

## A liberal anti-porn feminism?

Alex Davies

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...the glorification of settling for the best inequality has to offer or has stimulated the resourceful to invent, are what Ti-Grace Atkinson meant to reject when she said, "I do not know any feminist worthy of that name who, if forced to choose between freedom and sex, would choose sex. She'd choose freedom every time."<sup>1</sup>

In her essay "Why I'm Against S/M Liberation" (in *Against Sadomasochism*), Ti Grace Atkinson says, "I do not know any feminist worthy of that name who, if forced to choose between freedom and sex, would choose sex." While women are forced to make such a choice we cannot consider ourselves free.<sup>2</sup>

### **1 – The prospect of a liberal anti-porn feminism**

Catharine MacKinnon has presented two defences of several anti-pornography civil rights ordinances, which classify the trafficking (i.e. the production, sale, exhibition or distribution) of pornography as a form of discrimination on the basis of sex.<sup>3</sup> First, she justifies the ordinances by drawing attention to the role pornography purportedly plays in the subordination of women to men. Pornography sexualizes gender inequality and thereby helps to sustain gender inequality by making it attractive and constitutive of sex. Pornography should not be trafficked if we want an end to gender inequality. Second, MacKinnon presents what was originally a pre-emptive defence of the ordinances against the predictable challenge that, in restricting the trafficking of pornography, the ordinances violate the free speech rights of pornographers. According to the pre-emptive defence, pornography silences women's speech and so restrictions on the trafficking of pornography are needed in order to protect women's freedom of speech: the liberty of pornographers already infringes the liberty of women and the ordinances are required to address this. This is the free speech argument against pornography (the FS argument).<sup>4</sup>

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1 Catharine MacKinnon, "Sexuality, Pornography, and Method: 'Pleasure under Patriarchy,'" *Ethics* 99, no. 2 (1989): 344.

2 Ann Snitow, "Retrenchment vs. Transformation: The Politics of the Antipornography Movement," *Caught Looking: Feminism, Pornography & Censorship*, 1992, 17.

3 For a model of such an ordinance see Andrea Dworkin, "Against the Male Flood: Censorship, Pornography, and Equality," *Harvard Women's Law Journal* 8 (1985): 1–30. For the Minneapolis, Indianapolis, and Massachusetts ordinances see Andrea Dworkin and Catharine MacKinnon, eds., *In Harm's Way: The Pornography Civil Rights Hearings* (Cambridge, MA: Harvard University Press, 1997). When I speak of "anti-porn" feminists, I am not speaking of people who merely believe that pornography plays a role in gender inequality. I am speaking of people who wish to legally restrict it. I thus diverge from Anne Eaton's talk of "anti-porn" feminism in "A Sensible Anti-Porn Feminism," *Ethics* 117, no. 4 (2007): 674–715.

4 Succinct and straightforward statements of the FS argument can be found in "Memo on Proposed Ordinance" in Dworkin and MacKinnon, *In Harm's Way: The Pornography Civil Rights Hearings*, 258–59 and in Andrea Dworkin, "Dworkin on Dworkin," in *Radically Speaking: Feminism Reclaimed*, eds. Diane Bell and Renate Klein (Melbourne: Spinifex Press, 1996), 203–17. The argument is also stated in the Indianapolis, Minneapolis, and Massachusetts hearings, cf. Dworkin and MacKinnon, *In Harm's Way: The*

Philosophers Jennifer Hornsby, Rae Langton and Caroline West have taken the FS argument to be consistent with and implied by a liberal's commitments: the argument doesn't show that the liberal is wrong to be a liberal. The argument shows instead what, unbeknownst to the liberal, the liberal is really committed to.<sup>5</sup> Although the soundness of the FS argument is contested, this positioning of the FS argument as liberal-friendly is influential within feminist philosophy of language and it is beginning to gain acceptance outside of philosophy.<sup>6</sup>

But this positioning of the FS argument jars with MacKinnon's own antipathy toward liberalism.<sup>7</sup> For example, when she comments on the philosophical literature that has developed as a defence of and expansion upon her legal work on pornography—literature that Hornsby and Langton pioneered, and that for which West provides the authoritative survey—MacKinnon writes:

Why all these topics must be considered within the confines of liberalism is not broached even sideways, leaving liberalism assumed rather than interrogated. It is as if liberalism alone makes this discussion possible rather than also creates some of these issues and limits the means of effectively grappling with them.<sup>8</sup>

It would be surprising if it turned out—as Hornsby, Langton and West suppose—that MacKinnon's FS argument really is a demonstration of what the liberal is unwittingly committed to, rather than a demonstration of why the liberal as such is wrong.

In this paper, I am going to argue for an exclusive disjunction: either the FS argument makes the legislation it defends, to some degree, self-defeating, or, it is not a demonstration of what a liberal is unwittingly committed to. One cannot decouple the argument from MacKinnon's anti-liberalism without rendering the argument self-

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*Pornography Civil Rights Hearings*, 41–42, 274, 391. The statements of the argument most commonly referenced by philosophers are in MacKinnon's "Francis Biddle's Sister" and "Not a Moral Issue" in Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1987).

5 Rae Langton, "Speech Acts and Unspeakable Acts," *Philosophy and Public Affairs* 22 (1993): 329–30., Rae Langton, "Introduction," in *Sexual Solipsism: Philosophical Essays on Pornography and Objectification* (Oxford: Oxford University Press, 2009), 9., Jennifer Hornsby, "Speech Acts and Pornography," *Women's Philosophy Review* 10 (1993): 43., Caroline West, "The Free Speech Argument Against Pornography," *Canadian Journal of Philosophy* 33, no. 3 (2003): 393–94.

6 Nick Cowen, "Millian Liberalism and Extreme Pornography," *American Journal of Political Science* 60, no. 2 (2016): 509–20.

7 MacKinnon, *Feminism Unmodified: Discourses on Life and Law*, 15–16, p.99, p.129, pp.136-137, p.146, p.155, p.164, p.205; Catharine MacKinnon, "Liberalism and the Death of Feminism," in *The Sexual Liberals and the Attack on Feminism*, ed. Dorchen Leidholdt and Janice Raymond (New York: Teachers College Press, 1990), 3–13; Catharine MacKinnon, "The 'Case' Responds," *American Political Science Review* 95, no. 3 (2001): 709–11.

8 Catharine MacKinnon, "Forward," in *Speech and Harm: Controversies Over Free Speech*, ed. Ishani Maitra and Kate McGowan (Oxford: Oxford University Press, 2012), xvii.

defeating. I proceed as follows. In section 2, I introduce the ordinances that MacKinnon defended with the FS argument. In section 3, I describe a significant and growing class of women from whose hands and mouths pornographic speech derives. The liberty of such women to produce this speech (and of other women to consume it) will be abridged by restrictions on the trafficking of pornography. Even if the ordinances promote women's safety by protecting them against the harms of pornography, even if the ordinances protect women's liberty against infringement by pornographers, and even if the ordinances promote gender equality by (amongst other things) stopping men from disempowering women, the ordinances seem simultaneously to limit women's freedom. In section 4, I show that, despite the existence of these women, the philosophers and MacKinnon write in ways that imply the non-existence of women who are pornographers. But as I explain in section 5, MacKinnon adopts a view about women's autonomy that both permits her to deny that there are women who are pornographers (even while acknowledging the existence of the women described in section 3), and it permits her a reading of the FS argument on which it does not at all make the ordinances self-defeating. But as I explain in section 6, Hornsby, Langton and West cannot adopt MacKinnon's view of women's autonomy to buttress this alternative reading of the FS argument unless they abandon an important liberal commitment. Thus the FS argument only seems simultaneously cogent and liberal-friendly when one glosses over women's differences by disattending the women described in section 3.

## 2 – The Ordinances

The ordinances share two features: a definition of “pornography” and a specification of causes of action i.e. the conditions under which someone can use the ordinances to sue someone. We're going to focus on the trafficking cause of action. Who can sue under this cause of action? In the Minneapolis, Indianapolis and Massachusetts ordinances, we are told: 'Any woman has a cause of action hereunder as a woman acting against the subordination of women.'<sup>9</sup> The ordinances thus empower any woman to sue any trafficker of pornography simply for being that. In what follows, I will present the ordinances' definition of pornography, and provide a circumscribed interpretation of that definition that will allow us to identify what, if anything, would qualify as pornography as defined by the ordinances. I intend the conclusion of this paper to apply to any restrictions on the trafficking of pornography as defined in this section.

“Pornography” is defined in the ordinances in three parts.

### *Part I*

Pornography is the sexually explicit subordination of women through words or pictures.

MacKinnon makes clear elsewhere that pornography, so defined, is a set of sexually

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<sup>9</sup> Dworkin and MacKinnon, *In Harm's Way: The Pornography Civil Rights Hearings*, 436, 449, 460.

explicit materials, viz., those words or pictures that subordinate women.<sup>10</sup> The second part of the definition makes pornography a *subset* of sexually explicit materials that subordinate women, viz., those that also include certain contents.

### *Part II*

The words or pictures through which women are subordinated must also include one of the following contents:

- (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.<sup>11</sup>

The third part of the definition broadens the range of contents listed in part II:

### *Part III*

The use of men, children or transsexuals in the place of women in [part II, (i)-(ix)] is pornography.<sup>12</sup>

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10 MacKinnon *Feminism Unmodified: Discourses on Life and Law*, 176. Langton (in "Speech Acts and Unspeakable Acts") distinguishes between a causal and a constitutive version of the claim that something subordinates women. This distinction makes no difference to any line of reasoning in what follows, so I don't draw it.

11 Items (i), (v), (vi), and (vii) do not appear in the Indianapolis ordinance. However, the following is added: 'Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.' Items (vi) and (vii) do not appear in the Massachusetts ordinance.

12 In the model ordinance described by Dworkin, ("Dworkin on Dworkin."), and in the Massachusetts ordinance, it's unclear whether part III is supposed to apply to part I as well as part II. But in the Minneapolis and Indianapolis ordinances, part III explicitly applies only to part II. The difference matters. If part III applies to part I, then the ordinance combats the subordination of women, men, children and transsexuals. If part III applies only to part II, then the ordinance combats the subordination of women only. Because Hornsby, Langton and West focus upon the Minneapolis and Indianapolis ordinances, I will assume that part III does not apply to part I.

So any material that subordinates women which contains one of the relevant contents will qualify as pornography.

There remains the question (of definition): what is required of material in order for it to subordinate women? The ordinances are premised upon a theory of the role played by pornography in sustaining gender inequality.<sup>13</sup> According to that theory, sexually explicit material that depicts force used by men against women, or, which depicts women as submitting to men without force, makes us think of and see such relations between the sexes as what it is to be those sexes and what it is to engage in normal (non-prosecutable) sex. This has ramifications for both what men and women consider to be acceptable and what men can legally get away with doing to women. For example, it reduces the proportion of sex events which one might classify as sexual assault: sex wherein a man coerces a woman, or sex between a man and an unwilling but submissive woman, come to be seen as normal parts of gender relations, and hence, not sexual assault. Consequently, men have *de facto* rights to enforce their own will over women in a variety of contexts and women *de facto* lack the apparatus to seek justice against this enforcement through the legal system.

The debate about what sexually explicit material does lacks consensus.<sup>14</sup> But it should be relatively uncontroversial that, if any material plays the role described by this theory then sexually explicit material that has one of the following contents does so:

- force being exerted over women by men (or persons playing these social roles) in a way that is sexually arousing.
- women conforming to men's wishes even without the exertion of force (or where persons play the social roles of men and women) in a way that is sexually arousing.

I will call such material: material which eroticizes dominance/submission. I assume that whatever is required for material to qualify as subordinating, if anything satisfies those requirements, material which eroticizes dominance/submission satisfies those requirements. I assume this because material which eroticizes dominance/submission is the least controversial candidate for material that might play the role described by the theory upon which the ordinances are premised, and because it is surely material that plays this role which the ordinances are defined to target. Merely sexually explicit material will not qualify as pornography. Merely sexually explicit material which includes one of

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13 Descriptions of this theory can be found throughout MacKinnon, *Feminism Unmodified: Discourses on Life and Law*, 3–5, 148-150, 160, 171-174, 181, 187-190. See Edward Donnerstein's testimony in the Minneapolis hearing and MacKinnon's interview with Donnerstein for a detailed description of some empirical research on the effects of watching sexually explicit material of different kinds, which seems to have informed the theory upon which the ordinances are premised, cf. Dworkin and MacKinnon, *In Harm's Way: The Pornography Civil Rights Hearings*, 44–60, 290-310.

14 In Eaton's survey of the empirical literature, she concludes, 'we understand the claim that pornography causes harm as a hypothesis that has yet to be conclusively proved (or refuted).' Eaton, "A Sensible Anti-Porn Feminism," 715.

(i)-(ix), but without any exercise of power by a man over a woman (or persons playing these social roles), will not qualify as pornography by our definition. Sexually explicit material needs to depict such a gendered exertion of power in order to qualify as pornography in our narrowed sense.

Although perhaps narrower than MacKinnon intended, this interpretation of part I of the definition of pornography both allows us to readily identify material most likely to be targeted by the ordinances (despite the absence of consensus on the effects of sexually explicit material) and avoids rattling the liberal simply by encompassing too broad a range of material.

### **3 The ordinances enhance *and* abridge women's liberty**

Testifying against the Los Angeles legislation, Sandra Hale said:

Pornography and the degradation of and violence against women must be stopped, but as I was quoted in the LA Times as saying "The strategies we use must not abridge our freedoms."<sup>15</sup>

Hale believed that the ordinance was a method for addressing a genuine problem but it was a method that simultaneously abridged women's liberty and for this reason, she opposed it.<sup>16</sup> But if the ordinances are aimed at protecting women's liberty, what could Hale be worrying about?

I will provide evidence that women traffic pornography. Their liberty to do this, and the liberty of women to view that material, would be abridged by the ordinances. I conclude from this that there is a degree to which the ordinances are self-defeating: when defended by the FS argument, they are a method for protecting women's liberty which simultaneously abridges it. I will make an effort to explain some of the reasons women had and have for trafficking (and consuming) this kind of material. This will prepare the way for a response at the end of this section to an objection against the charge of self-defeat.

#### **3.1 *On Our Backs***

The beginning of the 1970s saw a demand from lesbians to be more central within the U.S. feminist movement.<sup>17</sup> In stating this demand, the idea was floated of a lesbianism that was

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15 Dworkin and MacKinnon, *In Harm's Way: The Pornography Civil Rights Hearings*, 344. Hale lost her job as Director of Women's Studies at her university for re-hiring Betty Brooks, who had been fired for her alleged use of pornographic material and her advocacy of lesbianism in her course *Health, Bodies, and Sexuality*.

16 For the same objection against the ordinances, see also the Feminist Anti-Censorship Taskforce (FACT) Nan Hunter and Sylvia Law, "The FACT Brief," in *Sex Wars: Sexual Dissent and Political Culture* (New York: New York, 2006), 265.

17 Carolyn Bronstein, *Battling Pornography: The American Feminist Anti-Pornography Movement, 1976-1986* (Cambridge: Cambridge University Press, 2011), 52-62.

not primarily a sexual orientation but instead a political choice and a significant component of this political choice was abstinence from so-called male identified behaviour.<sup>18</sup> Lesbian feminism, thus understood, gained traction within the U.S. feminist movement. By the end of the 1970s, it had created something of an orthodoxy about the kind of sex that women ought and ought not to have. As Nan Kinney describes it:

...penetration by any means was perceived as a violent, male-identified, dominant act, and was therefore not to be done. Lesbians were having very limited, politically-correct, side-by-side sex.<sup>19</sup>

One gets a sense of the range of behaviour that this orthodoxy governed from the published version of Amber Hollibaugh's contribution to the 1982 Barnard Conference on sexuality (a conference organized in opposition to the growing feminist anti-pornography movement of the time):

Who are all the women who don't come gently and don't want to; don't know yet what they like but intend to find out; are the lovers of butch or femme women; who like fucking with men; practice consensual s/m; feel more like faggots than dykes; love dildoes, penetration, costumes; like to sweat, talk dirty, see expressions of need sweep across their lovers' faces; are confused and need to experiment with their own tentative ideas of passion; think gay male porn is hot; are into power? Are we creating a political movement that we can no longer belong to if we don't feel our desires fit a model of proper feminist sex?<sup>20</sup>

In response to this new orthodoxy, Kinney and Debi Sundahl began, in the Summer of 1984, to publish a sexually explicit magazine made by and for lesbians: *On Our Backs* (OOB).<sup>21</sup> OOB included sexually explicit pictures, stories and articles. The pictures and stories depicted women being penetrated by objects, women on display, and fantasies that included the use of coercion, humiliation, and violence. They also depicted fantasies that included none of these things. The contents were designed to appeal to an audience of diverse sexual tastes and curiosities. The articles encompassed features on sexual practices such as orgasm from g-spot stimulation,<sup>22</sup> female ejaculation resulting from use of a dildo,<sup>23</sup> group sex,<sup>24</sup> and phone sex.<sup>25</sup> There were also features on sexual health. For

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18 Radicalesbians, *The Woman Identified Woman* (Pittsburgh: Know Inc., 1970), 3.

19 Nan Kinney, Nan Kinney - Uncovering a Pornographic Lesbian Sensibility: An Interview with Lesbian Pornographer Nan Kinney, interview by Cory Silverberg, 2007, [http://sexuality.about.com/od/eroticentertainment/a/nan\\_kinney.htm](http://sexuality.about.com/od/eroticentertainment/a/nan_kinney.htm).

20 Amber Hollibaugh, "Desire for the Future: Radical Hope in Passion and Pleasure," in *Pleasure and Danger: Exploring Female Sexuality*, ed. Carole Vance (Boston: Routledge and Kegan Paul, 1984), 403.

21 Debi Sundahl, Melissa Murphy, and Erin Findlay, *On Our Backs*, 1984-2005.

22 OOB (Fall 1984, vol. 1, issue 2, p.7; Summer 1985, vol. 2, issue 1, pp.37-38).

23 OOB (Fall 1985, vol. 2, issue 2, p.37).

24 OOB (Spring 1986, vol. 2, issue 4, p.6).

25 OOB (Jan-Feb 1991, vol. 7, issue 3, p.20).

example, there was an article on vaginal infections and how to reduce the risk of these while engaging in rough sex.<sup>26</sup> There were several articles on AIDS, which were used by nurses who were readers of OOB to teach about safe sex and the lesbians and practices who fell into high risk categories.<sup>27</sup> The magazine was an excellent place to put all this information—functioning as “bait” for those who might most need the information.

It is apparent from the letter pages of OOB that OOB had an enormously positive effect on the lives of many. Some readers lived in places that were violently intolerant of lesbians and the magazine offered a way for those readers to connect with others like themselves, in a pre-internet age.<sup>28</sup> OOB helped some readers know that contrary to the orthodoxy of the time, they were quite ordinary in what, as lesbians, turned them on, and in that what made them lesbians was a sexual orientation, not a political cause.<sup>29</sup> Some readers praised the magazine for helping them to escape guilt about being lesbian.<sup>30</sup> The magazine helped (at least) one butch reader see herself as beautiful by presenting butch women thus.<sup>31</sup> There were also negative reactions to OOB—though other readers often responded in OOB's defence. Several objected to a rape fantasy.<sup>32</sup> Others defended the fantasy in the next issue.<sup>33</sup> A reader objects to the depiction of women in bondage and positions of subordination.<sup>34</sup> A reader worries that men will misinterpret the images in OOB.<sup>35</sup> A reader objects to an article about butch lesbians wanting to become gay men, claiming: butch women do not want to become gay men.<sup>36</sup> Another reader replies to her: 'don't tell other dykes what they should or shouldn't be.'<sup>37</sup>

OOB unquestionably included material that eroticizes dominance/submission. So the ordinances would threaten both the liberty of the producers and distributors of OOB and the liberty of OOB's readers to view this material. This was no idle threat. Many opposed the magazine's contents and multiple attempts were made to stop the distribution of the magazine without the help of the ordinances.<sup>38</sup>

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26 OOB (Spring 1985, vol. 1, issue 4, p.15).

27 The articles appeared in OOB (Winter 1986, vol. 2, issue 3, p.30) and OOB (Fall 1987, vol. 4, issue 2). The first was praised in OOB (Spring 1986, vol. 2, issue 4, p.5) and the second in OOB (Spring 1989, vol. 5, issue 4, p.3).

28 For example, OOB (Fall 1984, vol. 1, issue 2, pp.5-7) and OOB (Spring 1990, vol. 6, issue 3, p.5).

29 For example, OOB (Fall 1984, vol. 1, issue 2, p.7), OOB (Spring 1985, vol. 1, issue 4, p.5), OOB (Spring 1986, vol. 2, issue 4, p.3), and OOB (Fall 1986, vol. 3, issue 2, p.3).

30 For example, OOB (Winter 1985, vol. 1, issue 3, p.5) and OOB (Winter 1987, vol. 3: no 3, p.3).

31 OOB (Winter 1985, vol. 1, issue 3, p.5).

32 OOB (Winter 1988, vol. 4, issue 3, p.3 and p.5). See also OOB (Spring 1990, vol. 6, issue 3, p.3).

33 OOB (Summer 1988, vol. 5, issue 1, p.3).

34 OOB (January-February 1990, vol. 6, issue 3, p.3).

35 OOB (July-August 1990, vol. 6, issue 6, p.7).

36 OOB (January-February 1991, vol. 7, issue 3, 1991, p.5).

37 OOB (May-June 1991, vol. 7, issue 5, 1991, p.5).

38 In OOB (Summer 1986, vol. 2, issue 5, p.3), a reader tells us that WAP (Women Against Pornography) had included pictures from OOB of pierced labia in their slide-show of material that they believed to subordinate women. In OOB (Winter 1987, vol. 3, issue 3, p.3) a reader tells us that a lesbian bookshop



### 3.2 Films by women

The availability of videos and VCRs in the 1980s allowed those who didn't want to enter an adult movie theatre to nonetheless watch sexually explicit material.<sup>39</sup> Suspecting that many of these people were women, Candida Royalle began to produce sexually explicit videos for women. This material, she thought, should be different from the other material available, if it is to be for women.<sup>40</sup> The differences she introduced were two: differences in production methods and differences of content.

With respect to production methods, Royalle tried to allow greater space for spontaneity in her films than had been permitted hitherto. A then standard way to shoot a sexually explicit film was to set up the lights and cameras so that 20 minutes can be shot of the performance of one sex act. Stop. Move the cameras and lights. Then commence another 20 minutes of the next sex act. The resulting footage can be edited to produce the film. Royalle instead gave the performers rough outlines of what the characters would do or want, before the filming, and then left them to engage in sex, uninterrupted, from beginning to end. She allowed camera persons freedom to react to the sex being filmed. She avoided both camera persons and performers from the mainstream industry, who, she thought, would replicate the industry's tropes.

Royalle's changes of content were aimed at depicting a certain kind of sex which would appeal to what Royalle believed to be women's distinctive sexuality.<sup>41</sup> One example: she replaced the standard cum shot (a man ejaculating onto a woman's body) with the performers' faces when climaxing, or clenched hands or buttocks. All in all, Royalle's sexually explicit films had a rather narrow range of "soft" content. It therefore seems unlikely—though not impossible—that Royalle's films would flout the ordinance.<sup>42</sup>

However, other women who have since produced sexually explicit films have preserved only Royalle's changes of method and not her narrow content: they acknowledge that not all women have the same sexual tastes simply in virtue of being women.<sup>43</sup> They include: Nina Hartley, Jacky St. James, Erika Lust, Tristan Taormino, Courtney Trouble, and Madison Young. Each has produced material that eroticizes dominance/submission.<sup>44</sup> They

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had been excluded from a literature festival because it stocked the magazine.

39 Tony Schwartz, "The TV Pornography Boom," *New York Times Magazine*, September 13, 1981.

40 Candida Royalle, "Porn in the USA," *Social Text*, no. 37 (1993): 23–32; Candida Royalle, "What's a Nice Girl like You ...," in *The Feminist Porn Book - The Politics of Producing Pleasure*, ed. Tristan Taormino et al. (New York City: The Feminist Press, 2013), 58–70.

41 Royalle, "What's a Nice Girl like You ...," 65.

42 Keller ("Powerless to Please: Candida Royalle's Pornography for Women," *New England Law Review* 26 (1992): 1301) argues that Royalle would be made liable by the ordinance.

43 For the difficulties of defining porn for women by content, see Ms. Naughty, "My Decadent Decade: Ten Years of Making and Debating Porn for Women," in *The Feminist Porn Book*.

44 E.g. *Nina Hartley's Guide To Bondage Sex* (Nina Hartley), *The Sexual Liberation of Anna Lee* (Jacky St. James), *Handcuffs* (Erika Lust), *Tristan Taormino's Guide to Rought Sex 1-3* (Tristan Taormino), *Fucking Mystic*

have various motivations for producing the material that they do. Hartley and Taormino believe that sexually explicit material can function as good sex education.<sup>45</sup> Taormino also believes that well-designed sexually explicit material can be used to expose what she calls the 'fallacies of gender': by which she means the gender binary and the stereotypes common in male-oriented pornography.<sup>46</sup> Trouble aims to produce material that shows people like her (larger, queer women) as desirable.<sup>47</sup> Young wants to produce depictions of authentic desire.<sup>48</sup> Lust wants to produce material that reflects her sexuality better than male oriented material.<sup>49</sup>

Do women want access to this material? Yes. First, a great many women want access to sexually explicit material of some sort.<sup>50</sup> In a survey of its readers, *marie claire* found that 10% of respondents watched sexually explicit material every day, 31% every week or so, and 30% several times a month.<sup>51</sup> Mostly, they watch it because it's a quick route to orgasm but also because it provides ideas about what to do in one's own sex life (39%) and because it allows one to feel in control of one's sexuality (36%). 51% said that they had learned more about different types of sex and sexuality by watching such material—something made possible by the availability of a diversity of material.

Second, those who use material that has been labelled "feminist" hold it in high regard. In her focus group study of consumers of feminist pornography, Liberman found that participants had developed a distaste for mainstream material, but were more likely to explore non-normative sexual behaviour (including BDSM) when shot through the lens of a feminist director (as opposed to a mainstream director) because they trusted the director's portrayal of women's sexuality and the ethics of the production of the portrayal.<sup>52</sup>

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(Courtney Trouble), and *Fifty Shades of Dylan Ryan* (Madison Young).

45 Nina Hartley, "Porn: An Effective Vehicle for Sexual Role Modeling and Education," in *The Feminist Porn Book*; Georgina Voss, "Tristan Taormino Interviewed by Georgina Voss," *Porn Studies* 1, no. 1 (2014): 203–5.

46 Tristan Taormino, "Calling the Shots: Feminist Porn in Theory and Practice," in *The Feminist Porn Book*, 262.

47 Rachael Liberman, "'It's a Really Great Tool': Feminist Pornography and the Promotion of Sexual Subjectivity," *Porn Studies* 2, no. 2–3 (2015): 186; Courtney Trouble, "Positively Fat and Queer: An Interview with Indie Porn Insider Courtney Trouble," in *New Views on Pornography: Sexuality, Politics, and the Law*, ed. Lynn Comella and Shira Tarrant (Santa Barbara, California: Praeger, 2015), 371–80.

48 Madison Young, "Authenticity and Its Role within Feminist Pornography," *Porn Studies* 1, no. 2 (2014): 186–88.

49 Rachel Kramer Bussel, "I'm a Feminist Pornographer," *Marie Claire*, October 21, 2015, <http://www.marieclaire.com/sex-love/a16426/im-a-feminist-pornographer/>.

50 As of 2003, women constituted 29% of purveyors of sexually explicit material on the internet: Anne Sabo, *After Pornified: How Women Are Transforming Pornography and Why It Really Matters* (Winchester, UK: Zero Books, 2012), 1.

51 Amanda de Cadenet, "More Women Watch (and Enjoy) Porn Than You Ever Realized: A Marie Claire Study," *Marie Claire*, October 19, 2015, <http://www.marieclaire.com/sex-love/a16474/women-porn-habits-study/>.

52 Liberman, "'It's a Really Great Tool': Feminist Pornography and the Promotion of Sexual Subjectivity,"

Third, in Crutcher's study of viewer reactions to feminist and mainstream material, she found that the difference was recognized: whereas in a mainstream film, the facts that (a) a particular sex act was unlikely to give sexual pleasure to the woman in the scene (at least, not to the degree she suggested), and (b) that the timing of particular sex acts and the pleasures experienced were unrealistic, made the mainstream material of much less interest than the feminist material viewed. So clear was the difference, that every female participant in the study asked for a copy of the feminist scene.<sup>53</sup>

There is then, in addition to OOB, other more recent material that qualifies as pornography, is produced by women and which women seem, for various reasons, to want access to. The liberty of these women to produce and consume this material would be abridged by the ordinance.

### 3.3 Displayers and Distributors

I will describe three locations in which pornography is distributed or displayed by women. Each is an attempt to provide women with easy access to sexually explicit material that they want to find.

Joani Blank opened the Good Vibrations sex toy store in 1977. Blank had heard many times women say that, although they may want to buy a vibrator to help them orgasm, they didn't want to go into a standard "dirty bookstore" where they risked harassment.<sup>54</sup> By contrast:

Good Vibrations was, by design, the antithesis of the kind of adult store one might expect to find in the red light district of a typical US city. It was a highly gender-coded environment where women could buy their vibrators, talk about sex, and feel supported around their sexuality at a time when there were few places to do so.<sup>55</sup>

In 1989, the store began to sell sexually explicit material with the same ethic as the store itself. The videos were selected on the basis of what the store thought its customers might want. The videos had their covers removed and were placed in unmarked black boxes. The store provided its own descriptions of the contents of the videos, which they believed were more accurate. Employees actively helped women find material that might interest them. According to the employees of the store, customers appreciated this.<sup>56</sup> But Good Vibrations sold pornography.<sup>57</sup> Thus the workers at Good Vibrations were and are

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180–81.

53 Emily Crutcher, "'She's Totally Faking It!': The Politics of Authentic Pleasure in Pornography," in *New Views on Pornography*, 330.

54 Carol Queen, "Good Vibrations, Women and Porn: A History," in *New Views on Pornography*, 179.

55 Lynn Comella, "From Text to Context: Feminist Porn and the Making of a Market," in *The Feminist Porn Book*, 83.

56 Cathy Winks in the Good Vibrations Guide to Adult Videos quoted in *Ibid.*, 85.

57 Carol Queen and Lynn Comella, "The Necessary Revolution: Sex-Positive Feminism in the Post-Barnard

traffickers in pornography.

Stoya created the website Trenchcoatx in 2015: a database of sexually explicit material.<sup>58</sup> It differs from major adult streaming websites in the following way. All such websites must tag their videos by sexual interest so that they can be searched. On most websites, these tags are ableist, racist and sexist. Stoya's website deploys a different set of search tags so that it's possible to search the material on her database without having to use such ableist, racist or sexist terms. Just as Good Vibrations provided a place through which women could find sexually explicit material without having to enter a place that was often unfriendly to women, Stoya offers something analogous for the internet age. Nonetheless, some of this material is pornography. Stoya traffics pornography.

Some university courses include the display of pornographic material. For example, Constance Penley has taught a course on sexually explicit film since 1993. She plays hardcore sexually explicit films to her students. The Santa Barbara County Citizens Against Pornography group called for her to be fired and her course cancelled.

The local antiporn activists... accused me of exposing children to pornography in my classroom, to the anger and dismay of my students who vocally spoke out against their characterization as children in letters to the editor of the local paper.<sup>59</sup>

Some of the material shown in the course will qualify as pornography. Penley is a trafficker in pornography.

### 3.4 *Ordeal*

Linda Boreman was the main performer of *Deep Throat*. Boreman wrote an autobiography, *Ordeal*, in which she describes how she was violently coerced into performing in that film, and much else besides. Langton reports finding this book sold in a catalogue of sexually explicit materials. Of the book, Langton says:

It is there because it is pornography after all: here, in this context, for these intended hearers, the uptake secured is bound to be that of pornography.<sup>60</sup>

If Langton is right, then Linda Boreman is a trafficker of pornography.

### 3.5 *Abridged Liberty*

The ordinances would threaten all of what has just been described: OOB and the various

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Era," *The Communication Review* 11 (2008): 287–90.

58 Natasha Lennard, "Can These Pornographers End 'MILFs,' 'Teens,' and 'Thugs'?" *The Nation*, September 29, 2016, <https://www.thenation.com/article/can-changing-our-porn-vocabulary-change-porn-itself/>.

59 Constance Penley, "A Feminist Teaching Pornography? That's Like Scopes Teaching Evolution!," in *The Feminist Porn Book*, 181.

60 Langton, "Speech Acts and Unspeakable Acts," 322.

functions it served; the woman-made pornography that has attracted a growing audience of female consumers, who are using it to learn about varieties of sex and sexuality and to take more control over their own sex lives; the distributors who have sought to make it easier for women to access a variety of sexually explicit material outside of unfriendly spaces; the educators who seek to teach students to think critically about the content and the economic and social context of sexually explicit material; and even the material that has been foundational in the thinking behind the ordinances. All of this points to the following conclusion: if the ordinances are justified with the aim of protecting women's liberty, then the ordinances are to some degree self-defeating.

This conclusion must be distinguished from two others which I am not drawing. First, I am not concluding that no argument in favour of the ordinances can be made to work. I am concluding that one argument for the ordinances is to some degree self-defeating. Second, I am not concluding that pornography does not constitute or cause harm to women. On the contrary, we're assuming that some material harms women. The conclusion drawn is about the values honestly served by the ordinances *qua* means to confront this assumed harm.

I will now address an objection to my assumption that because women produce and consume pornography, the ordinances, when justified by the FS argument, are to some degree self-defeating. The objection goes like this. It is not true that a piece of legislation is self-defeating when it aims at promoting the liberty of a given group by restricting the performance of a certain kind of activity, just because some members of that group also perform that activity. For instance, rape laws and sexual harassment laws restrict certain activities, in part, with the aim of promoting women's liberty. The laws, however, don't become self-defeating (to any degree) just because some women rape and sexually harass. But then there is no reason to think that the ordinances are (to any degree) self-defeating just because some women produce and distribute material that subordinates women.

There are, however, two important asymmetries between the ordinances on the one hand and rape and sexual harassment legislation on the other. These asymmetries show that we can consistently deny that rape and sexual harassment legislation are self-defeating but affirm that the ordinances (when defended by the FS argument) are.

First, the ordinances allow third parties to define women as victims of pornography even when the women so defined don't consider themselves to be such.<sup>61</sup> This is because the trafficking cause of action in the ordinances allows anyone to sue the traffickers of pornography on behalf of women. One misrepresents the ordinances if one claims that they merely enable those who have been directly harmed by a specific piece of pornography to seek and get redress.<sup>62</sup> Thus for instance, it would be quite possible for

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61 I owe this observation to Christine Littleton, "Feminist Jurisprudence: The Difference Method Makes," *Stanford Law Review* 41, no. 3 (1989): 779.

62 Lori Watson, "Pornography," *Philosophy Compass* 5, no. 7 (2010): 540.

Penley to be targetted by a member of the public for harming her adult students even though her students do not consider themselves to be harmed in any way by their exposure to pornography in Penley's classes.

Neither rape nor sexual harassment legislation allows a (mentally capable, adult) woman to be treated as a victim of rape or sexual harassment against her own perception of whether she is such. With respect to sexual harassment legislation, a third party cannot sue a person A on behalf of someone B on the ground that A sexually harassed B. B has to believe that she was sexually harassed and *she* has to sue. So a woman is always in a position, in effect, to veto the judgement that what happened to her is sexual harassment. With respect to rape legislation, sex is not rape unless it is non-consensual. Sex can be rough, violent, or even the consensual playing-out of a rape fantasy and still not be rape, provided that those involved truly consent to such sex. For this reason, whether or not a woman was raped depends very centrally upon whether or not she consented. The same is not true with respect to being a victim of the trafficking of pornography. Again, even if Penley's students consented to the viewing of pornographic materials in Penley's class, the ordinance allows Penley's students to be treated as victims of Penley.

Secondly, the ordinance restricts women's liberty to engage in activities beyond the subordination of women. It targets *materials* and not just acts done with materials: it's akin to a restriction, say, on alcohol rather than a restriction on drink driving. That means, because other activities are pursued by means of the use of pornography besides the subordination of women, the liberty of women to engage in those other activities is restricted by the ordinances. Such activities include: gaining access to the community of OOB when you're stuck in an intolerant part of the U.S. in a pre-internet era, education about safe and healthy means of carrying out diverse sexual practices, a relatively quick route to orgasm, and the de-shaming of various kinds of sexuality. These activities are considered (in some cases, highly) valuable by a significant number of women.

But there are no further activities which are valued by a significant proportion of women which would be indirectly restricted in the restricting of rape or sexual harassment. These pieces of legislation target acts and not objects used to perform those acts (or objects which are thought, in their very existence, to be the doing of those acts) which can also be used for other purposes of value to a significant proportion of women.

So, in two respects, rape and sexual harassment legislation are more successful at promoting women's liberty than the ordinances: they respect women's capacity to dictate whether or not they should be considered victims by the law and, of the acts of women they restrict, they restrict only obviously heinous and valueless acts of women (*viz.*, rape and sexual harassment). The ordinances do neither of these things: they remove an individual woman's capacity to dictate whether the law should consider her a victim and they target a range of women's activities besides the obviously heinous and valueless (*viz.*, subordinating of women). This difference warrants calling the ordinances, to some degree,

self-defeating, even if we don't call rape and sexual harassment legislation the same.

Better objects of comparison for the ordinances would be any legislation that, although aimed at promoting women's liberty, takes away a woman's capacity to dictate whether the law should consider her a victim and which stops women from engaging in activities beyond the obviously heinous and valueless. Consider, for example, the bans on the wearing of headscarves in French schools in 2004 and on the wearing of the burqa and niqab in public in France in 2011. One justification that has been given for each piece of legislation is the need to protect girls' and women's freedom to dress as they wish.<sup>63</sup> But the bans do not allow girls and women to dictate whether the law considers them victims of forced veiling and they stop girls and women from engaging in activities besides forced veiling which they consider to be of considerable value; viz., consensual veiling. These bans, justified in this way, are to a degree, self-defeating: even if they liberate those girls and women who are forced to wear these items, they simultaneously force other girls and women to give up a practice that is of considerable value to them. Both the bans (when justified with the aim of protecting women's and girls' liberty) and the ordinances (when justified with the FS argument) are premised upon a non-existent homogeneity in what women value: be this in women's and girls' attitudes towards veiling or in women's attitudes towards pornography. In this respect, the bans function similarly to the ordinances (as justified by the FS argument).

#### **4 Implying that no women are pornographers**

I now want to show that MacKinnon, Hornsby, Langton and West have made claims that imply the non-existence of women who are pornographers. I will argue in the next section that MacKinnon can make these claims and consistently acknowledge the existence of the women described in the previous section. There I will also argue that the reason she can do this affords her a reading of the FS argument on which it doesn't make the ordinances in any way self-defeating. In section 6, I will argue that Hornsby, Langton and West cannot follow MacKinnon in this if they want to keep their liberal credentials.

In three ways, MacKinnon implies that no women are pornographers. First, she repeatedly denies that pornographers' speech is women's speech: what we hear when we hear pornographic speech is women's silence, not women's speech.<sup>64</sup> If this were true then pornographers could not encompass women. The second and third ways in which MacKinnon implies this are both statements she makes in laying out the FS argument. In one statement of the argument, she writes:

The First Amendment's goals are furthered by restricting the speech of some so that

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63 Joan Wallach Scott, *The Politics of the Veil* (Princeton, New Jersey: Princeton University Press, 2007), chapter 5; Ulrike Spohn, "Sisters in Disagreement: The Dispute Among French Feminists About the 'Burqa Ban' and the Causes of Their Disunity," *Journal of Human Rights* 12, no. 2 (2013): 145–64.

64 Dworkin and MacKinnon, *In Harm's Way: The Pornography Civil Rights Hearings*, 276; MacKinnon, *Feminism Unmodified: Discourses on Life and Law*, 157–58, 181, 194–195, 208–209.

others might have access to it.<sup>65</sup>

The word “others” indicates that she's assuming that the group whose members are to have their speech restricted does not overlap with the group who are to be given access to speech by means of this restriction. Since the groups in question are pornographers and women, in this passage, MacKinnon implies that no women are pornographers. In another statement of the FS argument, MacKinnon writes:

The free speech of men silences the free speech of women. It's the same social goal just other *people*.<sup>66</sup>

Here, when MacKinnon speaks of men, she is referring to pornographers (this being a statement of the FS argument). She thus implies that pornographers are men. Given that men are not women, MacKinnon's statement implies that women are not pornographers.

In two ways, Hornsby, Langton and West also imply that women are not pornographers. First, Hornsby, Langton and West repeat or paraphrase MacKinnon's aforementioned line:

The free speech of men silences the free speech of women. It's the same social goal just other *people*.

Hornsby, Langton and West deploy this claim in their presentations of the FS argument—i.e. in speaking of men, they actually mean to speak of pornographers.<sup>67</sup> Thus they too imply that no women are pornographers.

Second, while Langton and West acknowledge that women produce sexually explicit material, they do not acknowledge that this material is pornographic. They distinguish between erotica and pornography as mutually exclusive categories and they only countenance the possibility that women want to produce and consume erotica: material that does not subordinate but is arousing.<sup>68</sup> They don't consider the possibility that women want to produce and have access to material that is dangerous to women.

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65 Dworkin and MacKinnon, *In Harm's Way: The Pornography Civil Rights Hearings*, 258.

66 MacKinnon, *Feminism Unmodified: Discourses on Life and Law*, 156, 193.

67 Jennifer Hornsby and Rae Langton, “Free Speech and Illocution,” *Legal Theory* 4, no. 1 (1998): 21; Langton, “Speech Acts and Unspeakable Acts,” 297; West, “The Free Speech Argument Against Pornography,” 421.

68 Langton, “Speech Acts and Unspeakable Acts,” 314; Caroline West, “Pornography and Censorship,” ed. Edward Zalta, *The Stanford Encyclopedia of Philosophy*, 2012, <http://plato.stanford.edu/archives/fall2013/entries/pornography-censorship>. There is one very brief moment—that occurs at some distance from her discussion of the FS argument—when West mentions that some feminists opposed the ordinances because they would generate 'interference with women's freedom to choose to produce and perform in pornography.' But West's discussion of the FS argument—including the distinction between erotica and pornography—is conducted as though women would only ever have reason to produce and consume erotica, not pornography.



For example, Langton presents the authors of the book *Pleasure and Danger* as persons who thought that the effects of pornography could be fought through the production of erotica. But this is inaccurate. The authors of *Pleasure and Danger* wanted women to have the freedom to produce and consume and experiment with dangerous material (i.e. pornography) because they believed that women's relationship to it is not well understood and cannot become well understood unless it is available; thus Carol Vance's remarks, in her introduction to *Pleasure and Danger*:

A serious effort to examine the relationship between sexual fantasy and behavior and agendas for social change is circumvented by the enormity of what we do not know: silences, oppressions, repressions, invisibility, denials, omissions, lies. Paradoxically, the effort to rein in sexual behavior and fantasy according to political dogma guarantees that the silence will continue and that information challenging it is unlikely to emerge.<sup>69</sup>

The authors of *Pleasure and Danger* didn't think that erotica ought to be sought instead of pornography, but rather that pornography (amongst other things) ought to be sought because pornography, albeit dangerous, may nonetheless have something to offer women—a sentiment with an uncanny resemblance to those expressed in the aforementioned studies by Crutcher, Liberman and *marie claire*.

Langton and West thus imply the non-existence of women who are pornographers by taking for granted a false dichotomy between those who seek to produce non-subordinating erotica, that is of value to women, and those who seek to produce subordinating pornography, that is dangerous to women.

### **5 MacKinnon on the social construction of women**

Earlier, I described the theory upon which the ordinances are premised: pornography normalizes and makes attractive women's subordination to men. What I did not stress is that this theory is just as much about the construction of women's sexuality as it is that of men's. According to the theory, pornography, and a variety of other social processes, constitute conditions under which women's preferences—and in particular, women's sexual preferences—are formed. However, women do not occupy positions of influence over these conditions. For that reason, MacKinnon does not believe that women's preferences are truly women's own. This idea finds succinct expression in the following:

In my view, sexuality is to feminism what work is to marxism... By saying that sexuality is to feminism what work is to marxism, I mean that both sexuality and work focus on that which is most one's own, that which most makes one the being the theory addresses, as that which is most taken away by what the theory criticizes. In each theory you are made who you are by that which is taken away

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<sup>69</sup> Carole Vance, "Pleasure and Danger: Toward a Politics of Sexuality," in *Pleasure and Danger: Exploring Female Sexuality*, ed. Carole Vance (Boston: Routledge and Kegan Paul, 1984), 22.

from you by the social relations the theory criticizes.<sup>70</sup>

The social relations that MacKinnon's theory criticizes are various modes of sexual violence against women and their eroticization: rape, incest, sexual harassment, domestic violence, prostitution, and pornography. MacKinnon considers all of these to be exertions of male power over women which are not properly constrained by law and she considers pornography, in particular, to be a device which makes these exertions of power desirable and to some extent invisible. For women to genuinely be in control of their preferences, they must, as a class, occupy positions of power so that women are not constructed by men to be subordinate to men. One might, as MacKinnon has, express this by saying that women have been silenced—what MacKinnon calls, a 'silence of the deep kind.'<sup>71</sup> Women who live in the context of gender inequality have been made to have certain preferences and not others and have thus been barred from expressing what theirs really would be. From this, and the assumption that there has never been gender equality, MacKinnon's claim that we have never heard women speak with their own voices, follows.<sup>72</sup> Moreover, if women are not only not in control of their own voices, but those voices have been made to serve gender inequality, it follows that simply liberating women as currently constructed is not a way to bring about gender equality: which explains both why MacKinnon insists that gender equality must be had before concern is rightly given to the protection of "women's" liberty,<sup>73</sup> and why MacKinnon insists that 'interpreting female sexuality as an expression of women's agency and autonomy is always denigrating and bizarre and reductive.'<sup>74</sup>

MacKinnon is quite willing to use the idea that women have been constructed, by others, to want their own subordination, in order to criticize her opponents. For example, at the hearing for the Los Angeles ordinance in 1985, MacKinnon makes a remark directed at the following parties: the U.S. Prostitutes Collective, FACT, a feminist who owns a bookstore, the aforementioned Sandra Hale, the National Organization for Women's National Board from the Southwest Region, Stonewall, and the ACLU. Of them, MacKinnon says:

Most broadly, I have heard support for pornography in a way that suggests to me, putting it together with what the psychologists have mentioned, that very often people who are abused by a system respond by identifying with the abuser and by defending the source of the abuse.<sup>75</sup>

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70 MacKinnon, *Feminism Unmodified: Discourses on Life and Law*, 43.

71 Ibid., 39. See also her opening speech in the Minneapolis hearing, where she says that pornography is used to make women lack ideas of their own in Dworkin and MacKinnon, *In Harm's Way: The Pornography Civil Rights Hearings*, 41.

72 MacKinnon, *Feminism Unmodified: Discourses on Life and Law*, 77, 196.

73 Ibid., 15, 129-130, 193 and MacKinnon, "Sexuality, Pornography, and Method: 'Pleasure under Patriarchy,'" 344.

74 MacKinnon, "Sexuality, Pornography, and Method: 'Pleasure under Patriarchy,'" 343.

75 Dworkin and MacKinnon, *In Harm's Way: The Pornography Civil Rights Hearings*, 356. Similarly, when reporting on the large number of women who opposed the ordinance in the Los Angeles hearing,

The broader context in which the preferences of these women were formed leads MacKinnon to quite unabashedly dismiss them as speaking with compromised voices.

Our interest in all this lies in the following. MacKinnon's view of what is required for women to truly own their own voices allows her to consistently deny that women are pornographers without denying the existence of the women described in section 3. It allows her to say: although plenty of pornography derives from the hands and mouths of women, it is not really *their* speech. Similarly, the liberty of women to express their sexuality by means of consuming pornography will not really be an exercise of *their* liberty. In each case, these women do not inhabit the social context they need to inhabit, if their speech and action are to be truly their own. MacKinnon's view of what's required for women to truly own their voices and actions, in turn, allows her a reading of the FS argument according to which silencing 'of the deep kind' is amongst the several kinds of silencing that the ordinance is supposed to address.<sup>76</sup> The reading goes like this. Pornography silences women in the sense that it is a feature of women's social context that makes others the authors of women's sexuality and hence any expression of that sexuality. Restrictions on pornography (such as the ordinance) are justified because they take back the authorship of women's sexualities from others and place them in women's own hands by changing women's social context. So the ordinance promotes women's freedom of speech by addressing the inequality that makes women, as a class, not authors of their own voices. The argument thereby concludes. This reading of the argument is not at all shown to be self-defeating by the existence of the women described in section 3, because although speech that derives from their hands and mouths will be silenced by the ordinances, that speech isn't really women's speech.

Hornsby, Langton and West have been keenly interested in providing accounts of how pornography could silence women's speech.<sup>77</sup> It's worth noting that none of these accounts interpret the claim that pornography silences women in the way that I have just proposed MacKinnon could intend it. All of the philosophers' accounts distinguish between a woman's intentions to perform speech acts and the successful performance of those speech acts. Pornography contributes towards the thwarting of the act but leaves the intention

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MacKinnon (*ibid*, pp. 11-12) dismisses those who opposed it as 'biological females'—insinuating that those who spoke against the ordinances were not speaking with “women's” voices (or perhaps that they were speaking with *women's* voices all too well i.e. with 'that which is most taken away by what' MacKinnon's theory criticizes). She (*ibid*, p.12) dismisses those women who opposed the proposed ordinance in Massachusetts by calling them mere 'mouthpieces' for other interests.

<sup>76</sup> MacKinnon makes several different kinds of silencing claim: pornography constructs women so that they have nothing to say (MacKinnon, *Feminism Unmodified: Discourses on Life and Law*, 39); pornography scares or terrorizes women into not speaking at all (*ibid*, 28, 130, 131, 140, 156, 180-181, 193, 194-195); pornography stops women from being understood (*ibid*, 166, 169-171); pornography lowers women's (perceived) credibility (*ibid*, 132, 180).

<sup>77</sup> Hornsby, “Speech Acts and Pornography”; Langton, “Speech Acts and Unspeakable Acts”; West, “The Free Speech Argument Against Pornography.”

untouched—the intentions are always women's own. So, on these interpretations of the silencing claim, pornography's silencing of women is never deep. It stops women from doing what they want. It doesn't make women want what they want. But if we read the FS argument only in terms of this “shallow” kind of silencing, then the ordinance defended by the FS argument—so understood—is to some extent self-defeating. For if we don't consider the intentions of these women to be compromised in the way that MacKinnon is willing, then we have to acknowledge that although the ordinance might stop some silencing of women, it will simultaneously silence women.

## **6 Liberals cannot follow MacKinnon**

MacKinnon can avoid the charge that, if the ordinance is defended by the FS argument then it is to some extent self-defeating, by coupling the argument with her view of the relationship between gender inequality and women's ownership of their own voices. Couldn't Hornsby, Langton and West do the same? In this section I am going to argue that they cannot if they want to maintain their liberal credentials.

For a person to be procedurally autonomous, her preferences for action must (and need only) meet requirements that are both internal and value-neutral.<sup>78</sup> A requirement is internal if it focuses upon processes that are internal to the person. It does not require that a person stand in certain social or political relations. It instead requires, for example, that the person have certain psychological properties such as an ability to critically reflect on what she wants. A requirement is value-neutral if it does not require that a person have preferences with particular contents. For example, a requirement that said that a person is autonomous only if her preferences are respectful of women would not be an admissible requirement on a procedural conception of autonomy. Other conceptions of autonomy deviate from the procedural by rejecting either value-neutrality (i.e. substantive conceptions of autonomy) or internalism (i.e. relational conceptions of autonomy).

Within a liberal state, the concept of autonomy (whichever one it is) is used 'to define and “mark” the citizen-subject of principles of justice', i.e., within that context, autonomy is treated as 'the characteristic of persons who are candidates for full participation in [...] collective decision-making processes.'<sup>79</sup> It determines, not whose welfare the state should care for but, to whom the state is answerable. Thus, depending upon how we define autonomy, we shift who is entitled to participate within collective decision-making processes of the state i.e. those debates that settle public policy. A liberal who is committed to value pluralism will tend to favour a procedural conception of autonomy as the mark of the citizen-subject: she doesn't want to rig the debate by gerrymandering its participants. She wants policy to get fixed by the outcome of a debate that is as inclusive as possible. Non-procedural conceptions of autonomy tend to exclude more people from these

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78 Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988); Harry Frankfurt, *The Importance of What We Care About* (New York: Cambridge University Press, 1988).

79 John Christman, “Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves,” *Philosophical Studies* 117 (2004): 156.

processes than procedural conceptions.<sup>80</sup>

When MacKinnon assumes that, because women inhabit the social context that they do, their speech and action is not really theirs, she assumes a relational conception of autonomy: no matter what internal, content-neutral constraints women meet, MacKinnon will deny that women's speech is their own insofar as they exist in such a context.<sup>81</sup> Furthermore, if we read the FS argument for the ordinance as about (at least) this kind of silencing, then MacKinnon will be employing a relational conception of autonomy as the mark of the citizen-subject: for she will be justifying coercive restrictions on the speech of the class of women described in section 3 by denying that that speech is really speech from autonomous persons.

Herein lies a clear, principled conflict between MacKinnon and a fairly standard kind of liberal. Whereas the liberal will not consider a failure of relational autonomy to be reason enough to diminish the authority that should be accorded a person's voice within collective decision-making processes, MacKinnon, appears to do precisely that: and she needs to do that, given the way she understands gender inequality. To do anything else, given her view of gender inequality, would be to leave in place a potent self-defensive mechanism of gender inequality: selves constructed so as to defend that inequality. That's why '[f]eminism thus does not "assume", it rather builds, its "women." From women who socially exist.'<sup>82</sup>

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80 Killmister and Oshana defend relational autonomy against the charge by Christman that its use in this role will lead to the oppression of the already oppressed and to an objectionable perfectionism, by removing relational autonomy from this role. Cf. Suzy Killmister, "Autonomy, Liberalism, and Anti-Perfectionism," *Res Publica* 19, no. 4 (2013): 353–69; Marina Oshana, *Personal Autonomy in Society* (Aldershot: Ashgate, 2006).

81 It makes no difference to the line of reasoning adopted here whether we ascribe a substantive or relational conception of autonomy to MacKinnon—just so long as the conception we ascribe diverges from the procedural conception favoured by many liberals. Nonetheless, I do not think it correct to ascribe to MacKinnon use of a substantive conception of autonomy. One reason for doubt is that, as we have seen, MacKinnon does not draw upon a purported gap between an authentic woman's voice whose authenticity is defined on the basis of content and what we currently hear from women—she draws instead upon observations of women's social and political context as that which thwarts a woman's possession of her own voice. Thus, for example, when MacKinnon criticizes Carol Gilligan for identifying a certain set of feminine values with women's values, she does so, not because those values in themselves are not women's own, or even because those values are inherently problematic, but instead because of what happens if those values are pursued in conditions of gender hierarchy: '*Given existing male dominance, those values amount to a set-up to be shafted*' (in Ellen DuBois et al., "Feminist Discourse, Moral Values, and the Law--A Conversation," *Buffalo Law Review* 34 (1985): 74. [my emphasis]). A second reason for doubt is that MacKinnon is adamant that she does not know what women would say if they had control over their own voices (cf. *Feminism Unmodified: Discourses on Life and Law*, 77). She claims to know only that women inhabit a position in which their actions and words are consequences of myriad pressures, over which women as a class lack control. What would happen if women gained significant influence over those pressures is something upon which she remains neutral. But she could not adopt that position if she deployed a substantive conception of autonomy which would make it definitive of autonomous acts and speech that they have certain aims and contents, rather than others.

82 Catharine MacKinnon, "Points Against Postmodernism," *Chicago-Kent Law Review* 75, no. 3 (2000): 696.

Quite plausibly, it's this conflict that Ronald Dworkin saw when he directly criticised the FS argument.<sup>83</sup> In his discussion of the argument, Dworkin alludes to a historical corruption of positive liberty. Positive liberty is the power to control or participate in public decisions. The corruption that Dworkin describes begins with the drawing of a distinction between a citizen's "rational self" (roughly, the wants the citizen, in some sense, ought to have) and her "empirical self" (roughly, the wants the citizen actually has). To have positive liberty is to act on the basis of one's rational self, and not merely one's empirical self. The corruption then moves to lumber the state with the project of making citizens act in accordance with their rational selves:

Freedom, on that conception, is possible only when people are governed, ruthlessly if necessary, by rulers who know their true, metaphysical, will. Only then are people truly free, albeit against their will.<sup>84</sup>

This describes MacKinnon's attitude towards the women described in section 3. So like other liberals who favour procedural autonomy as the mark of the citizen-subject, Dworkin would not find the FS argument compelling. It is an example of the corruption of positive liberty he opposed.

Moreover, it seems highly unlikely that the (liberal) judges who rejected the Indianapolis ordinance as unconstitutional would accept this way of protecting the ordinance from being, to any degree, self-defeating. Judge Barker draws attention to MacKinnon's assimilation of the position of adult women to the position of children.<sup>85</sup> Children are a paradigm of those who lack the mark of the citizen-subject. Barker rejects the assimilation. Judge Easterbrook believed that the ordinance would restrict the liberty of women's speech when that speech has political importance—as I have been describing.<sup>86</sup> The question is: if one were to reply to Easterbrook by denying that the speech of women that would get restricted is truly women's own, would this change Easterbrook's mind? Not likely. These liberal judges would have no truck with the suggestion that women as a class lack the mark of the citizen-subject.

Hornsby, Langton and West face, then, a dilemma. Either they can retain their liberal credentials and provide a version of the FS argument which focuses upon a kind of silencing that doesn't presuppose a non-procedural conception of autonomy as the mark of the citizen-subject, or they can lean upon the idea that pornography induces a silence of the deep kind. If they do the former, then the existence of the class of women described in

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83 Ronald Dworkin, "Liberty and Pornography," *The New York Review of Books* 38, no. 14 (August 15, 1991): 12–15; Ronald Dworkin, "Women and Pornography," *The New York Review of Books* 40, no. 17 (10 1993), <http://www.nybooks.com/articles/archives/1993/oct/21/women-and-pornography/>.

84 Dworkin, "Liberty and Pornography."

85 598 F. Supp. 1316 (1984) at 1332-1334.

86 771 F.2d 323 at 325 and 332.

section 3 means that to some degree, the ordinances defended by the FS argument are self-defeating. They might well empower some women to have some speech but, at the same time, the concerns of Hale, Hollibaugh, the founders of OOB and others would be realized. Women would have their liberty to express, explore and develop sexualities that are not properly “feminist” abridged. If, on the other hand, the philosophers do the latter, then they will lose their liberal credentials in using a non-procedural conception of autonomy as the mark of the citizen-subject.

One might try to slip out of this dilemma by justifying the prioritization of certain liberties of women over others. The liberty of women to (for example) explore, better understand and sharpen differences between assault and violent sex, is less important than the liberty of women to live in a world in which, although the threat of assault is reduced, the two are conflated. However, any attempt to do so would transform the FS argument into a defence of the ordinances which is based on a value other than the value of women's liberty. For we need some reason to think that some of women's liberties are so much more important than others that the latter are worth sacrificing for the sake of the former. That reason might be a concern for gender equality or for women's safety or something else. But it won't be a concern for women's liberty. The envisaged response gives up the ambition of defending the ordinances by appeal to the value of women's liberty as opposed to other values. It does not address the challenge I am raising to this ambition.

## **7 Liberalism and the problem of pornography**

Does this mean that we cannot address, within a liberal context, the problem pornography poses for gender inequality? No: there are at least two remaining ways in which the problem of pornography can be addressed within a liberal context.

First, there are other arguments besides the FS argument that attempt to work from liberal commitments (e.g. equality) for restrictions on pornography.<sup>87</sup> Those might still succeed even if the FS argument does not. They might show that the commitments of liberals like Ronald Dworkin, and the judges who ruled the Indianapolis ordinance unconstitutional, command forfeit of a value pluralism that encompasses sexualities that eroticize dominance/submission (and hence the pornography that helps construct them).

Second, it might be possible to address the problem pornography poses without restricting, and therefore without forfeiting this value pluralism. This depends both upon how one defines gender equality and upon the tightness of the connection between the eroticization of dominance/submission and gender inequality. If one defines gender equality so that, by definition, it is incompatible with the existence of persons who find dominance/submission sexually arousing, then gender equality is incompatible with a

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<sup>87</sup> Rae Langton, “Pornography: A Liberal’s Unfinished Business,” *Canadian Journal of Law and Jurisprudence* 12, no. 1 (1999): 109–33; Lori Watson, “Pornography and Public Reason,” *Social Theory and Practice* 33, no. 3 (2007): 467–88.

liberalism that respects a value pluralism that encompasses sexualities that eroticize dominance/submission, and hence, pornography. This, however, is not necessarily so if one defines gender equality in such a way that, at least conceptually, it doesn't require the elimination of sexualities that eroticize dominance/submission. Let's call whatever is constitutive of gender equality—where it does not require, by definition, the elimination of sexualities that eroticize dominance/submission—"G." *Ex hypothesi*, G does not obtain anywhere. If we believe MacKinnon's theory, pornography currently contributes towards the non-obtaining of G. However, pornography may do this in two ways: it may do it *necessarily*, so that, although we're not *defining* gender equality as incompatible with the eroticization of dominance/submission, nonetheless, realistically, it's only by the elimination of material that eroticizes dominance/submission that G could obtain; or alternatively, pornography may do this *contingently*, so that even without the elimination of pornography, G could realistically obtain. If pornography has whatever (causal or constitutive) effects it does on G only contingently, then there's no incompatibility between even a liberalism that respects a value pluralism that encompasses sexualities that eroticize dominance/submission and gender equality. Although in some circumstances, the eroticization of dominance/submission may contribute towards the non-obtaining of G, circumstances can in principle be changed so that it doesn't, without the elimination of sexualities that eroticize dominance/submission, and hence, without eliminating pornography (as we have defined it).

The nature of sexually explicit material—whether we understand it on the model of other pictures and films, or instead (as Langton recommends), on the model of speech acts—makes its meaning and consequences inherently context-sensitive.<sup>88</sup> This theoretical context-sensitivity is supported empirically by the fact that debriefings following the viewing of violent sexually explicit material significantly mitigate negative attitudes towards women, and by the fact that pre-dispositions to be misogynistic are an important precondition for sexually explicit material's negative influence on men's attitudes towards women.<sup>89</sup> But, like MacKinnon, one may believe that any attempt by women to take advantage of this context-sensitivity—to craft the context of pornography so as to turn its meaning and effects (both causal and constitutive) away from gender inequality—will inevitably result in the co-optation of women's voices in the service of gender inequality. Taormino, for example, describes how she had to make compromises against her wishes in order to get a distribution deal for her work with a major distributor: her voice bent to its male-monopolized context.<sup>90</sup>

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88 Susan Etta Keller, "Viewing and Doing: Complicating Pornography's Meaning," *The Georgetown Law Journal* 81 (1993): 2195–2242; Jennifer Saul, "Pornography, Speech Acts and Context," *Proceedings of the Aristotelian Society* 106 (2006): 229–48.

89 Neil Malamuth and James Check, "Debriefing Effectiveness Following Exposure to Pornographic Rape Depictions," *The Journal of Sex Research* 20, no. 1 (1984): 1–13; Neil Malamuth, Gert Martin Hald, and Mary Koss, "Pornography, Individual Differences in Risk and Men's Acceptance of Violence Against Women in a Representative Sample," *Sex Roles* 66 (2012): 427–39.

90 Taormino, "Calling the Shots: Feminist Porn in Theory and Practice," 256–57. See also: Rebecca Whisnant, "But What About Feminist Porn?: Examining the Work of Tristan Taormino," *Sexualization, Media, and*



Maybe. But it must be acknowledged that nothing MacKinnon (nor anyone else) says compels us to conclude that *all* attempts to exercise what agency women have in conditions of oppression will inevitably backfire. A long-standing criticism of MacKinnon's feminism is that it exaggerates the extent to which persons lose their capacity to act for themselves in conditions of oppression—which is why it risks recommending solutions to gender inequality (like the ordinances) that empower women insofar as they agree to view themselves as victims and actively disempower women who don't.<sup>91</sup> The system MacKinnon implores us to believe in apparently has flaws. It *is* possible to get turned on by dominance/submission without losing one's ability to tell the difference between sex (no matter how violent) and assault.<sup>92</sup> And although Taormino's experience is no doubt symptomatic, the material she and others produce is recognizably different to that produced by men.<sup>93</sup> Moreover, the kind of economic dynamic which pressured Taormino to compromise is to some extent diminishing in the adult film industry, just as it is in the music industry, thanks to the internet's democratization of access to the means of distribution.<sup>94</sup>

To really know whether even a liberalism that respects a value pluralism that encompasses the eroticization of dominance/submission is compatible with gender equality, we need to better understand what MacKinnon takes for granted: whether the production of material that eroticizes dominance/submission can *only* further entrench gender inequality. If not—if its production can be either neutral on this score (given suitable changes elsewhere, e.g., sex education or enhanced literacy of sexually explicit material), or perhaps even a part of a means of bringing about gender equality—then it might well be possible (in principle, at least) to address the problem pornography poses for gender equality without significant restrictions on sexually explicit material that eroticizes dominance/submission: because then their relation—the relation between such material and gender equality—is only contingent, not necessary.<sup>95</sup>

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*Society* 2, no. 2 (2016): 1–12.

91 Kathryn Abrams, "Sex Wars Redux: Agency and Coercion in Feminist Legal Theory," *Columbia Law Review* 95 (1995): 304–76; Ellen DuBois et al., "Feminist Discourse, Moral Values, and the Law--A Conversation," *Buffalo Law Review* 34 (1985): 70; Michele Moody-Adams, "Reclaiming the Idea of Equality," in *Feminist Interventions in Ethics and Politics: Feminist Ethics and Social Theory* (Lanham: Rowman & Littlefield Publishers, 2005), 184–201; Ellen Willis, "Comment (Ellen Willis)," in *Marxism and the Interpretation of Culture*, ed. Cary Nelson (Chicago: University of Illinois Press, 1988), 117.

92 Noam Haviv, "Reporting Sexual Assaults to the Police: The Israeli BDSM Community," *Sexuality Research and Social Policy* 13, no. 3 (2016): 276–87.

93 For Taormino, see Crutcher, "'She's Totally Faking It!': The Politics of Authentic Pleasure in Pornography." For others, see Sabo, *After Pornified: How Women Are Transforming Pornography and Why It Really Matters*.

94 Courtenay Daum, "Feminism and Pornography in the Twenty-First Century: The Internet's Impact on the Feminist Pornography Debate," *Women's Rights Law Reporter* 30, no. 3 (2009 2008): 543–65.

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