Loyola of Los Angeles
Entertainment Law Review

Volume 7 | Number 1 Article 5

1-1-1987

Constitutional Law: Death of an Ordinance: Pornography Unconstitutionally Defined as Sex Discrimination

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CONSTITUTIONAL LAW: DEATH OF AN ORDINANCE: PORNOGRAPHY UNCONSTITUTIONALLY DEFINED AS SEX DISCRIMINATION

Today, many citizens from all segments of the population are concerned about pornography's harm to society. Feminists are some of the foremost opponents of pornography because they view the contents of such materials as discriminatory against women.[1] They maintain that pornography perpetuates inequality between women and men because it influences the values and socialization of its audience, and ultimately, society as a whole.[2]

Reactions against pornography can be seen even at the local level. The Indianapolis City Council, after listening to feminists' testimony at a hearing, enacted an ordinance[3] which was the central controversy in *American Booksellers Association, Inc. v. Hudnut*.[4] The stated purpose of the ordinance was "to prevent and prohibit all discriminatory practices of sexual subordination or inequality through pornography."[5] The Sev-

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1. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

2. *Id.*

3. INDIANAPOLIS, IND., CODE § 16-3(q) (1984). This ordinance provides in part:

> [P]ornography shall mean the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:
> (1) Women are presented as sexual objects who enjoy pain or humiliation; or
> (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
> (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
> (4) Women are presented as being penetrated by objects or animals; or
> (5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or
> (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, through postures or positions of servility or submission or display.

The ordinance also provides that the "use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section." Additionally, the ordinance contains four prohibitions: one may not "traffic" in pornography; one may not "coerce" others into performing in pornography; one may not "force" pornography on anyone; and, one may not injure another in a way that is directly caused by pornography. INDIANAPOLIS, IND. CODE § 16-3(q)(4-7) (1984).

4. American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 106 S. Ct. 1172 (1986), *reh'g denied*, 106 S. Ct. 1664 (1986).

5. American Booksellers Ass'n, Inc. v. Hudnut, 598 F. Supp. 1316, 1320 (S.D. Ind. 1984), (citing INDIANAPOLIS, IND. CODE § 16-1(b)(8) (1984)).

enth Circuit Court of Appeals held the ordinance was unconstitutional. The court explained that the statute sought to censor speech by restricting pornography and thereby violated the first amendment.

The plaintiffs in *Hudnut* were publishers, distributors, and readers of books, magazines and films. They contended that Indianapolis' pornography ordinance violated the first amendment's guarantee of freedom of speech.[6]

The United States District Court for the Southern District of Indiana concluded that the ordinance was unconstitutional.[7] The district court held that the ordinance regulated speech rather than the conduct involved in making pornography.[8] The district court also said that Indianapolis did not establish that sex discrimination against women was a compelling enough interest to justify the regulation of speech.[9] Consequently, the ordinance was struck down.

The Seventh Circuit Court of Appeals affirmed the district court's holding that the pornography ordinance was unconstitutional.[10] The Seventh Circuit reasoned that Indianapolis' definition of "pornography" was considerably different from the usual definition of "obscenity" which has traditionally been held to be unprotected by the first amendment.[11] The Seventh Circuit discussed the usual analytic approach[12] taken with the term "obscenity" and concluded that the Indianapolis ordinance failed to fit within this measuring tool. Because they found that the ordinance discriminated on the ground of the content of speech, the opinion stopped short of the usual balancing analysis typically involved with evaluating obscenity.

The Seventh Circuit viewed the ordinance as "thought control"[13] because it regulated the content of speech, and thereby violated the first amendment. The opinion explained that the government cannot ordain a preferred viewpoint or perspective.[14] It stated that although the inequality of women may be a "pernicious" belief, under our Constitution, such a belief may prevail.[15] The government has no power to restrict expres-

6. *Hudnut*, 771 F.2d at 327.
7. *Id.* at 326.
8. *Id.*
9. *Id.*
10. *Id.* at 334.
11. *Id.* at 324.
12. *See* Miller v. California, 413 U.S. 15 (1973).
13. *Hudnut*, 771 F.2d at 325.
14. *Id.*
15. *Id.* at 328.

sion because of its message or ideas.[16] The Seventh Circuit went on to say that the ordinance established an "approved" view of women, and issues (like pornography) that shape culture and socialization cannot be controlled by government censorship.[17]

At the end of the opinion, the court recognized that the City and feminists were trying to change the existing "culture of power." It reasoned that restrictions on speech stifle change and that free speech is the best way to bring about the desired improvement.[18]

Lastly, the court discussed the salvageability of the ordinance. It concluded that only a complete legislative rewrite of the ordinance would remedy its unconstitutional nature.[19]

Upon defendants' appeal, the United States Supreme Court summarily affirmed the Seventh Circuit's decision.[20] A subsequent petition for rehearing was denied.[21]

ANALYSIS

In Western culture, women have traditionally been viewed as subordinate to men. In the last hundred years, however, great strides have been made toward equality. Nevertheless, some inequities still remain. Many women's rights activists feel that pornography is a vehicle for the continued subordination of women in our society.[22] These feminists want to eliminate all materials which perpetuate the traditional inequities between the sexes. They view all books, magazines, and films which portray women in a degrading fashion as pornography.[23] To the feminists, then, the elimination of pornography is simply a means to an end in the quest for equality.[24]

Feminists have had a great influence on legislatures all over the country.[25] They have compiled testimonials from thousands of women

16. *Id.*
17. *Id.*
18. *Id.* at 332.
19. *Id.*
20. American Booksellers Ass'n, Inc. v. Hudnut, 106 S. Ct. 1172 (1986).
21. *Id.* at 1664 (1986).
22. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).
23. However, feminists are not entirely opposed to sexually explicit materials. "Erotica" is sexually explicit, yet premised on equality between the sexes. Hence, it is not discrimination against women, and therefore, not pornography. *Id.* at 22.
24. *Id.* at 27.
25. The same group involved in the creation of the Indianapolis ordinance was also influential in the enactment of a Minneapolis Civil Rights ordinance. The ordinance was passed twice by the city council (in 1983 and 1984), but was vetoed by the mayor both times. MINNE-

who have been harmed by pornography, as well as hundreds of studies which conclude that pornography is indeed harmful to women.[26] The Indianapolis City Council was quite receptive to the information these activists offered them. The City agreed with the feminists that pornography constitutes discrimination against women.[27] In a daring and politically innovative move, Indianapolis enacted an ordinance which defined pornography as "the subordination of women."[28] Even before the ordinance went into effect, numerous parties filed suit against the mayor of Indianapolis, contending that the ordinance violated the first amendment right of free speech.[29]

Both the District Court and the Seventh Circuit struck down the ordinance as unconstitutional.[30] The Seventh Circuit dealt with this novel legislation in a very traditional and conservative manner.[31] Instead of capitalizing on this opportunity for innovation, the Seventh Circuit clung exclusively to the first amendment and the limits of precedent. It considered the notion of equality between the sexes (advocated in the statute) as one perspective or viewpoint.[32]

Admittedly, a portion of society may deny women's equality to men. However, not only is equality between the sexes the "approved" viewpoint of the Indianapolis ordinance,[33] but it is also mandated by the

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APOLIS, MINN. ORDINANCE amending tit. 7, chs. 139 & 141 (adding subparagraph to § 139.20).

26. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

27. *Hudnut*, 598 F. Supp. at 1319-20.

28. INDIANAPOLIS, IND. CODE § 16-3(q) (1984).

29. *Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 106 S. Ct. 1172 (1986), *reh'g denied*, 106 S. Ct. 1664 (1986). The plaintiffs in the case included the American Booksellers Ass'n which comprised 5200 bookstores and chains; the Association for American Publishers which includes most of the country's publishers; Video Shack, Inc., which sells and rents video cassettes in Indianapolis; Kelly Bentley, a resident of Indianapolis who reads books and watches films; the Council for Periodical Distributors Ass'ns, which comprises over 500 distributors of all types of reading materials; the Freedom to Read Foundation, a nonprofit organization established to promote and defend first amendment rights; the International Periodical Distributors Ass'n, Inc., a trade association for periodical distributors; the Koch News Co., the largest wholesale distributor in Indianapolis of books and periodicals; the National Ass'n of College Stores, Inc., a trade association of college stores; and the Omega Satellite Products Co., a distributor of television programming received from satellite transmissions.

30. *Id.*

31. The beginning of the opinion gets very bogged down in a discussion of "obscenity" and its determination. The ordinance purposely goes into great detail to describe what pornography entails for the express purpose of avoiding such an analysis. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. at 21-22.

32. *Hudnut*, 771 F.2d at 328.

33. *Id.*

United States Constitution.[34] Thus, conspicuously absent from the court's opinion was any discussion of the fourteenth amendment's guarantee against discrimination on the basis of sex. Instead, the court hid behind the veil of the first amendment's guarantee of free speech.

The court dismissed the City's contention that actresses are physically injured while making pornographic films. It declared that the images of pain on the screen were mere depictions[35] —no one believed that the actresses had actually suffered. Many documented studies and personal testimonials reveal that beatings, rapes, and even murders actually take place in front of the camera while pornography is being filmed.[36] Contrary to the court's suggestion, these harmful acts are not just special effects. "Sex is forced on real women so that it can be sold for a profit to be forced on other real women."[37]

The court stated that it accepted the premise behind this legislation that some pornography may be harmful. Nevertheless, in striking down the ordinance it stated that allowing more speech may be a more effective remedy than restriction would be.[38] The court reasoned that the proliferation of pornography will allow the truth as to its harmful character to surface.[39] Surely, more pornography promises to perpetuate the inequitable and harmful situation. Only with more expression opposing pornography by feminists and other activists will the harms created by it subside.

Next the Seventh Circuit tackled the City's argument that pornography is "low value" speech and enough like obscenity to warrant its prohibition.[40] It recognized that "[s]ome cases hold that speech far removed from politics and other subjects at the core of the Framers' concerns may be subjected to special regulation."[41] The court cited cases that dealt with restricting vile, offensive language as examples.[42] These obscenity cases were distinguished from *Hudnut* because they, "do not sustain statutes that select among viewpoints."[43] The court failed to recognize that the determination of what constitutes "vile" language is subjective and varies among different segments of our society. Under the Seventh Cir-

34. U.S. CONST. amend. XIV, § 1.
35. *Hudnut*, 771 F.2d at 330.
36. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).
37. *Id.* at 21.
38. *Hudnut*, 771 F.2d at 331.
39. *Id.* at 330.
40. *Id.* at 331.
41. *Id.*
42. *Id. E.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978).
43. *Id.*

cuit's reasoning, to state what is "vile" language is to select among viewpoints. Consequently, these cases are not so distinguishable.

Nevertheless, the court rebutted the City's "low value" contention by stating that pornography is so influential on society that it is precluded from being "low value" speech.[44] It confused the magnitude of the problem with the problem itself. The court was apprehensive to try to solve the problem of pornography because the problem is so pervasive and overwhelming. In the end, the court chose to do nothing.

The majority of this opinion dealt with the cost of restricting the speech at issue: pornography. When confronted with analyzing the value of pornography, the Seventh Circuit erroneously reached the conclusion that pornography could be valuable speech.[45] The court expressly refused to balance the value of the speech against the burden of the restriction,[46] perhaps to avoid the embarrassment of committing analytical suicide.

Freedom of expression is a right that most Americans cherish. The judiciary is obligated to protect this right under its mandate to uphold the Constitution. Nevertheless, some restrictions of freedom of speech are necessary to preserve other rights guaranteed by the Constitution which are equally as compelling.[47] Equality for all people and the right to be free from discrimination on the basis of sex are important enough values to justify the restriction of pornography.[48]

In *Hudnut*, however, the ordinance in controversy was admittedly quite broad. As the court explained, many classic literary works handed down in our culture would fall within the ordinance's definition of pornography.[49] Allowing this ordinance to take effect would create a flood of litigation. Although the Seventh Circuit's reasoning was quite weak, it probably came to the correct result.[50]

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44. *Id.*

45. *Id.*

46. *Id.* at 332.

47. *E.g.*, New York v. Ferber, 458 U.S. 747 (1982) (child pornography can be criminally banned); FCC v. Pacifica Found., 438 U.S. 726 (1978) (indecent radio broadcasts can be regulated through FCC licensing); Young v. American Mini Theatres, 427 U.S. 50 (1976) (exhibition of sexually explicit films may be regulated by zoning); Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973) (sex-designated ads may be prohibited under local sex discrimination statute).

48. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

49. *Hudnut*, 771 F.2d at 325. For example, the court cites James Joyce's ULYSSES and Homer's ILLIAD as both depicting women as submissive objects for conquest and domination.

50. The courts could have justifiably allowed the ordinance to take effect because a ripeness issue was involved. Ripeness embodies a principle that cases should not be tried prema-

Subsection six of the Indianapolis statute is particularly broad.[51] It includes in the definition of pornography materials in which "[w]omen are portrayed as sexual objects. . . ." Perhaps an elimination of this subsection would aid the statute in withstanding a constitutional attack. Clearly, many of the classic literary works that concerned the court would not be in violation of Indianapolis' definition of pornography without this subsection.

Additionally, the ordinance would be strengthened if it were worded throughout to include the sexual subordination of all people (women, men, and *children*) and not just women. In so doing, the statute may be constitutional because of its more obvious inclusion of restrictions on child pornography which have been held constitutional by the United States Supreme Court.[52]

IMPLICATIONS

The Indianapolis ordinance, although defeated, was significant because it represented women activists' continued pressure for equality. Despite the ruling in *Hudnut*, feminists will undoubtedly continue to exert pressure on legislatures to eliminate sex discrimination. Women, concerned with inequities in our society, will persist until discrimination is eliminated. Some of the feminists will remain influential in the legal system, while others may pursue unlawful means to effectuate change.[53]

New anti-pornography and anti-discrimination statutes that are narrower in scope need to be proposed, enacted, and tested in the courts. Litigation pertaining to the harms caused by pornography will continue.

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turely. The issue of ripeness in *Hudnut* arose because the plaintiffs had filed suit before the ordinance ever went into effect.

> It has been clear that even when suits of this kind involve a 'case in controversy' sufficient to satisfy the requirement of Article III of the Constitution, the task of analyzing a proposed statute, pinpointing its deficiencies. . .before the statute is put into effect, is rarely if ever an appropriate task for the judiciary.

Younger v. Harris, 401 U.S. 37, 53 (1971). In *Hudnut* both the district court and the Seventh Circuit reasoned that since the effects of the ordinance were easily predictable, the case was ripe for adjudication and the court had jurisdiction. The Supreme Court affirmed in *Hudnut*, 106 S. Ct. 1172 (1986), *reh'g denied*, 106 S. Ct. 1664 (1986), and hence, the flood of litigation that would have ensued once the ordinance took effect was avoided.

51. Section 16-3(q)(6) provides: "(6) 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." INDIANAPOLIS, IND., CODE § 16-3(q)(6) (1984). Women have been presented in this manner throughout history. Western culture is permeated with the subordination of women, and its literature is inextricably interwoven with the notions of subparagraph (6). It would be unrealistic, as well as unreasonable, to ban this heritage.

52. *See* New York v. Ferber, 458 U.S. 747 (1982).

53. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. at 62.

The courts will be repeatedly asked to define the limits of the first amendment until women are no longer harmed and subordinated by pornography and a satisfactory resolution to the problem is obtained.

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