

BUNDY'S REVENGE

By Maureen Dezell

Staff members in Kentucky Senator Mitch McConnell's office got a chuckle early in February when the conservative Republican couldn't show up for a Larry King show on sweeping anti-pornography legislation he has sponsored. Radical feminist Page Mellish took his place.

McConnell's Pornography Victims' Compensation Act, now before the Senate Judiciary Committee, would allow victims or alleged victims of sex crimes to sue producers and distributors of obscenity if they could prove the crime was somehow incited by the material. Dubbed the Bundy Bill (after serial killer Ted Bundy, who claimed, the night before his execution, that his addiction to hard-core pornography made him torture, maim, and murder), the proposal has the support of fundamentalist Christian organizations, "pro-family" lobbyists, as well as many feminists. As McConnell aide Scott Sowry puts it, "We're getting help from a lot of strange bedfellows on this one."

The McConnell bill received little attention until recently, in part because earlier versions would have allowed civil action against producers and vendors of *any* sexually explicit material and were clearly unconstitutional. Shortly before Judiciary Committee hearings on the bill last July, though, McConnell rewrote the act to apply only to obscenity and child pornography, neither of which has First Amendment protection. McConnell says he's confident his far-reaching measure has been crafted narrowly and cautiously enough to pass.

But the Pornography Victims' Compensation Act is neither narrowly nor cautiously crafted. The bill defines child pornography as "a description of a minor engaging in or participating in sexually explicit conduct," a definition that covers *Lolita*, the movie *Pretty Baby*, and the lyrics of countless pop songs (not to mention a few traditional ones). Just as worrying, as Bob Peck of the American Civil Liberties Union puts it, is the fact that the bill would cause "a serious revision of First Amendment law and tort law, making someone else responsible for someone's intentional criminal act." Similar efforts to exercise social control by assigning liability to third parties (tobacco, alcohol, and gun merchandisers or distributors) have met with mixed results, even though these products are considered inherently dangerous. The link between sexually explicit material and violence, on the other hand, has never been proved.

As is well known, there is no national standard of

obscenity. The "community standards" clause of the Supreme Court's 1973 *Miller* decision holds that if the average person in, say, Salt Lake City finds a movie obscene, it can be ruled so and banned from movie theaters and video stores there, even though no one in Los Angeles would bat an eye at the same film. Under the McConnell bill, a plaintiff would first have to convince a jury that obscene material was responsible for the harm she suffered. But something that's obscene in one locale may not be obscene in the place where it was produced or distributed. A plaintiff's community standards of obscenity, presumably stricter than those in media-production centers such as Los Angeles and New York, could soon become the national norm. It would only take a couple of six-figure awards before book or movie companies would begin self-censoring. Thus the bill would have the effect of making the strictest local standard of obscenity the national norm.

The standard would grow stricter still, since civil courts, where these cases would be filed, are more likely than their criminal counterparts to rule something obscene. Proof in tort law is based on a preponderance of evidence, rather than on the "beyond a reasonable doubt" standard in criminal cases. In fact, the accused in cases brought under a Pornography Victims' Compensation law wouldn't even have to have been convicted of a sex crime for a plaintiff to prevail.

Diane Zimmerman, an authority on the First Amendment at New York University Law School, offers one scenario of how cases brought under the McConnell bill would work. Juries first would be "asked to decide if the work is obscene—and therefore actionable—as part and parcel of a proceeding for damages brought by a plaintiff who may well have been horribly injured as a result of the assault in question." The jury, "faced with a victim seeking compensation for a heinous crime," is unlikely to make a dispassionate determination about whether the defendant produced or sold obscenity. Since plaintiffs would likely be suing media conglomerates for harm suffered, suits brought under the pornography victims' law would almost certainly be settled for significant sums.

Zimmerman predicts that such suits would prove as messy, contentious, and inconclusive as libel litigation. "Juries in those cases regularly find for the plaintiff, often making substantial awards, only to have appellate courts applying constitutional standards with greater dispassion reverse [the decisions]," she notes. "The pattern of litigation that has emerged in the libel context is costly for the courts and, if carried over into this setting, can have the effect of discouraging dissemination of a wide range of sexually explicit, non-obscene speech simply to avoid the risk of defending costly suits or, worse, paying out large judgments for speech incorrectly defined as obscene."

The prospect of being blamed and held responsible for a violent sex crime simply because a plaintiff, defendant, or jury says something you put on the market caused the deed has unleashed a small but activist fury

among publishers, producers, distributors, writers, authors, and artists. Many have protested to the Senate Judiciary Committee, whose liberal members, Joe Biden in particular, have expressed sympathy for their First Amendment concerns. That doesn't mean, of course, that a group of liberal senators is bound to band together and stand up to a conservative/feminist coalition touting an anti-pornography measure during an election year. That supporters of the law say their main goal is to stop violence against women won't make standing up to the bill any easier—particularly for Judiciary Committee liberals still reeling from charges of insensitivity to women's issues from the Thomas/Hill hearings last fall.

Feminists are divided on the issue. The McConnell bill incorporates tenets of an Andrew Dworkin/Catherine MacKinnon-sponsored ordinance that declares pornography a violation of women's civil rights, which passed the Minneapolis City Council in 1983, only to be vetoed by that city's mayor. Similar legislation, which received strong support from conservatives, was enacted in Indianapolis the following year but was struck down by a federal judge. Since then unsuccessful campaigns to allow women to sue for harm allegedly caused by porn have been waged in Cambridge, Los Angeles County, Madison, and in Michigan. A bill that would define pornography as a violation of women's civil liberties has been introduced in the Massachusetts legislature this year.

Mellish, who runs a group called Feminists Fighting Pornography, claims she's got the support of "the majority of grass-roots NOW members." Nationally, however, the National Organization for Women hasn't taken a public stand on the measure. The organization has "long had an official position opposing violence against women and pornography" but is also concerned about First Amendment rights, says Ginny Montez of NOW. After all, anti-obscenity efforts have been trained regularly on books such as *Our Bodies, Ourselves*. But how the group will handle the issue remains uncertain. NOW's new president, Patricia Ireland, contends that civil actions permitted by the McConnell bill could be "empowering" because they would allow female crime victims to determine what material is "acceptable." She has publicly congratulated McConnell for "doing a great service" in provoking discussion of the links between violent pornography and violence. But she hasn't endorsed his bill.

Mellish has. "We're happy to see the conservatives take our approach to this issue by shifting who's empowered," she says. "We're happy we're finally getting attention. The press has censored our movement because the press has a vested interest in the First Amendment.

"Ted Bundy, though, was a very smart man. He knew the night before he was executed that they'd have to pay attention. We owe a lot to Ted Bundy."

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