

# WOMEN, THE FIRST AMENDMENT, AND PORNOGRAPHY: AN HISTORICAL PERSPECTIVE

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## ABSTRACT

This article provides historical background for the questions of when and why feminists begin to view pornography as a crucial issue confronting women. It traces the emergence of obscenity as a category apart from the political, reflecting the nineteenth century split between sacred and secular. It discusses First Amendment challenges to suppression of birth control information. And it points out how the contemporary women's movement has challenged traditional interpretations of obscenity.

When the First Amendment was added to the Constitution of the United States in 1791, it was doubtful that anyone had ever heard of

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the term pornography. True, a little book titled *Le Pornographe* ("The Pornographer") had appeared in France in 1769, written by Nicholas Edme Restif, who intended it as an appeal for state-run brothels. Possibly the book circulated in the infant United States, but no record exists of any controversy surrounding it. For 60 years it remained the only significant work of its kind. Therefore, it can be said that pornography, often described as a portrayal of bizarre sexual activity designed to promote sexual arousal, did not exist as a problem in free expression when the First Amendment guaranteed freedom of speech and press as a right for all U.S. citizens (Kendrick, 1987, pp. 19–20).

Today pornography is said to be a multi-billion-dollar-a-year industry dominated by organized crime. A battle has emerged between feminists and civil libertarians over whether pornography can be restrained without endangering First Amendment rights. The purpose of this paper, however, is not to argue the merits of either side, but to set the controversy within an historical context. Its aim is to provide background to explore the questions of when and why feminists begin to view pornography as a crucial issue confronting women. To provide context it is necessary to review legal decisions based on conflict between the First Amendment and suppression of obscene materials (McCraw 1984, pp. 23–24).

## NINETEENTH-CENTURY BACKGROUND

As a recent author on pornography, Walter Kendrick, put it, "Though the nineteenth century invented 'pornography,' it did not invent the obscene." The concept of the obscene, an old-fashioned term compared to pornography, its modern counterpart, is an exceedingly durable one in history. Excavations at Pompeii proved the Romans had been fond of licentious painting and ornamentation. Interestingly, women and others of inferior social status were not allowed to see these works when they were uncovered in the eighteenth and nineteenth centuries. Only gentlemen of means could gain entry to the locked rooms that concealed these notorious objects (Kendrick 1987, pp. 1–11).

Three obscene books, *La Puttana Errante*, *L'Ecole des filles*, and *Satyra Sotadica*, all appeared in Europe in the 1650s and were soon translated into all major languages. They contain all the trademarks of present-day pornography—lesbianism, sodomy, seduction, multiple

copulation, flagellation, sadism, violence toward women and stereotyped characterizations. Obviously they were aimed at men. Custodians of public morals regularly expurgated English works during the Victorian era including the plays of Shakespeare, ostensibly to protect women and children from sexual content. The word pornography itself did not even appear in English dictionaries until the middle of the nineteenth century, although it derives from the ancient Greek term, *pornographos*, which translates as "whore-painters." Pornography appears in the 1864 edition of Webster's Dictionary defined as "licentious painting employed to decorate the walls of rooms sacred to bacchanalian orgies, examples of which exist in Pompeii" (Kutchinsky 1985, p. 100; Kendrick 1987, pp. 11–13).

Before the nineteenth century, little division existed between obscenity on moral and political grounds. While censorship itself is as old as the printing press, authorities in earlier eras made few attempts to distinguish between various categories of censorship. For practical purposes the state was the church and censorship on moral and religious grounds differed only slightly from that based on political beliefs. This attitude, transferred to colonial America, resulted in such legislation as that passed in Massachusetts in 1711 to outlaw the "Composing, Writing, Printing or Publishing, of any Filthy Obscene or Prophane Song, Pamphlet, Libel or Mock-Sermon, in Imitation or in Mimicking of Preaching, or any other part of Divine Worship." Such legislation was common in the colonies but was countered by the growing sentiment for freedom of speech, press, and religion that ultimately formed the basis for the First Amendment. Since women were only marginal participants in both the political and religious realms, they were not involved in the discussion of these constitutional principles (Siebert, Peterson, and Schramm 1956, pp. 14–21; Kendrick 1987, p. 127).

As the nineteenth century unfolded, lawmakers in Europe and the United States denoted obscenity as a category apart from the political, reflecting the growing split between the sacred and the secular. The first federal law directed at obscenity in the United States, the Customs Act of 1842, forbade the importation of "indecent" materials, although it did not define either the word "indecent" or "obscene." Whether the act stimulated production of such materials is unclear, but records show that an industry specializing in forbidden publications soon arose in the United States. Setting himself up as its chief opponent, a Christian fundamentalist, Anthony Comstock, head of the So-

ciety for the Suppression of Vice, spearheaded passage of a federal law that forbade the distribution of obscene material. It made nonmailable any "... obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion. . . ." Congress was pressured to appoint Comstock himself as the postal inspector whose responsibility it was to eliminate obscene materials from the mails (Masel-Walters 1978, pp. 2-3).

To some degree the issue of obscene publications attracted the attention of feminist reformers. Women involved in the social purity movement, rooted in the causes of temperance and abolition, successfully opposed attempts to legalize prostitution. By the 1880s social purity crusaders advocated the rehabilitation of prostitutes, an end to abortion and other efforts to regulate sexual conduct. On the issue of obscenity, the women reformers split. Many believed in censorship of the Comstockian sort, while others opposed prudishness and believed in the need to encourage sex education and frank discussion of sexual matters (Gordon 1977, pp. 116-119).

This dichotomy emerged clearly in controversy surrounding the dissemination of birth control information. Opposition by social purists to contraception served as one factor reinforcing censorship in the United States in the late nineteenth century. In England, on the other hand, the obscenity laws began to lose their effectiveness in regard to birth control following the trial of Annie Besant and Charles Bradlaugh in 1877. Their conviction was overturned on a technicality for violating the British version of the Comstock law by distributing a birth control pamphlet. The trial brought valuable publicity to the birth control cause and was viewed as the "triumph of a Free Press" by the defendants, who attempted to distinguish between what they considered an illegitimate attempt of government to limit the spread of contraceptive information and a legitimate prohibition against pornographic literature. But in the United States Comstock legislation remained in full force for about 40 more years.<sup>1</sup>

The most enduring obscenity test in the United States stemmed from the 1868 English court case *Regina v. Hicklin*. When a local court ruled an anti-Catholic pamphlet unconstitutional, the case was appealed to the Queen's Bench. There Lord Chief Justice Cockburn found the pamphlet to be obscene and offered the following:

The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.<sup>2</sup>

This definition became the Hicklin rule, which said that questionable printed material was that which might affect the most susceptible person, such as a child or abnormal adult. In addition, the rule did not require the work to be considered as a whole. Even an isolated passage could brand a book obscene. Although women were not specifically mentioned, the idea of protecting innocent young women was easily inferred (Hemmer 1986, p. 103).

Not surprisingly, this ruling allowed sweeping indictments of books dealing with sex on a literary or artistic level. Within the next century, such works as Whitman's *Leaves of Grass*, Voltaire's *Candide*, Dreiser's *An American Tragedy*, and Miller's *Tropic of Cancer* and *Tropic of Capricorn* were declared obscene by U.S. courts.

The Hicklin rule also provided ammunition for Comstock. Soon after Congress passed the Comstock Act, the term "comstockery" became a synonym for prudery, fear of sex, shame, and suppression. Nevertheless, in the late 1800s, there was strong public approval of Comstock's writings that warned against the "death trap" of sex. And the courts reflected the same attitude (Nelson 1967, p. 270, Comstock 1984, pp. 131-142).

The belief that exposure to so-called obscene material meant moral and physical ruin within the domestic setting was recurrent in Comstock's work. His efforts to save the young resulted in attempts to keep women ignorant of the unseemly affairs of men. This paternalistic attitude infused his 1883 treatise *Traps for the Young*:

Satan is permitted to place his traps where they will do him most good and the children most harm. The sickening details of crimes, infidel scoffings, cheap works of fiction, newspaper advertisements, 'blood and thunder' story papers—all are freely admitted around the hearthstones and under the rooftops of the land (cited in Nelson 1967, p. 270).

In 1882, Comstock reported an inventory of actions, taken over a 10-year period, for the "suppression of vice." It included a total of 273 persons sentenced and more than \$65,000 paid in fines under the Comstock rule. An extensive list of confiscations included more than one million "circulars, catalogues, songs, etc.," 22,354 newspapers,

and 64,836 "articles for immoral use, of rubber, etc." Comstock continued:

Night and day this evil has been pursued by the agents of the society. Eternal vigilance is the price of moral purity (cited in Nelson 1967, pp. 276-279).

## TWENTIETH CENTURY

As the twentieth century unfolded, momentum built up to challenge on First Amendment grounds the suppression of birth control information. Although some material on birth control had circulated in medical journals, books and newspaper advertising (for contraceptives and abortifacients) prior to passage of the Comstock law, this type of legislation on both the federal and state levels removed birth control information from nonmedical media. One of the relatively few individuals to speak out in opposition was Theodore Schroeder, a lawyer, who argued in a 1906 pamphlet that sexual matters were not obscene but that, in any case, all speech and writing deserved First Amendment protection (Goldstein 1985, pp. 86-97).

The first well-publicized challenge to Comstock, however, came from a radical woman reformer. Beginning in 1911 Margaret Sanger wrote on human reproduction for the *New York Call*, a Socialist publication. Her readers eventually included Comstock, who objected to an explicit article on venereal disease in 1913. It did not appear and the mainly blank column said, "What Every Girl Should Know. NOTHING! By order of the Post Office Department." The next year Sanger started her own radical journal, *Woman Rebel*. When charges of violating federal obscenity laws were brought against her for articles advocating contraception, she fled to Europe after secretly writing a pamphlet called "Family Limitation." Subsequently her husband was convicted for giving a copy of the pamphlet to an agent of Comstock. Upon her return to the United States, the charges against her were dropped in 1916 because the prosecution declined to make her a martyr to the birth control cause (Masel-Walters 1978, pp. 6, 10, 15).

After the Sanger case, birth control became an acceptable subject for general press coverage, although at most the popular press provided theoretical arguments for and against it and news of the movement. Sanger herself served as a focus for many articles. Since laws prohibited publication of information on contraceptives, journalists were unable to provide facts directly, even if they had wanted to, and could act

only as a conduit to her (Goldstein 1985, p. 204). Yet the feminist attack on laws prohibiting the dissemination of birth control knowledge helped put an end to public sentiments that equated diaphragms and dirty pictures (Masel-Walters 1978, p. 8).

*Good Housekeeping*, which had presented childbearing as the basic purpose of life, after 1917 presented birth control as an integral part of life. A 1916 article in a sociology journal was another example of birth control being placed on the agenda for public discussion. It discussed the way society persuaded women to have children and focused on the press coverage of news promoting maternity as well as on the laws against contraception. Thus it appears that feminists began to influence societal perceptions of what was and was not obscene prior to World War I (Fleener 1981, p. 27; Hollingsworth 1916, pp. 19–29; see also Goldstein 1985, p. 141).

While birth control information no longer was deemed obscene, the courts continued to be troubled by other material that dealt with sexual matters. In the early twentieth century, a few judges decided that social tolerance varies with the times and that “community standards” should become a criterion for defining obscenity. In 1913, in the *United States v. Kennerly* case, Judge Learned Hand asked whether “men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas.” To determine obscenity, he added, the court should consider the “critical point in the compromise between candor and shame at which the community may have arrived.”<sup>3</sup>

In 1922, the New York State Court of Appeals found that a book could not be ruled obscene because of selected passages or words. Instead, the work must be considered as a whole. In the first serious defeat of the Comstock Act, a suit was brought against the New York Society for the Suppression of Vice by Raymond D. Halsey, a book store clerk who sued for false arrest—and won. Although the meaning of obscenity was further defined, it was far from completely clarified (McClellan 1967, p. 56).

From the mid-1930s to the mid-1950s, the courts continued to redefine earlier doctrines. The principles of *Hicklin* were chipped away in 1933, when Federal Judge John Woolsey ruled that James Joyce’s *Ulysses* was not obscene and could be admitted into the country. The judge defined a book as obscene if it

tends to stir the sex impulses or to lead to sexually impure and lustful thoughts. Whether a particular book would tend to excite such impulses must be the test

by the court's opinion as to its effect (when judged as a whole) on a person with average sex instincts.<sup>4</sup>

The new definition brought the average person, rather than the most susceptible, into the court's consideration. And it reaffirmed the need to take into account the complete work instead of selected passages.

Judge Woolsey's decision was upheld on appeal in 1934, allowing *Ulysses*, along with *Kennerly* and *Halsey*, to provide the foundations of a new test of obscenity: The U.S. Supreme Court's major decision in the cases of *Roth v. United States* and *Alberts v. State of California*. The combined cases were significant on a number of levels. Most significant was the court's first confrontation with the question of whether the First or Fourteenth Amendments protect obscenity. It ruled they did not.

Roth was a New Yorker who published and sold books, magazines, and photographs, which, according to a U.S. District Court conviction, violated the federal obscenity statute. This judgment was confirmed by the U.S. Court of Appeals and by the Supreme Court. Alberts ran a mail order business in Los Angeles and was convicted by a municipal court judge on a misdemeanor complaint, which charged him with lewdly keeping obscene and indecent books for sale and for pandering through advertisements. His conviction was affirmed by a California Superior Court and by the Supreme Court (Nelson 1967, p. 301; Francois 1986, p. 427).

Although both defendants lost their cases, the Supreme Court's majority opinion was a landmark. Judge William Brennan, writing the opinion, stated "that the unconditional phrasing of the First Amendment was not intended to protect every utterance." Also significant was the removal of the Hicklin test, or judging the effect of isolated passages on the most susceptible persons, as "unconstitutionally restrictive of the freedom of speech and press." A new test would be "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests."<sup>5</sup>

In 1962, the court began to clarify the *Roth* test by stating, in *Manual Enterprises v. Day*, that a work must have a quality of "patent offensiveness" as well as appeal to prurient interests to be ruled obscene. In *Manual Enterprises*, the court ruled that magazines picturing nude males and aimed at homosexuals were not obscene. Two more criteria were added in the 1964 *Jacobellis v. Ohio* decision,



involving the French film *Les Amants*, when the court decided that national community standards should be used to judge obscenity and that a work "cannot be proscribed unless it is 'utterly without social importance.'" <sup>6</sup>

Four years later the Supreme Court ruled that to be obscene material had to be "utterly without redeeming social value." The decision came from *Memoirs v. Massachusetts*, which overturned attempts by at least four states to ban John Cleland's *Memoirs of a Woman of Pleasure* (or *Fanny Hill*, a book first found obscene in the United States in Massachusetts in 1821). Although the book was candid in its descriptions of sexual escapades, the court held that it had redeeming social value. Nevertheless, the Supreme Court justices did not reach a consensus on the definition of obscenity, and they continued their efforts to clarify both the *Roth* and *Memoirs* criteria until a new test was established in 1973. <sup>7</sup>

In the case *Miller v. California*, the defendant, Marvin Miller, was convicted of distributing sexually explicit advertisements to unwilling recipients. The court, in a five-to-four majority headed by Chief Justice Warren Burger, stressed three standards in ruling the material obscene:

First, the court redefined the term 'community.' No longer were contemporary 'community standards' to be considered national in scope. . . .

Second, the court retained the patent offensiveness standard. Obscenity could be determined when 'the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law.'

Third, obscenity could exist when 'the work, taken as a whole, lacks serious literary, artistic, political or scientific value.'<sup>8</sup>

The *Miller* decision thus removed the concept of "utterly without redeeming social value." Another major change was its reinstatement of local community standards, which could be determined by local juries. These two basic changes rejected much of *Memoirs* and of *Roth*. The country soon felt the effects of the *Miller* decision. Prosecutors started to purge bookstores, theaters, and newsstands. Even libraries and classrooms became the targets of book banning. States now found existing statutes not specific enough for interpreting *Miller*. A few months after the decision, at least ten states passed new obscenity laws and eighteen others considered similar action (Francois 1986, pp. 435-436).

In summary, the definition of obscenity in the United States has been shaped by three primary tests. The *Hicklin* rule prohibited any material that was thought to corrupt minors or sexually deviant adults. With the *Roth* test, material was obscene if an average person, applying contemporary community (national) standards, would find the dominant theme appealing to prurient interests. And the *Miller* test shifted responsibility back to localities for determining obscenity, which would be judged as patently offensive and lacking in serious literary, artistic, political, or scientific value (Hemmer 1986, p. 110).

Perhaps what is most interesting in all this chronology, however, is the extent to which women were not involved. While they obviously were depicted in the material at issue, women played no part in court action to determine what was or was not obscene. The subject was left to men to adjudicate. Over the years that judges grappled with questions of obscenity, the word pornography took hold in the language, although the courts did not define it.

In 1967, the U.S. Congress created the first Commission on Obscenity and Pornography. It spent more than two years and an estimated \$2 million trying to assess the extent of pornography and its effects, and in making recommendations for control without infringement on constitutional rights.

The Commission reviewed existing research as well as initiated new surveys to substantiate its report. Based on the collected evidence, the Commission concluded:

Empirical research . . . has found no reliable evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal sexual behaviour among youths or adults (*The Report* 1970, p. 169; see also Francois 1986, pp. 439–440).

In a survey involving interviews with a random sample of 2,486 adults and 769 youth (ages 15 to 20), the Commission found that citizens did not regard erotic materials as a significant social problem. When surveyors asked what were the two or three “most serious problems facing the country today,” respondents not surprisingly mentioned the Vietnam War, race relations, and the economy as their major concerns. Pornography, or erotic materials, ended the list of concerns with only a 2 percent response. The Commission survey that received the widest publicity showed that 60 percent of the respondents believed that adults should be able to read or watch whatever they want (*The Report* 1970, pp. 187–188; Pembar 1977, p. 359).

In contrast, the same survey showed that 73 percent of respondents believed that sex scenes in movies that merely titillate should be censored. At about the same time, a 1969 Gallup poll found that 85 percent of adults interviewed favored stricter laws regulating obscenity sent through the mails and that 76 percent favored stricter control of newsstand sales of offensive, sex-related material (Pembler 1977, p. 359; Chaffee and Petrick 1975, p. 208).

Paying little regard to the contradictions in public opinion, the Commission's 12-member majority recommended that all "federal, state and local legislation prohibiting the sale, exhibition, or distribution of sexual materials to consenting adults should be repealed." The Commission added, however, that material directed at children and pandering-type advertisements sent to unwilling adults should be regulated. The 1970 report was never adopted, rejected by both the U.S. Senate and President Richard Nixon (*The Report* 1970, pp. 51, 62-66).

From a woman's perspective the report pointed out at least two revealing elements. One majority finding was that pornographic material could be considered educational because of its dissemination of information on sex and its encouragement of less inhibited attitudes. Another was that women as well as men were interested in erotica (often described as soft-core pornography). Given the facts that only two women were commission members and that very little pornography was directed toward women, a *New York Times* commentator offered the suggestion: "Women's Lib could well make a plank in their platform out of the missing opportunity to either reject or embrace smut" (Barnes 1970, p. xiii).

## FEMINIST PROTEST

When the women's liberation movement evolved in the 1960s, its agenda, devoted chiefly to an array of issues crystalizing around attempts to pass the Equal Rights Amendment, made little mention of pornography. In 1970, Kate Millett, a leading radical feminist thinker, attacked "the sadistic character of such public fantasy as caters to male audiences in pornography or semi-pornographic media." Yet she went on to say that since masculine hostility toward women has been continuous over the course of history, its new depiction is less "a matter of increase than . . . a new frankness in expressing hostility" and argued that modern writers like Henry Miller have "absorbed not only the truthful explicitness of pornography, but its anti-social character as well" (Millett 1970, pp. 45-46).

It was not until 1976 that organized feminist activity focused on pornography. That year Women Against Violence in Pornography and Media was formed in San Francisco. Two years later it held the first national conference on pornography, drawing 5000 women who staged a Take Back the Night March through San Francisco's pornography district. Similar marches soon were held across the nation. In 1979 another group, Women Against Pornography, took women on tours through Time Square in New York City to expose them to the pornography there (Lederer 1980, p. 15).

The attack on pornography came at a time in the feminist movement when steam had run out for the ERA campaign. New momentum was needed, and efforts to combat pornography fit well with the conservative agenda that returned the White House to the Republicans in 1980. Thus the issue brought together an odd combination of radical feminists and right-wing moralists both determined—for quite different reasons—to save society from the effects of pornography.

According to Laura Lederer, one of the organizers of Women Against Violence in Pornography and Media, the feminist movement against pornography grew out of concern over increasing incidence of rape, wife-beating and other violent acts against women. As she put it:

... women have been bombarded with ever-increasing numbers of pornographic images in liquor stores, bookstores, and drugstores; in supermarkets; in the hands of fathers, uncles, brothers, sons, husbands, lovers, and boyfriends; in movies, in films, and on street-poster stores, and in shop windows. . . . We began to make the connections between media violence to women and real-life violence to them, to recognize the threat which pornography poses to our lives and livelihood, and to speak out against it (Lederer 1980, p. 16).

Her explanation involved several factors: The increase in availability of pornography including the proliferation of "porn strips" where live sex shows competed with "adult" bookstores; the spread of so-called soft porn from specialized men's magazines to the larger mass media; evidence of a cause-and-effect relationship between pornography and violent crime.

Evidence abounded on the first two points. "Porn strips," created by the liberalized attitudes on sex of the 1960s and early 1970s, combined with new video technology, existed in all large cities; magazines like *Hustler* and *Penthouse*, not to mention *Playboy*, had proliferated, and mainstream media, such as newspapers, routinely carried X-rated movie advertisements as well as general advertisements of a sexist nature (Lederer 1980, pp. 17-19).

Her third point, however, has given rise to endless debate. Can one prove a connection between increases in crimes against women and a general increase in the availability of pornographic materials? Besides, pornography is as difficult to define legally as obscenity. In spite of attempts to distinguish hard-core pornography from soft-core or erotica (which some feminists say they favor), no clear-cut yardstick exists. To just what degree does the fight against pornography run into First Amendment rights?

These fundamental questions have marred efforts to get anti-pornography legislation passed. In 1984 when Donald M. Fraser, mayor of Minneapolis, vetoed an ordinance drawn up by feminists who asserted that pornography violated women's civil rights, he presented his argument in First Amendment terms:

The remedy sought through the ordinance as drafted is neither appropriate nor enforceable within our cherished tradition and constitutionally protected right of free speech. The definition of pornography in the ordinance is so broad and so vague as to make it impossible for a bookseller, movie theater operator or museum director to adjust his or her conduct in order to keep from running afoul of its proscriptions (Fraser 1985, p. 71).

A similar ordinance was found unconstitutional in Indianapolis. A federal appeals court rejected it in 1985 and its ruling was upheld by the Supreme Court in 1986. Yet feminist forces led by Catharine A. MacKinnon, a law professor, and Andrea Dworkin, author of *Pornography: Men Possessing Women*, which insisted that pornography caused violence against women, continued to fight for the ordinance (Kendrick 1987, pp. 232–233).

While Dworkin offered no tangible proof, her argument rested on the assumption that male conduct would change for the better if men were deprived of pornographic images. Yet she argued that she was not against the First Amendment. She asserted that the First Amendment applies to “only those who can exercise the rights it protects.” Explaining her stand, she contended, “Pornography by definition—‘the graphic depiction of whores’—is trade in a class of persons who have been systematically denied the rights protected by the First Amendment and the rest of the Bill of Rights.” Therefore, she stated, the issue becomes “not whether the First Amendment protects pornography or should, but whether pornography keeps women from exercising the rights protected by the First Amendment” (Dworkin 1979, p. ix).

## CURRENT DEVELOPMENTS

Dworkin and other radical feminists who insist that there is a causal link between violent pornography and aggressive behavior voice a view similar to that of moralistic crusaders from Comstock to Ronald Reagan. In May 1984, President Reagan appointed a new commission directed by the U.S. Attorney General to reconsider the Commission Report of 1970. The President stated:

We think the evidence that has come out since . . . [the 1970 report], plus the tendency of pornography to become increasingly more extreme, shows that it is time to take a new look at this conclusion [that pornography has no significant effect on behavior], and it's time to stop pretending that extreme pornography is a victimless crime (Francois 1986, pp. 439-440).

Given such a mandate, the conclusions of the U.S. Attorney General's Commission on Pornography might have been expected. In July 1986, the two-volume, \$500,000 report was presented to Attorney General Edwin Meese at a news conference staged in front of a semi-nude female statue called "Spirit of Justice." The Commission's findings were diametrically opposed to those of the 1970 Commission, which was called "starkly obsolete." Overlooking the Supreme Court's *Miller* test of obscenity (which shifted the determination of obscene materials back to community standards), the 1986 report called for the enactment of federal laws that would make it easier to seize the assets of pornographers. It also directed the Federal Communications Commission to restrict pornographic cable television and "Dial-a-Porn" telephone services. The report included 37 pages of suggestions for citizen action against pornography and 300 pages of titles, descriptions and excerpts—all relating to pornographic material (U.S. Department of Justice 1986, pp. 1313-1315, 1505-1612).

Unlike its 1970 counterpart, the Meese Commission was not budgeted to conduct its own research. Instead, it based its conclusions on hearings, interviews with law-enforcement officials, and existing academic studies. But two of the researchers whose work was cited extensively in the report took strong issue with its conclusion:

The commission has ignored the inescapable conclusion that it is violence, whether or not accompanied by sex, that has the most damaging effect upon those who view it, hear it, or read about it (Donnerstein and Linz 1986, p. 59).

The picture that the two researchers drew from social science studies of men and pornography differed from that drawn by the Commission on three grounds: First, social scientists do not know if detrimental effects of viewing pornography are long-lived or fleeting; second, they are unsure whether all men are affected equally by bizarre pornographic themes; third, they do not know whether changes in attitudes about women and rape, revealed in relatively small-scale tests of consumers of pornography, have applicability to rape and aggression in the real world (Donnerstein and Linz 1986, p. 58).

The Commission Report itself drew dissenting opinions from two women members, Judith Becker and Ellen Levine. They objected to the premise that there is evidence linking pornography and violence. They stated that the Commission majority's "efforts to tease the current data into proof of a causal link . . . simply cannot be accepted" (see Stengel 1986, p. 15).

Even before the 1986 report was issued, Barry Lynn, a lawyer for the American Civil Liberties Union, criticized the Commission proceedings as "little more than prudishness and moralizing, masquerading behind social science jargon." He called the commissioners "quintessential censors" and observed that six of the eleven members were committed to stamping out pornography before the hearings had begun. Lynn's comments reflected the ACLU's longstanding policy on obscenity and censorship. Its policy guide states that all limitations of expression on the ground of obscenity are unconstitutional. Concurrently, it recognizes that legal limitations exist and works to minimize their restrictive effect (Stengel 1986, p. 15; *Policy Guide to ACLU* n.d.).

Taking sharp exception to the position of the ACLU, MacKinnon, like Dworkin, argues that the presumptions that underlie the First Amendment do not apply to women: "The First Amendment essentially presumes some level of social equality among people and hence essentially equal social access to the means of expression. In a context of inequality between the sexes, we cannot presume that this is accurate" (MacKinnon 1987, p. 129).

MacKinnon poses the following rhetorical question: "Has the so-called speech of the pornographers enlarged the speech of women?" As offensive as pornography may be, it is possible to answer her question with a qualified "yes," if for no other reason than that the availability of pornography had made women aware of what it is. Rather than circulating surreptitiously, hidden from the gaze of most

individuals except privileged males as it was in former times, pornography now openly depicts the hatred and subjugation of women that forms the rationale for the feminist protest against it (MacKinnon 1987, p. 209).

Regardless of whether the feminist opponents of pornography eventually succeed in securing passage of anti-pornography ordinances, they have attained success in one important area. Due largely to their efforts, the whole question of pornography has been brought onto the public agenda for serious discussion. This can be shown by examples of heightened sensitivity to the issue found in the mainstream media.

A 1987 *Washington Post* article, for instance, asked "What's So Funny About a Woman's Body?" in a critique of commercial exploitation of sexist messages on such merchandise as postcards, T-shirts, and aprons. A *Washington Post* columnist later chastised the *New York Times Magazine* for publishing a Revlon advertisement picturing four barely clothed women locked in a tight embrace. Newspapers also gave widespread coverage to protests against publication of the photograph of a student with uncovered breasts in the 1987 University of Maryland yearbook (Engel and Peter 1987; Yardley 1987; Hill 1987).

Another indicator of change is the shift in preferences among consumers of sexually explicit material. Circulation audits of thirteen magazines, including *Hustler*, *Oui*, *Penthouse*, and *Playboy*, showed steady increases in sales from 1975 to 1980, but since 1980, the total monthly sales of these magazines have declined by 35 percent. Pornographic movie houses declined to about 350 in the United States by 1987, a decrease from about twice that number in the mid-1970s. In New York City, there were 42 commercial pornographic establishments—theaters, bookstores and peep shows—while Manhattan alone had 121 a decade before (U.S. Department of Justice 1986, pp. 1409–1411; *Time* 1987, p. 63).

Nevertheless, consumers are still buying pornography with video-cassette recorder tapes now dominating the industry. With tapes going into the home, producers and distributors are intent on reaching both a male and female audience. In fact, women now make up an estimated 40 percent of the pornographic tape consumer market, and the industry has begun to gear its wares to women. The elements of the soap opera and romance novel are emerging to replace or at least diminish the bizarre sexual images that have typified pornographic products (*Time* 1987, p. 3).



In this consumer oriented society, technological and economic forces may well determine the future of pornography, rather than constitutional restraints or social action. But it is apparent that now women will be having a say one way or another. No longer is pornography entirely within the purview of men. Nor for that matter is the First Amendment. The women's movement is challenging traditional interpretations and in the process both exercising First Amendment rights and focusing on their meaning in a male-dominated society.

## NOTES

1. *The Queen v. Charles Bradlaugh and Annie Besant* (London: Freethought Publishing [1877], pp. i-ii), as cited in Masel-Walters (1978, pp. 15-17).
2. *Regina v. Hicklin* (L.R. 3Q.B. 360 [1869]), as cited in Hemmer (1986, p. 103).
3. *U.S. v. Kennerly* (209 F. 119 (S.D.N.Y. [1913])), as cited in Hemmer (1986, p. 103).
4. *U.S. v. One Book Called "Ulysses"* (72 F. 2d 705 [1934]), as cited in Chaffee and Petrick (1975, p. 204).
5. *Roth v. United States* (77 S.Ct. 1304 [1957]), as cited in Francois (1986, p. 427).
6. *Jacobellis v. Ohio* (84 S.Ct. 1676 [1964]); *Manual Enterprises v. Day* (82 S.Ct. 1432 [1962]), as cited in McClellan (1967, p. 57).
7. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts* (86 S.Ct. 975 [1966]), as cited in Chaffee and Petrick (1975, p. 205); see also McClellan (1967, p. 62).
8. *Miller v. California* (93 S.Ct. 2607 [1973]), as cited in Hemmer (1986, pp. 107-108).

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