute illegal sex discrimination, it has often been too broadly defined as extending to any expression with any sexual content or connotation. Since Catharine MacKinnon played a leading (and commendable) role in the legal system's recognition of sexual harassment as a form of illegal sex discrimination, it is not surprising that she and others have construed excessive sexual expression as punishable sexual harassment.

Restricting speech on the rationale that it is tantamount to illegal conduct is a tactic that has also been deployed by advocates with widely varying perspectives on issues relating to sex and gender. For example, anti-abortion activists are seeking to outlaw expression about abortion in states that severely restrict abortions. Even beyond providing general support for the dangerous blurring of the distinction between illegal conduct and speech about it in the anti-abortion context, this blurring in the context of sexual harassment itself endangers women's rights.

Appropriately, the Supreme Court has worked to narrowly hem in the conduct—including expression—that may be considered illegal sexual harassment in specific contexts. In the workplace, the Court has held that the expression must be "severe or pervasive" enough to create a "hostile or abusive work environment."[29] In the educational context, the Court has ruled that the expression must be "so severe, pervasive, and objectively offensive, and [it must] so undermine[ ] and detract[ ] from the victims' educational experience, that the victim-students are effectively denied equal access to [the] institution's resources and opportunities."[30]

A broader concept of speech that constitutes sexual harassment does not promote the key goal of countering sex discrimination, but rather undermines it. Vesting enforcement authorities with further discretion to restrict sexual expression under the rationale of harassment has the same predictable result as any measure that censor sexual expression: it too broadly suppresses speech that is especially important for women. Both prior editions of *Defending Pornography* recount multiple instances where complaints of sexual harassment have assailed expression by women feminists, ranging from artistic creations to academic lectures.

Since the book's second edition, an unduly expansive concept of proscriptive sexual harassment has become increasingly widespread, including in campus policies. A 2017 report by the American Association of University Professors concludes that universities have shown "a tendency to treat academic discussion of sex and sexuality as contributing to a hostile environment," a form of illegal sexual harassment.[31] Universities have continued to punish students and faculty members for all manner of sexual expression, even when it has an important academic purpose—and even when it has a feminist perspective.

Perhaps the most egregious example is the prolonged sexual harassment investigation that Northwestern University conducted against film professor Laura Kipnis in 2015 following an article she published in the *Chronicle of Higher Education* in which, ironically, she criticized the exaggerated, distorted concept of sexual harassment that is common on campus. For months, the university subjected her to Star Chamber-type interrogations, pursuing the charge that her essay somehow constituted unlawful harassment.

Symptomatic of the expanding impact of the "radical" feminist theories, well beyond the context of the sexual expression they directly

targeted, colleges and universities have incorporated the dangerous equation between conduct and expression into their codes barring "discriminatory harassment." Amplifying the problem, these policies typically define prohibited expression in broad, vague terms. They thus have enormous, chilling impacts on virtually any expression that refers to sex or gender (among myriad identity factors).

Let me cite one example from the University of Central Florida that a federal appellate court struck down in 2022. In all-too-nebulous language, this policy barred any student's speech that "unreasonably altered another student's educational experience" on the basis of multiple identity factors, including sex or gender. At oral argument, one of the judges asked the University's lawyer whether a student would violate this policy by stating that "abortion is immoral." The university counsel responded that "he couldn't say for sure." As the court commented: "If UCF's own attorney . . . can't tell whether a particular statement would violate the policy, it seems eminently fair to conclude that the school's students can't either."[32]

Regardless of whether a particular university expressly incorporates an unduly broad concept of sexual harassment into its policies, such concepts have become widely accepted across college campuses. Therefore, many students and faculty members avoid discussing topics related to sex and gender altogether, for fear of being accused of making someone "uncomfortable" or causing them "harm" (even if unintentionally). Surveys confirm rampant self-censorship around these concepts, even when they entail key public policy issues. For example, in a 2022 comprehensive survey of college and university students, which College Pulse conducted for the Foundation for Individual Rights and Expression (FIRE), 49 percent of students named abortion as a topic about which it is "difficult to have an open and honest conversation" on their campus.[33]

Another current topic of special importance to women and feminists, as well as LGBTQ+ people, is the potential impact that various policies concerning trans people have on gender-segregated entities. Prime examples include policies about the participation of trans women in women's sports and about accommodating trans women in certain facilities for women where safety concerns are acute, such as prisons and shelters for domestic violence victims. Feminists, cis women, and

trans women have sharply disagreed about these policies, with some in each group expressing their support for and opposition to these policies, respectively. Yet too many people—including some in each of these groups—refrain from expressing any views on such important issues. For instance, in the College Pulse survey cited above, 44 percent of respondents said that it is difficult to candidly discuss transgender issues on their campus.[34]

To be sure, the expression of views on such sensitive, important topics—across the ideological spectrum—could make any listener uncomfortable. But such discomfort is a small price to pay for the equal rights we all have, regardless of identity or ideology, to not only express our own views, but also to listen to other speakers' views, and to live in a society whose public policies are shaped by vigorous debates among "We the People." As the Supreme Court observed in a 2011 case: "As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate."

Eternal Anti-Censorship Vigilance—and Victories

> Eternal vigilance is the price of liberty.
>
> —Thomas Jefferson

Although many recent measures have been proposed to curtail sexual expression in contravention of fundamental First Amendment rights, a silver lining appears in the high success rate of lawsuits which have been filed to reverse these attempts. As in the past, these lawsuits have been supported by a broad array of organizations advocating for the rights of the people who are the most adversely affected by the censorship of sexual expression, including women, reproductive rights advocates, LGBTQ+ people, feminists, librarians, booksellers, teachers, and students.

Notably, the judges who have held that the First Amendment bars these speech-suppressive measures have been appointed by ideologically diverse US presidents. For example, the federal judges who struck down three state laws restricting sexual expression in the summer of

2023—Tennessee's anti-drag law, Arkansas's law against materials in libraries and bookstores deemed "harmful to minors," and Texas's age verification law for online sexual material—were appointed by former presidents Trump, Obama, and Reagan, respectively. To be sure, too many people—including too many politicians—tend to support "freedom of speech for *me*, but not for *thee*." Fortunately, though, many other people—including federal judges—recognize the golden rule of free speech: that we cannot enjoy freedom for the speech we love unless we also protect freedom for the speech we loathe.

Complementing the lawsuits enforcing First Amendment rights, there have been proliferating efforts to foster a robust free speech culture to counter the speech-suppressive climate that has hampered discussions on campus and elsewhere. These include: new campus centers, programs, and even academic departments and dedicated schools focusing on free speech, intellectual freedom, and civil discourse; new civil society organizations with the same mission; and the development of resources for every educational level, readily available online, to not only bolster knowledge about free speech rights, but also to gain skills for exercising them. Key to these efforts is education about the essential benefits that flow from robust free speech for every individual, for our democracy overall, and specifically for groups that have traditionally lacked political power, including women and LGBTQ+ people. I hope that this most recent reissue of *Defending Pornography* will contribute to these vital educational efforts, and will help to deflect future developments that would warrant another edition.

—Nadine Strossen
New Milford, Connecticut
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NOTES

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1. *Woodhull Freedom Foundation v. United States*, Case No. 22-5105, United States Court of Appeals, D.C. Cir., filed 14 September 2022, Brief of Decriminalize Sex Work, et al. in Support of Appellants, at p. 8.

2. Ibid. Brief of *Amicus Curiae*, Transgender Law Center, et al. in Support of Appellants, p. 1.
3. *Free Speech Coalition v. Colmenero*, Case No. 1:23-CV-917-DAE, United States District Court, W. D. TX, filed 31 August 2023, at p. 69.
4. Ibid. at p. 67. (Quoting Samuel L. Perry, "Banning Because of Science or In Spite of It?: Scientific Authority, Religious Conservatism, and Support for Outlawing Pornography, 1984–2018," *Social Forces* 100, no. 3 (March 2022): p. 1385.)
5. Ibid. (Quoting Athanasia Daskalopoulou and Maria Carolina Zanette, "Women's Consumption of Pornography: Pleasure, Contestation, and Empowerment," *Sociology* 54, no. 5 (May 2020): p. 969. The authors note that female consumption of pornography is both "empowering and disciplining" for women.)
6. *Miller v. California*, 413 U.S. 15, 24 (1973).
7. *Roth v. United States,* 354 U.S. 476, 487 (1957).
8. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (concurring).
9. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).
10. Catharine MacKinnon, quoted in Pete Hamill, "Women on the Verge of a Legal Breakdown," *Playboy*, January 1993, p. 186.
11. Patrick Cooke, "Defending the L-Word," *Vogue*, December 1992, pp. 156–160, at p. 158 (quoting Norma Ramos).
12. Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 33 Duke Law Journal 431–483 (1990); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 1989 Michigan Law Review 2320–2381 (1989); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 1982 Harvard Civil Rights-Civil Liberties Law Review 133–181 (1982). For a response to these arguments, see Nadine Strossen, *HATE: Why We Should Resist It with Free Speech, Not Censorship* (New York: Oxford University Press, 2020).
13. NOW-New York State, "Canada Sounds Death-Knell for Free Speech," press release, 28 February 1992.
14. Henry Louis Gates, Jr., "To Deprave and Corrupt," review of *Girls Lean Back Everywhere: The Law of Obscenity and the Assault on Genius*, by Edward de Grazia, *The Nation*, 29 June 1992, pp. 898–903, at p. 898.
15. *Reno v. ACLU*, 521 U.S. 824 (1997).
16. At pp. XX in this volume.
17. *Roe v. Wade*, 410 U.S. 113 (1973).
18. Jim Salter, "20 attorneys general warn Walgreens, CVS over abortion pills," *AP News*, 1 February 2023, https://apnews.com/article/abortion-missouri-state-government-west-virginia-united-states-us-food-and-drug-administration-a1b1a387788bb5aaa39c9ce4128d77ab.
19. *Alliance for Hippocratic Medicine, v. FDA*, Case No. 22-CV-223-Z, N.D. Tex. Issued 7 April 2023.
20. National Right to Life Committee, "National Right to Life Committee Proposes Legislation to Protect the Unborn Post-Roe," press release, 15 June 2022. The press release links to the text of the model law. The model law includes language such as, "Aiding or abetting an unlawful abortion should include, but not be limited to: giving instructions over the telephone, the internet, or any other medium of communication regarding self administered abortions or means to obtain an unlawful abortion; hosting or maintaining a website, or providing internet service, regarding how to obtain

an unlawful abortion; . . . and providing referrals to an unlawful abortion provider." For full text of the model law, see www.nrlc.org/wp-content/uploads/NRLC-Post-Roe-Model-Abortion-Law-Version-2.pdf.

21. Memorandum Opinion and Order, *Fayetteville Public Library v. Crawford County, Arkansas* (W.D. Ark.) Case 5:23-cv-05086-TLB Document 53, filed 29 July 2023, at p. 23.
22. Jonathan Oosting, "Tudor Dixon eyes banning 'pornographic' books in Michigan schools," *Bridge Michigan,* 20 September, 2022, www.bridgemi.com.
23. Charles P. Pierce, "Transphobic, Anti-Drag Laws May Affect Performances of Shakespeare, Too," *Esquire,* 26 January 2023, www.esquire.com.
24. *Free Speech Coalition v. Colmenero*, at pp. 40–41.
25. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998) (emphasis in original).
26. Valeriya Safronova, "Catherine Deneuve and Others Denounce the #MeToo Movement," *The New York Times*, 9 January 2018.
27. *American Booksellers Association v. Hudnut*, 598 F. Supp. 1316, 1340–41 (D. Ind. 1984), *aff'd*, 771 F. 2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 10001 (1986).
28. Jeannie Suk Gersen, "The Trouble with Teaching Rape Law," *New Yorker*, 15 December 2014.
29. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993).
30. *Davis v. Monroe County Board of Education*, 526 U.S. pp. 629, 633 (1999).
31. American Association of University Professors, "The History, Uses, and Abuses of Title IX," report, June 2016.
32. *Speech First, Inc. v. Cartwright*, USCA11 Case: 21-1258, filed 21 April 2022, pp. 21–22.
33. College Pulse and FIRE, 2022–2023 "College Free Speech Rankings: What is the State of Free Speech on America's College Campuses?," at p. 37.
34. Ibid.