

The New Legal Puritanism of Catharine MacKinnon

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By rejecting traditional legal definitions of "obscenity," Professor Catharine A. MacKinnon has successfully revived debate on questions about pornography.¹ Her work has called into question the consensus view that pornography regulation has dire implications for constitutionally guaranteed freedoms of speech and of the press.² Although others have made arguments for prohibiting pornography,³ this Article focuses primarily on the powerfully original work of Professor MacKinnon.

This Article does not concentrate on the legislation that MacKinnon was instrumental in drafting,⁴ but rather on the ideas that animated it. We argue here that while her critique of pornography has had the salutary effect of shifting the inquiry from aesthetic or "moral" considerations to the specific harms that pornography allegedly creates, her approach is fatally defective both in theory and in practice. Part I of this Article gives an account of the relevant legal background (the law of obscenity) and the traditional ways that scholars have thought about the problems pornography poses. Part II sets forth MacKinnon's rejection of obscenity doctrine, her redefinition of pornography, and her proffered reasons for prohibition. Finally, Part III consists of a critique of MacKinnon's approach. In it, we analyze her conceptions of both causation and consent; we describe broad sectors of art and literature that are at risk if a

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¹ See Catharine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321, 322-24 (1984) (distinguishing "the male morality of liberalism and obscenity law from a feminist political critique of pornography").

² See *id.* at 322, 336-40.

³ See, e.g., ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN 9 (1981) (defining pornography as "the graphic depiction of women as vile whores" and arguing that women will never be free as long as pornography exists); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589 (1986) (arguing that "pornography is low-value speech entitled to less protection . . . than most forms of speech").

⁴ See INDIANAPOLIS, IND., CODE § 16-3(q) (1984). This legislation, drafted by Professors MacKinnon and Dworkin, was declared unconstitutional. *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

MacKinnonite approach is followed; we analyze her rhetorical and theoretical orientation; and we conclude that the radical nature of her argument renders her proposals deeply problematic.

I. LEGAL BACKGROUND: OBSCENITY AND MORALITY

"I know it when I see it."

— Justice Potter Stewart⁵

A. *Historical Development of Obscenity Law*

The proscription of sexually explicit material has deep historical roots. In philosophy, its genesis can be traced to Plato, who banished the artist from his ideal state.⁶ At root, the reasons for Plato's proscription were moral: Plato was greatly offended by depiction of Olympian concupiscence.⁷ (Aristotle, in contradistinction, extolled the cathartic effects of art, especially tragedy.)⁸

Modern Anglo-American law still bears traces of the fears expressed in the *Republic* that immoral art could corrupt the citizenry. English censorship of expression initially appeared to be more concerned with religious and political themes than with sexual obscenity.⁹ The first reported obscenity cases in the

⁵ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

⁶ PLATO, *The Republic*, in PLATO: COLLECTED DIALOGUES *passim* (Edith Hamilton & Huntington Cairns eds. & Paul Shorey trans., 2d prtg. 1963).

⁷ *Id.* at 630-44, verses 386-99 (denouncing, *inter alia*, Homer's depictions of fear, Priam "rolling in the dung," violent laughter, and Zeus' being "so overcome by the sight of Hera that he is not even willing to go to their chamber, but wants to lie with her there on the ground"); *cf.* OVID, *THE ART OF LOVE* 105, bk. II, verses 579-86 (G.P. Goold ed. & J.H. Mozely trans., 2d ed. 1979) (recounting the amatory episode of Mars and Venus).

⁸ ARISTOTLE, *Poetics*, in BASIC WORKS OF ARISTOTLE 1455, 1457-58, 1460, 1487 (Richard McKeon ed., 1941).

⁹ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-16, at 905 (2d ed. 1988). The classic argument against an unfree (in this case, licensed) press is in John Milton's *Areopagitica*. His arguments can be categorized as (1) the historical failure of censorship and (2) the denigrating (and to that extent un-Christian) nature of censorship: we should have confidence in truth's ability to prevail. JOHN MILTON, *Areopagitica*, in COMPLETE POEMS AND MAJOR PROSE 717 (Merrit Y. Hughes ed., 1957). This idea, presaged by Esdras, is closely related to the Holmesian notion of a marketplace of ideas. D.R.M. BENNETT, ANTHONY COMSTOCK 1119 (Leonard W. Levy ed., 1971) (1878) (quoting Esdras: "As for truth, it endureth and is always strong: it liveth and conquereth for evermore."). Milton seemed to see virtue in a Millian clash with falsehood:

I cannot praise a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary, but slinks out of the race where that immortal

United States occurred in the early part of the nineteenth century.¹⁰ States soon passed obscenity statutes; in 1842, the federal government enacted a statute attempting to eliminate commerce in French postcards and obscene pictorial matter.¹¹

Shortly after the Civil War, Congress, urged by Protestant leaders and a New York City dry goods clerk named Anthony Comstock, enacted legislation prohibiting obscenity.¹² Comstock, an amalgam of the worst qualities of Joseph McCarthy and P.T. Barnum, had little doubt about or patience for the works he found obscene (they included Boccaccio's *Decameron* and the works of Zola, Daudet, and Balzac): "The effect of this cursed business on our youth and society, no pen can describe. It breeds lust. Lust defiles the body, debauches the imagination, corrupts the mind, deadens the will, destroys the memory, sears the conscience, hardens the heart, and damns the soul."¹³ Comstock received financial support from Morris K. Jesup, who, in the words of H.L. Mencken, was "very rich, and very eager to bring the whole nation up to grace by *force majeure*."¹⁴ Together, the two founded the YMCA Committee for the Suppression of Vice, whose formidable outgrowth was the New York Society for the Suppression of Vice.¹⁵ As secretary of the New York Society, Comstock was authorized to make arrests; he is said to have acted as an *agent provocateur* to sniff out peccant booksellers.¹⁶ Soon Comstock's crusade became national. As a post office agent, he launched spectacular raids and proceeded to organize antivice societies throughout the country.¹⁷ In 1873, amid intense lobbying by Comstock and his backers, President Grant signed vaguely worded legislation authorizing criminal penalties against sending

garland is to be run for, not without dust and heat that which purifies us is trial and
trial is by what is contrary.

MILTON, *supra* 729-30.

¹⁰ William B. Lockhart & Robert C. McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295, 324 & n.200 (1954).

¹¹ TRIBE, *supra* note 9, § 12-16, at 906 (citing 5 Stat. 566 (1842)).

¹² COMMISSION ON PORNOGRAPHY, ATT'Y GEN., FINAL REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY 12 (1986) [hereinafter FINAL REPORT]; FELICE F. LEWIS, *LITERATURE, OBSCENITY, & LAW* 10-11 (1976); H.L. MENCKEN, *A BOOK OF PREFACES* 255-60 (5th ed. 1924). See generally HEYWOOD BROUN & MARGARET LEACH, ANTHONY COMSTOCK 158-59 (1927).

¹³ LEWIS, *supra* note 12, at 12; cf. *In re Worthington Co.*, 30 N.Y.S. 361 (1894) (holding rare and costly editions of *Arabian Nights*, Ovid's *Art of Love*, Fielding's *Tom Jones*, and other works not obscene).

¹⁴ MENCKEN, *supra* note 12, at 257

¹⁵ LEWIS, *supra* note 12, at 10.

¹⁶ BROUN & LEACH, *supra* note 12, at 158-59; BENNETT, *supra* note 9, at 1011.

¹⁷ LEWIS, *supra* note 12, at 10.

obscene material through the mails.¹⁸ As early as 1878, Comstock's merciless prosecution and gleeful indifference to those whose lives he ruined earned him the title of "first-class Torquemada."¹⁹ Toward the end of his life, Comstock boasted that he had "convicted persons enough to fill a passenger train of sixty-one coaches, sixty coaches containing sixty passengers each and the sixty-first almost full. I have destroyed 160 tons of obscene literature."²⁰

Prior to the latter part of the nineteenth century, when the efforts of Comstock and his adherents prevailed on courts and legislatures alike, American courts had not attempted to define obscenity.²¹ But across the Atlantic, Lord Chief Justice Cockburn, in *The Queen v. Hicklin*,²² had developed a "sensitive-person" test of obscenity: "whether the tendency of the matter charged . . . is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."²³ American courts soon adopted the *Hicklin* test,²⁴ by which Theodore Dreiser's *An American Tragedy* and D.H. Lawrence's *Lady Chatterley's Lover* were declared obscene in 1930.²⁵ Three years later, however, the *Hicklin* test received a devastating blow. A New York federal district court refused to apply it, stating: "It is only with the normal person that the law is concerned."²⁶ Applying this standard, Judge Woolsey found that James Joyce's *Ulysses* was

¹⁸ *Id.*; see An Act for the Suppression of Trade in, and Circulation of, obscene Literature and Articles of immoral Use, ch. 258, sec. 2, § 148, 17 Stat. 598, 599 (1873).

¹⁹ BENNETT, *supra* note 9, at 1009.

²⁰ FINAL REPORT, *supra* note 12, at 13.

²¹ See *id.* at 12-13; Lockhart & McClure, *supra* note 10, at 324-25.

²² [1867-68] 3 L.R.-Q.B. 360.

²³ *Id.* at 371.

²⁴ See, e.g., *Rosen v. United States*, 161 U.S. 29, 43 (1896); *United States v. Kennerley*, 209 F. 119, 120 (S.D.N.Y. 1913) (Hand, J.) (applying and criticizing the test); *United States v. Clarke*, 38 F. 732, 733 (E.D. Mo. 1889); *United States v. Bebout*, 28 F. 522, 524 (N.D. Ohio 1886); *People v. Muller*, 96 N.Y. 408, 411 (1884).

²⁵ *Commonwealth v. Friede*, 171 N.E. 472 (Mass. 1930); *Commonwealth v. Delacey*, 171 N.E. 455 (Mass. 1930). See generally LEWIS, *supra* note 12, at 92-93, 102.

²⁶ *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182, 185 (S.D.N.Y. 1933) (Woolsey, J.), *aff'd*, 72 F.2d 705 (2d Cir. 1934). Judge Woolsey provided an objective test familiar from tort law:

Whether a particular book would tend to excite such impulses and thoughts must be tested by the court's opinion as to its effect on a person with average sex instincts—what the French would call *l'homme moyen sensuel*—who plays, in this branch of legal inquiry, the same role of hypothetical reagent as does the "reasonable man" in the law of torts and "the man learned in the art" on questions of invention in patent law.

Id. at 184.

not obscene.²⁷ The death knell thus sounded for the practice of widespread proscription of material whose only harm lay in its ostensible power to “deprave and corrupt” the less strong-willed portion of the citizenry

B. *Modern Supreme Court Doctrine and the Obscenity Standard*

1. *The Miller Test*

According to Professor Kathleen Sullivan, “To be prurient and offensive, a work has to turn you on and gross you out at the same time.”²⁸ This summation of the Court’s analysis, if accurate, belies years of mental toil and effort to articulate an obscenity doctrine.²⁹

The Sisyphean struggle of the Court to establish a workable obscenity standard began in earnest in *Roth v. United States*.³⁰ There Justice Brennan found that “obscenity is not within the area of constitutionally protected speech or press.”³¹ The applicable test is “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”³² The standard evolved in *Memours v. Massachusetts*,³³ in which a plurality of the Court incorporated “utterly without redeeming social value” into the definition of obscenity,³⁴ thus permitting some material previously deemed obscene to enter the domain of protected speech.

In *Miller v. California*,³⁵ the Court finally mustered a majority definition of obscenity:

The basic guidelines for the trier of fact must be: (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the

²⁷ *Id.*

²⁸ Jeff Rosen, ‘Miller’ Time, THE NEW REPUBLIC, Oct. 1, 1990, at 17 (quoting Kathleen Sullivan of Harvard Law School).

²⁹ See BOB WOODWARD & SCOTT ARMSTRONG, THE BROTHERS 192–204, 244–53, 279–82 (1979) (describing the Court’s efforts and the alleged various personal standards of obscenity). The frustration, difficulty, and unprincipledness in defining hard-core pornography was captured by Justice Stewart’s conclusory remark, “I know it when I see it.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (Stewart, J., concurring).

³⁰ 354 U.S. 476 (1957).

³¹ *Id.* at 485.

³² *Id.* at 489.

³³ 383 U.S. 413 (1966).

³⁴ *Id.* at 419.

³⁵ 413 U.S. 15 (1973).

applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.³⁶

The *Miller* standard is stricter than that set forth in *Memoirs*, because speech could have *some* (nonserious, nonglobal) redeeming value and yet still be unprotected. This newer standard permits regulation of pornography “merely because of environmental or aesthetic harms;” however, “considerations of gender are irrelevant.”³⁷

2. Child Pornography

The Court created a new category of unprotected speech in 1982. In *New York v. Ferber*,³⁸ the Court upheld a state criminal statute aimed at eliminating child pornography.³⁹ The Court took notice of the national problem of child pornography and the practicality of drying up the market by imposing severe criminal penalties on sellers, advertisers, and other promoters of the product.⁴⁰ *Ferber* is important not only because it created a new category of unprotected speech but also because it “signal[ed] a heightened sensitivity on the Court’s part to the harms that pornographic activity can inflict upon *participants* in obscene productions as well as viewers of the resulting materials.”⁴¹

C. Conventional Approaches to Pornography: Obscenity

Until recently, legislatures, courts, and scholars viewed pornography as a moral problem.⁴² Arguments about pornography’s tendency to incite illegal

³⁶ *Id.* at 24 (citations omitted).

³⁷ Sunstein, *supra* note 3, at 595.

³⁸ 458 U.S. 747 (1982).

³⁹ *Id.*; *cf.* *Osborne v. Ohio*, 495 U.S. 103 (1990) (upholding statute outlawing mere possession of child pornography).

⁴⁰ *Ferber*, 458 U.S. at 760.

⁴¹ *TRIBE*, *supra* note 9, § 12-16, at 915.

⁴² *See, e.g.*, *Miller v. California*, 413 U.S. 15, 20-21 (1973); ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 73-76 (1975) (discussing pornography in public places as a type of nuisance); ROBERT H. BORK, *THE TEMPTING OF AMERICA* 248-49 (1990); RONALD DWORKIN, *Do We Have a Right to Pornography?*, in *A MATTER OF PRINCIPLE* 335 (1985) (positing a “right to moral independence” through discussion of the Williams Report and critique of a “moral preferences” argument against pornography); RONALD DWORKIN, *Liberty and Moralism*, in *TAKING RIGHTS SERIOUSLY* 240, 256-58 (1977) (defending pornography from Devlinesque moral arguments); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 29 (1971) (“[P]ornography is increasingly seen as a problem of pollution of the moral and aesthetic atmosphere precisely analogous to smoke pollution. . . . [C]onstitutionally, art and pornography are on a par with industry and

behavior are not novel, but as Professor Louis Henkin observed over thirty years ago, "Obscenity is not suppressed primarily for the protection of others. Much of it is suppressed for the purity of the community and for the salvation and welfare of the 'consumer.' *Obscenity, at bottom, is not crime. Obscenity is sin.*"⁴³ Statutes proscribing obscenity typically include within their definition of it a reference to the scatological;⁴⁴ the focus is at least as much on the "emetic" as the "aphrodisiac."⁴⁵ Thus, analysis has traditionally concentrated more on offensiveness and less on incitement:

The question about obscenity is not whether books get girls pregnant, or sexy or violent movies turn men to crime. To view it in this way is to try to shoehorn the obscenity problem into the clear-and-present danger analysis, and the fit is a bad one. Books, let us assume, do not get girls pregnant; at any rate, there are plenty of other efficient causes of pregnancy, as of crime.⁴⁶

smoke pollution."); Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 411 (1963) ("Laws against obscenity reflect values of morality, decency, and modesty inherited from an earlier age and from religious ancestors."); cf. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 28.2, at 633 (3d ed. 1986) [hereinafter POSNER, *ECONOMIC ANALYSIS*] (arguing that "the law seems on firm economic ground in giving less protection to sexually explicit art and literature than to political and scientific ideas"); RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 331 (1988) [hereinafter POSNER, *LAW AND LITERATURE*] (Arguing against "[t]he wide-spread suppression of literature, in the name of morality").

⁴³ Henkin, *supra* note 42, at 395 (emphasis added).

⁴⁴ See, e.g., MODEL PENAL CODE § 254.1(1) (1962) ("Material is obscene if, considered as a whole, its predominant appeal is to a prurient interest, that is, a shameful or morbid interest, in nudity, sex or *excretion*" (emphasis added)). Most states have adopted definitions of obscenity that essentially track the Model Penal Code's definition. See, e.g., ALA. CODE § 13A-12-150 (1975); ARIZ. REV. STAT. ANN. § 13-3501 (1989); ARK. CODE ANN. § 5-68-302 (1987); CAL. PENAL CODE § 311 (West Supp. 1993); COLO. REV. STAT. § 18-7-101 (1986); DEL. CODE ANN. tit. 10, § 7201 (1989), tit. 11, § 1361 (1985); GA. CODE ANN. § 26-2101 (1977); IDAHO CODE §§ 18-1514, 18-4101 (1987); ILL. REV. STAT. ch. 38, para. 11-20 (1989); IOWA CODE § 728.1 (1979 & Supp. 1993). KAN. STAT. ANN. § 21-4301 (1988); KY. REV. STAT. ANN. § 531.010 (Baldwin 1990); MASS. ANN. LAWS ch. 272, § 31 (Law Co-op. 1992); MICH. COMP. LAWS § 752.362 (1991); MINN. STAT. § 617.241 (1987); MISS. CODE ANN. § 97-5-27 (Supp. 1992).

⁴⁵ Henkin, *supra* note 42, at 392 (using a phrase owed to "Judge Woolsey's felicity"); See *United States v. One Book Called "Ulysses,"* 5 F. Supp. 182, 185 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934) (Woolsey, J.) ("[T]he effect of 'Ulysses' on the reader undoubtedly is somewhat emetic, nowhere does it tend to be an aphrodisiac.").

⁴⁶ BICKEL, *supra* note 42, at 73; see also Henkin, *supra* note 42, at 392. Henkin states the following:

Pornography is thus seen as a matter of bad taste, a nuisance;⁴⁷ eagerness to prohibit it may be dismissed as social conservatism or, less charitably, "the mawkish prudery of psalm-singing shopkeepers and unschooled rustics."⁴⁸ Only in the very recent past have commentators, courts, and legislators begun to consider the special harms pornography presents to women. Catharine MacKinnon has become both the leader for and the symbol of that trend.

II. MACKINNON'S CRITIQUE OF PORNOGRAPHY

"All I maintain is that on this earth there are pestilences and there are victims, and it's up to us, so far as possible, not to join forces with the pestilences."

— Albert Camus⁴⁹

A. *Language and Style: Rejection of Neutral Principles*

The lyricism and force of Professor MacKinnon's writings are striking. Her frequent use of metaphor,⁵⁰ hyperbole,⁵¹ neologism,⁵² paradox,⁵³

Concentration on whether obscenity may—or may not—incite to unlawful acts aims beside the mark. The question, rather, is whether the state may suppress expression it deems immoral, may protect adults as well as children from voluntary exposure to that which may "corrupt" them, may preserve the community from public, rampant "immorality."

Id.

⁴⁷ BICKEL, *supra* note 42, at 74 ("Perhaps each of us can, if he wishes, effectively avert the eye and stop the ear. Still, what is commonly read and seen and heard and done intrudes upon us all, wanted or not, for it constitutes our environment.").

⁴⁸ W.V. QUINE, *QUIDDITIES* 207 (1987).

⁴⁹ ALBERT CAMUS, *THE PLAGUE* 229 (Stuart Gilbert trans., 1948).

⁵⁰ *See, e.g.*, CATHARINE A. MACKINNON, "More Than Simply a Magazine": *Playboy's Money*, in *FEMINISM UNMODIFIED* 134, 143 (1987) (stating that sex research of Masters and Johnson "revolves around the search for the perfect fuck, the modern equivalent of the holy grail").

⁵¹ *See, e.g.*, CATHARINE A. MACKINNON, *Linda's Life and Andrea's Work*, in *FEMINISM UNMODIFIED* 127, 127 (1987) ("When I mentioned to Andrea what I was going to do in my twenty-five minutes, she said, it will be twenty-five more minutes than has ever gone into any of that.").

⁵² *See, e.g., id.* at 128 (using the captivating term "pornographed").

⁵³ *See, e.g., id.* (speaking of Linda Lovelace: "I do think her experience on the one hand is individually extreme, specifically horrible, and unusually brutal, and is on the other hand a very common, everywoman kind of experience.").

allusion,⁵⁴ sarcasm,⁵⁵ humor,⁵⁶ and choice of diction⁵⁷ lends her writing a prophetic quality. It is sometimes confrontational and has an *épater les bourgeois* style. In *Feminism Unmodified*, Professor MacKinnon does not couch her arguments in the familiar lawyerly language of disinterested neutrality; rather, the book consists largely of political speeches.⁵⁸ This way of writing and speaking is also linked to MacKinnon's deeper criticism of "the definition of justice as neutrality between abstract categories."⁵⁹

Neutral principles are generally conceived as rules that a court is prepared to apply unrelentingly and without exception in all relevant cases.⁶⁰ The court must be held to a standard of consistency across all of the cases it encounters and the concerns of the court, so the argument goes, should be greater than

⁵⁴ See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 222 (1987) (referring to "the Three Christs of Ypsilanti").

⁵⁵ See, e.g., CATHARINE A. MACKINNON, *Francis Biddle's Sister: Pornography, Civil Rights, and Speech*, in *FEMINISM UNMODIFIED* 163, 193 (1987) (commenting on the purposes of the First Amendment: "who listens to a woman with a penis in her mouth?").

⁵⁶ See, e.g., *supra* note 54, at 13 ("Lawyers considering whether anything can be done for a woman . . . rarely conclude that they should confront or change the law. They look at cases the way surfers look at waves.").

⁵⁷ Professor MacKinnon, unlike the patrician Justice Harlan, prefers what Judge Woolsey termed "old Saxon words" to more accepted euphemisms. *United States v. One Book Called "Ulysses,"* 5 F. Supp. 182, 184 (S.D.N.Y. 1933) (Woolsey, J.), *aff'd*, 72 F.2d 705 (2d Cir. 1934). Her condemnations are graphic: "There is a way to fuck right, and if you can't manage it, Playboy is there to help you." MACKINNON, *supra* note 50, at 143.

⁵⁸ See MACKINNON, *supra* note 54, at 215 (discussing the dialogic character of these discourses: "Spoken words carry the specific quality of their birth relation forever, even if they are later written down as one person's delivery. As a form, speaking remains dialogue."). Two of Professor MacKinnon's discourses later appeared as articles in journals. See MacKinnon, *supra* note 1; Catharine A. MacKinnon, *Francis Biddle's Sister: Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

⁵⁹ MACKINNON, *supra* note 55, at 164.

⁶⁰ The seminal exposition of neutral principles was that of Herbert Wechsler. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (finding it difficult to locate a neutral principle justifying the Supreme Court's decision in *Brown v. Board of Educ.*, 347 U.S. 483 (1954)); see also ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 96 (1970) ("The process of the coherent, analytically warranted, principled declaration of general norms alone justifies the Court's function. . . ."); BORK, *supra* note 42, at 143-53 (discussing neutral principles: in derivation, definition, and application of principle). For a recent Supreme Court opinion relying on "a valid and neutral law of general applicability," see *Employment Division v. Smith*, 485 U.S. 660 (1988) (rejecting free exercise claim and upholding state denial of unemployment benefits to persons dismissed from their jobs because of religiously inspired peyote use).

merely those of the moment.⁶¹ Judge Cardozo had something like this in mind when he remarked: "Our jurisprudence has held fast to Kant's categorical imperative, 'Act on a maxim which thou canst will to be law universal.' It has refused to sacrifice the larger and more inclusive good to the narrower and smaller. . . . We look beyond the particular to the universal."⁶² But abstract standards and principles,⁶³ teaches MacKinnon, only appear gender-neutral; in reality, they are designed to perpetuate male domination.⁶⁴ MacKinnon's rejection of neutral principles is reminiscent of the criticism implicit in Anatole France's description of the French law that prohibited sleeping beneath bridges: it applied to rich and poor alike.⁶⁵ True, the Court has perceived the apparent but false symmetry in "separate but equal"⁶⁶ and prohibition of interracial marriage,⁶⁷ but it has failed to do the same in its legal analysis of pornography. Those who have power (white males) construct social reality (pornography and the pornographic view of women) so that "[i]f the law

⁶¹ See Wechsler, *supra* note 60, at 19.

⁶² BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 139-40 (1921).

⁶³ See generally POSNER, *LAW AND LITERATURE*, *supra* note 42, at 108 (presenting table of opposed conceptions of law).

⁶⁴ CATHARINE A. MACKINNON, *Difference and Domnance: On Sex Discrimination*, in *FEMINISM UNMODIFIED* 32, 36 (1987); CATHARINE A. MACKINNON, *On Exceptionality: Women as Women in Law*, in *FEMINISM UNMODIFIED* 70, 71-72. An example of the Court's neutral treatment of the sexes that has caused much controversy is *Geduldig v. Aiello*. *Geduldig v. Aiello*, 417 U.S. 484 (1974) (upholding California disability insurance system, which excluded coverage of normal pregnancy and childbirth, relying on the somewhat forced distinction between pregnant and nonpregnant persons). The deeper problem for the Court is to use a higher level of abstraction to avoid using the male as the paradigm in equal protection cases. See TRIBE, *supra* note 9, § 16-29, at 1584 (advocating concept of equality of opportunity).

⁶⁵ Michael D. Granston, *From Private Places to Private Activities: Toward a New Fourth Amendment House for the Shelterless*, 101 *YALE L.J.* 1305 (1992) (citing JOHN COURNOS, *A MODERN PLUTARCH* 27 (1928)).

⁶⁶ Compare *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding state racial segregation of railroad passengers under doctrine of separate but equal) with *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (overruling *Plessy* and the doctrine of separate but equal). See generally Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 424 (1960). Black suggests the following:

[I]f a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated "equally," I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter.

Id.

⁶⁷ See *Loving v. Virginia*, 388 U.S. 1 (1967).

then looks neutrally on the reality of gender so produced, the harm that has been done *will not be perceptible as harm.*"⁶⁸ In short, neutral principles allow men to rationalize their dominance over women; the harms they commit are covered up. This refusal to accept conventional legal neutralism is fundamental to MacKinnon's world view.

B. Rejection of the Obscenity Standard

As observed in Part I, traditional legal analysis of pornography has focused on obscenity.⁶⁹ MacKinnon's work rejects the obscenity approach.⁷⁰ Obscenity is concerned not so much with harm as with offensiveness.⁷¹ Pornography is broader and more comprehensive than obscenity; the focus is not on the material's ability to produce sexual arousal in men,⁷² but on the material's ability to produce sexual and other injury in women.⁷³ The absence of a critique of gender in obscenity law, for MacKinnon, "expose[s] both the enforced silence of women and the limits of liberalism."⁷⁴ MacKinnon proposes that "[o]bscenity law is concerned with morality, specifically morals from the male point of view, meaning the standpoint of male dominance."⁷⁵ But pornography, for the feminist, is not a question of morals (the good and the evil) but of politics (the powerful and the powerless).⁷⁶ In this way, the inquiry into pornography "is part of a larger project that attempts to account for gender inequality in the socially constructed relationship between power—the political—on the one hand and knowledge of truth and reality—the epistemological—on the other."⁷⁷ MacKinnon thus wishes not to ban the *obscene*, but rather to ban the *pornographic*—which makes necessary an explanation of what she takes the pornographic to be.

⁶⁸ MACKINNON, *supra* note 55, at 166.

⁶⁹ See *supra* notes 5–48 and accompanying text.

⁷⁰ See MacKinnon, *supra* note 1, at 322–23.

⁷¹ *Id.* "Obscenity" is etymologically traced to either the Latin for "off-stage" ("scena" or "stage") or the Latin "caenum" meaning "dirt, filth, mire, excrement;" "pornography" comes from the Greek "porne" meaning "whore." LUDWIG MARCUSE, *OBSCENE: THE HISTORY OF AN INDIGNATION* 12, 21 (Karen Gershon trans., MacGibbon & Kee 1965) (1962).

⁷² MacKinnon, *supra* note 1, at 329–31.

⁷³ *Id.*

⁷⁴ *Id.* at 322.

⁷⁵ *Id.* at 322–23.

⁷⁶ *Id.* at 323.

⁷⁷ *Id.* at 325.

C. MacKinnon's Definition of Pornography

The feminist theory of pornography derives from the feminist theory of sexuality: "[P]ornography reflects and reinforces the subordinating structure of male sexuality and power."⁷⁸ As a reflection of male domination, pornography is not so much atypical as archetypal.⁷⁹ The feminist definition of pornography is linked to a conception of coercion: "Pornography . . . is a form of forced sex"⁸⁰ Like rape and prostitution, "pornography institutionalizes the sexuality of male supremacy, which fuses the erotization of dominance and submission"⁸¹ Pornography teaches that rape, battery, sexual harassment, prostitution, and child sexual abuse are erotic.⁸² In sum, MacKinnon defines pornography as based on sexual discrimination:

[P]ornography [i]s the graphic sexually explicit subordination of women through pictures or words that also includes women dehumanized as sexual objects, things, or commodities; enjoying pain or humiliation or rape; being tied up, cut up, mutilated, bruised, or physically hurt; in postures of sexual submission or servility or display; reduced to body parts, penetrated by objects or animals, or presented in scenarios of degradation, injury, torture; shown as filthy or inferior; bleeding, bruised or hurt in a context that makes these conditions sexual.⁸³

The attempt to eliminate pornography is thus an attempt to minimize the violence against women which is so pervasive in our society. No one could deny that this definition *gets down to cases*: what person of good will would defend, for instance, graphic representations of brutalization of women? In certain respects, then, it seems a vast improvement over the bloodlessness and moral neutrality of conventional obscenity doctrine, as so aptly satirized in the legislative definition of obscenity put forth by Kurt Vonnegut's fictional Senator Rosewater: "Obscenity . . . is any picture or phonograph record or any written matter calling attention to reproductive organs, bodily discharges, or bodily hair."⁸⁴ The problem with Rosewater's definition, of course, is that in its attempt to minimize vagueness, it seems to maximize overreach. Whether

⁷⁸ DONALD A. DOWNS, *THE NEW POLITICS OF PORNOGRAPHY* 36 (1989).

⁷⁹ *Id.* at 40.

⁸⁰ MacKinnon, *supra* note 1, at 325.

⁸¹ *Id.* at 326.

⁸² MACKINNON, *supra* note 55, at 171.

⁸³ *Id.* at 176. This definition is substantially the same as that used in INDIANAPOLIS, IND., CODE § 16-3(q) (1984) (drafted by Professors MacKinnon and Dworkin and declared unconstitutional in *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986)).

⁸⁴ KURT VONNEGUT, JR., *GOD BLESS YOU, MR. ROSEWATER* 71 (1965).

MacKinnon's definition evades either of these notorious problems is addressed in Part III of this Article.

D. *The Harms of Pornography*

Although MacKinnon does not formally separate the types of harm associated with pornography (indeed, she maintains that pornography is harmful *in itself*), we have separated what we understand to be the chief harms of pornography to simplify analysis.

1. *Harms to Those Who Participate*

While pornography treats the sexes differently and it is women *as a group* who are injured,⁸⁵ feminist scholars also believe pornography harms the individuals who are the actual participants.⁸⁶ There is evidence that at least some actresses and models are "brutally coerced into pornographic performances."⁸⁷ The very titles of some pornographic films and magazines, *Whips & Rope* and *Tied & Tortured*,⁸⁸ suggest violence and cruelty. What makes pornography particularly insidious is that women are depicted as desiring and enjoying sexual abuse.⁸⁹

2. *Harms to Victims of Sex Crimes That Would Not Have Been Committed but for Pornography*

Professor MacKinnon states unambiguously that pornography causes violence against women: "Specific pornography does directly cause some assaults. Some rapes *are* performed by men with paperback books in their pockets."⁹⁰ The argument that pornography directly causes violence against women (and children), probably the most controversial feminist argument against pornography, is discussed in Part III of this Article.

⁸⁵ MACKINNON, *supra* note 55, at 178; MacKinnon, *supra* note 1, at 338.

⁸⁶ See MACKINNON, *supra* note 55, at 179-80.

⁸⁷ MacKinnon, *supra* note 1, at 339 (citing LINDA LOVELACE, *ORDEAL* (1980)).

⁸⁸ The titles of the magazines were gathered from a list published in FINAL REPORT, *supra* note 12, at 387-424. The report contains a long list of titles to be recalled not so much with a blush, but with revulsion and horror.

⁸⁹ MacKinnon, *supra* note 1, at 326.

⁹⁰ MACKINNON, *supra* note 55, at 184 (footnote omitted).

3. Harms to Society: Objectification of Women

Another harm of pornography lies in its objectification of women.⁹¹ Writing for *Nouvelle Revue Française* on the eve of the Second World War, Simone Weil commented: "Force is what makes the person subject to it into a thing."⁹² MacKinnon's view of pornography, linked as it is with a conception of coercion, shares this notion. She asserts that pornography turns women into things: corpses or slaves.⁹³ Here one detects a Kantian or Buberian theme.⁹⁴ "Pornography . . . creates an accessible sexual object, the possession and consumption of which is male sexuality, to be consumed and possessed as which is female sexuality."⁹⁵ Contrary to the Kantian view of "a free and rational agent whose existence is an end in itself, as opposed to instrumental,"⁹⁶ women in pornography exist for the purpose of male pleasure.⁹⁷

A closely related harm is the educative role of pornography. "Pornography is ideas; ideas matter. Whatever goes on in the mind of pornography's consumer matters tremendously."⁹⁸ The ideas behind pornography and what its consumers think are important because "[m]en treat women as who they see women as being. Pornography constructs who that is."⁹⁹

⁹¹ See *id.* at 187.

⁹² BERNARD KNOX, *Introduction to HOMER, THE ILLIAD 29* (Robert Fagles trans., 1990) (quoting Simone Weil). Knox notes that Weil's essay was scheduled for publication in *Nouvelle Revue Française* but that Paris was captured by the Nazis before it could be printed. *Id.*

⁹³ Cf. MACKINNON, *supra* note 55, at 181-82 (stating pornography denied women the ability to be "autonomous, self-defining, and free acting").

⁹⁴ See MacKinnon, *supra* note 1, at 341.

⁹⁵ *Id.* at 328.

⁹⁶ *Id.* at 341 (citing IMMANUEL KANT, *FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS* (Thomas K. Abott trans., 1969)).

⁹⁷ *Id.* Professor MacKinnon's argument here is in some ways reminiscent of Martin Buber's distinction between two attitudes of which humans are capable: I-Thou and I-It. I-Thou designates a relationship between subject and subject, a relation of reciprocity and mutuality; I-It designates a relation between a subject and object, involving some form of use or control, the object being wholly passive. MARTIN BUBER, *I AND THOU*, *passim* (Ronald G. Smith trans., 2d ed. 1958).

⁹⁸ MACKINNON, *supra* note 54, at 223.

⁹⁹ MacKinnon, *supra* note 1, at 326.

4. *Pornography Silences Women*

MacKinnon also argues that the liberal concept of an ideological marketplace is an inadequate theory in a hierarchical society.¹⁰⁰ “[T]he speech of the powerful impresses its view upon the world”¹⁰¹ and passes for objective reality.¹⁰² The terror and fear caused or associated with pornography silences women’s speech.¹⁰³ When a woman sees a pornographic depiction, it is a sort of epiphany: the story is about her.¹⁰⁴ The First Amendment is traditionally concerned with protecting speech that, but for government intervention, is free.¹⁰⁵ But women’s speech is silenced, *socially*, prior to government action.¹⁰⁶

This fourfold set of harms led MacKinnon to devise a set of civil laws that would allow individuals to sue the creators, vendors, and exhibitors of pornography.¹⁰⁷ Materials might then be removed from public availability by the courts’ power of injunction; publishers, booksellers, and video rental stores would have to be on guard against selling anything that might fall under the reach of the legislation.

III. PROBLEMS IN MACKINNON’S APPROACH

The American, save in moments of conscious and swiftly lamented devilry, casts up all ponderable values, including even the values of beauty, in terms of right and wrong. He is beyond all things else, a judge and a policeman; he believes firmly that there is a mysterious power in law; he supports and embellishes its operation with a fanatical vigilance.

— H.L. Mencken¹⁰⁸

A. *The Problem of Causation*

Imponderable counterfactuals. A complete analysis of causation is beyond the scope of one essay,¹⁰⁹ but much of the force of a feminist critique of

¹⁰⁰ See *id.* at 336–37.

¹⁰¹ *Id.* at 336.

¹⁰² *Id.* at 336–37.

¹⁰³ *Id.* at 337; see MACKINNON, *supra* note 55, at 193.

¹⁰⁴ Cf. MACKINNON, *supra* note 55, at 188 (describing that a woman believed that she was tied during sex because her husband used pornography).

¹⁰⁵ MacKinnon, *supra* note 1, at 340.

¹⁰⁶ *Id.*

¹⁰⁷ See MACKINNON, *supra* note 55, at 175–76.

¹⁰⁸ MENCKEN, *supra* note 12, at 198.

pornography turns on notions of causality: Pornography causes violence against women. It creates hostile ways of thinking about who women are and what they want; this hostility eventually erupts into violent acts.¹¹⁰ However, much of MacKinnon's argument appears unsupported or even insupportable. Propositions about causality require argument and evidence.¹¹¹

MacKinnon rejects the catharsis hypothesis, that pornography beneficially releases and redirects the urge to use women sexually; instead, the idea is that it more often stokes or even creates such desires.¹¹² Recall her statement about the causal powers of pornography: "Specific pornography does directly cause some assaults. Some rapes *are* performed by men with paperback books in their pockets."¹¹³ The first sentence is the general hypothesis of unmediated causation; the second is evidence for it. The image is of pornography inexorably driving men's actions. Such a method of discerning cause in the world, however, runs afoul of accepted canons of scientific evidence.

One way of understanding the objection to MacKinnon's inference is to ask, "How do we know what would have happened absent the existence of the relevant paperback books?" The short answer is that we do not. However, this way of phrasing the question is useful, for it forces us to pay attention to what, in philosophy, is called the problem of counterfactuals or hypothetical worlds.¹¹⁴ That is, if some aspect of the world changes, how can we know what other aspects of the world must necessarily change as well?¹¹⁵ How do we know that X *causes* Y?

¹⁰⁹ See, e.g., BERTRAND RUSSELL, *THE PROBLEMS OF PHILOSOPHY* 83-84 (Oxford University Press 1959) (1912) (explaining that common sense intuitions about causation turn out to be extraordinarily difficult to justify). The problems of causation have of course spawned numerous volumes. See, e.g., H.L.A. HART & TONY M. HONORE, *CAUSATION IN THE LAW* (2d ed. 1950).

¹¹⁰ See *supra* note 90 and accompanying text.

¹¹¹ Cf. HART & HONORE, *supra* note 109, at 227-28 (explaining the significance of evidence to prove causation in negligence cases).

¹¹² See MACKINNON, *supra* note 55, at 173. A more sophisticated discussion of how availability of pornography could reduce desires for rape is contained in RICHARD A. POSNER, *SEX AND REASON* 366-71 (1992).

¹¹³ See *supra* note 90 and accompanying text. MacKinnon apparently still holds this view. See Catharine A. MacKinnon, *Turning Rape into Pornography: Postmodern Genocide*, Ms., July-Aug. 1993, at 24 (arguing in part that pornography "primes" men to enjoy rape).

¹¹⁴ For a technical treatment of several problems arising more or less directly from counterfactuals, see ANTONY FLEW, *A DICTIONARY OF PHILOSOPHY* (rev. 2d ed. 1984). For an interesting discussion of counterfactuals in a legal context, see LEO KATZ, *BAD ACTS AND GUILTY MINDS* 143-45, 225-36 (1987).

¹¹⁵ Cf. KATZ, *supra* note 114, at 226 (showing that disposal of one country's nuclear weapons does not constitute peace unless other factors are present and understood).

It is unsatisfactory to identify two factors that go hand in hand with each other and to conclude from their association that one causes the other.¹¹⁶ That is, we have to guard against confusing correlation with causation. If we ignore this distinction, we might as well conclude that because there is a strong correlation of shoe size with reading level, possessing large feet causes us to read better. In fact, the only inference that this correlation would justify is that both shoe size and reading level are directly correlated with one another precisely because they are both functions of a third variable, age: high school students are likely to have much higher reading levels and larger feet than first graders. A similar example rests upon the positive relationship between the number of fire trucks at a fire and the amount of damage it creates. Most people discern that the causal relationship is not that the number of fire trucks influences the force of the fire.

People rarely come to such conclusions about reading levels or fire trucks, precisely because in everyday life common sense about causal forces intervenes. But the emotional appeal of arguments ascribing causal force to pornography can cause a temporary shutdown of common sense notions of causality. Besides, common sense is ultimately insufficient to identify causation; what is necessary is to demonstrate it in a manner susceptible to disproof.¹¹⁷

A common error when theorizing about causality is to read evidence off of what has happened in the world while ignoring the necessity—for the purpose of drawing evidentiarily supported conclusions—of the existence of a control group. The device of the controlled experiment eliminates this error. Any text on experimental design will say something like the following: “Basic to scientific evidence . . . is the process of comparison, of recording differences, or of contrast. Any appearance of absolute knowledge, or intrinsic knowledge about singular isolated objects, is found to be illusory upon analysis. Securing scientific evidence involves making at least one comparison.”¹¹⁸ Thus the evidence of the presence of a paperback book in the rape case is crucially insufficient, for we cannot know what would have happened in its absence.

¹¹⁶ The classic treatment of this remains DAVID HUME, AN INQUIRY CONCERNING HUMAN UNDERSTANDING §§ 2, 4–7 (Charles W. Hendel ed., 18th prtg. 1977) (1748). A perhaps more accessible laying out of the issues is Wesley C. Salmon, *An Encounter with David Hume*, REASON AND RESPONSIBILITY 221 (Joel Feinberg ed., 5th ed. 1981).

¹¹⁷ For an interesting example of the necessity of theory testing, see Randall L. Kennedy’s description of two conflicting theories that seem to explain the same social events. Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1760–87 (1989).

¹¹⁸ DONALD T. CAMPBELL & JULIAN C. STANLEY, EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH 6 (1963).

How might one show causality? Generally, there are two ways. First, one might actually set up experiments on two groups of people: an experimental group and a control group.¹¹⁹ We must then try to decide how an experiment might demonstrate that pornography creates an increased likelihood of rape. The need for such a question becomes apparent when we consider how an experiment would demonstrate that some factor creates an increased likelihood of rape. We might either argue that pornography creates attitudes that will increase the likelihood of rape, itself a dubious inference, or we might design some experiment that would have as its aim actually to cause experimental subjects to go out and commit rape. To say the least, such a design would have disturbing ethical implications.

There are even deeper experimental problems with the alternative to a controlled experiment; that is, the use of the data of the real world as a kind of quasi-experiment.¹²⁰ The first problem is, as noted before, the difficulty in finding and sorting out otherwise equal experimental and control groups. For instance, suppose we want to talk to a group of rapists and a group of nonrapists. Where shall we find the former? If we select them from prison, there is reason to believe that the institution functions as an intervening variable. And one suspects that it would be difficult to find self-identified rapists who have not been convicted.

Scientifically meaningful information about the causal powers of pornography is therefore rare. In a review of the literature on the causal powers of nonviolent pornography, Elizabeth and Albert Allgeier write that the case for its suppression on causal grounds is, at best, inconclusive: "Overall . . . there is little support for the belief that exposure to nonviolent erotica adversely affects attitudes toward rape or evaluations of rape victims. This is true for both short-term (less than one hour) and long-term (anything beyond one hour) exposure to nonviolent erotica."¹²¹ The Allgeiers go on to say that it would be reasonable to suggest that the artificial, sanitized atmosphere of the laboratory might skew the results of such a survey; they therefore recount an experiment conducted in a manner that presumably evaded this kind of bias. Specifically,

[The experimenters] took advantage of the fact that a sexually explicit movie was screened twice—once each semester—at a private southern university. They conducted a field study on the campus to assess the possible links between nonviolent erotica and aggression.

¹¹⁹ See *id.* at 13–16.

¹²⁰ *Id.* at 6–13.

¹²¹ ELIZABETH R. ALLGEIER & ALBERT R. ALLGEIER, *SEXUAL INTERACTIONS* 564 (3d ed. 1991).

On Monday of the week before the film was shown, the authors questioned more than 200 undergraduate women from the campus on whether or not they had been the victims of aggression during the previous weekend. The following Friday night, the film was shown, and the audience included about a third of the undergraduate men at the college. On the next two Mondays following the film's screening, the women were again asked to describe any experiences they had had with aggression over the previous weekend. There were no significant differences in the percentage of women reporting aggression before the film's showing (20 percent) versus after its screening (19 percent and 16 percent). Furthermore, those women whose male companions attended the movie reported experiencing no more aggression from the men than did the women whose companions had not viewed the film.¹²²

The available data on the causal powers of violent pornography provides little more justification for censorship. Several experiments have measured arousal caused by rape depictions, but the depictions are eroticized or suggest mutual consent.¹²³ Given the extremely large market for romances in which (to say the least) certain sorts of coercion are sentimentalized¹²⁴ and given the predominantly female composition of the buying public for such literature, it is difficult to argue that women generally perceive these kinds of depictions as threatening or unpleasant.¹²⁵ Regardless, even those experiments that measure arousal or willingness to deliver electric shocks after the subject has seen unambiguously violent pornography tell us little or nothing about the subject's willingness to commit rape. Perhaps the most interesting finding from such experiments is that the class of subjects who will be most aroused by violent pornography is predictable ahead of time.¹²⁶ When the experimental subjects are divided into those who admit that, assured of the impossibility of punishment, they might commit rape and those who nevertheless affirm that they would not, the former group has a more pronounced reaction to the depiction of rape.¹²⁷ In the authors' words:

¹²² *Id.* at 564-65.

¹²³ *Id.* at 566-68.

¹²⁴ Alice K. Turner, *The Tempestuous, Tumultuous, Turbulent, Torrid, and Terribly Profitable World of Paperback Passion*, NEW YORK MAG., Feb. 13, 1978, at 46.

¹²⁵ See HELEN HAZEN, *ENDLESS RAPTURE* 29 (1983).

¹²⁶ See ALLGEIER & ALLGEIER, *supra* note 121, at 567.

¹²⁷ *See id.* at 566-67.

Even a rape portrayal emphasizing the victim's pain and distress may, under certain conditions, stimulate high levels of sexual arousal in viewers. But this effect appears to vary as a function of whether or not the viewer describes himself as force-oriented . . . Force-oriented volunteers reported having more arousal fantasies after exposure to the rape version than after exposure to the mutual-consent version. Non-force-oriented men, however, reported having more arousing fantasies in response to the variations of the story involving mutual consent than in response to the rape variation.¹²⁸

This strongly suggests that pornography functions less as a coercive influence on people's actions (this, after all, is what causation is) and more as a medium that can only have an effect by modifying the current psychological makeup of the viewer. That is, pornography does not *create*, it only *channels*.

The MacKinnonite may respond, is channeling not *enough*? That is, is the possibility that pornography may cause its viewers to have such "attitudinal" changes that they might otherwise have ignored not enough grounds for its prohibition?¹²⁹ The answer to such a query is that the argument proves too much: If such a loose relationship between mental outlook and subsequent behavior will justify the proscription of the offending material, then anything goes. That is, consistency would require that all sorts of speech that have previously been considered innocuous and irregulable would be in genuine danger. Indeed, Supreme Court doctrine has recognized this danger; in modern times, the Court has displayed considerable antipathy towards such loose accounts of causation whenever possible. Professor Robert Post has ably explained how current antipornography arguments and their attendant low standards for causation mirror the positions of the now decisively defeated side on freedom of speech questions generally:

This is precisely the kind of argument that was traditionally offered to support the regulation of blasphemy. It was contended that blasphemy induced attitudinal changes toward religion that would lead persons to countenance anti-social acts. "Public contumely and ridicule of a prevalent religion threaten the public peace and order by diminishing the power of moral precepts." It is also the kind of argument used by the Supreme Court in the notorious case of *Debs v. United States*. There the Court upheld the conviction of Eugene Debs for delivering an anti-war speech to the state convention of the socialist party of Ohio, on the grounds that the "natural tendency and reasonably probable effect" of the speech would be to induce attitudinal changes in the audience that would increase their willingness to obstruct the recruitment of American forces for World War I.

¹²⁸ *Id.* at 567.

¹²⁹ Cf. MACKINNON, *supra* note 55, at 188 (stipulating that women are subjected to perform sexual acts because of pornography's effects on men).

As these examples illustrate, the government would acquire enormous and intolerable powers of censorship if it were to be given the authority to penalize any speech that would tend to induce in an audience disagreeable attitudinal changes with respect to future conduct. To avoid the potential for such censorship the Supreme Court has held that speech can only be penalized because of a causal nexus to future overt acts if the speech "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Pornography obviously does not meet this test. Given the present state of the evidence, then, the contention that pornography should be generally regulated because of its causal connection to future acts of sexual violence is profoundly at odds with the basic First Amendment principle that seeks to circumscribe broad government discretion to curtail speech.¹³⁰

Ultimately, arguments about the causal role of pornography seem to rely most heavily on what might be called "folk causation." It would seem most unwise to accept that pornography has some sort of inexorable causal power until we have established that there is no correlation between rape and, say, traumatic childhood experiences of the rapist. The argument loses its force if causation is metaphorical, not literal. Much more solid evidence is needed before extrapolation from anecdotal cases of the kind supplied could ever be justified. Until then, it is likely the best course to stick with the rule currently accepted by the Supreme Court—that no speech, however advocacy of violence it is taken to be, can be prohibited unless it incites and is likely to produce "imminent lawless action."¹³¹ Indeed, the (admittedly scanty) evidence in a related field suggests that pornography will have little effect on rape rates. When *Final Exit*, a self-help suicide manual, hit the *New York Times* bestseller lists, many mental health experts predicted that suicide rates would skyrocket.¹³² It did not happen: researchers found that the overall suicide rate in New York City remained unchanged. The only statistic that varied was relative incidence of suicide methods: the method the book recommended was the choice of a larger fraction of suicides.¹³³ Such a finding suggests to us that books illustrating socially disapproved actions will not create more of those actions; what they may do, however, is affect the details of actions that actors are already disposed to perform.

The evidence is ultimately too inconclusive, and the costs of a MacKinnonite legal regime too high, to walk down the prohibitionist avenue she advocates. If evidence of correlation is admissible, it supports conclusions

¹³⁰ Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297, 325–26 (1988) (footnotes omitted).

¹³¹ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

¹³² Sandra G. Boodman, *How-to Manual Failed to Increase Suicides*, WASH. POST, Dec. 7, 1993, at 25.

¹³³ *Id.*

as starkly contrary to MacKinnon's as well as it does her own. As Judge Posner notes, countries such as Denmark and Japan that have far fewer restrictions on pornography also have far lower rape rates: it is the countries in which pornography is harshly repressed (such as the Islamic nations) that the status of women is correlatively lower.¹³⁴ Posner concludes that the current evidence is simply insufficient to support any theory about pornography's relation to crime rates and the status of women.¹³⁵

B. Symbolic Statement

As observed in Part I, it would be a fundamental misunderstanding of MacKinnon's critique to imagine that causation is the sole consideration in prohibiting pornography. Indeed, part of the problem with pornography is not what it causes but rather what it reflects: deeply ingrained misogynist attitudes and patterns of thinking. We may be troubled by *Amos 'n' Andy* and *Little Black Sambo* not so much because we think they cause racism, but because they typify an appalling pattern of thinking about African-Americans.¹³⁶ Perhaps prohibiting pornography can be seen as a symbolic statement of social condemnation; a way for people "to symbolically reject, through legal prohibition, such ways of thinking."¹³⁷

By symbol, we refer to an outward object or action that makes visible or partly intelligible powerful inner feelings "which few of us can express in words."¹³⁸ In the medieval era, for example, the circle, which has neither beginning nor end, symbolized eternity. In the law, especially the criminal branch, some have seen the appropriateness of symbolism: some have suggested the symbolic value of capital punishment for murder, or castration for rape. Sodomy laws are often justified by appeals to symbolism.¹³⁹ Symbols, by definition, mean different things to different people.¹⁴⁰ As Justice Jackson remarked, "A person gets from a symbol, the meaning he puts into it,

¹³⁴ Richard A. Posner, *Obsession*, THE NEW REPUBLIC, Oct. 18, 1993, at 31, 34.

¹³⁵ *Id.*

¹³⁶ See LEE C. BOLLINGER, THE TOLERANT SOCIETY 184-85 (1986). There are, however, a number of films that are deeply disturbing but nevertheless recognized as important. Examples include BIRTH OF A NATION (David W. Griffith Corporation 1915) and TRIUMPH OF THE WILL (NSDAP and Leni Riefenstahl Studio Films 1934).

¹³⁷ See BOLLINGER, *supra* note 136, at 184-85.

¹³⁸ ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 94 (2d ed. 1986).

¹³⁹ For an enlightening discussion of this point, see the exchange between Judge Learned Hand and Judge Parker. 32 A.L.I. PROC. 128-29 (1955).

¹⁴⁰ See BICKEL, *supra* note 138, at 94. This insight drives the burgeoning discipline of semiotics.

and what is one man's comfort and inspiration is another's jest and scorn."¹⁴¹ Symbolic lawmaking, precisely because of its figurative nature, presents grave problems. Its practice runs the risk of unbounded application and susceptibility to the inflamed and transient passion of legislators. It appeals to our poetic impulses, which may be far out of line with concurrent legal traditions or conceptions of justice. The danger of symbolic lawmaking is that it can "run wild, like the vegetation in a tropical forest. The life of humanity can easily be overwhelmed by its symbolic accessories."¹⁴² Symbolic lawmaking is most troubling when it encroaches on areas of constitutional interest. Because legislation concerning pornography falls within an area of intense and longstanding constitutional concern and is especially likely to be dealt with by policymakers whose emotions run high, we should demand a good deal more than symbolism. The necessity for a higher standard becomes even more apparent when the contested symbolic status of pornography—is it a symbol of domination or liberation?—is considered.¹⁴³

C. *The Problem of Consent and Coercion*

Do women have free choice? Much of the power of MacKinnon's critique of pornography derives from its notion of coercion. In theory, she and any decent person should find common cause in prohibiting pornography when the actors are forced or coerced into acting or posing. But her notion of coercion is a bizarre and counterintuitive one. The Indianapolis ordinance drafted by Professors MacKinnon and Dworkin casts a strong presumption against consent of any kind by a participant in pornography.¹⁴⁴ But the impossibility of female free will, in "contexts of inequality," is less obvious than MacKinnon thinks.

Imagine, for instance, that someone put a gun to your head and forced you to play a lead role in a pornography film. This is essentially MacKinnon's rationale for her conclusion that actors in pornographic films are all victims of pornography;¹⁴⁵ it is a central image in her work.¹⁴⁶ This account of how

¹⁴¹ West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632-33 (1943).

¹⁴² BICKEL, *supra* note 138, at 95.

¹⁴³ For, of course, some men and women do find pornography to be an instrument of liberation. See Sallie Tisdale, *Talk Dirty to Me*, HARPER'S, Feb. 1992, at 37

¹⁴⁴ Nan D. Hunter & Sylvia A. Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce, et al.*, in *American Bookseller Association v. Hudnut*, 21 U. MICH. J.L. REF. 69, 127 (1987) (quoting INDIANAPOLIS, IND., CODE § 16-3(5)(A) VIII-XI (1984)). In this regard, one is reminded of Mencken's comment on Comstock and his followers: "All the odds are in their favour from the start. They have the statutes deliberately designed to make the defence onerous" MENCKEN, *supra* note 12, at 267.

¹⁴⁵ MACKINNON, *supra* note 55, at 179-83.

¹⁴⁶ See, e.g., MACKINNON, *supra* note 51, at 128-29.

women are forced to be "pornographed" has two dimensions. First, she relates how Linda Lovelace was manipulated, tortured, and threatened into performing in the movie *Deep Throat*.¹⁴⁷ One might question, however, how universal the coercion of actresses who are pictured performing sex acts is. Is it really the case that actresses are always coerced when they act in pornographic films? To this Professor MacKinnon responds, "Not all pornography models are, to our knowledge, coerced so expressly, but the fact that some are not does not mean that those who are, aren't,"¹⁴⁸ which is to say, it follows from the fact that some actresses are coerced that some actresses are coerced. The logic is much the same as that of a 1962 law review article that attempted to support the then-fashionable theory that cancer could be caused by a sudden, traumatic injury by wisely noting that "the absence of scientific data to prove that a single trauma may cause cancer does not mean that cancer cannot result from trauma,"¹⁴⁹ nicely skirting the more complex question of what would constitute genuine evidence one way or another.

Professor MacKinnon has a more substantive argument that no woman who is acting in a pornographic film is ever exercising free choice:

The further fact that prostitution and modeling are structurally women's best economic options should give pause to those who would consider women's presence there a true act of free choice. In the case of other inequalities, it is sometimes understood that people do degrading work out of a lack of options caused by, say, poverty. The work is not seen as *not* degrading "for them" because they do it.¹⁵⁰

Professor MacKinnon is propounding certain counter-intuitive theses here. She is describing a world in which women have choices (say) C₁ to C₁₀ in order of economic benefits. In MacKinnon's world, choice simply does not take place for anyone choosing among these options if the chooser suffers from "inequality." In such a situation, the chooser has to go with C₁₀ precisely because it is the best economic option; "free choice" does not exist.

Real life, however, is not like this. When choosing among employment options, people often do consider more than just their ultimate cash intake. In addition to milieus in which people arguably choose to do tougher or riskier work for higher income, there is also the phenomenon of people who, from all appearances, seem to make genuinely rational choices despite their economic

¹⁴⁷ See MACKINNON, *supra* note 55, at 180.

¹⁴⁸ *Id.*

¹⁴⁹ Rice L. Van Ausdall, Comment, *Sufficiency of Proof in Traumatic Cancer: A Medico-Legal Quandary*, 16 ARK. L. REV. 243, 243-44 (1962), quoted in PETER W. HUBER, LIABILITY 99 (1988).

¹⁵⁰ MACKINNON, *supra* note 55, at 180.

circumstances. Consider, for instance, two people from backgrounds of "inequality," both of whom possess relatively undesirable economic options. One takes a low-wage job and lives with his or her family; the other enlists in the Army despite the fact that he or she has other acceptable economic options. Both of them can be understood as having entirely understandable, albeit very different, reasons for their choices: the first values personal safety, family life, and minimal household obligations, while the second is attracted by the promise of health care, tuition aid, and perhaps a certain social prestige. The problem with Professor MacKinnon's theory—that free choice cannot exist in the context of "inequality"—becomes clearer when we consider these two cases, for her description of free choice simply cannot account for the worker who chooses to live with his or her family and would have to treat the second as equivalent to conscription. It does not seem that this would have to be the case. In fact, the great diversity of choices that people make suggests that these choices ought to be respected: joining the Army *is* different from being drafted, just as voluntarily choosing to take part in a great many enterprises *is* different from being coerced into them—even under conditions of "inequality."

It seems ultimately counterintuitive to strip responsibility from real men and women by inferring from the fact of some choice made that the choice is conclusive evidence of coercion.¹⁵¹ A central function of the criminal law is to punish people who break it, even when the criminal choice that is made seems most satisfying to the lawbreaker.¹⁵² Deterrence does sometimes fail; when it does, it is no accepted excuse at trial that the accused should be acquitted because the lawbreaking option was analogous to C10—that is, because it was really the best of the lawbreaker's "economic options." We ordinarily treat even those people in the grip of "inequality" as having rudimentary faculties of responsibility and choice.¹⁵³ In life, it is inevitable that people will make choices that others view as "degrading."

Of course, some people do not believe that criminals have any choice but to be criminals. Criminals, on this view, are simply victims of the cruel combination of a deprived upbringing, economic determinism, and capitalism.¹⁵⁴ Perhaps MacKinnon holds some view similar to this one; it is not

¹⁵¹ See JANET R. RICHARDS, *THE SCEPTICAL FEMINIST* 13–14 (1980).

¹⁵² See, e.g., WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 22 (2d ed. 1986) (stating that "Criminal law is framed in terms of imposing punishment for bad conduct . . .").

¹⁵³ Cf. *id.* at 441 (explaining that the "defense of necessity" is traditionally only valid for pressure arising from "physical forces of nature (storms, privations) rather than from other human beings").

¹⁵⁴ See, e.g., David F. Greenberg, *Marxist Criminology*, in 3 *THE LEFT ACADEMY* 164, 191–97 (Bertell Ollman & Edward Vernoff eds., 1986). This book contains a useful survey of works in this vein.

a view new to the University of Michigan Law School. The great trial lawyer, Clarence Darrow, once a student where Professor MacKinnon now teaches, was perhaps this century's greatest popularizer of it.¹⁵⁵ In the famous Leopold and Loeb case, Darrow quoted "old Omar Khayyam," and argued we are

But helpless pieces in the game He plays
Upon this checkerboard of nights and days;
Hither and thither moves, and checks, and slays,
And one by one back in the closet lays.¹⁵⁶

Such a view has dire ramifications that may not be immediately evident. It implies, among other things, that our distinction between things capable of guilt and those that are not is false.¹⁵⁷ Applying our working beliefs of blame and punishment becomes as absurd as Xerxes commanding his soldiers to whip the offending waves. And the distinction between "being stumbled over and being kicked" threatens to become without significance, an empty intuition best left to four-legged creatures.¹⁵⁸ How responsible would Professor MacKinnon say criminals are—how much of a faculty for free choice would she suggest that rapists, child molesters, and other sex criminals have? Are they not truly blameworthy for their actions? Such a view would sit uneasily with her repeated condemnations of those who act in sexually coercive ways.

Odd metaphysical notions about freedom of the will have powerful consequences in discussions of public issues. Take, for instance, a controversy that briefly flared during the Gulf War, likely now forgotten by all participants: the allegedly disproportionate number of African Americans who served in America's armed forces under Operation Desert Storm.¹⁵⁹ This real-world case invites us to look more carefully at the questions of choice and coercion that it

¹⁵⁵ Cf. CLARENCE DARROW, ATTORNEY FOR THE DAMNED: CLARENCE DARROW IN THE COURT ROOM 3-15 (Arthur Weinberg ed., 1989) (illustrating a speech by Clarence Darrow in which Darrow explains that criminals are in jail because of circumstances beyond their control).

¹⁵⁶ *Id.* at 65. Defendants Leopold and Loeb, the "boys," were not poor nor were they unintelligent; nevertheless, Darrow argued that they were victims of their surrounding and defective moral equipment: "The whole life of childhood is a dream and an illusion, and whether they take one shape or another shape depends not upon the dreamy boy but on what surrounds him." *Id.* at 63.

¹⁵⁷ This distinction can be traced to Roman law. See DIG. 9.1.1.9 (Ulpian, Ad Edictum 18).

¹⁵⁸ Cf. OLIVER W. HOLMES JR., THE COMMON LAW 3 (1881) (analyzing the development of the common law from a procedure "grounded in vengeance" to a procedure grounded in "actual intent and actual personal culpability").

¹⁵⁹ See Juan Williams, *Race and War in the Persian Gulf*, WASH. POST, Jan. 20, 1991, at B2.

inevitably touches. Is the idea of an all-volunteer force only a label, or is voluntary military enlistment morally superior to coercion? An article by Doug Bandow¹⁶⁰ strongly suggests that the military receives applicants from all strata of society in a manner roughly proportionate to their distribution in society.¹⁶¹ The deviations from this norm lie in the fact that the armed services routinely draw recruits who are more skilled and better educated than their civilian counterparts.¹⁶² In 1990, ninety-six percent of recruits managed to score in the top three categories of the Armed Forces Qualification Test, compared to only sixty-nine percent of an otherwise equal group of civilians.¹⁶³ A similar "degree gap" exists between recruits and comparable civilians: ninety-one percent of soldiers have high school degrees, while only seventy-five percent of the civilians in the corresponding sample have them.¹⁶⁴ There is also a dramatic distinction in favor of the enlistees when it comes to the two groups' future college plans.¹⁶⁵ Such data suggests anything but a resourceless proletariat with no options besides military service. Bandow writes that "conscription would make all African Americans worse off, preventing some who wanted to serve from joining while forcing some who didn't want to into boot camp."¹⁶⁶

He and other researchers conclude that the explanation from coercion is less likely than one based on less malign factors:

Not surprisingly, then, a 1977 Rand Corporation study found that "military service apparently continues to be viewed as an alternative employment option for a very broad cross section of American society, from the wealthiest to the poorest." Similarly, in a recent book devoted solely to this issue, Columbia University professor Sue Berryman concludes that "the data show incontestably that enlistees . . . do not come from the more marginal groups on any of four dimensions: family socio-economic status, measured verbal and quantitative abilities, educational achievement, and work orientation."¹⁶⁷

There will of course always be those who allege that those who agree to join the armed services (or to make pornographic movies) simply did not understand the nature of what they were getting into. Ray, a character in G. B.

¹⁶⁰ Doug Bandow, *The Volunteer Army Represents America*, WALL ST. J., Nov. 27, 1990, at A16.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

Trudeau's *Doonesbury* comic strip, might be taken as a spokesman for this view:

B.D.: How long you been in the Gulf, Ray?

RAY: 43 days, man. And I'll tell you one thing—I sure didn't bargain for this crap when I upped! I was gonna be all I could be, understand? I was gonna get a free education, see the world, learn how to program computers! It was today's army! Nobody said anything about actually having to fight!

Damn, I feel betrayed!

B.D.: Yeah, T.V. ads can trip you up that way . . . ¹⁶⁸

It is left as an exercise for the reader to determine which is more appropriate: Badow's contention that enlistees have authentically chosen their profession or Ray's anguish that he has been treated unfairly. The data above suggest the former: the view that poor people lack the freedom and judgment to make important choices seems mistaken as well as condescending.

The case of the pornography star initially seems even harder, but it is ultimately an even simpler one. MacKinnon's view that women cannot authentically choose to be actors in pornographic films is not even true of the one woman she takes as a paradigm case of a coerced actor: Linda Lovelace.¹⁶⁹ Even a quick reading of Lovelace's autobiographical account of her life after the filming of *Deep Throat* unambiguously demonstrates that coercion is the exception, not the rule. Lovelace explicitly distinguishes between her past experiences of brutalization by Chuck Traynor¹⁷⁰ and her comparatively benign experiences of poverty while married to Larry Marchiano:

You can imagine how we felt when we went to our Belle Terre post office and found a letter from a Hollywood producer. The producer would say he was surprised I had disappeared from public view. And he felt that the public would welcome a chance to see Linda Lovelace return in a brand new movie. And the pay would be incredible; offers ranged between \$100,000 and a million . . . And all I had to do was what I had done before in *Deep Throat*. What I knew, and they didn't, was that there would have been a major difference this time. This time, no one would have been forcing me. This time, if I acted in a dirty movie, I would be doing it out of need and greed.

¹⁶⁸ Gary B. Trudeau, *Doonesbury*, PINE BLUFF COM., Sept. 26, 1991, at A8.

¹⁶⁹ MACKINNON, *supra* note 55, at 180. MacKinnon refers to her as Linda Marchiano, but she has published two books as Linda Lovelace, a name by which she is perhaps more easily recognized.

¹⁷⁰ LINDA LOVELACE, *OUT OF BONDAGE* 76 (1986). Lovelace's implication that there were other times that she did not have a choice can only be understood in the context of Chuck Traynor's frequent threats against her personal safety.

And this time I had a choice.¹⁷¹

Although MacKinnon uses the life of Linda Lovelace to illuminate MacKinnon's reiterations that women who act in pornographic films have no choice but to do so, she does not explain why the experiences of Lovelace, the woman who is at the center of MacKinnon's accounts of coercion, are flatly irreconcilable with her theories.

Heeding such an inconsistency is helpful in understanding MacKinnon's rhetorical strategy, which derives a great deal of emotive mileage out of implicitly infusing a general term with a contingent and rhetorically convenient meaning. In philosophy, this technique is known as the "fallacy of persuasive definition."¹⁷² Such a rhetorical strategy is evident in her refusal to admit, for example, that women ever have power in this society; she calls female power "a contradiction in terms, socially speaking."¹⁷³ When considering the example of her own power when lecturing, she labels it "male power."¹⁷⁴ Another instance of the labels she uses to score gender points is evident in her description of "male" and "female" forms of athletics, in which the former is based on competition and victory against another, while the latter rests on a kind of intrinsic pleasure based on knowledge of the body.¹⁷⁵ When pressed, she admits that her metaphors of gender do not really describe real males and their approach to athletics. Her reasons for this use of gender-laden categories remain unclear unless they are intended to create a kind of schema of moral

¹⁷¹ *Id.*

¹⁷² For the best exposition of this notion, see CHARLES L. STEVENSON, *ETHICS AND LANGUAGE* 206-26 (1944):

Our language abounds with words which, like "culture" have both a vague descriptive meaning and a rich emotive meaning. The descriptive meaning of them all is subject to constant redefinition. The words are prizes which each man seeks to bestow on qualities of his own choice.

..

Persuasive definitions are often recognizable from the words "real" or "true"

. Since people usually accept what they consider true, "true" comes to have the persuasive force of "to be accepted." This force is utilized in the metaphorical expression "true meaning." The hearer is induced to accept the new meaning which the speaker introduces.

Id. at 212-14.

¹⁷³ CATHARINE A. MACKINNON, *Desire and Power*, in *FEMINISM UNMODIFIED* 46-53 (1987).

¹⁷⁴ *Id.* at 52.

¹⁷⁵ CATHARINE A. MACKINNON, *Women, Self-possession, and Sports*, in *FEMINISM UNMODIFIED* 117, 121 (1987).

evaluation driven by an abstract set of binary oppositions.¹⁷⁶ This sort of systematic redefinition, by no means uncommon in her work, is less a method of resolving disputes with those who might disagree than a kind of conceptual *fait accompli*. This strategic ambiguity, when coupled with frequent use of rhetorical questions and a politics that sometimes approaches the most vulgar kind of Marxism, may be rhetorically attractive¹⁷⁷ but it is neither compelling nor coherent. Her use of persuasive definition in the context of her account of sex does indeed make it difficult to see how any sexuality might be uncoerced: “[M]aybe they were coerced by something other than battery, something like economics, maybe even something like love,”¹⁷⁸ she writes; but this wrings the meaning out of what we ordinarily think of as coercion.

This way of understanding the world eliminates the possibility of someone making a genuine choice to be what is euphemistically called a “sex trade worker.” While such a possibility appears to be *prima facie* fantastic, a statement from the Canadian Organization for the Rights of Prostitutes (CORP) demonstrates that the proposition is by no means impossible:

No one should have to do anything they don't want for a living, but that's not a reality in life. Most of us end up taking jobs where there are certain compromises made, so we make a compromise: we'll give up this many hours of our day (and we've chosen a profession that involves the least hours) for this much reward, and we've chosen a profession that gives the most rewards in terms of work hours put in. And we will hopefully have the most control over our work environment: we will be our own boss. So we know that everyone has to do something to make a living; we've chosen the things that to us are the least evil in terms of what we're going to get out of it. We don't think any woman should have to make the choice to work as a prostitute any more than any woman should be forced to work in a factory or be forced to be a lawyer

¹⁷⁶ The best evidence for this view is presented in MacKinnon's following statement:

By male, then, I refer to apologists for these data; I refer to the approach that is integral to these acts, to the standard that has normalized these events so that they define masculinity, to the male sex role, and to the way this approach has submerged its gender to become “the” standard. This is what I mean when I speak of the male perspective or male power.

MACKINNON, *supra* note 173, at 52.

¹⁷⁷ For an excellent example of MacKinnon's use of all three of these rhetorical devices, see, *id.* at 60–61.

¹⁷⁸ CATHARINE A. MACKINNON, *Sex and Violence: A Perspective*, in FEMINISM UNMODIFIED 85, 88 (1987).

or a doctor, for that matter. But we obviously do feel that it's a legitimate service, and we'd like to be able to provide it to all people.¹⁷⁹

CORP's statement is taken from a remarkable compilation of dialogues between academic feminists, strippers, and prostitutes. While the weight of the evidence that the volume provides would by no means give grounds for the conclusion that sex trade workers have complete and universal job satisfaction,¹⁸⁰ it is replete with testimony that work in this area—for certain people—has its own rewards.¹⁸¹ One discussant says "I like it, I can live out my fantasies."¹⁸² Another argues that prostitution is good "in and of itself,"¹⁸³ precisely because it meets certain irreducible sexual needs. A third, a stripper, reveals that her choice of a profession—"to be my own boss, to be my independent power source, to be creative, to express myself fully, without terms of bureaucracy or established norms"—was in fact personally empowering.¹⁸⁴ In view of one of the newest fads in pornographic films—unpaid and home-made productions in which anonymous (but exhibitionistic) couples perform¹⁸⁵—one suspects that some actors in pornography really might consent to being paid for doing work that others are apparently willing to do for free.¹⁸⁶

The child pornography analogy. The argument for proscribing pornography based on the child pornography analogy is closely related to MacKinnon's conception of coercion. Much legal argument depends on perceiving and making analogies,¹⁸⁷ but wherever disanalogous factors present themselves, the strength of the analogy is proportionally diminished. Such an analogy is weak and liable to error and uncertainty. The attempt to analogize all pornography to child pornography runs directly into this problem.

¹⁷⁹ GOOD GIRLS/BAD GIRLS 207 (Laurie Bell ed., 1987) (interviewing CORP members Valerie Scott, Peggy Miller, and Ryan Hotchkiss).

¹⁸⁰ Several discussants at the conference made it plain that they found the work unpleasant and "degrading." It is imperative that this Article not minimize their suffering. *See id.* at 49–50 (contribution to symposium from "Participant 2"). The point we wish to underscore is that this subjective impression, like the vast majority of subjective impressions, is by no means a universal one.

¹⁸¹ *See, e.g., id.* at 91, 99, 119, 190.

¹⁸² *Id.* at 48 (contribution to symposium from Peggy Miller).

¹⁸³ *Id.* at 208 (interviewing CORP members Valerie Scott, Peggy Miller, and Ryan Hotchkiss).

¹⁸⁴ *Id.* at 190 (interviewing Amber Cooke).

¹⁸⁵ Anastasia Toufexis, *Sex Lies and Videotape*, TIME, Oct. 29, 1990, at 104.

¹⁸⁶ Presumably, the compensation for those who star in the "home-made" films lies in the knowledge that others might see them.

¹⁸⁷ *See, e.g.,* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).

As observed above, *New York v. Ferber*¹⁸⁸ created a new category of nonobscene unprotected speech;¹⁸⁹ it might be argued that pornography should be prohibited by analogous reasoning. Child pornography presents the fundamental problem of consent because the child is incapable of giving it. The law treats children differently from adults in many ways and for at least three reasons: (1) because of the peculiar vulnerability of children, (2) because of their inability to make critical decisions in an informed, mature manner, and (3) because of the traditional role of parents in childrearing.¹⁹⁰ In infancy, a considerable amount of absolutism is necessary: a three-year-old child cannot be left to experiment with a sharp object and learn the consequences. However, this sort of paternalism, if applied to a competent adult, is insulting. In the case of women, this sort of paternalism reinforces pernicious and stereotypic thinking.¹⁹¹ For a substantial part of this country's history, women could not hold office, serve on juries, or bring suit in their own names; married women were traditionally denied the right to convey property or serve as legal guardians of their own children.¹⁹² All this and much more was publicly justified under a version (there were surely other, darker motivations) of romantic paternalism. (One is reminded of Tacitus's trenchant remark of the Romanized Gauls: "What was called civilization was in fact a part of their slavery.")¹⁹³ In effect, paternalism (romantic or otherwise) says to the individual: we do not trust you to make the right choice (because you are too irrational or otherwise incapable to know what is best for you), so we will make the choice for you (because we know what is best for you). But this approach fails to appreciate the uniqueness of human desires and needs

¹⁸⁸ 458 U.S. 747 (1982).

¹⁸⁹ See *supra* notes 38-41 and accompanying text.

¹⁹⁰ GERALD GUNTHER, CONSTITUTIONAL LAW 613 n.3 (10th ed. 1980) (discussing *Bellotti v. Baird*, 443 U.S. 622 (1979)).

¹⁹¹ Hunter & Law, *supra* note 144, at 122-32; see, e.g., *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1868) (upholding law denying women right to practice law). In *Bradwell*, Justice Bradley's concurring opinion stated, "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." *Id.* at 141 (*Bradwell*, J., concurring); see also *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding state statute prohibiting women not "the wife or daughter of the male owner" from obtaining bartender's license); cf. *Frontiero v. Richardson*, 411 U.S. 677 (1973) (invalidating a statute treating women in the military differently than men in relation to justifiable rights for dependents allowances).

¹⁹² See *Frontiero*, 411 U.S. 677 (discussing sex discrimination under the guise of "romantic paternalism").

¹⁹³ CORNELIUS TACITUS, DE VITA AGRICOLAE [THE LIFE OF AGRICOLA] 107 (R.M. Ogilvie & Sir Ian Richmond eds., 1967) (in Tacitus's words, "idque humanitas vocabatur, cum pars servitutis esset.").

(emotional, intellectual, sexual, and the like) and the fact that knowledge of such needs is—because we have privileged access to our own minds, but not those of others—perceived best by the individual in question. In sum, the approach fails to treat the individual as one whose choices are worthy of respect.

There is at least one more argument for eschewing prohibition driven by either the analogy of child pornography or MacKinnon's consent/coercion theory. To the extent one believes pornography will protect itself by going underground (there is evidence in the Final Report of the Attorney General's Commission on Pornography that pornography flourished extralegally before more liberalizing Supreme Court obscenity decisions),¹⁹⁴ removing a woman's ability to consent similarly removes her ability to protect herself through legally enforceable agreements. Makers and participants will be outside the law—and outside some of the protections it offers.

D. *Of Slippery Slopes and Camels' Noses: Art, Literature, and the Costs of Prohibition*

The judge as literary critic. In his role as reader for the publisher Gallimard, André Gide, one of the century's great writers and literary critics, initially dismissed Marcel Proust's magnum opus, *Remembrance of Things Past*.¹⁹⁵ Gide lived to repent in leisure a judgment made in haste. Manet's *Le déjeuner sur l'herbe* (depicting a luncheon in the country; male figures surround an unclad woman) was rejected by the Salon and outraged the Emperor Napoléon III who pronounced it "immodest"¹⁹⁶ (the painting might disturb a feminist for different reasons). Today it is generally regarded as one

¹⁹⁴ FINAL REPORT, *supra* note 12, at 13.

¹⁹⁵ WALLACE FOWLIE, A READING OF PROUST 28 (1964).

¹⁹⁶ JOHN REWALD, THE HISTORY OF IMPRESSIONISM 85 (4th ed. 1973). Agreeing with the Emperor, a contemporary art critic remarked:

I ought not to omit a remarkable picture of the realist school, a translation of a thought of Giorgione into modern French. Giorgione had conceived the happy idea of a *fête champêtre* in which, although the gentlemen were dressed, the ladies were not, but the doubtful morality of the picture is pardoned for the sake of its fine color. Now some wretched Frenchman has translated this into modern French realism. Yes, there they are, under the trees, the principal lady, entirely undressed and two Frenchmen in wide-awakes sitting on the very green grass with a stupid look of bliss. There are other pictures of the same class, which lead to the inference that the nude, when painted by vulgar men, is inevitably indecent.

Id. (quoting Hamerton) (first alteration in original).

of the masterpieces of pre-Impressionist French painting. Here we take note of an important difference between the art critic and the judge: the errors of the former are only ridiculous, those of the latter are dangerous. The problem we face with the feminist critique of pornography is to find principled and reasonably definite lines to distinguish which literature may be permitted and which may not. In other words, we face the problem all line-drawing presents, that of overinclusion. The line-drawing experience in obscenity, in the eyes of many, has proved a striving after winds, a tilting at windmills. Can we, using MacKinnon's approach to pornography, enjoy greater success?

Consistency—why it matters. With any rule, moral or legal, it is important that the command speak with clarity and consistency. Before we make the rule, we want to consider what we are aiming at, weigh the consequences, and determine whether our purpose is sufficient. If we choose to make the law, we should enforce it uniformly. Ideally, penalties flow inevitably; just as the hot coal burns the child the first time, so it does the second and the third. The lesson is learned and learnable. It is important that law speak with equal consistency, for without it the penalty becomes arbitrary and hence precisely "cruel and unusual." Any hesitating or irregular infliction of penalties—in which an offense is greeted this time with lenity and the next with severity—is prone to abuse by *ad hoc* administration. So it is vitally important that a rule be capable of consistent enforcement. We now turn to see if we can make consistent distinctions between permissible literature and pornography.

Art and sexual misogyny. Much art, ancient and modern, is peculiarly violent, and much of this force is directed at women. Much art, ancient and modern, depicts women in what might be considered postures of sexual servility. We can illustrate these propositions with a few examples as well as some quotes from the classical canon. The Biblical story of Shelah and Ruth, the poetry of Catullus and Ovid, the Indian *Kama Sutra*, the frescoes on the Roman villas of Pompeii, and the poetry of the Earl of Rochester all depict or describe sexually explicit acts in which women could be seen as assuming passive or subordinate roles.¹⁹⁷ In the *Iliad*, where countless souls are sent

¹⁹⁷ Women can be found in positions of sexual subservience in the Biblical Song of Solomon, Ovid's *Ars Amatoria* (*Art of Love*), Petronius's *Satyricon*, Catullus's love poetry, Apuleius's *Golden Ass*, and Juvenal's *Satires* (particularly his Sixth). Explicit depictions of sexual acts in which women arguably assume subservient roles are found in the artistic traditions of ancient Egypt, Mesopotamia, Greece, the Roman Empire, India, China, Africa, Oceania, and pre-Columbian Central and South America. Cf. Thomas McEvilley, *Who Told Thee Thou Was't Naked*, ARTFORUM, Feb. 1987, at 102. The publication of sexually explicit material is a multi-billion dollar industry in the United States. Despite the attempts to censor or control it, Americans continue to consume sexually explicit material made available by magazines, videocassettes, films, books, telephone messages, and

hurling down to the House of Death, the *casus belli* is a rape. In *Paradise Lost*, Milton is quite explicit about the subordinate role of women:

[t]hough both
 Not equal, as thir sex not equal seemd;
 For contemplation hee and valour formd,
 For softness shee and sweet attractive Grace,
 Hee for God only, shee for God in hum:
 His fair large Front and Eye sublime declar'd
 Absolute rule; and Hyacinth Locks
 Round from his parted forelock manly hung
 Clustering, but not beneath his shoulders broad:
 Shee as a vail down to the slender waste
 Her unadorned golden tresses wore
 Dishevell'd, but in wanton ringlets wav'd
 As the Vine curls her tendrils, which impli'd
 Subjection, but requir'd with gentle sway,
 And by her yielded, by him best receivd,
 Yielded with coy submission, modest pride,
 And sweet reluctant amorous delay.¹⁹⁸

Milton eroticizes Eve's submission and Adam's domination; Eve is shown in postures of sexual servility and submission:

So spake our general Mother, and with eyes
 Of conjugal attraction unprov'd,
 And meek surrender, half embracing leand
 On our first Father, half her swelling Breast
 Naked met his under the flowing Gold
 Of her loose tresses hid: he in delight
 Both of her Beauty and submissive Charms
 Smil'd with superior Love. . . .¹⁹⁹

In Chaucer's *Merchant's Tale* we find sexual objectification of women: a wife is seen as a tool, good to the extent she serves to secure other values such as sexual pleasure.²⁰⁰ We also happen upon a disturbing sequence of what

computers. William A. Linsley, *The Case Against Censorship of Pornography*, in *PORNOGRAPHY* 343, 343 (Dolf Zillman & Jennings Bryant eds., 1989).

¹⁹⁸ JOHN MILTON, *PARADISE LOST*, bk. IV, ll. 295–311, at 261–62 (Roy Flannagon ed., 1993); see also *id.*, bk. VIII, ll. 541–53, at 455–56 (“Of Nature her th’ inferiour, in the mind // And inward Faculties . . . All higher knowledge in her presence falls // Degraded, Wisdom in discourse with her // Loses discount’nanc’t and like folly shewes.”).

¹⁹⁹ *Id.* at bk. IV, ll. 492–99, at 271–72.

²⁰⁰ GEOFFREY CHAUCER, *THE TALES OF CANTERBURY* 347 (Robert A. Pratt ed., 1974).

looks a great deal like spousal rape; the old lecher Januarie “brought abedde as stille as stoon” his child-bride May.²⁰¹ In other parts of the *Canterbury Tales*, we learn that women’s bodies belong to their husbands.²⁰² The Wife of Bath, who well knows the “wo that is in marriage”²⁰³ relates that she has been beaten deaf in one ear by her husband (“And with his fest he smoot me on the heed, // That in the floor I lay as I were deed.”)²⁰⁴ because “I rente out of his book a leef, [the “book” is a misogynist tract, “the book of wikked wyves”] // For which he smoot me so that I was deef.”²⁰⁵ In the *Miller’s Tale* “hende [handsome] Nicholas” the clerk, without the consent of the “yonge wyf” (not his but the Carpenter’s) “prively . . . caughte hire [her] by the queynte [crotch]” and “heeld hire harde by the haunchebones.”²⁰⁶

Shakespeare too offers his share of disturbing sexual images. At the besieged Harfleur, the young King Henry V asks, “What is’t to me . . . If your pure maidens fall into the hand // Of hot and forcing violation?”²⁰⁷ Here we are given the image of the bloody soldier’s hand “[d]efil[ing] the locks of your shrill-shrieking daughters.”²⁰⁸

We could go on at some length reciting Catullus’s poems of Lesbia, Ovid’s account of Verginia, and many other fusions of eroticism and violence (either express or implied) in art and literature.²⁰⁹ Helen Hazen’s *Endless Rapture* contains a detailed account of depictions of subordinated women in literature; her summary ranges from Austen, Eliot, and the Brontes to modern romance novels.²¹⁰ Our intent in piling up examples of possible subordination is not to demonstrate the existence of a gray area; rather, there is some question whether anything falls outside of it. But the implications of MacKinnon’s argument are that we cannot (indeed, we must not) stop to make distinctions between valuable and valueless works. What matters is that women are subjugated.²¹¹ Great art and literature depicting women as submissively enjoying sexual subjugation and abuse are especially insidious because “legitimate settings diminish the perception of injury done to those whose trivialization and

²⁰¹ *Id.* at 356.

²⁰² *Id.* at 543.

²⁰³ *Id.* at 252.

²⁰⁴ *Id.* at 272–73.

²⁰⁵ *Id.* at 268.

²⁰⁶ *Id.* at 82.

²⁰⁷ WILLIAM SHAKESPEARE, *KING HENRY THE FIFTH* act 3, sc. 3, ll. 19–21 (E.F.C. Ludowyk ed., Cambridge 1966).

²⁰⁸ *Id.* at l. 35.

²⁰⁹ For MacKinnon, this merely shows how pervasive male supremacy has made pornography. See MACKINNON, *supra* note 55, at 174.

²¹⁰ HAZEN, *supra* note 125, at 25–28.

²¹¹ See MACKINNON, *supra* note 55, at 175.

objectification they contextualize.”²¹² Thus, Professor MacKinnon seems prepared to follow the logic of her argument: “Besides, and this is a heavy one, if a woman is subjected, why should it matter that the work has other value?”²¹³ It is not clear what good qualities a work of art might have that would rescue it from the dustbin of political incorrectness if it is found to depict a “subjected woman.”

If MacKinnon is truly prepared to sacrifice works that depict women unfavorably but have serious artistic value, then it seems we have run up against a radically different vision of the world with which we cannot hope to reach agreement. Further argument must be pursued on a much more fundamental level than whether pornography should or should not be permitted; it should be apparent how much material that is conventionally protected by the First Amendment is committed to the flames by MacKinnon’s approach. If, on the other hand, it is MacKinnon’s view that there are some disliked works that should be protected, we again face the problem of devising principled distinctions. You might say, well, we know Milton when we read it and we know Shakespeare when we see it—but what of their countless epigones? Certain trends in post-modern art suggest that inferior imitation is precisely the quality at which certain artists aim.²¹⁴

We encounter grave difficulties in the case of performance artists such as Karen Finley, who smears food into her genitals, graphically describes violent sex with children, relatives, priests, and the handicapped, and has defecated on stage.²¹⁵ Finley’s performances have variously been described as a mixture of Brecht’s political performance strategy, Artaud’s sensualism, Ginsberg’s chanting,²¹⁶ and “female degradation, hilariously deconstructed.”²¹⁷ Finley views her work as a protest of sexism.²¹⁸ For most, her work is probably more emetic than aphrodisiac. But that is to use the language of obscenity law. Even if acquainted with MacKinnon’s conceptual framework, whether Finley’s work involves subordination, promotes objectification, or implies that women enjoy humiliation is an open question. Finley’s work clearly involves “penetrat[ion]

²¹² See *id.* at 174–75.

²¹³ See *id.* at 175. Of course, the use of the rhetorical question here makes it possible for MacKinnon to hedge her bets on whether she means what she says.

²¹⁴ See Amy M. Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1366, 1366–69 (1990) (discussing “post-modernists’” rejection of modernists’ artistic values of originality and quality in favor of derivativeness).

²¹⁵ *Id.* at 1369; C. Carr, *Karen Finley: The Pyramid Club*, ARTFORUM, Nov. 1988, at 148; *Karen Finley: The Kitchen*, ARTFORUM, Mar. 1987, at 130–31.

²¹⁶ Melissa Harris, *Karen Finley: The Kitchen, Franklin Furnace*, ARTFORUM, Sept. 1990, at 159–60 (reviewing Finley’s performances at The Kitchen).

²¹⁷ Carr, *supra* note 215, at 148.

²¹⁸ Rosen, *supra* note 28, at 17.

by objects"²¹⁹ and a pretty strong case could be made that woman is "presented in scenarios of degradation . . . shown as filthy . . . in a context that makes these conditions sexual."²²⁰ If Finley's work does not fall within the feminist prohibition, we face the problem posed by Annie Sprinkle, who performs the same shows at the Kitchen Center for the Performing Arts as she does for *Screw* magazine.²²¹ If we assume that Sprinkle's work involves more or less the same controversial actions as Finley's, it seems anomalous to tolerate the one and not the other. If we indulge the temptation to permit Finley's work and not Sprinkle's (at least for *Screw*) because Finley's work is meant to counteract sexist attitudes, then we appear to be engaging in what is known as viewpoint discrimination—a stifling of insufficiently progressive voices precisely because they are insufficiently progressive. Indeed, the problem of viewpoint discrimination was one of the reasons for the unconstitutionality of the Indianapolis ordinance authored by MacKinnon.²²²

The necessity of distinguishing between permissible and impermissible sexually explicit work without referring to the author's intentions or viewpoint is vexing. Consider The Dead Kennedys' song *Police Truck*: it describes a violent rape by the police.²²³ 2 Live Crew sings of "a woman being forced to engage in anal intercourse and lick excrement."²²⁴ The former was intended as a protest against police brutality, but the latter appears gratuitous. The acts depicted are the same but the reasons for depicting them very different. Professor Mark Tushnet makes a related point when discussing music videos: the interpretation of their "deep meaning" presents unique difficulties, and it is not clear whether their ultimate content is free from ambiguity.²²⁵ MacKinnon says the Indianapolis ordinance distinguishes depictions of subordination from

²¹⁹ MACKINNON, *supra* note 55, at 176; *see also* INDIANAPOLIS, IND. CODE § 16-3(q) (1984).

²²⁰ MACKINNON, *supra* note 55, at 176.

²²¹ *See* Adler, *supra* note 214, at 1369-70; Gretchen Faust, ARTS MAGAZINE, April 1990, at 104 (reviewing Sprinkle's performance at The Kitchen in which Sprinkle, *inter alia*, fellated a panel of dildos and "insert[ed] a speculum and invit[ed] the audience to see her cervix.").

²²² *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 329-31 (7th Cir. 1985) (concluding that First Amendment values trump the importance of reducing images of subordinated women), *aff'd*, 475 U.S. 1001 (1986).

²²³ THE DEAD KENNEDYS, *Police Truck*, on GIVE ME CONVENIENCE OR GIVE ME DEATH (cherry red records).

²²⁴ GERALD GUNTHER, CONSTITUTIONAL LAW 1117 n.2 (12th ed. 1991) (discussing 2 LIVE CREW, AS NASTY AS THEY WANNA BE (Luke Records 1989)).

²²⁵ Mark Tushnet, *The New Politics of Pornography Regulation*, 58 U. CIN. L. REV., 183, 184 n.1 (1989) (book review).

depictions that have the effect of subordinating women.²²⁶ In theory, such a distinction would keep books depicting the pornographic subordination of women, like Andrea Dworkin's *Pornography: Men Possessing Women*, from the shredder; it may even allow us to distinguish The Dead Kennedys' song from 2 Live Crew's. But if it is the pornographic depictions that do the subordinating, it is difficult to see how we can have the former without the latter.²²⁷

Pictorial v. nonpictorial speech: via media? We observed earlier that we could find common ground with MacKinnon by prohibiting pornography in cases where the model or actress was coerced. Here we might try to locate a toehold on the slippery slope; perhaps pictorial versus nonpictorial pornography affords a plausible distinction.²²⁸ For MacKinnon, this distinction does not even begin to scratch the surface. For us, it is worrisome for reasons articulated by Justice Holmes in 1903:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustration, outside the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time.²²⁹

Nevertheless, there are at least two plausible reasons to draw the pictorial-nonpictorial distinction. First, only pictorial pornography runs the risk of harm to models. Second, pictures of genitals appeal less to cognition than, say, a novel or book describing them (though this distinction, to some extent, ignores the significance of emotive communication described by Justice Harlan in *Cohen v. California*²³⁰). The range of protected speech can be broadened by

²²⁶ MACKINNON, *supra* note 55, at 176.

²²⁷ See Lisa Duggan et al., *False Premises: Feminist Antipornography Legislation in the U.S.*, in *WOMEN AGAINST CENSORSHIP* 130 (Varda Burstyn ed., 1985) (echoing our conclusions about the dangerous breadth of MacKinnon's ordinance and suggesting that "subordination" is only one of many terms in it that creates a possibility of aggressive and broad censorship).

²²⁸ Cf. Stanley Kaufman, *On Pornography II: Dissenting and Concurring Opinions*, *THE PUBLIC INTEREST*, Winter 1971, at 28, 31 (observing distinction between reader-writer relationship and employment of people to enact sexual fantasies on stage and screen before an audience).

²²⁹ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (Holmes, J.).

²³⁰ 403 U.S. 15 (1971); cf. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 467 (1990) (noting the value of the emotional component of speech acts).

limiting prohibition to instances in which an individual is deceived, threatened, or visited with actual force. Thus, prohibition would clearly be appropriate in instances in which an actual crime is being depicted.²³¹ This narrowing might face the problem posed by the Pentagon Papers case,²³² which permitted publication of material that had been obtained illegally. But as Professor Tribe has observed, that case was related to a political question more closely (or at least traditionally) related to First Amendment concerns. We might also distinguish work obtained illegally from work created illegally.

Even so, the pictorial distinction may prove hopelessly overbroad to the extent that we do not wish to proscribe, for example, the paintings (and the reproductions thereof) of artists such as René Magritte. Magritte's surreal paintings often have as their subject dismembered or disassembled female bodies. Thus, for example, his *Le Viol* ("The Rape") depicts female breasts (as eyes) and genitalia (as a mouth) superimposed on a head; in *La Bouteille* ("The Bottle") a nude female is stuffed inside a bottle; and in *La Philosophie dans le boudoir* ("Philosophy in the bedroom," echoing Marquis de Sade's famous novel of the same name) another nude is split into body parts.²³³

E. *Quis Custodiet? Censorship and the Tendency of Intolerance*

Background of censorship. Lenin is reputed to have said ideas are more fatal things than guns.²³⁴ History provides adequate illustrations that authorities have learned this lesson well. Censorship in its varied forms courses through the ages. The odor of burnt books wafts from the second century *forum romanum*, down through the fifteenth century Piazza della Signoria, scene of Savonarola's Bonfire of the Vanities, past the Berlin bonfires of 1933 in which the works of Kafka, Heine, Freud, Einstein, Zola, and Proust were incinerated, to the burning of *The Satanic Verses* in the *annus mirabilis*, 1989.²³⁵ The tendency to banish art and the artist is as old as Ovid²³⁶ and as modern as

²³¹ See TRIBE, *supra* note 9, § 12-16, at 915 n.71.

²³² *New York Times v. United States*, 403 U.S. 713 (1971) (per curiam).

²³³ See Susan Gubar, *Representing Pornography*, in FOR ADULT USERS ONLY 47, 49-54 (Susan Gubar & Joan Hoff eds., 1989).

²³⁴ Lance Marrow, *A Holocaust of Words*, TIME, May 2, 1988, at 96.

²³⁵ See Paul Berman, *Shame*, THE NEW REPUBLIC, Oct. 8, 1990, at 31 (recounting Western reluctance to defend speech rights in the Rushdie affair). Heine, a German Jew, wrote in the nineteenth century words that proved hauntingly prophetic in the twentieth: "Whenever they burn books they will also, in the end, burn human beings." JOHN BARTLETT, FAMILIAR QUOTATIONS 481 (Emily M. Beck ed., 1980).

²³⁶ According to Ovid, Augustus exiled him to Pontus for "carmen et error"—a poem and a mistake. CHARLES W. DUNMORE, SELECTIONS FROM OVID at viii-ix (Longman, Inc. 1980) (1963).

Mapplethorpe.²³⁷ History and experience make many skeptical whether government officials are willing or able to distinguish good and bad literature. Moreover, we worry that any increased power to make these choices, once vested, will be used as a smokescreen to suppress ideas the authority finds merely disagreeable—or worse, to target those who, for one reason or another, are thought inferior.²³⁸ Experience teaches us that many of the great works of art and literature have been banned—for political or moral reasons.

No man, said Dr. Johnson, would care to go on trial for his life once a week, even if possessed of absolute proofs of his innocence. By the same token, no man wants to be arraigned in a criminal court, and displayed in the sensational newspapers, as a purveyor of indecency, however strong his assurance of innocence.²³⁹

We are left to wonder how many works were abandoned or never created, how many Miltons were muted because of censorship's *in terrorem* effect.

Tendency of intolerance. The history of censorship is closely related to a more general social tendency (a theme of the great French novelists)²⁴⁰ to smooth out everything at a variance with itself, to chisel away all prominent or obtruding features of individual personality. The problem of intolerance is proverbial in the domain of religion, but it manifests itself elsewhere. One is tempted to say that intolerance is an inverse function of certainty, because heresy and the urge to suppress it tend to arise when the truth is uncertain. This point must not be carried too far; after all, we teach arithmetic dogmatically²⁴¹ and have little patience for those who view it skeptically. Perhaps Justice Holmes had something like this in mind when he observed that squelching free speech was “logical” when the truth was known (or, to be more precise, “if

²³⁷ See SCHAUER, *supra* note 224, at 117 n.2 (discussing Mapplethorpe indictment).

²³⁸ Cf. TRIBE, *supra* note 9, § 15-12, at 1428 n.53 (noting importance of shifting inquiry to higher levels of generality to prevent state from “masking forbidden antipathy to a group in the form of a moral aversion to what the group does”) (citations omitted); Hunter & Law, *supra* note 144, at 69, 108-11. Indeed, a decision by the Canadian Supreme Court based largely on MacKinnon's work was the springboard for Canadian seizures of books authored by her antipornography cocrusader Andrea Dworkin. Leanne Katz, *Censor's Helpers*, THE NEW YORK TIMES, Dec. 4, 1993, at 21.

²³⁹ MENCKEN, *supra* note 12, at 262-63.

²⁴⁰ See, e.g., BENJAMIN CONSTANT, ADOLPHE (C.P. Courtney ed., 1989); HONORÉ DE BALZAC, LE PÈRE GORIOT [FATHER GORIOT] (Thierry Bodin ed., 1971); GUSTAVE FLAUBERT, L'ÉDUCATION SENTIMENTALE [SENTIMENTAL EDUCATION] (P.M. Wetherill ed., 1984).

²⁴¹ See Bertrand Russell, *The Value of Free Thought*, in BERTRAND RUSSELL ON GOD AND RELIGION 239, 268 (Al Seckel ed., 1986).

you have no doubt of your premises").²⁴² But truth is sometimes uncertain even in the realm of mathematics, to say nothing of history, philosophy, or of the social sciences. When authorities find it necessary to suppress one idea to cause another to be believed, this very fact argues for more, not less, speech.²⁴³

Free speech—the refusal to quash views we find unsettling or hateful—teaches us (through a process Lee Bollinger has termed the “internal dialectic of tolerance”)²⁴⁴ intellectual attitudes and civic virtues essential to a pluralist society: self-restraint and self-control.²⁴⁵ The “impulse to intolerance”²⁴⁶ is therefore not a problem peculiar to the censor but part of a more general deficiency in human nature. If one appreciates this fact, the reasons for allowing *Hustler* and *Mein Kampf* to be published are at bottom identical.

Once the moral legitimacy of the censor is accepted, his power to act on this general impulse to intolerance, and the evil thereby engendered, is wide-ranging. Perhaps the liberal’s argument for a permissive legal attitude toward consumption of pornography is based largely on a prudential judgment that the tendency to intolerance should not be encouraged.

F. *Federalism and First Amendment Issues: Should We Allow Experimentation?*

The issue of federalism and pornography legislation has not, to our knowledge, been raised either by commentators or by courts. This seems unfortunate for at least two reasons. First, MacKinnon’s approach to pornography has enjoyed a greater reception at the local level. Second, a

²⁴² *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Holmes articulated a similar view elsewhere:

But on their premises it seems to me logical in the Catholic Church to kill heretics and [for] the Puritans to whip Quakers—and I see nothing more wrong in it from our ultimate standards than I do in killing Germans when we are at war. *When you are thoroughly convinced that you are right*—wholeheartedly desire an end—and have no doubt of your power to accomplish it—I see nothing but municipal regulations to interfere with your using your power to accomplish it. The sacredness of human life is a formula that is good only inside a system of law.

EDMUND WILSON, *Justice Oliver Wendell Holmes*, in *PATRIOTIC GORE* 743, 764 (1962) (emphasis added) (alteration in original) (quoting a Holmes letter written to Harold Laski).

²⁴³ Cf. *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring).

²⁴⁴ See BOLLINGER, *supra* note 136, at 124–74.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 139.

Brandeisian “laboratories of democracy”²⁴⁷ argument (diverse, particular experimentation with economic and social models so that, by interstate comparison, the best social arrangement emerges) works in favor of an Indianapolis-type approach. The question of federalism and constitutional adjudication is no small subject. Here we want only to make some observations about legislation that intrudes on areas of constitutional concern.

Most First Amendment doctrine cannot be justified by simple reference either to an antecedent choice for democracy or to an originalist understanding. The Court clearly has *not* followed an originalist approach to First Amendment analysis. The mere incorporation of the First Amendment through the Fourteenth Amendment and consequent application to the states changed First Amendment analysis in ways the Framers surely did not envision.²⁴⁸ The framers likely did not intend (unless their intentions are elevated to an extremely high level of abstraction) the constitutionalization of defamation law or the broad protection given to sexually explicit material.²⁴⁹ But once the constitutional text and the Framers’ intentions are no longer seen as dispositive,²⁵⁰ judicial review, “at least potentially a deviant institution in a democratic society,”²⁵¹ becomes increasingly problematic.²⁵²

²⁴⁷ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (articulating conception of states as laboratories engaged in novel experiments).

²⁴⁸ See *Stromberg v. California*, 283 U.S. 359 (1931) (incorporating directly, for the first time, the First Amendment into the Fourteenth). *Stromberg* was foreshadowed by the Court’s opinion in *Gitlow v. New York*, 268 U.S. 652 (1925). Many believed that the First Amendment and the entire Bill of Rights were unnecessary because Congress had not been given power to legislate concerning these matters. See, e.g., *THE FEDERALIST* No. 84, at 513–14 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

²⁴⁹ See generally THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS* 414–26 (1972); 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* §§ 1874–83 (Boston, Hilliard 1833).

²⁵⁰ The difference is that between *Marbury v. Madison* (pre-existing rules of constitutional law embedded in the text are discoverable and can be applied) and any of the Court’s modern Commerce Clause cases. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

²⁵¹ BICKEL, *supra* note 138, at 128.

²⁵² *Marbury v. Madison* was premised on a static notion of the Constitution: the sources of constitutional judgment are embedded in the Constitution. *Marbury*, 5 U.S. at 137. But see TRIBE, *supra* note 9, § 1-9, at 15–16, § 8-7, at 584, 586 n.37 (contrary to many scholars and commentators, Professor Tribe sees institutional concerns as having limited relevance); J. Skelly Wright, *The Role of the Supreme Court in a Democratic Society*, 54 CORNELL L. REV. 1, 11 (1968) (arguing that although courts are not politically responsible they are politically responsive).

[I]f the people themselves . . . , decide *in accordance with democratic procedures* that some speech will no longer be tolerated, then it is not 'the government' that is depriving 'us,' the citizens, of our freedom to choose but *we* as citizens deciding what the rules of conduct within the community will be. Then the "democracy" has functioned, and it may be asked whether it does not '[strike] at the very heart of [a] democracy' to say that the citizens cannot choose to make that decision.²⁵³

Here a court faces what Bickel termed "the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from."²⁵⁴ One tack a court might take when a purely textual and originalist approach has been abandoned is to give increased deference to institutions that are more politically responsible.²⁵⁵ Yet even this approach would not favor MacKinnon's ordinance.

The more a legislative enactment intrudes upon an area of constitutional concern, the more searching a court's inquiry should be.²⁵⁶ First, a court should assure itself that the legislation has been well-debated, that areas of constitutional concern have been fully weighed, and that the legislation is not the product of legislative haste or inattention.²⁵⁷ Although the *Hudnut* court made no reference to legislative haste, there is evidence that the Indianapolis ordinance, like the proposed Minneapolis ordinance, was the result of "unusual haste" by the legislative body and that constitutional concerns failed to receive adequate legislative deliberation.²⁵⁸

Second, and more controversially, a court should also be willing to give slightly more deference to Congress, the most broadly representative legislative body, than to state and municipal legislative bodies.²⁵⁹ This turns federalism on

²⁵³ BOLLINGER, *supra* note 136, at 50-51 (second and third brackets in original).

²⁵⁴ BICKEL, *supra* note 138, at 184.

²⁵⁵ See Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1046 (1981); Terrance Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 657 (1975) ("The democratic commitment of our age requires—or at least has seemed to many to require—that important value choices rest with institutions that are more politically responsible than courts.").

²⁵⁶ Cf. LEARNED HAND, *THE BILL OF RIGHTS* 11-18 (1958).

²⁵⁷ Cf. Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1186-87 (1977).

²⁵⁸ See DOWNS, *supra* note 78, at xxii-xxiii, 76, 82-83, 91, 95, 112, 116, 130.

²⁵⁹ A problem with giving greater deference to the federal government is that the standards adopted by it may well be more rigorous than those some state and local governments would choose. Put differently, "[T]he dangers of national censorship are not the same as the dangers of local suppression. The federal government is apt to impose the standards of Dubuque on Greenwich Village, whereas Dubuque can impose them only in Dubuque." BICKEL, *supra* note 60, at 104.

its head.²⁶⁰ But the rationale for attaching greater deference to national as opposed to local legislation is classical and articulated in *Federalist No. 10*:²⁶¹ “Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens.”²⁶² This “inhibiting” argument is most compelling to those who believe greater danger lies in governmental action than inaction. If one rejects this view, one might be more sympathetic to the facilitative “laboratories” approach. The suitability of the “laboratories” approach tends to be more persuasive when neither text nor tradition speaks to the problem and the problem is a new one facing society. This is because judicial action stands on the firmest ground when it is rooted in text or as part of an evolving tradition. As for new problems facing society, it is one thing for a court to modify or ratify the attempts of private action or of the legislature when such systems of decisionmaking have at least been given some play; it is quite another for a court to make the initial decision, “thus arrogating the entire responsibility, from beginning to end”²⁶³ and removing responsibility from the private and legislative sectors. MacKinnon’s analysis is novel;²⁶⁴ the underlying problem of pornography is not. We clearly have an established tradition of protecting speech (which includes speech unfavorable to women) and this tradition finds textual support in the First Amendment. This suggests that a court is justified in exercising a high degree of scrutiny and in according less deference to state or local legislation that trenches on previously protected speech.

²⁶⁰ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (articulating conception of states as laboratories).

²⁶¹ THE FEDERALIST No. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961). Justice Holmes, perhaps for slightly different reasons, saw judicial review of state legislation as more important than review of national legislation. OLIVER W. HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 291, 295-96 (2d prtg. 1952) (“I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.”).

²⁶² THE FEDERALIST No. 10, *supra* note 261, at 83.

²⁶³ BICKEL, *supra* note 60, at 107, *see also, supra* note 9, § 12-17, at 921-24 (observing that absent evidence of a chilling effect, the *Hudnut* court might have done better to avoid deciding the constitutionality of the Indianapolis ordinance until applied).

²⁶⁴ It may be fairer to say that orthodox analysis of pornography mishandled, but did not ignore, pornography’s effects on women; arguments about pornography and its relation to criminal and antisocial behavior toward women are traditional.

G. MacKinnon's Rejection of Legitimate Disagreement

Even those who are only casually acquainted with MacKinnon's work likely find it difficult to ignore the aura of visionary radicalism emanating from it. It is not simply her heated style of argument that is offputting; rather, it is her apparent conviction that those who dare to disagree with her are driven by deeply illegitimate motives. Instances of this outlook permeate her work. When arguing against the balancing of a panel on the regulation of pornography in order to add perspectives that differ from her own, she asks, "When world hunger is discussed, is it necessary to have the pro-hunger side presented?"²⁶⁵ When discussing the editorial content of *Playboy*, summarizing its articles which argue that the magazine falls under First Amendment protection, she deals with this concern by alleging that masturbation has made men psychologically equate the pleasure of orgasm with *Playboy's* editorial positions. She caps this speculation off with a rhetorical question curious in implication: "Ever wonder why men are so passionate about the First Amendment?"²⁶⁶ Her explanation for the phenomenon of widespread resistance on the part of women to the establishment of the Equal Rights Amendment—that "sex inequality gave them what little they had, so little that they felt they couldn't afford to lose it"²⁶⁷—is condescending towards women and dismissive of the phenomenon of legitimate disagreement. This exclusionary trend reaches its zenith when she denies that women who disagree with her on questions of philosophical method, political strategy, or pornography regulation can be feminists,²⁶⁸ thus purging all non-radicals from the movement.

An uglier departure from the norms of civilized discourse occurs when she terms those feminists who disagree with her views on pornography "collaborators" because they are "siding with the pornographers."²⁶⁹ This astonishing metaphor, conjuring up visions of Vichy France under the Nazis, loses much of its strength when it is recalled that whenever one takes a position on *any* public issue, there will doubtless exist unsavory characters who for their own reasons will take that side. Guilt by association is not generally held to be a strong argument, but for use as the central unifying metaphor of MacKinnon's *On Collaboration*,²⁷⁰ it is apparently strong enough. Professor

²⁶⁵ MACKINNON, *supra* note 51, at 133.

²⁶⁶ MACKINNON, *supra* note 50, at 138.

²⁶⁷ MACKINNON, *supra* note 54 at 226.

²⁶⁸ See MACKINNON, *supra* note 173, at 60; MACKINNON, *supra* note 50, at 137

²⁶⁹ See CATHARINE A. MACKINNON, *On Collaboration*, in *FEMINISM UNMODIFIED* 198, 205 (1987).

²⁷⁰ *Id.* at 198-205.

Wendy Brown's comments on MacKinnon's style of dealing with those with whom she disagrees is on point:

Any expression of women's differences, as well as any moments of power, pleasure, and agency that call into question the total and systematic quality of gender subordination, must therefore be explained away as illusory, challenged as liberal, fainthearted or apologist, or denounced as collaborative with the regime, all of which MacKinnon does whenever she encounters a feminist argument or practice at odds with her account.²⁷¹

This refusal to take seriously views that differ from her own is ultimately an epiphenomenal consequence of MacKinnon's rejection of universalism.²⁷² But universalism—the idea that moral rules apply to *everyone*, regardless of time or space—must in some sense be accepted by anyone who thinks law is worthwhile—the concept of law is infused with it.²⁷³ Without universalism, the kind of moral evaluation that is one of MacKinnon's specialties—indignation and fury about injustice, disregarded perspectives, suffering, unfair privileges, and abuse—can only be windy language lacking moral force. This rejection of universalism helps to explain both the overheated tone of her writing and the jarring impact it sometimes has upon the reader. If we are really to take MacKinnon at her word when she says in one of her social critiques, “we are not attempting to be objective about it, we're attempting to represent the point

²⁷¹ Wendy Brown, *Consciousness Razing*, THE NATION, Jan. 8, 1990, at 63.

²⁷² Richard Rorty takes a much more sympathetic view of MacKinnon's rejection of universalism. In his words,

I hope that feminists will continue to consider the possibility of dropping realism and universalism, dropping the notion that the subordination of women is *intrinsically* abominable, dropping the claim that there is something called “right” or “justice” or “humanity” which has always been on their side, making their claims true.

I admit that insofar as feminists adopt a Deweyan rhetoric of the sort I have just described, they commit themselves to a lot of apparent paradoxes, and incur the usual charges of relativism, irrationalism and power-worship. But these disadvantages are, I think, outweighed by the advantages.

Richard Rorty, *Feminism and Pragmatism*, MICH. Q. REV. 231, 237–38 (Spring 1991) (footnote omitted).

²⁷³ This recognition can be traced to Roman law. See, e.g., *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842) (Justice Story quotes Lord Mansfield quoting Cicero: “Non erit alia lex Romae, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes, et omni tempore una eademque lex obtinebit.”).

of view of women,"²⁷⁴ we must come to several disquieting conclusions. We must conclude that MacKinnon is, despite her rhetoric, not so much concerned with justice for everyone as she is for the interests of women. We must also conclude that MacKinnon thinks the two may sometimes come into conflict. And we must finally conclude that, when they do, MacKinnon will favor the cause of the group in which she is interested over the welfare of society as a whole. There is nothing wrong with favoring particular groups, but it is a conceit to argue or assume that such favoring has anything to do with justice.²⁷⁵ And it is a further conceit—a conceit intellectually sloppy, historically naive, and grossly arrogant—to think that one person can accurately determine and express the interests and desires of half of the world's population.²⁷⁶

IV. CONCLUSION

Not only against the authors themselves, but even against their books the censors aimed their wrath such that the records of the most brilliant and illustrious men were burned in the courtyard of the forum. Obviously they thought with that fire they had extinguished the voice of the Roman people, the liberty of the senate and the conscience of the human race.

— Cornelius Tacitus²⁷⁷

We have criticized the work of Professor MacKinnon throughout this last section. We do not mean to undervalue her remarkable achievement in this field of the law. One need not agree with her arguments to recognize that her work has changed the way people think about a fundamental issue and persuaded many erstwhile defenders of pornographic speech to amend their views.²⁷⁸ Thus, while the ordinance in Indianapolis was overturned, it would be a mistake to think that MacKinnon's attack on pornography was defeated. Perhaps the approach she advocates will, in the end, carry the day. But if it does, it will be because its purveyors proved successful in the marketplace of ideas.²⁷⁹ The moral passion and rhetorical power evident in MacKinnon's work

²⁷⁴ MACKINNON, *supra* note 178, at 86.

²⁷⁵ See RICHARDS, *supra* note 151, at 7-31.

²⁷⁶ MENCKEN, *supra* note 12, at 198.

²⁷⁷ Tacitus, *supra* note 193, at 93-94 (translation ours).

²⁷⁸ Cf. Cass R. Sunstein, *Femism and Legal Theory*, 101 HARV. L. REV. 826, 826 (1988) (reviewing CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987)).

²⁷⁹ The marketplace metaphor, as we saw earlier, is criticized by feminist writers as inappropriate in contexts of hierarchy. It is sometimes said that the marketplace metaphor is misleading or misguided because even, say, genocide can be accepted there. Still another and related criticism is that the marketplace does not ensure the discovery of truth. Two

has much to do with an implied universalism; absent it, MacKinnon is in the position of the builder of the heavenly city who filches stones from an ever-more-unsteady foundation. How can one take seriously someone whose methodological presumptions suggest that there is no need to listen to her precisely because she lives in a different moral universe? (Of course, since MacKinnon intimates that all sexual congress is *ipso facto* a product of male coercion,²⁸⁰ perhaps the different moral universe hypothesis should not be immediately discarded.) Her belief that “penetration itself is known to be a violation,”²⁸¹ that rape and intercourse are “difficult to distinguish,”²⁸² may deserve interest, compassion, even pity, but someone who wishes to write these ideas into law may merit a less charitable response.²⁸³

Additionally, the general problem of regulation—that is, its practitioners must issue rules, which themselves generally force a crude, one-size-fits-all approach on whatever is to be regulated—can only worsen when literature and art are at the mercy of state action. Herbert Spencer’s Popperian insight is worth repeating here:

As the alchemist attributed his successive disappointments to some disproportion in the ingredients, some impurity, or some too great temperature, and never to the futility of his process or the impossibility of his aim; so, every failure of state-regulations the law-worshipper explains away as being caused by this trifling oversight, or that little mistake: all which oversights and mistakes he assures you will in future be avoided. Eluding the

related responses seem in order. First, it is true that the idea of genocide has been accepted, *but* in societies that scarcely can be said to have had a free market in ideas and speech. Second, it is important that the marketplace analogy not be confused with a biological analogy. Competition in the marketplace can reliably bring about the “socially desired price and output only if competitors are forbidden to employ certain tactics, including violence, fraud, and collusion.” POSNER, *supra* note 230, at 118–19. This holds true with our marketplace metaphor—certain procedural rules must be followed. The ultimate success of truth is *not* inevitable and, as Mill observed, a sufficient application of legal or social penalties may generally succeed in the propagation of error. JOHN STUART MILL, ON LIBERTY 34–36 (Currin V. Shields ed., The Bobbs Merrill Co. 1956) (1859). The great advantage truth enjoys is its tendency of rediscovery—in more obliging times.

²⁸⁰ MACKINNON, *supra* note 51, at 128–29.

²⁸¹ Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State*, 8 SIGNS 635, 648 (1983).

²⁸² *Id.* at 647.

²⁸³ CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 172 (1989). A portrait of ideas underlying the statement is chapter seven of this book. *See also* MACKINNON, *supra* note 55, at 3, 7

facts as he does after this fashion, volley after volley of them produce no effect.²⁸⁴

To repeat, we have seen the radical change in the legal analysis of pornography. We have also sensed the power of MacKinnon's critique both of traditional legal analysis and pornography. Her analysis suggests that pornography is ultimately as harmful as it is distasteful. We have seen, however, that her conceptions of causation and consent are problematic and that the reasons for symbolic prohibition of pornography are unpersuasive.

The history of intolerance and censorship stand like a beacon amid treacherous shoals, cautioning us to seek safer haven elsewhere.²⁸⁵ The dangers of overinclusion, especially in light of trends in both classical and recent art, present a potent counterargument to MacKinnon's approach (just as they do to the Court's obscenity doctrine). MacKinnon's understanding of relations between the sexes is, to put it as charitably as possible, idiosyncratic. That understanding infects her every policy prescription. The deep commonalities that run from her ideas back to those of her puritanical predecessors serve as a powerful reminder: we ought to try and see that those people who want to interfere with the private lives of others do not so influence legislatures.

Professor MacKinnon has offered us a chance to radically diminish our First Amendment freedoms, based on dubious theories of human action. We must politely decline the invitation to join in such a dangerous undertaking.

²⁸⁴ HERBERT SPENCER, *THE MAN VERSUS THE STATE* 328-29 (Eric Mack ed., Liberty Press 1982) (1884).

²⁸⁵ Albert Camus's remark on the press seems true of speech generally: "The free press without doubt can be good or bad, but assuredly, without liberty it will never be anything but bad. . . . Liberty is nothing but the chance of being better, while servitude is the assurance of being worse." ALBERT CAMUS, *ESSAIS [ESSAYS]* 1812-13 (Roger Quilliot & Louis Faucon eds., 1965) (As stated by Camus, "La presse libre peut sans doute être bonne ou mauvaise, mais, assurément, sans la liberté elle ne sera jamais autre chose que mauvaise. . . . La liberté n'est rien d'autre que la chance d'être meilleur, tandis que la servitude est l'assurance du pire.").