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Bluebook 21st ed.
8 B.U. PUB. INT. L.J. 411 (1999).

ALWD 7th ed.
, , 8 B.U. Pub. Int. L.J. 411 (1999).

APA 7th ed.
(1999). Boston University Public Interest Law Journal, 8(2), 411-416.

Chicago 17th ed.
," Boston University Public Interest Law Journal 8, no. 2 (Winter 1999): 411-416

AGLC 4th ed.
" (1999) 8(2) Boston University Public Interest Law Journal 411

OSCOLA 4th ed.
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BOOK REVIEW

IN HARM'S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS

EDITED BY CATHARINE A. MACKINNON AND ANDREA DWORKIN

HARVARD UNIVERSITY PRESS, 1997

*Reviewed by Christine M. Durkin**

In 1983, Catharine A. MacKinnon and Andrea Dworkin introduced groundbreaking antipornography civil rights legislation. This was the first legislative effort to recognize the harm caused by pornography as a human rights violation. It defined pornography in law as the graphic, sexually explicit subordination of women, children, or men, including abusive and dehumanizing depictions. The legislation, based upon existing anti-discrimination laws and the Fourteenth Amendment's guarantee of equal protection, conceived of the injuries caused by pornography as capable of civil redress. Thus, it provided a private cause of action to individuals harmed by being coerced into making pornography, defamed in pornography, forced to consume pornography, assaulted as the direct result of specific pornography, or harmed by trafficking in pornography.

To date, approximately six jurisdictions have considered this legislation in some form.¹ *In Harm's Way* is a compilation of the proposed ordinances and bills, the hearings held thereon in Minneapolis, Indianapolis, Los Angeles, and Massachusetts, and the legal challenges to the legislation. *The Roar on the Other Side of Silence*, by Catharine A. MacKinnon, and *Suffering and Speech*, by Andrea Dworkin, are powerfully-written introductions that articulate the way in which pornographic images of women promote and perpetuate women's inequality, degradation, and abuse. They passionately and compellingly assert the need for civil remedies to redress violence contained in and directly caused by pornographic materials.

In their book, MacKinnon and Dworkin reproduce the oral and written testimony and exhibits, both for and against the legislation, in their entirety to the extent possible. Among the most compelling testimony in favor of the proposals

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¹ Los Angeles County and the cities of Minneapolis, Indianapolis, and Cambridge, Massachusetts considered it to be a civil rights ordinance. It was adopted by public referendum in Bellingham, Washington. Finally, the Commonwealth of Massachusetts proposed this bill in 1992. Nevertheless, it currently is not law in any jurisdiction.

are women's personal accounts of abuse caused by pornography. Women described being threatened, beaten, drugged, and raped in the making of pornographic materials, dispelling the commonly held belief that all or many women depicted in pornography participate willingly. Some witnesses described family members and strangers forcing them as children to pose for pictures and videos. Others testified that their partners battered them as adults and compelled them to participate in pornography as part of the abuse.² One of these women is Linda Marchiano, who testified that a pornographer held her captive, abused her, and forced her into films for approximately two and one half years. *Deep Throat*, one of the films in which Ms. Marchiano was forced to participate, and in which she had visible bruises, is one of the top-grossing pornographic films in history.

Several women who were abused as children or adults testified about the role of pornography in their abuse, contradicting the notion that pornography is victimless, harmless entertainment. A common theme in their stories was that their abusers used violent pornography prior to or during violent episodes and forced them with weapons and beatings to mimic scenes portrayed or described in the material. Battered women's advocates and counselors testified that numerous women disclosed to them that their batterers used violent pornography as "instruction manuals" to sexually abuse them. Law enforcement officials testified that they frequently found pornographic materials in the possession of sex offenders. Further, the exhibits to the Minneapolis hearings contain men's first-hand accounts of raping women after seeing similar acts in pornography. As one man stated, "I . . . saw this porn movie. It was a guy coming up from behind a girl and attacking her and raping her. That's when I started having rape fantasies [I thought,] It's all right; they even make movies of it."³

In addition to anecdotal evidence, the editors included the testimony of scientists who have studied pornography's effects, including their findings on the correlation between pornography and violence against women. They generally found that pornography that contained violence, such as physical abuse and rape, increased violent behavior in men against women. Conversely, purely erotic materials that did not portray power differentials or the subordination of women did not increase violent behavior in men. Although an individual's propensity to commit a sexual assault involves many factors, the studies showed that even among normal, healthy men, six weeks' exposure to "standard hard-core pornography" that did not contain overt physical violence changed men's attitudes toward women. The studies found that men became callous toward women, trivial-

² Ms. Marchiano used the pseudonym Linda Lovelace during that period and describes her story in her autobiography, *Linda Lovelace and Mike McGrady, Ordeal*. The pornographers vehemently deny that Ms. Marchiano participated in films against her will; therefore, the editors included Ms. Marchiano's polygraph test results in the exhibits to the Minneapolis hearings.

³ The editors also include excerpts from a book in which convicted sexual serial murderer Ted Bundy confessed his interest in materials "of a sexual nature that involve violence."

ized rape and were less likely to convict for rape or give a harsh sentence to a convicted rapist after exposure to non-violent pornography.

The editors also included the testimony of psychologists who have concluded that the degradation, dehumanization, and subordination of women in pornography, combined with the desensitizing effect it has on its consumers, cause changes in attitudes about women. The fact that many children learn about relations between men and women from pornographic images perpetuates these attitudes toward women. As one First Amendment scholar Frederick Schauer testified, "I [am astonished] that a society that so easily and correctly accepts the possibility that a cute drawing of a camel can [affect] the number of people who take up smoking, has such difficulty accepting the proposition that endorsing images of rape or other forms of sexual violence [affects] the number of people who take up rape."

MacKinnon and Dworkin address the argument of the legislation's opponents, who allege that existing laws satisfactorily address the alleged harms. They argue that criminal and tort law should provide remedies for victims of assault, coercion, and imprisonment by pornographers or consumers. By the same logic, criminal and tort law should cover injuries resulting from child pornography. It was necessary, however, to enact criminal laws to identify and address those specific harms. As MacKinnon points out, tort law also failed to provide adequate civil remedies for workplace sexual harassment. Victims' testimony contained in the book demonstrates that existing law does not effectively address pornography's harms. One of the reasons is that the law and society have not yet acknowledged that the harms exist. Additionally, the tool of the harms, the pornography itself, reinforces the belief that women are inferior. Thus, police, judges, and juries frequently do not believe women when they report the abuses. If the law does not identify pornography's harms and prescribe appropriate remedies, the abuses will continue.

Further, opponents feared that the law, if enacted, could be used against mainstream literary, artistic, or feminist work. Some individuals believe that feminist literature and even sex education materials, which may contain graphic descriptions, would be subject to suit under the proposals. The legislation excludes materials that are based upon equality, as well as libraries that display pornography for purposes of research and education. This argument may be a basis for limiting the definition of pornography in future proposals. The fact that the law could be abused, however, does not negate the need for it. Despite the fact that batterers sometimes seek restraining orders against their victims in retaliation or in an effort to control them, no one argues that abuse prevention laws should be repealed. Rather, legislators leave it to judges to dismiss groundless complaints and apply the law as intended. They must do the same with respect to anti-pornography civil rights legislation.

The principal argument of the legislation's opponents is that it is unconstitutional under the First Amendment to the United States Constitution. In the Appendix, the editors include the opinion of the Seventh Circuit Court of Appeals

in *American Booksellers Association, Inc. v. Hudnut*,⁴ which considered a challenge to the Indianapolis ordinance. The Seventh Circuit accepted the premise that “[d]epictions of subordination tend to perpetuate subordination . . . [which] in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets.”⁵ The court stated, however, that these very facts support the conclusion that pornography is protected speech.⁶ In other words, pornography affects people’s perceptions and attitudes; therefore, the City cannot regulate it. Accordingly, the *Hudnut* court struck down the Indianapolis ordinance. The United States Supreme Court summarily affirmed without argument.⁷

It is possible to enact an antipornography civil rights law that would withstand First Amendment challenges. The United States Supreme Court has carved out exceptions to constitutionally-protected words and pictures, including “obscenity.”⁸ According to the Court, the harms caused by obscenity outweigh First-Amendment guarantees. Given the compelling governmental interest in eradicating violence against women, legislators may adopt a clear and narrow definition of pornography beyond that which is obscene. Just as the United States Supreme Court upheld an ordinance that restricted sex-segregated advertisements because it furthered the local interest in combating sex discrimination and outweighed commercial speech interests, the Court should find antipornography civil rights laws constitutional.⁹

In Harm’s Way reignites the debate over pornography and its effect on women’s status in society, the workplace, and their own homes. In light of increasing public awareness of violence against women, *In Harm’s Way* is also an important collection of legislative histories. Through public outcry, such as that of witnesses at these hearings, legislators and executive officials have become more educated regarding domestic and sexual violence. Many have recognized the prevailing atmosphere of disrespect and devaluing of women in society that contribute to such crimes and are seeking creative solutions to these abuses. In 1994, the United States Congress enacted the Violence Against Women Act (VAWA),¹⁰ which provides various remedies to abuse victims, including “Civil Rights for Women.”¹¹ This specifically provides victims of gender-motivated violence a civil remedy against their abusers. In addition, Congress considered The Pornography Victims’ Compensation Act, which provided civil remedies to those co-

⁴ *American Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986).

⁵ *Id.*

⁶ *See id.*

⁷ *See American Booksellers Ass’n, Inc. v. Hudnut*, 475 U.S. 1001 (1986).

⁸ *See Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476 (1957) (holding that obscenity is not speech).

⁹ *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376 (1973).

¹⁰ 42 U.S.C. § 13981 (1997).

¹¹ Violence Against Women Act, Subtitle C, 42 U.S.C. § 13981 (1997).

erced into or assaulted during the making of pornography.¹² The most recent Congress considered VAWA II and the Hate Crimes Prevention Act, although it did not act upon either of these before adjournment.¹³ Advocates for women should look to the studies and testimony contained in *In Harm's Way* to support new remedies for abuse victims. Further, they should look to the anti-pornography proposals, together with the challenges thereto, to enable them to draft legislation that will both effectively address the devastating effects of violence and withstand constitutional scrutiny.

¹² S. 13191-13193, S. 3063, S. 13838-13839, S. 1187, S. 6853-6855, 98th Cong.; S. 7281-7283, S. 1521, 101st Cong.

¹³ H.R. 3514, S. 2110, 105th Cong. (VAWA II); S. 1529, 105th Cong. (hate crimes bill).

