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# Speech or Sex: The Porn Debate and American Politics

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Speech or Sex:  
The Porn Debate and American Politics

Abigail Preston

## Introduction

This project originated with what I perceived to be a great inconsistency in American law today: why is it illegal to perform sex acts for money in 49 of the 50 states unless one records the sex act and distributes it as pornography? The literal answer is a very short one: pornography is speech, and the right to free speech occupies a privileged position in American law and politics. Pornography has inspired intense debates spanning the disciplines of feminist theory, constitutional law, and political science, and the First Amendment enters into all of them at some point or another. This paper will challenge the central role that the First Amendment plays in the discussions of pornography in America. I argue that pornography is not necessarily or even easily defined as speech, but rather has become linked with speech in the American political, legal, and social consciousness through a particular set of historical and social circumstances, which have caused our courts, politicians, and theorists to largely ignore the role that sex plays in pornography.

Before I begin, I want to clarify that I will not take a position with regards to whether pornography is “good” or “bad” for society or for women. This is because the only way we can know whether pornography has benefitted or harmed people is by listening to the testimony of those people themselves, and the literature surrounding pornography contains true accounts of both natures. It is patronizing to tell people who claim to be empowered that they are actually being harmed, and it is dangerous to tell those who have been harmed that their harm is not real. In the interest of refusing to erase anyone’s actual experience, I will hold that pornography has the potential both to harm and to empower.

In the first chapter, I will lay out the theoretical foundations for my argument. I will show that the act of pornography is too multi-dimensional to be considered only an act of speech. For some people, pornography is an act of sex, and refusing to recognize this fact has the consequence of erasing the agency and experiences of those people. I will also argue that the speech aspect of pornography is not necessarily or unambiguously protected by the First Amendment, and so there may be another Constitutional standard for thinking about it.

In the second chapter I will provide a brief history of pornography as it has been understood and debated in American law and politics. I will show that while we think about pornography as a free speech issue today, this wasn't always the case. In fact, pornography did not become a free speech issue until after the Second World War. I will show how the factors that produced pornography as speech also made Americans more hostile than they might have been to any efforts to regulate it.

In the third chapter, I will outline the results of an over-time discourse analysis of articles about pornography in the *New York Times* from 1960 until 2010. I will show the changes in the discourse around pornography from 1960-2010, during which time it became consolidated in the discourse as an act of speech. Finally, I will outline the adverse theoretical and legal consequences of pornography as speech, as well as arguing for the advantages of shifting our political discourse to recognize the sex acts inherent in pornography.

The first question it is necessary to ask is one whose answer seems like it should be obvious, but has proved notoriously elusive for academics, activists, and judges alike: what is pornography? Most Americans with Internet access would probably agree with Justice Stewart's famous concurring opinion in *Jacobellis v. Ohio*: we know pornography when we see it.<sup>1</sup> While perhaps true, this type of a definition is surely inappropriate for use by lawmakers as it is inherently subjective and has the possibility to be interpreted in vastly different ways depending on the viewer. The curious thing about Stewart's definition, however, is that American scholars, politicians, and jurists interested in the subject of pornography haven't been able to come up with anything much better.

Feminist scholars who oppose pornography have put forth an alternative definition: the sexually explicit or graphic depiction of the subordination of women. Many feminist scholars have adopted this definition in their theoretical work and even in policy proposals.<sup>2</sup> While undeniably a fair characterization of an alarming amount of mainstream pornography, this definition is problematic in that it does not encompass all things that we are likely to consider pornographic. For example, it does not include graphic depictions of sex in which no one is subordinated or in which women dominate, and it does not address the problem of how we are to define a graphic depiction of sexuality when we disagree as to whether it depicts women as subordinated. Sex-positive

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<sup>1</sup> *Jacobellis v. Ohio* 378 U.S. 184 (1964)

<sup>2</sup> See Ed. Catharine MacKinnon and Andrea Dworkin, *In Harm's Way: The Pornography Civil Rights Hearings* (Cambridge, MA: Harvard University Press, 1981); Andrea Dworkin, *Pornography: Men Possessing Women* (New York: Pedigree Books, 1981), preface; Cass Sunstein, "Pornography and the First Amendment." *Duke Law Journal* 35, no. 4 (1986): 2.

feminists emphasize the role of alternative porn in subverting sexist gender norms.<sup>3</sup> Some examples might be gay pornography and pornography made by feminists.<sup>4</sup> Some pornography is made precisely for the purpose of combatting the sexual subordination of women, so we must recognize that misogynistic material and pornographic material are not one in the same, no matter how often the two overlap.

Further, such a definition could be overbroad, as it might be applied to works that most reasonable people would not consider pornography. Many have expressed concern about the fact that works like award winning films, plays by Shakespeare, and even the Bible might fairly be considered pornography under this definition.<sup>5</sup> To avoid this problem, an important aspect of pornography that should be included in any definition is the intent behind the material. Pornography is intended to cause sexual arousal. A scene depicting sex in a feature film, for instance, is generally not the same thing as pornography, although the line between pornography and art will undoubtedly be blurry at times. However, intent matters. Some people are undoubtedly sexually aroused by material that would not be commonly considered pornographic, but if we expanded our definition of pornography to include everything that could potentially cause sexual arousal, we would be left with an infinite collection of pornography.

The idea of intent to arouse has influenced much of the jurisprudence surrounding pornography, namely the doctrine of obscenity. American courts have never interpreted

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<sup>3</sup> Nina Hartley, "Porn: An Effective Vehicle for Sexual Role Modeling and Education," in *The Feminist Porn Book: The Politics of Producing Pleasure*, ed. Tristan Taormino et al (New York: Feminist Press and City University of New York, 2012).

<sup>4</sup> I acknowledge that feminists from the anti-pornography camp would disagree with me here, either on the grounds that such work is not actually pornography or, more likely, that it is not actually "feminist."

<sup>5</sup> MacKinnon and Dworkin, *In Harm's Way*, page 395.

the First Amendment to extend to speech that is “obscene,” but what it means to be obscene has varied over time. Currently, a work must depict sex, appeal in its entirety only to the viewer’s “prurient interest” and lack any “serious literary, artistic, political, or scientific value.”<sup>6</sup> The obscenity standard implies the intent to cause sexual arousal. However, it also implies that something can be pornographic without necessarily being obscene. In fact, the bar for proscribing material as obscene today is set extremely high and does not apply to all or even most pornography, as will become apparent later in this paper. For this reason, I will refrain from using “obscenity” and “pornography” interchangeably, since “pornography” is generally understood to be broader than just that which our courts deem obscene.

Both the obscenity standard and the anti-pornography feminist definition fail to take into account an important aspect of pornography as it exists today. Throughout history, works from a variety of media have been called pornographic, including writings, drawings, photography, and video, and the legal definitions we have at our disposal make no mention of production medium. Since the advent and popularization of video, however, I would argue that most Americans limit their concept of pornography to that which involves actual sexual labor. When we fail to differentiate between material entailing sex work and that which does not, we begin to see a problem: depending on the type of pornography in question, we are faced with immense discrepancies in the moral and legal implications of that pornography existing. Some things we consider pornographic might be judged purely on the basis of the message they send or the content

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<sup>6</sup> *Miller vs. California* 413 U.S. 15 (1973)

they contain, but other things must necessarily be considered, at least in part, as evidence of something that *happened*.

This aspect of the definition of pornography is perhaps most important for this paper. It is necessary to be specific about the nature and medium of pornography. When most of us refer to pornography today we are talking about videos or photos that required a real person to perform real sexual labor.<sup>7</sup> By defining pornography in this way, I give up the ability to be able to talk about all the material one might find on a porn website, since some of that might be animated or otherwise created, but the clarity we gain by distinguishing between pornography which requires sex work and erotic material which does not is much more valuable than a broader definition which more accurately encompasses everything that might be marketed as pornography.

Interestingly, while the distinction that I allude to has never been drawn in the courts when it comes to pornography depicting adults, it has been drawn when the material in question involves children. In *Ashcroft vs. Free Speech Coalition*, the Supreme Court affirmed the decision of the Ninth Circuit, which ruled that the Child Pornography Prevention Act of 1996, which prohibited both images of children engaged in sexual acts and images that appear to be of children engaging in sexual acts, was

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<sup>7</sup> I acknowledge that this definition creates ambiguity about whether works such as *Playboy*, and other sources featuring nude photographs constitute pornography. Generally, the broad term “sex work” encompasses not only actual penetrative sex, but also work such as nude dancing, modeling, and the like. It is not clear that we should define the act of posing nude for a photograph as a “sex act,” per se, however, these materials have been commonly thought of and referred to as pornography in America and they do require sexual labor. For that reason, it is reasonable to consider them “pornography” on my definition. We should realize, however, that they will not always carry the same ethical and legal implications as work which requires performers to actually engage in sex.

unconstitutional.<sup>8</sup> The rationale behind the Court's decision was that child pornography is prohibited because of the abuse inherent in making it, and that "virtual child pornography," or that which involves no actual children in its making, was a different legal category because it "records no crime and creates no victims."<sup>9</sup>

Certainly, not all recordings of sexual activity between adults are evidence crimes. However, the fact remains that the conceptual category of pornography, save for pornography involving or depicting sex acts with children, has failed to acknowledge the important differences between pornography that requires sexual labor and that which does not. The implications of this oversight for the sex laborers involved in the production of pornography are vast, and will become more apparent shortly. For this reason and those discussed above, in this paper "pornography" will refer to material intended to sexually arouse which requires some form of sexual labor.

Now that I have an operational definition of pornography, the second question I need to ask is whether pornography is speech. I am not interested here in the extent to which pornography has been treated as speech by the law; that will be the subject of a later chapter. Before I discuss that, however, I ask to what extent pornography actually *is* speech, or put a different way, whether the act of pornography (if there is such an act) is an act of speaking. As may be apparent from my definition of pornography, the answer to this question depends entirely on whom you ask.

Nina Hartley, famous writer, sex-positive feminist, and adult entertainer describes her experience in pornography in a way that makes it strikingly clear what I mean when I say this: "Beyond providing a perfect playground for my hedonistic indulgences, I saw

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<sup>8</sup> *Ashcroft vs. Free Speech Coalition* 535 U.S. 234 (2002)

<sup>9</sup> *Ibid.*

and continue to see porn as a means by which to share my deeply held ideas and opinions about sex, pleasure, love, and intimacy with other like-minded folks.”<sup>10</sup> Hartley is clearly performing a communicative act when she writes and directs pornographic material; she tells us herself that her intent is to share her ideas and to send a message.

Simultaneously, however, Hartley unambiguously engages in sex when she makes porn. She sees her work as a “playground for [her] hedonistic indulgences” and talks openly about how she enjoys the sexual pleasure she gains from her work. Hartley beautifully articulates the ways in which the act of making pornography blurs the line between speech and sex, and how it can be compellingly conceptualized as either or as both.

Her characterization can be expanded to the pornography industry at large. For pornographers, one can argue that pornography is speech, in the same way that we might say that the writers and directors of a non-pornographic film speak through their work. Equally, for others, the act of making pornography is entirely a sex act. Linda Marchiano, the “star” of the famous pornographic film *Deep Throat*, has spoken publicly and at length about how her experience in making the film was characterized by terror, torture, rape, and coercion.<sup>11</sup> Her experience has informed the work of feminist political theory framing pornography as harmful to women.<sup>12</sup> Marchiano is by no means the only person to give such testimony. Research into the effects of pornography has incited an

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<sup>10</sup> Hartley, “Porn: An Effective Vehicle for Sexual Role Modeling and Education,” page 230.

<sup>11</sup> Linda Lovelace and Mike McGrady, *Ordeal* (Citadel, 2006); MacKinnon and Dworkin, *In Harm’s Way*, page 61-63

<sup>12</sup> See Rae Langton, “Speech Acts and Unspeakable Acts,” *Philosophy and Public Affairs* 22, no. 4 (1993): 293-330; Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987).

astounding amount of testimony from women who have been coerced or forced into pornography and brutally mistreated.<sup>13</sup> It would be incoherent, not to mention insulting to Marchiano and others with similar experiences, to call their experiences speech.

Even for people who perform consensually in pornography and enjoy it, Hartley's experience of expressing herself and sending a message is hardly universal. Most performers in pornographic films or photographs are acting out someone else's script or vision. Some, like Hartley, might feel that their experience is communicative, but this only applies to performers that have the agency to choose the message they wish to communicate. For many performers in pornography, the message that they help to convey is not theirs but someone else's. Even though they may have agency in their choice of whether or not to participate, the product is not their message. Rather, it is the result of their sex, of their labor, and someone else's vision.

Once we have recognized the sex acts involved in the production of pornography, we begin to see that the question of regulating or not regulating pornography brings to light a conflict between several types of rights. That between the rights of the pornographers to freedom of expression, and the rights of the performers to autonomy, to bodily integrity, and freedom from sexual abuse is readily apparent. Anti-pornography feminism has introduced a third set of rights into the mix: the right to be free from the societal ills caused by violent and demeaning pornography.<sup>14</sup>

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<sup>13</sup> Sunstein, "Pornography and the First Amendment," page 3; MacKinnon and Dworkin, *In Harm's Way*.

<sup>14</sup> Since the theorists in question define pornography as the sexually explicit depiction of the subordination of women, they do not use the qualifiers "violent" or "sexist." However, since I wish to operate with the definition of pornography used most commonly, which includes gay pornography and even self-identifying feminist pornography, I make this distinction.

There exists evidence, though it is controversial, that exposure to violent and demeaning pornography bears a direct causal relationship to violence against women outside the pornography industry. Psychological tests in a laboratory setting have revealed an increased propensity to accept rape and to be aroused by violence among men exposed to violent pornography.<sup>15</sup> There is some evidence positively linking sales of pornography to rates of rape in the US, as well as showing increased rates of rape in nations that have liberalized their restrictions on pornography with no comparable increases in more conservative nations.<sup>16</sup> Finally, victims of sexual assault and discrimination testifying in favor of legislation restricting pornography have confirmed at alarming rates the role that pornography played in their abuse.<sup>17</sup>

In American courts, the rights of pornographers to freedom of expression has consistently prevailed over the rights of the performers and of the community at large, because pornography has been repeatedly seen as constitutionally protected speech. I have already shown that the status of pornography as speech is at least controversial. However, even when we push aside the sex aspect of pornography and grant that it is speech, whether or not that speech is constitutionally protected remains dubious.

The first reason is the law of obscenity, which holds that speech appealing only to prurient interest with no other social value is not protected. In fact, the earliest American obscenity statutes were aimed pornography. In *Commonwealth vs. Sharpless*, a Pennsylvania court made it a common law offense “to exhibit a picture of a nude couple

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<sup>15</sup> Sunstein, *Pornography and the First Amendment* page 4; MacKinnon and Dworkin, *In Harm's Way*, page 45-58.

<sup>16</sup> Sunstein page 4; notes 65, 66, 67, 70.

<sup>17</sup> MacKinnon and Dworkin, *In Harms Way*.

for profit.<sup>18</sup> This spurred several states to pass obscenity laws, as well as the first federal obscenity statute, which prohibited the import of obscene material in 1842.<sup>19</sup> It was not until 1957, in *Roth vs. United States*, that the Supreme Court considered the constitutionality of laws restricting obscenity. The Court found that obscenity, defined as appealing “as a whole” to “prurient interest,” were not protected under the First Amendment.<sup>20</sup> In 1973, *Miller vs. California* established the test for obscenity used in America today. In order to be considered obscene, a work must depict or describe sexual conduct in a patently offensive way as defined by an “average person” using “contemporary community standards” and must lack serious literary, artistic, political, or scientific value.<sup>21</sup>

The law of obscenity might appear to apply to most of what is commonly considered pornographic, and in fact, in the days before the Internet, obscenity prosecutions were a real threat to possessors and distributors of pornography. However, prosecutions on the basis of obscenity are notoriously rare today, even in states with laws restricting obscenity on the books. Perhaps this has to do with the sheer volume of available pornography, or perhaps with the changing nature of “contemporary community standards.” Whatever the reason, prosecutions and convictions for obscenity today are restricted to the most extreme pornography. Max Hardcore, a pornographic producer, director, and actor notorious for the graphic violence and intense misogynistic sentiment that characterizes his films, was notably found guilty of violating federal obscenity

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<sup>18</sup> *Commonwealth v. Sharpless* (1815), in Lawrence H. Tribe, *American Constitutional Law* (Mineola, NY: The Foundation Press, 1978), 658.

<sup>19</sup> Tribe, *American Constitutional Law*, page 658.

<sup>20</sup> *Roth v. United States* 354 U.S. 476 (1957)

<sup>21</sup> *Miller v. California* 413 U.S. 15 (1973)

statutes in 2008 and sentenced to forty-six months in prison.<sup>22</sup> However, Hardcore remains an example of the exception rather than the rule for two reasons: the first is the nature of the pornography he makes, and the second is the level of publicity he has received as an example among feminists of what is wrong with mainstream pornography.

The law of obscenity, while perhaps not a practical method by which pornography might be restricted, is the first reason one might argue that pornography is not constitutionally protected speech. However, the subjective nature of relying on “community standards” means that whether or not a given pornographic work is obscene tends to be a matter of preference. The second, and I argue the more compelling, reason why pornography is not clearly protected speech under the First Amendment can be attributed to Cass Sunstein’s article *Pornography and the First Amendment*. Sunstein evaluates the position of the Seventh Circuit Court in *American Booksellers, Inc. Vs. Hudnut*, which finds that the Antipornography Civil Rights Ordinance, which was adopted in Indianapolis in 1984, violated the First Amendment. The Ordinance, which defines pornography in the narrow, anti-pornography feminist sense referring only to the graphic depiction of the subordination of women, was drafted by feminist theorists Catharine MacKinnon and Andrea Dworkin and holds that pornography as they define it constitutes a form of discrimination against women. Their evidence for this claim, which compelled Mayor Hudnut of Indianapolis to sign their bill into law, was the same evidence that I presented above: that pornography has harmed the women who perform in it, and that it has contributed substantially to violence against women in general.

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<sup>22</sup> Gail Dines, *Pornland: How Porn Has Hijacked Our Sexuality* (Boston: Beacon Press, 2010), 71.

The Court in *Hudnut* granted that there was “much to” the perspective that pornography can cause injury. The majority opinion states “people often act in accordance with the images and patterns they find around them” and that “depictions of subordination tend to perpetuate subordination.”<sup>23</sup> However, the court found that the message of subordination “simply demonstrates the power of pornography as speech.”<sup>24</sup> This may seem paradoxical, but it is widely considered to be the central premise of the First Amendment that the government may not restrict speech based on its message or the particular idea it conveys. The prohibition on content-based restriction of speech is the reason why groups like the Ku Klux Klan and Neo-Nazis are constitutionally permitted to convey their messages publicly, despite the fact that the majority of the public finds them offensive.<sup>25</sup> As Justice Scalia put it in the majority opinion in *R.A.V. vs. City of Saint Paul*, even exceptions to the First Amendment like obscenity

“surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government ‘may regulate them freely.’ That would mean that a city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government, or, indeed, that do not contain an endorsement of the city government”<sup>26</sup>

Although Justice Scalia wrote this years after the Supreme Court affirmed the decision in *Hudnut*, his rationale is the same as that of the Seventh Circuit: while it is constitutionally permissible to regulate certain *types* of speech like obscenity or libel, it surely cannot be constitutional to regulate speech based on its *content*. This is precisely what MacKinnon

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<sup>23</sup> *American Booksellers, Inc. v. Hudnut* 771 F.2d 323, aff'd mem., 475 U.S. 1001

<sup>24</sup> *Ibid.*

<sup>25</sup> *Brandenburg v. Ohio* 395 U.S. 444 (1969) and *Collin v. Smith* 432 U.S. 43 (1977), both cited in *Hudnut*.

<sup>26</sup> *R.A.V. vs. City of Saint Paul* 505 U.S. 377 (1992)

and Dworkin attempted to do with their Ordinance that regulated pornography defined only as speech that subordinates women.

Sunstein challenges this conclusion. The Antipornography Civil Rights Ordinance, he argues, did not seek to regulate speech on the basis of its content, but rather on the basis of the harm it has been shown to cause. While the Constitution surely wouldn't permit a statute banning all speech advocating for the subordination of women, there exists precedent for regulating speech based on harm. This is the rationale, Sunstein argues, behind restrictions on advertising tobacco and casinos, even though these types of speech certainly express a specific viewpoint.<sup>27</sup> The harms caused by advertising cigarettes, however, are "so obvious and immediate that claims that the government is attempting to silence a position in a 'debate' do not have time even to register."<sup>28</sup> While it can certainly be argued that some pornography perpetuates sexist ideas, the fact that it is intended to cause sexual stimulation makes it "more akin to a sexual aid than a communicative expression."<sup>29</sup> The intent behind producing pornography, presumably, is not to advocate for the subordination of women, it is to arouse, and to be used as a sexual aid. It therefore can be argued that at least some pornography does not have the characteristics that single out communicative speech for special protection under the First Amendment.

Sunstein is far from the only person to make this argument: Shauer has argued that pornography "shares more of the characteristics of sexual activity than

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<sup>27</sup> Sunstein, "Pornography and the First Amendment," page 11

<sup>28</sup> Ibid.

<sup>29</sup> Sunstein, "Pornography and the First Amendment," 7

communication.”<sup>30</sup> John Finnis comes to a similar conclusion.<sup>31</sup> Nancy Bauer reminds us that even anti-pornography feminists such as Langton and MacKinnon have left unchallenged the conclusion that pornography is speech, when in fact “a great deal of pornography is not speech, except in the legal sense of the word.”<sup>32</sup> This is probably not true of all pornography, particularly as it becomes a medium used expressly for purposes of subversion by people like Hartley. However, their view calls into question the conclusion of the Seventh Circuit that the mere fact that a work of pornography depicts the subordination of women renders it protected speech.

The right to free speech is based upon the idea that the government must not restrict the free flow of ideas or political participation unless the content in question has the potential to incite harm or danger. In 1942, the Court ruled in *Chaplinsky vs. New Hampshire* that the Constitution “permits restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>33</sup> This decision is frequently cited as the basis for restrictions on libel, “fighting words,” and obscenity. In 1969, *Brandenburg vs. Ohio* established the idea that incitement to violence or lawlessness is not protected by the First Amendment to the same extent as other communicative speech is.

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<sup>30</sup> Frederick Shauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982), 181.

<sup>31</sup> Finnis, qu. in Andrew Koppelman, “Is Pornography ‘Speech?’” *SSRN Scholarly Research Paper* (Rochester, NY: Social Science Research Network), March 1, 2007.

<sup>32</sup> Nancy Bauer, *How To Do Things With Pornography*, (Boston, Harvard University Press, 2015), 63.

<sup>33</sup> *Chaplinsky v. New Hampshire* 315 U.S. 568 (1942), qu. in *RAV vs. City of St. Paul*

The danger that some pornography has been shown to cause might not be “imminent” in the same way as the violence incited by some speech, but this alone does not make it less harmful. The evidence showing that violent pornography normalizes and incites sexual violence is not any less valid than the evidence showing that advertising tobacco encourages smoking, and while some pornography might certainly be intended to communicate a message, it is misleading to assume that this is the primary purpose of pornography as a genre. If pornography is intended first and foremost for use in sex, it is not clear that its value as speech is any greater than the value of advertising as speech. Instead, the difference is one prohibition is based on a widely accepted social consensus, while the other is seen as value-based because “the prohibited speech is defined by less widely accepted values favoring the protection of the relatively powerless.”<sup>34</sup>

The Seventh Circuit held that despite a provision in the Ordinance introducing a civil action for victims of coercion into pornographic performances, the Ordinance as a whole restricted speech rather than the conduct involved in producing that speech.<sup>35</sup> This is entirely premised on the assumption that pornography is a communicative act rather than a sex act. The arguments to the contrary open the door to the conclusion that some pornography is more accurately thought of as a sex act, and potentially a discriminatory act, than one of speech. *Hudnut* does not accept this, and the rights to pornographic speech won out over the rights to be free from the harm that can be caused by pornography as sex.

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<sup>34</sup> Sunstein, “Pornography and the First Amendment,” page 11

<sup>35</sup> *American Booksellers, Inc. v. Hudnut* 771 F.2d 323, aff’d mem., 475 U.S. 1001

My discussion of the nature of pornography, combined with Sunstein's argument and those of other skeptics, show that there is at least a possibility that the decision in *Hudnut* was not a foregone conclusion. Pornography is not unambiguously speech protected by the First Amendment, and in fact it is not unambiguously speech at all. In the next chapters, I will argue that while "pornography as speech" is not an inevitable result of our constitutional law, American law and politics has come to associate pornography with speech nonetheless. It seems obvious to associate questions about pornography with concerns about freedom of speech, but in fact this tendency is the result of our courts and other political institutions failing to recognize the humanity of sex workers, and therefore to acknowledge the real sex acts involved in the production of some pornography.

## Chapter 2. Policing Sex, Becoming Speech: Pornography and Politics in Historical Context

In the previous chapter I introduced the idea that framing pornography as speech implicitly prioritizes the rights of those who speak through it and ignores the rights of those who experience it as sex. The idea of the law prioritizing the rights of pornographers may very well seem counter-intuitive to historians and political scientists, because efforts to restrict pornography have so often been used as examples of the voracity of America's puritan tendencies. Pornography has certainly served time and time again as a battleground for conservatives championing sexual morality and liberals advocating individual rights and privacy. However, social conservative efforts to censor pornography have been more symbolic than actually effectual, consistently “damning, rather than damming the ‘floodtide’ of filth allegedly engulfing the nation,” to borrow from Whitney Strub’s *Perversion for Profit: The Politics of Pornography and the Rise of the New Right*.<sup>36</sup> Even when conservatives have proposed substantive policy changes, they have frequently failed in the face of charges of censoring free speech. Feminist efforts like those in *American Booksellers vs. Hudnut*, have also been ultimately unsuccessful. The relative failure of anti-porn measures, especially when compared to conservative efforts in other realms touching on sexuality such as abortion and gay rights

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<sup>36</sup> Whitney Strub, *Perversion for Profit: The Politics of Pornography and the Rise of the New Right* (New York: Columbia University Press, 2011). Many of my historical examples come from Strub’s history of pornography in America. While I disagree with his central argument (namely, that liberal failures to recognize the important connection between pornography and freedom of speech have allowed conservatives to dominate discussion on the issue) I have not been able to find another account of the social, political, and legal history of pornography in America that covers the modern period nearly as thoroughly as this one.

is evidence that if anything has the power to trump traditional sexual morality in American politics, it is an appeal to free expression.

This chapter will briefly examine several key events in pornography's legal and political history. I will show that smut and speech have not always been linked in the American political consciousness but rather became so in the decades following the Second World War. Feminist efforts to curb pornography on equal rights grounds became inextricably linked to social conservative efforts to restrict obscenity as part of a regime of sexual policing. This led to backlash by liberals who emphasized the speech aspects of erotic work in order to defend individual and sexual liberties. As liberals fought to protect these rights, hardcore pornography exploded onto the mainstream scene. Engaged in what they saw as a battle over free speech, liberals failed to acknowledge the sex inherent in the pornography they defended. I will argue that the repeated attempts to regulate pornography by socially conservative groups seeking to police sexuality combined with an increase in the American political consciousness of anti-censorship and pro-rights attitudes, have *produced* pornography as a category of protectable speech, discrediting those who would frame pornography as sex, and creating a regime in which there was no room for complexity: pornography became speech, and speech alone. Sexual labor was not part of the equation.

Most accounts of pornography in American history trace efforts to censor it back to infamous nineteenth century Postmaster General Antony Comstock and the Comstock Act. However, an analysis of Comstock's regime that frames it purely as one of censorship is oversimplified. Some of the consequences of the Comstock act amounted to

ensorship, but his regime is more accurately described as one of policing sexual morality more broadly, not only sexually explicit speech.

The regulation and prohibition of materials considered sexually explicit did not begin with Comstock. The principle that the First Amendment does not extend to obscenity dates back to English Common Law based on the principle that the state was responsible for regulating public morality.<sup>37</sup> The Comstock Act does not mark the first laws against obscenity, but it does mark the first time that the United States actively enforced them. The Act, which prohibited sending obscene materials in the mail, interpreted “obscenity” as encompassing nude photographs, but also condoms, contraception, and information on abortion and contraception. Comstock and his supporters were also actively involved in campaigning against prostitution<sup>38</sup>.

Pornography, or at least the nude photographs that were considered pornographic at the time, were placed in the same legal class as things used unambiguously for sex. The Comstock Act regulated pornography as part of a regime of policing sexual morality, not one of censoring speech.

As the rigid sexual morality of the nineteenth century relaxed, people began challenging Comstock’s law in the courts, and the courts responded. Obscenity laws were relaxed substantially in the early twentieth century, but the idea of including pornographic materials within the realm of protected speech never entered into the conversation. The most famous early challenge to Comstock’s postal regulation had to do with James Joyce’s famous novel, *Ulysses*. In 1933, the Supreme Court ruled that bans on

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<sup>37</sup> *Regina vs. Hicklin*, cited in Thomas C. Mackey, “Pornography on Trial,” (Santa Barbara: ABC-CLIO, 2002), 15.

<sup>38</sup> Mackey, “Pornography on Trial,” page 25.

importing the book were unconstitutional precisely because it was not written with “pornographic intent.”<sup>39</sup> Rather than deciding to permit pornography, the Court recognized that the operational definition of obscenity was overbroad and had the potential to suppress literary works that no one would consider pornographic.

This revelation involved changing the legal standard for obscenity. After *Ulysses*, works could no longer be considered obscene based on isolated passages; a judgment of obscenity needed to be based on the dominant theme of the work as a whole. Additionally, the standard for a work’s “tendency to deprave and corrupt,” which was the test for obscenity at the time became based on the “average reader,” rather than the previous “most susceptible reader.”<sup>40</sup> This case can be read as ensuring that literary works like *Ulysses*, which contain sexual themes but are by no one’s standards pornographic, were not wrongfully accused of obscenity, while simultaneously focusing the obscenity standard more directly on pornographic materials, drawing a clear line between what was considered non-protected pornography and other works which were considered free expression. In 1936, this distinction was made even more explicit in the circuit court with *United States vs. Levine*. Learned Hand writes: “the standard must be the likelihood that the work will so arouse the salacity of the reader to whom it is sent to outweigh any literary, scientific, or other merits it may have in that reader’s hands; of this the jury is the arbiter.”<sup>41</sup> Hand draws the distinction between the speech that is protected by the First Amendment and material intended for sex, which is not.

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<sup>39</sup> *United States vs. One Book Called Ulysses*, cited in Mackey, “Pornography on Trial,” page 31-32

<sup>40</sup> *Ibid.*

<sup>41</sup> *United States vs. Levine* 362 U.S. 610 (1936)

Even as late as the 1950's, it would be inaccurate to say that pornography was considered a "free speech issue" in the United States. In 1951, Justice William O. Douglas, who would later become known as an absolute defender of free speech, wrote that obscene content should be unprotected by the First Amendment, along with "the teaching methods of terror and seditious content".<sup>42</sup> In fact, no politically prominent voices contended that pornographic works merited protection; even Eisenhower qualified his condemnation of book burning by saying that the government was right to censor obscenity for obscenity's sake.<sup>43</sup>

Estes Kefauver, a liberal Tennessee Democrat, began holding hearings in Congress on "pornographic literature and juvenile delinquency" in 1955. His report emphasized the alleged role of pornography in promoting sex crimes and advocated relatively moderate mail-regulation policies as well as the provision of adequate sexual education to counteract what were seen as the effects of pornography. Unlike critics who would draw similar links in the ensuing decades, Kefauver was not renounced as a censor; the New York Times headline reporting on his commission's hearings read "Smut Held Cause of Delinquency," not questioning the premise behind Kefauver's proposal. The article only mentions the First Amendment once, and this is to cite a "socialist leader" who "had spent much of his life defending civil liberties, but [said] that the First Amendment did not sanction pornography in its guarantee of freedom of the press."<sup>44</sup> Following the trend

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<sup>42</sup> *Dennis vs. United States* 341 U.S. 494 (1951), cited in Strub, *Perversion for Profit*, page 43.

<sup>43</sup> Strub, *Perversion for Profit*, page 36.

<sup>44</sup> "Smut Held Cause of Delinquency," *New York Times* (New York, New York), June 1, 1955.

of uncritical condemnation, *Newsweek* magazine ominously reported on the “spread of smut” in 1959.<sup>45</sup>

Even the American Civil Liberties Union, known today as a vehement defender of the right to produce and consume pornography under the First Amendment, routinely refused to assist in obscenity cases in the early fifties. ACLU staff counsel wrote to a California woman charged with distributing nude photos in 1951: “[I am] not sure whether we would consider the dissemination of nude photographs to be a civil liberty [especially when the purpose is] purely to cater to sexual curiosity or desire.”<sup>46</sup> In its 1954 annual report, which states “censorship law makes thought control possible,” the ACLU also expresses the following position: “the ACLU, of course, has no quarrel whatsoever with appropriate laws which punish obscenity.”<sup>47</sup>

In 1957, the Supreme Court considered the constitutionality of the Comstock Act, which still forbade the transport of obscene material in the mail. The court upheld the conviction in question, but again narrowed the standard for what might be considered obscene. The Court’s focus shifted from whether the piece as a whole had the potential for immoral influence to whether it appealed as a whole to the reader’s prurient interest.<sup>48</sup> *Roth* was the impetus for several high-profile exonerations of producers and publishers that had been convicted for obscenity.<sup>49</sup> However, these were mostly for novels and magazines containing nude photographs, not the type of thing that most would consider hard-core pornography. In fact, the introduction of the “prurient interest” test can be seen

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<sup>45</sup> Strub, *Perversion for Profit*, page 25.

<sup>46</sup> Strub, *Perversion for Profit*, Page 50.

<sup>47</sup> *America’s Need: A New Birth of Freedom: 34<sup>th</sup> Annual Report* New York (ACLU) 1954, reproduced in Strub, *Perversion for Profit* page 51.

<sup>48</sup> *Roth vs. United States* 354 U.S. 476, 1957

<sup>49</sup> Strub, *Perversion for Profit*, page 62-63.

as an attempt to narrow down the definition of obscenity to apply only to that which was intended to sexually arouse, rather than to serve some other communicative function.

It appears that from the very beginning of obscenity regulation in the United States through the 1950's, pornography as we understand it today was not connected in the nation's political consciousness with speech or the First Amendment. The courts exhibited a clear trend over time toward a more and more permissive definition of obscenity, but were always careful to qualify their decisions with language making it clear that material intended only for sexual stimulation were not covered by the First Amendment. Even the staunchest advocates for freedom of expression were unconcerned with protecting pornography.

Something must have changed. The political climate surrounding pornography in the 1950's was not at all reminiscent of the way we think about pornography and speech today. The Supreme Court affirmed the Indianapolis Circuit Court's condemnation of the Antipornography Civil Rights Ordinance without even hearing oral argument, and prosecutions of pornographers on the grounds of obscenity since have been few and far between. Larry Flynt, pornographer and founder of *Hustler* magazine, is perhaps better known today as a free speech activist, and has even run for office on these grounds. Pornography has always been a political issue, but it has decidedly changed in America from an issue of sexual morality to one of speech.

Three interrelated factors help explain this shift. First, the Cold War irreversibly shifted the way Americans perceived freedom of speech, adding a new level of vitriol to accusations of censorship and thought policing. As Strub puts it, the threat of Communism, perceived or real, meant that censorship became a "dirty word" with a force

that it had never quite had before.<sup>50</sup> This is the climate in which the Supreme Court unanimously found in *Stanley vs. Georgia* that private possession of obscenity was not a crime, and that any attempted regulation by the state of what an individual can watch or read in private impinges on the rights to freedom of expression and the pursuit of happiness<sup>51</sup>. We can see utter condemnation of perceived censorship in the language of the Circuit Court’s opinion in *Hudnut*: “We do not try to balance the arguments for and against an ordinance such as this [...] This is thought control.”<sup>52</sup> Regardless of the viability of the Antipornography Civil Rights Ordinance, the mere fact of a federal judge refusing to “weigh the arguments for and against” something that would restrict pornography due to free speech concerns is itself telling, and almost definitely would not have occurred forty years earlier.

Second, historian Thomas Mackey correctly points out the influence of the increased “rights-consciousness” of the courts and society in general spanning the 60’s and 70’s on pornography.<sup>53</sup> The Warren Court stands out in the level of protection for individual liberties and group rights represented by its decisions in the 1960’s. *Griswold vs. Connecticut* is a good example of the era’s judicial activism on behalf of liberal causes and its affirmation of sexuality as private, a notion that would be reflected by society at large during the “sexual revolution” of the 1970’s. The Warren Court was responsible for both *Jacobellis vs. Ohio* and *Roth vs. United States*, both of which upheld the exclusion of hard-core pornography from the realm of protected speech but also liberalized the

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<sup>50</sup> Strub, *Perversion for Profit*, page 12.

<sup>51</sup> *Stanley v. Georgia* 394 U.S. 557 (1969)

<sup>52</sup> *American Booksellers, Inc. v. Hudnut* 771 F.2d 323, aff’d mem., 475 U.S. 1001

<sup>53</sup> Mackey, *Pornography on Trial*, page 37.

nation's obscenity laws, paving the way for increasing acceptance and defense of pornography as legitimate speech in the decades to come.

The final factor contributing to liberal defense of pornography as speech ironically arose from those who condemned pornography most loudly. As early as the 1960's, socially conservative groups like Citizens For Decent Literature, which would eventually join forces with the New Right, were entering the political scene. Fundamentalist Christian groups had always taken an anti-pornography stance, but groups like CDL used radical anti-communist and homophobic rhetoric to condemn pornography in secular language, and they were extremely popular with like-minded conservatives concerned with what they perceived as the rise of sexual permissiveness.<sup>54</sup> The conflation of anti-pornography positions with an agenda of sexual morality seen by many as outdated and oppressive, I argue, gave those representing sexual minorities who achieved validation from the publication of alternative forms of pornography impetus to frame pornography in the one way that could draw even more sympathy from the average American than a moral panic surrounding sexuality: as freedom of expression. As the New Right became more influential and spawned more moralistic rhetoric, the speech-aspect of pornography made it an issue over which liberals could fight back more effectively than they could over, say, abortion or gay rights.

Of course, feminists who did not identify with the Right, such as those who drafted and supported the Antipornography Civil Rights Ordinance, also opposed pornography vocally. Although their rationale was different from that of the more conservative groups, they are often linked together in accounts of the politics of pornography as "strange

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<sup>54</sup> Strub, *Perversion for Profit*, page 96-97.

bedfellows.” This isn’t precisely correct; first off, the two groups defined pornography differently. CDL and other groups like it condemned all sexually explicit material, while feminists were only concerned with that which graphically depicted the subordination of women. Second, conservative activists tended to champion harsher laws criminalizing pornography, while their radical feminist counterparts were in favor of a law that introduced a civil remedy for those harmed by pornography as a form of discrimination. However, the two groups were similar in that they attempted to police the sexuality of others: the New Right championed monogamous and heteronormative standards, and the radical anti-pornography feminists assumed that all women involved in pornography or even heterosexual sex were victims of patriarchy with no real agency to make such decisions. This was by no means a consensus among feminists of the era: groups such as the Feminist Anti-Censorship Task Force made their disdain of the anti-pornography camp known, framing their cause as primarily one of freedom of speech. The anti-pornography’s sex-negative rhetoric and its uncomfortable closeness to the cause of the New Right certainly did not work to its advantage in winning over liberal allies.

Anti-pornography feminism failed in its one major attempt at legislative change: the Antipornography Civil Rights Ordinance was passed in both Indianapolis and Minneapolis (where it was vetoed twice by the Mayor), but was ultimately struck down by the Circuit and Supreme Court, condemned as censorship. The New Right was a bit more effective in its efforts, particularly during the Reagan administration. Under Reagan, generally considered the high point of the New Right, socially conservative Evangelicals in Congress succeeded in killing a bill that would loosen penalties for

interstate transportation of obscenity.<sup>55</sup> Federal indictments on the grounds of obscenity increased under Reagan and several pornography production companies went out of business, but convictions were notoriously difficult to get and the industry continued to flourish.<sup>56</sup> Compared to policy successes like those stemming from the War on Drugs and the Targeted Regulation of Abortion Providers (or TRAP) laws vindicated by *Planned Parenthood vs. Casey*, the most recent conservative efforts at stemming pornography were marginal and largely unsuccessful, at least at the Federal level. Notably, the most successful efforts to curb pornography occurred at the state level, and did nothing to regulate the production or content of pornography; rather they dealt with where pornography could be seen. Limited zoning regulations for sex shops and requirements that libraries install filtering devices on their public computers were successful. These did not challenge the nature of pornography as speech, but rather appealed to the state's interest in protecting vulnerable children. Strub argues that because pornography was such an effective moral rallying point, social conservatives were more interested in condemning it verbally than actually pushing for policy change.<sup>57</sup> While this is probably true, I would argue that the threat of being charged with censorship was also a major factor in the New Rights pornography strategy, or lack thereof.

Around the same time that these three important historical factors began to produce pornography as speech as a staple of the liberal vocabulary, pornography itself began to change as well. Playboy, often credited as the first instance of mainstream pornography, was founded in 1953. Other magazines capitalized on Playboy's model, and

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<sup>55</sup> Strub, *Perversion for Profit*, page 192

<sup>56</sup> *Ibid*, 209.

<sup>57</sup> *Ibid*, 119.

the type of content available in magazines quickly became more and more explicit. The type of pornography that concerns me most in this paper, namely, the type requiring models or actors to perform actual sex acts, has existed since the invention of the video camera. However, it remained underground for decades, and only became available to popular audiences around the late 1960's.<sup>58</sup> Some of the first widely known pornographic films featuring actual sexual acts were *Mona* and *Deep Throat*, released in 1970 and 1972, respectively. In other words, at the same time as pornography was becoming speech, it was, ironically, also becoming more predominately characterized by sex work.

By the time the Supreme Court devised the *Miller* test for obscenity that we use today,<sup>59</sup> the process of producing pornography as speech in American law and politics was already well underway. Although the *Miller* standard was arguably more limiting on paper than the *Roth* standard that preceded it, shifting from a burden to prove that a work was “utterly without redeeming social value” to a lower burden of whether the work lacks “serious literary, artistic, political, or scientific value,” far more hard-core pornography was produced and went unchallenged post-*Miller* than post-*Roth*. While *Miller* was met with approval by anti-porn activists and led to police crackdowns on theaters and bookstores in some states, these proved largely fruitless. Juries were often unwilling to convict in obscenity cases, and prosecutors began to consider them a “waste of time.”<sup>60</sup> A

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<sup>58</sup> Strub, *Perversion for Profit* 162.

<sup>59</sup> *Miller v. California* 413 U.S. 15 (1973)

<sup>60</sup> Strub, *Perversion for Profit* 172

study by the NYU Obscenity Law Project study confirmed that Miller had little impact on the day-to-day regulation of obscene materials.<sup>61</sup>

Perhaps the most telling example of the shift in political consciousness surrounding pornography is the vast difference in reception of the two presidential commission reports on pornography published only sixteen years apart from one another. The Presidential Commission on Obscenity and Pornography was appointed by President Johnson, and published its report in 1970 under Nixon. The second, now known as the Meese Commission, was appointed by President Reagan and Attorney General Edwin Meese, and delivered its report in 1986.

Johnson's commission declared pornography harmless to society, and called for a repeal of all obscenity laws aimed at regulating the consumption of pornography by adults. Its report relied entirely on empirical social science. Perhaps anticipating the Commission's liberal conclusions, President Nixon appointed anti-pornography activist Charles Keating, the founder of Citizens for Decent Literature, to the Commission in 1969. Keating publicly condemned the Commission's findings before they were published, and Nixon followed suit, making it clear that he did not approve of the conclusion that the Johnson-appointed body came to. In the end, the Senate voted 60-5 to reject the report, and in the public eye "the document remained largely unread and negatively prejudiced."<sup>62</sup>

Reagan's Meese Commission report reached essentially the opposite conclusion to its predecessor, but ironically, it received much the same response. The Meese

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<sup>61</sup> Obscenity Law Project, "an enquiry into the effects of Miller v. California on the control of obscenity" *NYU Law Review* 52 (1977); 810-939, cited in Strub, *Perversion for Profit*, page 173.

<sup>62</sup> Strub, *Perversion for Profit*, page 133.

Commission was run by proud New Right Conservatives with agendas centered in returning America to sexual morality, and as a result is widely criticized as distorting and over-exaggerating the research it cited, and with making false and misleading claims. It emphasized what it saw as the harms of pornography, both to viewers and the community at large, as well as to performers. The report was criticized and even ridiculed before it was published. *The Meese Commission Exposed* is a published collection of speeches by prominent figures like Kurt Vonnegut and Betty Friedan at a National Coalition Against Censorship conference.<sup>63</sup> Interestingly, the Meese Commission's report cites much of the same research as the Antipornography Civil Rights Ordinance, but comes to a conclusion that even Dworkin and MacKinnon would consider anti-feminist, the inclusion of all explicit material including that intended for sexual education in the definition of pornography, and the classification of pornography as a criminal act akin to prostitution, allowing for prosecution of pornographic performers.<sup>64</sup> Even so, the hyperbole of the Meese Commission Report and its largely negative reception most likely biased courts and the public even further against the aims of the feminist anti-pornography movement.

Psychologist Ed Donnerstein, who testified in support of the Antipornography Civil Rights Ordinance, publicly accused the Commission of twisting his research, which finds increased willingness to rape among men exposed to violent pornography. The Meese Commission presented these findings as applying to all sexually explicit materials

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<sup>63</sup> United States Attorney General's Commission on Pornography and U.S. National Coalition Against Censorship, *The Meese Commission Exposed* (New York: NCAC, 1984).

<sup>64</sup> Strub, *Perversion for Profit*, page 202

regardless of their violence.<sup>65</sup> Interestingly, Donnerstein has also said publicly that the findings of harm caused by pornography in the Meese Commission's report might actually be compatible with the opposite finding by Johnson's commission, due to the increased violence in pornography produced in the years between the two studies.<sup>66</sup> The Meese Commission Report also included an entire chapter on "Harm to Performers," based on testimony by women like Linda Marchiano who have appeared in pornography against their will, a perspective that I will argue has been largely ignored in discussion and policymaking.<sup>67</sup> However, any truth or legitimacy in the findings of the Report has been overshadowed by the sexually conservative agendas of its far-right authors, its hyperbolic rhetoric, and its shoddy science.

The immense differences between the 1970 report and the 1986 report and their respective receptions is indicative of two trends in the history of pornography in America. The first is the strengthening connection between pornography and freedom of expression, and the resulting increase in tolerance toward pornography in American culture. If anything, the fact that pornography was able to shift so completely from an issue of sexual morality to one of freedom of speech further bolsters the claim I made in the previous chapter: that pornography need not necessarily or only be thought of as speech. The second is the conflation of the anti-pornography cause with the moralizing and intolerance of the New Right, and the militant anti-sex members of feminist groups opposing pornography. Both factors that contributed heavily to the fate of the

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<sup>65</sup>MacKinnon and Dworkin, *In Harm's Way* page 45-58; Donnerstein, "The Question of Pornography," in *Psychology Today* (December 1986), 56-59 qu. on Strub p 207

<sup>66</sup> MacKinnon and Dworkin, *In Harm's Way* page 58

<sup>67</sup> *Ibid.*, page 14

Antipornography Civil Rights Ordinance and the state of pornography in the courts and the public consciousness today.

The process of pornography becoming protected speech culminated in 1988, with the California Supreme Court's Decision in *People v. Freeman*.<sup>68</sup> A producer of pornographic films was charged with pandering, or soliciting prostitution, for paying several actors to appear in a pornographic film. The job entailed having vaginal, oral, and anal sex. According to the California Supreme Court, this was not the first time someone had been charged with a prostitution-related offense for an act involved in the production of pornography, and it was time to address the proverbial elephant in the room: the pornography industry, so widely considered to produce content deserving of constitutional protection, depended for its existence on people having sex for money, a crime that was illegal in 49 out of 50 states.

The California Supreme Court found that the production of the film in question had not constituted prostitution, since the payment in question was only acting fees, not monetary payment for sexual pleasure, which was how the state of California defined prostitution at the time. According to the California Supreme Court, what had taken place was a sexual act between consenting adults; the producer had merely paid them for the privilege to film the act. Of course, this would have meant that the actors in question would have consented to the act had they not been paid, which is highly unlikely seeing as they were professionals hired through an agency to perform labor, but the court did not take note of this. The court noted, however, that even if the California prostitution statute were amended, the application of a pandering statute (and by extension, any prostitution

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<sup>68</sup> *People v. Freeman* (1988) 46 Cal.3d 419 , 758 P.2d 1128; 250 Cal.Rptr. 598

statue) to the practice of hiring actors to perform in the production of an adult film would impinge unconstitutionally on First Amendment rights, provided that the film in question wasn't legally obscene. Apparently, it was not.<sup>69</sup> New Hampshire has since made a similar ruling.<sup>70</sup> Since there have been no contesting rulings nor a Supreme Court decision on the matter, this remains the de facto legal precedent: pornography, legally speaking, is not sex work. It *can't* be sex work, precisely because it is speech.

As I explained in the previous chapter, when we think of pornography as speech and not sex or sex work, we also tend to think of it in terms of the people who experience it as a speech act and to erase the existence and the rights of those whose sexual labor makes it possible. The next chapter will test this claim through an empirical analysis of the issue framing and discourse around pornography in the media over time from 1960 until 2010, tracing the evolution of media rhetoric surrounding pornography and its erasure of the personhood and agency of the people involved in making pornography.

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<sup>69</sup> Section B.3a, *People v. Freeman* (1988) 46 Cal.3d 419

<sup>70</sup> *New Hampshire v. Theriault* 158 N.H. 123 (2008)

### Chapter 3. Porn in the *Times*: An Empirical Discourse Analysis

When we examine the history of pornography as it pertains to American law and politics, it appears that pornography was not always conceived of as an act of speech or expression, but rather became one in our nation's political consciousness through the interaction of a series of historical forces: increasing attention to and condemnation of acts perceived as censorship, a newfound focus on individual rights and sexual privacy, and intolerance of these rights on the parts of those who opposed pornography most loudly. I argue that when we think about pornography as an act of speech, we fail to consider the experiences and the agency of those who experience it as an act: as sex, as coercion, or as consensual labor. However, the history of pornography in law and politics can only ever tell us part of the story. I wanted to examine whether these trends appeared as well in more mainstream American thought, or whether the anti-pornography voices had more of an impact here than they did in the courts. I chose to conduct an empirical analysis of the discourse surrounding pornography in the *New York Times* from 1960 until 2010, the era that I believe encompasses the majority of contemporary debate and jurisprudence surrounding pornography in America. This chapter will outline that study and present its findings, which lend support to three ideas introduced earlier in this paper. The first is that pornography was not always an act of speech in the minds of Americans but rather became one. Second, this study shows that as pornography became an act of speech rather than one of sex, we saw a simultaneous increase in the permissiveness with which the issue of pornography was presented to the American public. Finally, the agency and personhood of the "speakers" in pornography is much more prevalent in the mainstream media than that of those who perform sexual labor.

I chose to begin my analysis in 1960 first because of the availability of data. For the 1950's, my search for articles dealing with pornography returned only ten articles from the *Times*, compared to 293 articles in the sixties and even higher numbers in the ensuing decades. This indicates that prior to 1960, pornography was not talked about with much regularity in the *Times*. I wanted to begin my analysis late enough that pornography was a somewhat regular topic of media discourse, but early enough that I could capture any changes in discourse that may coincide with the anti-pornography activism of the New Right and Radical Feminists, which reached its height in the seventies and eighties.

I chose to focus on the *New York Times* because it is widely considered the paper of record, so its discourse surrounding pornography is the best proxy we have for overall public discourse.<sup>71</sup> I do not attempt to argue that this news medium can provide an accurate representation of public opinion surrounding pornography at any given time. However, I do believe that it can represent more or less accurately what was presented to Americans as the realm of political possibility, or the context in which to form their opinions surrounding pornography. The analysis of how this realm of possibility is constructed by elites is known as discourse analysis.

The principles of discourse analysis posit that political and social meanings are discursively constructed.<sup>72</sup> This stems from a poststructuralist tradition, which argues that rather than searching for the meaning inherent in an issue or concept like pornography,

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<sup>71</sup> Despite the fact that it is sometimes seen as having a liberal bias, the *Times* has been used frequently in issue framing and content analysis studies as the paradigmatic paper of record for American political discourse. See Boydston, 2013, Rose and Baumgartner 2013, and Baumgartner, De Boef, and Boydston, 2008, as well as other works on the topics by these authors.

<sup>72</sup> Sarah Halperin and Oliver Heath, *Political Research: Methods and Practical Skills* (Oxford: Oxford University Press, 2012), 311.

we should examine what that concept has been presented to mean by discursive elites with the power to construct meaning. Foucault encourages us to focus on ways in which discourses “systematically form the objects of which they speak.”<sup>73</sup> Because of its reputation for credibility and its wide readership, the *New York Times* possesses considerable power with which to form political and social issues, or objects, in the consciousness of average Americans. Essentially, institutions and elites have the discursive power to shape the way we think about issues. I have already examined some of the ways in which the discourse of political and legal elites surrounding pornography have shaped the “object” of pornography, now I turn to a more systematic analysis of the news media, in order to understand better whether these elites have constructed pornography as an issue in the same ways as judges and politicians.

### Methods

For each ten-year period between 1960 and 2010, I filtered the set of all articles published in the *New York Times* by subject, to include only those dealing with pornography, and then took a random sample of ten articles for each decade<sup>74</sup>. For articles from 1970 to 2010, I used *Lexis Nexis*, which has a “subject” filter. One of the subjects that *Lexis Nexis* has coded for is “pornography,” so I was able to use this filter to obtain my sample<sup>75</sup>. *Lexis Nexis* does not include full articles from the *New York Times* published before 1969, so for these articles I relied on the *ProQuest* Historical Newspapers database. This database does not filter by subject, so I filtered the articles manually by including only those with abstracts containing the words “pornography,”

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<sup>73</sup> Michel Foucault, *The Archaeology of Knowledge and the Discourse on Language* (New York: Pantheon Books, 1972), 49.

<sup>74</sup> See Appendix, Section III.

<sup>75</sup> See Appendix, Section I a.

“obscene,” or “obscenity” and then eliminating the articles that, upon reading, were not referring to pornography<sup>76</sup>. By choosing to use a sample that was the same size for each decade, I sacrificed the ability to make any claims about the frequency with which pornography was talked about in the *New York Times* over time, but since I was concerned with patterns in the way in which pornography was discussed rather than the frequency, I chose to use samples that were constant in size. Next, I coded each article in my sample for a number of variables<sup>77</sup>. For this analysis, the following variables were relevant:

1. *Speech*: the number of references to freedom of speech, freedom of expression, or the First Amendment made in the article.
2. *AttPos*: the number of positive, or permissive, attitude statements about pornography in the article.
3. *AttNeg*: the number of negative attitude statements about pornography made in the article
4. *SpeechName*: the number of times a person who experiences pornography as an act of speech (a producer, director, or salesperson of pornographic material) is mentioned by name in the article
5. *SexName*: the number of times a sex worker or performer in pornography is mentioned by name in the article

I used these coding variables to test the hypotheses I formed in my analysis of the political and legal history of pornography. Because of what appears to be a consolidation of pornography as speech in the decades following the Second World War, I expected to see an increase in the number of references to speech over time, and a corresponding decrease in the number of articles that did not make reference to speech (*Speech=0*).

Because Americans tend to respond positively to free speech framing, I hypothesized that

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<sup>76</sup> See Appendix, Section I b.

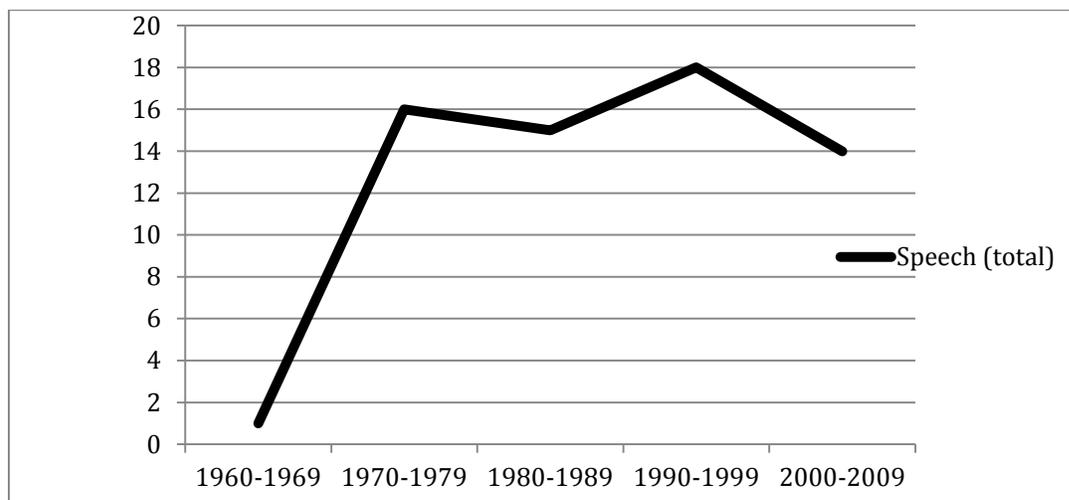
<sup>77</sup> See Appendix, Section III.

I would see a corresponding increase in positive attitude statements made about pornography in the media as it became framed as an issue of free speech.<sup>78</sup> Finally, because framing pornography as speech causes us to think about the speakers of pornography and to erase the sex work involved, I expected to see an over-time increase in the *SpeechName* variable, and a decrease in the *SexName* variable.

### Findings

Looking at the total number of references to speech made in each ten-year block of my sample, my first hypothesis was partially vindicated. The total number of references to speech increases sharply between the 1960s and the 1970s (see Figure 1).

**Figure 1: References to speech in New York Times Articles about pornography by decade**



In other words, there is a distinct change in the frequency of references made to speech in articles published in the 1960s and those published after, but no notable difference in the number of times speech was referenced from 1970-2009. The slight dip in the number of times speech was mentioned in the 1980s is most likely a result of reporting on the

<sup>78</sup> Thomas E. Nelson, Rosalee A. Clawson, and Zoe M. Oxley. 1997. Media Framing of a Civil Liberties Conflict and Its Effect on Tolerance. *American Political Science Review* 91, 3 (Sept.): 567-583.

feminist and new right stances against pornography. In fact, five of the ten articles in my random sample from 1980-1989 dealt with feminist anti-pornography efforts. However, 3 of those 5 also made reference to First Amendment concerns, and as we can see, speech is mentioned in the following decade even more frequently than it was in the 1960s. The dip in references to speech between 2000 and 2009 appears to be a result of a new phenomenon not seen my sample in the previous decades: value-neutral reporting on developments within the pornography industry. My sample for the most recent decade included two articles about the developing availability of pornography on smartphones and how it was impacting the market, as well as one about how pornography is becoming less plot-driven than it was in the past. By far, however, the most significant shift in discourse around pornography as speech occurred between the 1960s to the 1970s. This point can be further shown by examining the number of articles in each ten-year sample that made *no* reference to speech or the First Amendment (see Figure 2).

**Figure 2: Number of articles not referencing speech by decade**

Decade	<i>Speech=0</i>
1960-1969	9/10
1970-1979	5/10
1980-1989	6/10
1990-1999	2/10
2000-2009	5/10

In the 1960s, the majority of articles published by the *Times* about pornography did not use free-speech framing. In fact, the one article in my sample that did reference speech did so only once. In the ensuing decades, we see much more of a balance in the sample in between articles using free-speech framing and those that do not, and as we saw in Figure 1, overall references to speech by decade were much higher than in the 1960s. These data are not surprising when we consider the historical context: if we are attributing the shift

in discourse around pornography to increasing sensitivity to censorship following the Communist threat and the increase in individual right-consciousness and concerns about sexual privacy, it makes sense that we see the concepts of pornography and speech linking in the seventies. In the sixties, and conceivably in the decades before that, though I do not have the data to confirm this, pornography was talked about mostly in crime beats and articles about issues of public morality.

How did this change in discourse relate to the media's attitude toward pornography as a socio-political issue? With my data, I cannot say for certain whether producing pornography as a speech issue impacted changes in attitude framing or vice versa, nor can I make any claims about whether the media's framing of pornography had a decisive impact on public attitudes. However, this data does show a relatively steady increase in the number of positive or permissive attitude statements made about pornography over time relative to negative attitude statements. The prevalence of negative attitude statements did not show a discernable pattern other than being at their lowest points in the 1970s and 2000s (See Figure 3).

Perhaps the most interesting finding in the attitude data, however, is not the changes over time in the *Times*' attitude toward pornography but the relationship between positive attitude statements and references to speech. Throughout the entire dataset, we see a positive correlation ( $r=0.5306$ ) that is statistically significant at the  $p<.001$  level between *Speech* and *AttPos*, or between the number of times a given article makes

reference to free speech or the First Amendment and the number of positive or permissive statements it makes about pornography in general.<sup>79</sup>

This correlation is unexpected but important. The political science literature on issue framing focuses on the impact of referencing freedom of speech on readers and viewers; behavioral evidence shows that Americans are more likely to be sympathetic to political issues when they are framed as issues of free speech than when they are framed in other ways, all other things being equal. The classic example cites differences Americans' reactions to a KKK rally after reading articles framing the rally as an issue of free speech as opposed to one of public safety. We are much more likely to be sympathetic to the rights to assemble of such groups if they are framed in terms of free expression.<sup>80</sup> Studies like this one give us good reason to believe that Americans became more sympathetic to allowing pornography to proliferate when the media began framing it as a free-speech issue rather than one of sexual morality.

While public opinion data on the subject of pornography does not date back as far as my study does, this finding is in line with the recent opinion data that is available. A 2007 compilation of Pew Research data found that 70% of Americans disagree with the statement "nude pictures and X-rated videos on the Internet provide harmless

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<sup>79</sup> At times, references to speech and positive attitude statements overlapped in the sample. For example, statements along the lines of "this bill would constitute a violation of the First Amendment right to freedom of expression" referencing a bill that would restrict pornography, would have been counted as both a reference to speech and a permissive attitude statement. However, just as often the variables did not overlap. For example, statements such as "civil rights activists expressed First Amendment concerns" would count as statements referencing speech that are attitudinally neutral, and statements such as "there is no evidence that pornography causes sexual violence" would be coded as a permissive attitude statement that does not make reference to speech.

<sup>80</sup> Nelson et al, "Media Framing of a Civil Liberties Conflict."

entertainment for those who enjoy it” and the number of Americans agreeing that pornography in general is harmless has actually declined since 1987.<sup>81</sup> This is likely related to the growing prevalence of Internet pornography or the increasingly explicit and violent material, and might seem to suggest that public opinion is not in line with the increasingly permissive media framing of pornography.

However, despite reporting negative opinions about the harms pornography can cause, Americans see greater danger in government restrictions on entertainment media than they do in the effects of harmful media itself. Furthermore, 50% of Americans believe that audiences are responsible for the effects of potentially harmful media, compared to only 34% who believe producers should be held accountable.<sup>82</sup> Fully 79% believe that parents should be responsible for preventing children from accessing pornography, compared to only 4% who believe this is the government’s responsibility.<sup>83</sup> While unable to adequately show trends over time, the opinion data do suggest that Americans view pornography as speech that should not be censored by legal action, even though they largely believe pornography to be harmful. This is a testament both to the value Americans place on the freedom of speech, and the effectiveness of the shift in media and political discourse that produced pornography as speech.

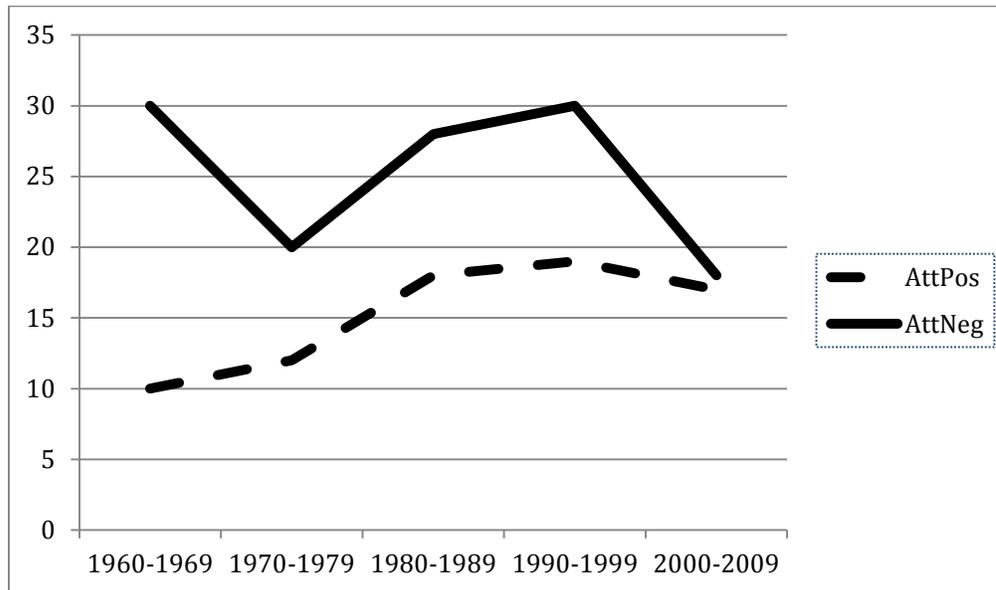
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<sup>81</sup>Pew Research Center, “Daily Number: Say Internet Pornography is Harmful,” *Pew Research Center*. July 21, 2007. <http://www.pewresearch.org/daily-number/say-internet-pornography-is-harmful/>

<sup>82</sup>Pew Research Center, “Support for Tougher Indecency Measures, But Worries About Government Intrusiveness: New Concerns About Internet and Reality Shows,” *Pew Research Center: U.S. Politics and Policy*. April 19, 2005. “<http://www.people-press.org/2005/04/19/support-for-tougher-indecency-measures-but-worries-about-government-intrusiveness/>

<sup>83</sup> Ibid.

Figure 3: Positive vs. negative attitude statements about pornography in the New York Times by decade



However, behavioral studies in a laboratory setting ask participants to read or view two news sources that are identical, apart from the fact that one source uses free-speech framing and the other does not. These differences in framing alone are shown to be sufficient to cause changes in opinion. An analysis of the media discourse surrounding pornography shows us that, at least when pornography is the subject in question, all other factors are *not* equal. When news staff publish content framing pornography as speech, they are more likely to also frame pornography in a positive, permissive, or sympathetic manner. This might be evidence that even journalists are not immune to the effects that speech framing has on individual attitudes, but it is definition evidence of the discursive construction of political meaning in action. The language of discourse analysis calls this process “articulation,” or the process by which meaning is fixed out of raw linguistic resources.<sup>84</sup> In the data, we can see the articulation of the concepts “pornography” and “free speech,” supplemented with positive attitude statements that encourage the reader to

<sup>84</sup> Halperin and Heath, *Political Research*, page 316

view the issue permissively. Discourse analysts call this second phase of the construction of meaning “interpellation,” which refers to the acceptance of the subject positions that the discourse constructs.<sup>85</sup> People tend to accept the ideologies that come from what they see as credible discourses, so if the *New York Times* is perceived as credible, this data is evidence that the meaning of pornography has been constructed as speech worthy of protection not only among elites, but among individuals as well.

Finally, I examined the data for references to those involved in the production of pornography as speakers and as actors, with the idea that as the discourse surrounding pornography began to revolve around speech, it would also begin to include more references to those who experience pornography as speech than to those who experience it as sex, furthering the idea that pornography is first and foremost an act of speech. After coding, there were not enough references to members of either group by name to discern whether or not there were any trends over time. However, when the entire data set was examined as a whole, a striking trend appeared: there were eleven references by name in the 50-article set to a person who profits or profited from the production of pornography as a director, producer, or salesperson. There was only a single reference to a sex worker by name.<sup>86</sup>

I was not able to test whether articles mentioning sex workers by name framed pornography more or less permissively than those that did not, because, as I found, the

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<sup>85</sup> Ibid.

<sup>86</sup> There was also one reference to “Linda Lovelace,” the character Linda Marchiano used in the film *Deep Throat*. However, since Marchiano has spoken so publicly about how she did not willingly take on this identity, I did not count it among references to sex workers by their names. If anything, calling Marchiano “Linda Lovelace” in the media detracts from her personhood and agency rather than reminding readers of it.

mainstream media does not appear to recognize the personhood or agency of sex workers who appear in pornography very much at all. I can say that in the one article where a sex worker was mentioned by name, a 2009 article about the changing nature of mainstream pornography, there was not a single reference to free speech or the First Amendment.<sup>87</sup> Granted, eleven references to “speakers” across the entire dataset is not a large number either, but when we consider that speakers were referenced eleven times more frequently than sex workers,<sup>88</sup> we see a meaningful pattern.

In the mainstream media, we are faced much more frequently with the personhood of those for whom pornography is an act of expression. While many Americans recognize the names and faces of famous pornography performers, it is dubious at best whether we truly recognize and respect their personhood, agency, and rights. Feminist theory that criticizes pornography emphasizes its tendency to reduce the women who appear in it to objects: Gail Dines emphasizes the stake that makers of violent or degrading pornography have in presenting the women in their films as objects deserving of sexual use or abuse in order to differentiate them from the “real” girls and women in viewers’ lives. She argues that were the distinction between “women” and “porn stars” not made clear, those who consume violent pornography might be turned off by it or feel sorry for the performers.<sup>89</sup> Others like Andrea Dworkin and Catharine MacKinnon emphasize that the line becomes blurry between “women in porn” and “women in real life,” contributing detrimentally to patriarchal rape culture and to the

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<sup>87</sup> “Lights, Camera, Lots of Action: What, You Want a Script, Too?” *New York Times* (New York, NY), July 8, 2009.

<sup>88</sup> As I mentioned in Chapter 1, speakers and sex workers are not mutually exclusive. There are certainly people who produce or direct pornography that also star in it. However, in the data that I collected no such individuals were mentioned.

<sup>89</sup> Dines, *Pornland* 63-64

second-class status of women more generally.<sup>90</sup> Rae Langton argues that since mainstream pornography has become something of an authoritative source for information about sexuality in the US, it has the power to systematically “rank” women as inferior or even as objects, removing from them the authority that their words would have in a culture not dominated by pornography. Mainstream porn sends the message that “no” doesn’t actually mean “no,” that women always enjoy sexual subordination and even abuse, and because porn has authority, the actual protests of women become illegitimate in the eyes of society. This is why, she argues, Linda Marchiano’s book about her the abuse she suffered at the hands of pornographers has been appropriated and sold as erotic material.<sup>91</sup> Others challenge Langton’s conclusion that pornography has the requisite authority to subordinate and discriminate, but I would argue that recognizing it as sex causes us to see the immense authority it does possess: rather than presenting a point of view, for many Americans pornography simply defines the erotic, particularly in the absence of adequate sexual education and the sex-negativity of much of American culture.<sup>92</sup>

This data speaks to the fact that the objectification of women in pornography exists outside of the pornography itself. The principles of discourse analysis challenge us to recognize that ways of talking about a topic are embedded in power relations supported by institutions, and to ask ourselves what we can learn about these relations from the discourses themselves. From the media discourse, as well as much of the legal and political discourse surrounding pornography, we see an implicit prioritization of the

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<sup>90</sup> See MacKinnon, *Feminism Unmodified* and Dworkin, *Pornography*.

<sup>91</sup> Langton, *Speech Acts and Unspeakable Acts*, page 310-326.

<sup>92</sup> Bauer, *How To Do Things with Pornography*, 76;

agency and rights of those who speak through pornography. We erase the experiences, be they positive or negative, of those whose sexual labor makes the pornography possible in the first place.

Discourse, particularly when it comes from powerful and authoritative sources, has the power to construct modes of understanding and even to create new human subjects.<sup>93</sup> American legal discourse has made subjects out of the “speakers” of pornography, and has reduced those who appear in it, both legally and in the consciousness of the average American, into objects or components of a speech act. The moral and political decisions we make about pornography in America, whether we think it is harmful or empowering, whether it should be left alone or regulated, are made in the context of this discourse. The next and final chapter will examine some of the implications this has on law, theory, and pornography today. I will then briefly argue the merits of recognizing the sexual labor aspect of pornography in policy-making and jurisprudence.

## Conclusions

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<sup>93</sup>Foucault 1972, qu. in Halperin and Heath, *Political Research*, page 32; see also Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Random House 1977) for another example of the creation or production of types of human subjects

Pornography needn't be thought of as speech and only speech. It is made up of sex acts just as much as it is of speech acts, and there is no definitive reason why the First Amendment must protect those speech acts in every case. It has become speech, however, through a set of historical processes that have impacted our nation's political, legal, and media discourse. Discourse shapes our ways of knowing, and today pornography and the First Amendment are linked in the American consciousness. This isn't just a theoretical argument; it has real implications for policy. As we saw in Chapter 2, being paid to perform sex acts in a pornographic film is not legally prostitution in America. This is, of course, good news for those with careers in the pornography industry, as they can do their jobs without fear of prosecution, unlike many other sex workers in the United States. However, it also means that the sexual labor inherent in the production of pornography has been effectively erased, pushed into the private sphere, along with the workers who perform it.

As adult entertainer Mercedes Carrera put it in a recent panel discussion on consent in the porn industry, porn is "the last truly free market."<sup>94</sup> This means that there are no real legal regulations of the production of pornography. In the same panel discussion in which Carrera participated, agents and producers from Los Angeles explained that the corporations they work with are self-regulatory, ensuring that performers are provided with consent forms that detail the jobs in question, as well as making use of "no" lists laying out the people they will not work with and the acts they will not do. However, Conner Habib, Vice President of the Adult Performers Advocacy Committee, a group

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<sup>94</sup> "Consent in Porn: Debunking Myths and Managing Realities," Vimeo video, 1:26, posted by "Sssh.com Original Films," March 2016, <https://vimeo.com/156978763>.

seeking to raise awareness about how the adult industry works and to assist performers, was quick to point out that while this is true of many larger corporations, the nature of porn on the Internet is such that anyone can be a producer or a performer. Most performers nationwide, says Habib, don't hire agents or sign paperwork.<sup>95</sup> They generally receive a one-time fee, which can be very low compared to the number of hours worked, and includes no royalties or benefits.<sup>96</sup> The people that sell the images resulting from their sex acts, however, profit from them many times over. Habib emphasizes that when we think about exploitation in the pornography industry, our minds often jump to sexual exploitation. However, he believes that most of the exploitation that occurs in the production of pornography is economic.<sup>97</sup> The fact that there are no restrictions or regulations governing how performers in pornography must be treated or paid is largely because no one is willing to admit that they perform sexual labor.

When any type of regulation is proposed, the voices of sex workers are conspicuously absent from the debate. The voices that we do hear, of course, are those of the people for whom pornography is speech. For example, when Los Angeles proposed a measure which would mandate the use of condoms in all pornographic film shoots, several production companies went to court, arguing that the measure was in violation of their First Amendment rights, as the measure would constitute a "complete ban on expression."<sup>98</sup> Condomless sex, they argued, constituted a form of expression, because condoms "remind the audience about real-world concerns such as pregnancy and disease" and "films depicting condomless sex convey a particular message about sex in a world

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<sup>95</sup> Video, "Consent in Porn."

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> *Vivid Entertainment v. Fielding* 13-56445, US 9<sup>th</sup> Cir. (2014)

without those risks.”<sup>99</sup> Of course, they did not mention the fact that real people had to engage in condomless sex in a world that *does* involve those risks in order to convey that message. In the end, the companies’ argument did not hold up and a modified version of the measure passed due to the government’s perceived interest in preventing the spread of sexually transmitted infections among the general public. The measure was framed as a public health effort, aimed at protecting the city of Los Angeles from the potential transmission of sexually transmitted infections that could result from the fact that the American porn industry is centered in LA. It was not aimed at workers’ rights or safety, and no mention was made of the rights or preferences of the sex workers involved.<sup>100</sup>

Some might argue that this situation has more benefits for performers in adult films than it has drawbacks. After all, they are allowed to choose which work they do, and if they are in any way harmed or exploited, they can use the legal system without fear of being prosecuted for selling sex. Nina Hartley is adamant that “if [she] won’t do it at home for free, [she] won’t do it on camera for money.” Simply put, she won’t do anything in her films that she doesn’t enjoy.<sup>101</sup> I have already expressed how people like Hartley complicate the dichotomy between speech and sex by producing and directing the pornography they appear in. Hartley in particular is challenging most aspects of mainstream pornography by creating a product that celebrates female sexual agency, a theme that isn’t very prevalent in pornography. The ability to do this, however, is a privilege; the vast majority of people who appear in pornography do not make it to “star” status and do not have the ability or resources to take control of the material in which

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<sup>99</sup> Ibid

<sup>100</sup> Ibid

<sup>101</sup> Nina Hartley, “Porn: An Effective Vehicle for Sexual Role Modeling and Education,” page 233.

they appear. Dee Severe, a director in the porn industry, condemns some companies that she knows of describing a certain scene to performers when they sign up, only to inform them when they arrive that the scene is something different.<sup>102</sup> While Severe and others might advocate forcefully against this, there is no law against it.

Of course, performers in pornography who have their consent violated or experience exploitation have the same legal recourse available to them that any other person would have. However, the conviction rate for rape in the United States is around two percent overall.<sup>103</sup> It seems that no matter what the circumstances, it is difficult to bring those accused of rape to trial, and even more difficult to get them convicted. If the victim in question has signed agreed to perform in a porn film or signed a contract, the chances of receiving justice when consent is violated seem painfully slim. To add to this, there is the fact that adult entertainers work in an industry that makes a lot of money off of depictions of sex in which a woman's "no" means "yes," where women are open to any sort of sexual encounter. On top of that, the law has systematically erased the agency of these performers. In these circumstances, I find it difficult to accept that a jury would believe them.

To test this theory, I read through the comments on an online article about the recent accusations against famous porn star James Deen.<sup>104</sup> Several women have come forth

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<sup>102</sup> Video, "Consent in Porn"

<sup>103</sup> "Reporting Rates" *RAINN: Rape, Abuse and Incest National Network*. April 10, 2016. <https://rainn.org/get-information/statistics/reporting-rates>

<sup>104</sup> Mitchell Sunderland, "I Thought, 'I'm Going to Die Here:' Joanna Angel accuses James Deen of Assault," *VICE News*, December 3, 2015. [https://broadly.vice.com/en\\_us/article/i-thought-im-going-to-die-here-joanna-angel-accuses-james-deen-of-assault?utm\\_source=vicefbus](https://broadly.vice.com/en_us/article/i-thought-im-going-to-die-here-joanna-angel-accuses-james-deen-of-assault?utm_source=vicefbus)

accusing him of rape, sometimes during filming.<sup>105</sup> Some of the comments from Facebook users included: “you can’t call rape if you signed up for a rape scene,” “In this article Deen has been quoted as saying ‘girls in porn are holes for me to put my dick in...’ well, aren’t they? Isn’t that what they chose?” and “Nobody should care if some disgusting prostitute is ‘raped’ by her nasty porn co-star. That’s not even possible! You can’t rape a whore.” Even though the women accusing Deen of assault are well-known and celebrated names in the industry, numerous fans expressed the belief that they must be lying, deserved what they got, or could not be raped because of their professions. These three comments in particular showed a belief that women working in porn are not the same type of women with the same type of agency as those who don’t work in porn. This message, albeit in less explicit words, has been projected in America for decades, and attitudes like these are the consequences.

I do not mean to imply that all pornography is rape, or that one can’t actively consent to be involved in pornography and enjoy it. Those who take this perspective are just as guilty of detracting from the agency of the people they talk about as those who argue sex workers can’t be raped. I do, however, argue that like all professions, pornography carries with it the potential for harm and exploitation, and by thinking of it first and foremost as speech we erase the labor involved, detracting from their agency in the eyes of the public, ignoring this potential for harm, and leaving those who are harmed with few options.

When the courts and the pornography industry do cross paths, prosecutions happen because of content, not conduct. Because pornography is speech, the legal standard

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<sup>105</sup>Gabby Bess, “James Deen Accused of Rape and Assault by Six Women,” *VICE News*, December 2, 2015. [https://broadly.vice.com/en\\_us/article/james-deen-accused-of-rape-and-assault-by-six-women](https://broadly.vice.com/en_us/article/james-deen-accused-of-rape-and-assault-by-six-women)

governing it is that of obscenity. Since *Miller v. California* is still the standard today, this means works are judged to be obscene or not with reference to “contemporary community standards.” In the age of the Internet, what are contemporary community standards for sexual materials? The answer is far from clear. There are no other legal guidelines to help juries decide what is obscene.

The closest thing we have is a list compiled by famous obscenity attorney Paul Cambria. The “Cambria List,” as it is now known, was published in 2002 and serves as a guideline for producers of pornography as to what they should not include in their videos if they do not want to face obscenity charges based on the history of obscenity prosecutions. In addition to warning against some inexplicable themes like “coffins” and “food used as a sex object,” and a few themes we might expect like “forced sex,” “incest,” and “pain and degradation,” the list cautions against using “male-male penetration,” “transsexuals,” “bi-sex,” “menstruation,” and “black men-white women” topics.<sup>106</sup> It should be noted that all of the listed themes are used in pornography today, and obscenity prosecutions are still very rare. However, the list is the best proxy for the way our courts understand “contemporary community standards” that exists, and it reveals an interesting pattern. Apparently, community standards, in addition to being somewhat arbitrary, have gendered, raced, and heteronormative undertones.

The Cambria list should give us pause about the claim that pornography is a viable way of protesting restrictive sexual norms, and should also lead us to ask whether “contemporary community standards” are really the best standards to govern the pornography industry. This becomes even more apparent when we consider the histories

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<sup>106</sup>“Prosecuting Obscenity: The Cambria List,” *PBS Frontline*, published 2002.  
<http://www.pbs.org/wgbh/pages/frontline/shows/porn/prosecuting/cambria.htm>

of two widely known pornographers in the courts. Both Larry Flynt and Max Hardcore have both been convicted for distributing obscenity.<sup>107</sup> The time they served was for the objectionable content of some of their videos. However, both men have also engaged in criminal sexual conduct. Larry Flynt published nude photographs of Jackie Kennedy Onassis without her consent in 1975, not to mention running a column in *Hustler* magazine for years which encouraged men to send in nude photographs of their wives or girlfriends for publication<sup>108</sup>. Max Hardcore is widely believed to have raped a performer on camera during an interview.<sup>109</sup> However, neither man was prosecuted for these incidents, and the content resulting from them remains available. Recognizing the agency of the people in pornographic photos and videos, and the real acts required to make them rather than prioritizing the speech of pornographers might lead to a standard which would prosecute criminal conduct, rather than content deemed objectionable by a questionable set of standards.

Recognizing that pornography entails sex would ultimately have positive consequences for policy: it would allow regulation of the industry based on what sex workers want, rather than what producers want to say. It would provide the conceptual background needed to pass legislation allowing redress for those who are harmed in the making of pornography without criminalizing those who choose it and enjoy it. It would

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<sup>107</sup> See Dines, *Pornland* page 71 for a brief description of Hardcore's conviction and references to more information. In addition to several other high-profile legal battles, Larry Flynt pled guilty to obscenity charges in 1999, see "Flynt Pleads Guilty in Ohio Obscenity Case," *New York Times* (New York: NY), May 13, 1999.

<sup>108</sup> Christopher Andersen, "How Nude Pictures of Jackie Kennedy Onassis were Set Up by her Husband," *New York Daily News*, October 26, 2014

<http://www.nydailynews.com/news/politics/jackie-o-aristotle-onassis-rocky-marriage-recounted-book-article-1.1987195>.

<sup>109</sup> Stephen Walker, *Hardcore*, Documentary, Principal Films, 2001.

not, as some opponents might argue, outlaw pornography. Rather, it would introduce a more relevant standard for which pornography can legally be produced and sold. It would open up the possibility that violent pornography without a clear communicative message could be curbed were it proven to cause real danger, without the First Amendment getting in the way. It would also force lawmakers to realize that criminalizing the act of having sex for money is not realistic. It happens every day in the production of pornography, and there is no defensible reason why a woman who is paid to perform a sex act on her own terms should be prosecuted, while a woman who is paid to perform a sex act which is then sold and capitalized on by someone else is not. As ex-sex worker Norma Jean Almodovar puts it, “logically, it is not possible for a consenting adult who engages in the exact same behavior to be ‘exploited’ in one situation and not the other.”<sup>110</sup> Laws forbidding the sale of sex other than in pornography do so under the auspices of preventing exploitation, but this does not hold up. When we examine the acts of pornography and prostitution critically, it becomes clear that the only real difference between the two is the camera, in some cases the person who profits, and the fact that pornography is much more widely socially accepted. Since Americans are clearly not willing to give up their “right” to pornography, the logical and just thing to do is to afford equal rights and protections to all sex workers. Both pornography and prostitution should be prohibited when proven to be harmful and only then.

The final advantage of recognizing that pornography is sex, at least in part, is a conceptual one. Advocates on both sides of the debates surrounding pornography have

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<sup>110</sup> Norma Jean Almodovar, “Porn Stars, Radical Feminists, Cops, and Outlaw Whores,” in *Prostitution and Pornography: Philosophical Debates About the Sex Industry*. Ed. Jessica Spector. (Stanford: Stanford University Press, 2006), 156-174.

fallen into the same trap: they either assume that all pornography is harmful, or that there should be no restrictions on it whatsoever. Both positions ignore the agency of the people whose labor is required to produce it. When we are forced to recognize that agency, we realize that we cannot fall on only one side of the so-called “porn wars.”

### Suggestions for Further Research

This project introduces a novel way of defining and conceptualizing pornography, and as such only skims the surface of the topic. Much work is to be done to further understand pornography in American, and to determine the viability of a legal and philosophical approach to pornography centered on sexual labor rather than speech. Three avenues for future research stand out to me. First, it would be useful to our understanding of the media framing and history of pornography as a political issue to conduct a more comprehensive analysis of the discourse surrounding pornography. Because this project was an undergraduate thesis, I was limited with respect to time and resources and as such had to analyze only one publication. I believe it would further deepen our understanding to include other publications in this type of analysis and examine similarities and differences in the way they present pornography as speech or as something else. Specifically, I would be interested in conducting similar analyses on feminist publications and publications with socially conservative agendas.

Second, this work brings up broad questions for political and legal theorists about the nature of speech. If pornography is to be thought of as sex work, what implications, if any, does this have for the definition of a communicative act? How does this definition of pornography interact with and affect the jurisprudence surrounding other types of speech

acts? On a related note, what does the history and pornography say about the First Amendment in general? Do Americans interpret it too broadly, and does it prioritize the rights of some groups over others?

Finally, many of the conclusions that this project comes to might be productively tested through a comparative analysis. It would be interesting to look at the history of, and discourse surrounding, pornography in other nations to discern what impact the unique premium placed on freedom of speech in America has had. Initially, I believe it would be informative to compare the history and policy surrounding pornography in the US to those nations which have implemented content-based restrictions on the production of pornography such as the UK and Canada, as well as nations which have historically been more liberal toward pornography than the US, such as the Netherlands. This project certainly brings up more questions than it answers, and I hope to be able to continue the conversation that I have begun here in my future work.

## Appendix

### I. Data Collection

#### a. *Data collection in Lexis Nexis*

- i. Limiting sources to the *New York Times*, and limiting “subject” to “pornography,” I searched articles for each decade beginning in 1970 and using a random number generator, selected 10 articles from each decade. Articles were sorted by relevance to search term (“pornography”) and I used a random number generator to generate 10 numbers between 1 and the  $n$ ,  $n$  being the total number of articles found. Then I pulled the articles corresponding to the randomly generated numbers. Next, I removed from my samples the articles dealing only with child pornography, as this is an importantly different subject from that with which I am dealing. The overwhelming cultural and political consensus is that pornography depicting children is, and should be, illegal. Thus, in addition to being not relevant to my topic, I expected that using articles dealing with child pornography in my sample would likely bias the sample, making it look overall more disapproving of pornography than it might otherwise look. I carried out the replacement by generating random numbers between 1 and  $n$  and examining the corresponding articles until a replacement that did not deal with child pornography was found. Articles that discussed

both child pornography and legal pornography or took a comparative perspective were left in the sample.

b. *Data Collection in ProQuest Historical Newspapers*

- i. I used identical methods to the ones described in 1.a, apart from the fact that I could not filter articles by subject, and instead searched for the terms “pornography,” “obscenity,” and “obscene” in the abstracts of articles. This created the additional step of filtering out articles that contained these words but did not actually talk about pornography in addition to those dealing only with child pornography. One example is an article that used the word “obscene” in its abstract only in reference to an “obscene hand gesture.”

II. Coding

a. *Speech* variable

- i. Any mention of “free speech,” “First Amendment,” “freedom of expression,” or “censorship” was coded as *Speech*.
- ii. *Speech*= $n$  where  $n$  is number of references.

b. *AttPos* variable

- i. Any statement critical of regulatory measures, such as a quoted disapproval of a given measure (e.g. “Why should I be the one to decide what [citizens] are allowed to have?” by a public official)
- ii. Any references to pornography as “natural” or “a fact of life”

- iii. Statements praising measures limiting restrictions on pornography (e.g. an article referring to the Netherlands decision to decriminalize pornography as “revolutionary”)
  - iv. Citations to research with conclusions that support permissive attitudes to pornography (e.g. findings that show crime dropping if pornography is allowed, findings that show no correlation between pornography and sexual violence.)
  - v.  $AttPos=n$  where  $n$  is number of such statements.
- c. *AttNeg* variable
- i. References to the position that pornography is harmful to children.
  - ii. Any statement praising a measure that restricts pornography.
  - iii. Any statement referring to pornography as “obscene” or unconstitutional.
  - iv. References to the production or sale of pornography as a crime.
  - v. References to pornography as a social “problem” or as needing a “solution.”
  - vi.  $AttNeg=n$  where  $n$  is number of such references.
- d. *SpeechName* variable
- i. Does the article reference someone involved in the pornography as a producer, director, or salesperson by name? If yes,  $SpeechName=1$ ; if no,  $SpeechName=0$ .
- e. *SexName* variable

- i. Does the article reference someone involved in the pornography industry as a performer or sex worker? If yes, *SexName*=1; if no, *SexName*=0.

### III. Data Set

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