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Giving the Devil the Benefit of Law: Pornographers, The Feminist Attack on Free Speech, and the First Amendment

Cover Page Footnote

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GIVING THE DEVIL THE BENEFIT OF LAW: PORNOGRAPHERS, THE FEMINIST ATTACK ON FREE SPEECH, AND THE FIRST AMENDMENT

John F. Wirenius*

I. Introduction

Until relatively recent times, it was easy to know where the battle lines over the censorship of “pornographic” materials had been drawn. Self-described progressives were adamant against such censorship, and conservatives in politics (and, frequently, religion) were for it. That has been changed over approximately the last decade, since the publication of Andrea Dworkin’s *Pornography: Men Possessing Women*.¹ Since then, a faction of the women’s movement has labored unceasingly for the enactment of laws regulating explicitly erotic materials that contribute, in their view, to the degradation of women. Catharine A. MacKinnon, who co-authored the prototypical ordinance² with Dworkin, has been one of the most vocal and influential advocates of this faction’s position. Described by Professor Cass Sunstein as “the most original and important voice behind feminism and law,”³ MacKinnon has gone far in legitimating her view and in winning adherents to her cause. Indeed, in a recent criminal case, the Supreme Court of Canada essentially adopted the arguments set forth by MacKinnon.⁴

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1. ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1980).

2. The ordinance’s text is set out and explained *infra* notes 11-15 and accompanying text.

3. Cass R. Sunstein, *Feminism and Legal Theory*, 101 HARV. L. REV. 826, 829 (1989).

4. In *Butler v. Her Majesty the Queen*, 1 S.C.R. 452 (1992), the Supreme Court of Canada held that the harm caused by “the proliferation of materials which seriously offend the values fundamental to our society is a substantial concern which justifies restricting the otherwise full exercise of the freedom of expression.” In determining that pornography as described by MacKinnon fell afoul of that rather elastic standard, the Court relied upon MacKinnon’s arguments that “if true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material. Materials portraying women as a class as objects for sexual exploitation and abuse have a negative

The growing acceptance of this viewpoint raises serious questions for First Amendment jurisprudence, questions whose resolution is fraught with peril. While the enactment of the MacKinnon-Dworkin ordinance and its upholding by the Supreme Court would not, of course, cause the constitutional sky to fall, the arguments that are winning converts and are acquiring an air of scholarly legitimacy are inimical, I believe, not only to the Constitution but to any notion of democratic-republican government. Both the premises upon which MacKinnon proceeds and the direction in which she hopes to push the law are utterly foreign to our concept of ordered liberty within a political form of government.⁵ While this does not of course prove that the ordinance is invalid, or itself hostile to these ideals, it certainly raises the question of whether MacKinnon is a person whose guidance in this matter is reliable. Furthermore, these premises and goals do in fact reflect on the ordinance itself, as it can be shown to serve them to the detriment of democratic-republican political values.

In order, then, to evaluate MacKinnon's assault upon the very notion of political rule it is important to first set out her proposal (Part II), and to scrutinize the arguments by which MacKinnon supports it (Part III). In Part IV, the fundamental question which MacKinnon poses, why we protect speech that harms, which is usually ducked by a sheepish grin, a shrug of the shoulders, and an uncritical reference to the First Amendment, is, if not answered, at least met square on. The exploration of MacKinnon's argument should shed some light upon this question in the specific context of the pornography issue (Part V), and may lead to a conclusion.

In explicating MacKinnon's views, primary importance should be given to the exposition contained in *Feminism Unmodified*⁶ and *To-*

impact on the individual's sense of self-worth and acceptance." *Id.* In explicating the materials which violated the standard, the Court declared: "[d]egrading or dehumanizing materials place women (and sometimes men) in positions of subordination, servile submission [sic] or humiliation. They run against the principles of equality and dignity of all human beings." *Id.* As MacKinnon has long advocated, consent is no defense, but rather "makes the acts more degrading or dehumanizing." Moreover, the decision is grounded not in morality, but in the public perception that pornography is "harmful to society, particularly to women." *Id.*

5. While "politics" and "political" have been used to connote anything pertaining to government — the sense in which MacKinnon uses them — they specifically denote the forms of government which rely upon the building of public consensus and the making of decisions by a free electoral process. As Bernard Crick has written: "politics represents at least some tolerance of differing truths, some recognition that government is possible, indeed best conducted, amid the open canvassing of rival interests." BERNARD CRICK, *IN DEFENCE OF POLITICS* 18 (2d ed. 1972).

6. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987) [hereinafter FEM-

ward a Feminist Theory of the State.⁷ Her 1984 Francis Biddle Memorial Lecture, Pornography Civil Rights and Speech,⁸ (reprinted as revised in *Feminism Unmodified*) and the ordinance itself are not as frank about the values they serve. The ordinance is a proposed law requiring popular support to secure passage, while the lecture is, in MacKinnon's own words, "an argument for the constitutionality of the ordinance"⁹ first given to an audience not entirely sympathetic to her views. Where the lecture and the ordinance conflict with her more theoretical utterances and those directed at her supporters, I give credence to the latter as being more representative of her genuine views. Without any importation of lack of candor to MacKinnon (whatever one may think of her views, she certainly does not hide them), it seems clear that the thinker and scholar has a freedom denied the advocate who can only press for as much as she can gain at the present time. These more pragmatic, political expressions of her views have a worth of their own, however, in understanding MacKinnon's goals in that they set out "the vision of the First Amendment with which our law is consistent."¹⁰

II. The MacKinnon-Dworkin Ordinance

A. The Proposed Ordinance

The MacKinnon-Dworkin ordinance defines pornography as:

the graphic sexually explicit subordination of women through pictures and/or words that also includes one or more of the following: (i) women are presented dehumanized as sexual objects, things, or commodities; or (ii) women are presented as sexual objects who enjoy pain or humiliation; or (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (v) women are presented in postures of sexual submission, servility or display; or (vi) women's body parts — including but not limited to vaginas, breasts, and buttocks — are exhibited, such that women are reduced to those

INISM UNMODIFIED] (a collection of MacKinnon's lectures and articles incorporating, *inter alia*, her articles concerning pornography).

7. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) [hereinafter *FEMINIST THEORY*] (MacKinnon's primary sustained work of jurisprudential theory, this work covers some of the same ground as *FEMINISM UNMODIFIED*, but does so in a more expansive, detailed framework, and in a more theoretical and systematic manner).

8. Catharine A. MacKinnon, *Pornography Civil Rights and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985) [hereinafter MacKinnon, *Pornography*].

9. *Id.*

10. *Id.* at 2.

parts; or (vii) women are presented as whores by nature; or (viii) women are presented being penetrated by objects or animals; or (ix) women are presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised or hurt in a context that makes these conditions sexual.¹¹

To pass muster under the Equal Protection Clause, no doubt, the ordinance extends to men and transsexuals as well as to women.

The "practice" of pornography under the MacKinnon-Dworkin ordinance renders the pornographer liable to civil suit under several sets of circumstances. First, women coerced, intimidated, or fraudulently induced into performing for pornography will have a cause of action.¹² Second, any assault or physical attack attributable to pornography gives the victim of the assault a cause of action against the pornographer.¹³ Third, "forcing pornography on a person" in "any place of employment, in education, in a home, or in any public place" creates "a cause of action against the perpetrator and/or institution."¹⁴ Finally, under the model ordinance, the production, sale, ex-

11. *Id.* at 1.

12. DONALD ALEXANDER DOWNS, *THE NEW POLITICS OF PORNOGRAPHY* 45 (1989). I use Downs's discussion of the ordinance only because it is slightly less diffuse than MacKinnon's various discussions of it. See, e.g., MacKinnon, *Pornography*, *supra* note 8. Downs's account is brief, compressed and accurate.

13. DOWNS, *supra* note 12, at 46. This particular provision is part of the Pornography Victim's Compensation Act currently before the Senate Judiciary Committee. S. 1521, 102d Cong., 1st Sess. (1991) [hereinafter PVCA]. Like the MacKinnon-Dworkin ordinance that can fairly be said to have inspired it, the bill creates a dramatic shift of responsibility for sexual violence from the rapist to the publisher who allegedly "inspires" the violence. One distinction between the PVCA and the MacKinnon-Dworkin ordinance is that the PVCA is limited to speech which is "obscene" where the ordinance is not. *Id.* at § 2(b). (Although this change frees the PVCA from the difficulties discussed in the text accompanying notes 34-60, *infra*, the remainder of the objections to MacKinnon's approach apply to the PVCA as well). While the PVCA does not contain the most controversial provision of the ordinance — that which allows women who have not been the victims of actual crimes to sue nonetheless "as a woman acting against the subordination of women" — the PVCA is otherwise *in pari materia* with the MacKinnon-Dworkin ordinance. The House version, the Pornography Victim's Protection Act, deals with the issue of women and children "coerced" into pornography. H.R. 1768, 102d Cong., 1st Sess. § 2 (1991). This bill contains no definition of coercion, and worse, explicitly provides that proof of various facts including "consent to a use of the performance that is changed into pornography" by the plaintiff will not prevent a finding of coercion. *Id.* at § 2(3). See also *infra* note 28.

14. DOWNS, *supra* note 12, at 46-47. This provision is essentially a broader version of Title VII protections against sexual harassment, extending that act's protections beyond the work place and educational facilities to any public place and the home. Compare 42 U.S.C. § 2000e-2(a)(1) (1988); see, e.g., *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991) (female welder belonged to protected class under Title VII; co-workers' conduct in posting pictures of nude and partially nude women in workplace sexualized workplace, constituting actionable sexual harassment); *Zabkowicz v. West Bend Co.*, 589 F.Supp. 780, 782-83 (E.D. Wisc. 1984) (sexual harassment of

hibition, or distribution of pornography is discrimination against women by means of trafficking in pornography, against which “any woman has a cause of action hereunder as a woman acting against the subordination of women”¹⁵ regardless of any proof of individual harm. Notably, this alleged civil rights ordinance is also *entirely* civil in its impact. There is no effort to impose criminal sanctions under any of the four provisions.

B. Why an Ordinance: The Harms of Pornography

The ordinance, like MacKinnon’s other writings, targets two discrete types of harm which are caused by pornography. The first kind, which can be termed “direct,”¹⁶ consists of the coercion of models or actresses into pornographic materials. This type of harm MacKinnon claims to be endemic in the pornography industry, and MacKinnon provides ample support for its existence.¹⁷ The best known example cited by MacKinnon among her largely anecdotal, but nonetheless telling, evidence of coercion is that of Linda Marchiano, who, according to her own account, has survived the most profitable commercialized rape in history.¹⁸ This direct injury — so-called by me because it is suffered in the very making of the pornographic product — is not restricted by MacKinnon to actual violent coercion or even to actual intimidation. She includes as coercion into pornographic activity the situation of women who are desperate for funds and, in MacKinnon’s view, marginalized by society into accepting such degrading, low-paying jobs. Such women are forced by socially imposed circumstances to turn to pornographers for funds.¹⁹ While these women are not victims in the conventional sense — they are not forced into their situa-

plaintiff included creation of hostile work environment by posting of “many sexually oriented drawings” with plaintiff’s initials on them).

15. DOWNS, *supra* note 12, at 46-47.

16. MacKinnon, who deplores the use of a solely linear form of causality, would be most unwilling to accept this distinction. For her, one of the great weaknesses of obscenity law and other First Amendment jurisprudence is its reliance upon “John hit Mary” causality. See FEMINIST THEORY, *supra* note 7, at 206-07; but see H.L.A. HART & A.M. HONORE, CAUSATION IN THE LAW 79-103 (1959) [hereinafter CAUSATION IN THE LAW] (setting out theoretical formulations and basis for traditional common law approach requiring finding of “proximate cause” prior to imposition of civil liability).

17. See, e.g., FEMINISM UNMODIFIED, *supra* note 6, at 127-34.

18. While Linda Marchiano’s account of her being coerced into the filming of DEEP THROAT has been disputed by others, including her co-star on that film, Harry Reems, it nonetheless seems more useful to accept her view, for the sake of discussion. Even if it did not happen to her, it plainly has happened to many others. For Reems’s account, see ALAN DERSHOWITZ, THE BEST DEFENSE 180-82 (1982).

19. FEMINIST THEORY, *supra* note 7, at 214, 242-43; FEMINISM UNMODIFIED, *supra* note 6, at 132, 205. The logic employed by MacKinnon to explore the coercive effect of capitalism into pornography is irresistibly reminiscent of George Bernard Shaw’s expla-

tions by the pornographers themselves, but are rather exploited by the pornographer — their consent is not meaningful in that they have no other real option. Moreover, women's position in society is determined, according to MacKinnon, in no small part by the social attitudes pornography fosters, the view that women are objects whose sexual nature is accessibility to the male.²⁰ Accepting this view, it no longer seems *outré* to view "consent" to appear in pornographic materials because of economic duress as coercion by pornographers as a group.

Nonetheless, it is useful to distinguish between actual coercion or intimidation of models/actresses by some producers or pornographers (chilling instances of which are given by MacKinnon) and this alleged prevalent inability to meaningfully consent to the activities involved.²¹ At the very least it permits the distinction between those pornography producers who themselves create the forces which subvert the wills of their models/actresses and those who merely take advantage of the law of supply and demand to recruit a work pool. MacKinnon says nothing about these latter that cannot be said of any employer in a capitalist system; all employers rely on the fact that their employees must find work to achieve subsistence. MacKinnon never addresses the question why appearing in pornography is different from any other unpleasant job that would remain unfilled but for the need for funds by those with no other economically viable options.

Before proceeding to the second form of injury MacKinnon finds in pornography, it is necessary to note some common ground with her. Even the most fanatical advocate of First Amendment absolutism would agree that cases of actual coercion or intimidation should form the grounds of a civil action or a criminal prosecution. Indeed the

nation of prostitution in *MRS. WARREN'S PROFESSION*. See GEORGE BERNARD SHAW, *PLAYS, PLEASANT AND UNPLEASANT* 200-06 (1905).

20. FEMINIST THEORY, *supra* note 7, at 139-52.

21. In her response to this Article, Professor Tracy Higgins calls this distinction "gendered," arguing that "women are substantially more vulnerable both to economic and to physical coercion." Tracy Higgins, *Giving Women the Benefit of Equality: A Response to Wirenius*, 20 FORDHAM URB. L.J. 77, 78 n.5 (1993). It is this very fact, upon which I fully agree with Professor Higgins, that renders the distinction gender neutral. These are two kinds of harm, and in society as it currently exists, women are more vulnerable to these harms than are most men. Since both of these harms are more oppressive to women than men, it is difficult to see why distinguishing between them is "gendered." The mere drawing of the distinction does not mean that one class (direct harms) is automatically deemed regulable and the other (indirect/attitudinal) is deemed sacrosanct, but rather that the concerns raised by regulation are not identic for both classes — which is exemplified by the fact that I can agree with MacKinnon and Professor Higgins regarding direct harms, yet disagree with them regarding attitudinal harms. For a discussion of attitudinal or indirect harms, see *infra* notes 29-34 and accompanying text.

films — or photographs thus created — may properly be declared to be forfeit and turned over to the victim for destruction if that is her wish, based upon the common law doctrine that one may not profit from one's crimes.²² As the film or photographs are the record of a crime as well as its products, it is wholly consonant with the First Amendment to say that such a record may not be sold for the profit of the rapist. To that extent MacKinnon is setting up a straw man when she writes that *Deep Throat* is protected speech: "The *film* apparently cannot be reached by *her* [Linda Marchiano] any more than by anyone else, no matter what was done to her in making it. The fact that Linda was coerced makes the film no less protected as speech, even though the publication of *Ordeal* makes clear that the film documents crimes, acts that violate laws in all the fifty states."²³ MacKinnon bases this straw man on the fact that *Deep Throat* has frequently been held to be not obscene under the test set out in *Miller v. California*.²⁴

22. "No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, . . . or to acquire property by his own crime. . . . The maxim [is] *volenti non fit injuria*." *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889); see also *New York Mutual Life Ins. Co. v. Armstrong*, 117 U.S. 591 (1886); *Barker v. Kallash*, 468 N.E.2d 39 (N.Y. 1984); *Carr v. Hoy*, 139 N.E.2d 531, 532 (N.Y. 1957). Surprisingly, MacKinnon never relies upon this well established doctrine in support of the ordinance's forfeiture and liability provisions, a lapse on her part which unfortunately deprives the best provision of the ordinance of a useful doctrinal anchor. This doctrine's applicability has not been affected by the Supreme Court's decision in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 112 S. Ct. 501 (1992). In *Simon & Schuster*, the Court struck as unconstitutionally broad a statute confiscating royalties from books published by prisoners concerning their crimes. Unlike cases involving the coercion of women into pornography, these memoirs do not involve the commercial exploitation of a photographic record of a crime — the direct fruit of the crime. Rather, they are the prisoner's recounting of his or her own experiences from an individual perspective. Significantly, the Court did not reject the general *Riggs* principle, nor did it strike all possible "Son of Sam" laws.

23. FEMINISM UNMODIFIED, *supra* note 6, at 129 (emphasis in original). MacKinnon's footnote for the statement "DEEP THROAT is protected speech" provides references to an earlier footnote listing cases ruling on the obscenity or nonobscenity of the film. Some of the cases finding DEEP THROAT not to be obscene include: *United States v. Various Articles of Obscene Merchandise*, 709 F.2d 132 (2d Cir. 1983); *State v. Aiuppa*, 298 So. 2d 391 (Fla. 1974); *Keller v. State*, 606 S.W.2d 931 (Tex. Ct. App. 1980). She also gives several examples of cases holding the film to be obscene, including *United States v. Battista*, 646 F.2d 237 (6th Cir. 1981) (upholding conviction under federal obscenity statute for transporting DEEP THROAT in interstate commerce); *United States v. One Reel of Film*, 360 F. Supp. 1067 (D. Mass. 1973); *State ex rel Wayne Prosecutor v. Diversified Theatrical Corp.*, 229 N.W.2d 389 (Mich. Ct. App. 1975); *People v. Mature Enterprises*, 343 N.Y.S.2d 911 (N.Y. Crim. Ct. 1973), *aff'd*, 352 N.Y.S.2d 346 (App. Div.), *modified*, 323 N.E.2d 704 (N.Y. 1974).

24. 413 U.S. 15 (1973). The constitutional status of DEEP THROAT is actually quite murky. See *supra* note 23 and cases cited therein. In *Miller*, the Supreme Court created a new test to determine whether or not given materials were "obscene." The test requires the finder of fact to ascertain whether (a) the average person, applying "contemporary

But coercion was not at issue in those cases. Those cases dealt exclusively with the question of whether the film was subject to suppression solely on the basis of its communicative content, and not on the basis of any incidents involved in filming. In a system of case-by-case adjudication, the settling of one question, obscenity, adverse to MacKinnon's position²⁵ does not at all reflect on how they would rule on an entirely separate claim, that of coercion. MacKinnon caustically writes that "[w]hen a woman speaks for herself, her violation becomes an atrocity and is therefore a lie. So *Deep Throat* is protected speech and *Ordeal* is sued for libel."²⁶ The fact that a libel suit was brought over Ms. Marchiano's book *Ordeal*, while perhaps unfortunate, is

community standards" would find that the work, taken as a whole, appeals to the prurient interest in sex; (b) the work depicts, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) the work, taken as a whole, lacks serious literary, artistic or political social value. 413 U.S. at 24-25. The Court explicitly rejected the former constitutional standard that the work be "utterly without redeeming social value" established in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). *Miller*, 413 U.S. at 23. The resulting balkanization of obscenity law, which requires publishers or filmmakers to be conversant with the obscenity laws of each state into which their work may eventually stray, allows material which is constitutionally protected in one state to be censored in another, under the national Constitution. For example, *DEEP THROAT* goes from protected expression to unprotected filth depending on the court in which the defendant finds himself. Compare *United States v. Various Objects of Obscene Merchandise*, 709 F.2d 132 (2d Cir. 1983) (holding that the film is not patently offensive to the community of the "New York Area"), and *People v. Mature Enterprises*, 343 N.Y.S.2d 911 (N.Y. Crim. Ct. 1973), *aff'd* 352 N.Y.S.2d 346 (App. Div. 1974) (finding the same film offensive in New York City). The impact of this balkanization of the definition of obscenity upon the Senate's Pornography Victims Compensation Act, *supra* note 13, is nothing short of staggering. The Senate bill is limited in its scope to reach only materials which are constitutionally deemed obscene. S. 1521, *supra* note 13, at § 2(b). Under *Miller*, the local community is not statewide, but regional — a town or perhaps a county. See *Hamling v. United States*, 418 U.S. 87 (1974). Thus, in a federal cause of action, under a federal statute, in a federal court, the threshold question of whether the Act even applies must be answered with reference to a local community in which that court may not even sit, depending on the vagaries of venue. Moreover, which communities' standards apply? Those of the community in which the materials are distributed by the publisher (those currently applicable), those of the community where the rapist or sexual assailant acquires the materials (if he buys them not from a direct distributor, but acquires them second hand) or those where the crime giving rise to the suit took place? In either of the latter two eventualities, the publisher is held to the standards of a community into which he may never have intended to distribute his or her materials, and with which he or she may have absolutely no connection. The end result could well be that no publisher would ever publish materials that could be found to be obscene even in the most parochial community as the publisher could well be judged by that community's standards years after publishing. (The bill's statute of limitations relates to the date of the crime, not of publication. S. 1521, *supra* note 13, at § 3(e)). This could occur even after the materials have been removed from the stream of commerce, and have been in the eventual criminal's hands for years — theoretically, possibly for decades.

25. See *supra* note 23.

26. FEMINISM UNMODIFIED, *supra* note 6, at 11.

scarcely probative; surely those whom she accused in print should have the right to endeavor to contest such accusations in court.

This is not to say that our law goes far enough in protecting coerced or intimidated women; it does not. Both criminal prosecutions and civil forfeiture actions based on directly coercive behavior are sorely missing in our society²⁷ and should be encouraged by all possible means, including statutory reform. An act based on the doctrine that one may not profit from one's crime, which would allow victims in the position of Linda Marchiano as described in *Ordeal* to sue for destruction of the resulting materials and for forfeiture of the profits, would be a valuable tool, so long as it was limited to cases of direct coercion.²⁸

The second form of harm caused by pornography can be described best as "attitudinal."²⁹ This harm is done to women at large throughout society. It encompasses a wide range of injuries, from that of having pornographic materials forced upon them, whether in the intimacy of the home or in the work place, to sexual violence encouraged or caused by the eroticization of violence that is a pronounced fixture of much pornography and by the objectification of women, which occurs in all pornography. MacKinnon and Dworkin argue that such desensitization to violence and resulting emulation of violently sexual materials form only a small part of such a harm.³⁰ Pornography further reinforces the male image — and thus that held by society — of women as objects and not as people in their own right, as inferior beings to be acted upon. This in turn leads to the legitimation of such attitudes, to the spreading of sexist attitudes and

27. One way in which it could go further is by enacting the *Riggs v. Palmer* forfeiture hearing. See *supra* note 22. As this hearing would be a civil and not a criminal proceeding (as indeed are the proceedings contained in the model ordinance), the plaintiff enjoys the advantage of a lower burden of proof.

28. The Pornography Victims Protection Act seems not to be so limited. H.R. 1768, *supra* note 13. First, while it does require "coercion" in order for models/actresses to establish a claim for relief, it sets up a series of roadblocks to a defendant in seeking to resist the plaintiff's claim. *Id.* at § 2. Among the panoply of evidence specifically listed as not negating coercion, (others include a contract and monetary remuneration) consent to commercial distribution of the materials is included. *Id.* If consent, apparently untainted by coercion itself, does not serve to negate coercion (which the act does not define) then it is difficult to imagine what would. If the Act is simply refusing to allow subsequent consent to negate prior coercion, the result is simply the creation of severe evidentiary problems for the defendant. (How can one defend against such a claim?). But it is possible to read the Act as saying that a consent apparently full and free at the time it is given does not preclude a jury from later finding coercion, and that all makers of "pornographic" materials act at their constant peril.

29. Again, it should be noted that these terms are not MacKinnon's and that she would surely object to their usage.

30. FEMINIST THEORY, *supra* note 7, at 134-52.

thus contributes to the perpetuation of male dominance in forms much less crude than actual rape.³¹ The battle cry of “porn is the theory, rape is the practice” is one believed by MacKinnon but it oversimplifies her view of the harms pornography causes.

While MacKinnon would claim both forms of harm are equally attributable to pornography,³² the attitudinal harms are distinguishable because they result from the consumers’ use of the material and the ideas or attitudes that come with the material. The direct harms, to the contrary, are inflicted in the very manufacture of the pornography and are not dependent upon the readers’ or viewers’ reaction to the materials. The pornographer who is penalized for these indirect harms is held accountable for the use the materials are to be put to, regardless of whether he³³ intended, anticipated or could have foreseen these uses. For example, if a woman is raped by an individual “inspired” by a layout in *Playboy*, MacKinnon would hold *Playboy* liable, despite the absence of any *mens rea* on the part of the magazine’s publishers. Whether desirable or not, this result is certainly a new departure in tort law, and should be recognized as such.³⁴ That the magazine may be put to such uses is foreseeable, MacKinnon

31. *Id.* at 134-38.

32. *Id.* at 206-07. Professor Higgins objects to this distinction between “direct” and “attitudinal” or “indirect” harms because “[t]his characterization suggests at the outset that the specific harms outside of coercion in the production of pornography are derivative, attenuated, indirect.” Higgins, *supra* note 21, at 78 n.7. The harms are certainly “indirect” and “derivative” in that they do not necessarily result from the production of the pornography alone — they require another step: the reading or viewing of the materials, and the audience’s acceptance of the portrayed dynamic of male-female relations as desirable. What I have called the indirect harms could not result were pornography produced by the carload but kept in warehouses; the direct harms could. The drawing of this distinction does not mean that the harm is less — simply that it is different in kind.

33. While most pornography is produced by men, it should be noted that more women are becoming involved in producing and writing erotic materials and films, such as Annie Sprinkle, Marilyn Chambers, and Candida Royale. Ms. Royale especially directs her films towards a mixed or female audience. Also, collections of erotica such as the KENSINGTON LADIES’ GROUP BOOK OF EROTICA (1991) show a growing interest of women in erotica. That such widespread interest increasingly includes the “pornographic” themes of dominance and submission is the contention of Nancy Friday. See NANCY FRIDAY, WOMEN ON TOP (1991).

34. Professor Higgins disputes this characterization, claiming that it “assumes too much. If, as an empirical matter, pornography is exposed as a dangerous product, why is it not at least foreseeable that it might inspire crimes against women.” Higgins, *supra* note 21, at 79 n.8. Of course, it is Professor Higgins who is doing the assuming here, by postulating that the definition of a “dangerous product” should be expanded to include the risk of an individual’s internalizing a proffered sexual fantasy which includes a course of conduct detrimental to others, by a mere showing that some individuals do. This is a new departure, one that would hold it to be tortious conduct to entertain or to convince another through representations of the desirability of a specified psychosexual dynamic. Altering the nature of another’s beliefs and desires by presentation of an alternative as

might well assert, but it is scarcely the use for which it is designed, nor is it a use which could be confined to pornographic materials. As to the genuinely attitudinal harms, they are best evaluated after MacKinnon's underlying premises are examined.

III. MacKinnon's Underlying Premises and the Ordinance

A. Contrasting Views: Free Speech Obscenity Jurisprudence and MacKinnon

The first such premise underlying MacKinnon's scheme is that the class of materials unprotected by the First Amendment should extend much further than that presently recognized by the Supreme Court. While there are several categories of speech that the Supreme Court has deemed not to fall within the protections of the First Amendment, pornography as defined by MacKinnon does not fit into any of them. The only way, therefore, to constitutionally justify the regulation of pornography is to apply the stringent test used for speech conceded to be of social importance.

The somewhat curious notion that not all speech is "speech" for constitutional purposes — that the regulation of some kinds of speech does not even present a First Amendment issue — has its roots in the 1942 case *Chaplinsky v. New Hampshire*.³⁵ In *Chaplinsky*, the Court opined that "there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional question. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those which by their very utterance tend to inflict injury or tend to incite an immediate breach of the peace."³⁶ The *Chaplinsky* dictum was reaffirmed in *Roth v. United States*.³⁷ In *Roth*, the Court found that the *Chaplinsky* category of obscenity was indeed one of those classes of low value speech not protected by the Constitution.³⁸ From *Roth* to the present, the basic question of obscenity ju-

desirable or simply true has not previously been deemed comparable to selling that person an exploding Pinto.

35. 315 U.S. 568 (1942) (upholding conviction for use of "fighting words" directed at city marshal in public speech).

36. *Id.* at 571-72.

37. 354 U.S. 476 (1956) (upholding the validity of federal obscenity statute without reaching issue of whether any particular materials were in fact obscene).

38. *Id.* at 484-85. Professor Higgins claims that this portrayal of First Amendment jurisprudence is an oversimplified model, and that in fact the Supreme Court *selectively* protects speech that harms. She points to the examples of employer speech during a union election and commercial speech as examples of harmful speech which the Court has deemed subject to prohibition upon a lesser showing of harm than the usually mandated compelling state interest. Higgins, *supra* note 21, at 83-85. In fact, the evolution of

risprudence has not been whether obscenity is protected by the First

the Court's concept of "low value" speech has been a convoluted one, although it has its genesis in *Chaplinsky*. The Court has added and dropped *Chaplinsky* categories at will, and has introduced an intermediate breed of category, one in which the speech is given some (although not full) First Amendment protection. Commercial speech is the classic instance of this "semi-*Chaplinsky*" category. In *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), the Court recognized commercial speech as a First Amendment hybrid, a mixture of protected and unprotected speech, in an area "traditionally subject to government regulation." *Id.* at 462-63. The Court accordingly extended to commercial speech a lesser degree of protection than that speech fully within the First Amendment's ambit, establishing this essentially new — albeit privileged — *Chaplinsky* category. *Id.*; see also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-73 (1976) (holding that state does not have plenary power to suppress truthful advertising); *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 106 S. Ct. 2968, 2976-79 (1986) (upholding Puerto Rico's ban on casino advertising directed at Puerto Rican citizens despite legality of gambling, and fact that advertising directed at United States residents was permitted). These decisions do not, in my opinion, show the Court acting in a principled or consistent manner. While it is as plausible to create a new *Chaplinsky* category as it is to delete an old one (such as the category of offensive speech eliminated by the Court in *Cohen v. California*, 403 U.S. 15 (1971)) ideally, some logical reason might be in the offing. Just as the original *Chaplinsky* categories sprung wholly formed from the imagination of Justice Murphy, so too the category of commercial speech materialized without any basis in principle.

The point that Professor Higgins misses in her discussion of these cases is that they do not establish some holistic principle that all First Amendment jurisprudence is a balancing test, in which the Court measures the harm done and decides whether it is serious enough to merit regulation of the speech. The first step it employs is to discern into which category the speech falls — whether the speech involved merits full protection (discussed *infra* notes 50-59 and accompanying text), no protection (the traditional *Chaplinsky* categories), or is in this new intermediate category. Then the relevant test is applied — that is, the Court determines whether the interest asserted by the state is weighty enough to overcome the level of protection accorded to that speech. See, e.g., *Central Hudson*, 447 U.S. at 566. I do not endorse this multi-tiered structure because of its complete separation from any traditional notions of interpretation of a constitution. In his reservations regarding this categorical approach, I agree with Justice Stevens's concurring opinion in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992). The concept that some speech is more equal than others finds no support in the First Amendment's language and resulted solely from the sweeping dictum uttered in *Chaplinsky* without any explanation. Moreover, the ease with which this analysis degenerates into the sort of raw political decision-making that Professor Higgins claims should be made "overtly," Higgins, *supra* note 21, at 87, further undermines the current approach, in my opinion. As will be argued in Parts VI and VII, allowing the political process (or the legal process) to determine who may or may not speak on the grounds that such speech may sway the hearts and minds of its auditors, fundamentally disservices the underlying precepts of a democratic-republican state.

The case of labor speech is readily distinguishable. In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (cited in Higgins, *supra* note 21, at 81 n.18, 83 n.30), the Court explicitly relied upon the fact that the challenged statute, 29 U.S.C. § 158(c), "merely implements the First Amendment by requiring that the expression of 'any views, argument, or opinion' shall not be 'evidence of an unfair labor practice,' so long as such expression contains 'no threat of reprisal or force or promise of benefit' in violation of [§ 158(a)(1)]. Section [158(a)(1)], in turn, prohibits interference, restraint or coercion of employees in the exercise of their right to self-organization." 395 U.S. at 617. Even the great First Amendment absolutist Justice Douglas recognized that speech could some-

Amendment, but rather whether the materials at issue are obscene.³⁹

This category of speech, obscenity, would superficially seem to be the most likely to include pornography,⁴⁰ and is the type of speech

times form a component of an action, so closely bound up in the action as to be a part thereof. *See* *Brandenburg v. Ohio*, 395 U.S. 444, 454-57 (1969) (Douglas, J., concurring). Such "speech brigaded with action" patently includes threats of the kind here involved. In such a case, the speech's message is not censored, but rather the ban falls upon the speech-component only incidentally in the process of preventing the action of coercion through threat. Here, the regulation limits coercive speech only — threats, etc. — and not argument or opinion.

Moreover, the Court treated the speech by employers as a case of two constitutional rights — both stemming from the First Amendment (although the employee's right of free association here was safeguarded by statute) — butting heads, and ruled that "an employer's rights cannot outweigh the equal rights of the employees to associate freely." 395 U.S. at 617. Similarly, in *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2745 (1991), the right of an attorney to speak freely clashed with the right to a fair trial guaranteed by the Sixth Amendment. Such genuine cases of constitutional guarantees in conflict provide the only legitimate exercise in "balancing" of constitutional rights in my opinion. The general concept of equality to which MacKinnon and Higgins advert does not exemplify such a case, as, in the conflict of pornography against the ideal of equalitarian relationships between the sexes, no role is played by the state, which by contrast tries the defendant and licenses the attorneys.

39. *See, e.g.*, *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964) (reversing conviction under state obscenity law since film involved was "not utterly without social importance" and thus not obscene under *Roth*); *Id.* at 197 (refusing to even attempt to define obscenity, Justice Stewart declares "I know it when I see it"); *Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973) (reaffirming *Roth's* holding that obscenity falls outside of the ambit of constitutional protection, and upholding conviction under state obscenity law to audience concededly comprised exclusively of consenting adults); *Miller v. California*, 413 U.S. 15 (1973) (in upholding conviction under state obscenity law for selling "illustrated books," Court revised definition of obscenity, establishing "local community standards" test); *Jenkins v. Georgia*, 418 U.S. 153 (1974) (reversing state court finding that film *CARNAL KNOWLEDGE* was obscene under *Miller*, Court held that nudity alone was insufficient to establish obscenity); *Hamling v. United States*, 418 U.S. 87 (1974) (in upholding conviction under *Miller* for mailing "illustrated version" of official report on pornography, held that "local community" under *Miller* is not statewide standard but truly local in scope); *see also* KENT GREENWALT, *SPEECH, CRIME AND THE USES OF LANGUAGE* 304 (1989) ("The basic constitutional standards have remained those of *Miller*").

40. The only other existing category which could conceivably apply under MacKinnon's logic is libel, treating pornography as libel of a group, i.e. women. Libel, however, involves an attack, intended to be taken as true, upon the character of an individual. *See* *New York Times v. Sullivan*, 376 U.S. 254 (1964) (reversing libel judgment against *New York Times* for advertisement allegedly libelling local sheriff on grounds that as a public figure sheriff could not be libelled unless false statements of fact were made with "malice", i.e., either knowledge of falsity or reckless disregard for falsity). In erroneously claiming that we do not protect speech that can be rationally found to lead to harm, MacKinnon in fact does rely on the sole group libel case decided by the Supreme Court, *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (upholding a group libel statute applying to racial epithets published by a white supremacist group in a newspaper advertisement). As MacKinnon does not justify suppression of pornography as an example of libel, however, but as speech that harms, her reliance on *Beauharnais*, and its dubious status as a

defined by the Court in *Miller v. California*.⁴¹ MacKinnon, however, squarely rejects the Court's obscenity doctrine as applicable to pornography.⁴² As a result of MacKinnon's rejection of this rubric, and her expansion of the definition of pornography beyond what has been deemed to constitute obscenity, the categorical exception for obscene materials cannot be used to justify the ordinance.⁴³

That MacKinnon's approach sweeps far more broadly than *Miller* is clear even without her explicit rejection of it; MacKinnon's ordinance does not provide protection for materials with social value and does not require that pornographic materials be looked at in their context:

the requirement that the work be considered "as a whole" legitimates something very like that on the level of publications such as *Playboy*, even though experimental evidence is beginning to support what victims have long known: legitimate settings diminish the injury perceived to be done to the women whose trivialization and objectification it contextualizes. Besides, if a woman is subjected, why should it matter that the work has other value? Perhaps what redeems a work's value among men enhances its injury to women. Existing standards of literature, art, science, and politics are, in feminist light, remarkably consonant with pornography's mode, meaning, and message.⁴⁴

The implications of this passage are to allow for the suppression of a wide range of work, broader, perhaps, than that which seems to fall

precedent does not provide the support needed for her ordinance. *See infra* notes 60-74 and accompanying text.

The Court removed the "profane" speech category in *Cohen v. California*, 403 U.S. 15 (1971) (reversing conviction predicated on appellant's wearing of jacket with the legend "Fuck the Draft"). Pornography as defined by MacKinnon also does not fit into the "fighting words" category of *Chaplinsky* because of the Court's holding that such words must, like libel, be directed at a single individual to fall under that case's doctrine. *See Feiner v. New York*, 340 U.S. 315 (1951) (upholding disorderly conduct conviction for calling public official "God-damned Fascist" and "racketeer").

41. 413 U.S. 15 (1973). *See supra* note 24.

42. *See, e.g.*, FEMINISM UNMODIFIED, *supra* note 6, at 150 ("The law of obscenity, the state's primary approach to its version of the pornography question, has literally nothing in common with this feminist critique. Their obscenity is not our pornography.").

43. Professor Higgins chides me for my failure to explore MacKinnon's reasons for rejecting the obscenity doctrine. Higgins, *supra* note 21, at 79. In fact, I accept MacKinnon's rejection of the doctrine, believing with her that it is essentially irrelevant to the discussion. Like MacKinnon, I further believe the doctrine is illegitimate, although my reasons are based on its *ipse dixit* nature, and the lack of any grounds in the First Amendment's language to support a corollary reading "except when the speech is offensive." In any case, MacKinnon both rejects it theoretically and exceeds its scope practically, and so the doctrine is unavailable to her supporters.

44. FEMINIST THEORY, *supra* note 7, at 202.

under the strict letter of the ordinance, which was, after all, written in the hope of gaining political support. It is unclear from the text of the ordinance that the context defense currently built into the law of obscenity⁴⁵ would be viable; however the ordinance as written certainly does not provide for such a defense.⁴⁶ The elimination of the context defense is no mere technical change in the law. By allowing even a single passage deemed pornographic to result in the suppression of the work at issue would result in the bowdlerization or loss of many works currently hailed as classics. James Joyce's *Ulysses* for one could not pass muster, nor could much of the works of D.H. Lawrence, to say nothing of Milton's *Paradise Lost*.⁴⁷ Indeed, public concern over the possibility of censoring works of literary value has wrung token concessions from MacKinnon and her supporters in at least one state.⁴⁸

More significantly, the reasons that MacKinnon believes justify the withdrawal of constitutional protection from materials within the ordinance apply equally to materials that are not within the narrowest reading of the ordinance; why is it only *explicit* sexual portrayal which is subject to censorship? Why are other materials⁴⁹ protected even though they can lead to the same attitudinal harms as sexually explicit materials? After all, if writing or depiction leads, through

45. See *supra* note 24.

46. In the most recent version of the ordinance to be approved by MacKinnon, Massachusetts's proposed Act to Protect the Civil Rights of Women and Children, it is explicitly stated that "[i]solated parts [of the work] shall not be the sole basis for complaints" under the trafficking provision, which allows women to sue on behalf of women as a class absent any showing of individualized injury. H.B. 5194, Mass. 177th General Court, 1992 Sess. § 2 (1992). Two observations apply to this resurrection of the context defense. First, it only applies to the trafficking provision, and not to the rest of the bill, thus allowing isolated passages to serve as a basis for suit under the other provisions. Also, this modification is a classic example of the sort of concessions which MacKinnon makes for political expediency. Plainly, this defense of context, while proposed in Massachusetts, is not desired, and is only sparingly extended.

47. Milton's description of Eve as deeply sexual and "not equal, as [her] sex not equal seemed . . . yield[ing] with coy submission" is just one of the passages to which I advert. *THE COMPLETE POETICAL WORKS OF JOHN MILTON* 221 (Harris Francis Fletcher ed., Houghton Mifflin Co. 1941).

While perhaps instructive to list works which would fall prey to censorship under MacKinnon's narrowed view of the First Amendment, it is also repetitive.

48. The Massachusetts Act to Protect the Civil Rights of Women and Children, *supra* note 46, at § 2, has also limited the trafficking provision to "pornography made using live or dead human beings or animals." This was done, according to MacKinnon, in order to end the debate about whether the works of Norman Mailer or Henry Miller might be suppressed. Tamar Lewin, *Pornography Foes Push For Right to Sue*, N.Y. TIMES, March 15, 1992, at A16. However, because of the possibility of liability for assaults inspired by textual materials, the prospect of mainstream publishers being held liable for sexual assaults cannot be dismissed.

49. Ambrose Bierce's fiercely misogynistic but asexual writings leap to mind.

means other than explicit portrayals of sex, to the creation of attitudes that tend to subordinate women, how is the harm done any different from that caused by a pornographic novel, which by definition cannot involve direct harm, and yet falls prey to the ordinance? Such a line of demarcation seems to be only a temporary concession to political reality. Even without this gloss, MacKinnon's willingness to discard the obscenity doctrine and especially the context defense alone dramatically expands the class of materials which fall outside the scope of First Amendment protection.

B. MacKinnon's "Vision of the First Amendment"

1. *Incidental versus Attitudinal Harms*

A second premise is the concept of the First Amendment with which MacKinnon believes her ordinance is consonant. MacKinnon argues that the First Amendment protects speech only insofar as no harm can result.

MacKinnon's gloss on the First Amendment is immediately divergent from the traditional, however, in that MacKinnon does not distinguish between the attitudinal harms, those done by the communicative content of the material to the values and attitudes of the audience, and harms that are incidental in nature. Incidental harms are distinguishable from the attitudinal harms in that they are in no way dependent upon the audience's adoption of the beliefs propounded by the communication at issue. Incidental harms are not inherent in the nature of the communication but rather are tied to the specific context in which the communication is made.

Under the constitutional jurisprudence that has dominated since 1919, a compelling state interest must be shown to regulate communication that falls within the definition of constitutionally protected speech.⁵⁰ That interest must be based not on the state's fear of what might result should the populace be won over to the speaker's viewpoint, but rather upon the factual context in which the words at issue are spoken, on "whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."⁵¹

50. Except, of course, in the case of low value speech categories already explored. See *supra* notes 35-49 and accompanying text.

51. *Schenck v. United States*, 249 U.S. 47, 52 (1919) (upholding convictions under Espionage Act for obstructing recruitment of soldiers during World War I on grounds that speech involved, though normally protected, presented a "clear and present danger" of causing a substantive evil that Congress was empowered to prevent, *i.e.*, the spreading

The classic case of falsely shouting “fire” in a crowded theater,⁵² for example, is based not upon the inherent nature of the message, but rather upon the factual context that makes a reasoned reaction to the false message unlikely. An audience in the dark, given a frightening buzzword in a situation suggesting impending doom, is likely to panic, not to think. Shout “fire!” in a sun-lit, uncrowded meadow, say, and you may cause puzzlement, but panic is less likely. The evil to be prevented is not the substance of the communication, a false message that there is a fire, but the chaos that would ensue in the blackened theater. MacKinnon rejects this requirement that regulation of speech be content-neutral and based only upon the factual context in which the statements are made, seeming to fall back upon the proposition that speech that exhibits a tendency to lead to unfortunate attitudes or practical results should be subject to the censor — a viewpoint long discredited.⁵³

Similarly, the test set out in *Brandenburg v. Ohio*⁵⁴ (and its looser ancestor, the clear and present danger test) prohibits revolutionary advocacy (or indeed any advocacy of violence) only in a context where a mob, swept away on a communal tide of passion, may well act upon the exhortations of their goad without a chance to think rationally. Mob psychology, as has been shown again and again, is

of disaffection and resistance to conscription in the ranks); see also *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (in addition to requirement that speech cause an imminent danger of lawless conduct, speaker must intend to cause the lawlessness for the speech to be without First Amendment protection). For a clear account of the development of the *Schenck* doctrine from its rather speech-repressive roots to the far more protective standard embodied in *Brandenburg*, see Frank Strong, *Fifty Years of “Clear and Present Danger”*: From *Schenck* To *Brandenburg* and Beyond, 1969 SUP. CT. REV. 41. See also Tom Hentoff, Note, *Speech, Harm and Self-Government: Understanding the Ambit of the Clear and Present Danger Test*, 91 COLUM. L. REV. 1453 (1991).

52. Posited by Justice Holmes in *Schenck v. United States*, 249 U.S. 47 (1919). See *supra* note 51 and accompanying text.

53. See FEMINISM UNMODIFIED, *supra* note 6, at 179 (“[w]hat unites many cases in which speech interests are raised and implicated but not, on balance, protected, is harm, harm that counts”). MacKinnon thus suggests that any harm suffices, not specifying the degree or the imminence of the requisite harm, nor a *Chaplinsky* category in which the “harmful” speech is not subject to First Amendment analysis. The “bad tendency” test, as it is called, was most famously endorsed by the Supreme Court in *Gitlow v. New York*, 268 U.S. 652, 669 (1925) and in *Whitney v. California*, 274 U.S. 357 (1927). The Court renounced the approach in *Dennis v. United States*, 341 U.S. 494, 507 (1951), although the version of the “clear and present danger” test which that Court erected was none too speech protective. For the content neutrality requirement’s evolution, see Geoffrey R. Stone, *Content Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

54. 395 U.S. 444 (1968). In addition to the danger that the speech cause an imminent danger of lawless conduct (essentially a restatement of the clear and present danger test set out in note 51 and accompanying text), the Court in *Brandenburg* added a specific intent requirement; the speaker must intend to cause the lawlessness for the speech to be properly proscribed. See *infra* note 65 and accompanying text.

nothing like that of individuals.⁵⁵ Under the *Brandenburg* test, the state steps in when the members of a mob are not acting as autonomous individuals but rather as the agents of the speaker, carrying out his or her will.

The same can be said of the infamous "fire" example, where the automatic reaction of people in a dark crowded space conducive to "herd" thinking is relied upon by the speaker. The speaker in this instance knowingly provokes the audience reaction, making it in fact his or her action. The harm MacKinnon would render actionable, that of reinforcing or causing to arise values which the audience members *accept*, and then consciously choose to act upon themselves, is quite distinct.

In First Amendment jurisprudence, if thoughts or images are communicated in such a way that the audience — and in pornography's case, it must be remembered, we are discussing a self-selected audience⁵⁶ — is confronted with them, but are not psychologically pressured to act upon them right away, the law irrebutably presumes that individuals are able to weigh, to evaluate for themselves, the merits of these images or thoughts,⁵⁷ although this presumption may be more a political commitment than an empirical statement. MacKinnon does not accept this distinction, and would hold the writer liable for the use to which his or her ideas are put by *any* audience member.⁵⁸

55. See ROLLO MAY, *POWER AND INNOCENCE* 186 (1972) (distinguishing between "fomented violence" from other kinds of violence, defining it as "a stimulation of the impotence and frustration felt by the people at large for the purposes of the speaker. Modern history is full of instances of how treating people like beasts leads them to become beasts in the process"); Oberschall, *The Los Angeles Riot of August 1965*, in DAVID BOESEL AND PETER ROSSI, *CITIES UNDER SIEGE* 96-97 (1972) (describing infectiousness of violence in riot situations, but rejecting theory of complete irrationality of rioters, concluding that "[w]hile riot behavior cannot be called rational in the everyday common meaning of that term, it does contain normative and rational behavior"); Wada and Davies, *Riots and Rioters*, in JAMES C. DAVIES, *WHEN MEN REVOLT AND WHY* 63 (1971) (characterizing rioters as primarily those with less stake in society; emphasizes "the suggestibility of a crowd").

56. By this I mean that most consumers of pornography presumably buy it at an adult book shop, which involves a deliberate decision to acquire or to view these materials. To some extent this indicates a receptivity to pornography's message or at least a desire to be exposed to it. Unlike experimental subjects, viewers of pornography in the real world are predisposed to it.

57. See, e.g., *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that the final end of the state was to make men free to develop their faculties. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine . . .").

58. What of, for example, the deviant member of the audience? MacKinnon's ap-

MacKinnon, in rejecting this dividing line, and maintaining that we in fact do censor speech that can rationally be found to be harmful, claims that the failure of traditional First Amendment doctrine is its refusal to accept the harms of pornography as "harm, harm that counts."⁵⁹

2. *Beauharnais v. Illinois*

Beyond the cases involving *Chaplinsky* categories excluded from the First Amendment's ambit by judicial *fiat*, MacKinnon relies upon the group libel case, *Beauharnais v. Illinois*,⁶⁰ which permits the imposition of criminal liability for defamatory and degrading statements about racial and other minority groups. Justice Frankfurter's opinion for the majority in *Beauharnais* found libel of a group to be as unprotected as libel of an individual, requiring only that the state be able to show a rational basis for the prohibition of such speech (the lowest level of constitutional scrutiny),⁶¹ and not the far more exacting "compelling state interest" normally required in free speech cases.⁶² Frankfurter found that the state had a rational basis for its censorship of racial epithets in that "the Illinois legislature may warrantably believe that a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits."⁶³

As Justice Black wrote in dissent, the *Beauharnais* approach "degrades First Amendment freedoms to the 'rational basis' level" from their usual preferred position.⁶⁴ MacKinnon's reliance upon this case, largely discredited and possibly overruled by *Brandenburg*, which in-

proach disregards the *attitude* of the author toward the degradation portrayed. John Fowles's *THE COLLECTOR*, for example, would surely fall within the terms of the Mackinnon-Dworkin ordinance, yet the novelist's sympathy is entirely with the *victim*, whose ordeal is portrayed in all of its horror. Perhaps a deeply ill member of the audience could use the work as inspiration for similarly gruesome activities, and yet this does not seem to justify its censorship.

59. FEMINISM UNMODIFIED, *supra* note 6, at 179. MacKinnon claims that the First Amendment does not extend its protection to speech that causes harm. *Id.* at 177-79. See also FEMINIST THEORY, *supra* note 7, at 206-09.

60. 343 U.S. 250 (1952) (upholding a group libel statute applied to racial epithets published by a white supremacist group in a newspaper advertisement).

61. *Id.* at 258-62.

62. *Id.*

63. *Id.* at 263.

64. *Beauharnais*, 343 U.S. at 269 (Black, J., dissenting). Justice Douglas dismissed the Frankfurter opinion contemptuously: "[i]t is a warning to every minority that when the Constitution guarantees free speech it does not mean what it says." *Id.* at 287 (Douglas, J., dissenting).

volved much the same sort of speech and found it constitutionally protected, shows that she is not operating within the mainstream of First Amendment jurisprudence.⁶⁵

The speech regulated by the ordinance does not fall into any of the past or present *Chaplinsky* categories,⁶⁶ necessitating under current doctrine that the ordinance receive strict scrutiny. Indeed, even conceding the continuing validity of *Beauharnais*, this remains the case. As the Seventh Circuit noted in invalidating the MacKinnon ordinance, the ordinance in not permitting context as a defense ignores the requirement that “[w]ork must be an insult or a slur for its own sake to come within the ambit of *Beauharnais*, and a work need not be

65. In *Brandenburg*, the speech held to be protected under the First Amendment was a call for political marches to persuade “our President, our Congress, our Supreme Court” to cease from “suppress[ing] the white race,” threatening that should the “suppression” continue, “it’s possible that there might have to be some revengeance [sic] taken.” 395 U.S. at 444-46. In *Beauharnais*, the speech held unprotected was a call for the Mayor and City Council of Chicago to “halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the negro—through the exercise of police power.” 343 U.S. 250, 276 (1952) (appendix to opinion of Justice Black). In view of the nearly identical nature of the speech involved in the two cases, it has long been believed that *Brandenburg* gutted *Beauharnais* of any precedential weight. See *American Bookseller’s Ass’n v. Hudnut*, 771 F.2d 323, 331 n.3 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986) (subsequent cases have “so washed away the foundations of *Beauharnais* that it could not be considered authoritative”) (citing *Collin v. Smith*, 578 F.2d 1197, 1205 (7th Cir. 1978) *cert. denied* 439 U.S. 916 (1978)); see also LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 861 (2d ed. 1988); but see *Smith v. Collin*, 439 U.S. 916, 919 (1978) (Blackmun, J., dissenting from denial of certiorari) (“[*Beauharnais*] has not been overruled or formally limited”).

66. MacKinnon’s rejection of the obscenity doctrine as a precedential prop and the inapplicability of the other *Chaplinsky* categories are set out in Part III.A. See *supra* notes 35-49 and accompanying text. Indeed, even accepting pornography as “low value speech” under *Chaplinsky*, the Supreme Court has recently held that “these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.) — not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government.” *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2540 (1992). By declaring even low value speech entitled to neutrality in regulation, the Court has substantially reworked *Chaplinsky*, which was itself predicated on the exclusion of low value speech categories from First Amendment strictures, declaring that regulation did not present a First Amendment problem. The same analysis used to invalidate regulation of racist hate speech — a subset of the *Chaplinsky* “fighting words” category — in *R.A.V.* would appear to invalidate the Pornography Victim’s Compensation Act. See *supra* note 13 and accompanying text. Just as did the invalidated St. Paul ordinance of *R.A.V.*, the PVCA targets some proscribable (because obscene) speech, but not all, and the distinction is drawn not on the basis of obscenity’s “distinctly proscribable content,” but on the impermissible criterion of the material’s viewpoint. S. 1521., *supra* note 13.

scurrilous at all to be ‘pornography’ under the ordinance.”⁶⁷ That is, a work need not be issued with the specific intent to defame and need not be defamatory in context — requisites for liability under *Beauharnais*’ libel framework.

The only remaining standard, therefore, by which to judge the ordinance is the hybrid of clear and present danger and intentional advocacy of unlawful conduct created by the Supreme Court in *Brandenburg*. As did the classic clear and present danger test of Justices Holmes and Brandeis, the *Brandenburg* test requires that speech be “directed to inciting or producing imminent lawless action and is likely to produce such action.”⁶⁸ In addition, the speaker, must intend that the imminent lawless result in fact occur.⁶⁹

While MacKinnon does allege that the harm done by pornography is clear and present, it is unclear whether she accepts the validity of the clear and present danger test, let alone the more rigorous *Brandenburg* standard.⁷⁰ By failing to establish either an intent or an imminence requirement, MacKinnon’s definition is simply not within the constitutional framework that is in place in the First Amendment. At times, she seems to recognize this, and presses for the creation of a new *Chaplinsky* category for pornography.⁷¹ As there is no case law on this innovative point save *American Bookseller’s Ass’n v. Hudnut*⁷² — and that ruling has not ended the debate, but rather has transferred its venue to the United States Congress in a version of the ordinance limited to obscene speech⁷³ — it is worthwhile to consider the rest of MacKinnon’s underlying suppositions, and what her approach would mean to First Amendment jurisprudence if ever adopted.⁷⁴

67. *American Bookseller’s Ass’n v. Hudnut*, 771 F.2d 323, 332 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986).

68. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1968).

69. *Id.*

70. FEMINISM UNMODIFIED, *supra* note 6, at 179, 193-95.

71. See FEMINISM UNMODIFIED, *supra* note 6, at 166-67 (“Substantively considered, the situation of women is *not really like anything else*. . . . Doing something legal about a situation that is not really like anything else is hard enough in a legal system that prides itself methodologically on reasoning by analogy”) (emphasis in original).

72. 771 F.2d 323, 325 (7th Cir. 1985). See *supra* note 67 and accompanying text.

73. See Pornography Victims Compensation Act, *supra* note 13.

74. Professor Higgins’s critique of this Article, claiming that I focus exclusively on “speech that falls within the core of the First Amendment’s protection” in evaluating MacKinnon’s view, see Higgins, *supra* note 21, at 82, in my judgment fails to recognize that after situating the MacKinnon-Dworkin ordinance within the present constitutional framework, I seek to answer the question whether we should accept MacKinnon’s invitation to create a new *Chaplinsky* category for pornography. The rest of this Article essentially grapples with the question of whether the values of the First Amendment, and, even more generally, of our society, are enhanced or diminished by such a new category. It seems to me that this question must be answered in order to reach a rational answer to

C. "The Personal Is the Political": MacKinnon and Privacy

A third major pillar supporting MacKinnon's view is her absolute rejection of the privacy doctrine. This rejection is somewhat unusual, as the doctrine is the foundation of one of the women's movement's shining victories, *Roe v. Wade*.⁷⁵ Moreover, privacy and autonomy rhetoric pervade the writings of more traditional feminists, and have been the source of much of their ideological appeal.⁷⁶

MacKinnon conceives of the privacy doctrine as a trap, a seductively liberating doctrine that in fact strengthens male dominance by guaranteeing an isolated sphere in which to operate. By sanctifying the home, where abuse of women is most pervasive, MacKinnon writes, this liberal doctrine gives man a legal *carte blanche* to abuse "their women" and "whip them into shape" behind closed doors:

For women the measure of the intimacy has been the measure of the oppression. This is why feminism has had to explode the private. This is why feminism has seen the personal as the political. The private is public for those for whom the personal is political. In this sense, for women there is no private, either normatively or empirically. Feminism confronts the fact that women have no privacy to lose or to guarantee. . . . The doctrinal choice of privacy in the abortion context thus reaffirms and reinforces what the feminist critique of sexuality criticizes: the public/private split. . . . The right to privacy looks like an injury presented as a gift, a sword in men's hands presented as a shield in women's.⁷⁷

the MacKinnon invitation, as opposed to the original *Chaplinsky* approach of legislation by *fiat*. The failure of the Court to explain why those classes of "low value" speech are so denominated has deprived the jurisprudence of coherence and is not an error which should be compounded by repetition.

75. 410 U.S. 113 (1973).

76. For an example of such a "more traditional feminism," see VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* (1928). While Professor Higgins correctly points out that Shakespeare's sister as envisioned by Woolf was not oppressed by the state, but by "social constraints," Higgins, *supra* note 21, at 84 n.33, she forgets that one of the most onerous constraints faced by the fictional Judith was her lack of privacy, from which Woolf took her title.

77. *FEMINIST THEORY*, *supra* note 7, at 191; *FEMINISM UNMODIFIED*, *supra* note 6, at 102 ("The right of privacy is a right of men 'to be let alone' to oppress women one at a time"). MacKinnon, it should be noted, supports the right of a woman to have an abortion on the grounds of sexual equality, although the reasoning is to me somewhat murky. Presumably, the right grants women a measure of power and anything that empowers women in any way helps lead toward sexual equality. Oddly, MacKinnon further asserts that the status of the fetus is irrelevant. The choice "must be *women's*, but not because the fetus is not a form of life. . . . I cannot follow that. Why should women not make life or death decisions?" she writes, blithely ignoring the fact that it is *never* considered legitimate for anybody, male or female, to decide to end another's life *in the interests of the decider*. See *FEMINISM UNMODIFIED*, *supra* note 6, at 94 (emphasis in original); *FEMINIST THEORY*, *supra* note 7, at 186. Even a military officer, who makes life and death

This rejection, however, seems to be premised on a rather gross misunderstanding of the privacy doctrine.⁷⁸ Indeed, if there is any constitutional doctrine MacKinnon should find objectionable on these grounds, it is not the privacy doctrine but rather the Fourth Amendment's requirement of probable cause to support a search by the police of the home of a citizen.

Unlike the privacy doctrine of *Roe*, the Fourth Amendment prohibits police from forcibly entering a private dwelling place unless they have probable cause to believe a crime is in progress. Thus, in cases where probable cause is absent, the Fourth Amendment could be said to prevent police interference in situations where abuse *is* going on behind closed doors. *Roe*, however, simply establishes the right of each person to control his or her body free of state interference as a fundamental liberty that can only be infringed upon a showing of a compelling state interest.⁷⁹

MacKinnon assumes that the privacy doctrine protects spouse abuse in the home, but this is not so. Meaningful, voluntary, consent is a necessarily implicit prerequisite for any application of the privacy doctrine.⁸⁰ *Roe* and *Griswold v. Connecticut*⁸¹ are based upon the protection of the *consensual intimacy* of couples (a protection later extended to heterosexual lovers).⁸² It is not based upon the nature of the *home*, as sacred, although Justice Douglas' language about the "sacred precincts of the marriage bed" can be read out of context to support such a notion. It is not *where* the state seeks to intervene that

decisions, is not permitted to make them on the basis of his or her selfish interests. See *United States v. Dykes*, 6 M.J. 744 (N.C.M.R. 1978); compare GLANVILLE WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 197-205, 225-36 (1957) (arguing, in discussion of therapeutic abortions, that even treating the fetus as a life, the doctrine of "double effect" permits the *saving* of one life (the mother's) at the expense of another (the fetus's) when not acting would cause the loss of both lives, and extending that logic to situations where other social goods can accrue).

78. This misunderstanding is shared by Professor Higgins. Higgins, *supra* note 21, at 84-85.

79. *But see* *Planned Parenthood v. Casey*, 119 S. Ct. 2791 (1992) (plurality opinion analyzing *Roe* treats abortion right as less than fundamental, although still important).

80. While the development of constitutional privacy doctrine is yet in its infancy, with the bulk of the post-*Roe* cases dealing specifically with abortion rights, the requisite of consent for any application of the privacy doctrine can be shown from the grounding of *Roe v. Wade* and *Griswold v. Connecticut* in each *individual's* personal constitutional right to autonomy. With this as the essential grounding of the privacy doctrine, logic dictates that coercion or undue influence of any kind would negate the doctrine's applicability in a given case. *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

81. 381 U.S. 479 (1965).

82. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *but see* *Bowers v. Hardwick*, 478 U.S. 186 (1986) (declining to extend *Griswold's* privacy analysis to homosexual sodomy).

makes *Griswold* special, but rather what occurs there.⁸³ Domesticity, as opposed to privacy, is what one has absent consent. The home can be, and frequently is, a place of *domestic* abuse, but such abuse is not in any way protected by the right to privacy. The right does not extend to couples as a unit, despite early language to that effect. The right to privacy belongs to *each* individual, female or male and is

within the meaning of the term "liberty" as used in the Fourteenth Amendment. *First is the autonomous control over the development and expression of one's intellect, interests, tastes, and personality. . . . Second is freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children. . . . Third is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf.*⁸⁴

Absent a meaningful consent, one formed without fear or undue influence, to whatever activity the state seeks to regulate, privacy interests are not in any way implicated. The fact that privacy-implementing doctrines may not provide sufficient protection for an unconsenting party in a presumptively private setting does not impact upon the doctrine's fundamental precept that the individual should have autonomy over his or her body and psyche. Indeed, this concept, properly applied, can provide remedies for women whose autonomy is violated within the home.

By removing the only precedential basis for protecting sexual conduct in the home, and by declaring that "feminism has had to explode

83. See WILLIAM O. DOUGLAS, *THE RIGHT OF THE PEOPLE* 87-93 (1958).

84. *Roe v. Wade*, 410 U.S. 113, 211, 213 (1973) (Douglas, J., concurring) (emphasis in original). Interestingly, the right to privacy as elucidated by Douglas provides an alternate basis to the civil right of action I proposed for models whose consent was not meaningfully given. See *supra* note 22-28 and accompanying text. For example, New York State's Civil Rights Law § 51 permits an individual to recover damages if another uses the plaintiff's "name portrait or picture" for commercial purposes without first obtaining consent. N.Y. CIV. RIGHTS LAW § 51 (McKinney 1992). This statute has been held to create "a right of privacy" and a corresponding "right of publicity" based upon the right to privacy doctrine that each individual has the right to autonomy over his or her self. See *Stephano v. News Group Publications*, 474 N.E.2d 580 (N.Y. 1984); see also *Ippolito v. Ono-Lennon*, 526 N.Y.S.2d 877, 883 (N.Y. Sup. Ct. 1988); see generally Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); PROSSER AND KEETON, *TORTS* 850 (5th ed. 1984). The privacy formulation may even be preferable to the "one may not profit from one's wrong" approach I have suggested, in that it need only be shown that the model did not consent to the distribution of the film commercially, a lower showing than that of coercion or intimidation required to establish a "wrong." Despite MacKinnon's assertion, I believe that under this approach the right of privacy can be not only a shield in women's hands, but even a sword.

the private,"⁸⁵ MacKinnon leads inexorably to the conclusion that there is no sphere of the individual's life that the state may not touch. If the personal is the political, as MacKinnon asserts, then the personal is subject to the regulation of the state. In MacKinnon's schema, therefore, there is no point at which the individual may cry "hands off."

Absent a right to privacy, any activity not explicitly mentioned in the text of the Constitution that the state can rationally find leads to a harm that the state is empowered to prevent may be regulated or prohibited outright.⁸⁶ Gone entirely from MacKinnon's conception of privacy are the notions of limited government and institutional distrusts which have largely driven political theory since Montesquieu.⁸⁷ The subordination of government to the individual citizens who created it, extending it only those powers which they deem absolutely necessary to preserve social order with the maximum amount of liberty — all of these quaint notions are discarded in MacKinnon's jurisprudence. Instead we have a state with the authority to regulate every component of the individual's life, from the forms of sexual intimacy they may conduct,⁸⁸ to the attitudes which they are to have.⁸⁹ The

85. FEMINIST THEORY, *supra* note 7, at 191. See *supra* notes 77-79 and accompanying text.

86. Under this logic, for example, the Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), that consensual homosexual intercourse may be rendered criminal is patently correct, a result which, paradoxically, most of MacKinnon's supporters (if not MacKinnon herself) would, it seems, find objectionable. In *Neutrality in Constitutional Law*, Cass Sunstein condemns *Bowers*, but likewise rejects the privacy argument in both the pornography and abortion contexts. Cass Sunstein, *Neutrality in Constitutional Law*, 92 COLUM. L. REV. 1 (1992) [hereinafter Sunstein, *Neutrality*].

87. See CRICK, *supra* note 5, at 15-34.

88. FEMINIST THEORY, *supra* note 7, at 140-43 (analyzing heterosexuality, homosexuality and lesbian sadomasochism as victim-victimizer relationships, reaffirming the dominance-submission social model); FEMINISM UNMODIFIED, *supra* note 6, at 60-61 (heterosexuality not a choice but "the structure of the oppression of women"), 85-92 (characterizing rape as "very little different from what most men do most of the time and call it sex"), 15 (lesbian sadomasochists "would sacrifice all women's ability to walk down the street in safety for the freedom to torture a woman in the privacy of one's basement without fear of intervention in the name of everyone's freedom of choice"). As shown, MacKinnon believes that harmful conduct of whatever stripe can and should be regulated by the state, without reference to the First Amendment or the right to privacy.

89. As has been discussed, a major reason underlying MacKinnon's espousal of the regulation of pornography is the establishment of an "anti-woman" climate. Professor Higgins, in concluding Part III of her response, joins MacKinnon in calling for an "activist state." Both see the conflict as "women against men who abuse, rape, harass, discriminate against, in short, oppress women." Higgins, *supra* note 21, at 85. Neither addresses the issue of why the prevention and punishment of such oppressive behavior does not provide sufficient redress without the creation of this "activist state" which has the power to regulate the "tone" of society, extending even to what forms of intimacy may be conducted or even written about. Absent a right to privacy or right to self-

state's role in promulgating a sexual orthodoxy and in suppressing any and all dissenting views⁹⁰ is a stringently maternalistic one.

For MacKinnon, whose Marxist strain should be noted,⁹¹ the state acts legitimately in fostering attitudes beneficent to equality among citizens and in suppressing actions and attitudes that deny or interfere with an egalitarian sense of community, (that is, which "cause harm that counts"). As with many other Marxists, MacKinnon is uncertain of the course than an equal society, in her terms, would take.⁹² However, it seems quite clear that the class whose interests she wishes to advance is an expanded notion of the proletariat — she includes within it not just women but also victims of racial discrimination, homosexuals and the working class.⁹³ Despite the sympathy one must feel with such a goal, MacKinnon's resultant jurisprudence is ulti-

expression, both of which MacKinnon (and, seemingly, Professor Higgins) would abolish, it is hard to see how any form of individual autonomy can be said to exist. While Higgins refers in a favorable manner to individual autonomy, Higgins, *supra* note 21, at 87, neither she nor MacKinnon provides an enforceable guarantee of that principle. Unfortunately, the cynical wisdom that a right without a remedy is no right at all belies this alleged support of individual autonomy; absent some method of enforcement, individual autonomy is unprotected against any depredation Professor Higgins's "activist state" might choose to make.

90. FEMINISM UNMODIFIED, *supra* note 6, at 15 ("In this protection racket of tolerance, everybody's sexual bottom line is rhetorically defended as freedom of expression, which has the political genius of making everybody potentially complicit through the stirring between their legs. But . . . anyone with an ounce of political analysis should know that freedom before equality, freedom before justice, will only further liberate the power of the powerful and will never free what is most in need of expression. If what turns you on is not your bottom line, and if you understand that pornography literally means what it says, you might conclude that sexuality has become the fascism of contemporary America and we are moving into the last days of Weimar"); *Id.* at 60-61 (sexuality compared to jobs under Marxist analysis: "if you even like your work . . . does that mean, from a marxist perspective, your work is not exploited?"). Sunstein argues also for the suppression of pornography in part because "pornography reflects and promotes attitudes toward women that are degrading and dehumanizing and that contribute to a variety of forms of illegal conduct, prominently including sexual harassment." Sunstein, *Neutrality*, *supra* note 86, at 25. Revealingly, Sunstein also argues in favor of prohibiting surrogate motherhood agreements on the grounds that "[s]urrogacy arrangements, if widespread, could affect attitudes, on the part of both men and women, about appropriate gender roles." *Id.* at 47. Thus, far from the more familiar argument that communicative actions (such as symbolic speech) are sometimes regulated despite their communicative content, Sunstein argues that a primary reason for regulating conduct is its likely impact upon public attitudes — that is, its communicative content.

91. FEMINIST THEORY, *supra* note 7, at 3-80, consists of a discussion of the relation between feminism and Marxism and ends with a discussion of the effort to synthesize the two. While MacKinnon is a feminist before she is a Marxist, she integrates much of Marxist thought into her own. See also FEMINISM UNMODIFIED, *supra* note 6, at 58-61.

92. FEMINIST THEORY, *supra* note 7, at xiii-xiv, 249.

93. FEMINISM UNMODIFIED, *supra* note 6, at 55-57. Despite MacKinnon's support of equal rights for homosexuals, her logic, as explained above, would remove the one possible constitutional bar to their persecution — the right to privacy. This fact should

mately totalitarian. It is not, it must be swiftly added, totalitarian in the sense of the tyrannies of Stalin, Mussolini, or Hitler, but rather in the sense of Plato's *Republic*, where the very music citizens may play and hear is subject to the imprimatur of the state.⁹⁴ The commitment to a limited government that is not able to exert such a reach is too basic to be fought out here. It is sufficient to note that MacKinnon does not share this commitment.

D. Who May Speak Freely? MacKinnon and the Legitimacy of Dissenting Views

MacKinnon repeatedly emphasizes that pornography "is not speech for women,"⁹⁵ a declaration that is profound in significance. It should not be simply written off with the flip (although true) reply that men's speech deserves constitutional protection. This easy answer misses the most interesting feature of MacKinnon's claim. She is not just advertent to the fact that the speaking done in pornography is not that of the models or actresses, although that is certainly a part of her meaning.⁹⁶ Nor is she referring to the fact that the vast bulk of pornography is written by and aimed at men, also a part of her observation.⁹⁷ Rather, she asserts that women who write pornographic materials themselves are not engaged in women's speech, nor are those women who defend the right to create pornography:

[W]hen women are aroused by sexual violation, meaning we experience it *as* our sexuality, the feminist analysis is . . . not contradicted, it is *proved*. The male supremacist definition of female sexuality as lust for self-annihilation has won. . . . [s]exism would be trivial if this were merely exceptional. (One might ask at this point not why some women embrace explicit sadomasochism, but why any women do not).⁹⁸

For MacKinnon, women's speech is not simply the exercise of woman's right to free speech, whatever it is she chooses to say. Rather, it is speech which is in the interests of women as a group; which is feminist speech. Feminist speech has a definition for MacKinnon: "you will notice that I equate 'in my view' with 'feminism',"⁹⁹ she

not be obscured because of the regrettable failure of the Court to follow *Griswold's* logic in *Bowers*.

94. PLATO, *THE REPUBLIC* 161-65 (D.Lee ed., Penguin Publishing Co. 1974).

95. FEMINISM UNMODIFIED, *supra* note 6, at 193-96; FEMINIST THEORY, *supra* note 7, at 205, 208-11.

96. *Id.*

97. FEMINISM UNMODIFIED, *supra* note 6, at 194.

98. *Id.* at 160-61 (emphasis in original).

99. *Id.* at 49; see also FEMINIST THEORY, *supra* note 7, at 117 ("radical feminism is

once said in an unusual burst of self-perception. Those women who do not share MacKinnon's view have been tamed by the system:

Women who oppose the civil rights law against pornography are simply conservative about other things [than are traditional conservatives]. When they defend the life they identify with, it is the sexual status quo they defend. . . . Acknowledging civil rights for women in pornography suggests that they are victims of restricted options on the basis of their sex and that some are directly coerced. This demeans as victims women who choose to survive through sexual sale through pure free will. . . . These women sense a judgment on their lives: that they have gone along with and sometimes even enjoyed inequality in the sexual sphere. They would rather live that way forever, and make sure other women do too, than face what it means, in order to change it. They recommend appeasement. Enforce the bargain, the bargain with *their* men. They may one day explain why women and children must be tortured and abused or no one can freely think, write, or publish.¹⁰⁰

These women, according to MacKinnon, have accepted a stake in the system; they are "collaborators," or "appeasers," conjuring up images of Neville Chamberlain's feeble sellout to Adolf Hitler. And, just as MacKinnon targets men who defend the rights of pornographers, anti-censorship feminists are vilified by her, their positions distorted to sound as though they defend rape and torture when in fact only consensual conduct forms a ground of difference between MacKinnon and liberals.¹⁰¹ As stressed before, in a liberal jurisprudence, there is no reason to extend constitutional protection to the commercial exploitation of an actual rape.¹⁰² Both liberal feminists and "pornographic" women are, in MacKinnon's view, reacting to the social matrix that seeks to engulf them — liberal women by defending a sanitized, never-never land version of the status quo, and "porno-

feminism"). That MacKinnon is not always — or has not always been — so dogmatic should be noted: "I speak as a feminist although not all feminists agree with everything I say." FEMINISM UNMODIFIED, *supra* note 6, at 21.

100. FEMINISM UNMODIFIED, *supra* note 6, at 226.

101. See FEMINISM UNMODIFIED, *supra* note 6, at 13, in which MacKinnon quotes a female liberal who blamed Linda Marchiano for "let[ting] this happen to her." MacKinnon is quite right to attack this particular form of imbecility. For liberal feminist writings concerned with the dangers of pornography yet opposing censorship, see Carole S. Vance, *Pleasure and Danger: Towards a Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 1-27 (Carole S. Vance, ed. 1991). See also Intons-Peterson & Roskos-Ewoldsen, *Mitigating the Effects of Violent Pornography*, in FOR ADULT USERS ONLY (Susan Gubar & Joan Hoff eds., 1989).

102. See *supra* notes 22-28 and accompanying text.

graphic" women by giving in to the actuality.¹⁰³

It is important to note that the argument that pornography is not women's speech, but rather silences women, has two components. Beyond MacKinnon's argument that pornography terrorizes women into silence and that counterspeech cannot be effective,¹⁰⁴ the concept that the speech of a woman is anything but women's speech shows her exaltation of the collective over the individual in stark relief. MacKinnon sets that speech which — in her judgement — benefits women as a class apart; only when a woman conforms to MacKinnon's orthodoxy is her speech women's speech. Anne Rice's three novels, published under the pseudonym A.N. Rocquelaure, do not constitute women's speech, exploring as they do sado-masochistic sex in various manifestations,¹⁰⁵ nor does her novel, *Exit to Eden*,¹⁰⁶ under the name Anne Rampling. Similarly, Pat Califia's writings about lesbian sado-masochism would be held unprotected.¹⁰⁷ But it is more than the mere holding of such works unprotected that is disturbing; it is the fact that they are not considered "women's speech." By not fitting the orthodoxy of feminism as defined by MacKinnon, Rice and Califia (and others, but two examples will suffice) are seemingly drummed out of their sex.

It is odd that MacKinnon, who writes movingly of the social costs paid by Andrea Dworkin and especially by Linda Marchiano in coming forward with their experiences,¹⁰⁸ does not even address the question of whether any grace should be extended to the serious artist (Rice) or the sincere representative of a sexual minority (Califia). While of course the same questions are presented with regard to their male counterparts, such as Robert Mapplethorpe, it is especially poignant that these women face censorship in the name of feminism. For whatever reasons, Rice's artistic vision¹⁰⁹ frequently recurs to

103. See FEMINISM UNMODIFIED, *supra* note 6, at 198-206; FEMINIST THEORY, *supra* note 7, at 209-12, 314.

104. See *infra* notes 115-22 and accompanying text.

105. THE CLAIMING OF SLEEPING BEAUTY, BEAUTY'S PUNISHMENT and BEAUTY'S RELEASE, are all works by Anne Rice. See KATHERINE RAMSLAND, PRISM OF THE NIGHT: A BIOGRAPHY OF ANNE RICE 213-38 (1991).

106. ANNE RAMPLING, EXIT TO EDEN (1985).

107. For Pat Califia's writings as cited by MacKinnon, see FEMINIST THEORY, *supra* note 7, at 142. Califia has also published a collection of avowedly pornographic short stories with a revealingly candid introduction under the somewhat unfortunate title of MACHO SLUTS (1989). I emphasize these examples as being the most stark and favorable to MacKinnon, but others (Anais Nin for example) exist.

108. FEMINISM UNMODIFIED, *supra* note 6, at 132-33.

109. Use of sado-masochotic imagery can be found in Rice's vampire trilogy as well. See, e.g., INTERVIEW WITH THE VAMPIRE 238, 245 (1976); see also THE VAMPIRE LES-TAT 157 (1985) and especially THE QUEEN OF THE DAMNED 376 (1988). While all three

what MacKinnon would term pornography, and Califia too had to decide whether to be an *honest* writer or a politically correct one.¹¹⁰ MacKinnon, in the name of women, would choose for these women — by the blunt instrument of the law. The individual woman is silenced in the name of providing free speech for women — a paradox if ever there was one.

Paradoxical or not, MacKinnon seeks to empower some vague, uniform collective called women (or, to steal a term from other radical feminists, “womenspirit”) by silencing not just men but individual women who are not in tune with this collective spirit.¹¹¹ Our system of jurisprudence honors dissent.¹¹² For MacKinnon dissent is an evil to be crushed.¹¹³

Perhaps the most genuinely chilling aspect of MacKinnon’s thought is her belief that silencing all opposition is the correct method to liberate women. She claims that pornography tyrannizes women and silences them:

I learned that the social preconditions, the presumptions, that underlie the First Amendment do not apply to women. The First Amendment essentially presumes some level of social equality among people and hence essentially equal social access to the means of expression. In a context of inequality between the sexes, we cannot presume that that is accurate. The First Amendment also presumes that for the mind to be free to fulfill itself, speech must be free and open. . . . [P]ornography contributes to enslaving women’s minds and bodies. As a social process and as a form of “speech,” pornography amounts to terrorism and promotes not

volumes were popularly successful (the first two especially), they have also received high esteem from critics. See RAMSLAND, *supra* note 105, at 314-15.

110. “We live in fear of being known, and such fear stifles the nascent erotic wish before the image of what is wished for can be fully formed. We know we are ugly before we have even seen ourselves and the injustice of this, the falsehood, chokes me. . . . I could keep my sexuality private . . . [T]hat involves telling a lie of omission—becoming invisible as a pervert; assuming an undeserved mantle of normalcy and legitimacy.” MACHO SLUTS, *supra* note 107, at 9. While many might feel empowered to sit in judgement of Califia’s lifestyle and writings, I can only admire her courage, and her candor.

111. In FEMINIST THEORY, *supra* note 7, at 40, MacKinnon writes: “Liberal feminism takes the individual as the proper unit of analysis and measure of the destructiveness of sexism. For radical feminism, although the person is kept in view, the touchstone for analysis and outrage is the collective (group called women). . . . In radicalism, women is a collective whole, a singular noun. . . . [I]n radical feminism [the personal comprises the collective].” *Id.* at 40.

112. For an enlightening view of the American tradition of honoring dissenters (in theory if not always in practice), see STEVEN H. SCHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE (1991).

113. This viewpoint does not go directly to the constitutional validity of the ordinance but provides a chilling vision of the goal that MacKinnon hopes to reach through its enactment and enforcement.

freedom but silence. Rather, it promotes freedom for men and enslavement and silence for women. . . . [u]nder conditions of sexual dominance, pornography hides and distorts truth while at the same time enforcing itself, imprinting itself on the world, making it itself real.¹¹⁴

Thus, silencing their oppressors will liberate women. The way to promote equality is not counter-speech, as Justice Brandeis would have it,¹¹⁵ but the oppressing of the oppressor. For MacKinnon, the conditions under which counter-speech can be effective do not exist because pornography undermines women's credibility when they do speak and terrorizes them into not speaking at all.¹¹⁶

This logic creates the danger that not only pornographers should be silenced, but any speaker whose message is deemed by MacKinnon to be harmful to the interests of women as well. Slippery slope arguments are usually the last refuge of the desperate academic, but this one has already been *borne out by the facts*. Much of what MacKinnon *would permit* to be banned might well be deemed to have literary, artistic, or political value, as was noted earlier. Moreover, MacKinnon and Dworkin have demonstrated their *willingness* to silence those who merely advocate the rights of pornographers. In the political process of passing the Minneapolis ordinance, for example, MacKinnon and Dworkin manipulated the hearings and the procedure by which the ordinance was passed in such a way as to totally disable dissent.¹¹⁷

114. FEMINISM UNMODIFIED, *supra* note 6, at 129-30.

115. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

116. FEMINISM UNMODIFIED, *supra* note 6, at 132.

117. *See* DOWNS, *supra* note 12, at 65-87. While there are many examples given by Downs to this effect (neglect by the ordinance's proponents of concerns of black political action groups, liberal feminist groups, etc.), I have selected a few of the more appalling examples of "steamrolling" by the ordinance's proponents to discuss here. While some opposing voices were heard, they were unable to prepare thoroughly due to the unprecedented speed with which the ordinance was pushed through, and the difficulty of acquiring a copy of it. According to Matthew Stark, "until about a day before the city council voted on it, [nobody ever] gave us a copy of [the ordinance]. We asked for it, but [they] kept playing games. . . . [F]or a period of a month or more, we didn't have anything." *Id.* at 85. The selection of witnesses and their questioning were ceded to MacKinnon and Dworkin, who made sure that witnesses were properly guided, as was Edward Donnerstein, a leading researcher on the social effects of pornography. Mr. Donnerstein was discouraged from qualifying his remarks. *Id.* at 84. MacKinnon shifted roles from that of advocate to that of expert hired by the council whenever it suited her purpose. *Id.* at 79-80, 84-85. Needless to say, as the questioning was left to the authors of the ordinance, no cross-examination was permitted. *Id.* at 80-83. Finally, when any of the unprepared, uninvited opposition *did* get to testify, they "were drowned out by the antics of the selected audience." *Id.* at 82. It is not difficult to guess by whom the audience was selected. Shouting down opponents is a favorite tactic of MacKinnon's and Dworkin's supporters; Harvard Professor Alan Dershowitz described the difficulty he encountered when, in the

It seems clear from these silencing tactics, when combined with the speed with which the ordinance was pushed through and the difficulties they created in evaluating the ordinance, that Dworkin and MacKinnon strove to avoid any consideration or discussion of the ordinance. Rather, they sought to secure its passage, regardless of whether it expressed the will of the people. For Donald Alexander Downs, MacKinnon's abusive tactics of "steam-rolling" her opposition is a regrettable lapse by a passionate true believer, who in her excessive zeal, seizes upon unworthy weapons. I contend that these tactics are rather implicit in her underlying theory. The idea that an oppressed minority can be empowered by silencing its oppressors and those who defend the rights of the putative oppressors, legitimizes the tactics of oppression, and indeed perhaps mandates them.

It is MacKinnon's contempt for the political process, evidenced by her manipulation of her role as a consultant and her willingness to disenfranchise political opposition, which supports the conclusion that she is a totalitarian. Not only does she reject the notions of free speech and of zones of individual freedom from government intrusion, she is willing to short-circuit the democratic process in such a way that only her view is aired. The will of the people is to be formed, manipulated by one-sided presentation and "guided" in the direction MacKinnon wishes it to move. In short, the political process becomes nothing more than a rubber stamp for already reached conclusions. For MacKinnon, democratic self-rule, political rule, has no value of its own.¹¹⁸ By any standards, the elimination of privacy, the disenfranchisement of all potential opposition¹¹⁹ and the emphasis on atti-

course of a debate with Dworkin, her supporters sought to shout him down whenever he spoke. DERSHOWITZ, *supra* note 18, at 190-91.

118. See FEMINIST THEORY, *supra* note 7, at 157-60.

119. Indeed, even liberal feminists are discredited by MacKinnon. FEMINIST THEORY, *supra* note 7, at 117 ("radical feminism is feminism"). That liberal feminists, such as June Callwood, felt their concerns were ignored by the Dworkin-MacKinnon group in the Minneapolis political process is especially compelling evidence of the consequence for MacKinnon of not being with MacKinnon 100 percent: your opinion becomes irrelevant, something to be brushed aside. See DOWNS, *supra* note 12. To be less than a total supporter is to be a collaborator, or traitor as shown above. For liberal feminist views against censorship (which I have sought not to echo), see WOMEN AGAINST CENSORSHIP (Varda Burstyn, ed., 1985); Nadine Strossen, *The Convergence of Feminist and Civil Liberties Principles in the Pornography Debate*, 62 N.Y.U. L. REV. 201 (1987). For perhaps the most appealing, and gentlest, feminist critique of MacKinnon, see Ruth Colker, *Feminist Consciousness and the State: A Basis for Cautious Optimism*, 90 COLUM. L. REV. 1146 (1990). While Professor Colker is (in my view) unduly laudatory of MacKinnon, her critique of her conclusions within a shared feminist perspective, as distinguished from my own liberal, pro-feminist framework, is hard to resist. Colker also valuably points out the dangers of intolerant, disrespectful rhetoric on both sides of this debate, a pitfall which is often difficult to avoid. *Id.* at 1169-70. Interestingly, Professor Higgins will

tude correction by the state can only be regarded as totalitarianism. The allegedly benevolent nature of the totalitarians, who seek to create a society in which equality and mutual respect would be at a premium, but liberty would be a thing of the past, does not alter the nature of the society that they seek to build.

IV. Why Protect Speech That Harms?

The fact that MacKinnon's political principles, which inform the model ordinance, are starkly different from those taken for granted in the American system does not, of course, completely undercut the ordinance. MacKinnon does raise the \$64,000 question of First Amendment jurisprudence: why, in heaven's name, do we protect speech that causes harm?¹²⁰ The essential question of why we regulate the incidental harms which accompany speech (mob violence, for example) but do not regulate speech that directly inflicts harm upon individuals or upon society as a group, is usually evaded.

Surely MacKinnon is right and the uttering of racist slurs is as much an injury as the violence that may be provoked by such slurs. Why must we wait for the Klan to become physically violent or for the American Nazi Party to actually assault Jewish citizens, and not recognize that the man or woman hearing diatribes against "niggers" or threatened with the gas chambers (which they may have barely avoided in their youths) *has* been injured as much as if punched or kicked.¹²¹ Indeed, the United States is almost alone among the nations in the extent to which we protect speech whose very utterance inflicts injury.¹²²

allow that there are possibly "good reasons — feminist reasons — for opposing such regulation" of pornography. Higgins, *supra* note 21, at 77 n.2. While Professor Higgins's willingness to allow for differences among feminists is an improvement on MacKinnon's inflexibility, I find her implicit belief that the only valid reasoning is feminist reasoning profoundly troubling.

120. MacKinnon herself does not ask the question, as we have seen, claiming that we do not avowedly protect speech that causes harm, but rather that our definition of causality is too narrow. This is a misapprehension. Much speech may cause various styles of harm; only that harm that presents a clear and present danger of illegal conduct has been regulable from (essentially) the dawn of First Amendment jurisprudence. See *Schenck v. United States*, 249 U.S. 47 (1919). The *Brandenburg* test that is now in effect requires even more to permit suppression; not simply that harm may occur, but that direct and imminent lawlessness will ensue, and that it is intended.

121. See *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (invalidating ordinance discriminating among "fighting words" and prohibiting those promoting racial, sexual and ethnic biases).

122. For example, the British have the Race Relations Act. The American failure to ratify the European Convention of Human Rights is attributed to its anti-hate agitation provisions which are violative of the First Amendment.

The pornography issue is an especially apt one for posing such a general theoretical question in a concrete and emotionally compelling context. While the empirical evidence is not perfectly clear in establishing a *causal* relationship between pornography and sexual violence and anti-women attitudes,¹²³ at the very least a reinforcing and legitimating of such attitudes seems reasonable to presume. It seems like a worthwhile exercise to accept MacKinnon's and Dworkin's evidence of harm and still ask the question: should pornography be deemed to be protected speech, and if so is there a better reason than simply that the First Amendment compels us to do it?¹²⁴

Nonetheless, the *kind* of harm involved must play a role in the discussion. Other than the direct harms, which plainly can be appropriately regulated, the harms that MacKinnon asserts flow from pornography boil down to essentially this: people will believe it.¹²⁵ Men especially will believe it, and act on it. Pornography's message, MacKinnon asserts, pervades society, leading to a devaluation of women and their objectification.¹²⁶ MacKinnon's contention that this breed of harm is one against which we must be protected is not simply at odds with over seventy years of First Amendment jurisprudence, it violates every one of the rationales underlying the First Amendment. These rationales seem to have as their unifying theme the need for a

123. Again, I have no intention of being exhaustive (or anywhere near it) on this topic, especially as I will be accepting MacKinnon's proposition *arguendo*. However, a few citations to empirical views disputing those cited by MacKinnon include ALAN SOBLE, *PORNOGRAPHY* (1986) (an especially interesting view as it comes from an author sharing MacKinnon's Marxist bias); WALTER KENDRICK, *THE SECRET MUSEUM* 231-35 (Penguin Books 1988); ALAN DERSHOWITZ, *TAKING LIBERTIES* 200-02 (1989).

124. Before proceeding, it would be well to narrow the field of discussion, by pointing out once again that it is only the *attitudinal* harms which may be protected by the First Amendment. The direct or overt harms are plainly appropriate grounds for suppression of the materials, civil liability and criminal prosecution. *See supra* notes 22-28 and accompanying text. Insofar as she points out the lack of energetic and sympathetic use of these legal weapons against direct harms, MacKinnon performs a valuable public service.

125. In view of Professor Higgins's claim that the reason we permit regulation of commercial speech is that people will believe its falsehoods, Higgins, *supra* note 21, at 87, I must hasten to add that I am not assuming a divinely implanted ability on the part of the American citizenry to discern empirically false statements of physical reality — such as how many caplets is an appropriate dosage, or are cigarettes *really* good for one's digestion. Nor am I postulating that each and every American can be trusted to be psychically aware of the truth or falsity regarding every tabloid story regarding the British Royal Family. Rather, I am postulating that in a democratic republic *value choices* are left up to each individual. Professor Higgins's statements concerning libel and commercial speech reveal far more than her use of the rhetorical technique of *reductio ad absurdum*. Professor Higgins displays a distressing elitism by treating such issues, where correct information must be given to the public for fear of their being duped, as comparable with the crucial philosophical and ethical framework of which each citizen must be his or her own sole arbiter.

126. *See, e.g., FEMINIST THEORY, supra* note 7, at 204-05.

democratic-republican state to presume the ability of its citizens to make rational choices.¹²⁷

V. The Pornography Question and the Rationales Underlying the First Amendment

A. The Centrality of the Pornography Issue

My contention that the treatment of pornography is central to the meaning of the First Amendment and not just an issue at the fringe of the jurisprudence is one shared by none other than Catharine MacKinnon:

First Amendment absolutism was forged in the crucible of obscenity litigation. Probably its most inspired expositions, its most passionate defenses, are to be found in Justice Douglas' dissents in obscenity cases. This is no coincidence. Believe him when he says that pornography is at the core of the First Amendment. . . . [P]ornography's protection fits perfectly with the power relations embedded in First Amendment structure and jurisprudence from the start. Pornography is exactly that speech of men that silences the speech of women. I take it seriously when Justice Douglas speaking on pornography and others preaching absolutism say that pornography has to be protected speech or else free expression will not mean what it has always meant in this country.¹²⁸

While MacKinnon claims that her ordinance fits within the First Amendment's requirements, plainly it is positing a far less protective test, allowing censorship based on content-based harm in addition to incidental or contextual harms.¹²⁹ It is, quite simply, an effort to reject the content neutrality requirement and to replace it with a far broader test.¹³⁰ The approach is of course quite in line with MacKinnon's rejection of neutrality or objectivity as a male form of thought, an epistemology which supports the status quo by presuming to set out what is, without noting the fact that what is, is the result of male

127. A distinction can be drawn between speech such as pornography, which communicates a world view in which is contained its harmful impact — that and the possibility of its impact upon its audience — and hate speech in a one-to-one setting, where it is not part of a political or other social message, but simply used as a psychic weapon against the victim. In this context, again the utterance of the speech causes harm, but not in a context where its status as an attempt to persuade or to influence legitimizes it; the psychic assault is the *only* purpose of the speech. What the Constitution mandates in such cases is a separate issue which needs its own exposition.

128. FEMINISM UNMODIFIED, *supra* note 6, at 208-09.

129. *Id.* at 191-95.

130. For a discussion of the application of traditional First Amendment jurisprudence to MacKinnon's ordinance and her justifications of it, see *supra* notes 35-74 and accompanying text.

dominance. By being neutral about what is, MacKinnon asserts, the liberal tradition legitimizes it.¹³¹

MacKinnon's willing concession that the treatment of pornography is an issue at the core of our liberal (in the classical sense of the word) First Amendment tradition provides a useful starting point for analysis. To her, it shows the fatally flawed nature of that tradition. But the rationale of the First Amendment as explicated by Justice Douglas provides an alternative view, a potent rejoinder to MacKinnon. What Justice Douglas asserted was the primacy of the individual over the government. As early as 1958, he wrote that:

Government exists for man [sic], not man for government. The aim of government is security for the individual and freedom for the development of his talents. The individual needs protection from government itself—from the executive branch, from the legislative branch, and even from the tyranny of judges. . . . There is, indeed, a congeries of these rights that may conveniently be called the right to be let alone.¹³²

Later, he would become fond of the phrase that the Constitution was designed to "keep the government off the backs of the people."¹³³

At least one major corollary can be found in this valuation of the individual and his or her primacy over the government: under any justification for free speech, we must be presumed to have the ability to accept or to reject ideas. The notions that free speech leads to the elucidation of truth,¹³⁴ or that it promotes and serves democratic rule,¹³⁵ or that it develops the sort of citizenry which we desire;¹³⁶ all of these notions — and indeed any defense of free speech not content to rest on slippery slope grounds — must presume that people as indi-

131. FEMINIST THEORY, *supra* note 7, at 83-105.

132. WILLIAM O. DOUGLAS, THE RIGHT OF THE PEOPLE 87 (1958) [hereinafter DOUGLAS]; see also WILLIAM O. DOUGLAS, THE ANATOMY OF LIBERTY 2 (Ruth Nanda Anshen ed., Pocket Books 1964) [hereinafter LIBERTY]. ("Men [sic] do not acquire rights from the government; one man does not give another certain rights. . . . They come to him because of the divine spark in every human being."); WILLIAM O. DOUGLAS, POINTS OF REBELLION (1969).

133. See, e.g., WILLIAM O. DOUGLAS, THE COURT YEARS 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS ix (1980).

134. See JOHN MILTON, AREOPAGITICA (1644), in MILTON'S AREOPAGITICA (H.B. Cotterill ed., 1952); see also *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting); JOHN STUART MILL, ON LIBERTY 22-30 (Norton Critical ed. 1975).

135. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO FREE GOVERNMENT (1948); Harry Kalven, Jr. *The New York Times Case: A Note on "the Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

136. Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653 (1988); LEE C. BOLLINGER, THE TOLERANT SOCIETY (1986).

viduals are competent to rule themselves, that they are able to reach rational decisions. And for that to be true, they must be able to distinguish truth from falsehood.

B. Historical Rationales for the First Amendment

All of the various articulations of a single rationale for free speech have in this sense fallen short of the mark. It has been argued — though with differing doctrinal results — that the speech with which the First Amendment is concerned is that which forms a part of political discourse. Both Alexander Meiklejohn and former Judge Robert Bork have advanced this rationale, which leads strongly to the conclusion that only speech on explicitly political subjects is protected by the First Amendment. While Meiklejohn sought to bring artistic or literary speech into the ambit of this rationale, as shaping the attitudes that citizens carry with them into the voting booth,¹³⁷ Bork correctly pointed out the weakness of this view, noting that “[o]ther human activities and experiences also form personality, teach and create attitudes just as much as does the novel, but no one would . . . [bar] regulations of economic activity, control of entry into a trade, laws about sexual behavior [!], marriage and the like.”¹³⁸

Harry Kalven, Jr., tended to agree with Bork and Meiklejohn but hedged his bets; he declared the abolition of the crime of seditious libel to be the “core function” of the First Amendment, but did not rule out existence of other values served by it.¹³⁹ He also, acknowledging the difficulty of the position, sought to extend protection beyond solely political speech.¹⁴⁰

Another major strain in First Amendment theory has asserted that freedom of speech helps mold the citizenry’s character in a desirable fashion, whether by inculcating courage, as desired by Justice Brandeis,¹⁴¹ or tolerance, the virtue adverted to by Dean Lee Bollinger.¹⁴² In either case, the character-building rationale is subject to various criticisms, the most fundamental of which has been made by Vincent Blasi:

[T]he premise that government should try to shape the ‘intellectual character’ of the citizenry has disturbing overtones . . . [i]t is the ambitious and comprehensive catechism that Bollinger wants

137. MEIKLEJOHN, *supra* note 135, at 99-100.

138. Bork, *supra* note 135, at 27.

139. Kalven, *supra* note 135, at 208-209.

140. *Id.*

141. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); *see supra* note 57.

142. BOLLINGER, *supra* note 136.

taught that gives me pause. For he seeks an educational experience that will influence the way persons conduct themselves across a wide range of social interaction. He speaks not of lessons or precepts but of character formation.¹⁴³

The same charge is applicable, though to a lesser extent, to Brandeis.

Even without such a comprehensive scheme of instruction, the notion that the First Amendment's value is anchored to a notion of individuals needing to experience the tutelage of the state is contrary to the common sense understanding which most people share that freedom is a good thing in itself. People do not seek freedom, people do not revolt against tyranny, simply because they want a substitute teacher. There is something deeply anarchic in humanity that longs to be answerable to no will but its own. This streak is balanced by the countervailing need to find not only security but reinforcement in others. The effort to accommodate these inconsistent — indeed contrary — needs makes up much of political thought. Even the most conformist of us wishes to be perceived as an individual; even the most independent seeks some degree of community. Moreover, neither theory sufficiently differentiates speech from other forms of conduct. No doubt the setting of a good example is a helpful side effect of the First Amendment, but it will hardly do as a primary purpose.

The third major strain involves the search for truth. Free speech, Milton alleged, will invariably lead to the discovery of the truth, for "who ever knew Truth put to the worse in a free and open encounter?"¹⁴⁴ This justification was also employed by John Stuart Mill in his classic *On Liberty*.¹⁴⁵ It was employed in a very different form by Justice Oliver Wendell Holmes in, most famously, *Abrams v. United States*.¹⁴⁶ In perhaps the most famous passage in the United States Reports, Holmes wrote:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the

143. Vincent Blasi, *The Teaching Function of the First Amendment*, 87 COLUM. L. REV. 387, 414 (1987) (reviewing BOLLINGER, *supra* note 136).

144. AREOPAGITICA, *supra* note 134, at 45.

145. *See supra* note 134.

146. 250 U.S. 616, 624-31 (Holmes, J., dissenting).

theory of our Constitution.¹⁴⁷

Holmes did not repose any confidence in the unfounded faith that "truth will out" on which Milton and Mill place such reliance. Indeed, in Milton and Mill, this faith in truth seems naive, lacking awareness of the frequently compelling power of error. When seductive but incorrect views are held by the majority, it bears down upon the fledgling dissenter with all the power of the human herd instinct, employing at least the power of non-legal forms of social coercion such as ridicule and ostracism. Holmes seems to many to be rooted in an absolute skepticism in the experience of truth, and finding that majority rule is the only way one can arrive at working "truths."¹⁴⁸ But he seems to me to be saying rather that free speech, which allows both points of view to go on the record and be preserved, is the only means of insuring that any errors we do make can be rectified in time. It is rather reminiscent of C.P. Snow's view that "it is an error, of course, to think that persecution is never successful. More often than not, it has been extremely so. . . [For example, Manicheism] would not have been known to exist except for the writings of its enemies. It was as though communism had been extirpated in Europe in the 1920's and was only known through what is said of it in *Mein Kampf*."¹⁴⁹ Insights that may benefit humanity, whether from positive or negative examples, can be forever lost, making it difficult if not impossible to trace errors and to set them right. Indeed, the loss of such insights could make the detection of errors not of the grosser kind impossible. Thus, to allow for the possibility that one of our experiments will fail, and that we may have to retrace our steps, Holmes defends the right of free expression even of thoughts we believe to be "fraught with death."¹⁵⁰

147. *Id.* at 630.

148. See, e.g., David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1310-11 (1983); Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 733 (1975); Yosai Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213 (1964).

149. C.P. SNOW, *THE LIGHT AND THE DARK* 39 (1947). The anti-pornography movement seems to have just that sort of oblivion in mind for the thought that it hates, if Cass Sunstein's view is any indication: "we could imagine a society in which the harms produced by pornography were so widely acknowledged and so generally condemned that an anti-pornography ordinance would not be regarded as viewpoint-based at all." Sunstein, *Neutrality*, *supra* note 86, at 29. In other words, the general acceptance of an orthodoxy does not simply legitimate it, it deprives its opposite of existence — which Sunstein appears to welcome.

150. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

C. Freedom of Speech: An End in Itself

Not only can the search for truth rationale be undermined as suggested above, it additionally lacks backing as an empirical proposition. It also seems to seriously underestimate the power of propaganda and social duress falling short of law. And in Holmes's "safety catch" form it certainly lacks the emotional sweep to justify Harry Kalven's description of the First Amendment as the most charismatic provision of the constitution.¹⁵¹ The same critique can be made of entirely negative justifications, such as distrust of government power and the slippery slope argument.¹⁵² The individual autonomy argument, as Bork showed, proves too much, leaving no rational grounds to distinguish between speech and other actions which provide self-gratification.¹⁵³

What, one begins to ask in desperation, is left to justify our almost intuitive perception that free speech is a good thing to have, and that the First Amendment — leaving aside all doctrinal questions of limit and interpretation for just a moment — is a worthwhile enactment? The answer is: all of the rationales advanced above. That no one of these rationales provides a completely satisfying justification for freedom of speech is hardly surprising; nothing so basic to our society can be summed up so easily. Each of the rationales offered provides at least one key value served by the First Amendment, but not its complete *raison d'être*. Despite the undermining of each rationale that has occurred in academic circles, they have all been a part of the discussion since Milton's *Areopagitica*. This fact, and the passionate allegiance each of the justifications commands from top-flight intellects throughout the evolution of the jurisprudence points, like Janus, in two directions. Either the First Amendment serves a host of discrete (although not inconsistent) values, of which no synthesis is possible or even desirable; or all of these value claims can be harmonized. It is the latter contention that attracts me.

It seems plain that Douglas' vision of the individual's primacy over the government and his or her right to self rule is derived from the "self-evident truths" upon which our government is based: "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights. . . . That to secure these rights, Govern-

151. Kalven, *supra* note 135, at xii.

152. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 [hereinafter Blasi, *The Checking Value*] (more than a mere slippery slope argument, but an essentially institutional view of the First Amendment, arguing that its purpose is in preventing abuse of official power); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

153. Bork, *supra* note 135, at 27.

ments are instituted among Men, deriving their just powers from the consent of the governed.”¹⁵⁴ As Justice Douglas comments on this provision of the Declaration of Independence, its theory grounds legitimate government “not from on high, not from a king, but from the consent of the governed.”¹⁵⁵

Thus, the single over-arching rationale of the First Amendment must be a statement of the nature of the relationship between government and citizen. The very nature of a democratic-republican form of government is that the people are presumed to be capable of self-rule. And in order to be capable of self-rule, as indicated before, a people must be able to distinguish between good and evil, true and false, wisdom and prudence. If the people — as individuals — are not able to make personal decisions about reading or viewing, how can they be assumed to be able to choose representatives, and make difficult and key policy decisions. Privacy doctrine, part of which is embodied in the First Amendment in that it denies the government access to a zone of self which each individual retains, is required by the very notion of democratic-republic government. If “we the people” are to be sovereigns, in any sense of the word, the government must be bound to respect the dignity and right of every citizen to rule over his or her own life. If the state need not honor the dignity of the individual by acknowledging his or her right within broad contours to control his or her own life, how can we be said to enjoy self-rule? It is the failure of Bork and Meikeljohn to perceive this which leads them into an unnecessarily narrow view of the First Amendment’s scope.¹⁵⁶

VI. Pornography and the First Amendment

Couched in such general terms, the argument is not of crystalline clarity. It will perhaps gain in momentum as applied to the concrete instance of pornography.

One threshold objection must be met before proceeding to that analysis, however. After all, critics could retort, it is plainly not some nameless, faceless government which imposes laws upon the citizenry, but rather the citizenry itself, or at least representatives of a majority of them. Why cannot the people themselves democratically decide to delimit the areas of permitted debate? As long as democratic process is observed, and each citizen can vote, surely there is nothing un-

154. PREAMBLE, THE DECLARATION OF INDEPENDENCE (U.S. 1776).

155. LIBERTY, *supra* note 132, at 2-3.

156. Kalven almost intuitively avoids this problem by committing to a *core* function of the First Amendment rather than an exclusive one. This is not the first time his unwillingness to oversimplify has served Kalven well. Kalven, *supra* note 135, at 208-09.

democratic about regulation of available ideas by the democratically elected majority, whatever else might also be wrong with such regulation.

Certainly, the electorate can pass laws regulating ideas by invoking the amendment process, if all else fails. Such a change, however, would constitute a restructuring so fundamental that it would no longer be accurate to describe the resultant system as a democratic republic. Any citizenry whose government can limit its exposure to ideas to those which are acceptably orthodox and agreeable to the government, can no longer be said to exercise ruling power. It simply rubber stamps the actions of the government that shapes its views, its morals, its aesthetics and its agenda. While democratic-republican in *form*, in fact such a system would be oligarchical, with the governed's role limited to that of selecting between alternatives acceptable to the ruling class. Such a government is but a hollow mockery both of democracy and of republicanism.

The notion that we can govern ourselves requires that we be free to explore, question and challenge the *status quo* in every walk of life. It is for this reason that the Declaration of Independence *explicitly* provides for the right to rebel against a government that no longer suits the needs of the people.¹⁵⁷ So too the people have the right to annul the revolution by amending the Constitution or altering the system in any other way they see fit. That right includes the replacement of a democratic government with a more authoritarian one. But such an alteration should be done in the open, with the consent of the people, as required by the amending process, and not by "interpreting" the Constitution in such a way as to change the system's fundamentals *sub silentio* — which is what I believe the MacKinnon-Dworkin ordinance seeks to do.

The effort to regulate against attitudinal harms caused by pornography stands on a completely different footing than the effort to provide compensatory and punitive sanctions against direct harms. The real question posed by attitudinal harms is not whether someone shall be held liable, but rather *who* shall be held liable — the pornographer, the abuser, or both?

Holding the pornographer liable for the uses to which men put his or her product clearly can be distinguished from holding him or her

157. This line of thought, and the notion of the continuing precedential power of the Declaration of Independence owes much to Charles L. Black, *On Reading and Using the Ninth Amendment*, in *THE HUMANE IMAGINATION* 196-99 (Woodbridge: OxBow Press 1986); see also BLACK'S STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1983).

liable for contributing to a social atmosphere conducive to the subordination of women; both provisions of the ordinance do, however, violate the same dignitary concern, that expressed by Milton in his metaphor of the schoolboy:

What advantage is it to be a man over it is to be a boy at school, if we have only escaped the ferula to come under the fescue of an Imprimatur? if serious and elaborate writings, as if they were no more than the theme of a grammar lad under his pedagogue, must not be uttered without the cursory eyes of a temporising and extemporising licenser? He who is not trusted with his own actions, his drift not being known to be evil and standing to the hazard of law and penalty, has no great argument to think himself reputed in the Commonwealth wherein he was born for other than a fool or a foreigner. . . . If in this the most consummate act of his fidelity and ripeness no years, no industry, no former proof of his abilities can bring him to that state of maturity as not to be still mistrusted and suspected . . . must appear in print like a puny with his guardian and his censor's hand on the back of his title to be his bail and surety, that he is no idiot or seducer, it cannot be but a dishonour and derogation to the author, to the book, to the privilege and dignity of learning.¹⁵⁸

Like Milton's schoolboy, we are presumed to be irrevocably sullied and forced into acting in manners we would normally be proof against by exposure to ideas. Such logic has been the principal motivation of the censor for as long as there has been censorship. As Walter Kendrick points out in *The Secret Museum*, the fear that especially vulnerable audience members, conceptualized by Charles Dickens as "The Young Person," would be completely overcome by pornography has dogged potential censors: "The most troublesome thing about the Young Person," he writes, "— I call her 'she' because Dickens did, though boys and men could be equally obstreperous — was that she persisted in taking representations for reality. Monkey-see-monkey-do was her only imperative."¹⁵⁹ While by no means the earliest such hysterical broadside, one of the most typical expressions of such fear can be found in this anonymous plaint: "[t]he matter was of such a leprous character that it would be impossible for any young man who had not learned the Divine secret of self-control to have read it without committing some form of outward sin within twenty-four hours after."¹⁶⁰

While MacKinnon claims to have eliminated the moral content and

158. AREOPAGATICA, *supra* note 134, at 27.

159. KENDRICK, *supra* note 123, at 68.

160. *Id.* at 87.

base of obscenity regulation,¹⁶¹ the notion that pornography is essentially coercive, that it causes its readers to act in ways in which they would not, within a tight temporal framework, is highly reminiscent of this early critic of Emily Zola. As Kendrick points out, MacKinnon and Dworkin replace the frail, corruptible (generally female) Young Person with one of their own: “[T]heir new Young Person — a brutal, low-minded male or indeed any male at all — was only a weirdly transmogrified version of a fantasy that, in the past, had abetted the oppression of the very people (women) who now wished to appropriate it.”¹⁶² The gentleman who paternalistically sought to protect weak boys and women — and the poor who could not “handle it” — has given way to the maternalistic feminist who “still desires to prevent the ignorant and vicious from obtaining access to dangerous representations, and this desire still masks a lust for power. The female gentleman, however, feels himself disenfranchised; power already belongs to the ignorant and vicious, and it must be wrested from them, though without changing the nature or structure of power in the slightest degree.”¹⁶³

Contrary to Justice Brandeis’ eloquent and seminal opinion in *Whitney v. California*,¹⁶⁴ the *Brandenburg* rule¹⁶⁵ is not based solely on the insight that in so constricted a time frame between the speech and the act, counterspeech cannot be effective. Rather, the imminence requirement uses the time factor as one probative of whether the audience member has become an instrument of the speaker’s will, the only context in which the First Amendment prohibits advocacy of unlawful acts.¹⁶⁶ If mere temporal inability to avert harm by counterspeech was the test, then the *Brandenburg* court’s imposition of an added prerequisite — that it be the speaker’s *intent* to cause unlawful action—does not make sense. When the *Brandenburg* test is fulfilled, however, the speaker-audience relationship is very like that of principal-agent. The audience member is, at the behest of the speaker, acting.¹⁶⁷ That the inflamed audience member does not have time to consider his action, or to be talked out of it, or reason it out for him or herself, cements the agency relationship, making the action more

161. FEMINISM UNMODIFIED, *supra* note 6, at 146-63.

162. KENDRICK, *supra* note 123, at 232.

163. *Id.* at 239.

164. 274 U.S. 357, 377 (1927) (“[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence”).

165. See *supra* notes 65-69 and accompanying text.

166. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

167. See MAY, *supra* note 55.

truly that of the speaker. Counterspeech — or time for consideration — gives the individual the choice to be rational, to decide whether or not the action will be *hers* or whether she will refrain.

The *Brandenburg* test permits suppression only in those cases analogous to the criminal obeying orders from a superior in the illegal hierarchy. The fact that those orders came in the form of speech does not make them protected by the First Amendment, as they are “speech brigaded with action.”¹⁶⁸ That is, the orders — and the speech that passes (or should it be flunks?) the *Brandenburg* test — are the functional equivalent of action *and are intended to be so*. The master criminal who claims that his henchman is not subject to his will in carrying out his orders, who claims that the fact that his physical action in the deed was only speech, is as disingenuous as Elizabeth I when she claimed that she did not kill Mary Stuart since her only act was that of signing the execution warrant. By speaking to one subject with her authority, with the intent that the subject would act, and knowing that this intent would be understood as mandatory, not permissive in nature, Elizabeth acted to kill Mary as plainly as if she had wielded the axe. So too the “flunker” of the *Brandenburg* test, whose knowledge of obedience comes not from the ability to discipline that the master criminal or monarch possesses, but from being himself or herself part of the dynamics of the crowd. Every speaker firmly in the saddle can *feel* the audience’s agreement, and can see its development into a mob, consonant with his or her intent. The speaker becomes so aligned with the crowd that it becomes fair to attribute the crowd’s conduct to him or to her.¹⁶⁹ By continuing to push for the desired result, the speaker takes the action upon him or herself. This intent, according to *Brandenburg*, must be *actual* and not presumed.¹⁷⁰

In pornography, intent to incite is almost surely missing and temporality is certainly absent. The harms MacKinnon deals with, even under her scenario, are a reinforcement and generation of attitudes *over time*. The rapist with the pornographic novel in his pocket (proof by the way, as if it were needed, that MacKinnon does not, as does

168. See, e.g., DOUGLAS, *supra* note 132, at 54-57 (explaining this concept in depth).

169. This is not to say, as Professor Higgins appears to construe the argument, that “people must be presumed to be capable of self-rule . . . except when they are not.” Higgins, *supra* note 21, at 86. It is not the incapacity of the crowd to resist the will of Svengali which renders the speaker’s language actionable. Rather, it is the speaker’s continuing affiliation with the mob in spite of knowing what will result if the inflammatory speech continues. By shouting “let’s kill” to an audience that the speaker knows is willing, able and ready to obey, the speaker may be said to deputize the audience to do his or her will.

170. See *supra* notes 68-69 and accompanying text.

Cass Sunstein¹⁷¹ distinguish the written word from photographs or drawings) has had plenty of time to pore over it and similar materials.

MacKinnon's assumption that the reader or viewer of some book or film is incapable of choosing to accept or reject the attitudes embodied in the presentation is extraordinarily degrading.¹⁷² It also ignores the degree to which the audience for pornography is self-selected; adult bookstores are quite clear about their contents. Moreover, the stares of passers-by no doubt make the would-be purchaser's decision to enter a self-conscious one for all but the most hardened of habitual consumers. MacKinnon's fundamental assumption that we are "Young Persons" in the parlance of Kendrick may be partially true, in that already extant attitudes may be buttressed or eroded by repeated voluntary exposure to the message of pornography. Nonetheless, such a half truth as MacKinnon advances and which lies behind most arguments, feminist or not, for the censorship of pornography, flatly denies the possibility of democratic self-rule.¹⁷³

171. Cass Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 616-19. Sunstein's claim that speech that contains non-cognitive appeals may be more easily regulated than purely rational speech ignores the immense power of symbolic speech, which by definition does not appeal to the intellect. Yet such speech is an integral part of human communication, as the Supreme Court has long recognized. See *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969). The Supreme Court has, in recognizing the value of such speech, noted that the right to free speech is the right to communicate effectively, and has permitted only regulation that goes to the conduct component of speech. See *Texas v. Johnson* 491 U.S. 397 (1989) (protesters' First Amendment rights prohibit state from proscribing only "disrespectful" flag burning"); see also *Eichman v. United States*, 496 U.S. 310 (1990) (invalidating federal statute protecting national flag against politically motivated burning). As Vincent Blasi points out, symbolic "conduct deserves a high degree of constitutional protection. [The] kind of stimulus necessary to activate the political conscience of [the] populace sometimes can be created only by transcending rationality and appealing to more primitive basic instincts." Blasi, *The Checking Value*, *supra* note 152, at 640. Winston Churchill's appeal to "fight [them] on the beaches" and his offer only of "blood, toil, tears and sweat" were not appeals to rationality, but they were nonetheless the finest kind of political speech: an appeal to the spirit of the nation. WINSTON CHURCHILL, *BLOOD, TOIL, TEARS AND SWEAT: THE SPEECHES OF WINSTON S. CHURCHILL* 149, 165 (David Carradine ed. 1989).

172. Professor Higgins asks why this assumption is more degrading than "the Court's assumption [under the *Brandenburg* circumstances] that a crowd may be swept out of control by a speaker." Higgins, *supra* note 21, at 86. Possibly because no such assumption is made; the crowd members are no less guilty of riot for all the exhortation they have heard. Rather, the speaker is presumed to have desired the violence and to have participated in it in a manner not unlike that of a principal in an agent-principal relationship. To switch metaphors, the speaker is like a conspirator whose co-conspirators have performed the overt act of rioting, and who thus is liable for the resulting violence. See GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 218-25 (1978).

173. Professor Higgins argues that "pornography does not harm through the expression of ideas but through the *noncognitive* sexualization of domination, the creation of an addiction to a violent sexual practice. Understood this way, the consumption of pornography is a sexual practice, not an idea about sexuality." Higgins, *supra* note 21, at 86

The fundamental tenet of politics in a democratic-republican sense is that human beings are capable of rational thought, and of choosing right from wrong. If this is not true with regard to the most intimate and basic of human relations, how can it be true of federal-state relations, or of foreign relations, or of any of the other realms in which the people are assumed to be fit to rule? If the people are in fact not fit to rule themselves as individuals as well as collectively, to govern their own lives, then self-government is impossible and we had better abandon the whole hypocritical enterprise of giving them the vote and institute a full scale regimen of social conditioning based on the most humane, psychologically effective and cost-effective technology. We will be with B.F. Skinner, *Beyond Freedom and Dignity*.¹⁷⁴ After all, pornographic materials are not the only ones that inculcate on a sub-rational level harmful attitudes whether leading to violence or other harms.¹⁷⁵ *Rambo*, *Birth of a Nation*, most of Wagner, and the collected works of Friedrich Nietzsche inculcate values most progressive people — including feminists and Marxists — would consider to be abhorrent, and they do it in a way that is similar to that of pornography: they deliver a message while we are emotionally engaged, whether in the rapture of music, or caught up in the narrative swirl of a “cracking good yarn.”

The First Amendment is not without costs, and has never been

(emphasis in original). As has already been pointed out, not only rational speech is worthy of First Amendment protection. See *supra* notes 164-68. More fundamentally, the mechanistic model of human behavior postulated by MacKinnon and Higgins — that exposure to pornography leads inexorably to the twisting of one's attitudes and views into a pornographic role — is belied by their own experience. Andrea Dworkin's book *PORNOGRAPHY*, *supra* note 1, is replete with detailed analyses and plot summaries of pornography, yet the author's revulsion at what she describes is clear. Thus, at least one response outside of the mechanistic model is possible.

174. B.F. SKINNER, *BEYOND FREEDOM AND DIGNITY* (1971) (psychological text postulating that personality is the product of environment and that conduct can be determined by psychological conditioning).

175. DERSHOWITZ, *supra* note 18, at 293-95. Indeed, many crimes have been attributed to the “inspiration” of popular media presentations; the attempted assassination of then-President Ronald Reagan by John Hinckley, Jr. was based upon the youth's obsession with Martin Scorsese's film *TAXI DRIVER*; Nathaniel White based his first murder on a scene from the film *ROBOCOP II*; the well regarded film *THE DEER HUNTER* contained a Russian Roulette scene said to have inspired similar incidents; similarly, a 1987 shooting and subsequent attempted suicide by a department store employee was derived from an episode of *Star Trek*. See *Imitators Under the Influence of Art*, *NEWSDAY*, August 10, 1992, at 38. All of these people emulated actions portrayed in the media with lethal results, yet no cry to ban *Star Trek* or to sue Gene Roddenberry's estate for “causing” the fatality has resulted. Seemingly, Americans believe that there is something about sex, as opposed to mere violence, that makes it special — a distinction premised more on a hangover of Victorian prudery, I suspect, than on any reasonable grounds.

thought to be. Ideas *do* present a danger to the *status quo*.¹⁷⁶ Justice Holmes was deadly serious when he wrote that "every idea is an incitement."¹⁷⁷ He recognized that in ideas are tremendous force, potential for good and for destruction. Was a man who had spent his entire life as a devotee of philosophy likely to protect free speech only because it came without serious risks? While always delighted to point out, as he did in *Abrams*, the tendency of those empowered by the status quo to hysterically exaggerate the dangers posed by dissent, Holmes, in the last analysis, firmly believed that ideas wield the greatest might:

Thus only can you gain the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought — the subtle postponed power which the world knows not, but which to his prophetic vision is more real than that which commands an army.¹⁷⁸

Holmes, give him his due, believed that if proletarian dictatorship was to win the assent of the majority, it should have its way, much as he despised it.¹⁷⁹ For he recognized that revolutionary system, one whose very base was in armed revolution, could scarcely be credible if it denied the people the right to change the course of society.

If we posit, with MacKinnon, that the receiving mind is without power to evaluate, and to reject or oppose ideas, then in truth democracy is itself a sure path to destruction. If we do not so posit, then the fact that a man or men may act upon abhorrent doctrines or attitudes cannot, in a democratic republic, form the basis for attributing liability for such actions to the preacher of these doctrines outside of the most narrow of circumstances, the circumstances captured in the *Brandenburg* rule.

The notion of the state that censorship postulates is a related but no less chilling factor. How can we be free if sexual orthodoxy and images are to be proscribed by law? If the state can reach into our bedrooms and tell meaningfully consenting adults (unlike children who are blanketly protected by the *parens patriae* role of the state) what may constitute proper forms of sexual intimacy, then there is no truth to Theodore Roosevelt's description of an American as *The Free Citizen*.¹⁸⁰ The establishment by law of such a sexual orthodoxy turns

176. Indeed, even MacKinnon writes: "[p]ornography is ideas; ideas matter." FEMINISM UNMODIFIED, *supra* note 6, at 223.

177. *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

178. OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 32 (1921).

179. *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

180. THEODORE ROOSEVELT, *THE FREE CITIZEN*, (H. Hagedorn, ed. 1958).

us from self-ruled individuals to creatures of the state, with our every move subject to that state's pleasure. That the state is comprised of our neighbors alters this not a jot but adds to the ignominy of our position. We are not asked to give up authority to some wise Solon or to Platonic Guardians, but rather to people no wiser or more inherently virtuous than ourselves. The result of this denial of individual sovereignty is that even our sexual identities and intimacies become the property of our neighbors.

If we are not in some spheres of our lives beyond the state's reach, however benevolent its purposes, then we exist for the state, not it for us. One would think that MacKinnon, who advocates the rights of some sexual minorities (homosexuals and lesbians), would know better than to seek the persecution of others (sado-masochists) and the regulation of the sexual majority (heterosexuals).

An interesting discussion — and one which I will presently forgo — can be found in the curious insight that MacKinnon's thesis, that people cannot parse pornographic materials and themselves interpret and evaluate them, not only undercuts our theory of government but undermines the guilt of the rapist himself. If the rapist cannot help being influenced by pornography and is powerless to reject its message is not his culpability diminished almost down to nothing? He is a mere tool of the pornographer as well as a victim in his own right. MacKinnon's assertion that rape is endemic — that all but 7.8 percent of women have been raped or otherwise sexually harassed (a figure which she does not, unfortunately, break down) becomes even more troubling than it is in its own right.¹⁸¹ Is our society truly ruled by a form of mind control that leads systematically to the brutalization of half of the population? Worse yet, are we to be treated to the "Penthouse defense" in addition to the Twinkie defense?¹⁸²

We suppose in our criminal justice system that free will exists, if only within the confines of unalterable circumstances, accidents, and subject to the impact of other wills similarly free, if only to a similarly limited extent. Such a supposition can after all be challenged, but does not that challenge run aground on our own intuitive experience of free will? Moreover, the only way free will can exist is if we give it rein. Unguided by society, not subject to holistic piloting in the name of our group benefit, a simulacrum of freedom can be found. To ac-

181. See FEMINISM UNMODIFIED, *supra* note 6, at 6 n.18; see also *supra* notes 107-111 and accompanying text (MacKinnon's discussion of Califa).

182. The defense proffered by Dan White for his assassination of Harvey Milk, the "Twinkie defense" was that consumption of the Hostess confection in bulk had altered his body chemistry to the extent that he was not responsible for his actions.

cept B.F. Skinner's insight (and Mark Twain's as well, surprisingly)¹⁸³ is to give up on the precious notion of individual freedom and dignity. A political commitment to these beliefs, even if it flies in the face of empirical reality, can help to make them true, or at least to leave open the possibility of their coming true. After all, if we are so subject to conditioning, can we not condition ourselves into individuality? Unless we suppose so, we reduce ourselves to Pavlov's dogs, slobbering on cue, and reduce our literature to that which is fit for the mentally incompetent. It is not that we do truly live lives of unfettered individuality, immune from the impingements of our culture; rather it is that only by minimizing the extent to which our culture impinges upon our individuality can we taste what little freedom is possible, a freedom made all the more precious by its limitations.

VII. Conclusion

Do I really mean to assert that the passage and upholding of the MacKinnon-Dworkin ordinance would sound the death knell of individuality and free will? Of course not. No single act will signal the end of American civil liberties. But this ordinance, and its precedential potential, are deeply foreign to the fundamental tenets of our political system, and can only help in their erosion. The sacrifice of freedom in the name of equality will deprive equality of its benefits; what comfort is it to know that we can all be equally oppressed? Indeed, even demagogues can sometimes perceive this; Huey Long once said that if fascism was to come to America, it would come disguised as a quest for equality.¹⁸⁴ This apt warning is not the last word on which to leave Catharine MacKinnon and the feminist movement to ban pornography. Rather, Justice Brandeis' more tolerant and wise words seem apposite:

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. [Those] born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.¹⁸⁵

183. MARK TWAIN, *WHAT IS MAN?* (1920).

184. See GEORGE SELDES, *THE GREAT THOUGHTS* 249 (1987) ("If fascism comes to America it would be on a program of Americanism").

185. *Olmstead v. United States*, 277 U.S. 438, 479 (1927) (Brandeis, J., dissenting).