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BRIEF AMICI CURIAE OF FEMINIST ANTI-CENSORSHIP TASKFORCE, ET AL., IN AMERICAN BOOKSELLERS ASSOCIATION v. HUDNUT

Nan D. Hunter* and Sylvia A. Law**

The document that follows represents both a legal brief and a political statement. It was written for two purposes: to mobilize, in a highly visible way, a broad spectrum of feminist opposition to the enactment of laws expanding state suppression of sexually explicit material; and to place before the Court of Appeals for the Seventh Circuit a cogent legal argument for the constitutional invalidity of an Indianapolis municipal ordinance that would have permitted private civil suits to ban such material, purportedly to protect women.1 Drafting this brief was one of

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1. The ordinance states:

Pornography shall mean the sexually explicit subordination of women, graphically depicted, whether in pictures or in words, that also includes one or more of the following:

(1) Women are presented as sexual objects who enjoy pain or humiliation; or
(2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
(3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
(4) Women are presented being penetrated by objects or animals; or
(5) Women are presented in scenarios of degradation [sic], injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; [or]
(6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.


The Court of Appeals held that the Indianapolis ordinance violated the first amendment, and the Supreme Court affirmed that ruling without issuing an opinion. American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986). It appears that the Feminist Anti-Censorship Taskforce (FACT) analysis had some influence on Judge Easterbrook's approach to the constitutional issues presented. The opin-
the most demanding and exhilarating assignments either author has yet undertaken.

The brief was written on behalf of the Feminist Anti-Censorship Taskforce (FACT) and was co-signed by the Women's Legal Defense Fund (WLDF) and eighty individual feminists. The analysis of sexuality underlying the brief flows directly from a long tradition of nineteenth-century women's rights activists who sought sexual self-determination as an essential aspect of full liberation. From the beginning, others within the early feminist movement opposed this understanding of feminism because they viewed sexuality as a realm in which women often suffered. To protect women, they sought to restrict male sexual freedom by imposing on men the standard of sexual purity already applied to women.2

The modern feminist movement has continued this divergence of viewpoint. Simone de Beauvoir, for example, saw the erotic as an aspect of human liberty and insisted that sexual self-determination constitutes a fundamental part of women's liberation.3 Since 1966, women's demands have included calls for greater sexual freedom for women and an end to double standards.4 At the same time, the movement has fought for and won a number of reforms to curb rape and other violence directed pointedly at women.5 A part of the feminist antiviolence movement evolved first into a campaign aimed at depictions of violence against women in a variety of media and then into a campaign aimed at all pornographic imagery, whether violent or not.6

Meanwhile, as feminist discourse on issues of sexuality became more elaborate, conservative forces also mobilized around issues of sexual imagery. An alliance of traditional moralists, the New Right, and some feminists promoted and defended the Indianapolis ordinance. In the current political environment, the conservative voices are plainly more powerful than those of the feminists. For conservatives, the current interest in suppression of pornography forms part of a larger agenda to reverse recent feminist gains through a moral crusade against abortion, lesbian and gay rights, contraceptive education and services, and women’s fragile economic achievements. Conservatives and religious fundamentalists oppose pornography because it appears to depict and approve of sex outside marriage and procreation. The Right seeks to use legitimate feminist concern about sexual violence and oppression to reinstate traditional sexual arrangements and the formerly inexorable link between reproduction and sexuality.

In 1985, conservative efforts to focus attention on suppression of sexual imagery culminated in Attorney General William French Smith’s establishment of a Commission on Pornography charged to find “more effective ways in which the spread of pornography could be contained.” Because most Americans do not share the moral view that confines sex to a solely procreative role, the Commission’s mission was to modernize the assault on sexually explicit images by demonstrating that pornography causes violence. Despite the number of members chosen with a history of vehement opposition to sexually explicit material and

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7. Duggan, Censorship in the Name of Feminism, Village Voice, Oct. 16, 1984, at 11, col. 1. The ordinance was introduced in the Indianapolis City Council by a member whose career was founded on anti-ERA organizing. Id. at 12, col. 1. The central popular support for its passage came from fundamentalists who attended the meetings at which the Council voted on the ordinance. The Reverend Greg Dixon of the Indianapolis Baptist Temple, a former Moral Majority official, organized the fundamentalist presence. Id. at 16, col. 1.


9. The Commission was chaired by Henry Hudson, a prosecutor whom President Reagan praised for closing down every adult bookstore in Arlington, Va. At least six of the 11 Commission members had previously taken strong public stands opposing pornography and supporting obscenity laws as a means of control. B. LYNN, POLLUTING THE CENSORSHIP DEBATE: A SUMMARY AND CRITIQUE OF THE FINAL REPORT OF THE ATTORNEY GENERAL’S COMMISSION ON PORNOGRAPHY 14-16 (1986) (ACLU Public Policy Report); Vance, The Meese Commission on the Road, NATION, Aug. 2, 1986, at 76 (also listing Commission member Frederick Schauer as having taken a public stand opposing pornography). For example, Commission member Dr. James Dobson is President of Focus on the Family, an organization that is “dedicated to the preservation of the home and the family and the traditional values growing out of the Judeo-Christian ethic.” B. LYNN,
tight control of the witness list, the Commission was unable to "prove" that pornography causes violence.

Social scientists, whose work the antipornography movement had previously utilized, refused in their testimony to draw the simple connections between pornography and violence that the Commission sought. Like FACT, these researchers urged the use of caution in the extension of artificial laboratory findings to naturalistic settings. Further, they testified that aggressive imagery and the mainstream media present more worrisome concerns than sexual imagery and X-rated channels. Unable to marshal systemic evidence that pornography causes concrete injury, the Commission was forced to rely upon the anecdotal testimony of carefully selected and well-prepared individual victims and to invoke a vastly broadened concept of "harm."13

Perhaps the most significant and most telling aspect of the Commission's work was its inability to agree on a definition of pornography.14 Undaunted, the Commission concluded that most commercially available pornography is "degrading" and contains "characteristics of degradation, domination, subordination, and humiliation," particularly of women. An earlier draft

supra, at 15. In addition, Commission member Frederick Schauer had previously argued for a highly restricted application of the first amendment. Id. at 17; Schauer, Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language, 67 Geo. L.J. 899, 922-23 (1979).

The three people without prior established positions on pornography frequently resisted the staff's agenda. They endorsed a statement that said that while they abhorred "the exploitation of vulnerable people" in pornography, they also rejected "judgmental and condescending efforts to speak on women's behalf as though they were helpless, mindless children." 1 COMM'N ON PORNOGRAPHY, supra note 8, at 194 (statement of Dr. Judith Becker, Ellen Levine, and Deanne Tilton-Durfee). Two of these three women dis­sented from the final report. See id. at 195-212 (statement of Dr. Judith Becker and Ellen Levine).

10. Over three-fourths of the witnesses urged tighter controls over sexually explicit materials. B. LYNN, supra note 9, at 7.
11. See generally id. at 57-88. Prof. Edward Donnerstein has denounced as "bizarre" the Commission's effort to use his research to buttress a claim that sexually violent material causes criminal behavior. Goleman, Researchers Dispute Pornography Report on Its Use of Data, N.Y. Times, May 17, 1986, at A1, col. 1.
12. Vance, supra note 9, at 79.
13. See 1 COMM'N ON PORNOGRAPHY, supra note 8, at 322-49. With respect to materials regarded by the Commission as nonviolent but degrading, the Commission acknowledged that there was little concrete evidence "causally linking the material with sexual aggression" but nonetheless concluded that the "absence of evidence should by no means be taken to deny the existence of the causal link." Id. at 332.
14. "[T]he most important harms must be seen in moral terms, and the action of moral condemnation of that which is immoral is not merely important but essential." Id. at 303.
15. Id. at 227-32.
16. See id. at 331.
of the Commission report had even offered examples of such material.\textsuperscript{17} For the final report, however, the Commission also found itself unable to agree on examples of “degradation.”\textsuperscript{18}

The Meese Commission recommended new federal and state legislation and increased prosecution to suppress sexually explicit materials to the maximum extent constitutionally possible.\textsuperscript{19} Unfortunately, it failed to embrace the recommendation of the 1970 Commission on Obscenity and Pornography\textsuperscript{20} to commence a serious sex education effort to empower young people to develop a healthy and balanced view of sexuality that would enable them to avoid unwanted pregnancy and sexually transmitted diseases. The Meese Commission did not recommend strengthening federal law to prohibit sexual harassment in the workplace.\textsuperscript{21} It did not call for legislation to remove spousal immunity in sexual assault cases or for funding to improve law enforcement against domestic violence.

At the level of popular opinion, little support seems to exist for either conservative or feminist campaigns against sexual imagery. Press reaction to the Meese Commission report was uniformly negative.\textsuperscript{22} In 1985, voters in Cambridge, Massachusetts,

\begin{itemize}
\item \textsuperscript{17} B. LYNN, supra note 9, at 71-72. These examples included:
[D]epictions of a woman lying on the ground while two standing men ejaculate on her; two women engaged in sexual activity with each other while a man looks on and masturbates; a woman non-physically coerced into engaging in sexual activity with a male authority figure, such as a boss, teacher, or priest, and then begs for more; . . . a woman with legs spread wide open holding her labia open with her fingers; a man shaving the hair from the pubic area of a woman; a woman dressed in a dog costume being penetrated from the rear by a man . . . .
\textit{Id.} at 71-72.

\item \textsuperscript{18} Id. at 72.

\item \textsuperscript{19} Two Commission members, both women, filed a sharp and cogent dissent. I \textit{Comm’n on Pornography, supra} note 8, at 195-212 (statement of Dr. Judith Becker and Ellen Levine).


\item \textsuperscript{21} For a case illustrating an inadequacy of the present antidiscrimination law, see \textit{Rabidue v. Osceola Refining Co.}, 805 F.2d 611, 622 (1986) (holding that posters of nude women on workplace walls and supervisors' obscene comments do not constitute actionable sexual harassment).

rejected, by a wide margin, a public referendum on an ordinance similar to the one adopted in Indianapolis. A broad range of feminist organizations opposed the ordinance. In 1986, citizens of Maine voted nearly three-to-one against adoption of an obscenity law; women’s organizations in Maine strongly opposed the proposal.

The feminists of FACT have helped to transform the contemporary dialogue about pornography. That debate no longer pits victimized women and conventional moralists against pornographers and civil libertarians. FACT affirms that sexuality is, for women, a source of pleasure and power, as well as a realm of danger and oppression. As a consequence, discussion of pornography and sexuality is more intricately contextualized and appropriately complex. The brief that follows aspires to keep open the discussion about sexual explicitness and to assert that sexually explicit materials have both liberating and repressive qualities. The feminist analysis of these issues remains far from complete. As Carole S. Vance, one of the founders of FACT, observes, “The hallmark of sexuality is its complexity: its multiple meanings, sensations, and connections.”

Despite the contradictory strands in the feminist approach, the empirical and intellectual exploration of sexuality remains a

finding.” Cohen, Pornography: The ‘Causal Link,’ Wash. Post, June 3, 1986, at A19, col. 2. Chicago Tribune columnist Mike Royko observed:

[I]n recent years there have been more than 220 bombings of abortion clinics. . . . Those who have been arrested have expressed deep religious convictions. . . .

. . . .

Extremist groups shoot rural sheriffs, talk show hosts and lawyers they suspect of being liberal. They, too, spout religious devotion.

So maybe we should begin considering the outlawing of religion because it is the root cause of so much violence.


24. FACT, Boston Chapter; The Boston Women’s Health Book Collective; Boston NOW; Women Against Violence Against Women, Boston Chapter; Cambridge Commission on the Status of Women; No Bad Women, Just Bad Laws (statements on file with the U. MICH. J.L. REP.).

25. Wald, Voters in Maine Defeat Anti-Obscenity Plan, N.Y. Times, June 11, 1986, at A32, col. 4. For ballot purposes, the four-and-a-half-page statute was reduced to the proposition, “Do you want to make it a crime to make, sell, give for value or otherwise promote obscene material in Maine?” Id.


27. Vance, Pleasure and Danger: Toward a Politics of Sexuality, in PLEASURE AND DANGER, supra note 2, at 5.
central enterprise for the contemporary feminist movement. Sexual ideas, images, and practices have been dominated by and oriented toward men and are often not responsive to women. Many women experience sexual failure and frustration, rather than ecstasy and pleasure. Furthermore, feminism’s core insight emphasizes that gender is socially defined. Social and sexual role acculturation largely determine gender differences; accordingly, these differences are not natural or immutable. In Simone de Beauvoir’s classic words, “One is not born, but rather becomes, a woman.” Social ideas and material arrangements give deep meaning to masculinity and femininity. The social significance of gender is fabricated to favor men systematically through economic, political, and legal structures that rest upon and reinforce gender. Sexual desire, both powerful and pliable, forms a part of that gender system. Discovering, describing, and analyzing the complex interaction of gender and sexuality, of representation and reality, thus remains a key project of feminist theory and lives.

28. For three excellent feminist collections, see POWERS OF DESIRE, supra note 4; PLEASURE AND DANGER, supra note 2; WOMEN AGAINST CENSORSHIP, supra note 6.
30. S. de Beauvoir, supra note 3, at 273.
IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 84-3147

AMERICAN BOOKSELLERS ASSOCIATION, INC., et al.,
Plaintiffs-Appellees,
v.
WILLIAM H. HUDNUT III, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Indiana

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April 8, 1985
CERTIFICATE OF INTEREST

The undersigned counsel of record for Amici furnishes the following list in compliance with Circuit Rule 5(b).

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2. The Women's Legal Defense Fund is a not-for-profit corporation incorporated in Washington, D.C.
3. The following attorneys, not affiliated with a law firm, represent the Amici in this Court:

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Interest of Amici

Amici are feminists who sign this brief as a statement of our opposition to the Indianapolis ordinance. We believe that the ordinance reinforces rather than undercuts central sexist stereotypes in our society and would result in state suppression of sexually explicit speech, including feminist images and literature, which does not in any way encourage violence against women. We condemn acts of violence against women; incitement to that violence; and misogyny, racism, and anti-semitism in all media. We believe, however, that the Indianapolis ordinance will not reduce violence against women and will censor speech and imagery that properly belong in the public realm. Some proponents of this ordinance genuinely believed that it would assist women to overcome disabling sex role stereotypes and promote greater equality for women. We who sign this brief are deeply concerned that it will have precisely the opposite effect.

THE FEMINIST ANTI-CENSORSHIP TASKFORCE (FACT) is a group of women long active in the feminist movement who organized in 1984 to oppose the enactment of Indianapolis-style antipornography laws. It is composed of community activists, writers, artists and teachers.

THE WOMEN'S LEGAL DEFENSE FUND, Inc. (WLDF) is a non-profit tax-exempt organization of over 1500 members founded to further women's rights and to challenge sex-based inequities through the law, especially in the area of employment discrimination and domestic relations. WLDF volunteer and staff attorneys conduct public education about women's rights and sex discrimination; counsel thousands of individual women annually about their rights; represent victims of sex discrimination in selected precedent-setting cases; and advocate on behalf of laws guaranteeing sex-based equality before legislative and executive branch policymakers and as amicus curiae in numerous court cases.

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RITA MAE BROWN is a well-known author whose works include *Rubyfruit Jungle*, *Southern Discomfort*, and *Sudden Death*.

ARLENE CARMEN is Program Associate at Judson Memorial Church in New York City, where she directs a ministry to street prostitutes. She is co-author of *Abortion Counseling and Social Change* (Judson Press 1973) and *Working Women: The Subterranean World of Street Prostitution*, scheduled to be published in August 1985.

DENISE S. CARTY-BENNIA is a Professor of Law, Northeastern University School of Law, and an active participant in movements opposing sex and race discrimination in the United States.

CHERYL L. CLARKE is a Black feminist lesbian poet, writer, and member of the editorial collective of *Conditions* Magazine.

MICHELLE CLIFF is the author of *Claiming an Identity They Taught Me to Despise* and *Abeng*. She is a member of Poets & Writers and The Authors Guild.
THE EDITORS OF CONDITIONS MAGAZINE—Founded in 1976, Conditions magazine is a feminist magazine of writing by women with an emphasis on writing by lesbians. The current editors are Dorothy Allison, Cheryl Clarke, Nancy Clarke Otter, and Debby Schaubman.

RHONDA COPELON is an Associate Professor of Law, City University of New York Law School at Queens College. For the past fifteen years, she has litigated civil rights and women’s rights cases as an attorney with the Center for Constitutional Rights.

ROSEMARY DANIELL is a full-time writer. Her books include A Sexual Tour of the Deep South (poetry, 1975); Fatal Flowers: On Sin, Sex, and Suicide in the Deep South (non-fiction, 1980); and Sleeping with Soldiers (non-fiction, 1985).

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BETTY DODSON is an artist, writer, publisher, and teacher. She has spent eleven years organizing sexual enhancement workshops for women. Her book, Self-Love and Orgasm, has sold 200,000 copies.

MARY C. DUNLAP is a law teacher and solo practitioner of civil law. She was co-founder and attorney-teacher at Equal Right Advocates, Inc., San Francisco, from 1973 to 1978. She is co-author of a chapter on the First Amendment in Sexual Orientation and the Law (Clark Boardman 1985).

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INTRODUCTION

The instant case involves the constitutionality of an anti-pornography ordinance enacted by the City Council of Indianapolis, City-County Ordinance No. 35, 1984. The ordinance was ruled unconstitutional by the U.S. District Court on a motion for summary judgment. American Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316 (S.D. Ind. 1984).

Amici believe that the ordinance violates both the First Amendment guarantee of freedom of speech and the Fourteenth Amendment guarantee of equal treatment under the law. Under its trafficking provision, the ordinance would allow injunctions to issue against the distribution, sale, exhibition or production of any sexually explicit materials which fall within its definition of pornography. No showing of harm to the plaintiff (individual or class) is required as proof prior to the issuance of such an injunction. Because the trafficking provision and the definition most flagrantly violate constitutional principles, this brief concentrates its focus on those two aspects of the ordinance.
I. THE ORDINANCE SUPPRESSES CONSTITUTIONALLY PROTECTED SPEECH IN A MANNER PARTICULARLY DETRIMENTAL TO WOMEN.

Although Appellants argue that the ordinance is designed to restrict images which legitimate violence and coercion against women, the definition of pornography in the ordinance is not limited to images of violence or of coercion, or to images produced by women who were coerced. Nor is it limited to materials which advocate or depict the torture or rape of women as a form of sexual pleasure. It extends to any sexually explicit material which an agency or court finds to be "subordinating" to a claimant acting on behalf of women and which fits within one of the descriptive categories which complete the definition of pornography.

For purposes of the trafficking cause of action, the ordinance defines pornography as the "graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more" of the depictions described in six categories. The violent and brutal images which Appellants use as illustrative examples cannot obscure the fact that the ordinance

1. (1) Women are presented as sexual objects who enjoy pain or humiliation; or
(2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
(3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
(4) Women are presented being penetrated by objects or animals; or
(5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or
(6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.


2. By the use of highly selected examples, Appellants and supporting amici convey the impression that the great majority of materials considered pornographic are brutal. Although most commercial pornography, like much of all media, is sexist, most is not violent. A study of pictorials and cartoons in Playboy and Penthouse between 1973 and 1977 found that, by 1977, about 5% of the pictorials were rated as sexually violent. "No significant changes in the percentage of sexually violent cartoons were found over the years." Malamuth & Spinner, A Longitudinal Content Analysis of Sexual Violence in the Best-Selling Erotic Magazines, 16 J. Sex. Research 226, 237 (1980). The Women Against Pornography (W.A.P.) amicus brief, in particular, totally mischaracterizes content analyses of pornography. It asserts, at p. 8 n.14, that one study found the depictions of rape in "adults only" paperbacks had doubled from 1968 to 1974, a statement which is simply false. The study found that the amount of explicit sexual content had doubled, but also
authorizes suppression of material that is sexually explicit, but in no way violent. The language of the definition mixes phrases that have clear meanings and thus ascertainable applications (e.g., "cut up or mutilated") with others which are sufficiently elastic to encompass almost any sexually explicit image that someone might find offensive (e.g., "scenarios of degradation" or "abasement"). The material that could be suppressed under the latter category is virtually limitless.

While the sweep of the ordinance is breathtaking, it does not address (nor would Amici support state suppression of) the far more pervasive commercial images depicting women as primarily concerned with the whiteness of their wash, the softness of their toilet tissue, and whether the lines of their panties show when wearing tight slacks. Commercial images, available to the most impressionable young children during prime time, depict women as people interested in inconsequential matters who are incapable of taking significant, serious roles in societal decision-making.

The constitutionality of the ordinance depends on the assumption that state agencies and courts can develop clear legal definitions of terms like "sexually explicit subordination," "sexual object," and "scenarios of degradation" and "abasement." In truth, these terms are highly contextual and of varying meanings. Worse, many of their most commonly accepted meanings would, if applied in the context of this ordinance, reinforce rather than erode archaic and untrue stereotypes about women's sexuality.

"that the plots, themes, and stories have remained much the same in these books throughout the years measured in this study." Smith, The Social Content of Pornography, 26 J. Comm. 16, 23 (1976). The brief then cites a study finding that depictions of bondage and domination in Times Square pornography stores "had increased dramatically in frequency by 1982," but neglects to mention that the increase was to 17.2%. The same study also concluded that "many bondage and domination magazines do not depict suffering or bodily injury." Dietz & Evans, Pornographic Imagery and Prevalence of Paraphilia, 139 Am. J. Psychiatry 1493, 1495 (1982). That some pornography would be found by amici on both sides to be offensive to women does not support this legislative approach to curtailling that pornography, which is overbroad and dependent on suppression of speech.
A. Historically the Law Has Incorporated a Sexual Double Standard Denying Women’s Interest in Sexual Expression.

Traditionally, laws regulating sexual activity were premised upon and reinforced a gender-based double standard which assumed:

that women are delicate, that voluntary sexual intercourse may harm them in certain circumstances and that they may be seriously injured by words as well as deeds. The statutes also suggest that, despite the generally delicate nature of most women, there exists a class of women who are not delicate or who are not worthy of protection. [By contrast, the law’s treatment of male sexuality reflected] the underlying assumption that only males have aggressive sexual desires [and] hence they must be restrained . . . . The detail and comprehensiveness of [such] laws suggest that men are considered almost crazed by sex.


The Indianapolis ordinance is squarely within the tradition of the sexual double standard. It allows little room for women to openly express certain sexual desires and resurrects the notion that sexually explicit materials are subordinating and degrading to women. Because the “trafficking” cause of action allows one woman to obtain a court order suppressing images which fall within the ordinance’s definition of pornography, it implies that individual women are incapable of choosing for themselves what they consider to be enjoyable, sexually arousing material without being degraded or humiliated.

The legal system has used many vehicles to enforce the sexual double standard which protected “good” women from both sexual activity and explicit speech about sex. For example, the common law of libel held that “an oral imputation of unchastity to a woman is actionable without proof of damage. . . . Such a rule never has been applied to a man, since the damage to his reputation is assumed not to be as great.” W. Prosser, Law of Torts, 759-60 (1971).

The common law also reinforced the image of “good” women as asexual and vulnerable by providing the husband, but not the
wife, remedies for “interference” with his right to sole possession of his wife’s body and services. The early writ of “ravishment” listed the wife with the husband’s chattels. To this day, the action for criminal conversation allows the husband to maintain an action for trespass, not only when his wife is raped but also even though the wife had consented to it, or was herself the seducer and had invited and procured it, since it was considered that she was no more capable of giving a consent which would prejudice the husband’s interests than was his horse . . . .

Id. at 874-77.

While denying the possibility that “good” women could be sexual, the common law dealt harshly with the “bad” women who were. Prostitution laws often penalized only the woman, and not the man, and even facially neutral laws were and are enforced primarily against women. See, e.g., Jennings, The Victim as Criminal: A Consideration of California’s Prostitution Law, 64 Calif. L. Rev. 1235 (1976). Prostitution is defined as “the practice of a female offering her body to indiscriminate sexual intercourse with men,” 63 Am. Jur. 2d Prostitution § 1 (1972), or submitting “to indiscriminate sexual intercourse which she invites or solicits.” Id. A woman who has sexual relations with many men is a “common prostitute” and a criminal while a sexually active man is considered normal.

The sexual double standard is applied with particular force to young people. Statutory rape laws often punished men for consensual intercourse with a female under a certain age. Comment, The Constitutionality of Statutory Rape Laws, 27 UCLA L. Rev. 757, 762 (1980). Such laws reinforce the stereotype that in sex the man is the offender and the woman the victim, and that young men may legitimately engage in sex, at least with older people, while a young woman may not legally have sex with anyone.

The suppression of sexually explicit material most devastating to women was the restriction on dissemination of birth control information, common until 1971. In that year, the Supreme Court held that the constitutional right to privacy protects an unmarried person’s right to access to birth control information. Eisenstadt v. Baird, 405 U.S. 438 (1972). To deny women access to contraception “prescribe[s] pregnancy and the birth of an un-
wanted child as punishment for fornication." Id. at 448. For the previous century, the federal Comstock law, passed in 1873, had prohibited mailing, transporting or importing "obscene, lewd or lascivious" items, specifically including all devices and information pertaining to "preventing contraception and producing abortion." Women were jailed for distributing educational materials regarding birth control to other women because the materials were deemed sexually explicit in that they "contain[ed] pictures of certain organs of women" and because the materials were found to be "detrimental to public morals and welfare." People v. Byrne, 99 Misc. 1, 6 (N.Y. 1917).

The Mann Act also was premised on the notion that women require special protection from sexual activity. 35 Stat. 825 (1910), 18 U.S.C. §§ 2421-2422. It forbids interstate transportation of women for purposes of "prostitution, debauchery, or any other immoral purposes," and was enacted to protect women from reportedly widespread abduction by bands of "white slavers" coercing them into prostitution. As the legislative history reveals, the Act reflects the assumption that women have no will of their own and must be protected against themselves. See H.R. Rep. No. 47, 61st Cong., 2d Sess. (1910), at 10-11. Like the premises underlying this ordinance, the Mann Act assumed that women were naturally chaste and virtuous, and that no woman became a whore unless she had first been raped, seduced, drugged or deserted. [Its] image of the prostitute . . . was of a lonely and confused female . . . . [Its proponents] maintained that prostitutes were the passive victims of social disequilibrium and the brutality of men . . . . [Its] conception of female weakness and male domination left no room for the possibility that prostitutes might consciously choose their activities.

3. 18 U.S.C.A. §§ 1461-1462 (West 1984); 19 U.S.C.A. § 1305 (West 1980 & Supp. 1984); see United States v. One Obscene Book Entitled "Married Love", 48 F.2d 821 (S.D.N.Y. 1931); United States v. One Book Entitled "Contraceptions", 51 F.2d 525 (S.D.N.Y. 1931) (prosecution for distribution of books by Marie Stopes on contraception); United States v. Dennett, 39 F.2d 564 (2d Cir. 1930) (prosecution of Mary Ware Dennett for publication of pamphlet explaining sexual physiology and functions to children); and Bours v. United States, 229 F. 960 (7th Cir. 1915) (prosecution of physician for mailing a letter indicating that he might perform a therapeutic abortion). It was not until 1971 that an amendment was passed deleting the prohibition as to contraception, Pub. L. No. 91-662, 84 Stat. 1973 (1971); and the ban as to abortion remains in the current codification of the law.

The Mann Act initially defined a "white slave" to include "only those women or girls who are literally slaves—those women who are owned and held as property and chattels . . . those women and girls who, if given a fair chance, would, in all human probability, have been good wives and mothers," H.R. Rep. No. 47, 61st Cong., 2d Sess., at 9-10 (1910). Over the years, the interpretation and use of the Act changed drastically to punish voluntary "immoral" acts even when no commercial intention or business profit was involved. See Caminetti v. United States, 242 U.S. 470 (1917); Cleveland v. United States, 329 U.S. 14 (1946).

The term 'other immoral acts' was held to apply to a variety of activities: the interstate transportation of a woman to work as a chorus girl in a theatre where the woman was exposed to smoking, drinking, and cursing; a dentist who met his young lover in a neighboring state and shared a hotel room to discuss her pregnancy; two students at the University of Puerto Rico who had sexual intercourse on the way home from a date; and a man and woman who had lived together for four years and traveled around the country as man and wife while the man sold securities.

Note, supra, at 1119.

Society's attempts to "protect" women's chastity through criminal and civil laws have resulted in restrictions on women's freedom to engage in sexual activity, to discuss it publicly, and to protect themselves from the risk of pregnancy. These disabling restrictions reinforced the gender roles which have oppressed women for centuries. The Indianapolis ordinance resonates with the traditional concept that sex itself degrades women, and its enforcement would reinvigorate those discriminatory moral standards which have limited women's equality in the past.
B. The Ordinance Is Unconstitutionally Vague Because Context Inescapably Determines the Effect of Sexual Texts and Images.

The ordinance authorizes court orders removing from public or private availability "graphic sexually explicit" words and images which "subordinate" women. A judge presented with a civil complaint filed pursuant to this law would be required to determine whether the material in question "subordinated" women. To equate pornography with conduct having the power to "subordinate" living human beings, whatever its value as a rhetorical device, requires a "certain sleight of hand" to be incorporated as a doctrine of law. American Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316, 1330 (S.D. Ind. 1984). Words and images do influence what people think, how they feel, and what they do, both positively and negatively. Thus pornography may have such influence. But the connection between fantasy or symbolic representation and actions in the real world is not direct or linear. Sexual imagery is not so simple to assess. In the sexual realm, perhaps more so than in any other, messages and their impact on the viewer or reader are often multiple, contradictory, layered and highly contextual.

The film Swept Away illustrates that serious problems of context and interpretation confound even the categories which on first reading might seem reasonably easy to apply. Made in 1975 by Italian director Lina Wertmuller, Swept Away tells a powerful story of dominance and submission. A rich attractive woman and a younger working class man are first shown as class antagonists during a yachting trip on which the man is a deckhand and the woman a viciously rude boss, and then as sexual antagonists when they are stranded on a Mediterranean island and the man exacts his revenge. During the second part of the film, the man rapes the woman and repeatedly assaults her. She initially resists, then falls in love with him, and he with her.

Scenes in Swept Away clearly present the woman character as "experienc[ing] sexual pleasure" during rape. In addition, she is humiliated, graphically and sexually, and appears to grow to enjoy it. Although sexually explicit depictions are not the majority of scenes, the film as a whole has an active sexual dynamic. Given the overall and pervasive theme of sexual dominance and submission, it is improbable that the explicit scenes could be
deemed “isolated.” It is virtually certain that the film could be suppressed under the ordinance since it was shown in laboratory studies cited by Appellants to measure negative impact of aggressive erotic materials.4

Swept Away is an example of graphic, sexually explicit images and characterizations used to treat themes of power imbalance, to push at the edges of what is thought to be acceptable or desirable, and to shock. Critical and popular opinions of the film varied, ranging from admiration to repulsion.5 Whatever one’s interpretation of the film, however, its profoundly important themes entitle it to a place in the realm of public discourse.

Context often determines meaning. Whether a specific image could be found to “subordinate” or “degrade” women may depend entirely on such factors as the purpose of the presentation; the size and nature of the audience; the surrounding messages; the expectation and attitude of the viewer; and where the presentation takes place, among others.6 Yet the trafficking provision allows blanket suppression of images based on highly subjective criteria which masquerade as simple, delineating definitions.

5. The reviewer for Ms. Magazine wrote:

At several points I was very offended by the idea of love won by brute force. . . . I'd like to explain this away by stressing that this is an allegory of class war, not sex war. But that is not true. For the brilliance of “Swept Away” is that it is everything at once. As a description of what capitalism does to us it is sophisticated and deep. At the same time, it comes to grips with the “war” between the sexes better than anything I've seen or read. . . . It has shocking scenes linking sex and violence and yet it is about tenderness. . . . [It] is a funny, beautiful, emotional movie about a somber, ugly, intellectual subject.


Other reviewers strongly disagreed:

I really don’t know what is more distasteful about this film—its slavish adherence to the barroom credo that all women really want is to be beaten, to be shown who’s boss, or the readiness with which it has been accepted by the critics. Yes, it is effective enough in parts, but strictly on the level of slick pornography.


6. The same theme may be perceived very differently in different contexts. In her novel, A Sea Change, feminist author Lois Gould repeatedly invokes fantasies and images of rape and submission in order to make more dramatic her story of women transforming their sexual lives. One striking passage narrates the main female character being stroked and then entered by the gun held by a fantasy male character, B.G. L. Gould, A Sea Change 95 (1977). At the end of the novel, the woman character becomes B.G. This graphic depiction of penetration by an object, undoubtedly suppressible under the ordinance, especially since there are several scenes in the book which could meet the definition of pornography, is one of the fantasies Gould explores and uses in her treatment of the theme of sexual power.
C. The Ordinance Is Unconstitutionally Vague Because Its Central Terms Have No Fixed Meaning, and the Most Common Meanings of These Terms Are Sexist and Damaging to Women.

The ordinance's definition of pornography, essential to each cause of action, is fatally flawed. It relies on words often defined in ways that reinforce a constricted and constricting view of women's sexuality. Thus Amici fear that experimentations in feminist art which deal openly and explicitly with sexual themes will be easily targeted for suppression under this ordinance.

The central term "sexually explicit subordination" is not defined. Appellants argue that "subordination" means that which "places women in positions of inferiority, loss of power, degradation and submission, among other things." Appellants' brief at 26. The core question, however, is left begging: what kinds of sexually explicit acts place a woman in an inferior status? Appellants argued in their brief to the District Court that "[t]he mere existence of pornography in society degrades and demeans all women." Defendants' memorandum at 10. To some observers, any graphic image of sexual acts is "degrading" to women and hence would subordinate them. To some, the required element of subordination or "positions of . . . submission" might be satisfied by the image of a woman lying on her back inviting intercourse, while others might view the same image as affirming women's sexual pleasure and initiative. Some might draw the line at acts outside the bounds of marriage or with multiple partners. Others might see a simple image of the most traditional heterosexual act as subordinating in presenting the man in a physical position of superiority and the woman in a position of inferiority.

In any of these contexts, it is not clear whether the ordinance is to be interpreted with a subjective or an objective standard. If a subjective interpretation of "subordination" is contemplated, the ordinance vests in individual women a power to impose their views of politically or morally correct sexuality upon other women by calling for repression of images consistent with those

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7. To define "pornography" as that which subordinates women, and then prohibit as pornographic that which subordinates, makes the claim that pornography subordinates either circular or logically trivial.
views. The evaluative terms—subordination, degradation, abasement—are initially within the definitional control of the plaintiff, whose interpretation, if colorable, must be accepted by the court. An objective standard would require a court to determine whether plaintiff's reaction to the material comports with some generalized notion of which images do or do not degrade women. It would require the judiciary to impose its views of correct sexuality on a diverse community. The inevitable result would be to disapprove those images that are least conventional and privilege those that are closest to majoritarian beliefs about proper sexuality.

Whether subjective or objective, the inquiry is one that plainly and profoundly threatens First Amendment freedoms and is totally inconsistent with feminist principles, as they are understood by Amici. Sexuality is particularly susceptible to extremely charged emotions, including feelings of vulnerability and power. The realm of image judgment opened by the ordinance is too contested and sensitive to be entrusted to legislative categorization and judicial enforcement.

The danger of discrimination is illustrated by the probability that some women would consider any explicit lesbian scene as subordinating, or as causing "[their] dignity [to] suffer," Appellants' brief at 36. Appellants plainly intend to include same-sex depictions, since their carefully selected trial court exhibits include such materials. 8 Lesbians and gay men 9 encounter massive discrimination based on prejudice related to their sexuality. 10 The trafficking provision of the ordinance virtually invites new manifestations of this prejudice by means of civil litigation against the erotica of sexual minorities.

8. See, e.g., Appellants' Exhs. N., M., and W. These exhibits, like most commercial pornography which depicts sex between women, were not produced by or primarily for lesbians. Yet part of the shock value of such images in contemporary society may be attributable to their depiction of sexual explicitness between women. When the door is opened to suppress "scenarios of degradation," for example, there is no guarantee that this shock value of any graphic depiction of homosexual acts will not spill over to images and texts which authentically express lesbian sexuality.

9. The provision that "the use of men . . . in the place of women . . . shall also constitute pornography" makes clear that same-sex male images and texts could fall within the scope of the ordinance, especially so, one supposes, if one male partner is depicted as effeminate.

The six subsections of the definition applicable to a trafficking complaint provide no clarification. The term "sexual object," for example, appears frequently in the definition. Appellants are confident that "the common man knows a sex object when he sees one." Appellants' brief at 40. Yet, although "sex object" may be a phrase which has begun to enjoy widened popular usage, its precise meaning is far from clear. Some persons maintain that any detachment of women's sexuality from procreation, marriage, and family objectifies it, removing it from its "natural" web of association and context. When sex is detached from its traditional moorings, men allegedly benefit and women are the victims.\(^\text{11}\) Feminists, on the other hand, generally use the term "sex object" to mean the absence of any indicia of personhood, a very different interpretation.

Appellants argue that the meaning of "subordination" and "degradation" can be determined in relation to "common usage and understanding." Appellants' brief at 33. But as we have seen, the common understanding of sexuality is one that incorporates a sexual double standard. Historically, virtually all sexually explicit literature and imagery has been thought to be degrading or abasing or humiliating, especially to women.

The interpretation of such morally charged terms has varied notoriously over time and place. A state supreme court thirty years ago ruled that the words "obscene, lewd, licentious, indecent, lascivious, immoral, [and] scandalous" were "neither vague nor indefinite" and had "a meaning understood by all." \(^\text{11}\) State v. Becker, 364 Mo. 1079, 1087, 272 S.E.2d 283, 288 (1954). See also Winters v. New York, 333 U.S. 507, 518 (1948). In Kansas v. Great American Theatre Co., the court accepted as a definition for "prurient interest," "an unhealthy, unwholesome, morbid, degrading, and shameful interest in sex," 227 Kan. 633, 633, 608 P.2d 951, 952 (1980) (emphasis added). A Florida obscenity statute which declared it to be "unlawful to publish, sell[, etc.] any obscene, lewd, lascivious, filthy, indecent, immoral, degrading, sadistic, masochistic or disgusting book"\(^\text{12}\) was found to be no longer adequate after the decision in Roth v. United States, 354 U.S. 476 (1957), absent both a contemporary definition of those terms and a standard based on the materials' overall value and

\(^{11}\) See, e.g., G. Gilder, Sexual Suicide (1973).

not just their explicitness. After Roth and subsequent decisions, the statute was amended three times to incorporate these additional elements. Upon amending the statute in 1961, the word “degrading” was dropped. Words like “degradation,” “abasement,” and “humiliation” have been used in the past synonymously with subjective, moralistic terms. There is no reason to believe that the language in this ordinance will be magically resistant to that kind of interpretation.


The ordinance requires enforcement of “common understandings” of culturally loaded terms. It perpetuates beliefs which undermine the principle that women are full, equal, and active agents in every realm of life, including the sexual.

13. See State v. Cohen, 125 So. 2d 560 (Fla. 1960); State v. Reese, 222 So. 2d 732 (Fla. 1969); and Rhodes v. State, 283 So. 2d 351 (Fla. 1973).

D. Sexually Explicit Speech Does Not Cause or Incite Violence in a Manner Sufficiently Direct to Justify Its Suppression Under the First Amendment.

To uphold this ordinance and the potential suppression of all speech which could be found to fall within its definition of pornography, this court must invent a new exception to the First Amendment. To justify that, Appellants must show that the speech to be suppressed will lead to immediate and concrete harm. Brandenburg v. Ohio, 395 U.S. 444 (1969); Collin v. Smith, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978). Only a small number of social science studies which purport to show a connection between violent pornography and negative attitudes and behavior toward women have been offered to support this position. For many reasons, their effort must fail.

Substantively, the studies relied upon do not justify the sweeping suppression authorized by the ordinance. Appellants cite the social science data in highly selective and grossly distorting ways. They fail to acknowledge that most of it is limited to studies of a narrow class of violent imagery. The ordinance, by contrast, both leaves untouched most of the images which may be said to cause negative effects and would allow the suppression of many images which have not been shown to have any harmful effect. Appellants also fail to mention that the "debriefing" phase of the cited experiments suggests that negative changes in attitudes may be corrected through further speech. They seek to create the false impression that new social science data have completely refuted the finding in 1971 by the Presidential Commission on Obscenity and Pornography that pornography was not harmful. However, as Professor Edward Donnerstein wrote in the study placed before the District Court by Appellants as Exh. T. at 127-28,

One should not assume . . . that all the research since the commission's time has indicated negative effects [of pornographic materials] on individuals. In fact, this is quite to the contrary. . . . [A] good amount of research strongly supports the position that exposure to certain types of erotica can reduce aggressive responses in people who are predisposed to aggression. The reader should
keep in mind the fact that erotica has been shown to have many types of effects.

Lastly, whatever Appellants' claims, numerous methodological problems make these studies too unreliable as predictors of real world behavior to sustain the withdrawal of constitutional protection from what is now permitted speech.

Although the ordinance authorizes suppression of far more than simply violent images, the limited findings of a linkage between sexually explicit materials and a willingness to aggress against women under laboratory conditions have occurred only in studies of "aggressive pornography," defined as a particular scenario: "depictions in which physical force is used or threatened to coerce a woman to engage in sexual acts (e.g. rape)." Appellants' Exh. S. at 105. This limiting definition is used by both Professor Donnerstein and Professor Neil Malamuth in the recently published book, Pornography and Sexual Aggression. See Malamuth, Aggression Against Women: Cultural and Individual Causes, in Pornography and Sexual Aggression 19, 29-30 (N. Malamuth & E. Donnerstein eds. 1984); Donnerstein, Pornography: Its Effect on Violence Against Women, in Pornography and Sexual Aggression, supra, at 53, 63. Where nonaggressive pornography is studied, no effect on aggression against women has been found; it is the violent, and not the sexual, content of the depiction that is said to produce the effects. Further, all of the aggression studies have used visual imagery; none has studied the impact of only words. Finally, even as to violent "aggressive pornography," the results of the studies are not uniform.

15. Studies have indicated that if you take out the explicit sexual content from aggressive pornographic films, leaving just the violence (which could be shown on any network television show), you find desensitization to violent acts in some subjects. However, if you take out the aggressive component and leave just the sexual, you do not seem to observe negative effects of desensitization to violence against women. Thus, violence is at issue here. That is why restrictions or censorship solutions are problematical.

Donnerstein & Linz, Debate on Pornography, Film Comment, Dec. 1984, at 34, 35.

16. Malamuth describes a study he did in which no evidence was found of changes in perceptions or attitudes following exposure to this type of pornography:

One group of male and female subjects looked at issues of Penthouse and Playboy magazines that showed incidents of sadomasochism and rape. A second group examined issues of these magazines that contained only non-aggressive pornography and a third group was given only neutral materials. Shortly afterward, subjects watched an actual videotaped interview with a rape victim and
Violent and misogynist images are pervasive in our culture. Nothing in the research cited by Appellants proves their hypothesis that these messages are believed in a qualitatively different way when they are communicated through the medium of sexually explicit material. Both Professors Donnerstein and Malamuth have noted that regulation of imagery targeted at the sexually explicit misses the core of the problem:

Images of violence against women are not the sole property of aggressive or violent pornography. Such images are quite pervasive in our society. Images outside of the pornographic or X-rated market may in fact be of more concern, since they are imbued with a certain "legitimacy" surrounding them and tend to have much wider acceptance. 

Sexist attitudes, callous attitudes about rape, and other misogynist values are just as likely to be reinforced by non-sexualized violent symbols as they are by violent pornography.

Donnerstein & Linz, supra p. 14, at 35 (emphasis added).

Attempts to alter the content of mass media . . . cannot be limited to pornography, since research has documented similar effects from mainstream movies. In addition, other mass media forms, such as advertisements, television soap operas, and detective magazines, to name a few, also contain undesirable images of violence against women. The most pertinent question on the issue of changing mass media content may not be where we draw the line between pornography and non-pornography but how we can best combat violence against women in its myriad forms.


responded to a questionnaire assessing their perceptions of a rape victim and her experience. Weeks later . . . subjects indicated their views on rape in response to a newspaper article. Exposure to the aggressive pornography did not affect perceptions of rape either in response to the videotaped interview with a rape victim or to the newspaper article.

Appellants' Exh. S. at 113.
When "more speech" can be an effective means of countering prejudicial and discriminatory messages, the First Amendment forbids the use of censorship to suppress even the most hateful content. Collin v. Smith, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978). The social science data upon which Appellants rely so heavily indicate that further speech can remove the negative effects on attitude registered after viewing certain kinds of violent pornography. Malamuth and Donnerstein both conduct "debriefing" sessions at the conclusion of their experiments. In these sessions, the purposes of the studies are explained to the subjects, and information is presented to dispel rape myths. The effectiveness of the debriefing sessions is then tested up to four months later. "The findings of these studies indicated consistently that the education interventions were successful in counteracting the effects of aggressive pornography and in reducing beliefs in rape myths." Malamuth, supra p. 14, at 46.

Censorship is not the solution. Education, however, is a viable alternative. Early sex education programs which dispel myths about sexual violence and early training in critical viewing skills could mitigate the influence of these films.

Donnerstein & Linz, supra p. 14, at 35.

This debriefing effect demonstrates that the changes in attitude shown from pornography are not permanent or, as Appellants contend, conditioned.

The substance of the social science data provides no support for the broad suppression of speech authorized by the ordinance. Further, even if the ordinance were narrowly limited to the "aggressive pornography" which has been studied, limits in the methodology fatally undermine Appellants' claims that even this violent material causes the sort of concrete, immediate harm that could justify creating a new exception to the First Amendment.

Behavior under laboratory conditions cannot predict behavior in life with the degree of accuracy and specificity required to justify a censorship law. The college students being studied in these laboratory tests knew that their actions would have no actual negative impact on real people. Indeed, the experimental
setting may induce conduct in subjects that they would not otherwise exhibit. In the words of one theorist:

Laboratory studies that deliberately lower restraints against aggression . . . may be seen as representing a reversal of the normal socialization process. After a subject has been angered, he is allowed (actually told) to attack his adversary. The victim emits no pain cues . . . and the subject not only feels better but learns that, in this laboratory situation, aggression is permissible and socially approved (i.e. condoned by the experimenter).

Donnerstein, supra p. 14, at 60.

Moreover, most of the reported willingness to aggress occurs only in subjects who are previously angered as part of the experiment shortly before they are asked to administer shocks. See generally Donnerstein, supra p. 14. Some researchers believe that the anger is the primary factor producing the manifestation of aggression. See Gray, Exposure to Pornography and Aggression Toward Women: The Case of the Angry Male, 29 Soc. Probs. 387 (1982).

Additionally, in most studies cited, aggressive behavior occurs only when the experimenter gives subjects disinhibitory cues indicating that such behavior is acceptable, and not when the experimenter provides an inhibitory communication.

These data highlight the important role of situational factors in affecting aggression against women and suggest that, while cultural factors such as aggressive pornography may increase some males’ aggressive tendencies, the actual expression of aggressive responses may be strongly regulated by varied internal and external (i.e., situational) variables.

Malamuth, supra p. 14, at 35.

In life, more than in a laboratory, a multitude of interacting factors shape behavior, including early childhood experiences, family dynamics, religious training, formal education, and one’s perceived relation to governmental structures and the legal system, as well as the entire range of media stimuli.17 It is difficult

17. See also Abramson & Hayashi, Pornography in Japan: Cross-Cultural and Theoretical Considerations, in Pornography and Sexual Aggression 173 (N. Malamuth & E.
even in the laboratory to identify a single "cause" for behavior. Every study finding a negative effect under laboratory conditions from viewing an image cannot be grounds for rewriting the First Amendment.

Appellants and supporting amici also claim a causal connection between the availability of pornography and rape. Such a claim is implausible on its face. Acts of rape and coercion long preceded the mass distribution of pornography, and in many cultures pornography is unavailable, yet the incidence of rape,

Donnerstein eds. 1984). Japanese pornography contains more depictions of rape and bondage than does American pornography and is also more readily available in popular magazines and on television. Yet, Japan has a substantially lower incidence of rape than any western country and a lower incidence of violent crime generally. The authors attribute the lower crime rate to cultural factors unrelated to pornography.

18. A good example of the limitations of laboratory studies is provided by the study described in Appellants’ Exh. R. Male subjects viewed violent “slasher” movies, one a day for five consecutive days, and answered questions each day about the extent to which the film was degrading to women. The subjects clearly knew that attitudes related to sexual violence against women were being measured. On the last day of the experiment, subjects were informed that the sixth and final film had not arrived. They were told since their original film did not arrive they would watch a law school documentary about a rape trial. After viewing the rape documentary, subjects completed questionnaires. The authors concluded that “exposed subjects later judged the victim of a violent assault and rape to be significantly less injured and generally more worthless than a control group of subjects who saw no films.” Appellants’ Exh. R., abstract.

Appellants cite this study in support of their claim that “pornography” makes men “less able to perceive that an account of rape is an account of rape.” Appellants’ brief at 20. The study is of limited value. First, the images used in the slasher films are not within the ordinance’s definition of pornography. Second, there is a high probability that “demand characteristics”—where subjects understand the purpose of a study and give the experimenter what he or she is thought to be looking for—skewed the responses. Third, the term “worthless” did not occur spontaneously to the subjects, but was suggested by a question asking, “I felt [the victim] was: valuable 1 2 3 4 5 6 7 8 9 worthless.” Thus, when the authors state that subjects who viewed the films found the victim “more worthless,” they mean that the subjects circled the number 6, say, instead of the number 4. The question regarding the perception of the victim’s injury was presented in a similar manner. What is being measured in studies of this type are not complex sets of attitudes, such as all of us have in real life, but gross responses on a questionnaire. Fourth, although the authors found “significant differences” between subjects who had viewed the films and those who had not on the “injury” and “worthlessness” measures, they did not find significant differences on other measures including defendant intention, victim resistance, victim responsibility, victim sympathy, and victim unattractiveness. Finally, an hypothesized correlation between perception of violence and perception of degradation proved to be non-significant, as did the expected correlation between perception of degradation and enjoyment of the film. The point is not that this is poor social science research, but that this kind of research does not produce evidence sufficiently strong to justify censorship.
and of discrimination against women generally, is high. The converse is also true; that is, there are places where pornography is widely available, and the incidence of rape is low compared to the United States.

Many studies have focused on Denmark to discern whether their abolition of the laws restricting pornography in the mid-1960's could be linked to any changes in behavior. Numerous conflicting arguments have been made as to the implications of the Danish experience. In 1979, the British Committee on Obscenity and Film Censorship published a report critically reviewing extensive data on the asserted linkage between pornography and sexual violence. Because it was done a decade after the American report, it includes much of the recent work published on this topic. The Committee found "no support at all" for the thesis that the availability of pornography in Denmark could be linked to an increase in sexual offenses. "It is impossible to discern a significant trend in rape which could be linked in any way to the free availability of pornography since the late 1960s." Obscenity and Film Censorship 83 (B. Williams ed. 1979).

Appellants' argument that pornography should be precluded from First Amendment protection would require this Court to find that it causes harm in the direct, immediate way that falsely shouting fire in a crowded theater does. The social science data upon which they rely lend no support to such a claim. The findings relate to only a small portion of the material which the ordinance would suppress, results of the studies are mixed, and even the data which report laboratory findings of aggression cannot be used blithely to predict behavior in the real world.

E. Constitutional Protection for Sexually Explicit Speech Should Be Enhanced, Not Diminished.

Sexually explicit speech which is judged "obscene" is not protected under the First Amendment. Miller v. California, 413

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19. Even the Baron and Strauss chapter, Sexual Stratification, Pornography, and Rape in the United States, in Pornography and Sexual Aggression, cited by the W.A.F. amicus brief at 16, which found, in a state-by-state analysis, a positive correlation between circulation rates for mainstream pornographic magazines (e.g., Playboy) and incidents of rape, could not explain some strikingly anomalous results, such as, for example, Utah, which ranked 51st (last) in per capita readership of sex magazines, but 25th in per capita rate of rape.
U.S. 15 (1973). Appellants seek to vitiate the protection currently afforded non-obscene sexual speech on the ground that any expression falling within the scope of this ordinance "is not the free exchange of ideas." Appellants' brief at 12. They ask this Court to rule that all sexually explicit speech is disfavored:

It is essential to look at the nature of the material regulated to measure the importance of the chilling effect. . . . [T]he ordinance reaches 'sexually explicit activity.' . . . The Supreme Court has determined that "there is . . . a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance." The message of Young is that it is constitutional for anyone who steps too close to the line to take the risk of crossing it when sexually explicit material is involved. The chilling effect is simply not entitled to great weight in this context.

Appellants' brief at 53 (citations omitted).

The argument that the First Amendment provides less protection for sexual images than for speech which is "political" misunderstands both the value of free expression and the political content of sexually explicit speech. Many justifications support free expression: our incapacity to determine truth without open discussion; the need for people to communicate to express self identity and determine how to live their lives; the inability of the censor to wield power wisely.

Further, sexual speech is political. One core insight of modern feminism is that the personal is political. The question of who does the dishes and rocks the cradle affects both the nature of the home and the composition of the legislature. The dynamics of intimate relations are likewise political, both to the individuals involved and by their multiplied effects to the wider society.20 To argue, as Appellants do, that sexually explicit speech is less important than other categories of discourse reinforces the conceptual structures that have identified women's concerns

20. Even clearly misogynist pornography is political speech. Indeed, antipornography activists have often argued that pornography is political propaganda for male dominance. One lawyer then associated with Women Against Pornography pointed out that the political message of pornography hostile to women results in its entitlement to heightened,
with relationships and intimacy as less significant and valuable precisely because those concerns are falsely regarded as having no bearing on the structure of social and political life.

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

For sexual minorities, speech describing conduct can be a means of self-affirmation in a generally hostile world. Constrictions on that speech can deny fundamental aspects of self-identity. Cf. Gay Law Students Ass'n v. Pacific Tel. & Tel., 24 Cal. 3d 458, 488, 594 P.2d 592, 611, 156 Cal. Rptr. 14, 33 (1979). In Rowland v. Mad River Local School District, 730 F.2d 444 (6th Cir. 1984), cert. denied, 53 U.S.L.W. 3614 (U.S. Feb. 26, 1985), a public employee was fired from her job because she confided in coworkers that she was bisexual. Although her statement resulted in no disruption of the workplace, the Court of Appeals ruled that it was constitutionally permissible to fire her "for talking about it." Id. at 450. Yet, as in Gay Law Students Association, the speech should have been considered political:

I think it is impossible not to note that a . . . public debate is currently ongoing regarding the rights of homosexuals. The fact of petitioner's bisexuality, once spoken, necessarily and ineluctably involved her in that debate. Speech that "touched upon" this explosive issue is no less deserving of constitutional attention than speech relating to more widely condemned forms of discrimination.


Thus, sexually explicit expression, including much that is covered by the ordinance, carries many more messages than simply the misogyny described by Appellants. It may convey the message that sexuality need not be tied to reproduction, men, or domesticity. It may contain themes of sex for no reason other than pleasure, sex without commitment, and sexual adventure—all of which are surely ideas. Cf. Kingsley Corp. v. Regents, 360 U.S. 684 (1959).

Even pornography which is problematic for women can be experienced as affirming of women’s desires and of women’s equality:

Pornography can be a psychic assault, both in its content and in its public intrusions on our attention, but for women as for men it can also be a source of erotic pleasure. A woman who is raped is a victim; a woman who enjoys pornography (even if that means enjoying a rape fantasy) is in a sense a rebel, insisting on an aspect of her sexuality that has been defined as a male preserve. Insofar as pornography glorifies male supremacy and sexual alienation, it is deeply reactionary. But in rejecting sexual repression and hypocrisy—which have inflicted even more damage on women than on men—it expresses a radical impulse.

Willis, Feminism, Moralism and Pornography, in Powers of Desire: The Politics of Sexuality 460, 464 (A. Snitow, C. Stansell & S. Thompson eds. 1983). Fantasy is not the same as wish fulfillment. See N. Friday, My Secret Garden: Women’s Secret Fantasies (1973) and Forbidden Flowers: More Women’s Sexual Fantasies (1975). But one cannot fully discuss or analyze fantasy if the use of explicit language is precluded.

The range of feminist imagination and expression in the realm of sexuality has barely begun to find voice. Women need the freedom and the socially recognized space to appropriate for themselves the robustness of what traditionally has been male language. Laws such as the one under challenge here would constrict that freedom. See Blakely, Is One Woman’s Sexuality Another Woman’s Pornography?, Ms. Magazine, Apr. 1985, at 37. Amici fear that as more women’s writing and art on sexual
themes emerge which are unladylike, unfeminine, aggressive, power-charged, pushy, vulgar, urgent, confident, and intense, the traditional foes of women's attempts to step out of their "proper place" will find an effective tool of repression in the Indianapolis ordinance.

II. THE ORDINANCE UNCONSTITUTIONALLY DISCRIMINATES ON THE BASIS OF SEX AND REINFORCES SEXIST STEREOTYPES.

The challenged ordinance posits a great chasm—a categorical difference—between the make-up and needs of men and of women. It goes far beyond acknowledgment of the differences in life experiences which are inevitably produced by social structures of gender inequality. The ordinance presumes women as a class (and only women) are subordinated by virtually any sexually explicit image. It presumes women as a class (and only women) are incapable of making a binding agreement to participate in the creation of sexually explicit material. And it presumes men as a class (and only men) are conditioned by sexually explicit depictions to commit acts of aggression and to believe misogynist myths.

Such assumptions reinforce and perpetuate central sexist stereotypes; they weaken, rather than enhance, women's struggles to free themselves of archaic notions of gender roles. In so doing, this ordinance itself violates the equal protection clause of the Fourteenth Amendment. In treating women as a special class, it repeats the error of earlier protectionist legislation which gave women no significant benefits and denied their equality.

A. The District Court Erred in Accepting Appellants’ Assertion That Pornography Is a Discriminatory Practice Based on Sex.

The ordinance is predicated on a finding that:

Pornography is a discriminatory practice based on sex which denies women equal opportunities in society. Pornography is central in creating and maintaining sex as a basis for discrimination. . . . [It harms] women's opportunities for equality of rights in employment, education, access to and use of public accommodations, and acquisition of real property; promote[s] rape, battery, child abuse, kidnapping and prostitution and inhibit[s] just enforcement of laws against such acts . . . .

Indianapolis, Ind., Code § 16-1(a)(2).

The District Court accepted that finding, but held that First Amendment values outweighed the asserted interest in protecting women. American Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316, 1335-37 (S.D. Ind. 1984).

Amici dispute the City and County's “finding” that “pornography is central in creating and maintaining sex as a basis for discrimination.” There was no formal, or indeed informal, legislative fact-finding process leading to this conclusion. Rather, legislators who had previously opposed obscenity on more traditional and moralistic grounds adopted a “model bill” incorporating this finding.22 The model bill was in turn based on legislative hearings, held in Minneapolis, which did not, in fairness, reflect a reasoned attempt to understand the factors “central” in maintaining “sex as a basis for discrimination.”23 See Appellants’ brief at 15 n.6.

It is true that sex discrimination takes multiple forms, which are reflected in the media. But the finding that “pornography is central in creating and maintaining sex as a basis for discrimina-


"tion" does not represent our best understanding of the complex, deep-seated and structural causes of gender inequality. In the past decade, many people have grappled with the question of causation. Feminist law professors and scholars have published and revised collections of cases and materials. K. Davidson, R. Ginsberg & H. Kay, supra p. 3 (1974 & 2d ed. 1981); B. Babcock, A. Freedman, E. Norton & S. Ross, Sex Discrimination and the Law: Causes and Remedies (1974 & Supp. 1978). The factors they find most significant include: the sex segregated wage labor market; systematic devaluation of work traditionally done by women; sexist concepts of marriage and family; inadequate income maintenance programs for women unable to find wage work; lack of day care services and the premise that child care is an exclusively female responsibility; barriers to reproductive freedom; and discrimination and segregation in education and athletics. Numerous feminist scholars have written major works tracing the cultural, economic, and psychosocial roots of women's oppression.

Misogynist images, both those which are sexually explicit and the far more pervasive ones which are not, reflect and may help to reinforce the inferior social and economic status of women. But none of these studies and analyses identifies sexually explicit material as the central factor in the oppression of women. History teaches us that the answer is not so simple. Factors far more complex than pornography produced the English common law treatment of women as chattel property and the enactment of statutes allowing a husband to rape or beat his wife with impunity. 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 who have studied the question.

Amici also dispute the "finding" that pornography, as defined by the ordinance, is "a discriminatory practice . . . which denies


women equal opportunities." Images and fictional text are not the same thing as subordinating conduct. The ordinance does not target discriminatory actions denying access to jobs, education, public accommodations, or real property. It prohibits images. Although ideas have impact, images of discrimination are not the discrimination.

Further, the ordinance is cast in a form very different from the traditional antidiscrimination principles embodied in the Constitution and federal civil rights laws. Antidiscrimination laws demand equality of treatment for men and women, blacks and whites. The ordinance, by contrast, purports to protect women. It assumes that women are subordinated by sexual images and that men act uncontrollably if exposed to them. Sexist stereotypes are thus built into its very premises, and, as we demonstrate infra, its effect will be to reinforce those stereotypes.

Hence, the District Court misperceived this case as one requiring the assignment of rank in a constitutional hierarchy. It is not necessary to rule that either gender equality or free speech is more important. The ordinance is fatally flawed not only because it authorizes suppression of speech protected by the First Amendment but also because it violates the constitutional guarantee of sex-based equality.

B. The Ordinance Classifies on the Basis of Sex and Perpetuates Sexist Stereotypes.

The ordinance defines pornography in gender specific terms as "the graphic sexually explicit subordination of women" that also presents "women" in particular ways proscribed by the law. The District Court found:

[t]he Ordinance seeks to protect adult women, as a group, from the diminution of the legal and sociological status as women, that is from the discriminatory stigma which befalls women as women as a result of 'pornography.'

American Booksellers Ass’n v. Hudnut, 598 F. Supp. at 1335 (emphasis supplied).
The heart of the ordinance is the suppression of sexually explicit images of women, based on a finding of "subordination," a term which is not defined. The ordinance implies that sexually explicit images of women necessarily subordinate and degrade women and perpetuates stereotypes of women as helpless victims and people who could not seek or enjoy sex.

The ordinance also reinforces sexist stereotypes of men. It denies the possibility that graphic sexually explicit images of a man could ever subordinate or degrade him. It provides no remedy for sexually explicit images showing men as "dismembered, truncated or fragmented" or "shown as filthy or inferior, bleeding, bruised or hurt."

The stereotype that sex degrades women, but not men, is underscored by the proviso that "the use of men, children, or transsexuals in the place of women . . . also constitutes pornography." Indianapolis, Ind., Code § 16-3(q). The proviso does not allow men to claim that they, as men, are injured by sexually explicit images of them. Rather men are degraded only when they are used "in place of women." The ordinance assumes that in sexuality, degradation is a condition that attaches to women.

The ordinance authorizes any woman to file a complaint against those trafficking in pornography "as a woman acting against the subordination of women." A man, by contrast, may obtain relief only if he can "prove injury in the same way that a woman is injured." Indianapolis, Ind., Code § 16-17(a)(7)(b). Again the ordinance assumes that women as a class are subordinated and hurt by depictions of sex, and men are not.

The ordinance reinforces yet another sexist stereotype of men as aggressive beasts. Appellants assert:

By conditioning the male orgasm to female subordination, pornography . . . makes the subordination of women pleasurable and seemingly legitimate. Each time men are sexually aroused by pornography, they learn to connect a woman's sexual pleasure to abuse and a woman's sexual nature to inferiority. They learn this in their bodies, not just their minds, so that it becomes a

26. Appellants explain that the proviso is needed because "without it, pornographers could circumvent the ordinance by producing the exact same material using models other than adult biological females, i.e., men, children, and transsexuals, to portray women." Appellants' brief at 45.
natural physiological response. At this point pornography leaves no more room for further debate than does shouting "kill" to an attack dog.

Appellants' brief at 21.

Men are not attack dogs, but morally responsible human beings. The ordinance reinforces a destructive sexist stereotype of men as irresponsible beasts, with "natural physiological responses" which can be triggered by sexually explicit images of women, and for which the men cannot be held accountable. Thus, men are conditioned into violent acts or negative beliefs by sexual images; women are not. Further, the ordinance is wholly blind to the possibility that men could be hurt and degraded by images presenting them as violent or sadistic.

The ordinance also reinforces sexist images of women as incapable of consent. It creates a remedy for people "coerced" to participate in the production of pornography. Unlike existing criminal, tort, and contract remedies against coercion, the ordinance provides:

proof of the following facts or conditions shall not constitute a defense: that the person actually consented . . . ; or, knew that the purpose of the acts or events in question was to make pornography; or demonstrated no resistance or appeared to cooperate actively in the photographic sessions or in the sexual events that produced the pornography; or . . . signed a contract, or made statements affirming a willingness to cooperate in the production of pornography.

Indianapolis, Ind., Code § 16-3.(5)(A) VIII-XI.

In effect, the ordinance creates a strong presumption that women who participate in the creation of sexually explicit material are coerced. A woman's manifestation of consent—no matter how plain, informed, or even self-initiated—does not constitute a defense to her subsequent claim of coercion. Women are judged incompetent to consent to participation in the creation of sexually explicit material and condemned as "bad" if they do so.

27. The provisions negating common law defenses to coercion are cast in facially neutral terms. But since "pornography" is defined in gender specific terms, the provisions abrogating defenses to coercion also apply to women or to others used "in the place of women."
Appellants argue that this provision is justified by Supreme Court precedent allowing suppression of sexually explicit material involving children. They assert that women, like children, "are incapable of consenting to engage in pornographic conduct, even absent a showing of physical coercion and therefore require special protection. . . . The coercive conditions under which most pornographic models work make this part of the law one effective address to the industry." [Sic.] Appellants' brief at 17.

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

C. The Ordinance Is Unconstitutional Because It Reinforces Sexist Stereotypes and Classifies on the Basis of Sex.

In recent years, the Supreme Court has firmly and repeatedly rejected gender-based classifications, such as that embodied in the ordinance. The constitutionally protected right to sex-based equality under law demands that:

the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. . . . The burden is met only by showing at least that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives."


The sex-based classifications embodied in the statute are justified on the basis of stereotypical assumptions about women's
vulnerability to sexually explicit images and their production and men's latent uncontrollability. But the Supreme Court has held that, "[This standard] must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions." Id. Gender-based classifications cannot be upheld if they are premised on "'old notions' and 'archaic and overbroad' generalizations" about the roles and relative abilities of men and women." Califano v. Goldfarb, 430 U.S. 199, 217 (1977).

The ordinance damages individuals who do not fit the stereotypes it embodies. It delegitimizes and makes socially invisible women who find sexually explicit images of women "in positions of display" or "penetrated by objects" to be erotic, liberating, or educational. These women are told that their perceptions are a product of "false consciousness" and that such images are so inherently degrading that they may be suppressed by the state. At the same time, it stamps the imprimatur of state approval on the belief that men are attack dogs triggered to violence by the sight of a sexually explicit image of a woman. It delegitimizes and makes socially invisible those men who consider themselves gentle, respectful of women, or inhibited about expressing their sexuality.

Even worse, the stereotypes of the ordinance perpetuate traditional social views of sex-based difference. By defining sexually explicit images of woman as subordinating and degrading to them, the ordinance reinforces the stereotypical view that "good" women do not seek and enjoy sex. 28 As applied, it would deny women access to sexually explicit material at a time in our

28. Perpetuating the stereotype that "good girls" do not enjoy sex, and suppressing images of women's sexuality, is particularly tragic for teenagers. A recent study by the prestigious Alan Guttmacher Institute identifies factors explaining why teenagers in the United States experience unwanted pregnancy at rates significantly higher than those in any other developed nation. This extensive study found that the single most important factor associated with low rates of unwanted pregnancy is "openness about sex (defined on the basis of four items: media presentations of female nudity, the extent of nudity on public beaches, sales of sexually explicit literature and media advertising of condoms)." The researchers conclude:

American teenagers seem to have inherited the worst of all possible worlds regarding their exposure to messages about sex: Movies, music, radio and TV tell them that sex is romantic, exciting, titillating. . . . Yet, at the same time, young people get the message good girls should say no. Almost nothing that they see or hear about sex informs them about contraception or the importance of avoiding pregnancy. . . . Such messages lead to an ambivalence about sex that stifles
history when women have just begun to acquire the social and economic power to develop our own images of sexuality. Stereotypes of hair-trigger male susceptibility to violent imagery can be invoked as an excuse to avoid directly blaming the men who commit violent acts.

Finally, the ordinance perpetuates a stereotype of women as helpless victims, incapable of consent, and in need of protection. A core premise of contemporary sex equality doctrine is that if the objective of the law is to "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate." Mississippi Univ. for Women v. Hogan, 458 U.S. at 725. We have learned through hard experience that gender-based classifications protecting women from their own presumed innate vulnerability reflect "an attitude of 'romantic paternalism' which, in practical effect, puts women not on a pedestal but in a cage." Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

The coercion provisions of the ordinance "protect" by denying women's capacity to voluntarily agree to participate in the creation of sexually explicit images. The trafficking provisions "protect" by allowing women to suppress sexually explicit speech which the ordinance presumes is damaging to them. The claim that women need protection and are incapable of voluntary action is familiar. Historically, the presumed "natural and proper timidity and delicacy" of women made them unfit "for many of the occupations of civil life," and justified denying them the power to contract. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141-42 (1872).

Until quite recently, the law commonly provided women special protections against exploitation. In 1936, the Supreme Court upheld a law establishing minimum wages for women saying, "What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers?" West Coast Hotel v. Parrish, 300 U.S. 379, 398 (1936). In 1948, the Court approved a law banning women from work as bartenders as a legitimate measure to combat the

communication and exposes young people to increased risk of pregnancy, out-of-wedlock births and abortions.

“moral and social problems” to which bartending by women might give rise. Goesaert v. Cleary, 335 U.S. 464, 466 (1948). The protectionist premise of these cases is now discredited and their holdings repudiated.

Women were, and continue to be, in a position of social and economic vulnerability that inhibits their ability to negotiate fair terms and conditions of wage labor. Further, the pervasive sexism and violence of our culture make women vulnerable to exploitation and inhibit their ability to enter into sexual or other relationships on a free and voluntary basis.

Slavery and free self-actualization are opposite poles on a continuum. Both free agency and response to external pressure are simultaneous aspects of human action. In the 1930’s, employers challenged minimum wage and hour laws saying that laborers “freely consented” to work twelve hours a day, under dangerous and harmful conditions, for wages that did not provide minimal subsistence. We understand today that this concept of voluntary consent is self-serving and empty. Similarly, many women engage in sex or in the production of sexually explicit materials in response to pressures so powerful that it would be cynical to characterize their actions as simply voluntary and consensual.

Still, the laws that “protected” only women from exploitation in wage labor hurt them. B. Babcock, A. Freedman, E. Norton & S. Ross, supra p. 25, at 48, 191-217. Many employers responded by barring women from the best paying jobs with the greatest opportunity for advancement. Further, the protective labor laws reinforced general beliefs about women’s vulnerability and incompetence. Similarly here, the protection of the ordinance reinforces the idea that women are incompetent, particularly in relation to sex.

The pervasive sexism and violence of our culture create a social climate—in the home, workplace, and street—that is different for women than for men. But even accurate generalizations about women’s need for help do not justify sex-based classifications such as those in this ordinance. It is also true that women generally are still the ones who nurture young children. Yet we understand that laws giving mothers an irrebuttable “tender years” presumption for custody, or offering child rearing leaves
only to mothers but not to fathers, ultimately hurt women and are unconstitutional. 29

Some of the proponents of the ordinance believe that it will empower women, while others support it for more traditional, patriarchal reasons. Supra note 22. But many gender-based classifications are premised on a good faith intent to help or protect women. Good intent does not justify an otherwise invidious gender-based law. "Our nation has had a long and unfortunate history of sex discrimination." Frontiero v. Richardson, 411 U.S. at 684. The clearest lesson of that history is that sex-based classifications hurt women.

Thus, the District Court was correct to reject Appellants' claim that women are like children who need special protection from sexually explicit material. The Court found that:

adult women as a group do not, as a matter of public policy or applicable law, stand in need of the same type of protection which has long been afforded children. . . . Adult women generally have the capacity to protect themselves from participating in and being personally victimized by pornography . . . .

American Booksellers Ass'n v. Hudnut, 598 F. Supp. at 1333-34.

The gender-based classification embodied in the ordinance is unconstitutional because it assumes and perpetuates classic sexist concepts of separate gender-defined roles, which carry "the inherent risk of reinforcing the stereotypes about the 'proper place' of women and their need for special protection." Orr v. Orr, 440 U.S. 268, 283 (1979).

D. The Sex-Based Classification and Stereotypes Created by the Ordinance Are Not Carefully Tailored to Serve Important State Purposes.

Appellants claim that the ordinance serves the "governmental interest in promoting sex equality." Appellants' brief at 23. Certainly preventing the violent subordination of women is the sort of compelling public purpose that might justify sex-based classification. But, as is often true of classifications justified on grounds that they protect women, the benefits actually provided are minimal. The ordinance thus also fails the requirement for a "substantial relationship" between its classification and the achievement of its asserted goal. Mississippi Univ. for Women v. Hogan, 458 U.S. at 724.

Supporters of the ordinance describe acts of violence against women and claim that the ordinance would provide a remedy for those injuries. But the only new remedy it provides is suppression of sexually explicit materials, a wholly inadequate and misdirected response to real violence.

Amicus Marchiano, for example, has written of her marriage to a man who beat her, raped her, forced her into prostitution, and terrorized her. L. Lovelace, Ordeal (1980). For several years prior to the making of Deep Throat, she was virtually imprisoned by her husband through brute force, control of economic resources, and the fact that she believed his claim that a wife could not charge her husband with a crime. Id. at 82. Had this ordinance existed then, it would not have helped her. There is a compelling social need to provide more effective remedies for victims of violence and sexual coercion. But the ordinance does not protect vulnerable people against those actions already prohibited by the criminal law. Those who have worked to empower battered women and children understand that effective enforcement of existing criminal sanctions demands a multipronged effort. Police and prosecutors must be trained, required to take complaints seriously, and given the resources to do so. Bruno v. McGuire, 4 Fam. L. Rep. (BNA) 3095 (1978). Help must be available on a continuous and prompt basis. A. Boylan & N. Taub, Adult Domestic Violence: Constitutional, Legislative and Equitable Issues (1981). Vulnerable people must be educated and provided support by community groups and shelters. L. Bowker, Beating Wife Beating (1982). See generally S.

Individuals who commit acts of violence must be held legally and morally accountable. The law should not displace responsibility onto imagery. Amicus Women Against Pornography describe as victims of pornography married women coerced to perform sexual acts depicted in pornographic works, working women harassed on the job with pornographic images, and children who have pornography forced on them during acts of child abuse. Appellants' brief at 13. Each of these examples describes victims of violence and coercion, not of images. The acts are wrong, whether or not the perpetrator refers to an image. The most wholesome sex education materials, if shown to a young child as an example of what people do with those they love, could be used in a viciously harmful way. The law should punish the abuser, not the image. Title VII of the Civil Rights Act provides remedies for working women injured by sexual taunts or slurs, including sexually explicit pictures, e.g., Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977), and for those injured by misogynist imagery. See, e.g., Kyriazi v. Western Elec. Co., 461 F. Supp. 892 (D.N.J. 1978). These legal principles apply to any images or texts which people put to discriminatory use, whether pornography or the Bible. But no law has or should assume that the same woman harassed by pornographic images in the workplace might not enjoy those very images if given the opportunity to put them to her own use.

To resist forced sex and violence, women need the material resources to enable them to reject jobs or marriages in which they are abused or assaulted and the internal and collective strength to fight the conditions of abuse. The ordinance does nothing to enhance the concrete economic and social power of women. Further, its stereotype of women as powerless victims undermines women's ability to act affirmatively to protect themselves.

Suppression of sexually explicit material will not eliminate the pervasive sexist images of the mainstream culture or the discriminatory economic and social treatment that maintains women's second class status. Such suppression will not empower women to enter into sexual relationships on a voluntary, consen-
sual basis. Empowering women requires something more than suppression of texts and images. It demands "concrete material changes that enable women and men to experience sexuality less attached to and formed by gender."\textsuperscript{30} These changes include social and economic equality; access to jobs, day care and education; more equal sharing of responsibility for children; recognition of the social and economic value of the work that women have traditionally done in the home; and access to birth control, abortion, and sex education.

III. Conclusion

Sexually explicit speech is not per se sexist or harmful to women. Like any mode of expression, it can be used to attack women's struggle for equal rights, but it is also a category of speech from which women have been excluded. The suppression authorized by the Indianapolis ordinance of a potentially enormous range of sexual imagery and texts reinforces the notion that women are too fragile, and men too uncontrollable, absent the aid of the censor, to be trusted to reject or enjoy sexually explicit speech for themselves. By identifying "subordination of women" as the concept that distinguishes sexually explicit material which is tolerable from that to be condemned, the ordinance incorporates a vague and asymmetric standard for censorship that can as readily be used to curtail feminist speech about sexuality, or to target the speech of sexual minorities, as to halt hateful speech about women. Worse, perpetuation of the concept of gender-determined roles in regard to sexuality strengthens one of the main obstacles to achieving real change and ending sexual violence.

Amici therefore ask this Court to affirm the judgment below.

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Respectfully submitted,

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