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SEXUAL SPEECH AND THE STATE: PUTTING PORNOGRAPHY IN ITS PLACE

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I. INTRODUCTION

People in the United States in the 1980's have experienced dramatic calls for restrictions upon certain types of sexually explicit speech, labeled "pornography," by a worrisome if historically unremarkable¹ coalition of allegedly radical feminists and obviously right-wing moralists. In 1984 and 1985, this call crescendoed legally, in at least two important and widely observed fora. In conjunction with its foray into a United States District Court in Indiana, and in a Department of Justice commission on pornography, a nationwide "anti-pornography" campaign experienced considerable media exposure and public discussion.

In the litigation of *American Booksellers Association Inc. v. Hudnut*,² an Indianapolis municipal ordinance that purported to define "pornography"³, and to declare it a civilly actionable form

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1. Dubois, MacKinnon, Dunlap et al., *Feminist Discourse, Moral Values and the Law - A Conversation* 34 BUFFALO L. REV. 67 (1985) ("The late nineteenth century women's movement also began a campaign against obscene literature. The Women's Christian Temperance Union, which was the largest late-nineteenth century feminist organization, had a department of obscene literature. It gave political support to Anthony Comstock (footnote omitted) . . . the author of the basic obscenity laws in the United States.") See also, Walkowitz, *The Politics of Prostitution*, 6 SIGNS 145 (Autumn, 1980).

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

3. The Indianapolis ordinance's definition of "pornography" was "the graphic sexu-

of "sex discrimination", was struck down judicially as an unconstitutional violation of the First Amendment's guarantee of free speech. During the same time period, the U.S. Attorney General's Commission on Pornography held hearings and ultimately released a report, declaring that pornography both is and causes criminal and violent behavior.⁴

Since the decision in *American Booksellers v. Hudnut*, there has been no other major court test of the constitutionality of "anti-pornography" ordinances modelled on the Indianapolis design. Since the Meese Commission released its "anti-pornography" report, Attorney General Meese has announced the establishment of a federal Center for Obscenity Prosecution and a task force of Justice Department lawyers to aid in the prosecution of pornographers, including a lawyer in each U.S. Attorney's office in the United States to specialize in pornography prosecutions.⁵

It seems fair to say that the 1980s' "anti-pornography" drive to date has received conflicting signals for the possible success of the legal dimensions of its effort to establish that "[peo-

ally explicit subordination of women, whether in pictures or in words, that also includes one or more of the following: (1) Women are presented as sexual objects who enjoy pain or humiliation; or (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or (3) Women are 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; or (4) Women are presented being penetrated by objects or animals; or (5) Women are 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; (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures of servility or submission or display." Indianapolis Gen. Ordinance, at § 16-3(q)(1) - (6). "The ordinance as passed in April 1984 defined 'sexually explicit' to mean actual or simulated intercourse or the uncovered exhibition of the genitals, buttocks or anus. An amendment in June 1984 deleted this provision, leaving the term undefined." *American Booksellers v. Hudnut*, 771 F.2d at 324. The ordinance also provided that pornography included the "use of men, children or transsexuals in the place of women in paragraphs (1) through (6) above. . . ." *Id.*

4. U.S. Attorney General's Commission on Pornography, Report (1986).

5. 3 Jour. Sexual Liberty 1 (March 1987). "Further, new bills are being in drafted to increase prison terms, confiscate assets of pornographers, restrict erotic television programs, and dial-a-porn telephone calls. Meese claimed that there would be no censorship or interference with First Amendment freedoms. Subsequently, at a Philadelphia speech to the Junior Statesmen America, Meese found himself confronted with a student holding up a centerfold of *Playboy* and asking if it were pornographic. Meese, reportedly somewhat flustered, admitted that *Playboy* and *Penthouse* were not considered obscene." *Id.*

ple] don't actually have a right to use dispossessed and exploited people to have [pornography] . . . so that [the user] can have sex."⁶ The mixed success of this drive, legally speaking, hopefully provides a break for closer and more deliberative examinations of the "anti-pornography" campaign itself. This article takes this "break in the action" as an opportunity to review the wider legal, political and psychological consequences of the drive against "pornography". The concern of this article is that the "anti-pornography" campaign has serious and as-yet ill-considered implications for a broader category of communication, here termed "sexual speech".

"Sexual speech" in this article refers to any communication in any medium about sexual matters. The premise of this article is that almost every kind of sexual speech should be more fully protected by the First Amendment's guarantee of freedom of speech than the crafters of the "anti-pornography" ordinances would have it be, and that almost every kind of sexual speech should even enjoy greater legal protection than sexual speech currently has, under U.S. Supreme Court decisions including *Miller v. California*.⁷

The author of this article observes that simultaneous with the passionate and complex outcry for restrictions on sexually explicit speech, in the "anti-pornography" campaigns, this nation is experiencing a number of less organized, less well-reported and still very vital struggles about sexual speech in other contexts, including controversies about the type, extent and methods of education about AIDS/ARC, contraception, abortion, gay/lesbian/bisexual people, sex education for minors (particularly about child abuse, pregnancy, heterosexuality and the alternatives, teen sexuality) and the protection of new forms and voices in erotic literature. It appears that at the same time that some factions in this society are calling for new restrictions on

6. Dworkin, *A Conflict of Sexual Rights*, M5, 38 (April 1985).

7. 413 U.S. 15 (1973). *Miller* contains the current general standard for prohibition of "obscenity", which it holds to be unprotected by the First Amendment: "obscenity" is that work which (1) "the average person, applying contemporary standards" would find, taken as a whole, appeals to the "prurient interest", and (2) "depicts or describes in a patently offensive way, sexual conduct specifically defined by the specific state law, sexual conduct specifically defined by the specific state law [prohibiting it];" and (3) "taken as a whole, 'lacks serious literary, artistic, political or scientific value.'" *Id.* at 24 (citations omitted).

“sexually explicit” speech, other factions (with considerable overlap in the interests implicated, where feminists are concerned) are calling for renewed scrutiny as to existing restrictions on purportedly “obscene” speech.

The author’s perspective on these importantly simultaneous developments is that if there is to be an inclusive, healthy and sex-positive national educational effort as to sex roles, sexuality and sexual relationships, there must be a place for “pornography”⁸ within the boundaries of both criminal and civil legality. The author is not deterred from this position by the feminist “anti-pornography” leaders’ assertion that any defense of “pornography” is “male supremacy,”⁹ any more than she is dissuaded from her position that sexual speech must be generally protected, rather than attacked, by the accusation of right-wing

8. The author proposes that the definition of “pornography” in the Indianapolis ordinance is far too sweeping to isolate and identify clearly even those forms of sexist violence that the designers of the ordinance claim to be seeking to prevent. The definition appears to include any literature where a person (male, female or ambiguous) enjoys her/his own or another’s pain in a sexual context. Indianapolis ordinance § 16-3(q)(1), (5), (6) see *supra* note 2. This section would make actionable any version of the classic picture of the female “dominatrix” in her black boots and chain belt, inflicting hard licks of her whip on a prostrate male’s bare buttocks, whether the image were presented to arouse those who enjoy sexual intimidation of men, or to parody and criticize sado-masochists generally. The ordinance’s definition also would appear to make actionable the Venus de Milo, any work that dwells so long or profoundly on breasts, clitorises or vaginas that it might be said to have reduced a woman or women (or men, children or transsexuals, for that matter, *American Booksellers*, 771 F.2d at 324 “into body parts”; this could include most underwear advertisements (§ 16-3(q)(3)). The definition also appears to include as legally actionable “pornography” the books *Ulysses* and the *Iliad*, cf. *American Booksellers v. Hudnut*, 771 F.2d at 325. Any depiction of women (or men, for that matter) using dildos, vibrators, diaphragms, speculums or any other objects to “penetrate” (the ordinance does not say what is “penetrated”, but, presumably, the vaginal opening, anal opening and urethra are intended; if the mouth is included, a more comprehensive array of words and pictures are made unlawful). Illustrative of the ordinance’s lack of attention to pressing current sex-related issues is the fact that the ordinance in its terms would not prohibit depiction of penetration by a penis, but would prohibit depiction of penetration by a penis covered by a condom (i.e. an “object”); thus, the ordinance permits illustrations of unsafe sex but makes actionable illustrations of one form of safe sex. See *supra* note 2 and accompanying text. See also *infra* note 17, for discussion of what constitutes “safe sex”. The definition also contains a sort of catch-all section, rendering essentially any purportedly offensive sexual objectification unlawful. Section 16-3(q)(6) would appear to make legally actionable the vast bulk of television depictions of women, from advertisements to the depiction of women as objects of an array of dominating, conquering, violating, exploiting, possessive and utile acts by men in sexual scenes from public television dramas to commercial daytime and evening “soaps”.

9. C. MacKinnon, *Not A Moral Issue*, 2 YALE L. & POLICY REV. 321 (Spring 1984).

“anti-pornography” leaders that those who defend “pornography” are libidinous libertines. The author is confident that she is neither a male supremacist nor a libidinous libertine.¹⁰

10. In the interests of elevating both the personal and the scholarly ethics of this discussion of sexual speech, including “pornography”, the author offers that it is vitally important that the parties to the discussion “come out” about those facets of themselves that are most germane to their legal/political positions. Cf. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW IV* (Foundation Press 1978) (“For me, the morality of responsible scholarship points not at all to the classic formula of supposedly value-free detachment and allegedly unbiased description. Instead such morality points to an avowal of the substantive beliefs and commitments that necessarily inform any account of constitutional arguments and conclusions . . . Therefore the reader will find this book taking explicit positions on the most troublesome problems in constitutional law.”) The author of this article wishes to take Professor Tribe’s model of scholarly ethics a step farther, and to practice honesty not simply in the taking of “explicit positions” about law and legal policy, but in the taking of “explicit positions” about sex itself; this step is warranted by vigorous application of the oft-quoted tenet of feminism that “the personal is political”. The author is an open lesbian, in a monogamous and committed relationship; she likes sex, and she loathes violence; she finds vibrators, winks, teddy bears, and kitty cats sexy; she feels disturbed by sadomasochism, in part because of childhood and adolescent physical, emotional and sexual abuse of which she is a recovering survivor, in therapy; she believes in the Bill of Rights as a wild but still-too-elitist experiment in which women, in and among other oppressed groups, are struggling for inclusion; she is generally optimistic, as opposed to cynical, about legal process, even as she is very exasperated and disgusted with the repression of people by law in this society. Most earnestly, the author points out that while many of those who are urging passage of “anti-pornography” measures purport to accept the idea that “the personal is political” and the related idea that law results from subjective judgments, these people do not “come out” sexually or personally, and do not identify themselves as to the experiences in their own lives that have influenced the development of their views and positions about sexual speech. The author seriously contends that the quality of discussion of these issues would be considerably enhanced if the persons seeking to restrict, prohibit or make legally actionable certain sexual beliefs, thoughts or practices felt some ethical obligation to reveal their own beliefs, thoughts and practices in the course of this dialogue. As feminist poet and philosopher Adrienne Rich has written, “Heterosexuality as an institution has also drowned in silence the erotic feelings between women. I myself lived half a lifetime in the lie of that denial. That silence makes us all, to some degree, into liars . . . The possibilities that exist between two people . . . are . . . the most interesting things in life. The liar is someone who keeps losing sight of these possibilities.” A. RICH, *WOMEN AND HONOR: SOME NOTES ON LYING* (5th printing, 1979). Lawyers and legal scholars, feigning objectivity and purporting to be neutral, almost universally do not say where they are coming from, in discussions about sex as in other subject matters. This “silence” is extremely hazardous, in that it enables people to be led astray by the dodges and disguises of legalese and “legal method”. There is also the danger that those who urge a certain legal outcome will be enforcing a code upon others that they do not live up to in their own personal lives. In the case of *Bowers v. Hardwick*, No. 86-140 (October Term 1985), in a brief for amici curiae Lesbian Rights Project and other feminist/egalitarian organizations, this author argued that “[i]f the sexual activities engaged in by tens of millions of persons, including oral-genital and anal-genital contact between male-male, female-female and male-female partners, are representative of the sexual activities engaged in by police officers, judges, jurors, prosecutors and others involved in enforcing the Georgia law and like laws of other states [prohibiting those types of sexual contacts], then there

The author asserts and believes that the “anti-pornography” sponsors’ emphasis on transforming more sexual speech into a form of legal wrong is a treacherous one, particularly in an era where more sexual speech is needed for so many reasons (some of which reasons are explored at length in this article.) The numerous and vital reasons for greater use of free speech to communicate about sexual matters appear generally to have been ignored or misunderstood in the righteous anger and political momentum that characterize the “anti-pornography” drive.

The author also believes and asserts and that the “raging public debate over pornography,”¹¹ with its “particularly heated” enactments among feminists,¹² should be understood and appreciated as precisely the type of generous, controversial activation and vitalization of expression that is protected by the First Amendment’s guarantee of free speech. The “pornography” debate of the 1980s illustrates the process and method of openness, vehement and deep disagreement and non-silencing of opposing expression that makes the guarantee of free speech itself so vital and central to the survival, enrichment and growth of life and ideas in a free and struggling-to-be-more-free society/world. Ironically, it is this means of debate and communication known as “free speech”, tolerating the most severe polarization of beliefs and the most open possible exchange of ideas, including those most palpably antithetical to the majoritarian, the moralistic and the traditional, that would be sacrificed to the ends of the “anti-pornography” group, albeit in favor of its extremely important goal of ending sexist violence. The very specificity about sexual matters in the exchange of ideas, beliefs and feelings about “pornography” would not be protected by the First Amendment, it those pressing for “anti-pornography” ordi-

will be many occasions where a lawbreaker will arrest, prosecute, convict or sentence another lawbreaker for acts that s/he also has done.” Brief of Mary Dunlap, *Bowers*, published in 4 N.Y. REV. L. & SOC. CHANGE 949, 965 (1986). Given the history of hypocrisy in law enforcement about sexual matters, there is an additional reason for those who propose new restrictions on sexual speech to “come out” about their own sexual experiences and values before prescribing to others. “Self-righteousness as to one’s definitions of sexual propriety is perhaps as deep-founded as the individual’s sense of boundaries upon his/her privacy and identity.” M. Dunlap, *Toward Recognition of A Right To Be Sexual*, 7 WOMEN’S RTS. L. RPT. 245, 248-249 (Spring 1982).

11. R. Bension, *Pornography and The First Amendment: American Booksellers v. Hudnut*, 9 HARVARD WOMEN’S L. J. 153, 154 (1986).

12. *Id.* at 155.

nances were to have their way with the First Amendment's guarantee of freedom of speech.

The "anti-pornography" activists claim that pornography silences women.¹³ In their zeal to end the "silencing" that they claim pornography both *is*, in and of itself,¹⁴ and causes to women, the incautious and cavalier approach of these activists to "free speech" threatens not only to silence women, and men, and the activists themselves, as well as any person in this society who is striving or needing to communicate about sexual matters in a more explicit way.

If the debate about the "pornography" ordinance were reduced to some of its symbolic essence, the opponents of pornography might be perceived as stating that (1) there is a war between women and men going on; (2) pornography is not only symptomatic of that war, but is itself an act of war; (3) destroying pornography would constitute not only a means of reducing the symptoms of the war, but a victory in a major battle of that war; and, (4) if people must be silenced along the way, as a cost of the war between the sexes, then let it be men (or, more radically: because it is inevitable in a war that someone gets silenced, it should be men in this war because they are wrong);

13. MacKinnon, *Not A Moral Issue*, *supra* note 8, at 322 ("the enforced silence of women"), *Id.*, at 326 ("Men, permitted to put words (and other things) in women's mouths, create scenes in which women desperately want to be bound, battered, tortured, humiliated, and killed . . . Women are there to be violated and possessed . . ."); C. MacKinnon, *Feminist Discourse, Moral Values, and the Law: A Conversation*, 34 *BUFFALO L. REV.* 11, 28 (1985) ("If somebody has got their foot on your neck, what do you do? I don't think you negotiate. I don't think you compromise. I don't think you even address the foot on your neck in your own voice, such as it is, and attempt to persuade it to move off. You try to figure out how to get it up off of you so that you can, among other things, have something to say.").

14. The "anti-pornography" ordinance defenders sought to argue in *American Booksellers*, 598 F.Supp at 1330, that "pornography" is not speech, but conduct, and thus that it is not protected by the First Amendment. The District Court, in rejecting that argument, stated that the contention that pornography is conduct, and thus is not entitled to First Amendment protection, was offered "one senses with a certain sleight of hand", given that the ordinance in its terms addresses "the sexually explicit subordination of women, graphically depicted, whether in pictures or in words . . ." *Id.* (emphasis in original). Even so, it is clear that the "anti-pornography" ordinance's drafters take the position that pornography constitutes a silencing of women in and of itself, whether or not it is proved to cause silencing of women outside and beyond the words and pictures that compose it. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 *HARV. CRV. RTS. - CIV. LIB. L. REV.* 1-21 (1985) ("[i]f a woman is subjected, why should it matter that the work has other value?").

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because "free speech" is part of a male establishmentarian legal system, there can be little lost¹⁵ by women if the "anti-pornography" campaign imposes jeopardy to "free speech" as men have defined, used and enjoyed it. (The implicit final step in this chain, which may actually be the first step for some who accept the "anti-pornography" position, is that because men and women are at war with each other, sex with men or in any position reminiscent of male/female intercourse is a defeat.¹⁶) It is the author's essential position that each of these beguiling and provocative steps in the feminist "anti-pornography" chain reaction contains both powerful truth and danger (in the potential of action based on the overstatement contained in each step), and that, ultimately, engagement in the chain reaction itself engulfs the possibilities that the truth in each step can be appreciated, isolated and built upon, without losing our developing senses of feminist and humanist priorities, and our legally evolving and constitutionally based progresses and possibilities, all to a reaction to "pornography".

II. CURRENT U.S. SOCIETY NEEDS MORE AND BETTER SEXUALLY EXPLICIT EXPRESSION, FOR NUMEROUS IMPORTANT REASONS.

The need for "sexually explicit" expression, and for more and clearer communication about sexual matters, seems to multiply with everyday's revelations of new relationships, possibilities between people, and phenomena. It is proposed that before any further restrictions on sexual speech are urged, the proponents of such restrictions consider the following list of priorities of the feminist and human rights movements, and the concrete implications of restrictions upon "sexually explicit" expression upon each priority:

1. The effort to give children better, more effective tools to combat sexual abuse, including familial sexual abuse and incest;

15. "In the struggle against pornography, women have precious few strategies and very little to lose. . . while women struggle to keep our movement alive, our sisters are beaten, fore-fucked, prostituted, impoverished and enslaved. This ordinance may relieve some of that suffering and help us name it for what it is." Baldwin, *The Sexuality of Inequality: The Minneapolis Pornography Ordinance*, 2 LAW & INEQUALITY 629, 646 (August 1984).

16. See quotation of Carol Vance and discussion thereof, *infra* note 27 and accompanying text.

2. Enablement/empowerment of both minors and adults to know more about their own developing sexualities (including the pro's and con's of being gay, lesbian,¹⁷ bisexual, heterosexual, celibate or otherwise; the methods and effects of particular forms of contraception; pregnancy in and out of marriage; surrogate motherhood; venereal disease; abortion choice; AIDS/ARC causes, modes of prevention and treatment; rape and sexual assault; the sex industry (including prostitution, pornography, commercialization of sex);
3. Improvement of intimate relationships, by people learning to say what they do and do not like, want or need in the way of sex;
4. Breaking down sex-stereotyping and sex-role stereotyping in all realms of life, in work, play, economics, sexual activity;
5. Expanding the possibilities of aesthetic and artistic adventuring about sex (viewing sexual activity as a frontier, in which fantasy, imagination and art need to be free to develop, alongside "safe sex"¹⁸ and auto-erotic practices) and developing rich and satisfying sources of erotica (that is, non-violent and egalitarian sexual media);
6. Working to overcome the dichotomization and polarization of "women" versus "ladies"¹⁹, and of sexually active women including "promiscuous" women, prostitutes, single mothers and teenage females versus virtuous females, virgins, and monogamous, virtuous wives;²⁰

17. Among the lesbian literature that the Indianapolis ordinance would easily be invoked to make civilly actionable might be JoAnn Loulan's book, *LESBIAN SEX* (1983), which interviews a great number of lesbians and reports their sexual practices; that work, as well as the vituperative and voluble criticisms of it as "proheterosexual" and "anti-political" in, for example, *The Lesbian Inciter* 6 (Dec. 1985), both contain discussions of women and dildoes, vibrators, men and other apparently actionable material, under the terms of the Indianapolis ordinance. See *supra* notes 3 & 7.

18. The phrase "safe sex" has developed as something of a term of art in the AIDS/ARC education and prevention process in the U.S. "Safe sex" excludes sexual practices that cause the exchange of bodily fluids (blood and semen, in particular) and, thus, that risk transmission of the AIDS virus.

19. In San Francisco, a group called the Plutonium Players got their start doing skits and sketches as "Ladies Against Women", featuring the mottoes "Born to Clean" and "You can't join this group unless your husband consents", and recommending activities such as "consciousness-lowering sessions". The humor of this group partly derives from the idea that ladies don't need equality, and really can't afford it if they are to remain ladies, who are defined, after all, by contrast to that less desirable and proper species, women. Phyllis Schlafly, a famous opponent of the women's movement and of the Equal Rights Amendment in particular, has advanced this "Ladies Against Women" school of thought, for real, in a number of publications and speeches. P. Schlafly, *The Power of The Positive Woman* (Jove, 1978); P. Schlafly, *New Guard* 85 (1973).

20. Actor Colleen Dewhurst testified at the Proceedings of the National Coalition

7. Elevating and enriching the level of public media about sexual activity (from the "dirty secrets" approach²¹ common in current media to something at once loftier and deeper) with attention to preserving fun as well as dignity and to respecting the need for privacy as well as public education in sexual matters;
8. Getting the government out of the bedroom where the activities occurring there are both "victimless" and essentially private²² while getting the government to act to prevent and remedy forms of serious and damaging violence against women that have been historically legally neglected or insulated from legal scrutiny by assertions of male, paternal privilege and authority (e.g. marital rape; child abuse and incest; sexual harassment);
9. Distinguishing between sex and violence.²³

Against Censorship that "[w]hen *Moon for the Misbegotten* [a play by Eugene O'Neill] opened in Detroit . . . [the police closed it] 'for obscenity' . . . [in that the play] mentioned 'mother' and 'postitute' in the same sentence." *The Meese Commission Exposed* 7, 9 (NCAC, 1/16/87). It is this type of legal intervention, not by police but by civil litigants offended by "pornography", that the Indianapolis "anti-pornography" ordinance legally would effectuate.

21. A prime current example of this approach to sexual activity is the reporting of the "dirty secrets" of the deposed leaders of the PTL (Praise the Lord) Club, an evangelical/television empire, Jim and Tammy Faye Bakker; he is reputed to have paid off a 20-year-old woman in conjunction with extramarital sexual activity, and to have hired both male and female sexual partners, and she is accused of a love affair (at least of the heart and soul) with a country singer. The sexism of this saga is pretty blatant, too. See Mandel, *It's Too, Too Easy To Laugh At Tammy*, S.F. Chronicle B3 (4/30/87).

22. See, e.g., brief amici curiae, *Bowers*, supra note 9; in *Bowers*, a bare majority of the U.S. Supreme Court upheld a Georgia law that prohibits all oral-genital and anal-genital contacts, regardless of any other circumstances.

23. "The word pornography covers a broad spectrum of sexual scripts and, certainly, some of these are violent, some show female humiliation, some indulge the idea that women like to be hurt. But pornography is above all about sex, about feelings that are fragile, often repressed, often a source of shame. Most people in this society were raised to fear sex, or feel guilty or embarrassed by it, so that when images of sex are mixed with images of violence, it is hard to separate out the sexual anxiety we feel from our repulsion to the violence. All the same, when a law against images is proposed, it's important to sort out these mixed feelings." L. Duggan & A. Snitow, *Porn Law Is About Images, Not Power*, NEWSDAY (9/26/84). Proponents of the ordinances foster confusion between sex and violence, and, it appears, seek to enrage and impassion their readers and listeners, by mixing sex and violence in the examples they offer in support of their position. See, MacKinnon, *Feminist Discourse, Moral Values and the Law A Discussion*, supra note, at 28, 35, 73, ("The freedom we have is so small compared to the kind of freedom that we could have if we transformed this society, if we were able to get this foot off our necks," (tying rape to the anti-pornography argument); Baldwin, *The Sexuality of Inequality: The Minneapolis Pornography Ordinance*, supra note 14, at 632 ("Women especially love to be fucked by animals, dildoes, fists, and penises, especially when being bound, beaten, cut, mutilated and killed . . . This is the version of sexual equality that is in the mouths of the pornographers who tell us they love women."); E. Spahn, *On Sex and Violence*, 20 New Eng.L.Rev. 629, 635-36 (1984-85) (Connecting violent rape, abduc-

The above itemization of the bases for needing more, better and clearer expression about sexual matters is neither exhaustive nor intended to be doctrinaire. Doubtlessly there are other important needs for more, better and clearer sexual speech that have been excluded. Moreover, feminists do disagree about these priorities, as well. Nevertheless, it remains true that each of the above listed items cuts against the approach of the "anti-pornography" ordinance, literally (in terms of a conflict between serving that priority and enforcing the ordinance), in policy terms, and in terms of constitutional and political development of "free speech".

A few illustrations of the incompatibility of the "anti-pornography" ordinance with fulfillment of the feminist/humanist priorities listed above should suffice to underscore the failure of the "anti-pornography" ordinances to have been designed and adopted with attention to their broad consequences. The absence of care as to the implications of the ordinance for these other feminist/humanist causes, and for the need for more open sexual speech to fulfill them, is as plain as it is confounding.

In California in 1986 and 1987, a significant legislative conflict ensued concerning the passage of "specific guidelines for teaching students [in public primary and secondary schools] about homosexuality, AIDS, contraception, abortion, and other sex-related issues."²⁴ Opponents of the guidelines argued that the state was fostering homosexuality by taking neutral positions about it, and asserted that "the revised guidelines offer no

tion and defecation and urination on victim with pornography). One powerful rhetorical mechanism of the "anti-pornography" proponents is to make as imperceptibly slight a distinction as possible between sex and violence, to gain support for ordinances that fail to distinguish sex and violence as well. In those instances where sex and violence are united in the examples themselves, there is no effort to point out that existing laws prohibit the violence, whether occurring in or out of sexual contexts. The method is extremely effective, in that the rage one feels toward the raping, defecating, urinating, stabbing, shooting and violent attacker can be transferred to the pornography found in his possessions before the attack, and to the maker of the pornography who profited by "inspiring" him to commit these acts by writing of similar acts, and marketing the writing. *Id.* The rage thus transferred holds the pornographer and the producer of the pornography responsible. None of the "anti-pornography" opponents offers a good reason, however, for not keeping the rage focused upon the attacker, and/or upon the criminal justice system that failed to convict him, and/or the society that taught him — in an everyday way, with or without pornography — that he could do these things to women and feel more powerful.

24. Los Angeles Daily Journal 2 (3/12/87).

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assurances that pornographic materials, in the name of "safe sex" education, will not be used."²⁵ The State Board of Education was deluged with letters taking sex-negative as well as specifically anti-gay/lesbian positions.²⁶

The Indianapolis "anti-pornography" ordinances, were it law in California, easily could be invoked to enable those opposing the sex education guidelines to bring civil suits against educators and school officials who, in following the guidelines, elected to provide, "in pictures or in words", information about sexual transmission of AIDS, or about particular "unsafe sex" practices (e.g. rimming, first-fucking, sharing sex toys).²⁷ Moreover, even if the precise terms of the ordinance could not be invoked to apply to the sex education materials of a particular (brave) teacher or (progressive) school district, the climate of restraint upon sexual speech promoted by the "anti-pornography" campaign would suffice to deter most educators from taking any such risks.

The sex-negative and speech-suppressing message of the "anti-pornography" campaign is powerful, both in and beyond the terms of the ordinances themselves. As one feminist anthropologist has observed:

[T]his law winds up doing a very traditional cultural operation in condemning sexually explicit images and words. There are a number of familiar themes: that sex degrades women but not men; that men are raving beasts; that sex is dangerous for women; that sexuality is male and not female; that women are victims, not sexual agents; that

25. *Id.* This argument was advanced by the Los Angeles County Commission on Obscenity and Pornography.

26. Letter from Lobby for Individual Freedom and Equality (LIFE) to interested constituent persons and groups (1/16/87).

27. These types of information readily could be interpreted to violate an "anti-pornography" ordinance worded as the Indianapolis ordinance was, with its sweeping and ambiguous wording. See n. supra. This litigative likelihood is enhanced where issues of gay/lesbian people are concerned, due to the commonness of hostile adversaries and/or judges, of which there appear to be a steady supply where gay rights causes are concerned, see M. Dunlap & J. Gomez, *First Amendment*, § 9.03(e), R. Achtenberg, ed. *SEXUAL ORIENTATION AND THE LAW* (Clark Boardman, 1985) ("Many judicial decisions as to lesbians and gay males betray, where they do not announce, a deep lack of respect for the people, value and cultures associated with lesbianism and gay male sexuality.").

men inflict sex on women; that penetration is equivalent to submission; and that heterosexuality - and not the institution of heterosexuality - is sexist. What appeared novel is really the reappearance of a very traditional concern that explicit sexuality itself constitutes the degradation of women.²⁸

The philosophical atmosphere of the "anti-pornography" campaign, to the extent that it conveys that sex is bad and should not be communicated about, certainly endangers the delicate work of those struggling for more openness and candor in sexual speech.

A related harmful consequence of the "anti-pornography" campaign is its support, whether intentional or inadvertent, of those who seek to empower and keep the State in the bedrooms of consenting adults, where sexual activity is concerned. In 1986, the U.S. Supreme Court dealt a severe blow to those seeking to limit the prerogatives of government to criminalize private, consenting sexual activity between adults, when it upheld a Georgia law that prohibits any oral-genital and any anal-genital sexual contact, regardless of circumstances, in the case of *Bowers v. Hardwick*.²⁹ In their incautious definitions of what sexual speech is to be legally actionable, as well as in their dependence upon lines of legal precedent that empower government to intrude into private, consenting sexual activity, the "anti-pornography" proponents strengthen the *Bowers v. Hardwick* line of analysis. In common with the approach of *Bowers*, the "anti-pornography" proponents would enable government to decide the bounds of sexual communication, and to act against those who cross the lines government chooses to draw.

Another example of the real damage to the above-enumerated feminist/humanist priorities that the "anti-pornography" ordinances achieve derives from the inadequacy and vagueness of the line between "pornography" and "erotica", not only in the

28. C. Vance, cited in Benson, *Pornography and The First Amendment: American Booksellers v. Hudnut*, supra note 10, at 171 n.82.

29. *Bowers*, No. 86-140, supra n.9. "Having approached the *Bowers* case with care, hope, and guarded optimism, it is difficult now to read the opinions of Justices White and Powell and Chief Justice Burger without concluding that these opinions represent unqualified disaster for lesbian and gay freedom and equality under law." M. Dunlap, Introduction to Brief of Mary Dunlap. *Bowers*, cited supra note 9, at 951.

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ordinances but in their drafters' thinking. While the drafters of the ordinances propose that the ordinances "include everything that is pornography and do . . . not include anything that is not" and "do . . . not include 'erotica,' which is sexually explicit sex promised on equality,"³⁰ nothing in the ordinances in any way exempts or insulates "erotica". In fact, the inclusion or exclusion of "erotica" is left entirely to judicial interpretation of the often vague, loose phrases of the ordinances.³¹

The range of feminist imagination and expression in the realm of sexuality has barely begun to find voice. Women need the freedom and the socially recognized space to appropriate for themselves the robustness of what traditionally has been male language. Laws such as the one[s] under challenge here could constrict that freedom . . . as more women's writing and art on sexual themes (footnote omitted) emerges which is unladylike, unfeminine, aggressive, power-charged, pushy, vulgar, urgent, confident and intense, the traditional foes of women's attempts to step out of their 'proper place' will find an effective tool of repression in the Indianapolis ordinance.³²

30. Bryden, *Between Two Constitutions: Feminism and Pornography*, 2 CONST. COMMENTARY 147, 171 (1985).

31. See *supra* notes 3 and 7 and accompanying text; see also, *American Booksellers v. Hudnut*, 598 F.Supp. at 1337-38 ("[t]he Court is struck by the vagueness problems inherent in the definition of pornography, itself, more specifically, the term, "subordination of women". That term is not specifically defined in the Ordinance, and it is almost impossible to settle in ones own mind or experience upon a single meaning or understanding of that term . . . What constitutes subordination under this Ordinance is left finally to the censorship committee or to individual plaintiffs who choose to bring actions to enforce [it] . . . and under any due process standards, that is unfair in a fundamental and constitutional sense.")

32. Brief Amici Curiae of the Feminist Anti-Censorship Task Force (FACT) et al. 31-32, in *American Booksellers v. Hudnut*, No. 84-3147 (4/8/85). The author of this article notes that she was an *amicus* who joined in that brief, along with, *inter alia*, Roberta Achtenberg, Directing Attorney of the Lesbian Rights Project, San Francisco; Jewelle Gomez, a critic for the Village Voice and other publications; Kate Millet, author of *SEXUAL POLITICS, THE PROSTITUTION PAPERS, FLYING and SITA*; Phyllis Lyon, co-author of *LESBIAN/WOMAN*; Del Martin, author of *BATTERED WIVES*; Adrienne Rich, a renowned lesbian feminist writer and poet; and dozens of others similarly involved. *Id.* at xii-xix. The Brief was authored by Nan Hunter and Sylvia Law of New York. The risk of the "anti-pornography" campaign for feminist imagination and sexual speech generally is deepened when the ordinances' proponents claim that pornography not only causes sexual violence, but is, in and of itself, sexual violence. Such an argument, if accepted, would have placed "pornography" on the "conduct" side of the speech/conduct line, in

In their terms, the ordinances give no protection whatsoever to "erotica", whether defined as the ordinance's drafters wish it to be or otherwise. Moreover, in the attitudes about sex that the ordinances are based upon, room for the development of sex-positive literature of an erotic nature is exceedingly hard to find.

III. EXISTING "OBSCENITY" DECISIONS THREATEN SEXUAL SPEECH GENERALLY, AND THE "ANTI-PORNOGRAPHY" ORDINANCES BUILD UPON THOSE DECISIONS.

One of the primary drafters of the Indianapolis and Minneapolis "anti-pornography" ordinances, law professor Catherine MacKinnon, claims that the ordinances are not derived from or based in concern about the prevention of "obscenity". Says MacKinnon:

"The law of obscenity (footnote omitted), the state's primary approach (footnote omitted) to its version of the pornography question, has literally nothing in common with this feminist critique [of pornography]. Their obscenity is not our pornography obscenity law proposes to control what and how sex can be publicly shown."³³

MacKinnon then proceeds in this article, and elsewhere,³⁴ vigorously to disown and disavow connection of her campaign with "obscenity" law.

Yet in the litigation of *American Booksellers v. Hudnut*,³⁵

First Amendment terms, enabling government to prohibit it outright, without regard to First Amendment implications. *But see* supra note 13 and accompanying text. The inability of the "anti-pornography" campaigners to differentiate between fantasy and reality, and between speech and conduct, empowers those who would welcome the opportunity to repress sexual speech in the name of preventing conduct. "Images of violence are not the same thing as violence itself; a picture of a rape is not a rape In fantasy, we test the boundaries of our feelings in ways that might terrify us in real life. The whole point on which discussions of fantasy and reality turn is that almost all of us *know the difference*." L. Duggan & A. Snitow, *supra* note 22 (emphasis in original) "Porn Law Is About Images, Not Power", *Newsday* (9/26/84).

33. MacKinnon, *Not A Moral Issue*, *supra* note 8, at 329. C. MacKinnon, *Feminist Discourse, Moral Values, and the Law A Conversation*, *supra* note 1, at 34 ("[the ordinance] . . . does not empower the state in the direct way that an obscenity law does").

34. See *supra* note 2 and accompanying text.

35. "The ordinance reaches 'sexually explicit activity' . . . The Supreme Court has

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MacKinnon et al. invoked this self-same body of "obscenity" prohibition as a basis for constitutional construction of a proposed exception of "pornography" from the guarantee of free speech.³⁶ It is precisely the precedents of the Supreme Court that entitle government to act against "obscenity" that MacKinnon and others defending the "anti-pornography" ordinance in Indianapolis depended upon, cited and sought to expand. The entire "anti-pornography" statutory approach was enabled and emboldened by case precedents that carved out an "obscenity" exception to the First Amendment's guarantee of "free speech".

The political distinction that MacKinnon offered between obscenity and pornography dissolved completely in the legal argument in *American Booksellers v. Hudnut*. This is particularly important when one considers that the reason MacKinnon sponsored the distinction was to differentiate her position, and to disassociate her politics, from that of right-wing moralists.

"Obscenity is a moral idea; pornography is a political practice. Obscenity is abstract; pornography is concrete. The two concepts represent two entirely different things. Nudity, explicitness, excess of candor, arousal or excitement, prurience, unnaturalness - these qualities bother obscenity law when sex is depicted or portrayed."³⁷ The above assertions were offered in defense of the idea that MacKinnon's position as a radical feminist was not a "moral" issue, and was wholly different than that of governmental agents running around suppressing sexual speech because they disapproved of it. Yet in the litigation of *American Booksellers v. Hudnut*, the two positions merged totally, in favor of the assertion that the "obscenity" exception to the First Amendment should be expanded to enable civil liability for a far wider array of sexual speech than *Miller v. Califor-*

determined that 'there is . . . a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance . . . The message . . . is that it is constitutional for anyone who steps too close to the line to take the risk of crossing it when sexually explicit material is involved. The chilling effect is simply not entitled to great weight in this context.' Brief of Appellants 53, *American Booksellers v. Hudnut*, No. 84-3147. "[Appellants in defending the ordinance] . . . ask this Court to rule that all sexually explicit speech is disfavored, so as to trivalize the threat of suppressing sexual speech which is currently protected by the Constitution . . ." Brief Amici Curiae of FACT 27, *supra* note 31.

36. *Id.*

37. C. MacKinnon, "Not A Moral Issue" 323, *supra* note 8.

nia³⁸ enables government to prohibit as “obscene”.

Even without the expansion of the “obscenity” exception that MacKinnon and others actually litigated to establish in *American Booksellers v. Hudnut*, sexual speech that serves feminist/humanist purposes is widely jeopardized by loose and ill-defined exceptions to the First Amendment’s protection of free speech. A recent example of this real jeopardy is the charge of “obscenity” by the Federal Communications Commission leveled against the Pacifica Foundation, at the behest of an Orange County preacher, for airing of a “safe sex” radio program entitled “Jerker”, which contained “sexually explicit” language.³⁹

A perhaps subtler and just-as-harmful example of the danger of poorly defined exceptions to the guarantee of free speech, of the sort urged by appellants in *American Booksellers v. Hudnut*, emerges from an employment discrimination case about a bisexual public employee. That case, *Rowland v. Mad River School District*,⁴⁰ resulted in a federal appellate court’s determi-

38. See *supra*, note 6 and accompanying text.

39. Coming Up 8 (San Francisco, May 1987). “For good measure, the preacher also complained about KPFK’s practice of giving calendar listings for a gay chapter of the ACLU.” *Id.*

40. *Rowland v. Mad River School District*, 730 F.2d 444, 449 (6th Cir. 1984), (citing *Connick v. Myers* appears to have established a “personal speech” exception to the First Amendment’s guarantee that threatens to engulf much “personal is political” speech about sexual matters and otherwise, see *supra* note 9, by the inclination to trivialize such matters. *Connick* and *Rowland* also both involve speech by women. The “anti-pornography” ordinance sponsors’ position feeds into and supports this very trivialization of women’s speech, at least about sexual matters, by arguments such as those made in the *American Booksellers* case that sexual speech is of “low value” in the U.S. constitutional scheme of things, and thus is not worthy of protection. In *American Booksellers*, the Court of Appeals resoundingly rejected this characterization of sexual speech, stating in relevant part: “We come, finally, to the argument that pornography is ‘low value’ speech, that it is enough like obscenity that Indianapolis may prohibit it. Some cases hold that speech far removed from politics and other subjects at the core of the Framers’ concerns may be subjected to special regulation. *e.g.*, *FCC v. Pacifica Foundation*, 438 U.S. 726, (1978); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 67-70; ____ S.Ct. 2440, 2450-52, 49 L.Ed.2d 310 (1976) (plurality opinion); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72, 62 S.Ct. 766, (1942). These cases do not sustain statutes that select among viewpoints, however . . . At all events, ‘pornography’ is not low value speech within the meaning of these cases. Indianapolis seeks to prohibit certain speech because it believes this speech influences social relations and politics on a grand scale, that it controls attitudes at home and in the legislature. This precludes a characterization of the speech as low value.” 771 F.2d at 331. It is noted that the appellants in *American Booksellers* sought to extend the “low value” idea from obscenity to pornography by contending that both have sex in common. This very conceptual bridge from obscenity to pornography,

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nation that a bisexual school guidance counselor's "coming out" to other staff in the school constituted non-protected speech, outside the First Amendment's protection, because her identification of herself as bisexual was speech "only in her personal interest . . . [on a matter not of] public concern. . . when she began speaking to others about her own sexual preference."⁴¹ The boundaries of this "personal speech" exception to the guarantee of free speech seem dangerously close to non-existent, where the silencing of unpopular speech about sexual matters (such as bisexuality) is concerned.

Rowland aptly illustrates the severe hazard to feminist priorities, not to mention to equal justice under law, of haphazard and expedient engrafting of exceptions upon the First Amendment for speech that is considered oppressive and offensive. In terms of the risk of the "obscenity" exception, no less a champion of both free speech⁴² and equal protection without regard to sex⁴³ than Justice William O. Douglas had occasion to observe:

If 'obscenity' can be carved out of the First Amendment, what other like exceptions can be created? Is 'sacrilege' also beyond the pale? Are utterances or publications made with 'malice' unprotected? How about 'seditious' speech or articles? False, scandalous, and malicious writings or utterances against the Congress or the President 'with intent to defame' or bring them 'the hatred of the good people' or 'to stir up sedition', or to 'excite' people to 'resist, oppose, and defeat' any

which MacKinnon and others deny using in condemning pornography but which they obviously used in defending the ordinance, *see supra* notes 32-38 and accompanying text, would invite those seeking to broadly prohibit sexual speech to cross over from obscenity to pornography, and beyond, without any regard for what is being trampled in terms of interests in sexual speech. It is this real-life disregard for the relationships of ideas, and this blitful ignorance about the carcinogenic quality of loose exceptions to free speech, *see e.g.*, discussion of *Rowland v. Mad River School District* and *Connick v. Myers*, *supra*, that spells disaster for all of the positive, feminist values served by sexual speech, if law is permitted to incorporate the "anti-pornography" chain reaction. See text at note 15, *supra*.

41. *Id.*

42. See THE DOUGLAS OPINIONS 170-230 (V. Countryman, ed.) (Random House 1977).

43. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, (1973) (joining in plurality opinion that sex should be a suspect category for equal protection purposes).

law were once made a crime [under the Alien and Sedition Acts of 1798]. Now that the First Amendment applies to the States . . . may the States embark on such totalitarian controls over thought or over the press? May Congress do so?⁴⁴

The concern that Justice Douglas articulated about the creation of exceptions to free speech certainly has as much application in an era of debate, dispute and cultural trouble about sexual politics as it has to the genres of traditional political and economic speech among cloistered elitist males for which free speech may have originally been intended.

At least one state supreme court recently recognized the essential danger of the "obscenity" exception to the First Amendment's guarantee, in striking down its own criminal obscenity law. The Oregon Supreme Court, in *Oregon v. Henry*,⁴⁵ held that its law making it a crime to make, exhibit, sell, deliver or provide any obscene medium violated its own state constitution, holding that the "obscenity" exception to the U.S. Constitution did not empower the state legislature to suppress speech; the Court observed that "[t]he problem with the U.S. Supreme Court's approach to obscene expression is that it permits the government to decide what constitutes socially acceptable expression."⁴⁶

Perhaps the most dramatic illustration of "anti-pornography" anti-logic lies in its proponents' apparent willingness to create an exception to First Amendment free speech that embodies so much confusion about the value of sexual speech and that is so ill-deliberated in general, that it enables the suppression of the proponents' own expression about sex. Are the "anti-pornography" advocates not precisely prototypical of those dangerous women, engaged in unprotected "personal speech" about sexual matters, that those whom they accuse of silencing women for profit and power would gladly find to be engaged in expres-

44. *Byrne v. Karalexis*, 396 U.S. 976, (1969) (dissenting) (in appeal from injunction permitting owner and operator of a motion picture theatre to be free of further prosecution pending resolution of the question whether the film, *I am Curious (Yellow)*, was obscene under Massachusetts law.).

45. 55 U.S.L.W. 2444 (1/21/87).

46. *Id.*

sion that is “obscene”, “pornographic” or anything else prerequisite to silencing them?

Of course, one would expect that the proponents would seek to defend their own communication by limiting their definition of “pornography” to a particular intent on the part of the communicator, and on the part of the recipient of the communication. After all, it is the smarmy porno profiteer and the equally smutty purchaser at whom the Indianapolis law is aimed, so a group of feminist debaters about sex should not be the targets of civil action, under the proponents’ theory. The problem with this theory is that *there is not any limitation* in the ordinance, nor in its proponents’ willingness to relegate sexual speech to a low order in First Amendment terms, such that right-wing moralists, claiming that discussions and depictions of pornography by feminists (not to mention famous feminist books such as *Our Bodies, Ourselves* and *Lesbian Sex*) are degrading and subordinate to women, to use the State to silence the entire feminist discussion. The “anti-pornography” proponents, with their genderized dichotomization of law and sexual speech as inherently male and of victims as ineluctably female, have missed a crucial point — free speech about sex is exactly what they are relying upon to conduct their side of this fascinating, difficult and probably unending debate. The exception for sexual speech of “low value” that they contend for today, in hopes of silencing “pornography”, will be invoked to silence their “low value” and “offensive” speech tomorrow. This author, for one, hopes that the exception that they seek never becomes law; if it does, she expects her own free speech to be demonstrably and tragically diminished.