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Owen M. Fiss

Yale Law School

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Freedom and Feminism

Owen M. Fiss*

Thurgood Marshall has taught us two lessons. The first demands that equality always be taken seriously and the second demonstrates how the law might be used to meet that demand. The revolution in the law that he so inspired began with race, but in time reached other disadvantaged groups, including women. Building on Marshall's achievements and the other hard fought victories of the civil rights movement, feminists have been demanding a true and substantive equality for women and using the law to achieve their purposes.

Sometimes, as with abortion or birth control, law has been used to combat law: the federal constitution has been used to annul state statutes that criminalize abortion or impede information about, and proper access to, birth control. Law has appeared, so to speak, on both sides of the issue, though the higher law has been identified with the cause of liberation, thanks to decisions like Griswold v. Connecticut1 and Roe v. Wade.2 In other instances, however, especially when the law has been used not to invalidate legal enactments, but to eradicate deeply entrenched social practices, the role of the higher law has not been so glorious: the federal constitution has been used as an instrument of resistance.

This odd reversal of the role of the Constitution in the struggle for equality has a faint counterpart in the civil rights area. Some resisted Brown v. Board of Education3 in the name of federalism and freedom of association, and sought to buttress their arguments by invoking the federal constitution. But this strategy of resistance was largely unsuccessful. In the feminist context, however, the situation is different. Statutes prohibiting sexual discrimination in the workplace and those requiring maternity leave have withstood constitutional challenge, in no small measure thanks to Marshall,4 but measures to combat pornography have been constitutionally crippled. A case in point is the antipornography ordinance of Indianapolis, Indiana, enacted in 1984 and struck down in its entirety the very next year by a federal appeals court.5

* Sterling Professor of Law, Yale University. Law Clerk to Thurgood Marshall, 1964-65, when the Justice served as a judge on the United States Court of Appeals for the Second Circuit. The author gratefully acknowledges the assistance of Jennifer K. Brown and Daniel Hildebrand in the preparation of this article.
1. 381 U.S. 479 (1965).

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Campaigns to curb pornography have been commonplace in American history, and the reasons underlying them manifold. What is distinctive about the feminist campaign is that it is predicated upon the egalitarianism that inspires the entire feminist movement. Certainly not all feminists support the campaign against pornography, but many of those who do justify their action in terms of equality. Their concern is not with the offensiveness of sexually explicit images, but with the use of those images to eroticize the subordination of women. The Indianapolis measure was an attempt to curb an industry whose product arguably creates and perpetuates inequalities between the sexes, not just in the bedroom, but also in the workplace and the university, and for that matter throughout society. As Andrea Dworkin and Catharine MacKinnon, leading figures in the antipornography campaign, have insisted on numerous occasions, the Indianapolis ordinance should be seen as a civil rights law.

In striking down the measure, Judge Frank Easterbrook, author of the appeals court opinion, relied on the First Amendment provision protecting freedom of speech: however noble its purpose, the ordinance abridges the freedom of speech guaranteed by the Constitution. Some have responded to Easterbrook by pointing to the harm caused by pornography and insisting that state policy permitting the perpetuation of this harm is at odds with the Fourteenth Amendment and its promise of equality. This response does not, however, appear wholly satisfactory. Even granting that this harm exists, such a response leaves us confronting the familiar conflict between liberty and equality, not knowing exactly which one should be given priority. Thurgood Marshall and others who look to him for guidance have insisted


upon the centrality of equality to the constitutional order, but never to the point of excluding liberty or making freedom of speech a secondary value. Indeed, some of Marshall's most memorable decisions, including one on obscenity, celebrate freedom of speech. Like most liberals, Thurgood Marshall wants both liberty and equality, and recognizes that these values feed on one another. What is therefore needed at this point is not simply the assertion of equality as a countervalue, but a second look at liberty: is the Indianapolis ordinance in fact a violation of the freedom of speech?

In addressing this issue it is important to avoid the approach of Judge Easterbrook which treats the ordinance as a single unified whole. The ordinance carefully distinguishes among four offenses, and the differences among these should be respected. One provision prohibits coercing people to perform in the production of pornography; a second prohibits forcing people to view pornography; a third addresses physical assaults inflicted by someone moved or provoked by a pornographic work; and a fourth prohibits trafficking in pornography. All four offenses share a common enforcement structure—no criminal sanctions, but cease-and-desist orders and damages, issued by an administrative agency and subject to full judicial review. The ordi-


10. Section 16-15 makes unlawful those discriminatory practices listed in § 16-3 (g), including these pornography-related offenses:

(4) Trafficking in pornography: The production, sale, exhibition, or distribution of pornography.

(5) Coercion into a pornographic performance: Coercing, intimidating or fraudulently inducing any person, including a man [or] transsexual, into performing for pornography, which injury may date from any appearance or sale of any product(s) of such performance.

(6) Forcing pornography on a person: The forcing of pornography on any woman, man, child, or transsexual in any place of employment, in education, in a home, or in any public place.

(7) Assault or physical attack due to pornography: The assault, physical attack, or injury of any woman, man, child, or transsexual in a way that is directly caused by specific pornography.

Indianapolis and Marion County, Ind., City-County General Ordinance No. 35 § 1, § 16-3 (June 4, 1984) [hereinafter Indianapolis Ordinance]. Section 16-26(d) allows the equal opportunity advisory board to issue cease-and-desist orders against anyone found to be engaging in an unlawful discriminatory practice and to award damages to victims of discriminatory practices that violate the Code. The full text of the ordinance can be found in DWORKIN & MACKINNON, supra note 7, at 106.
nance contains a strong severability provision and thus recognizes that different offenses present different First Amendment issues, some more difficult than others.

The least problematic provisions of the ordinance are those that protect against coerced performance in the production of pornography and the forced viewing of pornography. They are predicated on the claim that many persons are forced to participate in the production of pornography, and that people are sometimes forced to view pornography in situations ranging from the workplace to the intimacy of the home.

In judging these provisions, I begin with the view that the First Amendment is an instrument of democratic self-governance. It calls for wide and stringent protection for those who speak, or write, or otherwise communicate to the public—protection not just for the words they choose, but also for the means of producing and distributing their speech. State regulation of the means of producing and distributing speech are commonplace, but the First Amendment requires that those regulations not impoverish public debate. Imagine, for example, a statute strictly rationing the use of paper to produce political tracts or one aimed at preventing litter which banned all handbilling on public streets. Such measures would be unconstitutional.

There is, however, no comparable danger with the provisions of the Indianapolis ordinance respecting “coerced performance” or “forced viewing.” Like the examples just mentioned, they do in fact regulate the means of producing and distributing speech, and as such inevitably would have some effect upon public discourse, but the exercise of state power in both instances is strictly limited by the notion of “coercion” or “force.” These provisions require that pornography be produced without forced labor and distributed to willing recipients. Through operation of cease-and-desist orders, and as a result of the deterrent effect of liability rules, speech that violates these restrictions would be withdrawn from the public domain. But that is not a loss to be regretted, any more than we regret the loss of speech attributable to rules against plagiarism or copyright infringement. The “forced viewing”

and "coerced performance" provisions seek to protect the freedom of performers and the freedom of the audience, and thus tend more to promote than to destroy First Amendment values.

Of course, "coercion" and "force" are terms capable of great expansion and manipulation. But they appear throughout the law, both in common law rules and in statutes, and there is no reason to believe that they are especially lacking integrity when used in this context. As is always the case, they need further limitation and specification, but Judge Easterbrook never gave the courts the opportunity to develop the necessary limiting rules. He declared the ordinance invalid on its face. He did not base this preemptory ruling on the expansiveness of the notion of "coercion" or "force," but apparently objected to the partiality of the regulation: pornography may not be the only form of literature or art where there is "coerced performance" or "forced viewing," yet the legislature only focused on it.17

Admittedly, the legislature could have proscribed "coerced performances" in the production of all sexually explicit material, or for that matter, all forms of art or literature, or could have prohibited the "forced viewing" of

16. The ordinance made a gesture in this direction by providing that, in the context of "coerced performances":

(A) Proof of the following facts or conditions shall not constitute a defense:
   I. That the person is a woman; or
   II. That the person is or has been a prostitute; or
   III. That the person has attained the age of majority; or
   IV. That the person is connected by blood or marriage to anyone involved in or related to the making of the pornography; or
   V. That the person has previously had, or been thought to have had, sexual relations with anyone, including anyone involved in or related to the making of the pornography; or
   VI. That the person has previously posed for sexually explicit pictures for or with anyone, including anyone involved in or related to the making of the pornography at issue; or
   VII. That anyone else, including a spouse or other relative, has given permission on the person's behalf; or
   VIII. That the person actually consented to a use of the performance that is changed into pornography; or
   IX. That the person knew that the purpose of the acts or events in question was to make pornography; or
   X. That the person demonstrated no resistance or appeared to cooperate actively in the photographic sessions or in the sexual events that produced the pornography; or
   XI. That the person signed a contract, or made statements affirming a willingness to cooperate in the production of pornography; or
   XII. That no physical force, threats, or weapons were used in the making of the pornography; or
   XIII. That the person was paid or otherwise compensated.

Indianapolis Ordinance, supra note 10, § 1, § 16-3(g)(5).

any film or art. Yet there was ample basis for it to believe that these evils are sufficiently prevalent in the production and distribution of pornography of the type proscribed, as to warrant separate and immediate treatment. There is nothing arbitrary about the partiality and it works to the advantage of the First Amendment. The legislature need not burden all speech to address the harms produced by certain types of speech. Of course, as a consequence of the legislative selectivity, films with sexual explicitness would be saddled with rules that are not encountered by other types of films that arguably involve “coerced performance,” for example, those films involving torture or violence in a nonsexual setting. But this type of differentiation cannot be compared to the state disadvantaging one political candidate or position over another, which is a form of partiality that is unfair and an improper interference with popular sovereignty. In the electoral setting, the assumption is that the state can claim no justification for the partiality of its regulation other than the desire to favor one candidate. In the case of the Indianapolis ordinance, the state is trying to protect against coercion in the least intrusive way possible.

Similar considerations apply, though perhaps with less force, to the provision of the ordinance regarding pornography that causes assaults or physical attacks. This aspect of the ordinance is a response to situations in which a bizarre sexual crime, for example, a gang rape on a pool table in a barroom, closely tracks an act described and eroticized by a particular work of pornography. Like all the other offenses specified in the ordinance, this one is framed as a prohibition that is enforceable by both cease-and-desist orders and damage awards. But because it is conditioned upon a showing that there was in fact an assault, which was directly caused by a pornographic work, this provision should be understood as establishing a system of accountability, as creating liability for producers and distributors of pornography for physical attacks that might be triggered by one of their works. After liability is established, a cease-and-desist order might be issued, but the damage award and the prospect of other claims would discourage any further circulation and make the cease-and-desist order unnecessary or of only marginal importance.

At first glance, it would seem that this provision of the ordinance could be squared with the First Amendment on the theory that it treats works that cause sexual assaults as though they are incitements or solicitations to violence. The First Amendment does not bar the state from punishing both the rioter and the person who incited the riot. A problem arises, however, because we can never be certain as to which utterances might constitute an incitement. We fear that by imposing liability upon someone for speech that is shown to be an incitement, we might discourage any further speech that does not constitute an incitement and that should not be discouraged. The danger of this
chilling effect—deterring what should not be deterred—is manifest when criminal sanctions are threatened, but it is also present when there is a risk that damages will be awarded. Indeed, in the libel area we recognize that allowing a person to recover damages for an injury to reputation from false statements might chill or discourage the press from quite proper and important reportage or comment. Similarly, there is reason to fear that allowing a victim of a rape or physical assault to recover damages from the publisher of a magazine or producer of a film that led to a sexual attack might dangerously chill or discourage all kinds of publications or films, many of which are essential for free and open debate on issues of public importance.

The risk of this chill cannot be denied. Yet we learned to cope with it in other branches of the law, including libel, recognizing that it is a price that must be paid in order to accommodate conflicting values. A similar attitude seems appropriate here. The Court’s response to the possible chill of libel laws was not to transform the First Amendment into a blanket prohibition of such laws; rather the Court acted more circumspectly. It barred criminal laws against libel of public officials and created specific limitations to the cause of action for damages, for example, by requiring proof that a speaker knew or had reason to know what was said was false. In a similar spirit, the system of accountability established by the Indianapolis ordinance seeks to minimize the risk of a chilling effect. There is no criminal liability, only a right to sue for damages, and the person seeking to recover damages is required to show that: (1) there was a “direct” causal relation between the assault and the pornography; (2) the assault was tied to some “specific” pornographic work; and (3) the defendant knew or had reason to know that the work met the statutory definition of pornography.

Clearly, the Indianapolis City Council might have done more to minimize the chilling effect. For example, the ordinary standard of proof in civil cases might be increased to require a clear and convincing demonstration of the direct causal link between the assault and the pornography. Or proof might be required that the defendant intended or wanted such an attack to occur, or was recklessly indifferent to whether it might occur. As enacted, the ordinance requires the defendant in a damage action to have known that the work met the statutory definition of pornography, but it does not require a linkage between the intention or desires of the defendant and the sexual assault. The solicitation or incitement analogy would seem to suggest such a

19. Id. at 273.
20. Id. at 279-80.
21. Indianapolis Ordinance, supra note 10, § 1, § 16-3(g)(7), (8).
linkage, but that may reflect principles governing the criminal law rather than the requirements of the First Amendment.

The judgment of whether these additional safeguards are needed depends on a nuanced assessment of the risk of a chilling effect juxtaposed against the need to prevent sexual assault. As with the limiting rules surrounding the use of terms like "coercion" and "force," some of these safeguards might have been developed on a case-by-case basis as the ordinance was applied over time. But, once again, Easterbrook was too impatient for that: striking down the ordinance before it was ever applied, he denied the courts the opportunity so effectively used in the libel context to seek an accommodation of conflicting values by crafting additional safeguards. He objected to the system of accountability within the ordinance itself, complaining that the definition of pornography upon which it rested made actionable only those works that advanced a certain viewpoint regarding women, specifically, the view that women are sexual objects to be used by men.22 Pornography was defined in the ordinance as the "sexually explicit subordination of women,"23 and the system of accountability was thus limited to that which embodied or advanced such a view of women. Easterbrook saw this as a forbidden instance of viewpoint discrimination.24

Like every law, the Indianapolis ordinance embodies a viewpoint. It promotes the view that women should not be subordinated and should not be subject to physical violence. It also exposes films and productions which embody or express a contrary view to a system of accountability for sexual assaults that might result from the expression of that viewpoint. As with the "coerced performance" or "forced viewing" provisions, a certain genre of literature or art—that which is sexually explicit and subordinates women—is subjected to risks that others are not. For example, there is no system of accountability for works that cause physical harm to, or otherwise promote the subordination of, other groups (e.g., blacks or Jews), regardless of whether these works are sexually explicit. Nor is there a system of accountability for sexual assaults on women that might somehow be triggered by sexually explicit works that celebrate the power of women or that view women on equal terms.

However, these limits on the system of accountability do not strike me as fatal. The legislators may well have decided that the likelihood of physical assault triggered by films or magazines is far greater for women than other disadvantaged groups. Other groups may be subjected to what is euphemistically called "hate speech" today, but they do not confront the level of expo-

23. See infra note 28 (statutory definition of pornography).
sure presented by the pornography industry.  

Moreover, as to sexually explicit works that present women on equal terms, the legislature was surely entitled to take the position that the risk of physical violence triggered by such works is so negligible or trivial that it does not justify regulation.

These are the kind of judgments that legislators make all the time, and it is hard to see why the First Amendment denies them the opportunity to do so here. The Indianapolis City Council could have created a system of accountability for all physical assaults directly caused by a film or magazine; in that instance, the analogy to the law imposing liability for libel or incitement to violence would be stronger. But the First Amendment would not be served by requiring a system of such total regulation, for the risk of a chilling effect would be considerably broadened. In that sense, the partiality of the regulation serves First Amendment values rather than interferes with them. The partiality of the regulation may skew public debate by heightening the risks associated with the production of one art form. But disadvantaging one, though only one, form of art that leads to violent victimization imposes little distortion on the democratic process and at the same time is narrowly tailored to protect women from severe injuries.

In another branch of First Amendment law, one concerning the regulation of public fora, the Supreme Court has developed a body of decisions that condemns viewpoint discrimination and that might be thought to lend support to Easterbrook’s position. The imagined situation is a street corner with two speakers holding forth—one in favor of the war, one opposing it—and the decisions in question deny the state the power to discriminate or choose between these speakers—to arrest one speaker, but not the other. One can well understand the power of the principle against viewpoint discrimination in the imagined context, but in truth that principle has only limited applicability to the system of accountability enacted by the Indianapolis City Council.

To begin with, one should note that the norm against viewpoint discrimination, like any antidiscrimination rule, does not forbid all distinctions but only unjustified ones. The state cannot choose between two speakers on the street corner on the ground that it would like to hear one viewpoint discussed rather than the other. That would be an impermissible distortion of public debate. It can, however, arrest one of the speakers on the ground that he or she is inciting a riot. Similarly, while the system of accountability established

25. See, e.g., Dworkin & MacKinnon, supra note 7, at 15-16, 24-30 (sexism is more pervasive than other forms of discrimination because pornography has, throughout history, consistently defined women in unequal roles); MacKinnon, supra note 7, at 163-97 (same); Pornography: Research Advances & Policy Considerations (Dolf Zillman & Jennings Bryant eds., 1989).

26. See, e.g., Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972) (invalidating Chicago ordinance that barred all pickets near schools except those by organized labor, on the ground that the city had no compelling interest in favoring labor pickets).
by the Indianapolis ordinance distinguishes between two viewpoints that may be furthered by sexually explicit work—women as equal versus women as subordinate—that difference of treatment can be justified on the ground that one type of work is more likely than the other to provoke physical assaults. There is ample evidence indicating that this was the reasoning that led the members of the City Council to limit the system of accountability as they did, but their intent is not controlling. In judging the action of the police officer who arrests the speaker, what is crucial is not the actual motivation for choosing between speakers, but whether an independent objective basis exists for that choice. In this case, the proper inquiry is whether there is a basis for distinguishing between these speakers because one, but not the other, is likely to lead to sexual violence, a harm the state may validly seek to prevent.

Public forum cases not only permit the state to choose among speakers, provided the distinction is not based on a judgment about the merits of the idea being expressed, but they also bear witness to a general First Amendment rule that allows state regulations that have the effect of stopping or discouraging speech. As these cases indicate, the First Amendment does not act as an impenetrable shield around a speaker, even one holding forth in a public forum, but rather forces the state to bear the burden of giving an especially urgent or weighty justification—a compelling one—for any regulation that has a silencing effect. Annoying pedestrians is not enough of a justification, but preventing a riot is. The Indianapolis system of accountability will have a silencing effect, but surely Indianapolis has a compelling interest in deterring sexual attacks and compensating victims. Indianapolis might have been content to hold responsible only those individuals who engaged in the physical attack, but there are considerable advantages—arguably compelling ones—for going further back in the causal sequence. Most important, doing so makes it less likely that the attack will ever occur; it operates as a double check and makes the prospect of a damage recovery more realistic.

27. The Indianapolis City Council found that:

Pornography is a discriminatory practice based on sex which denies women equal opportunities in society. Pornography is central in creating and maintaining sex as a basis for discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it promotes, with the acts of aggression it fosters, harm women's opportunities for equality of rights in employment, education, access to and use of public accommodations, and acquisition of real property; promote rape, battery, child abuse, kidnapping and prostitution and inhibit just enforcement of laws against such acts; and contribute significantly to restricting women in particular from full exercise of citizenship and participation in public life, including in neighborhoods.

Indianapolis Ordinance, supra note 10, § 1, § 16-1 (a)(2).
This leaves for consideration the trafficking provision of the Indianapolis ordinance, which I have saved for last because it presents the greatest challenge to freedom of speech. Unlike the "physical assault" provision, it is not aimed at the consequences of the published material, and unlike the "coerced performance" and "forced viewing" provisions, it is not limited to means of production or distribution that are coercive, but rather it seeks to stop all production and distribution of such material. In that sense, the offense consists of the production and distribution of the material itself, not the consequences it might produce, nor the coercion used in its production or distribution; for that reason, the tension with the First Amendment is most acute.

This tension is acknowledged in the ordinance itself. The ordinance defines pornography in general terms as "the graphic sexually explicit subordination of women," and then identifies six different categories of material. The offenses of "physical assault," "coerced performance," or "forced viewing" could involve material from any of the six categories, including the last, which seems aimed at so-called soft-core pornography: "Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display." This last category of publication appears broad enough to include the familiar *Playboy* or *Penthouse* but is beyond the reach of the trafficking offense. That provision applies only to the most violent and brutal forms of pornography, which are described by the other five categories. Category (2), for instance, consists of material that presents women "as sexual objects who experience sexual pleasure in being raped." Category (3) consists of material that presents women "as sexual objects tied up or cut up or..."
mutilated. 31

This limitation on the trafficking offense—removing soft-core pornography from its reach—decreases its likely efficacy. Feminists do not attack pornography because it is shocking or indecent, but rather because it works to perpetuate the subordination of women. The underlying premise of such regulation is that pornography leads men to form a powerful association between sexual arousal and female subordination, and thus creates and sustains barriers to women's equality that are rooted in male sexual identity. 32 There is a question, at least in my mind, as to whether the feminist campaign against pornography is premised on an over-valuation of the role of artistic or literary material as a key determinant in the socialization process of men and the formation of their sexual identity, and those doubts grow in so far as the attack becomes confined to the more extreme categories of pornography. My hunch is that brutal magazines or films of the type covered by the trafficking offense play a negligible role in our culture, and in the socialization of most men or in the formation of their personalities. 33 This does not mean that the ban on trafficking is unjustified, but only that the justification is more attenuated than might first appear and is often buttressed by conceiving of it as the first step in a long evolutionary process (start with the worst and the lesser will fall).

While narrowing the focus of the trafficking offense lessens its likely contribution to the achievement of equality, it also lessens the force of the First Amendment objection. Seen in its proper form, the question posed is whether the First Amendment protects the production and distribution of sexually explicit material that presents women as sexual objects who, for example, enjoy sexual pleasure when being raped. This kind of material hardly seems central to democratic debate and in fact seems included within that larger category of material—"obscenity"—that the Supreme Court has routinely allowed to be curtailed, even by threat of criminal prosecution.

Judge Easterbrook notes that the definition of pornography in the ordinance does not meet the criteria that the Supreme Court laid down in Miller v. California 34 to mark the outer bounds of obscenity censorship. According to that case, the material must (1) appeal to a prurient interest in sex, (2) portray sexual activity in a patently offensive way, and (3) lack serious social, aesthetic, or political value. 35 Judge Easterbrook is entirely correct in noting

31. Id.
32. See MacKINNON, supra note 7, at 172 ("What pornography does goes beyond its content: it eroticizes hierarchy, it sexualizes inequality. . . . It institutionalizes the sexuality of male supremacy . . . .''); see also ANDREA DWORIN, PORNOGRAPHY: MEN POSSESSING WOMEN 241 (1981) (pornography's main theme is male power over women).
33. See generally Gey, supra note 7, at 1606-07.
34. 413 U.S. 15 (1973).
35. Id. at 24.
that the Indianapolis ordinance does not use the *Miller* formula to define the proscribed material. But, unlike Easterbrook, I do not believe this omission justifies invalidating the trafficking provision in the preemptory way that he did.

First of all, the *Miller* constitutional definition of obscenity has been used by the Supreme Court on a case-by-case basis to determine whether some particular criminal prosecution or civil interdiction could stand. There is no requirement that the state statute or local ordinance itself incorporate, in so many words, the *Miller* definition. In fact, most of the state and municipal obscenity statutes that have come before the Court have had no definitions of obscenity whatsoever, and the Court did not respond to this omission by invalidating those laws. Even when it ruled in favor of speech, it protected the material and left the statute standing. For example, the Supreme Court set aside Massachusetts’s attempt to censor the book *Fanny Hill* on the ground that the material lacked one of the requisite elements of the constitutional definition of obscenity, but the Court did not invalidate the state statute.36 A similar method could have been applied to the Indianapolis ordinance: the court could have waited to see whether the banned material actually met the constitutional definition of obscenity. It would be hard to imagine material falling within the trafficking offense that is not patently offensive or does not appeal to a prurient interest in sex. Even though the ordinance was not self-limiting, a judge could have waited, as the Court did with *Fanny Hill*, to see whether the particular work in question had serious political or aesthetic value.

There was, moreover, no need to assume that the Supreme Court’s current definition of obscenity—the so-called *Miller* test—is the only possible test for identifying sexually explicit material that is censorable. At the moment there is a settled quality to the *Miller* test, but in truth it is a relatively recent creation. The Court’s definition of obscenity was first suggested in a 1957 decision,37 it evolved during the 1960s,38 and then received yet another reformulation in *Miller* in 1973.39 The *Miller* definition is but a gloss upon the First Amendment, trying to accommodate three different considerations: (1) an appreciation of the dangers to social norms and even to physical well-

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38. *See, e.g., A Book Named “John Cleland’s Memoirs of a Woman of Pleasure,”* 383 U.S. at 413 (holding that sale of book with some social value is not constitutionally protected where the seller’s emphasis is solely on the book’s sexual content); *Mishkin v. New York*, 383 U.S. 502 (1966) (holding that prurient-appeal requirement of the prevailing obscenity test should be assessed with regard to the interests of the intended audience).

being arguably presented by obscenity; (2) respect for the original intent of the First Amendment, on the theory that the framers did not think that by protecting "the freedom of speech" they were protecting free circulation of obscene publications; and (3) a commitment to broaden the gambit of public discourse as a way of furthering democratic values. The *Miller* definition might be taken to represent a sensible accommodation of these conflicting concerns, yet there is no reason to believe that it is the only possible accommodation, or that it should preclude other efforts. In fact, the Supreme Court has itself reformulated the constitutional bounds of state power to interfere with speech when it has dealt with sexually explicit material depicting or aimed at children,40 or material that is carried over the public airways.41 The Indianapolis ordinance invited another reformulation, for another and perhaps more worthy cause: sexual equality.

In objecting to the trafficking provisions of the Indianapolis ordinance, Judge Easterbrook again complained not only of the fact that the definition of pornography in the ordinance is not coextensive with the *Miller* test, but also that it is viewpoint specific:42 pornography is defined not simply in terms of sexual explicitness, but also requires the subordination of women, for example, the depiction of women as sexual objects who experience sexual pleasure in being raped, cut up or mutilated. A work that is sexually explicit, but expresses a revulsion toward such horrors would not be covered. In that sense, the trafficking provision of the Indianapolis ordinance is indeed viewpoint specific, but that should not prevent it from constitutionally being applied to a work that otherwise met the *Miller* test.

All obscenity ordinances seek to further some particular viewpoint—for example, about the proper attitude toward sexual behavior or what kind of sexual activity should be publicly displayed—and are allowed to stand, notwithstanding the ban against viewpoint discrimination, because they are based, not on disagreement over the idea expressed, but on the harm to social norms or values that would be occasioned by the distribution of the material. Most traditional obscenity statutes are not viewpoint specific, but imagine an obscenity ordinance specifically aimed at sexually explicit films that eroticize sodomy and present it as a highly pleasurable form of sexual activity. Presumably, its viewpoint specificity would not prevent that ordinance from be-

40. See Ginsberg v. New York, 390 U.S. 629, 636-38 (1968) (holding that the judgment of whether material directed to minors is pornography is based on its appeal to the prurient interests of juveniles, not adults); New York v. Ferber, 458 U.S. 747, 756 (1982) (holding the *Miller* test need not be satisfied for sexual materials depicting children).

41. Federal Communications Comm'n v. Pacifica Found., 438 U.S. 726, 748-50 (1978) (noting that broadcasting receives "the most limited First Amendment protection because of its pervasiveness and accessibility to children").

42. American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 332 (7th Cir. 1985), aff'd per curiam, 475 U.S. 1001 (1986).
ing constitutionally applied to a film that otherwise met the Miller criteria. The film could be banned if it appeals to a prurient interest in sex, is patently offensive, and is without serious aesthetic or political value. Similarly, the fact that the Indianapolis ordinance defines the limits of the offense in terms of a specific viewpoint—that it is wrong to present women as sexual objects who enjoy rape—would not put it outside the bounds the Supreme Court has established for obscenity regulation.\footnote{43}

Recently, the Supreme Court issued a stern warning against the state using the broad power it has over a so-called unprotected category of speech to favor one side in a political debate.\footnote{44} The case in question involved “fighting words,” not obscenity, but Justice Scalia, writing for the majority, repeatedly used an example from the obscenity field to argue his position. He thought there was no difference between using a partial or selective ban on “fighting words” to advance the cause of tolerance and manipulating the “obscenity” exception to stifle criticism of government. He took as his starting point the proposition that it would be unconstitutional to “enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government.”\footnote{45}

It may seem that the Indianapolis trafficking provision runs afoul of Scalia’s stricture since that provision is linked to the cause of equality: only those images or words that subordinate women or somehow promote their subordination, as opposed to their elevation or equal treatment, are proscribed. But Justice Scalia made clear that he is not proscribing all selective regulations, nor even those that embody a content discrimination, but only those in which, as in the obscenity-city government example he used, the content discrimination is unrelated to the “distinctively proscribable content” of the speech.\footnote{46} He is complaining of extraneous content discrimination.

Justice Scalia’s hostility toward content discrimination is based on the fear that it tends to “drive certain ideas or viewpoints from the marketplace,”\footnote{47} but he does not see such a danger when the content discrimination that defines the selective regulation is related to the reasons why the state is allowed to regulate the category of speech in the first place.\footnote{48} Accordingly, he ac-

\footnote{43} See Schauer, \textit{supra} note 8, at 768.
\footnote{45} \textit{Id.} at 2543.
\footnote{46} \textit{Id.}
\footnote{47} \textit{Id.} at 2545 (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 112 S. Ct. 501, 508 (1991)).
\footnote{48} “When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is prescribable, no significant danger of idea or viewpoint discrimination exists.” R.A.V. v. City of St. Paul, 112 S. Ct. at 2545.
knowledged that the federal government could choose to criminalize only those threats of violence that are directed against the President, since, as he wrote, "[T]he reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President." 49 Similarly, while the trafficking ban does indeed single out certain sexually explicit images or material, specifically those that subordinate women, the reason for that selection is closely related to one of the reasons why obscenity is proscribable in the first place: to protect women from violence and sexual abuse. 50

Thus far I have suggested, contrary to Easterbrook’s opinion, that the trafficking provision of the Indianapolis ordinance is consistent with the Supreme Court’s stance on obscenity. At the most, one can say that some applications of the Indianapolis ordinance might be prohibited, depending upon, first, the specific nature of the material, and second, the specific limits placed on the state under the Miller test or some variant of it. If the Supreme Court’s position is still good law, then the trafficking provision of the Indianapolis ordinance should have been allowed to stand, though with limits applied to it on a case-by-case basis. A deeper objection to the trafficking provision comes from those who have serious misgivings about obscenity regulations in general, a group that includes a good portion of the liberal community, including many who strongly support the feminist movement. They doubt the validity of the trafficking provision of the Indianapolis ordinance not because it conflicts with what the Supreme Court has said is permissible in regulating sexually explicit material, but rather because they believe that the Court’s willingness to tolerate obscenity regulation is a serious compromise of the commitment to protect the freedom of speech.

One branch of this critique of obscenity regulation strikes me as unpersuasive. It is libertarian in nature, and decries the Indianapolis trafficking provision, as well as any obscenity statute, because such statutes interfere with the freedom of artists, writers, and publishers to convey their views and ideas to the public. These critics view the First Amendment as a protection of indi-

49. Id.
50. The coerced performance, forced viewing, and physical assault provisions are selective regulations that involve content discrimination, but the content discrimination is not extraneous. In any event these provisions clearly fall within a number of the exceptions Scalia created to his rule. One exception allows the state to accord differential treatment to a content-defined subcategory of proscribable speech if the subcategory is associated with the so-called “secondary effects” of speech; as he indicated, “A State could, for example, permit all obscene live performances except those involving minors.” Id. at 2546. A second exception, crafted with an eye toward Title VII sexual harassment claims, allows the state to make content-based distinctions in cases where the law is “directed not against speech but against conduct” and the speech is “swept up incidentally” as part of the regulatory scheme. Id.
individual autonomy: a freedom to speak, to say whatever one wishes. To me, however, such an interpretation of the First Amendment is unappealing either as a rule of law or as a philosophic principle, for no reason is given to prefer the autonomy of the speaker as opposed to the autonomy of those who might be harmed or offended by the speech. Filmmakers treasure the freedom to make the kinds of films they wish, and writers and publishers are equally insistent on their freedom. But it is not clear why their freedom should be given a priority over the freedom that other people have to control the kinds of works they are exposed to or the kind of environment in which they live.

A second critique of the Supreme Court's obscenity doctrine—one associated with the work of Alexander Meiklejohn, and more persuasive to me—sees the First Amendment more as an instrument of collective self-governance than of individual autonomy. It casts the underlying theory of the First Amendment in democratic terms, as a way of ensuring the essential precondition for popular deliberation and choice—robust public debate. Obviously, speech that specifically addresses some question of government policy has an immediate and direct claim to protection under this theory of free speech. But art and literature, even that which makes no mention of politics and government affairs, is also protected. As Meiklejohn insisted, "I believe, as a teacher, that the people do need novels and dramas and paintings and poems 'because they will be called upon to vote.'" Art, all art, even the sexually explicit, can be politically valuable and as such is most assuredly part of what I have referred to as public debate—that sphere of human activity that the First Amendment seeks to protect and enlarge.

Traditional obscenity regulation threatens to curtail and diminish the robustness of public debate without offering a countervalue comparable to that underlying laws prohibiting incitements to violence or making libel actionable, and thus should be viewed with great suspicion. The same danger to free speech is presented by the trafficking provision of the Indianapolis ordinance, even though it has a narrower compass than the typical obscenity regulation. The ordinance seeks among other things to interdict sexually explicit works of art or literature that portray women as experiencing sexual pleasure during rape. Although rape or mutilation is horrible and is to be condemned in

51. See Fiss, Why the State?, supra note 13, at 785.
52. See ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948) (First Amendment protects discussion of different views as a principle of self-government); Alexander Meiklejohn, The First Amendment is an Absolute, 1961 SUP. CT. REV. 245, 255 (First Amendment protects thoughts and actions necessary for governance).
54. This point is addressed at greater length in Owen M. Fiss, State Activism and State Censorship, 100 YALE L.J. 2087, 2091-92, 2103-04 (1991).
the most emphatic way, this law regulating the expression of views about, or
depiction of, rape should be no more acceptable than a law that banned traf-
ficking in works of art or literature that extolled the pleasures or desirability
of adultery or sadomasochism.

Some may see a difference between rape, on the one hand, and adultery or
sadomasochism, on the other, inasmuch as the raped woman is an involun-
tary victim of a criminal attack, while participation in adultery or sadomas-
ochism is presumably both consensual and generally legal. It is also true that
rape and the fear of rape, unlike adultery and perhaps also sadomasochism,
perpetuate the subordination of a disadvantaged group and thus offend the
egalitarian aspirations of the Constitution understood in the most general
terms. All this might be acknowledged, yet it does not require a different
result under the First Amendment. Democracy requires that all laws, in-
cluding the constitutional guarantee of equality, always be open to reconsid-
eration, revision and repeal. I emphatically reject the notion—made famous
in our time by Robert Bork—\(^5\) that the First Amendment leaves unprotected
advocacy of unlawful or even unconstitutional conduct. To borrow a formu-
lation from the Supreme Court, under the First Amendment there is no such
thing as a false idea.\(^6\)

This view of the First Amendment does not leave the state powerless. The
state is of course free to outlaw the undesirable conduct advocated, and all
incitements to unlawful action. For example, while the state may not pro-
hibit the general advocacy of the violent overthrow of government, it is cer-
tainly free to make it a crime to violently overthrow the government, or,
more significantly, to incite others to engage in that conduct.\(^7\) Incitement
occurs when individuals are being urged to engage in the proscribed conduct
and the matter has passed beyond the deliberative sphere. There is no more
room for speech.

Indianapolis may have been exercising this well-recognized state preroga-
tive when it provided for damages for someone assaulted as the direct result
of a specific pornographic work. Conceivably, the trafficking provision might
also be understood as a means to curb incitements to violence. In so far as it
is backed by a damage remedy, it may discourage speech that incites vio-
lence. It may, however, be extremely difficult to measure damages, since the
violence has not yet occurred, and as a result the trafficking offense is likely
to be enforced only through cease-and-desist orders. Even then, the incite-

\(^7\) *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (proscriptions against advocating force only unconstitutional when advocacy has become an incitement to imminent lawless action); see also *Kalven, supra* note 39, at 119-236 (outlining development of First Amendment exception for incitement).
FREEDOM AND FEMINISM

The state should be able to stop the general advocacy of an idea when that advocacy has the effect of interfering with the speech rights of others. In that instance, the state ban on speech does not restrict or impoverish public debate, but paradoxically enough, broadens it, for it allows all voices to be heard. The state acts not as a censor, but rather as a parliamentarian, requiring some to shut up so others can speak. Arguably, the trafficking provision of the Indianapolis ordinance could be justified on the ground that pornography silences women. But once again, to avoid unleashing a general censorial power, one must be careful to delineate two different kinds of silencing dynamics.

One is ideational. It is derived solely from the content of the message. Pornography, especially of the type that is the subject of the trafficking provision, may be understood as a demand or plea that women be silent, or somehow be silenced through violence. It is as though the pornographer said "women should not speak" or "women should not be taken seriously." A question can be raised as to whether pornography, even of the brutal kind covered by the trafficking provision, can be reduced to, or can be said to promote, this idea. But even if pornography can be understood in this way, I am wary of using the idea alone as a predicate for state regulation. My reluctance stems in part from doubt that the plea or demand for women's silence is, in itself, effective. Saying something does not make it so. I also fear that the recognition of such a silencing dynamic would remove from public discourse a whole category of ideas, namely, those that demand that various people be silenced or kept in silence ("Kill the Jews," "Reinstate Slavery," "Establish a Dictatorship of the Proletariat"). Life on this planet would be significantly better without these ideas in circulation, but allowing the state to ban them would give it the power to determine which ideas should enter or become part of public debate, a power that is inconsistent with the value entrusted to the First Amendment—popular sovereignty.

58. See Fiss, supra note 54, at 2100-01 (state should ensure that all views are heard).
The second silencing dynamic is sociological. It complains not just of the idea ("women should be silenced"), but of the conditions and circumstances under which the idea is circulated and distributed. It complains not of de Sade, or of the writing of a book, or the making of a film that eroticizes rape, but of the industrial dimensions of pornography: the constant bombardment in our culture of books, magazines, and films that propound this idea. It is not any particular work of art or literature that is the source of concern, but rather the fact that women know that in any place—Indianapolis, New York or Rome—there is a flood of books, magazines, films, or video cassettes that present them as sexual objects who experience sexual pleasure in being raped, cut up, or mutilated. It is this social practice, rather than any particular book, magazine or film itself, that induces fear in women and inculcates in them the habit of silence, or that leads men not to listen to what women say or not to take them seriously, at least about the terms of their social existence; it is this social practice that impoverishes public debate and gives substance to Catharine MacKinnon's rage: "We are stripped of authority and reduced and devaluated and silenced."60

Many factors account for the silencing of women. All the fault does not lie with the pornography industry, even less with the especially brutal kind of pornography covered by the trafficking ban. One can only wonder how much of this material is in circulation, taking its toll on the consciousness of men and women or otherwise shaping our culture. But there is nothing in the Constitution that precludes a legislative body from deciding that the silencing of women occasioned by the circulation of this kind of material is of sufficient magnitude to justify an attempt at regulation. Once again, this is a matter that can well be trusted to legislative judgment.61

There is a tradition in First Amendment cases of the judiciary making an independent assessment of the facts that are offered in support of an order stopping the circulation of a publication or film. This practice—most pronounced during the Warren Court's administration of its obscenity doctrine62—stems from the special significance attributed to speech, lying as it does at the heart of our democratic system. Such special scrutiny is not wholly appropriate in this context, for speech appears as both the object and justification of regulation; the speech of those producing and distributing

60. MacKinnon, supra note 7, at 193. A particular variety of this harm arises to the extent that the materials covered by the trafficking offense present rape, mutilation, and battering as sexually arousing entertainment and thus trivialize such acts of violence in the eyes of those (men) in charge of the legislative and administrative machinery of the state.

61. See Michelman, supra note 59, at 307.

pornographic material is restricted in order to enhance the speech of women. Under these circumstances, a highly skeptical attitude towards legislative judgments of fact might work against the preferred freedom.

However, even if legislators are granted a measure of deference, there is no denying that the theory I have outlined for sustaining various applications of the trafficking ban as a protection of speech would tax the imaginative and temporal resources of the judiciary. The narrow technical question before the court in each instance would be whether the film or publication met the definition of pornography set forth in the ordinance. But in order to meet the requirements of the First Amendment, the judge would have to make some assessment of the entire environment of which the challenged material was a part in order to determine whether it had the effect of silencing women, or more precisely, whether the legislature had good reason for believing that it had that effect. Are women speaking and being heard? Are they being silenced or discredited by the pornography industry? What contribution does the targeted work make to the power of that industry? Does the targeted work present some unique perspective that must be protected in order to avoid the suppression of an idea?

These inquiries, and all the others that might be required to operationalize the silencing theory, are highly context dependent and broad ranging, but they are not at all alien to free speech. They are foreshadowed by the third branch of the Miller test, making the protection of speech dependent on whether a work of art has serious political or aesthetic value. To take an example from another branch of the law, comparable sociological inquiries are required by the test that conditions interdiction of subversive advocacy upon a showing of clear and present danger. This is especially true if, as Learned Hand insisted in the communist conspiracy cases, the judge is to take account of both the gravity of the danger and the probability of it materializing. Moreover, however burdensome such inquiries might be, they may be justified by the value they serve—strengthening democratic debate. The purpose of the law is not to make judging easy, but to make sure that justice is done.

The Indianapolis ordinance as a whole is rooted in a concern for equality, and so is the trafficking ban. It is not based on a distaste or revulsion for the kind of brutal pornography that it reaches, though that is surely present, but aspires to make some small contribution to eradicating the social dynamics that result in the subordination of women. Simply to offer equality—taken as a Fourteenth Amendment value—as a defense for the trafficking regulation will not meet the free speech objection, unless we somehow postulate a

63. United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950) ("In each case [the courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."), aff'd, 341 U.S. 494 (1951).
priority for equality. However, once we understand that equality need not be seen as an independent value, based solely on the Fourteenth Amendment, but rather that it has First Amendment dimensions as well, the constitutional issue presented by the trafficking provision appears in a wholly new light. Democracy requires that everyone have an equal chance to speak and to be heard and the trafficking provision, aimed as it is at the pornography industry in its most extreme form, should be seen as a friend, rather than an enemy of democracy: an effort to establish the preconditions for free and open debate.