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Wendy Kaminer

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## TOWARD SAFETY, EQUALITY & FREEDOM\*

WENDY KAMINER\*\*

I was struck by the title of this panel, "Toward Safety, Equality & Freedom," because it might easily be used as a panel title at a pro-censorship conference. We're all in favor of safety, equality, and freedom. Well, maybe we're not *all* in agreement about equality; the question whether equality would make women safe and free has always been a divisive one for feminists. But, surely we're all in favor of safety and freedom; in fact, anti-pornography feminists believe that censorship is the path to safety and freedom and, perhaps, some version (or perversion) of equality. That is the heart of censorship's appeal.

The appeal of the anti-pornography movement is visceral, not intellectual; its arguments are primarily political, not legal. Despite all the academic theorizing about the clash of First and Fourteenth Amendment rights, the anti-pornography movement doesn't really rely on legal theories about censorship; it relies primarily on political theories and political notions of sexuality. Catharine MacKinnon's great contribution to the anti-pornography debate has been to declare the First Amendment irrelevant to it, by declaring that pornography is not speech, but some sort of action.<sup>1</sup> (Or, in her words, "Pornography is more act-like than thought-like.")<sup>2</sup> MacKinnon's followers take this notion literally. I once appeared on a talk show with an anti-pornography activist who compared the production of pornography to the manufacture of unsafe cars. Like the infamous Pinto with the exploding gas tank,<sup>3</sup> pornography was simply an incendiary device, she suggested, without even arguable constitutional protection. Her disregard for speech was consistent—she interrupted me

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\*\* Public Policy Fellow at Radcliffe College and a 1993 Guggenheim Fellow.

1. See Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 65 (1985) ("One can express the idea a practice embodies. That does not make that practice into an idea."). This thesis is developed in CATHARINE A. MACKINNON, *ONLY WORDS* (1993).

2. MacKinnon, *supra* note 1, at 65.

3. In 1978, the Ford Pinto was recalled due to a defect in its gas tank which was found to explode in rear-end collisions. See Joanne Omang, *Auto Recalls Are Heading for Another Banner Year*, WASH. POST, Aug. 6, 1978, at D1, D3. After 25 persons died when their Pintos exploded in rear-end collisions, Ford recalled 1.5 million cars to insert a barrier between the gas tank and the passenger compartments, at a cost of almost \$40 million. See *id.*

incessantly, insisting that the First Amendment issue was a "red herring," because pornography was not speech and, therefore, anti-pornography legislation was not censorship.

But, more than indifference to the First Amendment, more than the sense that the First Amendment is not at issue in this debate, at the heart of the anti-pornography movement lies a great deal of hostility toward the First Amendment.<sup>4</sup> While anti-censorship feminists regard the First Amendment as a path to safety and freedom, anti-pornography feminists regard it as a tool of male oppression.<sup>5</sup>

So, it is important to stress at the outset that this debate about pornography and censorship is not essentially a debate about legal theory; it is essentially a clash of values. It is a debate about values. Simply put, anti-pornography feminists do not value the First Amendment. They denigrate it, regarding it as just another privilege of the white male ruling class and a threat to women. What you can glean from Catharine MacKinnon's rather arcane academic writing (if you're motivated to decode it) is the suggestion that we replace the First Amendment with this principle: whatever is harmful to women and reinforces their subordinate position in society should be prohibited.

Who will decide what is harmful to women and what reinforces their subordinate status? Catharine MacKinnon, I guess, although given her view that society is simply an exercise in institutionalized sexism,<sup>6</sup> it has

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4. See, e.g., CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) [hereinafter *THEORY OF THE STATE*]:

The liberal theory underlying First Amendment law proceeds on the belief that free speech, including pornography, helps discover truth. Censorship, in its view, restricts society to partial truths. Laissez-faire might be an adequate theory of the social preconditions for knowledge in a nonhierarchical society. In a society of gender inequality, the speech of the powerful impresses its view upon the world, concealing the truth of powerlessness under a despairing acquiescence that provides the appearance of consent and makes protest inaudible as well as rare. . . . [W]hile the First Amendment supports pornography on the belief that consensus and progress are facilitated by allowing all views, however divergent and unorthodox, it fails to notice that pornography (like the racism, including anti-Semitism, of the Nazis and the Klan) is not at all divergent or unorthodox. It is the ruling ideology.

*Id.* at 205.

5. See, e.g., Andrea Dworkin, *For Men, Freedom of Speech; For Women, Silence Please*, in *TAKE BACK THE NIGHT* 256 (Laura Lederer ed., 1980) [hereinafter *TAKE BACK THE NIGHT*] (characterizing the First Amendment as a tool of men protecting their right to subjugate women).

6. See *THEORY OF THE STATE*, *supra* note 4, at 200 (arguing that the fundamental norms applied to the pornography issue are "supposed gender neutral but are implicitly, socially, gender based . . . . If such gendered concepts are constructs of the male

never been clear to me why, as an acclaimed radical feminist, she might expect ever to enjoy discretionary power to interpret subjective legal principles, especially those involving the subordination of women. (I've always thought that the more you distrusted judges, in general, the more wary you'd be of legal subjectivism.)

But the perils of introducing more discretion into sex discrimination law are not seriously explored and the hostility toward the First Amendment that pervades the anti-pornography movement is not always overtly expressed. Anti-pornography activists don't like being regarded as enemies of speech, any more than anti-abortion activists like being regarded as enemies of choice. So, while academia may be rife with theories of democratic governance that seek to justify opposition to the First Amendment,<sup>7</sup> anti-pornography activists have tended to focus on theories of sexuality to explain the First Amendment's irrelevance. They essentially argue that pornography is not speech because all men are beasts. Men are so essentially bestial, so unable to control their desires or urges, that, when exposed to misogynist literature or film, they are seized with an irresistible impulse to act it out. Under this view, it is not simply the pornography that's bad, because you can expose women to pornography without fear that it will turn them into sex fiends. Rather, it is the combination of pornography and *men* that's bad because men are bad. Catharine MacKinnon, for example, has written that exposing a man to pornography is like saying "Kill!" to a trained guard dog.<sup>8</sup> Again, that is not a theory of speech; that is a theory of sexuality. It tells us that pornography is action because all men are dogs who must be kept on short leashes.

The anti-pornography movement is founded, therefore, on a very traditional theory of gender difference—namely, the theory that men are naturally bestial, violent, and out of control, while women are pure, in

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experience, imposed from the male standpoint on society as a whole, liberal morality is an expression of male supremacist politics."); *see also* MacKinnon, *supra* note 1, at 18 ("[Pornography] institutionalizes the sexuality of male supremacy, fusing the erotization of dominance and submission with the social construction of male and female.").

7. *See, e.g.*, Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) (arguing that many forms of racist hate speech fall outside the purview of the First Amendment); Frederick Schauer, *The First Amendment as Ideology*, 33 WM. & MARY L. REV. 853 (1992) (arguing that the ideology of a broadly protective First Amendment, as commonly taught in American academic environments, condemns alternative views); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 627 (arguing that "skepticism about antipornography legislation is based on [*inter alia*] . . . a misapplication of conventional [First Amendment] doctrines requiring viewpoint-neutrality").

8. Catharine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321, 337 (1984).

control (if not repressed), and needful of protection. That has always been an appealing vision for men and women, and a recurrent theme for feminists.<sup>9</sup> It is the vision that was at the heart of the moral reform movements Lisa Duggan discussed this morning.<sup>10</sup> And, it is also the vision that has been at the heart of gender discrimination—the laws and customs that have relegated women to a separate, secondary sphere.

Traditional notions about gender are shared by many revisionist feminists today, both within and without the anti-pornography movement.<sup>11</sup> It's no coincidence that the anti-pornography movement was revitalized during the 1980s, at about the same time that theories about women's different voice were ascendant.<sup>12</sup> Anti-censorship feminists must understand this traditional vision of sexuality that fuels the anti-pornography movement and much of contemporary feminism. To oppose censorship effectively, we must offer an opposing view of sexuality, an opposing view of human nature.

At the same time, we must be sensitive to the practical appeal of censorship during a period of public concern about an epidemic of sexual violence.<sup>13</sup> As Lisa Duggan mentioned this morning, moral reform

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9. See, e.g., ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* 16 (1989) (describing "the modern legend of terror that man spews forth celebrating himself: he is biologically ordained . . . to terrorize women and other creatures into submission and conformity"); ELIZABETH H. WOLGAST, *EQUALITY AND THE RIGHTS OF WOMEN* 25-28 (1980) (positing that pregnancy makes women naturally more responsible than men).

10. See Lisa Duggan, *An Historical Overview*, 38 N.Y.L. SCH. L. REV. 25 (1993).

11. See generally WENDY KAMINER, *A FEARFUL FREEDOM: WOMEN'S FLIGHT FROM EQUALITY* (1990).

12. See *id.*; see generally CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982) (arguing that women define themselves and the world within the context of relationship, and that this approach differs from male notions of self and society, giving women a distinctively female "voice").

13. See generally *Domestic Violence: Terrorism in the Home: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources*, 101st Cong., 2d Sess. (1990). According to national statistics and FBI reports, a woman in the United States is battered once every 15 seconds, and 30 percent of all female homicide victims are killed by their husbands or boyfriends. *Id.* at 3 (opening statement of Sen. Dan Coats). In addition, the FBI reports that a forcible rape occurred, on average, once every five minutes in the United States during 1992. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, *UNIFORM CRIME REPORTS FOR THE UNITED STATES* 4 (1992).

Indeed, violence against women was a primary factor in the Supreme Court's ruling unconstitutional a state statute requiring women to notify their husbands before obtaining abortions. See *Planned Parenthood of Southeast Pa. v. Casey*, 112 S. Ct. 2791 (1992). The Court held that the requirement imposed a "substantial obstacle" for women because

movements have, throughout our history, displaced women's anxieties about actual violence.<sup>14</sup> Although in my view the moral reforms should be opposed, the anxiety that motivates them should be respected; it reflects the terror of actual sexual violence that has not been effectively addressed, just as the most repressive demands for law and order reflect anxiety about crime.

In some ways, censorship has the same relationship to sexual violence that capital punishment has to other violent crimes. It has enormous symbolic value. By demanding censorship, many women feel that they're taking action against rape and abuse. Joining a censorship campaign doesn't feel to them like playing the victim and asking for protection. It feels like fighting back, taking initiative on their own behalf. But like capital punishment, censorship would have very limited practical value. Censoring hard-core pornography (assuming we could adequately define the term), which is all that many anti-pornography feminists claim that they want to do, would have no more practical effect on the incidence of rape than several hundred executions a year would have on the incidence of murder.

Anti-pornography feminists essentially concede this conclusion when they target softer-core, mainstream "pornographic" images.<sup>15</sup> When, for example, they rail against the "pornography" produced by Madison Avenue or Hollywood (which reaches millions more Americans than anything sold on 42nd Street) they are telling us that we live in a pornographic culture—sponsored by corporate America.

So, if you were to take the feminist critique of pornography seriously, you wouldn't stop with censoring low-rent, hard-core pornography. You wouldn't even start with it. You'd start by establishing a national, feminist review board with authority to regulate all forms of expression that touch on sex or gender. You'd censor everyone from Ernest Hemingway to David Mamet, from Larry Flynt to Calvin Klein, from *Cosmopolitan* to *The Ladies Home Journal*. You'd probably also censor a great many fairy tales that celebrate female passivity. I suspect that "Cinderella" is destructive to more women than anything I've ever seen on 42nd Street.

Concern about popular images of sex and sexuality in fairy tales, fashion magazines, or erotica is not exactly unique to the anti-pornography movement. I imagine that many women don't exactly see themselves in the

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"a significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases." *Id.* at 2829.

14. See Duggan, *supra* note 10, at 29.

15. See generally Megan Boler et al., "We Sisters Join Together . . .," in TAKE BACK THE NIGHT, *supra* note 5, at 261 (summarizing early feminist protests against the Miss America pageant and *Playboy* magazine).

images of women we'd find down the block at Show World<sup>16</sup> or in the pages of *Vogue*. And, while I deplore the strategies and ideals of the anti-pornography movement, I respect the fear and frustration it reflects. I doubt there is a woman in this room who has never feared being raped. It is a great mistake for anti-censorship feminists not to honor that fear. It is a great mistake to dismiss the women engaged in the fight against pornography as being anti-sex, or to present the women engaged in the fight against censorship as pro-sex (just as it is a mistake for anti-porn feminists to present themselves as anti-violence and label us pro-violence). Thus, while I agree with Leonore Tiefer that we should talk about the positive value of pornography and the benign ways in which people use it,<sup>17</sup> I think it is equally important to talk about rape.

Even considering the practical problem of sexual violence, however, I still oppose censorship, on practical as well as on moral grounds. In my moral universe, censorship is more immoral than pornography. And as a practical matter, I have no doubt that censorship would not work. Human behavior is a bit more complicated than the simple cause-and-effect theories about pornography and violence suggest.<sup>18</sup>

You can't control behavior effectively by controlling speech, except perhaps in a totalitarian society, in which the suspension of free speech rights is matched by suspension of all other civil rights and backed by an intrusive police state. For the state to control private, personal attitudes and behaviors, its control must be total and unrelenting. In our culture, the discrete, minimalist forms of censorship that anti-pornography feminists

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16. Show World is an "adult entertainment" establishment located at 42nd Street and Eighth Avenue in New York City. It offers pornographic materials for sale, movies, peep shows, and live acts.

17. See Leonore Tiefer, *Some Harms to Women from Restrictions on Sexually Related Expression*, 38 N.Y.L. SCH. L. REV. 95 (1993).

18. Compare Ann Jones, *A Little Knowledge*, in TAKE BACK THE NIGHT, *supra* note 5, at 179 (suggesting that pornography teaches men to abuse women physically and sexually); Diana E. H. Russell, *Pornography and Violence: What Does the New Research Say?*, in TAKE BACK THE NIGHT, *supra* note 5, at 218 (discussing men's supposed propensity to rape and its relationship to pornography) with EDWARD DONNERSTEIN ET AL., THE QUESTION OF PORNOGRAPHY: RESEARCH FINDINGS AND POLICY IMPLICATIONS 20 (1987) (concluding that, even with respect to violent pornography, the only generalization possible is that "for some people, some of the time, exposure to violence will result in aggressive behavior") (citation omitted); Sunstein, *supra* note 7, at 592 n.27 (citing studies indicating that the link between violence in the media and behavior is better established than the link between portrayals of sex in the media and behavior).

claim to be proposing<sup>19</sup> would be imposed at an obvious cost to the arts and the fight for reproductive choice, but would offer no discernible benefit to the fight against sexual violence. The single-minded scapegoating of particular forms of pornography in what is labelled a pornographic culture—and what is indisputably a violent, well-armed culture—is a triumph of reductive reasoning.

The attempt to control anti-social speech overestimates the power of words as much as it undervalues the right to utter them. I don't mean to deny the existence of a relationship between media and real-life violence. I'm not a fan of Arnold Schwarzenegger, and I'm glad to hear that he has been "born again" and does not plan on making mindlessly violent movies anymore.<sup>20</sup> But I'm not holding my breath waiting for the world, along with his movies, to become less violent. The relationship between imaginary and actual violence is extremely diffuse and difficult to isolate or quantify. It is an important subject for critics, artists, producers, publishers, and philosophers, but an impossible one for legislators.

As a writer, I like to think words matter, but, they don't cast spells, at least not in a relatively free society in which people are encouraged to think for themselves. The more we value speech, the less we need to fear it, because the more we value speech, the more we value independent thinking. In a relatively free society, words are not incantations; we can resist them. (As a writer, I'm always struck by the ease with which people resist my words.)

Magical thinking suffuses the anti-pornography movement—and hate-speech movements in general. We are assured that if we just do away with the black magic of pornography, we will somehow do away with rape. But prohibiting sexist speech and name-calling will no more eradicate sexism, racism, and homophobia than prohibiting sex education will eradicate teenage pregnancy (much to Phyllis Schlafly's chagrin).

This exaggerated fear of images and ideas we don't like, this tendency to imbue them with magical power reflects, in part, a pervasive sense of victimization shared today even by the most privileged. "Women aren't free. Women don't have First Amendment rights," a Harvard

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19. MacKinnon describes her Model Ordinance in such terms. See MacKinnon, *supra* note 1, at 22-26 (describing the Ordinance, inter alia, as "exhaustive [but] specific," having a minimal chilling effect on speech, being no more than a "medium-message combination that resembles many other . . . exceptions to first amendment guarantees," and "not [constituting] a prior restraint").

20. See Nancy Griffin, *Fire & Reign: King Arnold Has the Sony Brass Jumping Through Hoops to Sell 'Last Action Hero'*, PREMIERE, June 1993, at 72 (discussing how actor Arnold Schwarzenegger, responding both to America's growing impatience with violence in the movies, and to his own new identity as a parent, is attempting to tone down the violence in his films).



undergraduate once told me. When a Harvard student tells you she is oppressed, you know you have just stepped through the looking glass.

A few years ago, as some of you may recall, women at Brown University wrote the names of purported sex offenders on bathroom walls.<sup>21</sup> As my friend Nancy Rosenblum who teaches at Brown says, that is the kind of action you take in a very repressive society, in which you have no official recourse for your complaints. While vestiges of official sexism may exist at Brown, there is also official concern about date rape, and there are procedures for dealing with it.<sup>22</sup> Brown University, as Professor Rosenblum points out, is not Czechoslovakia in 1968.

Nonetheless, at Brown, women's fear of rape and their sense of vulnerability apparently outweighed men's rights to confront their accusers, their rights to respond, and the possibility that some of the accusations might have been false. Of course, the possibility of false accusations is what we are not supposed to consider. If all men are presumed to be victimizers and all women presumed to be victims, the rights of individual men and women do not matter nearly as much as does choosing sides.

At its most extreme, that is the logic of terrorism: devaluing individuals and their rights, subordinating them to political agendas, people putting bombs on airplanes. I am not suggesting that men are in danger of being blown away by women. I am not particularly concerned with the effect on men of the sexuality debates. I am concerned with their effect on women, and with the resurrection of a feminist view of women as natural victims, which the anti-pornography movement helps perpetuate.

As feminists, we have to ask ourselves how women at Ivy League colleges, who are among the most privileged people on the globe, have come to feel oppressed. I have heard young women testify to the trauma of being fondled by their dates. (I say to myself, "Don't women have elbows anymore?") I have heard professional women testify to the trauma of hearing their colleagues tell sexist jokes in the workplace. And I imagine a world in which a woman hears some guy at work say "bitch"

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21. See Nancie L. Katz, *Convicted on the Ladies Room Wall*, NEWSDAY, Dec. 13, 1990, at 15 (reporting that women at Brown University, purportedly frustrated by the school administration's insensitivity to the problem of date rape, maintained a running list, on a bathroom wall, of male students alleged to have committed rape, as a warning to other women of the danger these men posed).

22. See *id.* (explaining that victims of sexual assault at Brown have the option of going to the police, bringing charges under the University's disciplinary procedures, or seeking some other resolution; in addition, Brown has issued a booklet for female students, outlining their options in the face of sexual assault, and the school mandates sessions for incoming students on the problem of sexual assault).

or sees him reading *Playboy*, and she has to take a three-day disability leave.

What is reflected and reinforced by the sexuality debates is a growing belief in women's fragility. We're so fragile that we are assaulted by magazines; we're raped by rude remarks; we're never merely offended; instead, we're emotionally disabled. We're so weak that an unwelcome remark, or what might once have been called an unwelcome advance, has the traumatic force of a physical assault. Sometimes when women talk about date rape and harassment, you have no idea what they are talking about. Were they raped, or merely fondled (or "felt up," as we used to say)? Were they chastised for not laughing at a dirty joke or subject to sexual blackmail at work? The anti-pornography movement has contributed much to this conflation of sexual misconduct with sexual crime. It provides the underlying ideology that equates actual and metaphorical violence, which has trivialized sexual violence and sexual discrimination far more than the Senate Judiciary Committee ever could.

Acknowledging this—that exaggerating the problem of sexual violence also trivializes it—is difficult for many women who are caught up in the sexuality debates, particularly privileged, college women. It means acknowledging that they are not so terribly oppressed, at a time when they are encouraged to seek virtue in oppression and even a sense of identity. One great underlying challenge for anti-censorship feminists, trying to inject some rationality into the sexuality debates, is the challenge that has always confronted civil rights advocates: How do we enlist people in a fight for institutional equality without overstating the institutional inequalities? How do we inspire people to seek liberation without instilling in them a crippling sense of how badly they are oppressed?

