Legislative Remedies for Unauthorized Sexual Portrayals: A Proposal

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Unauthorized sexual portrayals of models and actresses are alluring and commercially profitable. Yet these portrayals can harm the professional reputation and emotional well-being of the individuals portrayed. Although these individuals frequently bring invasion of privacy actions to redress their inju-

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1. For examples of such portrayals, see infra notes 4 and 9. See also PENTHOUSE MAGAZINE, July 1984 (nude pictures of Vanessa Williams taken several years before she won Miss America contest and allegedly published without authorization). See generally Wash. Post, July 31, 1984, at C2, col. 5 (discussing other woman who posed in photographs with Vanessa Williams). Publisher Guccione stated that Penthouse magazine published 4.5 million copies of the September issue and expected to make $10 million on the issue. Wash. Post, July 24, 1984, at A1, col. 2 (discussing resignation of Williams as Miss America); Id., July 23, 1984, at C1, col. 4; USA Today, July 23, 1984, at 1A, col. 2; Wash. Times, July 23, 1984, at 12B, col. 1; Wash. Post, July 21, 1984, at C1, col. 3.

2. See infra notes 4 and 91 (citing cases). Sexual portrayals may be "unauthorized" in two different senses. There may be some form of coercive conduct by the producers during the production process that causes some aspect of a portrayal to be unauthorized by the subject. For example, Linda Lovelace contends that she was hypnotized, beaten, and kidnapped in order for the movie Deep Throat to be produced. See L. LOVELACE & M. McCRADY, ORDEAL (1980). Alternatively, portrayals may be disseminated by other publishers in an unauthorized fashion. For example, Ann-Margret consented to being photographed nude for a movie, but not for the photograph to be published in High Society Celebrity Skin. See Ann-Margret v. High Soc'y Magazine, Inc., 498 F. Supp. 401 (S.D.N.Y. 1980). Or both problems may occur. See, e.g., L. LOVELACE & M. McCRADY, supra (Lovelace describes her inability to enjoin future dissemination of the movie Deep Throat). Throughout this Article, the concept of "unauthorized" use is meant to refer to both the conduct of producers and disseminators of sexual portrayals.
ries, these actions generally fail. The courts usually find models and actresses who are the victims of unauthorized sexual portrayals to be "public figures"
and therefore require them to prove that the publisher acted with "actual malice" a standard that is nearly impossible to meet. By contrast, individuals who are not considered to be public figures often obtain relief for unauthorized sexual portrayals under a more lenient "negligence" standard for invasions of privacy.

The courts have applied an expansive definition of "public figure" to actions involving unauthorized sexual portrayals, which has had the effect of precluding most models and actresses from attaining relief. This Article argues that the application of the public figure doctrine to actions for unauthorized sexual portrayals is both unnecessary and inappropriate. These portrayals rarely serve any newsworthy purpose and infringe upon the civil rights of the individuals portrayed.

The Seventh Circuit has recently endorsed this view in two contexts. First, in Douglass v. Hustler, the court suggested that the actual malice standard may not have been constitutionally required in a "public figure" model's sexual privacy action. Second, it suggested in American Booksellers Association v. Hudnut that states may strengthen the remedies available to individuals who are subjected to unauthorized sexual portrayals.

Accordingly, this Article proposes a legislative remedy for unauthorized sexual portrayals that would provide new protections for all plaintiffs and particularly for many models and actresses. The proposed statute provides all

5. See supra note 4 (citing cases). For example, Robyn Douglass, a model and actress, brought an action for invasion of privacy against Hustler magazine for publishing nude photographs of her. She had the photographs taken for a feature in Playboy and had not consented to the photographs being released to Hustler for publication. The district court granted her damages of $600,000 but the Seventh Circuit reversed, in part, because the district court failed to apply the "actual malice" standard. Douglass v. Hustler, 769 F.2d 1128 (7th Cir. 1985). Absent evidence that the publisher acted with "reckless disregard of the truth," Douglass was precluded from obtaining relief. Id. For further discussion, see infra notes 93-111 and accompanying text.


7. For example, the court awarded both compensatory and punitive damages to a model for an unauthorized sexual portrayal in Clark v. Celeb Publishing Inc., 530 F. Supp. 979 (S.D.N.Y. 1981) (relied on California statute that prohibits publications for commercial purposes without consent). Many other jurisdictions would reach the same result for private individuals under the common law. See infra notes 138-53 and accompanying text.

8. See supra note 4; infra notes 91-137 and accompanying text.

9. 769 F.2d 1128 (7th Cir. 1985).

10. Id. at 1140. Nevertheless, it did not reach that issue because it had not been raised by the plaintiff. Id. at 1140-41. For further discussion, see infra notes 93-111 and accompanying text.


12. Id. For further discussion, see infra notes 65-79 and accompanying text.

13. See text accompanying infra notes 90-91.
individuals with the right to consent to the dissemination or modification of their sexual portrayals so long as the primary purpose of the portrayals is not to impart news. In place of the public figure test, this Article proposes a “primarily newsworthy” standard.

Part I analyzes two limitations of existing legislation concerning sexual portrayals: a lack of concern for the rights of the individual portrayed and the use of criminal rather than civil sanctions. Legislation to correct these limitations is also proposed. Part II surveys common law actions brought by actresses and models and shows how the proposed legislation would affect these results. Part III argues that the proposed legislation would survive constitutional challenge on the ground that protection from sex-based violations of civil rights can justify restrictions on free speech. In light of recent decisions suggesting that protection of individuals from sex-based victimization may counterbalance free speech rights, this Article argues that unauthorized sexual portrayals violate the sex-based civil rights of the individuals portrayed. This civil rights concern enhances the desirability and constitutionality of a new state tort law remedy for unauthorized sexual portrayals.

I. Legislative Approaches to the Problem of Sexual Portrayals

A. Privacy Approach

In the late nineteenth century, Samuel Warren and Louis Brandeis focused attention on the development of privacy doctrine under the common law. They argued that a right to privacy should protect individuals from unwelcome media portrayals that damage their emotional well-being. As an example, they cited the recent action brought by Marion Manola who had been photographed surreptitiously while appearing on Broadway in a role that required her to wear tights. Manola objected to the dissemination of photographs and was able to obtain injunctive relief to prevent the dissemination of the photographs.

14. See infra notes 20-90 and accompanying text.
15. See infra notes 90-91 and accompanying text.
16. See infra notes 91-162 and accompanying text.
17. See infra notes 162-95 and accompanying text.
19. By arguing for a new state tort law remedy, the author does not mean to suggest that state legislative efforts are more desirable than federal legislative efforts. In fact, the author would endorse federal legislation to improve protection in this area. The focus on state legislation is simply strategic — tort remedies are already recognized on the state level so that it might be easier to strengthen those existing rights rather than to create a new body of rights.
21. Id. at 195-96 (arguing that “instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life” and that the “press is overstepping in every direction the obvious bounds of propriety and of decency”).
22. Id. at 197-207.
23. Id. at 195 n.7.
24. Id. A preliminary injunction was issued and no one appeared to oppose a permanent
Most states have either incorporated this privacy right into the common law or enacted specific legislation to protect it. For example, New York enacted a statute in the early twentieth century that provided a cause of action for damages and injunctive relief for anyone whose name or picture was used "for purposes of trade" without written consent. In the modern era, however, such remedies are barred for "public figures" who cannot satisfy the actual malice test. Under this test, public figures cannot recover for invasions of privacy unless they can demonstrate that the publisher displayed reckless disregard for the truth. The definition of public figure has greatly expanded

injunction. Id.


26. The New York statute provided:

Section 50. Right of Privacy.
A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

Section 51. Action for Injunction and for Damages
Any person whose name, portrait, or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the Supreme Court of this state against the person, firm or corporation so using his name, portrait or picture to prevent and restrain thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. . . . Nothing contained in this article shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in the article shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or picture used in connection therewith.


In 1983, the following language was added to section 51:

But nothing contained in this article shall be so construed as to prevent any person, firm or corporation from selling or otherwise transferring any material containing such name, portrait, or picture in whatever medium to any user of such name, portrait or picture, or to any third party for sale or transfer directly or indirectly to such a user for use in a manner lawful under this article.

Id. (Supp. 1986).

27. See supra note 4; infra notes 91-137 and accompanying text.

28. See supra note 6. For further discussion of the application of this standard, see infra notes 91-137 and accompanying text.
since its original conception for political persons to include individuals who have any notoriety. If an unauthorized sexual portrayal of a model or actress with any notoriety is accurate, this standard precludes relief. Ironically, Marion Manola would probably not be able to recover under today’s restrictions upon privacy doctrine because she was a public performer and was accurately portrayed in the unauthorized sexual portrayal.

The broad scope of the public figure doctrine stands in sharp contrast to the original Warren and Brandeis concept of matters of “public or general interest” exempted from liability for privacy violations. They defined “public or general interest” by reference to whether the portrayal had any legitimate relation to or bearing upon any act done by the individual in a public or quasi-public capacity. The legislation proposed here seeks to return the definition of public figure to Warren and Brandeis’ original conception by focusing on the newsworthiness of the portrayal and the publication. It also seeks to refocus the privacy discussion on a special concern of Warren and Brandeis — the harm accompanying sexual invasions of privacy.

B. Obscenity Regulation

Rather than enhancing the remedies for individuals harmed by sexual portrayals, most states have sought to protect the community from pornography through criminal sanctions. The Supreme Court’s 1973 landmark decision in Miller v. California, validated the suppression of sexual portrayals on the basis of the community’s conception of obscenity. In Miller, the Court upheld the use of criminal sanctions against individuals who disseminated sexual depictions that appealed to the “prurient interest” and lacked serious literary, artistic, political or scientific value. Since 1973, more than thirty-seven states have legislatively adopted or judicially incorporated the Miller obscenity

29. See Warren & Brandeis, supra note 20, at 214.
30. Nevertheless, as Part II of this Article will demonstrate, the public figure doctrine has greatly expanded the definition of matters of “public or general interest” as conceived by Warren and Brandeis. See infra notes 91-137 and accompanying text.
31. See Warren & Brandeis, supra note 20, at 196 (criticizing spread of “details of sexual relations” to “satisfy a prurient taste”).
34. The Miller decision articulated the following three part standard for determining whether a work is obscene:
(a) [W]hether the “average person, applying contemporary community standards” would find the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
The theory underlying the Miller decision is that obscenity is harmful, "low value" speech from which the community may choose to protect itself. But Miller, however, only sanctions the use of criminal prosecutions brought by the state on behalf of the community, not the use of civil actions by individuals. Thus, the Miller standard does not provide protection to individuals who have been harmed by the unauthorized use of sexual portrayals. In particular, the Miller standard does not bar the dissemination of non-obscene sexually explicit material that may cause the same harms as obscene portrayals of these individuals. Given the narrowness of the modern definition of criminal obscenity, most of the personal injuries caused by unauthorized sexual portrayals remain unremedied by obscenity prosecutions.

C. Zoning Regulations

In the 1970's, many cities enacted zoning regulations to regulate the exhibition of sexual materials that would not be considered obscene under Miller. This approach, similar to obscenity regulation, relies on the state for enforcement and seeks to protect the community as a whole rather than the individual portrayed. The constitutionality of an "anti-Skid Row" pornography ordinance was upheld in Young v. American Mini Theatres, Inc. That case approved the use of ordinances that prohibited the location of "adult" theatres within 1,000 feet of two other "regulated uses" (such as adult thea-

35. See Ferber, 458 U.S. at 755 n.7.
38. See, e.g., Young, 427 U.S. 50 (1976) (plurality opinion).
40. The Ordinance defined "adult" theatres on the basis of the character of the motion pictures that it exhibited. If the theater emphasized material that depicted, described, or related specified sexual activities or specified anatomical areas, it was regulated by the Ordinance. Young, 427 U.S. at 53 n.5. The statute also defined "specified sexual activities" and "specified anatomical areas."

"Specified sexual activities" were defined as:
1. Human genitals in a state of sexual stimulation or arousal;
2. Acts of human masturbation, sexual intercourse or sodomy;
3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

Id. at 53 n.4.

"Specified anatomical areas" were defined as:
1. Less than completely and opaquely covered: (a) human genitals, pubic region, (b) buttock, and (c) female breast below a point immediately above the top of the areola; and
2. Human genitals in a discernably turgid state, even if completely and opaquely covered.

Id.
tres or bookstores) or within 500 feet of a residential area.\textsuperscript{41}

The Young Court distinguished between a city's power to \textit{regulate} speech on the basis of content and its power to \textit{suppress} speech on the basis of content. It stated:

\textit{[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate. . . .}\textsuperscript{48}

Consequently, Young held that "[e]ven though the First Amendment protects communication in this area from total suppression . . . the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures."\textsuperscript{48}

The Court then analyzed whether the city had a sufficient justification to regulate speech on the basis of its content. It found that the city's interest in attempting to preserve the quality of urban life was sufficient to justify a limitation on the place where adult films may be exhibited.\textsuperscript{44} The factors that the Court considered in reaching that result were the nonpolitical nature of the speech that the city was regulating, the limited scope of the regulation, and the limited definition of sexual activity used in the ordinance.\textsuperscript{48}

The Young decision provides useful insight into the type of statute that might constitutionally restrict sexual portrayals. First, it suggests that limited regulations of sexual materials are constitutional so long as they do not result in the absolute suppression of speech on the basis of content. The legislation proposed in this Article meets that requirement by establishing restrictions that will not cause the suppression of sexual portrayals. Second, the Court

\textsuperscript{41} 427 U.S. at 52-53. Plaintiff theatres challenged the Ordinance because it allegedly violated the due process clause of the fourteenth amendment, the free speech clause of the first amendment, and the equal protection clause of the fourteenth amendment. The district court granted the defendant city's motion for summary judgment, Young v. American Mini Theatres, Inc., 373 F. Supp. 363 (E.D. Mich. 1974) and the court of appeals reversed, finding that the Ordinance violated the equal protection clause by classifying motion picture theatres on the basis of the content of the materials they showed to the public. Young v. American Mini Theatres, Inc., 518 F.2d 1014 (6th Cir. 1975).

The United States Supreme Court reversed the court of appeals, upholding the constitutionality of the Ordinance. Young, 427 U.S. 56 (1976). First, the Court rejected plaintiff's ability to raise the vagueness issue, because there was no uncertainty about the impact of the Ordinance on their rights. \textit{Id.} at 58-62. Second, the Court rejected plaintiff's argument that the Ordinance acted as a prior restraint on speech because the Ordinance did not deny the theatres access to the marketplace. \textit{Id.} at 62-64. Instead, the Court found that the Ordinance only regulated theatres in a manner that was constitutional under a city's zoning power. Third, the Court rejected plaintiff's equal protection argument that regulation of expressive activity predicated in whole or in part on the content of the communication was absolutely prohibited. \textit{Id.} at 64-74.

\textsuperscript{42} \textit{Id.} at 70.

\textsuperscript{43} \textit{Id.} at 70-71.

\textsuperscript{44} \textit{Id.} at 71-72.

\textsuperscript{45} \textit{Id.} at 69-70. For the definition of "sexual activity" used in the Ordinance, see \textit{supra} note 40.
suggestions that sexual materials that are not obscene under the *Miller* standard may be regulated as long as these regulations serve substantial state interests. The proposed statute is designed to serve the interests of providing a remedy for the harms suffered by individuals subjected to coercive behavior in the production of sexual portrayals, or to later unauthorized use of these materials. Third, the Court stresses the importance of clear regulatory language so that publishers will know what types of publications are restricted. The proposed statute meets this requirement by adopting the definitions of sexual activity and sexual anatomical areas used in the *Young* ordinances and by specifically defining the other relevant terms. Hence, the proposed statute satisfies the *Young* decision’s framework for constitutional regulation of sexual materials.

D. Protection of Children

A concern about the injury to certain individuals portrayed in pornography began to emerge in the 1970’s as national attention focused on the problem of the exploitive use of children in the production of sexual materials that would not be obscene under *Miller*. By 1982, twenty states had enacted legislation to prohibit the distribution of material depicting children engaged in non-obscene sexual conduct. The constitutionality of these criminal statutes was upheld in *New York v. Ferber*.

The *Ferber* Court based its departure from *Miller* on the ground that the “[s]tates are entitled to greater leeway in the regulation of pornographic depictions of children.” Five factors contributed to the Court’s holding. First, it found “that a State’s interest in ‘safeguarding the physical and psychological well-being of a minor’ was ‘compelling.’” Second, “[t]he distribution of photographs and films depicting sexual activity by juveniles” was “intrinsically

47. *Id.* at 749 n.2.
48. 458 U.S. 747 (1982). Ferber was the proprietor of a Manhattan bookstore specializing in sexually oriented products, and was indicted under N.Y. PENAL LAWS § 263 (McKinney 1980) for selling films of young boys masturbating. *Id.* at 751-52. Under the statute, a person commits a class D felony by “‘promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age.’” *Id.* at 751 (citing N.Y. PENAL LAW § 263.15 (McKinney 1980)). The maximum punishment for individuals convicted of a class D felony is seven years imprisonment while corporations may be fined up to $10,000. *Id.* at 751 n.3 (citing N.Y. PENAL LAW §§ 70.00, 80.10 (McKinney 1975)). To “promote” is defined as “‘to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.’” *Id.* at 751 (citing N.Y. PENAL LAW § 263.00(5) (McKinney 1980)). Also, “sexual conduct” is defined as conduct depicting “‘actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.’” *Id.* (citing N.Y. PENAL LAW § 263.00(3) (McKinney 1980)). Apparently, this part of the statute was not intended to adhere to the *Miller* definition of obscenity.
49. *Id.* at 756.
50. *Id.* at 756-57 (citing Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)).
related to the sexual abuse of children."\textsuperscript{51} Third, "[t]he advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials."\textsuperscript{52} Fourth, "[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct" was "exceedingly modest."\textsuperscript{53} Finally, the Ferber Court found that "[r]ecognizing and classifying child pornography as a category of material outside the protection of the First Amendment" was "not incompatible with... earlier decisions" permitting regulation of broadcasting, fighting words, and libel.\textsuperscript{64}

Accordingly, the Ferber Court permitted the state to use indirect means (controlling the dissemination of certain sexual materials) rather than a direct means (controlling the production of those sexual materials), to limit the use of children in explicit sexual materials. It found that indirect means were necessary because existing federal law that prohibited anyone from using children under the age of sixteen in the production of "sexually explicit conduct" had been ineffective.\textsuperscript{55}

Ferber thus held, as did Young, that speech may be restricted if the restrictions serve a substantial state interest. Summarizing prior decisions in this area, the Court justified a balancing test to evaluate the substantiality of the interests involved:

Thus, it is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required. When a definable class of material, such as that covered by [the New York statute], bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.\textsuperscript{56}

The recent Seventh Circuit decision in American Booksellers Association v. Hudnut suggests that the Ferber holding could also be used to uphold legislation that seeks to protect adult women from harms suffered by the production and dissemination of sexual materials, irrespective of whether the material is obscene under Miller. The Hudnut court stated, "when a state has a strong interest in forbidding the conduct that makes up a film (in Ferber sexual acts involving minors), it may restrict or forbid dissemination of the film in order to reinforce the prohibition of the conduct."\textsuperscript{57}

The legislation proposed in this Article attempts to redress injuries to individuals who are subjected to unauthorized sexual portrayals in a manner

\textsuperscript{51} Id. at 759.  
\textsuperscript{52} Id. at 761.  
\textsuperscript{53} Id. at 762.  
\textsuperscript{54} Id. at 763 (citations omitted).  
\textsuperscript{55} Id. at 759-60.  
\textsuperscript{56} Id. at 763-64.  
\textsuperscript{57} American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 332 (7th Cir. 1985).
that is consistent with the balancing test suggested by the Ferber Court. It is 
premised on the assertion that protecting the rights of individuals to exercise 
control over the dissemination of their sexual portrayals is a strong interest 
that counterbalances the publisher's free speech interests, so long as the pri-
mary purpose of the portrayal or publication is not to impart news. Rather 
than impose a criminal sanction, however, the proposed statute creates a civil 
cause of action against publishers who negligently ignore the rights of those 
whose portrayals they disseminate.

E. The Civil Rights Approach

A victim-based focus on the problem of sexual portrayals receives further 
impetus from the legislative contributions of Catharine MacKinnon and An-
drea Dworkin.58 MacKinnon and Dworkin propose regulations of sexual por-
trayals that are premised on the argument that sexually degrading portrayals 
of women infringe both the civil rights of those women and of women in soci-
ety at large by contributing to the subordination of women,59 irrespective of 
whether the portrayal is obscene under Miller.60 They propose a cause of ac-
tion for individuals whose civil rights have been infringed by pornography; 
they do not seek to use criminal sanctions.61 The central focus of their Model 
Ordinance, however, is not the protection of individuals who are portrayed in 
pornography. Although their Model Ordinance contains one general prohibi-
tion against coercing others into performing in pornography,62 they seek pri-
marily to protect the rights of women in the community at large who are in-
jured by pornography.

The definition of pornography contained in the MacKinnon-Dworkin Or-
dinance reflects their understanding of the civil-rights based injury caused 
by the presence of pornography in American life. It defines pornography as the 
graphic sexually explicit subordination of women through pictures or words

58. MacKinnon/Dworkin Model Antipornography Law [hereinafter cited as Model Anti-
DWORKIN, MEN POSSESSING WOMEN (1981); Baldwin, The Sexuality of Inequality: The Minne-
apolis Pornography Ordinance, 2 J. LAW & INEQUALITY 629 (1984); Dworkin, Against the Male 
Flood: Censorship Pornography, and Equality, 8 HARY. WOMEN'S L. J. 1 (1985); MacKinnon, 
Pornography, Civil Rights and Speech, 20 HARV. C.R.-C.L. REV. 1 (1985); MacKinnon, Not a 
Moral Issue, 2 YALE LAW & POLICY REV. 321 (1984); MacKinnon, Feminism, Marxism, 

59. Catherine MacKinnon and Andrea Dworkin, acting as consultants to the Minneapolis 
City Attorney's Office, have drafted an ordinance to amend the Minneapolis Code of Ordinances 
relating to civil rights to include pornography as a form of sex discrimination. See MINNEAPOLIS, 
MINN. CODE OF ORDINANCES, Title 7, Ch. 139 & Ch. 141 (passed Dec. 30, 1983; vetoed Jan. 5, 
1984) [hereinafter cited as MINNEAPOLIS ORDINANCE], reprinted in APPENDIX B, 20 NEW ENG. 
L. REV. 762 (1984-1985). This Ordinance is premised on the finding that "pornography is central 
in creating and maintaining the civil inequality of the sexes." MINNEAPOLIS ORDINANCE, supra, at 
Ch. 139.10(a)(1). The civil rights focus of the Ordinance is explicitly stated in the special findings 
on pornography. Id. See also infra note 66 (discussion of similar ordinance).

60. MacKinnon, Pornography, Civil Rights and Speech, supra note 58, at 21.
61. See Model Antipornography Law, supra note 58.
62. Id. § 3(1).
that also includes one or more of six specific types of depictions.63 Each of these types of depictions includes a combination of sexuality and degradation, e.g., “women are presented as sexual objects who enjoy pain or humiliation.”64

The constitutionality of the MacKinnon-Dworkin approach has been tested in American Booksellers Association v. Hudnut,65 where plaintiffs sought to enjoin the enforcement of the Indianapolis version of the MacKinnon-Dworkin Ordinance.66 The district court granted the plaintiffs’ summary judgment motion, finding that the Ordinance was unconstitutional because it directly regulated speech, was vague and overbroad, and established a prior restraint on speech.67

Feminists filed briefs on both sides of the issue on appeal. Feminist supporters of the ordinance argued that it constitutionally provided a cause of action to recover damages for the harm from pornography.68 They argued that pornography, as defined in the ordinance, was sex discrimination, rather than protected speech, and therefore could be regulated by the clear and specific language of the Ordinance.69

Feminist critics of the Ordinance contended that it was unconstitutional because it was unconstitutionally vague, and because it suppressed constitutionally protected speech in a manner particularly detrimental to women.70

63. Id. § 2(1).
64. Id. § 2(1)(ii).
65. 598 F. Supp. 1316, (S.D. Ind. 1984), aff’d 771 F.2d 323 (7th Cir. 1985).
66. The City of Indianapolis and County of Marion, Indiana passed a version of the MacKinnon-Dworkin ordinance on July 11, 1984. See INDIANAPOLIS ANTIPORNOGRAPHY ORDINANCE No. 24 & No. 35 (1984) [cited as INDIANAPOLIS ORDINANCE], selected passages reprinted in APPENDIX C, 20 NEW ENG. L. REV. 767 (1984-1985). The county of Los Angeles is considering a similar ordinance (copy available from author). Numerous other jurisdictions both in the United States and Canada are also considering such an ordinance. A bill was also introduced on the federal level by Senator Arlen Specter in 1984. S.3063, 98th Cong., 2d Sess., 130 CONG. REC. 13, 191-97 (1984). Although the proposed legislation died, it was reintroduced in 1985 and is presently in the Senate Subcommittee on Juvenile Justice. See Proposed Pornography Victims Act, S.1187, 99th Cong., 1st Sess., 131 CONG. REC. 6, 848 (1985) [hereinafter cited as Proposed Pornography Victims Act], selected passages reprinted in APPENDIX E, 20 NEW ENG. L. REV. 774 (1984-1985). The purpose of the statute is to amend title 18 of the United States Code to include the proposed Child Protection Act to create remedies for children and other victims of pornography, and for other purposes. Id. Although the statute is termed a “Child Protection Act” it contains protection for any individual who has been coerced, intimidated or fraudulently induced into engaging in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct. Id.
68. See Amicus Curiae Brief-Linda Marchiano, American Booksellers Assn, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985).
69. Id. at 13-43. The brief also argued that the case should be dismissed because there was no actual controversy, there were no proper defendants, there was no state action, the overbreadth allegation was not validly stated, and abstention applied. Id. at 1-13.
70. The leading feminist group to oppose the MacKinnon-Dworkin Ordinance is the Feminist Anti-Censorship Task Force [hereinafter cited as FACT]. More than eighty individuals, most of whom are active feminists, signed the brief recently submitted by FACT against the Indianapolis version of the MacKinnon-Dworkin Ordinance. See Amici Curiae Brief-Feminist Anti-Censorship Taskforce, et al., American Booksellers Ass’n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985) [hereinafter cited as FACT Brief]. See also Blakely, Is One Woman’s Sexuality Another Wo-
They disputed the Ordinance's premise that pornography is central to the creation and maintenance of sex discrimination. By contrast, they contended that constitutional protection for sexually explicit speech should be enhanced not diminished because such speech is political speech. On equal protection grounds, they argued that the Ordinance unconstitutionally discriminated on the basis of sex and reinforced sexist stereotypes by presuming that all women are subordinated by all sexually explicit images, that all women are incapable of making a binding agreement to participate in the creation of sexually explicit material, and that all men are conditioned to commit acts of aggression and to believe misogynist myths. They further argued that if women are harmed by pornography, one should regulate the resulting harmful conduct, not the speech.

The Seventh Circuit affirmed the district court decision but on different grounds. The court first addressed the legislative finding that depictions of women's subordination tend to perpetuate the subordinate status of women. Although the court accepted the reasonableness of that finding, it rejected the premise as a constitutionally sufficient basis for the legislation because "[i]f the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech.

71. See FACT Brief, supra note 70.
72. See id. at 1-32. According to Erica Jong, writer and poet and an opponent of the Mackinnon-Dworkin Ordinance: "Should censorship be imposed again, whether through the kind of legislation introduced in Minneapolis and Indianapolis or though other means, feminists would be the first to suffer." Blakely, supra note 70, at 38. See also Blakely, supra note 70, at 120 (statements of Nan Hunter and Barbara Herr); Walkowitz, Male Vice and Female Virtue: Feminism and the Politics of Prostitution in Nineteenth-Century Britain, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 419-38 (A. Snitow ed. 1983) [hereinafter cited as POWERS OF DESIRE] (arguing that women's attempts historically to set standards of sexual conduct have been easily subverted into repressive campaigns antithetical to the values and ideals of feminism); Decter, The Place of Pornography, HARPER'S MAGAZINE, Nov. 1984 at 31; Transcript of Workshop, Pornography: A Feminist Legal Response, at the 16th National Conference on Women and the Law (March 24, 1985) (available on cassette tape from the conference).
73. See FACT Brief, supra note 70, at 18-27; Blakely, supra note 70, at 40; Vance, Gender Systems, Ideology and Sex Research, in POWERS OF DESIRE 371-84 (criticizing assumptions behind sex research).
74. See FACT Brief, supra note 70, at 48-51; Blakely, supra note 70, at 40 (statement of Carole S. Vance: "What appeared novel is really the reappearance of a very traditional concern that explicit sexuality itself constitutes the degradation of women"). See also Vance, Pleasure and Danger; Toward a Politics of Sexuality, in PLEASURE AND DANGER 1-27 (C. Vance ed. 1984); Walkowitz, supra note 72; Willix, Feminism, Moralism, & Pornography, in POWERS OF DESIRE supra note 72, at 460-67. A related criticism of the Ordinance is that its supporters include both feminists and right-wing groups—an allegedly dangerous alliance; Blakely, supra note 70, at 47 (statement of Lisa Duggan).
75. American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985).
76. Id. at 330.
The court then explored whether the Ordinance might be justified as a vehicle to redress the injury that models in pornographic films may suffer. It rejected that justification because it found that depictions of physical injury in film do not necessarily correspond to real physical injury to the actresses involved. However, it observed that "a state may make injury in the course of producing a film unlawful independent of the viewpoint expressed in the film."

After holding that the Ordinance's definition of pornography was an unacceptable form of content regulation, the court considered whether it could salvage part of the Ordinance under the severability clause. It declined to do so, because it considered that to be the role of the legislature. Nonetheless, it did make the following observations about sections of the Ordinance that might be constitutional:

The offense of coercion to engage in a pornographic performance, for example, has elements that might be constitutional. Without question a state may prohibit fraud, trickery, or the use of force to induce people to perform—in pornographic films or in any other films. . . . The section creating remedies for injuries and assaults attributable to pornography also is salvageable in principle, although not by us. The First Amendment does not prohibit redress of all injuries caused by speech. Injury to reputation is redressed through the law of libel, which is constitutionally subject to strict limitations.

The Seventh Circuit decision was summarily affirmed by the United States Supreme Court without opinion on February 24, 1986. The Hudnut decision, however, remains important because it suggests that a state may seek to redress behavior that causes injury to individuals who are portrayed in pornography. The proposed legislation within that framework by providing relief to individuals who are portrayed sexually without their authorization.

F. An Alternative Proposal

Legislation could incorporate the recognition that well-known models and actresses need further protection from published unauthorized sexual portrayals but that publishers have a free speech interest in publishing newsworthy information. Such legislation could provide relief in the form of monetary damages for individuals who are portrayed sexually without their consent but exempt primarily newsworthy materials from coverage. Moreover, such legislation could use civil remedies rather than criminal sanctions to provide this relief.

This legislative framework would respect the positions held by both the opponents and proponents of the MacKinnon-Dworkin Ordinance and also survive constitutional attack. The proponents of the Indianapolis Ordinance

77. Id.
78. Id.
79. Id. at 332-33.
seem to favor such a framework because their legislation already has a provision that addresses the problem of a person being coerced, intimidated or fraudulently induced into performing for pornography. Similarly, the opponents of the Ordinance claim that they seek to prevent coercive conduct against women although they prefer existing laws against sexual harassment, rape and related conduct rather than restrictions on pornographic speech. The opponents do not seem to disagree with the principle that such coercive conduct should be prohibited. They do, however, appear to be unaware that many types of coercive conduct in the production of sexual material are not covered by existing law.

The proposed legislative framework would likewise regulate unauthorized sexual portrayals in order to protect against infringements upon sex-based civil rights, as suggested by the MacKinnon-Dworkin approach. An understanding of the need for such regulation is rooted in the work of Audre Lorde. Lorde, a feminist poet and essayist, has observed that individuals' freedom to control portrayals of their sexuality is an essential element of their sex-based civil rights because of the potential liberating power of freely created sexual portrayals. Unauthorized sexual portrayals threaten that potential because they are created in an environment in which individuals do not have control over their sexuality. Lorde, therefore, argues that the freedom to portray oneself sexually is an indicator of sex-based freedom and the inability to do so is an indicator of oppression on the basis of sex. Consequently, she urges individuals to explore free sexual expression more fully and avoid limitations on that freedom. The proposed legislation helps to attain that goal by providing individu-

81. See INDIANAPOLIS ORDINANCE, supra note 11, at § 16-1(5). This provision, however, is much broader than the legislation proposed in this Article because it provides that the fact that a person signed a contract, or made statements affirming a willingness to cooperate in the production of pornography does not necessarily negate a finding of coercive conduct. Id.

82. See Transcript of Workshop, supra note 72 (statement of Nan Hunter in response to question from audience).

83. For example, a well-known woman who has her picture taken for the purpose of appearing in a specific motion picture can have her picture used, against her express wishes, in a pornographic context. See Ann-Margret v. High Soc'y Magazine, Inc., 498 F. Supp. 401 (S.D.N.Y. 1980). Existing remedies against coercive conduct do not provide relief for this kind of action. Id.


85. Id. at 54. According to Lorde:

The erotic has often been misnamed by men and used against women. It has been made into the confused, the trivial, the psychotic, the plasticized sensation. For this reason, we have turned away from the exploration and consideration of the erotic as a source of power and information, confusing it with its opposite, the pornographic. But pornography is a direct denial of the power of the erotic, for it represents the suppression of true feeling. Pornography emphasizes sensation without feeling. The word erotic comes from the Greek work eros, the personification of love in all its aspects — born of Chaos, and personifying creative power and harmony. When I speak of the erotic, then, I speak of it as an assertion of the lifeforce of women; of that creative energy empowered, the knowledge and use of which we are now re-claiming in our language, our history, our dancing, our loving, our work, our lives. There are frequent attempts to equate pornography and eroticism, two diametrically opposed uses of the sexual.

Id. at 54-55.

86. A. LORDE, supra note 84.
als with more power to control their sexual expression.

Nonetheless, the proposed legislation would protect only the civil rights of the individual portrayed, not the civil rights of women in society at large. It provides the individual portrayed with the sole right to bring the cause of action. Neither women in the society at large nor the state may institute the action. This approach is the result of balancing the civil rights of the individual portrayed against the free speech interests of the publisher. This preference for consideration of the publisher's free speech interests has been influenced by the state's history of using its power, including its power to control speech to ensure male control over women's sexuality. Catharine MacKinnon has also recognized the dangers of vesting the state with power over women's sexuality:

[T]he state is male in the feminist sense. The law sees and treats women the way men see and treat women. The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender, through its legitimizing norms, relation to society, and substantive policies. It achieves this through embodying and ensuring male control over women's sexuality at every level, occasionally cushioning, qualifying or de jure prohibiting its excesses when necessary to its normalization.87

The fact that feminists may draft legislation does not change the reality that male control exists at "every level." Judges must enforce legislation, law enforcement agencies must make policy decisions about what types of cases to pursue, and lawyers must make arguments on behalf of clients. At all of those stages the maleness of the state could have a strong impact on any legislation, even if it were drafted by feminists with the interests of women at heart. For instance, feminist literature on topics such as abortion or birth control would be as likely to come under attack under the MacKinnon-Dworkin Ordinance as hard-core pornography because such literature may contain portrayals of women's sexuality which opponents of abortion or birth control may consider degrading.88 Similarly, feminist attempts to create erotic portrayals of

87. Although the language of the first amendment is absolute, courts use a balancing test to analyze alleged infringements of first amendment rights. See generally L. Tribe, American Constitutional Law § 12-2 (1978). First amendment considerations prevail when state actions infringe upon free speech unless a state can demonstrate that its regulations serve a compelling state interest and invoke the least possible restriction of free speech. See, e.g., Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984). In addition, many commentators argue that the courts recognize different types of speech which receive varying levels of protection under the above framework. See L. Tribe, supra, at § 12-15. For instance, commercial speech receives less protection than speech concerning a news story. See, e.g., Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973). See also Roberts, 104 S. Ct. at 3257 (1984) (O'Connor, J., concurring). For further discussion of this balancing test, see infra notes 164-95 and accompanying text.


89. See FACT Brief, supra note 70, at 6-8 (tracing historical suppression of birth control information because materials were deemed sexually explicit). See, e.g., United States v. One
women’s sexuality might be attacked under the MacKinnon-Dworkin Ordinance by individuals who find those portrayals degrading.

Even if such legal attacks were not successful, they could threaten the already precarious financial situation of many feminist publishers. This possibility also relates to an important free speech interest — protecting unorthodox speech from the political power of the majority. The MacKinnon-Dworkin Ordinance insufficiently addresses this problem while the proposed legislation in this Article centrally considers the issue.

Hence, this Article does not propose vesting the courts with the power to determine what types of portrayals are harmful to all women. Instead, the proposed legislation would give the courts the power to determine only whether publishers had negligently failed to obtain individuals’ consent before portraying them in ways that are clearly specified in the legislation.

The proposed legislation is as follows:

Section 1. Publishers, filmmakers, producers, and all other persons who contribute to the production of pictorial or prose portrayals must obtain written consent from an individual before disseminating or modifying a pictorial or prose portrayal of that individual’s sexual anatomical areas or sexual activities for commercial purposes in magazines, newspapers, movies or other forms of public portrayal. This written consent must specify the context of the dissemination or modification of each use of a portrayal. This obligation to obtain written consent applies to any pictorial or prose portrayal, as described above, in which a real person is portrayed in a recognizable manner, irrespective of whether the portrayal is considered fictional.

Section 2. An individual may bring an action against a publisher, filmmaker, producer, or any other individual who has intentionally or negligently failed to obtain his or her written consent, as required in section 1, to recover monetary damages for his or her injury, including but not limited to, damages to his or her reputation, career, personality, and emotional well-being. The fact that

Book Entitled “Contraceptions,” 51 F.2d 525 (S.D.N.Y. Cir. 1931) (prosecution for distribution of books by Marie Stopes on contraception); United States v. Dennett, 39 F.2d 564 (2d Cir. 1930) (prosecution of Mary Ware Dennett for publication of pamphlet explaining sexual physiology and functions to children); Bours v. United States, 229 F. 960 (7th Cir. 1915) (prosecution of physician for mailing a letter indicating that he might perform a therapeutic abortion); People v. Byrne, 99 Misc. 1, 163 N.Y.S. 682 (1917) (prosecution for distributing educational materials to women). For further discussion of history of state regulating material related to birth control, see Duggan, supra note 48; Walkowitz, supra note 72. See also FACT Brief, supra note 70, at 14-15 (observing that some women could experience explicit lesbian scene as subordinating, especially in light of historical prejudice that existed against lesbians and gay men).

90. Several feminist publications have recently stopped publishing or found it necessary to cease publishing temporarily for financial reasons. See 15 OFF OUR BACKS I (June 1985) (reporting that New Women’s Times stopped publication effective June 1985; that Big Mama Rag stopped publishing in 1984 after eleven years of publishing; that Equal Times stopped publishing in February 1984 after eight years; that both Feminist Connection and Commonwoman stopped publishing after two years; that Sojourner, Valley Women’s Voice and the Detroit Women’s Voice have been able to continue publication only after recent successful fundraising efforts).
the individual portrayed has previously provided written consent to be portrayed sexually is not a defense to the requirement of written consent to the dissemination or modification of pictorial or verbal portrayals described in section 1.

Section 3. Definitions.
(a) "Sexual anatomical areas" are defined as:
   1. less than completely and opaquely covered: (a) human genitals, pubic region. (b) buttocks, and (c) female breast below a point immediately above the top of the areola;
   2. human male genitals in a discernibly turgid state, even if completely and opaquely covered.

(b) "Sexual activities" are defined as:
   1. human genitals in a state of sexual stimulation or arousal;
   2. acts of masturbation, sexual intercourse or sodomy;
   3. fondling or other erotic touching of human genitals, pubic region, buttocks or female breast.

(c) Portrayals for "commercial purposes" are defined as: artwork, advertisements, nonfiction, fiction, movies, photographs, theatre productions, or other portrayals that are not used primarily for the purpose of disseminating news. Whether the primary purpose of a portrayal is to disseminate news shall be determined by analyzing the content, form and context of the portrayal as revealed by the publication as a whole. If either the specific portrayal or the publication in which the portrayal appears are not for the primary purpose of disseminating news then the portrayal will be considered commercial. If the primary purpose of the portrayal or the publication is to degrade, humiliate, or embarrass the individual portrayed on the basis of sex, then the portrayal is per se non-newsworthy. Whether the individual portrayed is a public figure is not relevant to the determination of whether the primary purpose of the specific portrayal or publication is to disseminate news.

(d) "Dissemination" is defined as: publication, display, reproduction, or any other form of public portrayal.

(e) "Modification" is defined as: any dissemination of a portrayal that is not identical to the original portrayal.

(f) "Pictorial or prose portrayal" includes photographs, drawings, captions, descriptions, movies, or any other type of portrayal that does not only include verbal portrayals.

(g) "Written consent" is defined as: a signed statement by the individual portrayed that provides authorization for a portrayal to be used in a specified context. If the individual portrayed is a minor or otherwise not competent under local law, then written consent may be obtained from the individual's parent or guardian. However, once a minor reaches the age of majority, he or she acquires the right to consent to future publication of the portrayal.

Section 4. Severability.
If any of these sections, sub-sections, or phrases are found to be unlawful or unconstitutional, then these unlawful or unconstitu-
tional sections, sub-sections, or phrases should be severed from the statute unless severing the invalid portion of the statute would clearly frustrate the intent of this statute.

This approach does not differ markedly, in its general conception from the approach suggested nearly a century ago by Warren and Brandeis. It focuses on the problem of sexual invasions of privacy and uses a definition of commercial purposes that reflects their conception of information that is not of public interest.

II. Application of Proposed Legislation

A. Portrayals for Commercial Purposes of Actresses and Models

1. “Public Figures”

The proposed statute would enhance the relief available for models and actresses who, as public figures, are portrayed sexually without their consent.91 Under existing law, they have limited avenues available for relief.92

Douglass v. Hustler93 epitomizes the nature of the problem. In 1974, at the beginning of her career, Robyn Douglass posed nude on two occasions for photographer Gregory.94 On one occasion she posed nude with another woman for a feature in Playboy. She signed a release regarding these pictures, but it did not specifically refer to the sale of the photographs to another publisher.95 Some of the photographs did appear in Playboy. She later posed for another Playboy feature on “water and sex.” Over the next seven years her reputation and that of Gregory thrived. She posed for Playboy eight times and appeared in a starring role in the movie “Breaking Away.”96

Gregory got a job with Hustler, partly based on his claim that he had signed releases from Douglass to publish in Hustler the photographs taken for Playboy.97 Hustler announced its plans to feature Douglass in its January 1981 issue. Douglass heard of this announcement and informed Hustler that

93. 769 F.2d 1128 (7th Cir. 1985).
94. Id. at 1131.
95. She signed a release authorizing Playboy to publish or otherwise use the photographs “for any lawful purpose whatsoever, without restriction.” Id.
96. Id.
97. Id. at 1131-32.
they did not have the right to publish her pictures.98 Hustler showed her the releases which Douglass readily denounced were forgeries.99 Although the January 1981 issue of the magazine had not yet been circulated to the general public, Hustler made no attempt to recall the issue.100 Some of the Gregory photographs that were published had been previously published elsewhere while others had not.101

Douglass brought an invasion of privacy action under the theories of portrayal in a false light and commercial appropriation of her name or likeness.108 The jury found that the published pictures contained captions which falsely suggested that Douglass was a lesbian and falsely suggested that she had voluntarily been portrayed in Hustler to enhance her career.103 Douglass also introduced evidence, which the jury accepted, that being portrayed in Hustler was substantially different from being portrayed in Playboy, and that the publication in the former magazine severely damaged her potential for advertising revenue.104 She was awarded $600,000 in damages by the district court.105

Although the court of appeals did not overturn the jury's factual findings, it reversed and remanded for a new trial on several grounds. First, it found that the unauthorized publication of photographs made by others for commercial purposes and withheld from public distribution violated her right to control the commercial appropriation of her name or likeness (her "right of publicity").106 Nevertheless, the court found it was error to allow the jury to find an invasion of Douglass's right of publicity for Hustler's publication of previously published material because that material was in the public domain.107 The court therefore distinguished between her right to control her sexual portrayal depending on whether the pictures had been previously published:

To forbid Hustler to publish any photographs of people without their consent, merely because it is an offensive, though apparently a lawful magazine, would pretty much put Hustler out of the news business, would probably violate the First Amendment, and would in any event cross outside the accepted boundaries of the right of publicity. But as noted earlier the nude photographs of Douglass that Hustler published had not been published before. They were, in a sense that tort law recognizes, part of her portfolio. She had a

98. Id. at 1132.
99. Id.
100. Id.
101. Id. at 1134.
102. Id. at 1132.
103. Id. at 1135.
104. Id. at 1135-37.
105. Id. at 1132. The jury found both defendants, Hustler and Gregory, liable and awarded the plaintiff $500,000 in compensatory damages against each defendant and $1,500,000 in punitive damages against Hustler. The judge remitted all but $100,000 of the punitive damages and Douglass accepted the remittitur. The award of compensatory damages against Gregory was not executed because on the eve of trial he had made an agreement with Douglass that if he testified truthfully, and consistently with his deposition, she would not execute any judgment against him. Hence the real judgment was only $600,000.
106. Id. at 1138.
107. Id. at 1139.
legally protected interest in deciding at least their first place of publication, provided *Playboy* did not exercise its right to publish them or to license their publication to others, a right for which Douglass had been compensated in executing the release to *Playboy*.108

The legislation proposed in this Article does not accept the "public domain" distinction. This distinction does not serve to protect models adequately from the economic and emotional harms that occur when sexual portrayals are used in an unauthorized way. The *Douglass* court cited no empirical evidence that publishers will be driven out of business if they must obtain the consent of those whose sexual portrayals they disseminate for profit. So long as a court finds that the primary purpose of a publication is not to impart news, a model should be able to retain control over portrayals of her sexuality irrespective of whether the pictures have been previously published.

A second reason that the *Douglass* court overturned the jury verdict was that the judge failed to instruct the jury on the actual malice standard for a false light invasion of privacy.109 Because of Douglass's notoriety as an actress and model, the appellate court considered her to be a public figure. By analogy to defamation law in which the actual malice standard is required for cases involving public figures, the court found that it was error for the judge to fail to instruct the jury that it must find actual malice by clear and convincing evidence on her claim of "false light" invasion of privacy.110 Yet the court was clearly troubled by the use of an actual malice standard in a case where the only contested issue was whether *Hustler* had obtained consent to publish the photographs:

As an original matter we would have our doubts [about the imposition of the actual malice standard]. The purpose of requiring proof of knowledge of falsity, or reckless disregard for the truth, is to lighten the investigative burdens on the press of determining the truth of what it writes. It is no great burden to determine whether a release has been executed; it is not like ascertaining the truth about allegations that a government official took a bribe or engaged in insider trading or fudged casualty statistics. A requirement that the plaintiff prove that the defendant was negligent in mistaking the existence of the release might be quite enough to protect the press from having to make costly investigations.111

In accordance with these policy judgments, the legislation proposed in this Article imposes a negligence standard for failure to obtain consent rather than an actual malice standard, unless the primary purpose of the publication is to impart news.

Lessening the limitations that presently exist on actions brought by well-known individuals is important because most of these individuals lose on a motion for summary judgment under present law. They cannot get their cases

108. *Id.*
109. *Id.* at 1140.
110. *Id.*
111. *Id.* at 1141.
to the jury. A case epitomizing this problem is Lerman v. Flynt Distributing. Jackie Collins Lerman was identified erroneously as the individual portrayed in nude photographs which appeared in Adelina magazine. The misidentified actress appeared topless in one of the pictures and in an orgy scene in the other. The caption identified the photographs as being Lerman and labeled her as the starlet who appeared in an orgy scene in the film, The World is Full of Married Men. Although Lerman had authored the book and had written the screenplay for The World is full of Married Men, she had not appeared in the movie, clothed or nude.

Lerman brought a federal suit alleging violation of the New York Privacy statute, invasion of her common law right to publicity and libel. She was awarded injunctive relief as well as 10 million dollars in compensatory and punitive damages, but the judgment was reversed because of Lerman's status as a public figure. Moreover, the Second Circuit independently reviewed the facts and determined that summary judgment should have been granted for the defendant. The court found that the plaintiff failed to offer proof sufficient to impose a duty on defendant Flynt Distributing to inquire as to the identity of the individual portrayed, and further failed to provide proof that any of defendant's employees had reason to believe that the publisher would misidentify Lerman as the actress pictured. Hence, the court held that there were no facts demonstrating that anyone in the defendant distributing company had a subjective awareness of the probable falsity. Plaintiff's evidence that the publisher continued to misidentify her after receiving notice of the lawsuit and that the publisher took no steps to investigate the truthfulness of the publication was insufficient to defeat defendant's motion for summary judgment. The court's discussion reflects the difficulty of raising a factual dispute on the issue of actual malice, let alone proving it.

Ann-Margret faced a similar problem when she brought a case against High Society Celebrity Skin. The magazine prides itself in "printing photographs of well-known women caught in the most revealing positions that [it is] able to obtain." The magazine reproduced stills of Ann-Margret that were taken from a scene of a movie in which she had appeared nude from the waist up. Ann-Margret had explicitly instructed the filmmaker not to make the stills available to anyone and had limited the number of people who could be

112. See supra note 91 (citing cases).
113. 745 F.2d 123 (2nd Cir. 1984).
114. Id. at 123.
115. Id.
116. Id.
117. N.Y. CIV. RIGHTS LAW §§ 50 & 51 (McKinney 1982).
118. Lerman, 745 F.2d at 127.
119. Id.
120. In the court's words, "[W]e hold as a matter of law that a properly instructed jury could not fairly and rationally conclude upon clear and convincing evidence that this defendant's uses were knowingly made with actual malice." Id. at 141.
121. Id. at 140.
122. Id. at 141.
124. Id. at 403-04.
125. Id.
present during the filming.\textsuperscript{126} After High Society Celebrity Skin featured the
stills, she brought suit under the New York Privacy statute.\textsuperscript{127} The federal
court dismissed her action because it found that a public figure could not bring
an action under the statute, even when the written consent requirement clearly
had not been met.\textsuperscript{128} It found her to be a public figure who had consented to
"having the image of her semi-nude body widely exposed to the general pub-
lic."\textsuperscript{129} The court assumed it had no options under the first amendment but to
dismiss Ann-Margret's action.\textsuperscript{130} It did not even allow her to go forward under
the actual malice standard:

Undoubtedly, the plaintiff is unhappy about the appearance of her
picture in the defendants' magazine. And while the Court can sym-
pathize with her feelings, the fact that she does not like either the
manner in which she is portrayed [citation omitted] or the medium
in which her picture is reproduced and her belief that such repro-
duction has caused her embarrassment [citations omitted] do not
expand her rights or create any cause of action under [the New
York statute].\textsuperscript{131}

The Lerman and Ann-Margret interpretations of first amendment re-
quirements were overly broad, because they equated privacy actions with libel
actions. The case upon which they relied, \textit{Time, Inc. v. Hill,}\textsuperscript{132} requires a
plaintiff to prove reckless disregard for the truth in a false light action.\textsuperscript{133} The
purpose of this standard is to protect a publisher from too high an investiga-

\textsuperscript{126} Id. at 403 n.2.
\textsuperscript{127} Id. at 404. She alleged that the one photograph of her partially nude violated her right
to privacy and that publication of all of the pictures violated her right of publicity. The first
allegation was made under sections 50 & 51 of the New York Civil Rights Statute and the second
allegation was made under the common law. This Article will not discuss her right to publicity
claim. She lost that claim because:

It is well established that simple use in a magazine that is published and sold for
profit does not constitute a use for advertising or trade sufficient to make out an
actionable claim, even if its manner of use and placement was designed to sell the
article so that it might be paid for and read.

\textit{Id.} at 406 (citations omitted).

\textsuperscript{128} Id. at 407.
\textsuperscript{129} Id. at 407 n.15.
\textsuperscript{130} Id. at 404-07.
\textsuperscript{131} Id. at 403 n.2 (citations omitted).

\textsuperscript{132} 385 U.S. 374 (1967). In \textit{Time,} the Supreme Court was faced with the question of
whether the trial court committed reversible error in failing to instruct the jury that a verdict of
liability under the New York privacy statute could be predicated only on a finding of knowing or
reckless falsity (i.e., actual malice) in the publication of a newsworthy article in \textit{Life Magazine,}
and whether the New York Statute should be declared unconstitutional for failing to require proof
of knowing or reckless falsity. The Supreme Court found that the trial court committed reversible
error but found the statute to be constitutional because "the New York Court of Appeals . . . has
been assiduous in construing the statute to avoid invasion of the constitutional protections of
speech and press." \textit{Id.} at 397. By citing \textit{Time Inc. v. Hill,} the Ann-Margret court implicitly
adopted the "knowing or reckless falsity" or "actual malice" standard for evaluating whether
Ann-Margret's privacy had been invaded.

\textsuperscript{133} Id. at 389-91.
tive burden before publishing what it believes to be truthful information. But this particular protection for publishers should not apply in a case where truth is irrelevant to the issue for invasion of privacy. Accordingly, it should not apply to Lerman's and Ann-Margret's claims that a publisher failed to act upon knowledge that the publication was not consensual and would harm the reputation of the individual portrayed.

The burden of determining whether a portrayal is authorized is quite different from the burden of determining whether information is accurate. Yet the Lerman and Ann-Margret courts assumed, without analysis, that the first amendment shields publishers who publish unauthorized material without regard to privacy injuries. Douglass suggests that some courts may be willing to distinguish privacy cases in which the only issue is consent, from defamation cases where the issue is reckless disregard of falsity and where extensive investigation would be necessary to determine whether the information printed was true. The proposed legislation would assist courts in moving in that direction by making two changes in existing law. First, the legislation would provide individuals with the right to consent to their sexual portrayals so long as the primary purpose of the specific portrayal or publication was not to impart news. The fact that the individual was a public figure would not be determinative on the issue of newsworthiness; instead, the court would consider the publication as a whole. This standard is the result of striking a new balance between the publisher's first amendment interests and the privacy interests of the individual portrayed. It provides individuals with rights over their own work, analogous to rights that artists have traditionally held. Second, the legislation provides an individual with the right to consent to each context in which his or her sexual portrayal is used. Prior consent to publish in a particular context would not be considered consent to all future publication. Without such a right, individuals lose the ability to continue to exercise rights over their portrayals, once their work has made an initial appearance in public.

134. Id. The Lerman court did not even permit a remand on the issue of knowing publication without consent or correct identification. The Ann-Margret court likewise ignored the fact that the plaintiff claimed her injury resulted from lack of consent rather than falsity. Instead, it assumed that a cause of action for privacy violation can only lie where falsity is claimed, and thus it dismissed her action in its entirety. These failures to distinguish privacy claims from libel claims are puzzling in light of the Supreme Court's recognition that different standards of protection for publishers may be appropriate in privacy cases. See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

135. Douglass v. Hustler, 769 F.2d at 1140-41 (7th Cir. 1985).


137. Under the libel-proof plaintiff doctrine, plaintiffs who challenge published statements that do not in fact damage their already sullied reputations cannot obtain relief. For further discussion of this doctrine, see Note, The Libel-Proof Plaintiff Doctrine, 98 Harv. L. Rev. 1909 (1985). Courts appear to be implicitly applying this doctrine in denying relief to women who object to an unauthorized sexual portrayal but have previously appeared sexually with their authorization. The problem with this analysis is the assumption that publication with authorization in one context is identical with republication without authorization in another context. Under libel-proof plaintiff doctrine, that distinction must be recognized. In the words of one commentator:
2. "Private" Individuals

By contrast, individuals who are not found to be public figures have fared better in false light invasion of privacy or right of publicity actions. Two recent Fifth Circuit cases exemplify this trend. In Braun v. Flynt, Jeannie Braun was portrayed in the magazine Chic which, according to the magazine's editor, depicts "unchasity in women." Braun had been photographed by her employer, an amusement park operator, as part of her swimming act with "Ralph the Diving Pig." She had signed a release that the photographs could be used "in good taste and without embarrassment to me and my family." The magazine allegedly obtained copies of the pictures by falsely stating to Braun's employer that it was a "fashion magazine" with travel articles in it and that it had "the same clientele that would read a Redbook or McCall's." Braun brought an action alleging invasion of privacy and the jury awarded her a total of $65,000 in compensatory and punitive damages. The Fifth Circuit affirmed because Chic was not entitled to the constitutional protection afforded publishers.

Similarly, in Wood v. Hustler, LaJuan Wood was portrayed in the "Beaver Hunt" section of Hustler magazine as a result of someone stealing a photograph that her husband had taken of her while she was swimming nude. The photograph had been submitted to the magazine with a forged consent form. Wood brought suit against Hustler for defamation and invasion of

Only if a judge finds that the challenged statement describes activity neither significantly different in degree or altogether different in kind from the plaintiff's reputed activities should the judge withhold the case from the jury on the ground that a reasonable person could not find harm to the plaintiff's reputation.

Id. at 1924.


139. 726 F.2d 245 (5th Cir. 1984).

140. Id. at 247.

141. Id. The full release stated:

I (Jeanne Braun) in consideration of the fact that I am employed and paid by Aquarena, Inc., agree as part of my employment that all photos taken of me can be used by Aquarena Springs and their advertising and publicity agents. It is to be understood that all photographs are to be in good taste and without embarrassment to me and my family.

Id.

142. Id. at 247-48.

143. Id. at 248. She filed the lawsuit against Larry Flynt, the publisher, and Chic.

144. Id. The jury also returned a damages award for $5,000 in actual damages and $25,000 in punitive damages for defamation. Id.

145. Id. at 258. The court affirmed only that part of the judgment that related to invasion of privacy. Id.

146. Id. at 250. The court did affirm the jury's finding of actual malice that supported the punitive damages award. Id. at 257-58.

147. 736 F.2d 1084 (5th Cir. 1984).

148. Id. at 1085-86.
privacy on two theories — publication depicting the subject in a false light and public disclosure of private facts. The jury awarded her $150,000 in compensatory damages, and the Fifth Circuit affirmed. The court of appeals rejected the argument that the standard for public figures should be applied to her action, and upheld the judgment under the negligence standard, because the record showed that Hustler carelessly administered the consent form.

The proposed legislation would provide relief similar to that approved in Flynt and Wood under the common law negligence standard. The key difference is that the protection would not turn on the question whether an individual is a public or private figure. This public/private figure distinction is difficult for courts to apply in sexual portrayal cases, and thus also difficult for publishers to determine in advance of litigation. It is unrelated to the first amendment interest in preserving open debate about public issues unless the sexual portrayal is part of news stories.

B. Portrayals of "Public Figures:" Towards a Consideration of Newsworthiness

The media serves an important role in our society in reporting information of public interest. Although the media often abuses its first amendment privileges, free speech is too important to compromise those privileges. Publications whose primary purpose is not to impart news however, do not deserve the near-absolute kind of protection that the current public figure rule provides. Rather than investigate whether the individual portrayed is a public

149. Id. at 1086. Her husband also brought suit for invasion of privacy. The court of appeals reversed the judgment for the husband because it found that Texas law "does not permit a plaintiff to recover for injury caused by the invasion of another's privacy." Id. at 1093.
150. Id.
151. Id. at 1094.
152. Id. at 1092.
153. Id. at 1093.
156. The recent Supreme Court decision, Dun & Bradstreet, Inc. v. Green moss Builders, Inc., 105 S. Ct. 2939 (1985), provides support for the constitutionality of this proposition. The Supreme Court ruled that "permitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the first amendment when the defamatory statements do not involve matters of public concern." Id. at 2948. It limited the Gertz test to false or defamatory statements that involved matters of public concern. For further discussion, see
figure, the proposed legislation focuses on whether the primary purpose of the publication is to impart news.

The actions brought by Robyn Douglass, Jackie Collins Lerman and Ann-Margret demonstrate the need to apply a primarily newsworthy test rather than a public figure test to these actions. In each case, the primary purpose of the publication was to display the plaintiff’s sexuality in a degrading manner rather than to impart news. Moreover, the type of publication in which these women were displayed was the crux of their injury. Robyn Douglass did not mind being portrayed in *Playboy*, and Jackie Collins Lerman did not mind being associated with her books about women’s sexuality. Ann-Margret did not object to being portrayed in a movie that she considered to be an artistic performance. However, none of them wanted to be portrayed in a magazine whose primary purpose was to display women’s sexuality in a degrading manner.

The *Douglass* court recognized the importance of this distinction to the reputation of the individual portrayed.157 It found that Douglass might reasonably consider a portrayal in *Playboy* to be beneficial to her reputation (or at least not harmful) and consider a portrayal in *Hustler* to be degrading. To reach that result it compared issues of *Hustler* and *Playboy*.158 It found that in *Playboy*, in contrast to *Hustler*, the erotic theme is generally muted, there are no sexual advertisements, there are no ridicules of racial or religious groups, and there are no repulsive photographs.159 Based on this overview it concluded that:

[I]t would not be irrational for a jury to find that in the highly permissive moral and cultural climate prevailing in late twentieth-century America, posing nude for *Playboy* is consistent with respectability for a model and actress but that posing nude in *Hustler* is not.160

Moreover, it observed that “advertising agencies in Chicago were afraid of their clients’ reactions if she appeared in commercials after her appearance in *Hustler*, but cared nothing about her appearing nude in *Playboy*.161

The legislation proposed in this Article would have the courts undergo the type of analysis used by the Seventh Circuit in *Douglass* to determine the primary purpose of the publication and portrayal. In making the determination of whether a publication or portrayal is newsworthy, the courts would evaluate the purposes of the publication and portrayal. One factor would be whether the primary purpose is to degrade, humiliate, or embarrass women, as considered by the *Douglass* court. The fact that the plaintiff might be a public figure under defamation law would be irrelevant to the determination whether a plaintiff should meet a proof standard higher than negligence.162 Hence, por-

infra notes 164-65 and accompanying text.
158. Id. at 1134-38.
159. Id. at 1137.
160. Id.
161. Id.
162. Sexual portrayals in publications that are primarily for the purpose of disseminating news are not covered under the proposed statute. Under existing law, some private figures have
trayals in High Society, Celebrity Skin, Chic, and Hustler would be per se non-newsworthy.

Hence, the purpose of this legislation is not to make benign publications like Time, Newsweek, Field and Stream, or Family Circle actionable for unauthorized sexual portrayals. Instead, the purpose is to provide a cause of action to individuals who are portrayed sexually without authorization in unquestionably non-newsworthy portrayals. Admittedly, the newsworthiness test could become as subjective and cumbersome as the existing public figure test. But the preceding discussion has shown that unauthorized sexual portrayals typically do not occur in the context of news presentations of any sort. Thus, a restrictive definition of non-newsworthiness, that considered whether the portrayal degraded, humiliated, or embarrassed the individual portrayed rather than delivered news, would include only the most injurious unauthorized sexual portrayals. In addition, by asking whether the primary purpose of the publication or portrayal is non-newsworthy, the proposed legislation attempts to provide a narrow definition of non-newsworthiness.

In considering the contribution of a newsworthiness approach, it should be remembered that a plaintiff does not necessarily prevail if it can be shown that he or she was subjected to an unauthorized sexual portrayal in a non-newsworthy context. The plaintiff would still have to prove that the publisher negligently failed to obtain written authorization. Hence, publishers who act with due care would be exempt from liability even if they published non-newsworthy, unauthorized sexual portrayals.

III. Constitutionality of Proposed Legislation

The proposed legislation would be most effective in redressing injuries to actresses or models who seek to attain control over the contexts in which their work was used or the manner in which their work is modified. First amendment law already recognizes that free speech interests must be balanced

against other fundamental interests. A woman's interest in portrayals of her sexuality, invoking interests in her sex-based civil rights and privacy rights, could counterbalance a publisher's free speech rights if the legislation were clearly written and created minimal restrictions on speech. Two issues must therefore be resolved to determine if the proposed legislation is constitutional under the existing balancing test. First, the proposed "newsworthiness" test must constitutionally restrict publisher's free speech rights. Second, the protections provided for individuals who are subjected to unauthorized sexual portrayals must serve sufficiently substantial interests to counterbalance the publisher's free speech interests.

A. Newsworthiness Test

The recent Supreme Court decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* provides strong support for the constitutionality of the proposed newsworthiness test. The issue in *Dun & Bradstreet* was whether a private plaintiff needs to demonstrate the actual malice to recover punitive damages in a case brought against a credit reporting agency for disseminating false and defamatory statements that were not of public concern. Although the Court had held that actual malice was required for the recovery of punitive damages, it had never determined whether the actual malice standard could be reduced to negligence when the defamatory statements involved no issue of public concern. In *Dun & Bradstreet*, it held that such a case does not require application of the actual malice standard.

The Court justifies its holding with the observation that not all speech is of equal first amendment importance. Specifically, it observes that commercial speech is deserving of minimal constitutional protection:

"[T]he most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a 'subordinate position in the scale of First Amendment values.' It also is more easily verifiable and less likely to be deterred by proper regulation. Accordingly, it may be regulated in

163. See *infra* notes 176-95 and accompanying text.
164. 105 S. Ct. 2939 (1985) (plurality opinion).
165. The defendant credit reporting agency had sent a report to five subscribers indicating that plaintiff had filed a voluntary petition for bankruptcy. *Id.* at 2941. The report was false. *Id.* Plaintiff brought suit for defamation and libel in state court against the credit reporting agency and received a jury award of $50,000 in compensatory or presumed damages and $300,000 in punitive damages. *Id.* at 2942. The trial court awarded a new trial because it was concerned that it should have required a higher standard of proof. The Vermont Supreme Court reversed, finding that the actual malice standard is inapplicable to nonmedia defamation actions. *Id.* See, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (holding that first amendment restricted damages that private individual could obtain from publisher for libel that involved matter of public concern); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (extending actual malice standard to libels of public figures); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (holding that public official cannot recover damages for defamatory falsehood unless he proves that false statement was made with actual malice). See also Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (plurality opinion) (extending actual malice standard to libels of any individual so long as defamatory statements involving matter of public or general interest).
166. *Dun & Bradstreet*, 105 S. Ct. at 2844 (emphasis added).
ways that might be impermissible in the realm of noncommercial expression.\textsuperscript{167}

In general, speech on matters of "purely private concern" are of less first amendment concern.\textsuperscript{168} Hence, a state may permit awards of presumed and punitive damages in defamation cases without a showing of actual malice.\textsuperscript{169} By contrast, the Court observed that speech on "matters of public concern" are at the heart of the first amendment and deserving of enhanced first amendment protection.\textsuperscript{170}

This focus on matters of public concern is not new to first amendment law. In 1971, the Supreme Court in its plurality opinion in \textit{Rosenbloom v. Metromedia, Inc.} suggested that the actual malice standard should extend to libels of any individual so long as the defamatory statements involved a "matter of public or general interest."\textsuperscript{171} Under the \textit{Rosenbloom} test, publication of any matter of public or general interest would be subjected to the actual malice standard irrespective of whether the individual libeled was an obscure, private person.

Although the \textit{Dun & Bradstreet} Court has returned the focus to whether the publication is of public concern, it appears to be using a much more narrow definition of public concern than that proposed in \textit{Rosenbloom}. It examined the content, form, and context of the publication as revealed by the whole record, and determined that defendant's credit report did not involve a matter of public concern because it was commercial speech, motivated by the desire for profit, which "like advertising, is hardy and unlikely to be deterred by incidental state regulation"\textsuperscript{172} and which is "also more objectively verifiable than speech deserving of greater protection."\textsuperscript{173} Consequently, the Court suggests that commercial speech or profit oriented speech would rarely constitute speech on matters of public concern.

Specifically, \textit{Dun & Bradstreet} provides support for the proposition that unauthorized sexual portrayals are outside the arena of matters of public concern. In criticizing the balancing test suggested by the dissent, the Court stated:

\begin{quote}
If the dissent were the law, a woman of impeccable character who was branded a "whore" by a jealous neighbor would have no effective recourse unless she could prove "actual malice" by clear and convincing evidence. \ldots The dissent would, in effect, constitution-
\end{quote}

\textsuperscript{167} \textit{Id.} at 2945 n.5.
\textsuperscript{168} \textit{Id.} at 2945.
\textsuperscript{169} \textit{Id.} at 2946.
\textsuperscript{170} \textit{Id.} at 2945. Unfortunately, the decision offers little guidance on what constitutes a matter of public concern. It simply states that a court should consider the "content, form, and context" of the publication to determine whether it concerns a public matter. \textit{Id.} at 2947 n.8. The legislation proposed in this Article adopts these factors for determining whether a publication is newsworthy but also provides specific guidance for the resolution of these factors when the purpose of an unauthorized sexual portrayal is to humiliate, degrade or embarrass women.
\textsuperscript{171} 403 U.S. 29, 44 (1971) (opinion of Brennan, J.).
\textsuperscript{172} \textit{Dun & Bradstreet}, 105 S. Ct. at 2947.
\textsuperscript{173} \textit{Id.}.  

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alize the entire common law of libel.\(^1\)

The legislation proposed in this Article incorporates the framework proposed in *Dun & Bradstreet* by providing that plaintiffs need only prove negligence to recover for unauthorized sexual invasions of privacy so long as the portrayal is not newsworthy as reflected by the content, form, and context of the portrayal.\(^2\)

B. Protection of Sex-Based Civil Rights

The United States Supreme Court's recent decision in *Roberts v. United States Jaycees*\(^3\) provides strong support for the argument that protecting women's interest in controlling portrayals of their sexuality is a substantial state interest that can counterbalance the publisher's free speech rights.\(^4\) The issue in *Roberts* was whether a Minnesota statute unconstitutionally interfered with the Jaycees' freedom of association rights.\(^5\) Under the Minnesota statute, it was an unlawful discriminatory practice for a place of public accommodation to deny persons the full and equal enjoyment of goods, services, facilities, privileges, advantages and accommodations because of race, color, creed, religion, disability, national origin or sex.\(^6\) Women who were denied full voting membership in the Jaycees because of their sex brought a challenge to the Jaycees's membership policies under that statute.\(^7\) The Supreme Court found that the statute did not abridge either the male members' freedom of intimate

\(^1\) Id. at 2947 n.7.

\(^2\) Unlike defamation law, the proposed legislation also does not provide presumed damages or punitive damages, thereby lessening the need for constitutional protection. In light of *Dun & Bradstreet*, the proposed legislation arguably could provide for presumed or punitive damages. The author, however, has chosen not to pursue that alternative in order to avoid chilling free speech.


\(^4\) Id. See also supra note 87 (discussing balancing test used to evaluate restrictions on free speech).

\(^5\) The first amendment to the United States Constitution provides that "Congress shall make no law... abridging the freedom of speech or of the press..." U.S. CONST. amend. 1. That provision applies to the states via the fourteenth amendment's due process clause. Duncan v. Louisiana, 391 U.S. 145, 148 (1968).

\(^6\) The Minnesota Human Rights Act contained the following relevant provision:

*It is an unfair discriminatory practice:

To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin, or sex.*

MINN. STAT. § 363.03 (1982).

\(^7\) *Roberts*, 104 S. Ct. at 3248. Before a hearing took place on the state charges, the Jaycees brought a federal action to enjoin enforcement of the Minnesota statute alleging that it violated male members' constitutional rights of free speech and association. *Id.* The federal district court certified to the Minnesota Supreme Court the question whether the Jaycees qualified as a place of public accommodation within the meaning of the statute. *Id.* at 3248. The Minnesota Supreme Court certified that the Jaycees did qualify as a place of public accommodation and the district court upheld the constitutionality of the statute. *Id.* at 3248-49. The court of appeals reversed. *Id.* at 3249. On appeal, the United States Supreme Court reversed. *Id.* at 3257.
association or their freedom of expressive association, and that the statute was not unconstitutionally vague and overbroad.\textsuperscript{181}

The Supreme Court's treatment of the freedom of expressive association issue is directly applicable to the constitutional issues implicated by the legislation proposed in this Article. The right to freedom of expressive association derives from the first amendment right to free speech. According to the Court in \textit{Roberts}:

An individual's freedom to speak, to worship, and to petition the Government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed . . . Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends.\textsuperscript{182}

The Supreme Court's discussion of the relationship between the male Jaycees' interest in freedom of expressive association and women's interest in being free from sex discrimination is relevant to the present discussion of the relationship between a publisher's interest in freedom of speech and women's interest in being free from unauthorized sex-based portrayals. Both discussions implicate the same basic set of interests.

The Minnesota statute implicated the Jaycees' right to expressive association because the statute intruded into the internal structure or affairs of the group. The statute indirectly interfered with free speech by impairing the "ability of the original members to express only those views that brought them together."\textsuperscript{183}

The Supreme Court assessed the constitutionality of the statute by balancing the Jaycees' interests in free association against the other fundamental interests served by the statute.\textsuperscript{184} According to the Court, "infringements on that right [right to free association] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."\textsuperscript{185} The Minnesota statute survived first amendment challenge under that framework because "Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms."\textsuperscript{186}

The Court in \textit{Roberts} described the importance of eradicating sex discrimination and its accompanying injury with some of the strongest language ever used by a majority of the Supreme Court. It categorized the injury at

\textsuperscript{181} Id. at 3245-46. For the uncredited origin of the concept of "intimate association," see Karst, \textit{The Freedom of Intimate Association}, 89 \textit{Yale L. J.} 624 (1979-1980).

\textsuperscript{182} \textit{Roberts}, 104 S. Ct. at 3244.

\textsuperscript{183} Id.

\textsuperscript{184} Id. at 3252-53.

\textsuperscript{185} Id. at 3252.

\textsuperscript{186} Id. at 3253.
issue as a "deprivation of personal dignity"\(^{187}\) and a "stigmatizing injury" which "is surely felt as strongly by persons suffering discrimination on the basis of sex as by those treated differently because of their race."\(^{188}\) Despite the fact that sex distinctions have historically received a lower level of judicial scrutiny than race distinctions,\(^ {189}\) the Court's statement bodes well for legislative attempts to eradicate sex discrimination. Legislation to eradicate sex discrimination must therefore be regarded as a state interest of the highest order.

The compelling interest served by the Minnesota statute was not the only determinative factor in the Court's holding. Three other factors were also significant. First, the statute did not aim at suppressing speech.\(^ {190}\) Second, it did not distinguish between prohibited and permitted activity on the basis of viewpoints.\(^ {191}\) Third, the statute's purpose could not be achieved through significantly less restrictive means.\(^ {192}\) The Minnesota statute was able to survive analysis under the above factors because of the evidence in the record of the "[s]tate's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services."\(^ {193}\) The Court found that any infringement of first amendment rights was incidental and minimal, rather than a basic component of the statute's purpose and structure.\(^ {194}\) Hence, the statute survived first amendment challenge.

The Court's holding in Roberts provides strong support for the constitutionality of the model statute proposed in this Article. Like the Minnesota public accommodations statute, the proposed legislation would not aim at the suppression of speech, nor discriminate on the basis of viewpoint. Any infringement on a publisher's first amendment rights would be minimal because of the limited consent-focused rights provided by the legislation. The statute would not have the effect of restricting the publication of any particular speech on the basis of content. Publishers could still portray individuals sexually in any conceivable manner as long as they had the consent of the individual portrayed. The proposed legislation would also meet the least restrictive alternative requirement because it would only restrict publishers' speech when they refused to abide by a clear and reasonable statutory requirement — the acquisition of the consent of the person portrayed before publication. Most importantly, the legislation would have the purpose of eradicating sex discrimination as well as the purpose of remedying privacy injuries, because unauthorized sexual portrayals represent both a real and symbolic infringement on individuals' ability to gain control over their sexual being and expression.\(^ {195}\)

### Conclusion

This Article has proposed legislation to redress the problem of unauthor-
rized sexual portrayals. It has demonstrated that this legislation would especially benefit well-known models and actresses who are often portrayed sexually without their consent and have no legal recourse available under existing law. Finally, it has argued that this legislation would be constitutional.

Recognition of the constitutionality of the proposed legislation also provides recognition of the limited scope of the legislation. Unlike the MacKinnon-Dworkin antipornography Ordinance, this legislation would not broadly prohibit sexual portrayals. Instead, the proposed legislation only seeks to make it more difficult for publishers to victimize nonconsenting individuals in the production of sexually explicit portrayals.

Nevertheless, this approach to the regulation of sexual portrayals has many advantages over prior approaches. Not only does it frame the problem of sexual portrayals in the context of a need for remedies for invasion of privacy, but it also justifies these remedies on the compelling state interest in eradicating sex discrimination. It could survive constitutional challenge because it accommodates the publisher's free speech rights through the "primarily newsworthy" exception and because it seeks to create a minimal restriction on speech rights through the requirement of consent.

Moreover, legislative hearings to consider this legislation will publicize an important social problem. Many individuals, predominantly women, often suffer a variety of injuries in order for sexual portrayals to be produced, and inadequate legal protections exist for such individuals. Many people, including many feminists, are unaware of the scope of this problem. The limited breadth of the proposed legislation could also be a great asset because the legislation attempts to respond to the common ground among feminists on the divisive issue of regulating sexual portrayals. By responding to this common ground in a framework that can withstand constitutional scrutiny, passage of this proposed legislation could be an important step in redressing the often ignored problem of unauthorized sexual portrayals.