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Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights

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BOOK REVIEW

DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS. By Nadine Strossen. New York: Scribner, 1995. pp.320. \$22.00.

*Reviewed by Melvin I. Urofsky**

I. INTRODUCTION

One of the more interesting, and at times more strident, debates in recent years is between a faction of the feminist coalition, proposing new and harsher methods of eliminating pornography and of punishing those who produce and purvey it, and civil libertarians, including many other feminists, who oppose such measures primarily on First Amendment grounds. The debate extends well beyond the cloistered halls of academe, and is far from arcane or hypothetical.

The attack on pornography and its purveyors has been spearheaded by writer Andrea Dworkin and law professor Catharine MacKinnon. While the effort has won limited legislative or judicial approval, it has had striking effects elsewhere, especially at colleges and universities, which many people consider not only bizarre but dangerous as well.

To counter the Dworkin-MacKinnon arguments, civil libertarians offer traditional First Amendment arguments. This approach, however, has been problematic, at least in constitu-

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tional terms. The Supreme Court, through various decisions on obscenity, has placed obscene materials¹ in a category that deserves little First Amendment protection.² Pornography also fails to fall into any of the categories of public discourse that Alexander Meiklejohn and other theorists have argued need to be protected and nurtured.³

Nadine Strossen offers the latest entry into the debate.⁴ As president of the American Civil Liberties Union, Strossen unsurprisingly adopts the organization's traditional position of unswerving commitment to full First Amendment protection of all speech. The work, however, is aimed at a popular audience. It is not a legal treatise,⁵ and those interested solely in the legal and constitutional aspects of the issue will find little new or innovative. Strossen defends pornography on feminist and other grounds as well. Compared to the harsh and often humorless diatribes of the antipornography feminists, it is a welcome addition to the debate.

1. There is a difference between obscenity and pornography, although in both lay and legal use the differences are often blurred or ignored. Among the definitions of "obscene" are "disgusting to the senses," "abhorrent to morality or virtue, *specif*: designed to incite lust or depravity," and "containing or being language regarded as taboo in polite society." Pornography is defined as "a depiction of erotic behavior (as in writing or painting) designed to cause sexual excitement." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1767 (3d ed. 1986). As such, what is obscene may not necessarily be pornographic, and what is pornographic, by this definition, certainly need not be obscene.

2. In *Miller v. California*, 413 U.S. 15 (1973), and its companion case, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), the Court held that sexually-oriented expression came within constitutional protection only if it met certain first Amendment standards. *Miller*, 413 U.S. at 24. One standard requires that the sexually-oriented expression possess "serious literary, artistic, political, or scientific value." *Id.*

3. See, e.g., THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970); THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* (1966); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1940). Emerson has responded to the Dworkin-MacKinnon proposal in *Pornography and the First Amendment: A Reply to Professor MacKinnon*, 3 YALE L. & POL'Y REV. 130 (1985).

4. NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS* (1995).

5. For a more legally-oriented analysis, see Nadine Strossen, *The Convergence of Feminist and Civil Liberties Principles in the Pornography Debate*, 62 N.Y.U. L. REV. 201 (1987), and Nadine Strossen, *A Feminist Critique of "the" Feminist Critique of Pornography*, 79 VA. L. REV. 1099 (1993).

II. THE DWORKIN-MACKINNON STATUTE

In the 1970s, as part of a broad feminist critique of sexist, violent imagery in contemporary society, women began focusing on pornography and how to deal with it. Nearly all feminists could agree that depictions of violence and brutality, especially linked to portraits of sexual domination and humiliation, degraded women. In 1979, they formed Women Against Pornography to advocate education about pornography and to protest it.⁶ The group, however, specifically eschewed censorship, and declared that it was not seeking to carve out "any new exceptions to the First Amendment."⁷

Eventually, a group of antipornography feminists began to focus almost entirely on sexual materials. According to Carole Vance, "[s]exism in sex, or in its substitute, sexually explicit material, was apparently worse than sexism anywhere else. According to its critics, pornography was now the central engine of women's oppression, the major socializer of men, the chief agent of violence against women."⁸

In 1983, Andrea Dworkin and Catharine MacKinnon, both faculty members at the University of Minnesota, drafted a model antipornography law that the Minneapolis City Council passed.⁹ The uniqueness of the law lies in the treatment of pornography as a civil rights violation rather than as speech outside the protection of the First Amendment as described by the *Miller* criteria¹⁰ for defining legal obscenity.¹¹

6. STROSSEN, *supra* note 4, at 73.

7. *Id.* at 73.

8. *Id.* at 74 (quoting Carole Vance in *Ideas—Feminism and Censorship* at 14 (transcript from Canadian Broadcasting Co. (Toronto: CBC Radio Works, 1993))). Vance, a Columbia University professor, was a founding member of the Feminist Anti-Censorship Taskforce (FACT). *Id.* at 73.

9. *Id.* at 75 (citing ANDREA DWORKIN & CATHARINE MACKINNON, *PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY* 132-42 (1988)).

10. *See supra* note 2.

11. For a defense of the proposed Minneapolis ordinance, and by implication all succeeding ones as well, see Michael A. Gershel, *Evaluating a Proposed Civil Rights Approach to Pornography: Legal Analysis as if Women Mattered*, 11 WM. MITCHELL L. REV. 41 (1985).

The ordinance declared that pornography is "a practice of sex discrimination,"¹² and provided causes of action "for damages and injunctive relief for four offenses: 'trafficking in pornography,' 'coercion into pornography,' 'forcing pornography on a person,' and 'assault or physical attack due to pornography.'"¹³ Essential to the entire scheme is the definition of pornography as "graphic sexually explicit subordination of women through pictures and/or words."¹⁴ The ordinance then went on to give eight criteria of what constituted "subordination":

- a. women . . . presented as dehumanized sexual objects, things or commodities; or
- b. women . . . presented as sexual objects who enjoy humiliation or pain; or
- c. women . . . presented as sexual objects experiencing sexual pleasure in rape, incest, or other sexual assault; or
- d. women . . . presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or
- e. women . . . presented in postures or positions of sexual submission, servility, or display; or
- f. women's body parts—including but not limited to vaginas, breasts and buttocks— . . . exhibited such that women are reduced to those parts; or
- g. women . . . presented being penetrated by objects or animals; or
- h. women . . . presented in scenarios of degradation, humiliation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.¹⁵

Although the City Council passed this proposal twice, the Democratic mayor of the city, Donald Fraser, who had been a consistent champion of women's rights, vetoed it both times on the grounds that it violated the First Amendment.¹⁶ Over the

12. STROSSEN, *supra* note 4, at 75.

13. *Id.*

14. *Id.*

15. *Id.* at 75 (citing ANDREA DWORKIN AND CATHARINE MACKINNON, *PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY* 138-42 (1988)). For a detailed discussion of the ordinance, see Paul Brest and Ann Vandenburg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 *STAN. L. REV.* 607 (1987).

16. STROSSEN, *supra* note 4, at 77.

next few years a number of cities throughout the country considered the Dworkin-MacKinnon statute. In 1984, a coalition of conservative Republicans and right-wing groups that had invariably opposed women's rights managed to secure the statute's passage in Indianapolis.¹⁷ Although touted as a pro-woman law, the local chapter of the National Organization for Women opposed its passage, while the antifeminist Phyllis Schlafly, the Reverend Greg Dixon of the Moral Majority, and Beulah Coughenour, who had led the Stop ERA movement, all supported the statute.¹⁸

MacKinnon explained the rationale behind the law as follows:

To reach the magnitude of this problem on the scale it exists, our law makes trafficking in pornography—production, sale, exhibition, or distribution—actionable. Under the obscenity rubric, much legal and psychological scholarship has centered on a search for the elusive link between pornography defined as obscenity and harm. They have looked high and low—in the mind of the male consumer, in society or in its “moral fabric,” in correlations between variations in levels of anti-social acts and liberalization of obscenity laws. The only harm they have found has been they have attributed to “the social interests in order and morality.” Until recently, no one looked very persistently for harm to women, particularly harm to women through men. . . . The pornography doesn't just drop out of the sky, go into his head and stop there. Specifically, men rape, batter, prostitute, molest, and sexually harass women. Under conditions of inequality, they also hire, fire, promote, and grade women, decide how much or whether or not we are worth paying and for what, define and approve and disapprove of women in ways that count, that determine our lives.¹⁹

In pornography, there it is, in one place, all of the abuses that women had to struggle so long even to begin to articulate, all the *unspeakable* abuse: the rape, the battery, the sexual harassment, the prostitution, and the sexual abuse

17. *Id.*

18. *Id.* at 77-78.

19. Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.—C.L. L. REV. 1, 50-52 (1985).

of children. Only in pornography it is called something else: sex, sex, sex, sex, and sex, respectively.²⁰

In less than ninety minutes after Mayor William Hudnut signed the Indianapolis ordinance into law, a coalition of booksellers and publishers challenged the statute in federal court on First Amendment grounds.²¹

III. THE COURTS AND ANTIPORNOGRAPHY STATUTES

The Dworkin-MacKinnon statute did not fare well in the courts. At the trial level, Judge Sara Evans Barker found the ordinance a gross violation of the First Amendment, and denounced efforts to alter social behavior by restricting speech.²² "To deny free speech in order to engineer social change in the name of accomplishing a greater good for one sector of our society erodes the freedom of all and . . . threatens tyranny and injustice for those subjected to the rule of such laws."²³

A panel of the United States Court of Appeals for the Seventh Circuit agreed. Judge Frank Easterbrook, who had been a law professor at the University of Chicago before President Reagan named him to the bench, delivered the opinion for the court in words that fully endorsed traditional First Amendment defenses of deviant thought:

The ordinance discriminates on the ground of the content of the speech. Speech treating women in the approved way—in sexual encounters "premised on equality"—is lawful no matter how sexually explicit. Speech treating women in the disapproved way—as submissive in matters sexual or as enjoying humiliation—is unlawful no matter how significant the literary, artistic, or political qualities of the work taken as a whole. The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents.²⁴

20. *Id.* at 16-17.

21. STROSSEN, *supra* note 4, at 79.

22. *See* American Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316 (S.D. Ind. 1984).

23. *Id.* at 1337.

24. American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 325 (7th Cir. 1985) (ci-

Any rationale we could imagine in support of this ordinance could not be limited to sex discrimination. Free speech has been on balance an ally of those seeking change. Governments that want stasis start by restricting speech. Culture is a powerful force of continuity; Indianapolis paints pornography as part of the culture of power. Change in any complex system ultimately depends on the ability of outsiders to challenge accepted views and the reigning institutions. Without a strong guarantee of freedom of speech, there is no effective right to challenge what is.²⁵

To the antipornography feminists, the Seventh Circuit decision made no sense because it rested on all the wrong grounds. MacKinnon made clear that to her, the First Amendment is not the controlling constitutional provision in this debate. In fact, First Amendment jurisprudence makes little sense when dealing with the issues that concern her. MacKinnon charges "[t]he law of the First Amendment comprehends that freedom of expression, in the abstract, is a system but fails to comprehend that sexism (and racism), in the concrete, are also systems."²⁶ As for the obscenity standard enunciated in *Miller*, she asked the question "if a woman is subjected, why should it matter that the work has other value?"²⁷

MacKinnon denounced the *Hudnut* decision as "the *Dred Scott* of the women's movement,"²⁸ a somewhat overblown statement that confused the single issue of pornography with the much broader range of social, political and economic problems that informs the women's movement. Following the Supreme Court's affirmance of the Seventh Circuit decision, a federal court invalidated another Dworkin-MacKinnon ordinance that had been enacted in Bellingham, Washington.²⁹

tations omitted), *aff'd*, 475 U.S. 1001 (1986).

25. *Id.* at 332.

26. CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 206 (1989).

27. MacKinnon, *supra* note 19, at 21.

28. STROSSEN, *supra* note 4, at 80 (quoting Catharine MacKinnon, *Sexual Politics of the First Amendment*, in FEMINISM UNMODIFIED 213 (1987)).

29. Village Books v. City of Bellingham, C88-1470D (W.D. Wash. 1988).

The decision in *Hudnut*, as noted, followed traditional lines of First Amendment analysis. One reason proponents of the Indianapolis law objected is that their legal rationale does not rely on the First Amendment, but rather on the Fourteenth Amendment's Equal Protection Clause. All feminists agree that "[t]he Women's Movement is a civil rights movement."³⁰ Dworkin and MacKinnon therefore attempted to frame a constitutional rationale based on civil rights assumptions; pornography, like racial discrimination, affects all members of the group in a harmful manner, and thus may be prohibited. Rather than viewing pornography as *speech*, they see it as *practice*, and even under traditional First Amendment analysis, action is treated differently than expression.

According to the Dworkin-MacKinnon rationale, most women in pornographic films are poor, minimally educated, and a disproportionate number are women of color. A high percentage are incest survivors, and many enter pornography in desperation, as runaways with little or no choice. Others are forced to "act" by husbands, lovers or pimps. The result is a business built upon the systematic coercion and exploitation of women. Moreover, the products churned out by this system cause harassment of women in the workplace and elsewhere, and lead to further brutalization and degradation.³¹ If one substituted the word "blacks" for "women," there would be no question that such a system would be found constitutionally impermissible. Why then, the argument goes, should pornography be allowed to flourish when it violates the civil rights of women?

One of the weak points of the Strossen book is that it does not tackle this issue head on. After listening to both sides in this feminist battle, one occasionally feels that they talk past each other, rather than directly to each other's arguments.³²

30. Wendy Kamner, *Pornography and the First Amendment: Prior Restraints and Private Action*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY 239, 247 (Laura Lederer ed., 1980).

31. Gershel, *supra* note 11, at 53-61.

32. MacKinnon has declared that in the pornography debate "[t]he law of equality and the law of freedom of speech are on a collision course in this country." STROSSEN, *supra* note 4, at 30 (quoting CATHARINE MACKINNON, ONLY WORDS 71 (1993)). As far as MacKinnon is concerned the values of free expression are secondary to freeing women—all women—from the harm caused by pornography.

However, Strossen's strength is that she takes the battle to her opponents. Since she is writing for a popular rather than an academic audience, her concern is to show that many of the sweeping assumptions about pornography made by the "MacDworkinites," as she calls them, are not true; the practical results of the feminist antipornography crusade have tended to stifle artistic speech more than hard core pornographic enterprises and should First Amendment principles be sacrificed, it will be women, artists, and minorities who will suffer the most.

IV. THE "SEX PANIC"

According to Strossen, "we are in the midst of a full-fledged 'sex panic,' in which seemingly all descriptions and depictions of human sexuality are becoming embattled."³³ We are all familiar with Senator Jesse Helms' attacks on the National Endowment for the Arts, but as Strossen shows "erotophobia" can be found all over the country; even images of nude bodies in non-sexual settings are under attack.³⁴

For example, in 1993, Vermont officials hung bedsheets over a mural in a state office building conference room. The mural, by artist Sam Kerson, had been commissioned to mark the 500th anniversary of Columbus landing in the New World.³⁵ Although one local newspaper described the mural as "a politically correct rendition of Columbus and his men . . . battle-axes and crucifix raised, ready to oppress the natives,"³⁶ a number of female employees objected to the depiction, complaining that because the mural included bare-breasted native women, its placement in the conference room constituted "sexual harassment."³⁷

In addition, when the writer Ntozake Shange appeared on the cover of *Poets & Writers*, she wore, as she described it, "a pretty lace top."³⁸ The magazine's readers, however, objected to

33. STROSSEN, *supra* note 4, at 20.

34. *Id.* at 21.

35. *Id.*

36. *Id.* at 21-22.

37. *Id.*

38. *Id.* at 23 (quoting Ntozake Shange, *Where Do We Stand on Pornography?*

the display. In the next two issues, the magazine received complaints asking if *Poets & Writers* had become a flesh magazine, and why had Shange appeared in her underwear?³⁹ Shange, who reported the incident in a *Ms.* symposium, questioned the validity of these complaints. She wondered if "bare shoulders are exploitation now?"⁴⁰ Andrea Dworkin responded affirmatively stating that "[i]t's very hard to look at a picture of a woman's body and not see it with the perception that her body is being exploited."⁴¹

The case of the highly respected Professor Graydon Snyder of the Chicago Theological Seminary illustrates the filing of a frivolous sexual harassment complaint. Snyder, an ordained minister, had for thirty years used a lesson from the Talmud as a starting point in his discussion of differences between Jewish and Christian concepts of sin, guilt, and responsibility. In the Talmud, the lesson deals with the responsibility of a man who falls off a roof, lands on a woman, and in doing so, accidentally has intercourse with her. The Talmudic lesson is that the man is innocent because the act was unintentional.⁴²

In 1994, a female student filed a sexual harassment charge against Snyder. The Seminary issued a formal reprimand, put notices in every student and faculty mailbox announcing that Snyder had engaged in sexual harassment, and then assigned a school official to monitor his classes lest he engage in further "harassment."⁴³

Are these isolated examples? The answer, unfortunately, is not. Strossen is not merely picking out sensational incidents to argue that the ideas put forward by Dworkin and MacKinnon are triggering a wave of anti-erotic persecution and making it impossible for male instructors to use any gender-based incident in teaching. Her book is full of examples and the total effect is depressing. There are indeed all too many examples of sexual harassment in the academy and in the workplace, and men

MS., Jan.-Feb. 1994, at 34).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 28.

43. *Id.*

need to think more carefully about what they say and do. Strossen knows quite well that there are many real cases of harassment and exploitation, but in discussing them she points out that there are criminal and civil laws already on the books to deal with such behavior.⁴⁴ And, as we shall see, she takes a far different view of the "sex business" than do the antipornography feminists. If nothing else, Strossen's perspective is a voice pleading for sanity, for common sense, and indeed for civility.⁴⁵ Beyond that, she is sounding an alarm; if we abandon our commitment to free expression, the results will be disastrous.

V. THE ORDINANCE IN PRACTICE

The original Dworkin-MacKinnon ordinance targeted pornographers and those who merchandised their products. The American Civil Liberties Union feared from the start that, in practice, the police and prosecutors would use the law against gay and lesbian bookstores, and against women themselves.⁴⁶ Although the ordinance has never been implemented in the United States, Canada adopted a similar law in 1992.⁴⁷ According to Strossen, it "has turned anticensorship feminists' fears into realities."⁴⁸

Canada, it should be noted, is not a totalitarian country. In fact, with some exceptions, it is as open and democratic a soci-

44. *Id.* at 119-32.

45. The attacks on anticensorship feminists in general, and on Strossen in particular, have been far from civil. "MacKinnon has compared feminists who oppose censorship to 'house niggers who sided with the masters,'" and MacKinnon has denounced FACT (the Feminist Anti-Censorship Taskforce) by stating, "[t]he labor movement had its scabs, the slavery movement had its Uncle Toms and Oreos cookies, and we have FACT." *Id.* at 32 (citing Pete Hamill, *Women on the Verge of a Legal Breakdown*, PLAYBOY, Jan. 1993, at 186). Dworkin has condemned free-speech feminists as "politically self-righteous fellow travelers of the pornographers." *Id.* at 32 (quoting Andrea Dworkin, *Pornography: The New Terrorism*, 8 N.Y.U. REV. L. & SOC. CHANGE 218 (1978-79)). Commenting about Strossen, Norma Ramos, the general counsel of Women Against Pornography, said that the ACLU "uses its women to further its antifeminist agenda. When Strossen became an apologist for the pornographers, she passed their litmus test to become president." *Id.* at 33.

46. *Id.* at 217.

47. *Id.*

48. *Id.*

ety as our own. One would expect to find censorship in regimes such as Stalinist Russia, Nazi Germany or Maoist China; as a number of writers have commented, tyrannical regimes have always attempted to restrict sexual expression. In practice, it has been a short step from repressing unpopular sexual ideas to repressing unpopular ideas of any sort, especially those that challenge the social or political status quo. As writer Erica Jong noted, "I believe that censorship only springs back against the givers of culture—against authors, artists, and feminists, against anybody who wants to change society. Should censorship be imposed . . . feminists would be the first to suffer."⁴⁹

This is exactly what happened in Canada, although the adopted statute is not as sweeping as the statute struck down in *Hudnut*. The law provides that no material will be deemed obscene if it has an artistic purpose or is part of a serious treatment of a sexual theme.⁵⁰ It only applies to the work taken as a whole, not to isolated portions.⁵¹ The Indianapolis ordinance, on the other hand, cared little about art, and held that any segment depicting subordination of women would damn the entire work. The Canadian law does, however, adopt the Dworkin-MacKinnon view of pornography as material portraying women in a "subordinating" or "degrading" manner, and its enforcement has been marked by homophobic and antifeminist excesses.⁵²

Much to the delight of Dworkin and MacKinnon, the Canadian Supreme Court upheld the law in *Butler v. Regina*.⁵³ MacKinnon praised the decision as "a stunning victory for women. This is of world historic importance. This makes Canada the first place in the world that says what is obscene is what harms women, not what offends our values."⁵⁴ Within a year after the decision, reporter Carl Wilson declared what he termed to be an "epidemic of censorship."⁵⁵ As civil libertarians

49. *Id.* at 225 (citing Mary Kay Blakely, "Is One Woman's Sexuality Another Woman's Pornography?" MS., April 1985, at 37-38 (quoting Erica Jong, writer)).

50. *Id.* at 231.

51. *Id.*

52. *Id.*

53. 1992 S.C.R. 452 (Can.).

54. STROSSEN, *supra* note 4, at 229 (citing Tamar Lewin, *Canada Court Says Porn Harms Women*, N.Y. TIMES, Feb. 28, 1992, at B7).

55. *Id.* at 230 (quoting Carl Wilson, *Northern Closure: Anti-Pornography Cam-*

and feminists had feared, the authority of the state did not restrict X-rated porn shops, but dissident gay, lesbian and feminist booksellers.

Even antipornography feminists who had supported the law now had second thoughts. Karen Busby, a lawyer with the Women's Legal Education and Action Fund, a group MacKinnon co-founded, and who had worked on its brief in *Butler*, confessed that the results had not been what they had intended:

Before the ink was dry on *Butler* . . . the Toronto police raided Glad Day Bookshop, a lesbian and gay bookstore, and confiscated *Bad Attitude*, a lesbian erotic magazine. . . . It was a shocking raid. Police ignored representations made by men of women in most cities across Canada . . . and yet the one thing that they raid is this one magazine that sells about forty copies every two months in Canada when it comes out. It's hardly a threat to women's equality and yet that's the magazine that they chose.⁵⁶

Two Canadian lower court decisions following *Butler* have also been marked by homophobic decisions in which the judges have declared homosexual sex as degrading and dehumanizing.⁵⁷ In addition Project P, the antiobscenity squad of the Ontario Provincial Police, has announced that by its interpretation of *Butler*, sexual expression is permitted only if it includes romance and a story line!⁵⁸ While Canadian customs officers have seized every variety of homosexual material,⁵⁹ they failed to keep items published by major book houses from coming into Canada. Thus, Madonna's *Sex*, and Bret Easton Ellis' *American Psycho*, which contains violent and sexually graphic accounts of the mutilation of women, were not even questioned.⁶⁰

paign in Canada, THE NATION, Dec. 27, 1993, at 788).

56. *Id.* at 232 (citing Karen Busby, "LEAF and Pornography: Litigating on Equality and Sexual Representation," 17 (1993) (unpublished remarks at Toronto Symposium)).

57. *Id.* at 233 (citing *The Queen or: v. Scythes* (Ontario Pizov. Div., Feb. 16, 1993); *Glad Day Bookshop v. Deputy Minister*, No. 619/90, 1992 Ont. C. J. LEXIS 1296 (Ontario Gen. Div., July 14, 1992)).

58. *Id.* at 234-35.

59. *Id.*

60. *Id.* at 235. A group of MacDworkinites ripped a copy of *Sex* to shreds at a well-publicized University of Chicago Law School conference in 1992.

Strossen takes more than a mild *schadenfreude* in the fact that two of the books seized by Canadian customs were written by Andrea Dworkin herself.⁶¹ The Canadian customs declared the books "illegally eroticized pain and bondage."⁶² Another item seized was a book entitled *Hot, Hotter, Hottest*, apparently because customs officials equated heat with sex.⁶³ Had they opened the cover they would have discovered a cookbook for spicy food.⁶⁴ Other examples of materials seized are not so humorous. A retired psychologist had written a book about his work with child molesters in order to get public action on the subject.⁶⁵ He sent the manuscript to an American literary agent, and when she returned it to him, Canadian customs officers seized it; three Mounties later raided his house, arrested him, and took him to jail in a squad car.⁶⁶

In the fall of 1993, Catherine MacKinnon, who had hailed the law and the *Butler* decision, conceded that the Canadian government was not going after violent material that degraded women, and that the law had done little, if anything, to advance women's causes in Canada.⁶⁷

VI. SEXUAL EXPRESSION AS PROTECTED EXPRESSION

The Canadian experience should give pause to those who think that outlawing pornography benefits women. The message

61. *Id.* at 237 (quoting Sarah Scott, *Porn Police: Who Decides What to Ban at the Border*, MONTREAL GAZETTE, Apr. 14, 1993 at A1). The seized books were ANDREA DWORKIN, *WOMAN HATING* (1984) and ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1979).

62. *Id.*

63. *Id.* at 238.

64. *Id.* Ohio officials had earlier confiscated a video entitled *Doing It Debbie's Way*, because of its allegedly provocative title. *Id.* Perhaps the officers had in mind the porn classic *Debbie Does Dallas*, but at the very least they should have looked at what they had seized—an exercise video by that most wholesome of actresses, Debbie Reynolds. *Id.* at 97.

65. *Id.* at 237.

66. *Id.* at 238 (quoting Mary Williams Walsh, *Chill Hits Canada's Pornography Laws*, L.A. TIMES, Sept. 6, 1993 at A1). Works by such respected writers as Marguerite Duras, Langston Hughes, Anne Rice, and Oscar Wilde, to name a few, have also been seized because they contained episodes depicting sexual activity that offended the censors. *Id.* at 238-39.

67. *Id.* at 239.

of Strossen's book is that most restrictions of free expression not only harm women, but also seriously affect the larger society. A case for regulation could be made, even under John Stuart Mill's belief that only harm to others can justify any form of state regulation, if there were real evidence that pornography leads to violence against women. MacKinnon herself, however, has in effect conceded that there is no such body of evidence.⁶⁸ At the same time, she attempted to justify censorship of sexually oriented materials by declaring "[t]here is no evidence that pornography does no harm."⁶⁹ For example, looking at Scandinavian countries where pornography is freely available and unrestricted, one does not find widespread violence against women.⁷⁰ In addition, two American commissions addressing the issue came to starkly differing conclusions, which cannot be rationalized by improvements in scientific investigation.⁷¹ MacKinnon and Dworkin have railed against what they consider the paternalistic, anti-woman American society, and yet they want to put power over expression into the hands of that society's government!⁷²

68. *Id.*

69. CATHARINE MACKINNON, *ONLY WORDS*, at 37 (1993).

70. See STROSSEN, *supra* note 4, at 255-56.

71. The Commission on Obscenity and Pornography, which was established in 1967 by Lyndon Johnson, issued its Report in 1970. COMMISSION ON OBSCENITY & PORNOGRAPHY, *THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY*, 91st Cong., 2d Sess. (1970). A majority of this Commission found no empirical evidence to support the contention that pornography caused sex crimes or other criminal behavior, and concluded that established patterns of sexual behavior were not changed by exposure to sexually explicit materials. The Report was attacked for its alleged methodological inadequacies by feminists who would later be in both the anti-pornography and anticensorship camps. In 1985 President Ronald Reagan created the Attorney General's Commission on Pornography headed by Edwin Meese, with a clear mandate to overturn the findings of the earlier report. The Meese Commission was heavily stacked with law enforcement officials and members of religious groups. Therefore, its conclusion that pornography was a cause for many of society's ills came as no surprise. THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, 131 CONG. REC. S6700-03 (1985). For a more detailed analysis of the two reports, see RONALD J. BERGER, ET AL., *FEMINISM AND PORNOGRAPHY* 22-28 (1991).

72. According to MacKinnon, "male dominance is perhaps the most pervasive and tenacious system of power in history . . . [and] is metaphysically nearly perfect." CATHARINE A. MACKINNON, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 182 (Katherine T. Bartlett & Rosanne Kennedy, eds., 1991).

There are many debatable parts of Nadine Strossen's book. This can be a sign of strength as well as a sign of weakness. Reading a provocative book, one that questions certain basic assumptions, is always more interesting than reading something which merely confirms beliefs. However, her grouping of all forms of sexually-oriented material into one category can be misleading. There is a difference between erotic materials and those which portray the violent debasement of women; as Justice Potter Stewart said, "I know it when I see it. . . ."⁷³ By glossing over these differences, Strossen avoids coming to terms with one of the more powerful arguments of the antipornography feminists: in making these films, women are debased, and the resulting humiliation may find an echo in wider society.⁷⁴

Strossen also deals with something that Dworkin and MacKinnon ignore: the nature of women's sexuality. Dworkin and MacKinnon have portrayed sexual relations between men and women in terms that deny any form of enjoyment. Dworkin has said:

Intercourse with men as we know them is increasingly impossible. It requires an aborting of creativity and strength, a refusal of responsibility and freedom: a bitter personal death. It means remaining the victim, forever annihilating all self-respect. It means acting out the female role, incorporating the masochism, self-hatred, and passivity which are central to it.⁷⁵

Catherine MacKinnon wrote: "Compare victims' reports of rape with women's reports of sex. They look a lot alike. . . . [T]he major distinction between intercourse (normal) and rape

73. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Potter J., concurring).

74. Strossen does not ignore the fact that some women are indeed forced into performing acts which are repulsive to them and to others, but she does make the case that there are women in the "sex business" who are there of their own free choice, who enjoy what they are doing, and it is for them, and not for others, to determine how they lead their lives. STROSSEN, *supra* note 4, at 185. She also proposes ways to reduce violence against women without subverting the First Amendment. *Id.* at 273.

75. *Id.* at 108 (citing ANDREA DWORKIN, *WOMAN HATING* 184 (1984)). In her book, *LETTERS FROM A WAR ZONE*, Dworkin declared that marriage is nothing more than a legal license to rape." *Id.* at 110 (citing ANDREA DWORKIN, *LETTERS FROM A WAR ZONE* 119, 176 (1988)).

(abnormal) is that the normal happens so often that one cannot get anyone to see anything wrong with it."⁷⁶

Given these comments, Strossen is not wrong to charge the feminist, antipornography movement with believing that "sex is inherently degrading to women."⁷⁷ Moreover, it raises "a serious dilemma for those who deplore sexism but not sex."⁷⁸ One antipornography group offered a solution by forming WAS—Women Against Sex.⁷⁹ As Professor Jeanne Schroeder of the Cardozo Law School has noted, these views harken back not only to the Puritanism of the seventeenth century and nineteenth century Victorian ideas, but also to the anti-sensual denunciations of St. Augustine and other early Christian fathers.⁸⁰

Strossen is openly and unabashedly sexual, and as the subtitle of one of her chapters notes, "Sexuality Does Not Equal Sexism."⁸¹ Strossen makes clear what MacKinnon and others ignore—women do enjoy sex; they can and do participate willingly and as equals in sexual relationships; and they enjoy and use sexual materials such as books and films.⁸² In a marvelous chapter entitled "Different Strokes for Different Folks: The Wonderful Diversity of Pornographic Imagination," Strossen recounts stories of feminist women who enjoy sex and who enjoy pornography.⁸³ Writer Sallie Tisdale has said "[w]omen who have seen little pornography seem to assume that the images in most films are primarily, obsessively, ones of rape. I find the opposite theme in American films: that of an adolescent rut, both male and female. Its obsession is virility, endurance, lust."⁸⁴

76. *Id.* at 108 (citing Catharine MacKinnon as quoted in Christina H. Sommers, *Hard-Line Feminists Guilty of Ms.-Representation*, WALL ST. J., Nov. 7, 1991, at A14).

77. *Id.* at 107.

78. *Id.* at 112.

79. *Id.*

80. Jeanne L. Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence*, 75 IOWA L. REV. 1135, 1136 (1980).

81. STROSSEN, *supra* note 4, at 119.

82. Although the actual number of X-rated films rented by women at video stores may never be known, it is quite high. Conservative estimates are that women, either singly or as part of a couple, account for about 40% of the adult video rental market. *Id.* at 144.

83. *Id.* at 141-60.

84. *Id.* at 143 (quoting Sallie Tisdale, *Talk Dirty to Me: A Woman's Taste for*

Even the *bête noire* of the antipornography group, rape, may be something other than subjugation of women. A woman's nightmare in real life, may be, in the same woman's fantasy, an enjoyable daydream.⁸⁵ Strossen cites, among others, Anaïs Nin's diary in which the writer described her rare fantasies as "[a] desire to feel the brutality of man. . . . To be violated is perhaps a need in women, a secret erotic need."⁸⁶ The central theme of Lina Wertmuller's acclaimed 1975 film, *Swept Away*, was the classic rape myth.⁸⁷ Although the film was by a woman who saw the rape not as simple brutalization, but also as part of a woman's fantasy, it was scorned by the antipornography feminists.⁸⁸

Strossen is asking that both women and men not be stereotyped, and then controlled by the State on the basis of that characterization.⁸⁹ There are problems and there is violence; but there are many materials in the market that are crudely labeled as pornography. In a free society, no one, especially the State, should decide for all what is acceptable sexual behavior.

VII. CONCLUSION

The heart of the Strossen book relies on a liberal rendition of traditional First Amendment jurisprudence which bans content discrimination and considers all ideas to have some value.⁹⁰ Perhaps in an age of sound bytes, terrorism, and hi-tech weaponry, the old notion of a market place of ideas needs to be rethought. That is a task for another book. Her concern here is with sexually-related materials, all of which would come under the rubric of "pornography" if the followers of Dworkin and MacKinnon have their way.⁹¹

Pornography, HARPER'S, Feb. 1992, at 45).

85. *Id.* at 152 (citation omitted).

86. *Id.*

87. *Id.*

88. *Id.* at 152-53.

89. *See id.* at 245-46.

90. *Id.* at 41.

91. *Id.* at 19.

There is no question that ours is a male-dominated society. Despite the many gains made both socially and legally by women in the last twenty years, much discrimination remains. There is also no question about the violence perpetrated against women, often by their spouses or boyfriends; this is a serious issue deserving a societal commitment to its solution. However, to blame all problems that women confront on pornography, and to assume that the abolishment of pornography, no matter how defined, will allow women to enter a new era is mere speculation.⁹²

The advocates of the Dworkin-MacKinnon measure have provided society with a service by illustrating the problem, and forcing people to recognize that violence is a constant fear for many women. However, the shrillness of their argument does not help the cause. I wondered whether Strossen was quoting out of context, since some of the comments in her book, including those contained above, seemed so fanatical and so far removed from reality. But if anyone doubts the stridency, all they need do is spend five minutes browsing through Andrea Dworkin's *Letters from a War Zone*,⁹³ Catharine MacKinnon's *Only Words*,⁹⁴ or any of the other works cited in *Defending Pornography*. One can then begin to appreciate why Rush Limbaugh's epitaph of "feminazis" struck so close to home.

Aside from her devotion to principles of free speech, Strossen is also committed to free individual choice.⁹⁵ She is quite open about her own enjoyment of sexual films, and makes a strong case of how and why other women enjoy seeing them, and in some cases, acting in them.⁹⁶ She makes it quite clear that it is an individual choice, and that no one has the right to tell someone else what to read or see, especially in the privacy of one's home or hotel room.⁹⁷ If particular types of film offend a

92. *Id.* at 245. Even if we focus just on materials that include sexual violence, according to Strossen, surveys indicate that depictions of violent sexual encounters, which the Dworkin/MacKinnon group equate as all of pornography, actually account for only 3% to 8% of the material on the market. *Id.* at 143.

93. ANDREA DWORKIN, *LETTERS FROM A WAR ZONE* (1988).

94. MACKINNON, *supra* note 70.

95. *E.g.*, STROSSEN, *supra* note 4, at 70-71.

96. *Id.* at 191-95; Sarah Kershaw, *Against Pornophobia*, NEW YORK, Jan. 16, 1995, at 20-21.

97. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); Claudia Dreifus, *Nadine*

person, she is not obligated to watch;⁹⁸ however, as Justice Harlan noted, "one man's vulgarity is another's lyric."⁹⁹ This is a far cry from MacKinnon's blanket condemnation:

The liberal defense of pornography as human sexual liberation, as de-repression—whether by feminists, lawyers, or neo-Freudians—is a defense not only of force and sexual terrorism, but of the subordination of women. Sexual liberation in the liberal sense frees male sexual aggression in the feminist sense. What in the liberal view looks like love and romance looks a lot like hatred and torture to the feminist. Pleasure and eroticism become violation. Desire appears as lust for dominance and submission.¹⁰⁰

It is always difficult to respond reasonably to fanatics, because, like all true believers, they are not concerned with reason. They "know" what is right, and whether the facts fit their preconceived notions is irrelevant. Andrea Dworkin, Catharine MacKinnon, and their allies have not only a vision but a cause. As far as they are concerned, questions of free speech are secondary and irrelevant in their mission to wipe out pornography.

In this context Nadine Strossen has written a tough-minded but sensible book. It has its faults, but on the whole it illustrates its points clearly, effectively, and convincingly. If the antipornography lobby has its way, women and other minorities will suffer along with society as a whole. Against that possibility, the only bulwark is a firm commitment to the principles of the First Amendment. It is not a new argument, but it is one that, in these days, cannot be repeated too often.

³
Strossen: 'I find the pro-censorship feminists politically naive', THE PROGRESSIVE, Mar. 1994, at 36.

98. STROSSEN, *supra* note 4, at 69-72.

99. *Cohen v. California*, 403 U.S. 15, 25 (1971).

100. Catharine MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321, 327 (1984).