

WHAT'S MORALITY GOT TO DO WITH IT?: THE GENDER-BASED HARMS OF PORNOGRAPHY

MICHELLE EVANS*

This paper is the first of a two part paper. This paper argues that Australia's approach to regulating pornography, namely censorship, fails to specifically address the sex-based harms caused by the production and distribution of pornography. Instead, Australia has adopted a morality based approach to regulation, which seeks to censor sexual materials that are 'morally offensive'. Such an approach does nothing to tackle gendered inequalities through which women are sexually targeted, degraded and socially disempowered; the end result of the production, sale and use of pornographic materials. This paper argues that a preferable approach is that first formulated by American feminists, Professor Catharine MacKinnon and Andrea Dworkin. Their sex equality approach to regulation, formulated as a civil rights ordinance, allows persons harmed by pornography to sue for these harms on the basis that pornography is an issue of sex discrimination.

Part two of this paper (to be published in the next issue of this journal) argues that the starting point for reform should be the internet, which makes increasingly violent and degrading pornography readily accessible in the home, a frequent site of abuse for women and children. This paper details the types of violent and degrading pornography available via the internet from a sex equality perspective. It discusses how MacKinnon and Dworkin's civil rights ordinance can be successfully applied to the internet to replace the current morality based *Broadcasting Services Act 1992* (Cth) which attempts to regulate 'offensive' material online through censorship.

I INTRODUCTION

Much has been written about pornography and there are numerous conflicting academic views and theories about what pornography is and does and how (if at all) it should be regulated. The traditional approach sees pornography as an issue of morality that should be regulated through censorship legislation on the basis of what a reasonable man would find offensive. This traditional approach (also

* Michelle Evans, Lecturer, The University of Notre Dame, Australia.

known as obscenity¹) has been implemented and enforced in Australia through censorship legislation such as the *Classification (Publications, Films and Computer Games) Act 1995* (Cth), the *Broadcasting Services Act 1992* (Cth), and through State legislation such as the *Censorship Act 1996* (WA).² The basis of this approach is that pornography should be censored because it has the potential to corrupt and deprave the viewers' morals,³ and potentially the morals of society as a whole.⁴

¹ In this paper I have used the terms 'morality', 'obscenity' and 'censorship' interchangeably. 'Obscenity' has its origins in the criminal law and concerns the suppression of materials which are deemed to be indecent or obscene in accordance with prevailing community standards. 'Censorship' is a subset of obscenity which usually does not involve the criminal law. Its foundations are in obscenity. Censorship involves a Censorship Board categorising materials in accordance with their level of offensiveness in accordance with prevailing community standards. Both censorship and obscenity involve a judgment being made about what is acceptable for reading or viewing in accordance with community standards. Both involve the suppression of materials deemed to be harmful to both the individual and society's moral fibre.

² In Australia, publications, films and computer games are classified by the Classification Board, located at the Office of Film and Literature Classification. The States are responsible for enforcement: See *Classification (Publications, Films and Computer Games) Act 1995* (Cth), ss 3, 4. See also: Office of Film and Literature Classification web page, *Agreement between the Commonwealth of Australia, the State of New South Wales, the State of Victoria, the State of Queensland, the State of Western Australia, the State of South Australia, the State of Tasmania, the Australian Capital Territory and the Northern Territory of Australia relating to a revised co-operative legislative scheme for censorship in Australia* <<http://www.oflc.gov.au/resource.html?resource=215&filename=215.pdf>> at 16 June 2006.

³ I have used the term, 'morality' to describe a censorship approach to pornography. Such an approach is also referred to as 'obscenity' and censorship legislation as 'obscenity legislation'.

⁴ Catharine A MacKinnon, *Towards a Feminist Theory of the State* (1989) 196. Note the following commentary about censorship's basis in morality from MacKinnon and Dworkin: Obscenity has an 'I know it when I see it' standard: *Jacobellis v Ohio*, 378 US 184, 197 (1964) (Stewart J), quoted in Catharine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987) 147, and is a male construct; 'Obscenity law is concerned with morality, specifically morals from the male point of view, meaning the standpoint of male dominance.': at 147; Obscenity regards women's bodies as being 'dirty' and 'filth': Andrea Dworkin, 'Against the Male Flood: Censorship, Pornography, and Equality' (1985) 8 *Harvard Women's Law Journal* 1, 7; as Dworkin argues, '...because women are seen primarily as sex, existing to provide sex, women have to be covered: our naked bodies being obscene': at 7.

This paper will argue that the censorship/morality based approach adopted in Australia is ineffective and inappropriate for regulating pornography because it does not address the harms of pornography: specifically, sexual inequality. This paper argues that the preferable legal approach is the sex equality approach first articulated by attorney and law professor Catharine MacKinnon and feminist writer Andrea Dworkin, in the form of a civil rights ordinance which recognises pornography as an issue of sex discrimination. MacKinnon and Dworkin argue that pornography sexualises and maintains inequality by promoting women as inferior and subordinate to men.⁵ It does this by associating women with feminine, men with masculine and by showing the masculine (male) as dominant and women (feminine) as inferior objects to be used, controlled, and violated for male sexual pleasure. Pornography does this in a context which shows these gender hierarchies as the natural or normal order of things. For MacKinnon and Dworkin, pornography is a sexually discriminatory act and should be legally actionable as such.⁶

⁵ See MacKinnon, *Towards a Feminist Theory of the State*, above n 4; MacKinnon, *Feminism Unmodified*, above n 4; Catharine A MacKinnon, 'Pornography Left and Right' (1995) 30 *Harvard Civil Rights-Civil Liberties Law Review* 143; Catharine A MacKinnon, 'Pornography, Civil Rights, and Speech' (1985) 20 *Harvard Civil Rights-Civil Liberties Law Review* 1; Catharine A MacKinnon, 'Pornography as Defamation and Discrimination' (1991) 71 *Boston University Law Review* 793; Andrea Dworkin, 'Pornography: The New Terrorism' (1978-79) 8 *New York University Review of Law and Social Change* 215.

⁶ See Dworkin, 'Against the Male Flood', above n 4, 1, quoted in Catharine A MacKinnon, *Sex Equality* (2001) 1571-3:

The oppression of women occurs through sexual subordination... In the subordination of women, inequality itself is sexualised: made into the experience of sexual pleasure, essential to sexual desire. Pornography is the material means of sexualising inequality; and that is why pornography is a central practice in the subordination of women. Pornography uses each component of social subordination. Its particular medium is sex. Hierarchy, objectification, submission, and violence all become alive with sexual energy and sexual meaning. In pornography, each element of subordination is conveyed through the sexually explicit usage of women: pornography in fact is what women are and what women are for and how women are used in a society premised on the inferiority of women...Sex is the material means through which the subordination is accomplished. Pornography is the institution of male hierarchy that sexualises hierarchy, objectification, submission and violence. As such, pornography creates the necessity for and the actual behaviours that constitute sex inequality.

Under MacKinnon and Dworkin's ordinance, those harmed in or by the production and distribution of pornography are empowered to sue the makers and distributors of that pornography. The sex equality approach of the ordinance is demonstrated by its definition of pornography in section 1(1) as follows:

- (1) Pornography is the sexually explicit subordination of women, graphically depicted, whether in pictures or in words, that also includes one or more of the following:
 - (i) women are presented dehumanized as sexual objects, things or commodities; or
 - (ii) women are presented as sexual objects who enjoy pain or humiliation; or
 - (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or
 - (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or
 - (v) women are presented in postures of sexual submission; or
 - (vi) women's body parts – included but not limited to vaginas, breasts or buttocks – are exhibited, such that women are reduced to those parts; or
 - (vii) women are presented as whores by nature; or
 - (viii) women are presented as being penetrated by objects or animals; or
 - (ix) women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised or hurt in a context that makes these conditions sexual.
- (2) The use of men, children or transsexuals in the place of women in (1)(i-ix) above is pornography...⁷

⁷ 'MacKinnon and Dworkin's Model Antipornography Civil Rights Ordinance' from Andrea Dworkin and Catharine A MacKinnon, *Pornography and Civil Rights: A New Day for Women's Equality* (1988), Appendix D.

Australia has not adopted this approach. It should. Rather, in Australia, both State and Commonwealth legislation regulates internet pornography as a matter of morality through censorship legislation. This is the approach that has been adopted in Australia through legislation such as the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act*), in which films, publications and computer games are censored and classified with reference to 'standards of morality, decency and propriety generally accepted by reasonable adults'.⁸ These moral standards also apply to the regulation of internet content, including internet pornography, under the *Broadcasting Services Act 1992* (Cth) (*Broadcasting Services Act*).⁹ Under the *Broadcasting Services Act* internet pornography is regulated through a classification system using the same classifications as films set out in the *Classification Act*.¹⁰

Additionally, the National Classification Code to the *Classification Act*, which provides additional guidance to the Classification Board about the classifications of films as 'RC', 'X 18+', and 'R 18+'¹¹ contains further reference to moral standards. For example, the film classification of 'RC' (Refused Classification) is premised upon standards of morality (emphasis added):

Films that:

- (a) depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or *revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults* to the extent that they should not be classified; or

⁸ Section 11(a) of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth).

⁹ *Broadcasting Services Act 1992* (Cth).

¹⁰ *Broadcasting Services Act 1992* (Cth) sch 5, cl 12, 13.

¹¹ *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 9, 12; See also: Office of Film and Literature Classification web page for the *National Classification Code* <<http://www.oflc.gov.au/resource.html?resource=60&filename=60.pdf>> at 16 June 2006.

- (b) describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not); or
- (c) promote, incite or instruct in matters of crime or violence.

This morality based model cannot do what the ordinance can because it does not recognise or provide remedies for the harms of pornography. Evelina Giobbe, a survivor of pornography and prostitution stated:

I am a rare survivor. Most women who have shared my experiences are not as fortunate. It took close to 20 years to undue [sic] the physical and emotional trauma of being used in prostitution and pornography. Today I am an activist in the feminist anti-pornography movement. But the pornography that was made of me still exists. I know the men who made it. I know where some of them are. But there is nothing I can do about it. I live knowing that at any time it could surface and be used to humiliate me and my family. It can be used to ruin my professional life in the future. Because pornography is a profitable multi-billion-dollar-a-year industry, I also know that what happened to me will continue to happen to other women and girls. They will continue to be used and hurt in the same way that I was. And if they should be fortunate enough to escape, they will live under the same threat of exposure and blackmail that I do.¹²

A censorship/morality-based model of regulation cannot help women like Ms Giobbe. It cannot recognise the harms done to these women, or provide them with compensation or damages. Morality cannot seize the pornography made of these women; nor can morality provide injunctive relief to stop pornography being sold, shown and distributed. The ordinance can. Specifically, the ordinance, in the words of MacKinnon, operates as follows:

¹² Evelina Giobbe, 'Surviving Commercial Sexual Exploitation' in Diana E H Russell (ed), *Making Violence Sexy: Feminist Views on Pornography* (1993) 40.

This law defines the documented harms pornography does as violations of equality rights and makes them actionable as practices of discrimination. This ordinance allows anyone hurt through pornography to prove its role in their abuse, to recover for the deprivation of their civil rights, and to stop it from continuing.¹³

In order to demonstrate why a sex equality approach should be adopted in Australia in order to adequately address pornographic harms, this paper will provide an overview of the harms of pornography. It will then outline the history and main provisions of the ordinance to illustrate how the ordinance can more specifically address these harms.

II HOW IS PORNOGRAPHY HARMFUL?

Pornography is not a harmless picture on a page, or a mere image on a film, video or computer screen. What is presented is the reality of every day life; a reality constructed through the lens of sex discrimination. Pornography has a very real impact on the lives of women and children and on the social construction of sexual inequality.¹⁴ We live in a society in which photographs and films of women being raped, abused and tortured in a sexual context are in demand and are readily available, particularly via the internet. However, society has also shown a reluctance to re-think the

¹³ Catharine A MacKinnon, *Only Words* (1993) 65.

¹⁴ See the testimony of Cheryl Champion at the Minneapolis Press Conference, quoted in Catharine A MacKinnon and Andrea Dworkin, *In Harm's Way: The Pornography Civil Rights Hearings* (1997) 262:

Pornography does not exist in isolation. This is not an issue of special interest for a small minority group. The sadistic violence and sexual enslavement we speak of is not isolated or remote – it is real. It is in the stories of the battered wives, molested children and raped women that happen everyday... It is evident that pornography could not be the product of a non-sexist culture where women are acknowledged as fully valuable human persons. In a non-sexist culture it would be shocking and intolerable to the community to view these images of women. In ours it is common place. We know we are free when pornography no longer exists. As long as it does exist we must understand that 'we are the women in it,' used by the same people, subject to the same devaluation.

existing legislative censorship approach to more effectively regulate internet pornography as an issue of sex equality. As will be explained shortly, it is a sex equality approach that appreciates ‘what pornography really is’¹⁵ and what pornography really does by empowering those harmed by pornography to seek financial redress and injunctive relief against its makers and distributors.¹⁶

There is a multitude of evidence, both in the form of women’s testimony at the civil rights hearings and in the form of scientific studies, that illustrates the harm caused by pornography. This paper will now outline some of this evidence, primarily focusing on the testimonies of women harmed by pornography at the civil rights hearings. These testimonies receive the main focus because they illustrate, in detail, the specific harms of pornography. An overview will then be given of some of the scientific evidence showing the direct relationship between pornography and sexual aggression, in support of the testimonies of these women.

A An Examination of Pornographic Harms

There are three kinds of pornographic harms that have been identified by anti-pornography feminists, and supported by women’s evidence at the civil rights hearings which are not addressed by a morality/censorship approach to regulation. These harms include:

- Harms to persons used in pornography. These persons are sometimes known as ‘actors.’ By using the term ‘actors’, I am referring to the people who are *used* in pornography. I do not intend the use of the term ‘actors’ to suggest that

¹⁵ Testimony of Jaye Morra at the Massachusetts hearings, quoted in MacKinnon and Dworkin, *In Harm’s Way*, above n 14, 414. Jaye Morra used the phrase, ‘what pornography really is’ in her testimony at the hearing.

¹⁶ Section 5(2)(a) of MacKinnon and Dworkin’s ordinance states that any person who has a cause of action under the ordinance may seek ‘nominal, compensatory, and/or punitive damages without limitation, including for loss, pain, suffering, reduced enjoyment of life, and special damages, as well as for reasonable costs, including attorney’s fees and costs of investigation’. Section 5(3)(a) provides that injunctive relief may also be sought. This could be utilised to stop pornography being shown, sold and distributed.

what we see in pornography is not real and that the participants are only 'acting'. In reality, pornography is made of real people whose consent is often absent or coerced.¹⁷

- Harms to 'non-actors'. By this I mean the physical, sexual and emotional abuse inflicted by some men who consume pornography on their spouses, partners, children, other family members and strangers.
- Maintaining systemic gender inequality and sex discrimination.¹⁸ Sexual inequality is reflected in pornography through sexualising rape, pain, mutilation and degradation by one person (masculine/male/dominant) on another person (feminine/female/submissive). These gendered hierarchies are presented as 'normal' and 'natural' in pornography and influence the perceptions of sex and

¹⁷ See Linda Lovelace, *Ordeal* (1980). See also, Gloria Steinem, 'The Real Linda Lovelace' in Diana E H Russell (ed), *Making Violence Sexy: Feminist Views on Pornography* (1993) 23. I agree with Kendall whose analysis of the term 'actors' used in gay male pornography, is equally applicable to heterosexual pornography, see: Christopher N Kendall, *Gay Male Pornography: An Issue of Sex Discrimination* (2004), 221, footnote 32:

The use of the word 'model' or 'actor' risks glamorizing the very real experiences of many of the people presented as 'actors' and the reality that they, as real people do experience. The seriousness of this point should not be underestimated. Those who support gay male pornography tend to overlook that the 'images/models' in gay male pornography are real people, upon many of whom direct physical contact, often in the form of violence presented through sex, is frequently inflicted in order to produce that which is defended as fantasy – a political euphemism or cover for abuse. It should not be assumed that these young men are always willing participants, particularly when free will is largely defined by one's ability to exercise some social or economic independence. The young men who appear in gay male pornography do so for a number of reasons, but 'choice' is not always a factor. This corresponds to the findings of those who have documented the lives of the women used in heterosexual pornography.

See also, Sharon A Abbott, 'Motivations for Pursuing an Acting Career in Pornography' in *Sex for Sale: Prostitution, Pornography and the Sex Industry* (2000) 17; Giobbe, above n 12, 37.

¹⁸ See, for example, MacKinnon, *Towards a Feminist Theory of the State*, above n 4, 197. See also, Andrea Dworkin, *Pornography: Men Possessing Women* (1989).

gender of those who view pornography.¹⁹ The result is a society in which men have power and women, sexualised as unequal, are harassed and demeaned because they do not.²⁰

1 HARM ONE: TO PERSONS USED IN PORNOGRAPHY

Pornography uses and presents women as depersonalised sexual objects for male sexual pleasure. In pornography we see real women being degraded, tortured, beaten and humiliated. In many of the presentations of women, now mainstreamed via magazines, movies and the internet, the women are shown as enjoying this treatment. In others, the women used to produce these materials look like they are in real pain and distress.²¹ Many are, while the message conveyed is that others should be. When discussing pornography, it is vital to recognise that ‘women in pornography are real women to whom

¹⁹ MacKinnon, *Towards a Feminist Theory of the State*, above n 4, 197; Dworkin, *Pornography: Men Possessing Women*, above n 18.

²⁰ Whilst these harms have been identified as three distinct categories, they are by no means separate. Rather, they are interconnected and allow each other to perpetuate, with each informing and reinforcing the other. Each exists in harmony with the other. For example, if we lived in an equal society, in which men and women were equal, men would not want to use pornography and women would not be used in pornography. As stated at the beginning of this section, ‘in a non-sexist culture it would be shocking and intolerable to the community to view these images of women. In ours it is common place’: testimony of Cheryl Champion at the Minneapolis Press Conference, quoted in MacKinnon and Dworkin, *In Harm’s Way*, above n 14, 262. In addition, in an equal society men would not be inspired and taught by pornography to harm and abuse women and children as the result of viewing it. On the other hand, pornography itself is instrumental in maintaining systemic gender inequality and sex discrimination by presenting women as dehumanised sexual objects who enjoy rape, pain and humiliation at the hands of men.

²¹ See generally, Diana E H Russell, *Against Pornography: The Evidence of Harm* (1993). In this book Russell provides commentary on over 100 pornographic photographs and cartoons. Many of the photographs show women bound, gagged, being raped, tortured, penetrated by objects and animals and in obvious pain and distress. The lack of consent by many of these women is obvious when viewing these photographs. Many of the cartoons trivialise and sexualise rape, sexual harassment in the workplace and sexual violence. See also, Diana E H Russell, *Dangerous Relationships: Pornography, Misogyny, and Rape* (1998). In this book, Russell describes the pornography, instead of reproducing the actual photographs and cartoons, before analysing them from a harms-based equality perspective.

something real is being done'.²² Their abuse, in turn, is sexualised in order to normalise the abuse of others. This abuse would not occur in a society premised upon equality. Pornography's central harm is the inequality of the sexes. Pornography creates the inequality that allows men to use these women to mass market more inequality through sex.

Pornography is often made of women and children in their homes by family members, often without their consent or knowledge.²³ Some women become involved in pornography because their fathers, brothers, boyfriends or other male relatives prostitute them and/or make pornography using them. Some of these women are photographed or filmed without their consent.²⁴ As one woman explained:

My brother started sexually abusing me when I was 4 or 5 and pornography was a part of the abuse. To be specific, he would describe a certain pose that he had seen in Playboy or Penthouse, and he'd make me do it. Often he would compare my body to the pictures in a very detailed and graphic and humiliating way. He also became obsessed with a feature they have in Hustler. He told me it was called The Beaver Hunt, and men could send in photographs of their wives and their girlfriends... He thought that this was the greatest thing, that he could be a pornographer too, so he made me pose for The Beaver Hunt and took pictures.²⁵

Pornographic 'actors' are often not acting. Rather, they are real women who have been filmed or photographed being raped or sexually abused. Sue Santa, a social worker who worked exclusively with adolescent females and who gave testimony at the Minneapolis hearings stated as follows:

22 MacKinnon, *Towards a Feminist Theory of the State*, above n 4, 198-9.

23 Gail Dines, Robert Jensen and Ann Russo, *Pornography: The Production and Consumption of Inequality* (1998) 24.

24 Ibid.

25 Testimony of Lierre Keith at the Massachusetts hearings, quoted in MacKinnon and Dworkin, *In Harm's Way*, above n 14, 399.

on many occasions, my clients are multi-, many-, rape victims. These rapes are often either taped or have photographs taken of the event. The young woman, when she tries to escape or leaves, is told that either she continues in her involvement in prostitution or those pictures will be sent to her parents, will be sent to the juvenile court, will be used against her. And out of fear, she will continue her involvement in prostitution. On several occasions, not many but several occasions, these young women have found that later that their pictures have been published in pornographic magazines without their knowledge and consent.²⁶

Linda Marchiano (known in pornography as Linda Lovelace) in her book *Ordeal*,²⁷ gave graphic details of how she was coerced into pornography by Chuck Traynor, her husband and pimp, and of the immense psychological and physical harm she suffered as a result.

Whilst the abuse Ms Marchiano suffered may appear extreme, her story illustrates the ease in which a young, naïve woman can be coerced into the pornography and prostitution industries by actual violence, the threat of violence to Ms Marchiano personally and to her family and friends, and psychological abuse. Her story also reveals a callous industry, premised upon profit at the expense of basic human dignity.

Ms Marchiano's ordeal began when she was 21 years old and staying with her parents to recover from a serious car accident. A high school friend came to visit her with a man named Chuck Traynor who Ms Marchiano initially thought was attractive, interesting and a gentleman.²⁸ Ms Marchiano's wrote in *Ordeal*, that her mother had a violent temper, and after an argument with her mother, in which her mother hit her, she was persuaded by Traynor that she could live with him until she recovered from her car accident.²⁹

²⁶ Testimony of Sue Santa at the Minneapolis hearings quoted in MacKinnon and Dworkin, *In Harm's Way*, above n 14, 176.

²⁷ Lovelace, above n 17. See also, Steinem, above n 17, 23.

²⁸ Lovelace, above n 17, 19-20.

²⁹ *Ibid* 19-21.

At the time she went to live with Traynor, Ms Marchiano knew very little about him. She did not know that he had a police record, including being found guilty of assault and battery, that he was facing charges of drug importation, and that he had previously run a brothel.³⁰ Ms Marchiano also reported that as their relationship progressed, Traynor would boast to her about people he had killed.³¹

Ms Marchiano reported that some time later, Traynor began to have financial difficulties and told Ms Marchiano that he was going back into the prostitution industry and that she should run his prostitution business with him as his 'Madam'. When Ms Marchiano refused, Traynor brutally beat and raped her.³² Ms Marchiano reported that from this time, Traynor became more possessive and violent towards her, ordering her around and openly displaying and cleaning his guns in order to threaten her.³³

Ms Marchiano wrote that one day Traynor informed her that they were going to meet some people. He drove her to a motel and took her into a room in which there were five men waiting.³⁴ On returning from the room's bathroom, Ms Marchiano wrote that Traynor informed her, 'you know those five guys out there... you're going to fuck all five of them.' When Ms Marchiano made several refusals, she was told by Traynor, '[i]f you don't, I'm going to put a bullet in your head right now'³⁵ and '[t]ake off your clothes or you are one fucking dead chick!'³⁶ Ms Marchiano was raped and sexually abused by four or the five men, with the other man and Traynor watching. She writes of this ordeal, 'I had never been so frightened in my life'³⁷ and 'I wouldn't have minded dying'.³⁸

30 Ibid 19-20.

31 Ibid.

32 Ibid 34-5.

33 Ibid 37-8.

34 Ibid 38-9.

35 Ibid 41.

36 Ibid 42.

37 Ibid 45.

38 Ibid 46.

After this incident, Traynor began to pimp Ms Marchiano out more and more. He ensured that she would not escape with threats of cutting up her face³⁹ and threats of violence, actual violence and verbal abuse:

Every day I either got raped, beaten, kicked, punched, smacked, choked, degraded or yelled at. Sometimes, I got all of the above. Strangely enough, what bothered me the most was the endless verbal abuse. He never let up...⁴⁰

Traynor took Ms Marchiano to her first pornographic photography session at the home of pornographer Leonard Campagno (also known as 'Lenny Camp'). She was made to have sex with another woman, including being penetrated by the woman wearing a strap on dildo.⁴¹ Ms Marchiano described this experience as 'one of the lowest spots in my life.'⁴²

Ms Marchiano felt at all times that she had no choice but to perform in pornography. She commented, 'the things that he used to get me into pornography went from a .45 automatic 8 shot and M-16 semi-automatic machine gun to threats on the lives of my family.'⁴³

Ms Marchiano wrote that at first she was fearful of escaping from Traynor, and instead focused on survival. She wrote:

At first I was certain that God would help me escape but in time my faith was shaken. I became more and more frightened, scared of everything. The very thought of trying to escape was terrifying. I had been degraded every possible way, stripped of all dignity, reduced to an animal and then to a vegetable. Whatever strength I

39 Ibid 51.

40 Ibid.

41 Ibid 58.

42 Ibid 59.

43 Testimony of Linda Marchiano at the Minneapolis hearings, quoted in MacKinnon and Dworkin, *In Harm's Way*, above n 14, 61.

had begun to disappear. Simple survival took everything: making it all the way to tomorrow was a victory.⁴⁴

Shortly afterwards Ms Marchiano made her first escape attempt when she was sent to an apartment with another woman on a prostitution job. Ms Marchiano tried to run away but was caught by Traynor at the bottom of the apartment. She wrote that her punishment was so bad that she blocked it from her memory:

I remember being icy with fear. However, whatever Chuck did to me that afternoon – the details – are gone from my memory. They're completely blocked. I can't remember a word that he said. I don't remember him throwing a punch or hitting me, but I do know it was the worst beating I ever got. It was a day before I could walk again.⁴⁵

Ms Marchiano made her second escape attempt on a visit to her parent's house. However, she changed her mind after Traynor threatened to kill her young nephew, father, mother and sister if she didn't stay with him.⁴⁶

In *Ordeal*, Ms Marchiano wrote that Traynor decided that she should do pornographic films. She named the first film she was made to do 'the piss movie' because it ended with the 'actors' urinating on each other.⁴⁷ Traynor's next pornographic film for Ms Marchiano was what Ms Marchiano described as the 'dog movie'.⁴⁸ She refused to do the film, saying, 'I'd rather take the beating'⁴⁹ but she was informed by Traynor that she must do the film, otherwise he would kill her.⁵⁰ Ms Marchiano wrote in *Ordeal* that Traynor, the film's

44 Lovelace, above n 17, 70.

45 Ibid 74.

46 Ibid 85-7.

47 Ibid 105.

48 Ibid 107.

49 Ibid 110.

50 Ibid.

director and the director's assistant were insistent that she change her mind:

Mr Traynor suggested the thought that I do films with a D-O-G, and I told him that I wouldn't do it. I suffered a brutal beating. He claims he suffered embarrassment because I wouldn't do it. We then went to another porno studio, one of the sleaziest ones I have ever seen, and then this guy walked in with his animal, and I again started crying. I said, I am not going to do this, and they were all very persistent, the two men involved in making the pornographic film and Mr Traynor himself. And I started to leave and go outside of the room where they make these films, and when I turned around there was all of a sudden a gun displayed on the desk and having seen the coarseness and callousness of the people involved in pornography, I knew that I would have been shot and killed. Needless to say, the film was shot and still is one of the hardest ones for me to deal with today.⁵¹

Ms Marchiano also wrote of the humiliation she suffered as a result of being used in this film saying, '[i]f I could have foreseen how bad it was going to be, I wouldn't have surrendered. I would have chosen the possibility of death.'⁵²

Ms Marchiano was later made to perform in the film *Deep Throat*. The film was about a woman who had a clitoris in the back of her throat. So that Ms Marchiano could manage the fellatio in the film without 'gagging', Traynor used hypnosis to inhibit the gag reflex.⁵³ At the civil rights hearing in Minneapolis, Ms Marchiano testified how she was severely beaten by Traynor while the film was being made:

During the filming of *Deep Throat*, actually after the first day, I suffered a brutal beating in my room for smiling on the set. It was a hotel room and the whole crew was in one room... Mr Traynor

⁵¹ Ibid 111. See also, testimony of Linda Marchiano at the Minneapolis hearings, quoted in MacKinnon and Dworkin, *In Harm's Way*, above n 14, 64.

⁵² Lovelace, above n 17, 111.

⁵³ Testimony of Linda Marchiano at the Minneapolis hearings, quoted in MacKinnon and Dworkin, *In Harm's Way*, above n 14, 65.

started to bounce me off the walls. I figured out of 20 people, there might be one human being that would do something to help me and I was screaming for help, I was being beaten, I was being kicked around and again, bounced off the walls. And all of a sudden the room next door became very quiet. Nobody, not one person came to help me. The greatest complaint the next day is the fact there was bruises on my body. So many people say that, in *Deep Throat*, I have a smile on my face, and I look as though I am really enjoying myself. No one ever asked me how those bruises got on my body.⁵⁴

When asked at the civil rights hearings how she felt about the fact that *Deep Throat* continued to be shown Ms Marchiano said, 'virtually every time someone watches that film, they are watching me being raped.'⁵⁵

Ms Marchiano made her third unsuccessful escape attempt after *Deep Throat*. Traynor arranged a brutal punishment, namely for Ms Marchiano to be brutally raped by another woman with a dildo which she described as 'the most intense pain I'd known.'⁵⁶ Ms Marchiano eventually did escape from Traynor by convincing him, for the first time, to leave her alone for several hours.⁵⁷

There can be no doubt that Ms Marchiano suffered severe physical and psychological harms at the hands of, and for the benefit of, the pornography industry. This is evidenced by films such as the 'dog movie', where the director and his assistant were complicit with Traynor in forcing Ms Marchiano to do the film upon threat of death, and *Deep Throat*, during which no one came to assist her when she was being brutally beaten. The pornography industry allowed Traynor to make money from abusing and degrading his wife. It was an industry that asked no questions about consent, even in the face of Ms Marchiano's obvious lack of it, nor cared, as long

54 Ibid 62.

55 Ibid 65.

56 Lovelace, above n 17, 162.

57 Ibid 220-2.

as the pornography was made and sold for a profit. Ms Marchiano continues to be exploited by the pornography industry today. An internet search using the search engine 'Google' of the name 'Linda Lovelace' revealed 1 050 000 hits in 0.19 seconds, an increase from a search conducted one year earlier which revealed 543 000 hits in 0.05 seconds.⁵⁸ This is a dramatic increase from the number of hits revealed by a 'Google' search conducted approximately two years earlier which resulted in 97 000 hits in 0.09 seconds.⁵⁹

A further harm to pornography's 'actors' is the substantial risk to actors of contracting sexually transmitted diseases. Torres has commented on the unsafe sexual practices in the context of pornographic films:

The nature of adult motion picture production encourages unusual and unsafe working conditions. Producers have been known to force actresses to do sexual acts 'that they would really rather not do.' In most of the productions, producers do not test the performers for sexually transmitted diseases and do not require that performers practice safe sex. Additionally, some producers ignore the risks associated with allowing a performer, who may be infected with HIV, to perform in a film. In these situations, the performers are faced with the greatest risk of contracting AIDS.⁶⁰

Torres also gives the example of John Holmes, a famous pornography 'actor', who died of AIDS related complications in March 1988. Holmes continued working in the pornography industry, even though many in the industry knew he was HIV positive.⁶¹ In doing so, he (and the industry) knowingly endangered the lives of hundreds of men and women.

⁵⁸ The 'Google' web page is located at <www.google.com.au>. These searches for 'Linda Lovelace' were conducted by the author on 19 June 2006 and 9 July 2005 respectively.

⁵⁹ This 'Google' search was conducted by the author on 25 June 2004.

⁶⁰ Francisco G Torres, 'Lights, Camera, Actionable Negligence: Transmission of the AIDS Virus During Adult Motion Picture Production' [1990] 13 *Hastings Communication and Entertainment Law Journal* 89, 99.

⁶¹ *Ibid.*

The disdain the pornography industry generally has for condoms is indicative of the sexualisation of risk in pornography. There is a category of pornography described by Torres as 'safe sex films'⁶² where condoms and dental dams are used. However, these films are rare and do not enjoy the popularity of other types of pornography. Pornography depicts violent and potentially harmful behaviours as sexy, legitimate and enjoyable. More significantly, pornography sexualises inequality by presenting women as sexual objects who enjoy pain, mutilation and rape and who are submissive to men. Any kind of protection from harm would contradict the sexualisation of inequality in pornography. Kendall comments in the context of gay male pornography:

it is clear that in many ways safe sex stands to emasculate the pornographic symbol. For safe sex to work, one needs to accept that both parties have rights and that both are sexual equals. Both parties merit protection and more importantly, both have the right to a recognised human existence. In a sense, safe sex represents a form of sexual negotiation, imposing limits on sexual conduct – negotiation that presupposes relatively equal parties. More importantly, however, it recognises that there are limits on what you can do to someone else through sex and what they, in turn, can do to you.⁶³

⁶² Ibid 97.

⁶³ Kendall, above n 17, 147. Whilst the preceding analysis is primarily focused on women used in heterosexual pornography, men and women used in gay and lesbian pornography often have similar experiences of exploitation, objectification and powerlessness. Many, young gay men according to Kendall become involved in the pornography industry because they have been forced to leave home at a young age when their parents have found out they are gay, giving them little opportunity to complete their education and leaving the prostitution and pornography industry as one of the few ways of earning an income: see Kendall, above n 17, 78.

By way of example, Kendall discusses the life of 1990s gay pornography 'actor' Nicholas Iacona, known in pornography as Joey Stefano: at 76-83. Stefano ran away from home when he was 15 years old and soon became involved in the pornography industry. He made over 35 hard-core pornographic videos. Stefano also became involved in prostitution. He hoped that it would lead to more legitimate television and film roles which many of the men who used him promised they would help him obtain. Stefano died of a drug overdose on 20 February 1994. He was broke, depressed and HIV positive. Joey Stefano, quoted in Charles Isherwood, *Wonder Bread and Ecstasy: The Life and Death of Joey Stefano* (1996), cited in Kendall, above n 17, 69, wrote:

2 HARM TWO: SEXUAL HARM TO NON-ACTORS

I was sexually abused in my family. I don't know if the man who abused me uses pornography, but looking at the women in those pictures, I saw myself at fourteen, at fifteen, at sixteen. I felt the weight of that man's body, the pain, the disgust... I don't need studies and statistics to tell me that there is a relationship between pornography and real violence against women. My body remembers.⁶⁴

For women and children who have been raped and sexually abused, there is often no question that there is a direct correlation between the harm they have suffered and pornography. However, pro-pornography activists deny that pornography causes *any* kind of harm.⁶⁵ They argue that any harm to women is caused through

No job
No money
No self-esteem
No confidence
All I have is my looks and body,
And that's not working anymore.
I feel washed up.
Drug problem.
Hate Life.
HIV-positive.

⁶⁴ Testimony of MMD, quoted in MacKinnon and Dworkin, *In Harm's Way*, above n 14, 134-5.

⁶⁵ See, for example, Nadine Strossen, *Defending Pornography: Free Speech, Sex and the Fight for Women's Rights* (1995); Nadine Strossen, 'Hate Speech and Pornography: Do we have to choose between Freedom of Speech and Equality?' (1995-96) 46 *Case Western Reserve Law Review*, 449; Nadine Strossen, 'Preface: Fighting Big Sister for Liberty and Equality' (1993) 38 *New York Law School Law Review* 1. See also, Nan Hunter and Sylvia Law, 'Brief Amici Curiae of Feminist Anti-Censorship Task Force' (1988) 21 *Michigan Journal of Law Reform* 69, 86 who opposed the Indianapolis Ordinance on the following grounds:

Sexually explicit speech is not per se sexist or harmful to women. Like any mode of expression, it can be used to attack women's struggle for equal rights, but it is also a category of speech from which women have been excluded. The suppression authorized by the Indianapolis ordinance of a potentially enormous range of sexual imagery and texts reinforces the notion that women are too

ensorship and that pornography should not be denied those who want it. For them, censorship laws aimed at regulating pornography have traditionally been used by men to silence women's voices and women's sexual expression.⁶⁶

It is submitted that just because censorship legislation has been used to silence women, this should not preclude pornography from being regulated in a manner that does not involve the silencing of legitimate, non-harmful expression. Despite this, alternative legal frameworks for regulation, such as MacKinnon and Dworkin's sex equality approach, have been discredited by the likes of Nadine Strossen as a form of censorship. What these pro-pornography writers fail to realise, however, is that the failure to regulate pornography at all is *itself* a form of censorship. As MacKinnon and Dworkin argue, pornography acts as a form of censorship by silencing women and making them unable to speak out.⁶⁷ It

fragile, and men too uncontrollable, absent the aid of the censor, to be trusted to reject or enjoy sexually explicit speech for themselves. By identifying 'subordination of women' as the concept that distinguishes sexually explicit material which is tolerable from that to be condemned, the ordinance incorporates a vague and asymmetric standard for censorship that can as readily be used to curtail feminist speech about sexuality, or to target the speech of sexual minorities, as to halt hateful speech about women. Worse, the perpetuation of the concept of gender-determined roles in regard to sexuality strengthens one of the main obstacles to achieving real change and ending sexual violence.

⁶⁶ Hunter and Law, above n 65.

⁶⁷ MacKinnon, 'Pornography, Civil Rights and Speech', above n 5, 36, where MacKinnon describes how pornography silences women:

Pornography makes their speech impossible and where possible, worthless. Pornography makes women into objects. Objects do not speak. When they do, they are by then regarded as objects, not as humans, which is what it means to have no credibility.

Dworkin, 'Against the Male Flood: Censorship, Pornography, and Equality', above n 4, 17-20, for a discussion of how part of pornography's subordination is to silence women. Dworkin argues that pornography not only silences women, but that it goes even further; it allows women's bodies to be used as pornographers' speech: 'The pornographers actually use our bodies as their language. Our bodies are the building blocks of their sentences.': at 18.

See also, Susan Griffin, *Pornography and Silence: Culture's Revenge Against Nature* (1982). Griffin argues 'that pornography is an expression not of human and erotic feeling and desire, and not of a love of the life of the body, but of a fear of bodily knowledge and a desire to silence eros': at 1. She argues that '[t]he pornographer reduces a woman to a mere thing, to an entirely material object without a soul...': at 3.

therefore ensures that male views are those most likely to be voiced. The result is inequality on the basis of sex; a gendered hierarchy in which ‘male’ is to ‘female’ as dominance is to submission. By discrediting or refusing to believe women’s narratives of harm, pro-pornography feminists silence these women in the same way that men always have. In addition, denying that actual harm was suffered by these women reinforces pornography’s message: ‘they want it; they all want it’.⁶⁸

The MacKinnon and Dworkin civil rights hearings gave women the opportunity to break their silence. Many of them did so in fear of their lives and in the hope that the ordinance would be enacted, thereby giving other women harmed by pornography a voice that they did not have, and the right to obtain compensation for sexual abuse and violence, including the right to injunctive relief and to stop pornography made of them being shown, sold and distributed. The testimony of several women at the civil rights hearings indicated that pornography played a causal role in their abuse by strangers. For example, Ms M testified at the Minneapolis hearing as follows:

When I was thirteen, I was camping with the Girl Scouts... I was walking in the forest outside of the camp in midafternoon and came upon three deer hunters who were reading magazines and talking and joking around. I turned to walk away and one of the men yelled, ‘There is a live one.’ And I thought they meant a deer, and so I ducked and tried to run away. I realised that there wasn’t

Griffin argues that throughout history, women have been silenced, and that pornography is a part of this ‘forced silencing’ of women: at 201. Griffin states, at 201-2:

And the story does not end with this forced silencing. Just as silence leaves off, the lie begins. This lie is not only the lie the pornographer tells, but the lie a woman begins to believe about herself, or even if she does not believe it, the lie a woman tries to mimic. For since all the structures of power in her life, and all the voices of authority – the church, the state, society, most likely even her own mother and father – reflect pornography’s fantasy, if she feels in herself a being who contradicts this fantasy, she begins to believe she herself is wrong. Wordlessly, even as a small girl, she begins to try to mould herself to fit society’s image of what a woman ought to be. And that part of her which contradicts this pornographic image of womanhood is cast back into silence.

⁶⁸ MacKinnon, *Feminism Unmodified*, above n 4, 191.

any deer in sight and that they meant me. And I started running and they ran away – they ran after me. I tripped... and they caught me. They told me to take off my clothes and I did... I took my clothes off, and they told me to lie down and the first man started. They told me not to say anything, that if I made a sound they would kill me, they would blow my head off... two men held their guns at my head and the first man hit my breast with his rifle, and they continued to laugh. And then the first man raped me. And when he was finished, they started to make jokes about how I was a virgin... The second man then raped me... When the second man finished, the third man was not able to get an erection, the other men, told me to give him a blow job, and I didn't know what a blow job was. The third man forced his penis into my mouth... He started swearing at me and calling me a bitch and a slut and that I'd better do it right and that I wasn't even trying. Then he started getting very angry and one of the men pulled the trigger on his gun, so I tried harder. Then when he had an erection, he raped me... Then they started walking away... and I looked down and saw that they had been reading pornographic magazines. They were magazines with nude women on the covers.⁶⁹

Ms M's testimony shows a direct relationship between the pornography her attackers were reading and their brutal rape and sexual assault on her. Carol LaFavour, an American Indian woman, also testified at the hearings that her attackers referred to a pornographic video game called 'Custer's Last Stand' during their attack on her:

I was attacked by two white men, and from the beginning they let me know that they hated my people, even though it was obvious from their remarks they knew very little about us. And they let me know that the rape of a 'squaw' by white men was practically honoured by white society. In fact, it has been made into a video game called, 'Custer's Last Stand.' And that is what they screamed into my face as they threw me to the ground, 'This is more fun than Custer's Last Stand'. They held me down and as one was running the tip of his knife across my face and throat he said, 'Do

⁶⁹ Testimony of Ms M, quoted in MacKinnon and Dworkin, *In Harm's Way*, above n 14, 102-3.

you want to play Custer's Last Stand? It's great. You lose, but you don't care, do you? You like a little pain, don't you, squaw?'...They made other comments – 'the only good Indian is a dead Indian,' 'a squaw out alone deserves to be raped' – words that still terrorise me today.⁷⁰

The American case of *State v Herberg*⁷¹ is a record of an horrific sexual assault and torture in which the perpetrator acted out content in several pornographic books including 'Violent Stories of Kinky Humiliation', 'Violent Stories of Dominance and Submission', 'Bizarre Sex Crimes', 'Shamed Victims' and 'Watersports Fetish: Enemas and Golden Showers'.⁷² Pacillo summarises the case as follows:

On July 17, 1981, David Herberg forced a 14-year-old girl into his car, tied her hands with his belt, and pushed her to the floor. With his knife, he cut her clothes off, then inserted the knife into her vagina, cutting her. After driving a short distance, he forced the girl to remove his clothing, stick a safety pin into the nipple of her own breast, and ask him to hit her. He then orally and anally raped the girl. He made her burn her own flesh with a cigarette, defecated and urinated in her face, and compelled her to eat the excrement and to drink her own urine from a cup. He strangled her to the point of unconsciousness, cut her body several times, then returned her to the place where he had abducted her. In reviewing Herberg's criminal appeal, the Supreme Court of Minnesota noted that when Herberg committed these acts, he was 'giving life to some stories he had read in various pornographic books.' Officials seized these books from him during his arrest.⁷³

⁷⁰ Testimony of Carole LaFavour, quoted in MacKinnon and Dworkin, *In Harm's Way*, above n 14, 148.

⁷¹ *State v Herberg*, 324 NW 2d 346, 347 (Minn, 1982), discussed in Edith L Pacillo, 'Note: Getting a Feminist Foot in the Courtroom Door: Media Liability for Personal Injury Caused by Pornography' (1994) 28 *Suffolk University Law Review* 123, 123.

⁷² Pacillo, above n 71, 123, footnote 1.

⁷³ *Ibid* 123.

Pornography not only has a role in sexual assaults by strangers. It also causes sexual abuse and violence in the home. Pornography is often used against women by boyfriends and family members as a manual for their abuse. Katherine Brady, a victim of incest, writes:

My father incestuously abused me for a period of 10 years, from the time I was 8 years old until I was 18... During the early stages of the molestation, my father used pornographic materials as a way of coercing me into having sex with him... My father used pornography for several purposes. First of all, he used it as a teaching tool – as a way of instructing me about sex and about what he wanted me to do with him. When he showed me the pictures, he would describe the acts in detail: ‘This is fellatio,’ ‘this is what you do with intercourse,’ and so forth. Second, my father used the pictures to justify his abuse and to convince me that what we were doing was normal. The idea was that if men were doing it to women in the pictures, then it was OK for him to do it to me. Finally, he used the pornography to break down my resistance. The pornography made the statement that females are nothing more than objects for men’s sexual gratification. How could I refuse my father when the pornography showed me that sex is what women and girls are for?⁷⁴

A woman named Suzanne Fuller testified at the Massachusetts hearings that she was made to repeat what the women did to the men in pornographic videos:

He forced me to watch porn flicks, insisting that I should like them, learn from them, and be like those women, so I could please him. He would always be forceful in intercourse after viewing these porn videos. He insisted that I repeat what the women did, as he repeated what the man did. He would hit me as he forced me. I felt humiliated, terrified. I was his sex slave. He showed me a picture of a woman, it was either from Penthouse or Playboy, and

⁷⁴ Katherine Brady, ‘Testimony on Pornography and Incest’ in Diana E H Russell (ed), *Making Violence Sexy: Feminist Views on Pornography* (1993) 43-4.

he said that he believed that she was me. Later, he told me that his deepest fantasy was to rape me, which he did repeatedly.⁷⁵

Several women made direct reference to pornography being used as a ‘text book’ for their abuse at the civil rights hearings such as RMM who testified at the Minneapolis hearings that:

He would read from the pornography like a text book. In fact, when he asked me to be bound, when he finally convinced me to do it, he read in the magazine how to tie the knots, and how to bind me in a way that I couldn’t get out. And most of the scenes that we – most of the scenes where I had to dress up or go through different fantasies – were the exact scenes he had read in the magazines.⁷⁶

⁷⁵ Testimony of Suzanne Fuller at the Massachusetts hearings, quoted in MacKinnon and Dworkin, *In Harm’s Way*, above n 14, 407.

Note also the testimony of LB at the Massachusetts hearings, quoted in MacKinnon and Dworkin, *In Harm’s Way*, above n 14, 381, who stated that:

He wanted me to watch how the various women in the video performed oral sex on the men. And then he insisted that I do the same with him while he continued to watch that movie. If I didn’t go down on him far enough or hard enough, he would put his hands on my head and push it up and down, sometimes so hard that I thought I would faint. If I gagged or choked, he would pull me up by the hair, throw me back on the floor, hit and kick me and verbally abuse me, calling me ‘worthless,’ ‘useless,’ and ‘a waste of his time.’ Then he would make me watch that video again, perform oral sex, and threaten to ‘break my jaw if I stopped.’

Another woman, Pat Haas, testified of the role pornography played in her abuse, in particular, how she was forced to perform the acts seen in pornography, quoted in MacKinnon and Dworkin, *In Harm’s Way*, above n 14, 370:

I was forced to provide videos for him. He found one particular one very appealing. It was about sadomasochism. He spent hours watching this movie and he then started forcing me to do the things that were in this movie. One night, I spent an evening with him. I had hot wax dripped on me. A couple of weeks later, I was forced to pierce my nipples, I was forced to have sex with other people, it didn’t make any difference – men, women, groups. He had me playing watersports games, which is drinking urine. And every time I said no, he would find a way of beating me. Most of the time it was with a two inch belt. He had knives at my throat; he tried strangling me on occasion.

⁷⁶ Testimony of RMM at the Minneapolis hearings, quoted in MacKinnon and Dworkin, *In Harm’s Way*, above n 14, 113-14. See also, Giobbe, above n 12, 37, where she stated, at 39:

Women working in male dominated trades have also been subjected to workplace harassment through the display of pornography in the workplace by male co-workers.⁷⁷ *Horne v Press Clough Joint Venture*,⁷⁸ is a decision of the Western Australian Equal Opportunity Commission which recognised that the display of pornography in a male dominated workplace amounted to sex discrimination and victimisation against two women employees.

The two women (the complainants) were cleaners and the only female employees on a construction site.⁷⁹ In several of the rooms that the women were required to clean, there were posters and pictures of naked and semi-naked women, described in the judgment as 'soft porn'.⁸⁰ The complainants felt uncomfortable with these

My last pimp was a pornographer and the most brutal of all. He owned about three women or girls at any given time. Every night he'd run stag films after which he'd choose one of us for sex. The sex always duplicated the pornography. He used it to teach us to service him. He made pornography of all of us. He also made tape recordings of us having sex with him and of our screams and pleas when he beat us, often threatening us with death. Later he would use these recordings to humiliate us by playing them for his friends in our presence, for his own sexual arousal and to terrorize us or other women he brought home.

⁷⁷ Workplace discrimination and victimisation as a result of the display of pornography was experienced by Ms B who testified at the civil rights hearings, see the testimony of Ms B, quoted in MacKinnon and Dworkin, *In Harm's Way*, above n 14, 121-2:

I, for the past six years, have been in training to be a plumber... I got stuck on a job that was almost completed but not quite... When I got on the job... it was a real shock when I walked in, because three of the four walls in the room were completely decorated with pictures out of various magazines, Hustler, Playboy, Penthouse, Oui, all of those. Some of them I would have considered regular pinups, but some of them were very, very explicit, showing women with their legs spread wide and men and women performing sex acts and women in bondage... I put up with it for about a week... I felt totally naked in front of these men... I got pissed off one day and ripped all the pictures off the wall. Well, it turned out to be a real unpopular move to do. I came back in at lunch time and half the pictures were back up again... I began to eat my lunch at other places in the building and was totally boycotted at work. The men wouldn't talk to me. I was treated like I had just done something terrible.

⁷⁸ *Horne v Press Clough Joint Venture* (1994) EOC 92-556 (*Horne*).

⁷⁹ The facts are set out on pages 77 057 – 77 059 of the judgment.

⁸⁰ *Horne*, above n 78, 77 057.

pictures but tolerated them as ‘incidental to their work’ on a male dominated construction site.⁸¹

One day, the second complainant went into the site supervisor’s office to clean it and ‘was confronted by a totally explicit poster of a nude woman.’⁸² She complained to the site supervisor but instead of the poster being removed a sticker was placed over the genitals of the woman in the pornography.

Later on, a pornographic poster showing a man and a woman ‘engaged in a sexual act’⁸³ was displayed on a wall of another of the rooms that one of the complainants had to clean. After ‘an angry confrontation with the owner of the poster’,⁸⁴ it was removed. From this time, the number of pornographic posters being displayed around the construction site increased. Several weeks later, the complainants found that one of the crib huts that they were required to clean had ‘particularly offensive posters on the walls.’⁸⁵

The complainants spoke to the site organiser of their union, the Metals and Engineering Workers’ Union (MEWU), Mr D, about these ‘particularly offensive posters’. The complainants took these posters down after Mr D agreed that they could remove them. The response that the complainants received from the other male workers on the construction site to taking down the posters was an extremely angry one.⁸⁶ Mr D then asked the complainants to speak to him in his office, telling them, ‘that it was very unfortunate they had taken the attitude they had towards the posters and that if they maintained that position, it would make them very unpopular on site.’⁸⁷ The women were told by Mr D that their actions could cause the men to go on strike, that they did not have the support of the MEWU and

81 Ibid.

82 Ibid.

83 Ibid.

84 Ibid.

85 Ibid.

86 Ibid.

87 Ibid.

that there was a 'computer blacklist' on which the complainants may find themselves listed as troublemakers. The complainants felt intimidated, threatened and that they had no support from their union.⁸⁸

Later on, the complainants were confronted by some of the men who demanded they return the posters. When the complainants tried to explain why the posters were offensive to them they were told, 'it was a male workplace and that the women had no right to bring a woman's perspective into it.'⁸⁹ The judgment then explains that: 'The men said they were lucky to have their jobs and if they wanted to work in a male environment they would just have to "cop it"'.⁹⁰

After this, more posters, which were more and more explicit and offensive to the women, began to be displayed around the workplace. A group of Christian male workers, who were also upset by the posters started to take some of the posters down, however the women were thought to be the culprits and were subjected to 'more abuse.'⁹¹

The first complainant then attended a training course in Perth and spoke to the State Secretary, Mr F, of the MEWU about the posters. She asked the union to intervene and suggested that the shop stewards and union officials should attend equal opportunity courses as they appeared not to be aware of their responsibilities under the equal opportunity legislation. Mr F refused, saying that 'he could not force people to undergo equal opportunity courses if they did not want to.'⁹²

Approximately a month later, the second complainant entered a crib hut and was confronted by 'a number of pornographic and sexually explicit posters displayed on the wall, including pictures of women

88 Ibid.

89 Ibid 77 057 – 77 058.

90 Ibid 77 058.

91 Ibid.

92 Ibid.

masturbating'.⁹³ She approached the Health and Safety Representative and Assistant Shop Steward, Mr R, and told him she wanted the posters removed. Mr R agreed to do something although 'he would not be very popular with the men.'⁹⁴ Instead of the posters being removed, 'a curtain of rubbish bags was placed over the display, with a note saying it was to protect the 'virginal morality' of the second complainant'.⁹⁵ The judgment goes on to state that: 'There was also a note pinned to the wall to the effect that if the complainants did not like it they should get out; that they were working in a male environment; that they were holding jobs that should have gone to men and generally containing personal abuse directed to them.'⁹⁶

When the second complainant told the first complainant about this incident, the first complainant approached the MEWU shop steward, and later five MEWU health and safety representatives, but the posters were still not removed. The next morning the first complainant went to the MEWU office and told Mr D and others in the office 'that it was about time they "got their act together and started acting like a union"'.⁹⁷

The offensive posters were taken down, but not the note. When the first complainant told the foreman that she feared a 'backlash' from the male workers, asking what could be done to prevent it, the foreman said nothing could be done and that he was leaving the note in place because it was 'fair comment'.⁹⁸ The first complainant also went to see the Industrial Relations and Personnel Manager who would not take any action because the posters had been removed.

The judgment states that the number of posters started to increase, as did their 'hard-core' content and as a consequence: 'The

93 Ibid.

94 Ibid.

95 Ibid.

96 Ibid.

97 Ibid.

98 Ibid.

complainants' relationship with the male workforce deteriorated even further. They were subjected to more personal abuse and offensive remarks. They felt threatened and intimidated.'⁹⁹

Several weeks later several incidents occurred that were intended to intimidate the women. Firstly, the first complainant entered a hut to clean and was 'confronted by a full length female nude poster which had been used for dart practice, and had also been violently stabbed through the heart, head and genitals.' It was reported that the first complainant felt 'very frightened and distressed by this.'¹⁰⁰ Secondly, when the second complainant went into the site office of the union to clean it, she saw 'a very explicit poster of a naked woman' above the MEWU Convenor's desk and felt that the union was condoning the material and 'attacking' her with the material instead of representing her interests.¹⁰¹ She took this poster down, and spoke to the Trade Union Training Authority to obtain information about equal opportunity courses. She gave this information to the Assistant Secretary of the MEWU but never heard from him again. Thirdly, the second complainant went to clean a new crib hut, 'she saw that all four walls and the ceiling were covered with hard-core pornographic material.'¹⁰² Fourthly, two weeks later the men had Christmas drinks the day before the Christmas holidays during which there was a lot of 'horseplay'. The first complainant heard one of the men yell, 'Get Heather' and she ran to the storeroom to hide. The first complainant's supervisor told the men to leave her alone, and she later became aware that her supervisor had been 'attacked.' She was also told: 'you should see what they had planned for you.'¹⁰³

The first complainant made a final attempt to do something about the pornography by organising a meeting with the personnel manager but afterwards was approached and intimidated by two

99 Ibid.

100 Ibid.

101 Ibid 77 059.

102 Ibid.

103 Ibid.

MEWU shop stewards. She then had an accident at work and did not return to the workplace. The judgment stated that prior to her accident:

she had been so stressed by the situation at work that she became ill. As she recovered from her injury she said the prospect of having to return to the site became increasingly distressing. She suffered a mental and emotional decline and eventually could not cope with the prospect of returning at all.¹⁰⁴

The second complainant went on annual leave but on her return was still subjected to abuse. She was told there were ‘graffiti drawings of an offensive and disgusting nature of her and the first complainant in the male toilets’.¹⁰⁵ She took photos at night of this graffiti and upon seeing the photos developed she was ‘physically ill, frightened and disgusted’ causing her to leave her job.¹⁰⁶

The complainants’ claim was based on s 160 of the *Equal Opportunity Act 1984* (WA). Their complaint was that the MEWU ‘through its employees or agents, caused, instructed, induced, aided or permitted the employer [Press Clough Joint Venture] to discriminate against them on the ground of their sex.’ The complainants argued that MEWU did this in two ways.¹⁰⁷ Firstly, by its employees and agents failing and refusing to support them in having the pornography removed from the workplace. Secondly, the women argued that MEWU’s employees or agents were responsible for the display of a pornographic poster in the union site office. The complainants also claimed victimisation under ss 67 and 161 of the *Equal Opportunity Act 1984* (WA). The Tribunal held on behalf of the complainants on both grounds.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid 77 062.

In the subsequent reported decision of *Horne v Press Clough Joint Venture*,¹⁰⁸ delivered on 21 April 1994, the Equal Opportunity Tribunal considered the women's case against their employer, Press Clough Joint Venture. The complainants alleged that the presence of pornography in their workplace amounted to sex discrimination, that their employer knew of the presence of the posters and was therefore directly liable under the Act, that their employer was liable for victimisation and that their employer had failed to take reasonable steps to prevent the discrimination and victimisation. The Tribunal found in favour of the women against their employer. The women were awarded damages of \$92 000.

In summary, there is significant documented evidence of the harms of pornography to women including sexual abuse in the home by family members and friends, rape and sexual abuse by strangers and workplace harassment and intimidation:

The harms of pornography to women... include dehumanization, humiliation, sexual exploitation, forced sex, forced prostitution, physical injury, child sexual abuse and sexual harassment. Pornography also diminishes the reputation of women as a group, deprives women of their credibility and social and self worth, and undermines women's equal access to protected rights.¹⁰⁹

B The Problem of Causation

The relationship between particularly sexually violent images in the media and subsequent aggression... is much stronger statistically than the relationship between smoking and lung cancer.¹¹⁰

¹⁰⁸ *Horne v Press Clough Joint Venture* (1994) EOC 92-591.

¹⁰⁹ Factum of the Intervener Women's Legal Education and Action Fund in the case of *R v Butler*, File No 22191, [23].

¹¹⁰ Edward Donnerstein, *Unpublished transcript of testimony to the Public Hearings on Ordinances to Add Pornography as Discrimination against Women* (Committee on Government Operations, City Council, Minneapolis, 1983) 4-12, quoted at Diana Russell, web page *Pornography as a Cause of Rape* <<http://www.dianarussell.com/pornasviolence.html>> at 20 December 2005. See also, Russell, *Against Pornography*, above n 21; Diana E H Russell, 'Nadine Strossen: The

Traditionally, the narratives of women, such as those discussed above, have been discredited by those who argue that the ‘pleasure to be gotten from’ pornography outweighs the harm of it,¹¹¹ or in fact, that there is no evidence that pornography causes harm at all. MacKinnon comments that it is frustrating that, ‘studies by men in laboratories to predict that viewing pornography makes men more sexually violent’ are required before the voices of women harmed by pornography will be believed.¹¹² Combined with the narratives of women harmed by pornography, it is difficult to ignore findings by researchers that there is a relationship between pornography and violence against women. And yet, far too many do.

It is not the purpose of this paper to provide a detailed analysis of every study investigating the effects of exposure to pornography. The findings of these studies have been summarised by others.¹¹³

Pornography Industry’s Wet Dream’ [Summer 1995] *On the Issues* 32, 33, in which this correlation is discussed.

¹¹¹ MacKinnon, *Feminism Unmodified*, above n 4, 202.

¹¹² *Ibid.*

¹¹³ See, for example, Russell, *Against Pornography*, above n 21; Edna F Einsiedel, ‘The Experimental Research Evidence: Effects of Pornography on the “Average Individual”’ in Catharine Itzin (ed), *Pornography: Women, Violence and Civil Liberties A Radical New View* (1992). Kendall, *Gay Male Pornography*, above n 17, 7-8, summarises ‘the literally thousands of empirical studies on this subject’ relied upon by the Women’s Legal Education and Action Fund (LEAF) in the Factum it filed as an Intervener in *R v Butler*. Kendall quotes LEAF, at 7:

LEAF, summarizing the groundbreaking work of experimental psychologists, noted that ‘when explicit sex and express violence against women are combined, particularly when rape is portrayed as pleasurable or positive for the victim, the risk of violence against women is known to increase as a result of exposure.’

Kendall cites the following authorities relied upon by LEAF (at [34]) as evidence for this quotation, at chapter 1, footnote 30:

E. Donnerstein, ‘Pornography: Its Effect on Violence against Women,’ in N. Malamuth and E. Donnerstein, eds., *Pornography and Sexual Aggression* (New York: Academic Press, 1984), 53; N. Malamuth and L. Berkowitz, ‘Victim Reaction in Aggressive Erotic Films as a Factor in Violence against Women’ (1981) 41 *Journal of Personality and Social Psychology* 710; N. Malamuth and J.V.P Check, ‘The Effects of Mass Media Exposure on Acceptance of Violence Against Women: A Field Experiment’ (1981) *Journal of Research in Personality* 436; N Malamuth, ‘Factors Associated with Rape as Predictors of Laboratory Aggression against Women’ (1983) 45 *Journal of Personality and Social Psychology* 432; N. Malamuth and J.V.P Check, ‘Aggressive Pornography and

Einsiedel, for example, summarised the findings of researchers as follows:

In evaluating the results for sexually violent material, it appears that exposure to such materials (1) leads to a greater acceptance of rape myths and violence against women; (2) has more pronounced effects when the victim is shown enjoying the use of force or violence; (3) is arousing for rapists and for some males in the general population; and (4) has resulted in sexual aggression against women in the laboratory.¹¹⁴

Russell also summarises the research on the causal relationship between pornography and harm as follows:

Beliefs in Rape Myths: Individual Differences' (1985) 19 *Journal of Research in Personality* 299; M. McManus, *Introduction to Report of Attorney General's Commission on Pornography* (Nashville: Rutledge Hill Press, 1986), xviii; N. Malamuth and J.V.P. Check, 'Penile Tumescence and Perceptual Responses to Rape as a Function of the Victim's Perceived Reactions' (1980) 10 *Journal of Applied Social Psychology* 528; and D. Linz and J. Bryant, 'Effects of Massive Exposure to Pornography,' in N. Malamuth and E. Donnerstein, eds., *Pornography and Sexual Aggression* (New York: Academic Press, 1984), 115.

Kendall also quotes LEAF (at [45]) in relation to research on non-violent materials, '[r]eferring to non-violent materials – that is, those that degrade and dehumanize women – the evidence demonstrates clearly that these materials also increase self-reported sexually aggressive behaviour.': at 7. Kendall cites the following authorities relied upon by LEAF as evidence for this quotation, at chapter 1, footnote 31:

J.V.P Check and T.H Guloien, 'Reported Proclivity for Coercive Sex Following Repeated Exposure to Sexually Violent Pornography, Nonviolent Dehumanizing Pornography and Erotica,' in D. Zillman and J. Bryant, eds., *Pornography: Research Advances and Policy Considerations* (Hillsdale, New Jersey; Erlbaum, 1989); D. Zillman and J. Bryant, 'Effects of Massive Exposure to Pornography,' in N. Malamuth and E. Donnerstein eds., *Pornography and Sexual Aggression* (New York; Academic Press, 1984), 115; J.V.P. Check and N. Malamuth, 'Pornography and Sexual Aggression: A Social Learning Theory Analysis' (1986) 9 *Communication Yearbook* 181; D. Zillman and J.B. Weaver, 'Pornography and Men's Sexual Callousness Toward Women,' in D. Zillman and J. Bryant, eds., *Pornography: Research Advances and Policy Considerations* (Hillsdale, New Jersey; Erlbaum, 1989), 45; D.E.H. Russell, 'Pornography and Rape: A Causal Model' (1989) 9 *Political Psychology* 41; D. Zillman and J. Bryant, 'Effects of Prolonged Consumption of Pornography on Family Values' (1988) *A Journal of Family Issues* 518; J.G. Buchman, 'Effects of Nonviolent Adult Erotica on Sexual Child Abuse Attitudes' (paper presented at meeting of the American Psychological Association, Boston, August 1990).

¹¹⁴ Einsiedel, above n 113, 265-6.

- A high percentage of non-incarcerated rapists and child molesters have said that they have been incited by pornography to commit crimes;
- Pre-selected normal healthy male students say they are more likely to rape a woman after just one exposure to violent pornography;
- A high percentage of male junior high school students, high school students, and adults in a non-laboratory survey report imitating X-rated movies within a few days of exposure;
- Hundreds of women have testified in public about how they have been victimised by pornography;
- Ten percent of a probability sample of 930 women in San Francisco and 25% of female subjects in an experiment on pornography in Canada reported having been upset by requests to enact pornography;
- Many prostitutes report that they have experienced pornography related sexual assault;
- The laws of social learning must surely apply to pornography at least as much as the mass media in general. Indeed, I – and others – have argued that sexual arousal and orgasm are likely to serve as unusually potent reinforcers of the messages conveyed by pornography;
- A large body of experimental research has shown that the viewing of violent pornography results in higher rates of aggression against women by male subjects.¹¹⁵

¹¹⁵ Russell, *Against Pornography*, above n 21, 149-50. For a more detailed analysis of the connection between pornography and sexual violence, see Russell's 'theoretical model of Pornography as a cause of Rape': at 118. Russell bases her model upon extensive scientific research including scientific studies on the correlation between pornography, sexual aggression, and sexual violence. Russell acknowledges that there are a number of factors that may dispose males to rape including biological factors, childhood sexual abuse, male sex-role socialisation, exposure to mass media that encourages rape and exposure to pornography: at 118. Russell then limits her focus to exposure to pornography as a cause of rape and summarises her theory as follows, at 119:

Pornography (1) predisposes some males to want to rape women and intensifies the predisposition in other males already so predisposed; (2) undermines some males' internal inhibitions against acting out their desire to rape; and (3) undermines some males' social inhibitions against acting out their desire to rape.

The scientific research summarised above provides clear evidence that there is a direct link between the viewing and production of pornography and sexual violence against women.

C HARM THREE: SEXUAL INEQUALITY

Central to this paper is MacKinnon and Dworkin's conviction that pornography should be regulated as an issue of sex discrimination, instead of censorship (morality). This paper also argues that a version of MacKinnon and Dworkin's civil rights ordinance should be enacted in Australia, preferably as an amendment to equal opportunity legislation, to regulate pornography distributed via the internet and pornography distributed in other ways. In order to understand why pornography should be regulated in this manner, it is necessary to outline MacKinnon and Dworkin's sex equality analysis of pornography.

MacKinnon and Dworkin argue that pornography is a principal means of maintaining inequality in society, by sexualising women's unequal position in society. Pornography constructs a gendered hierarchy between men and women with men at the top and women at the bottom.¹¹⁶ The hierarchy constructs men as dominant and

¹¹⁶ When I refer to 'male' and 'female' and 'men' and 'women' I am not referring to biology. Rather, I am referring to the social construction of these terms. Kendall discusses this in Kendall, *Gay Male Pornography*, above n 17, 31:

To talk of sex discrimination is to talk of gender and the inequalities that arise within a society in which gender differences are polarized and hierarchical – a society in which those who are 'male' get privilege and those who are not, do not. I refer here not to gender as biologically determined but rather gender differences as socially constructed and as defined by specific behaviours that ultimately result in the gender categories 'male' and 'female'. As MacKinnon explains '[g]ender is an inequality, a social and political concept, not a biological attribute, having nothing whatever to do with inheritance, pre-existence, nature, essence, inevitability, or body as such.' [Kendall quoting MacKinnon, *Towards a Feminist Theory of the State*, above n 4, 114.]

Kendall also cites Oostergaard to explain this social construction of gender: Kendall, *Gay Male Pornography*, above n 17, chapter 2, footnote 2, quoting Lise Oostergaard, *Gender and Development: A Practical Guide* (1992) 6-7:

Gender refers to the qualitative and interdependent character of women's and men's position in society. Gender relations are constituted in terms of the relations of power and dominance that structure the life chances of women and men. Thus gender divisions are not fixed biology, but constitute an aspect of the

women as inferior, with women shown to exist solely for the sexual pleasure of men. Men are active, women are passive. Men act upon, and use women for sexual pleasure. Women are shown to enjoy being used for male sexual pleasure. Women's perceived enjoyment of their objectification and humiliation, creates the belief in the viewer of pornography that this inequality is natural and normal. MacKinnon argues that it is this inequality that makes pornography sexy:

Inequality between men and women is what is sexy about pornography – the more unequal the sexier. In other words, pornography makes sexuality into a key dynamic in gender inequality by viscerally defining gender through the experience of hierarchical sexuality. On the way, it exploits inequalities of race, class, age, religion, sexual identity and disability by sexualising them through gender.¹¹⁷

As has been illustrated in this paper, violence and the absence of consent is a central experience of women used and forced to perform in pornography. Often, pornography shows men to have the power of sexual violence, which is then inflicted on women. Dworkin

wider social division of labour and this, in turn, is rooted in the conditions of production and reproduction and reinforced by the cultural, religious and ideological systems prevailing in a society.

The relations between men and women are socially constituted and not derived from biology. Therefore the term gender relations should distinguish such social relations between men and women from those characteristics which can be derived from biological differences.

These relations are not necessarily nor obviously harmonious and non-conflicting. On the contrary, the socially constructed relations between the genders may be ones of opposition and conflict. But since such conflicts are not to be analyzed as facts of biology and nature but as being socially determined, they may take very different forms under different circumstances. They often take the form of male dominance and female subordination.

In short, the concept of gender makes it possible to distinguish the biologically founded, sexual differences between women and men from the culturally determined differences between the roles given to or by women and men respectively in a given society. The first are unchangeable, like a destiny. The latter are workable and may be changed by political and opinion-shaping influences.

¹¹⁷ MacKinnon, 'Pornography as Defamation and Discrimination', above n 5, 802.

identifies the sexualisation of violence as part of the hierarchy that promotes inequality between men and women in society and which also promotes sexual abuse:

The insult pornography offers, invariably, to sex is accomplished in the active subordination of women: the creation of a sexual dynamic in which the putting down of women, the suppression of women, and ultimately the brutalization of women is what sex is taken to be... Pornography... crushes a whole class of people through violence and subjugation: and sex is the vehicle that does the crushing... Pornography, unlike obscenity, is a discrete, identifiable system of sexual exploitation that hurts women as a class by creating inequality and abuse.¹¹⁸

MacKinnon and Dworkin argue that through the use of gender, pornography sexualises inequality. Subordination of women in a sexual context is carried through to a social context. Through hierarchy, pornography tells lies about women and their place in society. The sexualisation of women's submission in pornography is then carried through to society's perceptions about women:

Pornography, in the feminist view, is a form of forced sex, a practice of sexual politics, an institution of gender inequality. In this perspective, pornography, with the rape and prostitution in which it participates, institutionalises the sexuality of male supremacy which fuses the erotization of dominance and submission with the social construction of male and female. Gender is sexual. Pornography constructs the meaning of that sexuality. Men treat women as whom they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be. Pornography is that way.¹¹⁹

¹¹⁸ Dworkin, 'Against the Male Flood: Censorship, Pornography and Equality', above n 4, 9.

¹¹⁹ MacKinnon, *Towards a Feminist Theory of the State*, above n 4, 197.

In the Canadian Supreme Court case of *R v Butler*,¹²⁰ the Women's Legal Education and Action Fund (LEAF), argued that pornography was an issue of sex discrimination which caused systemic gender inequality and the subordination of women within society.¹²¹ LEAF reviewed all the pornographic materials seized from the defendant's pornographic book store. Adopting MacKinnon and Dworkin's equality-based approach, LEAF argued in their factum that, 'pornography amounts to a practice of sex discrimination against individual women and women as a group'¹²² and that the documented harms of pornography to women 'include dehumanisation, humiliation, sexual exploitation, forced sex, forced prostitution, physical injury, child sexual abuse and sexual harassment. Pornography also diminishes the reputation of women as a group, deprives women of their credibility and social and self worth, and undermines women's equal access to protected rights.'¹²³ After viewing these materials, LEAF made the following submission about the way women are constructed in pornography:

In these materials, inter alia, women are presented as being raped. Sometimes they act as if they are enjoying it; sometimes they scream, resist and try to run. Sex acts are presented as being performed on subordinates or superiors by caretakers, including employer on employee, priest on penitent, doctor on nurse or nurse on patient. Adult women are presented as children, with child-like (shaved) pubic areas, teddy bears, hair ribbons and saddle shoes. Some participants appear to be children. Women are shown having sex with women, as sex for men. An Asian woman is subjected to racist insults as part of forced fellatio and rape. Women are presented as being sexually insatiable. Women are simultaneously or serially penetrated in every orifice by penises or objects. Women are presented as gagging on penises down their throats. Women lick men's anuses. Women are bound with rings through their nipples, and hung handcuffed from the ceiling. Men ejaculate

¹²⁰ *R v Butler* [1992] 1 SCR 452 (*Butler*).

¹²¹ Factum of the Intervener Women's Legal Education and Action Fund in the case of *R v Butler*, File No 22191.

¹²² *Ibid* [7].

¹²³ *Ibid* [23].

all over women, including on their faces and into their mouths. In these contexts, women are referred to and described as 'pussy', 'cunt', 'split beavers', 'hole', 'bitch', 'hot titties and twats', 'dyke meat', and 'chocolate box'.¹²⁴

In *R v Butler*, the Supreme Court of Canada rejected the appeal of a pornographic book store owner, Donald Victor Butler, against convictions under s 163 of the Canadian *Criminal Code* for selling and possessing obscene material. Butler appealed his convictions on the ground that the obscenity provisions of s 163 of the Canadian *Criminal Code*, under which he was convicted, were unconstitutional. Butler argued that s 163 of the Canadian *Criminal Code* contravened his freedom of speech and expression guaranteed by s 2(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*). Section 2(b) provides that: 'Everyone has the following fundamental freedoms: (b) freedom of thought, belief, opinion and expression including freedom of the press and other media communication.' Section 2(b) of the *Charter* is read with s 1, which provides: 'The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'

Consequently, the issues before the Court were whether s 163 of the *Criminal Code* violated s 2(b) of the *Charter* and, if so, whether this violation was justified under s 1 of the *Charter*.¹²⁵ The Court held that although s 163 did violate s 2(b) of the *Charter*, the violation was justified under s 1 of the *Charter* because the underlying purpose of the legislation was 'the protection of society from harms caused by the exposure to obscene materials.'¹²⁶ The Court commented about the role of pornography in maintaining sexual inequality:

¹²⁴ Ibid [4].

¹²⁵ *Butler*, above n 120, 471.

¹²⁶ Ibid 495.

This court has thus recognized that the harm caused by the proliferation of materials which seriously offend the values fundamental to our society is a substantial concern which justifies restricting the otherwise full exercise of freedom of expression. In my view, the harm sought to be avoided in the case of dissemination of obscene materials is similar... there is a growing concern that the exploitation of women and children, depicted in publications and films, can, in certain circumstances, lead to 'abject and servile victimization'.... if true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material. Materials portraying women as a class as objects for sexual exploitation and abuse have a negative impact on 'the individual's sense of self worth and acceptance.'¹²⁷

Significantly, the Court found that '...the objective of avoiding harm associated with the dissemination of pornography in this case is sufficiently pressing and substantial to warrant some restriction on full exercise of the right to freedom of expression.'¹²⁸ In addition, the Court found that the message of inequality portrayed by pornography is analogous to hate propaganda¹²⁹ and that after considering social science evidence, there was a 'causal relationship between obscenity and the risk of harm to society at large' and that 'the relationship between pornography and harm was sufficient to justify Parliament's intervention'.¹³⁰ The Court referred to the Meese Commission Report in support of the fact that although a direct causal relationship between pornography and harm is difficult to prove, it is reasonable to assume that exposure to pornography has a causal connection to changes in attitudes and beliefs:

the available evidence strongly supports the hypothesis that substantial exposure to sexually violent materials as described here bears a causal relationship to antisocial acts of sexual violence

¹²⁷ Ibid 496-7.

¹²⁸ Ibid 498 (Sopinka J).

¹²⁹ Ibid 501.

¹³⁰ Ibid.

and, for some subgroups, possibly to unlawful acts of sexual violence. Although we rely for this conclusion on significant scientific evidence, we feel it worthwhile to note the underlying logic of the conclusion. The evidence says simply that the images that people are exposed to bear a causal relationship to their behaviour. This is hardly surprising. What would be surprising would be to find otherwise, and we have not so found. We have not, of course, found that the images people are exposed to are a greater cause of sexual violence than all or even many other possible causes the investigation of which has been beyond our mandate. Nevertheless, it would be strange indeed if graphic representations of a form of behaviour, especially in a form that almost exclusively portrays such behaviour as desirable, did not have at least some effect on patterns of behaviour.¹³¹

In summary, MacKinnon and Dworkin argue that pornography is central in maintaining the 'social subordination'¹³² of women; in other words, sexual inequality. Dworkin identifies four main parts to social subordination: hierarchy, objectification, submission and violence. An overview of these four main parts further illustrates MacKinnon's and Dworkin's argument that pornography operates to maintain women's inequality in society:

Social subordination has four main parts. First, there is hierarchy, a group on top and a group on the bottom... Second, subordination is objectification. Objectification occurs when a human being, through social means, is made less than human, turned into a thing or commodity, bought and sold... Third, subordination is submission. A person is at the bottom of a hierarchy because of a condition of birth; a person on the bottom is dehumanized, an object or commodity; inevitably, the situation of that person requires obedience or compliance... Fourth, subordination is violence. The violence is systematic, endemic enough to be

¹³¹ *Attorney General's Commission on Pornography Final Report* (US, 1986) vol 1, 326 (*Meese Commission Report*), quoted in *Butler*, above n 120, 502 (Sopinka J).

¹³² Dworkin, 'Against the Male Flood: Censorship, Pornography and Equality', above n 4, 15.

unremarkable and normative usually taken as an implicit right of the one committing the violence.¹³³

Due to MacKinnon and Dworkin's identification of pornography as a means of maintaining systemic sex inequality, and the harm to women that results from the making and distribution of pornography, MacKinnon and Dworkin assert that pornography should be regulated as an issue of sex discrimination, rather than through morality based censorship legislation (also known as obscenity):

The law of obscenity has literally nothing in common with this feminist critique. Men's obscenity is not women's pornography. Obscenity is more concerned with whether men blush, pornography with whether women bleed – both producing a sexual rush.¹³⁴

III THE SOLUTION: MACKINNON AND DWORKIN'S CIVIL RIGHTS ORDINANCE

In 1983, Catharine MacKinnon and Andrea Dworkin were approached by residents of two working class areas of Minneapolis, in the United States, to help them draft a zoning ordinance to stop the distribution of pornography in their neighbourhoods. When MacKinnon and Dworkin were first approached, they were asked to draft a zoning ordinance which would only permit pornography to be sold in other specified low income neighbourhoods.¹³⁵ However, MacKinnon and Dworkin suggested that instead of drafting a zoning ordinance, the ordinance should adopt a sex equality approach. According to MacKinnon and Dworkin, restricting the sale of pornography to certain areas would continue to legitimise pornography, whereas a sex equality approach would recognise the

¹³³ Ibid 15-16.

¹³⁴ MacKinnon, *Towards a Feminist Theory of the State*, above n 4, 199.

¹³⁵ See generally, MacKinnon and Dworkin, *In Harm's Way*, above n 14. See also, Kendall, *Gay Male Pornography*, above n 17, 183–4 for a summary of the history of the ordinance.

harms of pornography and would allow victims of pornography to obtain redress for those harms. A civil rights ordinance, as opposed to a zoning ordinance, would allow the victims of pornography to sue the makers and distributors of that pornography, to obtain injunctions to stop the sale and distribution of pornography made of them and damages.¹³⁶

The ordinance was the first attempt to regulate pornography as an issue of sex discrimination.¹³⁷ The Minneapolis ordinance was enacted but vetoed by the then Mayor.¹³⁸ In 1984, Indianapolis passed a similar ordinance as legislation.¹³⁹ It was later held to be unconstitutional because it was deemed to be a violation of the right to freedom of speech, protected by the First Amendment to the *United States Constitution*.¹⁴⁰

A Outline of Sections of the Ordinance

Section 1, clause 1 of the ordinance recognises pornography as ‘a practice of sex discrimination’ which has the effect of ‘threatening the health, safety, peace, welfare, and equality of citizens in our community.’ This is an important statement about what the

¹³⁶ MacKinnon and Dworkin, *In Harm's Way*, above n 14; Kendall, *Gay Male Pornography*, above n 17, 183–4.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ *American Booksellers Association v Hudnut*, 771 F 2d 323 (7th Cir, 1985) (*Hudnut*), cited in MacKinnon and Dworkin, *In Harm's Way*, above n 14, which outlines the history of the ordinance. See also, MacKinnon, *Only Words*, above n 13, 65-8, for a discussion of *Hudnut*.

Note the Canadian approach regarding the inter-relationship between pornography and freedom of speech in *Butler*, above n 120, discussed later in this paper.

Australia does not have an express constitutional protection of freedom of speech. However, in *Australian Capital TV Pty Ltd v Commonwealth* (1992) 177 CLR 106, the High Court of Australia recognised an implied right in the *Commonwealth Constitution* to freedom of political speech. See also, *Nationwide News Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.

ordinance is and does. The ordinance provides a means of recognising the harms caused by pornography, including maintaining systemic gender inequality and also including more specific harms to women who are forced to perform in pornography or who are sexually assaulted due to pornography.

Section 1, clause 2 contains more detail about what pornography is and does – something that regulatory approaches premised upon morality do not. It identifies pornography as ‘a systemic practice of exploitation and subordination based on sex that differentially harms and disadvantages women.’ It also lists, in some detail, the harms of pornography. These include physical harm such as rape and sexual abuse, as well as psychological harms such as ‘psychic assault’. The harms are also listed to include lessening women’s ability to participate in society as equal citizens by diminishing ‘opportunities for equal rights in employment, education, property, public accommodations and public services’ and exposing those forced to perform in pornography to ‘contempt, ridicule, hatred, humiliation and embarrassment’.

Section 2, clause 1 contains a detailed definition of pornography which defines pornography as ‘the sexually explicit subordination of women through pictures and/or words’ which includes one or more of the characteristics listed in sub-paragraphs (a) through to (h). Although the definition of pornography in section 2, clause 1 specifically refers to women, clause 2 provides that ‘the use of men, children, or transsexuals in the place of women... is also pornography...’.

Section 3 outlines causes of action that a ‘person’¹⁴¹ can take pursuant to the ordinance. Section 3, clause 1, named ‘coercion into pornography’, provides that ‘it is sex discrimination to coerce, intimidate, or fraudulently induce...any person into performing for pornography’. Section 3, clause 1 also provides that damages and injunctions can be sought against the ‘maker(s), seller(s), exhibitor(s) and/or distributor(s)’ of that pornography. The fact that the ‘person is a woman’, ‘is or has been a prostitute’ (and numerous

¹⁴¹ ‘Person’ is defined in Section 2, clause 3 of the ordinance to ‘include child or transsexual’ as well as a woman.

other factors are listed in section 3, clause 1 from sub-paragraphs (a) through to (m) do not prevent a finding of coercion.

Section 3, clause 2 makes it 'sex discrimination to force pornography on a person in any place of employment, education, home or any public place.' Section 3, clause 3 provides that 'it is sex discrimination to assault, physically attack, or injure any person in a way that is directly caused by specific pornography.' It is also 'sex discrimination to defame any person through the unauthorized use of pornography of their proper name, image, and/or recognizable personal likeness.' Section 3, clause 5 provides that 'it is sex discrimination to produce, sell, exhibit, or distribute pornography, including through private clubs' but (in sub-paragraph (a)) exempts public and university libraries 'in which pornography is available for study'.

The defences available under the ordinance are set out in section 4. Clause 1 of section 4 provides that ignorance of the fact that materials are pornography or sex discrimination is no defence. Clause 2 of section 4 provides that no damages or compensation can be recovered under section 3, clause 5 (trafficking in pornography) 'unless the defendant knew or had reason to know that the materials were pornography'. Similarly, if there is an assault or physical attack against a person due to pornography, actionable under section 3, clause 3, damages or compensation can only be sought against the 'perpetrator of the assault or the attack' 'unless the defendant knew or had reason to know that the materials were pornography'. In addition, section 4, clause 3 provides that no damages or compensation can be sought against the makers, distributors, sellers or exhibitors of pornography which occurred prior to the date of the ordinance.

Section 5 of the ordinance contains the enforcement provisions. Section 5, clause 1 provides that if a person has a cause of action under the ordinance, they can seek relief in a civil court. This is a recognition of pornography as a civil rights violation against women and not an issue of morality. Section 5, clause 2(a) provides that if a person has a cause of action they can seek (or their estate can seek) 'nominal, compensatory, and/or punitive damages without limitation, including for loss, pain, suffering, reduced enjoyment of life, and special damages, as well as for reasonable costs, including

attorneys' fees and costs of investigation'. Section 5, clause 2(b) provides that no damages or compensation can be sought against the makers, distributors, sellers or exhibitors of pornography which occurred prior to the date of the ordinance.

Section 5, clause 3 permits a person who has a cause of action under the ordinance to apply for injunctive relief. However, under section 5, clause 3(a), a 'temporary or permanent injunction' cannot be issued prior to a court deciding that the 'challenged activities' contravene the ordinance. In addition, under section 5, clause 3(b), the injunction is limited to the pornography described in the order of the court and must not 'extend beyond' the pornography specified in the order. Finally, section 5, clause 5 provides that if a person obtains legal relief under the ordinance they are not precluded from seeking any other form of civil or criminal relief.

Consequently, Australia must adopt the sex equality approach proposed by the ordinance. The ordinance is the only method of regulation that addresses the harms of pornography and which empowers women to take direct action themselves without having to rely on patriarchal institutions such as police, customs officials, judges and censorship boards to take action for them. In the words of Dworkin:

This law educates. It also allows women to do something. In hurting the pornography back, we gain ground in making equality more likely, more possible – some day it will be real. We have a means to fight the pornographers trade in women. We have a means to get at the torture and the terror. We have a means with which to challenge the pornography's efficacy in making exploitation and inferiority the bedrock of women's social status. The civil rights law introduces into the public consciousness an analysis: of what pornography is, what sexual subordination is, what equality might be... The civil rights law gives us back what the pornographers have taken from us: hope rooted in real possibility.¹⁴²

¹⁴² Dworkin, 'Against the Male Flood: Censorship, Pornography and Equality' in Drucilla Cornell (ed), *Feminism and Pornography* (2000) 38.

IV CONCLUSION

Australia's censorship laws, which are premised upon protecting the public from exposure to material that may cause moral harm, fail to recognise the very real experiences of women who have been harmed by pornography. The harm of pornography is not its effect on society's moral fibre. Rather, pornography's harm is the very real physical and psychological harm to women used during the production of pornography. It is the harm to women that occurs from pornography's distribution and use, both in the form of rape and sexual abuse inspired by pornography, and in maintaining sexual inequality by its reinforcement of gendered power inequalities. Australia's morality based approach provides no remedy for these harms. The ordinance does, by recognising pornography as an issue of sex discrimination and by allowing those harmed by pornography to sue its makers and distributors, and to obtain injunctive relief to stop pornography from being shown, sold and distributed. The ordinance must be adopted in place of Australia's censorship regime because it is the only regulatory model that can address pornography's harms, and empower women to take action against pornography.

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