Tulsa Law Review

Volume 41
Issue 4 *The scholarship of Nadine Strossen*

Summer 2006

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THE BULL BY THE HORNS: NADINE STROSSEN, PORNOGRAPHY, AND FREE SPEECH

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The American Civil Liberties Union ("ACLU") has, for more than seventy-five years, been the chief defender of free speech in this country; indeed, it came into existence to protect the First Amendment from assault during the repressive years of the First World War and after.[1] It is no surprise, therefore, that the president of that organization should be an ardent advocate of untrammeled expression. What catches our attention, however, is that while Nadine Strossen has certainly stood up for free political speech—the traditional arena in which First Amendment battles are fought—she has chosen to defend, on First Amendment grounds, an area many people find well outside the umbrella of Speech Clause protection: pornography.

By arguing pornography is entitled to treatment as a protected form of expression, she has given new meaning to Holmes's famous dictum: "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."[2]

Strategically, if one can take "the bull by the horns," and make out a case that the First Amendment protects even pornographic expression—a thought many hate—it will be much easier to argue other types of expression, that are not as culturally freighted, also deserve constitutional protection.

Tactically, Strossen has made her argument in a number of smaller pieces and book reviews,[3] but her foremost statements have been a major law review article[4] and her book, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights*,[5] first published in 1995 and reissued in 2000. Strossen is neither the first, nor the only, person to suggest a connection between free speech and women's rights, or free speech and the effect that censorship of sexually oriented materials would have on

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1. Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (Oxford U. Press 1990).

2. *U.S. v. Schwimmer*, 279 U.S. 644, 654–55 (1929) (Holmes, Brandeis & Sanford, JJ., dissenting).

3. The first significant statement she made on this subject is a book review, *The Convergence of Feminist and Civil Liberties Principles in the Pornography Debate*, 62 N.Y.U. L. Rev. 201 (1987) (reviewing *Women Against Censorship* (Varda Burstyn ed., Douglas & McIntyre 1985)).

4. Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 Va. L. Rev. 1099 (1993).

5. Nadine Strossen, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* (NYU Press 1995).

women; yet because of her position as head of the ACLU, she is certainly the most prominent.

This article will briefly summarize Strossen's argument, and then examine it in the framework of some traditional expositions of the meaning of the First Amendment. The question is not whether the Framers in general, or James Madison in particular, had pornography in mind when they drafted the Speech Clause (Benjamin Franklin, of course, is another story); although pornography has been around and constitutes some of the pictorial relics we have of early Persian, Greek, and Roman civilization. Rather, the question is: Does Strossen make a compelling case—that efforts to limit pornographic material constitute an assault not just on the First Amendment but on women's rights as well?

Keep in mind that I am trying to resolve the old challenge of explaining the Talmud of the First Amendment while standing on one foot, and discussing pornography in a "red state," without either the wit or wisdom of Hillel.

In the 1970s, as part of a broad feminist critique of sexist and violent imagery in contemporary society, some women began focusing on pornography and how to deal with it. There was, and is, of course, the problem of how to define pornography, and while one can look the word up in the dictionary, in the end it is a subjective issue seen by different men and women in various ways.[6] "I know it when I see it,"[7] Justice Stewart famously said, or as Justice Harlan noted, "one man's vulgarity is another's lyric."[8] What nearly all feminists could agree upon, however, was that depictions of violence and brutality, especially linked to portraits of sexual domination and humiliation, degraded women. In 1979, Women Against Pornography came into being to advocate education about pornography and to protest it.[9] These women, however, specifically eschewed censorship, and declared they were not seeking to carve out "any new exceptions to the First Amendment."[10]

A few years later, however, some feminists began charging that pornography constituted the chief mechanism by which men controlled and abused women. In 1983 Andrea Dworkin and Catharine MacKinnon, then faculty members at the University of Minnesota, drafted what they considered a model antipornography law that the Minneapolis City Council enacted.[11] The uniqueness of their approach is that instead of treating pornography as a speech issue, and thus running afoul of the Court's ruling in

6. One law dictionary defines "pornography" as "pictures and/or writing of sexual activity intended solely to excite lascivious feelings of a particularly blatant and aberrational kind, such as acts involving children, animals, orgies, and all types of sexual intercourse." Law.com Dictionary, *Pornography*, http://dictionary.law.com/default2.asp?typed=pornography&type=1 (accessed Oct. 13, 2005).

7. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

8. *Cohen v. Ca.*, 403 U.S. 15, 25 (1971). One might note that the definition provided by Law.com Dictionary goes on to point out that defining what is pornographic is so subjective, "the law cases cannot print examples for the courts to follow." Law.com Dictionary, *supra* n. 6, at http://dictionary.law.com/default2.asp?typed=pornography&type=1.

9. Strossen, *supra* n. 5, at 73.

10. *Id.* (internal quotation marks and footnote omitted).

11. Andrea Dworkin & Catharine A. MacKinnon, *Pornography and Civil Rights: A New Day for Women's Equality* 133–42 (Organizing Against Pornography 1988).

Miller v. California,[12] they defined pornography as a civil rights violation—a form of gender discrimination. The ordinance, in order to avoid the problem of being void for vagueness, was extremely specific, detailing eight different criteria of depictions of women that amounted to "subordination."[13]

Although the City Council twice passed the law, Mayor Donald Fraser, a consistent advocate of women's rights, vetoed it both times on First Amendment grounds.[14] But a strange coalition of conservative Republicans and right-wing groups, that had always opposed women's rights, joined in with Dworkin and MacKinnon to secure the adoption of the ordinance in Indianapolis.[15] Although the sponsors tried hard to argue the law was not a repression of speech, but a civil rights measure, they could not convince the courts.[16] At the trial level, District Court Judge Sara Evans Barker found the ordinance a gross violation of the First Amendment, one that "threatens tyranny and injustice for those subjected to the rule of such laws."[17] On appeal, Judge Frank Easterbrook, a former University of Chicago law professor appointed to the bench by Ronald Reagan, delivered the opinion in words that fully endorsed the First Amendment: "The Constitution forbids the state to declare one perspective right and silence opponents."[18]

The court decisions followed traditional First Amendment analysis, and disappointed the ordinance's backers, who argued that pornography should not be viewed as *speech* but as *practice*, and even under traditional First Amendment analysis, action is treated differently than expression. According to the Dworkin-MacKinnon rationale, the practice of pornography degrades women. The women who appear in these films are poor, minimally educated, and are disproportionately women of color. A high percentage are incest survivors, and many enter the business in desperation, as runaways with little or no choice. Others are forced to "act" by husbands, boyfriends, or pimps. The "sex business" is thus built upon the systematic exploitation and coercion of women, and the products it churns out cause further harassment of women in the workplace and elsewhere. If one substituted the word "blacks" for "women," they argue, there would be no question that the system would be found constitutionally impermissible.[19]

12. 413 U.S. 15 (1973). In *Miller*, and its companion case, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (Brennan, Stewart & Marshall, JJ., dissenting), the Court held sexually-oriented expression came within constitutional protection only if it met certain First Amendment standards, and possessed "serious literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 24.

13. For the various provisions, see Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 Harv. Women's L.J. 1, 25 (1985). The rationale behind the law is explained by MacKinnon, in *Pornography, Civil Rights, and Speech*, 20 Harv. Civ. Rights-Civ. Libs. L. Rev. 1, 50–52 (1985).

14. *See In Harm's Way: The Pornography Civil Rights Hearings* (Catharine A. MacKinnon & Andrea Dworkin eds., Harv. U. Press 1997).

15. *See id.*

16. *See id.*

17. *Am. Booksellers Assn. v. Hudnut*, 598 F. Supp. 1316, 1337 (S.D. Ind. 1984).

18. *Am. Booksellers Assn. v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985), *aff'd*, *Hadnut v. Am. Booksellers Assn.*, 475 U.S. 1001 (1986).

19. Michael A. Gershel, *Evaluating a Proposed Civil Rights Approach to Pornography: Legal Analysis as if Women Mattered*, 11 Wm. Mitchell L. Rev. 41, 53–61 (1985).

As far as the First Amendment is concerned, MacKinnon has declared that in the pornography debate, the "law of equality and the law of freedom of speech are on a collision course in this country."[20] As far as she is concerned, the values of free expression are secondary to freeing all women from the harm caused by pornography.[21] And there lies, as far as free speech advocates are concerned, the fatal flaw, for without free speech, all other rights, including those of women, are in serious danger.

While Strossen does not attempt to answer all of the charges by what she calls the "MacDworkinites," she does take the battle to the enemy. In *Defending Pornography*, especially, her concern is to show that many of the sweeping assumptions about pornography and its effects on women are just not true; the practical results of the feminist antipornography crusade have been to stifle artistic speech and speech by gays and lesbians, far more than it has impacted porn producers; and that if First Amendment protections are compromised, it will be women, artists, and minorities who will suffer the most.[22]

Defending Pornography is a classroom teacher's gold mine. When trying to use worst-case examples to illustrate why free speech has to cover many types of expression, scholars could not begin to make up scenarios as pertinent as the real examples Strossen has uncovered. There is, of course, Jesse Helms attacking the National Endowment for the Arts,[23] and Attorney General John Ashcroft hanging drapes over the full-figured, but unfortunately bare-breasted Statue of Justice in, of all places, the Justice Department.[24]

In 1993, Vermont officials hung bed sheets over a mural in the state office building conference room.[25] The mural, by Sam Kerson, had been commissioned to mark the five hundredth anniversary of the landing of Columbus.[26] Although a local newspaper described the mural as "a politically correct rendition of Columbus and his men . . . battle-axes and crucifix raised, ready to oppress the natives,"[27] some female employees objected to the fact that the mural included bare-breasted native women—a form of sexual harassment.[28]

When the poet Ntozake Shange appeared on the cover of *Poets & Writers* wearing, at her choice, what she described as "'a pretty lace top,'"[29] she and the editors were subjected to a barrage of letters wanting to know why she was posing in her underwear. Then Andrea Dworkin chimed in, stating that it is "'very hard to look at a picture of a women's body and not see it with the perception that her body is being exploited.'"[30]

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20. Catharine A. MacKinnon, *Only Words* 71 (Harv. U. Press 1993).
21. *See* MacKinnon, *supra* n. 20.
22. *See* Strossen, *supra* n. 5.
23. *Id.* at 55.
24. Associated Press, *Justice Department Covers Partially Nude Statutes*, http://www.usatoday.com/news/nation/2002/01/29/statues.htm (last updated Jan. 29, 2002).
25. Strossen, *supra* n. 5, at 21.
26. *Id.*
27. *Id.* (internal quotation marks and footnote omitted).
28. *Id.* at 21–22.
29. *Id.* at 23 (quoting Ntozake Shange, *Where Do We Stand on Pornography?* Ms. at 34 (Jan.–Feb. 1994)).
30. Strossen, *supra* n. 5, at 23.

In 1993, the University of Nebraska ordered a graduate student to remove a photograph from his desk on the grounds that it contributed to a hostile environment for female students, staff, and faculty.[31] The snapshot showed his wife in a bathing suit.[32]

At Pennsylvania State University, English professor Nancy Stumhofer complained when she found herself teaching in a room with a copy of Francisco de Goya's *The Naked Maja* on the wall.[33] According to Stumhofer, the picture "embarrassed her and made her female students 'uncomfortable.'"[34] University officials removed the picture from the room, normally used for art history classes.[35]

In a case I was involved in, *Urofsky v. Allen*,[36] the Commonwealth of Virginia enacted a law prohibiting state employees from using state-owned computers to access sexually related material.[37] Among my fellow plaintiffs were Paul Smith, who had his website shut down; it contained material on gender roles and sexuality,[38] all related to courses he taught. Under the law, Terry Meyers could not access the Library of Virginia website—a state-sponsored agency—for his work and teaching on the sexually explicit poets of the Victorian era.[39] Needless to say, Dana Heller, a scholar of gay and lesbian studies, would also have run afoul of the law.[40]

The "sex panic,"[41] as Strossen calls it, is unfortunately widespread, and is getting worse, despite that many consumers of pornography are not sexual perverts sitting in sleazy movie houses with raincoats over their laps, but rather white, middle-class men and women.[42] There is a certain illogic in the idea that men and women who routinely stop by a video store on Friday afternoons to pick up some sexually stimulating tapes also vote into office men who immediately start introducing laws to restrict what people can see.

The strongest arguments that can be made against pornography are that it will be a perverse influence on children, and that some percentage of the women working in the

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31. *Id.* at 127.

32. *Id.*

33. *Id.* at 22.

34. *Id.* (citing Nat Hentoff, *Sexual Harassment by Francisco Goya*, Washington Post A21 (Dec. 27, 1991)) (footnote omitted).

35. Strossen, *supra* n. 5, at 22.

36. 995 F. Supp. 634 (E.D. Va. 1998), *rev'd sub nom. Urofsky v. Gilmore*, 167 F.3d 191 (4th Cir. 1999), *vacated and replaced, with same results*, 216 F.3d 401 (4th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1070 (2001).

37. Va. Code Ann. § 2.2-2827 (2005) (Restrictions on State Employee Access to Information Infrastructure).

38. *Urofsky*, 995 F. Supp. at 635.

39. *Id.*

40. *Id.*

41. Strossen, *supra* n. 5, at 20.

42. A few years ago, during a discussion of obscenity in a class on constitutional law, I suggested there might be misperceptions about those who actually attend adult movie houses. A few of my students volunteered to spend time in various video rental stores to see who went into rooms marked "Adult-Restricted." They came back the following week to report the vast majority had been white women, seemingly middle class, and ranging in age from mid-twenties on up. This observation had been totally unexpected, and, as I hoped, opened up class discussion quite a bit. At the end of the class a women in her early fifties came up to me and said she was one of those women who rented X-rated tapes, and that she and her husband had been using them for a while to stimulate their own sexual relations.

business do so against their will. As for the latter claim, it is undoubtedly true of some, but this could also be said of many people—men and women—in a variety of deadly dull jobs. Not all of us are lucky enough to be professors. But as Strossen, and some recent HBO specials have shown, there are many women who not only work in the sex business voluntarily, but they enjoy doing so! Despite the claims of Andrea Dworkin,[43] many women enjoy sex, and they find pornographic films stimulating, even when dealing with topics such as rape or submission.

As for children, children and pornography seem to have been around a long time. It used to be easier to hide dirty books and pictures from the wee ones. Now, as Wendy Kaminer points out, not only is there more of it available on the Internet, but children are far more computer literate than their parents.[44] Advocates of censorship, however, try to deprive everyone of sexually explicit material under the banner of saving the children.[45] It will not work. Moreover, the very same groups that claim they want parents to have more control over the lives of their children with less governmental interference are, as in many other cases, trying to invoke governmental authority to serve their own ends.

While I think Strossen does not fully address the argument of women forced to participate in sex films, she does make the point that there are plenty of laws on the books now that deal with such coercion.[46] The Supreme Court, moreover, has upheld laws regarding what everyone considers an absolute evil, child pornography.[47] As for the alleged affects that pornography has on how men treat women, there appears to be absolutely no empirical evidence to support this claim.[48]

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43. Dworkin has written:

> Intercourse with men as we know them is increasingly impossible. It requires an aborting of creativity and strength, a refusal of responsibility and freedom: a bitter personal death. It means remaining the victim, forever annihilating all self-respect. It means acting out the female role, incorporating the masochism, self-hatred, and passivity which are central to it.

Andrea Dworkin, *Woman Hating* 184 (Penguin Bks. 1974) [hereinafter Dworkin, *Woman Hating*]. In another book, Dworkin declared that marriage is nothing more than a legal license to rape. Andrea Dworkin, *Letters from a War Zone: Writings 1976–1989*, at 176 (E.P. Dutton 1988).

44. Wendy Kaminer, *Foreword to the New Edition*, in Nadine Strossen, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* vii (NYU Press 2000).

45. In *Butler v. Michigan*, 352 U.S. 380 (1957), the Court held that one could not censor adult materials to protect children, but still excluded obscene materials from protected speech.

46. *See* Strossen, *supra* n. 5, at ch. 9.

47. *N.Y. v. Ferber*, 458 U.S. 747 (1982).

48. The Commission on Obscenity and Pornography, established in 1967 by Lyndon B. Johnson, issued its report in 1970. Ronald J. Berger, Patricia Searles & Charles E. Cottle, *Feminism and Pornography* 22 (Praeger 1991) (citing H.R. Comm. on Obscenity & Pornography, *The Report of The Commission on Obscenity & Pornography*, Rpt. 521, 90th Cong. (Sept. 1970)). A majority of the Commission found no empirical evidence to support the contention that pornography caused sex crimes or other criminal behavior, and concluded that established patterns of sexual behavior were not changed by exposure to sexually explicit materials. *Id.* at 23. The Report was attacked for its alleged methodological inadequacies by feminists who would later be in both the antipornography and anticensorship camps. *Id.* In 1985, President Ronald Reagan created the Attorney General's Commission on Pornography headed by Edwin Meese, with a clear mandate to overturn the findings of the earlier report. *Id.* at 25 (citing *The Attorney General's Commission on Pornography*, 131 Cong. Rec. S12932 (1985)). The Meese Commission was heavily stacked with law enforcement officials and members of religious groups. *Id.* Therefore, its conclusion that pornography was a cause for many of society's ills, came as no surprise. Its findings and methodology were heavily criticized, especially by some scholars who claimed their research had been misinterpreted. Berger, Searles & Cottle, *supra*, at 25–28.

What then, if people enjoy pornography, if many of the men and women working in the sex business do so voluntarily, if there is no evidence that pornography plays any role in causing some men to abuse women, is the problem?

One answer is that, in times of great social transformation, people who fear change, strike out in a vain effort to halt the movement.[49] Blacks demanded civil rights and a new Ku Klux Klan arose. New ideas as well as effective means of birth control have allowed men and women greater leeway to enjoy their sexuality, an idea that seems to traumatize many people. Women demanded equality and the right to control their bodies, and this, in part, spawned the abortion backlash. The backlash against abortion may also be seen as part of the reaction against the greater freedom enjoyed by men and women since the development of safe and effective means of birth control.

While not all sexually explicit material is pornographic (as anyone looking at an OB-GYN textbook can affirm), nearly all pornography is sexually explicit. By making totally illogical connections and utilizing pseudoscientific surveys, opponents of modernism can blame it all on pornography. A recent book by Pamela Paul is entitled *Pornified: How Pornography is Transforming Our Lives, Our Relationships, and Our Families*.[50] In it, Paul charges the Internet has increased the availability of pornography to the point where there are now, by her count, 260 million pages of smut on the Web, and much of the content is violent toward women.[51]

Looking at this stuff may or may not make you blind, but according to Paul—relying on the interviews she conducted with eighty men and twenty women (with no indication of how or why this group was chosen)—porn will cause erectile dysfunction, force women to get breast implants, and lead men to lust after their nieces and stepdaughters.[52] Of the *large* sample of less than two-dozen women that Paul studied, nearly all reported they were mad at their husbands for being addicted to porn.[53] While I know little about Paul, we should not think this is another of those diatribes published by right-wing think tanks; the book bears the imprint of Times Books/Henry Holt & Company.

While there are troubling statistics about levels of sexual activity among teenagers, spousal battery, child molestation, and the like—none of which I hasten to say I dismiss casually—there does not seem to be any reliable study to indicate pornography is the root cause. That our society as a whole is more overtly sexual is undeniable; one does not have to go into adult theatres. To see weird sex and full-frontal nudity just turn on HBO's *Rome*,[54] flip over to MTV and there are clips of Paris Hilton's sex video, and on

49. This is not the first time in American history where radical social change has spawned a conservative backlash. Two examples that come quickly to mind are the Great Awakening of the early eighteenth century and the reactionary efforts to place social constraints, such as Prohibition, on the people in the 1920s.

50. Pamela Paul, *Pornified: How Pornography is Transforming Our Lives, Our Relationships, and Our Families* (Henry Holt & Co. 2005).

51. *Id.* at 59.

52. *See* Paul, *supra* n. 50; Amy Sohn, *Dirty Minds*, N.Y. Times Bk. Rev. 24 (Sept. 11, 2005) (reviewing Paul, *supra* n. 50).

53. *See* Paul, *supra* n. 50.

54. *Rome* (HBO 2005) (TV series).

another channel, something called *Girls Gone Wild*.[55] In the bookstores, and not behind the counter or in brown-paper wrappers, one can browse through books with sexual content well beyond anything banned by the Post Office. On the best-seller table, one will find porn star Jenna Jameson's autobiography.[56] One of the most popular aerobic regimens for women these days is *Cardio Striptease*,[57] and Ariel Levy claims, what she terms "raunch culture" is everywhere.[58] As Amy Sohn noted, "The real proof of our culture's decline may not be that so much pornography is available these days, but that you no longer have to look at pornography to get porn."[59]

Into this quagmire strides our heroine, and she defends pornography on three grounds—principles of law, especially First Amendment jurisprudence; social policy, in that suppression would have adverse effects on the women's movement; and what Teresa Bruce has called "existentially," in the sense that "attacks on pornography would perpetuate a diseased version of human sexuality."[60] It is the first of these, the legal arguments, that I am most interested in, and to some extent how antipornography laws have impacted women's groups.

The legal argument is traditional First Amendment analysis, influenced greatly by the free speech views of a man Strossen says "has always been one of my heroes," William O. Douglas.[61] Douglas took Hugo Black's absolutist interpretation of the First Amendment[62] to its logical extreme: Unless there was such a danger that no time existed to allow rational means of discourse to defuse the situation, the government had no business acting as a censor.[63] If some people published dirty books or produced skuzzy movies, and other people wanted to read or watch them, then that was their right.[64] The First Amendment was "designed to preclude courts as well as legislatures from weighing the values of speech."[65] As for controlling expression under the guise of protecting morality, Douglas would have none of it, and neither will Strossen.

According to Strossen, efforts to restrict pornography run afoul of the "'bedrock principle'"[66] of viewpoint neutrality.[67] According to this principle, "government may never limit speech just because any listener—or . . . indeed, the majority of the community—disagrees with or is offended by its content or the viewpoint it conveys."[68] Efforts to censor pornographic materials violate the "clear and present danger test,"

55. Sohn, *supra* n. 52 (citing *Girls Gone Wild* (Mantra Films, Inc.) (video series)).

56. *How to Make Love Like a Porn Star: A Cautionary Tale* (HarperCollins 2004); *see* Sohn, *supra* n. 52.

57. *Jeff Costa's Cardio Striptease Workout* (Studio Works 2004) (video series).

58. Ariel Levy, *Female Chauvinist Pigs: Women and the Rise of Raunch Culture* (Free Press 2005); *see also* Ariel Levy, *Raunchiness is Powerful? C'mon, Girls*, Washington Post B5 (Sept. 18, 2005).

59. Sohn, *supra* n. 52.

60. Teresa M. Bruce, *Pornophobia, Pornophilia, and the Need for a Middle Path*, 5 Am. U. J. Gender & L. 393, 395 (1997) (reviewing Strossen, *supra* n. 5) (footnote omitted).

61. Nadine Strossen, *Current Challenges to the First Amendment*, 36 Gonz. L. Rev. 279, 279 (2000–2001).

62. *See* Hugo LaFayette Black, *A Constitutional Faith* 44–47 (Alfred A. Knopf 1968).

63. *See Roth v. U.S.*, 354 U.S. 476, 508, 511 (1957) (Douglas, J., dissenting).

64. *See id.* at 509–13.

65. *Id.* at 514.

66. Strossen, *supra* n. 5, at 41 (quoting *Tex. v. Johnson*, 491 U.S. 397, 414 (1989)).

67. *Id.*

68. *Id.*

which holds that "a restriction on speech can be justified only when necessary to prevent actual or imminent harm, such as violence or injury to others."[69] Strossen believes the courts have accepted pornography as expressive of a political viewpoint about gender equality,[70] and because there is no proof that pornography leads to sexual violence,[71] government has no basis on which to suppress pornographic materials. Strossen is fond of Louis Brandeis's dictum that the "remedy to be applied [for bad speech] is more speech, not enforced silence."[72]

I think one should make clear that Strossen is not advocating pornography is for everyone; that it ought to be allowed into every home; that people and children should be forced to watch it; or that it is some sort of panacea, curing all sorts of physical and mental sexual dysfunctions. Rather, it is a form of expression. No one should be forced either to act in the production of movies and videos, but neither should they be prevented from doing so. Nor should they be forced to read or view materials of this nature, but the decision ought to be individual and not one made by the government.

While Strossen clearly adopts the Douglas view of keeping the government off the backs of the people,[73] in some ways the absolutist First Amendment view is the only one she can adopt. The courts have never endorsed the Black-Douglas view, and while there have been some notable victories by the ACLU in its fights against censorship,[74] these have been based more on the defects of the laws involved, rather than on any blanket acceptance of pornography within the First Amendment's circle of protection.

The issue first snuck into the Marble Palace as an apparent afterthought in a 1942 case, *Chaplinsky v. New Hampshire*,[75] when Justice Frank Murphy casually noted the First Amendment did not cover "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words."[76] In that decision, the Court seemingly adopted the view of Harvard Professor Zechariah Chafee, Jr., who argued for unlimited protection of speech in the political arena, but did not believe that the First Amendment covered nonpolitical expression such as the profane, the indecent, or the insulting.[77] Such speech contributed nothing to the analysis of ideas and the search for truth, and therefore could be restricted in order to serve the greater social values of "order, morality, the training of the young, and the peace of mind of those who hear and see."[78]

Alexander Meiklejohn, who had been one of Chafee's teachers, went even further than his former student did. He proposed an absolute protection of political speech,

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69. Nadine Strossen, *Hate Speech and Pornography: Do We Have to Choose Between Freedom of Speech and Equality?* 46 Case W. Res. L. Rev. 449, 455 (1996) (footnote omitted).

70. Strossen, *supra* n. 5, at 38.

71. *Id.* at 251–52; *see supra* nn. 54–59 and accompanying text.

72. *Whitney v. Ca.*, 274 U.S. 357, 377 (Brandeis, J., concurring); Strossen, *supra* n. 5, at 47–48.

73. *See supra* nn. 61–65 and accompanying text.

74. Among other cases, the ACLU was involved in *United States v. American Library Assn., Inc.*, 539 U.S. 194 (2003), and *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

75. 315 U.S. 568 (1942).

76. *Id.* at 572.

77. *See* Zechariah Chafee, Jr., *Free Speech in the United States* 150 (Harv. U. Press 1941).

78. *Id.*

which, like Brandeis, he saw as essential to free government.[79] There could be no fetters on ideas, he argued; "freedom of ideas shall not be abridged."[80] Private speech, on the other hand, defined primarily as not involving political matters, enjoys only a limited protection.

Perhaps the most supportive theoretical support one can find for Strossen is in the writings of Thomas Emerson, who proposed an "expression/action" theory. For Emerson, freedom of expression constituted an absolute, no matter what form it took. People can express their ideas through traditional speech or writing, or by other means, such as music and art. The right of free expression also includes the right to receive the opinion of others, the right to inquire freely, and the right to associate with others of similar views. Such a libertarian policy, Emerson argued, led to individual self-fulfillment, the discovery of truth, democratic decision-making, and the achievement of a more stable community.[81]

While Emerson drew the line between expression and action, he himself recognized the line is never clear, especially in those areas that Chafee, and the *Chaplinsky* Court deemed outside the reach of the First Amendment—obscenity, libel, and provocation. But like Chafee and Meiklejohn, Emerson's theory requires judges to make balancing decisions, and neither Black nor Douglas, and more recently Strossen, want them to do that. Speech is speech, no matter what form it takes, and the government—whether executive, legislative, or judicial—has no business deciding what may or may not be said, painted, sung, or acted.

The Court's obscenity decisions from *Roth v. United States*[82] through *Miller v. California*[83] do not provide a clear jurisprudential rule on how to deal with such materials.[84] These cases, as Justice Brennan noted, "cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values."[85] Later cases, such as *Reno v. American Civil Liberties Union*[86] and *Ashcroft v. Free Speech Coalition*,[87] are very fact specific, and while striking down efforts to regulate restrictions on Internet

79. *Id.*

80. Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* 28 (Harper & Bros. 1960); *see* Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 Stan. L. Rev. 299 (1978) (discussing the notion of political speech as having the highest value); William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1 (1965) (acknowledging Meiklejohn's influence on the Court).

81. Emerson's ideas are laid out most fully, in *The System of Freedom of Expression* (Random House 1970), and *Toward a General Theory of the First Amendment* (Vintage Bks. 1966).

82. 354 U.S. 476 (1957).

83. 413 U.S. 15 (1973).

84. *See* Melvin I. Urofsky, *The Continuity of Change: The Supreme Court and Individual Liberties, 1953–1986*, at 77–85, 97–101 (Wadsworth Publg. Co. 1991) (discussing the *Roth* and *Miller* cases in the broader context of the Court's work).

85. *Paris Adult Theater I*, 413 U.S. at 73 (Brennan, Stewart & Marshall, JJ., dissenting).

86. 521 U.S. 844 (1997).

87. 535 U.S. 234 (2002). This case dealt with virtual child pornography using computer generated images and not real children. However, see Justice Thomas's concurring opinion in which he notes that if the technology would someday make it impossible to tell the difference between real children and computer-generated images, he would be more prone to give Congress regulatory authority. *Id.* at 259.

pornography, they do so primarily on over-breadth grounds. In no case in recent years has any Justice adopted the Black-Douglas view.

However, if precedent does not support the case, practice does. In 1992, Dworkin and MacKinnon managed to get Canada to adopt a variation of the law that had been declared unconstitutional in *Hudnut*.[88] According to Strossen, it "has turned anticensorship feminists' fears into realities."[89] Canada is, of course, not a totalitarian country, and is in many ways as open and democratic a society as our own. It is not the type of government or society that—like Nazi Germany, Stalinist Russia, or Maoist China—attempted to repress sexual expression. But as history shows, it is only a short step from repressing unpopular ideas about sex, into repressing unpopular ideas about other things, especially ideas that challenge the social or political status quo. As the writer Erica Jong noted, "I believe that censorship only springs back against the givers of culture—against authors, artists, and feminists, against anybody who wants to change society."[90]

The Canadian law, although not as sweeping as the statute struck down in *Hudnut*, provides that no material will be deemed obscene if it has an artistic purpose or is part of a serious treatment of a sexual theme.[91] It only applies to the work taken as a whole, and not to isolated portions.[92] It does, however, adopt the Dworkin-MacKinnon view of pornography as material portraying women in a "subordinating" or "degrading" manner, and its enforcement has been marked by homophobic and antifeminist excesses.[93]

Much to the delight of Dworkin and MacKinnon, the Canadian Supreme Court upheld the law in *Butler v. The Queen*.[94] MacKinnon praised the decision as "a stunning victory for women. This is of world historic importance. This makes Canada the *first* place in the world that says what is obscene is what harms women, not what offends our values."[95] Within a year after the *Butler* decision, many feminist fears came true. A wave of censorship swept over Canada, aimed not so much at pornography, but at dissident gay, lesbian, and feminist booksellers.[96]

Even antipornography feminists now had second thoughts, including Karen Busby, one of the lawyers who had contributed to the briefs supporting the law. She confessed the results had not been what they intended.[97] Two homophobic Canadian lower court decisions following *Butler* distinguished themselves by the vitriolic manner in which the judges declared homosexual sex as "'degrading and dehumanizing.'"[98] Project P, the

88. Strossen, *supra* n. 5, at 217.

89. *Id.*

90. *Id.* at 225 (quoted in Mary Kay Blakely, *Is One Woman's Sexuality Another Woman's Pornography?* Ms. at 37–38 (Apr. 1985)) (internal quotation marks omitted).

91. *Id.* at 231.

92. *Id.*

93. Strossen, *supra* n. 5, at 231.

94. 1 S.C.R. 452 (Can. 1992); Strossen, *supra* n. 5, at 229.

95. Strossen, *supra* n. 5, at 229 (emphasis added, internal quotation marks and footnote omitted).

96. *Id.* at 231–33.

97. *Id.* at 232.

98. *Id.* at 233 (quoting *The Queen v. Sythes*, Ontario Ct. of Just. (Provincial Div. Feb. 16, 1993); *Glad Day Bookshop v. Dep. Minister of Natl. Revenue*, Ontario Ct. of Just. (Gen. Div. July 14, 1992)).

antiobscenity squad of the Ontario Provincial Police, announced that by its interpretation of *Butler*, sexual expression was permitted only if it included romance and a story line![99] Canadian customs officials seized every variety of homosexual material, but did not touch items from major publishing houses, thus allowing into the country, without question, Madonna's *Sex*[100] and Bret Easton Ellis's *American Psycho*,[101] the latter containing violent and sexually graphic accounts of the mutilation of women.[102]

Strossen, by the way, takes more than a mild *schadenfreüde* in the fact that Andrea Dworkin herself wrote two of the books seized by Canadian customs.[103] Customs officials asserted the books "illegally eroticized pain and bondage."[104] Another item seized was a book entitled *Hot, Hotter, Hottest*,[105] apparently because the customs officers equated heat with sex.[106] Had they opened it they would have found page after page of recipes and cooking instructions for spicy dishes.[107]

Other examples are not so funny. A retired psychologist had written a book about his work with child molesters in order to get public action on the subject.[108] He sent the manuscript to an American literary agent and, when she returned it to him, Canadian customs officials seized it; three Mounties later raided his house, arrested him, and took him to jail in a squad car.[109]

Strossen, implicitly and explicitly, argues censorship never works, even when there is a relatively narrow focus. Because, as Tom Lehrer sang to us so many years ago, obscenity, like beauty, is in the eye of the beholder, and laws aimed at pornography, no matter how narrowly the drafters may try to define the forbidden areas, inevitably are used against ideas that those in power see as objectionable for moral, political, social, or economic reasons. Because aesthetic tastes change over time, we have to be careful what we condemn. Recall Thedore Roosevelt's denunciation of Marcel Duchamp's *Nude Descending a Staircase* as obscene at the 1906 Armory Show. Recall also that James Joyce's *Ulysses* was once condemned as obscene, only to be voted the outstanding novel of the twentieth-century.

While I do not think Strossen has fully answered the charges that many in the sex business are performing unwillingly, outlawing pornography will not remedy that problem; it will only drive sleazy and unethical producers further underground, or more likely lead them to move to other countries where the production of such films is not

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99. *Id.* at 234.

100. Madonna, *Sex* (Ediciones B 1992).

101. Bret Easton Ellis, *American Psycho* (Vintage Contemporaries 1991).

102. Strossen, *supra* n. 5, at 235.

103. The two seized books were *Pornography: Men Possessing Women* and *Woman Hating*. Andrea Dworkin, *Pornography: Men Possessing Women* (E.P. Dutton 1979); Dworkin, *Women Hating*, *supra* n. 43.

104. Strossen, *supra* n. 5, at 237 (internal quotation marks and footnote omitted).

105. Janet Hazen, *Hot, Hotter, Hottest: 50 Fiery Recipes from Around the World: Cooking with Chilies, Peppercorns, Mustards, Horseradish, and Ginger* (Chronicle Bks. 1992).

106. Strossen, *supra* n. 5, at 238.

107. *Id.*

108. *Id.* at 237–38.

109. *Id.* Among authors whose work has been impounded because of episodes containing sexual activity are Marguerite Duras, Langston Hughes, Anne Rice, and Oscar Wilde, to name a few. *Id.* at 238–39.

restricted. Given the nature of the Internet, even if it does not have 260 million pages of pornographic content, it is hard to see how efforts at restriction in one country could succeed short of establishing an electronic dictatorship where everybody's net usage is monitored.

Strossen's arguments about women enjoying pornographic films for their own gratification or as a stimulus with their partners may be true, but it is not the reed on which I want to support the anticensorship argument. Rather, I suggest that in the absence of proof such materials directly harm individuals, it does not matter if people enjoy it and want to avail themselves of the latest video, or if they choose, as many people do, to ignore it. One reason the Supreme Court wound up in the morass it did in the cases leading up to *Miller* is that, with one exception, the Justices never asked the right question, namely, "What business is it of the state?" The one exception occurred in the child porn cases, where a clear answer existed—the state has an obligation to protect children against this type of abuse. It is one thing for an adult man or woman to voluntarily act in sexual movies; children have no capacity, and need to be protected.

I would like to end by going back in time to the first major obscenity case the Warren Court heard, *Roth v. United States*, and in fact go back to the decision of the lower court. Samuel Roth, at the time one of the Nation's leading distributors of sexually oriented material, had been convicted of mailing obscene publications in violation of federal law.[110] At his trial, Roth claimed the statute prohibiting the mailing of obscene or crime-inciting matter unconstitutionally restricted his freedom of speech and press.[111] The trial court denied the claim, as did the Court of Appeals, relying on earlier Supreme Court precedent.[112] But in a concurring opinion Judge Jerome Frank explored the legal and philosophical considerations of censorship, and suggested only material that posed a clear and present danger of inducing serious anti-social behavior should be proscribed.[113]

Frank put his finger directly on the problem: Did pornography pose a clear and present danger? If so, what was it, and, how did one prove it existed? If not, then why should the government punish it? Strossen also argues there is no clear and present danger, but again how does one know? There is no more evidence that lack of censorship promotes morally desirable goals than that censorship saves impressionable lads and lasses from eternal damnation.

The great First Amendment scholar Harry Kalven argued that, putting aside the problem of the children's audience, the alleged evils of pornography are:

> (i) The material will move the audience to anti-social sexual action; (ii) the material will offend the sensibilities of many in the audience; (iii) the material will advocate or endorse improper doctrines of sexual behavior; and (iv) the material will inflame the imagination and excite, albeit privately, a sexual response from the body.

110. *U.S. v. Roth*, 237 F.2d 796, 797 (2d Cir. 1956).
111. *Id.*
112. *Id.*
113. *Id.* at 825–26 (Frank, J., concurring).

> On analysis, these purported evils quickly reduce to a single one. The first, although still voiced by occasional politicians and "decency" lobbies, lacks scientific support. The second may pose a problem for captive audiences, but obscenity regulation has been largely aimed at willing, indeed all too willing, audiences. The third, thematic obscenity, falls within the consensus regarding false doctrine; unsound ideas about sex, like unsound ideas about anything else, present an evil which we agree not to use the law to reduce.[114]

This leaves restricting speech, because it possibly posed a clear and present danger of "exciting the sexual fantasies of adults"![115]

Many years ago, over a beer at the West End, one of my professors at Columbia gave a group of us graduate students good advice about picking a thesis topic. Not only should it be an "important" subject, which would make it easier to publish, but it should be something we would enjoy doing. "Writing a book or a thesis," he said, "is a lot like sex. If you are not having fun, then you are not doing it right."

Alas, there are many people in the country today who seem hell-bent on taking the fun out of sex. That women are discriminated against, that they suffer disabilities in the job market, that the Nation does not provide basic health and childcare services, that too many men believe women are punching bags, that young girls are molested—often by male relatives—is all too true. But the proposed solutions, especially in the area of censorship, are fraught with even worse dangers. Strossen will never convince right-wing social conservatives that sex is fun and women enjoy it, or that there is no proof whatsoever that pornography does anything else than, as Kalven noted, sexually excite some people.

She is absolutely correct, however, in insisting that while we try seriously to address the issues raised by some pro-censorship advocates, we do so in a way that does not in any manner subvert the First Amendment. Like the proverbial camel, once its nose is inside the First Amendment tent, freedom of expression will be greatly endangered. What continues to amaze me is not that social conservatives want to use the government to restrict behavior and speech they find objectionable; that has been going on ever since the Puritans settled in Massachusetts. Rather, it is that self-described radical feminists, such as Dworkin and MacKinnon, who have over the years railed against what they consider the paternalistic, anti-women American society, want to put power over expression into the hand's of that society's government!

It is always difficult to respond reasonably to fanatics, be they of the far left or the far right, and especially to those who see themselves as part of a great moral crusade. They are not concerned with reason. They "know" what is right, and if the facts fail to support their position, so much the worse for the facts. As Mr. Dooley observed many years ago, "a fanatic . . . does what he thinks th' Lord wud do if He knew th' facts iv th' case."[116] They are on a mission—the eradication of pornography—which the social conservatives believe will—along with the restoration of school prayer and the abolition

114. Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* 33–34 (Jamie Kalven ed., Harper & Row 1988).

115. *Id.* at 34.

116. F.P. Dunne, *Mr. Dooley's Philosophy* 252 (Harper & Bros. 1906).

of abortion—restore the United States to its former position of moral supremacy in the world, and which pro-censorship feminists believe is the all-important step to ending discrimination and subjugation of women.

Against this perverted vision, Nadine Strossen has argued in a tough-minded yet sensible manner, albeit in the great tradition of the ACLU's defense of freedom of expression. She makes clear that censorship will not benefit women, but will do them great harm. The best bulwark of freedom for women, and for the rest of us as well, is a strong commitment to traditional First Amendment principles.