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A PUBLIC UNIVERSITY'S RESPONSE TO STUDENTS' REMOVAL OF AN ART EXHIBIT*

MARJORIE HEINS**

I. INTRODUCTION

I have been asked to address the legal and policy implications of the by now infamous October 1992 incident in which editors of the *Michigan Journal of Gender & Law*, a student publication at the University of Michigan Law School, removed a video series from an art exhibit that they had commissioned because of a complaint that one of the films contained "pornography." What, if any, was the university's liability for the incident—legally, artistically, morally, and politically? What should have been the university's response?

Before we can answer these questions, we have to sort out the facts. In this case, there has been much angry rhetoric; there have been many misapprehensions. What follows is the best reconstruction I can make—assembled from numerous news articles, documents, and interviews—of what actually happened on October 30 and 31, 1992.

II. CENSORSHIP AT THE UNIVERSITY OF MICHIGAN LAW SCHOOL

A. *The Symposium*

In the spring of 1992, the *Michigan Journal of Gender & Law* invited artist Carol Jacobsen to exhibit her work on prostitution at the University of Michigan Law School, in connection with a symposium on the subject to be held that fall.[1] The university had agreed to spend $14,000 to fund the conference.[2]

Jacobsen expressed reservations. Would the symposium be dominated by the anti-pornography, anti-legalization-of-prostitution perspective of Catharine MacKinnon, a professor at the school? *Journal* member Lisa Lodin assured Jacobsen that it would not, that diverse viewpoints would

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* © Copyright by Marjorie Heins 1993. This article was adapted from a speech given at the University of Michigan Law School on October 16, 1993.

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1. *See* Carol Jacobsen, *First Amendment Rights Need to be Upheld*, MICH. DAILY, Nov. 6, 1992, at 4.

2. *See* Reed Johnson, *Sex, Laws and Videotape*, DET. NEWS, Dec. 7, 1992, at 1E (reporting that the funding had come from both the University of Michigan Law School and the *Michigan Journal of Gender & Law*).

be represented among the symposium's speakers.[3] As discussions progressed, Jacobsen proposed, and Lodin agreed, that the work of other artists, to be curated by Jacobsen, would be included in the exhibit.[4] The exhibit, to be called *Porn'im'age'ry: Picturing Prostitutes*, would present the views and experiences of prostitutes in their own voices.[5]

Things did not turn out as Lodin had hoped. According to the *New York Times*: "Several of the students who organized the conference said it had been impossible to get both viewpoints."[6] Lodin told the *Times*:

> "We had a problem as soon as we invited speakers, because some of the key anti-prostitution people accepted on the condition that they wouldn't speak if there were people from the other side there. . . . We agonized about it, because we felt we were being manipulated, but we went ahead anyway. Part of the reason we wanted Carol Jacobsen's exhibit so much was to show the other side, without confrontation."[7]

Similarly, Lodin told the *Detroit News*: "'The journal was in turmoil for weeks. We're, like, this is going to turn our symposium into a one-sided viewpoint.'"[8] "Deadlines looming," the *News* wrote, "the students decided to tip the conference toward the radical feminist, anti-pornography perspective. Speakers would include MacKinnon and her longtime collaborator, feminist author Andrea Dworkin. Opposing views would not be welcome."[9]

Lingua Franca magazine reported: "Jacobsen's misgivings returned . . . when she learned that the students had changed their minds and invited only MacKinnonite speakers . . . ."[10] At this point, "the students told [Jacobsen] that her exhibit was more important than ever; it would

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3. *See* Liza Mundy, *The New Critics*, LINGUA FRANCA, Sept./Oct. 1993, at 26, 28-29.

4. *See id.*; *see also* Tamar Lewin, *Furor on Exhibit at Law School Splits Feminists*, N.Y. TIMES, Nov. 13, 1992, at B16.

5. *See* Carole S. Vance, *Feminist Fundamentalism—Women Against Images*, ART AM., Sept. 1993, at 35.

6. Lewin, *supra* note 4.

7. *Id.*

8. Johnson, *supra* note 2, at 2E.

9. *Id.*

10. Mundy, *supra* note 3, at 29. In fact, upon learning that Dworkin had been invited to speak at the symposium, Jacobsen considered withdrawing. *See* Carol Jacobsen, *Anti-Porn Feminism v. Feminist Art: Notes on the Censorship of* Porn'im'age'ry: Picturing Prostitutes, 38 N.Y.L. SCH. L. REV. 63, 65-66 (1993).

provide the sole alternative viewpoint in an increasingly one-sided discourse."[11]

Despite her reservations, and the fact that her fears about a "stacked deck" had materialized, Jacobsen was persuaded to go forward with the exhibit. She arranged to include her own videotaped interviews with Detroit prostitutes, entitled *Street Sex*; a photo essay by New York artist Paula Allen about a prostitute named Angelina Foxy; and videos by various other artists, including San Francisco prostitute and activist Carol Leigh (a.k.a. Scarlot Harlot); New York artist, writer, and former porn actress Veronica Vera (who is also a coordinator of PONY—Prostitutes of New York); and three other artist-filmmakers, Randy Barbato, Susanna Aikin, and Carlos Aparicio.[12] Jacobsen worked with Lodin, other law students, and university staff on publicity and logistics for the exhibit, including an opening-night reception.

An October 8, 1992 press release on the letterhead of the *Journal of Gender & Law* announced:

> Local artist Carol Jacobsen and New York artist Paula Allen bring forth the realities surrounding prostitution in an exhibit from Oct. 20 to Nov. 1 in the Union Gallery at the Michigan Union. . . . The exhibit is sponsored by the newly-established *Michigan Journal of Gender & Law*, a student publication of Michigan Law School . . . . A related series of videotapes will be presented in room 1209 at the Union during the symposium Oct. 30 to 31.[13]

The release then listed the five additional videos: Leigh's *Outlaw Poverty, Not Prostitutes*; Vera's *Portrait of a Sexual Evolutionary*; Barbato's *Drag Queen* and *My Own Private Seattle*; and Aikin and Aparicio's *The Salt Mines*.[14]

On October 18 and 19, 1992, a crew of eight law students assisted Jacobsen, other artists, and University of Michigan staff in installing the *Street Sex* video and Allen's photo essay in the gallery of the student union. On October 20, Jacobsen gave a talk in the gallery on prostitution, political art, and the dangers of censorship.[15]

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11. Mundy, *supra* note 3, at 29.

12. Vance, *supra* note 5, at 35.

13. Press release on letterhead of the *Journal of Gender & Law* (Oct. 8, 1992) (on file with the *New York Law School Law Review*).

14. *See id.*

15. *See* Laura Berger, *Exhibit Caused People to Fear for Their Safety*, MICH. DAILY, Nov. 6, 1992, at 4.

As stated in the press release, the remaining five videos by Leigh, Vera, Barbato, Aikin, and Aparicio were to be installed in room 1209 of the union just before the conference began.[16] Jacobsen met with Lodin and another student on October 29 to install these videos, which Jacobsen had assembled onto one composite tape.[17]

Later, the student organizers claimed that at this point they had not screened the videos—the implication being that Jacobsen had somehow slipped one by them.[18] But there is no evidence that Jacobsen deceived the students. The names of the films were all included in the October 8 press release. Moreover, the students had helped Jacobsen install the composite video and had been free to watch it any time.[19]

On the morning of Friday, October 30, the opening day of the conference, one of the speakers, John Stoltenberg, went into room 1209 and viewed the composite tape. The *Detroit News* reported:

> New York City writer John Stoltenberg apparently was the only speaker to actually see Vera's video before it was removed. . . . When he saw Vera, speaking in what he describes as "this very stagy voice-over, arch, very crafted, coy, pouting," Stoltenberg thought: "What's wrong with this picture? This isn't the conference that I thought I had been invited to.". . . Stoltenberg alerted MacKinnon, whom he has known for 18 years. MacKinnon says she then told law student Julia Ernst, without recommending what should be done about the video.[20]

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16. *See supra* text accompanying note 13.

17. *See* Ami Walsh, *Prostitution Exhibit's Artist Removes it After 'Censorship'*, ANN ARBOR NEWS, Nov. 3, 1992, at C1, C3.

18. *Journal* member Laura Berger attempted to create this false impression when she wrote: "The Journal members decided to remove a series of videos from the exhibit. These videos were not Jacobsen's work, but rather had been collected by her and added to the exhibit for the days which overlapped with the symposium." Berger, *supra* note 15.

MacKinnon went further. Speculating about the presence of the Vera segment in the exhibit, she told the *Detroit News*: "'One, she (Jacobsen) was fed it by the ACLU and didn't know what was in it . . . or two, she tricked them . . . .'" Johnson, *supra* note 2, at 4E.

19. Jacobsen's agreement with the students entrusted her, as the curator, to make the artistic choices for the show. No limit was imposed on the explicitness of the films' content; indeed, in an exhibit that dealt with prostitution and was specifically designed—by agreement with the students—to provide a forum for the voices and firsthand experiences of prostitutes, it was hardly unreasonable to expect that there would have been both discussion and depiction of sexual subjects.

20. Johnson, *supra* note 2, at 2E.

Ernst responded to MacKinnon's call conveying Stoltenberg's complaint by removing the entire composite tape, without reviewing any of it or notifying Jacobsen.[21]

Jacobsen discovered that the tape was missing on Saturday morning.[22] Assuming that it had been stolen, she installed a new copy.[23] She then encountered *Journal* member Laura Berger, who told her that Ernst had removed the tape following a complaint from Stoltenberg, who had complained to MacKinnon, who in turn had complained to the students.[24]

Following this conversation, Berger introduced Jacobsen to Ernst, who told Jacobsen that she had removed the video under pressure from MacKinnon,[25] who had received Stoltenberg's initial complaint that the tape was pornographic.[26] Ernst told Jacobsen that she took full responsibility for removing the tape and that she did not want to blame MacKinnon.[27] She said she had removed the tape because she did not want to offend anyone.

Jacobsen told Ernst that she, Jacobsen, had reinstalled the video, and that it would remain on view; to remove it was censorship.[28] Ernst, visibly upset, replied that she would have to inform the audience that the tape had been reinstalled because MacKinnon and others thought it had been removed.[29]

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21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* MacKinnon has denied that she "complained" to the students, maintaining that she simply conveyed Stoltenberg's complaint without indicating her own view. *See* Lewin, *supra* note 4; *see also infra* notes 55-58 and accompanying text. However, Jacobsen remembers that Berger characterized MacKinnon's communication as a *complaint*. I will return shortly to what Ernst and the others might reasonably have inferred from MacKinnon's conduct. *See infra* text following note 58.

25. Author's conversation with Carol Jacobsen; Joyce Price, *Feminists in Free-Speech Spat*, WASH. TIMES, Nov. 13, 1992, at A1. *See also* Jacobsen, *supra* note 1; Johnson, *supra* note 2, at 2E (describing the events leading up to Ernst's removal of the video and MacKinnon's denial that she ordered the video removed; MacKinnon claims that she told Ernst of Stoltenberg's comments, but did not recommend removal).

26. *See* Johnson, *supra* note 2, at 2E.

27. *See* Mundy, *supra* note 3, at 29.

28. *See id.*

29. *See* Jacobsen, *supra* note 1. Again, MacKinnon has denied that this could have been said. She maintains that she did not know at the time—Saturday morning—what Ernst and the others had decided to do after she, MacKinnon, had "conveyed" Stoltenberg's complaint. Assuming it is true, however, that MacKinnon did not know for a fact whether Ernst had removed the tape, I think MacKinnon is being, at best, naïve. Given the students' apparent admiration for her well-known views, it would have been

Shortly after noon on Saturday, October 31, Jacobsen was permitted to read a statement deploring the removal of the video series—which, she said, she had specifically selected because it focused on prostitutes' and sex workers' "own voices."[30] She announced that she had reinstalled the tape and stated that if the conference organizers wished to censor or remove any part of the exhibit again, they would have to censor all of it.[31]

Shortly after Jacobsen delivered her statement, the students met with MacKinnon, Dworkin, Stoltenberg, and another conference speaker, Evelina Giobbe.[32] They then retired to a separate room, where they agreed among themselves to tell Jacobsen that the entire exhibit must be removed.[33]

What went on at this meeting with MacKinnon and the other speakers? According to one report, Dworkin told the students that "she'd been harassed by men who had viewed pornography."[34] For her part, MacKinnon "warned [the students] of the dangers of showing pornography, even in an academic context."[35] The students later told the *New York Times* that in deciding to censor the exhibit they were responding to complaints from both Stoltenberg and Giobbe.[36] The *Times* quoted student Bryan Wells:

> "We really didn't think of it as a censorship issue, but as a safety issue, because two of our speakers said that based on their experience at other events, the tape would be a threat to their safety. . . . It wasn't our place to assess that threat. It was our position to trust our speakers."[37]

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reasonable for Ernst to conclude that MacKinnon, having conveyed Stoltenberg's complaint that the video contained "pornography" (her nemesis), expected that the video would be removed forthwith. I do not know what, if anything, Ernst has said about the details of this conversation with Jacobsen or about her own state of mind at the time.

30. Joyce Price, *Feminists in Free-Speech Spat*, WASH. TIMES, Nov. 13, 1992, at A1, A6.

31. *See* Lewin, *supra* note 4; Mundy, *supra* note 3, at 29.

32. *See* Vance, *supra* note 5, at 35, 37 n.8; Mundy, *supra* note 3, at 29; Jacobsen, *supra* note 1.

33. Mundy, *supra* note 3, at 29; Vance, *supra* note 5, at 35.

34. *See* Laura Fraser, *Hear No Evil . . .*, S.F. WKLY., Nov. 11, 1992, at 11.

35. Mundy, *supra* note 3, at 29.

36. Lewin, *supra* note 4.

37. *Id.* I gather from this that Dworkin and Giobbe were the two speakers who warned of potential harassment.

Other contemporary accounts echo this theme. The *Detroit News*, for example, reported that: "[a]t least one speaker feared for her personal safety. 'These (images) are used to get men pumped,' student Laura Berger explain[ed], 'and women such as this speaker have been harassed by people who have watched pornography in the past.'"[38] The students, however, told the *New York Times* that they did not consider "either the free-speech implications or alternatives [such as] seeking increased security."[39]

There was hardly a need for increased security, of course, because there was not the slightest evidence of any threat to physical safety, or even harassment, at the conference. Indeed, the exhibit was located in a different building from the conference. Thus, even leaving aside the question whether censoring art merely because it is claimed that similar art has caused some misguided individual to commit an antisocial act can ever be consistent with free expression and a free society, what emerges from these facts is *not* any concern about safety. Instead, as the *Michigan Daily* reported: "The members of the *Journal* collectively determined that, because the tape made many people uncomfortable and created feelings of anxiety, it should be removed."[40] The *Daily* tellingly quoted student Ann Kraemer: "'I can't say that it's not censorship. . . . We did feel that the feelings of these people took precedence.'"[41]

And more than offended feelings were involved. Evidently, some of the speakers made clear to the students that their carefully planned conference would not go forward if the exhibit remained. Laura Berger wrote in the *Michigan Daily*: "Journal members acted to protect the security of our speakers *and to maintain the orderly presentation of the symposium*."[42] The *Ann Arbor News* reported: "Some law students also worried that they'd lose the support of the major symposium speakers, which included prominent feminist writers Andrea Dworkin and John Stoltenberg, director of the Council for Prostitution Alternatives Susan Kay Hunter, and U-M law professor Catharine MacKinnon."[43] As Bryan Wells told the *Detroit News*, "'I think the conference would've broken up, potentially, if we hadn't taken the action that we did.'"[44]

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38. Johnson, *supra* note 2, at 2E.

39. Lewin, *supra* note 4.

40. Erin Einhorn, *Law Journal Censors Video, Citing Pornographic Content*, MICH. DAILY, Nov. 2, 1992, at 1.

41. *Id.* at 2.

42. Berger, *supra* note 15, at 4 (emphasis added).

43. Walsh, *supra* note 17, at C3.

44. Johnson, *supra* note 2, at 1E.

These questions of motivation, of course, are crucial when we come to consider whether, as some have claimed,[45] the students were exercising their First Amendment rights in first removing the video series and then, on Saturday, ordering Jacobsen to dismantle the entire exhibit.

Another important question concerns the video itself. Veronica Vera's *Portrait of a Sexual Evolutionary* is an autobiographical work by an anti-censorship feminist, former sex worker, and prostitutes' rights advocate.[46] It includes sequences of Vera's 1984 testimony in front of a United States Senate subcommittee against anti-pornography legislation,[47] as well as clips from commercial pornography and images of semi-nude women (including the filmmaker). The film is in large part about sex and Vera's sexual adventures—hardly surprising in an exhibit concerning prostitution.

Stoltenberg's objections to the Vera video are telling. As he told the *Detroit News*, Vera appears, at times in the film, "coy, pouting."[48] If, as these comments suggest, Stoltenberg was objecting to a certain way that a woman presented herself, then the ensuing censorship was flatly ideological, for that is precisely what Jacobsen, at the students' invitation and with their approval, had chosen to present: the *voices* of sex workers (both literally and metaphorically). Thus, what Stoltenberg objected to was nothing less than these voices—with their intonations, their sexual attitudes—being heard at all. But, as Vera wrote in an open letter to the

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45. Kraemer, for example, told *Lingua Franca* that the students "did not wish to have 'commercial pornography' shown in any context and that, in fact, Jacobsen [had] interfered with *their* freedom of expression." Mundy, *supra* note 3, at 29.

Dean Lee Bollinger was more explicit. He "argued that: 'student organizations can invite or disinvite people to speak at conferences, and it's within their legal and constitutional rights.'" Vance, *supra* note 5, at 36 (quoting Bollinger's statement as reported by Julie Wiernik, *Exhibit on Prostitutes Returning to U-M*, ANN ARBOR NEWS, Mar. 17, 1993, at A1, A10). And he told the *Detroit News* that although he thought Jacobsen had been "'rudely treated, . . . [t]o be rudely treated is not to be denied your First Amendment rights' . . . ." Johnson, *supra* note 2, at 2E.

46. *See* Mundy, *supra* note 3, at 28; Johnson, *supra* note 2, at 1E, 2E.

47. At one point in the video, Vera admonishes Sen. Arlen Specter: "Senator, I'm very concerned that there is a whole layer of guilt laid on people because of their fantasies." *See* Johnson, *supra* note 2, at 1E; *see also* Lewin, *supra* note 4 (referring to the contents of Vera's video, including her testimony in front of a Senate subcommittee). Vera's statement is reproduced at *Effect of Pornography on Women and Children: Hearings Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary to Examine the Relationship of Pornography to Sexual Exploitation and Abuse of Women and Children, and to Consider the Need for Anti-Pornography Legislation*, 98th Cong., 2d Sess. 319 (1984) (statement of Veronica Vera).

48. Johnson, *supra* note 2, at 2E.

Michigan Daily, "If you were trying to study any other subject, you would study the experts. Carol Jacobsen offered you practical experts."[49]

Vera's film is more complex than Stoltenberg would have us think. Anthropologist and author Carole Vance wrote in the September 1993 issue of *Art in America*:

> Antipornography feminist critics assailed Veronica Vera's 30-minute video . . . as "pornography" because it contains—among many other things—short, sexually explicit excerpts from adult films in which she appeared. This makes as much sense as calling the video religious because it incorporates Catholic iconography as it traces her development from obedient daughter to sexually curious porn performer to video maker and sex advocate. Critics ignore the video's many framing devices; the narrative is filled with irony, camp and good girl/bad girl melodrama, interspersed with critiques of censorship, the most winning being Vera's 1984 testimony against MacKinnon-Dworkin style antiporn ordinances before a U.S. Senate subcommittee and the clearly flabbergasted and uncomfortable Sen. Arlen Specter. This video, like all others, can be read many ways; it may be that some viewers are discomfited by Vera's shifting, unstable perspective that lurches between seriousness and camp, her largely upbeat account of her experiences in the sex industry or her refusal to work within the genre of earnest documentary. Yet none of these issues—esthetic, intellectual and political—merit dismissal with the reductionist epithet "pornography."[50]

As Vance explains, the term "pornography," with its "unmistakably pejorative connotation," is now used by both moral conservatives and anti-porn feminists to "describe any material with a sexual content or theme of which the viewer disapproves."[51]

> [A]ntipornography feminists [she writes] are now hurling the term "pornography" at art videos which dissent from their favored position on prostitution. . . . Ironically, antiporn feminists wish to banish these videos specifically because of the *political ideas* they convey, yet their characterization of the videos as

49. Veronica Vera, *Censored Artist, Activist Speaks Out*, MICH. DAILY, Nov. 30, 1992, at 4.

50. Vance, *supra* note 5, at 36.

51. *Id.* at 35.

pornography—seemingly mindless, masturbatory vehicles—implies that they are devoid of meaning or ideas.[52]

But Vera's video is *full* of meaning and ideas—a crucial fact that has sometimes gotten lost in the heat of this controversy.

Yet another significant factual issue is the extent of MacKinnon's involvement in the censorship of the exhibit. The *New York Times* reported that MacKinnon, who related Stoltenberg's initial complaint about the video, "stressed that she was not involved in the decision" to remove it, but "said [that] she supported the students' action."[53] In a December 12, 1992 letter to the *Times*, MacKinnon quibbled with the word "stressed," saying that her noninvolvement had been established through interviews with the students.[54] Later, she wrote to the *Detroit News* that the students had "acted on their own. Not only didn't I participate in their decision, I didn't even express an opinion until interviewed days later."[55] This is more than a little disingenuous, in view of MacKinnon's acknowledgement that at the October 31 meeting she expressed to the students her views on the dangers of showing pornography, even in an academic setting.[56]

Elizabeth Hess opined for the *Village Voice* that the students were influenced by MacKinnon, "a notorious advocate for the removal of images she views as pornographic," regardless whether she explicitly urged them to remove the video series or the entire exhibit.[57] The *Detroit News* agreed: "The students unilaterally removed the video from Ms. Jacobsen's display after complaints from two speakers that an exhibit about prostitutes was tantamount to trafficking in women—a central tenet of MacKinnonism. . . . Professor MacKinnon supported the students' actions without even having seen the video."[58]

As these journalists' ruminations suggest, arguments over what precisely MacKinnon said or did not say are largely beside the point. They fail to take account of the very important message—which the students

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52. *Id.* at 36.

53. Lewin, *supra* note 4.

54. *See* Catharine A. MacKinnon, *Misleading Account of Videotape Dispute*, N.Y. TIMES, Dec. 12, 1992, at 22 (letter to the editor).

55. Catharine A. MacKinnon, *'Demonized' MacKinnon Replies*, DET. NEWS, Dec. 13, 1992, at 2B (letter to the editor).

56. *See supra* note 35 and accompanying text.

57. *See Get Off Our Backs*, VILLAGE VOICE, Feb. 23, 1993, at 5 (letter to the editor by Lee C. Bollinger; the quoted material appears in the printed reply of Elizabeth Hess, whose reporting Bollinger had criticized).

58. *Prostituting Feminism*, DET. NEWS, Nov. 19, 1992, at A14 (editorial).

surely grasped—that was expressed by Stoltenberg's decision to complain to MacKinnon, rather than to the students directly, and by MacKinnon's subsequent decision to convey Stoltenberg's message, rather than telling him to deliver it himself. Stoltenberg could well have thought that as a faculty member and probable guru to at least some of these students, MacKinnon was a figure of more authority than he would have been speaking to them on his own. The force of her action—even if, as she says, she did not tell the students what to do—could not have been lost on MacKinnon either. And the fact that the students removed the tape without even viewing it suggests that they believed that MacKinnon and others had made up their minds that the tape must go.

B. *After the Symposium*

The university's involvement in the controversy intensified after the symposium adjourned. The students had confiscated a valuable video consisting of five significant film works without its owner's assent, then had retained it unlawfully. The university took no effective action to ensure that the video was promptly returned to Jacobsen; instead, it appears to have ratified and involved itself in the students' act by borrowing the tape from them to make two unauthorized copies. It was not until many weeks later, after persistent demands by the artists through the ACLU, including the threat of a copyright lawsuit, that the confiscated video and the unauthorized copies were finally returned.[59]

Meanwhile, a strange silence had descended over the University of Michigan. Despite widespread publicity about the incident, and repeated protests from artists and anti-censorship groups (including feminists)—and despite law school dean Lee Bollinger's promptness in contacting the ACLU, which had agreed to represent the artists, to initiate settlement negotiations—Bollinger publicly took the position that the students had been at worst rude, that they had simply exercised their First Amendment rights, and that the university had no responsibility in the matter.[60]

As Carole Vance observed:

> [U]niversity administrators attempted to narrow the question to one of strict legal liability: did the university violate the First Amendment rights of the artists? This framing diverted attention from a second, quite separate question: did censorship occur at

59. *See* Vance, *supra* note 5, at 35.

60. *See supra* note 45.

> the university, and did educators have a responsibility to examine the circumstances and speak out about the event?[61]

Vance noted that, despite widespread expression of outrage from arts groups, anti-censorship feminists, and civil libertarians, "[the] faculty at Michigan . . . was largely silent about the case."[62] Indeed, the National Coalition Against Censorship, after writing a letter of protest to university president James Duderstadt,[63] followed up with a separate letter to each of the university's deans advising them of the incident and asking them to speak out. Not one responded.

The university's unwillingness to take a forthright position on the dangers of censorship persisted throughout the settlement negotiations and the subsequent tortuous process of arranging for the present conference and the reinstallation of the exhibit. The settlement agreement provided that, in exchange for the release of their legal claims against the university and the student editors of the *Journal of Gender & Law*, the artists would be paid $3000 and the exhibit would be reinstalled in conjunction with a "public forum" to "address issues arising out of this controversy."[64] The university would pay "all reasonable costs" of preparation and publicity for, and reinstallation of, the exhibit, and would invite all the artists to attend the opening and make public statements.[65] Accompanying the agreement was a letter from Bollinger to Jacobsen inviting her to "speak at—as well [as] to help me plan" the public forum.[66]

I will not torture you by detailing the tiresome history of delays and unfulfilled promises that has gotten us to today's rather meager conference. But in brief: despite the availability of many talented, accomplished, and articulate experts on feminism, censorship, and sexually explicit art; despite numerous requests by the university for suggested speakers knowledgeable about these subjects; and despite far more numerous responses to these requests from Jacobsen and her

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61. Vance, *supra* note 5, at 35.

62. *Id.*

63. Letter from Leanne Katz, Executive Director, National Coalition Against Censorship, to James T. Duderstadt, President, University of Michigan (Nov. 13, 1992) (copy on file with the *New York Law School Law Review*).

64. *See* Settlement Agreement between the Regents of the University of Michigan and Carol Jacobsen, Veronica Vera, Paula Allen, Carol Leigh, Randy Barbato, Susanna Aikin, and Carlos Aparicio, Jan. 28, 1993 [hereinafter Settlement Agreement] (copy on file with the *New York Law School Law Review*).

65. *See id.*

66. Letter accompanying Settlement Agreement from Lee C. Bollinger, Dean, University of Michigan Law School, to Carol Jacobsen (Jan. 8, 1993) (copy on file with the *New York Law School Law Review*).

representatives, the university finally saw fit to invite not one feminist anti-censorship speaker other than Jacobsen and me—both of whom, of course, are active parties to the controversy and therefore unable to appear here, as others could, in the roles of disinterested defenders of the arts, nondogmatic and uncensorious feminism, and free speech. Not only did the university fail to invite even one of the speakers we suggested—among them noted feminist author Wendy Kaminer; writer and founder of Feminists for Free Expression Marcia Pally; artist, activist, and founder of the nationally known Franklin Furnace Archive Martha Wilson; scholar and "sex panics" expert Carole Vance; lesbian performance artist Holly Hughes; arts curator Deborah Willis; writer and filmmaker Veronica Vera; and many others—but Bollinger flatly reneged on an explicit promise to invite Vance and on implicit commitments to Willis and Hughes. As to Vance, the dean explained cavalierly that he had changed his mind. His settlement-time invitation that Jacobsen "help plan" the conference was replaced, once the settlement agreement was signed, with a hard-line, no-compromise, "I'm in charge" attitude whereby the school refused not only to invite any outside feminist anti-censorship speakers but also to pay Jacobsen the same honorarium that had been offered to other invitees.

Thus, not only did the speaker lineup become so skewed as to make Jacobsen and me feel more like hunted game than participants in an open forum, but the university also took affirmative steps to scuttle the settlement altogether. In spite of extended planning meetings, *no* definite plans were made or speakers invited until many months after the agreement was signed. These delays, of course, ensured that the panels would be small and unrepresentative. The artists, although invited by the terms of the agreement to attend the opening, were not to have any of their expenses paid. Delay and refusal to front the costs of reinstallation forced Jacobsen to incur substantial out-of-pocket expenses to ensure that the exhibit was mounted properly. The university's conduct demonstrates that it would have been only too happy had the artists abandoned their efforts to reinstall the show.

III. LEGAL, POLITICAL, AND MORAL IMPLICATIONS

A. *First Amendment Arguments*

What are the legal, political, and moral implications of this incident?

Almost as soon as the story hit the media, Dean Bollinger took the position that although the students' action had been unwise, their removal of the exhibit simply had been an exercise of their First Amendment rights. The university, he said, certainly had not been involved, and therefore it was not legally liable for the students' acts. MacKinnon

agreed, telling the *Detroit Free Press* that the students "have the right to control what is shown in their name."[67]

In the abstract, I tend to agree with this proposition. But on these facts, the proposition does not help the university or get the students off the hook. I do believe that the students exercised their First Amendment rights when, acting on behalf of the university, they contracted with Jacobsen to curate an art exhibit and delegated the task of choosing its contents to her.[68]

Jacobsen fulfilled the terms of the bargain; the students violated these terms. Thus, neither the university, which authorized the students to make the contract, nor the *Journal of Gender & Law* would have a cognizable First Amendment defense to a breach of contract action by Jacobsen.[69]

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67. Marsha Miro, *Artist Ignites U-M Controversy About Pornography and Art*, DET. FREE PRESS, Dec. 20, 1992, at 7M, 11M.

68. Limits on content, however, formed no term of this contract (not even limits on "coy, pouting" tones of voice). *See supra* text accompanying notes 4-5; *supra* note 19. For that matter, the students also exercised their First Amendment rights when they issued a press release promoting the exhibit.

69. *Cf.*, Cohen v. Cowles Media Co., 501 U.S. 663, 671 (1991) (concluding that the First Amendment does not confer on the press a constitutional right to disregard promises that are otherwise enforceable under laws of general applicability). In *Cohen*, the plaintiff, a political activist, brought suit against a newspaper to whom, in exchange for confidentiality, he had provided damaging information about a member of the opposing ticket. *Id.* at 665-66. The paper identified Cohen as the source, and he was fired from his job. *Id.* at 666. When he sued the paper for breach of contract, the paper claimed that Cohen's suit was barred by the First Amendment. *Id.* The Minnesota Supreme Court agreed, holding that the Amendment barred Cohen from proceeding on either a contract or a promissory estoppel theory. *See id.* at 667. The United States Supreme Court reversed, holding that the promissory estoppel claim was not barred by the First Amendment because that doctrine is a law of general applicability, equally enforceable against both the press and the citizens of Minnesota. *Id.* at 670. The dissenters, although disagreeing with this particular result, acknowledged that liability for breaches of promise by the press was not necessarily constitutionally prohibited. *See id.* at 678-79 (Souter, J., dissenting). *See also* C. Adrian Vermeule, *Confidential Media Sources and the First Amendment:* Cohen v. Cowles Media, 15 HARV. J.L. & PUB. POL'Y 266 (1992) (arguing that the *Cohen* result is sensible); Vanessa Redgrave v. Boston Symphony Orchestra, Inc., 855 F.2d 888, 894-95 n.4 (1st Cir. 1988) (en banc) (stating in dictum that the court was "not convinced that the cancellation of a contract could ever receive First Amendment protection" and that "[u]nlike engaging in an economic boycott, burning a draft card, or wearing an armband, cancelling a contract is not a traditional form of protest"), *cert. denied*, 488 U.S. 1043 (1989). In *Redgrave*, the court went on to rule that because the orchestra's cancellation of Redgrave's contract had not been intended as an act of communication, it was unnecessary to analyze Redgrave's jury award of consequential damages for compatibility with the First Amendment. *See id.* at 896. *See also infra* notes 70-77 and accompanying text.

Indeed, in this case, because the students had not even viewed the video before they removed it, they and the university are in a particularly poor position to assert that the students exercised a First Amendment right not to be associated with its contents.

Fundamentally, what went on here was not an exercise of First Amendment rights by the students, but *acquiescence* by the students to the threats and complaints of third parties—the conference speakers. Such acquiescence to outside pressures—e.g., a company giving in to the demands of racist customers that it not hire minority employees—has long been rejected as a defense to civil rights complaints.[70] The legal answer is less clear with respect to outside pressures based not on race or religion, but on the content or viewpoint of creative expression. In one fascinating case brought about ten years ago, the Boston Symphony Orchestra (BSO) fired actress Vanessa Redgrave from a scheduled performance as a narrator of the Stravinsky opera, *Oedipus Rex*, because of pressures from contributors and other third parties who objected to her support of the Palestine Liberation Organization.[71] Redgrave sued, not only for breach of contract, but also for violation of the Massachusetts Civil Rights Act (MCRA),[72] a novel statute that prohibits private parties *as well as* government officials from interference with constitutional rights by "threats, intimidation or coercion."[73] In opposition to Redgrave's MCRA-based claim, the BSO attempted to argue that it had only been exercising its own First Amendment rights when it broke the contract because it did not want to compromise the artistic integrity of the performance by risking possible disruption by anti-Redgrave audience members.[74] No court involved in the case ever clearly ruled on the

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70. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429 (1984) (race discrimination in child custody decision—perceived societal burdens); Buchanan v. Warley, 245 U.S. 60 (1917) (race discrimination in housing—private prejudices); Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971) (sex discrimination in employment—customer preference), *cert. denied*, 404 U.S. 950 (1971); Sarni Original Dry Cleaners v. Cooke, 447 N.E.2d 1228 (Mass. 1983) (race discrimination in employment—neighborhood hostility; applying state law).

71. *See Redgrave*, 855 F.2d at 890-91.

72. Civil Rights Act, MASS. GEN. L. ch. 12, §§ 11H-I (1986).

73. *Id.* § 11H. As noted in *Redgrave*, this section permits suits against private parties for actions that would otherwise be forbidden only to state actors. *Redgrave*, 855 F.2d at 901. *See also* Marjorie Heins, *Massachussets Civil Rights Law*, 76 MASS. L. REV. 77, 81-85 (1991) (providing an overview of the MCRA).

74. *See Redgrave*, 855 F.2d at 891.

validity of this First Amendment defense, although some judges expressed sympathy for it.[75]

Here, the students could argue that they were exercising their First Amendment rights to plan and conduct an academic conference when they decided to take what they considered a necessary step—acquiescing in the speakers' demands—to assure that the conference would go forward. But any such claim by the students should be rejected, for it amounts to a "heckler's veto."[76] Rights of free speech—in this case, the artists'—cannot be held hostage, either to the loudest screamers or hecklers *or* to ideologically motivated censorship promoters.

Interestingly, the Boston Symphony Orchestra never argued that its alleged First Amendment right to preserve the quiet at a concert constituted a defense to Redgrave's breach of contract claim; the BSO offered to pay Redgrave her contract damages almost immediately after the breach.[77] Likewise, here, neither the *Journal* students nor the university would have had a viable First Amendment defense to a breach-of-contract claim by Jacobsen. The question is whether the First Amendment would provide them with a defense to a claim other than breach of contract: in essence, whether the students' alleged First Amendment rights would trump or cancel out the artists'. As noted, this question was not squarely answered in the *Redgrave* litigation, but as a matter of logic, it is a little difficult to see how the same asserted First Amendment rights can be a full defense to one legal claim yet no defense at all to another arising out of the same conduct.

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75. *See id.* at 904-06, 920-25 (Bownes, J., joined by Selya, J., concurring in part and dissenting in part). The majority's sentiments were expressed in dicta; Judge Bownes found it necessary to consider the BSO's First Amendment defense to Redgrave's MCRA claim because, unlike the majority, he did not agree that state law dispositively provided a defense to the defendant. *See id.* at 920 (Bownes, J., concurring in part and dissenting in part). However, Judge Bownes ultimately opined that "[t]o recognize an absolute first amendment defense of 'artistic integrity,' as the BSO urges, would flout the very values that the first amendment and the MCRA protect." *Id.* at 924 (Bownes, J., concurring in part and dissenting in part). For a description of the legal and artistic implications of the *Redgrave* case, which produced three appellate decisions, see Marjorie Heins, Vanessa Redgrave v. Boston Symphony Orchestra: *Federalism, Forced Speech, and the Emergence of the* Redgrave *Defense*, 30 B.C. L. REV. 1283 (1989).

76. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 409 (1989); Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

77. *See* Redgrave v. Boston Symphony Orchestra, Inc., 602 F. Supp. 1189, 1203 (D. Mass. 1985) (denying liability but tendering offer to settle pursuant to FED. R. CIV. P. 68), *aff'd in part, vacated in part*, 855 F.2d 888 (1st Cir. 1988) (en banc), *cert. denied*, 488 U.S. 1043 (1989). *See also* Heins, *supra* note 75, at 1295.

B. *University Responsibility*

To move now from the students' First Amendment rights to the question of university liability (these are two quite separate, though often merged, issues): I believe it is possible that in some contexts public university students can be *both* exercising their First Amendment rights (although I do not think they were doing so here) *and* operating with the authority of the state, i.e., subjecting the university to potential liability for their actions.[78] That is, I think that college or graduate school students do have First Amendment rights in the context of university-funded publications, exhibits, and other activities, especially if the university disclaims any editorial or curatorial control over the publication or exhibit in question.[79] But that does not mean that students, when operating with university funds and contracting for the use of university premises, cannot also be state actors.[80]

Some analogies come to mind. Voters may be exercising First Amendment rights when they pass an initiative amending their state constitution to, for example, deprive gays or others of the protection of

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78. *See, e.g.*, Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, 1075 (5th Cir. 1976) (affirming dismissal of suit against state university newspaper for refusing to print advertisement by gay student organization on grounds that in absence of state action by newspaper, "the First Amendment interdicts judicial interference with the editorial decision"), *cert. denied*, 430 U.S. 982 (1977); Sinn v. Daily Nebraskan, 638 F. Supp. 143 (D. Neb. 1986) (dismissing civil rights suit against public university student newspaper for refusing to print advertisement for lesbian roommate; the court found that freedom of the press applies to public university newspapers but implicitly recognized that such newspapers also can be state actors, concluding on the facts of the case that the *Daily Nebraskan* did not have sufficient indicia of state control and was therefore not a state actor), *aff'd*, 829 F.2d 662 (8th Cir. 1987).

79. *See, e.g.*, *Mississippi Gay Alliance*, 536 F.2d at 1075 (noting that the complaint did not assert that university officials supervised what was to be published in the newspaper and that there was "not the slightest whisper" that they in fact did); *Sinn*, 638 F. Supp. at 147 (noting four substantive ways in which the University of Nebraska had undertaken to ensure the editorial independence of the *Daily Nebraskan* and concluding that in all editorial respects it "function[ed] like a private newspaper").

80. *See, e.g.*, Gay and Lesbian Students Ass'n v. Gohn, 850 F.2d 361, 365-66 (8th Cir. 1988) (holding that state action was present in denial of funding to gay and lesbian student association by student senate at public university where university administrator had final say as to funding decisions through his power to hear appeals); Lee v. Board of Regents, 306 F. Supp. 1097, 1100 (W.D. Wis. 1969) (finding university had sufficient involvement in student newspaper advertising policies to constitute state action), *aff'd*, 441 F.2d 1257 (7th Cir. 1971).

civil rights laws.[81] But that does not mean that the initiative cannot be challenged as state action in violation of the Fourteenth Amendment.[82] Likewise, citizens may arguably be exercising their First Amendment rights when they erect a Christian nativity scene, or a Jewish menorah, in city hall during the holiday season. But the religious endorsement conveyed by the creche nonetheless amounts to state action and violates the Establishment Clause.[83]

In this case, the University of Michigan authorized students at its law school to enter into contracts inviting speakers to attend the conference and Jacobsen to mount an exhibit. Having authorized the students to act on its behalf in this way, the university was liable on those contracts.[84] Were the students also acting on behalf of the university, however, when,

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81. *See* Evans v. Romer, 854 P.2d 1270 (Colo. 1993), *cert. denied*, 114 S. Ct. 419 (1993). In May 1992, Colorado voters submitted petitions to the secretary of state to present to the electorate a new section 30 to article II of the state constitution. Amendment 2 provided:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Id. at 1272 (quoting COLO. CONST., art. II, § 30b (1992)).

82. *See id.* at 1286. The plaintiffs in *Romer* asserted that Amendment 2 violated their right to equal protection of the laws by denying gay men, lesbians, and bisexuals the opportunity to participate equally in the political process, and that Amendment 2 lacked a rational basis for the burdens it imposed on gay men, lesbians, and bisexuals. *See id.* at 1272 n.2. The Colorado Supreme Court held that the amendment did infringe on plaintiffs' fundamental right to participate on an equal basis in the political process, and it affirmed the issuance of an injunction against enforcement of the provision. *See id.* at 1286.

The Court took pains to note that even though the amendment "was passed by a majority of voters through the initiative process as an expression of popular will . . . , the facts remain that '[o]ne's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections' . . . ." *Id.* (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

83. *See* County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989). The Court ruled that the Establishment Clause of the First Amendment not only limits the religious content of the government's own communications, but also forbids government endorsement of religious communications by private citizens. *See id.* at 601-02.

84. *See supra* note 80 and accompanying text.

by breaking the contract with Jacobsen, they suppressed her artistic expression and that of the other artists?

Based on the facts we know, I think the answer is unclear. The doctrine of state action is a messy, shifting, and very fact-specific creature.[85] The Nixon and Reagan-Bush Supreme Courts have narrowed state action from its halcyon liberal days when it was stretched to provide remedies for private racial discrimination in which state and local governments were implicated.[86]

There are two possible arguments for state action here. First, some university official had a role in the decision (MacKinnon being the most likely candidate).[87] Second, the university had delegated to the students decision-making authority over the use of university resources and the expenditure of university funds. A close analogy is a student government's decision not to fund a particular student organization because of disagreement with that group's viewpoint. If a university has given the students authority to make decisions about expenditure of funds or use of school property, and if the decision is even passively approved by university officials, there is an argument for state action.[88]

As noted, the extent to which faculty member MacKinnon influenced the *Journal* students' decision has been a subject of much discussion, with both MacKinnon and the students disclaiming any responsibility on her part.[89] MacKinnon, however, participated in two crucial conversations: first, she conveyed Stoltenberg's complaint, which action she knew or should have known would signify agreement with Stoltenberg;[90] second, she expressed her views on pornography in an academic setting at the hastily called October 31 meeting with the students.[91] For MacKinnon to

85. *See, e.g.*, Ronna Greff Schneider, *State Action—Making Sense Out Of Chaos—An Historical Approach*, 37 U. FLA. L. REV. 737 (1985) (tracing the history of the state action doctrine through the late Burger Court and concluding that concerns for due process and federalism, respectively, have led the Court to expand or constrict the doctrine accordingly).

86. *See, e.g.*, Henry C. Strickland, *The State Action Doctrine and the Rehnquist Court*, 18 HASTINGS CONST. L.Q. 587 (1991) (discussing the viewpoints of Justices Rehnquist, Marshall, and O'Connor regarding the state action doctrine and noting the narrowness of Rehnquist's viewpoint).

87. *Cf.* Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, 1074 (5th Cir. 1976) (affirming dismissal of the suit, in part because "there was no indication that any University official *or faculty member* had anything to do with the rejection of the advertisement") (emphasis added).

88. *See supra* note 80 and accompanying text.

89. *See supra* notes 53-56 and accompanying text; *supra* note 29.

90. *See supra* text accompanying note 20; *supra* text following note 58.

91. *See supra* note 35 and accompanying text.

argue that this was not the equivalent of giving an opinion on the particular matter that was to be decided is difficult to accept. Deny it though she might, MacKinnon's role in this episode was pivotal, and depending on the extent of authority she actually exercised, supports an argument that the university was involved in the students' actions.[92]

As for the delegation argument, I think we would need more facts about the past practice of the university with respect to student-sponsored art exhibits and conferences. I do not know, for example, what, if any, final say the university has over students' expenditure of funds or use of university facilities, or what formal or informal rules may govern breaches of student-initiated contracts. The university's subsequent conduct in making unauthorized copies of the confiscated videotape, however, suggests ratification of the confiscation decision; certainly, it demonstrates official involvement in at least that chapter of the story. As an article in the *Student Press Law Center Report* on the recent epidemic of campus newspaper thefts notes, if a theft by students occurs with indications of "administrative endorsement, the paper might be able to make a claim for First Amendment infringement against the school itself."[93]

But as Carole Vance (who should have been here herself to tell you) has noted, there is an element of unreality about all of this legal argument.[94] It is largely beside the point. True, from the strictly legal point of view, it *may* make a difference how explicitly MacKinnon expressed to the students her already well-known opinions about pornography.[95] From a moral, intellectual, political, and artistic point of

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92. MacKinnon terms this argument "'slimy lawyer shit' that's part of a longtime ACLU 'smear campaign' against her." Mundy, *supra* note 3, at 29 (quoting MacKinnon).

93. *There for the Taking?: College Journalists Do Have Options for Stopping Newspaper Thieves*, SPLC REP., Fall 1993, at 10, 14.

94. *See* Carole Vance, *More Danger, More Pleasure: A Decade After the Barnard Sexuality Conference*, xvi, *in* PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY (Carole S. Vance ed., 1992), *reprinted in* 38 N.Y.L. SCH. L. REV. 289, 297 (1993).

95. *See, e.g.*, Sinn v. Daily Nebraskan, 829 F.2d 662, 666 (8th Cir. 1987):

> Our opinion [finding no state action] should not be read to imply that state action can never be present in the decisions of a student newspaper such as the *Daily Nebraskan*; rather, we [merely reject the argument] that state action is always present in the editorial choices of such a newspaper. *We believe that each case requires a separate inquiry into the underlying facts . . . .*

Id. (emphasis added). *See also* Daniel J. Coyle, Comment, *The First Amendment in Conflict: Advertising Access to State University Student Newspapers*, 24 SANTA CLARA L. REV. 763, 779 (1984) (surveying case law on the analogous subject of when state action will be found in public university newspapers' refusal to accept advertising and concluding that "the determination of the presence or absence of state action rests on the individual circumstances of each case").

view, I think it makes little difference at all. The students were merely practicing what the professor had frequently preached. That they ended up censoring art, mostly by women, and in Veronica Vera's case by a woman telling her own story of sexual adventure and sexual politics in her own voice ("coy" though it sometimes may have been), simply dramatizes the dangers that the censorship mentality poses *in particular* to women and others seeking social change.[96] Legal liability—fitting the facts into one or another of the United States Supreme Court's current doctrinal pigeonholes—is not the important issue here.

What is the issue? In part, as the title of this forum suggests, it is a university's response to censorship by students. And this issue is certainly a timely one, as my earlier reference to the rash of student thefts of newspapers attests.[97] The moral passion and ideological certainty of youth (I remember my own very well) are not necessarily sensitive to the values of tolerance, skepticism, and ambiguity that underlie a system of free expression.

How, then, should the university respond? It is tempting to say: let the students make their own mistakes. Do not treat them like infants. Certainly, do not interfere with their freedoms by imposing on them the heavy hand of *in loco parentis*. This makes sense—to a point. But when students, whether or not acting on behalf of the university, interfere with the free speech rights of others—whether by stealing newspapers, shouting down speakers, or dismantling art shows—the university has a responsibility to stop them.

It also has a responsibility to remedy the wrong that was done. In this case, it seemed at first that the University of Michigan genuinely wanted to do so: to reinstall the exhibit, and to present a fair and balanced symposium on the issues. What changed its mind? Why was there so much delay, so many hostile signals? Why do we now have a symposium on censorship where none of the nation's leading feminist anti-censorship scholars or critics or artists have been invited as speakers?

Certainly, there must have been pressures on the university not to settle. Reinstating the exhibit and paying the artists conveys the clear

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96. The increasing censorship in Canada as a result of a Canadian Supreme Court decision, R. v. Butler, [1992] 1. S.C.R. 452 (Can.) (adopting a MacKinnon-Dworkin view of pornography), drives home the point: works seized have been overwhelmingly, though not entirely, gay and lesbian, and have included JOHN RECHY, CITY OF NIGHT (1963) and, ironically but unsurprisingly, ANDREA DWORKIN, WOMAN HATING (1974). *See* Mary W. Walsh, *Chill Hits Canada's Porn Law*, L.A. TIMES, Sept. 6, 1993, at A1 (describing the rash of seizures following *Butler*, including various soft-core and non-pornographic items such as *Woman Hating*). *See generally* Thelma McCormack, *Censorship in Canada*, 38 N.Y.L. SCH. L. REV. 165 (1993) (tracing the recent state of censorship in Canada following the *Butler* decision).

97. *See supra* note 93 and accompanying text.

message that the censors were in the wrong. Yet the university went forward with the settlement—indeed, seemed eager for it. Was it concerned merely with avoiding litigation? Is the political atmosphere here at the University of Michigan so scornful of free expression that the university, even while desiring to settle and to avoid liability, nevertheless felt compelled to distance itself from the artists and refrain from forthrightly condemning the censorship that occurred?

It is not necessarily surprising that censorship and the sounds of silence should have strong backers, and even prevail, at a major university. In the 1950s, universities imposed loyalty oaths, purged professors accused of being communists or fellow travelers, and even fired employees who simply stood on their constitutional rights and refused to testify about their politics or those of their friends and families before inquisitorial congressional committees.[98] Intellectuality is no proof against the fears, temptations, and emotional satisfactions that drive periods of ideological conformity, with their pressures to scapegoat unpopular or nonmainstream speech. And scapegoating it clearly is. Much as civil rights advocates in the fifties were accused of being communists by those who opposed racial equality,[99] today, at the University of Michigan, those who oppose censorship and advocate women's sexual liberation are accused of being pornographers.

John Stoltenberg dismissed the protests and media coverage of this incident as a "tempest in a teacup."[100] I could not disagree more. The censorship of *Porn'im'age'ry* has profound implications for all of us. Indeed, it is a curious state of affairs when a writer would ever consider

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98. *See generally* ELLEN W. SCHRECKER, NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES 115-25 (1986) (discussing loyalty oaths imposed on faculty members of state universities in the late 1940s and early 1950s); *id.* at 149 (describing the academic establishment's policy of dismissing faculty members who refused to cooperate with anti-communist investigations: "[T]hey scrutinized [the faculty members'] political beliefs and affiliations in order to find a pattern of Communist [behavior]. Taking the Fifth Amendment, it was assumed, was part of that pattern."); *id.* at 172-73 (discussing the experience of Rutgers University associate professor Simon Heimlich, who, when called to appear before the Senate Internal Security Subcommittee in 1952 in spite of his not having been identified as a communist, refused to cooperate with the committee).

99. *See* KENNETH O'REILLY, "RACIAL MATTERS": THE FBI'S SECRET FILE ON BLACK AMERICA, 1960-1972, at 37-44 (1989). During the 1940s and 1950s, the FBI performed surveillance and maintained files of "rumor, gossip, and allegation" on people interested in civil rights. *Id.* at 38. FBI Director, J. Edgar Hoover, reportedly leaked unsubstantiated information to the House Committee on Un-American Activities and the Hearst press. Moreover, under Hoover's direction, the FBI prepared reports on journals such as *The Nation* and *The New Republic* that implicitly suggested "that only communists supported racial justice in America." *Id.* at 39.

100. Johnson, *supra* note 2, at 4E.

censorship to be trivial. Creative and intellectual freedom is the most important tool we have, not only for its own sake but for the causes we care about—including, most importantly, women's liberation.