

Catharine A. MacKinnon: The Rise of a Feminist Censor, 1983-1993

On October 18, 1983, a new leader stepped forward to assume command of a moribund movement to suppress sexually explicit material. Catharine A. MacKinnon, a 37-year-old feminist scholar had been asked by the Minneapolis Zoning Commission to testify on a proposed ordinance to restrict the location of "adult" bookstores and theaters. A graduate of Smith College and Yale Law School, MacKinnon had taught at some of the nation's leading law schools, but she was still searching for a tenured position. The latest in a string of one-year appointments had brought her to the University of Minnesota Law School where her course on "pornography" caught the eye of the zoning commission. As she began to testify, the commissioners may have expected the professor to support their efforts to regulate sexually explicit material. But they were only proposing to restrict access to this material: MacKinnon wanted to ban it. "...I do not admit that pornography has to exist," she told them.¹ Acknowledging that some sexually explicit material is protected by the First Amendment, MacKinnon proposed a strategy for circumventing constitutional guarantees:

I suggest that you consider that pornography, as it subordinates women to men, is a form of discrimination on the basis of sex. You already have an ordinance against sex-based discrimination in this city. You have the jurisdiction to make laws against forms of discrimination.²

In a few short sentences, MacKinnon launched a campaign that would dramatically shift the debate over the suppression of sexually explicit material. By arguing that censorship is a legitimate tool for attaining civil rights, she has made herself the leader of a powerful movement to limit the protection of the First Amendment.

Ten years later, Catharine MacKinnon is no longer an itinerant lecturer but a tenured professor at the University of Michigan Law School. As the author of four books and many articles, she is frequently cited in the media as an expert on sexual harassment, rape and other "women's issues." The U.S. Supreme Court has approved a definition of sexual harassment that reflects her belief that speech can create a hostile environment for women in the workplace. She has been even more influential in Canada where her broad definition of "pornography" has been approved by the Canadian Supreme Court. Considered a champion of women's rights both at home and abroad, MacKinnon has become a bona fide celebrity.

Yet MacKinnon remains committed to using censorship as a means of attaining equality. In fact, over the past 10 years, she has broadened her attack on the First Amendment by arguing that it is not only "pornography" but all "hate speech" that should be restricted. In Only Words, a book published by the Harvard University Press in September 1993, MacKinnon argued that censorship in the United States is exercised not by government but by powerful groups that "own" speech. Our society will not achieve

¹ Catharine A. MacKinnon, "Testimony, Zoning Commission, City of Minneapolis, Oct. 18, 1983

² Ibid

real equality until government uses its power to limit the free speech rights of the powerful and gives these rights to women and minority groups who have been "silenced" by their powerlessness, she says.³ As a result, MacKinnon criticizes a key protection of press freedom, *New York Times v. Sullivan*, as a decision "licensing the dominant to say virtually anything about subordinated groups..."⁴ She calls for a restoration of the doctrine of group defamation, which bans speech that exposes citizens of any race, color, creed or religion to contempt.

MacKinnon's solution is to call for "a new model for freedom of expression" that recognizes the right of women and racial minorities to equality as a limitation on First Amendment rights. These groups should have the right to ban from the schools "academic books purporting to document women's biological inferiority to men or arguing that slavery of Africans should return."⁵ Not only schools but society itself must be rid of discriminatory speech:

Wherever equality is mandated, racial and sexual epithets, vilification, and abuse should be able to be prohibited, unprotected by the First Amendment. The current legal distinction between screaming "go kill that nigger" and advocating the view that African-Americans should be eliminated from parts of the United States needs to be seriously reconsidered, if real equality is ever to be achieved.⁶

Obviously, the power of government to regulate speech will have to be broadened:

The state will have as great a role in providing relief from injury to equality through speech and in giving equal access to speech as it now has in disciplining its power to intervene in that speech that manages to get expressed.⁷

MacKinnon concluded by conjuring a vision of a future where "equality is a fact, not merely a word, [and] words of racial or sexual assault and humiliation will be nonsense syllables." Examples of pornography and hate speech will become curiosities that "reside in a glass case next to the dinosaur skeletons in the Smithsonian," MacKinnon said.⁸

Only Words was met by a wave of harshly critical reviews. In publications all along the ideological spectrum, the critics were nearly unanimous in condemning her proposals. "This professor at the University of Michigan law school...is a leader of the most radical assault on free speech in American history," columnist George Will said.⁹ "Her book begins as a denunciation of pornography and swiftly escalates into an all-out attack on the First Amendment," Michiko Kakutani wrote in *The New York Times*.¹⁰ (See Appendix for a list of reviews of Only Words.)

³ Catharine A. MacKinnon, Only Words, (Cambridge, Mass.: Harvard University Press, 1993), 77-78.

⁴ *Ibid*, 80.

⁵ MacKinnon, Only Words, 107.

⁶ *Ibid*, 108.

⁷ *Ibid*, 109.

⁸ *Ibid*, 109-110.

⁹ *Sacramento Bee*, Oct 30, 1993, B8.

¹⁰ *New York Times*, Oct 29, 1993, C26.

"The law of equality and the law of freedom of speech are on a collision course in this country," MacKinnon observed in Only Words.¹¹ For this, Catharine MacKinnon can claim much of the credit.

The woman who appeared before the Minneapolis Zoning Commission in 1983 was no ivory-tower academic. Catharine MacKinnon had been surrounded by politics all of her life. Her father had been a Republican Congressman from Minnesota and an unsuccessful candidate for Governor before becoming a federal judge. MacKinnon demonstrated her own interest in politics while still a student at Smith. During summer vacations, she immersed herself in practical politics, working as an intern for a Republican Congressman, a research director for a Virginia legislative candidate and a researcher for the Councils of Government. On graduation from Smith in 1964, MacKinnon enrolled as a graduate student in political science at Yale.

At Yale, MacKinnon became involved in radical politics. At the time, most student politics were radical. Opposition to the war in Vietnam was still growing. Only a few months before her arrival in New Haven, the killing of students during a protest at Kent State University touched off student strikes on campuses throughout the country. A new "women's movement" had emerged to resume the struggle for equal rights for women. MacKinnon told the *New York Times Magazine* that she was shaped by this radical ferment:

She traces her intellectual and political roots to this time, when she worked with the Black Panthers, studied martial arts, opposed the Vietnam War and found a focus in the nascent women's movement--from which, she often says, "I learned everything I know."¹²

MacKinnon embraced the women's movement. In 1974, she postponed work on her doctoral dissertation to enter Yale Law School where she resolved to do something about the fact that the law had "nothing whatever to do with the problem of sexual inequality as it's experienced by women."¹³ On graduating from law school, MacKinnon started teaching Yale's first women's studies course and resumed work on her Ph.D. dissertation, which sought to show that feminism could supplant both Marxism and liberalism as a theory of politics.

The early 1970's were heady days for feminists. In the 50 years since women won the vote, there had been little change in their position in society. The majority of women worked in the home, and the majority of those who worked for wages were mired in low-paying jobs. Women who tried to compete for traditionally male jobs faced discrimination. Men held political power and ran the country. Yet, within a few years of the rebirth of the feminist movement in 1967, women began to score significant victories in the battle for equal rights. In 1973, the U.S. Supreme Court upheld a woman's right to an abortion. Hopes were high as feminists launched a campaign for a new Equal Rights Amendment.

Optimism began to fade, however, when the women's movement suffered a number of serious defeats in the late 1970's. Only four years after *Roe v. Wade*, the Supreme Court limited the effect of its decision by ruling that government could not be compelled to pay for the abortions of poor women. The tremendous enthusiasm that had been

¹¹ Ibid, 71.

¹² *New York Times Magazine*, Oct 6, 1991, 31.

¹³ Ibid

unleashed by the women's movement among women who sought a change in their positions had sparked an equally powerful reaction among those who favored the status quo. As conservative groups organized themselves, the fight for the Equal Rights Amendment foundered. To many, it seemed that the women's movement itself was on the verge of dissolution.

As the prospect of equality between men and women seemed to fade, some feminists began to insist on the importance of protecting women from men. Feminist author Ann Snitow observed the change:

In general, there was a shift away from insisting on the power of self-definition...to an emphasis on how women are victimized, how all heterosexual sex is, to some degree, forced sex, how rape and assault are the central facts of women's sexual life and central metaphors for women's situation in general.¹⁴

Where feminists had formerly cited child-rearing practices and economic inequalities as the fundamental causes of sexism, a growing minority of feminists were arguing that violence and rape were the real problems. Inevitably, a hostility toward sexually explicit material began to grow as some feminists became convinced that it was implicated in a rising rape rate. The first feminist protest against a pornographic depiction of women occurred over a billboard in California in 1976. Three years later, Women Against Pornography was formed in New York. The feminist anti-pornography movement had been launched.

The leaders of the feminist anti-pornography movement regarded men as sexually vicious. In 1979, Andrea Dworkin published the book that became the movement's bible, Pornography: Men Possessing Women. Dworkin described herself as a victim of sexual abuse.¹⁵ In Pornography, she argued that the sexual abuse of women is not the exception but the rule: the "male-supremacist ideology" requires men to hurt women. Even consensual "sex," as men defined it, was an abuse. "Sex, a word potentially so inclusive and evocative, is whittled down by the male so that, in fact, it means penile intromission," Dworkin wrote. Consequently, "sex" is not an act of love but an affirmation of male supremacy:

In practice, fucking is an act of possession--simultaneously an act of ownership, taking, force; it is conquering; it expresses in intimacy power over and against, body to body, person to thing.¹⁶

Consequently, there is little to distinguish consensual sex from rape. "Romance...is rape embellished with meaningful looks," Dworkin observed in 1992¹⁷. Dworkin opposed

¹⁴ Ann Snitow, "Retrenchment Versus Transformation: The Politics of the Anti-Pornography Movement," in Varda Burstyn, ed., Women Against Censorship (Vancouver, Canada: Douglas and McIntyre, 1985), 110.

¹⁵ In a letter to the *New York Times Book Review* in 1992, Dworkin said that she had been sexually abused as a child; beaten during her marriage; sexually assaulted by prison doctors and guards following her arrest at a demonstration and further abused after she turned to prostitution to support herself. See *New York Times Book Review*, May 3, 1992, 12.

¹⁶ Andrea Dworkin, Pornography: Men Possessing Women, 2d ed. (New York: New American Library, 1989), 23.

"pornography" because she believed that it reinforced the male supremacist ideology and thus contributed to sexual abuse.

Catharine MacKinnon was strongly influenced by Dworkin's ideas, but she did not immediately endorse the idea of censoring sexually explicit material. The women's movement had always been against censorship. As social critics, feminists had often been the targets of censorship themselves. Margaret Sanger, the founder of the birth control movement, was prosecuted under the Comstock obscenity laws for sending birth control information through the mails. As late as June 1982, MacKinnon believed that censorship was not the right solution. She believed that "pornography" played a role in the oppression of women and that the women's movement should stop accepting money from Playboy. But she insisted that censorship would not enhance the position of women. "Censoring pornography has not delegitimized it," she wrote. "I want to delegitimize it. What would do that is unclear to me at this time."¹⁸ But MacKinnon changed her mind about censorship when she became convinced that pornography was responsible for the failure of the women's movement.

As she later admitted, MacKinnon had been baffled by the failure of women to rally to the cause of feminism. The women's movement was uncovering new evidence every day of the widespread abuse of women by men, but women were failing to respond:

Now why are these basic realities of the subordination of women to men, for example, that only 7.8 percent of women have never been sexually assaulted, not effectively believed...Why don't women believe our own experiences?¹⁹

In the face of all these facts, "the view that basically the sexes are equal in the society remains unchallenged and unchanged," MacKinnon insisted. Why was feminism on the ropes at the very moment when it should be reaping a whirlwind of female anger? MacKinnon finally came up with an answer. "The day I got this was the day I understood its real message, its real coherence: This is equality for us," she said. But what force is strong enough to deceive women so thoroughly? For MacKinnon, the answer was pornography.

MacKinnon became convinced that pornography blinds women to their oppression by making sexual abuse seem normal. It brainwashes them:

In pornography, there it is, in one place, all of the abuses that women had to struggle so long even to begin to articulate, all the unspeakable abuse: the rape, the battery, the sexual harassment, the prostitution, and the sexual abuse of children. Only in pornography it is called something else: sex, sex, sex, sex, and sex, respectively. Pornography sexualizes rape, battery, sexual harassment,

¹⁷ *New York Observer*, Oct 26, 1992, 19.

¹⁸ Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law*, (Cambridge, Mass.: Harvard University Press, 1987), 140.

¹⁹ *Ibid.*, 171. According to MacKinnon, this figure is derived from a survey of 930 San Francisco households. "The figure includes all the forms of rape or other sexual abuse or harassment surveyed, noncontact as well as contact, from gang rape by strangers to obscene phone calls, unwanted sexual advances on the street, unwelcome requests to pose for pornography, and subjection to peeping Toms and sexual exhibitionists (flashers)." *Ibid.*, 232-33.

prostitution, and child sexual abuse; it thereby celebrates, promotes, authorizes and legitimizes them.

As a result, women actually desire sexual subordination. This is not their fault, of course: pornography defines who they are. "Through this process pornography constructs what a woman is as what men want from sex," MacKinnon said. "Men's power over women means that the way men see women defines who women can be," she had observed earlier.²⁰ Therefore, women really have no free will. It is the pornographer who insists that women consent to their degradation:

Forget the realities of women's sexual/economic situation. When women express our free will, we spread our legs for the camera.

MacKinnon had lacked a reason for urging censorship before. Suddenly, it seemed to her that only censorship could free the minds of women.

It was the City of Minneapolis that gave MacKinnon the opportunity to test her theory. Both MacKinnon and Dworkin, who had been teaching the course on "pornography" with her, testified before the zoning commission in October 1983. Testifying first, Dworkin blasted the commission members for compromising with the pornographers. She also made their task harder by suggesting that their definition of "pornography" was too narrow. "...[W]omen do not just encounter this degradation in what you are calling adult bookstores. It's in supermarkets; it's in all kinds of places that we go," Dworkin said.²¹ But the Supreme Court had held that sexually explicit material was protected by the First Amendment unless it was "obscene" according to a three-part test that it had defined in 1973.

MacKinnon offered the politicians a way out of their dilemma. She told them that hearings might be held at which experts would establish how pornography harmed women. Once the harm of pornography was proved, it could be banned as a violation of the civil rights of women. At least one commission member, who was also a member of city council, thought MacKinnon's proposal a stroke of genius. Charlee Hoyt, who would become the sponsor of the MacKinnon-Dworkin ordinance, found the proposal "mind-boggling" and "fantastic."²² Following further conversations with the pair, Hoyt introduced a bill authorizing the city to hire them to draft an ordinance.

MacKinnon and Dworkin needed only five weeks to prepare the proposed ordinance that was submitted to the Minneapolis City Council on November 23. The ordinance authorized any woman to sue the producer or distributor of a pornographic work for "trafficking in pornography" on the grounds that "pornography" is a form of sex discrimination. "Pornography" was defined as "the sexually explicit subordination of women, graphically depicted, whether in pictures or words," that also included one or more of nine elements:

...women...presented dehumanized as sexual objects, things or commodities;...presented as sexual objects who enjoy pain or

²⁰ Ibid, 171-72

²¹ Andrea Dworkin, "Testimony, Zoning Commission, City of Minneapolis, Oct. 18, 1983," 2.

²² Donald A. Downs, The New Politics of Pornography, (Chicago, University of Chicago Press, 1989), 59.

humiliation;...presented as sexual objects who experience sexual pleasure in being raped;...presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; women's body parts are exhibited...such that women are reduced to those parts; women...presented as whores by nature; ...presented being penetrated by objects or animals...presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding bruised or hurt in a context that makes these conditions sexual.²³

The producers and distributors could also be sued for disseminating a work that "directly caused" an assault; or for disseminating a work that contained depictions of someone whose participation had been coerced. Finally, any person who had pornography "forced" on him or her at work, in school or at home could sue the perpetrator and the institution where the act occurred.

The MacKinnon-Dworkin ordinance was approved by the city council on December 30, five weeks after its introduction. But the swiftness of its passage obscures the bitterness of the fight over the bill. With the help of between 100 and 200 active supporters, MacKinnon and Dworkin organized a campaign that forced the bill through council. MacKinnon and Dworkin hand-picked the witnesses at a public hearing into the alleged harmfulness of sexually explicit material. Asked why critics of this view had not been allowed to testify, MacKinnon denied that there was another side:

Saying a body of research is open to interpretation to which it is not open is not professional. It is not objective. It is incompetent. Andrea Dworkin and I did not waste city council's resources with outdated and irrelevant data and investigations.²⁴

When Dworkin did debate the ordinance with a representative of the Minnesota Civil Liberties Union, her supporters booed the opposition.

As the council began consideration of the ordinance, it came under heavy pressure from the activists. Council member Barbara Carlson, a feminist who opposed the ordinance, recalled:

We were lobbied very hard. Charlee allowed women to really take over city hall. You couldn't go to the bathroom without being lobbied. And we were hearing from people in California--movie stars, Rhoda, etc. We were just hysterical with this whole thing.²⁵

"Their behavior toward anyone who dared to have an opposing view was appalling," Carlson said.²⁶ When conventional methods of pressure didn't seem adequate,

²³ For the text of the proposed Minneapolis ordinance, see Andrea Dworkin and Catharine MacKinnon, Pornography and Civil Rights: A New Day for Women's Equality (Minneapolis: Organizing Against Pornography, 1988).

²⁴ *Ibid.*, 89. Despite her concern for economy, MacKinnon and Dworkin would later bill the city for \$23,729 for their services. Their contract had set a maximum of \$5,000. *Minneapolis Star and Tribune*, Feb. 10, 1984, 1.

²⁵ Downs, 86.

²⁶ *Minneapolis Star and Tribune*, Feb 10, 1984, 1.

MacKinnon's supporters resorted to a takeover of the council chamber. Their choice of strong-arm tactics, in part, reflected the closeness of the division on the council. Finally, on December 30, the ordinance was approved 7-6 following a last-minute switch by one member of the council.

However, on January 5, despite heavy pressure, including a vigil outside his office by MacKinnon's supporters, Mayor Donald Fraser vetoed the ordinance. The bill was probably unconstitutional, Fraser said:

The definition of pornography in the ordinance is so broad and so vague as to make it impossible for a bookseller, movie theater operator or museum director to adjust his or her conduct in order to keep from running afoul of the law.²⁷

Fraser's veto prompted criticism from unexpected quarters. As Carlson reported, MacKinnon and Dworkin had been successful in winning endorsements from liberals in Hollywood and beyond. One of those who had been following the controversy was Harvard Law Professor Laurence Tribe, a liberal constitutional scholar. Tribe urged Fraser to approve the ordinance on the grounds that it was not the duty of the executive to consider the constitutionality of laws presented to him for signature. After Fraser rejected the ordinance, Tribe called the veto "an abuse of the fundamental structure of our system of government."²⁸ Fraser admitted to doubts about vetoing the ordinance. But "when in doubt I probably error the side of the First Amendment."²⁹ Later, when the council passed a revised version of the ordinance, he vetoed it again. By then, however, the main battle over the MacKinnon-Dworkin ordinance had shifted south to Indianapolis where the mayor was one of its biggest boosters.

It is not surprising that the city that finally enacted the MacKinnon-Dworkin ordinance was one of the most conservative in the country. While MacKinnon declared that her ordinance would be a major weapon in the battle for sexual equality, it also appealed strongly to conservatives who wished to ban sexually explicit material that was not legally obscene under the relatively narrow definitions of the Supreme Court decision. In Indianapolis, the support for the ordinance came almost entirely from conservatives: it was first brought to the attention of the city council by the Republican mayor, a Presbyterian minister who had been searching for new ways to control sexually explicit material; it was championed on the council by a woman who had been a leader in the fight against the Equal Rights Amendment; and when it appeared that continuing doubts about its constitutionality might block its passage, it was conservative anti-pornography groups, including one led by a former official of the Moral Majority, that put pressure on the council to pass it. Introduced on April 9, the MacKinnon-Dworkin ordinance passed on May 1 with the unanimous support of the 24 Republican members of the council. All five Democrats opposed it.³⁰

MacKinnon would later deny that she had depended on conservatives to pass her ordinance. "Wherever it is introduced, liberals and conservatives vote both for it and

²⁷ *New York Times*, Jan 6, 1984, 14.

²⁸ Downs, 62.

²⁹ *New York Times*, Jan. 6, 1984, 14

³⁰ Lisa Duggan, "Censorship in the Name of Feminism," *Village Voice*, Oct. 16, 1986, 11-12, 16-17, 42.

against it," she claimed.³¹ Yet, in Indianapolis, MacKinnon made no attempt to win liberal support. According to the *Village Voice*, she admitted that she made no contacts with local feminists.³² Perhaps she didn't want to face the anger of women like Sheila Seuss Kennedy, a Republican attorney who had once been publicly assailed for her feminism by the sponsor of the ordinance, Beulah Coughenour. Kennedy was outraged by the ordinance:

As a woman who has been publicly supportive of equal rights for women, I frankly find it offensive when an attempt to regulate expression is cloaked in the rhetoric of feminism. Many supporters of this proposal have been conspicuously indifferent to previous attempts to gain equal rights for women.³³

Not only did MacKinnon accept conservative support, she acquiesced in Coughenour's demand that she play down the "radical" origins of the ordinance. As a result, Dworkin, who dresses in bib overalls as a symbol of her hostility to women's fashions, was not hired as a consultant in Indianapolis. Nor was she called as an expert witness to testify on the ordinance. Only MacKinnon, the well-dressed lawyer, could communicate the right image of respectability. Nevertheless, the passage of the MacKinnon-Dworkin ordinance was hailed by its supporters as a great victory for women's rights.³⁴

The MacKinnon-Dworkin ordinance was challenged as a violation of the First Amendment within minutes of its enactment on May 1. National groups representing booksellers, publishers, librarians and magazine wholesalers and distributors joined several local plaintiffs in filing a court challenge on the grounds that the ordinance would result in the suppression of mainstream books, magazines and movies.³⁵ In their brief, the plaintiffs argued that the terminology of the ordinance was inherently vague. Words like "pornography," "subordination," "graphic," "sexually explicit," "sexual objects," "humiliation," "abasement," "inferior," "conquest," "postures of servility or submission," "women...being penetrated by objects" were subject to different interpretations. The ordinance could be applied to movies like "Dressed to Kill," "Ten," "Star 80," "Body Heat," "Swept Away," "Last Tango in Paris;" books like Witches of Eastwick, The Delta of Venus, Sidney Sheldon's The Other Side of Midnight, Judith Krantz's Scruples, Harold Robbins' Carpetbaggers and any of Ian Fleming's James Bond novels. The American Civil Liberties Union would later argue that the definition of pornography was broad enough to include such classic works of literature as Taming of the Shrew, Othello, Twelfth Night, Tom Jones, The Arabian Nights as well as feminist works by Kate Millet and Susan Brownmiller. It could even be used to suppress works by Andrea Dworkin, the ACLU said.³⁶

³¹ Catharine A. MacKinnon to Editor, *New York Times*, Mar. 11, 1990, VII, 34.

³² Duggan, 11.

³³ *Ibid.*, 15.

³⁴ Downs, 113, 121, 129.

³⁵ The plaintiffs were represented by Michael A. Bamberger, a New York attorney who is the general counsel of The Media Coalition, Inc., an anti-censorship group that includes the trade associations that were plaintiffs in the case. The local counsel was Sheila Seuss Kennedy.

³⁶ Using the Indianapolis definition, Dworkin's 1991 novel *Mercy* was judged "pornographic" by 63 per cent in a survey conducted by a University of Pennsylvania professor. See James Lindgin, "Defining Pornography," *University of Pennsylvania Law Review*, 141, no. 3 (April 1993), 1200, 1215.

In August, U.S. District Court Judge Sarah Evans Barker ruled that the Indianapolis ordinance violated the First Amendment and struck it down. Little had been known about Barker at the time of oral argument because she had only recently been appointed by President Ronald Reagan. *American Booksellers Association v. Hudnut* was her first case. Her opinion balanced sympathy with the goal of aiding women with a deep commitment to the First Amendment. Barker didn't disagree with the Indianapolis City Council's view "that pornography and sex discrimination are harmful, offensive and inimical" or that "some legislative controls are in order."³⁷ But she rejected MacKinnon's argument that "pornography" is not speech and dismissed the contention that most women were incapable of protecting themselves from either participating in or being victimized by pornography. As defined by the ordinance, "pornography" was clearly speech, and therefore protected by the First Amendment. For that reason alone, the ordinance must fall. However, Barker added another:

It ought to be remembered by defendants and all others who would support such a legislative initiative that, in terms of altering sociological patterns, much as alteration may be necessary and desirable, free speech, rather than being the enemy, is a long -tested and worthy ally. To deny free speech in order to engineer social change in the name of accomplishing a greater good for one sector of our society erodes the freedoms of all and, as such, threatens tyranny and injustice for those subjected to the rule of law.³⁸

In the months ahead, as Indianapolis appealed Barker's decision, many prominent feminists would announce their opposition to the Indianapolis ordinance on very similar grounds. Nobody needed the First Amendment more than feminists, they argued.

By the time of the enactment of the Indianapolis ordinance, feminists around the country had become aware of the MacKinnon's challenge to the feminist tradition of opposing censorship. Some began to speak out against the ordinance. Nan Hunter, a New York lawyer, argued that it would prevent women as well as men from expressing themselves about sexuality. It ran counter to the growth of women's freedom:

Feminists ought to be arguing just the opposite--that sexuality and representations of sex present issues which ought to be in the realm of public discussion and debate. It is especially troubling that, for all the talk of rape and torture, the ordinance would actually prohibit images of some consensual sexual acts as well.³⁹

Susie Bright, the owner of a women's vibrator store in San Francisco, objected to MacKinnon's assumption that women were not interested in sex, too. "We're not just a small group of women being manipulated by dirty old men," she said.⁴⁰ Feminists who opposed MacKinnon's views about sex and free speech grew so concerned about the danger they posed to the women's movement that they began to organize groups to

³⁷ *American Booksellers Assn. v. Hudnut*, 598 F.Supp. 1316 (1984), 1327.

³⁸ *Ibid.*, 1337.

³⁹ Duggan, 42.

⁴⁰ *Ibid.*

oppose the anti-pornography feminists. In New York, writers and lawyers formed the core of the Feminist Anti-Censorship Taskforce. In Berkeley, a "pro-sex" coalition held a counter-demonstration to protest feminist anti-pornography activities. The split in the feminist community was so deep that National Organization for Women, while agreeing with MacKinnon's views about the harmfulness of pornography, failed to endorse the Indianapolis ordinance.

In April 1985, the anti-censorship feminists explained their opposition to the Indianapolis ordinance in an amicus brief submitted to the Seventh Circuit Court of Appeals, which was then considering the appeal from Barker's decision. The brief was signed by prominent feminists of both sexes, including 63 women writers, lawyers and activists from both the liberal and radical wings of the feminist movement. Betty Friedan, the founder of NOW, and the writers Rita Mae Brown, Kate Millet and Adrienne Rich were among those who joined the brief. The FACT brief, which was written by Nan Hunter and Sylvia Law, challenged the contention at the heart of the Indianapolis ordinance--that "pornography is central in creating and maintaining sex as a basis for discrimination." A review of the literature on the sources of sexual inequality revealed that there were many, more significant forces perpetuating sexism:

The factors they find most significant include: the sex segregated wage labor market; systematic devaluation of the work traditionally done by women; sexist concepts of marriage and the family; inadequate income maintenance programs for women unable to find wage work; lack of day care services and the premise that child care is exclusively female responsibility; barriers to reproductive freedom; and discrimination and segregation in education and athletics.⁴¹

Misogynistic images of women play a role in their oppression but not the central role. Pornography can't be blamed for creating the English common law tradition of treating women as chattel property.

In short, the claim that "pornography is central in creating and maintaining sex as a basis of discrimination" is flatly inconsistent with the conclusions of most of those who have studied the question.⁴²

But the Indianapolis ordinance was not just wrong about the causes of sexism, it was itself sexist.

The FACT brief charged that the ordinance perpetuated a reactionary view of men and women. Despite MacKinnon's claim to believe that gender was not biological but social, the Indianapolis ordinance was based on the view that male sexuality was fundamentally aggressive. The FACT brief disagreed:

Men are not attack dogs, but morally responsible human beings. The ordinance reinforces a destructive sexist stereotype of men as irresponsible beasts, with

⁴¹ Nan D. Hunter and Sylvia A. Law, Brief Amici Curiae of Feminist Anti-Censorship Taskforce, 35-36. The FACT brief was published in 21 U. Mich. J.L. Ref. 69 (1987-88).

⁴² Ibid., 36.

"natural physiological responses" which can be triggered by sexually explicit images of women, and for which the men cannot be held accountable.⁴³

Women did not come off much better, since "the ordinance also reinforces sexist images of women as incapable of consent."⁴⁴ Consequently, the ordinance was unconstitutional not only because it violated the First Amendment but also because "the gender-based classification embodied in the ordinance...assumes and perpetuates classic sexist concepts of separate gender-defined roles..."⁴⁵ Far from ending sexism, the Indianapolis ordinance would perpetuate it, the FACT brief argued.

A three-judge panel of the Seventh Circuit Court of Appeals unanimously upheld Barker's decision in August 1985. Writing for the Court, Judge Frank Easterbrook said it was unnecessary to address any of the arguments made for the ordinance. Because it aimed to suppress a particular type of speech, the ordinance was content specific and therefore violated the First Amendment:

We do not try to balance the arguments for and against an ordinance such as this. The ordinance discriminates on the ground of the content of speech. Speech treating women in the approved way--in sexual encounters 'premised on equality'...--is lawful no matter how sexually explicit. Speech treating women in the disapproved way--as submissive in matters sexual or as enjoying humiliation—is unlawful no matter how significant the literary, artistic, or political qualities of the work taken as a whole.⁴⁶

Easterbrook also criticized the premise of the legislation--that "harmful" speech should be suppressed. He agreed that speech could be harmful-- "a belief may be pernicious--the beliefs of Nazis led to the death of millions, those of the Klan to the repression of millions."⁴⁷ Indeed, the Court agreed that "[d]epictions of subordination tend to perpetuate subordination."⁴⁸ But the harm that would result from censorship was greater than the harm that could be done by speech, Easterbrook said:

Racial bigotry, anti-semitism, violence on television, reporters' biases--these and many more influence the culture and shape our socialization. None is directly answerable by more speech, unless that speech too finds its place in popular culture. Yet all is protected speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.⁴⁹

⁴³ Ibid., 39.

⁴⁴ Ibid., 40.

⁴⁵ Ibid., 47.

⁴⁶ *American Booksellers Assn. v. Hudnut*, 771 F.2d 323 (1985), 325.

⁴⁷ Ibid., 328.

⁴⁸ Ibid., 329.

⁴⁹ Ibid., 330.

What the Indianapolis ordinance did was to take power away from people and give it to government, creating the very thing the Constitution had been adopted to avoid--arbitrary and tyrannical rule.

A year later, the controversy over the Indianapolis ordinance appeared to end when the U.S. Supreme Court summarily affirmed the Seventh Circuit decision. MacKinnon's chances of finding another city to adopt the ordinance seemed slim. Not only had the City of Indianapolis lost the case, it had also been ordered to pay the plaintiffs over \$100,000 to reimburse them for the cost of bringing the suit. Together with the city's expenses, this brought the cost of the case to over \$200,000. But, far from ending, the debate over the alleged harmfulness of sexually explicit material was only beginning in 1986.

MacKinnon was more determined than ever to pursue the fight. The Indianapolis case had given her a national reputation as a militant advocate of women's rights, and she was eager to convert the women's movement to her views. Her first task was to discredit her feminist critics. In a speech to the National Conference on Women and the Law before the Seventh Circuit decision in 1985, MacKinnon charged that her ordinance was being distorted by her feminist opponents. "It is my view that you are being largely lied to," she said. "I want you to hear the truth straight, just one time."⁵⁰ MacKinnon denied that under her ordinance all sexually explicit material could be suppressed. The ordinance requires that the material be sexually subordinating and include depictions of specified, subordinating acts, she said. But her critics had misrepresented the definition:

Why do women lawyers seem unable to comprehend that all these elements must be there? Why do they distort the law so ludicrously? Can't they get it right and still oppose it?⁵¹

The first woman lawyer to misrepresent the ordinance had been Judge Barker, but Barker was "not a feminist," she said.⁵² Her strongest feelings were reserved for those critics who called themselves feminists:

I really want you to stop your lies and misrepresentations of our position. I want you to do something about your thundering ignorance about the way women are treated. I want you to remember your own lives. I also really want you on our side. But, failing that, I want you to stop claiming that your liberalism, with its elitism, and your Freudianism, with its sexualized misogyny, has anything in common with feminism.⁵³

She singled FACT out by name. "The Black movement has Uncle Toms and Oreos cookies. The labor movement has scabs. The women's movement has FACT," MacKinnon said.⁵⁴

⁵⁰ MacKinnon, Feminism Unmodified, 199.

⁵¹ *Ibid.*, 201.

⁵² *Ibid.*, 203.

⁵³ *Ibid.*, 205.

⁵⁴ Catharine A. MacKinnon, "Liberalism and the Death of Feminism," J. Raymond and D. Leibholdt, eds., *The Sexual Liberals and the Attack on Feminism*, (Tarrytown, N.Y.: Pergamon Press, 1990), 12.

But it was MacKinnon who was guilty of misrepresentation. Following the Supreme Court's decision, she portrayed her ordinance as targeted narrowly on violent pornography. In March 1986, she told the Conference on Women and the Law in Chicago that she had specifically exempted non-violent pornography from one part of her ordinance:

We were so careful that practices whose abusiveness some people publicly question--for example, submission, servility, and display--are not covered by the trafficking provision. So we're talking rape, torture, pain, humiliation: we're talking violence against women turned into sex.⁵⁵

This exemption mitigated somewhat the chilling effect of her ordinance by exempting the publishers and distributors of magazines like *Playboy* and *Penthouse* from civil suits for merely selling the material. (They could still be sued if a model claimed to have been coerced into appearing in a magazine; if it "caused" a sexual crime or was "forced" on someone.) What MacKinnon didn't tell the conference was that she had originally opposed such an exemption. Under both the Minneapolis ordinance and the original ordinance passed by the Indianapolis City Council, a bookseller could be sued for trafficking in works depicting submission, servility and display, including *Playboy* and *Penthouse*.⁵⁶ The so-called *Playboy* exemption was forced on MacKinnon during negotiations over changes that were designed to make the Indianapolis ordinance less vulnerable to challenge after the American Booksellers Association and others filed their lawsuit. In fact, during those negotiations, MacKinnon was pushing to broaden the definition of pornography. She won her fight when she agreed to accept the trafficking exemption.⁵⁷ For public relations purposes, however, MacKinnon sought to play down the impact of her ordinance on non-violent material.

By pretending to focus on violent pornography, MacKinnon was able to present her attack on the First Amendment as less serious than it was. At the same time, it permitted her to identify herself with the American struggle for equal rights:

In serious movements for human freedom, speech is serious, both the attempt to get some for those who do not have any and the recognition that the so-called speech of the other side is a form of the practice of the other side. In union struggles, yellow-dog presses are attacked. Abolitionists attacked slave presses. The monarchists press was not tolerated by the revolutionaries who founded this country.⁵⁸

The Supreme Court decision in the Indianapolis case was "a fairly unprecedented display of contempt," MacKinnon said. But it was not entirely unprecedented. In the case of *Dred Scott*, the Supreme Court had decided that a slave was not a man. The two cases had a lot in common, MacKinnon claimed:

⁵⁵ Ibid., Feminism Unmodified, 210.

⁵⁶ MacKinnon has always believed that *Playboy* is pornography. See Feminism Unmodified, 137; *Only Words*, 15.

⁵⁷ Downs, 134.

⁵⁸ MacKinnon, Feminism Unmodified, 213.

The Indianapolis case is the Dred Scott of the women's movement. The Supreme Court told Dred Scott, to the Constitution you are property. It told women, to the Constitution, you are speech. The struggle against pornography is an abolitionist struggle to establish that just as buying and selling human beings never was anyone's property right, buying and selling women and children is no one's civil liberty.⁵⁹

The implication was clear. The Supreme Court's decision in the Indianapolis case was worthy of no more respect than its decision in the former case. One day, the country would realize that the First Amendment does not protect exploiters of women.

But MacKinnon had to face the fact that the attacks on her ordinance had largely discredited it among liberals. Even before her speech, she had seen her ordinance go down to defeat a third time. In November 1985, without waiting for the Supreme Court to render its verdict, the voters of Cambridge, Massachusetts, decisively rejected the MacKinnon ordinance in a referendum. The vote was 13,031 to 9,419. MacKinnon tried to put a brave face on the results. "They won but not by much," she insisted. "I think that's important for a powerless group. We came very close and got a lot of votes." Yet she could not prevent some bitterness from creeping into her voice. "This vote means the rights of pimps are still more important than the rights of women," MacKinnon said.⁶⁰ But just when things seemed bleakest, Ronald Reagan came to MacKinnon's rescue.

From its inception, the Reagan administration had been under pressure from conservative anti-pornography groups to appoint a commission that would repair the damage done by President Lyndon Johnson's Commission on Obscenity and Pornography. In 1970, this commission had concluded a two-year, \$2 million investigation into the alleged harmfulness of sexually explicit material by calling for the repeal of all laws banning the sale of sexual material to adults. Reagan finally agreed to appoint a new commission in 1985, but from the beginning the Attorney General's Commission on Pornography suffered from the perception that its findings were a foregone conclusion. Although the commission included a psychologist from Columbia University and a representative of the publishing industry, it was stacked with conservatives. (Its chairman was a former prosecutor who had made his mark prosecuting adult bookstores.) The commission was given \$400,000 and ordered to report its findings in one year. It had little choice but to confine its fact-finding to a series of public hearings. Not surprisingly, the Meese Commission, as it came to be called, was greeted with considerable skepticism by the press.

Catharine MacKinnon and the Meese Commission needed each other. The Meese Commission needed testimony about the harmfulness of pornography from people who were not conservative. At the Chicago hearing, the feminist attorney hit the spot. "Biting off her words as if they were bottlecaps," MacKinnon turned in her usual "flashy rhetorical display," the *Chicago Tribune* observed.⁶¹ MacKinnon, in turn, was looking for support for her ordinance. Both objectives were achieved. When the Meese Commission's final report was issued in July 1986, it included a recommendation that the

⁵⁹ Ibid.

⁶⁰ *United Press International*, Nov. 11, 1985.

⁶¹ *Chicago Tribune*, July 31, 1985, "Perspective," 15.

state legislatures consider the MacKinnon approach. (The report failed to note that the Indianapolis ordinance had been rejected by the Supreme Court in February.) MacKinnon hailed the commission's work. "Today could be a turning point in women's rights," she said.⁶²

MacKinnon's efforts on behalf of the Meese Commission went beyond praise of its general aims to a defense of its most controversial action. In February 1986, the commission sent a letter to 23 leading corporations, including CBS, Time, Ramada Inns, RCA, Coca-Cola, 7-Eleven, Rite Aid, Dart Drug Stores and National Video, asking them to respond to a charge made during the Los Angeles hearing that they were involved in "pornography distribution." The charge had been made by the Rev. Donald E. Wildmon, a Methodist minister from Tupelo, Mississippi, who directs the American Family Association, a conservative anti-pornography group. Without identifying the source of the charge, the commission letter informed the companies that unless they responded to Wildmon's allegation they would be identified as "distributors" of "pornography" in its final report. Several lawsuits were filed charging the commission with attempting to establish a blacklist to coerce the corporations to withdraw First Amendment-protected magazines like Playboy and Penthouse. A federal judge ordered the commission to retract the letter and barred it from issuing any lists of retailers.⁶³

MacKinnon approved of the commission's letter. In writing about the case later, she scoffed at the court's concern for the First Amendment rights of the plaintiffs:

Distributors are so intimidated by being asked, in words, if they sell pornography that they might choose not to sell it, but pornography itself intimidates no one, invades no protected rights, because it is only words.⁶⁴

The commission had done nothing wrong, MacKinnon insisted. It was *Playboy* that was trying to cover up embarrassing testimony. "*Playboy* and others sued the Attorney General's Commission on Pornography to keep the commission from publishing information testified to before the commission," she said.⁶⁵ The only purpose of the letter was to ask "the retailer if they did, indeed, sell pornography and if so why." It is significant that MacKinnon did not mention that it was Wildmon who made the original accusation. While she shared many of the same goals as the conservative anti-pornography groups, MacKinnon could not afford to be linked with them openly. Nor would Wildmon have wished to acknowledge MacKinnon as an ally. Nevertheless, MacKinnon played a critical part in helping conservative censors like Wildmon reshape their arguments for a new age.

The conservative anti-pornography groups were hopelessly old-fashioned as they entered the 1980's. They were primarily religious groups whose attacks on sexually explicit material were a defense of traditional values--virginity, monogamy and the patriarchal family. Even the names of these groups betrayed their concern for morality. Charles Keating had founded the Citizens for Decent Literature in Cincinnati in

⁶² *Time*, July 21, 1986, 21.

⁶³ Christopher M. Finan, "The Rev. Donald E. Wildmon's Crusade for Censorship, 1977-1989," in George Beahm, ed., War of Words: The Censorship Debate, (Kansas City: Andrews and McMeel, 1993), 264-5.

⁶⁴ MacKinnon, Feminism Unmodified, 224.

⁶⁵ *Ibid.*, 306.

1957. Wildmon originally named his group the National Federation for Decency. In a world transformed by the sexual revolution, people rightly suspected that what these groups opposed was not pornography but sexual freedom. They were the new prohibitionists intent on forcing people to observe their personal moral code. Clearly, the anti-pornography groups needed to change their pitch. It was here that MacKinnon played a critical role.

MacKinnon gave the anti-pornography movement a new vocabulary. After the Indianapolis battle, no one who advocated censorship assailed the immorality of sexually explicit material. They talked about the "harm" of pornography, particularly its effect on women and children. Pornography was transformed from a sin to a sociological problem. The change in the rhetoric of the anti-pornography movement was already clear in the Meese Commission report. While the civil rights approach was only one of 92 recommendations, the Meese Commission had thoroughly assimilated MacKinnon's language, condemning "non-violent materials depicting degradation, domination, subordination or humiliation."⁶⁶

The conservative anti-pornography groups scrambled to exploit the new argument for censorship. "No longer can the media or anyone else say that those opposing pornography are "extreme right-wing fundamentalists," the Rev. Jerry Kirk, executive director of the National Coalition Against Pornography, wrote in August 1986. The fight had been "mainstreamed":

Pornography is not a conservative or liberal issue. It is an issue for everyone who cares about the well-being of children, women, men and families. For some, it is a religious issue. For others, it is a moral issue. But for everyone, pornography is a public safety issue: the safety of our children from sexual abuse and molestation, our women from rape and degradation and our families from disease and disintegration.⁶⁷

Wildmon sought to appeal to this broadened constituency in 1988 when he changed the name of his organization from the National Federation for Decency to the American Family Association. By 1992, the budget of the AFA had grown to \$7 million.

With the fig leaf provided by Catharine MacKinnon, the conservative anti-pornography movement proceeded to wreak havoc with First Amendment rights over the next six years. The first to fall victim was the Southland Corporation, the owner of the 7-Eleven convenience store chain. Wildmon had been trying to get Southland to stop selling *Playboy* and *Penthouse* since 1984. When the Meese Commission threatened to identify Southland as a distributor of pornography, the corporation finally surrendered, ordering its 4,500 7-Eleven stores to pull the magazines and recommending that 3,600 franchise stores do the same. Southland said it was responding to evidence provided by the Meese Commission that showed a link between "adult magazines and crime, violence and child abuse."⁶⁸ Within months, six of the chains that had received the same letter as

⁶⁶ Attorney General's Commission on Pornography, Final Report, (Washington, D.C.: Government Printing Office, 1986), 1:329.

⁶⁷ Jerry Kirk to C. Fred Fetterolf, Aug. 13, 1986.

⁶⁸ *UPI*, Apr. 11, 1986. The only magazines carried by 7-Eleven were *Playboy*, *Penthouse*, and *Forum* magazines. But *Playboy* and *Penthouse* were explicitly excluded from the magazines examined by the

Southland and 34 smaller chains also decided to pull *Playboy* and *Penthouse*. By August 1986, 17,000 stores no longer carried the magazines.⁶⁹ The removal of *Playboy*, *Penthouse* and other men's "sophisticate" magazines from stores across the country had a domino effect, causing the removal of other controversial magazines. Magazines about rock and roll music, several teen magazines, the swimsuit issue of *Sports Illustrated*, and issues of *American Photographer* and *Cosmopolitan* were removed from sale in some parts of the country in the panic set off by the Meese Commission letter.

The impact of the Meese Commission grew year by year. The number of obscenity bills introduced around the country jumped dramatically as state legislatures responded to the commission's recommendations that they increase the penalties for selling obscene material: the commission proposed that a second offense should be a felony, and that obscenity offenses should be punishable under racketeering laws, so that the assets of the business could be seized as punishment. Over half of the major obscenity bills considered in 1987 were inspired by the Meese Commission report.⁷⁰

Meanwhile, the Reagan administration carried through on its promise of stiffer enforcement of the federal obscenity laws. Following another Meese Commission recommendation, a National Obscenity Enforcement Unit was created in the Justice Department. By 1990, its budget would grow to \$1.7 million and its nine attorneys could claim credit for having forced a number of distributors of sexually explicit material out of business. The NOEU's approach involved threats to bring simultaneous multiple prosecutions for violating the obscenity laws unless the distributor agreed to stop distributing all sexually explicit material, including *Penthouse*, *Playboy* and *Joy of Sex*.⁷¹ Conservative anti-censorship groups flowered.⁷² The censors had acquired powerful new legal weapons in their battle against sexually explicit material. But their most important asset was a new respectability. For this, they could thank MacKinnon and her followers.

Yet MacKinnon did not immediately benefit from her new prominence. Although she had taught at some of the country's most prominent universities, she complained that the radicalness of her views had prevented her from securing a permanent job. In 1982, MacKinnon said her career was an example of how difficult it is for a radical feminist to "make it" in academia:

I am told, see, a feminist can teach at Harvard, Yale and Stanford Law Schools. How can academia, legal education, law be antiwoman? This ignores the precariousness and threat of our situations as well as what we have been through...My work is considered not law by lawyers, not scholarship by academics, too practical by intellectuals, too intellectual by practitioners, and neither politics nor science by political scientists.⁷³

Meese Commission. "Our study did not address magazines like *Playboy* and *Penthouse*," Commission Chairman Henry Hudson said on "Meet the Press," on July 13, 1986.

⁶⁹ *Los Angeles Times*, Aug. 25, 1986, 1.

⁷⁰ Christopher M. Finan, "Blessing Censorship: The Impact of the Attorney General's Commission on Pornography," *Newsletter on Intellectual Freedom* 37, no. 1 (January 1988), 24.

⁷¹ ACLU Arts Censorship Project, *Above the Law: The Justice Department's War Against the First Amendment*, (December 1991), 5-10.

⁷² Finan, "Blessing Censorship," 25.

⁷³ MacKinnon, *Feminism Unmodified*, 132.

MacKinnon might also have noted that she had only graduated from law school five years earlier (she would not receive her Ph.D. until 1987) and that she had joined the labor force at a time when tenured academic jobs were in extremely short supply. But she insisted on believing that her advance was being blocked by political opposition. According to a profile of MacKinnon that appeared in the *New York Times Magazine*, it is significant that "in 1986, the year the Supreme Court ratified MacKinnon's first contribution to American law, she had no paying job."⁷⁴ (It was in 1986 that the Supreme Court endorsed the view advanced by MacKinnon and others that sexual harassment was a form of sex discrimination.) The *Times* did not note that 1986 was also the year that the Supreme Court rejected MacKinnon's ordinance as an attack on First Amendment rights.

Although it was an exaggeration, there was some truth to MacKinnon's charge that opposition to her ideas was hurting her career. This was clearly demonstrated when students at Yale Law School, her alma mater, petitioned for her appointment to a one-year position for the 1988-89 academic year. Some members of the faculty opposed the appointment on the grounds that MacKinnon was not sufficiently scholarly. There was also fear that she would polarize the law school. One professor warned that MacKinnon would make Yale "a theater of ideological warfare, as a well as an insufficiently supervised playground of the mind in which we lose our capacity to resist the charms of superficial and passing intellectual fads."⁷⁵ The appointment, which required the endorsement of two thirds of the faculty, was approved by the margin of a single vote.

If MacKinnon's views held her back, however, they did not hold her back for long. While they might not accord with the views of all faculty members, they were consistent with a growing intolerance for free speech on the nation's campuses. In the late 1980's, there was an upsurge in racial conflict at colleges and universities around the country. Led by the University of Michigan in 1988, many institutions adopted speech codes that punished expressions of racism, sexism and other ideas that might interfere with the education of minority students. At Michigan, the speech code was used to punish a graduate student in social work who expressed the view in class that homosexuality is a disease. The Michigan code was struck down in 1989 on the grounds that it punished speech that was protected by the First Amendment. However, the decision did not slow efforts to devise a speech code that could withstand constitutional scrutiny. "I can't recall a time when the right-wing philosophy that certain words and ideas must be curbed for the greater good of the polity has taken hold of so many students on the left," columnist Nat Hentoff wrote in April 1990.⁷⁶ What was even more remarkable was that many mainstream institutions supported the codes. In October, Hentoff criticized the *New York Times*, the Association of American University Professors and the American Council on Education for playing down the threat posed by speech codes.⁷⁷ Even the American Civil Liberties Union was split over what position to take. Finally, in June 1992, the Supreme Court appeared to reject limits on "hate speech" in its decision in *RAV v. St. Paul*.

⁷⁴ *New York Times*, Oct. 4, 1991, 52. According to a copy of MacKinnon's February 1993 resume, she was a visiting scholar at the Institute for Research on Women and Gender, Stanford University, from 1986 to 1988.

⁷⁵ *National Law Journal*, Feb. 15, 1988, 3.

⁷⁶ *Village Voice*, Apr. 24, 1990, 22.

⁷⁷ *Ibid.*, Oct. 22, 1991, 22.

MacKinnon's career flourished in this atmosphere. Her views on pornography made it natural that she should be invited to attend a conference on hate speech that was held at Hofstra University in 1988. MacKinnon's place on the cutting edge of the hate speech movement may also explain why it was the University of Michigan that finally offered her tenure in 1989. Certainly, it was not because MacKinnon had changed her views or softened the manner in which she expressed them. In her farewell address at Yale, delivered at commencement at the request of students, MacKinnon reminded the audience of the ubiquitousness of sexual abuse. Some of the proud mothers in the audience were sitting next to men who had battered them, MacKinnon said. Some of the well-dressed fathers had once sexually abused the women who were now graduating, she added.⁷⁸ The unfairness of her generalization did not diminish the enthusiasm of her supporters. They led the audience in a standing ovation for their departing heroine. Meanwhile, the University of Michigan was being introduced to MacKinnon by an interview in the student newspaper in which she declared that it would be "actionable" for a professor to require students to read works by the Marquis de Sade.⁷⁹

Despite her recent success, MacKinnon continued to insist that she and her supporters were the objects of persecution. In January 1990, she responded to a *New York Times* review of Donald Downs' book, The New Politics of Pornography, which asserted that in passing the Indianapolis ordinance MacKinnon had worked closely with conservatives who were hostile to women's rights. Downs' book was just another attempt to discredit her by saying that she was "in bed" with the Right, MacKinnon said. MacKinnon did not deny working with conservatives. She had worked with anyone who would support her ordinance, she acknowledged. But she was eager to expose what she described as a campaign to portray her as an instrument of the conservatives. This charge had originated in a \$1 million public relations campaign undertaken by the Media Coalition, MacKinnon charged.⁸⁰ She renewed her complaint that she and her supporters were being persecuted. The opponents of pornography were still being "libeled, fired, evicted..." she said. MacKinnon insisted that Dworkin, who had published four books since 1984, had been "silenced."⁸¹

Actually, MacKinnon and her ideas were gaining popularity every day. MacKinnon and other feminists had long argued that sexual harassment on the job should be recognized as a form of employment discrimination. MacKinnon published a pioneering book on the subject in 1979. In 1986, she was co-counsel in Meritor Savings Bank, F.S.B. v. Vinson, the case that established that freedom from sexual harassment was a civil right. While the Supreme Court decision in this case clearly advanced women's rights, the new standard for determining sexual harassment contained a potential threat to the First Amendment. The Court had upheld the view that harassing speech could

⁷⁸ *National Law Journal*, July 17, 1989, 4.

⁷⁹ *Ibid.*

⁸⁰ *New York Times Book Review*, March 11, 1990, 34. MacKinnon's charge was based on a letter by the public relations firm of Gray & Co. that proposed a campaign to rebut the Meese Commission report. The proposal, which had been made at the request of several members of the Media Coalition, was not implemented. While a new anti-censorship group--Americans for Constitutional Freedom--was founded by members of Media Coalition at this time, it did not criticize MacKinnon. ACF merged with Media Coalition in February 1990. For a description of the Gray & Co. letter see *Philadelphia Inquirer*, July 20, 1986, 20A.

⁸¹ *Times Book Review*, March 11, 1990, 34.

contribute to a "hostile" environment for women in the workplace. What would happen if a court found that words alone could constitute sexual harassment? In February 1991, a federal court in Florida ruled that the presence of sexually explicit magazines, calendars featuring female nudity and "sexually demeaning remarks and jokes" by male coworkers at the Jacksonville Shipyards constituted sexual harassment, even though the plaintiff had never been physically abused or propositioned for sex. In November, the *New Republic* warned:

Because the legal definition includes any unwanted verbal conduct that contributes to an "intimidating, hostile, or offensive working environment," it may lead to an outpouring of charges based less upon legitimate claims of harm than upon an increasingly powerful impulse to censor speech merely because it is offensive.⁸²

This prophecy was soon fulfilled.

In the following month, the American Family Association Legal Center agreed to represent Dolores Stanley, the manager of a Dairy Mart convenience store in Toronto, Ohio, who defied company policy by refusing to sell *Playboy*, *Penthouse*, and magazines with sexual content in her store. Stanley sued Dairy Mart, claiming that to force a woman to sell sexually explicit magazines constituted sexual discrimination and harassment.⁸³ If she prevails, thousands of stores throughout the country would be forced to discontinue the sale of books, magazines, videos and recordings that are protected by the First Amendment out of a fear that a female employee may sue them. Canada has also seen efforts to extend the civil rights laws as a way of suppressing sexually explicit material. In April 1993, the Ontario Human Rights Commission ordered an investigation into complaints that the sale of men's magazines in convenience stores creates a hostile environment for female shoppers under Canadian civil rights law.⁸⁴

Congress also responded to the MacKinnon approach. In 1984, Pennsylvania Senator Arlen Specter drew the substance of his proposed Pornography Victims Protection Act directly from the Indianapolis ordinance. It authorized a woman who was "coerced" into appearing in sexually explicit material to sue the producer and distributors of the material. While this bill never advanced, a second bill inspired by the MacKinnon approach, the Pornography Victims Compensation Act (S. 1521), became a major issue in Congress in 1991. S. 1521 was introduced by Senator Mitch McConnell, a conservative Republican from Kentucky. It authorized the victim of sexual crimes to sue the producer and distributors of sexually explicit material that allegedly "caused" the attack. While the original version of the bill targeted all sexually explicit material, including non-obscene works, the bill was soon amended to apply strictly to legally obscene material and child pornography. Nevertheless, producers and distributors remained concerned by the bill's potential chilling effect on non-obscene material. Despite spirited opposition, the bill was approved by the Senate Judiciary Committee, 7-6, with two conservative Democrats joining the Republicans to form the majority. However, the bill did not reach the Senate floor for a vote before Congress adjourned.

⁸² *The New Republic*, Nov. 4, 1991, 7.

⁸³ *Hartford Courant*, Jan. 23, 1992, 29.

⁸⁴ *Toronto Sun*, April 18, 1993, 1.

Despite her far-reaching impact on the debate over censorship, MacKinnon remained largely unknown to the general public until late 1991. On October 6, the *New York Times Magazine* made MacKinnon the subject of a laudatory cover story. The very next day, Anita Hill announced that she was willing to testify that Supreme Court nominee Clarence Thomas had sexually harassed her when they worked together. During the ensuing controversy, MacKinnon was sought out as an expert on sexual harassment. She appeared on "Donahue," NBC's "Today," ABC's "Nightline," PBS' "MacNeil-Lehrer News Hour" and worked as an NBC commentator during the three days of hearings.

When she could, MacKinnon used this opportunity to press the case against sexually explicit material. She told the Gannett News Service that Thomas' alleged references to pornography during conversations with Hill were common in harassment cases:

It's extremely common for women to be sexually harassed through pornography. Sometimes it's explicitly posted as part of the working environment, sometimes it's pulled out of drawers and referred to while (a woman is) present, and sometimes (a woman) is confronted with it in person, in his own mouth. The only thing unusual about these (Thomas) allegations is that we have heard about them.⁸⁵

She was frustrated that the Democratic members of the Judiciary Committee had failed to ask Thomas about his alleged use of pornography. She also blamed pornography for the fact that some people didn't believe Hill:

This is a country that's saturated with pornography. What you're doing with a country that's saturated with pornography is you are creating a population that will not believe Anita Hill....[You] create the belief in people that women lie about sex...⁸⁶

MacKinnon's unusual statements did not detract from her new celebrity. In the wake of the Thomas hearings, the Yale University Press ordered another printing on MacKinnon's book on sexual harassment. Her fame was established beyond cavil by a report that actress Faye Dunaway had sat in on one of her classes. "Dunaway is interested in portraying law professor Catharine MacKinnon in a movie about sexual harassment," *Time* reported.⁸⁷

After the Thomas hearings, MacKinnon moved from one triumph to the next. Before the end of the 1991, she was back in demand as a commentator on the rape trial of William Kennedy Smith, a nephew of Senator Edward Kennedy. Smith's acquittal gave MacKinnon the opportunity to restate her view that rape is the way that a masculine society perpetuates the subordination and inferiority of women. In an article titled "The Palm Beach Hanging," she said that rape does not differ materially from lynching, which was used to prevent blacks in the South from exercising their constitutional rights. But

⁸⁵ Gannett News Service, Oct. 9, 1991.

⁸⁶ *Connecticut Law Tribune*, Oct. 21, 1991.

⁸⁷ *Time*, Dec. 9, 1991, 21.

MacKinnon was no longer speaking to small coterie of women. "The Palm Beach Hanging" appeared on the Op-Ed page of *The New York Times*.⁸⁸

Two months later, in February 1992, MacKinnon won another important victory when the Canadian Supreme Court endorsed the view that some sexually explicit material that is "violent and degrading" harms women. MacKinnon was a co-founder of the Women's Legal Action Fund, the Canadian group whose brief shaped the new definition. Her influence was clear in the court's definition of "degrading" materials as those that "place women (and sometimes men) in positions of subordination, servile submission or humiliation." MacKinnon was elated. "This makes Canada the first place in the world that says what is obscene is what harms women, not what offends our values," she said.⁸⁹

What the Canadian Supreme Court decision really proved was that anti-censorship feminists were right when they predicted that the first persons to be hurt by censorship would be women. Three months after the Supreme Court decision, the Ontario Provincial Police brought the first charge under the new definition of obscenity against a gay and lesbian bookstore in Toronto, Glad Day Bookshop. The owner and manager of the store were charged with selling a lesbian magazine that included pictures of bound, naked women. Even Kathleen Mahoney, who worked with MacKinnon on the brief in the Canadian case, agreed that in this instance, at least, the new definition appeared to have misfired. "I think what's interesting is that the police would prosecute a lesbian store," Mahoney said.⁹⁰ Yet fear of an abuse of power by the state was precisely the reason that feminists and civil libertarians had opposed the MacKinnon law. "It just points up the dangers of investing the police with determining what is degrading," Nan Hunter, a member of FACT, observed. In succeeding months, Canadian customs officers stepped up their seizures of feminist, gay and lesbian material coming from the United States. In a moment of supreme irony, customs seized two works by Dworkin, *Woman Hating* and *Pornography: Men Possessing Women*, who thus found her own works suppressed under the definition of pornography that she had helped MacKinnon to write.⁹¹ In October, two boxes containing copies of a novel by critically-acclaimed author David Leavitt were also seized.⁹²

At the time of the Canadian decision, MacKinnon had predicted that it would mark the beginning of a change that would sweep the United States as well. "There are going to be several pieces of legislation in Congress soon, predicated on the harm approach and recognizing that both the making of pornography and its use do harm to women," she promised.⁹³ But as the year progressed, MacKinnon could not have been encouraged about the prospects for new Federal legislation. In part, this was because anti-censorship feminists were determined to prevent MacKinnon from winning a similar victory here.

The anti-censorship feminists had been energized by the fight against the Pornography Victims Compensation Act. Although MacKinnon declined to endorse the act because it did not target a wide enough range of sexually explicit material, S. 1521 clearly embodied MacKinnon's approach. Moreover, it was supported by other members

⁸⁸ *New York Times*, Dec. 15, 1991, 15.

⁸⁹ *Ibid.*, Feb 28, 1992, B7.

⁹⁰ *American Lawyer*, September 1992, 92.

⁹¹ *Montreal Gazette*, Jan. 22, 1993, 2; *Toronto Star*, April 18, 1993, B7.

⁹² *Toronto Star*, Oct. 18, 1993, A20.

⁹³ *New York Times*, Feb. 28, 1992, B7.

of the feminist anti-pornography movement who claimed wide support for the bill among women's groups. To counter this claim, a group called Feminists for Free Expression sent a letter to the Senate Judiciary Committee opposing the bill on behalf of 180 prominent women. The Feminist Anti-Censorship Task Force, which had been inactive since 1984, was revived. Five state chapters of the National Organization for Women, including New York and California, joined in the feminist opposition to S. 1521.⁹⁴ But the fact that women were organizing again to oppose MacKinnon only showed how far she had come.

By the fall of 1993, MacKinnon could look back on the last decade with considerable satisfaction. Her academic career was flourishing. She had risen from an itinerant lecturer to a tenured faculty member; published three books, and delivered the distinguished Gauss Lectures in Criticism at Princeton, which were to be published by the Harvard University Press in September. Smith College had presented her with the Smith Medal, and Reed College, Haverford College and Northeastern University had made her a recipient of honorary degrees. She almost touched the pinnacle of her profession in April when the Harvard Law School faculty voted on whether to offer her a tenured position. The vote was 33-22 in her favor, just shy of the two-thirds majority she required.⁹⁵

Her career on the public stage had also prospered mightily. She had acquired a national and an international reputation as a militant champion of women. Despite the fact that the courts had rejected her anti-pornography ordinance, MacKinnon was still able to get a hearing for her bill in Massachusetts in 1992. In Canada, she was hired by the federal government to help draft a law to shield the sexual histories of the victims in rape prosecutions. When two Croatian women's groups were looking for some one to represent Muslim and Croatian women who had been raped by Serbian nationalist soldiers, they hired MacKinnon.⁹⁶ Even her private life became a subject of public comment. When MacKinnon became engaged to Jeffrey Masson, a former psychoanalyst who had written a scathing attack on Freudianism, it was reported in *Time* and made the subject of a cover story in *New York* magazine.⁹⁷

Ten years after she advocated censorship for the first time before the Minneapolis Zoning Commission, Catharine MacKinnon has made it big.

⁹⁴ Since that time, a third group of anti-censorship feminists, the Working Group on Women, Censorship and "Pornography," has been organized by the National Coalition Against Censorship.

⁹⁵ *Time*, April 12, 1993, 15.

⁹⁶ *Washington Post*, Jan. 13, 1993, D22.

⁹⁷ *Time*, July 6, 1992, 79; *New York*, Mar. 22, 1993, 36-43.

APPENDIX

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