

Introduction

THE ANTIPORNOGRAPHY MOVEMENT has ignited one of the most heated controversies in feminist legal theory today. Feminist scholarship about pornography dates to the 1970s.¹ During that period, writers Robin Morgan, Susan Brownmiller, and Andrea Dworkin² introduced the view that pornography represents an ideology that influences social attitudes.

Robin Morgan, for example, linked pornography and rape. "Pornography is the theory, and rape the practice," she wrote.³ Similarly, Susan Brownmiller, in *Against Our Will: Men, Women and Rape*, identified pornography as one of two major institutions (along with prostitution) that contribute to rape.⁴ Calling for a ban on pornography, she wrote that pornography, like rape, is "designed to dehumanize women, to reduce the female to an object of sexual access, not to free sensuality from moralistic or parental inhibition."⁵ In addition, Andrea Dworkin in *Woman Hating* exposed several societal practices and beliefs, including pornography, as forms of "woman hating."⁶

During the same era, feminists also began addressing pornography as a political issue.⁷ In 1970 Robin Morgan and a group of women staged a sit-in at Grove Press, claiming that the press had "earned millions off the basic theme of humiliating, degrading, and dehumanizing women through sadomasochistic literature, pornographic films, and oppressive and exploitative practices."⁸ In Los Angeles in 1976, feminists staged a demonstration and held a press conference to protest a billboard of a chained and bruised woman, captioned "I'm black and blue from the Rolling Stones and I love it." In Rochester, New York, women vandalized a cinema showing a film in which a woman was reputedly tortured and murdered for sexual titillation. In San Francisco in 1978, Women Against Violence in Pornography and Media organized a national conference and staged a "Take Back the Night" march through the city's red-light district. Finally,

in New York City in 1979, a newly formed organization (Women Against Pornography) offered biweekly antipornography tours of Times Square.⁹

Although feminist concern about pornography was intensifying, feminists were not united in their views. By the end of the 1970s, significant divisions had emerged. Articles and books criticized the antipornography position.¹⁰ As Freedman and Thorne describe:

This latest political split within the women's movement, like all such splits, has been painful for participants and observers alike. It is especially unsettling for a movement that has flourished on an ideal of female unity and a dream of a common sexual politics. At times many of us have wished that the debate would simply fade away, or magically resolve itself, without our having to take personal stock of our confusion about sexuality, violence, pornography, and power. But when feelings run so high, on so central a political concern, there is, we sense, more than mere factionalism, personality conflict, or a natural process of organizational subdivision at stake. The debates and their intensity signal important issues that come at a critical moment in the history of our movement.¹¹

Feminists directed subsequent scholarship, in the 1980s, toward political reform.¹² One form targeted the findings of two government commissions on pornography: the Commission on Obscenity and Pornography created in 1967 by President Lyndon Johnson and chaired by constitutional scholar William Lockhart; and the U.S. Attorney General's Commission on Pornography (named the Meese commission after Attorney General Edwin Meese), which was established in 1985.¹³ Both commissions studied the nature, extent, and impact on society of pornography and made recommendations. Whereas the Lockhart commission found no empirical evidence linking pornography with criminal behavior,¹⁴ and consequently recommended repeal of legislation prohibiting its sale, exhibition, or distribution to consenting adults, the Meese commission recommended increased prosecution and the enactment of more restrictive legislation.¹⁵ Feminists from both the antipornography and the anticensorship positions criticized the commissions' findings.¹⁶

Feminist political action targeted the legislative process as well. Catharine MacKinnon¹⁷ and Andrea Dworkin¹⁸ in particular were leading reformers, creating a novel legal theory to regulate pornography. Together, they drafted an antipornography ordinance that provided the basis for legislative efforts in Minneapolis and Indianapolis.¹⁹ The ordinance became the focus of intense philosophical and legal controversy involving issues of women's sexuality, feminist theory and practice, and constitutional law.

In addition, the Feminist Anti-Censorship Task Force (FACT) was formed in 1984 in New York by feminist activists and scholars to oppose the MacKinnon-Dworkin ordinance.²⁰ Attorney Nan Hunter, founding member of FACT and director of the American Civil Liberties Union Lesbian and Gay Rights Project, was one of the foremost critics of the antipornography position.²¹ Her beliefs are reflected here in an es-

say (coauthored with Sylvia Law) which takes the form of an *amicus curiae* brief. Both liberal and libertarian feminists join in the FACT brief.²²

The MacKinnon-Dworkin ordinance is premised on the idea that pornography constitutes a form of discrimination against women and a violation of their civil rights. The ordinance distinguishes between sexually explicit materials that subordinate or degrade women and those that do not, providing a civil remedy for injuries caused only by the former. The ordinance defines pornography as

the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following: women are presented as sexual objects who enjoy pain or humiliation; or . . . being raped; or . . . are presented as . . . tied up or cut up or mutilated or bruised or . . . dismembered; or . . . as being penetrated by objects or animals; or . . . women are presented as sexual objects for domination, conquest, . . . possession, or use, or through . . . positions of servility or submission or display.²³

The ordinance is based on the following beliefs (beliefs expressed in legislative findings that were accepted in the *Hudnut* case, discussed below): pornography has a significant negative impact on women's lives, through the creation and maintenance of inequality between the sexes; promotion of bigotry, contempt, and aggression; and the undermining of women's rights to speech and action.

The ordinance provides that pornography is civilly actionable as a form of sexual discrimination when any of the following can be proven: (1) coercion into pornography; (2) forcing pornography on a person; (3) assaulting or physically attacking someone due to pornography; or (4) defaming a person through the use of their name, image, or likeness in pornography. Finally, the ordinance makes the production, sale, exhibition, and distribution of pornography a wrong that gives rise to injunctive relief by those who establish that they were specifically harmed by pornography.

MacKinnon and Dworkin first proposed the ordinance as an amendment to the Minneapolis city code.²⁴ After hearings in 1983, the Minneapolis City Council passed the legislation; however, the mayor vetoed it. Despite its redrafting and reenactment in 1984, the mayor vetoed the legislation once again.

Feminists were more successful in Indianapolis, where the city council passed a version of the ordinance in April 1984,²⁵ which was signed into law by Mayor William H. Hudnut. Soon, however, media trade groups and civil libertarians challenged the ordinance on First Amendment grounds. In November 1984, in *American Booksellers Ass'n, Inc. v. Hudnut*,²⁶ a federal district court granted plaintiffs' motion for summary judgment and declared the ordinance unconstitutional on grounds that it was vague, overbroad, and a prior restraint on speech. The court reasoned that the ordinance could survive attack only if the state's interest in prohibiting sex discrimination was so compelling as to outweigh the protected interest of free speech; the court ruled, as a matter of law, that the state's interest was not. In addition, the district court rejected defendants' argument that the interest of protecting women from sex-based discrimi-

nation was analogous to the state interest (previously recognized by the Supreme Court)²⁷ in protecting children from pornography.

On appeal, the Seventh Circuit Court of Appeals, in an opinion reprinted here (subsequently summarily affirmed by the U.S. Supreme Court),²⁸ affirmed the district court's holding. Although accepting "the premises of this legislation" "... [that the depictions] tend to perpetuate [women's] subordination," the court nonetheless found that the ordinance violated the First Amendment because it constituted impermissible viewpoint-based regulation.²⁹

Liberal Feminism

The subject of pornography has fragmented feminists into several camps. These factions include those who oppose censorship (liberal and libertarian feminists) and those who oppose pornography (radical feminists).³⁰

Liberal feminists, although united with other feminists in their opposition to restraints on sexual freedom, part company with most other feminists on the issue of pornography. Their commitment to certain liberal values, such as individual dignity and autonomy, equality, and self-fulfillment, leads them to believe it is wrong to restrict pornography.³¹ They adopt the liberal view of the state as a politically neutral institution whose function is to guarantee equal opportunity for self-fulfillment, to protect persons and property from unnecessary governmental interference.

Liberals distinguish between the private sphere of the family and the public sphere—a distinction that has implications for pornography.³² Classic liberals are united in their opposition to state intervention in the private sphere.³³ As Jagger notes:

The liberal commitment to liberty and the inviolability of private life places liberal feminists among most other feminists in their opposition to restraints on contraception, abortion, homosexuality, etc. The same commitment, however, separates liberal feminists from most other feminists on the issue of pornography. . . . Pornography presents a special problem for liberal feminists because of liberalism's historic commitment to freedom of expression and the right to privacy. Liberal feminists may be "personally" or "privately" revolted or titillated by pornography, but they have no "political" grounds for opposing it unless it can be shown to have a direct causal connection with the violation of women's rights.³⁴

Liberal feminists' criticisms, many of which are voiced in the following essays by Hunter and Law, Strossen, and Meyer, include the views that censorship would (1) ban some overtly feminist works; (2) discriminate against the least popular segments of society (including feminists and lesbians); (3) perpetuate paternalistic and demeaning gender stereotypes; (4) disempower women by emphasizing their victimization; (5) deprive women of employment opportunities in the sex industry; and (6) distract attention from more meaningful approaches to combating violence and discrimination against women.

Because liberal feminists do not believe that pornography is harmful,³⁵ they oppose regulation. They fear that increased regulation will have negative effects on individual freedom in general. As liberal feminist Wendy Kaminer, a member of Women Against Pornography, writes:

Legislative or judicial control of pornography is simply not possible without breaking down the legal principles and procedures that are essential to our right to speak. . . . We must continue to organize against pornography . . . but we must not ask the government to take up our struggle for us. The power it will assume to do so will be far more dangerous to us all than the 'power' of pornography.³⁶

Increasingly, however, some feminists are critical of liberals' anticensorship position, as the essays here illustrate.

Libertarian Feminism

The term *libertarian feminist* was coined by Ann Ferguson³⁷ to characterize a variant, sexual/radical view in the liberal tradition.³⁸ Whereas some liberals conceive of rights as positive entitlements, with the state playing an active role to ensure those rights,³⁹ other liberals conceive of rights as negative freedom: the right to be free from governmental constraints. Therefore they oppose state regulation. In this latter group are *laissez-faire* economists, who oppose economic regulation, and libertarians, who oppose regulation in private matters as well (such as speech and sexual behavior). *Laissez-faire* economists and libertarians, although both descendants of classic liberalism, are sometimes thought of as conservative because of their position on economic issues and, paradoxically, as liberal in their support of pornography.

Libertarians criticize radical feminists for conflating sex and violence.⁴⁰ They accuse radical feminists of attempting to return to a repressive moral code that stifles female sexuality.⁴¹ Whereas radical feminists criticize libertarians as reinforcing male violence, libertarian feminists criticize radical feminists for overemphasizing victimization.⁴² Moreover, libertarian feminists find that radical feminist explanations of pornography's effects on men (male motivation as an unreflective behavioral response) are overly simplistic.⁴³ Underscoring women's sexual repression rather than their victimization, libertarian feminists emphasize the liberating potential of pornography for women.⁴⁴

Radical Feminism

Radical feminism is a perspective that adopts as its central concern the subordination of women. Sexuality is the source of that subordination. According to this school of thought, women must organize against patriarchy as a class, in Marxist terms, in order