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**Catherine MacKinnon and the Pornography Debate: A Reasonable and Legal
Solution to a Persistent Problem Between Genders or an Unnecessary and
Unconstitutional Attack on Democracy?**

**Senior Thesis
The Honors Program
St. John's University**

Dr. Kay Wolsborn, Advisor

**In Partial Fulfillment
of the Requirements for the Distinction "All College Honors"
and the Degree Bachelor of Arts
in the Department of Government**

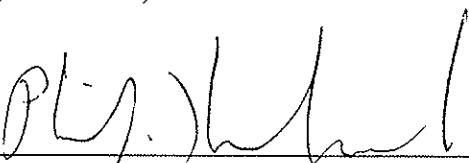
**by
Patrick James Larkin
May 5, 1995**

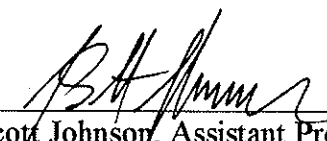
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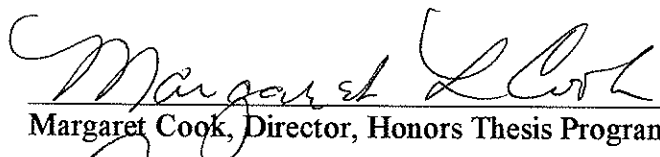
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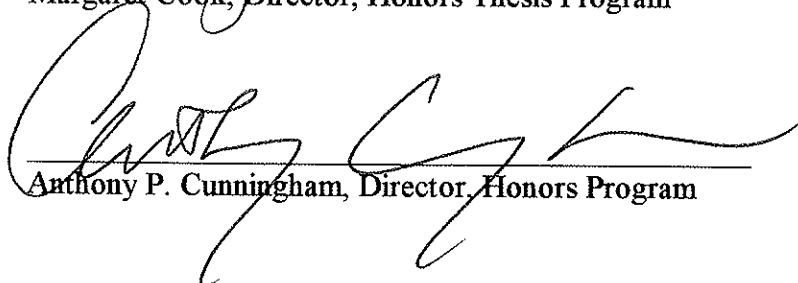

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INTRODUCTION: THE ISSUES OF EXPLICIT SEX IN SOCIETY

Since the late 1970s, selling sex has proliferated into a billion dollar industry. No longer is sex limited to the traditional venues of adult videos or magazines. With the advancement of today's technology, sexually explicit depictions have expanded into the arenas of telephone sex lines and on-line computer systems. Mainstream motion pictures and television shows are more sexually explicit than ever before. Moreover, Dr. Richard Donnerstein (1987), a leading social scientist on the topic of sex, has found that violence plays a much larger role in the content of sexual material than ever before, and portrayals of sexual acts other than the traditional depictions of heterosexual intercourse are also more prominent than in the past. As evidenced by the amounts of explicit material available and the increasing sums of money that consumers are willing to pay, the sex trade of the 1990s has without question grown into a successful and highly profitable industry.

Often sexually explicit materials are generally categorized as pornography. However, it is difficult to define "pornography," for what is meant by "pornography" for some can be far different from what it means for others. In writing this report, I will look at one specific definition of pornography, the one written by feminist and legal scholar Catherine MacKinnon. In her definition, she attempts to secure the ideas that sexually explicit materials have a damaging effect on society by physically and emotionally harming both men and women, young or old (MacKinnon, 1987). Encompassed in her definition, to varying degrees, are indirect and direct references to the many issues involving sexual

materials, both implicit and explicit, in our society. A brief mention of some of the issues stemming from the availability of sexual portrayals are included in the following paragraphs. I will only identify them and not analyze them in-depth, for the purpose of this text is to focus on Catherine MacKinnon's impact on the pornography issue. I mention these issues because no work can be done on pornography without acknowledging their constant presence in the debate.

The widespread availability of sexually explicit material initiates much debate about issues relevant to the societal standard of living. Among those issues is whether sexually explicit material offers beneficial or detrimental effects to society. If such material is a commodity that freely expresses ideas, what ideas does it promote? Do sexually explicit pictures and words simply offer new methods of sexual activity for couples, whether heterosexual and homosexual, to explore and enhance their erotic and intimate experiences? Or does the portrayal of explicit sex more harshly promote the concept that men are the dominant actors in society and women and children are mere subordinates, held at the mercy of men's orders and sexual arousal? Admittedly, both ideas are said to be expressed in sexually explicit portrayals, but the rise of violence in such depictions suggests that the latter is a more appropriate--or at least growing--perception of sexually explicit material. The prominence of the sexual content that subordinates women and children as second-class citizens through violence and other explicit depictions is what has caused many in society to re-examine and articulate what role sexually explicit depictions should play in society.

Other issues involve the conclusions from research conducted on the effects of sexually explicit material. Though most of the research results have been deemed inconclusive, Donnerstein (1987) reports on studies that suggest sexually explicit depictions increase men's anger toward women and instigate violent sexual arousal in the attitudes of men, as well as fear in the minds of women. Certainly, explicit sexual material is consumed by both men and women, but, Donnerstein, in his research, asserts that it is a prominent and accurate assessment that the majority of sexual material is targeted towards male consumers. Despite the inconclusive evidence, preachers such as Jerry Falwell and feminists such as Catherine MacKinnon and Andrea Dworkin, as well as other activists, believe a correlation between explicit sex portrayals and criminal sexual behavior does exist (Berger, 1989). In their studies and analysis, Dr. Donnerstein and other researchers have related materials of explicit sex to cases involving child abuse, domestic abuse, sexual harassment, and rape. Many psychological and academic experts believe sexual materials influence the many violent crimes against women and children because the materials often have the women and children submitting to the wishes of the men. As a result, the idea of a misogynist society becomes reality in the many criminal acts done against women (Donnerstein, 1987). On the other hand, there are proponents of sexually explicit material that declare such depictions are only a recreational activity and that in no way whatsoever do they contribute to the many criminal sexual acts against women and children. Author F.M. Christenson (1990) writes from this vantage point and states that sexual material only promotes sexual liberation and demonstrates the ecstasy and enjoyment that can be

reached in sexual orgasms. He does not accept the claims that sexually explicit materials initiate violence against women.

Another issue, obviously the most controversial, concerns the availability of sexually explicit material. If such depictions do promote hatred against women, and they are seen as contributing to violent sex crimes, should they be legally restricted? Many people support this belief, and they agree that pornography should be censored. Further, some people are just merely offended by the sexual depictions, and they too would like to see pornography legally prohibited. Of course, there are those on the other side who believe sexually explicit material should not be censored, even if it does initiate violent and unwanted sexual acts. The question thus becomes one of free speech, which has a history of controversy in the United States. Indeed, if a line should be drawn and explicit sexual portrayals should be censored, the question is where to draw that line.

Like any controversial matter between two or more sides, the issues concerning sexually explicit depictions are often addressed in the court of law. But the United States judicial system does not have a law concerning pornography. Rather, legal disputes involving issues of sexual explicitness are adjudicated under the jurisdiction of obscenity law (De Grazia, 1992). The Supreme Court made its first decision on the rule of obscenity in 1967, and only six years later, it established a legal test by which sexual commodities--magazines, books, movies, and other goods--are determined to be in either violation or protection of the First Amendment of the Constitution. The Supreme Court was reluctant to hear cases involving obscenity and pornography because of the difficulty to determine its availability status under the "freedom of expression" clause of the First

Amendment (De Grazia, 1992; Donnerstein, 1987; Downs, 1990). Most legal scholars agree that the legal test of obscenity written in 1973 in *Miller v. California* is vague, ambiguous, and unable to correctly address the pornography and obscenity issues present today (Berger, 1991; Downs, 1990; MacKinnon, 1987; MacKinnon 1993; Robel, 1989). Under this law, the pornography industry has grown into one of the most profitable trades of the 1990s in a span of only twenty years.

In writing this text on the subject of pornography, I explore an alternative legal option to current obscenity standard--an option that attracted considerable attention during the 1980s. In 1983, Catherine MacKinnon drafted a city ordinance for the City of Minneapolis that addressed the societal concerns about pornography. The central theme of this ordinance, or of any law dealing with pornography, is its definition of pornography. In her definition, MacKinnon addressed the sexually explicit subordination of women as well as the violent content of pornography. Catherine MacKinnon used the civil rights approach in drafting her ordinance, citing that pornography unnecessarily and inappropriately discriminates against women on the basis of sex (Banes, 1993; Dworkin, 1988; MacKinnon, 1987; MacKinnon, 1993). She meant this ordinance to be a means for discriminated women to seek legal remedies for the legal injuries they incurred in either producing or being forced to watch pornography. Although the ordinance was passed by the Minneapolis city council, the mayor vetoed it twice. A similar ordinance was enacted in Indianapolis, Indiana, but it was found unconstitutional in Federal District Court and by the U.S. Supreme Court (Berger, 1991; De Grazia, 1992; Donnerstein, 1987; Downs,

1990). Thus, in this paper I report on Catherine MacKinnon's city ordinance on pornography and how this alternative solution affected the pornography debate.

First, in Chapter 1, I will focus on how and why Catherine MacKinnon developed her strict stance on pornography. An analysis of the harmful effects of pornography, according to MacKinnon, is provided. It is here that I present and examine MacKinnon's definition of pornography, the one referred to throughout this text. In the next portion of the paper, Chapter 2, I will outline how the pornography debate and Catherine MacKinnon's ordinance forged a division in the feminist movement, focusing on the awkward alliances that have developed. An extensive look at the conservative and liberal viewpoints on pornography is included in this section. In order to fully understand how each group finds evidence that pornography does or does not have injurious social effects, a brief mention of some research techniques used is necessary. With the main viewpoints of pornography identified, I will then trace the history of obscenity law in Chapter 3. In Chapter 4, attention will turn to Catherine MacKinnon's city ordinance in Minneapolis, Minnesota. Here I look at how the ordinance originated and why it did not meet with city council approval. In this section, I also outline how the ordinance works, and how a claim can be filed under the ordinance. In Chapter 5, I discuss the ordinance in Indianapolis, Indiana. After outlining the ordinance's politics in this city, I examine why the civil rights ordinance ultimately failed. Here I cite court opinions that best summarize the sharp criticism that many opponents lashed out against Catherine MacKinnon's ordinance. Lastly, I will discuss alternative approaches to the problem in Chapter 6, providing both legal and nonlegal suggestions. Ideas for further research will also be explored.

At this time, I feel it necessary to briefly outline my purpose for exploring and devoting so much time and effort to this subject. I believe a legal approach to pornography is necessary, for I feel pornography offers many more negatives to society than positives. Pornography, as I view it, does unnecessarily degrade not only women, but men as well. Limiting representations of men to that of lustful, sex-craved monsters deprives the many accomplishments men have undertaken in shaping civilization. Likewise, the portrayal of women as only objects that seek pain and derision excludes them from the opportunity to finally realize their equality to men and restrict them from actualizing their potential to succeed in society's professional structure. Indeed, the trend towards more violent and explicit exposure can only have harmful effects on society. The act of demeaning women and children through pornography does nothing to promote the equal and friendly society in which we wish to live. (Developments of civil rights laws and sexual harassment laws are only two examples that society does indeed aim to live in a happy, friendly, and equal state.) In fact, I hold the opinion that violent and explicit portrayals of sex only dehumanize the human participants and the act of sex itself. And as pornography and its messages continue to proliferate into mainstream society, as it has already begun to do in movies and television programs, society will only become jaded with its effects. As more pornography expands into our culture, people will become more accustomed to its presence, ignoring the need to ward off its ill effects because it will be too large a battle to confront. Certainly, I deem it necessary that these concerns of pornography--concerns of a civilized society--should be addressed through law. In analyzing MacKinnon's ordinance, I set out to explore the issues of how a pornography

law can be developed and how it can be accepted and how it can be implemented and how it can ultimately be rejected.

CATHERINE MACKINNON:
DEFINITION OF PORNOGRAPHY

Citing pornography debates prior to the 1980s, Catherine MacKinnon and Andrea Dworkin point out that discussions always stalled around what pornography actually means. Participants--lawyers, judges, pornography producers, pornography viewers, men, women--all declared that pornography was impossible to define because it means different things to a variety of different people. According to MacKinnon and Dworkin (1988), most men liked the indefinability of pornography--without a definition, it could not be restricted. Thus men could continue to enjoy dehumanizing women while becoming sexually aroused at the same time. The subordination of women could continue without any debate.

So in order to have any substantive debate on pornography--or especially any law addressing pornography--a concrete definition of pornography is absolutely necessary. Catherine MacKinnon and Andrea Dworkin fulfill this requirement by adopting a rather clear approach in defining pornography (Bane, 1993). The two women discuss their method of forming the ordinance's definition in the following manner:

The ordinance adopts a simple if novel strategy for definition. It looks at the existing universe of the pornography industry and simply describes what is there, including what must be there for it to work in the way that it, and only it, works. (Dworkin, 1988, p. 37).

Through the ordinance's definition, MacKinnon and Dworkin (1988) acknowledge that pornography exists within a wide range of other sources that project women as

subordinate and second-class citizens. Examples include musical recordings and television commercials. Indeed, the two women assert they are not attempting to restrict or censor the message of pornography--a message that is seen everyday in movies or television shows. Rather, the two writers target the definition of pornography based on what it does, not says.

According to Catherine MacKinnon and Andrea Dworkin (1988), in order for pornography to succeed in the open market, "it must excite the penis" (p. 38). Writer Nat Hentoff (1992) stresses that such logic is too broad. He argues that the two feminist writers do not specify the components of excitement, and, as a result, all images of sexuality, whether depicted in a porn film or in a masterpiece painting, would fall within their ambiguous theory of pornography. Hentoff asserts that all sexual portrayals would be targeted for restriction under their logic, no matter the significance of a work's literary, artistic, or social value. However, in writing their definition, MacKinnon and Dworkin claim they restrict their idea of what sexually arouses men by focusing on what really excites the penis--the subordination of women through graphic sexually explicit pictures or words (Dworkin, 1988; MacKinnon, 1993). Arguing that their definition is clear and concrete, MacKinnon and Dworkin (1988) write that the "ordinance restricts its definition only to those sexually explicit pictures and words that actually can be proven to subordinate women in their making or use" (p. 39). There exist many materials that dehumanize women, but MacKinnon's and Dworkin's definition focuses only on those materials that harm women in making and viewing the pictures or words. Their definition includes the violent images that portray rape and other injurious activities to women--

images that the two authors proclaim must be actually enacted in order to be portrayed. Further proclaiming its concreteness, MacKinnon states that the ordinance “takes the risk that all damaging materials might not be covered in order to try to avoid misuse of the law as much as possible” (Dworkin, 1988, p. 39). The subsections listed in the definition are present because researched evidence and testimony suggest that they do harm to women, and in writing the ordinance, the “decision has been made that the harm they do to some people is not worth the sexual pleasure they give to other people” (p. 40). Thus, Catherine MacKinnon and Andrea Dworkin have devised a concrete definition of pornography based on what materials actually exist and what those materials actually do.

Studying the historical and contemporary perceptions of the relationship between the male and female genders, Ms. Dworkin and Ms. MacKinnon formed the foundation of their definition. They structured the base of the definition from both the ever-present opinion that women are commonly treated as inferiors to men--a view especially prevalent in depictions of sex--and from the contemporary battle for women's equality. From this approach, the women wrote that “pornography is the sexually explicit subordination of women, graphically depicted, whether in pictures or in words” (Bane, 1993, p. 153). The women then scrutinized the images present throughout society to list nine supplementary components of pornography. They included a subdivision that states “women are presented dehumanized as sexual objects, things, or commodities” (p. 151), a conclusion one can easily gather by viewing the latest beer or cosmetic advertisements. By studying the contents of adult magazines and adult movies, the women composed language in the definition to include the following six exhibitions: (1) depictions of acts that represent

women enjoying pain or degradation; (2) depictions that portray women seeking and experiencing pleasure in acts of rape; (3) depictions of women being tied up, bruised, mutilated, or suffering other physical abuse; (4) depictions of women reduced to body parts such as breasts and vaginas; (5) depictions of women being penetrated by animals and other objects; and (6) depictions of women connected with excretory functions or bleeding (Bane, 1993; Dworkin, 1988; MacKinnon, 1993). By studying what sexual depictions and images are present in contemporary society, Catherine MacKinnon and Andrea Dworkin constructed a definition of pornography that they felt echoed the current characteristics of sexually explicit material.

Dismayed and frustrated with the inability of the courts' obscenity law to restrict pornography, Catherine MacKinnon and Andrea Dworkin (1988) aimed to use their definition to combat the problem of pornography directly. They drafted an ordinance for the city of Minneapolis in 1983, and the central component of the ordinance was the definition of pornography. Citing the definition as clear and concise, MacKinnon argued the ordinance would provide women with the means to file a civil suit against the distributors, actors, and perpetrators of pornography. She hoped the physical and emotional injuries that women suffered from pornography would be remedied and considerably hindered. Ultimately, she believed the definition and the ordinance would be useful tools in the fight against women's inequality in society. Versions of the city ordinance were drafted in cities around the country, playing a major role in bringing the pornography debate to the forefront as a major societal issue.

MacKinnon's (1988) definition, in terms of the city ordinance, is as follows:

Pornography is the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

- women are presented dehumanized as sexual objects, things, or commodities; or
- women are presented as sexual objects who enjoy pain or humiliation; or
- women are presented as sexual objects who experience sexual pleasure in being raped; or
- women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or
- women are presented in postures of sexual submission, servility or display; or
- women's body parts--including but not limited to vaginas, breasts, and buttocks--are exhibited, such that women are reduced to those parts; or
- women are presented as whores by nature; or
- women are presented being penetrated by objects or animals; or
- women are presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual. (p. 36)

Catherine MacKinnon believes this definition concretely defines pornography without the broad ambiguities present in other definitions, particularly the test used by the courts to determine obscene pornography (explained in Chapter 3). The Michigan law professor believes her definition successfully defines the depictions of women that continue to support the perception that men hold dominion over women, a perception portrayed in

other images of society by blatantly reinforced in the images of pornography. Further, she states her definition especially targets those images that lead to the hateful and violent crimes against women--rape, sexual harassment, domestic abuse (Dworkin, 1988; MacKinnon, 1987; MacKinnon, 1993). In their book Gender and Public Policy: Cases and Comments, Bane and Winston (1993) supply a copy of the Minneapolis ordinance. The editors include the ordinance in their analysis of gender issues to demonstrate that pornography is a significant point of division between men and women in our culture, depicting the static societal perception that men are dominating and women are subservient.

Under current law, pornography is protected on the basis that it expresses ideas, regardless of social value--a view consistent with the First Amendment interpretation that all ideas have the right to be freely expressed. However, in Only Words, Catherine MacKinnon (1993) virtually proclaims that pornography is not an idea, but an act--an act indistinguishable from the act of rape. More specifically, pornography represents an action of sex discrimination that subordinates women by fostering negative attitudes toward women, forming a social arena in which inequality and violence against women increase; in short, pornography *does*, not *says*. MacKinnon argues that in order to become an idea, pornography must be done; in other words, women must be violated. They must be tied up, beaten, mutilated, and even killed. But under present conditions of law, these actions are seen as mere ideas that only offend. She asserts that pornography is wrongly judged as defamation and not as an act of discrimination, in light of the fact that there exists enough evidence from pornographic materials to show that women are

unnecessarily subordinated and discriminated against in much the same ways as they are under sexual harassment laws. By protecting pornography within the realm of the First Amendment, the government, says MacKinnon (1993), has placed a higher value on the free expression of speech than on the safety and equality of women.

In summary, MacKinnon and Dworkin drafted the city ordinance to combat the ills that pornography does to society. By defining pornography based on what it does, the two women aimed to make clear the dehumanizing effects pornography has on women. In Feminism Unmodified, MacKinnon (1987) thoroughly discusses the negatives associated with pornography. Whether pornography is a symptom or cause of the misogynist attitudes present today, its effects, according to MacKinnon, are real. The brief passage below summarizes her passionate feelings against pornography:

It eroticizes hierarchy. It sexualizes inequality. It makes dominance and submission into sex. Inequality is its central dynamic; the illusion of freedom coming together with the reality of force is central to its working . . . the victim must look free, appear to be freely acting. (p. 172)

Thus MacKinnon feels pornography continues the static perception of men and women--that men are dominating and women are subservient; it fosters inequality, both violently and nonviolently. With this definition of pornography and the civil rights ordinance itself, Catherine MacKinnon hoped that the silence of women would be broken, that with this tool of law, women could actually act free in denouncing and combating the unnecessary and malicious injuries done to them by pornography, rather than *appearing* to freely act

like they enjoy and seek the pleasures of those unnecessary and disgusting activities. A discussion of how this tool would actually reach its goals is presented in Chapter 4.

PERSPECTIVES OF PORNOGRAPHY: FEMINISTS, LIBERALS, AND CONSERVATIVES

PORNOGRAPHY DIVIDES FEMINISM

Catherine MacKinnon has worked continuously to incorporate gender issues as central themes within the pornography debate, particularly focusing on women's self-dignity and social equality. However, issues of gender have tended to be unnoticed within the whirling controversy (Berger, 1991). Prior to MacKinnon's rise of participation in the debate in the early 1980s, the discourse of pornography centered on the question of what is actually protected by the First Amendment. Especially in legal circles, pornography has been important only because of its significance in its application to the freedom of speech and expression clause in the Constitution. In 1993, MacKinnon wrote, "the pornography debate thus became one of governmental authority threatening to suppress genius and dissent" (p. 8). Further, she argued that most in the debate have forgotten or ignored the reason pornography was brought to the forefront in the first place: its capability to subordinate and violate women's social equality. But since the women's movement made discrimination and violence (rape) against women a public issue through acts of civil disobedience and lobbying for legislation, gender--through women's voices--has gradually been included in issues involving women (MacKinnon, 1993). Moreover, "once . . . women are heard and--this is the real hitch--become real, women's silence can no longer be the context in which pornography [is] analyzed" (p. 9). Evident by the growing number of women participating in politics and serving in elected offices, women's voices are certainly more prominent today than ever before. Through writing articles and

drafting city ordinances, Catherine MacKinnon, as well as many other feminists have made great strides in maintaining the pornography debate's focus on gender-related issues.

Catherine MacKinnon and Andrea Dworkin's city ordinance played an important role in the addition of gender concerns to the pornography issue and in the emergence of the pornography debate itself as one of the most discussed social issues in the 1980s. But their strict stance on the evil effects of pornography also contributed in forging a great split within the women's movement, instigating the formation of awkward alliances on each side of the debate. In the break-up, radical anti-pornography feminists, trying to restrict pornography, have aligned themselves with conservatives, and liberal feminists, supporting the free expression of pornography, have teamed with civil libertarians--awkward because neither conservatives nor civil libertarians are viewed as staunch supporters of feminist issues. Today, the women's movement is comprised of multiple factions working and competing with each other. In fighting for rights of reproductive freedoms and changes in the cultural perception of female sexuality, women were basically united throughout the 1960s and 1970s in accomplishing the opportunities made possible by the Supreme Court decision in *Roe v. Wade* and through the work of many pioneering feminists. But starting in the late 1970s and 1980s, the feminist movement began to divide in the face of the media's increased attention and sharp criticism of the implications of the women's movement. Slowly, the feminist movement split over their ideas about the source and solution of unequal status for women. As the pornography issue grew in importance and public attention, the major divide among feminists emerged, especially from the discussion of the civil rights ordinance (Berger, 1991). And as a major force in

bringing pornography to the public eye, Catherine MacKinnon can take some responsibility for the formation of this split (Dworkin, 1988).

Berger, Cottle, and Searles (1991) claim that the new feminist arena can be broken down into two major subfields: radical feminism and libertarian (liberal) feminism. As with any issue, there exist many different perspectives, but in discussing pornography, the authors organize the many varying viewpoints into these two opposing camps. On the surface, these two categories of feminism include a broad range of perspectives, but the authors mark a distinct difference. According to Berger et al. (1992), radical feminists focus on how sex portrayals victimize and oppress women. They favor censorship either by government mandate or by private programs. However, there are many feminists who are just as radical in their support of pornography, so in order to limit confusion, those against pornography will hereafter be referred to as anti-pornography feminists. In contrast to radical (anti-pornography) feminists, the authors label libertarian feminists as those who promote sex portrayals as an end to repression and a means to achieve freedom for women in reproduction and sexual activity. Believing censorship is an invasion of privacy by the government, they oppose it vehemently. Most feminists maintain agreement that society continues to perceive women as subordinates, and "certainly all feminists criticize . . . pornography, at least in its heterosexual versions, which represent women as passive desiring bodies . . . available for men's insatiable sexual appetites" (Segal, 1993, p. 7). There is also some agreement that the needless depictions of violence in sexual activity harmfully affect all participants--men, women, and children. But feminists vary greatly on what extent pornography actually enhances this perception, and

to what extent pornography should be regulated (Berger, 1991). Simply put, the feminist movement is greatly divided in addressing pornography.

ANTI-PORNOGRAPHY FEMINISM: A RADICAL PERSPECTIVE

Anti-pornography feminists are leaders in the attempt to regulate and restrict pornography. They believe pornography effectively contributes to the violence and social ill-will that harms women; indeed, some even believe pornography is the source. Donald Downs (1989) adds that according to this view of radical feminism, “pornography reflects and causes the subordination of women by eroticizing power and domination” (p. xix). By believing that pornography causes sexual assault, rape, and misogynist attitudes in both the production and consumption of pornography, Catherine MacKinnon’s approach has been identified as radical. Most anti-pornography feminists agree that some form of legal censorship should be enacted to prohibit the continued negative effects of pornography.

Anti-pornography ideology is based on the premise that several social harms are directly attributed to pornography: (1) women are harmed by being forced to produce pornography; (2) women are victims of sex crimes that are inspired by sexually explicit materials; (3) society is harmed by the constant depictions of women as negative and subordinate beings (Downs, 1989). In describing anti-pornography feminism, Berger et al. state that the “social relations of the sexes are organized so men may dominate and women must submit . . . [and] that the primary sphere of male power resides in the area of sexuality” (p. 35). By restricting pornography, anti-pornography feminists feel the societal perception that women must be submissive to male dominance would not be so prevalent.

Moreover, anti-pornography feminism has often been criticized as overly radical because it considers pornography as a theory for the acts it represents through books, films, pictures, etc. In fact, many anti-pornography feminists promote their attempts to restrict pornography under Robin Morgan's proclamation that pornography is the theory and rape the practice (Gibson, 1993). Catherine MacKinnon drew strong criticism in carrying Morgan's hypothesis a bit further by writing in 1993 that pornography itself is the practice, "indistinguishable from action" ("MacKinnon," 1994, p. 29). Using these theories to attack pornography, radical feminists demand strict restriction of sexually explicit materials; indeed, many demand censorship. In an attempt to mock and lessen the views of this radical approach in the eyes of the public, opponents of such thinking have labeled radical feminists as censors; thus anti-pornography feminists are commonly also referred to as pro-censorship feminists (Gibson, 1993).

Another aspect of radical feminism that has been sharply attacked by opponents, especially those within the feminist movement, is its relationship with many conservative movements. The conservative movement strongly opposes the availability of sexually explicit materials and activities, and anti-pornography feminists have joined with conservatives to strengthen their approach through joint conferences and various venues of legislative advocacy. Catherine MacKinnon's effort with the Indianapolis city council to implement the city ordinance provides an example of conservatives and anti-pornography feminists working together. (Refer to Chapter 5). Traditionally, conservative groups have not been recognized as supporters of the feminist movement; indeed, many conservatives do not condone the aims of the women's movement which

include abortion, birth control rights, free sexual expression, and the abandonment of traditional domestic role restrictions for women. Liberal feminists protest the formation of such alliances, fearing they will only drive women further under the dominance of men by resurrecting the oppression of all feminist materials associated with sex and marriage--birth control and abortion literature included (Kappeler, 1986).

A CONSERVATIVE VIEW

In contrast to anti-pornography feminism's radical emphasis on pornography's harm to women, conservatives identify the harms done to the family and moral standing of society as the major problems caused by pornography (Berger, 1991). They do not emphasize that pornography reflects violent and callous attitudes to women.

Conservatives form these views of pornography based on religious beliefs that emphasize traditional family values. Lynne Segal (1993) labels the conservative-religious movement as the "moral right," and states the conservative definition of pornography as those "representations of sex removed from what it is believed to be its legitimate function and purpose" (p. 6). For members of the moral right, pornography is looked upon as a sin, and it is obvious to them that any sexual materials, implicit or explicit, designed to inhibit erotic or sexual feelings in common people are both offensive and dangerous.

Conservatives particularly deem pornographic and obscene materials as disastrous to children, for not only does it put them in danger of sex crimes, but it also fosters their imagination and realization that the actions and depictions portrayed in pornography are both real and accepted norms of society. In portraying explicit sex through pictures or

words, pornography undermines the values of marriage, family, and procreation (Berger, 1991). Fighting these dangers, conservatives have sought to eliminate as much as possible anything relating to sex as seen from the public eye.

And this is why liberal feminists oppose the alliance between radical feminism and the moral right--conservatives aim to restrict anything promoting extramarital and recreational sex, including information on birth control, abortion, and sex education. Any material that openly exists for the sexual arousal of both men and women would be immediately censored if conservatives had their way (Gibson, 1993). The conservative ideology asserts that "equal treatment depends on substantive norms of virtue derived from a shared tradition and supported by the state" (Downs, 1989, p. xii). Censorship is thus justified because any theory of how to live a good life (religion) must be related to the institution (government) that administers over the social life. Because of their strict stance on any sexual material, and their immediate willingness to adopt censorship as a solution, religious-conservatives have been sharply attacked by those in the liberal camps. The liberal camps fear that the censorship of pornography will lead to the conservatives applying censorship to other areas. One example might be the elimination of the legal right to an abortion, something that most radical feminists like Catherine MacKinnon support (Berger, 1991). The fact that anti-pornography feminists have aligned themselves with such groups to promote censorship of pornography has enraged many women within feminism, thus further dividing the feminist agreement on pornography.

LIBERTARIAN FEMINISM: A LIBERAL PERSPECTIVE

Setting aside the theories and practices of anti-pornography feminism, some women support and align themselves with groups that promote the more liberal attitudes toward pornography. These attitudes are best exemplified in the ideology of civil libertarians. According to Berger et al., the libertarian approach to pornography “emphasizes the inviolability of individual rights and the sanctity of individual freedom” (p. 20). Ultimately, they believe that pornography exemplifies the free expression of ideas, and that by restricting those ideas, the state is undermining the freedoms and rights protected by the Constitution. To libertarians, it is impossible to decide what pornography is, and due to the fact that some people like it and some people do not, it is clear that a solution of censorship should not be advocated (Christenson, 1990). Since libertarians stress that the First Amendment freedoms from censorship and state invasion of privacy are the central focus of the pornography debate, it is these people that Catherine MacKinnon criticizes when she says they place a higher price on free speech than the protection and prevention of women from sexual violence (MacKinnon, 1993).

SUGGESTIVE, BUT INCONCLUSIVE RESEARCH

Arguing against the anti-pornography feminist claim that pornography is one of the main causes of violence toward women, the liberal perspective of pornography argues that there is no conclusive evidence that pornography enhances sexual violence against women. And they are correct, to a point.

In addition to reporting on the confrontation between radical and libertarian feminists, Berger et al. (1991) also analyze where and how the two opposing groups

acquire their data to back up their claims. The authors report that most of the data is based on laboratory experiments and public polls conducted by numerous social scientists and psychologists that have an academic emphasis in gender issues and male-female relationships. A more expanded and detailed discussion of research techniques and their results occurs in the work by Donnerstein, Linz, and Penrod (1987). These authors analyze the many different lab methods used, such as showing pornographic scenes from both R-rated and X-rated films to audiences that have a tendency to be more aggressive than “normal” and again to audiences that are considered “normal” or neutrally aggressive. Donnerstein et al. carried out additional experiments and also studied the results of their colleagues’ tests as well. Although they have not found conclusive evidence that nonviolent pornography increases aggressive and demeaning attitudes against women, Donnerstein et al. (1987) are “fairly confident that exposure to violent pornography may have negative effects on attitudes about women” (p. 144). The researchers did conclude that violence in pornography does increase sexual arousal in some men, particularly if the victim is shown as enjoying it (rape). In further analysis, Donnerstein et al. believe it is the violence that leads to aggression, and not the sexual explicitness. They came to this conclusion after partitioning a violent sex scene into just a sex act and a violent act. The viewers became more aggressive after the violent scene. Thus, Donnerstein et al. suggest that violent attitudes toward women may not be caused by pornography as much as strengthened by it.

However, they still take a cautious approach in analyzing these results, for there exist many limitations on the experiments used to determine if pornography actually does

instigate violent and women-hating behavior. As of 1991, most of these experiments were conducted with 18-22 year old college students, many of whom are open to change and new ideas. Also, in measuring aggression, the youths may not be reliable because they are frustrated with other aspects of everyday life, such as class assignments and tests. Also, aggression in the laboratory varies greatly from the aggression in real-life. And experiments that depend on self-reports are inconclusive because many of the respondents report what they feel is expected from them or they are too embarrassed to report their actual responses to pornography (Berger, 1991). Although some tests prove that anti-pornography feminists may be correct that pornography causes violence, Donnerstein et al. are hesitant in affirming those assumptions. They feel many more tests must be conducted, and new experiments that are more effective must be developed. Donnerstein et al. write that "until these studies are undertaken, it would be prudent to refrain from advocating outright bans on violent pornography" (p. 145). Thus, both Berger et al. and Donnerstein et al. acknowledge the importance of these experimental results, yet they also recognize the limits and shortfalls involved in conducting these tests.

Pointing to the inconclusive research conducted on the effects of pornography, libertarian feminists argue that radical feminists exaggerate the harms done to women by pornography. And they also point to many harms that would be felt by women and minorities if pornography was restricted. Libertarian feminists believe sexual repression is just as dangerous, for just as many sex crimes would occur if the outlet of pornography did not exist. They feel it is not just their goal to promote the romantic relationships

between individuals, but also to promote the physical and erotic pleasures that consenting adults can enjoy. According to this theory, pornography helps consumers “negotiate to maximize one another’s sexual pleasure and satisfaction by any means they choose” (Berger, 1991, p. 41). In addition, most libertarians do not believe that radical feminists or the state should dictate the sexual norms of society, and that is what they are doing in trying to censor pornographic materials. Indeed, civil libertarians and the libertarian feminists believe there are several beneficial aspects of pornography: (1) pornography may reduce sexual inhibitions; (2) pornography offers new methods of enjoying sex; and (3) pornography improves individuals’ sexual relationships with one another (Berger, 1991). Finally, libertarian feminists also believe that a narrow focus on pornography also ignores the many other forms of subordination and exploitation of women that occur in mainstream movies, magazines, books, commercials, television shows, and radio (Donnerstein, 1987). But they do not feel pornography exclusively contributes to these occurrences, and even if it could somehow be determined that it did, liberal feminists do not believe it should be censored anyway.

In Pornography: The Other Side, F.M. Christenson (1990), encompassing the liberal perspective, argues against all those who object to pornography and its effects. The author writes that the controversial debate centered on pornography spurs hatred among the participants, and most importantly, the debate dehumanizes the natural act of sex itself. If anything or if anyone is dehumanizing people, Christenson argues, it is the language and goals of the radical feminists like Catherine MacKinnon. Arguing against censorship and MacKinnon’s city ordinance, the author proclaims “dozens of charges that

are equally hateful, in books by scores of extreme feminists, are to be found in most bookstores and libraries If anyone is to be locked up for sexually degrading anyone, it is clear where we should start" (p. 162). It is clear from Christenson's statement that the pornography debate involves a great deal of animosity throughout the entire feminist movement.

Catherine MacKinnon's and Andrea Dworkin's definition of pornography, included in their attempts to legally combat pornography, has stirred the pornography debate, causing rifts in the feminist movement and the formation of awkward alliances. The pornography debate thus acts as a division between opposing groups of men and women. Through the discussion, radical feminists--anti-pornography feminists--have joined with groups of the moral right, enraging many women who have determinedly fought for reproductive and sexual rights for women. These liberal feminists feel abandoned and betrayed. While anti-pornography feminists have focused on the violence and misogynist attitudes toward women depicted in pornography, anti-censorship feminists have emphasized First Amendment freedoms and the dangers of sexual repression.

OBSCENITY LAW: **THE LEGAL APPROACH TO PORNOGRAPHY**

Central to the debate between anti-pornography supporters and civil libertarians is the concept of law. And pornography is not defined by the legal system. Instead, materials associated with pornography are judged by the courts on the basis of obscenity law. Although pornography and obscenity are often interchanged, they do not have similar definitions, and there is a confusion between the two terms. Donnerstein et al. report that obscenity is commonly “referred to disgusting and filthy acts or depictions that offend people’s sense of decency” (p. 147). Derived from the Latin root *obscaena*, “not for stage,” obscenity covers those things which society believes should not be made public; indeed, they “should be hidden” (Downs, 1989, p. 9). Obscenity entails anything that is considered foul, filthy, offensive, and shameful. In other words, obscenity law is nothing more than a judgement of values--values decided by either a judge or jury. Although it is not constricted to only sexual matters--obscenity law does include profanity, portrayals of non-sexual violence, and impolite sayings or acts--Downs writes that in America obscenity law is only narrowed to sexual imagery.

Pornography, in comparison, is derived from the Greek root *pornographos*, which refers to the “writing of harlots.” Pornography pertains to graphic and explicit depictions of both heterosexual and homosexual acts, with emphasis on graphic exposure of genitalia (Donnerstein, 1989). However, as Downs (1989) points out, pornographic material is not necessarily obscene, for “its presentation of sexual matters need not be ‘unwholesome’ or

‘prurient’” (p. 9). Confusion of obscenity and pornography stems from conservative perspectives that all sexual matters are offensive and rude, particularly graphic depictions (Donnerstein, 1989).

ORIGINS OF OBSCENITY LAW

The first official definition of obscenity in legal language did not occur until 1868 in England. Condemning the actions of a young man who wrote a pamphlet about imagined activities in a Catholic confessional, the English court prohibited the distribution of these pamphlets. In *Regina v. Hicklin*, Lord Chief Justice Cockburn wrote the first legal test of obscenity:

Whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. (Downs, 1989, p. 11)

It was the first time that material could be prohibited solely because of its sexual content, and not because of its attack on traditional government or religious institutions. Minimal passages of sexual explicitness included in an entire work were susceptible to the standard described in this test.

The *Hicklin* standard held course for several decades in American law until 1933 when a more liberal approach began to emerge. Downs (1989) cites the opinion of federal court Judge Woolsey in determining that James Joyce’s *Ulysses* was not obscene despite some isolated sexually explicit passages:

Whether the author had “pornographic intent,” and if not, whether the effect of the work as a whole on the average reader was to stir the sex impulses or to lead to sexually impure or lustful thoughts. (p. 12)

This new revision of the *Hicklin* test ruled that isolated passages do not prove pornographic intent, and that the value of the material in complete form must be taken into consideration over the few questionable passages within in it.

In 1957, the Supreme Court addressed the constitutionality of obscenity law for the first time in *Roth v. United States*. In this case regarding mass mailings of sexual literature, Justice William Brennan acknowledged that obscenity was not protected by the First Amendment because “it was utterly without redeeming social importance” (Berger, 1991, p. 113). Justice Brennan also narrowed the *Hicklin* test further by writing,

Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interests. (Donnerstein, 1987, p. 149)

Although it stated that the work as a whole must appeal to pornographic interests, Brennan’s new test was ultimately confusing because it failed to adequately define “community standards” and “prurient interests.” Thus, the new test was overtly ambiguous, but nevertheless, more cases were heard by the Supreme Court due to *Roth* because the Court wanted to redefine their ambiguous test for obscenity (Donnerstein, 1987).

Between 1962 and 1969, the Supreme Court basically withdrew the conservative presence in the tests for obscenity. In *Manual Enterprises v. Day*, Justice Harlan

narrowed *Roth* further by judging that the appeal to prurient interests must be in a “patently offensive” manner. In other words, the material had to “go way beyond what the Court would later call ‘customary limits of candor’ in depicting or describing sex” (Downs, 1989, p. 15). In 1964, the Court further liberalized the obscenity standard in *Jacobellis v. Ohio*. In this case, Justice Brennan applied *Roth*’s “utterly without redeeming social importance” to the test for obscenity. Placed in the standard for obscenity, this clause virtually made any idea protected by the First Amendment, for it was “interpreted as protecting works that contained ‘even minimally valuable material’” (Berger, 1991, p. 114). Extended to *Memoirs v. Massachusetts* in 1966, the clause now formulated a three point test for obscenity: (1) appeal to prurient interest, (2) patently offensive, and (3) utterly without redeeming social value (Donnerstein, 1987). Downs (1989) cites this progression of the Court as a complete turnaround of the conservative approach in *Hicklin*, “whereas works with small amounts of obscenity were once ruled obscene even if their dominant themes were not obscene, [now] material otherwise obscene could be saved by the presence of even minimally valuable material” (p. 15). With this new standard, obscenity prosecutions decreased dramatically, and the pornography industry began to flourish. In 1969, the Burger Court came close to grasping the liberal theory of obscenity in full. In *Stanley v. Georgia*, the Court ruled that individuals have the right to view pornographic material in their home by writing, “the right to receive information and ideas, regardless of their social worth, is fundamental to our free society” (Berger, 1991, p. 114). Thus, throughout the decade of the 1960s, the

Supreme Court ruled on more obscenity cases than ever before, and it ultimately liberalized the concept of offending materials in society.

In 1973, however, the Court retreated from the liberal approach, and redefined the *Memoir* test of obscenity. The new standard of obscenity reversed the “minimal valuable material” clause to put more emphasis on the value of the work. *Miller v. California* stressed that the work as a whole must be “serious” (Downs, 1989). The *Miller* test, still used today, includes a three-pronged test for obscenity:

- (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;
- (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (3) whether the work, taken as a whole, lacks serious, literary, artistic, political, or scientific value. (Lindgren, 1993, p. 1159)

Berger et al. (1991) write that the *Miller* test is only effective in prohibiting “hard-core” pornography, for Justice Burger stated that the only hard-core materials could be labeled patently offensive, and he attempted to list several examples of what was meant by hard-core, yet they too were ambiguous. Thus the new test did not differ much from the old *Memoirs* standard. Since 1973, courts have followed the *Miller* test, and the Court also ruled in a subsequent case that “nudity alone is not enough to make material legally obscene under the [accepted] standard. Such poses may be somewhat prurient, but they are not ‘unhealthy’” (Downs, 1989, p. 18). In addressing issues of obscenity and pornography, the Supreme Court and the American legal system have adopted a

continually liberal approach, following the guidelines of *Miller*, which defines the legal definition of obscenity.

EFFECTIVENESS OF OBSCENITY LAW

The effectiveness of obscenity law has been attacked from all sides, and statistics of prosecutions and the availability of pornographic materials provide evidence that the law has, in a sense, ultimately failed. Since the adoption of the *Miller* standard, the number of prosecutions of obscenity charges has actually decreased. At the same time, the pornography industry has exploded into a multi-billion dollar industry, and the quality of pornography has also significantly changed. Not only does current pornography portray more images of explicit sex and violence, but it also depicts expressions of minority sexual activity such as homosexuality, bestiality, and sadomasochism (Downs, 1989). Further, it is argued that obscenity law only contributes to the power structure of society, where women are submissive to men (MacKinnon, 1993). The liberal trend in addressing obscenity, which ultimately includes pornography, has placed the American legal system and the society as a whole in a complex and confusing context around the pornography issue.

In trying to apply obscenity law to portrayals of sexual acts other than heterosexual intercourse, the Court has failed due to its own ambiguous and confusing approach. Increasing depictions of homosexuality, fellatio, bestiality, and sadomasochism, often referred to as minority representations of sex, are difficult to address under the jurisdiction of obscenity law. According to Linda Williams (1993), Justice Burger's

attempts at defining hard-core pornography “shifted obscenity from mere explicitness in the representation of ultimate sex acts--heterosexual intercourse--to a lack of the ultimate, an absence of an end goal or direct gratification” (p. 49). In other words, in defining hard-core, Justice Burger pointed to those acts that would “turn off” the viewer. Such acts would not arouse the viewer but instead initiate disgust and shame in the viewer. But this attempt, Williams argues, has turned away from the normal and traditional definitions of obscenity. In describing hard-core pornography, Burger uses the terms “ultimate sex act.” What he indeed means here is his normal perception of heterosexual intercourse, because obscenity doctrine has always focused on explicitness of genitalia and heterosexual activity. Under these terms, minority expressions like homosexuality are difficult to address because they do not apply to the traditional conceptions of obscenity. Thus the Court does not have a foundational solution for addressing the pornographic proliferation of materials that include homosexuality, fellatio, cunnilingus, and sadomasochistic activity (Gibson, 1993). Certainly, none of these representations fit the context of heterosexual intercourse, which has always been the context of obscenity law.

That obscenity law does not correctly address homosexuality and other sexual representations different from heterosexual intercourse is not the only argument against it. John Stoltenberg (1993) writes that “obscenity laws perpetuate a belief in the vileness of women’s bodies” (p. 73). Agreeing with his statement, Catherine MacKinnon points that the current law continues society’s sexual objectification of women. She also points that obscenity laws have always been written and interpreted by white males: “Obscenity law is concerned with questions of sexual morality and sin, of good and evil, from the male point

of view. It is not so much aimed at protecting individuals from harm as at maintaining the 'purity' of the community" (Berger, 1991, p. 116). MacKinnon and many radical feminists criticize the obscenity laws because they do not recognize the harm done to women--or gender issues at all; obscenity law as they see it only fits in the context of male supremacy.

MacKinnon also attacks the ambiguities of the language of obscenity law. She cites part of the reason that pornographic materials have proliferated beyond control is the portion of the *Miller* test that exempts materials that hold social value. MacKinnon (1993) writes, "value can be found in anything. . . . And never underestimate the power of an erection, these days termed 'entertainment,' to give a thing value" (p. 88). She also criticizes the requirements regarding "prurient interests" and "community standards." Summarizing her thoughts on obscenity law, MacKinnon states:

The more pornography there is, the more it sets de facto community standards, conforming views of what is acceptable to what is arousing, even as the stimulus to arousal must be more and more violating to work. In other words, inequality is allowed to set community standards for the treatment of women. What is wrong with pornography is that it hurts women and their equality. What is wrong with obscenity law is that this reality has no role in it. This irrelevant and unworkable tool is then placed in the hands of the state, most of whose actors have little interest in avoiding prosecutions they cannot win. The American law of obscenity, as a result, is only words. (p. 88-89)

Most anti-pornography feminists echo MacKinnon's thoughts, believing the ambiguous

law of obscenity only serves to further maintain the silence and subordination of women under men.

In summary, obscenity law has followed liberal ideology in interpretation in the last twenty years. As a result of this tendency, fewer attempts at prosecution and an explosion of pornographic materials have become available. In addition to not addressing the concerns of harmful violence to women, obscenity law also does not correctly address sexual representations separate from heterosexual intercourse. Although the 1986 Attorney General's Commission on Pornography, conducted by Edwin Meese and other conservative appointees, recommended stricter adherence to the current obscenity law, there has not been a significant change in the number of prosecutions or in the availability of pornographic materials (Berger, 1991). Donald Downs (1989) points to six reasons why the *Miller* standard has not effectively regulated or hindered the presence of obscene materials, particularly pornography: (1) low priority by prosecutors because they do not have enough resources, and they tend to focus more on other crimes; (2) public tolerance of free choice in this area has been reflected by the attitudes of juries and judges; (3) the ambiguous language of the law causes juries to be reluctant to convict, especially "when the need to find guilt needs to be 'beyond a reasonable doubt'" (p. 21); (4) there is not an abundance of complaints by the public, the police do not investigate thoroughly on this matter, and judges deliver lenient sentences; (5) many juries are sexually aroused by the materials presented in court, and, as a result, are reluctant to find the materials obscene; and (6) pornographers have good representation in court--their attorneys effectively utilize

the factors mentioned above. Catherine MacKinnon cites these and other reasons why current law does not effectively address the harms of pornography. She admits that obscenity law treats “pornography (obscenity) as a term without specific implications for gender relations” (Berger, 1991, p. 115). With the mentioned factors acting as incentive, Catherine MacKinnon set out to correct the current legal approach by writing a civil ordinance that attempted an adequate and successful correction of obscenity law, focusing primarily on the harms done to women by pornography. This civil ordinance is examined in the next section.

THE MINNEAPOLIS ORDINANCE: BEGINNINGS, IMPLEMENTATION, AND FAILURE

EARLY ATTEMPTS TO RESTRICT PORNOGRAPHY IN MINNEAPOLIS

Citing the ineffectiveness of obscenity law, Catherine MacKinnon sought to develop a new approach to the problem of pornography. After years of devoting time and study to issues of sexual harassment and discrimination, MacKinnon, with the help of her friend Andrea Dworkin, began to study the social and physical implications of pornography on women. In 1982, she joined the faculty at the University of Minnesota Law School as a visiting professor of law. During this time, MacKinnon and Dworkin together taught a course that examined the role of pornography both in the legal and social arenas ("MacKinnon," 1994). The discourse from this class, in the context of current politics within the city Minneapolis, acted as the origin of this fresh approach to the problem of pornography.

Until MacKinnon's city ordinance was offered in 1983 and 1984, the city government of Minneapolis had always addressed the problems of pornography primarily through zoning laws with little success. The Alexanders, the family responsible for the proliferation of pornography within Minneapolis, consistently appealed the zoning laws. In a 1982 case, *Alexander v. City of Minneapolis*, a federal district court ruled that the zoning laws in Minneapolis went beyond "mere location restrictions and unduly limited public access to the adult material" (Downs, 1989, p. 55). As a result, the laws were abandoned, and those city officials and community residents who were against explicit sexual depictions were overly frustrated. Neighborhood groups were distraught for they

did not approve of the adult theaters and bookstores that existed near the homes, schools, and playgrounds of their children. During the summer of 1983, Naomi Scheman, a University of Minnesota philosophy professor, spoke to various neighborhood groups and recommended to the organizations that they approach the situation in a new manner. Explaining to the concerned parents and citizens that the zoning laws were really only addressing poverty and class issues and were avoiding women's issues, Scheman suggested that the organization heads meet with two feminist theorists currently teaching a pornography course at the University of Minnesota Law School (Downs, 1989). The neighborhood groups formed a task force and met with Catherine MacKinnon and Andrea Dworkin, and within days, the two feminists had written the pornography ordinance that would stir controversy in many cities throughout the country.

IMPLEMENTATION: HOW THE ORDINANCE WOULD WORK

MacKinnon's city ordinance was not written to determine if a picture or expression was obscene or not. In contrast to obscenity law, the ordinance did not set out to regulate morality or restrict the free expression of ideas. MacKinnon and Dworkin used the civil rights approach to prove that the effects of pornography violate and infringe upon the rights of women. The main goal of the ordinance was to prove that pornography's damage to women was real. Applying the tradition of civil rights law to the pornography issue, the two women sought to downplay the second-class status with which women are perceived and to decrease the illegal limitation of opportunities available to women as a

result of this perception (Dworkin, 1988). They further explained their application of civil rights law in the following words:

In this country, civil-rights law particularly has been an oppositional force for change. It has given people dignity, self-respect, and hope, without which people cannot live. Ever since Black people demanded legal change as one means to social change, civil rights has stood for the principle that systematic social inequality--the legal and social institutionalization of group-based power and powerlessness--should and would be undone by law. Law would do this both because it had a shameful part in creating and maintaining social inequality and because it could do something about it. (Dworkin, 1988)

By describing and explaining the reasons for this approach from the outset, MacKinnon and Dworkin aimed to clarify that the ordinance was not censoring or in any way eliminating the expression of free ideas. The ordinance was designed in the civil rights manner to ensure that women's equality status be recognized and maintained.

In practice, the civil ordinance provides women with a means to achieve compensation and acknowledgment for the injurious harms done to them through pornography. The ordinance's four primary causes of action include: coercion in producing pornography, the forcing of pornography on a person by viewing it, assault or physical attack due to pornography, and the trafficking of pornography (Dworkin, 1988). The language in the ordinance describing the coercion cause of action reads as follows:

It shall be sex discrimination to coerce, intimidate, or fraudulently induce any person, including transsexual, into performing for pornography, which injury may

date from any appearance or sale of any products of such performances. The makers, sellers, exhibitors, and/or distributors of said pornography may be sued for damages and for an injunction, including to eliminate the products of the performances from the public view. (Dworkin, 1988, p. 42)

In the hearings held to discuss the possible enactment of this ordinance in Minneapolis, many women testified that they were coerced into making pornography; in fact, many testified that they did not even know that pictures that were taken of them by boyfriends and husbands would be used as pornography (Downs, 1989). Although MacKinnon maintains that all women are coerced into pornography by society's treatment of them as subordinates, she leaves open in the ordinance that some women do indeed freely choose to submit themselves to pornographic performances. But the ordinance does attack those makers and distributors that coerce women into pornography by abducting them, intoxicating them, forcing them at gunpoint, or by fraudulent practices. An example of fraud would be to advertise for models for lingerie shoots, a job most aspiring models seek, and then ask them to pose in submissive postures and then later sell or distribute the pictures among the pornography industry (Dworkin, 1988). With the coercion clause, the ordinance offers the victims of pornography a venue in which to seek remedy for the unnecessary and illegal harms done to them by being coerced into the realm of making pornography.

The portion of the ordinance addressing the enforcement of pornography on a person is similar in nature to sexual harassment law. It merely states that "it shall be sex discrimination to force pornography on a person, including child or transsexual, in any

place of employment, education, home, or public place” (Dworkin, 1988, p. 49). Under this cause of action, only the perpetrator of the force or the institution responsible for the force may be sued. With this clause, person can bring suit against those who force pornographic images on them. The makers and distributors of pornography cannot be sued under this cause of action (Dworkin, 1988). Of course, in filing this suit, the pictures or expressions in question must first meet the definition of pornography as described by the ordinance.

The third primary cause of action is assault or physical action due to pornography. Under this section of the ordinance, a suit may be brought against both the perpetrator of the violence and the makers and distributors of the pornography. Although the link between violence and pornography is still greatly in question, MacKinnon and Dworkin provide at least the means for a woman “to try to prove that there is a direct causal relationship between an act of violence against her and a specific piece of pornography” (Dworkin, 1988, p. 50). MacKinnon admits that claims under this section of the ordinance would be extremely difficult to prove, yet she strongly believes that since much research has been done, there should at least be a means for people to try to prove the link between violence and pornography (Dworkin, 1988; MacKinnon, 1993).

The fourth cause of action relates to the trafficking of pornography. This section is unreasonably vague according to MacKinnon’s critics, for it reads “it shall be sex discrimination to produce, sell, exhibit, or distribute pornography, including through private clubs” (Dworkin, 1988, p. 44). In describing this section, the two authors state that “a trafficking complaint would provide the opportunity for women to attempt to

prove to the satisfaction of a trier of fact that there is a direct connection between pornography and harm to women as a class” (p. 45). In other words, this portion of the ordinance basically supplies a means for women to vent their anger about the mere existence of pornography. Certainly, the direct correlation that pornography causes and contributes to women’s perceived inferior status is most difficult to prove. This section has been greatly contested by opponents of the ordinance because of its vagueness.

Under the city ordinance, like any other law that restricts discrimination, the claimant has the right to file a claim of discrimination and injury either to the Human Rights Commission or directly to a court of law. In filing a complaint, the claimant must present an actual injury that is defined in one of the ordinance’s four main causes of action discussed above. The first task for the Commission or court, once a complaint is brought before it, is to decide if the material in question represents the interpretation of pornography as determined by the definition of pornography within the ordinance (Bane, 1993). If the material is found to meet the definition, the complaint may then be adjudicated.

A number of compensatory measures are available to plaintiffs seeking remedy for their alleged injuries. According to Catherine MacKinnon and Andrea Dworkin, the most obvious remedy is compensation through financial awards. The two women discuss the idea of financial compensation as follows:

While it is impossible truly to compensate anyone for the harm of pornography, it is also impossible truly to compensate for the injury of libel, wrongful death . . .

and most other personal injuries that are compensated all the time. The particular point of damages under this law is twofold: to recognize that something that belonged to the victim was wrongly taken from her, and to provide restitution in the same terms that provided the pornographers with an incentive to take it in the first place. (Dworkin, 1988, p. 55)

Pornographers do what they do in order to make large sums of money, and MacKinnon believes that one of the best methods of remedying the harms caused by pornographers is to provide monetary compensation for the victims' losses. Under the city ordinance, a complainant may seek an unlimited amount of nominal, compensatory, and punitive damages. The damages may involve either pain and suffering or reduced enjoyment of life (Dworkin, 1988). Attorneys' fees, costs of filing a case, and costs of investigation are also included in the damages that an alleged victim may seek. But the claimant may not seek criminal penalties against the alleged violators of the ordinance. In order to seek criminal penalties, criminal charges would have to be filed against the defendants by the city prosecutor under a criminal law, not a civil law such as MacKinnon's ordinance. Once a judgement is realized in a case involving the ordinance, the court has the authority to issue an order to eliminate the availability of the pornography that was found to be a product of coercion, an instigator of assault, or a product of enforcement upon another person. However, the court may take action to stop the distributing and selling of the pornographic materials in question only after the process of appealing has ended (Dworkin, 1988). Thus, MacKinnon's city ordinance provides the victims of pornography

with a venue in which to seek compensatory damages for the harms endured by the existence of pornography.

Actual enforcement of the ordinance is through civil law. As MacKinnon and Dworkin write, “any person aggrieved by violations of this law may enforce its provisions by means of a civil action filed in a court of competent jurisdiction” (Dworkin, 1988, p.54). MacKinnon and Dworkin use this approach for it provides women, men, and transsexuals easier access to file a claim and have their case at least heard in court. Prosecutors do not decide if a claim is valid or worthy of the courts’ time. Indeed, according to MacKinnon, the ordinance puts the case in hands of those who are hurt, not in the hands of the state, which has done nothing about pornography and its problems through the use of obscenity law (Dworkin, 1988; MacKinnon, 1987; MacKinnon, 1993). In drafting this ordinance, the two women attempted to empower the victims of pornography by giving them an open opportunity to express their voices and present their sufferings in an arena where they might actually be heard and taken at face value.

MINNEAPOLIS: ADOPTION AND FAILURE

Stemming from the failed zoning laws and the publicity surrounding Catherine MacKinnon’s determination to discover new approaches in her pornography law school class, the civic leaders in Minneapolis began to make the issue of pornography one of their highest priorities. One council member in particular, Charlee Hoyt, a Republican and outspoken feminist activist, pushed the pornography agenda to the forefront, fascinated by MacKinnon’s civil rights idea. The city government invited both MacKinnon and Andrea

Dworkin to an October 18, 1983, hearing on zoning laws. Midway through the hearing, MacKinnon stood up and compellingly asserted that the city was approaching the issue from a misguided vantage point, stating that the debate was neglecting the inclusion of women's issues. Andrea Dworkin seconded MacKinnon's contribution and elaborated,

This concentration on property indicates to me that property matters and property values matter but that women don't and that city councils frequently don't want real estate value to be hurt, but they ignore the fact that women are being hurt.

(Downs, 1989, p. 58)

Catherine MacKinnon then began discussing the suggestion that a civil rights approach be adopted, based on the fact that pornography discriminates against women. She recommended that hearings be held to explore the idea. Charlee Hoyt was amazed by MacKinnon and Dworkin and the suggestions they submitted. The council member opened her office to the two women, and they began holding regular meetings to work and rework the new strategy (Downs, 1989). At this hearing, the origins of MacKinnon's pornography ordinance began to take root and grow within the minds of those struggling to find a successful solution to the ills of pornography.

In its attempts to adopt MacKinnon's anti-pornography ordinance, the city government of Minneapolis abandoned its usual consensus-finding methods for a railroading mission to push the ordinance into reality without adequate consideration and examination of its subsequent consequences. Pressured by the facts that five city councilors were leaving office in January and that MacKinnon was also leaving to teach at another law school, the city aimed to pass the ordinance into law by January (Downs,

1989). MacKinnon and Dworkin presented the ordinance to the full council on November 23, 1983. Within a month, the council approved the ordinance with little consideration. Usually when making amendments to the city's civil rights laws, the proposed legislation goes through long and exhaustive scrutiny by the Civil Rights Commission, the City Attorney's Office and others. This route was not taken with MacKinnon's ordinance. William Prock, associate director of the Office of Civil Rights, commented on the city's actions in the following statement:

It was unprecedented in terms of the process that was used--the lack of contact with the appropriate offices, mainly civil rights and thorough analysis within the city attorney's office. And in terms of an outside consultant being hired, in essence, to draft an ordinance, whereas, in fact, all other ordinances were drafted by the city attorney. The process was totally outside of the routine method amending a civil rights ordinance. (Downs, 1989, p. 80)

In addition, the hearings held on December 12 and 13, 1983, did not include much opposition to the ordinance. Indeed, they were one-sided, dominated by the activist rhetoric led by Charlee Hoyt, Catherine MacKinnon, and Andrea Dworkin (Downs, 1989). Thus, when the Minneapolis city council first passed the ordinance, they neglected to follow through on its usual sharp scrutiny of newly proposed legislation, sacrificing quality debate for a quick solution.

At the hearings, led by Charlee Hoyt, opposition to the ordinance was limited. Orchestrated by Catherine MacKinnon, the hearings tugged at the minds of the city councilors and community members present. One witness, unwilling to reveal her name,

gave testimony that echoed anti-pornography feminist thought:

I have been threatened at knife point by a stranger in an attempted rape. I have been physically and verbally harassed. . . . I have experienced and continue to experience the humiliation, degradation, and shame that these acts were meant to instill in me. I believe that the only difference between my experiences and pornography was the absence of a camera. This connection became clear to me when I saw a documentary about pornography. . . . I realized that I was any one of the women in the film at least in the eyes of those men who have abused me. I saw myself through the abusers' eyes and I felt dirty and disgusting, like a piece of meat. (Downs, 1989, p. 71)

Most of the witnesses testified to similar experiences or experiences of being forced to make or watch or enact the depictions represented in pornography. Little or no effort was made to discuss opposing views of the ordinance, whether pornography did in fact instigate misogynist attitudes or whether the ordinance infringed on free speech. Neither issue was adequately discussed (Downs, 1989). Further, little attention was devoted to the language in the ordinance, not even a lengthy discussion concerning the quality of the pornography definition. Summarizing MacKinnon's and the council's actions in both the hearings and the entire process, Assistant City Attorney David Gross, an outspoken critic of the ordinance, stated,

In this case, the *consultant*, who was also the *advocate*, was paid by the council, the City of Minneapolis, to lobby the council. So you had the council lobbying itself, with scheduled hearings where all the time was taken up by the consultant

advocate. I said to myself, "Well, you know what a stacked deck is. Well that's a stacked deck!" So, factually, the council hired an advocate to consult with the City Attorney's Office. *But in actuality, we were cut off.* Comments by me [which dealt with free speech concerns and First Amendment case law] were essentially rejected out of hand. (Downs, 1989, p. 79).

In attempting to persuade the city officials, Ms. Hoyt and Ms. MacKinnon organized the hearings to concentrate only on the views of the supporters of the ordinance and the many anti-pornography activists.

After the hearings, the ordinance went through little revision. On December 30, 1983, only two weeks after the hearings and only four weeks after the ordinance was first officially presented, the city council passed the amendment to the city's civil rights law by a 7-6 vote. Mayor Donald Fraser, a moderate liberal, lobbied to delay the vote until a more thorough examination could be conducted. However, the vote was held anyway, and he felt compelled to veto the vote. He did not believe the council had given adequate consideration to the free speech implications. In addition, Mayor Fraser did not want the city to fight a lawsuit concerning the constitutionality of the ordinance without doing the appropriate research and scrutiny. He vetoed the ordinance on January 5, 1984. A week later, the newly elected council failed to acquire the nine votes needed to override the veto (Downs, 1989). Because the council sacrificed quality debate and scrutiny of the ordinance, it lost its gamble on a fast-food type of solution for the problems of pornography.

After the initial failure, the city council again attempted to implement the ordinance. In the following seven months, the city adopted its usual approach in addressing new legislation. The mayor created the Task Force on Pornography to study the effects of the ordinance, including the constitutional implications and the effects on society from pornography. The Task Force included three council members, two members of the Civil Rights Commission, and a member each from the Library Board, City Arts Council, and the mayor's office (Downs, 1989). They held more hearings, and this time voices of opposition were equally represented. In revising the ordinance, the Task Force sought to include "persons," not only "women" in the language of the legislation. In addition, it sought to constrict the definition to only violent sexual depictions, much to the dismay of MacKinnon and Dworkin who were now monitoring events from other cities. Further, the Task Force aimed to eliminate the ambiguous trafficking provision from the causes of action. In response, MacKinnon and Dworkin revised their own version. It was similar to the original, except it eliminated the "isolated passages" reference from the trafficking provision and it narrowed the definition to focus on violent portrayals, but it did not totally exempt other depictions like the Task Force version. As another vote neared, emotions in the city ran high. One young female activist engulfed herself in flames in front of an adult bookstore, hoping to signify the importance of the ordinance to women. In the end, the Government Operations Committee accepted the MacKinnon-Dworkin revision instead of the Task Force revision. In late July, the council again passed the ordinance 7-6. Again, Mayor Fraser vetoed the approval, pointing to the same reasons as before. He clearly did not want to battle over the

ordinance in court. On July 27, 1984, the council again failed to override the veto. There was, however, one provision. If the federal courts upheld a similar ordinance that the City of Indianapolis was advocating, the Minneapolis council would reenact the failed ordinance. The mayor supported this provision (Downs, 1989). Thus, after a lengthy and laborious debate concerning Catherine MacKinnon's ordinance, the city of Minneapolis again failed to produce an effective pornography law that met a consensus of the viewpoints on all sides.

In conclusion, the Minneapolis city leaders simply did not aim to implement the ordinance in the face of the mounting pressures of First Amendment rhetoric. Opponents to MacKinnon's ordinance finally received a chance to voice their concerns in the public forums, and this may have caused the ordinance to fail. Even after a seven-month deliberation, the mayor of Minneapolis was not satisfied that the ordinance would stand in federal court. Indeed, Mayor Fraser did not intend to entangle the city's affairs in a lengthy and costly court process that may not result in even one positive development to the city's pornography problem. Leading the argument against the ordinance, the Minnesota Civil Liberties Union (MCLU) may have mobilized enough impact to hinder the ordinance's passage. Throughout the second go-around with the anti-pornography feminists and supporters, the MCLU stressed that any "effort to deal with the potential harms of certain types of pornography was a threat to intellectual freedom" (Downs, 1989, p. 69). The MCLU also highly emphasized the consequences of adopting a law that may not meet constitutional standards, mainly the price of litigation in a lengthy court process. Downs (1989) cites three main reasons why council members failed to gather

enough votes to pass the ordinance and override the vetoes: 1) the council members feared the free speech implications; 2) they believed the liberal doctrine of free speech was the best public philosophy for feminists; and 3) they thought it useless to carry through on what probably would prove to be an unconstitutional and costly course of action (p. 75). Lastly, the MCLU stressed that implementation of the ordinance was a risky and unknown path to follow. Certainly, the Minneapolis city council aimed to restrict pornography, but it was not confident nor committed enough to its chosen approach to combat the evils of pornography. The City of Minneapolis did not have the confidence to officially take the city ordinance to the next level of examination: the judicial system's scrutiny of First Amendment issues. The City of Indianapolis did.

**THE INDIANAPOLIS CITY ORDINANCE:
ATTACK ON THE FIRST AMENDMENT?**

Although Catherine MacKinnon's anti-pornography ordinance was not accepted by the Minneapolis city government, the attention from the 1983 initiative sparked interest in other cities around the country that were experiencing growing problems due to pornography. One city in particular began drafting its own version of the ordinance only a short few weeks after Mayor Fraser first vetoed the Minneapolis ordinance in January, 1984. Strongly considered one of the most conservative cities in the country, the city of Indianapolis badly yearned to eliminate "the deterioration of neighborhoods . . . and the perceptions that the quality of life was degenerating"--problems that without a doubt seem to coincide with the presence of pornography (Downs, 1989, p. 98). The new approach devised by MacKinnon and Andrea Dworkin appeared to be the answer for which the city leaders were looking. Within a three-month span, Indianapolis policy-makers and elected officials swiftly drafted and passed a city ordinance similar to Catherine MacKinnon's Minneapolis version; in fact, Catherine MacKinnon herself again played a prominent role in revising the ordinance for its second attempt at enactment. With the city leaders promising to defend their version of the anti-pornography ordinance to the highest court, the outcome of the situation in Indianapolis would prove to either make or break MacKinnon's new civil rights ordinance as an effective tool of anti-pornography legislation. The explosion of the pornography industry had been no different in Indianapolis from the rest of the country during the aftermath of the obscenity standards set in *Miller* in 1973. By 1983, an Indianapolis task force reported the existence of sixty-

eight adult entertainment establishments within the city, not to mention the availability of adult magazines in local convenient stores and supermarkets (Downs, 1989). Like Minneapolis, the city attempted zoning laws and other means of action to crack down on pornography operations; as a result, there were many arrests but few actual prosecutions. For example, from 1979 to 1985, the city prosecutor's office made forty-five obscenity arrests, but only two actually went to court. Indeed, during the early 1980s, pornography was a hot issue in Indianapolis politics, for most elected officials--all either Republicans or conservative Democrats--ranging from the mayor to council members to prosecutors won their respective offices by vowing to fight the evils of pornography (Downs, 1989). Because of the political pressure put on the city officials by their own campaign themes and official rhetoric, they were forced to make pornography one of the city's most important social issues.

Frustrated with their lack of success in solving the problem of widespread availability of pornography, the city council searched for new approaches to the situation. In February 1984, Indianapolis mayor William Hudnut and Councilwoman Beulah Coughenour met with Minneapolis councilwoman Charlee Hoyt, one the most vocal supporters of MacKinnon's Minneapolis pornography ordinance. At this meeting, the three discussed the evils of pornography and its possible solutions. Both Indianapolis leaders were intrigued by Ms. Hoyt's presentation of the city ordinance, and upon their return to Indianapolis, Ms. Coughenour gathered a group of city officials and citizens to research and discuss the possibility of trying the ordinance in Indianapolis. Initially, Mayor Hudnut was hesitant in going ahead with the ordinance, but once political rival and

Head Prosecutor Steve Goldsmith began publicly urging the implementation of a similar ordinance, Mayor Hudnut pushed for a strong commitment to drafting an ordinance that would work. With all officials promising to solve the pornography problem, the internal pressure within the city government to do something was high. Officials competed vigorously with each other to find a remedy (Downs, 1989). And in that meeting with the Minneapolis council woman, a new and attractive solution for the city of Indianapolis was born.

As mentioned earlier, Indianapolis is recognized as one of the most conservative cities in the nation. Both the city government and the private citizen groups are based on strong conservative values. At the time of the city ordinance debate and vote, twenty-four of the twenty-nine city council members were conservative Republicans. The make-up of the social organizations against pornography was also loudly conservative. Most of these organizations were neighborhood groups fighting to combat the moral evils pornography brought to the community. The Thirty-eighth and Shadeland Neighborhood Improvement Association "acted to defend the values of neighborhood quality, social morality, and religion against the bookstores, massage parlors, and go-go bars" (Downs, 1989, p. 103). Founder June Beechler described her movement in the following words:

We saw a change in our neighborhood in the matter of a few years. . . . It's not community standards. These people have lived here, many of them twenty to fifty years--and then to see a business like that (adult bookstore) move in here. . . . I don't think that as a churchgoer I have any right to sit still and not do something

about it. I think we're going to be held responsible for what our young people will become. (p. 104)

The religious sentiment echoed throughout the other groups as well. More organized and vocal, the Citizens for Clean Community voiced strong fundamentalist religious values as part of their political movement. Another organization, Citizens for Decency through Law (CDL), stressed using the law rather than strictly utilizing religious rhetoric from the Bible. Most of this group concerned themselves with works that violated the obscenity doctrine by staging well-organized protests and writing legal critiques of many works. Although founded on religious principles, the movement stressed the separation of religion from politics. CDL founder Jack Lian explained this separation to Donald Downs (1989):

If you get religious overtones to this, then you lose a lot of people in the community because they don't have that direct affiliation with the Baptist Temple or the Moral Majority. So I try to stay away from the labels and strong rhetoric. (p. 106)

These important pressure groups, all of which had members who were on the city council, were strongly based, though some were not as outspoken as others, on the moral and religious values that were described in more detail in Chapter 3.

The debate on the ordinance in Indianapolis was not as heated or divisive as the debate in Minnesota. The only publicly organized movement against the ordinance came from the Indiana Civil Liberties Union (ICLU). As the vagueness issue was prevalent in Minnesota, it was in Indianapolis as well. Michael Gradison, executive director of the ICLU argued furiously with rhetoric that was not uncommon to MacKinnon's or other

ordinance supporters' ears. With the following statements he attacked the ambiguity of MacKinnon's definitions and their strict abandonment from the obscenity doctrine:

The terms that MacKinnon put into the ordinance have no real legal meaning or significance. They are words that wholly escape any real definition. It is extremely difficult for any legal scholar to attach any meaning to words like "subordination" or "foisting pornography upon an unwilling individual." . . . There's nothing in this amendment that says "obscenity," and nothing that says "socially redeeming value," or "community standards." (Downs, 1989, p. 115)

Although objections to the adoption of the ordinance were made, the conservative climate of both the city and the debate worked to overwhelm and basically smother any dissent against the ordinance.

Before the ordinance was officially presented to the city council, it went through a series of drafts and debates. Sometime in March, 1984, councilwoman Coughenour contacted Catherine MacKinnon, and shortly thereafter, MacKinnon went to Indianapolis to oversee the second attempt at trying to implement her now well-known pornography ordinance. Through heavy examination and debate, some council members argued that the ordinance as it stood in Minnesota would not meet constitutional standards. City lawyers were brought in to restructure the ordinance. They aimed to narrow the ordinance's targeted areas to only matters of explicit violence and physical abuse. In their definition of pornography, revising attorneys did not want to include "words," for these legal scholars thought that targeting written material would be too vague. They aimed to restrict the definition to only apply to pictures. Another change they sought to implement

was to remove the “isolated passages” language and focus only on works that could be readily determined as pornographic works on the whole. Catherine MacKinnon, in turn, argued that removing some of this language would ultimately hurt the essence and principle of the ordinance (Downs, 1989). Though some revisions were made, many supporters of the ordinance wanted to eliminate or rewrite other portions as well so as to ensure passage of the pornography law.

After the debate, the original Indianapolis ordinance, presented to the council on April 9, 1984, included only five of the nine components of MacKinnon’s original ordinance. In defining pornography, the Indianapolis version eliminated these four phrases from the original version:

- 1) women are presented dehumanized as sexual objects, things, or commodities;
- 2) women are presented in postures of sexual submission;
- 3) women’s body parts are exhibited, such that women are reduced to those parts;
- and
- 4) women are presented as whores by nature.

It still contained some ambiguity like the definition component describing women being presented as sexual objects who enjoy pain or humiliation. This edited version also applied to written words, not just pictures. Enforcement of the ordinance still hinged on the four aspects of trafficking, enforcement, coercion, and assault or physical attack (Downs, 1989). Thus, the first version presented to the council eliminated some of the ambiguity of MacKinnon’s definition, but questions still remained.

In the weeks following, the Indianapolis city council held open hearings to listen to both those supporting the ordinance and those against the ordinance. Testimony was heard from ex-pornography stars and from other women who explained how pornography hurt them. The ICLU spoke out, but not as loudly, for they did not want to appear unsympathetic to the dramatic testimony offered by the women. MacKinnon explained the need to solve this problem immediately, or else women would continue to be exploited and dehumanized. Neighborhood group leaders and religious pastors lectured on the moral and social dangers of pornography. After all the testimony was heard, the council voted 24-5 to pass the ordinance. On May 1, 1984, Mayor Hudnut signed the ordinance into law. Within hours, a group of booksellers and the ICLU filed suit in the U.S. District Court for the Southern District of Indiana (Downs, 1989). Catherine MacKinnon's city ordinance would now be adjudicated in the courts and its constitutionality would now be officially tested.

On May 9, 1984, U.S. District Judge Sarah Evans Barker issued a preliminary injunction enjoining actual enforcement of the ordinance until the court could reach a judgement. In *American Booksellers Association v. Hudnut*, Judge Barker ruled on November 19, 1984, that the ordinance's definition of pornography went "beyond obscenity, as defined by the Supreme Court in *Miller v. California*" (Downs, 1989, p. 136). In oral arguments, the defendants argued that pornography is similar to speech not protected in "libel" and "fighting words" cases. However, Judge Barker wrote that "it becomes clear that what defendants actually seek . . . is a newly-defined class of constitutionally unprotected speech, labeled 'pornography' and characterized as sexually

discriminatory” (p. 136). Judge Barker also found the ordinance unconstitutional due to vagueness in the definition of pornography. She cited such words as “pornography,” “subordination,” “degradation,” and “inferior” as examples. The enforcement aspects of the ordinance were also deemed unconstitutional based on ambiguity and going beyond the obscenity standard. Thus, MacKinnon’s ordinance was officially classified as an unconstitutional piece of legislation.

Following his vow to fight the battle to the Supreme Court, Mayor Hudnut filed an appeal to the U.S. Court of Appeals in Chicago. However, Judge Frank Easterbrook affirmed Barker’s decision in a lengthy, but well-organized opinion. (To best summarize Easterbrook’s opinion, it is quoted at length.) In his opening paragraphs, Judge Easterbrook wrote how important the free expression of ideas is to our society:

Under the First Amendment the government must leave to the people the evaluation of ideas. Bald or subtle, an idea is as powerful as the audience allows it to be. A belief may be pernicious--the beliefs of Nazis led to the death of millions . . . A pernicious belief may prevail. Totalitarian governments today rule much of the planet, practicing suppression of billions and spreading dogma that may enslave others. One of the things that separates our society from theirs is our absolute right to propagate opinions that the government finds wrong or even hateful. (De Grazia, 1992, p. 616)

After establishing the free expression of ideas in our society, Judge Easterbrook then directly addressed MacKinnon’s city ordinance. He described in the following words that the ordinance unconstitutionally restricts opposite viewpoints from being heard:

The Constitution forbids the state to declare one perspective right and silence opponents. . . . Under the ordinance graphic sexually explicit speech is “pornography” or not depending on the perspective the author adopts. Speech that “subordinates” women and also, for example, presents women as enjoying pain, humiliation, or rape, or even simply presents women in “positions of servility or submission or display” is forbidden, no matter how great the literary or political value of the work taken as a whole. Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual content. This is thought control. It establishes an “approved” view of women, or how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not. (De Grazia, 1992, p. 616)

Thus, in his opinion, Judge Easterbrook summarized the many points voiced by those against the ordinance. He explained that the ordinance indeed represented censorship, calling it a form of “thought control.” He also expressed that the language contained in the ordinance went beyond the constitutional limits described in the obscenity doctrine, particularly that the ordinance restricted material regardless of its value to society. And, finally, he affirmed the concerns of many that the ordinance was too vague and ambiguous to have any real merit.

In summary, the City of Indianapolis sought a new approach to battle the problem of pornography. The city government took a risk by advocating a piece of legislation that

had numerous questions surrounding it. In fact, the court battles cost the city about \$200,000 in expenses (Downs, 1989). Catherine MacKinnon's attempt to rewrite law concerning pornography ultimately failed on constitutional grounds, but what she did accomplish was to bring the pornography issue to the forefront of American politics. In Minneapolis, the ordinance was unusually vague and confusing. Indianapolis tried to alleviate some of the ambiguities contained within the ordinance language, and the ordinance took a step forward. It was passed overwhelmingly by the city council and was actually enacted into law, though only for a couple of hours. MacKinnon's brainchild in Indianapolis had brought a new approach to the pornography debate with only some success.

ALTERNATIVE APPROACHES TO PORNOGRAPHY

OTHER LEGAL APPROACHES

Certainly, there exist other alternatives to restricting pornography without advocating censorship. Some of these alternatives aim to work within the confines of obscenity law. In his solution to the problem, Donald Downs (1989) sees a need for the civil rights approach, but his solution would be within the realm of current obscenity law, an expansion of *Miller* to include violent obscenity and the harm to women. Downs concludes that this technique would both address the legitimate concerns of the radical and conservative feminists about violence, while at the same time acknowledging and respecting the liberal sexual expressions of the civil and libertarian feminists. Although his suggestion is not detailed, he feels such an approach could work. If obscenity law was recast into language that acknowledged the threat of violence and harm done to women, Downs (1989) writes that the new expansion could be enforceable, "given adequate social consensus, for it does recognize the difference between constructive and destructive forms of sexual depiction" (p. 198). Thus, one possible approach in the future is to redefine the current obscenity law to include language that recognizes the potential harm to women and children that can be done by sexually explicit violent depictions.

Another legal approach to restricting pornography is to simply enforce the obscenity standards that exist now. Lauren Robel (1989) writes that the "problem with existing remedies for decreasing the availability of 'hard-core' pornography is not that they cannot work, but that they are not systematically enforced" (p. 189). According to

Robel, simple enforcement of the current law, particularly in the trafficking of pornography, would considerably eliminate the graphic pornography that most radical feminists like MacKinnon find objectionable. Backing up her claims, Robel points to several cities where obscenity law enforcement has become a primary focus and a success in deterring the proliferation of pornographic materials. Indeed, such an approach may be more ideal, for then a whole new line of legal theory would not need to be examined and accepted (Berger, 1991).

NONLEGAL ALTERNATIVES

In addition to reshaping the current obscenity standard, some theorists advocate a policy where voluntary restrictions are imposed by the pornography industry itself. Until further research can be conducted on the correlation between pornography and violent sex crimes, researchers Donnerstein, Linz, and Penrod (1987) suggest this may be the best available restriction at the present time. Not advocating legal censorship in any way, the authors hint that the current pornography industry--and the motion picture industry as well--seriously examine the "possibility of prohibiting children and adolescents from viewing films that may either lead to desensitization to violence or result in greater acceptance of the idea that women enjoy being victims of sexual violence" (Donnerstein, 1987, p. 170). Ratings are currently in place, but are seldom enforced. In fact, many of the ratings on films, especially those within the motion picture industry, are inconsistently decided. Certainly, changes in the rating system within the pornography industry act as a nonlegal alternative to restricting the availability of sexually explicit material, at least for

the segment of population under the age of twenty. Thus another alternative is for the pornography industry itself to first acknowledge that some danger may exist to women and children, and then to make the public aware of such danger through the use of ratings or warning labels.

Another suggestion is to formulate a definition of pornography that is workable under the First Amendment doctrine, and this, of course, is not an easy task. James Lindgren (1993), a law professor at the University of Pennsylvania, conducted a survey among his students that compared MacKinnon's definition and the three-pronged test of obscenity law with another, more basic definition of pornography. Showing them pornographic images and texts, Lindgren asked them how each fit into the different definitions, and he found that MacKinnon's was the least vague. Respondents to the survey cited that MacKinnon's definition most appropriately defined pornography by including the language referring to the subordination of women and the reference to violent acts. Indeed, more research-based surveys like Lindgren's would evaluate what pornography means to most in society, and from there a workable definition might be developed that is actionable under the First Amendment.

Perhaps the most important research that can be done in the next few years is to follow the version of the ordinance that has been deemed constitutional in Canada. In *Butler v. Her Majesty the Queen*, the Canadian Supreme Court ruled that language similar to that contained in Catherine MacKinnon's ordinance is workable under Canada's free speech doctrine. In fact, the Canadian Court shifted the basis of its obscenity law from

morality to the harm principle (Kaihl, 1994). The implications of this ruling are not yet known, but it will be wise to follow how this version works and how effectively it addresses the problems of pornography, most importantly the depictions that promote violent and misogynist attitudes against women.

CONCLUSION

In summary, Catherine MacKinnon's city ordinance had a positive impact on the pornography debate, adding needed insight into the legal approach to pornography. Although it further divided the feminist movement on the issue, the ordinance stirred politicians, lawyers, reporters, scholars, and common citizens to analyze and examine the role of pornography in society. Clearly, the ordinance did supply a much needed legal alternative to that of the current obscenity standard. Its central focus, the definition of pornography, proved that pornography could be defined in a constricted fashion. As Lindgren (1993) pointed out in the preceding section, MacKinnon's definition of pornography was rated most effective among survey respondents in comparison to the ratings of the *Miller* test. Thus MacKinnon's work caused pornography to become one of the most debated social issues of the 1980s, and in doing so, the real concerns about pornography's harmful effects on women and children were put on the public agenda.

Indeed, the legal discussion of pornography moved forward due to MacKinnon's efforts, for a new alternative was introduced--an alternative that addressed the misogynist and violent attitudes prevalent in pornography. As further evidence of her moving the discussion forward, the Canadians have adopted her approach and added similar language to the Canadian Court's obscenity doctrine. In the years to come, study and research must focus on the effectiveness of *Butler v. Her Majesty the Queen* (MacKinnon, 1993). After seeing how this ruling will work in Canada, MacKinnon and others can make the changes needed to again introduce the ordinance as a verifiable solution to the problem of

pornography. Only with extensive research and thought can a legal approach to pornography be adopted that works within the tight confines of the First Amendment. Certainly, Catherine MacKinnon has made an effort, and now it is time for other political scientists and legal scholars to take her effort and bring it to the next level.

In concluding his study of the MacKinnon-authored Minneapolis and Indianapolis city ordinances, Donald Downs (1989) writes that the pornography debate has been “marred by lack of . . . perspective on both sides” (p. 198) because of the sharp division among the various participants. Both the radical and libertarian viewpoints exhibit intolerance of each others’ views, and this causes a difficulty in finding any substantive and compromising solution for the problem. There are too many extreme views, with neither side really listening or even attempting to understand the concerns of the other. And with feminists from the liberal left (MacKinnon and other radicals) joining forces with the conservative right, the debate has been only more complicated. Since pornography has both beneficial and negative effects upon society, Downs (1989) argues that a common ground must be met, and that the participants in the discussion must first sit down and forge a new understanding. “Absolutism must be avoided on either side of the pornography debate in favor of sensitivity to the need for civil compromise” (p. xxiii). Only then can a possible compromise or solution be even attempted, much less institutionalized.

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