

Freedom, Equality, Pornography

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Equality And Expressive Liberty

According to Andrea Dworkin, “The left--ever visionary--continues to caretake the pornography industry, making the whole wide world--street, workplace, supermarket--repellent to women.”¹ Dworkin is right that many people who locate themselves on the political Left oppose restrictive pornography regulations.² Her explanation of this opposition is uncertain, however, because she does not explain what she means by “the left.” Let’s assume, then, that it refers to people whose conceptions of justice give a large place to social equality--everyone who accepts, at a minimum, the following propositions:

1. Substantive equality of opportunity is a basic element of social justice.

Substantive equality of opportunity--as distinct from the formal equality of opportunity associated with the ideals of equality before the law and careers open to talents³--requires that people not be disadvantaged in life because they were, for example, born with few resources, with dark skin, or female.

2. Existing inequalities of wealth and power thwart substantive equality of opportunity.

3. Achieving substantive equality of opportunity requires an affirmative role for the state--for example, in regulating market choices. For “if inequality is socially pervasive and enforced, equality will require intervention, not abdication, to be meaningful.”⁴

This understanding of the Left is quite comprehensive, encompassing virtually all egalitarians. Precisely for this reason it highlights the interest and polemical thrust of Dworkin’s point. For more than a decade now, one group of feminists has urged pornography regulations as a strategy for combating the erotization of sexual

subordination, arguably an important factor in reproducing sexual inequality.⁵ Egalitarians embrace regulations of “market choices” in the name of economic equality, and commonly accept certain regulations of political expression--the content-neutral regulation of political expenditures--in the name of political equality.⁶ In short, they emphasize the importance of liberty and equality as political values, accept regulations of choice in the name of equality, and in some areas (say, the economy) think that justice requires such regulation. If substantive equality of opportunity is an important aspect of justice, and if there are background inequalities of power between men and women, then why, apart from reflex appeals to freedom of speech, resist the regulation of “sexual choices” in the name of sexual equality?⁷

One answer is that the regulations are divisive and diversionary, and probably ineffective cures for subordination. Although such pragmatic objections carry some weight, they fail to account for the special energy that has surrounded the debate about regulation--a debate that has focused on rights of expression. Moreover, for reasons I will discuss later, the Left--as I have interpreted Dworkin’s use of the term--cannot rely exclusively on such objections. According to a second line of argument, stringent regulations of pornography are wrong, and not just unlikely to be effective.⁸ I think these criticisms have some force, and propose to explore its scope and limits.

More specifically, I make three principal points:

1. The debate about pornography regulation, like much American political debate, is excessively legal.⁹ We are invited, for example, to assume that the MacKinnon-Dworkin account of pornography is correct, and then asked to consider what can we do about it, consistent with taking the First Amendment seriously.¹⁰ As a matter of method, I suggest that the argument--even the legal argument--ought to be

more about pornography. The proper resolution of issues about regulation depends on what pornography is and whether it merits the strong protections properly extended to political and artistic expression or rather the reduced levels of protection appropriate to commercial speech or personal libel.¹¹ An assessment of pornography regulation can no more avoid a discussion of the interests implicated in sexually explicit expression than an account of commercial speech regulation can proceed without reference to the interests implicated in it.

2. Because sexual expression serves basic interests, regulations of the sort advanced by MacKinnon and Dworkin are unacceptably broad and intrusive. Egalitarians ought not to treat the ideas of sexual choice and sexual liberation simply as ideologies that reflect, mask, and sustain practices of sexual subordination. I sketch a more limited form of pornography regulation--targeted on constitutionally obscene materials that sexualize violence (the pornographically obscene)--that is less vulnerable to objection than more restrictive regulations. But its restricted range is bound to limit its impact.

3. People committed to an ideal of justice that embraces substantive equality and expressive liberty ought not simply notice the lack of substantive equality, express opposition to restrictions on expression, and conclude with hand-wringing about the shame of sexual inequality, and how sadly tragic it is that a commitment to liberty stands as a bar to its remedy. We need to find a way to accommodate both commitments. So I conclude by sketching some proposals that might accommodate commitments to equality and free expression.

To put the main idea in broader terms: From Emma Goldman to Noam Chomsky, an important strand of the egalitarian tradition has urged that expressive liberty is an

intrinsic element of human liberation and a precondition for popular democratic politics. I endorse that strand of free-speech egalitarianism and explore its implications for the case of pornography.

A Rationale For Regulation

In this section, I sketch one style of argument for regulation, drawn largely from Catharine MacKinnon. So there is nothing original in the substance of my presentation, though I have tried to make the argument's assumptions and logic fully explicit.¹²

1. As a general matter, women suffer systematic social disadvantage by comparison with men. They are economically subordinate, required to bear the double burdens of production and reproduction, and physically insecure and subject to abuse.¹³

2. Such systematic disadvantage--that is, sexism--is a fundamental injustice. Like racism, it makes a difference into a source of disadvantage, violating the requirement of substantive equality of opportunity.

3. The reproduction of unjust, systematic disadvantage--whether the distinction underlying the disadvantage is sex, race, or class--is always a complicated causal story, featuring the internalization of dominant norms, social formation of desires that fit with existing opportunities, and rational calculations of advantage under constraints. But force, and threats of force, are also part of the answer. In the case of gender, women are subject to abuse by men, to rape, incest, harassment on the street and at work, physical abuse at home. Such violence and pervasive threats of violence have a social function. Not merely the sick behavior of individual men, they serve as enforcement mechanisms, as disciplinary devices that contribute to the reproduction of a system in

which sex is a basis for disadvantage by increasing the costs to women of violating gendered norms of proper behavior.¹⁴

In short, force and threats of force function as enforcement mechanisms for gender norms, thus helping to maintain a system that disadvantages women because of their sex, and benefits men because of theirs.¹⁵

4. Many people--and not only men¹⁶--find subordination and the force that helps to sustain it sexually exciting: they find sexism and its disciplinary armature sexy.¹⁷

5. An important part of the explanation for the reproduction of sexual subordination is that many people--and not only men--find subordination and the force that helps to sustain it sexually exciting.¹⁸ Because they find sexism sexy, they tolerate--or actively embrace--subordination and violence. In short, sexism is reproduced because it is sexy.

6. It is not original or intrinsic to human nature that people find sexism sexy. Although sexual desire, abstractly understood, may be intrinsic and original,¹⁹ the particular forms of sexual desire dominating our lives are a product of politics--in particular, the power of men and a culture dominated by that power.²⁰

7. Pornography plays a central role in defining what sexuality is for us, in particular in sexualizing--and so making permissible and attractive--subordination and the force that helps to sustain it. It "works by making sexism sexy;"²¹ it "makes hierarchy sexy."²² More strongly put: pornography "is a major way [my emphasis] in which sexism is enjoyed and practiced as well as learned."²³

Pornography, a subset of sexually explicit expression (see the later section "The Regulations" for the legal definition), sexualizes subordination in two ways. First, its content fuses sex and subordination. It presents women as enjoying subordination and

as willing subjects of it: resistance as desire; fear and horror as enjoyment; “no” as “yes.”²⁴ By presenting subordination and the abuse that serves to sustain it as consensual, pornography presents them as acceptable: “the victim must look free, appear to be freely acting. Choice is how she got there.”²⁵ Moreover, by presenting them as sexually exciting--as what sex is--it has the effect of fusing sexual desire with the desire for relations of subordination and domination: it accounts for the distinctive, politically constructed content of sexual desire. “In the subordination of women, inequality itself is sexualized: made into the experience of sexual pleasure, essential to sexual desire. Pornography is the material means of sexualizing inequality; and that is why pornography is a central practice in the subordination of women.”²⁶ Pornography produces a psychology perfectly suited to a social structure of sexual inequality, and in so doing provides the linchpin for the reproduction of such inequality.²⁷

How precisely does pornography produce such a psychology? How, in Dworkin’s words, does it sexualize “inequality itself,” and serve as the “material means of sexualizing inequality?” Two mechanisms--one cognitive, the other behavioral--have been proposed to account for this fusion. The cognitive mechanism reflects the fusion of sexuality and subordination in pornographic images, the background fact of male dominance, and two psychological facts--that we grasp concepts in part by mastering their paradigmatic instances, and that our desires are, as a general matter, concept dependent. According to this proposal, men master the concept of sex (and related concepts, including sexual pleasure, enjoyment, satisfaction, gratification) in part by recognizing the enjoyment of force and subordination as sexual enjoyment. Given a background of male power, these pornographic paradigms of sexuality are generalized: “Men treat women as who they see women as being. Pornography constructs who that

is. Men's power over women means that the way men see women defines who women can be. Pornography is that way."²⁸ Suppose, now, that desires are concept dependent, that we cannot specify the content of desires independently from the concepts available to the person whose desires they are--that, as applied to the case of sex, our sexual desires are desires for sex as we socially cognize it. As a result, sexual desires themselves are desires for sexual subordination; what counts as and what is experienced as sexual enjoyment reflects the pornographic conception of sexuality: "feminism exposes desire as socially relational, internally necessary to unequal social orders but historically contingent."²⁹ The problem in short is not that guys are animals, or that they never grow up; the trouble lies in the perfection of their (our) socialization under conditions of sexual inequality.

According to the behavioral mechanism, pornography works by "conditioning men's orgasm to sexual inequality."³⁰ Pornography depicts subordination and force; men watch (or read, or listen to) pornography; they masturbate; that reinforces an association between sexual excitement and subordination (alternatively, men and women together watch, read, or listen to pornography; they have sex; that reinforces a link between male sexual excitement and subordination). MacKinnon suggests an important role for this behavioral mechanism when she distinguishes the contribution of pornography to sexual inequality from the contribution of racial hate speech to racial subordination. Whereas pornography "manipulates the perpetrator's socialized body relatively primitively and directly," and works "by circumventing conscious processes,"³¹ "[n]othing analogous to the sexual response has been located as the mechanism of racism, or as the mechanism of response to sexist material that is not sexual."³² These claims are puzzling. If the distinction ("nothing analogous") is simply that racist hate

speech does not work through sex, then it seems uncontroversial, but irrelevant. If the distinction assumes that racist hate speech works through conscious processes, then it is of clear relevance, but highly implausible, and at odds with common understandings of categorization and stereotyping.³³ In any case, the behavioral mechanism is less plausible because it applies only to men whose orgasms are associated sufficiently frequently with consuming pornography for the reinforcement to work its effects.

An Excursus

This account of pornography derives its force from its apparent fit with certain illustrative cases of pornography. Consider, for example, *Shackled*, a quarterly magazine published by London Enterprises Limited “in the interest of informing and educating the adult public on the various forms and means of sexual expression.”³⁴

Shackled is, as the name indicates, a bondage and discipline magazine, one of roughly thirty-five such magazines distributed by Lyndon Distributors. More precisely, it is a bondage and discipline magazine depicting women bound and disciplined (men are presented through their words, not in pictures). The work of “informing and educating the adult public” starts with the cover: one issue features a naked woman lying on her back with her legs spread, eyes closed, a ball-gag in her mouth, and wrists in leather cuffs, which are strapped to the metal bed she is lying on. Another woman stands behind her, checking the strap that holds the ball-gag in place. The cover line reads “Girls Who Love Heavy Restraint! See ‘Em Stripped Naked and Chained.” A page 2 editorial—which includes the language about “informing and educating”—tells us that “Finding girls who love heavy restraint is easier than folks imagine. The censors who seek to ban bondage magazines—like this one—should understand that these are girls

who enjoy shackles.” The first photo layout (“Bi-Babe Bondage”) features two women, “One who thrives on suffering and tight restraint, the other on dishing out pain.” Another shows a woman (the girlfriend of a “brilliant young barrister” who has brought her to the “bar of justice”) with her wrists attached to a metal bar (said bar), eyes blindfolded, and mouth taped. According to the caption: “The tighter the rope--and the bigger the dick--the better she likes it.” Another: “Sure it hurts my tits, but I enjoy every pang.” Another: “Steel cuts into her tit, a gag into her mouth, but does she complain? Hell, yes!” The last layout: “Heavy chain and padlocks are her special thing. The weight really turns her on.” And it concludes: “After an hour of bondage, she’s screaming for hard cock.”

It does not add up to much of a narrative, but it covers the major points. Sexualize subordination (“girls stripped naked and chained”). Emphasize the moment of consent: that these women love enforced subordination (that it is easier to find bondage lovers than you might have thought, that they “love heavy restraint,” “enjoy shackles,” “thrive on suffering and restraint,” and “thrill to that constricting feeling, whether from rope or metal”). Depict pain and resistance as part of the pleasure, and so as constituting no objection to subordination (“thrives on suffering,” “Sure it hurts my tits, but I enjoy every pang.”) Finally, link subordination, the bondage that enforces it, and the consent that legitimates bondage (the pleasures of the accompanying pain), with intercourse and male orgasm. (“The tighter the rope--and the bigger the dick--the better she likes it.”) Thus the slogan: “pornography makes sexism sexy.”

No Other Exit

I return later to *Shackled*. For now, let’s consider the argument for regulation, which falls out more or less directly from the analysis I sketched above. Not simply an argument

about the “themes” or “ideas” present in pornography, the case turns principally on claims about what pornography does: “Men treat women as who they see women as being. Pornography constructs who that is. Men’s power over women means that the way men see women defines who women can be. Pornography is that way.”³⁵

Operating through the cognitive and behavioral mechanisms, pornography makes subordination and the force that contributes to its reproduction sexually exciting and definitive of women’s nature: it gives sexual desire and the experience of sexual satisfaction--which are not intrinsically attracted to subordination--their determinate content;³⁶ it gives subordination a central role in our self-definition as men and women (“Gender is sexual”³⁷); and it makes the harm of enforced subordination “invisible as harm” by presenting women as consenting to and enjoying their own subordination and abuse.³⁸

Suppose all of this is right. Then, pornography is key to making sexual subordination into a system--to “creating and maintaining sex as a basis for discrimination.”³⁹ Pornography serves as a linchpin not simply because of what it says, but because of what it does.⁴⁰ It takes our sexuality, a deep fact about our lives, and enlists it--as idea, identity, desire, and practice--in support of subordination. Pornography is not a treatise that justifies subordination, but a device that makes it seem right, look natural, and feel good. By producing a psychocultural setting that makes us experience sexism as irresistible, it closes off all avenues of exit from subordination, except the avenue of regulating pornography itself.

This account of pornography’s role is sometimes summarized in the claim that pornography subordinates--and not simply that its graphic, sexually explicit depictions of subordination cause subordination to be sexualized. A pornography ordinance adopted

in Indianapolis in 1984 defines pornography in part as “the graphic sexually explicit subordination of women, whether in pictures or in words” (for the full definition, see the next section, “The Regulations”). “What pornography does goes beyond its content: it eroticizes hierarchy, it sexualizes inequality. It makes dominance and submission into sex.”⁴¹ The claim that pornography subordinates should be understood in three ways.

1. The production of pornography regularly uses force.⁴²
2. Sexual force against women sometimes involves the use of pornography as a model: men force women to view pornography and to do what the pornography shows women doing.
3. Pornography reproduces sexual inequality by shaping gender identities and sexual desires in ways that make force attractive, subordination natural, and their injuries invisible. Given male power, pornography has those effects; and once those effects are in place, the reproduction of sexual inequality is the inevitable result.

I offer these three points as explication of the claim that pornography is “the graphic, sexually explicit subordination of women.” But do they really explain the “is”? I have two responses: “yes” and “wrong question.”

As to “yes”: what I have described is how--according to defenders of regulation-- pornography subordinates: by depicting subordination and force as sexy, thereby giving sexual desires and gender identities their content. Consider an analogous case. Suppose I say to you, “I didn’t incite the people demonstrating in front of the building to burn the building down; I simply urged them to do it, and by urging them caused them to be incited to burn it down.” To which the right response is: “You are telling me how you incited them, not that you didn’t.”

Similarly with subordinating: if someone says, “I know there is subordination, that pornography depicts subordination and violence as sex, that it thereby makes subordination and violence sexually exciting, and that subordination is reproduced because it is experienced as gender identity and sexual desire. But the pornography does not subordinate.” It is perfectly fair for the critic to respond: “You have told me how it subordinates; not that it doesn’t.”

As to “wrong question”: I think it is a mistake to suppose that the issue of regulation can or ought to be settled by first determining whether pornography is expression that says something objectionable and thereby causes injury or instead is injurious conduct (perhaps an illocutionary speech act)--put otherwise, by first determining whether it causes subordination or subordinates.⁴³ This supposition reflects a general approach to freedom of expression that exaggerates the importance of a prior expression-action distinction in settling issues of regulation.⁴⁴ An answer to the expression-or-action question is, I think, not best understood as a premise in argument about the regulation of expression. We do not first decide “expression or action” and then decide whether to regulate. Rather, the distinction reports a conclusion: when we have decided that regulation is permissible, we say that expression is conduct--we say that when we have decided to assign responsibility to the speech (think of blackmail and extortion). When we think regulation is inappropriate--when we are reluctant to assign responsibility to the use of words, rather than to events downstream--we say that the words are speech. But it is wrong to think that we settle “speech or action?” “saying or doing?” antecedent to argument about the assignment of responsibility and the permissibility of regulation, and then use that resolution in deciding the regulatory issue.

As applied to the issue at hand: the disagreement about whether pornography is subordinating conduct or is instead speech that may cause subordination is best understood as a disagreement about whether regulation is appropriate. It is best understood as a disagreement about where to assign responsibility, not as a claim about causation or constitution that might resolve an argument about such assignment.

The Regulations

Pornography regulations--for example, the ordinance adopted in Indianapolis in 1984 and overturned in 1986--reflect this analysis. The Indianapolis ordinance defines pornography as:

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 as sexual objects who enjoy pain or humiliation;
- Women are presented as sexual objects who experience sexual pleasure in being raped;
- Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt;
- Women are presented being penetrated by objects or animals;
- 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;

- Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.⁴⁵

The regulations establish four offenses: coercing someone into pornographic performance; forcing pornography on a person; assault caused by “specific pornography,” and trafficking in pornography. They empower an administrative agency to issue cease-and-desist orders against those who commit these offenses, and award damages to victims. And, whereas offenses under the coercion, forced viewing, and assault provisions cover materials in each of the six categories described in the regulation, the trafficking provision covers only the first five. The intent of this limits is to confine the trafficking provision to more violent and hard-core pornography.⁴⁶ But not all materials that fall into the first five categories are violent or brutal. Susie Bright’s anatomically precise discussion of the many varieties of dildo in her “Shiny Plastic Dildos Holding Hands” appears to fall into the fourth category, because women in it are penetrated by objects. But the depiction is neither violent nor brutal.⁴⁷ For now, though, let’s put such details to the side.

To see the connection with the analysis of the injuries of pornography, consider the contrast with obscenity regulations. In the 1973 case of *Miller v. California*, the Supreme Court held that expression is obscene and so has a reduced level of First Amendment protection only if it is offensive, prurient, and of no serious literary, artistic, political, or scientific value: in short, offensive, sexually preoccupied, crap.⁴⁸ Pornography regulations differ from obscenity regulations on each of these three dimensions.

1. Pornography regulations do not go after the prurient.⁴⁹ Their target is not sexual explicitness, preoccupation, or perversion but graphic materials that sexualize subordination. The concern is not--or at least is asserted not to be--pornography's sexual content, but its role in discrimination.

2. The regulations are not justified by reference to the *offensiveness* of graphic subordination⁵⁰--nor because it insults, damages reputations of women as a class,⁵¹ or inspires disgust, guilt, or fear⁵²--but by the harms of such representations, their role in reproducing a system of discrimination that turns the fact of sexual difference into a basis for social inequality.

The concern with the harm of sexual subordination is less immediately in evidence with the coercing, forcing, and assault provisions, which target either uncontroversially harmful consequences (assault), or coercive means (coercion and forced viewing). Such injuries are substantial, quite apart from their implications for discrimination. But even in these cases, the regulations reflect a concern with subordination: why target, for example, the forced viewing of pornography rather than all forced viewing, or coerced performances in pornography rather than all coerced performances? The natural explanation is that the aim is to remove, or at least to chill the production and distribution of, materials that fall into these six categories--materials that subordinate. Although the trafficking provision, then, is the most controversial element of the regulations, it reveals their overall aim, which is to target materials that sexualize subordination, and not simply those that produce specific injuries associated with particular uses of pornography.

3. They allow no exception for materials with serious literary, artistic, scientific, or political value.⁵³ This distinction connects with an important difference: the natural

objection to obscenity regulations is that offensiveness is not a sufficient basis for state regulation. The exemption for materials with serious value provides the basis for a reply: “because this stuff has little value, the normal presumption against regulating offensive expression is suspended.”⁵⁴ The issue with pornography is different. Harm, unlike offense, does conventionally establish a case for legal regulation—at least outside the context of expression. So, here the question is: given the harms, why does it matter if the stuff is not worthless?

Policy Case Against Regulation

Thus the case for regulation. Why doesn't it settle the matter—at least for people who endorse a conception of justice in which equality is an important political value? Equality is a fundamental political value; some uses of state power are justified because they promote that value. So why not in this case? Because pornography regulations violate the right to free expression? Maybe so. But let's put aside reflex appeals to rights of expression—the issue is why we should think those rights are at stake here, and sufficiently so to cause troubles for the regulations.

The Lawyer's Battery

What are the alternatives to a reflex appeal? One is to offer a familiar lawyer's battery of arguments against the regulations:

- The Case for Regulation is Too Speculative: “I agree that there is subordination [point 1]; that it is a basic injustice [point 2]; that it is maintained in part through force [point 3], which I hasten to add is already illegal; and that some people get off on it

[point 4]. But is it so clear that the sexualization of subordination explains much about the reproduction of subordination [doubting point 5]? And if it does--and even acknowledging that sexuality is socially constructed [accepting point 6]--how compelling is the evidence that pornography lies at the heart of that construction [doubting point 7]? Even if I grant that the sexualization of subordination is important to sex discrimination, I still have real doubts about whether pornography is the right target.

“Labor market segregation, economic inequality, and the unequal division of the labor of reproduction and socialization are far more important than the sexualization of subordination in explaining the reproduction of subordination. Or if you prefer to concentrate on cultural sources of gender inequality, consider conventional representations of women in commercial advertising. If you want to understand the legitimization of force, consider the pervasiveness of violence in popular culture and *Texas Chainsaw Massacre* and Brian de Palma-style slasher movies. Or if you want to focus on the sexualization of subordination, try the endless sexualization of movies and commercial advertising. Consider, in short, sexism without sex or violence; or violence without sexism or sex; or violent sexism without sex; or sexually suggestive sexism without violence or vivid subordination.

“With so much to consider, why pick on pornography as the basis of sex discrimination? Pornography is, after all, less pervasive than other cultural images, and less believable because it is so highly ritualized, badly written, and poorly acted.⁵⁵ Isn't it really because pornography is *sexually explicit*?⁵⁶ Isn't the political motive to build an alliance between people who are antisexism and people who are antisex? And so isn't the line between pornography and obscenity regulation really, in the end, not so sharp?”⁵⁷

This last set of polemical questions is meant to suggest that the diagnosis set out earlier is not what drives the focus on pornography. But the more fundamental objection fueling those political suspicions is that the diagnosis is too speculative to sustain the case for regulation.⁵⁸

▪ Besides, The Regulations Themselves Are too Vague: “Assume, *arguendo*, that pornography is the linchpin of the system of sexual inequality. Still, the ordinances are hopelessly vague: ‘sexual objects who enjoy . . . humiliation’; ‘postures or positions of servility or submission or display.’ Who could possibly tell whether their work was actionable under such a regulation?”⁵⁹

Consider, for example, Susie Bright’s “Story of O Birthday Party.” Susie Bright’s girlfriend Honey Lee arranges a thirtieth birthday celebration modeled on Pauline Reage’s *Story of O*. She dresses Susie Bright in a tight leather corset, has her shine the boots of a policewoman, and arranges for a “gourmet sadomasochist” friend to whip her.⁶⁰ Is this pornography, as the regulation defines it?

The story does, to be sure, include humiliation. And while “enjoyment” does not fully capture Susie Bright’s response to the humiliation, she does at least partly enjoy it. But it is hard to see Susie Bright as a “sexual *object* who enjoys humiliation,” rather than a sexual subject who sometimes enjoys humiliation, or at least who enjoys playing at enjoying humiliation, or enjoys playing at wondering (and getting other people to wonder) whether she enjoys humiliation.

And there are plenty of postures and positions of servility, submission, and display. But do these postures, set within the “Story of O Birthday Party,” subordinate? Perhaps not, given the author. Of course they might be said to subordinate *women as a*

class, even though they do not subordinate Susie Bright. But why not think instead that because they do not subordinate Susie Bright, they do not subordinate women as a class.

Consider, for example, this interchange between Susie Bright and Coral--the gourmet sadomasochist.⁶¹

SB: How am I supposed to take this pain? It is so intense. I don't know where to go with it.

C: When I get hit, I like to think about deserving it, needing to be punished.

SB: I can't do that. I was just thinking the very opposite . . . all I can think of is that I don't deserve this. I didn't do anything wrong.

C: Well, you can do it for Honey Lee. I know that's what she'd like.

SB: Yes, that's what O would do, but I'm too selfish for that.

C: You can be selfish as well. A lot of people like to take the pain, and connect the intensity to their clit or their nipples.

SB: Maybe. When you stroke my clit and fuck me, I appreciate the whip a little, because my cunt sucks the sensation right up.

[Coral hits her twice with the bamboo cane.]

SB: Coral, please, please, I can't do it, please, Jesus, I can't.

After begging Coral to stop, "She complied instantly." And then, as Bright leaves, she says "Coral, you're going to suffer terribly for what you did to me today."

Is this "graphic subordination"? Or graphic insubordination? Does it sexualize subordination? Or make a compelling case that sadomasochistic "herotica" is not for

everyone? Perhaps it is and does all these things, depending on the audience. But to introduce this dependence on the audience is precisely to underscore the uncertainty about what the regulations cover.

- Moreover, More Narrowly Drawn Regulations Would Be Pointless: “Assume that the regulations were tightened up--as in the restriction of the trafficking provision to more hard-core and violent materials. As they become narrower and more precise, they become less objectionable. But the less restrictive regulatory means are also less likely to be effective in achieving the stated aim of sexual equality. Moreover, the likelihood grows that other remedies--still less restrictive of expression--will do just as well. So the dangers grow of diverting attention and resources from real cures by focusing on pornography.”

- And, Anyway, The State is Patriarchal: “Who can trust the state to regulate speech--in particular to regulate it in ways that serve the interests of women?⁶² Consider the parallel with race: a Two Live Crew song was the first target of an obscenity prosecution for a piece of music. Give the state power to regulate expression, and it will inevitably use that power on less-powerful citizens.

“Put this well-founded mistrust together with the point about the vagueness in the regulatory language. Do we want--do women want--the state (say, the state of Utah) deciding whether oral sex is a posture of sexual submission?⁶³ Suppose the man is standing up, and the woman is kneeling. Suppose she is sitting on a chair. What about anal sex? Suppose the woman is on her hands and knees. Suppose she is lying on her

back. Suppose she is on her hands and knees, but the anal sex is part of a safe sex video.

“Many distinctions can be drawn, and exploring their nuances makes attractive fare for conferences on cutting-edge film theory.⁶⁴ But this is not a role for courts, or for the administrative bodies empowered to hear civil rights complaints under the proposed ordinances, especially given that ‘the law sees and treats women the way men see and treat women. The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender--through its legitimating norms, forms, relation to society, and substantive policies.’⁶⁵”

Limits of the Lawyer’s Battery

These considerations all have some force, and I will say later just what that force is. But it is, I believe, commonly exaggerated. Taken on their own, these four points are not especially damaging to pornography regulations, for parallel objections apply to acceptable regulations in other areas (acceptable at least to those who endorse equality as an important political value).

Start with the first claim about speculativeness--that pornography has not been shown to be the problem, so regulations of it may not really get at the harms that they are alleged to address. This point is surely correct. Experimental evidence and cross-national studies fail to establish a compelling case for connections between pornography and rape and subordination. Indeed, most studies find no connection between nonviolent pornography--sexually explicit and sexist--and increased aggression or a heightened disposition toward sexual coercion and violence. There is some evidence for a connection between violent pornography and hostility towards

women. Taken together with studies about the effects of graphic, nonsexual violence, however, that evidence suggests that the problem is the violence, not the sex.⁶⁶

But none of these doubts settles anything. The problem with this first objection is that many regulations--for example, regulations of economic activity--are not supported by demonstrative reasoning, but only by considerations that do not offend common sense. Maybe the demand for labor really is highly elastic and minimum-wage laws hurt the poor by shrinking the pool of low-wage jobs. Maybe they do not force firms to enhance productivity by training workers and upgrading technology. Maybe the principal effects of rent control are to limit the supply of housing and generate a secondary market for sublets from long-term renters, worsening the situation for low-income people. People disagree about these issues. But egalitarians believe that democratically elected bodies have the authority to decide how best to ensure substantive equality, and to employ strategies based in some measure on speculation.⁶⁷ Why, then, prevent democratically elected bodies--like the Indianapolis City Council--from going after abuse and subordination by regulating what they judge to be an essential link in the chain?⁶⁸

We'll get to the second point momentarily, but turn now to the third point--that narrower regulations are less objectionable, but also less likely to succeed. That observation is certainly true. But it is difficult to see how it amounts to a deep objection to the regulations, rather than a familiar policy disagreement.⁶⁹

Or take the final consideration: about mistrust in the state's capacity to regulate speech. Generic mistrust of the state cannot be the reason for opposing the regulation of pornography, at least not for egalitarians. Generic mistrust would reject the affirmative state that, at least in the context of a market economy, is necessary to economic egalitarianism. Whatever the favored methods of ensuring distributive

fairness--progressive taxation, support for public schools, programs of training and retraining, regulations on concentrations of wealth--the state has an important role to play in achieving it.

Suppose we narrow the scope of the mistrust, focusing it on the state's capacity to regulate expression. That will not do either. I take it to be common ground among egalitarians that commercial speech ought not to receive the strong protection appropriate to political advocacy: for example, false and misleading commercial representations should not get the same protection as false and misleading political speech.⁷⁰ But the state enacts and enforces regulations of false and misleading commercial speech.

It is equally implausible to make the case rest on the refined distinctions that the state would need to draw in order to regulate sexually explicit expression--or, as in the second objection, the vague language of the regulations. Courts must constantly make extremely fine distinctions and interpret vague language. Courts decide if capital punishment is cruel, whether animal slaughter is a legitimate part of a religious practice, which imbalanced agreements are unconscionable, whether twenty-four-hour waiting periods are unduly burdensome on rights of reproductive choice, and which persons are public figures for the purposes of libel law. Why can't they, in the fullness of time, develop ways to determine which postures are servile, for the purposes of adjudication?

But don't all of these replies to the objections neglect the fact that what pornography regulations regulate is expression? And isn't it appropriate to impose a higher burden of proof on such regulations? It is not the replies that neglect this fact; it is the objections themselves that do. Indeed, that is the point of the replies, which, generically speaking, underscore that the arguments in the lawyer's battery assume

what needs to be shown: that regulations of pornography must meet a very high burden of justification, a higher burden for example than regulations of economic activity or commercial speech or personal libel. Much of the debate about pornography that pretends to assess the evidence for its harmful effects is rather about the proper burden of proof: about how compelling the evidence needs to be. More specifically, criticisms commonly assume a very high burden of justification. Of course, setting the burden very high is almost certain to defeat the regulations (scrutiny of them will be “strict in theory, fatal in fact”): they will be overtaken by concerns about speculativeness, vagueness, the availability of less restrictive alternatives, and mistrust.

But the prior question is whether the burden ought to be pushed so high. Why protect pornography so stringently that the objections in the lawyer’s battery suffice to defeat regulations? That is the question. And the arguments considered thus far do not answer it. To say this is not to dismiss the four objections, and later I will come back to them, indicating the role that they should play in the rejection of stringent regulations. But first we need to address the more fundamental question.

Stronger Case Against Regulations

What, then, is the problem with pornography regulations? To answer this question, I start with some general background on the basic expressive and deliberative interests that underlie the case for stringently protecting expressive liberty.⁷¹ Then, I develop the following two theses:

1. The same reasons that support stringent protections of, for example, artistic and political expression apply to expression that would be restricted by Indianapolis-style regulations (the same basic interests are at stake here as well).

2. Because those reasons apply, the lawyer's battery does have some force, and therefore it is important to offer other means for addressing the harms of subordination.

Basic Interests

Strong protections of expressive liberty serve three basic interests--expressive, deliberative, and informational--and the weight of those interests explains the importance of especially stringent protections.⁷² I have argued for this view elsewhere (see note 71), and will confine my remarks here to a sketch of the expressive and deliberative interests.

The expressive interest is a direct interest in articulating thoughts, attitudes, and feelings on matters of personal or broader human concern, and perhaps through that articulation influencing the thought and conduct of others. Some examples will clarify the nature of the interest and the bases of its importance.

A common feature of different evaluative conceptions is that they single out certain forms of expression as especially important or urgent; the conception implies that an agent has weighty reasons for expression in certain cases or about certain issues. Consider two central cases in which agents hold views that assign them very strong, perhaps compelling, reasons for expression:

1. In a range of cases, the limiting instance of which is a concern to "bear witness," an agent endorses a view that places her under an obligation to articulate that view, and perhaps urge on others a different course of thought, feeling, or conduct. Restricting expression would prevent the agent's fulfilling what she takes to be an obligation; it would impose conditions that the agent reasonably takes to be unacceptable. Here, expressive liberty is on a footing with liberty of conscience,

regulations are similarly burdensome, and the magnitude of the burden reflects the weight of the reasons.

2. In a second class of cases, expression addresses a matter of political justice. Here, the importance of the issue--indicated by its being a matter of justice--provides a substantial reason for addressing it. The precise content and weight of the reason are matters of controversy. According to some views, public engagement is the highest good, and Brandeis urged that "public discussion is a political duty."⁷³ But even if political expression is neither the highest good nor a matter of duty, still, it is a requisite for being a good citizen, sometimes a matter of sheer decency. Characteristically, then, it has support from substantial reasons within different moral-political conceptions.

Other important cases include an interest in creating things of beauty. But the two I have mentioned suffice to underscore the importance of the expressive interest. They work outward from the case of fully conscientious expression, the paradigm of expression supported by substantial reasons from the agent's point of view. To be sure, different evaluative conceptions have different implications for what is reasonable to say and do. But all conceptions assign to those who hold them substantial reasons for expression, quite apart from the value of the expression to the audience, and even if there is no audience at all.

My emphasis on the expressive interest may suggest that the conception of expressive liberty I sketch here is more sectarian than I claim, in particular that it depends on a general philosophy of life according to which self-expression is the fundamental human good. But no such expressivist philosophy is at work.⁷⁴ The characterization of the expressive interest focuses on the role of reasons, and that distinguishes it from conventional discussion of the value of self-expression and self-

fulfillment. When, for example, people aim to comply with the moral obligations assigned to them by their moral views (whatever the content of those views), it may be misleading to treat their action as a matter of self-expression or self-fulfillment: from the inside, the conduct is mandatory, and the agent may think that conduct important because it fulfills an obligation disconnected from the self's inner nature.⁷⁵

The *deliberative* interest has two principal aspects. The first is rooted in the abstract idea--shared by different evaluative conceptions--that it is important to do what is genuinely worthwhile, not simply what one now believes to be worthwhile. For this reason, we have an interest in circumstances favorable to finding what is worthwhile: that is, to finding out which way(s) of life are supported by substantial reasons.

The second aspect of the deliberative interest is rooted in the idea that it is important that one's evaluative views not be affirmed out of ignorance or out of a lack of awareness of alternatives. Alongside the interest in doing what the strongest reasons support, then, there is also an interest in understanding what those reasons are and the kind of support they give. This, too, leads to an interest in circumstances favorable to such understanding.

These two aspects of the deliberative interest are connected to expression because reflection on matters of human concern characteristically requires others to advance alternative views. So the deliberative interest calls for circumstances suited to understanding what is worth doing and what the reasons are that support it--for example, circumstances featuring a diversity of messages, forcefully articulated.

Finally, the *informational interest* is an interest in securing reliable information about the conditions required for pursuing one's aims and aspirations. Although sexual

expression does advance this interest, it is also less weighty than the others and so I will put it to the side.⁷⁶

Interests and Pornography

I want now to suggest that the problems with stringent regulations lie in their capaciousness. More particularly, they are--both in the underlying principles and in their details--designedly inattentive to the expressive and deliberative interests in the sexually explicit materials that are, by the lights of the regulations, pornographic.

Let's start with the expressive interest. Earlier I mentioned cases of bearing witness and of expression on matters of political justice. In a third class of cases, concerns about human welfare and the quality of human life prompt expression; the evident importance of those concerns provides substantial reasons for the expression.

A paradigm is expression about sex and sexuality--say, artistic expression (whether with propositional content or not) that displays an antipathy to existing sexual conventions, to the limited sensibilities revealed in those conventions, and the harms they impose. In a culture that is, as Kathy Acker says, "horrendously moralistic," it is understandable that such writers as Acker challenge understandings of sexuality "under the aegis of art, [where] you're allowed to actually deal with matters of sexuality."⁷⁷

Again in an interview, Kathy Acker says: "I think you'd agree there are various things in us--not all of which are kind, gentle, and tender--readers of de Sade and Genet would probably agree on this point! But I think you can explore these things without becoming a mass murderer . . . without causing real damage, without turning to real crime. One way of exploring these things is through art; there are various ways of doing this. We

have . . . to find out what it is to be human--and yet not wreak total havoc on the society."⁷⁸

The human significance of sexuality lends special urgency to the explorations Acker describes. Moreover, that urgency does not decline when sexuality mixes with power and subordination--when it is not "kind, gentle, and tender." On the contrary, a writer may reasonably think--as Acker apparently does--that coming to terms with such mixing is especially important, precisely because, in the world as it is, power is so deeply implicated in sexual identity and desire. To stay away from the eroticization of dominance and submission is to avoid sexuality as it, to some indeterminate degree, is. But because the proposed regulations address what pornography (allegedly) does, they make no provision for the importance of the expressive interest--for the weight of the reasons that move at least some people to produce sexually explicit materials that conflict with the regulations.

At this point, a proponent of the regulations may wish to concede the point about the expressive interest, but wonder why anyone would think that this interest outweighs the harms of pornography. I reply to this concern after first discussing the deliberative interest.

An essay by several members of the Feminist Anti-Censorship Task Force (FACT) suggests the connections between deliberative interests and pornography:

[The existence of pornography] serves some social functions which benefit women. Pornographic speech has many, often anomalous, characteristics. One is certainly that it magnifies the misogyny present in the culture and exaggerates the fantasy of male power. Another, however, is that the existence of pornography has served to flout

conventional sexual mores, to ridicule sexual hypocrisy and to underscore the importance of sexual needs. Pornography carries many messages other than woman-hating: it advocates sexual adventure, sex outside of marriage, sex for no other reason than pleasure, casual sex, anonymous sex, group sex, voyeuristic sex, illegal sex, public sex.⁷⁹

They describe the importance of sexually explicit materials from the audience's point of view, not--as with the expressive interest--from the speaker's, and claim that such materials enable audiences to understand sexual possibilities, perhaps to reconceive their own sexual commitments. And--though the passage just cited does not say this--that enabling is not confined to more kind and gentle erotica; it cuts across the lines drawn in the regulations.

Three features of sexually explicit expression--its diversity, interpretability, and uncertain connections with sexual practice--are important to the connections between sexually explicit materials (including materials covered by pornography regulations) and the deliberative interest.⁸⁰

By "diversity," I mean the sheer variety of pornography. Earlier, I mentioned *Shackled*, which is illustrative but not representative. There are also many Fem-Dom magazines and videos, featuring dominant women and submissive men (or a mixture of submissive men and submissive women). In fact, one study shows Fem-Dom magazines outpacing Male-Dom.⁸¹ Moreover, bondage and discipline is only one of many themes in contemporary pornography. With easy desktop publishing, low-cost VCRs, and sexual materials all over the Internet, XXX-cinemas are in decline and the pornography market is not confined to men in trench coats. The shifting technologies

and markets have apparently had important implications for content. There is more bisexual, gay male, lesbian, soft X (no erection, no penetration), and sadomasochism (downplaying genital sexuality), and more heterosexual pornography that is not organized around a culminating cum shot.⁸² The fact of diversity baffles efforts to identify a single message of pornography, underscores the “many messages” described in the FACT passage, and suggests that pornography is more than a device that triggers erections and orgasms.

By interpretability, I mean that different viewers/listeners/readers will respond to pornography differently in part because of the wide-ranging sexual beliefs, feelings, sensibilities, desires, and imaginations they bring to it. There appears to be no hope of establishing a common conception of sexuality or a shared understanding of sexual pleasure and its role in a good human life—for example, of the relative importance of love and release from conventional inhibition in making for good sex. Lacking any basis in a shared, public view about sexuality, interpretations of pornography (and reactions to it) vary widely. Like the fact of diversity, this variation makes it tendentious to suppose that hard-core, sexually explicit expression contains a single message of sexual subordination, or has a determinate effect. And the absence of a single message or determinate effect underscores the connections with the deliberative interest.

Let’s return to the case of *Shackled*. Earlier, I presented a flat interpretation of it, presenting it as a paradigm of sexualized subordination. But other readings of its message and effect are available. For example, no men appear in the pictures: does this show that phallic absence enhances phallic power, or suggest that men are irrelevant to women’s sexual pleasure? Moreover, we have a magazine evidently intended for male pleasure, which emphasizes throughout the pleasures of the shackled

women. In one interpretation, this emphasis is what erotizing subordination is all about; but perhaps Shackled is a gender-bender magazine, whose intent or effect is to encourage a male audience to identify with the shackled women who are experiencing pleasure; and perhaps the pictorial absence of men is a precondition for fully identifying with the women. Or maybe Shackled is about transgression and resistance: after all, is “screaming for hard cock” a matter of begging, or commanding? To raise these questions is not to deny the obvious: photographs of women in chains, loving their bondage, and screaming for sex are not likely to do much to reduce sexual subordination, or men’s apparently inexhaustible reserves of misogyny. But I doubt that a world without Shackled will be created by more stringent regulations of pornography, or by denying its human complexity.

Finally, the uncertain connections of pornography and practice also weaken the link between pornography and subordination, and suggest connections with the deliberative interest. Pornography is as much an ingredient of sexual fantasy as it is a guide to sexual practice. Though some may see it as reflecting or guiding practice, others will see that it provides pleasures in part precisely because it enables viewers/readers/listeners to explore in fantasy (or play) aspects of desire and identity that they do not wish to pursue in practice (the pleasure of pretending to do the forbidden). Moreover, pornography does not simply “advocate” alternatives to conventional sexual practice, but instead it shows--as Duncan Kennedy has argued about sexy dressing--the erotic possibilities that lie in the transgression of conventions: the transgression itself is important to the erotic power.⁸³

Commenting on the complex connections of pornography and practice, Susie Bright, for example, reminds us that our fantasies are not “some kind of McGuffey’s

Reader on how to live.”⁸⁴ And, speaking to the issue of transgression, she adds that the “sexual liberation” message goes further than feminism “in not just criticizing the fact that sex roles were restricting, but advocating that sex roles had erotic possibilities if you subverted them.”⁸⁵

But as this last point underscores, pornography can play a role in advancing the deliberative interest in a world of unequal power in part by engaging our sexual desires, categories, identities, and fantasies as they are—even if our aim is to transform them. On this point, Judy Butler makes an essential observation: “[S]exuality is always constructed within the terms of discourse and power, where power is partially understood in terms of heterosexual and phallic conventions. . . . If sexuality is culturally constructed within existing power relations, then the postulation of a normative sexuality that is ‘before,’ ‘outside,’ or ‘beyond’ power is a cultural impossibility and a politically impracticable dream, one that postpones the concrete and contemporary task of rethinking subversive possibilities for sexuality and identity within the terms of power itself.”⁸⁶ As applied to the issue of pornography, this proposed “rethinking . . . within the terms of power” suggests that regulations targeted particularly on the fusion of sexuality and subordination—on the apparent extremes of heterosexual and phallic conventions—will cover too much. For it may be in part by working with that fusion and acknowledging its force, rather than by simply depicting a world of erotic possibilities beyond power, that we establish the basis for transforming existing forms of sexuality.

It may be objected, however, that if reflection proceeds within the terms of power, then it does not advance the deliberative interest, which is an interest in following the promptings of reason, not the dictates of power.⁸⁷ This objection raises large issues

about practical reason that I am not able to address within the confines of this article. I will, however, make a few remarks aimed at dispelling the air of inconsistency.

The force of the objection depends on how we understand “rethinking within the terms of power.” If it is interpreted to mean that we must accept existing gender norms and relations of power as circumscribing reflection, then the rethinking is, as the objection complains, disconnected from the deliberative interest. But “within the terms of power” should not be understood to imply such acceptance.⁸⁸ I take it to stand for the less controversial thesis that practical reflection must use as a point of departure norms (of gender, for example) and categories (of sexual orientation and conduct, for example), as well as images and desires, shaped by relations of power. Even on this interpretation of the phrase, however, the objection would still raise serious troubles *if* acknowledging the role of power-laden norms, categories, images, and desires in practical reflection required us to give up the idea that some patterns of conduct are better supported by reasons than others or the interest in pursuing those patterns. But no such nihilism about practical reason follows. Even if reflection uses power-laden norms and categories, we still have a reason to go to the store if we are hungry and know we can get food there; we still have a reason to believe that $2+2=4$, not to poison two-year-old children, and to be open to relevant evidence. To give such examples is not, of course, to answer the question: What is a reason (whether theoretical or practical)? That question lacks a simple answer. But whatever the correct explication, the intuitive force of claims about reasons of the kind just noted stands as an obstacle to any straightforward route from power-ladenness to nihilism.

A Digression on Method

I want to digress for a moment to comment on a feature of my argument that may not have gone unnoticed. I have principally cited women in my discussion of the connections between pornography and the expressive and deliberative interests. There may be some temptation to dismiss their remarks as collaboration, yet further evidence that pornography constructs women as the “agents” of their own subordination--that all they “do” is collaborate. After all, “[i]t would be surprising if men eroticized dominance, practiced it, and enforced it over women, and there were no women who eroticized subordination. The surprise is that so many of us don’t. . . .”⁸⁹ And there is a temptation as well to treat my citations of women as “hiding behind skirts.”⁹⁰

Both complaints have some force. But in the end I find it difficult simply to dismiss as collaboration considerations about the expressive and deliberative values of sexual expression. Those claims seem very plausible, and I see no *independent* evidence of collaboration.

As to hiding behind skirts: what else can I do to make the case for the expressive and deliberative interests? Refer to men who think pornography is great?⁹¹

Interests and Pornography, Redux

Let’s return, then, to the interests and the regulations. Suppose one accepts the connections with expressive and deliberative interests, and agrees about the importance of those interests. That may suffice to establish the first thesis I stated at the beginning of this section: that the same reasons that support stringent protections of, for example, artistic and political expression apply to expression that Indianapolis-style regulations would restrict. Still, the trouble for the regulations may not be obvious, for it might be thought that we now simply have a stand-off. On the one hand, we have a

case that pornography is seriously injurious; on the other, a case for connections with important human interests. Indeed, given the importance of substantive equality, appealing to the idea that it advances weighty interests will strike some as applauding rank self-indulgence, or as worrying more about artists and male orgasms than about women's lives.

This objection misstates the argumentative situation. In my earlier discussion of the "Policy Case Against Regulation," I did not dismiss the conventional criticisms, but complained that they assume what needs showing--that the regulations must satisfy a very high burden of justification. The weight of the considerations in the lawyer's battery--about the speculativeness of arguments supporting regulation and the importance of exploring less restrictive alternatives for addressing abuse and subordination--is not freestanding; instead, it reflects the importance of the regulated target.⁹² Thus, more speculative arguments will suffice when basic interests are not at stake. But given the importance of expressive and deliberative interests, and the connections between sexual expression and those interests, the high burden of justification is appropriate, and each of the four criticisms raises a serious objection to stringent regulations. Thus the second thesis: because the reasons for supporting stringent protections of, for example, artistic and political expression carry over to expression that Indianapolis-style regulations restrict, the lawyer's battery has some force; so we need to find other means to address the harms of subordination.

Alternative Strategies

Proposals to regulate pornography are animated by the damage pornography (allegedly) does to the cause of substantive sexual equality. I have criticized the

remedies. But because substantive equality is a fundamental political value, critics need to say something about alternative remedies. What might some alternative strategies be for addressing the problems of subordination that pornography regulations aim to address? Here I want to make three suggestions.

Before getting to the suggestions though, I emphasize that I offer them as supplements to, not substitutes for, familiar economic initiatives for achieving sexual equality and undermining the vulnerability that comes with inequality: say, policies of comparable worth to reduce unequal compensation within segregated labor markets, and a range of policies--including quality day care, flextime, parental leaves, mandatory support from absent fathers, equal legal entitlements to wage and salary income in the case of single-earner households, and a new framework of divorce law designed to equalize standards of living for post-divorce households--to address the unequal division of household labor.⁹³

More immediately, then:

1. If the problem with pornography is that it legitimates sexual abuse and force by sexualizing it, then a first natural step would be to target sexual abuse--the abuse of women as women--more directly. Such targeting might, for example, include a tort of domestic sexual harassment modeled on workplace sexual harassment--including elements of quid pro quo and hostile environment harassment.⁹⁴ To be sure, the modeling would need to be very loose: sex is supposed to play some role in the lives of married couples; it is not supposed to play a role in the lives of people who happen to be working in the same office. But extreme sexual demands coupled with threats, or public sexual humiliation, might be forms of domestic sexual harassment. And such a

tort could be a natural setting for actions against forcing pornography on a person, one element in the pornography ordinance I discussed earlier.

2. My second suggestion emerges from a claim commonly stated in debate about issues of expression: that the way to combat the injuries of speech is, as Justice Brandeis said, with more speech.⁹⁵ Brandeis's point is tirelessly repeated in discussions of freedom of expression. But the context of his remark is important. Brandeis was writing about a case of "subversive advocacy." He did not, however, address his remarks to the advocates: Anna Whitney, a 1920s leftist, was trying to speak; the state was shutting her up. Brandeis was reminding political elites of their vast resources for responding to arguments for revolutionary change: they might, for example, try to cure the social ills that prompt them or to argue the case against a revolutionary solution.

Addressed to less powerful groups, with restricted access to means of expression or whose voice is in other ways excluded or silenced, the easy injunction "More speech!" loses its force. Recommending "more speech" carries with it an obligation to ensure fair access to facilities of expression. It is unacceptable to impose a high burden on justifying restrictions on expression, justify that burden in part by the possibilities of combating the harms of expression with more speech, and then not endorse the requirement of ensuring such facilities.

The implications of this observation in the area of conventional political speech are easy to see. In that setting, fair access means: ensuring open public forums for expression; affirming the importance of diverse broadcast messages and the role of fair access in contributing to such diversity; financing political campaigns through public resources; and regulating private political contributions and expenditures.

Applied to the case of subordination, the implications are less clear because the mechanisms of exclusion--or "silencing"--do not have principally to do with the distribution of material resources, but--it is argued--precisely with what is said. So here there may be serious tensions between a commitment to fair access and an opposition to regulating the content of expression.

But we should resist jumping too quickly to this conclusion. For other measures of empowerment that are more affirmative than regulations of expression may show real promise in combating silencing and exclusion. Among the possibilities are regular public hearings on sexual abuse--perhaps subsidies for women's organizations to hold such hearings⁹⁶--or easier access of women to broadcast licenses. Moreover, insofar as silencing has economic foundations, efforts to ensure fair compensation and to address the traditional division of household labor would help.

3. Some regulations of violent pornography are not so vulnerable to the criticisms leveled earlier against the Indianapolis-style regulation. The central idea would be to define regulable pornography as a subcategory of the obscene expression that the Court now treats as having lower value. Consider an illustrative proposal.

Take obscenity, as currently understood. As I mentioned earlier, this category is defined so that material falls into it only if it is prurient, offensive, and lacking an intimate connection with First Amendment values. Putting to the side the puzzling role of prurience in the rationale for the category,⁹⁷ the idea is straightforward: low value reduces the case for protection and thereby permits regulation in the name of otherwise insufficient concerns about offensiveness. Accepting for the sake of argument that obscenity does not have First Amendment protection, one natural strategy would be to regulate the subcategory of obscene materials that sexualize subordination, or, more

narrowly, that sexualize violence. The strong presumption against regulation would be reduced because none of the obscene has a strong claim to protection--that is how the category has been defined. Assuming that reduced presumption, it ought to be permissible to regulate obscenity where there is a case for harm--in particular, violent pornography.⁹⁸ Indeed, that case ought to carry some weight even if one rejects offensiveness altogether as a basis for regulation, and so rejects obscenity regulations as currently understood.

If the principal reason for opposing Indianapolis-style pornography regulations is that the capacious category of the pornographic includes much that has substantial value, then a proposal along these lines may be workable. But the U.S. Supreme Court's decision in R.A.V. v. St. Paul--striking down a hate speech regulation--appears to block this subcategorization strategy.⁹⁹ In R.A.V., the Court majority held that it was impermissible to target a regulation on the hate speech that falls into the regulable category of fighting words. According to the Court, it is permissible to target a regulation on all fighting words, or on the especially provocative fighting words, because the provocativeness of fighting words underlies the permission to regulate them. But it is not permissible to target the hateful or racially insulting subcategory of fighting words: that is content regulation, as it would be content regulation to target violent pornography in which Republican men are the perpetrators.

By analogy, my guess is that the Court might accept regulations confined to obscene material that is grossly offensive--say, sex with animals or golden shower movies--for the offensiveness of obscenity is the reason for permitting its regulation. But they would not accept regulations targeted on the subcategory of obscene material that sexualizes violence: that would be content or viewpoint regulation. Here I disagree with

Owen Fiss.¹⁰⁰ Fiss argues that regulations of pornographic obscenity would be acceptable because they would regulate the subset of obscene material that is especially extreme from the point of view of the very considerations that initially justify regulating obscenity: “to protect women from violence and sexual abuse.”¹⁰¹ But this seems wrong. The rationale for obscenity regulations lies in offensiveness, not in protecting women from violence and sexual abuse. For that reason, the court’s position suggests a willingness to accept regulations of the grossly offensive, but not the pornographically obscene.

I think this is an indefensible position. And perhaps I am wrong about the Court’s response to the subcategorization strategy in this area. But even if I am, I do not think that pressing for such regulations would be a very wise political investment; the third point in the lawyer’s battery strikes me as relevant here. I doubt that regulations focused on sexually violent obscenity would do much work in addressing the harms of subordination. Suppose we agree that pornography, through cognitive or behavioral means, fuses sexual desire with the desire for subordination. Still, it seems very implausible that such fusion occurs through the consumption of violent pornography, which is not especially prominent, even in outlets dedicated entirely to hard-core, sexually explicit magazines, videos, and paraphernalia.¹⁰²

Here, however, we arrive at a familiar disagreement about effectiveness. It is not a disagreement of political principle--not a division on the importance of values of free expression and substantive equality--and treating it as one serves only to weaken support for those values.

Conclusion

Replying to a question put to her after a lecture several years ago, Catharine MacKinnon said that “equality is important but pleasure is too.” And she criticized those who do not accept that “equality matters on any level approximate to pleasure.”¹⁰³ The criticism is well taken. That’s why we need to attack the injustice of inequality and subordination while accommodating the importance of pleasure. Perhaps there is no way to do both. But without a compelling case for its impossibility, such pessimism seems unwarranted.

This chapter began as a reply to a talk at Brown University by Catharine MacKinnon on "Pornography: Left and Right" (March 1993). I presented a draft in my fall 1993 Political Philosophy seminar at MIT, and later versions at Wesleyan University, McGill University Law School, and the Central Division meeting of the American Philosophical Association (spring 1995). I am grateful to those audiences, and to Cass Sunstein and Pam Spritzer, for helpful criticisms, and to Karen Rothkin for research assistance.

ENDNOTES

¹“Women in the Public Domain: Sexual Harassment and Date Rape,” in *Sexual Harassment: Women Speak Out*, ed. Amber Coverdale Sumrall and Dena Taylor (Freedom, Calif.: Crossing Press, 1992), 3. This passage restates a central message of Dworkin’s earlier writing on pornography: that the Right’s celebration of domesticity and the Left’s celebration of sexual liberation represent two variations on the same malign themes--a practice of male dominance, an ideology of male supremacy, and a metaphysics of women as whores. See Andrea Dworkin, *Pornography: Men Possessing Women* (New York: Penguin, 1981), 203->09.

² The American conflict over pornography regulation has parallels elsewhere, for example in British debate in the early 1990s. For debate among British feminists, see Catherine Itzin, ed., *Pornography: Women, Violence, and Civil Liberties* (Oxford: Oxford University Press, 1992); Feminists Against Censorship, *Pornography and Feminism: The Case Against Censorship*, ed. Gillian Rodgeron and Elizabeth Wilson (London: Lawrence and Wishart, 1991); Lynne Segal and Mary MacIntosh, eds., *Sex Exposed: Sexuality and the Pornography Debate*. (London: Virago Press, 1992).

³ On the distinction, see John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), sec. 12; Brian Barry, *Theories of Justice* (Berkeley: University of California Press, 1989), secs. 26->28.

⁴ Catharine MacKinnon, “Privacy v. Equality: Beyond Roe v. Wade,” in her *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1983), 100.

⁵ On equality as the basis for pornography regulation, see Catherine MacKinnon, *Only Words* (Cambridge: Harvard University Press, 1993), part 3. On feminist opposition to

pornography regulation, see Nadine Strossen, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* (New York: Scribner, 1995), 31<->5.

⁶ See John Rawls, "The Basic Liberties and Their Priority," in *Political Liberalism* (New York: Columbia University Press, 1993), lecture 8, secs. 7, 12; Charles Beitz, *Political Equality* (Princeton: Princeton University Press, 1989), chap. 9.

⁷ "The law of equality and the law of freedom of speech are on a collision course in this country." MacKinnon, *Only Words*, 71.

⁸ The regulations favored by MacKinnon and Dworkin are civil, not criminal, and it might therefore be said that they are not "stringent." But stringency should not be settled by reference to regulatory form; it depends on the extent of a regulation's coverage, and the sanctions attached to violating it. Restrictions on political speech prior to *New York Times v. Sullivan* were stringent, though they derived from tort law.

⁹ For a striking and interesting exception, see Susan E. Keller, "Viewing and Doing: Complicating Pornography's Meaning," *Georgetown Law Journal* 81: 2195<->2228. See also Nadine Strossen, *Defending Pornography*. Strossen's book, published after I completed the penultimate draft of this chapter, argues that pornography regulations conflict with settled First Amendment doctrine, and that they would be bad for women's rights and equality, both because their enforcement would likely be damaging to women, and because they rest on distorted views of women (as victims), sex (as degrading to women), and pornography (as uniformly negative about women). Although I dislike the book's polemical tone and cartoonishly simple picture of the First Amendment, I agree with much of its content, and with Strossen's effort to engage the substance of sexual expression and not simply its doctrinal status.

¹⁰ The classic version of this strategy of argument is Judge Easterbrook's opinion in *American Booksellers Ass'n. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), affirmed without opinion, 475 U.S. 1001 (1986).

¹¹ On reduced protection of commercial speech, see C. Edwin Baker, *Human Liberty and Freedom of Speech* (Oxford: Oxford University Press, 1989), chap. 9; Rawls, “The Basic Liberties,” 363->68.

¹² For an especially clear statement of these themes and their connections, see Catharine MacKinnon, “Pornography as Defamation and Discrimination,” *Boston University Law Review* 71 (1991), 795->802. She emphasizes (at 796): (1) that women are “used, abused, bought, sold, and silenced,” (2) that “this condition is imposed by force,” and (3) that “pornography has a central role in actualizing this system of subordination in the contemporary West.” My presentation in the text aims to fill out these three points and make the connections more explicit. Also, see Catherine Itzin, “Pornography and the Social Construction of Sexual Inequality,” in Itzin, *Pornography*, chap. 2; Wendy E. Stock, “Feminist Explanations: Male Power, Hostility, and Sexual Coercion,” in *Sexual Coercion: A Sourcebook on its Nature, Causes, and Prevention*, ed. Elizabeth Grauerholz and Mary A. Koralewski (Lexington, Mass.: Lexington Books, 1991), 61->73.

¹³ On abuse, see MacKinnon, *Only Words*, 7. More generally, see, for example, Susan Faludi, *Backlash: The Undeclared War Against American Women* (New York: Crown, 1991); Susan Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989), chap. 7.

¹⁴ On sexual abuse as a disciplinary device, see Duncan Kennedy, “Sexual Abuse, Sexy Dressing, and the Eroticization of Domination,” in *Sexy Dressing*: (Cambridge: Harvard University Press, 1993), 147->62. Wendy Stock summarizes some of the empirical literature linking fear of assault (rape, in particular) with (“self-imposed”) behavioral restrictions in her “Feminist Explanations,” 67.

¹⁵ Of course the fact of disadvantage--the imbalance of power--also explains vulnerability to the imposition of sanctions. Coercion, then, reflects the vulnerability that

it helps to sustain. For an interesting and subtle discussion of the issue of male benefit, see Kennedy, "Sexual Abuse," 138->47.

¹⁶ "Some [women] eroticize dominance and submission; it beats feeling forced. Sexual intercourse may be deeply unwanted--the woman would never have initiated it--yet no force may be present. Catharine MacKinnon, "Feminism, Marxism, Method, and the State," *Signs* 8 (1983), 650; also MacKinnon, "Does Sexuality Have a History?" in *Discourses of Sexuality*, ed. Domna C. Stanton (Ann Arbor: University of Michigan Press, 1992), 134.

¹⁷ Affirming and linking the third and fourth points, Jane Caputi says that rape, like femicide, "is a social expression of sexual politics, an institutionalized and ritual enactment of male domination, and a form of terror that functions to maintain the power of the patriarchal order [point three]. Femicide, moreover, is not only a socially necessary act; it also is experienced as pleasurable and erotic [point four]." Caputi assumes--though she does not say here--that its being experienced as pleasurable and erotic helps to explain why it is done, that is, why acts that are "socially [i.e., functionally] necessary" are actually performed (see point 5 in the text). See Caputi, "Advertising Femicide: Lethal Violence Against Women in Pornography and Gorenography," in *Femicide: The Politics of Women Killing*, ed. Jill Radford and Diana E.H. Russell (New York: Twain Publishers, 1992), 205.

¹⁸ Whereas point 4 alleges a fact about sources of sexual excitement, point 5 gives prominent place to that fact--as distinct from, say, the sexual division of household labor, or early patterns of socialization, or strategies of human capital investment--in explaining sexual inequality.

¹⁹ Nothing in the argument requires affirming (or denying) the naturalness of some form of sexual desire. The distinction between a natural and socially constructed form of sexual desire traces at least to Rousseau. See his *Discourse on the Origin and*

Foundations of Inequality Among Men, trans. Victor Gourevitch (New York: Harper and Row, 1986), 163->66.

²⁰ Strossen badly misunderstands MacKinnon's views on this point. She says that "procensorship feminists," including MacKinnon, believe that men are "essentially bestial" (*Defending Pornography*, 113). It is difficult to understand how a reader of MacKinnon's work could think that MacKinnon believes that men or women are *essentially* anything. For example: "Sometimes people ask me, 'Does that mean you think there's no difference between men and women?' The only way I know how to answer that is: of course there is; the difference is that men have power and women do not. I mean simply that men are not socially supreme and women subordinate by nature; the fact that socially they are, constructs the sex difference as we know it. I mean to suggest that the social meaning of difference--in this I include *différance* [sic]--is gender-based" ("Desire and Power," in *Feminism Unmodified*, 51). Strossen offers a misinterpretation of a passage from *Only Words* as supporting evidence.

²¹ MacKinnon, "Pornography as Defamation and Discrimination," 802.

²² MacKinnon, "Pornography, Civil Rights, and Speech," *Harvard Civil Rights--Civil Liberties Law Review* (1985), 17.

²³ MacKinnon, "Pornography as Defamation and Discrimination," 796. John Stoltenberg puts the point still more strongly: "Pornography is what makes subordination sexy" [my emphasis]. See his "Gays and the Pornography Movement: Having the Hots for Sex Discrimination," in *Men Confronting Pornography*, ed., Michael Kimmel (New York: Crown Publishers, 1990), 260.

²⁴ The experimental literature on the effects of exposure to violent pornography in particular appears to bear out this claim about the importance of presenting women as "willing victims." In experimental settings, men who are not antecedently angry at a woman (the confederate in the experiments) are then exposed to a rape video in which

the victim expresses pleasure at the end. They are more likely to be aggressive with the confederate in subsequent stages of the experiment than men who are exposed to a rape video in which the woman is said to find the experience humiliating and degrading. See Edward Donnerstein, Daniel Linz, and Steven Penrod, *The Question of Pornography: Research Findings and Policy Implications* (New York: Free Press, 1987), 98.

²⁵ Catharine MacKinnon, “Frances Biddle’s Sister,” in *Feminism Unmodified*, 172.

²⁶ Andrea Dworkin, “Against the Male Flood,” in *Pornography*, 527.

²⁷ I suspect that adherents of the view sketched in the text implicitly assume that such a close fit between structure and psychology is required for the reproduction of sexual inequality. But there are many reasons, short of full endorsement, for compliance with, or consent to, system of inequality. For one discussion of such reasons, see Joshua Cohen and Joel Rogers, *On Democracy* (New York: Penguin, 1983), chap. 3.

²⁸ Catharine MacKinnon, “Not a Moral Issue,” in *Feminism Unmodified*, 148.

²⁹ Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1990).

³⁰ MacKinnon, “Pornography as Defamation and Discrimination,” 802. It is not clear in this article whether MacKinnon endorses the behavioral mechanism described in the text; it is more strongly suggested in *Only Words*, 16. Diana E.H. Russell provides the clearest statement in “Pornography and Rape: A Causal Model,” in *Pornography: Women, Violence, and Civil Liberties*, ed. Catherine Itzin (Oxford: Oxford University Press 1992), 324. Also, see Stoltenberg, “Pornography, Homophobia, and Male Supremacy,” in *ibid.*, 148.

³¹ Several proponents of pornography regulation have argued that its direct effects on the body, unmediated by cognition, remove it from the category of protected expression. For discussion and criticism, see David Coles, “Playing by Pornography’s Rules: The

Regulation of Sexual Expression,” University of Pennsylvania Law Review, 143, no. 1 (November 1994): 124->27.

³² See MacKinnon, Only Words, 61->62.

³³ See, for example Henri Tajfel, Differentiation Between Social Groups: Studies in the Social Psychology of Intergroup Relations (London: Academic Press, 1978).

³⁴ Editorial, Shackled no. 9 (May 1993): 2.

³⁵ MacKinnon, “Not a Moral Issue,” 148.

³⁶ MacKinnon, “Pornography as Defamation and Discrimination,” 802.

³⁷ MacKinnon, “Not a Moral Issue,” 148.

³⁸ MacKinnon, “Francis Biddle’s Sister,” 178; also MacKinnon, Feminist Theory of the State, 204.

³⁹ Minneapolis Public Hearings, cited in Donnerstein, Linz, and Penrod, The Question of Pornography, 139.

⁴⁰ MacKinnon, Only Words, 22.

⁴¹ MacKinnon, “Francis Biddle’s Sister,” 172; Only Words, 11, 22. For proposals about how to interpret the claims that pornography subordinates and silences, see Rae Langton, “Speech Acts and Unspeakable Acts,” Philosophy and Public Affairs 22, no. 4 (fall 1993): 293->330; Andrew Altman, “Liberalism and Campus Hate Speech: A Philosophical Examination,” Ethics 103 (January 1993): 302->17.

⁴² As MacKinnon emphasizes, the claim that some pornography is made using coercion is not the “legal basis for restricting all of it (Only Words, 20). Still, the pornography industry appears especially sensitive to the charge that coercion and abuse are central to the production of pornography. This sensitivity is highlighted in the Code of Ethics adopted by the Free Speech Coalition (an Industry association). Five of eight items in the Code address issues about the consensual nature of the production of pornography (including one that condemns the use of drugs and alcohol in production, and another

that requires performers to be old enough to give their consent). See *Adult Video News* 8, no. 7 (June 1993), 24. On the extent of force in production, see Strossen, *Defending Pornography*, chap. 9.

⁴³ For discussion of speech act theory and pornography, see Langton, "Speech Acts." According to Langton, pornography subordinates (and silences) only if pornographers' speech is authoritative about matters of sex (p. 311). I cannot see how this could settle the issue, because their speech may be authoritative because people regard them as "in the know" and so listen to them. Or it might be that men who think that women enjoy subordination go to pornography to learn how to do it (not because a producer of pornography is in authority, but because he or she is an authority). No amount of speech act theory is going to shift the debate away from causal argument and questions about the assignment of responsibility.

⁴⁴ For criticism of the project of founding an account of freedom of expression on a prior expression-action distinction, see Thomas J. Scanlon, "A Theory of Freedom of Expression," *Philosophy and Public Affairs* 1 (1972), 205-208.

⁴⁵ Indianapolis, Ind., City-Council General Ordinance No. 35 (June 11, 1984). The full text is cited in MacKinnon, *Feminism Unmodified*, 274, n. 1. The regulation was overturned in *American Booksellers Ass'n. v. Hudnut*.

⁴⁶ Owen Fiss, for example, describes the materials covered by the trafficking provision as "the most violent and brutal forms of pornography." See his "Freedom and Feminism," *Georgetown Law Review* 80, no. 6 (August 1992), 2051.

⁴⁷ See *Susie's Bright's Sexual Reality: A Virtual Sex World Reader* (Pittsburgh and San Francisco: Cleis Press, 1992), 27-36. Consider, too, the sexual fantasies involving animals reported in Nancy Friday, *Women on Top* (New York: Simon and Schuster, 1991), 106-11, 444-45. The passages reporting these fantasies appear also to fall into the fourth category.

⁴⁸ See Miller v. California 413 U.S. 15 (1973).

⁴⁹ On the problems of showing prurience, see MacKinnon, Only Words, 88.

⁵⁰ *Ibid.*, 100.

⁵¹ MacKinnon criticizes the reputational injury view of pornography in “Pornography as Defamation and Discrimination”; see also MacKinnon, Only Words, 11.

⁵² It does seem to inspire such reactions in some women: a survey published in Cosmopolitan in March 1990 reported that 66 percent of respondents (all women) did not enjoy seeing pornography, 32 percent felt disgusted, 32 percent felt offended, 31 percent felt guilty, and 18 percent felt frightened. See Catherine Itzin and Corinne Sweet, “Women’s Experience of Pornography,” in Pornography: Women, Violence, and Civil Liberties, ed. Catherine Itzin (Oxford, Oxford University Press, 1992), 228.

⁵³ “The ineffectualness of obscenity law is due in some part to exempting materials of literary, political, artistic, or scientific value. Value can be found in anything, depending, I have come to think, not only on one’s adherence to postmodernism, but on how much one is being paid. And never underestimate the power of an erection, these days termed ‘entertainment,’ to give a thing value.” MacKinnon, Only Words, 87->88.

⁵⁴ On the presumption, see Cohen v. California 403 U.S. 15 (1971).

⁵⁵ See Carlin Meyer, “Sex, Censorship, and Women’s Liberation,” Texas Law Review 72 (1994): 1097->1201.

⁵⁶ In a discussion of pornography and advertising, Jane Caputi lumps together sexism without sex or violence (an Yves Saint Laurent stocking ad), sexism and violence without explicit sex (Brian de Palma movies), sexism and sex without violence (Penthouse Magazine), and the combination of sexism, sex, and violence (the movie Cunt Torture). According to Caputi, they all have the effect of “reflecting, normalizing, and legitimating violence against women.” She does not indicate the regulatory

implications of this conclusion. See Caputi, "Advertising Femicide," 203-221. For MacKinnon's response to the question in the text, see her Only Words, 61-2.

⁵⁷ See, for example, Feminists Against Censorship, Pornography and Feminism, 28-9. The suggestion there is that the focus on sexual explicitness reflects a strategy of political alliance aimed at winning conservative, antisex allies.

⁵⁸ See Strossen, Defending Pornography, 39.

⁵⁹ Feminists Against Censorship, Pornography and Feminism, 69; Strossen, Defending Pornography, 75.

⁶⁰ Susie's Bright's Sexual Reality, 17-26.

⁶¹ Ibid., 24. I have edited out inessential details, and omitted ellipses.

⁶² See Burstyn, "Beyond Despair," 158, and Strossen, Defending Pornography, 217-46, particularly her discussion of Canadian regulation in the wake of Butler v. the Queen, 1 S.C.R. 452 (1992, Canada).

⁶³ See Feminists Against Censorship, Pornography and Feminism, 69.

⁶⁴ For an interesting discussion of pornography and safe sex videos--delivered at such a conference--see Cindy Patton, "Safe Sex and the Pornographic Vernacular," in How Do I Look: Queer Film and Video, ed. Bad Object-Choices (Seattle: Bay Press, 1991), 31-51, and the discussion at 51-63.

⁶⁵ MacKinnon, Feminist Theory of the State, 161-2.

⁶⁶ For a review of the literature, see Donnerstein, Linz, and Penrod, Question of Pornography, esp. chap. 6.

⁶⁷ It is not up to them whether to ensure substantive equality: justice demands that.

⁶⁸ Frank Michelman, "Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulations," Tennessee Law Review 56 (1989): 291-322.

⁶⁹ See Fiss, "Freedom and Feminism," 2052.

⁷⁰ For an argument based more fundamentally on mistrust, see Richard Epstein, *University of Chicago Law Review* 59 (1992): 41<->90. For criticisms, see Frank Michelman, “Liberties, Fair Values, and Constitutional Method,” *University of Chicago Law Review* 59 (1992): 91<->114.

⁷¹ This discussion of the fundamental interests draws on my “Freedom of Expression,” *Philosophy and Public Affairs* 22, no. 3 (Summer 1993), sec. 3.

⁷² Freedom of expression is commonly associated with such values as the discovery of the truth, individual self-expression, a well-functioning democracy, and a balance of social stability and social change. See Thomas Emerson, *The System of Freedom of Expression* (New York: Random House, Vintage, 1971). Lee C. Bollinger emphasizes as well the importance of encouraging tolerance in *The Tolerant Society* (Oxford: Oxford University Press, 1986); and Vincent Blasi examines the role of freedom of expression as a check on official misconduct in “The Checking Value in First Amendment Theory,” *American Bar Foundation Research Journal* 3 (1977): 521<->649. I think that the tie to the basic interests provides a more fundamental explanation for the protections. For discussion, see Cohen, “Freedom of Expression,” secs. 3, 4.

⁷³ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)

⁷⁴ On expressivism, see Charles Taylor, *Sources of the Self: The Making of Modern Identity* (Cambridge: Harvard University Press, 1989), chaps. 21, 24, 25.

⁷⁵ Kantians will identify acting from the moral law with revealing our nature as free, reasonable beings. Although I do not wish to dispute the truth of that view, I think that a conception of free expression should not depend upon it. For discussion, see Cohen, “Freedom of Expression,” 223<->4.

⁷⁶ On pornography’s informational role, see Strossen, *Defending Pornography*, 165<->67.

⁷⁷ See Kathy Acker, "Devoured by Myths: An Interview with Sylvère Lotringer," in *Hannibal Lecter, My Father* (New York: Semiotext(e), 1991).

⁷⁸ Kathy Archer interview by Andrea Juno in *Angry Women*, ed. Andrea Juno and V. Vale (San Francisco: Re/Search Publications, 1991), 184->85.

⁷⁹ Lisa Duggan, Nan Hunter, and Carole Vance, "False Promises: Feminist Antipornography Legislation," in *Caught Looking: Feminism, Pornography, and Censorship*, ed. Kate Ellis, Beth Jaker, Nan D. Hunter, Barbara O'Dair, Abby Tallmer (East Haven, Conn.: Long River Books, 1992), 82.

⁸⁰ These points are common in what Judith Butler calls the "pro-sexuality movement within feminist theory and practice." See her *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990), 30->31; see also Susan Keller, "Viewing and Doing: Complicating Pornography's Meaning," *Georgetown Law Review* 81 (1993): 2195->2228; Duncan Kennedy, *Sexy Dressing*, 126->213.

⁸¹ See Lynne Segal's Introduction to *Sex Exposed*, 6.

⁸² On the many varieties of pornography, see Linda Williams, "Pornographies on/scene," in *Sex Exposed: Sexuality and the Pornography Debate*, ed. Lynne Segal and May McIntosh (London: Virago, 1972), *ibid.*, 233->65; Cindy Patton, "Safe Sex," 31->51; and the interview with "Kay," in Robert Stoller, *Porn: Myths for the Twentieth Century* (New Haven: Yale University Press, 1991), 120->25. For a striking illustration of market fragmentation, see the list of alt.* newsgroups on Internet.

⁸³ "Sexual expression . . . subverts every taboo by making it a fetish. The forbidden is simultaneously eroticized." Cole, "Playing By Pornography's Rules," 116.

⁸⁴ See the interview of Susie Bright by Andrea Juno in *Angry Women*, 201.

⁸⁵ *Ibid.*, 202.

⁸⁶ Butler, *Gender Trouble*, 30.

⁸⁷ I am indebted to Susan Dwyer for raising this objection.

⁸⁸ “[T]o operate within the matrix of power is not the same as to replicate uncritically relations of domination.” Butler, *Gender Troubles*, 30. More generally, *Gender Trouble* is about displacing gender norms (p. 148) by understanding identity generally and gender identities in particular as performances, grasping the diversity of those performances, and developing a vocabulary suited to that diversity (as distinct from the binary oppositions that dominate current discourse).

⁸⁹ MacKinnon, “Does Sexuality Have a History?” 134, and MacKinnon, “On Collaboration,” in *Feminism Unmodified*, 198->205.

⁹⁰ I borrow the phrase from Catharine MacKinnon. She used it at the Brown conference mentioned at the beginning of these notes in connection with the phenomenon of citing women in arguments against pornography regulations.

⁹¹ But for some thoughtful remarks, see Kennedy, “Sexual Abuse,” 210->11.

⁹² This is the point of the familiar idea in constitutional law, that the level of scrutiny depends on the regulated target.

⁹³ See, for example, Okin, *Justice, Gender, and the Family*, chap. 8.

⁹⁴ I take the proposal from Kennedy, “Sexual Abuse,” 135.

⁹⁵ *Whitney v. California*, 274 U.S. 357 (1927). This and subsequent paragraphs on fair access draw on Cohen, “Freedom of Expression.”

⁹⁶ For a more general discussion of associative approaches to reconciling egalitarian and liberal commitment, see Joshua Cohen and Joel Rogers, “Secondary Associations and Democratic Governance,” *Politics and Society*, 20, no. 4 (December 1992): 393->472.

⁹⁷ If material is low-value and offensive, what does prurience add to the case for regulation?

⁹⁸ On the evidence that violent pornography is harmful, see Donnerstein, Linz, and Penrod, *Question of Pornography*.

⁹⁹ *R.A.V. v. St. Paul*, 122 S. Ct. 2538 (1992).

¹⁰⁰ See Fiss, "Freedom and Feminism," 2056, and n. 50.

¹⁰¹ Fiss, "Freedom and Feminism," 2056.

¹⁰² So it seems from outlets in Boston and New York, where sadomasochism (not always violent) is simply one among many niches--hetero, gay, bi, anal, oral, coeds, TV/TS, group, enema, and so on. More systematic surveys confirm the results of my causal inspection. For a discussion of some of the evidence on low and *declining* rates of violent imagery, see Lynn Segal's introduction to *Sex Exposed*, 6 (and the studies cited in notes 12 and 13).

¹⁰³ MacKinnon, "Does Sexuality Have a History," 134.