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THE MINNEAPOLIS ANTI-PORNOGRAPHY ORDINANCE: A VALID ASSERTION OF CIVIL RIGHTS?

I. Introduction

Pornography¹ has become a social phenomenon of primary concern.² No longer the hidden vice of upper-class males,³ pornography permeates our movie theatres, bookstores, newsstands, and telephone lines.⁴ Opponents of pornography, unable to contain its proliferation through traditional means,⁵ have turned to new and innovative avenues of redress.

In 1983, University of Minnesota law professor Catherine A. MacKinnon⁶ and feminist author Andrea Dworkin⁷ drafted a novel⁸ anti-pornography ordinance to amend the Minneapolis Civil Rights

1. The word pornography is derived from the Greek *pornographos*, meaning "the writing of harlots." H. HYDE, *A HISTORY OF PORNOGRAPHY* 1 (1964). It has come to mean "a depiction (as in writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement." WEBSTER'S *THIRD NEW INT'L DICTIONARY* 1767 (1976). For an explanation of how pornography is defined by the Minneapolis ordinance, see *infra* notes 21-22 and accompanying text.

2. The fact that a number of cities are showing great interest in the anti-pornography ordinances demonstrates growing national concern. See *infra* note 16 and accompanying text.

3. See Elshtain, *The New Porn Wars*, *THE NEW REPUBLIC*, June 25, 1984, 15, 15. "Pornography has always been with us, but now it seems to be coming at us. Once the secret vice of upper-class males, porn is now the public vice of anyone who chooses to share in it." *Id.*

4. *Id.* So-called "dial-a-porn" telephone services offer callers a recording of a real or simulated sexual performance. A particular "dial-a-porn" service operated by Carlin Communications, Inc. and Drake Publishers, Inc., received 180 million phone calls in a twelve-month period, six times as many calls received by the second most popular call-in number—horse racing results. *Nat'l L.J.*, Nov. 26, 1984, at 10, col. 4.

5. Traditional means of stemming pornography include obscenity laws and zoning legislation. For a discussion of these measures, see *infra* notes 167-73 and accompanying text.

6. Catherine A. MacKinnon is a feminist lawyer, teacher, writer, and activist. She is the author of *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979). See *infra* note 110 and accompanying text. Prior to her arrival at the University of Minnesota School of Law, MacKinnon taught at Yale, Harvard and Stanford law schools.

7. Andrea Dworkin is a feminist writer and activist who is the author of five books, including *PORNOGRAPHY: MEN POSSESSING WOMEN* (1981) and *RIGHT-WING WOMEN* (1983). During the fall of 1983, Dworkin was a Visiting Professor in Women's Studies and Law at the University of Minnesota.

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

Code.⁹ The ordinance, which defines pornography as a form of sex discrimination against women,¹⁰ was passed by the Minneapolis City Council by a seven to six vote on December 30, 1983¹¹ but was vetoed by Minneapolis Mayor Donald Fraser on January 5, 1984.¹²

On May 1, 1984, Mayor William Hudnut III of Indianapolis signed into law an ordinance based on the Minneapolis bill.¹³ Less than one hour later, first amendment proponents challenged the Indianapolis ordinance in federal district court.¹⁴ On November 19, 1984, the federal district court of Indianapolis declared the ordinance to be an unconstitutional abridgement of protected speech.¹⁵

The Minneapolis ordinance¹⁶ asserts that pornography, through

1984). The defendant's argument that the state's interest in protecting women from the degradation and humiliation caused by pornography is so compelling as to condone the regulation of traditionally protected speech was an issue of first impression in the courts. *Id.* at 1335. For a further discussion of the proponents' theory, see *infra* notes 174-98 and accompanying text.

9. Ordinance to amend MINNEAPOLIS CODE OF ORDINANCES tit. 7, chs. 139, 141 (1982) (passed Dec. 30, 1983; vetoed Jan. 5, 1984) [hereinafter cited as MINNEAPOLIS ORDINANCE].

10. *Id.* See *infra* notes 20-46 and accompanying text for the language of the Minneapolis ordinance.

11. N.Y. Times, Jan. 6, 1984, at A11, col. 1.

12. *Id.* Mayor Fraser stated that he vetoed the ordinance because it was "neither appropriate nor enforceable within our cherished tradition and constitutionally protected right of free speech." 70 A.B.A. J. 42 (March 1984). In response to the Mayor's veto, Professor Laurence H. Tribe of Harvard sent a letter to Council Member Sandra Hilary reprimanding the Mayor's veto as an abuse of our system of government. Professor Tribe urged the Council to prevent an executive from depriving the courts of an opportunity to adjudicate "what may eventually be found to be the first sensible approach to an area which has vexed some of the best legal minds for decades." Letter from Laurence Tribe to the Honorable Sandra Hilary (Jan. 8, 1984), reprinted in 53 HENNEPIN LAW. 17 (Mar.-Apr. 1984).

13. Ordinance to amend INDIANAPOLIS CODE, ch. 16 (1984) [hereinafter cited as INDIANAPOLIS ORDINANCE]; see N.Y. Times, May 15, 1984, at A14, col. 1. Prior to its enactment, the ordinance was adopted by the Indianapolis City-County Council by a twenty-four to five vote. *Id.*

14. N.Y. Times, May 15, 1984, at A14, col. 1.

15. American Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316, 1341-42 (S.D. Ind. 1984).

16. Versions of the Minneapolis ordinance have been used by other municipalities. The anti-pornography ordinance adopted in Indianapolis is based on the Minneapolis ordinance. See *supra* note 13 and accompanying text. In addition, Suffolk County proposed an ordinance that was based on the Minneapolis ordinance. SUFFOLK COUNTY, N.Y. INTRO. RES. NO. 1920-84, A Local Law to Limit Violence Against Women § 2(a) (1984) [hereinafter cited as SUFFOLK COUNTY ORDINANCE]. See N.Y. Times, Nov. 13, 1984, at B2, col. 1. The Suffolk County Ordinance was defeated in the Suffolk County Legislature by a nine to eight vote. N.Y. Times, Dec. 30, 1984, at E8, col. 2. Although the original Suffolk bill followed the Minneapolis bill, it was narrower in scope. MacKinnon and Dworkin opposed the bill because it failed to include most of the pornography that they feel is harmful to women

subordination and sex discrimination, violates the civil rights of women.¹⁷ Proponents of this civil rights approach argue that the state has a compelling interest in protecting women from the harm inflicted by pornography.¹⁸ The proponents further argue that the state's compelling interest in protecting its citizens from civil rights violations overrides first amendment challenge.¹⁹

This Note examines whether pornography violates women's civil rights and whether the Minneapolis ordinance can withstand first amendment challenge. This Note concludes that pornography neither constitutes a civil rights violation nor falls within the traditional categories of unprotected speech. Finally, this Note suggests that the appropriate means to combat pornography is free speech—the very means that the Minneapolis ordinance threatens to restrict.

II. The Ordinance

A. Scope of the Ordinance

The Minneapolis ordinance defines pornography as the graphic

and children. N.Y. Times, Nov. 22, 1984, at A26, col. 1. Suffolk County then redrafted the ordinance to comply with these criticisms. See letter from Paul Sabatino to Michael D'Andre, Suffolk County Legislator, Oct. 18, 1984 (copy available at Fordham University School of Law).

Other cities, such as Detroit, Wichita and Madison have shown an interest in the Minneapolis ordinance. N.Y. Times, May 15, 1984, at A14, col. 1. On July 16, 1985, the Los Angeles County Board of Supervisors adopted a similar anti-pornography ordinance. Ordinance to amend LOS ANGELES COUNTY CODE ch 13.17 (1985). Additionally, part of the Minneapolis ordinance has been used in a Senate bill called the Pornography Victims Protection Act introduced by Senator Arlen Specter (R.Pa.) in the last Congressional session. Blakely, *Is One Woman's Sexuality Another Woman's Pornography?*, Ms., April 1985, at 38.

Hereinafter this Note will limit its discussion to the Minneapolis ordinance but will cite to corresponding sections in the Indianapolis and Suffolk County ordinances where applicable.

17. See *infra* notes 44-46 and accompanying text. The civil rights approach to pornography also seeks to protect men, children, or transsexuals who are hurt by pornography in the same way that women are hurt. See *infra* note 22 and accompanying text.

18. *Amicus Curiae* Brief of Linda Marchiano at i, *American Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984) [hereinafter cited as Brief of Linda Marchiano]. Proponents argue that pornography harms the status of women based upon sex. *Id.* For a discussion of how pornography harms the status of women, see *infra* notes 46, 193-98 and accompanying text.

19. *Id.*; see also Memorandum to Minneapolis City Council by Catherine A. MacKinnon and Andrea Dworkin, December 26, 1983. See *infra* notes 151-208 and accompanying text for a discussion of the first amendment. Opponents of the ordinance argue that pornography neither falls within established categories of unprotected speech nor warrants the creation of a new exception to free speech. *Id.*

sexual subordination of women²⁰ that entails one or more of the following:

- (i) women are presented dehumanized as sexual objects, things or commodities; or
- (ii) women are presented as sexual objects who enjoy pain or humiliation; or
- (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or
- (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or
- (v) women are presented in postures of sexual submission; or
- (vi) women's body parts—including but not limited to vaginas, breasts, and buttocks—are exhibited, such that women are reduced to those parts; or
- (vii) women are presented as whores by nature; or
- (viii) women are presented being penetrated by objects or animals; or
- (ix) 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.²¹

20. MINNEAPOLIS ORDINANCE, *supra* note 9, § 3 to add § 139.20(gg)(1). "Pornography is the sexually explicit subordination of women, graphically depicted, whether in pictures or in words . . ." *Id.* In *American Booksellers*, the court found the ordinance void for vagueness. *American Booksellers*, 598 F. Supp. at 1337-39. The court noted that the term "subordination of women" does not meet the test stated by the Supreme Court in *Grayned v. City of Rockford*, which requires, in part, that laws "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *American Booksellers*, 598 F. Supp. at 1338, quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The ordinance does not define the term "subordination of women." As the federal district court of Indianapolis noted, it is unclear if "subordination of women" refers to physical, social, psychological, emotional or any other form of subordination. *Id.* Thus, the court held that the ordinance violates the basic principle of due process because the prohibitions of the ordinance are not clearly defined. *Id.* at 1339.

21. MINNEAPOLIS ORDINANCE, *supra* note 9, § 3 to add § 139.20(gg)(1)(i)-(ix). The Indianapolis ordinance omitted the following sections found in the Minneapolis ordinance: § 139.20(gg)(1)(i) (women are presented dehumanized as sexual objects, things or commodities); § 139.20(gg)(1)(v) (women are presented in postures of sexual submission); and § 139.20(gg)(1)(vii) (women are presented as whores by nature). See INDIANAPOLIS ORDINANCE, *supra* note 13, § 16-3(v). Even so, the court in *American Booksellers* found the enumerated categories to be plagued with constitutional problems of vagueness. *American Booksellers*, 598 F. Supp. at 1338-39. The court noted that terms such as "degradation," "abasement," and "inferior" are subjective terms which are inherently void for vagueness. *Id.* at 1339. Additionally, terms such as "in a context that make these conditions sexual" are not defined in the ordinance. *Id.* The void-for-vagueness issue is outside the scope of this Note.

The ordinance creates the right for any aggrieved person²² alleging violation of the ordinance to bring a civil action²³ against a maker, seller, exhibitor, or distributor of objectionable pornography.²⁴ The ordinance makes unlawful: (1) the trafficking of pornography;²⁵ (2) coer-

Section 2(a)(i) of the Suffolk County Ordinance combines the categories in § 139.20(gg)(1)(i) and § 139.20(gg)(1)(iv) of the Minneapolis ordinance to read "women are presented dehumanized as sexual objects, things, or commodities for domination, conquest, violation, exploitation, possession, or use, through postures or positions of sexual servility or submission or display." SUFFOLK COUNTY ORDINANCE, *supra* note 16, § 2(a)(i). Although the Suffolk County Ordinance contains all the other categories of the Minneapolis ordinance, the Suffolk County ordinance also requires that at least three of the descriptive categories are met. See SUFFOLK COUNTY ORDINANCE, *supra* note 16, § 2(a).

Opponents of the ordinance suggest that the following movies would fall within the ordinance's definition of pornography: "Dressed to Kill" (starring Michael Caine and Angie Dickinson); "Star 80" (starring Mariel Hemingway and Cliff Robertson); "Body Heat" (starring William Hurt and Kathleen Turner); "Swept Away" (starring Giancarlo Giannini and Mariangela Melato); and "Last Tango in Paris" (starring Marlon Brando and Maria Schneider). Memorandum of Law in Support of Moving Plaintiffs' Motion Pursuant to Fed. R. Civ. P. 56 for Summary Judgment at 20, *American Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984). In addition, opponents claim that books such as *THE WITCHES OF EASTWICK* by John Updike, *THE DELTA OF VENUS* by Anais Nin, *THE OTHER SIDE OF MIDNIGHT* by Sidney Sheldon, *SCRUPLES* by Judith Krantz, *THE CARPETBAGGERS* by Harold Robbins, various James Bond novels by Ian Fleming, and most romance ("gothic") novels would be encompassed by the ordinance's definition of pornography. *Id.* at 21. It was also suggested that the BIBLE contains certain passages which, to some, may present "graphic sexually explicit subordination of women," as do many "classics" such as Voltaire's *CANDIDE*. *Amicus Curiae* Brief of The Indiana Library Association and the Indiana Library Trustee Association at 6, *American Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984).

22. The ordinance provides a cause of action not only for women, but for men, children or transsexuals who prove that they are injured by pornography in the same way that women are injured. MINNEAPOLIS ORDINANCE, *supra* note 9, § 3 to add § 139.20(gg)(2); see also INDIANAPOLIS ORDINANCE, *supra* note 13, § 16-3(v); SUFFOLK COUNTY ORDINANCE, *supra* note 16, § 3(a). Opponents argue that granting men, women, children and transsexuals a cause of action under an ordinance that seeks to prevent sex discrimination against women is vague and "prevents meaningful reliance on legislative purpose." *Amici Curiae* Brief of the American Civil Liberties Union and the Indiana Civil Liberties Union at 26, *American Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984). However, the court in *American Booksellers* did not challenge the ordinance on this ground. This issue is outside the scope of this Note.

23. See *infra* notes 31, 32 and accompanying text for language in the statutes giving victims of harm caused by pornography the right to bring a civil action.

24. MINNEAPOLIS ORDINANCE, *supra* note 9, § 4 to add § 139.40 (m)-(s). See *infra* notes 25-28 and accompanying text. For corresponding sections in the Indianapolis and Suffolk County ordinances, see INDIANAPOLIS ORDINANCE, *supra* note 13, §§ 16-17, 16-26, 16-27; SUFFOLK COUNTY ORDINANCE, *supra* note 16, § 3.

25. MINNEAPOLIS ORDINANCE, *supra* note 9, § 4 to add § 139.40(l). Subsection (l) provides:

cion of others into pornographic performances;²⁶ and (3) the forcing of

(1) *Discrimination by trafficking in pornography.*

The production, sale, exhibition, or distribution of pornography is discrimination against women by means of trafficking in pornography:

(1) City, state, and federally funded public libraries or private and public university and college libraries in which pornography is available for study, including on open shelves, shall not be construed to be trafficking in pornography but special display presentations of pornography in said places is sex discrimination.

(2) The formation of private clubs or associations for purposes of trafficking in pornography is illegal and shall be considered a conspiracy to violate the civil rights of women.

(3) Any woman has a cause of action hereunder as a woman acting against the subordination of women. Any man or transsexual who alleges injury by pornography in the way women are injured by it shall also have a cause of action.

Id.

26. MINNEAPOLIS ORDINANCE, *supra* note 9, § 4 to add § 139.40(m). Subsection (m) provides:

Coercion into pornographic performances. Any person, including transsexual, who is coerced, intimidated, or fraudulently induced (hereafter, "coerced") into performing for pornography shall have a cause of action against the maker(s), seller(s), exhibitor(s) or distributor(s) of said pornography for damages and for the elimination of the products of the performance(s) from the public view.

(1) *Limitation of Action.* This claim shall not expire before five years have elapsed from the date of the coerced performance(s) or from the last appearance or sale of any product of the performance(s), whichever date is later;

(2) Proof of one or more of the following facts or conditions shall not, without more, negate a finding of coercion:

(i) that the person is a woman; or

(ii) that the person is or has been a prostitute; or

(iii) that the person has attained the age of majority; or

(iv) that the person is connected by blood or marriage to anyone involved in or related to the making of pornography; or

(v) that the person has previously had, or been thought to have had, sexual relations with anyone, including anyone involved in or related to the making of the pornography; or

(vi) that the person has previously posed for sexually explicit pictures for or with anyone, including anyone involved in or related to the making of the pornography at issue; or

(vii) that anyone else, including a spouse or other relative, has given permission on the person's behalf; or

(viii) that the person actually consented to a use of the performance that is changed into pornography; or

(ix) that the person knew that the purpose of the acts or events in question was to make pornography; or

(x) that the person showed no resistance or appeared to cooperate actively in the photographic sessions or in the sexual events that produced the pornography; or

(xi) that the person signed a contract, or made statements affirming a

pornography upon another person.²⁷ Additionally, the ordinance gives victims of any assault or physical attack caused by pornography a civil remedy against the perpetrator and those involved in the production or distribution of the pornography.²⁸

B. Procedural Devices Available Under the Ordinance

Like other laws prohibiting discrimination,²⁹ the ordinance allows victims of pornography to adjudicate complaints through the administrative apparatus of the Human Rights Commission³⁰ and in the courts.³¹ Under the procedural provisions of chapter 141 of the

willingness to cooperate in the production of pornography; or
 (xii) that no physical force, threats, or weapons were used in the making of the pornography; or
 (xiii) that the person was paid or otherwise compensated.

Id.; see also INDIANAPOLIS ORDINANCE, *supra* note 13, § 16-3(5); SUFFOLK COUNTY ORDINANCE, *supra* note 16, § 3(b).

27. MINNEAPOLIS ORDINANCE, *supra* note 9, § 4 to add § 139.40(n). Section 139.40(n) provides: "(n) *Forcing pornography on a person.* Any woman, man, child or transsexual who has pornography forced on him/her in any place of employment, in education, in a home, or in any public place has a cause of action against the perpetrator and/or institution." *Id.*; see also INDIANAPOLIS ORDINANCE, *supra* note 13, § 16-5(6); SUFFOLK COUNTY ORDINANCE, *supra* note 16, § 3(c).

28. MINNEAPOLIS ORDINANCE, *supra* note 9, § 4 to add § 139.40(o). Section 139.40(o) provides:

(o) *Assault or physical attack due to pornography.* Any woman, man, child, or transsexual who is assaulted, physically attacked or injured in a way that is directly caused by specific pornography has a claim for damages against the perpetrator, the maker(s), distributor(s), seller(s), and/or exhibitor(s), and for an injunction against the specific pornography's further exhibition, distribution, or sale. No damages shall be assessed (A) against maker(s) for pornography made, (B) against distributor(s) for pornography distributed, (C) against seller(s) for pornography sold, or (D) against exhibitor(s) for pornography exhibited prior to the enforcement date of this act.

Id.; see also INDIANAPOLIS ORDINANCE, *supra* note 13, § 16-3(7); SUFFOLK COUNTY ORDINANCE, *supra* note 16, § 3(c).

29. Memorandum to Minneapolis City Council from Catherine A. MacKinnon and Andrea Dworkin, Dec. 26, 1983, at 3.

30. MINNEAPOLIS CODE OF ORDINANCES ch. 141 (1982). The pre-existing administrative procedure would be followed. See *infra* notes 32-43 for a discussion of the pre-existing procedure. However, MINNEAPOLIS ORDINANCE, *supra* note 9, § 1 to add § 141.50(1)(3), adds the following provision: "(3) *Pornography.* The hearing committee or court may order relief, including the removal of violative material, permanent injunction against the sale, exhibition or distribution of violative material or any other relief deemed just and equitable, including reasonable attorney's fees." *Id.*; see also INDIANAPOLIS ORDINANCE, *supra* note 13, § 16-7.

31. MINNEAPOLIS ORDINANCE, *supra* note 9, § 2 to amend § 141.60. Section (2) provides that § 141.60 be amended as follows:

141.60 *Civil Action, judicial review and enforcement.*
 (a) *Civil actions.*

Minneapolis Code of Ordinances,³² a person alleging discrimination must file a complaint with the director of the Minneapolis Civil Rights Commission,³³ who is authorized to conduct an investigation to determine whether a violation has occurred.³⁴ If probable cause is found to exist, the director will seek to correct the violation through informal conciliation.³⁵ If conciliation proves unsuccessful, the complaint is referred to the Civil Rights Commission for a public hearing³⁶ in which a designated hearing committee³⁷ reviews the complaint and prescribes relief.³⁸ If the respondent fails to correct the discriminatory practice proscribed by the committee, judicial enforcement may be sought.³⁹ The hearing committee or the court may: (1) require removal of the pornography;⁴⁰

(1) An individual alleging a violation of this ordinance may bring a civil action directly in court.

(2) A complainant may bring a civil action at the following times:

(i) Within forty-five (45) days after the director, a review committee or a hearing committee has dismissed a complaint for reasons other than a conciliation agreement to which the complainant is a signator; or

(ii) After forty-five (45) days from the filing of a verified complaint if a hearing has not been held pursuant to section 141.50 or the department has not entered into a conciliation agreement to which the complainant is a signator. The complainant shall notify the department of his/her intention to bring a civil action, which shall be commenced within ninety (90) days of giving the notice. A complainant bringing a civil action shall mail, by registered or certified mail, a copy of the summons and complaint to the department and upon receipt of same, the director shall terminate all proceedings before the department relating to the complaint and shall dismiss the complaint.

No complaint shall be filed or reinstated with the department after a civil action relating to the same unfair discriminatory practice has been brought unless the civil action has been dismissed without prejudice.

Id.

32. MINNEAPOLIS CODE OF ORDINANCES ch. 141 (1984).

33. MINNEAPOLIS CODE OF ORDINANCES § 141.50(a) (1984). The complaint must be filed within six months of the incident that gave rise to the complaint. *Id.*; see also INDIANAPOLIS ORDINANCE, *supra* note 13, § 16-17.

34. MINNEAPOLIS CODE OF ORDINANCES § 141.50(b) (1984); see also INDIANAPOLIS ORDINANCE, *supra* note 13, § 16-24.

35. MINNEAPOLIS CODE OF ORDINANCES § 141.50(e) (1984); see also INDIANAPOLIS ORDINANCE, *supra* note 13, § 16-24.

36. MINNEAPOLIS CODE OF ORDINANCES § 141.50(h) (1984).

37. The committee must be formed within 30 days of the receipt of the complaint by the Commission. The chairperson must choose three members of the Commission, one of whom is an attorney, to serve as the committee. *Id.*; see also INDIANAPOLIS ORDINANCE, *supra* note 13, § 16-26.

38. MINNEAPOLIS CODE OF ORDINANCES § 141.50(h) (1984).

39. MINNEAPOLIS ORDINANCE, *supra* note 9, § 2 to amend § 141.60. See *supra* note 31 for the text of this section. See also INDIANAPOLIS ORDINANCE, *supra* note 13, § 16-27.

40. MINNEAPOLIS ORDINANCE, *supra* note 9, § 1 to add § 141.50(l)(3); see *supra* note 30 and accompanying text.

(2) permanently enjoin the sale,⁴¹ exhibition or distribution of the pornography;⁴² or (3) give "any other relief deemed just and equitable."⁴³

C. Purpose of the Ordinance

The legislative purpose of the ordinance is to prevent and prohibit the discriminatory practices encouraged by pornography.⁴⁴ The Minneapolis City Council found that pornography is central in creating and perpetuating the unequal position of the sexes.⁴⁵ The City Council's Special Findings on Pornography state:

The bigotry and contempt [pornography] promotes, with the acts of aggression it fosters, harm women's opportunities for equality of rights in employment, education, property rights, public accommodations and public services; create public harassment and private denigration; promote injury and degradation such as rape, battery and prostitution and inhibit just enforcement of laws against these acts; contribute significantly to restricting women from full exercise of citizenship and participation in public life, including in neighborhoods; damage relations between the sexes; and undermine women's equal exercise of rights to speech and action guaranteed to all citizens under the Constitutions and laws of the United States and the state of Minnesota.⁴⁶

III. What are "Civil Rights?"

The Minneapolis ordinance defines pornography as a violation of

41. MINNEAPOLIS ORDINANCE, *supra* note 9, § 1 to add § 141.50(1)(3).

42. *Id.*

43. *Id.* The hearing committee or the court may grant reasonable attorney's fees if they deem them to be just and equitable. *Id.*

44. MINNEAPOLIS ORDINANCE, *supra* note 9, § 1 to amend § 139.10 § (b). The ordinance adds part (4) which states that the public policy of the City of Minneapolis and the purpose of title 7 is "[t]o prevent and prohibit all discriminatory practices of sexual subordination or inequality through pornography." *Id.*; *see also* INDIANAPOLIS ORDINANCE, *supra* note 13, § 16-1(b); SUFFOLK COUNTY ORDINANCE, *supra* note 16, § (1). MacKinnon and Dworkin stated that "[t]he purpose of the [Minneapolis] ordinance is to make available an effective remedy . . . [for] the systematic discrimination, the condoned brutality, and the glorified debasement that defines the condition of an entire group of people." Memorandum to City Council, *supra* note 29, at 3.

45. MINNEAPOLIS ORDINANCE, *supra* note 9, § 1 to amend § 139.10(a); *see also* INDIANAPOLIS ORDINANCE, *supra* note 13, § 16-1(a); SUFFOLK COUNTY ORDINANCE, *supra* note 13, § 1.

46. MINNEAPOLIS ORDINANCE, *supra* note 9, § 1 to add § 139.10(a)(1); *see also* INDIANAPOLIS ORDINANCE, *supra* note 13, § 16-1(a)(2); SUFFOLK COUNTY ORDINANCE, *supra* note 16, § 1.

women's civil rights.⁴⁷ This argument provides a case of first impression in the courts.⁴⁸ Since present civil rights legislation does not encompass pornography, the courts must determine whether the concept of civil rights should be extended to afford protection to the women harmed by pornography.

A. The Early History of Civil Rights

The notion of protected "civil rights"⁴⁹ did not evolve until the Reconstruction Period of the late 1860's.⁵⁰ After the Civil War, Congress turned its attention from the slavery debate to the abuse

47. The purpose of the ordinance, to prevent discriminatory practices, is cast in civil rights terminology. See *supra* notes 44-46 and accompanying text. Proponents analogize the sex discrimination caused by pornography to the advocacy of the "separate but equal" doctrine in a civil rights context. See Brief of Linda Marchiano, *supra* note 18, at 42-43. Segregation expresses an idea that is protected under the first amendment but is not constitutionally protected behavior. *Id.* Proponents of the Minneapolis ordinance argue that protection of the idea that women are inferior to men should not extend protection to the sexual subordination of women. *Id.* However, in *American Booksellers*, the court concluded that this "content-versus-conduct" approach is not persuasive and is contrary to the first amendment. *American Booksellers*, 598 F. Supp. at 1330. See *infra* notes 151-208 for a discussion of the ordinance in regard to first amendment issues.

48. See *supra* note 8 and accompanying text.

49. Civil rights refer to those rights commonly denied people on the basis of race, color, religion, national origin, and sex. See Maslow & Robison, *Civil Rights Legislation and the Fight for Equality, 1862-1952*, 20 U. CHI. L. REV. 363, 363 n.1 (1953) [hereinafter cited as Maslow & Robison]. Civil rights differ from civil liberties, which are the personal rights guaranteed and protected by the Constitution, specifically the first ten amendments. *Id.*

50. See Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1323 (1952) [hereinafter cited as Gressman]; Maslow & Robison, *supra* note 49, at 365. Arthur J. Goldberg, Associate Justice of the United States Supreme Court, suggested that there are several reasons why equality, a primary goal of the founding fathers, was not expressly stated in the Constitution prior to the adoption of the fourteenth amendment. Goldberg, *Equality and Governmental Action*, 39 N.Y.U. L. REV. 205, 206-07 (1964) [hereinafter cited as Goldberg]. First, equality is implied throughout the Constitution in its guarantee of a Republican form of government ruled by the people and not by a king. *Id.* at 206. Second, the framers might naturally have assumed that equality was included in the term "liberty" which is incorporated in the preamble and in the due process clause of the fifth amendment. *Id.* at 207. Third, since many states incorporated equality in their constitutions, it may have been deemed unnecessary to include it on a federal level. *Id.* Finally, the most prevailing reason for the lack of civil rights activity prior to this time was the political and economic popularity of slavery. 1 STATUTORY HISTORY OF THE UNITED STATES 6 (B. Schwartz, ed. 1970) [hereinafter cited as Schwartz]; see Gressman, *supra*, at 1323; Maslow & Robison, *supra* note 49, at 367; Goldberg, *supra*, at 207. The pre-Civil War period was characterized by the *Dred Scott* philosophy that blacks were not citizens under the Constitution. Gressman, *supra*, at 1325; see *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856).

of state power in the areas of rights and liberties.⁵¹ At that point, federal protection of rights and liberties began to develop.

On February 1, 1865, Congress adopted and submitted to the states the thirteenth amendment,⁵² which abolished slavery and involuntary servitude in the United States and gave Congress the power to enforce this prohibition.⁵³ Despite congressional action, the South endeavored to keep blacks enslaved through the so-called Black Codes.⁵⁴ In response, Congress, over President Johnson's veto,⁵⁵ passed the first civil rights statute, the Civil Rights Act of 1866 (the 1866 Act).⁵⁶

The 1866 Act, which treats civil rights to mean freedom from acts of racial prejudice,⁵⁷ states that all persons born in the United

51. See Gressman, *supra* note 50, at 1323; Schwartz, *supra* note 50, at 8. Until the end of the Civil War, the states determined and protected the rights of their citizens, since the Bill of Rights was binding only on the federal government and not on the state governments. Schwartz, *supra* note 50, at 8-9.

52. U.S. CONST. amend. XIII. The thirteenth amendment states:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Id.

53. *Id.* The thirteenth amendment was the first protection of personal rights directed at the states and private individuals, as well as the federal government. Gressman, *supra* note 50, at 1324. Ratification of the thirteenth amendment was completed on December 18, 1865. *Id.* For a further discussion of the issues surrounding the adoption of the thirteenth amendment, see tenBroek, *Thirteenth Amendment to the Constitution of the United States*, 39 CALIF. L. REV. 171 (1951).

54. Maslow & Robison, *supra* note 49, at 366-67. The Black Codes were a variety of laws enacted in the South between 1865 and 1867, which restricted the rights of blacks to participate in society. *Id.* For example, Black Codes included laws that barred blacks from certain trades or businesses without special licenses and restricted their rights to rent and lease land outside cities. *Id.* at 367.

55. 6 MESSAGES AND PAPERS OF THE PRESIDENTS 405-13 (1897).

56. Ch. 31, 14 Stat. 27 (1866). See generally CONG. GLOBE, 39th Cong., 1st Sess. 1857-61 (passage in House of 1866 Act over President Johnson's veto); CONG. GLOBE, 39th Cong., 1st Sess. 1801-09 (passage in Senate of 1866 Act over President Johnson's veto).

57. Ch. 31, 14 Stat. 27 (1866). Section 1 of the Civil Rights Act of 1866 states:

CHAP. XXXI - *An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of Their Vindication*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to

States are citizens of the United States, and each citizen, regardless of race or color, shall have the same rights as white citizens.⁵⁸ Questions arose as to whether the 1866 Act granted power to Congress that was reserved to the states.⁵⁹ To ensure the constitutionality of the 1866 Act,⁶⁰ Congress, on July 13, 1866, proposed the fourteenth amendment which was ratified on July 21, 1868.⁶¹ The fourteenth amendment, which guarantees equal protection and due process of law for all people born or naturalized in the United States,⁶² became the predominant rationale for civil rights decisions by the United States Supreme Court.⁶³

Other Reconstruction Period civil rights measures followed immediately, each connecting civil rights to acts of racism. On February 26, 1869, Congress submitted to the states the fifteenth amendment,⁶⁴

make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Id.

58. See *supra* note 57 and accompanying text.

59. See Gressman, *supra* note 50, at 1328-29. In *People v. Brady*, 40 Cal. 198, 220-21 (1870), the court found the 1866 Act to be unconstitutional because it contravened the powers reserved to the state under the United States Constitution.

60. See Gressman, *supra* note 50, at 1327-28 (provisions and goals of 1866 Act were to be incorporated into constitutional provision to guarantee that federal government would have power to protect individual rights of citizens).

61. U.S. CONST. amend. XIV. The fourteenth amendment guarantees citizenship to all persons born or naturalized in the United States, and declares that the states shall provide due process of law and equal protection of the laws to all of their people. *Id.* Section 5 of the fourteenth amendment gives Congress the power to enforce the provisions of the amendment through appropriate legislation. *Id.* § 5; see *infra* note 82 and accompanying text.

62. U.S. CONST. amend. XIV. For example, prior to the fourteenth amendment, those people who were born and remained in the District of Columbia were not United States citizens. See *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 72 (1872).

63. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 616-17 (2d ed. 1983) [hereinafter cited as NOWAK]. Nowak states that the fourteenth amendment is difficult to interpret in light of the competing goals of Congress during the Reconstruction Period. *Id.* at 619-20. Thus, the history provides few guidelines on how the fourteenth amendment applies to modern civil rights issues. *Id.* at 620. Nowak suggests that, at best, the Congressional debates on the fourteenth amendment demonstrate four goals of Congress: (1) to guarantee protection of natural civil liberties from abuses by the state; (2) to help equalize the rights of black and white Americans; (3) to provide Congress with broad powers of enforcement; and (4) to localize the protection of civil rights in the federal government. *Id.* at 621.

64. U.S. CONST. amend. XV. The fifteenth amendment, ratified in 1870, states: Section 1. The right of citizens of the United States to vote shall not

which prohibited denial of the right to vote on the basis of race.⁶⁵ Next, Congress passed the Enforcement Act of May 31, 1870,⁶⁶ which created criminal penalties against those who deprived blacks of the rights enumerated in the 1866 Act.⁶⁷ The Anti-Ku Klux Klan Act,⁶⁸ enacted on April 20, 1871, outlawed conspiracies to deprive any person of equal protection or privileges and immunities under the law.⁶⁹ The final Reconstruction act, enacted on March 1, 1875,⁷⁰ prohibited discrimination on the basis of race or color in public places and in the selection of juries.⁷¹

B. Judicial Interpretation of Early Civil Rights Measures

Judicial interpretation of the thirteenth, fourteenth, and fifteenth amendments⁷² limited what seemed to be the far-reaching scope of the constitutional civil rights guarantees. In the *Slaughter House Cases*,⁷³ the United States Supreme Court held, in a five to four decision, that the privileges and immunities clause of the fourteenth

be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Id.

65. *Id.*

66. Ch. 114, 16 Stat. 140 (1870), amended 16 Stat. 433 (1871).

67. See Gressman, *supra* note 50, at 1334. The 1870 Act reenacted the 1866 Act under the premise that any constitutional infirmities of the 1866 Act were eradicated by the fourteenth amendment. *Id.* at 1333-34; see *supra* note 60 and accompanying text. The 1866 Act was then codified in R.S. §§ 1977, 1978 (1874), now 42 U.S.C. §§ 1981 and 1982. *Jones v. Mayer Co.*, 392 U.S. 409, 422 n.28 (1968).

68. 17 Stat. 13 (1871), codified at 42 U.S.C. §§ 1983, 1985 (1982). The Anti-Ku Klux Klan Act provides, in part:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress

17 Stat. 13, 13 (1871).

69. *Id.*

70. Ch. 114, 18 Stat. 335 (1875).

71. *Id.*

72. These three amendments are commonly referred to as the Civil War Amendments. See NOWAK, *supra* note 63, at 616.

73. 83 U.S. (16 Wall.) 36 (1873).

amendment did not protect the rights of citizens relating solely to state citizenship.⁷⁴ Under this decision, states could limit personal liberties that were not decidedly federal.⁷⁵

In *United States v. Cruikshank*,⁷⁶ the Supreme Court stated that the first section of the fourteenth amendment⁷⁷ applied exclusively to instances of state action.⁷⁸ The *Cruikshank* decision thereby removed civil rights violations by private parties from the scope of constitutionally guaranteed protection.⁷⁹ Various provisions of civil rights statutes eroded under the *Cruikshank* decision.⁸⁰ Finally, in 1883, the Supreme Court held in the *Civil Rights Cases*⁸¹ that the enforcement provisions of the thirteenth and fourteenth amendments⁸² did not authorize Congress to redress racial discrimination by private

74. *Id.* at 81-82.

75. *Id.* at 79-81. The *Slaughter House Cases* were not civil rights cases; they involved a state law that granted a monopoly to a corporation in the slaughter of animals. However the effect of the decision was felt by civil rights advocates, because much of the civil rights legislation relied on a broader interpretation of the privileges and immunities clause of the fourteenth amendment. See Gressman, *supra* note 50, at 1338; see also *infra* notes 79-83 and accompanying text.

76. 92 U.S. 542 (1876).

77. The first section of the fourteenth amendment provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

78. *Cruikshank*, 92 U.S. at 554-55.

79. *Id.* (Court found unconstitutional federal criminal indictments under conspiracy section of 1870 Act as applied to private persons who were not abridging federally guaranteed rights); see also *United States v. Harris*, 106 U.S. 629 (1883) (Court declared void criminal conspiracy section of Ku Klux Klan Act of 1871 which made conspiracies by private persons to lynch an offense).

80. In *United States v. Reese*, 92 U.S. 214 (1876), the Court held that two sections of the 1870 Act, which provided protection for all citizens in their right to vote, were unconstitutional under the fifteenth amendment because the scope of these sections was not confined to interferences based on race, color, or prior servitude as defined in the amendment. *Id.* at 220-22. In *James v. Bowman*, 190 U.S. 127 (1903), the Court struck down § 5 of the 1870 Act (§ 5507 of the Revised Statutes of the United States), which prohibited bribery in elections, because it went beyond the fifteenth amendment state action provisions and sought to reach private persons. *Id.* at 139.

81. 109 U.S. 3 (1883).

82. See *supra* note 61. Section 5 states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

individuals,⁸³ thereby further diminishing the efficacy of the civil rights statutes.

In addition to limiting the Civil War Amendments⁸⁴ to discrimination by state action, the Supreme Court suggested that the scope of these amendments was limited to racial discrimination.⁸⁵ In 1873, Justice Miller, in his delivery of the opinion of the Supreme Court in the *Slaughter House Cases*,⁸⁶ stated that although the fourteenth amendment was not restricted to discrimination against blacks, it was highly unlikely that the amendment would be found to protect against any other form of discrimination.⁸⁷ In 1873, the Supreme Court also decided *Bradwell v. Illinois*⁸⁸ in which the Court upheld the state's refusal to grant a woman a license to practice law. The three concurring justices in the *Bradwell* decision implied that they would not apply the privileges and immunities clause of the fourteenth amendment to protect the rights of women in the workplace.⁸⁹

C. Twentieth Century Developments in the Civil Rights Movement

Following the enactment of the Civil Rights Act of 1875,⁹⁰ congres-

83. 109 U.S. 3, 11 (1883) (Court held unconstitutional first two sections of Civil Rights Act of 1875, which outlawed discrimination based on race in use of public accommodations and recreational facilities; Court held that, under fourteenth amendment, private proprietors were free to discriminate on basis of race).

84. See *supra* notes 52-65 and accompanying text for a discussion of the thirteenth, fourteenth, and fifteenth amendments.

85. See *infra* notes 87-89 and accompanying text.

86. 83 U.S. (16 Wall.) 36 (1873).

87. *Id.* The Supreme Court stated:

We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.

Id. at 81.

88. 83 U.S. (16 Wall.) 130 (1873).

89. *Id.* at 141. The concurring justices were clearly impressed by the subject matter of the case. The plaintiff, Myra Bradwell, challenged the Illinois Supreme Court's decision denying her a license to practice law because she was female. Justice Bradley, in his concurrence in which Justices Swayne and Field joined, stated that females should not have the right to pursue all jobs because:

[m]an is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.

Id.

90. 18 Stat. 335 (1875).

sional activity in the civil rights area lay dormant for over three-quarters of a century. Then in the late 1950's, the so-called Second Reconstruction Period⁹¹ of civil rights began when Congress passed the Civil Rights Act of 1957.⁹² Over the next three decades, Congress passed four more civil rights acts,⁹³ of which the Civil Rights Acts of 1964⁹⁴ and 1965⁹⁵ have been as far reaching as any of the enactments of the post-Civil War Reconstruction Period.⁹⁶ In particular, the Civil Rights Act of 1964 (the 1964 Act)⁹⁷ increased the protected rights of blacks and expanded the definition of civil rights to protect against discrimination based on religion, national origin, and finally, sex.⁹⁸

Title VII⁹⁹ of the 1964 Act was, at that time, the only federal statute to specifically outlaw discrimination on the basis of sex.¹⁰⁰ Title VII states that it is unlawful for any employer to refuse to hire, dismiss, or otherwise discriminate against a person because of race, religion, national origin, or sex.¹⁰¹ The Supreme Court held, in *Phillips v. Martin Marietta Corp.*,¹⁰² that the scope of Title VII's prohibitions against sex

91. M. BERGER, EQUALITY BY STATUTE 1-64 (1968). The author equates the second surge of civil rights activity to the complex social changes of the period, including the South's economic problems of the 1930's and the development of urban poverty in the 1960's as blacks moved to the cities. *Id.* at 16-32.

92. Pub. L. No. 85-315, 71 Stat. 634 (1957).

93. The four civil rights acts following the Civil Rights Act of 1957 are: (1) The Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (1960); (2) The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); (3) The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965); (4) The Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968).

94. Pub. L. No. 88-352, 78 Stat. 241 (1964).

95. Pub. L. No. 89-110, 79 Stat. 437 (1965).

96. 2 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 837 (B. Schwartz, ed. 1970). The Civil Rights Act of 1964, as enacted, contains eleven titles. Title II (barring racial discrimination in public accommodations which affect commerce), Title VI (banning racial discrimination in all programs funded with federal assistance), and Title VII (banning discrimination in employment practices on the basis of race, religion, or sex) have had the greatest ramifications. *Id.* at 1018-20. The Voting Rights Act of 1965 bans those acts, such as voting qualifications, that deny or abridge the right of any citizen to vote due to race or color. 79 Stat. 437 (1965).

97. *See supra* note 94 and accompanying text. The 1964 Act is codified at 42 U.S.C. §§ 2000a-2000h (1982).

98. *Id.* However, Title VII, 42 U.S.C. § 2000e-2000e-17 (1982), is the only section of the 1964 Act to ban discrimination based on sex.

99. 42 U.S.C. § 2000e-2000e-17 (1982).

100. *Id.* Although Title VII bans discrimination on the basis of sex, it permits discrimination in hiring by sex where there "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise" 42 U.S.C. § 2000e-2(e) (1982).

101. 42 U.S.C. § 2000e-2 (1982).

102. 400 U.S. 542 (1971) (per curiam).

discrimination is not confined to overt discrimination based solely on gender; Title VII also prohibits discrimination against a subsection of the male or female class.¹⁰³ Therefore, sex discrimination can refer to discrimination based upon characteristics that affect the employment opportunities of one sex but not the other.¹⁰⁴

Although sex discrimination was introduced into the civil rights context in 1964, the Supreme Court did not invalidate a statute on those grounds until 1971. In that year, the Court held, in *Reed v. Reed*,¹⁰⁵ that the sex preference established by an Idaho statute violated the equal protection clause of the fourteenth amendment.¹⁰⁶ The Idaho statute stated that when otherwise equally qualified persons sought to administer an estate, preference was to be given to males over females.¹⁰⁷ Although the Supreme Court held that the Idaho statute constituted sex discrimination, it declined to elevate gender-based discrimination to the level of "suspect classification."¹⁰⁸ While

103. *Id.* at 544. The Supreme Court held that the company's refusal to hire mothers of young children but not fathers of young children constituted sex discrimination under Title VII. Although not all women were excluded from employment but only women with small children, the company rule violated Title VII because gender was a determination. Other courts have similarly concluded that discrimination based only partly on gender violates Title VII. See *Willingham v. Macon Tel. Pub. Co.*, 507 F. 2d 1084, 1089 (5th Cir. 1975) (en banc) ("sex plus" discrimination which classifies employees on basis of sex, plus an ostensibly neutral characteristic, violates Title VII); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198-99 (7th Cir.) (United's no-marriage rule for stewardesses discriminated on basis of sex because it was not applied to male employees), *cert. denied*, 404 U.S. 991 (1971); see also 110 CONG. REC. 2728, 13,825 (Congress specifically rejected amendment to Act which would have limited prohibition against sex discrimination to discrimination based solely on sex). Such a limitation, it was felt, would debilitate the Act. *Sprogis*, 444 F.2d at 1198 n.4; *Willingham*, 507 F.2d at 1089. See B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 337-60 (1976) (discussion of "sex plus" discrimination) [hereinafter cited as SCHLEI & GROSSMAN].

104. See SCHLEI & GROSSMAN, *supra* note 103, at 337.

105. 404 U.S. 71 (1971).

106. *Reed*, 404 U.S. at 74. The Supreme Court unanimously declared unconstitutional an Idaho statute that gave men preference over women to administer estates. *Id.* The Court held that the fourteenth amendment does not deny states power to treat different classes of persons differently, but rather denies states power to legislate that different treatment be accorded to people of different classes on the basis of criteria unrelated to the objectives of the statute at hand. *Id.* at 75-76.

107. *Reed*, 404 U.S. at 73. Section 15-314 of the Idaho Code provided that "[o]f several persons claiming and equally entitled [under §15-312] to administer, males must be preferred to females, and relatives of the whole to those of the half blood." IDAHO CODE tit. 15, § 314 (1948).

108. See NOWAK, *supra* note 63, at 718-19. The "strict judicial scrutiny" test arose from the United States Supreme Court's decision in *Korematsu v. United States*, 323 U.S. 214, 216 (1944). The *Korematsu* Court held that classifications

the justices differ as to the proper classification of sex-based discrimination,¹⁰⁹ the Supreme Court maintains that sex-based discrimination violates the equal protection guarantee of the fourteenth amendment.¹¹⁰

based on race or national origin were "suspect" or likely to be based on an impermissible purpose. *Id.* at 216. These classifications would be subject to rigid judicial review, and would be upheld only if required by "public necessity." *Id.* Thus, the Supreme Court established the strict scrutiny test which held that some restrictions on liberty of "suspect" classes will be allowed where they are required to satisfy "compelling" or "overriding" interests. NOWAK, *supra* note 63, at 633.

Three standards of review have been established in equal protection analysis. In addition to strict scrutiny, the Supreme Court has employed a "rational relation" test whereby a classification is allowed to stand if it bears a rational relation to a valid governmental end, and an "intermediate tier" analysis which falls somewhere between the two. NOWAK, *supra* note 63, at 590-99. See also *infra* note 109 and accompanying text for a discussion of the intermediate tier approach. For a discussion of the three tests, see generally Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEORGETOWN L.J. 1071 (1974).

In *Reed v. Reed*, 404 U.S. 71 (1971), the Supreme Court did not review the Idaho statute according to strict scrutiny analysis. Rather, the Court found the statute unconstitutional because it violated the equal protection clause while seeking to reduce the workload of the courts. *Id.* at 76-77. In essence, the Supreme Court questioned whether the differences in sex were rationally related to a permissible objective of the statute. NOWAK, *supra* note 63, at 719.

109. In the five-year period following *Reed*, the Supreme Court could not agree on the appropriate standard of review to be used in sex-classification cases. NOWAK, *supra* note 63, at 719. The standards of review included the traditional rational relation test and the strict scrutiny test. See *supra* note 108 and accompanying text. In addition, since 1976 the Supreme Court has used an intermediate standard of review which applies a "substantial relationship to an important interest" test. See NOWAK, *supra* note 63, at 722. The scope of this test is unclear; it neither prohibits all sex-based classifications nor sets standards for determining the importance of opposing governmental interests. See NOWAK, *supra* note 63, at 722-23. Rather, the test allows each justice to weigh the interest the government asserts to justify the sex-based classification and to determine if the interest and the classification are reasonably related. See *id.*

The intermediate tier analysis has been used by the Supreme Court in a number of "property-allocation cases." See e.g., *Califano v. Westcott*, 443 U.S. 76 (1979) (Social Security Act providing financial support due to unemployment of fathers but not mothers held invalid); *Orr v. Orr*, 440 U.S. 268 (1979) (state law providing that state court could grant alimony payments only from husbands to wives found unconstitutional). For a discussion of intermediate tier analysis, see generally Blattner, *The Supreme Court's "Intermediate" Equal Protection Decisions: Five Imperfect Models of Constitutional Equality*, 8 HASTINGS CONST. L.Q. 777 (1981); Emden, *Intermediate Tier Analysis of Sex Discrimination Cases: Legal Perpetuation of Traditional Myths*, 43 ALB. L. REV. 73 (1978).

110. In *Reed*, the Supreme Court stated that granting a mandatory preference to members of either sex over members of the other, merely to accomplish a non-compelling state interest, "is to make the very kind of arbitrary legislative choice

Soon thereafter, Congress passed sex discrimination legislation to protect women in the areas of education,¹¹¹ equal pay,¹¹² and housing.¹¹³ In 1976, the United States District Court of the District of Columbia held that sexual harassment violates Title VII of the 1964 Act.¹¹⁴

forbidden by the Equal Protection Clause of the Fourteenth Amendment" 404 U.S. at 76-77.

In *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION*, author Catherine MacKinnon analyzes the Supreme Court's approaches to sex discrimination cases along two lines: a concept of sex differences, whereby differing treatment is tied to biological traits (the differences approach) and an approach that treats women as unequal (the inequality approach). C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979) [hereinafter cited as *SEXUAL HARASSMENT OF WORKING WOMEN*]. MacKinnon cites *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), in which the Supreme Court alluded to both approaches. *SEXUAL HARASSMENT OF WORKING WOMEN, supra*, at 103. The majority in *Gilbert* held that excluding pregnancy from disability coverage was not discrimination simply because the coverage was not all inclusive. *Gilbert*, 429 U.S. at 133-36. Yet in his dissent, Justice Brennan recognized that a different result might be reached if the Court, under an inequality approach, focused on the fact that only women are subjected to a potential loss of income due to this disability. *Id.* at 147-48.

Although MacKinnon acknowledges that no legal doctrine exists which fully accepts the inequality approach, certain existing doctrines are akin to it, including the possible categorization of sex as a suspect classification, as four justices did in *Frontiero v. Richardson*, 411 U.S. 677 (1973) (rule allowing only male members of uniformed service to claim spouse as dependent held unconstitutional), and the prohibition of practices which, though seemingly neutral, have a discriminatory impact upon one sex. *SEXUAL HARASSMENT OF WORKING WOMEN, supra*, at 116-17.

The inequality approach goes beyond the obvious forms of discrimination and attacks the social structure which cumulatively subordinates women through negative stereotypes and second-class status. *Id.* at 102-03.

111. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1686 (1982) and Health, Education and Welfare Title IX regulations, 40 Fed. Reg. 24137 (1975) (codified at 45 C.F.R. Part 86) prohibit schools which discriminate on the basis of sex from receiving federal funding.

112. The Equal Pay Act of 1963, as amended by the Education Amendments of 1972, prohibits pay differentials on the basis of sex. 29 U.S.C. § 206(d) (1982) (amending Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1982)).

113. Titles VIII and IX of the Civil Rights Act of 1968 (the 1968 Act) and Title V of the National Housing Act as amended by Title VIII of the Housing and Community Development Act of 1974, commonly known as the Fair Housing Act, prohibit sex discrimination in housing. Specifically, the Fair Housing Act prohibits discrimination in the sale, rental, or financing of housing. 42 U.S.C. §§ 3601-3606 (1982). In addition, it prohibits intimidation, based on sex discrimination, of the sellers, purchasers, financiers, or inhabitants of a dwelling. 42 U.S.C. § 3631 (1982). The National Housing Act prohibits sex discrimination regarding the lending of financial assistance or services related to the selling or renting of dwellings. 12 U.S.C. § 1735f-5 (1982).

114. *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976). The court held that sexual harassment was treatment "based on sex" within the meaning of Title VII. *Id.* at 659; *see also Garber v. Saxon Business Products*, 552 F.2d 1032 (4th Cir.

In 1980, the Equal Employment Opportunity Commission (EEOC)¹¹⁵ published guidelines which expressly recognize sexual harassment as a form of employment discrimination.¹¹⁶

The legislative history concerning the intended scope of the sex discrimination provisions is sparse;¹¹⁷ therefore, courts have interpreted Title VII according to the traditional equal protection analysis.¹¹⁸

1977) (complaint alleging employer policy of acquiescence in subjecting female employees to sexual advances of male supervisors stated cause of action under Title VII).

115. Title VII is enforced and administered by the Equal Employment Opportunity Commission. 42 U.S.C. § 2000e-5 (1982).

116. 45 Fed. Reg. 7-1, 676 (1980), codified at 29 C.F.R. § 1604.11. In part, the guidelines state:

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

Id. (footnote omitted).

117. "The legislative history of title VII's prohibition of sex discrimination is notable primarily for its brevity." *General Elec. Co. v. Gilbert*, 429 U.S. 125, 143, *reh. denied*, 429 U.S. 1079 (1976). The Equal Employment Opportunity Commission (EEOC) admitted that further investigation was necessary to determine the parameters of sex discrimination. 30 Fed. Reg. 14927 (1965). In *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), Justice Goldberg commended Congress for not specifying what constitutes discrimination, because its definition is ever changing: "[Congress] pursued the path of wisdom by being unrestrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow." *Id.* at 238.

118.

The concept of "discrimination" . . . was well known at the time of the enactment of Title VII, having been associated with the fourteenth amendment for nearly a century, and carrying with it a long history of judicial construction. When Congress makes it unlawful for an employer to "discriminate . . . because of . . . sex . . .," without further explanation of its meaning, we should not readily infer that it meant something different from what the concept of discrimination has traditionally meant.

General Elec. Co. v. Gilbert, 429 U.S. at 145; *cf. Morton v. Mancari*, 417 U.S. 535, 549 (1974) (without evidence to prove otherwise, Congress cannot be held to have intended to repeal Indian preference of Equal Employment Opportunity Act of 1972); *Ozawa v. United States*, 260 U.S. 178, 193 (1922) (Section 2169 of Revised Statutes regarding immigration confined to white persons was not changed by Naturalization Act of 1906; if Congress intended to change rule so well and long established, it would have done so explicitly). The Supreme Court has stated that the purpose of Congress enacting Title VII was "the removal of artificial,

Under this analysis, the courts have held that sexual harassment exists not only when an employee alleges direct employment consequences stemming from sexual advances¹¹⁹ but also when an employer creates or condones a discriminatory work environment.¹²⁰

arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (requirement of high school diploma and intelligence tests which were not used to measure ability was discriminatory).

MacKinnon suggests that sexual harassment can be defined as sex discrimination under both the "differences approach" and the "inequality approach" taken by the United States Supreme Court in sex-discrimination cases. *See* SEXUAL HARASSMENT OF WORKING WOMEN, *supra* note 110, at 215. Under the inequality approach, the sexuality of the sexes, due to societal forces, is treated differently. Thus, "when women's sexuality is treated differently from men's sexuality, similarly situated women and men will have been differentially treated, to women's comparative disadvantage, and that is sex discrimination." *See id.* at 215-16. On a differences approach, men are not placed in comparable positions to women when faced with identical sexual harassment. *See id.* at 216.

119. *Miller v. Bank of Am.*, 600 F.2d 211 (9th Cir. 1979) (employee who was fired after refusing supervisor's demand for sexual favors had valid Title VII claim against employer); *Tompkins v. Pub. Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1048-49 (3rd Cir. 1977) (female employee whose continued employment was conditioned upon her submission to sexual advances of male supervisor had cognizable claim of sex discrimination under Title VII); *Barnes v. Costle*, 561 F.2d 983, 994-95 (D.C. Cir. 1977) (female employee whose job was abolished in retaliation for her refusal to submit to sexual advances of male supervisor had claim of violation of Title VII).

120. *Bundy v. Jackson*, 641 F.2d 934, 944 (D.C. Cir. 1981). In *Bundy*, the plaintiff suffered sexual intimidation by a co-worker and supervisors. The supervisors created the impression that her refusals interfered with her promotion. The court held that "conditions of employment" include the psychological and emotional work environment, thereby including the sexually stereotyped insults and demeaning positions suffered by the plaintiff in violation of Title VII. *Id.*

Title VII prohibits any form of employment discrimination. It prohibits "disparate treatment," which is intentional, unfavorable treatment of an employee based upon an impermissible criterion such as sex. *See Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977) (in disparate treatment discrimination, employer treats some people less favorably than others because of their race, religion, color, national origin, or sex). Title VII also prohibits those seemingly neutral practices which have a "disparate impact" and are not a business necessity. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-31 (1971) (requirement of high school diploma and passing of intelligence tests which were not used to measure ability discriminated against blacks when used as condition of employment).

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Supreme Court delineated the order and allocation of proof required in disparate treatment cases. First, plaintiffs must prove that they were treated differently because of a protected criteria such as sex. *Id.* at 802. If successful, the burden then shifts to the defendants to prove that the practice had a legitimate business purpose. *Id.* at 803. Plaintiffs then have the opportunity to show that defendant's asserted purpose was not valid, but was a means of discrimination. *Id.* at 804; *see also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (when female employee claimed failure to

Thus, sexual harassment in the workplace encompasses any act,¹²¹ sexual in nature, which interferes with a woman's¹²² job performance, makes her feel uncomfortable, or harms her chances of advancement.¹²³

get promoted and subsequent termination of employment was predicated upon her gender, defendant bore burden of explaining non-discriminatory reasons for such actions). However, in *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981), the Court of Appeals for the District of Columbia Circuit held that in sexual harassment cases, the *McDonnell Douglas* standards of proof should be relaxed in favor of the plaintiffs, due to the more difficult task of proving that sex, plus failure to submit to sexual advances, were factors of the discrimination. *Id.* at 951. The *Bundy* test requires that the employer prove, by "clear and convincing evidence," that any denied job benefit was based on non-discriminatory grounds. *Id.* at 953.

In cases alleging disparate impact, plaintiffs are merely required to show that a seemingly neutral employment practice produced a significant adverse impact on a particular race or class. *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977). Proof of disparate motive is not required. *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). In *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975), the Supreme Court set up a three-part schedule of the order and allocation of proof to be used in discriminatory impact cases, in which an employer must prove that any disparate impact is job related. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971). Therefore, depending on the facts of a particular case, sexual discrimination can be found to violate Title VII under either a discriminatory treatment or impact theory.

121. In *Bundy*, the Supreme Court held that a pattern of sexually degrading insults would be sufficient to violate Title VII by creating a discriminatory environment. 641 F.2d at 943-45. However, it is not the speech itself, but rather a pattern of such speech that would constitute an act of discriminatory treatment. *Id.* at 944. The court cites cases involving ethnic and racial slurs to support this proposition. For example, in *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87, 88 (8th Cir. 1977), the court held that isolated incidents of ethnic slurs were not sufficient to violate Title VII. However, courts have noted that patterns of racial slurs could violate Title VII entitlement to a nondiscriminatory environment. *See United States v. City of Buffalo*, 457 F. Supp. 612, 631-35 (W.D.N.Y. 1978) (number of instances of racial slurs and harassment against black police officers demonstrated working environment heavily charged with racial discrimination); *Steadman v. Hundley*, 421 F. Supp. 53, 57 (N.D. Ill. 1976) (allegations that defendant made racial slurs against him, gave him menial duties and spoke adversely of him to others provided sufficient information to withstand motion to dismiss Title VII claim).

122. Although sexual harassment is based on the protection of women, courts have noted that male employees may also be victims of sexual harassment. In *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977), the court noted that if, for example, a female supervisor imposed sexual advances on a male subordinate, the same problem would exist as when a male superior submits a female employee to sexual advances; the subordinate would be faced with a situation that, but for his or her sex, the employee would not have faced. *Id.*

123. 29 CFR § 1604.11(a)-(g) (1980); *see Vermeulen, Employer Liability Under Title VII for Sexual Harassment by Supervisory Employees*, 10 CAP. U.L. REV. 499, 499-505 (1981). Vermeulen discusses the "spectrum of conduct" incorporated in the term sexual harassment. For example, sexual harassment can be manifested by touches, jokes, slurs against women, or dress codes which require women to

As Justice Goldberg noted in *Rogers v. Equal Employment Opportunity Commission*,¹²⁴ the parameters of discrimination change with the times.¹²⁵ Civil rights, once limited to the contractual and property rights of blacks,¹²⁶ now encompass rights based upon race, religion, national origin, and sex.¹²⁷ The Minneapolis ordinance raises the question of whether the civil rights concept should be extended to include discrimination caused by pornography.

IV. Does Pornography Violate Civil Rights?

Pornography, as defined by the Minneapolis ordinance,¹²⁸ differs from the common definition of pornography which includes "erotica"¹²⁹ and "obscenity."¹³⁰ Proponents of the Minneapolis ordinance do not argue that all sexually explicit presentations violate the civil rights of women; rather, they maintain that only sexually explicit material which subordinates women violates women's civil rights.¹³¹

Throughout the history of civil rights, discrimination has been

wear revealing clothing. *Id.* at 499. In *SEXUAL HARASSMENT OF WORKING WOMEN*, *supra* note 110, at 25-55, author Catherine MacKinnon devotes chapter three to an examination of what sexual harassment is as reported by women who have experienced it. MacKinnon reports that sexual harassment takes physical forms, such as touches, as well as verbal forms, such as repeated comments regarding a woman's body. *Id.* at 29.

124. 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (employers who segregated their patients according to race discriminated against Spanish-surnamed employee by making her uncomfortable on job).

125. *Id.* at 238. See *supra* note 117 for a quote from Justice Goldberg's opinion.

126. See *supra* note 57 and accompanying text for language of the Civil Rights Act of 1866.

127. See *supra* notes 61-101 and accompanying text for an analysis of the rights that are encompassed by the Civil War Amendments and federal legislation.

128. See *supra* notes 20-46 and accompanying text for language of the Minneapolis ordinance.

129. Erotica depicts sexuality. *TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY* 24 (Lederer ed. 1980) [hereinafter cited as *TAKE BACK THE NIGHT*]. The ordinance does not restrict material that simply exudes sexuality; rather it only restricts material that subordinates women. See *supra* notes 20-21 and accompanying text for a discussion of the Minneapolis ordinance.

130. Obscenity, in common parlance, refers to that which is offensive or disgusting, based upon generally accepted principles of what is acceptable. *WEBSTER'S THIRD NEW INT'L DICTIONARY* 1557 (1976). This definition is far broader than that of the ordinance; the dictionary definition incorporates a moral measurement of what is socially appropriate, whereas the ordinance does not. Although material which is pornography under the ordinance might very well be obscene, the converse is not true.

131. See *supra* note 21 and accompanying text for the Minneapolis Ordinance, § 3 to add Minn. § 139.20 (gg)(1)(i)-(ix), which defines pornography.

defined as the unequal treatment¹³² of a person based on that person's class¹³³ or a characteristic of that class.¹³⁴ The Minneapolis City Council found that pornography promotes bigotry and contempt which leads to discrimination based on sex¹³⁵ in areas such as employment, education and participation in public life.¹³⁶ The City Council's assertion that pornography discriminates against women because of the negative ideas it promotes therefore represents a departure from the prior application of civil rights laws.

Pornography works in much the same way as racial or ethnic slurs in that it promotes bigotry and antisocial behavior.¹³⁷ Yet, even the broad 1964 Act¹³⁸ does not regulate the content of offensive speech or literature.¹³⁹ The 1964 Act regulates only unequal treatment by an

132. See *supra* notes 57-101 and accompanying text for an analysis of what constitutes discrimination under the Civil War Amendments and federal legislation.

133. "Class" refers to an individual's race, religion, color, national origin or sex. For example, § 2000e-2 of Title VII makes it an unfair labor practice for an employer to discriminate against an individual regarding a condition of employment because of the person's race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2 (1982).

134. Pregnancy, for example, is a characteristic of the female class, and is encompassed within Title VII. Pregnancy Discrimination Act, Pub. L. No. 95-955, 92 Stat. 2076 (1978). The Pregnancy Discrimination Act clarifies that "because of sex" or "on the basis of sex" as used in Title VII includes "because of or on the basis of pregnancy, childbirth or related medical conditions." Appendix—Questions and Answers on The Pregnancy Discrimination Act, Pub. L. No. 95-955, 92 Stat. 2076 (1978), *reprinted in* 29 C.F.R. § 1604 (1981).

135. Pornography harms the civil rights of women on the basis of their sexuality. It is arguable, under MacKinnon's "inequality" theory of sex discrimination cases, that women's sexuality is a characteristic of the class of women, because the sexuality of each sex is treated differently. See *supra* note 110 for a discussion of the inequality theory.

136. See *supra* notes 44-46 and accompanying text for the Minneapolis City Council's Special Findings on the harms created by the bigotry and contempt that pornography promotes.

137. In Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982), author Richard Delgado enumerates the psychological, sociological, and political effects of racial insults. He demonstrates that racial insults keep minority groups from assimilating into the economic and social mainstream of society. *Id.* at 135-49. The harm suffered by minorities through racial insults is similar to the harms that women suffer from pornography. Each group is kept at an unequal position in careers and social opportunities due to the degrading remarks that make people believe that these groups are inferior. See *id.* at 135-49.

138. See *supra* note 97 and accompanying text.

139. *Id.* Ojala, *The Minneapolis Pornography Ordinance—Censorship Not Civil Rights*, 53 HENNEPIN LAW. 10 (Mar.-Apr. 1984) (Minneapolis ordinance presents no new approach to civil rights, but rather seeks to suppress popular speech). Under Title VII, racial comments that are merely part of a casual conversation or that are sporadic do not constitute a violation. *EEOC v. Murphy Motor Freight*

employer.¹⁴⁰

Arguably, pornography causes discrimination against women. During public hearings on the Minneapolis ordinance,¹⁴¹ one woman testified that pornography displayed at her job forced her to transfer to a less desirable position.¹⁴² Pictures from pornographic magazines¹⁴³ decorated the co-ed employee lunchroom, causing her to suffer feelings of discomfort and humiliation.¹⁴⁴ When she removed the pornography,

Lines, Inc., 488 F. Supp. 381, 384 (D. Minn. 1980) (black employee proved he was subjected to vicious and frequent instances of racial harassment through repeated "nigger" references and racially motivated pranks). Rather, the working environment must be heavily charged with racial discrimination before a violation will be found. *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (employee's psychological, as well as economic, interests are protected under Title VII), *cert. denied*, 406 U.S. 957 (1972). The courts require that racially abusive language be "repeated," "continuous," or "prolonged" in order to violate Title VII. *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1359 (11th Cir. 1982) (employee's repeated use of terms "nigger rigged" and "black-ass" was severe enough to affect psychological well-being of black employees in violation of Title VII); *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982) (plaintiff entitled to retrial on claim that sexual harassment, through repeated sexual inquiries, vulgarities and advances over two-year period created distressing environment). Therefore, it is not the offensive speech but the permitting of a discriminatory work environment to exist, created through patterns of offensive speech, which violates Title VII. In cases of discriminatory environment due to racial slurs, the action is against the employer for allowing or condoning the discriminatory treatment. *Bundy v. Jackson*, 641 F.2d 934, 943 (D.C. Cir. 1981); *see supra* note 140 and accompanying text.

140. Title VII defines "employer" to include "any agent of such a person" (i.e. employer). 42 U.S.C. § 2000e(b) (1982). Courts have held that an employer is liable for sexual harassment by a supervisor where the employer has actual or constructive knowledge of it. *See Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Tompkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3rd Cir. 1977) (employer liable where knew or had constructive knowledge of sexual harassment and failed to act quickly to correct). Constructive knowledge can be found where a discriminatory work environment exists. *See Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894, 935 (D.N.J. 1978) (employer found to have constructive knowledge of sexual harassment due to pervasiveness of discriminatory environment). In *Miller v. Bank of Am.*, 600 F.2d 211, 213 (9th Cir. 1979), the court held an employer liable for sexual harassment by a supervisor under a respondeat superior theory, even though the employer had no knowledge of the harassment. Finally, the EEOC guidelines specify that employers are to be held liable for sexual harassment by supervisors. 29 C.F.R. § 1604.11(c) (1981).

141. Testimony, *Public Hearings on Ordinance to Add Pornography as Discrimination Against Women*, Minneapolis Government Operations Committee (Dec. 12, 1983).

142. Testimony, Session II, *reprinted in* Baldwin, *Pornography: More Than a Fantasy*, 53 HENNEPIN LAW. 8, 9 (Mar.-Apr. 1984) [hereinafter cited as *Pornography: More Than a Fantasy*].

143. The magazines included *Hustler*, *Playboy*, *Penthouse*, and *Oui*.

144. Testimony, Session II, *reprinted in* *Pornography: More Than a Fantasy*, *supra* note 142, at 9. She testified that: "It was very uncomfortable . . . to go down there and have dinner and lunch with about twenty men and here is me [sic] facing all these pictures . . . it finally got to the point where I could no

her male co-workers retaliated against her.¹⁴⁵ Proponents of the Minneapolis ordinance rely on such testimony in arguing that a civil action should exist to combat the pornography itself.¹⁴⁶ However, it is the employer who perpetrates the unequal treatment; pornography is merely the tool used to effect the discrimination. Under Title VII,¹⁴⁷ this woman may allege a civil rights violation, but the action would be against the employer for condoning a discriminatory work environment rather than against the manufacturer or distributor of the pornography.¹⁴⁸

Pornography does not treat women unequally as do all other civil rights violations.¹⁴⁹ Rather, pornography fosters negative stereotypes which cause people to treat women in an inferior manner.¹⁵⁰ The unequal treatment of women fostered by pornography constitutes the civil wrong, not the pornography itself.

V. Pornography and the First Amendment

The first amendment unambiguously declares that "Congress shall make no law . . . abridging the freedom of speech."¹⁵¹ However, the Supreme Court has held that speech is not an absolute right.¹⁵²

longer tolerate sitting there and realizing that all of these men were there, I felt totally naked in front of these men." *Id.*

145. *Id.* Her co-workers smashed her car, verbally abused her, and boycotted her at work.

146. *See id.*

147. 42 U.S.C. §§ 2000e-2000e-17 (1982).

148. *See supra* notes 139, 140 and accompanying text.

149. The sexual inequality of pornography is that 90% of it is directed against women. NEWSWEEK, Aug. 13, 1984, at 40.

150. *See supra* note 46 and accompanying text for the Minneapolis City Council's Special Findings on the harms created by the bigotry and contempt that pornography promotes.

151. U.S. CONST. amend. I.

152. *Cohen v. California*, 403 U.S. 15, 19 (1971) ("the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses"); *see Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942); *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940); *Herndon v. Lowry*, 301 U.S. 242, 258 (1937); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937); *Near v. Minnesota*, 283 U.S. 697, 708 (1931); *Stromberg v. California*, 283 U.S. 359, 368 (1931); *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring); *Schenck v. United States*, 249 U.S. 47, 51-52 (1919). The Justices have been divided on whether the right to free speech is absolute. *See NOWAK, supra* note 63, at 866. Justices Black and Douglas adhere to the absolutist view of free speech, although it has not been accepted by the Supreme Court. *Id.* at 866. Conversely, Justice Harlan was a proponent of the balancing view, whereby the court balances the interests in protecting certain forms of speech. *Id.* at 866-67.

Exceptions to the first amendment's protection exist where the harm caused by the speech overrides the value of free expression¹⁵³ and where speech is of little or no social value.¹⁵⁴ Proponents of the Minneapolis ordinance argue that the harm created by pornography classifies it as a form of unprotected speech.¹⁵⁵ However, in *American Booksellers Association v. Hudnut*,¹⁵⁶ the federal district court in Indianapolis held that that city's anti-pornography ordinance was an unconstitutional regulation of speech protected by the first amendment.¹⁵⁷

A. Pornography and Exceptions to the First Amendment

In *Chaplinsky v. New Hampshire*,¹⁵⁸ the Supreme Court listed certain forms of speech traditionally held to be unprotected by the first amendment, including "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."¹⁵⁹ In addition, the Court has held that commercial speech which is misleading or deceptive¹⁶⁰ or which advances an illegal activity¹⁶¹ is unprotected speech. In 1982, the Court extended

153. Such harm exists in the case of libel and fighting words. See *infra* notes 164-65 and accompanying text.

154. See *infra* note 159 and accompanying text.

155. See Brief of Linda Marchiano, *supra* note 18, at 13-19.

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

157. *Id.* at 1337. Additionally, the court found the ordinance to call for unlawful prior restraint. *Id.* at 1340-41. This aspect of the court's decision is outside the scope of this Note.

158. 315 U.S. 568 (1942) (state statute forbidding persons from using offensive speech which directly tends to incite acts of violence in public place does not substantially hinder free speech).

159. *Id.* at 572 (footnote omitted). In *Roth v. United States*, 354 U.S. 476, 484-85 (1957), the Supreme Court held that obscenity is not constitutionally protected speech because obscenity is without any redeeming social importance. However, in *Miller v. California*, 413 U.S. 15, 24-25 (1973), the Supreme Court altered the *Roth* standard and held that speech must lack serious literary, artistic, political, or scientific value to be obscene. In *Beauharnais v. Illinois*, 343 U.S. 250, 256-57 (1952), the Court held that libelous, insulting and fighting words are unprotected. However, some constitutional protection has been afforded libelous speech. *New York Times Co. v. Sullivan*, 376 U.S. 254, (1964) (to get damages for defamatory falsehood regarding official conduct, public official must prove "actual malice" because protection of free political discussion is fundamental principle of our democratic system). In *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam), the Court held that speech which is aimed at inciting "imminent lawless action" and is likely to produce such action, is unprotected.

160. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (commercial speech must concern lawful activity and not be misleading to be protected under first amendment).

161. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S.

the scope of unprotected speech to include material that visually depicts children engaged in sexual conduct.¹⁶²

The speech attacked under the anti-pornography ordinance is not encompassed by any of these pre-defined categories. Although evidence indicates that pornography causes physical harm to women,¹⁶³ it does not present the immediate potential for injury which is associated with "fighting words."¹⁶⁴ Pornography is not libelous because it is not a "defamatory falsehood."¹⁶⁵ Nor is pornography commercial speech which is "expression related solely to the economic interests of the speaker and its audience."¹⁶⁶

Furthermore, pornography, as defined by the ordinance, does not fall squarely within the parameters of the obscenity category. In *Miller v. California*,¹⁶⁷ the Supreme Court devised the following three-part test to identify legally obscene material:

- (a) whether 'the average person, applying contemporary community standards' would find the work, taken as a whole, appeals to the prurient interest;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct^[168] specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹⁶⁹

376 (1973) (ordinance prohibiting newspaper advertising system of sex-designated job opportunity column, in violation of prohibition against sex discrimination, does not violate first amendment).

162. *New York v. Ferber*, 458 U.S. 747 (1982) (New York statute prohibiting distribution of depictions of children engaged in sexual performances does not violate first amendment).

163. See *infra* notes 187-98 and accompanying text for a discussion of how pornography causes physical harm to women.

164. In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Supreme Court defined the test for "fighting words" to be "what men of common intelligence would understand would be words likely to cause an average addressee to fight." *Id.* at 573. Thus, "fighting words" create potential and likely imminency of action.

165. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The Alabama law applied in the case defined libel per se as words that "tend to injure a person . . . in his reputation" or to "bring [him] into public contempt." *Id.* at 263.

166. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980).

167. 413 U.S. 15 (1973) (conviction due to mailing sexually explicit material deemed obscene must be considered according to forum community test of what constitutes obscenity).

168. The Court states that this test refers only to materials which depict or describe "hard core" sexual conduct. *Id.* at 27.

169. *Id.* at 24 (citations omitted). In *Brockett v. Spokane Arcades, Inc.*, 105 S.

The Minneapolis ordinance, by making actionable¹⁷⁰ speech which subordinates women as a class,¹⁷¹ attacks material that is non-obscene under the *Miller* test.¹⁷² Although some sexually explicit material may fall within both the *Miller* test and the ordinance, other depictions would fall only under the broader ordinance test.¹⁷³ Thus, material that the Supreme Court has found to be protected speech nevertheless would be actionable under the Minneapolis ordinance. Proponents of the ordinance argue that a new exception to protected speech, like that recognized by the United States Supreme Court in *New York v. Ferber*,¹⁷⁴ should be carved out for pornography. In *Ferber*, the Supreme Court upheld a New York statute prohibiting the distribution of child pornography.¹⁷⁵ The Court stated that "the States are entitled to greater leeway in the regulation of pornographic

Ct. 2794, 2799 (1985), the Supreme Court held that materials must do more than provoke "lust" or other normal sexual desires to be characterized as "obscene."

170. The *Miller* test defines obscenity as a criminal legal term, whereas the ordinance seeks to facilitate civil actions against pornography. Compare *Miller*, 413 U.S. at 18 ("[t]his case involves the application of a State's criminal obscenity statute . . .") with MINNEAPOLIS ORDINANCE, *supra* note 9, § 2 to amend § 141.60 (*Civil Action, judicial review and enforcement*).

171. See *supra* notes 20-21 and accompanying text.

172. In *American Booksellers*, the court stated a number of reasons why the scope of the Indianapolis ordinance extended beyond the definition of obscenity as defined by *Miller*, including: (1) the Indianapolis ordinance did not speak of a "community standard" or limit the restriction to material that appealed to the "prurient interest;" (2) the restrictions of the Indianapolis ordinance are not limited to "patently offensive" materials; (3) there is no provision in the Indianapolis ordinance for material that is pornographic but has "serious literary, artistic, political or scientific value;" and (4) the Indianapolis ordinance does not limit itself to "hard core sexual conduct." *American Booksellers*, 598 F. Supp. at 1332.

173. See *supra* note 21 and accompanying text. MacKinnon and Dworkin argue that the approach used in the ordinance is better than that used in obscenity laws for the following reasons:

(1) obscenity laws are inconsistent and create confusion about pornography because they wrongfully identify the harm; they seek to stop that which offends aesthetic values rather than stopping the actual injury and abuse caused by pornography;

(2) obscenity is a social value judgment, whereas the sexually explicit subordination of women is concrete;

(3) obscenity suggests that women's bodies are dirty, as is sex, whereas the ordinance is not making moral judgments;

(4) courts have difficulty enforcing obscenity laws because there is no evidence of the harm of obscenity, yet evidence from the hearings, see *supra* notes 141-46; *infra* notes 193-95, demonstrates that pornography harms the status and treatment of women.

Memorandum to Minneapolis City Council by Catherine A. MacKinnon and Andrea Dworkin, briefly addressing questions raised about the ordinance (Dec. 26, 1983).

174. 458 U.S. 747 (1982). See Brief of Linda Marchiano, *supra* note 18, at 13-19 for proponents' argument to carve out a new exception to free speech.

175. 458 U.S. 747 (1982).

depictions of children”¹⁷⁶ due to the state’s compelling interest in protecting minors from the harms of pornography.¹⁷⁷

The *Ferber* decision emphasizes, as does the Minneapolis ordinance,¹⁷⁸ that pornography creates harm and is of little social value.¹⁷⁹ The *Ferber* Court did not employ the *Miller* test of legal obscenity¹⁸⁰ because that test did “not reflect the State’s particular and more compelling interest”¹⁸¹ in preventing pornography when children are involved. Proponents of the Minneapolis ordinance argue that women need protection because pornography imposes on women as a class the very conditions of vulnerability and lack of power that characterize children.¹⁸² However, children, due to their inherent vulnerability, are entitled to more stringent protection than women suffering similar harm.¹⁸³

176. *Id.* at 756.

177. The Supreme Court advanced the following five reasons for upholding the statute: (1) the states have a compelling interest in protecting the well-being of its minors; (2) the distribution of child pornography is related to the sexual abuse of children; (3) the advertising and selling of child pornography provides an economic motive for its production; (4) the value of child pornography is “exceedingly modest, if not *de minimis*,” and (5) the decision is not incompatible with earlier decisions that allow the regulation of speech based on its content. *Id.* at 756-64.

The United States Supreme Court has determined that the state’s interest in “safeguarding the physical and psychological well-being of a minor” is “compelling.” *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982) (though state’s interest in protecting minors is compelling, it does not justify rule excluding public from trials of sex-offenses where victim is minor). Even in the first amendment area, the state’s interest in protecting children can override protected constitutional rights. See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (FCC warranted in taking action against radio programming containing indecent language because broadcasting is easily accessible to children); *Ginsberg v. New York*, 390 U.S. 629 (1968) (permissible for state statute to limit sale of sexually explicit material to minors); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (statute forbidding minor to sell religious literature on street upheld against freedom of speech and freedom of religion claims).

178. See *supra* notes 20-46 and accompanying text.

179. 458 U.S. 747, 759-63 (1982).

180. See *supra* note 168 and accompanying text for the *Miller* test.

181. 458 U.S. 747, 761 (1982).

182. *Pornography: More Than a Fantasy*, *supra* note 142, at 25 (coercion that children suffer through pornography is same coercion that pornography forces on women).

183. In *American Booksellers Ass’n v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984), the court stated that women cannot be afforded the same protection as children because “[a]dult women generally have the capacity to protect themselves from participating in and being personally victimized by pornography” *Id.* at 1333. Although women are often forced into pornography for financial survival, they are more able to control their entry into pornography than are children. See TAKE BACK THE NIGHT, *supra* note 129, at 45-47 for an interview with an ex-pornography model who tells of the financial necessities that keep women trapped in pornography.

B. The State Interest in Regulating Pornography

The state has an interest in protecting its citizens from harm. In *Ginsberg v. New York*,¹⁸⁴ the Supreme Court held that a state legislature may act to ban certain behavior, including speech, where it is believed to cause harm, even without scientific proof of the causal link between the behavior and the harm.¹⁸⁵ However, the state can act legislatively to protect its citizens at the expense of a constitutional right such as free speech only when the state's interest in regulation is compelling.¹⁸⁶

Pornography is dominated by certain recurring themes:¹⁸⁷ (1) the sexual portrayal of violence;¹⁸⁸ (2) the image of the strong male and the passive, weak female who desires to be dominated;¹⁸⁹ (3) the

184. 390 U.S. 629 (1968).

185. *Id.* at 642-43. The Supreme Court stated, in relation to the hypothesized causal link between obscenity and harmful effects on youths, that it does not require of legislatures "scientifically certain criteria of legislation." *Id.* citing *Noble State Bank v. Haskell*, 219 U.S. 104, 110 (1911) (insignificant taking of private property where it protects public is constitutional, although not certain at what point police power is limited by Constitution). In *Roth v. United States*, 354 U.S. 476 (1957) (statute prohibiting mailing of obscene material upheld), the Supreme Court held that obscene materials are not protected by the first amendment, and allowed a state legislature to act on a hypothetical conclusion that obscenity is harmful, in order to protect "the social interest in order and morality." *Id.* at 485, quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (emphasis added in *Roth*); see also *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60-61 (1973) (although no conclusive proof that obscene material causes antisocial behavior, legislature of Georgia could determine that such causal connection existed in order to enjoin obscene films).

186. *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961).

[G]eneral regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.

Id. at 50-51.

187. Hommel, *Images of Women in Pornography and Media*, 8 N.Y.U. REV. L. & SOC. CHANGE 207 (1978-1979) [hereinafter cited as Hommel]. This article is the text that accompanied a slide show prepared by Women Against Violence in Pornography and Media (WAVPM). It provides a startling look at the images of women portrayed in pornography.

188. Most pornography combines violence and sex, be it through depictions of kidnapping, torture, hanging or murder. *Id.* at 210.

189. See, for example, the excerpt from *Slave Girls: Whipped, Tied and Trained*, where a man whips a woman and shouts "[y]ou take it, take your punishment, bitch, you take all of it, you slut." The woman is shown as deriving sexual pleasure from the whipping and verbal degradation. See Brief of Linda Marchiano, *supra* note 18, at Appendix C.

comic portrayal of rape and battery;¹⁹⁰ and (4) the image of women as inhuman sexual objects¹⁹¹ and natural prostitutes.¹⁹² These images, repeated over and over, create a warped view of sexuality which is transmuted into violence and discrimination against women.¹⁹³

190. A fashion feature in *Vogue* magazine, December 1975, portrayed a man slapping a woman and the woman screaming in pain. The text of the magazine defined this as chic and "in." See Hommel, *supra* note 187, at 213.

191. The cover of the album *Ain't That a Bitch?* by Johnny Guitar Watson portrays two women at his feet, both wearing collars and leashes; the couch on which he is sitting and the dog in the picture provide phallic imagery. *Id.* at 212.

192. In a magazine called *Little Girls*, a girl returning from parochial school is seduced by a man. She describes their departure, saying "[h]e handed me some money as I left; far out, that'll buy a lot of cookies." *Id.* at 208-09.

193. Donnerstein & Linz, *Sexual Violence in the Media: A Warning*, PSYCHOLOGY TODAY, Jan. 1984, at 14. The article describes the ongoing study, entitled "Effects of Media Exposure on Attitudes of Aggression" conducted by Donnerstein and Linz on massive exposure to commercially released sexually violent films, including "Texas Chainsaw Massacre" and "Maniac" (both R-rated) (an R-rating specifies "restricted: youngsters under seventeen admitted only if accompanied by parent or adult guardian;" see E. KATZ, THE FILM ENCYCLOPEDIA 949 (1979)). The study's findings show that even brief exposure can: (1) increase the viewer's acceptance of the belief that women want to be raped; (2) increase the willingness of a man to say that he would commit rape; (3) increase aggressive behavior by men against women in a laboratory setting; and (4) decrease male sensitivity to the plight of the rape victim. Donnerstein & Linz, *Sexual Violence in the Media: A Warning*, PSYCHOLOGY TODAY, Jan. 1984, at 15. This study was relied upon heavily by MacKinnon and Dworkin in the drafting of the ordinance. Donnerstein testified to the results of the study at the Government Operations Committee hearings. Press Release announcing the hearings, Dec. 12, 1983. Similar findings were reported in Malamuth & Check, *Penile Tumescence and Perceptual Responses to Rape as a Function of Victim's Perceived Reactions* in PORNOGRAPHY AND CENSORSHIP at 257 (1983). For an extensive bibliography of studies demonstrating the effects of pornography on violence against women, see Brief of Linda Marchiano, *supra* note 18, at Appendix B. In 1970, the federal government, after two years of investigation, concluded that exposure to pornography does not seriously promote antisocial behavior. THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY (1970) [hereinafter cited as THE REPORT]. THE REPORT concludes that, at most, exposure to sexual stimuli temporarily increases the frequency of masturbation, coitus, erotic dreams and conversations about sexual matters. *Id.* at 194. However, THE REPORT has been faulted on many grounds. For example, the study lacks evidence of the effects of pornography on the young, and the study was written prior to the advent of much of the violent pornography that exists today. See M. YAFFE & E. NELSON, THE INFLUENCE OF PORNOGRAPHY ON BEHAVIOR xiii (1982). Additionally, THE REPORT did not limit its research to "pornography" but includes much of the innocuous forms of sexually explicit material. TAKE BACK THE NIGHT, *supra* note 129, at 189. Whether or not conclusive findings to link pornography and antisocial behavior can be documented in a laboratory, the testimony of abused women cannot be ignored. See *infra* notes 194-96 and accompanying text.

In a nationwide poll conducted for the A.B.A. Journal, 70% of the lawyers polled (67% of the male lawyers, and 89% of the female lawyers) said they believed that some pornography discriminates against women, and 66% (64% of the male lawyers, and 82% of the female lawyers) felt that some pornography contributes

The most obvious victims of pornography are the models portrayed in pornographic films, shows and pictures.¹⁹⁴ Yet the cast of victims does not end there. Men take pornography home to their mates and force these women to act it out.¹⁹⁵ Women, forced to witness and participate in pornographic acts, are made to feel worthless and dehumanized.¹⁹⁶ On a political level,¹⁹⁷ pornography acts as a form

to violent crimes against women. 71 A.B.A. J. 46 (March 1985). Additionally, a Newsweek national poll found that three out of four adults agreed that pornography can lead to a loss of respect, as well as acts of sexual violence and rape against women. NEWSWEEK, Mar. 18, 1985, at 60.

194. In *"Then and Now: An Interview with a Former Pornography Model"* in TAKE BACK THE NIGHT, *supra* note 129, at 45-59, an ex-model told of the great amount of physical and emotional abuse forced on her as a model. She spoke of the vaginal trichomoniasis suffered by the models as a result of the filthy working conditions, the rape, the injuries, including broken bones and rope burns, from being put in physically dangerous positions, and the emotional abuse associated with being treated like a "piece of meat." *Id.* at 54-57. At the extreme end of the harm caused to pornography models are "snuff" films which purport to show the actual sexual rape and murder of women. LaBelle, *Snuff—The Ultimate in Woman-Hating* in TAKE BACK THE NIGHT, *supra* note 129, at 272-78. Supposedly in a movie of this type filmed in Argentina, a woman was actually murdered on camera for the sexual thrill of the audience. *Id.* at 276.

195. Staff members of women's shelters, sexual assault centers and mental health facilities testified at public hearings that pornography is used as an instruction manual for techniques of sexual, psychological and physical battery of women at home. *Testimony, Public Hearings on Ordinance to Add Pornography as Discrimination Against Women, Minneapolis Government Operations Committee* (Dec. 12, 1983), *reprinted in part in Pornography: More Than a Fantasy, supra* note 142, at 9. Individual women testified as to how men would bring pornography home and force them, through threats of physical harm, to perform the acts done in the "dirty" books. *Id.* One woman testified: "He would read the pornography like a textbook, like a journal. In fact, when he asked me to be bound, when he finally convinced me to do it, he read in the magazine how to tie the knots and how to bind me in a way that I couldn't get out." *Id.* In addition to testimony, emergency rooms reported an increase in the number of throat rapes following the opening of the movie "Deep Throat." Brief of Linda Marchiano, *supra* note 18, at 18 n.(*).

196. During the Public Hearings conducted by the Minneapolis Government Operations Committee, one woman testified to her feelings of degradation:

[I]nitially I started arguing that the women on stage looked very devastated like they were disgusted and hated it. I felt disgusted and devastated watching it. I was told by those men if I wasn't as smart as I was and if I would be more sexually liberated and more sexy, that I would get along a lot better in the world and that they and a lot of other men would like me more About this time when things were getting really terrible and I was feeling very suicidal and worthless as a person, at that time any dreams that I had of a career in medicine was just totally washed away. I could not think of myself any more as a human being.

Testimony, reprinted in Pornography: More Than a Fantasy, supra note 142, at 9.

197. Feminists often analyze pornography according to the political forces behind it. Typically, liberals view obscenity as part of free speech, while conservatives feel

of oppression; it terrorizes women, keeping them under the domination of men.¹⁹⁸

Pornography clearly has harmful effects. Yet the evidence of the harm created does not rise to the level of an interest sufficiently compelling to override the right to free speech.¹⁹⁹ The Supreme Court has stated that racist and anti-semitic speech cannot be suppressed regardless of the subordination and prejudice that it inspires.²⁰⁰ Similarly, courts continue to hold that unless otherwise protected speech actually incites lawless action, the producers of the speech cannot be held liable for any of the harmful effects caused by the speech.²⁰¹

that obscenity is not protected under the first amendment. See Yeamans, *A Political-Legal Analysis of Pornography* in TAKE BACK THE NIGHT, *supra* note 129, at 247-50.

198. See Dworkin, *Pornography: The New Terrorism*, 8 N.Y.U. REV. L. & SOC. CHANGE 215 (1978-1979) (pornography is propaganda which terrorizes women through rape, wife-beating and sexual abuse).

199. The amount of evidence of harm required depends upon the type of speech involved. Note, *Anti-Pornography Laws and First Amendment Values*, 98 HARV. L. REV. 460, 476-80 (1984). Speech which is considered to be of lesser value, such as libel or obscenity, can be restricted on the basis of evidence showing an arguable correlation to harm. See *supra* notes 163-86 and accompanying text. However, pornography is more similar to defamation and speech which, if imitated, could cause harm. In these "protected" categories the courts require stronger proof of a chain of causation to create a compelling state interest that would override the free speech interest. See *infra* notes 200, 201 and accompanying text.

200. See generally *National Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977) (per curiam) (use of swastikas and display of Nazi uniforms by National Socialist Party of America in predominantly Jewish town could not be enjoined); *on remand*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (Ohio statute aimed at Ku Klux Klan activity unconstitutional because it punished advocacy of use of force which is short of inciting lawless action); *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175 (1968) (*ex parte* order stopping "white supremacist" group from making racist speeches found unconstitutional); *Collin v. Smith*, 578 F.2d 1197 (7th Cir.) (ordinances restricting National Socialist Party of America from assembling in predominantly Jewish town declared unconstitutional), *cert. denied*, 439 U.S. 916 (1978). In these cases, the courts distinguished offensive speech from speech that is considered to be of lesser value, such as obscenity or libel.

201. Many cases have been brought in which the imitation of broadcasted material resulted in harm; each case has held that the broadcasters cannot be held liable. *Herceg v. Hustler Magazine, Inc.*, 565 F. Supp. 802 (S.D. Tex. 1983) (negligence and strict liability suit claiming that publication of article on "autoerotic asphyxiation" caused death of plaintiff's brother and son); *Zamora v. Columbia Broadcasting Sys.*, 480 F. Supp. 199 (S.D. Fla. 1979) (claim brought on behalf of minor alleging that he became involuntarily addicted to violence through excessive viewing on television and as result murdered his neighbor); *Olivia N. v. National Broadcasting Co.*, 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981) (nine year old "artificially raped" with bottle four days after assailants saw artificial rape scene in *Born Innocent* on NBC), *cert. denied*, 458 U.S. 1108, *reh. denied*, 458 U.S. 1132 (1982); *DeFilippo*

As Justice Holmes noted in his dissenting opinion in *United States v. Schwimmer*,²⁰² “if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.”²⁰³ Passage of the Minneapolis ordinance would create legislative “line-drawing” in the area of morality; legislatures would have the authority to regulate all speech that they deemed harmful or offensive.²⁰⁴ The ordinance would have a “chilling effect”²⁰⁵ on free speech since broadcasters²⁰⁶ and producers would be forced into self-censorship to protect themselves from lawsuits.²⁰⁷ As the court noted in *American Booksellers*

v. National Broadcast Co., 446 A.2d 1036, 8 Med. L. Rptr. 1872 (R.I. 1982) (wrongful death action brought by parents of thirteen-year-old who accidentally hanged himself while emulating stunt performed on *Tonight Show*).

However, in *Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975), the California Supreme Court held that a radio station could be liable for the death of two motorists killed in an automobile accident. *Id.* at 50-51, 539 P.2d at 42, 123 Cal. Rptr. at 472. The accident occurred as two teens who were participating in a radio contest sped to locate a disc jockey who was driving around Los Angeles. The court held that there existed no first amendment bar to the liability of the radio station “for the foreseeable results of a broadcast which created an undue risk of harm The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act.” *Id.* at 48, 539 P.2d at 40, 123 Cal. Rptr. at 472. No similar incitement theory can be made for pornography.

202. 279 U.S. 644 (1929) (dictum), *overruled*, 328 U.S. 61 (1946).

203. *Id.* at 654-55.

204. The court noted in *American Booksellers* that if the proponents’ argument were accepted, legislative bodies would gain support to enact legislation prohibiting other “unfair expression” which causes discrimination, including racial and ethnic slurs and derogatory remarks about the handicapped. *American Booksellers*, 598 F. Supp. at 1335.

205. The “chilling effect doctrine” refers to any law or practice which severely discourages the exercise of constitutional rights. BLACK’S LAW DICTIONARY 217 (5th ed. 1979). The “chilling effect doctrine” evolved from the Court’s decision in *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969) (threat to impose criminal punishment where it had been set aside due to constitutional error would have chilling effect on exercise of constitutional rights).

206. The rights of broadcasters are unique in that they must be weighed against the first amendment rights of the viewers to have access to a plethora of ideas provided by the limited broadcast channels. *See Columbia Broadcasting Sys. v. Democratic Nat’l Comm.*, 412 U.S. 94, 102 (1973) (must balance first amendment right to receive social and political views against broadcasters’ right to refuse editorial advertisements).

207. As the Court noted in *NAACP v. Button*, 371 U.S. 415 (1963), vague restrictions of free speech cannot exist because they threaten to stop speech: “[t]hese freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.” *Id.* at 433. Such self-censorship would violate the right of viewers to a “marketplace of ideas,” as first described by Justice Holmes in

Association, the Indianapolis ordinance, if found constitutional, "would signal so great a potential encroachment upon First Amendment freedoms that the precious liberties reposed within those guarantees would not survive."²⁰⁸

VI. Recommendations

The first amendment guarantee of free speech is the very vehicle by which pornography should be attacked. Opponents of pornography must make concerted efforts to decry pornography²⁰⁹ and educate the public regarding pornography's harmful effects.²¹⁰ Specifically, opponents of pornography must aim their educational efforts at the people who do business with pornographers.²¹¹ If the business community turns its back on pornographers, the industry will become less lucrative and, thus, less attractive to producers and distributors.²¹²

Beyond education, opponents of pornography should employ the legal tools presently available, such as obscenity laws²¹³ and zoning

his dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919) ("best test of truth is the power of the thought to get itself accepted in the competition of the market That at any rate is the theory of our Constitution.").

208. *American Booksellers*, 598 F. Supp. at 1336.

209. The concerted efforts of Rochester Women Against Violence Against Women (RWAVAW) is an inspiring example of the power of concerted effort and education. See Gever & Hall, *Fighting Pornography* in TAKE BACK THE NIGHT, *supra* note 129, at 279-85. The group displayed messages against pornography, picketed theatres, spoke out to educate the public, reprinted articles, and distributed leaflets to make the horrors of pornography known. *Id.* However, the group also engaged in illegal activities, such as destruction of property, which this Note does not advocate.

Private action can be effective. For example, in a panel discussion entitled *Regulation of Pornography*, reprinted in 8 N.Y.U. REV. L. & SOC. CHANGE, 281, 287 (1978-1979), Dean Norman Redlich pointed to the effective use of the boycott by followers of Senator McCarthy during the 1950's.

210. Attempts to demonstrate the harmful effects of pornography must start by shattering the myths created by pornography. See *supra* notes 187-93 and accompanying text for a discussion of the myths that pornography perpetuates.

211. Pornography is a thriving industry. In 1978, the pornography industry grossed an estimated four billion dollars a year; however, law enforcement officials speculated that the true figure was two or three times that amount. Cook, *The X-Rated Economy*, 22 FORBES 81, Sept. 18, 1978. Recent estimates put the figure at seven billion dollars a year, which is more money than the movie and music businesses combined. White, *Pornography and Pride*, ESSENCE, Sept. 1984, at 186. Without economic success, the industry would decline.

212. One way of making the business less lucrative is to make the patrons feel uncomfortable. For example, in one Southern town, women photographed men as they entered and exited porn shops. The women then made up Wanted Posters of the men and plastered them all over town. Morgan, *Theory and Practice: Pornography and Rape* in TAKE BACK THE NIGHT, *supra* note 129, at 129.

213. See *supra* notes 168-73 and accompanying text for a discussion of obscenity laws.

statutes.²¹⁴ Although these tools are of limited value,²¹⁵ their continued use will emphasize the growing concern over the harmful effects of pornography.

It is through concerted effort toward consciousness-raising that the battle against pornography must be fought. The proponents of the Minneapolis ordinance should be applauded for bringing this issue to the attention of lawmakers and citizens throughout the nation.²¹⁶ It is a marked step in the right direction.

VII. Conclusion

The Minneapolis anti-pornography ordinance, which asserts that pornography violates the civil rights of women, should not survive constitutional challenge. Pornography does not treat women unequally and so does not violate women's civil rights. Rather, pornography fosters negative and degrading untruths about women and their sexuality; these ideas are then transmuted into acts of sex discrimination, abuse, and violence against women. Moreover, pornography neither falls within the traditional categories of unprotected speech nor warrants the creation of a new category. Although pornography fosters ideas which cause harm to women, the state's

214. In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), the Court held that the state may prohibit exhibitions of obscenity even in the case of "adult only" exhibitions. *Id.* at 69. In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), the Supreme Court went further to hold that zoning ordinances could prohibit the concentration of adult theatres. *Id.* at 72-73. However, the Supreme Court invalidated a zoning ordinance in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), which purported to forbid all "live entertainment" in a commercial zone. *Id.* at 65-66.

215. See *supra* note 173 and accompanying text for a discussion of the effectiveness of obscenity laws. For a discussion of the effectiveness of zoning laws, see Friedman, *Zoning "Adult" Movies: The Potential Impact of Young v. American Mini Theatres*, 28 HASTINGS L.J. 1293 (1977); Katz, *Regulating Obscenity*, 5 WHITTIER L. REV. 1, 123-31 (1983).

216. Since the advent of the Minneapolis ordinance, the anti-pornography debate has been the cover story of such popular publications as *Ms.* magazine, *Newsweek*, and *The Village Voice*. See Blakely, *Is One Woman's Sexuality Another Woman's Pornography?*, *Ms.*, Apr. 1985; *The War Against Pornography—Feminists, Free Speech and the Law*, NEWSWEEK, March 18, 1985; *Forbidden Fantasies—A Special Issue on Pornography*, 29 THE VILLAGE VOICE, Oct. 16, 1984. In addition, the Minneapolis ordinance has been the topic of nationally broadcast television talk shows. The National Broadcasting Company (NBC) aired a *Donahue* segment entitled "Violence in Movies" on September 12, 1984, in which Professors Edward Donnerstein and Neil Malamuth, *supra* note 193, discussed the effects of sexual violence in movies, in relation to the Minneapolis ordinance. The Public Broadcasting System (PBS) aired a *Firing Line* segment entitled "Women Against Pornography" on March 8, 1985, in which Andrea Dworkin, co-drafter of the ordinance, *supra* note 7, debated the issues surrounding the Minneapolis ordinance.

interest in protecting women from these harmful effects is not compelling and, therefore, is insufficient to override the first amendment guarantee of free speech. In fact, the very means by which to combat pornography is through the free flow of ideas.

Addendum

On August 27, 1985, while this issue was going to press, the United States Court of Appeals for the Seventh Circuit found the Indianapolis anti-pornography ordinance unconstitutional.²¹⁷ In its affirmance of the district court's decision, the court of appeals held that although "[d]epictions of subordination tend to perpetuate subordination,"²¹⁸ pornography is a form of protected speech, as are racial bigotry, anti-semitism, and violence on television.²¹⁹ The court noted that "pornography" under the ordinance differs from "obscenity" and therefore cannot be similarly prohibited as a "low value" form of speech.²²⁰

Winifred Ann Sandler

217. *American Booksellers Ass'n v. Hudnut*, No. 84-3147 (7th Cir. Aug. 27, 1985).

218. *Id.* at 11.

219. *Id.* at 12-13.

220. *Id.* at 15-16.