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PREFACE:
FIGHTING BIG SISTER FOR LIBERTY AND EQUALITY

NADINE STROSSEN*

Pornography, in the feminist view, is a form of forced sex, . . . an institution of gender inequality. . . . [P]ornography, [w]ith the rape and prostitution in which it participates, . . . institutionalizes the sexuality of male supremacy¹

Catharine A. MacKinnon,
Professor of Law, University of Michigan

Feminists have many different views of sexually-explicit expression. A growing number believe that efforts to restrict such materials . . . [are part of] a continuing effort to control women's sexual expression and women's lives. These feminists are passionate in their belief that if efforts at restriction were successful, they—women—would be the losers.

The rights of women to speak out and think freely and to fight for their basic rights, to control their lives, their bodies, and to have economic and political equity are at stake—not merely whether sexually-explicit expression should exist.²

National Coalition Against Censorship,
Working Group on Women, Censorship
and "Pornography"

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

* Professor of Law, New York Law School; President, American Civil Liberties Union. The themes presented in this Introduction are more extensively explored in Nadine Strossen, *A Feminist Critique of "The Feminist Critique of Pornography"*, 79 VA. L. REV. 1099 (1993) [hereinafter Strossen I], and will be further developed in a book, to be published by Scribner in January 1995, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights*.

For research assistance with this essay, I am indebted to Stephen Hendricks, Thomas Hilbink, Carolyn D. Richmond, Karen Shelton, and Donna Wasserman.

1. Catharine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321, 325-26 (1984).

2. National Coalition Against Censorship, Women, Censorship, and "Pornography" 13-14 (Feb. 1993) (unpublished manuscript, on file with the *New York Law School Law Review*).

formalism or First Amendment pietism—is a distinctive feminist contribution.³

Henry Louis Gates, Jr.,
Chairman, Department of Afro-American Studies,
Harvard University

This historic Symposium issue of the *New York Law School Law Review* takes a major step toward righting an imbalance that has marred recent academic discussions about sexual speech. Led by University of Michigan Law Professor, Catharine A. MacKinnon, and author Andrea Dworkin, many feminists on campuses around the country have endorsed various measures to suppress sexual expression that is allegedly “subordinating” or “degrading” to women, based on the theory that such expression promotes misogynistic discrimination and violence.⁴ Labeling this category of sexual speech “pornography,” ostensibly to distinguish it from “obscenity”⁵—the differently defined category of sexual speech that the Supreme Court has held to lack First Amendment protection—these feminists have had an enormous impact on public perceptions and public policy.⁶

MacKinnon’s arrogant assumption that there is only one feminist view about what she calls “pornography” has unfortunately permeated media coverage and public consciousness. Too many journalists, government officials, and members of the public wrongly assume that if you are a feminist—or even a non-feminist woman—you therefore support

3. Henry Louis Gates, Jr., *To ‘Deprave and Corrupt’*, 38 N.Y.L. SCH. L. REV. 401, 438 (1993) (book review).

4. See, e.g., Andrea Dworkin, *Against the Male Flood: Censorship, Pornography and Equality*, 8 HARV. WOMEN’S L.J. 1, 24 (1985) (setting forth the text of the Model Anti-Pornography ordinance introduced by Dworkin and MacKinnon); Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 1-2, 22-60 (1985) (in the ordinance MacKinnon and Dworkin proposed, they define “pornography” as, *inter alia*, “the graphic sexually explicit subordination of women through pictures and/or words”).

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

6. See Strossen I, *supra* note *, at 1114-27.

restrictions on sexual speech.⁷ This simplistic, distorted view of feminist approaches to the critically important and complex subjects of speech, sex, discrimination, and violence may well be a major factor accounting for the widely-noted recent backlash against the women's rights movement.⁸ Some of the negative stereotypes that have been used unfairly to discredit advocates of feminist causes generally, including that feminism is anti-sex and anti-male,⁹ do, however, fairly characterize the views of MacKinnon, Dworkin and other anti-"pornography" feminists.¹⁰

The view of the National Coalition Against Censorship's Working Group on Women, Censorship, and "Pornography"¹¹ belies the widespread misperception, propounded by MacKinnonites and perpetuated by the media, that feminists generally seek to restrict sexual speech. Several other organizations also oppose restrictions on "pornography" specifically on feminist grounds, including the U.S.-based Feminist Anti-Censorship Taskforce and Feminists for Free Expression.¹² Additionally, as indicated by the Symposium contributions by Avedon Carol from Great Britain¹³ and Thelma McCormack from Canada,¹⁴ anti-censorship feminists in other countries have also banded together to oppose censoring sexual speech. These anti-censorship groups are supported by many prominent feminist activists, artists, authors, educators, scholars, and scientists, as well as experts on sexuality, gender-based discrimination, and violence.

7. See *id.* at 1107-08 & n.24.

8. See, e.g., SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* 46 (1991) (noting that the recent backlash against the women's rights movement is a "recurring phenomenon . . . [that] returns every time women begin to make some headway toward equality").

9. See generally *id.*

10. See Strossen I, *supra* note *, at 1147-51.

11. The Working Group and its members consistently put the term "pornography" in quotation marks to underscore that it is not a legal term of art with a precise, accepted meaning, but rather, a label for an intractably vague category of sexual expression, calling for inescapably subjective, and hence arbitrary, judgments. Indeed, in striking down a law reflecting the MacKinnon-Dworkin anti-"pornography" analysis, Judge Sara Evans Barker concluded that the central term "pornography" was so opaque as to render the law void for vagueness. *American Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316, 1337-39 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

12. See Strossen I, *supra* note *, at 1109-11.

13. See Avedon Carol, *Don't Get Fooled Again: Assailed in Britain*, 38 N.Y.L. SCH. L. REV. 183 (1993).

14. See Thelma McCormack, *Censorship in Canada*, 38 N.Y.L. SCH. L. REV. 165 (1993).

Although many influential feminists have consistently resisted all calls for suppressing sexual speech "for their own good," their position has not been as widely disseminated as that of their pro-censorship counterparts. The mainstream media, as well as academic publications, have emphasized the pro-censorship, MacKinnonite faction of feminism, thus fostering the misperception that all or most feminists adhere to it.¹⁵ Precisely to counter this misperception, the National Coalition Against Censorship formed the Feminist Working Group on Women, Censorship, and "Pornography" in 1992, which organized a conference on "The Sex Panic" in 1993.¹⁶

To counter the disproportionate circulation of the pro-censorship feminist perspective specifically in the crucially important academic sector,¹⁷ the *New York Law School Law Review* published this signally important Symposium issue, which contains speeches that were presented at "The Sex Panic" conference, and additional articles that well represent the broad range of anti-censorship feminist analyses. This novel collection, which includes classic previously published works, as well as many original contributions, constitutes a powerful response to the shibboleth that censoring "pornography" would counter misogynistic discrimination or violence. This timely compendium demonstrates that many feminist scholars in legal and other disciplines, as well as artists and activists, have reached precisely the opposite conclusion.

It is particularly distressing that the feminist pro-censorship position has been so influential within the academic world, notably the legal academic world, where one would expect values of free speech and gender-based equality to be especially cherished. The feminist anti-"pornography" faction has become disturbingly fashionable at elite law schools in recent years. Its views have been dominant in faculty appointments and promotions and have been prominently featured in some important conferences at prestigious law schools, in law journal publications, and certain law school courses, such as those on feminist jurisprudence.¹⁸

15. See Strossen I, *supra* note *, at 1107-08, 1114.

16. The conference was co-sponsored by The Women's Center of the Graduate Center of the City University of New York and The Vera List Center of the New School for Social Research.

17. See FALUDI, *supra* note 8; Nadine Strossen, *Legal Scholars Who Would Limit Free Speech*, CHRON. HIGHER EDUC., July 7, 1993, § 2, at B1 [hereinafter Strossen II].

18. See Strossen I, *supra* note *, at 1108 & n.29; Strossen II, *supra* note 17. See also Marjorie Heins, *A Public University's Response to Students' Removal of an Art Exhibit*, 38 N.Y.L. SCH. L. REV. 201 (1993); Carol Jacobsen, *Anti-Porn Feminism v. Feminist Art: Notes on the Censorship of Porn'im'age'ry: Picturing Prostitutes*, 38 N.Y.L. SCH. L. REV. 63 (1993) (describing the impact of the pro-censorship feminist

For example, recent surveys of all legal publications that discuss the feminist controversy over sexual expression, conducted by research assistants under my supervision, revealed that a majority of these writings advocated censorship, and that virtually all written from a feminist viewpoint did so.¹⁹ Consequently, even the substantial law review literature that refutes the MacKinnon-Dworkin analysis does not successfully counter the prevalent misimpression that feminist values weigh in favor of censoring "pornography."

It is precisely this crucial missing element in the legal literature that this Symposium amply supplies. For, unlike the vast majority of the prior law journal publications confronting the pro-censorship feminist theories, the contributions to this volume meet MacKinnonism on its own ground—that of gender equality and women's rights. Rather than relying solely on conventional free speech analysis, and thus appearing to shore up the MacKinnonites' claim that free speech values are at odds with

faction at the University of Michigan Law School, where Catharine MacKinnon is a professor); Leanne Katz, *Introduction: Women, Censorship, and "Pornography"*, 38 N.Y.L. SCH. L. REV. 9, 16-18 (1993) (describing a conference at the University of Chicago Law School which was dominated by pro-censorship feminists).

19. See Strossen I, *supra* note *, at 1107-08 & n.26-28. The survey was initially conducted in 1992 by Carolyn D. Richmond, and updated in 1994 by Stephen Hendricks.

Law review publications examining the Dworkin-MacKinnon approach to "pornography" were located pursuant to the following search request, conducted on June 27, 1994 on both LEXIS and WESTLAW: "porn! w/20 censor! and date after 1980." Additionally, a manual search was conducted of articles in the *Current Law Index* and the *Index of Legal Periodicals*. These searches yielded 172 articles, notes, and comments (book reviews and book review essays were not included). Of those 172, 54 focused on the "pornography" controversy (the remaining 118 contained only short, passing references to this controversy, and therefore were not included in the literature survey). Additionally, eight other relevant publications were located through footnote references in writings that had been identified through the forementioned searches, bringing the total number of pieces reviewed to 62.

Of the 62 relevant pieces reviewed and classified as to their positions on the MacKinnon-Dworkin approach to "pornography," 32 endorsed that approach, 25 opposed it, and five took no position on it.

Of the 25 law review pieces that opposed the MacKinnon-Dworkin approach, 20 were based on classic free speech analysis and only five on feminist analysis: Cheryl Smith Blum, *The Place of Art in Catharine MacKinnon's Feminist Legal Theory*, 19 J. CONTEMP. L. 445 (1993); Mary C. Dunlap, *Sexual Speech and the State: Putting Pornography in Its Place*, 17 GOLDEN GATE U. L. REV. 359 (1987); Susan Etta Keller, *Viewing and Doing: Complicating Pornography's Meaning*, 81 GEO. L.J. 2195 (1993); Jeanne L. Schroeder, *The Taming of the Shrew: The Liberal Attempt to Mainstream Radical Feminist Theory*, 5 YALE J.L. & FEMINISM 123 (1992); and Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099 (1993).

equality values, the authors of this Symposium provide new rationales for resisting censorship, expressly from a women's-rights-centered orientation.

Professor Gates highlights the intellectual importance of the novel, gender-equality-focused anti-censorship perspectives that pervade this Symposium.²⁰ He correctly states that the anti-"pornography" feminists tread no new intellectual ground. They have simply supplied some superficially new rhetoric to describe what analysis reveals to be, at bottom, conventional, traditional, conservative positions.²¹ Some analysts have persuasively explained that the pro-censorship feminist philosophy reflects profoundly reactionary views of sexuality and gender.²² For example, Professor Jeanne L. Schroeder's article powerfully plumbs the deep resonances between MacKinnon's views and medieval Catholic theology.²³

In contrast to the ultimately unoriginal nature of the pro-censorship feminist analysis of "pornography," the anti-censorship feminist analysis that is so richly represented in this Symposium does offer significant new insights into the ever-important subjects of sex, gender, and speech. In Professor Gates's words, "the critique of the anti-porn movement on grounds other than constitutional formalism or First Amendment pietism . . . is a distinctive feminist contribution."²⁴

The disturbingly great academic support for suppressing sexual speech is integrally related to the recently increased academic support, particularly in the legal academy, for suppressing "hate speech," or expression that conveys racial, religious, sexist, and other forms of bias.²⁵ Indeed, the MacKinnon-Dworkin concept of "pornography" is a species of hate speech because it is defined in terms of its alleged discrimination against women.

The academic champions of restricting hate speech and "pornography" share a common constitutional philosophy: that free speech and equality are inevitably in tension with each other, and that in order to advance equality, we consequently have to cut back on free speech. This view has been stated, for example, both in Catharine MacKinnon's latest book,

20. See Gates, *supra* note 3.

21. See *id.* at 440; Strossen I, *supra* note *, at 1114-16, 1164-66.

22. See Strossen I, *supra* note *, at 1147-51 (noting that the pro-censorship feminist philosophy, which implicitly emphasizes that sex is inherently degrading to women, is similar to the traditional stereotypes of women).

23. See Jeanne L. Schroeder, *Catharine's Wheel: MacKinnon's Pornography Analysis as a Return to Traditional Christian Sexual Theory*, 38 N.Y.L. SCH. L. REV. 225 (1993).

24. Gates, *supra* note 3, at 438.

25. See Strossen II, *supra* note 17.

Only Words,²⁶ and in a recent book of essays supporting the restriction of hate speech, *Words that Wound*,²⁷ by law professors Kimberlè Crenshaw, Richard Delgado, Charles Lawrence III, and Mari J. Matsuda.

The essays in this Symposium expose the fallacies in the foregoing “either-or” constitutional philosophy, and thus make a distinctive contribution to an important ongoing debate. A number of legal scholars recently have responded to the “speech-versus-equality” analysis by explaining that free speech and equality are mutually reinforcing, rather than inalterably opposing values in the contexts of the hate-speech debate²⁸ and other current controversies.²⁹ In parallel fashion, the essays in this Symposium explicate the positive interrelationship between free speech and equality in the context of the “pornography” debate. Drawing upon legal analysis, history, and a wide range of other scholarly disciplines, as well as personal experience, the writings in this volume convincingly demonstrate that women—along with all human beings—are entitled to both free speech *and* equality, and that we cannot enjoy one without the other.

The women and men who have contributed to this Symposium are as dedicated as any other feminists to eradicating violence and discrimination

26. CATHARINE A. MACKINNON, *ONLY WORDS* (1993) (arguing that because “pornography” subordinates women, courts should weigh women’s Fourteenth Amendment equal protection rights against First Amendment rights when considering laws restricting “pornography”). MacKinnon also argues that pornography does not deserve First Amendment protection because it involves actions, which are often coercive, rather than the mere expression of ideas. *Id.*

27. MARI J. MATSUDA ET AL., *WORDS THAT WOUND* (1993) (arguing that racially-motivated insults should not be protected by the First Amendment and that courts that have found that such speech is protected do so because they have failed to consider the history of racial oppression and its victims).

28. See NADINE STROSSEN ET AL., *SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, & CIVIL LIBERTIES* (1994) (responding to the arguments made in Matsuda et al.’s *Words That Wound*); Henry Louis Gates, Jr., *Why Civil Liberties Pose No Threat to Civil Rights*, NEW REPUBLIC, Sept. 20 & 27, 1993, at 37; Donald E. Lively, *Reformist Myopia and the Imperative of Progress: Lessons for the Post-Brown Era*, 46 VAND. L. REV. 865 (1993); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991); William B. Rubenstein, *Since When Is the Fourteenth Amendment Our Route to Equality?: Some Reflections on the Construction of the “Hate Speech” Debate From a Lesbian/Gay Perspective*, 2 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 19 (1992); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L. REV. 484.

29. *SPEECH AND EQUALITY: DO WE HAVE TO CHOOSE?* (Gara LaMarche ed., forthcoming Fall 1994) (discussing issues based on a conference held at New York University School of Law); 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 (1994).

against women; indeed, many of us work directly for these goals every day of our lives. We believe, though, that suppressing sexual words and images will not advance these crucial goals. To the contrary, we are convinced that censoring sexual expression would actually do more harm than good in terms of women's rights and safety. Therefore, we adamantly oppose any effort to restrict sexual speech not only because it would violate our cherished First Amendment freedoms—our freedoms to read, think, speak, sing, write, paint, dance, dream, photograph, film and fantasize as we wish—but also because it would undermine our equality, our status, our dignity, and our autonomy.

Women should not have to choose between freedom and safety, between speech and equality, between dignity and sexuality. Women can be sexual beings without forsaking other aspects of our identities. We insist on the right to enjoy the thrills of sex and sexual expression without giving up our personal security. We can exercise our free speech and our equality rights to denounce any sexist expressions of any sort—including sexist expressions that are also sexual—rather than seeking to suppress anyone else's rights.

Women's rights are far more endangered by censoring sexual images than they are by the sexual images themselves. Women do not need the government's protection from words and pictures. We *do* need, rather, to protect ourselves from any governmental encroachment into our freedom and autonomy, even—indeed, especially—when it is allegedly “for our own good.” As former Supreme Court Justice Louis Brandeis cautioned: “Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by [wo]men of zeal, well-meaning but without understanding.”³⁰

While expressing a dazzling diversity of perspectives and experiences in other respects, the contributions to this Symposium are all united by a central common belief—that the feminist pro-censorship movement is a far greater threat to women's rights than is the “pornography” it condemns. For women who cherish liberty and equality, “Big Sister” is as unwelcome in our lives as Big Brother.

30. *Olmstead v. United States*, 277 U.S. 438, 479 (1927) (Brandeis, J., dissenting).