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ARTICLES

JUDICIAL INDIFFERENCE TO PORNOGRAPHY'S HARM: *AMERICAN BOOKSELLERS v.* *HUDNUT*

PENELOPE SEATOR*

I. INTRODUCTION

By an amendment to its civil rights ordinance, Indianapolis enacted a civil rights anti-pornography law that created private causes of action for injuries done through the production and use of pornography.¹ This ordinance is the first law to define pornography for what it is - the subordination of women, a practice of sex discrimination - and to recognize and provide a remedy for the real and substantial harms women, children, and men suffer through pornography's production and consumption. The law would provide a remedy for sex-based harms done through pornography to those coerced into pornographic performances, those who have pornography forced on them, those

* B.A., J.D. University of Illinois. I wish to thank Pauline Bart, Loretta Hintz, Catharine MacKinnon and Annie McCombs for helpful comments on an earlier draft of this paper. I also thank the many women and those men whose work against pornography has made it possible to understand and say that pornography is a form of sexual abuse, not a form of freedom. My debt to the groundbreaking work of Andrea Dworkin and Catharine MacKinnon will be apparent to anyone familiar with their work.

1. Indianapolis, Ind., City-County General Ordinance No. 24, ch. 16 (amended May 1, 1984) [hereinafter cited as Indianapolis Gen. Ordinance]. The ordinance was amended by Indianapolis, Ind., City-County General Ordinance No. 35 (June 15, 1984). The ordinance was based on a model civil rights anti-pornography ordinance conceived and drafted by Andrea Dworkin and Catharine A. MacKinnon. The model ordinance is reprinted in Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1, 25 app. (1985) [hereinafter cited as *The Male Flood*].

who are assaulted in a way directly caused by a specific piece of pornography, and those who are injured by trafficking in pornography.² The ordinance recognizes for the first time that the harm of pornography is sexual abuse and the violation of women's civil rights. The ordinance is an important departure from the concept, purpose and effect of laws that attempt to regulate some sexually explicit material under the rubric of obscenity.³

After groundbreaking theoretical work and factual inquiry in the ordinance's development and defense,⁴ and widespread publicity and debate, the U.S. Supreme Court summarily affirmed⁵ a decision of the Court of Appeals for the Seventh Circuit⁶ declaring the ordinance unconstitutional as a violation of the first amendment of the U.S. Constitution.⁷ The Court's summary adjudication of the case followed a series of legislative initiatives in several cities throughout the United States to enact civil rights laws substantially similar to the Indianapolis ordinance.⁸ Despite the importance and magnitude of the harms the

2. Indianapolis Gen. Ordinance §§ 16-4(a)(4), (5), (6), and (7).

3. See, e.g., *Miller v. California*, 413 U.S. 15 (1973).

4. See, e.g., Baldwin, *The Sexuality of Inequality: The Minneapolis Pornography Ordinance*, 2 L. & INEQUALITY: J. THEORY & PRACTICE 629 (1984) [hereinafter cited as *The Sexuality of Inequality*]; Dworkin, *The Male Flood*, *supra* note 1; Donnerstein, Champion, Sunstein & MacKinnon, *Pornography: Social Science, Legal, and Clinical Perspectives*, 4 L. & INEQUALITY: J. THEORY & PRACTICE 17 (1986) (remarks of C. MacKinnon at 38-49) [hereinafter cited as *Social Science, Legal, and Clinical Perspectives*]; MacKinnon, *Pornography, Civil Rights and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985) (reprinted in C. MacKinnon, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 163 (1987) as *Francis Biddle's Sister: Pornography, Civil Rights and Speech*) [hereinafter cited as *Pornography, Civil Rights and Speech*]; MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984); C. MacKinnon, *FEMINISM UNMODIFIED* (Section III: "Pornography"). Andrea Dworkin's definitive work on pornography, A. DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1979) [hereinafter cited as *PORNOGRAPHY*], was published before the ordinance was conceived and drafted. See also, Benson, *Pornography and the First Amendment: American Booksellers v. Hudnut*, 9 HARV. WOMEN'S L.J. 153 (1986); Gershel, *Evaluating a Proposed Civil Rights Approach to Pornography: Legal Analysis as if Women Mattered*, 11 WM. MITCHELL L. REV. 41 (1985); Spahn, *On Sex and Violence*, 20 NEW ENGLAND L. REV. 629 (1984-1985); Lahey, *The Canadian Charter of Rights and Pornography: Toward a Theory of Actual Gender Equality*, 20 NEW ENGLAND L. REV. 649 (1984-1985); Note, *Anti-Pornography Laws and First Amendment Values*, 98 HARV. L. REV. 460 (1984).

5. *American Booksellers Ass'n, Inc. v. Hudnut*, 106 S. Ct. 1772 (1986), *reh. den.* 106 S. Ct. 1664 (1986).

6. *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985).

7. U.S. CONST. amend. 1.

8. A version of the civil rights anti-pornography ordinance was first introduced by a

ordinance addresses,⁹ the level of public interest it has generated, and the new and complex legal issues raised by the ordinance,¹⁰ the Court disposed of the case without full briefing, without argument, without giving reasons for its decision and without even a citation to existing case law.

The two lower courts that considered the constitutionality of the ordinance, the Federal District Court for the Southern District of Indiana¹¹ and the Court of Appeals for the Seventh Circuit,¹² although they gave reasons for their decisions, incompletely and inadequately considered the constitutional questions. Finding the ordinance unconstitutional, the Seventh Circuit held that it is viewpoint discrimination;¹³ the district court held that the interest in free speech outweighs the interest in

December 30, 1983 amendment to the Minneapolis civil rights ordinance. Minneapolis, Minn., Code of Ordinances, Title 7, ch. 139 (1982). The amendment was reintroduced January 13, 1984 after the mayor's January 5, 1984 veto. The Minneapolis City Council passed an amended version of the ordinance on July 13, 1984, which the mayor vetoed on the date it was enacted. A similar ordinance was introduced in Los Angeles, and in November, 1985 a civil rights anti-pornography referendum was rejected by less than 4,000 votes in Cambridge, Massachusetts. N.Y. Times, Nov. 12, 1985, at A16, col. 6.

9. Before the Minneapolis version of the ordinance was enacted, the Minneapolis City Council Committee on Government operations held extensive hearings in which victims of pornography and those who work with victims testified to the harm inflicted through pornography. *Public Hearings on Ordinances to Add Pornography as Discrimination Against Women*, Committee on Government Operations, City Council, Minneapolis, Minn. (Dec. 12-13, 1983) (available from Pornography Resource Center, 734 East Lake Street, Minneapolis, Minnesota, 55407) [hereinafter cited as *Hearings*]. The testimony also included social science evidence of pornography's harm. See *infra* text accompanying notes 160-169.

10. In a letter dated January 8, 1984 addressed to Minneapolis City Council Member Charlee Hoyt in response to Mayor Donald M. Fraser's veto of the ordinance, Professor Laurence Tribe said:

While many hard questions of conflicting rights will face any court that confronts challenges to the ordinance, as drafted it rests on a rationale that closely parallels many previously accepted exceptions to justly stringent First Amendment guarantees. While remaining uncertain myself as to the ultimate outcome of a judicial test, I urge you not to allow an executive to prevent the courts from adjudicating what may eventually be found to be the first sensible approach to an area which has vexed some of the best legal minds for decades.

Letter from Professor Laurence Tribe to Minneapolis City Council Member Charlee Hoyt (January 8, 1984) (on file with G.G.U. L. Rev.). Unfortunately, the courts that considered the Indianapolis ordinance's constitutionality did not adequately consider the "hard questions." See *infra* Section II.

11. American Booksellers Ass'n., Inc. v. Hudnut, 598 F. Supp. 1316 (S.D. Ind. 1984).

12. 771 F.2d 323 (7th Cir. 1985).

13. *Id.* at 325, 328.

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sex-based equality.¹⁴ Because the plaintiffs¹⁵ brought suit prior to any application of the ordinance, the courts decided the case in an abstract posture, before any state court construction of the law, and thus in a context that precluded a full and realistic consideration of the issues.¹⁶ Neither court appeared to fully understand the ordinance and, consequently, each wrote an opinion that considered the constitutionality of an imagined law, not the law Indianapolis enacted. Throughout the decisions, both courts incorrectly stated the terms of the ordinance, giving the appearance of a careless and cavalier consideration of the important issues the ordinance raises and the serious harms the civil rights approach is designed to remedy. Both courts avoided the difficult issues, sidestepping them to rely on first amendment absolutist doctrine and method that is neither true to existing Supreme Court decisions nor dispositive of the issues raised by the actual provisions of the ordinance. Neither court seriously considered the meaning and effect of the definition and regulation of pornography as a practice of sex discrimination, and neither court took seriously the massive harms clearly demonstrated in the legislative record.

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 six specific presentations.¹⁷ Those presentations are: women "presented as sexual objects who enjoy pain or humiliation"; women "presented as sexual objects who experience sexual pleasure in being raped"; women "presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts"; women "presented as being penetrated by objects or animals"; women

14. 598 F. Supp. at 1336.

15. The plaintiffs were producers, distributors and readers or viewers of books, magazines and films. *Hudnut*, 771 F.2d at 326.

16. Serious standing issues were resolved in favor of the plaintiffs. 771 F.2d at 327; 598 F.Supp at 1328. Those issues, despite their importance, will not be considered here. In addition, this article will not consider the issues of state action, ripeness, abstention, vagueness, overbreadth, and prior restraint addressed in the litigation. Note, however, that the 7th Circuit did not find the ordinance vague or a prior restraint and neither court found it overbroad. 771 F.2d at 332; 598 F. Supp. at 1339-40. The 7th Circuit was wrong when it stated that the district court found the ordinance overbroad. 771 F.2d 326.

17. Indianapolis Gen. Ordinance, § 16-3(q).

“presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised or hurt in a context that makes these conditions sexual”; and women “presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.”¹⁸ The ordinance provides that the “use of men, children or transsexuals in the place of women . . . shall also constitute pornography”¹⁹

After defining pornography, the ordinance creates four causes of action on behalf of persons who have been injured through pornography. These are assault, coercion, forcing and trafficking. Persons assaulted in a way directly caused by specific pornography,²⁰ persons coerced into pornographic performances,²¹ and persons injured by trafficking in pornography may recover against the perpetrators, makers, sellers, exhibitors or distributors.²² In the case of trafficking, any woman may file a complaint as a woman acting against the subordination of women, and any man, child or transsexual may file a complaint “but must prove injury in the same way that a woman is injured in order to obtain relief.”²³ A person who has pornography forced on her or him in any place of employment, in education, in a home, or in any public place may recover against the perpetrators and the institution in which the forcing occurred.²⁴ There is no cause of action for trafficking pornography that presents women as “sexual objects for domination, conquest, violation, exploitation, possession or use or through postures or positions of servility, submission or display.”²⁵ The ordinance provides for

18. *Id.* at § 16-3(q)(1)-(6).

19. *Id.* at § 16-3(q).

20. *Id.* at § 16-3(g)(7).

21. *Id.* at § 16-3(g)(5).

22. *Id.* at § 16-3(g)(4).

23. *Id.* at § 16-17(b).

24. *Id.* at § 16-3(g)(6); *Id.* at § 16-17(a)(7).

25. *Id.* at § 16-3(g)(8); *Id.* at § 16-3(q)(6). The ordinance makes the following provision concerning defenses:

Where the materials which are the subject matter of a complaint under paragraphs (4), (5), (6), or (7) of this subsection (g) are pornography, it shall not be a defense that the respondent did not know or intend that the materials were pornography or sex discrimination; provided, however, that in the cases under paragraph (g)(4) of section 16-3 or against a seller, exhibitor or distributor under paragraph (g)(7) of section 16-3, no damages or compensation for losses shall be recoverable

damages and injunctive relief for proven harm.²⁶

This paper will evaluate the opinions of the district court and the Seventh Circuit that held the ordinance violated the first amendment, with particular attention to the courts' treatment of the demonstrated harms of pornography (II). The paper argues that pornography is a practice of discrimination through which women are subordinated on the basis of sex (III). When pornography is understood in the context of social reality, it is seen as a *practice* of sex discrimination, just as racial segregation is understood as a practice of race discrimination when it and its meaning are seen in the context of a white supremacist society. Like all discrimination laws, the ordinance reaches practices of discrimination that are done in part through words or pictures and that construct the social definition of women and men. Consequently, if the ordinance violates the first amendment, so does all discrimination law. In response to the decision of the Seventh Circuit, the paper argues that the ordinance is not unconstitutional viewpoint discrimination because it is aimed at the harm of sex-based abuse and subordination, and not at the harm of an idea (IV). Finally, the courts' misapplications of first amendment doctrine and method are considered in relation to the construction of social reality, including through pornography, and in relation to their significance for the use of law as one tool for achieving sex equality (V).

II. THE HUDNUT DECISIONS

The decisions of both the district court and the 7th Circuit in *American Booksellers Ass'n., Inc. v. Hudnut*²⁷ distort the terms of the ordinance, misapply existing first amendment doctrine and method, and erase pornography's demonstrated harm. The Seventh Circuit, trivializing the harm, treated it as a reason

unless the complainant proves that the respondent knew or had reason to know that the materials were pornography. Provided, further, that it shall be a defense to a complaint under paragraph (g) of section 16-3 that the materials complained of are those covered only by paragraph (q)(6) of section 16-3.

Id. at § 16-3(g)(8).

26. *Id.* at § 16-17(a), (b), (c).

27. 598 F. Supp. 1316 (D.C. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd. mem.* 106 S. Ct. 1172 (1986).

to protect pornography, treating as viewpoint discrimination the element of the law aimed at sex discrimination.²⁸ The district court, also trivializing pornography's harm, treated its assertion as a reason to disbelieve its reality, minimizing the harm by assuming that speech interests always outweigh equality interests.²⁹ Both courts, each in its way, adopted a first amendment absolutist position. The district court wrote an absolutist opinion by purporting to balance speech and equality interests but, in fact, holding that speech always outweighs equality. The 7th Circuit's opinion is absolutist in that the court failed entirely to balance speech and equality interests.³⁰

The proper application of liberal legal method in the adjudication of *Hudnut* would require the categorization and balancing of competing interests in speech and equality. The balance would consider the specific interests served by pornography and those the ordinance serves, weighing pornography's value as speech against the harms of abuse and subordination done through assault, coercion, forcing and trafficking demonstrated in the legislative record. In this analysis, properly applied, the massive, demonstrated harms of the abuse done through pornography and its limited first amendment value³¹ should lead to the conclusion that the ordinance is constitutional. Other less serious and much less fully demonstrated harms have justified limits on first amendment interests.³² In the *Hudnut* litigation, the courts failed to respond to sexual harm to women as they have responded to other harms.³³

28. See *infra* text accompanying notes 73-100.

29. See *infra* text accompanying notes 34-72.

30. See *infra* text accompanying notes 73-100.

31. For a discussion of pornography's limited first amendment value, see Sunstein, *Pornography and the First Amendment*, 4 DUKE L.J. 589, 602-08 (1986).

32. These arguments are made in MacKinnon, *Pornography, Civil Rights and Speech*, *supra* note 4, at 26-31, 61-66.

33. This paper will not focus specifically on the nature, extent, and demonstration of pornography's harms. Anyone who wishes to understand those harms should read the transcript of the hearings the Minneapolis City Council Government Operations Committee held before the City Council enacted a version of the civil rights anti-pornography ordinance there. See generally, *Hearings*, *supra* note 9. Others have written specifically on pornography's harms. See, e.g., Baldwin, *The Sexuality of Inequality*, *supra* note 4; A. DWORKIN, *PORNOGRAPHY*, *supra* note 4; MacKinnon, *Social Science, Clinical, and Legal Perspectives*, *supra* note 4; MacKinnon, *Pornography, Civil Rights and Speech*, *supra* note 4.

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The district court approached the question of the constitutionality of the ordinance by stating, first, that pornography as defined is not conduct and, therefore, is "speech"³⁴ Next, the court concluded that pornography is protected speech by determining that pornography does not fit into any established category of unprotected speech,³⁵ and concluded that pornography may not be regulated under the reasoning of *New York v. Ferber*,³⁶ *F.C.C. v. Pacifica Foundation*,³⁷ or *Young v. American Mini Theatres, Inc.*,³⁸ by attempting to distinguish the regulations upheld in those cases from the Indianapolis ordinance.³⁹ Finally, the court determined that speech interests always outweigh the interest in sex equality.⁴⁰

The court's decision is filled with misconceptions about and misstatements of the terms of the ordinance. The court stated, incorrectly, that the city of Indianapolis had adopted the position that pornography is conduct.⁴¹ The court apparently failed to understand the city's argument that pornography is a practice of sex discrimination because it actively subordinates women, and also children and men, on the basis of sex when they are abused through pornography by assault, coercion, forcing and trafficking. The court, instead, in determining that pornography is "speech" and not "conduct", misquoted, with emphasis, a central term of the definition of pornography, ruling as though the law said that pornography is "the sexually explicit subordination of women, graphically *depicted*."⁴² Rather than confront the actual terms of the ordinance, and the city's argument that pornography is a practice of sex discrimination, the court asserted, without reasoning, that pornography is speech and, *therefore*, not discrimination.⁴³ The court posed the question within a

34. 598 F. Supp. 1330-33.

35. *Id.* at 1331-32.

36. 458 U.S. 747 (1982).

37. 438 U.S. 726 (1978).

38. 427 U.S. 50 (1976).

39. 598 F. Supp. at 1332-35.

40. *Id.* at 1335-37.

41. *Id.* at 1330. The defendant city did not argue that pornography is conduct in the first amendment doctrinal sense.

42. *Id.* at 1330. The court quoted the ordinance as it read before the June, 1984 amendment. *See supra* note 1.

43. 598 F. Supp. at 1330. "They contend (one senses with a certain sleight of hand) that the production, dissemination, and use of sexually explicit words and pictures is the actual subordination of women and not an expression of ideas deserving of First Amend-

closed world that it apparently imagined to be the world of first amendment jurisprudence. It set the parameters of the analytical possibilities by assuming that pornography is either "speech" or "conduct", in the first amendment doctrinal sense, without allowing even the possibility that pornography is something else: sex discrimination. The court's approach ignored the actual conception of the ordinance and the arguments of its proponents, and distorted and misused the first amendment conduct doctrine.⁴⁴

Throughout its opinion, the court stated that the ordinance "outlaws",⁴⁵ forbids,⁴⁶ bans,⁴⁷ prohibits,⁴⁸ and proscribes⁴⁹ pornography.⁵⁰ The court, for the most part, simply ignored what is actionable under the ordinance: assault, coercion, forcing and trafficking and, in a similar vein, asserted that "the Ordinance does not presume or require specifically defined, identifiable victims for most of its proscriptions."⁵¹ One assertion among these, that the ordinance does not *presume* victims, is correct. The legislative record *demonstrates* pornography's harm, and harm must be established before liability is imposed. The other assertions are false. The ordinance, far from outlawing or banning or prohibiting anything, except insofar as it might be correct to describe enjoining proven abuse and subordination as "banning", and far from failing to require identifiable victims, provides a remedy to those victimized by specified *acts* done through por-

ment protection." *Id.* The court stated that it accepted the legislative finding that pornography *causes* sex discrimination. *Id.* at 1330, 1335. It apparently failed to comprehend, however, the legislative finding that pornography *is*, and the definition of pornography as, sex discrimination.

44. The court used the first amendment concept of "conduct" as a way to determine that pornography is speech without confronting the argument in support of the ordinance. The court posited that pornography is either speech or conduct and, by concluding that it is not conduct, concluded that it is speech. It is not true, however, that whatever is not conduct is speech. The conduct doctrine is a doctrine, however unsupportable, that permits finding that speech interests are implicated even though the court sees more action than it sees words and pictures. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* at 598-601 (1978).

45. 598 F. Supp. at 1327, 1330

46. *Id.* at 1327.

47. *Id.* at 1328, 1331.

48. *Id.* at 1334, 1335.

49. *Id.* at 1335.

50. The idea that the ordinance "bans" or "outlaws" pornography is both an assertion that is good business for the pornographers and informed by their point of view. Pornography is sexually exciting in part because it is perceived as sex that is not allowed.

51. 598 F. Supp. at 1335.

nography. Harm must be proven on two levels for liability to be imposed. First, it must be established that the materials in question are pornography, which requires establishing, along with the other elements of the definition, that they subordinate on the basis of sex. Subordination is an injury. Second, it must be established that a particular woman, child, man or transsexual is injured by assault, coercion or forcing before liability is imposed for those acts. The trafficking provision, to which, perhaps, the court referred with the phrase "most of [the ordinance's] proscriptions", requires that injury to women as a group be established in particular cases by establishing that the material in question subordinates women. A child, man or transsexual must prove that s/he is injured in the same way that a woman is injured. The plaintiff in a trafficking action is both "specifically defined" and "identifiable."

The court's assertion that the ordinance bans pornography is consistent with its characterization of the ordinance as affording "protection"⁵² when the ordinance in fact provides redress for proven harms. The ordinance provides a remedy for harm done to women, and also children, men and transsexuals, as tenants are provided remedies for retaliation or wrongful eviction, or persons are provided civil remedies for abuses inflicted by the police or others acting under color of law, or workers are provided remedies for wrongful discharge. These remedies are understood as remedies. When, however, women were provided a remedy for sexual harm and abuse, the court termed the remedy "protection" and compared it with the protection ostensibly provided children by law, implying that the remedy itself disadvantages women by treating women like children.⁵³ In contrasting

52. *Id.* at 1333, 1334, 1335.

53. Why is providing a remedy to women for proven harm seen as protection that disadvantages women? The question is closely related to another question: Why is recognizing the extent to which women are injured as women condemned as turning women into victims by embracing women's victimization? It is in the interests of many, including men as a class and, at least on one level, including women who enjoy, however precariously, male privilege, to keep down women as a group. If the reality and extent of the injuries to women as women were recognized, and if women had the tools, including the legal tools, with which to end those injuries, women would begin to end sexual abuse and subordination. If saying it made it so, women could achieve equality by saying it exists, and create victimization by recognizing its existence. The denial of the extent to which women are injured as women is, in part, an expression of the pain and despair that the reality is capable of engendering. To change an injurious reality, it is necessary to change what actually is, not merely assert what one wishes were. Why, when, for instance, recog-

the criminal law concerning child pornography upheld in *Ferber* with the ordinance, the court proceeded as though the relevant question were whether, under law and public policy established before the ordinance created new law and public policy, adult women are in need of the same protection afforded children.⁵⁴ In fact, however, the question is whether the legislative record demonstrates that women, and also children, men and transsexuals, who are injured by assault, coercion, forcing or trafficking in pornography should have redress for their injuries.

Although the court stated that pornography is “harmful . . . and inimical to and inconsistent with enlightened approaches to equality”,⁵⁵ it treated pornography’s active subordination as “depiction”,⁵⁶ labeled its harm “offense”,⁵⁷ and distinguished pornography’s harm from “real social harm.”⁵⁸ Although the court stated that it accepted as true the legislative finding that pornography “conditions society to subordinate women”,⁵⁹ it apparently failed to comprehend the argument that pornography is sex discrimination and did not recognize the harm of subordinating women as a *real* harm. The harms that the legislative record establishes are serious, widespread, *and real*, meaning that real people, principally women, are actually harmed through pornography by assault, coercion, forcing and trafficking.

The court apparently did not understand the nature of the harms for which the ordinance provides redress. When the court compared the ordinance with the regulations upheld in *Pacifica* it contrasted the invasion of the seven dirty words broadcast over the radio with pornography. The court apparently saw real harm in *Pacifica*’s seven dirty words because the radio “‘invades’ the privacy of the home” where the “‘individual’s right to be left alone plainly outweighs the First Amendment rights of an

nizing the horror of the abuses, tortures and murders in El Salvador, Guatemala, South Africa and other countries is understood as the first step in changing them, is recognizing the sexual abuse, torture and murder of women in order to change it an act that victimizes women? If women were ideas or images or fantasies, as in the point of view constructed by pornography woman are, saying women are victimized might make it so.

54. 598 F. Supp. at 1333-34.

55. *Id.* at 1327.

56. *Id.* at 1327, 1330, 1331, 1333, 1334, 1335.

57. *Id.* at 1327, 1331, 1334.

58. *Id.* at 1327.

59. *Id.* at 1330.

intruder.'"⁶⁰ The court apparently believed it is more difficult to flip the switch on a radio than it is for a woman, or a child, to avoid having pornography forced on her in her home. Radio dials are generally more easily managed than adult men determined to impose sexual abuse. The court, however, concluded that, although the difficulty of turning off the radio and the consequent invasion of the privacy of the home warranted the regulation in *Pacifica*, the subordination, invasion, use and abuse of women and children through pornography by assault, coercion, forcing and trafficking do not warrant regulation of pornography. This is so because, the court asserted, in the face of a legislative record that proves the assertion false, "[a]dult women generally have the capacity to protect themselves from participating in or being personally victimized by pornography. . . ."⁶¹ The court also failed to recognize that the ordinance vindicates a woman's "right to be left alone" in her home by creating a cause of action for forcing pornography on a person in specified places, including in a home.⁶² Those victimized by sexual assault surely are not being "left alone."

As the court failed to understand the nature of the harms for which the ordinance provides redress, it failed also to recog-

60. *Id.*

61. *Id.* The court created a unique standard for determining whether injured persons are entitled to redress for their injuries. In the court's formulation, women are not entitled to redress for pornography's harm if women generally can avoid its harm. It is difficult to imagine such a standard applied to those injured in automobile accidents, or those mugged on the street (assuming that the mugging is not a sexual assault). The court's standard would require that those who would recover for injury must show that most others similarly situated have also been harmed. Ironically, sexual harm to women may be one of the few instances in which such a proof is possible. See, e.g., S. BROWN MILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975); L. CLARK & D. LEWIS, *RAPE: THE PRICE OF COERCIVE SEXUALITY* (1977); D. RUSSELL, *RAPE IN MARRIAGE* (1982); K. BARRY, *FEMALE SEXUAL SLAVERY* (1979); A. DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1979); L. LOVELACE & M. MCGRADY, *ORDEAL* (1980); *TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY* (L. Lederer ed. 1980); C. MACKINNON, *SEXUAL HARRASSMENT OF WORKING WOMEN* (1979); R. DOBASH & R. DOBASH, *VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY* (1979); D. MARTIN, *BATTERED WIVES* (1981); L. WALKER, *THE BATTERED WOMAN* (1979). See generally, *Hearings supra* note 9.

62. Indianapolis Gen. Ordinance, *supra* note 1, § 16-3(g)(4). See MacKinnon, *Privacy v. Equality: Beyond Roe v. Wade*, in *FEMINISM UNMODIFIED*, *supra* note 4, at 93 for an analysis of privacy doctrine that can make sense of the district court's apparent failure in *Hudnut* to comprehend the reality of the sexual abuse of women and children in homes. See also, Colker, *Pornography and Privacy: Towards the Development of a Group Based Theory for Sex Based Intrusions of Privacy*, 1 L. & INEQUALITY: J. THEORY & PRACTICE 191 (1983).

nize the identity of the victims whose rights the ordinance would provide the means to vindicate. In considering the relationship between the regulation upheld in *Pacifica* and the ordinance, the court asserted that the ordinance "is not written to protect children" ⁶³ Similarly, throughout its discussion of *Ferber*, the court proceeded as though the ordinance did not provide a remedy to children injured by assault, coercion, forcing or trafficking. ⁶⁴ The assertion and the assumption are simply false. ⁶⁵

In the court's analysis, the harm of pornography is unreal, ⁶⁶ irrelevant, ⁶⁷ or self-imposed. ⁶⁸ The court, despite its statement that harm was irrelevant to its decision, concluded that women who are victimized by pornography are to blame for the victimization. ⁶⁹ In fact, the court, in its version of the slippery slope - its *only* articulated reason for finding that speech interests outweigh equality interests - saw those whose injuries would be redressed by the ordinance as aggressors, with the pornographers apparently cast as victims. ⁷⁰ The court also stated that speech should be most vigorously protected against those who assert they are harmed through words or pictures, as though the fact that a person is victimized is reason to deny her redress in the face of competing first amendment interests:

To permit every interest group, *especially those who claim to be victimized by unfair expression*, their own legislative exceptions to the First Amendment so long as they succeed in obtaining a majority of legislative votes in their favor demonstrates the *potentially predatory nature* of what defendants seek through this Ordinance and defend in this lawsuit. ⁷¹

63. 598 F. Supp. at 1334.

64. *Id.* at 1332-34.

65. See Indianapolis Gen. Ordinance, *supra* note 1, at §§ 16-1(a)(2); 16-3(q); 16-17(a), (b).

66. See *supra* notes 57-58 and accompanying text.

67. 598 F. Supp. at 1333, 1337.

68. *Id.* at 1334.

69. *Id.*

70. *Id.* at 1337.

71. *Id.* (emphasis supplied). See Dworkin, *The Male Flood*, *supra* note 4, at 23 ("We come to the legal system beggars: though in the public dialogue around the passage of this civil rights law we have the satisfaction of being regarded as thieves.") The court's comments demonstrate its disregard of the legislative record and findings of pornography's serious and massive harms.

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The district court, although stating that it accepted the legislative finding that pornography causes sex discrimination, denied harm as unreal, trivialized it as offense, blamed it on pornography's victims, and deemed its assertion an act of aggression. It did this while purporting to leave the legislative record undisturbed.⁷²

The Seventh Circuit, like the district court, erased the reality of pornography's harm as the justification for the ordinance, simultaneously trivializing it⁷³ and asserting it as a demonstration that pornography is protected speech.⁷⁴ Like the district court, the Seventh Circuit assumed away in its analysis the statutory definition of pornography as sex discrimination, although, unlike the district court, it purported to accept the statutory definition.⁷⁵

The Seventh Circuit held that the ordinance is unconstitutional because its *definition* of pornography is unconstitutional viewpoint discrimination. The court, nevertheless, repeatedly left out or distorted one or more elements of the definition.⁷⁶ Consequently, the court considered it possible that the definition would apply to W.B. Yeats' "Leda and the Swan", Homer's *Illiad*, and James Joyce's *Ulysses*. The court failed to analyze these works under the actual terms of the ordinance, and consequently, by suggesting, without deciding, that these works *may* be covered, created the impression that the ordinance is vast and sweeping.⁷⁷

The court's failure to properly apply the ordinance's definition of pornography accounts for much of its mistaken analysis. Although the court stated that the ordinance defines pornography as a practice⁷⁸ and as subordination,⁷⁹ it undercut and, ulti-

72. 598 F. Supp. at 1337.

73. 771 F.2d at 329.

74. *Id.*

75. *Id.* at 324, 328, 329.

76. *Id.* at 325, 328.

77. *Id.* at 325, 327. The idea that "Leda and the Swan" is sexually explicit is totally unfounded. Interpenetrating gyres, blasted oaks, love having "pitched its mansion in / the place of excrement" because nothing "can be sole or whole / that has not been rent", "thighs caressed", and "helpless breast" are as close to sexually explicit as Yeats gets. "Explicit" means explicit, not implied, indicated or alluded to.

78. 771 F.2d at 324, 329.

79. *Id.* at 327, 329.

mately, negated in its analysis this recognition of the actual terms of the ordinance. The court did this in two ways. First, like the district court, the Seventh Circuit referred repeatedly to "depictions."⁸⁰ It treated pornography as an "idea",⁸¹ as "expression",⁸² "belief",⁸³ as "thought",⁸⁴ "image",⁸⁵ and "opinion."⁸⁶ Consequently, it assumed that the ordinance is concerned with truth and falsity,⁸⁷ "approved" views,⁸⁸ and the declaration of the truth of "preferred viewpoints."⁸⁹ The court stated, for instance: "[T]herefore we accept the premises of this legislation. *Depictions* of subordination tend to perpetuate subordination."⁹⁰ The ordinance is not premised on a relationship between subordination and its depiction. By confusing depictions and practices, the court blurred the line between practices and ideas, and between subordination and the depiction of subordination, treating pornography, a practice of discrimination, as though it were indistinguishable from an idea, a thought, an opinion or a belief. Because the court all but obliterated the distinction between the two, it could say that it accepted that pornography is a practice and not an idea, while also saying that pornography is an idea, thought, and depiction.

Second, the court purported to see much speech as though it were a practice. "If pornography is what it does, so is other speech."⁹¹ With a similar logic and apparently similar aim, the court stated both that pornography depends on "mental intermediation"⁹² and that sexual responses are often "unthinking responses", like, the court said, responses to "almost all cultural stimuli."⁹³ It is a contradiction to say pornography is a practice and that it is an idea, as it is a contradiction to say that pornography depends on "mental intermediation" and that sexual re-

80. *Id.* at 325, 328, 329, 330, 331, n.3.

81. *Id.* at 327, 328.

82. *Id.* at 328.

83. *Id.*

84. *Id.* at 328, 329.

85. *Id.*

86. *Id.* at 327, 329.

87. *Id.* at 330-331.

88. *Id.* at 325, 328.

89. *Id.* at 325.

90. *Id.* at 329.

91. *Id.*

92. *Id.*

93. *Id.* at 330.

sponses are "unthinking responses." It seems less important in the court's opinion whether the response to pornography is thinking or unthinking, and whether pornography is thought or practice, than that it should be indistinguishable from all that the first amendment protects.⁹⁴

The court treated the harm of pornography as trivial and as an argument for its protection. Although stating that it accepted the legislative finding of harm,⁹⁵ the court trivialized the harm by referring to it as "unhappy consequences"⁹⁶ and "unhappy effects."⁹⁷ As it trivialized pornography's harm, the court treated the harm as a reason to protect pornography, rather than as the basis of the policy and constitutional arguments in support of the ordinance: "Yet [this harm] simply demonstrates the power of pornography as speech."⁹⁸ Because the court turned the reason and constitutional justification for the ordinance into an argument for pornography's protection, the court saw *no* interest competing with what it *assumed* to be the speech interests served by pornography. As the harm of pornography was an argument for its protection, so the subordination element of the law was, in the court's view, not a competing interest, but unconstitutional viewpoint discrimination. The court's analysis swallowed up everything in the great maw of "speech", converting discrimination into an idea, a sex equality law into a viewpoint, and harm into a constitutional justification for perpetuating harm.

Because the court recognized only one interest, which it categorized as speech, it did not find it necessary to balance competing speech and equality interests. The court understood the equality provision of the law as an effort to regulate speech. The court's decision rested explicitly on first amendment absolutism:

94. The court seemed to assume that to say that something constructs social reality is a practice is to say that it is a belief or an idea that is interwoven with a way of life, a world view, or processes of socialization. *Id.* at 329-330. The court seemed to make this assumption because it could not see that anything but ideas could construct social reality. *See infra* section V.

95. 771 F.2d at 329.

96. *Id.* at 329, n.2.

97. *Id.* at 329. It is such acts as rape, battery, child sexual abuse, prostitution, sexual harassment and other abuse and discrimination that the court refers to by these phrases.

98. *Id.* at 329.

Racial bigotry, anti-semitism, violence on television, reporters' biases - these and many more influence the culture and shape our socialization. None is directly answerable by more speech, unless that speech too finds its place in the popular culture. Yet *all* is protected as speech, however insidious. *Any other answer* leaves the government in control of *all* of the institutions of culture, the great censor and director of which thoughts are good for us.⁹⁹

The method the court employed is consistent with this absolutist hyperbole. Because the court recognized no interest but a speech interest it gave *no* value to the compelling state interest in sex equality.¹⁰⁰

Both the district court and the Seventh Circuit assumed their way to the decisions they rendered. Both courts *assumed* that pornography is speech and not discrimination. The proper characterization of pornography - as thought or idea, or as a practice of sex discrimination - was a central point of contention in the *Hudnut* litigation. Each court resolved it through assuming pornography is speech and, *therefore*, not discrimination. For each court, this assumption determined the outcome. For the district court, the categorization determined outcome because it concluded that the category of speech interests always, particularly when harm is asserted, outweighs the category of equality interests. For the Seventh Circuit, the categorization determined the outcome because it adopted an absolutist approach in which all speech must be protected or none will be, and by which the court accorded the compelling state interest in sex equality no weight.

III. PORNOGRAPHY IS A PRACTICE OF SEX DISCRIMINATION

The courts and some commentators who have considered the question of the constitutionality of the civil rights anti-pornography ordinance have dismissed, ignored or failed to comprehend the definition of pornography as a practice of sex discrimi-

99. *Id.* at 330 (emphasis supplied).

100. See *Roberts v. United States Jaycees*, 468 U.S. 609, 623-24 (1984).

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nation.¹⁰¹ Much analysis has proceeded as though the ordinance simply regulates speech, without comprehending the basis and implications of the statutory definition of pornography. The argument for the constitutionality of the civil rights ordinance rests on the harm done through pornography and the analysis that infliction of this harm, in all its forms, constitutes a practice of sex discrimination. There has been little argument in support of the position that pornography is not a practice of sex discrimination. The assertion that pornography is speech and, therefore, not a practice, has ended the discussion in most cases.¹⁰² It is possible, however, to glean what seem to be the outlines of two implicit assumptions that apparently lead to the conclusion that pornography, because it is speech, is not a practice.

The first is simply that because pornography is words and pictures, it is not a practice.¹⁰³ The assumption is that a practice is *done*; words and pictures *are*, as though acts cannot be done through words and pictures. The fact that one can point, for instance, to a book or a picture and say, truthfully, "That is pornography", seems to imply that pornography is not also a practice of sex discrimination.

If one could isolate pornographic words and pictures and look at them one by one, out of the context of the world, out of the context of pornography's production and consumption in a system of male supremacy, it might seem plausible to say that pornography is not a practice because it is words and pictures. Similarly, if racial segregation could be taken out of context, isolated from the reality of white supremacy and the practice of

101. The failures, in addition to those of the district court and the Seventh Circuit in *Hudnut*, include Emerson, *Pornography and the First Amendment: A Reply to Professor MacKinnon*, 3 YALE L. & POL. REV. 130, 137 (1984) [hereinafter cited as *Reply to Professor MacKinnon*].

102. See, e.g., in addition to the *Hudnut* decisions, Emerson, *Reply to Professor MacKinnon*, *supra* note 101, at 137. The extent to which the opponents of the civil rights anti-pornography ordinance argue by mere assertion and proceed by assumption is a demonstration of Catharine MacKinnon's theory of epistemology and power. See, e.g., MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 SIGNS 515 (1982) [hereinafter cited as *An Agenda for Theory*]; MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983) [hereinafter cited as *Toward Feminist Jurisprudence*]; MacKinnon, *Pornography, Civil Rights and Speech*, *supra* note 4.

103. See, e.g., 598 F. Supp. at 1330-31; Emerson, *Reply to Professor MacKinnon*, *supra* note 101, at 137.

segregation, the fact that a white child went to one school and a Black child attended another might not be understood as race discrimination.¹⁰⁴ In isolation, outside the context of social reality, segregation would be simply a fact about where each attends school, or which drinking fountain each uses, or where each sits on the bus.¹⁰⁵ Outside the context of social reality, segregation is not race discrimination, because a practice of discrimination has meaning in the context of the social reality that it constructs and is constructed by. In the context of the production and use of pornography, in a context of social reality and male supremacy, pornography as defined in the ordinance is a practice of sex discrimination done through pictures and words, as segregation, in a context of white supremacy, is a practice of race discrimination.

Segregation, on one level, is a physical fact, as pornography, on one level, is a physical object. As political and social reality, however, pornography is no less a practice of sex discrimination than segregation is a practice of race discrimination. The fact that physical facts and physical objects *as such* are not practices does not mean that as, social realities and social institutions, they are not ways in which discrimination is practiced under conditions of inequality.¹⁰⁶

The second assumption that forms the foundation for the unreasoned rejection of the analysis of pornography as a practice

104. See *Plessy v. Ferguson*, 163 U.S. 537 (1896); See also Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) [hereinafter cited as *Neutral Principles*].

105. Because Wechsler considered segregated schools in the abstract and without relation to the realities of power under a system of white supremacy, he considered that segregated schools may benefit Black children, and that some Blacks may choose them. Wechsler, *Neutral Principles*, *supra* note 104, at 33. He failed to consider what meaning "choice" might have in a context in which choice does not exist: Black children could not choose to go to white schools under the system of segregation. Doing, even with a positive attitude, what one is required to do is not choice. This is true even if one likes doing what is required.

106. Words and pictures can be both obscenity and pornography. As obscenity, and from the viewpoint of obscenity law, they are the dirty, sexually arousing truth about sex that should be hidden. As pornography, they are a practice of sex discrimination. That is, pornography, like obscenity, is at a different level of meaning and abstraction from the physical object that may be either pornography or obscenity or both. Perhaps lawyers will be convinced by a substantively irrelevant analogy: A school is a physical object: a building. It is also an institution. Although buildings, as such, are not institutions, a school is both.

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of sex discrimination is that if attitudes and behavior are affected, they are affected by speech or ideas. The assumption is that social reality *is*, and is constructed solely by, speech and ideas. The Seventh Circuit relied on this assumption in its decision in *Hudnut*.¹⁰⁷ The constitutional defect of the ordinance, according to the 7th Circuit, is that it aims at the creation of social reality and, *therefore*, aims at expression, at speech.¹⁰⁸ The court concluded that pornography is speech *because* it constructs social reality. The court failed to make two crucial distinctions: (1) between practices that construct social reality, including constructing women and men as such,¹⁰⁹ and the expression of a belief; and (2) between belief and social reality. The court proceeded as though, *because* pornography is central in constructing social reality, it is an idea, a thought, or a belief - that it is "speech." By making these assumptions, the court implicitly adopted a position of philosophical idealism.

If pornography as defined in the civil rights anti-pornography ordinance is not a practice of sex discrimination, *nothing* is. Most discrimination is done, in whole or in part, in words. All sex discrimination is expressive, and all contributes to the creation of a world in which women are, in fact, subordinated to men through practices of sex discrimination that depend on and reinforce the belief that women are inferior to men. As race discrimination expresses Black inferiority and creates a world in which Blacks are subordinated to whites, so sex discrimination expresses women's inferiority as it simultaneously and inextricably subordinates on the basis of sex.¹¹⁰

107. 771 F.2d at 328-330. See *infra* section V.

108. *Id.* at 329.

109. See Mackinnon, *Pornography, Civil Rights, and Speech*, *supra* note 4, at 18: What pornography *does* goes beyond its content: It eroticizes hierarchy, it sexualizes inequality. It makes dominance and submission sex From this perspective, pornography is neither harmless fantasy nor a corrupt and confused misrepresentation of an otherwise natural and healthy sexual situation. It institutionalizes the sexuality of male supremacy, fusing the eroticization of dominance and submission with the social construction of male and female. To the extent that gender is sexual, pornography is part of constituting the meaning of that sexuality. Men treat women as who they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be.

110. See Brief of Andrea Dworkin, Amicus Curiae, *Hudnut*, 771 F.2d 323, at 9.

Words, in almost every instance, play a crucial role in practices of discrimination. When, for example, race discrimination has been practiced as segregation, it often has been done primarily through words - signs, spoken words, laws that have said where Blacks could eat, sit, drink, work, study, live. In addition, segregation has functioned also as a symbol, an expression of the subordination of Blacks to whites. Whether or not words are used in a particular instance of the practice of segregation, segregation is expressive. A separate drinking fountain is a symbol of white supremacy, as is the requirement that Blacks sit in separate railway cars. The symbolic meaning of segregation is inseparable from its operation as race discrimination. Segregation means what it means - Blacks are inferior - as it does what it does - subordinates on the basis of race.

In *Plessy v. Ferguson*,¹¹¹ the Supreme Court held that segregation is not race discrimination under the fourteenth amendment, ruling that separate but equal is equal. Because the Court in *Plessy* understood the *meaning* of segregation to exist only in the construction that Blacks "choose to put upon it",¹¹² it found that segregation was not discrimination. It was because the Court failed to formulate legal doctrine that comprehended the social *meaning* of the practice of segregation that it could hold it

It is wrong to say . . . that pornography as defined by the Ordinance expresses ideas and is therefore protected speech, unless one is prepared to say that murder or rape or torture with an ideology behind it also expresses ideas and might well be protected on that account. Most acts express ideas. Most systems of exploitation or inequality express ideas. Segregation expressed an idea more eloquently than any book about the inferiority of black people ever did. Yet the Supreme Court overturned segregation - after protecting it for a very long time - because the Court finally grasped its harm to people The fact that the idea that segregation expressed would suffer because the idea required the practice for much of its persuasive power did not afford segregation constitutional protection: attempts to invoke First Amendment justifications have been thoroughly repudiated.

111. 163 U.S. 537 (1896).

112. *Id.*

We consider the underlying fallacy . . . to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

Id. at 551.

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was not discrimination. Only when the act was seen to have a social meaning that affected the hearts and minds of Black children did separate but equal cease to look equal, and did segregation begin to look like discrimination.

In *Brown v. Board of Education*,¹¹³ the court understood that segregation operated as expression. Because it understood that segregation expressed a belief in Black inferiority, the Court understood it as race discrimination: "[T]o separate [Black children] from others of similar age and qualifications solely because of their race *generates a feeling of inferiority* as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."¹¹⁴ The Court upheld the finding that "the policy of separating the races is usually interpreted as *denoting the inferiority* of the negro group."¹¹⁵ In *Brown*, the Court held that the *meaning* of segregation harmed Black children on the basis of race and, therefore, was race discrimination. The fact that segregation was expressive did not prevent the Court from seeing that it was also a practice of race discrimination. Far from preventing the conclusion that segregation is discrimination, the expressive nature of segregation was a basis of the Court's holding that it *is* discrimination.

Like race discrimination, sex discrimination is also expression. In *Roberts v. United States Jaycees*,¹¹⁶ the Supreme Court held that the state's compelling interest in sex-based equality outweighed the first amendment rights of speech and association of an organization that excluded women from full membership. The Jaycees argued that admission of women as full members would infringe on their rights of association, impair the message conveyed by women's exclusion, and impair the members' speech interests by influencing the philosophical cast and public positions of the organization.¹¹⁷ The Jaycees argued that the exclusion of women was expressive, symbolic - "speech" in the first amendment sense. The exclusion was, nevertheless, simultaneously a practice of sex discrimination.

113. 347 U.S. 483 (1954).

114. *Id.* at 494.

115. *Id.*

116. 468 U.S. 609 (1984).

117. *Id.* at 617.

The practice of discrimination by the exclusion of women was speech in another sense. It, like most practices of discrimination,¹¹⁸ was done primarily through words. Women were excluded from full participation in the Jaycees by the organization's national bylaws.¹¹⁹ Bylaws are words. The Jaycees did not act to exclude women by posting guards at the door of the clubhouse.¹²⁰ When the Jaycees said that a woman could not join because she was a woman, the words, *in context of the power to make them effective*,¹²¹ were sex discrimination. When the Jaycees uttered the words, excluding a woman from membership, they practiced discrimination.¹²² The effect of the words, those in the bylaws and those uttered to an individual woman

118. Or at least those recognized as such in law. Rape and woman battering, for instance, two central practices by which women are subordinated on the basis of sex, are not actionable as sex discrimination, except when they come within the law of sexual harassment. Rape and battery are done less with words and more with acts than other practices of sex discrimination. They are, nonetheless, expressive.

119. 468 U.S. at 615.

120. In *Roberts*, two local chapters of the Jaycees had admitted women, with the result that the national organization imposed sanctions on the locals. The sanctions included denying members eligibility for state or national office or awards programs, and refusing to count their membership when counting votes at national conventions. Offices and awards are given with words, and voting is done through words. Members of the local chapters filed discrimination charges after receiving notice (in words, no doubt) that the national organization planned to consider (presumably in words) a motion (also words) to revoke the local chapters' charters (words).

121. See the comments of Sheila McIntyre in *Feminist Ethical Approaches to the First Amendment*, Panel Discussion at the 17th National Conference on Women and the Law at 18, 19 (March 22, 1986) [hereinafter cited as McIntyre, *Feminist Ethical Approaches*] (transcript on file with G.G.U. L. Rev.).

122. *Id.* If a man who had no authority in the Jaycees told a woman that she could not join because she was a woman, and if he, further, advocated women's exclusion from men's clubs on principle, he would lack power to effect his words. They would be speech; they would advocate women's exclusion and argue for women's inferiority. They would not be a practice of sex discrimination.

Men, simply as men under conditions of male supremacy, have the power to effect women's subordination through sex, including through pornography. If a man forces pornography on a woman, he is doing more than advocating her subordination: he subordinates and abuses her. If he coerces a woman into a pornographic performance, or sexually assaults a woman, including in a way directly caused by a specific piece of pornography, or if he trafficks in pornography, the man is not simply *saying* that she is subordinate to him as a woman and is the appropriate object of abuse: he abuses and subordinates her. Male supremacy itself creates the relationship of power in the context of which pornography is subordination and is practiced as abuse. Under the ordinance, discrimination through pornography by assault, coercion, forcing or trafficking need not be discrimination in, for example, housing or employment in order to be actionable. Indianapolis Gen. Ordinance, § 16-3(g)(4)-(7). An additional power relationship, such as that between employer and employee or landlord and tenant, is unnecessary to create the conditions under which one person, a woman, is subjected to another, a man.

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who sought to join, was the exclusion of a woman on the basis of sex. The words said: You are excluded because you are a woman, and, consequently, women were excluded. The words themselves were a practice of discrimination, and their impact, one might say their "communicative impact",¹²³ was to discriminate.¹²⁴

Discrimination in employment is, similarly, done primarily through words. Consider, for instance, the words, uttered by a person with the power to make promotions: "We're giving the promotion to Dick instead of to you [a woman] because we believe this is a man's job. Dick, you're the new district manager. Congratulations."¹²⁵ Without more, Dick is the district manager, and the company has practiced sex discrimination. Although it is true that Dick gets to move to the bigger office, and gets a bigger paycheck, and gets to tell more people what to do than he did before, the words themselves were discrimination. Laws that regulate discrimination, therefore, regulate what those who discriminate may say.

The law recognizes in other instances that "speech", in the form of words, pictures or expressive conduct, is a *practice* of discrimination. For instance, the National Labor Relations Act¹²⁶ prohibits employers from speaking critically of unionization in a way that coerces employees during the organizing period before a union election. In doing so, it defines such speech as an unfair labor *practice*.¹²⁷ Such speech is an unfair labor

123. See *infra* text accompanying notes 178-181.

124. This would be true even if the Jaycees had reversed their policy the following day, having done nothing but say that a woman could not join. The reversal of the policy might have mitigated damages by ending future discrimination; it would not have undone it from the time it occurred.

125. Although the words used now, in many places, are more subtle and coded than those in the text, employment discrimination is done, nonetheless, in words. In the hypothetical in the text, the words *are* the means of making the promotion and, therefore, *are* the act of discrimination. If a promotion is not effective until, for instance, the board of directors has taken a vote, or the president has written a letter stating that Dick is promoted, or the secretary or personnel department notes the promotion in company records, the promotion, and so the discrimination, is nevertheless done in words. Each of the acts by which the promotion might be made is an act done through words.

126. National Labor Relations Act, § 8, 29 U.S.C. § 158.

127. (a) It shall be an unfair labor practice for an employer - (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . . (c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the

practice because it operates, in the context of the unequal power of employers and employees, as coercion, as a threat.¹²⁸ The fact that the prohibited employer speech *is* speech does not make it any less an unfair labor practice.¹²⁹ Nor does the fact that it is speech mean that it is not also coercion. Similarly, pornography is subordination and, as such, is a practice of sex discrimination, without regard to whether it is also speech.¹³⁰

Congress has defined as discrimination advertising racial, sexual and other preferences in housing.¹³¹ The same statutory section declares it unlawful to “*represent* to any person because of race, color, religion, sex, or national origin that any dwelling is not available . . . when [it] is in fact so available”, or, for profit, to “*induce* . . . any person to sell or rent any dwelling by *representations* regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.”¹³² Similarly, Congress has created a cause of action for any person injured by two or more persons who conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving another of the equal protection of the law or equal privileges and immunities under the law.¹³³ Advertisements, representations and induce-

provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

National Labor Relations Act, 29 U.S.C. § 158(a)(1), (c). *See also* McIntyre, *Feminist Ethical Approaches*, *supra* note 121, at 21.

128. *See* McIntyre, *Feminist Ethical Approaches*, *supra* note 121, at 19-20, 21-22; *See also* NLRB v. Gissel Packing Co., 395 U.S. 575, 617-618 (1969).

129. NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969).

130. If a man rapes a woman, although the act is expressive of the woman's subordination, it is also, in itself, subordination. If he films it, to produce pornography making the abuse coercion under the ordinance, the production of the film and its subsequent distribution and consumption deepens the injury. The camera does not turn abuse magically into speech and not abuse. Linda Marchiano who, as Linda Lovelace, was coerced into making the pornographic film *Deep Throat*, said: “[E]very time someone watches that film, they are watching me being raped.” *Hearings*, *supra* note 9, at 16.

131. 42 U.S.C. § 3604(c) (1982) provides:

[I]t shall be unlawful . . .

(c) To make, print, or publish, or cause to be made, printed or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex or national origin, or an intention to make any such preference, limitation, or discrimination.

132. 42 U.S.C. § 3604(d), (e) (1982).

133. 42 U.S.C. § 1985(3) (1982).

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ments are done with words, pictures or expressive conduct. Conspiracy is done in words and when the Ku Klux Klan wears disguises on the highway, their acts are expressive. These civil rights statutes recognize that words, pictures and expressive conduct - "speech" - are practices of discrimination. They are constitutional.¹³⁴

Pornography is a practice for another reason. It is a practice because its definition in the ordinance describes what it does in the world. Pornography subordinates women through pictures and words. Seen through the lens of sex discrimination law, and in the context of social reality, what pornography does constitutes what it is.¹³⁵ Pornography is discrimination as employer speech that carries a threat of reprisal or promise of benefit is an unfair labor practice in the context of a union organizing drive, and as a racially discriminatory advertisement for the sale of a dwelling is race discrimination. Such employer speech coerces; such advertising discriminates. In a similar fashion, pornography is discrimination because, and only when, it subordinates on the basis of sex.

It is a legal conclusion that something is pornography under the ordinance, as it is a legal conclusion that something is obscenity under the statutory and case law of obscenity. To say that pornography is not a practice of sex discrimination would be like saying that obscenity is not material that the average

134. *United States v. Hunter*, 459 F.2d 205, 211, 213 (2d Cir. 1972), *cert. den.* 409 U.S. 934, *reh. den.* 413 U.S. 923; *United States v. Bob Lawrence Realty, Inc.*, 313 F. Supp. 870, 872-873 (D.C. Ga. 1973).

135. *See Hudnut*, 771 F.2d at 329. The Seventh Circuit said that "[i]f pornography is what pornography does, so is other speech." *Id.* What follows this sentence in the court's opinion is a statement of a series of harms, some of which are massive harms, that the court said, or said others believe, are the effects of speech. *Id.* at 329-330. The court apparently believed that the ordinance defines pornography as what pornography does only because harm results from its production and consumption. This assumption avoided the question how pornography actually functions in the world. The court simply asserted and assumed that it functions as Hitler's speeches, the advocacy of communism, religion, television and seditious libel - a mixed bag by any standard. The court proceeded as though the only argument that pornography is a practice of discrimination is that it does massive harm. Although the harm of pornography is part of the argument that it is a practice of sex discrimination, the way pornography functions *in the context of male supremacy*, the manner in which it does the harm it does in a context of unequal power, is essential to the understanding of pornography as sex discrimination. The court's equation leaves out the social reality of male supremacy in which pornography is what it does.

person, applying contemporary community standards would find, taken as a whole, appeals to the prurient interest, that depicts, in a patently offensive way, sexual conduct specifically defined by applicable law, and that, taken as a whole, lacks serious value.¹³⁶ Under the ordinance, whatever is not a practice of sex discrimination is not pornography. The definition of pornography as subordination is, on one level of its legal meaning, the *requirement* that only that which is discrimination can be pornography under the ordinance. That something is or is not discrimination would be subject to proof in each case.

Pornography is a practice also because it is the repetition of a limited number of discrete and recognizable formulae.¹³⁷ One of the prime attacks by opponents of the ordinance has been that the ordinance covers too much. Some opponents have asserted that the ordinance would reach virtually all of the world's art and literature, much of which is sexist and takes the point of view that women are men's inferiors.¹³⁸ These arguments fail to apply the statutory definition to the work that assertedly would fall within pornography's definition.¹³⁹ These arguments also frequently are stated as first amendment absolutist hyperbole.¹⁴⁰ In

136. *Miller v. California*, 413 U.S. 15, 24 (1973).

137. Brief of Andrea Dworkin, Amicus Curiae, *supra* note 110, at 12-13.

The statutory definition of pornography in the Ordinance, far from being "vague", delineates the structure of actual, concrete material produced and sold as pornography by the \$8-billion-a-year industry. No adult bookstore has any problem knowing what to stock. No consumer has any problem knowing what to buy. No pornography theatre has any trouble knowing what to show. The so-called books are produced by formula, and they do not vary ever in their nature, content, or impact. They cannot be confused with the language of any writer I have ever read, including Jean Genet and Jerzy Kosinski, who are particularly graphic about rape and hate women.

Id. (citation omitted).

138. *See, e.g., Emerson, Reply to Professor MacKinnon, supra* note 101, at 131-132.

139. The technique that those who make this error use is to apply one or, sometimes two, of the three parts of the definition of pornography and, often, to ignore that what is actionable are acts: assault, coercion, forcing and trafficking. *See, e.g. Hudnut*, 771 F.2d at 328.

140. *See, e.g., Hudnut*, 771 F.2d at 330. In the discussions of the anti-pornography ordinance, the absolutist argument appears to play on anxiety about the loss of relatively unrestricted sexual access to women. "First Amendment absolutism was forged in the crucible of obscenity litigation. Probably the most inspired expositions, the most passionate defenses of First Amendment absolutism, are to be found in Justice Douglas's dissents in obscenity cases." MacKinnon, *Feminist Ethical Approaches to the First*

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fact, the definition of pornography in the ordinance, developed as a description of the materials trafficked in an identifiable industry, describes a limited genre of materials, far more limited than any statutory or common law regulation of any arguably "speech" category.

Finally, pornography is a practice because it is subordination. Trafficking in pornography is trafficking in subordination. This is true in the sense that pornography actively subordinates women and, therefore, is a practice of sexual subordination. It is true also in the sense that the product that is trafficked is women's subordination. Pornography is commercially and sexually valuable in part because it is women's sexual subordination. What the consumer of pornography buys when he buys pornography is women's subordination made into and sold as sex.

Anti-union employer speech in the context of a union organizing drive is words. Seen through the lens of labor relations law and social reality, it is also an unfair labor practice because it coerces employees. Segregation is a practice of race discrimination and a symbol of white supremacy. The exclusion of women from the Jaycees, done through words, with the exclusion itself justified as expressive, is sex discrimination. The com-

Amendment, supra note 121 (remarks of Catharine A. MacKinnon at 5-6). In considering the anti-pornography ordinance, otherwise clear-thinking people - including lawyers who know how to read statutes - lose the ability to distinguish a civil law from a criminal law, remedies from prohibitions, an act from a thought and a law based on discrimination from an obscenity law. It appears that the thought of losing relatively unrestricted sexual access to women prompts an hysteria that clouds clear thinking.

In *Hudnut*, the Seventh Circuit asserted that if speech and practices that "influence the culture and shape our socialization", including "racial bigotry, anti-semitism, violence on television, [and] reporters' biases", are restricted, all freedom is lost. 771 F.2d at 330. This statement was presented as argument, when it is mere assertion of a legally and factually incorrect proposition. In fact, the first amendment and substantial rights of speech coexist with defined and limited restrictions on speech and expressive practices. If to permit any restriction on speech and practices that shape the culture is to become a totalitarian regime, the United States, in addition to its other shortcomings, already is. The absolutist rhetoric that surrounds the first amendment gives rise to a unique form of argument that would not be tolerated in other contexts. Why is the argument not made, and accepted, that to permit any deviation from equality will turn one portion of the society into the abject slaves of another? Why is there no fear of the slippery slope from inequality to slavery? How does the value placed on equality differ from that placed on speech such that the thought of undermining equality does not raise a spectre of harm comparable to that raised by the thought of restricting, in a carefully defined and limited way, what has been accepted as "speech"? See Brief of Andrea Dworkin, Amicus Curiae, *supra* note 110, at 14-16.

pany promotes a man over a woman because he is a man by saying the words that he is promoted. By saying those words, it has discriminated. Pornography is words and pictures, and also a practice of sex discrimination done through words and pictures.

IV. VIEWPOINT DISCRIMINATION AND THE SUBORDINATION OF WOMEN

The Seventh Circuit held that the anti-pornography civil rights ordinance is unconstitutional because it discriminates on the basis of viewpoint. The court said:

Under the ordinance graphic sexually explicit speech is "pornography" or not depending on the perspective the author adopts. Speech that "subordinates" women and also, for example, presents women as enjoying pain, humiliation, or rape, or even simply presents women in "positions of servility or submission or display" is forbidden, no matter how great the literary or political value of the work taken as a whole. Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual content. This is thought control. It establishes an "approved" view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not.¹⁴¹

141. 771 F.2d at 328. The errors in this quotation are symptomatic of the errors that the court made throughout its opinion. The court assumed that pornography is speech, without coming to grips with its definition as sex discrimination. The court treated subordination as though it were a "perspective", as though to subordinate a woman is simply to adopt an attitude toward or idea about her. The court failed to consider all three elements of the definition of pornography, proceeding in its analysis as though one or two of the elements were sufficient, and misstating elements that it included. The court, in the second quoted sentence, omitted the "graphic sexually explicit" element of the definition. In its apparent attempt to paraphrase subsections (1), (2), and (6) of the definition of pornography, the court omitted the requirement that women be "presented as sexual objects." The court in this passage treated the law as a prohibition, stating that under the ordinance speech is "forbidden", and failing to recognize that the ordinance creates remedies for proven harm. The court referred to the absence of a term protecting pornography deemed to have literary or political value, as though the standards of obscenity law apply to the ordinance. It contrasted pornography as defined with "[s]peech that *portrays* women in positions of equality" (emphasis supplied), as though the difference between pornography and portrayals of equality were the difference between one image or portrayal and another, rather than the difference between a practice that subordinates on the basis of sex and a portrayal that does no such thing. Again proceeding as

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It is an important first amendment principle that the government may not discriminate between speech or speakers based on its agreement or disagreement with the ideas expressed, suppressing the expression of some ideas but not others.¹⁴² From this principle, the outlines of a doctrine, recently named the "viewpoint discrimination" doctrine,¹⁴³ have been drawn: the state may not enact regulations that are "in fact based on the desire to suppress a particular point of view",¹⁴⁴ or that are "impermissibly motivated by a desire to suppress a particular point of view."¹⁴⁵

The viewpoint discrimination doctrine must be distinguished at the outset from three things it is not. It is not a doctrine that limits regulation of all speech that expresses a viewpoint. All, or virtually all, speech expresses, implicitly or explicitly, a viewpoint. So does much conduct, including acts of discrimination. The question, however, is not whether the regulated speech expresses a point of view, but whether the regulation is based on, or aimed at, the viewpoint expressed. Thus, for instance, most time, place and manner restrictions on speech¹⁴⁶ regulate speech that expresses a viewpoint. They are not for that reason viewpoint regulations. The regulation of child pornography is harm-based rather than viewpoint-based.¹⁴⁷ This is true although child pornography legislation is content regulation, and although child pornography expresses the point of view that sexual activity is natural and beneficial and enjoyable for children. Only if the regulation is aimed at the suppression of the point of view expressed is the law viewpoint-based.

Second, the viewpoint doctrine is not a doctrine that limits

though the ordinance must meet the standards of obscenity law, which no party or amicus argued that it does, the court objected to the law because it does not distinguish among materials on the basis of *how* sexually graphic they are. Disregarding the actual terms of the statutory definition, the court treated it as though it defined pornography as "speech", "thought", a "view", and treated the law as though it "controlled", "approved" and "disapproved" speech, thoughts, or view points.

142. *See, e.g.,* *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972).

143. *See* *Cornelius v. NAACP Legal Def. & Educ. Fund*, 105 S. Ct. 3439, 3454 (1985); *Perry Ed. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 49, n.9 (1983).

144. 105 S. Ct. at 3454.

145. *Id.* at 3455. *See also* 460 U.S. at 49, n.9.

146. *See, e.g.,* *Cox v. New Hampshire*, 312 U.S. 569 (1941).

147. *See* *New York v. Ferber*, 458 U.S. 747 (1982).

regulations that express a viewpoint. Virtually all laws express points of view. Regulations that prohibit the posting of billboards, for instance, express the point of view that communities should be protected from visual blight.¹⁴⁸ Securities regulation expresses the point of view that persons should be protected from fraud and misrepresentation in the purchase and sale of securities. Obscenity law expresses the viewpoint that only certain sex should be seen in public. Sex discrimination law, when effective in subverting male supremacy, expresses the point of view that women should not be subordinated to men on the basis of sex. Such laws are not, for that reason, impermissibly viewpoint-based.

Third, the viewpoint discrimination doctrine does not look at the effects of the regulation in question but, rather, at the aim or motive of the regulation. It is a limitation on regulations aimed at the suppression of, or motivated by the desire to suppress, particular points of view. The doctrine requires *proof* of discriminatory motive.¹⁴⁹ Discriminatory motive can be determined by assessing the degree of “fit” between the regulation and the end, unrelated to the aim of suppressing speech, that is asserted to justify the regulation.¹⁵⁰ If harm is asserted as a justification, it is necessary to assess the reality and severity of the harm. In order to determine, as *Cornelius v. NAACP Legal Def. & Educ. Fund*¹⁵¹ and *Perry Ed. Ass’n. v. Perry Local Educators’ Assn.*¹⁵² require, whether the legislature in fact acted to discriminate against a particular point of view, it is necessary to assess the purpose of the legislation and to determine whether the regulation is narrowly drawn to achieve it.¹⁵³ Where the purpose of the legislation is to remedy harm, the reality and severity of the harm and the fit of the regulation to the harm are measures of motive.

Pornography, as defined in the civil rights anti-pornography

148. See *Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

149. See *Cornelius*, 105 S. Ct. at 3454-55; *Perry Ed. Ass’n*, 460 U.S. at 49 (“There is, however, no indication that the School Board intended to discourage one viewpoint and advance another.”); *Id.* at 50, n.9 (“[T]here is no indication in the record that the policy was motivated by a desire to suppress PLEA’s views.”).

150. *Cornelius*, 105 S. Ct. at 3455.

151. 105 S. Ct. 3439 (1985).

152. *Perry Ed. Ass’n*, 460 U.S. 37 (1983).

153. *Cornelius*, 105 S. Ct. at 3454; *Perry Ed. Ass’n*, 460 U.S. at 49-51.

ordinance, expresses a point of view: that women are, and should be, sexually subordinate to men. That pornography expresses the view that women are properly sexually subordinate to men is *not* a reason to protect or to regulate it, any more than the point of view expressed in other discriminatory practices are reasons to protect or regulate them.¹⁵⁴ The ordinance also expresses a point of view: that the sexual subordination of women is sex discrimination. It is the fact that pornography expresses a viewpoint that the Seventh Circuit reacted to when it said that "graphic sexually explicit speech is 'pornography' or not depending on the perspective that the author adopts."¹⁵⁵ It is the point of view that the ordinance expresses that the court decried when it said that the ordinance "establishes an 'approved' view of women, of how they may react to sexual encounters, of how the sexes may relate to each other."¹⁵⁶ Pornography takes a viewpoint, as does the ordinance. The ordinance does not, therefore, discriminate on the basis of viewpoint or "establish an 'approved' view of women",¹⁵⁷ or amount to "thought control."¹⁵⁸ Unless the ordinance is aimed at the suppression of a particular point of view, or is motivated by a desire to suppress a particular point of view, it is not viewpoint-based.

In *Hudnut*, there was *no* evidence that the ordinance was motivated by a desire to suppress a particular point of view.¹⁵⁹ The ordinance is motivated by the desire to remedy the harms of sexual abuse and subordination, not by the desire to suppress a viewpoint or idea. The notion that the harm of pornography is the harm of an idea or viewpoint is a notion informed by the point of view of those who are at very little risk of suffering sexual abuse and subordination. It is a notion informed by the point of view of those who cannot comprehend the realities of

154. In *Hudnut*, the Seventh Circuit treated pornography's expression of the point of view that women are sexually subordinate as a reason to protect it and to prohibit its regulation. 771 F.2d at 329.

155. *Id.* at 328.

156. *Id.*

157. *Id.*

158. *Id.*

159. The courts, plaintiffs and some amici asserted and assumed such a motive. They did not attempt to prove it. The question whether the ordinance is viewpoint discrimination, in fact, was not litigated. The Seventh Circuit raised the issue *sua sponte* and decided it without the benefit of briefs or argument. Important constitutional issues affecting important questions of public policy are not properly treated in such a cavalier fashion.

lives lived under conditions of sexual subordination in which sexual abuse is endemic and ordinary. As the legislative record demonstrates, the ordinance fits the harm at which it aims. The legislative record establishes pornography's harm through the testimony of women who have been coerced into pornographic performances,¹⁶⁰ who have had pornography forced on them at home¹⁶¹ and at work,¹⁶² and of women and men whom men have forced to perform sexual acts that have been sexualized through pornography.¹⁶³ The record also provides supporting accounts by workers at rape crisis centers,¹⁶⁴ battered women's shelters,¹⁶⁵ and mental health facilities,¹⁶⁶ of incest survivors and their therapists,¹⁶⁷ and of women who have been used in prostitution.¹⁶⁸ Experimental research and social studies also predict many of these results and document their occurrence.¹⁶⁹

As the legislative record clearly shows, and as was uncontested in the litigation, the reason for the ordinance's existence is to provide a remedy to women, and also children and men, harmed through pornography. Harm is also its constitutional justification. If women were not harmed by pornography, the ordinance could function only as viewpoint discrimination. If women were not harmed by pornography, the ordinance would be, as the Seventh Circuit held it is, rather than a regulation to remedy harms to women injured through pornography, a regulation through which the state favored one viewpoint over another.

The Seventh Circuit, while purporting to accept the legislative record and finding of harm,¹⁷⁰ wrote an opinion that rendered the harm invisible. The court's treatment of the ordinance as viewpoint discrimination is a product of its failure to actually

160. *Hearings*, *supra* note 9, at 13-16. See also L. LOVELACE & M. GRADY, *ORDEAL*, *supra* note 61.

161. *Hearings*, *supra* note 9, at 43-45.

162. *Id.* at 50-52.

163. *Id.* at 37-39, 66-67.

164. *Id.* at 71-72.

165. *Id.* at 67-71.

166. *Id.* 72-73, 74, 75-77.

167. *Id.* at 81-83, 85-86, 89-90, 99.

168. *Id.* at 46-49.

169. See generally, *PORNOGRAPHY AND SEXUAL AGGRESSION* (N. Malamuth & E. Donnerstein, eds. 1984). See also *Hearings*, *supra* note 9, at 4-12, 19-20.

170. 771 F.2d at 329.

see, and write a decision sensitive to, pornography's *demonstrated* harm. The court erased the harm by its failure to measure the motive of the law by reference to the severity of the harm revealed in the legislative record, and by reference to the fit between the harm and the regulation. To see the law as viewpoint discrimination is to render invisible pornography's demonstrated harm.

The fact that words, pictures or expressive conduct - "speech" - does harm that depends, in part, on the "content", meaning, or "communicative impact"¹⁷¹ of the speech does not imply necessarily that the words or pictures do their harm through the communication and effect of an *idea*. Consider, for instance, blackmail. Blackmail is done in words. It is not the time, place or manner of the words that is regulated when blackmail is criminalized. The same is true of bribery, conspiracy, perjury, treason and other similar crimes. Securities regulation, for instance, regulates what must and what may not be said in a prospectus. The law of fraud and misrepresentation regulates what people may say, the *content* of their speech. These laws do not regulate *ideas*, although they do regulate speech based on the meaning of what is uttered. They regulate, and are aimed at the harm of, words used in particular contexts as communication for particular purposes. They are aimed at the harm of the use and effect of words *used* as bribery, conspiracy, perjury, treason, fraud, or blackmail, *not* at ideas. They are aimed, like the anti-pornography ordinance, at the harm of words or pictures that derives from their existence as something other than, or in addition to, their existence as ideas, and to their functioning to persuade, advocate, argue or simply express. The Supreme Court has referred to these harms, which are done through words but are not the harm of ideas, as "unique evils that the government has a compelling interest to prevent."¹⁷²

Similarly, the anti-pornography ordinance is aimed, not at the ideas expressed by pornography, but at sex-based subordina-

171. See generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 44, at 580-584.

172. *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) ("[A]ct of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that the government has a compelling interest to prevent - wholly apart from any point of view such conduct may transmit.").

tion and abuse. Although pornography is expressive - expressing, for example, the viewpoint that women are sexually subordinate whores who love and deserve rape - the expression of this viewpoint is only one part of the way pornography exists and functions in the world. The expression of the viewpoint, and any harm done through its expression, is not what the ordinance is aimed at regulating. The law targets subordination in the definition of pornography, and targets abuse by limiting actionable harm to that done, *not by ideas*, but by assault, coercion, forcing and trafficking in subordination through pornography. Subordination, assault, coercion, forcing and trafficking are not ideas: they are unique evils that the government has a compelling interest to prevent.

Other examples of comparable regulations exist in the law. For example, the law prohibiting employers from speaking critically of unionization in a way that coerces or threatens employees in the organizing period before a union election does not violate the first amendment.¹⁷³ The law permits pro-union employer speech; it forbids anti-union employer speech. It is, therefore, content-based. It is not, however, viewpoint-based in the first amendment doctrinal sense unless it is aimed at the suppression of an anti-union viewpoint. It is not viewpoint-based if it is aimed at the harm of something else, something other than the persuasive impact of the words.

In the case of threatening anti-union employer speech, the something else is coercion. The government is aiming not at the viewpoint expressed by employer speech, but at the harm of coercion. The regulation of anti-union employer speech during an election is justified by the fact that the speech does not operate to persuade by the logic, eloquence or truth of the viewpoint expressed: it "persuades" by coercion, operates as a threat, provokes compliance through instilling fear, all in a context of unequal power.¹⁷⁴

173. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-619 (1969). Professor Sheila MacIntyre made this argument in *Feminist Ethical Approaches*, *supra* note 121, at 18-25. See also Sunstein, *Pornography and the First Amendment*, 4 DUKE L.J. 589, 613 (1986).

174. McIntyre, *Feminist Ethical Approaches*, *supra* note 121, at 19-20.
[L]awmakers recognize that employers have the power to effect what they utter in speech. The labor boards understand that when the union is defeated in the election following an

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In context, the speech is coercion. It is not, therefore, protected speech. Its harm, in context, is not its persuasive force, but its coercive force. Viewpoint-based regulation aims at what is advocated and at the effects accomplished by persuasion, at the harm of an idea. The labor law forbidding employer speech promising a benefit or threatening reprisal in the context of an election, like the anti-pornography ordinance, is aimed at a distinguishable harm, at something else: coercion or, in the latter case, assault, coercion, forcing or trafficking in sex-based subordination. As the employer speech in question *is*, in the particular context of unequal power, coercion, pornography, as defined by the ordinance, and in the context of male supremacy, *is* subordination. It operates by subordinating, as the prohibited employer speech operates by coercing. It is actionable when *used* to abuse, as employer speech is prohibited when used to threaten. Although in each case the speech may operate, in part, through the expression of a viewpoint, the regulations in question do not aim at or reach it for that reason.

Subordination and the related harms of pornography are intertwined with the expression of the viewpoint that women are subordinate, so that, in pornography, women are subordinated through a practice of sex discrimination while the pornography, simultaneously, expresses the viewpoint that women are sexually subordinate to men. Subordination is done *through* words and pictures, but it is *done* nonetheless.

In first amendment jurisprudence, the doctrine that regulations, with certain limited categorical exceptions, may not be aimed at the harm or danger of ideas is stated as the doctrine that the state may not regulate the "communicative impact" of "speech."¹⁷⁵ This doctrine is, apparently, the doctrine that the 7th Circuit called on when it invalidated the ordinance because it concluded that the harm of pornography is done through "mental intermediation."¹⁷⁶ Although the communicative impact

anti-union employer speech, it is *not* because employees were persuaded by the logic of the employers' words about unions, but because they were persuaded by fear for their livelihoods.

Nor is it because they are moved by the employer's passionate rhetoric.

175. See generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 44, at 580-584.

176. 771 F.2d at 329.

doctrine is an important first amendment doctrine, it is stated in a manner that obscures its actual outlines and application, and that is insensitive to the actual operation of expression.

First, as shown above, the doctrine is not applied to bribery, conspiracy, blackmail, perjury, treason and other similar crimes done through words, although such acts are done through the communicative impact of words. Certainly, the first amendment, until the *Hudnut* decision, had not been used to invalidate discrimination laws, although much discrimination is done through words and all is expressive,¹⁷⁷ and although discrimination constructs to a significant degree the social meaning and consequences of gender. The words through which discrimination is done operate through their meaning, their communicative impact, both in the sense that the words, by virtue of their meaning, are discrimination and in the sense that things happen as a result of the meaning of the words, the content of the speech. The law of sex discrimination regulates the communicative impact of speech and the harms flowing from communicative impact.

Second, the statement of the communicative impact doctrine is founded on an insufficiently analyzed concept of communicative impact. The doctrine forms the foundation of the argument that the ordinance is invalid because it is aimed at the harm of an idea. According to this argument, any viewpoint-based regulation can be stated as a regulation based on harm.¹⁷⁸ The danger of such speech, the danger regulated by the ostensibly harm-based laws, the argument proceeds, is the danger of loathsome speech to have its way in the marketplace of ideas.¹⁷⁹ In this view, the harm regulated by any law regulating the communicative impact of speech is the harm of an idea or a viewpoint.

By this argument, implicitly adopted by the Seventh Circuit in *Hudnut*, the court erased the real and demonstrated harms of abuse and subordination that are inextricably intertwined with the production and consumption of pornography. This argument

177. See *supra* section III.

178. See, e.g., Stone, *Anti-Pornography Legislation as Viewpoint Discrimination*, 9 HARV. J. L. & PUB. POL. 461, 467 (1986).

179. See, e.g., 771 F.2d at 329-330.

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assumes that the only harm that flows from the communicative impact of expression is the harm of persuading listeners to an odious viewpoint. It *assumes* that if a regulation aims at communicative impact, it aims at an idea or a viewpoint that the government believes is not only wrong, but dangerous. Thus, it is said that the restriction of speech based upon its "communicative impact" is restriction based upon "a fear of how people will react to what the speaker is saying."¹⁸⁰ The phrase "a fear of how people will react to *what the speaker is saying*" obscures how speech actually functions. What is an employer saying when she says to employees during a union organizing drive: "If we just cooperate and try to get along together, we'll all be a lot better off than if we have to fight this thing out the hard way, maybe lose jobs or have to close down the shop?" What is the "communicative impact" of this speech? In one sense, what the speaker communicates are the ideas, thoughts or viewpoint she conveys, the position she advocates, the logic of her words. In another sense, she communicates a threat. In a context of unequal power and coerced compliance, the "viewpoint" communicated cannot be separated from the threat. [Both are the "communicative impact" of the "speech."] References to the "communicative impact" of speech, to "what the speaker is saying", therefore, are highly misleading when they fail to distinguish between the operation of words as persuading through the force of ideas and the impact of communication through the force of something else: coercion, for instance, or abuse and subordination. The harm reached by the anti-pornography ordinance and similar regulations is not the harm of an idea.¹⁸¹

An analysis of the use of words and pictures to abuse and subordinate or coerce, rather than to persuade or advocate through the expression of an idea, is necessarily sensitive to so-

180. J. ELY, DEMOCRACY AND DISTRUST 111 (1980).

181. The law has engaged, in obscenity law, in a fruitless search for the harm of obscenity. Historically, the "harm" of obscenity has been showing sex that should not be seen, particularly to unwilling viewers and to children. See Baldwin, *The Sexuality of Inequality*, *supra* note 4, at 633-634. Now, with the widespread public display and availability of pornography, sexually explicit materials can be reached under zoning laws. See, e.g., *Renton v. Playtime Theatres, Inc.*, 106 S.Ct. 925 (1986). The harm of pornography is something quite different from the searched for, imagined and selective "harms" of obscenity, and the devaluation of property values addressed by zoning laws. The harm of pornography is not the harm of an idea or an image; it is not "offense"; it is the harm of sexual abuse and subordination.

cial context and social reality. Such an analysis cannot assume that words function simply to express ideas and, therefore, that any regulation of the “communicative impact” of words is regulation of ideas, of thought. In *NLRB v. Gissel Packing Co.*,¹⁸² the Supreme Court upheld the National Labor Relation Act’s restriction on threatening employer speech during a union election through a consideration of the context of the speech, particularly the context of the relative power of employers and employees:

Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer’s rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in [the NLRA]. And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.¹⁸³

The decision of the Seventh Circuit in *Hudnut* is neither sensitive to the context and reality in which pornography exists, particularly the context of sex-based power, nor aware that pornography’s impact, its subordination of women, is not the effect of ideas.

The error in the line of argument that all content-related harm done through words or pictures is the harm of the idea or viewpoint expressed derives in part from the failure to consider context. It is the failure to understand how speech functions in reality, rather than in the theoretical marketplace of ideas.¹⁸⁴ It

182. 395 U.S. 575 (1969).

183. *Id.* at 617.

184. The phrase “marketplace of ideas” itself demonstrates its deficiencies. It makes the unfounded assumption that all that is at issue when words or pictures are at issue is ideas. It is as though speech, in the world, takes place as, and only as, a contest of viewpoints, disembodied, divorced from social reality; as though speech can be reduced to logical propositions and the propositions compared in the abstract to determine which is true. It is as if the process of the creation of truth and social reality were the process of the competitive interaction of ideas, and may the best syllogism win.

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derives in part from the assumption that words, or all communication, operate as pure thought, as though they were pure idea, existing out of context and unrelated to social reality. The analogies used to make the argument take pornography out of context and strip it of social reality.

The Seventh Circuit, for instance, analogized the ordinance to a regulation that would prohibit films critical of Republicans but not those critical of Democrats.¹⁸⁵ In this analogy, the speech regulated is nothing but the pure expression of a viewpoint. The analogy erases harm and subordination. It erases context. It erases reality. The regulation in the court's example is clearly a violation of the first amendment. There is simply no justification for the regulation of films critical of Republicans except viewpoint discrimination. The analogy is an attempt to make the ordinance something it is not. If the ordinance made actionable¹⁸⁶ films that advocated women's sexual subordination, it would be analogous to the court's hypothetical regulation.¹⁸⁷

185. 771 F.2d at 331.

186. The court used the word "prohibit", again failing to make the basic distinction between the enactment of a prohibition and the creation of a legal remedy. In formulating the analogy, it also ignored that what is actionable under the ordinance are *acts*, assault, coercion, forcing and trafficking, which are done *in part* through words. See Indianapolis Gen. Ordinance, § 16-3(g)(4)-(7).

187. *Compare Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 688 (1959) ("What New York has done, therefore, is to prevent the exhibition of a motion picture because that picture advocates an idea - that adultery under certain circumstances may be proper behavior.") Argument in opposition to the ordinance that fails to distinguish advocacy of an idea, including any supposed "harm" or "danger" of such advocacy, from the harms of abuse and subordination done through pornography by assault, coercion, forcing and trafficking finds expression in Stone, *Anti-Pornography Legislation as Viewpoint Discrimination*, *supra* note 178. In that comment, the author analogized the ordinance to a law that *prohibits* "any publication that may *persuade* listeners to refuse induction into the army", asserting that the hypothetical law is a "harm-based" statute. *Id.* at 466 (emphasis supplied). He asserted the unquestionably true proposition that the hypothetical law is viewpoint discrimination. The analogy to the ordinance, however, misleads by erasing harm, by treating the ordinance as a regulation of the advocacy of an idea, and by failing to analyze the concept of "communicative impact" on which the argument relies. *Id.* at 467. The argument of the comment as a whole is tautological: it states the terms of the ordinance as though it were a regulation of the harm of an idea - which is, by definition, viewpoint discrimination - and concludes, therefore, that the ordinance is viewpoint discrimination. "Harm" in the comment's argument *means* the danger of an idea. The comment even uses the word "persuade" in the draft hypothetical, making the argument a perfect circle. If the ordinance defined pornography as words or pictures that persuade viewers that women are subordinate, the analogy would be good and the ordinance would be viewpoint discrimination. The comment makes the analogy by distorting and misrepresenting the actual terms of the ordinance, and by failing to comprehend the harm of sexual abuse and subordination at which the ordinance aims.

The court treated the ordinance the same as it would have treated a similar law that defined pornography as the sexually explicit "equalization" of women that also included descriptions of mutual sex premised on equality. Harm and the public policy pursuant to which sexual equality is identified as a compelling state interest did not figure in the court's decision. If the harm of pornography were not demonstrated in the legislative record, and if sex equality were not a compelling state interest, the court's conclusion that the law is viewpoint discrimination would be correct. Pornography's harms, the harms of abuse and subordination, and the fact that the law is properly a sex discrimination law - a conclusion that the 7th Circuit did not contest - are the reason for the ordinance's existence and the argument for its constitutionality. The court distorted and gutted the law in order to conclude that it is unconstitutional viewpoint discrimination.¹⁸⁸

The court did not identify the element of the law that it concluded was viewpoint discrimination. It cannot be the "sexually explicit" portion of the definition, for regulation of sexually explicit speech has not been treated as viewpoint-based.¹⁸⁹ The six descriptions of the content of pornography cannot be the viewpoint element. Although they are a content element, they are not viewpoint-based. Those elements could appear, for instance, in a work criticizing pornography and arguing for women's equality. Such a work would not have the viewpoint of pornography, although it contained one or more of the six descriptions. It can only be that the court was treating the subordination element of the definition of pornography as viewpoint discrimination. Rather than recognizing that the ordinance is a sex discrimination law, and, therefore, not viewpoint discrimination, the court used the fact that it is a sex discrimination law to conclude that it is viewpoint discrimination.

188. A comparison of the ordinance with the effort to stop the Nazis from marching in Skokie, Illinois similarly guts the ordinance by erasing the fact that it is a civil rights law. *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978) was posed as *Hudnut* was decided, as simply a speech case, and not a civil rights case. *Collin* could have been posed as a civil rights case with a potentially different result from the one the court reached. See 578 F.2d at 1204, n.13 ("It bears noting that we are *not* reviewing here a law which prohibits acts designed to impede the equal exercise of guaranteed rights. . . . If we were, we would have a very different case.") (Citations omitted).

189. See, e.g., *Renton v. Playtime Theatres, Inc.*, 106 S. Ct. 925 (1986).

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All acts of sex discrimination have a viewpoint: women are inferior to and should be subordinate to men. All acts of race discrimination take the point of view that Blacks, or members of another racial group, are inferior to whites and, therefore, should be subordinate to whites. Laws against sex and race discrimination take a different viewpoint, a viewpoint favoring equality. If the reasoning of the Seventh Circuit in *Hudnut* were evenhandedly applied to all discrimination law, all discrimination law would violate the first amendment. All sex discrimination laws, that are effective as such, aim at practices that contribute to the social acceptance of the belief that women are inferior to men as they construct a world in which, in fact, women are subordinated to men. In, for instance, *Pittsburgh Press Co. v. Pittsburgh Commn. on Human Rights*,¹⁹⁰ the court upheld a law that prohibited sex-segregated employment advertisements. The law, like many laws regulating sex discrimination in employment, took the viewpoint that the workforce should not be sex-segregated. It was not invalid, any more than Title VII of the Civil Rights Act of 1964¹⁹¹ as a whole is invalid, because it legislates an "approved view" of women in the workforce.¹⁹² Although the law regulated the use of words - the publication of words in newspapers - it was not "thought control", but a sex discrimination law. Similarly, the law of sexual harrassment regulates words, pictures and expressive conduct. In, for instance, *Katz v. Dole*,¹⁹³ the court held that the verbal sexual harrassment to which the plaintiff was subjected in her employment was a practice¹⁹⁴ of sex discrimination. The fact that the discrimination was done through words, in the form of "sexual slur, insult and innuendo" and through "sexually related epithets addressed to and employed about" the plaintiff¹⁹⁵ did not result in the conclusion that the harrassment was speech and, therefore, not a practice of discrimination, nor that its regulation violated the first amendment.¹⁹⁶

190. 413 U.S. 376 (1973).

191. 42 U.S.C. § 2000e.

192. See Appellants' Jurisdictional Statement at 21, *Hudnut*, 106 S. Ct. 1772 (1986).

193. 709 F.2d 251 (4th Cir. 1983).

194. *Id.* at 254.

195. *Id.* at 253.

196. See Brief of Andrea Dworkin, Amicus Curiae, *supra* note 110, at 18-19.

All any exploiter has to do is to interject speech into any practice of exploitation, however malignant, and hide the whole practice behind the First Amendment. By isolating the speech

In the dominant liberal ideology, the central harm of sex discrimination is that it reinforces and rests on "archaic and overbroad generalizations"¹⁹⁷ about women and "stereotyped characterizations of the sexes."¹⁹⁸ Archaic stereotypes are *ideas* about women. They are, in fact, presumptively *false* ideas about women. That the central dynamic of sex discrimination is seen, in liberal ideology, to be its reliance on false ideas of women has not resulted in the conclusion that sex discrimination law is a violation of the first amendment. The fact that the harm of sex discrimination is done in part by creating, affecting or reinforcing beliefs about or perceptions of women's inferiority does not mean that discrimination law violates the first amendment, or that it is "thought control"¹⁹⁹ or the "legislation of an approved view of women."²⁰⁰ The ordinance reaches practices that subordinate women and, as such, does not require a determination whether any particular view of women is true or false. In liberal ideology, a practice of sex discrimination is a practice that embodies, relies on, or assumes a false view of women.²⁰¹ It is ironical that a sex discrimination law that makes subordination and abuse actionable, and that does not depend on judgments of what is true and false about women, should be held to be thought control and the legislation of an approved view, when sex discrimination laws that, under liberal theory, depend on

elements in other practices of discrimination and asserting their absolute protection, the discrimination can be made to disappear. Consider, for example, a common situation in sexual harassment in employment, where a "speech" element - a sexual proposition from a supervisor - is part of a chain of events leading to an adverse employment consequence. . . . No court has held that the mere presence of words in the process of discrimination turns the discrimination into protected activity.

Rape is not a viewpoint, either, although it expresses a viewpoint, and is part of what socially constructs women and men as such. "To be rapable, a position which is social, not biological, defines what a woman is." MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 4, at 651. In the analysis of the Seventh Circuit in *Hudnut*, therefore, and particularly if the rapist says anything while he is in the act of raping, laws against rape would violate the first amendment.

197. *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975).

198. *Dothard v. Rawlinson*, 433 U.S. 333 (1977).

199. 771 F.2d at 328.

200. *Id.*

201. In the liberal theory of sex discrimination law, a woman must show that she is similar to a man in relevant respects in order to recover for sex discrimination; she must show that what is true of men is true of her. See generally, MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *FEMINISM UNMODIFIED*, *supra* note 4, at 32-45.

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judgments concerning what is true and false about women should be upheld.

In the liberal theory of sex discrimination, the law permits persons to hold stereotyped notions about women, and to say them. The law imposes liability, however, for discriminating against women, including through words,²⁰² based on those archaic beliefs. Under the ordinance, one may believe and say, for instance, that women love rape, and are properly sexually subordinate to men. The ordinance does not require that anyone adopt or express any particular viewpoint on women. Under the ordinance, it is a defense that the materials merely express an idea about the subordination of women. It is a question of fact in each case whether the material in question actively subordinates, or merely expresses the viewpoint that women are and should be sexually subordinate. People remain free to say, for instance, that women love to be beaten and raped, so long as they do not practice sex discrimination by assault, coercion, forcing or trafficking in subordination through pornography.²⁰³ The ordinance requires simply that persons who injure others by acting in specified ways in the production, distribution and consumption of pornography compensate the victims for their acts of sex discrimination, and that they stop injuring them in this way henceforth. Like any discrimination law, the anti-pornography ordinance regulates discrimination *as* discrimination, and not as speech. This is true even though the discrimination may be done partly, or primarily, in words or pictures or both, and even though it may be expressive conduct.

In the decision of the Seventh Circuit, pornography's harm is not seen as real; it is not seen as important. The court saw the harm as a mere pretext for discrimination on the basis of viewpoint because it did not see the harm as sufficiently serious to justify the regulation. If the court had seen the harm as real and important, it would not have concluded that the legislature was

202. *See supra* section III.

203. The regulation of employer speech, for instance, is limited to speech that functions as a threat, that coerces, as the ordinance is limited to materials that subordinate when used to abuse. In *Gissel*, the Court distinguished the operation of speech to express an idea from its operation as a threat: "Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or a promise of benefit.'" 395 U.S. at 618.

acting to suppress a viewpoint. If the court had seen the harm as real and important, it would have seen that the law is directed against a serious, even monumental, harm, not against an idea or a viewpoint. If one sees no harm, or trivial harm, and, therefore, nothing substantial to aim at but viewpoint, one sees the law as aimed at viewpoint. Despite its lip service to the severity of the harm, the Seventh Circuit erased the harm in a contest of viewpoints. The court apparently saw the ordinance as posing questions of right and wrong, true and false: What is the correct view of women's sexuality? What is good sex and what bad? The ordinance does not pose those questions. The court failed to address the questions the ordinance actually posed to it: Is pornography simply an idea? Is the harm of pornography the harm of a dangerous idea? Does the harm of pornography justify a law that provides redress to those proven to be harmed in specified ways through its production and consumption? Is it unconstitutional to provide a remedy for sex-based abuse and subordination that is done in part through pictures and words? What is the significance of the legislative finding that pornography is a practice of sex discrimination?

The court decided *Hudnut* as though it were a contest between individual rights of free speech and the government. It did not seriously consider the civil rights of women and their violation through pornography to be at issue.²⁰⁴ The court considered the constitutionality of the ordinance as though the harms for which it would provide a remedy all happen in someone's mind and body. The someone, of course, is the male consumer of pornography. The view that the real events caused by pornography are the events in the mind and body of the male consumer is the view of obscenity law. It is also the pornographic view. In that view, men, men's minds, and men's erections and orgasms are real. Women are invisible except as ideas or fantasies that occasion male erection and orgasm. The view that pornography is thought, idea - an event in the mind of the male consumer - or fantasy - a mental or other event that occa-

204. Despite the serious standing and Article III case or controversy issues the defendant raised, the constitutionality of the ordinance was litigated in a case without a plaintiff who asserted injury through pornography. The plaintiffs postured the case as an abstract contest between individual rights to free speech and the government. The absence of a woman plaintiff asserting injury through pornography is one aspect of the erasure of women and harm to women in the litigation.

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sions male erection and orgasm - is one aspect of the way that the pornographic view, and the view institutionalized in the law according to *Hudnut*, render women and harm to women invisible.

In the Seventh Circuit's decision, to subordinate a woman is simply to *say* something, to express an idea. The court assimilated the harm of pornography to its viewpoint, ignoring, in the process, the real harms, that are not thoughts, to real women, who are not ideas. The court assimilated a practice of sex discrimination to protected speech, as though nothing happens but the expression of an idea when a woman is subordinated and abused by pornography through assault, coercion, forcing or trafficking. The court treated the ordinance as though it were not a remedy for real harms to real women. It is as though the court saw the ordinance as providing a remedy against ideas about or views of women. The struggle, in the court's view, is *between* ideas, not *against* women's abuse and subordination.

V. SOCIAL REALITY AND PORNOGRAPHY'S HARM

In life, the harm of pornography is obscured because what is done to those harmed - principally women - is consonant with, even constructive of, what it means to be a woman.²⁰⁵ The harm, if perceived at all, is not perceived as serious and political, but as trivial and personal. The harm is obscured because the fact that a woman was abused is proof that her abuse was appropriate to her status and definition.²⁰⁶ Pornography eroticizes dominance and submission, it sexualizes inequality and abuse. Because pornography's harm is *sexual* harm to *women*, it is

205. See generally, A. DWORKIN, PORNOGRAPHY, *supra* note 4; MacKinnon, *An Agenda for Theory*, *supra* note 4; MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 4.

206. The belief that victims are, by definition, appropriate victims is applied to all those victimized by relegation to second class social status. It applies principally to women, particularly to sexual victimization of women. Women ask for and deserve rape, battery, and sexual harassment; women's sexual nature is expressed in pornography; women like it. The attitude rests in part on the assumption that things are as they ought to be, so that those who are hurt are appropriately hurt; those who are victimized are victimized because they were, even before the victimization, metaphysically or psychologically victims. This position is often stated as the conclusion that there will always be rape, battery, pornography, prostitution - as though sexual abuse is one of the inevitable costs of being a woman like death from traffic accidents is one of the inevitable costs of automobiles. It has the ring of a justification, if not a hope.

obscured. The harm itself is sexualized, and is perceived, not as harm, but as pleasure. Because pornography, its harm, and women, are seen from the point of view that pornography is central in constructing, its harms are not perceived or, when perceived, are trivialized.²⁰⁷

The real harm of pornography, its harm to women and children, and also men, received little recognition in the *Hudnut* decisions and some commentary on the ordinance. Although purporting to leave the legislative findings of harm undisturbed, both the district court and the Seventh Circuit erased the sexual use and abuse that is inseparable from pornography's production and consumption. Both courts erased the social and sexual reality in which pornography is a practice of sex discrimination, in which pornography is trafficking in women. Some commentators, while paying lip service to the harm of pornography, have found it irrelevant to whether pornography may be regulated.²⁰⁸ Others assert that pornography has not been shown to do the harm established in the legislative record.²⁰⁹ Pornographers have been in the forefront of this line of argument, writing it, publishing it, and giving money to those who say it.²¹⁰

207. See MacKinnon, *Pornography, Civil Rights, and Speech*, *supra* note 4, at 7-8 ("What a woman is, is defined in pornographic terms; this is what pornography does. If the law then looks neutrally on the reality of gender so produced, the harm that has been done will not be perceived as harm. It becomes just the way things are.").

208. See, e.g., Emerson, *Response to Professor MacKinnon*, *supra* note 101, Stone, *Anti-Pornography Legislation as Viewpoint Discrimination*, *supra* note 178.

209. See, e.g., Lynn, "Civil Rights" Ordinances and the Attorney General's Commission: *New Developments in Pornography Regulation*, 21 HARV. C.R.-C.L. REV. 27 (1986).

210. Pornographers' comments on the effort to establish that pornography harms women include Nobile, *The New Frigidity*, FORUM at 61 (June, 1986). Pornographers also publish the comments of others on the civil rights anti-pornography movement. See, e.g., Petersen, *Politically Correct Sex*, PLAYBOY at 67 (Oct. 1986); Nobile, *Interview: Varda Burstyn*, FORUM at 13 (September, 1985). The American Civil Liberties Union and its affiliates have been both outspoken advocates for pornographers and their financial beneficiaries. The ACLU opposed legislation against child pornography, and opposed the civil rights anti-pornography ordinance (which includes remedies for children injured through pornography). The offices of the Minnesota Civil Liberties Union is housed in a building owned by Ferris Alexander, a major local pornographer, where it is reported to have paid little or nominal rent. The Playboy Foundation has been a contributor to the ACLU, and it is reported that ACLU affiliates in San Diego, California, Los Angeles, California, and Iowa City, Iowa have shown pornography, including *Deep Throat*, at fundraising events. Attorneys who have been employed by the ACLU and its affiliates have represented pornographers as private counsel. Economic interest is widely understood to affect people's thought, behavior and loyalties. Sexual interest, although less widely understood, operates similarly.

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The harm of pornography, both in the abuse of individual women, children and men, and as a practice that subordinates women as a group, failed to inform the courts' decisions in the litigation on the constitutionality of the anti-pornography ordinance. The problem was not that the harm is not serious. It is. The problem was not that the harm was not demonstrated. It was, by any reasonable and generally accepted standard of demonstration. The problem was that the harm is a sexual harm done principally to women. The erasure of the harm is a product of the social invisibility of sexual harm to women, and of the application of legal method and doctrine in a manner that failed to comprehend sexual harm, that is, harm to women as women. Erasing the harm was crucial to the decision of the Seventh Circuit that the ordinance is viewpoint discrimination. It was crucial to the determination of the district court that speech interests outweigh equality interests. And it is crucial to the failure to understand pornography as a practice of sex discrimination; as trafficking in women; as real harm to real women and as the subordination of women.

The decisions of both courts turned women into speech, erasing real women as they protected the "right" to harm women as freedom of speech. The decisions of both courts in *Hudnut* obscured that the decisions protect a system of trafficking in women. What *Hudnut* says, when it is applied to the world, is: trafficking in women is protected by the constitution. The decisions, which turn women into speech, replicate the pornographers' view of the process of the production of pornography. In the decisions of the *Hudnut* courts, the picture that is the product of the sexual use of a woman is separated from the process of its production, abstracted from the trafficking in women that is pornography, identified as words or pictures and protected as "speech." From the pornographers' point of view, once the sexual use or abuse of a woman is photographed, the woman becomes irrelevant and the picture becomes real. In this view, one can protect the picture without harming the woman; one can harm the woman through the picture without the picture losing the protection the first amendment affords speech. In this view, trafficking in pornography is not trafficking in the women, children and men from whom or about whom or to facilitate the sexual use of whom the pornography is made. In the production, distribution and consumption of pornography, and

under the decisions in *Hudnut*, women are the speech of the pornographers.²¹¹

The recent litigation over the constitutionality of the civil rights anti-pornography ordinance is not the first time the law has failed to comprehend that a practice of discrimination is a practice of discrimination.²¹² Before the Court held in *Brown v. Board of Education*²¹³ that racial segregation in education harms Black children by "denoting their inferiority",²¹⁴ the law did not perceive segregation to be race discrimination.²¹⁵ When Professor Wechsler asked the question whether the validity of *Brown* depended on the evidence that segregation harms Black children, he, in part, questioned whether segregation in education was not beneficial to Black children.²¹⁶ Expert opinion varied. White children might be painfully hostile to Black children in integrated schools; maybe Black children felt secure in their own schools; maybe some Blacks would choose segregation.²¹⁷

Wechsler asked these questions as he argued for judicial decision-making freed of interest, politics and the desire for results, and as he argued for a bright line between fact and principle. Neutrality, he believed, resided in principle, reason and abstraction. Principle, reason and abstraction, as such, are cleansed of social reality. What is true in principle, in the ab-

211. Brief of Andrea Dworkin, Amicus Curiae, *supra* note 110, at 238.

[I]n pornography, *acts* done to or by women are called "speech", even though the woman is doing an act dictated by what is required to sexually gratify men. Her body is a commodity in itself. Her body is also the literal language of the so-called publisher, who in reality is a pimp trafficking in women. Because the pimp introduces a camera into the trafficking, his whole process of exploiting the woman's body is protected as "speech."

212. The *Hudnut* litigation and the public debate surrounding the ordinance and its enactment also are not the first time that sexual abuse has been called an idea or a sexual fantasy. See J. MASSON, *THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY* (1984).

213. 347 U.S. 483 (1954).

214. *Id.* at 494.

215. *Plessy v. Ferguson*, 163 U.S. 537 (1896). In *Brown*, the Court for the first time held that it "must look to the effect of segregation itself on public education." 347 U.S. at 493. Before *Brown*, it had found inequality of "tangible" factors between segregated schools. See, e.g., *Sweatt v. Painter* 339 U.S. 629 (1950).

216. Wechsler, *Neutral Principles*, *supra* note 104, at 33.

217. *Id.* at 32-33.

stract, is true in all possible worlds.²¹⁸ In some other world, segregation might not be an institution of white supremacy and anti-miscegenation laws might not be discrimination against Blacks.²¹⁹ In this world, they are.

In *Plessy v. Ferguson*,²²⁰ the Supreme Court held that segregation is race discrimination only if Blacks "choose to put that construction upon it."²²¹ Consistent with Wechsler's approach, the Court decided *Plessy* as though social reality did not exist, as though there were only isolated acts and individual responses. Wechsler realized precisely that the construction to be put upon the acts is the issue: whose interpretation of the acts will define them in law?²²² How, Wechsler asked, can one measure the validity of state imposed segregation? By the way Blacks interpret it? That interpretation, it went without saying, is not neutral. It is from the point of view of Blacks that segregation is subordination, is an injury. That interpretation is not *law*. The harm, *if any*, existed, in the view of the Court in *Plessy* and in Wechsler's view, in the heads of Blacks, not in reality. For the Court in *Plessy*, as for Wechsler, the idea that the interpretation of Blacks, of the powerless, defined reality was unthinkable. The idea that Black reality could be institutionalized in law did not need argument to refute it: the question whether to use the interpretation of Blacks to measure the validity of the law, Wechs-

218. In *Plessy*, the Court stated that segregation laws "do not necessarily imply the inferiority of either race to the other." 163 U.S. at 544 (emphasis supplied). What is necessarily true is true in principle, without reference to the world as it actually is. In contrast, in *Brown*, the Court looked to the actual effect of segregation on Black children and public education. 347 U.S. at 493, 494.

219. Wechsler, *Neutral Principles*, *supra* note 104, at 33-34. In that world, the language used in the text to describe it would not exist.

220. 163 U.S. 537 (1896).

221. *Id.* at 551.

222. Compare MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 4, at 652:

What is wrong with rape is that it is an act of the subordination of women to men. Seen this way, the issue is not so much what rape "is" as the way its social conception is shaped to interpret particular encounters. Under conditions of sex inequality, with perspective bound up with situation, whether a contested interaction is rape comes down to *whose meaning wins* The problem is this: the injury of rape lies in the meaning of the act to its victims, but the standard for its criminality lies in the meaning of the same act to the assailants. Rape is only an injury from women's point of view. It is only a crime from the male point of view, explicitly including that of the accused.

ler apparently believed, answered itself.²²³

The law cannot both comprehend social reality and maintain a bright line between fact and principle. Principle, which is assumed to be neutral precisely because it is *not* informed by social reality, will take on the cast of the decision-maker - his or her viewpoint, values, experience and politics - unless the decision-maker is informed and bases decision in part on social reality as seen from viewpoints other than the viewpoint institutionalized in law. Arguments make sense, conclusions appear true or false, based not only on pure logic, but on one's interest and experience, one's point of view.²²⁴ To the extent that the realities, experience and point of view of the litigants fail to make their way into judicial decision-making, the only point of view informing the decision is that of the decision-maker (as a person) and that institutionalized in law.²²⁵ Such "neutrality" is neither neutral, nor capable of comprehending social power and social powerlessness, and so of achieving actual equality.²²⁶

223. See Wechsler, *Neutral Principles*, *supra* note 104, at 33.

Is it alternatively defensible to make the measure of validity of legislation the way it is interpreted by those who are affected by it? In the context of a charge that segregation *with equal facilities* is a denial of equality, is there not a point in *Plessy* in the statement that if "enforced separation stamps the colored race with a badge of inferiority" it is solely because its members choose "to put that construction upon it?" Does enforced separation of the sexes discriminate against females merely because it may be the females who resent it and it is imposed by judgments predominantly male? (Citation omitted).

The intended *reductio* - the suggestion that race segregation is not discrimination because it has something in common with the imposition of male judgments on women - fails. See C. MacKinnon, *SEXUAL HARRASSMENT OF WORKING WOMEN* 140-141 (1979).

224. Legal reasoning, in any case, operates principally by analogy. See Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501 (1948). Same and different are informed by one's interest and experience to a greater extent than is a syllogism.

225. They are likely to be the same, both because of the demographics of those sitting on the bench, and because those sitting on the bench are carefully schooled in the point of view institutionalized in law.

226. MacKinnon, *Pornography, Civil Rights and Speech*, *supra* note 4, at 4-5.

[T]he problem with neutrality as the definition of principle in constitutional adjudication is its equation of substantive powerlessness with substantive power and calling treating these the same, "equality." The neutrality approach understands that abstract systems are systems, but it seems not to understand that substantive systems are also systems.

See also C. MacKinnon, *SEXUAL HARRASSMENT*, *supra* note 264, at 126 - 27, 140. The phrase "actual equality" is derived from Lahey, *The Canadian Charter of Rights and*

The legal method that Wechsler counseled, and that the *Hudnut* courts, each in its way and however imperfectly,²²⁷ applied is one founded on abstraction. The *Hudnut* courts simply categorized pornography as "speech", proceeding as if the task were to make law about the thing - most abstractly, "speech", most concretely, words or pictures - that they abstracted, categorized and labeled, rather than to make law for the conduct of human relationships in the world. Rather than seeing the complex world of social reality, seeing speech as embedded in the world that gives it meaning, both courts abstracted and categorized pornography as speech, treating it as though it exists as a value without reference to context and reality. In the opinion of the district court, the process of categorization divorced the speech interests from the equality interests by abstracting both from social reality. The Seventh Circuit simply assimilated equality interests to speech interests. In both opinions, the realities of particular circumstances *became* the abstract categories created by the manner in which the courts used legal method and doctrine.

Wechsler identified result oriented judicial decision-making as the central evil of insufficiently abstract principles.²²⁸ To seek, or applaud, a particular result is to abandon principle and neutrality for politics. What Wechsler's analysis obscures is that the method he approved determines, to a significant extent, outcome. The method that Wechsler applied in his analysis of *Brown* would determine the outcome in that case. Wechsler, and the law, could not comprehend segregation as a practice of race discrimination when the practice was abstracted from social reality and the issue was posed as the abstract question whether separate but equal was equal. Similarly, in the *Hudnut* litigation, the courts abstracted from the reality of pornography's production and consumption. Neither court wrote a decision that comprehended and adequately responded to the world so clearly revealed in the legislative record, a world in which pornography is trafficking in women. Consequently, real women and real harm were rendered invisible, and the courts failed to understand the analysis of pornography as a practice of sex dis-

Pornography: Toward a Theory of Actual Gender Equality, *supra* note 4.

227. See *supra* section II.

228. Wechsler, *Neutral Principles*, *supra* note 104.

crimination through which women, and also children and men, are subordinated and abused. By their manner of employing the process of abstraction through categorization, the courts turned women into abstractions, into ideas, and made law about *nothing but* "speech."

The failure of the *Hudnut* courts to recognize pornography as a practice of sex discrimination, although not contesting the legislative finding that it is, and the decision that the ordinance violates the first amendment, touch fundamental questions of the construction of social reality, its comprehension in law, and the possibility of using law as a tool for achieving women's equality. In liberal first amendment jurisprudence, "speech" operates in a "marketplace of ideas", where the power of speech is, ultimately, the power of truth.²²⁹ The point and purpose of speech is to get ideas accepted as true because they are true. This analysis obscures, among other things, the complex relationship between the construction and definition of social reality and what is accepted as true. It fails to account for the way the "free marketplace" looks to those without the power to define the terms of the exchange. For those whose viewpoint defines reality, the power to impress their viewpoint on the world is, as they see it, the power of true ideas. When what one thinks is imposed upon the world and defined in the process of the imposition as true, it appears that what is imposed prevails because it is true, because of the power of "speech", the power of words as such. From the point of view of those with the power to define reality, the male point of view that is institutionalized in, among other things, law,²³⁰ the force of the imposition is invisible, except as the force of ideas. To those who define reality, its defini-

229. The metaphor of the "marketplace of ideas" is familiar from an often-cited passage in the dissent of Justice Holmes in *Abrams v. United States*, 250 U.S. 616, 630 (1939):

But when men [sic] have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

230. See, Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83 (1980); MacKinnon, *An Agenda for Theory*, *supra* note 4; MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 4.

tion is merely a statement of ideas, true if and to the extent that it conforms to an independently existing reality. To those on whom the definition is imposed through all available forms of social power, it is imposed as the definition of reality because it is the way *others* see, with their interests and from their viewpoint. From the viewpoint of the relatively powerless, the viewpoint of the powerful is imposed as it is said. From the viewpoint of the powerful, the viewpoint of the powerless is interpretation, which is neither reality nor a viewpoint that is institutionalized in law.²³¹ Those who define reality stand within their viewpoint and defend "speech", as though in defending power *as* speech they are not defending power. Because those with the power to impress their viewpoint as reality see the process of this imposition as the power of speech, it appears that whatever constructs reality must be ideas and their expression: "speech."

This analysis makes sense of the otherwise puzzling statement of the 7th Circuit in *Hudnut* that pornography's power to do the harm it does demonstrates that it is protected speech.²³² From the point of view of those who are deprived of power as women, pornography is targeted because it is an organized and powerful institution of male supremacy. It is because pornography is trafficking in women, a practice that eroticizes male dominance and women's subordination and through which women, and also children and men, are sexually abused, that it should be made actionable as sex discrimination. Under the 7th Circuit's

231. MacKinnon, *Pornography, Civil Rights and Speech*, *supra* note 4, at 3-4.

Having power means, among other things, that when someone says, "this is how it is," it is taken as that way. . . . Speaking socially, the beliefs of the powerful become proof, in part, because the world actually arranges itself to affirm what the powerful want to see. If you perceive this as a process, you might call it force, or at least pressure or socialization or what money can buy. If it is imperceptible as a process, you may consider it voluntary, or consensual, or free will, or human nature, or just the way things are Powerlessness means that when you say "this is how it is," it is *not* taken as being that way. This makes articulating silence, perceiving the presence of absence, believing those who have been socially stripped of credibility, critically contextualizing what passes for simple fact, necessary to the epistemology of a politics of the powerless.

Compare Wechsler, *Neutral Principles*, *supra* note 104, at 33-34.

232. 771 F.2d at 329.

Hudnut decision, it is that same fact, stated as the power of speech to get itself accepted in the marketplace, that identifies pornography for first amendment protection. From the point of view embodied in the ordinance and, under the decision of the 7th Circuit, from the point of view institutionalized in law, pornography constructs social reality. According to the decision in *Hudnut*, pornography is speech - thought, idea, image - *because* it constructs reality.²³³ From the viewpoint of women and the anti-pornography ordinance, reality is not constructed by thought or idea, but by political and sexual realities, including pornography.²³⁴

233. *Id.*

234. MacKinnon, *Pornography, Civil Rights and Speech*, *supra* note 4, at 19.

[T]he experience of the (overwhelmingly) male audiences who consume pornography is therefore not fantasy or simulation or catharsis but sexual reality, the level of reality on which sex itself largely operates The way in which the pornography itself provides what those who consume it want matters. Pornography *participates* in its audience's eroticism through creating an accessible sexual object, the possession and consumption of which is male sexuality, as socially constructed; to be consumed and possessed as which, is female sexuality, as socially constructed; and pornography is a process that constructs it that way.

One often-stated defense of pornography is that it is "harmless fantasy." The argument is: pornography is harmless because it is fantasy. The reality is: pornography turns women and harm to women into fantasy. Real women and harm to real women are obliterated twice over in pornography. Women, whose social existence is as object, *See generally* MacKinnon, *An Agenda for Theory*, *supra* note 4, exist in pornography as fantasy object: twice removed from personhood. You can't harm a fantasy; you can create it, make a representation of it and get off on it. The ideology that says pornography is not harmful because it is fantasy is the ideology of pornography.

It is because male viewers are aroused by pornography that it is defined as fantasy. (Male viewers set the standard, not because similar, or complementary, fantasies do not affect women's sexuality, but because women's fantasies do not form the *definition* of what is erotic. Sex, including pornography, is defined by a male standard of what is arousing. Women's sexuality is defined by, and is not definitive of, that standard.) The relationship between sex and fantasy is not: this is fantasy and men get off on it. It is: this is fantasy *because* men get off on it. Fantasy is the thought, writing, act or picture of what men want sexually. It is what is in men's minds when they orgasm. It is also the acting out in the world of what is in men's minds when they orgasm. The line defining fantasy is not a line between thought and act. Fantasy is, by definition, whatever turns men on sexually; it is also, by definition, harmless. This definition of fantasy as equated with harmless and as equated with what turns men on sexually explains, in part, why the harm to women through pornography is rendered invisible. *See* Brief of Andrea Dworkin, *Amicus Curiae*, *supra* note 110 at 3 ("The actions immortalized in pornography are not ideas, thoughts, or fantasies. The vocabulary of "sexual fantasy", often applied to pornography as a genre, is in fact the language of prostitution, where the act that the man wants done and pays to get done is consistently referred to as his "fantasy", as if it never happens in the real world."). In the analysis of pornography from the point of view of

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Under the decision of the Seventh Circuit in *Hudnut*, the first amendment is a tool of male hegemony, including the hegemony of the male point of view. The first amendment protects social reality as it is constructed, because reality, in the liberal, idealistic philosophy reflected in the decision of the Seventh Circuit, is constructed of ideas. In the decision of the Seventh Circuit, the first amendment protects pornography as such because pornography constructs social reality. If the process of the creation of social reality is confused with the process of thought, then a regulation that moves against male supremacy at the level of the construction of social reality will be seen to violate the first amendment.

It might seem that the effect of such an approach would be even-handed and fair because it would apply neutrally and symmetrically to invalidate those regulations that challenge and those that legislate the male point of view. The court's treatment of the subordination element of the law as viewpoint discrimination, however, reveals the bias of the neutral viewpoint as applied to determine the outcome in *Hudnut*. The world to which law applies is a world of unequal power in which women as a group are subordinated to men as a group; it is not a symmetrical world of gender-neutral persons. The law has recognized this inequality, and recognized it as something to change, by recognizing sex equality as a compelling state interest in the law of sex discrimination.²³⁵ A law that realizes the compelling state interest in sex equality does not simply express one point of view. By treating a sex discrimination law as the legislation of a viewpoint, the *Hudnut* court ignored both the reality of unequal power and the existing law of sex discrimination in which sex equality is a compelling state interest. *If* sex discrimination law did not exist, *if* pornography were harmless, and *if* pornography were not a practice of sex discrimination, the ordinance *would* be viewpoint discrimination. It would also be pointless and unnecessary. To treat an asymmetrical world as though it

women and underlying the civil rights ordinance, pornography is sexual reality.

235. See *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). One strand of sex discrimination law recognizes inequality by recognizing the systematic subordination of women as the harm of sex discrimination. The other strand, which is insensitive to the realities of power and to women's systematic subordination, sees the harm of sex discrimination as the harm of making inappropriate differentiations. See generally, MacKinnon, *Difference and Dominance*, *supra* note 201.

were symmetrical, ignoring in the process the existing public policy in which sex equality is a compelling state interest, does not produce even-handed adjudication. It, instead, further institutionalizes sex inequality. From the "neutral" point of view, *Plessy's* analysis of segregation is right because based on the formal equation of separate but equal with equal, and *Brown* is wrong because based on the interpretation Blacks put upon their lives. If the decision in *Hudnut* is right, subordinate but equal is equality for women.²³⁶ If subordination is equality for women, a decision upholding the ordinance would be wrong because it would recognize subordination as subordination by understanding it in the context of social reality as sex discrimination, not as simply one viewpoint.

In *Hudnut*, the Seventh Circuit said that the first amendment prohibits the government from declaring what is true and what false.²³⁷ If the first amendment is a tool of the hegemony of the male point of view, however, it not only does not prohibit the government from declaring truth: it is a vehicle for its creation and declaration. In *Hudnut*, after stating that the government may not declare what is true, the court declared the truth of the metaphor of the marketplace of ideas.²³⁸ Similarly, the court declared the truth of the belief that the enactment of sexual submission in *Carnal Knowledge* is not "a real sexual submission."²³⁹ The very method and viewpoint of the decision-

236. MacKinnon, *Pornography, Civil Rights and Speech*, *supra* note 4, at 27-28.

The harm of pornography, broadly speaking, is the harm of the civil inequality of the sexes made invisible as harm because it has become accepted as the sex difference [I]f you see women as just different, even or especially if you don't know that you do, subordination will not look like subordination at all, much less like harm. It will merely look like an appropriate recognition of the sex difference Pornography does treat the sexes differently [But] the major argument does not turn on mistaken differentiation The salient quality of a distinction between the top and the bottom in a hierarchy is not difference, although top is certainly different from bottom; it is power. So the major argument is: Subordinate but equal is not equal.

237. 771 F.2d at 330-331.

238. *Id.* at 330.

239. *Id.* The court declared the truth of the point of view that the enactment of sex for the camera is not sexual reality to demonstrate that pornography is not sexual reality. In the point of view of the ordinance pornography is sexual reality. Without regard to whether *Carnal Knowledge* is pornography under the ordinance, the court's treatment of sexual reality in its comment on *Carnal Knowledge* casts light on its analysis of por-

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maker is an implicit declaration of truth: the truth of the decision-maker's viewpoint. The court held the ordinance unconstitutional because it did not comport with the truth as the court saw it. That "truth" is that pornography is "speech"; that if women sexually submit in front of a camera there is not a "real sexual submission"; that the enactment of a law that realizes the compelling state interest in sex equality is simply the expression and regulation of a viewpoint; that the infliction of sexual abuse and subordination is somebody's right, and that their protection through law as speech is everybody's freedom. In *Hudnut*, the court not only declared the truth of the male point of view; it also precluded the *expression* in law of the truth that pornography harms women.

Legislation from the male point of view is not seen as from a point of view. It is seen as objective. It is because the civil rights anti-pornography ordinance is written from the point of view of those injured by pornography rather than those who get profit and pleasure from it, that the court found it to be viewpoint discrimination. Why are obscenity laws not impermissible viewpoint discrimination, legislating as they do a view of sex and women's bodies as dirty secrets? Why is a rape law exempting sex forced on a woman by her husband not impermissible viewpoint discrimination, legislating, as it does, an approved view of women, marriage and sex in which rape of one's wife is acceptable? To Wechsler, his point of view, the point of view institutionalized in law, was neutral and objective: truth; the point of view of Blacks was interpretation: a point of view. It is when a

nography. The woman who played a sexually submissive role in the movie was a real woman (significantly, nameless in the court's opinion) who on a real movie set before real people (no doubt mostly men, or at least those with power were no doubt mostly men) really acted out a scene of sexual submission. How did the court determine that there was not a real sexual submission in the enactment of the sexual scenes in *Carnal Knowledge*? Is there a "real sexual submission" when a woman does a burlesque show in front of watching men? How is that different from the acting in *Carnal Knowledge*? If men watching the filming of *Carnal Knowledge* became sexually aroused, was there a real sexual submission? Did sexual submission happen, from the male point of view, rather than being merely acted out but not really happening, if those viewing the filming were aroused? If the actors were aroused? One difference between a burlesque show and a movie set where sex is filmed is that a camera is present on the movie set. The camera seems to be a magical transformer of real into unreal, so that what happens in the world becomes unreal if it is put on film. Perhaps that is so because if a camera is present the acting out creates the conditions for real sex: man and picture. In this view, nothing real happens when a camera is present; the picture, however, is real.

law institutionalizes a point of view different from that ordinarily institutionalized in law that it is apparent to those who define the dominant point of view that there is a point of view at all. One sees a point of view as a point of view when it is not one's own; one's own point of view seems transparent to the world. When one's own point of view is socially accepted as definitive of reality it, no doubt, must become particularly difficult to see it as a point of view.

The civil rights anti-pornography ordinance has a viewpoint, which the court recognized as such because it was not its own. Because the ordinance expresses a viewpoint that the court did not share, it concluded that it is viewpoint discrimination; it embodies a point of view seen as such because different from the court's own. The ordinance puts the male point of view into question, revealing it *as* a point of view. Because the ordinance codifies women's point of view, what is clear from the male point of view is, first, that the law has a viewpoint and, second, that it is different from the male viewpoint, which is taken to be transparent to and definitive of reality. From the male point of view, therefore, what one sees with the enactment of the ordinance is an attack on one's point of view; from the point of view of women, what one sees is an attack on sexual abuse and subordination. If pornography is defined as "speech", abuse and subordination become and, under *Hudnut*, become protected as, ideas.

In the theory of philosophical idealism on which the Seventh Circuit's *Hudnut* decision rests, a law that strikes at male supremacy on the level of its construction of reality strikes at ideas. Because pornography constructs reality through the infliction of sex-based harms, any legal attack on the abuse done through pornography also is, under the *Hudnut* decision, a violation of the first amendment. If achieving equality for women requires a reconstruction of social reality through a reconstruction of the practices, institutions and ways of life that create social reality, the first amendment, under the reasoning of the Seventh Circuit in *Hudnut*, would preclude any attempt to achieve equality through the use of law. Under *Hudnut*, however, one *can* use law to *further* institutionalize the male point of view. A law that is consistent with the dominant view looks like objective reality to those whose viewpoint is definitive of objectivity

and neutrality. Those whose viewpoint is definitive of reality are those who, in general, decide what will be law. So long as the court rules as though reality were ideas and the abuse of women an expression of ideas, a law that strikes at the creation and perpetuation of a world in which women are subordinated and abused as women will be understood, in the language of liberal first amendment theory, to "distort public debate." In *Hudnut*, both courts used the first amendment to protect male supremacy.

To defend pornography as speech is to turn women into speech by erasing the reality of harm to women; by seeing pornography as only speech, and not as trafficking in women; by seeing speech, not sex discrimination; by seeing the subordination of women as the perspective the author adopts; by adopting the view that to subordinate a woman is to express an idea. But, in reality, "women are not flags."²⁴⁰ If pornography is protected as speech, women are available for sexual use and abuse because women are the speech of the pornographers. For women, free speech, interpreted to mean, as in *Hudnut*, that pornography is protected by the first amendment, means that women may be freely used *as* speech: if women are the pornographers' speech, women's injury by sexual use and abuse through pornography may not be made actionable in law. For men, the protection of pornography as speech means that they may freely use women *to* speak.

Why does the court, and the male point of view institutionalized in law, turn sexual reality into an idea? Why does the court turn subordination into the "perspective the author adopts?"²⁴¹ One answer is that pornography can be protected if it is an idea. It can also be exalted, unlike sexual arousal, which

240. MacKinnon, *Pornography, Civil Rights and Speech*, *supra* note 4, at 28-31.

What unites many cases where speech interests are raised and implicated but not, on balance, protected, is harm, harm that counts. . . . Courts have seen harm in other cases. The question is, will they see it here, especially given that the pornographers got there first. I will confine myself here to arguing from cases on harm to people, on the supposition, the pornographers notwithstanding, women are not flags.

Id. Women would have fared better in *Hudnut* as draft cards, with a significance and reality beyond symbolic value. See *O'Brien v. U.S.*, 391 U.S. 367 (1968).

241. 771 F.2d 328.

is valued and important but cannot be directly protected by the first amendment. As speech, sex can be protected by constitutional principle. If sexual practices can be treated in law as speech, men remain free to use women sexually. Pornography is defined as speech also because of that other pole of power: money. The pornography industry in the United States alone is an 8 billion dollar per year business.²⁴² If pornography were actionable as sex discrimination, the business would be at risk. If pornography were not sexually and financially valuable to those who make and use it, it would be regulated as discrimination rather than protected as the expression of a viewpoint.²⁴³

The real marketplace in which pornography exists is not the liberal's imagined marketplace of ideas. It is an actual marketplace where women and children are trafficked for sexual pleasure and economic profit. The power that the pornographers wield in the marketplace in which pornography exists is not the power of ideas or truth; it is the power of sex and money protected as the power of "speech." The real marketplace is the one in which the pornographers have had the economic and sexual power to get what they do accepted as speech - to define the regulation of pornography as the regulation of speech. The method the courts used in *Hudnut* was the method employed in *Plessy* to protect the system of white supremacy. The result in *Hudnut*, however, is closer to the result in *Dred Scott v. Sandford*:²⁴⁴ the protection of a system of trafficking in human beings. When pornography is understood for what it is - the traffic in sexual abuse and subordination - the law will regulate it as a violation of civil rights and will provide remedies for its harms. When pornography is understood for what it is - the abuse and

242. U.S. NEWS AND WORLD REPORT 84-85 (June 4, 1984)

243. MacKinnon, *Social, Legal, and Clinical Perspectives*, *supra* note 4, at 49.

The bottom line of all the resistance we encounter to this law is that a lot of people, people who matter, enjoy pornography. That is why they defend it. This is also why there is so much hysteria and distortion over the civil rights approach. The worry is not that it would misfire, but that it would fire at all. The fear is, it would work."

244. 60 U.S. 393 (1857). See MacKinnon, *Social Science, Legal, and Clinical Perspectives*, *supra* note 4, at 48-49.

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subordination of women and children, and also men - male
supremacy will budge.²⁴⁵

245. At a panel entitled "Developing Feminist Jurisprudence" at the 14th National Conference on Women and Law (Washington, D.C., April 7-10, 1983), Catharine MacKinnon said that, when sexual harrassment became actionable as sex discrimination, she saw male supremacy "budge."