

it but degrading from material that is nei-  
t nor degrading, and we have all relied on  
tion of interpretation of existing studies  
ot have drawn the same divisions, studies  
raw these distinctions, clinical evidence,  
ion of victim testimony, and our own per-  
: the effect of images on human behavior.  
he social science evidence is far from con-  
: are on the current state of the evidence  
: that material of this type does not bear a  
tionship to rape and other acts of sexual  
Ve rely once again not only on scientific  
lined later in the Report, and examined by  
but on the fact that the conclusions of  
es seem to most of us fully consistent with  
ense. Just as materials depicting sexual vio-  
t intuitively likely to bear a causal rela-  
sexual violence, materials containing no  
or suggestions of sexual violence or sex-  
nce seem to most of us intuitively unlikely  
ausal relationship to sexual violence. The  
l clinical evidence to date are less persua-  
s lack of negative effect than they are per-  
the presence of negative effect for the  
olent material, but they seem to us of equal  
power as the studies and clinical evidence  
egative effects for the degrading materials.  
conclusion from the social science evi-  
at there is no persuasive evidence to date  
the connection between non-violent and  
ling materials and acts of sexual violence,  
ere is some but very limited evidence, indi-  
the connection does not exist. The total-  
ocial science evidence therefore, is slightly  
: hypothesis that non-violence and non-  
materials bear a causal relationship to acts  
iolence.

\* \* \*

t our analysis in large part to degradation that  
dicted in the material. It may very well be that  
led to a woman being willing to pose for a pic-

a non-degrading sexual act. It may be that coercion caused  
the picture to exist. And it may very well be that the exist-  
ing disparity in the economic status of men and women is  
such that any sexually explicit depiction of a woman is at  
least suspect on account of the possibility that the economic  
disparity is what caused the woman to pose for a picture  
that most people in this society would find embarrassing.

the importance of considering as pervasively as possible the  
status of women in contemporary America, including the  
effects of their current status and what might be done to  
change some of the detrimental consequences of that status.  
But without engaging in an inquiry of that breadth, we must  
generally, absent more specific evidence to the contrary,  
assume that a picture represents what it depicts.

## From *Pornography, Civil Rights, and Speech*

CATHARINE A. MACKINNON

\* \* \*

There is a belief that this is a society in which women  
and men are basically equals. Room for marginal cor-  
rections is conceded, flaws are known to exist,  
attempts are made to correct what are conceived as  
occasional lapses from the basic condition of sex  
equality. Sex discrimination law has centered most  
of its focus on these occasional lapses. It is difficult  
to overestimate the extent to which this belief in  
equality is an article of faith to most people, includ-  
ing most women, who wish to live in self-respect in  
an internal universe, even (perhaps especially) if not  
in the world. It is also partly an expression of natu-  
ral law thinking: If we are inalienably equal, we can't  
"really" be degraded.

This is a world in which it is worth trying. In this  
world of presumptive equality, people make money  
based on their training or abilities or diligence or  
qualifications. They are employed and advanced on  
the basis of merit. In this world of just deserts, if  
someone is abused, it is thought to violate the basic  
rules of the community. If it doesn't, that person is  
seen to have done something she could have chosen  
to do differently, by exercise of will or better judg-  
ment. Maybe such people have placed themselves in  
a situation of vulnerability to physical abuse. Maybe

Catharine MacKinnon, "Pornography, Civil Rights, and Speech,"  
*Harvard Civil Rights/Civil Liberties Law Review* 20, no. 1 (1985):  
10-68 (edited). Copyright © 1985 by the President and Fellows  
of Harvard College. Reprinted with permission.

they have done something provocative. Or maybe  
they were just unusually unlucky. In such a world, if  
such a person has an experience, there are words for  
it. When they speak and say it, they are listened to.  
If they write about it, they will be published. If there  
are certain experiences that are never spoken, or cer-  
tain people or issues seldom heard from, it is sup-  
posed that silence has been chosen. The law,  
including much of the law of sex discrimination and  
the first amendment, operates largely within the  
realm of these beliefs.

Feminism is the discovery that women do not live  
in this world, that the person occupying this realm  
is a man, so much more a man if he is white and  
wealthy. This world of potential credibility, author-  
ity, security, and just rewards, recognition of one's  
identity and capacity, is a world that some people do  
inhabit as a condition of birth, with variations *among*  
*them*. It is not a basic condition accorded humanity  
in this society, but a prerogative of status, a privilege,  
among other things, of gender.

I call this a discovery because it has not been an  
assumption. Feminism is the first theory, the first  
practice, the first movement, to take seriously the sit-  
uation of all women from the point of view of all  
women, both on our situation and on social life as a  
whole. The discovery has therefore been made that  
the implicit social content of humanism, as well as  
the standpoint from which legal method has been  
designed and injuries have been defined, has not

been women's standpoint. Defining feminism in a way that connects epistemology with power as the politics of women's point of view, this discovery can be summed up by saying that women live in an other world: specifically, a world of *not* equality, a world of inequality.

Looking at the world from this point of view, a whole shadow world of previously invisible silent abuse has been discerned. Rape, battery, sexual harassment, forced prostitution, and the sexual abuse of children emerge as common and systematic. We find rape happens to women in all contexts, from the family, including rape of girls and babies, to students and women in the workplace, on the streets, at home, in their own bedrooms by men that they do not know, and by men that they do know, by men they are married to, men they have had a social conversation with, or, least often, men they have never seen before. Overwhelmingly, rape is something that men do or attempt to do to women (forty-four percent according to a recent study) at some point in our lives. Sexual harassment of women by men is common in workplaces and educational institutions. Up to eighty-five percent of women in one study report it, many in physical forms. Between a quarter and a third of women are battered in their homes by men. Thirty-eight percent of little girls are sexually molested inside or outside the family. Until women listened to women, this world of sexual abuse was *not spoken* of. It was the unspeakable. What I am saying is, if you *are* the tree falling in the epistemological forest, your demise doesn't make a sound if no one is listening. Women did not "report" these events, and overwhelmingly do not today, because no one is listening, because no one believes us. This silence does not mean nothing happened, and it does not mean consent. It is the silence of women of which Adrienne Rich has written, "Do not confuse it with any kind of absence."<sup>1</sup>

Believing women who say we are sexually violated has been a radical departure, both methodologically and legally. The extent and nature of rape, marital rape, and sexual harassment itself, were discovered in this way. Domestic battery as a syndrome, almost a habit, was discovered through

refusing to believe that when a woman is assaulted by a man to whom she is connected, that is not an assault. The sexual abuse of children was uncovered, Freud notwithstanding, by believing that children were not making up all this sexual abuse. Now what is striking is that when each discovery is made, and somehow made real in the world, the response has been: It happens to men too. If women are hurt, men are hurt. If women are raped, men are raped. If women are sexually harassed, men are sexually harassed. If women are battered, men are battered. Symmetry must be reasserted. Neutrality must be reclaimed. Equality must be reestablished.

The only places where the available evidence supports this, where anything like what happens to women also happens to men, are with children—little boys are sexually abused—and in prison. The liberty of prisoners is restricted, their freedom restrained, their humanity systematically diminished, their bodies and emotions confined, defined, and regulated. If paid at all, they are paid starvation wages. They can be tortured at will, and it is passed off as discipline or as means to an end. They become compliant. They can be raped at will, at any moment, and nothing will be done about it. When they scream, nobody hears. To be a prisoner means to be defined as a member of a group for whom the rules of what can be done to you, of what is seen as abuse of you, are reduced as part of the definition of your status. To be a woman is also that kind of definition and has that kind of meaning.

Men *are* damaged by sexism. (By men, I am referring to the status of masculinity which is accorded to males on the basis of their biology, but is not itself biological.) But whatever the damage of sexism is to men, the condition of being a man is not defined as subordinate to women by force. Looking at the facts of the abuses of women all at once, you see that a woman is socially defined as a person who, whether or not she is or has been, *can at any time* be treated in these ways by men, and little, if anything, will be done about it. This is what it means when feminists say that maleness is a form of power and femaleness is a form of powerlessness.

In this context, what all of this "men t is about, is that people don't really seem t that the things I have just said are true, tho really is little question about their empirical The data are extremely simple, like wom nine cent on the dollar pay figure. People do seem to believe that either. Yet there is no of its empirical validity. This is the workpl. What women do is seen as not worth muc is not worth much is seen as something fo to do. *Women* are not seen as worth muc thing. Now why are these basic realities of ordination of women to men, such that for only 7.8 percent of women have never been assaulted,<sup>2</sup> not effectively believed, not per real in the face of all this evidence? Why do believe our own experiences? In the face c evidence, especially of systematic sexual ab jection to violence with impunity is one expression, although not the only express degraded status—the view that basically the equal in this society remains unchallen unchanged. The day I got this was the day stood its real message, its real coherence: *Thi ity for us.*

I could describe this but I couldn't explai I started studying a lot of pornography. In raphy, there it is, in one place, all of the ab women had to struggle so long even to begi ulate, all the *unspeakable* abuse: the rape, th the sexual harassment, the prostitution, and ual abuse of children. Only in the pornogr: called something else: sex, sex, sex, sex, respectively. Pornography sexualizes rape, sexual harassment, prostitution, and chil abuse; it thereby celebrates, promotes, au and legitimizes them. More generally, it crit dominance and submission that is the dyna mon to them all. It makes hierarchy sexy that "the truth about sex" or just a mirror c Through this process, pornography constru a woman is as what men want from sex. Thi the pornography means. (I will talk about tl works behaviorally, with the evidence on it talk about the ordinance itself.)

g to believe that when a woman is assaulted an to whom she is connected, that is not an . The sexual abuse of children was uncov- eud notwithstanding, by believing that chil- ere not making up all this sexual abuse. Now ; striking is that when each discovery is and somehow made real in the world, the e has been: It happens to men too. If are hurt, men are hurt. If women are raped, raped. If women are sexually harassed, men ally harassed. If women are battered, men ered. Symmetry must be reasserted. Neu- must be reclaimed. Equality must be reestab-

only places where the available evidence sup- is, where anything like what happens to also happens to men, are with children— s are sexually abused—and in prison. The f prisoners is restricted, their freedom re- their humanity systematically diminished, ies and emotions confined, defined, and reg- paid at all, they are paid starvation wages. be tortured at will, and it is passed off as or as means to an end. They become com- ey can be raped at will, at any moment, ing will be done about it. When they obody hears. To be a prisoner means to be ; a member of a group for whom the rules in be done to you, of what is seen as abuse e reduced as part of the definition of your e be a woman is also that kind of definition at kind of meaning.

re damaged by sexism. (By men, I am refer- e status of masculinity which is accorded n the basis of their biology, but is not itself ) But whatever the damage of sexism is to ondition of being a man is not defined as e to women by force. Looking at the facts es of women all at once, you see that a ocially defined as a person who, whether is or has been, *can at any time* be treated ys by men, and little, if anything, will be : it. This is what it means when feminists ileness is a form of power and femaleness f powerlessness.

In this context, what all of this “men too” stuff is about, is that people don’t really seem to believe that the things I have just said are true, though there really is little question about their empirical accuracy. The data are extremely simple, like women’s fifty-nine cent on the dollar pay figure. People don’t really seem to believe that either. Yet there is no question of its empirical validity. This is the workplace story: What women do is seen as not worth much or what is not worth much is seen as something for women to do. *Women* are not seen as worth much, is the thing. Now why are these basic realities of the subordination of women to men, such that for example only 7.8 percent of women have never been sexually assaulted,<sup>2</sup> not effectively believed, not perceived as real in the face of all this evidence? Why don’t *women* believe our own experiences? In the face of all this evidence, especially of systematic sexual abuse—subjection to violence with impunity is one extreme expression, although not the only expression, of a degraded status—the view that basically the sexes are equal in this society remains unchallenged and unchanged. The day I got this was the day I understood its real message, its real coherence: *This is equality for us.*

I could describe this but I couldn’t explain it until I started studying a lot of pornography. In pornography, there it is, in one place, all of the abuses that women had to struggle so long even to begin to articulate, all the *unspeakable* abuse: the rape, the battery, the sexual harassment, the prostitution, and the sexual abuse of children. Only in the pornography it is called something else: sex, sex, sex, sex, and sex, respectively. Pornography sexualizes rape, battery, sexual harassment, prostitution, and child sexual abuse; it thereby celebrates, promotes, authorizes, and legitimizes them. More generally, it criticizes the dominance and submission that is the dynamic common to them all. It makes hierarchy sexy and calls that “the truth about sex” or just a mirror of reality. Through this process, pornography constructs what a woman is as what men want from sex. This is what the pornography means. (I will talk about the way it works behaviorally, with the evidence on it, when I talk about the ordinance itself.)

Pornography constructs what a woman is in terms of its view of what men want sexually, such that acts of rape, battery, sexual harassment, prostitution, and sexual abuse of children become acts of sexual equality. Pornography’s world of equality is a harmonious and balanced place. Men and women are perfectly complementary and perfectly bipolar. Women’s desire to be fucked by men is equal to men’s desire to fuck women. All the ways men love to take and violate women, women love to be taken and violated. The women who most love this are most men’s equals, the most liberated; the most participatory child is the most grown-up, the most equal to an adult. Their consent merely expresses or ratifies these preexisting facts.

The content of pornography is one thing. There, women substantively desire dispossession and cruelty. We desperately want to be bound, battered, tortured, humiliated, and killed. Or, to be fair to the soft core, merely taken and used. This is erotic to the male point of view. Subjection itself with self-determination ecstatically relinquished is the content of women’s sexual desire and desirability. Women are there to be violated and possessed, men to violate and possess us either on screen or by camera or pen on behalf of the consumer. On a simple descriptive level, the inequality of hierarchy, of which gender is the primary one, seems necessary for the sexual arousal to work. Other added inequalities identify various pornographic genres or sub-themes, although they are always added through gender: age, disability, homosexuality, animals, objects, race (including anti-semitism), and so on. Gender is never irrelevant.

What pornography *does* goes beyond its content: It eroticizes hierarchy, it sexualizes inequality. It makes dominance and submission sex. Inequality is its central dynamic; the illusion of freedom coming together with the reality of force is central to its working. Perhaps because this is a bourgeois culture, the victim must look free, appear to be freely acting. Choice is how she got there. Willing is what she is when she is being equal. It seems equally important that then and there she actually be forced and that forcing be communicated on some level, even if only through still photos of her in postures of receptivity

and access, available for penetration. Pornography in this view is a form of forced sex, a practice of sexual politics, an institution of gender inequality.

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 erotization 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. Pornography is that way. Pornography is not imagery in some relation to a reality elsewhere constructed. It is not a distortion, reflection, projection, expression, fantasy, representation, or symbol either. It is a sexual reality.

In Andrea Dworkin's definitive work on pornography, sexuality itself is a social construct gendered to the ground. Male dominance here is not an artificial overlay upon an underlying inalterable substratum of uncorrupted essential sexual being. Dworkin's *Pornography: Men Possessing Women* presents a sexual theory of gender inequality of which pornography is a constitutive practice. The way in which pornography produces its meaning constructs and defines men and women as such. Gender has no basis in anything other than the social reality its hegemony constructs. Gender is what gender means. The process that gives sexuality its male supremacist meaning is the same process through which gender inequality becomes socially real.

In this approach, the 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. Understanding this dimension of the problem does not require noticing that pornography models are real women to whom, in most cases, something real is being done; nor does it even require inquiring into the systematic infliction of pornography and its sexuality upon women, although it helps. The way in which the pornogra-

phy 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.

The object world is constructed according to how it looks with respect to its possible uses. Pornography defines women by how we look according to how we can be sexually used. Pornography codes how to look at women, so you know what you can do with one when you see one. Gender is an assignment made visually, both originally and in everyday life. A sex object is defined on the basis of its looks, in terms of its usability for sexual pleasure, such that both the looking—the quality of the gaze, including its point of view—and the definition according to use become eroticized as part of the sex itself. This is what the feminist concept “sex object” means. In this sense, sex in life is no less mediated than it is in art. One could say men have sex with *their image* of a woman. It is not that life and art imitate each other; in this sexuality, they *are* each other.

To give a set of rough epistemological translations, to defend pornography as consistent with the equality of the sexes is to defend the subordination of women to men as sexual equality. What in the pornographic view is love and romance looks a great deal like hatred and torture to the feminist. Pleasure and eroticism become violation. Desire appears as lust for dominance and submission. The vulnerability of women's projected sexual availability, that acting we are allowed (i.e. asking to be acted upon), is victimization. Play conforms to scripted roles. Fantasy expresses ideology, is not exempt from it. Admiration of natural physical beauty becomes objectification. Harmlessness becomes harm. Pornography is a harm of male supremacy made difficult to see because of its pervasiveness, potency, and, principally, because of its success in making the world a pornographic place. Specifically, its harm cannot be discerned, and will not be addressed, if viewed and approached neutrally, because it *is* so much of “what is.” In other

words, to the extent pornography succeeds in constructing social reality, it becomes invisible as harm. If we live in a world that pornography creates through the power of men in a male dominated situation the issue is not what the harm of pornography is, but how that harm is to become visible.

Obscenity law provides a very different analysis and conception of the problem. In 1973, the legal definition of obscenity became that which

the average person, applying contemporary community standards, would find that, taken as a whole, appeals to the prurient interest; that which depicts and describes in a patently offensive way [You feel like you're a cop reading someone's *Miranda* rights] sexual conduct as defined by the applicable state law; and that which, taken as a whole, lacks serious literary, artistic, political or scientific value.<sup>3</sup>

Feminism doubts whether the average gender-neutral person exists; has more questions about the content and process of defining what community standards are than it does about deviations from them; wonders why prurience counts but powerlessness does not, and why sensibilities are better protected from offense than women are from exploitation; defines sexuality, and thus its violation and expropriation, more broadly than does state law; and questions why a body of law which has not in practice been able to tell rape from intercourse should, without further guidance, be entrusted with telling pornography from anything less. Taking the work “as a whole” ignores that which the victims of pornography have long known: Legitimate settings diminish the injury perceived to be done to those whose trivialization and objectification it contextualizes. Besides, and this is a heavy one, if a woman is subjected, why should it matter that the work has other value? Maybe what redeems the work's value is what enhances its injury to women, not to mention that existing standards of literature, art, science, and politics, examined in a feminist light, are remarkably consonant with pornography's mode, meaning, and message. And finally—first and foremost, actually—although the subject of these materials is overwhelmingly women, their contents almost entirely comprised of women's

f provides what those who consume it want. Pornography *participates* in its audience's through creating an accessible sexual possession and consumption of which is quality, as socially constructed; to be considered possessed as which, is female sexuality, as constructed; and pornography is a process that constructs it that way.

The subject world is constructed according to how it is with respect to its possible uses. Pornography is defined by how we look according to how we are sexually used. Pornography codes how to look at a man, so you know what you can do with one and what you can see one. Gender is an assignment made to a man both originally and in everyday life. A sex object is defined on the basis of its looks, in terms of its utility for sexual pleasure, such that both the quality of the gaze, including its point of view, and the definition according to use become part of the sex itself. This is what the concept "sex object" means. In this sense, pornography is no less mediated than it is in art. One man has sex with *their image* of a woman. Pornography that life and art imitate each other; in this sense, they *are* each other.

Pornography is a set of rough epistemological translations that defend pornography as consistent with the interests of the sexes is to defend the subordination of men to men as sexual equality. What in the popular view is love and romance looks a great deal like hatred and torture to the feminist. Pleasure and desire become violation. Desire appears as lust and submission. The vulnerability of women is projected sexual availability, that acting we are asked (i.e. asking to be acted upon), is victimization. Pornography conforms to scripted roles. Fantasy pornography, is not exempt from it. Admiration of physical beauty becomes objectification. Pornography becomes harm. Pornography is a harm to women's supremacy made difficult to see because of its invisibility, potency, and, principally, because of its success in making the world a pornographic one. Pornographically, its harm cannot be discerned, and its harm is addressed, if viewed and approached neutrally because it is so much of "what is." In other

words, to the extent pornography succeeds in constructing social reality, it becomes invisible as harm. If we live in a world that pornography creates through the power of men in a male dominated situation the issue is not what the harm of pornography is, but how that harm is to become visible.

Obscenity law provides a very different analysis and conception of the problem. In 1973, the legal definition of obscenity became that which

the average person, applying contemporary community standards, would find that, taken as a whole, appeals to the prurient interest; that which depicts and describes in a patently offensive way [You feel like you're a cop reading someone's *Miranda* rights] sexual conduct as defined by the applicable state law; and that which, taken as a whole, lacks serious literary, artistic, political or scientific value.<sup>3</sup>

Feminism doubts whether the average gender-neutral person exists; has more questions about the content and process of defining what community standards are than it does about deviations from them; wonders why prurience counts but powerlessness does not, and why sensibilities are better protected from offense than women are from exploitation; defines pornography as sexual equality, and thus its violation and expropriation, more broadly than does state law; and questions why a body of law which has not in practice been able to tell rape from intercourse should, without further guidance, be entrusted with telling pornography from anything less. Taking the work "as a whole" ignores that which the victims of pornography have long known: Legitimate settings diminish the injury perceived to be done to those whose trivialization and objectification it contextualizes. Besides, and this is a heavy one, if a woman is subjected, why should it matter that the work has other value? Maybe what redeems the work's value is what enhances its injury to women, not to mention that existing standards of literature, art, science, and politics, examined in a feminist light, are remarkably consonant with pornography's mode, meaning, and message. And finally—first and foremost, actually—although the subject of these materials is overwhelmingly women, their contents almost entirely comprised of women's

bodies, our invisibility has been such, our equation as a sex *with* sex has been such, that the law of obscenity has never even considered pornography a woman's issue.

Obscenity, in this light, is a moral idea; an idea about judgments of good and bad. Pornography, by contrast, is a political practice, a practice of power and powerlessness. Obscenity is ideational and abstract; pornography is concrete and substantive. The two concepts represent two entirely different things. Nudity, excess of candor, arousal or excitement, prurient appeal, illegality of the acts depicted, and unnaturalness or perversion are all qualities that bother obscenity law when sex is depicted or portrayed. Sex forced on real women so that it can be sold at a profit to be forced on other real women; women's bodies trussed and maimed and raped and made into things to be hurt and obtained and accessed and this presented as the nature of women in a way that is acted on and acted out over and over; the coercion that is visible and the coercion that has become invisible—this and more bothers feminists about pornography. Obscenity as such probably does little harm. Pornography is integral to attitudes and behaviors of violence and discrimination which define the treatment and status of half the population.

At the request of the city of Minneapolis, Andrea Dworkin and I conceived and designed a local human rights ordinance in accordance with our approach to the pornography issue. We define pornography as a practice of sex discrimination, a violation of women's civil rights, the opposite of sexual equality. Its point is to hold accountable, to those who are injured, those who profit from and benefit from that injury. It means that women's injury—our damage, our pain, our enforced inferiority—should outweigh their pleasure and their profits, or sex equality is meaningless.

We define pornography as the graphic sexually explicit subordination of women through pictures or words that also includes women dehumanized as sexual objects, things, or commodities, enjoying pain or humiliation or rape, being tied up, cut up, mutilated, bruised, or physically hurt. in postures of sexual sub-

mission or servility or display, reduced to body parts, penetrated by objects or animals, or presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual. Erotica, defined by distinction as not this, might be sexually explicit materials premised on equality. We also provide that the use of men, children or transsexuals in the place of women is pornography. The definition is substantive in that it is sex-specific, but it covers everyone in a sex-specific way, so is gender neutral in overall design.

\* \* \*

This law aspires to guarantee women's rights consistent with the first amendment by making visible a conflict of rights between the equality guaranteed to all women and what, in some legal sense, is now the freedom of the pornographers to make and sell, and their consumers to have access to, the materials this ordinance defines. Judicial resolution of this conflict, if they do for women what they have done for others, is likely to entail a balancing of the rights of women arguing that our lives and opportunities, including our freedom of speech and action, are constrained by—and in many cases flatly precluded by, in, and through—pornography, against those who argue that the pornography is harmless, or harmful only in part but not in the whole of the definition; or that it is more important to preserve the pornography than it is to prevent or remedy whatever harm it does.

In predicting how a court would balance these interests, it is important to understand that this ordinance cannot now be said to be either conclusively legal or illegal under existing law or precedent, although I think the weight of authority is on our side. This ordinance enunciates a new form of the previously recognized governmental interest in sex equality. Many laws make sex equality a governmental interest. Our law is designed to further the equality of the sexes, to help make sex equality real. Pornography is a practice of discrimination on the basis of sex, on one level because of its role in creating and maintaining sex as a basis for discrimination. It harms many women one at a time and helps keep

all women in an inferior status by defining our subordination as our sexuality and equating that with our gender. It is also sex discrimination because its victims, including men, are selected for victimization on the basis of their gender. But for their sex, they would not be so treated.

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. Consider this analogy with race: If you see Black people as different, there is no harm to segregation; it is merely a recognition of that difference. To neutral principles, separate but equal was equal. The injury of racial separation to Blacks arises "solely because [they] choose to put that construction upon it."<sup>4</sup> Epistemologically translated: How you see it is not the way it is. Similarly, if 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 not treat the sexes differently, so the case for sex differentiation can be made here. Men as a group do not tend to be (although some individuals may be) treated like women are treated in pornography. But as a social group, men are not hurt by pornography the way women as a social group are. Their social status is not defined as *less* by it. So the major argument does not turn on mistaken differentiation, particularly since women's treatment according to pornography's dictates makes it all too often accurate. 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.

Particularly since this is a new legal theory, a new law, and "new" facts, perhaps the situation of women it newly exposes deserves to be considered on its own terms. Not to mention, why the problems of fifty-three percent of the population have to look like somebody else's problems before they can be recognized as existing, but then can't be addressed if they do look like other people's problems, about which

something might have to be done if so done about these, is a construction of what truly deserves inquiry. Limiting the justification of this law to the situation of women would limit the precedential value of a favorable particularity to one side, the *approach* to that supported by a whole array of prior decisions that have justified exceptions to first amendments, when something that matters is directly at stake. What unites many cases where speech interests are raised and implicated in a balance, protected, is harm, harm that some existing exceptions, the definitions, are more open-ended than ours. In some, the exceptions are more severe, or potentially more so. For ours is a civil law; most others are criminal laws, not all. Almost none show as many people affected. Evidence of harm in other cases is vastly less concrete and more conjectural. It is not to say that there is necessarily less of the previous cases addresses a problem of or magnitude—for instance, an \$8 billion industry. Nor do other cases address an industry of which has such widespread harm. Courts have seen harm in other cases. That 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 that, the pornographers notwithstanding, women are not flags.

\* \* \*

To reach the magnitude of this problem or to see it exists, our law makes trafficking in pornography, production, sale, exhibition, or distribution, obscene. Under the obscenity rubric, much psychological scholarship has centered on the elusive link between pornography, obscenity and harm. They have looked for the link in the mind of the male consumer; or in its "moral fabric," in correlations between obscenity and levels of anti-social acts and libelous obscenity laws. The only harm they have attributed to "the obscenity" has been one they have attributed to "the obscenity in order and morality."<sup>5</sup> Until recently, we looked very persistently for harm to women

in an inferior status by defining our sub-  
 as our sexuality and equating that with  
 r. It is also sex discrimination because its  
 cluding men, are selected for victimization  
 sis of their gender. But for their sex, they  
 be so treated.

arm of pornography, broadly speaking, is  
 of the civil inequality of the sexes made  
 s harm because it has become accepted as  
 ference. Consider this analogy with race:  
 Black people as different, there is no harm  
 ion; it is merely a recognition of that dif-  
 neutral principles, separate but equal was  
 injury of racial separation to Blacks arises  
 ause [they] choose to put that construc-  
 t."<sup>4</sup> Epistemologically translated: How you  
 the way it is. Similarly, if you see women  
 rent, even or especially if you don't know  
 ), subordination will not look like subor-  
 all, much less like harm. It will merely  
 an appropriate recognition of the sex

aphy does not treat the sexes differently,  
 for sex differentiation can be made here.  
 roup do not tend to be (although some  
 may be) treated like women are treated  
 phy. But as a social group, men are not  
 rnography the way women as a social  
 heir social status is not defined as *less* by  
 ajor argument does not turn on mistaken  
 on, particularly since women's treatment  
 ) pornography's dictates makes it all too  
 ate. The salient quality of a distinction  
 top and the bottom in a hierarchy is not  
 although top is certainly different from  
 s power. So the major argument is: Sub-  
 equal is not equal.

ly since this is a new legal theory, a new  
 w" facts, perhaps the situation of women  
 oses deserves to be considered on its own  
 o mention, why the problems of fifty-  
 it of the population have to look like  
 use's problems before they can be recog-  
 ting, but then can't be addressed if they  
 other people's problems, about which

something might have to be done if something is  
 done about these, is a construction of things that  
 truly deserves inquiry. Limiting the justification for  
 this law to the situation of women would serve to  
 limit the precedential value of a favorable ruling. Its  
 particularity to one side, the *approach* to the injury is  
 supported by a whole array of prior decisions that  
 have justified exceptions to first amendment guar-  
 antees, when something that matters is seen to be  
 directly at stake. What unites many cases where  
 speech interests are raised and implicated but not, on  
 balance, protected, is harm, harm that counts. In  
 some existing exceptions, the definitions are much  
 more open-ended than ours. In some, the sanctions  
 are more severe, or potentially more so. For instance,  
 ours is a civil law; most others are criminal, although  
 not all. Almost none show as many people directly  
 affected. Evidence of harm in other cases tends to be  
 vastly less concrete and more conjectural, which is  
 not to say that there is necessarily less of it. None of  
 the previous cases addresses a problem of this scope  
 or magnitude—for instance, an \$8 billion a year  
 industry. Nor do other cases address an abuse, the  
 practice of which has such widespread legitimacy.  
 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 that, the pornographers notwithstand-  
 ing, women are not flags.

\* \* \*

To reach the magnitude of this problem on the scale  
 it exists, our law makes trafficking in pornography—  
 production, sale, exhibition, or distribution—action-  
 able. Under the obscenity rubric, much legal and  
 psychological scholarship has centered on a search  
 for the elusive link between pornography defined as  
 obscenity and harm. They have looked high and  
 low—in the mind of the male consumer, in society  
 or in its "moral fabric," in correlations between vari-  
 ations in levels of anti-social acts and liberalization  
 of obscenity laws. The only harm they have found  
 has been one they have attributed to "the social inter-  
 est in order and morality."<sup>5</sup> Until recently, no one  
 looked very persistently for harm to women, partic-

ularly harm to women through men. The rather obvi-  
 ous fact that the sexes *relate* has been overlooked in  
 the inquiry into the male consumer and his mind.  
 The pornography doesn't just drop out of the sky, go  
 into his head and stop there. Specifically, men rape,  
 batter, prostitute, molest, and sexually harass women.  
 Under conditions of inequality, they also hire, fire,  
 promote, and grade women, decide how much or  
 whether or not we are worth paying and for what,  
 define and approve and disapprove of women in ways  
 that count, that determine our lives.

If women are not just born to be sexually used,  
 the fact that we are seen and treated as though that  
 is what we are born for becomes something in need  
 of explanation. If we see that men relate to women  
 in a pattern of who they see women as being, and  
 that forms a pattern of inequality, it becomes impor-  
 tant to ask where that view came from or, minimally,  
 how it is perpetuated or escalated. Asking this re-  
 quires asking different questions about pornography  
 than the ones obscenity law made salient.

Now I'm going to talk about causality in its nar-  
 rowest sense. Recent experimental research on por-  
 nography shows that the materials covered by our  
 definition cause measurable harm to women through  
 increasing men's attitudes and behaviors of discrim-  
 ination in both violent and nonviolent forms. Expo-  
 sure to some of the pornography in our definition  
 increases normal men's immediately subsequent will-  
 ingness to aggress against women under laboratory  
 conditions. It makes normal men more closely resem-  
 ble convicted rapists attitudinally, although as a  
 group they don't look all that different from them to  
 start with. It also significantly increases attitudinal  
 measures known to correlate with rape and self-  
 reports of aggressive acts, measures such as hostility  
 toward women, propensity to rape, condoning rape,  
 and predicting that one would rape or force sex on  
 a woman if one knew one would not get caught. This  
 latter measure, by the way, begins with rape at about  
 a third of all men and moves to half with "forced  
 sex."<sup>6</sup>

As to that pornography covered by our definition  
 in which normal research subjects seldom perceive  
 violence, long-term exposures still makes them see

women as more worthless, trivial, non-human, and object-like, i.e., the way those who are discriminated against are seen by those who discriminate against them. Crucially, all pornography by our definition acts dynamically over time to diminish one's ability to distinguish sex from violence. The materials work behaviorally to diminish the capacity of both men and women to perceive that an account of a rape is an account of a rape. X-only materials, in which subjects perceive no force, also increase perceptions that a rape victim is worthless and decrease the perception she was harmed. The overall direction of current research suggests that the more expressly violent materials accomplish on less exposure what the less overtly violent—that is, the so-called “sex only materials”—accomplish over the longer term. Women are rendered fit for use and targeted for abuse. The only thing that the research cannot document is which individual women will be next on the list. (This cannot be documented experimentally because of ethics constraints on the researchers—constraints which do not operate in life.) Although the targeting is systematic on the basis of sex, it targets individuals at random. They are selected on the basis of roulette. Pornography can no longer be said to be just a mirror. It does not just reflect the world or some people's perceptions. It *moves* them. It increases attitudes that are lived out, circumscribing the status of half the population.

What the experimental data predict would happen, actually does happen in women's real lives. You know, it's fairly frustrating that women have known that these things do happen for some time. As Ed Donnerstein, an experimental researcher in this area, often puts it, “we just quantify the obvious.” It is women, primarily, to whom the research results have been the obvious, because we live them. But not until a laboratory study predicts that these things *would* happen, do people begin to believe you when you say they *did* happen to you. There is no—*not any*—inconsistency between the patterns the laboratory studies predict and the data on what actually happens to real women. Show me an abuse of women in society, I'll show it to you made sex in the pornography. If you want to know who is being hurt in this

society, go see what is being done and to whom in pornography and then go look for them other places in the world. You will find them being hurt in just that way. We did in our hearings.

In our hearings, women spoke, to my knowledge for the first time in history in public, about the damage pornography does to them. We learned that pornography is used to break women, to train women to sexual submission, to season women, to terrorize women, and to silence their dissent. It is this that has previously been termed “having no effect.” Men inflict on women the sex that they experience through the pornography in a way that gives women no choice about seeing the pornography or doing the sex. Asked if anyone ever tried to inflict sex acts on them they did not want that they knew came from pornography, ten percent of women in a recent random study said yes. Twenty-four percent of married women said yes. That is a lot of women. A lot more don't know. Some of those who do testified in Minneapolis. One wife said of her ex-husband: “He would read from the pornography like a text book, like a journal. In fact when he asked me to be bound, when he finally convinced me to do it, he read in the magazine how to tie the knots. . . .” Another woman said of her boyfriend: “[H]e went to this party, saw pornography, got an erection, got me . . . to inflict his erection on. . . . There is a direct causal relationship there.” One woman who said her husband had rape and bondage magazines all over the house, discovered two suitcases full of Barbie dolls with rope tied on their arms and legs and with tape across their mouths. Now think about the silence of women. She said, “He used to tie me up and he tried those things on me.” A therapist in private practice reported:

Presently or recently I have worked with clients who have been sodomized by broom handles, forced to have sex with over 20 dogs in the backseat of their car, tied up and then electrocuted on their genitals. These are children, [all] in the ages of 14 to 18, all of whom [have been directly affected by pornography,] [e]ither where the perpetrator has read the manuals and manuscripts at night and used these as recipe books by day or had the pornography present at the time of the sexual violence.

One woman, testifying that all the women in of ex-prostitutes were brought into prostit children through pornography, characterize collective experience: “[I]n my experience t not one situation where a client was ne pornography while he was using me or that not just watched pornography or that it was referred to and directed me to pornography.” she continued, “witness the abuse of w pornography constantly and if they can't ei that behavior with their wives, girl friends dren, they force a whore to do it.”

Men also testified about how pornograp them. One young gay man who had seen *Play Penthouse* as a child said of heterosexual porno

It was one of the places I learned about sex and i me that sex was violence. What I saw there was relationship between men and women. . . . [T]h was to be used, objectified, humiliated and hurt; was in a superior position, a position to be vi pornography I learned that what it meant to be se a man or to be loved by a man was to accept his

For this reason, when he was battered by lover, which he described as “one of the m foundly destructive experiences of my l accepted it.

Pornography also hurts men's capacity to women. One young man spoke about this that connects pornography—not the prohib pornography—with fascism. He spoke of his to repudiate the thrill of dominance, of his c finding connection with a woman to who close. He said:

My point is that if women in a society filled by i phy must be wary for their physical selves, a ma man of good intentions, must be wary for his mi do not want to be a mechanical, goose stepping fc the Playboy bunny, because that is what I think [T]hese are the experiments a master race perpet those slated for extinction.

The woman he lives with is Jewish. There wa brutal rape near their house. She was afraid; s to joke. It didn't work. “She was still afraid



ety, go see what is being done and to whom in pornography and then go look for them other places in the world. You will find them being hurt in just the same way. We did in our hearings.

In our hearings, women spoke, to my knowledge for the first time in history in public, about the damage pornography does to them. We learned that pornography is used to break women, to train women in sexual submission, to season women, to terrorize women, and to silence their dissent. It is this that has previously been termed "having no effect." Men tell women the sex that they experience through the pornography in a way that gives women no voice about seeing the pornography or doing the same. Asked if anyone ever tried to inflict sex acts on women, they did not want that they knew came from pornography, ten percent of women in a recent random study said yes. Twenty-four percent of married women said yes. That is a lot of women. A lot more women know. Some of those who do testified in Minneapolis. One wife said of her ex-husband: "He would come from the pornography like a text book, like a manual. In fact when he asked me to be bound, when he was really convinced me to do it, he read in the magazine how to tie the knots. . . ." Another woman said of her boyfriend: "[H]e went to this party, saw pornography, got an erection, got me . . . to inflict sex acts on . . . There is a direct causal relationship here." One woman who said her husband had pornography and bondage magazines all over the house, displayed two suitcases full of Barbie dolls with rope around their arms and legs and with tape across their faces. Now think about the silence of women. She said "He used to tie me up and he tried those things on me." A therapist in private practice reported:

Recently or recently I have worked with clients who have been sodomized by broom handles, forced to have sex with their dogs in the backseat of their car, tied up and then urinated on their genitals. These are children, [all] in the age of 14 to 18, all of whom [have been directly affected by pornography,] [e]ither where the perpetrator has read the magazine and manuscripts at night and used these as recipe books by day or had the pornography present at the time of the sexual violence.

One woman, testifying that all the women in a group of ex-prostitutes were brought into prostitution as children through pornography, characterized their collective experience: "[I]n my experience there was not one situation where a client was not using pornography while he was using me or that he had not just watched pornography or that it was verbally referred to and directed me to pornography." "Men," she continued, "witness the abuse of women in pornography constantly and if they can't engage in that behavior with their wives, girl friends or children, they force a whore to do it."

Men also testified about how pornography hurts women. One young gay man who had seen *Playboy* and *Penthouse* as a child said of heterosexual pornography:

It was one of the places I learned about sex and it showed me that sex was violence. What I saw there was a specific relationship between men and women. . . . [T]he woman was to be used, objectified, humiliated and hurt; the man was in a superior position, a position to be violent. In pornography I learned that what it meant to be sexual with a man or to be loved by a man was to accept his violence.

For this reason, when he was battered by his first lover, which he described as "one of the most profoundly destructive experiences of my life," he accepted it.

Pornography also hurts men's capacity to relate to women. One young man spoke about this in a way that connects pornography—not the prohibition on pornography—with fascism. He spoke of his struggle to repudiate the thrill of dominance, of his difficulty finding connection with a woman to whom he is close. He said:

My point is that if women in a society filled by pornography must be wary for their physical selves, a man, even a man of good intentions, must be wary for his mind. . . . I do not want to be a mechanical, goose stepping follower of the Playboy bunny, because that is what I think it is. . . . [T]hese are the experiments a master race perpetuates on those slated for extinction.

The woman he lives with is Jewish. There was a very brutal rape near their house. She was afraid; she tried to joke. It didn't work. "She was still afraid. And just

as a well-meaning German was afraid in 1933, I am also very much afraid."

Pornography stimulates and reinforces, it does not cathart or mirror, the connection between one-sided freely available sexual access to women and masculine sexual excitement and sexual satisfaction. The catharsis hypothesis is fantasy. The fantasy theory is fantasy. Reality is: Pornography conditions male orgasm to female subordination. It tells men what sex means, what a real woman is, and codes them together in a way that is behaviorally reinforcing. This is a real five-dollar sentence but I'm going to say it anyway: Pornography is a set of hermeneutical equivalences that work on the epistemological level. Substantively, pornography defines the meaning of what a woman is by connecting access to her sexuality with masculinity through orgasm. The behavioral data show that what pornography means is what it does.

So far, opposition to our ordinance centers on the trafficking provision. This means not only that it is difficult to comprehend a group injury in a liberal culture—that what it *means* to be a woman is defined by this and that it is an injury for all women, even if not for all women equally. It is not only that the pornography has got to be accessible, which is the bottom line of virtually every objection to this law. It is also that power, as I said, is when you say something, it is taken for reality. If you talk about rape, it will be agreed that rape is awful. But rape is a conclusion. If a victim describes the facts of a rape, maybe she was asking for it, or enjoyed it, or at least consented to it, or the man might have thought she did, or maybe she had had sex before. It is now agreed that there is something wrong with sexual harassment. But describe what happened to you, and it may be trivial or personal or paranoid, or maybe you should have worn a bra that day. People are against discrimination. But describe the situation of a real woman, and they are not so sure she wasn't just unqualified. In law, all these disjunctions between women's perspective on our injuries and the standards we have to meet go under dignified legal rubrics like burdens of proof, credibility, defenses, elements of the crime, and so on. These standards all contain

a definition of what a woman is in terms of what sex is and the low value placed on us through it. They reduce injuries done to us to authentic expressions of who we are. Our silence is written all over them. So is the pornography.

By contrast, we have as yet encountered comparatively little objection to the coercion, force, or assault provisions of our ordinance. I think that's partly because the people who make and approve laws may not yet see what they do as that. They *know* they use the pornography as we have described it in this law, and our law defines that, the reality of pornography, as a harm to women. If they suspect that they might on occasion engage in or benefit from coercion or force or assault, they may think that the victims won't be able to prove it—and they're right. Women who charge men with sexual abuse are not believed. The pornographic view of them is: They want it; they all want it. When women bring charges of sexual assault, motives such as venality or sexual repression must be invented, because we cannot really have been hurt. Under the trafficking provision, women's lack of credibility cannot be relied upon to negate the harm. There's no woman's story to destroy, no credibility-based decision on what happened. The hearings establish the harm. The definition sets the standard. The grounds of reality definition are authoritatively shifted. Pornography is bigotry, *period*. We are now—in the world pornography has decisively defined—having to meet the burden of proving, once and for all, for all of the rape and torture and battery, all of the sexual harassment, all of the child sexual abuse, all of the forced prostitution, *all* of it that the pornography is part of and that is part of the pornography, that the harm *does happen* and that when it happens it looks like this. Which may be why all this evidence never seems to be enough.

It is worth considering what evidence has been enough when other harms involving other purported speech interests have been allowed to be legislated against. By comparison to our trafficking section, analytically similar restrictions have been allowed under the first amendment, with a legislative basis

far less massive, detailed, concrete, and conclusive. Our statutory language is more ordinary, objective, and precise, and covers a harm far narrower than its legislative record substantiates. Under *Miller*, obscenity was allowed to be made criminal in the name of the "danger of offending the sensibilities of unwilling recipients, or exposure to juveniles."<sup>7</sup> Under our law, we have direct evidence of harm, not just a conjectural danger, that unwilling women in considerable numbers are not simply offended in their sensibilities, but are violated in their persons and restricted in their options. Obscenity law also suggests that the applicable standard for legal adequacy in measuring such connections may not be statistical certainty. The Supreme Court has said that it is not their job to resolve empirical uncertainties that underlie state obscenity legislation. Rather, it is for them to determine whether a legislature could reasonably have determined that a connection might exist between the prohibited material and harm of a kind in which the state has legitimate interest. Equality should be such an area. The Supreme Court recently recognized that prevention of sexual exploitation and abuse of children is, in their words, "a governmental objective of surpassing importance."<sup>8</sup> This might also be the case for sexual exploitation and abuse of women, although I think a civil remedy is initially more appropriate to the goal of empowering adult women than a criminal prohibition would be.

Other rubrics provide further support for the argument that this law is narrowly tailored to further a legitimate governmental interest consistent with the interests underlying the first amendment. Exceptions to the first amendment—you may have gathered from this—exist. The reason they exist is that the harm done by some speech outweighs its expressive value, if any. In our law, a legislature recognizes that pornography, as defined and made actionable, undermines sex equality. One can say—and I have—that pornography is a causal factor in violations of women; one can also say that women will be violated so long as pornography exists; but one can also say simply that pornography violates women. Perhaps this is what the woman had in mind who testified at

our hearings that whether or not pornographic violent acts to be perpetrated against some not her only issue. "Porn is already a violation against women. It is our mothers, our daughters, and our wives that are for sale for change at the newsstands in this country." *Sky v. New Hampshire* recognizes the ability as "fighting words" speech which, "by [its] utterance inflicts injury. . . ." Perhaps the only reason pornography has not been "fighting words" sense of words which by their utterance tend to be an immediate breach of the peace—is that women seldom fought back, yet.

Some concerns close to those of this case underlie group libel laws, although they differ equally important. In group libel law, as Justice Brandeis's opinion in *Beauharnais* illustrates, it is understood that individuals' treatment and lives in life may depend as much on the reputation of the group to which such a person belongs as their own merit. Not even a partial analog made to group libel doctrine without examination by Justice Brandeis, and recently lined by Larry Tribe: Would more speech, rather less, remedy the harm? In the end, the answer may be yes, but not under the abstract system of speech, which only enhances the power of pornographers while doing nothing to substantiate the free speech of women, for we need civil equality. The situation in which we presently find ourselves with respect to pornography is one in which more pornography is intended with rectifying or even counterbalancing damage through speech, because so long as pornography exists in the way it does there *be more speech by women*. Pornography strips a woman of credibility, from our accustomed sexual assault to our everyday reality of sexual harassment. We are deauthorized and reduced to devaluated and silenced. Silenced here means the purposes of the first amendment, the conditions presumed and promoted by the free speech, do not pertain to women because they are not our conditions. Consider them: ind

less massive, detailed, concrete, and conclusive. Statutory language is more ordinary, objective, precise, and covers a harm far narrower than its relative record substantiates. Under *Miller*, obscenity was allowed to be made criminal in the name of "danger of offending the sensibilities of unwilling recipients, or exposure to juveniles."<sup>7</sup> Under our law, we have direct evidence of harm, not just a conceptual danger, that unwilling women in considerable numbers are not simply offended in their sensibilities, but are violated in their persons and restricted in their options. Obscenity law also suggests that the applicable standard for legal adequacy in measuring such connections may not be statistically certain. The Supreme Court has said that it is their job to resolve empirical uncertainties that underlie state obscenity legislation. Rather, it is for them to determine whether a legislature could reasonably have determined that a connection might exist between the prohibited material and harm of a kind in which the state has legitimate interest. Legitimacy should be such an area. The Supreme Court has recently recognized that prevention of sexual exploitation and abuse of children is, in their words, "a governmental objective of surpassing importance."<sup>8</sup> It might also be the case for sexual exploitation and abuse of women, although I think a civil remedy is initially more appropriate to the goal of empowering adult women than a criminal prohibition could be.

Other rubrics provide further support for the argument that this law is narrowly tailored to further legitimate governmental interest consistent with the interests underlying the first amendment. Except to the first amendment—you may have gathered from this—exist. The reason they exist is that the harm done by some speech outweighs its expressive value, if any. In our law, a legislature recognizes that pornography, as defined and made actionable, undermines sex equality. One can say—and I have—pornography is a causal factor in violations of the first amendment; one can also say that women will be violated as long as pornography exists; but one can also say that pornography violates women. Perhaps that is what the woman had in mind who testified at

our hearings that whether or not pornography causes violent acts to be perpetrated against some women is not her only issue. "Porn is already a violent act against women. It is our mothers, our daughters, our sisters, and our wives that are for sale for pocket change at the newsstands in this country." *Chaplin v. New Hampshire* recognizes the ability to restrict as "fighting words" speech which, "by [its] very utterance inflicts injury. . . ." Perhaps the only reason that pornography has not been "fighting words"—in the sense of words which by their utterance tend to incite immediate breach of the peace—is that women have seldom fought back, yet.

Some concerns close to those of this ordinance underlie group libel laws, although the differences are equally important. In group libel law, as Justice Frankfurter's opinion in *Beauharnais* illustrates, it has been understood that individuals' treatment and alternatives in life may depend as much on the reputation of the group to which such a person belongs as on their own merit. Not even a partial analogy can be made to group libel doctrine without examining the point made by Justice Brandeis, and recently underlined by Larry Tribe: Would more speech, rather than less, remedy the harm? In the end, the answer may be yes, but not under the abstract system of free speech, which only enhances the power of the pornographers while doing nothing substantively to guarantee the free speech of women, for which we need civil equality. The situation in which women presently find ourselves with respect to the pornography is one in which more pornography is inconsistent with rectifying or even counterbalancing its damage through speech, because so long as the pornography exists in the way it does there will not be more speech by women. Pornography strips and devastates women of credibility, from our accounts of sexual assault to our everyday reality of sexual subordination. We are deauthorized and reduced and devaluated and silenced. Silenced here means that the purposes of the first amendment, premised upon conditions presumed and promoted by protecting free speech, do not pertain to women because they are not our conditions. Consider them: individual self-fulfillment—how does pornography promote our

individual self-fulfillment? How does sexual inequality even permit it? Even if she can form words, who listens to a woman with a penis in her mouth? Facilitating consensus—to the extent pornography does so, it does so one-sidedly by silencing protest over the injustice of sexual subordination. Participation in civic life . . . how does pornography enhance women's participation in civic life? Anyone who cannot walk down the street or even lie down in her own bed without keeping her eyes cast down and her body clenched against assault is unlikely to have much to say about the issues of the day, still less will she become Tolstoy. Facilitating change—this law facilitates the change the existing first amendment theory has been used to throttle. Any system of freedom of expression that does not address a problem where the free speech of men silences the free speech of women; a real conflict between speech interests as well as between people, is not serious about securing freedom of expression in this country.

For those of you who still think pornography is only an idea, consider the possibility that obscenity law got one thing right. Pornography is more act-like than thought-like. The fact that pornography, in a feminist view, furthers the idea of the sexual inferiority of women, which is a political idea, doesn't make the pornography itself into a political idea. One can express the idea a practice embodies. That does not make that practice into an idea. Segregation expresses the idea of the inferiority of one group to another on the basis of race. That does not make segregation an idea. A sign that says "Whites Only" is only words. Is it therefore protected by the first amendment? Is it not an act, a practice, of segregation because of the inseparability of what it means from what it does? Law is only words.

The issue here is whether the fact that the central link in the cycle of abuse that I have connected is words and pictures will immunize that entire cycle, about which we cannot do anything without doing something about the pornography. As Justice Stewart said in *Ginsburg*, "When expression occurs in a setting where the capacity to make a choice is absent, government regulation of that expression may coexist with and even implement First Amendment guar-

antees."<sup>9</sup> I would even go so far as to say that the pattern of evidence we have closely approaches Justice Douglas' requirement that "freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it."<sup>10</sup> Those of you who have been trying to separate the acts from the speech—that's an act, that's an act, there's a law against that act, regulate that act, don't touch the speech—*notice here* that the fact that the acts involved are illegal doesn't mean that the speech that is "brigaded with" it, *cannot* be regulated. It is when it *can* be.

I take one of two penultimate points from Andrea Dworkin, who has often said that pornography is not speech for women, it is the silence of women. Remember the mouth taped, the woman gagged, "Smile I can get a lot of money for that." The smile is not her expression. It is her silence, and it is not her expression not because it didn't happen, but because it *did* happen. The screams of the women in pornography are silence, like Kitty Genovese's screams, whose plight was misinterpreted by some onlookers as a lovers' quarrel. The flat expressionless voice of the woman in the New Bedford gang rape, testifying, is the silence of women. She was raped as men cheered and watched like they do in and with the pornography. When women resist and men say, "Like this you stupid bitch, here is how to do it" and shove their faces into the pornography, this "truth of sex" is the silence of women. When they say, "If you love me, you'll try," the enjoyment we fake, the enjoyment we learn, is silence. Women who submit because there is more dignity in it than in losing the fight over and over live in silence. Having to sleep with your publisher or director to get access to what men call speech is silence. Being humiliated on the basis of your appearance, whether by approval or disapproval, because you have to look a certain way for a certain job, whether you get the job or not, is silence. The absence of a woman's voice, everywhere that it cannot be heard, is silence. And anyone who thinks that what women say in pornography is women's speech—the "Fuck me, do it to me, harder," all of that—has never heard the sound of a woman's voice.

The most basic assumption underlying first amendment adjudication is that, socially, speech is free. The first amendment says Congress shall not abridge the freedom of speech. Free speech, get it, *exists*. Those who wrote the first amendment *had* speech—they wrote the Constitution. *Their* problem was to keep it free from the only power that realistically threatened it: the federal government. They designed the first amendment to prevent government from constraining that which if unconstrained by government was free, meaning *accessible to them*. At the same time, we can't tell much about the intent of the Framers with regard to the question of women's speech, because I don't think we crossed their minds. It is consistent with this analysis that their posture to freedom of speech tends to presuppose that whole segments of the population are not systematically silenced, socially, prior to government action. If everyone's power were equal to theirs, if this were a non-hierarchical society, that might make sense. But the place of pornography in the inequality of the sexes makes the assumption of equal power untrue.

This is a hard question. It involves risks. Classically, opposition to censorship has involved keeping government off the backs of people. Our law is about getting some people off the backs of other people. The risks that it will be misused have to be measured against the risks of the status quo. Women will never have that dignity, security, compensation that is the promise of equality so long as the pornography exists as it does now. The situation of women suggests that the urgent issue of our freedom of speech is not primarily the avoidance of state intervention as such, but getting affirmative access to speech for those to whom it has been denied.

\* \* \*

#### NOTES

1. A. Rich, *Cartographies of Silence*, in *The Dream of a Common Language* 16, 17 (1978).
2. This figure was calculated at my request by D. Russell on the random sample data base discussed in D. Russell, *Rape in Marriage* (1982). The figure includes all the forms of rape

- or other sexual abuse or harassment surveyed, non-as well as contact, from gang-rape by strangers to phone calls, unwanted sexual advances on the street, come requests to pose for pornography, and subject "Peeping Toms" and sexual exhibitionists.
3. *Miller v. California*, 413 U.S. 15, 24 (1973).
4. *See Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).
5. *Roth v. United States*, 354 U.S. 476, 485 (1957) (c *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1
6. *See Briere & Malamuth, Self-Reported Likelihood of Aggressive Behavior: Attitudinal Versus Sexual Explanati*

### Feminists aga

W

Despite efforts to redevelop it, New York's second Street retains its underground appeal, cially for consumers of pornography. What city cials call "sex-related uses"—triple-X video (for-book) stores, peep shows, and topless bars—declined in number since their heyday in the 1 and much of the block between Seventh and E avenues is boarded up, a hostage to develop New sex businesses—yuppie topless bars and d scale lap-dancing joints (don't ask)—are prosp elsewhere in Manhattan. But Peepland (MULTI-BOOTH! NUDE DANCING GIRLS!) still reigns, and World, a glitzy sex emporium, still anchors the end of the block, right around the corner from *New York Times*.

In the late 1970s I led groups of suburban wo on tours through Show World and other F second Street hot spots, exposing them, in the i ests of consciousness-raising, to pornography's va genres: Nazi porn, nurse porn, lesbian porn, bon porn—none of it terribly imaginative. The women n't exactly hold hands as they ventured down street with me, but they did stick close together; t

Wendy Kaminer, "Feminists against the First Amendm Copyright © Wendy Kaminer. First published in *The Atl Monthly* November 1992.

The most basic assumption underlying first amendment adjudication is that, socially, speech is free. The first amendment says Congress shall not abridge the freedom of speech. Free speech, get it, folks. Those who wrote the first amendment had speech—they wrote the Constitution. Their problem was to keep it free from the only power that realistically threatened it: the federal government. They designed the first amendment to prevent government from constraining that which if unconstrained by government was free, meaning *accessible to them*. At the same time, we can't tell much about the intent of the Framers with regard to the question of women's speech, because I don't think we crossed their minds. It is consistent with this analysis that their posture to freedom of speech tends to presuppose that whole segments of the population are not systematically silenced, socially, prior to government action. If everyone's power were equal to theirs, if this were a non-hierarchical society, that might make sense. But the place of pornography in the inequality of the sexes makes the assumption of equal power untrue.

This is a hard question. It involves risks. Classically, opposition to censorship has involved keeping government off the backs of people. Our law is about putting some people off the backs of other people. The risks that it will be misused have to be measured against the risks of the status quo. Women will never have that dignity, security, compensation that is the promise of equality so long as the pornography exists as it does now. The situation of women suggests that the urgent issue of our freedom of speech is not primarily the avoidance of state intervention as such, but getting affirmative access to speech for those to whom it has been denied.

\* \* \*

#### NOTES

1. A. Rich, *Cartographies of Silence*, in *The Dream of a Common Language* 16, 17 (1978).

2. This figure was calculated at my request by D. Russell on the random sample data base discussed in D. Russell, *Rape and Marriage* (1987). The figure includes all the forms of rape

or other sexual abuse or harassment surveyed, non-contact as well as contact, from gang-rape by strangers to obscene phone calls, unwanted sexual advances on the street, unwelcome requests to pose for pornography, and subjection to "Peeping Toms" and sexual exhibitionists.

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

4. *See Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

5. *Roth v. United States*, 354 U.S. 476, 485 (1957) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

6. *See Briere & Malamuth, Self-Reported Likelihood of Sexually Aggressive Behavior: Attitudinal Versus Sexual Explanations*, 37

*J. Res. Personality* 315, 318 (1983) (58% of college males in survey report some likelihood of forcing sex on woman if they knew they would not get caught).

7. *See Miller v. California*, 413 U.S. 15, 19 (1973).

8. *New York v. Ferber*, 458 U.S. 742, 757 (1982).

9. *Ginsberg v. New York*, 390 U.S. 629, 649 (1968) (Stewart, J., concurring in result) (emphasis added).

10. *Roth v. United States*, 354 U.S. 476, 514 (Douglas, J., dissenting) (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)).

## Feminists against the First Amendment

WENDY KAMINER

Despite efforts to redevelop it, New York's Forty-second Street retains its underground appeal, especially for consumers of pornography. What city officials call "sex-related uses"—triple-X video (formerly book) stores, peep shows, and topless bars—have declined in number since their heyday in the 1970s, and much of the block between Seventh and Eighth avenues is boarded up, a hostage to development. New sex businesses—yuppie topless bars and downscale lap-dancing joints (don't ask)—are prospering elsewhere in Manhattan. But Peepland (MULTI-VIDEO BOOTHS! NUDE DANCING GIRLS!) still reigns, and Show World, a glitzy sex emporium, still anchors the west end of the block, right around the corner from *The New York Times*.

In the late 1970s I led groups of suburban women on tours through Show World and other Forty-second Street hot spots, exposing them, in the interests of consciousness-raising, to pornography's various genres: Nazi porn, nurse porn, lesbian porn, bondage porn—none of it terribly imaginative. The women didn't exactly hold hands as they ventured down the street with me, but they did stick close together; trav-

eling en masse, they were not so conspicuous as individuals. With only a little less discomfort than resolve, they dutifully viewed the pornography.

This was in the early days of the feminist anti-porn movement, when legislative strategies against pornography were mere gleams in the eye of the feminist writer Andrea Dworkin, when it seemed possible to raise consciousness about pornography without arousing demands for censorship. That period of innocence did not last long. By 1981 the New Right had mounted a nationwide censorship campaign to purge schools and public libraries of sex education and other secular-humanist forms of "pornography." Sex education was "filth and perversion," Jerry Falwell announced in a fund-raising letter that included, under the label "Adults Only, Sexually Explicit Material," excerpts from a college health text. By the mid-1980s right-wing advocates of traditional family values had co-opted feminist anti-porn protests—or, at least, they'd co-opted feminist rhetoric. The feminist attorney and law professor Catharine MacKinnon characterized pornography as the active subordination of women, and Phyllis Schlafly wrote, "Pornography really should be defined as the degradation of women. Nearly all porn involves the use of women in subordinate, degrading poses for the sexual