

THE PRICE WE PAY

*The Case Against Racist Speech,
Hate Propaganda, and Pornography*



Edited by

Laura J. Lederer and Richard Delgado

 Hill and Wang 1995

NEW YORK

A division of Farrar, Straus and Giroux

WHY THE FIRST AMENDMENT IS BEING USED TO PROTECT VIOLENCE AGAINST WOMEN

Twiss Butler

Twiss Butler argues that men's control of institutions of communication and education allows them to support speech that harms women and to suppress speech against that harm. She observes that the publishing industry funds legal, journalistic, and nonprofit organizations endorsing a First Amendment absolutist position. She contends that the industry's defense of pornography as protected speech serves the double purpose of dignifying misogyny and establishing the First Amendment as the publisher's product liability shield.



*All unequal power relationships must, in the end, rely on the threat or reality of violence to protect themselves.**

Despite men's violence against women, the legal system continues to deny women's right to equal protection of the law. In addition, men still frame the public discourse so as to conceal this denial and to prevent our uniting in rebellion against it. As Sally Kempton wrote early in the women's movement, "It is hard to fight an enemy who has outposts in your head."¹ And, we might add, outposts in the schools, at newsstands, and on TV. If I seem to overstate the conflict, consider that every woman in this country is less free than every man to walk out of the house at night. What is it that so routinely restricts our freedom of movement? Abigail Adams identified it in a letter to Isaac Smith in 1771, saying that she longed to be "a rover," but citing as a deterrent "the many dangers we are subject to from your sex."²

If we admit that sex discrimination exists, it is not men-bashing, but ex-

* Lorenne M.G. Clark and Debra J. Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: Canadian Women's Educational Press, 1977), p. 176.

planatory, to address the way that it advantages all men, just as racism advantages all whites. Where there is advantage, there is motivation to maintain it. Moreover, there is no point in discussing harm without identifying the beneficiaries of it.

Traditional First Amendment arguments for freedom of speech take for granted that we inhabit a civil society and meet on a level playing field to contest points on which we disagree. Such an egalitarian view of the Constitution, however, was hardly what the founding fathers had in mind. Writing in 1776, John Adams argued against permitting women—as well as men without property and “lads from twelve to twenty-one”—to have the vote because that would “destroy all distinctions and prostrate all ranks to one common level.”³ At the same time, he refused his wife Abigail’s demand on behalf of women that the country’s “new code of laws . . . put it out of the power of the vicious and the lawless to use us with cruelty and indignity with impunity.” His chilling assurance to her was: “Depend upon it, we know better than to repeal our masculine systems.”⁴ Both her demand and his response were privately communicated, and her anger found its sole recorded outlet in a letter to her friend Mercy Otis Warren.⁵ In contrast, his point of view was publicly enshrined in the United States Constitution.

A century and a half later, in 1920, masculine systems briefly appeared to be in some danger when women won recognition of the right to vote through the passage of the Nineteenth Amendment. Some men sensibly feared that women would use their vote, as Alice Paul urged, to amend the Constitution to secure their right to equal protection of the law. Those fears were unwarranted, however. The prolonged campaign for the vote had shown how hard it would be for women to get the information they needed to vote in their own interest so long as education and communication were dominated by men, and issues framed to men’s advantage.

The civil rights movement of the 1960s, in a repeat of the post-Civil War campaigns for the Thirteenth, Fourteenth, and Fifteenth amendments, did not acknowledge women’s virtual exclusion from the Constitution, in addition to that of African Americans. If society and the law treated women differently from men, in the post-civil rights era, that was presumably because women were different, not because men were keeping something of value from them—that is, their rights as citizens. If it were otherwise, surely our schoolbooks would have mentioned it. At public hearings in the 1970s, feminists who provided content analyses to document the trivialization and exclusion of women and girls from educational materials promptly learned that liberal patriarchy do not hesitate to use accusations of censorship to chill dissent and maintain a racist, sexist status quo.⁶ Feminists expected resistance from the

conservative patriarchy when we objected to sexist materials, but we were surprised by cries of censorship from the American Civil Liberties Union, People for the American Way, the American Library Association, and the National Council of Teachers of English—none of whom was providing leadership in the revision of educational materials that relegated girls and women to subordinate status. Their arguments against change equated criticism—that is, our bringing “more speech” into the vaunted marketplace of ideas—with censorship. At the same time, they acknowledged no de facto censorship in the minimal, stereotyped treatment of women and girls in materials in use.

In this fashion, from the beginning of this country, institutions of communication directed by men have blocked women’s access to information and denied women the opportunity to shape public discourse in response to our experience. That is why it has been possible in this supposedly exemplary democracy not only to deny women their constitutional right to equal protection of the law, but also to keep them largely ignorant of that denial and how it affects their lives generation after generation. So ignorant that even the Equal Rights Amendment campaign could be fatally diverted from every issue that would have made it clear to men that advocates meant business, and clear to women that they could use their vote to establish their right to equality.

In the late 1980s, civil rights lobbyists worked together to get homophobic crime added to the Hate Crime Statistics Act, which already addressed crimes of racism and anti-Semitism. But when an advocate for battered women asked that rape be counted as a hate crime against women, coalition members balked, saying that rape was not a hate but a sex crime; that the legislation would never pass with rape included; that rape statistics would outnumber and overwhelm statistics on “real” hate crimes; and that if rape were included, Senator Helms would attach an anti-abortion amendment to the bill.

Did the women lobbyists walk out, refuse to help the men get their legislation passed, or go public with the issue to make it possible for women to support political action on their own behalf? No, they did not. So rape, men’s quintessential hate crime against women, the one that defines all women as prey, is still invisible in federal hate crime statistics. Now we find ourselves endlessly repeating grim statistics about violence against women in every phase and circumstance of life from childhood to old age. Shouldn’t we question why violence against women is treated as sexual chic or a natural occurrence, like bad weather, rather than repudiated as a behavior used by men to control women? Where is our resistance to this normalized subordination, this mundane terrorism? Is our only role to be practicing tactics of avoidance or cleaning up the damage? Why must we seek special legislation to go about our daily

business? Where is our entitlement to the bodily integrity and equal protection that is men's constitutional birthright?

As John Adams conceded, violence is necessary to enforce subordination of an individual or group. Inevitably, the oppressor objectifies and dehumanizes the target group to justify violence against them. Men use pornography to objectify women, not only making subordination sexy, but effectively defining sexuality as dominance by men and the subordination of women. Calling subordination sex does not make it hurt any less, but in this area, as elsewhere, men's control over information is a critical element in maintaining their power.

When feminists criticize pornography as graphic misogyny, they are attacking not only the system of sexism itself, with its economic and social pay-offs for men, not only *Playboy's* advertising rates, but also publishers' broad First Amendment shield against liability for any harm caused by the products that they produce and sell.

The publishing industry and the men in it therefore have a conflict of interest in reporting a critique of pornography as inimical to women's civil rights (unsecured as those rights are by the Constitution). We need to consider how that conflict of interest distorts the information we receive through journalistic coverage of public debate and action on this issue.

Publishers protect their liability shield either by silencing feminists while granting speech to those who vilify them, or by misrepresenting the feminist critique of pornography. Women are given credibility and access to speech to the extent that they say what men want them to say. Stray from the script and you will be attacked, misquoted, or simply go unheard. As power brokers in a large industry profiting from sexism, publishers disguise this censorship as selfless concern for the First Amendment and freedom of speech.

The Association of American Publishers, the American Booksellers Association, and other media trade groups have long promoted an aggressive First Amendment line, particularly since the publication in 1970 of the first report of the President's Commission on Obscenity and Pornography. Pressured by the lobbying of civil libertarian groups, the Commission abandoned its investigation as to whether pornography was harmful. Instead it came up with the fantasy of "pornography as catharsis," and a burgeoning industry was saved.*

The self-serving doctrine promoted by publishers and libertarians is summarized by law professor Frederick Schauer as follows: "[L]egal toleration of

* There are two main models scientists use to explain behavior: the *catharsis* model—which says the more you see the *less* you do, and the *imitative* model—which says the more you see the *more* you do. Most new research on pornography (and on violence) supports the validity of the imitative model.—Eds.

speech-related harm is the currency with which we as a society pay for First Amendment protection.”⁷ It is not enough to notice, as Schauer does, that this price is not borne equally when the reality remains unremedied so that license to wield harmful speech only profits the speaker and silences the victim.

In the news business as elsewhere, men have long relied on the weapon of pornography to avoid having to compete on their own merits.⁸ The role pornography plays in keeping women journalists at a disadvantage is evident in the experience of Lynn Carrier, an editorial writer for the *San Diego Tribune* who sued the paper in 1990 for sex discrimination and harassment. Men coworkers attempted to intimidate and segregate Carrier by displaying pornography in the office, using sexual insults when talking with her, and asking her to run out and buy a copy of *Playboy* for her supervisor—who also wondered aloud what she would charge *Playboy* for posing nude for photographs. Carrier won her civil suit (refusing, incidentally, to accept a secret settlement), but the outcome was typical—she no longer works at the *Tribune*, but is employed instead at a smaller paper in the area.⁹

It becomes hard to tell where the news business ends and pornography begins when it is pornography that shapes standards for how women will be depicted. In addition, mainstream media legitimate pornography by touting the *Playboy* interview or the *Sports Illustrated* swimsuit issue. The hit-and-run intrusion of pornography into everyday journalism is epitomized by the tactic used by *Spy* magazine to attack Hillary Rodham Clinton on the cover of its February 1993 issue. In a skillfully doctored color photograph with Oval Office trappings in the background, her head is united with the body of a woman in scanty, black leather dominatrix attire, whip in hand. The studded collar around her neck neatly conceals the splice.

Given the value of pornography in supporting men’s dominance, pornographers can count on help from publishers and the courts in defending their product from any meaningful legal restraint.¹⁰ But, as I have mentioned, pornography has an even stronger claim on the resources of the publishing industry, because of their mutual interest in denying that published speech can be held accountable for harm.

An ad in an insurance trade periodical for a company whose slogan is “We insure free speech” warns: “Free speech can carry a high price for your media clients because publishers, broadcasters and advertising agencies are vulnerable to lawsuits in ways most companies are not.”¹¹ An article in another insurance trade periodical explains: “Everything that is published, broadcast or advertised is protected by the First Amendment . . . [A] media liability policy is the only form of liability coverage that relies on constitutional law as a primary defense

. . . [W]hy is the coverage necessary? Because ongoing legal, political and social debate continues about how broad that constitutional protection should be."¹²

No industry is better situated to lobby the public on behalf of its commercial interests than one whose product consists of speech and images, whether categorized as news, education, entertainment, or advertising. The publishing industry is sparing no expense to control the debate on the breadth of constitutional protection of speech.

In February 1993, the Freedom Forum Foundation took a full-page advertisement in the *Washington Post* to announce that former Supreme Court justices William Brennan, Jr., and Thurgood Marshall would receive the organization's highest honor, the Free Spirit Award, along with cash awards of \$100,000 "in recognition of their extraordinary achievement in promoting the values of free press, free speech, and free spirit."¹³ The ad included pictures of the honorees and samples of their wise pronouncements on First Amendment protection of offensive speech and a man's right to read books or watch films of his own choosing in his own house. Not mentioned was that the Freedom Forum is funded by the Gannett Corporation, a media giant that publishes *USA Today*. Using corporate sponsorship to promote laissez-faire First Amendment platitudes from the highest of judicial sources typifies the publishing industry's increasingly bold exploitation of the First Amendment to sanctify its commercial self-interest.

Publishers also use grants to infiltrate academic institutions. As talking heads or op-ed writers, academics make classy mouthpieces for publishers' interests. They skillfully transform crass commercial concerns into lofty issues of public policy. Gannett set up Freedom Forum First Amendment centers at Columbia and Vanderbilt universities and gave a quarter of a million dollars to the University of Maryland to put its glossy Freedom Forum insert into the *American Journalism Review*. The Graduate School of Public Affairs at the University of Colorado at Denver is headquarters for the First Amendment Congress, with over forty contributing members, including "major print and broadcast news media associations," as well as schools of journalism and collegiate news associations.¹⁴

The list goes on: the University of Virginia has its Thomas Jefferson Center for the Protection of Free Expression, Penn State University has the Pennsylvania Center for the First Amendment, the College of William and Mary houses the Institute of Bill of Rights Law, and Harvard University's Kennedy School of Government has its Frank Stanton Professor of the First Amendment and fellow of the Joan Schorenstein Barone Center on the Press, Politics, and

Public Policy. That legal scholar serves, along with two ultraconservative colleagues, on a university committee appointed to help the Harvard community reflect on free speech questions "in a principled way."¹⁵

There are also the Theater of the First Amendment at George Mason University in Virginia; the First Amendment Lounge at the National Press Club in Washington, D.C.; and the annual Hugh M. Hefner First Amendment Award orchestrated for the Playboy Foundation by the American Civil Liberties Union. The television tabloid *Inside Edition* recently flashed pictures of women apparently sexually servicing men at a fund-raiser in Los Angeles for the Free Speech Legal Defense Fund to benefit the so-called adult video industry.

The self-righteousness produced by this institutional validation can be seen in *Chicago Tribune* columnist Clarence Page's commentary in November 1991 on the *Robinson v. Jacksonville Shipyard* case, about the use of pornography to harass women tradesworkers. Gazing at a newsroom colleague's poster-size, full-color photograph torn from the pages of the *Chicago Tribune*, featuring actress Heather Locklear in a swimsuit, Page cites the judge's finding in the shipyard case that there is no First Amendment right to harass. How long, he worries, can the press "remain free . . . once a court has determined that people can be damaged" by what he calls "non-libelous, non-obscene products of the press."¹⁶

As a multibillion-dollar business, pornography is an extremely popular product. Masquerading, however, as "the speech we hate, but must defend lest the Constitution be harmed," pornography plays a special role as a worst-case example calling for a heroic First Amendment defense. Any evidence of harm to women and children must be concealed or denied to safeguard the industry mantra, "If it's published, it's protected." That is why press reports on hearings held by the 1986 Attorney General's Commission on Pornography often put the word "victim" in quotation marks to suggest a dubious concept. (The National Coalition against Censorship continues to use this convention in its publications on pornography.) *Washington Post* reporter Howard Kurtz described commission witnesses as "a parade of self-described victims who tell their sad stories from behind an opaque screen. . . . Many experts on both sides of the question say such anecdotal tales of woe prove nothing about the effect of sexually explicit materials."¹⁷

To protect pornography, women's speech must be carefully controlled. When Linda Lovelace said she loved starring in pornographic films, she was treated as credible; when Linda Marchiano said that she had been beaten, raped, and coerced into making those films, her credibility was questioned.* No risk is

* Linda Lovelace was Linda Marchiano's stage name.—Eds.

overlooked. At a National Press Club speech by Christie Hefner in 1986, I addressed her "as a pornographer" in a written question about her lawsuit to censor testimony from a federal hearing that referred to *Playboy* as pornography; when my question was read aloud by the club's president, these three words were deleted.

Institutional protection of pornography is strikingly evident in reporting on the Andrea Dworkin/Catharine MacKinnon antipornography civil rights ordinance, which would have allowed women to seek damages under specific conditions from those responsible for harm proved attributable to pornography. While every media pundit was free to misrepresent the ordinance as a "ban" in the style of obscenity law, MacKinnon and Dworkin were never allowed an op-ed in any major newspaper to present it accurately or discuss it in their own words.

In 1991, the *New York Times* asked MacKinnon to write an op-ed column on the *Robinson v. Jacksonville Shipyard* decision, but insisted that she substitute ellipses for graphic language quoted from the trial record as examples of the sexual harassment endured by women shipyard workers. MacKinnon refused to do so and the op-ed was rejected.^{18*}

In March 1993, a conference on speech, equality, and harm brought together distinguished theorists on pornography and hate speech at the University of Chicago Law School. The *New York Times*¹⁹ report on the conference gave the lead and five of the first seven paragraphs to statements disparaging the conference and its participants. The lead exemplified the very tactics it purported to reject: "Treading close to what critics consider the land of the thought police, some legal scholars are joining together to fight against images they believe should never be produced and words they believe should never be spoken." Coming before the reader has any factual idea of the subject matter addressed, this statement is fear-mongering. Twenty paragraphs describe the conference or quote participants while thirteen paragraphs focus on critical views on it, a poor ratio of new ideas to status quo defense.

Identifying who gets speech when pornography is under attack demonstrates that the First Amendment does the best job of protecting those who need it least. When the Supreme Court agreed in 1986 to review routine obscenity and student speech cases but refused to hear arguments on the Indianapolis antipornography ordinance,²⁰ they showed by their choice that the speech they genuinely hate is that which lets women tell the truth about pornography.

* This is a common problem. When pornographers sell violent pornography as entertainment for men, it is protected by the First Amendment. But when feminists such as MacKinnon, Dworkin, or Nikki Craft use that same pornography—or the same pornographic technique—to expose pornographers, they are accused of being lewd and are censored by the media—or, in some instances, even arrested!—Eds.

In the case of the ordinance, the Supreme Court summarily affirmed an appeals court's opinion that women were harmed by pornography but that a civil rights remedy would hurt the First Amendment. Media reports praised the Court for preventing a First Amendment catastrophe. At the same time, the media praised the Court for decisions in other cases that rejected plaintiffs' arguments that their First Amendment rights were being abridged in favor of arguments affirming the importance of protecting commercial property values or upholding the authority of school officials. Justice Potter Stewart told us more than he intended about how power defines reality when he said of obscenity, "I know it when I see it."²¹ Concerns about government censorship of publishers' speech seem irrelevant, however, compared to the nongovernmental ways in which women's speech is suppressed or devalued.

Most censorship, in fact, is carried out privately by those with editorial power. It is not called censorship, and it is subject to no public accountability whatever. There is no reason why women must tolerate this exercise of private rights against their right to equal protection of the law. The authoritative voice of the status quo speaks to us through a public television series characterizing the Constitution as "a delicate balance"—a warning to keep our hands off it. This is a warning that must be disregarded. The corollary to "If it ain't broke, don't fix it" is "If it's broke, fix it." If the First Amendment works for half the people to the detriment of the other half, then the First Amendment is broken and we need an Equal Rights Amendment to fix it. John Adams's conviction that masculine systems would be endangered if men could no longer abuse women with impunity holds true centuries later.

For feminists, the challenge remains how to think and communicate freely in a hostile environment that works to control our minds and silence our speech. If women's votes are to be marshaled to gain legal, social, and economic equality, we must find ways to overcome the enemy that has outposts in our heads.

1. Sally Kempton, "Cutting Loose," *Esquire* (July 1970), p. 57.
2. Alice Rossi, ed., *The Feminist Papers*, 1988, p. 9.
3. *Ibid.*, p. 11.
4. *Ibid.*, p. 5.
5. *Ibid.*, p. 6.
6. Larry Green, "Book Censorship Wave Seen in the Wake of Conservative Political Victories," *Los Angeles Times*, 12 November 1980, p. 18 (an interview with Judy Krug, director of the American Library Association's Office of Intellectual Freedom; the article was included with a 1981 direct-mail funding solicitation by People for the American Way).
7. Frederick Schauer, "Uncoupling Free Speech," *Columbia L. R.* 92 (1992), p. 1321.
8. A 1993 Indiana University study shows that women have been kept at 34 percent of the journalism work force for the last ten years. D. Weaver and G. C. Willhoit, "The American Journalist in the 1990's," cited in *The Forum*, p. 7, a Freedom Forum Foundation insert in the *Washington Journalism Review* (January 1993).
9. Brae Canlen, "The Editorial They," *San Diego Reader*, 6 December 1987.
10. Sandra Saperstein, "Publishers Joining Playboy in Attack on Group's Letter," *Washington Post*, 7 June 1986, p. A2.
11. Media/Professional Insurance, *National Underwriter*, 19 October 1992, p. 47.
12. Bill Bauer, "Media Liability Coverage," *Best's Review*, August 1992.
13. *Washington Post*, 11 February 1993, p. A20.
14. Claudia A. Haskel and Jean H. Otto, eds., *A Time for Choices*, First Amendment Congress, 1991.
15. *Harvard Magazine* (January/February 1993), p. 74.
16. Clarence Page, "Restriction on Pinups Raises Another Issue," *Harrisburg Patriot News* (Pennsylvania), 11 November 1991.
17. Howard Kurtz, "Pornography Panel's Objectivity Disputed," *Washington Post*, 15 October 1985.
18. Catharine A. MacKinnon, speech to the National Press Club, Washington, D.C., 22 November 1993.
19. Isabel Wilkerson, "Foes of Pornography and Bigotry Join Forces," *New York Times*, 12 March 1993, p. B16.
20. *American Booksellers Association v. Hudnut*, 771 F. 2d 323 97th Cir. (1985), aff'd, 475 U.S. 1001 (1986). Routine cases heard, for example, *City of Renton et al. v. Playtime Theatres, Inc. et al.* 475 U.S. 41 (1986) (zoning regulations) and *Bethel School District No. 403 35 et al. v. Fraser, a minor et al.* 478 U.S. 675 (1986) (regulating student speech).
21. Catharine A. MacKinnon, "Not a Moral Issue," in *Feminism Unmodified* (Harvard, 1987), pp. 147-48.