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Ruth Colker
Tulane Law School

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RUTH COLKER*

I. INTRODUCTION

The question of whether society should regulate sexual portrayals that are not "obscene" under the *Miller* standard[1] has received considerable attention.[2] Various strategies have been suggested to strengthen the regulation of sexual portrayals. Each strategy reflects the proponents' conception of the nature of the harm occasioned by some of these portrayals—that they violate women's civil rights,[3] harm the moral fabric of society,[4] or pose a

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* Associate Professor, Tulane Law School; J.D. Harvard Law School 1981; A.B. Harvard-Radcliffe College 1978. The author wishes to acknowledge the assistance of Mary Whisner, Suzanne Stocking and John Stick whose conversations and editorial assistance contributed to this Article. The author, of course, assumes responsibility for the ideas expressed.

1. The current legal definition of pornography was set forth in Miller v. California, 413 U.S. 15 (1973), in which the Supreme Court articulated the following three part standard for determining whether a work is obscene:

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

Id. at 24. For further discussion of the traditional definition of pornography, see Jacobs, *Patterns of Violence: A Feminist Perspective on the Regulation of Pornography*, 7 HARV. WOMEN'S L.J. 5, 25-29 (1984).

2. *See, e.g.*, Baldwin, *The Sexuality of Inequality: The Minneapolis Pornography Ordinance*, 2 LAW & INEQUALITY 629 (1984); Fahringer, *Obscenity Law: Who Will Guard the Guards?*, TRIAL, Aug. 1980, at 20; MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984); Stone, *Obscenity Law Reform: Some Practical Problems*, 130 NEW L.J. 872 (1980); Yaffé, *The Law Relating to Pornography: A Psychological Overview*, 20 MED. SCI. & L. 20 (1980); Comment, *Obscenity Law in Ohio*, 13 AKRON L. REV. 520, 529 (1980); Note, *Texas' New Obscenity Laws: Redefining Taste*, 17 HOUS. L. REV. 835 (1980); Comment, *Pennsylvania Obscenity Law: A Pornographer's Delight*, 41 U. PITT. L. REV. 251 (1980). *See also* Jacobs, *supra* note 1, at 30-36 (discussing commentators' and courts' responses to pornography).

3. Catharine MacKinnon and Andrea Dworkin, acting as consultants to the Minneapolis City Attorney's Office, have drafted a municipal civil rights ordinance that would define pornography as a form of sex discrimination. Their ordinance is premised on the finding

special threat to children.[5] Little attention has been given, however, to another harm that flows from certain sexual portrayals—a harm to the individual portrayed when that individual has

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that "pornography is central in creating and maintaining the civil inequality of the sexes." MINNEAPOLIS, MINN., 7 CODE OF ORDINANCES § 139.10(a)(1) (1984), *reprinted in* 130 CONG. REC. S13192 (daily ed. Oct. 3, 1984) [hereinafter MINNEAPOLIS ORDINANCE]. The civil rights focus of the ordinance is explicitly stated in the "special findings on pornography." Proposed amendment to MINNEAPOLIS ORDINANCE, *supra*, *reprinted in* 130 CONG. REC. S13192-93 (daily ed. Oct. 3, 1984).

The MacKinnon-Dworkin ordinance defines four types of unlawful practices: (1) trafficking in pornography; (2) coercion into pornographic performances; (3) forcing pornography on a person; and (4) assault or physical attack due to pornography. *Id.* at § 4. It generally creates a civil cause of action for any person aggrieved by violations of the ordinance. The trafficking provision explicitly provides a cause of action for any woman, man, child, or transsexual who alleges injury by pornography in the way women are injured by it. *Id.* § 3(2).

The city-county council of Indianapolis and the surrounding county of Marion passed an ordinance similar to the MacKinnon-Dworkin ordinance on July 11, 1984. INDIANAPOLIS & MARION COUNTY, IND., CITY-COUNTY GENERAL ORDINANCE No. 35 (1984) (amending INDIANAPOLIS & MARION COUNTY, IND., CODE ch. 16, relating to human relations, equal opportunity), *reprinted in* 130 CONG. REC. S13193-97 (daily ed. Oct. 3, 1984). Los Angeles County has considered a similar ordinance. Proposed Los Angeles County Anti-Pornography Civil Rights Law (copy available from author). The MacKinnon-Dworkin approach has received ample criticism. The leading feminist organization to oppose the MacKinnon-Dworkin approach is the Feminist Anti-Censorship Task Force (FACT). More than 80 individuals, most of whom are active feminists, signed a brief recently submitted by FACT in litigation against the Indianapolis ordinance. *See* Brief of Amici Curiae of Feminist Anti-Censorship Taskforce for the American Booksellers Ass'n, American Booksellers Ass'n v. Hudnut, No. 84-3147 (7th Cir. filed Apr. 8, 1985) [hereinafter FACT BRIEF]. *See also* Alter, *Pornography and Feminism: Divisive Relations Explored*, NEW DIRECTIONS FOR WOMEN, Jan.-Feb. 1985, at 12, col. 3; Blakely, *Is One Woman's Sexuality Another Woman's Pornography?*, Ms., Apr. 1985, at 37; *The Minneapolis Anti-Pornography Ordinance*, GUILD NOTES, Winter 1985, at 7; *New FACT Group Battles Censorship Law*, NEW DIRECTIONS FOR WOMEN, Jan.-Feb. 1985, at 1, 13; *The War Against Pornography*, NEWSWEEK, Mar. 18, 1985, at 58-66; Duggan, *Censorship in the Name of Feminism*, The Village Voice, Oct. 16, 1984, at 11.

The only court to address the constitutionality of the MacKinnon-Dworkin approach has found it to be unconstitutional. American Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (1985), *aff'd mem.*, 106 S. Ct. 1172 (1986).

4. *See supra* note 1.

5. *See, e.g.*, New York v. Ferber, 458 U.S. 747 (1982). For further discussion of the child pornography statute at issue in *Ferber*, see *infra* notes 181-82 and accompanying text. A statute has been introduced on the federal level by Senator Arlen Specter of Pennsylvania (S. 3063, 98th Cong., 2d Sess. (1984)). Senator Specter's bill would amend title 18 of the United States Code to include a Child Protection Act to create remedies for children and other victims of pornography. Although the statute is termed a "Child Protection Act" it contains protection for any individual who has been coerced, intimidated or fraudulently induced in engaging in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct. *See* proposed § (c)(1). For further description of this proposed statute, see 98th Cong., 2d Sess., 130 CONG. REC. S13191-97 (daily ed. Oct. 3, 1984) (statement of Sen. Specter).

not consented to the portrayal. People mistakenly assume that this problem does not exist or that these individuals already attain sufficient relief under existing law.[6]

Individuals who are portrayed sexually without their consent rarely prevail in actions to redress the injury stemming from these portrayals.[7] The individuals who have brought these actions can

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6. *See, e.g.*, FACT Brief, *supra* note 3, at 48-51. *See also* Transcript of Workshop, Pornography: A Feminist Legal Response, 16th Nat'l Conference on Women and the Law, in New York City (Mar. 24, 1985) (available on cassette tape from the conference) (one member of the audience who identified herself as a tort professor asked why existing tort law would not assist victims of pornographic portrayals. One of the speakers at the workshop, Nan Hunter, suggested in response to a similar question from the audience that existing legal doctrine is sufficient to respond to victimization from pornography). For a proposed statutory solution to this problem, see Colker, *Legislative Remedies for Unauthorized Sexual Portrayals: A Proposal*, 20 NEW ENG. L. REV. 687 (1984-85).

7. *See, e.g.*, Keeton v. Hustler Mag., 465 U.S. 770 (1984) (female plaintiff having personal jurisdiction to bring libel suit against defendant); Lerman v. Flynt Distrib. Co., 745 F.2d 123 (2d Cir. 1984) (reversing jury award of ten million dollars for female plaintiff who was allegedly misidentified as the subject of nude magazine photographs), *cert. denied*, 105 S. Ct. 2114 (1985); Faloona v. Hustler Mag., 799 F.2d 1000 (5th Cir. 1986) (affirming dismissal of invasion of privacy case stemming from publication of plaintiff's nude photographs in the *Sex Atlas*); Wood v. Hustler Mag., 736 F.2d 1084 (5th Cir. 1984) (affirming damages for female plaintiff who was allegedly depicted nude in Hustler's "Beaver Hunt" section without her consent), *cert. denied*, 105 S. Ct. 783 (1985); Boddie v. ABC, 731 F.2d 333 (6th Cir. 1984) (reversing lower court's dismissal of action brought under federal wiretap statute regarding information obtained about female plaintiff's sexual activity); Braun v. Flynt, 726 F.2d 245 (5th Cir.) (affirming female plaintiff's damage award in privacy action concerning allegedly unauthorized publication of female plaintiff's photograph), *cert. denied sub nom.*, Chic Mag. v. Braun, 105 S. Ct. 252 (1984); Pring v. Penthouse Int'l, 695 F.2d 438 (10th Cir. 1982) (reversing jury award on behalf of plaintiff and dismissing action where magazine allegedly portrayed plaintiff as performing aberrant sexual acts with her baton), *cert. denied*, 462 U.S. 1132 (1983); Clark v. ABC, 684 F.2d 1208 (6th Cir. 1982) (reversing and remanding summary motion for defendant in defamation action involving defendant's alleged portrayal of plaintiff as a street prostitute), *cert. denied*, 460 U.S. 1040 (1983); Street v. NBC, 645 F.2d 1227 (6th Cir. 1981) (affirming summary judgment for defendant in libel action arising out of defendant's allegedly inaccurate portrayal of plaintiff as a whore), *cert. granted*, 454 U.S. 815, *cert. dismissed*, 454 U.S. 1095 (1981); Geisler v. Petrocelli, 616 F.2d 636 (2d Cir. 1980) (reversing dismissal of female plaintiff's action relating to publication of story which allegedly depicted plaintiff as engaging in "untoward sexual conduct"); Douglass v. Hustler Mag., 607 F. Supp. 816 (N.D. Ill. 1984) (granting defendant magazine's motion for new trial unless plaintiff agreed to remittitur of jury award in action stemming from defendant's alleged publication of female plaintiff's photograph without her consent), *rev'd in part*, 769 F.2d 1128 (7th Cir. 1985); Jackson v. Playboy Enters., 574 F. Supp. 10 (S.D. Ohio 1983) (granting defendant's motion to dismiss in action brought by three minor male plaintiffs allegedly photographed while being assisted by a female policewoman in fixing a bicycle. This photo was included in the publication of a spread of nude photographs of the policewoman without the plaintiffs' consent); Parnell v. Booth Newspapers, 572 F. Supp. 909 (W.D. Mich. 1983) (denying defendant's motions for dismissal and summary judgment where defendant allegedly published plaintiff's photo-

be divided into five categories: (1) well-known nonpolitical individ-

graph in "false light" in connection with newspaper articles on prostitution); Barger v. Playboy Enters., 564 F. Supp. 1151 (N.D. Cal. 1983) (granting defendant's summary judgment motion in defamation action relating to publisher's allegedly inaccurate description of female plaintiff as engaging in aberrant sexual behavior), *aff'd*, 732 F.2d 163 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 175 (1984); Hamilton v. United Press Int'l, 9 Media L. Rep. (BNA) 2453 (S.D. Iowa 1983) (granting defendant's motion for summary judgment in action brought by male plaintiff for story that allegedly incorrectly stated that he was married to a woman who had been arrested for indecent exposure; denying motion for summary judgment in action brought by wife of male plaintiff); Wynberg v. Nat'l Enquirer, 564 F. Supp. 924 (C.D. Cal. 1982) (granting defendant's motion for summary judgment in libel action brought by male plaintiff arising from publication of information about a close personal relationship); McCabe v. Village Voice, 550 F. Supp. 525 (E.D. Pa. 1982) (granting defendant's motion for summary judgment on libel and false light claims while denying motion as to the publication of private facts claim in action brought by female plaintiff who was allegedly depicted nude without her authorization); Lerman v. Chuckleberry Publishing, 544 F. Supp. 966 (S.D.N.Y. 1982) (reversing verdict that had been granted to plaintiff in suit alleging invasion of privacy based on publication of nude photographs), *rev'd sub nom.* Lerman v. Flynt Distrib., 745 F.2d 123 (1984); Clark v. Celeb. Publishing, 530 F. Supp. 979 (S.D.N.Y. 1981) (awarding female plaintiff damages in action relating to allegedly unauthorized publication of photographs of her on the cover of and in advertisements for defendant's magazine); Miss America Pageant v. Penthouse, 524 F. Supp. 1280 (S.D.N.Y. 1981) (granting defendant's motion for summary judgment in libel action brought by plaintiff pageant after magazine story depicting sexual behavior by contestants); Ann-Margret v. High Soc'y Mag., 498 F. Supp. 401 (S.D.N.Y. 1980) (dismissing action brought by female plaintiff for publication of her partially nude photograph allegedly without her authorization); Neiman-Marcus v. Lait, 13 F.R.D. 311 (S.D.N.Y. 1952) (granting motion to dismiss the claim of saleswomen who were allegedly depicted as prostitutes and denying motion to dismiss claim of salesmen who were allegedly described as "faggots" and "fairies"); Martin v. Penthouse, 12 Media L. Rep. (BNA) 2058 (Cal. Ct. App. 1986) (affirming summary judgment for defendant's invasion of privacy action challenging publication of photographs of plaintiffs at "exotic erotic ball"); Diaz v. Oakland Tribune, 139 Cal. App. 3d 118, 188 Cal. Rptr. 762 (1983) (reversing jury award for plaintiff who had undergone gender "corrective" surgery); Herrell v. Twin Coast, 7 Media L. Rep. (BNA) 1216 (Cal. Ct. App. 1981) (affirming dismissal of plaintiff's complaint in action arising from a story stating that male plaintiffs had been suspended from the police force for an alleged sexual assault); Spradley v. Sutton, 9 Media L. Rep. (BNA) 1481 (Fla. Cir. Ct. 1982) (granting defendant's motion for summary judgment in invasion of privacy action against television station for defendant's allegedly unauthorized broadcast of male plaintiff partially nude); Brooks v. Stone, 253 Ga. 565, 322 S.E.2d 728 (1984) (granting defendant's motion for summary judgment in defamation action relating to allegedly sexually critical statements about plaintiff); Shields v. Gross, 58 N.Y.2d 338, 448 N.E.2d 108, 461 N.Y.S.2d 254 (1983) (dismissing female plaintiff's action relating to allegedly nonconsensual publication of her photographs); Cohen v. Herbal Concepts, 100 A.D.2d 175, 473 N.Y.S.2d 426 (reversing dismissal of plaintiff's complaint where mother and child were photographed partially nude for an advertisement), *aff'd*, 63 N.Y.2d 379, 472 N.E.2d 307, 482 N.Y.S.2d 457 (1984); Springer v. Viking Press, 90 A.D.2d 315, 457 N.Y.S.2d 246 (1982) (dismissing plaintiff's action arising from unauthorized publication of a fictional novel in which plaintiff was allegedly portrayed as a whore), *aff'd*, 60 N.Y.2d 916, 458 N.E.2d 1256, 470 N.Y.S.2d 579 (1983); Brinkley v. Casablancas, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1981)

uals, often models or actresses, who are portrayed sexually without their consent;[8] (2) private individuals who have information about their sexual behavior or sexual victimization published in news-related stories without their knowledge or consent;[9] (3) public or private figures who are portrayed in dramatic fictionalizations of their sexual behavior without their consent;[10] (4) individuals who seek to enter the arena of political dialogue and face sexual invectives about their gender;[11] and (5) private individuals who appear in advertisements in a sexually suggestive context without their knowledge or consent.[12] In all but the fifth category, these individuals have generally failed to prevail.[13] Nevertheless,

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(granting partial summary judgment on behalf of plaintiff where defendant allegedly published female plaintiff's photograph without authorization); Giaimo v. Literary Guild, 79 A.D.2d 917, 434 N.Y.S.2d 419 (1981) (affirming defendant's motion for dismissal where male and female plaintiffs' photograph was published without authorization in an advertisement); Creel v. Crown Publishers, 115 A.D.2d 414, 496 N.Y.S.2d 219 (1985) (dismissing plaintiff's invasion of privacy action stemming from publication of plaintiff's nude photograph in a guide to nude beaches); Moore v. Stonehill Communications, 7 Media L. Rep. (BNA) 1438 (N.Y. Sup. Ct. 1981) (granting plaintiff's motion for summary judgment where defendant published an allegedly unauthorized sexual photograph of plaintiff in advertisement for a book); Guccione v. Hustler, 7 Media L. Rep. (BNA) 2077 (Ohio Ct. App. 1981) (affirming on the issue of liability but reversing and remanding on the issue of damages in action by male plaintiff arising from publication of a magazine photograph depicting him engaged in sexually aberrant activity); Miller v. Charleston Gazette, 9 Media L. Rep. (BNA) 2540 (W. Va. Cir. Ct. 1983) (granting defendant's motion for summary judgment in action arising from allegedly depicting male plaintiff in a cartoon as a person who engaged in deviant sexual activities); Doe v. Sarasota-Bradenton Television, 436 So. 2d 328 (Fla. Dist. Ct. App. 1983) (dismissing plaintiff's complaint in action relating to unauthorized publication of plaintiff's identity as a rape victim); Cape Publications v. Bridges, 423 So. 2d 426 (Fla. Dist. Ct. App. 1982) (reversing award for female plaintiff where her partially nude photograph was allegedly published without authorization), *cert. denied*, 464 U.S. 893 (1983). *Cf.* Schrottman v. Boston Globe, 7 Media L. Rep. (BNA) 1487 (Mass. Super. Ct. 1981) (granting plaintiff's motion for summary judgment in libel action arising from defendant's alleged false attribution of the use of an offensive, racial epithet to plaintiff); Arrington v. New York Times, 55 N.Y.2d 433, 434 N.E.2d 1319, 449 N.Y.S.2d 941 (1982) (granting defendant's motion to dismiss in action arising from newspaper's unauthorized publication of plaintiff's photograph in article on the upward mobility of the black middle class), *cert. denied*, 459 U.S. 1146 (1983). For further discussion of issues arising from racial epithets, see Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.- C.L. L. REV. 133 (1982).

8. *See infra* text accompanying notes 35-63.
9. *See infra* text accompanying notes 64-85.
10. *See infra* text accompanying notes 86-98.
11. *See infra* text accompanying notes 99-105.
12. *See infra* text accompanying notes 106-31.
13. *See infra* text accompanying notes 35-131.

Aside from three successful cases brought by women who were not public figures under

this Article argues that most of the individuals falling within these categories *should* prevail under existing law.

Part II of this Article argues that individuals must have the right to consent to their published sexual portrayals in order to avoid the psychological and pecuniary harms arising from the inaccurate message that they have willingly consented to being depicted as sex objects.[14] It posits that the right to consent to sexual portrayals is an important aspect of individuals' fundamental rights of privacy, free speech and sex-based civil rights.

Part III of this Article proposes a framework to balance the full set of rights implicated by these cases.[15] Under this proposed framework, courts would first determine whether the individual portrayed had consented to the portrayal, and then determine what fundamental interests are raised by the case. For example, if a private individual were portrayed in a sexual context without consent, he or she could invoke the rights of privacy, sex-based civil rights, and free speech rights. By contrast, if the portrayal were not sexual the individual would not be able to invoke sex-based civil rights. The publisher, however, would be able to invoke free speech rights—the strength of which would be determined by the newsworthiness of the publication. In light of the recent Supreme Court decisions, *Roberts v. United States Jaycees*,[16] and *American Booksellers Association v. Hudnut*,[17] the full set of

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N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1982) (discussed further *infra* notes 41-63 and accompanying text), more than 90% of the women who brought the cases cited in *supra* note 7 have not obtained favorable judgments. The three *successful* cases brought by women under N.Y. CIV. RIGHTS LAW §§ 50-51 are: Clark v. Celeb Publishing, 530 F. Supp. 979 (S.D.N.Y. 1981); Cohen v. Herbal Concepts, 100 A.D.2d 175, 473 N.Y.S.2d 426, *aff'd*, 63 N.Y.2d 379, 472 N.E.2d 307, 482 N.Y.S.2d 457 (1984); Brinkley v. Casablancas, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1981). By contrast, relatively many men have obtained favorable judgments both within and outside the jurisdiction of the New York statute. *See, e.g.*, Carson v. Here's Johnny Portable Toilets, 698 F.2d 831 (6th Cir. 1983); Guccione v. Hustler, 7 Media L. Rep. (BNA) 2077 (Ohio Ct. App. 1981). *See also* Ali v. Playgirl, 447 F. Supp. 723 (S.D.N.Y. 1978) (obtaining a preliminary injunction to restrain publisher from distributing all copies of its magazine in England and New York that contained the drawing of a nude black man seated in the corner of a boxing ring with a caption describing him as "the Greatest"); Neiman-Marcus v. Lait, 13 F.R.D. 311 (S.D.N.Y. 1952) (denying defendant's motion to dismiss an action by male plaintiffs arising out of their depiction as "faggots" and "fairies" by defendant).

14. *See infra* text accompanying notes 24-131.

15. *See infra* text accompanying notes 132-55.

16. 468 U.S. 609 (1984).

17. 771 F.2d 323 (7th Cir. 1985), *aff'd*, 106 S. Ct. 1172 (1986).

rights implicated by these types of cases could be further recognized.

Part IV of this Article argues that the failure to consider the full set of rights implicated by these cases has led the courts to misapply existing legal doctrine.[18] The courts have misapplied the actual malice standard,[19] the limited purpose public figure doctrine,[20] and the standard of protection for news stories.[21] Additionally, the courts have misinterpreted the recognizability requirement for fictional portrayals,[22] and have failed to protect individuals from sex-based group vilification.[23] Under the framework proposed in this Article, these doctrines would not be determinative in cases involving consentless sexual portrayals.

II. THE PROBLEM

A. *The Harm*

The category of consentless sexual portrayals overlaps with the traditional category of pornography.[24] Some sexual portrayals that are generally understood to be pornography are produced without the consent of the individual portrayed.[25] Other sexual portrayals, such as many of the examples to be discussed in this Article,[26] are not commonly understood to be pornography but are also produced without the consent of the individual portrayed.[27] A cause of action is needed for victims of published consentless sexual portrayals irrespective of whether the portrayals fit the traditional definition of pornography. Consentless sexual portrayals are usually harmful to the individual portrayed and are

18. *See infra* text accompanying notes 156-210.
19. *See infra* text accompanying notes 37-50.
20. *See infra* text accompanying notes 51-63.
21. *See infra* text accompanying notes 64-85.
22. *See infra* text accompanying notes 86-98.
23. *See infra* text accompanying notes 99-105.
24. *See supra* note 1.
25. For example, Linda Lovelace, the woman portrayed in the movie, *Deep Throat*, has alleged that she was portrayed without her consent. *See* L. LOVELACE, ORDEAL (1980). Some jurisdictions may consider this movie to be obscene under the *Miller* standard. *See* People v. Mature Enters., 73 Misc. 2d 749, 343 N.Y.S.2d 911 (N.Y. Crim. Ct. 1973).
26. *See, e.g.*, Clark v. ABC, 684 F.2d 1208 (6th Cir. 1982) (plaintiff allegedly depicted in film footage as prostitute while walking down the street fully clothed), *cert. denied*, 460 U.S. 1040 (1983).
27. *See infra* text accompanying notes 64-131.

often created in a context where the individual portrayed and the publisher had unequal bargaining power.[28]

Consentless sexual portrayals invoke the message that the individual portrayed willingly consented to be portrayed sexually in a public setting. Because of the prevalent sexist stereotype that "women are natural sexual prey to men and love it,"[29] this message is especially harmful to women who have not consented to sexual portrayals. It "strips women of their autonomy, dignity, and sexual potential"[30] by contributing to a climate in which women's lack of control over their sexual integrity is considered acceptable.[31]

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28. For a discussion of the link between sexual portrayals and patriarchy, see K. BARRY, FEMALE SEXUAL SLAVERY (1979) (providing a historical and sociological discussion of coercion against women to perform sexual acts); A. DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1981) (providing theoretical discussion of the link between pornography and the oppression of women by men); TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY (L. Lederer ed. 1982) (containing a collection of essays providing a feminist critique of pornography); MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS: J. OF WOMEN IN CULTURE & SOC'Y 515 (1982) [hereinafter SIGNS I]; MacKinnon, *Feminism, Marxism, Method, & the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. OF WOMEN IN CULTURE & SOC'Y 635 (1983) [herinafter SIGNS II] (providing theoretical discussion of women's treatment under the law). For a discussion of the link between consentless sexual portrayals and the development of modern technology, see Warren and Brandeis, *infra* note 34.

Sexual portrayals become particularly alluring or profitable when the woman portrayed has not consented. For example, the recent *Penthouse Magazine* publication of Vanessa Williams' photographs netted records for both amount of revenue received and number of copies sold. *See infra* text accompanying notes 87-88. *See generally* K. BARRY, *supra*; S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1977); A. DWORKIN, *supra*; C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979); K. MILLETT, SEXUAL POLITICS (1969); F. RUSH, THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN (1980); TAKE BACK THE NIGHT, *supra*.

29. A. RICH, *Compulsory Heterosexuality and Lesbian Existence*, in WOMEN, SEX AND SEXUALITY 62, 72 (C. Stimpson & E. Person eds. 1980).

30. *Id.*

31. The injury is characterized in this Article as a violation of a woman's sex-based civil rights; the woman is only portrayed sexually because she is a woman, i.e., a man is less likely to be portrayed as a sex object. Catharine MacKinnon more fully explains the significance of an action against a woman "because she is a woman."

> The substantive principle governing the authentic politics of women's personal lives is pervasive powerlessness to men, expressed and reconstituted daily *as* sexuality. To say that the personal is political means that gender as a division of power is discoverable and verifiable through women's intimate experience of sexual objectification, which is definitive of and synonymous with women's lives as gender female.

MacKinnon, SIGNS I, *supra* note 28, at 535. For a further discussion of the sex-based nature of pornographic portrayals, see Lorde, *Uses of the Erotic: The Erotic as Power*, in SISTER OUT-

As with the related problem of the publication of unwelcome, intentional racial invectives, the individuals portrayed in unwelcome and often derogatory sexual contexts need legal protection. In the words of Richard Delgado, who has studied the problem of racial invectives:

> Victims of racial invective have few means of coping with the harms caused by the insults. Physical attacks are of course forbidden. "More speech" frequently is useless because it may provoke only further abuse or because the insulter is in a position of authority over the victim. Complaints to civil rights organizations also are meaningless unless they are followed by action to punish the offender. Adoption of a "they're well meaning but ignorant" attitude is another impotent response in light of the insidious psychological harms of racial slurs. When victimized by racist language, victims must be able to threaten and institute legal action, thereby relieving the sense of helplessness that leads to psychological harm and communicating to the perpetrator and to society that such abuse will not be tolerated, either by its victims or by the courts.[32]

Similarly, victims of consentless sexual portrayals need effective remedies to relieve their sense of helplessness as powerless sex objects, as well as to recover for any pecuniary damage to their reputations or careers.[33]

SIDER 53-59 (1984). *See also* Kittay, *Pornography and the Erotics of Domination*, in BEYOND DOMINATION: NEW PERSPECTIVES ON WOMEN AND PHILOSOPHY 145-74 (C. Gould ed. 1983) (defining pornography by reference to the "actual or intimated sexual illegitimacy" of the portrayal). According to Lorde:

> The erotic has often been misnamed by men and used against women. It has been made into the confused, the trivial, the psychotic, the plasticized sensation. For this reason, we have often turned away from the exploration and consideration of the erotic as a source of power and information. But pornography is a direct denial of the power of the erotic, for it represents the suppression of true feeling. Pornography emphasizes sensation without feeling. The very word *erotic* comes from the Greek word *eros*, the personification of love in all its aspects — born of Chaos, and personifying creative power and harmony. When I speak of the erotic, then, I speak of it as an assertion of the lifeforce of women; of that creative energy empowered, the knowledge and use of which we are now reclaiming in our language, our history, our dancing, our loving, our work, our lives. There are frequent attempts to equate pornography and eroticism, two diametrically opposed uses of the sexual.

Lorde, *supra*, at 54-55.

32. Delgado, *supra* note 7, at 146-47.

33. This author recognizes that the ability to consent is a necessary, although not sufficient, indicator of sexual freedom. Other indicators of sexual freedom include consideration of the other employment options available to the individual portrayed, the size of the monetary compensation given to the individual for participating in the portrayal, or evidence of threats made against the individual for failing to participate in the portrayal. For a further discussion of the courts' treatment of the consent issue when women are por-

B. *Lack of Relief Under Existing Law*

Under existing law, individuals who are victims of consentless sexual portrayals rarely prevail. One of their few options is to bring an action for invasion of privacy.[34] This approach is rarely successful, as can be seen by examining the results in five categories of cases.

1. *Well-Known, Non-Political Individuals.* The first category includes well-known, non-political individuals who have had their reputations damaged by consentless sexual portrayals which went beyond the boundaries of what they considered acceptable.[35] Their actions to recover damages for such portrayals are generally unsuccessful.[36]

Two cases challenging the conduct of *Celebrity Skin* magazine reflect the difficulties that well-known individuals encounter when they bring actions against publishers.[37] *Celebrity Skin* prides itself

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trayed sexually, see Colker, *Pornography and Privacy: Towards the Development of a Group-Based Theory for Sex-Based Intrusions of Privacy*, 1 LAW & INEQUALITY: A JOURNAL OF THEORY & PRACTICE 191, 214-22 (1983).

34. *See* cases cited *supra* note 7. Invasion of privacy actions can be brought under four related theories: (1) for appropriation of a plaintiff's name or likeness for a defendant's benefit or advantage; (2) for intrusions upon a plaintiff's physicial solitude or seclusion; (3) for public disclosure of private facts about a plaintiff; or (4) for publicity which places plaintiff in a false light in the public eye. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 802-14 (4th ed. 1971). The four causes of action differ considerably:

> [T]he first and second require the invasion of something secret, secluded or private pertaining to the plaintiff; the third and fourth do not. The second and third depend upon publicity, which the first does not, nor does the fourth, although it usually involves it. The third requires falsity or fiction; the other three do not. The fourth involves a use for the defendant's advantage, which is not true of the rest.

Id. at 814.

Modern privacy doctrine derives from Samuel Warren and Louis Brandeis' pioneering work, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) which expanded a property-based privacy doctrine into a person-based doctrine. Until the late nineteenth century there was no perceived need to develop legal protections against consentless sexual portrayals. The rise of modern technology inspired the need for a person-based cause of action for invasion of privacy. *Id.* at 196. During the last eighty years, legislatures have codified and courts have interpreted Warren's and Brandeis' conception of the right to privacy under the four distinct types of actions outlined above. For a historical discussion of the invasion of privacy doctrine, see Colker, *supra* note 33, at 201-05.

35. *See, e.g.*, Lerman v. Flynt Dist. Co., 745 F.2d 123 (2d Cir. 1984); Ann-Margret v. High Soc'y Mag., 498 F. Supp. 401 (S.D.N.Y. 1980); Davis v. High Soc'y Mag., 90 A.D.2d 374, 457 N.Y.S.2d 308 (1982).

36. *See, e.g.*, cases cited *supra* note 35.

37. *See* Ann-Margret v. High Soc'y Mag., 498 F. Supp. 401 (S.D.N.Y. 1980); Davis v.

on "printing photographs of well-known women caught in the most revealing positions that [it is] able to obtain."[38] An actress[39] and a professional boxer[40] brought legal actions against *Celebrity Skin* under a New York civil rights statute[41] that provides a cause of action for injunctive relief and damages when a person's name, portrait, or picture is used, without that person's consent, for advertising purposes or for purposes of trade.

a. *Ann-Margret.* Ann-Margret, the actress, brought the first action against the magazine.[42] In 1978, she allowed a filmmaker to film her partially dressed during the production of one scene of a movie. It was the second time in her career that she had been filmed unclothed from the waist up. As a condition of the filming, she only permitted essential personnel to be present and insisted

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High Soc'y Mag., 90 A.D.2d 374, 457 N.Y.S.2d 308 (1982).

38. Ann-Margret v. High Soc'y Mag., 498 F. Supp. 401, 403 (S.D.N.Y. 1980).

39. *See id.*

40. *See* Davis v. High Soc'y Mag., 90 A.D.2d 374, 457 N.Y.S.2d 308 (1982).

41. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1982):

Section 50. Right of Privacy

> A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

Section 51. Action for Injunction and for Damages

> Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use, and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment, specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this act shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic production which he has sold or disposed of with such name, portrait or picture used in connection therewith.

42. Ann-Margret v. High Soc'y Mag., 498 F. Supp. 401 (S.D.N.Y. 1980).

that the least possible amount of footage be taken.[43] She attempted to control both the content and the context of the filming.

Without the knowledge or consent of Ann-Margret, *Celebrity Skin* obtained a copy of the film and reproduced four pages of photographs of her, including one photograph in which one of her breasts was visible.[44] Ann-Margret brought suit against the publisher claiming violation of her right to privacy and publicity under section 51 of the New York Civil Rights Statute.[45]

The district court recognized that a literal interpretation of the statute required a holding in favor of Ann-Margret because the magazine made no attempt to acquire her consent,[46] as required by the New York statute.[47] Nevertheless, relying on *Time, Inc. v. Hill,*[48] the court ruled against Ann-Margret for two reasons.

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43. *Id.* at 403 n.2.

44. These photographs appeared in the first edition of *Celebrity Skin* which was subtitled "Special Collector's Edition No. 1." *Id.* at 404.

45. She alleged that the one photograph of her posing partially nude violated her right to privacy and that the publication of all of the pictures violated her right of publicity. The first allegation was made under sections 50 and 51 of the New York Civil Rights Statute; the second allegation was made under the common law. *Id.* at 404-06. This Article will not discuss her right to publicity claim. She lost that claim because:

> [i]t is well established that simple use in a magazine that is published and sold for profit does not constitute a use for advertising or trade sufficient to make out an actionable claim, even if its "manner of use and placement was designed to sell the article so that it might be paid for and read."

Id. at 406 (citations omitted).

46. *Id.* at 404.

47. *Id.* at 403-04. Nevertheless, the court also seemed to be using an implied consent theory, because Ann-Margret had consented to appearing in the original film.

> The plaintiff in the instant action chose to appear partially nude during one scene in a major motion picture which she knew was to be widely distributed. Upon release, that film, which was highly successful, was seen by millions of persons. It has been held that when an individual consents to be viewed in a certain manner during the course of a public performance, such as in a movie, it cannot then be argued that a subsequent faithful reproduction (no allegation has been made that the picture has been altered) of that appearance constitutes an invasion of privacy . . . . [H]aving consented to the exhibition there is no invasion of privacy because [it is] not shown to the audience contracted for.

Id. at 405 (footnotes and citations omitted).

48. In Time, Inc. v. Hill, 385 U.S. 374 (1967), the Supreme Court was faced with the question of whether the trial court committed reversible error in failing to instruct the jury that a verdict of liability under the New York statute could be predicated only on a finding of knowing or reckless falsity (i.e., actual malice) in the publication of a newsworthy article in *Life Magazine.* Additionally, the Court had to determine whether the New York statute should be declared unconstitutional for failing to require proof of knowing or reckless

First, the court held that it was required to apply the stringent standards that had developed for public figures under defamation law.[49] Second, it found that the New York statute did not provide the plaintiff with the right to consent to each *context* in which she was portrayed.[50]

b. *Cathy Davis.* The second case against *Celebrity Skin* involved Cathy Davis. Davis was the first woman to become a professional, licensed boxer.[51] The magazine published photographs of two female boxers.[52] One picture portrayed two female boxers unclothed from the waist up. To the left of the photograph, in bold print, was the name "Cat Davis," with the following statement:

> Her vital statistics are: 35-25-35, 16 fights and 15 k.o.'s. Pound for pound, the 132 lb beauty is one of the best female boxers in the ring today. Although her manager/husband Sal Algieri claims she's never posed nude, this photo sent in by a reader sure looks like the Top Cat to us.[53]

Davis brought an action for damages under sections 50 and 51 of the New York Civil Rights Statute,[54] and introduced unrefuted evidence that she was not one of the persons in the photograph.[55] The state trial court held for Davis on her motion for summary judgment because the defendants had neither disputed

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falsity. The Supreme Court found that the trial court committed reversible error but found the statute to be constitutional because "the New York Court of Appeals . . . has been assiduous in construing the statute to avoid invasion of the constitutional protections of speech and press." *Id.* at 397. In citing Time, Inc. v. Hill, the trial court implicitly adopted the "knowing or reckless falsity" or "actual malice" standard for evaluating whether Ann-Margret's privacy had been invaded.

49. As a public figure, the court held, Ann-Margret had no right to challenge a faithful reproduction of her appearance because such a reproduction was a newsworthy item that deserved first amendment protection. "The press may at times be trivial, and even obnoxious, but this must be tolerated because of the important part it plays in protecting our liberty." Ann-Margret v. High Soc'y Mag., 498 F. Supp. 401, 405-06 n.12 (S.D.N.Y. 1980).

50. *See infra* text accompanying notes 175-77.

51. Davis v. High Soc'y Mag., 90 A.D.2d 374, 374, 457 N.Y.S.2d 308, 310 (1982).

52. *Id.* at 375, 457 N.Y.S.2d at 310.

53. *Id.* at 375, 457 N.Y.S.2d at 311, (appearing on page 84 of the third edition of *Celebrity Skin*).

54. She also brought an action alleging a violation of her "right to publicity" under the common law. *Davis*, 90 A.D.2d at 374, 457 N.Y.S.2d at 310. Because the lower court had granted summary judgment to plaintiff solely on the basis of her claims under the New York statute, the court of appeals did not address the merits of her right to publicity claim. *See id.* at 377 n.1, 457 N.Y.S.2d at 312 n.1.

55. *Id.* at 376-77, 457 N.Y.S.2d at 311.

that the photographs were of Davis nor that there was a lack of consent.[56] Since the New York statute required written consent,[57] the lower court found the lack of consent dispositive.

The state court of appeals reversed and remanded the case to the trial court without challenging any of the factual findings underlying the trial court's decision.[58] It agreed that the magazine specialized in publishing sexually revealing photographs of well-known women, that the published photograph was identified as depicting Davis, and that the publication was made without her written consent. The court of appeals reversed because the trial court had not made findings on the factual issue of "actual malice."[59]

Although the New York statute did not require that the actual malice standard be applied to public figures, the *Davis* court, relying on *Time, Inc. v. Hill*, found that first amendment considerations required using the actual malice standard in cases involving public figures.[60] Because the "actual malice" is a factual issue, the case had to be remanded to the trial court for a factual finding.[61] According to the court of appeals, defendants' allegations that the photograph did not depict Davis and that the photographer had proven reliable in the past were sufficient, as a matter of law, to survive Davis' summary judgment motion.[62] Defendants were not required to allege evidence of having obtained Davis' consent to survive the summary judgment motion, despite the language of the New York statute.[63]

2. *Private Individuals Portrayed in Newsstories.* The second category encompasses private individuals who have had information about their sexual behavior or sexual victimization published in news-related stories without their knowledge and consent and

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56. *Id.*

57. *Id.* at 376-77, 457 N.Y.S.2d at 311-12.

58. *Id.* at 376-77, 457 N.Y.S. 2d at 312.

59. *Id. See generally* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Time, Inc. v. Hill, 385 U.S. 374 (1967); New York Times v. Sullivan, 376 U.S. 254 (1964). For a detailed discussion of defamation law and the actual malice standard as they relate to women's sex-based discrimination for invasions of privacy, see Colker, *supra* note 33, especially at 210-13.

60. *Davis*, 90 A.D.2d at 382-84, 457 N.Y.S.2d at 315-16.

61. *Id.* at 383, 457 N.Y.S.2d at 316.

62. *Id.* at 384, 457 N.Y.S.2d at 316.

63. *Id.* at 382-83, 457 N.Y.S.2d at 315.

who have suffered emotional distress from such publications.[64] Both men and women have challenged their sexual portrayals in news stories on the basis that the portrayals were inaccurate or not of public interest.[65] They have rarely won.[66]

a. *Ruby Clark.* For example, on April 22, 1977, American Broadcasting Corporation ("ABC") aired a special television broadcast entitled, "Sex for Sale," that described the problem of prostitution in America's cities and suburbs.[67] One segment of the broadcast showed Ruby Clark walking down the street in a middle-class neighborhood. The context suggested that Clark was a prostitute.[68] ABC had filmed Clark without her knowledge or consent.

Clark brought an action against ABC claiming defamation

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64. *See* Cape Publications v. Bridges, 423 So. 2d 426 (Fla. Dist. Ct. App. 1982) (female plaintiff's privacy not invaded by newspaper publication showing her partially nude and emotionally distressed during police rescue), *cert. denied*, 464 U.S. 893 (1983); Spradley v. Sutton, 9 Media L. Rep. (BNA) 1481 (Fla. Cir. Ct. 1982) (male plaintiff's privacy not invaded despite a television station broadcast of film showing surrender and arrest of plaintiff, who had allegedly shot police officer and held young boy hostage, and who was dressed in underwear at the time of his arrest). *Cf.* Arrington v. New York Times, 55 N.Y.2d 433, 434 N.E.2d 1319, 449 N.Y.S.2d 941 (1982) (black male plaintiff's allegations under sections 50 and 51 of the New York Civil Rights Law that photographer and photographic agency violated the statute by taking his photograph and selling it without his consent to illustrate an article on the upward mobility of the black middle class were sufficient to withstand defendants' motion to dismiss; however, plaintiff's allegations were not sufficient to give rise to cause of action for false light invasion of privacy), *cert. denied*, 459 U.S. 1146 (1983).

65. *See supra* note 64.

66. *Id.*

67. *See* Clark v. ABC, 684 F.2d 1208 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983).

68. Soon after Clark was pictured, a female resident of the neighborhood stated in the broadcast that, "[a]lmost any woman who was black and on the street was considered to be a prostitute herself. And was treated like a prostitute." *Id.* at 1211.

During and following the broadcast, several acquaintances and relatives phoned Clark to say that they thought she was portrayed as a prostitute. Afterwards, employers refused her employment because they feared that hiring her would hurt their business. She was also shunned and propositioned. *Id.*

Clark had not consented to the portrayal and was not aware that she was being filmed. ABC had no reason to believe that she was a prostitute. Clark's portrayal was simply convenient to the story line—she was young, stylishly dressed, female and black, fitting into one stereotype of a prostitute. For a discussion of women's special victimization by pornography, *see generally* A. DWORKIN, *supra* note 28 at 129-98; Gardner, *Racism in Pornography* in TAKE BACK THE NIGHT 105 (L. Lederer ed. 1980). Walker, *Coming Apart*, in TAKE BACK THE NIGHT 95 (L. Lederer ed. 1980). *But see* Bulkin, *Hard Ground: Jewish Identity, Racism and Anti-Semitism* in YOURS IN STRUGGLE 89, especially at 129-30 (1984) (criticising Dworkin's approach to racial sexual issues).

and invasion of privacy.[69] The district court granted ABC's motion for summary judgment and found that the broadcast was not libelous as matter of law.[70] The court of appeals reversed.[71] It held that the district court should have granted summary judgment for ABC only if the broadcast was not reasonably capable of a defamatory meaning.[72] The court of appeals found that the broadcast was capable of having either a defamatory or non-defamatory meaning, depending upon whether an observer would conclude that the broadcast depicted Clark as a prostitute.[73] This factual issue was for the jury to decide.[74] Thus, six years after the original broadcast,[75] Clark won the right to have a jury decide whether she was defamed by the broadcast.

b. *Jane Doe.* In cases where a woman's sexuality has been accurately, although nonconsensually portrayed in news-related stories, the individual has had less success than Clark, even though courts have reprimanded the media for failing to serve the public interest.[76] Jane Doe, for example, agreed to testify against her alleged rapist at a criminal trial under the assurance that her name and photograph would not be published or displayed.[77] She testified, and Sarasota-Brandenton Television aired the testimony during the evening news. It also identified Jane Doe by name to the viewing audience.[78]

Relying on a Florida statute that prohibited publication of information identifying sexual offense victims,[79] Doe brought an ac-

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69. Clark initiated an action in Wayne County Circuit Court against ABC alleging defamation and invasion of privacy. She claimed that the Broadcast depicted her as a "common street prostitute." ABC removed the case to a federal district court pursuant to the court's diversity jurisdiction. *Clark*, 684 F.2d at 1211.

70. *Id.* at 1212.

71. *Id.* at 1210.

72. *Id.* at 1213.

73. *Id.* at 1213-14.

74. The court accepted ABC's argument that courts must be cautious in allowing juries to decide defamation cases which involve public interest reporting. *Id.* By ruling in favor of ABC on the summary judgment motion it did not have to send the matter to the jury.

75. ABC appealed the court of appeals' decision to the Supreme Court which denied the request for review in 1983. Clark v. ABC, 460 U.S. 1040 (1983).

76. *See* Doe v. Sarasota-Bradenton Television, 436 So. 2d 328 (Fla. Dist. Ct. App. 1983).

77. *Id.* at 329.

78. *Id.*

79. The text of the Florida statute is as follows:

tion for invasion of privacy and intentional infliction of emotional distress against Sarasota-Bradenton Television.[80] The court dismissed the complaint, citing *Cox Broadcasting Corp. v. Cohn*,[81] a Supreme Court decision that precludes a state from punishing a reporter for accurately publishing information obtained at a judicial proceeding.[82] It was undisputed that the information reported about Doe was accurate. Nevertheless, the *Doe* court ended its opinion by chastising the state for its actions, stating:

> [W]e cannot resist the opportunity to chastise the state somewhat for not having sought a protective order regarding cameras in the courtroom or other proper steps to support its alleged assurance to appellant that her name and photograph would not be published.[83]

Although the court thought that the news media "could well assume no responsibility not to publish the video tape,"[84] it did note that "in the future it would behoove the media to engage in their own balancing test with an eye to avoiding such harm as may have occurred here."[85]

3. *Portrayals in Fiction.* The third category comprises public and private figures who have experienced emotional distress from dramatic fictionalizations of their sexual behavior, because of their inability to limit recognizable descriptions of themselves.[86]

Section 794.03.

> Unlawful to publish or broadcast information identifying sexual offense victim. No person shall print, publish, or broadcast, or cause or allow to be printed, published or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense within this chapter. . . .

Id. at 329 n.1 (quoting FLA. STAT. § 794.03 (1981)).

80. Doe filed a four-count complaint against Sarasota-Bradenton Television Company: (1) seeking a declaration that she was a member of the class protected by the Florida statute, (2) seeking damages for violation of the statute, (3) seeking damages for intentional invasion of privacy, and (4) seeking damages for intentional infliction of emotional distress. *Id.* at 329.

81. 420 U.S. 469 (1975).

82. *Id.* at 489-96.

83. *Sarasota-Bradenton Television*, 436 So. 2d at 331.

84. *Id.*

85. *Id.* at 332.

86. *See, e.g.*, Pring v. Penthouse Int'l, 695 F.2d 438 (10th Cir. 1982) (article describing physically impossible act in impossible setting a fantasy and cannot be seen as describing plaintiff), *cert. denied*, 462 U.S. 1132 (1983); Springer v. Viking Press, 90 A.D.2d 315, 457 N.Y.S.2d 246 (1982) (female plaintiff's allegation that her former boyfriend's published novel contained a character who resembled her as a prostitute who engages in unorthodox sexual activities was insufficient to withstand defendant's motion to dismiss both her libel

Fictional portrayals of public or private persons receive strong first amendment protection from the courts, even when a plaintiff argues that the piece of fiction portrays her recognizably in a derogatory sexual context.[87] The underlying theory is that fiction rarely permits identification of a real person.[88]

Pring v. Penthouse International[89] is illustrative of the judicial protection of public figures who are portrayed in fiction. Kimerli Jayne Pring had participated in a Miss America contest as Miss Wyoming. One of her talent acts was baton twirling.[90] *Penthouse* magazine published a piece of fiction that described a woman named "Charlene" who was Miss Wyoming in a Miss America contest and performed baton twirling. She performed various acts of fellatio with her baton and later with her coach, that caused him to levitate. Both acts were performed in the presence of a national television audience at the Miss America Pageant.[91]

Pring brought an action for defamation against the magazine and the author of the article. The trial court submitted to the jury the question of whether the story could be reasonably understood to refer to the plaintiff.[92] The jury found that the plaintiff was the person "referred to" and awarded her more than $14 million in damages.[93]

The court of appeals reversed.[94] It found that the "reasonably understood" test should not have been submitted to the jury because the story was "fantasy" rather than "fiction" or "fact."[95] According to the court, "[t]he charged portions of the story described something physically impossible in an impossible setting

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action and one brought under New York Civil Rights Law, sections 50-51), *aff'd*, 60 N.Y.2d 916, 458 N.E.2d 1256, 470 N.Y.S.2d 579 (1983).

87. *See* cases cited *supra* note 86.

88. *Pring*, 695 F.2d at 442. *But see* Bindrim v. Mitchell, 92 Cal. App. 3d 61, 78, 155 Cal. Rptr. 29, 39 (applying test to determine whether plaintiff is identifiable in work of fiction), *cert. denied*, 444 U.S. 984 (1979).

89. 695 F.2d 438 (10th Cir. 1982).

90. *Id.* at 440-41.

91. *Id.*

92. *Id.* at 442.

93. She was awarded $1.5 million in actual damages and $12.5 million in punitive damages against the magazine, and $10,000 in actual and $25,000 in punitive damages against the author. The defendants appealed to the Tenth Circuit which remanded the case to the district court with instructions to set aside the jury verdict and dismiss the action. *Id.* at 443.

94. *Id.* at 442-43.

95. *Id.* at 443.

. . . it is simply impossible to believe that a reader would not have understood that the charged portions were pure fantasy and nothing else."[96] The court found that if fiction is so embellished so as to be considered fantasy, a court, as a matter of law, can find that a plaintiff was not recognizable.[97]

The *Pring* court of appeals did express some sympathy for the plaintiff, however, stating: "although a story may be repugnant in the extreme to an ordinary reader, and we have encountered no difficulty in placing this story in such a category, the typical standards and doctrines under the first amendment must nevertheless be applied."[98]

4. *Group Vilification.* The fourth category contains individuals who seek to enter the arena of political dialogue and have had to contend with sexual invectives about their gender that reinforce sexist stereotypes and limit their ability to participate in effective political dialogue.[99] Individuals are often insulted sexually in response to their use of nonsexual language to criticize others. Their legal actions have been unsuccessful, especially in cases where the response could be considered fictional.[100]

An example of such a situation occurred in the case of *Brooks*

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96. *Id.*

97. *But see id.* at 444 (Breitenstein, C.J., dissenting) (recognizing that an individual can be defamed in a fictional publication when the individual is identifiable).

As Circuit Judge Breitenstein noted in his dissent:

> Moral standards may have changed since the First Amendment was adopted but that change has not gone so far as to protect a publisher which defames an identifiable living person by relating commission of an act of sexual deviation and perversion.

Id. at 444 (Breitenstein, C.J., dissenting).

98. *Id.* at 443.

99. *See, e.g.*, Miller v. Charleston Gazette, 9 Media L. Rep. (BNA) 2541 (W. Va. Cir. Ct. 1983) (male plaintiff's complaint about a cartoon that depicted plaintiff, a candidate for United States Attorney, in a cage with other animals using various props that were allegedly associated with aberrant sexual behavior, was insufficient to withstand defendant's summary judgment motion); Guccione v. Hustler, 7 Media L. Rep. (BNA) 2077 (Ohio Ct. App. 1981). *Cf.* Shrottman v. Boston Globe, 7 Media L. Rep. (BNA) 1487 (Mass. Super. Ct. 1981) (judgment entered for plaintiff on his libel action where a reporter incorrectly attributed to him a statement using the word "nigger").

It is useful to view this category of cases in the broader context of victims being considered the cause of their own victimization. For women, the contexts of rape, sexual harassment, spousal abuse, and unwanted pregnancies, have often evoked this response. *See, e.g.*, works cited in *supra* note 28.

100. *See, e.g.*, cases cited *supra* note 99.

v. Stone.[101] Susan Brooks, a student at Georgia Medical College, brought a libel action against the school newspaper for publishing the following description of Brooks:[102] "We have different backgrounds from the rest of you. Our mothers were German Shepherds; our fathers were Camels, so naturally we love to hump bitches in heat. Say, Ms. Brooks, when do you come in season?"[103]

One reason that the court held against Brooks[104] was that it found she had "induced the editors' reply" by commencing the name-calling campaign by criticizing the newspaper in nonsexual terms.[105] The apparent underlying rationale of the court's decision was that if a woman criticizes a person or publication, especially with language that is considered inappropriate for women, she has consented to a reply attacking her sexuality in return.

5. *Portrayals of Private Individuals for Commercial Purposes.* The only category of actions involving consentless sexual portrayals that has had some success consists of cases brought by purely private individuals who were not aware that their photographs were being taken.[106] Individuals who are portrayed sexually in advertising have not always consented to their portrayals.[107] Even in New York, where the New York Civil Rights Statute requires consent before a person can be portrayed in an advertisement, the use of portrayals without consent persists.[108]

Cohen v. Herbal Concepts[109] exemplifies this practice. Susan and Ira Cohen and their daughter, Samantha, were visiting friends during the weekend of July 4, 1977.[110] Susan and Samantha were bathing in the nude in a stream located on private property when

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101. 9 Media L. Rep. (BNA) 1823 (Ga. State Ct., Richmond Co. 1983).

102. *Brooks*, 9 Media L. Rep. (BNA) at 1823.

103. *Id.*

104. The trial court held against Brooks because it found that the piece was fictional. The statement "cannot be described as a factual attack on the plaintiff's virtue, because of clearly absurd statements." *Id.* Thus, a fictional sexual attack was considered not to be defamatory.

105. *Id.* at 1824. She had stated that the paper was trash and belonged in the bottom of bird cages. *Id.* at 1823.

106. *See infra* text accompanying notes 109-31. *Cf.* Clark v. Celeb. Publishing, 530 F. Supp. 979 (S.D.N.Y. 1981) (plaintiff awarded compensatory and punitive damages under California law for unauthorized publication by a New York publisher of photographs showing plaintiff getting undressed).

107. *See infra* text accompanying notes 109-31.

108. *Id.*

109. 63 N.Y.2d 379, 472 N.E.2d 307, 482 N.Y.S.2d 457 (1984).

110. *Cohen*, 63 N.Y.2d at 382, 472 N.E.2d at 308, 482 N.Y.S.2d at 458.

Ira observed a photographer taking pictures of Susan and Samantha as they entered the water. Some time later, while flipping through a magazine, Ira recognized his wife and daughter in a photograph of two nude persons that appeared as part of an advertisement for a product used to fight cellulite.[111]

Susan Cohen brought an action against Herbal Concepts, the manufacturer of "Au Naturel," under the New York Civil Rights Statute, seeking damages for publishing the photographs for advertising purposes.[112] The trial court dismissed the complaint finding that the identity of the plaintiffs could not be determined from the picture.[113] The state court of appeals reversed, finding that the New York statute contains no identification requirement and that it was sufficient that the plaintiff could identify herself in the picture.[114]

Other women have also used the New York statute successfully. For example, in *Moore v. Stonehill Communications*,[115] the plaintiff was seventeen years old when she posed in a bathing suit for "test" photographs by a professional photographer.[116] The photographs were intended only for her portfolio and for practice. The photographer, however, sold the photographs to the publisher of "High Times Encyclopedia of Recreational Drugs," who used the photographs in an advertisement for its product[117] with a caption that suggested Moore was exposing herself sexually and using drugs.[118]

Moore brought an action under sections 50 and 51 of the

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111. The photograph depicted two nude persons, a woman carrying a small object in her left hand and a young girl entering shallow water. Neither face was visible, but the rear and side of both persons could be seen. The woman's waist, arms, right breast and buttocks were visible. The advertising copy described a product, "Au Naturel," in a message directed to women with "fatty lumps and bumps that won't go away." *Id.* at 382, 472 N.E.2d at 308, 482 N.Y.S.2d at 458.

112. *Id.* at 381, 472 N.E.2d at 307, 482 N.Y.S.2d at 458.

113. *Id.* at 383, 472 N.E.2d at 308, 482 N.Y.S.2d at 458.

114. *Id.*

115. 7 Media L. Rep. (BNA) 1438 (N.Y. Sup. Ct. 1981).

116. *Moore*, 7 Media L. Rep. (BNA) at 1439.

117. One photograph featured Moore posed frontally, sitting on a beach in a bathing suit, accompanied by a mock-up of the book. The advertising copy stated: "Expose myself? Why not, if I know what I'm doing. . . . I want to open up to sights, sounds, tastes, smells, feelings. That's why I expose myself to drugs . . . sometimes. That's why I'm crazy about this book. I take it everywhere." *Id.* at 1438-39.

118. The advertisement also claimed that the book related the "truth about sex, drugs, and aphrodisiacs." *Id.* at 1439.

New York Civil Rights Statute and moved for summary judgment.[119] The defendants conceded that they had never entered into a contract with Moore permitting the use of the photograph. The court granted Moore's motion for summary judgment as to the issue of liability for compensatory damages and for injunctive relief relative to the further publication, sale, or distribution of the photograph.[120] Further, the court found that whether the defendants knew that the photograph was used without the plaintiff's consent was irrelevant to the questions of compensatory damages and injunctive relief.[121]

Similar actions brought in other jurisdictions, however, have not fared as well.[122] For instance, Christina McCabe brought libel, portrayal in a false light, and publicity given to private life claims in a Pennsylvania district court[123] after she was portrayed in the centerfold of *Village Voice*.[124] Although the photographer had assured the editor that he had written releases, he conceded at trial that the releases were not signed by McCabe.[125]

On a summary judgment motion, the court ruled in favor of

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119. She also sought to sever her third cause of action for libel. *Id.* at 1438.

120. *Id.* at 1439.

121. *Id.*

122. *See* Valentine v. CBS, 698 F.2d 430 (11th Cir. 1983) (plaintiff's allegations that song lyrics describing plaintiff's role as a murder witness were defamatory, invaded her privacy, and constituted an unauthorized publication of her name in violation of state law were not sufficient to withstand defendant's motion for summary judgment). *But see* Wood v. Hustler Mag., 736 F.2d 1084 (5th Cir. 1984) (affirming judgment for female plaintiff after *Hustler Magazine* published a stolen photograph depicting plaintiff in the nude, that was submitted with a forged consent form; reversing judgment for plaintiff's husband), *cert. denied*, 105 S. Ct. 783 (1985); Braun v. Flynt, 726 F.2d 245 (5th Cir. 1984) (plaintiff's allegation that picture was obtained through fraudulently induced consent resulted in jury award for plaintiff that included compensatory and punitive damages under Texas law), *cert. denied sub nom.*, Chic Mag. v. Braun, 105 S. Ct. 252 (1984).

123. McCabe v. Village Voice, 550 F. Supp. 525 (E.D. Pa. 1982). In addition, plaintiff's complaint included a separate negligence count, which the court denied, insofar as it did not contain allegations distinct from her other claims. *Id.* at 526 n.1.

124. McCabe met Donald Herron at a San Fransisco art gallery. She was introduced to Herron by a mutual friend and agreed to have him photograph her. Herron informed her at the time, around 1978, that he intended to use the photograph in a book he was publishing. She allegedly made no response and did not sign a release permitting him to use the photographs. Early in 1980, Herron contacted the centerfold editor of *The Village Voice* to ask if he might be interested in publishing some of Herron's work. In April, 1980, the *Voice* centerfold featured Herron's photographs, including that of McCabe. Underneath her photograph was a caption reading, "Christina McCabe — Model." *Id.* at 527- 28.

125. *Id.* at 527.

the defendants on the libel and portrayal in a false light claims.[126] It denied defendants' motion on the publicity given to private life claim.[127] The court found that the photograph of the plaintiff, taken in a bathtub, was not sexually suggestive and was not capable of a defamatory meaning, nor did it place the plaintiff in a false light.[128] The only reading of the photograph of which the court could conceive was the suggestion that the reader should bathe.[129] Therefore, the court found no grounds on which the plaintiff could prevail on the libel and false light claims.

In considering the publicity given to private life claim, however, the court did find that the publication of a nude photograph of a private individual met the standard of publication of a matter which "would be highly offensive to a reasonable person" and "is not of legitimate concern to the public."[130] The court offered no explanation for its distinction that the photograph was offensive yet not defamatory. Underlying the court's analysis was an inability to take seriously the plaintiff's contention that she was injured by the implication that she had "asked" to be portrayed as a sexual object.[131] McCabe did not consider the photograph to be about bathing, as the court interpreted it. Rather, she considered

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126. *Id.* at 526.

127. *Id.*

128. *Id.* at 528-29.

129. The court stated:

> In this case, considering the totality of the printed material, including the title of the feature "Centerfold," and the accompanying photographs, the plaintiff's photograph and the designation "Model," I find the publication incapable of defamatory meaning. Neither the plaintiff's photograph, nor the entire feature, is obscene or even suggestive. Nothing in the presentation suggests that the plaintiff is sexually promiscuous. While some readers might conclude that the plaintiff was supportive of avant garde photography, this communication cannot support a defamation claim.

Id. at 528 (footnote omitted).

130. *Id.* at 529 (quoting RESTATEMENT (SECOND) OF TORTS § 652D). The distinction may have been based on the court's observation that "defendants apparently concede that publication of a nude photograph would normally meet the standards of [publicity given to private life claim]". *McCabe*, 550 F. Supp. at 529. The defendants chose to challenge that aspect of plaintiff's claim by arguing that McCabe was reasonably understood to have consented to the publication of her picture and that publication was of legitimate concern to the public, rather than to challenge whether the publication was highly offensive under the standards of a publicity given to private life claim. Recognizing that concession, however, does not explain why the parties (and the court) agreed to assume that the photograph was highly offensive for the publicity given to the private life claim, but not highly offensive for the libel and false light claim.

131. *See supra* text accompanying notes 37-50.

it to be a statement that she had requested to be publicly portrayed in the nude.

III. An Alternative Approach

Rather than view these cases as only involving problems of privacy—that automatically give way to an articulation of any free speech interest—these cases should be analyzed as presenting infringements of additional substantial rights. It should be recognized that published consentless sexual portrayals may infringe the sex-based civil rights, privacy rights and free speech rights of the individual portrayed as well as invoke the free speech interests of the publishers. A framework should be applied to these cases that would consider this full set of rights.

The framework proposed below would protect individuals from being portrayed publicly without their consent under a four-part balancing standard which considers each of the fundamental interests implicated by these cases.[132] When an individual brings an invasion of privacy action under common law or state law for a consentless sexual portrayal, a court would have to determine whether a publisher's action was lawful under the following balancing test:

(a) where the person portrayed *has* been portrayed in a sexual context and has *not* been portrayed in a context in which he or she is a public figure, the court should determine whether the portrayal served a compelling public interest and whether obtaining the person's consent would have caused extreme undue hardship;

(b) where the person portrayed has *not* been portrayed in a sexual context and has *not* been portrayed in a context in which he or she is a public figure, the court should determine whether the portrayal served a substantial public interest and whether obtaining the person's consent would have caused substantial undue hardship;

(c) where the person portrayed *has* been portrayed in a sexual context and *has* been portrayed in a context in which he or she is

132. This framework of limited regulation to encourage free speech has been recognized in other contexts as effective and beneficial. *See, e.g.*, Harper & Row Publishers v. Nation Enters., 105 S. Ct. 2218 (1985) (fair use doctrine in copyright law). *Cf.* Merryman, *The Refrigerator of Bernard Buffet*, 27 Hastings L.J. 1023 (1976) (artist's moral right to control dissemination or destruction of her own art work).

a public figure, the court should determine whether the portrayal served a substantial public interest and whether obtaining the person's consent would have caused substantial undue hardship; (d) where the person portrayed has *not* been portrayed in a sexual context and *has* been portrayed in a context in which he or she is a public figure, the court should determine whether the portrayal served a significant public interest and whether obtaining the person's consent would have caused significant undue hardship.

Each fundamental interest would not necessarily be raised in all cases considered under this framework. The individual's privacy and free speech rights would be invoked if the individual were portrayed without consenting; the individual's sex-based civil rights would be invoked if the portrayal were sexual. The publisher's free speech rights would always be invoked in these cases; however, the strength of that right would depend upon whether the publication was newsworthy rather than commercial. For example, if the portrayal invoked both sex-based civil rights (*e.g.*, a woman was portrayed sexually because she is a woman) and the right to privacy, it would receive stronger protection under this framework than would a situation that only invoked one fundamental right. If the individual portrayed were also a public figure, the framework would balance the fundamental rights of the individual portrayed against the importance of disseminating information about public figures. Because the framework would only provide relief if the portrayal occurred without the consent of the individual portrayed, it would not directly regulate speech on the basis of content.

This proposed framework reflects the Supreme Court's recent holding in *Roberts v. United States Jaycees*.[133] The issue in *Jaycees* was whether a Minnesota statute unconstitutionally interfered with the Jaycees' freedom of association rights as guaranteed by the first amendment to the United States Constitution.[134]

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133. 468 U.S. 609 (1984).

134. *Id.* at 610. Under the Minnesota Statute it was an unlawful discriminatory practice for a place of public accomodation to deny persons the full and equal enjoyment of goods, services, facilities, privileges, advantages and accomodations because of race, color, creed, religion, disability, national origin or sex.

The Minnesota Human Rights Act contained the following relevant provision:

> It is an unfair discriminatory practice: To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed,

The Supreme Court assessed the constitutionality of the statute by balancing the Jaycees' interest in free association against the other fundamental interests served by the statute.[135] The Minnesota statute survived first amendment challenge under that framework because "Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms."[136]

The Court in *Jaycees* described the importance of eradicating sex discrimination and its accompanying injury with some of the strongest language ever used by a majority of the Supreme Court. It categorized the injury at issue as a "deprivation of personal dignity"[137] and a "stigmatizing injury" that "is surely felt as strongly by persons suffering discrimination on the basis of sex as by those treated differently because of their race."[138] Because sex distinctions have historically received a lower level of judicial scrutiny than race distinctions,[139] that statement provides strong support for the ability of courts to balance violations of sex-based rights against other fundamental rights.[140]

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religion, disability, national origin or sex.

MINN. STAT. § 363.03(3) (1982). 468 U.S. at 615.

Women who were denied full voting membership in the Jaycees because of their sex brought a challenge to the Jaycees' membership policies under that statute. 468 U.S. at 614. Before a hearing took place on the state charges, the Jaycees brought a federal action to enjoin enforcement of the Minnesota statute, alleging it violated male members' constitutional rights of free speech and association. The federal district court certified to the Minnesota Supreme Court the question of whether the Jaycees qualified as a place of public accommodation within the meaning of the statute. The Minnesota Supreme Court found that the Jaycees did qualify as a place of public accommodation and the district court upheld the constitutionality of the statute. The court of appeals reversed. *Id.* at 615-16.

The United States Supreme Court found that the statute did not abridge either the male members' freedom of intimate association or their freedom of expressive association, and that the statute was not unconstitutionally vague or overbroad. *Id.* at 618-31.

135. *Id.* at 622-29. According to the Court:

> Infringements on that right [right to free association] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.

Id. at 623 (citations omitted).

136. *Id.* at 623.

137. *Id.*

138. *Id.* at 625.

139. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 210-11 n.* (1976) (Powell, J., concurring) (suggesting middle-tier approach to sex discrimination).

140. In addition to using the balancing test set forth by the Supreme Court, the pro-

The Supreme Court's balancing of the freedom of expressive association interest against the civil rights interest is directly applicable to the framework suggested above, because those interests are analogous to the interests presented in consentless sexual portrayals. A male Jaycee's right to freedom of expressive association is analogous to a publisher's right to free speech, because both rights derive from the first amendment's protections.[141] Moreover, a female Jaycee's interest in the freedom to become a full member without regard to her sex is analogous to a woman's interest in controlling her sex-based portrayals, because both interests derive from an interest in sex-based civil rights.[142] Accordingly, it is appropriate to balance women's sex-based interest in being free from consentless sexual portrayals against publishers' first amendment interests, as suggested in the proposed

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posed framework has several other features which were critical in the determination to uphold the Minnesota statute. First, the statute was not aimed at the suppression of speech. *Jaycees*, 468 U.S. at 623. Second, it did not distinguish between prohibited and permitted activity on the basis of viewpoint. *Id.* Third, the statute's purpose could not be achieved through significantly less restrictive means. *Id.* at 626. The Minnesota statute was able to survive analysis under the above factors because of the evidence in the record of the "State's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services." *Id.* at 624. The Court found that any infringement of first amendment rights was incidental and minimal, rather than a basic component of the statute's purpose and structure. *Id.* at 627. Hence, the statute survived first amendment challenge.

The Court's holding in *Jaycees* provides strong support for the framework proposed in this Article. Like the Minnesota public accommodations statute, the proposed framework would seek to vindicate violations of the sex-based civil rights, free speech rights and privacy rights of the individual portrayed. Vindication of these rights would indirectly limit a publisher's first amendment free speech rights, but not because of the content of the restricted speech.

Any infringement on a publisher's first amendment rights would be minimal because of the consent-focused (rather than content-focused) perspective of the framework. This framework would not absolutely prohibit any particular speech on the basis of content. Publishers could still sexually portray women in any conceivable manner, as long as they had the consent of the individual portrayed.

141: According to the Court in *Jaycees*:

> An individual's freedom to speak, to worship, and to petition the Government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. . . . Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

Id. at 622.

142. *See supra* note 31.

framework.

The constitutionality of this approach has received further support from the Supreme Court's affirmance of the Seventh Circuit's recent decision in *American Booksellers' Association v. Hudnut*,[143] a case concerning the constitutionality of the Indianapolis Anti-Pornography Ordinance.[144] Although the Seventh Circuit struck down the ordinance, it noted that the problem of victimization of individuals in the production of pornography is an important problem that states can constitutionally regulate, even if such regulation limits publishers' free speech rights.[145] It justified that statement with the observations that such regulation would be content-neutral and that a state has a strong interest in forbidding such conduct.[146] The Supreme Court's summary affirmance leaves that discussion intact.

Finally, the Supreme Court's recent decision in *Dun & Bradstreet v. Greenmoss Builders*[147] makes it clear that commercial speech is entitled to less protection than political speech. The Court observed that commercial speech "occupies a 'subordinate position in the scale of first amendment values.' "[148] Thus, the Court concluded that commercial speech "may be regulated in ways that might be impermissible in the realm of noncommercial expression."[149]

By contrast, limiting sexual portrayals through enhanced direct regulation of speech solely on the basis of its content is unconstitutional[150] and undesirable in light of the state's history of using its power, including its power to control speech, to ensure

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143. 771 F.2d 323 (7th Cir. 1985), *aff'd*, 106 S. Ct. 1172 (1986).

144. *See supra* note 3.

145. *American Booksellers*, 711 F.2d at 332-33.

146. *Id.*

147. Dun & Bradstreet v. Greenmoss Builders, 105 S. Ct. 2939 (1985) (plurality opinion). The issue in this case was whether the actual malice standard could be reduced to negligence when the defamatory statements involved no issue of public concern. *Id.* at 2944.

148. *Id.* at 2945, n.5 (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)).

149. *Id.* This commercial speech/noncommercial speech distinction received further support from two recent Supreme Court cases, Arcara v. Cloud Books, 106 S. Ct. 3172 (1986) (holding that first amendment does not bar enforcement of a statute authorizing closure of adult bookstore that is used as place of prostitution); Bethel School District No. 403 v. Fraser, 106 S. Ct. 3159 (1986) (holding that first amendment does not prevent school district from disciplining student for giving an offensive speech).

150. *See supra* notes 134-41 and accompanying text.

male control over women's sexuality.[151] For instance, under a content-based approach that sought to expand the definition of obscenity, literature on topics such as abortion or birth control would be as likely to come under attack as hard-core pornography.[152] Similarly, attempts to create erotic portrayals of women's sexuality might be attacked under a content-based approach by individuals who find such portrayals degrading.[153] Even if such le-

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151. *See* FACT brief, *supra* note 3, at 6-8 (tracing the historical suppression of birth control information because the materials were deemed sexually explicit). *See, e.g.*, United States v. One Book Entitled "Contraceptions," 51 F.2d 525 (2d Cir. 1931) (prosecution for distribution of books by Marie Stopes on contraception); United States v. Dennett, 39 F.2d 564 (2d Cir. 1930) (prosecution of Mary Ware Dennett for publication of pamphlet explaining sexual physiology and functions to children); Bours v. United States, 229 F. 960 (7th Cir. 1915) (prosecution of physician for mailing a letter indicating that he might perform a therapeutic abortion); People v. Byrne, 99 Misc. 1, 163 N.Y.S. 682 (Sup. Ct. 1917) (prosecution for distributing materials to women). For a further discussion of the history of state regulation of birth control related material, see Duggan, *supra* note 3.

See also FACT brief, *supra* note 3, at 1-32. According to Erica Jong, writer, poet and opponent of the MacKinnon-Dworkin ordinance: "Should censorship be imposed again, whether through the kind of legislation introduced in Minneapolis and Indianapolis or through other means, feminists would be the first to suffer." Blakely, *supra* note 3, at 38. *See also* Blakely, *supra* note 3, at 38 (statement of Barbara Kerr); Blakely, *supra* note 3, at 120 (statements of Nan Hunter); Aryeh, Brownmiller, Elshtain, Goldstein, Jong, Lapham, & Neier, *The Place of Pornography*, HARPER'S MAGAZINE, Nov. 1984, at 31; Walkowitz, *Male Vice and Female Virtue: Feminism and the Politics of Prostitution in Nineteenth-Century Britain* in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 419-38 (1983) [hereinafter POWERS OF DESIRE] (arguing that, historically, women's attempts to set the standards of sexual conduct have been easily subverted into repressive campaigns antithetical to the values and ideas of feminism); Transcript of Workshop, *supra* note 6.

Catharine MacKinnon, although she co-authored the Minneapolis ordinance and has been one of its strongest proponents, has also recognized the dangers of vesting the state with power over women's sexuality:

> [T]he state is male in the feminist sense. The law sees and treats women the way men see and treat women. The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender, through its legitimizing norms, relation to society, and substantive policies. It achieves this through embodying and ensuring male control over women's sexuality at every level, occasionally cushioning, qualifying or de jure prohibiting its excesses when necessary to its normalization.

MacKinnon, SIGNS II, *supra* note 28, at 644.

The fact that individuals who seek to enhance women's civil rights may draft legislation does not change the reality that male control exists at "every level." Judges must enforce legislation, law enforcement agencies must make policy decisions about what types of cases to pursue, and lawyers must make arguments on behalf of clients. At all of these stages the maleness of the state could have a strong impact upon any legislation, even if it were drafted by individuals with the best intentions and ideas.

152. *See* Walkowitz, *supra* note 151; Alter, *supra* note 3.

153. This criticism has surfaced in the debate over the MacKinnon-Dworkin ordi-

gal attacks were not successful, they could threaten the already precarious financial situation of many feminist publishers.[154]

Hence, if a new framework is to be developed, courts should not make content-based judgments of what types of portrayals are harmful to all women. Instead, courts should determine which fundamental interests are raised by an individual's invasion of privacy action occasioned by a consentless portrayal. Under this proposed framework, individuals would have control over their basic sexual integrity, including its expression in public portrayals, to fully protect their sex-based and free speech rights.[155]

IV. Application of the Proposed Framework

The fact that plaintiffs who bring actions relating to their consentless sexual portrayals usually fail to prevail is disturbing. Although courts have expressed sympathy for these plaintiffs, they have often erroneously believed that various legal doctrines—the actual malice standard for public figures, the definition of a public figure, the recognizability requirement for fictional portrayals, and the lack of injury from group vilification—precluded them from awarding relief. In actuality, these doctrines are not constitutionally required in many of these cases. Alternatively, these individuals might attain relief under the framework introduced in Part III.[156]

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nance. *See* FACT brief, *supra* note 3, at 14-15 (observing that some women might consider explicit lesbian sexual portrayals as demeaning or subordinating, especially in light of the historical prejudice that has existed against lesbians and gay men).

154. Several feminist publications have recently stopped publishing or have found it necessary to take a break from publishing for financial reasons. *See* 15 Off our Backs, June 1985 at 1 (reporting that the New Women's Times, Big Mama Rag, Equal Times, Feminist Connection, Commonwoman and Women of Color News all stopped publishing, and that Sojourner, Valley Women's Voice and the Detroit Women's Voice have been able to continue publication only after a recent successful fundraising effort).

155. *See supra* note 31.

156. Nevertheless, a consent-focused approach does have two key shortcomings. First, though expanding our understanding of who is injured by unwelcome sexual portrayals, *see, e.g.*, Bryant, *Sexual Display of Women's Bodies—A Violation of Privacy*, 10 Golden Gate L. Rev. 1211 (1980) (ignoring injury to individual portrayed); Jacobs, *supra* note 1; *Principles of Expression and Restriction: A First Amendment Symposium*, 40 U. Pitt. L. Rev. 517-660 (1979), this approach ignores the possibility that injury to society as a whole may arise from either consensual or nonconsensual sexual portrayals. In failing to focus on this aspect of the injury, this Article does not intend to suggest that this aspect of the injury is not important. It is, however, beyond the scope of this Article.

Second, a consent-focused approach, while avoiding some of the free speech problems

A. *Portrayals of Public Figures*

1. *Public Figure Requirements.* Well-known nonpolitical individuals, often models and actresses, have failed to prevail because of the imposition of the actual malice standard to their cases. Under the proposed framework, courts would not necessarily be constrained by that standard.

Despite the holdings in the cited cases involving Ann-Margret and Cathy Davis, *Time, Inc. v. Hill* [157] does not require that the standards for defamation be applied to such cases.[158] The issue in *Time, Inc.* was whether the actual malice standard, which had evolved in defamation actions brought by public figures under *New York Times v. Sullivan*,[159] should be applied to "false light" invasion of privacy actions brought under the New York statute. The actual malice standard had developed to protect publishers

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faced by a content-focused approach, does not avoid all such problems. The first amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech or of the press. . . ." U.S. CONST. amend. I. That provision applies to the states via the fourteenth amendment's due process clause. Duncan v. Louisiana, 391 U.S. 145, 148 (1968). Content-based legislation is highly disfavored under the first amendment. *See* Roberts v. United States Jaycees, 468 U.S. 609 (1984). Because a consent-focused approach is content neutral, it avoids some first amendment problems faced by the content-based proposed Minneapolis ordinance. Specifically, the media's right to report information of public interest may clash with the desire of the individuals portrayed to keep information about themselves from the public. *See generally* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

In addition, although the language of the first amendment is absolute, courts use a balancing test to analyze alleged infringements of first amendment rights. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978). First amendment considerations prevail when state actions infringe upon free speech, unless a state can demonstrate that its regulations serve a compelling state interest and invoke the least possible restriction on free speech. *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609 (1984). Many commentators argue that the courts recognize different types of speech that receive varying levels of protection under the above framework. *See, e.g.*, TRIBE, *supra* at 578-608. For instance, commercial speech receives less protection than speech containing news stories. *See, e.g.*, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973). *See also* Roberts v. United States Jaycees, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring).

157. 385 U.S. 374 (1967).

158. Although the Ann-Margret court did not explicitly state that it was applying an "actual malice" standard, one could imply the use of that standard in the court's discussion of the higher standard that must be applied to public figures who bring invasion of privacy actions. *See supra* note 48. An allegation of falsity is only necessary in "false light" invasion of privacy actions. *See supra* note 34.

159. 376 U.S. 254 (1964) (holding that a public official must prove actual malice before liability may ensue in a defamation action against critics of the official's conduct). *See also* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (extending the actual malice standard to public figures who may not be public officials).

who made good faith attempts to publish accurate and newsworthy information from defamation actions.[160] Under the actual malice standard, unless a plaintiff can show that the publisher acted with "reckless disregard for the truth" in publishing false and defamatory information, the public figure cannot obtain relief.[161]

The *Time, Inc.* Court found that the actual malice standard should be applied to "false light" invasion of privacy cases because of the similarity between such actions and defamation actions.[162] In both types of actions a plaintiff's central allegation is that he or she has been falsely portrayed in published materials. The *Time, Inc.* Court, however, expressly limited its holding to "false light" actions.[163] It stated that its holding did not necessarily apply to other types of invasion of privacy actions, such as an action for intentional infliction of emotional distress.[164]

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160. *See* New York Times v. Sullivan, 376 U.S. 254, 294 (1964) (commenting that a state statute which permitted the law to presume injury from the act of publication itself, rather than requiring proof of actual malice in cases against public officials, would "threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials.").

161. *Id.*

162. Time, Inc. v. Hill, 385 U.S. 374 (1967).

163. *Id.* at 387-88.

164. "This limitation [application of actual malice standard] to newsworthy persons and events does not of course foreclose an interpretation of the statute to allow damages where 'Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency.' " *Id.* at 383-84 n.7 (1967) (quoting Sidis v. F-R Publishing Corp., 113 F.2d 806, 809 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940)). The Court then listed a host of cases in which the right of privacy was held to give way to the right of the press to publish matters of public interest. *Id.*

The Supreme Court's recent decision in Harper & Row v. National Enters., 105 S. Ct. 2218 (1985) also provides support for the constitutionality of the proposed statute. The Court was faced with the question of whether the "fair use" doctrine under the Copyright Act should be expanded to include a "public figure" exception. *Id.* at 2228-31. The purpose of such an exception would be to protect the media from liability under the Copyright Act for publishing copyrighted, newsworthy material without obtaining the author's consent. *Id.* at 2227-31. Under existing copyright doctrine, the public importance of material does not affect its protection under the fair use doctrine. *Id.* at 2228-31.

The Court in *Harper & Row* held that a public figure exception to the fair use doctrine should not be recognized. In reaching that decision, it emphasized that the protection of first amendment interests includes the protection of the free speech rights of the author, as well as those of the publisher. In the Court's words:

> [F]reedom of thought [and expression] "includes both the right to speak freely and the right to refrain from speaking at all." Wooley v. Maynard, 430 U.S. 705, 714 (1977) (Burger, C.J.). We do not suggest that this right not to speak would sanction abuse of the copyright owner's monopoly as an instrument to suppress facts. But in the words of New York's Chief Judge Fuld: "The essen-

Given that Ann-Margret's action was based on allegations of intentional infliction of emotional distress rather than a "false light" portrayal, the holding in *Time, Inc.* should have been irrelevant to her action. Ann-Margret did not allege that the defendant falsely portrayed her; she was undisputably the person portrayed partially nude in the photographs. Her suit stemmed from an allegation that the defendant had reason to believe that its publication of her photograph was offensive and invaded her privacy. Logically, it did not make sense to require Ann-Margret to show that the defendant acted in reckless disregard of the truth because all of the information published by the defendant was in fact truthful.

Ann-Margret's action differed from a defamation action or false light action in another respect. The core of a defamation action is the allegation that a third party has made a false statement about the plaintiff.[165] Ann-Margret, however, was not a third party, but rather was the speaker in the public statement. The defendant figuratively put words in her mouth by forcing her to be portrayed in a context that she found objectionable.[166] Ann-Margret, therefore, had a free speech interest that is not present in the traditional defamation context. The proposed framework would recognize the free speech and sex-based civil rights implicated in cases similar to Ann-Margret's and would, therefore, refuse to apply the stringent actual malice standard.

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tial thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields that man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect." Estate of Hemingway v. Random House, 23 N.Y.2d 341, 348, 244 N.E.2d 250, 255, 296 N.Y.S.2d 771, 776 (1968).

Harper & Row, 105 S. Ct. at 2230 (1985) (Court's emphasis).

The Court's focus on the free speech rights of the author is relevant to the proposed legislation, because this legislation seeks to protect those free speech rights in the context of sexual expression. Nevertheless, the applicability of *Harper & Row* to the present context is limited because copyright regulation is specifically permitted under the United States Constitution, article I, section 8 ("The Congress shall have Power . . . to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

165. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

166. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705 (1977) (slogan on New Hampshire license plates found unconstitutional because it infringed on the driver's right not to speak).

Similarly, the *Davis* application of the actual malice standard was inappropriate. The court's rationale for applying the actual malice standard to Davis' case was that she was a "limited purpose" public figure in the context of the portrayal.[167] Limited purpose public figures are public figures in some contexts but not in others.[168] The actual malice standard only applies to those contexts in which they are portrayed as public figures.

The *Davis* court of appeals found that Davis was a limited purpose public figure in the context of boxing.[169] That finding is indisputable. However, the court also found that the magazine had portrayed her in that context.[170] This latter finding is questionable as *Celebrity Skin* did not portray Davis as a powerful boxer—the role in which she was a public figure. Instead, she was portrayed in a topless pose. In portraying Davis topless, *Celebrity Skin* stripped her of her power by depicting her as a sex object. The caption clarified the role in which she was being portrayed by describing her sexually and not as a boxer. Similarly, *Celebrity Skin* did not portray Ann-Margret in her public role as an actress, but rather focused on her sexual characteristics. The magazine attempted to develop a new context in which Davis and Ann-Margret would be considered public figures. No attempt was made to display them in the context in which they were already known.

Moreover, the *Time, Inc.* actual malice standard did not need to be applied to Davis' action because her action did not depend on a "false light" allegation. Davis could have brought an invasion of privacy action against the defendant, even if the photograph had been of her, so long as she had taken reasonable steps to keep

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167. Davis v. High Soc'y Mag., 90 A.D.2d 374, 384, 457 N.Y.S.2d 308, 316 (1982).

168. In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Supreme Court examined whether Gertz was a public figure in the context of a particular controversy. Later courts have relied on that analysis to recognize the concept of "limited purpose" public figures. *See, e.g.*, Street v. NBC, 645 F.2d 1227, 1234 (6th Cir. 1981), *cert. granted*, 454 U.S. 815, *cert. dismissed*, 454 U.S. 1095 (1981); Time, Inc. v. Johnston, 448 F.2d 378, 380 (4th Cir. 1971); Vitale v. National Lampoon, 449 F. Supp. 442, 445 (E.D. Pa. 1978).

169. Davis v. High Soc'y Mag., 90 A.D.2d 374, 384, 457 N.Y.S.2d 308, 316 (1982).

170. The *Davis* court found:

> She is not a public figure in the general sense . . . . However, within the context of female boxing, she's apparently very public and well-known. Since the photos and caption are related to female boxing and are the subjects of this lawsuit, plaintiff must be considered a limited-purpose public figure as a matter of law.

Id. at 384, 457 N.Y.S.2d at 316.

the photograph private. Hence, the proposed framework would analyze Davis' action by first inquiring as to whether she had been portrayed in a context in which she was a public figure and by then inquiring as to whether attempting to attain her consent would have been unduly burdensome.

The Seventh Circuit recently suggested in *Douglass v. Hustler*[171] that the actual malice standard may not be necessary in a case involving a consentless sexual portrayal of a well-known actress. One issue in the case was whether *Hustler* had properly obtained a release before publishing a nude photograph of Douglass.[172] Although the court did not reach the issue of whether the actual malice standard was necessary, it noted:

> As an original matter we have our doubts [about whether the actual malice standard is required]. The purpose of requiring proof of knowledge or falsity, or reckless disregard for the truth, is to lighten the investigative burdens on the press of determining the truth of what it writes. It is no great burden to determine whether a release has been executed; it is not like ascertaining the truth about allegations that a government official took a bribe or engaged in insider trading or fudged casualty statistics. A requirement that the plaintiff prove that the defendant was negligent in mistaking the existence of the release might be quite enough to protect the press from having to make costly investigations.[173]

Thus, under the proposed framework, courts would first determine which fundamental rights each party could invoke. The inquiry would then turn to the issue of how burdensome it would have been for the publisher to obtain the individual's consent. The level of burdensomeness permitted would depend upon the relative strength of the civil rights, privacy rights, and free speech rights presented by the parties' positions. This framework reflects the Supreme Court's recent holding in *Roberts v. United States Jaycees*[174] that certain fundamental rights such as sex-based civil rights and the free speech rights of the individual portrayed can be balanced against, and override, freedom of speech considerations.

2. *Context of Portrayal.* Another reason why Ann-Margret failed to prevail was that the court found that she did not have the

171. 769 F.2d 1128 (7th Cir. 1985).
172. *Id.*
173. *Id.* at 1140.
174. 104 S. Ct. 3244 (1984).

right to consent to each context in which she was portrayed. The New York statute's silence on that issue and the Supreme Court's holding in *Time, Inc.*[175] were the bases for that decision. The court found that a public figure who consents to a portrayal in one context cannot object to an accurate reproduction of that portrayal in another context.[176] This finding, however, ignores the fact that Ann-Margret had a free speech right, as well as a privacy right, to have control over the message she expressed through the portrayal of her sexuality. Instead of being used to preclude the individual portrayed from obtaining recovery, *Time, Inc.*'s requirement that courts consider the free speech interests present in such cases should be used as the basis for an argument that courts must consider the free speech interests of the individual portrayed, as well as those of the publisher.

Nevertheless, the district court was not entirely hostile to Ann-Margret's claim. It "sympathize[d] with her feelings" and suggested that it might have ruled in her favor had it been more aware of the full range of fundamental interests at issue in that case.[177] Application of a framework that would protect an individual's civil rights and free speech rights to consent to each context in which his or her sexual portrayal is used could permit the court's "sympathy" to have substantive application.

B. *Portrayals of Private Persons as Part of a News Story*

As demonstrated above, private individuals have limited opportunity for relief if they are portrayed sexually in a news story. Under the proposed framework, courts must consider the individual's free speech and sex-based civil rights interests rather than only the media's free speech interests. In Ruby Clark's case, the district court failed to consider her interests in privacy. However, the court of appeals did balance Clark's right to be free from def-

175. Ann-Margret v. High Soc'y Mag., 498 F. Supp. 401 (S.D.N.Y. 1980).

176. *Id.*

177. In the opinion of the court:

> Undoubtedly, the plaintiff is unhappy about the appearance of her picture in the defendants' magazine. And while the Court can sympathize with her feelings, the fact that she does not like the manner in which she is portrayed . . . or the medium in which her picture is reproduced, . . . and her belief that such reproduction has caused her embarrassment, . . . do not expand her rights or create any cause of action under section 51 of the Civil Rights Law.

Ann-Margret v. High Soc'y Mag., 498 F. Supp. 401, 405-06 (S.D.N.Y. 1980).

amation against the media's right to report news of public interest.[178] Because the broadcast was inaccurate, and Clark was not a public figure, the final balance was in Clark's favor. Clark would have benefitted if a clear framework had existed to inform the district court that it needed to engage in such a balancing test.

The *Doe* court believed that *Cohn v. Cox Broadcasting Corp.* precluded it from balancing the interests raised by the case. The Supreme Court decision, *New York v. Ferber*,[179] however, speaks directly to the limited application of the *Cohn* holding to these types of cases.[180]

In *Ferber*, the Court upheld the constitutionality of a child pornography statute after conducting a balancing test between the first amendment interests and the state's interest in protecting the welfare of children.[181] In order to conduct such a balancing test and to recognize the importance of children's welfare, the Court

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178. *See supra* text accompanying notes 67-75.

179. 458 U.S. 747 (1982).

180. In *New York v. Ferber*, the Court was presented with the constitutionality of a state statute that prohibited persons from knowingly promoting a sexual performance of a child under the age of 16 by distributing material which depicts such a performance. N.Y. PENAL LAW § 263 (McKinney 1980). Section 263.15 provides that a person is guilty of a class D felony (punishable by up to seven years for individuals and up to $10,000 for corporations) if that person: "promot[es] a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age." Section 263.00(5) defines "promote" as follows: " 'Promote' means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same."

181. *Ferber*, 458 U.S. at 764. Paul Ferber challenged the constitutionality of the state statute as a defense to his conviction. Ferber had been indicted on two counts under a related statute, which required a finding that the sexual performance was obscene, and on two counts under the statute cited above, which did not require such a finding. He was acquitted under the first statute and was found guilty under the latter statute. The New York Court of Appeals overturned his conviction on first amendment grounds. *Id.* at 752. The United States Supreme Court granted the State's petition for certiorari to resolve the question: "To prevent the abuse of children who are made to engage in sexual conduct for commercial purposes, could the New York State Legislature, consistent with the First Amendment, prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene?" *Id.* at 753. In the opinion of the Court:

> When a definable class of material, such as that covered by 263.15 [the state statute], bears so heavily and persuasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.

Id. at 764.

had to distinguish *Cox Broadcasting Corp. v. Cohn*.[182] The Supreme Court's 1975 holding in *Cox Broadcasting Corp.* did not appear to permit any balancing against first amendment interests when the published materials were of public interest. However, relying on a more recent Supreme Court decision in *Smith v. Daily Mail Publishing Co.*,[183] the Court in *Ferber* was able to restrict the implications of the *Cox Broadcasting Corp.* holding.[184]

In *Smith v. Daily Mail Publishing Co.*, the Supreme Court recognized that interests of the highest order might permit restrictions of truthful information obtained during court proceedings

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182. 420 U.S. 469 (1975). The issue in *Cox Broadcasting Corp. v. Cohn* was the constitutionality of a state statute that made it unlawful to publish, or cause to be published, any information concerning "the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made." The full provision reads as follows:

> It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor.

GA. CODE ANN. § 26-9901 (1972).

A reporter had published the name of a rape victim after obtaining the name from indictments that were made available for public inspection during the trial. 420 U.S. 469, 472 & n.3 (1975). In addition to examining the indictments, he learned the name of the victim from personal observation. *Id.* The Supreme Court held that the statute was not constitutional because it infringed upon the publication of truthful information that was of public interest. *Id.* at 495. Its finding that the information was of public interest was premised on the observation that the state had consistently treated the information with that label. According to the Court, "[b]y placing the information in the public domain on official court record, the State must be presumed to have concluded that the public interest was thereby being served." *Id.*

The Court suggested that the state could only have limited publication of the information if it had consistently treated the information as private. The Court stated: "[i]f there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information." *Id.* at 496.

A state may not make information available to the public in judicial proceedings and then try to restrict its publication by the media. The Court found that, "[o]nce true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." *Id.*

183. 443 U.S. 97 (1979).

184. 458 U.S. 747, 759 n.10 (1982).

or in other public forums.[185] Although the Court found that the statute limiting news coverage was unconstitutional, it did conduct a balancing test before reaching that result. The Court defined the test as follows: "if a newspaper lawfully obtains information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."[186]

The interest asserted by the state in *Daily Mail* was the protection of the anonymity of the juvenile offender in order to further his or her possibility of rehabilitation. The Court found that the asserted interest was significant, but not of the highest order.[187] Justice Rehnquist, in his concurrence, agreed with the Court's holding but found that the state's articulated interest was of the

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185. 443 U.S. 97 (1979). The issue in *Daily Mail* was whether a state could constitutionally impose criminal sanctions on a newspaper for accurately publishing an alleged juvenile delinquent's name. The statute at issue stated:

> [N]or shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court. . . . A person who violates . . . a provision of this chapter for which punishment has not been specifically provided, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten nor more than one hundred dollars, or confined in jail not less than five days nor more than six months, or both such fine and imprisonment.

W. VA. CODE §§ 49-7-3, 49-7-20 (1976).

Two newspapers had purportedly violated the statute by publishing the name of the alleged assailants after interviewing various witnesses, the police, and an assistant prosecuting attorney. After being indicted for violating the statute, the newspapers filed an original-jurisdiction petition with the West Virginia Supreme Court of Appeals, seeking a writ of prohibition against the prosecuting attorney and alleging that the statute violated the first and fourteenth amendments of the United States Constitution and several provisions of the State Constitution. The West Virginia Supreme Court of Appeals issued the writ of prohibition, 161 W. Va. 684, 248 S.E.2d 269 (W. Va. 1978), *aff'd*, 443 U.S. 97 (1979).

186. Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979).

187. Moreover, it found that the statute did not serve the articulated purpose because it only restricted newspapers from publishing the information. The electronic media and other types of publishers were permitted, and did, publish the information in question. Finally, the Court found that criminal penalties were not necessary to achieve the statute's purpose. *Id.* at 104-05.

The Court also emphasized the narrowness of its holding:

> Our holding in this case is narrow. There is no issue before us of unlawful press access to confidential judicial proceedings, see Cox Broadcasting Corp. v. Cohn, 420 U.S. at 496 n.26; there is no issue here of privacy or prejudicial pretrial publicity. At issue is simply the power of a state to punish the truthful publication of an alleged delinquent's name lawfully obtained by a newspaper. The asserted state interest cannot justify the statute's imposition of criminal sanctions on this type of publication.

Id. at 105-06 (footnotes omitted).

"highest order."[188] He concurred in the decision because he agreed that the state statute did not accomplish its stated purpose by prohibiting only newspapers from printing the names of youths charged in juvenile proceedings.[189] Rehnquist concluded with the observation that "a generally effective ban on publication that applied to all forms of mass communication, electronic and print media alike, would be constitutional."[190] Thus, he objected to the statute's framework rather than to its purpose.

The Supreme Court's holding in *Ferber* and distinction of *Cox* and *Daily Mail* suggest that Rehnquist's concurrence in *Daily Mail* is reflective of the Court's present position. The Court in *Ferber* found that publication of sexual portrayals posed a great threat to children because of the long-term potential of private sexual actions being made public anytime during that child's life.[191] In spite of *Cox* and *Daily Mail*, the Court held that protecting a child from such abuse was considered to be a state interest of the highest order which could override first amendment considerations. The Court balanced the competing interests rather than assume that first amendment considerations necessarily prevailed. The Court described its rationale for conducting a balancing test by distinguishing *Cox* and *Daily Mail*.[192] Rather than emphasize the unconstitutionality of the *Cox* and *Daily Mail* statutes and the limited nature of a state's right to protect the interests of children and juveniles, the Court emphasized in *Ferber* that those cases "only" applied to situations where the state could not articulate a compelling interest.[193]

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188. *Id.* at 110 (Rehnquist, J., concurring).

189. *Id.*

190. *Id.*

191. New York v. Ferber, 458 U.S. 747, 749 n.1 (1982).

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> Thus, distribution of the material [child pornography] violates "the individual interest in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 599 (1977). Respondent cannot undermine the force of the privacy interests involved here by looking to *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), and *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), cases protecting the right of newspapers to publish, respectively, the identity of a rape victim and a youth charged as a juvenile offender. Those cases only stand for the proposition that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order."

Id. at 759 n.10 (citations omitted). *See also* Whalen v. Roe, 429 U.S. 589, 599 (1977).

193. That emphasis is consistent with the Court's final statement in *Daily Mail*. *See*

The holding in *Ferber* supports the constitutionality of the framework suggested in this Article. It established that first amendment interests can be balanced against other first amendment interests. *Ferber*, however, is limited to the context of a state trying to protect children or juveniles. It does not explicitly respond to the question of whether sex-based civil rights may also be balanced against first amendment free speech rights. The Supreme Court's recent decision in *Roberts v. United States Jaycees*[194] responds to that issue by holding that a state may seek to protect women's civil rights and free speech rights at the expense of publishers' first amendment free speech interests.

C. *Portrayals of Persons in Fiction*

Part II of this Article demonstrated that courts often believe that they cannot provide relief to individuals who are portrayed sexually in fiction. Under the proposed framework, these individuals could prevail.

The *Pring* court considered itself absolutely constrained by first amendment considerations.[195] By contrast, other courts have recognized that these considerations are not absolute. In *Bindrim v. Mitchell*,[196] a case mentioned by the *Pring* court,[197] the California Court of Appeals affirmed a damage award on behalf of a psychologist who had been portrayed recognizably in a fictional account of his nude group therapy sessions. Plaintiff had permitted the author of the story to attend his therapy sessions on the condition that she "not take photographs, write articles, or in any manner disclose who has attended the workshop or what has transpired."[198] Plaintiff asserted that he was libeled in the piece by the suggestion that he used obscene language and by inaccurate portrayals of what took place. Plaintiff obtained relief despite the court's finding that he was a public figure and that the piece was fictional.

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supra note 187.

194. 468 U.S. 609 (1984).

195. *See supra* text accompanying notes 86-98.

196. 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979).

197. Pring v. Penthouse Int'l, 695 F.2d 438, 442 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

198. Bindrim v. Mitchell, 92 Cal. App. 3d 61, 69, 155 Cal. Rptr. 29, 33, *cert. denied*, 444 U.S. 984 (1979).

The defendants in *Bindrim* argued that the fact that the book was labeled a novel barred any claim that the writer or publisher may have implied that the characters in the book were factual representations of actual persons.[199] The court rejected that argument:

> That contention, thus broadly stated, is unsupported by the cases. The test is whether a reasonable person, reading the book, would understand that the fictional character therein pictured was, in actual fact, the plaintiff acting as described . . . . Whether a reader, identifying plaintiff with the "Dr. Herford" of the book, would regard the passages herein complained of as mere fictional embroidering or as reporting actual language and conduct, was for the jury. Its verdict adverse to the defendants cannot be overturned by this court.[200]

Although the *Pring* court briefly mentioned the *Bindrim* decision,[201] it failed to distinguish why the fiction could be submitted to the jury in *Bindrim* but not in *Pring*.

Under the framework proposed by this Article, the *Pring* court would have been able to consider the plaintiff's sex-based civil rights and free speech interests in controlling the context in which she was sexually portrayed. Those interests, coupled with the privacy interests, could have counterbalanced the defendant's free speech interests. Application of this standard could have allowed the *Pring* court's sympathy to have had substantive meaning for the plaintiff.

D. *Group Vilification*

The injury from sex-based group vilification has never been properly recognized. Under the proposed framework, this right would be balanced against other competing interests.

The *Brooks* court failed to recognize the full scope of the injury to the plaintiff from the sex-based criticism.[202] Recognition that the publisher's reply constituted "group vilification" could have permitted the plaintiff to recover damages. Other courts have recognized this concept in the racial context.[203] For instance,

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199. *Id.* at 78, 155 Cal. Rptr. at 39.

200. *Id.*

201. Pring v. Penthouse Int'l, 695 F.2d 438, 443 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

202. *See supra* text accompanying notes 99-105.

203. *See generally* Delgado, *supra* note 7.

the Washington Supreme Court in *Contreras v. Crown Zellerbach Corp.*[204] found that a Mexican-American, who had been subjected to a campaign of racial abuse by his fellow employees, had stated a claim against his employer for the tort of outrage.

Richard Delgado, in a recent article, argues that an independent tort action for racial insults is both permissible and necessary.[205] He first traces the psychological, sociological and political effects of racial insults—arguing that racial insults are linked to the denial of equal treatment.[206] He then proposes that a plaintiff be permitted to bring an action under the following standard: "Language was addressed to him or her by the defendant that was intended to demean through reference to race; that the plaintiff understood as intended to demean through reference to race; and that a reasonable person would recognize as a racial insult."[207]

The Supreme Court's recent decision in *Roberts v. United States Jaycees*[208] suggests that the tort of outrage could be equally applied to sexual insults that are intended to be demeaning. According to the *Jaycees* Court, the stigmatizing injury and denial of equal opportunities "is surely felt as strongly by persons suffering discrimination on the basis of sex as by those treated differently because of their race."[209]

E. *Private Individuals Portrayed in Advertising*

Private individuals who are portrayed sexually in advertising without their consent often prevail under existing law when the courts recognize that the nonconsensual sexual portrayal is defamatory.[210] The proposed framework would strengthen that result by permitting plaintiffs to recover damages if they can show that a consentless sexual portrayal has injured them by falsely suggesting that they consented to the portrayal, even if they cannot meet the traditional standards for defamation. Hence, Moore could have attained relief without proving that the portrayal was defamatory.

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204. 88 Wash. 2d 735, 565 P.2d 1173 (1977) (en banc).
205. Delgado, *supra* note 7.
206. *Id.* at 135-49.
207. *Id.* at 179.
208. 468 U.S. 609 (1984).
209. *Id.* at 625. *See generally* Delgado, *supra* note 7.
210. *See supra* text accompanying notes 106-31.

V. Conclusion

Existing law has assisted private persons who have been portrayed sexually for commercial purposes and have not consented to their portrayals. However, private individuals who have been portrayed in either news stories or fiction, and *public* figures who have been portrayed in any context, have not been able to obtain relief for their nonconsensual sexual portrayals.

Many of these plaintiffs could have prevailed under a broader interpretation of existing invasion of privacy law, as set forth in the proposed framework. Ann-Margret and Cathy Davis could have prevailed if the courts had not erroneously extended the actual malice standard to actions for intentional infliction of emotional distress. When the heart of a plaintiff's action is that the defendant portrayed her in an objectionable and highly private, yet accurate context, courts should investigate whether the publisher intentionally invaded the plaintiff's privacy. The question of whether the publisher displayed reckless disregard for the truth—the appropriate inquiry under the actual malice standard—is irrelevant to an allegation of intentional infliction of emotional distress for a consentless but accurate sexual portrayal.

Moreover, Cathy Davis could have prevailed if the court had not erroneously applied the limited purpose public figure test. The purpose of that test is to protect publishers who publish information about an individual relating to that person's status as a public figure. Rather than assume that a person is a public figure in all contexts, courts should use the limited purpose public figure test to determine whether the challenged portrayal closely relates to an individual's status as a public figure. A nude portrayal of a public figure in a context only superficially resembling that person's status as a public figure, should not be sufficient to meet the standards of the limited purpose public figure test.

Ruby Clark could have prevailed if the district court had recognized that her portrayal as a prostitute was capable of conveying an offensive message. Instead, she needed to endure more than six years of litigation before persuading the court of appeals to instruct the district court to consider her argument that the broadcast was capable of that meaning.

Jane Doe could have prevailed if the court had recognized that it was permitted to balance a plaintiff's privacy rights, free speech rights, and sex-based civil rights against the publisher's

first amendment rights. It did not have to rely on the media voluntarily conducting its own balancing test.

Kimerli Jayne Pring could have prevailed if the court had recognized that fictional portrayals are not absolutely protected under the first amendment when the individual portrayed is recognizable. It failed to see that recognizable fictional portrayals can be harmful.

Finally, Susan Brooks could have prevailed if the court had recognized that nonsexual criticism does not necessarily "induce" a sexual insult. It could have noted that criticism through group vilification receives less first amendment protection than other types of criticism.

The proposed framework strengthens the available relief. It considers the civil rights to be free from both invasions of privacy and sex-based invasions of privacy. When courts balance the competing interests, individuals who allege both types of civil rights infringements will have stronger claims than persons who only allege invasions of privacy. An individual who is portrayed in the context of a *private* person will have a stronger claim than an individual who is portrayed in the context of a *public* person. The proposed framework is more encompassing than the courts' interpretations of the New York statute. It requires that an individual consent to each context in which his or her portrayal is used and explicitly covers both public and private individuals. It also survives anticipated first amendment challenges under the United States Supreme Court's recent decisions in *New York v. Ferber*[211] and *Roberts v. United States Jaycees*.[212]

211. 458 U.S. 747 (1982).
212. 468 U.S. 609 (1984).