Indiana Law Review

Volume 18 1985 Number 2

Pornography as Group Libel: the Indianapolis Sex Discrimination Ordinance

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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.[1]

I. Introduction

It is a common assertion of many feminists that the display of women's bodies, whether in advertisements for jeans or in hardcore pornography, not only leads to violence against women, but also constitutes a form of class or group libel.[2] Despite the argument espoused by many feminists,

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[1]Indianapolis, Ind., Code of Indianapolis and Marion County, Indiana § 16-1(a)(2) (1984)

[2]Gloria Steinem's statement of the position is archetypal:

> [O]ur bodies have too often been the objects of pornography and the woman-hating, violent practices that it preaches. Consider also our spirits that break a little each time that we see ourselves in chains on full labial display for the conquering male viewer, bruised or on our knees screaming a real or pretended pain to delight the sadist, pretending to enjoy what we don't enjoy, to be blind to the images of our sisters that really haunt us—humiliated often enough ourselves by the truly obscene idea that sex and the domination of women must be combined.

Steinem, *Erotica and Pornography: A Clear and Present Difference*, Ms. Magazine, Nov. 1978, at 78. A similar argument is made by Susan Brownmiller. *See* S. Brownmiller,

that pornography degrades and debases females through its portrayals,[3] there have been very few attempts to develop a doctrinal case that pornography is "group libel."[4]

On May 1, 1984, however, the City of Indianapolis, Indiana adopted an ordinance[5] that appears to be based on an assumption that pornography is group libel and leads to violence against females.[6] This ordinance does

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AGAINST OUR WILL: MEN, WOMEN AND RAPE, 394 (1975). *See also infra* notes 3-4 and accompanying text.

[3]S. BROWNMILLER, *supra* note 2, at 394. *See also* S. GRIFFIN, PORNOGRAPHY & SILENCE: CULTURE'S REVENGE AGAINST NATURE (1981); Morgan, *How to Run the Pornographers Out of Town (And Preserve the First Amendment)*, MS. MAGAZINE, Nov. 1978, at 55; *Violent Pornography: Degradation of Women versus Rights of Free Speech*, 8 N.Y.U. REV. L. & SOC. CHANGE 181 (1979).

The terms "feminist," "feminist argument," "feminist position," and the like are used throughout this Article to distinguish the particular antipornography views of women's rights activists from the more traditional antipornography views of conservatives. The traditional conservative argument is that pornography degrades the human race by "de-individualizing and dehumanizing sex acts." E. VAN DEN HAAG, CENSORSHIP: FOR AND AGAINST, 146-47 (H. Hart ed. 1971). Arguably, "dehumanization" causes people to treat one another merely as objects and means. This eventually leads to the regression of people to an animal state, and diminishes the specialness of human life. *Id.* The feminist position views pornography as directed primarily against women, and many feminists view it as inherently violent. Pornography which is not overtly violent is still implicitly violent because it teaches men to view women as *things*, rather than as human beings, leading ultimately to sexism, rape, and other forms of sexual violence.

Feminists are not monolith in their views. *See, e.g.*, JAGGER & STRUHL, FEMINIST FRAMEWORKS (1978) (discussing the different views among feminists). There is, however, very widespread agreement that pornography is both a cause and a symptom of sexism and violence against women.

[4]In its original formulation, "A group libel law [was] a statute making it a criminal offense to portray . . . certain groups in a way which [would] (a) incite the general population to hate, ridicule and disparage that group, and/or (b) present a danger of breach of the peace." *See* Beth, *Group Libel and Free Speech*, 39 MINN. L. REV. 167, 167 (1955). *See also infra* text accompanying note 30.

No works have been found by this author that specifically refer to pornography as group libel. However, at least one author has developed an analogy between obscenity and racial insults. Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982). *See also* Bryant, *Sexual Display of Women's Bodies—A Violation of Privacy,* 10 GOLDEN GATE 1211 (1980).

[5]*See* General Ordinance No. 35, INDIANAPOLIS, IND., CODE OF INDIANAPOLIS AND MARION COUNTY, INDIANA Ch. 16 (1984). On November 19, 1984, this ordinance was declared unconstitutional by Federal District Court Judge Sarah Evans Barker in American Booksellers Ass'n Inc. v. Hudnut, 598 F. Supp. 1316 (S.D. Ind. 1984). This Article refers to the *American Booksellers* opinion where the Author's analysis coincides with the court's conclusions. This Article does not, however, attempt to serve as an analysis of the *American Booksellers* opinion. The district court held that the ordinance, by defining what it viewed as pornography, "sought to regulate expression, that is, to suppress speech. And although the State has a recognized interest in prohibiting sex discrimination, that interest does not outweigh the constitutionally protected interest of free speech." *Id.* at 1342. Therefore, the ordinance was held unconstitutional. As of publication, the district court's *American Booksellers* decision is on appeal to the Seventh Circuit Court of Appeals. American Booksellers v. Hudnut, No. 84-3147 (7th Cir. Dec. 21, 1984).

[6]*See supra* notes 3-4. Opponents of pornography consider neither obscenity laws of the type upheld by the United States Supreme Court in Miller v. California, 413 U.S.

not specifically define pornography as group libel. Rather, it refers to pornography as a discriminatory practice against women, violating the civil rights of females.[7] Yet clearly, the law also qualifies as a group libel law, in that it punishes individuals for the display of materials which portray a group in a way that at least some members of the group find offensive.[8]

The ordinance is an attempt to expand the concept of sexual harassment in the workplace—a concept accepted by the Equal Opportunities Commission and the courts—to society as a whole. An assumption underlying the ordinance is that pornography is sexual harassment and can be outlawed, as is sexual harassment forced on a female in the workplace.[9] As such, it is in conflict with the philosophy underlying the United States Supreme Court's decisions regarding first amendment and obscenity issues: speech may not be punished or limited merely because it offends,[10] and that the beholder of such objectionable material has the option of averting his eye to avoid exposure.[11]

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15 (1973), nor the zoning laws of the type upheld in Young v. American Mini Theatres, 427 U.S. 50 (1976), to be adequate safeguards for two reasons. First, *Miller* only reaches "hardcore" pornography and does not include violence in its definition. *See infra* notes 126-28 & 135. Second, "[z]oning statutes do not ban pornography; they merely contain it." *Violent Pornography and the First Amendment: A Dialogue*, 8 N.Y.U. REV. L. & SOC. CHANGE 187, 196 (1979).

Because of dissatisfaction with traditional obscenity law approaches, a new approach based on the concept of sex discrimination was developed by women's rights activists in Minneapolis. However, their movement was stymied when Mayor Donald Fraser vetoed the ordinance on the grounds that it was unconstitutional. N.Y. Times, Jan. 6, 1984, § 1, at 11, col. 1.

[7]INDIANAPOLIS, IND., CODE OF INDIANAPOLIS AND MARION COUNTY, INDIANA §§ 16-1(a)(2); -3(g)(4), (5), & (6). Specifically, pornography is defined as "the graphic sexually explicit subordination of women." *Id.* at § 16-3(q).

[8]*See infra* notes 30-38.

[9]The history of the Indianapolis ordinance supports the argument that it is an attempt to broaden the workplace analogy to include society-at-large. The Indianapolis ordinance grew out of an ordinance written in Minneapolis by both Catherine MacKinnon, a law professor specializing in sexual discrimination in the workplace, and Andrea Dworkin, a visiting professor at the University of Minnesota. N.Y. Times, Jan. 6, 1984, § 1, at 11, col. 1.

The analogy between the workplace is based on the perceived unavoidable nature of exposure and harassment in both situations. The Equal Employment Opportunity Commission's (EEOC) *Guidelines on Discrimination Because of Sex* uses the presumption of a "captive" female audience to hold employers responsible for sexual harassment by employees. 29 C.F.R. § 1604.11 (1984). While not specifically referring to the workplace analogy, feminists argue that pornography is inescapable in modern society, using a captive audience argument similar to the EEOC's position. *See* S. GRIFFIN, *supra* note 3, and A. DWORKIN, PORNOGRAPHY/MEN POSSESSING WOMEN (1981).

[10]*See* Collin v. Smith, 447 F. Supp. 676, 697 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978) and cases cited therein. *See also infra* notes 123-28.

[11]*See* Miller v. California, 413 U.S. 15 (establishing a three-prong test for obscene materials); Erznoznik v. Jacksonville, 422 U.S. 205, 208-12 (1975) (setting forth the concept of the avertable eye). A feminist response to the Court's concept of the avertable eye is that pornography and its effects are so pervasive in the society that they cannot be avoided, and therefore must be controlled. *See also supra* note 3.

Under the Indianapolis ordinance,[12] any woman who feels aggrieved by a piece of pornography[13] can file a complaint with the city's Office of Equal Opportunity (OEO).[14] After a finding that the material meets the criteria of the ordinance, the OEO may seek court review of its findings. If upheld, a temporary injunction may be issued to the purveyor of the material pending resolution of the complaint by the OEO.[15] Violation of such an order, however, would carry a civil rather than a criminal penalty.

Immediately upon its enactment, the Indianapolis ordinance was found unconstitutional on first amendment grounds in *American Booksellers Association, Inc. v. Hudnut*.[16] The ordinance, by casting an antipornography law in the guise of a civil rights law, is an innovative attempt to circumvent the limitations of the law of obscenity,[17] while gaining societal and legal acceptance for a feminist concept of pornography. In addition, it is an ingenious way to avoid many of the problems that have plagued attempts to outlaw pornography as a form of group libel.

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[12]The Indianapolis ordinance reads in pertinent part:

> Pornography shall mean the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:
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> (1) Women are presented as sexual objects who enjoy pain or humiliation; or
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> (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
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> (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
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> (4) Women are presented being penetrated by objects or animals; or
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> (5) Women are presented in scenarios of degredation, injury, abusement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; and
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> (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.
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> 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.

INDIANAPOLIS, IND., CODE OF INDIANAPOLIS AND MARION COUNTY, INDIANA § 16-3(q) (1984).

[13]*Id.* §§ 16-4 to -17 [the Office of Equal Opportunity shall hereinafter be referred to as the OEO].

[14]*Id.* § 16-27(c).

[15]Section 16-26(d) provides in part that:

> [T]he committee may cause to be served on the respondent an order requiring the respondent to cease and desist from the unlawful discriminatory practice and requiring such person to take further affirmative action as will effectuate the purposes of this chapter, including but not limited to the power to restore complainant's losses incurred as a result of discriminatory treatment, as the committee may deem necessary to assure justice; . . . .

Id. at § 16-26(d). Court enforcement of the orders is provided after a *de novo* determination of sexual discrimination. *Id.* at §§ 16-27.

[16]598 F. Supp. 1316 (S.D. Ind. 1984).

[17]*See supra* note 11 and *infra* note 19.

If such an approach were ever upheld by the courts, it would have an impact in many areas of the law. First, such a holding would resurrect, in a new guise, the concept of thematic obscenity which the Supreme Court rejected in 1959.[18] Second, such an approach would circumvent the Supreme Court's guidelines for defining obscenity,[19] thereby allowing the proscription of materials which are not necessarily obscene. Third, the ordinance presents a confrontation with the Supreme Court's concept of the avertable eye by contending that the effects of pornography are so pervasive that they are inescapable.[20] Fourth, by statutorily determining that pornography is, in essence, "group libel" against women,[21] the civil rights approach allows its proponents to avoid proving the validity of such claims as pornography differentially harms women, promotes bigotry or contempt of women, or fosters acts of aggression against females.[22] All that is required under the ordinance is a finding that the material meets the ordinance's definition of pornography.[23] Fifth, the approach incorporated by the ordinance avoids the decision of the United States Supreme Court in *Stanley v. Georgia*,[24] which permitted the use of "obscene" materials in the privacy of one's own home.[25] And finally, in theory, the ordinance makes the politically responsive Office of Equal Opportunity into a censorship board.[26]

One important question posed by the feminist argument and the Indianapolis ordinance is the extent to which nonobscene material can be proscribed without violating the free speech and press guarantees of

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[18]*See* Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959).

[19]The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24 (1972) (citations omitted).

[20]"The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." Cohen v. California, 403 U.S. 15, 21 (1971). Absent such circumstances, it is generally the viewer's duty to "avoid further bombardment of their sensibilities simply by averting their eyes." *Id.*

[21]*See supra* notes 1-8 and accompanying text.

[22]Generally, political lawmaking bodies do not require the type of proof of harm that would normally be required in a court of law. The procedure set up by the Indianapolis ordinance, which resembles a civil rights action, requires less than a court of law might require in a suit alleging pornography. Legislatures, although they are not required to prove the assumptions on which they act, are generally required to exercise greater caution in areas dealing with freedom of speech, than in other legislative matters. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

[23]INDIANAPOLIS, IND., CODE OF INDIANAPOLIS AND MARION COUNTY, INDIANA § 16-15 (1984). *See also supra* note 12.

[24]394 U.S. 557 (1969).

[25]*Id.* at 568.

[26]*See supra* notes 12-15 and accompanying text.

the first amendment. The purpose and effect of the new civil ordinance was not to replace and/or supplement the present criminal procedures for regulating obscenity, nor would its enforcers be bound by the criminal substantive law or procedures. Rather, it was designed as a civil statute that treats pornography as a form of discrimination. As such, the ordinance presented major constitutional issues.

This Article will first examine the constitutional status of criminal group libel laws, of the type upheld in *Beauharnais v. Illinois*,[27] and its implication for civil group libel laws.[28] It will then review the other areas of constitutional deficiency within the ordinance, and focus on whether or not a hybrid group libel law could ever stand up to constitutional scrutiny.[29] Before one can fully understand the role that criminal group libel laws play in determining the constitutionality of an ordinance like the one in Indianapolis, however, it is important to review the theories that have shaped the development of both group libel laws and the law of obscenity.

II. The Concept of Group Libel

A. Introduction

Underlying group libel laws is a theory that an individual derives a sense of worth from his community. "[P]articipation in groups . . . contribute to [an individual's] . . . social welfare and develop[s] [one's] individual capacities. Hence, defamatory attacks on groups are attacks both on the pluralistic forces which make up a democratic society and derivatively on the individual members whose own status derives from their group affiliations."[30]

This theory forms a basis for both civil and criminal laws aimed at controlling group libel. However, group libel laws are by definition a restriction on the freedom of discussion; hence, courts have been extremely reluctant to endorse them.[31]

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[27]343 U.S. 250 (1952).

[28]*See infra* notes 30-114 and accompanying text.

[29]*See infra* notes 115-60.

[30]Reisman, *Democracy and Defamation: Control of Group Libel,* 42 Colum. L. Rev. 727, 731 (1942). In his seminal article on group libel, Reisman stated the classic case for group defamation laws:

> The role assigned to individual honor in a community's scheme of values, the character of the groups whose reputation is safeguarded, and the type of protective measures taken are important indications of the community's cultural level and democratic quality. It is only through strengthening the protection of the groups to which an individual belongs that his own values and his own reputation can be adequately safeguarded. The isolated person is as helpless in the face of systematic defamation by opposing groups . . . as in the face of concerted economic power. In the political as in the economic struggle, modern democracy operates through the interplay of group activities . . . .

Id.

[31]Recent statements indicate that group libel laws of the type upheld in Beauharnais v. Illinois, 343 U.S. 250 (1952), may be unconstitutional. Collin v. Smith, 578 F.2d 1197, 1205 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); Tollett v. United States, 485 F.2d 1087, 1094 n.14 (8th Cir. 1973); Anti-Defamation League of B'nai B'rith v. F.C.C. 403 F.2d 169, 174, n.5 (D.C. Cir.) (Wright, J., concurring), *cert. denied*, 394 U.S. 930 (1968).

In the past, two approaches to group libel have been used: incidental protection of groups, and members of groups, through standard libel law and, criminal group libel laws.[32] The standard law of libel was developed to protect the individual, or identifiable members of small groups who had been defamed. Thus, this approach offered only a limited civil remedy for group defamation. For example, one basic principle underlying this area is that defamation of a large nonincorporated group ("class" is a less commonly used, but more accurate term) does not give rise to a civil action by the group. Another is that defamation of a large group does not give rise to a civil action by an individual group member, unless the member can show special application of the defamatory material to himself of herself.[33]

Because of these limitations in the civil law, the concept of criminal group libel was developed in the early part of this century.[34] These new laws were based on a "fighting words" rationale, that is, words which resulted in disturbances of the peace.[35] There were earlier state cases sustaining group libel laws,[36] yet *Beauharnais v. Illinois*[37] was the first group libel case ever to reach the United States Supreme Court. Therefore, despite questions as to its continuing legal validity,[38] it has never been explicitly overruled and is the starting point for any discussion of group libel.

B. Beauharnais v. Illinois[39]

Joseph Beauharnais was the president of the White Circle League of America, Inc. In January, 1950, he organized and directed a group of

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[32]*See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250 (1952). *See infra* notes 39-64.

[33]For a discussion of the law of defamation, see L. ELDREDGE, LAW OF DEFAMATION (1978); W. PROSSER, HANDBOOK OF THE LAW OF TORTS (4th ed. 1971); Tanenhaus, *Group Libel*, 35 CORNELL L. REV. 61 (1950) (tracing the historical antecedents of group libel laws in England and America); Note, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1904). *See also* Lewis, *The Individual Member's Right to Recover for a Defamation Leveled at the Group*, 17 U. MIAMI L. REV. 519 (1963). For a demonstration of the rules in action, see Neiman-Marcus v. Lait, 13 F.R.D. 311 (S.D.N.Y. 1952).

[34]Tanenhaus, *supra* note 33, at 268-72.

[35]Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). In *Chaplinsky*, the Court stated:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Id. at 571-72 (footnotes omitted).

[36]*See* People v. Turner, 28 Cal. App. 766, 154 P.2d 34 (1915); Alumbaugh v. State, 39 Ga. App. 559, 147 S.E. 714 (1929); People v. Speilman, 318 Ill. 482, 149 N.E. 466 (1925); Crane v. State, 14 Okla. Crim. 30, 166 P. 1110 (1917).

[37]343 U.S. 250 (1952).

[38]New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See also* Collin v. Smith, 578 F.2d 1197, 1205 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

[39]343 U.S. 250 (1952). For a similar discussion of this case and changes in the concept of group libel, see the district court opinion in Collin v. Smith, 447 F. Supp. 676 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir. 1978).

volunteers who distributed leaflets on street corners in downtown Chicago. The handbills, cast in the form of a petition to the Mayor and City Council, called upon the city " 'to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro—through the exercise of the Police Power.' "[40] The leaflet urged the white people of the city to resist the civil rights programs and called upon " 'all normal white people' " to join the battle against blacks.[41] Beauharnais was arrested under a section of the Illinois Criminal Code[42] that made it unlawful to publish anything portraying a class of citizens as lacking in virtue or other such thing which might induce a breach of the peace. As a defense, Beauharnais offered to prove the truth of his statement with testimony explaining that black residential areas had high crime rates, and that an area's property values actually did decrease when blacks become residents.[43] At the time of this opinion, Illinois recognized the truth as a general defense in such actions. To succeed, one had to show not only that the utterance stated the facts, but also that the publication was made " 'with good motives and for justifiable ends.' "[44] The latter part of the test could not be met, and therefore the trial judge sustained an objection to this offer of proof, also finding that the statute was not an unconstitutional restriction of free speech.[45]

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[40]343 U.S. at 276 (quoting the leaflet)(Appendix to Opinion of Black, J., dissenting). The leaflet, which contained an application for membership in the White Circle League, urged " 'ONE MILLION SELF RESPECTING WHITE PEOPLE IN CHICAGO TO UNITE UNDER THE BANNER OF THE WHITE CIRCLE LEAGUE . . . [to resist] TRUMAN'S INFAMOUS CIVIL RIGHTS PROGRAM and many Pro Negro Organizations to amalgamate the black and white races with the object of mongrelizing the white race.' " *Id.* (Appendix to Opinion of Black, J., dissenting) (quoting the leaflet). It further stated that " '[i]f persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, SURELY WILL.' " *Id.* (quoting the leaflet). The leaflet ended with a declaration that " '[T]HE FIRST LOYALTY OF EVERY WHITE PERSON IS TO HIS RACE. . . . THE HOUR HAS STRUCK FOR ALL NORMAL WHITE PEOPLE TO STAND UP AND FIGHT . . . .' " *Id.* (quoting the leaflet).

[41]*Id.* (quoting the leaflet).

[42]The statute read:

> It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots . . . .

ILL. REV. STAT. ch. 38, § 471 (1950).

[43]343 U.S. at 266 n.21.

[44]*Id.* at 265 (quoting ILL. CONST., Art. II, § 4)(footnote omitted). *See also* 343 U.S. at 254 n.1.

[45]343 U.S. at 254. The Illinois Supreme Court agreed with the trial judge's action. It determined that such evidence went only to the truthfulness of Beauharnais' statements, and did not prove that the publication was made with good motives or for justifiable ends. Yet under the Illinois statute, truth alone was not a defense. *See supra* note 43 and accompanying text.

The court took note of the clear and present danger test but did not apply it,[46] finding the leaflet libelous as a matter of law. Thus, the jury was restricted to the narrow factual question of whether Beauharnais was in fact guilty of manufacturing, publishing, or distributing the leaflets, as proscribed by the statute.[47] Under these rulings, Beauharnais was convicted and fined $200.[48]

The Supreme Court of Illinois sustained the conviction on the grounds that truth alone was not a defense against a charge of criminal libel. It was necessary to prove the item was published " 'with good motives and for justifiable ends.' "[49] Beauharnais, however, had not made an offer of proof of either, and the court doubted that he could in view of the scurrilous nature of the leaflet. Therefore, the court concluded that the trial judge's refusal to accept Beauharnais' evidence was not in error, and the statute was upheld based on a "fighting words" rationale.[50]

On appeal to the Supreme Court of the United States, Beauharnais attacked the Illinois statute as being too vague to meet the tests of the due process clause. He also argued that the statute violated the first amendment protections of freedom of speech and press.[51] Justice Frankfurter, writing for a five-man majority, easily disposed of the vagueness argument. He recited a fifty-year history of racial violence in Illinois to show that the state legislature was dealing with more than just an abstract issue when it drafted the criminal statute. Moreover, he found the statute clear, both in its drafting and application.[52]

The central issue before the Court was the legitimacy of group libel laws, or rather, whether or not the fourteenth amendment prevents states from punishing such libels.[53] Justice Frankfurter noted that just as a state could have an interest in sanctioning libelous statements made to individuals, so too could that state have an interest in preventing such statements from being directed at a group. The Court felt that unless such laws were without purpose or relation to the well-being of the state, it could not

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[46]The Illinois Supreme Court in People v. Beauharnais, 408 Ill. 512, 517-18, 97 N.E.2d 343, 346 (1951), quoted the original statement of the "clear and present danger" test from Schenck v. U.S., 249 U.S. 47 (1919). "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.* at 52 (quoted in People v. Beauharnais, 408 Ill. at 517, 97 N.E.2d at 346). The Illinois Supreme Court concluded that "[a]ny ordinary person could only conclude from the libelous character of the language that a clash and riots would eventually result between the members of the White Circle League of America and the Negro race." 408 Ill. at 517, 97 N.E.2d at 346.

[47]343 U.S. 250, 254.

[48]*Id.* at 251.

[49]408 Ill. at 518, 97 N.E.2d at 346 (quoting ILL. REV. STAT. ch. 38 § 404 (1949)). *See also supra* note 43.

[50]408 Ill. at 517-18, 97 N.E.2d at 347.

[51]343 U.S. at 251-52.

[52]*Id.* at 257-64.

[53]*Id.* at 252.

preclude a state from prohibiting such language.[54] Refusing to pass on the wisdom of the Illinois statute, the Supreme Court determined that nothing in the United States Constitution precluded Illinois from passing such a law, and affirmed the conviction.[55]

The most important dissent was that of Justice Black. He argued that a group libel law such as the Illinois statute could not be fitted into the traditional pattern of criminal libel laws, pointing out that hitherto the *crime* had punished only "false, malicious, scurrilous charges against *individuals*, not against huge groups."[56] Justice Black believed that the expansion of criminal laws beyond demonstrable *individual* injuries made the charge of libel so vague that it was nothing more than an arbitrary basis

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[54]Justice Frankfurter's majority opinion stated:

> No one will gainsay that it is libelous falsely to charge another with being a rapist, robber, carrier of knives and guns, and user of marijuana. The precise question before us, then, is whether [the 14th amendment] prevents a State from punishing such libels—as criminal libel has been defined, limited and constitutionally recognized time out of mind—directed at designated collectivities and flagrantly disseminated. . . . We cannot say . . . that the question is concluded by history and practice. But if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this is a wilful and purposeless restriction unrelated to the peace and well-being of the State.
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> Illinois . . . [could] conclude that wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community. . . .
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> In the face of . . . history and its frequent obligato of extreme racial and religious propaganda, we would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it is presented. . . .
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> . . . .
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> [W]e are precluded from saying that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved.

Id. at 257-63. The Court went on to note that because the libelous language was not protected by the first amendment, it was unnecessary, either for [the Supreme Court] or for the State courts, to consider the issues behind the phrase "clear and present danger." Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class. *Id.* at 266.

[55]343 U.S. at 266-67.

[56]*Id.* at 271-72 (Black, J., dissenting) (emphasis added). Justice Black noted:

> This limited scope of the law of criminal libel is of no small importance. It has confined state punishment of speech and expression to the narrowest of areas involving nothing more than purely private feuds. Every expansion of the law of criminal libel so as to punish discussions of matters of public concern means a corresponding invasion of the area dedicated to free expression by the First Amendment.

Id. at 272.

for limiting speech critical of certain groups. Noting that Beauharnais was simply "making a genuine effort to petition [his] elected representatives,"[57] Justice Black explained that the effect of the *Beauharnais* decision was to make it "very dangerous indeed to say something critical of [a group]"[58] when "arguing for or against the enactment of laws that may differently affect [that group]."[59]

There is little doubt that group libel laws, whether or not they can be fitted into the traditional criminal libel law pattern,[60] do cause serious constitutional concerns, for they are restrictions on free discussion. In this specific case, Beauharnais was circulating his leaflets as part of a campaign to secure legislation, albeit legislation which would have been unconstitutional if enacted.[61] As Justice Jackson pointed out in his dissent, under the challenged law there was no requirement

> to find any injury to any person, or group, or to the public peace, nor to find any probability, let alone any clear and present danger, of injury to any of these. . . .
>
> . . .
>
> The leaflet was simply held punishable as criminal libel *per se* irrespective of its actual or probable consequences.[62]

Constitutional concerns over such a *per se* treatment make the validity of *Beauharnais* highly doubtful today. It has never been used as precedent in a Supreme Court decision; rather, "the views of [Justice] Black . . . to a great extent have prevailed in later cases."[63] At least three federal courts of appeal have stated in dicta that it is doubtful whether the case is still good law.[64]

C. *The Continuing Validity of Group Libel Laws and* Beauharnais v. Illinois

Since the *Beauharnais* decision, the standards used by the courts to determine the validity of state restrictions on the freedoms of speech and press have changed in three distinct ways. First, the incorporation of the provisions of the first amendment into the fourteenth amendment is now

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[57]*Id.* at 267 (Black, J., dissenting).

[58]*Id.* at 273 (Black, J., dissenting).

[59]*Id.* (Black, J., dissenting).

[60]*See* Note, *Constitutional Law: Validity of Group Libel Laws*: Beauharnais v. Illinois, *343 U.S. 250 (1952)*, 38 CORNELL L. REV. 240, 241 nn.9-10 and accompanying text. After an examination of cases, the author concludes that "the majority of cases in this country have held that the libelling of large groups can constitute criminal libel whereas only a few cases hold to the contrary." *Id.* at 241 (footnote omitted). *See also supra* text accompanying note 56.

[61]Note, *supra* note 60, at 241 n.8 and accompanying text.

[62]343 U.S. at 302 (Jackson, J., dissenting).

[63]J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 944 (2d ed. 1983).

[64]Collin v. Smith, 578 F.2d 1197, 1205 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); Tollett v. United States, 485 F.2d 1087, 1094 n.14 (8th Cir. 1973); Anti-Defamation League of B'nai B'rith v. F.C.C., 403 F.2d 169, 174 n.5 (D.C. Cir.)(Wright, J., concurring), *cert. denied*, 394 U.S. 930 (1968).

well established.[65] Second, in first amendment cases, the Court has long since abandoned the "rational relationship" test used by Justice Frankfurter to respond to the vagueness issue presented by Beauharnais and to justify the state's restriction of such speech. The standard today is much higher: a law which restricts freedom of speech must be one that is necessary in order to achieve a compelling state interest.[66] Third, the law of libel, from which criminal and group libels law developed, has been modified drastically since *Beauharnais*.

Beginning with *New York Times Co. v. Sullivan*,[67] the Supreme Court has systematically abolished many of the old common law rules of libel law on which the decision in *Beauharnais* was based. For example, the Court has voided the rule that truth is a defense only when the material is published with good motives.[68] Truth is now an absolute defense in a libel suit, even if the purpose of the statement was malicious.[69] Additionally, the Court has abolished the common law rule that if a publication is defamatory *per se*, the plaintiff need not prove actual damages.[70] Today, actual damages must be proven, and punitive damages are not permissible in such civil actions.[71]

Another criticism aimed at the type of criminal group libel statute upheld in *Beauharnais* is exhibited in the more recent libel law decisions.[72] In these cases, there appears to be an overriding concern for "limiting libel laws to cases in which they are *actually necessary* for the protection of reputation."[73] Arguably, the necessity of a group libel statute to protect the reputation of a group, or an individual's interests when the speech is directed at the group, is less than the need for a statute to protect an individual from speech directed specifically at that individual. Furthermore, a *criminal* libel law,[74] designed merely to protect one's reputation, under some circumstances, might be considered "unnecessary and excessively restrictive of speech."[75] Thus, it is easy to understand the criticism

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[65]*See supra* note 54 and accompanying text.

[66]*See, e.g.*, NAACP v. Button, 371 U.S. 415, 438-44 (1963)(because the state failed to "advance any substantial regulatory interest," any broad prohibitions of speech were dissallowed by the first amendment).

[67]376 U.S. 254 (1964).

[68]*See supra* note 43 and accompanying text.

[69]Time, Inc. v. Hill, 385 U.S. 374, 383, 387-91 (1967)(extending the rule to a private plaintiff suing a publication that cast him in a "false light" but did not defame him, when the subject matter was of public interest); Garrison v. Louisiana, 379 U.S. 64, 70-76 (1964). *See also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 348-50 (1974).

[70]*See* Gertz v. Robert Welch, Inc., 418 U.S. at 349.

[71]*Id.* at 348-50.

[72]*See, e.g.*, Collin v. Smith, 447 F. Supp. 676 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

[73]447 F. Supp. at 696 n.15 (emphasis added).

[74]*Beauharnais* involved " 'a form of criminal libel law.' " 343 U.S. at 253 (citation omitted).

[75]447 F. Supp. at 696 n.15. The trial court went on to state that "[s]uch a position would strongly imply that any criminal law designed to punish the infliction of psychological trauma through speech such as racial slurs is unconstitutional, and that the victim should be limited to his tort law remedy." *Id.*

of *Beauharnais*, wherein a criminal group libel law was applied to protect a group from harm.[76]

It is important to note, however, that the majority in *Beauharnais*, and subsequent cases that have referred to *Beauharnais*, correctly characterized the statute involved as one which punished both defamatory speech and speech that was likely to cause violence.[77] Yet, in *Garrison v. Louisiana*,[78] the Court cited *Beauharnais* as an example of a "narrowly drawn [statute] . . . designed to reach speech, such as group vilification, [that is] 'especially likely to lead to public disorders.' "[79] It appears that after *New York Times*[80] and *Garrison*, then, the Supreme Court treats racially defamatory speech as a special category of speech which can be regulated only if it is likely to cause violence or a breach of the peace.

For these reasons, the trial court in *Collin v. Smith*[81] concluded that *Beauharnais* had been overruled, or "at the very least it has been undermined so severely that it should be restricted to its facts."[82] Not everyone, however, is so convinced that *Beauharnais* has been overruled. In the denial of a stay of the court of appeals order in *Smith v. Collin*,[83] Justice Blackmun dissented stating "*Beauharnais* has never been overruled or formally limited in any way."[84] When the writ of certiorari, stemming from the Seventh Circuit decision invalidating the city ordinances was denied, Justice Blackmun again dissented. He urged that certiorari be granted, "in order to resolve any possible conflict that may exist between the ruling of the Seventh Circuit here and *Beauharnais*."[85]

It is fairly clear that *Beauharnais* has been overruled *sub silentio*, Justices Blackmun and Rehnquist (and possibly White) to the contrary notwithstanding. Even if it has not been overturned, the continued linking of group libel laws with the prevention of violence and disorder has surely limited the applicability of the case to a narrow set of facts.

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[76]*See supra* notes 39-64 and accompanying text.

[77]*Beauharnais*, 343 U.S. at 254. In *Beauharnais*, Justice Frankfurter's opinion relied heavily on the history of violence in Illinois as a justification for the passage of such a law. *Id.* at 258-62. *See also supra* note 52 and accompanying text. The Court makes this same point in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), when it refers to its decision in *Beauharnais*. *Id.* at 268-69.

[78]379 U.S. 64 (1964).

[79]*Id.* at 70 (citations omitted).

[80]*See, e.g.*, New York Times V. Sullivan, 376 U.S. 254 (1964).

[81]447 F. Supp. 676 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

[82]447 F. Supp. at 698. The court of appeals in *Collin* also expressed doubts "that *Beauharnais* remains good law at all after the constitutional libel cases." 578 F.2d at 1205.

[83]436 U.S. 953 (1978) (Blackmun, J., dissenting).

[84]*Id.* (Blackmun, J., dissenting). Justice Rehnquist joined in the dissent.

[85]Smith v. Collin, 439 U.S. 916, 919 (1978)(Blackmun, J., dissenting). Justice White joined in the dissent but it is unclear whether he agreed with Justice Blackmun's earlier statement that *Beauharnais* had not been overruled. For a scholarly defense of group defamation laws, see Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 SUP. CT. REV. 281.

III. The Indianapolis Ordinance as a Group Libel Law

Assuming *arguendo* that both *Beauharnais* and group libel laws are still constitutionally viable, does the Indianapolis ordinance meet the tests imposed by *Beauharnais*? The answer is dependent upon the ordinance's similarity to the statue approved in *Beauharnais*.

In a clear attempt to meet some of the overt *Beauharnais* conditions, the Indianapolis ordinance[86] appears to contain elements similar to those of the Illinois legislature of which Justice Frankfurter approved in *Beauharnais*.[87] There is, however, one major difference. The Illinois legislature was able to point to a history of racial violence to support its position. The Indianapolis City Council, instead, simply found that "[p]ornography is [both] a discriminatory practice based on sex which denies women equal opportunities in society. . . [and]. . . a systematic practice of exploitation and subordination based on sex which differentially harms women."[88] Such an unsupported statement does not rise to the level of historical evidence upon which the law and opinion in *Beauharnais* were based.[89] The rationale in *Beauharnais* requires a showing that the speech or practice is harmful—it is not enough to show that it is offensive or merely state that it is differentially harmful.[90] Furthermore, to be a valid group libel law, there must be a group against which the speech is directed. That is, it *must* be differentially harmful.

A. The Simple Causal Connection Between Pornography and Harm to Women.

The essence of the feminist argument is that pornography embodies an ideology of "cultural sadism" directed against women.[91] For feminists, pornography is pathognomonic of the "objectification" of females which leads to their treatment in society. Many think the case against pornography is obvious, for they believe a direct causal relationship exists between pornography and violence against women.[92] As one author phrased it, "pornography is the theory, violence is the practice."[93]

Two developments seem to lend support to this argument. First, a series of psychological studies have been conducted which were interpreted

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[86]Indianapolis, Ind., Code of Indianapolis and Marion County, Indiana § 16-1(a)(2) (1984).

[87]343 U.S. at 253-64.

[88]Indianapolis, Ind., Code of Indianapolis and Marion County, Indiana § 16-1(a)(2) (1984).

[89]*See supra* note 52. *See infra* notes 93-98 (data challenging the factual underpinning of the Indianapolis Council's findings and the ordinance itself).

[90]*See supra* notes 9-12 and 18-26 and accompanying text.

[91]The term "cultural sadism" is the author's. However, the concept is very widespread, especially among the more militant feminists. *See, e.g.*, S. Brownmiller, *supra* note 2; K. Millett, Sexual Politics (1970).

[92]*See* R. Morgan, Going Too Far: The Personal Chronicle of a Feminist 165 (1977). *See also infra* notes 107-08 and accompanying text.

[93]Morgan, *supra* note 92, at 165.

as proving that exposure to pornographic movies results in increased hostility and violence against women.[94] Second, there is a perceived increase in violence against women in the media and in pornographic films.[95]

Professor Edward Donnerstein, who was cited at length by the supporters of the Indianapolis ordinance,[96] has conducted a series of laboratory studies on the relationship between erotica, aggressive erotica, and violence toward women. Like earlier researchers, Donnerstein found "no evidence that exposure to nonviolent erotica will increase aggression against women."[97] However, he did find that exposure to violence caused male laboratory subjects to treat females aggressively.[98]

More recently, Donnerstein and his associates have turned to a new technique to assess the relationship between erotica, aggressive erotica, and violence toward women. The new studies attempt to assess the long range effects of exposure to violence and violent erotica, by measuring attitudinal change toward rape victims after exposure to violence. Subjects who had been exposed to violence and violent erotica in films were used as jurors in simulated rape cases. As a result of this exposure, those jurors were less likely to feel sympathy toward the women who claimed they had been raped.

These studies have been used to provide support to the argument that pornography incites violence toward women. In fact, the research was relied upon heavily by the proponents of the Indianapolis ordinance. There are, however, serious methodological problems in attempting to transfer findings regarding laboratory induced anger to the real world.[99] Professor

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[94]Donnerstein, *Pornography and Violence Against Women: Experimental Studies*, 347 ANNALS OF THE NEW YORK ACADEMY OF SCIENCE 277 (1978); Donnerstein, *Facilitating Effects of Erotica on Aggression Against Women*, 36 J. PERS. & SOC. PSYCHOLOGY 1270 (1978); Malamuth, *Testing Hypotheses Regarding Rape: Exposure to Sexual Violence, Sex Differences and Normality of Rapists*, 14 J. RESEARCH IN PERS. 121 (1980).

[95]*See infra* text accompanying notes 102-04.

[96]N.Y. Times, July 3, 1984, § 1, at 8, col. 1.

[97]E. Donnerstein, *Erotica and Human Aggression*, *in* AGGRESSION (R. Geen & E. Donnerstein eds. 1982).

[98]Donnerstein's early research used a research paradigm in which male subjects, angered by a researcher, were shown erotic material and subsequently given an opportunity to give an electrical shock to the original transgressor. The intensity of the shock given by the male subjects to male subjects tended to decline when the erotic film was aggressive or aggressive/erotic but tended to increase when the recipient was female. Although there are alternative explanations for the behavior, for example, male bonding, the findings were hailed by opponents of pornography as proof that pornography led to violence against women.

[99]*See* Gray, *Exposure to Pornography and Aggression Toward Women: the Case of the Angry Male*, 29 SOC. PROB. 347 No. 4 (Apr. 1982) (a review and devastating critique of aggression research). Among other issues, Gray questions whether undergraduate men in a college setting respond to pornography in the same manner as the general male population. Studies of pornography using students usually measure the effect immediately, or ten minutes after exposure. Unless a solid case can be made that short-term experimental results can be transferred directly to the long-term real world, the utility of such studies is limited.

Another problem with most experimental studies, including Donnerstein's, is that the

Donnerstein has even stated that his research has been "misused" by opponents of pornography. "If you take the violent content out of pornographic films and leave only the explicit sex, there is no effect . . . [for] it's the violence, *whether connected with sex or not*, that results in a desensitizing to violence."[100]

Even conservative intellectuals who oppose pornography do not think the theory has been proven that exposure to pornography causes sexual aggression. One of the most conservative scholarly opponents to pornography, Ernest van Den Haag, accepts the feminist argument that pornography is disruptive of the society because it "reduces people simply to bearers of impersonal sensations of pleasure and pain."[101] Yet, he has not been persuaded by any of the tests that pornography causes sexual aggression. "There have been studies on the connection between pornography and sexual aggression, but none serious."[102]

In explaining its harmfulness, feminists maintain that pornography is not merely dehumanizing but that it also objectifies, humiliates, degrades, and physically brutalizes women.[103] However, contrary to this belief, pornographic movies are not about men objectifying women; rather, they exhibit the physical aspects of both genders' sexuality.[104]

Another development buttressing the feminists' argument is a perceived increase in violence against females, both in the mass media and in particular pornographic movies. The cause celebre was the presentation of the pornographic movie *Snuff* just off New York's Time Square, amid

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subject is angered and, subsequently, is required to shock the specific person who angered him. Some shock behavior is required whether the subject desires to administer shock or not. More important is the fact that retaliatory behavior toward a specific person is different from displaced retaliation toward a more general target. Hurting a known or an unknown person after that person has angered or hurt you (with or without seeing a film) cannot be generalized to hurting or desiring to hurt known or unknown persons who have not hurt or angered you.

[100]N.Y. Times, July 3, 1984, § 1, at 8, col. 1 (emphasis added).

[101]*Id.*

[102]*Id.*

[103]S. GRIFFIN, *supra* note 3, at 46. The problem is stated by Griffin:

> If all the literature on pornography were to be represented by one performance, and that performance were to move into its most dramatic moment, the scenes which have been secretly promised by all that has gone before, which will both embody the entire action and meaning of the play and give to its audience the most acute emotional experience, these would have to be the moments (which are inevitable in the pornographic oeuvre) in which most usually a woman, sometimes a man, often a child, is abducted by force, verbally gagged, often tortured, often hung, his or her body suspended, wounded and then murdered.

Id.

[104]*Id. See also* Toolin, *Attitudes about Pornography: What Have the Feminists Missed?*, 17 J. POP. CULTURE 167, 173 (Fall 1983). Toolin states:

> In all cases [of pornography], women and men are shown as weak; neither is in control. Passion is in control; genitals are in control. Women are controlled by their own desires, their insatiable passion, and/or the uncontrollable passions of men. Men are controlled by the desires and passions of women, and by their own insatiable desires and uncontrollable passions.

newspaper stories of an investigating of the widespread private sales of movies in which women were killed. The picketing and publicity which resulted created a perception in many minds that pornography was primarily *about* violence against women.

This perception, however, is largely inaccurate and based on selective perception. Rape scenes and violence against women are relatively rare in mass audience pornographic movies as a matter of definition: pornographic films depict males *and* females overcome by lust, as a result there is almost no resistance to sexual overtures. A recent content analysis of sixty-seven pornographic movies, in both New York City and Houston or Austin, Texas, found very little (less than one percent of the total screen time) sadomasochism or violence. Rather, the study found that men are more likely than females to be the subject of such violence.[105] Based on this data, it arguably appears that the position that women are *routinely* brutalized in pornography is, at the least, biased.[106]

B. Pornography as Per Se Violence Against Women

While some feminists see a simple causal connection between pornography and violence against women, the more sophisticated avoid the evidentiary trap by arguing that pornography is *per se* violence against women. "For whether or not pornography causes sadistic acts to be performed against women, above all pornography is in itself a sadistic act."[107] This is

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[105]There were only 3 rape scenes in the 67 movies analyzed. The sample also included 3 females who were killed. However, in all 3 cases, there was no sexual context: one was accidental; one was the killing of a female witness to a crime; and one duelist, not known to be female until later killed. By contrast, seven men were killed, another was assaulted with a blowtorch, and another by a knife-wielding woman.

[106]*Pornotopia in the 1980s: A Content Analysis of Contemporary American Pornographic Films* (presented by W. Brigman at the American Popular Culture Association Annual Meeting, Wichita, Kansas on April 22, 1983). The following is a complete listing of acts of violence against women in the 67 films:

> woman chained, still photo of whip (no on-screen violence); women tied up after announcing such a desire; physician rapes patient, asks for forgiveness; sex-initiation scene, girl cries afterwards; Indian woman raped, fights to end; woman assaulted by Indian woman's relatives, enjoys it, marries the Indian; woman tied to tree to observe husband (no other violence); man stalks woman with knife (not real); shooting; movie man ties up his wife to prevent her disclosing his plans; bondage scene; one stroke spank; "pretend I'm beating you"; three real strokes; female-female punishment by spanking (heard, not seen); two female spanking scene, bondage only; accidental (?) killing; killing of female witness (no sexual context); one slap during photo session for realism; two girls kidnapped; they make sexual overtures; two slaps on woman's hips during intercourse at her request; woman kidnapped and tied up, berates kidnappers as impotent; female duelist killed, not known she is female; attempted rape by mental defective aborted by his sister.

[107]S. GRIFFIN, *supra* note 3, at 111. Griffin goes on to note:

> Let us remember that the central experience of sadomachism is humiliation. The actual images of pornography degrade women. This degradation is the essential experience of pornography. It can be argued that for a woman to be

the philosophy underlying the feminist argument and the Indianapolis ordinance against pornography. It matters not that there is no evidence that pornography causes violence against women because pornography *per se* is violence against women—it "*is in itself a sadistic act.*"[108]

The argument is fatally flawed, both logically and constitutionally. First, it avoids having to demonstrate clearly that the speech or practice is harmful. Second, it assumes that pornography *uniquely* objectifies women and, as such, "differentially harms women."[109] Yet, unless it can be proven that pornography *differentially* harms women, there can be neither a group libel nor a civil rights violation.[110] Women alone, however, are not objectified in pornography; people are objectified. The differential treatment which is assumed, in reality, does not exist.

The ordinance itself is logically inconsistent on this point. Although "pornography" is uniquely defined in section 16-3 as both written and pictorial works where *women* are "presented as sexual objects who enjoy pain . . . [or] as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display,"[111] the word "women" is specifically said to also apply to "men, children, or transsexuals."[112]

Not only does this destroy the group libel and civil rights logic underlying the law, and its very reason for being, it also makes the definition incomprehensible and unconstitutionally vague. By definition, a group libel law must protect something less than the entire population. Without an element of exclusivity or inclusivity, the act ceases to be either a group libel law or a civil rights law. It becomes, instead, a calculated attempt to

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> disrobed in public at all, given the values of this culture, is a degradation . . . . She has been paid to take off her clothing. And she has about her posture the attitude of a whore who has been paid to move in a certain way. She is chattel. When she is chained, her chains are redundant, for we know that she is not a free being. The whole value, the thrill of the "peep show" or a centerfold depends on a woman's degradation. In this way she plays the whore. For she is *literally* for sale. Her image, printed on a newspaper, is reproduced countless times, and lies flat under a plastic screen, to be had for twenty-five or fifty cents by a passing man.

Id.

[108] *Id.*

[109] INDIANAPOLIS, IND., CODE OF INDIANAPOLIS AND MARION COUNTY, INDIANA § 16-1(a)(2) (1984).

[110] A practice which treats all individuals alike, even negatively, is not discrimination nor is it "group" libel. While it may be possible that the entirety of the American population constitutes a "group" in the nonlegal use of the term, the concept of "group discrimination" or "sex discrimination" logically requires that the "group" be a subset of the population. The key element in the concept of discrimination is the arbitrary selection from a number of persons "all of whom stand in the same relation to the privileges granted, and between whom and [those] not so favored no reasonable distinction . . . can be found." Franchise Motor Freight Assoc. v. Seavy, 196 Cal. 177, 180, 235 P. 1000, 1002 (1925).

[111] INDIANAPOLIS, IND., CODE OF INDIANAPOLIS AND MARION COUNTY, INDIANA § 16-3(q)(1), (6) (1984).

[112] *Id.* § 16-3(q).

suppress literature, art, and speech merely because it offends. This is not constitutionally permissible.

IV. The Indianapolis Ordinance and the First Amendment

Among other factors, the ordinance is fatally flawed as either a group libel law or civil rights law by its inclusion of the entire human race. Therefore, the only question that remains is whether or not it can survive standard first amendment scrutiny.[113] In *American Booksellers Association, Inc. v. Hudnut*,[114] United States District Court Judge Sarah Evans Barker found the answer was no.

Viewed from the perspective of first amendment jurisprudence, the ordinance suffers from a variety of major constitutional defects. Chief among these are excessive vagueness, failure to comply with the established definition of obscenity, irreconcilable conflict with the concept of the avertable eye, the attempt to create third party tort liability for injuries "caused" by "pornography," and an administrative system of prior censorship which is inconsistent with the requirements established by the United States Supreme Court.[115]

A. Excessive Vagueness

The ordinance's language is rooted in feminist philosophy.[116] As a result, the statute contains words and phrases left undefined outside of feminist rhetoric and employs them in a manner inconsistent with standard usage. The term "pornography" is the most obvious of these for reasons stated above, but the law is replete with others.[117] For example, one key word, "subordination," is never defined in the ordinance, nor is its meaning made clear from the context in which it is used.[118] The standard definition of "subordination" is "placed in a lower order, class, or rank . . . inferior in . . . dignity, power, importance, or the like . . . secondary,

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[113]In order to be constitutionally valid, a law restricting freedom of speech must meet one of the exceptions specifically enumerated by the United States Supreme Court: 1) libel and slander (group libel laws, if they are still constitutionally valid, are a variant of this category); 2) "fighting words"; or 3) obscenity. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). Although cast as a civil rights law, the Indianapolis ordinance must fit within one of these special categories, or be subjected to the normal rules which govern limitations on freedom of speech.

[114]598 F. Supp. 1316 (S.D. Ind. 1984). *See supra* note 5.

[115]*See supra* notes 18-26 and accompanying text.

[116]*See, e.g.*, Elshtain, *The New Porn Wars*, The New Republic, June 25, 1984; N.Y. Times, June 10, 1984, § 4, at 2, col. 3.

[117]The plaintiffs in *American Booksellers* challenged the word "pornography" along with several others as being unconstitutionally vague. 598 F. Supp. at 1337-38.

[118]"Pornography shall mean the graphic sexually explicit subordination of women . . . ." Indianapolis, Ind., Code of Indianapolis and Marion County, Indiana § 16-3(q). The *American Booksellers* court concentrated its vagueness discussion on the phrase "subordination of women." 598 F. Supp. at 1337-39.

minor."[119] Presumably, the ordinance uses the word differently. Otherwise, any presentation of a female in a role other than the highest status role possible in an artistic presentation would be impermissible.

The attempt to create a new definition of pornography only compounds the problem of clarity. For example, the essence of the definition is the term "presented as sexual objects." While that term may be clear to a radical feminist, it is essentially meaningless to one not versed in the peculiar language of feminism. Other terms used in the definition share the same flaw, such as "who enjoy . . . humiliation; . . . presented in scenarios of degradation . . . shown as . . . inferior; . . . presented . . . for . . . conquest . . . through postures or positions of servility or submission or display."[120] Not only does the ordinance attempt to prevent a presentation of bondage, which some do not consider improper, or immoral, or degrading, but if interpreted literally the "posture . . . of submission" prohibition would outlaw any art work involving nudity where the female is not superior.

Equally ambiguous is section 16-3(g)(6), which makes the "forcing of pornography on a person" a discriminatory practice. What constitutes "forcing?" If a host suggests to a guest that a recent issue of a magazine has an excellent article on a black political leader and gets a copy of the magazine for the guest to read and the magazine meets the statutory definition of "pornography," is that forcing?

To one versed in antipornography linguistics, the apparent ambiguities are not ambiguous at all.[121] However, merely because one group in a society understands its idiosyncratic use of the English language does not protect that language from the charge of being unconstitutionally vague. Quite the contrary: it enhances the charge. Adequate notice of violation of law requires that the law use language within the usual framework of meaning. As noted by the district court, "Persons subjected to this Ordinance cannot reasonably steer between lawful and unlawful conduct, with confidence that they know what its terms prohibit."[122] This places a special burden upon those who create new concepts, a burden to use language to make those concepts clear. The Indianapolis ordinance is couched in propagandistic rather than legal terms, and is therefore unconstitutionally vague.

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[119]BLACK'S LAW DICTIONARY 1278 (rev. 5th ed. 1979).

[120]INDIANAPOLIS, IND., CODE OF INDIANAPOLIS AND MARION COUNTY, INDIANA § 16-3(q) (1984). The *American Booksellers* court also pointed to the vagueness of these terms. 598 F. Supp. at 1338-39.

[121]For example, to one not familiar with the logic or language of feminists, the statement regarding women and penetration by objects is unconstitutionally vague because it could include a woman who was shot or stabbed. *See* INDIANAPOLIS, IND., CODE OF INDIANAPOLIS AND MARION COUNTY, INDIANA § 16-3(q)(4)(1984). However, one familiar with the vocal objection of feminists to presentations of scenes in which women are shot or stabbed will realize that the language is intentionally broad in order to outlaw violent movies.

[122]*American Booksellers*, 598 F. Supp. at 1339.

B. Is It Constitutionally Possible to Proscribe Nonobscene Material?

Leaving aside the specific linguistic deficiencies of the ordinance, an important question posed by the Indianapolis ordinance is the extent to which nonobscene material can be proscribed without violating the free speech and press guarantees of the first amendment. Under the first amendment, "speech may not be punished merely because it offends."[123] Only speech which constitutes "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words"[124] and "child pornography"[125] may be proscribed. The exception for "libelous" material is inapplicable in this case because the Indianapolis ordinance is much broader. Therefore, the only reasonable category upon which the law can be based is "obscenity." This too is inapplicable.

In *Miller v. California*,[126] the United States Supreme Court created a three-prong test which must be met before sexually related material may be restricted as obscene and therefore devoid of first amendment protection:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[127]

The *Miller* Court made it clear that material which did not meet this test for obscenity could not be proscribed, and further required that the controlling ordinance specifically detail the type of material outlawed.[128]

The Indianapolis ordinance makes virtually no attempt to meet any of the tests established by the United States Supreme Court in *Miller*. It does not refer to a "community standard" test, nor does it require that the material be "patently offensive."[129] Furthermore, the closest that the ordinance comes to an exemption for works that have serious "literary, artistic, political or scientific value" is a limited exemption for "[c]ity, state,

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[123]Collin v. Smith, 447 F. Supp. 676, 697 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

[124]Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); *see* Miller v. California, 413 U.S. 15 (1973). *See also American Booksellers*, 598 F. Supp. at 1331 (quoting *Chaplinsky* for the same proposition).

[125]New York v. Ferber, 458 U.S. 747 (1982). *See also American Booksellers*, 598 F. Supp. at 1331 (citing *Ferber*).

[126]413 U.S. 15 (1973).

[127]*Id.* at 24 (citations omitted). Judge Barker, in *American Booksellers*, noted that the *Miller* obscenity test was not directly applicable to the Indianapolis ordinance because the ordinance, as acknowledged by the defendants, sought to proscribe speech that was not obscene. 598 F. Supp. at 1331-32.

[128]This position was reaffirmed the following year in Jenkins v. Georgia, 418 U.S. 153 (1974).

[129]*See American Booksellers*, 598 F. Supp. at 1332.

and federally funded public libraries or private and public university and college libraries in which pornography is available for study."[130] However, even that exemption does not cover "special display presentations" (which are not defined in the ordinance), also leaving other institutions or individuals not named. Thus, the private or public art museum which displays erotic etchings from Picasso, and the bookstore which sells such collections, would be subject to a discrimination order.[131]

The major flaw in the legislative scheme, however, is its attempt to restrict nonobscene materials. The intent is evident from the provision in the original ordinance,[132] subsequently deleted by amendment,[133] which defined "sexually explicit" material to include "[u]ncovered exhibition of the genitals, pubic region, buttocks or anus of any person."[134] Such material obviously is not within the "hardcore pornography" that Chief Justice Burger stated in *Miller* was the only type that could be proscribed.[135]

The deletion of the inappropriate definition by amendment does not remedy this defect, for under *Miller*, the legislative body must explicitly state the types of activity which are proscribed.[136] It could be argued that Indianapolis is a creature of the State of Indiana and, therefore, the state's definition of "sexually explicit" is controlling. Such an argument is, however, both illogical and self-defeating. The state obscenity law[137] is a criminal statute which defines obscenity in accordance with *Miller*. As such, the state statute is not broad enough to reach the type of material which the city attempts to regulate. Imputing the state statute to the Indianapolis ordinance would render the ordinance no more effective than the current Indiana law, thereby defeating the purpose of the ordinance.

C. The Concept of the Avertable Eye

An irreconcilable conflict exists between the feminist proposals[138] to control pornography and the United States Supreme Court's concept of

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[130]The ordinance reads: "City, state, and federally funded public libraries or private and public university and college libraries in which pornography is available for study, including on open shelves, shall not be construed to be trafficking in pornography, but special display presentations of pornography in said places is sex discrimination." INDIANAPOLIS, IND., CODE OF INDIANAPOLIS AND MARION COUNTY, INDIANA § 16-3(g)(4)(A)(1984).

[131]Section 16-3(g)(4)(C) provides that the paragraph regarding trafficking in pornography "shall not be construed [as making] isolated passages or isolated parts actionable." *Id.* Presumably, this phrase is an attempt to incorporate the *Miller* requirement that a work be considered as a whole. 413 U.S. 15, 24 (1973). But since it is in a section which deals with trafficking in pornography rather than in the definition of pornography, its meaning and intent are unclear.

[132]Section 16-3(bb) of the original amendment was signed into law on May 1, 1984.

[133]The definition was deleted in the subsequent amendment, signed into law on June 15, 1984.

[134]INDIANAPOLIS, IND., CODE OF INDIANAPOLIS AND MARION COUNTY, INDIANA § 16-3(bb), *repealed by*, General Ordinance No. 35 (June 1, 1984).

[135]413 U.S. 15 (1973).

[136]*Id.* at 24.

[137]IND. CODE §§ 35-49-1-1 to -3-4 (Supp. 1984).

[138]*See supra* notes 1-3.

the avertable eye. The first amendment strictly limits the government's power to act as a censor.[139] As such, "the burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities . . . by averting [his] eyes.' "[140] However, the feminist position is that pornography is so pervasive in the society and so harmful in its impact that it is impossible to avoid it, or its impact, by averting the eyes.

One interpretation of this position, adopted by the Indianapolis ordinance, is that pornography is sexual harassment and could be outlawed if it were explicitly forced upon a female in the workplace.[141] The Equal Employment Opportunity Commission (EEOC) and the courts have recognized that sexual harassment is gender based discrimination and, that as such, it violates section 703 of the Civil Rights Act of 1964.[142] The EEOC and the courts agree that employers have an affirmative duty under Title VII of the Act to maintain a working environment free of discriminatory insult, intimidation, and other forms of harassment on the basis of race, religion, national origin, or sex.[143] It is fairly clear that under this section, the posting or open circulation of pornography in a workplace would constitute sexual harassment in the same sense that an employer's tolerance of ethnic jokes directed at an employee is prohibited national origin harassment.[144] In connection with the avertable eye concept, while in a work environment, one cannot, and should not, be forced to quit work or be fired from her employment in order to avoid being sexually harassed.

The attempt, however, to expand this sexual harassment concept from the workplace to society at large cannot stand constitutional or logical scrutiny. "Forcing" pornography on a female employee as a condition for

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[139]Erznoznik v. Jacksonville, 422 U.S. 205, 209-10 (1975).

[140]*Id.* at 210-11 (quoting Cohen v. California, 403 U.S. 15, 21 (1971)). Justice Powell spoke for the majority in *Erznoznik*:

> [W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. . . . Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home . . . or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. . . .
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> . . . .
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> [T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent the narrow circumstances described above, the burden normally falls upon the viewer to "avoid further bombardment of [his] sensibilites simply by averting [his] eyes."

422 U.S. at 209-11 (footnotes and citations omitted).

[141]*See supra* note 9.

[142]42 U.S.C. § 2000e-2(a) (1984). The EEOC's *Guidelines on Discrimination Because of Sex* states that "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." 29 C.F.R. 1604.11(a) (1984).

[143]EEOC Dec. (CCH) ¶ 6757 (Feb. 6, 1981).

[144]*See* EEOC Dec. (CCH) ¶ 6085 (Dec. 16, 1969).

continued employment is not analogous to allowing other individuals to purchase or view the same material in an art gallery, a movie theatre, or their own homes. This, however, is precisely the flawed analogy on which the Indianapolis ordinance is based.

D. The Constitutionality of Third Party Tort Actions for Injuries "Caused" by Pornography

Consistent with the belief that pornography breeds violence against females, the Indianapolis ordinance creates a tort action authorizing a claim against anyone in the chain of publication and distribution, when a person is attacked by another acting under the influence of the outlawed materials.[145] Leaving aside the difficulty of proving causation, this provision is directly contrary to a significant number of cases which have rejected the attempt to create third party liability based on exposure to communicative materials of the type contemplated in the ordinance.[146] For example, the Rhode Island Supreme Court dismissed the claim of parents who contended that a television network was liable for the death of their son who had attempted to copy a stunt seen on *The Tonight Show*. The court determined that to allow recovery "on the basis of one minor's actions would invariably lead to self-censorship by broadcasters in order to remove any matter that may be emulated and lead to a law suit."[147]

In a more analogous case to the issue at hand, the Federal District Court for the Southern District of Texas dismissed a suit involving liability for publishing a sex-related article which allegedly caused the death of two people. The court found that "[c]ourts have found that First Amendment considerations . . . argue against the liability of a publisher for a reader's reactions to a publication, absent incitement."[148]

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[145]"The assault, physical attack, or injury of any woman, man, child, or transsexual [is accomplished] in a way that is directly caused by specific pornography." INDIANAPOLIS, IND., CODE OF INDIANAPOLIS AND MARION COUNTY, INDIANA § 16-3(b)(7)(1984). *See also id.* §§ 16-17. *See American Booksellers*, 598 F. Supp. at 1341.

[146]See Herceg v. Hustler Magazine, Inc., 565 F. Supp. 802 (S.D. Tex. 1983); Zamora v. Columbia Broadcasting System, 480 F. Supp. 199 (S.D. Fla. 1979); Olivia N. v. National Broadcasting Co., 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981), *cert. denied.*, 458 U.S. 1108 (1982); DeFilippo v. National Broadcasting Co., 446 A.2d 1036 (R.I. 1982).

[147]DeFilippo v. National Broadcasting Co., Inc., 446 A.2d 1036, 1041 (R.I. 1982)(footnote omitted).

[148]Herceg v. Hustler Magazine, Inc., 565 F. Supp. 802, 804 (S.D. Tex. 1983)(footnote omitted). In the well-publicized "Born Innocent" case, the California Court of Appeals specifically discussed the analogy between prior restraint on speech and civil liability premised on traditional negligence concepts. It concluded that "the chilling effect of permitting negligence actions for a television broadcast is obvious. 'The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute.' " Olivia N. v. National Broadcasting Co., 126 Cal. App. 3d 488, 495, 178 Cal. Rptr. 888, 892 (1981), *cert. denied.*, 458 U.S. 1108 (1982) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964)).

In addition to the chilling effect these potential civil damages have on "the exercise of first amendment freedoms,"[149] the provision which makes those "trafficking in pornography"[150] responsibile for third party acts of violence or discrimination is defective because it does not postulate a reasonable person test. Under the Indianapolis ordinance, if the most susceptible person in the society were exposed to pornographic material and injured another, all persons in the chain of production and distribution would be liable. This resulting liability would have the unconstitutional effect of reducing what normal adults could view to that which would not adversely motivate the most impressionable and/or morally bent person in the society. Surely this concept, quite similar to strict liability, does not comport with the constitutional protections enunciated by the United States Supreme Court.[151]

E. Constitutional Limitations on the Powers of Censorship Boards

Under the Indianapolis ordinance, the city's Office of Equal Opportunity (OEO) becomes in essence a censorship board with broad discretion and powers, including the power to issue cease and desist orders and impose sanctions.[152] Although the decisions of the OEO are subject to judicial review in contested cases, the procedures established in the ordinance do not meet the constitutional tests developed by the courts.[153] As the United States Supreme Court has noted, a system of prior restraint "comes to [the] Court bearing a heavy presumption against its constitutional validity."[154]

Even in those cases where the material involved was obscene and unprotected under the Constitution, a censorship body has been upheld "only

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[149]Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967).

> The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself . . . . Unless persons . . . desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors.

Id. See also New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[150]INDIANAPOLIS, IND., CODE OF INDIANAPOLIS AND MARION COUNTY, INDIANA § 16-3(b)(7) (1984).

[151]Erznoznik v. Jacksonville, 422 U.S. 205 (1975).

[152]*See* INDIANAPOLIS, IND., CODE OF INDIANAPOLIS AND MARION COUNTY, INDIANA §§ 16-26(d), (e)(1984). These sections empower the committee and subsequently the board, prior to a judicial determination of the controversy, to issue cease and desist orders, to restore the complainant's losses, and take other steps they "deem necessary to assure justice," and to initiate license revocation procedures against individuals found in violation of the ordinance. The power is denied in cases where actual direct physical harm is alleged. *Id.* §§ 16-27(e). *See also American Booksellers*, 598 F. Supp. at 1340-41.

[153]*See* Freedman v. Maryland, 380 U.S. 51 (1965); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963). *See also American Booksellers*, 598 F. Supp. at 1340-41 (citing the *Freedman* decision at length).

[154]Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)(citations omitted). *See also American Booksellers*, 598 F. Supp. at 1340 (quoting *Bantam Books* for the same proposition).

where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint."[155] In a somewhat analogous instance, a federal district court voided a city ordinance which allowed the city manager to impose fines for the commercial exploitation of obscenity because it was an "informal system of prior restraint operated entirely by a political official."[156] The trial court found that the ordinance placed pressure on bookstores to pay the fine "and forego the expense and risk of a court test of the City Manager's personal judgment of what is obscene."[157] The Indianapolis ordinance operates in essentially the same way, with the Office of Equal Employment directing the system of restraint.

Moreover, the United States Supreme Court has set forth specific procedural safeguards which must be incorporated into any scheme of prior administrative censorship.

> *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured.[158]

None of these protections is found in the Indianapolis ordinance. The first action under the Indianapolis procedures is an informal attempt by a committee of the OEO to resolve the issue, followed by a public hearing, a committee decision, an appeal within thirty days to the entire OEO, a decision by the OEO within thirty days of the filing, and a recourse to the courts within ten days after the application of OEO sanctions. When coupled with the time involved for judicial review, the process may take months or even a year, during which time the OEO's cease and desist order and/or fine remains in effect. Such a procedure does not meet the constitutional requirement of a "prompt final judicial determination."[159] Nor does the procedure meet the requirement that the cease and desist order run "only for a specified brief period and for the purpose of preserving the status quo."[160]

The net effect of the administrative procedures required by the Indianapolis ordinance is to delay the consideration of challenged material

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[155]Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (citations & footnote omitted).

[156]U.T., Inc. v. Brown, 457 F. Supp. 163, 168 (W.D.N.C. 1978). The ordinance conformed to the *Miller* obscenity standards but its enforcement, nevertheless, presented an unconstitutional prior restraint.

[157]*Id.* at 169.

[158]Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560 (1975). *See also* Blount v. Rizzi, 400 U.S. 410, 417 (1971); Freedman v. Maryland, 380 U.S. 51, 58-59 (1965). The *American Booksellers* court also relied on this analysis. 598 F. Supp. at 1340.

[159]Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560 (1975). Nor does such a procedure provide an "almost immediate judicial determination of the validity of the restraint." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)(footnote omitted).

[160]Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560 (1975).

until it is no longer current or salable. This is especially true in the case of dated material such as magazines which depend on timeliness to generate interest and sales, but it is also true of popular books which must normally sell during the relatively short period when they are new or popular if they are to be commercially successful. Such an effect is clearly unconstitutional.

V. Conclusion

Unless the concept of group libel is to be resurrected with a greatly expanded scope, the Indianapolis attempt to outlaw pornography as a form of sexual discrimination and harassment against women cannot survive the basic constitutional tests normally applied to governmental attempts to limit expression. The law is not analogous to the group libel law that was upheld in *Beauharnais v. Illinois*,[161] then subsequently undermined in later decisions. The racial epithets in that case were explicitly directed at blacks and there was a record of violence against blacks in the state. Relying on unproven (and arguably false) assumptions about the nature and effects of pornography, the Indianapolis ordinance attempts to regulate images, not explicit verbal expression. There is a vast difference between Joseph Beauharnais' explicit attacks on blacks in his leaflets and the indirect commentary on women found in pornographic materials. Moreover, the "fighting words" rationale which supported the Illinois statute is missing in the Indianapolis ordinance. Instead, the ordinance relies on another unsupported argument, that pornography leads to violence against women.

While the concept of "forcing" pornography has some validity in the limited environs of the workplace, that concept poses grave dangers to freedom of communication when transferred to the society as a whole. One of the most troublesome aspects of the Indianapolis censorship procedure is that it allows a politically sensitive body, acting on the basis of a philosophical statement cast in the form of a very vague, confusing, and logically inconsistent law, to determine what is the proper image of a group to be portrayed in all forms of communication in all locations. It is precisely this type of censorship activity that the United States Supreme Court has tried to prevent by a series of decisions which have established specific limitations on censorship boards, and have narrowed the concepts of libel and group libel.

The long and bitter controversy over pornography and obscenity attests to the fact that it offends many in the society, both men and women. Nevertheless, attempting to limit speech by using a law that does not meet the constitutional safeguards or standards established by our highest Court, no matter how noble the goals, is offensive and restrictive of one of our most basic freedoms—that of free speech.

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[161] 343 U.S. 250 (1952).