Michigan Law Review

Volume 88 | Issue 6

1990

The New Politics of Pornography

René L. Todd
University of Michigan Law School

THE NEW POLITICS OF PORNOGRAPHY. By *Donald A. Downs.* Chicago: University of Chicago Press. 1989. Pp. xxiv, 198. Cloth, $42; paper, $14.95.

Donald Downs'[1] *The New Politics of Pornography* asserts that radical feminist anti-pornography legislation is inconsistent with the liberal model of the first amendment. This assertion will be nothing new to radical feminists; they have heard it before and have said it themselves.[2] Downs takes the argument one step further and attempts to establish that the liberal model of the first amendment is superior to progressive models that might accommodate the radical feminist position. The proof is simple: the liberal model is conducive to free speech, while progressive models are not. Yet just when things are looking bleak for the radical feminists, Downs attempts to placate them with a "compromise": a new definition of pornography that restricts only *violent* obscene materials. What Downs fails to realize is that a compromise between obscenity law and anti-pornography law is not possible: traditional obscenity law accommodates community norms even as feminist anti-pornography law deconstructs them. Downs' "compromise" is simply his preference for societal expressions of morality over individual accounts of subjugation.

The New Politics of Pornography attacks the extremism Downs believes typical of the present pornography debate, particularly on the part of radical feminists Andrea Dworkin and Catharine MacKinnon (p. xvii). Dworkin and MacKinnon assert that pornography creates sexual inequality, silencing the voices of women within the first amendment marketplace. They argue that mere facial, or procedural, equality is inadequate: treating unequally placed parties in an equal fashion does not result in "substantive equality."[3] If women are to achieve substantive equality within the first amendment, they believe, society must restrict pornographic speech.

Dworkin and MacKinnon drafted anti-pornography ordinances that were enacted in Indianapolis and Minneapolis, creating a civil cause of action against the producers of materials that depict "the sexually explicit subordination of women, graphically or in words."[4]

---

1. Donald Downs is currently an associate professor of political science at the University of Wisconsin at Madison. He is the author of NAZIS IN SKOKIE: FREEDOM, COMMUNITY, AND THE FIRST AMENDMENT (1986).

2. *See* MacKinnon, *Not a Moral Issue,* 2 YALE L. & POLY. REV. 335-36 (1984). *See generally* West, *Jurisprudence and Gender,* 55 U. CHI. L. REV. 1 (1988).

3. *See* MacKinnon, *Pornography, Civil Rights, and Speech,* 20 HARV. C.R.-C.L. L. REV. 1, 4-5 (1985).

4. The Minneapolis ordinance defined pornography as "the sexually explicit subordination of women, graphically or in words," in which

(i) women are presented as sexual objects, things, or commodities; or

Such restrictions, Downs believes, threaten the core of a liberal model of the first amendment (p. 5). In contrast, Downs "advocate[s] legal tolerance and endorse[s] preserving the liberal core of general First Amendment law for expression that may possess intellectual value" (p. xxiv).

Part I of *The New Politics of Pornography* sets forth the conception of the liberal first amendment doctrine Downs defends (pp. 1-33). According to Downs, the liberal model of the first amendment "assumes that the individual citizen is autonomous and responsible," so that liberal conceptions of equality are limited to state neutrality (p. 5). This conception can accommodate only the exceptions necessary to protect individual rights, or to account for speech that is closely aligned to action (p. 5). Downs believes that radical feminist anti-pornography efforts are inherently inconsistent with this model because they seek to disfavor speech that harms women as a group.

Downs follows this argument with three sections detailing the procedural history of the anti-pornography ordinances in Minneapolis and Indianapolis.[5] He is particularly critical of the roles played by MacKinnon and Dworkin in the legislative processes. For example, in the Minneapolis debate, MacKinnon and Dworkin acted as both consultants to the city council and lobbyists for the ordinance (p. 61). According to Downs, this led to almost totalitarian one-sidedness of debate, characterized by emotional hearings where women expressed their "uncompromising rage" at their perceived victimization (pp. 68-69). Downs asserts that this "psychology of victimization . . . jeopardized objectivity and perspective," resulting in a process that was "more therapeutic than objective" (pp. 71-72). Dworkin's and MacKinnon's "questionable tactics" (p. 113) caught both council members and potential opponents of the ordinances unprepared. Thus, the ordinances were railroaded through their respective city councils, supported by members who either did not understand the radical feminist premises on which the ordinances were based (pp. 120-21), or who were afraid of appearing "pro-pornography" to their constituents (pp.

(ii) women are presented as objects who enjoy pain or humiliation; or
(iii) women are presented as sexual objects who experience sexual pleasure in being raped; or
(iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or
(v) women are presented in postures of sexual submission or sexual servility, including by inviting penetration; or
(vi) women's body parts — including but not limited to vaginas, breasts, and buttocks — are exhibited, such that women are reduced to those parts; or
(vii) women are presented as whores by nature; or
(vii) women are presented being penetrated by objects or animals; or
(ix) women are presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.

P. 44. The Indianapolis ordinance was struck down by the Seventh Circuit in American Booksellers Assn. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd.* 475 U.S. 1001 (1986).

5. *See* Parts II-IV, pp. 34-143.

126-27). By allowing these ordinances to pass in so "disconcerting" a fashion (p. 143), these councils, in Downs' words, failed to "live[ ] up to [their] First Amendment obligations" (p. 142).

After alleging the legal illegitimacy of the radical feminist anti-pornography ordinances, Downs attacks their theoretical legitimacy. Part V asserts the superiority of the liberal model of the first amendment over the progressive models that would accommodate radical feminist efforts to achieve substantive equality (pp. 144-98). Identifying the first amendment as "one of the last bastions of liberal norms" (p. 147), Downs asserts the validity of the liberal model as a historical matter. According to Downs, a liberal first amendment has protected dissent and controversial speech throughout the civil rights movement, the Vietnam War, and indeed, the feminist movement itself (pp. 147-48). "Content neutrality guarantees that groups competing in a context of cultural pluralism all will enjoy the right to express their views and attempt to influence public and legal opinion" (p. 148). Downs acknowledges that "dominant discourses prevail over less dominant ones and there is not perfect competition among ideas" (p. 147). Movements of "progressive censorship" (p. 148), however, result only in oppression. Despite its faults, the liberal approach remains superior to "[a]bsolutist approaches, which attempt to impose one view of right and denigrate all others, [and which] have historically led to hate, repression, and violence directed at those outside the new order" (p. 149). In the context of the anti-pornography movement, Downs argues that civil pornography actions may be used as harassment mechanisms, and may chill unrestricted speech (pp. 155-56). The result, in Downs' view, is "a frontal attack on a free intellectual environment" (p. 162). Accordingly, Downs espouses the liberal conception of the first amendment over progressive models, including radical feminist attempts to achieve substantive equality.

Downs discusses the possibility of creating a new unprotected classification of speech within the liberal model, in the tradition of *New York v. Ferber*[6] and *Young v. American Mini Theatres.*[7] However, Downs finds the causal link between pornography and violence toward women insufficient to warrant restriction of arguably artistic materials.[8] He defends "artful pornography" on the grounds that such materials may provide a retreat from and repression of the

6. 458 U.S. 747 (1982) (upheld prohibition on child pornography).

7. 427 U.S. 50 (1976) (upheld zoning restriction on "adult" theatres).

8. *See* pp. 165-75; *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-17 n.49 (2d ed. 1988):

> That many areas of existing first amendment doctrine — ranging from obscenity law to the law of labor-management communications — implicitly tolerate content-based, and perhaps even viewpoint-based, controls of speech . . . seems an insufficient justification for inviting a new, and a particularly dramatic, departure from the overarching principle that government should not be empowered to suppress expression based on the rejection of the world view that it propounds as evil, or false, or both.

human condition that may be necessary to fulfill psychological needs (pp. 187-88). Because such speech provides a societal benefit, it should not be excluded from the protection of the liberal model of the first amendment.

However, Downs acknowledges that "[e]ven though a predominantly liberal approach to speech is necessary to maintain an open society, the values of the open society are not exclusively libertarian" (p. 197). Rather, the liberal model may "entertain non-liberal values in areas of expression that do not directly impinge on its political and intellectual core" (p. 197). Although artful pornography may benefit society by fulfilling psychological needs, Downs believes "[d]emocratic society has a right to draw the line of tolerance at the worse, most degrading depictions of sex that are unredeemed by art" (p. 188). Such depictions "represent not the dialectic of existence but an abandonment of responsibility" (p. 188). Excluding these materials recognizes that "values of restraint based on the norms of civility and equal respect are necessary to foster a healthier society and cultural pluralism" (p. 197). Accordingly, the liberal model of the first amendment may accommodate the societal decision to exclude sexually offensive materials from first amendment protection.

Downs believes the present-day obscenity test, as set forth by the Supreme Court in *Miller v. California,*[9] adequately represents the societal decision to exclude those "most degrading sexual depictions." The *Miller* test considers:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[10]

The *Miller* test's societal and legal legitimacy is evidenced by its "established track record" (p. 196). The only flaw in the *Miller* definition, in Downs' eyes, is its failure to account for sexual violence — the key element, he believes, that feminists have brought to the pornography debate (p. 188). According to Downs, "there appears to be a greater social consensus for restricting violent sexual material than for other types" (p. 196). Thus, he "recommend[s] that the concept of obscenity either be broadened to include certain forms of violence or that violence be dealt with in established obscenity doctrine" (p. 188).

However, Downs cautions that broadening the definition of obscenity to include all sexual violence would risk the loss of artistic material. "Some landmark films like Alfred Hitchcock's *Psycho* would fall by the wayside, as would some scenes from *Doctor Zhivago,* to

9. 413 U.S. 15 (1973).

10. 413 U.S. at 24 (citations omitted).

name just two artistic examples from an endless list" (p. 191). Further, enforcement of such a standard would be ineffectual, as pornographers would devise ways to "side-step[ ] the law" (p. 192). Indeed, Downs implies that the plethora of violent sexual images in society today is the result of obscenity enforcement.[11] Thus, broadening the *Miller* definition in societal condemnation of violence would threaten the core of the liberal first amendment.

The only alternative open to Downs is therefore to narrow the *Miller* definition to include only violent obscene materials — "[p]ortrayals of murder, dismemberment, brutality, or violence in the context of obscene acts (that is, those which depict ultimate sexual acts, lewdly displayed naked bodies, or excess of sexual detail)" (p. 195). By combining society's concern for morality with the concern society and radical feminists share for violence, Downs believes he has achieved a compromise that may be accommodated by the liberal model of the first amendment.

Downs fails to realize that compromise between traditional obscenity law and feminist anti-pornography law is not possible. Obscenity law is an effort to legislate morality; anti-pornography law is an effort to legislate equality.[12] Obscenity law seeks to further standards of the community; anti-pornography law sees that community as a sexual hierarchy, and seeks to prohibit materials that create that hierarchy. The test for obscenity is male-oriented: whether or not the material produces an erection.[13] The test for pornography is female-oriented: whether or not the material degrades women. In the words of MacKinnon, "Obscenity is more concerned with whether men blush, pornography with whether women bleed — both producing a sexual rush."[14]

According to MacKinnon, obscenity law mirrors and reinforces the sexual hierarchy that pornography creates.

> In pornography, women are sex. In obscenity law, women are sex. In pornography, women's bodies are dirty. In obscenity law, obscenity is filth. In pornography, the more explicit the sex, the more pornographic. In obscenity law, the more explicit the sex, the more obscene. In pornography, sex is a dirty secret. Obscenity law sees it, therefore, helps

11. P. 192 ("One reason there is so much violence in depictions today is that such depictions appeal to primitive sensibilities without running afoul of obscenity law. . . . [V]iolent sex is a substitute for obscene sex."). *But see* C. MACKINNON, A FEMINIST THEORY OF THE STATE 200 (1989) ("[M]ore and more violence has become necessary to keep the progressively desensitized consumer aroused to the illusion that sex (and he) is daring and dangerous.").

12. This distinction is evident in the vocabulary of the debate. "The term 'obscenity' refers to indecency and filth; the term pornography — derived from the Greek word for 'writing about whores' — refers to materials that treat women as prostitutes and that focus on the role of women in providing sexual pleasure to men." Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 595.

13. *See* C. MACKINNON *supra* note 11, at 199-200.

14. *Id.* at 199.

> keep it, that way. Pornography sees nothing wrong with what it does to women. Neither does obscenity law. Pornography is socially decried but socially permitted. Obscenity is the legal device through which it is legally repudiated but legally permitted.[15]

Obscenity law does not account for gender distinction or gender oppression. It excludes materials radical feminists consider harmless, yet protects materials radical feminists find harmful. The sexual focus of both obscenity and anti-pornography law creates the illusion of similarity.[16] In reality, the two share little beyond their animosity to an overlapping set of materials.

The distinctions between obscenity law and anti-pornography law arise from the incompatible theories of social power from which the two derive. Obscenity law reflects the morality of the governing community, a community radical feminists believe reflects the sexual hierarchy anti-pornography law is intended to eradicate. *The New Politics of Pornography* is thus a paradigm of conservative thought. Downs bases his preference for the liberal model of the first amendment in history, a classic social conservative position of deference to "the accumulated wisdom of a community's positive conventional morality. . . ."[17] He grants the legitimacy of an obscenity exception to the liberal model of the first amendment because it, too, represents societal consensus and has achieved legal legitimacy.[18] Downs adds a violence prong to the *Miller* test because there is even greater societal consensus for this narrower definition.[19] Thus, both the present obscenity standard and Downs' compromise standard reflect societal mores as expressed through social consensus and legal doctrine.

The feminist model, on the other hand, does not constitute a valid exception from the liberal model because it derives its support not from community norms, but from individual accounts of harm.[20]

---

15. *Id.* at 201.

16. As Downs describes, Dworkin and MacKinnon took advantage of this overlap by recruiting the conservative anti-obscenity votes as well as the radical anti-pornography votes to pass the Indianapolis and Minneapolis ordinances. *See* pp. 34-143. Indeed, Downs hints at some degree of hypocrisy on the part of MacKinnon, whom Indianapolis city council members perceived as conservative, and who impliedly did nothing to correct that perception. P. 113.

17. West, *Progressive and Conservative Constitutionalism,* 88 MICH. L. REV. 641, 654 (1990).

18. Pp. 194, 197. West characterizes "legal conservatives" as those who believe that the state "should defer to the vision of the good articulated in established, historically enshrined legal traditions, including, most significantly, constitutional history and common law precedents." West, *supra* note 17, at 655.

19. *See* p. 196.

20. Pp. 70-72, 79. West characterizes MacKinnon and other radical feminists as "anti-subordination progressives."

> The meaning of the good, for anti-subordination progressives, is negatively inferred from varying experiences [either one's own or others'] of subordination, bondage and invasion. The sorts of experiences of inequality that inform anti-subordinationist politics and legal thought are vast. They include, for example, the daily, numbing joylessness of a materially impoverished existence; the self-contempt from being regarded as essentially less than human, less than whole, less than entitled, or less than respected; the pain of being a target

Downs' extensive discussion of what he considers to be the tainted legislative processes that passed the anti-pornography ordinances is intended to show the lack of both communitarian and legal authority behind the ordinances.[21] If the ordinances had been passed through the most pure of legislative processes, and were fully backed by community support, they too might warrant some degree of accommodation.[22] Thus, Downs' argument rests on the legitimacy of communitarian authority as opposed to the legitimacy of conceptions of the good derived from individual, idealist perceptions.[23]

By Downs' own account, he is "not concerned with broader questions of social life but rather with the roles of competing political theories as they relate to free speech law and policy" (p. xvi). Unfortunately, this self-imposed constraint makes Downs' conclusions too easy. The pornography debate has been raging on a substantive level for too many years to be glossed over by assumptions that community authority is inherently more legitimate than idealistic radical approaches. Yet once Downs has established to his satisfaction that the liberal model of the first amendment is valid, he believes he need not address the substantive inequalities that the progressive model of the first amendment intends to correct.

> of hatred and abuse; the dehumanization of being an object of property, of sexuality, or of another's goals and ambitions; the general day-to-day horror of being systematically lessened or "handicapped" so that another can feel whole; of being systematically dirtied or polluted, so that another can feel pure and clean; of being systematically rendered contingent, natural, bodily, of the dirt, or of the earth, so that another can feel transcendantal, free, spiritual or rational; and of being systematically perverted, bent and marginalized so that another can feel normal, straight and central.

West, *supra* note 17, at 685.

21. Downs' discussion shows that the ordinances lacked the sort of pervasive societal support that he attributes to the obscenity doctrine, and thus, in the social conservative view, do not warrant an exception to the liberal model of the first amendment. It is unclear, however, with what level of legal illegitimacy Downs intends to charge the Minneapolis and Indianapolis city councils. The symbolic campaigns that so disconcert Downs are not unusual to legislative forums, *see generally* M. EDELMAN, THE SYMBOLIC USES OF POLITICS (1964); neither are votes cast to protect political reputations. For example, Senator Lowell Weicker implied that Members of Congress and Senators voted for the Gramm-Rudman-Hollings Deficit Reduction Act in order to avoid appearing "pro-deficit." *See* Roberts, *Drive to End Deficits: Odd Bedfellows,* N.Y. Times, Oct. 10, 1985, at B18, col. 1. Downs thus does not make clear how purely democratic the legislative process must be in order to attain legitimate legal status.

22. *See* Sunstein, *supra* note 12, at 616. However, even unified societal support for the measure would perhaps not warrant full accommodation in Downs' view. According to Downs, the liberal model of the first amendment "may entertain non-liberal values in areas of expression that do not directly impinge on its political and intellectual core." P. 197. According to Downs, the radical feminist model directly cuts to this political and intellectual core because of its "stunning disrespect . . . toward art and intellectual freedom and its disdain for the links between sexual portrayal and knowledge." P. 155. However, if it were possible to classify pornography as speech closely aligned to action, and thus unprotected, the feminist prohibition on sexually degrading materials might be justified. *See infra* notes 28-32 and accompanying text.

23. The radical feminist anti-pornography model is inconsistent with communitarian authority because it denies the validity of societal consensus, on the grounds that individual choice is not possible in a patriarchal society, *see* p. 39, and rejects societal norms because they perpetuate preexisting hierarchies. *See* p. 37.

By assuming the legitimacy of social authority, as opposed to idealistic authority, Downs fails to meet MacKinnon and Dworkin on their own ground. Radical feminists assert that pornography denies them the opportunity to participate in the "marketplace of ideas." In the words of Catharine MacKinnon,

> Pornography strips and devastates women of credibility, from our accounts of sexual assault to our everyday reality of sexual subordination. We are stripped of authority and reduced and devalidated and silenced. Silenced here means that the purposes of the First Amendment, premised upon conditions presumed and promoted by protecting free speech, do not pertain to women because they are not our conditions.[24]

By devaluing women as speakers, pornography creates a failure of the "marketplace of ideas." It is this market failure that anti-pornography ordinances intend to correct.[25]

Downs supports the liberal model of the first amendment because he asserts the model is conducive to freedom, while the "progressive censorship" model is not. Indeed, he warns feminist critics that "they would seem ill advised to cast away a doctrine and its institutional supports that provide their radicalism with an opportunity to be heard" (p. 151). Yet this argument *assumes* the presence of freedom. Radical feminists may agree that the liberal model is more conducive to *men's* freedom of speech. Yet they assert that the liberal model oppresses women's speech. Downs' argument assumes the invalidity of this proposition without support. If both models are oppressive, Downs would need to show that the harm the progressive model poses to male speech is greater than the harm the liberal model poses to women. Since he avoids issues of substantive equality altogether, he is unable to do so, and instead assumes what he needs to prove.[26] By assuming the nonoppressiveness of the liberal model, and the oppressiveness of progressive censorship, Downs need only ground his arguments in a negative conception of state neutrality. Thus, the anti-pornography ordinances need not be dealt with as efforts to achieve substantive equality, but are treated as attempts to "favor" feminist

---

24. MacKinnon, *Francis Biddle's Sister: Pornography, Civil Rights, and Speech*, in FEMINISM UNMODIFIED 163, 193 (1987).

25. The liberal doctrine of state neutrality "presuppose[s] that whole segments of the population are not systematically silenced socially, prior to government action." C. MACKINNON, *supra* note 11, at 206. If this presumption is incorrect, some corrective mechanism must be incorporated into the neutrality model in order to maintain its integrity. Thus, market correction is *not* fundamentally inconsistent with the liberal model of state neutrality, but rather, is necessary to maintain the model. MacKinnon has expressed this consistency: "It is the same social goal, just other *people*." C. MACKINNON, *supra* note 11, at 205 (emphasis added).

26. Downs briefly addresses the argument of women's societal disempowerment in saying that, "[a]lthough cowed and disempowered women do tragically exist, they are likely a minority among women." P. 70. Downs lists no support for this assertion, nor does he set forth his definition of "disempowerment."

viewpoints in the first amendment arena.[27]

Even if one assumes the validity of the liberal model of the first amendment, however, it is not obvious that the anti-pornography ordinance is an effort to favor feminist viewpoints and disfavor misogynistic viewpoints. The radical feminist critique is not simply an objection to "the content of the ideas advocated by [pornographic] material" (p. 153). Rather, it asserts that pornography itself is an *act* of degradation:

> [P]ornography is more act-like than thought-like. The fact that pornography, in a feminist view, furthers the idea of the sexual inferiority of women, a political idea, does not make the pornography itself a political idea. That one can express the idea a practice embodies does not make that practice into an idea. Pornography is not an idea any more than segregation is an idea, although both institutionalize the idea of the inferiority of one group to another. . . . In a feminist perspective, pornography is the essence of a sexist social order, its quintessential social act.[28]

In the radical feminist view, pornography is a political act, rather than an expression of a political idea. Contrary to the assumptions of the marketplace of ideas metaphor, more speech will not remedy the harm because the act of pornography has devalued any speech that may occur in response.[29] The ordinance would not restrict speakers from arguing that women should be considered "sexual objects, things, or commodities."[30] Rather, it restricts depictions that actually turn women *into* sexual objects, things, or commodities.[31]

In this sense, pornography is more akin to action than to political

---

27. *See* p. 7 (quoting Tigue, *Civil Rights and Censorship,* 11 WM. MITCHELL L. REV. 81, 93 (1985)).

28. MacKinnon, *supra* note 2, at 335.

29. MacKinnon asks and answers this question for radical feminists:

> Would more speech, rather than less, remedy the harm? In the end, the answer may be yes, but not under the abstract system of free speech, which only enhances the power of the pornographers while doing nothing substantively to guarantee the free speech of women, for which we need civil equality. The situation in which women presently find ourselves with respect to the pornography is one in which more *pornography* is inconsistent with rectifying or even counterbalancing its damage through speech, because so long as the pornography exists in the way it does there *will not be more speech by women.*

MacKinnon, *supra* note 3, at 63.

30. *See supra* note 4.

31. According to MacKinnon:

> Pornography is a set of hermeneutical equivalences that work on the epistemological level. Substantively, pornography defines the meaning of what a woman is by connecting access to her sexuality with masculinity through orgasm. The behavioral data show that what pornography means *is* what it does.

MacKinnon, *supra* note 3, at 59. Thus, radical feminists argue that pornography "creates the experience of a sexuality which is itself objectified." C. MACKINNON, *supra* note 11, at 199. Pornography does not merely advocate sexual hierarchy; it *creates* that hierarchy.

Frederick Schauer has made a similar argument in the context of obscenity law. Schauer argues that obscenity, even though it may consist of speech, is not "speech" because the receiver does not receive it as a communication, but rather as "a purely physical response." Schauer, *Speech and "Speech" — Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language,* 67 GEO. L.J. 899, 922 (1979).

expression. Downs recognizes that the liberal doctrine of the first amendment "makes a basic, if imperfect and inexact, distinction between speech and action. Speech is protected unless it constitutes unlawful or tortious action or is directly tied to unlawful action, such as libel, incitement, solicitation, conspiracy or the like" (p. 5). Again, Downs relies on legal conclusions. The determination of whether speech is lawful or unlawful is distinct from the determination of whether that speech is "speech" protected by the first amendment, or "action" that falls outside of the first amendment. Feminists assert that pornography is "action," and therefore unprotected by the first amendment. Accordingly, they seek legislation to make pornography an "unlawful or tortious action." Downs, however, denies the legitimacy of such efforts by showing the procedural faults and lack of societal support behind such legislative efforts.[32]

By denying the validity of the anti-pornography ordinance on grounds of social authority, Downs denies the validity of the entire radical feminist movement. Radical feminism originates outside of, rather than from within, society. It relies on the experiences of individuals and on an idea of equality perceived within the interstices of a patriarchal society. Those experiences and perceptions have been brought forward slowly and painfully through "consciousness raising" — a process of listening to and sharing women's stories.[33] To Downs, these stories are "anecdotal" evidence (p. 79) whose primary purpose is catharsis (pp. 68, 71-73). Although Downs acknowledges that "meaningful social change may result when private psychological suffering is transformed into public language," he warns that "such politics can also unleash an emotionalism and intolerance which threaten the perspective and civility required by healthy public life" (p. 68).

Indeed, it is the "uncompromising rage" of the radical feminists that offends Downs.[34] It seems that Downs believes that what radical feminists need is a good sense of humor.[35] Apparently he thinks they

32. This explains why *The New Politics of Pornography,* spends 109 of 198 total pages (pp. 34-143) scrutinizing the political processes of the Indianapolis and Minneapolis city councils, despite the fact that its purported goal is to establish the theoretical invalidity of radical feminist anti-pornography legislation. *See* p. xvi.

33. *See* C. MACKINNON, *supra* note 11, at 83-105.

34. *See* p. 69. Downs' (male) colleagues praise him for his objectivity:

> The hallmarks of this careful study are reason, empathy, and moderation. It is a welcome antidote to the blinkered ideologies that have dominated discussions of pornography. Downs gives both sides of the pornography debate a fair hearing, while patiently exposing the weaknesses of absolutist positions. This is the voice of a true scholar.

David P. Bryden, Co-editor, *Constitutional Commentary,* quoted on book jacket of hardcover copy.

35. Downs cites approvingly what he deems to be a Nietzschean perspective:

> According to this perspective, the gender separatism espoused by some radical feminists and lesbians and the sexual denial advocated by some conservatives are nihilistic because they represent a puristic recoiling from the inevitable travails of the heterosexual encounter. The absence of humor in so many of the conservative and feminist attacks on pornography is indicative of this suffocation of life, for laughter is the emotional bridge between human

are taking it all too seriously when women are brutalized by both the production and consumption of pornography.[36] Radical feminists' lack of humor blinds them to the artistic and human value of pornography. To Downs, "the dangers of pornographic art are worth risking because the form engages [a] fundamental dialectic of our natures."[37] Of course, those women who have been victimized by pornography might not agree that the outcome of such a balancing test is so obvious. Maybe it is because they have not yet learned to laugh about it.

— *René L. Todd*

---

animality and reason. Laughter heals the pain of the cardinal split in human nature and is a sign of psychic health. The absence of humor is of a piece with the failure of the Minneapolis ordinance to distinguish between artful and non-artful pornography.

P. 181 (footnote omitted). These words mirror those often applied to victims of sexual harassment in the workplace. *See* C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 51-52 (1979).

36. Catharine MacKinnon relates the details of a Minnesota case of sexual abuse:

> [A] fourteen-year-old girl on a bicycle was stopped with a knife and forced into a car. Her hands were tied with a belt, she was pushed to the floor and covered with a blanket. The knife was then used to cut off her clothes, and fingers and a knife were inserted into her vagina. Then the man had her dress, drove her to a gravel pit, ordered her to stick a safety pin into the nipple of her left breast, and forced her to ask him to hit her. After hitting her, he forced her to commit fellatio and to submit to anal penetration, and made her use a cigarette to burn herself on her breast and near her pubic area. Then he defecated and urinated on her face, forced her to ingest some of the excrement and urine and made her urinate into a cup and drink it. He took a string from her blouse and choked her to the point of unconsciousness, leaving burn marks on her neck, and after cutting her with his knife in a couple of places, drove her back to where he had gotten her and let her go. The books that were found with this man were: *Violent Stories of Kinky Humiliation, Violent Stories of Dominance and Submission, . . . Bizarre Sex Crimes, Shamed Victims,* and *Water Sports Fetish, Enemas and Golden Showers.* The Minnesota Supreme Court said "It appears that in committing these various acts, the defendant was giving life to some stories he had read in various pornographic books."

MacKinnon, *supra* note 3, at 46-50.

37. P. 182. Downs draws a parallel between pornography and alcohol abuse. Both, he states, are likely causal agents in abuse of women, yet the harm is not sufficient to justify prohibition of either. Pp. 165, 192. Yet the women's temperance movement was an attempt to mitigate the harms suffered by women whose lives depended on the productivity of their alcoholic husbands. To economically powerless women, the harm was indeed sufficient to warrant prohibition. *See generally,* A. WITTENMYER, HISTORY OF THE WOMAN'S TEMPERANCE CRUSADE (1878).