

Review Essay

**REEL "RAPE SPEECH":
VIOLENT PORNOGRAPHY AND
THE POLITICS OF HARM**

STEVEN ALAN CHILDRESS

Edward Donnerstein, Daniel Linz, and Stephen Penrod, *The Question of Pornography: Research Findings and Policy Implications*. New York: Free Press, 1987. xiv+274 pp. Notes, bibliography, appendix, index. \$24.95.

Gordon Hawkins and Franklin E. Zimring, *Pornography in a Free Society*. Cambridge: Cambridge University Press, 1988. xiii+236 pp. Bibliography, index. \$24.95.

Donald A. Downs, *The New Politics of Pornography*. Chicago: University of Chicago Press, 1989. xxiv+266 pp. Notes, index. \$42.00.

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On his retirement in 1981, Justice Potter Stewart lamented that his enduring legacy on the Bench would be a throwaway line he wrote concurring in an obscenity case (see *Chicago Tribune*, 9 Dec. 1985, p. 22): He said he could not really define obscenity but he knew it when he saw it (*Jacobellis v. Ohio* 1964:197). Many writers credit that line with a healthy dose of good sense. During the last decade, however, it has become clear that although everyone knows hard-core pornography when they see it, they see it in strikingly different places, and so no one really knows it at all. This confusion has led to a strange political marriage among various groups of antipornographers who might divorce if they recognized that they have irreconcilable differences in defining pornography. It has also led to political commissions and recent books on the subject, all which ultimately seem to establish their own irrelevancy for focusing on sex films when the biggest enemy, explicit violence, only sporadically cohabitates with sex. Maybe the real pornography isn't anything close to what Justice Stewart would have recognized; maybe it's *Robocop II*.

What I did last summer: In my thirtysomething years, I became an oldfart. Watching *Robocop II*, with its open-heart surgery—no anesthesia—and bloodbaths, I suddenly realized I wanted my child never to see this. I didn't want the grade school kid in the row behind me, sobbing and later too scared to leave the theater, seeing this. Hell, I didn't want me seeing this. Yet there wasn't a stitch of nudity or even implicit sexiness in this movie. By almost any accepted measure, and certainly the courts', it was neither obscene nor pornographic. But I cringed at the thought of finding that kid behind me in a dark alley in 2001. Or what might this film do to me?

First, a few definitions. The common denominator of most definitions of pornography is the explicit representation of sexuality. *Robocop II*, therefore, is not pornographic, while groups then argue whether *Blue Velvet* and *Debbie Does Dallas* are. Various definers debate the levels of explicitness and sexuality necessary to cross a line from mere sexual innuendo and erotica to pornography. "Hard-core" pornography contains even higher explicitness and more sex. Obscenity now is more a legal term which courts define by its social worthlessness and exclusive appeal to prurient interest.

Because these terms are often thrown about as if self-defining or, worse, as mere conclusions rather than starting-point definitions, it is necessary when commenting on different books on pornography to work with a fairly broad concept of pornography. As I use the term here, pornography refers to sexually related speech with some level of explicitness.¹ Further definition of that explicitness will be provided, to the extent possible, as the context or study requires.

Harder than defining pornography is explaining and proving its harm. Various actors in the antipornography debate suggest that the harm is (a) a moral harm, (b) a general utilitarian harm to urban areas and culture, (c) a specific harm to victimized women (those who participate in making pornography and those injured by its consumers), or (d) a general harm to all women and maybe men. Many apparent allies in the battle against pornography share neither a definition of pornography nor a definition of its harm. Even less unity would be demonstrated if these "allies" were cornered into defining the way in which pornography relates to its various harms: Is it the main cause, a cause, a symptom, a symbol, or the very harm itself?

Yet, in a sense, all of this is beside the point. The recent books on the subject convince one (to some extent unwittingly) that pornography, as it is usually defined, is in fact a massive scapegoat. The present focus on the visual dangers of titillation, copulation, and autoeroticism would be better turned toward mutilation, corpses, and autopsies.

I. THREE STUDIES OF PORNOGRAPHY, POLITICS, AND SOCIETY

During the 1980s, the dilemma of pornography hit the political fan and became a subject of renewed social concern. In 1985, President Reagan asked his attorney general to establish a commission to investigate the impact of pornography on society and to recommend ways to constrain its spread. The Meese Commission, as it came to be known, held hearings and published a report in 1986 that was openly and unsurprisingly antipornography. The hearings and report sparked new media attention to the sociology and politics of pornography. Meanwhile, a decidedly different group of radical feminists was seeking the adoption, in various cities, of ordinances that would declare pornography to be a violation of women's civil rights.² Other local governments passed laws, many

¹ Erotica has similar themes but with less explicitness.

² As is discussed below (part IV), these feminists define pornography ideologically, as the sexually explicit portrayal, in pictures or words, of the subordination or degradation of women. Their ordinance proceeds to set out some specific ways in which speech can have this message, e.g., by presenting women as sexual objects, as whores by nature, or in postures of sexual servility. Pornography then is discrimination against women rather than titillation

which the courts upheld against First Amendment challenge, that focused on the urban side effects of sex-related businesses. Later, Jimmy Swaggart fell from grace and Ted Bundy was executed, each in the last hour blaming pornography.

Out of such hand wringing, akin to a decade-long tent revival meeting, have come three books. Published at the close of the decade, they attempt to place pornography more objectively and deeply into its psychological, social, and political context. Each focuses on a different aspect of the debate over pornography and thus becomes a good complement to the others.

Psychologists Donnerstein, Linz, and Penrod, in *The Question of Pornography: Research Findings and Policy Implications*, have compiled two decades of experiments and studies on whether pornography causes harm. They survey the available social science data and suggest that the only form of pornography that clearly harms is sexualized violent speech—and this perhaps no more so than violent speech without much explicitness.

In *Pornography in a Free Society*, criminologist Hawkins and law professor Zimring study the politics of three governmental commissions and reports on pornography. Their intriguing conclusion, which they concede is not self-evident, is that the Meese Commission not only will have little social effect on pornography but that it is an accommodation to widespread availability—indeed it is a social ceremony of adjustment. Courts apparently will follow suit in adjusting.

In *The New Politics of Pornography*, political scientist Downs details the political actions of some radical feminists in promoting and defending their novel civil rights-based approach against pornography. He juxtaposes the political theory behind that approach, one of progressive censorship, with more traditional First Amendment analysis which allows political speech to compete freely in the marketplace of ideas.

As a group these books provide a significant source of information on the social implications of pornography and the political actions it has inspired. On that level the entire inquiry into the subject has been advanced by these surveys. As a historical account, for example, each successfully complements the others in summarizing the state of the literature on social science and policy implications. (Further, each attempts to relate its findings to the treatment which the legal system typically gives pornography, though with, I think, mixed success.)

Unfortunately, each book needs a complement. None provides a big enough picture so that it succeeds in its own stated scope without reference to the other studies. Donnerstein et al. build

of men. Because the ordinance focuses on pornography's effect against the class of women rather than on the prurient interest of the audience, it places new limits on the First Amendment rights of pornographers. Still, the definition, like traditional ones, requires sexual explicitness.

their social science inquiry on a policy premise which makes sense only if the reader accepts both the experimental model and a misplaced legal analysis. Hawkins and Zimring write more about the politics of commissions than, as promised, about free society, and their book only sporadically supports, or even turns to, the controversial theory which is supposed to be their main point: that society through the Meese Commission will accept widespread use of pornography. Downs successfully exposes and explains the theoretical underpinnings of the feminists' challenge to free speech law but comes across as a bit whiny and politically naive in complaining about their political tactics. In a sense, these studies are least successful when dealing with the promises suggested in their titles and dust jackets.³

Nevertheless, the three books, when read together, allow us to focus more clearly on the essential social questions raised by pornography, especially whether pornography harms and how (as I introduce in part II). If so, what politically and legally is to be done (part III), and can this be reconciled with the radical feminist perspective (part IV)?

II. DOES PORNOGRAPHY HARM?

Before one explores the politics of pornography's harm, a fitting first inquiry is whether it does harm. The best source of information on the "traditional" harm of pornography—harm to victims of crimes caused in part by its users—now is Donnerstein, Linz, and Penrod, *The Question of Pornography*. This book summarizes, study by study, the state of the research on this issue, analyzing over twenty years of experiments and social science studies of sexually explicit material in many forms, and its potential for fairly immediate harm committed by users.

After introducing the legal context of the inquiry into harm (chap. 1), the authors review the findings of the 1970 Presidential Commission on Obscenity and Pornography (chap. 2). Later research is divided into two paths: the effects of nonviolent pornography (on behavior (chap. 3) or on attitudes (chap. 4)), and the effects of violent pornography (chap. 5). The authors then attempt to sort out the effects of sex from those of violence (chap. 6) and to relate their conclusions both to legal solutions (chap. 7) and other policy initiatives (chap. 8).

³ I hope this is not merely my own whinings that the books are mistitled. Or even, as I believe is ironically true, that (a) the political scientist is strongest on legal theory and weakest on political reality, (b) the criminologists present adequate political background but fail to relate this inquiry to free speech law or social theory, and (c) the psychologists need to provide stronger justification for their experimental method and its legal implications. Each openly advocates a particular use for their work, and so it is fair to inquire whether they succeed on that level or adequately address the specific issues they do raise. Still these shortcomings do not overwhelm the success each has on other important fronts.

A. Early Studies of Pornography and Harm

1. *Findings of the 1970 Commission*

For most inquiries into harm, the starting place is the 1970 Commission. There was little prior research on pornography, and one reason President Johnson formed the Commission was to begin a generation of better research (p. 23). The Commission, especially its Effects Panel of social scientists, instituted a wide variety of new experimentation forming the base of inquiry in the area. As summarized by Donnerstein et al. (pp. 23–37, 74), these first efforts included public opinion surveys showing that concern about pornography was slight in 1970, new studies confirming that pornography produces sexual arousal, and early studies of the impact on attitudes (finding that exposure tends to produce tolerance toward pornography itself).

Potentially more telling were the first laboratory experiments regarding erotic stimulation of aggressive behavior, as measured nonsexually by a willingness to give a shock to a confederate “victim.” Surprisingly, only one series was produced (p. 30). It found that, for subjects exposed to highly arousing materials, aggression increased if the victim had angered the subjects earlier. Yet if the prior interaction was friendly, the stimulus increased positive behavior (pp. 30–31). Another study gave the first hint that aggression relates to mixing violence with sex: Subjects exposed to a silent erotic film accompanied by an audio account of the woman’s plan to kill her lover showed higher aggression toward an angering shock victim than those who saw the same film with a nonviolent but sexual audio (p. 32).

The Commission reported on correlation studies relating the incidence of pornography to sex crimes and delinquency. Although limited and often confounded by the events of the 1960s, the studies showed that, in the United States, sex crime and delinquency rates decreased, or increased relatively slightly, while the availability of sex materials increased sevenfold during the decade. The panel concluded that these studies did not establish a significant causal connection between increased erotica and sex offenses (p. 33). The Commission’s no-harm conclusion was also based in part on famous studies from Denmark, which related large drops in sex crimes during a period (1967–69) to legalization of pornography (pp. 33–34, 61–62).

Meanwhile, three specific studies in the United States compared rapists to a nonrapist control group and found, perhaps counterintuitively, that the control group had earlier and more exposure to pornography as adolescents, and more recent exposure as adults, than did the rapists (p. 34).⁴

⁴ Later studies also confirmed that offenders had less early exposure, and less frequent exposure as adults (pp. 70–71). This consistent finding is especially telling since such studies may be the closest model to an epidemiological

Based on the relatively benign effects reported in the studies, or at least their overall ambiguity—and even some evidence showing that pornography might have benefits in certain circumstances (at least in Copenhagen)—the Commission’s final report asserted that any case against pornography in 1970 could not be made upon “demonstrated effects of a damaging personal or social nature” (U.S. Commission on Obscenity and Pornography 1970:139).

These pioneering social science efforts had real limitations. All of the original research involved relatively short time spans (p. 24). Importantly, the researchers used pornography available at that time, which usually involved nonviolent sexual images or passages (pp. 23, 32, 87; see Downs, p. 23). Thus, the first studies say little about the potential harm caused by violent materials. This became a source of increasing criticism of the Commission’s methodology and findings (e.g., Berkowitz 1971; Cline 1974).

Despite these specific limitations, and the general limitations endemic to such methodologies (as I discuss in the next section), the Commission Report “basically gave pornography a clean bill of health” regarding its potential for traditional harm. It was considered the “definitive statement” for some time (p. 23). Yet the effort and reactions to it eventually spurred new and more detailed social science inquiry (p. 38).

2. Forms and Limitations of Methodology

The studies used by the 1970 Commission foreshadowed the various methodologies used since 1970 to test the relationship between pornography and violence. The two main examples are (a) experiments in which subjects are shown pornography and then secretly tested for higher aggression (usually measured by the amount of shock or noxious noise they impose on a confederate) or questioned regarding attitudes and perceptions, and (b) studies within populations to test the correlation between availability of pornography and antisocial behavior, usually crime rates.

In this area, at least, each method’s strength also reflects its weakness: (a) laboratories provide controlled environments so that their specific findings are less influenced by confounding real-world events, but these events may make it impossible to infer no effect in the real world just because none occurs in the lab, while (b) population studies as presently done test real-world correlation using subjects not influenced by laboratory limitations, but conclusions drawn are at the mercy of the confounding events of real life and lack control of extraneous causes (even if correlation can be assumed to mean causation). Most studies of pornography since 1970 have used an experimental approach.

All experiments may be generally limited by such factors as

study that we have. Self-report studies show that prior attitudes about women are a better predictor of rape than is exposure to pornography (pp. 105–7).

(a) the unreal nature of lab violence, (b) the lack of real punishment or social control, (c) subjects' inhibitions while being observed or interviewed, (d) the use of willing college students as the norm, (e) an experimenter demand effect (causing subjects to guess), (f) publication of studies mainly if they have positive results, (g) the lack of good definitions of violence and aggression, and (h) the ethical inability to produce real violence. These factors are explained by Donnerstein et al., to their credit, in introducing and defending the general concept of behavioral experimentation in this area (pp. 11–20, 93, 105, 135).

Yet the larger problem of drawing real-world inferences from the data is inadequately resolved (see pp. 5–6, 105, 174). No experiments exist, of course, which directly test a relationship between exposure to pornography and sexual violence. The point of the controlled experiments is to deliberately expose subjects to pornography, and test their differentiated response (in simulated aggression or self-reporting on questionnaires) as against those not exposed; then the experimenters infer or theorize a potential increase in real violence. Is that inference sound? In the language of experiments, do the studies have external validity?

Unfortunately, the authors' effort to defend the method by comparing it to nonexperimental ones, mainly by demonstrating that laboratory control is good, inadequately justifies the leap of faith they require to draw conclusions about larger society from that controlled setting. This is especially true if, intuitively, *sexual* behavior is an area where external inferences are especially strained or the lab is an especially unrepresentative place.⁵

Fortunately, for most readers these studies are fascinating on their own terms even if their policy relevance is uncertain. The studies do at least raise inferences about what might happen in some settings when exposure to certain forms of pornography increases. For example, differing lab responses to violent and nonviolent stimuli create an agenda for future research to focus on that division.⁶ Finally, the existing studies, with all their weaknesses, do allow us to say what we do *not* know; they stand as a check against those who read too much into them, and they thus form the basis to criticize the political misuse of the research.

⁵ The authors should have noted a further weakness that may make most such studies useless to generalize to real life: Apparently pornography in reality is often used as a masturbatory aid (U.S. Department of Justice 1986:266). However, few of the experiments in the last two decades appear to facilitate this use (most do not allow take-home), so it is possible that real use will yield entirely different results, e.g., does a release or catharsis (compare pp. 9, 25) blunt harmful impact?

⁶ The studies at least are suggestive of potential real-life effects. A consistent pattern of differentiated responses to violent stimuli raises a fair question of whether real users may become more violent when exposed to such materials. A consistent lack of any significant behavioral response peculiar to nonviolent pornography, even in the lab, may call for those who believe that such materials cause immediate social harm to better support their case.

B. Nonviolent Pornography: Research After 1970

1. *Effects on Behavior*

a) **Laboratory Experiments into Aggression.** Donnerstein et al. divide the newer studies into those dealing with nonviolent and violent pornography. Early post-1970 studies of nonviolent materials focused on same-sex aggression. Toward the end of the 1970s, the emphasis changed to violence against women and, eventually, violent pornography as a stimulus of such aggression (p. 38).

The same-sex aggression studies of nonviolent pornography (e.g., Zillmann 1971) confirmed the result suggested in the Commission's experiments: Angered subjects stimulated by nonviolent sexual materials increased their aggression toward an angering confederate. For example, Zillmann showed subjects a documentary, a boxing film, or a nonviolent film involving nudity and petting. Afterwards, viewers of boxing or eroticism increased their aggression. These results, however, were apparently the function of a higher level of physiological arousal, not necessarily sexual arousal; indeed, increased aggression has also resulted from other forms of physical excitement, including exercise, noise, and humor (pp. 42–43).

In other studies, exposure to pornography actually decreased aggression over time and increased positive behavior toward a pleasant confederate (pp. 42–44). At most these seemed to show that erotic films accentuate present sentiments, as does any exciting material, but it would be hard to blame the sex as such.⁷ Donnerstein et al. conclude that any aggression found, and results were mixed on that score, occurs from generic arousal and whether the subject enjoys the depiction, not the sexual content (pp. 47–49, 71–72).⁸

Somewhat surprisingly, only recently have experimenters consistently turned their attention to man-on-woman aggression in the laboratory after men were exposed to nonviolent pornography. Most of these researchers have assumed that pornography could trigger aggression toward women, and have designed experiments accordingly. But “this assumption turned out to be harder to prove than many experimenters anticipated” (p. 51). One of the 1970 Commission's studies, in which men subjects did increase their verbal abuse against a female confederate (“when I look at you I

⁷ In a later experiment by Zillmann et al. (1981), subjects who watched arousing surgery showed the same increase in aggression as viewers of an arousing but displeasing sex film. Thus, erotic materials “affect aggression because they are arousing and pleasant or irritating—not simply because they display sex” (*ibid.*, p. 249).

⁸ This is especially true for prolonged exposure since arousal and repulsion diminish after repetition and, therefore, so does aggression. In fact, those exposed massively in one experiment showed lower aggression than the control group (p. 49). Other same-sex experiments involving women subjects produced similar aggression (pp. 48–49).

want to puke”), has been cited as supporting the conclusion that pornography leads to violence against women (e.g., Cline 1974). The experiment was likely flawed by human nature: As Donnerstein et al. note, “this effect only occurred when the men were told that if they increased their verbal abuse they would be allowed to see another erotic film” (p. 51). The study confirms only the unstriking proposition that making men abuse women as a condition of continuing to watch works (see Howitt 1982:113).

Later studies without such flaws produced more benign results. In one, men and women subjects given erotic passages did increase aggression toward a woman, but at the same rate and level; in another, male subjects shown *Playboy* nudes actually reduced aggression against both men and women confederates—with even less aggression toward the women than toward the men (p. 52). The authors recognize that the laboratory condition creates inhibitions which might reduce aggression against women (pp. 3–16, 52, 54), but they agree that these early studies suggest that exposure to erotica does not increase aggression differentially against women (p. 52). When subjects were angered, or the conditions of arousal and anger were manipulated separately, men still failed to increase aggression differentially toward women and men victims, even if they became more aroused (pp. 53–54).⁹

Experimenters found a larger increase in simulated aggression only if men were given multiple chances (in order to lower inhibitions substantially) to aggress against an angering female. Still, the increase was slight compared to the doubling of shock level that resulted when men were shown *The Wild Bunch* instead of the erotic clip (pp. 55–58). It remains to be seen whether this result can be consistently replicated.

b) Population Studies. Because no one has experimented with actual male aggressors to produce sexual violence in the lab, even if the above experiments had consistently produced higher aggression, one might not necessarily infer that pornography causes, or even significantly contributes to, real sexual violence. Some studies correlating availability of pornography with sex-crime rates have attempted to explore that real-world link in a more direct way, understanding that a correlation does not prove that the two variables caused each other or that they were not caused by some third independent variable (pp. 60–61).

Following on the Denmark studies, which found large and lasting drops in crime rates after pornography became widespread,

⁹ This was true even when subjects “accidentally” observed a model male aggressing against the female confederate. The subjects’ own aggression increased, but at the same level as a bland-film control group that observed the aggressive model. Thus, probably the observation of the aggression, not the subsequent pornography, produced more aggression (pp. 54–55).

researchers measured similar correlations worldwide.¹⁰ Some, notably Court (1984), have pointed out the weaknesses of the earlier studies, especially their focus on reported rates of some decriminalized sex offenses. Court's own studies conclude that increased pornography correlates with increased crime in other countries, such as Japan, where sex crime rates (actually, all crime rates) dropped after pornography restrictions increased. Yet Japan's pornography is brutally violent and may say nothing about sexual speech as such. Donnerstein et al. are reluctant to generalize from Court's nonrandom studies or to assume that increased availability means increased consumption; other critics have been harsher, saying Court misuses statistics (pp. 62–66; see Bynum 1991:1154). Even if the authors properly hesitate to give Court's analysis too much meaning, it should be noted that the Denmark studies seem to share similar flaws.

This is an area which needs more careful investigation involving random sampling, accurate consumption rates, a recognition of the limits of crime rates (especially as regards rape, differentially underreported), and multivariate research methods. For example, more recent studies comparing U.S. state rape rates with circulation rates of eight men's magazines at first blush suggest a strong correlation between consumption and crime; for example, Nevada and Alaska top both lists. However, introducing a third variable—"hypermasculine sex-role orientation," through responses on a Violence Approval Index—makes the relationship between magazines and rape rates "disappear" (p. 67). Another study was unable to correlate rape rates with numbers of adult theaters and shops. In this study, the circulation of only one set of magazines was statistically significant: *Field and Stream* and *American Rifleman* (p. 69).

Although the authors believe that the European studies are methodologically "on sounder footing" than Court's approach (p. 73), they conclude that the nonlaboratory data are even less conclusive than the experimental evidence in their ability to show that nonviolent pornography has a differentiated effect on violence toward women.

2. *Effects on Attitudes and Perceptions*

Surer results were found once researchers examined changes in attitudes rather than aggressive behavior. Pornography apparently does demonstrably affect attitudes, at least in the short run. It was already clear by 1970 that prolonged exposure produces more liberal attitudes toward pornography itself and its legalization but not necessarily more sex-calloused opinions (pp. 29, 74). More recently, a few studies have found some more directly "nega-

¹⁰ For example, West Germany had no increase in rape but did have an increase in general crime rates for a time after decriminalization (p. 62).

tive" effects on attitudes, at least for repeated or prolonged exposure. One series in the 1980s found that, after massive exposure to exploitive but nonviolent films portraying women as extremely easy, both males and females became more tolerant of bizarre pornography, became less supportive of statements about sexual equality, and became on paper more lenient in punishing a hypothetical rapist (pp. 75–77).

The authors explore whether a message which is demeaning to women, rather than the general sexual explicitness, accounts for these effects (p. 77). A 1985 study, which separated dehumanizing erotica from more egalitarian erotica, suggests that while subjects who watched the dehumanizing film reported sex-calloused attitudes, even long-term exposure to mutually consenting themes "probably does not facilitate negative changes in antisocial attitudes among males" (p. 78).¹¹ This is an area needing methodologically sound study, particularly in distinguishing within classes of erotica based on how they present women. It is too early to indict all sexually explicit speech as such for producing "negative" mind sets (p. 81).¹²

I use quotes around "negative"—Donnerstein et al. do not—because it is not so clear that all studies finding change should call it bad. The authors do not ask whether it is fair to characterize lower support for the ERA as "negative" by itself or whether control groups *overpunish* rapists. The question is whether the new attitudes, directly or indirectly, lead to aggressive harm. If the attitudinal changes result in bad acts, the concern is well founded. But the behavioral studies indicate no differentiated short-term aggression. Long-term impact from years of secret exposure can be supposed only if one translates attitudes into actions (see pp. 5–6). The available evidence does not yet demonstrate that nonviolent pornography causes "traditional" harm. Of course, the change in political attitude which may result from massive exposure may well be "harm" if that concept is given a broader definition. The more political definitions of pornography and harm proposed by radical feminists will be considered in part IV.

¹¹ Two later studies which showed demeaning sequences in a fuller context, not as plotless excerpts, found no significant increase in rape-calloused views or the perception of women as mere sex objects (pp. 79–80). The authors theorize that the ratio of demeaning images to normal images may control whether prolonged exposure produces "negative" attitudes (p. 80).

¹² Some studies found, predictably, that erotica causes subjects to report dissatisfaction with the performances and appearances of their present sex partners. Others found "positive" effects, i.e., enhanced acceptance of partners (pp. 81–84). Even where dissatisfaction was reported, the culprit is probably not explicitness, since similar results were found with "Charlie's Angels" and magazine ads (pp. 82–83).

C. Recent Research into Violent Pornography

1. *Studies of Violent Pornography*

Before one considers a political or attitudinal definition of harm, it is necessary to complete the picture of physical harm and its legal implications. The missing element in the above studies, even those involving demeaning images, is violence. Violent pornography is defined by the authors (pp. 87–88) as the sexually explicit portrayal of a woman forced to have sex but leading to a positive victim outcome (she enjoys it). This distinction may account for the 1970 Commission's apparent contradiction by the less-approving 1972 Commission on Television Violence. Assuming that violent pornography became more available after 1970, and assuming that nonviolent pornography produces little or no aggressive behavior, it is possible that pornography involving explicit violence (especially toward women) nevertheless causes harm not produced by the 1970 genre of pornography. Studies of violent pornography became the new focus of social scientists in the 1980s, and ostensibly of the 1986 Meese Commission as well (pp. 86–87).

The findings on violence are far more indicting, although less experimental research has been done in this area. These experiments use a similar methodology, but the stimuli contain sexually explicit images of rape or other explicit sexual violence. In one pioneering study (Malamuth 1978), college men, angered by a female confederate, were shown passages and pictorials that were neutral, sexual but nonaggressive, or sexually violent. Under conditions of inhibition, all three groups responded with the same level of aggression. Within the half of each group which was told that it was permissible to aggress against the victim, the group exposed to the violent story displayed the highest aggression.

Donnerstein's own series of studies in the 1980s distinguished between male and female "victims." A nonviolent sex film did not differentially increase aggression against a woman (in fact the woman fared better than the man after this film), and an explicit rape film did not increase aggression against a man when compared to the nonviolent sex film. But a significantly higher level of aggression against a woman victim was shown by men who watched the rape film, whether or not she had angered the subjects (pp. 93–95).¹³ However, a later study surprisingly found no such aggressive effects from repeated exposure, using either nonvi-

¹³ Another experiment involving angered male subjects found heightened aggression when the rape film showed either a positive victim ending or a negative ending (she did not enjoy it), yet again no increase for men (against women) exposed to the nonviolent but sexually explicit film. For nonangered men, however, only the positive-ending film increased aggression (pp. 95–98). Donnerstein theorized that the negative ending reinforced existing predispositions among angered men, while the positive ending suggested that aggression was acceptable, thereby reducing inhibitions for all men, similar to the Malamuth study (pp. 96–97).

olent or violent materials, after a one-week delay. Donnerstein et al. call for more research on the lasting or cumulative impact of rape films but conclude “with certainty that there is an immediate effect, however short-lived” (p. 100). At least the results are more troubling than those consistently found using nonviolent sexual images.

The authors also report attitudinal changes among male and female subjects in a few studies of violent pornography. Those shown positive-ending rape films were more likely to view the victim in later rape films (which ended with the rape itself) as suffering less pain; surprisingly, however, they gave the rapist a harsher sentence (pp. 100–101).¹⁴ Other attitudinal studies have been inconsistent, prompting the authors to theorize that changes depend principally on the subject’s initial rape attitudes and the stimulus’s message (pp. 105–7). The authors conclude that violent pornography “is not necessarily ‘causing’ calloused attitudes about rape, but rather reinforcing and strengthening already existing beliefs and values” (p. 103).

Nevertheless, the reader may think it intuitively likely that long-term exposure to rape films of whatever ending could cause even nondisposed consumers to suffer rape callousness or even higher scores on a likely-to-rape scale. Further study might prove this. Some studies have already shown that even “nonrapists” are aroused by some images of rape, especially if the victim responds with pleasure (pp. 103–4). It can be argued that even if violent pornography’s only effect is to heighten present antisocial values, that result is “harm” in some fairly immediate sense. On the other hand, some images with relatively little sexual explicitness, from soaps to MTV, may get the same result.

2. *Separating the Sex from the Violence*

Despite the limited number of studies that really focus on the question whether sexually explicit violence harms more than other violence, Donnerstein et al. understandably attempt to sort out the sex from the violence. Throughout most of *The Question of Pornography*, the authors use a scientific, relatively neutral, style. Yet at this crucial point, really the core of the book, it is disconcerting that the argument strays from its clear analysis-of-studies format. Rather, the authors discuss the key question—Is it the sex or is it the violence?—by way of a speculative anecdote of an imaginary mad therapist who forces victims to watch blood flicks

¹⁴ This study is often cited for a different finding: 51 percent of males reported themselves as somewhat likely to behave like the rapist if they could not be caught. Although this has been reported as a remarkable by-product of viewing violent pornography, in fact that same 51 percent figure occurred for *all males* in the study, regardless of experimental exposure! The authors properly correct the antipornography groups who “misinterpret” this figure by blaming the pornography (p. 101), yet it should be noted that the figure is remarkable for what it suggests about society generally.

blunted by happy scenes of mild sexiness, in order to desensitize them (pp. 112–36). The authors take this approach apparently due to the relative lack of experiments involving such prevalent R-rated “slasher films” with explicit violence but only suggestive sexuality as *Texas Chainsaw Massacre*. Apparently, however, as the introductory anecdote suggests, the authors believe that sexual explicitness is not the key variable in the combination of sex and violence (see p. 113). The initial studies focusing on that combination of sex and violence which informs violent pornography and many mainstream media portrayals appear to support this view.

A 1981 attitudinal study used *The Getaway*, a film without explicit sex in which Steve McQueen kidnaps and assaults Ali MacGraw and she likes it enough to plot with him against her husband. Days later, male (but not female) viewers exhibited significant increases in acceptance of interpersonal violence over the bland-film control group, as well as increases in acceptance of rape myths (p. 109). This suggests that even if violent pornographic films (i.e., with explicit sex) cause attitudinal changes, so does prime-time fare involving nonexplicit sexual violence, and at similar rates.

A later behavioral study compared angered male subjects exposed to an X-rated nonviolent and noncoercive film, an X-rated sexually violent film, or a nonexplicit nonsexual film involving aggression against women. Viewers of the violent sex film showed the highest aggression, while the nonviolent sex film, despite high arousal, produced no more aggression against a female target than did a bland control film. “Most importantly, the aggression-only film . . . produced more aggression against the woman” than the sex-only film (p. 110). Interestingly, the highest self-reports of callous rape attitudes and likelihood of rape or force (50 percent) were found in the aggression-only group—not in the violent pornography (25 percent) or the sex-only (11 percent) groups (p. 111). The authors conclude that violence need not occur in a sexually explicit context to negatively affect viewer attitudes and behavior. Thus, it is “somewhat misguided” to “focus research efforts on pornographic images of violence against women,” ignoring the large amount of violence in accessible R-rated films (p. 112).

The book analogizes these movies to successful desensitization treatments by actual therapists regarding snakes, surgery, and battlefields. Hundreds of studies of the influence of TV violence on aggression (e.g., “SWAT”-watching boys and girls ignore a fake fight in the lab (pp. 118–23)) reinforce this perspective. The authors’ own two studies of low-sex/high-violence R-rated slasher films reveal a desensitization effect among nonrandom subjects.¹⁵

¹⁵ This is measured by responses to mood and attitude questionnaires (finding lowered anxiety about the violence and lowered views of how degrading the films were) and by response to an “unrelated” rape trial (finding lower sensitivity to rape victims after longer exposure). Some of the results, particu-

Does exposure then increase aggressive *behavior*? Hypothesizing that it would, the authors found the limited evidence inconclusive, but point to one longitudinal study that correlated children's actual aggressive habits to the amount and level of generic TV violence (pp. 134–35).

Donnerstein et al. conclude that slasher films at least “efficiently” desensitize viewers to the plight of victims. But at this point the reader is not expressly helped to sort out the fundamental question raised, whether sexually explicit or even sexualized violence desensitizes more than generic violence found in media portrayals. A no-harm finding for sex-only films tells little if we are still left to ponder any real difference between the dreaded “slasher” films, a Steve McQueen film, and MTV. The authors here commit only to the “expectation” that “exposure to sexualized violence would have the same effect” as “nonsexual media violence,” dampening of responsivity (p. 135). Yet the question it appeared they were asking was whether sexualized violence is more desensitizing, not whether it is reasonable to assume, as it is, that sexualized violence can harm as much as other violence. At least as much, of course, but more? The reader, then, is not really told, Is it the sex or is it the violence? as the chapter title and presumably the book as a whole asks.

By contrast, elsewhere the authors appear more committed (see pp. xi, 2) to the conclusion that violence drives the negative changes more than does sexual explicitness. They find that the genre “that is most dangerous would be that which depicts sexual violence against women in either a sexually explicit or non-explicit manner” where the victim is portrayed as enjoying the assault (p. 160). They also note that the evidence showing “sexually violent pornography” to be harmful is based on relatively nonexplicit films, so violence, “whether or not in a sexually explicit context, should be the focus of concern” (p. 175; see p. 179). Linz, Penrod, and Donnerstein state more strongly in an article (1987:713) that “it is sexually *violent* material, rather than sexually *explicit* material, that results in harmful effects” (emphasis in original), since effects do not vary with the explicitness as long as the violence is sexual (*ibid.*, p. 721).

The combination of sex with violence should be a concern if one assumes with “good reason” that mixing the two is especially harmful (p. 92). But the authors do not really make the case that this combination is more harmful, only speculating that it is particularly “potent” since it helps a conditioning process that associates sex with violence (p. 92). This is fair speculation, of course, but not really proved in the studies. One could fairly argue on the same inconclusive evidence that violence is so strongly the driving force

larly numbness to violence and a higher tendency to acquit, were replicated with female subjects (pp. 123–33).

that sexual themes are relatively irrelevant as a contributing factor. At this point, the authors could be much clearer as to whether they conclude that sexuality is relatively unimportant, or rather that violence-plus-sex films should be the main area of concern. Their bottom line appears a bit inconsistent or at least unclearly stated.

Apparently we are in fact left with the conclusion that “sexualized violence,” whatever its explicitness, is the biggest culprit.¹⁶ Pornography’s potential for causing violence has little or nothing to do with the sexual explicitness which underlies virtually all definitions of pornography. Even more surely, sex alone is not a significant source of such harm.

The authors’ lack of definitional clarity—especially in often failing to clearly distinguish sexually explicit violence from sexualized violence—is common to the entire debate on pornography. Likewise the continuing disjunction between their apparent findings and the present focus of the law of obscenity. Even among feminists who turn the definition more toward images of women, the starting point is sexually explicit speech, with violence added as a “more harm” factor.

Yet considering these empirical data, the reader may conclude that the traditional and even radical feminist approach now appears backward. The evidence from Donnerstein et al. so far suggests that what makes pornography “pornographic,” its high sexual explicitness, is indeed the scapegoat of a relevant inquiry into harmful speech. Given that the studies show that sex-only films have little or no impact on aggression, the question should be whether adding sexual explicitness to violence makes harm more likely or more severe. The initial focus should be violence; then the authors should lead us more fully through the inquiry whether the addition of sex (at various levels of explicitness) changes the response in terms of attitudes and experimental aggression. Maybe *Robocop II* or even *Field and Stream* frames the first line of inquiry after all.

3. *Is Pornography Generally Violent?*

Even if violent pornography potentially harms, or harms more than nonpornographic violence, the volume of harm in the real world depends on its widespread availability. Increasing availability was assumed by critics of the 1970 Commission and by the 1986 Commission, which portrayed violent pornography as the most

¹⁶ Researchers in this area might consider a six-cell table comparing violence and no violence (in its rows), with no sex, implicit sex, and explicit sex (in its columns). Donnerstein et al. most clearly suggest that there is little difference in outcome between (a) combining violence with implicit sex and (b) combining violence with explicit sex. The no-violence row, whatever the level of sex, appears relatively harmless. One might also argue from their data that the violence/no-sex combination is substantially as harmful as the remaining violence row.

prevalent form of erotica (p. 88). Such beliefs were based in part on a study which found violent or bondage images to be increasing in mainstream explicit magazines, such as *Playboy*, from 1 percent to 5 percent of their pictorials (Malamuth and Spinner 1980). One might wonder how even 5 percent has become accepted as making violent images the “norm” of erotic films or publications. Even if 5 percent is considered a substantial presentation of the subject, Donnerstein et al. note that this figure, using magazine pictorials from 1973 through 1977, is contrary to a more recent study of all images in *Playboy* from 1954 to 1983, in which recent levels of violence were below the peak 1977 level earlier used. Sexual violence now is in 0.0003 pages and 0.004 pictures (pp. 88–89).

A study of XXX-rated videos from 1979 to 1983 found that they contained relatively low levels of aggression (frequency and intensity), with actually decreasing sexual violence over time. In these videos the norm is egalitarian acts or neither-dominant sex roles. This hardly supports the inference that sexual violence and subjugation are disproportionately found in explicit sex films; indeed, the natural conclusion is that these sexual images are less problematic for those who focus their concern on the harmful presentation of women. But R-rated videos, with implied sex and nudity, had sharply higher levels of violence, more male dominance, and more scenes of rape and coercion against women—contrary to expectation (pp. 90–91). The authors urge reevaluating whether pornography is the place to search for increases in sexual violence.¹⁷ The concern should focus on the shelves, not under the counter (pp. 91, 173–74).

D. Policy Implications of the Donnerstein Findings

When Donnerstein et al. turn from research findings to “policy implications,” they are less sure-footed. They introduce the policy framework early in the book to provide “a context within which to evaluate the research discussed in the remaining chapters” (p. 6). But in their framework the paradigm legal case relating to sexually explicit works is a civil tort action in which a sexually assaulted victim sues not the attacker but rather the media entity that taught or encouraged the attacker to use the particular method of assault depicted in the defendant’s film, book, or TV show (pp. 6–7).

In such a case, they note, the court, reviewing the constitutionality of holding the media responsible for its purported causal connection to the attack, applies the standard for political incitement attributed to Holmes: The media can be held liable only if

¹⁷ Concluding contrary to common belief that pornography is not shown to be as a whole proportionally more violent than in 1970 (see also Hawkins and Zimring, p. 95), Donnerstein et al. nonetheless reason that as all pornography has increased, surely violent pornography is much more available and more easily encountered than before.

publishing the depiction presented a “clear and present danger” of wrongful conduct to the eventual victim (e.g., as developed in *Brandenburg v. Ohio* 1969 (likely to produce imminent lawless action)). Thus, they conclude, the reader “must consider whether the research presented in the following chapters” establishes “a link between viewing sexual violence and harmful behavior sufficient to meet the ‘incitement standard’ laid down in *Brandenburg*” (p. 7). This requires a specific, tangible harm and a relatively high likelihood of the wrongful act (pp. 7–8, 155–56).

This legal framework, without more, is misplaced. It is true that courts faced with suits redressing sexual acts in imitation of media depictions may borrow the political incitement analysis and the *Brandenburg* test to resolve the tort suit’s constitutionality (Robel 1989; Childress 1988). But that context is anything but the paradigm: First Amendment issues dealing with obscene or pornographic materials do not typically occur in private tort suits.¹⁸

Instead, the issue will usually arise in the context of criminalization of materials and prosecution of pornographers and users (or zoning of market sources), under a targeted legislative or governmental scheme, following a governmental determination that outlawing the material and practice is justified. In other words, the paradigmatic question is: Can pornography constitutionally be a crime? In that context, courts do not use the strict Holmes test or incitement analysis, usually reserving that for speech closer to the core of free speech values, especially politics (e.g., Tribe 1988: 832–61, 928–40). I would agree that “clear and present danger” *should* be the general test for regulation of speech (Shapiro 1966), or even for this area of speech, but it is not.

A less demanding analysis, substantively and procedurally, is usually given sexual speech because it is seen to be at the periphery of free speech concerns, often called “low value” speech deserving of less protection (see Tribe 1988:904–19, 939–40). Courts are more likely to approve governmental regulation and control in the area, especially where the state’s interests are seen as legitimate and category-based rather than focusing on the speaker’s message as such. But they have been less generous in approving restrictions which focus on subsets of the general categories.

The essential distinction is between content-based restrictions

¹⁸ Perhaps the authors use the tort example because it raises the causal question in its starkest framework, but here the law and social science do not coincide so conveniently. Even the newer concepts of statutory civil liability for the discrimination effected by pornography, as proposed by feminists, involve legislative determinations of the need for relief, not particularized incitement tort suits under the common law. When Donnerstein et al. do address this approach (pp. 137–45, 152–60), they focus on whether such ordinances are based on a sufficient causal connection (pp. 8–10, 155). However, the principal constitutional weakness of the radical feminist proposal (discussed in part IV) is not tort causation or proof of clear and present danger but a lack of viewpoint neutrality.

on speech (such as obscenity, which may be suppressed because of its generic lack of social value) as opposed to content-neutral time, place, and manner regulation. Within the content-based restrictions, which are reviewed according to wholesale categories of content that receive differing protection as a group, courts are particularly reluctant to approve restrictions based not on a broad category of content but on the particular viewpoint, message, or idea expressed. Donnerstein et al. never reconcile their concern over a particular subform of sexual speech having specific genre content—sexualized violent speech—with traditional law that presumes courts may not endorse such a specific content breakdown or the resulting *targeted* regulation. This makes the policy implications less than compelling since, without further explanation, they run afoul of the accepted legal framework. The tort example used is not a terribly relevant legal premise under which to consider the research findings.

This misfocus, fortunately, does not much affect the book's strength, its research aspects. After introducing the legal premise, the authors largely abandon it, as the incitement example and legal test are not further explored, even in the legal and policy chapter (pp. 141–52), except in a separate section on “instructional effects” (pp. 155–60). While the reader is asked to consider the book in light of an unhelpful legal framework, the authors do not really force social science into this legal analysis.

Indeed, the authors' own policy proposals, for example, recommending further research, especially longitudinal studies (pp. 144, 171, 174), focus on gathering information and educating people, not on using the law to restrict availability. They support this focus with a careful and promising review of studies on the immediate effectiveness of postexposure debriefing and intervention (pp. 179–96). Two such studies showed significantly lower rape myths six months after instruction (pp. 183–85; see Intons-Peterson and Roskos-Ewoldsen 1989). Yet the authors could have bolstered this informational and educational policy perspective by integrating it within a competing-ideas marketplace theory of the First Amendment. Properly located, their approach could have had stronger theoretical and legal appeal.

As part of their informational perspective, the authors detail the historical and present failure of the film industry's MPAA rating system, which relegates brutal violence to the same accessible R rating given any movie that says “fuck” twice (pp. 160–70). Slasher films abound, and the R rating serves as a nondiscriminating heap (in contrast to the rating systems of many other countries, such as Britain, which emphasize violence). Their proposal that a new rating specifically address violence and sexual violence and inform parents of the harm that may result (p. 170) makes enough sense to guarantee it won't happen (even under the new NC-17 rating). Better labeling plus education holds out one of the

more promising avenues for effective action in this troubling area, especially because it is less susceptible to judicial override and is less underinclusive than most legal responses, which have focused on sexually explicit speech while the bulk of violent media depictions lie elsewhere.

The final shortcoming of the book is that it does not integrate the social science findings into the politics of the entire debate about pornography, separate from the legal rules that shape policy. This is unfortunate. Donnerstein is known as an expert in studies of this sort, so he testified before the Meese Commission and, we learn elsewhere (Downs, pp. 84, 123), at hearings on the feminist-backed ordinances (which perhaps misused his data; see Hawkins and Zimring, p. 166). Yet the book does not discuss his contribution to the politics or the politicians' use of his evidence. Although the book is not primarily about the politics of harm, still one author has participated in the process: His views would have been interesting. More broadly, the authors' expertise provided an opportunity to fully analyze ways in which various political actors in the 1980s used the social science evidence.

For example, more could be said of the political use of social science data to reach the 1986 Commission's findings. Although the book discusses, usually in kind terms, some specific mistakes in the Commission's methodology (pp. 172–77),¹⁹ no real analysis is directed at the unanimous ultimate conclusion, which is greatly exaggerated, that “the evidence strongly supports” a finding that certain forms of pornography “bear a causal relationship to antisocial acts of sexual violence” (U.S. Department of Justice 1986:326). Only tangentially do Donnerstein et al. make the point (pp. 173, 178) that the Commission may have betrayed its own supposed emphasis on violence by its actions and proposals, as witnessed elsewhere by its successful letter-writing campaign to drive *Playboy* from 7-Eleven stores (Hawkins and Zimring, pp. 15–16, 203–5). In sum, the book presents a valuable presentation of the social science findings on the harm of pornography but fails to integrate these findings with the law and politics of porn.

III. THE POLITICS OF PORNOGRAPHY COMMISSIONS

A. The Commission Reports

If the politics of pornography are downplayed in Donnerstein et al., they are at the core of Hawkins and Zimring's *Pornography in a Free Society*. The book is primarily a study of the politics of the 1970 and 1986 U.S. Commissions and England's comparable 1979 Williams Committee. The authors give several examples of the 1986 Meese Commission's errors (pp. 94–107). These include

¹⁹ For example, the Commission overestimated violence in hard-core pornography and combined lab results to assume their external validity (pp. 173–75).

definitional problems leading to its reliance on studies about violence in drawing general conclusions about pornography (pp. 94, 104), and its making findings even while conceding “the absence of evidence” on point (p. 96). They also raise problems with the other commissions (pp. 77, 82–94).

But this book is more about the institutional politics and policy recommendations of the three commissions and their effect on law and society than about the study-by-study validity of their conclusions. The authors do not attempt a solution to the problem of pornography. While they list policy options (pp. 198–217) and properly recognize that there is middle ground between censorship and anarchy (p. 198), they decline to endorse any specific program or set of responses (p. 199). Their overall goal is to comprehend the debate and predict its direction rather than to repair it.²⁰

To this end, Hawkins and Zimring provide a detailed summary of each commission report (pp. 20–145), including charts juxtaposing each finding on social harm (pp. 75, 78–81). The core of the book is a chapter-by-chapter analysis and comparison of the committees’ views on a variety of important subtopics.

On basic definition of pornography (pp. 20–29): All reports suffer a “Babelish confusion” (p. 25), and the 1986 report comes across as especially inconsistent, vague, and a “muddle” throughout (p. 27; see pp. 28–29, 94, 97, 102–5).

On distribution and content of pornography (pp. 30–73, 95): Findings commonly take “the form of dubious quantitative impressions and largely notional statistics” (p. 30). The authors catalog the forms of sexually explicit speech (even computer bulletin boards like SYSLAVE) and estimate their proportional importance and orientation (pp. 31–49). They conclude that soon the most prevalent form will be videos and materials used at home (pp. 38–41, 50, 52, 71). This will have profound social effects, making much of the current focus of antipornography legislation (through, e.g., zoning) obsolete (see pp. 211–12) and increasing exposure to children (p. 72).

On harm (pp. 74–108): They believe that the differing commission conclusions were largely a function of how the evidence was evaluated and weighed, not its nature and extent (pp. 76, 88). This view is at odds with the Donnerstein et al. conclusion that little data existed before 1970 and the study of violent pornography is a recent phenomenon. Hawkins and Zimring apparently do not believe that the lab studies of 1970–85 (the heart of Donnerstein et al.) are germane to the issue of sex crimes, so their review of the “role of social science” focuses on the “drawing of contrary conclusions” from apparently similar evidence (p. 77). This is a real weakness if Donnerstein et al. are right that much of the research

²⁰ Surprisingly, they believe that the debate’s contours have been set and will not change soon (p. xii).

published after 1970 has provided a new social science basis with which to reexamine and refine policy.²¹ This approach does, however, set the tone for the book's harms inquiry, which focuses more on the political use of evidence than on what it shows.

Like Donnerstein et al., Hawkins and Zimring raise the fundamental question whether the harm is from the sex or the violence. While the authors seem to agree with the proposition that the research indicates that violence, not explicit sex, causes any harm found, they do not answer the source-of-harm question. They successfully show, however, that the 1986 Commission could not have either, since it relied on studies using *Porky's* to draw conclusions about violent pornography (p. 103). They therefore criticize the "almost schizophrenic dissociation" between the research and the Commission's conclusions (p. 99). If violent films without sexually arousing content can produce aggression, "then what is harmful about the communication is not pornographic and what is pornographic about the communication is not harmful" (p. 103). A particular focus on pornography is "pointless" if violence without sexual explicitness is the source of negative results (p. 104).

Hawkins and Zimring complete the picture begun by Donnerstein et al. regarding traditional harm. Together the books cause us to focus on both the research narrowing the problem to sexualized violence and the policy ramifications of the continuing confusion concerning sex, explicit sex, violence, violent sex, and violent explicit sex.

As this review indicates, Hawkins and Zimring are generally critical of each report. Yet it could be said that they do not venture far enough from the way in which the reports frame the issues.²² Like the commissions, the book focuses more on sexual explicitness generally than on violent pornography or nonpornographic violence, even though the authors apparently recognize that violence is the critical issue (pp. 102–4).

B. The Politics of First Amendment Law

The most pressing area where a constricted frame limits analysis is the chapter on free speech law. A book called *Pornography in a Free Society* might reasonably include its own analysis of the free speech implications of pornography. The authors instead review only the politics of each report's understanding of the First

²¹ Elsewhere Hawkins and Zimring do credit the recent research with new findings on violent pornography (p. 102).

²² Perhaps because the book is largely about politics and not social science, its critiques are primarily based on inconsistencies and internal confusion in the reports rather than the contrast between the reports' conclusions and the findings of actual studies. This at times unreasonably assumes a large amount of background knowledge. For example, at one point Hawkins and Zimring note that the 1979 report played "peek-a-boo with the social science research" which suggests harm, by excoriating "Dr. John Court" (p. 94)—with no explanation anywhere of who Court is or what he did.

Amendment. The question is not “the proper relationship of First Amendment doctrine to pornography but rather the way in which government commissions deal with the issues of free expression” (p. 144).

This chapter assumes, without explanation or grounding in modern free speech law, that the legal issue is one of balancing the interest in free expression against pornography’s costs to society (e.g., p. 109). This allows the authors to provide interesting inventories of communicative arguments favoring sex speech and of the variety of harms it may cause (pp. 109–25). They do not explain under what law a court might use this balancing approach or how it relates to future doctrine in the area. The discussion comes across as surveying the various interests a commissioner might weigh in reaching a perception about whether pornography should be protected, and apparently that is the point. But it does not help the reader to understand where a legal line might be drawn if the commissioner believes partial protection is in order or a court wants to distinguish among various types of pornography and of harm.

The approach, then, reduces the First Amendment inquiry to a comparative “harms” analysis (see, e.g., pp. 109, 125, 136) without really explaining how the judiciary will fit that analysis into constitutional terms. By relating each report to its own view of harm rather than to a theoretical basis of free speech jurisprudence, Hawkins and Zimring turn the legal question into a behavioral one, more than present law permits. The focus on the commissioner-eye view of the law does not advance a broad understanding.

Even within this analytic focus, one political area could have been explored: the role on the Meese Commission of Frederick Schauer, a law professor and noted First Amendment theorist. Schauer drafted the report’s crucial legal and harms sections (Schauer 1987:738). Its legal stance (pp. 111, 132–35, 137–38, 141–42) appears greatly influenced by Schauer’s theory (1979:906, 922–23, 926) that pornography is noncognitive and nonideal—an act and a stimulant more than speech—and therefore entitled to little if any protection. The report itself concludes that most material “is not so much a portrayal of sex, or discussion of sex, but sex itself . . . properly removed from the First Amendment questions” (U.S. Department of Justice 1986:226–67). The report finds that the “special power of the First Amendment” should be “reserved for the conveying of arguments and information,” while hard-core materials fall below “this minimal threshold of cognitive or similar appeal” (*ibid.*, pp. 264–65).

This is Schauer—not the Supreme Court. Yet Hawkins and Zimring do not say whether the noncognitive view is accepted doctrine, useful for judicial review of the report’s proposals, or even persuasive. They might have noted that present courts do not yet

review pornography for whether it has ideas. More fundamentally, it should be clear that most pornography does contain ideas and opinions, at least of its own hedonistic worth and probably of more general value (Childress 1988:702–5), and that its users are affected cognitively, as the social science data show. Hawkins and Zimring do compare the reports' widely differing views of pornography's communicative value—the 1970 Commission credited it with having ideas (pp. 112–13)—but the views are not related to basic law or Schauer's own thesis.²³

This is surprising since, early on (pp. 5–19), the authors provide insight into the political composition of the commissions, and what it means to put certain personalities in charge of an inquiry. They argue persuasively that the varying conclusions of the three commissions (especially the 1986 Commission's finding of harm and recommendation of tougher measures) were not simply a function of the political leanings of the participants and organizers.²⁴ The results were also driven by the commissioners' contrasting *professional* backgrounds: For example, the 1970 Commission was dominated by the professoriat, including three empirical sociologists, and only social scientists staffed the Effects Panel; the 1986 Commission had a higher ratio of lawyers (and they participated more), plus a law enforcement chair, but no sociologists (pp. 16–18, 77, 82–83). Hawkins and Zimring view the approach of the later commission as more “legalistic” than the prior two (see pp. 18, 76, 102).

It does appear that the differing approaches brought by separate disciplines informed the commissioners' willingness to consider a proposition as proved. Interestingly, no real effort in 1986 was made to open participation, even in hearings, to a feminist perspective or to industry and consumers (pp. 18–19, 53).

C. Social and Legal Impact

1. *The Social Legacy of the 1986 Commission*

Hawkins and Zimring's principal thesis is that, like the two reports before it, the 1986 Meese report and its ninety-two recommendations have had and will have little legal or social impact. It is, rather, an “accommodation to widespread pornography” more like “complaining about history [than] trying to change it” (p. xi). The introduction, dust jacket, and various passages in the book (e.g., pp. 16, 144, 149–50) predict that society will expand its toleration of smut and even that the reports are just part of these “cere-

²³ None of the books engages Schauer's more sophisticated probabilistic conception of causation (1987) or relates that theory to either the social science data or the radical feminist viewpoint.

²⁴ The backgrounds of the 1986 commissioners, however, suggest a stacked deck, as many had already gone on record as being antipornography, including a crusading prosecutor and a priest with a Ph.D. in medieval dogma who had spoken out against Dr. Ruth (pp. 13–15).

monies of adjustment to the social fact of widespread availability" (p. xi).

The authors bolster the point that society is accommodating pornography's availability by noting the lack of immediate, specific legal response to each proposal (p. 16). The 1986 report, for example, is high on "get tough" language but, they argue, short on details of how the rollback might be achieved (p. 223).²⁵ It is a "confirmation of the revolution," not a "call to counterrevolution" (p. 225).

This is an interesting thesis, but it needs more support than it is given. The book turns out to be more of an analytic and helpful review of the commissions than a sustained argument for this interpretation. No attempt is made to place this prediction into a general sociological perspective, as by exploring a Durkheimian model of social necessity and norm definition, or by relating the various actors to the social movement on which they thrive, as Luker (1984) has done by presenting abortion policy as a social role definition. Nor do the authors relate their social theory to the explorations of sexuality, knowledge, and society which Foucault has offered (e.g., 1980; compare Hoff 1989:17).

Hawkins and Zimring are, of course, known for counterintuitive social predictions, such as their thesis (Zimring and Hawkins 1986) that abolition of capital punishment in the United States is likely (probably led by the Supreme Court). But predicting a future of less social concern about pornography, though possible, is counterintuitive for good reason.

Many factors discussed in the book may in fact point toward a future of attempted restriction. The market has shifted away from specialized sex shops and into mainstream stores (such as video rental centers and convenience stores) which are far more "vulnerable to a consumer boycott" because they fear losing their mainstream sales (p. 71). The specific success of recent nonlegal efforts to get such stores to drop adult sales (pp. 15–16, 203–5), as well as successful sponsor-aimed boycotts against racy TV shows, all support predicting that pornography is somewhat vulnerable. This is especially likely, I would add, in light of what the authors elsewhere call the antipornography leaders' "missionary zeal" (p. 150).²⁶

Greater access by children in the home (pp. 72, 212), the lack of agencies to regulate child participation if decriminalization succeeds (p. 192), and the perception (likely erroneous) that most por-

²⁵ They foresee more mainstream industry involvement (pp. 221–22). They note that use has become more middle class, and they believe that legal enforcement against increasing home use is much more difficult (pp. 50, 212, 220–21).

²⁶ It is possible, for instance, that pornography will remain of high social concern even if the authors are correct that legal action will often fail in this area (as it might, for example, with gun control).

nography is violent (p. 95) may also aid the restrictive cause. The authors further recognize that recriminalization could be done on a “modest budget” (p. 224), and the recent expansion of zoning powers “could achieve the effects of virtual prohibition” (p. 143). It appears, therefore, that Hawkins and Zimring’s thesis assumes that traditional obscenity law will not be altered (p. 225) and that a convincing link between pornography and harm will not be found (p. 226). These two assumptions may not sufficiently credit the creativity of either conservative courts or social scientists.²⁷

Other factors that Hawkins and Zimring do not consider also weigh in favor of predicting that society will continue to have an interest in fighting pornography. Chief among these is the unusual merging of left-feminist and conservative forces during the 1980s. If such different groups can agree that smut has to go, doesn’t that bode some ill for their object of scorn? More broadly, no one politically can be “for” pornography, so proposed legislation tends to pass (Downs, pp. 126–27). Also, stepped-up enforcement after 1986 under existing law (*ibid.*, p. 20; *California Lawyer*, Jan. 1991, pp. 17–19) means continued attention. Rock is obscene, art is obscene (*Newsweek*, 2 July 1990, pp. 46–52), even “Shit Happens” on cars is obscene (*American Bar Association Journal*, June 1990, p. 30).

More fundamentally, Hawkins and Zimring ignore the possibility that pornography has become, for public apologies, the scapegoat of choice—from Swaggart to Bundy, the latter stating hours before his execution, “Pornography can reach out and snatch a kid out of any house today” (*Chicago Tribune*, 26 Jan. 1989, p. 21). Finally, the report may have a life beyond its proposals. It may act to confirm the public’s concern about pornography (Downs, p. 25).

2. Future Legal Restrictions on Sexual Speech

Whether society adopts specific commission proposals is a relatively narrow measure of a commission’s success. For example, by serving as the evidentiary, legitimating, and policy basis for legislative findings underlying future restrictions, the 1986 report may stand as the official antidote to the prior two reports. Future courts may approve controls on pornography in ways, and to an extent, not addressed by Hawkins and Zimring.

Courts may more readily defer to the legislative concern and thus approve new legal efforts, especially if they are category-based rather than overtly political. Regarding commercial speech, another low-protection category, the Supreme Court has already upheld a content-based ban on casino ads aimed at locals, because judges should not second-guess the legislative findings of harm in this low-value nonpolitical context (*Posadas de Puerto Rico Associ-*

²⁷ Part of the explanation for each report’s impact may lie in the political climate existing at the time of its publication (see p. 12). Even if the authors are right that the reports have been buried, the explanation may be temporary politics rather than a societal adjustment.

ates v. Tourism Company of Puerto Rico 1986). Startlingly, the Court said that the power to ban gambling (prostitution?) “necessarily includes” restricting ads (films?) relating to it (*ibid.*, p. 346; see Tribe 1988:901–4). The Court has similarly approved sweeping zoning restrictions on adult theaters, though obviously content-based, because the ordinances were nominally aimed not at the speech but at its secondary effects on the neighborhood (*City of Renton v. Playtime Theatres, Inc.* 1986). The Court’s reasoning has led to even more restrictive approaches by lower courts (see Childress 1989).

An imaginative court, so inclined, could combine these two doctrines to cover the entire low-value area of commercial sexual speech, deferring to legitimated “findings” and legislative determinations regarding social harm. Such a court may then find that it is not the judiciary’s business to strictly scrutinize the legislative conclusions that bad side effects are caused by the speech and that these effects justify regulating and even prohibiting certain categories of such speech. This is especially so if the entire area of concern could be made illegal.²⁸

The Court has also approved special restrictions on subcategories of pornography. Recently the Court held that the First Amendment does not protect even the private use of nonobscene but nude child photos (*Osborne v. Ohio* 1990), in part because the “evidence suggests” that pedophiles use child pornography to seduce other children. The evidence cited was the 1986 report. This approach unfortunately suggests still another way to expand regulation of all sexual speech: The courts could continue to remove privacy and procedural protections, like the overbreadth doctrine, both of which were given short shrift in *Osborne*.

More generally, the Supreme Court is moving away from an all-or-nothing approach in reviewing regulation of many categories of low-value speech (Tribe 1988:928–44). These doctrinal flexibilities imply a future in which courts may approve governmental regulation of nonobscene sexual speech. Even nonsexual violence could become regulated with sufficient justification, plus a two-word change of the standard obscenity test to include patently offensive *violent* images which appeal to an unhealthy interest in *violence* and are without serious social value.

The courts should not make such changes, I believe, but they could arguably make them without utterly rejecting the viewpoint-neutral theory of the First Amendment that informs traditional

²⁸ Alternatively, the courts might begin to focus on the power to control acts rather than speech, as in the gambling case, and would find support in Schauer’s view as found in the 1986 report. For example, Judge Edith Jones, widely reported to be on the short list of Supreme Court nominees, has cited the 1986 report as establishing that sexual speech does not contain ideas and so it is not really protected (see Childress 1988: 703–4).

law (compare Downs, pp. 153–54; Sunstein 1986).²⁹ The question is whether groups interested in regulating sexually violent speech can devise an approach that accomplishes much of their political goal without directly confronting traditional free speech doctrine—and whether they want to avoid that direct symbolic confrontation. One group that apparently welcomes a head-on struggle are those sympathetic to a radical feminist perspective. That perspective has raised a very different story of politics and legal theory than is exemplified by the three commissions.

IV. THE POLITICS OF RADICAL FEMINISM

A. The Ideology of Pornography and Harm

The best critical analysis of this feminist free speech perspective is to be found in Downs's *The New Politics of Pornography*. The author surveys traditional First Amendment law (chap. 1) and exposes its deep conflict with the feminist proposal (chap. 2). He then examines the political machinations the radical feminists used to promote their proposal in Minneapolis (chap. 3) and Indianapolis (chap. 4), as well as the lawsuits they defended. Finally, he discusses the potential harm of pornography and the prospects of future legal restriction of some forms of pornography (chap. 5).

The radical feminist view is exemplified by Catharine MacKinnon (1987) and Andrea Dworkin (1985). They persuaded Indianapolis to pass a civil rights ordinance making pornography—newly defined by its violent, degrading, or subjugating depiction of women (pp. 43–48, 114–15)—an act of sex discrimination redressable by civil enforcement. Their proposed ordinance defines pornography not by reference to traditional obscenity law (which focuses on prurient interest and lack of social value) but by its content and idea about the position of women (pp. 43–44). Pornography to fall under this enforcement scheme must (a) be sexually explicit (though not necessarily to the point of being obscene) and (b) subordinate women, through at least one of nine specified means, such as presenting them as sexual objects, as whores by nature, as objects who enjoy pain or humiliation, or in positions of sexual servitude. By taking MacKinnon and Dworkin seriously, Downs's book serves to complete the picture of pornography politics that the others begin.

To be sure, Hawkins and Zimring introduce the radical feminist perspective (pp. 151–74). Yet like Donnerstein et al., this intro-

²⁹ I do not favor such doctrinal maneuvering and blind deference to legislative determinations on harm. Certainly present doctrine, without more, does not readily approve all restrictions on sexual speech. But I do read the trend as suggesting that these doctrines may be broadened and combined in new ways which will eventually rationalize judicial rubber stamping of relatively broad restrictions on such speech. Future cases may use the 1986 report and social science data to further the trend, contrary to the Hawkins and Zimring thesis.

duction only scratches the surface of this approach, largely ignoring: the group politics driving the governmental efforts at implementing measures in Indianapolis and Minneapolis (where the mayor vetoed it); the new First Amendment theory justifying such censorship (ultimately the courts struck it down); and the future legal possibilities of theoretically modified efforts still focusing on violent pornography.

The Hawkins and Zimring analysis insists that MacKinnon's view of the First Amendment is unclear and "equivocal" (p. 171)—that she has not justified the proposals' constitutionality—but does not say affirmatively what is unconstitutional about these measures. The free speech problems are reduced to the understandable criticism that the feminist definition of pornography is unclear (see p. 172). The definitional inadequacies that do exist are not placed within a First Amendment argument. For example, the authors might have related the definition's ambiguity to its political nature, hence the viewpoint discrimination that violates accepted free speech law.

Further, Hawkins and Zimring do not really take at face value (pp. 164–66) the radical feminist concept of "harm"—invisible, pervasive, societal harm that makes the world a pornographic place (MacKinnon 1987:154). They instead relate it to more traditional harms analysis by saying it "establishes no causal connection . . . whatsoever" (p. 164). Of course, MacKinnon invites this confusion by making her view of harm a moving target (e.g., pp. 165, 172) and by, in part, relying on (and overstating?) Donnerstein's research (p. 166). A deeper inquiry into her argument shows that it is not really about causing rape. Rather, it is more about the broader harm to all women, a massive societal rape, that occurs when pornography exists and is legitimated by governmental inaction (see MacKinnon 1987:154–55, 166, 174; Downs, pp. 39–43). And in a more immediate sense of harm, pornography, as it is broadly defined in this conception, may contribute to the conditions making degradation, coercion, and even rape more likely. In this sense, I would argue, those concerned about either narrow or broad "harm" might do well to fashion a new concept of "rape speech" that better captures the harm than do the old wineskins of pornography and, especially, obscenity.

Hawkins and Zimring do raise a weakness of the feminist approach that it shares with other approaches. It is not clear why the *sexually explicit* presentation of female inequality and subjugation is a special problem (p. 161). The authors argue that depicting women as whores may not be "more objectionable or more harmful if presented graphically" (p. 161). Thus, it is "difficult to understand the selection of pornography as their principal target" (p. 163).

This is fundamentally correct. If harmful messages abound, why control only the sexually explicit ones? Or if rape, even societal rape, is an act of hatred rather than sex, why is sex such an

important defining point in the kind of speech that most concerns the radical feminists? Perhaps the subtle ideology in many nonpornographic images is the real political enemy, so that this type of "rape speech" is its own classification cutting across sexually graphic lines.

Ultimately, however, both in Hawkins and Zimring and in Donnerstein et al. there is only a hint at the deeper theoretical justifications and limits to the feminist approach. That might be expected, of course, since Hawkins and Zimring's book is not primarily about the politics of feminism, just as Donnerstein et al.'s is not really about harm in a broad, nontraditional sense.

Downs's book directly confronts the radical feminist perspective. Downs helpfully locates this view within a developed conception of the First Amendment (in addition to providing a comprehensive survey of U.S. obscenity law (pp. 8–22; compare Hoff 1989)). He argues that the new debate over pornography "is part of a broader controversy concerning the nature of liberty and freedom in society" (p. 32).

This broader controversy is about the value of liberalism itself, in its requirement of state neutrality to individual conceptions of good (pp. xv, 7–8). Traditional or "modern" free speech law is a particularly intransigent form of liberalism that similarly requires legal neutrality toward beliefs and values (pp. 3–6); it is this century's Holmes-Brandeis legacy touting the competition of ideas in the ideological marketplace and permitting the state to control expression only with good reason. In doctrinal form, the Constitution will usually not permit restrictions of speech based on the idea expressed (p. xiv), even if it will allow certain general categories of speech to be treated differently because of their lower value when compared to the important, usually political, areas of discourse that are supposedly nearer the core of the First Amendment (see pp. 3–4, 153–54).

By contrast, this form of radical feminism rejects a procedural and "neutral" liberalism both as a way to structure an unequal society and, in particular, as a jurisprudential basis of free speech law (pp. 29–33). Properly understood, the new perspective is not a tinkering with modern rules but is a fundamental challenge to the entire liberal conception of free speech that underscores most of modern doctrine. The feminist critiques do not simply misunderstand modern First Amendment law (as Hawkins and Zimring seem to say); they reject it, reimagine it. Pornography law should be "reinterpreted in a manner more consistent with other, less liberal areas of law" as a "serious alternative to liberal models of justice, free speech, and pornography" (p. 32). It should emphasize substantive justice rather than a false, procedural neutrality in the market. To accusations of censorship, the honest radical feminist response, Downs would say, must be that the goal is "progressive censorship"—the kind that corrects a failed market by quelling

“dominant conservative or reactionary ideas in order that progressive concepts can be heard and acted upon” (p. 30). Overall, then, the rise of feminist critiques has paralleled the “crumbling of the national intellectual consensus concerning civil liberty policy and the role of the state” (p. 31).

Moreover, the sort of “harm” that concerns MacKinnon and Dworkin is related to their radical conception of free speech. They construe both harm and cause and effect differently from that reflected generally in modern doctrine—which assumes that the marketplace of ideas is legitimate so that, unless harm is big and soon, the cure is more speech rather than enforced silence (p. 40). Instead, their approach is theoretically less individualistic and more diffuse.³⁰ It rejects the speech/action distinction and the positivistic causation which is so important in finding traditional harm (pp. 40–42, 167). “First Amendment logic,” MacKinnon complains, “like nearly all legal reasoning, has difficulty grasping harm that is not linearly caused in the ‘John hit Mary’ sense” (1987:140). Not only does the feminist proposal challenge free speech traditions, it also reimagines the harms analysis which necessarily relates to that tradition.

MacKinnon and Dworkin actually seem to have several conceptions of harm. In places, pornography does not just depict harm; it *is* harm (p. 42). In others, the traditional connection seems more direct, as when they repeat the slogan that pornography is theory and rape is practice (see Morgan 1977). Levin (1988) has argued that MacKinnon confuses representations with things since she describes pornography as something done to women. One wonders similarly whether ultimately the feminist position has no independent harm component at all, or defines harm in such a way as to be beyond the reach of social science findings.

Downs’s ideological perspective enriches the reader’s understanding of both the radical feminist challenge and its critics. Those who reject this feminist approach, including many feminists (e.g., Burstyn 1985), myself, and ultimately Downs (p. 146), do so because they reject its nonliberal ideological base. Ultimately the hope and belief is, by recent example, that visualization of the rape scene in Jodie Foster’s *The Accused* brings home the blatant horror of the crime (rather than its sexuality) in a way that the rest of the film, in merely talking about the event, did not—and that the education possible through the medium outweighs the risk of its encouraging some people to do the harm, at least until that risk is crystal clear. Yet even in rejecting the feminist model, it is important to understand the feminist theory for what it is rather than chiding it for redefining pornography and pornography’s harm.

³⁰ Ironically, the actual ordinance empowered individuals to bring actions and perhaps dictate group conduct. In this sense the radical feminists may have promoted not a communitarian control but an individual veto, merely shifting the trump right to a different set of individuals.

Downs makes the model more comprehensible by juxtaposing liberal theory.³¹

MacKinnon and Dworkin define both pornography and harm in blatantly political terms, which confounds those who believe that the state may not sponsor ideas. Modern First Amendment law is steeped in that liberal neutrality, even for many conservatives. Yet the Indianapolis ordinance was intended to separate pro-female from anti-female speech, under progressive censorship, and to construe pornography as political speech; thus, it attacked “the very heart of the modern doctrine of speech” (p. 152). Unsurprisingly, modern courts struck it down (pp. 8, 44, 135–40). Even if pornography is low-value speech, the Seventh Circuit held, the ordinance “established an ‘approved’ view” amounting to “thought control” (*American Booksellers Association v. Hudnut* 1985:328).

B. Political Machinations of the Feminists

In addition to presenting this ideological approach, Downs’s book is an exploration of the real-world politics of the feminists and politicians in Minneapolis and Indianapolis. This complements the picture of a decade of pornography politics presented by Hawkins and Zimring.³²

Downs’s detailing of left-feminist politics at work (pp. 51–143) is limited to an interesting tale of two cities: power politics, shortcuts, and controlled evidentiary presentations, all related to the local political climate. His version of events is as follows. MacKinnon and Dworkin originated, in a law school seminar, their theory that pornography is sex discrimination (p. 56). Quick support came from certain politicians in Minneapolis, then Indianapolis (pp. 76–86). MacKinnon and Dworkin are presented as uncompromising political manipulators intent not on public debate but on building a legislative record for a predetermined outcome (p. 82). They also may have acted improperly as advocates when they were hired as consultants (pp. 84–86), and MacKinnon used her lawyer skills to cross-examine Donnerstein into manipulated testimony (p. 84). They are portrayed as creative, mesmerizing, hard-working, often arrogant—and not as open about their legal theory as they might be. Women who disagreed were said to be suffering

³¹ However, this perspective also allows Downs to skirt and perhaps overstate much of the social science data (e.g., pp. 24, 32, 165), such as accepting uncritically the 1986 report’s estimates of the prevalence of violence in pornography (p. 22) and its trust of magazine correlation studies (p. 168).

³² Downs does not, however, convincingly relate his subject to the 1986 report, which he presents as drawing on the feminist theory (p. 2). Hawkins and Zimring (pp. 18, 152–53) show that the feminist voice was largely excluded, and the report ignored the role of pornography in male dominance, in contrast to a 1985 Canadian committee. More recently, a New Zealand committee basically adopted the radical feminist approach, beyond even the Canadian report (see Bynum 1991).

from false consciousness (p. 61). Politicians quickly caved into the pressure (pp. xvii, 76).

Downs's analysis of these actions is, as this recitation suggests, quite critical.³³ Unfortunately, he does not explicitly explain or justify the bases of his criticism, which apparently draws on its own liberal ideology. Clearly he believes the feminists have not played fair, but he does not ask whether the assumptions underlying his vision of politics as "a process of legitimate compromise" (p. 74) are correct, or even something in which the radical feminists believe. Apparently they do not, given their manipulation of the process and stifling of dissent. But it should not come as a surprise that *in politics* they seem to reject a process-based, traditional, pluralistic, and deliberative method—when Downs has demonstrated that feminist *free speech theory* accepts progressive censorship, rejects the marketplace of ideas, and espouses substantive justice over form. Whether the process employed satisfies a liberal conception of politics is somewhat beside the point, unless we reject beforehand a nonliberal view.

Downs's repeated calls for tolerance (pp. xviii, xxi, 129), civility (pp. xxi, 91, 129, 142), and responsibility (pp. xvii, 52, 65, 66, 89, 128) ignore both the feminists' thesis and the book's own teachings about its ideological base. "The ethic of responsibility," he adds, demands "respect of competing legitimate values" (p. 65). But this is his ethic, not theirs, as the book amply but only implicitly reveals (compare p. 82).

Downs establishes, with facts and interviews from participants, that each ordinance was "railroaded" through (pp. 66, 88, 112, 120, 130) from a "stacked deck" (pp. 79, 83). Yet at times it is unclear what he expects from MacKinnon and Dworkin: In Minneapolis they overly dominated and manipulated the hearings (pp. 82–86) while in Indianapolis their aloof approach (which worked) was misleading to conservatives who did not know the theory behind their ordinance (pp. 121, 129, 131). Criticism of some of their particular decisions and actions is fair (e.g., MacKinnon presented her views as orthodox law likely to survive court challenge (p. 116)). The general criticism, however, loses much of its force by neglecting to relate such actions either to politics as usual or as part and parcel of their theory.³⁴

Nevertheless, these chapters capture the day-to-day political events by which a revolutionary effort developed. Indianapolis

³³ Downs's view of proper politics, to be fair, is consistently applied to both extremes (while compromisers are always "thoughtful"). The Minneapolis ACLU is chided for its uncompromising stance (pp. 85–87). But it should not be surprising that the ACLU gave no ground on this issue; it would be like forgetting the marshmallows at a flag burning.

³⁴ Similarly, Downs's institutionalist view of the process is narrow when he considers the role of the courts: Both sides' intransigence "required agents from outside the debate to step in and restore the balance" (p. xix), but are courts really outside the political process?

presents the more interesting picture because of the “unusual alliances between the Right and Left” (p. xiii) which may spur future efforts along these lines. It is not clear that the Right really understood the Left here, or would have adopted such a left-political definition of pornography had they understood (pp. 111, 121). Perhaps each side got what it wanted from the arrangement. Politics makes strange bedfellows.

C. The Future of Radical Feminist Proposals

Ultimately, Downs rejects this new approach to pornography because he endorses liberal values and the historical record of “balanced” free speech under the modern view (pp. 146–52). A balanced approach is essential in an open and pluralist society to keep one side from being favored (pp. 146, 148). No one idea should dominate discourse (p. 149). Of course, these justifications, though compelling (and I agree that the liberal view has served well and should only be scrapped for a clearly superior alternative), do little more than state basic disagreement with the tenets of the non-liberal view. All of the listed virtues, especially balance, simply are not seen as a plus to one who believes that present dialog begins basically unbalanced. Still, Downs believes that many of the perceived harms can be addressed by less ideological definitions of unprotected speech. Something short of progressive censorship could do some good and may be approved by courts.

Parts of the complex ordinance (see pp. 43–50, 114–15), Downs notes, might be salvable under modern free speech doctrine. For example, if it were narrowed to deal only with the *category* of sexually explicit violence, whether egalitarian or not, it may be “less obviously invalid” (p. 154), especially if more procedural protections were provided (see pp. 155–62).

He suggests that courts may approve a new unprotected category of sexually explicit speech that is intentionally arousing and depicts women as needing physical abuse (Sunstein 1986), although the focus on abuse of women, since it is less category-like than all sexual violence, may still be problematic. Downs instead opts for a much narrower focus—even narrower than present law—that would prohibit sexually violent material that is *already* obscene under the Supreme Court’s traditional test (pp. 194–98). I note that adding the requirement of violence does have the virtue of focusing on the most harmful pornography, and skillfully selective enforcement plans under present law would have the same effect. But it is also underinclusive since it excludes R-rated slasher films that should be of particular concern (see p. 189).

Downs is wary of going after broader groups of violent speech since censorship might affect art and artistic values, broadly defined (pp. 155, 173–74, 176). This concern misses the point if the justification for restricting speech is its harm rather than its lack

of social value (the obscenity approach). Harmful art, like harmful trash, perhaps should go.

More generally, the analysis retains the tired obscenity approach rather than focusing on the real danger. Downs, like others, concedes that sexual explicitness is an unimportant factor in the combination of sexualized violence (pp. 167–68, 172, 188–89). He then inexplicably starts the analysis from obscenity, explicitness, and arousal. This does not begin to get at much of the identifiable “rape speech” prevalent in society. Sunstein, too, makes sexual explicitness part of the test. Even the radical feminists retain what might be the traditional obscenity test’s most harmless factor, explicitness, as part of their formula.

V. CONCLUSION: TOWARD A FOCUS ON “RAPE SPEECH”

Almost all the available evidence points to this conclusion: Of sex, sexual violence, and violence, the least of these is sex. Once violence is sorted out as a factor in sexually explicit material, the immediate negative effect, in terms of aggression, is slight to none. We do not yet know whether the addition of sex to graphic violence has a more harmful impact, but we can safely look for the source more within the violence than the sex as such.

Perhaps violent depictions are the wolf while pornographic films, photos, and books are the three little pigs. It does not make sense to ban pigs while noting that wolves cause harm. The pigs should not be blamed just because they’re in the same story with the wolf, who incidentally appears in a lot of other stories without pigs.

Radical feminists cleverly argue that “pornography is the theory, and rape the practice” (Morgan 1977:169). Nevertheless, more immediate good could be done by recognizing that rape is both the theory and the practice. If society wants to regulate rape conduct by restricting speech, it should focus as much as possible on a specific concept of “rape speech,” on, that is, those forms of speech that come as close as possible to encouraging violence, directly or indirectly. Further study may show that rape speech, or some larger class of violent speech that increases violence toward men and women, includes violent works with little sexual content. Such study may at least confirm that the present concept of pornography as sexually explicit misses the point.

At the least this should be the point of inquiry, working backwards into the sexual content—rather than starting with sex and adding a measure of violence as present theorists, even radical feminists, do. The traditional view, that speech should not be restricted for its content except in exceptional cases, should be retained. If the exception is to be found, it should be limited to the forms of speech which do harm.

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