Fordham Urban Law Journal

Volume 20 | Number 1 Article 3

1992

Giving Women the Benefit of Equality: A Response to Wirenius

Tracy Higgins
Fordham University School of Law

Giving Women the Benefit of Equality: A Response to Wirenius

Cover Page Footnote
Associate Professor of Law, Fordham University School of Law.

GIVING WOMEN THE BENEFIT OF EQUALITY: A RESPONSE TO WIRENIUS

*Tracy Higgins**

I. Introduction: Feminist Speech and Pornography

It is no coincidence that what Mr. Wirenius[1] terms the "battle lines" over the regulation of pornography have been redrawn over the past two decades, a period in which women have entered the legal profession and legal academy in record numbers. Whatever one might believe about the regulation of pornography, it is impossible to dispute that it is produced primarily by and for men, and its harms, however extensive they might be, are visited primarily on women. Women have been the "casualties" of the battle and, not surprisingly, have a different story to tell about what is at stake in the struggle.

Whether supporting or opposing pornography regulation,[2] feminist legal scholars tend to approach the issue from neither of the traditional positions — First Amendment absolutist or moral censor. Rather, a feminist approach to pornography is informed by an understanding of the profound harm that pornography can and does inflict upon women. Consequently, even for feminists who may oppose pornography regulation (perhaps for fear of an even greater silencing force),[3] the choice is not an obvious one, as it seems to be for Mr. Wirenius, between the good of civil libertarianism and the evil of totalitarianism.

This essay offers a feminist response to Mr. Wirenius's provocative critique of Professor MacKinnon. Part II explores his critique of the

* Associate Professor of Law, Fordham University School of Law.

1. John F. Wirenius, *Giving the Devil the Benefit of Law: Pornographers, the Feminist Attack on Free Speech, and the First Amendment*, 20 FORDHAM URB. L.J. 27 (1992) [hereinafter Wirenius].

2. Although I agree with much of what Professor MacKinnon has to say about the harms of pornography and the importance of regulation, I do believe that feminists may have good reasons — feminist reasons — for opposing such regulation. Under patriarchy women have much to fear from many sources. That some feminists differ with me about the risks and benefits of regulating pornography does not mean that they are any less feminists. For MacKinnon's view, see Catharine MacKinnon, *On Collaboration*, *in* FEMINISM UNMODIFIED (1987).

3. *See, e.g.*, CAROL SMART, FEMINISM AND THE POWER OF LAW 114-37 (denying that law is the solution to the problem of pornography while recognizing the importance of the problem); ZILLAH EISENSTEIN, THE FEMALE BODY AND THE LAW 162-74 (acknowledging the problem of sexual subordination as a message of pornography but raising the danger of suppression of multiplicity of sexual practices).

MacKinnon-Dworkin ordinance and elaborates some of Professor MacKinnon's arguments in support of the ordinance, particularly her arguments regarding speech and harm. Part III situates her First Amendment theory within her broader critique of liberalism and compares her vision of the state with the one articulated by Mr. Wirenius. Finally, Part IV suggests a feminist re-vision of Mr. Wirenius's question "why do we protect speech that harms?"

II. First Amendment Doctrine: What's In, What's Out, and What It Means

The MacKinnon-Dworkin ordinance targets a range of harms resulting from the creation and distribution of pornography, harms that Mr. Wirenius classifies in two categories, direct and indirect. Direct harm, he explains, consists of "the coercion of models or actresses into pornographic materials."[4] Finding common ground with Professor MacKinnon and other feminists, he argues that such cases of actual[5] coercion or intimidation may form the basis of a civil or a criminal prosecution without posing First Amendment problems.[6]

In contrast to these direct harms, which he argues can and should be regulated, Mr. Wirenius finds the regulation of his second category of harms, which he terms "indirect" or "attitudinal" harms,[7] profoundly problematic. In this category, Mr. Wirenius includes all

4. Wirenius, *supra* note 1, at 31.

5. He distinguishes actual (presumably meaning physical and or psychological) coercion from economic coercion. As an expression of what kind of coercion matters, this distinction is, in my view, gendered in the sense that women are substantially more vulnerable both to economic and to physical coercion. Women, I would argue, are therefore more likely to contest the distinction as a basis for defining what is properly regulable in this context. Nevertheless, I shall accept this distinction for the purpose of responding to Mr. Wirenius's critique.

6. *See* Wirenius, *supra* note 1, at 32-33. Mr. Wirenius accuses Professor MacKinnon of setting up a "straw man" when she suggests that the first amendment prevents Linda Marchiano from suppressing the film DEEP THROAT, the record of her sexual violation. Materials that are the record of a crime, he insists, including film or photographs, may be confiscated under the doctrine that one may not profit from one's crime. However, his solution to the problem of direct harm seems at least questionable in light of the Supreme Court's recent holding in Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 112 S. Ct. 501 (1992). In *Simon & Schuster*, the Court held that a New York law providing for the confiscation of royalties from books published by convicted criminals concerning their crimes is an unconstitutional content-based regulation, and therefore a violation of the author's First Amendment rights. Notwithstanding this decision, I do hope that Mr. Wirenius' optimism regarding the regulation of at least some pornography as the record of a crime is warranted.

7. This characterization suggests at the outset that the specific harms outside of coercion in the production of pornography are derivative, attenuated, indirect, an assumption that has important consequences in the context of First Amendment doctrine. *See infra* notes 37-39 and accompanying text (discussing causation).

harm to everyone (men and women) that can be attributed to pornography outside of the narrow range of the direct harms described above. Examples of such attitudinal harm include increased violence against women, due to the effect of consumption of pornography on men, and the harassment or degradation of women, resulting from women's exposure to pornography. In other words, attitudinal harm includes harm that results from a consumer's *use* of pornography as opposed to the creation of the pornography itself.[8] It is the proposed regulation of this type of harm that Mr. Wirenius believes "inimical . . . not only to the Constitution but to any notion of democratic-republican self government."[9]

Having articulated this distinction and focusing on the regulation of indirect harm, Mr. Wirenius begins his analysis by noting that Professor MacKinnon fails to situate pornography within the traditional categories defined by the Supreme Court as "nonspeech." He reviews the most obvious of these categories, including obscenity, group libel, and fighting words, and concludes that none satisfactorily encompass the definition of pornography contained in the MacKinnon-Dworkin ordinance.

Although acknowledging in a footnote[10] that Professor MacKinnon herself expressly rejects obscenity as an adequate basis for regulating pornography, Mr. Wirenius does not explore her reasoning. Nevertheless, her explanation of the inadequacy of traditional categories is essential to her broader vision of the First Amendment and bears elaboration. The Supreme Court has defined obscenity as material that " 'the average person applying contemporary community standards' would find . . . taken as a whole, appeals to the prurient interests . . . depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, taken as a whole, lacks serious literary, artistic, political, or scientific value."[11] Some part of what the MacKinnon-Dworkin ordinance would classify as pornographic would undoubtedly also be obscene under this analysis; however, the focus of the Court's definition is offense to the community, an infraction of moral norms, not harm to individuals.

8. Mr. Wirenius characterizes the effort to penalize pornographers for indirect harms as "a new departure in tort law" in that the producer is held liable for the use to which the materials are put, regardless of whether he intended, anticipated, or could have foreseen these uses. This description, it seems to me, 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?

9. Wirenius, *supra* note 1, at 28.

10. *See* Wirenius, *supra* note 1, at 39-40 n.40.

11. Miller v. California, 413 U.S. 15, 24 (1973).

By noting that "[t]heir obscenity is not our pornography,"[12] Professor MacKinnon underscores the distinction between regulation based on moral offense and the very specific (and concrete) harm of pornography. One might imagine that this distinction would allay at least some of Mr. Wirenius's concerns about the scope of the ordinance. Unlike historical obscenity regulation, the MacKinnon-Dworkin ordinance attempts to define its target as specifically and as narrowly as possible. The ordinance does not depend upon an appeal to "community standards," thereby requiring moral conformity to a particular norm. Rather, the MacKinnon-Dworkin ordinance defines its target in terms of sexual subordination — perhaps only a subcategory of "obscene" material but one that harms women in concrete and demonstrable ways.[13]

Although on the one hand the ordinance targets a category of materials that may be narrower (and is certainly more clearly defined) than the Supreme Court's category of obscenity, its scope is, as Mr. Wirenius correctly points out, broader in certain respects than that definition. For example, the ordinance would not clearly exempt materials that, while obscene (and pornographic), taken as a whole have artistic or political value. Nor would Professor MacKinnon protect an individual's right to consume pornographic materials in private, if such consumption can be shown to have resulted in the type of harm targeted by the statute. This, however, is consistent with the purpose of the regulation — to reduce or eliminate the harm that pornography inflicts on women — as opposed to obscenity law's concern with regulating public morality while protecting private "pleasure."

Assuming that the speech targeted by the ordinance does not fall within any of the categories of speech excluded from the First Amendment's protection, Mr. Wirenius concludes that the regulation must be analyzed according to the Court's most protective standard, requiring a compelling state interest to justify regulation.[14] He explains that "[t]he only remaining standard (outside the *Chaplinsky* categories) 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*."[15] He interprets this standard

12. *See* CATHARINE MACKINNON, FEMINISM UNMODIFIED 150 (1987).

13. Under the ordinance, the plaintiff has the burden of establishing the causal link between the pornographic material and the harm she allegedly suffered. The ordinance is in no sense a prior restraint — rather, it imposes liability only when harm can be proved.

14. *See* Wirenius, *supra* note 1, at 37.

15. Wirenius, *supra* note 1, at 47.

as permitting regulation only of harms that are incidental in nature, those harms that are not dependent upon the content of the communication but on the context in which it is uttered.

By suggesting a simple dichotomy in which speech is either excluded entirely (the *Chaplinsky* categories) or accorded full protection (under *Brandenburg*), Mr. Wirenius fails to acknowledge the doctrinal complexity of the Supreme Court's approach to the First Amendment. In addition to obscenity and fighting words, which the Court has excluded altogether from the scope of the First Amendment,[16] the Court has treated certain types of speech as low value speech, according them some but not full First Amendment protection.[17] For example, the Supreme Court has held that the First Amendment does not prohibit government regulation of an employer's speech during a union election.[18] Similarly, commercial speech, such as advertisements for legal gambling establishments,[19] is subject to regulation. These types of regulation are, of course, content-based regulations which survive First Amendment scrutiny because they target harms that the government is empowered to prevent.[20] The regulations are constitutional neither because the speech is excluded altogether from First Amendment protection nor because they meet the stringent *Brandenburg* compelling state interest test. Rather, these categories of speech, as low-value speech, are simply accorded less than full constitutional protection.

Mr. Wirenius oversimplifies not only the Supreme Court's First Amendment analysis but Professor MacKinnon's as well in that he attributes to her the premise that the First Amendment protects

16. *But see* R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (striking down hate speech ordinance that imposed a viewpoint-based restriction despite its limitation to fighting words).

17. For a discussion of the Supreme Court's treatment of low value speech, see Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 602-08 (1986) [hereinafter Sunstein].

18. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 618-19 (1969). Although the Court in *Gissel Packing* does not expressly define labor speech as "low value," its willingness to balance the employer's constitutional right to free speech against the employees' statutory right to associate freely in the formation of unions indicates that the protection accorded the employer's speech is significantly less than full First Amendment protection.

19. *See* Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) (holding that a state may bar casino advertising even though gambling is legal); *see also* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 771-73 (1976) (holding that a state may suppress false and misleading pharmaceutical advertisements).

20. For an argument that pornography may be regulated as a form of "low value" speech, see Sunstein, *supra* note 17.

speech only so far as no harm can result.[21] Although not entirely clear on this point, he suggests that this premise reflects her interpretation of the Supreme Court's most speech-protective standard — the compelling state interest test.[22] Arguing that Professor MacKinnon fails to distinguish attitudinal harm (harm resulting from the communicative content of the speech) and incidental harm ("harm independent of the audience's adoption of the beliefs propounded in the communication"),[23] he insists that the latter but not the former may serve as a basis for regulating speech.[24]

By focusing his analysis narrowly on speech that falls within the core of the First Amendment's protection, Mr. Wirenius both misinterprets Professor MacKinnon's argument about speech that harms and overstates the degree to which the Supreme Court's First Amendment doctrine approaches absolutism. He correctly observes that speech that is excluded from the scope of the First Amendment may be regulated, although perhaps not in unlimited ways.[25] Moreover, such regulation need not be justified by reference to harm and is subject only to rational basis review. Nevertheless, the claim that the regulation of obscenity and fighting words, strictly speaking, need not be based on harm is not an answer to Professor MacKinnon's broader claim that we in fact permit regulation of speech when the harm is sufficiently important (or the speech sufficiently unimportant). In other words, obscenity and fighting words are excluded from First Amendment protection because, in the view of the Court, their harm outweighs their value. That the question of harm has been answered by the Court at the categorical level rather than the level of the specific case does not mean that the harm (and the relative value) of the speech was not a part of the equation.

Regulation of speech that is deemed to fall within the core of the First Amendment must be justified by a compelling state interest, a standard that concededly can be met only in very narrow circumstances. However, even limiting the analysis to speech that the Court has deemed within the scope of the First Amendment's protection, it is clear that certain types of potentially harmful speech may be regulated in situations that would not meet the stringent *Brandenburg* standard. As noted above, labor speech and commercial speech both receive some but not full First Amendment protection and conse-

21. *See* Wirenius, *supra* note 1, at 42.
22. *See* Wirenius, *supra* note 1, at 42, 45.
23. Wirenius, *supra* note 1, at 42.
24. *See* Wirenius, *supra* note 1, at 42.
25. *See* Wirenius, *supra* note 1, at 45 n.62.

quently may be regulated based on their content. Why? Because unregulated the speech may have a harmful effect on its audience.

Finally, focusing on the *Brandenburg* standard itself, Mr. Wirenius cites the famous "shouting fire in a crowded theater" example, arguing that "[t]he 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."[26] One might imagine an identical defense of the MacKinnon-Dworkin ordinance — that the evil to be prevented is not the substance of the communication, a false message about the inferiority of women, but the violence that results from the consumption of pornography. Both types of regulation are dependent upon a presumption about the listener's reaction to the message of the speaker, whether or not the regulation is directed at the message itself.

In short, the degree to which speech is protected depends at some level upon an assessment, albeit frequently an implicit one, of the nature and significance of the harm that motivates the regulation. Understood within this broader context, Professor MacKinnon's argument that the First Amendment permits regulation of harm that matters seems compelling, not as a restatement of the Supreme Court's own conception of its First Amendment approach,[27] but as a description of the political reality of First Amendment doctrine. The state may regulate obscenity (because it offends),[28] fighting words (which by their utterance inflict harm),[29] labor speech (which contains the potential for coercion),[30] and commercial speech (which may undermine the operation of the marketplace of goods and services as opposed to the marketplace of ideas).[31] All of these types of speech have been analyzed within the context of the First Amendment and have been afforded limited protection or no protection whatsoever. Why? Because they cause harm, harm that matters.[32]

---

26. Wirenius, *supra* note 1, at 43.

27. In R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992), Justice Stevens in concurrence expresses his own misgivings about the Court's categorical approach, noting that "the Court has applied its analysis less categorically than its doctrinal statements suggest." *Id.* at 2567. He then goes on to discuss factors that, in his view, underlie the Court's decisions. *Id.*

28. *See* Miller v. California, 413 U.S. 15 (1973).

29. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

30. *See* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

31. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

32. The Supreme Court, most recently in R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992), has relied on a distinction between regulation based on content and regulation based on viewpoint, the latter being more constitutionally suspect than the former. This

III. The Threat of Pornography: A Feminist Reading vs. A Liberal Reading

Given the types of speech that the Supreme Court has determined may be regulated consistently with the First Amendment, why is regulation of pornography particularly threatening? It is in his discussion of Professor MacKinnon's analysis of privacy that Mr. Wirenius suggests his answer to this question. Focusing on her critique of privacy as a vehicle for protecting reproductive rights, Mr. Wirenius insists that "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."[33] This broad definition of the proper role of the state extended to the area of speech and thought would, following Professor MacKinnon's theory, lead to the promulgation of "a sexual orthodoxy."[34]

In developing this vision of the totalitarian state, Mr. Wirenius ignores the more subtle relationship between Professor MacKinnon's critique of the First Amendment and the doctrine of privacy. The doctrine of privacy, by creating a zone of personal decisionmaking in which the state may not interfere, insulates the preexisting power structure within that sphere. Similarly, the First Amendment, by precluding any law that abridges freedom of speech, presupposes that freedom of speech exists absent state regulation. In other words, in the received wisdom of liberalism, the state and the state alone threatens speech. What MacKinnon and other feminist scholars have argued is that inequality between men and women exists prior to the

---

distinction, while perhaps superficially compelling, is not without critics. *See, e.g.*, Sunstein, *supra* note 17.

Whatever the merits of the content/viewpoint distinction, this does not seem to be the distinction upon which Mr. Wirenius relies in identifying the danger of the anti-pornography regulation. Rather, in his view, the regulation is problematic not because it discriminates based on viewpoint but because it targets harm that results from the listener's cognitive response to the speech. *See* Wirenius, *supra* note 1, at 42-47.

33. Mr. Wirenius suggests, incorrectly in my view, that Professor MacKinnon's rejection of the doctrine of privacy is somehow at odds with much of mainstream feminism. Feminists, including MacKinnon, support the notion that individual autonomy (including for example the right to abortion) is essential to women's equality. The feminist critique of the traditional doctrine of privacy is that it protects not individual autonomy but private exercise of power.

This was certainly Virginia Woolf's concern in A ROOM OF ONE'S OWN. Her appeal was for economic and social independence for women, not a guarantee of noninterference by the state. Shakespeare's sister was not silenced by the state but by social constraints enforced by men under patriarchy. Thus, Mr. Wirenius's citation to Woolf as a counterpoint to MacKinnon seems misguided.

34. Wirenius, *supra* note 1, at 52.

state. Women are silenced by pornography (and sexual violence and sex discrimination and poverty and social devaluation) prior to the First Amendment. Absent state regulation, men's speech is free, women's speech is not. Thus, by protecting freedom of speech to the extent that it exists prior to the state, the First Amendment preserves unequal speech and unequal power. If men's "speech" through pornography silences (or humiliates, devalues, abuses, or even kills) women, this is not a problem that the liberal state can reach.

In a sense, when Mr. Wirenius suggests that Professor MacKinnon's arguments are in conflict with traditional "notions of limited government and institutional distrust," he has got her meaning exactly right. For Mr. Wirenius, the conflict is men and women as citizens against a state that would encroach on personal liberties. For Professor MacKinnon, the conflict is women against men who abuse, rape, harass, discriminate against — in short oppress — women. To the extent that the liberal state is limited in its ability to reach these harms, it reinforces patriarchy. To the extent that a commitment to equality permits the state to reallocate power and redress these forms of oppression, the state is an ally of the oppressed, including women. In other words, from a feminist standpoint, traditional notions of limited government and institutional distrust do not necessarily coincide with (indeed may be antithetical to) other values of liberalism, including individual autonomy for men and women, and yes, freedom of speech. Mr. Wirenius sees an activist state as heralding the specter of totalitarianism; feminists, including Professor MacKinnon, see it as containing the seeds of equality.

IV. Why Do We (Selectively) Protect Speech That Harms?

Rather than respond to Professor MacKinnon's central observation that political choices underlie what the Court has deemed protected or unprotected speech, Mr. Wirenius misinterprets the significance of her argument while, in my view, overstating the threat her ideas pose to our collective free speech values. By assuming simply that we do protect speech that harms and asking why, Mr. Wirenius misses a more relevant and interesting question: Why do we protect some types of harmful speech and not others?

Attempting to answer the question "Why do we protect speech that harms?" Mr. Wirenius reviews various rationales underlying the First Amendment and offers as a unifying theme "the need for a democratic-republican state to presume the ability of its citizens to make

rational choices."[35] He explains that

> 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, . . . a people must be able to distinguish between good and evil, true and false, wisdom and prudence.[36]

As an argument for First Amendment absolutism, this justification is at least logical, but Mr. Wirenius is not an absolutist. His acceptance of the Supreme Court's clear and present danger standard as applied to mob violence in *Brandenburg* in effect qualifies his presumption of autonomy and rationality — people must be presumed to be capable of self-rule . . . except when they are not.

Attempting to distinguish the harm in *Brandenburg* from the harm of pornography, Mr. Wirenius explains that in *Brandenburg* "the speaker-audience relationship is very like that of principal-agent. The audience member is, at the behest of the speaker, acting."[37] On the other hand, the harm of pornography, he posits, depends upon acceptance by the reader of the ideas expressed in the pornographic material. This distinction, however, rests on a controverted point about the operation of pornography. Arguably 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 in this way, the consumption of pornography is a sexual practice, not an idea about sexuality, just as the posting of pornography in the workplace is an act of sexual harassment, not the expression of a point of view about women's role in the workplace.[38]

It is not clear why Mr. Wirenius is willing to accept the theory of mob psychology upon which *Brandenburg* relies while rejecting out of hand MacKinnon's theory regarding the noncognitive operation of pornography. Why is Professor MacKinnon's claim about the subconscious harm of pornography "extraordinarily degrading"[39] while the Court's assumption that an audience may be swept out of control by a speaker perfectly acceptable?

Mr. Wirenius offers no answers to these questions, nor does he offer

35. *See* Wirenius, *supra* note 1, at 60-61.

36. Wirenius, *supra* note 1, at 67.

37. Wirenius, *supra* note 1, at 70.

38. *See* CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 204-06 (1989); FEMINISM UNMODIFIED 172-73 (1987).

39. Wirenius, *supra* note 1, at 72.

a principled distinction, within the context of his theory of the state, between pornography and other types of speech regulation. If the presumption that individuals are capable of discerning good from evil, truth from falsehood, is essential to democracy, must we eliminate laws against libel and slander? Imposing liability for false statements about individuals certainly seems antithetical to Mr. Wirenius's assumption that none of us are fooled by such statements. Similarly, regulation of false advertising claims also seems to undermine a presumption that individuals can discern the truth. Why not simply presume that we will all know when an ad campaign is fraudulent or exaggerated? Mr. Wirenius does not address the implications of his assumption for these other types of speech regulation nor, conversely, the effects of such regulation on the health of our democracy.

V. Conclusion

In the end, Mr. Wirenius's own answer as to why we protect speech that harms is simply that we must — that protection of speech follows from our necessary assumptions about the nature of the individual within a system of self-government. Moreover, he insists that "[a] political commitment to these beliefs, even if it flies in the face of empirical reality, can help to make them true. . . ."[40] In other words, believing can make it so. In the meantime, men speak, the pornography industry thrives, and women suffer in the name of individual liberty.

An alternative response to Mr. Wirenius' question as to why we protect speech that harms is to recognize that we don't — at least not always — and that our commitment to free speech at times collides with other equally important values, including perhaps equality. In light of this selective protection of speech, a First Amendment analysis of pornography regulation depends less upon manipulating categories of nonspeech or distinguishing between content and viewpoint regulation than upon understanding the nature of the harm and making a judgment about its significance. This judgment, in turn, is one that should be made overtly in light of our sometimes conflicting commitments to equality and liberty rather than resolved implicitly through uncritical adherence to the fiction of free speech.

40. Wirenius, *supra* note 1, at 76.