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FACT'S FANTASIES AND FEMINISM'S FUTURE: AN ANALYSIS OF THE FACT BRIEF'S TREATMENT OF PORNOGRAPHY VICTIMS

LILA LEE*

INTRODUCTION

In 1985, a group of self-described feminists filed what they called the FACT brief in the federal litigation that challenged Indianapolis' anti-pornography ordinance.¹ It was written on behalf of the Feminist Anti-Censorship Taskforce ("FACT"), and cosigned by the Women's Legal Defense Fund and eighty self-described feminists, the vast majority of whom were women employed as academics, professionals, or in the arts.² The FACT brief endures as the quintessential and definitive statement of liberal feminists on pornography.³ An important part of feminism's recent past, the views espoused by FACT are widely held in the present, and addressing their continuing influence is crucial to feminism's future.

This Essay examines closely one particular aspect of the FACT brief: its writers' reaction to and treatment of the public testimony of women victimized by pornography. That testimony was taken during the legislative hearings on Indianapolis's anti-pornography ordinance.⁴ In addition, all testimony from the hearings on the Minneapolis anti-pornography ordinance was entered in the

* The author wishes to express her appreciation to Allen Zimmerman, without whose help and support this Essay could not have been written.

1. See Brief Amici Curiae of Feminist Anti-Censorship Taskforce et al., *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986), *reprinted in* Nan D. Hunter & Sylvia A. Law, 21 MICH. J.L. REF. 69 (1988).

2. See Hunter & Law, *supra* note 1, at 70.

3. For example, a recent treatise on women and law contains excerpts from the FACT brief as the primary exemplar of what it terms "Feminist Responses to the Feminist Attack on Pornography." See KATHARINE T. BARTLETT & ANGELA HARRIS, *GENDER AND LAW: THEORY, DOCTRINE, AND COMMENTARY* 642-44 (2d ed. 1998).

4. See *IN HARM'S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS* 39 (Catharine A. MacKinnon & Andrea Dworkin eds., 1997) (publication of testimony at antipornography ordinance hearings). Copies of the entire hearings were widely circulated in photocopy. In addition, extensive excerpts from the Minneapolis hearings were also part of the judicial record in the case.

legislative record in Indianapolis.⁵ It is my conclusion that the signatories to the FACT brief exist in a fantasy world in which women victimized in pornography simply do not exist, a fantasy in which pornography has nothing to do with sexism. In this idyll, what the women of FACT perceive as their interests—equal employment, abortion rights, and full participation in the traditionally male public sphere—would be magically furthered if women allowed themselves to enjoy the pornography that was hitherto the province of men.

FACT's fantasies have not come true. Their brief was apparently effective in helping to invalidate the ordinance, thus denying the victims the legal remedies they sought. But the idyll never arrived. In the years since FACT turned their backs on the women hurt in pornography, the abortion right has eroded severely through a combination of restrictive legislation and lack of providers. Even elite women like the signatories to the FACT brief have hit glass ceilings, been shunted to the mommy track, combined their careers with the uncompensated second shift at home, been sexually harassed in the workplace, and continued to receive less money than men for comparable or even identical work. Sexual abuse of children continues unabated and largely unreported. And rape is still rampant, its effects exacerbated by the existence of a growing subpopulation of serial killers, whose victims of choice are usually women.

I. FACT'S FANTASY THAT THE ORDINANCE WAS FOISTED UPON WOMEN BY RIGHT-WING MEN AND CENSORS ALL EXPLICIT SEXUAL EXPRESSION

Some simple facts get lost in the political crossfire between right and left, and in the knee-jerk allusions to the First Amendment that constitute standard discourse about the anti-pornography ordinance. Whose ordinance was it, and what did it really say? In the endless discussions about the respective interests of the political left and right in the Indiana ordinance, it is often forgotten that the ordinance was victim-driven, and that the victims had an agenda that was neither right nor left, but their own. They wanted civil remedies for real injuries to them, remedies they could implement for themselves, remedies that gave them both financial damages and social empowerment. The ordinance is the law pornography victims

5. *See id.*

wanted, and it expresses *their* interests, not necessarily the interests of either the left or the right. This is not to say that either the left or the right did not have interests affected by the ordinance; it is to point out the obvious but often overlooked fact that pornography victims had their own stake in the ordinance. That stake produced its language, coverage, and concept. A commentator, although fairly unsympathetic to the ordinance, conveys clearly the essential impetus supplied by the victims at the hearings:

The hearings were crucial in galvanizing support for the ordinance According to William Prock, "absent what was presented at those hearings, and the way it was subsequently summarized and interpreted, the council would not have had a basis for the ordinance. I don't think you would have found seven council members willing to vote for the ordinance absent what was presented at the hearings." A leader of the Pornography Resource Center also pointed to the importance of the hearings. "I think most of us got politicized by the hearings . . . the hearings are a fundamental thing to read."⁶

The hearings were not closed . . . and opposing voices spoke. But the audience did not want to hear. It reacted passionately against testimony that opposed *or even questioned* the proposed law The audience . . . reacted to unsympathetic testimony with booing and hissing, moaning and crying . . . the audience remained deeply engaged, emotional, and defensive. It was their moment, and no one would be permitted to diminish it.⁷

Imagine actual Holocaust survivors, present at the Nuremberg Trials, being unable and unwilling to suppress their spontaneous expressions of grief and anger at suggestions that no harm had been done, nor legal intervention needed.

Next, what exactly was this ordinance, so passionately supported by pornography victims, that FACT says prevents women from being able to consent to model for pornography, the ordinance that FACT says censors all explicit sexual expression? Actually, the ordinance neither criminalized nor censored pornography. Rather, it provided a civil remedy under which women harmed by pornography could sue its makers and distributors for damages they can prove were done by them and ask an administrative agency or later a court to issue an

6. DONALD ALEXANDER DOWNS, *THE NEW POLITICS OF PORNOGRAPHY* 81 (1989) (describing the hearings at Minneapolis for the ordinance that was the precursor of the Indiana ordinance litigated in *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986), and quoting Paul Brest & Ann Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607, 629 (1987)).

7. *Id.* at 82-83.

injunction against the offenders. The potential plaintiffs were envisaged as of two principal types: women who are harmed while making pornographic films by coercion, and battered or raped women who can show a sufficient causal connection between the abuse and their abuser's use of pornographic materials. The ordinance contains a list of facts that are not allowed to automatically create a legal conclusion of consent on the part of the plaintiff, but does not, as the FACT brief erroneously argues, create a conclusive presumption that no plaintiff consented.⁸

In addition to falsely characterizing the ordinance as censorship, FACT argues that "as applied" the ordinance would censor *all* sexually explicit material.⁹ This is curious, because the ordinance is clear and unambiguous about drawing a distinction between sexually explicit material and sexually explicit material that subordinates women. It clearly, explicitly, and unambiguously separates "sexually explicit" from "subordinates" by its plain language and by giving a list of specific additional limitations on what sexually explicit subordinating material the ordinance would be confined to. If subordination and sexual explicitness were coextensive under the ordinance, the subsections would single out exceptions to subordination, not limits to it. FACT's qualification that "as applied" the ordinance would cover virtually all sexually explicit sexual expression was a plain misreading of the ordinance. While it is perfectly true that any woman can claim to be sexually subordinated by any given piece of sexually explicit material, just as any woman can claim to be discriminated against by any employment decision, both must prove their injuries and cause in fact in a court of law.

II. FACT'S FANTASY THAT THE VICTIMS OF PORNOGRAPHY WHO TESTIFIED AT THE HEARINGS DO NOT COUNT

In 1999, three American soldiers were captured in Kosovo. The press and the nation were very, very interested in what the soldiers had to say. While they were in captivity, with their words unavailable to us, we inspected their pictures on the front pages of American newspapers with minute care, and winced over the bruises described in the headlines. Unlike Nicole Brown Simpson's pictured bruises, no

8. See INDIANAPOLIS & MARION COUNTY, IND., HUMAN RELATIONS, EQUAL OPPORTUNITY CODE ch. 16 (1984), reprinted in *IN HARM'S WAY*, *supra* note 4, at 438-57.

9. See Hunter & Law, *supra* note 1, at 129. "The ordinance presumes women as a class (and only women) are subordinated by virtually any sexually explicit image." *Id.* at 122.

one said that the soldiers' bruises had been created with cosmetics. Speculation about their treatment was anguished and intense, but it was also just that—speculation, and acknowledged as such. What everybody was really waiting and hoping for, with bated breath, was for those soldiers to come home to us, released from captivity, and tell us about their experiences. We figured that was the only way we would know. And we, as a country, were prepared to defend our soldiers, issue reprisals had they been mistreated, and base our military policies on the information they gave us because we thought of ourselves as a country, and of the soldiers as, in a sense, valued parts of ourselves.

One would think that a group of women evaluating the results of pornography upon women would have the same attitude—surely the survivors' words would be awaited with bated breath, held as definitive, truthful, and more relevant than any speculation. But, as Virginia Woolf pointed out, women have no country—not even a country composed of and defined by women and their interests.¹⁰ Nowhere has her observation been borne out with more striking clarity than in the FACT brief, which, after mischaracterizing the social scientists' testimony on the causal link between pornography and harms to women as inconclusive, dismissed the anguished testimony of survivors of pornography in a single sentence:

Unable to marshal *systemic* evidence that pornography causes concrete injury, the Commission was forced to rely upon the *anecdotal* testimony of carefully selected and well-prepared individual victims¹¹

FACT's footnote to this dismissive phrase provides neither argument nor evidence—not so much as a headcount given of the witness victims the Commission discusses—for its conclusion that the witnesses were “carefully selected” and “well-prepared.”¹²

10. VIRGINIA WOOLF, *THREE GUINEAS* 109 (1938).

11. Hunter & Law, *supra* note 1, at 72 (emphasis added). Interestingly, reports of police brutality are often dismissed by those reluctant to implement proposed reforms as “anecdotal” rather than “systemic.” Perhaps women abused in pornography are subject to some of the same assumptions that operate to the detriment of those who complain of police brutality. The underlying assumptions seem to be that (1) if abuse actually occurred, it was so rare and isolated as to not merit a general solution; (2) if the person seeking to be believed were a credible person and of good character (i.e., believable) they would not ever have been in a position to be abused (i.e., detained by the police or photographed by a pimp); and (3) if abuse occurred, it was no more than the complainant deserved due to their defective nature (i.e., being a black man who probably committed a crime or a sexually active/attractive woman). For an excellent discussion of police brutality and the concept of anecdotal evidence, see Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 *BUFF. L. REV.* 1275 (1999).

12. Hunter & Law, *supra* note 1, at 72.

Evidently, FACT considers that the conclusions of social scientists—male social scientists, in this case—who studied pornography in laboratories are much more important than the testimony of actual pornography victims. Why didn't FACT—which has many J.D.'s, Ph.D.'s, and professors among its members, and ought to understand the concept of intellectual accountability to empirical facts—explain or qualify or even try to document their statement that the witnesses at the open public hearing were “carefully selected” and “well-prepared”? And, if they wondered how these women got there or had reason to doubt their credibility, why didn't they conduct an inquiry on their own, or present an interview of even one woman who claimed that she had been victimized by pornography to support their challenge? FACT's credibility would be enormously enhanced if they could have cited even one woman claiming something along the lines of “Yes, I was raped. The police have found that the rapist visited an adult bookstore on the day it happened, but I don't believe the pornography had anything to do with what happened to me.”

But FACT is not interested in anecdotal evidence, despite the fact that the stories women tell consist of anecdotal evidence, which is, according to real feminists, consciousness raising, a primary method of feminism, and according to some critical theorists, narrative, and, in courts, testimony. When the women victimized in pornography tried to share their consciousness, their first-hand knowledge, their direct accounts of their own lived experiences, their stories, their testimony, the so-called feminists of FACT were not interested in hearing it.

FACT precedes its brief with an introduction that provides an extensive discussion of the feminist discourse on sexual expression and its relationship with conservative social and political forces.¹³ According to FACT, the players—discussants or experts—in the pornography debate include such people as Simone DeBeauvoir, Attorney General William French Smith, attorney and prosecutor Henry Hudson, the Meese Commission, Dr. James Dobson, Dr. Judith Becker, social scientist Professor Edward Donnerstein, Meese Commission Member Frederick Schauer, journalist Richard Cohen, and author Carol S. Vance.¹⁴ Those are the people FACT cites and talks about. In its attempt to place the debate over the ordinance

13. *See id.* at 69.

14. *See id.* at 70-74.

within a political context of the political left and right and the feminist movement, FACT leaves out the real players or discussants or witnesses—the victims. None are identified by name, as an interest group, or even as a source of demographic data. In ignoring the testimony of the victims, FACT itself replays an old male pattern of abuse—the victims are mere pawns between warring groups of men. FACT wants to play with the guys, argue on their level, and that requires them to ignore their less fortunate sisters.

III. FACT'S FANTASY THAT PORNOGRAPHY CAN MEANINGFULLY BE CHARACTERIZED AS IMAGERY, IMAGES, OR "RICH FANTASY MATERIAL"

Although the vast majority of pornography is made with live women, the FACT brief authors, throughout much of the brief, discuss pornography as if it were digitized, painted, drawn, or written without live women. The words that recurred repeatedly in the brief are "imagery," "image," and "fantasy." This approach ignores the fact that pornography consumers want and get representations—meaning appropriations—of real women, even if consumers don't want them to look like real women. Thus, what is painfully and expensively achieved with liposuction, silicone breast implants, airbrushing, camera filters, and sophisticated cosmetics could quite easily be achieved digitally or by a painting, consumers would rather have a real woman with breast implants than a painting or pixel of a woman with larger-than-average breasts. FACT is correct in assuming that consumers are buying an image and a fantasy, but they fail to acknowledge that much of the gratification consumers seek and experience is dependent upon real, live women being used to make it. Vargas girls wouldn't cut it with today's pornography consumers, even if they were drawn spread-eagle and holding dildos instead of wearing pearls. Part of the excitement generated by pornography has to do with the power and taboo of making an actual woman perform the acts. FACT's discussion of pornography as "images" and "fantasy" treats pornography as if it were a pure artifact of creativity, like a painting without a live model or a digital image that is completely fabricated. Men know real women are in porn, but FACT doesn't want to know.

One of the most egregious examples of FACT's unrealistic use of "imagery" and "fantasy" occurs in its analysis of the effects of pornography on consumers:

Pornography can be a *psychic assault*, both in its content and in its public intrusions on our attention, but for women as for men it can also be a source of erotic pleasure. A woman who is raped is a victim; a woman who enjoys pornography (even if that means enjoying a rape fantasy) is in a sense a rebel, insisting on an aspect of her sexuality that has been defined as a male preserve. Insofar as pornography glorifies male supremacy and sexual alienation, it is deeply reactionary. But in rejecting sexual repression and hypocrisy—which have inflicted even more damage on women than on men—it expresses a radical impulse. *Fantasy* is not the same as wish fulfillment. But one cannot fully discuss or analyze *fantasy* if the use of explicit language is precluded.¹⁵

This paragraph is remarkable, among other things, for its refusal to view pornography from the perspective of any woman other than a potential consumer. According to this paragraph, the potential harm of pornography exists only to the consumer, who may experience it as “psychic assault.” But focusing exclusively on the argument of how consumers psychically experience pornography elides the *physical* assault the woman in the materials may well have experienced in the making of the pornography. It also ignores the repeated psychic assault *she* may experience as the material that documents her abuse is trafficked and she is used sexually over and over again. FACT’s writing about pornography as fantasy is itself a fantasy that real women are not used to make pornography.

The authors of the FACT brief are similarly blinkered when they discuss pornography in terms of its role in assaults on married women, girlfriends, and children:

Individuals who commit acts of violence must be held legally and morally accountable. The law should not displace responsibility onto *imagery*. Amicus Women Against Pornography describe as victims of pornography married women coerced to perform sexual acts depicted in pornographic works, working women harassed on the job with pornographic *images*, and children who have pornography forced on them during acts of child abuse. Each of these examples describes victims of violence and coercion, not of *images*. The acts are wrong, whether or not the perpetrator refers to an *image*.¹⁶

Here, FACT ignores the victims’ testimony as to the impelling exemplary or textbook function of pornography, amply attested to in the public hearings on the ordinance.¹⁷ FACT ignores the reality that

15. *Id.* at 121 (quoting Ellen Willis, *Feminism, Moralism, and Pornography*, in *POWERS OF DESIRE: THE POLITICS OF SEXUALITY* 460, 464 (Ann Snitow et al. eds., 1983)) (emphasis added).

16. *Id.* at 134 (emphasis added).

17. See *IN HARM’S WAY*, *supra* note 4, at 172, 246-47, 280 (pornography used to

this function is obviously enhanced by real women performing the acts the rapist or assaulter comes to want to perform on his victims. A photo or film of a woman submitting to deep throat sex is much more persuasive and authoritative support for a man's argument that "this is what real women do" than a woodblock print or etching showing a man's penis going to the base of a woman's throat. If the authors of the FACT brief had opened themselves to the testimony of pornography victims, this point would have been clear to them. The use of sanitizing, distanced words such as "image," "imagery," and "rich fantasy material" ignores the testimony of the victims. Victims are not an image. The only rich fantasy going on here is the one FACT has lost itself in.

IV. FACT'S FANTASY THAT THE TRUE COST OF PORNOGRAPHY IS REFLECTED IN WHAT CONSUMERS PAY AT THE VIDEO COUNTER

A primitive cost-benefit analysis of pornography underlies the FACT brief, one that—unwittingly, one supposes—shockingly insults and exploits pornography's victims; it assumes that the cost of pornography to the victim is fairly and accurately reflected in existing commercial outlet prices. The explicit part of the analysis is FACT's assertion of the benefits of pornography to female consumers:

As applied, [the ordinance] would deny women access to sexually explicit material at a time in our history when women have just begun to acquire the social and economic power to develop our own images of sexuality.¹⁸

Depictions of ways of living and acting that are radically different from our own can enlarge the range of human possibilities open to us and help us grasp the potentialities of human behavior, both good and bad. Rich fantasy imagery allows us to experience in imagination ways of being that we may not wish to experience in real life. Such an enlarged vision of possible realities enhances our human potential and is highly relevant to our decision-making as citizens on a wide range of social and ethical issues.¹⁹

FACT thus defines the value—the benefit—of pornography to a group of people it calls "us"²⁰ and "we."²¹ The "us" and "we" consist

indoctrinate a child that sexual abuse is normal); *see id.* at 175-76 (pornography as instruction manual for sodomy of child); *see id.* at 131, 161 (pornography as instructional manual for sexual assault); *see id.* at 113-14, 150-51, 162, 169-70, 370, 374 (pornography as textbook); *see id.* at 176 (pornography as training manual for prostitution).

18. Hunter & Law, *supra* note 1, at 129-30.

19. *Id.* at 120.

20. *Id.*

21. *Id.*

of a highly educated and successful group that principally includes law professors, other academics, attorneys, and published writers. FACT seems to contend that the proper cost of this “benefit” is the current market price of pornography. Therefore, if one of the women of FACT wants to slum (learn about “ways of living and acting that are radically different from our own”), learn about sex, explore her dark side, have a stimulus to a “rich fantasy life,” “grasp the potentialities of human behavior, both good and bad” or just get off sexually, she is entitled to do so by handing over whatever amount of money the pornographers are currently charging to rent or consume their victims. The women of FACT denounce any suggestion that the costs are actually higher.

The ordinance is a civil remedy. It does not censor pornography or make it unavailable, but would, if enacted and enforced, raise the cost and/or decrease the availability of pornography because any woman who can establish in court that she was harmed by pornography will receive damages for, and/or an injunction against, its use. Pornography would likely become more expensive in three ways: (1) pornographers would pass the damages on to pornography consumers; (2) pornography would be more scarce and thus more expensive; and (3) it would probably become more intrinsically expensive to make porn because the models would need to be paid more and treated better in order to perform willingly. When FACT fights the ordinance by saying that FACT wants pornography, and expects to get it at its current low price, in effect FACT is asking pornography’s victims to subsidize FACT’s pleasure with the victims’ pain. If no woman can establish in court that she was hurt by pornography, the women of FACT can get all the porn they want at current prices.

The ordinance thus makes a simple point about the cost of externalities. If any woman can establish that she was hurt, that hurt should be figured into what FACT pays. If pornography is truly made unavailable by the ordinance, it will only be because its victims, real women, establish in real court cases that pornography harmed them—so much that no one can afford to market it anymore. Any pornography where harm to victims cannot be proved will be fully available to FACT for the enrichment of their fantasy lives. Only in their fantasies—and in the world without the ordinance we currently live in, due in part to FACT—are the women of FACT entitled to more. And if FACT truly were to feel deprived by the decrease in pornography supply, they’re smart enough, capable enough, and

creative enough to make and distribute their own, in-house. To circumvent the coercion provision of the ordinance, they could use themselves as so-called models.

V. FACT'S FANTASY THAT ONLY MALE EXPERTS' OPINIONS ARE EVIDENCE OF WHETHER PORNOGRAPHY HARMS WOMEN

Part of FACT's fantasy is that pornography does not harm women. Another part is that male expert opinion is a more credible assessment of whether pornography harms women than the opinion of women who claimed that it harmed them. The introduction to the FACT brief made much of what it termed the 1985 Commission on Pornography's failure to "prove" that pornography causes violence or harm. Specifically, FACT charges that the Commission "was unable to 'prove' that pornography causes violence," was "forced to . . . invoke a vastly broadened concept of harm," and found itself unable to agree on what constituted degradation in pornography.²²

A refutation of the FACT brief's misrepresentation of both the evidence and the Commission's analysis and findings is not within the scope of this Essay²³ but the question of whose opinions should be accorded credibility as to the harm, violence, and degradation women sustain from pornography is central to it. Pornography victims gave anguished testimony in the hearings on the Indianapolis ordinance. They told us, among other things, of the way pornography had been instrumental in their rapes; told us they had suffered harms of subordination and second-class status and imposed inferiority from pornography even when it did not result in something the law called rape or violence or that a doctor would call physical abuse. In a word, they testified that they were *violated* by porn—that their experience of pornography was a form of violation or violence to them.

FACT does not discuss porn being a violation as such and is remarkably unsophisticated in its treatment of the concept of violence. They neither analyze nor discuss it, but seem to implicitly shunt and cabin it off into anything the criminal law recognizes. This is a rather naive view of criminal law, which any lawyer knows is normative—it merely tells us which acts we have collectively and currently decided not to tolerate. Violence comes from a violation, and a violation is defined only in relation to an entity we see as having

22. *Id.* at 71-73.

23. In fact, the social scientists' empirical evidence supports the victims' testimony that pornography contributed to their injuries.

a right to integrity. Violence and the right to integrity are assigned social definitions, ones that have not reflected women's realities in a male-dominated society.

As to the reality of there being a violation, it is bizarre that FACT does not accept victim testimony as even rising to the level of evidence. Isn't it possible that some of the victims—for instance, the woman who testified at the Minneapolis hearings²⁴ that when she was thirteen and on a camping trip in the woods she was gang raped by men reading pornography—knew something that a social scientist didn't? In refusing to listen to these women, FACT implicitly accepts the male standard of what constitutes violence, degradation, or other harm to a woman. Victims' testimony shows that they experienced coercion into making, consuming, or imitating pornography, that they had been harmed by the pornography, and that it had helped to cause the rapes and assaults they suffered. The ordinance was their remedy of choice; it was clearly and explicitly designed to put power into their hands and no one else's; its measure of harm was defined by victims' complaints, and its conclusion of causation was the conclusion of the victims. Its provisions were based on what they said happened in their lives. FACT, in its fantasies, hides from, refuses to confront, and refuses to even discuss what real women told us—that they were hurt, harmed, violated, and degraded by pornography. That is evidence.

FACT's reactionary obtuseness about violence, harm, and causation is easily exposed if one substitutes rape for pornography. For centuries, androcentric laws have replied to a woman who complained of rape "no harm, no foul" unless she had bruises on her. By accepting at face value the male standard of harm, violence, and degradation, FACT is doing the same to pornography's victims.²⁵

VI. FACT'S FANTASIES ABOUT AGENCY AND PROTECTIONISM FOR WOMEN

As described and quoted in Part IV of this Essay, FACT believes that women exercise agency, autonomy, and self-determination when they choose to consume pornography, and these good activities should be encouraged with a copious and readily available supply of it. FACT also believes that women of whom pornography is made

24. See *IN HARM'S WAY*, *supra* note 4, at 101-03.

25. See *id.* at 70-72, 106-14 (showing several representative examples of women testifying that pornography had caused them severe dignitary harm).

should not be able to exercise their agency to sue under the ordinance because these women already exercised their agency when they allowed themselves to be pornographed. The FACT brief argues that women's agency is disrespected when they are allowed to argue under the ordinance that the consent they gave the pornographer was coerced: FACT argues that the ordinance holds that "[w]omen are judged incompetent to consent to participation in the creation of sexually explicit material and condemned as 'bad' if they do so."²⁶ FACT elaborates the theme of agency with its comment that allowing some pornography models to sue would undercut the agency of other models who did not want to sue, making it harder for them to get jobs because pornographers would be afraid of lawsuits:

This provision does far more than simply provide a remedy to women who are pressured into the creation of pornography which they subsequently seek to suppress. It functions to make all women incompetent to enter into legally binding contracts for the production of sexually explicit material. When women are legally disabled from making binding agreements, they are denied power to negotiate for fair treatment and decent pay. Enforcement of the ordinance would drive production of sexually explicit material even further into an underground economy, where the working conditions of women in the sex industry would worsen, not improve.²⁷

Finally, FACT argues that the ordinance will hurt women in pornography, indeed all women, despite the fact that it is women with personal experience with pornography's harms who requested the ordinance: "In treating women as a special class, it repeats the error of earlier protectionist legislation which gave women no significant benefits and denied their equality."²⁸

All this talk about agency, capacity to consent, competence, and protectionism is very abstract and high flown; but what it works out to concretely is elite women participating in the exploitation of a group of young and financially disadvantaged women. According to FACT, when a woman wants to go to the video store and rent a porno film, that's agency, deserving respect, protection, and celebration. But when a woman says a pornographer victimized her, and she wants a law that recognizes her injury, allows her to sue for damages (the last I heard money is considered a "real" benefit, and being able to sue in your own name is empowering), and obtain an injunction to stop the

26. Hunter & Law, *supra* note 1, at 127.

27. *Id.* at 128.

28. *Id.* at 122.

trafficking of the record of her violation, FACT tells her, in essence, to quit whining; the “protectionism” she asks for will only make her more of a wimp than she already is. Apparently, FACT has two versions of character building: self-indulgence for the elite and a stiff upper lip for the victimized. This gerrymandering of agency and protectionism dignifies consumers’ choice to use pornography while it discounts victims’ testimony that they want a civil remedy when they are harmed. FACT deploys the concepts of agency and protectionism in a cruel and dissociated attempt to obscure recognition of the harms women suffer in pornography.

FACT’s argument on consent is similarly removed from reality. Due to empirical observations based upon the actual working of the pornography industry—empirical observations FACT does not discuss or challenge—so-called consents are frequently invalid by any reasonable standard. At best, they are the product of sex-unequal conditions. The ordinance merely acknowledges this reality by providing that when a woman sues under the ordinance, alleging that she was coerced into making pornography, proof that she signed a contract would not in itself be a defense to the action. Thus, the court would be required to examine whether or not a signed contract embodies genuine consent.²⁹ Moreover, any woman bringing a lawsuit is saying her consent wasn’t valid, and she ought to know. Who is being protected by making sure she can’t?

FACT’s charge that the ordinance is “protectionist” is wrong. The truth is that society protects whatever it values—the borders of its territories, its educational system, the rights of consumers, and air traffic are obvious examples. Does FACT think that consumers are demeaned and deprived of agency by lemon laws that protect them from unfair retail installment contracts? Or false advertising? Also, FACT’s argument loses sight of the benefit to women abused in pornography of knowing that they can choose to bring suit, the benefit of knowing that the law sees them and their injuries—that they are not invisible.

FACT itself is perniciously protectionist in its argument that the ordinance, chosen by the victims, will in reality hurt them. If agency is what FACT approved of, they should have applauded the courage and self-determination of women who wanted to change the law to recognize their injuries. The women in FACT rejected pornography

29. See INDIANAPOLIS & MARION COUNTY, IND., HUMAN RELATIONS, EQUAL OPPORTUNITY CODE ch. 16-3(5)A.11 (1984).

victims' own choice of a remedy—the ordinance is their chosen remedy—and instead impose their own idea of what circumstances would benefit sex workers. If FACT is so big on agency, and so against protectionism, why didn't they let the women hurt by pornography decide what laws were to their benefit? FACT was signed by seventeen law professors, four editors and publishers, seventeen published authors, two business owners, sixteen nonlegal professors, four attorneys, and a few activists for such causes as abortion, gay rights, and women's rights in the workplace. Not one woman described herself as a prostitute, formerly prostituted woman, pornography "actress," pornography "model," or sex worker.³⁰ It is fair to describe the women in FACT as elite, whether in terms of income, job security, prestige, or education. It is also fair to describe them, based on their brief, as having been consciously or unconsciously contemptuous of the values, experiences, judgments, and desires of women less elite than themselves.

VII. FACT'S FANTASY THAT ALL THIS "ANECDOTAL" VICTIMIZATION HAS NOTHING TO DO WITH THEM

Denying and discounting the testimony of pornography's victims, FACT allows itself to ignore half of the male dominance equation. That equation goes like this: male dominance equals forced sex on the left plus forced childbearing and rearing on the right.³¹ It is a system that protects the interests of all males in male dominance, while failing to guarantee any one woman a combination of sexual, reproductive, and economic equality. In hitching its wagon to the left's star, FACT hoped to avoid the evils forced on women by the right. It hoped to have equal employment, access to abortions, and gay and lesbian rights. What FACT refused to face is that the left and the right are not really opposed when it comes to equality for women; neither wants it. Women choosing between left and right face a double bind that can only be broken when they abandon hope of help from either and turn to other women instead. The writers of FACT flinched from the knowledge the pornography victims tried to give them: pornography perpetuates a male view of women as cunts, and,

30. This is a very rough tally, as some signatories to the FACT brief fall into several categories.

31. See ANDREA DWORIN, *RIGHT WING WOMEN* (1978), which dissects this system and reveals the complex dynamic of men right and left effectively cooperating with each other and women right and left effectively selling each other out.

while pornography is allowed to run rampant, women will never be respected as equals on the job or in the home. The day conservative women fight for all women's employment rights and liberal women fight for all women's right to be free from harm of pornography is the day we'll have sex equality, and not before.

In opposing the ordinance, FACT accepts the basic patriarchal dichotomy of Madonna/whore in the sense that FACT sees no reason women would object to pornography other than the fact that pornography is sexual. FACT says that the ordinance tells them they were bad whores if they "modeled" in porn and liked it, but FACT tells supporters of the ordinance that they were prudish Madonnas. In other words, FACT accepts the dichotomy between repression (the right) and liberation/sexual freedom (the left) without realizing that both sides are horns of a sexist dilemma—the right likes wives and the left likes whores, but both wives and whores are subordinated as women.

FACT's basic problem is that it operates on a fatally incomplete definition of misogyny. FACT believes that misogyny consists of simultaneously "protecting" and disempowering women—women kept in the private sphere, women kept in the home, and women kept in cages. Ergo, FACT reasons, if women are allowed to act like public women (if they are not "protected"), they will be allowed to have abortions, orgasms, and jobs—they will be allowed to be like men. FACT fails to understand that misogyny exists equally on the left and the right. FACT's bargain with the left (I'll learn to like or at least tolerate pornography and be one of the boys so that I can have equal rights in the workplace and a safe, legal abortion if I decide I need it) is the mirror image of the conservative women's bargain with the right (I'll accept the criminalization of abortion and act like a good wife so don't treat me like a slut and whore). If there weren't any misogyny, women could have birth control, only voluntary sex, women-controlled abortion, equal pay, *and* protection from being trafficked in subordinating, sexually explicit sex all at once.

CONCLUSION

The unfortunate reality is that, although FACT submitted its brief in 1985, fifteen years ago—a time in feminism's recent past—the brief's treatment of pornography victims is very much a part of feminism's present. Many influential commentators in the pornography debate echo FACT's treatment of pornography victims

and their testimony as either nonexistent or unimportant. Edward de Grazia, in his 1992 book *Girls Lean Back Everywhere: The Law of Obscenity and the Assault on Genius*,³² shares FACT's fantasy that pornography is produced without a terrible cost to women. His book is a pastiche of dozens of clips and quotes documenting the drama of pornography and censorship in which the lives of (mostly male) geniuses/artists are damaged by censorship, but it contains no material illustrating the situation of women forced to perform for or consume pornography or of a rape victim injured by pornography.³³ Less polite, but not less callous, than the authors of the FACT brief, de Grazia refers sneeringly to women who are violated through pornography as "victims" in quotes.³⁴ Judge Richard Posner, in his 1992 book *Sex and Reason*,³⁵ characterizes adult pornography as a "victimless crime" absent the specific circumstance of the adult model's being physically injured.³⁶ In 1996, Nadine Strossen, President of the ACLU, summarized the reasons that she is opposed to legislation such as the ordinance,³⁷ using arguments virtually identical to those found in the FACT brief. Like FACT, Strossen fails to come to grips with the testimony at the hearings. Wendy McElroy, whose approach to the pornography issue consists mainly of collecting anecdotes of women in pornography who say they enjoy their work, simply does not address the issue of those women in and out of the industry who have testified that pornography has

32. EDWARD DE GRAZIA, *GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS* (1992).

33. *See id.* at 91, 109, 477, 524.

34. *Id.* at 584-85.

35. RICHARD A. POSNER, *SEX AND REASON* (1992).

36. *Id.* at 371, 381.

37. Nadine Strossen, *Hate Speech and Pornography: Do We Have to Choose Between Freedom of Speech and Equality?*, 46 CASE WES. RES. L. REV. 449, 460-61 (1996). Strossen lists the following reasons:

censoring pornography would suppress many works that are especially valuable to women and feminists; any pornography censorship scheme would be enforced in a way that discriminates against the least popular, least powerful groups in our society, including feminists and lesbians; [such an ordinance] would perpetuate demeaning stereotypes about women, including that sex is [bad for women]; it would perpetuate the disempowering notion that women are essentially victims; it would distract from [more effective] approaches to countering discrimination and violence against women; [by driving pornography underground], it would harm women who voluntarily work in the sex industry; it would harm women's efforts to develop their own sexuality; it would strengthen the power of the right wing, whose patriarchal agenda would curtail women's rights; by undermining free speech, censorship would deprive feminists of a powerful tool for advancing women's equality; [and], since sexual freedom and freedom for sexually explicit expression are essential aspects of human freedom, censoring such expression would undermine human rights more broadly.

Id. at 460-61.

victimized them.³⁸ She, like the women in FACT, pretends that the women who have been victimized in pornography simply do not exist in order to make her point.

Carlin Meyer is another opponent who needs to effectively erase testimony to make her point. Discussing the extensive testimony in support of the ordinance by the woman who performed in the movie *Deep Throat* at gunpoint, Meyer states that "Linda Lovelace Marchiano . . . is often paraded by feminist porn-suppressionists as a quintessential example of the evils of pornography."³⁹ The extraordinary cruelty and contemptuousness of this response to Linda Marchiano's testimony is powerful proof that pornography has the power to degrade, disenfranchise, and render women invisible and without credibility. There is no other reason for Ms. Meyer's bizarre implication that Linda Marchiano was a paraded puppet when she testified, at length and in detail, that she had been tortured and abused to make pornography. There is also no other reason for Meyer's rejection of Marchiano's testimony that her abuse was inflicted by pornographers, and her conclusion that the abuse happened because Ms. Marchiano's character had been weakened by reading romance novels.⁴⁰

FACT kept largely silent in response to the testimony of pornography victims, dismissing their words without listening to them, dismissing the witnesses as "carefully selected" and "well-prepared" and their testimony as "anecdotal." FACT's treatment of these witnesses has been echoed by de Grazia on the left, Judge Posner on the right, Strossen for the ACLU, and McElroy for the pro-sex "feminist" contingent. Most terribly, it was echoed in the litigation that overturned the ordinance. In *Hudnut*, the Seventh Circuit acknowledged the harm inflicted on women by pornography:

Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront . . . insult and injury at home, battery and rape on the streets The bigotry and contempt [pornography] produces, with the acts of aggression it fosters, harm women's opportunities for equality and rights [of all kinds].

38. WENDY MCELROY, XXX: A WOMAN'S RIGHT TO PORNOGRAPHY (1995).

39. Carlin Meyer, *Sex, Sin, and Women's Liberation: Against Porn-Suppression*, 72 TEX. L. REV. 1097, 1180-81 (1994).

40. See *id.*; see also David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 116 (1998) (analysis of pornography suppression that ignores costs to victims and their need for justice, and comfortably concludes that, because taboo increases desire, there is no point to "regulating" pornography).

And the Court concluded: "Yet this simply demonstrates the power of pornography as speech."⁴¹ When the United States Supreme Court affirmed the Seventh Circuit's overturning of the ordinance by a vote of six to three, they did not bother to hear arguments, read briefs, or issue an opinion. Like FACT, de Grazia, Posner, Strossen, and McElroy, the United States Supreme Court dealt with the victims' testimony "summarily."⁴² Meaning, they gave it a weight of zero.

All of the many who advocate the legal protection of pornography should remind themselves of some words Kate Millett, one of the signatories to the FACT brief, wrote in her book *The Politics of Cruelty*:

The French, who have a word for this kind of writing, call it *temoignage*, the literature of the witness; the one who has been there, seen it, knows. It[s] . . . basis is factual, fact passionately lived and put into writing by a moral imperative rooted like a flower amid carnage with an imperishable optimism, a hope that those who hear will care, will even take action.⁴³

Moreover, Millett, the other FACT brief signatories, de Grazia, Posner, Strossen, and McElroy should consider specifically a particular piece of *temoignage*, spoken by "M.M.D." at the Minneapolis pornography hearings, a piece of *temoignage* that they should have managed to hear or read before they consented to sign the FACT brief or publish a writing that adopted its arguments:

I was at the demonstration . . . [and] went into the porn shop and movie theater there. I looked, glancing really, at the images on the shelves and on the screen and, even in the midst of the large and angry powerful group of women, I was afraid. Two days later, having failed my attempts to keep those images away from me

I was sexually abused in my family. I don't know if the man that abused me uses pornography, but looking at the women in those pictures, I saw myself at fourteen, at fifteen, at sixteen. I felt the weight of that man's body, the pain, the disgust.

I am angered now and horrified. You see so clearly that I was used as if I was a disposable image. I am also angered and horrified to find that such limited exposure to pornography called up the memories and the behavior patterns of my victimization so profoundly. *I don't need studies and statistics to tell me that there is a relationship between pornography and real violence against*

41. American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 329 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

42. *Id.* (6-3 summary affirmance).

43. KATE MILLETT, *THE POLITICS OF CRUELTY: AN ESSAY ON THE LITERATURE OF POLITICAL IMPRISONMENT* 15 (1994).

women. *My body remembers.*⁴⁴

The women of FACT probably don't really want their pleasures paid for by the misery of pornography victims. But it does appear that, like well-meaning collaborators throughout history, they have been very careful not to know what really happened, and what is really happening. The women of FACT want to stay buried in their fantasies, but the pornography victim's literature of *temoignage* will find them.

It will find us all. The full text of the pornography hearings was published in 1997, and is now available at any bookstore. The ordinance will come back because the courage and hope that fed it are imperishable. And when it does, Kate Millett and all the other women who signed the FACT brief must re-read their own words on *temoignage*, apply them to their sisters, and file their next amicus brief in favor of the re-proposed ordinance. FACT's fantasies existed in feminism's past and they unfortunately inform its present, but in feminism's future, those fantasies must give way to an honoring of the victims' reality.

44. IN HARM'S WAY, *supra* note 4, at 134-35 (emphasis added).