

Revisiting Dworkin-Mackinnon Approach for The Censorship of Pornography in 2021: Why A Pro-Censorship Stance on Pornography Remains Beneficial for Women

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Abstract

Should pornography be censored? Would any attempt to censor pornography pose a substantial risk to free speech? This paper offers a pro-censorship stance that builds on Catherine MacKinnon's and Andrea Dworkin's influential ideas underlying their Antipornography Civil Rights Ordinance (1984); specifically, pornography is the act of sex discrimination, and it should be censored because it harms women. Building on their analysis, I will argue that pornography should be censored because it harms women's free speech and inhibits women's ability to use free expression for self-fulfillment (i.e., creating and defining their identity). The scope of exploration is limited to cisgender heteronormative pornography. Pornography can be defined as explicitly depicting the subjugation of women in a violent and sexual way. The definition can be refined by including additional categories of sexually explicit material – erotic and educational – to understand what pornography is not. I reconsider what censorship could look like by proposing a multi-layered approach. Although pornography should still be accessible, users should have to navigate several regulated layers to do so. Censorship is important to protect women's free speech and validate the harm pornography causes them.

Introduction

The pro-censorship movement of pornography garnered attention following the Dworkin-MacKinnon Antipornography Civil Rights Ordinance, proposed to the city of Indianapolis in 1984. Underlying the Ordinance was Andrea Dworkin's and Catherine MacKinnon's proposal that pornography is the practice of "sex discrimination," and as such, it harms women. The Ordinance claimed that because of the way in which pornography harms women, pornography could and should be censored using the precedent of prior restraint.²⁷³ The Ordinance challenged

²⁷³ Prior restraint allows for judicial review and suppression of materials prior to publishing or broadcasting on the grounds that it is libelous or harmful.

the traditional defense that pornography is protected under the First Amendment as it is simply freedom of expression. The Dworkin-MacKinnon approach also shifted away from the traditional legal perspective of Obscenity Law²⁷⁴ which provides the standard for censorship of sexually explicit materials. They believe Obscenity Law to be an abstract concept imposed from the male viewpoint and thus unable to recognize or censor pornography's concrete harm to women. However, the Ordinance was overturned in the landmark case *American Booksellers Assn' v. Hudnut* (1985)²⁷⁵ on the grounds that it was unconstitutional under the First Amendment. Despite the failure of the Ordinance to become law, Dworkin-MacKinnon's approach remains a polarizing position that has inspired responses from both pro and anti-censorship supporters.

Censorship of pornography remains an important issue as the pornography industry continues to grow exponentially. In 2020, revenue from online streaming alone generated more than \$775 million in the USA.²⁷⁶ In recent years, exposés such as *The New York Times*' "The Children of Pornhub"²⁷⁷ have uncovered the rape and assault that plagues the industry. The consumption of materials depicting the rape, assault and abuse of women is growing, and it is important to question whether allowing this to continue in the name of free speech is at all beneficial to women. Dworkin and MacKinnon are right in arguing that it must be clearly acknowledged that the industry is built on the harm of women, and a free speech position has been insufficient to combat the systemic harm of pornography.

²⁷⁴ *Miller v. California*, 413 U.S. 15 (1973)

²⁷⁵ *Hudnut v. American Booksellers Ass'n*, 771 F.2d 323 (7th Cir. 1985).

²⁷⁶ "Adult and Pornographic Websites in the US," IBIS World, October 19, 2020, <https://www.ibisworld.com/industry-statistics/market-size/adult-pornographic-websites-united-states/>

²⁷⁷ Nicholas Kristof, "The Children of Pornhub," *The New York Times*, December 4, 2020, <https://www.nytimes.com/2020/12/04/opinion/sunday/pornhub-rape-trafficking.html>

This essay proposes a pro-censorship stance as censorship is the only effective means to combat pornography's substantial and myriad harms to women. The scope of exploration is limited to cisgender heteronormative pornography, however, it is important to acknowledge that censorship would also have consequences for sex workers, as well as non-binary people and members of the LGBTQ+ community. This pro-censorship stance builds on the Dworkin-MacKinnon approach that pornography is a system that causes collective harm to women. More specifically, it reconsiders the reasons for censorship, arguing that it is because pornography harms the validity of women's free speech and prevents individual self-fulfillment²⁷⁸ that it qualifies for censorship. Of course, a pro-censorship stance must inevitably tackle the definition of pornography. Pornography is best defined as explicitly depicting the subjugation of women in a violent and sexual way. The definition can be refined through additional categories of sexually explicit material – erotic and educational – to understand what pornography is not. It also reconsiders what censorship of pornography should look like by proposing multi-layered censorship. Multi-layered censorship could still allow access to pornographic materials, but consumers should have to go through several 'layers' to do so. Finally, censorship effectively acknowledges pornography's substantial harms; this legal recognition strengthens women's voices and can make women's free speech a more powerful tool.

Dworkin-MacKinnon Approach

Traditionally, the censorship of pornography has been treated under Obscenity Law. First adopted into Federal Law in 1873, Obscenity Law limits the distribution of obscene materials.

²⁷⁸ A women's individual self-fulfillment is her ability to define herself. Pornography's harm is that it prevents women from creating a definition free from objectification.

Most recently, obscenity has been determined by the Miller test established in *Miller v. California* (1973). To be deemed obscene:

“the average person applying contemporary community standards would find that, . . . taken as a whole, appeals to the prurient interest . . . [which] depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and [which], taken as a whole, lacks serious literary, artistic, political, or scientific value.”²⁷⁹

However, the Dworkin-MacKinnon approach rejects Obscenity Law as the standard for censorship of pornography because it is an “ideational and abstract” system based on moral judgements.²⁸⁰ Instead, pornography is a “concrete and substantive” system²⁸¹ that consists of real people and real impacts. Dworkin and MacKinnon posit that it is impossible for an abstract system to be the judge of a concrete one. Obscenity Law cannot recognize the harm pornography causes women, as it only recognizes that which offends our sensibilities and not that which harms in reality. Whether pornography harms women is not some abstract question. Women suffering from sex discrimination as a result of pornography is a reality, a real harm, for so many women.

Dworkin and MacKinnon also criticize Obscenity Law, as the “community standards” cited in the law are representative of the male standard. MacKinnon supports their claim through her example of Justice Stewart’s famous view on obscenity – “I know it when I see it.”²⁸² In this quote, Justice Stewart is providing a statement of epistemology – he knows through seeing – and thus his seeing will determine what obscenity is.²⁸³ Justice Stewart’s view is accepted because of

²⁷⁹ *Miller v. California*, 413 U.S. 15 (1973)

²⁸⁰ MacKinnon, “Francis Biddle’s Sister”, 175.

²⁸¹ *Ibid.*

²⁸² *Ibid.*

²⁸³ *Ibid.*, 164.

his position of power. Hence, epistemology and power, as represented in a patriarchal legal system, converge to give Obscenity Law its inherently male perspective. In short, because both pornography and Obscenity Law are built on the male viewpoint; the harm that pornography causes to women is rendered invisible and this is what necessitates the Dworkin-MacKinnon Ordinance.

The 1984 Dworkin-MacKinnon Antipornography Civil Rights Ordinance calls for the censorship of pornography. It states that:

Pornography is the graphic sexually explicit subordination of women through pictures and/or words that also includes 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 or positions of sexual submission, servility, or display; or (vi) women's body parts-including but not limited to vaginas, breasts, or 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, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.²⁸⁴

²⁸⁴ Andrea Dworkin and Catherine MacKinnon, "Appendix A" in *Pornography and Civil Rights: A New Day for Women's Equality* (Minneapolis, Min: Organising against Pornography, 1988) 101.

The Dworkin-MacKinnon Ordinance is rooted in the definition of pornography as “sex discrimination.”²⁸⁵ Dworkin and MacKinnon define pornography as “sex discrimination” to demonstrate that pornography is an *act* rather than speech. Pornography is not the expression of sexist attitudes, but an *act* of harm to women. In order to understand such a definition of pornography, a definition of “sex-discrimination” is also necessary. According to MacKinnon, sex discrimination is a “substantive system” that involves “real people with real social labels.”²⁸⁶ Given that sex discrimination, and accordingly pornography, involves real people, it follows that it has a tangible impact on our daily lives. The Dworkin-MacKinnon approach believes that this impact is constructing the “social reality of gender;”²⁸⁷ specifically, a construction of woman which “institutionalizes the sexuality of male supremacy.”²⁸⁸ Male supremacy is institutionalized because pornography creates a standard against which women are viewed as men’s inferior. This influences the way women are viewed in society; if men believe women to be lesser, they will treat them in such a way.

The Dworkin-MacKinnon approach further illustrates the harm of pornography by discrediting the view that pornography is simply a tool to explore sexuality and personal fantasies. The Dworkin-MacKinnon approach credits pornography with the “violence and discrimination which define the treatment and status of half the population.”²⁸⁹ Pornography legitimizes this violence and discrimination because it is only in pornography that rape, battery, sexual harassment, prostitution and child sex abuse are called something else: “sex, sex, sex, sex, and sex, respectively.”²⁹⁰ Pornography transforms fantasy into a harmful reality because it

²⁸⁵ Catherine A. MacKinnon, “Francis Biddle’s Sister: Pornography, Civil Rights, and Speech,” in *Feminism Unmodified, Discourses on Life and Law* (Cambridge, Mass: Harvard University Press, 1994), 163.

²⁸⁶ MacKinnon, “Francis Biddle’s Sister”, 164.

²⁸⁷ *Ibid.*, 166.

²⁸⁸ *Ibid.*, 172.

²⁸⁹ Catherine A. MacKinnon, “Not a Moral Issue,” *Yale Law & Policy Review* 2, no. 2 (1984): 324.

²⁹⁰ MacKinnon, “Francis Biddle’s Sister”, 171.

depicts the abuse of women in a ‘legitimate’ setting, therefore legitimizing such acts. The profits collected from the depictions of abuse act to further legitimize them. Indeed, pornography causes harm not because it is the dangerous fantasy of female subjugation, but because it “is the power and the act” of it.²⁹¹ Pornography is action – it is the action of normalizing acts of inequality and perpetuating harmful attitudes towards women. As pornography is harm and action, the Dworkin-MacKinnon approach deems that under the principle of prior restraint, pornography may be exempt from First Amendment protection.

The Dworkin-MacKinnon approach also challenges the First Amendment’s definition of ‘harm’ to qualify pornography for censorship. They argue that pornography causes a collective harm²⁹² that can only be recognized as being caused by pornography when looking at the whole of the harmed group. However, collective harm cannot be recognized by the linear causality of harm the First Amendment upholds. MacKinnon posits that for the First Amendment to recognize pornography's harm, it “must cause harm like negligence causes car accidents.”²⁹³ Pornography, however, does not harm the individual in such a way. As Dworkin contends, “the name of the next victim is unknown but everything else [the harm] is known.”²⁹⁴ Furthermore, there is again the issue of approaching harm from the male perspective. When attempting to decode pornography’s harm, courts have approached it from the powerful male viewpoint. As a result, courts have failed to identify the harm that pornography causes because it harms women, the powerless. Thus, to promote equality and prevent the continuing systematic harm of women, censorship is demanded to stop the powerful from normalizing such inequality and harm.

²⁹¹ Andrea Dworkin, “Against the Male Flood: Censorship, Pornography, and Equality.” *Harvard Women’s Law Journal*, no. 8 (1985): 11.

²⁹² *Ibid.*, 339.

²⁹³ *Ibid.*, 338.

²⁹⁴ Dworkin, “Against the Male Flood,” 11.

The Dworkin-MacKinnon approach also challenges the assumption that freedom of speech, including pornography, helps discover the truth. MacKinnon first notes that in a society where gender inequality prevails, “the speech of the powerful impresses its view on the world.”²⁹⁵ This harks back to her observation that Justice Stewart’s power, and his status as male, allowed what he viewed as obscenity (and what should not be viewed as an obscenity) to be taken as fact. Allowing pornography as a form of free speech lets it “invent women”²⁹⁶ because it represents the voice of the powerful – namely men. Certainly, granting pornography First Amendment protection allows for the dangerous spread of misinformation. In the case of pornography, the First Amendment is supporting the claim (and act) that women are inferior. The ‘truth’ that pornography reveals is no ‘truth’ at all; it is only a falsehood perceived as a ‘truth’ that promotes the subjugation of women.

Finally, the Dworkin-MacKinnon approach challenges the common belief that free speech helps those who seek change, as not all speech is actually ‘free’. MacKinnon contests the First Amendment’s assumption that “whole groups of the population are not systematically silenced prior to government action.”²⁹⁷ For MacKinnon, the First Amendment fails to acknowledge that we live in a hierarchical society where, even if all are free to speak, not all voices will be heard or deemed important. Pornography exemplifies this hierarchical society and its practice of sex discrimination, where women are viewed as lesser than men. As Dworkin notes, “silence is not speech.”²⁹⁸ Pornography silences women, and by allowing the substantive system that is pornography to continue, women are consistently and systematically being silenced.

²⁹⁵ MacKinnon, “Not a Moral Issue,” 336.

²⁹⁶ *Ibid.*, 337.

²⁹⁷ MacKinnon, “Not a Moral Issue,” 340

²⁹⁸ Dworkin, “Against the Male Flood,” 11.

Dworkin and MacKinnon conclude that censorship is the best path for equality. Pornography undermines women's speech as it constructs women as the lesser. Free speech cannot further women's equality because the voices of women are systematically silenced through pornography. For Dworkin and MacKinnon, the First Amendment has failed women, and thus affirmative action, in terms of censorship, is necessary to further the fight for equality.²⁹⁹ Censorship of pornography does not aim to silence voices; instead, as Dworkin argues, censorship has to do with prohibiting harmful acts.³⁰⁰ Censorship can aid women in combating the substantive and substantial harms caused by the system and act of pornography.

Responses to the Dworkin-MacKinnon Approach

Feminists and First Amendment theorists have composed the two principal responses to the Dworkin-MacKinnon approach. The foundation of both these responses is the same, as they advocate that a pro-censorship stance is more harmful to women's quest for equality than the free distribution of pornography. Both groups concur that any censorship scheme, especially one proposed under as broad a definition as by Dworkin and MacKinnon, would outlaw many important works of literature, including Henry Miller's *Tropic of Cancer*, William Faulkner's *Sanctuary*, as well as much of Shakespeare and Greek mythology.³⁰¹ Moreover, it would inevitably result in work valuable to feminists and the feminist cause being censored, including some of MacKinnon's and Dworkin's own writings. Dworkin and MacKinnon have both acknowledged this criticism and deemed it a worthwhile price.³⁰² However, banning depictions

²⁹⁹ MacKinnon, "Francis Biddle's Sister," 195.

³⁰⁰ Dworkin, "Against the Male Flood," 2.

³⁰¹ Thomas I. Emerson, "Pornography and the First Amendment: A Reply to Professor MacKinnon," *Yale Law & Policy Review* 3, no.2 (1984): 132.

³⁰² Nadine Strossen, "A Feminist Critique of 'the' Feminist Critique of Pornography," *Virginia Law Review* 79, no. 5 (1993): 1142

of the subordination of women could prevent women from sharing their own lived experiences of subordination and its harm. Censorship risks silencing women, the very thing which the Dworkin-MacKinnon model is trying to prevent and inhibits any further discussion on pornography and its harm. Censorship does not stop subordination's harm but rather erases it from the public conscience.

Additionally, both feminist and First Amendment anti-censorship supporters concur that censoring pornography would undermine free speech, consequently depriving women of a powerful tool for furthering their equality. Although Emerson acknowledges the concerns of the Dworkin-MacKinnon model—that free speech only amplifies the voice of the powerful and silences the voice of the dissenting—he maintains that “a fully balanced equality of speech among all groups and individuals is probably unattainable” without compromising the freedom of the system.³⁰³ Even if speech is not equally heard, Free Speech ensures everyone's equal right to speech. Anti-censorship supporters uphold that it is this right that has allowed for the progression of women thus far. Indeed, it is the very right that has enabled Dworkin and MacKinnon to express their pro-censorship stance and openly criticize patriarchal society. Moreover, feminists contend that pornography is not a unique way in which women are exploited or subordinated. As it is non-unique, censoring pornography would not end the exploitation or sexist portrayal of women; thus, it is not worth the risk of jeopardizing the powerful tool of free speech which can combat the exploitation. Censorship would be harmful on the grounds that it would undermine women's speech, and it would be ineffective as women would continue to be exploited in other ways.

³⁰³Emerson, “Pornography and the First Amendment,” 140.

While First Amendment theorists and feminists concur on the key issues of censorship, their reasoning differs. First Amendment theorists hold that Dworkin-MacKinnon's definition of pornography and subsequent argument for pro-censorship are unconstitutional as they violate the First Amendment. A key issue lies in the Dworkin-MacKinnon definition of pornography as "sex discrimination." Critics view this as an attempt to define pornography as action rather than speech, allowing them to bypass the First Amendment. *Hudnut v. American Booksellers Assn'* (1985) is a key case supporting this line of response. In the case, the plaintiff successfully argued to overturn the Dworkin-MacKinnon ordinance, arguing that defining pornography as 'discrimination' is "no more than a play on words" as "pornography is speech or expression, as those terms are used in the first amendment approach."³⁰⁴ Furthermore, the Dworkin-MacKinnon Ordinance states that pornography is the "sexually graphic depiction" through images or words,³⁰⁵ yet, according to the First Amendment, images and words constitute expression. Ergo, to argue for the censorship of pornography is to argue for the censorship of speech.

While critics acknowledge that pornography can promote harmful attitudes, it does not explicitly call on people to harm women and therefore cannot be censored under prior restraint. As reasoned in *American Booksellers Ass'n v. Hudnut* (1985), a depiction of subordination is not the act of subordination itself.³⁰⁶ Thus, if the government chooses to censor pornography, they are censoring it because of the attitudes it promotes and not the harm it inflicts. As such, this would be content-based censorship, which is unconstitutional under the First Amendment. It is not the government's role or right to implement "thought control"³⁰⁷ and determine which belief is morally right. If the government only deems legal that which depicts women as equals, and

³⁰⁴ *Hudnut v. American Booksellers Ass'n*, 771 F.2d 323 (7th Cir. 1985).

³⁰⁵ Dworkin and MacKinnon, "Appendix A" 101.

³⁰⁶ *American Booksellers Ass'n, Inc. v. Hudnut*

³⁰⁷ *Ibid.*

anything which depicts them otherwise as illegal, it would also violate the First Amendment (yet this is exactly what Dworkin and MacKinnon supposedly argue for). Emerson further demonstrates the unconstitutionality of such censorship through the absence of any precedent. He notes that laws combatting racism, which he believes is the closest parallel to gender equality, do not address the “expression of discriminatory beliefs, opinions, ideas or attitudes.”³⁰⁸ A lack of precedent for such sweeping censorship or even any censorship of discriminatory speech would make any censorship unconstitutional, meaning pornography should remain as protected speech.

For feminists, however, concerns are rooted in the fear that censorship will be imposed in a paternalistic way; accordingly, censorship would further subjugate women. Indeed, the Dworkin-MacKinnon approach has argued that the law is often enacted from a male-viewpoint, but it has failed to address how censorship would not be enacted in such a way. Feminists believe that a paternalistic enforcement of censorship could prevent further discussion of pornography’s harm and inhibit women’s ability to share their own experiences of its harm. Strossen notes that there have been examples throughout history of how “censorship efforts often have linked the suppression of sexually oriented material with the suppression of material important to women’s rights.”³⁰⁹ She specifically cites the Comstock Act which banned materials containing any sexually oriented material and material relating to contraception or abortion,³¹⁰ which damaged women’s ability to learn about and discuss their sexual health. The censorship of pornography, especially as defined by the Dworkin-MacKinnon Ordinance, could easily extend to women speaking up against discrimination and abuse, as well as sharing their own stories about rape and

³⁰⁸ Emerson, “Pornography and the First Amendment,” 140.

³⁰⁹ Strossen, “A Feminist Critique,” 1169.

³¹⁰ Ibid.

sexual assault. For anti-censorship feminists, censorship does not erase discrimination and abuse but merely silences it, as it becomes harder for women to speak up against it and share their experiences.

Feminists also believe that the paternalistic censorship will further perpetuate sexist stereotypes, specifically regarding sexuality. Many feminists equate Dworkin-MacKinnon with an anti-sex position, as it suggests an incompatibility between a woman's freedom and her participation in sexual relations.³¹¹ Paradoxically, the Dworkin-MacKinnon model is attempting to free women of sexism and the ensuing stereotypes by imposing a sexist stereotype on women. Carlin Meyer eloquently articulates this stereotype, stating that censorship "reinforces the very sin=sex=woman nexus that has for centuries undergirded women's oppression."³¹² Censorship will not stop the male-viewpoint from constructing sexuality and gender but actually strengthen its power to do so. Arguably, women will endure even less control in defining their sexuality and gender as any attempt to do so fulfils the notion of "sex=sin=women." Free speech, it is argued, is a more powerful tool for women to explore their sexuality since it does not impose sexist stereotypes on them. Free speech means women are free to explore and express themselves in any way they choose, without fear of censorship.

Why Remain Pro-Censorship in 2021?

I still maintain that a pro-censorship stance on pornography is the most beneficial to women in 2021. Censorship minimizes the extent to which pornography systemically harms the validity of women's free speech and enables women to achieve individual self-fulfillment (i.e.,

³¹¹ Ibid., 1148.

³¹² Meyer, Carlin. "Sex, Sin, and Women's Liberation: Against Porn-Suppression." *New York Law School: Faculty Scholarship* (1994): 1100, accessed 10 Nov., https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1672&context=fac_articles_chapters

construct their sense of self) free from objectification. Indeed, the Dworkin-MacKinnon approach acknowledges the systemic nature of pornography's harm through their definition of pornography as the practice of "sex discrimination;" however, they do not go far enough in acknowledging its consequences. Alisa L. Carse, a pro-censorship thinker, examines the consequences of pornography's systemic harm and determines that it is its harm to women's constitutionally protected liberty that qualifies pornography for censorship. Carse defines this constitutionally protected liberty as "the status of all persons as independent and equal rather than subservient;"³¹³ additionally, she posits that it is the goal of free speech to protect our liberty – namely, our equality. Therefore, only speech that upholds and protects equality, fulfilling the goal of free speech, can be considered such and be afforded protection under the First Amendment.

Therefore, the basis for censorship should be the harm pornography causes to the liberty of free speech. As the Dworkin-MacKinnon approach states, pornography constructs the social reality of gender.³¹⁴ This reality is one in which women are always defined in relation to and as inferior to men. If the definition of women relies on the existence of men, it follows that woman, by their very definition, cannot be free from men. It then follows that their life in practice cannot be free – including their speech. That is, their free speech, like their gender, is always defined in relation to men's free speech. Women's free speech is conditional on the free speech of men and its status as inferior to men's, and thus it is not free in its own right. A women's free speech is abridged in the sense that it is defined and relies on the free speech of another entity; their free speech is further abridged by being defined as lesser to men's. While pornography harms women in many ways, including their status as equals, it is pornography's harm to free speech that

³¹³ Carse, "An Uncivil Liberty?" 173.

³¹⁴MacKinnon, "Not a Moral Issue," 327.

qualifies it for censorship. In their inaction, the government allows pornography to abridge free speech.

Pornography's harm to women's free speech extends to limiting their free expression; specifically, their free expression of self-fulfillment. Self-fulfillment is one of the values served by protecting free speech. That is, individuals can use free speech to create and express their own identity. Pornography does not necessarily limit an individual from defining themselves; however, it does limit a class of people – women – from attaining self-fulfillment. Pornography restricts women from self-fulfillment by establishing the filter through which any woman's expression of identity is interpreted. This filter is pornography's construction of women in relation to men as their inferior and acts to calibrate any expression of identity to fit pornography's construction of women. Pornography's 'filter' is detrimental to equality because this filter renders it impossible to produce a definition of women where they are equal to men.

Pornography's filter inhibits women from using their freedom of expression to identify as non-consenting. Their identity is always under the lens of objectification; pornography fixes women's identity as sexual objects with a desire to be subjugated. Examples of how pornography's filter serves to calibrate women's free speech include marital rape laws and "no means no" laws. Marital rape only became illegal across the USA in 1993, and many state laws still contain loopholes that make it extremely difficult to prosecute.³¹⁵ The delay in legal action and the continued difficulty to prosecute marital rape illustrates how pornography's filter allows men to understand women's words through a different filter. Men do not hear women's speech when they said "no" or "stop," as men understand women's speech through the filter of women

³¹⁵ Karen Zraik. "Inside One Woman's Fight to Rewrite the Law on Marital Rape." *The New York Times*. April 13, 2019. Accessed 7 Jan. 2021. <https://www.nytimes.com/2019/04/13/us/marital-rape-law-minnesota.html#:~:text=While marital rape has been,cases, according to data compiled.>

as sexual objects that are meant to be subjugated. Pornography inhibits women from defining themselves as non-consenting. “No means no” laws have further proven how pornography’s benchmark inhibits women’s free speech. Until 2017, Maryland did not recognize rape unless a woman fought back.³¹⁶ This interpretation of the law disempowered women’s free speech as her identification as a non-consenting individual through her free expression was meaningless. Instead, her speech was once again calibrated against the concept that women are objects that are meant to be subjugated. Under pornography’s construction of women, women cannot even identify themselves as non-consenting.

A New Approach to Censorship

In order to censor pornography, it is, of course, necessary to define it. There is no doubt that pornography is a system which subjugates women. Alisa L Carse highlights that pornography’s role in subjugation is evident even in its etymology: pornography is derived from the Greek words *pone*, meaning “sexual slave,” and *graphos*, meaning “depiction of.”³¹⁷ Within its name – *graphos* – pornography identifies itself as speech. Accordingly, critics are correct in arguing that pornography is a form of expression, especially in the sense determined by the First Amendment. However, Dworkin-MacKinnon’s supposition that pornography is an act also holds merit. Certainly, pornography must constitute a “substantive system”³¹⁸ as its message – the subordination of women – is consistent in each work. So, individual instances of pornography – videos, images, words that depict the subjugation, discrimination and abuse of women – can be

³¹⁶ Pat Warren. “‘No Means No Law’ Redefines Rape in Maryland.” CBS Baltimore. April 12, 2017. Accessed 6 Jan 2021. <https://baltimore.cbslocal.com/2017/04/12/no-means-no-law-redefines-rape-in-maryland/>.

³¹⁷ Alisa L. Carse, “Pornography: An Uncivil Liberty?” *Hypathia* vol.10, no. 1 (1995): 158.

³¹⁸ MacKinnon, “Francis Biddle’s Sister,” 164.

classified as forms of expression. However, pornography, as a whole, is a system which does not simply depict subjugation, but clearly *acts* to subjugate women. The harm pornography causes cannot be seen or understood in isolation; instead, the individual instances must be assessed in the context of the whole system for the harm to become visible. Accordingly, by assessing instances in the context of the whole system and whether they contribute to the harm enacted by it, censorship becomes harm-based and not unconstitutionally, content-based.

Nevertheless, pro-censorship stances such as the Dworkin-MacKinnon approach have struggled because the definition of pornography is broad and invites issues such as the ‘slippery slope.’ To understand what pornography is, it is easier to define what is not pornography. To show what pornography is not, three categories of sexually explicit material should be established: erotic, educational and pornographic. Both erotic and educational materials should be exempt from censorship. Erotica is an expression of sexuality that features no subjugation of or violence towards women. Educational materials relate to women’s sexual and reproductive health. Pornographic materials will not contain any of the characteristics of educational and erotic materials. Additionally, pornography will always feature the subjugation of women and has no further value. In determining which category, a work falls into, the work should be assessed as a whole.

To further appease ‘slippery slope’ critics, Carl R. Sunstein’s approach should also be incorporated. Sunstein proposes that such a ‘slippery slope’ can be avoided by establishing a narrower scope of pornography that is eligible for censorship. He suggests that only visual material with the explicit depiction of rape and subjugation can be censored.³¹⁹ Additionally, pieces that do not explicitly depict rape but that contain a rape ‘theme’ are not subject to

³¹⁹ Cass R. Sunstein, “Pornography and the First Amendment.” *Duke Law Journal* vol. 5, no. 4 (1986): 625.

censorship. This then protects, for example, pieces of classical literature from censorship. By limiting the broad conception of pornography through tangible measures, Sunstein clearly establishes what can be censored and prevents an ‘imaginative’ interpretation of censorship, thus addressing the ‘slippery slope’ concern. Although a narrower scope of censorship will not attack the whole system of pornography, it can still lessen its harm by limiting the extent of its exposure.

While the educational category is quite distinct from pornography, distinguishing erotica and pornography poses more of a challenge. The categorization of erotica versus pornography is not unique to this argument. It is generally accepted that erotica is an artful expression of sexuality that does not correlate sexuality with violence or male domination. Conversely, pornography explicitly depicts the subjugation of women in a violent and sexual way. Of course, making such a distinction can involve bias and once again invite the ‘slippery slope’ argument. In order to diminish bias and ensure *only* pornography is being censored, each work should be considered within the context of the whole system of pornography. Again, it is only when viewing the whole system that the harm of pornography becomes evident; therefore, the harm of a single work will only be elucidated when evaluated within the context of the whole system. In this way, even though the legislation censors instances of pornography, it still acknowledges that the harm is caused by the system as a whole.

Additionally, the erotica category is intended to address concerns of feminist critics that censorship of pornography harms women’s sexuality. A pro-censorship stance is not intended to be, as posited by Strossen, an “anti-sex” stance.³²⁰ The fight for equality includes women’s rights to construct their own sexuality which is significantly limited by the prevalence of

³²⁰ Strossen, “A Feminist Critique,” 1147.

pornography. Pornography limits women's free expression of their sexuality: indeed, its construction of women in relation to men as their inferior means that every aspect of a women's life is also defined in relation to men, including their sexuality.

By contrast, erotic materials empower women's freedom of expression, particularly in relation to their sexuality. Erotica does not uphold the construction of women as sexual objects to be subjugated. In distinguishing the two, erotica can be seen as liberating free expression of sexuality and pornography as inhibiting. Of course, pornography is not mind control, and women are not forced to accept pornography's construction of sexuality. However, the prevalence of pornography significantly limits the freedom women have to explore their sexuality independent of men. It also limits the places in which women can express a 'women-constructed' sexuality, reflecting the limitations pornography imposes on women's free speech.³²¹

Accordingly, MacKinnon's and Dworkin's proposal for censorship should be reconsidered and replaced with multi-layered censorship. Multi-layered censorship means content can still be accessed, but the consumer must go through 'several layers' to view it. These layers suppress access to materials by limiting distribution and imposing requirements for consumption. For pornography, these layers could include only being able to obtain pornography from government-licensed retailers or websites and having to provide personal information (name, date of birth, social security number, etc.) to gain access. Multi-layered censorship could also require warnings on any pornographic material about the harms it causes women. Imposing censorship in this way also helps to strengthen the system of categorization, as even if borderline cases of erotica are incorrectly classified as pornography, they can still be accessed.

³²¹ The proposal can still be successful even if the categories are blurred on the edges. The main target of censorship is hardcore pornography which does not lie on the edge of erotica and pornography.

There is precedent for the multi-layered restriction of pornography. The Supreme Court upheld the *United States, et al. v. American Libraries Association, et al.*, ruling that libraries are required to install filters so that both minors and adults cannot access ‘obscene’ materials online; however, adult patrons could request that the filter be disabled.³²² Building on this precedent, this proposal would see multi-layered censorship extend beyond government funded buildings and Wi-Fi. Government regulation should extend to private consumption of pornography, with requirements being introduced on all premises selling pornographic material and pornographic websites.

In American democracy, liberty and equality must “operate side by side.”³²³ Multi-layered censorship offers a compromise between the two, allowing both to co-exist. Multi-layered censorship serves liberty by still allowing the consumer to access the material, even though they must go through several layers to do so. Multi-layered censorship also serves equality as it minimizes and regulates pornography’s harms. Ultimately, it is the law that helps us construct ‘community norms’ and thus what is considered normal. As long as pornography remains uncensored, the harms it causes women – including inequality – are normalized. However, when the law imposes filters and warnings on pornographic content, it is warning the public about pornography’s harms to women. Multi-layered censorship supports equality by reshaping ‘community norms’ so that the public no longer consider pornography and its harms normal.

Responding to Anti-Censorship Arguments

³²² Rehnquist, William H, and Supreme Court of The United States. U.S. Reports: *United States et al. v. American Library Association, Inc., et al.*, 539 U.S. 194. 2002. Periodical. <https://www.loc.gov/item/usrep539194/>.

³²³ Richard Delgado, “About Your Masthead: A Preliminary Inquiry into the Compatibility of Civil Rights and Civil Liberties,” *Harvard Civil Rights-Civil Liberties Law Review* vol. 39, no.1 (2004): 244.

When proposing censorship, it is always necessary to consider whether the harm pornography causes is more dangerous than the risk censorship poses to free speech. Censoring pornography poses a low risk to free speech because of the nature of its content. Following the argument of Carl R. Sunstein, pornography is low-value speech as it neither communicates a substantive message nor does so in a “cognitive way.”³²⁴ It does not have an educational purpose; it does not have an artistic purpose – its only purpose is to construct a sexual reality that subjugates women. He posits that to believe censoring the low-value speech that is pornography could somehow harm free speech is an “overvaluation of harm.”³²⁵ The censorship of pornography poses minimal risk to free speech because it has no value or purpose beyond building a sexuality founded on the harm of women. It is censorship – and not free speech – that can stop pornography from constructing sexuality in this way.

Censorship is also more beneficial than outright free speech because it offers a legal means to address and prevent the harm of pornography. Anti-censorship groups retreat to the response that free speech itself has afforded the censorship debate to emerge and, as Strossen argues, raise the American consciousness.³²⁶ While this is true, it is only when legal measures have been discussed, such as the Dworkin-MacKinnon Ordinance, that the debate has garnered any attention. Moreover, as MacKinnon has noted, free speech does not mean equal speech.³²⁷ Despite having free speech in name, women are amongst those who are often silenced. While it is not within the power of the government to ensure all voices are heard equally, enforcing this harm-based censorship on pornography can empower and amplify women’s voices.

³²⁴ Sunstein, “Pornography and the First Amendment,” 606.

³²⁵ *Ibid.*, 627.

³²⁶ Strossen, “A Feminist Critique,” 1168.

³²⁷ MacKinnon, “Francis Biddle’s Sister,” 193.

Strengthening for women to tackle these issues. Ironically, in the case of pornography, it is censorship – and not free speech – that allows women to fight for equality.

Feminists have often countered censorship by arguing that women can ‘reclaim’ pornography. However, it is unlikely that attempts to produce feminist pornography will be sufficient to overthrow the multi-million-dollar mainstream pornography industry which is built on the subjugation of women by powerful men. Pornography produces what the consumer wants (or what powerful men want or perceive as normal or acceptable). Without action to change attitudes – such as censoring images of women being raped, assaulted and abused – the consumer will continue to want pornography that depicts the subjugation of women.

Allowing for erotica, as well as exempting written pieces of pornography, still gives people ample opportunity to explore their sexuality without the construct of sex discrimination. Censorship intends to free women from the construct of sex-discrimination to discover their own sexuality independent of men. Censoring pornography does not proliferate an anti-sex stance, but rather establishes a clear anti-degradation stance.

A credible and important objection to the proposed categories, and censorship in general, is that it will be imposed in a paternalistic way. However, in deciding categorization and censorship of each instance in reference to the whole system of pornography, the risk of a paternalistic implementation can be minimized. This is because it forces the evaluation to be conducted not against one’s own viewpoint, but the system of pornography and its harm to free speech. The categories, in a sense, elevate the discussion and analysis to the collective and systematic level, where real harms can be discussed and analyzed. For example, the question of harm shifts from whether pornography expresses a harmful attitude toward, or about, women, to an assessment of whether pornography is harmful to the free speech of women. Does it, as a

whole, limit their speech? Does it silence women? Once the legal discussion of the real harms is elevated to these kinds of harms caused by pornography, women can then have a voice about these harms and have legal standing to bring claims that actually show instances of the harms that pornography causes.

Conclusion

Though the Ordinance failed in 1984, the Dworkin-MacKinnon approach has stood the test of time because sexism has also stood the test of time. Their approach remains important because it has amplified the voices of women and illuminated the harm they have suffered because of pornography. Although their approach presents weaknesses to be challenged and discussed, it is correct in its fundamental claims. Pornography is a system that harms women because of how it constrains women's free speech and their ability to define themselves free from objectification, and it is this harm that renders pornography suitable for censorship. While critics have posed valid responses to their proposed Ordinance, time has ultimately proved that free speech is not a more powerful tool to remedy the inequality and inferiority promoted by pornography. Free speech has failed to combat pornography's harm, and the industry continues to grow and profit.

A pro-censorship stance is a pro-equality stance. It is a stance that legally recognizes the harm pornography has caused women and helps to prevent further discrimination. Paradoxically, censorship bolsters free speech and amplifies women's voices—it allows women's voices to be heard. Censorship has done more for women, even just through its proposal, than outright free speech. The mere mention of 'censorship' sparks ongoing debate and has seen more people become cognizant of pornography's harm. The law, including censorship, can be used to

challenge ‘community norms’ and create legal remedies for pornography’s harms. While it is free speech that enables women to voice the harms, it is ultimately legal action - specifically censorship – that will legitimize their voices in the world.

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marital rape has been cases, according to data compiled.