Civil Rights and Censorship—Incompatible Bedfellows

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I. INTRODUCTION

On December 30, 1983, the Minneapolis City Council passed what was labeled an innovative "civil rights" approach to combat-
ing pornography.\(^1\) The ordinance was the brainchild of Catharine MacKinnon and Andrea Dworkin.\(^2\) Within days of the passage of the ordinance, the Executive Director of the Minnesota affiliate of the American Civil Liberties Union (MCLU) termed the ordinance a "constitutional mockery."\(^3\) The MCLU promised prompt court action to challenge the ordinance if the Mayor of Minneapolis signed it into law.\(^4\)

The opportunity for a court challenge never arose. On January 5, 1984, six days after passage of the ordinance, the measure was vetoed by Minneapolis Mayor Donald M. Fraser.\(^5\) In his veto message, the Mayor stated:

> The remedy sought through the ordinance as drafted is neither appropriate nor enforceable within our cherished tradition and constitutionally protected right of free speech. The definition of pornography in the ordinance is so broad and so vague as to make it impossible for a bookseller, movie theatre operator or museum director to adjust his or her conduct in order to keep from running afoul of its proscriptions.\(^6\)

The Mayor of Minneapolis and the Executive Director of the MCLU were correct. The MacKinnon/Dworkin ordinance\(^7\) was a

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1. See Council passes pornography law, Minneapolis Star & Trib., Dec. 31, 1983, at 1A, col. 1, for an account of the passage of the ordinance. The ordinance passed the Minneapolis City Council by a vote of 7-6 after a lengthy and emotional debate concerning the nature of pornography and the first amendment.

2. Catharine MacKinnon is an Associate Professor at the University of Minnesota Law School. At the time the ordinance was proposed, Andrea Dworkin was a Visiting Professor at the University of Minnesota.

3. See Head of state MCLU asks Fraser to veto pornography law, Minneapolis Star & Trib., Jan. 2, 1984, at 1B, col. 1. The MCLU had been in contact with book sellers, publishers, and lawyers willing to volunteer their services to fight the ordinance, arguing that even the Bible would be subject to censorship under the ordinance, arguing that even the Bible would be subject to censorship under the ordinance. Id.

4. Id.

5. See Letter from Minneapolis Mayor Donald M. Fraser to Alice Rainville, President, Minneapolis City Council, and Council Members (Jan. 5, 1984) (veto message) (on file with the Minneapolis City Council).

6. Id.


References to the "MacKinnon/Dworkin ordinance" or the "proposed ordinance" in this Article are to the proposed draft of the ordinance introduced to the Minneapolis City Council on November 23, 1983, authored by Catharine MacKinnon and Andrea Dworkin. It is this draft which is reproduced in the Appendix to these Articles. See Appendix,
constitutional mockery. Its purported use of the term "civil rights" is incompatible with its remedy of censorship. In fact, had a law school class been instructed to draft an ordinance pertaining to regulation of sexually explicit material which deliberately violated every substantive and procedural principle of the first amendment, it is difficult to see how the class could have improved upon the measure passed by the Minneapolis City Council.

This Article will examine that proposed ordinance. The purpose of the Article is to illustrate that civil rights and censorship are indeed incompatible bedfellows. While no court has ruled on the merits of the MacKinnon/Dworkin ordinance, long-established substantive and procedural principles of the first amendment lead to the conclusion that such an ordinance is unconstitutional. The ordinance's violation of first amendment principles amounts to censorship. Material deserving first amendment protection would be withheld from public scrutiny under the ordinance. The Article will first examine the substantive and procedural provisions of the proposed ordinance. Second, the Article will discuss the substantive first amendment violations of the ordinance. It will demonstrate that the ordinance does not meet the constitutional standards required for the prohibition of ideas. The vagueness and overbreadth of the ordinance will be illustrated. Third, several specific principles of constitutional law which the ordinance violates will be examined. Fourth, the Article will dis-

supra. After the draft was submitted, the Government Operations Committee of the Minneapolis City Council held public hearings on the proposed amendment. The Committee reported the amendment favorably to the Council on December 22, by a 5-0 vote. The Council passed the amendment on December 30, by a vote of 7-6. See Minneapolis, Minn., City Council Official Proceedings, Dec. 30, 1983, at 1998-99 (on file with the Minneapolis City Council).

Mayor Fraser vetoed the amendment on January 5, 1984. See Minneapolis Star & Trib., Jan. 6, 1984, at 1A, col. 1. On January 13, 1984, the Council attempted unsuccessfully to override the veto.

A slightly altered version of the MacKinnon/Dworkin draft was reintroduced to the Council on January 13, 1984, and was co-sponsored by four of the Council members. Also, in January 1984, Mayor Fraser created the Ad Hoc Minneapolis Task Force on Pornography. In addition to considering the revised draft of the MacKinnon/Dworkin ordinance, the task force considered six proposed amendments to the Minneapolis civil rights code that were designed to deal with pornography. The task force recommended its own civil rights amendment which was considerably narrower than the MacKinnon/Dworkin version. See Minneapolis Star & Trib., May 2, 1984, at 4B, col. 5.

8. See infra notes 13-51 and accompanying text.

9. See infra notes 52-124 and accompanying text.

10. See infra notes 125-167 and accompanying text. The specific constitutional violations that will be discussed are: the ordinance's exemption for certain libraries and the equal protection clause of the fourteenth amendment; the ordinance's cause of action for
cuss whether the ordinance falls within one of the recognized exceptions to the first amendment.\textsuperscript{11} Finally, the ordinance's procedural provisions will be considered in light of the doctrine of prior restraint.\textsuperscript{12}

II. THE ORDINANCE

The MacKinnon/Dworkin ordinance was proposed as an amendment to Chapters 139 and 141 of the Minneapolis Code of Ordinances.\textsuperscript{13} The ordinance proposed to amend the existing civil rights ordinance to create certain "special findings on pornography."\textsuperscript{14} The special findings are factual findings which state the effect pornography has on the civil rights of women.\textsuperscript{15} Among these are the statements that pornography creates and maintains the inequality of the sexes, that pornography promotes rape, battery, and prostitution, and that pornography generally prevents women from fully exercising their various civil rights.\textsuperscript{16} The ordinance intends to prohibit all discriminatory practices based on pornography\textsuperscript{17} and provide certain civil remedies for coercive acts

assault and the \textit{R. v. Hicklin} standard; and the absence of a scienter requirement in the ordinance.

11. See infra notes 168-211 and accompanying text.
12. See infra notes 212-228 and accompanying text.
13. Chapter 139 of the Minneapolis Code of Ordinances sets forth the substantive provisions of the city's civil rights law. These substantive provisions include the prohibition of discrimination in employment, housing, and public accommodations based upon race, religion, national origin, sex, and affectional preference. \textit{See} MCO ch. 139 (1982). Chapter 141 establishes the Department of Civil Rights, and sets forth the procedural mechanism by which the substantive provisions of Chapter 139 are to be enforced. \textit{See} MCO ch. 141 (1982).
14. Proposed Ordinance § 1, to amend MCO § 139.10(a)(1).
15. Id. The full text of the special findings reads as follows:

(1) \textit{Special Findings on Pornography:} The Council finds that pornography is central in creating and maintaining the civil inequality of the sexes. 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, property rights, public accommodations and public services; create public harassment and private denigration; promote injury and degradation such as rape, battery and prostitution and inhibit just enforcement of laws against these acts; contribute significantly to restricting women from full exercise of citizenship and participation in public life, including in neighborhoods; damage relations between the sexes; and undermine women's equal exercise of rights to speech and action guaranteed to all citizens under the constitutions and laws of the United States and the State of Minnesota.

\textit{Id.}

16. \textit{Id.}
17. \textit{See id.} § 4, to add MCO § 139.40(b)(2).
based on pornography.18

A. Substantive Provisions

The ordinance provides several substantive provisions that an individual could use to combat pornography. These include an extensive definition of the word “pornography,”19 a section concerning discrimination against women by trafficking in pornography,20 and several legal remedies for certain acts related to pornography.21

The ordinance defines the term pornography as “a form of discrimination on the basis of sex.”22 It further defines pornography as “the sexually explicit subordination of women, graphically depicted, whether in pictures or in words,” provided that one or more of nine descriptions or depictions also appear in the work.23 These descriptions include such things as women depicted as sexual objects, women shown in positions of sexual submission, and women shown as “whores by nature.”24

Sections (l)-(o) of the ordinance define substantive acts of dis-
clemination through pornography. These sections also set forth the civil remedies individuals have for various acts caused by pornography. Section (1) provides that trafficking in pornography is discrimination against women under the civil rights law.25 The section has an exemption for public libraries funded by the city, state, or federal government, as well as private or public university or college libraries.26 Section (1) also prohibits the formation of private clubs or associations for the purpose of trafficking in pornography and calls such clubs or associations "a conspiracy to violate the civil rights of women."27 The section provides that any woman has a cause of action against pornographers for subordination.28 It further provides the same cause of action for any man or transsexual who alleges injury by pornography "in the [same] way women are injured by it."29

Section (m) makes the coercing of a pornographic performance a violation of the civil rights law.30 The section provides that any

(iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or
(v) women are presented in postures of sexual submission; or
(vi) women's body parts—including but not limited to vaginas, breasts, and buttocks—are exhibited, such that women are reduced to those parts; or
(vii) women are presented as whores by nature; or
(viii) women are presented being penetrated by objects or animals; or
(ix) women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.

(2) The use of men, children, or transsexuals in the place of women in (1) (i - ix) above is pornography for purposes of subsections (1) - (p) of this statute.

Id. 25. Id. § 4, to add MCO § 139.40(/). Section (1) reads as follows:

(1) Discrimination by trafficking in pornography. The production, sale, exhibition, or distribution of pornography is discrimination against women by means of trafficking in pornography:

(1) 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.

(2) The formation of private clubs or associations for purposes of trafficking in pornography is illegal and shall be considered a conspiracy to violate the civil rights of women.

(3) Any woman has a cause of action hereunder as a woman acting against the subordination of women. Any man or transsexual who alleges injury by pornography in the way women are injured by it shall also have a cause of action.

Id. 26. Id. § 4, to add MCO § 139.40(/)(1). However, "special display presentations" of pornography in such libraries would constitute discrimination. Id.

27. Id. § 4, to add MCO § 139.40(/)(2).

28. Id. § 4, to add MCO § 139.40(/)(3).

29. Id.

30. Id. § 4, to add MCO § 139.40(m). Section (m) reads as follows:
person who is coerced, intimidated, or fraudulently induced into performing for pornography has a cause of action for damages against the maker, seller, exhibitor, or distributor of the pornography. A cause of action is also provided to eliminate the products of the performance from public view.

Section (n) gives a person who has pornography forced on him or her a cause of action against the perpetrator, and also against any institution involved.

(m) Coercion into pornographic performances. Any person, including transsexual, who is coerced, intimidated, or fraudulently induced (hereafter, "coerced") into performing for pornography shall have a cause of action against the maker(s), seller(s), exhibitor(s) or distributor(s) of said pornography for damages and for the elimination of the products of the performance(s) from the public view.

(1) Limitation of action. This claim shall not expire before five years have elapsed from the date of the coerced performance(s) or from the last appearance or sale of any product of the performance(s), whichever date is later;

(2) Proof of one or more of the following facts or conditions shall not, without more, negate a finding of coercion;

(i) that the person is a woman;
(ii) that the person is or has been a prostitute;
(iii) that the person has attained the age of majority;
(iv) that the person is connected by blood or marriage to anyone involved in or related to the making of the pornography;
(v) that the person has previously had, or been thought to have had, sexual relations with anyone, including anyone involved in or related to the making of the pornography;
(vi) that the person has previously posed for sexually explicit pictures for or with anyone, including anyone involved in or related to the making of the pornography;
(vii) that anyone else, including a spouse or other relative, has given permission on the person’s behalf;
(viii) that the person actually consented to a use of the performance that is changed into pornography;
(ix) that the person knew that the purpose of the acts or events in question was to make pornography;
(x) that the person showed no resistance or appeared to cooperate actively in the photographic sessions or in the sexual events that produced the pornography;
(xi) that the person signed a contract, or made statements affirming a willingness to cooperate in the production of pornography;
(xii) that no physical force, threats, or weapons were used in the making of the pornography;
(xiii) that the person was paid or otherwise compensated.

Id.

31. “Person” is defined under section (m) as “any person, including [a] transsexual.”

Id. § 4, to add MCO § 139.40(m). The reason for the specific reference to “transsexuals” is unknown; see also id. § 4, to add MCO § 139.40(o), for a similar definition under the cause of action for assault.

32. Id. § 4, to add MCO § 139.40(m).

33. Id. § 4, to add MCO § 139.40(n). Section (n) reads as follows:

(n) Forcing pornography on a person. Any woman, man, child, or transsexual who has pornography forced on him/her in any place of employment, in education, in a home, or in any public place has a cause of action against the perpetrator and/or institution.

Id.
Section (o) deals with the subject of assaults or physical attacks resulting from pornography. The section provides that any person who is directly injured by specific pornography can make a claim for damages against the perpetrator of the pornography. Under section (o), an injunction may be issued to prohibit the further exhibition, distribution, or sale of the pornography.

B. Procedural Provisions

With one important exception, the procedural provisions of the MacKinnon/Dworkin ordinance are the same as those found in Chapter 141 of the Minneapolis Code of Ordinances. Chapter 141 details the procedures for enforcement of the civil rights laws. Chapter 141 requires a person who believes himself or herself to have been the victim of discrimination to file a complaint with the director of the Minneapolis Civil Rights Commission. The director then is authorized to make a preliminary investigation to determine whether probable cause exists to believe that the allegations of discrimination are well-founded. If the director determines that no probable cause exists, the director shall notify the complainant and the respondent of his determination, and of the complainant's right to appeal this decision to a review commit-

34. Id. § 4, to add MCO § 139.40(o). Section (o) reads as follows:
(o) Assault or physical attack due to pornography. Any woman, man, child, or transsexual who is assaulted, physically attacked or injured in a way that is directly caused by specific pornography has a claim for damages against the perpetrator, the maker(s), distributor(s), seller(s), and/or exhibitor(s), and for an injunction against the specific pornography's further exhibition, distribution, or sale. No damages shall be assessed (A) against maker(s) for pornography made, (B) against distributor(s) for pornography distributed, (C) against seller(s) for pornography sold, or (D) against exhibitors for pornography exhibited prior to the enforcement date of this act.

35. Under section (o), an injury includes any assault, physical attack, or injury that is directly caused by specific pornography. Id. While this definition specifically applies to physical injury, it is possible that it could also be interpreted to include mental or emotional injury. This issue, however, is beyond the scope of this Article.

36. Also liable for damages under section (o) are the “maker(s), distributor(s), seller(s) or exhibitor(s)” of the pornography. Id.

37. Id.

38. Id.; see also id. § 4, to add MCO § 139.40(p). Section (p) states that it is not a defense to the provisions of the ordinance that the defendant did not know or intend that the materials are pornography or sex discrimination.

39. See infra note 50 and accompanying text.
40. MCO ch. 141 (1982).
41. Id. § 141.50(a). The complaint must be filed within six months of the incident giving rise to the complaint. Id.
42. Id. § 141.50(b).
The review committee may affirm or reverse the director's decision, or send the complaint back to the director for additional investigation.44

If the director finds probable cause, he will attempt to conciliate the matter.45 If conciliation cannot be accomplished, the complaint shall be referred to the Civil Rights Commission.46 The chairperson of the Civil Rights Commission shall designate a hearing committee to evaluate the complaint.47

If the hearing committee finds that the respondent has engaged in discrimination, it is required to issue an order directing the respondent to cease engaging in the discriminatory activity.48 It may also take any other affirmative action necessary to effectuate the purposes of the Minneapolis Civil Rights Law.49

In addition to this pre-existing procedure, the MacKinnon/Dworkin ordinance would add the following provision to the Minneapolis Code of Ordinances:

(3) Pornography. The hearing committee or court may order relief, including removal of violative material, permanent injunction against the sale, exhibition or distribution of violative material, or any other relief deemed just and equitable, includ-

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43. Id. § 141.50(d). The director's decision must be appealed within 15 days to the review committee. Id. The committee must consist of at least three members of the Minneapolis Civil Rights Commission. At least one of the three members of the review committee must be an attorney. Id.
44. Id.
45. Id. § 141.50(e).
46. Id.
47. Id. § 141.50(h). The committee must be established within 30 days of the referral of the complaint to the Commission. The chairperson must designate three members of the Commission to serve as the hearing committee. At least one of the members of the hearing committee is required to be an attorney. Id.
48. MCO § 141.50(j).
49. Id. § 141.50(k)(1). Among the affirmative actions available to the hearing committee is an award of punitive damages. Punitive damages may be awarded in an amount not less that $100 or more than $6000. Reasonable attorney's fees may also be awarded. Id.
ing reasonable attorney's fees. 50

Under the proposed ordinance, therefore, if a particular book, magazine, or motion picture were found to be pornography, a three-person committee could order the offending material permanently barred from distribution within the city of Minneapolis. 51

III. THE ORDINANCE AND SUBSTANTIVE FIRST AMENDMENT LAW

Judicial interpretation has established several principles which govern freedom of speech under the first amendment. 52 These principles protect the rights of persons to speak freely in society. 53 It is against these principles that the MacKinnon/Dworkin ordinance must be examined. Such an examination reveals that the proposed ordinance is unconstitutional, since it unduly restricts society's ability to transmit and receive certain types of speech. The proposed ordinance violates three principles of first amendment law: the prohibition of ideas, 54 vagueness, 55 and overbreadth. 56

50. Proposed Ordinance § 1, to add MCO § 141.50(f)(3). This procedural provision is nominally a separate ordinance, introduced contemporaneously with the substantive provisions.

51. See id. A publisher, seller, distributor, or exhibitor of material barred by the review committee can seek judicial review in district court, pursuant to the Minnesota Administrative Procedures Act. MCO § 141.160(b). For a discussion of the provisions of the Minnesota Administrative Procedures Act, see supra note 47.

In addition to the administrative procedure provided for, the ordinance also authorizes that any person alleging a violation of the ordinance may bring a direct civil action. Proposed Ordinance § 2, to add MCO § 141.60(a). The ordinance does not specify what court would be authorized to hear such claims. Presumably it would be the district court, a court of general jurisdiction. The inability of a municipality to create subject matter jurisdiction in the district court for a private cause of action is a separate infirmity of the ordinance which is beyond the scope of this Article.

52. See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 857 (2d ed. 1983) [hereinafter cited as NOWAK]. This Article will consider three of these first amendment principles and how they relate to the proposed ordinances. These principles are: the prohibition of ideas, see infra notes 57-83 and accompanying text; overbreadth, see infra notes 84-116 and accompanying text; and vagueness, see infra notes 117-124 and accompanying text.

53. See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). In his dissent, Justice Holmes spoke of the "marketplace of ideas" theory of free speech. The premise of this theory is that the first amendment prohibits government from suppressing ideas because the truth of an idea can best be determined in the marketplace of competing ideas. Id.; see also NOWAK, supra note 52, at 864.

54. See infra notes 57-83 and accompanying text.

55. See infra notes 117-124 and accompanying text.

56. See infra notes 84-116 and accompanying text.
A. The Ordinance and the Prohibition of Ideas

One of the most firmly established principles of first amendment law is that the expression of ideas through speech is protected.57 Ideas, no matter how unpopular, come within the scope of protected speech provided for by the first amendment.58 Certain speech, however, has never been afforded protection under the first amendment.59 One example of unprotected speech is obscenity.60 The best means of examining the constitutionality of the pornography definition in the MacKinnon/Dworkin ordinance is to compare that definition with the law of obscenity as it has been developed by the United States Supreme Court. Since the Supreme Court has established obscenity as the demarcation between protected and unprotected speech in the area of sexually explicit communications,61 the definition of obscenity can be used as a benchmark to examine the constitutionality of the MacKinnon/Dworkin ordinance.

The seminal case holding that obscene speech is not entitled to constitutional protection was Roth v. United States,62 decided in 1957. In Roth, the Supreme Court stated that all ideas, even those having the slightest redeeming social value, are protected by the first amendment.63 The first amendment, however, has never af-

57. See NOWAK, supra note 52, at 857-73.
58. See supra note 53; see also Roth v. United States, 354 U.S. 476, 484-85 (1957).
59. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (libelous statements made with "actual malice" are not afforded constitutional protection); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (words deemed to be "fighting words," which by their very utterance inflict injury or tend to incite an immediate breach of the peace, are not afforded constitutional protection); Schenck v. United States, 249 U.S. 47 (1919) (words used in circumstances in which they present a "clear and present danger that they will bring about the substantive evils Congress has a right to prevent" are not afforded constitutional protection).
60. See Chaplinsky, 315 U.S. at 571-72. "Lewd and obscene" speech is within a "certain well-defined and narrowly limited class of speech, the prevention and punishment of which [has] never . . . raise[d] any Constitutional problem." Id.
61. See Miller v. California, 413 U.S. 15 (1973); see also infra notes 87-93 and accompanying text.
63. Id. at 484-85. In discussing the protection afforded to speech, the Supreme Court stated that:

The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . .

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guarantees, unless excludable because they encroach upon the limited area of more important interests.

Id. at 484 (footnote omitted).
forbade protection to obscene speech. The benefit that comes from such speech is outweighed by the social interests in order and morality. The Court defined obscene material as material dealing with sex in a manner that appeals to prurient interests. The term "prurient interests" was defined as "material having a tendency to excite lustful thoughts." The Court in Roth thus distinguished ideas from obscenity. Ideas, no matter how disgusting, revolting, or even hateful, are entitled to the full measure of constitutional protection. Obscenity, however, is not entitled to the same protection.

The distinction between speech which advocates ideas and speech which merely appeals to base, animalistic desires was highlighted even more clearly in Kingsley International Pictures Corp. v. Regents of the University of New York. In Kingsley International Pictures Corp., New York State denied a license to exhibit the motion picture Lady Chatterley's Lover. The license was denied pursuant to a statute permitting the denial of a license to a motion picture that was obscene, indecent, or of such a character that its exhibition would corrupt morals or incite criminal activity. In holding the license denial to be a violation of the first amendment, the Supreme Court specifically addressed the New York court's justification for the denial. The New York court justified the license denial on the basis that the motion picture alluringly portrayed adultery as normal behavior, rather than on the basis that the film was "obscene" as defined by Roth. The Supreme Court stated that what New York had done was to prevent the exhibition of a motion picture because that picture advocated an idea—"that adultery under certain circumstances may be proper behavior."

64. Id. at 484. The Court stated that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." Id.
65. Id. According to the Roth Court, some ideas are not fully protected "because they encroach upon the limited area of more important interests." Id.
66. Id. at 487.
67. Id. at 487 n.20.
68. Id. at 484-85.
70. Id. at 685.
71. Id.
72. Id. at 687. Specifically, the lower court relied on that portion of the New York statute requiring the denial of licenses to motion pictures that are immoral because they portray acts of sexual immorality as desirable, acceptable patterns of behavior. Id. at 687-88.
73. Id. at 688-89.
The first amendment, however, guarantees the freedom to advocate ideas. The New York court, therefore, had struck at the heart of constitutionally protected liberty.\(^{74}\)

Since Roth and Kingsley International Pictures Corp., the Supreme Court has not deviated from the principle according almost absolute constitutional protection to the advocacy of ideas.\(^{75}\) Lower courts have also repeatedly held that ideas, even hateful ideas such as the teachings of the American Nazi Party\(^{76}\) and literature advocating the use of illegal drugs,\(^{77}\) are protected by the first amendment.

Judged by this standard, the MacKinnon/Dworkin definition of pornography is unconstitutional. What makes sexually explicit material pornography under the MacKinnon/Dworkin ordinance is not its degree of sexual explicitness, not its appeal to prurient interests, nor even its lack of social value. Rather, it is the content of the ideas advocated by the material.\(^{78}\) To fall within the ordinance’s definition of pornography material must not only be sexually explicit, but must also depict the subordination of women by portraying women as dehumanized sexual objects,\(^{79}\) as sexual objects who enjoy pain or humiliation,\(^{80}\) as sexual objects who experience sexual pleasure in being raped,\(^{81}\) or as whores by nature.\(^{82}\)

\(^{74}\) Id.

\(^{75}\) See, e.g., Police Dep’t v. Mosely, 408 U.S. 92 (1972), where the Court invalidated a Chicago ordinance that prohibited the picketing of residential real estate, but created an exemption for labor picketing. The Court held the ordinance constitutionally invalid, since the sole basis for determining whether picketing was legal or illegal was the content of the picket sign. The Court held that the ordinance infringed upon the right to express any thought free from government censorship. Id. at 95-96.

\(^{76}\) See Village of Skokie v. National Socialist Party of Am., 69 Ill. 2d 605, 14 Ill. Dec. 890, 373 N.E.2d 21 (1978) (per curium), in which the Supreme Court of Illinois reversed an injunction against the American Nazi Party to prevent it from conducting a demonstration in the village of Skokie, Illinois, which was populated by a number of survivors of Nazi concentration camps. In Collin v. Smith, 578 F.2d 1197 (7th Cir.), \(\text{cert. denied, 439 U.S. 916 (1978)}\), the court invalidated three Skokie ordinances that prohibited the dissemination of racist literature, required special permits for demonstrations, prohibited marching while in military uniforms, and required liability insurance for a Nazi parade.

\(^{77}\) See High O’ Times, Inc. v. Busbee, 456 F. Supp. 1035, 1041-43 (N.D. Ga. 1978), \(\text{aff’d, 621 F.2d 141 (5th Cir. 1980)}\), in which the court invalidated a law prohibiting the dissemination of drug-related literature to minors.

\(^{78}\) See Proposed Ordinance § 3, to add MCO § 139.20(gg).

\(^{79}\) Id. § 3, to add MCO § 139.20(gg)(1)(i).

\(^{80}\) Id. § 3, to add MCO § 139.20(gg)(1)(ii).

\(^{81}\) Id. § 3, to add MCO § 139.20(gg)(1)(iii).

\(^{82}\) Id. § 3, to add MCO § 139.20(gg)(1)(vii). Professor MacKinnon has explicitly noted that the definition of pornography in the ordinance is idea-based. She has stated that the definition of pornography “does not include . . . erotica, which is sexually ex-
Thus, two books or motion pictures could portray the identical amount of sexual explicitness and be identical in their appeal to prurient interests and lustful thoughts, but still be treated differently under the ordinance if one depicted women in subordination to men, while the other depicted men and women in a position of equality. The former would be pornography and subject to legal sanction under the ordinance. The latter would not. The content of the idea advocated by the respective works is the only distinguishing factor between the two works. The first amendment prohibits such a distinction.83

B. The Ordinance and the Overbreadth Doctrine

One of the most important substantive components of first amendment law is the overbreadth doctrine. A statute is unconstitutionally overbroad if its prohibitions can be applied to constitutionally protected speech.84 Even if an individual is engaged in an activity that is not entitled to first amendment protection, a statute or ordinance proscribing that conduct may still be overbroad.85 If the individual's conduct could properly be proscribed by a more narrowly drawn statute or ordinance, the individual may raise the overbreadth of the statute as a basis for invalidating the statute or ordinance.86

84. See Lewis v. City of New Orleans, 415 U.S. 130, 134 (1974), in which the Supreme Court struck down an ordinance which proscribed the use of "opprobrious language." The Court held that the term went beyond the "fighting words" exception to the first amendment and was overbroad. Id.; see also NOWAK, supra note 52, at 867-71 (general overview of the overbreadth doctrine).
85. NOWAK, supra note 52, at 868.
86. Id. For cases outlining both the substantive overbreadth doctrine and the standing rule, see Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980) (regulation on charitable solicitation by a political organization held overbroad); Gooding v. Wilson, 405 U.S. 518 (1972) (law relating to breach of the peace invalidated; specifically holding that the parties had standing to attack the laws without demonstrating that their own conduct could not be regulated by a more narrowly drawn statute); Dombrowski v. Pfister, 380 U.S. 479 (1963) (enforcement of Louisiana's Subversive Activity and Communist Control Law enjoined on the ground that the statute was susceptible of being applied to plaintiffs civil rights workers' protected first amendment activities); NAACP v. Button, 371 U.S. 415 (1963) (virginia law prohibiting attorney solicitation invalidated on the ground that it was susceptible to application to plaintiffs' protected speech in recruiting plaintiffs for civil rights actions). For cases limiting the applicability of the overbreadth doctrine, see New York v. Ferber, 458 U.S. 747 (1982) (statute prohibiting child pornography held not unconstitutionally overbroad); Broadrick v. Oklahoma, 413 U.S. 601 (1973)
The overbreadth of the MacKinnon/Dworkin ordinance is apparent on two levels. Most obvious is the fact that the ordinance exceeds the standard set forth by the Supreme Court for regulating sexually explicit material. In *Miller v. California*, the Supreme Court acknowledged the inherent dangers of regulating any form of expression. Statutes designed to regulate obscene materials must be carefully limited. The Court confined the scope of regulation of obscenity to material that depicts or describes sexual conduct. This sexual conduct must be specifically defined by statute.

The *Miller* court established three guidelines that must be met by a trier of fact when regulating sexually explicit material. First, the trier of fact must ascertain whether "the average person, applying contemporary community standards," would find that the work, taken as a whole, appeals to prurient interests. Second, the trier of fact must ascertain whether the work "depicts or describes, in a patently offensive way," sexual conduct that is specifically defined by state law. Finally, the trier of fact must determine whether the work as a whole "lacks serious literary, artistic, political, or scientific value."

The MacKinnon/Dworkin ordinance exceeds the permissible scope of regulation of sexually explicit materials to which states are constitutionally confined under *Miller*. In fact, the ordinance incorporates none of the *Miller* requirements. It does not require the depiction of specific sexual acts in a patently offensive way. It does not require that the work, taken as a whole, when viewed by the average person, appeal to the prurient interest. Nor does it evaluate material by its serious literary, artistic, political, or scientific value. Given the fact that anything which does not fall within the *Miller* definition is presumed to be entitled to constitutional protection, the pornography definition contained in the MacKinnon/Dworkin ordinance is incompatible with the Supreme Court's standards for regulating sexual expression.

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(Court refused to apply overbreadth doctrine to a statute limiting political contributions by a public employee, stating that the action did not involve pure speech and that the overbreadth was not substantial).

88. Id. at 23-24.
89. Id.
90. Id. The conduct can be specifically defined either in the statute, or as construed by the courts.
91. Id. at 24 (quoting *Roth*, 354 U.S. at 489).
92. Id.
non/Dworkin ordinance is susceptible of application to protected speech. The ordinance, therefore, is unconstitutionally overbroad.

Second, even assuming the Supreme Court would create an exception for pornography which depicts the subordination of women similar to that created for child pornography, such an exception would not solve the ordinance's overbreadth problems. In New York v. Ferber, the Supreme Court established an exception to the overbreadth doctrine for child pornography. In Ferber, a New York criminal statute prohibited persons from knowingly promoting sexual performances by children under the age of sixteen by distributing material which depicted such performances. There was no requirement of patent offensiveness, appeal to prurient interest, or lack of serious literary, artistic, political, or scientific value in the statute. However, the statute did require, as a prerequisite for criminal liability, the actual live performance of a sex act by a child under the age of sixteen in order for criminal liability to attach. The Court rejected an overbreadth challenge because the statute did not reach a substantial number of impermissible applications. While the Court expressed concern that the statute may prohibit some speech which is protected by the first amendment, it noted that this prohibition would amount to only a tiny fraction of the materials within the statute's reach. Other methods could also be used to circumvent the statutory requirement of the actual use of children in the material, thereby limiting the application of the statute.

94. See Ferber, 458 U.S. 747.
95. Id.
96. Id. at 749-50.
97. Id. at 771.
98. Id. at 773. The Court stated that:
   We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. . . . While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of [the statute] in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach.

99. Id. at 762-63. The Court specifically noted that:
   The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis. We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and nec-
The overbreadth problem in *Ferber* was insubstantial because the statute required the actual sexual abuse of children in the production of the material in order for criminal penalties to attach. It is readily apparent from the *Ferber* Court's analysis that mere verbal descriptions of children engaging in sexual activity, drawings of children engaged in sexual activity, simulations of children engaged in sexual activity, or acts performed by persons over the statutory age who look like children, could not be constitutionally prohibited unless the work otherwise fell within the *Miller* standards.

By contrast, the MacKinnon/Dworkin ordinance would prohibit material involving adults which the *Ferber* Court refused to prohibit even when the material involved children. The MacKinnon/Dworkin ordinance does not require that a woman actually be subjected to sexual abuse in the production of a work before the work may be considered pornography. A mere simulation, drawing, or verbal description of such abuse will render a work pornographic and subject to legal sanctions. The problem is further aggravated by the fact that a depiction of sexually explicit subordination of women may be pornography under the ordinance, whether the depiction be in pictures or in words. Thus, a single verbal description of a woman being subjected to sexual abuse can render a work pornographic and therefore subject to the ordinance's sanctions. This is true regardless of the literary, artistic, political, or scientific value of the work.

Such an approach to restricting sexually explicit material has been rejected by the Supreme Court ever since *Roth*. The standard of obscenity before *Roth* judged material solely by the effect

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100. *Id.* at 760.
101. *Id.* at 764-65.
102. See Proposed Ordinance § 3, to add MCO § 139.20(gg).
103. *Id.* § 3, to add MCO § 139.20(gg)(1). For the full text of the definition of pornography, see *supra* note 24.
104. Proposed Ordinance § 3, to add MCO § 139.20(gg)(1).
105. See *supra* note 63. All ideas, even those having the slightest social value, are protected under *Roth*. 354 U.S. at 484.
isolated excerpts had upon unusually susceptible persons. Roth, however, rejected this standard since it could encompass material entitled to first amendment protection. The Roth Court replaced the old standard with one that considers community-wide factors. The current standard examines the material as a whole, and applies contemporary community standards, rather than considering the effect an isolated passage has upon a susceptible person.

The MacKinnon/Dworkin ordinance does precisely what the Supreme Court rejected in Roth. It permits a work to be deprived of constitutional protection solely on the basis of a single isolated passage, rather than considering the work as a whole. The overbreadth problems involved in such an application of the ordinance are substantial. The mystery novel which contains a single description of a rape to be solved by police becomes pornography under the ordinance. The rape scene between Rhett Butler and Scarlett O’Hara in Gone With the Wind, and Winston Smith’s rape fantasy during Hate Week in George Orwell’s 1984, become pornography under the ordinance.

Perhaps the most ironic victim of the overbreadth of the MacKinnon/Dworkin ordinance would be Linda Marchiano, one of the principal witnesses on behalf of the ordinance. Ms. Marchiano’s book Ordeal, in which she alleges that her former husband forced her into prostitution through repeated acts of physical violence, would constitute pornography under the MacKinnon/Dworkin ordinance.

Portions of Ms. Marchiano’s book could be considered subordi-
nation of a woman, graphically described in words, in which a woman is presented as a dehumanized sexual object, as a sexual object mutilated or physically hurt, and in a scenario of degradation, injury, abasement, or torture, in a context that makes these conditions sexual.\[115\] Had the ordinance been enacted, Ms. Marchiano's own book could have been declared pornographic, and she could have been subjected to legal sanctions.\[116\]

In contrast to the child pornography statute in *Ferber*, the overbreadth in the MacKinnon/Dworkin ordinance is real and substantial. It can be applied to protected speech, even to the speech of the most ardent supporters of the ordinance itself. That fact alone is compelling evidence of the unconstitutionality of the ordinance.

C. *The Ordinance and Constitutional Vagueness*

A first amendment doctrine closely related to overbreadth is that of vagueness.\[117\] Any statute affecting first amendment rights which is drafted in a manner so vague that persons of common intelligence must guess at its meaning and differ as to its application will be invalidated for vagueness.\[118\]

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directly. They talked to each other over and around me, as though I was a piece of meat.

Most of the time my eyes were tightly closed. They didn't mind. They were so into getting their rocks off that they wouldn't have cared if I was an inflatable plastic doll, a puppet. They picked me up and moved me here and there; they spread my legs this way and that; they shoved their things at me and into me.

Three of the animals were constant and persistent, always coming at me, not even resting between times. The other two would back off from time to time. Two of the men got their biggest thrill by working themselves up to the point of coming and then shooting their sperm all over my body and rubbing it in.

*Id* at 36-37.

115. See Proposed Ordinance § 3, to add MCO § 139.20(gg)(1).

116. Speculation that this might occur if the proposed ordinance were enacted is hardly fanciful. Under Section (o), if a man read the above passage describing the actions of Ms. Marchiano's husband and was inspired to commit the same acts against a woman, the woman would have a cause of action against Ms. Marchiano and against the bookstore where the perpetrator bought the book. It is not inconceivable that an attorney representing a victim of such a sexual assault would attempt to sue every defendant he or she possible could, especially the ones with deep pockets.

117. NOWAK, *supra* note 52, at 871.

118. See *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). In *Papachristou*, the Court held a disorderly conduct statute void for vagueness since it failed to give a person of ordinary intelligence notice that his conduct was forbidden by statute, and because it encouraged arbitrary and erratic arrests and convictions. *Id* at 162. The Court held that "Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the state commands or forbids.'" *Id* (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)).
In condemning vagueness involving first amendment freedoms, the Supreme Court has held that vague laws violate several important values. First, vague laws are a trap for the innocent. A law should provide a person with a reasonable opportunity to know what is prohibited. Vague laws fail to provide this reasonable opportunity. Second, vague laws delegate basic policy decisions to enforcement personnel on an ad hoc basis. This promotes the arbitrary enforcement of the law. Finally, vague laws operate to inhibit first amendment freedoms by not clearly defining what is prohibited. Persons must steer wide of the "unlawful zone" under a vague statute. Under a clearly defined statute such inhibition is not required.

The vague and undefined terms in the definition of pornography under the MacKinnon/Dworkin ordinance are nearly limitless. It is difficult to ascertain what conduct would constitute subordination of a woman. Equally unclear is the extent to which a depiction or description must go before it becomes sexually explicit. Also, persons of common intelligence can and neces-

119. See Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). In discussing the values violated by vague laws, the Court stated:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms, it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden area were clearly marked.

Id. at 108-09 (footnotes omitted).

120. Id.

121. Id.

122. Id.


124. During the public debate on the ordinance, one audience member rhetorically asked whether the "missionary position" would qualify as subordination of women.
sarily will differ as to what constitutes a woman being presented as a dehumanized sexual object.

The MacKinnon/Dworkin ordinance could produce the adverse effects attributed to vague laws. The lack of clarity in the definition of pornography would necessarily lead to arbitrary decisions by the Minneapolis Civil Rights Department and judges in deciding which books, magazines, and motion pictures to censor. Similarly, the very vagueness of these definitions could cause booksellers, publishers, and exhibitors to steer wide of the unlawful zone. This would deter them from distributing material which deals with the subjects of sex and women for fear of the adverse consequences which might follow. The danger of arbitrary and capricious enforcement of vague laws, and the danger of persons too fearful of that arbitrary enforcement to publish or distribute controversial works, are far greater threats to society than Deep Throat will ever be.

IV. THE PUBLIC AND PRIVATE LIBRARY EXEMPTION AND THE FIRST AND FOURTEENTH AMENDMENTS

Under the MacKinnon/Dworkin ordinance, certain public and private libraries would be exempt from the ordinance’s sanctions.125 Pornographic material available for study at such libraries is not considered discrimination against women under the ordinance.126 The unconstitutionality of this section stems from its discriminatory treatment of persons who sell pornography. Under this section, a proprietor of a bookstore who charges money for pornography is subject to civil liability.127 A library that lends the same material at no charge, however, is immune from liability.128 Even assuming that pornography, as defined by the ordinance, is totally without first amendment protection, the exemption of libraries from the ordinance’s sanctions violates the equal protection clause of the fourteenth amendment.129

125. Proposed Ordinance § 4, to add MCO § 139.40(f)(1). The ordinance grants to any “[c]ity, state, and federally funded public libraries or private and public university and college libraries in which pornography is available for study” an exemption from the sanctions provided in the ordinance. Id.
126. Id. “Special display presentations” of pornography in such libraries would constitute discrimination. Id.
127. See id. § 4, to add MCO § 139.40(f).
128. See id. § 4, to add MCO § 139.40(f)(1).
129. The equal protection clause states that: “No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.
Obscenity statutes and ordinances containing similar exceptions have repeatedly been held unconstitutional. In *People v. Wrench*, the court considered the validity of a penal statute which made it an affirmative defense to a charge of obscenity that the obscene materials were being furnished to persons who had a scientific, educational, or governmental justification for possessing them. In order to preserve the constitutionality of the ordinance, the court held that the ordinance must be construed to justify the sale of allegedly obscene materials to all consenting adults. The court could find no rational basis for allowing only persons with Ph.D’s and high IQ’s to possess such material.

Similarly, the Supreme Court of Louisiana, in *State v. Luck*, held unconstitutional a provision in a Louisiana statute exempting schools, churches, museums, and medical clinics from its state obscenity law. The court held the exemption provision to be a violation of the equal protection clause of the fourteenth amendment. The court could find no rational basis reasonably related to a valid governmental purpose for allowing colleges and medical clinics to sell pornography for commercial gain, while prohibiting a bookstore from engaging in the same activity.

131. *Id* at 97, 371 N.Y.S.2d at 837. The court held that the statute must be construed to apply to the average individual engaged in intellectual pursuits, no matter how stimulating those pursuits might be. A seller of such material has just as much right to sell it to a “student of the school of hard knocks” as he does to a recognized intellectual. *Id* at 99, 371 N.Y.S.2d at 838-39. The fact that a profit was derived from the sale or that the subject matter was intended to entertain did not deprive the material of its constitutional protection. *Id* at 100, 371 N.Y.S.2d at 839.
132. 353 So. 2d 225 (La. 1977).
133. *Id* at 230-32. The exemption provision read as follows:

The provisions of this section do not apply to recognized and established schools, churches, museums, medical clinics, hospitals, physicians, public libraries, governmental agencies, quasi-governmental sponsored organizations and persons acting in their capacity as employees or agents of such organization. For the purpose of this paragraph, the following words and terms shall have the respective meanings defined as follows:

(1) Recognized and established schools means schools having a full time faculty and pupils, gathered together for instruction in a diversified curriculum.
(2) Churches means any church, affiliated with a national or regional denomination.
(3) Physicians means any licensed physician or psychiatrist.
(4) Medical clinics and hospitals mean any clinic or hospital of licensed physicians or psychiatrists used for the reception and care of the sick, wounded or infirm.

**LA. REV. STAT. ANN. § 14:106(D) (West 1974)** (subdivision D was modified slightly in 1983 in a manner not affecting its constitutionality, but to date has not been repealed by the legislature).

134. 353 So. 2d at 232. The court held the statute unconstitutional because the statute
The Minnesota Supreme Court invalidated a similar exemption in a Duluth obscenity ordinance. In *City of Duluth v. Sarette*\(^1\) a provision of a Duluth obscenity ordinance exempted schools, churches, medical clinics, hospitals, libraries, and government agencies from its coverage.\(^2\) The Minnesota Supreme Court held that providing total immunity for particular groups and institutions, regardless of their use of obscene material, resulted in arbitrary and overbroad classifications.\(^3\) Such classifications had no relation to any legitimate government purpose.\(^4\)

In both *Luck* and *Sarette*, the courts, while invalidating the exemption provisions, refused to invalidate the underlying statute or ordinance.\(^5\) The courts' basis for severing the exemption provision was their determination that the intent of the exemption was to protect material which had serious literary, artistic, political, or scientific value. This protection was already provided, however, under the definition of obscenity found in *Miller*. The exemption was therefore unnecessary, and the provisions could be severed without defeating the intent of the legislative bodies.\(^6\)

In contrast, no exemption is provided under the MacKinnon/Dworkin ordinance for works which have serious literary, artistic, political, or scientific value. Therefore, no legitimate purpose exists for allowing libraries to lend such material. As a result, a court would have no choice but to invalidate the entire statutory provision in question.\(^7\)

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2. *Id.* at 535. The ordinance allowed exemptions for such organizations regardless of the use to which the obscene material was put by the organization.
3. *Id.* at 536. The court was disturbed by the use of tax exempt status as a distinction, because the characteristic was too nebulous.
4. *Id.* The court saw no rational basis in using the amount of publicly donated funds as a distinction between organizations.
5. See *Luck*, 353 So. 2d at 232-33; *Sarette*, 283 N.W.2d at 536-37. In *Sarette*, the court held that striking down the exemption provisions would not alter the intended effect of the ordinance, which was to regulate material covered by the *Miller* standards. 283 N.W.2d at 537.
6. See *Luck*, 353 So. 2d at 232-33; *Sarette*, 283 N.W.2d at 536-37.
7. See Minneapolis Fed'n of Teachers Local 49 v. Obermeyer, 275 Minn. 347, 147 N.W.2d 358 (1966), in which the court held it to be beyond its constitutional power to sever an exemption provision from a statute when that provision violated the equal protection clause.
V. A CAUSE OF ACTION FOR SEXUAL ASSAULT—A RETURN TO R. v. HICKLIN

One of the most serious attacks on the first amendment put forth by the MacKinnon/Dworkin ordinance is the provision creating a civil cause of action for victims of sexual assault caused by pornography. The cause of action for sexual assault is, in effect, a return to a standard of obscenity which the Supreme Court has rejected for over thirty years.

The Supreme Court in Roth explicitly rejected the R. v. Hicklin standard, which measured obscenity by the impact an isolated passage in a particular work has upon the person most susceptible to the influence of the passage. The Court reasoned that by judging obscenity upon the reaction of the most susceptible person rather than the average person, “material legitimately [dealing] with sex” would be subject to censorship.

In rejecting the Hicklin standard, the Supreme Court has gone so far as to reverse a conviction under the average person test of Roth and Miller where the jury was instructed that children could be included within the community by which prurient interest and patent offensiveness are to be judged. In holding the jury instruction unconstitutional, the Court in Pinkus v. United States noted that the effect of such an instruction would be to reduce the adult population to reading only material that is fit for children.

In fact, section (o) of the MacKinnon/Dworkin ordinance is far...
more restrictive of first amendment rights than the statutes in *Hicklin* or *Pinkus*. Under section (o), any person sexually assaulted by someone who is inspired by a passage from a book to commit the assault would have a civil cause of action. 151 That single act could result in damages being assessed against the distributor, author, publisher, or retailer of the book. 152 Also, an injunction could be issued prohibiting the work from being distributed anywhere in the community. 153 The reaction of the most degenerate reader or viewer in society could determine what the remainder of the population would be permitted to read. If it is unconstitutional to restrict the reading material of the general population on the basis of the reaction of the person most susceptible to a prurient appeal, certainly the "pervert's veto" which could result from section (o) of the ordinance must also be considered unduly restrictive.

While not ruling on the precise issue raised by the MacKinnon/Dworkin ordinance, numerous courts have held that any attempt to impose civil liability on the basis of the violent reaction of a single person to a published work violates the first amendment. Several courts have dismissed actions seeking to impose civil liability upon television networks on the basis of the reaction of a single viewer to certain programming. Such actions have involved a fifteen-year-old boy shooting and killing an eighty-three-year-old neighbor, allegedly due to television violence; 154 a rapist allegedly modeling his attack after a rape scene on a television special; 155 and a young boy killing himself by attempting to copy a stunt shown on the *Tonight Show*. 156 In each of these cases, the court held

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151. Proposed Ordinance § 4, to add MCO § 139.40(o); *supra* note 34 (full text of section (o)).
152. Proposed Ordinance § 4, to add MCO § 139.40(o).
153. *Id.*
154. *Zamora v. Columbia Broadcasting System*, 480 F. Supp. 199 (S.D. Fla. 1979). The *Zamora* court held that to impose such a broad legal duty upon the media would not only be impractical and unrealistic, but would have a staggering effect on our economy. To impose liability on the media for such actions would open the doors to an indeterminate amount of liability. *Id.* at 202.
155. *Olivia N. v. National Broadcasting Co.*, 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981). The court held that the central concern of the first amendment in the area of motion pictures is that there be a "free flow from creator to audience of whatever message a film . . . might convey." *Id.* at 493, 178 Cal. Rptr. at 891-92 (citing *Young v. American Mini Theatres*, 427 U.S. 50, 77 (1976) (Powell, J., concurring). The court also held that the electronic media is entitled to the same first amendment protections. *Id.* at 493, 178 Cal. Rptr. at 892.
156. *DeFillippo v. National Broadcasting Co.*, 446 A.2d 1036 (R.I. 1982). To impose self-censorship upon a television station would not only violate their right to make pro-
that to allow a single, isolated reaction to a television program to govern the content of future programming would lead to self-censorship.\textsuperscript{157}

The same flawed theory underlies the MacKinnon/Dworkin ordinance. Just as the reaction of a single minor cannot form the basis of a damage award,\textsuperscript{158} so the reaction of a single rapist cannot form the basis of a damage award against a bookseller and permanently deprive the public of the right to view the material.\textsuperscript{159}

\section{VI. THE ABSENCE OF SCIENTER AS A DEFENSE TO CIVIL LIABILITY}

An established principle of first amendment law is that criminal liability cannot be imposed upon a publisher, retailer, or distributor of obscene material in the absence of the element of scienter or knowledge of the nature and contents of the material.\textsuperscript{160} The absence of a requirement of scienter in the MacKinnon/Dworkin ordinance renders the ordinance unconstitutional.

In \textit{Smith v. California},\textsuperscript{161} the Supreme Court discussed the scienter...
requirement. The Court invalidated an ordinance imposing strict criminal liability for obscenity upon a bookseller, regardless of the bookseller's knowledge of the contents of the material in question.162 The Court noted that dispensing with the requirement of knowledge of the contents of a book on the part of a seller would result in a severe limitation on the public's access to constitutionally protected matter.163 Because such an ordinance would require a bookseller to restrict himself to selling only those books he had actually inspected, the amount of material available to the public would necessarily be limited.164

The MacKinnon/Dworkin ordinance does not require scienter before liability can be imposed. Section (p) of the ordinance specifically states that it is not a defense to an action arising under the ordinance that the defendant did not know or intend that the materials constituted pornography or sex discrimination.165 It makes no difference that Smith v. California deals with criminal as opposed to civil liability. The Supreme Court has recognized that the imposition of civil liability can be every bit as chilling on the exercise of first amendment rights as the imposition of criminal penalties.166 In fact, the chilling effect of civil damage awards has led the Supreme Court to reject strict civil liability for defamation of public figures.167 To impose strict civil liability for pornography regardless of the defendant's scienter similarly violates first amendment rights. The threat of severe civil sanctions would lead booksellers and exhibitors to confine their exhibition or sale of materials to those which they have personally examined. Such self-censorship limits the public's access to protected first amendment material.

162. See id. at 154-55.
163. Id. at 153.
164. Id. The Court noted that removing the scienter requirement would have the effect of penalizing booksellers even though they did not have the slightest notice of the contents of the book. Removing the scienter requirement would also impose severe limitations on the public's access to constitutionally protected material. Id. In the case of child pornography involving the actual abuse of children, the Court has held that no criminal liability can be imposed in the absence of scienter. See Ferber, 458 U.S. at 765 (1982).
165. Proposed Ordinance § 4, to add MCO § 139.40(p).
167. See id. at 277.
VII. THE ORDINANCE AND THE RECOGNIZED EXCEPTIONS TO THE FIRST AMENDMENT

Proponents of the ordinance have attempted to justify its provisions by analogy to several recognized exceptions to the first amendment. These exceptions include group libel, speech involving a clear and present danger, and commercial speech. An examination of these exceptions reveals that none justify the measures taken in the ordinance.

A. Group Libel

One of the most popular justifications for the MacKinnon/Dworkin ordinance has been the "group libel" theory based on the Supreme Court's decision in Beauharnais v. Illinois. In Beauharnais, the Supreme Court affirmed a conviction under an Illinois criminal libel statute. The defendant was convicted of distributing a leaflet urging the Mayor and City Council of Chicago "to halt the further encroachment, harassment, and invasion of white people, their property, neighborhoods and persons, by the Negro." Beauharnais, however, is not a first amendment case. The majority opinion in Beauharnais is based on the fourteenth amendment.

169. See Dennis v. United States, 341 U.S. 494 (1951). For a discussion of the clear and present danger exception, see infra notes 191-99 and accompanying text.
171. As previously noted, the obscenity and child pornography exceptions are unavailing. See generally supra notes 56-116 and accompanying text. The definition of pornography contained in the ordinance does not fall within the definition of obscenity contained in Miller, 413 U.S. at 24 (1973), or the child pornography exception as outlined in Ferber, 458 U.S. at 771.
172. 343 U.S. 250 (1952).
173. Id. at 251. The statute provided that:
It shall be unlawful for any person, firm or corporation to manufacture, sell, 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 otherwise is productive of breach of peace or riots . . . .
Id.
174. Id. at 252. The leaflet further stated that "If the 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.
amendment.\textsuperscript{175}

There are two reasons why the group libel theory cannot justify the MacKinnon/Dworkin ordinance. First, support for the \textit{Beauharnais} decision has been substantially eroded, both in the Supreme Court and in lower federal courts. Twelve years after \textit{Beauharnais}, the Supreme Court eliminated one of the decision's underlying presumptions: that the first amendment does not restrict libel in civil cases.\textsuperscript{176} Thereafter, the Court reversed a criminal libel conviction, explicitly holding that the first amendment does restrict criminal libels, notwithstanding language to the contrary in \textit{Beauharnais}.\textsuperscript{177} Two years later, a unanimous Court invalidated a common law offense of criminal libel on first amendment grounds without mentioning \textit{Beauharnais}.\textsuperscript{178}

Just as the Supreme Court has failed to give precedential value to \textit{Beauharnais}, the lower federal courts have also minimized its importance.\textsuperscript{179} In \textit{Collin v. Smith},\textsuperscript{180} the Seventh Circuit invalidated a

\begin{itemize}
\item \textsuperscript{175} See \textit{id.} at 258. Justice Frankfurter stated in the majority opinion: "The precise question before us, then, is whether the protection of 'liberty' in the Due Process Clause of the Fourteenth 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 collectives and flagrantly disseminated." In a dissenting opinion, Justice Black stated that the majority "simply acts on the bland assumption that the First Amendment is wholly irrelevant. It is not even accorded the respect of a passing mention." \textit{id.} at 268 (Black, J., dissenting).
\item \textsuperscript{177} See \textit{Garrison v. Louisiana}, 379 U.S. 64, 67-68 n.3 (1964). The Court in \textit{Garrison} found no problem in stating that the first amendment applied to criminal, as well as civil, libel cases. The reasons that allow the first amendment to apply to civil libel cases are of no less force merely because the remedy is criminal. The constitutional guarantees of free speech compel application of the same standard in criminal and civil libel cases. \textit{id.} at 74.
\item \textsuperscript{178} See \textit{Ashton v. Kentucky}, 384 U.S. 195, 200-01 (1966). The \textit{Ashton} Court relied on \textit{Terminiello v. Chicago}, 337 U.S. 1 (1949), to support its decision that the first amendment applies to criminal libel cases. The Court stated that: "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." \textit{Ashton}, 384 U.S. at 199-200 (quoting \textit{Terminiello}, 337 U.S. at 4).
\item \textsuperscript{179} See \textit{Tollett v. United States}, 485 F.2d 1087, 1094-95 (8th Cir. 1973). For example, in \textit{Tollett}, the court reversed the defendant's conviction for mailing postcards containing "'scurrilous' and 'defamatory' language." \textit{id.} at 1088. The court termed the history of criminal libel statutes "ignominious," \textit{id.} at 1094, and noted that it was extremely doubtful that the Illinois statute considered in \textit{Beauharnais} would be upheld today. \textit{id.} at 1094 n.14. Other decisions which have rejected the \textit{Beauharnais} reasoning include Sambo's Restaurants, Inc. v. City of Ann Arbor, 663 F.2d 686, 694 n.7 (6th Cir. 1981) (city enjoined from denying restaurant owner's right to use trade name "Sambo's" even though there was evidence that the name offended racial group); Anti-Defamation League of B'nai B'rith v. FCC, 403 F.2d 169, 174 n.5 (D.C. Cir. 1968) (Wright, J., concurring), cert. denied,
Skokie, Illinois ordinance prohibiting the dissemination of materials intending to promote hatred against persons on the basis of their race, national origin, or religion.\textsuperscript{181} The court stated that its decision was not governed by \textit{Beauharnais}.\textsuperscript{182} The Village of Skokie's petition for a writ of certiorari in the Supreme Court was denied, with two Justices dissenting.\textsuperscript{183} The sole reason given by the dissenting Justices for wishing to grant certiorari was that the Court should consider whether or not to formally overrule \textit{Beauharnais}.\textsuperscript{184}

This analysis illustrates that any attempt to justify a content-based restriction on the basis of \textit{Beauharnais} is on extremely shaky ground. Both the Supreme Court and the lower federal courts have recognized that \textit{Beauharnais} is no longer controlling when the first amendment and libel are concerned.

The second reason \textit{Beauharnais} lacks precedential value is that since the Supreme Court's 1964 decision in \textit{New York Times Co. v. Sullivan},\textsuperscript{185} it is necessary for a plaintiff to plead and prove particularized injuries in order to impose civil liability for defamation.\textsuperscript{186} The Court has held that the first amendment was violated by a trial court construction that "an imputation of impropriety to one or some of a small group that casts suspicion on all is actionable."\textsuperscript{187} In contrast to the general requirement of particularized

\textsuperscript{180} 578 F.2d 1207 (7th Cir.), cert. denied, 439 U.S. 916 (1978).

\textsuperscript{181} Id at 1199. In Collin, members of the American Nazi Party brought an action seeking declaratory and injunctive relief against enforcement of the ordinance. The ordinance was enacted after the Nazis announced plans to march in front of the village hall in Skokie, a Chicago suburb with a large Jewish population, including many survivors of the Holocaust. \textit{Id}.

\textsuperscript{182} See \textit{id} at 1203-05. In discussing the effect of \textit{Beauharnais}, the court stated that:

[W]e agree with the district court that decisions . . . since \textit{Beauharnais} have abrogated the Chaplin crash dictum, made one of the premises of \textit{Beauharnais}, that the punishment of libel 'has never been thought to raise any Constitutional problem.' [\textit{New York Times Co. v. Sullivan}] . . . and [\textit{Gertz v. Welch}] . . . are indisputable evidence that libel does indeed now raise serious . . . First Amendment problems, sufficient as a matter of constitutional law to require the substantial rewriting of both criminal and civil state libel laws.

\textit{Id} at 1205.

\textsuperscript{183} See \textit{Collin}, 439 U.S. 916, 916 (Blackmun, J., dissenting). Mr. Justice White joined with Mr. Justice Blackmun in the dissent. \textit{Id}.

\textsuperscript{184} \textit{Id} at 919.

\textsuperscript{185} 376 U.S. 254, 292 (1964).


\textsuperscript{187} \textit{Rosenblatt}, 383 U.S. at 80-82. In \textit{Rosenblatt}, a supervisor of a county recreation
damages, the MacKinnon/Dworkin ordinance would give a civil cause of action to any woman simply because of pornography's existence. The ordinance would grant this cause of action regardless of whether the pornography created any particularized injury with respect to her. This would violate first amendment guarantees by undermining the particularization requirements set forth by both the Supreme Court and lower federal courts.

B. The Clear and Present Danger Standard

The second exception to the protection of the first amendment is for speech which involves a clear and present danger of inciting unlawful conduct. Speech which presents a clear and present danger of bringing about "those substantive evils that Congress has a right to prevent is exempt from first amendment coverage." While the clear and present danger standard is a recognized exception to the first amendment, application of this principle has been extremely limited.

The Court has recognized that the clear and present danger standard applies only in the narrowest of circumstances. Only if speech is likely to incite imminent lawless action will censorship be permitted.

Such action must rise far above public inconven-
ience, annoyance, or unrest.\textsuperscript{192} Recent decisions make clear that the danger of lawless action must be truly imminent, or no prohibition can be made of such speech.\textsuperscript{193}

Despite extensive expert testimony on behalf of the ordinance by various social scientists, no showing was made that the material prohibited by the MacKinnon/Dworkin ordinance is limited to that which creates a threat of \textit{imminent} unlawful conduct. Dr. Edward Donnerstein testified that exposure to violent pornography created calloused attitudes toward women, and increased the trivialization of rape and the acceptance of the rape myth.\textsuperscript{194} He also admitted, however, that these attitudes are reversible through a debriefing process, whereby persons exposed to pornography are dissuaded by the presentation of contrary ideas.\textsuperscript{195} Moreover, the notion that imminent lawless activity is fostered by pornography was clearly disputed before the Pornography Task Force by researchers Candace Kruttshnitt and Linda Heath.\textsuperscript{196} The study by Ms. Kruttshnitt and Ms. Heath, comparing sex offenders with members of the population at large from similar age and neighborhood groups, revealed no substantial difference between the two groups in terms of exposure to violent pornography.\textsuperscript{197}

Thus, even construing the evidence most favorably to the proponents of the ordinance, no evidence exists to support the proposition that pornography causes imminent lawless conduct. At best,
exposure to pornography affects attitudes. However, these attitudes can be reversed by exposure to opposing attitudes, supporting the Supreme Court’s conclusion that the appropriate remedy is more speech, not less.  

C. Commercial Speech

The final exception to first amendment law advanced on behalf of the MacKinnon/Dworkin ordinance is the commercial speech exception. In Valentine v. Chrestensen, 199 the Court held that the first amendment imposes no restraint on speech which consists of “commercial advertising.” 200 The precedential value of Valentine, however, has been undermined by more recent decisions of the Supreme Court which have accorded substantial first amendment protection to commercial speech. 201


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198. See, e.g., Terminello, 337 U.S. at 4; Abrams, 250 U.S. at 630 (Holmes, J., dissenting); see also supra note 191.
199. 316 U.S. 52 (1942).
200. Id. at 54.
203. Id. at 378. The ordinance proscribed discrimination in employment on the basis of race, color, religion, ancestry, national origin, place of birth, or sex. Section 8 of the ordinance declared it to be an unlawful employment practice:
   except where based upon a bona fide occupational exemption certified by the Commission:
   (a) For any employer to refuse to hire any person or otherwise discriminate against any person with respect to hiring . . . because of . . . sex.
   (e) For any 'employer,' employment agency or labor organization to publish or circulate, or to cause to be published or circulated, any notice or advertisement relating to 'employment' or membership which indicates any discrimination because of . . . sex.
   (j) For any person, whether or not an employer, employment agency or labor
based its decision upon two factors, neither of which are present in the MacKinnon/Dworkin ordinance.

First, the commercial speech involved in *Pittsburgh Press Co.* was entitled to substantially less first amendment protection than speech having to do with ideas. The Court specifically noted that the advertisement "did no more than propose a commercial transaction."\(^{204}\) In contrast, the material sought to be regulated by the MacKinnon/Dworkin ordinance goes far beyond material which simply proposes commercial transactions. The crux of the pornography definition in the MacKinnon/Dworkin ordinance has nothing to do with proposing a commercial transaction. Rather, it deals solely with the advocacy of ideas.\(^ {205}\) In *Pittsburgh Press Co.*, the Supreme Court rejected the notion that merely because speech is sold at a profit, it becomes commercial and subject to regulation.\(^ {206}\) The MacKinnon/Dworkin ordinance is not limited to proposals of purely commercial transactions. It applies to all published material that contains "pornography," regardless of whether the material involves commercial advertising.\(^ {207}\) Failure to limit the scope of the MacKinnon/Dworkin ordinance to material which proposes a commercial transaction limits any precedential value *Pittsburgh Press Co.* might otherwise have.

Second, the *Pittsburgh Press Co.* decision noted that the advertisement in question not only proposed a commercial activity, but also proposed an illegal commercial activity. Such illegal activity could be regulated.\(^ {208}\) The Court noted that, consistent with the first amendment, a newspaper could be prohibited from publishing commercial advertisements proposing the sale of narcotics or solicitation of prostitutes.\(^ {209}\) Although the illegality "may be less overt," the Court saw no difference in principle between advertise-

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organization, to aid . . . in the doing of any act declared to be an unlawful employment practice by this ordinance.

Id.

204. *Id.* at 385.

205. *See Proposed Ordinance § 3, to add MCO § 139.20(gg).*

206. 413 U.S. at 385. The Court stated:

If a newspaper's profit motive were determinative, all aspects of its operation—from the selection of news stories to the choice of editorial position—would be subject to regulation if it could be established that they were conducted with a view toward increased sales. Such a basis for regulation clearly would be incompatible with the First Amendment.

Id.

207. *See Proposed Ordinance § 3, to add MCO § 139.20(gg).*

208. 413 U.S. at 388. The illegal commercial activity proposed by the advertisements was sexual discrimination in violation of the ordinance. *Id.; see supra note 203.*

209. 413 U.S. at 388.
ments inviting the sale of narcotics or solicitation of prostitutes, and sexually discriminatory job advertisements.210

*Pittsburgh Press Co.* holds that in the area of commercial transactions, government can prohibit the publication of direct invitations to engage in commercial transactions which are unlawful. However, the MacKinnon/Dworkin ordinance is not so restricted. Its prohibitions encompass far more than invitations to commercial activities which are unlawful by nature. The ordinance is not restricted to purely commercial transactions and is not restricted to invitations to engage in unlawful commercial activity.211 As such, the ordinance falls outside the scope of the commercial speech exception to the first amendment.

**VIII. THE ORDINANCE AND PRIOR RESTRAINT**

The MacKinnon/Dworkin ordinance authorizes an administrative restraint on the exhibition and distribution of materials presumptively entitled to first amendment protection.212 In the event that a complaint is brought, the director of the Minneapolis Civil Rights Commission determines whether probable cause exists to believe pornography is involved.213 If probable cause is found, an administrative hearing is held before a hearing committee.214 If the committee determines the material to be pornography, it may order the material barred from public distribution. The distributor or exhibitor must then affirmatively seek relief from that order in court.215

Such a procedure violates well-established law governing administrative restraints on first amendment activity. In *Freedman v. Maryland*,216 the Supreme Court declared that whenever administrative restraints on first amendment rights are authorized, a fourfold procedural safeguard must be implemented.217 First, the administrative agency imposing the restraint must grant or deny permission to engage in the first amendment activity within the

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210. *Id.* at 388-89.
211. *See Proposed Ordinance § 3, to add MCO § 139.20(gg).*
212. *See supra* notes 39-46 and accompanying text.
213. *See supra* notes 41-42 and accompanying text.
214. *See supra* notes 45-47 and accompanying text.
215. *See supra* note 49 and accompanying text.
217. *Id.* at 58-59.
briefest possible time. 218 Second, in order for the activity to be restrained, the statute must require the administrative officer involved to institute proceedings for a temporary or permanent injunction. 219 Third, any restraint imposed in advance of final judicial determination on the merits must be limited by law to the preservation of the status quo for the shortest possible fixed period. 220 Finally, a prompt, final judicial determination must be assured. 221 These procedural safeguards have been held necessary whenever administrative restraints on first amendment activity are imposed. 222

Whatever doubt may have existed about the scope of the requirements developed in Freedman was put to rest by Southeastern Promotions, Ltd. v. Conrad. 223 The Court restated and affirmed the requirements of Freedman, and applied them in the broader context of speech in a public forum. 224 Consequently, numerous federal courts have held that the Freedman procedural safeguards must be

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218. Id. at 59. The time period for granting or denying permission to engage in the activity must be specified in the statute or ordinance which allows review. See id. at 60.
219. See id. at 58. The statute or ordinance must specify a time period within which the administrative proceedings must be brought. Id. at 59. The administrative officer instituting the proceedings assumes the burden of proof that the material cannot be restrained. Id. at 58.
220. Id. at 59.
221. Id. at 59-60 (Maryland statute did not provide assurance of prompt judicial determination).
222. See Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560 (1975) (procedural safeguards required when action was brought against musical production showing in municipal theatre); Blount v. Rizzi, 400 U.S. 410 (1971) (safeguards required when restriction placed on obscene materials sent by mail); United States v. Thirty-Seven Photographs, 402 U.S. 363, 367 (1971) (seizure of imported obscene material required imposition of Freedman standards); Teitel Film Corp. v. Cusack, 390 U.S. 139, 141-42 (1968) (motion picture shown in public place was protected by Freedman standards). See generally Blasi, Prior Restraints on Demonstrations, 68 MICH. L. REV. 1481 (1970) (demonstration regulation should be subject to Freedman standards); Monaghan, First Amendment "Due Process," 83 HARV. L. REV. 518 (1970) (judicial determination regarding protected character of speech must either precede or immediately follow any governmental determination of obscenity).
224. Id. at 559-62. The Court stated:

The settled rule is that a system of prior restraint 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.'

If a scheme that restricts access to the mails must furnish the procedural safeguards set forth in Freedman, no less must be expected of a system that regulates use of a public forum. Respondents here had the same power of licensing and censorship exercised by postal officials in Blount, and by boards and officials in other cases.

Id. at 559-60.
present in laws which require official permission or authorization as a condition precedent for first amendment activity. In Minnesota, the United States District Court has held that the absence of the Freedman procedural due process safeguards would invalidate an entire administrative system of prior restraint on adult bookstores.

Judged by the Freedman standards, the procedural safeguards provided by the MacKinnon/Dworkin ordinance are inadequate. The ordinance contains no guarantee of a prompt determination by either the director or the review committee as to the entitlement of materials to first amendment protection. If the review committee determined a work to be pornography, it could issue an immediate administrative ban. This would place the burden upon the exhibitor, distributor, seller, or publisher to obtain judicial relief from that ban. The ordinance also contains no provision requiring the Department of Civil Rights to assume the burden of proof in the administrative proceedings. Finally, the ordinance provides no guarantee of a prompt judicial determination. Thus, even if the MacKinnon/Dworkin ordinance were substantively constitutional, its failure to provide the procedural due process necessary under Freedman means that it must be invalidated.

IX. CONCLUSION

It is difficult to examine the MacKinnon/Dworkin ordinance and find a substantive or procedural principle of the first amendment which it does not violate. Its definition of pornography is based solely upon an objection to the content of ideas. The definition is overbroad and encompasses materials entitled to constitutional protection. The definition is also unconstitutionally vague.

225. See, e.g., International Soc'y for Krishna Consciousness, Inc. v. Rochford, 585 F.2d 263, 271-72 (7th Cir. 1978) (Freedman safeguards must be present in regulations promulgated by the aviation commission concerning distribution of literature in municipal airport); Fernandes v. Limmer, 465 F. Supp. 493, 501-02 (N.D. Tex. 1979) (city ordinance regulating solicitation by non-profit religious organizations in city airport must contain Freedman safeguards); United States v. Silberman, 464 F. Supp. 866, 873 (M.D. Fla. 1979) (regulations which require permit before person is able to solicit religious business on federal property must contain "criteria that are narrow, and strict, definitive and objective"); International Soc'y for Krishna Consciousness, Inc. v. Bowen, 456 F. Supp. 473, 443-44 (S.D. Ind. 1978) (state fair regulations which lacked Freedman safeguards and limited religious group to solicitation from booth constituted prior restraint).


227. See supra notes 39-51 and accompanying text.

228. MCO § 141.50 (1982).
The exemption of libraries results in a violation of the equal protection clause. The cause of action for rape or sexual assault caused by pornography plainly adopts standards of liability which have been rejected by the United States Supreme Court for twenty-seven years. The absence of scienter further chills constitutionally protected speech. Even assuming the entire ordinance to be substantively constitutional, procedural deficiencies would require invalidation. The ordinance and the arguments advanced in favor of it are "absurd and fanciful."\(^{229}\)

Civil rights and censorship are indeed incompatible bedfellows. The incompatibility arises out of a mistaken notion as to precisely what constitutes civil rights in a free society. As offensive as pornography may be to some, there is not and there cannot be, in a free society, a right not to be offended. As one judge has noted, "It may ... be well to remember that often 'words die away, and flow off like water—leaving no taste, no color, no smell, not a trace.' Any exception, however, to the First Amendment ... would not 'die away.' It would remain a dangerous and unmanageable precedent in our free and open society."\(^{230}\)

\(^{229}\) People v. Nitti, 312 Ill. 73, 81, 94 (1924).

\(^{230}\) Collin, 578 F.2d 1197, 1210 (1978) (Wood, J., concurring) (quoting A. Solzhenitsyn, Nobel Lecture (1972) (footnote omitted)).