# Pornography as a Civil Rights Violation

The recent attacks on pornography by leading women in the feminist movement have brought about laws which seek to make trafficking in certain types of pornography a per se form of discrimination against women. Although the courts rejected the model anti-pornography ordinance,[1] drafted by feminist-author Andrea Dworkin and attorney Catharine MacKinnon and enacted by the city of Indianapolis,[2] as violative of the First Amendment, there is good reason to believe a similar statute with a definition of pornography using the *Miller* test could pass constitutional muster.

An excellent discussion of the harms flowing from pornography, whether obscene or not, is contained in Tulane Associate Professor Ruth Colker's article "Published Consentless Sexual Portrayals: A Proposed Framework For Analysis." 35 Buffalo L.Rev. 39 (1986). Colker points out the need for civil remedies to be available to persons harmed by pornography, noting that "[i]ndividuals who are portrayed sexually without their consent rarely prevail in actions to redress the injury stemming from these portrayals" because relief is not available under *existing* law. 35 Buffalo L.Rev. at 41.

The 1986 Attorney General's Commission on Pornography joined the feminists and other concerned citizens in recommending that legislatures should "consider legislation affording protection to those individuals whose civil rights have been violated by the production or distribution of pornography. The legislation should define pornography realistically and encompass all those materials, and only those materials, which actively deprive citizens of such rights. At a minimum, claims could be provided against trafficking, coercion, forced viewing, defamation, and assault..."[3]

In the view of the courts, the problem with the Indianapolis ordinance law is in its use and definition of the word "pornography." The ordinance was interested only in certain types of pornography, which it defined as sexually explicit pictures or words that associate

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[1] See: ***American Booksellers Ass'n, Inc. v. Hudnut,*** 771 F.2d 323 (7th Cir. 1985), 598 F.Supp. 1316 (S.D. Ind. 1984).

[2] Indianapolis and Marion County, Ind. Ordinance 35, ch. 16 (June 15, 1984) [hereinafter cited as Indianapolis ordinance]. Similar ordinances were introduced in Los Angeles and Minneapolis, although the Mayor of Minneapolis vetoed that city's proposed ordinance on the grounds that it violated the First Amendment. See: "A Court Test for Porn," ***Newsweek,*** August 13, 1984.

[3] Final Report of the Attorney General's Commission on Pornography, Vol. 1, p. 756 (July, 1986). For a recent discussion of forced viewing of pornography in the workplace, see ***Barbefta v.*** *Chem* ***Lawn*** *Services Corp.,* 669 F.Supp. 569 (W.D.N.Y. 1987), which reversed a dismissal by summary judgment.

women's physical abuse or degradation with sexual pleasure, either by depicting women as enjoying such abuse or degradation, or by presenting their abuse or degradation as a sexual stimulus for men.[4] That approach is based, at least in part, on the various studies showing a correlation between that type of pornography and violent or otherwise anti-social behavior against women; as well as the real world experiences of many victim women and children.

The definition of pornography contained in the Indianapolis ordinance differs substantially from the legal definition of obscenity. This difference comes about because the ordinance is aimed only at pornography that degrades, subordinates, or urges violence against women. The ordinance did not attempt to deal with all materials which current law deems obscene, although some of the works it would have affected would be obscene. And more importantly, the ordinance would have reached some works which are not obscene. That was one reason the ordinance was ultimately ruled constitutionally infirm.

The Indianapolis ordinance, similar to the recommendation of the Attorney General's Commission on Pornography, made trafficking in "pornography," coercing another into a "pornographic" performance, forcing "pornography" on a person, or assaulting or physically attacking another due to specific "pornography," unlawful discriminatory practices.[6] The ordinance gave any *person* claiming to be

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[4] "Pornography shall mean the graphic sexual explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

(1) Women are presented as sexual objects who enjoy pain or humiliation; or

(2) Woman are presented as sexual objects who experience sexual pleasure in being raped; or

(3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or

(4) Women are presented being penetrated by objects or animals; or

(5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual;

(6) 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."

Indianapolis Ordinance 35, Sec. 2 § 16-3(q).

[5] See: e.g., Zillmann, D., *Connections Between Sex and Aggression* (Hillsdale, N.J.: Lawrence Erlbaum Assoc., 1984); Cline, V., "Aggression Against Women: The Facilitating Effects of Media Violence and Erotica" (Salt Lake City: Univ. of Utah, 1983); and Donnerstein, E., "Aggressive Erotica and Violence Against Women," ***Journal** of Personality **and** Social Psychology* (Vol. 39, No. 2, Aug. 1980).

[6] Indianapolis Ordinance, Section 16-15.

aggrieved under the ordinance a cause of action against the person engaging in discriminatory practice. (E.g., "against the perpetrator(s), maker(s), seller(s), exhibitor(s), or distributor(s).") In the case of trafficking in pornography, any woman could file a complaint as a woman (representing the "class" of women generally) acting against the subordination of women.[7]

In *American Booksellers Ass'n v. Hudnut,* 598 F.Supp. 1316 (S.D. Ind. 1984), the District Court declared the ordinance unconstitutional and permanently enjoined its application. The 7th Circuit affirmed, ruling the ordinance unconstitutional as regulating speech, not conduct. *American Booksellers Ass'n v. Hudnut,* 771 F.2d 323 (7th Cir. 1986). The Supreme Court summarily affirmed, with three justices voting to set the case for oral argument. 475 U.S. 1001 (1986).

The U.S. District Court, in a case of first impression, ruled that the speech at issue did not fall within established categories of expression (i.e., libel, fighting words, or obscenity) that can be prohibited outright without abridging First Amendment rights. Importantly, the court refused to carve out a new exception to First Amendment protection, holding that the "state interest [in protecting women from degrading depictions that may contribute to discrimination], ... though important and valid ... in other contexts, is not so fundamental an interest as to warrant a broad intrusion into otherwise free expression." 598 F.Supp. at 1336. The court also held that the ordinance, even if construed to proscribe only unprotected speech, was unconstitutionally vague and imposed an unconstitutional prior restraint.

The 7th Circuit agreed with the District Court's judgment, but did not reach the issues of vagueness and prior restraint. The court reasoned that the ordinance discriminated on the basis of the *content* of speech, thus provoking the greatest degree of scrutiny. Under the proposed ordinance, wrote the court, "[s]peech that 'subordinates' women and also, for example, presents women as enjoying pain, humiliation, or rape, or even simply presents women in positions of servility or submission or display is forbidden, no matter how great the literary or political value of the work taken as a whole. Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual content. This is thought control. It establishes an 'approved' view of women ... [t]hose who espouse the approved view may use sexual images; those who do not, may not." 771 F.2d at 328.

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[7] Indianapolis Ordinance, Section 16-17

Amendment was implicated because "pornography" as defined in the ordinance was not in a category excluded from the protection of the First Amendment. The court distinguished the definition of pornography in the ordinance from the definition of obscenity given by the Supreme Court, noting that the ordinance did not require patent offensiveness, prurient appeal or lack of serious literary, artistic, political or scientific value. The court seemed to leave open the possibility that this type of ordinance — requiring civil liability — might be upheld if the definition of pornography was amended to include the *Miller* three-pronged test of obscenity. That interpretation of the case is strengthened by the court's explicit acceptance of the premises of the legislation: "Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets." 771 F.2d at 329.

Unless an ordinance defines pornography in such a way as to remove it from First Amendment protection, courts may continue striking down tort recoveries for harms resulting from speech. In the landmark libel case *New York Times* Co. *v. Sullivan,* the Supreme Court stated that "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." 376 U.S. 254, at 277 (1964). That notion was expanded recently by the Fifth Circuit in Herceg *v. Hustler Magazine Inc.,* 814 F.2d 1017 (5th Cir. 1987), *cut. denied,* _____ U.S. _____, 99 L.Ed.2d 420 (1988). The court overturned a jury award against *Hustler* of damages for emotional and physical harm to the mother and friend of an adolescent boy who died because of a magazine article which described the dangerous practice of autoerotic asphyxia. The court opined that "[o]ne of our basic constitutional tenets ... forbids the state to punish protected speech directly or indirectly, whether by criminal penalty or civil liability." 814 F.2d at 1020. The court cited *New York Times Co. v. Sullivan* to counter the plaintiff's argument that "while the First Amendment might prevent the state from punishing publication of such articles as criminal, it does not foreclose imposing civil liability for damages that result from publication." 814 F.2d at 1023. In the *N.Y. Times* case, the Supreme Court noted that the fear of civil liability could be "markedly more inhibiting than the fear of prosecution under a criminal statute." 376 U.S. 254, 277 (1964). The *Herceg* court also criticized, then tried to distinguish its ruling from, a decision of the California Supreme Court which allowed civil liability to be imposed for harm resulting from protected speech. In *Weirum v. RKO General,* 539 P.2d 36 (Cal. 1975), California's high court held that a radio station could be held liable for wrongful death damages arising from an accident caused when two youths who listened to a promotional broadcast raced in cars through the streets in order to be the first

to reach the site at which the station had announced prize money would be given away. The court summarily rejected a First Amendment defense:

> Defendant's contention that the giveaway contest must be afforded the deference due society's interest in the First Amendment is clearly without merit. The issue here is civil accountability for the foreseeable results of a broadcast which caused an undue risk of harm to decedent. The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act.

539 P.2d at 40.

The *Herceg* court faulted the California Supreme Court for failing to distinguish between protected speech containing dangerous ideas, and speech clearly and immediately dangerous and of slight social value. It attempted to contrast the radio station's desire to achieve a commercial result and minimal efforts to warn listeners to drive safely with Hustler's article — which the court implicitly suggests was to serve some educational purpose, or at least some purpose other than to sell magazines — and Hustler's explicit "attempts to dissuade its readers from conducting the dangerous activity it describes." 814 F.2d at 1024. One 5th Circuit judge concurred on technical grounds, but disagreed strongly with the majority's "broad reasoning that appears to foreclose the possibility that any state might choose to temper the excesses of the pornography business by imposing civil liability for harms it directly causes." 814 F.2d at 1025. Judge Edith H. Jones, arguing that pornography deserves less protection than other speech under the First Amendment, said "no federal court has held that death is a legitimate price to pay for freedom of speech." 814 F.2d at 1026. She suggested carving out another exception to free speech, and allowing the state to protect "children's lives when they are endangered by suicidal pornography." *Id.* at 1025.

Judge Jones took aim at the poorly conceived majority opinion, and perhaps offered some reasons why the U.S. Supreme Court should consider reversing the Fifth Circuit's decision. She notes that the majority summarily decided that *Hustler* magazine was entitled to full constitutional protection under the First Amendment. This despite the fact that the article contained elements of commercial speech, which carries limited constitutional protection, and bordered on obscenity and incitement to lawless conduct, which forms of speech carry no constitutional protection whatsoever. Incredibly, the majority decided that a pornographic magazine's article which explains in great detail how to masturbate while cutting off oxygen to

the brain, and which led to the death of a teenager, was entitled to just as much protection under the First Amendment as pure political speech. 814 F.2d at 1024. The Supreme Court denied *certiorari.* _____ U.S. _____, 99 L.Ed.2d 420 (1988).

In denying review, the U.S. Supreme Court allowed the *Herceg* judgment to stand for the proposition that states may not impose civil liability where they cannot impose criminal liability. The civil rights approach to pornography was, therefore, severely restricted from application for any harmful speech that enjoys First Amendment protection. It is probable, however, that civil sanctions for harmful pornography which is also legally obscene — and thus subject to criminal sanctions — are still available.