

# [Porno college essay](https://assignbuster.com/porno-college-essay/)

Suppose one accepts MacKinnon and Dworkin’s suggestedstatutory definition of pornography. How does one whogenerally accepts MacKinnon and Dworkin’s views on thepervasively harmful effect of pornography, and who accepts a needfor legal redress of the harms perpetrated by pornography, dealwith pornographic material? The ordinance proposed by MacKinnon and Dworkin would dealwith such material by enacting legislation which gives peopleadversely affected by the works, which clearly fit theirdefinition of pornography, a cause of action against theproducers, vendors, exhibitors or distributors for“ trafficking”, or for an assault “ directly caused by thespecific work. I do not think liberals, or others for that matter, shouldhave much problem with the clause dealing with assault, since acausal connection to specific works is demanded by it. However, s. 3. 2(iii) which deals with trafficking would be veryproblematic for liberals and legal conservatives because itcreates a cause of action for a person contrary to thetraditional conception of a rights holder’s cause of action. This subsection reads: Any woman has a claim hereunder as a woman actingagainst the subordination of women. Any man, child ortranssexual who alleges injury by pornography in theway women are injured by it also has a claim. emphasis addedMy goal in this paper is to suggest that a slightmodification to this subsection of the ordinance would make itvery difficult for liberals and legal conservatives to object toit. This modification would restrict the cause of action to thesame persons as the other sections of the ordinance, namely, theparticular victim of the specified injury. I shall argue thatsuch a modification would largely cohere with the conception ofharm already at work in Ontario law, would afford only a minorreduction in the potential efficacy of such legislation incurbing the harm of pornography, and would offer to empower thefeminist camp which is behind such an ordinance with a mechanismfor social and political change if a sufficiently organizedfeminist “ vanguard” took hold of the opportunity to empowerwomen.

Adrian Howe argues that the concept of social injury whichmay be suggested by the ordinance recognizes the differentialharm felt by women from pornography. Howe suggests this socialnotion of harm may be a necessary feature of any successful lawreform which is to address the huge social problem of maledomination and female oppression. The liberal notion of anindividuated human right fails to capture, for MacKinnon andHowe, “ the specificity of the harm to women.” Thus, anordinance which did not create a cause of action “ for women aswomen” would fail to address the root of the social problem ofwhich pornography is a manifestation. This conception of social harm, and thus subsection3. 2(iii), may offend liberals or legal conservatives in two ways. First, the notion of non-individuated harm is antithetical to theliberal conception of a rights holder claiming a cause of action. Fundamental to a liberal conception of harm is the notion of theindividual who is autonomous, separate and fundamentally worthyof respect. Rawls and Kant exemplify this view in their analyseswhen they posit the undifferentiated self, free of any particularqualities save that of being an agent worthy of a fundamental, inviolable respect. This notion of the individual worthy ofequal concern and respect in the eyes of the state permeatesliberal conceptions of rights. It is also a fundamental, if notexclusive, tenet of the common law of torts: In tort litigation, the courts must decide whether toshift the loss suffered by one person, the plaintiff, to the shoulders of another person emphasis added.

Clearly, on its face this conception of harm precludes thenotion of a harm suffered collectively which cannot be delineatedindividually. While class actions are possible, and claims maybe made on behalf of groups such as company shareholders, this isonly by virtue of the fact that a legally recognized individualhas suffered an identifiable particular harm.

Thus, the conventional liberal notion of harm is radicallydistinct from that outlined by Howe and MacKinnon. Since on theliberal conception rights holders are autonomous, individualselves who are essentially distinct, harm to one is distinct fromharm to another. It may be that a liberal conception of a rightsholder simply renders the concept of a social harm, and thus acause of action “ for women as women” incoherent. I do not wishto discuss whether it is possible to develop a complete liberalnotion of social harm. It is sufficient to note that the notionof harm to rights holders inherent in the dominant liberal legaldiscourse appears to preclude a cause of action by any individualsimply by virtue of their membership in an oppressed socialclass.

The problem for feminism is that the offence of traffickingin pornography, if the cause of action were limited toindividuals who allege a direct harm stemming from thistrafficking, may seldom if ever deliver a remedy. Consider theimmense burden for a successful action: She must first prove that the relevant materials arepornography. They must be sexually explicit and theymust contain one or more of the features listed in thedefinition. Second, she must prove that the materialssexually subordinated her. The materials have to bemore than just offensive; this is not a law thatworries about offending sensibilities, it is concernedwith injuries to women. These injuries must be provenin court. Only then will the plaintiff be awardeddamages or an injunction against the materials inquestion emphasis added.

The harm which a particular woman suffers as a result oftrafficking in pornography is not easily delineated. It is notthe physical assault or forced viewing outlined in the othersections of the ordinance. Nor is it (for MacKinnon/Coleproponents) a tangible physical harm in the “ John hits Mary” sense: Pornography causes attitudes and behaviours ofviolence and discrimination that define the treatmentand status of half the population .

Pornography institutionalizes the sexuality of malesupremacy …

Since the harm caused by pornography is a social, collectiveharm to women, conventional liberal notions of tortious harm areseemingly unable to capture its seriousness (no single womanappears to have been grievously harmed). Thus, to limit thecause of action in the ordinance’s trafficking provision toparticular, individual women might seem futile for feminists inthat a traditional liberal court would be unable to make sense ofthe claims of harm involved.

The situation may not be quite so bleak. It will be usefulto examine the notion of a social harm, a harm which cannot betied directly to one victim, in the areas of criminal and tortlaw. I suggest that Ontario courts already have the basis for aframework of social harm in the federal statutory provisions onhate literature, and in the principles which can be adopted fromthe Bhadauria case.

The Criminal Code in sections 318 and 319 prohibits theadvocating or promoting of genocide and the incitement of hatredof identifiable groups respectively. It is noteworthy that“ identifiable group” is defined as “ any section of the publicdistinguished by colour, race, religion or ethnic origin”, butdoes not include gender identification. These sections allowgroups, rather than individuals, to seek redress for thedissemination of hateful or pro-genocidal material. Section 319has been found to violate s. 2(b) of the Charter of Rights andFreedoms, but to be justified under s. 1 of the Charter. Thus, it is considered to be coherent in Canadian criminal lawfor a somewhat intangible social harm to have been suffered by agroup through the publication of literature, and for a remedy tobe appropriate.

There are problems with this kind of legal protection fromsocial harm if MacKinnon and Cole’s assumptions about the legalsystem are accepted. The sections may take effect only on theinitiative of the Attorney General; it is this feature which ledto charges against Ernst Zundel for the publication ofliterature denying the holocaust and claiming the existence of aZionist conspiracy being laid by Jewish activist groups unders. 181 of the Code. Thus, Cole’s claim that legal redress forthe harm of pornography will not be effectively obtained throughreliance on intervention by a male-dominated executive branch ofgovernment is supported by the failure of anotheridentifiable victim group to have charges laid by the AttorneyGeneral in what appeared to many to be a clear case. In isolatedcases like Keegstra, where children were the group to whomhateful information was being disseminated, the law recognizessocial harms as actionable. It is clear though that thepragmatic barriers to criminal prosecutions for the harmpornography causes to women, as opposed to society’s moralintolerance of the offensive content, are immense in a maledominated liberal society.

What should not be lost in this pragmatic pessimism is theadequacy of the conceptual foundation of a social harm whicharose in Keegstra. In this case, the social harm was seennot only to affect the “ targets” of the information, in this caseJews, but to adversely affect “ society at large”. Furthermore, the type of harm caused to the target group is similar to thatseen by feminists as suffered by women due to pornography: Disquiet caused by the existence of such material isnot simply the product of its offensiveness, however, but stems from the very real harm which it causes.

Emotional damage caused by words may be of gravepsychological and social consequence. They canconstitute a serious attack on persons belonging to aracial or religious group, and in this regard the CohenCommittee noted that these persons are humiliated anddegraded (p. 214).

Referring then to a prominent liberal theorist, Dickson C. J. said: In my opinion, a response of humiliation anddegradation from an individual targeted by hatepropaganda is to be expected. A person’s sense ofhuman dignity and belonging to the community at largeis closely linked to the concern and respect accordedthe groups to which he or she belongs (see IsaiahBerlin, “ Two Concepts of Liberty”, in Four Essays onLiberty (1969), p. 118, at p. 155).

Let us call the harm to a particular woman which is sufferedas a result of trafficking in pornography a quasi-social harm. It is distinguished from a social harm in that the victimconceived as a member of a victimized class, but any action toredress this harm is brought solely on her own behalf for theharm personally suffered. Unlike the actions in the criminalcases previously cited, claims here are not on behalf of a groupor on behalf of society as a whole, but are on behalf of anindividual who has suffered as a member of a class. The modifiedordinance I propose seeks to redress quasi-social harms. One mayquestion whether this (as distinct from addressing social harm)is a tenable legal proposition or not. I suggest that it is, atleast in Ontario, given our established legal categories andmeans of redress.

The Ontario Human Rights Code provides an example of anattempt to redress quasi-social harms. It may be true that tortlaw is unable to address the “ social injury that occurs at apersonal level”, but this is exactly the kind of injury thehuman rights codes of the country have been enacted to redress. While couched in the terminology of individual human rights, theOHRC’s categories of protection indicate a necessary connectionto the notion of a social harm.

The OHRC does not promise equality, equal treatment, equalrespect etc. of every person, its grandiose preamblenotwithstanding. What it promises is that injuriousdiscrimination to individuals due to membership in certain socialcategories will be redressed by damages or injunction. Thesesocial categories are those which are traditionally associatedwith social injury – race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital or family status, or handicap. Notice that manycategories are absent – foolhardiness, poverty, language group, education, etc. What this indicates is that the OHRC does notaddress an equality right per se, but addresses social harm as aresult of being eg. black, female, Croatian, gay, blind, 25 yr.

old, unmarried, etc. The remedies under s. 40 of the OHRC arenearly identical to those in the modified ordinance – damages, including those for personal anguish, costs of the action, andinjunction.

The modified ordinance would thus be quite similar to theexisting human rights legislation in Ontario in its recognitionof social harm and its suggestion of remedies. Where it woulddiffer is in its refusal to supplant the power of the victim topursue their own action in court, rather than deal with acommission (and its discretionary powers) or board of inquiry toinvestigate matters. Thus the modified ordinance wouldremain “ women-initiated and women-driven.” It would alsodiffer from the OHRC in that it would clearly specify an as yetunrecognized particular method of inflicting harm: traffickingin pornography.

One well-known attempt to pursue a remedy for a quasi-socialharm outside the administrative realm of the OHRC succeeded inthe Ontario Court of Appeal, but failed at the Supreme Court ofCanada. In Bhadauria, the plaintiff alleged that she had beendiscriminated against because of her race in applying for ateaching position, and brought an action on a common law tortbasis of discrimination, and also cited a violation of the OHRCas giving a cause of action.

Wilson J. in the Court of Appeal held that it was open tothe court to allow the expansion of the common law to include thetort of discrimination, and would have allowed the action toproceed. The question of whether the OHRC gave rise to anindependent civil action was not entertained given thisfinding. Laskin CJ. in the Supreme Court of Canada said that the OHRCwas meant to supplant the attempt to seek a remedy at common law, not to supplement it, and thus barred the action from proceedingeither at common law or directly from an alleged breach of theOHRC since Bhadauria had not attempted to invoke the proceduresof the OHRC for redress. What is noteworthy from this caseis that the question of whether this kind of harm was capable ofjudicial consideration was never at issue. For the Court ofAppeal, the common law was fully capable of entertaining such aharm as a tort. For the Supreme Court, the OHRC was seen as theappropriate means of redressing such harm.

What the examples from criminal and tort law demonstrate isthat the notion of a quasi-social harm is tenable in our legalsystem, particularly if individuals are given a statutory rightto pursue remedies for it. Thus, the modified ordinance wouldsimply indicate to the court a category of social harm which hasnot previously been specifically addressed, the harm to womenfrom the propagation of pornography. The relative success atachieving remedies from OHRC provisions, as compared to thereluctance of the government to permit the exercise of theCriminal Code provisions, indicates that retaining a civil rightof action for individuals will be the strategically better movefor feminists insofar as they are seeking redress. I shall leavediscussion of whether this is a tenable feminist politicalstrategy for dealing with pornography for a later part of thepaper.

It may be objected that the fact that our legal tradition iscapable of making sense of the notion of a quasi-social harm, andthus could provide the judiciary with the conceptual tools toadjudicate on a modified version of the ordinance, does not implythat the modified ordinance and its conception of harm isacceptable in a liberal framework. A liberal framework maydemand individuated harms, and the fact that our existing legalframework can work outside that limitation simply demonstratesthat liberalism is not at the root of our legal framework’sevolving notion of harm. Thus, the ordinance may still be seenby liberals as incoherent, or worse, to invoke an illegitimateconception of non-individuated rights and afford state enforcedremedies for illegitimate purposes.

This liberal argument may be theoretically tenable, and thusthe “ bleak” picture I painted may still apply insofar as wefavour a liberal legal framework. Furthermore, the powerfulliberal arguments concerning freedom of speech may override theconcern for the kind of harm contained in the ordinance. Perhapsbecause the alleged harm has not been demonstrably linked to thepropagation of pornography, or is not a harm in the liberalsense, but an expression of a preference, a liberal frameworkcould not permit the ordinance since it is an undue restrictionon free expression.

My response to this is twofold. First, given thatprotection from harm is generally an acceptable justification fora restriction on liberty in a liberal framework, it is up toliberals to deliver a coherent rebuttal to MacKinnon et al.’scontention that pornography causes genuine physical andpsychological harm to women, rather than just revulsion. To dateI have not seen a liberal rebuttal which did not make theassumption that the root of the problem of pornography is simplymoral offence, i. e. strongly held preferences against thepropagation of pornography. I find the feminist claims aboutharm to be very persuasive, and until they are addressed byliberals in terms of a rebuttal of the harm, rather than byreference to the moral disvalue of pornography, the onus shouldrest on them.

Second, the ordinance is not an attempt to arrive at acoherent theoretical position on pornography, but is an attemptto solve a social problem through the mechanism of law. If theattempt of the existing legal system to redress such problems isillegitimate simply on abstract liberal grounds, it need not be afundamental practical concern of feminists to convince liberalsthat the ordinance is acceptable. From the feminist strategicperspective, it is enough to show, as I am attempting, that someform of the ordinance coheres well with the existing legaltradition whether that tradition is fundamentally liberal orotherwise. The problem of theoretical legitimacy of the legalsystem as a whole need not be of particular concern forproponents of the ordinance; what is important is redressing theharms done to women by the political and legal means at hand. Moreover, I am not convinced, given the comments of Dickson J.

above, that liberal theories are committed to abandoning thenotion of harm and the means of redress which we see in theexisting legal framework. Perhaps then only certain categoriesof liberalism would take objection with the notion of harmaddressed in Keegstra or the OHRC.

The second major problem with the ordinance for ourtraditional liberal legal framework is the identification of thesource of the harm. The liberal conception of autonomousindividuals requires a particular victim and a particularperpetrator. MacKinnon and Cole extensively consider the notionof women as victims of a social harm, but give littleconsideration to the notion of the perpetrators of this harmbeyond the simple definition of pornography. For them, itwould seem that if we can identify pornography, we can identifythe source of the harm. Clearly, identification of theperpetrators is required before an action for redress can belaunched under the ordinance. Even though this is not atheoretical requirement of every system of redress for harm, it is both a theoretical and pragmatic requirement for launchinga civil action. The frameworks of criminal law, tort law and theOHRC all presume an identifiable perpetrator of a harm can beidentified. Even if it were not a legal requirement for adetermination of entitlement to a remedy that one be capable ofidentifying the perpetrator, it would be rather pointless tolaunch an action for damages or injunction if there were noidentifiable legal person from whom to collect or upon whom theinjunction would act. The harm from pornography is not easily traced to a singlesource. MacKinnon et al. go to great lengths to point out thecomplexity of the problem of pornography, that harm ensues notjust because of what the content of pornography is, but becauseof how the messages of pornography contribute to the socialfabric of male hegemony. “ Pornography institutionalizes thesexuality of male supremacy.” If, as has been argued, pornography’s harm is intimately connected to social practices, then perhaps blame for this harm cannot be pinpointed topornography alone, or any particular source of pornography. Itis beyond the scope of this paper to attempt an analysis ofsociety which could offer insight into the distribution ofresponsibility for reparation of the harm of pornography acrossall members and institutions in society. Instead I shallattempt to offer insight into the smaller problem of distributionof responsibility among pornographers. Given the huge volume ofpornography, in many cases it may be impossible to pinpoint theparticular publishers, materials etc. which led to the quasi-social harm against a plaintiff. I suggest that a solution tothe problem of perpetrator identity may be suggested by analysisof the California Supreme Court’s treatment of the problem in aproduct liability case.

The excerpt from Linden above indicates thattraditionally the perpetrator of a tort must be clearly, individually identified as the cause of the harm suffered by theplaintiff. This traditional concept of causation in tort law isnot sacrosanct. In Sindell, an action launched by a victim of aharmful drug succeeded against a multitude of pharmaceuticalcompanies even though no one company could be causally linked tothe harm suffered by the particular victim. The plaintiff’s mother had consumed the drug DES during herpregnancy, and the plaintiff suffered birth defects as a result. Evidence of the particular supplier of this drug to her motherhad long since vanished, but it was certain that somemanufacturer out of a number producing it at the time of thepregnancy had promoted the drug without warning of the potentialside effects. The California Supreme Court held that, in theabsence of direct causal links to any particular supplier of thedrug DES, the plaintiff could recover damages in proportion tothe likelihood that any manufacturer was the one which providedthe drug to her mother during pregnancy.

This case has many obvious differences from a purportedaction for harm from trafficking in pornography. It was certainthat the plaintiff had suffered a tangible physical harm from theproduct; the only question was whether manufacturer A, B, C etc.

had been the perpetrator. What is interesting about the case forproponents of a modified ordinance is that if a woman coulddemonstrate to the court a harm from the propagation ofpornography in general, this case would indicate that allpornographers or traffickers might be held liable in proportionto some measure of their market share. Of note is the fact thatonly “ the producers of a substantial share of the market, thatis, over 50 per cent” needed to be sued to invoke this“ market share” liability notion. Thus, if a woman coulddemonstrate the relevant quasi-social harm from pornography, andname producers of at least 50% of the market share of therelevant material, she would meet the threshold for bringing anaction. Of course, if a particular trafficker could show thattheirs was not a harmful brand of pornography (or moreaccurately, was not harmful, and thus was not pornography), theywould be immune from the action. One problem with this scheme is limiting the nameddefendants to those who produce an identifiable kind ofpornography. I am not confident that in all or even most cases awoman would be able to identify any particular kind ofpornography as that which caused the harm she experienced. Thisis again due to the complex social nature of the harm, itsdifficulty to pinpoint. There is a danger that an implausible oruntenable number of publishers or traffickers of other sortswould be named in any given lawsuit. Furthermore, publishersmight begin a “ third party” frenzy in an attempt to draw inothers to distribute the costs of the suit. However, it seemsplausible in at least some cases that a particular class ofmaterial could be identified as the cause of the harm, andsince (as I shall soon argue) the importance to feminists of theordinance is not just its success at compensating particularwomen, but its political and social effects, if some casessucceed it will be a great victory.

Thus, the problem of identification of a perpetrator is notinsurmountable. There is at least some jurisprudence which wouldgive judges the tools to offer redress where individualperpetrators cannot be identified. In particular cases there maysimply be single or multiple defendants, or there may be anidentifiable class of defendant where the particular perpetratorsare unknowable. In either case, the Ontario courts haveavailable to them the conceptual tools to deal with the matter.

The addition of the indeterminate perpetrators doctrine fromthe DES case would be a welcome addition to the judicialtreatment of a modified ordinance, but successful actions wouldnot depend on it. It is not impossible to imagine the kind ofmaterial that would be claimed to be harmful – it wouldcontain pictures or words where women in a sexual context aredehumanized, objectified, shown as enjoying pain, rape orhumiliation, bruised, bleeding or hurt, etc. Once theidentification of harmful material is accomplished, thepublishers, distributors, etc. need to be identified and named. Then the major problem for a woman to overcome as plaintiff unders. 3. 2(iii) is to demonstrate that some genuine quasi-social harmto her came about from the propagation of pornography, althoughshe was not assaulted or forced to view or participate in it. Asthe Ruth M. testimony indicates, this is not entirely implausible.

To sum thus far, a modified version of the ordinance wouldgive individual women a cause of action for quasi-social harmsthey have suffered as a result of trafficking in pornography. While the hate literature provisions of the criminal code suggestthat our legal framework can deal with the notion of social harm, greater success can be expected if the modification is adopted. This modification would bring the feminist notion of harmsuggested by MacKinnon and her proponents within a legalframework not unlike some of the existing legal schema in Ontariowhich give civil remedies for quasi-social harms. The problem ofspecifying a perpetrator, while great, is not insurmountablegiven the doctrine in Sindell and the accepted notion of multipledefendants in civil suits. Finally, though the ordinance may atfirst seem unworkable (as any new legal doctrine does until ithas had judicial treatment), there are genuine fact situations inwhich redress seems just and plausible.

I have mentioned feminist strategy in various contexts inthis paper. Of course there is debate within feminist circlesover the appropriate strategies for dealing with the problem ofpornography. The ordinance, modified or not, will notsatisfy every feminist. I think it would be a tenableproposition for MacKinnon and her proponents not only in itsprovision of a remedy for particular social harms suffered byindividual women, but because it will serve to expose the harm ofpornography to great public scrutiny, provided feminists devotesubstantial political effort to particular cases. MacKinnon et al. are concerned that the ordinance should bea mechanism for changing the power relations sustained bypornography. Since the harm of pornography is in a sense heldcollectively, is social, and since the modified ordinancerestricts the cause of action to a single plaintiff on her ownbehalf as a woman, the modified ordinance has arguably created alaw which is unlikely to be pursued. This is because the womenmost likely to succeed are the least likely to proceed – theyeither will not possess sufficient power in their situation ofsubjugation, or they will not recognize the harm since for themit is normalized, adopted, accepted.

It is probably true that the ordinance will not turn upside-down the subjugation of women simply by offering remedies toindividual women. The harm of pornography to women is social; individual remedies will not change that. However, the existenceof the ordinance, and the existence of women like Ruth M. andLinda Marchiano who somehow break out from the bonds of apornographic existence mean that some cases will come to light. If proponents of MacKinnon’s ordinance adopt a suitable strategicposture, the ordinance will be effective in meeting their aim oflimiting the harmful effect of pornography on women.

The task for feminists, I would suggest, is twofold. First, organization of support mechanisms is needed to give women theresources to come forward and challenge those who harm themthrough trafficking in pornography is needed. The role ofsupport groups, groups to provide legal resources, groups toprovide personal support in a situation where one’s establishedvalues, relationships etc. are shaken apart, is crucial to thesuccess of actions brought under the ordinance. Individual womenwould be truly exceptional to successfully bring forth an actionon their own. Second, feminists must try to contain and confront politicalopposition to the modified ordinance which can be expected. There is little doubt in my mind that cases brought under thisordinance would bring about much publicity, just as Keegstra andZundel did. Opponents will be quick to point out the“ censorship” involved, the restriction on freedom of expression, and cry for the invocation of the Charter of Rights to thwartefforts at redressing the harm to women. Feminists must striveto bring the harm to the attention of the public, show the publicwhat it is that pornography does, as well as show the communitywhat it contains. The campaigns, the publicity in both lobbyingfor enactment of the ordinance, and pursuing actions under itwill no doubt rally a significant segment of the community tosupport women in their quest for freedom from harm. While itwill no doubt also create controversies, polarizations, opposition, etc. (much as the Thomas hearings recently did on theissue of harassment), the exposure of the issue will, I suggest, be strategically beneficial.

To conclude, a version of the ordinance which is modified torestrict the cause of action for trafficking in pornography toindividuals would be a tenable proposition. It would not be anextreme departure from our liberal legal tradition, but wouldafford redress for individuals who suffer quasi-social harms in amanner consistent with existing legislation on discrimination andhate literature. The problem of identifying perpetrators isdifficult, but existing doctrine in the sphere of negligence lawprovides some insight into dealing with it. Furthermore, thefeminist goal of a large scale change in the power imbalanceperpetuated by pornography will at least be advanced, though notfully attained, by the ordinance. I suggest that such a modifiedordinance should be given serious consideration by feminists andour legislators.” Remedies for Pornography in the Ontario Legal Context” Term Paper for “ Free Speech, Pornography and the RelationshipBetween Law and Morality” Prof. David DyzenhausUniversity of Toronto Faculty of LawJanuary 6, 1992Category: Miscellaneous